

# Business as Usual: Immigration and the National Security Exception

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## I. INTRODUCTION

For many, the name *Iqbal* identifies a famous Pakistani poet and philosopher. In Arabic, the name *Iqbal* means one who is fortunate or wealthy. In several cultures, the naming of a child is a sacred act and celebrated event. Such cultures associate a name's meaning to the qualities and characteristics shared by the child named. By extension, one might assume that one who is named *Iqbal* will enjoy great prosperity and riches. The legal and human journey for a man named Javaid Iqbal proved to be quite different.

Javaid Iqbal is a native and citizen of Pakistan and a Muslim. After moving to the United States, Iqbal worked as a cable television installer on Long Island. Iqbal was one among hundreds of men apprehended and detained by the United States Department of Justice in the weeks that followed the September 11, 2001 attacks. Iqbal was held in a federal prison in Brooklyn, New York called the Metropolitan Detention Center (MDC), for more than one year.<sup>1</sup> In January 2002, Iqbal was transferred to the maximum security section of the jail known as the Administrative Maximum Special Housing Unit (ADMAX SHU).<sup>2</sup> Following his deportation to Pakistan, Iqbal filed a federal lawsuit in the District Court

1. First Amended Complaint, *Elmaghraby v. Ashcroft*, No. 04-CV-1809, 2004 WL 3756442 (E.D.N.Y. Sept. 30, 2004).

2. *Id.*

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for the Eastern District of New York against several federal government officials, including the former Attorney General John Ashcroft and the former head of Federal Bureau for Investigations Robert S. Mueller III, claiming that they were responsible for the abuses he suffered while at MDC.<sup>3</sup> While at MDC, Iqbal alleged that he suffered the following abuses “numerous instances of excessive force and verbal abuse, unlawful strip and body cavity-searches, the denial of medical treatment, the denial of adequate nutrition, extended detention in solitary confinement, the denial of adequate exercise, and deliberate interference with [his] rights to counsel and to exercise of [his] sincere religious beliefs,” among other things.<sup>4</sup> Iqbal alleged that he was singled out for mistreatment based on race, religion and national origin and also “subjected to a pattern and practice of cruel, inhuman, and degrading treatment in violation of the United States Constitution, federal statutory law, and customary international law.”<sup>5</sup>

Over the government’s objections that Iqbal’s legal claim was insufficiently stated and that in any event they were entitled to “qualified immunity” both the district court and the Second Court of Appeals found that Iqbal’s allegations were adequate.<sup>6</sup> Notably, the Second Circuit held:

[M]ost of the rights that [Iqbal] contends were violated do not vary with surrounding circumstances, such as the right not to be subjected to needlessly harsh conditions of confinement, the right to be free from the use of excessive force, and the right not to be subjected to ethnic or religious discrimination. The strength of our system of constitutional rights derives from the steadfast protection of those rights in both normal and unusual times.<sup>7</sup>

Thereafter, former Solicitor General Paul Clement filed the government’s petition for writ of certiorari to the Supreme Court arguing that among other reasons, Iqbal’s allegations lacked the specificity required by *Bell Atl. Corp. v. Twombly*, an antitrust case decided by the Court in 2007.<sup>8</sup> The Supreme Court granted certiorari in *Iqbal*, and in reversing the Second Circuit, concluded that Iqbal failed to allege a

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3. See Complaint, *Elmaghraby*, No. 04-1809 (E.D.N.Y. May 3, 2004) 2004 WL 3756439; see also First Amended Complaint, *Elmaghraby*, No. 04-1809, 2004 WL 3756442 (E.D.N.Y. Sept. 30, 2004).

4. *Elmaghraby*, No. 04-1809, 2004 WL 3756442 (E.D.N.Y. Sept. 30, 2004).

5. *Id.*

6. See *Elmaghraby v. Ashcroft*, No. 04-CV-1809, 2005 WL 2375202, at \*18 (E.D.N.Y. Sept. 27, 2005); *Iqbal v. Hasty*, 490 F.3d 143, 164 (2d Cir. 2007).

7. *Hasty*, 490 F.3d at 159.

8. Petition for Writ of Certiorari, *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009) (No. 07-1015), available at <http://www.usdoj.gov/osg/briefs/2007/2pet/7pet/2007-1015.pet.aa.pdf>; *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).

“plausible” link between the officials’ conduct and the abuses he said he had suffered. Specifically, the Court found that under *Twombly*, Iqbal’s complaint “has not nudged his claims of invidious discrimination across the line from conceivable to plausible.”<sup>9</sup> Writing for the majority, Justice Anthony Kennedy remarked:

The September 11 attacks were perpetrated by 19 Arab Muslim hijackers who counted themselves members in good standing of al Qaeda, an Islamic fundamentalist group. Al Qaeda was headed by another Arab Muslim—Osama bin Laden—and composed in large part of his Arab Muslim disciples. It should come as no surprise that a legitimate policy directing law enforcement to arrest and detain individuals because of their suspected link to the attacks would produce a disparate, incidental impact on Arab Muslims, even though the purpose of the policy was to target neither Arabs nor Muslims.<sup>10</sup>

Since the Supreme Court’s decision was handed down on May 18, 2009, there has been a flurry of news articles, trade journals, blogs, law reviews and even proposed legislation responding to the striking impact of *Iqbal* on the future of the notice pleading standard.<sup>11</sup> Characterizing

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9. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, at 1951 (2009). To reach this conclusion, the Court summarized *Twombly*’s interpretation of the Rule 8 standard: 1) the principle that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions; 2) only a complaint that states a plausible claim survives a motion to dismiss. As to the allegations specified in Iqbal’s complaint, that Mueller and Ashcroft “knew of, condoned, and willfully and maliciously agreed to subject [him] to harsh conditions of confinement “as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest,” the Court found these and related allegations to be merely conclusory and not entitled to being accepted as true. As to Iqbal’s factual allegations that Ashcroft and Mueller “arrested and detained thousands of Arab Muslim men . . . as part of its investigation of the events of September 11” and “the policy of holding post-September-11<sup>th</sup> detainees in highly restrictive conditions of confinement until they were cleared by the FBI was approved by Defendants Ashcroft and Mueller,” the Court relied on possible alternative explanations, to conclude that discrimination was not a plausible conclusion. Interestingly, the Court utilized an immigration “alternative” to conclude that Iqbal’s arrest and detention were nondiscriminatory. “On the facts respondent alleges the arrests Mueller oversaw were likely lawful and justified by his nondiscriminatory intent to detain aliens who were illegally present in the United States and who had potential connections to those who committed terrorist acts. As between that “obvious alternative explanation” for the arrests, [citing *Twombly*], and the purposeful, invidious discrimination respondent asks us to infer, discrimination is not a plausible conclusion.” *Id.* at 1952.

10. Syllabus, *Ashcroft v. Iqbal*, at 1941 (2009) (No. 07-1015). The Supreme Court sent the case back to the Second Circuit Court of Appeals to determine whether Iqbal should have the opportunity to modify his complaint to provide more information about the defendants’ discriminatory intent and involvement. On July 28, 2009, the Second Circuit Court of Appeals remanded the case back to the district court to decide the same. *Iqbal v. Ashcroft*, 574 F. 3d 820 (2d.Cir. July 28, 2009).

11. According to the *New York Times*, within the first two months of the Court’s decision, *Iqbal* was cited to more than 500 times by the lower courts. Adam Liptak, 9/11

*Twombly* as a “Rule 8 plus” standard, law professor Anthony Renzo argues that since the new standard requires a level of specification that only the government possesses the effect of the *Iqbal* decision is that plaintiffs are paralyzed from seeking judicial remedies when senior level government officials have breached the Constitution.<sup>12</sup>

This Article draws attention to the role of immigration in *Iqbal*, and argues that far from creating a new standard in the immigration realm, the *Iqbal* decision perpetuates a longstanding “Business As Usual” standard that permits the federal government to create and sustain laws that selectively discriminate against foreign nationals during times of national security, with minimal accountability. More specifically, the “Business As Usual” standard can be defined by the sum of the Article’s parts, namely 1) an overreaching set of laws adopted by Executive and/or Legislative branch during times of national security; 2) a tangible set of harms falling on particular foreign nationals as a consequence of these laws; 3) blanket permission to the government to sustain such laws without any evidence of improved national security or stated benefits; 4) less than successful attempts by government ombudsmen to ameliorate the above-stated harms; and 5) extreme deference by the courts to the “political branches” in recognition of the plenary power doctrine.

Part II of this Article places *Iqbal* in the larger context of how immigration law and policy was made and applied in the aftermath of September 11, 2001.<sup>13</sup> This Part describes the Federal government’s design for arresting and detaining “special interest” detainees in connection with the events of September 11, 2001, and the related procedural defects and concerns of mistreatment documented by the

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*Case Could Bring Broad Shift on Civil Suits*, N.Y. TIMES, July 20, 2009, available at <http://www.nytimes.com/2009/07/21/us/21bar.html>; see also Dawinder S. Sidhu, *First Korematsu and Now Ashcroft v. Iqbal: The Latest Chapter in the Wartime Supreme Court’s Disregard for Claims of Discrimination*, 58 BUFF. L. REV. (forthcoming 2010), available at <http://ssrn.com/abstract=1478787> (“[A] Westlaw search conducted on September 21, 2009, containing the Supreme Court reporter citation to *Iqbal*, yielded 1,789 hits in the federal case database.”); *Access to Justice Denied: Ashcroft v. Iqbal: Hearing Before the Subcomm. on the Constitution, Civil Rights and Civil Liberties of the H. Comm. on the Judiciary*, 111<sup>th</sup> Cong. 4 (2009) (statement of Rep. Henry C. Johnson, Jr., Member, Subcomm. on the Constitution, Civil Rights, and Civil Liberties) (“[S]ince the *Iqbal* decision earlier this year over 1,600 district and appellate court cases have been thrown out due to insufficient pleadings, and that is just totally unacceptable to the notions of fair play and substantial justice that was [sic] imbedded into my memory during law school.”).

12. Posting of Anthony F. Renzo to American Constitution Society, *A Law-Free Zone for All the King’s Men*, <http://aclaw.org/node/13479> (May 28, 2009, 15:57 EST).

13. In many places throughout this article the terms “aftermath of September 11, 2001,” “post 9-11 policies,” “9-11 policies” and “policies issued after 9/11” are used interchangeably.

Inspector General. This Part also summarizes a handful of national security policies enacted after 9/11 that at best, had a disproportionate impact on foreign nationals from countries with Muslim-majority populations and at worst, selectively discriminated and targeted nationalities and religions for extra scrutiny without basic safeguards or due process.

Part III shows how many of the policies described in Part II continue to impact individuals and families nine years later. For example, this Part highlights how the special registration program has caused many Arab and Muslim applicants to be denied an immigration benefit or relief based on noncompliance with a component of the registration program. This Part also describes and critiques how many of the policies that originated on a “national security” premise have been recast and sustained as broad immigration enforcement tools.

Part IV of the Article describes the government’s efforts to mitigate some of the harms emanating from many post 9-11 policies. Specifically, this Part describes the multiple public offices, complaint mechanisms, and initiatives established in the Executive Branch to combat 9/11 discrimination. This Part also examines related legislative and to a smaller scale, judicial efforts to redress the overreach of many 9/11 policies described in Part II.

In Part V, the Article discusses whether the impact of 9/11 policies resulted in quantifiable improvements to national security to argue that many of these policies were made with minimum accountability on the creators of such policies. This Part argues that many if not most of the policies identified in Part II have not been shown to have advanced national security and instead have resulted in substantial harms to the Arab and Muslim community.

Part VI of the Article describes the plenary power doctrine and the judiciary’s historical deference to discriminatory immigration laws created by the political branches, especially during times of national security. It also describes the high standard imposed by the judiciary for establishing selective prosecution claims. This Part analyzes how these high standards enabled the Executive Branch to institute otherwise discriminatory policies and practices following 9/11. In this way, the Article shows how the pleading standard created by *Iqbal* bears a sharp resemblance to how the courts have treated selective discrimination claims in immigration matters, especially during times of national security.

Recognizing the forces of the Business As Usual Standard, the Article offers some recommendations to the Executive, Legislative and Judicial branches moving forward.

## II. CONTINUING IMPACT OF POST 9-11 IMMIGRATION PRACTICES

### A. *PENTBOTTM Detentions and OIG Detainee Report*

Following the September 11, 2001 terrorist attacks, federal agencies responsible for national security and immigration enforcement targeted noncitizens from Arab, Muslim and South Asian countries.<sup>14</sup> The Department of Justice's Federal Bureau of Investigations launched a major domestic investigation known as the Pentagon/Twin Towers Bombing Investigation or PENTBOTTM. In October, former Attorney General John Ashcroft spoke at a conference to the U.S. Mayors, analogizing former Attorney General Robert F. Kennedy's belief that arresting mobsters for "spitting on the sidewalk" would help thwart organized crime, to the zealotry with which potential "terrorists" in the September 11, 2001 should be punished.<sup>15</sup> Ashcroft remarked:

Let the terrorists among us be warned: If you overstay your visa—even by one day—we will arrest you. If you violate a local law, you will be put in jail and kept in custody as long as possible. We will use every available statute. We will seek every prosecutorial advantage. We will use all our weapons within the law and under the Constitution to protect life and enhance security for America.<sup>16</sup>

One of the principal tactics used by the United States government after the September 11 attacks was to use existing and new immigration directives to arrest and detain noncitizens with possible ties to terrorism. Many concerns raised by advocacy groups, individual complaints, and the news media in the months following September 11, were documented in a related government report issued by the Department of Justice's Inspector General (OIG Detainee Report).<sup>17</sup> The specific number of noncitizens detained in connection with the PENTBOTTM investigation is unknown. According to the OIG Detainee Report, "the Public Affairs Office stopped reporting the cumulative totals after the number reached approximately 1,200, because the statistics became confusing."<sup>18</sup> While

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14. Throughout this article, the terms "Arab, Muslim and South Asian" "Arab and Muslim" and "Muslim-majority" will be used interchangeably, unless otherwise noted.

15. OFFICE OF THE INSPECTOR GENERAL, THE SEPTEMBER 11 DETAINEES: A REVIEW OF THE TREATMENT OF ALIENS HELD ON IMMIGRATION CHARGES IN CONNECTION WITH THE INVESTIGATION OF THE SEPTEMBER 11 ATTACKS, at ch. 2 § I(B) (2003) (hereinafter OIG, THE SEPTEMBER 11 DETAINEES), available at <http://www.usdoj.gov/oig/special/0306/>.

16. *Id.* at 2 § I(B).

17. *Id.* According to the OIG Detainee Report "Based on this assessment by the FBI, "high interest detainees" were sent to BOP high-security facilities, while "of interest" and "interest unknown" detainees generally were housed in less restrictive facilities, such as county jails under contract to the INS." *Id.* at ch. 2 § V.

18. *Id.* at ch. 1 n.2.

many detainees were released without any criminal or civil charges after being questioned, a meaningful number were arrested and detained on civil immigration violations.<sup>19</sup> In this way and beyond Ashcroft's vow to use every law on the books to go after suspected terrorists, he in fact used every law on the books to go after individuals (i.e., undocumented noncitizens) who were not even suspected of terrorism. The OIG Detainee Report found that 762 of these individuals classified by the FBI as "of interest," "of high interest" or of "undetermined interest" were detained pursuant to the PENTBOTT investigation, and placed on a special "INS Custody List" because the FBI assessed that they may have ties to terrorism or because the FBI did not have enough information to make this determination.<sup>20</sup> The investigations focused on males from Muslim-majority countries. According to the OIG Detainee Report, "The September 11 detainees were citizens of more than 20 countries. The largest number, 254 or 33 percent, came from Pakistan, more than double the number of any other country. The second largest number (111) came from Egypt. Nine detainees were from Iran and six from Afghanistan."<sup>21</sup>

While the government held these detainees in a variety of correctional facilities, the OIG review focused on two facilities where a majority of the detainees (approx. 475) were held and related complaints were filed: The Metropolitan Detention Center (MDC) and the Passaic County Jail (Passaic).<sup>22</sup> MDC is located in Brooklyn, New York and operated by the Department of Justice's Bureau of Prisons (BOP). MDC is a 9-story structure that holds men and women who have either been convicted of a criminal offense or who are awaiting a trial or sentencing.<sup>23</sup> Passaic is a county jail located in Paterson, New Jersey. The OIG sampled 119 detainees and focused its review on issues affecting the length of the detainees' confinement, including: 1) the process undertaken by the FBI and others to clear individual detainees of

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19. *Id.* at ch. 1. According to the *New York Times*, "Mr. Iqbal was arrested in his Long Island apartment on Nov. 2 by agents who were apparently following a tip about false identification cards. In his apartment they found a Time magazine showing the World Trade Center towers in flames and paperwork showing that he had been in Lower Manhattan on Sept. 11, picking up a work permit from immigration services." Nina Bernstein, *U.S. Is Settling Detainee's Suit in 9/11 Sweep*, N.Y. TIMES, Feb. 28, 2006, available at [http://www.nytimes.com/2006/02/28/nyregion/28detain.html?page-wanted=1&\\_r=1](http://www.nytimes.com/2006/02/28/nyregion/28detain.html?page-wanted=1&_r=1).

20. OIG, THE SEPTEMBER 11 DETAINEES, *supra* note 15, at ch. 1 § II.

21. *Id.* at ch. 1 § II.

22. *Id.* at ch. 1 § II.

23. OFFICE OF THE INSPECTOR GENERAL, SUPPLEMENTAL REPORT OF SEPTEMBER 11 DETAINEES' ALLEGATIONS OF ABUSE AT THE METROPOLITAN DETENTION CENTER IN BROOKLYN, NEW YORK 2 (December 2003) (hereinafter OIG, SUPPLEMENTAL REPORT), available at <http://trac.syr.edu/immigration/library/P29.pdf>.



a connection to the September 11 attacks or terrorism in general; 2) bond determinations for detainees; 3) the removal process and the timing of removal; and 4) conditions of confinement experienced by detainees, including their access to legal counsel.<sup>24</sup>

Recognizing the challenges faced by the Department of Justice and components in the wake of the September 11, 2001 attacks, the OIG nevertheless identified a number of concerns with the policies the Department of Justice implemented as part of the PENTBOTTM investigation, including, but not limited to: the slow pace of the Department's "hold until cleared" policy and related lack of resources;<sup>25</sup> the delay in INS's timely service of charges to detainees with timely Notices to Appear;<sup>26</sup> the little to no evidence on which INS relied to oppose bond set by Immigration Judges for detainees who were not yet cleared by the FBI;<sup>27</sup> the BOP's initial communications blackout and its policy of permitting detainees one legal call per week (and specifically how a legal call was calculated);<sup>28</sup> serious delays between the time FBI communicated to BOP that a detainee had been cleared of terrorism and the time in which BOP notified MDC of such clearance;<sup>29</sup> a "pattern of physical and verbal abuse" by some MDC staff, among other findings.<sup>30</sup>

#### *B. OIG MDC Report*

In December 2003, the Department of Justice's OIG published a supplemental report on the allegations of detainee abuse at MDC following September 11, 2001 (MDC Report).<sup>31</sup> The MDC Report summarizes the classification and procedures in place for PENTBOTTM detainees, noting that some of these detainees were confined to a special housing unit, where they remained in their cells for at least 23 hours per day.<sup>32</sup> Whereas most of the MDC staff members interviewed by the OIG stated that they always behaved professionally towards the 9/11 detainees, the OIG found that several MDC staff violated BOP policy by verbally and physically abusing some of the 9/11 detainees.<sup>33</sup> The MDC

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24. OIG, THE SEPTEMBER 11 DETAINEES, *supra* note 15, at ch. 1 § II (a detailed methodology can be found here).

25. *Id.* at ch. 4 § I.

26. *Id.* at ch. 3.

27. *Id.* at ch. 5.

28. *Id.* at ch. 7 § V.

29. *Id.* at ch. 7 § IV(B).

30. *Id.* at ch. 7 § VI.

31. OIG, SUPPLEMENTAL REPORT, *supra* note 23.

32. *Id.* at 3.

33. *Id.* at 8. The OIG defined "physical abuse" as "the handling of detainees in ways that physically hurt or injure them without serving any correctional purpose." The OIG

Report concluded that the following allegations of physical abuse took place at MDC: 1) slamming, bouncing, and ramming detainees against walls;<sup>34</sup> 2) bending or twisting detainees' arms, hands, wrists, and fingers;<sup>35</sup> 3) lifting restrained detainees off the ground by their arms, and pulling their arms and handcuffs;<sup>36</sup> 4) stepping on detainees' leg restraint chains;<sup>37</sup> 5) using restraints improperly;<sup>38</sup> and 6) handling detainees in an otherwise rough or inappropriate manner.<sup>39</sup> Based on statements from MDC staff, witnesses outside of MDC, and select videotapes, the OIG concluded that several detainees were also verbally abused by MDC staff.<sup>40</sup> In one interview between the OIG and a lieutenant at MDC, the lieutenant remarked that when select detainees requested for more food, some MDC staff would reply "[y]ou're not getting shit because you killed all those people."<sup>41</sup> Similarly, some of the detainees alleged that they were threatened with statements such as:

Whatever you did at the World Trade Center, we will do to you.

You're never going to be able to see your family again.

If you don't obey the rules, I'm going to make your life hell.

You're never going to leave here.

You're going to die here just like the people in the World Trade Center died.<sup>42</sup>

The MDC Report also identifies a number of operational issues at MDC relating to the treatment of PENTBOTTM detainees, building upon the OIG Detainee Report's findings of:

problems with detainees receiving timely access to counsel, detainees being held under extremely harsh conditions of confinement such as cells being lighted 24 hours a day, detainees being held in lockdown for at least 23 hours a day, detainees being placed in full restraints every time they were moved, and detainees not receiving adequate recreational opportunities.<sup>43</sup>

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defined "verbal abuse" to mean "insults, coarse language, and threats to physically harm or inappropriately punish detainees." *See id.*

34. *Id.* at 11-16.

35. *Id.* at 16-18.

36. *Id.* at 18-19.

37. *Id.* at 20-22.

38. *Id.* at 22-25.

39. *Id.* at 26-28.

40. *Id.* at 28-30.

41. *Id.* at 29.

42. *Id.* at 28.

43. *Id.* at 30-31.

Specifically, the MDC Report highlights how MDC staff placed detainees' faces or heads against a t-shirt bearing an American flag and the phrase "These colors do not run" to send a message; how meetings between attorneys and MDC detainees were improperly audio recorded, thereby limiting communications between attorney and client and chilling detainees from alleging misconduct or abuse; how MDC staff strip searched detainees excessively; how MDC staff banged on the cell doors of detainees while they were sleeping; and how MDC delayed releasing a significant number of videotapes to the OIG.<sup>44</sup>

While many of the practices documented by the OIG might be criticized by civil liberties advocates and scholars in any context, it is indisputable that these policies impacted primarily Muslim male populations. Also significant was the government's reliance on general and often racially and ethnically based tips and leads to determine who should be arrested and labeled as "special interest."<sup>45</sup>

### C. *Turkmen Lawsuit*

One significant lawsuit that followed the PENTBOTTM detentions was *Turkmen v. Ashcroft*, a class action brought by the Center for Constitutional Rights (CCR) on behalf of several males who were detained at MDC in connection with the PENTBOTTM investigation.<sup>46</sup> Spanning more than 100 pages, an amended complaint filed with the federal court in the Eastern District of New York in 2006 details the alleged mistreatment suffered by the named plaintiffs, summarizes the OIG reports detailing the abusive practices and conditions at MDC, and among other things alleges that "[b]y subjecting Plaintiffs and class members to excessive force, unreasonable and excessively harsh and inhumane conditions, and penalizing them for the practice of their faith, the Defendants in this action have intentionally and/or recklessly violated

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44. See *id.* at 31-43. Once the OIG reviewed the previously held videotapes, they found that some of the MDC staff members interviewed "engaged in the very conduct they specifically denied in their interviews." *Id.* at 42.

45. See, e.g., OIG, THE SEPTEMBER 11 DETAINEES, *supra* note 15, at ch. 2 § II.

For the most part, the 762 aliens classified as September 11 detainees were arrested by FBI-led terrorism task forces pursuing investigative leads and were held on valid immigration charges. These leads ranged from information obtained from searches of the hijackers' cars and personal effects to anonymous tips called in by members of the public suspicious of Arab and Muslim neighbors who kept odd schedules . . . . PENTTBOTTM leads that resulted in the arrest of a September 11 detainee often were quite general in nature, such as a landlord reporting suspicious activity by an Arab tenant.

*Id.* at ch. 2 § II.

46. Third Amended Class Action Complaint and Demand for Jury Trial, *Turkmen v. Ashcroft*, 2006 U.S. Dist. LEXIS 95913 (E.D.N.Y. 2006) (No. 02-CV-2307 (JG)), available at [http://www.ccrjustice.org/files/Turkmen\\_3rdAmendedComplaint\\_09\\_04.pdf](http://www.ccrjustice.org/files/Turkmen_3rdAmendedComplaint_09_04.pdf).

rights guaranteed to Plaintiffs and class members under the First, Fourth, and Fifth Amendments to the United States Constitution, and under customary international law and treaty law.”<sup>47</sup> Responding to a motion to dismiss filed by the defendants, Judge John Gleeson dismissed the plaintiffs’ claims related to prolonged detention but permitted the plaintiff’s challenges on the conditions of confinement and racial and religious discrimination to ensue.<sup>48</sup> The Second Circuit Court of Appeals upheld Judge Gleeson’s dismissal about the plaintiff’s allegations of prolonged detention, vacated a portion of the district court’s decision and remanded the entire case to the district court to entertain an amended complaint by the plaintiffs and to consider the complaint under the new pleading standard articulated in *Twombly* and *Iqbal*.<sup>49</sup>

On October 31, 2008, the plaintiffs in *Turkmen* filed an amicus brief in *Iqbal*, analogizing the mistreatment and abuse suffered by the plaintiffs in *Turkmen* and *Iqbal* at the hands of former FBI Director Mueller and former Attorney General Ashcroft, and opposing a special pleading standard for higher ranking officials.<sup>50</sup> Expressing their opposition to a higher pleading standard, *amici* noted:

Petitioners maintain that the protection of a vaguely defined class of “higher ranking officials” from “frivolous lawsuits” requires a special rule available to no other defendant or potential defendant . . . . At issue here is not a small or local operation, in which it is plausible to suppose the heads of the Department Justice and the FBI had no role, but a massive, nationwide program in which petitioners played a prominent, part. Press conferences and public speeches by petitioners regarding the 9/11 investigation as it proceeded are noted in the April 2004 report of the Justice Department’s Office of the Inspector General. Meetings and conversations of other Department of Justice and FBI officials are scattered throughout that report; to suppose that all of this activity took place without the participation of petitioners strains the imagination.<sup>51</sup>

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47. *Id.* at ¶ 3. For a description and timeline of *Turkmen* from the date on which the original complaint was filed in 2002 to date, see Center for Constitutional Rights, *Turkmen v. Ashcroft*, <http://ccrjustice.org/ourcases/current-cases/turkmen-v.-ashcroft>.

48. Center for Constitutional Rights, *supra* note 47.

49. Posting of *Turkmen v. Ashcroft*, No. 06-3745 to [http://blogs.findlaw.com/second\\_circuit/2009/12/turkmen-v-ashcroft-no-06-3745.html](http://blogs.findlaw.com/second_circuit/2009/12/turkmen-v-ashcroft-no-06-3745.html) (Dec. 21, 2009, 15:59 EST); Center for Constitutional Rights, *supra* note 48.

50. Motion for Leave to File Brief for Amici Curiae Ibrahim Turkmen et al. in Support of Respondent Javaid Iqbal, *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009) (No. 07-1015), available at [http://www.ccrjustice.org/files/Iqbal\\_Amicus\\_0.pdf](http://www.ccrjustice.org/files/Iqbal_Amicus_0.pdf).

51. *Id.* at 1-3. On November 3, 2009, CCR announced that five plaintiffs held at MDC following the September 11, 2001 attacks had reached a settlement with the government for \$1.26 million. According to the one of the plaintiffs who settled, Yasser Ebrahim:

While the OIG reports and *Turkmen* lawsuit were limited to the treatment of select “special interest” detainees picked up in the immediate aftermath of the terrorist attacks, the Executive Branch and the Department of Justice in particular implemented a number of policy changes targeted at individuals from Muslim-majority countries. Dubbed as national security measures, many of these changes made specific amendments to immigration policies and laws and included 1) codifying a broader time period during which an officer may bring charges against any apprehended noncitizen; 2) requiring certain immigration court hearings to be “closed” to the media, public and family members of the defendant; 3) deploying immigration officers to arrest, detain and remove individuals from particular nationalities who are identified in a database as having been ordered removed; 4) soliciting individuals of particular nationalities for “voluntary” interviews with the FBI; 5) requiring men from 25 select countries to “register” with their local immigration office and follow related “exit and entry” requirements; and 6) other discriminatory acts. Some of these policies were country specific meaning that the government intentionally solicited individuals from particular countries to participate in special programs. Other directives were facially neutral, but were applied to a specific population based on religion, ethnicity, nationality, age, and/or gender. Each of these changes is discussed in turn below.

#### D. 48 Hour Rule

In September 2001, the Department Justice promulgated a new regulation enabling officers to make charging decisions within 48 hours of an individual’s arrest or detention.<sup>52</sup> The regulation allows a charging decision to be prolonged for longer than 48 hours for “an additional reasonable period of time” in cases that present an “emergency or other extraordinary circumstance.”<sup>53</sup> The regulation does not define “emergency or other extraordinary circumstance” nor does it interpret

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We were deprived of our rights and abused simply because of our religion and the color of our skin. After seven long years, I am relieved to be able to try to rebuild my life. I know that I and others are still affected by what happened and that communities in the U.S. continue to feel the fallout. I sincerely hope this will never happen again.

Center for Constitutional Rights, *Five New York Men Detained and Abused in Post-9/11 Immigration Sweeps Settle Case for \$1.26 Million*, Nov. 3, 2009, <http://www.ccrjustice.org/newsroom/press-releases/five-new-york-men-detained-and-abused-post-9/11-immigration-sweeps-settle-ca>.

52. Custody Procedures, 66 Fed. Reg. 48331 (Sept. 20, 2001); Disposition of Cases of Aliens Arrested without Warrant, 8 C.F.R. § 287.3(d) (2010).

53. Custody Procedures, *supra* note 52; Disposition of Cases of Aliens Arrested without Warrant, *supra* note 52.

what constitutes “an additional reasonable period of time.” Similarly, the regulation does not contain a timeframe for when a noncitizen should be served with notice of his charges or a Notice to Appear (NTA), nor does it explicate when the NTA should be filed with the immigration court. The OIG Detainee report concluded that approximately 192 special interest detainees were served NTAs more than 72 hours following their arrest and that 5 of these detainees waited approximately 168 days to be served.<sup>54</sup>

The absence of a legal timeframe for serving the NTA to an individual or court creates a great liberty cost to detained individuals, as many are unable to see a judge until the NTA is filed with the court and a hearing has been scheduled.<sup>55</sup> The regulations confirm that removal proceedings are triggered only when the NTA is filed with the immigration court.<sup>56</sup> In theory, such filing is followed by the court’s scheduling of a preliminary “arraignment” hearing known as the “master calendar” hearing.<sup>57</sup> While it is technically possible for an immigration detainee to request for release from custody to an immigration judge without being issued an NTA,<sup>58</sup> the likelihood that she will have knowledge of this technicality is low. Because immigration removal proceedings are considered to be “civil,” respondents are not guaranteed court-appointed counsel as in the criminal system. Practically speaking this means that 84 percent of immigration detainees proceed with the removal process without counsel and in some cases with severe cultural, language, and educational barriers.<sup>59</sup> Against this backdrop, it is difficult to imagine that immigration detainees would be informed about their ability to request for release. Moreover, permitting the government to hold a person in custody for prolonged periods without an NTA raises serious due process concerns. The NTA contains critical information regarding the noncitizen’s immigration charges, court date, ability to secure counsel at his own expense, change of address requirements, and

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54. OIG, THE SEPTEMBER 11 DETAINEES, *supra* note 15, at ch. 3, §§ I(B), III(A).

55. Shoba Sivaprasad Wadhia, *The Policy and Politics of Immigrant Rights*, 16 TEMP. POL. & CIV. RTS. L. REV. 387, 407-08 (2007); Shoba Sivaprasad Wadhia, *Under Arrest: Immigrants’ Rights and the Rule of Law*, 38 U. MEM. L. REV. 853, 866 (2008).

56. Jurisdiction and Commencement of Proceedings, 8 C.F.R. § 1003.14 (2009).

57. OFFICE OF THE CHIEF IMMIGRATION JUDGE, IMMIGRATION COURT PRACTICE MANUAL 64-70 (2008), available at <http://www.justice.gov/eoir/vll/OCIJPracManual/Chap%204.pdf>.

58. Custody/Bond, 8 C.F.R. § 1003.19 (2009).

59. ABA COMMISSION ON IMMIGRATION, REFORMING THE IMMIGRATION SYSTEM 7 (2010), available at <http://new.abanet.org/Immigration/Documents/ReformingtheImmigrationSystemExecutiveSummary.pdf>; AMNESTY INTERNATIONAL USA, JAILED WITHOUT JUSTICE: IMMIGRATION DETENTION IN THE USA 4 (2009), available at <http://www.amnestyusa.org/uploads/JailedWithoutJusticeExecutiveSummary.pdf>.

other information.<sup>60</sup> Without an NTA, a detained noncitizen is left in the dark, preventing him from accessing counsel, or even understanding the nature of his custody or charges.

#### *E. Closed Hearings*

On September 21, 2001, the former Chief Immigration Judge Michael Creppy issued a memorandum to all the immigration judges and court administrators (Creppy Memo), instructing them to close certain immigration cases to the public and to “avoid discussing the case or otherwise discussing any information about the case to anyone outside of the Immigration Court.”<sup>61</sup> The Creppy Memo specified that selected cases should be separated from all other cases on the docket, and closed to visitors, press, and family.<sup>62</sup> By May 8, 2009, the Department of Justice confirmed 641 immigration cases were closed pursuant to the Creppy Memo.<sup>63</sup> The vast majority of closed cases involved Arab and Muslim men. The Creppy Memo raised a number of constitutional questions including, but not limited to, First Amendment protections.<sup>64</sup>

#### *F. Alien Absconder Initiative*

On January 25, 2002, the former Deputy Attorney General issued guidance on the “Alien Absconder Initiative” (AAI).<sup>65</sup> While the stated purpose of the AAI was to locate more than 300,000 individuals with unexecuted removal orders, the government focused its resources on the nearly 6000 men from largely Muslim and Arab countries.<sup>66</sup> While

60. Immigration and Nationality Act [INA] § 239, 8 U.S.C. § 1229 (2009).

61. Memorandum from Michael Creppy, Chief Immigration Judge, to all Immigration Judges and Court Administrators (Sept. 21, 2001) *available at* <http://www.cnss.org/creppy%20memo.pdf>; *see also* Stephen H. Legomsky, *The Ethnic and Religious Profiling of Noncitizens: National Security and International Human Rights*, 25 B.C. THIRD WORLD L.J. 161, 174 (2005) [hereinafter Legomsky, *Ethnic and Religious Profiling*]; *N. Jersey Media Group v. Ashcroft*, 308 F.3d 198, 203 (3d Cir. 2002) (quoting the Memorandum from Michael Creppy *supra*).

62. Memorandum from Michael Creppy, *supra* note 61.

63. Legomsky, *Ethnic and Religious Profiling*, *supra* note 61 (citing to testimony of Kevin Rooney, Director of EOIR, before Subcomm. on Immigration, Border Security, and Claims, Comm. on the Judiciary, U.S. House of Representatives).

64. *See, e.g., N. Jersey Media Group*, 308 F.3d at 203; *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 710–11 (6th Cir. 2002). *See also* Mary-Rose Papandrea, *Under Attack: The Public’s Right to Know and the War on Terror*, 25 B.C. THIRD WORLD L.J. 35 (2005).

65. Memorandum from Larry Thompson, Deputy Attorney General, to the INS Commissioner, the FBI Director, the US Marshals Service Director, and US Attorneys (Jan. 25, 2002), *available at* <http://news.findlaw.com/hdocs/docs/dojabscndr012502mem.pdf>

66. JEANNE A. BUTTERFIELD, AM. IMMIGRATION LAW FOUND., EXECUTIVE BRANCH ACTIONS (2002), [http://www.ailef.org/lac/lac\\_otherresources\\_execbranchactions.asp](http://www.ailef.org/lac/lac_otherresources_execbranchactions.asp);

operation of a program premised on immigration enforcement and focused on individuals ordered removed might not be inherently objectionable, what is problematic was the government's selective application of the AAI to nationals from Muslim-majority countries based on national security grounds.<sup>67</sup> Scholars have classified the government's selective enforcement of these men as racial profiling, highlighting the fact that while the vast majority of so called "absconders" came primarily from Latin America, the government's targeting of the slice of men from Muslim-majority countries was discriminatory.<sup>68</sup> While the AAI became somewhat neutralized with ICE's independent creation of a National Fugitive Operation Program in 2003, the agency's initial focus on individuals from particular religions and nationalities is striking.<sup>69</sup> According to the 2002 memo, INS officers are also required to enter identified "absconders" into the National Crime and Information Center (NCIC), a national database utilized daily by state and local law enforcement; apprehend and interview such absconders; and prosecute or remove such individuals.<sup>70</sup> The theory behind placing "absconders" into the NCIC is that local police officers can notify INS (now ICE) when such individuals are identified.<sup>71</sup> While the legal and policy concerns raised by placing largely civil information into the NCIC database are many, the author highlights here the government's targeted civil data of particular minority groups for insertion into the NCIC following September 11, 2001.

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Kevin R. Johnson & Bernard Trujillo, *Immigration Reform, National Security After September 11, and the Future of North American Integration*, 91 MINN. L. REV. 1369, 1370 (2007). See Kevin Lapp, *Pressing Public Necessity: The Unconstitutionality of the Absconder Apprehension Initiative*, 29 N.Y.U. REV. L. & SOC. CHANGE 573, 573-76 (2005); Karen C. Tumlin, Comment, *Suspect First: How Terrorism Policy Is Reshaping Immigration Policy*, 92 CAL. L. REV. 1173, 1190-93 (2004).

67. See *infra* Part V.

68. Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575, 1579-80 (2002); Arvin Lugay, Book Review: "In Defense of Internment": Why Some Americans Are More "Equal" than Others, 12 ASIAN L.J. 209, 228 (2005).

69. MARGOT MENDELSON, SHAYNA STROM & MICHAEL WISHNIE, MIGRATION POLICY INST., COLLATERAL DAMAGE: AN EXAMINATION OF ICE'S FUGITIVE OPERATIONS PROGRAM 19-20 (2009), available at [http://www.migrationpolicy.org/pubs/NFOP\\_Feb09.pdf](http://www.migrationpolicy.org/pubs/NFOP_Feb09.pdf).

70. Memorandum from the Deputy Attorney General to the Commissioner of the Immigration and Naturalization Service, Director of the Federal Bureau of Investigation Director of the United States Marshal Service & United States Attorneys (Jan. 25, 2002), available at <http://tinyurl.com/2bka4gy>.

71. See, e.g., Michael Ramage, Fla. Dep't of Law Enforcement Gen. Counsel, Remarks at the International Association of Chiefs of Police Legal Officers Annual Meeting (Nov. 14, 2004), transcript available at <http://www.aele.org/ramage2004.html>.



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*G. Voluntary Interview Program*

In 2001, the Department of Justice instituted a “voluntary” interviewing program “to interview aliens whose characteristics were similar to those responsible for the attacks” whose purpose was to “determine what knowledge the aliens might have of terrorists and terrorist activities.”<sup>72</sup> By March 2003, the Government Accountability Office (GAO) reported that 3,216 noncitizens were interviewed in two phases of the program.<sup>73</sup> Interview questions included birthplace and country of citizenship; contact information for the noncitizen and his or her family members; education and employment; the noncitizen’s foreign travel, involvement in armed conflicts, reaction to terrorism, and knowledge of terrorism or any criminal activity.<sup>74</sup> The GAO noted that while interviewees were not forced into participating in the interviews, “they worried about repercussions, such as future INS [DHS] denials for visa extensions or permanent residency, if they refused to be interviewed.”<sup>75</sup> Moreover, attorneys and advocates in three districts told GAO that “interviewed aliens told them they felt they were being singled out and investigated because of their ethnicity or religious beliefs.”<sup>76</sup>

In 2003, DOJ instituted a second interviewing program with thousands of Iraqis with the purpose of gathering counterterrorism information and intelligence.<sup>77</sup> While the former Attorney General lauded the information gathered from the Iraqi community, legal scholars and members of the community criticized the FBI’s use of profiling. Legal scholar and Georgetown law professor David Cole commented “So we’ve got now suspicion predicated only on national origin

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72. GAO, JUSTICE DEPARTMENTS PROJECT TO INTERVIEW ALIENS AFTER SEPTEMBER 11, 2001 1 (2003), available at <http://www.gao.gov/new.items/d03459.pdf> [hereinafter GAO REPORT].

73. See *id.* at 8; American Immigration Lawyers Association, *Boiling the Frog Slowly: Executive Branch Actions Since September 11, 2001*, 7 BENDER’S IMMIGR. BULL. 1236, 1236-44 (2002); *The Aftermath of September 11: A Chronology*, 79 INTERPRETER RELEASES 1359, 1360 (Nov. 9, 2002). The questions were pre-formulated and are reproduced in the GAO REPORT, *supra* note 72, at 21-27 (2003).

74. GAO REPORT, *supra* note 72, at 21-27.

75. *Id.* at 5; see also Memorandum from the Deputy Attorney General, to All U.S. Attorneys and All Members of Anti-Terrorism Task Forces (Nov. 9, 2001), available at <http://www.justice.gov/dag/readingroom/terrorism2.htm>.

76. GAO REPORT, *supra* note 72, at 16.

77. *Hearing before the Commerce, Justice, State and Judiciary Subcommittee of the Senate Appropriations Committee*, 108<sup>th</sup> Cong. (2003) (statement of John Ashcroft, Att’y Gen. of the United States), available at <http://www.justice.gov/archive/ag/testimony/2003/040103appropstestimony.htm>.

extending to U.S. citizens . . . . That's exactly what we had during World War II with Japanese Americans."<sup>78</sup>

#### H. *Special Registration*

In September 2002, former Attorney General John Ashcroft rolled out a tracking program known as "special registration." Formally called the "National Security Entry and Exit Registration System" or NSEERS, the program was rolled out in multiple phases, beginning first with visiting nonimmigrants from Iran, Iraq, Libya, Sudan and Syria.<sup>79</sup> Such individuals were required to register at the port of entry (POE) at which they entered, follow up with an in-person interview between day 30 and day 40 from the date of entry, and register again upon exiting the United States.<sup>80</sup> Individuals who failed to comply with the NSEERS program were placed into the NCIC to enable local enforcement officials to apprehend such individuals.<sup>81</sup> The NSEERS program was expanded to include a "call-in" component to reach certain males who had already entered the United States.<sup>82</sup> The announcement of and instructions for call-in registration was made through four publications in the Federal Register.<sup>83</sup> In sum, select males from 25 countries were solicited for call-in registration.<sup>84</sup> Information collected and interview questions included bank account information, credit card information, and affiliations with political, religious, or social groups on university

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78. Pierre Thomas, *FBI Mounts Intense Iraqi-American Probe*, ABC NEWS, Mar. 25, 2003, <http://abcnews.go.com/US/story?id=90744&page=1>.

79. Press Release, DOJ, Attorney General Ashcroft Announces Implementation of the First Phase of the National Security Entry-Exit Registration System (Aug. 12, 2002), available at [http://www.justice.gov/opa/pr/2002/August/02\\_ag\\_466.htm](http://www.justice.gov/opa/pr/2002/August/02_ag_466.htm).

80. Registration and Monitoring of Certain Nonimmigrants, 67 Fed. Reg. 52584 (Aug. 12, 2002). See also Registration and Fingerprinting, 8 C.F.R. § 264.1(f) (2008).

81. See *The FBI's National Crime Information Center: Hearing Before the S. Subcomm. on Immigration, Border Security, and Citizenship, S. Comm. on the Judiciary*, 108th Cong. (2003) (testimony of Michael D. Kirkpatrick, Assistant Dir. in Charge, Criminal Justice Info. Serv. Div.) available at <http://www.fbi.gov/congress/congress03/ncic111303.htm>.

82. See Registration of Certain Nonimmigrant Aliens from Designated Countries, 68 Fed. Reg. 2363 (Jan. 16, 2003); Registration of Certain Nonimmigrant Aliens from Designated Countries, 67 Fed. Reg. 77642 (Dec. 18, 2002); Registration of Certain Nonimmigrant Aliens from Designated Countries, 67 Fed. Reg. 70526 (Nov. 22, 2002); Registration of Certain Nonimmigrant Aliens from Designated Countries, 67 Fed. Reg. 67766 (Nov. 6, 2002) (the four Federal Register publications in this footnote will hereinafter be referred to collectively as the Federal Register Publications). Under § 263 of the Immigration and Nationality Act, 8 U.S.C. § 1303 (2006), the Attorney General is authorized to prescribe special registrations and forms for the registration and fingerprinting of special groups of nonimmigrants.

83. See Federal Register Publications, *supra* note 82.

84. See *id.*

campuses.<sup>85</sup> The men targeted for call-in registration came from the following countries: Iran, Iraq, Libya, Sudan, Syria, Afghanistan, Algeria, Bahrain, Eritrea, Lebanon, Morocco, North Korea, Oman, Qatar, Somalia, Tunisia, United Arab Emirates, Yemen, Pakistan, Saudi Arabia, Bangladesh, Egypt, Indonesia, Jordan, and Kuwait.<sup>86</sup> The NSEERS program was riddled with problems ranging from a lack of resources for the government to actually implement the program, to feelings of besiegement by the Muslim, Arab, and South Asian communities for being singled out as potential threats to national security.<sup>87</sup> Moreover, thousands of compliant registrants were detained upon registration, placed in removal proceedings, and removed from the United States.<sup>88</sup> In December 2003, the DOJ issued an interim rule “suspending” select portions of the NSEERS program.<sup>89</sup> In particular, the agency lifted the 30-40 day interview requirement for POE registrants, and the annual re-registration requirements applicable to all special registrants.<sup>90</sup> The interim rule also halted the call-in registration program, while still maintaining the agency’s ability to institute domestic registration in the future and interview individuals on a case-by-case basis.<sup>91</sup> The suspension rule not only created the false impression that NSEERS was

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85. Jane Black, *At Justice NSEERS Spells Data Chaos*, BUSINESSWEEK, May 2, 2003 available at [http://www.businessweek.com/technology/content/may2003/tc2003052\\_6532\\_tc073.htm](http://www.businessweek.com/technology/content/may2003/tc2003052_6532_tc073.htm).

86. See Federal Register Publications, *supra* note 82; see also AM.-ARAB ANTI-DISCRIMINATION COMM. & CTR. FOR IMMIGRANTS’ RIGHTS, PENNSYLVANIA STATE UNIV., NSEERS: THE CONSEQUENCES OF AMERICA’S EFFORTS TO SECURE ITS BORDERS 15-16 (Am.-Arab Discrimination Comm. 2007) [hereinafter AM.-ARAB ANTI-DISCRIMINATION COMM. & CTR. FOR IMMIGRANTS’ RIGHTS, NSEERS], available at <http://www.adc.org/PDF/nseerspaper.pdf>.

87. See generally AM.-ARAB ANTI-DISCRIMINATION COMM. & CTR. FOR IMMIGRANTS’ RIGHTS, NSEERS, *supra* note 86.

88. Fact Sheet, ICE, Changes to National Security Entry/Exit Registration System (NSEERS) Dec. 1, 2003, available at <http://www.ice.gov/pi/news/factsheets/nseersFS120103.htm>; see AM.-ARAB ANTI-DISCRIMINATION COMM. & CTR. FOR IMMIGRANTS’ RIGHTS, NSEERS, *supra* note 86, at 6.

89. Suspending the 30-Day and Annual Interview Requirements from the Special Registration Process for Certain Nonimmigrants, 68 Fed. Reg. 67577, 67578 (Dec. 2, 2003) (to be codified at 8 C.F.R. pt. 264); ICE Fact Sheet, *supra* note 88; see also AM.-ARAB ANTI-DISCRIMINATION COMM. & CTR. FOR IMMIGRANTS’ RIGHTS, NSEERS, *supra* note 86, at 10.

90. Suspending the 30-Day and Annual Interview Requirements from the Special Registration Process for Certain Nonimmigrants, 68 Fed. Reg. 67577, 67578 (Dec. 2, 2003) (to be codified at 8 C.F.R. pt. 264); ICE Fact Sheet, *supra* note 88; see also AM.-ARAB ANTI-DISCRIMINATION COMM. & CTR. FOR IMMIGRANTS’ RIGHTS, NSEERS, *supra* note 86, at 18.

91. Suspending the 30-Day and Annual Interview Requirements from the Special Registration Process for Certain Nonimmigrants, 68 Fed. Reg. 67577, 67578 (Dec. 2, 2003) (to be codified at 8 C.F.R. pt. 264); see also AM.-ARAB ANTI-DISCRIMINATION COMM. & CTR. FOR IMMIGRANTS’ RIGHTS, NSEERS, *supra* note 86, at 18.

“over,” but also failed to address many of the residual problems associated with the implementation of the program.<sup>92</sup>

### *I. Other Discriminatory Acts*

The government’s targeting of individuals from Muslim-majority countries after 9/11 coincided with the increase in hate crimes and related violent acts by private actors against this population.<sup>93</sup> These acts were documented by the American-Arab Anti-Discrimination Committee and the Council on American-Islamic Relations with chilling detail.<sup>94</sup> One profile of a hate crime murder in Mesa, AZ published in the ADC Report read:

49-year-old Indian Sikh, Balbir Singh Sodhi, was shot while planting flowers outside his Chevron station. His murderer, 42-year-old Frank Roque, had spent the day drinking and raving about how he wanted to kill the “rag heads” responsible for the terrorist attacks four days earlier. After being kicked out of a bar, Roque went on a shooting rampage. He first shot and killed Sodhi, and afterwards fired on the home of an Afghan family. He then shot several times at a Lebanese-American clerk who escaped injury. During his arrest he yelled, “I am a patriot!” and “I stand for America all the way!”<sup>95</sup>

One scholar has associated the combination of government policies and private acts targeted at Arab, Muslims and South Asians as a “de-Americanization” process, which can be defined as “a twisted brand of xenophobia that is not simply hatred of foreigners but also hatred of those who in fact may not be foreigners but whom the vigilantes would prefer being removed from the country anyway.”<sup>96</sup>

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92. AM.-ARAB ANTI-DISCRIMINATION COMM. & CTR. FOR IMMIGRANTS’ RIGHTS, NSEERS, *supra* note 86, at 18-21.

93. See e.g., Gil Gott, *The Devil We Know: Racial Subordination and National Security Law*, 50 VILL. L. REV. 1073, 1110-20 (2005); Muneer I. Ahmad, *A Rage Shared by Law: Post-September 11 Racial Violence as Crimes of Passion*, 92 CAL. L. REV. 1259 (2004).

94. See Gott, *supra* note 93, at 1110 (citing Council on American-Islamic Relations, *The Status of Muslim Civil Rights in the United States 2004* 4-5 (2004)); see also AM.-ARAB ANTI-DISCRIMINATION COMM., 1991 REPORT ON ANTI-ARAB HATE CRIMES: ADC SPECIAL REPORT 5 (Am.-Arab Discrimination Comm. 1992).

95. AM.-ARAB ANTI-DISCRIMINATION COMM., REPORT ON HATE CRIMES AND DISCRIMINATION AGAINST ARAB-AMERICANS: THE POST-SEPTEMBER 11 BACKLASH 69 (Am.-Arab Discrimination Comm. 2003) (hereinafter AM.-ARAB ANTI-DISCRIMINATION COMM., REPORT ON HATE CRIMES), available at <http://www.adc.org/PDF/hcr02.pdf>.

96. Bill Ong Hing, *Vigilante Racism: The De-Americanization of Immigrant America*, 7 MICH. J. RACE & L. 441, 444 (2002). In one of his many chilling accounts of “De-Americanization” Hing recounts the celebration of the reopening of a General Motors plant at which former Congressman Norman Mineta was asked “and how long have you lived in our country?” Even though Mineta was born in San Jose, CA and

Airport discrimination against the Arab, Muslim and South Asian population also increased following 9/11.<sup>97</sup> Not long after the attacks of Sept. 11, 2001, the *New York Times* coined the term “flying while brown” to refer to the “reports of Muslim-Americans being asked to get off planes.”<sup>98</sup> Moreover, between 2001 and 2009, the Department of Transportation and the Transportation Security Administration together received more than 2000 complaints about civil rights violations.<sup>99</sup> Discrimination at airports was also documented by the American-Arab Anti-Discrimination Committee, which found that “discrimination at airports based on stereotyping, over-zealousness [sic] or prejudice by airline personnel or even other passengers is now one of the main sources of discrimination facing Arab-American travelers.”<sup>100</sup>

Finally, employment discrimination against Muslims and South Asians heightened following 9/11. In the fifteen months following the September 11, 2001 attacks, the Equal Employment Opportunity

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attended school in California, this question highlights how Mineta was “de-Americanized” (as does his family’s internment during World War II). *Id.* at 455.

97. See, e.g., OFFICE OF AVIATION ENFORCEMENT & PROCEEDINGS, AVIATION CONSUMER REPORTS (2009), available at <http://airconsumer.ost.dot.gov/reports/index.htm>; see also Phil Hirschhorn & Michael Okwu, *Airlines Face Post 9/11 Racial Profiling, Discrimination Suits*, CNN, June 4, 2002, <http://archives.cnn.com/2002/LAW/06/04/airlines.discrimination/>; AM.-ARAB ANTI-DISCRIMINATION COMM., REPORT ON HATE CRIMES, *supra* note 95, at 21-31.

98. Somini Sengupta, *Sept. 11 Attack Narrows the Racial Divide*, N.Y. TIMES, Oct. 10, 2001, at B1, available at <http://www.nytimes.com/2001/10/10/nyregion/a-nation-challenged-relations-sept-11-attack-narrows-the-racial-divide.html?pagewanted=1>.

99. See Spencer S. Hsu & Sholnn Freeman, *JetBlue, TSA Workers Settle in T-Shirt Case*, WASH. POST, Jan. 6, 2009, at A2, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/01/05/AR2009010502877.html>; see also OFFICE OF AVIATION ENFORCEMENT & PROCEEDINGS, *supra* note 97.

100. AM.-ARAB ANTI-DISCRIMINATION COMM., REPORT ON HATE CRIMES, *supra* note 95, at 7. Notwithstanding the complaints documented by the United States government and civil rights organizations, Michael Kirkpatrick and Margaret Kwoka conclude that no single victim of airport discrimination has prevailed under a “disparate impact” theory under Title VI of the Civil Rights Act. Michael T. Kirkpatrick & Margaret B. Kwoka, *Title VI Disparate Impact Claims Would Not Harm National Security: A Response to Paul Taylor*, 46 HARV. J. ON LEGIS. 503, 516 (2009). In fact, not one of the five lawsuits filed by the American Civil Liberties Union against American, Continental, Northwest, and United airlines even made it to trial. See *id.* In one of these cases, *Dasrath v. Continental Airlines*, three men were removed from a plane after a passenger reported that three “brown skin[ned] men” were “behaving suspiciously.” *Dasrath v. Continental Airlines, Inc.*, 467 F. Supp. 2d 431, 436 (D.N.J. 2006). The court ultimately granted a summary judgment stating that “when the circumstances are viewed in their entirety, a jury would be compelled to find that security considerations were the sole reason for Dasrath’s removal, even though Dasrath had not engaged in suspicious behavior.” Kirkpatrick & Kwoka, *supra* at 516 (citing *Dasrath*, 467 F. Supp. 2d at 446) (internal citations omitted). Kirkpatrick and Kwoka associate Dasrath’s loss to the high legal bar required for succeeding in discrimination lawsuits based on disparate impact. Kirkpatrick & Kwoka, *supra* at 516.

Commission handled nearly 700 complaints related specifically to the attacks.<sup>101</sup>

The foregoing summary is by no means exhaustive and in fact only identifies a handful of the dozens of largely Executive branch national security policies issued after 9/11 that implicated noncitizens. It is appropriate to acknowledge that some of the aforementioned policies are not inherently objectionable, but are offensive when selectively applied to particular nationalities, religions and ethnicities, without a measurable national security benefit. In response to these policies, scores of scholars, policymakers, and lawyers have criticized the unequal status held by Arabs, Muslims, and South Asians following 9/11.<sup>102</sup> Interestingly, these critics are not limited to immigration experts, but also include representatives from the human rights, civil rights, privacy rights, religious, and ethnic arenas.<sup>103</sup> This article does not seek to rehash the criticism here but instead makes three observations for current discussion. First, nearly nine years later, many of the changes made after 9/11 remain “on the books,” and in some cases continue to disproportionately impact noncitizens from Muslim-majority countries

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101. See Gott, *supra* note 93, at 1118. See also AM.-ARAB ANTI-DISCRIMINATION COMM., Equal Employment Opportunity Commission (EEOC) Fact Sheet, <http://www.adc.org/index.php?id=1682> (2002); Press Release, EEOC, EEOC Provides Answers About Workplace Rights of Muslims, Arabs, South Asians and Sikhs (May 15, 2002), <http://www.eeoc.gov/eeoc/newsroom/release/5-15-02.cfm>.

102. See e.g., Dawinder S. Sidhu, *Wartime America and The Wire: A Response to Posner's Post-9/11 Constitutional Framework*, 20 GEO. MASON U. CIV. RTS. L.J. 37, 64 (2009); Volpp, *supra* note 68, at 1576 (“September 11 facilitated the consolidation of a new identity category that groups together persons who appear Middle Eastern, Arab, or Muslim. This consolidation reflects a racialization wherein members of this group are identified as terrorists and are disidentified as citizens.”); Kevin R. Johnson, Lecture, *The Fiftieth Annual Dyson Distinguished Lecture: The Forgotten “Repatriation” of Persons of Mexican Ancestry and Lessons for the “War on Terror,”* 26 PACE L. REV. 1, 14 (2005); Susan M. Akram & Kevin R. Johnson, *Race, Civil Rights, and Immigration Law After September 11, 2001: The Targeting of Arabs and Muslims*, 58 N.Y.U. ANN. SURV. AM. L. 295, 351–53 (2002); Raquel Aldana, *The September 11 Immigration Detentions and Unconstitutional Executive Legislation*, 29 S. ILL. U. L.J. 5 (2005); ACLU, SANCTIONED BIAS: RACIAL PROFILING SINCE 9/11 (2004), available at [www.aclu.org/FilesPDFs/racial%20profiling%20report.pdf](http://www.aclu.org/FilesPDFs/racial%20profiling%20report.pdf).

103. America’s Challenge: Domestic Security, Civil Liberties, and National Unity After September 11, June 30, 2003—Migration Policy Institute; Targets of Suspicion: The Impact of Post-9/11 Policies on Muslims, Arabs and South Asians in the United States May 31, 2004, Immigration Policy Center; Above the Law: Executive Power after September 11 in the United States, January 31, 2004 - Human Rights Watch; Assessing the New Normal: Liberty and Security for the Post-September 11 United States September 30, 2003—Human Rights First; How Changes to U.S. Law & Policy Since 9/11 Erode Human Rights and Civil Liberties March 11, 2003—The Lawyers Committee for Human Rights; Presumption of Guilt: Human Rights Abuses of Post-September 11 Detainees, August 31, 2002—Human Rights Watch; Kevin R. Johnson, *Racial Profiling After September 11: The Department of Justice’s 2003 Guidelines*, 50 LOY. L. REV. 67, 79, at n.61 (2004) (hereinafter Johnson, *Racial Profiling After September 11*).

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and their families. Second, the government's role in ameliorating the discriminatory impact of these policies through a series of office posts, public statements, and community outreach has been limited, and in some cases, ineffective. Third, the government has not been held accountable for failing to quantify the national security benefits of many of the foregoing 9/11 immigration policies. The aforementioned observations are discussed in the following three sections.

### III. CONTINUING IMPACT OF POST 9-11 IMMIGRATION PRACTICES

#### A. *Special Registration Residue*

The harsh effects of immigration policies enacted in the name of 9/11 continue to disproportionately impact noncitizens from Muslim-majority countries. To illustrate, the aforementioned NSEERS program continues to affect scores of individuals visiting and residing in the United States, as well as their family members. Those affected include, but are not limited to, individuals who: 1) did not comply with the NSEERS program and at some point after the registration period sought an immigration benefit or relief from removal; or 2) complied with NSEERS but during the course of registration were found to be out of status. Individuals falling in the former category include those who were unaware of the NSEERS program, and those who were aware of the program, but were afraid to register. A meaningful number of these "NSEERS violators" have been deemed to have "willfully failed" to register even in situations where little to no evidence has been put forth regarding "willfulness." In one case, one private attorney reported her client had applied for adjustment (green card) status before an immigration judge, based on his marriage to a United States citizen.<sup>104</sup> The immigration judge required the client to first undergo "late registration" under NSEERS with a local ICE office by December 2009.<sup>105</sup> The attorney appeared with her client at a local ICE office for late registration, and following unforeseen delays, highlighted the interview details:

I explained again that this young man had no reason not to register [at the time NSEERS was implemented], he was in valid status, had just turned 17, didn't speak English, was trying to deal with a new high school in the US and had he known about Registration, he would have registered. The agents said it was no excuse. They said absent catastrophic illness or jail, there was not a valid excuse. I explained

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104. Posting of Fahed Al-Rawaf to Race Matters, <http://endnseers.blogspot.com/2009/11/commentary-on-late-nseers-registration.html> (Nov. 16, 2009).

105. *See id.*

that is not a correct standard. They had to determine if it was “willful.” They said that no one would be a “willful” violator if all they had to say was they didn’t know.<sup>106</sup>

What is remarkable about the foregoing tale is that a person who was represented by a premier immigration attorney and had a brother who was able to clear late registration under the same circumstances, nevertheless received a “willful violator” stamp in his passport.<sup>107</sup>

In addition to creating a burdensome and disparate process for applicants subject to late registration, immigration adjudicators have also denied immigration benefits or relief, in part or solely due to an individual’s noncompliance with the NSEERS program.<sup>108</sup> The harsh repercussions of such denials on American families and employers are evident by the fact that eligibility for an immigration benefit or relief from removal are often based on the noncitizen’s relationship with a United States citizen spouse or employer. A recent report by the Center for Immigrants’ Rights at Pennsylvania State University’s Dickinson School of Law and the American-Arab Anti-Discrimination Committee (ADC-Penn State Report) highlights the story of a native and citizen of Morocco who was denied a green card despite good-faith attempts to comply with special registration, his loving marriage to a United States citizen, and their three U.S.-born children.<sup>109</sup> As summarized by the ADC-Penn State report “. . . Nasser was denied adjustment of status and was found to have ‘willfully’ violated NSEERS. This has left Mr. Nasser in the difficult position of being ineligible to work because he has no legal status in the United States, and has harshly impacted him and members of his immediate family.”<sup>110</sup> In addition to those residing in the United States, the NSEERS program has also impacted visiting students and scholars.<sup>111</sup> The government’s selective use of NSEERS information to deny immigration benefits and relief also confirms the government’s conversion of a program once premised on national security into one utilized as an everyday immigration enforcement tool.

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106. *Id.*

107. *See id.*

108. *See* AM.-ARAB ANTI-DISCRIMINATION COMM. & CTR. FOR IMMIGRANTS’ RIGHTS, NSEERS, *supra* note 86, at 10.

109. *Id.* at 10.

110. *Id.* at 11.

111. *Id.*



*B. Recasting National Security Policy as Immigration Law Enforcement Tools.*

Like with the NSEERS program, the government has re-characterized many of the 9/11 policies as general immigration enforcement tools, forgetting the context under which such policies arose and the individuals that continue to suffer as a consequence. For example, the above-described 48-hour rule remains good law, as does the absence of a timeframe for serving an NTA on the noncitizen and with the immigration court.<sup>112</sup> Similarly, the Department of Homeland Security has expanded the once Muslim-focused Alien Absconder Initiative into a “National Fugitive Operations Program” targeting all noncitizens with outstanding orders of removal.<sup>113</sup> One could argue that the government has improved its policies by applying the 48-hour rule and “fugitive” program universally to all noncitizens, as opposed to concentrating on select nationalities, ethnicities, or religions. However, this fact still provides little information about how select groups have been impacted as initial targets, and on a broader level, fails to clarify whether such policies improved national security or mitigated the harms suffered by Arab, Muslim, and South Asian communities. These harms include “being treated less favorably than others for inadequate reasons, . . . personal feelings of humiliation, unfair treatment, a loss of dignity, a loss of confidence, and the sense of being seen and treated as an outsider.”<sup>114</sup>

The harms of the 9/11 policies to individuals and families extend beyond those who remain in or continue to visit the United States. Although less quantifiable, a meaningful number of individuals from Muslim-majority countries have left the United States solely or in part due to the heightened restrictions imposed on such individuals after 9/11. While the twenty-four Muslim-majority nations make up only 2% of the undocumented population, there was a 31.4% increase in deportation within this group in the years following 9/11.<sup>115</sup> In addition to formal removals following 9/11, Muslims voluntarily fled U.S. neighborhoods in large numbers.<sup>116</sup>

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112. See Aliens and Nationality, 8 C.F.R. § 287.3(d) (2009).

113. ICE, National Fugitive Operations Program, <http://www.ice.gov/pi/dro/nfop.htm> (2008).

114. Legomsky, *Ethnic and Religious Profiling*, *supra* note 61, at 183.

115. Rashad Hussain, *Preventing the New Internment: A Security-Sensitive Standard for Equal Protection Claims in the Post-9/11 Era*, 13 TEX. J. C.L. & C.R. 117, 137-38 (2007).

116. See, e.g., Sarah Stuteville, *Trouble in Little Pakistan*, VOICES THAT MUST BE HEARD (May 26, 2004), available at [http://www.indypressny.org/nycma/voices/119/briefs/briefs\\_1/](http://www.indypressny.org/nycma/voices/119/briefs/briefs_1/).

Notably, the U.S. government continues to identify counterterrorism as a premise for targeting new profiling policies at Muslim-majority countries. One policy arose following a bombing attempt from a Nigerian man who boarded a U.S.-bound plane on December 25, 2009, in Amsterdam, Netherlands.<sup>117</sup> The suspect, Umar Farouk Abdul Mutallab, hid the explosives in his underwear but was caught in time by members of the airline crew and passengers.<sup>118</sup> Days after the incident, the Transportation Security Agency announced that it would require nationals from the following 14 nations to undergo heightened screening when entering the United States: Cuba, Sudan, Syria, Iran, Afghanistan, Algeria, Iraq, Lebanon, Libya, Nigeria, Pakistan, Saudi Arabia, Somalia, and Yemen.<sup>119</sup> Critics of the new screening programs believe the screening procedures are nothing less than racial and religious profiling.<sup>120</sup> Within this group are those who argue that extra patdowns based on a person's religion or nationality are an ineffective counterterrorism tool at best and a discriminatory program no different from NSEERS at worst.<sup>121</sup> Most recently, and in a seeming effort to move away from nationality as a basis for extra screening, President

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117. Posting of Macon Phillips to White House Blog, <http://www.whitehouse.gov/blog/2009/12/28/president-addresses-public-attempted-terrorist-attack> (Dec. 28, 2009, 04:35 PM EST); Dan Eggen, Karen DeYoung, & Spencer S. Hsu, *Plane Suspect was Listed in Terror Database After Father Alerted U.S. Officials*, WASH. POST, Dec. 27, 2009, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/12/25/AR2009122501355.html>.

118. Phillips, *supra* note 117; Dan Eggen, Karen DeYoung, & Spencer S. Hsu, *Plane Suspect was Listed in Terror Database After Father Alerted U.S. Officials*, WASH. POST, Dec. 27, 2009, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/12/25/AR2009122501355.html>.

119. TSA.gov, TSA Statement on New Security Measures for International Flights to the U.S., [http://www.tsa.gov/press/happenings/010310\\_statement.shtm](http://www.tsa.gov/press/happenings/010310_statement.shtm) (Jan. 3, 2010); *Muslim-American Group Criticizes TSA Plan as Profiling*, CNN, Jan. 4, 2010, available at <http://www.cnn.com/2010/CRIME/01/04/tsa.measures.muslims/index.html>; Eric Lipton, *U.S. Intensifies Air Screening for Fliers from 14 Nations*, N.Y. TIMES, Jan. 4, 2010, at A4, available at <http://www.nytimes.com/2010/01/04/us/04webtsa.html?hp=&pagewanted=all>.

120. ADC Statement Regarding New TSA Directives, <http://endnseers.blogspot.com/2010/01/adc-statement-regarding-new-tsa.html>.

121. See, e.g., Posting of Under the Radar to Politico, [http://www.politico.com/blogs/joshgerstein/0110/TSA\\_s\\_echoes\\_of\\_Ashcroft.html](http://www.politico.com/blogs/joshgerstein/0110/TSA_s_echoes_of_Ashcroft.html) (Jan. 5, 2010, 12:58 EST); Posting of Targeting Needles or Adding More Hay?: Airport Profiling 'Countries of Interest', and American Security to Race Matters, <http://endnseers.blogspot.com/2010/01/targeting-needles-or-adding-more-hay.html> (Jan. 27, 2010); Posting of James J. Zogby, to Race Matters, <http://endnseers.blogspot.com/2010/01/profiling-is-back.html> (Jan. 11, 2010); Posting of New TSA Guidelines Troubling and Ultimately Ineffective, to Race Matters, <http://endnseers.blogspot.com/2010/01/adc-statement-regarding-new-tsa.html> (Jan. 8, 2010); AM.-ARAB ANTI-DISCRIMINATION COMM., ADC AND BROAD COALITION OBJECT TO TSA RECENT DIRECTIVES THAT NEGATIVELY IMPACT 700 MILLION PEOPLE, <http://www.adc.org/index.php?id=3532> (Jan. 8, 2010).

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Obama signed off on a new security initiative that utilizes “intelligence information and assessment of threats to identify passengers who could have links to terrorism.”<sup>122</sup>

#### IV. GOVERNMENT’S RESPONSE TO DISCRIMINATORY IMPACT OF POST 9-11 POLICIES

##### A. *Executive Branch*

Following the 9/11 attacks, former President George W. Bush made a series of public statements that effectively acknowledged the “good” Muslims in the United States and throughout the world.<sup>123</sup> Two days after 9/11, he stated, “Our nation must be mindful that there are thousands of Arab Americans . . . who love their flag just as much as . . . [we] do. And we must be mindful that as we seek to win the war that we treat Arab Americans and Muslims with the respect they deserve.”<sup>124</sup> While messages such as this one seem contradictory when balanced against the anti-Muslim and anti-Arab sentiment permeating many of the 9/11 policies, scholar Karen Engle argues that both messages are necessary to help legitimize the war on terror.<sup>125</sup>

Congress and the Executive Branch also attempted to ameliorate the backlash against Arab Muslims, and South Asians in a number of ways. As part of the historic signing of the USA Patriot Act of 2001, Congress included “findings” and “sense of Congress” language to acknowledge the violent actions taken against Arab Americans and Muslim Americans following 9/11; the heroic actions of this community during the attacks; and the importance of preserving the safety and civil rights and civil liberties of all communities, including Arab Americans, Muslim Americans, and Americans from South Asia.<sup>126</sup> The Patriot Act also included a directive to the Department of Justice’s Inspector General to review, analyze and publicly report on allegations of civil rights and civil liberties violations committed by Department employees and officials.<sup>127</sup>

Following 9/11, the Assistant Attorney General for Civil Rights with the Department of Justice’s Civil Rights Division (CRD) created the Initiative to Combat Post-9/11 Discriminatory Backlash (CRD Project), in an effort to address “violations of civil rights laws against Arab,

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122. Jeff Zeleny, *Security Checks on Flights to U.S. to Be Revamped*, N.Y. TIMES, Apr. 2, 2010, at A1, available at <http://www.nytimes.com/2010/04/02/us/02terror.html>.

123. Karen Engle, *Constructing Good Aliens and Good Citizens: Legitimizing the War on Terror(ism)*, 75 U. COLO. L. REV. 59, 106 (2004).

124. *Id.* at 107.

125. *Id.* at 109.

126. USA PATRIOT ACT of 2001, Pub. L. No. 107-56, § 102, 15 Stat. 272 (2001).

127. USA PATRIOT ACT of 2001, Pub. L. No. 107-56, § 1001, 15 Stat. 272 (2001).

Muslim, Sikh, and South-Asian Americans, and those perceived to be members of these groups.”<sup>128</sup> The CRD Project was initiated by three former CRD attorneys who began receiving complaints from the Arab, Muslim and South Asian community immediately after September 11, 2001.<sup>129</sup> Within a few days of approaching the former Assistant Attorney General of Civil Rights, the CRD Project was formally established to act as a clearinghouse and investigatory body for discrimination complaints post 9-11 including but not limited to housing/public accommodations, employment, and hate crimes.<sup>130</sup> The CRD Project eventually received a formal staff and in addition to processing complaints, played a role in facilitating inter-government agency dialogues as well as conversations between these agencies and affected community groups.<sup>131</sup>

In 2003, the Department of Justice issued guidance on racial profiling (2003 DOJ Guidance).<sup>132</sup> The stated purpose of the guidance was to “prohibit racial profiling in law enforcement practices without hindering the important work of our Nation’s public safety officials, particularly the intensified anti-terrorism efforts precipitated by the events of September 11, 2001.”<sup>133</sup> Notably, the 2003 DOJ Guidance makes an exception for investigations relating to national security, noting:

Federal law enforcement officers who are protecting national security or preventing catastrophic events (as well as airport security screeners) may consider race, ethnicity, and other relevant factors to the extent permitted by our laws and the Constitution. Similarly, because enforcement of the laws protecting the Nation’s borders may necessarily involve a consideration of a person’s alienage in certain circumstances, the use of race or ethnicity in such circumstances is properly governed by existing statutory and constitutional standards.<sup>134</sup>

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128. DOJ, Civil Rights Division, Initiative to Combat Post-9/11 Discriminatory Backlash, [http://www.justice.gov/crt/legalinfo/nordwg\\_mission.php](http://www.justice.gov/crt/legalinfo/nordwg_mission.php) (2008).

129. Interview with Deepa Iyer, Executive Director, South Asian Americans Leading Together, (Feb. 18, 2010, 10:30am).

130. *Id.*

131. *Id.*

132. DOJ, Civil Rights Division, Guidance Regarding the Use of Race by Federal Law Enforcement Agencies, [http://www.justice.gov/crt/split/documents/guidance\\_on\\_race.php](http://www.justice.gov/crt/split/documents/guidance_on_race.php) (June 2003).

133. DOJ, Civil Rights Division, Guidance Regarding the Use of Race by Federal Law Enforcement Agencies, [http://www.justice.gov/crt/split/documents/guidance\\_on\\_race.php](http://www.justice.gov/crt/split/documents/guidance_on_race.php) (June 2003).

134. DOJ, Civil Rights Division, Guidance Regarding the Use of Race by Federal Law Enforcement Agencies, [http://www.justice.gov/crt/split/documents/guidance\\_on\\_race.php](http://www.justice.gov/crt/split/documents/guidance_on_race.php) (June 2003). The policy cites to *United States v. Brignoni-Ponce*, a case in which the Supreme Court found that “[t]he likelihood that any given person of Mexican

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Moreover, the 2003 DOJ Guidance also clarifies that it serves only as a vehicle for internal management and should not be construed to create a procedural or substantive right or benefit enforceable by law.<sup>135</sup> The national security exception has been criticized by many scholars and advocates as one that merely swallows the “rule” and permits the kind of profiling that took place after 9/11.<sup>136</sup> One scholar has concluded,

[t]he result of this policy guidance is to ban racial profiling in counterterrorism efforts of everyone except Arabs, Muslims, and South Asians, as the profiling of these communities is almost always the purported basis of national security, and because it is almost always exclusively those communities that are suspected of terrorism.<sup>137</sup>

Beginning in March 2003, many of the immigration-related functions once held by the Department of Justice’s Immigration and Naturalization Service were transferred to the Department of Homeland Security.<sup>138</sup> Notably, the Department of Homeland Security adopted the racial profiling guidance created by the Department of Justice. A related statement on race-neutrality by the Department of Homeland Security states, “The Department of Homeland Security’s policy is to prohibit the consideration of race or ethnicity in our daily law enforcement activities in all but the most exceptional instances.”<sup>139</sup> The DHS statement

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ancestry is an alien is high enough to make Mexican appearance a relevant factor” in an immigration stop. *United States v. Brignoni-Ponce*, 422 U.S. 873, 886-87 (1975).

135. DOJ, Civil Rights Division, Guidance Regarding the Use of Race by Federal Law Enforcement Agencies, [http://www.justice.gov/crt/split/documents/guidance\\_on\\_race.php](http://www.justice.gov/crt/split/documents/guidance_on_race.php) (June 2003).

136. ACLU & THE RIGHTS WORKING GROUP, THE PERSISTENCE OF RACIAL AND ETHNIC PROFILING IN THE UNITED STATES 14 (2009) *available at* [http://www.aclu.org/files/pdfs/humanrights/cerd\\_finalreport.pdf](http://www.aclu.org/files/pdfs/humanrights/cerd_finalreport.pdf); AMNESTY INTERNATIONAL USA, THREAT AND HUMILIATION: RACIAL PROFILING, NATIONAL SECURITY AND HUMAN RIGHTS IN THE UNITED STATES (2007) *available at* [http://www.amnestyusa.org/racial\\_profiling/report/](http://www.amnestyusa.org/racial_profiling/report/); LEADERSHIP CONFERENCE ON CIVIL RIGHTS EDUCATION FUND, WRONG THEN, WRONG NOW: RACIAL PROFILING BEFORE & AFTER SEPTEMBER 11, 2001 *available at* <http://www.civilrights.org/publications/wrong-then/> (last visited Feb. 10, 2010); The Rights Working Group, Issue Brief, *Full of Holes: The 2003 Department of Justice Guidance Regarding the Use of Race by Federal Law Enforcement Agencies*, *available at* [http://www.rightsworkinggroup.org/sites/default/files/DOJGuidance\\_IssueBrief.pdf](http://www.rightsworkinggroup.org/sites/default/files/DOJGuidance_IssueBrief.pdf) (last visited Feb. 10, 2010); Johnson, *Racial Profiling After September 11*, *supra* note 103, at 83; Joseph D. Pollak, *Racial Profiling is Wrong: A Doctrinal Comparison of Counter-Terrorism Racial Profiling in Europe and the United States*, (April 13, 2009) (unpublished working paper), *available at* <http://ssrn.com/abstract=1390269>.

137. Ahmad, *supra* note 93, at 1268; *see also* Johnson, *Racial Profiling After September 11*, *supra* note 103, at 84 (“The guidelines themselves inadvertently reveal the potential for excessive reliance on race.”).

138. 8 U.S.C.S. § 1103 (2010).

139. Memorandum from Tom Ridge, Sec’y. of the Dep’t of Homeland Security, about The Department of Homeland Security’s Commitment to Race Neutrality in Law

continues “DHS personnel may use race or ethnicity only when a compelling governmental interest is present. Rather than relying on race or ethnicity, it is permissible and indeed advisable to consider an individual’s connections to countries that are associated with significant terrorist activity.”<sup>140</sup> This language is troubling in part because it infers that profiling based on nationality or national origin is permissible and in fact preferable.<sup>141</sup> While profiling based on nationality or national origin may not be inherently wrong, there are at least five reasons why it is offensive and in many cases no different from profiling based on race, ethnicity or religion: 1) in practice many policies based on nationality disproportionately impact particular religions and ethnicities; 2) this disproportionate impact creates the perception that a particular policy is premised on anti-Arab or anti-Muslim sentiment; 3) most of the countries identified by the government as harboring terrorists have been Arab or Muslim; 4) in practice “nationality” based profiling is often conflated with “national origin” profiling; 5) profiling based on country of birth has extended to naturalized United States from particular countries, leading to the presumption that citizens from particular places are somehow less reliable or loyal in their allegiances to the United States.<sup>142</sup>

The Department of Homeland Security also created a Traveler Redress Inquiry Program (TRIP) for individuals who face traveling delays or mishaps during screening.<sup>143</sup> According to then Homeland Security Secretary Michael Chertoff, “[t]his is a win-win program. Eliminating false-positives makes the travel experience more pleasant for legitimate visitors, and it frees up our front-line personnel to apply even greater scrutiny of those individuals who truly present safety and security risks.”<sup>144</sup>

Pursuant to its statutory authority and mission, the Department of Homeland Security’s Office of Civil Rights and Civil Liberties has dialogued with various advocacy groups about 9/11 programs, and further investigated complaints alleging discrimination against a person returning to the United States from Saudi Arabia after completing the

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Enforcement Activities (June 1, 2004), [http://www.dhs.gov/xlibrary/assets/CRCL\\_MemoCommitmentRaceNeutrality\\_June04.pdf](http://www.dhs.gov/xlibrary/assets/CRCL_MemoCommitmentRaceNeutrality_June04.pdf).

140. *Id.*

141. *See also* ASIAN L. CAUCUS & STAN. L. IMMIGRANTS’ RTS. CLINIC, RETURNING HOME: HOW THE U.S. GOVERNMENT PRACTICES UNDERMINE CIVIL RIGHTS AT OUR NATION’S DOORSTEP 30-31 (2009).

142. *See* Legomsky, *Ethnic and Religious Profiling*, *supra* note 61, at 191-193; ASIAN L. CAUCUS & STAN. L. IMMIGRANTS’ RTS. CLINIC, *supra* note 141, at 24-32.

143. DHS, DHS Traveler Redress Inquiry Program (DHS TRIP), [http://www.dhs.gov/files/programs/gc\\_1169676919316.shtm](http://www.dhs.gov/files/programs/gc_1169676919316.shtm) (2009).

144. TSA, Press Release, DHS Launches Traveler Redress Inquiry Program—DHS Trip Provides a Central Gateway for Travel-Related Issues (Feb. 21, 2007), *available at* [http://www.tsa.gov/press/releases/2007/press\\_release\\_02212007.shtm](http://www.tsa.gov/press/releases/2007/press_release_02212007.shtm).

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Hajj religious pilgrimage; DHS TRIP travelers' complaints alleging discrimination based on race, disability, religion, gender, or ethnicity; and related allegations of discrimination and profiling by DHS employees.<sup>145</sup> Likewise, the DHS OIG has investigated civil rights and civil liberties-related complaints and issued reports on the quality and efficiency of various programs implemented after 9/11 including but not limited to TSA's screening procedures and DHS TRIP.<sup>146</sup> More recently, the DHS OIG agreed to commence an inspection on the NSEERS program in 2010 and to date, has met with stakeholders about the operational aspects and human consequences of the program.<sup>147</sup>

In addition to creating public mission statements and mechanisms for handling complaints, the Department of Homeland Security has also issued limited policy guidance to remedy the various 9/11 measures outlined above. In response to the findings and recommendations in the OIG Detainee Report documenting the procedural defects and mistreatment suffered by special interest detainees, the Department of Homeland Security's former Under Secretary for Border and Transportation Security issued policy guidance (2004 Guidance) instructing officers to make charging determinations and serve detainees with an NTA in a timely manner absent emergency or extraordinary circumstances.<sup>148</sup> Consistent with the regulations, the 2004 Guidance instructs officers to make a charging determination within 48 hours of arrest or detention, and also creates a 72 hour policy for serving noncitizens with a NTA.<sup>149</sup> Recognizing the regulatory exception to the 48-hour rule, the 2004 Guidance also identifies examples of potential emergency or other extraordinary circumstances.<sup>150</sup> Unfortunately, these

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145. See, e.g., DHS, OFFICE FOR CIVIL RIGHTS AND CIVIL LIBERTIES, FIRST QUARTER FISCAL YEAR 2009 REPORT TO CONGRESS 1 (2009), available at [http://www.dhs.gov/xlibrary/assets/crcl\\_first\\_Quarter\\_Report\\_to\\_Congress\\_FY\\_2009.pdf](http://www.dhs.gov/xlibrary/assets/crcl_first_Quarter_Report_to_Congress_FY_2009.pdf).

146. See, e.g., DHS, OFFICE OF THE INSPECTOR GENERAL, ONE DHS UNITED: SEMIANNUAL REPORT TO THE CONGRESS 31-44 (2009), available at [http://www.dhs.gov/xoig/assets/semiannlrpts/OIG\\_SAR\\_Apr09\\_Sep09.pdf](http://www.dhs.gov/xoig/assets/semiannlrpts/OIG_SAR_Apr09_Sep09.pdf).

147. AM.-ARAB ANTI-DISCRIMINATION COMM., Press Release, Office of Inspector Gen. at DHS to Audit NSEERS at the Request of ADC and Other Major Organizations, Nov. 19, 2009 (available at <http://adc.org/index.php?id=3524>).

148. Memorandum from Asa Hutchinson, Undersec'y Border and Transp. Sec., to Michael J. Garcia, Assistant Sec'y U.S. ICE & Robert Bonner, Comm'r U.S. CBP, about Guidance on ICE Implementation of Policy and Practice Changes Recommended by the Department of Justice Inspector General, Mar. 30, 2004, available at <http://www.immigrationforum.org/images/uploads/ICEGuidance.pdf>.

149. *Id.*

150. *Id.* For a more detailed analysis of the Hutchinson Guidance, see Wadhia, *The Policy and Politics of Immigrant Rights*, *supra* note 55; Wadhia, *Under Arrest*, *supra* note 55; Shoba Sivaprasad Wadhia, *Immigration: Mind Over Matter*, 5 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 201 (2005).

examples have been criticized as broad enough to swallow the well-intentioned timeframes identified by the DHS.<sup>151</sup>

*B. Legislative Branch*

The legislation creating DHS also established a statutory office of civil rights and civil liberties (DHS CRCL)<sup>152</sup> as well as Office of Inspector General (DHS OIG).<sup>153</sup> The mission of the DHS CRCL is to provide legal and policy advice to DHS components about civil rights and civil liberties matters; investigate related complaints; direct DHS' equal employment opportunity (EEO) programs; and engage in community outreach.<sup>154</sup> The mission of the DHS OIG is "to serve as an independent and objective inspection, audit, and investigative body to promote effectiveness, efficiency, and economy in the Department of Homeland Security's programs and operations, and to prevent and detect fraud, abuse, mismanagement, and waste in such programs and operations."<sup>155</sup>

Congress passed legislation in 2004 to strengthen the oversight and investigatory capacity of the DHS CRCL and OIG. Specifically, the Homeland Security Civil Rights and Civil Liberties Protection Act of 2004 (CRCLPA) requires the DHS' Officer for Civil Rights and Civil Liberties to: 1) report directly to the Secretary of DHS; and 2) review and assess information concerning civil rights abuses and profiling on the basis of race, ethnicity, or religion by DHS employees and officials.<sup>156</sup> CRCLPA further amplified the civil rights officer's responsibilities to include the investigation of complaints alleging civil rights-related abuses and mistreatment and created a statutory senior position within the OIG to review and investigate allegations of civil rights abuses by DHS employees or contractors.<sup>157</sup>

Likewise, legislation was introduced in 2004 by the Senate<sup>158</sup> and House of Representatives<sup>159</sup> and again in the House in 2005<sup>160</sup> to rollback

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151. See Wadhia, *The Policy and Politics of Immigrant Rights*, *supra* note 55; Wadhia, *Under Arrest*, *supra* note 55; Wadhia, *Immigration*, *supra* note 150.

152. DHS, Office for Civil Rights and Civil Liberties, [http://www.dhs.gov/about/structure/editorial\\_0371.shtm](http://www.dhs.gov/about/structure/editorial_0371.shtm) (2010).

153. DHS, Office of the Inspector General, <http://www.dhs.gov/xoig/index.shtm> (2010).

154. DHS, Office for Civil Rights and Civil Liberties, *supra* note 152.

155. DHS, Office of the Inspector General, *supra* note 153.

156. The Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, § 8303, 118 Stat. 3637, 3867 (2004).

157. The Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, §§ 8303-8304, 118 Stat. 3637, 3867-68 (2004).

158. See Civil Liberties Restoration Act of 2004, S. 2528, 108th Cong. (2004).

159. See Civil Liberties Restoration Act of 2004, H.R. 4591, 108th Cong. (2004).



a handful of the aforementioned immigration policies enacted by the Executive Branch following 9/11. The Civil Liberties Restoration Act (CLRA) was never enacted into law but contained a measured set of remedies that would have terminated the Creppy Memo in favor of presumptively opening immigration proceedings to the public in the absence of a compelling government interest determination on a case-by-case basis;<sup>161</sup> repealed the regulations associated with NSEERS and provided limited relief to individuals with immediate eligibility for an immigration benefit or relief from removal; and required noncitizens held by DHS beyond 48 hours without charges or notice of charges to see a judge to determine whether prolonged detention is appropriate; among other provisions.<sup>162</sup> While the CLRA was introduced more than two years after 9/11, the political climate was not yet ripe for such reforms.<sup>163</sup> Nevertheless, the convictions expressed by co-sponsors of CLRA were striking.<sup>164</sup>

### C. Judiciary Branch

In the courts, select federal court decisions have acknowledged missteps by the government in the wake of 9/11. Notably, the number of cases may be limited in light of the fact that the secrecy surrounding the 9/11 policies, and in particular the PENTBOTTM investigation may have limited the number of challenges brought to the courts. As to the constitutionality of closed immigration hearings, the Creppy Memo was challenged in the federal courts as violating the First Amendment, arguing in part that a wholesale closure of immigration hearings is not “narrowly tailored” to meet a government interest.<sup>165</sup> The Third and Sixth Circuit Courts of Appeals were split.<sup>166</sup>

Beyond the three branches, and marking the transition to the Obama Administration, a number of policymakers, and academics issued various “blueprints” to the Administration with specific recommendations for

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160. See Civil Liberties Restoration Act of 2005, H.R. 1502, 109th Cong. (2005).

161. See *id.*

162. See generally *id.*

163. See Wadhia, *The Policy and Politics of Immigrant Rights*, *supra* note 55, at 420.

164. See, e.g., Cong. Rec. E588 (daily ed. Apr. 7, 2005) (statement of Rep. Berman).

165. See, e.g., *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 707 (6th Cir. 2002); *N. Jersey Media Group v. Ashcroft*, 308 F.3d 198, 225-26 (3d Cir. 2002); see also Editorial, *Deportation Behind Closed Doors*, N.Y. TIMES, May 30, 2003, at A26, available at <http://www.nytimes.com/2003/05/30/opinion/deportation-behind-closed-doors.html>.

166. See *Detroit Free Press*, 303 F.3d at 692-93; see also *N. Jersey Media Group*, 308 F.3d at 225-26; see also Lauren Gilbert, *When Democracy Dies Behind Closed Doors: The First Amendment and “Special Interest” Hearings*, 55 RUTGERS L. REV. 741, 766 (2003).

rolling back some of the resonating 9/11 immigration policies.<sup>167</sup> For example, on NSEERS, The Constitution Project recommended that the government “[a]dopt legislation or regulations requiring that DHS may not selectively target foreign nationals for deportation or other immigration enforcement on the basis of race, ethnicity, religion, or political association or ideology.”<sup>168</sup> On the 48-hour notice rule, an informal coalition of policy experts recommended that the Administration “[r]equire by regulation that a noncitizen detainee be charged and issued a charging document within 48 hours of his or her arrest or detention, and that, upon arrest, he or she be provided with oral and written information concerning the right to representation by qualified counsel, and how to schedule a timely custody hearing before an immigration judge, independent of the date of the removal hearing.”<sup>169</sup>

Leaders within the Obama Administration have also recognized the residual effects of 9/11 on Arab, Muslim, and South Asian communities. In his installation ceremony as the Assistant Attorney General in the Department of Justice’s Civil Rights Division, Tom Perez remarked “Civil Rights in 2009 means . . . understanding how the aftermath of the September 11, 2001 terrorist attacks has subjected the Arab-American and Muslim-American communities to an unjustified backlash, and working to be sure we don’t fall into the trap of believing that we either protect our national security and safe streets OR we protect civil rights. We can and must do both.”<sup>170</sup> Finally, in his inaugural address to the nation, President Barack Obama remarked:

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167. See, e.g., OBAMA-BIDEN TRANSITION PROJECT, IMMIGRATION POLICY: TRANSITION BLUEPRINT (2008), available at [http://law.psu.edu/\\_file/Immigrants/Immigration\\_Policy\\_Transition\\_Blueprint.pdf](http://law.psu.edu/_file/Immigrants/Immigration_Policy_Transition_Blueprint.pdf); HUMAN RIGHTS FIRST, HOW TO REPAIR THE U.S. ASYLUM SYSTEM: A BLUEPRINT FOR THE NEXT ADMINISTRATION 13 (2008), available at <http://www.humanrightsfirst.org/pdf/081204-ASY-asylum-blueprint.pdf>; MIGRATION POLICY INSTITUTE, DHS AND IMMIGRATION: TAKING STOCK AND CORRECTING COURSE 4 (2009), available at [www.migrationpolicy.org/pubs/DHS\\_Feb09.pdf](http://www.migrationpolicy.org/pubs/DHS_Feb09.pdf); ACLU, ACTIONS FOR RESTORING AMERICA: TRANSITION RECOMMENDATIONS FOR PRESIDENT-ELECT BARACK OBAMA 1 (2008), available at [www.aclu.org/images/asset\\_upload\\_file734\\_37256.pdf](http://www.aclu.org/images/asset_upload_file734_37256.pdf). The Liberty & Security Transition Coalition “reflects the ongoing, collaborative efforts of a coalition of more than twenty leading organizations and over seventy-five people in the human rights and liberty and security communities.” LIBERTY & SECURITY TRANSITION COALITION, LIBERTY AND SECURITY: RECOMMENDATIONS FOR THE NEXT ADMINISTRATION AND CONGRESS (2008), available at <http://2009transition.org/liberty-security/>.

168. THE CONSTITUTION PROJECT, THE USE AND ABUSE OF IMMIGRATION AUTHORITY AS COUNTERTERRORISM TOOL: CONSTITUTIONAL AND POLICY CONSIDERATIONS 12 (2003), available at [http://www.constitutionproject.org/pdf/Immigration\\_Authority\\_As\\_A\\_Counterterrorism\\_Tool.pdf](http://www.constitutionproject.org/pdf/Immigration_Authority_As_A_Counterterrorism_Tool.pdf).

169. OBAMA-BIDEN TRANSITION PROJECT, *supra* note 167.

170. Thomas E. Perez, Asst. Att’y Gen. for Civ. Rts., Installation Ceremony Address (Nov. 13, 2009), available at [http://www.justice.gov/crt/speeches/perez\\_installation\\_speech.php](http://www.justice.gov/crt/speeches/perez_installation_speech.php).

To the Muslim world, we seek a new way forward, based on mutual interest and mutual respect. To those leaders around the globe who seek to sow conflict, or blame their society's ills on the West, know that your people will judge you on what you can build, not what you destroy. To those who cling to power through corruption and deceit and the silencing of dissent, know that you are on the wrong side of history, but that we will extend a hand if you are willing to unclench your fist.<sup>171</sup>

Arguably, the government's efforts to combat discrimination were made more difficult by the public sentiments on racial profiling after 9/11. The events of 9/11 strained efforts to end racial profiling and instead legitimized profiling based on race, religion, and national origin.<sup>172</sup> After 9/11, 58% of respondents to a Gallup poll supported more intense screening for those who "appeared to be Arabs" while 50% of the respondents favored special registration cards for ethnic Arabs (including U.S. citizens).<sup>173</sup>

#### V. LACK OF ACCOUNTABILITY

Despite the steps taken by the government and key stakeholders to redress the discriminatory backlash and policies emanating from 9/11, the impact has been minimal.

One test to measure accountability is to determine whether the 9/11 policies resulted in quantifiable improvements in national security. Despite the criticisms raised against the PENTBOTM detentions and harsh immigration policies enacted after 9/11, the government has offered very limited information about how these policies advanced national security. Security experts and ex-officials of INS and the Department of Homeland Security have questioned the national security

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171. President Barack Obama, Inaugural Address (Jan. 20, 2009), available at <http://www.whitehouse.gov/blog/inaugural-address/>.

172. Kevin R. Johnson, *How Racial Profiling in America Became the "Law of the Land": United States v. Brignoni-Ponce and Whren v. United States and the Need for Rebellious Lawyering*, UC DAVIS LEGAL STUDIES RESEARCH PAPER SERIES NO. 174, at 65 (2009) [hereinafter Johnson, "*The Law of the Land*"]. Karen Engle has argued that today's profiling is both tolerated and even endorsed because it operates alongside an open offer to those identified with profiled groups to demonstrate that they are model members of their groups. Multiculturalism and tolerance continue to be a desirable goal, if not a fact of life. In the spirit of tolerance, good Muslims tolerate profiling.

Engle, *supra* note 123 at 94.

173. Johnson, "*The Law of the Land*," *supra* note 172, at 63. Notably, the widespread support for profiling policies under the "war on terror" has continued despite meaningful public debate opposition to foreign policy matters, including the Iraqi war. Engle, *supra* note 123 at 105. Again, Engle attributes the public support for the war on terrorism as a foundation for "good" versus "bad" aliens and citizens. *Id.* at 94-95.

value of many of the aforementioned 9/11 laws. The former 9/11 Commission and related Terrorist Travel report (Commission Report) analyzed the potential linkages between the 9/11 immigration policies and benefits to national security. The Commission found scant security value in the Alien Absconder Initiative, concluding, “[w]e have not learned that any of the absconders were deported under a terrorism statute, prosecuted for terrorism-related crimes, or linked in any way to terrorism.”<sup>174</sup> This sentiment was echoed by former INS Commissioner Doris Meissner, when she remarked that the absconder initiative has “marginal security benefits, while further equating national origin with dangerousness.”<sup>175</sup>

The Commission also documented the opposition expressed by domestic and foreign government officials to the NSEERS program<sup>176</sup> and highlighted testimony from former General Counsel David Martin stating that “call-in registration component of NSEERS may have diminished the willingness of immigrant communities to supply the government with intelligence.”<sup>177</sup> The *New York Times* also reported on similar comments made by the former INS Commissioner James Ziglar stating that “he and members of his staff had raised doubts about the benefits of the special registration program when Justice Department officials first proposed it. He said he had questioned devoting significant resources to the initiative because he believed it unlikely that terrorists would voluntarily submit to intensive scrutiny.”<sup>178</sup> Mr. Ziglar continued, “[t]o my knowledge, not one actual terrorist was identified. But what we did get was a lot of bad publicity, litigation and disruption in our relationships with immigrant communities and countries that we needed help from in the war on terror.”<sup>179</sup> More recently, Robert Bonner, former Commissioner of the Customs and Border Protection agency at the Department of Homeland Security and Edward Alden, a senior fellow at

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174. Thomas M. McDonnell, *Targeting the Foreign Born by Race and Nationality: Counterproductive in the “War on Terrorism,”*? 16 PACE INT’L L. REV. 19, 34-35 (2004) (quoting Michael Janofsky, *9/11 Panel Calls Policies on Immigration Ineffective*, N.Y. TIMES, Apr. 17, 2004, at A8, available at [www.nytimes.com/2004/04/17/national/17IMMI.html?pagewanted=1](http://www.nytimes.com/2004/04/17/national/17IMMI.html?pagewanted=1)) (internal quotations omitted).

175. MUZAFFAR A. CHISHTI, ET AL., AMERICA’S CHALLENGE: DOMESTIC SECURITY, CIVIL LIBERTIES, AND NATIONAL UNITY AFTER SEPTEMBER 11 13 (Migration Policy Inst. 2003), available at [www.migrationpolicy.org/pubs/Americas\\_Challenges.pdf](http://www.migrationpolicy.org/pubs/Americas_Challenges.pdf).

176. NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES, 9/11 AND TERRORIST TRAVEL STAFF REPORT 159 (2004), available at [http://www.9-11commission.gov/staff\\_statements/911\\_TerrTrav\\_Monograph.pdf](http://www.9-11commission.gov/staff_statements/911_TerrTrav_Monograph.pdf).

177. *Id.* at 160.

178. Rachel L. Swarns, *Program’s Value in Dispute As a Tool to Fight Terrorism*, N.Y. TIMES, Dec. 21, 2004, available at [http://www.nytimes.com/2004/12/21/national/21deport.html?pagewanted=1&\\_r=1](http://www.nytimes.com/2004/12/21/national/21deport.html?pagewanted=1&_r=1)

179. *Id.* (internal quotations omitted).

the Council on Foreign Relations, noted “[a] program that pulls aside only men from Muslim countries is not the sophisticated response required to counter [terrorism] efforts . . . . As the United States continues the struggle against terrorism, it should constantly evaluate the best tools at hand. Special registration is not one of these, and it should be abolished.”<sup>180</sup>

Similarly, the Government Accountability Office’s assessment of the voluntary interview program was speculative at best:

[t]he results of the project—in terms of how many, what types, and the value of investigative leads obtained from the interviews—are unknown because DOJ considers the information too sensitive to divulge. Views about the impact of the project on community relations were mixed, with some law enforcement officials indicating that the project helped build ties between law enforcement and the Arab community, while others indicated that the project had a negative effect on such relations.<sup>181</sup>

In addition to the sentiments expressed by security experts, ex-government officials and the government’s own watchdogs, common sense suggests that individuals seeking to engage in a terrorist act on U.S. soil would not have voluntarily participated in programs such as NSEERS and the voluntary interview program.

It should be acknowledged that the authors of the 9/11 attacks came from specific regions of the world and that immigration law has long included distinctions based on citizenry, national origin and ethnicity.<sup>182</sup> Consequentially, reasonable scholars have disagreed about when and what kind of profiling is appropriate.<sup>183</sup> In his criticism of the racial and ethnic profiling of Arabs, Muslims, and South Asians following September 11, 2001, scholar Thomas McDonnell notes:

[R]ace or ethnicity alone provide scant basis for suspecting an individual of terrorist crimes. Most population surveys estimate that there are 2.8 million to 6 million Arab Muslim immigrants living in the United States. In purely mathematical terms, the odds that race or

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180. Robert Bonner & Edward Alden, *The Wrong Way to Screen Visitors*, WASH. POST, Nov. 21, 2009, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/11/20/AR2009112003375.html>.

181. GAO REPORT, *supra* note 72 at 17.

182. See generally Legomsky, *Ethnic and Religious Profiling*, *supra* note 61.

183. “‘Racial Profiling’ occurs whenever a law enforcement officer questions, stops, arrests, searches, or otherwise investigates a person because the officer believes that members of that person’s racial or ethnic group are more likely than the population at large to commit the sort of crime the officer is investigating.” Johnson, *Racial Profiling After September 11*, *supra* note 103, at n.1 (quoting Samuel R. Gross & Debra Livingston, *Racial Profiling Under Attack*, 102 COLUM. L. REV. 1413, 1415 (2002)); see generally Johnson, *“The Law of the Land”*, *supra* note 172.

ethnicity alone will yield suspects is in the order of one in several thousands, odds so remote as to make race or nationality relatively little help in identifying terrorists.<sup>184</sup>

McDonnell further contends that reliance on racial profiles alone is more likely to result in “false” positives, while also ignoring actual wrongdoers who fail to fit such profiles.<sup>185</sup> Distinguishing racial ethnic profiling from nationality-based profiling, Philip Haymann and Juliette Kayyem have argued that profiling is effective but should instead focus on nationality and its significance to one’s loyalties as opposed to race and ethnicity.<sup>186</sup> Daphne Barak-Erez identifies several flaws in a nationality-focused profile, including but not limited to the fact that there is a strong relationship between nationality and racial and ethnic affiliation; nationality-based profiling is not necessarily effective for countries with large immigrant populations; and the potential negative impact on American citizens and their families.<sup>187</sup> Meanwhile, Stephen Legomsky makes a distinction between “rational” profiling and “justified” profiling, arguing that law enforcement profiling should be justifiable only when the practice is rational (profile corresponds to the relevant danger) and sufficiently balanced to factor in both the efficiency gains and substantial harms inherent in government-sponsored discrimination based on ethnicity or religion.<sup>188</sup>

In his work “Thinking Through Internment: 12/7 and 9/11,” Jerry Kang raises six meaningful points to the profiling discussion including

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184. McDonnell, *supra* note 174, at 44-45.

185. *Id.* at 46. McDonnell illustrates this point by identifying shoe bomber Richard Reid, dirty bomber Jose Padilla, and the French citizen Zacarias Moussaoui, none of whom would have been subject to the special registration program. *See id.*

186. *See* Daphne Barak-Erez, *Terrorism and Profiling: Shifting the Focus from Criteria to Effects*, 29 CARDOZO L. REV. 1, 4 (2007).

187. *Id.* at 4-6. Barak-Erez argues for an altered form of profiling based on the kinds of decisions to which it is applied. For example, he argues that profiling for purposes of applying a more detailed visa process might be more acceptable than profiling for the purposes of completely denying a visa. *Id.* at 7; *see also* Legomsky, *Ethnic and Religious Profiling*, *supra* note 61, at 185. Legomsky argues:

the distinction [between country of nationality rather than nationality or religion] should not be overstated. First, almost all the countries that the United States has designated as harboring terrorists are predominantly Arab, Muslim, or both. Even if, as it asserts, the administration’s policy truly is not driven by ethnicity or religion, the practical impact falls disproportionately on one ethnic and one religious group. Second, so long as the impact is disproportionate, large segments of the population will perceive, rightly or wrongly, that the country-of-nationality distinction is merely a façade for anti-Arab or anti-Muslim sentiments—or at least that the same action would have been politically infeasible had other ethnic groups been singled out.

*Id.*; *see generally* ASIAN L. CAUCUS & STAN. L. IMMIGRANTS’ RTS. CLINIC, *supra* note 141.

188. Legomsky, *Ethnic and Religious Profiling*, *supra* note 61, at 178.

but not limited to: 1) existence of data to show that particular policies actually led to the identification of terrorists; 2) significance of the data (Kang uses the following example “[s]o, even if the Arab-looking man seated to your left is 100 times more likely to be a terrorist than the Aryan-looking man seated to your right (relative), 100 times a number essentially zero is still near zero (absolute)”; 3) benefit of utilizing profiling to the number of lives saved in contrast to neutral tools that may result in the same or even greater benefits; 4) harm to the victim and his family; 5) context and consequence of the group being profiled; and 6) notwithstanding the empirical evidence, the existence of moral principles that reject profiling measures.<sup>189</sup>

Kang’s final point is complicated by the fact that in the case of September 11, the government publicly opposed racial profiling while somehow distinguishing it from the profiling of Arab and Muslim looking men after 9/11. This distinction was made convenient by the sentiment of the public and the low legal bar for profiling noncitizens during times of national security. Far from discarding their moral principles on profiling after 9/11, the remedial efforts made by the Departments of Justice and Homeland Security and the legislature to protect civil rights and civil liberties and condemn racial and ethnic profiling suggest that someone in the government recognized the moral implications of actions following 9/11. Nevertheless these efforts have been largely unsuccessful in controlling the damage 9/11 policies have caused to affected communities, or modifying the perception that terrorists come from particular nations, ethnicities, and religions.

## VI. THE ROLE OF THE JUDICIARY

While the impact of the *Iqbal* decision on the notice-pleading standard is striking, its effects on the permissiveness of selective enforcement policies against foreign nationals are minimal, when contextualized against the government’s practices following 9/11. To the extent that the Executive Branch and Congress have historically overreacted to the threats posed by noncitizens during a national crisis by eroding basic procedural safeguards, relaxing evidentiary standards, and imposing excessive penalties against noncitizens based on race, religion, ethnicity, nationality, national origin, and political ideology, the “business as usual” standard is not unique to 9/11. In short, the *Iqbal* decision merely reflects an accepted legal standard that permits the government to selectively discriminate against foreign nationals.

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189. Jerry Kang, *Thinking Through Internment: 12/7 and 9/11*, 9 ASIAN L.J. 195, 197-200 (2002).

A. *Constitutional Rights of Noncitizens: A Brief Lesson*

The plain language of the Constitution iterates one of Congress' enumerated powers to include the "power to . . . establish an uniform Rule of Naturalization."<sup>190</sup> This has been interpreted by the Supreme Court to give Congress the "plenary power" to regulate immigration "beyond constitutional norms and judicial review."<sup>191</sup> The plenary power doctrine was portrayed in two early Supreme Court cases *Chae Chan Ping* and *Fong Yue Ting*.<sup>192</sup> For most of the nineteenth century, the government relied on the plenary power doctrine to exclude and deport noncitizens on the basis of race and national origin.<sup>193</sup> In *Chae Chin Ping* (known also as the Chinese Exclusion Case), the Supreme Court upheld a congressional measure that prohibited Chinese residents in the United States departing to China for a visit to return to the United States.<sup>194</sup> Justice Field held:

The power of exclusion of foreigners being an incident of sovereignty belonging to the government of the United States, as a part of those sovereign powers delegated by the Constitution, the right to its exercise at any time when, in the judgment of the government, the interests of the country require it, cannot be granted away or restrained on behalf of any one.<sup>195</sup>

The Supreme Court made a similar holding in *Fong Yue Ting*, when upholding a statutory provision that required "at least one credible white witness" to attest to the residency of a Chinese individual in the United

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190. U.S. CONST. art. 1, § 8 cl. 1, 4. Other scholars have identified the Commerce Clause, the Migration or Importation Clause, and War Clause as additional sources for federal immigration power. See, e.g., Aldana, *supra* note 102, at 17.

191. Frank H. Wu, *The Limits of Borders: A Moderate Proposal for Immigration Reform*, 7 STAN. L. & POL'Y REV. 35, 43 (1996).

192. See *Chae Chan Ping v. United States*, 130 U.S. 581 (1889); *Fong Yue Ting v. United States*, 149 U.S. 698 (1893); see also Gabriel J. Chin, *Chae Chan Ping and Fong Yue Ting: The Origins of Plenary Power*, in IMMIGRATION LAW STORIES (David Martin & Peter Schuck eds., 2005). For an examination of the earliest cases establishing the plenary power doctrine, see STEPHEN H. LEGOMSKY, IMMIGRATION AND THE JUDICIARY, LAW AND POLITICS IN BRITAIN AND AMERICA, ch. 3 (Oxford University Press) (1987) [hereinafter LEGOMSKY, IMMIGRATION AND THE JUDICIARY].

193. The racist origins of the plenary power doctrine are well recognized by scholars. See, e.g., Johnson, Lecture, *supra* note 102, at 531.

194. *Chae Chan Ping*, 130 U.S. at 599-600. Importantly, when the Chinese Exclusion case was decided the Supreme Court had not yet crafted the "heightened scrutiny" or "strict scrutiny" standards. As such "the judicial deference to the legislative branch, and its accompanying lack of interest in protecting the civil rights of racial minorities, were normal and not anomalous for their time. They are abnormal and anomalous today, though." Wu, *supra* note 191, at 47.

195. *Chae Chan Ping*, 130 U.S. at 609.



States prior to the enactment of broader anti-Chinese legislation.<sup>196</sup> Justice Horace Gray stated, “[t]he right of a nation to expel or deport foreigners . . . is as absolute and unqualified as the right to prohibit and prevent their entrance into the country.”<sup>197</sup> Neither *Chae Chan Ping* nor *Fong Yue Ting* have been overruled. The plenary power was further protected by Congress’s enactment of the national origins quota system in 1924.<sup>198</sup> Legal scholars have long criticized the plenary power doctrine, arguing that constitutional protections ought to apply in the immigration context.<sup>199</sup> While the judiciary has recognized some level of procedural due process in immigration matters,<sup>200</sup> courts have remained particularly loyal to “plenary power” and, in turn, deferential to the Executive and Legislative branches.<sup>201</sup> Notably, this loyalty has

196. *Fong Yue Ting*, 149 U.S. at 729; Wu, *supra* note 191, at 44.

197. *Fong Yue Ting*, 149 U.S. at 707.

198. See Kevin R. Johnson, *The Case Against Race Profiling in Immigration Enforcement*, 78 WASH. U. L. Q. 675, 689 (2000) (citing Immigration Act of 1924, ch. 190, § 11(a), 43 Stat. 153, 159 (repealed 1952)).

199. See Kif Augustine-Adams, *The Plenary Power Doctrine After September 11*, 38 U.C. DAVIS L. REV. 701, 706 (2005); see also GERALD NEUMAN, *STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS AND FUNDAMENTAL LAW* (Princeton University Press) (1996); see generally Linda S. Bosniak, *Membership, Equality, and the Difference that Alienage Makes*, 69 N.Y.U. L. REV. 1047 (1994); see generally Gabriel J. Chin, *Segregation’s Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1 (1998); see generally Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny*, 100 HARV. L. REV. 853 (1987); 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 (1996); see generally Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255 (1985) [hereinafter Legomsky, *Immigration Law*]; see generally Philip Monrad, Comment, *Ideological Exclusion, Plenary Power, and the PLO*, 77 CAL. L. REV. 831 (1989); see generally Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545 (1990); see generally Cornelia T. L. Pillard & T. Alexander Aleinikoff, *Skeptical Scrutiny of Plenary Power: Judicial and Executive Branch Decision Making in Miller v. Albright*, 1998 SUP. CT. REV. 1 (1998); see generally Victor C. Romero, *The Congruence Principle Applied: Rethinking Equal Protection Review of Federal Alienage Classifications After Adarand Constructors, Inc. v. Peña*, 76 OR. L. REV. 425 (1997); see generally John A. Scanlan, *Aliens in the Marketplace of Ideas: The Government, the Academy, and the McCarran-Walter Act*, 66 TEX. L. REV. 1481 (1988); see generally Michael Scaperlanda, *Polishing the Tarnished Golden Door*, 1993 WIS. L. REV. 965 (1993); see generally Margaret H. Taylor, *Detained Aliens Challenging Conditions of Confinement and the Porous Border of the Plenary Power Doctrine*, 22 HASTINGS CONST. L.Q. 1087 (1995); see generally Wu, *supra* note 191.

200. For detailed support of the procedural due process “exception” to the plenary power doctrine, see Legomsky, *Immigration Law*, *supra* note 199.

201. See, e.g., *Harisiades v. Shaughnessy*, 342 U.S. 580, at 597 (1952) (Frankfurter, J. concurring) (“[T]he underlying policies of what classes of aliens shall be allowed to enter and what classes of aliens shall be allowed to stay, are for Congress exclusively to determine even though such determination may be deemed to offend American traditions

permitted a series of legislative acts targeting particular races, nationalities, and alleged sympathizers of the Cold War and Communism to survive judicial scrutiny.<sup>202</sup>

While the landmark case of *Korematsu v. United States* dealt with a U.S. citizen, the case is instructive to the discussion about how the Court analyzes racially based laws generated in times of war. Specifically, the December 7, 1941 bombing of Pearl Harbor triggered strong anti-Japanese sentiment from both the government and the public.<sup>203</sup> In February 1942, then President Franklin D. Roosevelt issued Executive Order 9066 allowing the U.S. military to enact any policies necessary for the national security.<sup>204</sup> While the Executive Order itself was facially neutral it was utilized to validate restrictions on nearly every ethnic Japanese in America.<sup>205</sup> By December 1942, nearly 120,000 were detained in camps along the West Coast.<sup>206</sup> In *Korematsu*, the Supreme Court upheld the validity of Executive Order 9066 ordering Japanese Americans to internment camps during World War II.<sup>207</sup> *Korematsu* was a United States citizen born in California to Japanese parents convicted of violating the aforementioned internment order.<sup>208</sup> While the Court found that the Executive Order violated the Equal Protection Clause and

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and may, as has been the case, jeopardize peace.”); *Kleindienst v. Mandel*, 408 U.S. 753, at 765-66 (1972) (“[T]he Court’s general reaffirmations of [the plenary power doctrine] have been legion . . . [t]he Court without exception has sustained [it] . . . .”); *Knauff v. Shaughnessy*, 338 U.S. 537, at 544 (1950) (“Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.”); *see also* *Landon v. Plasencia*, 459 U.S. 21 (1982); *Sale v. Haitian Centers Council*, 509 U.S. 155 (1993); *Shaughnessy v. Mezei*, 345 U.S. 206, 222-23 (1953) (“Due Process does not invest any alien with a right to enter the United States, nor confer on those admitted the right to remain against the national will. Nothing in the Constitution requires admission or sufferance of aliens hostile to our scheme of government.”); *see also* *Zadvydas v. Davis*, 533 U.S. 678, at 696 (2001) (“terrorism” might warrant “special arguments” for “heightened deference to the judgments of the political branches with respect to matters of national security”); *Mathews v. Diaz*, 426 U.S. 67, 79-80 (1976) (“In the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens.”); *see also* *Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471 (1999).

202. *See, e.g.*, The Internal Security Act of 1950, 64 Stat. 987 (2010); McCarran-Walter Act of 1952, P.L. 82-414 (2010); Smith Act, 18 U.S.C.S. § 2385 (2010).

203. *See, e.g.*, Lugay, *supra* note 68, at 209; Kang, *supra* note 189, at 19; Volpp, *supra* note 68, at 1575.

204. Exec. Order No. 9066, 7 Fed. Reg. 1407 (Feb. 25, 1942).

205. Lugay, *supra* note 68, at 213 (2005).

206. *Id.*

207. The race-based paradigm of the Japanese internment is further highlighted by the fact that Italian Americans and German Americans, while also subject to internment during this time, were assessed individually for their loyalty to the U.S. as opposed to categorically presumed as disloyal and therefore subject to internment. Engle, *supra* note 123, at 83.

208. *Korematsu v. United States*, 323 U.S. 214 (1944).

applied the higher “strict scrutiny” standard,<sup>209</sup> it nonetheless upheld the constitutionality of Executive Order 9066.<sup>210</sup>

Even during the Cold War era, the political branches continued to create laws targeted at particular nationalities for scrutiny based on national security. In response to the 1979 Iranian hostage crisis, the INS promulgated a regulation that required students from Iran to report to INS in order to “provide information as to residence and maintenance of nonimmigrant status” or else be subject to deportation.<sup>211</sup> When the regulation was challenged on constitutional grounds, the D.C. Court of Appeals recognized that classifications based on nationality are consistent with due process and equal protection so long as they are not “wholly irrational.”<sup>212</sup> The court upheld the regulation and concluded:

For reasons long recognized as valid, the responsibility for regulating the relationship between the United States and our alien visitors has been committed to the political branches of the Federal Government. Since decisions in these matters may implicate our relations with foreign powers, and since a wide variety of classifications must be defined in the light of changing political and economic circumstances, such decisions are frequently of a character more appropriate to either the Legislature or the Executive than to the Judiciary. This very case illustrates the need for flexibility in policy

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209. Under Equal Protection doctrines courts first determine the level (rational, intermediate, or strict) of scrutiny required before deciding whether a particular classification made by the state sufficiently relate to the government’s objective. Traditionally, the courts have applied a heightened level of scrutiny to classifications based on race, sex national origin, alienage, and legitimacy. See Kenji Yoshino, *Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of “Don’t Ask, Don’t Tell,”* 108 YALE L.J. 485 (1999).

210. *Korematsu*, 323 U.S. at 222-23 (notably, *Korematsu* has never been explicitly overturned); there is a rich body of scholarship analogizing the policies faced by Japanese and Japanese Americans in the wake of the Pearl Harbor bombing to the ones faced by Arabs, Muslims, and South Asians in the wake of 9/11. By the same token, some scholars and judges have challenged the analogy made between the post 9/11 detentions and profiling and the internment of the Japanese, because the latter incident was “more” restrictive and discriminatory than the former. Nevertheless, the selective profiling and imprisonment based on religion, nationality, and national origin that both groups shared are similar in substance and no more justifiable. As described by one scholar: “[t]hat the form of the discrimination may seem less invidious, however, does not deflect from the fact that profiling”—considering individuals suspicious on the basis of religion and not on a single iota of evidence—“is discriminatory in substance. Profiling in the post-9/11 may not seem as unfavorable as other practices, but this comparison does not change the nature of profiling from a discriminatory to non-discriminatory.” Sidhu, *supra* note 102, at 72.

211. *Narenji v. Civiletti*, 617 F. 2d 745, 746 (D.C. Cir. 1979).

212. *Id.* at 747 (D.C. Cir. 1979) (citing *Mathews v. Diaz*, 426 U.S. 67, 81-82 (1970), *Fiallo v. Bell*, 430 U.S. 787 (1977)).

choices rather than the rigidity often characteristic of constitutional adjudication . . . .<sup>213</sup>

The court went on to say that the consequences of the registration requirement “is a judgment to be made by the President and it is not for us to overrule him, in the absence of acts that are clearly in excess of his authority.”<sup>214</sup>

The standard for selective enforcement claims was heightened in 1999 with the Supreme Court’s decision in *Reno v. American-Arab Anti-Discrimination Committee (Reno)*.<sup>215</sup> *Reno* involved eight noncitizens who alleged they were targeted for deportation on the basis of their national origin and political support for the Popular Front for the Liberation of Palestine (PFLP).<sup>216</sup> Writing for the majority, Justice Scalia asserted the Executive Branch’s broad discretion to determine whom to prosecute, and its incompatibility with judicial review.<sup>217</sup> Scalia highlights the foreign policy and intelligence-related reasons for shielding decisions by the immigration agency from outside review. In an unforgettable passage of the opinion, Scalia notes:

The 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>218</sup>

Notably, Justice Scalia also cites to early decisions by the Court to rationalize selective enforcement in deportation cases. Specially, he held that unlike a criminal prosecution where the consequences can lead to punishment, deportation is not the same as punishment and is merely an effort by the government to terminate “an ongoing violation” of the United States immigration laws. Justice Scalia remarked, “[t]he contention that a violation must be allowed to continue because it has been improperly selected is not powerfully appealing.”<sup>219</sup>

In the same way that *Twombly* and *Iqbal* have been criticized for creating an unachievable pleading standard that gives government officials a free pass, *Reno* created an unachievable standard for selective prosecution cases. Justice Scalia stated: “[t]o resolve the present

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213. *Id.* at 748.

214. *Id.*

215. *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471 (1999).

216. *Id.* at 473.

217. *Id.* at 489-90.

218. *Id.* at 491.

219. *Id.*

controversy, we need not rule out the possibility of a rare case in which the alleged basis of discrimination is so outrageous that the foregoing considerations can be overcome.”<sup>220</sup> “Although ‘outrageous’ is not a self-defining term, a few things the Court did not consider to be outrageous are apparent: ‘[d]eeming nationals of a particular country a special threat . . . [and] antagoniz[ing] a particular foreign country by focusing [enforcement efforts] on that country’s nationals . . . .’”<sup>221</sup>

Numerous cases claiming selective enforcement by the immigration agency after 9/11 have been rejected based on *Reno*’s “outrageousness” standard. Notably, a number of these cases involve challenges to agency policies as “national security” measures after September 11, 2001.<sup>222</sup> For example, many federal judges have relied on the *Reno* standard to dismiss or deny several lawsuits filed around the NSEERS program.<sup>223</sup> In 2002, a federal district court in California dismissed a complaint alleging the unlawful arrests of individual participants of the “call-in registration” process.<sup>224</sup> Finally Sameer Ashar provides a chilling account of an “outrageous discrimination” claim brought on behalf of his client, a fifty-eight year old Pakistani man who was detained at Passaic County Jail after an interrogation by INS.<sup>225</sup> As described by Ashar:

There appeared to be no discernable reason for the arrest of my client, other than the fact that he was brown-skinned, Muslim, and present at the Brooklyn mosque on the morning of the INS sweep . . . . [O]ur argument was that the government had engaged in “outrageous” discrimination on the basis of race and religion, in

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220. *Id.* at 491.

221. *Id.*

222. But see Aldana, *supra* note 102, at 24, contending that the Attorney General lacked the inherent executive powers to promulgate regulations altering detention and due process standards for foreign nationals after 9/11. Specifically, Aldana argues that “because the Attorney General’s issuance of September 11 regulations without congressional mandate, usurps the ‘lawmaking’ function entrusted by the Constitution to Congress, it violates separation of powers . . . .” *Id.* Following this theory, Aldana distinguishes the *Korematsu* case (which involved a congressional declaration and congressionally authorized executive order to intern Japanese and Japanese Americans) from the 9/11 detentions that were preceded by no such authorization by Congress. *Id.*

223. See, e.g., *Kandamar v. Gonzales*, 464 F.3d 65, 74 (1st Cir. 2006) (“To be sure, Moroccan nationals were required to register with DHS while a person in the same situation but not from one of the NSEERS countries would not have been placed in removal proceedings. However, a claim of selective enforcement based on national origin is virtually precluded by *Reno v. American-Arab Anti-Discrimination Committee*”); see also *Rajah v. Mukasey*, 544 F.3d 427 (2d Cir. 2008).

224. *Am.-Arab Anti-Discrimination Comm. v. Ashcroft*, 241 F. Supp. 2d 1111 (C.D. Cal. 2003).

225. Sameer M. Ashar, Symposium, *Immigration Enforcement and Subordination: The Consequences of Racial Profiling After September 11*, 34 CONN. L. REV. 1185, 1187-89 (2002).

targeting the mosque at which my client stayed, and then questioning and arresting him.<sup>226</sup>

The immigration judge threw out the case, indicating that she would not allow Ashar and his client “to drag INS officials into her courtroom to explain their enforcement policies.”<sup>227</sup> While Ashar points to a handful of federal court decisions in support of the procedural due process rights of noncitizens, he laments: “Even armed with a few favorable decisions on procedural rights, immigrant detainees would likely be unable to defeat the presumption that the INS may use race and national origin to selectively enforce and detain.”<sup>228</sup>

*Reno*’s ability to silence many valid claims of discrimination by foreign nationals has been remarkable. In the aforementioned companion case to *Iqbal*, *Turkmen v. Ashcroft*, United States District Court Judge John Gleeson relied on *Reno* to reject the plaintiff’s selective enforcement claims based on race and religion, concluding that the government’s decision to impose greater scrutiny to those who violated their visa, based on national origin and race, and prolong their detention during the investigation “was not so irrational or outrageous as to warrant judicial intrusion into an area in which courts have little experience and less expertise.”<sup>229</sup> Similarly, in affirming Judge Gleeson’s dismissal of the plaintiffs’ claims about prolonged detention, the Second Circuit cited to *Reno*. “Similarly, plaintiffs point to no authority clearly establishing an equal protection right to be free of selective enforcement of the immigration laws based on national origin, race, or religion at the time of plaintiffs’ detentions.”<sup>230</sup>

The foregoing body of court challenges indicates that in most cases, measures that profile foreign nationals on the basis of race, ethnicity, religion, national origin, nationality, or political ideology will be upheld. Perhaps this is no different from Kang’s sentiments on internment and 9/11 when he states:

[W]e should not be surprised if courts determine that national security in the face of terrorism is—in the lingo of constitutional

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226. *Id.* at 1188-89.

227. *Id.* at 1189.

228. *Id.* (citing Motomura, *supra* note 199, at 600-13).

229. *Turkmen v. Ashcroft*, No. 02-2307, at 79 (E.D.N.Y. June 14, 2006).

230. Posting of *Turkmen v. Ashcroft*, No. 06-3745 to [http://blogs.findlaw.com/second\\_circuit/2009/12/turkmen-v-ashcroft-no-06-3745.html](http://blogs.findlaw.com/second_circuit/2009/12/turkmen-v-ashcroft-no-06-3745.html) (Dec. 21, 2009, 15:59 EST); *but see* *Iqbal v. Hasty*, 490 F.3d 143, 175 (2d Cir. 2007) (determining that *Reno* “does not stand for the proposition that the Government may subject members of a particular race, ethnicity, or religion to more restrictive conditions of confinement than members of other races, ethnic backgrounds, or religions”) (rev’d on other grounds and remanded, *Iqbal*, 129 S. Ct. 1937).

law—a “compelling interest” and that crude forms of racial profiling, notwithstanding its over and under inclusiveness, are “narrowly tailored” to furthering that interest. It would be foolish to think that the courts will necessarily save us from the excesses of the more political branches. That is another lesson of the internment. This is all the more reason to demand that our political leaders publicly make the cost-benefit and moral case in favor of racial profiling before they adopt any such practice.<sup>231</sup>

Similarly, Kevin Johnson offers advice on the government’s role in protecting racial minorities during times of emergency:

As a nation, we must be careful in times of severe national stress. In such times, as history has shown time and time again, the nation has acted aggressively, but mistakenly, frequently punishing minorities—in no small part because that tack was feasible politically and legally—in ways that we as a society later regret. Years from now, we may look back on the days after September 11, 2001 in a way that we look today at the Alien and Sedition Acts, the Chinese Exclusion laws, the Palmer Raids, and Japanese internment, the McCarthy era, and surveillance of Martin Luther King Jr. and other civil rights activists in the 1960s. For that reason, we should pause and be vigilant in an attempt to avoid acting rashly at cross-purposes with our true goal of protecting the nation and its values. We all should be vigilant in evaluating the impacts on civil rights of national policies implemented in the name of national security, especially when the rights being infringed are those of a discrete and insular minority. Importantly, a system of laws and judicial review is a most essential safeguard during these difficult times.<sup>232</sup>

## VII. CONCLUSION AND RECOMMENDATIONS

The following recommendations focus on policy changes and legal modifications at the Executive and Legislative branch levels. The goals of these recommendations include, but are not limited to 1) repealing 9/11 policies that had a disproportionate impact on nationals from Muslim-majority countries; 2) requiring greater oversight of such policies in order to determine whether the government is justified in creating or sustaining such policies; and 3) codifying that racial and religious profiling is unacceptable even during times of national emergency. Recommendations to the judiciary fall last and reflect the author’s belief that the power of the plenary doctrine makes it difficult to rely on the courts to reverse national security policies created by the

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231. Kang, *supra* note 189, at 200.

232. Johnson, Lecture, *supra* note 102, at 25-26.

political branches that discriminate against individuals and groups. Instead, consideration must be given to arming the government's own watchdogs with greater ability to require the government to justify the value of its policies and modifying the law to afford noncitizens and minorities basic safeguards during times of emergency.

A. *Executive Branch*

1. Modify DOJ Guidance on Racial Profiling

DOJ should consider amending their 2003 DOJ Guidance on racial and ethnic profiling. The Guidance should be binding on all DOJ personnel. Similarly, the Guidance should include nationality<sup>233</sup>, national origin, religion, and political ideology (in addition to race and ethnic profiling) as factors that are generally prohibited from being used as a law enforcement tool. Moreover, until immigration policy and law is sufficiently disaggregated from national security programs, the 2003 DOJ Guidance should remove the broad exceptions created for national security and border security.

2. Repeal DOJ/DHS Regulations on Special Registration

DHS should repeal the regulations relating to special registration, and ensure that individuals impacted by the program are able to apply for and receive immigration benefits if they are otherwise eligible and also apply for legalization if they are otherwise qualified. In the interim, DHS should ensure that prosecutorial discretion is exercised favorably toward affected individuals with strong equities such as family ties, employment, or community ties in the United States. The Administration should reject screening and tracking programs that selectively discriminate against groups based on race, religion, ethnicity, nationality, national origin, or political ideology as a means for preserving national security or as an immigration enforcement tool.

3. Repeal EOIR Memo on Closed Hearings

DOJ's Executive Office for Immigration Review should repeal the "Creppy Memo" permitting closed immigration hearings. The government should adopt legislation or regulations that require immigration proceedings to be public and closed on a case-by-case basis,

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233. While profiling based on nationality may not be inherently objectionable, the practical impact is offensive and often discriminatory. See e.g., Legomsky, *supra* note 61, at 185; ASIAN L. CAUCUS & STAN. L. IMMIGRANTS' RTS. CLINIC, *supra* note 141, at 30-31.



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only if the government can provide compelling evidence that a portion or the entirety of a hearing should be closed.<sup>234</sup>

#### 4. Amend DOJ/DHS Regulations on Custody Determinations

DHS should modify the current regulations related to custody determinations. Specifically, the agency should adopt a “48 hour” rule for charging noncitizens detained by an immigration officer or agent deputized to perform immigration functions. Similarly, DHS should be required to serve a Notice to Appear on the noncitizen and file the NTA with the immigration court within 72 hours. Any individual held in immigration custody beyond these specified timeframes should be immediately placed before an immigration judge. An immigration judge should determine whether prolonged detention without charges, service of charges, or filing of such charges is appropriate. This determination should be made on the record.

#### 5. Create Greater Mechanisms for Accountability and Oversight

The Administration should create greater mechanisms for accountability and oversight of agency programs that disproportionately target individuals based on race, religion, ethnicity, national origin, nationality, or political ideology. The impact and national security value of the AAI, NSEERS program, and the Creppy Memo should be audited. Programs that lack a legitimate purpose must sunset within a prescribed time period or be eliminated altogether. On an annual basis, the Inspector General office or related watchdog of the agency at which the program operates should audit such programs. Such audits should be publicly available, and include recommendations about whether to continue, modify or terminate a particular program.

### *B. Legislative Branch*

#### 1. Greater Congressional Oversight

Congress should engage in greater oversight on Executive branch activity and policymaking. As described by Senator Patrick Leahy at an oversight hearing following 9/11:

[t]he need for congressional oversight and vigilance is not, as some mistakenly describe it, “to protect terrorists”—it is to protect ourselves and our freedoms, something in which each and every

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234. For an example of related legislative language, *see* Civil Liberties Restoration Act of 2005, H.R. 1502, 109th Cong. (2005).

American has a stake. It is to make sure that we keep in sight at all times the line that separates tremendous government power on the one hand and the rights and liberties of all Americans on the other.<sup>235</sup>

Congressional oversight hearings should be regularly scheduled to address not only the national security implications of past and future terrorist events, but also to address the scope and appropriateness of profiling policies created in the name of national security.

## 2. Enact End Racial Profiling Act

Congress should enact the *End Racial Profiling Act*. Introduced numerous times in the House and Senate, the End Racial Profiling Act (ERPA) defines racial profiling as “the practice of a law enforcement agent or agency relying, to any degree, on race, ethnicity, national origin, or religion in selecting which individual to subject to routine or spontaneous investigatory activities.”<sup>236</sup> ERPA has also noted the deficiencies in the 2003 DOJ Racial Profiling Guidance and acknowledges that

[i]n the wake of the September 11, 2001, terrorist attacks, many Arabs, Muslims, Central and South Asians, and Sikhs, as well as other immigrants and Americans of foreign descent, were treated with generalized suspicion and subjected to searches and seizures based upon religion and national origin, without trustworthy information linking specific individuals to criminal conduct. Such profiling has failed to produce tangible benefits, yet has created a fear and mistrust of law enforcement agencies in these communities.<sup>237</sup>

## C. Judiciary

The courts can and should play a greater role in scrutinizing actions taken by the Executive Branch. While the courts have long concluded that matters of foreign affairs and national security are best left to the

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235. Marie A. Taylor, *Immigration Enforcement Post-September 11: Safeguarding the Civil Rights of Middle Eastern-American and Immigrant Communities*, 17 GEO. IMMIGR. L.J. 63, 104 (2002) (citing DOJ, Oversight Hearing, Dec. 6, 2001, opening statement of Sen. Leahy).

236. End Racial Profiling Act of 2007, S. 2481 110th Cong. (2007); *see also* Senator Russ Feingold, Fact Sheet on End of Racial Profiling Act, [http://feingold.senate.gov/issues\\_profilingfacts.html](http://feingold.senate.gov/issues_profilingfacts.html). Co-sponsors in 2007 included, Sen. Sherrod Brown (OH), Sen. Maria Cantwell (WA), Sen. Benjamin L. Cardin (MD), Sen. Hillary Rodham Clinton (NY), Sen. Christopher J. Dodd (CT), Sen. Richard Durbin (IL), Sen. Edward M. Kennedy (MA), Sen. John F. Kerry (MA), Sen. Frank R. Lautenberg (NJ), Sen. Robert Menendez (NJ), Sen. Barbara A. Mikulski (MD), Sen. Barack Obama (IL), and Sen. Debbie Stabenow (MI).

237. End Racial Profiling Act of 2007, S. 2481 110th Cong. (2007).

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“political branches” of government, courts must still scrutinize Executive Branch actions that are contrary to checks and balances, without congressional authorization, or inconsistent with common understandings of checks and balances.<sup>238</sup>

The greatest problem with the Business As Usual Standard is that many of the 9/11 immigration policies were employed with little national security benefit and were discriminatory. The foregoing recommendations will not lead to an overnight change in a legal and social culture that permits “Business as Usual,” but they do offer some potentially tangible benefits. First, rolling back the national security and immigration policies that disproportionately impact Arabs, Muslims and South Asian communities will reduce the profiling and substantial harms suffered by such communities. Second, including greater oversight mechanisms will enable the government to utilize its own ombudsmen to ensure that national security policies are effective and balanced against the potential harms. Third, enacting anti-profiling legislation will limit the extent to which national security can serve as a proxy for immigration policy that discriminates against particular communities. Even with the most deferential judges, the foregoing changes can potentially result in a culture of deference to a more reasonable and less discriminatory set of laws.

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238. Aldana, *supra* note 102, at 40.