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The USA Patriot Act: A Policy of Alienation

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Kam C. Wong*

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.

—Statement from President Bush (September 13th, 2001)¹

The act, written in response to the September 11 attacks, in theory applies to all citizens, but it was written with Muslims in mind and in practice denies them their civil liberties by empowering law enforcement authorities to raid their homes, offices, and mosques in the name of the war on terrorism.

—Geneive Abdo (2005)²

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1. Press Release, White House Office of the Press Sec'y, President Pledges Assistance for New York in Phone Call with Pataki, Giuliani: Remarks by the President in Telephone Conversation with New York Mayor Giuliani and New York Governor Pataki (Sept. 13, 2001), <http://www.whitehouse.gov/news/releases/2001/09/20010913-4.html>.

2. Geneive Abdo, *Islam in America: Separate but Unequal*, WASH. Q. 7, 12(2005); see also Chrystie Flournoy Swiney, *Racial Profiling of Arabs and Muslims in the US: Historical, Empirical, and Legal Analysis Applied to the War on Terrorism*, 3 MUSLIM WORLD JOURNAL OF HUMAN RIGHTS 1 (2006) (Post-9/11 profiling of Muslims is not a cost-effective deterrent to terrorists and threats. The government needs to re-evaluate post-9/11 anti-Muslim policies and practices in place) available at <http://www.bepress.com/mwjhr/vol3/iss1/art3>.

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INTRODUCTION

On September 11, 2001, terrorists attacked America without warning, killing 2,752 people.³ That same day, President George W. Bush promised that “The United States will hunt down and punish those responsible for these cowardly acts.”⁴ On October 26, 2001, President Bush signed into law the USA PATRIOT ACT (USAPA or the Act).⁵ The USAPA gave law enforcement officials expansive powers and security agencies increased resources to fight terrorism, both at home and abroad.⁶ Throughout the entire USAPA legislative process, neither Congress nor

3. See “The final death toll of the attack upon the World Trade Center on September 11th, 2001,” <http://www.ourcivilisation.com/usa/toll.htm>. The FBI reported 3,047 victims from all locations of the terrorist attacks on September 11, 2001. Fed. Bureau of Investigation, Uniform Crime Reports: Crime in the United States 2001, 302.

4. Press Release, White House Office of the Press Sec’y, Remarks by the President Upon Arrival at Barksdale Air Force Base (Sept. 11, 2001), <http://www.whitehouse.gov/news/releases/2001/09/20010911-1.html>.

5. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No.107-056, 115 Stat. 272 (2001).

6. For legal analysis, see Charles Doyle, Cong. Research Serv., CRS REPORT FOR CONGRESS: THE USA PATRIOT ACT: A LEGAL ANALYSIS (2002).

the Administration systematically investigated or comprehensively considered the relative utilities and likely impact of the Act.⁷

The USAPA is now five years old and little is known about the implementation, and in turn the impact, of the Act. While the Bush administration, as supported by a Republican Congress,⁸ was quick to push for the reinventing and renewing of the Act,⁹ there is very little information on the law's impact and virtually no assessment of its effectiveness. As observed by Nancy Kranich:

Almost two years after passage of the USA PATRIOT Act, little is known about how the law is being used to track terrorists or innocent Americans. The Justice Department has foiled numerous attempts by lawmakers and civil libertarians to learn how the Administration has deployed new tools granted under the Act. Congressional hearings this spring yielded virtually no new information about the number of times individuals' library records have been sought or how many court orders have been obtained to watch someone's computer activities or conduct other surveillance on U.S. citizens. Justice officials claim that even generic numbers are classified, and are provided confidentially only to congressional intelligence committees.¹⁰

7. See Kam C. Wong, *The USA PATRIOT Act: Some Unanswered Questions*, 34 INT'L J. SOC. L. 1-41 (2006).

8. CNN, House Approves Renewal of Patriot Act: Critics Voice Concern Over Civil Liberties, CNN.COM, July 22, 2005, <http://www.cnn.com/2005/POLITICS/07/21/patriot.act> ("The final vote was 257-171. The bill makes permanent 14 of 16 provisions in the act set to expire next year and extends two others for another 10 years . . . In the final tally, 14 Republicans bucked Bush and the party leadership to vote against the Patriot Act renewal. Among Democrats, 43 supported it, while 156 voted no"); see also CNN, Patriot Act Renewal Fails in Senate: GOP Fights to Save Provisions Before End-of-Year Deadline, CNN.COM, Dec. 16, 2005, <http://www.cnn.com/2005/POLITICS/12/16/patriot.act> (discussing the defeat of the renewal of USAPA bill by filibuster in the Senate).

9. See Associated Press, President urges renewal of Patriot Act, USA TODAY, Apr. 17, 2004, available at http://www.usatoday.com/news/washington/2004-04-17-bush-terrorism_x.htm ("To abandon the Patriot Act would deprive law enforcement and intelligence officers of needed tools in the war on terror, and demonstrate willful blindness to a continuing threat"); see also R. Jeffrey Smith, Attorney General Urges Renewal of Patriot Act: Gonzales Gives First Policy Speech, WASH. POST, Mar. 1, 2005, at A2 (USAPA "has helped prevent additional terrorist attacks . . . Giving law enforcement the tools they need to keep America safe while honoring our values").

10. Nancy Kranich, Commentary: The Impact of the USA PATRIOT Act: An Update, THE FREE EXPRESSION POLICY PROJECT (FEPP), BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW, Aug. 27, 2003, <http://www.fepproject.org/commentaries/patriotactupdate.html>.

The Bush administration has routinely resorted to national security,¹¹ executive privilege,¹² operational secrecy,¹³ or Presidential fiat¹⁴ to keep the specifics of the Act secret from the public. As time passes, the unintended consequences of the Act and related anti-terrorism measures have mushroomed, resulting in ramifications that are increasingly felt throughout American society. Foreign students have been deterred from coming to the United States.¹⁵ Librarians have started to concern themselves with government monitoring activities.¹⁶ Neither of these examples, however, compare to the impact felt by Muslims in the U.S., the group most affected by the Act.¹⁷

Muslims, individually and as a group, have been singled out for special (mis)treatment since 9/11,¹⁸ in ways ranging from domestic

11. See DOJ Oversight: Terrorism and other Topics Before the H. Comm. On the Judiciary, 108th Cong. 16 (2004) (When Senator Grassley asked why the Attorney General classified information about whistleblower Edmonds, a translator who was fired from the FBI, the Attorney General said, "If I am not mistaken, in the matter to which you make reference, the national interests of the United States would be seriously impaired if information provided in one briefing to the Congress were to be generally available").

12. See *id.* at 98. (When questioned by Senator Durbin on a memo defining permissible torture by Assistant Attorney General Jay Bybee, the Attorney General refused to answer on executive privilege grounds).

13. Seth Rosenfeld, *9-11-01: Looking Back, Looking Ahead: A Nation Remembers: Patriot Act's Scope, Secrecy Ensnare Innocent, Critics Say*, S.F. CHRON., Sept. 8, 2002, at A1, available at <http://www.sfgate.com/cgi-bin/article.cgi?file=/c/a/2002/09/08/MN30478.DTL> ("So far, the full impact of the Patriot Act remains unknown, partly because the Bush administration has insisted on secrecy that some courts and members of Congress have called excessive").

14. See Edward Epstein, *Bush to Face Tough Questions Over Patriot Act, Spy Orders*, S.F. CHRONICLE, Dec. 24, 2005, at A11, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2005/12/24/MNGBOGD4FF1.DTL> (The President ordered electronic surveillance on US soil without consulting Congress).

15. See Adrian Arroyo, *Comments: The USA PATRIOT Act and the Enhanced Border Security and Visa Entry Reform Act: Negatively Impacting Academic Institutions by Deterring Foreign Students from Studying in the United States*, 16 TRANSNAT'L LAWY. 411 (2003), available at http://www.iienetwork.org/index.v3page?d_v=rm&d_mid=50357&p=33311.

16. See American Library Association, *The USA Patriot Act in the Library*, <http://www.ala.org/ala/oif/ifissues/usapatriotactlibrary.htm> (last visited Nov. 6, 2006) ("[The USA PATRIOT Act's] . . . enhanced surveillance procedures pose the greatest challenge to privacy and confidentiality in the library").

17. See *infra* Section II: "Literature Review."

18. Muslims were not the only group of people who were subject to indiscriminate application of post-9/11 counter-terrorism measures. See e.g. David Morton, *Detained*, CLEVELAND FREE TIMES, Dec. 17, 2001, <http://altnet.net/story/12092> (describing an incident in which eleven Israelis were rounded up and questioned after being picked up for visa violations. They were detained in local jails with no legal justification, rights or due process); see also Eric Lichtblau, *New Details on F.B.I. Aid for Saudis after 9/11*, N.Y. TIMES, Mar. 27, 2005, at 8 (describing how some Arabs and Muslims were luckier than others. The Bush administration helped hundreds of prominent Arabs escape the frontal

registration and airport profiling to immigration detention.¹⁹ The USAPA enables the government to monitor, investigate, detain, and deport Muslims legally in the name of security, without rudimentary due process of the law and in gross violation of their rights.²⁰

This Article provides a brief overview of how Muslims were treated after 9/11. It documents how the USAPA and related measures have been used to monitor, investigate, detain, and deport Muslim U.S. citizens in violation of their civil rights.²¹ Of particular importance, is how the life circumstances of the Muslims in America have changed for the worse as a result of zealous enforcement and discriminatory application of the USAPA.²² In so doing, this Article seeks to provide concrete facts and a rich context to ascertain the implications of 9/11 on American society.

Based on a larger research project,²³ this Article points to the need for systematic and comprehensive investigation into the impact of the USAPA on the Muslim community in the U.S., and in turn analyzes the implications of 9/11 on American society.²⁴

attack of the 9/11 aftermath) available at <http://www.nytimes.com/2005/03/27/politics/27exodus.html>.

19. See Louise Cainkar, Post 9/11 Domestic Policies Affecting U. S. Arabs and Muslims: A Brief Review, 24 *COMP. STUD. S. ASIA, AFR. AND MIDDLE E.* 247 (2004).

20. See, e.g., Office of the Inspector Gen., U.S. Dep't of Justice, 107th Cong., Report to Congress on Implementation of Section 1001 of the USA PATRIOT Act: (as required by Section 1001(3) of Public Law 107-56) (2002); Philip Shenon, Report on U.S. Antiterrorism Law Alleges Violations of Civil Rights, *N.Y. TIMES*, July 21, 2003 at A1.

21. See CATO INSTITUTE, *CATO HANDBOOK FOR CONGRESS: POLICY RECOMMENDATIONS FOR THE 108th CONGRESS* 117-24 (Edward H. Crane & David Boaz eds., 2003); AsiaSource, Interview by Nevmeen Shaikh with Dalia Hashad, Advocate, ACLU (Apr. 10, 2003), http://www.asiasource.org/news/special_reports/hashad.cfm.

22. See Steven Salaita, Ethnic Identity and Imperative Patriotism: Arab Americans Before and After 9/11, 32 *C. LITERATURE* 146 (2005) (examining "the effects of 9/11 on Arab Americans and other minorities").

23. This Article is the result of a four-year research project (2002—2006) by the author entitled, "The Impact and Implications of USA PATRIOT Act on American Society." Research output to date includes: Kam C. Wong, *The USA Patriot Act: Some Unanswered Questions*, 34 *INT'L J. SOC. L.* 1-41 (2006) (on historical context); Kam C. Wong, *The Making of the USA PATRIOT ACT I: The Legislative Process and Dynamics*, 34 *INT'L J. SOC. L.* 179-219 (2006) (on the legislative process); Kam C. Wong, *The Making of the USA PATRIOT ACT II: Public Sentiments, Legislative Climate, Political Gamesmanship, Media Patriotism*, 34 *INT'L J. SOC. L.* 105-40 (2006) (on the political environment); Kam C. Wong, *Implementing the USA PATRIOT ACT: A Case Study of the Student and Exchange Visitor Information System (SEVIS)*, 2 *BYU EDUC. & L.J.* 1 (2006) (on implementation problems).

24. Charles Doyle, Cong. Research Serv., CRS Report for Congress: USA Patriot Act Sunset: Provisions That Expire on December 31, 2005, 1 (June 10, 2004) (Subsection 224(a) of the USAPA indicates that various sections in Title II of the Act are to remain in effect only until December 31, 2005) available at <http://www.fas.org/irp/crs/RL32186.pdf>.

This Article is organized into the following sections. Section I is a “Literature Review” of popular and scholarly readings, which notes that while there were many discussions over the impact of the USAPA, many of them were produced by interested parties, and more than a few of them are tainted by motives ranging from patriotism to political gamesmanship.²⁵ Section II details the “Research Questions and Model of Analysis.” Section III provides an overview of “Post 9/11 Counter-Terrorism Strategy”, such as total information control. Section IV discusses “Post 9/11 Counter-Terrorism Operations” including FBI dragnet and INS preventive detention. The Conclusion provides a detailed account and in-depth analysis of the “Impact Upon the Muslim Community and Implications for America.”

I. LITERATURE REVIEW

A cursory review of news accounts,²⁶ investigative reports,²⁷ popular readings,²⁸ commissioned studies,²⁹ Congressional testimonies,³⁰ panelists’

25. Wong, *The Making of the USA PATRIOT Act II*, *supra* note 23.

26. Rosenfeld, *supra* note 13.

27. Caught in the Crossfire: Arab Americans in Wartime (PBS television broadcast Sept. 4, 2002) (following the lives of three Arab American New Yorkers after the September 11th terrorist attacks).

28. William Fisher, Govt Targets Arab, Muslim Americans Again, ANTIWAR.COM, Oct. 5, 2004, <http://www.antiwar.com/ips/fisher.php?articleid=3707> (FBI agents are again contacting Arab and Muslim Americans for “voluntary interviews” before Nov. 2, 2004 election to intimidate electorate or impress would-be voters of war on terror); see also Abdus Sattar Ghazali, Muslims American Muslims Four Years After 9/11, American Muslim Perspective, Sept. 11, 2005, http://www.amperspective.com/html/four_years_after_9-11.html (“Stereotyping and scapegoating Muslims and Islam remain a popular past time for the US media . . .”).

29. ARAB AM. INST., HEALING THE NATION: THE ARAB AMERICAN EXPERIENCE AFTER SEPTEMBER 11 (2002), http://www.arabvoices.net/healing_the_nation.pdf.

30. See, e.g., Detainees: Hearing Before the Sen. Comm. on the Judiciary, 109th Cong. (2005) (statement of Glenn A. Fine, Inspector Gen. U.S. Dep’t of Justice) (summarizing findings and recommendations to OIG’s June 2003 report entitled “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” and December 2003 report, entitled “Supplemental Report on September 11 Detainees’ Allegations of Abuse at the Metropolitan Detention Center in Brooklyn, New York”); America after 9/11: Freedom Preserved or Freedom Lost?: Hearing Before U.S. Sen. Judiciary Comm., 108th Cong. (2003) (testimony of Dr. James Zogby, President of Arab Am. Inst.); Implementation of the USA Patriot Act: Prohibition of Material Support Under Sections 805 of the USA Patriot Act and 6603 of the Intelligence Reform and Terrorism Prevention Act of 2004: Hearing Before the Subcomm. On Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary, 109th Cong. (2005).

presentations,³¹ learned treatises,³² and journal articles³³ makes it clear that 9/11 has had a grave impact on American society. The USAPA, for better or worse, has come to be associated with the war on terror. Harmful impacts of the Act on America are evident everywhere. No one was spared, even Senator Kennedy was stopped from boarding a plane five times because his name appeared on the “no fly” list.³⁴ All matters have been impacted, including travel and banking.³⁵ A systematic and comprehensive analysis of related literature shows that Muslims in America suffered the most as a result of Bush’s war on terror.³⁶

31. See Virginia Law, Panelists Examine Consequences of Patriot Act, Oct. 3, 2005, http://www.law.virginia.edu/home2002/html/news/2005_fall/patriotact.htm (Panelists included: Imad Damaj, President, Va. Muslim Coal. For Pub. Affairs; Ken Willis, Executive Dir., ACLU of Va.; Robert M. O’Neil, Law Prof. and Dir. of the Thomas Jefferson Ctr.).

32. See, e.g., NAT HENTOFF, *THE WAR ON THE BILL OF RIGHTS—AND THE GATHERING RESISTANCE* (2003); LOST LIBERTIES: ASHCROFT AND THE ASSAULT ON PERSONAL FREEDOM (Cynthia Brown ed., 2003) [with an introduction by Aryeh Neier]; *THE WAR ON OUR FREEDOMS: CIVIL LIBERTIES IN AN AGE OF TERRORISM* (Richard C. Leone & Greg Anrig, Jr. eds., 2003); David Lyon, *SURVEILLANCE AFTER SEPTEMBER 11* (2003); Barbara Olshansky & the Ctr for Constitutional Rights, *SECRET TRIALS AND EXECUTIONS: MILITARY TRIBUNALS AND THE THREAT TO DEMOCRACY* (2002); Christian Parenti, *THE SOFT CAGE: SURVEILLANCE IN AMERICA FROM SLAVERY TO THE WAR ON TERROR* (2003).

33. Sunaina Maira, *Youth Culture, Citizenship and Globalization: South Asian Muslim Youth in the United States After September 11th*, 24 *COMPARATIVE STUDIES OF SOUTH ASIA, AFRICA AND THE MIDDLE EAST* 219-231 (2004); Muqtedar Khan, *American Muslims and the Rediscovery of America’s Sacred Ground*, in *TAKING RELIGIOUS PLURALISM SERIOUSLY: SPIRITUAL POLITICS ON AMERICA’S SACRED GROUND* 137 (Barbara A. McGraw & Renee Formicola eds., 2005), available at <http://www.brookings.edu/views/articles/fellows/khanchapter.pdf> (prior to Sept. 11th, the external influence and cultural identity of Muslims was strong. But, after 9/11 the Muslim community was put on the defensive, and that identity was shaken. The USAPA in particular was a rude awaking for the Muslim community).

34. Sarah Kehaulani Goo, *Terror no-fly list singled out Kennedy. Senator was stopped 5 times at airports*, S.F. CHRONICLE, Aug. 20, 2004, at A3, available at <http://www.sfgate.com/cgi-bin/article.cgi?file=/c/a/2004/08/20/MNGQ28BM1O1.DTL>.

35. See, e.g., Harvey M. Silets & Carol R. Van Cleef, *Compliance Issues in the Wake of the USA PATRIOT Act*, 10 *JOURNAL OF FINANCIAL CRIME* 392 (2003) (compliance with USAPA is costly and non-compliance is devastating); James Fisher, James Gilsinan, Ellen Harshman, Muhammed Islam & Fred Yeager, *Assessing the Impact of the USA PATRIOT Act on the Financial Services Industry*, 8 *JOURNAL OF MONEY LAUNDERING CONTROL* 243 (2005) (a cost-benefit analysis of the Act is not possible since the deterrent effect of the Act cannot be ascertained. Experience with the Act to date, however, confirms that there are substantial financial costs and a whole host of privacy concerns).

36. Information available on the impact of 9/11 in general and as a result of the USAPA was limited by the pre-9/11 information-communication structure in the Nation and within the immigrants’ communities. The reporting on the impact and effect of 9/11 might also be biased against reporting positive news. For a discussion of the information flow within immigrant network pre- and post-9/11, see Suzette B. Masters & Ted Perlmutter, *Reactions of the Immigration Community to the Events of September 11th* (2002), <http://www.newschool.edu/icmec/reaction.html> (last visited Oct. 18, 2006).

One of the most critical and damning reports of post 9/11 anti-terrorism performance and its impact on Muslims and aliens, came from the Office of the Inspector General (OIG) of the Department of Justice (DOJ). The OIG testified before the Congress as to the plight of 9/11 detainees:

Our review determined that 762 aliens were detained on immigration charges in connection with the PENTTBOM³⁷ investigation in the first 11 months after the terrorist attacks . . . Our review found that many September 11 detainees did not receive notice of the charges against them in a timely manner . . . More than a quarter of the 762 detainees' clearance investigations took longer than 3 months . . . Our review found serious problems in the treatment of the September 11 detainees housed at the MDC . . . the BOP³⁸ imposed a total communications blackout for several weeks on the September 11 detainees held at the MDC³⁹ . . . Most of the September 11 detainees did not have legal representation prior to their detention at the MDC . . . detainees were placed in full restraints whenever they were moved, including handcuffs, leg irons, and heavy chains . . . The detainees also were subjected to having two lights illuminated in their cells 24 hours a day . . . We concluded that on occasion staff members used strip searches to intimidate and punish detainees.⁴⁰

The government's high handed counter-terrorism measures and tactics were egregious enough to attract the intervention of the court. The judge in *United States v. Awadallah*, 202 F. Supp.2d 55, (S.D.N.Y. 2002) opined:

Having committed no crime—indeed, without any claim that there was probable cause to believe he had violated any law—[the witness] bore the full weight of the prison system designed to punish convicted criminals as well as incapacitate individuals arrested or indicted for criminal conduct . . . [He was] repeatedly strip-searched, shackled whenever he [was] moved, denied food that complies with his religious needs . . . prohibited from seeing or even calling his family over the course of 20 days and then [pressured into] testifying while handcuffed to a chair.

37. "PETTBOM" is the FBI code name for the investigation into the September 11, 2001 "Pentagon/Twin Towers Bombing." It is the largest FBI investigation in U.S. history.

38. Acronym stands for "Bureau of Prison."

39. Acronym stands for "Metropolitan Detention Center."

40. Hearings, *supra* note 30 (statement of Glenn A. Fine).

The observations of the government and opinions of the court also found their way into the press, as newsworthy human stories. For example, *The Times of London* in May 2003 received this letter from Tony Willoughby of Willoughby & Partners, a firm of solicitors:

The head of IT at our law firm is a Muslim. He is a gentleman in every sense of the word. His fanaticism, if he has any, is restricted to cricket. Sunday he went on a business trip to California. On arrival at Los Angeles he was detained and interrogated on suspicion of being a terrorist “For the first 12 hours he was refused access to a telephone. After 16 hours, not having been given any food, he asked if he could have some. He was given ham sandwiches and, when he explained that he could not eat pork, was told: ‘You eat what you are given.’ He did not eat. He was eventually escorted back to the airport in handcuffs and deported.⁴¹

The San Francisco Chronicle has documented many instances of the USAPA being used in abusive ways.⁴² For example, a Pakistani scientist and permanent U.S. resident was asked by the FBI why he ordered certain technical books via E-bay.⁴³ E-Bay was suspected of providing the information to the FBI.⁴⁴ A group of Middle East students from San Francisco State University turned over to the FBI a fax pointing to an Arabic terrorist warning. Instead of investigating the looming threat, the FBI investigated the student group as suspected terrorists.⁴⁵ A Muslim woman, with a traditional face covering, went to the Bank of America branch near Tarzana (Los Angeles County) where she had been a customer for 10 years, but the bank refused to cash her check or open her account because she looked suspicious.⁴⁶ Randy Hamud, a Muslim lawyer in San Diego who has represented several men detained since September 11, had his phone tapped and computer searched.⁴⁷ Barry Reingold, 61, a retired Pacific Bell employee, was visited and questioned by FBI agents for being critical of US foreign policy when working out in a San Francisco gym.⁴⁸ His name was supplied to the FBI as a result of Operation TIPS (Terrorism Information and Prevention System).⁴⁹ Soon after the September 11 attacks, FBI agents went to the San Francisco home of Kamal Hakim,

41. A Tale of Two Brits, Posting of David Cohen, <http://www.brothersjudd.com/blog/archives/009541.html> (Dec. 9, 2003).

42. Rosenfeld, *supra* note 13.

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

who came to the United States from Yemen and became a permanent resident in 1995. Hakim, 34, said he voluntarily spoke twice with agents, who asked about his associates, his travels and his views on the attacks.⁵⁰

Similar observations were made by other individual state governments⁵¹ and university studies.⁵² For instance, the California Senate Office of Research investigated the personal experience and human costs of the war on terror as well as the tactics used by the federal government to prosecute the war on terror. It found that many Muslim, South Asians, and Arab immigrants in California have faced humiliation, embarrassment and intrusions of privacy.⁵³ To blame for this problem, is the “sometimes overzealous enforcement of the Patriot Act, including indefinite detentions, secret searches and surveillance and the monitoring of computer traffic.”⁵⁴

The implementation of the Act and related measures has affected Muslims in America individually and collectively, in psychological, social, economic and political terms. Imand Damaj, president of the Virginia Muslim Coalition for Public Affairs, best summed up the Muslim experience post 9/11 by noting:

After 9/11, I learned that free speech is not an equal right to all of us . . . National origin, skin color, accent, religion do make a difference . . . It's a sad reality, but that's the reality . . . It is hard to quantify the impact of the Patriot Act itself, because it's not only the Patriot Act . . . A lot of people feel they are being treated as guilty by association. We know we are under supervision in our mosque and worship centers. We have regular visits from the FBI in Richmond . . . We certainly feel that our citizenship is becoming less and less meaningful . . .⁵⁵

50. *Id.*

51. Max Vanzi, SEN. OFFICE OF RESEARCH, THE PATRIOT ACT: OTHER POST-9/11 ENFORCEMENT POWERS AND THE IMPACT ON CALIFORNIA'S MUSLIM COMMUNITIES: FROM A CALIFORNIA PERSPECTIVE: AN ANALYSIS OF THE FALLOUT FROM INVESTIGATIONS, INTERROGATIONS, ARRESTS, DETENTIONS, AND DEPORTATIONS 62 (2004) http://www.sen.ca.gov/sor/reports/REPORTS_BY_SUBJ/PUBLIC_SAFETY_JUDICIARY/PATRIOTACT.PDF.

52. Stephen Wessler, CTR. FOR THE PREVENTION OF HATE VIOLENCE, UNIV. OF SOUTHERN ME., AFTER 9-11: UNDERSTANDING THE IMPACT ON MUSLIM COMMUNITIES MAINE: THE RESPONDING TO SEPTEMBER 11TH PROJECT 6-9, 11 (2002) <http://www.cphv.usm.maine.edu/911%20Report.pdf> (Commissioned study of 2000 to 2500 Muslims living in Maine immediately after 9/11 showed that they were made targets of bias and hate crimes perpetrated by civilians as well as harassment, surveillance and profiling by officials on the other. Muslims were made to feel alienation, anxiety and fear, notwithstanding the many gestures of compassion and good will).

53. Vanzi, *supra* note 51.

54. *Id.*

55. Virginia Law, *supra* note 31.

As might be expected, popular writings on the Act, like everything in America post 9/11, have been heavily influenced by an acute concern with security and tempered with a visceral reaction of patriotism. Dispassionate impact studies and policy analyses of the Act have been influenced by fierce and fiery partisanship and blind and blinding advocacy, as driven by entrenched fundamental values and established vested interests.⁵⁶ Intellectual debates have been determined more by accepted assumptions and received perspectives than by enlightened theory, discovered evidence and informed discussion. In practical terms, there was a lot more rhetoric and propaganda than painstaking investigation and in-depth analysis. As a result there is more fire than heat, smoke than light.

II. RESEARCH QUESTIONS AND MODEL OF ANALYSIS

This Article investigates two major issues: (1) How has the implementation of the USAPA impacted the Muslim community in the U.S.?.; and (2) What are some of the more salient and lasting implications of 9/11, including the USAPA, on American society?

For the purpose of this research, the following definition or understanding of Muslim community is adopted:

‘Muslim community’ denotes a type of a grouping of people, where Islam is the decisive common denominator not only in the religious practice but also in the behavior of the community in general. Secularizing tendencies are often inhibited or reverted by activities of internal fundamentalist movements that advocate obedience to religious prescriptions in everyday life. As for decision-making, a kind of communalism is prevalent, based usually on broader kinship structures.⁵⁷

There are many ways to observe, measure, document and evaluate the impact and implications of the USAPA on society. As with most other policy analysis research, the observed impact and implications of the USAPA depends as much on where you look as with whom you ask. For example,

- What kinds of activities, rights or interests were being affected? The USAPA affected many activities, (e.g.

56. David Horowitz, *Unholy Alliance: How the Left Supports the Terrorists at Home*, *FrontPage Magazine*, Sept. 24, 2004, <http://www.frontpagemag.com/articles/Printable.asp?ID=15221>.

57. Jan Šnidauf, Major Security Implications of Muslim Communities’ Presence in Western-Type Societies, Association for International Affairs, Prague Security Studies Institute (May 23, 2003) http://www.js.amo.cz/archive/me_islam/PP-MuslimCommun.html.

research vs. teaching),⁵⁸ rights, (e.g. academic freedom⁵⁹ vs. right to free speech⁶⁰), and interests, (e.g. legal vs. economic).⁶¹

- Who is being affected?⁶² Many people are differently affected by the USAPA, e.g. South Asian Americans, Arab Americans, Muslim Americans, and look alike “Muslims.”⁶³
- How is the impact being felt? Impact can be felt individually as well as collectively, psychologically and physically, and socially as well as politically.

Finally, and perhaps more significantly, policy and program impact analysis ultimately depends on the perspective adopted and the frame of reference used by the evaluator.

- From whose perspective is the impact being evaluated? (E.g. from the perspective of the administration or of society generally)
- With what frame of reference is the impact evaluated? (E.g. from a security or liberty perspective)
- What is the time frame in evaluating impact? The impact can be measured in long or short-term.

In this study, I will be looking at the impact of the USAPA from the Muslim perspective, as representing their personal experience and group

58. David Lombard Harrison, Higher Education Issues After The USA Patriot Act, University of North Carolina, Office of the President available at http://www.nacua.org/documents/PatriotAct_Outline.pdf (last visited Oct. 18, 2007).

59. Beshara Doumani, *ACADEMIC FREEDOM AFTER SEPTEMBER 11* (MIT Press, 2006) (Kathleen J. Frydl discussed issues surround on the loyalty-oath and free-speech controversies at the University of California. Amy Newhall described the contentious relationship between universities and the government regarding language acquisition programs. Joel Beinin raised issues with policing of thought in the academy on Middle East subject matters.)

60. RESOLUTION ON THE USA PATRIOT ACT AND RELATED MEASURES THAT INFRINGE ON THE RIGHTS OF LIBRARY USERS, 2002-2003 CD # 20.1 2003 ALA Midwinter Meeting. <http://www.ala.org/ala/washoff/WOissues/civilliberties/theusapatriotact/alaresolution.htm>.

61. SR 03-17 Bank Secrecy Act Examination Procedures to the USA PATRIOT Act (PDF) (Section 313 of USAPA limits banks' economic activity by prohibiting banks from setting up corresponding accounts for off shore “cell” banks, Section 341 requires banks to share client information with other banks and law enforcement agencies, this affects the propriety rights of banks and privacy rights of banking customers) http://www.ffiec.gov/ffiecinfobase/resources/retail/ffb-sr03-17_new_exam_proced_patriot_act.pdf#search='USA%20PATRIOT%20ACT%20and%20Banking'.

62. Robert Hefner, Remarks on Muslim Politics and U.S. Policies: Prospects for Pluralism and Democracy in the Muslim World, The Pew Forum on Religion and Public Life and the Institute on Religion and World Affairs (Sept. 17, 2003).

63. Maira, *supra* note 33.

reaction to post 9/11 anti-terrorism measures, specifically those dragnet anti-terrorism operations, such as operation PENTTBOM and “Special Registration” programs.

III. POST 9/11 COUNTER-TERRORISM STRATEGY: TOTAL INFORMATION CONTROL

A. Post 9/11 Strategy and Tactics

On September 11, 2001, immediately after the attack, the President of the United States promised that “[t]he United States will hunt down and punish those responsible for these cowardly acts.”⁶⁴ A day later, on September 12, 2001, the President declared war on terrorism, pledging, “[the] United States of America will use all our sources to conquer this enemy.”⁶⁵ On September 14, 2001, the President, pursuant to the National Emergencies Act,⁶⁶ declared that the nation was in a state of emergency.⁶⁷ The Attorney General was charged by President Bush with the responsibility of tracking down the terrorists and protecting the nation from another terrorist attack. President Bush instructed Attorney General Ashcroft immediately after the 9/11 attacks, “John, make sure this [9/11—terrorism] can’t happen again.”⁶⁸ The Attorney General took the charge serious and issued this warning:

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.⁶⁹

64. Remarks by the President Upon Arrival at Barksdale Air Force Base (Sept. 11, 2001) available at <http://www.whitehouse.gov/news/releases/2001/09/20010911-1.html>.

65. Remarks by the President in Photo Opportunity with the National Security Team (Sept. 12, 2001) available at <http://www.whitehouse.gov/news/releases/2001/09/20010912-4.html>.

66. 50 U.S.C. § 1601 (2006).

67. Declaration of National Emergency by Reason of Certain Terrorist Attacks (Sept. 14, 2001) available at <http://www.whitehouse.gov/news/releases/2001/09/20010914-4.html>.

68. Steven Brill, *After: How America Confronted the September 12 Era*, 15 (Simon & Schuster) (2003).

69. Newsmax.com Wires, Ashcroft Eager to Expand Police Powers, <http://www.newsmax.com/archives/articles/2001/10/25/160238.shtml> (last visited Oct. 18, 2006).

Immediately after 9/11, the Attorney General acted to empower government officials and restrict the rights of the people, in the name of promoting national security and fighting terrorism.⁷⁰ According to the Attorney General the key to winning the war on terror is information control, total awareness of the enemy's position, and complete cover-up of the government's activities. The Attorney General sought and achieved complete information blackout of DOJ enforcement operations. On October 12, 2001, Ashcroft issued new Administration policy on the Freedom of Information Act (FOIA), which superseded the Department of Justice FOIA policy memorandum released in October 1993. The old FOIA policy was in favor of liberal information release; there was a "presumption of disclosure" to achieve "maximum possible disclosure."⁷¹ Contrary to the former presumption, the new policy favors withholding information until justified.⁷² The Ashcroft policy implored the agencies to release information *only* after careful consideration of national security, law enforcement and personal privacy needs. Under the new policy, the DOJ stands ready to defend against any FOIA request on "sound legal basis."⁷³ Research has shown that since 9/11, the Bush administration has consistently denied public access to government information based on the First Amendment or through the FOIA. As observed by Public Citizen, a national, non-profit consumer advocacy organization:

From the first days of his administration, President Bush has taken steps to tighten the government's hold on information and limit public scrutiny of its activities. Expansive assertions of executive privilege, restrictive views of the Freedom of Information Act, increasing use of national security classification,

70. Insatiable Appetite: The Government's Demand for New and Unnecessary Powers After September 11, AM. CIV. LIBERTIES UNION REP. (ACLU Washington National Office), Oct. 15 2002, at 2.

71. U.S. Gen. Accounting Office, Freedom of Information Act: Agency Views on Changes Resulting from New Administration Policy, G.A.O Doc. No. 03-981, at 2,4 and 8 (Sept. 2003).

72. See John Ashcroft, U.S. Attorney General, Memorandum from Attorney General John Ashcroft to Heads of All Federal Departments and Agencies on The Freedom of Information Act (Oct. 12, 2001) available at <http://www.usdoj.gov/oip/foiapost/2001foiapost19.htm>. (This memo was buttressed by another memo calling for reclassification of "Previously Unclassified or Declassified Information" and more restrictive release of "Sensitive But Unclassified Information" Memorandum from Andrew H. Card, Jr., Assistant to the President and Chief of Staff to Heads of Executive Departments and Agencies on Action to Safeguard Information Regarding Weapons of Mass Destruction and Other Sensitive Documents Related to Homeland Security (Mar. 19, 2002) available at <http://www.usdoj.gov/oip/foiapost/2002foiapost10.htm>).

73. *Id.* ("When you carefully consider FOIA requests and decide to withhold records, in whole or in part, you can be assured that the Department of Justice will defend your decisions unless they lack a sound legal basis or present an unwarranted risk of adverse impact on the ability of other agencies to protect other important records").

stonewalling in response to congressional requests for information—all these were evident even before the September 11 attacks. Since then, the clamps on information have only tightened.⁷⁴

The Bush administration's stance has been supported by sympathetic courts with an inhospitable attitude toward free access to government information when national security is at stake, as well as a willingness to defer to the President in time of war.⁷⁵

With the new FOIA policy, the Bush administration is able to keep much of its anti-terrorism policies and decision-making secret, thus insulating the administration from public accountability and political consequences. For example, the DOJ successfully withheld "sensitive" USAPA implementation information from being released, such as the number, names and whereabouts of people being held by the government, as well as the frequency, manners and targets for which Section 215 USAPA powers have been used.⁷⁶ The DOJ justified withholding of information from public disclosure on the grounds of "mosaic theory," which supposes that innocuous pieces of information can be used by terrorists to discover anti-terrorism strategies or tactics.⁷⁷

Consistent with Attorney General John Ashcroft's strategy of secrecy, he refused to release information to the Congress on anti-terrorism operations and measures.⁷⁸ This led Senator Leahy to call for more cooperation between the legislative and executive branches in fighting the war on terror:

74. Public Citizen, Bush Secrecy.org, available at <http://www.bushsecrecy.org/> (last visited Nov. 15, 2006).

75. See Mary-Rose Papandrea, *Under Attack: The Public's Right to Know and the War on Terror* 25 B.C. THIRD WORLD L.J. 34-81, 36 (2005) (discussing President Bush's attitude and policy toward information control).

76. See, e.g., *Ctr. for Nat'l Sec. Studies v. Dep't of Justice*, 215 F.Supp. 2d 94 (D.C.C. 2002); *Am. Civil Liberties Union v. Dep't of Justice*, 321 F.Supp. 2d 24 (D.D.C. 2004); *Am. Civil Liberties Union and Elec. Privacy Info. Ctr. v. Dep't of Justice*, Civil Action No. 05-845 (D.D.C. April 2005) ("EPIC, joined by the American Civil Liberties Union and library and booksellers' organizations, filed suit on October 24, 2002 under the FOIA in seeking the disclosure of information concerning implementation of the controversial USA PATRIOT Act"); *Elec. Privacy Info. Ctr. v. Dep't of Justice*, No. 05-845 (D. D.C. Nov. 16, 2005) (EPIC files a federal complaint forcing the FBI to disclose information about its use of USAPA investigative powers under the sunset provisions).

77. David E. Pozen, *Note, The Mosaic Theory, National Security, and the Freedom of Information Act*, 115 YALE L.J. 628 (Dec. 2005) (this Note traces the evolution of the "mosaic theory" in the Freedom of Information Act (FOIA) national security jurisprudence. It observes that after 9/11 the "mosaic theory" was heavily borrowed to justify executive secrecy and elicit judicial deference).

78. See generally *People for the American Way, Two Years After 9/11: Ashcroft's Assault on the Constitution*, Sept. 9, 2003 available at http://www.pfaw.org/pfaw/dfiles/file_232.pdf.

Attorney General Ashcroft has repeatedly declined to appear before the Judiciary Committee to answer questions, and his Department is painfully slow to respond to written requests for information. To quote my friend Senator Grassley, "getting information from the Justice Department under Ashcroft is like pulling teeth." By ignoring oversight requests until answers are moot or outdated, and responding in only vague and conclusory fashion, if at all, the Justice Department frustrates our constitutional system of checks and balances, and sows the sort of public distrust that now accompanies the PATRIOT Act.⁷⁹

Along the same vein, the Attorney General resisted public request and court order for information. In 2002, the Attorney General successfully had state and local governments refuse to release names of people detained since September 11, with the use of the preemption doctrine, which states that federal law supersedes any state or local claims to the information.⁸⁰ In January 2002, the ACLU of New Jersey sued for the release of ghost detainee's name under the New Jersey right-to-know law.⁸¹ A New Jersey court granted the relief on April 22, 2002.⁸² Ashcroft declined to follow state court order.⁸³

On September 21, 2001, 10 days after 9/11, Chief Immigration Judge Michael Creppy issued a memo⁸⁴ closing all deportation proceedings to the public and press,⁸⁵ if and when it is deemed appropriate to do

79. Statements on Introduced Bills and Joint Resolutions Congressional Record Oct. 1, 2003, P. S12278-S12299 available at http://www.fas.org/irp/congress/2003_cr/s1695.html.

80. Release of Information Regarding Immigration and Naturalization Service Detainees in Non-Federal Facilities, 67 Fed. Reg. 19, 508 (Proposed Apr. 22, 2002) (to be codified at 8 C.F.R. pts. 236 and 241).

81. N.J. high court won't hear appeal on releasing detainees' names ASSOCIATED PRESS, July 10, 2002. (The N.J. Supreme refused to hear appeal of state appellate court decision to allow the federal government to withhold name of 9/11 detainees held in N.J. state prison).

82. *Am. Civil Liberties Union of New Jersey v. County of Hudson*, 352 N.J. Super. 44 (2002).

83. 67 Fed. Reg. 19, 508 *supra*.note 79.

84. Memorandum from Michael Creppy, Chief Immigration Judge on Cases Requiring Special Procedures and with Instructions for Cases Requiring Additional Security to All Immigration Judges (Sept. 21, 2001) available at <http://files.findlaw.com/news.findlaw.com/cnn/docs/aclu/creppy092101memo.pdf>.

The Chief Immigration Judge's authority in this case is derived from 8 U.S.C. S 1103(a) (1994) (Under the Immigration and Nationality Act the Attorney General has the responsibility for "administration and enforcement" of "all laws relating to the immigration and naturalization of aliens." The Act authorizes the Attorney General to prescribe "such regulations . . . as he deems necessary for carrying out his authority").

85. *Id.* (In designated "special interest" cases there is supposed to be complete blackout of information. The immigration judge is authorized "to close the hearing[s] to the public, and to avoid discussing the case[s] or otherwise disclosing any information

so and as directed by DOJ in “special interest cases.”⁸⁶ The designation of “special interest”⁸⁷ is summarily made with no input from the detainees and cannot be appealed. The need for a special Creppy Memo procedural hearing is based on two justifications: 1) Avoiding setback to the terrorism investigation, e.g. disclosure might reveal focus, direction or progress of the investigation and 2) Protecting detainees from harm or stigma, e.g. disclosure might subject detainee to harm or intimidation and prevent him/her from cooperating. The Creppy Memo was challenged by the ACLU in *Detroit Free Press, v. Ashcroft*,⁸⁸ filed in U.S. District Court in the Eastern District of Michigan, Southern Division.⁸⁹ “The primary issue on appeal in this case, is whether the First Amendment to the United States Constitution confers a public right of access to deportation hearings. If it does, then the Government must make a showing to overcome that right.”⁹⁰

B. Total Information Awareness

As the Attorney General John Ashcroft was restricting access to the federal government anti-terrorism effort, he was seeking more and more information on the terrorists, through Total Information Awareness (TIA)⁹¹ and the Terrorism Information and Prevention System (TIPS).⁹² Even the established attorney-client privilege or Constitutional

about the case[s] to anyone outside the Immigration Court . . . [t]he courtroom must be closed for these cases—no visitors, no family, and no press . . . [this] includes confirming or denying whether such a case is on the docket or scheduled for a hearing”).

86. Heidi Kitrosser, *Secrecy in the Immigration Courts and Beyond: Considering the Right To Know in the Administrative State*, 39 HARV. C.R.-C.L. L. REV. 95 (2004).

87. *North Jersey Media Group v. Ashcroft*, 308 F.3d 198 (3d Cir. 2002), (According to Dale L. Watson, the FBI’s Executive Assistant Director for Counterterrorism and Counterintelligence, “special interest” cases involved aliens who “might have connections with, or possess information pertaining to, terrorist activities against the United States”).

88. *Detroit Free Press v. Ashcroft*, 195 F. Supp. 2d 937, 946 (E.D. Mich. 2002).

89. *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 682 (6th Cir. 2002); see also Amy E. Hooper, *Investigation Terrorism: The Role of the First Amendment*, 2004 Duke L. & Tech. Rev. 0002 (providing a historical context of the case) <http://www.law.duke.edu/journals/dltr/articles/PDF/2004DLTR0002.pdf>.

90. *Detroit Free Press*, *supra* note 88, at 945.

91. American Civil Liberties Union, Q&A on the Pentagon’s “Total Information Awareness” Program, (Apr. 20, 003) available at <http://www.aclu.org/privacy/spying/15578res20030420.html> (TIA is run by the Defense Advanced Research Projects Agency (DARPA) at the Department of Defense. TIA collects as much information as possible about as many people as possible and compiles it into an “ultra-large-scale” database in order to identify terrorists by discerning patterns of activities and discovering linkages in relationships).

92. Nat Hentoff, *Ashcroft’s Master Plan to Spy on Us*, THE VILLAGE VOICE, Aug. 2, 2002, <http://www.villagevoice.com/news/0232,hentoff,37174.6.html> (The Terrorism Information and Prevention System sought to recruit a million letter carriers, meter readers, cable

privacy was considered no obstacle to the Attorney General's hunt for information. Thus, on October 31, 2001, the Department of Justice published a new regulation, 28 C.F.R. § 501.3(d), authorizing the Bureau of Prisons (BOP) to monitor communications between prisoner detainees and their lawyers without obtaining a court order. This rule applied to all detainees, irrespective of the alleged crime and stage of legal proceeding. The rule grants the Attorney General the authority to listen in on attorney-client communication if there is "reasonable suspicion" that a person in custody "may" use communications with attorneys or their agents "to further or facilitate acts of terrorism."⁹³ The Justice Department "shall . . . provide appropriate procedures for the monitoring or review of communications between that inmate and attorneys or attorneys' agents who are traditionally covered by the attorney-client privilege."⁹⁴ Except in court ordered cases, the BOP "shall provide written notice to the inmate and to the attorneys involved, prior to the initiation of any monitoring or review," that "all communications between the inmate and attorneys may be monitored, to the extent determined to be reasonably necessary for the purpose of deterring future acts of violence or terrorism."⁹⁵ This rule was a radical departure from an established Constitutional rule.⁹⁶ The rule undermined existing legal professional ethical norms⁹⁷ and attracted scorn

technicians, and other workers with access to private homes as informants to report to the Justice Department any activities they think suspicious).

93. 28 C.F.R. §§ 500-501; see National Security; Prevention of Acts of Violence and Terrorism, 66 Fed. Reg. 55062 (October 31, 2001); see also Eavesdropping on Attorney-Client Communications, Friends Committee on National Legislation, Dec. 20, 2001, http://www.fcnl.org/issues/item_print.php?item_id=265&issue_id=69.

94. 28 C.F.R. § 501.3(d) (October 31, 2001).

95. 28 C.F.R. § 501.3(d)(3) (October 31, 2001) (discussing that limited privilege is allowed. The Department "shall employ appropriate procedures to ensure that all attorney-client communications are reviewed for privilege claims and that any properly privileged materials . . . are not retained during the course of the monitoring." Review is conducted by a "privilege team." "Except in cases where the person in charge of the privilege team determines that acts of violence or terrorism are imminent, the privilege team shall not disclose any information unless and until such disclosure has been approved by a federal judge").

96. *Coplon v. U. S.*, 191 F.2d 749 (D.C. Cir. 1951) (monitoring of conversations between detainees and their attorneys denies the accused of their constitutional right to effective assistance of counsel); *Hoffa v. U. S.*, 385 U.S. 293, 306 (1966) (affirming holding in *Coplon*); *Shillinger v. Hayworth*, 70 F.3d 1132, 1141 (10th Cir. 1995) (Sixth Amendment protects against intentional intrusion into attorney-client relationship).

97. See generally DR 1-103 [1200.4] Disclosure of Information to Authorities, New York Lawyer's Code of Professional Responsibility, http://www.law.cornell.edu/ethics/ny/code/NY_CODE.HTM.

from civil rights advocates,⁹⁸ legislators,⁹⁹ lawyers,¹⁰⁰ and a variety of public interest groups.¹⁰¹

After 9/11 the Attorney General, DOJ, FBI, and NSA mounted the largest surveillance program in the nation to track down terrorists and prevent another attack.¹⁰² Most of the effort has been directed towards the Muslim community and has been spurred by ethnic considerations.

In 2002, building upon the community policing framework and National Neighborhood Watch Program,¹⁰³ Attorney General John Ashcroft announced the creation of the Terrorism Information and Prevention System (TIPS).¹⁰⁴ The program asked citizens and recruited informants to spy on their neighbors, report on their friends and look over the shoulder of everyone.¹⁰⁵ Those who were recruited include: letter carriers, utility employees, truck drivers and train conductors, i.e. those who have routine contact, unimpeded access and privileged information to homes, businesses, transport systems, and databases. The pilot program

98. See National Lawyers Guild, Written Comment by the Mass Chapter to a Final Rule of the AG Authorizing the Monitoring of Communication Between Detainees and their Attorneys Without a Warrant (Dec. 22, 2001) <http://nlgmass.org/events/news0202.html#eavesdrop>.

99. See Patrick Leahy, U.S. Senator, Letter to Attorney General John Ashcroft, 'Deeply Troubled' About Monitoring Of Conversations Between Detainees And Their Attorneys; Asks Answers From Attorney General Ashcroft, Office of U.S. Senator Patrick Leahy (November 9, 2001) available at <http://leahy.senate.gov/press/200111/110901.html>.

100. See Robert J. Anello, Justice Under Attack: The Federal Government's Assault on the Attorney-Client Privilege, *Cardozo Pub. L. Pol'y Ethics J.* 1 (2003) (Anello was Chairman of the Committee on Professional Responsibility of the Association of the Bar of the City of New York).

101. American Civil Liberties Union, Coalition Comments Regarding Eavesdropping on Confidential Attorney-Client Communications (Dec. 20, 2001) available at <http://www.aclu.org/crimjustice/gen/10088leg20011220.html>.

102. Lowell Bergman, *Post-9/11 Tips to FBI Often Led to Dead Ends: NSA Forwarded Flood of Eavesdropping Data*, San Diego Union Tribune, Jan. 17, 2006, http://www.signonsandiego.com/uniontrib/20060117/news_1n17nsa.html.

103. ATTORNEY GENERAL ASHCROFT ANNOUNCES NEIGHBORHOOD WATCH CAMPAIGN, Press Release, Department of Justice, March 6, 2002 ("The Attorney General announced a grant of \$1.9 million ... to double the number of National Neighborhood Watch programs over the next two years ... to enhance local homeland security efforts and make preparedness a part of our daily lives") available at http://www.usdoj.gov/opa/pr/2002/March/02_ag_125.htm.

104. See American Library Association, Terrorism Information and Prevention System (TIPS), (providing a documentary archive of TIPS) <http://www.ala.org/ala/oif/issues/terrorisminformationprevention.htm> (last visited Oct. 18, 2006).

105. Ritt Goldstein, *US planning to recruit one in 24 Americans as citizen spies*, SMH.com.au, July 15, 2002, <http://www.smh.com.au/articles/2002/07/14/1026185141232.html>.

as announced on the government website, www.citizen corps.gov,¹⁰⁶ was to be started in August 2002 with the government recruiting 1 million informants in ten cities. This amounted to one in twenty-four people in those cities turning into government spies. As described on the website, TIPS is “a nationwide program giving millions of American truckers, letter carriers, train conductors, ship captains, utility employees, and others a formal way to report suspicious terrorist activity.”¹⁰⁷ As designed the TIPS program involved a million workers, who, “in the daily course of their work, are in a unique position to serve as extra eyes and ears for law enforcement.” TIPS volunteers will receive “training . . . in how to look out for suspicious and potentially terrorist-related activity . . . [and] a formal way to report [that activity] through a single and coordinated toll-free number.”¹⁰⁸ The TIPS program was also linked to the FOX television program “America’s Most Wanted.”¹⁰⁹

Tom Ridge, the Secretary of Homeland Security, defended the TIPS program, noting that the civilians “might pick up a break in the certain rhythm or pattern of a community. They may pick up in the course of their daily business something that’s very unusual.”¹¹⁰ It was not intended for “Americans spying on Americans.”¹¹¹

The TIPS program received mixed review from the public; some deemed it essential to fight terror,¹¹² others thought it reminiscent of the state of government in 1984,¹¹³ still others considered it incompatible with their professional status and responsibilities. If our experience with the immediate aftermath of 9/11 is any guide, TIPS would have resulted in selective attention, discriminatory reporting, if not even racial bias. What is “unfamiliar” “suspicious” or “not normal” is quite often a mere figment of one’s imagination.

106. See Citizen Corps, *Neighborhood Watch Program*, <http://www.citizen corps.gov/programs/watch.shtm> (last visited Oct. 18, 2006) (The site no longer contains information on TIPS, but references the importance of the Neighborhood Watch program after 9/11).

107. See American Library Association, *supra* note 104.

108. Why-war.com, *What Is Operation TIPS?*, WASHINGTON POST, July 14, 2002, available at <http://www.why-war.com/news/2002/07/14/whatisop.html>.

109. Dave Lindorff, *Analysis: When Neighbors Attack!*, SALON, Aug. 6, 2002, http://www.why-war.com/news/2002/08/06/whenneig.html#terrorism_information_prevention_system.

110. DOJgov.net, *Justice Department Prepares Citizen Watch. USDOJ registered postal workers, plumbers, police and painters . . . spying on you in your home*, July 19, 2002, <http://www.dojgov.net/TIPS-01.htm>.

111. *Id.*

112. Liza Porteus, *Labor Union Supports Bush TIPS Plan*, FOX NEWS, Aug. 7, 2002, <http://www.why-war.com/news/2002/08/07/laboruni.html>.

113. Daniel Kurtzman, *Bush Channels Orwell*, S.F. CHRONICLE, July 28, 2002, <http://www.why-war.com/news/2002/07/28/bushchan.html>. See also GEORGE ORWELL, 1984 (Penguin Books 1961) (1949) (1984 depicts in vivid detail how totalitarian government and national security state operates).

While the TIPS program never materialized, the intent of the Administration was made clear, and its rhetoric became reality: Big Brother is around the corner and here to stay. Government spokesman repeatedly warned people to: “watch what you say.”¹¹⁴

In order to be able to predict and prevent terrorism, the Bush administration, from the DOJ to NSA, has resorted to “data mining” techniques and programs to keep track of terrorist activities.¹¹⁵ Data mining, the ability to use computer programs and statistical modeling to uncover hidden patterns and subtle relationships, has long existed and was widely used in the commercial world to discern consumer taste or market trends. It has since been adopted by the government for a variety of purposes. A survey of 28 government agencies (with 12 responding) in 2004, revealed that the government has engaged in 199 data mining operations, of which 122 involve personal information. The top six purposes for which data mining of personal information is used are: increasing tax compliance (7 data mining efforts), to collecting terrorist intelligence (10), managing human resources (15), detecting criminals (15), uncovering fraud, waste and abuse (24), and improving services (33).¹¹⁶

One such counter-terrorism data mining program is the Total Information Awareness Program (TIA), operated under the Information Awareness Office (IAO) at the Defense Advance Research Agency (DARPA).¹¹⁷ The first director of IOA was Adm. John Poindexter, former United States National Security Advisor to President Ronald Reagan.¹¹⁸ In fiscal year 2003, IOA started to fund research and development of the Total Information Awareness (TIA) Program. The TIA’s function and capabilities have been described in the following manner:

114. Reacting to Bill Maher’s comments that terrorists are not cowards, but members of the U.S. Armed Forces are, the White House Press Secretary, Mr. Fleischer warned that these remarks are “reminders to all Americans that they need to watch what they say, watch what they do. This is not a time for remarks like that; there never is.” WhiteHouse.gov, Press Briefing by Ari Fleischer, Sept. 26, 2001, <http://www.whitehouse.gov/news/releases/2001/09/20010926-5.html#BillMaher-Comments>.

115. EAVESDROPPING 101: WHAT CAN THE NSA DO? NSA Watch—ACLU (n.d.) <http://www.nsawatch.org/eaves101.html>.

116. United States General Accounting Office, *Data Mining: Federal Efforts Cover a Wide Range of Uses* (2004), <http://www.gao.gov/new.items/d04548.pdf>.

117. The IAO seeks to devise innovative and technologically sophisticated ways to analyze data. John Poindexter, Overview of the Information Awareness Office, DARPA/Tech 2002 Conference, Anaheim, Calif., Aug. 2, 2002, <http://www.fas.org/irp/agency/dod/poindexter.html> (“I think the solution [to asymmetric warfare, including terrorism] is largely associated with information technology. We must become much more efficient and more clever in the ways we find new sources of data, mine information from the new and old, generate information, make it available for analysis, convert it to knowledge, and create actionable options”).

118. John Markoff, *Chief Takes Over at Agency to Thwart Attacks on U.S.*, N.Y. TIMES, Feb. 13, 2002, at A27.

The TIA program sought to develop information technology in three areas. Those areas are language translation, data search with pattern recognition and privacy protection, and advanced collaborative and decision support tools. Language translation technology would enable the rapid analysis of foreign languages, both spoken and written, and allow analysts to quickly search the translated materials for clues about emerging threats. The data search, pattern recognition, and privacy protection technologies would permit analysts to search vast quantities of data for patterns that suggest terrorist activity while at the same time controlling access to the data, enforcing laws and policies, and ensuring detection of misuse of the information obtained. The collaborative reasoning and decision support technologies would allow analysts from different agencies to share data.¹¹⁹

In May 2003, the TIA program was renamed the Terrorism Information Awareness Program for political reasons.¹²⁰ The ultimate objective is to predict, preempt and interdict terrorist activities. Very rapidly TIA came to represent the problems with President Bush's Big Brother approach to counter-terrorism. Congress stopped funding the project, and Poindexter resigned in August of 2003.¹²¹ While the TIA program never got beyond the laboratory stage, the ideas behind it were sufficient to rattle a nation skeptical of the intent, and frightened about the prospect, of a government bent on keeping anything and everyone under electronic surveillance.¹²²

119. GlobalSecurity.org, Total Information Awareness (TIA): Terrorism Information Awareness (TIA), <http://www.globalsecurity.org/security/systems/tia.htm> (last visited Oct. 18, 2006).

120. Report to Congress regarding the Terrorism Information Awareness Program, May 20, 2003, http://www.information-retrieval.info/docs/tia-exec-summ_20may2003.pdf.

121. Bradley Graham, *Poindexter Resigns but Defends Programs; Anti-Terrorism, Data Scanning Efforts at Pentagon Called Victims of Ignorance*, THE WASHINGTON POST, Aug. 13, 2003, A02, <http://www.washingtonpost.com/ac2/wp-dyn/A51578-2003Aug12>.

122. Scott Berinato, *The Short Life, Public Execution and (Secret) Resurrection of Total Information Awareness*, CSO ONLINE, August 10, 2004, <http://www.csoonline.com/read/080104/poindexter.html>. (“Was it an Orwellian nightmare or an intelligence savior? John Poindexter says TIA was sucked into a vortex of politics and knee-jerk foolishness before anyone could answer that question”).

C. Government as “Big Brother”—FBI Intelligence
Gathering Operations

On May 30, 2002, the Attorney General’s Guidelines on General Crimes, Racketeering and Terrorism (“Guidelines”)¹²³ were released to the public.¹²⁴ The Guidelines revised pre-existing guidelines by former Attorney Generals. The 2002 version was a sharp departure from the Guidelines of the 1970s (Levi Guidelines)¹²⁵ and the 1980s (Reno Guidelines).¹²⁶ The new Guidelines allow the FBI to monitor political groups without suspicion of any criminal or terrorist activities. As a result, the FBI may go on a fishing expedition and listen in to intimate conversation or watch over the private conduct of lawful citizens. Worse yet, the Guidelines allows the FBI to monitor political dissidents and advocacy groups, at will.

The Guidelines also allow for “full investigation” to gather criminal intelligence “concerning the nature and structure of the enterprise—including information relating to the group’s membership, finances, geographical dimensions, past and future activities, and goals—with a view toward detecting, preventing, and prosecuting the enterprise’s criminal activities.”¹²⁷ Furthermore,

[A]terrorism enterprise investigation may be initiated when facts or circumstances reasonably indicate¹²⁸ that two or more persons are engaged in an enterprise for the purpose of: (i) furthering political or social goals wholly or in part through activities that involve force or violence and a violation of federal criminal law, (ii) engaging in terrorism as defined in 18 U.S.C. 2331(1) or (5) that involves a violation of federal criminal law

123. The Attorney General’s Guidelines on General Crimes, Racketeering Enterprise and Terrorism Enterprise Investigations, May 30, 2002, <http://www.usdoj.gov/olp/generalcrimes2.pdf>.

124. David Johnson & Don Van Natta Jr., *Ashcroft Weighs Erasing FBI Limits for Surveillance. Seeking to Free FBI to Spy on Groups*, THE N.Y. TIMES, Dec. 1, 2001 at A2.

125. Guidelines by Attorney General Edward Levi on Domestic Intelligence, March 1976, available at *Statutory Charter: Hearings Before the Senate Committee on the Judiciary, 95th Cong. pt. 1, 20-26 (1978)* (hereafter “1978 Senate Hearings on FBI Statutory Charter Part I”) and in *FBI Oversight: Hearings Before the Subcommittee on Civil and Constitutional Rights of the House Judiciary Committee on the Judiciary, 95th Cong. 181-87 (1978)*.

126. Electronic Privacy Information Center, *The Attorney General’s Guidelines*, <http://www.epic.org/privacy/fbi/> (last visited Oct. 18, 2006).

127. The Attorney General’s Guidelines, *supra* note 123.

128. The “reasonable indication” threshold for undertaking such an investigation is substantially lower than probable cause.

or (iii) committing any offense described in 18 U.S.C. 2332b(g)(5)(B).¹²⁹

In practical terms, the “reasonable indication” standard for opening a criminal intelligence investigation of an enterprise in the terrorism context could be satisfied in a number of ways. While no particular factor or combination of factors is required, considerations that will generally be relevant to the determination of whether the threshold standard for a terrorism enterprise investigation is satisfied are a group’s statements, its activities, and the nature of potential federal criminal law violations suggested by its statements or activities, including:

- (1) Threats or advocacy of violence or other covered criminal acts . . .
- (2) Apparent ability or intent to carry out violence or other covered activities . . .
 - (i) By acquiring, or taking steps towards acquiring, biological agents or toxins, toxic chemicals . . . or other destructive or dangerous materials (or plans or formulas for such materials), or weapons, under circumstances where, by reason of the quantity or character of the items, the lawful purpose of the acquisition is not apparent;
 - (ii) By the creation, maintenance, or support of an armed paramilitary organization;
 - (iii) By paramilitary training; or
 - (iv) By other conduct demonstrating an apparent ability or intent to injure or intimidate individuals, or to interfere with the exercise of their constitutional or statutory rights.¹³⁰

The Guidelines allow the FBI to look into any individual or organization that the FBI considers to be subversive or dangerous, or professes ideas different from the administration, such as anti-war protestors who advocate civil disobedience.

Under the Guidelines, FBI agents can attend public meetings, visit houses of worship, listen in on chats, download information from message boards, and purchase commercial data mining information. Specifically, the Introduction to the Guidelines enumerates:

129. III. Criminal Intelligence Investigation (B)(1)(a) General Authority, The Attorney General’s Guidelines on General Crimes, Racketeering Enterprise and Terrorism Enterprise Investigations, 15, May 30, 2002, <http://www.usdoj.gov/olp/generalcrimes2.pdf>.

130. *Id.* at 4-5.

- (ii) Visiting places and events which are open to the public for the purpose of detecting or preventing terrorist activities (VI.A(2));
- (iii) Carrying out general topical research, such as searching online under terms like “anthrax” or “smallpox” to obtain publicly available information about agents that may be used in bioterrorism attacks (VI.B(1));
- (iv) Surfing the Internet as any member of the public might do to identify, e.g., public websites, bulletin boards, and chat rooms in which bomb making instructions, child pornography, or stolen credit card information is openly traded or disseminated, and observing information open to public view in such forums to detect terrorist activities and other criminal activities (VI.B(2)).¹³¹

The FBI’s unlimited surveillance and monitoring of political speech has also been abused. For example, The FBI interviewed San Franciscan Barry Reingold after he made remarks in his local gym that “Bush has nothing to be proud of. He is a servant of the big oil companies and his only interest in the Middle East is oil.”¹³² Subsequently, two agents showed up at his home.¹³³ After the agents assured him he was entitled to freedom of speech, Reingold said “Thank you. That ends our conversation.”¹³⁴ When Reingold closed his door, he heard one of the agents say, “But we still need to do a report.”¹³⁵

131. *Id.* at 6.

132. Kris Axtman, *Political Dissent Can Bring Federal Agents to Door*, CHRISTIAN SCI. MONITOR, Jan. 8, 2002, <http://www.csmonitor.com/2002/0108/p1s4-usju.html>.

133. *Id.*

134. *Id.*

135. *Id.*

IV. POST 9/11 COUNTER-TERRORISM OPERATIONS DRAGNET AND PREVENTIVE DETENTION

A. FBI "special interest" dragnet¹³⁶

The campaign against domestic terrorism started immediately after 9/11.¹³⁷ The FBI launched the PENTTBOM or "Pentagon/Twin Towers Bombing" to investigate the September 11, 2001 attacks on New York and Washington, D.C. In time, PENTTBOM would become the largest criminal investigation in U.S. history.¹³⁸

In 2003, after an extensive internal investigation, the Office of the Inspector General (OIG) of the Department of Justice (DOJ) released its audit report on the FBI's post 9/11 investigation effort and its impact on civil rights. The report was entitled, "The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in

136. Laura W. Murphy & Timothy H. Edgar, ACLU Testimony on "Immigration Enforcement Since September 11, 2001" before the House Judiciary Subcommittee on Immigration, Border Security and Claims, ACLU, May 8, 2003, <http://www.aclu.org/safefree/general/17298leg20030508.html> (shortly after 9/11 the DOJ, as instructed by Attorney General Ashcroft, launched a "massive preventive detention" campaign with the use of immigrant charges as a pretext and afforded few legal rights, process, resource and relief to investigative subjects. "Under new Department of Justice policies, immigrants today can be arrested and held in secret for a lengthy period without charge, denied release on bond without effective recourse, and have their appeals dismissed following cursory or no review. They can be subjected to special, discriminatory registration procedures involving fingerprinting and lengthy questioning concerning their religious and political views. An immigrant spouse who is abused by her husband must fear deportation if she calls the local police. Asylum-seekers fleeing repressive regimes like those of the Taliban or Saddam Hussein may face mandatory detention, without any consideration of their individual circumstances").

137. As of September 14, 2001 the FBI had assigned 4,000 special agents and 3,000 support staff to the 9/11 investigation, and had processed 36,000 leads; of which more than 30,000 were received via the Internet, 3,800 were called in, and 2,400 were generated by field offices. The Avalon Project at Yale Law School, *September 11, 2001: Attack on America Attorney General and FBI Director News Conference*; Sept. 14, 2001, http://www.yale.edu/lawweb/avalon/sept_11/ashcroft_briefing04.htm.

138. Dan Eggen, *FBI's 9/11 Team Still Hard at Work: Dwindling Group Wants to See Probe Through to the End*, WASHINGTON POST, June 14, 2004, at A01, available at <http://www.washingtonpost.com/ac2/wp-dyn/A39160-2004Jun13?language=printer> ("Originally numbering more than 70 people, the team chased more than a quarter-million leads in the months after the attacks, dispatching thousands of FBI agents worldwide") (the PENTTBOM interviewed 180,000 people and reviewed millions of pages of documents); see *The "PENTTBOM" Investigation*, http://www.washingtonpost.com/wp-srv/nation/daily/graphics/penttbom_061404.html (summarizing PENTTBOM investigative activities; see also *Criminal Complaints & Indictments*, FoxNews.com, http://www.foxnews.com/projects/pdf/112801_complaints.pdf (listing PENTTBOM and related detentions, criminal complaints and indictments)).

Connection with the Investigation of the September 11 Attacks.”¹³⁹ This is one of the most comprehensive reports conducted by the DOJ on problems with the implementation of post 9/11 anti-terrorism measures. The investigation benefited from Congressional authority and internal access to sources and information. The report was based on systematic and extensive examination of government records and interview of government officials at different levels, e.g. FBI field office supervisors and street FBI agents, and at many enforcement agencies, e.g. BOP, FBI, INS.

The report made the following findings about the PENTTBOM investigation:

- (1) In the aftermath of the September 11 attacks, the FBI launched the PENTTBOM investigation. Many people (of Middle East extraction) were detained as material witnesses or persons of interests based on no more than their ethnicity, association with terrorists or just anonymous clues, e.g. reports of suspicious Arab and Muslim neighbors who kept odd schedules.¹⁴⁰
- (2) If the arrested persons were of interest, they would be placed on the INS Custody list as September 11 detainees. They would remain in that status until being cleared by the FBI, under the “hold until clear policy.” They were not allowed to be on bond. They were not allowed to be removed by the INS or depart voluntarily.¹⁴¹
- (3) “September 11 detainees did not receive notice of the charges against them in a timely manner . . . We found that the INS served only 60 percent of the September 11 detainees with NTAs within its goal of 72 hours. Many detainees did not receive their charging documents for weeks, and some for more than a month, after being arrested.”¹⁴²
- (4) The FBI was under-resourced. The FBI only cleared less than 3 percent of the 762 September 11 detainees within

139. U.S. Dep’t of Justice, Office of the Inspector Gen., *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* (2003) available at <http://www.usdoj.gov/oig/special/0306/full.pdf> (hereinafter Office of the Inspector Gen. I); see also U.S. Dep’t of Justice, Office of the Inspector Gen., “Supplemental Report on September 11 Detainees’ Allegations of Abuse at the Metropolitan Detention Center in Brooklyn, New York” (2003) available at <http://www.usdoj.gov/oig/special/0312/index.htm>.

140. Office of the Inspector Gen. I, at 16-17.

141. *Id.* at 18, 25, 37-71.

142. *Id.* at 29.

3 weeks of their arrest, the average “hold until clear” lasted 80 days, and 25% took 3 months or more.¹⁴³

- (5) The September 11 detainees were treated harshly, inhumanely and abusively while in detention at the NYC Metropolitan Detention Center (MDC).¹⁴⁴ First, the BOP imposed a total communications blackout at MDC for weeks.¹⁴⁵ Second, BOP used “Witness Security” classification to restrict access to information about them, including their identity, location, and status—No one knew of their existence and whereabouts.¹⁴⁶ Third, detainees were placed in total isolation and subjected to cells lighted for 24 hours a day.¹⁴⁷ Fourth, “the evidence showed a pattern of physical and verbal abuse by some correctional officers at the MDC against some September 11 detainees, particularly during the first months after the attacks and during intake and movement of prisoners.”¹⁴⁸
- (6) Most of the September 11 detainees did not have timely and competent legal representation before and during their MDC stay.¹⁴⁹ MDC misled the detainees in their effort to obtain representation.¹⁵⁰ Further complicating the detainees’ efforts to obtain counsel, the lists of pro bono attorney provided to the September 11 detainees contained inaccurate and outdated information.¹⁵¹ As a result, detainees often used their sole legal call during the week to try to contact one of the legal representatives on the pro bono list, only to find that the attorney either had changed their telephone number or did not handle the particular type of immigration situation faced by the detainees.¹⁵²

Subsequently, the DOJ, FBI and INS launched four successive waves of investigative/enforcement operations, all of which targeted the Muslim communities as possible threats to U.S. security. Many innocent and law abiding Muslims were caught up in the “dragnet” by happenstance, mis-

143. *Id.* at 51-52.

144. *Id.* at 142.

145. *Id.* at 112-115.

146. *Id.*

147. *Id.* at 153.

148. *Id.* at 142.

149. *Id.* at 132.

150. *Id.* at 134.

151. *Id.* at 135.

152. *Id.*

takes, incompetence, neglect, zealotry, and discrimination. For example, on December 17, 2001, Abdallah Higazy, an Egyptian engineer graduate student, was arrested for having information to or being involved in the 9/11 attack by the FBI.¹⁵³ The FBI arrested him as a result of having a pilot's radio in his hotel room, which was left there by the prior resident. Though Abdallah volunteered and passed the lie detection test, the FBI continued to interrogate him coercively and without the presence of a lawyer.¹⁵⁴ A second example involves three Middle Eastern men stopped by the New York Police Department for a traffic violation on September 15, 2001.¹⁵⁵ They were found with construction plans to a public school. Later, it was confirmed that they worked at the school and had authority and reason to be carrying the plans. Nevertheless, the men were subjected to a prolonged detention under the auspices of September 11.¹⁵⁶

B. Attorney General "Special Registration" Program¹⁵⁷

Shortly after 9/11 and until December 2003, the DOJ and INS launched a nation-wide program, The National Security Entry and Exit Registry System (NSEERS),¹⁵⁸ in order to screen and track non-immigrants¹⁵⁹ who posed increased national security risks. The INS sought new special registration rules on June 1, 2002.¹⁶⁰ The strategic aim of the Bush administration and the DOJ was to utilize every resources at their disposal, in this case immigration law, to weed out suspect terrorists, through preventive detention and deportation.¹⁶¹ As Ashcroft made clear in a post 9/11 anti-terrorism policy speech:

153. *In re Material Witness Warrant*, 214 F. Supp. 2d 356, 358 (S.D.N.Y. 2002).

154. Human Rts. Watch, *Presumption of Guilt: Human Rights Abuses of Post-September 11 Detainees* 37 n. 133 (2002), available at <http://www.hrw.org/reports/2002/us911/USA0802.pdf>.

155. *Regarding Overseeing Impact of Antiterrorism Initiatives on Immigrant Communities: Hearing Before the N.Y. City Council Comm. On Immigration* (2004) (testimony of Udi Ofer, Attorney, N.Y. Civil Liberties Union) available at http://www.nyclu.org/antiterror-initiatives_testimony_021704.html.

156. *Id.*

157. Nora V. Demleitner, *Misguided prevention: The War on Terrorism as a War on Immigrant Offenders and Immigration Violators*, 40 No. 6 CRIM. L. BULL. 2 (2004).

158. Louise Cainkar, *Targeting Muslims, at Ashcroft's Discretion*, MIDDLE EAST REPORT ONLINE, Mar. 14, 2003, <http://www.merip.org/mero/mero031403.html>.

159. *Id.* (NSEERS requirements applied only to certain non-immigrant aliens. It did not apply to U.S. citizens, lawful permanent residents, refugees, asylum applicants (Who filed before November 22, 2002), asylum grantees, and diplomats or others admitted under A or G visas).

160. U.S. Dep't of Justice, Immigration and Naturalization Serv., *Department of Justice Proposes New Rule for Nonimmigrant Aliens* (2002), available at <http://www.state.gov/s/ct/rls/fs/2002/11409.htm>.

161. David Cole, *The Priority of Morality: The Emergency Constitution's Blind Spot*, 113 YALE L.J. 1753, 1755 (2004) (arguing against emergency regulations and suspension of

We have modeled our tactics after a previous Justice Department fighting a different threat in this same nation. The Justice Department of Robert F. Kennedy, it was said, would arrest a mobster for spitting on the sidewalk if it would help in the fight against organized crime. In the war on terror, it is the policy of this Department of Justice to be equally aggressive in protecting Americans. We will arrest and detain any suspected terrorist who has violated our laws. Suspects without links to terrorism or who are not guilty of violations of the law will not be detained. But terrorists who are in violation of the law will be convicted; in some cases they'll be deported; in all cases they'll be prevented from doing further harm to Americans.¹⁶²

The purported reasons for a new registration system are as follows:

Deploy a pilot entry-exit program as quickly as possible, focusing on aliens who present the highest risk of involvement in terrorist organizations.

Disrupt the activities of terrorists residing in the United States under false pretenses.

Notify the FBI and other law enforcement agencies when aliens purporting to visit the United States for legitimate reasons deviate from their stated plans.

Notify the FBI and other law enforcement agencies when aliens overstay the terms of their non-immigrant visas.

Match the fingerprints of high-risk aliens entering against the fingerprints of known or suspected terrorists at the port of entry.

Obtain fingerprint and photograph data on aliens from high-risk countries for law enforcement use.

Obtain current address, telephone, and email information on aliens from high-risk countries.

constitution); see also Bruce Ackerman, *The Emergency Constitution*, 113 YALE L.J. 1029 (2004) (arguing against emergency regulations at the expense of constitutional protection).

162. Attorney Gen. Ashcroft, Announcement of Reorganization of the Nation's Justice and Law Enforcement Resources (Nov. 8, 2001) available at <http://www.fas.org/irp/news/2001/11/ag-110801.html>.

Enforce the law requiring aliens to notify the Attorney General when they change address.¹⁶³

The program collected detailed information about the background and purpose of an individual's visit to the United States, periodic verification of their location and activities, and departure confirmation. The Department of Homeland Security has justified the NSEERS on the following grounds:

- (1) NSEERS allows the United States to run the fingerprints of aliens who may present elevated national security concerns against a database of wanted criminals and known terrorists;¹⁶⁴
- (2) NSEERS enables DHS to determine instantly when such an alien has overstayed his visa, which was the case with three of the 9/11 hijackers;¹⁶⁵
- (3) NSEERS enables DHS to verify that an alien in the United States on a temporary visa is doing what he said he would be doing, and living where he said he would live.¹⁶⁶

In 1996, Congress mandated the development of a comprehensive entry-exit program by 2005. Before 9/11, a registration system existed in name only. Under the Immigration and Nationality Act, it is the duty of any alien over 14 years old who remains in the United States more than 30 days to be registered and fingerprinted (INA section 262). Under current law (INA section 263), the Attorney General can require the registration and fingerprinting of any class of aliens, other than those admitted for permanent residence. In most cases, the regulations have waived the fingerprinting requirements. Current regulations have limited registration to aliens from Iraq, Iran, Sudan and Libya.¹⁶⁷

Under NSEERS, aliens were first registered and fingerprinted at the port-of-entry. They were then required to re-register after 30 days, and annually thereafter. On December 1, 2003, the Department of Homeland

163. U.S. Dep't of State, *National Security Entry-Exit Registration System: System designed to protect U.S. citizens from terrorism*, (2002) available at http://usinfo.state.gov/is/Archive_Index/EntryExit_Registration_System.html.

164. Department of Homeland Security, *Fact Sheet: Changes to National Security Entry/Exit Registration System (NSEERS)*, (Dec. 1, 2003), <http://www.dhs.gov/dhspublic/display?theme=43&content=3020>.

165. *Id.*

166. *Id.*

167. "Section 262(a) of the Immigration and Nationality Act ('INA') (8 U.S.C. 1302(a)) provides that all aliens who are age 14 or older and who have not previously been registered and fingerprinted at a consular office abroad, pursuant to section 221(b) of the INA (8 U.S.C. 1201(b)) or sections 30 or 31 of the Alien Registration Act, 1940, have a duty to apply for registration and to be fingerprinted if they remain in the United States for 30 days or longer." Registration and Monitoring of Certain Nonimmigrants from Designated Countries, 67 Fed. Reg. 57, 032 (Sept. 6, 2002).

Security suspended¹⁶⁸ the NSEERS automatic re-registration requirement that mandated aliens to re-register after 30 days and after one year.¹⁶⁹ Instead, the DHS has the discretion to ask for continuing registration in specific cases. Foreign students and visiting scholars who change address or educational institution through Student and Exchange Visitor Information System (SEVIS) constitute a notification for the purposes of NSEERS registration.

As operated, the NSEERS program¹⁷⁰ targeted citizens and nationals from Afghanistan, Algeria, Bahrain, Bangladesh, Egypt, Eritrea, Indonesia, Iran, Iraq, Jordan, Kuwait, Libya, Lebanon, Morocco, North Korea, Oman, Pakistan, Qatar, Somalia, Saudi Arabia, Sudan, Syria, Tunisia, the United Arab Emirates, and Yemen, though others have been involved.

Between November 5, 2002 and September 30, 2003 the NSEERS conducted a total of 290,526 registrations and registered a total of 177,260 people, i.e. 207,007 registrations (93,741 individuals) at the points of entry, and 83,519 individuals at the former INS offices. The total number of notices to appear issued was 13,799, of which 1 in 5 (20.79%) or 2,870 were detained and 23 placed in custody. Registration with the NSEERS was conducted in waves: Groups 1, 2, 3 and 4. Group 1 was comprised of nonimmigrant males from Iran, Iraq, Libya, Sudan and Syria. Group 2 was nonimmigrant males from Afghanistan, Algeria, Bahrain, Eritrea, Lebanon, Morocco, North Korea, Oman, Qatar, Somalia, Tunisia, the United Arab Emirates and Yemen. Pakistan and Saudi Arabia comprised Group 3, according to the INS. Nonimmigrant Pakistani and Saudi Arabian males born before January 13, 1987, make up Call-In Group 3 of the National Security Entry-Exit Registration System (NSEERS) and are required to report to the INS to be interviewed and fingerprinted. Group 4, with a deadline of March 28, consisted of nonimmigrant males from Bangladesh, Egypt, Indonesia, Jordan and Kuwait.¹⁷¹

A number of studies by Muslim self-help, immigration reform and civil rights groups conducted studies on the impact of the "Special Registration" program. Newspapers¹⁷² as well as investigative reporters covered

168. The DHS never gave a reason for the suspension. The most common reasons for suspension were: First, NSEERS was inconsistently applied; Second, it was discriminatorily applied; Third, it was indiscriminately applied; Fourth, it was not cost-effective to apply. Jane Black, *At Justice, NSEERS Spells Data Chaos*, BUSINESS WEEK, May 2, 2003 http://www.businessweek.com/technology/content/may2003/tc2003052_6532_tc073.htm.

169. See Agency Information Collection Activities: Proposed Collection, 68 Fed. Reg. 67, 464 (Dec. 2, 2003).

170. Cainkar, *supra* note 158.

171. Rachel L. Swarns & Christopher Drew, *Aftereffects: Immigrants; Fearful, Angry or Confused*, *Muslim Immigrants Register*, N.Y. TIMES, Apr. 25, 2003, at A1.

172. See, e.g., Lillian Thomas, *Muslim Men Register Warily Under U.S. Requirement as Terror Precaution*, POST-GAZETTE, (Pittsburgh), Mar. 16, 2003, at A3 ("If you were called down—you, a European-American who's a citizen—if you got a call to come down to some government office, you'd be a little bit nervous." "There is a threat to the U.S. I

the story with intense interest.¹⁷³ There were also many personal accounts. Yashar Haider described what happened to him on February 2, 2003, when he reported to the San José INS offices for special registration and was arrested and detained at the Yuba County Jail for allegedly overstaying his visa for 20 days:

By 9:30 pm we reached Yuba County Jail and the shackles were removed; we were all thoroughly checked and huddled into another hall, the so-called "Booking Area." By 11:00 pm we were getting booked. Tags were issued and my criminal number 103957 was given to me. For the first time in my life I realized that my identity was lost and I became a number in the criminal justice system. My crime was going to the San Jose INS offices on February 2, 2003, for special registration.¹⁷⁴

"This program has created a culture of anxiety, humiliation, and despair in communities throughout this country," said Samina Faheem, Executive Director of the American Muslim Voice and Pakistan American Alliance.¹⁷⁵ "It has made people feel like common criminals, to register and re-register every time they leave the country. We are wasting precious resources on this program."¹⁷⁶

think it's a threat to humanity. If there is reason to interview someone because of suspicious behavior, that's fine. But I don't think it's right, I don't think it's fair, to interview everyone"); see also Chaleampon Ritthichai, *The Special Registration Program*, GOTHAM GAZETTE, Feb. 2003, <http://www.gothamgazette.com/article/20030203/11/270> (Donna Lieberman, Executive Director at New York Civil Liberty Union: "This definitely bred fear, intimidation and confusion on the part of many affected . . . There are so many who just don't understand: why them?").

173. *Targets of Suspicion: The Impact of Post-9/11 Policies on Muslims, Arabs and South Asians in the United States*, IMMIGR. POL'Y IN FOCUS Vol. 3(2), (Immigration Policy Center, a division of the American Immigration Law Foundation, Washington, D.C.) (2004).

174. Press Release, ACLU, Immigrants Targeted for Deportation After Participating in INS Special Registration Program Speak Out, <http://www.aclu.org/safefree/general/16830prs20030701.html> (last visited Oct. 17, 2006).

175. *Immigrants Targeted for Deportation After Participating in INS Special Registration Program Speak Out*, American Muslim Perspective, July 1, 2003, http://www.civilrights.ghazali.net/html/body_aclu-amv_presser.html (last visited Oct. 17, 2006).

176. *Id.*

CONCLUSION: IMPACT UPON THE MUSLIM COMMUNITY AND IMPLICATIONS FOR AMERICA

Muslims in America are not the same after 9/11 attacks which changed America for ever and this change has profoundly affected the seven million-strong American Muslim community.

—Abdus Sattar Ghazali,
“Portrait of a Post 9/11 American Muslim,”
Al-Jazeera, September 8, 2005¹⁷⁷

A. Immediate impact

Never before has an international terrorist act had such a devastating impact on Muslim life in the U.S. The USA Patriot Act created fear that gripped Muslim communities.¹⁷⁸ The Muslims in America found themselves living in a “virtual internment camp”¹⁷⁹ where everything they said or did was being closely inspected and negatively construed.¹⁸⁰

MUSLIM POPULATION ESTIMATES OF VIRTUAL INTERNMENT CAMP

Government Action	Government Admissions	Conservative Estimates
FBI: interviewed/interrogated investigated/questioned/raided	27,000	90,000
Detained or arrested	6,483	15,000
Deported	3,208	3,208
In process of deportation	13,434	13,434
Undergoing voluntary deportation	n/a	unknown
Fled the country in fear	n/a	50,000
Subpoenas/search warrants	18,000	18,000
NSEERS: special registration/interviewed/ fingerprinted/photographed	144,513	144,513
Under surveillance through libraries	n/a	unknown
Electronic surveillance	n/a	100,000
Gone underground	n/a	unknown
Total	212,638	434,155

177. Abdus Sattar Ghazali, *Portrait of a Post 9/11 American Muslim*, *Al-Jazeera*, Sept. 8, 2005, <http://www.aljazeera.info> (follow Opinion Editorials hyperlink; then follow September 2005 Opinion Editorial Links; then see September 8, 2005).

178. Abdul Malik Mujahid, *In a Virtual Internment Camp: Muslim Americans since 9/11*, Soundvision, (2003–2004), <http://www.soundvision.com/info/muslims/internment.asp>.

179. *Id.*

180. *Id.*

Source: Abdul Malik Mujahid. In a Virtual Internment Camp: Muslim Americans since 9/11. <http://www.soundvision.com/info/muslims/internment.asp>.

There were many documented instances of cruel and illegal treatment of Muslims by federal officials, only some of which were acknowledged by the DOJ Inspector General. For example, people were arrested without notice, detained and held incommunicado, deported for the slightest infraction, and subjected to hearings based on secret evidence without a charge or evidence of terrorism brought.¹⁸¹

Of all the post-9/11 policies, “the National Security Entry-Exit Registration System (NSEERS), commonly referred to as “Special Registration,” has had the most serious impact on the targeted communities.¹⁸² Interviews conducted with attorneys, community groups and registrants themselves indicate that the deportations and heightened immigration scrutiny resulting from NSEERS and other post-9/11 policies have created widespread fear, stress and alienation in the nation’s Muslim, Arab and South Asian communities.”¹⁸³

NSEERS and other post-9/11 policies have had a devastating impact on Muslim and South Asia immigrant communities. These communities bore the brunt of post-9/11 restrictive policies and became targets of suspicion resulting from heightened security.¹⁸⁴ Particularly:

Fear, stress and alienation: 9/11 policies generated fear, stress and alienation in Muslims, Arabs and South Asians. This led “many hard-working, law-abiding new Americans to question their future in this country.”¹⁸⁵

Confusion and misinformation: Enforcement of NSEERS suffered from inadequate publicity by the government, misinformation by the officials, misreporting by the press and erroneous understanding by the affected public. This led to unintentional violation and unjust application of the laws.

Selective and discriminatory enforcement: Muslims, Arabs and South Asians felt that they were targets, and NSEERS enforcement and immigration laws were selectively and discriminatorily applied.¹⁸⁶

181. Office of the Inspector Gen. I, *supra* note 139, at 134.

182. Bill Ong Hing, *Misusing Immigration Policies in the Name of Homeland Security*, 6 THE NEW CENTENNIAL 195 (2006).

183. Immigration Policy Center, *supra* note 173, at 1.

184. *Id.* at 2.

185. *Id.*

186. *Id.* at 8-9.

Economic and social impact: Arrest, detention and deportation of husbands and fathers affected their households economically. Deportation placed long time resident and school-age children in foreign lands. Children 16 years of age and under were afforded even less legal rights under NSEERS deportation policies.¹⁸⁷

Fear and uncertainty: Selected enforcement of minor immigration regulations in large scale on Muslims, Arabs, and South Asians generated fear within the ranks of lawful residents and students.¹⁸⁸ This caused them to turn away from the government in providing information¹⁸⁹ or seeking help.¹⁹⁰

Unmet legal needs: The afflicted populations, Muslims, Arabs, and South Asians, were not properly represented and protected legally. NSEERS alone generated 14,000 removal cases mostly in four areas of the nation: New York, Los Angeles, Houston, and Florida.¹⁹¹

B. Long Term Implications

September 11 brought a lot of changes to America. First and foremost were attitudinal changes, e.g. more trust in the government, increased faith in religion, increased family unity, and more compassion for strangers. It also caused the public to become more involved and engaged as citizens in a variety of ways, thus revitalizing American democracy. It motivated people to become more informed about politics, sacrifice personal rights to the government, get involved in the war on terror, and feel proud to be American, embracing “patriotism” over “individualism.”¹⁹²

187. *Id.* at 7-8.

188. *Id.* at 15.

189. *Id.* at 10.

190. *Id.* at 16-18.

191. *Id.* at 11-14.

192. Markus Prior, *Political Knowledge after September 11*, 35 PS: POL. SCI. & POLITICS 523 (2002).

C. War of Identity¹⁹³

But the 9/11 induced changes may also have resulted in misdirected impact, unintended consequences and other undesirable effects over time. That is exactly what happened to the Muslim community.¹⁹⁴

In the very beginning, the Muslim communities were at a loss as to what to do. 9/11 stirred up mixed emotions in U.S. Muslims and other immigrants. Condemnation of the attack raised emotions of guilt for being Muslim. Criticism of the Bush administration raised feelings of shame for not being as patriotic as an American should. Nothing they can do will right the wrong of 9/11 by their “people.” In supporting the war against Osama Bin Laden, they feel lied to by the administration. Finally, it appears that no matter what they do, Muslims are not judged on their acts as individuals, but held accountable based on their ethnicity and the color of their skin. These are no doubt very frustrating and anxious experiences. In order to alleviate these doubts, tensions, and anxieties, the Muslim community came together and forged a plan to fight for their own stake in America.

The motivation to re-invent the Muslim community also has deeper roots in a concern for justice. Most Islamic scholars agree that jihad is nothing more than a call for personal struggle, i.e. exerting one’s utmost toward the true path of Islam. It is an effort to purify oneself and get rid of the evil from within through prayers (salat), giving of alms, helping the needy (zakat), and fasting during the month of Ramadan. In another sense, there is a global struggle waged against injustice and oppression. Hence the Islamic response of jihad is meant to cleanse the world. Of these two, the first concept of jihad is the most favored. It is the greater jihad, involving a life-long activity among Muslims. Muslims are pursuing this by coming together, setting political goals (gaining election), and more importantly, establishing a socio-political identity in the America polity.¹⁹⁵

193. Federico V. Magdalena, *Islam and the Politics of Identity: Lessons from the Philippines and Southeast Asia*, <http://www.hawaii.edu/cps/identity.html> (last visited Oct. 17, 2006).

194. Muneer Ahmad, *Homeland Insecurities: Racial Violence the Day After September 11*. 20 Soc. TEXT 101 (2002)(arguing that 9/11 is a rude awakening for Muslims and that America has never been a place of the free and land of equality; Muslims, like other minorities, need to learn their place in America—not as free willing masters but as indentured slaves).

195. Mona Eltahawy, *9/11 was Good for the Muslim World*, Christian Science Monitor, Oct. 18, 2005, <http://www.csmonitor.com/2005/1018/p09s01-coop.html>.

D. Consolidating Opposition

Before 9/11, the Muslims and South Asian communities were splintered and disorganized.¹⁹⁶ The first wave of East Asian immigrants who came in the 1960s and 1970s were technology immigrants. They were comfortably middle class and contributed more to American life than they took. The second wave came in the 1980s. They came to the United States for purposes of family reunion.¹⁹⁷ Soon they became welfare immigrants. They took more than they gave from society. They are dependent on the main culture for welfare and support, and they did not attempt to integrate.¹⁹⁸ Unlike the Chinese immigrants of old, both of these groups failed to work with each other. They also lacked a defined identity to rally around, until, the events of September 11. There is also the younger generation, who refuses the old identity, and seeks to be accepted into the mainstream.¹⁹⁹

9/11 and the USAPA helped the Muslim and South Asian community to come together as a cohesive group for a common cause; that is the common cause of protecting themselves against an external threat of post-9/11 Muslim phobia.²⁰⁰ For example, before 9/11, about eighty percent of the American public thought it was wrong for law enforcement to use racial profiling, popularly used to refer to the disproportionate targeting of African American drivers by police for the offense of “driving while black.”²⁰¹ However, after the shock of the 9/11 attacks, sixty percent favored racial profiling, “at least as long as it was directed at Arabs and Muslims.”²⁰²

This shift in attitude is a wake up call for Muslims. They must do something, anything to defend their interests and restore “justice.” In the context of the USAPA this means taking the initiative to proclaim their

196. *DawaNet Report 2: Charlotte Muslim Community Overview*, Council of American Muslim Professionals—Charlotte Chapter (March 19, 2005, at 6. (Muslim communities are disorganized due to a lack of leadership and interests) available at <http://www.campnet.net/charlotte-nc/report2final.pdf>.

197. Maira, *supra* note 33.

198. *Id.*

199. *Id.*

200. Kemal Argon, *Islam in America: A brief overview and some prospects for resurgence*, <http://scholar.google.com/scholar?hl=en&lr=&q=cache:ritSUygA4qof:www.ips.org.pk/publications/Perspectives/Chapter%25206.pdf+Islam+in+America:+A+brief+overview+and+some+prospects+for+resurgence>.

201. Wikipedia, *Driving While Black*, http://en.wikipedia.org/wiki/Driving_While_Black (last visited Oct. 17, 2006) (“Driving While Black” is a parody of the real crime driving while intoxicated; it refers to the idea that a motorist can be pulled over by a police officer simply because he or she is black and then charged with a trivial or perhaps non-existent offense).

202. David Cole & James Dempsey, *Terrorism and the Constitution: Sacrificing Civil Liberties in the Name of National Security*, 168 *The New Press* (2002).

loyalty to the flag and condemn the attack in no uncertain terms. This also means that when they find that their overture is rejected and they are hated no matter what they do, they must start to turn inward, gaining emotional support from their own group.

E. Implications for America

For better or worse, 9/11 was a transformational event, for the people, for the nation. 9/11 changed the nation's ethos.²⁰³ This event has transformed people's lives. It has made them self conscious of what they can say or do, what they can read and with whom they can associate. It has also prepared them for war with a heightened sense of patriotism and a willingness to stand behind America, "right or wrong." Most significantly for this project, it has made some people hate foreigners while others feel ashamed of their identity.

In terms of culture and values, the biggest discernable change after 9/11 was the nation's dismissive attitude towards human, civil and constitutional rights in the face of terrorist threats. After 9/11, it came to be considered acceptable, if not even necessary, to torture suspected terrorists for information,²⁰⁴ to imprison terrorists (Taliban and al-Qaeda members) without due process,²⁰⁵ to compromise citizens' privacy rights in the name

203. Amitai Etzioni, *American Society in the Age of Terrorism*, http://www.gwu.edu/~ccps/news_american_society.html (last visited Nov. 15, 2006) (As reported by Etzioni: "A year before the attack, in September 2000, Muslim Americans were viewed favorably by 50 percent of Americans, and unfavorably by 21 percent. Six months later, in March 2001, 45 percent viewed Muslim Americans favorably and 24 percent viewed them unfavorably. Two months after the attack (and the first time the data on this topic was provided after September 11), the proportion of those who viewed Muslim Americans favorably increased to 59 percent and the proportion who viewed them unfavorably decreased to 17 percent. A few months later, in February and March 2002, the percentages changes only slightly—54 percent of Americans viewed Muslim Americans favorably and 22 percent viewed them unfavorably).

204. Dana Priest, *Justice Dept. Memo Says Torture "May Be Justified,"* WASHINGTON POST, June 13, 2004, <http://www.washingtonpost.com/ac2/wp-dyn/A38894-2004Jun13?language-printer>. See also Memorandum from the U.S. Dep't of Justice to Alberto R. Gonzales, Counsel to the President (Aug. 1, 2002), available at <http://news.findlaw.com/hdocs/docs/doj/bybee80102ltr.html>.

205. Michael Byers, *Ignore the Geneva Convention and Put Our Own Citizens at Risk*, 62 THE HUMANIST 33, (2002) (The 1949 Geneva Convention on the treatment of prisoners of war (P.O.W.s) stipulates that they are to be afforded "the same courts according to the same procedure as in the case of members of the armed forces of the detaining power." Article 102. Geneva Convention relative to the Treatment of Prisoners of War. Adopted on 12 August 1949 by the Diplomatic Conference for the Establishment of International Conventions for the Protection of Victims of War, held in Geneva from 21 April to 12 August, 1949 entry into force 21 October 1950.

By not treating Taliban and al-Qaeda fighters as entitled to P.O.W. status, the U.S. violated fundamental principles of international law as well as war conventions, and in time these actions will put our soldiers at risk and the United States' international human

of security,²⁰⁶ and to deny information to journalists to facilitate the fighting of a war on terror.²⁰⁷

Finally and most controversially, 9/11 has transformed the United States from an open, democratic society, to a closed, garrison state. Michaels outlines twelve defining characteristics, with ratings, of a national security state.²⁰⁸ They are:

- (1) Visible increase in uniform security (100%), e.g. increased private security and military jets patrolling the sky.
- (2) Lack of accountability in law enforcement (75%), e.g. indiscriminate arrests and unconstitutional detention of immigrants.
- (3) Reduced judiciary supervision and enhanced executive mistreatment of suspects (30%), e.g. as evidence of reduced judiciary supervision, the establishment of the military tribunals and expansion of the FISA secretive courts in the processing of terrorism cases. As to executive mistreatment of suspects, the government's discriminatory and abusive treatment of Muslims, abusive use of FISA process (12,179 cases since 1979 with 1 denied), and the oppressive nature of the Military Tribunal.
- (4) Secrecy of ruling authority and momentum of threat (60%), e.g. the "Secrecy Surrounding the Rationale for

rights leadership under attack); see U.S. Dep't of Justice, Office of the Inspector Gen., *The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Changes in Connection with the Investigation of the September 11 Attacks* (2003) (The report examined 762 aliens under Immigration and Naturalization Service (INS) custody as a result of post 9/11 PENTTBOM investigation. The detainees were subject to lengthy detention without notice, representation and hearing. They were subjected to personal humiliation and physical abuse without recourse).

206. C. William Michaels, *NO GREATER THREAT: AMERICA AFTER SEPTEMBER 11 AND THE RISE OF A NATIONAL SECURITY STATE* (Algora Publishing 2002) ("Indeed there is no greater threat to the security of this country than a systematic dismantling of civil liberties and the rule of law with a dramatic shift of political will and resources to investigate, surveillance, and prosecution, coupled with the almost uncanny ability of the American public to place too much faith in government at the precise time when just the opposite approach is required").

207. Danny Schechter, *How Did 9/11 Change Big Media?* INTERVENTION MAGAZINE, Sept. 11, 2003, www.interventionmag.com/cms/modules.php?op=modload&name=News&file=article&sid=495 (9/11 has changed the media substantially. After 9/11, "patriotic correctness" has become in vogue. The media put concern with fear before commitment to facts. Overall, journalists were more respectful of the authority, more deferential to officials, more trusting of government, and less critical of the administration).

208. Michaels, *supra* note 206 at 299-300 ("The Ratings: A National Security State 'Scorecard,"); see also Mark S. Zaid, *Was September 11 Actually a Prelude to 1984?: A Review of a New Book Forecasting the Possible Rise of a National Security State*, FINDLAW, Jan. 24, 2003, http://writ.news.findlaw.com/books/reviews/20030124_zaid.html.

Afghanistan War and Further Military Actions” and “Secret Surveillance Orders by Expanded FISA Court.”

- (5) Media in the service of the State (55%), e.g. concentration of media ownership and lack of criticism of government activities.
- (6) National resources devoted to security threat (85%), e.g. \$40 billion in Congressional emergency appropriations after 9/11 earmarked for anti-terrorism activities.
- (7) Patriotism moving to nationalism (60%), e.g. American flag waving, increased enrollment in ROTC and application to the FBI and CIA and increased blind trust in the government.
- (8) Lack of critical response by religions (30%), e.g. Bush enlisting the church to support his war on terror.
- (9) Wartime mentality and permanent war economy (100%), e.g. the establishment of the Department of the Homeland Security with 170,000 employees and \$37.7 billion of budget for the first year.
- (10) Targeted individuals and groups (60%), e.g. dragnet kind of interviewing and interrogation of foreign nationals and students, especially those of Middle East origin or Muslim persuasion.
- (11) Direct attack on dissent (10%, e.g. local (e.g. Denver) police keeping files on peace activists and organizations and conservative public interest groups reporting and criticizing views of liberal and anti-war faculty.
- (12) Increased surveillance (35%), e.g. increased surveillance in public places and government involvement with cyberspace defense.

The impact of the USAPA on Muslims bears witness to such a transformation process. The impact of 9/11, including the USAPA, and its implications for America are not yet understood by scholars, nor are they fully appreciated by the people.

F. *Final Thoughts*

Senator Feingold reminded the Nation that “wartime has sometimes brought us the greatest tests of our Bill of Rights.”²⁰⁹ Looking back in history, there is ample evidence of backlash against minorities during national crisis, e.g. the internment of Japanese-Americans, German-Americans, and Italian-Americans during World War II, the blacklisting of supposed communist sympathizers during the McCarthy era, and the surveillance and harassment of antiwar protesters, including Dr. Martin Luther King Jr., during the Vietnam War. The pattern seems to repeat itself. With 9/11, we have adopted a policy of large scale preventive detention of Muslims and wholesale deportation of South Asians. It does not appear that we, as a nation, have learned from our past mistakes; we keep on violating Constitutionally-protected rights during national crisis, only to have to make amends later. The ill treatment of Muslims in America will likely meet with the same fate. The only question is when will the apology come? By then, it might be too late.

“Oh, When will you ever learn?”

Oh, When will you ever learn?”

—Pete Seeger (1961)²¹⁰

Where Have All the Flowers Gone

209. Electronic Privacy Information Center, *Statement Of U.S. Senator Russ Feingold On The Anti-Terrorism Bill*, Oct. 25, 2001 <http://www.epic.org/privacy/terrorism/usapatriot/feingold.html>.

210. Pete Seeger, *Where Have All the Flowers Gone?* On Pete Seeger's Greatest Hits (Sony 2002).