Immigration and Constitutional Consequences of Post-9/11 Policies Involving Arabs and Muslims in the United States: Is Alienage a Distinction without a Difference?[1]

Susan M. Akram[*] & *Maritza Karmely*[**]

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[1] The authors refer to Linda Bosniak's exhaustive work examining the rights distinctions inside and outside immigration law. *See* Linda Bosniak, *Membership, Equality, and the Difference that Alienage Makes*, 69 N.Y.U. L. REV. 1047 (1994).

[*] Associate Clinical Professor, Boston University School of Law and Supervising Attorney, Boston University Civil Litigation Program; A.B., University of Michigan; J.D., Georgetown University; Diplome in Human Rights Institut International des Droits de l'Homme, Strasbourg; Fulbright Scholar in Palestine, 1999-2000. She thanks BUSL law student and research assistant, Rasmus Goksor, for his invaluable assistance on the research and footnote editing for this Article.

[**] Public Interest Attorney, Boston, Massachusetts; B.A., Boston College, J.D., Boston University School of Law. She was co-counsel with Malea Kiblan and Susan Akram in the secret evidence case of Dr. Anwar Haddam before the Board of Immigration Appeals, and was on the legal team for the federal court litigation in that case.

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INTRODUCTION

There has been much public and academic discussion on post-9/11 government policies and whether their impact on Arabs and Muslims in the United States is unconstitutional "racial profiling" or legitimate immigration control based on constitutionally permissible nationality distinctions. The main assumption underlying this debate is that the focus of the government's policies in the "war on terror" is noncitizens, even if principally Arabs and Muslims. Thus, the racial profiling issues center on the differences between the constitutional due process analysis applied to noncitizens, or "aliens" in immigration parlance, and that applied to citizens.[2] In general, the widely accepted conclusion is that

[2] "Alien" is a specific legal term under U.S. immigration laws. It refers to any individual with noncitizen status in the United States, although the individual could hold

discriminatory treatment of noncitizen Arabs and Muslims, even if amounting to racial profiling, is constitutionally permissible because of the well-established constitutional exceptionalism of the immigration context. In other words, the government's post-9/11 policies have targeted noncitizen Arabs and Muslims, not *citizen* Arabs and Muslims, and racial profiling against aliens does not offend the Constitution.

This Article challenges the above argument and a number of its underlying assumptions. Part I challenges the assumption that the targets of the government's domestic policies in the "war on terror" are Arab and Muslim noncitizens. We review evidence indicating that U.S. government targeting of Arabs and Muslims, both aliens and citizens, began long before September 11, 2001. This part then examines the full range of post-9/11 government actions and concludes that the communities targeted are Arab and Muslim citizens as well as noncitizens. Part II addresses the long-term immigration and constitutional consequences of significant new policies and their effects on noncitizen Muslims and Arabs in the United States. Part II also analyzes whether the laws and policies meet constitutional standards in either the immigration or nonimmigration context. Part III concludes with an assessment of major policy changes and their long-term consequences — across the citizen/noncitizen divide — on the overall integrity of the constitutional system: consequences to free speech and association, checks and balances, and open judicial and governmental process.

I. DISPELLING THE MYTH: TARGETING ARAB AND MUSLIM CITIZENS AND NONCITIZENS BEFORE AND AFTER SEPTEMBER 11, 2001

Professor David Cole forcefully argues that the focus of the government's post-9/11 policies in the "war on terror" have been mainly noncitizens, albeit noncitizen Arabs and Muslims, and abusive acts against noncitizens are consistent with a pattern of governmental overreaction in times of crisis that has historically been supported by the American public.[3] This part offers a conclusion at odds with Professor

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one of many different types of statuses, whether "immigrant" or "nonimmigrant." *See generally* Immigration and Nationality Act, 8 U.S.C. § 1101 (2001) (definitions). Because the main distinction for purposes of this Article is between citizen and noncitizen, those will be the primary terms of reference used in order to avoid the pejorative connotation of "alien." However, case law and academic commentaries refer extensively to "alien" and "alienage," so these terms will also be used when appropriate.

[3] *See* DAVID COLE, ENEMY ALIENS: DOUBLE STANDARDS AND CONSTITUTIONAL FREEDOMS IN THE WAR ON TERRORISM 5-6, 85-87 (2003).

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Cole's premise. Although there are strong historical parallels between the government's post-9/11 policies and prior actions in times of national crisis, there are some significant differences in the current context. This part contends that the targeting of Arabs in America began long before 9/11 and, thus, Professor Cole's thesis cannot adequately explain how this targeting is solely in response to the most recent national security crisis. This part further contends that pre- and post-9/11 targeting of Arab and Muslim communities was of both citizens and noncitizens and that there are critical immigration and constitutional consequences resulting from the government's policies that affect noncitizens. The long-term implications of racial/ethnic/religious profiling of Arabs and Muslims cannot be understood outside of the historical context.

A. *Pre-9/11 Policies Targeting Arabs and Muslims*

There is a significant body of literature documenting the demonizing of Arabs and Muslims that supports the claim that profiling of these communities was widely accepted before 9/11.[4] These factors, ranging from Hollywood stereotyping to politically motivated targeting, have been aggravated by a series of government policies singling out the Arab and Muslim communities in the United States for disparate and excessive treatment.[5] A recent, exhaustive review of the U.S. film industry, for example, reveals that Arabs and Muslims are almost exclusively portrayed as terrorists or as other negative characters, rather than in a wider variety of roles or as everyday people with families and friends.[6] Such damaging racial stereotyping of Arabs and Muslims in film and in popular culture affects and influences law enforcement and private conduct.[7]

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[4] *See, e.g.*, Susan M. Akram & Kevin R. Johnson, *Race, Civil Rights, and Immigration Law After Sept. 11, 2001: The Targeting of Arabs and Muslims*, 58 N.Y.U. ANN. SURV. AM. L. 295 (2002); David Cole, *Their Liberties, Our Security: Democracy and Double Standards*, 31 INT'L. J. LEGAL INFO. 290 (2003); Natsu Taylor Saito, *Symbolism Under Siege: Japanese American Redress and the "Racing" of Arab Americans as "Terrorists,"* 8 ASIAN L. J. 1 (2001); Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575 (2002). On racial profiling in immigration generally, see Kevin R. Johnson, *The Case Against Race Profiling in Immigration Enforcement*, 78 WASH. U. L.Q. 675 (2000) [hereinafter Johnson, *The Case Against Racial Profiling*].

[5] *See* Akram & Johnson, *supra* note 4, at 303-16.

[6] *See* JACK SHAHEEN, REEL BAD ARABS: HOW HOLLYWOOD VILIFIES A PEOPLE 9, 34-35 (2001); Akram & Johnson, *supra* note 4, at 309-10.

[7] *See* Akram & Johnson, *supra* note 4, at 309-10 (citing Saito, *supra* note 4, at 12-14); Leonard M. Baynes, *Racial Profiling, September 11th and the Media: A Critical Race Theory Analysis*, 2 VA. SPORTS & ENT. L.J. 1, 39-62 (2002). According to the FBI's report, *Hate Crime*

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Tactics by several administrations over the last several decades have also had a direct effect on Arab and Muslim communities. Government policies and legislation against Arabs date back to President Nixon's "Operation Boulder" directives, which singled out Arabs in America for FBI investigation, interrogation, and wiretapping.[8] Since that time, every U.S. administration has instituted policies targeting Arab or Muslim communities. The Carter Administration responded to the Iranian hostage crisis by issuing a regulation requiring only Iranian students in the United States on nonimmigrant visas to report to the U.S. Immigration and Naturalization Service ("INS") and provide residence and school enrollment information.[9] President Reagan's Administration

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Statistics 2001, at http://www.fbi.gov/ucr/01hate.pdf, in 2001, "anti-Islamic religion" hate crimes increased "by more than 1600 percent over the 2000 volume. In 2001, reported data showed there were 481 incidents made up of 546 offenses having 554 victims of crimes motivated by bias toward the Islamic religion." In September, 2004, the Department of Justice Civil Rights Division reported:

> The Civil Rights Division, the Federal Bureau of Investigation, and United States Attorneys offices have investigated 546 incidents since 9/11 involving violence, threats, vandalism and arson against Arab-Americans, Muslims, Sikhs, South-Asian Americans and other individuals perceived to be of Middle Eastern origin. The incidents have consisted of telephone, internet, mail, and face-to-face threats; minor assaults as well as assaults with dangerous weapons and assaults resulting in serious injury and death; and vandalism, shootings, arson and bombings directed at homes, businesses, and places of worship.

DEP'T OF JUSTICE CIVIL RIGHTS DIV., ENFORCEMENT AND OUTREACH FOLLOWING THE SEPTEMBER 11 TERRORIST ATTACKS (Sept. 9, 2004), *available at* http://www.usdoj.gov/crt/legalinfo/discrimupdate.htm.

[8] In 1972, a special committee of the Nixon Administration designed procedures to "combat terrorism." The recommendations were called "Operation Boulder" and included surveillance of citizens — immigrants and nonimmigrants — and other restrictions on noncitizens from Arab countries. The directive authorized the FBI to, among other actions, investigate individuals with "Arabic backgrounds" to ascertain alleged relationships with "terrorists." *See* Akram & Johnson, *supra* note 4, at 314.

[9] *See id.* at 314, 338-39. This regulation was upheld in Narenji v. Civiletti, 617 F.2d 745 (D.C. Cir. 1979), *cert. denied*, 446 U.S. 957 (1980). Holding that the regulation passed the "rational basis" test, the court further found that "it is not the business of courts to pass judgment on the decisions of the President in the field of foreign policy." *Id.* at 748. The Immigration and Naturalization Service was restructured and divided into two main agencies under the Homeland Security Act of 2002: the Bureau of Citizenship and Immigration Services, and the Bureau of Immigration and Customs Enforcement. The former is responsible for immigration petitions and applications, and the latter for removal, deportation, and related enforcement issues. *See* Homeland Security Act of 2002, Pub. L. No. 107-928, §§ 441, 451, 116 Stat. 2135, 2192, 2195-97 (2002). The Immigration District Counsel offices also have been placed under the jurisdiction of the Department of Homeland Security, and their relationship to the Department of Justice ("DOJ") remains unclear. Because these major changes in agency structure and jurisdiction became effective after most of the cases discussed in this Article were commenced, and for ease of reference, the Article will refer to the relevant immigration entity as the "Immigration Service" or

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issued a secret National Security Decision Directive to create a network of agencies to prevent "terrorists" from entering and remaining in the United States.[10] Under the Directive, the INS designed the "Alien Terrorists and Undesirables: A Contingency Plan," calling for mass arrests and detentions of Arab noncitizens and using ideological exclusion grounds under the Immigration and Nationality Act ("INA") to deport, detain, and exclude Arab noncitizens.[11] In the 1990s, the first Bush Administration began a surveillance program involving the Federal Bureau of Investigation ("FBI") and other law enforcement interrogations of Arabs.[12] The Clinton Administration was responsible for the passage of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA")[13] and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA").[14] Aside from AEDPA's overall negative impact on immigration policy, its harshest and most restrictive provisions were almost exclusively enforced against the Arab communities.[15]

The most recent example of the government's racial profiling and selective treatment of Arabs and Muslims prior to 9/11, however, was its novel use of immigration regulations to remove, exclude, and detain Arabs and Muslims on the basis of "secret evidence," that is, evidence which the government refused to disclose to the individuals or their

"INS."

[10] Agencies, under one proposal, would provide the INS with "names, nationalities and other identifying data and evidence relating to alien undesirables and suspected terrorists." Akram & Johnson, *supra* note 4, at 316 (citing *Legislation to Implement the Recommendations of the Comm'n on Wartime Relocation and Internment of Civilians: Hearing on H.R. 442 Before the Subcomm. on Admin. Law and Gov't Relations of the House Comm. on the Judiciary*, 100th Cong. 67 (1987)).

[11] *Id.* (citing Memorandum from Investigations Div., Immigration & Naturalization Serv., Alien Border Control Group IV-Contingency Plans 16 (Nov. 18, 1986) [hereinafter INS Memorandum]). The plan targeted nationals of Algeria, Libya, Tunisia, Iran, Jordan, Syria, Morocco, and Lebanon and contemplated that over 1000 people would be apprehended and detained in tent facilities in Oakdale, LA. *Id.* at 316 n.126.

[12] *See id.* at 315-16; Susan M. Akram, *Scheherezade Meets Kafka: Two Dozen Sordid Tales of Ideological Exclusion*, 14 GEO. IMMIGR. L.J. 51, 52 n.5 (1999). The DOJ also fingerprinted all U.S. residents and immigrants of Arab origin. *See* Akram & Johnson, *supra* note 4, at 315-16.

[13] Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996).

[14] Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, Div. C., 110 Stat. 3009 (1996).

[15] Michael J. Whidden, *Unequal Justice: Arabs in America and United States Antiterrorism Legislation*, 69 FORDHAM L. REV. 2825, 2869 (2001). Whidden notes that Arabs have felt the impact of AEDPA because of the (1) designation of foreign terrorist organizations, (2) fundraising prohibition, and (3) use of secret evidence. *Id.*

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attorneys in the course of proceedings against them. These cases, litigated in the 1990s around the country — with a single exception — involved Arab and Muslim noncitizens.[16] Prior to these cases, the federal government had used secret orders, secret trials, and secret evidence against noncitizens at various times,[17] but Congress and the courts checked the use of secrecy in this way when glaring abuses became public.[18]

Although pre-dating the 1990s round of secret evidence cases, the case known as "The L.A. Eight" may have been the government's test case for using the INA and immigration regulations for large-scale detention and removal of Arabs on the basis of "secret evidence."[19] In 1987, in dramatic early dawn raids, Los Angeles federal officials arrested eight activists — mostly students — who later became known as the "L.A. Eight."[20] The

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[16] *See* Akram & Johnson, *supra* note 4, at 322. *See generally* Akram, *supra* note 12 (listing out Muslim and Arab individuals targeted by government's use of secret evidence and describing litigation of six specific cases).

[17] Two critical cases illustrating the dangers of the use of secret evidence are those of Ellen Knauff and Ignatz Mezei. Ellen Knauff was a German national who, upon arriving to the United States in 1948 with her U.S. citizen husband, was ordered excluded and detained without a hearing because her presence was deemed "prejudicial to the United States." The Supreme Court upheld the government's actions, including the government's failure to inform Knauff of the evidence against her, and found that her due process rights were not violated because she, as an excluded alien, had none. *See* United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 539-40, 543-47 (1950). Ignatz Mezei, born in Gibraltar (but of uncertain nationality), arrived in the United States in 1923. He married a U.S. citizen and, in 1948, traveled to Romania. He was refused entry in Romania and was excluded and detained upon his return to the United States because his entry was considered "prejudicial to the public interest." Charles D. Weisselberg, *The Exclusion and Detention of Aliens: Lessons From the Lives of Ellen Knauff and Ignatz Mezei*, 143 U. PA. L. REV. 933, 965 (1995). Like Knauff, he was excluded without a hearing on the basis of "confidential" information. He succeeded in his fifth habeas corpus action to obtain a hearing. *See* United States *ex rel.* Mezei v. Shaughnessy, 101 F. Supp. 66, 70 (S.D.N.Y. 1951); Weisselberg, *supra* at 966. The Supreme Court reversed, citing the government's plenary power to exclude aliens and finding that Mezei had forfeited his long-term resident status by departing the United States. *See* Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 214 (1953).

[18] Under pressure from Congress, the Attorney General reopened Knauff's case and the evidence was revealed to be "uncorroborated hearsay" based on unsubstantiated rumors that suggested Knauff had passed secrets to Czechoslovakian officials. She was ultimately admitted to the United States after over two years in detention. Weisselberg, *supra* note 17, at 960, 963-64. Congress ultimately intervened in Mezei's case as well, when a Special Inquiry Board concluded that the government's main claim was that Mezei had been an active member of the Communist Party. The Board concluded, however, that he played only a minor role in the Communist Party and posed no danger to national security. After nearly two years in detention, he was finally released. *Id.* at 975-84; Akram, *supra* note 12, at 62-64.

[19] *See* INS Memorandum, *supra* note 11, at 7.

[20] *See* United States v. Hamide, 914 F.2d 1147, 1148 (9th Cir. 1990). "L.A. Eight" is

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eight were arrested, detained, and threatened with deportation because they were associated with the Popular Front for the Liberation of Palestine ("PFLP"), a group the government charged with advocating for the "doctrines of world communism."[21] Their alleged "association" with the group was reading and distributing PFLP literature.[22] The eight individuals were given deportation hearings, but the government tried to avoid producing any of its evidence in open court to the respondents or their lawyers.[23] The courts eventually struck down the government's use of secret evidence.[24]

AEDPA and IIRIRA included provisions authorizing the use of secret evidence in immigration proceedings. AEDPA established an Alien Terrorist Removal Court, explicitly providing for the use of secret

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shorthand for a series of cases involving the seven Palestinians and one Kenyan arrested and placed in deportation proceedings in 1987. The published decisions on the cases include Reno v. Am.-Arab Anti-Discrimination Comm., 525 U.S. 471 (1999); Am.-Arab Anti-Discrimination Comm. v. Reno, 70 F.3d 1045 (9th Cir. 1995); Am.-Arab Anti-Discrimination Comm. v. Meese, 714 F. Supp. 1060, 1063 (C.D. Cal. 1989), *rev'd on other grounds*, Am.-Arab Anti-Discrimination Comm. v. Thornburgh, 970 F.2d 501 (9th Cir. 1991). For some of the extensive commentary on this litigation, see Akram, *supra* note 12; William C. Banks, *The "L.A. Eight" and Investigation of Terrorist Threats in the United States*, 31 COLUM. HUM. RTS. L. REV. 479 (2000); Kevin R. Johnson, *The Antiterrorism Act, the Immigration Reform Act, and Ideological Regulation in the Immigration Laws: Important Lessons for Citizens and Noncitizens*, 28 ST. MARY'S L.J. 833 (1997) [hereinafter Johnson, *The Antiterrorism Act*]; Gerald L. Neuman, *Terrorism, Selective Deportation and the First Amendment After* Reno v. Am.-Arab Anti-Discrimination Comm., 14 GEO. IMMIGR. L.J. 313 (2000); Adrien Katherine Wing, Reno v. American-Arab Anti-Discrimination Committee*: A Critical Race Critique*, 31 COLUM. HUM. RTS. L. REV. 561, (2000).

[21] *Hamide*, 914 F.2d at 1148.

[22] *See id.*

[23] *See id.* at 1150.

[24] *See id.* at 1147; Am.-Arab Anti-Discrimination Comm. v. Reno, 883 F. Supp. 1365, 1379 (C.D. Cal. 1995). After spying on members of the L.A. Eight for years and finding no basis for criminal charges, the FBI recommended that the INS deport them. *See* JAMES DEMPSEY & DAVID COLE, TERRORISM AND THE CONSTITUTION: SACRIFICING CIVIL LIBERTIES IN THE NAME OF NATIONAL SECURITY 37-41 (2002). Over the course of the litigation against the L.A. Eight, the government produced thousands of pages of documents in support of its charges. These documents have disclosed nothing more than entirely legal political activity protected under the First Amendment. The district court ruled that the McCarran-Walter Act ideological exclusion provisions under which the L.A. Eight were charged were unconstitutional. *See* Am.-Arab Anti-Discrimination Comm. v. Meese, 714 F. Supp. 1060, 1063 (C.D. Cal. 1989), *rev'd on other grounds*, Am.-Arab Anti-Discrimination Comm. v. Thornburgh, 970 F.2d 501 (9th Cir. 1991). Congress then repealed the provisions. *See* Immigration and Nationality Act § 212(a)(3), 8 U.S.C. § 1182(a)(3) (2003); COLE, *supra* note 3, at 165-66; Akram, *supra* note 12, at 74. Today, 17 years after the L.A. Eight were first rounded up by federal agents and detained under the McCarran-Walter Act (which Congress has since repealed), three of them have become permanent residents. The other five, however, continue to defend against additional charges under various immigration provisions, including, most recently, the USA PATRIOT Act. *See* COLE, *supra* note 3, at 168.

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evidence in special "alien terrorist" removal procedures.[25] IIRIRA also authorized the use of secret evidence in ordinary removal proceedings.[26] However, to date, the INS has not prosecuted a single case under the special "alien terrorist" removal procedures. In prosecuting under these provisions, the INS bypassed the restrictions placed on use of secret evidence in the Special Removal Court proceedings by relying on previously passed immigration regulations that purport to allow the use of classified evidence in ordinary removal proceedings without any constitutional safeguards.[27] In strategies similar to those the federal government used in the post-9/11 cases, the INS and the FBI used the immigration regulations and secrecy to undermine constitutional guarantees in "alien terrorist" cases brought after the 1996 legislation.[28]

In more than two dozen cases brought subsequent to the passage of AEDPA in the 1990s (and before 9/11), the INS sought to remove Arab and Muslim noncitizens on various immigration statuses and on the basis of evidence it refused to disclose to the individuals or their lawyers.[29] Though the government denies that it selectively used secret evidence against Arabs and Muslims, there is evidence of only one non-Arab/non-Muslim secret evidence case — that of an Indian Sikh — since the government commenced these cases.[30] These individuals were

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[25] *See* Antiterrorism and Death Penalty Act of 1996 § 303(a), 18 U.S.C. § 2339B (2001) (allowing government to seek to admit, *ex parte*, redacted materials, stipulations about what classified material might prove, or declassified summary of classified material); *see also* Antiterrorism and Death Penalty Act of 1996 § 401(a), 8 U.S.C. § 1533 (2003) (providing that Attorney General may seek removal of person determined to be terrorist according to "classified information" without giving alien access to classified information).

[26] *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996 § 304, Pub. L. No. 104-208, 110 Stat. 309 (1996) (codified as amended at 8 U.S.C. § 1229(a) (2000)).

[27] *See* Akram, *supra* note 12, at 72. Under the terrorist removal procedures provided in AEDPA, the government must provide an unclassified summary of evidence to the alien that is sufficient for the defendant to be able to confront the evidence and meet the charges against him. *See* Antiterrorism and Death Penalty Act of 1996 § 401, 8 U.S.C. § 1531, § 504(e)(3) (2003). Further, alien terrorist removal proceedings must be brought before a federal judge, who has the authority pursuant to the Act to review the classified evidence and to address constitutional issues associated with its use. *See* Antiterrorism and Death Penalty Act of 1996 § 401, 8 U.S.C. § 1532, § 502 (2000).

[28] *See* Akram, *supra* note 12, at 72.

[29] In some instances, the government's "secret evidence" was actually public knowledge. For example, in the case of Nasser Ahmed, the "secret" evidence turned out to be Ahmed's "association" with Sheik Omar Abdel Rahman (widely acknowledged because Ahmed was a paralegal on Sheik Rahman's defense team) and a letter, which was published, but not by Ahmed, which the INS asserted sparked a terrorist incident. The INS ultimately declassified this evidence in order to prevail on appeal, and the allegations were proved false or inconsequential. Ahmed's asylum application was subsequently granted. Akram, *supra* note 12, at 76, 85-87; *see* COLE, *supra* note 3, at 173-74.

[30] *See* Cheema v. Ashcroft, 372 F.3d 1147 (9th Cir. 2004); Akram & Johnson, *supra* note

arrested and detained for periods ranging from two to more than four-and-a-half years on the basis of secret evidence.[31] In a series of decisions in these cases, the federal courts and the Board of Immigration Appeals ("BIA") found the government's use of secret evidence to detain and deport unconstitutional,[32] required the government to declassify the evidence and produce it to the court,[33] or obtained special clearance for a judge to review the evidence and determine its weight and relevance.[34] In each of the cases in which the evidence was declassified or produced, it was found to be hearsay, conjectural, unreliable, or utterly unpersuasive of the government's charges.[35]

4, at 322.

[31] *See* Akram & Johnson, *supra* note 4, at 322. Mazen al Najjar was the longest held of all the pre-9/11 secret evidence detainees; he was in immigration detention for over four-and-a-half years. *See* Al-Najjar v. Ashcroft, 257 F.3d 1262, 1276 (11th Cir. 2001); *Noteworthy*, 79 INTERPRETER RELEASES 1421, 1441 (2002). After three-and-a-half years, he was released, never knowing the charges or the evidence that had been held against him. Several months later, he was arrested again and ultimately deported. *See Al Najjar Again in INS Detention Due to Alleged Terrorist Ties*, 78 INTERPRETER RELEASES 1849, 1859, (2001); *Noteworthy*, 79 INTERPRETER RELEASES 1355, 1355 (2002). After being refused entry by several countries, Al-Najjar finally found a home in an undisclosed country in September 2002. *See Noteworthy*, 79 INTERPRETER RELEASES 1421, 1441 (2002); Rachel La Corte, *Deported Ex-Academic Reunited with Family Terror Suspect Now in Arab Nation*, MIAMI HERALD, Feb. 6, 2003, at 3B. In most of these cases, the FBI had initially investigated, interrogated, or subjected the individuals to surveillance, found no criminal activity, and then turned the cases over to INS to initiate removal proceedings. *See Al-Najjar*, 257 F.3d at 1274-76; Al-Najjar v. Reno, 97 F. Supp. 2d 1329, 1333 (S.D. Fla. 2000); Kiareldeen v. Reno, 71 F. Supp. 2d 402 (D.N.J. 1999); *In re* Nasser Ahmed, 1 (N.Y., EOIR, Immigr. Ct. May 1, 1996); Akram, *supra* note 12 at 76-77.

[32] United States v. Hamide, 914 F.2d 1147 (9th Cir. 1990); *Al-Najjar*, 97 F. Supp. 2d at 1349; *Kiareldeen*, 71 F. Supp. 2d at 414; Am.-Arab Anti-Discrimination Comm. v. Reno, 883 F. Supp. 1365, 1377 (C.D. Cal. 1995).

[33] *See In re* Nasser Ahmed (N.Y., EOIR, Immigr. Ct. May 1, 1996); Niels W. Frenzen, *National Security and Procedural Fairness: Secret Evidence and the Immigration Laws*, 76 INTERPRETER RELEASES 1677, 1682 (1999). For a description of Nasser Ahmed's case, see COLE, *supra* note 3, at 174; DEMPSEY & COLE, *supra* note 24, at 129-31.

[34] *See In re* Anwar Haddam, 2000 BIA LEXIS 20 (B.I.A. 2000); *In re* Anwar Haddam, No. A22-751-813, at 2-3 (B.I.A. 1998); *Kiareldeen*, 71 F. Supp. 2d at 414; *Am.-Arab Anti-Discrimination Comm.*, 883 F. Supp. at 1377. For a description of the eventual review of the secret evidence in Dr. Haddam's case, see Haddam v. Reno, 54 F. Supp. 2d 588, 591 (E.D. Va. 1999).

[35] *See Hamide*, 914 F.2d at 1147; *Al-Najjar*, 97 F. Supp. 2d at 1349; *Kiareldeen*, 71 F. Supp. 2d at 414; *Am.-Arab Anti-Discrimination Comm. v. Reno*, 883 F. Supp. at 1377; Rafeedie v. INS, 795 F. Supp. 13, 20 (D.D.C. 1992); *Nasser Ahmed*, 1 (N.Y., EOIR, Immigr. Ct. May 1, 1996); DEMPSEY & COLE, *supra* note 24, at 129-31; Frenzen, *supra* note 33. In several cases, the "classified" evidence was exactly the same evidence that the government had produced previously in open court. *See Nasser Ahmed*, 1 (N.Y., EOIR, Immigr. Ct. May 1, 1996); DEMPSEY & COLE, *supra* note 24, at 129-31, 134. In one case, the "secret evidence" was the identity and statement of the respondent's ex-wife, who was involved in a heated custody proceeding with the respondent, and whose various misconduct allegations against him

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In addition, when the undisclosed evidence was unclassified or disclosed, it became evident that the government's "terrorist" claims were based on unprovable hearsay[36] and biased sources[37] and, most troubling, were motivated by U.S. foreign policy considerations.[38] One of the least publicized cases was that of Algerian national Dr. Anwar Haddam, who was held for over four years on secret evidence allegations.[39] In November 2000, four years and one day after Dr. Haddam was first detained, the BIA finally reviewed the government's classified evidence *in camera* and found nothing to justify his continued detention. The BIA ordered Dr. Haddam released, finding that there was no evidence that he posed any threat to the security of the nation.[40]

When the government's abuses in the post-1996, pre-9/11 secret evidence cases came to light through press reports and congressional hearings, adverse publicity and outcry from Arab, Muslim, and civil liberties organizations pressured Congress to propose legislation to repeal the provisions authorizing the use of secret evidence in immigration proceedings.[41] In a largely symbolic action, the House of

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had previously been found not credible in court. *Kiareldeen*, 71 F. Supp. 2d at 413, 416-17.

[36] *See In re* Anwar Haddam, No. A22-751-813 (B.I.A. Sept. 10, 1998), *aff'd In re* Anwar Haddam, 2000 BIA LEXIS 20 (B.I.A. 2000). For a description of the government's lack of evidence, and biased and hearsay sources in the secret evidence cases, see Akram, *supra* note 12, at 81-84.

[37] *See Al-Najjar*, 97 F. Supp. 2d at 1333-34. On improper and unethical conduct by the government in the secret evidence cases, see Akram, *supra* note 12, at 84-90.

[38] *Al-Najjar*, 97 F. Supp. 2d at 1333-34. On the government's foreign policy considerations in the secret evidence cases, see Akram, *supra* note 12, at 70-76.

[39] *See In re* Anwar Haddam, No. A22-751-813 (B.I.A. Sept. 10, 1998); *In re* Anwar Haddam, 2000 BIA LEXIS 20 (B.I.A. 2000). In the Haddam case, the INS submitted over 200 exhibits on the record, aside from what it claimed it had as "classified" exhibits. *See* Trial R. Gov't Ex.s., *In re* Haddam, No. A22-751-813 (Va. EOIR, Immigr. Ct. 1997) (on file with author). These exhibits made no connection between Dr. Haddam and the events the government claimed were terrorist acts ordered or incited by Dr. Haddam, or by groups in Algeria over which the government sought to show Dr. Haddam had some control — as the BIA ultimately found in its decisions. *See In re* Anwar Haddam, 2000 BIA LEXIS 20 (B.I.A. 2000); *In re* Anwar Haddam, No. A22-751-813 (B.I.A. Sept. 10, 1998). The record evidence was replete with hearsay, as the BIA found, raising suspicion about the quality of the evidence the government was withholding from Dr. Haddam, his lawyers, and the courts. *See In re* Anwar Haddam, 2000 BIA LEXIS 20 (B.I.A. 2000); *In re* Anwar Haddam, No. A22-751-813 (B.I.A. Sept. 10, 1998).

[40] The BIA also granted Dr. Haddam asylum, finding that he had a well-founded fear of persecution in Algeria and deserved "a favorable exercise of discretion." *In re* Anwar Haddam, 2000 BIA LEXIS 20 (B.I.A. 2000); Asma Yousef, *Special Report: Algerian Victim of Secret Evidence Dr. Anwar Haddam Embraces Freedom*, WASH. REP. ON MIDDLE EAST AFFAIRS, Jan./Feb. 2001, at 14, 81, *available at* http://www.wrmea.com/archives/Jan_Feb_2001/0101014.html.

[41] The Secret Evidence Repeal Act of 1999, H. R. 2121, 108th Cong. (1999), introduced on June 10, 1999 by Representatives Bonior (D-MI), Campbell (R-CA), Conyers (D-MI), and

Representatives voted on June 23, 2000 to cut the average cost of secret evidence detentions from federal prison funding as a rebuke to the Department of Justice ("DOJ") and INS.[42] Ironically, candidate George Bush, in his second televised presidential debate, pledged to prohibit the use of secret evidence in court proceedings and to end the use of racial profiling against Muslims and Arabs in the United States.[43] Unsurprisingly, the proposed secret evidence repeal bill lost support after 9/11.[44] As documented here and elsewhere, 9/11 ushered in a new round of anti-Arab and anti-Muslim policies at the hands of the second Bush Administration.

B. *Post-9/11 Policies Targeting Arabs and Muslims*

1. Policies Immediately After 9/11 Directly Targeted Noncitizen Arabs and Muslims

The government's practices and policies in the domestic "war on terror" resulted in the arrests, detentions, interrogations, and deportations of thousands of people — estimates have ranged from 2000 to 5000.[45] Most of these arrests and detentions were supposedly

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Barr (R-GA), with over 90 co-sponsors, would have abolished all uses of secret evidence. A copy of H. R. 2121 is available at http://www.fas.org/sgp/congress/hr2121.html.

[42] Amendment 19 to H.R. 4690 "reduces Federal Prison System Salaries and Expenses funding by $173,480, the average cost of incarcerating the noncitizens currently detained when the INS denied bond, asylum, or other relief based on secret evidence." 146 CONG. REC. D646-01, D646 (2000).

[43] Bush stated:

> On the issue of secret evidence — another creation of the Clinton/Gore Justice Department — I am also troubled by the disturbing stories of how this policy is being implemented. More and more, new immigrants, often Arab or Muslim immigrants, face deportation or even imprisonment based on evidence they've never seen and never been able to dispute. That's not the American way. Here, too, the security of our country and of our people is of course the foremost consideration. Yet that doesn't justify a disregard for fairness, dignity, or civil rights. As President, I will work with leaders like Senator Spence Abraham and Congressman Henry Hyde to ensure respect for the law — and for all law-abiding citizens.

Governor George W. Bush's Record of Inclusion, Written Statement Submitted in Second Presidential Debate, *available at* http://www.archive.aclu.org/congress/l071301a.html. For a transcript of the debate, see http://www.c-span.org/campaign2000/transcript/debate_101100.asp.

[44] *See* William Glaberson, *U.S. Is Taking a New Look at Secret Evidence, Some Experts See Trend in Immigration Cases*, SAN DIEGO UNION TRIB., Dec. 9, 2001, at A2.

[45] David Cole calculates over 5000 detainees, adding 1182 (the number of detainees the

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authorized by one or more of the regulations or policies described below, most of which were passed or implemented soon after September 11, 2001.[46] Legal scholars, commentators, and the media have critically examined the policies and laws that the government has claimed authorize its actions in these arrests and detentions, and most agree that these policies almost exclusively focused on Arabs and Muslims, whether justified by terrorism concerns or not.[47]

Immediately after 9/11, the FBI initiated an extraordinary and massive investigation into the terrorist attacks, an investigation designated "PENTTBOM."[48] The investigation had two main objectives: identifying the terrorists involved, as well as any possible accomplices, and coordinating all levels of law enforcement to prevent subsequent attacks against the United States or its interests abroad.[49] On orders by the Attorney General to use "every available law enforcement tool" to arrest persons who "participate in, or lend support to, terrorist activities," law enforcement focused on using federal immigration laws to arrest and detain noncitizens suspected of any terrorist ties.[50] More than 1200 citizens and noncitizens were detained for interrogation within the first two months of the attacks.[51] Although many were questioned and

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Justice Department last admitted were detained in November 2001), 1100 (the number of foreign nationals detained under the Absconder Apprehension Initiative, "which expressly targets for prioritized deportation the 6000 Arabs and Muslims among the more than 300,000 foreign nationals living here with outstanding deportation orders"), and 2747 (the number of noncitizens detained in connection with a "Special Registration program . . . also directed at Arab and Muslim noncitizens"). COLE, *supra* note 3, at 25. The total number of detainees is unclear because the Justice Department has declined to release any figures since November 2001. *Id.*

[46] The government has used a wide range of new policies carried out under a variety of secrecy provisions and orders to arrest, detain, charge, deny release or bond of detainees, or conduct immigration, deportation or criminal proceedings against Arab and Muslim citizens and noncitizens. Only a few of the critical secrecy provisions put in place after 9/11 are discussed in this Article.

[47] *See infra* note 258. For justification of the government's far-reaching new and amended immigration, criminal, banking, and terrorism provisions resulting in targeted prosecutions of Arabs and Muslims based on terrorism concerns, including most of the provisions discussed in this Article, see Robert M. Chesney, 42 HARV. J. ON LEGIS. (forthcoming 2005) (draft on file with author).

[48] "Pentagon/Twin Towers Bombings." *See* OFFICE OF THE INSPECTOR GENERAL, U.S. DEP'T OF JUSTICE, 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 10 (2003), *available at* http://www.usdoj.gov/org/special/0306/full.pdf [hereinafter FIRST OIG REPORT].

[49] *See id.*

[50] *See id.*

[51] *See* MIGRATION POLICY INSTITUTE, AMERICA'S CHALLENGE: DOMESTIC SECURITY, CIVIL LIBERTIES, AND NATIONAL UNITY AFTER SEPTEMBER 11, at 7 (2003) [hereinafter MPI] ("More

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released with no charges pressed against them, many were detained for immigration law violations.[52] According to a number of DOJ officials, it was apparent very early on in the investigation that many, if not most, of the 9/11 detainees had no connection to terrorism.[53] Despite this knowledge, the DOJ maintained the FBI "clearance" policy, preventing the release of noncriminal aliens for long periods of time.[54] The Office of the Inspector General ("OIG") reported that a number of DOJ employees below the top echelons expressed grave concerns, at many different points in the process, about the delays and other significant violations that were plaguing the process itself.[55] Apparently, the serious problems with the clearance process and unjustified lengthy detentions were concerns raised by many officials through the chain of command of the INS and FBI.[56]

The government instituted a variety of measures to conduct the arrests and detentions, and to ensure that those arrested remained in detention for as long as the government deemed necessary for its investigation. By November 2001, the DOJ publicly proclaimed that it would no longer disclose any information about the 9/11 detainees, including the numbers being held, their names, or their locations.[57] David Cole noted that "every aspect of the proceedings, no matter how routine, is closed to the public, to the press, and even to family members."[58]

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than 1200 people — the government refuses to say how many, who they are, or what has happened to all of them — have been detained . . . [and] [d]espite 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.").

[52] *See id.*

[53] *See* FIRST OIG REPORT, *supra* note 48, at 47.

[54] *See id.* at 38.

[55] Among the memoranda drafted by various units expressing concerns about the problems with the "of interest" designations were those by officials in the Terrorism and Violent Crime Section ("TVCS") of the Criminal Division of the Attorney General's office. One of the TVCS attorneys sent a typed note to the Chief and Deputy Chief of his unit saying, "[I]t was obvious that the overwhelming majority were simple immigration violators and had no connection to the terrorism investigation." The Criminal Division decided not to send the TVCS attorney's memo to the FBI. *Id.* at 65-66 n.50.

[56] *Id.* at 66-67. Despite lower officials' assertions that they attempted to raise the concerns with their chiefs early on, both the Deputy Attorney General and the Attorney General said they had not been made aware of the problems with or the slow pace of the FBI clearance process. *Id.* at 67.

[57] *See* Julie Mason, *Touchy Ashcroft Defends Actions*, HOUSTON CHRON., Dec. 7, 2001, at A1; Susan Milligan, *Fighting Terror: Dispute on Detainees Nov. 6 Letter*, BOSTON GLOBE, Nov. 16, 2001, at A41; Joan Vennochi, *Fearful Times with the Attorney General*, BOSTON GLOBE, Nov. 6, 2001, at A15.

[58] David Cole, *In Aid of Removal: Due Process Limits on Immigration Detention*, 51 EMORY L.J. 1003, 1005 (2002) [hereinafter Cole, *In Aid of Removal*].

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Within a year after the attacks, Amnesty International,[59] Human Rights Watch ("HRW"),[60] the American Civil Liberties Union ("ACLU"),[61] and the Center for Constitutional Rights[62] published a number of detailed investigative reports on the arrests and detentions. According to the reports, by the end of 2002, most detainees arrested during the initial sweeps had been deported, released, or were charged with crimes unrelated to 9/11.[63] The DOJ provided varying and inconsistent information at different times in response to requests from Congress or court orders for information.[64] So far, the nationalities of post-9/11 detainees charged with federal or state crimes or held on material witness[65] warrants have not been made public.[66] Nevertheless, it is apparent from the government's lists, the investigative reports, and the OIG reports that virtually all of the "special interest" detainees whose nationalities were revealed came from South Asia, the Middle East, and North Africa.[67]

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[59] AMNESTY INTERNATIONAL, 2002 ANNUAL REPORT: USA (2003) [hereinafter AMNESTY U.S. REPORT]; AMNESTY INTERNATIONAL, UNITED STATES OF AMERICA, THE THREAT OF A BAD EXAMPLE: UNDERMINING INTERNATIONAL STANDARDS AS "WAR ON TERROR" DETENTIONS CONTINUE (2003) [hereinafter AMNESTY THREAT OF BAD EXAMPLE]; AMNESTY INTERNATIONAL, MEMORANDUM TO THE U.S. ATTORNEY GENERAL: AMNESTY INTERNATIONAL'S CONCERNS REGARDING POST SEPTEMBER 11 DETENTIONS IN THE U.S.A. (2002).

[60] HUMAN RIGHTS WATCH, REPORT: PRESUMPTION OF GUILT: HUMAN RIGHTS ABUSES OF POST-SEPTEMBER 11 DETAINEES (2002), *available at* http://www.hrw.org/reports/2002/us911/USA0802.pdf [hereinafter HRW REPORT].

[61] AM. CIVIL LIBERTIES UNION, INSATIABLE APPETITE: THE GOVERNMENT'S DEMAND FOR NEW AND UNNECESSARY POWERS AFTER SEPTEMBER 11, at 5-6 (2002); INTERNATIONAL CIVIL LIBERTIES REPORT (2002) [hereinafter ACLU, INSATIABLE APPETITE].

[62] CTR. FOR CONSTITUTIONAL RIGHTS, STATE OF CIVIL LIBERTIES REPORT: AN ANALYSIS OF THE EROSION OF CIVIL LIBERTIES IN THE POST 9/11 ERA 7-16 (2002) [CTR. FOR CONSTITUTIONAL RIGHTS, STATE OF CIVIL LIBERTIES REPORT].

[63] AMNESTY U.S. REPORT, *supra* note 59, at 1.

[64] On November 5, 2001, the DOJ stated that the government had arrested 1182 individuals in connection with the investigation, most of whom were still in custody. *See* Dan Eggen & Susan Schmidt, *Count of Released Detainees Is Hard to Pin Down*, WASH. POST, Nov. 6, 2001, at A10; Amy Goldstein & Dan Eggen, *U.S. to Stop Issuing Detention Tallies*, WASH. POST, Nov. 9, 2001, *cited in* HRW REPORT, *supra* note 60, at 18; *Two Branches at Odds on Detainees' Status*, PHILA. INQUIRER, Nov. 6, 2001, at A4; *see also Preserving Freedom While Fighting Terrorism: Hearing Before the Senate Judiciary Comm.*, 107th Cong. (2001) (testimony of Michael Chertoff Assistant Attorney General).

[65] For discussion of material witness cases, see *infra* Part III.B.1.c.

[66] HRW REPORT, *supra* note 60, at 60.

[67] The largest group of detainees was from Pakistan (254), followed by Egypt (111) and Turkey (52). Other "special interest" cases were citizens of North America, Canada, or European countries, but turned out to be naturalized citizens, natives of South Asia, the Middle East, and North Africa. FIRST OIG REPORT, *supra* note 48, at 20-21.

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The government claimed that all the detainees were initially questioned because they had some connection with, or some information about, terrorist activity.[68] Research in the published reports indicates, however, that the links to the investigation were in many cases nothing more than racial profiling on the basis of nationality, religion, and gender. As HRW noted: "[B]eing a male Muslim noncitizen from certain countries became a proxy for suspicious behavior. The cases suggest that where Muslim men from certain countries were involved, law enforcement agents presumed some sort of a connection with or knowledge of terrorism until investigations could subsequently prove otherwise."[69]

Soon after 9/11, the INS Executive Associate Commissioner for Field Operations issued eleven Operational Orders to INS field offices regarding the handling of 9/11 detainees over a twelve day period beginning September 15, 2001.[70] The Operational Orders dramatically altered normal procedures for immigration detainees and for INS handling of immigration cases. Before September 11, 2001, the INS district offices processed all routine immigration cases, other than the exceptional terrorism and war crime cases that were handled by the National Security Unit at the INS Headquarters.[71] One of the first changes the Operational Orders made was the establishment of a new unit within the INS, called the Custody Review Unit ("CRU"), to manage and centralize decision-making in the post-9/11 cases.[72] Under these orders, the FBI determined whether individuals who were detained in the PENTTBOM investigation were to be designated as "special interest," and if so, what classification of "interest" they were to receive.

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[68] "[The detainees] were originally questioned because there were indications that they might have connections with, or possess information pertaining to, terrorist activity. . . . In the course of questioning them, law enforcement agents determined, often from the subjects themselves, that they were in violation of federal immigration laws, and, in some instances also determined that they had links to other facets of the investigation." Ctr. for Nat'l Sec. Studies v. United States Dep't of Justice, 215 F. Supp. 2d. 94 (D.D.C. 2002), *rev'd*, 331 F.3d 918 (D.C. Cir. 2003), *cert. denied*, 124 S. Ct. 1041 (2004) (Declaration of James Reynolds, Chief of the Terrorism and Violent Crime Section in the department's Criminal Division, para. 10), *available at* http://www.cnss.org/dojreynoldsdeclaration.htm

[69] HRW REPORT, *supra* note 60, at 12. There is a plethora of commentary on racial and religious profiling against Arabs and Muslims before 9/11. *See* sources cited *supra* note 4. For commentary on racial profiling against Arabs and Muslims after 9/11, see sources cited *infra* note 258.

[70] *See* FIRST OIG REPORT, *supra* note 48, at 43.

[71] *See id.*

[72] *See id.* at 44.

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The "special interest" designations were conducted entirely in secret.[73]

"Special interest" cases became so on the basis of a myriad of "sources" — tips from spouses, neighbors, or members of the public[74] who said individuals were "suspicious" or accused them of being terrorists without any basis.[75] Others were randomly arrested in circumstances where they happened to encounter law enforcement and had the misfortune of being from the Middle East or were Muslim.[76] Muslim U.S. citizens and their spouses were also caught up in the sweep.[77] Others were detained because their names resembled those of the alleged hijackers.[78] As one FBI spokesman put it, "The only thing a lot of these people are guilty of is having the Arabic version of Bob Jones for a name."[79] The OIG Report confirms the arbitrary nature of the "leads" that precipitated most of the arrests, the designation of

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[73] *See id*

[74] *See* HRW REPORT, *supra* note 60, at 12. HRW investigated, among others, the following cases: A Palestinian engineer who was detained for 22 days for visa overstay, based on an anonymous and false tip that he possessed a gun (interview by HRW; name withheld); two Pakistanis and an Indian businessman arrested at a gas station on the basis of a tip that they were "Arabs" (interview with Neil Weinrib, attorney for Ayazuddin Sheerazi); a Pakistani convenience store owner arrested on a neighbor's tip to police that he was an "Arab" who had guns and might be a terrorist (interview with attorney Robert Carlin, attorney for Mohammed Asrar). HRW reports that Asrar's counsel claimed he was detained, held in maximum security, and was facing three to four years of imprisonment for illegal possession of ammunition because of "innocuous facts" such as being South Asian and taking pictures of the Atlanta skyline. *See* HRW REPORT, *supra* note 60, at 12-16.

[75] See individual case descriptions in HRW REPORT, *supra* note 60, at 14 (citing personal interviews and press reports).

[76] See individual case descriptions and press reports cited in HRW REPORT, *supra* note 60, at 14-15.

[77] HRW interviewed Tiffanay Hughes, a U.S. citizen married to a Yemeni, who reported that when she went to pick up her orders in Massachusetts, an officer told her that she could not wear her *hejab*, a Muslim female headcovering. When she said it was a religious symbol, the officer told her, "Don't let people know that you're Muslim. It's dangerous." She claimed that among the things that triggered suspicion at the base was her identification card photo with the *hejab*. HRW REPORT, *supra* note 60, at 15-16.

[78] *Id.* at 16 (listing individuals who were probably detained because of their last names: Abdulaziz Alomary, Al-Badr Al-Hazmi, Khalid S.S. Al-Draibi, and Saeed Al Kahtani, according to press reports. Some were charged with immigration violations while others were eventually released); *see also* Robyn Blumner, *Abusing Detention Powers*, ST. PETERSBURG TIMES, Oct. 15, 2001, at 1D; John Cloud, *Hitting the Wall*, TIME MAG., Nov. 5, 2001, at 65; Sydney P. Freedberg, *Terror Sweep a Battle of Rights and Safety*, ST. PETERSBURG TIMES, Jan. 13, 2002, at 1A; Scot Paltrow & Laurie P. Cohen, *Government Won't Disclose Reasons Why It Detains 200 People in Terror Probe*, WALL ST. J., Sept. 27, 2001, at B1; Pete Yost, *Three Tunisians Ordered out of U.S.*, ASSOCIATED PRESS, Nov. 15, 2001, *cited in* HRW REPORT, *supra* note 60, at 16.

[79] Patrick McDonnell, *Nation's Frantic Dragnet Entangles Many Lives Investigation: Some Are Jailed on Tenuous "Evidence," Their Opinion of America Soured*, L.A. TIMES, Nov. 7, 2001, at A1, *cited in* HRW REPORT, *supra* note 60, at 16 n.28.

individuals as "special interest," and their detentions.[80]

Related to the "special interest" designations was the "hold until cleared" policy under which the FBI required that the INS not release any individual until a specific determination was made that he was not implicated in the terrorism investigation. The "clearance" decision was also made in secret — neither the public nor the detainee himself had access to the criteria by which someone could be "cleared" of terrorist ties. Moreover, the immigration detainees were held and tried in secret.[81] The clearance process was fraught with delays. The OIG Report concluded that of the 762 detainees, only 2.6% were cleared within three weeks after their arrests.[82] According to data reviewed by the OIG, the average case took eighty days for the FBI to clear.[83]

Another dramatic change was the new rule concerning the timing for charging an immigration detainee. Before 9/11, immigration regulations required the INS to charge an alien within twenty-four hours of arrest.[84] On September 17, 2001, the DOJ issued a new regulation, expanding this time period from twenty-four hours to forty-eight hours.[85] The revised regulation also contains an exception for "extraordinary circumstances" that allows the INS to issue the charging document within a "reasonable period of time," not limited to forty-eight hours.[86] Despite the expanded time periods permitted by the Regulation and the USA PATRIOT Act[87]

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[80] *See generally* FIRST OIG REPORT, *supra* note 48.

[81] *See* 28 C.F.R. § 501.3 (2004); FIRST OIG REPORT, *supra* note 48, at 112-14.

[82] FIRST OIG REPORT, *supra* note 48, at 46.

[83] *See id.*

[84] *See* 8 C.F.R. § 287.3(d) (2004). The normal immigration procedure involves the INS deciding, within the specified period after arrest, whether to charge the alien with violating federal immigration laws. If the INS decides that there is evidence to support immigration charges, it initiates a removal proceeding by serving the Notice to Appear ("NTA") on the alien and the Immigration Court. The NTA must specify the particular acts alleged to be in violation of law.

[85] *See* 8 C.F.R. § 287.3(d) (2004); 66 Fed. Reg. 48334 (Sept. 17, 2001).

[86] The regulation does not define "extraordinary circumstances" or "reasonable period of time." Nor does it require a specific period within which the INS must serve the NTA on the alien or notify the Immigration Court about what charges are being brought. The regulation only addresses the timing of the charging decision. *See* 8 C.F.R. § 287.3(d) (2004).

[87] Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001) [hereinafter USA PATRIOT Act]. Soon after 9/11, Congress passed the USA PATRIOT Act, which gave the federal government, among others, sweeping new powers of surveillance; broad new authority to detain and exclude noncitizens; and authority to arrest, detain, and prosecute under expanded terrorist provisions. The USA PATRIOT Act allows the DOJ to keep certified suspected "terrorists" in custody for seven days without charge. At the end of this period, the Attorney General must charge the

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(and many detainees were being held without charge for longer than forty-eight hours), the certification authority under the USA PATRIOT Act has not been used.[88]

On October 31, 2001, the government issued a new "automatic stay" rule. This rule provides that in cases where a bond of $10,000 or more had been set, an immigration judge's order of release is to be stayed if the INS files a "Notice of Service Intent to Appeal Custody Redetermination."[89] The rule authorizes stays without the prior requirements of likelihood of success on appeal and a showing of irreparable harm. It allows stays even in situations where no such showing could be made.[90]

The OIG reports widespread institutional delays built into the entire process of arresting, charging, and processing the 9/11 "special interest" detainees.[91] The evidence detailed in the many reports leads to the conclusion that the widespread violations of detainees' rights were a deliberate part of the government's PENTTBOM strategy. The new detention policies implemented after 9/11 undermined prior due process

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suspect with a crime, initiate immigration procedures for deportation, or release the detainee.

[88] "Six months after the USA PATRIOT Act was passed the Department of Justice declared that it had not certified any noncitizen as a terrorism suspect under the Act." HRW REPORT, *supra* note 60, at 48; *see* Tom Brune, U.S. *Evades Curbs in Terror Law*, NEWSDAY.COM, Apr. 26, 2002, *at* http://pqasb.pqarchiver.com/newsday/116092651.html?did=116092651&FMT=ABS&FMTS=FT&date=Apr+26%2C+2002&author=Tom+Brune.+WASHINGTON+BUREAU&desc=U.S.+Evades+Curbs+in+Terror+Law; *see also* Margaret Taylor, *Dangerous by Decree: Detention Without Bond in Immigration Proceedings*, 50 LOY. L. REV. 149, 149-51 (2004). Based on the information the DOJ released in January and February of 2002, HRW produced a detailed summary of the length of time 718 of the "special interest" detainees were held prior to charges being brought. HRW found that 136 individuals were held for over a week with no charge; of those, 64 were charged three or more weeks after their arrest, and 35 were held anywhere from one to three months with no charge. Specific cases of lengthy detentions without charge are detailed in HRW REPORT, *supra* note 60, at 51-52.

[89] 8 C.F.R. § 1003.19 (2004).

[90] *See* Cole, *In Aid of Removal*, *supra* note 58, at 1030.

[91] A main reason for the delay in serving NTA's on detainees was the requirement that all NTA's be approved by INS Headquarters. Confusion over the procedure for serving NTA's after they had been sent to headquarters was another major reason for delays. *See* FIRST OIG REPORT, *supra* note 48, at 108. The data produced by the INS for the Office of the Inspector General confirms the long delays in charging many individuals with immigration violations. According to the data, 59% of the detainees whose cases were examined by the OIG (452 of 762) were served NTAs within 72 hours of their arrest — beyond the time required under the new regulation. In the remaining 192 cases for which data was available, the INS took more than 72 hours to serve NTAs. Of these 192 detainees, 71% (137) were arrested by the INS in the New York City area. On average, 9/11 detainees arrested in New York City and housed at the Metropolitan Detention Center received their NTAs 15 days from the time of their arrest. *See* FIRST OIG REPORT, *supra* note 48, at 29, 35.

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guarantees and ensured lengthy detentions without charge, during proceedings, and after removal orders. Moreover, it is now evident that the government's strategy includes the use of immigration detention to conduct criminal investigations. Thus, immigration detainees were intentionally held for long periods of time when the government lacked any evidence that the individuals were a flight risk or posed a danger to the community.[92]

Within a week after 9/11, the DOJ informed the INS that no "special interest" detainee could be processed under normal immigration procedures until he had received a clearance letter from the Chief of the FBI's International Terrorism Operations Section ("ITOS") in its Counterterrorism Division.[93] As justification for the centralized clearance process, the FBI and the DOJ claimed that the entire investigation was part of a "mosaic" of countless bits of information and evidence and that only FBI headquarters had sufficient overall information to determine whether an individual alien detained in connection with a lead was "of interest" to the investigation.[94]

Within a month of 9/11, the Administration issued a directive launching a "voluntary interview" program. The directive, entitled the "Antiterrorism Plan," stated that the "guiding principle of this. . . plan is the prevention of future terrorism through the dismantling of terrorist organizations operating within the United States."[95] The first 5000 individuals designated for interviews were claimed to have "al Qaeda related factors."[96] Apparently, the Foreign Terrorist Tracking Task Force compiled the original list based on a set of criteria. These criteria were: males between eighteen and thirty-three who entered the United States after January 1, 2000 on a nonimmigrant visa, and who held passports from or lived in countries known to have al Qaeda presence.[97] The DOJ kept the list of countries "known to have al Qaeda presence" a secret. Nevertheless, based on information about who was interviewed, the countries appeared to be Afghanistan, Pakistan, Yemen, Sudan, and Indonesia.[98] The interviewees were exclusively Arab or Muslim.[99]

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[92] *Id.* at 47-48.

[93] *Id.* at 42.

[94] *Id.* at 42-43.

[95] MPI, *supra* note 51, at 41 n.14 (quoting Memorandum from Kenneth L. Wainstein, Director, and J. Patrick Rowan, Assistant U.S. Attorney, Executive Office for U.S. Attorneys, U.S Dep't of Justice (Feb. 26, 2002) [hereinafter Wainstein Report]).

[96] *Id.* at 41 (quoting Wainstein Report, *supra* note 95, at 4).

[97] *Id.*

[98] *See* John R. Wilke, *Justice Department Ends Interviews with Muslim Aliens*, WALL ST. J., Mar. 20, 2002, at A24. According to a recent study of the program by the General

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In February 2002, despite admitting that the first 5000 interviews had not produced any leads to terrorist activity, the DOJ initiated a second round of interviews. This round involved interviews of 3000 individuals. The criteria were essentially the same, except for changes in the ages and relevant entry dates. The second round targeted individuals between eighteen and forty-six years old who had entered the United States between October 2001 and February 2002.[100]

In a January 25, 2002 memorandum from the U.S. Deputy Attorney General, the DOJ revealed the "Absconder Apprehension Initiative" to identify, interview, arrest, and deport people who received final orders of removal but, nonetheless, remained in the United States.[101] While the memo states that the government's intention is to deport all "absconders" — the total number of absconders was estimated at approximately 314,000 — the memo also reveals that the government's priority is to deport those "who come from countries in which there has been al Qaeda terrorist presence or activity."[102] The justification for focusing on certain "priority" countries was that the DOJ believed that individuals from such countries would have "information that could assist the campaign against terrorism."[103] However, as reported in the press, rather than identifying persons with terrorist connections, the Initiative resulted in arrests and deportations of "people with established community roots: the neighborhood grocer, families with schoolchildren and. . . the spouses or parents of American citizens."[104] The memo does

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Accounting Office, attorneys and immigration advocates noted that the "interviewed aliens did not perceive the interviews to be truly voluntary because they were worried about repercussions, such as future INS denials for visa extensions or permanent residency, if they refused." MPI, *supra* note 51, at 18 (quoting GEN. ACCT. OFF., REPORT GAO-03-459, HOMELAND SECURITY: JUSTICE DEPARTMENT'S PROJECT TO INTERVIEW ALIENS AFTER SEPTEMBER 11, 2001, 0, 5 (2003)).

[99] Among the immediate critics of the program was Representative John Conyers, Jr., who, in a letter to John Ashcroft stated that he was concerned that the "program is the product of racial and ethnic profiling of Arab-American and American Muslim communities. . . . [C]onducting questioning at places of employment has already resulted in embarrassment, suspicion, and in some cases termination." He described "complaints of agents intimidating individuals at mosques by insisting they provide lists of worshippers." Letter from John Conyers, Jr., to the Honorable John D. Ashcroft, Attorney General of the United States (Nov. 27, 2001), *available at* http://www.house.gov/conyers/pr112701.htm.

[100] *See New Round of Interviews Planned with Foreigners*, WALL ST. J., Mar. 21, 2002.

[101] MPI, *supra* note 51, at 40 (citing 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 (Jan. 25, 2002)).

[102] *Id.*

[103] *Id.*

[104] Susan Sachs, *Traces of Terror: The Detainees; Cost of Vigilance, This Broken Home*, N.Y. TIMES, June 4, 2002, at A15.

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not list the countries considered "priority," and the criteria by which the government focused on certain "absconders" have remained secret. The Initiative, however, almost exclusively targeted over 5000 Arab and Muslim "absconders."[105] Some labeled it a "witch hunt singling out those absconders simply because of their Arab origin."[106]

In June 2002, the Attorney General implemented another program, subjecting nationals of certain countries to special treatment both on entry into the United States and while residing in the country.[107] The National Security Entry-Exit Registration System ("NSEERS") requires nationals of certain countries to be fingerprinted and photographed upon entry, to register periodically with the INS, and to comply with exit controls when they depart the country.[108] The Attorney General expanded the meaning of "nationals" to include individuals born in one of the designated countries, regardless of whether the person remains a citizen of the country of origin.[109] Thus, a person born in an Arab or Muslim country on the registration list remains subject to the special requirements, even if he holds a French, British, or Australian passport. NSEERS also provides that any individual violating the registration requirements would be listed on the National Crime Information Center system ("NCIC") and could be arrested if his or her name is found on the database, even during a routine traffic stop.[110] The final rule on special registration stated that NSEERS would apply to all male citizens or nationals of designated countries over age sixteen who are both present

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[105] INS estimated that there were about 5900 absconders wanted from the priority countries. *Noteworthy*, 79 INTERPRETER RELEASES 509, 529 (2002).

[106] *See DOJ to Apprehend, Interrogate Undocumented Aliens with Potential Terrorism Links, Contradicting Public Statements*, 79 INTERPRETER RELEASES 236, 237 (2002) (quoting American-Arab Anti-Discrimination Committee).

[107] Attorney General Prepared Remarks on the National Security Entry-Exit Registration System, (June 6, 2002), *at* http://www.usdoj.gov/ag/speeches/2002/060502 agpreparedremarks.htm?; *see* National Security Entry-Exit Registration System (June 5, 2002), *at* http://www.usdoj.gov/ag/speeches/2002/natlsecentryexittrackingsys.htm [hereinafter NSEERS]. The domestic registration system of NSEERS was known as the "Call-In Registration" program. For a description of the program, see http://www.migrationinformation.org/USfocus/display.cfm?id=116#1.

[108] *See* MPI, *supra* note 51, at 15.

[109] The State Department also conducts a security review of any citizen from seven countries on the State Department's list of states that sponsor terrorism under the Enhanced Border Security And Visa Entry Reform Act of 2002, 8 U.S.C. § 1701 (2002). This Act makes it difficult for nationals from a state that "sponsors terrorism" to obtain a visa because it requires a favorable "security advisory opinion" — a review from agencies in Washington — before a visa will issue. *See* MPI, *supra* note 51, at 11-12.

[110] *See* MPI, *supra* note 51, at 15.

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in the United States and who arrive after the program's initiation.[111]

As of January 2003, the DOJ indicated that it had detained 1169 people as a result of NSEERS and Call-In Registration, and justified the program as rounding up persons who were out of status.[112] By January 17, 2003, 164 of these individuals were still in detention. The Attorney General stated that he would not disclose the criteria for persons who pose "an elevated national security risk" because doing so might jeopardize the counterterrorism effort.[113] However, the American Bar Association reported that government officials had revealed that the criteria were eighteen to thirty-five year old men from mostly Muslim countries.[114]

Several thousand people were arrested in the PENTTBOM dragnet, and thousands more were arrested and detained later through the "voluntary interview," special registration, and absconder initiative processes. Yet, as of the date of this writing, not a single person arrested in the preventive detention campaign has been charged with any terrorist-related crime.[115] Only five detained individuals have been charged with any terrorist-related crime.[116] Rather than leading to

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

[112] *See* Kris Kobach, Counsel to the Att'y Gen., Dep't of Justice, Foreign Press Center Briefing (Jan. 17, 2003), *at* http://fpc.state.gov/16739pf.htm.

[113] *See* Susan Sachs, *U.S. Will Fingerprint Some Foreign Visitors*, N.Y. TIMES, Sept. 9, 2002, at A16.

[114] *See* Stephanie Francis Cahill, *Fingerprint Program Gets Mixed Reviews: ABA Experts Say Plan May Prevent Terrorism but Could Also Encroach on Liberties*, 22 A.B.A. J. E-REP. 1 (June 7, 2002), *at* http://www.abanet.org/journal/ereport/j7visa.html.

[115] Zacarias Moussaoui, the only person so far charged with direct connections to the 9/11 events, was separately arrested before 9/11, and not as a result of the massive PENTTBOM investigation. *See* COLE, *supra* note 3, at 26.

[116] Earnest James Ujaama, detained in July 2002, was indicted in Seattle, Washington on August 28, 2002 (indictment available at http://news.findlaw.com/hdocs/docs/terrorism/usujaama82802ind.pdf). Ujaama pled guilty to providing humanitarian aid to the Taliban, in violation of an economic embargo, in return for the government dropping all other charges. *See* Mike Carter & David Heath, *Seattle Man's Arrest Tied to International Investigation: Ujaama Suspected of Aiding Militant Cleric*, SEATTLE TIMES, July 24, 2002, at A1; Robert L. Jamieson, Jr., *Ashcroft, Ujaama: The Boys Are Back in Town*, SEATTLE POST-INTELLIGENCER, July 23, 2003, at B1. Karim Koubriti, Ahmed Hannan, and Farouk Ali-Hamoud were arrested on September 17, 2001 and indicted on terrorism-related charges on August 28, 2002 (indictment available at http://news.findlaw.com/hdocs/docs/terrorism/uskoubriti82802ind.pdf). Koubriti and another man, Abdel-Ilah Elmardoudi (who was not arrested as result of post 9/11 investigations), were convicted of conspiracy to provide material support to terrorists, and of fraud and misuse of visas. Hannan was acquitted on terrorism related charges, but convicted on fraud charges. Ali-Hamoud was acquitted of all charges. Suzette Hackney et al., *Convictions and Acquittals: Verdict Doesn't End Debate, Victory Claimed by Both Sides in Terrorism Case*, DETROIT FREE PRESS, June 4, 2003, *at* http://www.freep.com/news/locway/tri4_20030604.htm. Koubriti and Elmardoudi's

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prosecutions of terrorists, these policies have targeted and rounded up innocent civilians.[117]

2. Legislation Passed Immediately After 9/11 Directly Targeted Noncitizen Arabs and Muslims

In addition to the many new policies initiated after 9/11, a number of provisions of the USA PATRIOT Act and other lesser-known laws passed after 9/11 gave the government new and expanded authority to remove, exclude, and detain Arab and Muslim noncitizens, and criminalize various activities based on the political and family associations of these noncitizens. As an integral part of its "war on terror" strategy, the federal government also used a series of provisions and policies to freeze the assets of Muslim charities, to arrest and detain prominent members of Muslim organizations affiliated with those charities, and to require disclosure of information about many Muslim charitable organizations, including lists of their donors. This section discusses the most critical of these laws while Part III discusses their consequences.

The "terrorist activity" and "terrorist organization" provisions of section 411 of the USA PATRIOT Act grant the government expansive powers to remove aliens and to criminalize activities based on affiliations or associations deemed to be terrorist. This section also expands the class of immigrants who are subject to removal on terrorism grounds. Section 411 amends section 212(a)(3) of the INA by including additional categories of noncitizens prohibited from entering the United States or subject to removal from the United States.[118] First, it expands the group of removable aliens by defining "terrorist activity" to include

convictions are under review because the U.S. Attorney's Office disclosed that at least two documents which cast doubt on the credibility of the government's star witness were not disclosed to defense counsel. David Shepardson, *Terror Evidence Audited*, DETROIT NEWS, Feb. 2, 2004, at METRO 1C. Maher "Mike" Hawash, detained on a material witness warrant on March 20, 2003, pled guilty to conspiring to aid the Taliban. Noelle Crombie, *Portland 7 Figure Gets 7 Years for Taliban Aid*, PORTLAND OREGONIAN, Feb. 10, 2004, at A1.

[117] The government abandoned NSEERS in December 2003, replacing the "special registration" program with the U.S. Visitor and Immigrant Status Indicator Technology program ("U.S. Visit"). The new program continues to monitor men from 24 predominately Muslim countries in South Asia and the Middle East. *See* Dan Eggen, *U.S. Set to Revise How It Tracks Some Visitors; Muslims Have Protested Use of Registration*, WASH. POST, Nov. 21, 2003, at A01; *Amnesty International USA: End of Special Registration Welcome But Will It End Discriminatory Treatment?*, U.S. NEWSWIRE, Dec. 1, 2003, *available at* 2003 WL 64750439.

[118] Immigration Act, 8 U.S.C. § 1182 (2000).

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any crime that involves the use of a "weapon or dangerous device."[119] The term "terrorist organization" has been expanded to include groups — never designated as terrorists in the past — of "two or more individuals, whether organized or not" who are engaged in specified terrorist activity.[120] "Engage in terrorist activity" has also been redefined to include providing "encouragement," including publicly endorsing terrorist activity.[121] Most significantly, the government can find that an organization engages in terrorist activity under this broad definition if it seeks to fund lawful ends, such as political and humanitarian activities.[122] Section 411 very clearly imposes restrictions solely on the basis of political associations protected by the First Amendment.[123]

Section 412 of the USA PATRIOT Act allows the DOJ to keep suspects certified as "terrorists" in custody for seven days without charge.[124] At

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[119] 8 U.S.C. § 1182(a)(3)(B)(iii)(V)(b); USA PATRIOT ACT § 411; Nancy Chang, *The USA PATRIOT Act: What's so Patriotic about Trampling on the Bill of Rights?*, CTR. FOR CONST. RTS., Nov. 2001, at 9, *available at* http://www.ccr-ny.org/v2/reports/docs/USA_PATRIOT_ACT.pdf. Since 1983, the U.S. government has defined the term "terrorism," "for statistical and analytical purposes," as the "premeditated, politically motivated violence perpetrated against noncombatant targets by sub-national groups or clandestine agents, usually intended to influence an audience." *See* Chang, *supra*, at 9 n.57 (citing U.S. DEP'T OF STATE, PATTERNS OF GLOBAL TERRORISM 2000, Introduction (2001)). Section 411 of the USA PATRIOT Act, however, stretches the term to encompass any crime that involves the use of a "weapon or dangerous device (other than for mere personal monetary gain)." USA PATRIOT ACT § 411(a). Under this broad definition, an immigrant who grabs a knife or makeshift weapon in the midst of a heat-of-the-moment altercation or in committing a crime of passion may be subject to removal as a "terrorist." *See* Chang, *supra*, at 9.

[120] 8 U.S.C. § 1182 (a)(3)(B)(vi)(III); Chang, *supra* note 119, at 7.

[121] 8 U.S.C. § 1182(a)(3); Vijay Sekhon, *The Civil Rights of "Others": Antiterrorism, the Patriot Act, and Arab and South Asian American Rights in Post-9/11 American Society*, 8 TEX. F. ON C.L. & C.R. 117, 121 (2003).

[122] The term "terrorist organization" is no longer limited to organizations which have been officially designated as terrorist and whose terrorist designations are published in the Federal Register. USA PATRIOT ACT § 411(a) amended 8 U.S.C. § 1182(a)(3)(B)(vi)(I) to include as a "terrorist organization" any foreign organization so designated by the Secretary of State under 8 U.S.C. § 1189, a provision that was introduced in the AEDPA. As of Oct. 5, 2001, 26 organizations had been designated as foreign terrorist organizations under 8 U.S.C. § 1189. *See* 66 Fed. Reg. 51088-90 (Oct. 5, 2001). In order to qualify as a designated "foreign terrorist organization" under 8 U.S.C. § 1182(a)(3)(B)(vi)(I), the Secretary of State must find that "(A) the organization is a foreign organization; (B) the organization engages in terrorist activity; and (C) the terrorist activity of the organization threatens the security of U.S. nationals or the national security of the United States." *See* 8 U.S.C. § 1189(a)(1)(A)-(C).

[123] NAACP v. Claiborne Hardware Co., 458 U.S. 886, 932 (1982), *cited in* Chang, *supra* note 119, at 9 n.60 ("The Supreme Court has described guilt by association as 'alien to the traditions of a free society and the First Amendment itself.'").

[124] Entitled "Mandatory Detention of Suspected Terrorists; habeas corpus; judicial

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the end of this period, the Attorney General must either charge the suspect with a crime or initiate immigration procedures for deportation. Otherwise, the suspect must be released.[125] HRW found that "[s]ix months after the USA PATRIOT Act was passed the Department of Justice declared that it had not certified any noncitizen as a terrorism suspect under the Act."[126] Despite this far-reaching authority, the government instead relied on the provision in 8 C.F.R. 287, giving it an "additional reasonable period of time" in an "emergency or other extraordinary circumstance" to hold individuals indefinitely.[127] This regulation gives the DOJ extraordinary powers of detention, exceeding the limits included in section 412 of the USA PATRIOT Act,[128] as there is no specified limit on how long someone could be held in such "emergency" situations.[129]

Another provision of the USA PATRIOT Act, section 106, amends the International Emergency Economic Powers Act ("IEEPA").[130] Initially a relatively noncontroversial form of "nation-to-nation diplomacy," IEEPA was originally used to impose economic embargoes on foreign countries by authorizing the President to cut off funds for designated "terrorist" groups and individuals.[131] In 1995, President Clinton extended IEEPA to political groups when he declared a national emergency with respect to the Middle East peace process.[132] The USA PATRIOT Act amendments, however, went beyond President Clinton's extension by authorizing the Treasury Department to freeze all assets of any organization simply on the assertion that it is under *investigation* for *potentially* violating IEEPA.[133] The USA PATRIOT Act amendments authorize the government to defend any challenged "freeze order" on the basis of secret evidence.[134] Subsequently, President Bush issued an executive order imposing financial restrictions on "specially designated global

review," section 412 amends INA section 236. *See* USA PATRIOT ACT § 412, 8 U.S.C. § 1101.

[125] USA PATRIOT ACT § 412.

[126] HRW REPORT, *supra* note 60, at 48.

[127] 8 C.F.R. 287; HRW REPORT, *supra* note 60, at 49.

[128] USA PATRIOT ACT § 412.

[129] *See preamble*, 66 Fed. Reg. 48,334 (Sept. 20, 2001), *amending* 8 C.F.R. § 287.3 (2001). The INS is not required to justify extending the period under the language of the rule. *See* 66 Fed. Reg. 48334; HRW REPORT, *supra* note 60, at 48-49.

[130] 50 U.S.C. § 1702 (2000).

[131] David Cole, *The New McCarthyism: Repeating History in the War on Terrorism*, 38 HARV. C.R.-C.L. L. REV. 1, 25 (2003) [hereinafter Cole, *The New McCarthyism*].

[132] *See id.*

[133] *See* USA PATRIOT ACT § 106; Cole, *The New McCarthyism*, *supra* note 131, at 27.

[134] *See id.*

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terrorists" and authorized the Secretary of Treasury to add to the list those who "assist in, sponsor, or provide. . . support for, or are otherwise associated with" a designated terrorist.[135]

Based on this amendment and other authority, in November 2002, the FBI and other federal agents raided the homes and businesses of Muslims, and confiscated the records of Muslim charitable and financial organizations in different parts of the country.[136] Soon afterwards, officers and heads of these organizations were arrested on government allegations that they were funding terrorist groups. The government's actions in freezing the charities' assets, arresting their principals, and prosecuting the cases have been conducted under a myriad of secrecy provisions that have prevented the defendants from obtaining the evidence underlying the government's claims, and, thus, prevented meaningful defense of the charges against them.[137]

3. Policies and Legislation Also Targeted Arab and Muslim Citizens After 9/11

a. "Voluntary Interviews" and Related Policies

In November 2000, the government launched another program targeting Arabs. The Bush Administration announced that it had identified over 10,000 persons of Iraqi origin, both U.S. citizens and noncitizens, whom it would subject to interviews.[138] In March 2003, the FBI stated that 3000 individuals who were born in Iraq had been interviewed and that it was going "to contact about 11,000 Iraqi-born people in the United States."[139] The Iraqis interviewed included U.S. citizens of Iraqi origin.[140] As with the other interview programs, the government did not release the exact criteria by which individuals were chosen for interviews, but the criteria were not based on any ties to terrorism and the targets of the interview programs were exclusively Iraqi nationals, including citizens.[141]

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[135] *See* Exec. Order No. 13,224, 66 Fed. Reg. 49,079 (Sept. 23, 2001).

[136] *See infra* notes 443-44 and accompanying text.

[137] *See* COLE, *supra* note 3, at 78.

[138] *See* MPI, *supra* note 51, at 42.

[139] *Id.*

[140] *Id.*

[141] In January 2002, the Justice Department announced "Operation TIPS." This program would have recruited private citizens to spy on neighbors by authorizing "millions of American truckers, letter carriers, train conductors, ship captains, utility employees and others" to report activity they deemed "suspicious" because they believed

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In May 2004, the FBI launched another "interview" campaign, focusing on the Muslim community. Reports indicate that the FBI sought to interview as many as 5000 individuals.[142] The government claimed the purpose of the interviews was to obtain leads on a suspected terrorist attack planned for the summer of 2004.[143] Despite the government's stated aim of "rooting out" terrorist attacks, the "overwhelming focus of the FBI outreach. . . [was] law-abiding members of the Muslim community."[144] The American-Arab Anti-Discrimination Committee ("ADC") indicated that, unlike previous initiatives, the FBI did not communicate any plans to conduct interviews.[145] In fact, the ACLU wrote to FBI Director Robert Mueller for more details regarding the interviews because there was a "lack of official information from the government" about the program.[146] Groups such as the Council on American-Islamic Relations ("CAIR") reported that they received "dozens of reports of Muslims being questioned at their workplaces and homes by the FBI." Questions asked of Muslim Americans included whether they engage in prayer.[147]

b. Financial, Banking, and Surveillance Legislation

Although the aim of the Victims of Terrorism Tax Relief Act of 2001 is to provide tax relief for terrorism victims, title II of the Act requires the Internal Revenue Service ("IRS") to provide taxpayer information to federal law enforcement agencies responsible for investigating or responding to terrorist incidents.[148] As a result, the government's most

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the activity could be terrorism-related. MPI, *supra* note 51, at 19; COLE, *supra* note 3, at 73. In response to criticism, the government banned the program. *Id.* at 19.

[142] *See* Richard Schmitt & Donna Horowitz, *FBI Starts to Question Muslims in U.S. About Possible Attacks*, L.A. TIMES, July 18, 2004, at A17; Richard Schmitt, *Terror Interviews Promised in May Have Yet to Begin*, SEATTLE TIMES, July 6, 2004, at A4 [hereinafter Schmitt, *Terror Interviews*].

[143] *See* sources cites *supra* note 142.

[144] Schmitt, *Terror Interviews*, *supra* note 142; *see ABC News: Good Morning America*, headlines (May 28, 2004), *available at* 2004 WL 62992620.

[145] *See Know Your Rights if Approached by the FBI* (July 19, 2004), *available at* http://www.adc.org/index.php?id=2271&no_cashe=1&sword_list[]=fbi.

[146] Richard Schmitt, *FBI Delays Interviews in Fighting Terror Plot*, L.A. TIMES, July 5, 2004, at A1.

[147] Schmitt & Horowitz, *supra* note 142. As this Article went to press, the FBI was preparing another round of interrogations, surveillance, and detentions under its "October Plan." *Id.* The plan includes targeting "persons of interest" for questioning and surveillance, including revisiting mosques around the country. *Id.* *FBI's Anti-Terror 'October Plan'* (CBS Evening News television broadcast, Sept. 17, 2004), *available at* http://www.cbsnews.com/stories/2004/09/17/eveningnews/main644096.shtml.

[148] Title II of the Victims of Terrorism Tax Relief Act of 2001, entitled Disclosure of Tax

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recent actions in targeting Muslim charities include the Senate Finance Committee's requests for the IRS to turn over confidential tax and financial records, including donor lists, of dozens of Muslim charities and foundations. Although such private information has been requested in the past, "[senate finance] committee staffers and outside experts said the scope of [such requests] is unusual because of its breadth."[149] In fact, a former IRS commissioner, Donald Alexander, has acknowledged that although the request is "rather broad," he "expects the committee will be judicial in releasing any private information to the public."[150] The Senate Finance Committee is only one of many governmental agencies with the authority to request such information from the IRS under this provision.[151]

Section 314 of the USA PATRIOT Act permits "cooperation among financial institutions, their regulatory authorities, and law enforcement authorities."[152] It also encourages "regulatory authority and law enforcement authorities to share with financial institutions information regarding individuals, entities, and organizations engaged in or reasonably suspected based on credible evidence of engaging in terrorist acts or money laundering activities."[153] This provision further permits financial institutions to monitor the accounts of individuals and organizations without notice.[154]

Section 806 of the USA PATRIOT Act, amending the "Civil Forfeiture" statute, allows the government to seize or freeze assets "on the mere assertion that there is probable cause to believe the assets were involved

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Information in Terrorism and National Security Investigations, amends 26 U.S.C. § 6103 (providing for few exceptions to general rule that tax returns are confidential). Victims of Terrorism Tax Relief Act of 2001, Pub. L. No. 107-134, § 201, 115 Stat. 2440; American Civil Liberties Union, *How the USA PATRIOT Act Redefines "Domestic Terrorism,"* Dec. 6, 2002, *available at* http://www.aclu.org/news/NewsPrint.cfm?ID=11437&c=111 [hereinafter ACLU].

[149] Dan Eggen & John Mintz, *Muslim Groups' IRS Files Sought; Hill Panel Probing Alleged Terror Ties*, WASH. POST, Jan. 14, 2001, at A01.

[150] *See id.*

[151] *See id.*

[152] USA PATRIOT ACT § 314(a)(1).

[153] *Id.* The section, entitled "Cooperative efforts to deter money laundering," amends 31 U.S.C.A. § 5311, otherwise known as the "Banks Secrecy Act." This Act, passed 30 years ago, was a legislative effort to curb money laundering. Even before the USA PATRIOT Act's amendment, the statute had become "a bewildering array of statutes, rules, regulations, and amendments . . . that serve to create a virtual labyrinth of tangled provisions." Stephen Woodrough, *Civil Money Penalties and the Bank Secrecy Act — A Hidden Limitation of Power*, 119 BANKING L.J. 46 (2002).

[154] USA PATRIOT ACT § 314(3)(a).

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in domestic terrorism."[155] Such assets may be seized temporarily without a hearing and may be permanently forfeited on no more than a civil "preponderance of the evidence" standard.[156] This provision has been called "by far the most significant change of which political organizations need to be aware."[157]

The USA PATRIOT Act has also amended the Foreign Intelligence Surveillance Act ("FISA") in several significant ways that affect Arab and Muslim citizens and residents in the United States. FISA was initially passed to regulate the CIA and FBI's methods of gathering intelligence and monitoring suspected terrorists by allowing the "wiretapping of citizens as well as resident aliens in the United States in foreign intelligence investigations upon the showing of probable cause that the target was a 'foreign power' or an 'agent of a foreign power.'"[158] FISA required the government to request authorization for surveillance of citizens from a special eleven-judge panel.[159] As described below, the USA PATRIOT Act's amendments to FISA have eroded many legal protections available to both citizens and noncitizens.[160]

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[155] ACLU, *supra* note 148. The USA PATRIOT Act authorizes the government to seize and forfeit all assets, foreign or domestic:

> (i) of any individual, entity, or organization engaged in planning or perpetrating any act of domestic or international terrorism . . . (ii) acquired or maintained by any person with the intent and for the purpose of supporting, planning, conducting or concealing any act of domestic or international terrorism . . . or (iii) derived from, involved in, or used or intended to be used to commit any act of domestic or international terrorism.

USA PATRIOT ACT§ 806 (*amending* 18 U.S.C.A. § 981).

[156] USA PATRIOT ACT § 806.

[157] ACLU, *supra* note 148.

[158] *See* Sekhon, *supra* note 121, at 123.

[159] FISA established the FISA Court, now comprising eleven federal district court judges, which review government applications to conduct surveillance. The FISA Court operates entirely in secret, and its decisions are not published. The Attorney General's Office states that the FISA Court has rejected only one out of 15,264 applications for surveillance by the government between 1979 and 2002 (a 99.95% approval rate). *See* (1979-2002) ATT'Y GEN. ANN. REPS., *available at* http://www.fas.org/irp/agency/doj/fisa.

[160] Examples include section 203 of the USA PATRIOT Act, which authorizes disclosure, without judicial supervision, of certain criminal and foreign intelligence information to law enforcement agencies if the receipt of the information will "assist the official . . . in the performance of his official duties." Such information sharing is not limited to terrorism-related investigations. *See* Chang, *supra* note 119, at 7. Section 213 permits federal authority to conduct covert searches of a person's home or office without notification of the warrant's execution until after the search has been completed. It permits the government to delay notice of execution of a warrant to seize items if a court finds "reasonable necessity" for the seizure. *See id.* at 4. This section is not limited to terrorism-related investigations, but extends to all criminal investigations. *See id.* at 5.

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Section 218 of the USA PATRIOT Act amends two sections of FISA.[161] Labeled the "most radical provision of the USA PATRIOT Act,"[162] this short amendment replaces "the purpose" from FISA's electronic surveillance and physical search provisions with "a significant purpose."[163] The amendment now permits the government to conduct physical searches or electronic surveillance where obtaining foreign intelligence information is a "significant purpose" of the surveillance. Law enforcement agencies conducting a criminal investigation can subvert Fourth Amendment requirements simply by claiming that foreign intelligence-gathering is "a significant purpose" of their investigation.[164]

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[161] 50 U.S.C.A. §§ 1804, 1823 (2004).

[162] *See* Chang, *supra* note 119, at 7.

[163] At the time FISA was passed, the extreme secrecy of FISA proceedings was justified as being limited to only those cases in which the government's purpose is foreign intelligence surveillance. The strict distinction between proceedings and standards for foreign intelligence surveillance and those required for criminal prosecution incorporated in FISA were the result of public and congressional concern about widespread government abuse of surveillance powers during the Cold War, the McCarthy period, and later domestic counterintelligence scandals. FBI and CIA surveillance abuses such as COINTELPRO (counterintelligence program), Operation CHAOS, and the wiretapping of thousands of Americans involved in the civil rights or anti-war movement, including Martin Luther King, Jr., came to public attention through the "Church Committee" hearings and Report. *See* 2 SENATE SELECT COMM. TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, INTELLIGENCE ACTIVITIES AND THE RIGHTS OF AMERICANS, FINAL REPORT, S. REP. NO. 94-755 (1976), *available at* http://www.icdc.com/~paulwolf/cointelpro/churchfinalreportIIa.htm. FISA was enacted two years later, allowing the government to conduct surveillance that did not meet strict Fourth Amendment search and seizure guidelines as long as it was for foreign intelligence purposes and not for criminal law enforcement. Now, the USA PATRIOT Act's amendment of FISA authorizes such surveillance, even where the government's primary purpose is criminal prosecution. *See* 50 U.S.C. § 1801 (1978), *amended by* USA PATRIOT ACT § 218. However, even before the USA PATRIOT Act amendments, the government was using FISA for domestic surveillance in cases that clearly involved criminal investigations or political surveillance. Among the known cases where such abuses have come to light are the L.A. Eight litigation and some of the secret evidence cases of the 1990s, in which both the targeted individuals and their counsel were subjected to wiretapping and other surveillance. *See* Robert A. Dawson, *Shifting the Balance: The D.C. Circuit and the Foreign Intelligence Surveillance Act of 1978*, 61 GEO. WASH. L. REV. 1380, 1398 (1993) (reviewing L.A. Eight FISA litigation); *see also* Akram, *supra* note 12 (reviewing FISA issues and challenges in Dr. Anwar Haddam's case). For a discussion of pre-USA PATRIOT Act FISA surveillance abuses, see DEMPSEY & COLE, *supra* note 24, at 49-60.

[164] 50 U.S.C.A. §§ 1804, 1823. In its first published decision in May 2002, the FISA Court rejected new procedures proposed by the Attorney General, which were designed to implement the USA PATRIOT Act provisions, allowing the FBI to use FISA for primarily law enforcement purposes. The FISA Court found that the new procedures circumvented Fourth Amendment requirements for criminal investigations, and were inconsistent with the minimization provisions of FISA itself. *See In re* All Matters Submitted to the Foreign Intelligence Surveillance Court, 218 F. Supp. 2d 611 (For. Int. Surv. Ct. 2002); *see also* Anita

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Section 215 of the USA PATRIOT Act also changes FISA requirements, extending the government's reach into citizens' and noncitizens' records and other materials.[165] This section provides that the FBI (or a designee) may apply "for an order requiring the production of any tangible things. . . for an investigation to protect against international terrorism or clandestine intelligence activities."[166] A judge must approve the application if it conforms to the provision's requirements.[167] Prior to the USA PATRIOT Act amendment, the government was required to articulate specific facts to support a reasonable belief that the individual whose records were sought was a "foreign power or an agent of a foreign power."[168] Now, FBI certification that such records are necessary "to protect against international terrorism or clandestine intelligence activities," without more, is sufficient to obtain a court order to obtain the records.[169]

Finally, in another far-reaching USA PATRIOT Act provision, section 802 defines and creates, for the first time in American law, the crime of "domestic terrorism."[170] The broad definition includes "acts dangerous to human life that are in violation of the criminal laws" if they "appear to be intended. . . to influence the policy of a government by intimidation or coercion."[171] The definition is virtually unrestricted and provides the government a license to investigate and conduct surveillance of organizations simply because of their opposition to government policies. An attorney for the Center for Constitutional Rights, Nancy Chang,

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Ramasastry, *Why the Foreign Intelligence Surveillance Act Court was Right to Rebuke the Justice Department* (Sept. 4, 2002), *available at* http://writ.findlaw.com/ramasastry/20020904.html. The FISA Court of Review convened for the first time since its establishment under the Statute to review the FISA Court decision and to address the constitutionality of the Attorney General's procedures. The only party to this extraordinary process was the government itself. In November 2003, the FISA Court upheld the constitutionality of FISA and the Attorney General's procedures under the USA PATRIOT Act. *In re* Sealed Case, 310 F.3d 717 (For. Int. Surv. Rev. 2002). With the government as the only party to the case, the decision in its favor also meant no appeal to the United States Supreme Court. Apparently, the FBI immediately began to use FISA authority for surveillance in criminal investigations that previously would have required Fourth Amendment scrutiny under title III or other law. *See* Brief of Amici Curiae in Support of Defendants' Motion to Suppress Foreign Intelligence Surveillance Evidence at 8, United States v. Battle, NO. CR-02-399-JO, 2003 WL 751155 (D. Or. Feb. 25, 2003), *available at* http://news.findlaw.com/hdocs/docs/terrorism/usbattle91903aclu.pdf.

[165] Chang, *supra* note 119, at 5-6.

[166] USA PATRIOT ACT § 218.

[167] *Id.*

[168] 18 U.S.C.A. § 1862(a) (2000).

[169] Chang, *supra* note 119, at 4.

[170] *Id.* at 2.

[171] USA PATRIOT ACT § 802.

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warns that "[e]nvironmental activists, anti-globalization activists, and anti-abortion activists who use direct action to further their political agendas are particularly vulnerable to prosecution as 'domestic terrorists.'"[172] This provision gives the Attorney General broad discretion to criminally prosecute legitimate political dissent.[173]

C. *Secrecy, Black Holes, and Other Legal Anomalies Targeting Arabs and Muslims Across the Board*

A range of secrecy policies and directives were also implemented after 9/11, in conjunction with the legal and policy changes discussed in this Article. For example, after questioning and detaining over 1000 individuals after 9/11, the government prohibited the release of information about detainees to the public. A few government affidavits were the only support for the ordered secrecy. In response, the ACLU and the Center for National Security Studies ("CNSS") sued federal agencies and state counties under the Freedom of Information Act ("FOIA") and comparable state legislation. In both cases, the government managed to justify withholding the specific detainee information by citing to an exception under FOIA and by issuing an interim rule implemented to pre-empt state laws to the contrary, prohibiting state and local officials from releasing information about the detainees.

On September 21, 2001, Chief Immigration Judge Michael Creppy ordered that the press and public could not attend immigration hearings of individuals classified by the government as being of "special interest" to its investigation of the 9/11 attacks.[174] The media filed suit in various jurisdictions to contest the Creppy Memo, and two circuits were split on whether this directive complies with the constitutional requirements under the First and Fifth Amendments. In the Sixth Circuit, two courts found that the Creppy Memo was unconstitutional.[175] The Third Circuit, however, held that that the Creppy Memo was constitutional.[176]

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[172] *See* Chang, *supra* note 119, at 3; ACLU, *supra* note 148 ("The definition of domestic terrorism is broad enough to encompass the activities of several prominent activist campaigns and organizations. Greenpeace, Operation Rescue, Vieques Island and WTO protesters and the Environmental Liberation Front have all recently engaged in activities that could subject them to being investigated as engaging in domestic terrorism.").

[173] *See* Chang, *supra* note 119, at 3.

[174] Nancy Chang & Alan Kabat, *Summary of Recent Court Rulings on Terrorism-Related Matters Having Civil Liberties Implications*, CTR. FOR CONST. RTS., at 3 (Mar. 8, 2004), *available at* http://www.ccr-ny.org/v2/legal/september_11th/docs/summaryofcases2-4-04.pdf.

[175] *See infra* Part III.B.2.

[176] See *infra* Part III.B.2.

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Along with the new secrecy measures, the government instituted a series of novel legal devices designed to avoid normal constitutional procedures and guarantees. For example, in November 2001, President Bush declared the need for "extraordinary treatment" of noncitizens allegedly involved with al Qaeda or involved in "acts of international terrorism" and ordered individuals captured in Afghanistan (after U.S.-led military operations) sent to Guantánamo Bay, Cuba.[177] Noncitizens held at Guantánamo initially were designated as "enemy aliens," justifying the government's position that such individuals are outside the jurisdiction of the military and U.S. court system, purportedly under Supreme Court precedent.[178] U.S officials also argued that certain detained individuals are not "prisoners of war" under the Third Geneva Convention because they are members of al Qaeda, not state actors. Such detainees — nationals from dozens of countries including Yemen, Australia, Britain, and Pakistan — are deemed "unlawful combatants" and unprotected by the Third Geneva Convention, which requires, among other guarantees, that captured persons be treated humanely and given a prompt review of whether they should be designated as "prisoners of war."[179] As a result of the Bush Administration's new legal framework, the Guantánamo detainees could not consult with counsel or challenge the legality of their detention. Federal habeas petitions were filed on behalf of many of the detainees. The Supreme Court disagreed with the Bush Administration's so-called legal justifications and found that federal courts have jurisdiction to hear the detainees' habeas

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[177] *See* Diane Marie Amann, *Guantánamo*, 42 COLUM. J. TRANSNAT'L. L. 263, 267-71 (2004) (citing Military Order of Nov. 13, 2001: Detention, Treatment, and Trial of Certain Noncitizens in the War Against Terrorism, 66 Fed. Reg. 57,833, 57,834 (Nov. 16, 2001), *reprinted in* 10 U.S.C. § 801 (2001)).

[178] In *Johnson v. Eisentrager*, 339 U.S. 763 (1950), the Supreme Court held that noncitizens held in military detention in Germany could not petition U.S. courts for writs of habeas corpus. The government argues that noncitizens detained at Guantánamo, and therefore outside U.S. territory, are similar to the *Eisentrager* plaintiffs. *See* Amann, *supra* note 177, at 268.

[179] *See infra* notes 181, 184. On the significant international law violations involved in the government's "unlawful combatant" designations and the treatment meted out to Guantánamo detainees, including credible evidence of torture and cruel treatment, see AMNESTY THREAT OF BAD EXAMPLE, *supra* note 59; Amann, *supra* note 177; Jordan J. Paust, *Judicial Power to Determine the Status and Rights of Persons Detained Without Trial*, 44 HARV. INT'L L.J. 503 (2003); *see also* Harold Hongju Koh, *A United States Human Rights Policy for the 21st Century*, 46 ST. LOUIS U. L.J. 293 (2002); Amnesty Int'l, Memorandum to the U.S. Government on the rights of people in U.S. Custody in Afghanistan and Guantánamo Bay ¶ 21 (Apr. 15, 2002), *available at* http://web.amnesty.org/ai.nsf/Index/AMR510532002 (concluding that states "may not depart from the requirement of effective judicial review of detention").

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challenges.[180]

The "enemy combatant" designation, which the government subsequently assigned to detainees in Guantánamo and other detainees who were arrested on U.S. soil or brought within the territory of the U.S. mainland after 9/11, does not have current domestic or international legal precedent or clear legal context. Indeed, the Supreme Court recently noted in *Hamdi v. Rumsfeld* that there "is some debate as to the proper scope" of the term "enemy combatant" and emphasized that "the Government has never provided any court with the full criteria that it uses in classifying individuals as such."[181] The term appears once in the 1942 Nazi saboteurs case, *Ex parte Quirin*.[182] In *Quirin*, the Court declined to grant habeas corpus relief to German petitioners who were in U.S. military custody. In so holding, the Court found that the petitioners were "unlawful combatants" and described an unlawful combatant as "an *enemy combatant* who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property."[183] The *Quirin* court found that such "unlawful combatants" are subject to capture and detention like lawful combatants, but, as offenders against the laws of war, are additionally subject to trial and punishment by military tribunals.[184]

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[180] *See infra* notes 363-365 and accompanying text.

[181] Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2639 (2004). For the international law implications, and claims of violations under the four Geneva Conventions, of the "enemy combatant" rubric and treatment afforded U.S. citizens so designated, see Paust, *supra* note 179 and see also Amann, *supra* note 177. Further discussion of the international law ramifications of "enemy aliens," "enemy combatants," and "unlawful combatants" are beyond the scope of this Article.

[182] 317 U.S. 1 (1942).

[183] *See id.* at 31 (emphasis added). In *Quirin*, the Court decided that unlawful combatants, including those who do not wear "fixed and distinguished emblems," are not entitled to be treated according to the laws of war in that they are not entitled to the substantive and procedural protections set forth in the Third Geneva Conventions of 1949. In February 2004, White House Counsel Alberto Gonzales stated that the Administration uses an "analytical framework based on the Supreme Court's decision in *Ex parte Quirin*" to justify designating individuals as enemy combatants. Chang & Kabat, *supra* note 174, at 12 (citing Vanessa Blum, *Bush Counsel: How U.S. Classifies Terror Suspects*, LEGAL TIMES, Mar. 1, 2004, at 1, 13; Stuart Taylor, *Progress on Gitmo Process*, LEGAL TIMES, Mar. 1, 2004, at 54).

[184] *See* Chang & Kabat, *supra* note 174, at 12; *see also* American Bar Association Task Force on Treatment of Enemy Combatants, Criminal Justice Section, Section of Individual Rights and Responsibilities, Senior Lawyers Division, Revised Report 109 to the House of Delegates, Feb. 10, 2003, at 4. Amnesty International found that "instead of applying the Geneva Convention in full, the U.S. Executive has chosen to drop hundreds of those it has detained in Afghanistan and elsewhere into a legal black hole, outside the sovereign territory of the United States, out of the reach of the courts, under the label 'enemy combatant.'" AMNESTY THREAT OF BAD EXAMPLE, *supra* note 59, at 6.

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Because the government could not detain U.S. citizens captured abroad or on the mainland as "enemy aliens," it designated them as "enemy combatants."[185] In the much-publicized cases of U.S. citizens Jose Padilla, Yaser Hamdi, and Ali Saleh Kahlah, the government designated them "enemy combatants" and confined them in military detention with severe restrictions on access to counsel, their families, the press, and the protections of the civilian courts. In its recent ruling in the *Hamdi* case, however, the Supreme Court placed limitations on the government's "enemy combatant" strategy — the government must provide U.S. citizens designated as "enemy combatants" with access to the federal courts for a fair review of the reasons for the designation and detention.[186]

Aside from the "enemy combatant" and unlawful combatant labels, the Bush Administration devised additional novel legal strategies to bypass normal constitutional guarantees triggered when any individual is arrested or detained. The government utilized the rarely-used material witness statute to detain individuals indefinitely and in secret. The material witness statute permits the government to detain individuals, including citizens, upon a showing that the individual's appearance is material to a criminal proceeding.[187] If the government can show that it would be impractical to subpoena the individual, a judicial officer can arrest the person and delay release "for a reasonable period of time."[188] The government, "reading this statute expansively, has secretly locked up an undisclosed number of terrorism suspects — believed to be in the dozens — even though it lacks probable cause to hold them on criminal or immigration charges."[189] All of the policies discussed above were designed to, or had the effect of, stripping individuals of minimum constitutional and international law guarantees, and, as we describe in this Article, Arabs and Muslims have been the main victims.

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[185] *See* Amann, *supra* note 177, at 273.

[186] *Hamdi*, 124 S. Ct. at 2634; *see infra* notes 339-52 and accompanying text.

[187] 18 U.S.C.A. § 3144 (2004).

[188] *Id.* Because the statute does not define "criminal proceeding," there has been debate as to whether the government can detain a material witness before an indictment has been issued. *See, e.g.*, Robert Boyle, *The Material Witness Statute Post September 11: Why It Should Not Include Grand Jury Witnesses*, 48 N.Y.L. SCH. L. REV. 13 (2003-04). *Compare* United States v. Awadallah, 202 F. Supp. 2d 55 (S.D.N.Y. 2002) (holding that material witness statute does not allow detention for grand jury investigation, in part because statute does not apply until indictment has issued), *with In re* Application of United States for a Material Witness Warrant, 213 F. Supp. 2d 287 (S.D.N.Y. 2002) (holding that material witness statute applies to grand jury proceedings, and, therefore, before indictment has issued).

[189] Chang & Kabat, *supra* note 174, at 8.

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II. CONSTITUTIONAL AND IMMIGRATION IMPLICATIONS OF POST-9/11 POLICIES AFFECTING NONCITIZEN MUSLIM AND ARAB COMMUNITIES

There are both constitutional and immigration consequences to noncitizen Muslim and Arab communities in the United States resulting from the legislation and policies adopted since 9/11. This part reviews the constitutional concerns raised by the laws and policies described above. It also draws some conclusions about the changes these policies have brought about in both the immigration and nonimmigration contexts.

A. *Immigration Detention Policies and Practices*

A number of the post-9/11 provisions and policies have significantly altered detention procedures and practices in the immigration context. These policies have exacerbated a trend toward criminalizing immigration law,[190] expanding the categories of mandatory detainees, reducing administrative discretion in determining release, and curtailing the immigration and federal courts from review of detention decisions.[191] The post-9/11 detention policies, whether implemented through regulation or simply executive fiat, have pushed well beyond what were previously considered constitutional limitations to immigration detention.

The long term due process implications for the Arab and Muslim communities affected by the 9/11 policies relate to many, if not most, of the actions discussed above, but abusive and arbitrary arrests and detentions have been central to the concerns. Under the Constitution, detention without charge violates the liberty rights in the Due Process

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[190] For some of the literature addressing the causes and consequences of the criminalization of immigration law, see Bill Ong Hing, *The Immigrant as Criminal: Punishing Dreamers*, 9 HASTINGS WOMEN'S L.J. 79 (1998); Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases*, 113 HARV. L. REV. 1889 (2000); Maria Isabel Medina, *The Criminalization of Immigration Law: Employer Sanctions and Marriage Fraud*, 5 GEO. MASON L. REV. 669 (1997); Teresa Miller, *Citizenship & Severity: Recent Immigration Reforms and the New Penology*, 17 GEO. IMMIGR. L.J. 611 (2003).

[191] In addition to authorizing the use of secret evidence in the immigration context, amendments included in AEDPA and IIRIRA removed federal court jurisdiction to review most immigration decisions, including detention and removal orders. IIRIRA stripped the federal courts from jurisdiction to review removal orders of aggravated felons. However, the federal courts as well as the Supreme Court have construed these provisions to protect some right to review constitutional issues and purely legal questions involved in detention decisions through habeas corpus and limited appellate review. See AEDPA and IIRIRA provisions discussed in *Zadvydas v. Davis*, 533 U.S. 678, 686-702 (2001), *INS v. St. Cyr*, 533 U.S. 289, 308-10 (2001), and *Xiong v. INS*, 173 F.3d 601, 608 (7th Cir. 1999).

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Clause of the Fifth and Fourteenth Amendments.[192] As the Supreme Court has stated, "freedom from imprisonment — from government custody, detention, or other forms of physical restraint — lies at the heart of the liberty that the [Due Process] Clause protects."[193] The Supreme Court has ruled that in criminal cases, the government must bring charges, and a judge must make a determination of probable cause within forty-eight hours of arrest.[194]

Although the "special interest" immigration detainees were held primarily pursuant to a criminal investigation, the new provision of 8 C.F.R 287.3 ("Regulation") denied them the due process right of criminal suspects to be charged within forty-eight hours.[195] This regulation, with its provision expanding that time indefinitely for "emergency or extraordinary circumstances," allows the government to hold individuals for months without being charged with violating the law.[196] This regulation completely suspends the normal immigration rules, obviating the seven day limitation on immigration arrests without charge that was included in the USA PATRIOT Act. Both the INS and the FBI have ignored any limits on their ability to arrest and detain without charge, failing to read a reasonable time limitation into the indefinite detention provision for emergencies and declining to even apply the USA PATRIOT Act seven day limitation.

The Regulation itself has been heavily criticized, so only a brief review of the statutory and constitutional problems it presents is necessary here.[197] There are facial constitutional infirmities with the new Regulation because it contains no criteria as to what constitutes an

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[192] *See* U.S. CONST. amend. V, XIV.

[193] *Zadvydas*, 533 U.S. at 690 (citing Foucha v. Louisiana, 504 U.S. 71, 80 (1992)). Claims asserting arbitrary detention have also been made on other grounds, such as the right to counsel under the Sixth Amendment ("in all criminal prosecutions, the accused shall enjoy the right to . . . have the assistance of counsel for his defense") and the excessive bail provision of the Eighth Amendment ("excessive bail shall not be required"). *See* HRW REPORT, *supra* note 60, at 47 n.172.

[194] *See* County of Riverside v. McLaughlin, 500 U.S. 44, 56-57 (1991).

[195] *See* HRW REPORT, *supra* note 60, at 49.

[196] *See generally* MPI, *supra* note 51, at 52-64 (detailing lengthy delays in charging and detaining without charge). For a thorough discussion of the constitutional problems with the amended regulation, see Administrative Comment, *Indefinite Detention without Probable Cause: A Comment on INS Interim Rule 8 C.F.R. Sec. 287.3*, 26 N.Y.U. REV. L. & SOC. CHANGE 397 (2000-01) [hereinafter Administrative Comment].

[197] Administrative Comment, *supra* note 196; *see* HRW REPORT, *supra* note 60; Amnesty International's Concerns Regarding Post-September 11 Detentions in the USA, *at* http://www.amnestyusa,org/annualreport. For a thorough critique of the unconstitutionality of many of the government's post-9/11 detention policies and practices, see Cole, *In Aid of Removal*, *supra* note 58 and see also Chang, *supra* note 119.

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emergency or other extraordinary circumstance. Nor does it limit the period of time that a noncitizen can be held without charge in such circumstances.[198] Detaining individuals without charging them for lengthy periods, even when authorized by statute or regulation, gives the government discretion to engage in arbitrary, preventive, and indefinite detention, which the Fifth Amendment prohibits.[199] The Regulation permits indefinite pretrial detention, which is constitutionally prohibited, whether applied to citizens or aliens.[200] The Due Process Clause applies "to all 'persons' within the United States," including aliens, whether their presence is lawful or not.[201] Noncitizens detained for possible immigration law violations have the same right to be "promptly" informed of the charges against them as a citizen held in police custody.[202] If charges are not filed, the detained person is entitled to release.[203] The Fifth Amendment restricts the government's power to detain, other than in prescribed punitive and limited non-punitive circumstances, and does not permit punitive or preventive detention in the immigration context without individualized and stringent review of the individual's dangerousness or risk of flight.[204] Moreover, the Regulation is not narrowly tailored to the government's interests, especially in cases in which the government produces no particularized evidence connecting a particular individual to terrorism. This situation prevailed in thousands of post-9/11 arrests and detentions.[205] It also

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[198] The preamble to the new rule explains that, in emergencies, the INS may require additional time beyond 48 hours before filing charges "to process cases, to arrange for additional personnel or resources, and to coordinate with other law enforcement agencies" (citing *Supplementary Information,* 8 C.F.R. 287 (2004)). The rule does not require that the INS justify the delay in filing charges or even that it serve notice to the individual or to the immigration court of its intent to hold the detainee past 48 hours without charge. Although the preamble to the rule argues that immediate implementation of the rule without public comment was needed to react to the 9/11 attack, the rule has no expiration date, and thus is now a permanent feature of U.S. immigration regulations. *See* HRW REPORT, *supra* note 60, at 48-49.

[199] *See* Cole, *In Aid of Removal, supra* note 58, at 1025-26.

[200] *See id.* at 1021.

[201] HRW REPORT, *supra* note 60, at 47 (citing Zadvydas v. Davis 533 U.S. 678, 690 (2001)); *see also* U.S. CONST. amend. V; Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886).

[202] HRW REPORT, *supra* note 60, at 48.

[203] *See id.*

[204] *See Zadvydas*, 533 U.S. at 690; Cole, *In Aid of Removal, supra* note 58, at 1007 (citing United States v. Salerno, 481 U.S. 739, 752-53 (1987)).

[205] *See* Chang, *supra* note 119. Although a thorough analysis of the international law concerns raised by post-9/11 legislation and policies is beyond the scope of this Article, it is important to note that arbitrary detention, defined as detention that is not conducted "on such grounds and in accordance with such procedures as are established by law," violates international human rights law. Detention is also arbitrary as a matter of international law,

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violates the Fourth Amendment's probable cause requirement for an arrest without warrant, which the courts have extended to noncitizens in search and seizure situations[206] as well as in arrests and detentions.[207] The forty-eight hour or longer period to determine an individual's custody status significantly alters prior immigration practice concerning prompt determination of an individual's status and reasons for custody.[208]

Aside from the change in the charging period, the centralized charging and "hold until cleared" process also has significantly altered the normal immigration procedure for charging and detaining immigration violators. The process employed after 9/11 actually put the charging and detention decisions in immigration cases in the hands of the FBI rather than the INS. The "hold until cleared" policy authorized the FBI to render a final decision on when an individual could be removed from the country. This policy completely subverts the core of immigration authority in deportation/removal decisions and also violates the Fifth Amendment's requirements of substantive and procedural due process.[209] It is unclear what the status of these procedures is, as there is no indication that these new policies have been revoked even after the OIG had made serious charges of government misconduct and constitutional violations. One unnamed DOJ lawyer called the policy shift from immigration decision-making to FBI decision-making "uncharted territory" because it "assumed that a person in detention could have a link to terrorism unless and until the FBI said otherwise."[210]

The automatic stay, "hold until cleared," and "no bond" policies also violate the Fifth Amendment due process requirement.[211] The automatic

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whether conducted under legal provisions, if it is manifestly disproportional, unjust, or unreasonable. *See International Covenant on Civil and Political Rights*, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at art. 9, para. 1, U.N. Doc. A/6316 (1966).

[206] "The right of the people to be secure in their persons . . ., against unreasonable searches and seizures, shall not be violated . . ., but upon probable cause . . ." U.S. CONST. amend. IV; *see also* Almeida-Sanchez v. United States, 413 U.S. 266, 273-75 (1973).

[207] Rhoden v. United States, 55 F.3d 428 (9th Cir. 1995); *see* Arevalo v. Woods, 811 F.2d 487 (9th Cir. 1987).

[208] *See* Custody Procedures, 66 Fed. Reg. 48,334, 48,335 (Sept. 20, 2001) [hereinafter Custody Procedures] ("Unless voluntary departure has been granted pursuant to subpart C of 8 CFR part 240, a determination will be made within 48 hours of the arrest, except in the event of an emergency or other extraordinary circumstance in which case a determination will be made within an additional reasonable period of time.").

[209] *See* United States v. Salerno, 481 U.S. 739, 746-47 (1987).

[210] Eric Lichtblau, *U.S. Report Faults the Roundup of Illegal Immigrants After 9/11*, N.Y. TIMES, June 3, 2003, *available at* http://www.globalpolicy.org/wtc/liberties/2003/0603immigrants.htm.

[211] *See generally* Cole, *In Aid of Removal*, *supra* note 58; HRW Report, *supra* note 60, at 53-

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stay rule gives the INS complete discretion to determine bond or release, taking any meaningful opportunity to challenge the basis of detention out of the hands of the immigration courts. Before this rule, if the government believed an individual posed a threat or a flight risk, it could always seek stays of release orders by showing likelihood of success and irreparable harm.[212] The automatic stay provision authorizes stays with no such showing — even in situations where no such showing could be made. Such discretion goes well beyond any legitimate purpose the government might have, violating due process.[213]

Several courts have found that the automatic stay provision violates an alien's due process rights. In *Almonte-Vargas v. Elwood*, a non-"special interest" case, a district judge in Pennsylvania found that continued detention under the automatic stay rule violated due process, granted a writ of habeas corpus, and ordered the petitioner released.[214] The petitioner was a native and citizen of the Dominican Republic who was in the United States as a lawful permanent resident. The INS had not alleged she had any ties to terrorism, yet used the automatic stay provision to prevent her release. Despite an immigration judge's order that she be released, the INS detained the woman for more than four months. The court found that "the INS is essentially disregarding [legal precedent] and accomplishing. . . mandatory detention as an 'aggravated felon' through the mechanism of the automatic stay."[215] It stated that "due process is not satisfied where the individualized custody determination afforded to Petitioner was effectively a charade. By pursuing an appeal of the [Immigration Judge's] bond determination and requesting that no action be taken on the appeal, the INS has nullified [the Immigration Judge's] decision."[216] HRW has noted, "Her

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[212] Cole, *In Aid of Removal*, *supra* note 58, at 1030, and sources cited within.

[213] In *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), the Court established the following standard for examining due process rights in the immigration context:

> [D]ue process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

[214] *See* Almonte-Vargas v. Elwood, NO. 02-CV-2666, 2002 U.S. Dist. LEXIS 12387 (E.D. Pa. June 28, 2002).

[215] *See id.* at *1-3.

[216] HRW REPORT, *supra* note 60, at 56-57 (citing *Almonte-Vargas*, 2002 U.S. Dist. LEXIS at

case is a reminder that the changes to immigration regulations issued by the DOJ in the months after 9/11 apply to all noncitizens, not only those detained under suspicion of links to or knowledge about terrorism."[217]

Since *Almonte-Vargas*, several other courts have held that the government's use of the automatic stay regulation violates aliens' due process rights in cases where terrorism was not an issue.[218] In at least two cases, the courts have held that the regulation did not violate due process.[219] *Almonte-Vargas*, *Bezmen v. Ashcroft*, and other cases striking down the automatic stay on due process grounds offer little consolation to the Arab and Muslim communities affected by the government's post-9/11 policies. To date, no judge has found the automatic stay rule a violation of due process in any of the "special interest" cases involving Arabs and Muslims.

Related to the automatic stay policy is the INS policy of continued detention after final order of removal. There is no immigration regulation or statute authorizing detention in cases where the INS continued to detain individuals after they were ordered deported or granted voluntary departure. The only exceptions are when the government is unable to find a country that will accept the individual, or the individual lacks valid travel documents. In the majority of the "special interest" cases, neither of these exceptions existed, yet the

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*5).

[217] *See* HRW REPORT, *supra* note 60, at 56 n.211.

[218] *See* Zavala v. Ridge, 310 F. Supp. 2d 1071, 1076 (N.D. Cal. 2004) (finding that "in this case, as in all instances in which the automatic stay is involved by the Service, there has already been a determination by an immigration judge that the alien [a citizen from Mexico] is not a danger to the public or a significant flight risk"); Ashley v. Ridge, 288 F. Supp. 2d 662, 669 (D.N.J. 2003) (finding that Due Process rights of petitioner, native of Jamaica with no alleged ties to terrorism, were violated because he was "detained for an indeterminate period pursuant to the unilateral determination by a BICE official, despite the findings of an Immigration Judge that he be released"); Bezmen v. Ashcroft, 245 F. Supp. 2d 446, 451 (D. Conn. 2003) (noting that "stated goals of the interim detention regulation at issue [8 C.F.R. §1003.19(i)(2) (2004)], preventing the release of aliens who pose a threat to national security or the public, are not served as Bezmen [a citizen from Turkey] is not claimed by the INS to represent such a threat"). The *Ashley* and *Zavala* courts further concluded that the detention was a violation of the aliens' substantive due process rights. *See Zavala*, 310 F. Supp. 2d at 1077; *Ashley*, 288 F. Supp. 2d at 669.

[219] In *Pisciotta v. Ashcroft*, 311 F. Supp. 2d 445 (D.N.J. 2004) (involving citizen from Italy) and *Galarza-Solis v. Ashcroft*, No. 03-C-9188, 2004 WL 728199 (N.D. Ill. Mar. 30, 2004) (involving citizen from Mexico), the courts concluded that the automatic stay regulation did not violate the aliens' due process rights. Both courts relied on the Supreme Court decision, *Demore v. Kim*, 538 U.S. 510 (2003), which upheld the constitutionality of the mandatory detention of criminal aliens pursuant to 8 U.S.C. § 1226(c) (2004). Because the *Demore* Court did not address the automatic stay provision, it is unclear how its holding is relevant to the constitutionality of the automatic stay.

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government continued to detain the individuals for long periods after final orders of removal under its "hold until cleared," or "clearance," policy. The Migration Policy Institute ("MPI") found that of the 407 detained people whose cases were surveyed, at least 100 had FBI "holds" placed on them, and almost sixty were detained after a final order of deportation. Of the sixty, more than thirty were detained five weeks or more after the deportation order.[220]

In June 2003, in *Turkmen v. Ashcroft*, the Center of Constitutional Rights sued the Attorney General on behalf of a class of male noncitizens from the Middle East and South Asia.[221] Based partly on evidence found in the OIG Report, the complaint claims that each of the noncitizen plaintiffs had no ties to terrorism, yet they were improperly detained for several months.[222] The case alleges that post-9/11 detainees were capriciously classified as being "of interest" to the Administration's terrorism investigation despite the lack of any evidence linking them to terrorism.[223] The case also alleges that the detainees were subjected to practices which violated their constitutional rights, such as prison guard beatings, a blanket policy of denying them release on bond, and interfering with their ability to retain counsel.[224] The case is still pending.[225]

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[220] *See* MPI, *supra* note 51, at 56.

[221] 2004 U.S. Dist. LEXIS 14537, at *1 (E.D.N.Y. July 29, 2004). Ibrahim Turkmen, an immigrant living in San Diego was one victim of the government's "clearance" policy. Turkmen, a Turkish citizen, is a Muslim Imam. He overstayed his six-month visa and, on Oct. 18, 2001, was arrested by the FBI on the implication that he was somehow associated with Osama Bin Laden, an accusation which never evolved into any formal charge. After he was put in removal proceedings, he agreed to leave the United States and was granted voluntary departure by an immigration judge, allowing him to leave the country without a final deportation order. He had a ticket to return to Turkey, but the INS refused to allow him to leave. Instead, he remained in INS detention for over three months. The INS did not have any reason to detain him as he was not charged on criminal, security, or any other grounds. The INS simply had not "cleared" him in their investigation of the attacks on 9/11. *See generally*, Class Action Complaint and Demand for Jury Trial, Turkmen v. Ashcroft, 2004 U.S. Dist. LEXIS 14537 (E.D.N.Y. July 29, 2004), *available at* http://news.corporate.findlaw.com/hdocs/docs/terrorism/turkmenash41702cmp.pdf [hereinafter Turkmen Class Action Complaint].

[222] *See* Turkmen Class Action Complaint, *supra* note 221, at 2.

[223] *See id.* at 2, 5.

[224] *See id.* at 2-3. Most recently, the defendants, including John Ashcroft and FBI Director Robert Mueller, sought to dismiss the complaint on qualified immunity and jurisdictional grounds. *See* Chang & Kabat, *supra* note 174, at 6.

[225] The Center for Constitutional Rights filed a Third Amended Complaint on September 14, 2004, based, in part, on new facts revealed in the OIG report, U.S. DEPT. OF JUSTICE, SUPPLEMENTAL REPORT ON SEPTEMBER 11 DETAINEES' ALLEGATIONS OF ABUSE AT THE METROPOLITAN DETENTION CENTER IN BROOKLYN, NEW YORK, *available at* http://www.usdoj.gov/org./special/0312/final.pdf. For more details on the status

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Related to the three policies discussed above — automatic stay, "no bond," and "clearance" — are the policies of setting extraordinary and unjustified bond amounts after 9/11 and the "mosaic" theory. The government set bonds that were more than triple the bond amounts sought before the terrorist attacks.[226] An individual's ability to obtain release was also affected by the government's novel "mosaic" theory. The "mosaic" theory reverses the presumption of innocence and eliminates any right to liberty in the absence of a showing of dangerousness. The proposition that the U.S. government should be able to detain noncitizens while it investigates them, in the absence of probable cause for criminal conduct, has no legal basis either in criminal or immigration law.[227]

Nor is there a legal basis for the government's argument that the mere possibility that the detainee has "useful information" is sufficient for detaining him.[228] The government's widespread use of material witness warrants in order to interrogate individuals for possible information on terrorist plots, when it had no intention of producing the individuals as material witnesses, also subverted normal criminal processes and constitutionally required safeguards in criminal cases. A number of commentators have discussed in detail the significant constitutional infirmities of using the material witness statute as a pretext for terrorism investigations, focusing on the Fourth, Fifth and Sixth Amendment violations.[229] Tania Cruz succinctly summarized the core problem:

> As with enemy combatants, by not charging material witness detainees with a crime, the executive could assert that constitutional liberties were not implicated and that courts should therefore avoid closely scrutinizing the threshold designation. But the ultimate effect of the threshold material witness designation was to deprive the individual of fundamental liberties — often through prolonged

of the *Turkmen* matter, see http://www.ccr-ny.org/v2/legal/september_11th/sept11Article.asp?ObjID=35KQUuFROg&Content=96.

[226] *See* Jim Edwards, *Attorneys Face Hidden Hurdles in September 11 Detainee Cases*, 166 N.J. L.J. 789 (2001).

[227] *See* Zadvydas v. Davis, 533 U.S. 678 (2001); United States v. Salerno, 481 U.S. 739 (1987); Terry v. Ohio, 392 U.S. 1 (1968); Wong Wing v. U.S., 163 U.S. 228 (1896); Kim v. Ziglar, 276 F.3d 523 (9th Cir. 2002).

[228] *See, e.g.*, HRW REPORT, *supra* note 60, at 55.

[229] *See, e.g.*, MPI, *supra* note 51, at 58-62; Richard H. Parsons et al., *Ways to Challenge the Detention of Your Client who Has Been Declared a Material Witness or the Incommunicado Detention of any Client*, THE CHAMPION, Apr. 2003, at 34, *available at* http://www.nacdl.org/public.nsf/698c98dd101a846085256eb400500c01/568cb38be712096d85256e540074c149?OpenDocument&Highlight=0,detention; Boyle, *supra* note 188.

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> detention under horrendous prison conditions without probable cause, charges, or trial.[230]

The combination of these policies results in a lack of guarantees of fair review of immigration custody determinations and fair procedures for release. Commentators point out that these policies further the trend towards the criminalization of immigration law that began in the mid-1980s.[231] Among the post-9/11 changes in immigration policy, or the increased use of pre-existing policies, that have entrenched the criminalization of immigration practice are the targeting of specific groups of individuals for detention or removal based on their race, national origin, religion, or their particular immigration status.[232] As one commentator has noted:

> Many of the individuals targeted for detention and deportation have tenuous connections to crime that are given greater weight as crime becomes a mode of governing immigrants. These subjects include asylum seekers who falsify their immigration documents; workers who cross the border without authorization; former felons or even misdemeanants; and more recently visa overstayers and men of Arab descent — even U.S. citizens — who are criminally suspicious only because they share the same ethnicity as the notorious 9/11 hijackers.[233]

Another way in which post-9/11 policies have further criminalized immigration procedures is the explicit authorization given to state and local authorities to enforce the immigration laws for the first time.[234] In addition, the DOJ authorized state and local law enforcement to post information on civil immigration violators on the NCIC database. This unprecedented action now allows law enforcement to have access to immigration information available on the database to check and enforce immigration law violations.[235] These measures have been criticized as

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[230] Tania Cruz, *Judicial Scrutiny of National Security: Executive Restrictions of Civil Liberties When "Fears and Prejudices are Aroused,"* 2 SEATTLE J. SOC. JUST. 129, 162 (2003).

[231] *See* Bill Ong Hing, *supra* note 190; M. Isabel Medina, *supra* note 190; Helen Morris, *Zero Tolerance: The Increasing Criminalization of Immigration Law,* 74 INTERPRETER RELEASES 1317, 1317 (1997); *see also* Nora V. Demleitner, *Immigration Threats and Rewards: Effective Law Enforcement Tools in the "War" on Terrorism?,* 51 EMORY L.J. 1059 (2002) (discussing how post-9/11 law and policy has contributed significantly to criminalization of immigration law).

[232] *See* Teresa A. Miller, *Citizenship and Severity: Recent Immigration Reforms and the New Penology,* 17 GEO. IMMIGR. L.J. 611, 657-60 (2003).

[233] *Id.* at 649.

[234] *See* MPI, *supra* note 51, at 81-85.

[235] The DOJ has created this broad new authority to enhance state and local law

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ultra vires the statutory authority granted to the DOJ by Congress for collecting and centralizing certain types of information and for determining when such information could be shared with state and local authorities.[236] They have also been criticized for violating established federal pre-emption of immigration authority as well as violating state sovereignty in determining what classes of civil violations state authorities may enforce. The reversal of established policy that now requires states to enforce federal immigration laws has been met with opposition on many fronts, including local police and other law enforcement in cities and towns across the country.[237]

B. *Access to Counsel and Hearing and Appeals Procedures*

September 11 also ushered in a series of policies that threaten to seriously erode core constitutional rights guaranteeing effective assistance of counsel. These new policies undermine access to counsel in the immigration context,[238] the right to counsel in a criminal case,[239] and

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enforcement in federal immigration law enforcement through a series of measures. *See* 67 Fed. Reg. 48,354 (July 24, 2002) (placing certain state and local law enforcement officers under authority of INS to enforce immigration laws in situations of "mass influx of aliens" supposedly authorized by INA § 103(a)(8)); Chris Adams, *INS to Put in Federal Criminal Databases the Names of People Ordered Deported*, WALL ST. J., Dec. 6, 2001, at A22; *see also* NSEERS, *supra* note 107 (stating that information on persons not in compliance with NSEERS requirements will be entered into NCIC); Att'y Gen. John Ashcroft, Prepared Remarks on the National Security Entry-Exit Registration System (June 6, 2002), *at* http://www.usdoj.gov/ag/speeches/2002/060502agpreparedremarks.htm. In addition, under a Memorandum of Understanding, the DOJ and the State of Florida launched a pilot project authorizing state and local law enforcement officers to carry out immigration enforcement under INS authority. For a discussion of these measures, see MPI, *supra* note 51, at 82-85.

[236] See analysis of 28 U.S.C. § 534(a)(1) and 8 U.S.C. § 1252(c) in MPI, *supra* note 51, at 83-84.

[237] *See* National Immigration Forum, *Law Enforcement, State and Local Officials, Community Leaders, and Editorial Boards Voice Opposition to Local Enforcement of Immigration Laws* (May 2, 2002), *at* http://www.ilw.com/lawyers/immigdaily/editorial/2002,0503-dojopposition.shtm.

[238] There is no right to be provided counsel in the immigration context, but there is a right of access to counsel and the right to be free from interference in the attorney-client relationship. *See* INA § 240(b)(4)(A) (stating that aliens "shall have the privilege of being represented, at no expense to the Government, by counsel of the alien's choosing who is authorized to practice in such proceedings"); *see also* United States v. Salerno, 481 U.S. 739 (1987); Orantes-Hernandez v. Thornburgh, 919 F.2d 549 (9th Cir. 1990); Haitian Refugee Ctr. v. Smith, 676 F.2d 1023 (5th Cir. 1982).

[239] The Sixth Amendment right to counsel attaches at particular key stages in a criminal case after the government has initiated charges against the accused. *See* Kirby v. Illinois, 406 U.S. 682, 691 (1972). Commentators have argued that the attorney-client privilege is itself protected by the Sixth Amendment. *See* Ellen S. Podgor & John Wesley Hall,

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the confidentiality of the attorney-client relationship.[240] On October 31, 2001, the Attorney General authorized the Bureau of Prisons ("BOP") to monitor and review communications between detainees or inmates and their lawyers in any BOP facility.[241] This regulation, permitting the DOJ to monitor confidential attorney-client conversations of detained individuals, brings about a major change in what has long been considered the core of effective legal representation.[242] The BOP rule gives the government unreviewable authority to eavesdrop on attorney-client conversations and applies to all DOJ detainees in immigration, pretrial, and criminal detention. In contrast to the previously limited crime-fraud or national security exception to the attorney-client privilege, the new regulation takes away the authority of the courts to determine whether and when the privilege can be pierced and gives that authority to the DOJ and its administrative agents.[243]

The first prosecution under the government's new policies of monitoring attorney-client communications, although not directly authorized by the new BOP regulation, was that of a defense attorney, Lynne Stewart, in April 2002. The DOJ indicted Stewart for conspiring to provide and providing material support to a terrorist organization, for conspiring to defraud the United States, and for making false statements to the DOJ.[244] The indictments resulted from interception of Stewart's communications with her client, Sheik Omar Abdul Rahman, who is serving a life sentence for conspiring to bomb several New York City

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Government Surveillance of Attorney-client Communications: Invoked in the Name of Fighting Terrorism, 17 GEO. J LEGAL ETHICS 145 (2003); *see also* Martin R. Gardner, *The Sixth Amendment Right to Counsel and its Underlying Values: Defining the Scope of Privacy Protection*, 90 J. CRIM. L. & CRIMINOLOGY 397 (2000).

[240] *See, e.g.*, Upjohn Co. v. United States, 449 U.S. 383 *passim* (1981); *see also* Marjorie Cohn, *The Evisceration of the Attorney-Client Privilege in the Wake of September 11, 2001*, 71 FORDHAM L. REV. 1233 (2003).

[241] *See* 28 C.F.R. § 501.3(d) (2004).

[242] Rules and Regulations, Bureau of Prisons, U.S. Dep't of Justice, 28 C.F.R. §§ 500, 501 (2002); Prevention of Acts of Violence and Terrorism, 66 Fed. Reg. 55062 (Oct. 31, 2001); *see* Cohn, *supra* note 240.

[243] The crime-fraud exception allows a court to determine whether a communication between client and counsel has lost its privileged character because it was made to further a crime or fraud. *See* United States v. Zolin, 491 U.S. 554, 556-57 (1989). Only a judge can make this determination, which is triggered by the government making a prima facie case based on nonprivileged evidence proffered to the court during *in camera* review. *See id.* at 572, 574. In situations where the government claims privileged communication should be pierced because of a threat to national security, it could obtain a probable cause warrant to search or intercept communications under title III of the Omnibus Crime Control Act of 1968 and a wiretap order from a federal judge. *See* 18 U.S.C. §§ 2510-21 (1994).

[244] United States v. Sattar, No. 02 Cr. 395 (JGK), 2002 WL 1836755, at *1 (S.D.N.Y. Aug. 12, 2002).

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landmarks and to commit other criminal acts. From the time of his sentencing in 1997, Sheik Rahman was subjected to special administrative measures that circumscribed his access to mail, telephone communications, visitors, and the media. Stewart signed an agreement that extended these measures to her as a condition of maintaining communication with her incarcerated client.[245] At Stewart's arraignment, the government admitted that its case was partly based on evidence it obtained under a court order permitting electronic surveillance of her communications under FISA.[246] When Stewart sought information on whether the government was monitoring her office, her defense attorney's offices, or communications between her and any of her other clients, the government could not assure her that it was not engaging in court-authorized monitoring under any one of several provisions of law.[247]

The "special interest" procedures and the related secrecy measures the DOJ put in place after 9/11[248] exacerbated pre-existing problems of access to competent representation in immigration proceedings.[249] Post-9/11 policies may have eviscerated whatever rights of access to counsel and competent representation of counsel existed before 9/11. So far, there is little indication that the courts will restore those rights in the

[245] *See* Cohn, *supra* note 240, at 1249.

[246] *See supra* notes 161-69 and accompanying text.

[247] *See Sattar*, 2002 WL 1836755, at *2.

[248] For details of the effects on individual detainees of the post-9/11 policies of closed hearings, "special interest" designations, the hold until cleared policy, nonlisting of detainees, strip-searching, monitoring and other interference with counsel, torture, mistreatment, abuse, incompetent or non-independent doctors, denial of medical access, and use of isolation/lockdown, see generally ACLU, INSATIABLE APPETITE, *supra* note 61; CTR. FOR CONSTITUTIONAL RIGHTS, STATE OF CIVIL LIBERTIES REPORT, *supra* note 62; HRW REPORT, *supra* note 60; MPI, *supra* note 51; FIRST OIG REPORT, *supra* note 48; and sources cited *supra* note 59. *See also* Release of Information Regarding Immigration & Naturalization Service Detainees in Non-Federal Facilities, 8 C.F.R. §§ 236.1, 241.1 (2002) (prohibiting state authorities from releasing information concerning detainees in contract facilities, and overturning court order in *North Jersey Media* case that county officials must release information about federal detainees under New Jersey access laws). Under the purported authority of this rule, Florida jails began denying detainees access to their attorneys. *See* Henry Pierson Curtis, *Jail Cites INS Secrecy Rule in Denying Attorney Access*, ORLANDO SENTINEL, July 2, 2002, at B1.

[249] Pre-9/11 detainee access problems include routine transfer of detainees to facilities around the country, mingling immigration with criminal detainees, lack of immigration library materials, lack of access to adequate translators, lack of adequate access to medical facilities and doctors, lack of access to counsel and family members, intrusive body searches and strip searches, and significant credible claims of widespread physical and psychological abuse. *See, e.g.*, United States v. Salerno, 481 U.S. 739, 749-52 (1987); Orantes-Hernandez v. Meese, 685. F. Supp. 1488, 1496-97 (C.D. Cal. 1988); *see also* MARK DOW, AMERICAN GULAG (2004).

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immigration context because challenges to constitutional infringement of rights to counsel in the nonimmigration context have been struck down.[250]

The right to contact and obtain assistance from an individual's foreign embassy is perhaps more critical for protecting individuals in immigration detention than access to attorneys because there is no immigration right to counsel.[251] Detention of any foreign national triggers several key requirements of the Vienna Convention on Consular Relations ("VCCR"): a detainee must be informed of the right to contact his or her consulate and seek consular assistance; the government must provide notice to a consulate upon detaining one of its nationals; the government must give the consulate access to its detained national; and the government must permit the consulate to obtain legal counsel for the detainee.[252] These VCCR provisions are binding on the U.S. government not only through treaty obligations, but also through codification in immigration regulations.[253] However, the government's widespread violations of consular access and rights indicate that this critical source of protection may no longer be guaranteed.[254]

Finally, as a consequence of the secret hearings, secret detentions, and violations of access rights, persons in removal proceedings may no longer have a right to a fair hearing or open proceeding. The federal government's blanket closure of "special interest" hearings to the public, the media, and family members reverses the tradition of open deportation hearings that has been in place for over a hundred years.[255] The procedures outlined above and discussed in the civil liberties and human rights reports that resulted in denial of access to counsel, family,

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[250] *See Sattar*, No. 02-CV-395 (JGK), 2002 U.S. Dist. LEXIS 14798, at *20 (rejecting Stewart's Sixth Amendment argument, stating that, absent showing of prejudice, "where the intrusion upon attorney-client communication is unintentional or justified there can be no violation of the Sixth Amendment").

[251] *See supra* note 238.

[252] Convention on Consular Relations, Dec. 24, 1969, art. 36, *et seq.*, 21 U.S.T. 77, 596 U.N.T.S. 261.

[253] The U.S. ratified the VCCR in 1969. Although the government's post-9/11 policies have also been widely criticized for violating numerous international law provisions, discussion of international law violations, other than those codified in the immigration regulations, are beyond the scope of this Article. For a discussion on international law violations implicated by the government's treatment of Guantánamo Bay detainees, enemy aliens, unlawful combatants, and enemy combatants, see, for example, Diane Marie Amann, *Guantánamo*, 42 COLUM. J. TRANSNAT'L. L. 263 (2004). *See* AMNESTY U.S. REPORT, *supra* note 59; HRW REPORT, *supra* note 60; *see also* 8 C.F.R. § 236.1(e) (2004).

[254] *See* AMNESTY U.S. REPORT, *supra* note 59; HRW REPORT, *supra* note 60.

[255] Unlike deportation hearings, exclusion hearings have traditionally been closed to the public. *See* INA § 236, 8 C.F.R. § 1003.27 (2004).

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and phones; transfers without notice to counsel or family; etc., all eviscerate meaningful procedural rights, let alone substantive due process. The post-9/11 procedures violated virtually every aspect essential to procedural due process: notice of charges, the right to be informed of one's rights, access to a fair and meaningful hearing, and a fair opportunity for review of charges and grounds for detention.[256] The blanket secrecy orders imposed by the government masked widespread violations of core constitutional rights under the Fourth, Fifth, Sixth, and Eighth Amendments.[257]

III. LONG-TERM CONSEQUENCES TO THE CONSTITUTIONAL SYSTEM OF POST-9/11 LAW AND POLICIES AFFECTING CITIZENS AND NONCITIZENS ALIKE

The most obvious long-term effects on immigration and civil rights of Arabs and Muslims since 9/11 concern race and religious profiling. This part first examines the government's assertions that it has not engaged in racial profiling and that its actions are based on nationality/citizenship categorizations, which are constitutionally permissible in the immigration context. After concluding that these policies have indeed involved racial, religious, and ethnic origin profiling, we summarize the constitutional problems they raise. Finally, we address three areas of significant constitutional concern triggered by such policies: the erosion of checks and balances, the threats to open government, and the chill to freedom of religious and political expression. These policies drastically affect the overall integrity of our system of government.

A. *The Implications of Racial Profiling for Arabs and Muslims in the United States*

The profiling aspect of the government's policies after 9/11 that target Arab and Muslim communities has been the subject of much discussion and criticism in the press and academic commentary.[258] Although the

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[256] *See* INA §§ 236, 239, 287, 240; *see also* ALEINIKOFF ET AL., IMMIGRATION AND CITIZENSHIP PROCESS AND POLICY 621-789 (5th ed. 2003).

[257] *See* AMNESTY THREAT OF BAD EXAMPLE, *supra* note 59; AMNESTY U.S. REPORT, *supra* note 59; OFFICE OF THE INSPECTOR GENERAL, DEPARTMENT OF JUSTICE, 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 (June 2003), *available at* http://www.usdoj.gov/oig/special/0306/; HRW REPORT, *supra* note 60. Significant Eighth Amendment violations discussed in detail in the above reports have not been addressed in this Article.

[258] Numerous and often widely varying definitions of racial profiling have been

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government has admitted at various times that one or another of its actions target individuals of a particular ethnic origin, it has claimed that it has acted legally, that it has not engaged in race or religious profiling, and that it has targeted individuals on the basis of particular risk factors related to the 9/11 hijackers.

Attorney General Ashcroft claimed that the government's policies singled out noncitizens on the basis of their citizenship, not their ethnicity:

> We have not identified people based on their ethnic origin. We have identified individuals who are not citizens, but based on the country which issued their passports. Virtually all the nations that issue passports, just as the United States of America does, issue passports to people of a variety of ethnic origins and backgrounds, because they're diverse nations.[259]

President George Bush repeatedly asserted that the "war on terrorism" was a war against specific individuals and nations that harbored them, not on Islam or the Muslim world.[260] The seemingly logical connection

formulated, from those incorporated in state statutes prohibiting profiling, to those in legal and social science literature. For a good review of disparate definitions, see Albert W. Alschuler, *Racial Profiling and the Constitution*, 2002 U. CHI. LEGAL F. 163, 168 n.24 (2002). Gross and Livingston provide a useful definition of racial profiling, suggesting that it "occurs whenever a law enforcement officer questions, stops, arrests, searches, or otherwise investigates a person because the officer believes that members of that person's racial or ethnic group are more likely than the population at large to commit the sort of crime the officer is investigating." Samuel R. Gross & Debra Livingston, *Racial Profiling Under Attack*, 102 COLUM. L. REV. 1413, 1415 (2002). For commentary on the government's actions after 9/11 as racial profiling, see HRW REPORT, *supra* note 60; *see also* Sameer M. Ashar, *Immigration Enforcement and Subordination: The Consequences of Racial Profiling After Sept. 11*, 24 CONN. L. REV. 1185, (2002); Vijay Sekhon, *supra* note 121; Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575 (2002). For arguments that the policies are not racial profiling, or that racial profiling is constitutionally permissible in the "war on terror," see John Dwight Ingram, *Racial and Ethnic Profiling*, 29 T. MARSHALL L. REV. 55 (2003); Stephen J. Ellman, *Racial Profiling and Terrorism*, 46 N.Y.L. SCH. L. REV. 675 (2002-03). For arguments in the press supporting Arab/Muslim profiling after 9/11, see Kathy Barrett Carter, *Some See New Need for Racial Profiling: Threats to Security Alter State National Debate*, STAR-LEDGER, Sept. 20, 2001, at 21; Michael Kinsley, *When is Racial Profiling Okay?*, WASH. POST, Sept. 30, 2001, at B7; Charles Krauthammer, *The Case for Profiling: Why Random Searches of Airline Travelers Are a Useless Charade*, TIME, Mar. 18, 2002, at 104; Peter A. Shuck, *A Case for Profiling*, AM. LAW, Jan. 2002, at 59.

[259] Attorney General John Ashcroft Provides Total Number of Federal Criminal Charges and INS Detainees, Press Conference (Nov. 27, 2001), *at* http://www.usdoj.gov/ag/speeches/2001/agcrisisremarks11_27.htm.

[260] *See, e.g.*, Press Release, The White House Office of the Press Secretary, "Islam Is Peace," President Says (Sept. 17, 2001), *available at* http://www.whitehouse.gov/news/releases/2001/09/20010917-11.html [hereinafter "Islam Is Peace" Press Release]; *see also* J. Gregory Sidak, *The Price of Experience: The Constitution After Sept. 11, 2001*, 19 CONST.

behind these assertions was readily disproved within the first few weeks after 9/11.

In the first place, fifteen of the nineteen hijackers were of Saudi Arabian nationality. Of the remaining four, one was Egyptian, one Lebanese, and two were nationals of the United Arab Emirates ("UAE").[261] The vast majority of individuals arrested, detained, and ultimately deported from the United States were nationals of Pakistan, yet no Pakistani national was among those identified as the 9/11 hijackers or their associates. The Administration has repeatedly proclaimed that Pakistan is its biggest ally in the fight against terror.[262] In contrast, while Pakistanis were clearly designated for the "voluntary interview" process, Saudis were not. The designations were illogical if based on the stated criteria outlined in the memo by Kenneth Wainstein, Assistant U.S. Attorney, which indicated that the interviews were to target those with "al Qaeda related factors," particularly the presence of such nationals among the 9/11 hijackers.[263]

Saudis were also not included on the initial list of nationalities designated for special registration.[264] The countries of nationality of the nineteen hijackers were not on the first special registration list at all. Oddly enough, the second list of countries designated for special registration included Morocco, North Korea, Oman, Qatar, Bahrain, and Tunisia — none of which had nationals on the 9/11 airplanes — along with the UAE, which had two nationals amongst the hijackers. Saudi Arabia and Pakistan were included on the third revised list, but not until November 2002.[265] These were strange priorities for an administration supposedly concerned with targeting nationals of countries most

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COMMENT 37, 58 (2002) (reviewing statements that "war on terror" was not war on Islam); President George W. Bush, Press Conference by President Bush and President Havel of Czech Republic (Nov. 20, 2002), *available at* http://www.whitehouse.gov/infocus/ramadan/islam.html ("Ours is not a war against a religion, not against the Muslim faith. But ours is a war against individuals who absolutely hate what America stands for. . . .").

[261] *See* CIA, *11 September 2001 Hijackers*, http://www.cia.gov/cia/public_affairs/speeches/2002/dci_testimony_06182002/DCI_18_June_testimony_new.pdf.

[262] *See* Farhan Bokhari, *Pakistan Textile Industry Prepares to Compete with Asian Rivals*, FIN. TIMES, May 7, 2004, at 9; Joseph Curl, *At Convention, Bush to Tout "Great Record,"* WASH. TIMES, Aug. 24, 2004, at A04; Press Release, The White House Office of the Press Secretary, U.S.-Pakistan Affirm Commitment Against Terrorism (Feb. 13, 2002), *available at* http://www.whitehouse.gov/news/releases/2002/02/20020213-3.html.

[263] *See* MPI, *supra* note 51, at 41.

[264] Two dozen members of Osama Bin Laden's family from Saudi Arabia were given permission to leave the United States immediately after 9/11 with the assistance of the Saudi Embassy and the Bush Administration. *See* Jane Mayer, *The House of Bin Laden*, NEW YORKER, Nov. 12, 2001, at 54; Patrick E. Tyler, *Fearing Harm*, N.Y. TIMES, Sept. 30, 2001, at 1.

[265] *See supra* notes 107-14 and accompanying text.

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obviously connected with the hijackings.

Second, and with greater implication, the special registration process, NSEERS, was extended, without notice, to individuals whose national origin was one of the countries designated for the process, but who were citizens of countries not on the list.[266] The obvious motivation was to target persons on the basis of their Arab ethnicity, not on the basis of their current nationality or citizenship. The unannounced "policy" was first publicized through the case of a Canadian citizen, Maher Arar, who was detained and interrogated for nine hours without counsel in New York while on a layover from Tunisia to Montreal in September 2002. Without contacting Canadian officials or Arar's family, U.S. authorities detained him for a week and later removed him to Syria, the country of his birth, which he had left fourteen years ago. Arar was jailed in Syria, and apparently tortured.[267] As a result of this and similar cases, the Canadian government issued a travel advisory to its citizens who were born in certain Arab or Muslim countries that they should not travel to the United States because they risked being removed to their countries of origin.[268]

Third, the government's actions have most definitely not been narrowly targeted against noncitizens. Although the press and civil rights groups focused primarily on the arrests and detentions of over a thousand individuals after 9/11, as discussed above, these government actions have only been a part of the strategy in the "war on terrorism." Closely related to the roundup have been actions targeting and affecting Arabs and Muslims across the board, U.S. citizens and noncitizens, in a broad range of ways. While the Absconder Initiative, the Voluntary Interviews, NSEERS, and certain provisions of the USA PATRIOT Act have primarily targeted noncitizen Arabs and Muslims, the Iraqi Interviews, other provisions in the USA PATRIOT Act, and related

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[266] *See supra* notes 107-09 and accompanying text.

[267] *See* Kate Jaimet, *"My life and my career have been destroyed,"* OTTAWA CITIZEN, Nov. 5, 2003, at A6; *see also* Francine Dube, *Arar Sues Canada for $400M over Syria Ordeal*, OTTAWA CITIZEN, Apr. 22, 2004, at A1 (stating that Arar has sued Canada); Melissa Radler, *Canadian Muslim Sues Top US Officials After Being Tortured in Syria*, JERUSALEM POST, Jan. 25, 2004, at 4 (stating that Arar has sued United States government).

[268] For news reports on the Canadian travel advisory, see Tom Cohen, *Canada Issues US Travel Warning*, ASSOCIATED PRESS, Oct. 30, 2002, *available at* http://www.cbsnews.com/stories/2002/10/30/world/main5276550.shtml?CMP=ILC-SearchStories; Elise Labott, *Canada Issues US Travel Warning*, CNN, Oct. 30, 2002, *available at* http://www.cnn.com/2002/TRAVEL/10/30/canada.us.travel; CTV News Staff, *Some Middle Eastern Cdns to Boycott US*, CTV.CA, Oct. 30, 2002, *available at* http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/1036000833331_111/?hub=Canada.

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government actions are targeting and affecting both Muslim and Arab citizens and noncitizens. Far-reaching government actions have singled out U.S. *residents* and *citizens* of Arab origin and Muslim faith. Many of these policies and laws and some of their consequences are described here, but other measures the government may use to target these communities and their consequences may not be known for some time. One troubling recent revelation, for example, is the government enforcement agencies' exceptional request for census data on Arab-Americans.[269] The ADC notes that the only other time in history when such information has been shared was prior to the internment of Japanese Americans during World War II.[270]

Such decisions and actions bear closer scrutiny in order to answer the questions: do they constitute *racial profiling*,[271] and if so, are they constitutionally prohibited or at least highly constitutionally suspect? With respect to citizens of Arab origin or Muslim faith, in the nonimmigration context, racial profiling presumptively violates the constitutional guarantees of equal protection under the Fifth and Fourteenth Amendments.[272] Laws or policies purposely discriminating on the basis of race, national origin, or other protected classes are unconstitutional.[273] Prior to 9/11, studies reflecting that police departments in many parts of the country excessively relied on race for law enforcement, particularly in cases involving African Americans and Latinos,[274] engendered widespread responses from the public and

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[269] According to an ADC press release, the U.S. Census Bureau provided detailed information about the Arab-American population to the U.S. Customs Service in 2002, and to the Bureau of Customs and Border Protection ("CBP") at DHS in 2003. Information provided by the Census Bureau included "specific data on the Arab-American population" in the United States "broken down by population size . . . as well as by zip code." CBP's Commissioner Robert Bonner admitted that higher-level officials were "initially unaware" that the information had been shared between the agencies. *See* Press Release, American-Arab Anti-Discrimination Committee, ADC Presses CBP on Census Data (Aug. 13, 2004), *available at* http://adc.org/index.php?id=2303.

[270] *See id.*

[271] For purposes of this discussion, we adopt Gross and Livingston's definition although a very precise definition of racial profiling is unnecessary, as it is the effects of profiling or targeting of the Arab or Muslim communities by law enforcement in the ways outlined in this Article that is important here. We use the term, "racial profiling," here as a shorthand for race, ethnicity, and religious profiling that are the focus of this Article. *See* Gross & Livingston, *supra* note 258.

[272] U.S. CONST. amend. V, XIV.

[273] *See* Washington v. Davis, 426 U.S. 229, 234 (1976).

[274] For a discussion of the empirical studies on racial profiling by law enforcement, see DAVID A. HARRIS, PROFILES IN INJUSTICE: WHY RACIAL PROFILING CANNOT WORK (2002); David A. Harris, *The Stories, the Statistics, and the Law: Why "Driving While Black" Matters*, 84 MINN. L. REV. 265, 294-98 (1999); Katheryn K. Russell, *"Driving While Black": Corollary*

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government sectors that race profiling was illegal and ineffective.[275] Both federal and state authorities made pronouncements and took steps to ensure that racial profiling by law enforcement would end.[276] Despite such efforts, and despite judicial decisions that racial profiling violates the Constitution, the courts have failed to unequivocally invalidate race-based law enforcement techniques even in the criminal context. The Supreme Court has whittled down the core doctrine articulated in *Brown v. Board of Education*, which stands for the proposition that profiling on the basis of race or religion must be narrowly tailored or necessary to achieve a compelling government interest.[277] Since *Brown*, the Supreme Court and the lower federal courts have refused to apply strict scrutiny even to equal protection challenges, following more recent Supreme Court doctrine which has effectively eviscerated strict scrutiny over discriminatory law enforcement actions.[278]

Phenomena and Collateral Consequences, 40 B.C. L. REV. 717, 721-28 (1999).

[275] *See* Gross & Livingston, *supra* note 258, at 1413 (concluding that "[b]y Sept. 10, 2001, virtually everyone, from Jesse Jackson to Al Gore to George W. Bush to John Ashcroft, agreed that racial profiling was very bad"); George W. Bush, Address of the President to the Joint Session of Congress (Feb. 27, 2001), *available at* http://www.whitehouse.gov/news/releases/2001/02/20010228.html (stating that racial profiling is "wrong, and we will end it in America"). Commentators note that racial profiling generally hurts minorities, is overinclusive and underinclusive, wastes resources, and is ineffective as law enforcement technique. Alschuler, *supra* note 258; David Rudovsky, *Law Enforcement by Stereotypes and Serendipity: Racial Profiling and Stops and Searches Without Cause*, 3 U. PA. J. CONST. L. 296 (2001); Andrew Taslitz, *Stories of Fourth Amendment Disrespect*, 70 FORDHAM L. REV. 2257 (2002).

[276] *See* Address of the President to the Joint Session of Congress (Feb. 27, 2001), *available at* http://www.whitehouse.gov/news/releases/2001/02/20010228.html; Associated Press, *Attorney General Seeks to End Racial Profiling*, N.Y. TIMES, Mar. 2, 2001, at A20.

[277] Brown v. Bd. of Educ., 347 U.S. 483 (1954); *see also* Adarand Constructors v. Pena, 515 U.S. 200, 227 (1979) (concluding that "all racial classifications, imposed by whatever federal, state, or local government actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests").

[278] *See* Whren v. United States, 517 U.S. 806, 819 (1996). In *Whren*, the Court significantly weakened the Fourth Amendment as a basis for challenging race profiling in traffic stops, indicating that claims of discriminatory law enforcement had to be based on equal protection under the Fifth Amendment and would prevail only upon a showing of discriminatory intent. This test places an impossible burden on plaintiffs. *See, e.g.*, Washington v. Davis, 426 U.S. 229, 244-45 (1976). The *Whren* decision has been heavily criticized by academic and other commentators. *See* Alschuler, *supra* note 258, at 192 (concluding that biggest mistake in race profiling doctrine is separating Fourth Amendment and Equal Protection Clause of Fifth Amendment); *see also* Tracey Maclin, *Race and the Fourth Amendment*, 51 VAND. L. REV. 333 (1998); David Sklansky, *Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment*, 1997 SUP. CT. REV. 271 (1997); Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. REV. 956 (1999).

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After 9/11, similar pronouncements were made by the government to those made concerning racial profiling of blacks and Hispanics, condemning race or religious profiling against Arabs and Muslims in America.[279] However, immigration cases have established that the Fourth Amendment will rarely be available as a basis for aliens to challenge discriminatory law enforcement searches and seizures.[280] From a constitutional perspective, the prohibition against discriminatory application of law under the Due Process or Equal Protection Clauses of the Fifth Amendment should apply equally in the immigration context because the Fifth Amendment does not distinguish between citizens and noncitizens, but applies to all persons in the United States.[281] The Supreme Court, however, has sustained immigration stops and seizures based "largely" on ethnic appearance in Fifth Amendment challenges.[282] Some pre-9/11 cases did strike down race- and ethnicity-based law enforcement, at least in the immigration stop context, discrediting the probative value of racial or ethnic origin in circumstances where individualized suspicion is required, as in criminal law or immigration law enforcement.[283] Since 9/11, widespread sentiment favoring the elimination of racial profiling has dissipated. "Flying while Arab" has become the public expression of post-9/11 profiling and has received far greater acceptance than "driving while black" ever did.[284]

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[279] *See* "Islam Is Peace" Press Release, *supra* note 260.

[280] *See* United States v. Martinez-Fuerte, 428 U.S. 543, 563 (1976) (stating that stops at permanent checkpoints away from border do not require "individualized suspicion," and "even if it be assumed that such referrals are made largely on the basis of apparent Mexican ancestry, we perceive no constitutional violations"); *see also* United States v. Verdugo-Urquidez, 494 U.S. 259, 261 (1990) (finding no Fourth Amendment protection for persons with significant connections with United States). In *INS v. Lopez-Mendoza*, the Supreme Court held that the Fourth Amendment's exclusionary rule does not apply in deportation proceedings absent "egregious violations of Fourth Amendment or other liberties that might transgress notions of fundamental fairness . . ." 468 U.S. 1032, 1050-51 (1984).

[281] *See* Bridges v. Wixon, 326 U.S. 135 (1945); Yick Wo v. Hopkins, 118 U.S. 356 (1886); *see also* Zadvydas v. Davis, 533 U.S. 678 (2001) (stating that "Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary or permanent").

[282] *See* Martinez-Fuerte, 428 U.S. at 564 n.17.

[283] United States v. Montero-Camargo, 208 F.3d 1122, 1135 (9th Cir. 2000) ("Hispanic appearance is, in general, of such little probative value that it may not be considered as a relevant factor where particularized or individualized suspicion is required," discrediting reasoning in *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975), which found "Mexican appearance" could be factor in immigration stop); *see also* Carrasca v. Pomeroy, 313 F.3d 828 (3d Cir. 2002).

[284] *See* Ellen Baker, Comment, *Flying While Arab-Racial Profiling and Air Travel Security*, 67 J. AIR L. & COM. 1375 (2002); Ellman, *supra* note 258; David A. Harris, *Flying While Arab:*

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With the historical exceptionalism of constitutional law vis-á-vis immigration policies based on the plenary power doctrine,[285] the

Lessons from the Racial Profiling Controversy, C.R. J. (2002). Numerous claims were filed against airlines after 9/11, charging discrimination in treatment of Arab and Muslim passengers. The ACLU also sued major airlines over passenger discrimination. *See* Bayaa v. United Airlines, 249 F. Supp. 2d 1198 (C.D. Cal. 2002) (denying airline's motion to dismiss Bayaa's case, but granting motion to dismiss as against plaintiff American-Arab Anti-Discrimination Committee based on lack of standing); Chowdhury v. Northwest Airlines Corp., 238 F. Supp. 2d 1153 (N.D. Cal. 2002) (denying airline's motion to dismiss); Dasrath v. Continental Airlines, 228 F. Supp. 2d 531 (D.N.J. 2002) (denying airline's motion to dismiss); Press Release, American Civil Liberties Union, ADC and Redman Law Firm Sue Four Major Airlines Over Discrimination Against Passengers (June 4, 2002), *available at* http://archive.aclu.org/news/2002/n060402a.html. The Department of Justice's Civil Rights Division issued guidelines on the use of race in law enforcement, which attempts to differentiate between racial profiling in law enforcement in general and racial and ethnic profiling in immigration enforcement, concluding that the former is almost always unconstitutional, while the latter is constitutionally permissible in a wide range of enforcement actions. *See* U.S. Dep't of Justice, Civil Rights Division, Guidance Regarding the Use of Race by Federal Law Enforcement Agencies (June 2003), *available at* http://www.usdoj.gov/crt/split/documents/guidance-on-race.htm. For a critique of the Guidelines and discussion of the issues they raise, see Kevin R. Johnson, *Racial Profiling After September 11: The Department of Justice's 2003 Guidelines*, 50 LOY. L. REV. 67 (2004) [hereinafter Johnson, *Racial Profiling After September 11: The Department of Justice's 2003 Guidelines*].

[285] Beginning with *Chae Chan Ping v. United States*, 130 U.S. 581 (1889) (Chinese Exclusion Case), the Supreme Court decided in a series of cases that Congress and the Executive have "plenary power" in immigration decisions and that such decisions are largely immune to judicial review. *See* Shaughnessy v. Mezei, 345 U.S. 206 (1953); Harisiades v. Shaughnessy, 342 U.S. 580 (1951). There has been much criticism of the "exceptionalism" of plenary power in immigration. *See* Linda S. Bosniak, *Membership, Equality, and the Difference that Alienage Makes*, 69 N.Y.U. L. REV. 1047 (1994) (noting that "exceptionalism" of plenary power in immigration applies primarily in decisions directly concerning policies to deport or exclude, but does not affect decisions affecting noncitizens in other constitutionally-protected areas); Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1 (1998) (arguing that "exceptionalism" of plenary power in immigration was created in climate when extreme racism was tolerated throughout American society); Kevin R. Johnson, *Race and Immigration Law and Enforcement: A Response to Is There a Plenary Power Doctrine?*, 14 GEO. IMMIGR. L.J. 289 (2000) (arguing that "exceptionalism" of plenary power in immigration is aberration in development of constitutional protections). Although some commentators have argued that plenary power has not created much exception to constitutional protections in immigration, *see* Gabriel J. Chin, *Is There a Plenary Power Doctrine? A Tentative Apology and Prediction for Our Strange but Unexceptional Constitutional Immigration Law*, 14 GEO. IMMIGR. L.J. 257 (2000), academics discussing recent trends in immigration-related policies, including those after 9/11, are reaching consensus that plenary power has returned in force. *See* Johnson, *The Antiterrorism Act*, *supra* note 20; Thomas W. Joo, *Presumed Disloyal: Executive Power, Judicial Deference, and the Construction of Race Before and After September 11*, 34 COLUM. HUM. RTS. L. REV. 1 (2002); Saito, *supra* note 4; Michael Wishnie, *Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection and Federalism*, 76 N.Y.U. L. REV. 493, 553 (2001); *see also* Kathryn Lohmeyer, Note, *The Pitfalls of Plenary Power: A Call for Meaningful Review of NSEERS "Special Registration,"* 25 WHITTIER L. REV. 115, 129, 164 (2003).

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continued erosion of judicial review under immigration law amendments,[286] and the extreme deference courts have afforded to executive decisions in times of national crisis, there is little hope that equal protection or substantive due process claims of Arabs and Muslims will prevail in the courts.[287] First, governmental actions have long been upheld in the immigration context against challenges that such actions unconstitutionally discriminate on the basis of race or ethnicity,[288] national origin,[289] sex,[290] selective prosecution,[291] and other highly discriminatory classifications.[292] The courts have consistently refused to apply heightened scrutiny to government classifications that would have required strict or heightened scrutiny in any other context, applying the extreme deferential standard of plenary power to such classifications when immigration decisions are implicated.[293]

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[286] Under the immigration amendments to the judicial review provisions of the INA of 1996, Congress significantly limited the rights of aliens to federal court review of their immigration claims. The amendments, in particular, limited the timing for filing claims and the types of claims that could be brought. *See* Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, 110 Stat. 3009 (1996); Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996).

[287] Even before 9/11, the Supreme Court reaffirmed Congress' plenary power to discriminate against aliens in enforcing immigration laws. Affirming the constitutionality of the judicial review restrictions under the 1996 laws, the Supreme Court stated, in *Reno v. American-Arab Anti-Discrimination Committee*, that the federal courts cannot question the government's selective enforcement of immigration laws, even if such laws impinge on First Amendment freedoms of speech and political affiliations. Reno v. Am.-Arab Anti-Discrimination Comm., 525 U.S. 471, 488 (1999).

[288] *See* Fong Yue Ting v. United States, 149 U.S. 698 (1893); *Chae Chan Ping*, 130 U.S. at 583-84.

[289] *See* Narenji v. Civiletti, 617 F.2d 745 (1979).

[290] *See, e.g.*, Fiallo v. Bell, 430 U.S. 787 (1977).

[291] *See* Am-Arab Anti-Discrimination Comm., 525 U.S. 471. Aside from selectively prosecuting Arab and Muslim noncitizens, the federal government apparently applies discriminatory standards to the manner in which it is prosecuting terrorist-related cases when it comes to Arab and Muslim citizens, bringing media attention to cases in which Muslims are alleged to have engaged in terrorism while downplaying similar allegations involving non-Muslim or non-Arab Americans. For example, on Aug. 6, 2004, the government announced two different arrests in the "war on terrorism." The arrests of two Muslims in New York, alleged to have conspired in a money-laundering scheme related to terrorism, merited a prominent press conference by the DOJ in Washington, D.C. However, the second arrest of a non-Muslim individual charged with possessing 1500 pounds of a fertilizer similar to that used to destroy the Oklahoma City federal building in 1995 was given no publicity by the government. *See* Press Release, ADC Questions Apparent Double Standard in Arrest Announcements (Aug. 6, 2004) (on file with author).

[292] *See, e.g.*, Orantes-Hernandez v. Meese, 685 F. Supp. 1488 (1988).

[293] As affirmed by the Supreme Court in Fiallo v. Bell, 430 U.S. 787 (1977), a case rejecting due process and equal protection challenges to immigration classifications based on sex and legitimacy of parent-child relationships:

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Second, so long as the government claims its actions are targeting noncitizens, the consequences to citizens are likely to be seen as tangential and, under prior case law, not warranting special constitutional scrutiny by the courts. Because the most widely-publicized aspects of the government's policies have been those affecting noncitizens, the government's claim that such persons are here illegally and that they have no constitutional claim to be free from race profiling is persuasive to many.[294] Additionally, although the consequences of racial, ethnic, or religious profiling are much the same for noncitizens as for citizens, the courts are unlikely to sustain constitutional challenges by Arab and Muslim noncitizens because of the factors discussed here.

Third, so long as the courts continue to defer to the government's claim that it is targeting noncitizens on the basis of citizenship or current nationality, rather than on the basis of ethnicity, national origin, race, or religion, they are unlikely to strike down most of the government's post-9/11 law and policy changes. This is primarily due to the strong precedent of *Narenji v. Civiletti*, in which the D.C. Circuit struck down an equal protection challenge to a special regulation requiring only Iranian national nonimmigrant students to comply with a special registration program.[295] That case teaches that if there is a reasonable basis for the government to make a foreign policy determination that nationals of a particular country are a special threat, then it can target those nationals for special immigration procedures without constitutional

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> Our cases "have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control." . . . [T]he Court (recently) had occasion to note that "the power over aliens is of a political character and therefore subject only to narrow judicial review."

Id. at 787. Professor Saito assesses the different standard of review applied by the courts to disfavored groups from that applicable to other groups when it involves persons of particular races or national origin in the following contexts, both before and after 9/11: indefinite and harsh detentions under pretext of immigration violations; the use of secret evidence to detain or deport; the use of immigration laws to chill particular political speech or activism; kidnapping individuals abroad to transport them to the United States for trial and indefinite detention. *See* Saito, *supra* note 4.

[294] On September 16, 2001, USA Today, CNN and Gallup polled Americans about their reactions to the attacks in New York and Washington. Forty-nine percent of those interviewed said they would approve requiring Arabs, including U.S. citizens, to carry a special ID. Fifty-eight percent were in favor of requiring Arabs, including U.S. citizens, to undergo special, more intensive security checks before boarding airplanes in the United States. *See* Susan Sachs, *For Many American Muslims, Complaints of Quiet but Persistent Bias*, N.Y. TIMES, Apr. 25, 2002, at A16.

[295] Narenji v. Civiletti, 617 F.2d 745, 748-49 (1979).

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infringement.[296] In *Narenji*, Iranian students in the United States were subjected to special photographing and fingerprinting requirements, much like the NSEERS process implemented after 9/11. The government's justification, which the D.C. Circuit accepted, was that Iranians were holding Americans hostage in Tehran, in violation of international law, and that was sufficient to justify targeting Iranian students in the United States. Despite its apparently clear application to post-9/11 policies, the government's tactics are constitutionally suspect even under the logic of *Narenji*. Unlike *Narenji*, it is without doubt that race, ethnic origin, and religion — not nationality — have been the basis of the government's actions after 9/11.[297] The court did not address how its reasoning might change if the government claimed that Iranians holding Americans hostage in Iran was sufficient justification to subject all Muslims, Persians, and "Persian-looking" persons in the United States to special processing, arrests, detentions, and other abusive actions without constitutional constraints.[298]

Fourth, post-9/11 cases reflect the courts' heightened deference to governmental decision-making and action, on the logic that executive action in "wartime" has limited constitutional constraints.[299] Challenges of discriminatory treatment by Arab and Muslim citizens and residents to post-9/11 policies are not faring much better than those of noncitizens despite relatively more robust constitutional guarantees.[300] Such heightened deference compounds the pre-existing barriers to application of full constitutional standards to noncitizens under ordinary, non-

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[296] *Id.* Other courts upheld the special processing imposed on Iranians on similar grounds. *See* Ghaelian v. INS, 717 F.2d 950 (6th Cir. 1983); Nademi v. INS, 679 F.2d 811 (10th Cir. 1982); Dastmalchi v. INS, 660 F.2d 880 (3d Cir. 1981); Malek-Marzban v. INS, 653 F.2d 113 (4th Cir. 1981).

[297] *See* Akram & Johnson, *supra*, note 4, at 338.

[298] Unlike Arabs, Iranians trace their ancestry to the ancient Persians and speak one or more of the modern Persian derivative languages: Farsi, Darri, or Pushto. *See* U.S. CENSUS BUREAU, Census (2000) [hereinafter Census (2000)], *available at* http://www.cia.gov/cia/publications/factbook/geos/ir.html#People. Although the majority population of Iran is Shi'a Muslim, like Arabs, Iranians may be any one of the Muslim sects, Christian, Jewish, Zoroastrian ("Parsee"), or Baha'i. The single common factor of the 22 Arab nations is the Arabic language, as they include among their populations all three monotheistic religions as well as many other religious groups. There is no single ethnicity categorized as "Arab"; the only identifying characteristic of the Arab peoples is that they come from an area of the world where Arabic is the commonly spoken language. Iranians are not Arabs because they do not speak the Arabic language and do not identify as having Arab "roots." *See* U.S. CENSUS BUREAU, Census 2000 Brief, The Arab Population: 2000 (Dec. 2003), *available at* http://www.census.gov/prod/2003pubs/c2kbr-23.pdf [hereinafter Census 2000].

[299] *See* Cruz, *supra* note 230, at 155.

[300] *See, e.g.*, Harisiades v. Shaughnessy, 342 U.S. 580 (1952).

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wartime "emergency" situations. Arguments supporting racial profiling of Arabs and Muslims since 9/11 have largely focused on the premise that the extreme national emergency that began on that date required swift and extreme measures by the federal government, a "compelling governmental interest" that clearly outweighs opposing interests of civil liberties.[301] Commentators have also focused on the measure of intrusion of constitutional rights posed by racial profiling, particularly of noncitizens, and have given them minimal value in comparison to the perceived risks and the weighty governmental interests.[302] However, these arguments miss a number of key consequences of racial profiling and dismiss or devalue significant additional interests that are at stake for the communities victimized by the process.

In the first place, as Albert Alschuler points out, whether racial profiling is defensible rests squarely on the premise that law enforcement can indeed distinguish one racial or ethnic group from another.[303] The courts have rightfully questioned whether Mexicans or Latinos can be identified by their "appearance."[304] Arabs are even less racially or ethnically homogeneous than Mexicans or Hispanics — those fitting stereotypical "Arab-appearance" will most likely be profiled and stopped, while many Arabs will not be.[305] Alschuler makes a second important point: post-9/11 profiling is distorted by what he terms the "Sept. 11 availability heuristic," which is the tendency to overestimate the risk of memorable events compared to others.[306] Although the 9/11 attacks were the deadliest in recent memory, the prior most costly act of terrorism on U.S. soil in terms of American lives was the blowing up of the Oklahoma City federal building by a white American, Timothy

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[301] *See* Ellman, *supra* note 258; *see also* Gross & Livingston, *supra* note 258; Ingram, *supra* note 258.

[302] *See* Carter, *supra* note 258, at 21 (quoting civil rights attorney Floyd Abrams, "It would be a dereliction of duty to the American public to forget the fact that the people who committed these terrible crimes all spoke Arabic to each other"); Krauthammer, *supra* note 258.

[303] *See* Alschuler, *supra* note 258.

[304] United States v. Montero-Camargo, 208 F.3d 1122, 1130 (9th Cir. 2000); *see also* Johnson, *Racial Profiling After September 11: The Department of Justice's 2003 Guidelines*, *supra* note 284.

[305] Just as it is impossible to categorize "Mexican appearance," *see* Montero-Camargo, 208 F.3d at 1130, it is impossible to categorize "Arab appearance" because Arabs are heterogeneous and comprise multiple ethnicities. *See* Census 2000, *supra* note 298. For a discussion about the arbitrary nature of profiling on the basis of Mexican, Hispanic, or Arab race or ethnicity, see Alschuler, *supra* note 258, at 224-25 and Johnson, *The Case Against Racial Profiling*, *supra* note 4.

[306] Alschuler, *supra* note 258, at 224-25.

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McVeigh, along with other members of an American militia group.[307] The problem created by the "availability heuristic" is that it diminishes the risk of non-Arab acts of terrorism that cause or could cause grave harm.[308]

In addition, using the accepted constitutional criteria permitting profiling in the immigration context to justify profiling Arabs and Muslims for possible terrorist involvement has serious analytical flaws. As many have noted, those involved in terrorism likely have a pool of potential candidates who will not fit whatever profile the U.S. authorities

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[307] Holly Bailey, *Oklahoma City*, NEWSWEEK, Mar. 8, 2004, at 8.

[308] Alschuler lists non-Arab acts of terrorism, such as the anthrax scare, attributable to a white male researcher in the U.S. biowarfare program. Alschuler, *supra* note 258, at 250. Not mentioned in Alschuler's discussion is how the public's acceptance of a narrow definition of "terrorism" distorts which acts are considered terrorist and, hence, which categories of actors are perpetrators of terrorism. State terrorism, considered by many in the world to constitute the greatest threat to peace and stability, is thus excluded from this public understanding of terrorism. *See* NOAM CHOMSKY, PIRATES AND EMPERORS: INTERNATIONAL TERRORISM IN THE REAL WORLD (1986); *see also* NOAM CHOMSKY, THE FATEFUL TRIANGLE: THE UNITED STATES, ISRAEL, AND THE PALESTINIANS (1983). The prevalent American perception is encapsulated in President Bush's characterization of the "war on terror" as a "Crusade," a historical analogy with horrifying connotations to the Arab world. *See* Press Release, The White House Office of the Press Secretary, Remarks by the President upon Arrival (Sept. 16, 2001), *available at* http://www.whitehouse.gov/news/releases/2001/09/20010916-2.html (President Bush stated, "This crusade, this war on terrorism is going to take a while."). In contrast to the widely-held perception by Americans that Arab/Muslim "terrorism" is the most pervasive threat to their security, a poll conducted by EOS Gallup Europe at the request of the European Commission indicates that Europeans believe the United States and Israel are the countries posing the biggest threat to world peace. *See Iraq and Peace in the World*, FLASH EUROBAROMETER NO. 151, at 81, 87, *available at* http://europa.eu.int/comm/public_opinion/flash/fl151_iraq_full_report.pdf. In a similar distortion, U.S. forces are seen as victims of Iraqi "terrorism" in the current conflict and mourned as human beings in the United States, while Iraqi civilians are not seen as victims of American state terrorism or given equal dignity as human beings. For example, as of November 4, 2004, there had been 1266 American forces casualties in the Iraq conflict, and 8150 wounded. The major media conglomerate, CNN, keeps a running update of the names, ages, photos, hometown, and manner of death of American and coalition military casualties. *Forces: US & Coalition/Casualties*, *available at* http://www.cnn.com/SPECIALS/2003/iraq/forces/casualties/ (last visited Nov. 4, 2004). The website, IRAQ BODY COUNT, http://www.iraqbodycount.net/ (last visited Sept. 29, 2004), indicates that between 14,219 and 16,352 Iraqi civilians have been killed. Yet, CNN lists not a single Iraqi civilian casualty. A recently published study conducted by the Center for International Emergency Disaster and Refugee Studies, Johns Hopkins Bloomberg School of Public Health on the results of a systematic survey of Iraqi civilian costs concluded that 100,000 Iraqis or more have been killed in the invasion and occupation of Iraq. Les Roberts et al., *Mortality Before and After the 2003 Invasion of Iraq: Cluster Sample Survey*, 364 THE LANCET 1857 (Oct. 24, 2004). The U.S. position towards Iraqi civilian deaths is encapsulated in General Tommy Franks' assertion that: "We don't do body counts." Jonathan Steele, *Body Counts*, THE GUARDIAN, May 28, 2003, *available at* http://www.guardian.co.uk/usa/story/0%2C12271%2C965235%2C00.html.

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are using for selection criteria at airports, border crossings, or in other activities. Americans, like John Walker Lindh and Jose Padilla, and non-Arabs, like Richard Reid, have already proved that profiling is likely to be ineffective in the long run.[309] Other commentators have assessed whether the measures taken are practicable and whether they efficiently use law enforcement resources.[310] The discrimination inherent in racial and religious profiling alienates Arabs and Muslims in the United States in the same way that blacks have been alienated in this country. Such discrimination inexorably leads to grievances that may ultimately result in violent acts against the government, as historical lessons have taught.[311] Government authorities themselves have indicated that alienating the very communities whose cooperation is needed for vital information on the "war on terror" is counterproductive.[312]

Finally, the question must be asked again: who is bearing the greatest burden of the civil liberties restrictions, and do the benefits justify the costs? The costs are difficult to quantify, as they are borne in differing measures by different communities, but some conclusions can be drawn. Noncitizens, particularly noncitizen Arabs and Muslims, are bearing the greatest burden.[313] Arab and Muslim citizens are also paying a very high price. Whether these costs are justified must be looked at in contrast to how the public and affected communities would justify similar profiling

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[309] *See* Alschuler, *supra* note 258, at 226.

[310] *See* Ellman, *supra* note 258, at 699 (stating that selection based on race, religion, and similar factors are not only discriminatory, but also foolish because vast majority of Arabs and Muslims are innocent, and non-Arabs may be terrorists). A comparison of the small proportion of Arabs or Muslims involved in terrorist incidents against the United States with the numbers of Arabs and Muslims in the world today illustrates the foolish proposition pointed out by Ellman. There are over 300 million Arabs in the world. *See* American-Arab Anti-Discrimination Committee, Facts about Arabs and the Arab World, *available at* http://www.adc.org/index.php?id=248. Approximately 1.2 billion people worldwide, or 19.67% of the world population, are Muslim. *See* THE WORLD FACTBOOK, *available at* http://www.odci.gov/cia/publications/factbook/geos/xx.html (last updated Sept. 14, 2004). The U.S. Census reports 1.2 million persons in the United States identifying as having Arab ancestry. *See* Census 2000, *supra* note 298. In 2001, 0.5% of the U.S. population self-identified as Muslim. Adherents.com, *Largest Religious Groups in the United States of America*, *at* http://www.adherents.com/rel_USA.html#religions (last visited Sept. 28, 2004). To extrapolate from the tiny proportion of individuals who commit terrorist acts that these huge populations of Arabs and Muslims are all "terrorist" is no less racist than extrapolating from the U.S. prison population of African Americans that the African American population, as a whole, is "criminal."

[311] *See* Ellman, *supra* note 258, at 705.

[312] *See* MPI, *supra* note 51, at 148-51.

[313] *See* David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953 (2002); Natsu Taylor Saito, *Whose Liberty? Whose Security? The USA PATRIOT Act in the Context of COINTELPRO and the Unlawful Repression of Political Dissent in the United States*, 81 OR. L. REV. 1051 (2003).

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in situations *not* involving Arabs or Muslims. If Arab/Muslim profiling is justifiable after 9/11, then profiling should also have been justified for white U.S. citizen males after the Oklahoma City bombing in 1996. Alschuler puts it best:

> Would. . . [it be] appropriate to subject black men to special screening following a suicide bombing causing the death of thousands by nineteen black terrorists who appeared to be part of an international organization?. . . . Perhaps one could distinguish the profiling of blacks from the profiling of Arabs on the grounds that blacks bear the scars of their race's long and continuing subordination in America. . . . Reasons less defensible than the one just noted might make the intensive screening of Arabs more acceptable to some Americans than the intensive screening of blacks. Arabs have less political power in the United States and less ability to make their grievances heard. They are likely to appear more "foreign" and, to some, more menacing. If sentiments like these led Americans to restrict the liberty of Arabs although they would not restrict the liberty of blacks, the distinctive treatment of Arab ethnicity would seem especially invidious.[314]

B. *Additional Constitutional Concerns*

As detailed above, the evidence is now conclusive that the government targeted both citizen and noncitizen Arabs and Muslims for harsh and abusive measures after 9/11. The government has successfully blurred the constitutional lines between Arab and Muslim citizens and noncitizens through the use of immigration process as a pretext to conduct criminal or terrorist investigations. The pretextual use of the immigration process has swept up citizens and persons lawfully in the United States into procedures that presume illegal presence and apply lower constitutional standards.[315] These actions are obliterating the traditional distinctions between the lesser constitutional standards to noncitizens in the deportation/removal context and the full constitutional standards to citizens and noncitizens whose constitutional

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[314] Alschuler, *supra* note 258 at 228-29. In response to Charles Krauthammer's justifications of profiling Arabs and Muslims, Alschuler posits: "If a large number of white terrorists had bombed several federal buildings and other facilities, Charles Krauthammer and I might be required to line up by race while black men, Asian men, Latino men, Native-American men, and Arab men passed us by." *Id.* He suggests that if racial profiling of Arabs is considered acceptable, then in the situation he posits, "Krauthammer and I should take our lumps." *Id.* at 263.

[315] *See* Chang & Kabat, *supra* note 174.

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rights are being adjudicated in a nonremoval context.[316] The plenary power doctrine, which both limits judicial review of immigration decisions made by Congress and the executive branches and lowers the constitutional standard that otherwise applies,[317] has traditionally been understood to apply only to the core of immigration decisions. In other words, those decisions concern who may be admitted, excluded, or removed from the United States. Decisions outside of this realm — such as criminal procedure, entitlement to benefits, employment, property, and other issues — have been decided on normal constitutional grounds,[318] applying essentially the same constitutional standards as would apply to citizens in the same context.[319]

This "inside"/ "outside" distinction may have been obliterated in the post-9/11 world. The government now uses immigration detention to pursue criminal investigations and prosecutions; uses preventive

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[316] The authors here do not disagree with Natsu Taylor Saito's argument that these changes are not aberrations but continue a long history of exceptionalism towards disfavored groups, whether in the immigration context or otherwise. The authors simply draw narrower conclusions with respect to the particular treatment of Arabs and Muslims before and after 9/11. We agree that the treatment of these communities is consistent with a larger pattern identified by Professor Saito. *See* Natsu Taylor Saito, *Will Force Trump Legality After September 11? American Jurisprudence Confronts the Rule of Law*, 17 GEO. IMMIGR. L.J. 1 (2002). Our conclusions are also consistent with the observations of Hiroshi Motomura and others that certain groups are perceived as full members of the "American community" while certain groups will never be perceived as full members with equal rights, regardless of their status as U.S. citizens or nationals. *See* Hiroshi Motomura, *Immigration and "We the People" After September 11*, 66 ALB. L. REV. 413 (2003) [hereinafter Motomura, *Immigration and We the People*]; Hiroshi Motomura, *PART II: Federalism, International Human Rights and Immigration Exceptionalism*, 70 U. COLO. L. REV. 1361 (1999).

[317] For cases finding that plenary power limits the constitutional protections of noncitizens in the exclusion and deportation context, see Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206 (1953); United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537 (1950); Nishimura Eiku v. United States, 142 U.S. 651 (1892); Chae Chan Ping v. United States, 130 U.S. 581 (1889).

[318] For cases finding that usual constitutional standards apply to noncitizens when the issues at stake are outside the immigration context of entry and removal, see Landon v. Plasencia, 459 U.S. 21 (1982); Plyler v. Doe, 457 U.S. 202 (1982); Mathews v. Diaz, 426 U.S. 67 (1976); Graham v. Richardson, 403 U.S. 365 (1971); Yick Wo v. Hopkins, 118 U.S. 356 (1886).

[319] *See* Bosniak, *supra* note 285 (reviewing caselaw and commentary supporting premise that plenary power doctrine controls rights and status of noncitizens "inside" immigration law, while full constitutional rights apply to rights and status "outside" immigration law, but finding that significance of alienage depends more on where concepts of immigration or membership in American community begins and ends than on strict notions of when issue is "inside" or "outside" immigration law); *see also* Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545 (1990). The extent to which the "inside"/"outside" distinction has broken down in other nonimmigration contexts aside from the criminal investigations and prosecutions discussed here is beyond the scope of this Article.

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detention in ways not permitted in the immigration process and unconstitutional in either civil or criminal processes;[320] posts immigration violators on criminal databases to be utilized by state and federal law enforcement untrained in immigration law; and applies high security measures to immigration detainees without affording them the normal constitutional protections that would be applicable to them if they were detained in the course of a criminal or terrorism investigation. The consequences of this "blurring of the lines" are that both citizens and noncitizens are being stripped of constitutional protections on the basis of ethnicity or religious identity in nonimmigration contexts that do not justify the constitutional exceptionalism of plenary power.[321]

The post-9/11 policies that this Article discusses erode the very basic guarantees of due process — both in the immigration and nonimmigration context. The secrecy orders surrounding all the post-9/11 arrests, detentions, and procedures allow the government to circumvent full constitutional protections required in criminal investigations by claiming that it was pursuing removal and not criminal proceedings against the individuals. Racial profiling and due process issues aside, a number of post-9/11 policies are rapidly eroding the core constitutional guarantees for Arab and Muslim communities targeted by post-9/11 policies. The very integrity of the American constitutional system appears to be breaking down — at least as far as these communities are concerned — so that the protections offered through rigorous checks and balances, open government, and freedoms of religious and political expression are no longer ensured to Arabs and Muslims, regardless of their citizenship status. Although we focus on how these policies have a particular impact on Arabs and Muslims, the effects are far-reaching for the integrity of the constitutional system itself.

1. Erosion of Checks and Balances

Government excesses in the past have only been checked by vigorous implementation of checks and balances among and between the three

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[320] *See* Cole, *In Aid of Removal*, *supra* note 58.

[321] Hiroshi Motomura argues that the critique of post-9/11 government policies that distinguishes between the rights of citizens and aliens fails to take into account the rights of wider communities of both U.S. citizen relatives and noncitizen relatives who are "Americans in waiting" that are also profoundly affected by the post-9/11 policies. Further discussion of this broader effect on Arab and Muslim communities in the United States are beyond the scope of this Article. *See* Motomura, *Immigration and We the People*, *supra* note 316.

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branches of government.[322] A number of academic observers have noted that, in the latest national security crisis, the courts have, as in other times of national emergency, applied minimal judicial review to the government's actions.[323] For example, in the material witness, "enemy combatant," and "special interest" cases, judicial review of the government's novel designations and justifications for its actions in the majority of cases was minimal, "some evidence" review.[324]

The "enemy combatant,"[325] material support,[326] and material witness[327] cases have all been tried, and the individuals detained, under tight secrecy and gag orders. These measures have removed meaningful congressional and judicial oversight into how the government has prosecuted these cases and, indeed, the evidence supporting the government's prosecutions.[328] Moreover, to the extent the courts have

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[322] *See* Eugene Rostow, *The Japanese American Cases — A Disaster*, 54 YALE L.J. 489 (1945). In the World War II and Cold War Era secret evidence immigration cases of Knauff and Mezei, for example, it was only congressional action that finally brought the Administration's abusive secret evidence detentions and exclusions to an end. *See supra* notes 17-18 and accompanying text.

[323] *See* Cruz, *supra* note 230 (suggesting framework for judicial review that preserves constitutional rights); *see also* Raquel Aldana-Pindell, *The 9/11 "National Security" Cases: Three Principles Guiding Judges' Decision-Making*, 81 OR. L. REV. 985 (2002).

[324] *See, e.g.*, Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2637 (2004) (noting that Fourth Circuit declined Hamdi's habeas petition on basis of one governmental affidavit — "the sole evidentiary support that the Government has provided to the courts for Hamdi's detention"). In *Hamdi*, the government argued, in part, that courts should not interfere in matters involving the military because an ongoing military conflict "ought to eliminate entirely any individual process." *Id.* at 2645. The Court applied the balancing test from *Mathews v. Eldridge* and concluded that because "due process demands some system for a citizen detainee to refute his classification, the proposed 'some evidence' standard is inadequate." *Id.* at 2651. Most significantly, the Court noted that while it is critical for the Government to detain individuals who pose an immediate threat to national security, "history and common sense teach us that an unchecked system of detention carries the potential to become a means for oppression and abuse of others who do not present that sort of threat." *Id.* at 2647; *see also* Cruz, *supra* note 230, at 146-47.

[325] *See* Rasul v. Bush, 124 S. Ct. 2686 (2004); Hamdi v. Rumsfeld, 316 F.3d 450 (4th Cir. 2003); Coalition of Clergy v. Bush, 310 F.3d 1153 (9th Cir. 2002), *cert. denied*, 123 S. Ct. 2073 (2003); Padilla *ex rel.* Newman v. Bush, 233 F. Supp. 2d 564 (S.D.N.Y. 2002).

[326] *See infra* Part III.B.1.b.

[327] *See In re* Application of the United States for a Material Witness Warrant, 213 F. Supp. 2d 287 (S.D.N.Y. 2002); United States v. Awadallah, 202 F. Supp. 2d 55 (S.D.N.Y. 2002); *see also* Chang & Kabat, *supra* note 174.

[328] Raquel Aldana-Pindell suggests that three main factors appear to be determining the outcome of the post-9/11 cases: greater deference to the executive in cases that have greater national security implications and fewer domestic implications; less deference to the Executive when the power being exercised appears reserved for Congress; and less deference to the Executive when there are serious Bill of Rights implications to the petitioners' challenges. *See* Aldana-Pindell, *supra* note 323. The research in this and prior articles by this author and Kevin Johnson suggests that possibly the most important factor

reviewed these post-9/11 government policies and novel legal theories, they have, for the most part, given them extreme deference, with weak justification for such deference.[329]

a. "Enemy Combatant" Cases: *Padilla, Hamdi,* and *Al-Marri*

The domestic "enemy combatant" cases are prime illustrations of the minimal scrutiny the federal courts have been giving government policies and justifications to arrest and detain without providing the most basic constitutional guarantees. In the case of Jose Padilla, an American citizen and convert to Islam, the government used a material witness warrant to arrest and detain him, and to deny him access to court-appointed counsel.[330] Attorney General John Ashcroft publicly

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in the perspective the courts have towards the post-9/11 cases is that they involve Arabs and Muslims; the courts share with the congressional and executive branches a now-institutionalized racism towards these communities that has been reinforced by the events of 9/11.

[329] *See, e.g.*, Ctr. for Nat'l Sec. v. U.S. Dep't of Justice, 331 F.3d 918, 926-27 (D.C. Cir. 2003); N. Jersey Media Group, Inc. v. Ashcroft, 308 F.3d 198, 219 (3d Cir. 2002). Traditionally, the federal courts have afforded the Executive great deference in times of war and other national emergencies. Reflecting such attitude by the judiciary, Supreme Court Chief Justice William H. Rehnquist states in his book that "in time of war, the laws are silent" ["inter arma silent legis"]. *See* WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME 25 (1998). Justice Rehnquist argues that because courts traditionally defer to the executive during wartime, it is preferable for the judiciary to simply avoid critical constitutional inquiry until the national emergency is over. *Id.* at 222; *see* Cruz, *supra* note 230, at 171.

[330] Jose Padilla, also known as Abdulla al-Muhajir, was arrested at O'Hare Airport on May 8, 2002 pursuant to a material witness warrant issued in the Southern District of New York. He was held in New York for a month without charge and without access to his court-appointed counsel, Donna Newman, on the basis of being a material witness. *See* HUMAN RIGHTS WATCH, U.S. CIRCUMVENTS COURTS WITH ENEMY COMBATANT TAG (June 12, 2002) [hereinafter HRW ENEMY COMBATANT], *available at* http://www.hrw.org/press/2002/06/us0612.htm. In stark contrast to its handling of the Padilla case, the government entered into a plea agreement with John Walker Lindh, another American convert to Islam and an alleged "enemy combatant" captured in Afghanistan in December 2001. Lindh's agreement with the government included a guilty plea to two felony charges and a sentence of 20 years in prison. *See* Baynes, *supra* note 7, at 44. One explanation for the disparate treatment Lindh received from the government (as compared to Padilla and other so-called enemy combatants), as reported by Jane Mayer, is that the government's case against Lindh was fraught with constitutional and ethical violations, and the government may have become nervous because those violations were made public by a legal advisor in an internal-ethics unit. *See* Jane Mayer, *Lost in the Jihad*, NEW YORKER, Mar. 10, 2003, at 58, *available at* http://www.newyorker.com/fact/content/?030310fa_fact2. Another explanation attributes the differing treatment of Lindh from Padilla and the others to inherent racism, which affords preferential treatment to white, middle-class Americans, as opposed to nonwhites. *See, e.g.*, Baynes, *supra* note 7, at 39-62 (extensively comparing media coverage of alleged post-September 11 Muslim perpetrators and concluding that Lindh was treated more favorably and received more empathy in general than Padilla and

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accused him of meeting with senior al Qaeda leaders in Pakistan and Afghanistan to plan attacks in the United States, including detonation of a radioactive "dirty bomb," but no charges were filed.[331] While proceedings were pending before the district court in June 2002, President Bush abruptly designated Padilla an "enemy combatant."[332] Upon the DOJ's request, the district court vacated the material witness warrant and federal agents transported Padilla in secret to a Navy brig in South Carolina, where he remained incommunicado for more than a year without being charged with any crime.[333] The evidence on which the government relied to designate Padilla an "enemy combatant" and to remove Padilla from the reach of the U.S. justice system was submitted under seal as "classified information," and thus not reviewable by Padilla or his attorney. Although the attorney's representation of Padilla was terminated upon the vacation of the material witness warrant, she filed a habeas corpus petition to the Second Circuit as Padilla's next friend and was ultimately appointed as Padilla's attorney for the habeas proceeding.[334]

On December 18, 2003, the Second Circuit ordered the Department of Defense to release Padilla to the custody of the District Court for the Southern District of New York within thirty days of the order.[335] The court found that the Non-Detention Act explicitly denies the government the power to detain "enemy combatants" indefinitely without charge, or hold them incommunicado without a hearing, and without access to counsel on the basis of a unilateral determination that the person may be

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other non-white Muslims).

[331] HRW ENEMY COMBATANT, *supra* note 330; Editorial, *The Padilla Decision*, N.Y. TIMES, Dec. 19, 2003.

[332] *See* Padilla *ex rel.* Newman v. Bush, 233 F. Supp. 2d 564 (S.D.N.Y. 2002).

[333] Brief of Amici Curiae Cato Institute et al., Padilla v. Rumsfeld, 352 F.3d 695 (2d Cir. 2003) (Nos. 03-2235(L) and 03-2438); Brief of Amici Curiae Hon. John J. Gibbons et al., Padilla v. Rumsfeld, 352 F.3d 695 (2d Cir. 2003) (Nos. 03-223(L) and 03-2438), *available at* http://news.findlaw.com/hdocs/docs/padilla/padrums73003gibbrf.pdf; *see also* HRW ENEMY COMBATANT, *supra* note 330.

[334] The government claimed, among other things, that granting Padilla access to an attorney would undermine the "trust and dependency" on the military that it needed in order to "effectively interrogate" him. *See Padilla*, 233 F. Supp. 2d at 600; *see also* Padilla v. Bush, 02-Civ.4445 (S.D.N.Y. Dec. 4, 2002) (opinion and order).

[335] The court found that the Non-Detention Act prohibits detention of American citizens on American soil by the executive branch without a clear authorization by Congress. *See* 10 U.S.C. § 4001(a) (2000). Neither Congress' Authorization for Use of Military Force Joint Resolution, *see* Congress' Authorization for Use of Military Force Joint Resolution, Pub. L. No. 107-40, 115 Stat. 224 (2001) [hereinafter Joint Resolution], nor 10 U.S.C. § 956(5) (allowing for funds to be used for purpose of detaining persons whose status is "similar to prisoners of war") constitute such authorization.

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connected with an organization that intends harm to the United States. The court held: "In the domestic context, the President's inherent constitutional powers do not extend to the detention as an enemy combatant of an American citizen seized within the country away from a zone of combat."[336] On June 28, 2004, however, the Supreme Court reversed the decision of the Second Circuit.[337] The Court avoided reaching the merits and, thus, failed to address whether the President had the constitutional authority as Commander in Chief to detain Padilla militarily. Affording the government great deference, it upheld the government's position that Padilla had improperly filed his habeas petition in the Southern District of New York.[338]

Yaser Hamdi's case fared differently in the Fourth Circuit. Unlike Padilla's seizure on U.S. soil, Hamdi was seized by the U.S. military in Afghanistan during hostilities there. After being detained in several facilities in Afghanistan, Hamdi was transferred to Guantánamo Bay.[339] He was held, along with the approximately 600 other detainees, incommunicado (i.e., without access to a lawyer and without means to challenge his detention).[340] When Hamdi's interrogators learned that he was a U.S. citizen, federal authorities transferred him to a Naval Brig in Norfolk, Virginia, where he was held incommunicado.[341]

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[336] Padilla v. Rumsfeld, 352 F.3d 695, 724 (2d Cir. 2003). The Detention of Enemy Combatants Act of 2003, introduced by Rep. Schiff on Feb. 27, 2003 (still pending legislation at date of writing), states that "[t]he term 'enemy combatant' has historically referred to all of the citizens of a state with which the Nation is at war, and who are members of the armed force of that enemy state." The Detention of Enemy Combatants Act, H.R. 1029, 108th Cong., 1st Sess. § 2 para. 8 (2003). But, according to the Act, in the "present conflict" (the "war on terrorism"), enemy combatants "come from many nations, wear no uniforms, and use unconventional weapons." *Id.* It is difficult to determine how the Act's "new" definition of "enemy combatant" to fit the circumstances of the "present conflict" differs significantly from the examples presented by the Supreme Court in *Quirin*. However, Schiff found the present circumstances to be so novel that the "power to name a citizen as an 'enemy combatant' is therefore extraordinarily broad." *Id.* Further, the Act grants the Executive broad latitude to establish the process, standards, and conditions in which a United States citizen or lawful resident may be detained as an enemy combatant, and demands deference to military judgment concerning the determination of enemy combatant status. *Id.* § 2, para. 10.

[337] Rumsfeld v. Padilla, 124 S. Ct. 2711 (2004).

[338] The Court found that Padilla incorrectly named Secretary Donald Rumsfeld as a respondent in his habeas petition and that the proper respondent was the Commander of the Consolidated Naval Brig, Melanie Marr. The Court further held that the District Court for the Southern District of New York lacks jurisdiction over a petition brought against Commander Marr because she is located in South Carolina. *Id.* at 2727.

[339] *See* Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2635-36 (2004).

[340] *See id.* at 2636-38.

[341] *Id.*

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In June 2002, Hamdi's father filed a petition, as next friend, for writ of habeas corpus.[342] In January 2003, the Fourth Circuit denied Hamdi's right to habeas corpus review of his detention, primarily because he was "captured" in a "zone of active combat."[343] The district court had declared that the government's evidence — the affidavit of a Special Advisor to the Under Secretary of Defense for Policy, Michael Mobbs — "fell far short" of the minimal criteria necessary to support Hamdi's detention.[344] Nevertheless, the Fourth Circuit explicitly deferred to the military and the Executive's determination of Hamdi's status, stating that because Hamdi was captured in a combat zone, the Mobbs declaration was sufficient to support the constitutionality of the Executive's detention decision.[345] The Fourth Circuit rejected Hamdi's petition for rehearing *en banc*.[346] Articulating serious concerns about the clandestine nature of the government's evidence, the dissent in the *en banc* petition called the decision of the majority "breathtaking," as it deferred to the "short hearsay declaration by Mr. Michael Mobbs — an unelected, otherwise unknown, government 'advisor' as the sum total of the government's evidence supporting Hamdi's detention."[347]

Fortunately, unlike in *Padilla*, the Supreme Court did not avoid Hamdi's case on the merits.[348] The Court vacated the Fourth Circuit's dismissal of Hamdi's habeas petition, holding that a U.S. citizen detained as an "enemy combatant" must receive a meaningful opportunity to contest his detention.[349] A plurality of the Court answered in the affirmative the threshold question of whether the Executive has the authority to detain citizens as "enemy combatants."[350] The government

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[342] *See id.* at 2636.

[343] *See id.* at 2638.

[344] *Id.* at 2637.

[345] *See id.* at 2638.

[346] Hamdi v. Rumsfeld, 337 F.3d 335 (4th Cir. 2003).

[347] *Id.* at 372.

[348] Though these cases fared differently in the courts, they nonetheless both illustrate the separation of powers problems related to the enemy combatant designation by the executive branch.

[349] *See Hamdi*, 124 S. Ct. at 2648.

[350] The plurality answered the "narrow question," for the purposes of this case, of whether the government may detain citizens as "enemy combatants" when the government alleges the individual "was 'part of or supporting forces hostile to the United States of coalition partners' in Afghanistan and who 'engaged in an armed conflict against the United States' there." *Id.* at 2645. Justices Ginsburg and Souter concluded that Hamdi's detention is unauthorized under the Non-Detention Act (providing that "[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress") because the act must "be read broadly to accord the statute a long reach and to impose a burden of justification on the Government." *Id.* at 2654, 2660.

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had argued that "no explicit congressional authorization is required, because the Executive possesses plenary authority to detain pursuant to Article II of the Constitution."[351] Although agreeing with the President's right to make such a designation, a majority of the Court held that a "citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification and a fair opportunity to rebut the government's factual assertions before a neutral decisionmaker."[352] During the negotiations for Hamdi's release after the Supreme Court's decision, press reports commented that the government's negotiations were a "remarkable turnaround for a man who for years now the government has sworn is a terrorist."[353]

Ali Saleh Kahlah al Marri is the third U.S. citizen to be designated an "enemy combatant" and denied his constitutional rights to counsel, trial, and review and rebuttal of the charges against him. Al Marri is a Qatari national living in the United States.[354] Detained since December 2001, he was arrested in Peoria, Illinois and flown to New York. Authorities first held him as a material witness and later charged him with lying to the FBI and with credit card fraud.[355] Al Marri was never charged with terrorism-related offenses, yet along with other "special interest" detainees at the Metropolitan Detention Center in New York, he was held in solitary confinement, locked down without any exercise or recreation, under constant monitoring, denied access to family, and

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[351] The plurality did not reach this question, however, because it held that Congress authorized Hamdi's detention under the Authorization for Use of Military Force (AUMF). The AUMF empowered the President to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks." *Id.* at 2635.

[352] *Id.* at 2648.

[353] *See* Andrew Cohen, *Crying Wolf in the War Against Terror: The Feds Face a Stunning Blow to Credibility by Releasing a Long-Jailed U.S. Citizen*, L.A. TIMES, Aug. 16, 2004, at B11. As this Article went to press, there were new developments in Hamdi's case. The government agreed to release Hamdi in September 2004. As conditions for his release from solitary confinement at a military brig in Charleston, South Carolina, Hamdi agreed, among other things, to renounce his U.S. citizenship, remain in Saudi Arabia for five years, and release the U.S. government for violating any laws during his captivity. *See* Kevin Bohn, *Lawyer: Enemy Combatant to Leave Tuesday* (Sept. 27, 2004), *available at* http://www.cnn.com/2004/LAW/09/27/enemy.combatant/; Associated Press, *Hamdi to Be Freed This Week, Lawyer Says*, (Sept. 27, 2004), *available at* http://www.msnbc.msn.com/id/6116717/. For a copy of the Agreement, see http://news.findlaw.com/hdocs/docs/hamdi/91704stlagrmnt3.html.

[354] HUMAN RIGHTS WATCH, *U.S. Again Uses Enemy Combatant Label to Deny Basic Rights* (June 23, 2003), *available at* http://www.hrw.org/press/2003/06/us062303.htm.

[355] *See* Petition for Writ of Habeas Corpus, *filed in* Al-Marri v. Bush, at 4, *available at* http://news.findlaw.com/hdocs/docs/almarri/almarribush70703pet.pdf [hereinafter Petition for Writ of Habeas Corpus].

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denied access to counsel.[356] Some time later, the government dismissed the charges in New York due to "unconstitutional venue" and transferred him to Peoria, Illinois, where it filed the same charges against him.[357] Following his arraignment, federal prosecutors imposed "Special Administrative Measures," which included a ban on "contact visits" between al Marri and his attorneys and monitoring of his communications with counsel.[358]

In June 2003, al Marri was designated an "enemy combatant," and the criminal charges were dropped. He was transferred into the custody of the U.S. Military, and held at the Naval Consolidated Brig in Charleston, South Carolina.[359] Al Marri's counsel filed a habeas petition in Illinois, but as a result of his transfer to South Carolina, the District Court for the Central District of Illinois concluded "somewhat regretfully" that Illinois was not the proper venue for his habeas petition.[360] The Seventh Circuit affirmed the holding[361] and a petition for certiorari has been filed.[362]

The Supreme Court has also reviewed the incommunicado detentions of the Guantánamo detainees. Despite the government's attempt to prevent the detainees from access to courts and counsel, the Supreme Court, in *Rasul v. Bush*, held that aliens captured abroad and detained at Guantánamo Bay may challenge their detention under the federal habeas statute.[363] The petitioners, two Australians and twelve Kuwaitis, filed complaints seeking, among other things, to be informed of the charges against them, to be allowed to meet with their families and counsel, and to have access to the courts or an impartial tribunal. The District Court for the District of Columbia held that federal courts did not have jurisdiction over the habeas petitions, and the court of appeal affirmed.[364]

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[356] *See id.* at 3-4. On May 7, David Kelley, Deputy District Attorney for the Southern District of New York, told al Marri, who was at the time accompanied and represented by counsel, that if he continued to assert his innocence and to pursue dismissal of the indictment, the conditions of his confinement would be "aggravated." *Id.* at 6.

[357] Al-Marri v. Bush, 274 F. Supp. 2d 1003 (C.D. Ill. 2003).

[358] *See* Petition for Writ of Habeas Corpus, *supra* note 355, at 7.

[359] *See Al-Marri*, 274 F. Supp. 2d at 1004-05.

[360] *Id.* at 1008.

[361] *See* Al-Marri v. Rumsfeld, 360 F.3d 707, 712 (7th Cir. 2004).

[362] *See Al-Marri*, 360 F.3d 707, *petition for cert. filed*, 72 U.S.L.W. 3672 (U.S. Apr. 9, 2004) (No. 03-1424).

[363] *See* Rasul v. Bush, 124 S. Ct. 2686, 2692 (2004).

[364] Relying on *Johnson v. Eisentrager*, 339 U.S. 763 (1950), the District Court concluded that "aliens detained outside of the sovereign territory of the United States [may not] invok[e] a petition for a writ of habeas corpus." 215 F. Supp. 2d 55, 68 (D.D.C. 2002). The Supreme Court declined to adopt this position, holding instead that the facts in *Rasul* are distinguishable from the facts in *Eisentrager*. The Supreme Court also noted that federal

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Reversing the appellate court, the Supreme Court held that "federal courts have jurisdiction to determine the legality of the Executive's potentially indefinite detention of individuals who claim to be wholly innocent of wrongdoing."[365] The government has been interpreting the Supreme Court decision in a way that severely limits the detainees' access to meaningful court review.[366]

b. Material Support Cases: *Lackawanna Six* and *Portland Seven*

The material support cases also raise very troubling questions about checks and balances in light of questionable government actions and about whether the government used secret and abusive tactics to cover up lack of evidence to support indictments in these cases.[367] The *Lackawanna Six* and *Portland Seven* cases have been widely publicized by the Justice Department as major victories in the "war on terror."[368] In the

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courts have entertained the habeas petition of an American citizen who threatened a military installation during the Civil War. *See Rasul*, 124 S. Ct. at 2693 (citing *Ex parte* Milligan, 71 U.S. 2 (1866)).

[365] *Rasul*, 124 S. Ct. at 2699. The Court concluded that *Eisentrager* had been overruled and, thus, did not preclude federal courts' jurisdiction over habeas petitions.

[366] Guantánamo Press reports indicate that the Bush Administration "is taking the narrowest possible view" of the legal rights afforded to the Guantánamo detainees by the Supreme Court. *See* John Mintz & Michael Powell, *Attorneys for Detainees Plan Fast Action*, WASH. POST, June 29, 2004, at A11. In response to the Supreme Court's decision in *Rasul*, "judicial-like" proceedings began in late July 2004. The government created a Combatant Status Review Tribunal ("CSRT") to determine whether the detainees were enemy combatants. The tribunals permit the detainees to challenge their designation before a military panel, but without the assistance of an attorney. *See* Suzanne Goldenberg & Vikram Dodd, *Pentagon Accused of Evading Guantánamo Ruling*, THE GUARDIAN, July 8, 2004, *available at* http://www.guardian.co.uk/guantanamo/story/0,13743,1256578,00.html; Charlie Savage, *Muslim Chaplain Resigns From Army; Decries Treatment in Failed Spy Case*, BOSTON GLOBE, Aug. 3, 2004, at A4. Indeed, attorneys representing the detainees are not permitted to attend the hearings. *See* Savage, *supra*, at A4 (quoting attorney Clive Stafford Smith as stating that government's review "is not a hearing of any sort. . . . The Supreme Court ruling is very clear. They have a right to an independent tribunal. This is just a total smokescreen.").

[367] The "material support" cases illustrate new DOJ strategies to shut down so-called "sleeper cells" — individuals who could not be linked with specific plans to commit a violent act, but who may be engaged in supporting violent or terrorist activities in more tangential ways. For a thorough description of the material support and other provisions utilized by the government, characterizing them as creative prevention strategies, see Chesney, *supra* note 47, at 33-56. *See also* Peter Margulies, *Judging Terror in the "Zone of Twilight": Exigency, Institutional Equity, and Procedure After September 11*, 84 B.U. L. REV. 383 (2004).

[368] *See Hearing Before the House Comm. on the Judiciary*, 108th Cong. (June 5, 2003) (statement of Attorney General John Ashcroft). *See also* Press Conference, Deputy Attorney General Larry D. Thompson (Sept. 14, 2002), *available at* http://www.usdoj.gov/dag/speech/2002/091402dagremarks.htm (stating that "United States law enforcement has

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Lackawanna case, six men, all U.S. citizens of Yemeni descent, were charged in Buffalo, New York with providing material support and resources to a terrorist group.[369] Dubbed a "terrorist cell" at the time of their arrest,[370] the six men traveled to Afghanistan where they allegedly attended and trained at a camp associated with Osama Bin Laden and al Qaeda.[371] They were charged with providing "material support and resources" to a terrorist group, in violation of U.S. law.[372] The six men pled guilty without a trial, in exchange for a promise of lighter sentences and an agreement that they would not be designated "enemy combatants." The government appeared to be using the threat of the "enemy combatant" designation to obtain guilty pleas in these cases where such pleas might otherwise not have been entered.

Particularly disturbing is the information that surfaced through investigative reporting that the CIA had assassinated a key potential witness in the *Lackawanna* case, Kamal Derwish, the alleged seventh member of the group.[373] Derwish was allegedly the individual who

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identified , investigated, and disrupted al Qaeda-trained terrorist cell on American soil").

[369] The material support statute, 18 U.S.C. §§ 2339A, 2339B, was an AEDPA creation passed in 1996. The legislation made it a crime for anyone to provide "material support" to a terrorist or terrorist organization. The *Lackawanna* and *Lindh* cases were the first attempts by the government to charge individuals with violating the "material support" provision of section 2339B by providing themselves as personnel to, and receiving training from, a terrorist organization. *See* Statement of Chris Wray, Assistant Attorney General, *Oversight Hearing: Aiding Terrorists — An Examination of the Material Support Statute, Before Senate Judiciary Comm.*, 108th Cong. (May 5, 2004), *available at* http://judiciary.senate.gov/ testimony.cfm?id=1172&wit_id=3391 (stating that, "in our view, prosecutors may use the material support statutes to prosecute . . . individuals because the definition of material support includes personnel, in the form of one's own personal services"). The USA PATRIOT Act amended the material support statute by enhancing the penalty provision and modifying, among other things, the definition of "material support or resources" to include "expert advice or assistance." USA PATRIOT ACT §§ 805, 810. The court, in *Humanitarian Law Project v. Ashcroft*, 309 F. Supp. 2d 1185 (C.D. Cal. 2004), concluded that the term "expert advice or assistance" is impermissibly vague. In *Humanitarian Law Project v. Reno*, 205 F.3d 1130 (9th Cir. 2000), *cert. denied*, 532 U.S. 904 (2001), the Ninth Circuit affirmed the district court's holding that interpreting section 2339B to prohibit the provision of "training" and "personnel" is impermissibly overbroad and, thus, void for vagueness under the First and Fifth Amendments.

[370] *See* Ben Dobbin, *Prosecutor: Alleged NY Terror Cell Watched Since Summer 2001*, DEMOCRAT & CHRON., Sept. 16, 2002, *available at* http://www.democratandchronicle.com /news/extra/lackawanna/0916story081529_news.shtml.

[371] *See* Associated Press, *Lackawanna Man Pleads Guilty to Terror Links*, DEMOCRAT & CHRON. (Apr. 9, 2003), *available at* http://www.democratandchronicle.com/news/extra /lackawanna/0409story075342_news.shtml

[372] *See* United States v. Goba, 220 F. Supp. 2d 182, 187 (W.D.N.Y. 2002).

[373] Kamal Derwish, also known as Ahmed Hijazi, a U.S. citizen and admitted by the government to be an "unindicted co-conspirator X," was assassinated in an airstrike planned and executed by the CIA. Derwish was traveling in a car in Yemen with Qaed

recruited the Lackawanna men to travel to Afghanistan and, thus, would have been the source of any exculpatory evidence concerning the facts of their travels, timing, motivation, and the material support they gave al Qaeda.[374] The murder of a U.S. citizen abroad by U.S. authorities, barely reported, unchallenged, and unreviewed by U.S. courts or Congress, raises grave doubts that any constitutional checks exist to curtail abuse of executive authority against even U.S. citizen Arabs and Muslims anywhere in the world.

Similarly, the *Portland Seven* cases have raised the specter that the unchecked authority of the executive branch to designate anyone an "enemy combatant" — regardless of U.S. citizenship status — will force people who do not intend to engage in terrorism to enter guilty pleas rather than be subjected to indefinite detention without trial. The Portland cases involved U.S. citizens Ahmed Bilal, Muhammed Bilal, Maher Hawash, and three other men who attempted to enter Afghanistan. The men never made it to Afghanistan; they were stopped at the border of China and turned over to U.S. authorities. One Kenyan woman, the ex-wife of one of the men, was also charged.[375] As part of plea bargains with Ahmed and Muhammed Bilal, the government dropped the charges of treason.[376]

Following the Bilal brothers' pleas, the three others accused of entering Afghanistan with them or supporting the plan, Patrice Lumumba Ford, Jeffrey Leon Battle, and October Martinique Lewis, pled guilty.[377] Ford and Battle were sentenced to eighteen years for treason, or "conspiracy to levy war against the United States," a Civil War era charge of sedition.[378] A seventh member of the group was reportedly killed in

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Salim Sinan al-Harethi, a man said to be al Qaeda's chief operative in Yemen. An unmanned CIA Predator aircraft fired a missile at the car, which subsequently exploded, killing both men, as well as five other civilians whose involvement in terrorism is unknown. *See* Matthew Purdy & Lowell Bergman, *Where the Trail Led: Between Evidence and Suspicion; Unclear Danger: Inside the Lackawanna Terror Case*, N.Y. TIMES, Oct. 12, 2003, at 1; Associated Press, *U.S.: Man Killed in Yemen was Alleged Leader of 'Lackawanna 6,'* DEMOCRAT & CHRON., Nov. 14, 2002.

[374] *See* John J. Goldman, *Last of the 'Lackawanna Six' Terror Defendants Sentenced*, L.A. TIMES, Dec. 18, 2003, at A38.

[375] *See* Plea Agreement for Plaintiff, United States v. Battle, No. 02-399-01-JO (D. Or. Oct. 16, 2003), *available at* http://news.findlaw.com/hdocs/docs/terrorism/usbattle101603plea.pdf.

[376] *Id.*

[377] Press Release, Department of Justice, October Martinique Lewis Pleads Guilty to Money Laundering Charges in "Portland Cell" Case (Sept. 26, 2003), *available at* http://www.usdoj.gov/opa/pr/2003/September/03_crm_532.htm.

[378] Andrew Kramer, *2 Who Sought to Aid Taliban Get Prison*, PHILA. INQUIRER, Nov. 25, 2003, at A6.

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Pakistan.[379] Hawash struck a deal for a lighter sentence in exchange for testifying against the others.[380] The primary evidence offered against the group was based on information collected by the FBI pursuant to FISA, as amended by the USA PATRIOT Act, on secret warrants issued by the FISA court.[381] Like the "enemy combatant" cases, the material support cases have proceeded with the government's evidence remaining secret; in both types of cases, there is disturbing evidence that U.S. authorities were involved in the assassination of key potential witnesses for the defendants.

c. Material Witness Cases: *Awadallah*

In another case in which the government used the material witness statute to detain an individual for alleged terrorist ties, the Justice Department held Osama Awadallah, a San Diego student, in highly restrictive detention for months. The court in *United States v. Awadallah* reviewed the government's use of the material witness statute to hold Awadallah, a Jordanian citizen, as a possible "witness" in connection with an investigation of the 9/11 attacks.[382] Although supposedly only a "witness," Awadallah was treated as a high security federal prisoner and detained in prisons around the country. When transferred to the Metropolitan Correction Center in New York, he was placed in solitary confinement and strip-searched whenever he left his cell.[383] He was not allowed to have family visits or make telephone calls. After his arrest as a material witness, Awadallah was charged and indicted for making false statements to a grand jury. The district court threw out the indictment, holding that his arrest was illegal because the material witness statute does not authorize the arrest of grand jury witnesses.[384]

The Second Circuit reversed. In *United States v. Awadallah*,[385] the court concluded that the language of the material witness statute and the legislative history indicated that the government could detain a grand jury witness.[386] Consequently, Awadallah's indictment for making false

[379] Noelle Crombie, *Prosecutors Say Portland 7 Figure Is Dead, Move to Drop Final Case*, OREGONIAN, June 23, 2004, at B7.

[380] *See* Blaine Harden & Dan Eggen, *Duo Pleads Guilty to Conspiracy Against US; Last of the "Portland 7" Face 18 Years in Prison*, WASH. POST, Oct. 17, 2003, at A3.

[381] *Id.*

[382] 202 F. Supp. 2d 55 (S.D.N.Y. 2002).

[383] *Id.* at 59-61.

[384] *See id.* at 61-79.

[385] 349 F.3d 42 (2d Cir. 2003).

[386] Before the Second Circuit reversed the district court decision in *United States v.*

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statements was reinstated despite the fact that the "FBI investigations subsequently established that Awadallah had no connections with or knowledge about the 9/11 attacks or terrorist activities, but that he had met two of the alleged hijackers two years earlier when they lived in San Diego, California."[387]

Although the government justifies its post-9/11 policies as necessary to effectively prosecute those engaged in "terrorism," its allegations of "terrorism" and "terrorist-related" charges may mask a more pernicious problem, at least with respect to constitutional rights and liberties. A significant recent study supports the view that the vast majority of cases that the government has prosecuted since 9/11 as "terrorist" cases are garden-variety criminal cases — most not related to terrorist activity at all. Researchers at the Syracuse University data analysis center, Transactional Records Access Clearinghouse ("TRAC"), issued a study that aggregated all prosecutorial data from September 11, 2001 to September 30, 2003, broke that data into component categories, and compared it with pre-9/11 conviction and sentencing rates. One of the critical conclusions of the study is that more than half of the 879 cases labeled "terrorism" or "anti-terrorism" prosecutions during the period resulted in no jail time. Only twenty-three of those convicted received sentences of five or more years, and only five (including Richard Reid, the "shoe bomber") received sentences of over twenty years. Even more telling were those convictions under the "international terrorism" category. There were 184 of these during the period, but only three received sentences of over five years, eighty resulted in no jail time, and ninety-one received sentences of less than one year.[388] Both Republican and Democratic members of the Senate have reacted to the study.[389]

Awadallah, the court, in *In re Material Witness Warrant*, 213 F. Supp. 2d 287, 289 (S.D.N.Y. 2002), held that the material witness statute was intended to apply to grand jury witnesses, in part because a grand jury proceeding is not a "criminal proceeding" within the meaning of the material witness statute. The court also found that detaining an individual pursuant to the material witness statute does not violate the witness's Fourth Amendment rights.

[387] HRW REPORT, *supra* note 60, at 36 n.127.

[388] *See* Transactional Records Access Clearinghouse ("TRAC"), *A Special TRAC Report: Criminal Terrorism Enforcement Since the 9/11/01 Attacks* (Dec. 8, 2003), *available at* http://trac.syr.edu/tracreports/terrorism/report031208.html [hereinafter *TRAC Report*].

[389] Senator Charles Grassley, a member of the Senate Judiciary Committee, publicly stated that the report "raises questions about the accuracy of the department's claims about terrorism enforcement." Senator Patrick Leahy, the ranking Democrat on the Committee, said the report "[u]nderscores concerns that I and others have raised about how the Justice Department approaches, handles and labels the cases that it calls anti-terrorism cases." *See* Press Release, American Civil Liberties Union, ACLU Says Skewed Statistics on Terrorism Prosecutions Show Credibility Gap (Dec. 8, 2003), *available at* http://www.aclu.org/news/NewsPrint.cfm?ID=14535&c=206.

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Consistent with its secrecy policies, the DOJ is now withholding information concerning individual prosecutions previously released to organizations like TRAC.[390] Discussing the TRAC study and known information about the terrorist-related cases that the government had prosecuted, David Cole concludes that of the thousands of arrests, detentions, and prosecutions of various kinds, the government has not convicted a single person besides Reid of a terrorist offense, making the "administration's record. . . 0 for 5000."[391]

2. The Threat to Open Government

Another major casualty in the government's "war on terror" strategy is the tradition of open government. Virtually all the measures and legal fictions that law enforcement used after 9/11 to effectuate its goals in the "war on terror" were instituted and maintained through a wide range of secrecy orders, directives, and regulations. The secrecy provisions have both a profound effect on the way Arabs and Muslims view the transparency of their government's actions, as well as more permanent repercussions on the guarantees of open government in this democracy.

Two critical secrecy policies — the denial of access to detainee information and the Creppy Memo, which closed immigration hearings to the public — have been litigated. The results of judicial review of the secrecy policies are mixed and are not encouraging for Arab/Muslim concerns. In *Detroit Free Press v. Ashcroft*, the Detroit News, the Metro Times, Representative John Conyers of Michigan, and the ACLU challenged the Creppy Memo's ban on media and public access to immigration hearings after 9/11.[392] On appeal from the district court's grant to plaintiffs' request for injunctive relief, the Court of Appeals for the Sixth Circuit held that the press has a First Amendment right to access immigration hearings, and found the blanket closure of

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[390] *TRAC Report*, *supra* note 388, at 1.

[391] David Cole, *The D.C. Gang that Couldn't Shoot Straight*, L.A. TIMES, Sept. 19, 2004, at M5. Cole cites the recent Detroit cases in which the government's only post-9/11 jury conviction for terrorism was thrown out of court because the government's main witness had lied on the stand. *Id.* On the recent developments in the Detroit "terrorism" cases, see also *New Prosecutor in Botched Detroit Case*, WASH. TIMES, Sept. 20, 2003, *available at* http://washingtontimes.com/upi-breaking/20040920-052236-8632r.htm. Cole distinguishes between the material support prosecutions, in which no actual terrorist activity was involved, from prosecutions based on terrorist acts. *Id.*

[392] Detroit Free Press v. Ashcroft, 303 F. 3d 681 (6th Cir. 2002) (affirming decision of district court); Detroit Free Press v. Ashcroft, 195 F. Supp. 2d 937 (E.D. Mich. 2002) (granting plaintiffs' injunction against further closed hearings).

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deportation hearings in "special interest" cases unconstitutional.[393] Addressing the government's national security concerns, Judge Keith held that an immigration judge may make an individualized finding that the hearing must be conducted in secret to protect national security.[394] In reaching his decision Judge Keith noted that the "executive branch seeks to uproot people's lives, outside the public eye, and behind closed doors" and that "democracies die behind closed doors."[395] In the related case of *Haddad v. Ashcroft*, District Court Judge Edmunds held that the Creppy Memo interferes with a detainee's due process right to a fair and open immigration hearing.[396] The court ordered that the government "must either release Haddad from detention or hold a new detention hearing that is open to the press and public."[397]

The Third Circuit reached a completely different result in a similar case in *North Jersey Media Group v. Ashcroft*,[398] where newspaper publishers sued to challenge the Creppy Memo's directive denying them a right of access to "special interest" deportation hearings. In the case below, District Court Judge John Bissell found the secrecy policy unconstitutional, stating that such secrecy allowed the government to "bar the public and press from deportation hearings without any particularized showing or justification. . . [which was] a clear case of irreparable harm to a right protected by the First Amendment."[399] The Third Circuit reversed the district court's order enjoining the Creppy Memo directive. Although acknowledging the result the Sixth Circuit reached in *Detroit Free Press*, the court concluded that the press and public do not have a First Amendment right to access to the courts.[400] The ACLU filed for a writ of *certiorari*; the Supreme Court denied it. In

[393] *Detroit Free Press*, 303 F. 3d at 681.

[394] *Id.* at 707.

[395] *Id.* at 683. The court also noted that "fittingly, in this case, the Government subsequently admitted that there was no information disclosed . . . that threatened the 'national security or safety of the American people' . . . yet all these hearings were closed." *Id.* at 709.

[396] Haddad v. Ashcroft, 221 F. Supp. 2d 799, 805 (E.D. Mich. 2002).

[397] *Id.* at 805. While the case was on appeal, the administrative proceedings were completed and a final order of removal was entered. Mr. Haddad was subsequently deported. *See* Haddad v. Ashcroft, 76 Fed. Appx. 672 (6th Cir. 2003).

[398] N. Jersey Media Group, Inc. v. Ashcroft, 308 F.3d 198 (3d Cir. 2002), *cert. denied*, 123 S. Ct. 2215 (2003).

[399] N. Jersey Media Group, Inc. v. Ashcroft, 205 F. Supp. 2d 288, 304 (D.N.J. 2002). In his dissent, Judge Scirica found that although national security may warrant the closure of a "special interest" alien deportation hearing in some circumstances, the issue is really over who should make the decision. He concluded that an immigration judge can make that determination "with substantial deference to national security." 301 F.3d at 221.

[400] *Id.* at 201-02, 221.

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its brief opposing certiorari, the government claimed that it would not be conducting any more secret hearings and that its policies related to secret hearings are under review.[401]

The results in the related secrecy policy prohibiting disclosure of information about immigration detainees are also mixed. In *ACLU of New Jersey v. County of Hudson*, the local ACLU sued New Jersey county jails for refusing to disclose information about the INS detainees held in their jails, relying on New Jersey's "Right-to-Know" and "Jailkeeper's" laws.[402] Five days after Superior Court Judge Arthur D'Italia granted plaintiffs access to the county records,[403] the INS issued an "interim rule," overriding New Jersey and other state laws by prohibiting state and local officials from releasing the names of INS detainees.[404] On the basis of this interim regulation, the New Jersey state court of appeals reversed the trial court's ruling. Noting that courts "have recognized that judicial deference to the Executive Branch is especially appropriate in the immigration context," the court held that the new federal regulation pre-empts state law.[405] The Supreme Court of New Jersey declined further review.[406]

The District Court for the District of Columbia ruled against the government in a similar case, *Center for National Security Studies v. United States Department of Justice*, but the appellate court overturned the decision.[407] Seeking basic information about individuals whom the DOJ arrested and detained after 9/11, the ACLU and Center for National Security Studies sued the DOJ under FOIA. On August 2, 2002, District Court Judge Gladys Kessler ordered the government to release the names of the detainees and their attorneys.[408] The government appealed

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[401] *See As Supreme Court Rejects Review of Access to 9/11 Immigration Hearings, ACLU Sees Hopeful Signs of Changed Policy, available at* http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=12724&c=206 (May 27, 2003).

[402] ACLU of New Jersey v. County of Hudson, 799 A.2d 629 (N.J. Super. Ct. App. Div. 2002), *cert. denied*, 803 A.2d 1162 (N.J. 2002).

[403] *Id.* at 636. The judge stayed his decision to allow time for the government to appeal. *See id.*

[404] *See* 8 C.F.R. § 236.6 (2002).

[405] *ACLU of New Jersey*, 799 A.2d.at 648 (citations omitted). The court also noted that the interim rule was "effective immediately upon signing," that notice "was not published in the Federal Register" as required by 5 U.S.C.A. § 553(b) (2004) "nor was the public afforded a comment period prior to promulgation" as required by 5 U.S.C.A. § 553(c) (2004). *Id.* at 651.

[406] *See ACLU of New Jersey*, 803 A.2d 1162.

[407] Ctr. For Nat'l Sec. Studies v. U.S. Dep't of Justice, 331 F.3d 918 (D.C. Cir. 2003), *cert. denied*, 124 S. Ct. 1041 (2004).

[408] *See* Ctr. For Nat'l Sec. Studies v. U.S. Dep't of Justice, 215 F. Supp. 2d 94 (D.D.C.

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and Judge Kessler stayed her order pending appeal.[409] The D.C. Circuit reversed the district court's decision, holding that the names of the detainees and their lawyers were within FOIA's law enforcement exemption.[410] The court's rationale deferred almost exclusively to the government's arguments and two affidavits, finding that "the judiciary owes some measure of deference to the executive in cases implicating national security, a uniquely executive purview."[411]

Although there has been debate and academic disagreement over the reasons for the different results in these cases, and what constitutional criteria should govern the public access cases,[412] the critical implication for the affected Arab and Muslim communities is that it was used only against them. Whether it will be used against others is an open question. Nevertheless, to date, the Creppy Memo and related secrecy policies have not been revoked or superseded; they stand as continued authority for the government to rely on in the future, permanently reversing the presumption of access to public hearings, information on government process, and open administrative procedures. Muslims and Arabs might observe that, once again, they are the only noncitizen groups against whom these secrecy policies have been implemented since September 11, 2001.

2002).

[409] *See* Ctr. For Nat'l Sec. Studies v. U.S. Dep't of Justice, 217 F. Supp. 2d 58 (D.D.C. 2002).

[410] *See Ctr. For Nat'l Sec. Studies*, 331 F.3d at 920. The district court had rejected the government's "mosaic" argument because, as a matter of law, the FOIA exemption requires "an individualized assessment of disclosure, and the government's mosaic theory could not justify a blanket exclusion of information." *Id.* at 924. The circuit court, however, applied exemption 7(A) under FOIA to find that the government could withhold the requested information about the detainees because the data was "compiled for law enforcement purposes" and the production "could reasonably be expected to interfere with enforcement proceedings." *Id.* at 926, 929.

[411] *Id.* at 926-27. In his dissent, Judge Tatel found:

> [T]he [majority's] uncritical deference to the government's vague, poorly explained arguments for withholding broad categories of information about the detainees, as well as its willingness to fill in the factual and logical gaps in the government's case, eviscerates both FOIA itself and the principles of openness in government that FOIA embodies.

Id. at 937.

[412] *See* Lauren Gilbert, *When Democracy Dies Behind Closed Doors: The First Amendment and "Special Interest" Hearings*, 55 RUTGERS L. REV. 741 (2003); *see also* Kathleen K. Olson, *Courtroom Access After 9/11: A Pathological Perspective*, 7 COMM. L. & POL'Y 461 (2002); Shirley C. Rivadeneira, *The Closure of Removal Proceedings of September 11th Detainees: An Analysis of Detroit Free Press, North Jersey Media Group and the Creppy Directive*, 55 ADMIN. L. REV. 843 (2003).

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3. Curtailing Freedom of Religious and Political Expression

Further fueling Muslims' perceptions that their religion is under attack are the cases involving Muslim military officials on Guantánamo. Three Muslims have been charged with security-related violations by the federal government. The charges followed complaints made by at least two of these officials about the treatment of the detainees at Guantánamo.[413] In the most controversial of the three cases, the government arrested Army Captain James Yee, the only Muslim chaplain at Guantánamo, in September 2003.[414] The government detained him for seventy-six days in a Navy brig; much of that time was spent in maximum-security solitary confinement. In late September 2003, the press, based on an anonymous source, incorrectly reported that he had been charged with "sedition, aiding the enemy, spying, espionage, and failure to obey a general order."[415] However, Captain Yee was never charged with those crimes. Instead, the U.S. Army ultimately charged him with two counts of unlawful transportation of classified information ("wrongfully transporting classified information without the proper locking containers or covers"), two counts of using a government computer to store pornographic material, one count of giving a false statement regarding release of CDs to detainees, and having sexual relations with a woman at Guantánamo.[416] Captain Yee's lawyer, Eugene Fidell, claimed that he was "fascinated" by the ultimate charges in "a case that began as a triumph in the war on terrorism."[417] In March 2004, the Army dropped all criminal charges, but reprimanded Yee for the adultery and pornography charges — a reprimand which was

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[413] Katherine Stapp, *Rights: One Muslim Freed, Two Others Still Face Guantánamo Charges*, Inter Press Service, Apr. 22, 2004, *available at* 2004 WL 59283363.

[414] Yee was arrested at Jacksonville Navel Air Station after custom agents received a tip from the FBI and searched his bag. He allegedly had papers thought to be related to Guantánamo. Even after all the charges were dropped, the government never revealed what the papers allegedly showed. *See* Savage, *supra* note 366.

[415] Savage, *supra* note 366; Rowan Scarborough, *Islamic Chaplain Is Charged as Spy*, WASH. TIMES, Sept. 20, 2003, at A1.

[416] Rowan Scarborough, *Military Adds Sex Charges Against Muslim Chaplain*, WASH. TIMES, Nov. 26, 2003, at A1; Guy Taylor, *Muslim Chaplain Charged by Army; Espionage Not Among Counts*, WASH. TIMES, Oct. 11, 2003, at A1.

[417] *See* Ray Rivera, *Pentagon to Probe Yee Case; Review Set for Fall*, SEATTLE TIMES, Aug. 5, 2004, at B3 (citing Pentagon's plan to investigate Yee's treatment); Savage, *supra* note 366; Scarborough, *supra* note 415. For the evolution in one newspaper's accounts of this case, from terrorism to adultery, see Rowan Scarborough & Steve Miller, *Airman Accused of Terror Spying; Islam Radicals Pick Chaplains*, WASH. TIMES, Sept. 24, 2003, at A1; Jerry Seper, *American Muslim Leader Arrested*, WASH. TIMES, Sept. 30, 2003, at 1; Taylor, *supra* note 416; and see also Glenn Simpson, *FBI Reviews Muslims' Military Role*, WALL ST. J., Oct. 15, 2003, at A12.

overturned a month later.[418]

The other two Guantánamo officials arrested on security/espionage charges are Syrian-born Air Force Senior Airman Ahmed al-Halabi, who worked as a translator at Guantánamo,[419] and Ahmed Fathy Mehalba, who also worked as an interpreter at Guantánamo.[420] Both individuals were arrested under government claims of terrorist-related activity, and the government proceeded to close aspects of their cases under secrecy orders.[421] As this Article went to press, all spy charges against al-Halabi were dropped.[422]

Muslim lawyers are also feeling the impact of discriminatory policies. In one example, in May 2004, the FBI arrested Brandon Mayfield, an Oregon attorney who is a Muslim convert, for his alleged connection with train bombings in Madrid in March 2004. The FBI alleged that investigators found his fingerprint on a bag thought to be linked to the bombings. After he was detained for two weeks, the FBI admitted that they were mistaken. Court documents (unsealed after Mayfield was released) indicate that Spanish authorities questioned the FBI's fingerprint conclusions three weeks before Mayfield's arrest and that U.S. officials re-examined their mistaken conclusions only after Spanish authorities linked the print to another individual. Even after the FBI admitted its mistake, the government stated that Mayfield remained a material witness and restricted his movements. The restrictions were ultimately removed.[423]

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[418] On August 2, 2004, Yee submitted a letter of resignation from the Army, citing the government's "pattern of unfairness." According to the letter, he also has "waited for months for an apology for the treatment to which [he has] been subjected." Savage, *supra* note 366.

[419] Arrested in July 2003 at the Jacksonville Naval Air Station in Florida, al-Halabi was on his way to Syria to get married. The government alleged that his laptop computer contained documents from detainees — a charge which he denies. Since he was arrested, several charges have been dropped, such as mishandling classified information and attempted espionage and aiding the enemy. The government also has dropped other less serious charges against al-Halabi, such as giving prisoners baklava pastries. Halabi's attorney, Don Rehkopf, claims that though the government has been ordered to produce approximately 30,000 documents, he has only received 150 pages as of the time of this Article. *See* Carol Rosenberg, *Three Spying Charges Dismissed*, DETROIT FREE PRESS, Dec. 20, 2003, at 4A; Stapp, *supra* note 413.

[420] Mehalba was also accused of possessing classified information when he was arrested in September 2003 on his way home from a vacation in Egypt. His attorney claims that he mistakenly copied a file — for which he had clearance — onto a computer disk. *See* Stapp, *supra* note 413.

[421] *Id.*

[422] *See* Laura Parker, *Spy Case Was "A Life-Altering Experience" for Airman*, USA TODAY, Oct. 18, 2004, at 2A.

[423] *See* Noelle Crombie, *FBI Chief Says Agency Is Examining Evidence Procedure in Mayfield*

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In the 1990s secret evidence cases, the government's charges against Dr. Haddam and the other secret evidence defendants, like so many other Arabs and Muslims, were, at best, based on guilt by association. The current "war on terrorism" is also based in large part on guilt by association, sending the message that being Arab or Muslim, or associating with Arab or Muslim causes or organizations, is suspect and could subject an individual to discriminatory treatment, at the least, or criminal prosecution, at most. The material support provision in the 1996 legislation has been used since 9/11 to target Muslims and Arabs for their association with, or for their charitable giving to, various Muslim foundations.[424] The statute does not require any proof that the individual intended to further terrorist activity.[425] The Secretary of State decides which groups are designated "foreign terrorist organization,"[426] but the statute does not provide the organization notice or a hearing.[427] The government has used this provision against the Lackawanna Six, Portland Seven, John Walker Lindh, Lynne Stewart, James Ujaama, the Benevolence International Foundation, the Global Relief Foundation ("GRF"), and the Holy Land Foundation ("HLF").[428] These cases provide significant evidence of the broad reach of related new policies that target mostly U.S. citizen Arabs and Muslims. In these cases, the connections with terrorism seem very dubious, and, instead, reflect a broad-range targeting of particular communities. The cases have generated significant criticism about violations of due process and the First Amendment — the latter concerns range from freedom of association and advocacy to overbreadth and vagueness of the statutory language.[429]

Case, OREGONIAN, July 1, 2004, at C4; *It's Called Democracy*, L.A. TIMES, June 29, 2004, at B12; *Madrid Bombings Case Thrown out Against Oregon Attorney*, *available at* http:/www.cnn.com/2004/US/West/05/24/spain.bombings.lawyer.ap/index.html (May 25, 2004).

[424] *See* Cole, *The New McCarthyism*, *supra* note 131, at 8-10; Randolph N. Jonakait, *A Double Due Process Denial: The Crime of Providing Material Support or Resources to Designated Foreign Terrorist Organizations*, 48 N.Y.L. SCH. L. REV. 125 (2003-04).

[425] *See* Cole, *The New McCarthyism*, *supra* note 131, at 8-10.

[426] *Id.* at 10 ("the statute gives the Secretary of State a virtual blank check in designating groups; he can designate any foreign organization that has ever used or threatened to use a weapon against person or property and whose activities are contrary to our foreign policy, national defense, or economic interests.").

[427] *See* Jonakait, *supra* note 424, at 125.

[428] *See* Cole, *The New McCarthyism*, *supra* note 131, at 9 nn.36-37.

[429] *See* Jonakait, *supra* note 424 (concluding that manner of designating foreign terrorist organizations and related material support law denies due process); *see also* COLE, *supra* note 3 (arguing that organizations are denied due process because they cannot access classified information on which government's determination is based and because of government's overbroad interpretation of what constitutes national security threat).

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The USA PATRIOT Act has also drastically expanded the powers of the federal government to obtain information, arrest, detain, and indict individuals for "terrorism-related" activities and associations. These provisions are having a significant impact on the perception that Muslims and Arabs in the United States, citizens and immigrants, have meaningful rights to free speech or association. Most of these provisions have secrecy provisions that prevent individuals from discovering evidence supporting the government's actions, from legally challenging the actions, or from defending themselves from the consequences of the actions. With respect to noncitizens, the USA PATRIOT Act's expanded terrorism definition has unprecedented consequences. It may deny entry or render deportable persons who "endorse terrorism,"[430] support terrorists in tangential ways, or associate with terrorist organizations. Speech, silence, and even unintended associations may trigger the violations.[431] In particular, the USA PATRIOT Act's expanded definition of terrorism, the amended provisions concerning "terrorist organizations," "supporting terrorist organizations," asset forfeiture, and government actions pursuant to these provisions, are targeting and affecting the Arab and Muslim communities so widely that the effect — and, as these communities perceive it, the motivation — is to chill or suppress political and religious speech and association.

Although it is not clear to what extent ordinary Americans have felt the impact of the USA PATRIOT Act provisions authorizing broad sharing and disclosure of financial information, there is no question that Arab and Muslim citizens have felt the sting of these new measures.

Whether the material support and foreign terrorist organization prosecutions meet the constitutional standards for First-Amendment-protected association and advocacy activity under the Supreme Court doctrines of *Brandenburg* and *Scales* remains to be addressed by the courts. *See* Brandenburg v. Ohio, 395 U.S. 444 (1969) (First Amendment prohibits governmental restrictions on speech unless "directed to inciting or producing imminent lawless action"); *see also* Scales v. United States, 367 U.S. 203 (1961) (prosecutions on basis of mere membership in organization violates First Amendment unless government can prove that individual was active member of organization and that he knew of and specifically intended to further illegal ends).

[430] For example, the State Department abruptly revoked a visa granted to Tariq Ramadan, an Islamic scholar from Switzerland appointed to teach Islamic philosophy and ethics at the University of Notre Dame in the 2004 academic year. Ramadan initially received a visa in February 2004 once he was cleared by Homeland Security, but that decision was then reversed. According to a spokeswoman for the State Department, Ramadan's visa was revoked under a provision of the USA PATRIOT Act that authorizes visa revocation because of an individual's political activities if those efforts are seen as "endorsing terrorism." Geneive Abdo, *Muslim Scholar Has Visa Revoked*, CHI. TRIB., Aug. 24, 2004, at 1.

[431] *See supra* notes 121-23 and accompanying text.

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Financial institutions, operating under secrecy provisions authorized by the USA PATRIOT Act or federal government directives, are closing Arab and Muslim bank accounts, canceling credit cards, and disrupting wire transfers across the country.[432] In Boston, Fleet Bank has closed at least fifteen accounts of Muslim and Arab clients, without explanation. In New Jersey and New York City, dozens of Muslims have been asked to provide large amounts of documentation to verify their financial activity; if they fail to comply, they face cancellation of their credit cards.[433]

For example, Hossam Algabri, a U.S. citizen and Egyptian native, was informed by Fleet Bank that his bank account had been closed because his account had been flagged for suspicious activity. Algabri later found out "that a one-time withdrawal of $7000, as well as his habit of depositing different checks in individual envelopes at the same time, constituted suspicious behavior."[434] Perhaps Algabri was singled out because he worked for Ptech, Inc., a Quincy, Massachusetts software firm that received negative national press because there was some indication that the FBI was initiating an investigation of the company in December 2002.[435] The status of the FBI's investigation of Algabri, Ptech, or any of its current employees is unclear, but no charges have been filed against them. Nevertheless, Fleet Bank closed the bank accounts of Ptech's principals.[436]

In an earlier case in Massachusetts, the Administration also targeted subsidiaries of Al Barakaat for the company's alleged ties to terrorism, and attempted to connect one of its principals, Mohamed Hussein, to

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[432] *See* Sara B. Miller, *Blacklisted by the Bank*, CHRISTIAN SCIENCE MONITOR, Aug. 25, 2003, at 15.

[433] *See id.* at 16. On the Boston bank account closures, see also Matthew Brelis, *Muslim Society Presses Fleet*, BOSTON GLOBE, Apr. 4, 2003, at D3. On the nationwide bank closures, see Leela Jacinto, *Muslim Blacklisting? American Muslims Accuse Banks and other Financial Institutions of Discrimination*, ABC News.com, June 11, 2003, *at* http://www.masnet.org/masnews.asp?id=177.

[434] *See* Miller, *supra* note 432.

[435] Despite the FBI's assurances in December 2002 that neither the company nor its employees were targets of an FBI investigation, news media covered the FBI's so-called "raid" of the firm on December 6, 2002. *See* ROBERT MORLINO, "OUR ENEMIES AMONG US!" THE PORTRAYAL OF ARAB AND MUSLIM AMERICANS IN POST-9/11 AMERICAN MEDIA, CIVIL RIGHTS IN PERIL 73-91 (Elaine C. Hagopian ed., 2004). As a result, while most of Ptech's clients — such as several federal agencies — did not stop doing business with the company, the 10-year-old company had to lay off its entire staff by October 2003. *See* Steve Adams, *Rumored Links to Terrorism Doomed Business; But Owner of Former Quincy Company Has No Hard Feelings*, PATRIOT LEDGER, May 14, 2004, *available at* http://ledger.southofboston.com/articles/2004/05/14/news/news04.txt.

[436] *See* Matthew Brelis, *Muslim Society Presses Fleet*, BOSTON GLOBE, Apr. 4, 2003, at D1.

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international terrorism.[437] Al Barakaat was a small, family-owned business engaged in transferring individual funds from expatriate Somalis in the United States to their families in Somalia.[438] Concluding that the government neither charged Hussein with any terrorism-related offenses nor offered any proof of his so-called terrorism connection, Federal District Court Judge Robert Keeton "lashed out at the government" for linking Hussein to terrorism and stated that it "shocks [his] conscience" that he was asked to sentence Hussein as a terrorist.[439] The sum total of the government's charges against Al Barakaat was that it violated a licensing requirement under state law.[440]

Another example of a Muslim American affected by the new financial provisions of the USA PATRIOT Act is Faizah Zuberi. Zuberi, a Pakistani-born U.S. citizen and doctor, had an excellent credit report, but was treated with suspicion and required to provide "an inordinate" amount of documentation when she tried to apply for an American Express card.[441] Her case is apparently not unusual — one investigative report found twelve cases in which Muslims with good credit had their American Express credit cards cancelled.[442]

As an integral part of its "war on terror" strategy, the federal government has used a series of provisions and policies to freeze the assets of Muslim charities, arrest and detain prominent members of Muslim organizations affiliated with those charities, and require disclosure of information about many Muslim charitable organizations, including lists of their donors. The DOJ has frozen more than $136 million dollars held by the largest Muslim charitable organizations in the United States, including the three largest — the HLF, Benevolence International, and the GRF.[443] In November 2002, the FBI and other federal agents raided the homes and businesses, and confiscated the records, of Muslim charitable and financial organizations in different parts of the country. Subsequently, officers and heads of these organizations were arrested with government allegations that they were funding terrorist groups. The HLF and GRF challenged the

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[437] *See* Thanassis Cambanis, *Somali Gets 18-Month Term: Judge Says U.S. Failed to Make Terrorist Link*, BOSTON GLOBE, July 23, 2002, at B3.

[438] *Id.*

[439] *Id.*

[440] *See* Indictment at 6, United States v. Hussein, (D. Mass, Nov. 14, 2001), *available at* http://news.findlaw.com/hdocs/docs/terrorism/ushussein111401ind.pdf.

[441] *See* Jacinto, *supra* note 433.

[442] *See id.*

[443] *See* Eggen & Mintz, *supra* note 149.

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government's order freezing their assets as well as their likely designation as a "specially designated global terrorist" notwithstanding the USA PATRIOT Act's failure to provide for judicial review.[444]

In *Global Relief Foundation, Inc. v. O'Neill*, the GRF sought to enjoin the Secretary of Treasury's order blocking its assets and to enjoin the Secretary from designating it a "specially designated global terrorist." The District Court for the Northern District of Illinois held that IEEPA applied to U.S. corporations and declined to adopt the GRF's arguments that the statute was unconstitutional.[445] In *Holy Land Foundation for Relief and Development v. Ashcroft*, the court held that the government could rely on hearsay evidence in designating the HLF as a "specially designated global terrorist."[446] In both the HLF and GRF cases, prosecutors have sought to use classified evidence to prevent disclosure of the basis of charges against the charities and the basis for freezing their assets.[447]

In the most recent action involving the government's targeting of Muslim charities, the Senate Finance Committee has asked the IRS to turn over confidential tax and financial records, including donor lists, on dozens of Muslim charities and foundations. The Committee's request is made under its statutory authority to obtain private financial records held by government agencies. The request asks for lists of the leaders of the charities, financial records, donor lists, applications for tax-exempt status, and other private and sensitive information.[448] Thus far in these

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[444] *See* Chang & Kabat, *supra* note 174, at 35-37; Cole, *The New McCarthyism*, *supra* note 131, at 26-28.

[445] *See* Global Relief Foundation, Inc. v. O'Neil, 207 F. Supp. 2d 779 (N.D. Ill. 2002), *aff'd*, 315 F.3d 748 (7th Cir. 2002), *and cert. denied*, 124 U.S. 531 (2003). The GRF argued, in part, that no "foreign national" has an interest in its assets because the company is a U.S. Citizen and IEEPA does not apply to corporations that hold charters within the United States and, therefore, is out of the reach of IEEPA. The court rejected the GRF's argument, holding that, by "interest," the statute contemplates "beneficial" rather than "legal" interests. The GRF is a charitable corporation based in Illinois that conducts operations in 25 foreign countries "including Afghanistan, Albania, Bosnia, Kosovo, Iraq, Lebanon, Pakistan, Palestine (West Bank and Gaza), Russia (Chechnya and Ingushetia), Somalia and Syria." *Id.* at 750.

[446] Holy Land Found. for Relief and Dev. v. Ashcroft, 333 F.3d 156, 162 (D.C. Cir. 2003), *reh'g denied*, Holy Land Found. for Relief and Dev. v. Ashcroft, No. 02-5307, 2003 U.S. App. LEXIS 17641, at *1 (D.C. Cir. Aug. 22, 2003), *and reh'g en banc denied*, Holy Land Found. for Relief and Dev. v. Ashcroft, No. 02-5307, 2003 U.S. App. LEXIS 17642, at *1 (D.C. Cir. Aug. 22, 2003); Chang & Kabat, *supra* note 174, at 36.

[447] The government's actions in freezing the charities' assets, arresting their principals, and prosecuting the cases have been conducted under a myriad of secrecy provisions that have prevented the defendants from obtaining the evidence underlying the government's claims, preventing meaningful defense of the charges against them.

[448] *See* Eggen & Mintz, *supra* note 149.

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cases, the government has produced no evidence of any terrorist involvement with the charities or financial institutions, yet, as in the Ptech and Al Barakaat situations, the government has succeeded in shutting the institutions down or destroying the businesses permanently. The Committee's request lists a range of charities besides the GRF and HLF, including the Muslim World League, the World Assembly of Muslim Youth, and the Islamic Society of North America.[449] Ibrahim Hooper of the Council on American-Islamic Relations claims that "[t]he Muslim community would view this as another fishing expedition solely targeting Muslims in America" and asks, "Are they now going to start a witch hunt of all the donors of these now closed relief organizations, so that Muslims are going to be targeted once more based on their charitable giving?"[450]

For Arabs and Muslims, these policies appear to have been instituted only to target them, and courts have not vigorously reviewed most of the policies. The message conveyed is that Arabs and Muslims are not likely to be afforded minimal due process rights when confronted with excessive behavior from federal government agencies. Nor will the courts enforce such rights on their behalf. These cases are, again, viewed in light of the recent history of serious deprivations of due process rights of Arabs and Muslims through federal government action and judicial inaction, from "Operation Boulder" to the pre-9/11 secret evidence cases that had already indelibly marked the collective memory of these communities.

CONCLUSION

This Article looks at the immigration and constitutional consequences of the most critical law and policy changes since September 11, 2001 and draws some conclusions about the long-term consequences of these actions and policies. Despite the rhetoric of the Executive and its agencies, the government's post-9/11 policies do not target noncitizens suspected of terrorism in general, but specifically Arabs and Muslims,

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[449] *Id.*

[450] *Id.* Charitable giving is not optional for Muslims. Charity, or *zakaat*, is one of the five pillars of Islam. The obligatory *zakaat* is 2.5% of disposable income of every Muslim, as required by the *Qur'an* 2:43 ("And be steadfast in prayer; practice regular charity . . ."); *Qur'an* 2:110 ("And be steadfast in prayer and regular in charity; And whatever good ye send forth for your souls before you, ye shall find it with God: for God sees Well all that ye do."); *Qur'an* 98:5 ("And they have been commanded no more than this: To worship God, offering Him sincere devotion, being true [in faith]; to establish regular prayer; and to practice regular charity; and that is the religion right and straight.").

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whether citizens or aliens. Placed in the broader context of ongoing laws and policies targeting or disproportionately having an impact on both citizen and noncitizen Arabs and Muslims, the policies clearly do not focus on individuals who are terrorist risks or noncitizens who are undocumented. They single out Arab and Muslim communities in the United States for disparate and disproportionate treatment in a huge range of ways unconnected with terrorism. The long-term constitutional issues, amounting to race and religious profiling, threaten Arab and Muslim communities through widespread denial of due process. Moreover, governmental actions impose long-term consequences on Arab and Muslim communities, and also affect the overall integrity of the constitutional system in three particular areas: checks and balances, open government, and freedom of expression. Arabs and Muslims residing in the United States view these laws and the government's actions as deliberately targeting them for their political and religious expressions, rather than legitimately investigating those who have ties to terrorism. For Arabs and Muslims in this country, the federal government's strategies in the "war on terror" have deeply eroded their belief in the integrity of the American system of justice.

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