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

SUSAN M. AKRAM & KEVIN R. JOHNSON

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Abstract:

This article is part of a symposium on "Migration Regulation Goes Local: The Role of States in U.S. Immigration Policy." Although only time will tell, September 11, 2001 promises to be a watershed in the history of the United States. Not long after the tragedy, supporters and critics alike saw the federal government as "pushing the envelope" in restricting civil liberties in the name of national security. This article analyzes the nation's response to the horrific loss of life of September 11 and shows how the centralization of immigration power in the hands of the federal government, may exacerbate the civil rights impacts of the enforcement of the immigration laws. The federal government has acted more swiftly and uniformly than the states ever could, with severe consequences for the Arab and Muslim community in the United States. That the reaction was federal in nature - and thus national in scope as well as uniform in design and impact, and with precious few legal constraints - worsened the civil rights impacts.

The civil rights deprivations resulting from federal action reveals that national regulation of immigration is a double-edged sword. Although federal law pre-empts state laws designed to regulate immigration or discriminate against aliens, it can also, with few legal constraints, strike out at immigrants across the nation if it sees fit. That in turn suggests that the role of states, as well as the federal government, in the regulation of immigration and immigrants, especially in times of national crisis, deserves most serious attention.

The federal government's response to September 11 also demonstrates the close relationship between immigration law and civil rights in the United States. Noncitizens historically have been the most vulnerable to civil rights deprivations, in large part because the law permits, perhaps even encourages, extreme governmental conduct with minimal protections for the rights of noncitizens. Unfortunately, the current backlash against Arabs and Muslims in the United States fits comfortably into a long nativist history.

In sum, a complex matrix of "otherness" based on race, national origin, religion, and political ideology contributes to the current attacks on the civil rights of Arabs and Muslims in the United States. As has occurred in the past, the ripple effects of national security measures in the end may adversely affect the legal rights of all noncitizens, not just Arabs and Muslims. Indeed, as we contend in this article, the civil rights deprivations resulting from the war on terrorism may have long term adverse impacts on the civil rights of citizens as well as noncitizens in the United States.

To help us better understand the latest "war on terrorism," Part I of the Article analyzes the general demonization of Arabs and Muslims generally in the United States and how the law has been influenced by, and reinforced, the negative stereotypes. This section reviews the federal government's actions directed at Arabs and Muslims in the name of combating terrorism well before September 11. As Professor Edward Said has observed, terrorism in these times "has displaced Communism as public enemy number one." That has translated into a near exclusive focus on "foreign terrorists," particularly Arabs and Muslims. Part II studies the federal government's zealous investigatory methods after

September 11 directed at Muslim and Arab noncitizens, with disregard for their civil rights, and the possible long term impacts of that response.

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

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INTRODUCTION

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Although only time will tell, September 11, 2001 promises to be a watershed in the history of the United States. After the tragic events of that morning, including the hijacking of three commercial airliners subsequently used as weapons of mass destruction,¹ America went to "war" on many fronts, including but not limited to military action in Afghanistan.² As needed and expected, heightened security and an intense criminal investigation followed. Moreover, almost immediately after the tragedy, Arabs and Muslims, as well as those "appearing" to be Arab or Muslim, were subject to crude forms of racial profiling.³ Airlines removed Arab and Muslim passengers, including a Secret Service agent assigned to protect President Bush, from an airplane for making the flight crew "uncomfortable."⁴ Hate crimes against Arabs, Muslims, and others rose precipitously.⁵

¹ See Serge Schmemmann, *U.S. Attacked; President Vows to Exact Punishment for 'Evil'*, N.Y. TIMES, Sept 12, 2001, at A1.

² Congress, however, did not formally declare war, which allows the President expansive powers over "alien enemies" under the Alien Enemy Act of 1798. See J. Gregory Sidak, *War, Liberty, and Enemy Aliens*, 67 N.Y.U. L. REV. 1402 (1992). Thus, many of the security measures adopted by the federal government, see *infra* text accompanying notes __, cannot be said to have been authorized by Congress.

³ See *infra* text accompanying notes ____.

⁴ See *Guard for Bush Isn't Allowed Aboard Flight*, N.Y. TIMES, Dec. 27, 2001, at B5; Ken Ellingwood & Nicholas Riccardi, *Arab Americans Enduring Hard Stares of Other Fliers*, L.A. TIMES, Sept. 20, 2001, at A1; Phillip Morris, *Racial Profiling Has a New Target*, PLAIN DEALER, Sept. 25, 2001, at B9. In response to early reports of discrimination against Arab and Muslim appearing people, the Department of Transportation issued a Policy Statement emphasizing that a person cannot be disparately treated solely based on national origin or religion. See U.S. Dep't of Transportation, *Carrying out Transportation Inspection and Safety Responsibilities in a Nondiscriminatory Manner*, Oct. 17, 2001 (www.dot.gov/airconsumer/OGCreminer1./htm).

⁵ See Laurie Goodstein & Tamar Lewin, *Victims of Mistaken Identity, Sikhs Pay a Price for Turbans*, N.Y. TIMES, Sept. 19, 2001, at A1; Tamar Lewin & Gustav Niebuhr, *Attacks and Harassment on Middle Eastern People and Mosques*, N.Y. TIMES, Sept. 18, 2001, at B5; see also Bill Ong Hing, *Vigilante Racism: The De-Americanization and Subordination of Immigrant America*, unpublished manuscript on file with authors (documenting hate

In Arizona, a U.S. citizen claiming vengeance for his country killed a Sikh immigrant from India based on the mistaken belief that this turban-wearing, bearded man was "Arab."⁶

crimes against Muslims after September 11 and tying this period into historical antecedents); 147 CONG. REC. E2150 (Nov. 28, 2001) (Rep. Conyers) (stating that, from September 11 to November 28, 2001 American-Arab Anti-Discrimination Committee had investigated over 450 hate crimes); 147 CONG. REC. H8174, 8174-75 (Nov. 14, 2001) (Rep. Woolsey) (recounting statistical data showing precipitous rise in hate crimes against Muslims and Arabs after September 11). The Council on American-Islamic Relations reported nearly one thousand anti-Arab, Muslim incidents around the country between September 11 and October 22, 2001. See <http://www.cair-net.org>. By the end of October, 2001, the Department of Justice was investigating over 250 hate crimes against Arabs and Muslims nationwide. See <http://www.usdoj.gov/crt/legalinfo/discrimupdate.ht> (Jan. 21, 2002); Author Conversations in Oct. 2001 with Casey Stavropoulos and Dan Nelson, U.S. Dept of Justice, Civil Rights Section, Public Information Div.

⁶ See Goldstein & Lewin, *supra* note __; Richard Serrano, *Assaulting Against Muslims, Arabs Escalating*, L.A. TIMES, Sept. 28, 2001, at A1.

Not long after the tragedy, supporters and critics alike saw the federal government as "pushing the envelope" in restricting civil liberties in the name of national security.⁶ Other contributions to this symposium analyze the devolution of immigration regulation from the federal government to the states.⁷ This article analyzes the nation's response to the horrific loss of life of September 11 and shows how the centralization of immigration power in the hands of the federal government, may exacerbate the civil rights impacts of the

⁶ See Christian Berg, *Thornburgh: Bush Doing Just Fine*, MORNING CALL (Allentown, Pennsylvania), Nov. 16, 2001, at A4 (quoting former Attorney General Richard Thornburgh); J.M. Lawrence, *Civil Rights Advocates Wary About the Future*, BOSTON HERALD, Sept. 28, 2001, at 34 (reporting concerns of civil rights advocates that federal government might have popular support to "push the envelope" on infringing on civil liberties).

⁷ See, e.g., Victor C. Romero, *Devolution and Discrimination*, 58 ANN. SURVEY AM. LAW (forthcoming 2002); CITE TO OTHER SYMPOSIUM PAPERS ON THIS TOPIC. The proper role, if any, for the states in immigration enforcement has emerged as an issue of academic commentary. Compare Peter J. Spiro, *The States and Immigration in an Era of Demi-Sovereignities*, 35 VA. J. INT'L L. 131 (1994) [hereinafter Spiro, *Demi-Sovereignities*] (contending that states should have increased role in immigration matters); Peter J. Spiro, *Learning to Live With Immigration Federalism*, 29 CONN. L. REV. 1627 (1997) (analyzing states' new power over defining benefit eligibility for aliens in 1996 welfare reform law), with Michael A. Olivas, *Preempting Preemption: Foreign Affairs, State Rights, and Alienage Classifications*, 35 VA. J. INT'L L. 217 (1994) (challenging Spiro's argument and defending federal pre-emption of state efforts to regulate immigration); Hiroshi Motomura, *Immigration and Alienage, Federalism and Proposition 187*, 35 VA. J. INT'L L. 201 (1994) (questioning Spiro's thesis on grounds that the federal government should play central role in formation of immigrants' national identity); Peter H. Schuck & John Williams, *Removing Criminal Aliens: The Pitfalls and Promises of Federalism*, 22 HARV. J.L. & PUB. POL'Y 367 (1999) (analyzing difficulties of federal government working with state and local agencies in the deportation of criminal aliens and analyzing potential for creation of better working relationship); Michael J. Wishnie, *Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection and Federalism*, 76 N.Y.U. L. REV. 493 (2001) (criticizing devolution of authority to states to discriminate against aliens in welfare reform laws).

enforcement of the immigration laws. The federal government has acted more swiftly and uniformly than the states ever could, with severe consequences for the Arab and Muslim community in the United States. That the reaction was federal in nature and thus national in scope as well as uniform in design and impact, and with precious few legal constraints⁸ -- worsened the civil rights impacts.

The civil rights deprivations resulting from federal action reveals that national regulation of immigration is a double-edged sword. Although federal law pre-empts state laws designed to regulate immigration or discriminate against aliens,⁹ it can also, with few legal constraints, strike out at immigrants across the nation if it sees fit. That in turn suggests that the role of states, as well as the federal government, in the regulation of immigration and immigrants, especially in times of national crisis, deserves most serious attention.

⁸ See *infra* text accompanying notes __.

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

The federal government's response to September 11 also demonstrates the close relationship between immigration law and civil rights in the United States. Noncitizens historically have been the most vulnerable to civil rights deprivations, in no small part because the law permits, and perhaps even encourages, extreme governmental conduct with minimal protections for the rights of noncitizens.¹⁰ Unfortunately, the current backlash against Arabs and Muslims in the United States fits comfortably into a long nativist history, including the Alien and Sedition Act of the 1790s, the Palmer Raids and the Red Scare that followed World War I, and other concerted efforts by the U.S. government to stifle political dissent.¹¹ This historical moment is especially troubling because, reminiscent of the Japanese internment during World War II,¹² perceived racial, coupled with religious and other, difference amplifies the animosity toward

¹⁰ See *infra* text accompanying notes ____.

¹¹ See Kevin R. Johnson, *The Antiterrorism Act, The Immigration Reform Act, and Ideological Regulation in the Immigration Laws: Important Lessons For Citizens and Noncitizens*, 28 ST. MARY'S L.J. 833, 841-69 (1997) [hereinafter Johnson, *Antiterrorism*]; see also Victor C. Romero, *On Elian and Aliens: A Political Solution to the Plenary Power Problem*, 4 N.Y.U. J. LEGIS. & PUB. POL'Y 343, 359-62 (2000/01) (contending that Supreme Court's deference to Congress and Executive Branch in combating "terrorism" is reminiscent of anti-Chinese and anti-communist sentiment of previous eras). The Alien and Sedition Acts were designed to eliminate political "subversives" from the United States, and can be viewed as a Federalist effort to reduce immigrant support for the Republican Party. See generally JAMES MORTON SMITH, *FREEDOM'S FETTERS: THE ALIEN AND SEDITION LAWS AND AMERICAN CIVIL LIBERTIES* (1956). The Palmer Raids were raids, following a series of bombings, conducted under the direction of U.S. Attorney General Mitchell Palmer resulting in the deportation of alleged subversives. See Johnson, *Antiterrorism, supra*, at 846-50.

¹² See *Korematsu v. United States*, 323 U.S. 214 (1944) (upholding internment of persons of Japanese ancestry during World War II); see also A.G. Block, *History for Our Times: Pearl Harbor and the Birth of Modern California*, CAL. J., Nov. 2001, at 8 (analyzing similarities between the government's response to the attack on Pearl Harbor and violence of September 11, 2001). See generally Symposium, *The Long Shadow of Korematsu*, 40 B.C. L. REV. 1, 19 B.C. THIRD WORLD L.J. 1 (1998) (analyzing implications of *Korematsu* decision).

Arabs and Muslims.¹³

In sum, a complex matrix of "otherness" based on race, national origin, religion, and political ideology contributes to the current attacks on the civil rights of Arabs and Muslims in the United States.¹⁴ As has occurred in the past, the ripple effects of national security measures in the end may adversely affect the legal rights of *all* noncitizens, not just Arabs and Muslims.¹⁵ Indeed, as we contend in this article, the civil rights deprivations resulting from the war on terrorism may have

¹³ See Natsu Taylor Saito, *Symbolism Under Siege: Japanese American Redress and the "Racing" of Arab Americans as Terrorists*, 8 ASIAN L.J. 1, 11-26 (2001). See generally MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES* (2d ed. 1994) (analyzing construction of "races" in modern United States).

¹⁴ See Adrien Katherine Wing, *Reno v. American-Arab Anti-Discrimination Committee: A Critical Race Critique*, 21 COLUM. HUM. RTS. L. REV. 561, 571-94 (2000) (analyzing multiple dimensions of identity of Arabs that U.S. government allegedly sought to deport because of their political activities); see also Susan M. Akram, *Scheherezade Meets Kafka: Two Dozen Sordid Tales of Ideological Exclusion*, 14 GEO. IMMIGR. L.J. 51 (1999) (reviewing evidence of discriminatory targeting of Arabs and Muslims by the U.S. government for detention, removal, and secret evidence proceedings, in immigration enforcement).

¹⁵ See *infra* text accompanying notes ____.

long term adverse impacts on the civil rights of *citizens* as well as noncitizens in the United States.

To help us better understand the latest "war on terrorism," Part I of this Article analyzes the general demonization of Arabs and Muslims generally in the United States and how the law has been influenced by, and reinforced, the negative stereotypes. This section reviews the federal government's actions directed at Arabs and Muslims in the name of combating terrorism well before September 11.¹⁶ As Professor Edward Said has observed, terrorism in these times "has displaced Communism as public enemy number one."¹⁷ That has translated into a near exclusive focus on "foreign terrorists," particularly Arabs and Muslims. Part II studies the federal government's zealous investigatory methods after September 11 directed at Muslim and Arab noncitizens, with disregard for their civil rights, and the possible long term impacts of that response.

1. The Demonization of Persons of Arab and Muslim Ancestry

Commentators long have observed how popular perceptions of racial and other minorities influence their treatment under the law.¹⁸ This proves to be true with respect to Arabs and Muslims.

¹⁶ For a summary of the adverse impacts of 1996 anti-terrorism legislation on Arabs and Muslims, see Akram, *supra* note __; Michael J. Whidden, Note, *Unequal Justice: Arabs in America and United States Antiterrorism Legislation*, 69 *FORDHAM L. REV.* 2825 (2001); *infra* text accompanying notes ____.

¹⁷ Edward Said, *The Essential Terrorist*, in *BLAMING THE VICTIMS: SPURIOUS SCHOLARSHIP AND THE PALESTINIAN QUESTION* 149 (Edward Said & Christopher Hitchens ed., 1988); see LAWRENCE HOWARD, *TERRORISM: ROOTS, IMPACT, RESPONSE* 1 (Lawrence Howard ed., 1992) ("The phenomenon of terrorism has become a major concern of the American public. The Reagan administration elevated it to the foremost foreign policy problem of the nation.").

¹⁸ See, e.g., Richard Delgado & Jean Stefancic, *Images of the Outsider in American Law and Culture: Can Free Expression Remedy Systemic Social Ills?*, 77 *CORNELL L. REV.* 1258 (1992); Margaret M. Russell, *Race and the Dominant Gaze: Narratives of Law and Inequality in Popular Film*, 15 *LEG. STUDS. FORUM* 243 (1991); Cynthia Kwei Yung Lee, *Race and Self-Defense: Toward a Normative Conception of Reasonableness*, 81 *MINN. L. REV.* 367 (1996); see also Jody Armour, *Stereotypes and Prejudice: Helping Legal Decisionmakers Break the Prejudice Habit*, 83 *CAL. L. REV.* 733 (1995) (articulating need to recognize impacts of negative

In sum,

stereotypes and prejudice on legal decisionmaking). See generally Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987) (articulating theory of unconscious racism and its impact on discrimination in modern United States).

Arab Americans and Muslims have been "raced" as "terrorists": foreign, disloyal, and imminently threatening. Although Arabs trace their roots to the Middle East and claim many different religious backgrounds, and Muslims come from all over the world and adhere to Islam, these distinctions are blurred and negative images about Arabs or Muslims are often attributed to both. As Ibrahim Hooper of the Council on American-Islamic Relations notes, "The common stereotypes are that we're all Arabs, we're all violent and we're all conducting a holy war."¹⁹

The demonizing of Arabs and Muslims in the United States, accompanied by harsh legal measures directed at them, began well before the tragedy of September 11, 2001.²⁰ It can be traced to years of mythmaking by film and media,²¹ popular stereotypes,²² and a campaign to build political support for U.S. foreign policy in the Middle East.²³ Since at least the 1970s, U.S. laws and

¹⁹ Saito, *supra* note __, at 12 (footnote omitted).

²⁰ See Akram, *supra* note __ (tracing targeting of Arabs and Muslims in immigration enforcement).

²¹ See *infra* text accompanying notes ____.

²² See Edward Said, *A Devil Theory of Islam*, THE NATION, Aug. 12, 1996; see also AHMED YOUSEF & CAROLINE KEEBLE, THE AGENT: THE TRUTH BEHIND THE ANTI-MUSLIM CAMPAIGN IN AMERICA (1999) (tracing impact of anti-Arab, anti-Muslim campaign in United States).

²³ See *infra* text accompanying notes ____.

policies have been founded on the assumption that Arab and Muslim noncitizens have terrorist links and targeted them for special treatment under the law.²⁴ The post-September 11 targeting of Muslims and Arabs is simply the latest chapter in this history.²⁵

2. *The Stereotype of Arabs as Terrorists and Religious Fanatics*

²⁴ See *infra* text accompanying notes ____.

²⁵ See *infra* text accompanying notes ____.

Similar to the animus toward other racial minorities, anti-Arab, anti-Muslim animus can be viewed as part of a dynamic process of "racialization."²⁶ Arabs and Muslims have been racialized by mainstream U.S. society in different ways from other minority groups:²⁷

²⁶ Omi and Winant describe "race" as "an unstable and "de-centered" complex of social meanings constantly being transformed by political struggle." OMI & WINANT, *supra* note ____, at 68; see Ian F. Haney López, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1 (1994).

²⁷ As a historical matter, different racial groups have been racialized in different ways. See generally JUAN F. PEREA ET AL., *RACE AND RACES: CASES AND RESOURCES FOR A DIVERSE AMERICA* (2000) (collecting cases and historical literature on racialization of African Americans, Asian Americans, Latina/os, and Native Americans); TIMOTHY DAVIS ET AL., *A READER ON RACE, CIVIL RIGHTS, AND THE*

The first, and most obvious, is the political violence of Jewish extremist groups, which is correctly viewed as emanating from the Arab-Israeli conflict.... The second is a more nativistic violence which is xenophobic and local in nature.... The third is a form of jingoist hostility and violence usually associated with international crises involving U.S. citizens....²⁸

The law and its enforcement of the law also has contributed to hostility toward Arabs and Muslims in the United States.²⁹

1. *Politically-Motivated Violence and Intimidation*

LAW: A MULTIRACIAL APPROACH (2001) (collecting legal scholarship analyzing different civil rights issues facing various minority communities).

²⁸ Nabeel Abraham, *Anti-Arab Racism and Violence in the United States*, in THE DEVELOPMENT OF ARAB-AMERICAN IDENTITY 180 (Ernest McCarus ed., 1994) [hereinafter Abraham, *Anti-Arab Racism*] ; see also Nabeel Abraham, *The Real Target of the Airport Atrocities*, MIDDLE EAST INTERNATIONAL, Jan. 24, 1986, at 14-16; Nabeel Abraham, *Arab-American Marginality: Mythos and Praxis*, in ARAB-AMERICANS: CONTINUITY AND CHANGE ___ (Baha Abu-Laban & Michael Suleiman eds., 1989); Nabeel Abraham, *The Gulf Crisis and Anti-Arab Racism in America*, in COLLATERAL DAMAGE: THE NEW WORLD ORDER AT HOME AND ABROAD ___ (Cynthia Peters ed., 1991).

²⁹ See *infra* text accompanying notes ___.

The Arab-Israeli conflict contributes to the modern stereotype of Arabs and Muslims as "terrorists." "Jewish extremist groups constitute an undeniable source of anti-Arab hate violence not discussed in conventional accounts of racist violence in the United States."³⁰ According to the Rand Corporation, the Jewish Defense League (JDL), was "one of the most active terrorist groups in the United States" in the 1980s.³¹ Jewish extremist organizations committed "approximately 20 terrorist incidents and numerous other acts of violence, including extortion or threats," about one-fourth of the total terrorist acts in the United States in the 1980s.³²

Hate crime studies, however, generally fail to separately identify Arab ethnic origin in their victim classifications.³³

³⁰ Abraham, *Anti-Arab Racism*, *supra* note __, at 157

³¹ BRUCE HOFFMAN, *TERRORISM IN THE UNITED STATES AND THE POTENTIAL THREAT TO NUCLEAR FACILITIES* 11, 15 (Rand Corp, 1986).

³² John Harris, *Domestic Terrorism in the 1980's*, FBI LAW ENFORCEMENT BULL., Oct. 1987, at 6; *see also* Whidden, *supra* note __ (reviewing data before September 11, 2001, showing that most recent terrorist acts in the United States were not committed by Muslim or Arab groups).

³³ *See, e.g.*, FBI, *Terrorism in the United States*, yearly reports, at <http://www.fbi.gov/publications>.

Others omit Jewish extremist groups from the categories of hate crime perpetrators.³⁴

³⁴ See, e.g., CHRIS LUTZ, *THEY DON'T ALL WEAR SHEETS: A CHRONOLOGY OF RACIST AND FAR RIGHT VIOLENCE 1980-1986* (Center for Democratic Renewal/National Council of Churches, 1987); ANTI-DEFAMATION LEAGUE, *HATE GROUPS IN AMERICA* (1988); ANTI-DEFAMATION LEAGUE, *EXTREMISM ON THE RIGHT: A HANDBOOK* (1988).

The Anti-Defamation League (ADL) of B'nai B'rith engages in efforts to intimidate Arabs, Muslims, and others with similar views on the Middle East conflict, from engaging in political debate. The ADL aggressively seeks to discredit or silence critics of Israel or defenders of Palestinian human rights.³⁵ In 1983, for example, the ADL released a handbook entitled *Pro-Arab Propaganda in America: Vehicles and Voices*,³⁶ which characterizes groups or individuals who criticize Israel or Zionism as "extremists" intent on eradicating Israel or inciting anti-Semitism in America.³⁷ Besides listing of the most prominent scholars on Middle East issues, from Columbia's Edward Said to Harvard's Walid Khalidi, the handbook labeled every humanitarian organization dealing with the Middle East or Palestine as extremist.

The ADL also has sought to silence pro-Muslim and pro-Arab messages. For example, most recently, the Florida ADL unsuccessfully lobbied the Florida Commission on Human Relations to exclude a Muslim representative from a panel at a civil rights conference.³⁸ The American Jewish Committee also sought to

³⁵ See Alfred Lilienthal, *The Changing Role of B'nai B'rith's Anti-Defamation League*, WASH. REPORT ON MIDDLE EAST AFFAIRS, June 1993, 18.

³⁶ See *Pro-Arab Propaganda in America: Vehicles and Voices, A Handbook* (Anti-Defamation League of B'nai B'rith, 1983 ed.), copy on file with the author.

³⁷ See Lilienthal, *supra* note __, at 18.

³⁸ See *ADL and AJC Demand Muslim Panelists Be Excluded*,

exclude Ghazi Khankan, executive director of the New York chapter of the Council on American-Islamic Relations (CAIR), from participating in a public forum on multicultural understanding because he was "anti-Israel."³⁹ Along similar lines, the ADL demanded that CAIR's Northern California director be prevented from testifying about hate crimes before the California Select Committee on Hate Crimes.⁴⁰

WASH. REPORT ON MIDDLE EAST AFFAIRS, Jan./Feb. 2002, at 83.

³⁹ See *id.* at 83.

⁴⁰ See *id.*

Nor have the efforts at silencing opposing political views stopped at these measures. In January 1993, the results of a Federal Bureau of Investigation (FBI) investigation against veteran San Francisco Police Department officer Tom Gerard and an ADL-paid undercover agent Roy Bullock, came to light. Law enforcement authorities uncovered computerized files on thousands of Arab Americans and Arab organizations, as well as many other organizations.⁴¹ The ADL's offices contained identical files, which reflected surveillance of the United Auto Workers, NAACP, Greenpeace, ACLU, Asian Law Caucus, National Lawyers Guild, Rainbow Coalition, Jews for Jesus, and three current or past members of the U.S. Congress (Nancy Pelosi, Ron Dellums, and Pete McCloskey).⁴² The information included confidential files from the FBI and the Central Intelligence Agency. The ADL, Gerard, and Bullock passed the surveillance information on to Israeli and South African intelligence agencies.⁴³ As part of the settlement of lawsuits resulting from the investigation, the ADL has been permanently enjoined from engaging in any further illegal spying against Arab American and other civil rights groups.⁴⁴

□The overall effect of the ADL's practices is to reinforce the image of Arabs as terrorists and security threats, thereby creating a climate of fear, suspicion, and hostility towards Arab-Americans and others who espouse critical views of Israel, possibly leading to death threats and bodily harm.□⁴⁵

⁴¹ See Dennis Opatray & Scott Winokur, *S.F. Spying Case Details Laid Bare*, S.F. EXAMINER, Apr. 11, 1993, at ___.

⁴² See Abdeen Jabara, *The Anti-Defamation League: Civil Rights and Wrongs*, 45 COVERTACTION, Summer 1993, at 28-29.

⁴³ See Dennis Opatray & Scott Winokur, *Israeli Detainee Linked to S.F. Police Spy Case*, S.F. EXAMINER, Feb. 12, 1993, at ___; Jim McGee, *Jewish Group's Tactics Investigated*, WASHINGTON POST, Dec. 19, 1993, at ___.

⁴⁴ See Final Settlement, *American-Arab Anti-Discrimination Comm v. Anti-Defamation League*, Civ. Action No. 93-6358 RAP (Shx) (C.D. Cal.). The class action was brought by the American-Arab Anti-Discrimination Committee, numerous civil rights organizations, and several individuals. See Michael Gillespie, *Los Angeles Court Hands Down Final Judgment in Anti-Defamation League Illegal Surveillance Case*, WASH. REPORT ON MIDDLE EAST AFFAIRS, Dec. 1999, www.washington-report.org; Martin Berg, *ADL Agrees to Stop Spying on Civil Rights Groups*, L.A. DAILY J., Sept. 28, 1999.

⁴⁵ Abraham, *Anti-Arab Racism*, *supra* note ___, at 187.

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

Building on existing stereotypes in U.S. society about Arabs and Muslims, media and film have found a ready audience for dangerous and one-dimensional images. Such depictions contribute to the racialization of Arabs and Muslims and promotes and reinforces unconscious racism toward them.⁴⁶

Jack Shaheen's review of Hollywood films offers convincing evidence of the vilification of Arabs and Muslims by the movie industry.⁴⁷ Hollywood has made hundreds of movies in which Arabs or Muslims are portrayed as terrorists or otherwise placed in a negative, often non-human, light. These movies show Westerners hurling such epithets at Arabs as "assholes", "bastards", "camel-dicks", "pigs", "devil-worshipers", "jackals", "rats", "rag-heads", "towel-heads", "scum-buckets", "sons-of-dogs", "buzzards of the jungle", "sons-of-whores", "sons-of-unnamed goats", and "sons-of-she-camels."⁴⁸ Arab women are portrayed primarily as weak and mute, covered in black, or as scantily clad belly dancers.⁴⁹

The U.S. Department of Defense has cooperated with Hollywood in making more than a dozen films showing U.S. soldiers killing

⁴⁶ See *supra* text accompanying notes ____.

⁴⁷ See JACK G. SHAHEEN, REEL BAD ARABS: HOW HOLLYWOOD VILIFIES A PEOPLE (2001); see also Saito, *supra* note ___, at 12-14 (summarizing how racial stereotypes of Arabs and Muslims in film and popular culture affect law enforcement and private conduct).

⁴⁸ SHAHEEN, *supra* note ___, at 11.

⁴⁹ See *id.* at ____.

Arabs or Muslims.⁵⁰ Audiences fully embrace the demonization in these movies:

⁵⁰ See *id.* at 15.

To my knowledge, no Hollywood WWI, WWII, or Korean War movie has ever shown America's fighting forces slaughtering children. Yet, near the conclusion of [the movie] *Rules of Engagement*, U.S. marines open fire on the Yemenis, shooting 83 men, women, and children. During the scene, viewers rose to their feet, clapped and cheered. Boasts director Friedkin, "I've seen audiences stand up and applaud the film throughout the United States."⁵¹

Nor has Islam, which is inextricably linked with "holy war," male patriarchy, and terrorism, fared any better on the silver screen.⁵² Muslims are shown as hostile invaders, or "lecherous oil sheikhs intent on using nuclear weapons."⁵³ A far-too-common scene shows a mosque with Arabs at prayer, cutting away to showing civilians being gunned down.⁵⁴

⁵¹ *Id.*

⁵² See Leti Volpp, *Gazing Back*, 14 BERKELEY WOMEN'S L.J. 149 (1999) (book review) (examining interaction of race, gender, and culture in stereotypes about Muslim and other noncitizens and impact on the law).

⁵³ See SHAHEEN, *supra* note __, at 9.

⁵⁴ *See id.*

Film portrayals omit Arabs and Muslims as ordinary people, families with social interactions, or outstanding members of communities, including scholars, writers, or scientists.⁵⁵ In modern U.S. film history, few movies have shown Arabs in a favorable light, and only a handful in which Arabs and Muslims had leading roles as protagonists.⁵⁶ Few commentators have criticized the one-sided depiction of Arabs and Muslims.⁵⁷

⁵⁵ Such stereotypical depictions have been a problem for other minority groups as well. See Delgado & Stefancic, *supra* note __; see also Juan F. Perea, *Los Olvidados: On the Making of Invisible People*, 70 N.Y.U. L. REV. 965, 970-72 (1995) (noting invisibility of Latina/os in literature and other prominent places in U.S. culture).

⁵⁶ See SHAHEEN, *supra* note __, at 34-35.

⁵⁷ See *id.* at 31-33.

Stereotypes seen in film affect the conduct of public officials and private citizens. Private citizens and public officials long have directed hate messages and violence, and discriminated against, Arabs and Muslims.⁵⁸ For example, mayoral candidate Michael Guido distributed a campaign brochure in Dearborn, a Detroit suburb, in which he claimed the city's Arab Americans "threaten our neighborhoods, the value of our property and a darned good way of life."⁵⁹ In 1981, Michigan governor William Milliken, said in a newspaper interview that Michigan's economic woes were due to the "damn Arabs."⁶⁰ Such statements by public officials fuel the perception that attacks on this

⁵⁸ See Abraham, *Anti-Arab Racism*, *supra* note __ at 188-92. For detailed reports, see AMERICAN-ARAB ANTI-DISCRIMINATION COMM., 1991 REPORT ON ANTI-ARAB HATE CRIMES: POLITICAL AND HATE VIOLENCE AGAINST ARAB-AMERICANS; AMERICAN-ARAB ANTI-DISCRIMINATION COMM., 1995 REPORT ON ANTI-ARAB RACISM: HATE CRIMES, DISCRIMINATION AND DEFAMATION OF ARAB-AMERICANS; AMERICAN-ARAB ANTI-DISCRIMINATION COMM., 1996-97 REPORT ON HATE CRIMES & DISCRIMINATION AGAINST ARAB-AMERICANS; AMERICAN-ARAB ANTI-DISCRIMINATION COMM., 1998-2000 REPORT ON HATE CRIMES AND DISCRIMINATION AGAINST ARAB-AMERICANS (reports archived at <http://www.adc.org>).

⁵⁹ Let's Talk About City Parks and the Arab Problem, brochure of the Guido Mayoral campaign (cited in Abraham, *Anti-Arab Racism*, *supra* note __, at 191).

⁶⁰ Abraham, *Anti-Arab Racism*, *supra* note __, at 196 (quoting Milliken).

community are acceptable.⁶¹

⁶¹ See *id.* at 195; see also *supra* note ___ (citing reports connecting official policies with anti-Arab violence).

Because popular perceptions about Arabs and Muslims make acceptance of their campaign contributions politically risky, politicians have felt compelled to return financial contributions from Arab Americans. In the 1984 presidential campaign, Walter Mondale returned \$5,000 in contributions made by U.S. citizens of Arab ancestry.⁶² Philadelphia mayoral candidate Wilson Goode returned over \$2,000 in campaign contributions from Arab Americans.⁶³ In his first congressional race, Joe Kennedy returned \$100 to James Abourezk, a former Democratic senator from North Dakota who is Arab American.⁶⁴ Current New York Senator Hillary Clinton returned \$50,000 to Muslim organizations.⁶⁵ Indeed, New York City Mayor Rudolph Guiliani returned ten million dollars given by a Saudi Arabian for the victims of the World Trade Center.⁶⁶

3. *Racism in Times of National Crises*

Times of crisis often are accompanied by hostility toward minorities in the United States. Perpetrators of hate crimes may not accurately differentiate among victims based on religion or ethnic origin, from Pakistanis, Indians, Iranians, and Japanese to Muslims, Sikhs and Christian Arabs.⁶⁷

⁶² See *Mondale Camp Returns Funds to U.S. Arabs*, N.Y. TIMES, Aug. 25, 1984, at sec. 1, p. 28.

⁶³ See Stephen Franklin, *Arab-Americans Fall Victim to Mid-East Kuwaiti Ship Flagging Sparks Fears*, CHI. TRIB., July 12, 1987, at 19.

⁶⁴ See *The Untouchables; Immigration Service Arrests Palestinians*, THE NATION, Mar. 21, 1987.

⁶⁵ See Dean E. Murphy, *Mrs. Clinton Says She Will Return Money Raised by a Muslim Group*, N.Y. TIMES, Oct. 26, 2000, at A1. This phenomenon resembles the controversy during the Clinton administration about receipt of campaign contributions from [foreign] sources, which resulted in the investigation of many Asian American contributors. See FRANK H. WU, *YELLOW: RACE IN AMERICA BEYOND BLACK AND WHITE* 104-16 (2001).

⁶⁶ See Neil MacFarquhar, *Saudi Sheik Regrets Giuliani Turning Down His Donation*, N.Y. TIMES, Oct. 13, 2001, at B4.

⁶⁷ See *supra* text accompanying note ___ (discussing murder of Sikh as act of vengeance against Arabs and Muslims for September 11 terrorism).

[W]hile they are closely associated with Islam, only twelve percent of the United States— four to five million Muslims are Arab and those Arab Muslims comprise a minority of the Arab American community. American society, however, identifies Arabs and Islam as one and the same. Coupled with this presumption is the prevailing misrepresentation of Islam as bent on a holy war against the United States. While extremists may invoke the Koran to justify terrorism, the —vast majority— of Islamic worshipers are —decent, law-abiding, productive citizens.—⁶⁸

⁶⁸ Whidden, *supra* note __, at 2850 (footnotes omitted).

Terrorist acts by small groups of Arabs and Muslims frequently are followed by generalized hostility toward Arab and Muslim communities. In 1985, Lebanese Shi'ite gunmen highjacked a TWA Flight 847 to Beirut, horribly beat to death a young American on the plane, and held the remaining passengers for over two weeks.⁶⁹ Violent attacks against persons of Arab and Muslim origin around the United States followed.⁷⁰ Islamic centers and Arab American organizations were vandalized and threatened. A Houston mosque was firebombed. A bomb placed in the American-Arab Anti-Discrimination Committee office in Boston exploded, severely injuring two policemen.⁷¹ Later, after terrorists

⁶⁹ See *Stalemate Continues; Hijackers Let Television Reporters Interview Jet Pilot*, THE RECORD, June 19, 1985, at 1.

⁷⁰ See Abraham, *Anti-Arab Racism*, *supra* note ___, at 161-62; see also Bob Baker, *Anti-Arab Violence Represents 17% of Racial, Religious Attacks in 1985*, L.A. TIMES, Mar. 1, 1986, at part 1, p. 29 (discussing hate crime reports).

⁷¹ See Abraham, *Anti-Arab Racism*, *supra* note ___, at 162.

hijacked the Achille Lauro cruise liner and murdered Leon Klinghoffer, a wave of generalized anti-Arab violence in the United States ensued, including a bombing of the Los Angeles American-Arab Anti-Discrimination Committee office that killed its director.⁷²

⁷² The day before his murder, the director, Alex Odeh, had appeared on a television interview in which he condemned terrorist acts, but said he believed Yasser Arafat was not behind the event. At the time of Odeh's murder, Jewish Defense League head Irv Rubin stated to reporters: "No Jew or American should shed one tear for the destruction of a P.L.O. front in Santa Ana or anywhere else in the world." *Bomb Kills Leader of U.S. Arab Group*, N.Y. TIMES, Oct. 12, 1985, at sec. 1, p.5. Rubin later was indicted for conspiring to bomb a Los Angeles mosque and the office of California Congressman Darrell Issa, a person of Lebanese ancestry. See David Rosenzweig, *2 JDL Leaders Are Indicted by U.S. Grand Jury*, L.A. TIMES, Jan. 11, 2002, at part 2, p. 3; see also Delinda C. Hanley, *Freeze on Jewish Defense League Assets Called for After JDL Bomb Plot Foiled*, WASH. REP. ON MIDDLE EAST AFFAIRS, Jan./Feb. 2002, at 16 (discussing Jewish Defense League violence against Arabs and Muslims).

In 1986, in apparent response to the Reagan Administration's "war on terrorism" directed at Libya,⁷³ another episode of anti-Arab hysteria broke out. The same night of the United States raid on Libya, the American-Arab Anti-Discrimination Committee national office in Washington received threats. In addition, the Detroit American-Arab Anti-Discrimination Committee office, the Dearborn Arab community center, and the Dearborn Arab-American newspaper all received bomb threats.⁷⁴ Beatings and other violent attacks on Arabs were reported across the United States.⁷⁵ The home of a Palestinian immigrant family was broken into, a smoke bomb thrown inside, and the words "Go Back to Libya" scrawled on the walls.⁷⁶

The Gulf War intensified anti-Arab hostility in the United States. Before the invasion of Kuwait in 1990, the American-Arab Anti-Discrimination Committee had reported five anti-Arab hate crimes that year. Immediately after the invasion, from August 2, 1990 until February 2, 1991, it reported 86 incidents.⁷⁷ When U.S. intervention commenced in January 1991, Arab and Muslim community organizations were bombed, vandalized, and subject to harassment, while Arab-owned businesses were vandalized or

⁷³ See *infra* text accompanying notes __.

⁷⁴ Abraham, *Anti-Arab Racism*, *supra* note __, at 171, and sources cited.

⁷⁵ See *supra* note __ (citing reports).

⁷⁶ See Steve Lerner, *Terror Against Arabs in America*, NEW REPUBLIC, July 28, 1986, at 24.

⁷⁷ See *supra* note __ (citing reports).

destroyed.⁷⁸

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

⁷⁸ See Abraham, *Anti-Arab Racism*, *supra* note __, at 204.

Institutional racism also has resulted in the targeting of Arabs and Muslims.⁷⁹ The Nixon Administration's "Operation Boulder" was the first concerted U.S. government effort to target Arabs in the United States for special investigation and discourage their political activism on Middle Eastern issues.⁸⁰ Ostensibly designed to confront the threat posed by terrorists who took hostages and murdered athletes at the 1972 Munich Olympics, the President's directives authorized the FBI to investigate people of "Arabic-speaking origin" to determine their

⁷⁹ See generally Ian F. Haney-Lopez, *Institutional Racism: Judicial Conduct and a New Theory of Racial Discrimination*, 109 YALE L.J. 1717 (2000) (articulating theory of institutional racism). Law and its enforcement also contributes to the racialization of Arabs and Muslims. See *supra* text accompanying notes ___ (discussing racialization process).

⁸⁰ See PUB. PAPERS OF THE PRESIDENT ___ (1974). For discussion of the impacts of Operation Boulder on Arab Americans, see *The Civil Rights of Arab-Americans*, Information Paper No. 10, Association of Arab-American University Graduates (M. Cherif Bassiouni ed., Jan., 1974).

potential relationship with [terrorist] activities related to the Arab-Israeli conflict.⁸¹ The FBI investigated and interrogated noncitizens and citizens of Arab origin,⁸² and the FBI and Justice Department admittedly wiretapped prominent Detroit lawyer Abdeen Jabara, then-President of the Association of Arab-American University Graduates.⁸³

⁸¹ See N.Y. TIMES, Oct. 5, 1972; *Israel Fighting Terror with Terror*, WASH. POST, Oct. 15, 1972; Lawrence Mosher, *Arabs Taste U.S. Terror*, NAT. OBSERVER, Nov. 18, 1972; CHICAGO SUN-TIMES, July 9, 1973; NEWSWEEK, June 18, 1973, at 32. At that time, the only terrorist acts in the U.S. related to the Arab-Israeli conflict were committed by the JDL. See Hagopian, *Minority Rights in a Nation-State: The Nixon Administration's Campaign Against Arab-Americans*, J. PALESTINE STUDS., Autumn-Winter, 1975-76.

⁸² See Hagopian, *supra* note ____, at 102.

⁸³ See Associated Press, May 22, 1974.

Later in the 1970s, President Carter took numerous steps against Iranians and Iran in response to the crisis in which U.S. citizens were held hostage in Teheran.⁸⁴ In the 1980s, the Reagan Administration targeted Libya in the name of combating terrorism. President Reagan in 1986 announced that the U.S. government had "irrefutable" evidence that Libyan leader Muammar Qaddafi was responsible for terrorist attacks at the Rome and Vienna airports.⁸⁵ The U.S. navy later that year shot down two Libyan planes off the coast of Libya. President Reagan announced that "we have the evidence" that Qaddafi was sending hit teams to assassinate Reagan. No evidence has ever been presented that Qaddafi was behind the terrorist attacks in Rome and Vienna or that any Libyan "hit squads" had been sent to the United States.⁸⁶

⁸⁴ See *infra* text accompanying notes ____.

⁸⁵ See NOAM CHOMSKY, *PIRATES & EMPERORS: INTERNATIONAL TERRORISM IN THE REAL WORLD* 138-40 (1986).

⁸⁶ A faction of the Palestinian Liberation Organization (PLO) that had broken with Yasser Arafat, was ultimately found to be responsible for the attacks on the Rome and Vienna airports. "[T]here [was] not the slightest evidence to implicate Libya." CHOMSKY, *supra* note __, at 5-36. Moreover, FBI assistant director Oliver Revell later admitted that claims that Qaddafi had sent assassins to the United States was "a complete fabrication." WASH. TIMES, Mar. 27, 1986.

Nevertheless, the United States bombed Libya.⁸⁷ In addition, vandalism and violence against United States residents of Arab or Middle Eastern origin and their community centers, mosques, businesses, and homes followed the public announcements.⁸⁸

⁸⁷ See CHOMSKY, *supra* note __, at 149-50.

⁸⁸ See Abraham, *Anti-Arab Racism*, *supra* note __, 193-94.

In the 1990s, the U.S. government's "war on terrorism" focused on Iraq and its leader, Saddam Hussein. Characterizing Hussein as "the new Hitler of the Middle East," the Bush administration accused Iraqi forces of atrocities against Kuwaitis, many that later proved to be fabricated.⁸⁹ The FBI also initiated a nationwide interrogation effort against Arab and Muslim community leaders, activists, and anti-war demonstrators.⁹⁰ Additional policy measures put in place were nationwide fingerprinting of all residents and immigrants in the United States of Arab origin, and the institution of a Federal Aviation Administration system of airline profiling of persons from the Arab world.⁹¹ Private harassment and violence against

⁸⁹ See Noam Chomsky, *The Gulf War, in THE REAL STORY SERIES: WHAT UNCLE SAM REALLY WANTS* 60-68 (1997).

⁹⁰ See *Domestic Repression and the Persian Gulf War*, MSN NEWS, vol. 7, issue 1, special ed., 1991.

⁹¹ See Akram, *supra* note __, at 52-53; Sharon LaFraniere, *FBI Starts Interviewing Arab-American Leaders*, WASH. POST., Jan. 9, 1991, at A14; Emily Sachar, *FBI Grills NY Arab-Americans*, NEWSDAY, Jan. 29, 1991, at 6; Lisa Belkin, *For Many Arab-Americans, FBI Scrutiny Renews Fears*, N.Y. TIMES, Jan. 12, 1991; see also AMERICAN-ARAB ANTI-DISCRIMINATION COMM., 1999-2000 REPORT, *supra* note __ (reviewing race profiling of Arabs and Muslims on airplanes); Whidden, *supra* note __, at 2879-2880 (same).

the Arab and Muslim communities followed.⁹²

As this discussion suggests, the federal government's action against Arab and Muslim groups generally has been followed by indiscriminate threats and violence against Arabs and Muslims in the United States. This frightening pattern has continued after the events of September 11.⁹³

⁹² See *supra* note __ (citing reports).

⁹³ See *infra* text accompanying notes ____.

Foreign policy has played a large role behind immigration measures directed at Arabs and Muslims in the United States. The Immigration and Naturalization Service (INS) sought to deport noncitizens of Palestinian ancestry,⁹⁴ at the same time that the federal government attempted to shut down Palestine Liberation Organization (PLO) representative offices in the United States⁹⁵ and at the United Nations.⁹⁶ In the 1980s, President Reagan issued a secret National Security Decision Directive that authorized the creation of the Alien Border Control Committee designed to prevent "terrorists" from entering or remaining in the United States. The Committee considered proposals to implement a "registry and processing procedure" to collect information on noncitizens in the United States. Under one proposal, intelligence agencies would provide the INS with "names, nationalities and other identifying data and evidence relating to *alien undesirables and suspected terrorists* believed to be in ... the U.S."⁹⁷ The Alien Border Control Committee also considered an INS-created strategy called "Alien Terrorists and Undesirables: A Contingency Plan,"⁹⁸ which called for use of ideological exclusion grounds in the immigration laws against

⁹⁴ See *supra* text accompanying notes ____.

⁹⁵ In 1987, Congress enacted an Anti-Terrorism Act which mandated the closure of the Palestine Information Office (PIO) in Washington, the official institution representing the PLO in the United States and the PLO Observer Mission at the United Nations. Constitutional challenges to the Anti-Terrorism Act failed. See *Palestine Information Office v. Schultz*, 853 F.2d 932 (D.C. Cir. 1988); *Mendelsohn v. Meese*, 695 F. Supp. 1474 (S.D.N.Y. 1988).

⁹⁶ See *United States v. Palestine Liberation Organization*, 695 F. Supp. 1456 (S.D.N.Y. 1988).

⁹⁷ Legislation to Implement the Recommendations of the Comm'n. on Wartime Relocation and Internment of Civilians: Hearings on H.R. 442 before the Subcomm. on Admin. Law and Gov't Relations of the House Comm. On the Judiciary, 100th Cong. 67 (1987) (emphasis added).

⁹⁸ See MEMORANDUM FROM INVESTIGATIONS DIV., IMMIGRATION & NATURALIZATION SERV., ALIEN BORDER CONTROL (ABC) GROUP IV "CONTINGENCY PLANS (Nov. 18, 1986) (with attachments including INS, Alien Terrorists and Undesirables: A Contingency Plan (1986)) [hereinafter INS CONTINGENCY PLAN], on file with author.

noncitizens only from Arab countries and Iran.⁹⁹

2. Efforts to Stifle Political Dissent: The Case of the LA
8

⁹⁹ See *infra* text accompanying notes __ (discussing ideological exclusion grounds). Nationals of Algeria, Libya, Tunisia, Iran, Jordan, Syria, Morocco, and Lebanon were targeted under the plan. See INS CONTINGENCY PLAN, *supra* note __, at 16.

Critics long have pointed out that the United States has discriminated against Arabs and Muslims in applying the terrorist exclusion provisions of the Immigration & Nationality Act (INA).¹⁰⁰ Arabs, particularly Palestinians, are the primary groups subject to many of the terrorism provisions,¹⁰¹ as well as other measures taken in the war on terrorism. During the Gulf War crisis, for example, government officials fingerprinted and photographed all entrants of Arab origin [] and only Arabs [] regardless of past activities or any evidence of terrorist

¹⁰⁰ See, e.g., John A. Scanlan, *American-Arab [] Getting the Balance Wrong [] Again!*, 52 ADMIN. L. REV. 347, 363-68 (2000) (analyzing how U.S. government employed ideological exclusions against Arabs and Muslims); David Cole, *Guilt By Association: It []s Alive and Well at the INS*, THE NATION, Feb. 15, 1993 (stating that, at the time, the LA 8 were the only noncitizens that the INS had ever sought to remove under terrorism provisions of immigration laws).

¹⁰¹ See Akram, *supra* note __; Cole, *supra* note __; Whidden, *supra* note __.

sympathies.¹⁰²

¹⁰² See Sharon LaFraniere & George Lardner, *U.S. Set to Photograph, Fingerprint all New Iraqi and Kuwaiti Visitors*, WASH. POST, Jan. 11, 1991, at A23. The Department of Justice ordered all immigrants with Iraqi or Kuwaiti passports to be fingerprinted and photographed. The FBI also interviewed 200 Arab-American business and community leaders under the guise of uncovering "terrorist" affiliations. For plans to resurrect these procedures, see *Fingerprinting of Nonimmigrants Designated by the Attorney General*, 58 Fed. Reg. 68, 024 (1993) (Dec. 23, 1993). Such targeted measures, although discriminatory, are difficult to challenge legally. See *infra* text accompanying notes __.

INS decisions to exclude and deport individuals for their speech or affiliation were based on provisions in the INA allowing exclusion and deportation on ideological grounds.¹⁰³ In 1977, Congress enacted the McGovern Amendment that permitted the Attorney General to waive the exclusion of any noncitizen that was based on affiliation with an organization that the U.S. government designated as "terrorist."¹⁰⁴ However, by a variety of means, consular officers could continue to base exclusion decisions on ideology.¹⁰⁵ In 1979, Congress created a single

¹⁰³ See INA § 212(a)(27)-(29), 8 U.S.C. § 1182(a)(27)-(29) (1952), as amended 22 U.S.C. § 2691; see, e.g., *Kleindienst v. Mandel*, 408 U.S. 753 (1972); *Allende v. Schultz*, 845 F.2d 1111 (1st Cir. 1988); *Harvard Law School Forum v. Schultz*, 633 F. Supp. 525 (D. Mass. 1986); *Abourezk v. Reagan*, 785 F.2d 1043 (D.C. Cir. 1986), *aff'd by equally divided Court*, 484 U.S. 1 (1987). The ideological exclusion provisions had been the subject of sustained academic criticism as being inconsistent with the First Amendment. See, e.g., John A. Scanlan, *Aliens in the Marketplace of Ideas: The Government, the Academy, and the McCarren-Walter Act*, 66 TEX. L. REV. 1481 (1988); Steven R. Shapiro, *Ideological Exclusions: Closing the Border to Political Dissidents*, 100 HARV. L. REV. 930 (1987); Philip Monrad, Comment, *Ideological Exclusion, Plenary Power, and the PLO*, 77 CAL. R. REV. 831 (1989). According to INS data, over 8,000 noncitizens were denied entry into the United States because of their political beliefs or associations between 1952 and 1984. See Dave Martella, Comment, *Defending the Land of the Free and the Home of the Fearful: The Use of Classified Information to Deport Suspected Terrorists*, 7 AM. U. J. INT'L L. & POL'Y 951, 962-63 (1992) (citing INS estimates).

¹⁰⁴ 22 U.S.C. § 2691 (1988).

¹⁰⁵ The McGovern Amendment did not eliminate ideological exclusion for two reasons. First, the waiver only applied to exclusion under INA § 212(a)(28), which permitted consular officers to exclude noncitizens under the INA § 212(a)(27) ideological exclusion grounds. Second, the waivers were discretionary and unlikely to be approved without the recommendation of the State Department. See *id.*; Keisha A. Gary, *Congressional Proposals to Revive Guilt by Association: An Ineffective Plan to Stop Terrorism*, 8 GEO. IMMIGR. L.J. 227, 237 (1994). A later version of the McGovern Amendment was codified as 22 U.S.C. § 2691 (1988) by the Foreign Relations Authorization Act, Pub. L. No. 100-204, § 901, 101 Stat. 1331, 1399-1400

exception to the McGovern Amendment that permitted exclusion of officials or representatives of the PLO.¹⁰⁶

(1987). This version, however, kept the PLO exception. This temporary provision later was made permanent, see Foreign Relations Authorization Act, Pub. L. No. 101-246, § 128(1), 104 Stat. 15, 30 (1990), before removal of most of the ideological exclusion provisions by the Immigration Act of 1990, Pub. L. No. 101-649, § 601(a), 104 Stat. 4978, 5071 (1990).

¹⁰⁶ The exception stated that the waiver is inapplicable to any [officials [or] representatives ... of the PLO.] *Id.*

The years of federal government efforts to remove the "LA 8" shows the extremes to which it will resort in order to remove political dissidents from the country.¹⁰⁷ The case began before dawn on January 26, 1987, when FBI, INS and Los Angeles police officers descended on the Los Angeles home of Khader Hamide, a U.S. lawful permanent resident, and his Kenyan-born wife Julie Mungai.¹⁰⁸ The couple were handcuffed, told they were being arrested for "terrorism," and taken into custody while police blocked the street and an FBI helicopter hovered overhead.¹⁰⁹ Six

¹⁰⁷ See Johnson, *Antiterrorism*, *supra* note __, at 865-69. For consideration of this case from different vantage points, see William C. Banks, *The "L.A. Eight" and Investigation of Terrorist Threats in the United States*, 31 COLUM. HUM. RTS. L. REV. 479 (2000); Berta Esperanza Hernandez-Truyol, *Nativism, Terrorism, and Human Rights -- The Global Wrongs of Reno v. American-Arab Anti-Discrimination Committee*, 31 COLUM. HUM. RTS. L. REV. 521 (2000); Hiroshi Motomura, *Judicial Review in Immigration Cases After AADC: Lessons From Civil Procedure*, 14 GEO. IMMIGR. L.J. 385 (2000); Gerald L. Neuman, *Terrorism, Selective Deportation and the First Amendment after Reno v. AADC*, 14 GEO. IMMIGR. L.J. 313 (2000); Wing, *supra* note __.

¹⁰⁸ The published decisions in the case include *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471 (1999); *American-Arab Anti-Discrimination Comm. v. Reno*, 170 F.3d 1264 (9th Cir. 1999); *American-Arab Anti-Discrimination Comm. v. Reno*, 132 F.3d 531 (9th Cir. 1997); *American-Arab Anti-Discrimination Comm. v. Reno*, 119 F.3d 1367 (9th Cir. 1997); *American-Arab Anti-Discrimination Comm. v. Reno*, 70 F.3d 1045 (9th Cir. 1995); *American-Arab Anti-Discrimination Comm. v. Thornburgh*, 970 F.2d 501 (9th Cir. 1991); *American-Arab Anti-Discrimination Comm. v. Nelson*, 940 F.2d 445 (9th Cir. 1991); *American-Arab Anti-Discrimination Comm. v. Meese* 714 F. Supp. 1060 (C.D. Cal. 1989).

¹⁰⁹ For detailed descriptions of the arrests, detentions and proceedings against the LA 8, see Akram, *supra* note __, at 73; William Overend & Ronald L. Soble, *7 Tied to PLO Terrorist Wing Seized by INS*, L.A. TIMES, Jan. 27, 1987; see also JAMES DEMPSEY & DAVID COLE, *TERRORISM AND THE CONSTITUTION: SACRIFICING CIVIL LIBERTIES IN THE NAME OF NATIONAL SECURITY* __ (1999) (discussing LA 8 case); Susan M. Akram, *Historic Court Decision Protects First Amendment Rights of Dissident Aliens*, 18 IMMIGRATION NEWSLETTER (Nat'l Immigration Project of Nat'l Lawyers Guild, spring 1989) (same).

other individuals were arrested that morning as part of the sweep.

Information provided by the ADL triggered the FBI investigation of the Los Angeles 8. *See supra* text accompanying notes ____ (discussing ADL's surveillance efforts).

The INS sought to remove the LA 8 from the United States based on political ideology. Both the director of the FBI and the regional counsel of the INS testified to Congress that the sole basis of the government's efforts to deport the LA 8 was their political affiliations. In the words of FBI director William Webster, "[a]ll of them were arrested because they are alleged to be members of a world-wide Communist organization which under the [INA] makes them eligible for deportation If these individuals had been United States citizens, there would not have been a basis for their arrest."¹¹⁰ The evidence underlying the government's charges amounted to a claim that the LA 8 read or distributed pro-Palestinian literature linked to the Popular Front for the Liberation of Palestine (PFLP). The district court found that the ideological exclusion grounds violated the First Amendment.¹¹¹

¹¹⁰ *Hearings Before the Senate Select Committee on Intelligence on Nomination of William Webster to be Director of Central Intelligence*, 100th Cong. 94-95 (1987) (testimony of FBI Director William Webster); see DEMPSEY & COLE, *supra* note ___, at 35.

¹¹¹ See *American-Arab Anti-Discrimination Comm. v. Meese* 714 F. Supp. 1060 (C.D. Cal. 1989).

In 1990 while the LA 8 case was pending, Congress repealed the ideological exclusions from the immigration laws.¹¹² The INS then instituted new proceedings against the LA 8 based on nonideological grounds, including the addition of new terrorism charges. The INA permits removal of noncitizens who have engaged in "terrorist activity," which is defined as committing "in an individual capacity or as a member of an organization, an act of terrorist activity or an act which the actor knows or reasonably should know, affords material support to any individual, organization or government in conducting a terrorist activity at any time"¹¹³ This broad language authorizes the INS to deport or exclude an individual who has donated money to an organization for its legal, social, or charitable activities if any arm of that organization also has engaged in terrorism.¹¹⁴ The thrust of the INS case was based on the LA 8's affiliation with the PFLP, a PLO-splinter organization, which the district court found was engaged in a wide range of lawful activities, from providing education, health care, social services and day care, to cultural and political activities. Because this provision had never previously been used to seek to deport anyone from the United States, the LA 8 challenged the selective

¹¹² See Immigration Act of 1990, Pub. L. No. 101-649 § 601(a), 101 Stat. 4978, 5071 (1990), amending Immigration & Nationality Act (INA) § 212(a), 8 U.S.C. § 1182(a).

¹¹³ See INA § 212(a)(4)(B)(iii), 8 U.S.C. § 1182(a)(4)(B)(iii) (1990).

¹¹⁴ See *infra* text accompanying notes ___ (discussing breadth of definition of "terrorist activity" in immigration laws). The United States Code includes a number of definitions of "terrorist activity" for law enforcement, surveillance, and other purposes. The INA broadly defines "terrorist activity" for purposes of the immigration laws. See, e.g., INA § 212(a)(3)(B)(ii), 8 U.S.C. § 1182(a)(3)(B)(ii) (listing terrorist activities without intent or political motivation requirements). The USA PATRIOT Act expands the definition of "terrorist activity." See *infra* text accompanying notes ___. For criticism of the definition of "terrorist activity" in the INA, see Neuman, *supra* note __; Susan Dente Ross, *In the Shadow of Terror: The Illusive First Amendment Rights of Aliens*, 6 COMM. L. & POL'Y 76 (2001); Nadine Strossen, *When and How: Criticisms of Federal Counter-Terrorism Laws*, 20 HARV. J.L. & PUB. POL'Y 51 (1997); Whidden, *supra* note ___.

enforcement of the immigration laws in retaliation for their exercise of protected First Amendment rights.¹¹⁵ In the end, the Supreme Court held that noncitizens unlawfully in the United States have no general constitutional right to assert selective enforcement as a defense to deportation.¹¹⁶ The Court ruled that the 1996 amendments to the immigration laws limiting judicial review, barred judicial review of their claim.¹¹⁷

The INS continues to seek to deport the LA 8. The INS has opposed their applications for relief from removal of two of the LA 8 on the basis of secret evidence.¹¹⁸

3. The Secret Evidence Cases

¹¹⁵ See *supra* note ___ (citing authorities). The FBI had conducted a three and a half year investigation against the LA 8 before turning the case over to the INS for lack of evidence for a criminal prosecution. See *DEMPSEY & COLE, supra* note ___, at 37-38.

¹¹⁶ See *Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471 (1999); *infra* text accompanying notes ___ (discussing implications of this Supreme Court decision for challenges of selective enforcement).

¹¹⁷ See *Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. at 471. In reaching that conclusion, the Court relied on INA § 242(g), 8 U.S.C. § 1252(g), which provides:

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

¹¹⁸ Following the Court's decision, the case was remanded to the immigration court. In 2001, the court dismissed the primary removal charges on the grounds that they were not meant to apply retroactively to acts of participating in demonstrations, distributing newspapers, and fund-raising for humanitarian projects for a group classified by the U.S. government as a "terrorist" organization committed before Congress enacted the removal grounds. See *STEPHEN H. LEGOMSKY, IMMIGRATION AND REFUGEE LAW AND POLICY* 86 (3d ed. 2002).

The INS continues to seek to deport the INS has selectively targeted Arabs and Muslims through the use of secret evidence -- evidence that it refuses to disclose to the noncitizen or his counsel -- to charge, detain, and deny bond in removal proceedings. Until recent years, the use of secret evidence by law enforcement agencies and INS has been extremely rare.¹¹⁹ The federal government brought over thirty secret evidence cases between 1987 and September 11, 2001, with two dozen being litigated between 1996 and 2001.¹²⁰

¹¹⁹ See *Jay v. Boyd*, 351 U.S. 345 (1956); *Jay v. Boyd*, 350 U.S. 931 (1956); *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950); *United States ex rel. Mezei*, 345 U.S. 206 (1953).

¹²⁰ See Akram, *supra* note __, at 52 n.4.

In *Rafeedie v. INS*,¹²¹ Fouad Rafeedie, a 20-year lawful permanent resident of Palestinian origin, was arrested on returning to the United States after a two week trip to a conference in Syria sponsored by the Palestine Youth Organization. He was placed in summary exclusion proceedings — the first time such proceedings had ever been used against a lawful permanent resident — based on ideological exclusion grounds.¹²² Seeking to exclude Rafeedie without a hearing and without revealing its evidence to him, the INS claimed that disclosing its evidence against Rafeedie would be —prejudicial to the public interest, or endanger the welfare, safety, or security of the United States.—¹²³ The court of appeals rejected the INS— positions and mandated application of the normal due process analysis in deciding whether the federal government—s national security interests outweighed Rafeedie—s First Amendment rights.¹²⁴ The court stated that the only way Rafeedie could prevail would be —if he can rebut the undisclosed evidence against him It is difficult to imagine how even someone innocent of all wrongdoing could meet such a burden.—¹²⁵

¹²¹ See *Rafeedie v. INS*, 688 F. Supp. 729 (D.D.C. 1988), *aff—d in part, rev—d in part, remanded*, 880 F.2d 506 (D.C. Cir. 1989).

¹²² See INA — 212(a) (27–29), 8 U.S.C. — 1182(a) (27–29); *supra* text accompanying notes ___ (discussing ideological exclusions).

¹²³ *Rafeedie v. INS*, 688 F. Supp. at 734.

¹²⁴ See *id.*

¹²⁵ *Rafeedie*, 880 F.2d at 516.

Following repeal of the ideological exclusions in 1990,¹²⁶ the INS used secret evidence to detain and deport Arabs and Muslims. In response to the 1993 Oklahoma City bombings, Congress enacted anti-terrorism legislation that has facilitated the targeting of Muslim and Arab noncitizens. In 1996, Congress passed the Antiterrorism and Effective Death Penalty Act (AEDPA)¹²⁷ and the Illegal Immigration Reform and Individual Responsibility Act (IIRIRA),¹²⁸ which brought about radical changes to the immigration laws,¹²⁹ and effectively allowed for ideological exclusion and removal.¹³⁰

Bolstered by the 1996 reforms curtailing the rights of noncitizens, the INS initiated approximately two dozen deportation proceedings on the basis of secret evidence, claiming that it would compromise the security of the United States.¹³¹ Although

¹²⁶ See *supra* text accompanying notes __.

¹²⁷ Pub. L. No. 104-132, 110 Stat. 1214 (1996) [hereinafter AEDPA]; see Whidden, *supra* note __, at 2841-83 (summarizing genesis of AEDPA and analyzing its impact on Arabs and Muslims).

¹²⁸ Pub. L. No. 104-208, Title III, 110 Stat. 3009 (1996).

¹²⁹ See *infra* text accompanying notes __.

¹³⁰ See *infra* note __ (citing authorities on breadth of the [terrorist activity] provisions of the INA). For discussion of the use of these provisions to target Arabs and Muslims, see Scanlan, *supra* note __; Ross, *supra* note __.

¹³¹ See Akram, *supra* note __ 52 n.4 (listing noncitizens involved in post-1996 secret evidence cases and noting that all known cases involved Arabs or Muslims); see also Martin Schwartz, Niels Frenzen, & Mayra L. Calo, *Recent Developments in the INS's Use of Secret Evidence Against Aliens*, in 2001-02 IMMIGRATION & NATURALIZATION HANDBOOK 300 (2001) (discussing secret evidence cases). Many important decisions in these cases were made by the immigration courts, which do not publish their decisions. Citations to the cases below are from immigration court decisions and related materials. Court documents in the cases discussed below are on file with Kit Gage, National coordinator of the National Coalition to Protect Political Freedom, 3321 12th Street, N.E., Washington, D.C. 20017 cases).

denying that it selectively uses secret evidence against Arabs and Muslims, the INS has been unable to point to a single secret evidence case not involving an Arab or Muslim noncitizen.¹³²

¹³² See Testimony of INS General Counsel Paul Virtue on Oct. 8, 1998, *The National Security Considerations Involved in Asylum Applications: Hearings Before the Senate Judiciary Committee on Technology, Terrorism and Government Information*, 105th Cong., at 5-14 (FDCH Political Transcripts).

AEDPA established a special procedure for detaining and deporting "alien terrorists" that permitted the use of secret evidence with certain procedural safeguards.¹³³ The INS, however, has not yet used the new procedures.¹³⁴ The INS instead has relied on pre-existing regulations authorizing the use of secret evidence in the immigration courts.¹³⁵ By so doing, the INS avoids conforming the procedural safeguards in AEDPA, such as producing an unclassified summary of the secret evidence to the alien, having a federal judge assess the constitutionality of the use of secret evidence, and charging the noncitizen under a substantive "terrorism" provision of law, which would require the

¹³³ Title IV of AEDPA addresses suspected "alien terrorists." AEDPA § 401 established new procedures for deciding the admissibility or removability of suspected terrorists. It defines an "alien terrorist" as "any alien who has engaged, is engaged, or at any time after admission engages in any terrorist activity," including an act that "affords material support to [any person or group] . . . conducting a terrorist activity." AEDPA § 401 (codified at 8 U.S.C. §§ 1531(1), 1227(a)(4)(B), 1182(a)(3)(B)(iii)). AEDPA § 302 authorizes the Secretary of State to designate a "foreign terrorist organization." A "foreign terrorist organization" is (a) a foreign organization; (b) engaging in terrorist activity (as defined under 8 U.S.C. § 1182(a)(3)(B)); (c) that threatens the security of the U.S. or its citizens. AEDPA § 302 (codified at 8 U.S.C. § 1189(a)(1) (Supp. V 2000)).

Section 401 created a special removal court for "alien terrorists" that gives the special court the power to "examine, ex parte and in camera, any evidence for which the Attorney General determines that public disclosure would pose a risk to the national security of the United States or to the security of any individual because it would disclose classified information." AEDPA § 401 (codified at 8 U.S.C. § 1534(e)(3)(A)); see also Michael Scaperlanda, *Are We That Far Gone?: Due Process and Secret Deportation Proceedings*, 7 STAN. L. & POL'Y REV. 23 (1996) (analyzing proposed secret evidence proceedings in AEDPA).

¹³⁴ At the time of the publication of this article, the special terrorist removal court has never been used. See 78 INTERPRETER RELEASES 363 (Feb. 12, 2001).

¹³⁵ See 8 C.F.R. § 240.33(c)(4).

government to sustain its burden of proof.¹³⁶

The secret evidence cases pursued by the INS reflect the selective targeting of Arabs and Muslims. The cases of the "Iraqi 7" arose out of the U.S. government's resettlement of 6,000 Iraqi Kurds after the Gulf War. Brought as refugees for resettlement to the United States,¹³⁷ the Iraqi men had been recruited by the U.S. government to overthrow Saddam Hussein, and were later airlifted out of Iraq with their families when the attempt failed.¹³⁸ The "Iraqi 7" were placed in exclusion proceedings for entering without valid visas, and then held in detention as "security risks ... against the United States."¹³⁹ Claiming that the evidence supporting the security risk allegations was classified, the INS would not reveal it.¹⁴⁰ The immigration court reviewed the secret evidence and ordered the

¹³⁶ See Akram, *supra* note __, at 72 (reviewing AEDPA's procedural protections in terrorist court).

¹³⁷ For a summary of the Iraqi 7 cases by the counsel for the noncitizens, see Neils Frenzen, *National Security and Procedural Fairness: Secret Evidence and the Immigration Laws*, 76 INTERPRETER RELEASES 1677 (Nov. 22, 1999).

¹³⁸ See *id.*

¹³⁹ See *id.*

¹⁴⁰ See *id.*

men excluded.¹⁴¹

¹⁴¹ See *id.*

James Woolsey, the former Director of the CIA who directed the U.S. government's efforts to organize the overthrow of Saddam Hussein, was one of the lawyers representing the Iraqis. The government denied him access to the secret evidence, claiming that it did not trust him to keep the information confidential.¹⁴²

The INS ultimately released 500 pages of the evidence. Besides concluding that hundreds of pages had been erroneously classified, Woolsey found that the evidence was based on serious errors in Arabic-English translations, ethnic and religious stereotyping by the FBI, and reliance on unreliable information, including rumors and innuendo. Woolsey pointed out that either INS counsel or intelligence agents made significant false statements to the immigration judge.¹⁴³ Despite the weakness of the government's case, the case was only concluded when five of the Iraqis entered into a settlement agreement withdrawing their pending asylum claims in order to obtain release from

¹⁴² See *id.*

¹⁴³ See *The National Security Considerations Involved in Asylum Applications: Hearings Before the Tech., Terrorism and Gov't Information Subcomm. of the Senate Comm. on the Judiciary, 105th Cong., at 23-37 (1998) (statement of James R. Woolsey).*

detention.¹⁴⁴ They had been detained for two years.¹⁴⁵

¹⁴⁴ See Frenzen, *supra* note __.

¹⁴⁵ See *id.*

Mazen al-Najjar and Anwar Haddam experienced the longest detention in secret evidence proceedings; Al-Najjar was initially held for three and a half years,¹⁴⁶ and Haddam for four years.¹⁴⁷ Al-Najjar, a stateless Palestinian, was the editor-in-chief of a research journal of the World and Islam Studies Enterprise (WISE), a think-tank based at the University of South Florida devoted to dialogue on issues related to the Middle East.¹⁴⁸ The INS arrested Al-Najjar and placed him in removal proceedings in 1997 as part of an FBI investigation against a former administrator of WISE who became head of the Islamic Jihad. The arrest and detention was based on secret evidence.¹⁴⁹

Anwar Haddam was an elected member of the Algerian Parliament.¹⁵⁰ A Professor of Physics at the University of Algiers, he ran for election on the Islamic Salvation Front (FIS) platform.¹⁵¹ The FIS, a moderate Islamic party, swept the 1991 elections by 80% of the popular vote. The Algerian military staged a *coup d'etat*, arrested the president of the FIS, and rounded up thousands of FIS members. Top FIS officials were killed or imprisoned; thousands of FIS supporters were

¹⁴⁶ See *FBI Terror Probes Focus on Muslim*, WASH. POST, Oct. 31, 1998, at A1.

¹⁴⁷ See *In re Anwar Haddam*, 2000 BIA LEXIS 20, at 1 (BIA Dec. 1, 2000); see also *Kiareldeen v. Reno*, 71 F. Supp.2d 402 (D. N.J. 1999) (ordering release of Palestinian detained for one-and-a-half years based on secret evidence).

¹⁴⁸ See *Al-Najjar v. Ashcroft*, 257 F.3d 1262 (11th Cir. 2001); *Al-Najjar v. Reno*, 97 F. Supp. 2d 1329 (S.D. Fla. 2000). For discussion of various developments in the Al-Najjar case, see 77 INTERPRETER RELEASES 1747 (Dec. 18, 2000); 77 INTERPRETER RELEASES 1712 (Dec. 11, 2000); 77 INTERPRETER RELEASES 1566 (Nov. 6, 2000); 77 INTERPRETER RELEASES 9377 (July 17, 2000). The U.S. government later re-arrested and detained Al-Najjar after September 11. See *infra* text accompanying notes ____.

¹⁴⁹ See *Al-Najjar v. Reno*, 97 F. Supp. 2d at 1333-35.

¹⁵⁰ See Akram, *supra* note ___, at 79-81 (analyzing case); *In re Anwar Haddam*, 2000 BIA LEXIS 20 (BIA Dec. 1, 2000).

¹⁵¹ See *In re Haddam*, *supra* note ___, at 6.

imprisoned, tortured, and executed.¹⁵² A civil war followed with tens of thousands of deaths resulting.¹⁵³ One of the few elected FIS officials who managed to escape Algeria, Haddam entered the United States legally on a valid nonimmigrant visa in 1992 and later filed an asylum claim.¹⁵⁴ The INS took Haddam into custody and detained him based on secret evidence.¹⁵⁵

¹⁵² See *id.* at 9.

¹⁵³ See *id.*

¹⁵⁴ See *id.*

¹⁵⁵ See *id.* at 7. The INS also opposed Haddam's asylum

In both the Al-Najjar and Haddam cases, as the secret evidence has either been unclassified or disclosed, it is evident that the government's "terrorist" claims were based on unreliable evidence.¹⁵⁶ Both were released after years of detention.

claim, stating that he was barred from asylum as a "persecutor of others" and rested its position primarily on evidence it maintained was classified and would not produce in court. See Immigration & Nationality Act § 208(b)(2)(A)(i), 8 U.S.C. § 208(b)(2)(A)(i).

¹⁵⁶ See *In re Haddam*, No. A22-751-813 (BIA Sept. 10, 1998), *aff'd*, *In re Anwar Haddam*, *supra* note ____.

Nasser Ahmed also was held in custody and denied bond for three years based on secret evidence.¹⁵⁷ An Egyptian native, Ahmed was a court-appointed translator for the legal defense team of Sheik Abdel Rahman for the conspiracy to bomb the World Trade Center in New York City in 1996.¹⁵⁸ During the trial, FBI and INS agents tried to convince Ahmed that he should assist in the Rahman investigation and threatened him with deportation if he refused to cooperate.¹⁵⁹ Ahmed would not assist the government. The INS arrested and detained him and opposed Ahmed's asylum claim based on the secret evidence.¹⁶⁰ Losing his case in the immigration court based on secret evidence, Ahmed filed a habeas corpus petition.¹⁶¹ After the INS released some of its secret

¹⁵⁷ See Matter of Nasser Ahmed, No. A90-674-238 (Immigration Court June 24, 1999). The BIA denied Ahmed's appeal seeking a bond redetermination. See *In re Nasser Ahmed*, No. 90-674-238 (BIA Sept. 1996); see also DEMPSEY & COLE, *supra* note __, at 128-31 (discussing case).

¹⁵⁸ See *infra* text accompanying notes __.

¹⁵⁹ See Matter of Nasser Ahmed, *supra* note __.

¹⁶⁰ See DEMPSEY & COLE, *supra* note __, at 129.

¹⁶¹ See *In re Nasser Ahmed*, No. 90-674-238 (BIA Sept. 1996).

evidence, Ahmed refuted it. On remand, the immigration court dismissed the evidence underlying the government's remaining contentions on the grounds that it was based on a primary informant who had personal reasons for desiring Ahmed's deportation.¹⁶²

As the secret evidence cases have slowly worked their way through the judicial process, the government's claims in all the cases have evaporated. None of the cases included sufficient evidence of terrorism-related charges necessary to justify the years of detention.¹⁶³ Besides the individual loss of liberty, the cases have chilled Arab and Muslim political speech.

4. *Conclusion*

¹⁶² *In re Nasser Ahmed*, at 7 (N.Y. EOIR, Immigration Court, July 30, 1999) (decision following remand).

¹⁶³ See Akram, *supra* note __; Frenzen, *supra* note __.

This section generally illustrates how stereotypes about Arabs and Muslims have influenced immigration law and its enforcement, as well as the civil rights of Arab and Muslim noncitizens in the United States. This discussion is by no means comprehensive. Other examples of the laws responding to perceived fears of Arab and Muslim terrorism are plentiful. For example, in the 1990s, the much-publicized case of asylum seeker Sheik Omar Rahman, later convicted for his involvement in the 1993 World Trade Center bombing,¹⁶⁴ almost by itself resulted in changes to the immigration laws narrowing the rights of all asylum applicants. An episode on the popular television show *60 Minutes*¹⁶⁵ focusing on his alleged abuse of the asylum system triggered a chain reaction culminating in 1996 asylum reforms, including a summary exclusion procedure by which a noncitizen could be excluded from the country without a hearing on an asylum or other claim to relief.¹⁶⁶

¹⁶⁴ See *United States v. Rahman*, 189 F.3d 88 (2d Cir. 1999), *cert. denied*, 528 U.S. 982 (2000). For reference to how *racist stereotypes of terrorist Arabs out to destroy American democracy* posed challenges to the defense, see Binny Miller, *Give Them Back Their Lives: Recognizing Client Narrative in Case Theory*, 93 MICH. L. REV. 485, 561 (1994).

¹⁶⁵ See PHILIP G. SCHRAG, *A WELL-FOUNDED FEAR: THE CONGRESSIONAL BATTLE TO SAVE POLITICAL ASYLUM IN AMERICA* 42-44, 134, 137, 148, 162, 164, 217 (2000); *60 Minutes: How Did He Get Here?* (CBS Television broadcast, Mar. 14, 1993).

¹⁶⁶ See T. ALEXANDER ALEINIKOFF, *IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY* 863-71, 1028-29 (4th ed. 1998) (discussing summary

2. The Civil Rights Implications of the Modern War on Terrorism

exclusion provisions of 1996 immigration reforms).

Part I analyzed how the demonization of Arabs and Muslims has impacted the evolution of the law and encouraged harsh governmental efforts to remove Arabs and Muslims from the United States.¹⁶⁷ This section analyzes how the same stereotypes have affected the civil rights of all persons of Arab and Muslim ancestry in the United States since September 11, 2001.¹⁶⁸ The aftermath of the various national security measures promise to have enduring impacts on the civil rights of all minority groups in the United States.

1. *The Immediate Impacts*

¹⁶⁷ See *supra* text accompanying notes ____.

¹⁶⁸ See *infra* text accompanying notes ____.

The federal government responded with ferocity to the events of September 11. Hundreds of Arab and Muslim noncitizens were rounded up as "material witnesses" in the ongoing investigation of the terrorism or detained on relatively minor immigration violations.¹⁶⁹ The dragnet provoked criticism as a poor law enforcement technique as well as a major intrusion on fundamental civil liberties.¹⁷⁰ Congress swiftly passed the USA PATRIOT Act,¹⁷¹ which, among other things, allowed the government to detain suspected noncitizen "terrorists" for up to a week without charges, and bolstered federal law enforcement surveillance powers over citizens, as well as immigrants, associated with "terrorism." President Bush's controversial military order allowing alleged noncitizen terrorists, including those arrested in the United States, to be tried in military courts with the accused guaranteed few rights, provoked a firestorm of controversy.¹⁷² Proposed regulations issued in November 2001 in response to the U.S. Supreme Court decision in *Zadvydas v. Davis*¹⁷³ holding that indefinite detention of noncitizens ordered removed from the country was not authorized by law, include an exception permitting indefinite detention of noncitizens for terrorism and national security reasons.¹⁷⁴ Attorney General

¹⁶⁹ See *infra* text accompanying notes ___ (analyzing in detail federal law enforcement response to September 11 events, including a massive dragnet directed at Muslims).

¹⁷⁰ See Jim McGee, *Ex-FBI Officials Criticize Tactics on Terrorism*, WASH. POST, Nov. 28, 2001, at A1; Lawrence, *supra* note ___.

¹⁷¹ Pub. L. No. 107-56, 115 Stat. 272 (2001) (Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act) of 2001).

¹⁷² See Military Order of Nov. 13, 2001, 66 Fed. Reg. 57833 (Nov. 16, 2001).

¹⁷³ 533 U.S. 678 (2001).

¹⁷⁴ See 66 Fed. Reg. 56967, 56979-80 (Nov. 14, 2001) (discussing 8 C.F.R. § 241.14(d)). The Court suggested that this might be constitutionally permissible. See *Zadvydas*, 121 S. Ct. at 2502 ("Neither do we consider terrorism or other special circumstances where special arguments might be made for forms of preventative detention and for heightened deference to the judgments of the political branches with respect to matters of

Ashcroft issued an interim rule allowing electronic surveillance of attorney-client communications with detained terrorists.¹⁷⁵

national security.)). For criticism of the proposed regulation, see Immigrant Rights Clinic, *Administrative Comment: Indefinite Detention Without Probable Cause: A Comment on INS Interim Rule 8 C.F.R. § 287.3*, 26 N.Y.U. REV. L. & SOC. CHANGE 397 (2000/01).

¹⁷⁵ See 66 Fed. Reg. 55062 (Oct. 31, 2001); Neil A. Lewis & Christopher Marquis, *Larger Visa Waits for Arabs; Stir Over U.S. Eavesdropping*, N.Y. TIMES, Nov. 10, 2001, at A1; George Lardner Jr., *U.S. Will Monitor Calls to Lawyers*, WASH. POST, Nov. 9, 2001, at A1.

To the extent that the U.S. responses to September 11 can be characterized as regulating immigration, the law affords considerable leeway to the political branches of the federal government. The Supreme Court has upheld racial, national origin, political, and other forms of discrimination against noncitizens in the immigration laws that would patently violate the Constitution if the rights of citizens were implicated.¹⁷⁶ The so-called "plenary power" doctrine creates a constitutional immunity from judicial scrutiny of substantive immigration judgments of Congress and the Executive Branch.¹⁷⁷ Immigration law, in which the powers of the U.S. government are at their zenith, thus allows the federal government to lash out at the particular "undesirable" groups of the day.¹⁷⁸ Such authority increases exponentially when, as in the case of international terrorism, perceived foreign relations and national security

¹⁷⁶ See, e.g., *The Chinese Exclusion Case* (Chae Chan Ping v. United States), 130 U.S. 581 (1889) (upholding racial discrimination in immigration laws); *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952) (allowing for deportation of immigrants based on their political views); see also *Nguyen v. INS*, 533 U.S. 53 (2001) (upholding gender discrimination in citizenship laws); *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471 (1999) (holding that courts lacked authority to review claim of selective enforcement of immigration laws by Muslim noncitizens); *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155 (1993) (holding that President's policy of interdicting Haitians fleeing political violence on high seas and returning them to Haiti without hearing asylum and other claims did not violate domestic or international law).

¹⁷⁷ But see Gabriel J. Chin, *Is There a Plenary Power Doctrine? A Tentative Apology and Prediction for Our Strange But Unexceptional Constitutional Immigration Law*, 14 GEO. IMMIGR. L.J. 257 (2000) (questioning whether "plenary power" doctrine in fact protects immigration laws from constitutional scrutiny).

¹⁷⁸ See Kevin R. Johnson, *Race, The Immigration Laws, and Domestic Race Relations: A "Magic Mirror" Into the Heart of Darkness*, 73 IND. L.J. 1111 (1998) (analyzing use of immigration laws to adversely affect racial minorities); Johnson, *Antiterrorism*, *supra* note ___ (same for political minorities); Kevin R. Johnson, *Public Benefits and Immigration: The Intersection of Immigration Status, Ethnicity, Gender, and Class*, 42 UCLA L. REV. 1509 (1995) (same for poor and working people).

matters are at issue.¹⁷⁹ As history teaches, with immigration law and its enforcement firmly in the hands of the federal government,¹⁸⁰ uniform, national civil rights deprivations may result.¹⁸¹

¹⁷⁹ See, e.g., *INS v. Aguirre-Aguirre*, 526 U.S. 415, 425 (1999) (stating that "[w]e have recognized that judicial deference to the Executive Branch is especially appropriate in the immigration context where officials `exercise especially sensitive political functions that implicate questions of foreign relations[']") (citing *INS v. Abudu*, 485 U.S. 94, 110 (1988)); *Mathews v. Diaz*, 426 U.S. 67, 81 n.17 (1976) ("[A]ny policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.") (quoting *Harisiades v. Shaughnessy*, 342 U.S. 580, 589 (1952) (footnote omitted)); see Harold Hongju Koh, *Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair*, 97 *YALE L.J.* 1255 (1988). Such deference combines with that ordinarily accorded agency action to create a most potent form of deference to the Executive Branch's immigration decisions. See *Aguirre-Aguirre*, 526 U.S. at 423-24 (relying on *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1974)); *INS v. Zacarias*, 502 U.S. 478, 481 (1992) (stating that agency fact-finding could "be reversed only if the evidence presented . . . was such that a reasonable factfinder would have to conclude that the requisite fear of persecution existed." (citation omitted); see also Kevin R. Johnson, *Responding to the "Litigation Explosion": The Plain Meaning of Executive Branch Primacy Over Immigration*, 71 *N.C. L. REV.* 413 (1993) (analyzing the impact of deference to agency action in Supreme Court's immigration decisions).

¹⁸⁰ See *DeCanas v. Bica*, 424 U.S. 351, 354 (1976) ("Power to regulate immigration is unquestionably exclusively a federal power.") (citations omitted); see also *League of United Latin American Citizens v. Wilson*, 908 F. Supp. 755 (1995) (holding that most of Proposition 187, California law seeking to regulate undocumented immigration, was pre-empted by federal law). *But see Spiro, Demi-Sovereignties*, *supra* note ___ (contending that states should have greater role in regulating immigration).

¹⁸¹ See, e.g., BILL ONG HING, *MAKING AND REMAKING ASIAN AMERICA*

1. *The Dragnet*

THROUGH IMMIGRATION POLICY, 1850-1990 (1993) (analyzing how exclusionary federal immigration laws adversely affected Asian Americans); IAN F. HANEY LOPEZ, WHITE BY LAW (1996) (analyzing law in place from 1790-1952 requiring that alien be "white" in order to naturalize). Alternatively, the federal government can act nationally to protect civil rights of noncitizens against conduct by the federal government. See *supra* text accompanying notes

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The events of September 11, 2001 understandably provoked an immediate and ferocious federal governmental response. Heightened security measures were the first order of the day. Within a matter of weeks, the U.S. government arrested and detained over 1,200 Arab and Muslim immigrants.¹⁸² The mass dragnet of Arab and Muslim men from many nations, with the largest numbers from Pakistan and Egypt, apparently has failed to produce any direct links to the terrorists acts; about one hundred were charged with minor crimes and another 500 were held in custody on immigration-related matters, such as having overstayed their temporary nonimmigrant visas.¹⁸³ Attorney

¹⁸² See David E. Rovella, *Clock Ticks on 9/11 Detentions*, NAT'L L.J., Nov. 5, 2001, at A1; *A Deliberate Strategy of Disruption*, WASH. POST, Nov. 4, 2001, at A01; Lois Romano & David S. Fallis, *Questions Swirl Around Men Held in Terror Probe*, WASH. POST, Oct. 15, 2001, at A01. One Pakistani man died in federal custody under mysterious circumstances. See Guy Gugliotta, *Pakistani Held After Sept. 11 Attacks Dies in Cell*, WASH. POST, Oct. 25, 2001, at A18.

¹⁸³ See DOJ Orders Incentives, 'Voluntary' Interviews of Aliens to Obtain Info on Terrorists, 78 INTERPRETER RELEASES 1816, 1817 (Dec. 3, 2001); Josh Meyer, *The Investigation: The Dragnet Produces Few Terrorist Ties*, L.A. TIMES, Nov. 28, 2001, at A1; see also Greg Smith & Joe Calderone, *No Big Fish in 9/11 Dragnet*, DAILY NEWS (New York), Nov. 30, 2001, at 6 (The dragnet that swept through New York in search of terrorists in the days after Sept. 11 scraped up mostly a handful of small-time hustlers and hapless immigrants with visa problems.). The first indictment for conspiracy in the hijackings was of a noncitizen in federal custody for immigration violations on September 11. See David Johnston & Philip Shenon, *Man Held in Custody Since August is Charged With a Role in Sept. 11 Terror Plot*, N.Y. TIMES, Dec. 12, 2001, at A1.

Information remains sketchy about the persons detained because the Attorney General has refused to release specific information about them, prompting criticism by U.S. Senator Russell Feingold, see Russ Feingold, *Name the Detainees*, WASH. POST, Dec. 23, 2001, at B07, and a Freedom of Information Act lawsuit, see *Rights Groups Sue DOJ, INS for Information on Those Detained or Arrested Following September 11*, 79 INTERPRETER RELEASES 5 (Jan. 2, 2002). Information produced in response to the litigation shows that the handling of Muslims arrested on immigration charges after Sept. 11 has been fraught with delay

General John Ashcroft admitted that minor immigration charges would be used to hold noncitizens while the criminal investigation continues.¹⁸⁴

and sloppy bookkeeping and that dues process was shortchanged . . .
. . . Jim Edwards, *Data Show Shoddy Due Process for Post-Sept. 11 Immigration Detainees*, N.J. L.J., Feb. 6, 2002.

¹⁸⁴ See Immigrant Rights Clinic, *supra* note ___, at 414 (collecting Ashcroft's public statements).

The nature and conditions of the initial wave of mass arrests and detentions warrant consideration. Arab and Muslim detainees were held for weeks without any charges filed against them and without being provided basic information about why federal authorities continued to detain them.¹⁸⁵ The U.S. government, for example, held Dr. Al-Badr Al-Hazmi, a radiologist who had lived as a lawful permanent resident for years with his family in San Antonio, for two weeks in large part because he shared the same last name — a common one in Saudi Arabia -- with two of the September 11 hijackers.¹⁸⁶ The U.S. government arrested and held a Yemeni immigrant for two months who was interrogated and threatened, before being released without being charged.¹⁸⁷ One Muslim student was arrested for visa problems and held in a local jail in Mississippi, where as police watched he was beaten by other prisoners for being a terrorist.¹⁸⁸ An Egyptian computer engineering student was wrongly detained for over three weeks and charged with lying to federal investigators about ownership of an aviation radio allegedly recovered in his hotel room, which (as it turned out) in fact did not belong to him.¹⁸⁹ Not surprisingly given the tenor of the times, there was virtually no real public outcry about the mass arrests.¹⁹⁰

¹⁸⁵ See Evan Thomas & Michael Isikoff, *Justice Kept in the Dark*, NEWSWEEK, Dec. 10, 2001, at 37. In addition, after September 11, the immigration courts began holding secret hearings in immigration cases of noncitizens as part of the criminal investigation. See William Glaberson, *Closed Immigration Hearings Criticized as Prejudicial*, N.Y. TIMES, Dec. 7, 2001, at B7.

¹⁸⁶ See Thomas & Isikoff, *supra* note ___, at 42.

¹⁸⁷ See Susan Milligan, *Fighting Terror/The Detainees Testimony; Yemeni Immigrant Says He Was Abused*, BOSTON GLOBE, Dec. 5, 2001, at A13.

¹⁸⁸ See Thomas & Isikoff, *supra* note ___, at 39-40

¹⁸⁹ See June Fritsch, *Grateful Egyptian is Freed as U.S. Terror Case Fizzles*, N.Y. TIMES, Jan. 18, 2002, at A1. [The case began to unravel . . . , when the real owner of the radio, a private pilot and American citizen, came forward to claim it. He had left it in his room . . . of the [] hotel. *Id.*

¹⁹⁰ Indeed, in Attorney General Ashcroft's testimony before the U.S. Senate Judiciary Committee, he lambasted critics of the

The dragnet did not end there. The Justice Department also sought to interview about 5000 men -- almost all of them Arab or Muslim -- between the ages of 18-33 who had arrived on nonimmigrant visas in the United States since January 1, 2000.¹⁹¹

Bush administration's anti-terrorism policies as aiding the terrorist cause. See *Excerpts from Attorney General's Testimony Before Senate Judiciary Committee*, N.Y. TIMES, Dec. 7, 2002, at B6.

¹⁹¹ See Thomas & Isikoff, *supra* note ___, at 43; DOJ Orders

There was no evidence that any of the 5000 had been involved in terrorist activities. Although technically [voluntary],¹⁹² the interviews with law enforcement authorities undoubtedly felt compulsory to many. Arab and Muslim fears of detention and deportation¹⁹³ were reinforced by the November 2001 arrest and

Incentives, 'Voluntary' Interviews of Aliens to Obtain Info on Terrorists, 78 INTERPRETER RELEASES 1816, 1817 (Dec. 3, 2001).

¹⁹² See *Administration Defends Military Commissions, Other Antiterrorism Measures During Senate Hearing*, 78 INTERPRETER RELEASES 1809, 1810 (Dec. 3, 2001) (summarizing congressional testimony of Assistant Attorney General Michael Chertoff that interviews were [voluntary] and based not on race profiles but on the fact that al Qaeda terrorist group recruits from specific nations and encourages use of certain visas).

¹⁹³ See Tim Jones, *Interview Requests Chill U.S. Arabs*,

threatened deportation of Mazen Al-Najjar, who had previously been held on secret evidence and released after the government failed to provide any evidence that Al-Najjar was engaged in terrorist activity.¹⁹⁴

CHI. TRIB., Dec. 2, 2001, at 1; Tom Kenworthy, *Arabs Fear that Cooperation Could be Costly*, USA TODAY, Dec. 3, 2001, at 4A.

¹⁹⁴ See *Al Najjar Again in INS Detention Due to Alleged Terrorist Ties*, 78 INTERPRETER RELEASES 1859 (Dec. 10, 2001); Anthony Lewis, *Abroad at Home; It Can Happen Here*, N.Y. TIMES, Dec. 1, 2001, at A27; see also *supra* text accompanying notes ___

(discussing Al-Najjar's detention based on secret evidence). Under the immigration laws, "terrorist activity" is defined broadly to include donations of funds to the humanitarian activities of a "terrorist organization." See Johnson, *Antiterrorism*, *supra* note __, at 866-67 (analyzing breadth of INA § 213(a)(3)(B)(iii), 8 U.S.C. § 1182 (a)(3)(B)(iii)); *supra* text accompanying notes __ (discussing breadth of definition); see also Neuman, *supra* note __, at 322-37 (contrasting various definitions of "terrorist activity").

The questioning of Muslims could be expected to alienate the noncitizens interviewed. A memorandum from the Office of the U.S. Deputy Attorney General offered detailed instructions on information to be solicited, and mentioned that the U.S. government should be informed if an interviewee was suspected of being in the country in violation of the immigration laws.¹⁹⁵ This shows an effort to remove Arabs and Muslims from the country based on immigration law violations wholly unrelated to terrorism, as part of the war on terrorism.¹⁹⁶

¹⁹⁵ See Office of the Deputy Attorney General, Guidelines for the Interviews Regarding International Terrorism, Nov. 9, 2001, *reprinted in* 78 INTERPRETER RELEASES 1829 (Dec. 3, 2001) (Appendix I).

¹⁹⁶ To this end, the federal government detained Arabs and Muslims held for immigration violations pending deportation as a [symbolic] gesture to show that the U.S. government is [getting

tough¹ on immigration enforcement. See *Testimony of Margaret H. Taylor, Professor of Wake Forest, University School of Law, Hearing Before the Subcommittee on Immigration and Claims, Judiciary Committee, House of Representatives*, FED. DOC. CLEARINGHOUSE, Dec. 19, 2001.

The questions suggested that the Arab and Muslim community was prone to disloyalty. One line of questioning was as follows: [You should ask the individual if he noticed anybody who reacted in a surprising or inappropriate way to the news of the September 11th attacks. You should ask him how he felt when he heard the news.]¹⁹⁷ This tracks questions reportedly asked by federal investigators soon after the bombing. At that time, the FBI asked persons of Arab ancestry the following:

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

Does it make you sad?

Does it make you happy?

Does it make you angry?

How do you feel about being American?

How do you feel about being an Arab?

Why is it that America is considered the enemy?¹⁹⁸

¹⁹⁷ See Office of the Deputy Attorney General, *supra* note ____, at 4.

¹⁹⁸ Gina Keating, *ACLU Faults FBI for Aggressive Questioning*, DAILY RECORDER (Sacramento), Sept. 26, 2001, at 1, 7.

Despite the criticism, legal support may exist for the dragnet. In *Brown v. City of Oneonta*,¹⁹⁹ a crime victim identified a young African American man as the perpetrator of a burglary and assault who, while committing the crime, cut himself with a knife; the police attempted to question all African American students at the local university and [over the next several days, the police conducted a `sweep' of Oneonta, stopping and questioning non-white persons on the streets and inspecting their hands for cuts. More than two hundred persons were questioned during that period, but no suspect was apprehended.] The court of appeals held that, although the police employed an old-fashioned dragnet like those police techniques long condemned as overbroad and over-inclusive,²⁰⁰ the sweep did not violate the

¹⁹⁹ 221 F.3d 329 (2d Cir. 1999) (emphasis added), cert. denied, 122 S. Ct. 44 (2001).

²⁰⁰ See Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341, 351 (1949); see, e.g., *Davis v. Mississippi*, 394 U.S. 721 (1969) (reversing rape conviction in which African American man was detained and

Equal Protection Clause.²⁰¹ *Oneonta* offers legal justification

fingerprinted, along with over twenty other African Americans, in violation of Fourth Amendment).

²⁰¹ See *Oneonta*, 221 F.3d at 337 (¶Plaintiffs do not allege that upon hearing that a violent crime had been committed, the police used an established profile of violent criminals to determine that the suspect must have been black. Nor do they

for the federal government's Arab and Muslim dragnet even though law enforcement in both instances arguably relied excessively on race in a criminal investigation.²⁰² Besides the fact that the alleged perpetrators of the terrorist acts were Muslim, another consideration — the need to establish a discriminatory intent — would make it difficult to prevail on an Equal Protection claim.²⁰³

allege that the defendant law enforcement agencies have a regular policy based upon racial stereotypes that all black . . . residents be questioned whenever a violent crime is reported.[]).

²⁰² See, e.g., R. Richard Banks, *Race-Based Suspect Selection and Colorblind Equal Protection Doctrine*, 48 UCLA L. REV. 1075, 1090-92 (2001).

²⁰³ See *Washington v. Davis*, 426 U.S. 229 (1976). The academic challenges to the intent requirement are legion. See, e.g., Lawrence, *supra* note __; Haney-Lopez, *supra* note __.

Muslims allegedly perpetrated the terrorism of September 11 and a few Arab and Muslim noncitizens might have information about terrorist networks. The dragnet directed at all Arabs and Muslims, however, is contrary to fundamental notions of equality and the individualized suspicion ordinarily required for a stop under the Fourth Amendment.²⁰⁴ It exemplifies the excessive reliance on race in the criminal investigation, a frequent law enforcement problem,²⁰⁵ and shows how, once race (at least of nonwhites) enters the process, it can come to predominate the investigatory process. To target an entire minority group across the country for questioning is obviously over-inclusive. Over one million persons of Arab ancestry in the United States,²⁰⁶ all who may feel threatened and under suspicion, cannot miss the not-too-subtle message sent by the federal government.

In important ways, the September 11 dragnet employed by the federal government resembles the Japanese internment during World War II.²⁰⁷ Statistical probabilities, not individualized suspicion, resulted in action directed at a discrete and insular minority who have been classified as an "alien enemy."²⁰⁸ National identity and loyalty are defined in part by "foreign" appearance, ambiguous as that may be.²⁰⁹ In some ways, the

²⁰⁴ See, e.g., *United States v. Sokolow*, 490 U.S. 1, 7 (1989); *Terry v. Ohio*, 392 U.S. 1, 27 (1968)

²⁰⁵ See *Banks*, *supra* note __.

²⁰⁶ See U.S. Bureau of the Census, Profile of Selected Social Characteristics: 2000 http://factfinder.census.gov/servlet/TTable?ds_name=ACS_C2SS_EST_G00 (visited Dec. 10, 2001).

²⁰⁷ See *supra* text accompanying notes __; see also KENNETH L. KARST, *BELONGING TO AMERICA* 91 (1989) ("One of the saddest lessons of *Korematsu* is that we do not seem to learn much from the lessons of the past.")

²⁰⁸ See *United States v. Carolene Prods*, 304 U.S. 144, 152 n.4 (1938) (holding that heightened level of scrutiny of classifications affecting "discrete and insular minorities" might be justified because of deficiencies of political process).

²⁰⁹ See *Wu*, *supra* note __, at 79-129; Keith Aoki *[[Foreignness]] & Asian American Identities: Yellowface, Wold War II*

current treatment of Arabs and Muslims is more extralegal than the internment. There is no Executive Order at issue governing the treatment of Arabs and Muslims, or a formal declaration of war.²¹⁰

Propaganda, and Bifurcated Racial Stereotype, 4 UCLA ASIAN PAC. AM. L.J. 1 (1997); Natsu Taylor Saito, *Alien and Non-Alien Alike: Citizenship, Foreignness, and Racial Hierarchy in American Law*, 76 OR. L. REV. 261 (1997). Given the diversity of appearance in these communities, the very concept of "Arab" and "Muslim appearance" is a misnomer. See SHAHEEN, *supra* note __, at 4; MICHAEL SULEIMAN, *ARABS IN AMERICA: BUILDING A NEW FUTURE* __ (1989).

²¹⁰ See *supra* note __. In response to previous claims of unlawful national origin or race discrimination, the Executive Branch has been quick to deny that a regulation permitted such discrimination. See *Jean v. Nelson*, 472 U.S. 846, 855-56 (1985).

The law also affords considerable support for the federal government to selectively enforce the immigration laws. In a similar time of national crisis when U.S. citizens were held hostage in Iran, a court of appeals in *Narenji v. Civiletti* upheld a regulation that required only Iranian students on nonimmigrant visas to report to the INS and provide information about residence and evidence of school enrollment.²¹¹ The court held that the regulation had a "rational basis" and emphasized that "it is not the business of courts to pass judgment on the decisions of the President in the field of foreign policy."²¹² Courts reviewing other regulations directed at Iranian citizens

²¹¹ See *Narenji v. Civiletti*, 617 F.2d 745 (1979), cert. denied, 446 U.S. 957 (1980); see also Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 587-88 (1990) (discussing how district court had sought to invalidate the President's action because it constituted discrimination on the basis of nationality); *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155 (1993) (upholding interdiction and repatriation policy directed exclusively at Haitians).

²¹² *Narenji*, 617 F.2d at 748.

refused to disturb the Executive Branch's judgment.²¹³ This precedent arguably supports the Justice Department's questioning of all Arab and Muslim noncitizens.²¹⁴ There are important distinctions between this instance and that case, however. The policy at issue in *Narenji* was based on nationality, while current targeting of Arabs and Muslims, who are from many different nations, is not. Whether this distinction would provide the support for a successful legal challenge is unclear.

²¹³ See, e.g., *Ghaelian v. INS*, 717 F.2d 950 (6th Cir. 1983) (holding that court lacked jurisdiction to review Equal Protection challenge to regulation in deportation action); *Dasltmalchi v. INS*, 660 F.3d 880 (3d Cir. 1981) (same); *Nademi v. INS*, 679 F.2d 811 (10th Cir. 1982) (upholding regulation allowing Iranian citizens only 15 days before voluntarily departing the country); *Malek-Marzban v. INS*, 653 F.2d 113 (4th Cir. 1981) (same)

²¹⁴ See *supra* text accompanying notes ____.

Recent Supreme Court precedent further suggests that it will be difficult to prevail on any claim that the federal government is selectively enforcing the immigration laws.²¹⁵ The Court in

²¹⁵ See *Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471 (1999) (holding that INA § 242(g), 8 U.S.C. § 1252(g), barred review of selective enforcement claim by members of Popular Front for the Liberation of Palestine); *supra* text accompanying notes __ (discussing case of LA-8). For analysis of the selective enforcement claims on nationality and foreign policy grounds, see Neuman, *supra* note __, at 338-41; see also David A. Martin, *On Counterintuitive Consequences and Choosing the Right Control Group: A Defense of Reno v. AADC*, 14 GEO. IMMIGR. L.J. 363, 379-83 (2000) (suggesting that the Court in its analysis should have considered noncitizen's stake in the country, such as whether the person was a lawful permanent

Reno v. American-Arab Anti-Discrimination Committee expressed disfavor of such claims: “[t]he Executive should not have to disclose its ‘real’ reasons for deeming nationals of a particular country a special threat” or indeed for simply wishing to antagonize a particular foreign country by focusing on that country’s nationals” and even if it did disclose them a court would be ill equipped to determine their authenticity and utterly unable to assess their adequacy.²¹⁶ The Court, however, offered a narrow window for selective enforcement claims, acknowledging “the possibility of a rare case in which the alleged basis of discrimination is so outrageous” that such a claim might lie.²¹⁷

resident or on a temporary student visa).

²¹⁶ *American-Arab Anti-Discrimination Committee*, 525 U.S. at 491.

²¹⁷ *Id.*; cf. *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1050-51 (1984) (stating that exclusionary rule might apply to deportation proceedings in cases of “egregious violations of Fourth Amendment or other liberties that might transgress notions of fundamental fairness and undermine the probative value of the evidence obtained”) (citation omitted); Judy C. Wong, Note, *Egregious Fourth Amendment Violations and the Use of the Exclusionary Rule in Deportation Hearings: The Need for Substantive Equal Protection Rights for Undocumented Immigrants*, 28 COLUM. HUM RTS. L. REV. 431, 455-60 (1997) (summarizing lower court decisions finding that immigration stop based exclusively on race was an

The judicial deference to the federal government's actions directed at Iranians in the United States during the hostage crisis was criticized in ways that apply equally to the reaction to the response to the events of September 11:

[egregious] Fourth Amendment violation justifying application of exclusionary rule).

Narenji is troublesome because an executive classification based on nationality in a foreign affairs crisis poses the danger that *the Executive will overvalue the government interest and undervalue the individual constitutional interest. In a severe crisis, the political and psychological pressures on the Executive are extreme. In this situation, executive measures may be motivated by frustration or desperation rather than an assessment of their actual usefulness, or they may reflect little more than a desire to appear stern and decisive. Conversely, in times of crisis the individual interests of persons selected for special burdens may be grossly undervalued. Indeed, the virulence of popular feeling against Iranian nationals during the hostage crisis raises the possibility that the Executive, in imposing special burdens on Iranian students, may have been reflecting to some extent a constitutionally impermissible hostility based on national origin. The atmosphere during the hostage crisis was marked by a hostility directed at citizens of Iran that resembled to some extent the hostility that is frequently directed toward citizens of an enemy nation during a war.*²¹⁸

²¹⁸ See Peter E. Quint, *The Separation of Powers Under Carter*, 62 TEX. L. REV. 785, 856 (1984) (emphasis added) (footnotes omitted). Cf. PETER ANDREAS, *BORDER GAMES: POLICING THE U.S.-MEXICO DIVIDE* (2000) (analyzing how U.S. government has pursued increased border enforcement for political and symbolic impacts despite its overall lack of effectiveness).

In the aftermath of September 11, the U.S. government arguably overreacted. Clearly, it placed little value on the liberty and equality interests of Arabs and Muslims.²¹⁹ The response may be motivated in part by [impermissible hostility based on national origin.] Arabs and Muslims long have suffered discrimination in the United States,²²⁰ and hate crimes against, and animosity toward, Arabs and Muslims increased greatly after September 11.²²¹ With few legal constraints, the federal government adopted extreme action, with a largely symbolic impact.²²²

Moreover, the dragnet might prove to be a poor law enforcement technique. Race profiling in criminal law enforcement has been criticized because, by alienating minority communities, it increases the difficulties of securing their

²¹⁹ See *supra* text accompanying notes ____.

²²⁰ See, e.g., *St. Francis College v. Al-Khazraji*, 481 U.S. 604 (1987); *Amini v. Oberlin College*, 259 F.3d 493 (6th Cir. 2001); see also *supra* text accompanying notes ____ (discussing hate crimes against Arabs and Muslims).

²²¹ See *supra* text accompanying notes ____.

²²² The claim that the federal government overreacted is buttressed by the fact that some state and local authorities refused to cooperate with some of the investigation. See *infra* text accompanying notes ____.

much-needed cooperation in law enforcement.²²³ In a time when Arab and Muslim communities might be of assistance in investigating terrorism, they are being rounded up, humiliated, and discouraged from cooperating with law enforcement by fear of arrest, detention, and deportation.

²²³ See David A. Harris, *The Stories, the Statistics, and the Law: Why [Driving While Black] Matters*, 84 MINN. L. REV. 265, 298-300 (1999).

Ultimately, this mass dragnet suggests to all persons of Arab and Muslim ancestry in the United States, including U.S. citizens, that they are less than full members of U.S. society.²²⁴

The various efforts by the U.S. government, even while claiming that it is not discriminating against Arabs or Muslims,²²⁵

²²⁴ See Linda S. Bosniak, *Membership, Equality, and the Difference that Alienage Makes*, 69 N.Y.U. L. REV. 1047 (1994) (considering membership rights of aliens in national community); Michael Scaperlanda, *Partial Membership: Aliens and the Constitutional Community*, 81 IOWA L. REV. 707 (1996) (analyzing [partial membership] rights accorded noncitizens in United States); see also Linda Kelly, *Defying Membership: The Evolving Role of Immigration Jurisprudence*, 67 U. CIN. L. REV. 185 (1998) (studying application of membership paradigm to recent immigration law developments). See generally KARST, *supra* note ___ (discussing efforts of various minorities to achieve full membership in U.S. society).

²²⁵ See President Bush, *Address Before a Joint Session of the Congress on the United States Response to the Terrorist*

marginalize them. Consequently, the legal measures taken by the federal government reinforce deeply-held negative stereotypes (i.e., that they are foreign and possibly disloyal to the United States) about Arabs and Muslims.²²⁶

2. *Visa Processing and Removals*

Attacks of September 11 (Sept. 20, 2001), 37 COMP. PRES. DOCS. 1347, 1348 (2001 (emphasizing that war on terrorism was not a war on Muslim people)).

²²⁶ Cf. Gerald M. Rosberg, *The Protection of Aliens from Discriminatory Treatment by the National Government*, 1977 SUP. CT. REV. 275, 327 (analyzing stigmatizing impact of racial exclusions on federal immigration law on persons sharing that ancestry in the country).

Some of the September 11 airplane hijackers had entered the country on student nonimmigrant visas but never attended school.²²⁷ As one response, the State Department slowed its issuance of visas to persons seeking entry from Arab nations.²²⁸ Such conduct is wholly within the hands of the Executive Branch.

In recent years, Congress has extended greater discretion to the State Department in visa processing and, according to some critics, increased the potential for nationality-based discrimination in the visa issuance process.²²⁹ Moreover, the merits of visa decisions by State Department consular officers long have been immune from any judicial review.²³⁰

In November 2001, the INS announced its first mass arrest of nonimmigrant students who had violated the terms of their visas; the arrests were exclusively of students from nations with alleged terrorist links, Iran, Syria, Pakistan, Libya, Saudi

²²⁷ See *infra* text accompanying notes ___. However, one alleged co-conspirator in the hijackings apparently was denied a visa four times and never was able to enter the country to participate in the hijackings. See Kate Zrnike & James Risen, *Tracing a 16-Month Infusion of Men and Money, Culminating in the Horror of Sept. 11*, N.Y. TIMES, Dec. 12, 2001, at B7.

²²⁸ See Neil A. Lewis & Christopher Marquis, *Larger Visa Waits for Arabs*, N.Y. TIMES, Nov. 10, 2001, at A1; Matthew Purdy, *Bush's New Rules to Fight Terror Transform the Landscape*, N.Y. TIMES, Nov. 25, 2001, at 1A.

²²⁹ See William L. Pham, Comment, *Section 633 of IIRIRA: Immunizing Discrimination in Immigrant Visa Processing*, 45 UCLA L. REV. 1461 (1998) (reviewing change in 1996 immigration reform law). The 1996 amendment was a response to the decision in *Legal Assistance for Vietnamese Asylum Seekers v. Department of State*, 45 F.3d 469 (D.C. Cir. 1995) (holding that State Department had engaged in nationality-based discrimination against Vietnamese asylum-seekers in violation of immigration laws), *vacated and remanded*, 519 U.S. 1 (1996).

²³⁰ See *Pena v. Kissinger*, 409 F. Supp. 1182 (S.D.N.Y. 1976); *Hermina Sague v. United States*, 416 F. Supp. 217 (D. P.R. 1976). For analysis and suggested reform, see James A.R. Nafziger, *Review of Visa Denials by Consular Officers*, 66 WASH. L. REV. 1 (1991).

Arabia, Afghanistan, and Yemen.²³¹ Additional scrutiny of visa applications from certain nations with large Arab and Muslim populations, as well as possible nationality-based reporting and related requirements for immigrants and nonimmigrants in the United States, like those seen in response to the Iranian hostage crisis,²³² could be on the horizon. Such measures might be authorized by law,²³³ with any selective enforcement claims facing formidable legal barriers.²³⁴

²³¹ See James Sterngold with Diana Jean Schemo, *10 Arrested in Visa Cases in San Diego*, N.Y. TIMES, Dec. 13, 2001, at B1.

²³² See *supra* text accompanying notes ____.

²³³ See *supra* text accompanying notes ____.

²³⁴ See *supra* text accompanying notes ____.

Along similar lines, the Justice Department has announced that it will focus removal efforts on 6,000 young men from the Middle East who were subject to deportation orders.²³⁵ Although the enforcement of removal orders is based on nationality, such actions would be difficult to challenge legally.²³⁶

3. *Torture*

The Arab and Muslim dragnet was not the most extreme option considered in the wake of September 11. Indeed, the tenor of the public debate allowed for consideration of policy alternatives that previously would have been virtually unthinkable. Torture to extract information, or the threat of sending a suspect to a country that engaged in torture, was discussed as a policy option.²³⁷ A public re-evaluation of the ordinary Fourth

²³⁵ See *DOJ Focusing on Removal of 6,000 Men from Al Qaeda Haven Countries*, 79 INTERPRETER RELEASES 115 (Jan. 21, 2002); Dan Eggen & Cheryl W. Thompson, *U.S. Seeks Thousands of Deportees*, WASH. POST, Jan. 8, 2002, at A1.

²³⁶ See *supra* text accompanying notes ____.

²³⁷ See *infra* text accompanying notes ____.

Amendment prohibition of such practices²³⁸ ensued.

Torture was contemplated because many of the [material witnesses] arrested and detained in the dragnet in the weeks following September 11²³⁹ did not provide information to the U.S. government. Given the indiscriminate nature of the arrests,²⁴⁰ many in all likelihood did not have any relevant information. Nonetheless, support for torture came from across the political spectrum, including from persons known as advocates of civil liberties.²⁴¹

²³⁸ See *Rochin v. California*, 342 U.S. 165 (1952) (holding that search that [shocked the conscience] violated the Fourth Amendment).

²³⁹ See *supra* text accompanying notes ____.

²⁴⁰ See *supra* text accompanying notes ____.

²⁴¹ See Jonathan Alter, *Time to Think About Torture*, NEWSWEEK, Nov. 5, 2001, at 45 (quoting Harvard Law School

professor Alan Dershowitz to effect that, if torture is to be used, judicial approval should be required).

Torture unquestionably is an extreme measure, going well beyond the conventional law enforcement techniques of arrest, detention, and interrogation. The consideration of extreme measures reveals the popular perception about Muslim "terrorists."²⁴² As Professor Porras observed,

[t]he terrorist is transformed through the . . . rhetoric from an ordinary deviant into a frightening, "foreign," barbaric beast at the same time that extra-normal means are called for to fight terrorism. Since terrorists are never imagined as anything other than terrifying, blood-thirsty barbarians, ordinary law is understood to be deficient or insufficient to deal with them.²⁴³

This classification of Arabs and Muslims as inhuman "others" taps into a long history of nativism and the view that foreigners are presumptively disloyal and dangerous to the security of the United States.²⁴⁴

The legal use of torture hopefully will never come to pass

²⁴² See *supra* text accompanying notes ____.

²⁴³ Ileana M. Porras, *On Terrorism: Reflections on Violence and the Outlaw*, 1994 UTAH L. REV. 119, 121; cf. Kevin R. Johnson, *"Aliens" and the U.S. Immigration Laws: The Social and Legal Construction of Nonpersons*, 28 U. MIAMI INTER-AM. L. REV. 263 (1996-97) (analyzing how use of term "alien" in immigration law dehumanizes noncitizens and helps to rationalize their harsh treatment).

²⁴⁴ See *supra* text accompanying notes ____ (discussing internment of persons of Japanese ancestry during World War II).

in the United States. However, the fact that it was discussed in polite company in the wake of September 11 demonstrates the monumental — although perhaps temporary — shift in public opinion about the need to protect civil liberties. At a minimum, the serious discussion of torture broadened the spectrum of policy options for fighting terrorism.

4. *Conclusion*

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

2. *Long Term Civil Rights Impacts*

The federal government's reaction to the events of September 11, promise to have deep and enduring civil rights impacts. As the not-so-distant past demonstrates, immigration reforms and executive action, which have the appearance of responding to the acts of terrorism, will remain with us and adversely affect the rights of all immigrants and many citizens.²⁴⁵ Moreover, more fundamental immigration reform proposals, namely the possible regularization of the immigration status of many undocumented immigrants in the United States and repeal of special secret evidence procedures, under serious discussion before September 11 may well go by the wayside.²⁴⁶ The demise of regularization proposals will maintain the uncertain legal status, and accompanying vulnerability, of undocumented immigrants living on the periphery of U.S. social life.²⁴⁷

²⁴⁵ See *infra* text accompanying notes __.

²⁴⁶ See *infra* text accompanying notes __.

²⁴⁷ See Lori A. Nessel, *Undocumented Immigrants in the Workplace: The Fallacy of Labor Protection and the Need for Reform*, 36 HARV. C.R.-C.L. L. REV. 345 (2001) (contending that federal labor law fails to adequately protect undocumented workers); Maria L. Ontiveros, *Forging Our Identity: Transformative Resistance in the Areas of Work, Class, and the Law*, 33 U.C. DAVIS L. REV. 1057 (2000) (analyzing efforts of Mexican immigrants to resist their marginalization in economic

and social life); see also Linda S. Bosniak, *Opposing Prop. 187: Undocumented Immigrants and the National Imagination*, 28 CONN. L. REV. 555, 576-77 (1996) ("[W]hile [the undocumented] formally are afforded the minimum rights of personhood under the law, they lie entirely outside the law's protections for many purposes, and they live subject to the fear of deportation at virtually all times.") (citations omitted); Jorge A. Vargas, *U.S. Border Patrol Abuses, Undocumented Mexican Workers, and International Human Rights*, 2 SAN DIEGO INT'L L.J. 1 (2001) (discussing human rights abuses suffered by undocumented Mexican workers in the United States).

Moreover, the focus on "Arab appearance" and Muslim identity has revived debate about the propriety of race profiling in law enforcement, an enduring problem for racial minorities in the United States.²⁴⁸ Before September 11, the U.S. public and policy-makers had come a long way in a relatively short time in critically scrutinizing the use of race and perceived racial appearance in criminal and immigration law enforcement. One day promised to change all of that.

1. *Recent History: Oklahoma City and Immigration Reform*

The leeway afforded the federal government in immigration matters²⁴⁹ allows the political branches to swiftly take aggressive actions and appear to offer a "quick fix" to deeply complex political, economic, and social problems. Immigration reform will likely be one of the impacts of September 11. Recent history offers a helpful, if not comforting, lessons in this regard.

²⁴⁸ See *infra* text accompanying notes ___.

²⁴⁹ See *supra* text accompanying notes ___.

In 1996, Congress passed tough immigration legislation in response to the fear of terrorism in the wake of the Oklahoma City bombing; the reforms created special removal proceedings for alleged terrorists.²⁵⁰ This and other aspects of the Antiterrorism and Effective Death Penalty Act adversely affected the Arab and Muslim community,²⁵¹ as well as other noncitizens in the United States.²⁵² Congress enacted such drastic measures despite the fact that a former U.S. army officer and U.S. citizen was the primary perpetrator of the Oklahoma City bombing.²⁵³

The Antiterrorism Act arguably did little to quell the threat of terrorism in the United States.²⁵⁴ However, it and other 1996 immigration reform legislation, limited judicial review of various deportation decisions, and adversely affected noncitizens in other ways.²⁵⁵ Only in 2001 did the Supreme Court

²⁵⁰ See AEDPA, *supra* note __; *supra* text accompanying notes __ (discussing AEDPA's provisions). For discussion of the severe impacts of the 1996 immigration reforms on immigrants, see Nancy Morawetz, *Rethinking Retroactive Deportation Laws and the Due Process Clause*, 73 N.Y.U. L. REV. 97 (1998); Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936 (2000); *infra* note __ (citing authorities).

²⁵¹ See Whidden, *supra* note __; *supra* text accompanying notes __.

²⁵² See *infra* text accompanying notes __.

²⁵³ See *United States v. McVeigh*, 153 F.3d 1166 (10th Cir. 1998). Despite the fact that Arabs and Muslims had nothing to do with the bombing, hate crimes and threats against Arabs and Muslims increased substantially after the bombing; in addition, the initial stages of the criminal investigation that followed focused on Arabs. See Whidden, *supra* note __, at 2863-65.

²⁵⁴ See Note, *Blown Away? The Bill of Rights After Oklahoma City*, 109 HARV. L. REV. 2074 (1996). Domestic terrorists continue to pose a serious threat to public safety in the United States. See Whidden, *supra* note __, at 2853-60.

²⁵⁵ See Jennifer A. Beall, *Are We Only Burning Witches? The Anti-Terrorism and Effective Death Penalty Act of 1996's Answer to Terrorism*, 73 IND. L.J. 693 (1998); Lisa A. Solbakken, Note, *The Anti-Terrorism and Effective Death Penalty Act: Anti-*

clarify a conflict among the circuits and ensure that habeas corpus review of removal orders remained intact.²⁵⁶

Immigration Legislation Veiled in an Anti-Terrorism Pretext, 63 BROOKLYN L. REV. 1381 (1997); see also *Illegal Immigration Reform and Immigrant Responsibility Act of 1996*, Pub. L. No. 104-208, 110 Stat. 3009 (1996) (amending immigration laws in variety of ways to the detriment of immigrants).

²⁵⁶ See *INS v. St. Cyr*, 121 S. Ct. 2271 (2001).

As occurred in the aftermath of the Oklahoma City bombing, immigration reforms will likely be one response to September 11. Proposed bills designed to better monitor nonimmigrants who enter the country on student visas, respond to the fact that several of the terrorists involved in the September 11 hijackings had entered the country on such visas and never attended school.²⁵⁷ In addition, public opinion polls suggest that voters may support

²⁵⁷ See Diana Jean Schemo, *Eager for Foreign Students, Universities Persuade Senator to Drop Plan to Limit Visas*, N.Y. TIMES, Nov. 18, 2001, at 1B. Initially, Senator Diane Feinstein proposed a moratorium on all student visas. See Diana Jean Schemo, *Access to U.S. Courses Is Under Scrutiny in Aftermath of Attacks*, N.Y. TIMES, Sept. 21, 2001, at B7.

immigration, civil rights, and other restrictions aimed at Arabs and Muslims, including U.S. citizens.²⁵⁸

²⁵⁸ See Richard Morin & Claude Deane, *Most Americans Back U.S. Tactics: Poll Finds Little Worry Over Rights*, WASH. POST, Nov. 29, 2001, at A1 (reporting poll results showing broad support for Bush administration measures to combat terrorism with little concern for loss of civil rights); USA Today/CNN/Gallup Poll Results, Sept. 16, 2001 (showing that almost 50% of persons polled supported a special identification card for Arabs, including U.S. citizens, and that almost 60% favored more intensive security checks before Arabs could board airplanes). The public's willingness to sacrifice civil liberties remained strong well after September 11, see Robin Tower & Janet Elder, *Public is Wary But Supportive on Rights Curbs*, N.Y. TIMES, Dec. 12, 2001, at A1 (reporting on poll data), with President Bush's approval ratings at all-time highs, see Andrew Kohut, *Will Bush Bring the Party With Him?*, N.Y. TIMES, Jan. 13, 2002, at sec. 4, p. 17 ("George W. Bush has set the modern presidential record for stratospheric approval ratings"—only Franklin Roosevelt and Harry Truman had longer runs of nearly universal public support.). At one commencement ceremony in California, the

audience heckled a speaker off the stage after she spoke on the need for vigilance in protecting civil liberties in the response to terrorism. See Timothy Egan, *In Sacramento, A Publisher's Questions Draw the Wrath of the Crowd*, N.Y. TIMES, Dec. 21, 2001, at B1.

Congress already has taken an initial cut at the immigration laws. Section 411 of the USA PATRIOT Act expands the definition of "terrorist activity" in the immigration laws that may justify the finding that may justify the findings that a noncitizen is inadmissible to include a threat to use, or the use of, "any dangerous device, with intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property"; this likely will result in an additional removal ground for aliens convicted of simple assault and similar crimes not ordinarily thought of as "terrorist" in nature.²⁵⁹ The Act further provides that a spouse or child of a "terrorist" who is also inadmissible generally is inadmissible.²⁶⁰ A noncitizen also may be deemed inadmissible for being "associated with a terrorist organization," whose broad terms seem to build on the principle of "guilt by association."²⁶¹ The Act provides for retroactive application of the various changes to the immigration laws.²⁶² Congress also included appropriations funds for increased border enforcement, even though there was no evidence that the alleged terrorists evaded inspection at the national borders.²⁶³

²⁵⁹ See USA PATRIOT Act, *supra* note __, § 411 (amending §§ 212(a)(3) (inadmissibility grounds) and 237(a)(4)(B) (removal grounds) of INA).

²⁶⁰ See USA PATRIOT Act, *supra* note __, § 411 (amending § 212(a)(3) of INA).

²⁶¹ See USA PATRIOT Act, *supra* note __, § 411 (amending § 212(a)(3) of INA).

²⁶² See USA PATRIOT Act, *supra* note __, § 411 (amending §§ 212(a)(3) (inadmissibility grounds) and 237(a)(4)(B) (removal grounds) of INA).

²⁶³ See USA PATRIOT Act, *supra* note __, § 402 (authorizing appropriations necessary to triple the Border Patrol personnel along northern border). This provision responds to fears that terrorists might seek to enter the country from Canada, and the arrest, and later conviction, of an Algerian man with bomb-making materials seeking to enter the United States from Canada on the eve of the new millennium. See Jane Fritsch, *Algerian Sentenced in 1999 Plot to Bomb Airport*, N.Y. TIMES, Jan. 17, 2002, at A26; Sam Howe Verhovek with Tim Weiner, *Man Seized with Bomb Parts at Border Spurs U.S. Inquiry*, N.Y. TIMES, Dec. 19, 1999, at A1. The Act's emphasis on northern border enforcement may shift the

myopic focus from the southern border with Mexico, which was the primary place of heightened border enforcement in the 1990s. See Bill Ong Hing, *The Dark Side of Operation Gatekeeper*, 7 U.C. DAVIS. J. INT'L L. & POL'Y (forthcoming 2001) (analyzing human impacts of greatly increased border enforcement operations along U.S./Mexico border).

In addition, the Aviation and Transportation Act, which placed airport security in the hands of the federal government, made U.S. citizenship a qualification for airport security personnel.²⁶⁴ Although possibly constitutional,²⁶⁵ the citizenship requirement injures many lawful immigrants who had held these low-wage jobs.²⁶⁶ Somewhat ironically, while immigrants can be

²⁶⁴ Pub. L. No. 107-71 § 111(a)(2)(A)(ii), 115 Stat. 597, _____ (2001).

²⁶⁵ See, e.g., *Cabell v. Chavez-Salido*, 454 U.S. 432 (1982) *Ambach v. Norwick*, 441 U.S. 68 (1979) (refusing to find unconstitutional state law barring aliens from employment as public school teachers); *Foley v. Connelie*, 435 U.S. 291 (1978) (upholding state law requirement that citizenship requirements for police officers).

²⁶⁶ See Steven Greenhouse, *Groups Seek to Lift Ban on Foreign Screeners*, N.Y. TIMES, Dec. 12, 2001, at B10 (reporting that 80% of the security screeners at San Francisco International Airport and 40% of those at Los Angeles International are immigrants facing loss of their jobs); see also Sam Skolnik, *INS Checking Sea-Tac Workers*, SEATTLE POST-INTELLIGENCER, Nov. 28, 2001, at A1 (stating that Immigration & Naturalization Service was

conscripted into the military,²⁶⁷ they cannot serve in airport security positions.

reviewing immigration status of Seattle airport's 18,000 workers because of security concerns).

²⁶⁷ See 50 U.S.C. app. § 453 (1994); see also Charles E. Roh, Jr. & Frank K. Upham, *The Status of Aliens Under United States Draft Laws*, 13 HARV. J. INT'L L. 501 (1972). It is noteworthy that President Ford issued an order limiting federal service positions to citizens, see 41 Fed. Reg. 37303 (1976), after the Supreme Court had invalidated a Civil Service Commission rule to that effect, see *Hampton v. Mow Sun Wong*, 426 U.S. 88 (1976).

More generally, the events of September 11 likely will adversely impact long contemplated reforms to immigration law and enforcement, with likely impacts on people of color. Before the bombings, immigrant rights advocates believed it possible that Congress would ameliorate some of the harsh provisions of the 1996 immigration legislation, including possible elimination of the secret evidence proceedings.²⁶⁸ Indeed, during the 2000 Presidential campaign, George W. Bush claimed that the Clinton administration's use of secret evidence proceedings against Arabs and Muslims amounted to unlawful racial profiling.²⁶⁹ The abolition of secret evidence proceedings currently appears out of the question.

Over the last few years, immigration rights activists had mobilized support of a coalition of groups for a series of immigration reforms to "Fix 96," a response to the harsh consequences of the 1996 immigration reforms.²⁷⁰ All such

²⁶⁸ See Secret Evidence Repeal Act, H.R. 2121, 106th Cong., 2d Sess. (2000); Anthony Lewis, *Abroad at Home*, N.Y. TIMES, Nov. 4, 2000; *supra* text accompanying notes ____ (discussing secret evidence cases).

²⁶⁹ See Vice President Gore and Governor Bush Participate in Second Presidential Debate, FDCH POL. TRANSCRIPTS, Oct. 11, 2000.

²⁷⁰ See Somini Sengupta, *The Immigration Debate: Full Employment Opens the Door*, N.Y. TIMES, June 18, 2000, at 4

legislative proposals probably died on that day.

(discussing "Fix '96 Campaign" and various immigration reform efforts); Eric Lipton, *As More are Deported, a '96 Law Faces Scrutiny*, N.Y. TIMES, Dec. 21, 1999, at A1 (same); see also PETER H. SCHUCK, *CITIZENS, STRANGERS, AND IN-BETWEENS* (1998) (referring to 1996 reforms as "radical" and "that Congress severely restricted the legal rights of both legal and illegal immigrants").

Moreover, a short-lived historical moment appeared in early 2001 promising a fundamental transformation of U.S./Mexico migration. Only days before September 11, public discussion had been ongoing about the possibility of dramatic changes to the migration relationship between the two nations. The Mexican government supported a program that would allow for the [regularization] of the immigration status of many undocumented Mexican migrants in the United States,²⁷¹ while the Bush administration pushed for a temporary work program.²⁷² Although difficult sticking points remained,²⁷³ a compromise appeared possible. After September 11, such reform discussion virtually disappeared, perhaps another casualty of the catastrophic events of that day.²⁷⁴

Regularizing migration from Mexico promised to make the issue of undocumented immigration more manageable for the United States. Mexican citizens represent a significant portion of the population.²⁷⁵ Thus, undocumented workers will remain in the shadows of U.S. social life. Mexican immigrants also may experience the ripple effects of the heightened border enforcement.²⁷⁶ Only time will tell whether a historic

²⁷¹ See Ginger Thompson, *U.S. and Mexico to Open Talks on Freer Migration of Workers*, N.Y. TIMES, Feb. 16, 2001, at A1.

²⁷² See *id.*

²⁷³ See Eric Schmitt, *No Agreement Yet With Mexico on Immigration Plan, U.S. Says*, N.Y. TIMES, Sept. 1, 2001, at A1 (quoting Senator Phil Gramm, who supported guest worker program but vowed that any legalization program would have to be passed [over my cold, dead political body]).

²⁷⁴ See Ronald Brownstein, *Green Light, Red Light; Is the Push to Liberalize Immigration Policy a Casualty of the Surprise Terrorist Attacks on September 11?*, AM. PROSPECT, Nov. 19, 2001, at 28; Tim Weiner & Ginger Thompson, *Mexico Lower on Bush's List Since Sept. 11*, N.Y. TIMES, Dec. 29, 2001, at A4.

²⁷⁵ See U.S. DEPT OF JUSTICE, 1998 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE 240 (2000) (Table I) (compiling statistical data showing that, as of 1996, about 54% of undocumented immigrant population was of Mexican origin).

²⁷⁶ See Fox Butterfield, *Drug Seizures Have Surged at the Border Officials Say*, N.Y. TIMES, Dec. 16, 2001, at sec. 1A, p. 32

opportunity to reform the migration relations between the United States and Mexico was destroyed with the World Trade Center.

2. *Race Profiling*

(noting impacts of increased border enforcement after September 11); Richard Serrano, *Arrests on Border Fall After 9/11*, L.A. TIMES, Feb. 2, 2002, at A1 (reporting fewer arrests on border after September 11 perhaps due to increased fears of arrest and detention).

In the last few years, the use of race profiling in criminal law enforcement previously had undergone sustained attack.²⁷⁷ Presidential hopefuls had criticized race profiling by police in traffic stops.²⁷⁸ After the 2000 election, both President Bush and Attorney General Ashcroft publically condemned race profiling.²⁷⁹

Similarly, the argument had been powerfully made that race-based enforcement of the immigration laws is inappropriate.²⁸⁰

²⁷⁷ See, e.g., Angela J. Davis, *Race, Cops, and Traffic Stops*, 51 U. MIAMI L. REV. 425 (1997); Harris, *supra* note __.

²⁷⁸ See Richard L. Berke, *Gore and Bradley Duel, Briefly on Race Issue*, N.Y. TIMES, Jan. 18, 200, at A20.

²⁷⁹ See *Attorney General Seeks End to Racial Profiling*, N.Y. TIMES, Mar. 2, 2001, at A20. Previously, as a presidential candidate, George Bush had claimed that the Clinton Administration's use of secret evidence proceedings against Muslim immigrants amounted to racial profiling. See *supra* text accompanying notes __.

²⁸⁰ See Kevin R. Johnson, *The Case Against Race Profiling in Immigration Enforcement*, 78 WASH. U.L.Q. 675 (2000).

Although the Supreme Court condoned the practice in 1975,²⁸¹ one court of appeals in 2000 held that the Border Patrol could not consider a person's "Hispanic appearance" in making an immigration stop.²⁸² The profile was over-inclusive, pulling in too many U.S. citizens and lawful permanent residents and subjecting them to civil rights deprivations, as well as allowing for the arrest of a small number of undocumented immigrants.

²⁸¹ See *United States v. Brignoni-Ponce*, 422 U.S. 873, 886-87 (1975).

²⁸² See *United States v. Montero-Camargo*, 208 F.3d 1122 (9th Cir. 2000) (en banc).

Moreover, sustained public criticism of race profiling in national security matters came in the wake of the Wen Ho Lee debacle in which trumped up espionage charges evaporated when exposed to the light of day.²⁸³ This case is instructive with respect to the current situation of Arabs and Muslims in the United States, in part because Lee was presumed to be disloyal because of long held stereotypes about Asians.²⁸⁴

In all of these circumstances, law enforcement based on alleged group propensities runs afoul of the U.S. Constitution, which is generally premised on the view that individualized suspicion is necessary for stops.²⁸⁵ Unfortunately, governmental reliance on statistical probabilities at the core of the

²⁸³ See Neil Gotanda, *Comparative Racialization: Racial Profiling and the Case of Wen Ho Lee*, 47 UCLA L. REV. 1689 (2000); Wu, *supra* note __, at 176-90.

²⁸⁴ See Leti Volpp, *[Obnoxious to Their Very Nature]: Asian Americans and Constitutional Citizenship*, 8 ASIAN L.J. 71, 79-82 (2001); Thomas W. Joo, *What, If Not Race, Tagged Lee?*, L.A. TIMES, Aug. 15, 2001, at part 2, p. 13.

²⁸⁵ See *supra* note __ (citing cases).

opposition to racial profiling, have been resurrected by the September 11 terrorist attacks.

After the tragedy of September 11, persons of apparent Arab ancestry were questioned for possible links to terrorism, removed from airplanes, and generally subject to extra scrutiny at every turn.²⁸⁶ To many, the reconsideration of the use of race in law enforcement made perfect sense. Public opinion, at least for a time, quickly shifted to favor race profiling in the war on terrorism.²⁸⁷ If the shift proves enduring, it could have long term impacts, including encouraging reconsideration of the efforts to end race profiling in *all* law enforcement.

The federal government's profiling of Arabs and Muslims in the investigation promotes the legitimacy of race profiling.²⁸⁸ It also has undermined federal efforts to pressure state and local law enforcement agencies to end the practice. One member

²⁸⁶ See *supra* text accompanying notes __.

²⁸⁷ See Sam Howe Verhovek, *Americans Give in to Race Profiling*, N.Y. TIMES, Sept. 23, 2001, at A1; see, e.g., *Profiles in Timidity*, WALL ST. J., Jan. 25, 2002, at A18 (endorsing race profiling in war on terrorism); James Q. Wilson & Heather R. Higgins, *Profiles in Courage*, WALL ST. J., Jan. 10, 2002, at A12 (same); Stuart Taylor Jr., *The Case for Using Racial Profiling at the Airports*, NAT'L J., Sept. 22, 2001 (advocating race profiling of Arab appearing people on airplanes); Bruce Fein, *A Commensurate Response*, WASH. TIMES, Sept. 18, 2001, at A17 (advocating many measures, such as revoking executive order prohibiting U.S. assassinations of foreign leaders, and calling for President Bush and Congress to authorize race and religious profiling in efforts to investigate international terrorism). As profiling becomes commonplace, one might think that terrorists might try to have terrorists who did not fit the "Arab" stereotype. Cf. Johnson, *supra* note __, at 711 (making similar point with respect to race profiling along the U.S./Mexican border). It appears that profiling may not be all that successful; in flying from France to the United States, one Muslim convert with explosives in his shoes was able to board a domestic flight despite heightened security. See Sebastian Rotella & Marjorie Miller, *Terrorists are Difficult to Profile*, L.A. TIMES, Dec. 29, 2001, at A1.

²⁸⁸ See *supra* text accompanying notes __.

of Congress proclaimed that anyone with [a diaper on his head and a fan belt around that diaper] should be stopped and questioned.²⁸⁹ A Republican member of Congress of Lebanese descent (Darrell Issa) accused Air France of race profiling in denying him a seat on a flight to Europe.²⁹⁰ An Arab American Secret Service agent assigned to protect President Bush was denied access to an American Airlines flight.²⁹¹

²⁸⁹ See *Apology from Congressman*, N.Y. TIMES, Sept. 21, 2001, at A16.

²⁹⁰ See *Rep. Issa Says His Arab Name Kept Him Off Flight*, L.A. TIMES, Oct. 27, 2001, at A1; see also Rosenzweig, *supra* note ___ (reporting on indictment of two Jewish Defense League leaders for conspiracy to blow up Issa's congressional office).

²⁹¹ See *Guard for Bush Isn't Allowed Aboard Flight*, N.Y. TIMES, Dec. 27, 2001, at B5.

Interestingly, state and federal tensions have arisen due to the federal government's racial profiling in the wake of September 11. Several local law enforcement agencies resisted the Attorney General's request for cooperation in interviewing Arabs and Muslims²⁹² in hopes of uncovering information about the bombings on the grounds that this constituted impermissible racial profiling.²⁹³ In addition, the Attorney General also requested that the U.S. government should be informed if an interviewee was suspected of being in the country in violation of the immigration laws.²⁹⁴ This, of course, would discourage immigrant cooperation with the police and make local law enforcement more difficult.²⁹⁵

In short, the U.S. government's response to the loss of life of September 11 promises to have long term immigration and civil rights impacts. The impacts may well be felt by citizens as well as immigrants of many different ancestries. Unfortunately, this continues a pattern in U.S. history.²⁹⁶

CONCLUSION

The stereotyping of Arabs and Muslims historically has had a dramatic impact on immigration law and policy. Separate procedures and the selective enforcement of the immigration laws has adversely affected the civil rights of Arabs and Muslims in

²⁹² See *supra* text accompanying notes ____.

²⁹³ See Fox Butterfield, *Police are Split on Questioning of Mideast Men*, N.Y. TIMES, Nov. 22, 2001, at A1; Jim Adams, *Twin Cities Police Undecided on Helping FBI*, STAR TRIB. (Minneapolis, MN), Nov. 22, 2001, at 7B. Some resistance stems from local laws and regulations limiting police cooperation with the INS, which were designed to encourage crime victims and witnesses to cooperate with local law enforcement. See, e.g., Patrick J. McDonnell, *INS Hunt Not Seen as Issue for LAPD*, L.A. TIMES, Dec. 8, 2001, at Part 2, p.4 (discussing 1979 Los Angeles Police Department directive barring officers from inquiring about immigration status).

²⁹⁴ See *supra* text accompanying notes ____.

²⁹⁵ See *supra* text accompanying notes ____.

²⁹⁶ See *supra* text accompanying notes ____.

the United States. The most recent "war on terrorism" has built on previous anti-terrorist measures. Sadly but not unexpectedly, private discrimination frequently has accompanied governmental action directed at Arabs and Muslims.

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

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