

## RACE, CIVIL RIGHTS, AND IMMIGRATION LAW AFTER SEPTEMBER 11, 2001: THE TARGETING OF ARABS AND MUSLIMS

SUSAN M. AKRAM\* & KEVIN R. JOHNSON\*\*

### INTRODUCTION

Although only time will tell, September 11, 2001, promises to be a watershed in the history of the United States. After the tragic events of that day, including the hijacking of four commercial airliners for use as weapons of mass destruction, America went to “war” on many fronts, including but not limited to military action in Afghanistan.<sup>1</sup>

As needed and expected, heightened security measures and an intense criminal investigation followed. Almost immediately after the tragedy, Arabs and Muslims, as well as those “appearing” to be Arab or Muslim, were subject to crude forms of racial profiling.<sup>2</sup> Airlines removed Arab and Muslim passengers, including, in one

---

\* 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. Professor Akram served as lead counsel on the Board of Immigration Appeals appeal and co-counsel in the federal court litigation of the secret evidence case of Anwar Haddam, discussed *infra* text accompanying notes 177–82, and is a member of a national network of attorneys representing noncitizens in secret evidence cases.

\*\* Associate Dean for Academic Affairs, University of California at Davis, Professor of Law and Chicana/o Studies; Director, Chicana/o Studies Program (2000-01); A.B., University of California, Berkeley; J.D., Harvard University. Thanks to Matthew Garvey of the *NYU Annual Survey of American Law* for organizing this symposium, as well as Michael Wishnie and Nancy Morawetz for their important roles. Bill Hing, Michael Wishnie, Leti Volpp, and Peter Margulies offered helpful comments on a draft of this paper. Carrie Rosenbaum (UC Davis, 2002) provided excellent research assistance.

1. Congress afforded broad powers to the President to use military force against the perpetrators of the violence of September 11. See Pub. L. No. 107-40, 115 Stat. 224 (2001). Congress, however, did not formally declare war, which would have authorized the President to exercise expansive power over “alien enemies” under the Alien Enemy Act of 1798. See J. Gregory Sidak, *War, Liberty, and Enemy Aliens*, 67 N.Y.U. L. REV. 1402, 1405–06 (1992).

2. See *infra* text accompanying notes 195–268.

instance, a Secret Service agent assigned to protect President Bush.<sup>3</sup> Immediately after September 11, hate crimes against Arabs, Muslims, and others rose precipitously.<sup>4</sup> In Arizona, a U.S. citizen claiming vengeance for his country killed a Sikh immigrant from India based on the mistaken belief that this turban-wearing, bearded man was "Arab."<sup>5</sup>

Supporters and critics alike saw the federal government as "pushing the envelope" in restricting civil liberties in the name of national security.<sup>6</sup> Other contributions to this symposium analyze

---

3. See Ken Ellingwood & Nicholas Riccardi, *Arab Americans Enduring Hard Stares of Other Fliers*, L.A. TIMES, Sept. 20, 2001, at A1; *Guard for Bush Isn't Allowed Aboard Flight*, N.Y. TIMES, Dec. 27, 2001, at B5; Phillip Morris, *Racial Profiling Has a New Target*, PLAIN DEALER (Cleveland), Sept. 25, 2001, at B9. In response to early reports of discrimination against Arab- and Muslim-appearing people, the Department of Transportation issued a policy statement emphasizing that a person cannot be disparately treated solely based on national origin or religion. See U.S. DEP'T OF TRANSP., CARRYING OUT TRANSPORTATION INSPECTION AND SAFETY RESPONSIBILITIES IN A NONDISCRIMINATORY MANNER (2001), at <http://airconsumer.ost.dot.gov/rules/20011012.htm> (last visited Oct. 28, 2002). After being barred from flights even though they had cleared airport security checks, several airline passengers brought racial discrimination actions against four airlines. See Laura Loh, *Barred Travelers Charge 4 Airlines With Race Bias*, L.A. TIMES, June 5, 2002, at B5.

4. See Bill Ong Hing, *Vigilante Racism: The De-Americanization and Subordination of Immigrant America*, 7 MICH. J. RACE & L. 441 (2002); Laurie Goodstein & Tamar Lewin, *Victims of Mistaken Identity, Sikhs Pay a Price for Turbans*, N.Y. TIMES, Sept. 19, 2001, at A1; Tamar Lewin & Gustav Niebuhr, *Attacks and Harassment Continue on Middle Eastern People and Mosques*, N.Y. TIMES, Sept. 18, 2001, at B5; see also 147 CONG. REC. E2150 (daily ed. Nov. 28, 2001) (statement of Rep. Conyers, Jr.) (indicating that, between September 11 and November 28, 2001, the American-Arab Anti-Discrimination Committee had investigated over 450 hate crimes); 147 CONG. REC. H8174, 8174 (Nov. 14, 2001) (statement of Rep. Woolsey) (recounting statistical data showing a precipitous rise in hate crimes against Muslims and Arabs immediately after September 11). Between September 11, 2001, and February 8, 2002, over 1700 anti-Muslim incidents were reported to the Council on American Islamic Relations. See The Council on American Islamic Relations, *Anti-Muslim Incidents*, at <http://www.cair-net.org/nr/statements.asp> (last visited Sept. 9, 2002). By April 2002, the Department of Justice was investigating over 250 post-September 11 hate crimes against Arabs and Muslims nationwide. Interview by Susan M. Akram with Casey Stavropoulos and Dan Nelson, U.S. Dep't of Justice, Civil Rights Section, Pub. Info. Div. (Oct. 2001); see also U.S. DEP'T OF JUSTICE, ENFORCEMENT AND OUTREACH FOLLOWING THE SEPTEMBER 11 ATTACKS, at <http://www.usdoj.gov/crt/legalinfo/discrimupdate.htm> (last visited Apr. 2, 2002). For a report of increasing violence directed at Asian Pacific Americans since September 11, see NAT'L ASIAN PACIFIC AM. LEGAL CONSORTIUM, BACKLASH: WHEN AMERICA TURNED ON ITS OWN (2001).

5. See Goodstein & Lewin, *supra* note 4; Richard A. Serrano, *Assaults Against Muslims, Arabs Escalating*, L.A. TIMES, Sept. 28, 2001, at A1.

6. See Christian Berg, *Thornburgh: Bush Doing Just Fine*, MORNING CALL (Allentown, Pa.), Nov. 16, 2001, at A4 (quoting former Attorney General Richard Thorn-

the devolution of immigration regulation from the federal government to the states.<sup>7</sup> This Article analyzes the nation's response to the horrific loss of life on September 11 and shows how the centralization of immigration power in the hands of the federal government in certain circumstances may exacerbate the negative civil rights impacts of the enforcement of the immigration laws. The federal government has acted more swiftly and uniformly than the states ever could, with harsh consequences to the Arab and Muslim community in the United States. That the reaction was federal in nature—and thus national in scope as well as uniform in design and impact, and faced precious few legal constraints<sup>8</sup>—increased the severity of the impacts.

The civil rights deprivations resulting from federal action reveal that national regulation of immigration is a double-edged sword. Federal preemption of state law is designed to create a uniform immigration law and frequently has served to prevent local

---

burgh); J.M. Lawrence, *Civil Rights Advocates Wary About the Future*, BOSTON HERALD, Sept. 28, 2001, at 34 (reporting concerns of civil rights advocates that federal government might have popular support to “push the envelope” in restricting civil liberties). Before September 11, Chief Justice Rehnquist had documented the willingness of Presidents to curtail civil liberties in times of war. See generally WILLIAM H. REHNQUIST, *ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME* (1998) (describing history of restrictions on civil rights by U.S. Presidents during times of war).

7. See, e.g., Victor C. Romero, *Devolution and Discrimination*, 58 N.Y.U. ANN. SURV. AM. L. 377 (2002). The proper role, if any, for the states in immigration enforcement has emerged as an issue of academic commentary. Compare Peter J. Spiro, *Learning to Live with Immigration Federalism*, 29 CONN. L. REV. 1627 (1997) (analyzing states' new power over defining benefit eligibility for noncitizens in 1996 welfare reform law), and Peter J. Spiro, *The States and Immigration in an Era of Demi-Sovereignities*, 35 VA. J. INT'L L. 121 (1994) [hereinafter Spiro, *Demi-Sovereignities*] (contending that states should have an increased role in immigration regulation), with Hiroshi Motomura, *Immigration and Alienage, Federalism and Proposition 187*, 35 VA. J. INT'L L. 201 (1994) (questioning Spiro's thesis on the grounds that the federal government should play a central role in the formation of immigrants' national identity), Michael A. Olivas, *Preempting Preemption: Foreign Affairs, State Rights, and Alienage Classifications*, 35 VA. J. INT'L L. 217 (1994) (challenging Spiro's argument and defending federal preemption of state efforts to regulate immigration), Peter H. Schuck & John Williams, *Removing Criminal Aliens: The Pitfalls and Promises of Federalism*, 22 HARV. J.L. & PUB. POL'Y 367 (1999) (analyzing the difficulties arising from the federal government's efforts to work with state and local agencies to deport criminal aliens and analyzing the potential for a better working relationship), and Michael J. Wishnie, *Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection, and Federalism*, 76 N.Y.U. L. REV. 493 (2001) (criticizing the devolution of authority to states to discriminate against noncitizens in welfare reform laws).

8. See *infra* text accompanying notes 194–349.

discrimination against noncitizens.<sup>9</sup> However, the federal government can also, with few legal constraints, strike out at immigrants across the nation if it sees fit. That suggests that the federal government's role in the regulation of immigration and immigrants, as well as its interaction with the states, deserves most serious attention, especially in times of national crisis.

Besides acting on a national scale in the "war on terrorism" that followed September 11, the federal government took steps that might also have future civil rights consequences.<sup>10</sup> In the investigation of the hijackings, the Department of Justice enlisted the assistance of state and local law enforcement agencies in the questioning of Arabs and Muslims.<sup>11</sup> As part of heightened security measures, the Bush administration considered permanently increasing the role of local police in immigration enforcement, which would represent a significant departure from the near-exclusive federal dominance over this field.<sup>12</sup> Because local police are generally unfamiliar with the immigration laws, they have been involved in well-known episodes of egregious violations of the civil rights of U.S. citizens as well as noncitizens in efforts at immigration enforcement.<sup>13</sup> As a result, state and local involvement in immigration enforcement might have lasting civil rights impacts on immigrants in the United States.

The federal government's response to September 11 demonstrates the close relationship between immigration law and civil rights in the United States. Noncitizens historically have been vulnerable to civil rights deprivations, in no small part because the law permits, and arguably encourages, extreme governmental conduct with minimal protections for the rights of noncitizens. Unfortunately, the current backlash against Arabs and Muslims in the United States fits comfortably into a long history, including the

---

9. See, e.g., *Plyler v. Doe*, 457 U.S. 202, 212–13 (1982); *Graham v. Richardson*, 403 U.S. 365, 371, 374 (1971); *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410, 416 (1948); *Hines v. Davidowitz*, 312 U.S. 52, 62–63 (1941); *League of United Latin Am. Citizens v. Wilson*, 908 F. Supp. 755, 768 (C.D. Cal. 1995). In 1996 reforms to the immigration laws, see *infra* text accompanying notes 294–302, Congress afforded state and local governments greater powers to assist the federal government in the enforcement of the immigration laws. See Jay T. Jorgensen, Comment, *The Practical Power of State and Local Governments to Enforce Federal Immigration Laws*, 1997 B.Y.U. L. REV. 899, 902–03. This has raised civil rights concerns. See *infra* text accompanying notes 294–302.

10. See *infra* text accompanying notes 341–48.

11. See *infra* text accompanying notes 341–44.

12. See *infra* text accompanying notes 343–44.

13. See *infra* text accompanying notes 345–49.

Alien and Sedition Acts of the 1790s, the Palmer Raids and the Red Scare that followed World War I, and other concerted efforts by the U.S. government to stifle political dissent.<sup>14</sup> This backlash is especially troubling because of the possibility—exemplified by the internment of persons of Japanese ancestry during World War II<sup>15</sup>—that racial, religious, and other differences have fueled the animosity toward Arabs and Muslims.<sup>16</sup>

A complex matrix of “otherness” based on race, national origin, religion, culture, and political ideology may contribute to the ferocity of the U.S. government’s attacks on the civil rights of Arabs and Muslims.<sup>17</sup> As recently stated,

---

14. See 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, 841–69 (1997); see also Victor C. Romero, *On Elián and Aliens: A Political Solution to the Plenary Power Problem*, 4 N.Y.U. J. LEGIS. & PUB. POL’Y 343, 359–62 (2001) (contending that the Supreme Court’s deference to Congress and the Executive Branch in combating “terrorism” is reminiscent of anti-Chinese and anti-communist sentiment of previous eras). Designed to eliminate political “subversives” from the United States, the Alien and Sedition Acts have been characterized as a Federalist effort to reduce immigrant support for the Republican Party. See generally JAMES MORTON SMITH, *FREEDOM’S FETTERS: THE ALIEN AND SEDITION LAWS AND AMERICAN CIVIL LIBERTIES* (1956). The so-called Palmer Raids were a series of mass arrests, following several bombings, conducted under the direction of U.S. Attorney General Mitchell Palmer resulting in the deportation of alleged subversives. See Johnson, *supra*, at 846–50.

15. See *Korematsu v. United States*, 323 U.S. 214 (1944) (upholding the internment of persons of Japanese ancestry during World War II); see also A.G. Block, *History for Our Times: Pearl Harbor and the Birth of Modern California*, CAL. J., Nov. 2001, at 8 (analyzing the similarities between the U.S. government’s response to the attack on Pearl Harbor and violence of September 11); Jerry Kang, *Thinking Through Internment: 12/7 and 9/11*, 27 AMERASIA J. 42 (2001) (analyzing similarities between Japanese internment and U.S. response to September 11); Eric K. Yamamoto & Susan Kiyomi Serrano, *The Loaded Weapon*, 27 AMERASIA J. 51 (2001) (same). See generally Symposium, *The Long Shadow of Korematsu*, 40 B.C. L. REV. 1, 19 B.C. THIRD WORLD L.J. 1 (1998) (analyzing the legacy of the *Korematsu* decision). One member of the U.S. Civil Rights Commission observed that, in the event of another terrorist attack, he could see the U.S. government interning Arab Americans. See Niraj Warikoo, *Civil Rights Unit Member Forsees Arab Detainment in the U.S.*, DETROIT FREE PRESS, July 20, 2002.

16. See Natsu Taylor Saito, *Symbolism Under Siege: Japanese American Redress and the “Racing” of Arab Americans as “Terrorists,”* 8 ASIAN L.J. 1, 11–26 (2001).

17. See Adrien Katherine Wing, *Reno v. American-Arab Anti-Discrimination Committee: A Critical Race Critique*, 31 COLUM. HUM. RTS. L. REV. 561, 571-88 (2000) (analyzing “multiplicative identities” of Palestinians that the U.S. government sought to deport because of their political activities); see also Susan M. Akram, *Scheherazade Meets Kafka: Two Dozen Sordid Tales of Ideological Exclusion*, 14 GEO. IMMIGR. L.J. 51, 54 (1999) (reviewing the evidence of discriminatory targeting of Arabs and Muslims by the U.S. government for detention, removal, and secret

Most Americans probably feel particularly threatened because the September 11 suicide hijackers were foreign, and some may be especially fearful because they were Arabs. This fear may cause us to exaggerate the danger of future attacks in general, and of attacks by Middle Eastern terrorists in particular. As a result, we may overestimate the effect of racially specific security measures. *And unfortunately, we are more willing to accept aggressive measures when they target small and politically disempowered groups, specifically racial and ethnic minorities, and foreign nationals.*<sup>18</sup>

As has occurred in the past, the ripple effects of national security measures in the end may adversely affect the legal rights of *all* noncitizens, not just Arabs and Muslims.<sup>19</sup> Indeed, we contend in this Article that the civil rights deprivations resulting from the war on terrorism may have long-term adverse impacts on the civil rights of *citizens* as well as noncitizens in the United States.

To help us better understand the latest “war on terrorism,” Part I of this Article analyzes the demonization of Arabs and Muslims in the United States before September 11 and how the law has been influenced by, and has reinforced, negative stereotypes. The federal government’s actions directed at Arabs and Muslims in the name of combating terrorism commenced well before September 11. As Professor Edward Said has observed, terrorism in these times “has displaced Communism as public enemy number one.”<sup>20</sup> That has translated into a near exclusive focus on “foreign terrorists,” particularly Arabs and Muslims. Part II studies the federal government’s zealous post-September 11 investigatory methods directed at

---

evidence proceedings). For other accounts of the role of race in the U.S. government’s response to the events of September 11, see Thomas W. Joo, *Presumed Disloyal: The Wen Ho Lee Case, the War on Terrorism and the Construction of Race*, 34 COLUM. HUM. RTS. L. REV. 1 (forthcoming 2002); Victor C. Romero, *Proxies for Loyalty in Constitutional Immigration Law: Citizenship and Race After September 11*, 52 DEPAUL L. REV. (forthcoming 2002); Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575 (2002).

18. Samuel R. Gross & Debra Livingston, *Racial Profiling Under Attack*, 102 COLUM. L. REV. 1413, 1430 (2002) (emphasis added).

19. *See infra* text accompanying notes 289–349.

20. Edward Said, *The Essential Terrorist*, in *BLAMING THE VICTIMS: SPURIOUS SCHOLARSHIP AND THE PALESTINIAN QUESTION* 149 (Edward Said & Christopher Hitchens eds., 2001); *see* LAWRENCE HOWARD, *TERRORISM: ROOTS, IMPACT, RESPONSES* 1 (Lawrence Howard ed., 1992) (stating that “The phenomenon of terrorism has become a major concern of the American public. *The Reagan administration elevated it to the foremost foreign policy problem of the nation*”) (emphasis added).

R

Arab and Muslim noncitizens, with little concern for their civil rights or for the potential long-term impacts of that response.

Because of the suppression of Arab voices, discussed below, many of the events and injustices are not reported in mainstream sources. As a result, we have used a number of sources that better reflect the Arab and Muslim experience in the United States. It is only by including these sources that the full picture can be better acknowledged and understood.

### I. THE DEMONIZATION OF PERSONS OF ARAB AND MUSLIM ANCESTRY

Commentators have observed how popular perceptions of racial and other minorities influence their treatment under the law.<sup>21</sup> As with other minority groups, this proves to be true with respect to Arabs and Muslims. As Professor Natsu Saito summarizes,

Arab Americans and Muslims have been “raced” as “terrorists”: foreign, disloyal, and imminently threatening. Although Arabs trace their roots to the Middle East and claim many different religious backgrounds, and Muslims come from all over the world . . . , these distinctions are blurred and negative images about either Arabs or Muslims are often attributed to both. As Ibrahim Hooper of the Council on American-Islamic Relations notes, “The common stereotypes are that we’re all Arabs, we’re all violent and we’re all conducting a holy war.”<sup>22</sup>

The demonizing of Arabs and Muslims in the United States, accompanied by harsh legal measures directed at them, began well before the tragedy of September 11, 2001.<sup>23</sup> It can be traced to

---

21. See, e.g., Richard Delgado & Jean Stefancic, *Images of the Outsider in American Law and Culture: Can Free Expression Remedy Systemic Social Ills?*, 77 CORNELL L. REV. 1258 (1992); Cynthia Kwei Yung Lee, *Race and Self-Defense: Toward a Normative Conception of Reasonableness*, 81 MINN. L. REV. 367, 402–52 (1996); Margaret M. Russell, *Race and the Dominant Gaze: Narratives of Law and Inequality in Popular Film*, 15 LEGAL. STUD. F. 243 (1991); see also Jody Armour, *Stereotypes and Prejudice: Helping Legal Decisionmakers Break the Prejudice Habit*, 83 CAL. L. REV. 733 (1995) (arguing for the need to recognize impacts of negative stereotypes and prejudice on legal decisionmaking). See generally Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 322–23 (1987) (articulating the theory of unconscious racism and its impact on discrimination in modern United States).

22. Saito, *supra* note 16, at 12 (footnote omitted).

23. See Akram, *supra* note 17 (tracing the contemporary targeting of Arabs and Muslims in immigration enforcement).

popular stereotypes,<sup>24</sup> years of myth-making by film and media,<sup>25</sup> racism during times of national crisis,<sup>26</sup> and a campaign to build political support for U.S. foreign policy in the Middle East.<sup>27</sup> Since at least the 1970s, U.S. laws and policies have been founded on the assumption that Arab and Muslim noncitizens are potential terrorists and have targeted them for special treatment under the law.<sup>28</sup> The post-September 11 targeting of Muslims and Arabs is simply the latest chapter in this history.<sup>29</sup>

A. *The Stereotyping of Arabs as Terrorists and Religious Fanatics*

Similar to the animus toward other racial minorities, anti-Arab, anti-Muslim animus can be viewed as part of a dynamic process of “racialization.”<sup>30</sup> “Racialization,” as used here, views “race” as “an unstable and ‘de-centered’ complex of social meanings constantly being transformed by political struggle.”<sup>31</sup> This understanding of race breaks with the traditional view that race is fixed by biology; it instead considers “racial formation” to explain how race operates in the United States.<sup>32</sup>

24. See Edward W. Said, *A Devil Theory of Islam*, THE NATION, Aug. 12, 1996, at 28; see also AHMED YOUSEF & CAROLINE F. KEEBLE, THE AGENT: THE TRUTH BEHIND THE ANTI-MUSLIM CAMPAIGN IN AMERICA (1999) (discussing the anti-Arab, anti-Muslim campaign in the United States).

25. See *infra* text accompanying notes 69–79.

26. See *infra* text accompanying notes 89–104.

27. See *infra* text accompanying notes 37–68.

28. See *infra* text accompanying notes 105–26.

29. See *infra* text accompanying notes 194–349.

30. See Ian F. Haney López, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1 (1994).

31. MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES 68 (1986). For analysis of the social construction of different races—that is, racialization—in the United States, see RODOLFO F. ACUÑA, OCCUPIED AMERICA: A HISTORY OF CHICANOS (3d ed. 1988) (documenting history of discrimination against Chicana/os as a racial group in the United States); TOMÁS ALMAGUER, RACIAL FAULT LINES: THE HISTORICAL ORIGINS OF WHITE SUPREMACY IN CALIFORNIA (1994) (analyzing racialization of Asians, Indians, and Mexicans in California); CRITICAL WHITE STUDIES: LOOKING BEHIND THE MIRROR (Richard Delgado & Jean Stefancic, eds.) (1997) (considering the emergence of a “white” identity); TIMOTHY DAVIS ET AL., A READER ON RACE, CIVIL RIGHTS, AND AMERICAN LAW: A MULTIRACIAL APPROACH (2001) (collecting legal scholarship analyzing different civil rights issues facing various minority communities, articulating how these issues have been experienced in unique ways); IAN F. HANEY LÓPEZ, WHITE BY LAW (1996) (reviewing how courts interpreted “whiteness” when it was a prerequisite for citizenship under the naturalization laws); JUAN F. PEREA, ET AL., RACE AND RACES: CASES AND RESOURCES FOR A DIVERSE AMERICA (2000) (documenting the history of discrimination against different groups seen as racially different in U.S. history).

32. See OMI & WINANT, *supra* note 31, at 68–69.

R  
R  
R  
R

R



Defining race as a process in which racial difference is socially, not biologically, constructed assists in examining the treatment of Arabs and Muslims in the United States; their experiences show the severe damage that racialization can do, and offers the hope that the process can be reversed.<sup>33</sup> Effectively recognizing that race is the product of social construction, the U.S. Supreme Court held that different groups may be racialized and that Arabs can be discriminated against as members of a different “race” in violation of the civil rights laws.<sup>34</sup>

Through the process of racialization, Arabs and Muslims have been considered racially different from whites and other racial minorities. Professor Nabeel Abraham, a leading commentator on racism against Arabs and Muslims in the United States, identifies three distinct ways in which Arabs and Muslims have been racialized: (1) through political violence by extremist groups based on the Arab-Israeli conflict in the Middle East; (2) by xenophobic violence targeting Arabs and Muslims at the local level; and (3) through the hostility arising from international crises affecting the United States and its citizens.<sup>35</sup> The law and its enforcement also has contributed to the hostility toward Arabs and Muslims in the United States.<sup>36</sup>

#### 1. The Silencing of Arabs Through Politically-Motivated Violence and Intimidation

Conflict in the Middle East provokes violence against Arabs and Muslims in the United States, as well as the less well known intimidation tactics followed by some mainstream activist organizations. A Rand Corporation study conducted for the U.S. Department of Energy concludes that the Jewish Defense League (JDL) was, for over a decade, one of the most active terrorist groups, as classified by the FBI, in the United States.<sup>37</sup> The study reviews the

---

33. See Saito, *supra* note 16, at 11–26.

34. See *St. Francis Coll. v. Al-Khazraji*, 481 U.S. 604, 610 n.4 (1987) (holding that a U.S. citizen born in Iraq could bring a civil rights action for discrimination based on Arab ancestry and recognizing that “[m]any modern biologists and anthropologists . . . criticize racial classifications as arbitrary and of little use in understanding the variability of human beings”).

35. Nabeel Abraham, *Anti-Arab Racism and Violence in the United States*, in *THE DEVELOPMENT OF ARAB-AMERICAN IDENTITY* 155, 180 (Ernest McCarus ed., 1994) [hereinafter Abraham, *Anti-Arab Racism*]; see Nabeel Abraham, *The Gulf Crisis and Anti-Arab Racism in America*, in *COLLATERAL DAMAGE: THE NEW WORLD ORDER AT HOME AND ABROAD* 255 (Cynthia Peters ed., 1991).

36. See *infra* text accompanying notes 105–26.

37. See BRUCE HOFFMAN, *TERRORISM IN THE UNITED STATES AND THE POTENTIAL THREAT TO NUCLEAR FACILITIES* 11, 15 (1986).

violence known to have been committed by the JDL, as well as incidents in which the JDL's involvement was suspected, all of which were described as part of a strategy "to eliminate perceived enemies of the Jewish people and Israel."<sup>38</sup> The violence included bombings of Arab foreign offices, as well as planting bombs in American-Arab Anti-Discrimination Committee Offices across the country.<sup>39</sup> According to the FBI, Jewish extremist organizations were responsible for twenty terrorist incidents in the 1980s.<sup>40</sup>

Despite the many incidents of anti-Arab violence at the hands of extremist groups, influential hate crime studies fail to include these groups as perpetrators of these crimes.<sup>41</sup> According to Professor Abraham, "Jewish extremist groups constitute an undeniable source of anti-Arab hate violence not discussed in conventional accounts of racist violence in the United States."<sup>42</sup>

Even less well publicized than the anti-Arab violence of extremist groups is the campaign by mainstream organizations, such as the Anti-Defamation League of B'nai B'rith (ADL), to intimidate and silence Arabs and Muslims. Established in the early 1900s as an organization with the mission of fighting anti-Semitism, the ADL gained a reputation as a leading anti-discrimination organization in the United States. Unfortunately, after the creation of Israel in 1948, the ADL added a new mission: to discredit or silence critics of Israel or defenders of Palestinian human rights.<sup>43</sup> The ADL has aggressively engaged in efforts to intimidate Arabs, Muslims, and others with similar views on the Middle East conflict, discouraging them from engaging in political debate. In 1983, for example, the ADL released a handbook entitled *Pro-Arab Propaganda in America: Vehicles and Voices*.<sup>44</sup> It lists as "anti-Israeli propagandists" some of the most prominent scholars on Middle East issues, including Columbia's Edward Said<sup>45</sup> and Harvard's Walid Khalidi,<sup>46</sup> as well as

---

38. *Id.* at 16.

39. *See id.* at 12-15.

40. *See Domestic Terrorism in the 1980's*, FBI LAW ENFORCEMENT BULL. (FBI, Wash., D.C.), Oct. 1987, at 13.

41. *See, e.g.*, CHRIS LUTZ, THEY DON'T ALL WEAR SHEETS: A CHRONOLOGY OF RACIST AND FAR RIGHT VIOLENCE 1980-86 (1987); ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH, EXTREMISM ON THE RIGHT: A HANDBOOK (1988).

42. Abraham, *Anti-Arab Racism*, *supra* note 35, at 157.

43. *See* Dr. Alfred M. Lilienthal, *The Changing Role of B'nai B'rith's Anti-Defamation League*, WASH. REP. ON MIDDLE E. AFF., June 1993, 18.

44. *See* ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH, PRO-ARAB PROPAGANDA IN AMERICA: VEHICLES AND VOICES: A HANDBOOK (1983) [hereinafter HANDBOOK].

45. *See* HANDBOOK, *supra* note 44, at 91 ("Said's renown as an academic figure within the PLO leadership has made him an attractive spokesman for the terrorist organization. He has frequently been a featured speaker at anti-Israel forums.").

R

R

humanitarian organizations dealing with the Middle East or Palestine.<sup>47</sup> Alfred Lilienthal, an influential commentator on Middle East issues, himself on the ADL's blacklist,<sup>48</sup> claimed "[m]any ADL charges against critics of Israel are totally inaccurate, questionable, or based upon half-truths" and the ADL often characterizes groups or individuals who criticize Israel or Zionism as "extremists" intent on eradicating Israel or inciting anti-Semitism in America.<sup>49</sup>

The handbook was widely distributed throughout the United States, according to critics, to challenge, harass, and silence groups and individuals on the list.<sup>50</sup> The ADL is not the only mainstream

---

46. *Id.* at 75 (listing Khalidi as one of these "anti-Israeli propagandists"). Other scholars have been listed in the HANDBOOK as well.

While still a member of the Senate, [James] Abourezk was a powerful spokesman for the Palestinian Arab cause and an outspoken critic of Israel and the "Zionist Lobby." In 1977, he chaired hearings on Israel's "colonization" of the West Bank, held before the Subcommittee on Immigration, Refugees and International Law of the Senate Judiciary Committee. Four of the five academic figures called as witnesses by the subcommittee were long-time critics of Israel. . . .

*Id.* at 49.

In 1974 and 1975, [Dr. Clovis] Maksoud made two extended propaganda tours of the United States as Special Envoy of the Arab League. Several themes then appeared time and again in Maksoud's speeches. He hammered at the "inherent intransigence" of Israeli policies and at the "unreasonableness" of the Jewish state. He said that Israel must become a "democratic secular state"—which was the propaganda line of the PLO.

*Id.* at 81.

47. According to the Arab Women's Council release, the group has been trying to convince the American public to pressure U.S. political leaders to stop the sale of U.S. weapons to Israel for use against the Lebanese people. . . . In the two week period between June 15 and July 1, 1982, the Arab Women's Council spent \$300,000 on their media drive against Israel.

*Id.* at 14.

48. The HANDBOOK states, "[Dr. Alfred] Lilienthal, who has described himself as a 'practicing Jew,' has on a number of occasions echoed the charge often made by Arab propagandists and anti-Semites that American Jews who support Israel, or who are Zionists or pro-Zionists, are involved in 'dual loyalty.'" HANDBOOK, *supra* note 44, at 78.

49. Lilienthal, *supra* note 43, at 18.

50. The Middle East Studies Association (MESA) has passed two resolutions criticizing the ADL for defaming students, teachers, and researchers as "pro-Arab propagandists." See Betsy Barlow, *Middle East Studies Association Condemns ADL Philadelphia Office*, WASH. REP. ON MIDDLE E. AFF., Jan.-Feb. 1997, at 72, available at [www.washington-report.org/backissues/0197/9701072.htm](http://www.washington-report.org/backissues/0197/9701072.htm); Phebe Marr, *MESA Condemns Blacklisting*, WASH. REP. ON MIDDLE E. AFF., Dec. 17, 1984, at 8. MESA members were targeted after the ADL and American Israel Public Affairs Committee distributed a list of allegedly anti-Israel, pro-Arab individuals and groups to student leaders at college campuses. See Marr, *supra*; Letter from Leonard Zakim,

organization to distribute lists of Arab-American individuals and groups and those working with them. The American-Israel Public Affairs Committee (AIPAC) issued two similar lists.<sup>51</sup> Through a campaign primarily on college campuses organized against groups and individuals on these lists, AIPAC and ADL have harassed and intimidated academics and activists for years.<sup>52</sup>

Aside from its campaign to discredit and silence academics on university campuses, the ADL also has sought to silence pro-Muslim and pro-Arab speakers from engaging in public debate concerning the Middle East. Most recently, the Florida ADL unsuccessfully lobbied the Florida Commission on Human Relations to exclude a Muslim representative from a panel at a civil rights conference.<sup>53</sup> Similarly, the American Jewish Committee sought to exclude the executive director of the New York chapter of the Council on American-Islamic Relations (CAIR) from participating in a public forum on multicultural understanding because he was "anti-Israel."<sup>54</sup> The ADL demanded that CAIR's Northern California director be prevented from testifying about hate crimes before the California Select Committee on Hate Crimes.<sup>55</sup>

The full extent of the ADL's activities against Arabs did not come to light until January 1993 when the results of an FBI investigation of a veteran San Francisco Police Department officer and an ADL-paid undercover agent became public. Law enforcement authorities uncovered computerized files on thousands of Arab Americans and information on Arab organizations, as well as many other mainstream organizations.<sup>56</sup> These files reflected surveillance of organizations and leaders, including the NAACP, Greenpeace, ACLU, Asian Law Caucus, National Lawyers Guild, Rainbow Coalition, Jews

---

Executive Director, Anti-Defamation League of B'nai B'rith, to Campus Jewish Leaders (Nov. 1983) (on file with Susan M. Akram).

51. See AMY KAUFMAN GOOTT & STEVEN J. ROSEN, *THE CAMPAIGN TO DISCREDIT ISRAEL* (1983); JONATHAN S. KESSLER & JEFF SCHWABER, *THE AIPAC COLLEGE GUIDE: EXPOSING THE ANTI-ISRAEL CAMPAIGN ON CAMPUS* (1984).

52. See PAUL FINDLEY, *THEY DARE TO SPEAK OUT* (1985); EDWARD TIVNAN, *THE LOBBY: JEWISH POLITICAL POWER AND AMERICAN FOREIGN POLICY* (1987); Naseer Aruri, *The Middle East on the US Campus*, *THE LINK*, May-June, 1985; Rachele Marshall, *The Decline of the B'nai B'rith: From Protector to Persecutor*, *WASH. REP. ON MIDDLE E. AFF.*, April, 1989, at 19, available at <http://www.washington-report.org/backissues/0489/8904019.htm>.

53. See Delinda C. Hanley, *ADL and AJC Demand Muslim Panelists Be Excluded*, *WASH. REP. ON MIDDLE E. AFF.*, Jan.-Feb. 2002, at 83 (2002).

54. See *id.* at 83.

55. See *id.*

56. See Rick Paddock, *A Spy for the Anti-Defamation League: Did a Liberal Civil Rights Group Get Caught with Its Binoculars Up?*, *CAL. J.*, June 1, 1993, at 2.

for Jesus, and three current or past members of the U.S. Congress.<sup>57</sup> The information included confidential law enforcement files and information from the Department of Motor Vehicles.<sup>58</sup> The FBI confirmed that the ADL provided the information from the surveillance activities to the South African government.<sup>59</sup> The ADL's attorney admitted that the ADL had passed surveillance information to Israel.<sup>60</sup> At least one U.S. citizen of Arab descent who had been the subject of surveillance was arrested in Israel when he visited the Israeli-occupied Palestinian territories.<sup>61</sup> When the spying became public, an array of civil rights lawsuits were filed.<sup>62</sup> As part of the settlement of a class action, the ADL was permanently enjoined from illegal spying on Arab American and other civil rights groups.<sup>63</sup>

Despite the settlement and the permanent injunction, the damage to the civil liberties of Arabs in the United States from the ADL's surveillance activities has been done. The discovery of espionage has contributed to the climate of fear for Arab and Muslim

57. See Abdeen Jabara, *The Anti-Defamation League: Civil Rights and Wrongs*, 45 COVERT ACTION, Summer 1993, at 28-29; see also S.F. DISTRICT ATTORNEY'S OFFICE, ORGANIZATIONAL VICTIMS OF ADL ESPIONAGE (1993), reprinted in AMERICAN-ARAB ANTI-DISCRIMINATION COMM. TIMES, May-June 1993, at 21 (on file with Susan M. Akram).

58. See Jabara, *supra* note 57, at 30-31; see also *Background on the ADL Spying Case*, attached to Center for Human Rights and Constitutional Law Settlement Memorandum, Sept. 2, 1999 (summary of evidence produced in *Am.-Arab Anti-Discrim. Comm. v. Anti-Defamation League of B'nai B'rith*, Civ. Action No. 93-6358-RAP(SHx) (C.D. Cal. 1999) (on file with Susan M. Akram)).

59. See Jabara, *supra* note 57, at 31; see also *Background on the ADL Spying Case*, *supra* note 58.

60. See Jabara, *supra* note 57, at 31; Jim McGee, *Jewish Group's Tactics Investigated*, WASH. POST, Oct. 19, 1993, at A1.

61. See Dennis Opatrny & Scott Winokur, *Israeli Man Held by Israel Linked to Spy Case*, S.F. EXAMINER, Feb. 12, 1993, at A1; Jabara, *supra* note 57, at 29.

62. See Second Amended Complaint for Injunctive and Declaratory Relief and Damages, *Am.-Arab Anti-Discrim. Comm. v. Anti-Defamation League of B'nai B'rith*, No. Cv. 93-6358-RAP (C.D. Cal. Oct. 20, 1993) (on file with Susan M. Akram); Bob Egelko, *Jewish Defense Group Settles S.F. Spying Suit*, S.F. CHRON., Feb. 23, 2002, at A23; Dennis King & Chip Berlet, *ADLgate*, TIKKUN, vol. 8, July-Aug. 1993, at 31; Dennis Opatrny & Scott Winokur, *Police Said to Help Spy on Political Groups*, S.F. EXAMINER, Mar. 9, 1993, at A1.

63. See Final Settlement, *Am.-Arab Anti-Discrim. Comm. v. Anti-Defamation League*, Civ. Action No. 93-6358 RAP (C.D. Cal. 1999). This class action was brought by the American-Arab Anti-Discrimination Committee, numerous civil rights organizations, and several individuals. See Martin Berg, *ADL Agrees to Stop Spying on Civil Rights Groups*, L.A. DAILY J., Sept. 28, 1999, at 1; Michael Gillespie, *Los Angeles Court Hands Down Final Judgment in Anti-Defamation League Illegal Surveillance Case*, WASH. REP. ON MIDDLE E. AFF., Dec. 1999, at 43.

R

R

R

R

R

Americans. U.S. intelligence agencies may have obtained information on politically active Arab groups and individuals from the ADL that could potentially place them under heightened government scrutiny.<sup>64</sup> Consequently, Arab Americans may perceive that the U.S. government is in collusion with Israeli and anti-Arab organizations. Such perceptions have been reinforced by the revelation that information provided by the ADL triggered the FBI investigation and arrest of a group of noncitizens, known as the "L.A. Eight," for alleged "technical violations" of the Immigration and Nationality Act.<sup>65</sup> Furthermore, "[n]o . . . major American Jewish organization has condemned the ADL for its political excesses or its documented association with Israeli intelligence organizations."<sup>66</sup> Our research has not discovered any publication in which the ADL admitted culpability or disavowed these activities.

In sum, the ADL has engaged in surveillance of Arab and Muslim groups in an apparent effort to intimidate and silence those voices it deems "anti-Semitic."<sup>67</sup> As Professor Abraham summarizes: "The overall effect of the ADL's practices is to reinforce the image of Arabs as terrorists and security threats, thereby creating a climate of fear, suspicion, and hostility towards Arab-Americans and others who espouse critical views of Israel, possibly leading to death threats and bodily harm."<sup>68</sup>

## 2. The Impact of Anti-Arab Images in Popular Culture

Racism against Arabs is not all the work of political activists. Importantly, feeding on existing stereotypes in U.S. society about Arabs and Muslims, media and film have found a ready audience for dangerous and one-dimensional images. Such depictions contribute to the racialization of Arabs and Muslims. In addition, in a

64. See McGee, *supra* note 60.

65. See Jabara, *supra* note 57, at 37; see also *infra* text accompanying notes 127-149 (discussing L.A. Eight case).

66. See Gillespie, *supra* note 63, at 43.

67. An ADL advertisement in the *New York Times*, entitled "We Hate Keeping Files on Hate," claims that:

For 83 years, ADL has considered it our duty to collect and process information on racists, anti-Semites and extremists by monitoring and analyzing publications of all kinds and to share our findings to help focus American public opinion on the dangers of bigotry and hatred. No other organization has published the quantity of such information as we have. The FBI, law enforcement agencies and the media have used our research and fact finding publications as a dependable source of information about prejudice and hate crimes.

Anti-Defamation League, Advertisement: *We Hate Keeping Files on Hate*, N.Y. TIMES, May 11, 1997, at E15 (copy on file with Susan M. Akram).

68. Abraham, *Anti-Arab Racism*, *supra* note 35, at 187.

R  
R  
R  
R

R

study on anti-Arab racism, Professor Abraham documents a range of racial epithets, intolerant speech, and violence directed at Arabs by private citizens and public officials.<sup>69</sup>

Jack Shaheen's review of U.S. films offers convincing evidence of the vilification of Arabs and Muslims by the movie industry.<sup>70</sup> Shaheen catalogues hundreds of Hollywood movies in which Arabs or Muslims are portrayed as terrorists or otherwise placed in a negative, often non-human, light. Muslims are shown as hostile invaders, or "lecherous, oily sheikhs intent on using nuclear weapons."<sup>71</sup> A far-too-common scene shows a mosque with Arabs at prayer, then cuts away to showing civilians being gunned down.<sup>72</sup>

These movies show Westerners hurling such epithets at Arabs as "assholes," "bastards," "camel-dicks," "pigs," "devil-worshippers," "jackals," "rats," "rag-heads," "towel-heads," "scum-buckets," "sons-of-dogs," "buzzards of the jungle," "sons-of-whores," "sons-of-unnamed goats," and "sons-of-she-camels."<sup>73</sup> Arab women are often portrayed as weak and mute, covered in black, or as scantily clad belly dancers.<sup>74</sup>

The U.S. Department of Defense has cooperated with Hollywood in making more than a dozen films showing U.S. soldiers killing Arabs and Muslims.<sup>75</sup> Audiences apparently embrace the demonization in these movies. As Shaheen notes,

[t]o my knowledge, no Hollywood WWI, WWII, or Korean War movie has ever shown America's fighting forces slaughtering children. Yet, near the conclusion of [the movie] *Rules of Engagement*, US marines open fire on the Yemenis, shooting 83 men, women, and children. During the scene, viewers rose to

69. See Abraham, *Anti-Arab Racism*, *supra* note 35, at 187. For detailed reports, see AMERICAN-ARAB ANTI-DISCRIMINATION COMM., 1991 REPORT ON ANTI-ARAB HATE CRIMES: POLITICAL AND HATE VIOLENCE AGAINST ARAB-AMERICANS; AMERICAN-ARAB ANTI-DISCRIMINATION COMM., 1995 REPORT ON ANTI-ARAB RACISM: HATE CRIMES, DISCRIMINATION AND DEFAMATION OF ARAB-AMERICANS; AMERICAN-ARAB ANTI-DISCRIMINATION COMM., 1996-97 REPORT ON HATE CRIMES & DISCRIMINATION AGAINST ARAB-AMERICANS; AMERICAN-ARAB ANTI-DISCRIMINATION COMM., 1998-2000 REPORT ON HATE CRIMES AND DISCRIMINATION AGAINST ARAB-AMERICANS. The reports are archived at <http://www.adc.org>.

70. See JACK G. SHAHEEN, REEL BAD ARABS: HOW HOLLYWOOD VILIFIES A PEOPLE (2001); see also Saito, *supra* note 16, at 12-14 (arguing that racial stereotypes of Arabs and Muslims in films and popular culture affect law enforcement and private conduct).

71. SHAHEEN, *supra* note 70, at 9.

72. See *id.*

73. *Id.* at 11.

74. See *id.* at 22-24.

75. See *id.* at 15.

R

R

R

their feet, clapped and cheered. Boasts director Friedkin, "I've seen audiences stand up and applaud the film throughout the United States."<sup>76</sup>

One-sided film portrayals omit images of Arabs and Muslims as ordinary people with families and friends, or as being outstanding members of communities, scholars, writers, or scientists.<sup>77</sup> Few U.S. movies have depicted Arabs or Muslims in a favorable light, and even fewer have included them in leading roles.<sup>78</sup> Commentators rarely criticize the unbalanced depiction of Arabs and Muslims.<sup>79</sup> The stereotyping and demonizing of Arabs and Muslims by American films may well have gone largely unnoticed because they are entirely consistent with widespread attitudes in U.S. society.

Reinforcing the anti-Arab, anti-Muslim stereotypes portrayed in film, public officials have openly used intolerant speech toward Arabs and Muslims—speech that would be deemed clearly unacceptable if directed at other minority groups.<sup>80</sup> For example, a mayoral candidate distributed a campaign brochure in Dearborn, a suburb of Detroit, Michigan, in which he claimed the city's Arab Americans "threaten our neighborhoods, the value of our property and a darned good way of life."<sup>81</sup> In 1981, the governor of Michigan proclaimed that Michigan's economic woes were due to the "damn Arabs."<sup>82</sup> Such statements by public officials fuel the perception that prejudice and animosity directed at Arabs and Muslims are socially acceptable.<sup>83</sup>

Moreover, prominent politicians have returned financial contributions from Arab- and Muslim-American groups, fearing the political risks of the acceptance of such monies. For example, in the 1984 presidential campaign, Walter Mondale returned \$5,000 in contributions made by U.S. citizens of Arab ancestry.<sup>84</sup> Philadelphia mayoral candidate Wilson Goode returned over \$2,000 in cam-

76. *Id.*

77. Negative stereotypical depictions in popular culture have been a problem for other minority groups as well. *See supra* note 21 (citing authorities).

78. *See* Shaheen, *supra* note 70, at 34–35.

79. *See id.* at 31–33.

80. *See* Abraham, *Anti-Arab Racism*, *supra* note 35, at 188–92.

81. Michael Guido, *Let's Talk About City Parks and the Arab Problem*, cited in Abraham, *Anti-Arab Racism*, *supra* note 35, at 191.

82. Abraham, *Anti-Arab Racism*, *supra* note 35, at 196 (quoting Governor Milliken).

83. *See id.* at 195.

84. *See Mondale Campaign Returns Funds to U.S. Arabs*, N.Y. TIMES, Aug. 25, 1984, at L28.

R

R

R

R

R



paign contributions from Arab Americans.<sup>85</sup> In his first congressional race, Joe Kennedy returned \$100 to James Abourezk, a former U.S. Senator who is Arab-American.<sup>86</sup> New York Senator Hillary Clinton returned \$50,000 to Muslim organizations.<sup>87</sup> Although several of these politicians stated that they returned the funds because of the contributors' anti-Semitic remarks, the perception remains that Arab and Muslim Americans cannot legitimately participate in the body politic without undergoing careful scrutiny. For similar reasons, New York City Mayor Rudolph Guiliani returned ten million dollars donated by a Saudi Arabian prince for the victims of the World Trade Center destruction due to a public outcry caused by the contributor's criticism of U.S. foreign policy in the Middle East.<sup>88</sup>

### 3. Racism in Times of National Crises

Times of crisis are often accompanied by hostility toward minorities in the United States. For Arabs and Muslims, this may be even more problematic, as perpetrators of hate crimes against Arabs and Muslims frequently fail to differentiate among persons based on religion or ethnic origin, from Pakistanis, Indians, Iranians, and Japanese to Muslims, Sikhs and Christian Arabs.<sup>89</sup> The widespread perception in the United States is that Arabs and Muslims are identical and eager to wage a holy war against the United States.<sup>90</sup> In fact, according to a 1993 report, only 12% of the Muslims in the United States at that time were Arab,<sup>91</sup> and Arab Mus-

---

85. See Stephen Franklin, *Arab-Americans Fall Victim to Mideast: Kuwaiti Ship Flagging Sparks Fears*, CHI. TRIB., July 12, 1987, § 1, at 19.

86. *The Untouchables: Immigration Service Arrests Palestinians*, 244 THE NATION 348 (1987).

87. See Dean E. Murphy, *Mrs. Clinton Says She Will Return Money Raised by a Muslim Group*, N.Y. TIMES, Oct. 26, 2000, at A1. Politicians have at times treated contributions by Asian Americans in similar ways. See FRANK H. WU, *YELLOW: RACE IN AMERICA BEYOND BLACK AND WHITE* 104–16 (2002) (summarizing the controversy during the Clinton administration about receipt of campaign contributions from “foreign” sources, which resulted in the investigation of many Asian-American contributors).

88. See Neil MacFarquhar, *Saudi Sheik Regrets Giuliani Turning Down His Donation*, N.Y. TIMES, Oct. 13, 2001, at B4.

89. See, e.g., *supra* text accompanying note 5 (discussing murder of Sikh as act of vengeance against Arabs and Muslims for September 11 terrorism).

90. See Suad Joseph, *Against the Grain of the Nation—The Arab*, in ARABS IN AMERICA: BUILDING A NEW FUTURE 260, 261 (Michael W. Suleiman ed., 1999); Michael J. Whidden, Note, *Unequal Justice: Arabs in America and United States Antiterrorism Legislation*, 69 FORDHAM L. REV. 2825, 2850 (2001).

91. See Lynne Duke, *Islam is Growing in U.S. Despite an Uneasy Image*, WASH. POST, Oct. 24, 1993, at A1.

lims are even a minority in the Arab-American community.<sup>92</sup> Although there are Muslim “extremists,” the majority of Muslims are “decent, law-abiding, productive citizens.”<sup>93</sup>

Because of the lack of differentiation between different types of Arabs and Muslims, terrorist acts by small groups of Arabs and Muslims often have been followed by generalized hostility toward entire communities of Arabs and Muslims in the United States. For example, after Lebanese Shi’a gunmen in 1985 highjacked TWA Flight 847 to Beirut, beat an American on the plane to death, and held the remaining passengers hostage for over two weeks,<sup>94</sup> violent attacks against persons of Arab and Muslim origin occurred across the United States.<sup>95</sup> Islamic centers and Arab-American organizations were vandalized and threatened. A Houston mosque was firebombed. A bomb exploded in the American-Arab Anti-Discrimination Committee office in Boston, severely injuring two policemen.<sup>96</sup> Later that same year, after terrorists hijacked the Achille Lauro cruise liner and murdered a passenger, a wave of anti-Arab violence swept the country, including the bombing of an American-Arab Anti-Discrimination Committee office that killed its regional executive director.<sup>97</sup>

In 1986, in apparent response to the Reagan Administration’s “war on terrorism” directed at Libya,<sup>98</sup> another episode of anti-Arab

92. See Michael W. Suleiman, *Introduction: The Arab Immigrant Experience, in ARABS IN AMERICA: BUILDING A NEW FUTURE*, *supra* note 90, at 18. R

93. Editorial, *Don’t Judge Islam by Verdicts*, ORLANDO SENTINEL, Mar. 8, 1994, at A10.

94. See Bernard Weinraub, *39 American Hostages Free After 17 Days*, N.Y. TIMES, July 1, 1985, at A1.

95. See Abraham, *Anti-Arab Racism*, *supra* note 35, at 161–62; see also Bob Baker, *Anti-Arab Violence Represents 17% of Racial, Religious Attacks in 1985*, L.A. TIMES, Mar. 1, 1986, part 1, at 29 (discussing hate crime reports). R

96. See Abraham, *Anti-Arab Racism*, *supra* note 35, at 162; see also Ethnically Motivated Violence Against Arab-Americans: Hearing Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary, 99<sup>th</sup> Cong. 57, 64 (1988) [hereinafter *Violence Against Arab-Americans Hearings*]. R

97. At the time of this murder, the *New York Times* quoted JDL head Irv Rubin as stating that “No Jew or American should shed one tear for the destruction of a P.L.O. front in Santa Ana or anywhere else in the world.” *Bomb Kills Leader of U.S. Arab Group*, N.Y. TIMES, Oct. 12, 1985, at A5. In 2002, Rubin was indicted for conspiring to bomb a Los Angeles mosque, the Muslim Public Affairs Council, and the office of U.S. Congress member Darrell Issa. See David Rosenzweig, *2 JDL Leaders Are Indicted by U.S. Grand Jury*, L.A. TIMES, Jan. 11, 2002, at B3; see also Delinda C. Hanley, *Freeze on Jewish Defense League Assets Called for After JDL Bomb Plot Foiled*, WASH. REP. ON MIDDLE EAST AFFAIRS, Jan.–Feb. 2002, at 16 (discussing Jewish Defense League violence against Arabs and Muslims).

98. See *infra* text accompanying notes 111–15.

harassment and violence broke out. The same night of a U.S. bombing raid on Libya, the American-Arab Anti-Discrimination Committee national office in Washington received threats. Shortly thereafter, the Detroit American-Arab Anti-Discrimination Committee office, the Dearborn Arab community center, and the Detroit Arab-American newspaper received bomb threats.<sup>99</sup> Threats, beatings and other violent attacks on Arabs were reported across the United States.<sup>100</sup> At this time, someone broke into a Palestinian family’s home, set off a smoke bomb inside the house, and painted slogans such as “Go Back to Libya” on the walls.<sup>101</sup>

The Gulf War intensified anti-Arab hostility in the United States. The American-Arab Anti-Discrimination Committee reported four anti-Arab hate crimes for 1990 before the invasion of Kuwait in August.<sup>102</sup> Between the invasion and February 1991, the Committee reported 175 incidents.<sup>103</sup> When U.S. intervention commenced in January 1991, Arab and Muslim businesses and community organizations were bombed, vandalized, and subjected to harassment.<sup>104</sup>

4. The U.S. Government and the Role of Law

Institutional racism through the law and its enforcement has contributed to the racialization and targeting of Arabs and Muslims.<sup>105</sup> The federal government’s actions taken in the name of fighting terrorism have been followed by indiscriminate threats and violence against Arabs and Muslims in the United States. This

99. See Abraham, *Anti-Arab Racism*, *supra* note 35, at 171; AMERICAN-ARAB ANTI-DISCRIMINATION COMM., HARASSMENT AND VIOLENCE LOG SHEET 16–17 (1986) (on file with Susan M. Akram); see also *Violence Against Arab-Americans Hearings*, *supra* note 96, at 1-2.

R

100. See AMERICAN-ARAB ANTI-DISCRIMINATION COMM., *supra* note 99, at 8–27; Abraham, *Anti-Arab Racism*, *supra* note 35, at 171–75.

R

R

R

R

101. See Abraham, *Anti-Arab Racism*, *supra* note 35, at 172 (the mother of the family told a reporter that “their house had been broken into and a bedroom set afire the previous year (1985),” and that statements with an “Arab Go Home” theme were painted on the family car); see also Steve Lerner, *Terror Against Arabs in America*, NEW REPUBLIC, July 28, 1986, at 24.

102. See AMERICAN-ARAB ANTI-DISCRIMINATION COMM., 1991 REPORT ON ANTI-ARAB HATE CRIMES, *supra* note 69, at 6.

R

103. See *supra* note 69 (citing reports); AMERICAN-ARAB ANTI-DISCRIMINATION COMM. SPECIAL REPORT, 1991 REPORT ON ANTI-ARAB HATE CRIMES: POLITICAL AND HATE VIOLENCE AGAINST ARAB AMERICANS 6 (1992).

R

104. See Abraham, *Anti-Arab Racism*, *supra* note 35, at 204; AMERICAN-ARAB ANTI-DISCRIMINATION COMM. SPECIAL REPORT, *supra* note 103, at 11–22.

R

R

105. See generally Ian F. Haney López, *Institutional Racism: Judicial Conduct and a New Theory of Racial Discrimination*, 109 YALE L.J. 1717 (2000) (offering general theory of institutional racism and the law).

frightening pattern has repeated itself in the wake of September 11.<sup>106</sup>

The Nixon Administration's "Operation Boulder" was an early effort of the U.S. government to target Arabs in the United States for special investigation and discourage their political activism on Middle Eastern issues.<sup>107</sup> Ostensibly designed to confront the threat posed by terrorists who took hostages and murdered athletes at the 1972 Munich Olympics, the President's directives authorized the FBI to investigate people of "Arabic background" to determine their potential relationship with "terrorist" activities related to the Arab-Israeli conflict.<sup>108</sup> The FBI admittedly wiretapped prominent Detroit lawyer Abdeen Jabara, then-President of the Association of Arab-American University Graduates.<sup>109</sup>

Later in the 1970s, President Carter took numerous steps against Iranians and Iran in response to the crisis in which U.S. citizens were held hostage in Teheran.<sup>110</sup> In the 1980s, the Reagan Administration's foreign policy also involved combating "terrorism." President Reagan in 1986 announced that the U.S. government had evidence that Libyan leader Muammar Qaddafi was responsible for terrorist attacks, such as those at the Rome and Vi-

---

106. See *infra* text accompanying notes 194–349.

107. In 1972, President Nixon assembled a special committee of cabinet officials to formulate special measures to combat "terrorism"; the committee's recommendations included surveillance of citizens, immigrants, and nonimmigrants, and various immigration restrictions on noncitizens from Arab nations. See M. Cherif Bassiouni, *Introduction* to *THE CIVIL RIGHTS OF ARAB-AMERICANS: "THE SPECIAL MEASURES"*, at v–vi (M. Cherif Bassiouni ed., Jan., 1974). A number of the recommendations, including visa restrictions, were implemented under the name "Operation Boulder." See 37 Fed. Reg. 20,176 (Sept. 27, 1972) (to be codified at 22 C.F.R. pt. 41 and 8 C.F.R. pt. 212); *Older Arab-Americans Fear Return to '70's Monitoring Nixon Intelligence Operation Included Wiretapping, Watch Lists*, DALLAS MORNING-NEWS, Sept. 28, 2001, at 30A. For analysis of the negative impacts on the civil rights of Operation Boulder on Arab Americans, see Abdeen M. Jabara, *Operation Arab: The Nixon Administration's Measures in the United States After Munich*, in *THE CIVIL RIGHTS OF ARAB-AMERICANS: "THE SPECIAL MEASURES"*, *supra*, at 1–14.

108. For a detailed discussion of Operation Boulder, the special measures authorized by President Nixon, and the newspaper coverage thereof, see Charles R. Gesser, *A Non-Arab Looks at an Anti-Arab American Policy*, in *THE CIVIL RIGHTS OF ARAB-AMERICANS: "THE SPECIAL MEASURES"*, *supra* note 107, at 16–27, 21, 17; Elaine Hagopian, *Minority Rights in a Nation-State: The Nixon Administration's Campaign Against Arab-Americans*, J. PALESTINE STUDS., Autumn–Winter, 1975–76.

109. See press release, Associated Press (May 22, 1974), *cited in* Hagopian, *supra* note 108, at 102. Jabara later filed a civil rights suit against the federal government. See *Jabara v. Webster*, 691 F.2d 272 (6th Cir. 1982), *cert. denied*, 464 U.S. 863 (1983).

110. See *infra* text accompanying notes 252–58.

R

R

R

R

enna airports, and was planning further attacks in the United States.<sup>111</sup> The U.S. Navy later that year shot down two Libyan planes off the coast of Libya. President Reagan proclaimed that “we have the evidence” that Qaddafi was sending hit teams to assassinate the U.S. President.<sup>112</sup> Despite official responses from the Austrian, Italian, and Israeli governments that there was no evidence of Libyan involvement in the Rome and Vienna attacks, or that any Libyan “hit squads” had been sent to the United States,<sup>113</sup> the United States bombed Libya.<sup>114</sup> Vandalism and violence against United States residents of Arab or Middle Eastern origin and their community centers, mosques, businesses, and homes followed the public announcements.<sup>115</sup>

In the 1990s, after the U.S. invasion of Kuwait, the U.S. government’s “war on terrorism” shifted focus to Iraq and its leader, Saddam Hussein.<sup>116</sup> The Bush administration accused Iraqi forces of atrocities against Kuwaitis.<sup>117</sup> The administration then launched a surveillance program directed at Arab Americans. The FBI interrogated Arab and Muslim leaders, activists, and anti-war demonstrators across the country.<sup>118</sup> The Department of Justice instituted fingerprinting of all residents and immigrants in the United States of Arab origin; the Federal Aviation Administration commenced a system of airline profiling of persons from the Arab world.<sup>119</sup> Pri-

111. *See generally* NOAM CHOMSKY, *PIRATES & EMPERORS: INTERNATIONAL TERRORISM IN THE REAL WORLD* 117–30 (1987).

112. *See id.* at 123.

113. A faction of the Palestinian Liberation Organization (PLO) that had broken with Yasser Arafat was ultimately found to be responsible for the attacks on the Rome and Vienna airports. “[T]here [was] not the slightest evidence to implicate Libya.” CHOMSKY, *supra* note 111, at 118. FBI Executive Assistant Director Oliver Revell later admitted “that threats by Col. Qaddafi to send masses of suicide terrorists into the streets of America were ‘a complete fabrication.’” John McCaslin, *Terrorists Trained Abroad Are Known to Live Here*, WASH. TIMES, Mar. 27, 1986, at A1.

114. *See* CHOMSKY, *supra* note 111, at 117–19.

115. *See* AMERICAN-ARAB ANTI-DISCRIMINATION COMM., *supra* note 99, at 8–27.

116. *See* Alexander Cockburn, *Beat the Devil*, 252 THE NATION 114 (1991).

117. *See* NOAM CHOMSKY, *WHAT UNCLE SAM REALLY WANTS* 60–68 (1997). *See generally* PHILIP M. TAYLOR, *WAR AND THE MEDIA: PROPAGANDA AND PERSUASION IN THE GULF WAR* 251–53 (1992) (addressing discrepancies between the portrayal of the Gulf War by the Iraqi UN members and the U.S. government).

118. *See* Akram, *supra* note 17, at 52 n.5; Emily Sachar, *FBI Grills NY Arab-Americans*, NEWSDAY, Jan. 29, 1991, at 6.

119. *See* Akram, *supra* note 17, at 52–53; Lisa Belkin, *For Many Arab-Americans, FBI Scrutiny Renewes Fears*, N.Y. TIMES, Jan. 12, 1991 at A4; Sharon LaFraniere, *FBI Starts Interviewing Arab-American Leaders*, WASH. POST., Jan. 9, 1991, at A14; Sachar, *supra* note 118, at 6; *see also* Whidden, *supra* note 90, at 2879–80 (reviewing race

R

R

R

R

R

R

vate harassment and violence against the Arab and Muslim communities followed.<sup>120</sup>

Foreign policy has played a large role behind immigration measures directed at Arabs and Muslims in the United States. The Immigration and Naturalization Service (INS) sought to deport noncitizens of Palestinian ancestry<sup>121</sup> at the same time that the federal government attempted to shut down Palestine Liberation Organization (PLO) offices in the United States<sup>122</sup> and at the United Nations.<sup>123</sup> In the 1980s, President Reagan issued a secret National Security Decision Directive that authorized the creation of a network of agencies designed to prevent “terrorists” from entering or remaining in the United States.<sup>124</sup> Under one proposal, intelligence agencies would provide the INS with “names, nationalities and other identifying data and evidence relating to *alien undesirables and suspected terrorists* believed to be in . . . the U.S.”<sup>125</sup> The Alien Border Control Committee also considered an INS-created strategy called “Alien Terrorists and Undesirables: A Contingency Plan,” which called for mass arrests and detentions of noncitizens from Arab nations and Iran and suggested using ideological exclusion grounds in the immigration laws to remove noncitizens from Arab countries and Iran already in the United States.<sup>126</sup>

---

profiling of Arabs and Muslims on airplanes); AMERICAN-ARAB ANTI-DISCRIMINATION COMM., 1998–2000 REPORT, *supra* note 69 (same).

120. *See supra* note 69 (citing reports summarizing anti-Arab discrimination and hate crimes).

121. *See infra* text accompanying notes 127–49 (discussing the U.S. government’s efforts to deport the L.A. Eight because of their political activities).

122. In 1987, Congress enacted a law mandating the closure of the Palestine Information Office (PIO) in Washington, which represents the PLO in the United States, and the PLO Observer Mission at the United Nations. Constitutional challenges to the law failed. *See Palestine Info. Office v. Schultz*, 853 F.2d 932, 934 (D.C. Cir. 1988); *Mendelsohn v. Meese*, 695 F. Supp. 1474, 1490 (S.D.N.Y. 1988).

123. *See United States v. Palestine Liberation Org.*, 695 F. Supp. 1456 (S.D.N.Y. 1988) (rejecting U.S. government’s efforts to close the PLO office used in connection with its role as Permanent Observer to the United Nations).

124. *See* National Security Decision Directive No. 207, *The National Program for Combatting Terrorism*, at <http://www.gwu.edu/~nsarchiv/NSAEDD/NSAEBB55/nsdd207.pdf> (Jan. 20, 1986).

125. *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) (submission of Investigations Division of the Immigration and Naturalization Service) (emphasis added).

126. *See* Memorandum from Investigations Div., Immigration & Naturalization Serv., Alien Border Control (ABC) Group IV–Contingency Plans 16 (Nov. 18, 1986) (with attachments including INS, *Alien Terrorists and Undesirables: A Contin-*

B. *Efforts to Stifle Political Dissent: The Case of the L.A. Eight*

Critics long have pointed out that the United States has discriminated against Arabs and Muslims in applying the terrorist exclusion provisions of the Immigration and Nationality Act (INA), the comprehensive U.S. immigration law.<sup>127</sup> Arabs, particularly Palestinians, are the primary groups subject to many of the terrorism provisions.<sup>128</sup> During the Gulf War crisis, for example, government officials fingerprinted and photographed all entrants with Iraqi or Kuwaiti passports without regard to evidence of past terrorist activities or sympathies.<sup>129</sup>

Related to the terrorist provisions in the immigration laws are those permitting exclusion of noncitizens based on political beliefs or associations, passed during the anti-communist fervor of the McCarthy era.<sup>130</sup> The courts generally upheld application of the ideological exclusions,<sup>131</sup> which provoked sharp academic criticism.<sup>132</sup>

---

*gency Plan* (1986)) (on file with Susan M. Akram). Nationals of Algeria, Libya, Tunisia, Iran, Jordan, Syria, Morocco, and Lebanon were targeted under the plan, which had three phases, culminating in a proposal for apprehending over one thousand persons and detaining them in Louisiana. *See id.* *See also infra* text accompanying notes 130–35 (discussing ideological exclusion grounds).

127. *See, e.g.,* John A. Scanlan, *American-Arab—Getting the Balance Wrong—Again!*, 52 ADMIN. L. REV. 347, 363–68 (2000) (analyzing how U.S. government employed ideological exclusions against Arabs and Muslims); David Cole, *Guilt by Association: It's Alive and Well at INS*, 256 THE NATION 198–99 (1993).

128. *See* Akram, *supra* note 17, at 51; Whidden, *supra* note 90, at 2825.

129. *See* Sharon LaFraniere & George Lardner, *U.S. Set to Photograph, Fingerprint all New Iraqi and Kuwaiti Visitors*, WASH. POST, Jan. 11, 1991, at A23. The Department of Justice ordered all immigrants with Iraqi or Kuwaiti passports to be fingerprinted and photographed. The FBI also interviewed 200 Arab-American business and community leaders under the guise of uncovering “terrorist” affiliations. For plans to resurrect these procedures, see Addition of Provision for the Registration and Fingerprinting of Nonimmigrants Designated by the Attorney General: Removal of the Requirement for the Registration and Fingerprinting of Certain Nonimmigrants Bearing Iraqi and Kuwaiti Travel Documents, 58 Fed. Reg. 68,024 (Dec. 23, 1993) (to be codified at 8 C.F.R. pt. 264).

130. *See* Immigration and Nationality Act (INA) § 212(a)(27)–(29), 8 U.S.C. § 1182(a)(27)–(29) (1952) (repealed 1990). Between 1952 and 1984, over 8000 noncitizens were denied entry into the United States because of their political beliefs or associations. *See* Dave Martella, Comment, *Defending the Land of the Free and the Home of the Fearful: The Use of Classified Information to Deport Suspected Terrorists*, 7 AM. U. J. INT'L L. & POL'Y 951, 962–63 (1992) (citing INS estimates).

131. *See, e.g.,* Kleindienst v. Mandel, 408 U.S. 753, 754–55 (1972); Allende v. Schultz, 845 F.2d 1111 (1st Cir. 1988); Abourezk v. Reagan, 785 F.2d 1043 (D.C. Cir. 1986), *aff'd by equally divided Court*, 484 U.S. 1 (1987); Harvard Law School Forum v. Schultz, 633 F. Supp. 525 (D. Mass. 1986).

132. *See, e.g.,* Philip Monrad, Comment, *Ideological Exclusion, Plenary Power, and the PLO*, 77 CAL. L. REV. 831 (1989); John A. Scanlan, *Aliens in the Marketplace of*

In 1977, Congress enacted the McGovern Amendment, which permitted the Attorney General to waive the exclusion of any noncitizen affiliated with an organization proscribed by the United States.<sup>133</sup> In 1979, Congress created a single exception to the McGovern Amendment that barred waiver of the exclusion for PLO officials or representatives.<sup>134</sup> In any event, through a variety of means, consular officers could continue to exclude a person based on ideology.<sup>135</sup>

The federal government's efforts to remove the "L.A. Eight" illustrate the extremes to which it will resort in order to deport political dissidents from the country.<sup>136</sup> The case began before dawn on January 26, 1987, when officers of the FBI, INS, and Los Angeles police department descended on the Los Angeles home of Khader

---

*Ideas: The Government, the Academy, and the McCarran-Walter Act*, 66 TEX. L. REV. 1481 (1988); Steven R. Shapiro, *Ideological Exclusions: Closing the Border to Political Dissidents*, 100 HARV. L. REV. 930 (1987).

133. See 22 U.S.C. § 2691 (1988) (denying waiver to noncitizens connected with the Palestine Liberation Organization, as well as representatives of organizations advocating totalitarian government).

134. A later version of the McGovern Amendment, codified as 22 U.S.C. § 2691 (1988) by the Foreign Relations Authorization Act, Pub. L. No. 100-204, § 901, 101 Stat. 1331, 1399-1400 (1987), maintained the PLO exception. This temporary provision later was made permanent, see Foreign Relations Authorization Act, Pub. L. No. 101-246, § 128, 104 Stat. 15, 30 (1990), before repeal of most of the ideological exclusion provisions by the Immigration Act of 1990, Pub. L. No. 101-649, § 601(a), 104 Stat. 4978, 5071 (1990). The exception states that the waiver is inapplicable to "an alien who is an officer, official, representative, or spokesman of the Palestine Liberation Organization." *Id.* (amending INA § 212(a), 8 U.S.C. § 1182(a)).

135. The McGovern Amendment did not wholly eliminate ideological exclusion of noncitizens for at least two reasons. First, the waiver only applied to exclusion under INA § 212(a)(28), which permitted consular officers to exclude noncitizens under other ideological exclusion grounds. Second, the waivers were discretionary and unlikely to be approved without the recommendation of the State Department. See Keisha A. Gary, *Congressional Proposals to Revive Guilt by Association: An Ineffective Plan to Stop Terrorism*, 8 GEO. IMMIGR. L.J. 227, 237 (1994).

136. See Johnson, *supra* note 14, at 865-69. For consideration of this case from different vantage points, see William C. Banks, *The "L.A. Eight" and Investigation of Terrorist Threats in the United States*, 31 COLUM. HUM. RTS. L. REV. 479 (2000) (analyzing law concerning surveillance of foreign terrorism suspects); Berta Esperanza Hernández-Truyol, *Nativism, Terrorism, and Human Rights—The Global Wrongs of Reno v. American-Arab Anti-Discrimination Committee*, 31 COLUM. HUM. RTS. L. REV. 521 (2000) (examining inconsistencies between U.S. immigration law and international human rights law in dealing with the L.A. Eight); Hiroshi Motomura, *Judicial Review in Immigration Cases After AADC: Lessons From Civil Procedure*, 14 GEO. IMMIGR. L.J. 385 (2000) (analyzing legal implications of Supreme Court decision); Gerald L. Neuman, *Terrorism, Selective Deportation and the First Amendment after Reno v. AADC*, 14 GEO. IMMIGR. L.J. 313 (2000) (same).

R



Hamide, a U.S. lawful permanent resident, and his Kenyan-born wife Julie Mungai.<sup>137</sup> The couple were handcuffed, told they were being arrested for “terrorism,” and taken into custody while police blocked the street and an FBI helicopter hovered overhead.<sup>138</sup> Six other individuals were arrested that morning.<sup>139</sup>

The INS sought to remove the L.A. Eight from the United States based on political ideology. Both the director of the FBI and the regional counsel of the INS testified before Congress that the sole basis of the government’s efforts to deport the L.A. Eight was their political affiliations. In the words of FBI director William Webster, “[a]ll of them were arrested because they are alleged to be members of a world-wide Communist organization which under the [INA] makes them eligible for deportation . . . . *If these individuals had been United States citizens, there would not have been a basis for their arrest.*”<sup>140</sup> The evidence underlying the government’s charges amounted to a claim that the L.A. Eight read or distributed literature linked to the Popular Front for the Liberation of Palestine (PFLP), which the district court found was engaged in a wide range of lawful activities, from providing education, health care, social services, and day care, to cultural and political activities.<sup>141</sup> The dis-

137. Published decisions in the lengthy case include *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471 (1999); *Am.-Arab Anti-Discrimination Comm. v. Reno*, 170 F.3d 1264 (9th Cir. 1999); *Am.-Arab Anti-Discrimination Comm. v. Reno*, 132 F.3d 531 (9th Cir. 1997); *Am.-Arab Anti-Discrimination Comm. v. Reno*, 119 F.3d 1367 (9th Cir. 1997); *Am.-Arab Anti-Discrimination Comm. v. Reno*, 70 F.3d 1045 (9th Cir. 1995); *Am.-Arab Anti-Discrimination Comm. v. Thornburgh*, 970 F.2d 501 (9th Cir. 1991); *Am.-Arab Anti-Discrimination Comm. v. Thornburgh*, 940 F.2d 445 (9th Cir. 1991); *Am.-Arab Anti-Discrimination Comm. v. Meese*, 714 F. Supp. 1060 (C.D. Cal. 1989).

138. For a description of the arrests, charges, and proceedings against the L.A. Eight, see Akram, *supra* note 17, at 73; William Overend & Ronald L. Soble, 7 *Tied to PLO Terrorist Wing Seized by INS*, L.A. TIMES, Jan. 27, 1987, at A1; see also JAMES X. DEMPSEY & DAVID COLE, *TERRORISM AND THE CONSTITUTION: SACRIFICING CIVIL LIBERTIES IN THE NAME OF NATIONAL SECURITY* 33–34 (1999) (discussing the L.A. Eight case); Susan M. Akram, *Historic Court Decision Protects First Amendment Rights of Dissident Aliens*, 18 IMMIGRATION NEWSLETTER 1 (Nat’l Immigration Project of Nat’l Lawyers Guild, Spring 1989) (same). Information provided by the ADL triggered the FBI investigation of the L.A. Eight. See *supra* text accompanying notes 56–65 (discussing ADL’s surveillance efforts).

139. See Banks, *supra* note 136, at 479.

140. *Nomination of William H. Webster: Hearings before the Select Comm. on Intelligence of the United States Senate*, 100th Cong., 1st Sess. 95 (1987) (testimony of FBI Director William Webster) (emphasis added).

141. See *Am.-Arab Anti-Discrimination Comm. v. Reno*, 119 F.3d 1367, 1370 (9th Cir. 1997); Banks, *supra* note 136, at 505.

R

R

R

R

strict court ruled that the ideological exclusion grounds violated the First Amendment.<sup>142</sup>

In 1990, while the L.A. Eight case was pending, Congress repealed the ideological exclusion grounds from the immigration laws.<sup>143</sup> The INS then instituted new proceedings against the L.A. Eight based on charges of terrorism, as well as other grounds.<sup>144</sup> The INA permits removal of noncitizens who have “engaged in terrorist activity,” which is defined as having committed, “in an individual capacity or as a member of an organization, an act of terrorist activity or an act which the actor knows, or reasonably should know, affords material support to any individual, organization, or government in conducting a terrorist activity at any time. . . .”<sup>145</sup> This broad language authorizes the INS to deport or exclude an individual who has donated money to an organization for its legal, social, or charitable activities if any part of that organization also has engaged in terrorism, as broadly defined.<sup>146</sup>

The thrust of the INS case was based on the L.A. Eight’s affiliation with the PFLP. Because this provision had never previously been used by the INS to seek to deport a noncitizen from the United States, the L.A. Eight claimed that the federal government selectively enforced the immigration laws against them for exercising their First Amendment rights.<sup>147</sup> In the end, the Supreme Court ruled that the 1996 amendments to the immigration laws barred judicial review of their claim.<sup>148</sup>

142. See *Am.-Arab Anti-Discrimination Comm. v. Meese*, 714 F. Supp. 1060 (C.D. Cal. 1989).

143. See Immigration Act of 1990, Pub. L. No. 101-649 § 601(a), 101 Stat. 4978, 5071 (1990) (amending INA § 212(a), 8 U.S.C. § 1182(a)).

144. See *Am.-Arab Anti-Discrimination Comm. v. Reno*, 70 F.3d 1045, 1053 (9th Cir. 1995).

145. INA § 212(a)(3)(B)(iii), 8 U.S.C. § 1182(a)(3)(B)(iii) (emphasis added). After September 11, Congress further expanded the definition of “terrorist activity.” See *infra* text accompanying notes 303–06.

146. For criticism of the INA’s broad definition of “terrorist activity,” see Neuman, *supra* note 136, at 322–27; Susan Dente Ross, *In the Shadow of Terror: The Illusive First Amendment Rights of Aliens*, 6 COMM. L. & POL’Y 75 (2001); Nadine Strossen, *Criticisms of Federal Counter-Terrorism Laws*, 20 HARV. J.L. & PUB. POL’Y 531 (1997); Whidden, *supra* note 90, at 2871–74.

147. See *supra* note 137 (citing cases). The FBI had conducted a three year investigation of the L.A. Eight before turning the case over to the INS due to a lack of evidence necessary for a criminal prosecution. See DEMPSEY & COLE, *supra* note 138, at 37–38.

148. See *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 471–72 (1999); *infra* text accompanying notes 259–62 (discussing implications of this Supreme Court decision for challenges of selective enforcement of the immigration

R

R

R

R

Following the Court's decision, the case was remanded to the immigration court. In 2001, the court dismissed the primary removal charges on the grounds that they were not meant to apply retroactively. Nonetheless, the INS continues its efforts to deport the L.A. Eight, even relying on secret evidence in seeking removal of two of the eight.<sup>149</sup>

### C. *The Secret Evidence Cases*

The INS also has selectively targeted Arabs and Muslims through the use of secret evidence—evidence that it refuses to disclose to the noncitizen or his or her counsel—to charge, detain, and deny bond or release in removal proceedings. By 1999, twenty-five secret evidence cases were pending in the United States.<sup>150</sup>

In *Rafeedie v. INS*,<sup>151</sup> Fouad Rafeedie, a 20-year lawful permanent resident of Palestinian origin, was arrested upon returning to the United States after a two week trip to a conference in Syria sponsored by the Palestine Youth Organization. He was placed in summary exclusion proceedings based on ideological grounds.<sup>152</sup> The INS claimed that disclosing its evidence against Rafeedie would be “prejudicial to the public interest, safety, or security of the United States.”<sup>153</sup> The court of appeals rejected the INS position and required application of the ordinary due process analysis in deciding whether the federal government's national security interests outweighed Rafeedie's First Amendment rights.<sup>154</sup> The court observed that the only way Rafeedie could have prevailed over the INS's secret evidence would be if he could “rebut the undisclosed

---

laws). In reaching that conclusion, the Court relied on INA § 242(g), 8 U.S.C. § 1252(g), which provides that:

Except as provided in this section and notwithstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this Act.

*Reno*, 525 U.S. at 477 (citing INA § 242(g), 8 U.S.C. § 1252(g)).

149. See STEPHEN H. LEGOMSKY, IMMIGRATION AND REFUGEE LAW AND POLICY 86 (3d ed. 2002).

150. See Akram, *supra* note 17, at 52 n.4.

151. *Rafeedie v. INS*, 688 F. Supp. 729 (D.D.C. 1988), *aff'd in part, rev'd in part, remanded*, 880 F.2d 506 (D.C. Cir. 1989).

152. See *Rafeedie*, 688 F. Supp. at 731; *supra* text accompanying notes 130–38 (discussing ideological exclusions).

153. *Rafeedie*, 688 F. Supp. at 734–35.

154. See *Rafeedie*, 880 F.2d at 524.

evidence against him . . . . It is difficult to imagine how even someone innocent of all wrongdoing could meet such a burden.”<sup>155</sup>

Since repeal of the ideological exclusion provisions of the INA in 1990,<sup>156</sup> the INS has relied on secret evidence to detain and deport Arabs and Muslims. Moreover, in response to the 1995 Oklahoma City bombings, Congress enacted anti-terrorism legislation that has facilitated the targeting of Arab and Muslim noncitizens—the Antiterrorism and Effective Death Penalty Act (AEDPA)<sup>157</sup> and the Illegal Immigration Reform and Individual Responsibility Act (IIRIRA),<sup>158</sup> both of which brought about radical changes to the immigration laws<sup>159</sup> and effectively allowed for the possibility of ideological exclusion and removal through secret evidence proceedings.<sup>160</sup>

Bolstered by the 1996 reforms curtailing the rights of noncitizens, the INS brought approximately two dozen deportation actions based on secret evidence, claiming that disclosing the evidence would compromise the security of the United States.<sup>161</sup> Although denying that it selectively uses secret evidence against Arabs and Muslims, our research has not uncovered a single secret evidence case not involving an Arab or Muslim noncitizen.<sup>162</sup>

155. *Id.* at 516.

156. *See supra* text accompanying note 143.

157. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996) [hereinafter AEDPA]; *see* Whidden, *supra* note 90, at 2841–83 (summarizing genesis of AEDPA and analyzing its impact on Arabs and Muslims).

158. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (1996) [hereinafter IIRIRA].

159. *See infra* text accompanying notes 294–301.

160. *See supra* note 145 (citing authorities on breadth of the “terrorist activity” provisions of the INA). For discussion of the U.S. government’s use of these provisions against Arabs and Muslims, *see* Scanlan, *supra* note 127; Ross, *supra* note 146.

161. *See* Akram, *supra* note 17, at 52 & n.4 (listing post-1996 secret evidence cases); *see also* Martin Schwartz, Niels Frenzen & Mayra L. Calo, *Recent Developments on the INS’s Use of Secret Evidence Against Aliens*, in 2001-02 IMMIGRATION & NATURALIZATION HANDBOOK 300 (2001) (discussing secret evidence cases). Immigration courts, which do not publish decisions, made many of the important decisions in the secret evidence cases. Citations to many of the following cases are from immigration court decisions and related materials. Court documents in the cases discussed below are on file with Kit Gage, national coordinator of the National Coalition to Protect Political Freedom, 3321 12th Street, N.E., Washington, D.C. 20017.

162. *See The National Security Considerations Involved in Asylum Applications: Hearings Before the Senate Judiciary Committee on Technology, Terrorism and Government Information*, 105th Cong. 5–14 (1998) (testimony of INS General Counsel Paul Virtue) (FDCH Political Transcripts).

R  
R  
R  
R  
R

AEDPA established a special procedure for detaining and deporting “alien terrorists” that permitted the use of secret evidence with certain procedural safeguards designed to protect constitutional rights.<sup>163</sup> The INS, however, has never used the procedures;<sup>164</sup> instead, it has relied on pre-existing regulations it claims authorize the use of secret evidence in the immigration courts.<sup>165</sup> By so doing, the INS has avoided complying with AEDPA’s safeguards, including requiring the production of an unclassified summary of the secret evidence to the noncitizen and having a federal court assess the constitutionality of the use of secret evidence.<sup>166</sup> This strategy has allowed the U.S. government to avoid charging the noncitizen under a substantive “terrorism” provision of the INA, which would require the government to prove such a charge.<sup>167</sup>

The cases of the “Iraqi Seven” arose out of the U.S. government’s resettlement of Iraqi Kurds after the Gulf War.<sup>168</sup> The Iraqi

---

163. AEDPA established new procedures for deciding the admissibility or removability of suspected terrorists. It defines an “alien terrorist” as “any alien who has engaged, is engaged, or at any time after admission engages in any terrorist activity,” including an act that “affords material support to [any person or group] . . . conducting a terrorist activity.” AEDPA § 401 (codified at 8 U.S.C. §§ 1531(1), 1227(a)(4)(B), 1182(a)(3)(B)(iii) (2000)). AEDPA § 302 authorizes the Secretary of State to designate a “foreign terrorist organization,” which is defined as (a) a foreign organization; (b) engaging in terrorist activity (as defined under 8 U.S.C. § 1182(a)(3)(B) (2000)); (c) that threatens the security of the U.S. or its citizens. See AEDPA § 302 (codified at 8 U.S.C. § 1189(a)(1)). Section 401 creates a special removal court for “alien terrorists” that gives the special court the power to “examine, ex parte and in camera, any evidence for which the Attorney General determines that public disclosure would pose a risk to the national security of the United States or to the security of any individual because it would disclose classified information.” AEDPA § 401 (codified at 8 U.S.C. § 1534(e)(3)(A)); see also Michael Scaperlanda, *Are We That Far Gone?: Due Process and Secret Deportation Proceedings*, 7 STAN. L. & POL’Y REV. 23 (1996) (analyzing proposed secret evidence proceedings in AEDPA).

164. See *107th Congress Continues to Wrap Up Assignments; House Immigration Oversight Proposed*, 78 INTERPRETER RELEASES 361, 363 (2001).

165. See, e.g., 8 C.F.R. § 240.33(c)(4) (2001); see also *107th Congress Continues to Wrap Up Assignments; House Immigration Oversight Proposed*, 78 INTERPRETER RELEASES 361, 363 (2001).

166. See AEDPA § 504(e)(3)(B) and (C).

167. See *id.* at § 303(f)(2)(B); *id.* at § 504(e)(3)(C).

168. For a general summary of the Iraqi Seven cases by the lead counsel on the cases, see Niels W. Frenzen, *National Security and Procedural Fairness: Secret Evidence and the Immigration Laws*, 76 INTERPRETER RELEASES 1677, 1681 n.31 (1999). The immigration court cases were *In re Mohammed Jwer Al-Ammary*, No. A76-201-533, *Ali Jahjoh Saleh*, No. A86-200-369, *Adil Hadi Awadh* No. A76-201-533, *Mohamed Jassin Tuna*, No. A76-200-974, *Ali Yasim Mohammed Karim*, No. A76-

men, who had all worked for a CIA-funded Iraqi opposition group, were evacuated from Iraq by the United States. The INS commenced exclusion proceedings against them based on alleged visa violations. Fearing persecution if returned to Iraq, the Iraqi Seven sought asylum in the United States. Relying primarily on secret evidence, the immigration judge found them to be national security risks.<sup>169</sup>

As a result of the litigation, the INS released 500 pages of evidence used against the Iraqi Seven. James Woolsey, the former director of the CIA who directed the U.S. government's efforts to organize the overthrow of Saddam Hussein, was one of the lawyers representing the Iraqis. Besides concluding that hundreds of pages had been erroneously classified, Woolsey found that the evidence was based on serious errors in Arabic-English translations, ethnic and religious stereotyping by the FBI, and reliance on unreliable information, including rumors and innuendo. He claimed that the U.S. government made material misrepresentations to the immigration judge.<sup>170</sup> Despite the weakness of the government's case, the case was only concluded when five of the Iraqis entered into a settlement agreement withdrawing their asylum claims in exchange for release from detention.<sup>171</sup>

Mazen al-Najjar and Anwar Haddam experienced the longest detentions connected with secret evidence proceedings: first jailed in May, 1997, Al-Najjar was held for three-and-one-half years;<sup>172</sup> Haddam was held for four years.<sup>173</sup> Al-Najjar, a stateless Palestinian, was editor of the journal of the World and Islam Studies Enterprise (WISE), a think-tank based at the University of South Florida

---

200-431, Safadim Hassan Al-Batat No. A76-201-494, Haidar Al-Bandar, No. A76-200-959, Mohammed Yassin Mohammed Karim, No. A75-010-668. None of the decisions in these cases were published. See Frenzen, *supra*.

169. See Frenzen, *supra* note 168; see also e-mail from Niels Frenzen, Counsel for Iraqi Seven, to Amy Geyer (March 6, 2002) (on file with Susan M. Akram). R

170. See *The National Security Considerations Involved in Asylum Applications: Hearings Before the Senate Judiciary Committee on Technology, Terrorism and Government Information*, 105th Cong. 23-27 (1998) (statement of R. James Woolsey). R

171. See Frenzen, *supra* note 168.

172. See Laila Al-Arian, *Citizens Must Deal with Civil Liberties in Limbo*, THE HOYA, Jan. 15, 2002, at <http://www.thehoya.com/viewpoint/011502/view4.cfm>; ACLU of Florida, *Palestinian Professor Challenges His Detention by INS as Illegal*, May 14, 2002, at <http://www.aclufl.org/body-alnajjarhabeasrelease.051402.html>; John Mintz & Michael Grunwald, *FBI Terror Probes Focus on Muslim*, WASH. POST, Oct. 31, 1998, at A1.

173. See *In re Anwar Haddam*, 2000 BIA LEXIS 20, at 1 (BIA Dec. 1, 2000); see also *Kiareldeen v. Reno*, 71 F. Supp. 2d 402 (D. N.J. 1999) (ordering release of Palestinian detained for one-and-a-half years based on secret evidence).

devoted to promoting discussion of Middle East issues.<sup>174</sup> The INS arrested Al-Najjar and placed him in removal proceedings as part of an FBI investigation against a former WISE administrator who became head of the Islamic Jihad.<sup>175</sup> The arrest and detention was based on secret evidence.<sup>176</sup>

Anwar Haddam was an elected member of the Algerian Parliament.<sup>177</sup> A professor of physics at the University of Algiers, he ran for election as a member of the Islamic Salvation Front (FIS), a moderate Islamic party that swept the 1991 elections with 80% of the vote.<sup>178</sup> The Algerian military staged a *coup d'etat*, arrested the president of the FIS, and rounded up thousands of its members. Top FIS officials were killed or imprisoned while thousands of FIS supporters were imprisoned, tortured, and executed.<sup>179</sup> A civil war followed with tens of thousands of deaths.<sup>180</sup> One of the few elected FIS officials who managed to escape Algeria, Haddam entered the United States on a valid nonimmigrant visa in 1992 and later filed an asylum claim.<sup>181</sup> The INS took Haddam into custody and detained him based on secret evidence.<sup>182</sup>

In both the Al-Najjar and Haddam cases, as the secret evidence has either been unclassified or disclosed, it was demonstrated that the government's "terrorist" claims were based on unreliable evidence.<sup>183</sup> They were released only after years of detention.

Nasser Ahmed, a father of U.S.-citizen children, was held in custody and denied bond for three-and-a-half years based on secret

---

174. See *Al-Najjar v. Ashcroft*, 273 F.3d 1330 (11th Cir. 2001); *Al-Najjar v. Ashcroft*, 257 F.3d 1262, 1272 (11th Cir. 2001); *Al-Najjar v. Reno*, 97 F. Supp. 2d 1329, 1332-34 (S.D. Fla. 2000). For discussion of various developments in the Al-Najjar case, see *Al Najjar Released Following Attorney General's Review*, 77 INTERPRETER RELEASES 1747 (2000); *BIA Stays Ordering Dr. Al Najjar's Release; Federal Court Review Sought*, 77 INTERPRETER RELEASES 1712 (2000); *Public Record Evidence Insufficient to Support Al Najjar's Detention, IJ Rules*, 77 INTERPRETER RELEASES 1566 (2000); *Detention Based on Secret Evidence Violates Due Process Absent Safeguards, District Court Rules*, 77 INTERPRETER RELEASES 937 (2000). After September 11, the U.S. government re-arrested and detained Al-Najjar. See *infra* text accompanying notes 232-33.

175. See *Al-Najjar*, 257 F.3d at 1273-74.

176. See *Al-Najjar*, 97 F. Supp. 2d at 1333-34.

177. See *In re Haddam*, 2000 BIA LEXIS 20 (BIA Dec. 1, 2000); Akram, *supra* note 17, at 79-81 (analyzing the INS proceedings brought against Haddam).

178. See *In re Haddam*, 2000 BIA LEXIS 20, at \*6.

179. See *id.* at \*9.

180. See *id.*

181. See *id.*

182. See *id.* at \*7.

183. See *In re Haddam*, No. A22-751-813 (BIA Sept. 10, 1998), *aff'd*, *In re Haddam*, 2000 BIA LEXIS 20 (BIA Dec. 1, 2000).

R

R

evidence.<sup>184</sup> Charged in April 1995 with overstaying his visa, he had been released on \$15,000 bond while he pursued a claim for political asylum.<sup>185</sup> In 1996, while his own deportation proceedings were ongoing, Ahmed became the court-appointed translator for the attorneys representing Sheik Omar Rahman, later convicted in the 1993 World Trade Center bombing attempt.<sup>186</sup> As Ahmed was going to immigration court for his asylum hearing, the INS arrested him and opposed his release on bond.<sup>187</sup> On remand, the immigration court dismissed the evidence of the government's remaining contentions on the grounds that it was based on an informant who had personal reasons for seeking Ahmed's deportation.<sup>188</sup>

As the secret evidence cases have slowly moved toward conclusion, the government's claims in all of the cases evaporated. No case has included sufficient evidence of terrorism-related charges necessary to justify detention.<sup>189</sup> Besides the individual loss of liberty, these cases have chilled Arab and Muslim political speech.

#### D. Conclusion

Stereotypes about Arabs and Muslims have influenced immigration law and its enforcement, as well as the civil rights of Arab and Muslim noncitizens in the United States. This discussion is by no means comprehensive. Other examples of the U.S. government's response to perceived fears of Arab and Muslim terrorism are plentiful. For example, in the 1990s, the much-publicized case of asylum seeker Sheik Omar Rahman, later convicted for his role in the 1993 World Trade Center bombing,<sup>190</sup> by itself resulted in changes to the immigration laws narrowing the rights of all asylum

184. See *Matter of Nasser Ahmed*, No. A90-674-238 (Immigration Court June 24, 1999) (decision following remand); see also DEMPSEY & COLE, *supra* note 138, at 128-31 (discussing case). R

185. See Petitioner/Plaintiff's Memorandum in Support of Motion for Preliminary Injunction at 2 (on file with Susan M. Akram). R

186. See *infra* text accompanying notes 190-93. R

187. See DEMPSEY & COLE, *supra* note 138, at 129. R

188. *In re Nasser Ahmed*, at 7 (Exec. Office Immigration Review, Immigration Court, July 30, 1999) (decision following remand). R

189. See Akram, *supra* note 17 (discussing the release of certain detainees due to a lack of sufficient evidence to justify detention). R

190. See *United States v. Rahman*, 189 F.3d 88, 103 (2d Cir. 1999); see also Binny Miller, *Give Them Back Their Lives: Recognizing Client Narrative in Case Theory*, 93 MICH. L. REV. 485, 561 (1994) (acknowledging that stereotypes about "terrorist Arabs out to destroy American democracy" posed difficult challenges to the defense in this case).



applicants.<sup>191</sup> An episode of the popular television show “60 Minutes,”<sup>192</sup> focusing on his alleged abuse of the asylum system, triggered a chain reaction culminating in 1996 asylum reforms, including a summary exclusion procedure by which a noncitizen could be excluded from the country without a hearing on an asylum or other claim to relief.<sup>193</sup>

## II. THE CIVIL RIGHTS IMPLICATIONS OF THE MODERN WAR ON TERRORISM

As shown above, demonization of Arabs and Muslims has impacted the evolution of the law and encouraged harsh governmental efforts to remove Arabs and Muslims from the United States. The same stereotypes have affected the civil rights of all persons of Arab and Muslim ancestry in the United States since September 11, 2001.<sup>194</sup> Importantly, the aftermath of the security measures taken since then threaten to have enduring impacts on the civil rights of all immigrants, as well as some U.S. citizens.

### A. *The Immediate Impacts*

The federal government responded with ferocity to the events of September 11.<sup>195</sup> Hundreds of Arab and Muslim noncitizens were rounded up as “material witnesses” in the ongoing investigation of the terrorism or detained on relatively minor immigration violations.<sup>196</sup> The dragnet provoked criticism as a poor law enforcement technique as well as a major intrusion on fundamental civil

---

191. See PHILIP G. SCHRAG, *A WELL-FOUNDED FEAR: THE CONGRESSIONAL BATTLE TO SAVE POLITICAL ASYLUM IN AMERICA* 42–44, 134, 137, 148, 162, 164, 217 (2000).

192. *60 Minutes: How Did He Get Here?* (CBS television broadcast, Mar. 14, 1993).

193. See INA § 235, 8 U.S.C. § 1225; T. ALEXANDER ALEINIKOFF ET AL., *IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY* 863–71, 1028–29 (4th ed. 1998) (discussing summary exclusion provisions of 1996 immigration reforms).

194. For analysis of the balancing of necessary security measures and democratic values in response to terrorism, see Symposium, *Law and the War on Terrorism*, 25 HARV. J.L. & PUB. POL’Y 399 (2002); Note, *Responding to Terrorism: Crime, Punishment, and War*, 115 HARV. L. REV. 1217 (2002); Peter Margulies, *Immigration, Terror, and Democracy* (unpublished manuscript on file with Kevin R. Johnson).

195. For the most part, it is undisputed that the federal government took the steps outlined in this section. See Viet D. Dinh, *Foreword: Freedom and Security After September 11*, 25 HARV. J.L. & PUB. POL’Y 399, 401–06 (2002) (offering a description from high level Justice Department official of the U.S. government’s conduct during the war on terrorism).

196. See *infra* text accompanying notes 212–68.

liberties.<sup>197</sup> Congress swiftly passed the USA PATRIOT Act,<sup>198</sup> which, among other things, allowed the government to detain suspected noncitizen “terrorists” for up to a week without charges, and bolstered federal law enforcement surveillance powers over citizens and noncitizens associated with “terrorism.” President Bush issued a military order allowing alleged noncitizen terrorists, including those arrested in the United States, to be tried in military courts while guaranteed few rights.<sup>199</sup> Proposed regulations issued in response to the U.S. Supreme Court decision in *Zadvydas v. Davis*,<sup>200</sup> holding that indefinite detention of noncitizens ordered removed from the country was not authorized by law, include an exception permitting indefinite detention of noncitizens for terrorism and national security reasons.<sup>201</sup> Attorney General Ashcroft issued an interim rule allowing electronic surveillance of attorney-client communications with detained alleged terrorists,<sup>202</sup> which was fol-

---

197. See Jim McGee, *Ex-FBI Officials Criticize Tactics on Terrorism*, WASH. POST, Nov. 28, 2001, at A1; Lawrence, *supra* note 6.

198. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act), Pub. L. No. 107-56, §§ 412, 201–25, 115 Stat. 272, 350–52, 278–96.

199. See Military Order of Nov. 13, 2001, 66 Fed. Reg. 57,833 (Nov. 16, 2001). For an assessment of the legality of the military tribunals, see Kenneth Anderson, *What To Do with Bin Laden and Al Qaeda Terrorists?: A Qualified Defense of Military Commissions and United States Policy on Detainees at Guantanamo Bay Naval Base*, 25 HARV. J.L. & PUB. POL’Y 591 (2002); Curtis A. Bradley & Jack L. Goldsmith, *The Constitutional Validity of Military Commissions*, 5 GREEN BAG 2D 249 (2002); Mark A. Drumbl, *Judging the 11 September Terrorist Attack*, 24 HUM. RTS. Q. 323 (2002); George P. Fletcher, *On Justice and War: Contradictions in the Proposed Military Tribunals*, 25 HARV. J.L. & PUB. POL’Y 635 (2002); Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L.J. 1259 (2002); Jordan J. Paust, *Antiterrorism Military Commissions: Courting Illegality*, 23 MICH. J. INT’L L. 1 (2001); see also Harold Hongju Koh, *The Spirit of the Laws*, 43 HARV. INT’L L.J. 23 (2002) (expressing concern about U.S. government’s compliance with international human rights law in its responses to September 11).

200. 533 U.S. 678 (2001).

201. See Continued Detention of Aliens Subject to Final Orders of Removal, 66 Fed. Reg. 56,967, 56,979-80 (Nov. 14, 2001). The Court suggested that this might be constitutionally permissible. See *Zadvydas*, 533 U.S. at 696 (“Neither do we consider terrorism or other special circumstances where special arguments might be made for forms of preventive detention and for heightened deference to the judgments of the political branches with respect to matters of national security.”). For criticism of an earlier proposed detention regulation, see Shirley Huey et al., Administrative Comment, *Indefinite Detention Without Probable Cause: A Comment on INS Interim Rule 8 C.F.R. § 287.3*, 26 N.Y.U. REV. L. & SOC. CHANGE 397 (2000).

202. See National Security; Prevention of Acts of Violence and Terrorism, 66 Fed. Reg. 55,062 (Oct. 31, 2001); George Lardner Jr., *U.S. Will Monitor Calls to Lawyers*, WASH. POST, Nov. 9, 2001, at A1; Neil A. Lewis & Christopher Marquis,

lowed by an indictment of an attorney for allegedly aiding terrorist activities.<sup>203</sup>

To the extent that the U.S. responses to September 11 can be characterized as regulating immigration, existing caselaw affords considerable leeway to the political branches of the federal government. The Supreme Court has upheld immigration laws discriminating against noncitizens on the basis of race, national origin, and political affiliation that would patently violate the Constitution if the rights of citizens were at stake.<sup>204</sup> The so-called “plenary power” doctrine creates a constitutional immunity from judicial scrutiny of substantive immigration judgments of Congress and the Executive Branch.<sup>205</sup> The doctrine thus allows the federal government, through the immigration laws, to lash out at any group considered undesirable.<sup>206</sup> Such authority increases exponentially when, as in the case of international terrorism, perceived foreign relations and national security matters are at issue.<sup>207</sup> When immigration law and

---

*Longer Visa Waits for Arabs; Stir Over U.S. Eavesdropping*, N.Y. TIMES, NOV. 10, 2001, at A1.

203. See Alan Feuer, *A Persistent Defender, Even in a Mets Cap*, N.Y. TIMES, Apr. 10, 2002, at A16.

204. See, e.g., *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952) (allowing for deportation of immigrants based on their political views); *The Chinese Exclusion Case* (Chae Chan Ping v. United States), 130 U.S. 581, 599, 609 (1889) (upholding racial discrimination in immigration laws); see also *Nguyen v. INS*, 533 U.S. 53 (2001) (upholding gender discrimination in provision of immigration laws); *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471 (1999) (holding that courts lacked authority to review claim of selective enforcement of immigration laws against Arab and Muslim noncitizens); *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 187–88 (1993) (holding that President’s policy of interdicting Haitians fleeing political violence on the high seas and returning them to Haiti without hearing asylum and other claims, did not violate domestic or international law).

205. See *supra* note 204 (citing cases, including *The Chinese Exclusion Case*, generally considered to be the foundation for the plenary power doctrine). But 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) (suggesting that the “plenary power” doctrine is largely dicta that rarely affects results of immigration cases). R

206. See Johnson, *supra* note 14, at 841–69 (same for political minorities); Kevin R. Johnson, *Public Benefits and Immigration: The Intersection of Immigration Status, Ethnicity, Gender, and Class*, 42 UCLA L. REV. 1509, 1519–28 (1995) (same for poor and working people); Kevin R. Johnson, *Race, The Immigration Laws, and Domestic Race Relations: A “Magic Mirror” into the Heart of Darkness*, 73 IND. L.J. 1111, 1119–47 (1998) (analyzing use of immigration laws to adversely affect racial minorities). R

207. See, e.g., *INS v. Aguirre-Aguirre*, 526 U.S. 415, 425 (1999) (recognizing “that judicial deference to the Executive Branch is especially appropriate in the immigration context where officials ‘exercise especially sensitive political functions that implicate questions of foreign relations’”) (quoting *INS v. Abudu*, 485 U.S.

its enforcement rests primarily in the hands of the federal government,<sup>208</sup> uniform, national civil rights deprivations may result.<sup>209</sup>

The law supporting much of the immigration and civil rights incursions of the “war on terrorism,” including the plenary power doctrine, have been subjected to sustained scholarly criticism.<sup>210</sup> In important ways, contemporary immigration law ignores a constitutional revolution that occurred in the area of civil rights over the

---

94, 110 (1988)); *Mathews v. Diaz*, 426 U.S. 67, 81 n.17 (1976) (“[A]ny policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.”) (quoting *Harisiades v. Shaughnessy*, 342 U.S. 580, 588–89 (1952) (footnote omitted)); see also Harold Hongju Koh, *Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair*, 97 YALE L.J. 1255, 1258–63, 1291–1316 (1988) (analyzing the reasons why Presidents’ foreign policy initiatives are rarely disturbed). Such deference combines with that ordinarily accorded agency action to create a most potent form of deference to the Executive Branch’s immigration decisions. See *INS v. Elias-Zacarias*, 502 U.S. 478, 481 (1992) (stating that agency fact-finding could “be reversed only if the evidence presented . . . was such that a reasonable factfinder would have to conclude that the requisite fear of persecution existed”); *Aguirre-Aguirre*, 526 U.S. at 423–24 (relying on *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984) and deferring to INS interpretation of immigration law); see also Kevin R. Johnson, *Responding to the “Litigation Explosion”: The Plain Meaning of Executive Branch Primacy Over Immigration*, 71 N.C. L. REV. 413 (1993) (analyzing the impact of deference to agency action in Supreme Court’s immigration decisions).

208. See *DeCanas v. Bica*, 424 U.S. 351, 354 (1976) (“Power to regulate immigration is unquestionably exclusively a federal power.”) (citations omitted); see also *League of United Latin American Citizens v. Wilson*, 908 F. Supp. 755 (1995) (holding that most of Proposition 187, a California law seeking to regulate undocumented immigration, was preempted by federal law). But see Spiro, *Demi-Sovereignities*, *supra* note 7 (contending that states should have greater role in regulating immigration). R

209. See generally BILL ONG HING, *MAKING AND REMAKING ASIAN AMERICA THROUGH IMMIGRATION POLICY, 1850–1990* (1993) (analyzing how exclusionary federal immigration laws adversely affected Asian Americans); HANEY LÓPEZ, *supra* note 31 (analyzing laws in place from 1790–1952 requiring that immigrants be “white” in order to be naturalized). Alternatively, the federal government can act nationally to protect civil rights of noncitizens against conduct by the state governments. See *supra* note 9 and accompanying text (citing cases). R

210. See, e.g., GERALD L. NEUMAN, *STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW* 14 (1996). See generally Linda Kelly, *Preserving the Fundamental Right to Family Unity: Championing Notions of Social Contract and Community Ties in the Battle of Plenary Power Versus Aliens’ Rights*, 41 VILL. L. REV. 725, 733–38 (1996); Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255 (1984).

latter half of the twentieth century.<sup>211</sup> Nonetheless, much of this body of law—or, more accurately, the perceived immunity from any legal constraints—has guided the Bush administration’s domestic responses to the legitimate concerns with terrorism.

### 1. The Dragnet

The events of September 11, 2001 understandably provoked an immediate federal governmental response. Heightened security measures were the first order of the day. Within a matter of weeks, the U.S. government arrested and detained in the neighborhood of 1000 people as part of the Justice Department’s investigation into the September 11 attacks.<sup>212</sup> The mass dragnet of men from many nations, with the largest numbers from Pakistan and Egypt, apparently failed to produce any direct links to the terrorists acts; about 100 were charged with minor crimes and another 500 were held in custody on immigration-related matters, such as having overstayed their temporary nonimmigrant visas.<sup>213</sup> Attorney General John Ashcroft admitted that minor immigration charges would be used to hold noncitizens while the criminal investigation continues.<sup>214</sup>

---

211. See Gabriel J. Chin, *Segregation’s Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1, 1–12 (1998).

212. See David E. Rovella, *Clock Ticks on 9/11 Detentions*, NAT’L L.J., Nov. 5, 2001, at A1; Amy Goldstein, *A Deliberate Strategy of Disruption*, WASH. POST, Nov. 4, 2001, at A1; Lois Romano & David S. Fallis, *Questions Swirl Around Men Held in Terror Probe*, WASH. POST, Oct. 15, 2001, at A1. One Pakistani man died in federal custody. See Guy Gugliotta, *Pakistani Held After Sept. 11 Attacks Dies in Cell*, WASH. POST, Oct. 25, 2001, at A18. Amnesty International has expressed concerns about the possible human rights violations resulting from the detentions. See AMNESTY INT’L, UNITED STATES OF AMERICA: AMNESTY INTERNATIONAL’S CONCERNS REGARDING POST SEPTEMBER 11 DETENTIONS IN THE USA, <http://web.amnesty.org/ai.nsf/Index/AMR510442002?> (last visited Mar. 19, 2002).

213. See DOJ Orders Incentives, ‘Voluntary’ Interviews of Aliens to Obtain Info on Terrorists, 78 INTERPRETER RELEASES 1816, 1817 (2001); Josh Meyer, *Dragnet Produces Few Terrorist Ties*, L.A. TIMES, Nov. 28, 2001, at A1; see also Greg Smith & Joe Calderone, *No Big Fish in 9/11 Dragnet*, DAILY NEWS (New York), Nov. 30, 2001, at 6 (“The dragnet that swept through New York in search of terrorists in the days after Sept. 11 scraped up mostly a handful of small-time hustlers and hapless immigrants with visa problems.”). Zacarias Moussaoui, a noncitizen in federal custody for immigration violations on September 11, was the one and only noncitizen indicted in connection with a role in the September 11 hijackings. See David Johnston & Philip Shenon, *Man Held Since August is Charged With a Role in Sept. 11 Terror Plot*, N.Y. TIMES, Dec. 12, 2001, at A1. The U.S. government is prosecuting Moussaoui for conspiracy in the attacks. See John Gibeaut, *Prosecuting Moussaoui*, ABA J., July 2002, at 36.

214. See Huey, *supra* note 201, at 414; see also Philip Shenon & Don Van Natta Jr., *U.S. Says 3 Detainees May Be Tied to Hijackings*, N.Y. TIMES, Nov. 1, 2002, at A1 (reporting that Attorney General “Ashcroft offered a detailed explanation of the

Information remains sketchy about the persons detained by the U.S. government because the Attorney General has refused to release specific information about them, prompting criticism from U.S. Senator Russell Feingold.<sup>215</sup> The Justice Department issued a rule barring disclosure of information about INS detainees held by state and local authorities, which survived a legal challenge.<sup>216</sup> After September 11, the immigration courts began holding secret hearings in immigration cases involving Arab and Muslim noncitizens.<sup>217</sup> In sum, the federal government's treatment of the detainees, and its treatment of Arab and Muslim noncitizens in immigration proceedings, was shrouded in secrecy.<sup>218</sup>

To gain information about the detainees, civil rights organizations filed a Freedom of Information Act action.<sup>219</sup> According to one press report, information produced in response to the litigation shows "that the handling of Muslims arrested on immigration charges after Sept. 11 has been fraught with delay and sloppy book-keeping and that due process was shortchanged . . . ."<sup>220</sup>

The nature and conditions of the initial wave of mass arrests and detentions warrant consideration. Arab and Muslim detainees

---

government's 'spitting on the sidewalk' policy, in which immigrants suspected of terrorist ties are apprehended for even minor, unrelated charges, just so long as they are taken off the street"). For an analysis of whether the U.S. government's responses constituted impermissible racial profiling, see Gross & Livingston, *supra* note 18.

215. See Russ Feingold, *Name the Detainees*, WASH. POST, Dec. 23, 2001, at B7.

216. See *INS Detention Regulation Preempts N.J. Laws on Access to Inmate Information*, 71 U.S.LW. 1004 (2002).

217. See William Glaberson, *Closed Immigration Hearings Criticized as Prejudicial*, N.Y. TIMES, Dec. 7, 2001, at B7. The Supreme Court stayed a lower court decision enjoining the holding of secret hearings. See *Ashcroft v. N. Jersey Media Group*, 2002 U.S. LEXIS 4898, at \*1 (June 28, 2002) (staying injunction entered in *N. Jersey Media Group, Inc. v. Ashcroft*, 2002 U.S. Dist. LEXIS 10136 (D. N.J. May 28, 2002)); *Supreme Court Allows Secrecy to Stand in Deportation Cases*, N.Y. TIMES, June 29, 2002, at A10.

218. In a letter dated July 3, 2002, the U.S. Department of Justice stated that, since September 11, the Immigration and Naturalization Service had detained 752 noncitizens on immigration violations and that 129 persons had been charged with crimes; however, the letter stated that the federal government lacked the records necessary to provide information about the number of persons detained without being charged. See Letter from Daniel J. Bryant, Assistant Attorney General, to the Honorable Carl Levin, Chairman, U.S. Senate, Permanent Subcomm. on Investigations, Comm. on Governmental Affairs (July 3, 2002) (on file with Kevin R. Johnson).

219. See *Rights Groups Sue DOJ, INS for Information on Those Detained or Arrested Following September 11*, 79 INTERPRETER RELEASES 5 (2002).

220. Jim Edwards, *Data Show Shoddy Due Process for Post-Sept. 11 Immigration Detainees*, N.J. L.J., Feb. 4, 2002, at 1.

were held for weeks—in some instances, months—without any charges filed against them and without being provided information about why federal authorities continued to detain them.<sup>221</sup> For example, the U.S. government held Dr. Al-Badr Al-Hazmi, a radiologist who had lived as a lawful permanent resident for years with his family in San Antonio, for two weeks, partly because he shared the same last name—a common one in Saudi Arabia—with two of the September 11 hijackers.<sup>222</sup> The U.S. government arrested and held a Yemeni immigrant for two months who was interrogated and threatened before being released without being charged.<sup>223</sup> One Pakistani student was arrested for visa problems and held in a local jail in Mississippi, where police allegedly watched as he was beaten by other prisoners for being a terrorist.<sup>224</sup> An Egyptian computer engineering student was wrongly detained for over three weeks and charged with lying to federal investigators about ownership of an aviation radio allegedly recovered in his hotel room, which (as it turned out) did not belong to him.<sup>225</sup> Given the tenor of the times, it is not surprising that Attorney General Ashcroft lambasted critics of the Bush administration's anti-terrorism measures as aiding the terrorist cause.<sup>226</sup>

The federal government also made it difficult for attorneys for Arab and Muslim detainees to gain access to their clients so that they could provide them with legal advice.<sup>227</sup> In fact, the United States held as an “enemy combatant” without charges or access to

---

221. See Steve Fainaru, *Detainees Offer Glimpse of Life in N.Y. Facility*, WASH. POST, Apr. 17, 2002, at A1; Steve Fainaru, *Suspect Held 8 Months Without Seeing Judge*, WASH. POST, June 12, 2002, at A1; Evan Thomas & Michael Isikoff, *Justice Kept in the Dark*, NEWSWEEK, Dec. 10, 2001, at 37; see also *United States v. Awadallah*, 2002 U.S. Dist. LEXIS 7537 (S.D.N.Y. April 30, 2002) (finding that “material witnesses” could not be detained during grand jury investigation).

222. See Thomas & Isikoff, *supra* note 221, at 40–42 (explaining that additional factors were that he had contacted one of Osama Bin Laden's brothers in 1999 regarding the World Assembly of Muslim Youth, and because he had booked flights on the same web service used by the hijackers). R

223. See Susan Milligan, *Yemeni Immigrant Says He Was Abused*, BOSTON GLOBE, Dec. 5, 2001, at A13.

224. See Thomas & Isikoff, *supra* note 221, at 39–40. R

225. See June Fritsch, *Grateful Egyptian is Freed as U.S. Terror Case Fizzles*, N.Y. TIMES, Jan. 18, 2002, at A1. “The case began to unravel . . . , when the real owner of the radio, a private pilot and American citizen, came forward to claim it. He had left it in his [hotel] room.” *Id.*

226. See *Excerpts from Attorney General's Testimony Before Senate Judiciary Committee*, N.Y. TIMES, Dec. 7, 2002, at B6.

227. See Elizabeth Amon, *The Fight Over Access to Terror Suspects*, NAT'L L.J., June 10, 2002, at 1; Randall B. Hamud, *Diary of a “Terrorist's” Lawyer*, CAL. LAW., Apr. 2002, at 20.

an attorney a U.S. citizen of Latina/o ancestry who converted to Islam and allegedly was part of a plot to detonate a nuclear device and was arrested on U.S. soil.<sup>228</sup>

The dragnet did not end there. The Justice Department also sought to interview about 5000 men—almost all of them Arab or Muslim—between the ages of 18 and 33 who had arrived on nonimmigrant visas in the United States since January 1, 2000.<sup>229</sup> There was *no* evidence that any of the 5000 had been involved in terrorist activities. Although technically “voluntary,”<sup>230</sup> the interviews with law enforcement authorities undoubtedly felt compulsory to many.<sup>231</sup> Arab and Muslim fears of detention and deportation<sup>232</sup> were reinforced by the November 2001 arrest of Mazen Al-Najjar, who had previously been held on secret evidence and released after the government failed to provide evidence that he was engaged in terrorist activity.<sup>233</sup> In March 2002, Attorney General Ashcroft asked U.S. attorneys to interview another 3000 or so Arab and Muslim noncitizens.<sup>234</sup> Around the time of this announcement, the

228. See James Risen & Philip Shenon, *U.S. Says It Halted Qaeda Plot to Use Radioactive Bomb*, N.Y. TIMES, June 11, 2002, at A1. Other “enemy combatants” apprehended in Afghanistan detained in Guantanamo Bay, Cuba, including at least one U.S. citizen, were denied access to counsel. See, e.g., *Hamdi v. Rumsfeld*, 2002 U.S. App. LEXIS 14012 (4th Cir. July 12, 2002).

229. See Thomas & Isikoff, *supra* note 221, at 42–43; *DOJ Orders Incentives, ‘Voluntary’ Interviews of Aliens to Obtain Info on Terrorists*, *supra* note 213, at 1816–17. R  
R

230. See *Administration Defends Military Commissions, Other Antiterrorism Measures During Senate Hearing*, 78 INTERPRETER RELEASES 1809, 1810 (Dec. 3, 2001) (summarizing congressional testimony of Assistant Attorney General Michael Chertoff that interviews were “voluntary” and based not on race profiles but on the fact that al Qaeda recruits from specific nations and encourages use of certain visas).

231. See Gross & Livingston, *supra* note 18, at 1424 (questioning the “voluntariness” of such interviews from the perspective of Arab and Muslim noncitizens being questioned). R

232. See Tim Jones, *Interview Requests Chill U.S. Arabs*, CHI. TRIB., Dec. 2, 2001, § 1, at 1; Tom Kenworthy, *Arabs Fear that Cooperation Could be Costly*, USA TODAY, Dec. 3, 2001, at 4A.

233. See *Al Najjar Again in INS Detention Due to Alleged Terrorist Ties*, 78 INTERPRETER RELEASES 1859, 1859 (Dec. 10, 2001); Anthony Lewis, *It Can Happen Here*, N.Y. TIMES, Dec. 1, 2001, at A27; see also *supra* text accompanying notes 172–76 (discussing Al-Najjar’s detention based on secret evidence). Under the immigration laws, “terrorist activity” has been defined broadly to include donations of funds to the humanitarian activities of a “terrorist organization.” See Johnson, *supra* note 14, at 866–67 (analyzing the breadth of INA § 212(a)(3)(B)(iii), 8 U.S.C. § 1182 (a)(3)(B)(iii) (1952)); *supra* text accompanying notes 145–46 (discussing breadth of definition); see also Neuman, *supra* note 136, at 322–37 (contrasting various definitions of “terrorist activity”). R  
R  
R

234. See *U.S. Attorney General John Ashcroft Holds News Conference*, FDCH POL. TRANSCRIPTS, Mar. 20, 2002.



federal government conducted raids on Arab and Muslim offices and homes in search of terrorist connections.<sup>235</sup>

The questioning of noncitizen Arabs and Muslims could be expected to alienate those interviewed, as well as the communities of which they are a part. A memorandum from the Office of the U.S. Deputy Attorney General offered detailed instructions on information to be solicited, and mentioned that the U.S. government should be informed if an interviewee was suspected of being in the country in violation of the immigration laws, implying an effort to remove Arabs and Muslims from the country based on immigration law violations wholly unrelated to terrorism.<sup>236</sup>

The questions directed at the noncitizens suggested that the Arabs and Muslims were prone to disloyalty. One line of questioning was as follows: "You should ask the individual if he noticed anybody who reacted in a surprising or inappropriate way to the news of the September 11th attacks. You should ask him how he felt when he heard the news."<sup>237</sup> This tracks questions reportedly asked by federal investigators soon after the bombing. At that time, the FBI posed the following questions to Arabs and Muslims:

How do you feel about what happened last week in New York?

Does it make you sad?

Does it make you happy?

Does it make you angry?

How do you feel about being American?

How do you feel about being an Arab?

Why is it that America is considered the enemy?<sup>238</sup>

Despite the criticism, legal precedent may exist for the racially-skewed dragnet. In *Brown v. City of Oneonta*,<sup>239</sup> a crime victim iden-

---

235. See Sharon Behn, *US Muslim Community Outraged by Raids on Muslim Offices and Homes*, AGENCE FRANCE PRESSE, Mar. 21, 2002.

236. See Memorandum from the Deputy Attorney General, to all United States Attorneys and all Members of the Anti-Terrorism Task Forces (Nov. 9, 2001), reprinted in *DOJ Orders Incentives, 'Voluntary' Interviews of Aliens to Obtain Info on Terrorists, Foreign Students, Visa Processing Under State Dept. Scrutiny*, 78 INTERPRETER RELEASES 1816 app. 1 (Dec. 3, 2001). To this end, the federal government detained Arabs and Muslims held for immigration violations pending deportation as a "symbolic" gesture to show that the U.S. government is "getting tough" on immigration enforcement. See *Testimony of Margaret H. Taylor, Professor of Law, Wake Forest University School of Law, Hearing Before the Subcomm. on Immigration and Claims, House Comm. on the Judiciary*, FED. DOC. CLEARINGHOUSE, Dec. 19, 2001.

237. Memorandum from the Deputy Attorney General, *supra* note 236, at 4.

238. Gina Keating, *ACLU Faults FBI for Aggressive Questioning*, DAILY RECORDER (Sacramento), Sept. 26, 2001, at 1, 7.

239. 221 F.3d 329 (2d Cir. 2000), *cert. denied*, 122 S. Ct. 44 (2001).

tified a young African-American man as the perpetrator of a burglary and assault who, while committing the crime, cut himself with a knife. The police attempted to question all African-American students at the local university and “over the next several days, the police conducted a ‘sweep’ of Oneonta, stopping and questioning non-white persons on the streets and inspecting their hands for cuts. More than two hundred persons were questioned during that period, but no suspect was apprehended.”<sup>240</sup> Although the police employed an old-fashioned dragnet like those police techniques long condemned as overbroad and over-inclusive,<sup>241</sup> the court of appeals held that the sweep did not violate the Equal Protection Clause of the Fourteenth Amendment.<sup>242</sup>

By almost all accounts, Muslims perpetrated the terrorism of September 11. A few Arab and Muslim noncitizens in the United States might have information about terrorist networks. *Oneonta* thus may offer legal justification for the federal government’s Arab and Muslim dragnet, even though law enforcement in the case arguably relied excessively on race in the criminal investigation.<sup>243</sup> Besides the fact that the alleged perpetrators of the terrorist acts were Muslim, another consideration—the need to establish a “discriminatory intent” on the part of the government—could make it difficult to prevail on an Equal Protection claim.<sup>244</sup> Nonetheless, the dragnet directed at all Arabs and Muslims is contrary to fundamental notions of equality and the individualized suspicion ordinarily required for a stop under the Fourth Amendment.<sup>245</sup> It

---

240. *Id.* at 334.

241. See Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341, 351 (1949); see, e.g., *Davis v. Miss.*, 394 U.S. 721 (1969) (reversing rape conviction in which African-American man was detained and fingerprinted, along with over twenty other African Americans, in violation of Fourth Amendment).

242. See *Brown v. City of Oneonta*, 221 F.3d 329, 337 (2nd Cir. 2000) (“Plaintiffs do not allege that upon hearing that a violent crime had been committed, the police used an established profile of violent criminals to determine that the suspect must have been black. Nor do they allege that the defendant law enforcement agencies have a regular policy based upon racial stereotypes that all black . . . residents be questioned whenever a violent crime is reported.”).

243. See, e.g., R. Richard Banks, *Race-Based Suspect Selection and Colorblind Equal Protection Doctrine and Discourse*, 48 UCLA L. REV. 1075, 1090–92 (2001); Dorothy E. Roberts, *Crime, Race, and Reproduction*, 67 TUL. L. REV. 1945, 1947–48 & n.8 (1993).

244. See *Washington v. Davis*, 426 U.S. 229, 239–47 (1976) (holding that discriminatory effect will not establish the discriminatory intent necessary for a successful Equal Protection claim). Scholars have challenged the intent requirement. See, e.g., Lawrence, *supra* note 21, at 319; Haney López, *supra* note 105.

245. See, e.g., *United States v. Sokolow*, 490 U.S. 1, 7 (1989); *Terry v. Ohio*, 392 U.S. 1, 27 (1968).

exemplifies the excessive reliance on race in the criminal investigation, a frequent law enforcement problem, and shows how, once race (at least of nonwhites) enters the process, it can come to dominate an investigation.<sup>246</sup> To target an entire minority group across the country for questioning is obviously over-inclusive. Over one million persons of Arab ancestry in the United States,<sup>247</sup> all of whom may feel threatened and under suspicion, cannot miss the message sent by the nature of the federal government's investigation.<sup>248</sup>

In important ways, the September 11 dragnet carried out by the federal government resembles the Japanese internment during World War II,<sup>249</sup> although detention fortunately does not appear to be a current part of the U.S. government's strategy. National identity and loyalty are defined in part by "foreign" appearance, ambiguous as that may be.<sup>250</sup> In some ways, the current treatment of Arabs and Muslims is more extralegal than the internment. No Executive Order authorizes the treatment of Arabs and Muslims; nor has there been a formal declaration of war.<sup>251</sup> Moreover, nationality, which is more objective and easier to apply than religious and racial classifications, is not used as the exclusive basis for the measures. Rather, the scope of the investigation is broad and amorphous enough to potentially include all Arabs and Muslims, who may be natives of countries from around the world.

In a similar time of national crisis when U.S. citizens were held hostage in Iran, the court of appeals in *Narenji v. Civiletti* upheld a

246. See Banks, *supra* note 136, at 1101.

247. U.S. Census Bureau, Profile of Selected Social Characteristics: 2000, at [http://factfinder.census.gov/servlet/QTTable?ds\\_name=D&geo\\_id=D&qv\\_name=ACS\\_C255\\_EST\\_G00\\_QT02&lang=en](http://factfinder.census.gov/servlet/QTTable?ds_name=D&geo_id=D&qv_name=ACS_C255_EST_G00_QT02&lang=en) (last visited Dec. 10, 2001).

248. See Gross & Livingston, *supra* note 18, at 1438 (stating that investigations based on group probabilities of criminal wrongdoing are "stigmatizing," "humiliating," and reinforce negative stereotypes).

249. See *supra* text accompanying notes 15–16. See generally KENNETH L. KARST, BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION 91 (1989) ("One of the saddest lessons of *Korematsu* is that we do not seem to learn much from the lessons of the past.").

250. See WU, *supra* note 87, at 79–129; Keith Aoki, "Foreign-ness" & Asian American Identities: Yellowface, World War II Propaganda, and Bifurcated Racial Stereotypes, 4 UCLA ASIAN PAC. AM. L.J. 1 (1996). Given the diversity of appearance in these communities, the notion of Arab or Muslim appearance is a misnomer. See SHAHEEN, *supra* note 70, at 4; ARABS IN AMERICA, *supra* note 90, at 13–15.

251. See *supra* note 1. In response to previous claims of unlawful national origin or race discrimination, the Executive Branch has quickly denied that a regulation permitted such discrimination. See *Jean v. Nelson*, 472 U.S. 846, 855–56 (1985).

R

R

R

R

R

R

regulation that required only Iranian students on nonimmigrant visas to report to the INS and provide information about residence and evidence of school enrollment.<sup>252</sup> The court held that the regulation had a “rational basis” and emphasized that “it is not the business of courts to pass judgment on the decisions of the President in the field of foreign policy.”<sup>253</sup> Courts reviewing other regulations directed at Iranian citizens during this time also refused to disturb the Executive Branch’s judgment.<sup>254</sup>

*Narenji* offers some support for the Justice Department’s questioning of Arab and Muslim noncitizens.<sup>255</sup> There are important distinctions, however, between this instance and that case. The policy at issue in *Narenji* was based on nationality, while the current targeting of Arabs and Muslims, who are from many different nations, is not as narrowly tailored. National origin distinctions would appear less subject to abuse than other broader classifications. “If these [nationality] distinctions are not defined in terms of race and are not motivated by racial prejudice . . . then they would not elicit heightened scrutiny under ordinary equal protection analysis.”<sup>256</sup> Alternatively, racial, ethnic, and religious classifications would warrant strict scrutiny.<sup>257</sup> In the federal government’s response to September 11, such classifications are precisely what are triggering the various security measures.

The judicial deference to the federal government’s actions directed at Iranians in the United States during the hostage crisis was

---

252. *Narenji v. Civiletti*, 617 F.2d 745 (D.C. Cir. 1979), *cert. denied*, 446 U.S. 957 (1980); *see also* Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 587–88 (1990) (discussing how district court had sought to invalidate the President’s action because it constituted discrimination on the basis of nationality); *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155 (1993) (upholding interdiction and repatriation policy directed exclusively at Haitians).

253. *Narenji*, 617 F.2d at 748.

254. *See, e.g.*, *Ghaelian v. INS*, 717 F.2d 950, 953 (6th Cir. 1983) (holding that the court lacked jurisdiction to review an Equal Protection challenge to a regulation in a deportation action); *Dastmalchi v. INS*, 660 F.2d 880, 892 (3d Cir. 1981) (same); *Nademi v. INS*, 679 F.2d 811 (10th Cir. 1982) (upholding regulation allowing Iranian citizens only 15 days before voluntarily departing the country); *Malek-Marzban v. INS*, 653 F.2d 113 (4th Cir. 1981) (same).

255. *See supra* text accompanying notes 212–48.

256. Neuman, *supra* note 136, at 340.

257. *See, e.g.*, *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995) (holding that all racial classifications, including those in federal programs to increase government contracting with minority businesses, are subject to strict scrutiny); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (to the same effect).

criticized in ways that apply equally to the reaction to the response to the events of September 11:

*Narenji* is troublesome because an executive classification based on nationality in a foreign affairs crisis poses the danger that *the Executive will overvalue the government interest and undervalue the individual constitutional interest. In a severe crisis, the political and psychological pressures on the Executive are extreme. In this situation, executive measures may be motivated by frustration or desperation rather than by an assessment of their actual usefulness, or they may reflect little more than a desire to appear stern and decisive. Conversely, in times of crisis the individual interests of persons selected for special burdens may be grossly undervalued.* Indeed, the virulence of popular feeling against Iranian nationals during the hostage crisis raises the possibility that the Executive, in imposing special burdens on Iranian students, may have been reflecting to some extent a constitutionally *impermissible hostility based on national origin.* The atmosphere during the hostage crisis was marked by a hostility directed at citizens of Iran that resembled to some extent the hostility that is frequently directed toward citizens of an enemy nation during a war.<sup>258</sup>

Although presenting formidable barriers to claims, the Supreme Court has left an opening for challenges to race-based enforcement of the law.<sup>259</sup> The Court in *Reno v. American-Arab Anti-Discrimination Committee* expressed disfavor of selective enforcement claims: “[t]he Executive should not have to disclose its ‘real’ reasons for deeming nationals of a particular country a special threat—or indeed for simply wishing to antagonize a particular foreign country by focusing on that country’s nationals—and even if it did disclose them a court would be ill equipped to determine their authenticity and utterly unable to assess their adequacy.”<sup>260</sup> The

---

258. Peter E. Quint, *The Separation of Powers Under Carter*, 62 TEX. L. REV. 785, 856 (1984) (emphasis added) (footnotes omitted); see also PETER ANDREAS, BORDER GAMES: POLICING THE U.S.–MEXICO DIVIDE (2000) (analyzing how U.S. government has pursued increased border enforcement for political and symbolic impacts despite its overall lack of effectiveness).

259. See *supra* text accompanying notes 127–49 (discussing case of L.A. Eight). For analysis of the selective enforcement claims, see Neuman, *supra* note 136, at 338–41; see also David A. Martin, *On Counterintuitive Consequences and Choosing the Right Control Group: A Defense of Reno v. AADC*, 14 GEO. IMMIGR. L.J. 363, 379–83 (2000) (suggesting that the Court should have considered a noncitizen’s stake in the country, such as whether the person was a lawful permanent resident or on a temporary student visa, in addressing claims).

260. *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 491 (1999).

Court, however, acknowledged “the possibility of a rare case in which the alleged basis of discrimination is so outrageous” that such a claim might not be foreclosed.<sup>261</sup> This exception might be triggered if the U.S. government’s action was based on race,<sup>262</sup> which arguably is the case with respect to the policies directed at Arabs and Muslims after September 11.

In the aftermath of September 11, the U.S. government arguably overreacted and appeared to place little value on the liberty and equality interests of Arabs and Muslims.<sup>263</sup> The response may be motivated in part by invidious hostility based on race and religion. With few legal constraints, the federal government adopted extreme action, with a largely symbolic impact in fighting terrorism, while having devastating impacts on Arabs and Muslims in the United States.

Moreover, the dragnet might prove to be a poor law enforcement technique. Racial profiling in criminal law enforcement has been criticized for alienating minority communities and making it more difficult to secure their much-needed cooperation in law enforcement.<sup>264</sup> In a time when Arab and Muslim communities might be of assistance in investigating terrorism, they are being rounded

---

261. *Id.*

262. The courts have expressed a willingness to invalidate an immigration stop under the Fourth Amendment if based exclusively on race. *See* *Brignoni-Ponce v. United States*, 422 U.S. 873 (1975) (invalidating a border stop near U.S./Mexico border based exclusively on race); *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1050–51 (1984) (stating that the exclusionary rule might apply to deportation proceedings in cases of “egregious violations of Fourth Amendment or other liberties that might transgress notions of fundamental fairness and undermine the probative value of the evidence obtained”); *see also* *Orhorhaghe v. INS*, 38 F.3d 488, 497 (9th Cir. 1994) (finding that the sole basis for seizure by INS was person’s racial background or national origin and constituted an egregious violation of the Fourth Amendment); Judy C. Wong, Note, *Egregious Fourth Amendment Violations and the Use of the Exclusionary Rule in Deportation Hearings: The Need for Substantive Equal Protection Rights for Undocumented Immigrants*, 28 COLUM. HUM. RTS. L. REV. 431, 455–60 (1997) (summarizing lower court decisions finding that the immigration stop based exclusively on race was an “egregious” Fourth Amendment violation justifying the application of exclusionary rule).

263. *See supra* text accompanying notes 194–251.

264. *See* David A. Harris, *The Stories, the Statistics, and the Law: Why “Driving While Black” Matters*, 84 MINN. L. REV. 265, 298–300 (1999) (discussing “deep cynicism among blacks about the fairness and legitimacy of law enforcement and courts” due to “[r]acially targeted traffic stops”).

up, humiliated, and discouraged from cooperating with law enforcement by fear of arrest, detention, and deportation.<sup>265</sup>

Ultimately, such tactics suggest to noncitizens and citizens of Arab and Muslim ancestry in the United States that they are less than full members of U.S. society.<sup>266</sup> The various efforts by the U.S. government, even while it claims not to discriminate against Arabs or Muslims,<sup>267</sup> marginalize these communities. Consequently, the legal measures taken by the federal government reinforce deeply-held negative stereotypes—foreign-ness and possibly disloyalty—about Arabs and Muslims.<sup>268</sup>

## 2. Visa Processing and Removals

Many of the September 11 airplane hijackers appear to have entered the country on student nonimmigrant visas, which provoked concern and an array of federal responses.<sup>269</sup> Visa monitoring concerns increased exponentially when two suspected terrorists received visa renewals months after their deaths on September 11.<sup>270</sup>

---

265. See James H. Johnson, Jr., *U.S. Immigration Reform, Homeland Security, and Global Economic Competitiveness in the Aftermath of the September 11, 2001 Terrorist Attacks*, 27 N.C. J. INT'L L. & COM. REG. 419, 450–55 (2002).

266. See Michael Scaperlanda, *Partial Membership: Aliens and the Constitutional Community*, 81 IOWA L. REV. 707 (1996) (analyzing the legal “partial membership” rights accorded noncitizens in the United States); see also Linda Kelly, *Defying Membership: The Evolving Role of Immigration Jurisprudence*, 67 U. CIN. L. REV. 185, 187 (1998) (studying the application of the membership paradigm to recent immigration law developments). See generally KARST, *supra* note 249 (discussing efforts of various minorities to achieve full membership in U.S. society). R

267. See President Bush, *Address Before a Joint Session of the Congress on the United States Response to the Terrorist Attacks of September 11*, 37 WEEKLY COMP. PRES. DOCS. 1347, 1348 (Sept. 20, 2001) (emphasizing that the war on terrorism is not a war on Muslim people).

268. Cf. Gerald M. Rosberg, *The Protection of Aliens from Discriminatory Treatment by the National Government*, 1977 SUP. CT. REV. 275, 327 (analyzing stigmatizing impact of racial exclusions in federal immigration law on persons sharing that ancestry in the country).

269. See Johnson, *supra* note 265, at 438–49 (reviewing the immigration status of 19 noncitizens involved in the September 11 hijackings). Immediately after September 11, Senator Dianne Feinstein proposed a six-month moratorium on all student visas. See Diana Jean Schemo, *Access to U.S. Courses Is Under Scrutiny in Aftermath of Attacks*, N.Y. TIMES, Sept. 21, 2001, at B7. It is noteworthy that one alleged co-conspirator in the hijackings apparently was denied a visa four times and never was able to enter the country to participate in the hijackings. See Kate Zernike & James Risen, *Tracing a 16-Month Infusion of Men and Money, Culminating in the Horror of Sept. 11*, N.Y. TIMES, Dec. 12, 2001, at B7. R

270. See Elizabeth A. Palmer & John Godfrey, *Sensenbrenner Leading the Charge for Immediate INS Overhaul*, CQ WKLY., Mar. 16, 2002, at 705.

As an initial response, investigators contacted administrators at over 200 colleges to collect information about students from Middle Eastern countries.<sup>271</sup> In December 2001, with a mass arrest, the INS announced its crackdown of noncitizens who violated the terms of their student visas. Arrests focused exclusively on students from nations with alleged terrorist links: Iran, Iraq, Sudan, Pakistan, Libya, Saudi Arabia, Afghanistan, and Yemen.<sup>272</sup> Along similar lines, the Justice Department in January 2002 announced that its "Operation Absconder" will focus removal efforts on 6000 young men from the Middle East who have ignored deportation orders.<sup>273</sup>

In May 2002, Congress passed the Enhanced Border Security and Visa Reform Act to improve the monitoring of noncitizens in the United States on student and other visas.<sup>274</sup> In June 2002, Attorney General John Ashcroft announced a new National Security Entry-Exit Registration System, which will impose special registration requirements on noncitizens who, as determined by the federal government, pose "national security risks."<sup>275</sup> Specifically, fingerprinting, photographing, and added registration requirements will be required of nationals of Iran, Iraq, Libya, Sudan, and Syria, and any other noncitizens determined by the Attorney Gen-

---

271. See Neil A. Lewis & Christopher Marquis, *Larger Visa Waits for Arabs*, N.Y. TIMES, Nov. 10, 2001, at A1; Matthew Purdy, *Bush's New Rules to Fight Terror Transform the Legal Landscape*, N.Y. TIMES, Nov. 25, 2001, at A1.

272. See James Sterngold with Diana Jean Schemo, *10 Arrested in Visa Cases in San Diego*, N.Y. TIMES, Dec. 13, 2001, at B1.

273. See DOJ *Focusing on Removal of 6,000 Men from Al Qaeda Haven Countries*, 79 INTERPRETER RELEASES 115 (2002); *Deputy Attorney General Releases Internal Guidance for 'Absconder' Apprehensions*, 79 INTERPRETER RELEASES 261 (2002); Dan Eggen, *Deportee Sweep Will Start With Mideast Focus*, WASH. POST, Feb. 8, 2002; Dan Eggen & Cheryl W. Thompson, *U.S. Seeks Thousands Ordered Deported: Focus on Mideast Men is Criticized*, WASH. POST, Jan. 8, 2002, at A1. The former INS Commissioner Doris Meissner questioned whether this was sound policy. See *On the Fence: Former INS Commissioner Doris Meissner on the Contradictions of Migration Policy in a Globalizing World*, FOREIGN POL'Y, Mar. 1, 2002, at 23.

274. Enhanced Border Security and Visa Entry Reform Act of 2002, Pub. L. No. 107-173, 116 Stat. 543 (2002).

275. See *Groups Voice Racial Profiling Concerns Over Plan to Fingerprint, Track U.S. Visitors*, 70 U.S.L.Wk. 2793 (2002); Eric Lichtblau, *Strict New Visa Rules Outlined Amid Protests*, L.A. TIMES, June 6, 2002, at A1; Eric Schmitt, *U.S. Will Seek to Fingerprint Visas' Holders*, N.Y. TIMES, June 4, 2002, at A1.



eral.<sup>276</sup> The Attorney General will have exclusive authority to designate the noncitizens deemed to be “national security risks.”<sup>277</sup>

Any legal challenges to the visa policies and procedures will prove difficult. Visa procedures generally are not subject to judicial review. Indeed, Congress in 1996 extended greater discretion to the State Department in visa processing and, according to some critics, increased the potential for nationality-based discrimination in the visa issuance process.<sup>278</sup> Moreover, the merits of visa decisions by State Department consular officers long have been immune from any judicial review.<sup>279</sup> Selective enforcement claims also face formidable legal barriers.<sup>280</sup>

### 3. Torture

The Arab and Muslim dragnet was not the most extreme option considered in the wake of September 11. Indeed, the tenor of the public debate allowed for consideration of policy alternatives that previously would have been virtually unthinkable.<sup>281</sup> Torture

276. See 67 Fed. Reg. 40,581 (June 13, 2002); U.S. Department of Justice, National Security Entry-Exit Tracking System Fact Sheet (June 5, 2002), at <http://www.usdoj.gov/ag/speeches/2002/natlsecentryexittrackingsys.htm> (last visited June 7, 2002).

277. See 67 Fed. Reg. at 40,581–85.

278. See IIRIRA, *supra* note 158, § 633 (amending INA § 202(a)(1), 8 U.S.C. § 1152(a)(1)) (providing that the Secretary of State has the authority for determining the procedures for the processing of visa applications); William L. Pham, Comment, *Section 633 of IIRIRA: Immunizing Discrimination in Immigrant Visa Processing*, 45 UCLA L. REV. 1461 (1998) (criticizing 1996 change in law). The 1996 amendment was a response to the decision in *Legal Assistance for Vietnamese Asylum Seekers v. Dept. of State*, 45 F.3d 469 (D.C. Cir. 1995) (holding that State Department had engaged in nationality-based discrimination against Vietnamese asylum-seekers in violation of the immigration laws), *vacated and remanded*, 519 U.S. 1 (1996).

279. See *Saavedra Bruno v. Albright*, 197 F.3d 1153, 1159–60 (D.C. Cir. 1999); *Hermína Sague v. United States*, 416 F. Supp. 217, 219 (D.P.R. 1976); *Pena v. Kissinger*, 409 F. Supp. 1182, 1185–87 (S.D.N.Y. 1976). The lack of judicial review is troubling given that evidence suggests that consular officers may have relied on racial and economic stereotyping in denying visas. See *Olsen v. Albright*, 990 F. Supp. 31 (D.D.C. 1997) (discussing the case of consular officer who was allegedly terminated for refusing to follow racial and economic profiles in visa issuance processes); see also LEGOMSKY, *supra* note 149, at 437 (discussing facts of *Olsen v. Albright*). For analysis and suggested reform, see James A.R. Nafziger, *Review of Visa Denials by Consular Officers*, 66 WASH. L. REV. 1 (1991).

280. See *supra* text accompanying notes 259–62.

281. See, e.g., *Rochin v. California*, 342 U.S. 165, 172 (1952) (holding that pumping suspect’s stomach was a method “too close to the rack and the screw,” that it “shock[ed] the conscience,” and thus violated the Fourth and Fourteenth Amendments).

R

R

R

to extract information, or the threat of sending a suspect to a country that engaged in torture, was discussed as a policy option.<sup>282</sup> A public reevaluation of the ordinary Fourth Amendment prohibition of such practices ensued.<sup>283</sup>

Torture was contemplated because many of the “material witnesses” arrested and detained in the dragnet in the weeks following September 11 apparently did not provide much information to the U.S. government.<sup>284</sup> Given the relatively indiscriminate nature of the arrests, many in all likelihood did not have any relevant information. Nonetheless, support for torture came from across the political spectrum.<sup>285</sup>

Torture unquestionably is an extreme measure, going well beyond conventional law enforcement techniques. The consideration of extreme measures reveals the popular perception about the nature and inhumanity of Arab and Muslim “terrorists.”<sup>286</sup> As Professor Porras observed,

[t]he terrorist is transformed through the . . . rhetoric from an ordinary deviant into a frightening, “foreign,” barbaric beast at the same time that extra-normal means are called for to fight terrorism. Since terrorists are never imagined as anything other than terrifying, blood-thirsty barbarians, ordinary law is understood to be deficient or insufficient to deal with them.<sup>287</sup>

This classification of Arabs and Muslims as inhuman “others” taps into their enduring demonization as presumptively disloyal and dangerous to the security of the United States.<sup>288</sup>

The legal use of torture hopefully will never come to pass in the United States. However, the fact that it was discussed in polite company in the wake of September 11 demonstrates the monumental—although hopefully temporary—shift in public opinion about the need to protect national security whatever the cost to civil liberties.

282. See *infra* text accompanying notes 283–85.

283. See Jonathan Alter, *Time to Think About Torture*, NEWSWEEK, Nov. 5, 2001, at 45; cf. Susan Estrich, *Fear Itself—In Times of Threat, Some Cures Are Worse Than the Disease*, AM. LAW., Dec. 2001, at 65.

284. See *supra* text accompanying notes 212–68.

285. See Alter, *supra* note 283.

286. See *supra* text accompanying notes 21–126.

287. Ileana M. Porras, *On Terrorism: Reflections on Violence and the Outlaw*, 1994 UTAH L. REV. 119, 121 (1994); cf. Kevin R. Johnson, “Aliens” and the U.S. Immigration Laws: *The Social and Legal Construction of Nonpersons*, 28 U. MIAMI INTER-AM. L. REV. 263 (1996-97) (analyzing how the use of the term “alien” in immigration law dehumanizes noncitizens and helps to rationalize their harsh treatment).

288. See *supra* text accompanying notes 21–126.

R

R

R

R

R

#### 4. Conclusion

The federal government acted quickly and nationally in responding to the events of September 11. The law enforcement tactics generally were based on group probabilities, not individualized suspicion of wrongdoing or knowledge. A discrete and insular minority suffered the consequences, with little negative public reaction and general public support for the U.S. government's response.

#### *B. Long Term Civil Rights Impacts*

The federal government's reaction to the events of September 11 promises to have a deep and enduring impact on civil rights in the United States. As the not-so-distant past demonstrates, immigration reforms and executive action, which have the appearance of responding to the acts of terrorism, will remain with us long after the immediate terrorist threat has passed and adversely affect the rights of all immigrants and many citizens.<sup>289</sup> Moreover, fundamental immigration reform proposals, such as the possible regularization of the immigration status of many undocumented immigrants in the United States and repeal of special secret evidence procedures, under serious discussion before September 11, may well go by the wayside.<sup>290</sup> The demise of regularization proposals will maintain the uncertain legal status, and accompanying vulnerability, of undocumented immigrants.<sup>291</sup>

---

289. See *infra* text accompanying notes 294–301; William J. Stuntz, *Local Policing After the Terror*, 111 YALE L.J. 2137 (2002) (analyzing direct and indirect impacts on all U.S. citizens of enhanced local law enforcement powers after September 11). For discussion of the adverse impacts of the 1996 immigration reforms on the immigrant community, see Nancy Morawetz, *Rethinking Retroactive Deportation Laws and the Due Process Clause*, 73 N.Y.U. L. REV. 97, 111-14 (1998); Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936 (2000).

290. See *infra* text accompanying notes 316–25.

291. See Linda S. Bosniak, *Opposing Prop. 187: Undocumented Immigrants and the National Imagination*, 28 CONN. L. REV. 555, 576–77 (1996) (“While [the undocumented] formally are afforded the minimum rights of personhood under the law, they lie entirely outside the law’s protections for many purposes, and they live subject to the fear of deportation at virtually all times.”) (citations omitted); Lori A. Nessel, *Undocumented Immigrants in the Workplace: The Fallacy of Labor Protection and the Need for Reform*, 36 HARV. C.R.-C.L. L. REV. 345, 348 (2001) (contending that federal labor laws fail to adequately protect undocumented workers, leaving them “without meaningful remedies and vulnerable to deportation if they assert their protected rights”); Maria L. Ontiveros, *To Help Those Most in Need: Undocumented Workers’ Rights and Remedies Under Title VII*, 20 N.Y.U. REV. L. & SOC. CHANGE 607 (1994) (arguing that employers exploit undocumented workers, including

R

R

Moreover, the focus on “Arab appearance” and Muslim identity has revived debate about the propriety of racial profiling in law enforcement, an enduring problem for racial minorities in the United States.<sup>292</sup> Before September 11, the U.S. public and policy-makers had come a long way in a relatively short time in critically scrutinizing the use of race and perceived racial appearance in criminal and immigration law enforcement.<sup>293</sup> One day promised to change all of that.

#### 1. Recent History: Oklahoma City and Immigration “Reform”

The leeway afforded the federal government in immigration matters allows the political branches to swiftly take aggressive actions and appear to offer a “quick fix” to deeply complex political, economic, and social problems.<sup>294</sup> Immigration reform will likely be one of the impacts of September 11. Recent history offers helpful, if not comforting, lessons in this regard.

In 1996, Congress passed tough immigration legislation in response to the fear of terrorism in the wake of the bombing of a federal building in Oklahoma City; the reforms, among many other things, created special removal proceedings for alleged terrorists.<sup>295</sup> The Antiterrorism and Effective Death Penalty Act of 1996 has adversely affected the Arab and Muslim community,<sup>296</sup> as well as other noncitizens in the United States.<sup>297</sup> Congress enacted such drastic measures despite the fact that a former U.S. army officer and U.S. citizen was the primary perpetrator of the Oklahoma City bombing.<sup>298</sup>

---

many Latina/os, who have few legal remedies); *see also* Jorge A. Vargas, *U.S. Border Patrol Abuses, Undocumented Mexican Workers, and International Human Rights*, 2 SAN DIEGO INT’L L.J. 1 (2001) (discussing human rights abuses suffered by undocumented Mexican workers in the United States).

292. *See infra* text accompanying notes 326–49.

293. *See infra* text accompanying notes 326–49.

294. *See supra* text accompanying notes 194–288.

295. *See supra* notes 163–67 and accompanying text (discussing AEDPA’s terrorism provisions).

296. *See generally* Whidden, *supra* note 90.

297. *See infra* text accompanying notes 299–301.

298. *See* *United States v. McVeigh*, 153 F.3d 1166 (10th Cir. 1998). Despite the fact that Arabs and Muslims had nothing to do with this act of terrorism, hate crimes and threats against Arabs and Muslims increased substantially immediately after the bombing. In addition, the initial stages of the criminal investigation that followed focused on Arabs and Muslims. *See* Whidden, *supra* note 90, at 2863–67.

R  
R  
R  
R  
R  
R  
R

AEDPA arguably did little to quell the threat of terrorism in the United States.<sup>299</sup> However, it and other 1996 immigration reform legislation that limited judicial review of various deportation and related decisions, have adversely affected noncitizens.<sup>300</sup> Only in 2001 did the Supreme Court clarify a conflict among the circuits and ensure that habeas corpus review of removal orders remained intact.<sup>301</sup>

As seen in the aftermath of the Oklahoma City bombing, a congressional response to September 11 may include immigration reforms. Public opinion polls suggest that voters may support immigration, civil rights, and other restrictions aimed specifically at Arabs and Muslims, including U.S. citizens.<sup>302</sup>

Besides laws designed to improve visa monitoring,<sup>303</sup> Congress has already taken one significant effort at immigration reform. Section 411 of the USA PATRIOT Act expands the definition of “terrorist activity,” which justifies exclusion, to include using any “explosive, firearm, or other weapon or dangerous device (other than for mere personal monetary gain), with intent to endanger, directly or indirectly, the safety of one or more individuals or to

---

299. See Whidden, *supra* note 90, at 2853–60; Note, *Blown Away? The Bill of Rights After Oklahoma City*, 109 HARV. L. REV. 2074, 2075–76, 2080 (1996).

300. See AEDPA, *supra* note 157, § 440; IIRIRA, *supra* note 158, §§ 306(a), (d), 308(g)(10)(H), 371(b)(6); see, e.g., Jennifer A. Beall, Note, *Are We Only Burning Witches? The Antiterrorism and Effective Death Penalty Act of 1996's Answer to Terrorism*, 73 IND. L.J. 693, 705–07 (1998); Dulce Foster, Note, *Judge, Jury and Executioner: INS Summary-Exclusion Power Under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996*, 82 MINN. L. REV. 209 (1997); Lisa C. Solbakken, Note, *The Anti-Terrorism and Effective Death Penalty Act: Anti-Immigration Legislation Veiled in an Anti-Terrorism Pretext*, 63 BROOK. L. REV. 1381, 1389–91 (1997).

301. See *INS v. St. Cyr*, 533 U.S. 289 (2001).

302. See Richard Morin & Claude Deane, *Most Americans Back U.S. Tactics: Poll Finds Little Worry Over Rights*, WASH. POST, Nov. 29, 2001, at A1 (reporting poll results showing broad support for Bush administration measures to combat terrorism with little concern for loss of civil rights); USA Today/CNN/Gallup Poll Results, Sept. 16, 2001, at <http://www.usatoday.com/news/nation/2001/09/16/terrorism-poll2.htm> (last visited Oct. 31, 2002) (showing that almost 50% of persons polled supported a special identification card for Arabs, including U.S. citizens, and that almost 60% favored more intensive security checks before Arabs could board airplanes). The public's willingness to sacrifice civil liberties of Arabs, Muslims, and others remained strong well after September 11. See Robin Toner & Janet Elder, *Public is Wary But Supportive on Rights Curbs*, N.Y. TIMES, Dec. 12, 2001, at A1 (reporting on poll data). At a commencement ceremony in California, the audience heckled a speaker off the stage after she spoke of the need for vigilance in protecting civil liberties in the response to terrorism. See Timothy Egan, *In Sacramento, A Publisher's Questions Draw the Wrath of the Crowd*, N.Y. TIMES, Dec. 21, 2001, at B1.

303. See *supra* text accompanying notes 269–80.

R

R

R

cause substantial damage to property.” This may result in an additional removal ground for noncitizens convicted of assault and similar crimes not ordinarily thought of as “terrorist” in nature. The Act further provides that a spouse or child of an inadmissible “terrorist” is generally inadmissible as well.<sup>304</sup> A noncitizen also may be deemed inadmissible for being “associated with a terrorist organization,”<sup>305</sup> broad terms reminiscent of the discredited principle of guilt by association. The Act provides for retroactive application of the various changes to the immigration laws.<sup>306</sup>

The USA PATRIOT Act also appropriated funds for increased border enforcement, even though there is no evidence that the alleged terrorists evaded inspection at the national border.<sup>307</sup> In addition, the law allows the federal government greater surveillance powers, which may impact the rights of U.S. citizens.<sup>308</sup> The various provisions of the USA PATRIOT Act likely will be subject to constitutional challenges on a wide variety of grounds.<sup>309</sup>

In addition, the Aviation and Transportation Security Act, which placed airport security in the hands of the federal government, made U.S. citizenship a qualification for airport security personnel.<sup>310</sup> Although arguably constitutional,<sup>311</sup> the citizenship

---

304. See USA PATRIOT Act of 2001, Pub. L. No. 107-56, § 411, 115 Stat. 272, 345; see also Regina Germain, *Rushing to Judgment: The Unintended Consequences of the USA PATRIOT Act for Bona Fide Refugees*, 16 GEO. IMMIGR. L.J. 505 (2002) (analyzing impact of USA PATRIOT Act on asylum-seekers).

305. USA PATRIOT Act § 411.

306. See *id.*

307. *Id.* at § 402 (authorizing appropriations necessary to triple the Border Patrol personnel along northern border). This provision responds to fears that terrorists might seek to enter the country from Canada; on the eve of the new millennium, an Algerian man with bomb-making materials seeking to enter the United States from Canada was arrested and later convicted in a plot to bomb an airport. See Jane Fritsch, *Algerian Sentenced in 1999 Plot to Bomb Airport*, N.Y. TIMES, Jan. 17, 2002, at A26; Sam Howe Verhovek & Tim Weiner, *Man Seized with Bomb Parts at Border Spurs U.S. Inquiry*, N.Y. TIMES, Dec. 18, 1999, at A1. The Act's emphasis on northern border enforcement may shift the myopic focus from the southern border with Mexico, which experienced heightened border enforcement in the 1990s. See Bill Ong Hing, *The Dark Side of Operation Gatekeeper*, 7 U.C. DAVIS J. INT'L L. & POL'Y 121, 124-26, 135-44 (2001).

308. See Sharon H. Rackow, Comment, *How the USA PATRIOT Act Will Permit Governmental Infringement Upon the Privacy of Americans in the Name of "Intelligence" Investigations*, 150 U. PA. L. REV. 1651 (2002).

309. See *Developments in the Law—The Law of Prisons*, 115 HARV. L. REV. 1915, 1933-38 (2002) (outlining possible constitutional infirmities in USA PATRIOT Act).

310. Pub. L. No. 107-71, § 111(a)(2), 115 Stat. 597, 617 (2001).

311. See, e.g., *Cabell v. Chavez-Salido*, 454 U.S. 432 (1982) (upholding a state law requiring peace officers to be U.S. citizens); *Ambach v. Norwick*, 441 U.S. 68

requirement injures many lawful immigrants who had held these low-wage jobs in airports across the country.<sup>312</sup> Ironically, while immigrants can be conscripted into the military, and thus stationed at many airports,<sup>313</sup> they cannot serve in airport security positions. In addition, immigration checks of airport employees led to arrests of undocumented persons; a large number of these reported arrests were not of Arab or Muslim origin.<sup>314</sup>

As part of efforts at heightened security, the U.S. government likely will take other actions that will adversely affect immigrants generally. For example, the Justice Department announced in July 2002 that it would begin requiring that noncitizens report changes of address within ten days of moving or be subject to deportation.<sup>315</sup> This new reporting requirement likely will result in many more possible removal cases.

More generally, the events of September 11 likely will adversely impact long-contemplated reforms to immigration law and enforcement. Before the bombings, immigrant rights advocates believed it possible that Congress would ameliorate some of the harsh provisions of the 1996 immigration legislation, including possible elimination of the secret evidence proceedings.<sup>316</sup> During the 2000

---

(1979) (rejecting constitutional challenge to a state law barring an alien from certification as public school teacher unless that person intends to apply for U.S. citizenship); *Foley v. Connelie*, 435 U.S. 291 (1978) (refusing to disturb a state law requiring police officers to be U.S. citizens).

312. See Steven Greenhouse, *Groups Seek to Lift Ban on Foreign Screeners*, N.Y. TIMES, Dec. 12, 2001, at B10 (reporting that 81% of the security screeners at San Francisco International Airport and about 40% of those at Los Angeles International were immigrants who faced loss of their jobs); see also Sam Skolnik, *INS Checking Sea-Tac Workers: Purpose is to Weed Out Unauthorized Employees*, SEATTLE POST-INTELLIGENCER, Nov. 28, 2001, at A1 (stating that the INS was reviewing immigration status of Seattle airport's 18,000 workers because of security concerns).

313. See 50 U.S.C. app. § 453 (1994); see also Charles E. Roh, Jr. & Frank K. Upham, *The Status of Aliens Under United States Draft Laws*, 13 HARV. INT'L L.J. 501 (1972).

314. See Ted Bridis, *D.C.-Area Airport Raids Net Nearly 100 Arrests*, CHI. TRIB., Apr. 24, 2002; Juliet V. Casey, *Operation Tarmac: Advocates: Hispanics Unfairly Targeted*, LAS VEGAS REV.-J., Feb. 9, 2002, at 1B; Patrick J. McDonnell, *200 Airport Workers in West Arrested by INS*, L.A. TIMES, Mar. 27, 2002, at pt. 2, p. 7; Steve Mile-tich, *20 Arrested at Sea-Tac to Be Handled Through Deportation Actions*, SEATTLE TIMES, Jan. 23, 2002, at B1; Matthew B. Stannard, *INS Holds 25 at Airports*, S.F. CHRON., Mar. 26, 2002, at A1; *INS Arrests 30 Airport Employees in Portland*, SEATTLE TIMES, Dec. 21, 2001, at B2.

315. See Jonathan Peterson, *Noncitizens Must Report If They Move*, L.A. TIMES, July 23, 2002, pt. 1, at 1.

316. See Secret Evidence Repeal Act of 2000, H.R. 2121, 106th Cong. (2000); Anthony Lewis, *Abroad at Home: The Uses of Secrecy*, N.Y. TIMES, Nov. 4, 2000, at A21; *supra* text accompanying notes 150–89 (discussing secret evidence cases).

Presidential campaign, George W. Bush criticized the Clinton administration's use of secret evidence proceedings against Arabs and Muslims as tantamount to unlawful racial profiling.<sup>317</sup> Given the federal government's desire for secrecy in its treatment of Arabs and Muslims,<sup>318</sup> the abolition of secret evidence proceedings currently appears out of the question.

Over the last few years, immigration rights activists had built broad support for a series of immigration reforms to "Fix 96," a response to the harsh consequences of the 1996 immigration reforms.<sup>319</sup> All such legislative proposals appear to have died on September 11.

Moreover, a short-lived historical moment appeared in 2001 promising a fundamental transformation of U.S.-Mexico migration. Only days before September 11, public discussion had been ongoing between the United States and Mexican governments about the possibility of dramatic changes to the migration relationship between the two nations. The Mexican government supported a program that would allow for the "regularization" of the status of many undocumented Mexican migrants in the United States,<sup>320</sup> while members of the Bush administration hoped for great expansion of the existing guest-worker programs.<sup>321</sup> Although difficult sticking points remained,<sup>322</sup> a compromise appeared possible. After September 11, such reform discussion disappeared for months. This reform is perhaps another casualty of the catastrophic events of that day.<sup>323</sup>

---

317. See *Vice President Gore and Governor Bush Participate in Second Presidential Debate*, FDCH POL. TRANSCRIPTS, Oct. 11, 2000.

318. See *supra* text accompanying notes 215–18.

319. See Eric Lipton, *As More Are Deported, a '96 Law Faces Scrutiny*, N.Y. TIMES, Dec. 21, 1999, at A1 (discussing "Fix 96" campaign and various immigration reform efforts); Somini Sengupta, *The Immigration Debate: Full Employment Opens the Door*, N.Y. TIMES, June 18, 2000, at D4 (same); see also PETER H. SCHUCK, *CITIZENS, STRANGERS, AND IN-BETWEENS* 143–44 (1998) (referring to 1996 reforms as "radical" and describing the ways in which they are "harsh and unjust").

320. See Ginger Thompson, *U.S. and Mexico to Open Talks on Freer Migration for Workers: Bush Signaling New Focus on Immigration Issues*, N.Y. TIMES, Feb. 16, 2001, at A1.

321. See Eric Schmitt, *No Agreement Yet with Mexico on Immigration Plan, U.S. Says: Details Are Still Unsettled on Eve of Fox's Visit*, N.Y. TIMES, Sept. 1, 2001, at A1.

322. See *id.* (quoting Senator Phil Gramm, who supported the expanded guest worker program but vowed that any legalization program would have to be passed "over [his] cold, dead political body").

323. See Ronald Brownstein, *Green Light, Red Light: Is the Push to Liberalize Immigration Policy a Casualty of the Surprise Terrorist Attacks on September 11?*, AM. PROSPECT, Nov. 19, 2001, at 28; Julia Malone, *Immigration Takes Back Seat to Security*, ATLANTA J.



Regularizing the immigration status of migrants from Mexico promised to make undocumented immigration a more manageable issue for the United States, as Mexican citizens represent a significant portion of the undocumented population.<sup>324</sup> With the retreat from this change in direction, undocumented Mexican immigrants will be denied the opportunity to regularize their immigration status. They also are more likely to experience the ripple effects of heightened border enforcement.<sup>325</sup> Only time will tell whether a historic opportunity to reform the migration relations between the United States and Mexico was destroyed with the World Trade Center.

## 2. Racial Profiling

Prior to September 11, the use of racial profiling in criminal law enforcement had been the subject of critical analysis.<sup>326</sup> Presidential hopefuls criticized racial profiling by police in traffic stops.<sup>327</sup> After the 2000 election, both President Bush and Attorney General Ashcroft publically condemned racial profiling.<sup>328</sup>

Similarly, the argument had been powerfully made that race-based enforcement of the immigration laws is inappropriate.<sup>329</sup> Al-

---

& CONST., Mar. 20, 2002, at 3A; Tim Weiner & Ginger Thompson, *Mexico Lower on Bush's List Since Sept. 11*, N.Y. TIMES, Dec. 29, 2001, at A4.

324. See U.S. DEP'T OF JUSTICE, 1998 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE 240, 241 (2000) (compiling statistical data showing that, as of 1996, about 54% of undocumented immigrant population was of Mexican origin).

325. See Fox Butterfield, *Drug Seizures Have Surged at the Border Officials Say*, N.Y. TIMES, Dec. 16, 2001, § 1A, at 32 (noting impacts of increased border enforcement after September 11); Richard A. Serrano, *Arrests on Border Fall After 9/11*, L.A. TIMES, Feb. 2, 2002, at A1 (reporting fewer arrests on border after September 11 perhaps due to increased fears of arrest and detention).

326. See, e.g., Angela J. Davis, *Race, Cops, and Traffic Stops*, 51 U. MIAMI L. REV. 425, 442-43 (1997); Harris, *supra* note 264; Tracey Maclin, *Race and the Fourth Amendment*, 51 VAND. L. REV. 333, 342-62 (1998).

327. See Richard L. Berke, *Gore and Bradley Duel, Briefly, on Racial Issue*, N.Y. TIMES, Jan. 18, 2000, at A20.

328. See *Attorney General Seeks End to Racial Profiling*, N.Y. TIMES, Mar. 2, 2001, at A20.

329. See Kevin R. Johnson, *The Case Against Racial Profiling in Immigration Enforcement*, 78 WASH. U. L.Q. 675 (2000); Victor C. Romero, *Racial Profiling: "Driving While Mexican" and Affirmative Action*, 6 MICH. J. RACE & L. 195 (2000); see also Conference, *National Council of La Raza 2001 Annual Conference: Selected Panels*, 7 TEX. HISP. J.L. & POL'Y 13, 24-28 (2001) (statement of Ms. Maria Demeo, Mexican American Legal Defense and Education Fund) (discussing problems of racial profiling of Latina/os in immigration and criminal law enforcement).

though the Supreme Court condoned the practice in 1975,<sup>330</sup> one court of appeals in 2000 held that the Border Patrol could not consider a person's "Hispanic appearance" in making an immigration stop.<sup>331</sup> The court ruled that the profile was over-inclusive, pulling in too many U.S. citizens and lawful permanent residents, as well as allowing for the arrest of a relatively small number of undocumented immigrants.

Moreover, sustained public criticism of racial profiling in national security matters came in the wake of the Wen Ho Lee debacle, in which trumped-up espionage charges evaporated when exposed to the light of day.<sup>332</sup> Similar to the case of Arabs and Muslims in the United States, Lee was likely presumed disloyal because of long-held stereotypes about persons of Asian ancestry.<sup>333</sup>

In all of these circumstances, law enforcement measures based on alleged group propensities for criminal conduct run afoul of the U.S. Constitution, which is generally premised on the view that individualized suspicion is necessary for police action.<sup>334</sup> Unfortunately, September 11 resurrected governmental reliance on statistical probabilities at the core of racial profiling.

After the tragedy of September 11, persons of apparent Arab ancestry were questioned for possible links to terrorism, removed from airplanes, and generally subject to scrutiny at every turn.<sup>335</sup> To many, the reconsideration of the use of race in law enforcement made perfect sense. Public opinion, at least for a time, shifted to favor racial profiling in the war on terrorism.<sup>336</sup> If the shift proves

330. See *United States v. Brignoni-Ponce*, 422 U.S. 873, 886–87 (1975) (holding that Mexican appearance was one relevant factor in, but alone not enough to justify, finding reasonable suspicion to conduct a stop to investigate whether occupants of a car are illegal immigrants).

331. See *United States v. Montero-Camargo*, 208 F.3d 1122 (9th Cir. 2000) (en banc).

332. See WU, *supra* note 87, at 176–90; Neil Gotanda, *Comparative Racialization: Racial Profiling and the Case of Wen Ho Lee*, 47 UCLA L. REV. 1689 (2000).

333. See Leti Volpp, "Obnoxious to Their Very Nature": *Asian Americans and Constitutional Citizenship*, 8 ASIAN L.J. 71, 79–82 (2001); Thomas W. Joo, *What, If Not Race, Tagged Lee?*, L.A. TIMES, Aug. 15, 2001, at B13.

334. See *supra* note 245 (citing cases).

335. See *supra* text accompanying notes 194–268.

336. See Gross & Livingston, *supra* note 18, at 1413–14; Dave Boyer, *Ban on Profiling Draws Growing Concern*, WASH. TIMES, June 5, 2002, at A1; Charles Krauthammer, *The Case for Profiling*, TIME, Mar. 8, 2002, at 104; David E. Rovella, *Pro-Police Opinions on the Rise, Poll Says*, NAT'L L.J., Jan. 21, 2002, at A1; Sam Howe Verhovek, *Americans Give in to Racial Profiling*, N.Y. TIMES, Sept. 23, 2001, at A1; see also Peter H. Schuck, *A Case for Profiling*, AM. LAW., Jan. 2002, at 59; Liam Braber, Comment, *Korematsu's Ghost: A Post-September 11th Analysis of Race and National Secur-*

R

R

R

R

enduring, it could have long-term impacts, including encouraging reconsideration of the efforts to end racial profiling in *all* law enforcement, thereby affecting U.S. citizens as well as foreigners.

The federal government's profiling of Arabs and Muslims in the criminal investigation and dragnet promotes the legitimacy of racial profiling.<sup>337</sup> It also has undermined federal efforts to pressure state and local law enforcement agencies to end the practice. One member of Congress proclaimed that anyone with "a diaper on his head and a fan belt around that diaper" should be stopped and questioned.<sup>338</sup> A Republican member of Congress of Lebanese descent (Darrell Issa) accused Air France of racial profiling in refusing to allow him to board a flight to the Middle East.<sup>339</sup> An Arab-American Secret Service agent assigned to protect President Bush was denied access to a commercial airline flight.<sup>340</sup>

Somewhat surprisingly, state and federal tensions have arisen due to the federal government's racially-tinged investigation in the wake of September 11. A handful of local law enforcement agencies resisted the Attorney General's request for cooperation in interviewing Arabs and Muslims<sup>341</sup> on the grounds that this constituted impermissible racial profiling.<sup>342</sup>

---

*ity*, 47 VILL. L. REV. 451 (2002) (analyzing impact of concern with national security after September 11 on racial profiling); Bruce Fein, *A Commensurate Response*, WASH. TIMES, Sept. 18, 2001, at A17 (proposing many measures, such as revoking the executive order prohibiting U.S. assassinations of foreign leaders, and calling for President Bush and Congress to authorize racial and religious profiling in efforts to investigate international terrorism); *Profiles in Timidity*, WALL ST. J., Jan. 25, 2002, at A18 (reasoning that racial profiling, after September 11, "isn't discrimination; given the threat, it is common sense"); Stuart Taylor Jr., *The Case for Using Racial Profiling at the Airports*, NAT'L J., Sept. 22, 2001 (advocating racial profiling of people of Arab appearance on airplanes); James Q. Wilson & Heather R. Higgins, *Profiles in Courage*, WALL ST. J., Jan. 10, 2002, at A12 (same).

337. See *supra* text accompanying notes 194–268.

R

338. *Apology from Congressman*, N.Y. TIMES, Sept. 21, 2001, at A16 (apologizing for his comment).

339. See *Rep. Issa Says His Arab Name Kept Him Off Flight*, L.A. TIMES, Oct. 27, 2001, at A13.

340. See *Guard for Bush Isn't Allowed Aboard Flight*, *supra* note 3.

R

341. See *supra* text accompanying notes 229–38.

R

342. See Jim Adams, *Twin Cities Police Undecided on Helping FBI; They Fear Interviewing Mideast Men Would be Profiling*, STAR TRIBUNE (Minneapolis, MN), Nov. 22, 2001, at 7B; Fox Butterfield, *Police Are Split on Questioning of Mideast Men*, N.Y. TIMES, Nov. 22, 2001, at A1. Some resistance stems from local laws and regulations limiting police cooperation with the INS, which were designed to encourage crime victims and witnesses to cooperate with local law enforcement. See, e.g., Patrick J. McDonnell, *INS Hunt Not Seen as Issue for LAPD*, L.A. TIMES, Dec. 8, 2001, at B4 (discussing 1979 Los Angeles Police Department directive barring officers from inquiring about immigration status).

More generally, the “war on terrorism” caused the federal government to reconsider its exclusive domain over immigration enforcement and consider extending power to state and local law enforcement agencies to enforce the immigration laws.<sup>343</sup> This ultimately could change the entire balance of immigration law enforcement power, which until relatively recently was almost exclusively in the hands of the federal government.<sup>344</sup> State and local involvement in immigration enforcement warrants concern in light of a spate of civil rights violations in the name of immigration enforcement by local authorities.<sup>345</sup> Local police from the sheriff’s department in Riverside County, California were videotaped beating two unarmed, undocumented Mexican immigrants who tried to evade the Border Patrol.<sup>346</sup> In an effort to rid the community of undocumented immigrants, local police in a Phoenix, Arizona suburb violated the constitutional rights of U.S. citizens and lawful immigrants of Mexican ancestry by stopping persons because of their skin color or their use of the Spanish language.<sup>347</sup> One can expect civil rights violations when local authorities, who generally are not

---

343. See DOJ *Legal Opinion Would Broaden Use of State, Local Personnel in Immigration Enforcement*, 79 INTERPRETER RELEASES 519 (2002); Susan Sachs, *Long Resistant, Police Start Embracing Immigration Duties*, N.Y. TIMES, at A11; Cheryl W. Thompson, *INS Role for Police Considered*, WASH. POST, Apr. 4, 2002, at A15. In July 2002, the Justice Department entered an agreement with Florida to train a group of police to assist in the enforcement of the immigration laws. See Peterson, *supra* note 315.

344. See *supra* text accompanying note 9.

345. See, e.g., *Farm Labor Org. Comm. v. Ohio State Highway Patrol*, 95 F. Supp. 2d 723 (N.D. Ohio 2000) (reviewing evidence that Ohio law enforcement officers asked only Hispanic motorists for immigration documentation); MANUEL PASTOR, JR. ET AL., *LATINOS AND THE LOS ANGELES UPRISING: THE ECONOMIC CONTEXT* 11–13 (1993) (discussing Los Angeles Police department sweeps of Latina/o immigrants in South Central Los Angeles during May 1992 Rodney King violence); H.G. Reza, *Minor Offenders in Orange County Taken to Border Patrol*, L.A. TIMES, Feb. 12, 2001, at B1 (reporting that local police agencies had been arresting Latina/o immigrants on minor criminal matters, such as soliciting work or selling flowers at traffic intersections, and, rather than prosecuting them for the crime, transported them to nearest INS checkpoint to facilitate their removal from the country); Ty Tagami, *INS Arrests 14 Hispanics at Courthouse in Monticello*, HERALD-LEDGER (Kentucky), Nov. 21, 2000 and Ty Tagami, *Roadblock Reveals Problem for Courts*, HERALD-LEDGER (Kentucky), Nov. 26, 2000 (reporting that local police set up roadblocks on highway on route to poultry processing plant to verify driver’s licenses, registrations, and automobile insurance, arrested a group of Latina/o immigrants and notified the INS, which took the immigrants into custody when they appeared in court to pay traffic fines).

346. See Kenneth B. Noble, *Videotape of Beating by Authorities Jolts Los Angeles*, N.Y. TIMES, Apr. 3, 1996, at A10.

347. See OFFICE OF THE ATTORNEY GENERAL OF ARIZONA, *RESULTS OF THE CHANDLER SURVEY* 31 (1997).

well-versed in the nuances of the immigration laws, seek to enforce those laws.<sup>348</sup>

In short, the U.S. government's response to the loss of life of September 11 promises to have long-term immigration and civil rights impacts. The impacts may well be felt by citizens as well as immigrants of many different ancestries. Unfortunately, this continues a pattern in U.S. history.<sup>349</sup>

### CONCLUSION

The stereotyping of Arabs and Muslims historically has had a dramatic impact on immigration law and policy. Separate procedures and the selective enforcement of the immigration laws has adversely affected the civil rights of Arabs and Muslims in the United States. The most recent "war on terrorism" has built on previous anti-terrorist measures. Sadly but not unexpectedly, private discrimination frequently has accompanied governmental action directed at Arabs and Muslims.

The federal government's response to the events of September 11 reveals much about the relationship between immigration and civil rights. The federal government responded with a vengeance, focusing on Arab and Muslim noncitizens across the country. With few legal constraints, and acting in a time when the public was more willing to sacrifice civil liberties of Arabs and Muslims in the name of national security, the federal government pursued harsh means with little resistance.

The events of September 11 reveal the limited membership rights accorded persons of Arab and Muslim ancestry in the United States—U.S. citizens as well as immigrants. Such treatment has been suffered by various groups in the nation's history. Many of those groups, such as African Americans, Asian Americans, and Latinos, continue to strive for full membership in this society. Only time will tell whether Arab and Muslim Americans will ever achieve that goal, or perhaps which group will replace them as the demons of tomorrow.

---

348. See Linda Reyna Yanez & Alfonso Soto, *Local Police Involvement in the Enforcement of Immigration Laws*, 1 U. TEXAS HISPANIC L.J. 9 (1994) (discussing civil rights issues posed when local law enforcement authorities attempt to enforce immigration laws).

349. See *supra* text accompanying notes 14–16.

