

THE ROAD TO INTERNMENT: SPECIAL REGISTRATION AND OTHER HUMAN RIGHTS VIOLATIONS OF ARABS AND MUSLIMS IN THE UNITED STATES

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Dust storms.

Sweat days.

Yellow people,

Exiles.

I am the mountain that kisses the sky in the dawning.

I watched the day when these, your people, came into your heart.

Tired.

Bewildered.

Embittered.

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The author would like to acknowledge and thank Malea Kiblan, a civil rights attorney in McLean, Virginia, for her invaluable mentoring and referral of many of the cases described in this article, which in large part made this article possible, including her ideas suggesting a relationship between Special Registration as a preparation for interning Arabs and the preparation of camps in Louisiana for this purpose. The author would like to thank Roger McCrummen for his mentorship and assistance with many of these cases, as well as Robin Goldfaden an attorney with the ACLU Immigrants' Rights Project in California for joining as co-counsel for the brief in two of the Special Registration cases described herein. Her assistance was critical in formulating and assisting with the legal strategies for these cases over a course of over a year which led to successful resolution and dismissal of charges against the clients. See *infra* Part IV.K. None of this would be possible without the moral support and inspiration of my wife, Rima, during the two years it took to write this article and the three-year period in which these cases and my research took place. The author would also like to thank Professor Susan Akram at Boston University for her comments, ideas, and helpful references, particularly in regards to her and the work of others, such as David Cole, in discovering government plans to intern Arabs prior to 9/11.

The author would also like to thank the following attorneys for their often critical assistance in the form of legal analysis, discussion, or comments with some of the concepts and observations in this article that were primarily in the form of assistance with the cases discussed in this article over a period of three years: Suzanne Gladney of Legal Aid of Western Missouri; Stephen Kirschbaum of Stephen M. Kirschbaum, LLC in Kansas City, Missouri; Roger McCrummen, Jonathan Willmoth, and Alexander Solorio with my law firm; Lauren Reinhold with the University of Kansas in Lawrence, Kansas; Kareem Shora, Leila Laoudji, Carol Khawly, and Nawar Shora with the ADC in Washington, D.C.; Faith Nouri with Nouri Law Corporation in Los Alamitos, California; Malea Kiblan with Kiblan & Battles in McLean, Virginia; Atessa Chehrazi with Jackson & Hertogs, LLP in San Francisco, California; Crystal Williams with AILA in Washington, D.C.; Mazen Sukkar with the Law Offices of Sukkar, Arevalo, and Associates in Hollywood, Florida; Suzanne Brown with the Law Offices of Suzanne Brown, P.C. in St. Louis, Missouri; and Karen Pennington of the Law Office of Karen H. Pennington in Dallas, Texas. However, the ideas expressed in this article are not necessarily the views of any of those acknowledged above, nor of the shareholder and associates of The McCrummen Immigration Law Group, LLC.

*I saw you accept their compassion, impassive but visible.
Life of a thousand teemed within your bosom.
Silently you received and bore them.
Daily you fed them from your breast,
Nightly you soothed them to forgetful slumber,
Guardian and keeper of the unwanted.*

*They say your people are wanton
Sabateurs.
Haters of white men.
Spies.
Yet I have seen them go forth to die for their only country,
Help with the defense of their homeland,
America.*

*I have seen them look with beautiful eyes at nature.
And know the pathos of their tearful laughter,
Choked with enveloping mists of the dust storms,
Pant with the heat of sweat-days; still laughing.
Exiles.*

*And I say to you these you harbor and those on the exterior,
“Scoff if you must, but the dawn is approaching,
When these, who have learned and suffered in silent courage;
Better, wiser, for the unforgettable interlude of detention,
Shall trod on free sod again,
Side by side peacefully with those who sneered at the
Dust storms.
Sweat days.
Yellow people,
Exiles.*

—*Manzanar* by Michiko Mizumoto,
Japanese American Relocation Center
(circa 1942–45)¹

1. Michiko Mizumoto, *Manzanar*, Japanese-American Relocation Center Records, Dept. of Manuscripts and University Archives, Cornell University (circa 1942–45), available at <http://www.densho.org/learning/spice/lesson4/4activity4-4handouts.PDF> (last visited Nov. 7, 2004). DEBORAH GESENSWAY & MINDY ROSEMAN, BEYOND WORDS: IMAGES FROM AMERICA'S CONCENTRATION CAMPS 108–09 (1987).

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INTRODUCTION: THE ROAD TO INTERNMENT

The Japanese internment was a shame² and embarrassment.³ We apologized for the Japanese internment in World War II. “[S]ome five thousand Germans and Italians, both citizens and ‘enemy aliens,’ were eventually interned”⁴ We regretted those times where the U.S. government prejudged some of us by our group characteristics, our race, ethnicity, or nationality and violated our human rights. These gross aberrations in the American character are the farthest thing from the definition of “American.” “The Japanese internment affronted American ideals of justice.”⁵ Some historians have stated that the internment “came close to direct duplication of Fascism.”⁶ Violating the rights of other human beings because of our fears has never worked in increasing our security. After over two centuries of U.S. history, we are currently discriminating, persecuting, and violating human rights based on nationality. However, this time it is unprecedented because it encompasses ethnicity and religion.⁷ We are doing this to Arabs and Muslims. Not only

2. David Cole, *The Priority of Morality: The Emergency Constitution's Blind Spot*, 113 YALE L.J. 1753, 1755 (2004) [hereinafter Cole, *Priority of Morality*]. “The Palmer Raids and the Japanese internment are widely acknowledged as two of the most shameful moments in American history; the detention of thousands of Arabs and Muslims after September 11 deserves a place in that dubious pantheon.” *Id.*

3. See, e.g., DAVID M. KENNEDY, *FREEDOM FROM FEAR: THE AMERICAN PEOPLE IN DEPRESSION AND WAR, 1929–1945* 759 (1999).

For the Japanese internees, the entire episode had been a cruel torment. By one estimate they suffered some \$400 million in property losses as a result of evacuation. Congress in 1948 provided a paltry \$37 million in reparations. In another spasm of conscience forty years later, Congress awarded \$20,000 to each surviving detainee.

Id.

4. *Id.* at 750 n.4; see also L.A. Chung, *A Wider View of Internees' Experience*, SAN JOSE MERCURY NEWS, Feb. 11, 2003 (discussing N.C. congressman Howard Coble's comments supporting internment of Arabs and the plight of not only the Japanese during the internment of World War II, but also the internment of large numbers of Italians and Germans), available at <http://www.mercurynews.com/mld/mercurynews/news/local/5153900.htm?1c>.

5. KENNEDY, *supra* note 3, at 760.

6. HOWARD ZINN, *A PEOPLE'S HISTORY OF THE UNITED STATES, 1492–PRESENT* 416 (5th ed. 2003).

In one of its policies, the United States came close to direct duplication of Fascism. This was in its treatment of the Japanese-Americans living on the West Coast. After the Pearl Harbor attack, anti-Japanese hysteria spread in the government. One Congressman said: “I'm for catching every Japanese citizen in American, Alaska and Hawaii now and putting them in concentration camps. . . . Damn them! Let's get rid of them!”

Id.

7. Elisa Massimino, *Symposium Critique*, 19 J.L. & RELIGION 81 (2003–2004) (discussing the human rights violations of Muslims in the aftermath of 9/11).

is it not helping with our nation's security, it is affronting "American ideals of justice."

Today, it is no longer the "yellow people" that we fear. It is no longer the "Japs"⁸ we presume guilty. It is now the Arabs and Muslims that we are labeling with similar epithets as "Saboteurs,"⁹ "Haters of white men"¹⁰ or "Spies."¹¹

8. See KENNEDY, *supra* note 3, at 749, 752.

General John L. DeWitt, chief of the army's Western Defense Command, at first dismissed loose talk of mass evacuations as "damned nonsense." . . . "An American citizen, after all, is an American citizen," he declared. . . .

. . . .

. . . The same man . . . now announced, "A Jap's a Jap. . . . It makes no difference whether he is an American citizen or not. . . . I don't want any of them."

Id. (sixth and seventh omissions in original).

9. Cf. AMERICAN-ARAB ANTI-DISCRIMINATION COMM., REPORT ON HATE CRIMES AND DISCRIMINATION AGAINST ARAB-AMERICANS 124-31 [hereinafter ADC DISCRIMINATION REPORT] ("One hundred percent of the terrorists involved in the Sept. 11 mass murder were Arabs. Their accomplices, if any, were probably Arabs too, or at least Muslims. Ethnicity and religion are the very basis of their movement." (quoting Richard Cohen, Editorial, *Profiles in Evasiveness*, WASH. POST, Oct. 1, 2001, at A33)); ("Those who take the Koran seriously are taught to hate the Christian and the Jew; lands taken from Islam must be recaptured. And to the Islamist, dying in a jihad is the only way one can be assured of Allah's forgiveness and eternal salvation." (quoting Chuck Coleson, *Evangelizing for Evil in Our Prisons*, WALL ST. J., June 24, 2002, at A16)); ("We should invade their countries, kill their leaders and convert them to Christianity." (quoting Ann Coulter, *This Is War*, NATIONAL REVIEW ONLINE (Sept. 13, 2001), at <http://www.nationalreview.com/coulter/coulterprint091301.html>)); ("I'm beginning to believe that the central source of animus from the Arab world is, quite simply, envy. . . . The Islamic world has a self-esteem problem." (quoting Jonah Goldberg, *Civilization Envy: On Muslims, Israel, and McDonalds*, NATIONAL REVIEW ONLINE (Sept. 28, 2001), at <http://www.nationalreviewonline.com/goldberg/goldberg092801.shtml>))

10. For example, U.S. Attorney General John Ashcroft stated in an interview with syndicated columnist Cal Thomas that "Islam is a religion in which God requires you to send your son to die for him. Christianity is a faith in which God sends his son to die for you." ADC DISCRIMINATION REPORT, *supra* note 9, at 128. The Attorney General in an on-line reply to criticism of this statement said that these remarks "do not accurately reflect what I believe I said"; however, Cal Thomas stated that "the quote was accurate and that he had read it back to Ashcroft and his communications director during an interview in the attorney general's office." Dan Eggen, *Alleged Remarks on Islam Prompt an Ashcroft Reply*, WASH. POST, Feb. 14, 2002, at A31.

11. Cf. ADC DISCRIMINATION REPORT, *supra* note 9, at 128-30 ("If I see someone come in that's got a diaper on his head, and a fan belt wrapped around that diaper on this head, that guy needs to be pulled over." (quoting Louisiana Republican Congressman John Cooksey)); ("[A] Georgia sheriff should be turned loose to 'arrest every Muslim that comes across the state line.'" (quoting Georgia Congressman Saxby Chambliss)); ("Congressman Norwood sent a letter to his constituents in the 10th District, dated June 12, that supports the racial profiling of Arab men. It says 'Arab Muslim male extremists' are responsible for numerous terrorist attacks . . ." (quoting Georgia Congressman Charlie Norwood)); ("We're not attacking Islam, but Islam has attacked us. The God of Islam is not the same God. He's not the son of God of the Christian of Judeo-Christian faith. It's a different God and I believe it is a very evil and wicked religion." (quoting Rev. Franklin Graham, *NBC Nightly News* (NBC television broadcast, Nov. 17, 2001))); ("The persecution or elimination of non-Muslims has been a cornerstone of Islamic conquests and rule for centuries . . . [The Koran] provides ample evidence that

Arabs and Muslims, especially the noncitizens, may suffer the same fate of becoming “exiles” as the Japanese.¹² Fred Korematsu¹³ and other Japanese Americans¹⁴ have expressed their concern about the similar relationship between the discrimination and internment¹⁵ that the Japanese suffered in World War II to what Arabs and Muslims are experiencing today.¹⁶ Korematsu stated that “[t]here are Arab-Americans today who are

Islam encourages violence in order to win converts and to reach the ultimate goal of an Islamic world.” (quoting Rev. Franklin Graham, Associated Press (Dec. 14, 2001) (omission and alteration in original));

“Now, sure, in America, many, many so-called Muslims had watered down the teachings of Mohammed. They say, we don’t believe that, we don’t believe the Koran, really it’s something else. But if you believe what those people in Mecca believe, what the people who follow Osama bin Laden believe, then we have an enemy we have to do something about.”

(quoting Rev. Pat Robertson, *Late Edition with Wolf Blitzer* (CNN television broadcast, Feb. 24, 2002)).

12. See Stanley Mark et al., *Have We Learned the Lessons of History? World War II Japanese Internment and Today’s Secret Detentions*, IMMIGR. POL’Y FOCUS, Oct. 2002, at 3, 10 [hereinafter Mark et al., *Secret Detentions*], available at <http://www.aifl.org/ipc/ipf1002.pdf>.

After Pearl Harbor, the Roosevelt administration implemented policies that blatantly resulted in the exclusion of people of Japanese ancestry. . . . [D]espite commendable rhetoric by President Bush warning against intolerance of and violence against Arab Americans and Muslims living in the United States, his administration has implemented policies that fly in the face of his admonitions.

Id.

13. See *Korematsu v. United States*, 323 U.S. 214, 223 (1944) (upholding Korematsu’s criminal conviction for attempting to escape the internment camp). *But see* *Korematsu v. United States*, 584 F. Supp. 1406, 1411, 1419–20 (N.D. Cal. 1984) (granting a writ of *coram nobis* and voiding Korematsu’s 1944 conviction). “President Bill Clinton rendered further atonement in 1998 when he bestowed the nation’s highest civilian honor, the Presidential Medal of Freedom, on that implausible paladin, Fred Korematsu.” KENNEDY, *supra* note 3, at 759.

14. See generally Annie Nakao, *Japanese Americans Can Feel Muslims’ Pain*, S.F. CHRON., Aug. 7, 2003, at E14 (“[I]t is heartening that Japanese Americans—so traumatized by their World War II internment that they spent the next half century relentlessly pursuing the American dream of assimilation—were among the first to step up and stand behind Muslims and Arabs in the days after Sept. 11.”).

15. See Reuters, *Monitoring of Iraqis Likened to Internment*, TORONTO STAR, Nov. 19, 2002, at A15. “Suspicion is being attached to ethnicity The logic behind the internment of Japanese Americans was that the pool of potential spies was limited to that community. We are now seeing that the major terrorists are restricted in their pool to Arabs and Muslims.” *Id.* (quoting Jean AbiNader, managing director of the Arab American Institute).

16. See Kevin R. Johnson, *Roll over Beethoven: “A Critical Examination of Recent Writing About Race”*, 82 TEX. L. REV. 717, 725 (2004).

[T]he urgency of the issue hit its zenith with the federal government’s dragnet that included mass arrests and detention of thousands of Arabs and Muslims following the horrible events of September 11, 2001. Such human rights violations, which some claim resemble the infamous internment of persons of Japanese ancestry during World War II, warrant most serious attention.

Id. (footnotes omitted); see also Susan M. Akram & Kevin R. Johnson, *Race, Civil Rights, and Immigration Law After September 11, 2001: The Targeting of Arabs and Muslims*, 58 N.Y.U. ANN. SURV. AM. L. 295, 337 (2002) [hereinafter Akram & Johnson, *Race, Civil Rights, and Immigration Law*].

going through what Japanese Americans experienced years ago, and we can't let that happen again."¹⁷ Members of the U.S. Civil Rights Commission appointed by President George W. Bush have "broached the possibility of a rising public sentiment for internment camps if the U.S. were attacked again."¹⁸ There are also U.S. senators who have made suggestions that they approved of the Japanese internment, and they have drawn parallels between the Japanese in World War II and Arabs today.¹⁹ The Chief Justice of the U.S. Supreme Court believes that if only the

In important ways, the September 11 dragnet carried out by the federal government resembles the Japanese internment during World War II [However,] the current treatment of Arabs and Muslims is more extralegal than the internment. No Executive Order authorizes the treatment of Arabs and Muslims; nor has there been a formal declaration of war.

Id.

17. Eric Paul Fournier, *Of Civil Wrongs and Rights: The Fred Korematsu Story*, PBS (July 2003), at <http://www.pbs.org/pov/pov2001/ofcivilwrongsandrights/storyline.html>.

18. Niraj Warikoo, *Arabs in U.S. Could Be Held, Official Warns, Rights Unit Member Forsees Detainment*, DETROIT FREE PRESS, July 20, 2002, available at http://www.freep.com/news/metro/civil20_20020720.htm.

A member of the U.S. Civil Rights Commission said in Detroit on Friday he could foresee a scenario in which the public would demand internment camps for Arab-Americans [sic] if Arab terrorists strike again in this country.

If there's a future terrorist attack in America "and they come from the same ethnic group that attacked the World Trade Center, you can forget about civil rights," commission member Peter Kirsanow said.

. . . . Kirsanow . . . argu[ed] that Arab and Muslim Americans should accept the country's new antiterrorism laws and complain less about infringements to their civil rights.

If there's another attack by Arabs on U.S. soil, "not too many people will be crying in their beer if there are more detentions, more stops, more profiling," Kirsanow said.

Id.

19. See, e.g., Associated Press, *Coble Says Internment of Japanese-Americans Was Appropriate*, CHARLOTTE OBSERVER, Feb. 5, 2003, available at <http://www.charlotte.com/mld/observer/news/local/5107909.htm>.

A congressman who heads a homeland security subcommittee said on a radio call-in program that he agreed with the internment of Japanese-Americans during World War II.

. . . . "We were at war. They (Japanese (Americans) – [sic] were an endangered species," Coble said. . . .

Like most Arab-Americans today, Coble said, most Japanese-Americans during World War II were not America's enemies.

. . . . "Some probably were intent on doing harm to us," he said, "just as some of these Arab-Americans are probably intent on doing harm to us."

Id.

Japanese aliens were interned in World War II, not the U.S. citizens, that it would have been constitutional.²⁰

As a prelude to the extreme of exile or internment, serious human rights abuses are occurring in the United States against Muslims and Arabs since September 11th,²¹ and they are still continuing to this day in practice and through legislation. These practices are simply not seriously discussed in the mainstream press or general public discourse. This lack of attention and acceptance of the ongoing human rights abuses in the United States of Arabs and Muslims is a real possibility if current abuses are not curbed, especially if there is another major terrorist attack or military conflict²² in the Middle East involving Iraq, Afghanistan, Israel/Palestine, Saudi Arabia, Syria, or Iran.²³ Perhaps the government will become more desperate as it sees that its tactics continue to be unsuccessful in finding “terrorists,” or proper intelligence and police work are not utilized, and instead the government relies only on ethnicity and religion for investigation and deportation.

The lack of attention in the general public discourse of what is occurring to Arabs and Muslims²⁴ is exactly what occurred during the

20. See *infra* text accompanying notes 564–67.

21. See David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953, 974–77 (2002) [hereinafter Cole, *Enemy Aliens*] (discussing the “Ethnic Profiling” of Arabs and Muslims in the United States post September 11, 2001).

22. From either the U.S. torture of Iraqis in U.S. custody where the U.S. government is at fault, or to the beheadings of Americans or non-Iraqis by Arabs or Muslims, a rise in the level of discrimination against Arabs or Muslims within the United States is seen. See, e.g., *US: Anti-Islam Hatred at New High*, ALJAZEERA.NET (June 26, 2004), at [http://english/aljazeera.net/NR/exeres/834641A5-3F08-49A0-90D2-885EFE28FF97.htm](http://english.aljazeera.net/NR/exeres/834641A5-3F08-49A0-90D2-885EFE28FF97.htm).

The recent beheading of two Americans have [sic] added fuel to the angry backlash against Arab-Americans and Muslims that began after the 2001 terrorist attacks.

....

Death threats against American Muslims have risen and Mosques have been vandalised.

“Since 9/11, every time there is an incident overseas attributed to Muslims or Arabs, we go on orange alert ourselves,” said immigration solicitor Sohail Muhammad.

Id.

23. An example could be with the American occupation of Iraq that seems to deteriorate almost daily with rumors that “foreign” forces or even Al-Qai’da is involved. If more U.S. forces are sent and accusations or realities come to light that perhaps other “Muslim” or “Arab” militants are involved, the United States might start treating similar nationals in the United States as enemies, and Special Registration would be an ideal system for more “voluntary” interviews or rounding up certain Arabs and Muslims or nationals.

24. See Akram & Johnson, *Race, Civil Rights, and Immigration Law*, *supra* note 16, at 301 (“Because of the suppression of Arab voices . . . many of the events and injustices are not reported in mainstream sources.”).

Japanese internment; “[n]ot until after the war did the story of the Japanese-Americans begin to be known to the general public.”²⁵ There is a continued rise in calls and acceptance of racial, ethnic, national, and religious profiling and defense of the Japanese internment²⁶ that has been heralded by Daniel Pipes,²⁷ who was appointed by George Bush to the National Institute of Peace.²⁸ Yet all the while, U.S. public sentiment for restricting the rights of Muslim-Americans is increasing.²⁹

Special Registration also creates a system of discrimination, humiliation, and a framework in which to implement a roundup and internment of Arabs and Muslims. Fred Korematsu³⁰ best typified the argument against the internment of the Japanese by reminding us of actually what we did to other humans. Mr. Korematsu, in his short statement to the federal court that overturned his conviction for disobeying orders to go to a

25. ZINN, *supra* note 6, at 416.

26. Almost four years after September 11, 2001, the political push for ethnic and religious profiling continues to become more extreme despite not having a major terrorist attack within the United States since that time. In August 2004, Michelle Malkin published her book defending the internment of Japanese Americans and arguing in favor of ethnic profiling. MICHELLE MALKIN, IN DEFENSE OF INTERNMENT: THE CASE FOR “RACIAL PROFILING” IN WORLD WAR II AND THE WAR ON TERROR xiii (2004). Malkin was the author of another anti-immigrant book, *Invasion*, which was on the *New York Times* Bestseller List. She is also a Fox News Channel contributor and syndicated news columnist. *Inter alia*, she attempts to defend the Japanese internment—that it was not primarily based on racism or as bad as what we are taught. *Id.* at xvi. She states that she would not condone a massive internment of Arabs and Muslims, although she seems to make a case for it, but to at least profile Arabs and Muslims and not to be overly concerned about infringing on their liberties. *See id.* at xiii.

[My book] offers a defense of the most reviled wartime policies in American history: the evacuation, relocation, and internment of people of Japanese descent during World War II My book is also a defense of racial, ethnic, religious, and nationality profiling policies . . . which are now being taken or contemplated during today’s War on Terror.

Id. But see Daniel M. Filler, *Terrorism, Panic, and Pedophilia*, 10 VA. J. SOC. POL’Y & L. 345, 349 (2003) (“[P]ublic displays of support for targeted minorities, to rhetorical attacks on these minorities—bears a great resemblance to the years and months preceding Japanese internment.”).

27. See Daniel Pipes, *Why the Japanese Internment Still Matters*, STAR-TELEGRAM.COM (Dec. 30, 2004) (commending Malkin’s book, discussed *supra* note 26, as well as the recent Cornell University poll discussed *infra* note 29), at <http://www.dfw.com/mld/dfw/news/opinion/10529596.htm>.

28. See Press Release, The White House, President George W. Bush, Personnel Announcement (Aug. 22, 2003), available at <http://www.whitehouse.gov/news/releases/2003/08/20030822-7.html>.

“The President has signed the recess appointment of Daniel Pipes of Pennsylvania to be a Member of the Board of Directors of the United States Institute of Peace. The President nominated Mr. Pipes on April 2, 2003.” *Id.*

29. See Associated Press, *Poll Shows U.S. Views on Muslim-Americans*, MSNBC.COM (Dec. 17, 2004) (stating that “[n]early half of all Americans believe the U.S. government should restrict the civil liberties of Muslim-Americans, according to a nation-wide poll . . . conducted by Cornell University”), available at <http://www.msnbc.msn.com/id/6729916/>.

30. See generally Eric L. Muller, *Inference or Impact? Racial Profiling and the Internment’s True Legacy*, 1 OHIO ST. J. CRIM. L. 103, 106 (2003) (“Laurence Tribe said it most simply of all in testimony before the Senate Judiciary Committee: ‘We are at the *Korematsu* crossroads.’”).

concentration camp during World War II, perhaps in the most human and direct terms of which the entire issue of internment lay, stated: “Forty years ago I came into this courtroom in handcuffs and I was sent to a camp. . . . The camp was not fit for human habitation. Horse stalls are for horses, not for people.”³¹ “Ethnicity and religion should never be used as a proxy for individualized suspicion or guilt,” the Japanese Internment was a “great embarrassment, [because] military ‘justification’ was found to be racial prejudice and government misconduct.”³² The Japanese internment, like the current religious, national and ethnic focus in deportation, investigation and Special Registration, found zero terrorists or spies.³³

Special Registration and other human rights violations of Arabs and Muslims should be ended and laid to rest in the graveyard of the darker part of U.S. history that includes the Japanese internment, slavery, racist immigration policy, treatment of African Americans, and the ethnic cleansing of American Indians.³⁴ Otherwise, our hard fought civil rights and liberties that have made the United States one of the most pluralistic, free, and strong societies in history and a beacon of light and refuge for the oppressed where its citizens can flourish will disintegrate. This should be prevented because if there is another terrorist attack, these rights violations will arise again, worsen, and possibly lead to some form of internment based on experience with September 11th and the reaction towards Arab

31. Transcript, *Of Civil Wrongs and Rights* (PBS television broadcast, July 10, 2001), at <http://www.pbs.org/pov/utills/pressroom2001/ofcivilwrongsandrights/OfCivilWrongsandRightsTranscript.doc>.

32. Mark et al., *Secret Detentions*, *supra* note 12, at 16.

Ethnicity and religion should never be used as a proxy for individualized suspicion or guilt. Not too long ago, the Supreme Court in *Korematsu* upheld an emergency rationale made by the military to uphold the exclusion of citizens and immigrants of Japanese ancestry from the West Coast. To the nation’s great embarrassment, military “justification” was found to be racial prejudice and government misconduct. Despite the pressure to ratify government action at times of conflict and crisis, the judiciary must not allow our nation to commit such acts of deprivation against American residents by virtue of their nations of origin or religious beliefs.

Id.

33. See Cole, *Priority of Morality*, *supra* note 2, at 1755.

And in the most infamous preventive detention campaign in American history, 110,000 persons—U.S. citizens and foreign nationals alike—were rounded up and interned during World War II simply because of their Japanese ancestry. None was found to have engaged in sabotage or espionage, the stated justifications for the internment.

Id. (footnotes omitted).

34. See Jonathan K. Stubbs, *The Bottom Rung of America’s Race Ladder: After the September 11 Catastrophe Are American Muslims Becoming America’s New N....S?*, 19 J.L. & RELIGION 115, 117 (2003–2004) (“Muslims . . . are being subjected to the same type of treatment in America that has been historically reserved for people of darker colors like Blacks, Latino/as, Asians and Native Americans.”).

and Muslim individuals. In a country where defending racism is taboo, Arab prejudice³⁵ is “rampant” and often considered legitimate to outwardly defend for supposed rational reasons even in intellectual circles; this results in one of the most dangerous and “extreme form[s] of racism.”³⁶ Practitioners should be aware and prepared to handle these situations when they represent Arab or Muslim clients in immigration proceedings.

Michiko Mizumoto wrote her poem *Manzanar* at the Manzanar relocation camp.³⁷ Even Americans can understand the potential cruelty of human beings who have their own government subordinate other “humans”³⁸ and designate them as “enemy aliens” as the U.S. government is designating Arabs and Muslims today. David M. Kennedy in his Pulitzer Prize winning book, *Freedom from Fear*, wrote:

A riot at Manzanar in late 1942, precipitated by anger over the government’s use of “stool pigeons” to keep tabs on dissidents, left two internees dead and eight seriously wounded. “*You can’t imagine how close we came to machine-gunning the whole bunch of them,*” one official told a San Francisco reporter. “The only thing that stopped us, I guess, were the effects such a shooting would have had on the Japs holding our boys in Manila and China.”³⁹

U.S. citizens, permanent residents, and aliens with Japanese ancestry became designated “enemy aliens” by the U.S. government. This

35. For a discussion on the U.S. government crackdown on Arab political opinion in the United States and the history of anti-Arab/Muslim sentiment and stereotyping in U.S. and Western culture, see Akram & Johnson, *Race, Civil Rights, and Immigration Law*, *supra* note 16, at 301–11.

A more complex problem is that the average educated Westerner is unaware that he suffers from prejudice towards the Arabs. The New England or Hampstead liberal would be alarmed to find himself making a derogatory generalization about ‘the blacks’, ‘the Chinese’ or, still more, ‘the Jews’. He feels no such compunction in his thoughts about ‘the Arabs’.

PETER MANSFIELD, *THE ARABS* 451 (1976).

36. See, e.g., Noam Chomsky, *Noam Chomsky: You Ask the Questions*, *THE INDEPENDENT*, Dec. 4, 2003, available at <http://news.independent.co.uk/people/profiles/story.jsp?story=469811>.

37. GESENSWAY & ROSEMAN, *supra* note 1, at 108.

38. A good example of governmental policies subordinating other humans and leading to serious human rights violations is the Iraqi prisoner torture scandal. See Ahdaf Soueif, *This Torture Started at the Very Top, a Profound Racism Infects the US and British Establishments*, *THE GUARDIAN UNLIMITED*, May 5, 2004 (discussing the British media’s shock over photos of torture and humiliation of Iraqis by U.S. and British soldiers), available at <http://www.guardian.co.uk/>; see also Douglas Jehl, *A Trail of ‘Major Failures’ Leads to Defense Secretary’s Office*, *N.Y. TIMES*, Aug. 25, 2004 (tracing what went wrong at Abu Ghraib to Defense Secretary Donald H. Rumsfeld’s office), available at <http://www.nytimes.com/2004/08/25/politics/25assess.html?hp=&pagewanted=print&poit>.

39. KENNEDY, *supra* note 3, at 754 (emphasis added).

designation poured into the minds of U.S. citizens and subordinated an entire class of humans, including police, guards, and soldiers. The Japanese were then effectually lowered to the level of a bug or cockroach that could be simply stepped upon or machine-gunned en masse, as almost happened here. They were innocent aliens. Most were American. Others were at least human. And others, although they lived in the United States permanently were not allowed to become U.S. citizens because they were not “white.”⁴⁰

I. THESIS

This article is an essay and critical review of immigration law. It is based on my experience as an immigration attorney and research that concurs with the well-documented, widespread, and systematic violations of the rights of Arabs and Muslims in the United States post 9/11. These violations are part of a continued trend in recent decades, and there now exists a real risk of another internment⁴¹ that could approach the levels of internment experienced during World War II.

Internment of Arabs and Muslims has arguably already occurred since 9/11, although we may not know at this point if they are kept in special designated locations.⁴² In 1986, the U.S. government developed a contingency plan for interning Arabs.⁴³ Although the proposed camps in this plan were never built, the new, large detention facility in Oakdale, Louisiana, was constructed perhaps to take their place;⁴⁴ this Oakdale camp is known in the immigration field as being used for immigration detention in general. Although Professor David Cole believes that a World War II-level of internment is not likely to occur because it is not practical and Arabs are more disbursed geographically⁴⁵ than were the Japanese, he has

40. See Muller, *supra* note 30, at 115.

[It is] undoubtedly true for the Japanese aliens in the United States in 1942—the immigrants who had been forbidden by racist United States naturalization law from becoming American citizens since they had arrived decades earlier. Many of these aliens considered themselves loyal Americans by the time of Pearl Harbor, even if America has never accepted them as such.

Id. (footnote omitted).

41. The author would like to acknowledge the comments made by Fred Korematsu in the PBS documentary *Of Civil Wrongs and Rights*, *supra* note 17. It was his words in court and actions in that documentary that were the final impetus to my thesis in this article.

42. See BLACK'S LAW DICTIONARY 816–17 (6th ed. 1990) (stating that the definition of “internment” is “[t]he detainment or confinement of enemy aliens or persons suspected of disloyalty in specially designated areas; e.g. Japanese during World War II”).

43. See *infra* text accompanying notes 499–508.

44. *Id.*

45. See Cole, *Enemy Aliens*, *supra* note 21, at 994 (“[T]here are many millions of Arabs and

recently asserted that the number of detainees has exceeded 5,000,⁴⁶ which is approximately the number of Germans and Italians interned in World War II.⁴⁷ It does not appear at this moment that Arabs and Muslims have been interned in “camps” within the mainland United States, such as that envisioned with the 1986 plan to intern Arabs from eight countries. It is also not known the exact percentage of the 5,000 detainees that are Arab or Muslim. We do not know if any of those detained could meet the threshold definition of “internment.” If there was any level of internment occurring, such as a few unknown individuals in “camps” somewhere, this internment certainly would be on a dramatically lower scale than the Japanese internment in World War II. However, thousands continue to be held in detention facilities off the mainland, and the government has constructed “camps” that are housing hundreds at Guantanamo. This detention in principle is broader in many respects in scale than the Japanese internment because it is based on religion, ethnicity, and a broad spectrum of nationalities of countries with which the United States is either not at war or considers strong allies. Moreover, as Professor Susan Akram, who also believes that internment of Arabs and Muslims is a realistic possibility,⁴⁸ points out, what is occurring to Arabs and Muslims is extralegal, whereas the Japanese internment was arguably legal because it was based on an Executive Order.⁴⁹

This article particularly focuses on Special Registration and how it creates a logistical framework and discriminatory culture that could lead to the internment of Arab and Muslims. Census data on Arab-Americans has been provided to the Department of Homeland Security (DHS) upon its request.⁵⁰ This increases the risk of a higher level of internment that may include U.S. citizens. Both Special Registration and census data can assist the government with overcoming the issue of Arabs and Muslims being dispersed throughout the United States.⁵¹ This internment, detainment, deportation, and massive rights abuses have already occurred on a scale that

Muslims interspersed throughout American society, making anything like mass internment so impractical that it is not even contemplated.”)

46. See Cole, *Priority of Morality*, *supra* note 2, at 1753 (“As of January 2004, the government had detained more than 5,000 foreign nationals through its antiterrorism efforts.”).

47. See *supra* text accompanying note 5.

48. See Personal conversation with Susan M. Akram (July 16, 2004) (during which the author and Akram discussed the thesis of this article, and Akram agreed that, based on her experience, internment is possible); see also E-mail from Susan M. Akram, to Ty S. Wahab Twibell (July 20, 2004) (discussing the 1986 Contingency Plan for the detainment and internment of aliens from seven Arab countries and Iran) (on file with author).

49. Akram & Johnson, *Race, Civil Rights, and Immigration Law*, *supra* note 16, at 337.

50. See *infra* Part VII.A.

51. See Cole, *Enemy Aliens*, *supra* note 21, at 994 (noting that “there are many millions of Arabs and Muslims interspersed throughout American society”).

rivals past major government actions, including the Japanese internment and Palmer raids.⁵²

This author does not assert that Special Registration is a systematic plan or conspiracy known to all or many sectors of the government, merely that internment has been planned by the government for Arabs recently. Special Registration falls right in line with this plan in both theory and practice. The mechanisms are in place to track Arabs and Muslims through continued Special Registration, and now with the DHS requesting census data on locations of Arab-Americans, they may be located in numbers of at least 1,000 down to the zip code. The climate of discrimination and persecution continues to be present with little discussion in the general public discourse. The rights abuses of Arabs and Muslims are sensational in U.S. history. The United States is continuing to make the same mistakes, and the Special Registration system is analogous to those past mistakes. There is continued, increased, or at the very least unabated support for internment in public discourse. Another terrorist attack or increased war in the Middle East could make internment a known reality, and it may be large scale.

In Part II, this article provides a brief overview of the discrimination and persecution of Arab and Muslim aliens in the United States. In Part III, this article introduces Special Registration, which is the massive, ongoing, and unprecedented registration of Arab and Muslim males ages sixteen and over in the United States, including women and children of all ages for some countries. In Part IV, I discuss my experience in my immigration cases involving Arabs, Muslims, and others, including aliens and citizens that range from early 2002 to late 2004, almost a year after the press reported that Special Registration had “ended” in December 2003. In Part V, the defenses by the U.S. Department of Justice (DOJ) and the DHS in support of Special Registration are discussed. Part VI discusses the fallacies of racial and ethnic profiling, such as Special Registration, as well as de jure and de facto discrimination in all law enforcement issues and more discussion of the Japanese internment, history of the treatment of the Germans, and the recent racial profiling of Mexicans in border enforcement. Part VII includes details of the 1986 plan to intern Arabs and how the DHS has recently requested data from the Census bureau on Arab-Americans as it did with the Japanese in World War II. The conclusion is a poem, *The Day of Evacuation*. It serves as a warning or foreshadowing of how today, as in World War II when a U.S. citizen was allegedly implicated in the attack on Pearl Harbor, that if a U.S. citizen was ever implicated in a

52. See *supra* note 2 and accompanying text.

terrorist attack in the United States in the near future who was Arab or Muslim, not only could Arab and Muslim aliens be interned, but U.S. citizens as well. Registration paves that road.

II. THE DISCRIMINATION AND PERSECUTION OF ARABS AND MUSLIMS IN THE UNITED STATES

In the aftermath of September 11th,⁵³ popular discrimination aside, there have been serious infringements by the U.S. government⁵⁴ on the human rights⁵⁵ of Arabs⁵⁶ and Muslims,⁵⁷ focusing on male aliens primarily for minor immigration violations⁵⁸ and in some cases, U.S. citizens. Certainly, many Arab and Muslim citizens live in fear.⁵⁹ These violations⁶⁰

53. For an excellent, and one of the earliest, discussions of the immediate aftermath of September 11th and its impact on Arabs and Muslims, see Akram & Johnson, *Race, Civil Rights, and Immigration Law*, *supra* note 16; Susan M. Akram, *The Aftermath of September 11, 2001: The Targeting of Arabs and Muslims in America*, 24 ARAB STUD. Q. 61 (2002).

54. For an example of official discrimination by the former INS or Department of Homeland Security, see Nina Bernstein, *From Immigrants, Stories of Scrutiny, and Struggle*, N.Y. TIMES, July 20, 2004, at B3.

The Sikh man, Gurdayal Singh, 41, a United States citizen, said his experience last summer was unintentionally set into motion by an immigration agent who boarded his New York-bound bus in Syracuse and publicly questioned his immigration status. Later in the journey, the man sitting next to Mr. Singh began to curse him as “bin Laden” and hit him.

Id.

55. For a discussion on relevant international law, including the Law of War and International Human Rights law with possible U.S. violations, see Natsu Taylor Saito, *Will Force Trump Legality After September 11? American Jurisprudence Confronts the Rule of Law*, 17 GEO. IMMIGR. L.J. 1, 20–31 (2002). “All of the detainees are apparently being denied their Eighth Amendment right to bail.” *Id.* at 16.

56. See Mark et al., *Secret Detentions*, *supra* note 12, at 11 (“[During] [t]he Bush Administration’s [c]ounterproductive [e]nforcement [b]litz [o]ver the last year, the Justice Department has announced a series of enforcement initiatives that selectively target Arabs, South Asians and Muslims . . .”).

57. See David Cole, *Their Liberties, Our Security*, BOSTON REVIEW, Dec. 2002/Jan. 2003 [hereinafter Cole, *Their Liberties, Our Security*] (discussing the constitutional illegality of many U.S. deportation policies that prioritize the deportation of aliens of Arab countries “simply because of their origin”), available at <http://bostonreview.net/BR27.6/cole.html>.

58. See 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, 397 (2000–2001).

The use of immigration status as a wedge for law enforcement to force its way into people’s lives has created anxiety among the innocent that they or their loved ones will be caught in the broad sweep of their communities, their constitutional rights all but suspended in the largest single law enforcement investigation in the history of this country.

Id.

59. See, e.g., Barnie Choudhury, *US Arabs ‘Fear for Their Family’*, BBC NEWS (July 29, 2004), at <http://news.bbc.co.uk/2/hi/americas/3938205.stm>. “Almost 60% of Arab Muslims living in the US fear for the future of their families Almost a quarter of those asked said a family member had

of constitutional⁶¹ and human rights have been massive and include the following: mass deportation⁶² (some of which is secret⁶³); secret⁶⁴ hearings;⁶⁵ arrests;⁶⁶ secret arrests, secret detainment;⁶⁷ detainment⁶⁸

been insulted because of their race or religion.” *Id.*

60. *See, e.g.*, Danny Hakim, *Judge Reverses Convictions in Detroit ‘Terrorism’ Case*, N.Y. TIMES, Sept. 3, 2004, available at <http://www.nytimes.com/2004/09/03/national/03terror.html>. “[P]rosecutors and others entrusted with safeguarding us through the legal system clearly must . . . not act outside the Constitution, the judge said in his decision. Unfortunately . . . that is precisely what has occurred in the course of this case.” *Id.* (quotations omitted).

61. *See Saito, supra* note 55, at 15–16.

While noncitizens have limited constitutional rights with respect to immigration matters, since the 1896 *Wong Wing* case, federal courts have consistently held that the protections provided criminal suspects or defendants by the Fourth, Fifth, and Sixth Amendments apply to all persons, not only to U.S. citizens.

...
 . . . the government’s stated purpose of holding people to “find out what they know” violates the Fifth Amendment’s ban on custodial interrogation without access to counsel.

Id. (footnotes omitted). For a discussion of the possible Fourth Amendment violations of indefinite detention without probable cause affected by the rule published immediately after September 11th in 66 Fed. Reg. 10,390 (Sept. 20, 2001) (amending 8 C.F.R. § 287.3(d) (2004)), which provides for indefinite detention, see Administrative Comment, *supra* note 58, at 397. Noting that there may be other solutions besides Fourth and Fourteenth Amendment constitutional arguments, see William M. Carter, Jr., *A Thirteenth Amendment Framework for Combating Racial Profiling*, 39 HARV. C.R.-C.L. L. REV. 17, 93. “Courts have construed the Fourth and Fourteenth Amendments in ways that preclude any effective remedy. Congress has also proved unwilling to adopt legislation addressing the problem. The Thirteenth Amendment, based upon its legislative history, historical context, and interpretation in *Jones*, remains a viable and powerful remedy for racial profiling.” *Id.*

62. *See, e.g.*, Rachel Swarns, *Arab-Americans Gather to Build Their Civil Rights Activism*, N.Y. TIMES, June 14, 2003, at A12 (according to officials, more than 13,000 Arab and Muslim men registered by the government are in deportations proceedings); *see also DOJ Focusing on Removal of 6,000 Men from Al Qaeda Haven Countries*, 79 INTERPRETER RELEASES 115, 115 (2002) (stating that DOJ has added “the names of approximately 6,000 men from al Qaeda-harboring countries . . . to the National Crime Information Center (NCIC) database”); Tom Reeves, *63,000 and Counting, Mass Deportations Mostly Go Unnoticed*, COUNTERPUNCH, Mar. 6/7, 2004 (detailing the detention of 63,000 immigrants and their possible deportation by the Department of Homeland Security), available at <http://www.counterpunch.org/reeves03062004.html>.

63. *See Craig Whitlock, A Secret Deportation of Terror Suspects, 2 Men Reportedly Tortured in Egypt*, WASH. POST, July 25, 2004, at A01 (describing the role of the United States in a secret plot to apprehend terrorist suspects in Sweden).

64. *See Saito, supra* note 55, at 8.

Pursuant to a directive issued by Immigration Judge Creppy on September 21, all immigration hearings related to September 11 have been closed to the public. As a result, as of August 2002, the only other information known about the detainees comes through their families and lawyers. We do not know who else is being held, where they are, or how they are being treated. We do not know who has been charged, or what violations of law, if any, are being alleged.

Id.

65. *See Hasti Fakhrai-Bayrooti, Note, Denial of Public Access to Deportation Hearings: Is It Protecting National Security or Violating Fundamental Liberties?*, 25 WHITTIER L. REV. 203, 229–30 (2003).

without charges;⁶⁹ excessively prolonged⁷⁰ or indefinite detainment;⁷¹ infringement of access to counsel⁷² or impenitence of obtained counsel;⁷³

Perhaps one of the most troubling features of the government's response to the September 11 attacks has been the Creppy Directive's blanket closure of deportation hearings to both the public and the press.

... The Framers carefully drafted the First Amendment because they "did not trust any government to separate the truth from the false for us."

Id. (footnotes omitted); see also Mark et al., *Secret Detentions*, *supra* note 12, at 11.

A day later, on September 21st, Chief Immigration Judge Michael Creppy, at the direction of the Attorney General, issued a directive to all immigration judges ordering that in certain "special interest" cases, which were not defined, "(t)he courtroom must be closed . . . —no visitors, no family, and no press."

Id. (alteration and omission in original).

66. See, e.g., Amnesty Int'l, *Amnesty International's Concerns Regarding Post September 11 Detentions in the USA 1* (March 2002) [hereinafter *Amnesty Int'l U.S. Detainee Report*] ("[S]ome 300 people arrested in the post September 11 . . . sweeps are believed to remain in the custody of the Immigration and Naturalization Service . . ."), available at [http://web.amnesty.org/aidoc/aidoc_pdf.nsf/Index/AMR510442002ENGLISH/\\$File/AMR5104402.pdf](http://web.amnesty.org/aidoc/aidoc_pdf.nsf/Index/AMR510442002ENGLISH/$File/AMR5104402.pdf).

67. See Mark et al., *Secret Detentions*, *supra* note 12, at 10 ("[S]ince September 11, 2001, the Department of Justice . . . has arrested, detained, and in some cases, deported, over 1,200 people . . . under a veil of complete secrecy."); see also *Amnesty Int'l U.S. Detainee Report*, *supra* note 66, at 6 ("Detainees and their attorneys report a great frustration at not being able to gather information about the status of a case, and the lack of transparency of the procedures, which the INS seems to be following in determining whether a detainee can be released.")

68. See Human Rights Watch, *U.S.: Ensure Protections for Foreign Detainees* (Dec. 1, 2001) ("Even in the current crisis, the U.S. government has an obligation to protect the rights to freedom from arbitrary detention and to a fair trial, rights possessed by citizens and non-citizens alike." (quoting Sidney Jones, Director of the Asia Division of Human Rights Watch)), available at <http://www.hrw.org/press/2001/11/pakfordet1201.htm>; Saito, *supra* note 55, at 6 ("Since September 11, 2001, the federal government has detained at least 1,200 immigrants, evidently selected on the basis of their national origin, gender, and age.")

69. See *Amnesty Int'l U.S. Detainee Report*, *supra* note 66, at 10 ("Amnesty International is concerned that many of those detained in the post 9.11 sweeps have been held for prolonged periods without being charged or brought before a judge, contrary to the international standards."); Saito, *supra* note 55, at 6 ("They have been held indefinitely, often without charge, and the Justice Department has refused to acknowledge who is being held, why, or even where they are.")

70. See Mark et al., *Secret Detentions*, *supra* note 12, at 11 ("A mere nine days after the attacks, the Justice Department amended existing regulations to increase from one to two days the time the [INS] can detain a non-citizen without filing charges, and allow for the extension of this period for an unspecified 'reasonable' additional time . . .").

71. See *Amnesty Int'l U.S. Detainee Report*, *supra* note 66, at 13–15 (describing examples of detainees being held for prolonged periods of time).

72. See, e.g., Saito, *supra* note 55, at 7 ("[D]etainees have reported being denied access and lawyers that they were unable to find their clients.")

73. Human Rights Watch (HRW) documented the serious curtailment of legal representation of post-September 11 detainees. In an August 2002 report, the organization stated, "Unfortunately, many of the post-September 11 detainees were unable to exercise their right to counsel." Human Rights Watch, *Presumption of Guilt: Human Rights Abuses of Post-September 11 Detainees 34* (2002) [hereinafter *Human Rights Watch, Presumption of Guilt*], available at <http://www.hrw.org/reports/2002/us911/USA0802.pdf>. HRW documented that detainees were regularly denied the right to counsel for

delayed access to courts;⁷⁴ excessive bonds;⁷⁵ disappearances;⁷⁶ abductions;⁷⁷ and continued detainment⁷⁸ despite bond posting or despite immigration judge release orders.⁷⁹ Moreover, Arab and Muslim citizens have experienced improper questioning⁸⁰ and both physical and verbal

days, weeks, and months. *Id.* at 35–37. HRW found that detainees were refused and denied counsel while in both FBI and INS custody. *Id.* The FBI and INS impeded client efforts to seek attorneys, and once detainees had attorneys, “INS frustrated attorneys’ efforts to reach their clients, whether deliberately or because of bureaucratic chaos and confusion. Attorneys have said that it was hard for them to retrieve information about their clients, including the time and date of hearings.” *Id.* at 41–42. HRW goes on to provide specific and individual accounts that support these propositions. *Id.* at 42–45. HRW accurately determined the precise numbers of individuals who were underrepresented in immigration proceedings based on data from the Executive Office for Immigration Review under the Department of Justice. *Id.* at 43 n.152. In immigration courts alone, out of the individuals detained in 2001, a staggering 80% did not have counsel. *Id.* Of those detained who were involved with appeals, only 47% had counsel. *Id.* Counsel represented only 54% in nondetainee cases before immigration judges and only 68% of those who had appeals. *Id.*; see also Amnesty Int’l U.S. Detainee Report, *supra* note 66, at 15–23 (documenting detainees’ lack of access to attorneys, telephones, relatives, interpreters, translators, and their consulates, as well as the issue of frequent transfers).

74. HRW also found that detainees were delayed access to courts because INS delayed filing charges while the individuals were detained. Human Rights Watch, *Presumption of Guilt*, *supra* note 73, at 55.

75. See *id.* (“After talking to attorneys representing forty-nine clients, journalist Jim Edwards calculated that New Jersey immigration judges have approved bond amounts five times higher or more than before September 11 for those detained in connection with the terrorists investigation.”).

76. See Saito, *supra* note 55, at 36.

One of the most disturbing aspects of the post-September 11 detentions and prosecutions is their secrecy. Over a thousand individuals have literally “disappeared,” and their families, their lawyers, and the general public are not allowed to know who is detained, where they are or under what conditions, or why they have been detained.

Id.

77. The United States has abducted Arabs and Muslims and brought them to the United States, as it did with hundreds of individuals of Japanese ancestry from South America in World War II, and precedent since has supported these acts that violate international law. Saito, *supra* note 55, at 44–45. Inter alia, Professor Saito states:

According to Supreme Court precedent, not only is it constitutionally permissible to kidnap individuals and bring them to the United States to be prosecuted as criminals, it is apparently also permissible to kidnap large groups of people, including children and old people, identified solely on the basis or [sic] race or national origin, and detain them indefinitely on the assertion of a national security interest.

This was in many ways standard United States policy with respect to all of the Indian nations forced onto reservations in the mid- to late-1800s, but one example stands out most conspicuously, that of the Chiricahua Apaches, every one of whom—man, woman, and child—was imprisoned by the U.S. government for 27 years.

Id. at 43 (footnote omitted).

78. For a book discussing immigration detention in detail, see MARK DOW, *AMERICAN GULAG: INSIDE U.S. IMMIGRATION PRISONS* 89 (2004).

79. Human Rights Watch, *Presumption of Guilt*, *supra* note 73, at 55, 57.

80. Some of the questions directed at Arabs and Muslims in many cases included the following

abuse⁸¹ due to their Muslim or Arab characteristics⁸² and repression in other spheres of daily life including religious oppression.⁸³ Further breaking down the morality of treatment of Arabs and Muslims was the talk of the permissive use of torture of Arabs and Muslims, which was leaking its way into public⁸⁴ and legal discourse,⁸⁵ often by arguments that we were encountering a new type of threat.⁸⁶

by federal investigators immediately after 9/11:

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?

Akram & Johnson, *Race, Civil Rights, and Immigration Law*, *supra* note 16, at 335.

81. See Amnesty Int'l U.S. Detainee Report, *supra* note 66, at 31–32 (“According to lawyers who have clients in [the Metropolitan Detention Center], several detainees have shown signs of depression and mental stress. Several were described as being on a ‘razor’s edge’, ‘visibly shaking’ and crying continually.”).

82. See Human Rights Watch, *Presumption of Guilt*, *supra* note 73, at 75.

On October 1, 2001, Awadallah was shackled in leg irons and flown to New York City. At the New York airport, the United States marshals threatened to get his brother and cursed “the Arabs.” The marshals then transported him to the Metropolitan Correctional Center in New York . . . where he was placed in a room so cold that his body turned blue. Awadallah was then taken to a doctor. After being examined, a guard caused his hand to bleed by pushing him into a door and a wall while he was handcuffed. The same guard also kicked his leg shackles and pulled him by the hair to force him to face an American flag.

Id. (omission in original). For criticism of David Cole and Lawrence Tribe and arguing for a more aggressive approach to fighting terrorism, including a proposal for an “*Emergency Constitution*,” see Bruce Ackerman, *This Is Not a War*, 113 *YALE L.J.* 1871, 1872–73 (2004).

83. See John G. Douglass, *Raiding Islam: Searches That Target Religious Institutions*, 19 *J.L. & RELIGION* 95, 96 (2003–2004) (discussing the damage of reputations and instilment of fear in the Muslim community that comes from raids based on secret evidence that can be very broad under the PATRIOT Act and that fails to uncover any link to terrorism and works to maximize the harm done to Muslim institutions rather than working to minimize it).

84. See Akram & Johnson, *Race, Civil Rights, and Immigration Law*, *supra* note 16, at 344.

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

Id.

85. In an age where arguments promoting internment, racial profiling, or the acceptable use of torture abound, there should be some point at which morality should be considered. See, e.g., Cole, *Priority of Morality*, *supra* note 2, at 1800 (“While the threat of future terrorism may well warrant rethinking constitutional structure, detaining innocent human beings to reassure a panicked public is not the sort of ‘sweeping revision’ the world, or the United States, should adopt.”).

86. See Oren Goss, *Chaos and Rules: Should Responses to Violent Crises Always be*

It was only days after September 11th when the Department of Justice (DOJ)⁸⁷ began the process of simply detaining⁸⁸ and attempting to deport Arabs and Muslims with minor or no immigration violations. Although there are tens or hundreds of thousands of aliens in the United States who have outstanding orders of deportation and Arabs and Muslims are a small percentage of this number, DOJ targeted these Arabs and Muslims for deportation.⁸⁹ DOJ also announced a series of “voluntary” interviews of thousands of Arab or Muslim men.⁹⁰ The U.S. government has instituted a policy of preventive detention, where the government arrests and detains the alien prior to investigating whether there is a criminal or immigration violation. The alien is detained and charged weeks or months later.⁹¹ The

Constitutional?, 112 YALE L.J. 1011, 1019 (2003) (“Despite repeated statements that the events of September 11th have forever changed the world, much of the discussion around matters dealing with terrorism, the structuring of counterterrorism measures, and extraordinary governmental powers to answer future threats is not new.”) (footnote omitted).

87. See generally Press Release, Human Rights Watch, United States: Abuses Plague Sept. 11 Investigation, Checks on Government Authority Should Be Restored (Aug. 15, 2002), available at <http://www.hrw.org/press/2002/08/usdetainees081502.htm>. “An immigration violation should not give the government license to rip up the rule book By restricting judicial oversight and blocking public scrutiny, the government has exercised virtually unchecked power over those it has detained.” *Id.* (quoting Jamie Fellner, director of HRW’s U.S. program).

88. See, e.g., Nina Bernstein, *2 Men Charge Abuse in Arrests after 9/11 Terror Attack*, N.Y. TIMES, May 3, 2004, at B1.

But within weeks of Sept. 11, 2001, both had been picked up by federal agents in an anti-terror sweep. For 23 hours a day, they were locked in solitary confinement in the harsh maximum-security unit

. . . .

The lawsuit charges that the men were repeatedly slammed into walls and dragged across the floor while shackled and manacled, kicked and punched until they bled, cursed as “terrorists” and “Muslim bastards,” and subjected to multiple unnecessary body-cavity searches, including one during which correction officers inserted a flashlight into Mr. Elmaghraby’s rectum, making him bleed.

Id.

89. See *Middle Eastern “Absconders” to Be Rounded Up*, 7 BENDER’S IMMIGR. BULL. 264, 264 (2002) (“Federal agents will soon begin to round up ‘absconders’ . . . starting with those who come from countries with known al Qaeda presence or activity.”).

90. See Human Rights Watch, *Presumption of Guilt*, *supra* note 73, at 3.

Immediately after the September 11 attacks, the Department of Justice [and the FBI and INS] . . . began a process of questioning thousands of people. . . . The decision of whom to question often appeared to be haphazard, at times prompted by law enforcement agents’ random encounters with foreign male Muslims or neighbors’ suspicions. The questioning led to the arrest and incarceration of as many as 1,200 non-citizens

Id.

91. See Mark et al., *Secret Detentions*, *supra* note 12, at 12–13.

Prior to September 11, minor visa violations would not have resulted in prolonged periods of detention. After September 11, the immigration laws have been used to facilitate a form of preventive detention, which is to arrest first and investigate later to uncover some violation. It is generally the other way around in criminal

U.S. government would also detain and attempt to deport even those Arabs⁹² and Muslims who came forward voluntarily with information to assist them in combating terrorism.⁹³

Despite any hurdle that was placed in front of them, DOJ continued with more policies that targeted Arabs and Muslims higher up in the legal system. They implemented policies and rules that overruled judges' abilities to release individuals, so that even if a judge ruled that an individual could be released, the individual remains detained.⁹⁴ Furthermore, DOJ conducted or plans to conduct over 8,000 interviews of Muslim and Arab males,⁹⁵ simply based upon their religion or ethnicity, or as the U.S. government claims, solely on the basis of their nationality and gender.⁹⁶ Many of these policies are rooted in the USA PATRIOT Act,⁹⁷ which has limited many freedoms of both aliens⁹⁸ and citizens alike, such as guilt by association of aliens, ideological exclusion, greater liberality in

enforcement—one can only be arrested after probable cause is found that the individual was involved in criminal activity. Once the immigration violation is uncovered, the non-citizen can potentially be detained indefinitely under the government's expanded powers.

Id.

92. For more details and accounts of these policies imposed by the U.S. government on Arabs and other types of situations, including general societal discrimination, see ADC DISCRIMINATION REPORT, *supra* note 9.

93. HRW's August 2002 report detailed many cases illustrating this proposition, including:

The Department of Justice has detained men from the Middle East on immigration charges after they contacted the agency volunteering information about the alleged hijackers. For example, two days after the attacks, Mustafa Abu Jdai, a Jordanian of Palestinian descent, contacted the FBI and told investigators he had answered an advertisement for a job posted at a Dallas, Texas, mosque and met in the spring of 2001 with several Arabic-speaking men who offered to pay him to take flight lessons in Texas, Florida, or Oklahoma. The FBI showed him photographs and he recognized one of the men as Marwan Al-Shehhi, one of the alleged hijackers. Abu Jdai was subsequently charged with overstaying his visa and remained in detention for three months pending deportation.

Human Rights Watch, *Presumption of Guilt*, *supra* note 73, at 16.

94. See Mark et al., *Secret Detentions*, *supra* note 12, at 11 ("After this rule took effect, there were reported instances of delays in charging non-citizens with immigration violations.").

95. The initial plan immediately after September 11th called for voluntary interviews of 5,000 "Middle Eastern" men. See *Interviews Regarding International Terrorism*, 6 BENDER'S IMMIGR. BULL. 1257, 1257 (2001) (detailing the Attorney General's "interviewing project").

96. See Mark et al., *Secret Detentions*, *supra* note 12, at 13 ("8,000 young Arab and Muslim immigrants have been sought for 'voluntary' interviews by the Federal Bureau of Investigation.").

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

98. See generally Lindsay N. Kendrick, Comment, *Alienable Rights and Unalienable Wrongs: Fighting the "War on Terror" Through the Fourth Amendment*, 47 HOW. L.J. 989, 991 (2004) ("The USA PATRIOT Act is the legislative response to the public's fear about terrorism and anti-American sentiment, and ultimately, the public's fear that Arabs, Middle Easterners, and Muslims are threats . . .").

detention,⁹⁹ and secret searches without probable cause.¹⁰⁰ The PATRIOT Act has been used, as recently as August 2004, to quash moderate Muslim scholars.¹⁰¹ Citing the PATRIOT Act,¹⁰² the Department of Homeland Security (DHS) revoked a visa it had issued to a prominent Swiss theologian, Tariq Ramadan, who had entered the United States as a visiting professor at the University of Notre Dame.¹⁰³ Professor Ramadan is a well-known Muslim scholar, a strong outspoken opponent of extremism and terrorism, and an advocate for democracy.¹⁰⁴ *Time* magazine has heralded the professor and included him in its “list of the world’s 100 most influential people.”¹⁰⁵

There were many outcries of these human rights violations by the U.S. government. Human Rights Watch (HRW) stated:

Unfortunately, the fight against terrorism launched by the United States after September 11 did not include a vigorous affirmation of . . . freedoms. Instead, the country has witnessed a persistent, deliberate, and unwarranted erosion of basic rights against abusive governmental power that are guaranteed by the U.S. Constitution¹⁰⁶ and international human rights law.¹⁰⁷

99. See Saito, *supra* note 55, at 2 (“[T]he ‘USA PATRIOT Act,’ which gives intelligence and law enforcement agencies dramatically expanded surveillance powers, blurs the line between intelligence and criminal investigations, mandates interagency information sharing, and makes it easier to detain and deport immigrants.”).

100. For an excellent discussion of these issues, see Cole, *Enemy Aliens*, *supra* note 21, at 966–74.

101. Am. Immigration Lawyer’s Ass’n, Visa Denials and “Culture of No” Hurt America (Sept. 7, 2004) (posted on AILA InfoNet at Doc. No. 040900760), available at <http://www.aila.org>.

102. Roger W. Bowen, *University Should Judge Scholar’s Teachings*, CHI. TRIB., Sept. 5, 2004, at 8 (commenting that Notre Dame, not the Department of Homeland Security, has the expertise to decide who it will hire), available at 2004 WL 92383329.

103. *US Academics, Newspaper Protest Revocation of Visa for Islamic Scholar*, AGENCE FR. PRESSE, Sept. 1, 2004, available at 2004 WL 91842328.

104. See Louise Cainkar, Editorial, *A Blow to Academics*, WASH. POST, Sept. 8, 2004, at A22.

By revoking Islamic scholar Tariq Ramadan’s visa to stop him from teaching at the University of Notre Dame . . . the U.S. government has dealt a blow to academic freedom. . . .

At recent meetings of the American Sociological Association, scholars asked why U.S. sociologists know so little about Muslims. . . . It is shocking how badly the United States trails the rest of the world in its knowledge of Muslims.

Id.

105. Burton Bollag, *U.S. Shuts Out Muslim Scholar, Raising Fears for Academic Freedom*, CHRON. HIGHER EDUC. (Sept. 10, 2004), available at <http://chronicle.com/free/v51/i03/03a00801.htm>.

106. See generally Saito, *supra* note 55, at 16. “Because the government has proceeded in secret with respect to the approximately 2,000 persons detained following September 11, it is difficult to assess the extent to which it is complying with these constitutional requirements. Nonetheless, there are many indications that each of these guarantees has been repeatedly violated.” *Id.*

107. Human Rights Watch, *Presumption of Guilt*, *supra* note 73, at 3. “Most of those directly

It appears that now, whenever Legacy INS, the U.S. CIS, ICE, CBP,¹⁰⁸ or the FBI¹⁰⁹ encounters an Arab or Muslim, they will probe the individual's ties to terrorism, often utilizing detainment or fear of deportation in attempts to intimidate individuals regardless of family ties to the United States, such as U.S. citizen children or spouses.¹¹⁰ In "special interest" cases, the Bush administration also has implemented policies that allow the Attorney General and the INS to indefinitely detain Arabs and Muslims.¹¹¹

The U.S. government also began allowing government eavesdropping on attorney-client conversations.¹¹² DOJ allowed the press to attend certain

affected have been non-U.S. citizens. Under Attorney General John Ashcroft, the Department of Justice has subjected them to arbitrary detention, violated due process in legal proceedings against them, and run roughshod over the presumption of innocence." *Id.*

108. In these discussions, it needs to be pointed out that sometimes the acronym INS is used, while at other times U.S. CIS (or CIS), ICE, or CBP is utilized. See Am. Immigration Lawyer's Ass'n, DHS Divisions Drop "Bureau" from Names (Sept. 8, 2003) (posted on AILA InfoNet at Doc. No. 03090841), available at <http://www.aila.org>. The INS, or Immigration and Naturalization Service, was formerly under the Justice Department but has been reorganized and placed under the jurisdiction of the newly formed Department of Homeland Security (DHS). The former INS, or Legacy INS, which it prefers its former self to be referred, has been reorganized into three separate organizations within DHS. Legacy INS was formed into the Bureau of Citizenship and Immigration Services (U.S. CIS or CIS), the Bureau of Immigration and Customs Enforcement, (ICE), and the Bureau of Customs and Border Patrol (CBP). The physical separation began March 1, 2003. Thus, with the discussion in this article spanning before and after March 1, 2003, the acronym INS and the others are necessary. The U.S. CIS is primarily the "service" wing of the former INS. It is responsible for primarily processing the applications and petitions of aliens who are in the United States in legal status or aliens who are eligible for immigrant or nonimmigrant benefits. ICE is primarily the "enforcement" wing of the former INS. It is responsible for enforcing the immigration laws and investigating immigration violations and related issues of all aliens in the United States. CBP works in the area of border enforcement and entry into the United States. U.S. Customs has been reorganized into CBP, and ICE also has some overlapping role with customs and CBP in some parts of the United States. Immigration judges and the Board of Immigration Appeals (BIA) remain part of the Executive Office for Immigration Review (EOIR) and within the Justice Department.

109. See generally Meredith McEver, Symposium Testimony, 19 J.L. & RELIGION 73, 73 (2003–2004) (chronicling personal testimony of a licensed clinical social worker describing her experiences with providing "group therapy to women whose homes were raided by the FBI and U.S. Customs Service because their husbands were suspected of aiding terrorism").

110. See Mark et al., *Secret Detentions*, supra note 12, at 13 ("[T]he purpose of the detention is to probe into the noncitizen's potential involvement in terrorist activity or to expel the noncitizen from the country regardless of family ties or citizen children.").

111. See *id.*

[U]nder the Patriot Act, charges must be lodged within seven days. Not surprisingly, the Bush Administration has issued new rules for use in the "special interest" cases giving the Attorney General even broader powers than those approved by Congress in the Patriot Act. Thus, by executive fiat, the Bush Administration has circumvented the will of Congress and arrested non-citizens without bringing charges.

Id.

112. See *id.* at 12 ("[T]he Justice Department now permits the government to eavesdrop on the

courtroom proceedings; one judge ruled that in special interest cases (primarily affecting Muslims and Arabs) “immigration judges are required to close hearings to the public, including family, friends, and the media.”¹¹³

Another method DOJ implemented is calling an individual, including U.S. citizens, as a “material witness” without pressing any charges; although some courts have held that such methods are unconstitutional, the policies continue “unchecked.”¹¹⁴ DOJ set policies that called for INS prosecuting attorneys to override immigration judge decisions when a judge has ruled against the INS requesting no bond and no release or bonds of \$10,000, a process that could result in indefinite detention.¹¹⁵ In sum, there have been many due process violations¹¹⁶ for Arabs and Muslims because the U.S. Supreme Court does not consider deportation as “punishment” or immigration violations as “crimes”,¹¹⁷ therefore, the government believes it

conversations between lawyers and their clients in federal custody, including people detained [only] for immigration reasons . . . if there is a ‘reasonable suspicion’ that information might be exchanged that could potentially deter future violent acts.”).

113. Human Rights Watch, *Presumption of Guilt*, *supra* note 73, at 24; *see also* Mark et al., *Secret Detentions*, *supra* note 12, at 12. “[M]ass detentions of [Muslim or Middle Eastern/special interest cases and] non-citizens [have been] conducted in secret, none of which, to date, has unearthed a link to terrorism [I]mmigration laws have been used to detain non-citizens so as to bypass the greater safeguards afforded . . . [in] criminal prosecution[s].” *Id.*

114. Mark et al., *Secret Detentions*, *supra* note 12, at 12.

Another technique used by [the] Justice [Department] to circumvent due process has been to detain an unknown number of citizens and non-citizens as “material witnesses.” These detainees need not be charged with any violations, under the pretext that they have information relating to the terror attacks. One federal judge has released such a detainee, a young Muslim male, on the ground that the detention was unconstitutional, but the practice remains unchecked and Human Rights Watch has identified 35 individuals held as material witnesses.

Id. (footnotes omitted).

115. *See id.* at 11–12.

Just over a month later, the Justice Department promulgated a regulation permitting INS prosecuting attorneys to override the decision of an immigration judge to release a non-citizen on bond when either the INS sets no bond or bond at \$10,000 or more. Thus, if the INS does not like an immigration judge’s decision, it need only file a notice that it intends to appeal to obtain a stay and extend the detention. Even if the Board of Immigration Appeals upholds the immigration judge’s decision, the INS may certify the decision to the Attorney General until he has made a final decision. This may result in the non-citizen’s indefinite continued detention.

Id. (footnote omitted).

116. *See id.* at 11 (“[T]he Justice Department . . . selectively target[s] Arabs, South Asians and Muslims living in the United States and deprive[s] them of the most basic due process protections.”).

117. *See, e.g.*, *Carlson v. Landon*, 342 U.S. 524, 542 (1952) (concluding that the denial of bail in deportation cases is not unconstitutional). *But see* Michelle Rae Pinzon, *Was the Supreme Court Right? A Closer Look at the True Nature of Removal Proceedings in the 21st Century*, 16 N.Y. INT’L L. REV. 29, 32 (2003) (discussing that deportation proceedings are more criminal in nature than civil).

can escape the requirements of due process.¹¹⁸ Moreover, the U.S. alien population is especially vulnerable to human rights abuses due to a number of characteristics including physical appearance, lack of cultural conformity, and the ease at which they can violate their legal immigration status, such as dropping to less than full-time educational status, taking a part-time job, or overstaying their visa.¹¹⁹

There is more. The U.S. government implemented a process of registering males from Arab and Muslim countries. This program requires the registration, fingerprinting, photographing, and continued monitoring of Arab and Muslim males sixteen and over, as well as women and children from some countries. If they fail any requirement of this registration program, they could be subject to arrest, detainment, loss of legal migrant status, deportation,¹²⁰ and/or criminal charges.¹²¹

Many human rights and civil rights groups¹²² have sued the U.S. government, namely the Justice Department, on such issues as failing to disclose the identities of secret Muslim and Arab detainees.¹²³ They have also sued for unlawful detainment,¹²⁴ such as the case where hundreds of

118. See generally DAVID COLE, *ENEMY ALIENS* 7 (2003) [hereinafter COLE, *ENEMY ALIENS*] (arguing that the double standard applied to foreigners is constitutionally suspect, ineffective to solve security problems, and involves measures that will eventually be applied to American citizens); Cole, *Enemy Aliens*, *supra* note 21, at 955 (discussing the need to find a balance between liberty and security, post-September 11th).

119. See, e.g., Cole, *Enemy Aliens*, *supra* note 21, at 957 (“Because noncitizens have no vote, and thus no direct voice in the democratic process, they are a particularly vulnerable minority.”).

120. See, e.g., Bernstein, *supra* note 54, at B3. “[H]e was not afraid to report for ‘special registration,’ he said, because his tourist visa had still been valid when she applied for an immigrant visa on his behalf. But instead of waiting out its own application backlog, he said, the government automatically moved to deport him.” *Id.*

121. See Mark et al., *Secret Detentions*, *supra* note 12, at 13. “[The] Justice [Department] promulgated an alien registration rule that would require the registration, fingerprinting and photographing of nationals or citizens of Iran, Iraq, Libya, Sudan and Syria. Violation of these reporting rules could result in loss of status, deportation and inclusion in a national crime database.” *Id.*

122. Saito, *supra* note 55, at 7 (“Eighteen organizations, including the American Civil Liberties Union (‘ACLU’), Amnesty International USA, the Center for Constitutional Rights, Human Rights Watch, the American Immigration Law Foundation, and the American Immigration Lawyers Association, then joined in a lawsuit demanding the release of basic information on the detainees.”).

123. See, e.g., Center for Nat’l Sec. Studies v. Dep’t of Justice, 215 F. Supp. 2d 94, 113 (D.D.C. 2002) (ordering that the Department of Justice “shall disclose within fifteen days the names of those it has arrested and detained in connection with its September 11, 2001 terrorist investigation”), *rev’d*, 331 F.3d 918 (D.C. Cir. 2003).

124. See Complaint for American-Arab Anti-Discrimination Committee et al. at 1, American-Arab Anti-Discrimination Comm. v. Ashcroft (C.D. Cal. Dec. 24, 2002), available at <http://www.cair-net.org/downloads/NR996.pdf>. The action was filed in the U.S. District Court for the Central District of California. *Id.* It alleged that INS unlawfully arrested and detained hundreds of aliens who came forward to register for Special Registration in December 2002 in Los Angeles, California. *Id.* The lawsuit took objection to the arrests and sought an injunction against similar detentions during the registrations scheduled for January 10, 2003, for aliens from other countries (including Afghanistan,

Iranians, who were legally residing in the United States, were arrested and detained as a result of Special Registration.¹²⁵ Results from the lawsuits have shown few, if any, were charged with involvement in terrorism or had any connections to terrorism.¹²⁶

There have been a number of court decisions that have overruled the U.S. government's attempts, namely the Executive Branch and the Justice Department, for violating sacred tenants of the Constitution. In one important case before the Sixth Circuit Court of Appeals, *Detroit Free Press v. Ashcroft*, the court recognized the media's First Amendment right to attend deportation hearings of "special interest" detainees. Justice Keith, in his introductory remarks stated the following:

The Executive Branch¹²⁷ seeks to uproot people's lives, outside the public eye, and behind closed doors. The First Amendment, through a free press, protects the people's right to know that their government acts fairly, lawfully, and accurately in deportation

Algeria, United Arab Emirates, and Yemen) and February 21, 2003, for aliens from Saudi Arabia and Pakistan. The lawsuit claimed that arrests and detentions were illegal; the proper arrest warrants were not obtained; the aliens had pending applications for permanent residence; some detainees with avenues available to legalize their status were being detained without bail or bail hearings; and the fear of mass arrest created by these detentions and Special Registration inhibited compliance by others similarly situated. *Id.*

125. See Reuters, *Arab, Muslim Groups Sue INS, Ashcroft Over Detentions*, WASH. POST, Dec. 25, 2002, at A13 ("Attorney General John D. Ashcroft and the Immigration and Naturalization Service were sued today by a coalition of Arab and Muslim groups over the mass detentions of immigrants from Muslim countries who came forward to register under new anti-terrorism rules."). They were being sued for detaining over 1,000 mostly Iranian-Americans who came forward to register because they were Iranian males. *Id.* The article goes on to state that:

Peter Schey, president of the Los Angeles-based Center for Human Rights and Constitutional Law and the lead attorney for the six, unnamed plaintiffs in the lawsuit, said mass registration was irrational because "no undocumented terrorist will come forward."

. . . .
"The mass arrests have further eroded confidence in the fairness of the INS and the immigration system among Arab and Muslim communities," the lawsuit said.

Id.

126. Saito, *supra* note 55, at 7-8.

In response to the FOIA suit, the Justice Department reported that 460 persons remained in [INS] custody in January 2002, over 300 in April, and 104 at the end of May. The Justice Department also reported that most were being held on immigration charges, some on criminal charges, and a few as material witnesses. Despite all of these detentions, after nine months of investigation, the only person indicted on related charges was Zacarias Moussaoui, believed to be the twentieth hijacker, who was arrested before September 11.

Id. (footnotes omitted).

127. For a fairly recent compilation of executive actions since September 11th, see Am. Immigration Lawyers Ass'n, *Boiling the Frog Slowly: Executive Branch Actions Since September 11, 2001*, 7 BENDER'S IMMIGR. BULL. 1237, 1237 (2002).

proceedings. When government begins closing doors, it selectively controls information rightfully belonging to the people. Selective information is misinformation.¹²⁸

In another case, a court did order the government to release the names of detainees. “In *Center for National Security Studies, et al. v. U.S. Department of Justice*, a federal district court in Washington, D.C. held that “secret arrests are a concept odious to a democratic society and profoundly antithetical to the bedrock of values that characterizes a free and open one such as ours.”¹²⁹ However, some other courts have been generally supportive of Ashcroft’s discriminatory or persecutory policies.¹³⁰

In attempts to increase the punitive nature of the entire legal structure for immigrants including, or in particular Arabs and Muslims, the Attorney General also “reformed” the Board of Immigration Appeals (BIA),¹³¹ which oversees the decisions of immigration judges. BIA decisions were taking two to seven years for nondetained cases and that is a problem that needs addressing; however the Attorney General’s concept of “reform” constituted eliminating several BIA judges, rather than adding judges or

128. *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 683 (6th Cir. 2002), *quoted in* Mark et al., *Secret Detentions*, *supra* note 12, at 15.

Without prior notice to the public, the courtroom security officers announced that the hearing was closed to the public. The detainee was denied bail and has been in government custody ever since. The plaintiffs sued the government in federal district court to claim a public right of access to the removal hearing under the First Amendment of the Constitution. The Sixth Circuit Court of Appeals affirmed the lower court’s ruling in favor of an open deportation hearing.

Mark et al., *Secret Detentions*, *supra* note 12, at 15.

129. *Ctr. for Nat. Sec. Studies v. United States Dep’t of Justice*, 215 F. Supp. 2d 94, 96 (D.D.C. 2002) (quotations omitted), *quoted in* Mark et al., *Secret Detentions*, *supra* note 12, at 16). To mention how horrendous Ashcroft’s orders were, several U.S. District Courts have ruled those orders as unconstitutional, and they have withstood appeal. *See* Human Rights Watch, *Presumption of Guilt*, *supra* note 73, at 26. “On April 3, 2002, a federal judge in Michigan concluded the blanket closure of removal hearings in ‘special interest’ cases violated constitutional mandates.” *Id.* (citing *Detroit Free Press v. Ashcroft*, 195 F. Supp 2d 937 (E.D. Mich. 2002)). The judge stated in part that “[o]penness is necessary for the public to maintain confidence in the value and soundness of the Government’s actions, as secrecy only breeds suspicion.” *Id.* (quoting *Detroit Free Press v. Ashcroft*, 195 F. Supp. 2d at 944). A federal court in New Jersey found the Attorney General’s authorized memorandum on secrecy “unlawful.” *Id.* (citing *N. Jersey Media Group v. Ashcroft*, 205 F. Supp. 2d 288 (D.N.J. 2002)).

130. *See* Mark et al., *Secret Detentions*, *supra* note 12, at 15–16. “The government appealed the New Jersey case to the Third Circuit Court of Appeals, seeking a stay of the District Court’s order, which was not granted. The government turned to the U.S. Supreme Court, which, without comment, granted the government’s emergency request for a stay.” *Id.*

131. *See Ashcroft Unveils Sweeping Reforms at BIA*, 7 BENDER’S IMMIGR. BULL. 261, 261 (2002). “[Attorney General] Ashcroft’s new proposed regulations take the streamlining project to the extreme. . . . [Because] all immigration appeals will be sent to a screening panel where [a] single Board member will either decide the cases or determine that they are appropriate for review by a three-member panel.” *Id.*

making them more efficient. His view of increased efficiency was regulations that required only cursory review or blanket affirmances of immigration judge decisions. We now regularly see BIA one-page decisions that are simple blanket affirmances of immigration judge decisions. One does not know if BIA really reviewed the appeal. A number of lawsuits resulted from this new attack on the justice system.¹³²

As if DHS and DOJ targeting Arabs and Muslims through enforcement and the entire legal structure was not enough, they have begun targeting counsel, such as me, for representing some of these individuals. I was one of eleven attorneys nationwide who advised and represented Saudi nationals in the Midwest and some southern states with their Special Registration interviews. This author learned during the final stages of this article, in doing an Internet search, that articles in the U.S. press, authored by *Newsweek* and the *Associated Press*, accuse attorneys, such as myself, with “working hand in glove with the Saudi Arabian government”¹³³ and assert

132. See, e.g., *Lawsuit Challenges BIA ‘Reform’ Regulations*, IMMIGR. L. TODAY, Jan./Feb. 2003, at 13, 13.

The Capital Area Immigrants’ Rights Coalition (CAIR Coalition) and the American Immigration Lawyers Association (AILA) . . . filed a federal lawsuit challenging the decision-making process used by the Department of Justice (DOJ) in promulgating new regulations that fundamentally restructure the Board of Immigration Appeals (BIA). The regulations are likely to dramatically curtail meaningful appellate review of tens of thousands of immigration decisions each year.

Id.

133. Michael Isikoff & Mark Hosenball, *With Friends like These*, NEWSWEEK, Mar. 26, 2003, available at <http://www.msnbc.msn.com/nid/3068465>.

A surprise Perry Mason-type maneuver in an Idaho courtroom has put the spotlight on an increasingly sensitive problem facing federal prosecutors in the war on terror: a battalion of defense lawyers working hand in glove with the Saudi Arabian government.

Ever since the 9-11 attacks, NEWSWEEK has learned, the Saudi Embassy in Washington has been providing top-flight defense lawyers free of charge for any Saudi citizen detained as part of the Justice Department’s crackdown on suspected terrorists.

. . . .

A key issue in the two-day detention hearing was whether Al-Hussayen was still receiving scholarship funding from the Saudi government to pursue his graduate studies at the University of Idaho. The assistant U.S. attorney in charge of the case, Kim Lindquist, presented testimony from an FBI agent that Al-Hussayen’s scholarship had been cut off at the end of last year. That lessened Al-Hussayen’s ties to the community and made him more of a flight risk, Lindquist argued.

. . . .

But the next day, Al-Hussayen’s lawyer, David Nevin, showed up in court with a document that seemed to directly undercut Lindquist’s case: a financial statement faxed overnight from the Saudi Embassy that showed that Al-Hussayen’s funding had been extended

that attorneys such as myself are assisting the Saudi government with “buying off witnesses.”¹³⁴ This is news to me. The journalists’ and the U.S. government’s statements and conclusions are unfounded.¹³⁵ After

Id.

134. See John Solomon, *FBI Says Saudis Buy Off Witnesses* (Oct. 17, 2003), available at <http://www.kansas.com/mld/kansas/news/nation/7039388.htm>.

The U.S. lawyer hired by the Saudi Embassy to coordinate the hiring of attorneys across the country for Saudi citizens said she is mystified by the criticism.

“I am fascinated that the FBI is unhappy with it. Isn’t the right to counsel a bedrock of the American court system?” asked Malea Kiblan, an immigration attorney for two decades who is the lead counsel for the Saudis on immigration cases.

Kiblan said she has arranged attorneys for hundreds of Saudis who have been detained on visa violations or simply been instructed by immigration agents to sit down and be interviewed.

“In the end, such help benefits the United States as well by ensuring they stay within the law,” Kiblan said.

“Many of these students are being debriefed multiple times by the FBI, and it has been a very traumatic experience,” she said.

Id.

135. In regards to the Solomon article, *supra* note 134, I am one of the attorneys retained in the case described above and was hired by Ms. Kiblan. None of my clients were ever charged with anything remotely as described above, or with terrorism. At most, they were charged with cheating on an exam, and that was only one case. Most all were law abiding and only feared being deported because they were Saudi. That case and all my other cases were only charged with minor immigration violations; they were charged with violating their immigration status by not keeping a full courseload of twelve hours. Most of them dropped a class, without knowing the consequences, in order to maintain high GPAs so they would be able to get a job or get into a graduate program. Universities played a strong role, which far overshadows an attorney’s ability to help students in the case of Special Registration. Perhaps the universities should be included in the Justice Department’s accusations. I know of one university in Arkansas that accompanied a Saudi student to Special Registration for no fee, and a major university in Kansas advised its Saudi students similarly as I would have. Moreover, most, if not all, of my clients have been questioned multiple times before they were advised or even realized the Saudi embassy could assist them. In all my cases, I believe, the FBI did not have an interest in these individuals before I could even contact or properly represent my clients. In one of my FBI/INS/U.S. Postal Service “terrorism” interviews with one of my clients, the FBI and INS agent made negative remarks about the Saudi government providing counsel to some of its citizens. Although the Solomon article states that the U.S. government does not provide similar assistance, I believe that if another country began systematically targeting Anglo-Americans or U.S. citizens as systematically as the United States has targeted Arabs and Muslims, the United States would likely assist its citizens in a similar fashion; governments do tend to try to protect their own citizens, especially overseas. There is nothing odd or unusual about that, especially considering what has been occurring with Arabs and Muslims and Saudi nationals in the United States. Also, the Saudi Arabian government is a long-standing ally of the United States. They have intimate relations with the Bush family; however, the Bushes are not accused of working hand and glove with the Saudi government. Theoretically speaking, even if a direct linkage was made with the Saudi government to September 11th, it still does not mean that every Saudi national is complicit to such terrorist acts, just as every Japanese was not complicit with the attack on Pearl Harbor. Moreover, the Saudi embassy has absolutely no role in these cases; they are not the client.

what I have experienced regarding discrimination, as well as constitutional violations (e.g., unlawful searches) and human rights violations described in a majority of my Arab and Muslim cases, I am not surprised that DHS and DOJ currently feel threatened by attorneys involved and are now attacking the legal representatives of Arabs and Muslims. It is a shame that these departments are assisted by shabby journalism.¹³⁶

The situation for Arabs and Muslims in the United States has deteriorated to such an extent that some Arabs and Muslims are fleeing the United States to other countries. One news source reported Muslim and Arab men fleeing to Canada¹³⁷ because “[t]hey wanted to be some place safe, and they had determined that place was not the U.S. Since [the National Security Entry-Exit Registration System] (NSEERS) went into effect, 3,000 Pakistanis have fled to Canada and 1,100 have been deported.”¹³⁸ Canada reacted angrily¹³⁹ and swiftly to U.S. policies against

136. The Isikoff and Hosenball article, *supra* note 133, is baseless. In addition to the arguments discussed, none of my clients or most individuals in these situations are “suspected terrorists,” at least none that I am aware of. It is interesting that a “Perry Mason-type maneuver” includes only showing that an individual was receiving a scholarship and that the Saudi government/embassy verified that fact. It is not understood, at least by this author, how a faxed statement from an embassy showing that the embassy was providing a scholarship to one of its citizens could cause such distress and result in accusations that the lawyer and the Saudi government were working in collusion. Why a news source, such as *Newsweek*, would make sensational accusations from the facts described is mystifying; so too is its inclusion of Saddam Hussein and terrorism in the same breath. Again, it should be repeated that if a Saudi national, or a “suspected terrorist” to any degree, claims that he or she on a scholarship from a government and that individual is represented by an attorney, and if the attorney receives a faxed statement from the government stating that the individual is indeed receiving a scholarship on certain dates, the FBI can claim that it is “outrageous.” *Newsweek* can claim that he or she was using “Perry Mason-type tactics” and invariably working “hand in glove” and that the government is also somehow involved in terrorism. I do not represent the Saudi government, only some of its citizens. I do not know what the Saudi government does in some sectors as is often accused. I do know that I have not seen the Saudi government involved in any terrorism, nor involved in any degree whatsoever with my clients with whom it assists with their legal bills. In my experience, the Saudi government gladly assists its citizens in all sorts of issues, just as other embassies of countries all over the world, including our own, do when we are overseas.

137. See, e.g., Cam Simpson et al., *Immigration Crackdown Shatters Muslims’ Lives*, CHI. TRIB., Nov. 16, 2003, at 1 [hereinafter Simpson et al., *Immigration Crackdown*] (“Thousands chose to pack all they owned into trucks, vans and taxis and drive to Canada—hoping for refugee status.”), available at 2003 WL 68333193.

138. Traci Hukill, *A Safe Haven Turns Hostile*, ALTERNET (Mar. 27, 2003), available at <http://www.alternet.org/story/15480>. She suggested that the treatment of Muslim Middle Easterners has reached a point to where they feel persecuted and are attempting to flee the United States; perhaps this is part of the goal of some in the administration. She wrote about the situation on the border of the United States and Canada:

[A]t [the] Vive La Casa shelter in Buffalo, NY, . . . [o]f the 952 people who came to ask the non-profit for help with their paperwork and a place to stay while it was being processed, some 550 were Pakistani, about 50 were Egyptian, and the rest were a mosaic of Indonesians, Bangladeshis, Colombians and others—all trying to leave the United States to seek safe haven in Canada.

Muslims and Arabs and acted to warn some of its Arab and Muslim citizens from entering the United States.¹⁴⁰ It is no wonder, then, that Canada

A similar scenario unfolded at border crossings into Ontario in January, when 871 people sought Canadian asylum

Prompting them was a Feb. 19 INS special registration deadline for nationals of seven countries: Pakistan, Saudi Arabia, Egypt, Bangladesh, Indonesia, Jordan and Kuwait. Under the National Security Entry-Exit Registration System (NSEERS) program . . . [t]hose who don't show up, if caught later, face arrest and possible deportation.

. . . They wanted to be someplace safe, and they had determined that place was not the U.S. Since NSEERS went into effect, 3,000 Pakistanis have fled to Canada and 1,100 have been deported.

Id. (emphasis added).

139. The press in the Netherlands reported that “many Canadians became furious over the treatment given to some of their countrymen at US airports and border crossings. American officials were fingerprinting, photographing and registering any Canadians born in Iraq, Iran, Syria, Libya or Sudan.” Dan Karpenchuk, *Canada Slams US Travel Rules*, RADIO NETHERLANDS (Nov. 7, 2002), at <http://www.rnw.nl/hotspots/html/can021107.html>.

Even one of Canada's most celebrated writers, Rohinton Mistry, complained about what he called the unbearable treatment he received at American airports. Mr. Mistry, an Indian-born Canadian and not a Muslim, says he was so upset he cancelled the second half of his US book-tour because of the humiliation.

The issue prompted the government in Ottawa to issue a warning to Canadians born in those countries not to travel to the US.

Id.

140. Another article published in New Zealand on November 11th, 2002, described a situation about a native born Syrian who was a Canadian citizen and experienced more difficulties than Mr. Mistry; he was actually deported back to Syria instead of Canada, where he was a citizen and had been living for over ten years. *In Post-9/11 Climate, Canada Warns Some of Its Foreign-Born Citizens Not to Travel to U.S.*, Radio Interview by Scott Harris with Michael Ratner, president, Center for Constitutional Rights (Nov. 11, 2002), at <http://www.scoop.co.nz/mason/stories/HL0211/S00077.htm>. The excerpt quotes a Canadian foreign affairs department official, Reynald Doiron, who stated that the U.S. policy is discriminatory because it targets citizens based on where they were born. *Id.* The excerpt also quotes Michael Ratner, attorney and president of the Center for Constitutional Rights in the United States:

But the facts are incredible and you have the Canadian government, one of the U.S.'s closest allies objecting, saying ‘What are you doing with one of our citizens?’ And the U.S. does it anyway. . . .

What's really shocking of course now, is that the Canadian government actually issued a travel advisory. A travel advisory is the kind of thing that the U.S. issues when they're dropping bombs all over Afghanistan and they say American citizens shouldn't go there. This one is amazing. It's a one-page sheet that says basically, citizens—nationals—of the following countries, who were born in those countries but who are Canadian citizens should not travel to the United States because they are taking a risk of being sent back to their countries (of birth). Is that not unbelievable and remarkable? Our ally is actually issuing a travel advisory about the country next door to it, that is as close to the United States as the two fingers on my hand, both literally and actually in politics.

Id. What is more outrageous, during the writing of one of the drafts of this article, the Canadian/Syrian mentioned above was finally returned to Canada; however, he was actually *tortured* in Syria. DHS provided no apologies.

serves as a refuge for Muslims and Arabs from the United States. Canada's Immigration Minister, Denis Coderre, was concerned that the issue was not limited to Canadian citizens and stated that he considered it "racial profiling" which created "two classes" of Canadian residents and citizens.¹⁴¹ Canada issued a travel advisory to the United States, which stated the following: "[T]he Department of Foreign Affairs and International Trade advises Canadians who were born in [Libya, Sudan, Iraq, Iran, Pakistan, Syria, Yemen, or Saudi Arabia] or who may be citizens of these countries to consider carefully whether they should attempt to enter the United States for any reason"¹⁴² This warning caused a swift U.S. reaction to modify the public perception and quell the Canadian reaction to its policies.¹⁴³

Prime Minister Jean Chretien blamed the United States for deporting a Canadian citizen to Syria last year, saying Wednesday his government was never told that was happening.

Arar, in his first public comments Tuesday since being released by Syria on Oct. 5, described beatings and other torture during almost a year of detention there.

"It is unacceptable and deplorable what happened to this gentleman," Chretien said Wednesday. "This gentlemen [sic] was in New York and he was deported to Syria by the American government. The Canadian government had nothing to do with it. When we heard about it, we protested."

In New York, a Center for Constitutional Rights lawyer said he was examining the actions of U.S. authorities. . . . [T]he United States, as a signatory of the International Convention Against Torture, is obligated to avoid deporting people to countries known to practice torture.

Tom Cohen, *Canada Leader Blames U.S. in Deportation*, MONTEREY HERALD, Nov. 5, 2003, available at <http://www.montereyherald.com/mld/montereyherald/news/nation/7183151.htm>. Recent revelations show that this case involving Arar is actually part of a larger U.S. policy. See Jane Mayer, *Outsourcing Torture, The Secret History of America's "Extraordinary Rendition" Program*, NEW YORKER, Feb. 14, 2005, available at http://www.newyorker.com/fact/content/?050214fa_fact6 (discussing this case and the U.S. government's program of deporting terrorist suspects such as Arar on a large scale to countries known to practice torture).

141. See Karpenchuk, *supra* note 139.

"Well, it annoys me a lot because first of all when we're talking about landed immigrant[s] we're talking about permanent resident[s] in Canada, which means future Canadian citizens[s] and you know as well as me that all the screening[s], all the testing, all the criteria that you have to go through to become that permanent resident, I think that's enough, you don't need to have two classes. So I believe that it's a [sic] racial profiling again, and we have to do something about it."

Id. (quoting Denis Coderre, Canada's Immigration Minister).

142. Tom Cohen, *Canada Issues U.S. Travel Warning*, CBS NEWS (Oct. 30, 2002), at <http://www.cbsnews.com/stories/2002/10/30/world/main527560.shtml>.

143. On October 31, 2002, the United States delayed issuance of an order requiring Canadian

What is interesting, hopeful, and troubling is that DOJ, in its own internal review of the September 11th detainees by its Inspector General, found credence to the same human rights abuses as documented by prominent U.S. civil rights groups such as HRW, American Civil Liberties Union (ACLU), American-Arab Anti-Discrimination Committee, Lawyer's Committee for Human Rights,¹⁴⁴ American Immigration Law Foundation (AILF),¹⁴⁵ and Amnesty International based in the United Kingdom. It also found that few, if any, of the detainees had any links to terrorism.¹⁴⁶ It is hopeful in that the government can criticize itself; however, although the media¹⁴⁷ and organizations such as the American Immigration Lawyers

landed immigrants to have visas as it awaited further comments. Am. Immigration Lawyers Ass'n, DOS/INS Temporarily Withdraw Regulation Requiring Visas for Canadian Landed Immigrants (Oct. 31, 2002) (posted on AILA InfoNet at Doc. No. 02103145), *available at* <http://www.aila.org>. Not more than a day after Canada issued this warning, the United States modified its stance for Canadian citizens, or they did so apparently. AILA released a statement by Barbara Comstock, Director of Public Affairs for DOJ regarding NSEERS and stated that "[i]n response to concerns previously expressed by the Canadian Government about . . . (NSEERS) . . . the United States changed the treatment [of those] who are Canadian citizens. Place of birth, by itself, will not automatically trigger registration." Am. Immigration Lawyers Ass'n, DOJ Seeks to Assuage Canadian Concerns over Special Registration (Nov. 1, 2002) (posted on AILA InfoNet at Doc. No. 02110540), *available at* <http://www.aila.org>; *see also* Elise Labott, *Canada Lifts Advisory on U.S. Travel*, CNN (Nov. 7, 2002), *at* <http://www.cnn.com/2002/TRAVEL/11/07/canada.us.advisory>. "Canada this week lifted a travel advisory urging Canadian citizens born in Iran, Iraq, Libya, Sudan and Syria to consider avoiding travel to the United States. . . . Canadian officials told CNN their government considered the regulations 'discriminatory' and 'unfriendly.'" *Id.*

144. For an excellent report documenting much of what is expressed in this article, as it was almost completed, see Lawyers Comm. for Human Rights, *Assessing the New Normal, Liberty and Security for the Post-September 11 United States* (2003), *available at* <http://www.humanrightsfirst.org/pubs/descriptions/Assessing/Ch3.pdf>.

145. Am. Immigration Lawyers Ass'n, *Testimony of DOJ Inspector General on the Detention and Treatment of September 11 Detainees* (July 2, 2003) (describing the "Testimony of Glenn A. Fine[,] Inspector General, U.S. Department of Justice, before the Senate Committee on the Judiciary concerning 'The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks'" (posted on AILA InfoNet at Doc. No. 03070213), *available at* <http://www.aila.org>; *see also* Am. Immigration Lawyers Ass'n, *Comments on Inspector General's Report Detailing Post 9/11 Detention Practices* (June 3, 2003) (criticizing the DOJ for ignoring U.S. law in its detention practices post 9/11) (posted on AILA InfoNet at Doc. No. 03060340), *available at* <http://www.aila.org>.

146. *See* Simpson et al., *Immigration Crackdown*, *supra* note 137, at 4.

The government detained more than 1,000 people in the initial arrests They were overwhelmingly Arab or Muslim men

Atty. Gen. John Ashcroft gave the impression that the men were suspected terrorists and that their arrests were preventing new assaults.

But none of those men was ever charged with involvement in the attacks. And for most of them, there was no evidence that they were terrorists, according to a report by Justice Department Inspector General Glenn Fine

Id.

147. *See, e.g.*, Curt Anderson, *Patriot Act Abuse Complaints Documented* (July 22, 2003) ("Justice Department investigators found that 34 claims were credible of more than 1,000 civil rights

Association (AILA) picked up on the rather harsh self-criticism, it is troubling that abused human rights policies including Special Registration continue. It was also troubling because of the callousness of the Justice Department's response to the Inspector General's criticism of improper practices against Arab and Muslim detainees. The Deputy Attorney General responded that "[o]n September 11, 2001, terrorists murdered 3,000 innocent people on American soil" and that therefore "it is unfair to criticize the conduct of members of my staff during this period."¹⁴⁸

The U.S. General Accounting Office (GAO) also reviewed the Justice Department's efforts to interview aliens after September 11th.¹⁴⁹ Despite the assertions by the Justice Department that the program "netted intelligence information and had a disruptive effect on terrorists[.]" that the aliens "were not coerced to participate" in the interviews, and that the interviewers "adhered to DOJ's guidance," the GAO found that the aliens "worried about repercussions, such as future INS denials for visa extensions or permanent residency, if they refused [to be interviewed]" and thus "did not perceive the interviews to be truly voluntary."¹⁵⁰ GAO claimed it could not adequately evaluate the program because DOJ had yet to analyze the results and that "there are no specific plans to evaluate the project data[.]" and "DOJ has not conducted an assessment of the interview project and as of January 2003, had no specific plans to do so."¹⁵¹ Similar to the issue of detainment, although the press did pick up on it,¹⁵² the findings did not make the general public discourse, and the problems continue.¹⁵³

and civil liberties complaints stemming from anti-terrorism efforts, including allegations of intimidation and false arrest."), at http://www.kansascity.com/mld/kansascity/news/breaking_news/6353771.htm; Philip Shenon, *Report on USA Patriot Act Alleges Civil Rights Violations*, N.Y. TIMES, July 21, 2003 ("A report by internal investigators at the Justice Department has identified dozens of recent cases in which department employees have been accused of serious civil rights and civil liberties violations . . ."), available at <http://www.nytimes.com/2003/07/21/politics/21JUST.html>.

148. Memorandum from Deputy Attorney General Larry D. Thompson, to Inspector General Glenn A. Fine (April 4, 2003), available at <http://www.usdoj.gov/oig/special/0306/appK.htm>.

149. See U.S. Gen. Accounting Office, *Homeland Security: Justice Department's Project to Interview Aliens After September 11, 2001* 3 (Apr. 2003) ("[T]he Attorney General directed [the Executive Office for U.S. Attorneys] EOUSA to oversee an interview project that was intended to gather information on potential terrorism and help prevent any future terrorist attacks."), available at <http://www.gao.gov/new.items/d03459.pdf>.

150. *Id.* at 5-6.

151. *Id.* at 6.

152. See, e.g., Curt Anderson, *GAO Slams Justice on Treatment of Aliens*, WASH. POST, May 9, 2003 ("The Justice Department's effort to interview some 7,600 foreigners in the United States after the Sept. 11 terrorist attacks was conducted haphazardly, leading to incomplete, inconclusive results, congressional investigators say."), available at <http://zzpat.tripod.com/cvb/impeach92.html>.

153. See Lawyers Comm. for Human Rights, *supra* note 144, at 31 ("The mass round-ups of predominantly Arab and Muslim immigrants that occurred in the weeks and months following September 11 have ended, although immigration laws are still being enforced disproportionately against

The pattern of abuse, lawmaking, and policy of the U.S. government has been one that attempts to deport and track as many Arabs and Muslims as possible and to scare them from visiting the United States. Hence, making a clear statement that Arabs and Muslims are not wanted in the United States. The press seldom reports this phenomenon, similar to the approach in World War II. This approach is akin to attacking a city ghetto and eliminating it from the city simply because its members have perhaps the same ethnicity, nationality, or religion of a few criminals who committed a heinous war crime. The result can be argued as something for the U.S. government to avoid. Certainly, if they inspect, interrogate, and remove that population, they can argue they found some criminals, stopped some crime, and prevented this entire population from committing any terrorist act. Why then was this approach not utilized in the case of Timothy McVeigh and his group? Certainly if the government targeted every Oklahoman or other individuals who shared characteristics similar to McVeigh and his group, the government would find some criminals and would prevent all those they target from committing any terrorist acts. The government's actions massively violate human rights, our civil liberties, alienate those communities, and simply make an already difficult problem almost impossible. Most importantly, it has not worked. Perhaps it is subconscious, bigoted vengeance.

III. SPECIAL REGISTRATION: THE ROAD TO INTERNMENT

The massive human rights violations described in Part II of this article are indeed cause for concern and an issue in human rights advocacy that needs to be urgently addressed. However, they are the environs in which Special Registration operates. Arab and Muslim human rights violations, such as secret arrests, detainment, and deportation only assist the journey of Special Registration down the road to internment. Special Registration¹⁵⁴ is the greatest cause for concern, and it is de jure discrimination. Many of the remaining human rights violations are de facto discrimination; typically states rarely admit publicly and officially that they are targeting a specific group or groups.

Although it is the detainment, harassment, and other human rights abuses in terms of selective or overall enforcement of immigration policies

those communities.”)

154. This rule was published in the *Federal Register* on Dec. 2, 2003. See Suspending the 30-Day and Annual Interview Requirements from the Special Registration Process for Certain Nonimmigrants, 68 Fed. Reg. 67,578, 67,583 (Dec. 2, 2003) (to be codified at 8 C.F.R. pt. 264) (requiring fingerprinting, registration, and photographing of certain nonimmigrant aliens).

that appear to be the most visible type of physical or psychological harm, it is Special Registration that sets up both a logistical system of tracking and locating aliens, which aids the culture of discrimination that would allow the internment of certain Arab and Muslim aliens. Also, we are already seeing U.S. citizens affected, and as Professor Cole has pointed out, once we start taking away the liberties of “enemy aliens,” we also set a course in which U.S. citizens’ rights will be affected.¹⁵⁵

A. *The Legal Authority and Logistics of Special Registration*

Special Registration is one component of the National Security Entry-Exit Registration System (NSEERS).¹⁵⁶ Special Registration was announced to begin on August 12, 2002, in the *Federal Register*.¹⁵⁷ Special Registration mandates that nonimmigrant Arab and Muslim visitors, who have entered the United States before or after certain dates, must come forward to register.¹⁵⁸

Arabs and Muslims were given certain deadlines to register depending on their nationality, and each group of countries was broken into four main groups that were announced on certain dates. There are twenty-five countries or “nationalities” to date that must come to register.¹⁵⁹ The twenty-five countries have come to be categorized into four groups: Group I,¹⁶⁰ Group II,¹⁶¹ Group III,¹⁶² and Group IV.¹⁶³ The new regulations now

155. See Cole, *Enemy Aliens*, *supra* note 21, at 957 (arguing that “the drawing of lines in the sand between citizens of our nation and those against whom we are fighting” should be resisted); Cole, *Their Liberties, Our Security*, *supra* note 57 (discussing that failing to protect the rights of noncitizens will “pave the way for future inroads on citizens’ liberties”).

156. See Press Release, U.S. Department of Justice, Attorney General Ashcroft Announces Implementation of the First Phase of the National Security Entry-Exit Registration System (Aug. 12, 2002) (announcing that NSEERS will reinstate the requirements to register and fingerprint aliens), available at http://www.usdoj.gov/opa/pr/2002/August/02_ag_466.htm.

157. Registration and Monitoring of Certain Nonimmigrants, 67 Fed. Reg. 52,584, 52,584 (Aug. 12, 2002) (to be codified at 8 C.F.R. pts. 214, 264).

158. For example, the regulations might require registration of an alien from a certain country who was “last admitted to the United States on or before September 10, 2002, and who will remain until at least December 16, 2002.” Registration of Certain Nonimmigrant Aliens from Designated Countries, 67 Fed. Reg. 67,766, 67,766 (Nov. 6, 2002).

159. See, e.g., Richard Sindelar, *CHIMERA, NSEERS, Lookouts, and Security Checks: The New Age*, 8 BENDER’S IMMIGR. BULL. 1, 9 (2003).

All males age 16 and over, who have been in the United States since prior to September 30, 2002, and who are citizens or nationals of the following countries must register with the INS under the special registration regulations: Afghanistan, Algeria, [Armenia was listed here but was taken off the list only days after it was announced], Bahrain, Eritrea, Iran, Iraq, Lebanon, Libya, Morocco, North Korea, Oman, Pakistan, Qatar, Saudi Arabia, Somalia, Sudan, Syria, Tunisia, United Arab Emirates and Yemen.

Id.

160. Group I countries include the following: Iran, Iraq, Libya, Sudan, and Syria. Registration

state that registration will be done on a “case-by-case basis”;¹⁶⁴ however, they surely will track from the same pool these four groups of countries. There are certain designated Immigration and Naturalization Service (INS), or Bureau of Citizenship and Immigration Service (U.S. CIS) offices where they can register and only certain designated ports of entry and departure from which they can exit or enter the United States.¹⁶⁵

The regulations refer to Arabs and Muslims by nationality and only males aged sixteen and over.¹⁶⁶ In Group I, however, all aliens are required to register, including children and women.¹⁶⁷ “The INS publicized registration requirements poorly and mass confusion and fear arose in the affected immigrant communities.”¹⁶⁸

By certain dates, the “*enemy aliens*”¹⁶⁹ must come forward to register.¹⁷⁰ If they do not come forward willfully, they violate the terms of their legal immigrant status.¹⁷¹ Special registrants may also have to report within thirty to forty days after their entry into the United States and then again on an annual basis.¹⁷²

The interview can take as few as fifteen minutes to upwards of thirty to forty-five minutes. There have been reports in Kansas City by other

of Certain Nonimmigrant Aliens from Designated Countries, 67 Fed. Reg. at 67,766.

161. Group II countries include the following: Afghanistan, Algeria, Bahrain, Eritrea, Lebanon, Morocco, North Korea, Oman, Qatar, Somalia, Tunisia, United Arab Emirates, and Yemen. Registration of Certain Nonimmigrant Aliens from Designated Countries, 67 Fed. Reg. 70,526, 70,526 (Nov. 22, 2002).

162. Group III countries include the following: Saudi Arabia and Pakistan. Registration of Certain Nonimmigrant Aliens from Designated Countries, 67 Fed. Reg. 77,642, 77,643 (Dec. 18, 2002).

163. Group IV countries include the following: Bangladesh, Egypt, Indonesia, Jordan, and Kuwait. Registration of Certain Nonimmigrant Aliens from Designated Countries, 68 Fed. Reg. 2363, 2364 (Jan. 16, 2003).

164. See Registration and Fingerprinting of Aliens in the United States, 68 Fed. Reg. 67,578, 67,583 (Dec. 2, 2003) (to be codified at 8 C.F.R. pt. 264) (“[T]he Department of Homeland Security will determine on a case-by-case basis which aliens must appear in person to verify information.”).

165. Registration of Certain Nonimmigrant Aliens from Designated Countries, 67 Fed. Reg. 52,584, 52,592 (Aug. 12, 2002) (to be codified at 8 C.F.R. pt. 264).

166. Registration of Certain Nonimmigrant Aliens from Designated Countries, 68 Fed. Reg. at 2364; Sindelar, *supra* note 159, at 9.

167. Marko C. Maglich, *Special Registration of Certain Nonimmigrants*, 80 INTERPRETER RELEASES 150 app. at 4–6, 9 (2003).

168. Lory D. Rosenberg, *NSEERS Program Expanded Again*, 8 BENDER’S IMMIGR. BULL. 185, 185 (2003).

169. See generally Cole, *Enemy Aliens*, *supra* note 21, at 959 (referencing the fact that the Enemy Alien Act of 1798 is still enforceable today and allows “the President during wartime to detain, deport, or otherwise restrict the liberties of any citizen over 14 . . . [from] a country with which we are at war”).

170. Registration and Monitoring of Certain Nonimmigrants, 67 Fed. Reg. at 52,592.

171. *Id.* at 52,591.

172. *Id.* at 52,592.

attorneys that the registration interviews now take only five minutes; however, my last interview took almost forty-five minutes and then two hours to acknowledge on a form that the alien was registered as requested by the Nebraska Service Center.

The interview begins with the interviewer asking the Arab or Muslim about his basic biographical information, such as where he lives, the name of his employer, the type of work he does, how long he has been in the United States, and even what type of transportation he uses to get to work. The interviewee then has his fingerprints and photograph taken electronically. The interviewee is also asked to provide his photo identification, usually a driver's license and another form of identification, preferably a credit card. As the prints and photographs continue to be processed, the interviewee is asked questions about his status in the United States and to show that he has been maintaining status. In the case of a student, he or she must show at least full-time enrollment with a school and his or her I-20 documents. Ideally, the student will provide a letter from the school indicating compliance with student status. A temporary or H-1B worker might show recent pay stubs to show that he continues to work pursuant to his work classification. In some cases, the alien may be asked to provide telephone numbers and contacts of friends or relatives in the United States or in his home country.

Arabs or Muslims are then given information that shows what airports they must use to enter or leave the United States and where they must register. The information packet and the officer also explain that if they move within a city or to another city or change their address at all, they must notify the government.¹⁷³ If they leave the United States, they must register on the way out. New Arab and Muslim arrivals are also registered when they enter the United States, and if they remain beyond thirty days, they must register within thirty to forty days at their local Bureau of Immigration and Customs Enforcement (ICE) office.¹⁷⁴ These new arrivals are required to be informed by the admitting Bureau of Customs and Border Patrol (CBP) officer of these obligations; "enemy aliens" must also register on an annual basis within ten days of the date they registered.¹⁷⁵ If they do not, ICE agents will come looking for them, deport them, and may subject them to criminal penalties.¹⁷⁶ September 11, 2003, marked the first anniversary of the first wave of Special Registration. Only Arabs or

173. Registration and Fingerprinting of Aliens in the United States, 8 C.F.R. § 264.1(f)(5) (2004).

174. Registration and Monitoring of Certain Nonimmigrants, 67 Fed. Reg. at 52,592.

175. *Id.*

176. *Id.*

Muslims from twenty-five designated countries are or were required to go through this process. There are no plans to expand this list to include all countries for the Special Registration program.

The regulations appear to be changing such that the government is attempting to focus registration from nationality to be more case specific as of December 2, 2003;¹⁷⁷ thus, registration may now also be de facto discrimination. When the *Washington Post* first broke this story on November 2003, it reported: “The Department of Homeland Security is preparing to abandon a visitor-registration program that primarily affects Muslim men and caused widespread confusion and protests earlier this year after thousands of people who complied were arrested or ordered deported, according to several government officials.”¹⁷⁸ However, despite press releases to the contrary, the program was not abandoned and continues to exist. We had at least four disturbing cases the day after the suspension of Special Registration that are notorious examples of the traps fraught from Special Registration.¹⁷⁹

The U.S. government is implementing a new program called US Visit which should be applicable to all visitors, however, there is concern that that tracking of Arab and Muslims will continue and it has yet to be fully implemented.¹⁸⁰

B. Research and Reports of the Implementation of Special Registration

The American Immigration Law Foundation (AILF)¹⁸¹ studied the actual implementation of Special Registration and the experiences of the registrants themselves in its report issued on April 15, 2003, entitled *Inconsistency, Confusion, and Chaos: Experiences with Call-in Special Registration*.¹⁸² The report based its analysis on “empirical evidence of

177. See Suspending the 30-Day and Annual Interview Requirements from the Special Registration Process for Certain Nonimmigrants, 68 Fed. Reg. 67,578, 67,580 (Dec. 2, 2003) (to be codified at 8 C.F.R. pt. 264) (“The determination of whether and alien will be subject to additional registration requirements will be made on a case-by-case basis.”). As of the writing of this article, the final rule is yet to be published.

178. Dan Eggen, *U.S. Set to Revise How It Tracks Some Visitors, Muslims Have Protested Use of Registration*, WASH. POST, Nov. 21, 2003, at A1.

179. See *infra* Part IV.K.3.

180. See Press Release, American Civil Liberties Union, ACLU Says New Border Fingerprinting System Likely to Sow Confusion, Tracking of Arabs and Muslims Based on National Origin Will Continue (Jan. 5, 2004) (explaining that the ACLU warned that the US VISIT tracking program will increase confusion), available at <http://www.aclu.org/news/NewsPrint.cfm>.

181. A description of AILF, which is closely associated with AILA, can be found at http://www.aifl.org/main_about.asp.

182. Christopher J. Einolf & Luke Hall, Am. Immigration Law Found., *Inconsistency, Confusion, and Chaos: Experiences with Call-in Special Registration 2* (Apr. 15, 2003), available at

what has been reported widely in the media, by immigration practitioners, and by community and ethnic groups.”¹⁸³ Some of my own experiences with Special Registration were included in the samples analyzed in this report.

AILF authors Christopher Einolf and Luke Hall¹⁸⁴ stated in this report that Special Registration “has [led to] confusion, inconsistency, and at times, chaos” because “[t]he INS has been woefully unprepared to handle Call-In Special Registration[,]” that “[f]ew if any instructions came from INS headquarters, hence local offices have been left to develop their own procedures and policies[,]” and that “[p]ractices and interpretations have varied between INS offices and sometimes within the same office.”¹⁸⁵ In addition, “strains on INS resources” have caused “the detention and removal of noncitizens en route to becoming permanent residents.”¹⁸⁶

The report first quoted statistics of the numbers arrested, detained, related on bond, and the numbers of Notices to Appear that were filed.¹⁸⁷ The report studied six primary areas: (1) “In status, on-time registrants”; (2) “Late registrants”; (3) “Registrants with a pending application for lawful permanent residency”; (4) “Registrants with a pending application for

http://www.ailf.org/lac/lac_sr_report_041503.pdf.

183. *Id.* at 8.

184. The findings of Einolf and Hall are confirmed and very similar to another article. See Howard W. Gordon & Nancy H. Morowitz, *Special Registration: A Nightmare for Foreign Visitors*, IMMIGR. L. TODAY, Mar./Apr. 2003, at 42, 42.

[T]he National Security Entry-Exit Registration System (NSEERS)—a.k.a. Special Registration—has caused confusion, heavy-handedness, and inconsistent enforcement at INS offices. Many local offices were unprepared to accommodate the numbers of foreign nationals appearing for registration, resulting in lengthy delays. So far, thousands have acquiesced to INS’s mandate, and hundreds have been detained for visa violations. Some offices have denied registrants the right to be accompanied by legal counsel, while others have permitted foreign nationals to be registered in the presence of their attorneys. Most dramatically, detained registrants have been subjected to harsh treatment, including those with pending applications for immigration benefits.

Id.

185. Einolf & Hall, *supra* note 182, at 8.

186. *Id.* at 1.

187. *See id.*

According to the Bureau of Citizenship and Immigration Services of the Homeland Security Department . . . 54,484 individuals had registered at district offices as of March 18, 2003. Of those, 1,854 unlawfully present individuals had been detained as a part of the NSEERS Call-In Special Registration. As of March 18, 2003, 87 registrants remained in custody. Fifty-seven of those were detained for criminal convictions and had not been released on bond. Additionally, 5,636 Notices to Appear had been issued, commencing removal proceedings against those nonimmigrants.

Id.

lawful permanent residence status, who were married to a U.S. citizen”; (5) “Respondents with dual citizenship”; and (6) “Registrants with credit cards.”¹⁸⁸

In regards to registrants who were in status and who registered before the deadline and the reports of special registrants in general, Einhoff and Hall described one case where

a man . . . had come to the United States on a fiancé visa. When he attempted to register at the Arlington INS office, the registration officer could not find any record of his visa, and did not believe the man’s own statements that he had a valid immigration status. He was arrested and taken to a county jail, but was released later that day after his fiancée hired an attorney to represent him, and the attorney convinced INS that the man was in a valid nonimmigrant status.¹⁸⁹

Einholf and Hall described other observations made by the registrants, including the fact that they had to wait an average of *six hours* to register:

Many respondents complained that the registration process was disorganized, and that they had to wait an excessively long time before being called for their interview. Of the 50 respondents who specified how long they had to wait, the amount of time spent waiting ranged from less than an hour to over 19 hours. The average wait time was six and a half hours. Three respondents waited at INS all day only to be asked to return the next day, and two respondents had to report to INS three times before finally being allowed to register.¹⁹⁰

Regarding registrants who registered late, the report found that many registrants did not register on time because they “had not heard about the special registration program in time” and others “had dual citizenship and did not think, at first, that they had to register.”¹⁹¹ The report studied nine cases and stated:

There is evidence that INS policy towards late registrants has been inconsistent. In four of the cases of late registrants, INS accepted their excuse for arriving late and allowed them to maintain their lawful immigration status. In the other five cases,

188. *Id.* at 5–7.

189. *Id.* at 5.

190. *Id.*

191. *Id.*

INS put the registrants in removal proceedings and two of these five were arrested and incarcerated in county jails.¹⁹²

In regards to special registrants who had pending applications for permanent residence, AILF found that only seventy-one out of their sample of 102 registrants were allowed to continue processing for their permanent residence applications, that thirty-one of them were placed into proceedings before an immigration judge, and twenty-seven of those were arrested.¹⁹³ All but four were released after paying a bond. Some paid the minimum bond of \$1,500, whereas others paid a range from \$2,000 to \$10,000, and one individual was required to post a \$30,000 bond.¹⁹⁴ Einhoff and Hall stated that “[i]t was not clear what criteria INS used to decide whether to initiate [sic] removal proceedings or to detain a registrant with a pending application.”¹⁹⁵ Einhoff and Hall evaluated INS offices throughout the United States:

Practices varied among INS offices and within the same INS office. At some offices, such as those in Atlanta, Dallas, and Houston, few registrants with pending applications were placed in removal proceedings. At other offices, such as those in Boston, Miami, and Los Angeles, INS initiated removal proceedings against most registrants with pending applications. In most offices, only a few of these registrants also were detained, but in Miami, Santa Ana, and Los Angeles, the INS detained more than half of the registrants with pending INS applications against whom proceedings were initiated.¹⁹⁶

In regard to registrants who had pending applications for permanent residence based on marriage to a U.S. citizen, Einhoff and Hall again found gross inconsistency: “The INS policy of initiating removal proceedings and detaining registrants was particularly inconsistent and puzzling in the cases of those registrants who are married to United States citizens”¹⁹⁷ and that:

It is unclear what criteria INS used to decide whether to initiate removal proceedings in these cases. Procedures varied among INS offices and within a single INS office. For example, two respondents to our survey, both Moroccan citizens married to

192. *Id.*

193. *Id.* at 5–6.

194. *Id.* at 6.

195. *Id.*

196. *Id.*

197. *Id.*

a U.S. citizen, went to the same INS office, the Milwaukee District Office. INS allowed one of the men to continue waiting for his application for lawful permanent residency to be approved, but initiated removal proceedings against the other man.¹⁹⁸

In regards to individuals who were not only nationals of one of the twenty-five countries, AILF described how it was very confusing for those individuals to decide whether they had to register and “INS treatment of dual citizens, or registrants who might be dual citizens, varied.”¹⁹⁹ Furthermore, some individuals were not aware of their nationality and a requirement to register either because they had been out of their home country since childhood, or they did not know their citizenship status.²⁰⁰ It was described how in some of these cases, late registration individuals with otherwise valid immigrant status were arrested, and the INS initiated removal proceedings against them.²⁰¹

Regarding the evaluation of registrants with credit cards—which proves very concerning because of the common sense fear of providing anyone with one’s own credit card number—AILF found from a sample of 266 registrants, eighty-two were required to provide the INS with their credit card or debit card numbers. Einhorn and Hall commented that this requirement was not provided in the regulations or any provision of the

198. *Id.*

199. *Id.*

200. *Id.* at 7. “A few of these respondents had lived in their second country of citizenship since their early childhood, and did not even know whether they still retained citizenship in their country of birth. Some respondents fled their countries of birth after having been granted refugee status.” *Id.*

201. *See id.*

Three of the 37 survey respondents who had dual citizenship tried to comply with special registration, only to be turned away by INS officers who insisted that they did not have to register. On the other hand, two other dual citizens did not register at first because they did not realize that that [sic] the requirement applied to them. When they became aware of their obligation and attempted to register late, INS initiated removal proceedings for their failure to comply. Both men were in a valid immigration status at the time, and their only violation of U.S. immigration law was their failure to register before the deadline.

One of these men, a Canadian citizen, had been born in Syria but left the country at the age of two. He later came to the United States to work on a H1-B visa. Having spent nearly his entire life in Canada, he did not consider himself a citizen or national of Syria. The other man was a native of Iran who had fled that country and had been granted refugee status in Norway, later becoming a Norwegian citizen. At first, he did not realize that the special registration regulations applied to him. When he did attempt to register late, the INS initiated removal proceedings although his immigration status was otherwise valid.

Id.

immigration law and that it was “unclear why INS wanted credit card information, or what it plans to do with that information.”²⁰²

There were also, in some areas, mass arrests of hundreds of Arabs and Muslims who were actually “legal” in status. The mass arrests of Iranians in California was one of the most egregious and massive onslaughts of human rights violations as a result of Special Registration. These individuals were treated differently or charged with immigration violations that are nonissues for most other immigrants. This has been documented, and I experienced it personally.²⁰³ The Iranian Bar Association in February 2004 published a study of these arrests and deportations.²⁰⁴ They found that there was improper interrogation of the registrants,²⁰⁵ arbitrary detention of registrants,²⁰⁶ demeaning and humiliating treatment of Iranians,²⁰⁷ arbitrary questioning of registrants,²⁰⁸ interrogation failures,²⁰⁹

202. *Id.*

This occurred at 37 of the 52 offices at which survey respondents registered. Many respondents expressed their concern about having to provide INS with their credit card numbers. There is nothing in the special registration legislation and regulations, or in any other provision of immigration law, that requires noncitizens to provide INS with their credit card numbers.

Id.

203. *See, e.g., infra* Part IV.K.2.

204. Iranian-American Bar Ass’n, A Review of the Treatment of Iranian Nationals by the INS in Connection with the Implementation of NSEERS Special Registration Program (2004), *available at* <http://www.iaba.us/Documents/Final%20Docs/NSEERSReport.pdf>.

205. *See id.* at 3.

[T]he Report finds that the questioning of registrants by INS officials was frequently conducted in an arbitrary manner, and, in certain cases, went well beyond what was necessary to accomplish the purposes of the special registration program. In one case recounted to the IABA, a registrant was asked by an INS official whether he believed in the Bible.

Id.

206. *See id.* at 3–4 (“[T]he Report finds that detention decisions were often made in a arbitrary manner, and without the particularized analysis that is legally required of the government.”).

Twenty-four of the 34 registrants . . . were detained by the INS for some period of time. Yet every single one of these 24 detainees had voluntarily appeared to register at an INS office; 20 had applications already pending with the INS concerning their immigration status; 16 had lived in the United States for longer than five years; and 23 had immediate family members residing in the United States. In addition, there [was] no evidence that any of the 24 detainees were deemed to pose a national security threat.

Id. at 4.

207. *See, e.g., id.* at 30.

For instance, upon learning that the detainees before him were Iranian, one officer reportedly stated “Let me go grab my shotgun.” Another officer reportedly called a group of detainees “animals” and said he was tired of dealing with them, while another informed a detainee that they were “cleaning up America” by detaining the Iranian special registrants. One interviewee reported that when his group of detainees asked for the heat to be turned on in the bus

inconsistent standards and practices,²¹⁰ poor detention conditions,²¹¹ lack of proper medical care,²¹² and the secrecy in which these events occurred.²¹³

The BBC began reporting on the issue soon after the Special Registration program started. In December 2002, the BBC reported, “Saudi and Pakistani men visiting or studying in the United States will be required to register with the government and provide their fingerprints and photographs.”²¹⁴ The BBC reported that the American Muslim Council told the BBC that “[t]his is a kind of racial profiling which is unconstitutional in this country.”²¹⁵ A couple of months earlier, the BBC reported, “Coming into the country, we’ve had people just sent back, detained, mistreated, basically with interrogation and intimidation. It’s

transporting them to a detention center, the driver responded that they “didn’t deserve it.” Another interviewee reported that, when a cellmate complained about the cold, he was “roughed-up” by an officer, while another officer said that he could “go back, if he wasn’t happy here.” While this interviewee noted that a superior later apologized for the physical abuse, two additional interviewees also reported that INS officers pushed or shoved them while moving them from place to place.

Id.

208. *Id.* at 19.

209. *Id.* at 18–19.

210. *Id.* at 22.

211. *Id.* at 4.

212. *See, e.g., id.* at 27–28.

In one instance, a detainee who shortly before detention had undergone a hernia operation reported that he was refused his medication even though he repeatedly asked for it and even though he explained that, without the medication, he was in substantial pain. He allegedly was given his medication only on the eighth day of his detention. Another detainee reported that, during a flight by which the detainees were being transported to a facility in Florence, Arizona, detention officials confiscated medication of another detainee who was having trouble breathing. Finally, some detainees reported an incident on a bus ride between INS detention facilities where a detainee reportedly fainted and struck his head on the toilet in the back of the bus, remaining unconscious for approximately twenty minutes. Despite the pleas of the other detainees on the bus, the driver reportedly declined to stop the bus or otherwise assist in securing medical assistance.

Id.

213. *See, e.g., id.* at 30.

One detainee reported that INS officers asked if he was gay, and when he said yes, he was separated from the other detainees and held in isolation for two days. Approximately three weeks after his December 12, 2002 registration, this interviewee was deported to Denmark. Neither his family nor his lawyer was informed of the deportation.

Id.

214. *US Imposes New Visitor Regulations*, BBC NEWS (Dec. 18, 2002), at <http://news.bbc.co.uk/1/hi/world/americas/2585375.stm>.

215. *Id.* (quoting Faiz Rehman of the American Muslim Council).

unfortunate that we've come into this situation after 9/11."²¹⁶ The article described the new registration process in the United States that appeared to single out Muslims from Middle Eastern countries: "[C]ivil liberties groups, some members of Congress and Arab and Muslim American groups have criticised the US programme saying it singled out Muslims from Middle Eastern countries."²¹⁷ The Director of the American Civil Liberties Union's (ACLU) Immigrants' Rights Project was quoted: "Selective enforcement of any law based on unchangeable characteristics like race, ethnicity or national origin is at its core un-American."²¹⁸ These articles also stated something important; it is not as if only the "guilty" have been singled out, most are innocent, and there is little if any connection to "terrorism." The BBC article noted: "It's pretty obvious that this plan won't work at anything except . . . to essentially 'pick on' people who haven't done anything wrong but happen to come from the administration's idea of the wrong side of the global tracks."²¹⁹

In January 2003, the BBC reported on the registration deadlines and their effect in the United States: "Thousands of immigrants in the United States are rushing to comply with a deadline to register with authorities under anti-terror laws introduced following the 11 September attacks."²²⁰ The BBC reported that "[u]p to 1,000 men from Iran, Iraq, Libya, Sudan and Syria, who came forward in earlier registration processes, are currently being held by US authorities, according to human rights advocates."²²¹ The BBC reported on the fear of these individuals: "'I'm totally scared,' [said] 28-year-old Chedli Fathi."²²² Most importantly this BBC News article stated:

The arrests led to mass protests, with many comparing the process to the internment of Japanese-Americans during World War II.

. . . .

The arrests also became a public relations disaster for the Bush administration, with critics saying that it is unlikely that

216. Kevin Anderson, *Arab-Americans Fear Registration System*, BBC NEWS (Oct. 2, 2002) (quoting Gus Shihab, U.S. immigration attorney), at <http://news.bbc.co.uk/1/hi/world/americas/2290997.stm>.

217. *Id.*

218. *Id.* (quotations omitted).

219. *Id.* (quoting Lucas Guttentag, Director of the ACLU Immigrants' Rights Project).

220. *Immigrants Rush to Meet US Deadline*, BBC NEWS (Jan. 10, 2003), at <http://news.bbc.co.uk/1/hi/world/americas/2644951.stm>.

221. *Id.*

222. *Id.*

terrorists would take part in a voluntary registration programme.²²³

IV. EXPERIENCES IN THE FIELD

I have experienced the above findings and reports to a very large degree in virtually all of my cases involving Arabs and Muslims.²²⁴ These personal experiences²²⁵ in the professional course of my work as an attorney²²⁶ have really driven home to me the concept that internment can happen fairly easily because of its logistical framework, and the current sentiment not only with the public and U.S. government policy makers, but also with lower level immigrant enforcement officials. It should be noted that some of the most egregious Special Registration cases that I have had have occurred since December 2003, described in Part IV.K.3, after the

223. *Id.* (emphasis added). During the final editing of this article, the Commissioner of the former INS discussed his disagreement with and the failures of Special Registration to capture any terrorists:

James W. Ziglar, who was commissioner of the Immigration and Naturalization Service before it was subsumed into the Department of Homeland Security, said he and members of his staff had raised doubts about the benefits of the special registration program when Justice Department officials first proposed it. He said he had questioned devoting significant resources to the initiative because he believed it unlikely that terrorists would voluntarily submit to intensive scrutiny. . . . “This project was a huge exercise and caused us to use resources in the field that could have been much better deployed.”

“As expected, we got nothing out of it,” said Mr. Ziglar “To my knowledge, not one actual terrorist was identified. But what we did get was a lot of bad publicity, litigation and disruption in our relationships with immigrant communities and countries that we needed help from in the war on terror.”

Rachel L. Swarns, *Program’s Value in Dispute as a Tool to Fight Terrorism*, NEW YORK TIMES, Dec. 21, 2004, at A26.

224. For details of additional stories similar to my field experiences, see DOW, *supra* note 78.

225. Out of respect to the institutions and confidentiality to my clients, as well as attorney ethics, I will use alias names, not mention names of professors involved and sometimes the cities in which the universities are located, which often have more than one university.

226. My experience is from representing immigrants and employers of immigrants, including Arabs and Muslims in such cases as: removal proceedings, which can include asylum applications; immigrant or nonimmigrant applications, which includes both family, school, exchange, research, or business applications; consular processing; and attending Special Registration interviews. I attended and advised clients regarding Special Registration interviews not only in the normal course of work that already involved some clients who were Muslim or Arab, but also I was one of eleven attorneys in the United States designated by the Royal Embassy of Saudi Arabia for Saudi students attending school in the United States to contact for advice regarding Special Registration and to attend Special Registration interviews. For a Web site that provides a list of attorneys who can assist Saudi students, see <http://www.sacm.org/lawyers.htm> (last visited Feb. 19, 2005). I also represented a number of Saudis via one of the Saudi Arabian embassy’s counsel in a variety of immigration matters immediately after September 11th.

Department of Homeland Security (DHS) allegedly *ended* Special Registration. These clients continued to risk deportation even as recently as October 2004 and March 2005 as the DHS has continued to aggressively pursue them for alleged violations of special registration requirements that were suspended in December 2003. A few of my Special Registration cases in late 2003 have been severe enough to catch the interest of the DHS Liaison with the American Immigration Lawyers Association (AILA) National Headquarters, the American Civil Liberties Union (ACLU) Immigrants' Rights Project in California, and the American-Arab Anti-Discrimination Committee (ADC) in Washington, D.C.

A. Immediate Post-September 11th Aftermath

In the days, weeks, and months that immediately followed September 11th, if Arabs or Muslims fell out of valid immigration status,²²⁷ especially as a student,²²⁸ they would be arrested and detained and would most often experience some of the human rights abuses discussed above. For a typical client to fall out of status, it most often meant that they merely dropped below full-time status in college.²²⁹ This is all it would take to subject an Arab or Muslim to immediate arrest, detention, and the human rights abuses described above.

A common scenario I have seen for Saudi Arabian students is that they often fell out of status because of new processes due to September 11th, which caused lengthy visa processing delays outside the United States after they went home to visit over winter or summer break. The delays in processing were primarily directed towards young Arab and Muslim males.²³⁰ For example, in the Christmas that immediately followed

227. For the regulations governing student status, or F-1 classification, see Nonimmigrant Classes, 8 C.F.R. § 214.2(f) (2004).

228. See Akram & Johnson, *Race, Civil Rights, and Immigration Law*, *supra* note 16, at 342.

As an initial response, investigators contacted administrators at over 200 colleges to collect information about students from Middle Eastern countries. In December 2001, with a mass arrest, the INS announced its crackdown of noncitizens who violated the terms of their student visas. Arrests focused exclusively on students from nations with alleged terrorist links: Iran, Iraq, Sudan, Pakistan, Libya, Saudi Arabia, Afghanistan, and Yemen.

Id. (footnotes omitted).

229. See 8 C.F.R. § 214.2(f)(6)(i)(B) (noting that the student must be enrolled in a full course of study of at least twelve semester hours per term of certified "full course of study" for graduate level study).

230. See *Waiting Period for Arabs Applying for NIVS?*, 6 BENDER'S IMMGR. BULL. 1258, 1258 (2001).

Numerous press reports have been circulating that the State Department has implemented a 20-day waiting period for nonimmigrant visa applicants from

September 11th, a number of students returned home to visit their families, and if they had to renew their student visa,²³¹ they could be delayed up to a month applying for a new visa at the U.S. consulate. These students would then find themselves arriving back to the United States to resume classes at the end of January or beginning of February rather than the beginning of January when classes began. They would be almost a month behind and then would try to catch up in several classes. Many found it impossible to keep up, especially graduate students, who did not want a low grade to negatively affect their GPA. They would drop their class, often unable to replace it at that point in the semester without giving it much thought, or at least without thinking they could end up for weeks or months in jail. The students often were not provided with any warning from their advisors or schools of the repercussions of what would follow. They also did not expect that they could be arrested and interrogated by the FBI and Immigration and Naturalization Service (INS) about their connections to terrorism after being pulled out of their classroom or lambasted in their home residence at 6 or 7 a.m. They might be asked if they are “Muslim,” their feelings about September 11th, the Iraq War, whether they are “religious,” or how they felt about being an Arab.

The first case I represented after September 11, 2001, was in November 2001. He was a young Saudi Arabian man who I will call Samir. He was attending a university in Springfield, Missouri.²³² Samir dropped his course load below twelve hours. He dropped one class because his math teacher would constantly ask him his opinion about September 11th or Osama Bin Laden because the teacher knew he was from Saudi Arabia. These constant questions over days and weeks in front of his classmates made him feel very uncomfortable, so he eventually dropped the class. Samir also dropped another class because he realized it was not required for his major, and he also found out that he could take another class required for his major at a community college for a lower price.²³³

certain Muslim and Arab countries. Some reports state that all men of “fighting age”, roughly 16 to 45, from Arab and Muslim countries are subject to additional background checks and security screenings that take a minimum of 20 days.

Id.

231. See *State Dept. Suspends Automatic Visa Revalidations for Certain Aliens from Terrorist-Sponsoring Countries*, 79 INTERPRETER RELEASES 377, 377 (2002) (explaining the interim rule eliminating automatic revalidation of nonimmigrant visas to students from Iraq, Iran, Syria, Libya, Sudan, North Korea, and Cuba).

232. Samir was an F-1 student working towards a degree in Computer Science, and this was his first semester at this college.

233. The professor was also handing out materials regarding Bin Laden and September 11th. At no time was Samir aware that dropping below twelve hours could cause him to be technically out of status, especially when he was trying to find a replacement class for the chemistry class. He said that his

Except for the Bin Laden situation, Samir was like any normal college student who decides to drop a class, for a variety of reasons, including not feeling comfortable with the professor.

Circumstances that lead to the arrest of Arabs or Muslims are varied. Samir was arrested and pulled out of his classroom by the Springfield police because he got into an argument with a secretary at his university's international office, which he stated resulted from his frustration with the bureaucracy of the university on an issue that spanned several weeks.²³⁴ He allegedly told the secretary that he was going to "kill" her.²³⁵ The woman contacted the Springfield police who immediately came and pulled him out of the classroom and arrested him. They did not believe there was enough of an issue to press any charge, including "disturbing the peace" for which he was arrested. That may have solved the Springfield police issue; however, since he was Muslim, Arab, or Saudi Arabian, he was suspected by the FBI and the INS. Springfield police questioned and detained him while he was in their custody, and they also notified the FBI and INS. The FBI, after questioning him about any terrorist connections or knowledge, did not have any interest in him.²³⁶ The INS found that he was out of status, of which he was unaware. Samir was kept in jail during this period for at least two weeks while they initiated deportation, or removal proceedings, against him. They determined that he was not a terrorist threat perhaps in only the first day or two. He told me that he was forced to eat pork against his religion, although he had requested meals without pork. He did not eat or ate very little.²³⁷ He and many others complained that the

advisor never made him aware of the impact on his student status by dropping below twelve hours, and his math teacher's conduct, especially during a math class, was improper. The school's international department also never advised him as to the consequences of dropping his class at any time, although he consulted with his advisor(s) in dropping the class, and the international department indicated to me that they did not know the identity of his advisor.

234. The main trouble started when Samir tried to get his college credits transferred and thus had to make numerous trips to the international student office. He explained that he went on endless rounds trying to find someone who could help him and was told to return in a week. He did, and then they said to come in the next day. He did, and then they said he needed an appointment, so he returned again. He was then told they could not help him and that he needed to see his advisor.

235. The Springfield police came and arrested him and then notified INS. The INS and FBI questioned and investigated him and found he was out of student status. Then INS contacted the school and asked about his status, and the school responded with a letter stating he was simply out of status. Not only did the Springfield police arrest Samir, but also they pulled him out and arrested him right in the middle of his class. The Springfield police stated to me that what occurred did not satisfy the elements of the city's disturbing the peace ordinance.

236. During Samir's detainment, for almost two weeks he was subjected to endless FBI questioning while he was in jail and before I was contacted or able to locate him.

237. Regarding treatment in jail or other acts by U.S. CIS or ICE, or INS back then, issues like how individuals such as Samir are treated in jail, or even illegal searches in the process of their arrest or while they are being arrested, seldom affect their immigration issues, which is my primary focus to first

guards at the jail made them sleep on the floor when they saw other cells available or empty.

When I finally met Samir, he was soft-spoken, polite, and did not appear the least physically threatening; he was small in stature and certainly never came across as any potential threat—even if he did say something threatening, especially to have the police come immediately and rip him out of his class.²³⁸ It turns out that he did say “I am going to kill you,” but the context, even agreed to by the director of the international department, was not as it would seem when someone says that they’re going to “kill” someone. He said it in a calm, even laughing, manner (both sides, per my client and the director of the department, said they were laughing and no voices were raised). He said he apologized to her after he said it. He kept returning to the office over a period of several weeks and was told contradictory instructions about whom to talk with or what he needed to do to get his transcripts sent. At this one instance, he was told that he had to speak to a different person, by this same person, and he was frustrated. After he left, the woman started thinking about it, and it did make her feel uncomfortable, and she called the police, who found nothing to substantiate any charges. The school apparently was not willing to be that helpful to him because he was attempting to transfer schools. The supervisor even stated to me that “he was wanting to transfer from the university anyway,” as if this lowered the threshold of their responsibility for this case.

Samir was prevented access to counsel and from contacting his embassy and was left in custody for almost two weeks as his \$10,000 bond was being raised. Prior to September 11th, we rarely saw bonds of this amount assessed; after September 11th, \$10,000 bonds became routine in almost every Arab or Muslim case. Unlike typical criminal detainment of U.S. citizens or those with immigration issues, one cannot merely get a bondsman and pay ten percent to post a bond. There are few if any bondsmen who do immigration bonds, at least in this region of the United States. Those who do assist with immigration bonds often charge a nonrefundable 50% of the bond, and some even want collateral for the full amount. Thus, a high bond can have the effect of prolonging detainment or making it impossible to be released. If the alien remains in custody, the

resolve. Often the clients do not want to complain and just want to be out of the situation they are in. Moreover, it is important to maintain a good relationship with the persons you are dealing with, such as in acquiescing to a bond reduction or voluntary departure, or even to provide information, and to talk with you about the case. Therefore, you must either do a balancing act or hold off any complaints until the first immigration issue is resolved, especially if you are trying to get a bond set by the very people that you want to complain against or to have the attorneys assist in getting a bond hearing.

238. Samir had no animosity towards the college; he just wanted to go on to another school and not return to the United States. He did not wish to pursue a complaint even at our urging.

entire removal process is expedited and it is more difficult for counsel to represent the alien because aliens are frequently moved hours away with little or no notice to the attorney or alien's family because the INS leases jail or prison space from municipalities.

Every time I get a detainee case, a family member or the embassy's counsel usually contacts me. It then can easily take me a day to two to locate, talk with, and get a G-28 signed by the client in order for INS or the Bureau of Immigration and Customs Enforcement (ICE) to talk to me and give basic information. Often, the family member, the embassy, and/or its counsel may not know exactly where the client is being held. It also may be days or weeks before a detainee can see an immigration judge in this part of the country.

Not only did this experience traumatize Samir, but also when I talked to his parents and family in Saudi Arabia, they became very distressed. I have experience such distress in other cases, too, and, in some cases, family members became ill because of what was happening to their children in the U.S. Samir's family was one of two cases I had where the parents got so worried that one of them had to be hospitalized when she heard that her son has been imprisoned for two weeks because he was not carrying enough college hours and was being deported. I believe it was his mother who has high blood pressure and had to be hospitalized. I would call, and his little sister would tell me that the family was still at the hospital. They heard about what was happening to Arabs and Muslims and were afraid for him. His dad, who spent thirty years in the United States, wanted him to come back to Saudi Arabia. He did not want Samir even to attempt going to school in the United States, for at least the time being, until things changed.²³⁹ As I have stated throughout this article, this is probably the intended effect by some immigration and FBI officials and many others especially at higher levels in the Justice Department who have implemented, recommended, or let these policies and practices continue—to get the Arabs and Muslims out of the United States.

We did obtain voluntary departure relief for Samir, but in the course of discussing the INS prosecuting attorney's position on this matter, which is very important in these cases, especially with certain immigration judges who simply follow the INS's position, they stated that they might object to voluntary departure, and thus wanted to deport Samir, because they had monitored Samir's telephone conversations with Saudi Arabia and told me that he mentioned "Bin Laden." I had to explain that what was likely said

239. Samir's father told him that things would probably only be worse even if he went to a different school, and, therefore, he did not want him to return to the United States for at least several years.

was that he dropped his class because his math teacher kept asking him about Bin Laden, and because he dropped this class, he was out of status and deportable.

Samir was released and obtained voluntary departure on the “11th” of the month²⁴⁰ after both the immigration judge and the INS District Counsel called the school again to ask if they considered Samir a “threat.”²⁴¹ He wanted to complete school that December, but found that he had additional troubles including failing classes for not being able to complete his finals, which of course, he missed because he was in custody. At least in the case of his English teacher, after I explained everything that Samir went through, she replied that hearing these things made her “stomach hurt.”²⁴²

B. Universities as Sword and Shield of Arab and Muslim Students

Universities and colleges play a crucial role in how students are treated by the INS or FBI. Fortunately, the large area of Kansas City University is

240. I remember visiting and meeting with Samir immediately before his hearing before the immigration judge on December 11, 2001. Samir was signing his name on a document for me to represent him before the immigration court, and he asked me what date it was. I replied “the 11th.” He reacted sadly and sarcastically and said “great.” At this hearing, I stated to the immigration judge the circumstances and that the school did not state he was a threat and identified the individual who told me.

241. The immigration judge and the INS District Counsel decided to check my statement and called the school on a teleconference call on the spot and did not state that I was present. The school official reiterated what I said, with even a sigh before she said “no, he is not a threat,” as if she realized this entire situation with him had gotten out of control, which she indicated to me before and after his hearing.

The woman in charge of Samir’s college’s international office was helpful, and she did tell me that she felt things went too far, and it should have been handled by the school’s own disciplinary system instead of calling the police. She certainly did not indicate that she felt he was any threat. She was defensive of the school’s actions, as expected of anyone in her position, and stated that she felt Samir was “pushy” and “did not even intend to go to [the college] the following semester,” and when certain words were said, they have a protocol to call the police. She did acknowledge to me when he said the words “I am going to kill you” that they were said in a very nonthreatening manner.

242. After being in custody for almost two weeks over this entire ordeal that spanned the time of his finals, he tried to complete his course work. However, his English teacher would not accept his assignment and gave him an “F” for the course. She said there was nothing she could do about it.

When I tried to contact Samir’s English teacher regarding this situation, she replied to me with the following:

Dear Ty,

Thank you for informing me about this situation. Reading all of the things that [Samir] went through made my stomach hurt. I didn’t know the particulars until now, so I had no warning that I should give an extension or what. As I said before, if [the college] directs me to grade his papers and give him a new grade I will. Until further notice, however, I cannot do anything to change what is recorded.

Sincerely, /s/

E-mail from University Professor, to Ty S. Wahab Twibell (Dec. 29, 2001) (on file with author).

protective of its students from the INS and FBI, as well as other universities in Lawrence or Manhattan, Kansas. One or two others in surrounding cities actually have worked against their students.

1. The Shield: Protecting Students from INS “Cowboys Who Come to Scare the Crap out of the Students”

In late 2002, I was assisting a young female Iraqi with her asylum application.²⁴³ I was also assisting her with applying for a change of status from a temporary work (H-1B) to student classification (F-1). She was in the process of changing from a Missouri school to another state to be with her parents. She became very alarmed after she received an e-mail from the university in Kansas City stating that the university was aware that she did not attend her classes, and therefore, they were required to notify the INS. However, she had obtained the new I-20 from the Michigan school which had already notified the INS of her change in schools.²⁴⁴ She and her family asked me to contact Kansas City University because they were in absolute fear that she may be arrested.²⁴⁵ Although she was in the United States legally, and this could be demonstrated, the entire ordeal of possible weeks in jail and the interrogations is nothing anyone would want to risk. Often the arresting officers do not know the nuances of some alien classifications and the legal effect of having an asylum application or adjustment application pending within their own organization.

The individual in charge of the university seemed to understand the alarm and informed me that the university goes through several steps before they notify the Kansas City District INS because they “go and act like cowboys and scare the crap out of the students.” This was the most senior-level individual at the university in the international department. He stated that unless they perceived a student to be a “real threat,” they did not call the Kansas City INS as a matter of policy. They instead contact the regional INS in Nebraska, who he stated behaved more professionally in dealing with these types of matters, which at the same time allowed them to

243. The asylee’s family fled Iraq after persecution on partial account of them refusing to join Saddam Hussein’s Ba’ath party.

244. See *INS to Speed Tracking of Foreign Students*, 7 BENDER’S IMMIGR. BULL. 656, 656 (2002) (requiring schools to report student enrollment data to INS).

245. She and her family got very nervous and asked if I could contact the university. I contacted someone in charge of the international program and explained the situation and asked for him not to notify INS because, even if she was in the United States legally, the INS computer and communication system was such that if agents came to arrest or question her, they may not be able to ascertain if she had an asylum application pending to determine her status, and she would likely be in custody for days or weeks before she was released, or they may still refer her to an immigration judge and require a bond that the family could not afford to pay.

meet their requirement of informing the INS, but with minimal damage to the students or the school's reputation by preventing unnecessary midnight raids on the homes of their Arab or Muslim students because they were not enrolled for enough hours.

2. The Sword: Discriminating Against Arab and Muslim Students and Assisting in their Deportation

In another town and university in Missouri, I represented two individuals in a situation that I believe was a blatant occurrence of discrimination by the university that worked in collusion with the INS. It was a case of two Saudi Arabian twin brothers at a university in a smaller town in northern Missouri. I will call these individuals Ali and Mohammed. They were in many ways model students who were involved with their community and had the association and respect of some of the community leaders.²⁴⁶ Their father had strong contacts with the United States and even came to visit his sons. The Saudi embassy and its counsel contacted me because the twins were being held for violating their student status on bonds of \$10,000 each. As it turns out, the twins were never out of valid student status. In fact, they had always been enrolled beyond full-time, more than twenty hours some semesters, and their grades were exemplary. They were not notified of any status issue by the school. However, the school inadvertently wrote and informed the INS in December 2002 that the twins were "never enrolled" and therefore out of student status, although they had been enrolled with the university for almost two years.

As it turns out, the twins had been under investigation, along with many others, for going to flight school for several months; however, the INS and FBI could not find any wrongdoing or connection to terrorism.²⁴⁷ It was almost two weeks after representing the twins that I learned this information. It was never the basis for any charges against them. Neither the school nor the INS mentioned this to me until almost the resolution of the case.

What happened is that during the intense interviewing by the FBI and INS, they compared notes with school officials and reviewed their school

246. Mohammed and Ali did well in their community and were known to be "young men" who are "clean cut, upright individuals" by well-respected community members who also were their hosts for at least one year.

247. It is not unusual for a Saudi and some other nationalities to take flying lessons on small planes because in Saudi Arabia, a pilot license is very valuable since there is a great deal of transportation that is done by flying because of the geographical terrain and climatic conditions that favor air over land transportation.

applications. The school informed me only that the information “suddenly became known to them.” They found that while the twins orally told the FBI or INS that they had learned English at a school for a few weeks (not even college or university, I understand) when they were visiting the United States with their father years ago at a different time when he was a student, they did not mention this “school” on their school applications when it asked for a listing of any colleges or universities that they attended in their past. The twins did list a college they previously attended. The school reasoned that since they did not disclose all the “schools” they attended, they could argue that they were never enrolled because there was a small notice on the application that said if they did not disclose all information, the student could be disenrolled. The school never notified the twins of this issue or asked for an explanation; they simply wrote a letter to the INS who came out to arrest the twins. The twins stated that they did not list the school where they learned English because they did not think that was what the application meant when it asked for “universities” or “colleges” and that they would have no reason for not listing the “school.”

In the course of the twins’ detainment, INS confiscated and searched the twins’ dorm rooms and computers;²⁴⁸ they did not find any terrorist bomb plans or conspiracies against the United States, but they did find pornography. One officer, almost with excitement like he had found “something” else against them, asked me if they could “go ahead” and question them (without me present) about possible violations of the “federal child pornography act.” However, the INS agent could not articulate exactly what law had been violated other than the pictures may be of “minors.”²⁴⁹ It did not exactly shock me too much to think that someone

248. Such unconstitutional searches of homes are standard fare when Arabs and Muslims are arrested. Kendrick discussed some constitutional defenses to such searches. *See* Kendrick, *supra* note 98, at 1025–26.

Arbitrary and discriminatory enforcement of the laws by police officers constitutes an unreasonable search and seizure because the random targeting is not based on any suspected wrongdoing or violation of the law; rather it is based on racial, religious or ethnic reasons. If defendants who have been charged with violations under the USA PATRIOT Act are going to have any legal recourse, the courts should allow a Fourth Amendment challenge.

Id. (footnote omitted).

249. Additionally, despite it often being difficult to contact the investigating INS officers to discuss my clients’ issues, one afternoon after I had entered an appearance on the case, at about 5:30 p.m., a very enthusiastic INS agent called me and asked me if he could question my clients about something. When he left a voice message, which I promptly returned, he almost seemed happy and left me three numbers including his cell phone to return his call; this never happens. When I called him back that early evening, the INS investigative officer told me they reviewed one of the twins’ hard drives that they confiscated from their dorm rooms (the twins resided separately in different dorm rooms) at the university after their arrest. They stated the university had given them permission to

who confiscated and searched a computer from a college dorm room might find pornography. It was not known whether it was from my client, or his U.S. citizen, non-Arab, non-Muslim roommate. I also wondered if the INS or FBI went through every single person's computer, what all they might find. It reminded me of "driving while black," which describes law enforcement's ability to racially profile and then find a minor violation or "crime" to charge an individual.

After threatening the university with discrimination charges, the university, after checking again with its counsel and the FBI that the twins were not "threats," agreed to reenroll them like nothing happened. The INS District Counsel stated that he would not file the Notice to Appear in immigration court because they would not have any basis to charge the twins.²⁵⁰ The president of the university also personally met with them, and we learned that he also took flight lessons from the same school as the twins. The twins have since been enrolled, had their passports returned, and finally their \$20,000 bond returned, although it took them almost nine months before the INS would return the money.

C. FBI Interviews: "Voluntary" Questioning as Means to Deport Arabs and Muslims Rather than a Valid Law Enforcement Purpose

In August 2004 in Lawrence, Kansas, an attorney for a major university in that town contacted me. She said one of the students needed the immediate assistance of an attorney. As I learned from her and the student, who I will call Nazar, he was leaving his classroom when he was stopped by an FBI and ICE agent right outside the door as all the students were leaving. They showed him their identification and asked to see his

review their hard drives because they owned the computers.

When I was being told this, I wondered what could be on the hard drives, and I admit part of me actually hoped that there might be some secret terrorist plans or something to help me make sense out of all of this or justify what they were doing. However, my heart sank; INS stated that the twins' computer hard drives contained pornography, including one item of child pornography. They wanted to now question Ali and Mohammed about possible violations of federal law.

I asked what federal law they had violated. The officer said he did not know for sure, but probably under "something" with the "child pornography statute," although he could not state which exact federal law was violated, only that it was the "federal child pornography law." I of course told the agent "no" that he could not "go ahead" and question my clients on this matter. When I mentioned this to my clients, they hardly reacted, as if it was nothing, and they did not seem to know what the agents might find. They said their roommates also used those computers. They did say they may have visited pornographic sites before but had never purchased any pictures on-line; however their non-Arab/non-Muslim roommate did buy pictures, they believe, but on a different computer.

250. After consulting with the Missouri Commission on Human Rights regarding all of these issues, their investigator believed, as I did after discussing with him all the details, that there appeared to be discrimination and that INS and the university were looking for some way to deport them.

passport. He showed them only his driver's license and his I-94 card. He carried these two items because the university attorneys instructed the foreign students to carry those at the minimum. These documents were advised to the students by their school's attorneys to be sufficient without their passport if they at least carried their I-94 card and other identification such as their driver's license. When he showed the agents these two documents, the agents said that he should have his passport, and that he could be deported for not carrying it with him. This was the first statement said to him by the agents and it was a threat. Then they said they wanted him to step aside with them and answer some questions. Nazar asked them what the questions were about, and they would not tell him. He told the agents he wanted to talk to his embassy. Nazar was Saudi Arabian. They replied they just wanted to ask him some questions. He then said he also wanted to talk to a lawyer first. They replied, "Why do you want to talk to a lawyer? Do you have something to hide?" He repeated that he just wanted to talk to his embassy or a lawyer first. They told him he could be deported for not carrying his passport. Then they told Nazar that they would give him one week to contact a lawyer and if they did not hear from him by the end of the week, they would "come looking" for him. They reminded him again they could deport him for not carrying a passport. Nazar promptly contacted the school, his embassy, and me. I was prepared to work with the university attorney in this case to assist him further, and we had permission from Nazar to exchange information. We instructed Nazar to immediately consult an attorney if the FBI or INS approached him again. Fortunately, after the week deadline, the FBI did not return.

In July and August 2004, there was another round of FBI questioning of Arabs and Muslims in the United States that was unannounced and unknown until there were complaints, such as this one, which I reported to some human rights organizations.²⁵¹ We were especially concerned by a case a few months earlier in Lawrence with a client that I will call Kareem.

In April 2004, Kareem contacted the Saudi Arabian embassy, who referred him to me and asked that I assist him, because the FBI was apparently harassing him. Kareem was a doctoral arts student in Lawrence,

251. See Ben Duncan, *Outreach Process or Racial Profiling?*, ALJAZEERA.NET (Aug. 27, 2004), at <http://english.aljazeera.net/NR/exeres/52D570B-5B368-4B54-9F45-499C0AD98434.htm>. "During the past seven weeks, many Arab and Muslim Americans across the country say they have felt the sting of the Bush administration's most recent homeland security crackdown. . . . [There have been] numerous complaints about 'coercive or intimidating tactics used by FBI agents.'" *Id.*; see also Press Release, American Civil Liberties Union, ACLU to Provide Legal Help to Muslims and Arabs Caught Up in New Round of FBI Questioning (Aug. 5, 2004) (announcing ACLU's offer of free legal representation to Arabs and Muslims approached by the FBI in their "dragnet" racial profiling), available at <http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=16212&c=272>.

Kansas. Over the course of a year, from 2003 to 2004, the FBI contacted him at places like Borders bookstore where he studied. He had no idea how the FBI knew he was at Borders. He told me that they must have known he was there because he would use his credit card (perhaps they got his information through Special Registration).

He would be studying at Borders, and they would suddenly show up and start asking him questions, not about him, but about other people, even in cities far away, as well as about Saudis, Americans, and others. He said he did not know most of the individuals about whom he was questioned. They would ask him questions, such as if a certain individual was emotionally stable or involved in any Islamic groups, etcetera. Most of the time, he said he did not know, but he continued answering their questions and trying to help them.

Kareem told me that he would be willing to help them; however, it was beginning to unnerve him because not only would they show up at Borders and that was embarrassing and distracting enough, but they also began showing up at his home unannounced. These impromptu, unannounced visits took place over a time period of a year. He also had his wife and children with him. I used to call his house and talk to his wife; she knew very little English, and I could hear the children crying in the background. He said it is not that he did not want to talk to them per se, but he had two papers and finals that he had to finish by a certain day that month. All the constant and unannounced visits by the FBI were unnerving him. He could not concentrate on his work. He never knew when they might show up, at home or at Borders. There were supposedly new FBI agents contacting him now from Kansas City, Missouri instead of Topeka, Kansas, who were more aggressive. He asked them the day before he resorted to contacting the embassy and an attorney if they could wait at least until a certain day that month, the due date of his paper and finals, which was only two weeks later. At first the agent said okay, but then called Kareem that day and still wanted to ask him questions, at which point Kareem finally reached his limit.

I called the agent in Kansas City, and I started out professionally and politely by introducing myself. I told him that Kareem did not mind answering questions; however, he was requesting that the agent wait just a couple more weeks until a certain date when his finals would be done and after all his papers were due. The agent was initially polite and professional with me. Then I asked about the nature of the questions. The agent replied to me that of course he could not tell me, and then in a sudden twist of emotion said, "Well, looks like we are going to get a deportation order for him!" As soon as he said that, I knew that it was an intimidation game

because I had already checked and verified his status with the school; there was no basis to deport him. I responded similarly that comments like that to clients and attorneys are why we so strongly warn our individuals to have attorneys present because people like him use these tactics. I said he was in valid immigration status and was not deportable. The agent replied to me, shouting at the top of his lungs, “What do you know about this? What do you know about deportation? How do you know he won’t be deported?”

At this point, I was not even angry because I thought something must be wrong with this agent. I paused for a second and replied that he was only using these threats because my client was an Arab, Muslim, and Saudi national and that I report behavior like this to the Inspector General and other organizations. He quieted down and grumbled about taking my contact information and that he would have to talk to his supervisor on how to proceed. He mumbled something to the effect that if he needed to reach Kareem, he would contact me. I then asked him for his badge number. He would not give it to me, but repeated his name and said he was at the FBI in Kansas City. I contacted the university again and explained what happened. The university said it was willing to assist in any way it could and to also provide the agent with its contact information, which I did when I followed up with the agent with a certified letter. To date, we have never heard from the agent again. These agents certainly lost the confidence of these clients, the university, and me as they have all across the nation. They have lost these sources for proper intelligence gathering to protect our nation against terrorism. Thus, FBI agents actually had someone willing to talk to them and provide information over a long period of time and they were abusive to him and his family while ruining their connection and trust with this community in yet one more case.

The use of racial, religious, or ethnic classifications in law enforcement have been studied numerous times and found not to be productive,²⁵² and I experienced this in early January or February 2002. The client was a U.S. permanent resident whom I will call Isa.²⁵³ This was my second and

252. See, e.g., Akram & Johnson, *Race, Civil Rights, and Immigration Law*, *supra* note 16, at 340–41.

[T]he dragnet might prove to be a poor law enforcement technique. Racial profiling in criminal law enforcement has been criticized for alienating minority communities and making it more difficult to secure their much-needed cooperation in law enforcement. 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.

Id. (footnotes omitted).

253. Isa called me and asked if he should worry about this voluntary interview. He said that he had nothing to hide, and I had to almost insist that he take a lawyer because there were many stories of

probably most significant and chilling encounter with the FBI and the INS.²⁵⁴ It involved “volunteer” questioning over a three-hour period at the FBI in Kansas City, Missouri.

Isa was married to a U.S. citizen and had a U.S. citizen child. Isa was either in the United States or had contacts with the United States spanning over twelve years.²⁵⁵ He was not subject to any criminal or terrorist investigation. His name had simply come up by accident to the attention of the Midwest Terrorism Taskforce, who was apparently investigating the friends and relatives of a U.S. permanent resident who, years ago, was alleged to have used a credit card that was not in his name.²⁵⁶ It was clear that Isa had no connection to any criminal issue or any terrorism during the interview or even suspicion at the onset.²⁵⁷ Yet, the INS agent lied to me about their intent and scoured his history in an attempt to deport him. The interview itself began with discriminatory or prejudiced views²⁵⁸ of both immigrants in general²⁵⁹ and Islam.²⁶⁰ The FBI and INS even refused to

the government trying to find immigration weaknesses or get them to contradict themselves in some way and to such a degree as to be considered a “lie.” The government would then charge them criminally and deport them, regardless of whether they were a criminal or suspected of terrorism. Isa finally agreed to take me to the interview, and my suspicions were confirmed. The INS and Postal Inspector did remark a couple of times that Isa was brave for his willingness to come to the interview.

254. This interview demonstrated that the U.S. government or Justice Department actually does target Muslims and Arabs, and even legal residents. They will search their immigration history and look for a weakness to either deport the individual from the United States or put fear into that individual. I will call the two U.S. government interrogators Bob and Fred.

255. Isa was a Shi’a Muslim. He was not very religious. He had a weak accent and wore cowboy boots and jeans.

256. The only reason he ever came into contact with the FBI or INS was that his name came up on a dental record in another individual’s car, who was also Saudi Arabian. The individual who owned the car was part of a group of friends and a brother of a Saudi national that INS had been investigating several years earlier for credit card fraud. The best I can make out of the story was that this Saudi national was not liked by INS because of a personality conflict, and he had used his wife’s credit card or some credit card with a false identity issue. I do not think the amount was that much, and there were no charges that prevented him from becoming a U.S. permanent resident; he had U.S. citizen children and a U.S. citizen wife who supported him. This all occurred months or even years before September 11th, but apparently, these agents started looking at his case again.

257. Isa arrived and the questions proceeded. There was not much of an issue initially, starting first with the common questions about September 11th. I remember no remarkable questions or anything that was inappropriate besides the entire concept of asking an Arab about September 11th.

258. I stated that there should be no questions regarding his religion, and when it was mentioned that he was “Shi’a Muslim,” which is not as common in Saudi Arabia, Bob remarked “isn’t that what they are in Iran?”

259. I arrived at the FBI about thirty to forty minutes before Isa arrived. When I arrived, Bob and Fred took me to the questioning room. Although it was at the FBI, Bob was a U.S. Postal Inspector and Fred was an INS agent. They were all part of the Midwest Taskforce Against Terrorism, which is a conglomerate of agencies that includes the FBI, INS, and apparently the Postal Inspector.

As the three of us sat there waiting, I learned quickly that particularly Fred, the INS agent, was not too fond of immigrants. He asked me if I liked to practice immigration law, as if he disdained

tell him or me what the interview was about, although they told me that there would be “really no immigration issues” and that “you really do not have to be here.”

However, the INS agent had a series of questions set up perhaps to trap my client into contradicting himself or arguably lying to a federal agent or attempting to get him to admit he falsely claimed to be a U.S. citizen.²⁶¹ The meeting was disrupted by me twice, and it ended with me accusing the INS of looking for some reason to deport him simply because he was Arab, Muslim, or Saudi Arabian.²⁶² As I accused the INS agent, he nodded in

that someone would like practicing it, and they both began laughing about the general prospect or cases where lawyers’ clients do not tell their attorneys the truth and then the attorney finds out in an interview or hearing. Fred began asking me about various immigration laws and policies including section 245(i) (a provision which allows some aliens to get into legal status), which he stated that he did not like and was against.

260. If Islam is misunderstood and perceived to be “violent” as this officer insinuated, then certainly Shi’a Islam is misunderstood to a greater degree. The Shi’a and Muslims were generally oppressed in Iran during the early part of the twentieth century under the Pahlavi dynasty and the Shah in 1925, often with U.S. and British support. The United States and Britain often forced Iran not only into dictatorship, but also from either oppressing or promoting resurgence of Islam according to their political goals. *See, e.g., MOOJAN MOMEN, AN INTRODUCTION TO SHI’I ISLAM: THE HISTORY AND DOCTRINES OF TWELVER SHI’ISM 250–52 (1985).*

In 1928 a law was passed making the abandonment of traditional dress in favour of Western attire compulsory.

...
... in 1941 ... [e]ven the veil made a reappearance on the streets. The British, who had spearheaded the Allied occupation of Iran which forced Ridā Shāh’s abdication during the war, also encouraged this resurgence of the ulama as a bulwark against communists who had occupied parts of northern Iran.

...
... the Shāh, with strong British and American support, became increasingly dictatorial and soon all elements of democracy were gradually eradicated or negated.

Id.

261. Fred first hit a line of questioning about when Isa was a permanent resident and when he entered the United States. However, Fred asked Isa if he had ever been arrested or had a court issue. Isa indicated a long time ago, I believe more than ten or twelve years ago, he was arrested, but it was dismissed and not on his record. Fred stated he checked Isa’s history at the U.S. consulate in Saudi Arabia and that he did not indicate an arrest and thus lied to them, just as Fred had lied to me at that same moment.

262. It was at that moment that I raised my voice and interjected that simply because he was Saudi Arabian, Muslim, or Arab that they were simply looking for a way to deport him. Fred nodded his head in affirmation, as he was watching me react. The atmosphere became tense. I explained that it was often normal for people to say and think to put “no” to arrest questions if it was expunged or not on their record. It is not proper in immigration issues, because they usually ask for even those that may have been dismissed or expunged, if you read the language carefully; however, I have actually had a client in a different type of matter tell me “no” to a permanent residence application for a DUI arrest, when he had been arrested, based upon advice from his criminal attorney. Thus, it may not be correct, in my opinion, but an individual may have an argument as to why he said “no” to that question, and lawyers have recommended to my clients that they can mark “no” on these types of questions.

acknowledgement before I saw the Postal Inspector knock his leg under the table to stop.²⁶³ If I had not been there, they could have used his responses as a “legal” means to deport him. They have left him alone since. Individuals without attorneys may not have been as fortunate as the above cases.

One factor that convolutes the perception by some groups in the analysis of Muslims and Arabs being targeted was the prelude to the U.S. invasion of Iraq. FBI and INS also began targeting Iraqis in particular.²⁶⁴ They began systematically questioning Iraqis.²⁶⁵ They also began detaining Iraqis perhaps for weeks or months, such as Iraqi asylum seekers, which was greatly criticized by the United Nations High Commission for Refugees (UNHCR).²⁶⁶

Fred continued his questioning and backed off that point, but then got to something else, which is another typical tactic: asking someone if they ever claimed to be a U.S. citizen. If one ever claims to be a U.S. citizen, even if they do not understand the question, which most do not initially despite being apparently benign in comparison to other crimes, an affirmative answer is perhaps one of the most serious actions that can ever be of consequence—a non-U.S. citizen immigrant can be forever barred from entering the United States. And often, especially if there are English difficulties or if the immigrant has been in the United States for an extended period of time, has children, or has lived and worked for years, he or she may answer affirmatively without understanding the question or what is being asked or what he or she is answering. Fred asked Isa this question, and I immediately stopped the interview and again raved about what he was doing because Isa appeared to begin answering affirmatively. Thus, this was another “immigration” question or typical trap that Fred used, although he told me earlier that there were no immigration issues and that I did not have to be there. If it is not to deport the individual, they use these tactics to put the individual in fear so that they feel that the FBI has something over them.

263. This interview was really a clumsy approach, and this conclusion was solidified after they did not bother this individual one more time after I accused them. *See generally* Marie A. Taylor, *Immigration Enforcement Post-September 11: Safeguarding the Civil Rights of Middle Eastern-American and Immigrant Communities*, 17 *GEO. IMMIGR. L.J.* 63, 112 (2002).

In the months following the attacks, many advocates and some public officials questioned the efficacy of conducting a “clumsy, dragnet approach” in Justice Department investigations, when it became evident that such efforts appeared to be both overbroad and potentially counter-productive. As Senator Russ Feingold has aptly noted, “[i]n a rush to find terrorists, the Department appears to have disrupted the lives of hundreds of people, most of whom will prove to be wholly innocent of any connection to terrorism.”

Id. (alteration in original) (footnotes omitted).

264. *See* Am. Immigration Lawyers Ass’n, *BICE Begins Seeking Out, Apprehending Certain Iraqi Nationals in the U.S.* (Mar. 20, 2003) (discussing how BICE and FBI agents unlawfully sought out specific Iraqi nationals and apprehended them) (posted on AILA InfoNet at Doc. No. 03032032), available at <http://www.aila.org>.

265. *See* Dan Eggen, *FBI Has War Plans to Mobilize Agents Against Terrorists*, *WASH. POST*, Mar. 17, 2003, at A1 (according to FBI officials, “if U.S. forces invade Iraq, the FBI has plans to . . . interview thousands of Iraqis in the United States”).

266. *See* Press Release, United Nations High Commission for Refugees, *UNHCR Appeals for Protection of Asylum Seekers in the United States* (Mar. 21, 2003) [hereinafter *UNHCR Press Release*], available at <http://www.unhcr.ch/cgi-bin/texis/vtx/print?tbl=NEWS&id=3e7b27384>.

UNHCR is concerned by the new US Government policy to mandatorily detain

The FBI questioned my first immigration client, an Iraqi refugee from the first Gulf War who at the time was waiting for his U.S. citizenship to be approved any day. He only informed me of what happened after the FBI and INS visited him. He said the FBI and the INS came to his house unannounced and questioned him and his friends. He was actually pretty confident with them and told me that he said to them: “You talk to me because my name is Mohammed,” which his name is not, but he made a point. He stated they started questioning him about his I-94 document. The agents told him that his I-94 did not appear valid or was suspicious. This is not the case; I know for a fact that he entered the United States at the behest of UNHCR and with the agreement of the United States. He had an I-94 document because INS made a mistake and lost or failed to make his permanent resident card; he was not yet a U.S. citizen when he was asked questions and for some reason, his citizenship was processed much more slowly because of “security checks.” This is also a typical example of how “voluntary” interviews or “informational” interviews are very intimidating and dangerous; one is in the spotlight and has his or her most personal effects examined by those looking for some weakness. It can make a person feel nervous or guilty, although he or she may have no reason to fear any legal issue. He was accused that his I-94 was not valid, when I myself knew and witnessed him obtaining the I-94 from INS and knew his immigrant status and that it was UNHCR that provided for him entering the United States as a refugee. His voluntary questioning finally ended without incident. His citizenship finally was approved.

asylum seekers based on nationality.

Operation Liberty Shield calls for the automatic and continued detention of arriving asylum seekers from over 30 classified countries and territories throughout immigration proceedings. In a letter to the US Government, the High Commissioner for Refugees Ruud Lubbers noted: “Detention of asylum seekers should be the exception, not the rule and should be based on an individualized assessment of the security risk the person poses.” Blanket mandatory detention based on nationality varies from accepted international human rights norms and standards.

....

The tendency to link asylum seekers and refugees to terrorism is a dangerous and erroneous one. Asylum seekers who reach the United States have themselves escaped acts of persecution and violence, including terrorism, and have proven time and again that they are the victims and not the perpetrators of these attacks. They have often been stripped of their dignity, homes and livelihoods and have lost loved ones. The United States has always been a generous and safe harbor for those victims of war, persecution and human suffering. UNHCR hopes these people in need will continue to find safety and dignity on US shores.

Id.

This treatment is not always related purely to Muslims or Arabs. First, most Arabs in the United States are Christian. There was also similar treatment of East and South Asians. Another attorney in the Kansas City area represented a Christian Malaysian, where the FBI and INS questioned him at his place of work in early 2002. He was an engineer with the city, with no record of any criminal wrongdoing, and it was never made clear to him or anyone why he was being questioned. His attorney suspected that a competing sub-contractor was sore about this organization getting a contract from them. Often, aliens have disgruntled or jealous people call INS and claim they are working without authorization or that a marriage is a fraud, etcetera. The FBI and INS provided no evidence of any wrongdoing and were very belligerent at his place of work. Even before the interview started, they said things like “what is [name of the organization] doing paying for immigrants” or “nice to know where our tax dollars go for immigrants.” The interview only lasted twenty minutes.

At his FBI interview, there was some mysterious document in his file or something the agent would say that contradicted what he said. This was probably just to keep aliens in fear because the agents also accused my client of the same, as in my case above, when in fact I attested that no contradictory statements were made. This attorney also noted that no contradictory statements were made. Neither the INS nor FBI ever charged him with any crime or accused him of any wrongdoing, and it was not clear from the interview on what the questions or subject matter was about. It was such a humiliating and painful experience for this particularly sensitive client. He was worrying about what it could be about, what was happening to other immigrants, and whether the INS or FBI would approach him again. He finally decided in the following weeks to quit his job and leave the United States.

D. Abuse of Arab and Muslim Detainees

One detainee case I had appeared to be the same type that Human Rights Watch (HRW) documented as an abuse of detainees, which has been widespread.²⁶⁷ I will call him Mustafa. He was thirty-nine years old and

267. See, e.g., Saito, *supra* note 55, at 8, 19.

The case of Rabih Haddad, a detained Muslim community leader from Detroit, is illustrative. . . . Haddad was held in solitary confinement, under constant surveillance, allowed outside of his cell for only one hour a day, during which time he was taken, shackled, down the hall to a cage with a non-functioning exercise bicycle. He was allowed no contact with other inmates and only allowed one 15-minute phone call to his family every 30 days. He was not told why he was being detained.

. . . .

had been living in the United States for almost twenty-one years. Mustafa was convicted years ago for serious fraud issues that landed him in federal prison.²⁶⁸ As soon as he was released, the INS attempted to deport him because of the nature of his crime. Mustafa was Palestinian. He was born in a refugee camp in Gaza. His family had fled to Kuwait but was expelled along with tens of thousands of other Palestinians during the first Gulf War. His family fled from Kuwait to Africa. Mustafa had come to the United States to study while his parents were still in Kuwait. At that time, the Palestinian New Intifada was at its height; he was fearful of returning to his refugee camp in Gaza. The immigration judge denied his asylum case a couple of years earlier. However, the INS never came to arrest and deport him.

Mustafa had been living in the Kansas City area for years, as he always had since he first arrived in the United States when he was a teenager. He had a common-law wife, who he had been living with for several years. He had been earning the respect of her family and his community. He had his own business and was earning a living supporting himself and his wife.²⁶⁹ However, as Arabs and Muslims were targeted,²⁷⁰ he was arrested. Because he was Palestinian, they would not be able to deport him; he has no country that will accept him. In some cases such as these, they might post a bond, so he can live and work until they secure a visa to another country, perhaps Gaza or a surrounding Arab country, which is very unlikely.

. . . The conditions of detention described by Rabih Haddad appear to be the norm for the post-September 11 detainees, and there have been numerous reports of even harsher treatment.

Id. (footnotes omitted).

268. In the 1990s, Mustafa got involved in check fraud. An immigration judge determined that the applicant was deportable because he was convicted of two crimes involving moral turpitude. Mustafa was sentenced to time in federal prison and served his entire sentence. After he was released, he faced being deported. He applied for asylum, and the judge accepted his application and did not find that his crimes were serious enough to prevent his asylum application. However, the judge denied Mustafa's asylum application, and he appealed. The Board of Immigration Appeals (BIA) finally denied his asylum appeal, and his order of removal was reinstated.

269. For the five years prior to August 2002, Mustafa continued living in the Kansas City area with his common-law wife. He has lived a peaceful life with her and started his own neighborhood business. He developed a loving and close relationship with his wife and a good rapport with his clients. He had a loving, stable, and supportive wife. She has been working as a secretary for one of the court systems in Kansas City. His wife, her family, and many community members who knew him for years, even children of friends and family, wrote detailed and convincing letters on how they have known and interacted with him and that he was not a threat and had nothing but positive things to say about him. The children even spoke of how he helped them study. Other community members, who knew him and about his time in jail, spoke of his regret for his mistakes and efforts to regain a decent life for his family.

270. *See, e.g., supra* note 89 and accompanying text.

However, the FBI and INS refused to set any bond. Moreover, they attempted to coerce and question him about other individuals that he claimed he knew nothing about. They impeded his access to counsel in the first place, and then once I represented him, they impeded my ability to represent him at a crucial time during his custody review.²⁷¹ They threatened that if he told anyone else that he was in custody, they would make things “difficult” for him, and when upon my advice he said he wanted a lawyer to be present when they talked to him, they isolated and separated him from the rest of the population. They also investigated and threatened to detain his U.S.-citizen wife for up to five hours for an alleged parking ticket that she never remembered receiving, and she did not

271. I returned to Kansas City, and my law clerk then immediately called INS to make sure they received my entry of appearance and to ask of any plans to move Musatafa to another facility. INS will often move aliens from one facility to another, even different states, without notice to the attorney or family. No one knows they have been moved until the detainee tries to call them (which often is difficult, if they are allowed to call; the system of collect calls often does not work or requires them to make several attempts before reaching anyone). Our office, for example, often mysteriously has difficulties in receiving these calls, and when we call the phone company or the jail, we are given different explanations. I also wanted to discuss with INS why they or the FBI separated him from the rest of the prison population and to request that they not question him unless I was present. Moreover, for the custody review that I was hired to assist him with, the documentation was due to be submitted in only a matter of a few days. This was a critical time for me to visit and have access to Mustafa.

The day of, or after I submitted my G-28, my law clerk tried to reach INS several times and left several messages. After my office did manage to talk to an INS officer, and, *inter alia*, when Mustafa’s deportation officer was asked if Mustafa was going to be moved soon, the deportation officer had no knowledge of the move. I learned the very next day that the day after I visited with Mustafa and the day that I entered my appearance in the case, the INS officer told my law clerk that he had no knowledge of Mustafa being moved to another jail. We learned that during the time of the conversation that the INS in fact was moving Mustafa to a facility almost an hour away from the Kansas City area. They did not inform his wife or me.

Not only did this infuriate me, because I felt I was lied to about him being moved and that the FBI was threatening him if he obtained legal assistance, but also it was exactly in line with the HRW report—about the threats and isolation of detainees and the either intentional or bureaucratic actions that moved detainees and prevented effective assistance of counsel. It was Mustafa’s wife who called me after Mustafa called her and told her that he was transferred.

I accused INS, via a letter, that it was impeding and interfering with my representation of Mustafa and demanded an explanation of why he was moved and why he was moved at the time after which I had entered my appearance, as well as the fact that it was a critical time in my representation, only days before his custody review. I got into perhaps my first very large verbal altercation with the INS officer who called me and virtually threatened me by stating, “why don’t you come on down to our office” After a perhaps nonpeaceful ending of our conversation, his supervisor called me to apologize about what happened, but that his transfer was not related to me entering an appearance and that they did not have my G-28 in their file yet. He said that this officer actually did not have knowledge of his transfer. I accepted the explanation that he personally did not know about Mustafa being transferred and realized that I could assist him with his custody review with help from his wife and their friends or family who were writing letters on his behalf, and that if I did have to meet him, I could drive an hour. I also noted that HRW stated that sometimes these moves and actions were intentional, but also at times, they were due to the bureaucracy of the INS and the state or local prison systems they were leasing.

understand that it could be outstanding.²⁷² They tried to coerce him into giving information or assisting them with tracking another individual. The FBI also called me at my home residence to ask a basic question when they had my work contact information, and I have never provided my home number or given them permission to call me at home. Fortunately, after nearly a year in confinement, a bond was set for Mustafa because there was no country with which to send him. He could not afford to pay it, so after another half-year, he was released under his own recognizance. Many individuals are never released, particularly Palestinians, and they are detained indefinitely for either lack of bond or being unable to raise it.

E. U.S. Attorney General Utilizing Criminal Prosecutorial Discrimination to Target Arabs and Muslims

I had one client in Springfield, Missouri, who I will call Kamal, who also was Saudi Arabian. He fell into the typical scenario of being caught outside the United States because of U.S. consulate delays in processing his visa. He visited his family in Saudi Arabia in December 2001 and was not able to return to resume classes until January 2002. He had difficulties in keeping up in class and could not afford to have a bad grade, so he dropped the class. He primarily earned “A’s” in his classes up until that point.

Kamal was arrested, and we went through the typical process of trying to locate where he was in custody by trying to talk to him and finding out what happened. We learned that the jail facility was not treating him properly or equally to the other inmates, and he was being served only meals that contained pork. He often was forced to sleep on the floor while he saw other inmates sleep on beds, as well as other empty cells. I have had several clients mention these same stories.

272. I did proceed with his custody review, but also learned that when Mustafa’s wife went to visit him in custody, they told her to look into outstanding parking tickets. She went back to work, and although she worked for the county court and had excellent access to her ticket records and warrants and should have been able to find any outstanding, she could not. She returned to visit her husband, and she was detained and threatened that they would detain her for up to five hours because she had two outstanding traffic violations. They would not provide any information on the tickets. She was not given a ticket number, license number, or anything. She said once they found out she worked for the courts, they released her only after an hour and a half. She thought the tickets were maybe from a car of hers that was previously stolen. She again checked the records when she returned to work. She eventually did find the tickets and violations but noted that it was during times she was at work; she checked the time sheets and verified that she was working during those days. She said she was not the type of person to have ever been arrested or in trouble for any matter or to allow a ticket to grow into a warrant. She said she was truly terrified and found it a strange “coincidence” about the tickets and how she was at work when they were supposedly committed. She did not deny them, but she did not remember dealing with them; they occurred, according to her time sheets, when she was at work, and she would not have parked illegally during those times.

Kamal was questioned about September 11th and his knowledge of terrorism. He also was in custody for being out of student status for almost two weeks. We managed to post bond, and he was released. His options were reinstatement to student status or voluntary departure. He had a job with the Saudi Arabian government who wanted him to return, and he was on scholarship. He wanted to continue school, so he could have a better position once he returned home. We predicted that it was unlikely that he could be reinstated to student status, but he insisted because it was critical for his job back in Saudi Arabia to complete his master's degree, so we proceeded with that process in the following weeks.

After he was released on immigration bond and returned to Springfield, I learned one morning that federal marshals, on what was apparently a nonimmigration federal charge, arrested him. The Saudi counsel called me and stated that there was a massive sweep of Arab and Muslim men across the United States that morning.²⁷³ We were given no information as to why they were arrested. Federal marshals were instructed not to give any information until Attorney General John Ashcroft made the announcement at a press conference that afternoon. Similar to the case of the twins, I secretly hoped that it was some sort of terrorist sting operation because it would make more sense. All morning other attorneys and I were checking the Justice Department Web site for the announcement, which we were told would be posted.

It was not a terrorist sting operation, but rather a nationwide sting operation for cheaters of the Test of English as a Foreign Language (TOEFL), an exam that English speaking countries require foreign students who do not come from an English speaking country to take before they can enter the school. These individuals were being charged in federal court.²⁷⁴ Though this is not a scientific finding, and it may not be the case, every indication to me in representing my client and discussing these issues with other attorneys was that the TOEFL test cheaters that were rounded up were either Arab or Muslim and that cheating on the TOEFL exam was nothing new, but a rather frequent occurrence. The criminal attorney for Kamal told me that there were instances where some of the attorneys did accuse the government of prosecutorial discrimination,²⁷⁵ however, such a defense was

273. Press Release, United States Department of Justice, Dozens of Foreign Students Arrested Nationwide in English Language Testing Scam (May 7, 2002), *available at* http://www.usdoj.gov/usao/nj/publicaffairs/NJ_Press/files/to0507_r.htm.

274. The federal charge came for mail fraud; engaging in this cheating or in some portion through the U.S. Postal Service makes it a felony. Attorneys on the east coast handled the criminal matter along with many others.

275. *See generally* United States v. Chafat Al Jibori, 90 F.3d 22, 25 (2d Cir. 1996) (discussing the burden-shifting rules in a case involving a claim of selective prosecution).

very difficult, and most of the cases were settled when the alien agreed to leave the United States.

The net effect for Ashcroft's massive TOEFL roundup was virtually no sentence or punishment, but charging them with federal crimes of mail fraud or conspiracy to commit mail fraud or defraud of the U.S. government. This was the first time the U.S. government has aggressively pursued students for cheating on an exam, and it only pursued the Arab and Muslim students, not the many other nationalities who also frequently cheat on the exam. The U.S. government's main goal was not incarceration or fines, but rather purging the United States of Arabs and Muslims, or agreeing to drop charges or alleviate sentencing in return for their departure from the United States.²⁷⁶

F. Discriminatory Arrest, Harassment, and Deportation

Early in 2003, I had another encounter in Springfield, Missouri with the INS/FBI and the Springfield police. We had just obtained voluntary departure for a client of mine who I will call Salim. The FBI and INS tracked Salim merely because he brought food to a disabled man who works maintaining and cleaning a mosque in Springfield.²⁷⁷ The second time Salim brought food for the man, he noticed an FBI card on the disabled man's door.²⁷⁸ Apparently, Salim had been watched or followed when he visited this man, because when he left for his friend's house immediately after, he pulled up to the house, and not only was there the Springfield police, but there was also the FBI and ICE waiting for him.

276. I state this as a goal of the U.S. government, or Attorney General Ashcroft, by the fact that from what I understand about these cases, only Arabs were pursued. I saw the list of those being charged, and they all had Arabic names. I saw no non-Arabic names, and I understood from the attorneys representing these cases that such cheating is commonplace on the TOEFL exam for other nationalities and that the defense in some of these cases was prosecutorial discrimination. However, in many cases when the student admitted to cheating, it was a very difficult defense. I also state this proposition because in virtually every single case, the attorney general or ICE seemed satisfied in resolving the disputes mostly, or in part, when the individual agreed to leave the United States.

277. For other reports on the treatment of Muslims in similar situations, see Gazala Ashraf, Symposium Testimony, 19 J.L. & RELIGION 69, 69 (2003–2004) (chronicling the personal testimony of a student at the University of Richmond School of Law and describing his experience of enduring two raids by the U.S. government because he was a “Muslim and . . . affiliated with Muslim institutions”).

278. Salim told me that he had twice gone to help a disabled man at the mosque. He said the man was mentally disabled and helped take care of the mosque, as sort of a maintenance man. He said the members of the mosque and Muslims in the area would help take care of him by taking food or ensuring that he had somewhere to live. Salim said that he brought the man a meal one evening, and then the man asked Salim to come again. He came the next evening and found an FBI business card in the door for him to call them. He told the disabled man about the FBI card and showed the man that it was in his door, and the man became very nervous and scared. Salim also told me he felt that he was being watched that evening.

They had run his license plates through and found that he had outstanding traffic tickets and had not registered his car²⁷⁹ in time after he purchased it.²⁸⁰ They arrested him and detained him for at least two weeks. He was asked questions about terrorism and 9/11; he was also asked if he knew how the Springfield mosque was being financed and about his and Saudi Arabian views on the Iraq war. Although he was here legally and registered as a full-time student²⁸¹ and married to a U.S. citizen with a pending permanent residence application that also gave Salim permission to remain in the United States,²⁸² the INS initiated deportation proceedings.

ICE claimed that although Salim was enrolled and registered full time, he was not actually going to his classes, and they compelled his wife to withdraw her petition in part because they said he was tied to terrorist activities (they soon got a divorce).²⁸³ It was initially the wife who contacted me when the INS and FBI were illegally searching her home and was assuring me that her marriage to him was bona fide.²⁸⁴ Any terrorism

279. For other cases of similar arrests of Muslims and Arabs on pretexts of minor traffic violations, see Saito, *supra* note 55, at 9–10. “[T]he INS attempted to deport Abdel-Jaber, a 30-year-old father of five and legal immigrant from the West Bank—initially stopped for driving four miles an hour over the speed limit—because he had not reported his change of address.” *Id.*

280. Salim returned immediately after that to his friend Kamal’s place, the same Kamal as described above. He said as he pulled up to Kamal’s residence, he saw the Springfield police, the FBI, and what is now ICE waiting for him outside. The only basis they had for arresting him, from what I even understand today, is that they watched him take food to this individual and ran his license plate and found a basis to arrest and to question him.

281. He was in F-1 status, but after contacting his school, they found that he was not actually attending classes. Moreover, although he was not actually attending classes, he was technically still in F-1 status; the school considered him registered as a full-time student and did not have a policy of dropping students for not attending finals. The university had now taken a more kind and understanding approach to its foreign students; the university was very helpful and had only good things to say about Salim. They said he was even a model student but ran into financial difficulties and could not afford his tuition. The university said it tried to convince him to pay what he could and to continue his classes, but as the school explained to me, it was an honor issue for him not to attend unless he was paying.

282. Salim’s pending application for permanent residence based on a marriage to a U.S. citizen, regardless of being in or out of F-1 status, entitled him to remain in the United States during the adjudication of his application.

283. The same day or the next day, when I was trying to see if the Saudi embassy was interested in retaining counsel for him and what the situation was for Salim, I learned from the counsel at Legal Aid, who speaks with most immigrant detainees in the area, that he was involved in shipping paramilitary equipment, or night-vision goggles, back to Saudi Arabia in violation of some arms or military export legislation. This came as a surprise to me and from what I understand is one of the issues the FBI and INS confronted his wife with—his possible involvement in terrorist support—and helped frighten and entice her to withdraw her petition for Salim. This was in the course of the U.S. invasion of Iraq, and there were reports about countries, such as Syria, being accused of shipping night-vision goggles into Iraq. This was the first I heard of it, a week after the confrontation, and I knew of no federal charges of this sort against him.

284. It was actually Salim’s wife who initially attempted to retain me. She and his friend called me as the INS, FBI, and Springfield police were searching their house. She said they did not have a

or related criminal charges were unfounded and any reference was obscuring the facts and used to intimidate his wife.²⁸⁵ Moreover, in an act of the Bureau of Citizenship and Immigration Services (U.S. CIS), which I think is the fastest I have ever seen ICE or CIS respond, they denied Salim's application for permanent residence only days after they arrested him. The FBI also continued to follow and question Salim, and another of Kamal's criminal (TOEFL) attorneys warned the FBI and this particular agent repeatedly not to question Kamal without permission or presence. However, often the clients get nervous or intimidated, feeling they have nothing to hide. These two simply wanted to leave the United States at this point, so they wanted to talk to the agents, against our advice, in hopes of the FBI assisting them to leave. We had to threaten the FBI with an injunction from federal court.²⁸⁶ Salim stated that the FBI continued to follow him, even a few days before he was scheduled to leave. He also stated that the FBI and ICE track or follow and harass other Muslim and Arab persons in Springfield. In most of these cases, the U.S. government was successful in getting other Muslim Arabs out of the United States.

warrant, and she did not want them to search their house. I told them to try to get the agents' names and not to consent to the search. The agents were apparently standing and watching. They were going up to all the rooms in their residence and through the documents. Almost comically, I heard one of the agents state that he thought something was burning in the kitchen, and therefore had to go there and check it out to make sure nothing was burning or starting a fire. All of the agents, but one, gave their name. They would not talk to me of course, because as I heard them say, "We do not have any G-28 on file, so we cannot talk to him."

285. Salim said he never purchased or intended to purchase quantities of night-vision goggles to send to Saudi Arabia. He said he did have a friend in Saudi Arabia who liked to hunt and had a pair. His friend asked him to check into buying a pair in the United States because the friend said he heard they were less expensive and better quality. Salim said he and his friend went to a major sporting goods store in a city in Missouri to inquire about them. The Bass Pro clerk said they did not have them, but wrote down on a piece of paper the names of some other stores and Web sites that might carry what they were looking for. Then when Salim was arrested, the FBI or INS searched his car and found this slip of paper from Bass Pro, and this is where the story originated.

When Salim was arrested, he was later asked about this paper, but he was mainly asked if he knew how the Springfield mosque got its funding. I understand the FBI asked him this question. He was also asked by the INS or ICE official, after he had been in custody for at least a couple of days, how he and Saudi Arabians felt about the Iraq War. The ICE agent said he was just asking out of curiosity, and Salim responded he did not feel comfortable answering it, especially since he was in custody and since he was in the presence of the guard. The ICE agent did not seem to accept his answer and asked again. After Salim was released, we never saw any accusation again of the night-vision goggle issue.

286. The FBI continued to try to speak to Salim, however, without informing or asking me. They also attempted to question Kamal.

G. U.S. Citizens with Muslim or Arab Spouses Falsely Accused of Fraudulent Marriages or Forced to Withdraw Immigrant Petitions

In June 2004, I was contacted by a couple in Waterloo, Iowa. The wife, who I will refer to as Sara, was married to a Pakistani Muslim man who I will refer to as Zubeir. Zubeir and Sara have been married and living together for almost four years. Sara filed an immigrant petition for Zubeir very soon after they were married. U.S. CIS in Des Moines, Iowa (Omaha District Office) has refused to adjudicate Sara's I-130 immigrant petition, which she filed in August 2001, now for three and a half years. They put him into removal proceedings on charges based on false information by an unreliable witness that his wife was mentally challenged and their marriage was a fraud. The judge closed his case and they attempted to file for permanent residence. They were interviewed and not asked anything about their marriage or about any fraud. However, Zubeir's permanent residence application was denied because of "fraud" in what he told Embassy officials in Pakistan he was going to do in the U.S. when he was going to visit, yet he was never asked any questions about this subject, and he had rational explanations for their accusations.

Their attorney filed a motion to reconsider, which was lost, and then they were told it was not timely received, which was false. No decision was ever made on Sara's I-130. The U.S. CIS in Iowa also mishandled Zubeir's work authorization application and gave him wrong advice, which prematurely ended his work authorization before his I-485 was denied.

The couple did have an attorney, but they ran out of money and could no longer afford him after they paid legal fees for almost three years. Zubeir has been unable to obtain work authorization since his I-485 was no longer pending. Sara has been forced to work sixty to eighty hours per week to make ends meet. Their only legal recourse may be to sue CIS in federal court on a writ of mandamus action, which forces the government to perform a required ministerial act; not to necessarily approve it, but to at least decide their petition and application. This is an action very similar to the one at issue in *Marbury v. Madison*.²⁸⁷ Such a federal action could cost several thousand dollars in legal fees, money which Sara and Zubeir do not have. However, they would be forced to pay the expensive fees for their improperly denied I-485 application and motion to reconsider. Forcing a decision on their I-130 via federal lawsuit also would not return him to legal status without a pending or approved I-485.

287. See generally *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 148 (1803) (detailing the nature and use of writs of mandamus).

Their lawyer, in November 2003, wrote to the Omaha District Director officially complaining and alleging discrimination. The District Director replied in writing and promised to respond to the complaint in thirty days. He never responded. Their attorney followed up again. The couple then ran out of money and tried to seek the assistance of local low cost or free legal services, which were either nonexistent or overextended with other cases. They finally contacted the American-Arab Anti-Discrimination Committee who referred them to me. We wrote to the District Director again and received no response to our third complaint in August 2004.

We then ran into representation issues on non-immigration-related matters because Zubeir was constantly being questioned or contacted by the FBI and other government agencies, including the Internal Revenue Service in connection with another case—another Pakistani that he had information on. Apparently, his information was invaluable because they offered him money for his testimony. We were worried about his constant interaction with U.S. government officials when we was not in legal status; he could be removed at any time. We tried to obtain legal counsel for him, and, finally, the couple saved money and consulted an attorney specialized in this area and the IRS and FBI stopped pursuing him for the other case. Zubeir, while he could not work, volunteered at the Red Cross and other humanitarian agencies. He also traveled to Florida for several weeks with the Red Cross to assist with the hurricane disaster in August 2004. They saved money for a permanent residence application. Finally, in February 2005, we were able to file another permanent residence case for him and obtain work authorization. They were interviewed in March 2005 and not arrested. Hopefully, his case will be adjudicated soon and his case finally approved. Even at this point, they still want to immediately move out of Waterloo, Iowa because they do not feel welcome and because of the issues they went through.

I worked with an individual whose case was related to Salim's situation above²⁸⁸ in that the U.S. citizen was clearly persuaded to withdraw her petition for her spouse.²⁸⁹ She was mentally disabled, and her husband was

288. *See supra* notes 277–86 and accompanying text.

289. The ADC Report (the ADC referred this case to me) described the situation as follows:

An American married to a Jordanian national was interviewed by agents from the INS and the FBI regarding her husband, for whom she had filed a I-130 petition requesting his permanent resident status. She was persuaded by the agents to revoke her application. The INS agent also questioned the nature of the marriage and warned her of the consequences of having a marriage of convenience for the purpose of gaining permanent resident status for her husband. They also told her she did not need a lawyer present during their visit. The woman is on disability and her husband can no longer work since the petition was revoked. Her husband was detained by INS, released on \$5,000 bond and afterwards faced deportation

arrested immediately after September 11th. The INS and FBI told her that her husband may be connected to terrorism and threatened her regarding the serious consequences of the immigration fraud and persuaded her to withdraw her petition for her husband, which nullified his application for permanent residence. She called me after he was arrested and put into deportation proceedings. He was cleared and never charged with any terrorist or criminally related issue. His only violation was being present in the United States illegally, which only occurred after the wife was persuaded to withdraw her petition for him.

H. Discriminating Against Arabs and Muslims at Local CIS Information Window

In years of practice, I have known all types of individuals who go to INS or U.S. CIS and ask questions, such as how to change their immigrant status, extend their stay, or other questions on an entire host of issues, without any problem. Sometimes INS or U.S. CIS may be rude or not properly answer the question, but the majority of time, they are professional. Moreover, in some cases, even if it appeared that an individual was out of status and was someone that could be arrested by ICE, if they came in to ask a question, INS or U.S. CIS would warn them that they should do something or they could be arrested, but they would not arrest them. However, I had a Palestinian client, who just entered the United States from Gaza last summer. He came in a visitor exchange program and was still in valid immigrant status for another month when he went to the Kansas City U.S. CIS office. He wanted to ask them how he could continue his stay or enroll in school.

He stated that his college told him how to change his status to a student and recommended that he go ask U.S. CIS about it in person. He went to U.S. CIS and asked them at the window. The person at the window listened to his question and then looked at his documents and told him “just a minute” and asked him to take a seat. The ICE agents then came out and called him and his friend back to the investigations and deportation department. My client and his friend told me they had them sit down at an agent’s desk. He stated that the officer had a gun out on the desk and that it was actually pointed towards them. The officer told my client that he had thirty more days to remain in the United States, and that he better leave

hearings although he was cleared of any involvement with the events of September 11.
ADC DISCRIMINATION REPORT, *supra* note 9, at 34.

because on the thirty-first day, he would be at his address to arrest and deport him back to Gaza.

I. Discriminating and Investigating Arabs and Muslims Applying for Permanent Residence

I had one family-based immigration case, a case our firm represented for almost a year, in which ICE agents went at 7 a.m. and intruded on our client's home to question them without our permission and without any search warrant. There was never any search warrant and evidence was never found to make it an issue to litigate; it became simply an intrusion on privacy. Now, I have to warn all my clients, particularly the Arab and Muslim ones, that this is a possibility.

In this case, the Saudi national had a permanent residence application pending based on a petition filed by his U.S. citizen wife. We had their interview, and the case was approvable. The U.S.-citizen spouse was in the last stages of pregnancy with their child. However, only a few days after our interview with U.S. CIS, the U.S.-citizen wife, who I will call Kelly, contacted me and said early in the morning, around 7 a.m., ICE and FBI agents came into their house to question them. As I stated, Kelly was very pregnant and woke up that morning to find the FBI and INS standing there in her house, nearly in her room, before she could even get out of bed. They came without a warrant, let in by her husband, who I will call Munir. Munir was frightened when they knocked on the door that morning and just let them in; he did not know what to do. Kelly was telling me they were asking them all sorts of things like whether they were Christian or Muslim. She said she asked the agents how their religion was relevant to anything. It did sound to me, after talking to Kelly, that they did not have any useful information for the INS or FBI, and the agents left.

After I learned about this incident, at our monthly AILA/INS liaison meeting, I asked the now-retired District Director Michael Heston about this matter. I asked him why the INS would come to visit my client without informing me or warning them in advance when we had a G-28 filed for almost a year, and we just had the adjustment interview a few days earlier. He would not comment and said it was an investigative issue and that it could happen again. It was really difficult, frustrating, and sad for me to again have to warn my client of my government's behaviors because they were Arab, Muslim, or came from a certain country. Most cases of this type are adjudicated well within one year. This couple now has a child, and Munir's case has been pending for over two years for "security checks."

J. General Climate of Discrimination

As the tales and documentation above demonstrate, there is a general climate of discrimination against Arabs and Muslims in the United States.²⁹⁰ For example, once I was told by District Counsel in discussing a particular Saudi client, that “you know, I don’t have to tell you, because of where he is from, we are going to be looking at him very closely.” He then told me that just that day, when the Saudi prince was personally visiting with President George W. Bush at his ranch in Texas, there were a number of Saudis on the plane with the prince that INS did not allow to get off the plane onto U.S. soil.

Another client’s wife told me that all Arabs were being investigated at a local pancake chain where her husband was working. I asked if INS was investigating all employees there, and she told me that the owner asked the agents if they were interested in all the employees at the pancake house, and they replied that they were only interested in the ones with “Arabic names.”²⁹¹

Just in August 2003, I had at least three cases of Saudi nationals, which were non-criminal cases and basically non-issue cases of visa overstay. There were absolutely no security issues. Except for the TOEFL case, I am not aware that any other cases of mine, in which the FBI has been interested, were due to national security concerns or other non-immigration issues. There have been no criminal violations, other than a bounced check for fifteen dollars at a gas station that later kept the TOEFL case in custody for two months and forced that person to have voluntary departure with safeguards. In these three cases, however, in which the national went back to Saudi Arabia pursuant to a voluntary departure order, I received a letter from the Department of Homeland Security asking if I was still interested in this “Attack on America Request” and that I had only thirty days to respond. When I called and asked what an “Attack on America Request” was, I was told it was regarding my Freedom of Information Act (FOIA)

290. As discussed elsewhere in this article, the climate of discrimination against Arabs and Muslims existed well before 9/11. *See, e.g.*, Saito, *supra* note 55, at 38 (“Prior to September 11, the INS attempted to deport several dozen people on the basis of secret evidence, almost all of them Muslim, most of them of Arab descent.”).

291. For discussion of a similar example, see Cole, *Priority of Morality*, *supra* note 2, at 1754.

In June 2003, the Justice Department’s own Inspector General issued a sharply critical report on the preventive detention campaign, finding, among other things, that people were detained and treated as “of interest” to the September 11 investigation on such information as an anonymous tip that there were “too many” Middle Eastern men working in a convenience store.

Id.

request pertaining to individuals involved in the “Attack on America” investigation, which was specifically related to September 11th. I stated that I did not know of or did not understand how my clients were involved in such an investigation. The only correlation was that they were Saudi Arabian; they were simply kids who actually wanted to keep staying in the United States, despite all they went through, to be with their friends who were going to school.

The woman replied that it could be a mistake and that she did not know. She stated that she just received their files and that she was going through old, pending FOIA requests. She just wanted to know if I still needed the information. I would routinely do FOIA requests on all my Arab and Muslim clients, especially in many cases where they did not have documentation or had it confiscated by the INS or FBI. I simply wanted to know what was in their file. Though Attorney General Ashcroft’s new orders regarding FOIA requests, contrary to the Clinton policy, is if there is any argument why a particular document should not have to be copied for the FOIA request, he would support them. I remember the case I had for Mustafa: I performed a personal file review of his two separate large stacks of files at the INS, which were several inches thick. When I did the FOIA request to get copies, I only received thirteen sheets of paper.

This “Attack on America Request” told me that although none of my clients were accused of terrorism, that they still were still being internally regarded by the U.S. government as suspects from 9/11 because of their ethnic, national, or religious characteristics.

K. Special Registration Field Experience

Although the Special Registration interview itself took from twenty to thirty minutes, the wait for the interview, as AILF documented above, was six hours. U.S. CIS had only eight to sixteen slots open for special registrants per day. They were first come first serve. If an individual took the day off to register, he may find himself only to be turned away and have to come back the next day. The Kansas City office serves all of Kansas and Missouri, although this office has branches in St. Louis, Missouri and Wichita, Kansas. I personally waited an average of two to three hours with clients. One time I waited with a client for almost five hours.

At my first interview, the INS interviewer and exams supervisor told me that “you must not be involved in the interview. You can only be there strictly to observe. Nothing else. You are only there to observe.” He told me this sternly as soon as we came from the waiting room before we even began walking down the hall to the interview room. I have gone to many

interviews, trials, and other encounters with the former INS, and I never was treated or told anything to this degree even before the interview began, all from an individual most attorneys, including myself, highly respected. It was simply because the individual was Lebanese. What he told me regarding my role in representation also contradicted U.S. law.²⁹² I later concluded that since he had an attorney at the interview, that he must have had some status violation.

In the Wichita, Kansas office, I know of several cases of resident M.D.s, who already work an inhumane number of hours and have patients, who went to register and take a day off to only learn that they had to come back the next day. This was not only a waste of time, humiliating, and a cost to them, but also the hospitals and patients suffered.

At our AILA/INS liaison meeting, when Special Registration was being introduced to the attorneys, it was explained to us that INS also knew very little about it or how it would be implemented. INS instructed us not to have the clients come in the first day because the logistics of the program were not yet known to them. They just said to tell our clients to bring all their names, addresses, and telephone numbers of contacts in the United States and their home country, as well as documents proving that they are in legal status.

At the U.S. CIS service center level,²⁹³ which is the Nebraska Service Center, aside from all the changes in policies that have negatively hurt all law abiding migrants in the United States, special registrants are also subject to Requests for Information that request proof of registration even in cases where the individual is not required to register. I had a case with a client from Indonesia, who thought he had to register and who it appeared had to return to register after thirty days from his last entry. He went with one attorney, and the INS supervisor glanced at his passport and stated that

292. Representation and Appearances, 8 C.F.R. § 292.5(b) (2004), provides for the right of representation in this instance, which states as follows:

Whenever an examination is provided for in this chapter, the person involved shall have the right to be represented by an attorney or representative who shall be permitted to examine or cross-examine such person and witnesses, to introduce evidence, to make objections which shall be stated succinctly and entered on the record, and to submit briefs. Provided, that nothing in this paragraph shall be construed to provide any applicant for admission in either primary or secondary inspection the right to representation, unless the applicant for admission has become the focus of a criminal investigation and has been taken into custody.

Id.

293. There are four main regional service centers in the United States: California Service Center, Texas Service Center, Nebraska Service Center, and Vermont Service Center. These centers process the majority of applications, primarily business or nonfamily based applications. If an application requires an interview, it is forwarded to the local INS center.

he did not have to register. I went with him again to attempt to register and waited two hours to learn that he did not have to register due to the timing of when he last entered the United States and for some other reasons. Then, we received a Request for Evidence on his H-1B temporary worker²⁹⁴ extension request asking for proof of registration and if he had not registered to explain. We had to submit two detailed affidavits and explanations of the regulations arguing that he did not have to register.

As of the writing of this article, I had a client who planned to travel to the U.S. Virgin Islands and Puerto Rico for vacation. But when I consulted with the local CIS and found that he still had to register on his way out of the United States to these U.S. territories, I determined how it would affect his departure times if transit at the airport was long enough while he tried to register with ICE, and when I informed him that failing to register could be criminal, he opted to stay in the territorial United States for his vacation. He had enough to worry about in his career and maintaining stability; it was one thing he chose not to deal with. If he were not from Lebanon, he would not have had that issue.

Many attorneys are confused as to whether someone is required to register or not, and the regulations cannot always serve as guidance, because, for one, the government argues that anyone from any country may be required to register, and they often must rely on what they are told upon their entry into the United States. Further, we learn that regardless of what they are told, they may or may not have to register. The Bureau of Customs and Border Patrol (CBP) and ICE also have overlapping roles. In some instances, ICE is responsible for Special Registration, whereas in others cases, CIS addresses registration issues. Still in other situations, CBP appears to be in charge of Special Registration. I remember a discussion with some attorneys in different parts of the United States regarding the fact that there was confusion as to whether an application for a waiver of the Special Registration requirement was filed with CBP or ICE. Those who suffer are the Arab and Muslim clients who must face the potential of criminal sanctions and deportation for these issues.

1. Improper Registration of Arab and Muslim U.S. Citizens and Other Issues for Muslim U.S. Citizens

If there is a fear that these abusive practices would apply to a U.S. citizen,²⁹⁵ it is a well-founded fear because I did have a Special Registration

294. For the regulations pertaining to H-1B classification or admission of temporary workers, see Nonimmigrant Classes, 8 C.F.R. § 214.2(h)(1)(ii)(B) (2004).

295. Many other types of abuses have occurred to Muslim U.S. citizens. *See* Aysha Nudrat

case that did affect a U.S. citizen.²⁹⁶ I had a client call me after he apparently registered with INS in St. Louis, Missouri. He was confused and did not know if he did the right thing and whether he would have to register annually. He was a U.S. citizen and born in Missouri. However, he also had Saudi citizenship because his parents were Saudi Arabian.

He stated that he went to the INS office in St. Louis and showed them both of his passports and asked them if he was required to register. They took his address, fingerprints, and provided him a FIN, an acronym for what is termed a “fingerprint identification number.” From what he described, it appeared that they did register him.

Needless to say, he was not required to register, and INS has no legal authority to register him and should have turned him away. It is a serious violation of his civil rights, although it appears at this point, it is difficult to take legal action without some actual physical or demonstrable psychological harm. As is typical in cases where Muslim and Arab clients are arrested, there is almost always an illegal search. However, since INS rarely finds or uses something they find against the alien, it is hard to sue them for the civil liberty violation. Although if they do find, say a dental record with someone’s name on it, they can be questioned, like Isa above.²⁹⁷ Or if they find a piece of paper about night-vision goggles from Bass Pro shops, they can accuse the alien of being involved in terrorism, tell his wife, get her to withdraw her I-130 petition, and deport him, like Salim above.²⁹⁸

I have inquired via certified mail to INS and then to ICE and have had no response. I am in the process of making a complaint to the Inspector General of the Department of Homeland Security. There may be little to do other than to complain and ensure that when it is a year from now, agents do not simply see an alien’s name on a list and come track him down and attempt to arrest him because he did not show up within ten days for his annual registration. Perhaps he tries to leave the United States, and it comes up then with his FIN number, and they try to detain him. He is worried and states to me that he has other friends and neighbors who are

Unus, Symposium Testimony, 19 J.L. & RELIGION 79, 79 (2003–2004) (documenting personal testimony of a U.S. citizen Muslim who described how “federal agents broke into our home and terrorized my eighteen-year-old daughter and me”). Furthermore, the agents “humiliated us while they kept telling us that we didn’t do anything wrong and they were handcuffing us for their own safety. They treated us as criminals although there was nothing charged against us[.]” and the federal agents said to them “we are better than your police.” *Id.* at 79–80 (quotations omitted).

296. For discussion on the treatment of U.S. citizens accused of terrorism and issues related to their rights, see Saito, *supra* note 55, at 12–14.

297. See *supra* notes 253–63 and accompanying text.

298. See *supra* Part IV.F.

also dual citizens or U.S. citizens with Arab or Muslim nationality and that they are not only nervous, but wonder if they are required to register.

I have also had a U.S. citizen in Springfield, Missouri, a former Pakistani nationality, who not only was experiencing discrimination at his place of work, but also he was suddenly on a “no fly list” because his name was similar to another individual; he and his U.S. permanent-resident wife and U.S.-citizen son are hassled every time they travel.

2. Arabs and Muslims are Treated Differently Because of the Logistics of Special Registration

I had an Arab and Muslim client arrested at a Special Registration interview.²⁹⁹ I will call him Musa, who is Egyptian. Musa, like the Iranians in California and others with pending I-485s and Salim above, was in the United States legally pending the outcome of his permanent residence application, which can take months or more than a year. He is married to a U.S. citizen, and he was arrested for reasons that are virtually a non-issue in 99% of these types of cases.³⁰⁰ Fortunately, U.S. CIS or ICE did not attempt to scare or threaten his wife into withdrawing her petition for him like they did to Salim’s wife and the other case above from Topeka, Kansas.

299. However, when Musa was asked about his employment during Special Registration, not only was he arrested, but also we were not told what was going to happen, and the arresting agent was not even entirely aware of the situation. When it got to the point of the interview where Musa was being asked about his employment, Musa seemed to hesitate because he was nervous at that point about mentioning the employer. The woman doing the interview said little and just nervously and quickly gave him information documents about Special Registration and asked us to sit outside; she said she was waiting for the fingerprints to clear. It was a little strange, because normally the registrants are given an I-94 with their FIN on the card and a notation of when they were registered. She ushered us out of her office so quickly that I was sitting there thinking of the situation and had almost an hour to sit there with my client wondering what happened. I was thinking surely there was no reason to arrest him because he has a pending I-485, and the local office assured us they would not arrest in such cases.

300. Musa also had his work card authorization still pending. Until approximately a year ago, the local office would be able to produce a work card the day after or when an individual filed an application for permanent residence. However, because of the volume of cases, the INS now takes sixty to ninety days to process work cards, and they take up to a year to process a permanent resident application. Musa had not yet received his work card, but the Special Registration deadline was coming up. He was nervous to go in with Special Registration until he received his work card because he was presently working without authorization. He was in a situation other non-Arab or non-Muslim immigrants never have to face. If an individual is married to a U.S. citizen, and if they at least entered the United States legally, even if they overstay their status deadline by days or years, the period of working without authorization does not prevent them from obtaining permanent residence and in practice, it is a nonissue 99.9% of the time. It is rarely, if ever, asked about because it is known they worked without authorization and that the law does not penalize them for it. Although, since September 11th, some clients are asked by CIS if they have ever used fraudulent documents to obtain employment or perhaps a fraudulent social security number. If the answer is affirmative, they can obtain a waiver, which is often “little more than a slap on the wrist.”

In the process of Musa's arrest, we were not notified that he was being arrested, but we were surprised at his Special Registration interview³⁰¹ when the arresting ICE officer did not understand the logistics and legalities of his status³⁰² and when the officer impeded our ability to represent him, as well as when the officer did not explain to us or to him why they were arresting him. His other attorney states that ICE provided him with about four different explanations as to why they were arresting him. It was especially concerning to us because the Kansas City office explained that they would not arrest individuals with pending permanent resident applications in these types of situations. They explained that INS was about to end and transform into ICE and U.S. CIS in the next couple of days and that there were new policies.

At the end of the day, Musa was released without bond; however earlier in the day, they indicated that bond would not be set, and Musa would not be released. Then there was discussion of the bond being \$10,000 or \$20,000. At Musa's marriage interview, several months later, they separated him and his wife and questioned one of them without counsel and without notice to the counsel who was representing the other at the same time. Fortunately, we believe this case has been, or is about to be, approved. Yet Musa still must apply for permanent residence before an immigration judge rather than by the normal process.

It was also curious that when Alejandro Solorio, his other attorney and a colleague at my firm, was with the ICE agent trying to get the Notice to Appear, or essentially trying to find out what exactly he was being charged with (there was some debate on this matter), Alejandro asked him for this

301. There we were, both of us sitting and thinking about the situation and what was happening and that surely the fingerprint results were back; it usually only takes minutes. However, after at least forty-five minutes of waiting, the dreaded door opened—not the door right next to us leading to the examination or interview rooms, not the door in the middle of the waiting room that says “deportation hearings” that leads to the immigration judge's rooms, but the door farther down that leads to deportation and the investigation part of the building, which on this Friday was going to be where ICE resides by the following Monday. A deportation officer opened the door and called for Musa.

302. I walked down with him, and he asked for Musa to come into the hallway behind the door and looked at me wondering who I was and what I was doing there. I told him who I was; he ignored me and began speaking to Musa: “You have been working without authorization, correct?” He already had Musa's passport and stated, “Okay, you entered as a visitor on” a certain date, and then he said “you were authorized to stay until this date” and then said Musa was out of status, working without authorization, and was going to be arrested. I told the officer that Musa had a pending application for permanent residence, and it was clear the officer did not know what I was talking about; the woman apparently just handed him Musa's passport and said he was working without authorization. I stated that he has a right to remain in the United States during the pendency of his permanent residence application, and this was a waivable issue, and the office assured us immigration attorneys that this would not occur. The officer said, “Examinations will judge that application; I talked to my supervisor; this is what I am supposed to do.”

charging document, and the ICE agent replied, in a mumbling and disgusted manner, shaking his head, something to the effect that, “You lawyers, always trying to find ways to get around the law.” Contrary to his comment, we were trying to ensure that the government followed the law.³⁰³

3. Continued ICE Targeting of Arabs and Muslims After Two Special Registration Requirements are Suspended

Even after the alleged “suspension” in December 2003 of two major Special Registration requirements, our firm had a total of six cases with major registration issues. In four of these cases, the individuals were placed in removal (deportation) proceedings either shortly before or after December 2, 2003. It was only in one of the cases that the individual arguably “violated” any requirements of Special Registration. In five of the cases, the individual landed in removal proceedings either because of a failure of ICE or CBP to follow the regulations, or CIS and ICE lacked competence or guidance from CIS headquarters to deal with the matter. These cases represent the continued Special Registration issues for Arabs and Muslims and continued attempts to remove them. They also demonstrate that Special Registration either did not work, or that it did work, since “registered” Arabs and Muslims must continually inform the U.S. government of their whereabouts if there was ever a call to intern them.

In December 2003 and in May 2004, we entered an appearance in four Special Registration cases where CBP failed to warn the Arabs and Muslims that they must report to reregister with their local ICE office between thirty and forty days of their entry into the United States. In three out of four of these cases, the individuals had long histories, often years, of working or studying in valid immigration status, fully complying with the nonimmigrant requirements for F-1 or H-1B visas. There was only one case where the individual was arriving for the first time and knew nothing of “Special Registration” until he inquired at his school about it after talking to some of his friends. In none of the cases above, did ICE discover the aliens. In all of the above cases, it was the alien who took the initiative in trying to find out their requirements either directly with his or her local CIS office or with his or her school.

303. The arresting officer must issue the charging document, the NTA, within forty-eight hours. Field Officers; Powers and Duties, 8 C.F.R. § 287.3(d) (2004). An alien arrested without a warrant must also be advised of the reasons of the arrest, the right to be represented by counsel, a list of available free legal services, and that any statement from the alien may be used against them. 8 C.F.R. § 287.3(c).

The CBP officers did not inform these individuals that they were “registered,” nor did they inform them of the requirements for being registered. They did not provide them with any information packet regarding their obligations for registration, although ICE charged and issued a Notice to Appear (NTA) in all four of these cases to deport them for failing to reregister.³⁰⁴ The regulations clearly state that the admitting officer must inform registrants that they are being registered³⁰⁵ and that they must reregister within thirty to forty days, as well as register annually.³⁰⁶

The only case where the individual did actually fail to meet a requirement was a marriage case involving a Moroccan who married a U.S. citizen. He did not go to call-in registration because he did not learn about it until the deadline passed. He was just “registered” in August 2004, and CIS and ICE gave attorneys conflicting directions on how to handle registration cases.

Another case involved our application for a temporary worker H-1B extension for an engineer of a major engineering company who was born in Pakistan. At age six, he left Pakistan for the United Kingdom and became a U.K. citizen. He has only been back to Pakistan once since and was required to get a visa to visit. He was not required to be specially registered and we argued this two times in our written response to the CIS at the Nebraska Service Center; however, the CIS said they would not proceed

304. The four individuals were charged with violating Nonimmigrant Classes, 8 C.F.R. § 214.1(f) (2004), which states as follows:

[T]his chapter . . . relate[s] to the maintenance of nonimmigrant status and also on the full and truthful disclosure of all information requested by the Service. Willful failure by a nonimmigrant to register or to provide full and truthful information requested by the Service (regardless of whether or not the information requested was material) constitutes a failure to maintain nonimmigrant status under section 237(a)(1)(C)(i) of the Act (8 U.S.C. 1227 (a)(1)(C)(i)).

Id.

305. Pursuant to Registration and Fingerprinting of Aliens in the United States, 8 C.F.R. § 264.1(f)(3) (2004), the Service “shall advise the nonimmigrant alien subject to special registration that [if the alien remains in the United States for 30 days or more] [t]he nonimmigrant alien subject to special registration must appear” at a Service office in person to complete registration by providing additional documentation confirming compliance with the requirements of his or her visa.

306. The “report back” provision of 8 C.F.R. § 264.1(f)(3) specifically applies only to those who were required to register and who were registered upon entry. In the *Federal Register*, the proposed rule specifies that if a nonimmigrant alien subject to Special Registration stays in the United States for a period of thirty days or more, the alien must report to a designated office of the Service on or after the alien’s thirtieth day in the United States, but before the alien’s fortieth day in the United States to confirm the information provided in the alien’s initial registration at the port of entry. Suspending the 30-Day and Annual Interview Requirements from the Special Registration Process for Certain Nonimmigrants, 68 Fed. Reg. 67,578, 67,583 (Dec. 2, 2003) (to be codified at 8 C.F.R. pt. 264).

with the case until we actually tried to register him with ICE and forwarded his case to ICE for an appointment. ICE said that he was not required to register, they agreed, but would register him since that was what the U.S. CIS in Nebraska seemed to want and it would be easier for CIS to continue processing his H-1B extension. Thus, he was “registered” in August 2004 because of not only CIS incompetence or “lack of guidance,” but also because there was a hidden “real” requirement that it was based on birth, contrary to the U.S. reaction to the Canadian travel advisory. We spent several hours of time writing to the CIS over this matter. The client and I also spent at least two hours in person waiting and getting him registered at the local CIS/ICE office.

Two cases in removal proceedings were dismissed by ICE’s own admission of their mistakes. In one case, a Kuwaiti went to inquire about the Special Registration requirements in Wichita, Kansas, and he was asked to go back and bring his passport. When he returned, they arrested him and took his passport. In the other case, a Kuwaiti was arrested by ICE when the agent was checking into his case. District Counsel agreed to withdraw the NTA after he determined that he was not even registered, or, at least not fingerprinted and photographed.

Two of our clients remained in removal proceedings for alleged Special Registration violations until October 2004 and March 2005. The ACLU Immigrants’ Rights Project assisted in representation with these two cases; they officially joined as counsel of the brief in August 2004 because of the egregious nature of the civil rights violations. The ACLU Immigrants’ Rights Project had been assisting me in consultation during the previous year as they did with other Special Registration cases throughout the U.S., many of which still continue

The first client still in removal proceedings I will call Tarik. He arrived in the United States in late 2002 as an F-1 student. It was the first time he entered the United States. He was not told upon entry that he was “registered,” nor was he given any information packet explaining registration. He was only photographed and fingerprinted, and the admitting officer only commented on the I-20 that he needed since he had two I-20s. Through his friends, Tarik later learned about the annual registration that included Moroccans. He never worked without authorization, and only on-campus employment as allowed and approved by his school. No one wrote anything on his I-94, including a return date; it only contained the stamp of the “NSEER.” He was certainly not told that he had to return to reregister in thirty to forty days. They did quickly fingerprint and photograph him and just told him, “You are all set. Have a good trip.”

Then around November 2003, over a year later, he got nervous after hearing things from his friends about registration, and he went to his school to find out more information on what he should do. He went to the International Office on campus and requested an interview with an immigration advisor. The advisor called ICE in Wichita, Kansas, and talked to the officer. The advisor later left a message on my voice mail saying that Tarik should immediately go to the ICE officer. Later Tarik found out from the advisor that when the advisor called ICE and explained to the officer that Tarik had not reregistered and did not know about it, the ICE officer replied to the advisor, “he is blowing smoke up your dress.”

Tarik went to the ICE office and said at first they were nice, and then when he followed them inside the office, they started “scaring” him and told Tarik that he was “going to be deported in 48 hours.” They told him that he “did not deserve to be in the U.S. in the first place” and that the “U.S. is not for people like [him].” They fingerprinted him, took his picture, and threw him into a cell. They finally released him without bond. They charged him with not returning to reregister within thirty to forty days and working without authorization, although he was working with authorization. He said that the officers were arguing with each other about whether he should be charged with working without authorization.

The other case in which the individual is still in removal proceedings involves a client that I will call Nassor. Nassor had been studying in F-1 classification and working pursuant to H-1B classification for several years in the United States. He has a Ph.D. and works as a post-doctoral research fellow at a university in Manhattan, Kansas. He earned his Ph.D. in the United States. He is a Palestinian national and a Canadian landed immigrant. He is not a national of Jordan or any of the other countries required to register as part of Special Registration or NSEERS. However, in addition to his Palestinian Authority passport, he has a Jordanian travel document. Since Jordan is listed as his nationality on his I-94, U.S. visa and his other immigration documents, he mistakenly believed that he was required to register and ICE did register him.

Nassor registered during the “call-in” timeframe and registered again when he exited twice to Canada during mid-2003. He was readmitted twice into the United States with no problems. However, at neither time was he informed that he was “registered.” He was *not* informed that he had to reregister thirty to forty days later; his I-94 was not noted that he had to reregister in thirty to forty days, as it is for many individuals, and he was not provided an information packet on Special Registration.

It was not until he attempted to leave the United States again for Canada in late 2003 (when he was registering with ICE before he left) that

the CBP or ICE officials at the Canadian border told him that he should have reregistered within thirty to forty days of his last entry into the United States. The immigration officials told him that he should go back to Wichita and register, or they would not be able to allow him to reenter the United States. This came as a surprise and shock to him, and he returned and immediately contacted his university for assistance. He did not know whether he should have reregistered, but he tried to follow the instructions of the immigration officials.

Nassor contacted the International Student Center at his university, and they thought it would be no problem to contact ICE to register late if he had to because they had been reasonable in other situations (when CIS had been doing the registration months earlier). However, when the Center discussed the issue with ICE, there was worry that he might be arrested. The Center recommended that he contact a lawyer and other organizations.

He contacted attorneys and ADC and was referred to me. I referred him to an attorney in Wichita. I also collected his data, as we do on Special Registration cases, and forwarded his information to the ACLU and ADC, who collect data on these kinds of cases. Also, I was already consulting other attorneys in the United States, as well as DHS liaisons in AILA, to alert them of this practice and to seek their assistance about Nassor's specific case *before* he was arrested.

Then, in late November 2003, days before two Special Registration requirements were suspended, two agents from ICE came to the Nassor's laboratory, arrested him, handcuffed him, and took him to the county jail, where he spent the night. Nassor was released the next day, but his passport was retained. As one of his fellow professors at his university stated in a letter to the court:

I am totally surprised and shocked by these events.
[Nassor] is one of the most non-political persons I know. . . .

. . . .
. . . He was very surprised to be told, at his most recent visit to the Canadian border that he should have registered with Wichita again within 30 days and he was preparing to do just that when he was arrested. It seems to me that it would have been very easy for the U.S. Immigration authorities to tell him of this responsibility orally at the time of his entry back into the U.S. after his visit to Canada, especially since it appears that the penalty for failing to comply is so serious. *He was not told.*

I would like to close with the observation that the arrest in our laboratory of a research associate is a very unusual and disruptive event. It has caused a great deal of confusion,

uncertainty and fear for our students and postdocs, many of whom are not U.S. citizens, as well as for the faculty. It has certainly distracted our attention from our responsibilities to the university. I have not seen anything like this happen in my thirty four years at [this] University.³⁰⁷

The dean of Nassor's department concurred and related the impact on Nassor:

We further understand that any alleged failure to comply with the Special Registration requirements was due to the fact that he was not made aware he had to report to an Immigration office within 30-40 days following his entry into the U.S. after a short trip to Canada.

The . . . University community was shocked to learn that a full-time researcher who has made numerous contributions to the University was not only arrested and detained, but was also subjected to the embarrassment of being handcuffed and taken from our campus. Likewise, we are saddened by the negative impact this experience has and will continue to have on [Nassor's] personal and professional life. . . . Neither will he be able to attend any international conference in his area In a figurative sense, he continues to be hand-cuffed both personally and professionally.³⁰⁸

ICE did not alert him of new ICE practices and policies once they fully took over Special Registration from CIS in Kansas City (they stated this to our office even after annual registration and the thirty to forty day registration process was suspended). This policy was to place individuals in removal proceedings in situations where the individual was not registered by the admitting officer, if in their opinion, the local ICE thought the individual should have been registered. This included situations where the individual was mistaken, not informed, or even where the admitting officer did not in fact register the individual. Therefore, we wanted to make sure Nassor consulted a lawyer before he attempted to register because we were certain he would be arrested.

Contrary to the law, the ICE District Counsel told me that he would not agree to the NTA being dismissed. He said to me, "Whether he 'forgot' or was mistaken is of no consequence." This is contrary to the law, which

307. Letter from University Professor, to Immigration Court 1-2 (Dec. 4, 2003) (emphasis added) (on file with author).

308. Letter from Dean of Department, to Immigration Court 1 (Dec. 5, 2003) (on file with author).

provides for a violation of Special Registration requirement only if it was “willful.”³⁰⁹ Further, to back up this point, the immigration judge (one who unusually acts independently of ICE attorneys) at the master hearing stated that he only needed a statement that Nassor was not aware of the requirement.

Nassor’s and Tarik’s cases were compelling enough to human rights organizations, including Robin Goldfaden at the ACLU’s Immigrants’ Rights Project in California, that they have agreed to join as counsel of the brief in our motion and legal strategy to dismiss both of these cases and prepare for appeals. Ms. Goldfaden and the ACLU Immigrant’s Project took an interest in these two cases, as they do with other special registration cases nationwide.

After being falsely charged with violating his immigration status and not complying with the special registration requirements, Nassor considered leaving the U.S. for Canada, however, he would not leave because of the complexities of his immigration proceedings. We filed motions to dismiss on both of these cases.

Tarik had a hearing on his motion in September 2004, and after the immigration judge listened to him testify that he was not aware of the requirement, the judge was satisfied that it was not a willful violation and dismissed the case. It was interesting to note that the judge, after listening to Tarik’s testimony, looked incredulously at the government attorney and asked if they still wanted to go forward with the case. The ICE attorney responded that it was the prerogative of the court to make the determination of willfulness.

Nassor’s case was not scheduled for an initial hearing until July 2005. However, with our motion to dismiss we requested an earlier court date and the judge moved his case up to January 2005. Although this was the same immigration judge and similar charges, the ICE attorney aggressively pursued his case. After we filed our motion to terminate proceedings in November 2004, the ICE attorney responded with a proposed witness and a computer printout that purported to show that Nassor was provided an information packet on his requirements under special registration. Not only

309. See Registration of Certain Nonimmigrant Aliens from Designated Countries, 67 Fed. Reg. 67,766, 67,766 (Nov. 6, 2002) (to be codified at 8 C.F.R. pt. 264).

A willful failure to comply with the requirements of this Notice constitutes a failure to maintain nonimmigrant status under section 237(a)(1)(C)(i) of the Act . . . Pursuant to section 237(a)(3)(A) of the Act . . . an alien who fails to comply with the provisions of this Notice is deportable, unless the alien establishes to the satisfaction of the Attorney General that such failure was reasonably excusable or was not willful.

Id.

did Nassor deny that he was given instructions or provided such a packet, even if he did, it still does not show that his violation was “willful.”

The immigration judge seemed to take a more serious approach to this case, and the proceedings lasted over an hour with the judge questioning Nassor and listening to my arguments. As it turned out, the computer printout did show that he was not given a packet upon his last entry into the U.S. and did not show that he was made aware of the requirements. The immigration judge dismissed the charges against him. In his decision, the judge cited another case where the charge of a “willful” violation was not to be found even when the alien did not or should have known requirement to reregister within thirty to forty days after entry. The immigration judge also noted that this case was being heard in January 2005, after the re-registration requirements were suspended in December 2003, and the court was trying to determine what occurred at an entry into the U.S. in July 2003. Further, the judge noted that if it was DHS policy to continue pursuing such cases, it would be fraught with difficulties in the logistics of showing that an individual willfully violated the requirements, not to mention that they were even provided an information packet. He gave the example that individuals were not required to sign that they received an information packet. After this experience, Nassor still seeks to leave the U.S. for Canada after being embroiled in this ordeal for over a year. At the very least, this was also a waste of government resources.

We have seen some cases with special registrants who have the admitting officer write their FIN on their I-94 and that they must reregister within thirty to forty days, sometimes with specific dates. Other officers just write the FIN, and others write nothing. The ICE attorney told me in his refusal to withdraw the NTA on two of my cases, that he must “rely on the regularity of the Department of Homeland Security” in regards to the handling of Special Registration information packets.

In marriage cases, ICE still has a fluctuating policy on how to handle cases where the individual did not register, and it was not willful. I filed an I-130/I-140 for a Moroccan who did not register because by the time he found out about it, the deadline had passed. When I began representation of him, other attorneys and I consulted CIS on procedures in cases where an alien who was required to register at call-in registration did not do so. They informed us that cases such as these would be referred to ICE for evaluation of the registration issue. We were told by the Kansas City ICE attorney that they did not yet have guidance from their headquarters on how to handle these cases; this was still in January 2004. Then, about two weeks before his interview, we were instructed to contact the CIS supervisor in advance, so he could be registered, and he must be registered before the case

proceeded. I did contact the CIS supervisor prior to the interview, and he instructed me that the interview could take place, but we must get a registration interview scheduled, and the exams officer handling the case instructed me to do the same and to request such from ICE in writing. The CIS examiner who interviewed Nassor for the I-130 and I-485 had us sit back in the waiting room while she consulted her supervisor on how to handle the situation. Some time later, she called us back and said she did not know who to contact but to contact ICE in writing. What is ridiculous is that the ICE office is perhaps forty feet away from where we were standing, in the same building and the same office. Before DHS was created, it would only be a matter of a phone call. Now the doors are locked between the two agencies, even when working on the very same case at the same time. I was told that the local CIS office cannot even check on their computers to see if an individual is registered, although the Service Centers supposedly can.

However, the Service Centers are also without guidance on dealing with registration issues. For example, we had another case in August 2004, where an individual was “registered,” although he was not required to register. This was due to lack of guidance and bureaucratic confusion. I will call him Mazen. Mazen was born in Pakistan, but left for the United Kingdom when he was under ten, and obtained British citizenship. At that instant, he lost his Pakistani nationality because Pakistani law does not permit dual citizenship. He actually needed a visa to return to Pakistan a few years ago. He is working for a major engineering company in temporary worker (L-1) status. He did not go to call-in registration because, as we advised him, he was not a national or citizen of Pakistan. When we applied for an extension of his L-1 visa, the Nebraska Service Center (CIS) asked for either proof that he went to call-in registration or that he was not required to register. It is quite difficult to say that one is “not” a national, so we provided Pakistani law stating that there is not dual citizenship, his British passport, an affidavit from him stating he was not Pakistani, and a copy of his visa that he used to enter Pakistan.

In a rare event, the Nebraska Service Center actually called our office to state they understood our response. However, they did not have guidance on how to handle these cases from CIS headquarters, so either the case would remain pending until they received guidance or until we attempted to register him and get something from ICE that stated he was not required to register. Our experience at the time showed that ICE was placing many people into removal proceedings if they thought the alien should have registered (even if not legally, they do have authority to register any alien).

Mazen attempted to get help from the Pakistani embassy to no avail. However, in early August 2004, I managed to actually get a letter from the Pakistani embassy stating he was *not* a Pakistani national or citizen. At almost the same time, Nebraska decided to issue an intent to deny unless we tried to register him, and they set an appointment just a week away to register him. The embassy also sent an e-mail to ICE, according to the letter, asking them to respond to Nebraska directly.

After two hours of waiting at the local Kansas City office, ICE determined that to “be on the safe side” and to “make Nebraska happy,” they would go ahead and register him, despite agreeing that he was not required to register at call-in registration and that he was not a Pakistani national.³¹⁰ They had no knowledge of any e-mail from Nebraska regarding the matter and were reticent to sign and answer the questions on the form Nebraska provided. Mazen’s application is still pending to date.

As yet another example, a long-time client of mine from Bangladesh, who was here legally for years in H-1B status, married to a U.S. citizen, and had an application for permanent residence pending, wanted to make a short visit to Canada. Although the thirty day and the annual registration requirements were recently suspended, I warned him several times that he was still subject to registration and must leave only at designated ports of entry, and therefore, he must register upon exiting the United States. Unlike the thirty to forty day and annual registration requirements, which were status violations, failure to register upon exiting was an excludible failure, and he would never be able to return to the United States. He almost did not believe me and called the telephone number for CBP/ICE near the Canadian border, and they explained to him that he *did not* have to register. He asked me about this, and I warned him that they would say he did not have to, that he would have trouble finding their office, and that their office in some airports was only open during certain hours, but he in fact had to register. He did, and he thanked me later because he said several aliens did not register as they left, and they were in the same line back into the United States, and they were not allowed to return. At his marriage interview, when I explained that he did register when he left, the CIS examiner said that she did not believe that he had to register upon leaving, but only had to leave at certain ports. Thus, CIS, ICE, and CBP even today frequently fail to understand the requirements, and ICE punishes these individuals if the aliens fail to understand.

310. See *infra* pages 515–16 (describing a case I observed involving a Swiss national in nearly the identical situation who was not required to register, although he was born in Pakistan, but who was not ethnically Pakistani).

V. U.S. GOVERNMENT DEFENSE OF SPECIAL REGISTRATION

One noted defender of Special Registration is Professor Kris Kobach, who was legal counsel to Attorney General Ashcroft and the chief architect of the Special Registration program.³¹¹ He is also a professor at the University of Missouri at Kansas City. I attended a debate Professor Kobach had with Professor David Cole at the University of Missouri at Kansas City, where Kobach discussed many of these issues.³¹² At this debate, Professor Kobach essentially rearticulated some of the very same arguments made in the original press release regarding Special Registration.³¹³ The *Chicago Tribune* reported that “Kris Kobach went . . . to the inner circle of policymaking at the Justice Department, where he was a principle architect of one of the most far-reaching immigration measures since the Sept. 11 attacks” and that “[t]he registration program that Kobach helped craft mandated that men from 24 predominantly Muslim nations and North Korea report to government offices so they could be fingerprinted, photographed and questioned.”³¹⁴ The *Tribune* reported that “[t]he power exercised in the most recent domestic registration was extraordinary”³¹⁵ and rooted in measures adopted at the United States’ entrance into World War II.³¹⁶

My analysis and comments in this section regarding Attorney General Ashcroft’s position and arguments in favor of Special Registration are based on the Attorney General’s response to criticisms of Special Registration,³¹⁷ the press release posted at the Department of Justice (DOJ)

311. See Cam Simpson, *The Registration’s Architect: Aspiring Politician at Center of Policy*, CHI. TRIB., Nov. 16, 2003, at 1 [hereinafter Simpson, *Registration’s Architect*] (noting that Kobach “helped craft” the Special Registration program), available at 2003 WL 68333194; Simpson et al., *Immigration Crackdown*, *supra* note 137, at 1.

312. Debate between Georgetown Professor of Law, David Cole, and University of Missouri Kansas City Professor of Law and Counsel to the U.S. Attorney General, Kris Kobach, *Civil Liberties in a Time of Terror*, Kansas City, Mo. (Apr. 9, 2003) [hereinafter Cole and Kobach Civil Liberties Debate].

313. Kris Kobach, Foreign Press Center Briefing on National Security Entry-Exit Registration System (NSEERS) (Jan. 17, 2003) [hereinafter Kobach Briefing], available at <http://fpc.state.gov/fpc/16739.htm>.

314. Simpson, *Registration’s Architect*, *supra* note 311, at 1.

315. *Id.*

316. See *id.* at 1–2.

Seeking authority to implement the domestic phase of the registration program, the Justice Department reached back to little-used provisions first adopted in 1940 under the Alien Registration Act, which was passed on the eve of America’s entry into World War II. More than 5 million foreign visitors to the U.S. were registered without regard for nationality.

Id. However, Kobach’s registration program registered aliens purely on the basis of nationality.

317. See *supra* note 148 and accompanying text.

Web site,³¹⁸ and Professor Kobach's comments in his debate with Professor Cole,³¹⁹ which reflect the same substance as the DOJ press release regarding the National Security Entry-Exit Registration Program (NSEERS).³²⁰ Although the Department of Homeland Security (DHS) and the Immigration and Naturalization Service (INS) became the Bureau of Customs and Border Patrol (CBP), the Bureau of Immigration and Customs Enforcement (ICE), and the Bureau of Citizenship and Immigration Services (CIS) within DHS, the DOJ still retains authority over the immigration judges and Board of Immigration Appeals (BIA) in the Executive Office for Immigration Review (EOIR), the ultimate arbitrator in Special Registration issues. Professor Kobach continues to defend the administration's immigration policies even recently when the 9/11 panel called them ineffective.³²¹ He was an attorney for FAIR, for whom he filed an anti-immigration lawsuit on behalf of their organization against the State of Kansas. In November 2004, he lost as the Republican nominee for one of the Kansas Senate seats and has since returned to being a professor at the University of Missouri-Kansas City School of Law.

A. Analysis of Attorney General Response to Comments on Special Registration in the Federal Register

Even during my days studying public administration in college and perusing the *Federal Register*, and then representing asylum clients, I never would have imagined that one day I would read the following as a defense of U.S. law:

318. See *supra* note 156 and accompanying text.

319. Cole and Kobach Civil Liberties Debate, *supra* note 312.

320. See Press Release, U.S. Department of Justice, INS Reminds Certain Non-Immigrants of 18 Countries of New Registration Requirement (Dec. 6, 2002), available at http://www.stanford.edu/dept/center/new/Call-in_PR_12-6-02.pdf.

NSEERS promotes several important national security objectives. It allows INS to run the fingerprints of aliens who may present elevated national security concerns against a database of wanted criminals and known terrorists. NSEERS also enables INS to instantly determine when such an alien has overstayed his visa. NSEERS also gives INS the ability to verify that an alien in the United States on a temporary visa is doing what he said he would be doing and living where he said he would live.

Id.; see also Press Release, U.S. Department of State, Suspected Terrorists, Convicted Criminals Identified in New U.S. Border Checks (Jan. 17, 2003) [hereinafter Press Release, U.S. Department of State] (describing Professor Kobach's statements regarding the components of NSEERS), available at <http://usinfo.state.gov/archives/display.html?p=washfileenglish&y=2003&m=January&x=200301171600eporter@pd.state.gov0.1734735&t=xarchives/xarchit.em.html>.

321. See Michael Janofsky, *9/11 Panel Calls Policies on Immigration Ineffective*, N.Y. TIMES, Apr. 17, 2004, at A8 (describing Kris Kobach's defense of immigration policies after criticism from the 9/11 panel).

Several commenters argued that the rule targets specific minority ethnic groups and members of a specific religion, i.e., Arabs and Muslims. The commenters noted that several individuals currently being detained or prosecuted would not have been covered by the specific criteria set forth in the proposed rule. One commenter in particular argued that the proposal “will further stigmatize innocent Arab and Muslim visitors . . . who have committed no crimes and pose no danger to us.”

. . . .
The Department strongly disagrees with the premise of the comments that the rule is invidiously discriminatory. Congressional enactments and regulations concerning immigration have historically drawn distinctions on the basis of nationality³²²

The apologist for NSEERS states that Special Registration does not target individuals on the basis of race or religion, although it does target visitors on the basis of nationality.³²³ It is interesting that the comments discuss the same protected grounds in the U.N. Refugee Convention, except that only “nationality” is left off: “The Department strongly disagrees with the implication that it would develop or apply such criteria in an invidious manner on the basis of race, religion, or membership in a social group.”³²⁴ The regulation admits there is discrimination based on nationality: the realities of the NSEERS program and the U.S. immigration policy in general additionally invoke discrimination based on religion and ethnicity.

Additionally, of course, the U.S. government has historically regulated on the basis of nationality; however, it did so in racist fashion,³²⁵ was unsuccessful, did not assist our national security, and the mass detentions

322. Registration and Monitoring of Certain Nonimmigrants, 67 Fed. Reg. 52,584, 52,585 (Aug. 12, 2002) (to be codified at 8 C.F.R. pts. 214, 264).

323. Kathryn Lohmeyer, Note, *The Pitfalls of Plenary Power: A Call for Meaningful Review of NSEERS “Special Registration”*, 25 WHITTIER L. REV. 139, 173 (2003).

[T]he very existence of NSEERS serves to promote fear and alienation both inside and outside of our borders and that the national security the federal political branches are charged with protecting is better served by a more even-handed administration of immigration law and policy.

Id. at 179.

324. Registration and Monitoring of Certain Nonimmigrants, 67 Fed. Reg. at 52,585.

325. See JOE R. FEAGIN, *RACIST AMERICA: ROOTS, CURRENT REALITIES, AND FUTURE REPARATIONS* 216 (2000) (“The Naturalization Act of 1790 had explicitly limited the privilege of naturalized citizenship to ‘white’ immigrants.”).

were “constitutionally suspect.”³²⁶ “From the early days of the new nation, the United States instituted far-reaching forms of exclusionary measures to keep out foreigners.”³²⁷ The U.S. government has a long history of racism and nationality discrimination, and the Attorney General chose to base his policies on these dark examples.³²⁸ The U.S. government has interned Japanese Americans, as well as Germans and Italians, and has prevented Asians and African-Americans from acquiring citizenship.³²⁹ It did not consider African-Americans U.S. citizens until the Civil War,³³⁰ and it did not consider Native Americans as citizens³³¹ despite the Fourteenth Amendment.³³² Neither did the United States consider Mexicans or the “‘non-white’ inhabitants of Western territories formerly under the control of Mexico” as citizens.³³³ The United States also precluded other nationalities from acquiring citizenship until as late as the 1950s. With the 1952 Immigration and Nationality Act,³³⁴ the United States granted citizenship,

326. Cole, *Priority of Morality*, *supra* note 2, at 1754. “Prior mass preventive detention campaigns have been similarly unsuccessful and constitutionally suspect. . . . [T]here are *no* mass preventive detention success stories in our history.” *Id.* at 1754–55.

327. Richard A. Boswell, *Racism and U.S. Immigration Law: Prospects for Reform After “9/11?”*, 7 J. GENDER RACE & JUST. 315, 317 (2003).

328. *See, e.g.*, ZINN, *supra* note 6, at 416.

The month the war ended in Asia, September 1945, an article appeared in *Harper’s Magazine* by Yale Law Professor Eugene V. Rostow, calling the Japanese evacuation “our worst wartime mistake.” Was it a “mistake”—or was it an action to be expected from a nation with a long history of racism and which was fighting a war, not to end racism, but to retain the fundamental elements of the American system?

Id.

329. *See* FEAGIN, *supra* note 325, at 216.

[B]etween 1878 and the 1920s numerous U.S. courts were forced to examine applications for naturalization from members of several Asian groups. In one important 1878 case, *In re Ah Yup*, a federal district judge decided that a Chinese American could not become a naturalized citizen because he was *not white*.

Id.

330. Boswell, *supra* note 327, at 317. “The racial climate was so strong that significant efforts were made to persuade African-Americans to leave the United States and emigrate to the newly formed Republic of Liberia and other places.” *Id.* at 323.

331. *See, e.g.*, *Johnson v. M’Intosh*, 21 U.S. (8 Wheat.) 543, 574 (1823) (establishing that Native Americans did not hold title to lands discovered subsequently by civilized nations).

332. *See* Boswell, *supra* note 327, at 318 (“[D]espite the Fourteenth Amendment, U.S. laws continued to preclude Native Americans from citizenship or its benefits until the late 1880’s.”); *see also id.* at 322 (“At the same time that U.S. leaders were preventing non-white immigration, they were also conquering and forcibly removing indigenous persons to ‘reservations’ or relegating them to positions of servitude.”).

333. *Id.* at 322.

334. Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (codified as amended in scattered sections of 8 U.S.C.); *see also* John Tehranian, Note, *Performing Whiteness: Naturalization Litigation and the Construction of Racial Identity in America*, 109 YALE L.J. 817, 841 (2000).

or prohibited certain rights, based on nationality, referring to “non-white” aliens.³³⁵ It was not until 1965 that the national origin barriers were finally removed in U.S. immigration law.³³⁶ It was partly a tactic of the “furious battle with the communist Soviet Union” to show the world that it was the United States that had the “moral high ground in the international arena.”³³⁷

There are many other monumental instances in U.S. history in which nationality, race, or ethnicity has been utilized to legally discriminate. The law once condoned slavery and prohibited integrated education between blacks and whites; however, neither should be given precedential value. Many have argued that alienage was targeted for dissenting political beliefs such as communism.³³⁸ Many argue that the United States is still racist towards black or African aliens, such as Haitians.³³⁹ “As a nation

With the McCarran-Walter (Immigration and Nationality Act) of 1952, Congress finally abandoned the race-based system of naturalization in existence since 1790. After 1952, members of any ethnicity and race could become citizens; yet the quota system based on national origins, which limited annual immigration from each nationality to two percent of the respective nationality’s share of the United States population in 1980, remained intact. It was not until 1965 that Congress finally did away with the quota system—a system that placed heavy restrictions on immigrants from anywhere in the world besides Western Europe.

. . . despite these reforms, a performative/white bias continues to exist in the immigration system.

Id. (footnotes omitted). For a discussion on cases discussing whether Arabs could be considered “white,” see *id.* at 837–39.

In 1942, the United States District Court for the Eastern District of Michigan held that an Arab male, Ahmed Hassan, did not qualify as a white person capable of citizenship through naturalization. . . . As Judge Tuttle writes, “[A]part from the dark skin of the Arabs, it is well known that they are a part of the Mohammedan world and that a wide gulf separates their culture from that of the predominantly Christian peoples of Europe.[”]

Id. at 837 (footnote omitted).

335. See Boswell, *supra* note 327, at 325 (“The clear purpose of the 1910 national origin quota was to ‘confine immigration as much as possible to western and northern European stock.’” (quoting U.S. COMM’N ON CIVIL RIGHTS, *THE TARNISHED GOLDEN DOOR: CIVIL RIGHTS ISSUES IN IMMIGRATION* 8 (1980)).

336. See *id.* at 327. “President Kennedy’s 1963 proposals were finally enacted in 1965. . . . [T]he 1965 amendments to U.S. immigration law removed the national origin barriers and were hailed as the elimination of racial barriers to U.S. immigration admission” *Id.*

337. *Id.*

338. See, e.g., Saito, *supra* note 55, at 40–41.

Despite the danger of rendering the First Amendment meaningless, the government has consistently deported noncitizens on the basis of their political beliefs and associations—from the Palmer Raids of 1919–1920 . . . to the removal of former Communists under the Alien Registration Act of 1940 . . . to its recent efforts to deport persons affiliated with the Popular Front for the Liberation of Palestine.

Id. (footnotes omitted).

339. See, e.g., Malissia Lennox, Note, *Refugees Racism, and Reparations: A Critique of the*

struggling to overcome a legacy of segregation, intolerance, and racism, we should be skeptical of any system that treats a specific group as less worthy than, or inferior to, the majority.”³⁴⁰

Generally, the response to the comments is not only nationality that is considered, but also other factors such as intelligence, which is always expounded in publicity campaigns, as will be discussed below, and that basically, the law is such that regulation based on nationality is acceptable and that “Congress regularly makes rules that would be unacceptable if applied to citizens.”³⁴¹

The final rule also addressed whether adequate notice is given, especially in light of some comments that publication in the *Federal Register* may be too obscure, particularly when aliens may have difficulties with language and culture and that the notice should be tailored to the regulated group.³⁴² Some commenters stated that due process requires individualized hearings.³⁴³ DOJ replied almost arrogantly that

the commenters appear to raise the issue of whether publication of a notice in the Federal Register, as required by § 264.1(f)(4), of the applicability of the requirements of this rule to a specific country or class, is sufficient notice of the application of the rule under the Due Process Clause.

Such notice by publication in the Federal Register unequivocally constitutes sufficient notice for due process

United States' Haitian Immigration Policy, 45 STAN. L. REV. 687, 688 (1993). “The continuing presence of racial discrimination in contemporary U.S. immigration policy provoked this note. The Bush Administration’s policy of forcibly repatriating Haitian refugees exemplifies this discrimination.” *Id.*

340. Tamra M. Boyd, Note, *Keeping the Constitution’s Promise: An Argument for Greater Judicial Scrutiny of Federal Alienage Classifications*, 54 STAN. L. REV. 319, 348 (2001). The entire passages reads as follows:

As a nation struggling to overcome a legacy of segregation, intolerance, and racism, we should be skeptical of any system that treats a specific group as less worthy than, or inferior to, the majority. American history is replete with examples of how a group’s inferior *legal* status can contribute to and perpetuate its inferior *social* status. Jim Crow and the marginalization of women are just two examples. Treating resident aliens as inferior before the law is the first step toward relegating them to second-class status in society. Moreover, if alienage discrimination is not controlled, it may quickly become a surrogate medium for expressions of racial animus and other improper motives. Neither result is consistent with the egalitarian ideals of our society and Constitution.

Id. at 348–49.

341. Registration and Monitoring of Certain Nonimmigrants, 67 Fed. Reg. 52,584, 52,585 (Aug. 12, 2002) (to be codified at 8 C.F.R. pts. 214, 264) (quoting *Matthews v. Diaz*, 476 U.S. 67, 80 (1976)).

342. *See id.* at 52,584 (“The commenter argues that those individuals, with limited English proficiency or literacy, are not being given adequate notice . . .”).

343. *Id.*

purposes. . . .

. . . .
 . . . It is the individual's responsibility to know the law.³⁴⁴

The Attorney General also argued that DOJ is taking additional steps in making the rule public;³⁴⁵ however, there are few if any public announcements on the radio or news. To this day, I have many prospective clients who are not aware of Special Registration, much less the general public.

B. The Attorney General's Defense of Special Registration

The August 12, 2002, final rule on Special Registration began with “[r]ecent terrorist incidents have underscored the need to broaden the special registration requirements for nonimmigrant aliens from certain designated countries [who] require closer monitoring.”³⁴⁶ Professor Kobach began his address on the subject by pulling out the powerful September 11th sentiment.³⁴⁷ He provided, as a backdrop, the horrific tragedy of September 11th and how three of the nineteen hijackers had overstayed their visas, that it was easy for individuals to overstay their visas, that the INS had no system in place to know if they left the United States, and that “they had no obligation to make further contact with federal law enforcement”³⁴⁸ However, problems with the immigration system are not what Congress has found, but rather issues with intelligence,³⁴⁹ and instead, Professor Kobach instilled a system that does not use intelligence, but focuses on the bases of nationality, race, and religion, specifically Arabs and Muslims,³⁵⁰ in an effort to track and deport them, and it has not yielded

344. *Id.*

345. *See id.* (“[T]he Department is taking steps in addition to publication in the Federal Register to publicize its actions relating to immigration matters.”).

346. *Id.*

347. Some congressional leaders doubt that Special Registration helps U.S. security. “We have grave doubts about whether the INS’s implementation of NSEERS has struck the proper balance between securing our borders on the one hand and respecting the civil liberties of foreign students, businesspeople, and visitors who have come to our nation legally on the other.” Letter from Senator Russell D. Feingold, Senator Edward M. Kennedy, and Representative John Conyers, Jr., to U.S. Attorney General John D. Ashcroft 1 (Dec. 23, 2002) [hereinafter Congressional Letter to Attorney General Ashcroft], available at http://www.house.gov/judiciary_democrats/dojentryexitltr122302.pdf.

348. Kobach Briefing, *supra* note 313.

349. *See* Simpson et al., *Immigration Crackdown*, *supra* note 137, at 2 (“In fact, while three of the Sept. 11 hijackers had overstayed their visas, a sweeping, bipartisan congressional probe later cited shoddy intelligence work, not poor immigration enforcement, as being at the root of the nation’s vulnerability that day.”).

350. *See* Lynne Bernabei & David Cole, Op-Ed, *Stereotyping Hurts the War; Little Cooperation*

any successful terrorist-related suspects.³⁵¹ Kobach cited precedent and the 1952 law on which the authority for Special Registration³⁵² is based and how the United States historically has targeted aliens on the basis of nationality.³⁵³ However, as discussed above in response to the final rule comments, although the United States has historically regulated aliens on the basis of nationality, we have also learned to regret it, as in the case of the Japanese internment.

Professor Kobach is deceptive in that he appears to state that the only time arriving aliens need to provide their information on where they are staying in the United States is when they state something vague, such as “Ramada Hotel,” on their simple, small, white I-94 card.³⁵⁴ However, even as the comments on the Special Registration process describe, this Special Registration is the “third” check in the system.³⁵⁵ There are already two extensive checks for aliens who enter the United States, and Professor Kobach makes it appear that there is barely any check at all and an individual merely must fill out an I-94 card.³⁵⁶ This is simply not true.

On the visa application forms, there are extensive requirements that

in Finger-pointing, WASH. TIMES, Nov. 16, 2003, at A23. “In casting their net of suspicion broadly over tens of thousands of Arab and Muslim men, Ashcroft and the Department of Justice have done more than simply misdirect their investigative focus. They have alienated critically important allies in the war on terrorism . . .” *Id.*

351. *See Arabs, Muslims; Registration Program Has Been Unfair, Ineffective*, DETROIT FREE PRESS, Nov. 29, 2003 [hereinafter *Registration Program Unfair*] (“[Special Registration] has not been effective and has alienated people whose help the government can use in the ongoing hunt for suspected terrorists.”), available at 2003 WL 75652283.

352. For a discussion and overview of NSEERS and Special Registration, as well as legal, domestic (constitutional), and international concerns, see Lohmeyer, *supra* note 323. “The special registration program violates the equal protection clauses of the Constitution because it singles out certain groups based on nationality.” *Registration Program Unfair*, *supra* note 351.

353. *See Kobach Briefing*, *supra* note 313. “The idea of registering people is not a new idea at all. The authority to do so in the United States is based on a 1952 provision of the Immigration and Nationality Act . . .” *Id.*

354. *Id.* The I-94 card is the arrival or departure card for arriving aliens. Inspection of Persons Applying for Admission, 8 C.F.R. § 235.1(f) (2004). It is the inspecting INS or CBP officer that reviews the alien’s documents, asks questions, and personally marks the I-94 card of the nonimmigrant or statuses the alien he or she is admitting.

355. *See Registration and Monitoring of Certain Nonimmigrants*, 67 Fed. Reg. 52,584, 52,586 (Aug. 12, 2002) (to be codified at 8 C.F.R. pts. 214, 264) (“The rule must be understood as a third line of defense.”).

356. *See Kobach Briefing*, *supra* note 313.

I’m sure many of you have filled these out before, requires only an I-94 form, to be filled out on the plane, typically. It looks like a traffic ticket—(holds up hands)—it’s about this big. And it requires nothing more in terms of stating your plans to the United States and give us a foreign address. One of the hijackers wrote, “Ramada Hotel, New York,” not even New York City, no address, no specification.

Id.

request such items as specific addresses of employment, education, and even the specific itinerary and points of contact in the United States.³⁵⁷ Entry requirements also mandate such information and documentation includes financial statements and property interests in the home country.³⁵⁸ Although an individual completes the I-94 aboard the plane, it is the inspecting ICE or CBP official that examines it and writes down the actual visitor classification of the alien, and most aliens are required to have a visa.³⁵⁹ An ICE or CBP officer is the one who inspects arriving aliens.³⁶⁰ Moreover, most aliens have already applied for the visa from the State Department,³⁶¹ which does a wide range of security checks that can take several months;³⁶² the State Department determines which level of security

357. The requirements for a student visa can be found at the following State Department web address: <http://travel.state.gov/visa/state113328.html> (last visited Feb. 19, 2005). For temporary visitors, see the official State Department documentary requirements at <http://travel.state.gov/visa/state174234.html> (last visited Feb. 19, 2005).

358. All visa applications require form DS-156, which requests, inter alia, the following information: passport information; all names used; birth information; national identification numbers; home address; home contact and fax numbers, as well as employment and fax numbers; marital status; spouse information; spouse birth information; name and address of employer and schools; occupation information; address of stay in the United States; and the name and telephone numbers of contacts in the United States where the applicant plans to stay; length of time and purpose of the trip; who is paying for the applicant's trip; history of staying in the United States and prior visas; and names and relationships of persons traveling with the applicant. See the DS-156 form at the State Department Web site at <http://evisaforms.state.gov/ds156.asp?lang=1> (last visited Feb. 19, 2005).

If one is a male from an Arab or Muslim country, he must also complete the DS-157 form, which asks the following information: the name of one's tribe or clan; the name of one's parents; all countries that the applicant has visited in the last ten years; all countries that have issued the applicant a passport; the current employer or the last two employers of the applicant including the address, telephone number, job title, supervisor's name, and dates of employment; all professional, social, and charitable organizations to which the applicant belongs, works, or has contributed; questions on skills involving firearms and explosives, as well as nuclear, biological, or chemical experience; questions on military service; involvement in armed conflict; all educational institutions that the applicant has attended, including the course of study and dates of attendance; and a request for specific itinerary and specific locations visited, including points of contact. For a copy of the DS-157 form, see <http://www.visapro.com/Download/DS-157-Form.pdf> (last visited Feb. 19, 2005).

359. For exemptions to the visa requirement in entering the United States, see Visas: Documentation of Nonimmigrants Under the Immigration and Nationality Act, as Amended, 22 C.F.R. §§ 41.1–41.3 (2004).

360. See Registration and Monitoring of Certain Nonimmigrants, 67 Fed. Reg. at 52,587. “[T]he inspecting officer must determine that the alien is admissible. In this context, it is the alien’s responsibility to prove admissibility. INA section 212 (8 U.S.C. 1182). If the nonimmigrant alien can satisfy these requirements, then the alien may be admitted.” *Id.*

361. For the basic requirements for student, exchange, or visitor visa applications to a U.S. consulate or abroad, see Visas: Documentation of Nonimmigrants Under the Immigration and Nationality Act, as Amended, 22 C.F.R. §§ 41.31, 41.61, 41.62 (2004).

362. See, e.g., Am. Immigration Lawyers Ass’n, Testimony of Palma Yanni on the Impact of Visa Approval Backlogs on Small Business (June 6, 2003) (“Visas that once took a day now take a month—if you’re lucky.”) (posted on AILA InfoNet at Doc. No. 03060644), available at <http://www.aila.org>.

clearance each alien who applies for a visa to the United States must undergo.³⁶³

Moreover, the redundant nature of Special Registration is more apparent in the regulations themselves. Again, individuals who apply for visas from states that “sponsor terrorism” already undergo extensive security checks in the visa application process; actually, they are barred from applying for visas unless they pass the security check.³⁶⁴ Thus, the inspecting officer is the “second” check of the entering alien, as the Special Registration final rule explains,³⁶⁵ who will ask the same questions about what the alien plans on doing in the United States.

Even if it is true, as Professor Kobach stated, that an arriving alien only wrote “Ramada Hotel, New York,” there is an inspecting agent who looks, or should look, at that card and can ask for more detailed information.³⁶⁶ Inspecting agents ask these questions all the time. It is usually individuals who are already U.S. permanent residents who go visit friends and family, even in such countries as Spain, and the inspecting officer will quiz them to make sure the marriage is bona fide, even when the individual has a U.S. citizen child in their arms. I have had several clients who state that the inspecting officer will tell them that they are “lying” about which flight they came in on and set them aside in a room to interrogate them.

363. See Am. Immigration Lawyers Ass’n, DOS Cable Revises Clearance Procedures for Certain Cases (June 17, 2003) (advising that the length of validity of clearances for certain visa applicants is extended to one year) (posted on AILA InfoNet at Doc. No. 03061748), available at <http://www.aila.org>; DOS Issues Security Advisory Opinion Guidance (June 9, 2000) (compiling all current security advisory opinions and name check requirements) (posted on AILA InfoNet at Doc. No. 00060904), available at <http://www.aila.org>; DOS Summary of Special Processing Requirements (July 20, 2001) (updating the summary of nationalities and/or circumstances that for security reasons require additional procedures in order to issue immigrant and nonimmigrant visas) (posted on AILA InfoNet at Doc. No. 01072031), available at <http://www.aila.org>; State Dept. Updates Guidance on Technology Alert Checks (Mar. 4, 2003) (providing updates for the Technology Alert List since September 11 and guidance for cases of inadmissible aliens attempting to enter the United States to violate U.S. laws) (posted on AILA InfoNet at Doc. No. 03030449), available at <http://www.aila.org>.

364. See Registration and Monitoring of Certain Nonimmigrants, 67 Fed. Reg. at 52,586–87. Section 306 of the Enhanced Border Security and Visa Entry Reform Act of 2002 bars the issuance of visas from a country that is a state sponsor of international terrorism unless the Security of State, in consultation with the Attorney General and the heads of other appropriate agencies, makes a determination that an alien from such a country does not pose a threat to the safety or national security of the United States.

Id.

365. See *id.* at 52,586. “The rule must be understood as a third line of defense. First, the Department of State must be satisfied that the individual is eligible for a visa.” *Id.*

366. See Documentary Requirements: Nonimmigrants, 8 C.F.R. § 212.1 (2004) (grouping nonimmigrant aliens by class and detailing the types of documents necessary for admission into the United States).

Moreover, immediately after September 11th, before the advent of Special Registration, I had clients from Arab and Muslim countries who already had visas, and they were stopped, inspected, and taken to other rooms for thorough searches and asked questions about where they were staying in the United States and the purpose of their visit. It is very misleading, in other words, to give the impression that all an individual must do is complete an I-94 card to be admitted into the United States.

There is one point that Professor Kobach did not make in either the press release or his debate with Professor Cole. In May 2003, I participated on a racism panel before Missouri judges, and the moderator of the panel, Dean Burnele V. Powell of the University of Missouri-Kansas City where Professor Kobach teaches, responded to my recitation of the harsh treatment of Arabs and Muslims who merely fall out of student status.³⁶⁷ Dean Powell responded by quoting Professor Kobach and stated that they should be suspected because some of the September 11th hijackers also had fallen out of status from school, perhaps by not carrying enough hours.³⁶⁸ However, if one thinks religion, nationality, or ethnicity is too broad, the categorizing of students falling out of full-time status encompasses about everyone. This applies to about every normal, college student from time to time; they drop hours because of a class they are performing poorly in, for a variety of personal reasons, and they do not want it to negatively affect their grade point average. They may realize that the class is not necessary for their major. Maybe they are just goofing off, as many college students do, and should not be considered “terrorists.” Few foreign students, especially at the time of September 11th, ever realized the drastic consequences of dropping below full-time status. Their fellow students drop or add classes all the time; their friends have done it, and they may have even dropped a class in the past without being imprisoned and subjected to numerous rights abuses.

Professor Kobach did state that Congress should mandate that a system be implemented by 2005; however, it was implemented two years earlier for only the Muslim and Arab countries, which seems curious.³⁶⁹ He also stated that we need to “get control of our borders,”³⁷⁰ which may be true,

367. MO. MUN. & ASSOC. CIRCUIT JUDGES ASS’N, 2003 ANNUAL COURTS CONFERENCE (May 21–23, 2003).

368. *Id.*

369. Kobach Briefing, *supra* note 313.

370. *Id.* In the past, fears of political instability in the United States often caused the government to focus on “security” on the U.S.-Mexican border, as well as the perception that we have to get “control of our borders.”

[A]fter the Great Depression, and in the 1930’s the government embarked on a program of mass deportations of nearly a half-million Mexican-Americans,

but why only control the Muslim and Arab visitors?³⁷¹ He made a statement that most everyone can agree with, but does not explain; this “control” is about only certain immigrants, Muslims and Arabs.³⁷²

As Professor Kobach described NSEERS, he outlined a very nonintrusive process,³⁷³ which even asks for “any cellphone numbers they have, any e-mail addresses”³⁷⁴ in addition to items that the visa application and INS or ICE border agents are already supposed to ask or can ask upon entry into the United States. Such processes should be part of the normal visa application process by all immigrants that is already in place. One good reason for Special Registration for detainment or internment, as Professor Kobach observed, is “in the event it was learned in the future that the person needed to be contacted by law enforcement.”³⁷⁵

Professor Kobach attempted to make the process so nonintrusive, such as only taking “10 seconds to obtain prints” or a “few minutes to run those prints against a database of tens of thousands of wanted criminals, people with criminal records and known terrorists.”³⁷⁶ Using the terms “criminals” and “terrorists” might lead one to think that those subject to the Special Registration are terrorists, but they should be presumably innocent.³⁷⁷ How

including U.S. citizens, under a program called the “repatriation campaign.” It was during this period that the modern perception of immigration deluge and uncontrollable borders began when the restrictions created a new class of “illegal aliens;” most notably along the U.S.-Mexican border. Consequently, most of the immigration legislation enacted after the deportation of Mexican-Americans dealt primarily with issues of security and reflected fears of political instability.

Boswell, *supra* note 327, at 325 (footnotes omitted).

371. *But see* Letter from U.S. Senator Christopher Bond, R-Mo., to Ty Twibell (July 11, 2003) (“The Special Registration Program has been designed carefully and does not discriminate on the basis of race and ethnicity.”) (on file with author).

372. *See* Kobach Briefing, *supra* note 313 (“It became clear on September 11th . . . [we] needed an immediate step . . . and responded to that need—the National Security Entry-Exit Registration System, or NSEERS, as it has come to be known.”).

373. *But see* Richard Leiby, *A Day to Wait, and Pray; at the Immigration Service, Arab Men Face Their Uncertain Futures*, WASH. POST, Jan. 11, 2003, at C01. “As yesterday’s registration deadline for 13 nationalities loomed, lawyers fumed over paperwork delays and watched as some clients were put in chains and jailed. Most are allowed to post bond, but those with criminal records or who are potential national security threats are imprisoned.” *Id.*

374. Kobach Briefing, *supra* note 313.

375. *Id.*

376. *Id.* *But see* Leiby, *supra* note 373, at C1. “[T]o others, the decision-making appears arbitrary. And intrusive. Some complain of long interrogations, including queries about their religious beliefs and mosque attendance.” *Id.*

377. *See* Congressional Letter to Attorney General Ashcroft, *supra* note 347, at 2 (“These reports are all the more troubling because this new program comes one year after the Department launched its first roundup and detention of mostly Arab and Muslim men, the vast majority of whom were detained for immigration violations and ultimately cleared of any involvement in terrorist activity.”)

good would most of us feel that our names were run against “tens of thousands” of “wanted criminals” or “terrorists,” especially these days, or if we had the name “Mohammed” and every reference to us by the government and the press was “suspected terrorists” or “those arrested after September 11th” as if to draw a direct correlation? How would we feel if we were asked what type of transportation we used to get to work or to give our credit card numbers or e-mail addresses?³⁷⁸ I can imagine it would be very nerve racking, and I empathize with them. Moreover, 16% of all men who went in for Special Registration ended up being put in removal proceedings;³⁷⁹ statistics like these are bound to make any reasonable person a bit nervous before going in and having to regularly report and register.

In addition, regarding the speed or alleged efficiency of the process, Professor Kobach talked about the process as being “minimal” and quick. However in practice, it is not quick—his national average of “18 minutes” is only for the interview itself, and he did not mention the waiting period before the interview or the number of times individuals must return to the U.S. CIS because there were too many people.³⁸⁰ As previously noted, AILF found that the average wait time was *six hours*,³⁸¹ and I personally

378. *See id.*

[W]e are concerned about the interview stage of the NSEERS special registration program. We understand that information is sought on the individual’s credit card, bank account, and video rental card numbers, and, for those on student visas, on affiliation with campus political and religious groups and names of roommates. These questions raise serious privacy and constitutional concerns.

Id.

In December 2004, the former INS Commissioner’s and Professor Kobach’s statements that no terrorists had been caught by the special registration system is tell-tale—particularly when Kobach stated that catching terrorists was not the “point” but rather, the information gathered. This lends support to the thesis of this article.

Kris Kobach, the architect of the program at the Justice Department, disputes that assessment, saying the program was invaluable. He said it had provided the government with fingerprints, photographs, banking and credit card records about Arab and Muslim immigrants that were previously unavailable.

The mass registrations were necessary, Mr. Kobach said, because there was no systematic way to track immigrants once they entered the country

Swarns, *supra* note 223.

379. *See* Rachel L. Swarns, *Thousands of Arabs and Muslims Could Be Deported, Officials Say*, N.Y. TIMES, June 7, 2003, at A1 (stating that of the 82,000 Arab and Muslim men who came forward for special registration, more than 13,000 (“roughly 16 percent of the total”) face deportation).

380. *See* Kobach Briefing, *supra* note 313. “[T]he imposition is minimal. . . . [T]he national average is 18 minutes, and we expect that to decrease in the future . . . with a new version of the software . . . to get the information as quickly as possible so the person is not delayed” *Id.*

381. Einolf & Hall, *supra* note 182, at 5.

experienced a wait time of *two to four hours*,³⁸² not to mention that some people were turned away and had to return the next day.³⁸³

During Kobach's debate with Professor Cole, a fellow immigration attorney who was born in Iran asked Professor Kobach about his position on the mass arrests of Iranians in California, most of whom were in the United States legally.³⁸⁴ Kobach responded that very few of them were actually deported and few of them were currently detained.³⁸⁵ And in one of Professor Kobach's most incredible defenses, which Professor Cole remarked in his follow-up response, was that the Iranians were not really "imprisoned" or "detained" but rather, merely "temporarily" and "constructively detained"³⁸⁶ for further investigation, and it was nearing the end of the day and INS had no choice but to incarcerate them until they had time or could decide how to proceed.³⁸⁷ His core response seemed to be that it was essentially a nonissue because they were eventually released and few were ultimately deported.

Professor Kobach frequently remarked that many European countries require registration, which is a basic, simple process.³⁸⁸ Only one out of

382. See *supra* Part IV.K.

383. *Id.*

384. See, e.g., Congressional Letter to Attorney General Ashcroft, *supra* note 347, at 1. According to news reports, many of those detained have applications pending for adjustment of status on which the INS has not yet acted.

For example, according to a news report, a 16 year old boy who entered the country lawfully on a student visa was separated from his pregnant mother, even though he is seeking permanent residency to be able to join his mother, who is a permanent resident, and stepfather, who is a US citizen, in America. According to another report, a successful Iranian Jewish business man, who had fled Iran and believed he could find freedom and security in America, was arrested and jailed even though he has had an application for permanent residency pending with the INS for five years. It is unjust to penalize and detain people who have a claim to lawful status when, in many cases, it is the INS processing backlog that has caused the delay in approving status-adjustment applications.

Id.

385. Cole and Kobach Civil Liberties Debate, *supra* note 312.

386. For a congressional response to detention from Special Registration, see Congressional Letter to Attorney General Ashcroft, *supra* note 347, at 2. "We are also concerned by reports that detainees have been denied access to counsel and are being held in deplorable conditions, including being deprived of food for more than 24 hours and being forced to sleep on cold floors." *Id.*

387. Cole and Kobach Civil Liberties Debate, *supra* note 312.

388. See Kobach Briefing, *supra* note 313.

Very quick process, and I think many—many of you are familiar with the fact that most European countries have done this for decades. If you change address in Europe or if you establish an address in most European countries, you have to at some point report, usually to the local police is the way the system works there, and prove that you're living where you say you are living.

Id.; see also Press Release, U.S. Department of State, *supra* note 320 ("While NSEERS has been met with some alarm and resentment from immigrant communities, Kobach said it is no more demanding

seventy-six INS offices simply verifies what the individuals are doing. However, these offices are overwhelmed. Individuals must wait for hours and often learn they have to try and come back again. In Europe and the United Kingdom where Professor Kobach went to school, it was an efficient process, and not only Arabs and Muslims had to do it, but all nationalities.³⁸⁹ Professor Kobach frequently described the program as just like a European one stating, “you’ve traveled to Europe” and that “it’s a pretty standard thing”;³⁹⁰ however, they do not only register Muslims and Arabs or certain nationalities. Moreover, other countries can certainly be racist themselves and apparently contrary to the politics of the current administration by distancing itself or criticizing Europe. Any similarities between Europe and the United States apparently are convenient. For example, during the brutal and inhumane French colonialism and oppression of Algeria, they also had much to fear from “Arabs” and “Muslims.”

I also found it ironic when I recalled witnessing a European going through the registration process. I thought about Professor Kobach’s comments at the time. It was one of those days I was with a registrant waiting for hours, and I would often see other special registrants there waiting for their turn. Most all did not have an attorney and usually went to register at the advice of their employer’s counsel. After talking with some of them, many should not have registered, but corporations often preferred to err on the side of attempting to register. In one case, a Swiss national (who, as racist as it may sound) clearly did not appear to be Arab nor Muslim, and he was not. However, his parents were working for a time in Pakistan, and he was born in Pakistan but returned to Switzerland soon after birth. Thus, he had little or no cultural ties whatsoever to an Arabic or Islamic country. He was virtually cursing before and after his interview on

than laws in place in many European countries where alien visitors staying for prolonged periods must advise authorities of their whereabouts.”). *But see* Leiby, *supra* note 373, at C1. “‘It looks like a communist country, a dictatorship,’ he says, recalling how he fled Ethiopia as a teenager, after a Marxist regime took over in 1974. ‘That’s why we came here, for freedom.’” *Id.* (quoting a Yemeni passport holder).

389. *Cf.* Kendrick, *supra* note 98, at 991.

Hundreds of Arabic, Middle Eastern, and Muslim persons in America have horrific post-September 11th tales to tell of profiling, abuse, hatred, and brutality inflicted by fellow citizens and law enforcement alike. These women and men have had their physical persons violated in some instances, and in many instances, their civil liberties violated as well.

Id.

390. Kobach Briefing, *supra* note 313. “[I]f you’ve traveled in Europe and stayed there for an extended period of time . . . you are asked to just come in and verify where you are living, and it’s a pretty standard thing. Also, departure controls are common around the world.” *Id.*

how “ridiculous” the entire process was with the waiting and treatment. He stated that Europe and Switzerland did have a similar system, but it was actually only ten to fifteen minutes, and I believe he said it applied to everyone; it was “not this [explicative deleted]!” and he stormed out of the INS after missing a half a day of work. Of course, since he was not Arab or Muslim, his interview took less than a minute; they said he did not have to register. However, I have seen some other cases where it appeared that an individual did not have to register, but they did regardless and thus have gotten themselves into a position where they must register every year or face tough consequences, and none of them are European, as in the case above.

When Kobach described the “third element of NSEERS[,]” he also described it as that one “simply has to verify their departure at the airport or the port of entry” and that it is “[a]gain, a very quick process.”³⁹¹ This very quick process has managed to get 16% of its Arab and Muslim participants in removal proceedings. In reality, Arab and Muslim males are asked to arrive and change their itinerary, so they have an additional hour for this process. Second, this is the most potentially criminal part of the process; if one fails to register upon leaving, they may never enter the United States again. This is often because CBP or ICE does not know exactly how to approve their exit. There have been cases where the individual attempted to leave properly according to NSEERS, but he was not registered correctly as he left, due to the incompetence of the government, and he was thus barred from entering the United States ever again.³⁹² Fortunately, in one noted

391. *Id.* “[W]hen the person leaves, they simply have to verify their departure at the airport or the port of entry. Again, a very quick process, and many countries have had departure controls for decades . . .” *Id.*

392. *See, e.g.,* Sameer Ahmed, *INS Prevents Alum from U.S. Re-entry*, STANFORD DAILY, Apr. 15, 2003, available at http://www.stanforddaily.com/tempo?page=content&id=10889&repository=0001_article.

Imagine leaving the country for spring break, with one quarter left to graduate, and then being prohibited by the U.S. government from returning to school to finish your degree and see your friends and family.

That is what has happened to Yahya Jalil, a 1996 Stanford graduate from Pakistan now at the University of Pennsylvania’s Wharton School of Business. On March 12, when Jalil was returning from a spring break trip to London, INS agents at Newark airport barred his entry to the United States. . . .

Jalil was not allowed to enter the country because he didn’t register with the INS at Newark on March 8, the day he departed for London. The departure registration is one of many INS requirements initiated after 9/11 to track visitors from 25 predominantly Arab and Muslim countries. Under the law, first enforced in December 2002, these visitors must have INS approval before entering or leaving the country, moving residences, buying a house and switching jobs.

According to Jalil, his failure to register upon departure was purely accidental.

“When I checked in at the airport, I asked the airline [United] if, as a Pakistani

case, the State Department put into place a procedure to address this,³⁹³ but the potential remains, and it is an indication that this is not simply a quick, simple, nonintrusive process. Rather, it is a very nerve-racking, potentially devastating, and very inconvenient process. If one is from France or Belgium or most African countries, they do not have to rearrange their flights to allow an additional hour for this process.

Kobach is also wrong on some other points. Although Special Registration does not apply to permanent residents, U.S. citizens, or asylum seekers in some cases,³⁹⁴ it does affect individuals who are in the process of seeking permanent residence, asylum seekers who apply for asylum now, and Iraqi asylum seekers.³⁹⁵ It has affected U.S. citizens, as in my case, where the U.S. citizen was registered because he was also a Saudi national. Moreover, NSEERS and other immigration policies do affect asylum seekers. It can apply to asylum seekers, and UNHCR heavily criticized the United States for its poor treatment of asylum seekers and of detaining them from the very countries in which Mr. Kobach claims that they are exempted.³⁹⁶ It only does not apply to asylum seekers who apply before a certain date.³⁹⁷ Moreover, other draconian policies do apply to asylum seekers. In March 2003, The London *Independent* reported that “[t]he United States has ordered the detention of all political asylum-seekers from a long list of Arab and Muslim countries, infuriating immigration advocates who say it violates international human rights law.”³⁹⁸

It is only those aliens with a stake in the United States who will likely come forward. If it is so easily “manipulated” and “abused,” once again,

passport holder, there was a requirement other than submitting my I-94 [visa form] to the airline,” he said. “They said that there was no other requirement.”

Id.

393. Am. Immigration Lawyer’s Ass’n, DOS Addresses NSEERS Failure to Exit Through Departure Control (May 12, 2003) (posted on AILA InfoNet at Doc. No. 03051245), available at <http://www.aila.org>.

394. See generally Bill Frelick, *Neglect Is Never Benign*, 58 BULL. ATOM. SCIENTISTS, Nov./Dec. 2002, at 27, 35. “[After September 11.] [t]he United States . . . halted all . . . processing . . . [and] fewer refugees were admitted . . . in 2001 than in any year since 1987 Canada’s refugee processing was not suspended after September 11, and Canada’s resettlement program continued to operate throughout the year.” *Id.*

395. See Kobach Briefing, *supra* note 313. “[T]his only applies to non-immigrant visa-holders It does not apply to lawful permanent residents in the United States who are citizens of another country U.S. citizens . . . refugees . . . asylum applicants . . . asylees . . . [and] holders of certain diplomatic visas.” *Id.*

396. UNHCR Press Release, *supra* note 266.

397. Asylum seekers are only exempted if they applied for asylum on or before November 30, 2002.

398. Andrew Gumbel, *US to Round Up All Muslim and Arab Asylum-seekers*, THE INDEPENDENT, Mar. 19, 2003, available at <http://news.independent.co.uk/world/politics/story.jsp?story=388562>.

the backdrop against the hijackers from September 11th and migrants intent on doing us “harm” (again catch words to get the audience fearful of the migrant menace and to forget for a second that the special registrants are not the ones responsible for September 11th, not proven terrorists, nor the ones abusing the system),³⁹⁹ why aren’t the processes for the visa application and entry already enforced for all migrants, not just Arabs and Muslims?

Professor Kobach expounded on the number of criminal arrests, either Arab or Muslim examples, including some Canadian, that he made sure to throw in the mix; he also mentioned that over a hundred nations are subject to this program.⁴⁰⁰ However, Arabs and Muslims are only a small percentage of the overall number of illegal migrants in the United States, and of course, targeting them will find some criminals. However, it leaves out larger amounts of individuals who are non-Arab and constitute an interest to national security and who are the largest portion of the illegal migrant population.⁴⁰¹ And Professor Kobach appeals to those who think that there are criminal aliens out there and that it is better to get some than none. At an INS conference I attended at the Nebraska Service Center near the end of 2002, the Director of the Nebraska Service Center stated that they now do security checks on all applications that come through, even the U.S.-citizen petitioner. They stated that only about five percent of the applications had any negative criminal history or some sort of negative issue that required further scrutiny, which could be a minor or major criminal issue, and half of those were mistaken identity. So, only about 2.5% of all applications, out of the million or so, which come through Nebraska have any negative history that requires some analysis. This approach also assumes that all “terrorists” have some amount of criminal history. Outside the Test of English as a Foreign Language (TOEFL) issue above, I have yet to have a client who was involved in any criminal issue, especially terrorism.

The Attorney General, via Professor Kobach, spent a great amount of time describing how 148 and some odd countries,⁴⁰² not just the Muslim

399. See Kobach Briefing, *supra* note 313 (“It is temporary visas . . . that all of the 19 hijackers used, and the kind of vehicle that is so easily—has been in the past, so easily manipulated and abused . . .”).

400. *Id.*

401. See, e.g., Simpson et al., *Immigration Crackdown*, *supra* note 137, at 1. “Their stories illustrate how the campaign has ruptured families, separating men from their U.S.-citizen wives and children. They show how the government effectively put a premium on catching scofflaws from mostly Muslim nations while allowing hundreds of thousands of violators from other countries, including convicted criminals, to wander free.” *Id.*

402. *But see id.* at 6.

and Arab ones,⁴⁰³ are subject to Special Registration or registration with NSEERS. They even tout numbers that purportedly show that it is mainly people from the United Kingdom or Canada who top the list in being registered. However, they do not give a percentage from each country, nor do they state if they are dual citizens or residents between the United Kingdom, Canada, and Arab and Muslim countries; we all know it is the case.⁴⁰⁴ This denial becomes most alarming.⁴⁰⁵ I also think he made a misleading point that “[t]he vast number are picked—are pulled into the system because intelligence-based criteria are used by the INS inspectors at the port of entry to identify people coming in who meet certain criteria for being registered in the system.”⁴⁰⁶ He must only be referring to the greatest proportion of these symbolic/fictitious 148 countries⁴⁰⁷ that he continuously tries to project a certain connotation. The majority, and most all, special registrants are picked by nationality; there is no question about it. This

Ashcroft urged Americans not to . . . target[] individuals based on race, religion or national origin.

Yet the administration went on to launch a program centered on nationality that would register 83,310 men in the U.S. from predominantly Muslim countries. Told that it was their legal obligation, many complied, only to face deportation.

Id. (quotations omitted).

403. *See id.* at 1. “Akbar is one of more than 13,000 men the government moved to deport as part of a Bush administration dragnet that even its own officials acknowledge was a hastily assembled and blunt tool. They say they are not targeting Muslims, but people from nations where terrorists operate.” *Id.*

404. *See* Congressional Letter to Attorney General Ashcroft, *supra* note 347, at 2.

This pattern of targeting persons for arrest based on race, religion, ethnicity, or national origin rather than on specific evidence of criminal activity or connection with terrorist organizations only serves to undermine the trust of the American people, especially the Arab and Muslim American communities whose cooperation we need more than ever to protect our nation.

Id.

405. *See* Leiby, *supra* note 373, at C1.

“This has absolutely nothing to do with a person’s race, religion or ethnicity,” says Justice Department spokesman Jorge Martinez. “The INS has the duty, when encountered with an alien out of status, to temporarily detain that individual. They are not arrested, but detained, until a national security check can be conducted.”

Id. *See generally* David Cole, *The New McCarthyism: Repeating History in the War on Terror*, 38 HARV. C.R.-C.L. L. REV. 1, 1–2 (2003) (“Today’s war on terrorism has already demonstrated our government’s remarkable ability to evolve its tactics in ways that allow it simultaneously to repeat history and to insist that it is not repeating history.”); Karen Engle, *Constructing Good Aliens and Good Citizens: Legitimizing the War on Terror*, 75 U. COLO. L. REV. 59, 63 (2004) (discussing, inter alia, oscillation “between profiling and stereotyping, on one hand, and, on the other hand, a sincere insistence that Muslim[s] . . . are an important respectable part of the United States polity”).

406. Kobach Briefing, *supra* note 313.

407. *See* Simpson et al., *Immigration Crackdown*, *supra* note 137, at 10–11 (“Deportation orders have increased markedly for unauthorized immigrants from 24 predominantly Muslim countries while those from other nations face no extra scrutiny.”).

intelligence-based criterion is right there in the regulations themselves, including whether the individual has extensive contact or travels in the infamous Arab/Muslim country list. Moreover, it is not physically possible for them to evaluate every single applicant by intelligence-based criteria, unless they picked nationality in the first place.⁴⁰⁸ He also does not state that their intelligence-based criterion includes connection with an Arab or Muslim country. We cannot view that data, as far as I know (unless connection with one of the twenty-five countries is a specific criterion for intelligence-based criteria in the regulation itself), but everyone in the field, as well as news reports, knows that it is men from predominantly Muslim and Arab countries, and none have been found to have any connection with terrorism.⁴⁰⁹ Additionally, most detainees were arrested without charges, yet never had any charges in connection with terrorism.⁴¹⁰

Professor Kobach also asserted that some of these countries, such as Pakistan, are in fact our allies and that it is an unfortunate fact that they have a high level of Al-Qa'ida activity in their country. None of the countries listed outwardly support Al-Qa'ida, and in fact, Al-Qa'ida is known to be against almost all of these governments, including Saudi Arabia, Syria, Lebanon, Iran, and all the other countries on the list.⁴¹¹ Al-Qa'ida has sworn to bring these governments down. Most Muslim groups

408. See Kobach Briefing, *supra* note 313. The registrants come from 148 different countries and “the reason . . . is that NSEERS is not limited to any one country. . . . The vast number are [sic] picked . . . because intelligence-based criteria are used by the INS inspectors at the port of entry to identify people . . . for being registered” *Id.*

409. See Simpson et al., *Immigration Crackdown*, *supra* note 137, at 10. “83,310: Number of foreign visitors from 24 predominantly Muslim nations who registered with the government . . . 13,740: Number of those 83,310 who were ordered into deportation proceedings. 0: Number who were publicly charged with terrorism, although officials say a few have terrorism connections.” *Id.*

410. See Cole, *Priority of Morality*, *supra* note 2, at 1754.

Many were initially arrested without charges at all; over seven hundred of the arrests remain secret to this day; and more than six hundred detainees charged with immigration violations were tried in secret, without any showing that any information involved in their immigration hearings was classified. The vast majority were not only not charged with a terrorist crime, but were affirmatively cleared of any connection to terrorism by the FBI. Virtually all of the detainees were from predominantly Arab countries.

Id. (footnotes omitted).

411. Cf. Robert Fisk, *He Is Alive. There Can Be No Doubt About It. But the Questions Remain: Where on Earth Is He, and Why Has He Resurfaced Now?*, THE INDEPENDENT, Nov. 14, 2002, at 3 (noting that Bin Laden always hated Saddam Hussein’s “un-Islamic behaviour, his secularism, his use of religion to encourage loyalty to a Baath party that was co-founded by a Christian.”); Robert Fisk, *Terror Attacks: Elusive Bin Laden Still Has the Global Reach to Strike Terror at Will*, THE INDEPENDENT, Nov. 29, 2002, at 6 (asserting that in bombing an Israeli-owned hotel in Kenya, Al-Qa'ida did not care about casualties and that they did not specifically target, but were looking to produce a “clash of civilisations” pitting themselves against Western society).

have objected to the proposition that Al-Qa'ida has any semblance to Islam, and many of the countries, such as Iran, Lebanon, and Iraq have either very large or majority Shi'a Muslim populations that are ever more different than the Al-Qa'ida version of Islam. Moreover, many of the countries, such as Iraq, particularly now that it is under U.S. occupation, but also Egypt, Jordan, Pakistan, and some others, are secular governments, which Al-Qa'ida abhors. Al-Qa'ida has admitted operating not just in these twenty-five countries, and George Tenet himself, in his testimony to Congress, has stated that Al-Qa'ida "has cells" not only in Europe, but also in the Philippines.⁴¹² Al-Qa'ida is also known to operate throughout Africa.⁴¹³ None of these other countries are on the Special Registration list, however.

More importantly, the term "Al-Qaeda," as the chief reporter for the *London Observer*, Jason Burke states, "is a messy and rough designation, often applied carelessly in the absence of a more useful term."⁴¹⁴ "Al-Qaeda" was a term "used by the most extreme elements among the radicals fighting in Afghanistan"⁴¹⁵ and that "[i]t is unclear if those involved with bin Laden called themselves 'al-Qaeda' at all at this stage."⁴¹⁶ Burke warns against the "temptation" to use the term "network of networks" or "bin Laden-linked" when "Islamic militancy is a broad-based, multivalent, diverse movement."⁴¹⁷ In fact, Burke states that "[e]very piece of evidence I came across in my own work contradicted this notion of al-Qaeda as an 'Evil Empire' with an evil mastermind at its head."⁴¹⁸ "The nearest thing to 'al-Qaeda', as popularly understood, existed for a short period, between

412. Press Release, U.S. Embassy, CIA's Tenet Says Al-Qa'ida Still a Serious Threat (Feb. 7, 2002), available at <http://usembassy.state.gov/posts/pk1/www02020703.html>.

413. *Id.*

414. JASON BURKE, AL-QAEDA: CASTING A SHADOW OF TERROR 7 (2003).

415. *Id.* at 8. "Bin Laden and al-Qaeda are the radical, extremist fringe of the broad movement that is modern Islamic militancy." *Id.* at 5.

416. *Id.* at 9. *But see* ROHAN GUNARATNA, INSIDE AL QAEDA: GLOBAL NETWORK OF TERROR 1 (2002) ("Al Qaeda is the first multinational terrorist group of the twenty-first century and it confronts the world with a new kind of threat.").

417. BURKE, *supra* note 414, at 235.

[T]he temptation to see these groups, 'the network of networks', as 'bin Laden-linked' or part of al-Qaeda must be resisted. 'Al-Qaeda' . . . function[s] for many of them at specific times but Algerian, Chechen and Indonesian groups are rooted in specific local contingencies and causes. Islamic militancy is a broad-based, multivalent, diverse movement. It goes far beyond the deeds or words of one man or one small organisation.

Id.

418. *Id.* at 4.

1996 and 2001. Its base had been Afghanistan.”⁴¹⁹ Many [young Muslim men], as late as 1998, had never even heard of Osama bin Laden.”⁴²⁰

Thus, the Attorney General and his spokespersons are on pretty shaky ground when they defend Special Registration as only being a “coincidence,”⁴²¹ that it is Arab and Muslim countries because it happens to be countries in which “Al-Qa’ida” operates;⁴²² we do not know what “Al-Qa’ida” means. It becomes difficult to understand how an extremist radical group in Afghanistan at a certain time in recent history is able to operate in Lebanon, Syria, Iran, Iraq, and other countries.⁴²³ President Bush has had a difficult enough time demonstrating that even the former government of Iraq had any connection to Al-Qa’ida. Al-Qa’ida has also been known to operate in many countries well outside of those countries on the Special Registration list, including Bosnia, Albania, China, Russia, Turkey, Georgia, Malaysia, Singapore, and the Philippines.⁴²⁴ None of these countries are included on the Special Registration country list. Moreover, to what degree must Al-Qa’ida operate in any given country until they make it on the Special Registration list?

Furthermore, membership and participation in Al-Qa’ida is not popular in general. Its membership is considered to be very low. Its only appeal is that one of its prime targets now has turned from Russia to the United States, and there are many in the Middle Eastern world who have anger towards the United States because of Iraq, the Palestinian/Israeli conflict, and the Israeli occupation of Palestinian land, which is perceived to be done with American approval, funding, and diplomatic support. Thus, targeting Arabs and Muslims in the United States is only going to play further into

419. *Id.* at 5.

420. *Id.*

421. For a good discussion on the mentality of some groups in the United States that erroneously and opportunistically focused on Muslims and Arabs from a supposedly secular government, see AS’AD ABUKHALIL, *BIN LADEN, ISLAM, AND AMERICA’S NEW “WAR ON TERRORISM”* (2002).

422. See Congressional Letter to Attorney General Ashcroft, *supra* note 347, at 1.

[T]his special registration program appears to be a component of a second wave of roundups and detentions of Arab and Muslim males disguised as a perfunctory registration requirement. Reports indicate that hundreds of individuals who have voluntarily appeared to register at INS offices around the country . . . have been arrested and detained without reasonable justification.

Id.

423. Interestingly, the situations, including the policies of the Southern powers, provide fertile feeding ground for fanatics. See BURKE, *supra* note 414, at 249 (“Everywhere there is fertile ground for fanatics to find material support and local helpers.”).

424. See, e.g., GUNARATNA, *supra* note 416, at 11. “Al Qaeda includes Uzbeks, Kazahks, Kirgyz, Turkmens and Tajiks in Soviet Central Asia; Urghurs in Xingjiang in China . . . Indians . . . Malaysians, Singaporeans . . . and Filipinos It is now a truly transnational organization, operating throughout the Asia-Pacific, from Asiatic Russia to Australasia.” *Id.*

Al-Qa'ida's hands as it will increase anger and resentment in the Arab and Muslim communities abroad and provide more eager participation for Al-Qa'ida.

Professor Kobach stated that DOJ “know[s] immediately when a person doesn't show up” and that has “yielded some strong investigative leads.”⁴²⁵ This is incorrect, at least in my experience. My clients who were charged for not showing up in thirty to forty days were only charged—most often several months later—when they inquired in person to make sure they were properly complying with the requirements for registration when they were never informed to return. Thus, this process does not even appear to be working properly and instead serves only as a trap to deport Muslims or Arabs when they try to comply with the law.

Professor Kobach stated that the program found 3,995 wanted criminals who attempted to enter the United States;⁴²⁶ however, he does not mention whether these criminals would have been detected without NSEERS, nor does he provide a comparison to years where NSEERS was not implemented.⁴²⁷ And, as Professor Cole has pointed out, in this entire program of NSEERS and other methods, one in three “terrorists” have been arrested by a strict definition of “terrorism,” and only one of those has been charged with any of the crimes associated with September 11th.⁴²⁸ All of these tactics have only worked to alienate the Muslim and Arab communities with little or no improvement in national security.⁴²⁹

425. Kobach Briefing, *supra* note 313.

426. *Id.* But see Cole, *Priority of Morality*, *supra* note 2, at 1753–54.

As of January 2004, the government had detained more than 5000 foreign nationals through its antiterrorism efforts. By any measure, the program has been spectacularly unsuccessful. None of these detainees has been determined to be involved with al Qaeda or the September 11 conspiracy. Only three have been charged with any terrorism-related crime, and two of those three were acquitted of the terrorism charges. The lone conviction—for conspiring to support some unspecified terrorist activity in the unspecified future—has been called into question by the revelation that the prosecution failed to disclose evidence that its principal witness had lied on the stand.

Id.

427. Kobach Briefing, *supra* note 313. Professor Cole also made this proposition. Cole and Kobach Civil Liberties Debate, *supra* note 312.

428. Television Interview by *Frontline* with David Cole, author and professor at Georgetown University Law Center (Sept. 12, 2003), available at <http://www.pbs.org/wgbh/pages/frontline/shows/sleeper/interviews/cole.html>; see also Cole, *Enemy Aliens*, *supra* note 21, at 960 (stating that only one single alien has been charged with any involvement in the September 11th crimes).

429. See Joseph Onek, Symposium Critique, 19 J.L. & RELIGION 85, 87 (2003–2004) (“We cannot achieve national security if we are seen as violating the rights of our Islamic citizens and immigrants.”).

The American Immigration Law Foundation (AILF) has also commented on Professor Kobach's alleged claimed "success" of Special Registration,⁴³⁰ as it stated:

There have been self-congratulatory statements in the press from Department of Justice (DOJ) aides like Kris Kobach, who, predictably, said of alien registration: "I regard this as a great success." However, it's worth noting that no terrorists have been prosecuted criminally or paraded before television cameras as a result of the mass registration of Muslims and Arabs. Does anyone doubt that the Justice Department would have announced any forthcoming criminal prosecutions of terrorists discovered through this controversial policy?⁴³¹

Another example of the alleged success in capturing "terrorists" or suspected terrorists was a press release by the Department of State International Information Program entitled *Suspected Terrorists, Convicted Criminals Identified in New U.S. Border Checks*,⁴³² which, despite its title, says little or nothing about apprehending terrorists, unless of course, "suspected terrorists" are all the Arabs and Muslims its governs.

Professor Kobach often referred to NSEERS or Special Registration as merely "just get[ting] information and just get[ting] them into the system" and, moreover, the extension of deadlines for registration, the "grace period[s]" and their "willingness to listen and to make adjustments to the program" were indications of how the characteristics of Special Registration were fair and just.⁴³³ Professor Kobach did acknowledge that "some people might not have heard in time" and that "they were afraid to come in and register" because the deadline had passed and because extending the deadlines once in some cases simply "reflects our desire to make it as easy as possible and make this registration process as painless as

430. *But see Registration Program Unfair, supra* note 351. "The Bush administration ought to learn a lesson from this failure [of Special Registration]. Any program that aims to root out terrorists should not single out certain groups or alienate people whose help the government needs." *Id.* In December 2004, the New York Times quoted Professor Kobach, in regard to the special registration program, as stating that "[no] one was charged with terrorism crimes, but that argument completely misses the point." Swarns, *supra* note 223. As stated above, the former INS Commissioner made the same comment and faulted the Special Registration program on other grounds, including wasting government resources. *See supra* note 223.

431. AILF Immigration Policy Center, *Foreign Policy Fallout: Assessing the Risks of Post-9/11 Immigration Policies*, IMMIGR. L. TODAY, July/Aug. 2003, at 24, 26 (footnote omitted).

432. Press Release, U.S. Department of State, *supra* note 320.

433. Kobach Briefing, *supra* note 313. "[W]e announced a grace period . . . [a]nd that's, I think, important, because it shows our willingness to listen and to make adjustments in the program . . . [and] not to trick anyone . . . [and then] removing them from the United States." *Id.*

possible so that all lawful visitors can come in and be enrolled in the system.”⁴³⁴ This is misleading; the deadline was extended not because of the Justice Department’s compassion, but because “[i]n the wake of public outcry over the arrests and the sting of poor planning, the INS reopened the registration period for men from these [then] 18 countries.”⁴³⁵

He also claimed that this system not only protects the “audience” or “American citizens, naturalized citizens” (the immigrants themselves, he says in a subdued fashion) and “lawful permanent residents,” but most importantly, the “visitors themselves,”⁴³⁶ a key warning phrase that was also used to rationalize the internment of the Japanese.

The fact about Special Registration is that those who are true threats would not come forward and certainly persons not in legal status would not come forward. Professor Kobach was quizzed on this very issue.⁴³⁷ In practice, individuals would not come forward or would only do so with well-advised possible relief. Otherwise, they would be deported and have no ability to return to the United States, in most cases, for at least ten years. Many had been living in the United States for years, had been working, and had families. Many were simply unaware of the program to begin with. The only instance where I could assure a possible positive outcome is if an individual had an asylum claim or withholding of removal claim. I could not advise a client not to register, because I had to advise him that he legally was required to register, but I could only advise on the positive and negative legal outcomes for registration, and if an individual had no immigration relief, there were little real positive legal outcomes of registering. They would have complied with the law, but they would likely be deported and apart from their families for at least ten years. And of course, this would only apply to Muslims and Arabs, not to the vast majority of migrants in the United States, who are Hispanic and have about as much connection to September 11th as Arabs. More incredulously, there are more terrorist attacks against U.S. citizens or U.S. interests in South America than in the Middle East.⁴³⁸

434. *Id.*

435. Rosenberg, *supra* note 168, at 185.

436. Kobach Briefing, *supra* note 313.

437. *See id.*

If they go to register, they’re going to get arrested and deported. I mean, what incentive would they have to actually come forward?

MR. KOBACH: . . . there are a number of reasons One is . . . if you keep any violation that you have as being a merely administrative violation, rather than . . . a criminal violation.

Id.

438. *See, e.g.,* Ali Abunimah, *Most Terrorist Attacks on U.S. Are Not from the Middle East*, SEATTLE POST-INTELLIGENCER, May 9, 2000, available at <http://seattlepi.nwsource.com/opinion/>

Professor Kobach stated that if aliens are apprehended for being out of status, they can simply argue their case in front of an immigration judge and that coming “forward doesn’t remove any of the due process and any of the administration hearings they would otherwise get.”⁴³⁹ He stated that they can seek a “change of status” and that the “immigration judge, who would weigh their case in the hearing, can make a determination as to whether their application for a change of status would have been granted or not. So, you know, they can still argue their case, as it were, in front of an immigration judge.”⁴⁴⁰

This is not true. If an individual is out of status, they cannot change status, and the immigration judge does not have the authority to grant or change status. If an application to change status “would have been granted,” it makes little sense because if it was granted in the past, and if they are not in status now, it does not affect their situation one way or another; it only matters that they are presently out of status, except in some limited cases where an individual can apply for reinstatement of status, and it is INS or U.S. CIS that does the reinstatement. The immigration judge only takes that under advisement and can only terminate proceedings. However, once an individual is in removal proceedings, even if they are married to a U.S. citizen or have some other claim to relief, there is only very limited relief available. Many have no choice but to leave the United States.

Reinstatement to student status has certain criteria, takes months, and generally, U.S. CIS has not been approving them. Professor Kobach also failed to articulate the fact that such a large number of Arab and Muslim detainees are not getting “due process” because deportation is not considered a punishment, and immigration violations are not considered criminal. And if the individual has no relief to seek, he or she can only be deported.

terropl.shtml?searchpagefrom=3&searchdiff=1608.

Contrary to popular perceptions, most terrorist attacks against American targets do not emanate from the Middle East or South Asia. Of the 169 specifically anti-American attacks on foreign soil in 1999, 96 were in Latin America, 30 were in Western Europe—many of these committed by groups opposed to the war in Kosovo—nine in the countries of the former Soviet Union and 16 in Africa. Only 11 were in the Middle East, and only six in Asia. The proportions have been similar at least since 1996.

Id.; see also Isabel Hilton, *Terror as Usual*, THE GUARDIAN, Sept. 23, 2003 (noting that “Colombia has the world’s highest rate of kidnapping”), available at <http://www.guardian.co.uk/colombia/story/0,11502,1047759,00.html>.

439. Kobach Briefing, *supra* note 313.

440. *Id.*

The other issue, which marks a perhaps inaccurate view of immigration law, is that if an alien is arrested and put into proceedings before an immigration judge, an individual could still ask for any available relief. This is incorrect. The fact that an individual is placed into “proceedings” bars most forms of relief or prevents the alien from obtaining immigration benefits except for voluntary departure.

Another falsehood by Professor Kobach is the fact that these immigration violations are not “minor.” Professor Kobach was asked by an audience member how serious these alleged “minor” immigration violations were. Professor Kobach, with mild attempt at humor, made the comparison of tax evasion, which, he noted, eventually took out Al Capone. This is a biased and unrealistic comparison. I believe Professor Cole explained on a PBS program dealing with his new book, *Enemy Aliens*, that everyone knew that Al Capone was a crook and was involved in the mafia, murder, and extortion and he had full due process protection. However, we do not know that all or even some Arabs and Muslims are crooks; rather, the vast majorities are innocent of any minor or serious crime. We do not know Arabs and Muslims are per se guilty of murder, extortion, and terrorist activity. So, to target them with the same comparison is incredulous.

VI. THE FALLACY OF DISCRIMINATING ON THE BASIS OF RACE, ETHNICITY, OR RELIGION

A. *Historical Failure of Discrimination in Protecting National Security*

Racial profiling, it has been argued,⁴⁴¹ is ineffective,⁴⁴² morally⁴⁴³ and

441. See generally DAVID A. HARRIS, PROFILES IN INJUSTICE: WHY RACIAL PROFILING CANNOT WORK ix (2002) (chronicling stories of African Americans and Latinos, who were subjected to racial profiling).

442. See *id.* at 13.

[N]ew data now offer an irrefutable statistical argument against the practice [of racial profiling]. Despite the widespread belief that racial profiling, reprehensible though it may be, is an effective and efficient way of catching criminals—a “rational” approach to law enforcement—newly collected information about “hit rates” gives the lie to this assumption Data emerging from studies done over the last few years demonstrate conclusively that hit rates—the rates at which police actually find contraband on people they stop—run contrary to long-held “commonsense” beliefs about the effectiveness of racial profiling. The rate at which officers uncover contraband in stops and searches is *not* higher for blacks than for whites, as most people believe. Contrary to what “rational” law enforcement justification for racial profiling would predict, *the hit rate for drugs and weapons in police searches of African Americans is the same as or lower*

legally⁴⁴⁴ wrong, and it damages the relationships between law enforcement officers “and the communities they serve.”⁴⁴⁵

“National” profiling has not worked in the past in the United States, particularly in the case of the Japanese, Germans, and Italians. It is not working now with Arabs and Muslims. The Justice Department has put forward the argument that because of National Security Entry-Exit Registration System (NSEERS), they have arrested potential criminals and terrorists. However, as Professor Cole has pointed out, they have only one who has been charged with crimes related to September 11th.⁴⁴⁶ He also argues that the other criminals and alleged terrorists would have been detected without NSEERS. Moreover, the Justice Department still has not even reviewed the results of its interviews to determine if they have been helpful.

To date, none of these acts or policies have unearthed any link to terrorism,⁴⁴⁷ and the individuals detained or deported typically had only minor visa violations, although they were treated as if they were presumed

than the rate for whites. Comparing Latinos and whites yields even more surprising results. Police catch criminals among Latinos at *far lower rates* than among whites. These results hold true in studies done in New York, Maryland, New Jersey, and other places. We see the same results in data collected by the U.S. Customs Service, concerning the searches it does of people entering the country at airports: the hit rate is lower for blacks than it is for whites, and the hit rate for Latinos is still lower.

Id.

443. *See id.* at 12. “Taken at face value, we could say that racial profiling is morally and ethically wrong. It is clearly unconscionable to treat an individual as a criminal suspect simply because of a small number of individuals from the same racial or ethnic group are criminals.” *Id.*

444. *See id.*

[I]n a society dedicated to equal justice under law, such a practice also undermines our commitment to individual civil rights. Enforcing the law on the basis of racial and ethnic calculations therefore also offends the Constitution. All Americans are guaranteed “the equal protection of the law”; there are few values closer to the core of our political culture. Enforcing the law in a racially or ethnically biased way violates this central principle.

Id.

445. *See id.*

Racial profiling also damages the relationship between police departments and the communities they serve. . . . [P]rofilng, which treats all citizens of particular racial and ethnic groups as potential criminals, can do nothing but alienate these same citizens from their police. It breaks down the trust that must be at the heart of any true partnership, and it threatens to defeat community policing’s best efforts to fight crime and disorder. Racial profiling reinforces the preexisting fissures of race in our society.

Id.

446. *See generally* sources cited *supra* note 118.

447. Mark et al., *Secret Detentions*, *supra* note 12, at 13.

to be guilty of terrorism.⁴⁴⁸ Profiling by religion or ethnicity, or even nationality, as the government claims, is counterproductive,⁴⁴⁹ and it alienates and antagonizes⁴⁵⁰ Arab and Muslim communities.⁴⁵¹ Profiling simply does not work⁴⁵² and is a failed law enforcement tool,⁴⁵³ even noted as such by law enforcement agencies.⁴⁵⁴ The 9/11 panel in April 2004 criticized the immigration policies⁴⁵⁵ and “concluded that immigration

448. See Human Rights Watch, *Presumption of Guilt*, *supra* note 73, at 3.

By February 2002, the Department of Justice acknowledged that most of the persons detained in the course of the September 11 investigation and charged with immigration violations . . . were of no interest to its anti-terrorist efforts. As of July 2002, none of the “special interest” detainees had been indicted for terrorist activity; most had been deported for visa violations. Nevertheless, their histories of arrest, interrogation, and detention reflected the department’s unwarranted presumption of their guilt.

Id.

449. See Mark et al., *Secret Detentions*, *supra* note 12, at 11. “The use of racial and religious profiling as a national security weapon has been tried before. It was unsuccessful during World War II—none of the interned U.S. residents of Japanese ancestry were ever charged with sabotage or espionage—and it is just as likely to be unsuccessful now.” *Id.*

450. See *id.* (“These measures have not only failed to improve our national security, but have antagonized the very immigrant communities who are in the best position to assist the government in rooting out terrorism.”).

451. See James Vicini, *Protests at Plan to Fingerprint Foreign Visitors*, THE INDEPENDENT, June 6, 2002, available at <http://news.independent.co.uk/world/americas/story.jsp?story=302574>.

“Congressman John Conyers . . . denounced the system as employing racial and ethnic profiling. ‘Rather than helping to protect our citizens, these registration rules will only serve to further alienate the American Muslim community and our Muslim allies abroad, two crucial allies in our fight against terrorism,’ he said.” *Id.*

452. See Mark et al., *Secret Detentions*, *supra* note 12, at 14 (“Profiling . . . casts too wide a net, lulls us into a false sense of security by making facile assumptions about our enemies, alienates entire communities of people who could be great sources of intelligence, and erodes our civil liberties and our constitutional principles.”). See generally Sharon L. Davies, *Profiling Terror*, 1 OHIO ST. J. CRIM. L. 45, 52 (2003) (criticizing and discussing the views of legal scholars who advocate ethnic and religious profiling of Arabs and Muslims).

453. Cf. Mariano-Florentino Cuéllar, *Choosing Anti-Terror Targets by National Origin and Race*, 6 HARV. LATINO L. REV. 9, 10 (2003) (“[P]rofilng is just one example of a pervasive problem in anti-terrorism policy: law enforcement policies appear to be shaped more by political demands . . . rather than by a sustained, reasoned inquiry into whether such policies actually *are* useful.”).

454. See Kendrick, *supra* note 98, at 992.

While on the surface it may seem logical to focus on Middle Eastern men, or those who are devout Muslims, studies show that racial profiling is not a valid technique, nor has it been proven effective. In fact, the opposite is true. Studies show that racial profiling does not help apprehend criminals, and actually worsens relationships between the police and the community they serve.

Id. (footnotes omitted).

455. The utility of racial profiling in U.S. customs has been studied. See Victor C. Romero, *Proxies for Loyalty in Constitutional Immigration Law: Citizenship and Race after September 11*, 52 DEPAUL L. REV. 871, 880 (2003) (“[A] General Accounting Office report of U.S. Customs Service procedures in 1997 and 1998 revealed that customs officers were less effective when they relied on race and gender profiles in conducting searches for contraband than when they did not . . .”).

policies promoted as essential to keeping the country safe from future attacks have been largely ineffective, producing little, if any, information leading to the identification or apprehension of terrorists.”⁴⁵⁶ It was reported that Justice Department officials “‘made little attempt to distinguish’ between immigrants who had ties to terrorism and those who did not.”⁴⁵⁷ The *New York Times* reported that:

Perhaps the most controversial of the programs was one that sought to identify “special interest” immigrants, which resulted in the arrests of more than 700 people, most from Middle Eastern countries, who were charged with violating immigration laws and held for months, in many cases, until federal agents cleared them of any involvement in terror-related activities.⁴⁵⁸

Discrimination based on nationality or other characteristics is what brutal, human rights abusing regimes do, including those of the alleged “axis of evil”⁴⁵⁹ countries including Iraq,⁴⁶⁰ Iran,⁴⁶¹ and North Korea, not to

456. Janofsky, *supra* note 321, at A8.

457. *Id.*

458. *Id.* The *Times* quoted Kate Martin, director of the Center for National Security Studies: “Hundreds of people’s rights were violated, and, very importantly, the United States is now seen around the world as a country where Arabs and Muslims can be arrested in secret and held without charges. That’s a very dangerous development in terms of a country promoting democracy and human rights as an antidote to terrorism.”

Id.

459. Syria has been one country that recently appeared to teeter on the U.S. axis of evil list. See Bureau of Democracy, Human Rights, and Labor, U.S. Dep’t of State, Country Reports on Human Rights Practices 2002, Syria § 1d (2003), available at <http://www.state.gov/g/drl/rls/hrrpt/2002/18289.htm>.

Arbitrary arrest and detention were significant problems. . . . [I]n cases involving political or national security offenses, arrests often were carried out in secret. Suspects may be detained incommunicado for prolonged periods without charge or trial and are denied the right to a judicial determination regarding the pretrial detention. Some of these practices were prohibited by the state of emergency, but the authorities were not held to these strictures. Additionally, those suspected of political or national security offenses may be arrested and prosecuted under ambiguous and broad articles of the Penal Code All were initially held incommunicado and in solitary confinement, though the criminal court trials and initial sessions of one of the other trials were open to the press and diplomats.

Id.

460. See Bureau of Democracy, Human Rights, and Labor, U.S. Dep’t of State, Country Reports on Human Rights Practices 2002, Iraq § 1f (2003), available at <http://www.state.gov/g/drl/rls/hrrpt/2002/18277.htm>. “The regime frequently infringed on citizens’ constitutional right to privacy, particularly in cases allegedly involving national security. The law defined security offenses so broadly that authorities effectively were exempt from the legal requirement to obtain search warrants, and searches without warrants were commonplace.” *Id.* The report further provided that:

mention an entire host of other countries in the world that are known human rights violators who we are now mimicking in our treatment of Arabs and Muslims. Discriminatory and persecutory actions by governments, similar to what the U.S. government is doing, are notorious and common actions taken by governments all over the world. Often, the most brutal regimes and notable human rights regimes, particularly U.S. allies and other super powers, such as China⁴⁶² and Russia,⁴⁶³ claim to act in the manner they do because of issues of “national security.” This is exactly what is now

Shi'a groups reported numerous instances of religious scholars being subjected to arrest, assault, and harassment in the past several years, particularly in the internationally renowned Shi'a academic center of Najaf. In 2000 AI reported that the regime deported systematically tens of thousands of Shi'a (both Arabs and Kurds) to Iran in the late 1970s and early 1980s, on the basis that they were of Persian descent.

Id. § 2c. “Citizens considered by the regime to be of Iranian origin must carry special identification and often were precluded from desirable employment. Over the years, the regime deported hundreds of thousands of citizens of Iranian origin.” *Id.* § 5.

461. See Bureau of Democracy, Human Rights, and Labor, U.S. Dep't of State, Country Reports on Human Rights Practices 2002, Iran § 1e (2003) (“Trials in the Revolutionary Courts, in which crimes against national security and other principal offenses are heard, were notorious for their disregard of international standards of fairness.”), available at <http://www.state.gov/g/drl/rls/hrrpt/2002/18276.htm>.

462. See Bureau of Democracy, Human Rights, and Labor, U.S. Dep't of State, Country Reports on Human Rights Practices 2002, China (includes Tibet, Hong Kong, and Macau) § 2a (2003), available at <http://www.state.gov/g/drl/rls/hrrpt/2002/18239.htm>.

The Basic Law's Article 23 requires that the Government enact legislation prohibiting treason, secession, sedition, subversion against the Central People's Government, and theft of state secrets, and to criminalize links with foreign political organizations that are harmful to national security. . . . Article 23 could restrict fundamental rights and freedoms. Of particular concern were the proposed extension of treason, sedition, secession, and subversion criminal offenses to permanent residents, without regard to nationality or legal domicile; the proposal to ban organizations affiliated with mainland political organizations that have been banned by the PRC on national security grounds; . . . new uncertainty about the parameters of “unlawful disclosure” of state secrets; and other proposals perceived as potentially limiting freedom of speech and press.

Id.

463. See Bureau of Democracy, Human Rights, and Labor, U.S. Dep't of State, Country Reports on Human Rights Practices 2002, Russia § 5 (2003), available at <http://www.state.gov/g/drl/rls/hrrpt/2002/18388.htm>.

The Constitution prohibits discrimination on the basis of nationality; however, Roma and persons from the Caucasus and Central Asia faced widespread governmental and societal discrimination

New federal and local measures to combat crime were disproportionately applied against persons appearing to be from the Caucasus and Central Asia. Police reportedly beat, harassed, and demanded bribes from persons with dark skin, or who appeared to be from the Caucasus, Central Asia, or Africa. Law enforcement authorities also targeted such persons for deportation from urban centers.

Id.

occurring with the genocide in Sudan; the Arab militias, the Junjaweed, are targeting, discriminating, persecuting, and killing black African Suffi Muslims belonging to certain tribes because it is suspected that rebels come from these tribes. It is the same with Russia, Iraq, China, or even the United States targeting Arabs and Muslims. Nations never attack ethnic or religious groups per se; it is always because “rebels” are suspected within these groups.

B. Alienation of Arab and Muslim Communities

Additionally, the United States is often seen as a role model in the area of human rights, but as Amnesty International has pointed out, the United States is setting a bad example for other nations.⁴⁶⁴ The American Immigration Law Foundation (AILF) also pointed out that:

A growing number of foreign policy experts are voicing concern that certain restrictive policies toward noncitizens implemented by the U.S. government in the aftermath of the 9/11 terrorist attacks may be causing long-term damage to U.S. foreign policy goals [because] some policies—in particular the special registration requirements imposed on nonimmigrants from predominantly Muslim countries—have cast a net too wide to effectively enhance security, while promoting a perception that Muslims and Arabs are no longer welcome in the United States.⁴⁶⁵

AILF noted that “[t]he idea that you stigmatize whole classes of people and profile them because you think this is going to prevent the next terrorist attack is exactly the wrong way [to go about it].”⁴⁶⁶

AILF also stated that Special Registration and similar policies, while having little or no success in finding terrorists or curbing terrorist attacks, have caused great distress for Muslim visitors: “massive decrease[s] in the number of foreign students from Muslim states, scores of foreign faculty being unavailable to teach courses, scientific research projects becoming

464. Press Release, Amnesty International, United States of America: The Threat of a Bad Example (Aug. 19, 2003), available at <http://web.amnesty.org/library/print/ENGAMR511182003>. “The very core of American history, law and culture condemns the ideas of punishment before trial, denial of due process and secret government by fiat. . . . Who is an enemy combatant . . . can be anyone the president wants. And that is terrifying.” *Id.* (quoting a former judge on the Superior Court of New Jersey).

465. AILF Immigration Policy Center, *supra* note 431, at 24.

466. *Id.* at 26 (quoting Vincent Cannistraro, former Director of Counterterrorism Operations and Analysis of the CIA) (second alteration in original).

delayed or derailed, and businesses moving trade elsewhere.”⁴⁶⁷ AILF also detailed more criticism by other sources and discussed in detail these harmful effects on specific projects and issues.⁴⁶⁸

C. Deportation Can Be a War Crime, and the Irony is that Discrimination Based on Nationality, Social Group, and Religion Can Be a Basis for Seeking Asylum

It is interesting to represent clients in asylum cases who claim persecution in other countries because of their immutable characteristics especially when I fear persecution along those same lines from the U.S. government for my family, my clients, and myself. I have come to know fairly well one very important section of the U.N. Refugee Convention, which is incorporated into U.S. law that defines an asylee or refugee as a person who:

[O]wing to well-founded fear of being persecuted for reasons of race, *religion, nationality*, membership of a *particular social group* or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or . . . is unable or, owing to such fear, is unwilling to return to it.⁴⁶⁹

The refugee convention here is referring to a government’s treatment of its own nationals or citizens, not typically migrants or aliens. However, this passage is important to show that we should give pause if there is discrimination or persecution along these same lines.

The difficulty is that the U.S. Supreme Court does not consider “deportation” or immigration violations to be “crimes,” and thus are beyond the reach of the U.S. Constitution on the issue of punishment as it relates to detainment and the abuses associated with that for immigration violations.⁴⁷⁰ However, deportation has been considered to be an age-old

467. *Id.* (quoting the results of an October 2002 survey by the Association of American Universities).

468. *Id.* at 24–27.

469. Protocol Relating to the Status of Refugees, Jan. 31, 1967, art. 1, 19 U.S.T. 6223, 6225, 602 U.N.T.S. 267, 268 (incorporating by reference Convention Relating to the Status of Refugees, July 28, 1951, art. 1(A)(2), 19 U.S.T. 6259, 6261, 189 U.N.T.S. 150, 152–53 (emphasis added)).

470. Of course, as cited elsewhere, there are other arguments under the Constitution. *See, e.g., Saito, supra* note 55, at 32.

The Bush administration’s post-September 11 policies for screening and tracking visitors to the U.S., and interrogating, detaining, and deporting noncitizen residents are explicitly based on national origin, race, religion, gender,

tactic to persecute our fellow man. *Black's Law Dictionary* defines “crime against humanity” as the following and “deportation” is included in it:

A brutal crime that is not an isolated incident but that involves large and systematic actions, often cloaked with official authority, and that shocks the conscience of humankind. Among the specific crimes that fall within this category are . . . deportation, and other inhumane acts perpetrated against a population, whether in wartime or not.⁴⁷¹

Another well known law dictionary also defines “crime against humanity” similarly:

[I]nhumane conduct committed as part of a widespread or systematic attack directed against a civilian population
 . . . Crimes against humanity constitute one of the three general categories of WAR CRIME. Conduct that may constitute a crime against humanity includes . . . deportation, imprisonment, torture . . . and PERSECUTION on political, racial, religious, or similar grounds.⁴⁷²

The truth be told, states always go after their migrant population in times of “war” or crisis. And deportation is the age-old tool of repression. It seldom works, ends up hurting a country’s own citizens, and states usually regret it. I wonder if Professor Kobach could state, considering the legal and factual history of discrimination based on nationality, an instance in history where it worked?

When war begins, the deportations begin.⁴⁷³ When war begins, refugees are made.⁴⁷⁴ Migrants suffer. When war begins, the ethnicities⁴⁷⁵

and age. . . . [T]hese practices violate both the Constitution’s guarantee of equal protection and the prohibitions on discrimination based on race, religion, and national origin found in international law.

Id.

471. BLACK’S LAW DICTIONARY 378 (7th ed. 1999).

472. RANDOM HOUSE WEBSTER’S DICTIONARY OF THE LAW 118 (2000).

473. *See, e.g.*, ALEKSANDR M. NEKRICH, THE PUNISHED PEOPLES: THE DEPORTATION AND FATE OF SOVIET MINORITIES AT THE END OF THE SECOND WORLD WAR 9 (George Saunders trans., 1978) (noting that the Soviets deported “Volga Germans . . . Kalmyks, Karachai, Chechens, Ingush, Crimean Tatars, and Balkars”); CONSTANTINE M. PANUNZIO, THE DEPORTATION CASES OF 1919–1920 5 (photo. reprint 1970) (1921) (discussing the deportation of European immigrants during World War I); LOUIS F. POST, THE DEPORTATIONS DELIRIUM OF NINETEEN-TWENTY: A PERSONAL NARRATIVE OF AN HISTORIC OFFICIAL EXPERIENCE vii (photo. reprint 1970) (1923) (describing deportations from the United States during World War I as a “delirious outburst in the United States against resident aliens”).

474. *See, e.g.*, ROBERTA COHEN & FRANCIS M. DENG, MASSES IN FLIGHT: THE GLOBAL CRISIS OF INTERNAL DISPLACEMENT 19 (1998).

and nationalities of a state's own citizens and, particularly, noncitizens are subject to discrimination and persecution. We search for enemies within. We always look to the same place. We always do the same things.⁴⁷⁶

When times are good, the economy is hot, and peace has taken hold, immigrants are viewed as treasures of the state and are afforded more rights.⁴⁷⁷ This is particularly the case in nations that have high levels of immigrants and allow "foreigners" to enter with "ease," such as the United States, Australia, and Canada, all of which could actually be considered "immigrant nations."⁴⁷⁸ All of these nations are very successful, no doubt, due to the efforts of their "alien" populations who were responsible for creating these relatively new nations at the expense of the indigenous populations. However, during times of war and/or when the economy goes sour, it is again the immigrants to blame.⁴⁷⁹

Many of the major instances of internal displacement during the 1970s and 1980s took place in regions and states that were the locus of cold war proxy wars: Ethiopia and Somalia in the late 1970s; and Afghanistan, Angola, Mozambique, El Salvador, and Guatemala in the 1980s.

....
Millions were also displaced in the struggle in Afghanistan between Soviet invaders and the Afghan resistance armed by the United States and others.

Id.

475. See *id.* at 22 (noting that deportations and refugee exoduses are based primarily along lines of ethnicity).

476. To add an old cliché of analogies to the Roman Empire and famous philosophers, it was true that the Roman Empire was a visible sector of the history of a powerful nation that dealt similarly with its immigrants. Niccolò Machiavelli described the views, if not of the Romans, at least of an Italian philosopher during the fourteenth and fifteenth centuries in his book, *Discourses on Livy*, in a chapter actually entitled "Rome Became a Great City through Ruining the Surrounding Cities and Easily Admitting Foreigners to Its Honors." NICCOLÒ MACHIAVELLI, *DISCOURSES ON LIVY* 133 (Harvey C. Mansfield & Nathan Tarcov trans., Univ. Chicago Press 1996) (1517). Machiavelli writes:

By love through keeping the ways open and secure for foreigners who plan to come to inhabit it so that everyone may inhabit it willingly; by force through undoing the neighboring cities and sending their inhabitants to inhabit your city. . . . Thus this mode of proceeding, together with the others that will be said below, made Rome great and very powerful.

Id. at 134–35.

477. For a discussion on whether both emigration and immigration are both human rights issues and whether the claims of outsiders are always superceded by national sovereignty and a state's own citizens, see Myron Weiner, *Ethics, National Sovereignty and the Control of Immigration*, INT'L MIGRATION REV., Mar. 22, 1996, at 1, available at 1996 WL 13348033. For an excellent in-depth discussion on intellectual thought on emigration and immigration according to Islam, see Sami A. Aldeeb Abu-Sahlieh, *The Islamic Conception of Migration*, INT'L MIGRATION REV., Mar. 22, 1996, at 1, available at 1996 WL 13348024.

478. Ty S. Twibell, *Immigrant Nations: A Comparison of the Immigration Law of Australia and the United States*, 19 U. TASMANIA. L. REV. 57, 57 (2000).

479. Machiavelli also blamed the "foreigners" for the demise of the Roman Empire because of their voting habits. Machiavelli explained:

Because of the liberality that the Romans practiced in giving citizenship to

VII. SPECIAL REGISTRATION PAVES THE ROAD TO INTERNMENT FOR
ARABS AND MUSLIMS

A. *Special Registration and Census Data Utilized as Tracking System of
Arabs and Muslims*

The discussion of the tracking system is simple: the U.S. government takes biographical and personal data about Arab and Muslim males and keeps track of them. It takes their fingerprints, electronic photographs, and even their credit card and personal telephone numbers. They must check in or notify the government when they move from town to town and take an additional hour before leaving the United States. Then after arriving in the United States, as Professor Kobach noted, if the government ever needs to contact them, it knows where to look, and if immigrants do not show up at their scheduled time, the government will come looking for them.

Thus, if the U.S. government, Justice Department, or the Department of Homeland Security (DHS) ever decided to intern Arab and Muslim male or female aliens, and even their citizen spouses and children, it could do so efficiently.⁴⁸⁰ Tracking and taking Arab-Americans would prove more

foreigners, so many new men were born in Rome that they began to have so much share in the votes that the government began to vary, and it departed from the things and from the men with which it was accustomed to go.

MACHIAVELLI, *supra* note 476, at 309 (footnote omitted). However, Quintus Fabius tried to put a stop to this, as Machiavelli continues: “When Quintus Fabius, who was censor, perceived this, he put all these new men from whom this disorder derived under four tribes, so that by being shut in such small spaces they could not corrupt all Rome.” *Id.* at 309–10.

480. *Cf.* Filler, *supra* note 26, at 347–48.

[E]merging rhetoric tying terrorism to pedophilia . . . sets the groundwork for more oppressive detention of Muslims at some future date [and if there is another attack involving American Muslims] it seems unlikely that Americans would fully endorse any remedy as draconian as widespread detention of Muslims on religious grounds alone. To support such a move, Americans would be forced to renounce core civil rights values. Yet the developing rhetorical links between Islam, terrorism, and pedophilia may help those who promote such policies in the future.

Id. (footnote omitted).

There is some evidence that the DHS is using data acquired from Special Registration to target Arabs and Muslims who registered. The American-Arab Anti-Discrimination Committee (ADC) filed a FOIA request to determine the “nationality breakdown” of a recent arrest of 230 detainees in which it is feared that NSEERS data was used to facilitate the arrests, “resulting in a disproportionate impact on” the Arab and Muslim-American communities. Letter from Hon. Mary Rose Oakar, President, American-Arab Anti-Discrimination Committee, to Michael J. Garcia, Assistant Secretary, U.S. Immigration and Customs Enforcement, U.S. Dep’t of Homeland Security (Dec. 14, 2004), available at <http://www.adc.org/Doc/ADCtoICE.doc>. The DHS refused to release the data and the ADC appealed. Letter from Hon. Mary Rose Oakar, President, and Kareem W. Shora, Director, Legal Policy, American-Arab Anti-Discrimination Committee, to Privacy Office, U.S. Dep’t of Homeland Security

complicated, as it did in the case of the Japanese. Perhaps they could center in on heavily Arab or Muslim populated states or urban population centers, and if there is a legitimate fear of the possibility of interning U.S. citizens or U.S. permanent residents with Arab or Muslim characteristics, how would the government be able to track them? Professor Cole has argued that a level of internment of Arabs and Muslims akin to the Japanese is unlikely given how they are spread throughout the United States. However, it was uncovered, in August 2004, that in August 2002 and December 2003 DHS requested detailed tabulated data on the location of Arabs throughout the United States.⁴⁸¹ Groups have voiced concern that not since World War II, when the U.S. government requested data on those with Japanese ancestry, has the government been known to take such an action, and they have cited such request as a breach of public trust.⁴⁸² One set of data listed cities where 1,000 or more Arabs were living and others had a breakdown of Arabs by zip code.⁴⁸³ The information regarding DHS's requests for locating Arabs in the United States was only found out by a civil rights organization's Freedom of Information Act (FOIA) request.⁴⁸⁴

Now some questions come to mind: has DHS or the Immigration and Naturalization Service (INS) ever planned for such an operation since the Japanese internment, or has it just started after September 11th? What evidence is there for such a plan?

(Mar. 3, 2005), available at <http://www.adc.org/Doc/ADCtoFOIA.doc>.

481. Lynette Clemetson, *Homeland Security Given Data on Arab-Americans*, N.Y. TIMES, July 30, 2004, at A14 ("The tabulations were produced in August 2002 and December 2003 in response to requests from what is now the Customs and Border Protection division of the Department of Homeland Security."). DHS said the information was to be used to help airports post signs in Arabic, educate travelers, or that they were not aware of who or why such requests were being made and that it would be investigated and would not happen again. See Press Release, U.S. Customs and Border Protection, U.S. Customs and Border Protection Statement on Census Data (Aug. 13, 2004) (detailing that the requested information was not released and subsequently deleted), available at http://www.adc.org/PDF/Census_Data.pdf. Rights groups were not satisfied with these explanations and have continued to request additional explanation on why DHS requested such detailed data on Arabs.

482. See Clemetson, *supra* note 481, at A14.

The Census Bureau has provided specially tabulated population statistics on Arab-Americans to the Department of Homeland Security, including detailed information on how many people of Arab backgrounds live in certain ZIP codes.

. . . civil liberties groups . . . say it is a dangerous breach of public trust and liken it to the Census Bureau's compilation of similar information about Japanese-Americans during World War II.

Id.

483. See *id.* "One set listed cities with more than 1,000 Arab-Americans. The second, far more detailed, provided ZIP-code-level breakdowns of Arab-American populations, sorted by country of origin. The categories provided were Egyptian, Iraqi, Jordanian, Lebanese, Moroccan, Palestinian, Syrian and two general categories, 'Arab/Arabic' and 'Other Arab.'" *Id.*

484. See *id.* (explaining that the Electronic Privacy Information Center, a public interest group that focuses on civil liberties, found out about the Census Bureau's data sharing on Arab-Americans).

*B. INS Contingency Plan for Interning Arabs and Muslims Prior to
September 11th*

As Professors Susan Akram and David Cole were involved in the defense and litigation of the LA 8⁴⁸⁵ cases in 1987 and subsequent years, a document was leaked that yielded something quite dark and frightening and could be a telltale sign of what may be happening to Arabs and Muslims since 9/11.⁴⁸⁶ The thirty-one page memorandum they obtained was entitled *Alien Terrorists and Undesirables: A Contingency Plan* (1986).⁴⁸⁷ The plan described a phased process of first “registering”⁴⁸⁸ Arab aliens and utilizing a variety of immigration legal strategies⁴⁸⁹ to arrest and detain aliens from eight Arab countries.⁴⁹⁰ The memo envisioned the process to begin with the detention of a few hundred Arabs to over 1,000.⁴⁹¹ Once the

485. See Susan M. Akram, *Scheherezade Meets Kafka: Two Dozen Sordid Tales of Ideological Exclusion*, 14 GEO. IMMIGR. L.J. 51, 73 & n.129 (1999) [hereinafter Akram, *Scheherezade Meets Kafka*]. “LA 8’ is the acronym for a series of cases involving the seven Palestinians and one Kenyan arrested and placed in deportation proceedings in 1987. The litigation has continued for twelve years.” *Id.*

486. See *id.* at 94 (discussing government plans to hold aliens in a detention facility in Oakdale, Louisiana); COLE, ENEMY ALIENS, *supra* note 118, at 102 (referring to the strategies contained in the INS contingency plan).

487. See Akram, *Scheherezade Meets Kafka*, *supra* note 485, at 94. “Among the plans of the Border Control Committee was an INS-created strategy called ‘Alien Terrorists and Undesirables: A Contingency Plan.’ This thirty-one page memorandum . . . only came to light as part of the LA 8 litigation . . .” *Id.* (footnote omitted) (Memorandum on file with Professor Akram.); see also Lisa Belkin, *Interviews by FBI Raise Furor Arab-Americans Say They’re Being Harassed*, L.A. DAILY NEWS, Jan. 13, 1991, at N1 (“[T]he FBI and the Immigration and Naturalization Service had drawn up a contingency plan to quarantine Arab-Americans at a camp in Oakdale, La., in the event of war with certain Arab states.”).

488. See Akram, *Scheherezade Meets Kafka*, *supra* note 485, at 94 n.244 (“These plans clearly envision a phased process of registration, detention, and removal of aliens from specified countries.”). Akram also states that:

[The Alien] Border Control Committee [which prepared the Contingency Plan], an interagency task force comprising members of the FBI, CIA and Department of State, considered a number of different proposals to carry out its mission, including one to implement a “registry and processing procedure” to keep information on aliens in the United States.

Id. at 93.

489. See *id.* at 94 (“[The Alien Terrorists and Undesirables: A Contingency Plan] suggests use of the McCarran-Walter Act to apprehend and detain aliens from designated countries . . .”); see also COLE, ENEMY ALIENS, *supra* note 118, at 102 (“[O]fficials considered an INS ‘Contingency Plan,’ which, among other things, called for the use of immigration law to intern ‘alien terrorists’ and ‘alien activists’ in a federal detention center in Oakdale, Louisiana.”).

490. See Akram, *Scheherezade Meets Kafka*, *supra* note 485, at 94 n.245 (“Nationals of the following designated countries were to be rounded up and apprehended: Algeria, Libya, Tunisia, Iran, Jordan, Syria, Morocco and Lebanon.”).

491. See *id.* at 94 n.244. “The first phase contemplates apprehending 200 to 500 aliens and detaining them in INS holding facilities. The second phase contemplates INS detaining between 500 to

detention of Arabs exceeded 1,000, a relocation camp or detention facility in Oakdale, Louisiana was to be built to house them.⁴⁹² It is not known what the capacity for the camp in Louisiana would be or to what scale of Arab internment was envisioned. Professor Cole stated that over 5,000 aliens, many or mostly Arab or Muslim, have been detained.⁴⁹³

There is some evidence, that either this plan or something like it has taken place.⁴⁹⁴ First, Special Registration, or National Security Entry-Exit Registration System (NSEERS) registration, is similar to the registration envisioned in this memo. Second, the utilization of immigration strategies to arrest and detain aliens has been implemented. Third, even congressional leaders have complained to DHS that the level of detainment of Arabs and Muslims from Special Registration is beginning to resemble the internment of Japanese, Germans, and Italians.⁴⁹⁵ Fourth, the aliens required to register come from the eight countries mentioned in the memo and, moreover, possess Arab and/or Muslim characteristics. Fifth, although the camps envisioned in the contingency plan were never built, the new, large detention facility in Oakdale, Louisiana was constructed, perhaps to take their place. There have been recent news reports suggesting that Muslim detainees who were eventually deported came from the facility.⁴⁹⁶ And Sixth, prominent attorneys, such as Akram⁴⁹⁷ and Cole,⁴⁹⁸ as well as other critics⁴⁹⁹ already had the suspicion that Arabs and Muslims have been

1000 aliens in the isolated facility at Oakdale, Louisiana.” *Id.* (citation omitted).

492. *See id.* at 94 & n.244. “The memo . . . proposes . . . detaining aliens apprehended . . . in the large, newly-constructed INS detention facility in Oakdale, Louisiana. The third phase, in the event over 1000 aliens were to be apprehended, would require detention of aliens in military barracks and in tent facilities on 100 acres of land in Louisiana.” *Id.*

493. Cole, *Priority of Morality*, *supra* note 2, at 1753.

494. *See* COLE, ENEMY ALIENS, *supra* note 118, at 102 (“When the ‘Contingency Plan’ was leaked, the government quickly backed away from it, insisting that it was merely a ‘thought experiment.’”).

495. *See* Congressional Letter to Attorney General Ashcroft, *supra* note 347, at 3–4. “Our nation still bears the scars of an earlier crisis when our government went too far by detaining Japanese, German, and Italian Americans based on their race, ethnicity, or national origin. We should not repeat these painful mistakes.” *Id.*

496. *See* *Chartered Flight Fetches 70 Pakistani Detainees from USA*, PAK. TIMES, Aug. 27, 2004 (stating that “[a]n earlier report from Washington said that the special flight with the Pakistani immigration detainees left Louisiana”), at <http://www.pakistantimes.net/2004/08/27/top5.htm>.

497. *See* Akram, *Scheherezade Meets Kafka*, *supra* note 485, at 73 (“The LA 8 and Rafeedie cases are the predecessors of the current secret evidence cases, in which the INS seems to be pursuing a selective strategy against Muslims and Arabs residing in this country.”) (footnotes omitted).

498. *See* COLE, ENEMY ALIENS, *supra* note 118, at 47–56 (comparing the ethnic profiling of Muslims with past instances of governmental profiling).

499. *See* Akram, *Scheherezade Meets Kafka*, *supra* note 485, at 94.

Many critics have pointed out that the United States has discriminated against Arabs in applying the terrorist exclusion provisions of the INA. Palestinians are the only group ever prosecuted for their activities under the current provisions of

targeted, particularly in the years following 1986, in a manner akin to McCarthyism.⁵⁰⁰

C. The Dark Precedent of Racism and Continued Discrimination of Ethnic Minorities

The culture of discrimination⁵⁰¹ against Arabs⁵⁰² and Muslims has culminated over the past few decades.⁵⁰³ Certainly, the government's racist treatment of this group is lesser, and societal violence or condemnation is lesser, than it was against the Japanese, Italians, and Germans in the first two world wars. However, we essentially did the same thing to Iraqi aliens by silently detaining them in large numbers. The U.S. government's targeting of Arabs and Muslims represents the largest targeting based on association since the singling out of communist sympathizers during the McCarthy Era.

There have been many prominent government leaders, including Attorney General Ashcroft, as mentioned in the outset of this article, who have either made a racist remark or espoused a belief on Arabs or Muslims⁵⁰⁴ that affects or explains the policy of the U.S. government or

terrorist exclusion laws. During the Gulf War crisis, government officials fingerprinted and photographed all entrants of Arab origin—and only Arabs—regardless of past activities or evidence that they actually intended to engage in terrorism.

Id. (footnotes omitted); *see also* Saito, *supra* note 55, at 37 (“Since the late 1980s, the INS has attempted to remove persons of Arab or Middle Eastern descent on the basis of secret evidence, despite the efforts of some federal district courts and courts of appeal to curb the practice.”).

500. *See* COLE, ENEMY ALIENS, *supra* note 118, at 105–16, 129–58 (discussing the extensive similarities between McCarthyism and the current treatment of Arabs); Akram, *Scheherezade Meets Kafka*, *supra* note 485, at 62 (same).

501. *Cf.* Eric Treene, Symposium Critique, 19 J.L. & RELIGION 89, 89–90 (2003–2004) (describing the outreach to the Arab and Muslim community by the U.S. government and its efforts in curbing hate crimes against Muslim and similar communities).

502. *See, e.g.*, EDWARD W. SAID, CULTURE AND IMPERIALISM 36 (1993).

Perceptions and political attitudes molded and manipulated by the media were significant here. In the West, representations of the Arab world ever since the 1967 War have been crude, reductionist, coarsely racist, as much critical literature in Europe and the United States has ascertained and verified. Yet films and television shows portraying Arabs as sleazy “camel-jockeys,” terrorists, and offensively wealthy “sheikhs” pour forth anyway.

Id.

503. Akram & Johnson, *Race, Civil Rights, and Immigration Law*, *supra* note 16, at 302. “Since at least the 1970s, U.S. laws and policies have been founded on the assumption that Arab and Muslim noncitizens are potential terrorists and have targeted them for special treatment under the law. The post-September 11 targeting of Muslims and Arabs is simply the latest chapter in this history.” *Id.* (footnotes omitted).

504. John Ashcroft is known to be a very devout Christian. The perception of Islam in Christian

supports some form of internment for Arabs or Muslims, not to mention the fact that popular political commentators, religious leaders, and the general public support either greater monitoring of Arabs and Muslims or some level of internment.⁵⁰⁵ These are very dangerous signs because they demonstrate that notable segments of U.S. society, especially coupled with another terrorist attack by a group such as Al-Qa'ida, could live with and support the notion of interning Arabs and Muslims.

The Mexican experience shows us how easy de facto discrimination can occur, including ethnic or national profiling of Mexicans and targeting of innocents from an apparently benign or nonracist strict border enforcement policy. The Japanese and German experiences illustrate how preexisting racist tendencies can be provoked by terror or war attacks, such as the bombing of Pearl Harbor and the sinking of the *Lusitania*.

1. The Japanese Experience

The Japanese internment⁵⁰⁶ did not occur in a vacuum. It occurred in an environment of governmental and societal prejudice. For example, the Immigration Restriction Act of 1924 prevented Japanese from becoming citizens, while “expos[ing] them to the accusation that as non-citizens they were poorly assimilated into American society.”⁵⁰⁷

Japanese Americans formed tightly knit, self-sufficient communities within a society filled with anti-Asian sentiment, inherited from the Chinese who settled in America before them. When Japan bombed Pearl Harbor on December 7, 1941, their lives changed dramatically. The ensuing war years in which more than 120,000 Japanese Americans were interned in camps

thought throughout the centuries has been studied and flawed in many respects:

Violence had a double significance in the relations of Islam and Christendom: force was used by Islam and against it. The theoretical justification of crusading warfare is related to this problem. The use of force was almost universally considered to be a major and characteristic constituent of the Islamic religion, and an evident sign of its error. Christians took this view while at the same time enthusiastically embracing the almost identical doctrines of Crusade.

NORMAN DANIEL, *ISLAM AND THE WEST: THE MAKING OF AN IMAGE* 131 (Oneworld Publ'n 1993) (1960).

505. See Choudhury, *supra* note 59. “They found that 49% of the general population would support the increased surveillance of Arab Americans. . . . [O]ver 40% of the general population would support the detention of Arabs and Muslims without the evidence to prosecute them.” *Id.*

506. For a discussion of the Japanese internment and arguments that the internment's mistake was not so much presumed guilt, but the level of depravity of the internment, see Muller, *supra* note 30.

507. KENNEDY, *supra* note 3, at 749.

are forever embedded into the Japanese American community memory.⁵⁰⁸

Then, “[o]n February 19, 1942, under the guise of ‘military necessity,’ President Franklin D. Roosevelt signed Executive Order 9066, providing for the mass evacuation and incarceration of Japanese and Japanese Americans.”⁵⁰⁹ The internment was not only of Japanese aliens, but also U.S. citizens, approximately 120,000 persons in total. The Japanese were told that it was for their own protection: “Violence against the Japanese American community gave rise to a new rationale for total evacuation; the ‘it’s for their own protection’ argument joined the battery of reasons to incarcerate an entire ethnic group of people regardless of citizenship.”⁵¹⁰ The Japanese were accused of failing to become citizens and integrate into U.S. society; however, discriminatory laws at times forbade Japanese from ever becoming citizens at certain periods of time prior to World War II, even as far back as 1914—“the U.S. judicial system clearly acknowledged racial classification in determining citizenship status.”⁵¹¹

2. The German Experience

When a German submarine sank the *Lusitania* in 1915, “[n]o event in World War I stirred American emotions more profoundly.”⁵¹² “Nearly 1,200 persons, including 124 American citizens, lost their lives.”⁵¹³

508. WENDY NG, JAPANESE AMERICAN INTERNMENT DURING WORLD WAR II: A HISTORY AND REFERENCE GUIDE 1 (2002).

509. GESENSWAY & ROSEMAN, *supra* note 1, at 41.

510. *Id.* at 42.

511. NG, *supra* note 508, at 9.

One Issei who wanted to become a U.S. citizen was Takao Ozawa. . . . Ozawa latter settled in Hawaii, married, started a family, and worked for an American company. In 1914, he filed an application for U.S. citizenship. His application for citizenship was denied because the court declared that Ozawa was “in every way eminently qualified under the statutes to become an American citizen” except that he was not “white.” Ozawa decided to take his case to the U.S. Supreme Court. Here, he told the Court that he was a true American, that he made sure that his wife was educated in the United States, that he spoke English at home with his children, and that he did not have any connection with the Japanese government. He also stated that he was loyal to the United States and grateful for the opportunity the country had given him. In 1922, the Court handed down their decision. Ozawa was not entitled to naturalized citizenship simply because he was not Caucasian.

Id.

512. FREDERICK C. LUEBKE, BONDS OF LOYALTY: GERMAN-AMERICANS AND WORLD WAR I 131 (1974).

513. *Id.*

“Appalled by the destruction of civilian life, most Americans condemned the sinking as a revolting crime against humanity.”⁵¹⁴ Then German-Americans became targets.

Fear of war led some journalists to question the loyalty of German-American citizens. “Wild rumors circulated that several hundred thousand German-Americans living in the New York area intended to seize the city in the name of the Fatherland.”⁵¹⁵ Following was business discrimination towards German-Americans, a spate of articles, books, and tracts that raised anger towards German-Americans, particularly those who chose to use the hyphenated “German-American,” that was epitomized when Theodore Roosevelt mused:

No good American, whatever his ancestry or creed, can have any feeling except scorn and detestation for those professional German-Americans who seek to make the American President in effect a viceroy of the German Emperor. The professional German-Americans of this type are acting purely in the sinister interest of Germany. They have shown their eager readiness to sacrifice the interests of the United States whenever its interest conflicts with that of Germany. They represent that adherence to the politico-racial hyphen which is the badge and sign of moral treason.⁵¹⁶

Even President Wilson made public remarks that brought into question the loyalty of German-Americans.⁵¹⁷ Cartoons appeared in newspapers such as the *Chicago Daily News* that accused German-Americans of “bomb plots, intrigues, and conspiracies.”⁵¹⁸ Both political parties began rejecting the German-American vote,⁵¹⁹ just as today’s politicians try to reject the Muslim vote.⁵²⁰

Some of the most drastic measures were those that actually attacked the German language. Several states, such as Louisiana and Kentucky, actually prohibited “enemy languages”; their measures went so far as to prohibit German from being used in elementary and secondary schools. German

514. *Id.*

515. *Id.* at 134.

516. *Id.* at 174 (citing N.Y. TIMES, June 27, 1916).

517. *Id.* at 143.

518. *Id.* at 147.

519. *Id.* at 177.

520. *See, e.g.,* Akram & Johnson, *Race, Civil Rights, and Immigration Law*, *supra* note 16, at 310–11 (describing how Arabs and Muslims must undergo additional scrutiny than other ethnic or religious groups when they attempt to participate in the political process and their contributions are often rejected).

was even stifled in churches by many localities and states.⁵²¹

Laws against Germans, particularly German aliens, were pronounced and Germans then, like Arabs and Muslims today, were required to register:

German aliens were touched more directly by federal regulations. At the beginning of the war, the President had acted under the ancient Alien and Sedition Act of 1798 to restrict their activities. Later, as the spy hysteria intensified in the fall of 1917, *Wilson issued new orders requiring all German aliens fourteen years of age and older to register with the government.* On the assumption that all were potential enemy agents, they were barred from the vicinity of places deemed to have military importance, such as wharves, canals, and railroad depots. Moreover, they were expelled from the District of Columbia, required to get permission to travel within the country or to change their place of residence, and forbidden access to all ships and boats except public ferries. These regulations, necessary as some of them were, affected as many as 600,000 persons. The American Protective League was given the responsibility of screening all applicants for the required permits and over 200,000 were then investigated. Subsequently several thousand were interned in concentration camps as minor infractions of the rules were exaggerated into major offenses.⁵²²

German-Americans also suffered individual and private acts of discrimination and persecution, such as mob attacks. German houses and churches were burned down in mob attacks, as well as many other acts of terror, such as the burning of German books.⁵²³ For example, “[i]n dozens

521. See LUEBKE, *supra* note 512, at 251–52.

A score of articles advocating the abolition of German language in America appeared in periodicals with national circulation. Repression was repeatedly justified on the grounds that the German churches and schools, as well as the German-language press, were intent upon retarding the assimilation process, thereby making 100 percent Americanism impossible. Retention of the German language was described as the key to the Pan-German conspiracy. . . .

Dozens of cities, large and small, decided to remove German from the curricula of their school systems. State governments followed suit. . . .

The most drastic measure was enacted by the Louisiana legislature. It totally prohibited the use of the “enemy language” in the public and private elementary and secondary schools of the state. A similar bill was vetoed by Kentucky’s governor.

Id.

522. *Id.* at 255–56 (emphasis added) (footnotes omitted).

523. See, e.g., *id.* at 253 (“Perhaps the most frightening form which the war on language took was book burning.”); see also *id.* at 283–93 (discussing the difficulty of speaking or teaching German at churches).

of communities mobs disguised as volunteer patriotic organizations terrorized allegedly disloyal German-Americans. Placing themselves above the law, the gangs dragged suspects from their homes to be interrogated, threatened, beaten, or deported.”⁵²⁴

3. The Continuing Mexican Experience

A common and easy example that illustrates how discrimination, especially when coupled with migrants who may have darker skin or other noticeable ethnic characteristics, occurs when immigration laws are “enforced” is exemplified around the Mexican border. Large immigration enforcement operations have been documented to create institutional racial profiling that leads to illegal stops of U.S. citizens because they exhibit racial characteristics similar to targeted alien groups. Professor Harris documented one case where an immigration enforcement project in 1997, “Operation Rio Grande,” led to the repeated illegal stops of a district judge who was appointed by President Carter and who had the same racial characteristics, or appeared to belong to the same nationality of aliens, who were the target of Operation Rio Grande.⁵²⁵ DHS has again begun focusing

524. *Id.* at 281.

525. See HARRIS, *supra* note 441, at 4–6.

In 1997, the area around Brownsville became the focus of intense immigration enforcement. . . . The result was a strong, proactive Border Patrol presence, enough to affect almost everyone of Mexican descent.

During the summer of 1999, Judge [Filemon] Vela and three members of his staff drove to Laredo, one of the cities in south Texas where Judge Vela holds court on a regular basis. . . . A Border Patrol agent, who’d been sitting in a vehicle parked next to the side of the road, pulled them over. The agent asked Judge Vela and the others in the car about their citizenship. After they had answered, Judge Vela asked the agent why he had stopped the car. “He said he stopped us because there were too many people in the vehicle” Only then did Judge Vela tell the agent who he was; he also said that he felt that the agent did not have legal grounds to stop them. . . . Vela made a complaint to the officer’s superiors—not so much about the conduct of the particular officer involved but rather about the practices and policies that led him to make an unjustified stop. . . . It’s not at all surprising that Judge Vela’s complaint was taken seriously by the Border Patrol; he received assurances that Border Patrol agents would get more training and education to teach them to stop motorists only with a legal basis.

Almost exactly a year after his first encounter with the Border Patrol, Judge Vela was again on his way to Laredo to preside in court, driving on the same road, this time as the passenger of an assistant U.S. attorney. . . . [A] Border Patrol agent pulled the car over; again, Judge Vela—an American citizen, an attorney, and a federal judge—had to answer questions about his citizenship. Once again, Judge Vela asked the agent why the agent stopped them. The answer this time: the car had tinted windows. . . .

. . . Vela has taught American law and constitutionalism on behalf of the United

on the Mexican border,⁵²⁶ as well as the Canadian border, with increased powers to deport and without the opportunity for migrants to appear before an immigration judge.⁵²⁷

D. Unprecedented Targeting Based on Religion and Ethnicity: The Meaning of the Terms “Arab” and “Muslim”

As stated above, the registration and targeting of aliens in the United States since September 11th, or in the new “War on Terror,” is unprecedented and extraordinarily broad.⁵²⁸ The scope of targeting is broader than any time in U.S. history,⁵²⁹ and it is both de jure and de facto. In World War I and II, for example, it was Japanese,⁵³⁰ Germans, and Italians who were the nationalities targeted in both de jure via government targeting and de facto via governmental and societal targeting and discrimination.⁵³¹ The United States was officially at war with the governments of Japan, Italy, and Germany.

However, in this new “War,” the United States is not technically at war with any nation. Although we were initially at war, after 9/11, with the

States government to attorneys, judges, and other officials all over the world, particularly in Latin America, and he believes with all his heart that the United States and its Constitution are something special, something unique—something worth preserving. “But if you let these things happen, it will deteriorate.” He worries that something is badly out of balance. Another Hispanic judge in Brownsville, who has also experienced the Border Patrol’s tactics firsthand, puts it this way: “It feels like occupied territory. It does not feel like we’re in the United States of America.”

Id. (footnotes omitted).

526. See generally Kevin R. Johnson, *September 11 and Mexican Immigrants: Collateral Damage Comes Home*, 52 DEPAUL L. REV. 849, 850 (2003) (discussing the negative impact of September 11th immigration policies on Mexican migrants).

527. See Rachel L. Swarns, *U.S. to Give Border Patrol Agents the Power to Deport Illegal Aliens*, N.Y. TIMES, Aug. 11, 2004, at A1 (“Officials said that the new plan would help deter illegal immigration, speed deportations and address issues of border security.”); see also Press Release, U.S. Department of Homeland Security, DHS Announces Expanded Border Control Plans (Aug. 10, 2004) (detailing DHS plans to expand the expedited removal process, which “will allow DHS to speed the removal of illegal aliens who are caught while attempting to enter the United States by fraudulent means or while attempting to elude Customs and Border Protection (CBP) Border Patrol agents”), available at <http://www.dhs.gov/dhspublic/display?content=3930>.

528. See Akram & Johnson, *Race, Civil Rights, and Immigration Law*, *supra* note 16, at 337 (“[T]he scope of the investigation is broad and amorphous enough to potentially include all Arabs and Muslims, who may be natives of countries from around the world.”).

529. However, as discussed previously, some scholars believe that targeting Arabs and Muslims began at a smaller scale a few decades ago. See *supra* notes 485–92 and accompanying text.

530. The Japanese, being of a different “race,” were targeted much more substantially than the “white” Germans and Italians who never were restricted from being U.S. citizens and permanent residents because of their race. See *supra* notes 325–337 and accompanying text.

531. See *supra* Parts VII.A., VII.B., VII.C.

Taliban, then in control of Afghanistan, and later with Iraq when the Bush administration decided to invade Iraq to oust Saddam Hussein also as part of the “War,” the installed or occupied governments of Iraq and Afghanistan are now considered allies. We are not technically at war with the “Axis of Evil” countries. The vast majority of the Arab and Muslim countries on the Special Registration list are allies of the United States.⁵³² In addition, Al-Qa’ida is not part of any of these governments, and it is, in almost all cases, antithetical to the populations and governments of these countries.⁵³³ The only cohesive quality of these countries is religious and ethnic hegemony.

The de facto targeting of these countries is allegedly based on nationality,⁵³⁴ yet the de facto targeting and discrimination by the U.S. government is not only based on nationality, but also on religion and ethnicity.⁵³⁵ In either case, it is unprecedented and abysmally overbroad because it targets nationalities of countries that are U.S. allies in the War on Terror, where there is an even lower probability of any alleged suspicion between the *enemy aliens* and our enemies than even the Japanese, Italians, and Germans.

The terms “Arab” and “Muslim” are very broad. The term “Muslim” is easy enough to define: “Muslims” are subscribers to the religion of Islam.⁵³⁶ It is estimated that there are well over one billion Muslims in the world, or one-fifth of the world’s population.⁵³⁷ “Arab,” like the terms “Hispanic,” “Latino,” or “Anglo-American,” does not refer to any “race” or genetically similar group of people, but rather the term “Arab” refers more to an ethnic group as opposed to a nationality, religion, or race, which are social constructs.⁵³⁸ For many U.S. readers of this article, the diversity of the Latino and Anglo-American populations is reasonably expected to be better understood than Arab since the reader is likely be an Anglo-

532. *See supra* notes 160–63.

533. *See supra* notes 411–13.

534. *See supra* Part V.A.

535. *Id.*

536. For more information on Islam, see THE OXFORD DICTIONARY OF ISLAM (John L. Esposito, ed., 2003).

537. THE CAMBRIDGE ILLUSTRATED HISTORY OF THE ISLAMIC WORLD x (Francis Robinson ed., 1996).

538. *See* Akram & Johnson, *Race, Civil Rights, and Immigration Law*, *supra* note 16, at 303.

Defining race as a process in which racial difference is socially, not biologically, constructed assists in examining the treatment of Arabs and Muslims in the United States . . . Effectively recognizing that race is the product of social construction, the U.S. Supreme Court held that different groups may be racialized and that Arabs can be discriminated against as members of a different “race” in violation of the civil rights laws.

Id.

American or be aware of the diversity of Latinos because of their large presence and integration in the United States. Christians are also most likely to understand the large diversity in the Christian population. With that said, consider the following hypothetical: Instead of a group of Arab/Muslim hijackers, the hijackers were Anglo-American and came from countries such as New Zealand, Canada, and the United States, or they were Hispanic and came from Colombia, Ecuador, and Mexico, and they were all Christian. Would it make sense to target all Latinos and Hispanics? All Christians? Would it make sense to target all Anglo-Americans, from Canada to the United States or even Australia?⁵³⁹ Of course it would not, even if it was not allegedly based on Christianity or ethnicity, but nationality. This would especially not make sense if the governments of these countries were not involved and the group or groups that the Anglo-American or Hispanic hijackers were members of were antithetical to the religions and common belief systems of most of the country's inhabitants. However, because of Western societal attitudes towards Arabs and Muslims, it is easier to think that Arabs and Muslims lack "our" diversity and that they are suspect enough not only to be scrutinized closer but also to be treated differently, discriminated against, and persecuted.⁵⁴⁰ The misunderstanding between the West and Muslims⁵⁴¹ is age-old, including

539. Imagine after the terrorist bombing in Oklahoma that every Oklahoman was suspected and treated differently than other Americans. How efficient and logical would it be to investigate and keep track of every single Oklahoman? There are certain states in which Timothy McVeigh's group and American terrorist groups operate, but do we suspect everyone from Oklahoma or Michigan? Do we suspect every Irish man or woman or every man or woman from the United Kingdom, although the IRA is known to operate there? What about the IRA in Boston? Should everyone in Massachusetts be a suspect? Sure, study Oklahoma, maybe ask Oklahomans questions about what they know, but to spend huge amounts of time and resources, as well as propounding massive human rights violations against every ordinary Oklahoman would at the very least be unreasonable, and it would likely be criminal. *See* Stubbs, *supra* note 34, at 122–23 (comparing the difference between the terrorist attack involving Timothy McVeigh and 9/11).

[I]n contrast to the September 11 tragedy, following the 1995 bombing of the Murrah Federal Building in Oklahoma, governmental law enforcement personnel did not create a racial profile of individuals like Timothy McVeigh, and engage in widespread arrests of disgruntled white males who perceived themselves to have axes to grind with the American government.

Id.

540. *See generally* EDWARD W. SAID, *ORIENTALISM* 36 (1978) (examining Western conceptions of Eastern culture).

541. *Cf.* Akram & Johnson, *Race, Civil Rights, and Immigration Law*, *supra* note 16, at 340.

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

the notion of Islam as violent.⁵⁴² If there was ever Orientalism in the Occidental or Western Culture, the Special Registration system is the unfortunate epitome of this deeply rooted thinking of the “other.”⁵⁴³

In addition to the logistical mechanism that Special Registration creates for enabling the internment of Arab and Muslim aliens (and perhaps even Arab-Americans), it allows an infrastructure for the acceptance of Arabs and Muslims being treated differently. Internment of Arabs and Muslims could not occur simply by a military order or government policy because of our legal and cultural system, but could only take place if the culture, the press, and the political climate created pressure towards it or allowed it. Such was the case with the Japanese internment. Although there were many who were against it or found the government’s racist policies to be abhorrent, the internment was still allowed to take place. An example of this aversion to the Japanese internment is the resignation of Milton S. Eisenhower, the brother of Dwight D. Eisenhower, from the position of Director of the War Relocation Authority because he found the internment unconscionable; upon his resignation, he advised his successor “to take the job only if his conscience would allow him to sleep at night. His own, Eisenhower explained, did not.”⁵⁴⁴

Additionally, it is interesting that President Franklin Roosevelt stated that the racial and religious discrimination occurring during the internment was akin to Hitler’s policies; it happened because there was the threat of war and fear in the United States, and many racists advocated quarantining the Japanese. Roosevelt proclaimed:

Id. (footnote omitted).

542. For an excellent discussion on the misunderstandings of Islam by the West, see DANIEL, *supra* note 504. “The use of force was almost universally considered to be a major and characteristic constituent of the Islamic religion, and an evident sign of its error. Christians took this view while at the same time enthusiastically embracing the almost identical doctrines of Crusade.” *Id.* at 131. Some of this misunderstanding has been applied to Arabs as well. See NOAM CHOMSKY, 9-11, at 21 (2001).

Are Arabs, by definition, necessarily, the West’s new enemy? Certainly not.

First of all, no one with even a shred of rationality defines Arabs as “fundamentalist.” Secondly, the U.S. and the West generally have no objection to religions fundamentalism as such. The U.S., in fact, is one of the most extreme religious fundamentalist cultures in the world; not the state, but the popular culture.

Id.

543. See generally SAID, *supra* note 540, at 36 (“In the West, representations of the Arab world ever since the 1967 War have been crude, reductionist, [and] coarsely racialist”); Susan M. Akram, *Orientalism Revisited in Asylum and Refugee Claims*, in MORAL IMPERIALISM: A CRITICAL ANTHOLOGY 61 (Berta Esperanza Hernández-Truyol ed., 2002) (comparing the concept of Orientalism with Westerner’s current conceptions of Muslims and Arabs); Susan M. Akram, *Orientalism Revisited in Asylum and Refugee Claims*, 12 INT’L J. REFUGEE L. 7, 9–10 (2000) (discussing how “neo-orientalist stereotyping” of Islam by human rights advocates adversely affects asylum and refugee applicant cases).

544. KENNEDY, *supra* note 3, at 754.

“Remember the Nazi technique: ‘Pit race against race, religion against religion, prejudice against prejudice. Divide and conquer!’ We must not let that happen here We must be particularly vigilant against racial discrimination in any of its ugly forms. Hitler will try again to breed mistrust and suspicion between one individual and another, one group and another, one race and another.”⁵⁴⁵

E. The Current U.S. Supreme Court May be Weak Protection Against Internment

While there may not be governmental leaders today who would advocate the Japanese internment in toto, there are those who might agree with the acceptability of internment in principle. Further, while the U.S. Supreme Court strongly disagrees with the internment of citizens,⁵⁴⁶ it may entertain the concept of internment for aliens.

The American Immigration Law Foundation has noted that the current Chief Justice of the U.S. Supreme Court, William Rehnquist, has written that although the internment of U.S. citizens with Japanese ancestry was improper, the internment of Japanese aliens⁵⁴⁷ may not have been.⁵⁴⁸

Professor Cole has also noted Rehnquist’s opinion and how the Supreme Court could pave the road for violations of citizens’ liberties:

In the Chief Justice’s estimation, in other words, the error was not in making assumptions based on racial stereotypes, but in

545. *Id.* at 760.

546. See Muller, *supra* note 30, at 106–07. “*Korematsu* is a defunct decision. Eight of the nine currently sitting justices of the United States Supreme Court have called it a mistake. . . . Justice Scalia [called] *Korematsu* . . . not just a mistake, but a mistake on par with *Dred Scott*.” *Id.*

547. See *id.* at 117 (“Chief Justice Rehnquist . . . suggested that the internment would have been tolerable if it had burdened only aliens.”).

548. See Mark et al., *Secret Detentions*, *supra* note 12, at 17.

But can we trust the Supreme Court to uphold these lower court rulings? Chief Justice Rehnquist, in *All the Laws But One: Civil Liberties in Wartime*, suggests that while the internment of citizens of Japanese ancestry may not have been justified, the internment of Japanese immigrants may have been. He cites a little known law enacted in 1798, the Enemy Alien Act, which authorizes the President, during a declared war, to detain, expel, or otherwise restrict the freedom of any citizen 14 years or older of the country with which the United States is at war. While these are only the Chief Justice’s private reflections in a history book, and the war on terrorism remains an undeclared war, it is hoped that Chief Justice Rehnquist and his colleagues will follow a long line of judicial precedents after 1798 that have recognized the due process rights of non-citizens living in the United States.

Id.

making assumptions about *citizens* based on racial stereotypes.

In my view, the error is much more fundamental. The Japanese internment during World War II was not an isolated mistake that happened to harm 70,000 citizens, but an action fully in keeping with prevailing anti-Japanese popular sentiment that predated but was obviously exacerbated by the war. The error was to treat people as dangerous and to intern them not based on their individual conduct, but on the basis of their group identity. It was as wrong to apply that reasoning to aliens as it was to apply it to citizens. But more significantly, the fact that internment extended to citizens illustrates how anti-alien measures can pave the way for serious inroads on citizens' liberties as well.⁵⁴⁹

Perhaps it would only take the participation of one Arab-American or Muslim-American in a terrorist attack to include Arab and Muslim U.S. citizens into the realm of potential internees. Many scholars believe there is precedent⁵⁵⁰ for more extreme discrimination or even persecution of Arabs or Muslims in the United States.⁵⁵¹ Kennedy writes: "The release at the end of January of a government investigation of the Pearl Harbor attack proved the decisive blow. The report, prepared by Supreme Court Justice Owen J. Roberts, alleged without documentation that Hawaii-based espionage agents, including Japanese-American citizens, had abetted Nagumo's strike force."⁵⁵² And in haunting recantation of Professor Cole's discussion on

549. Cole, *Enemy Aliens*, *supra* note 21, at 993–94.

550. See Elbert Lin, Comment, *Korematsu Continued* . . . , 112 YALE L.J. 1911, 1911 (2003) ("*Dasrath v. Continental Airlines, Inc.* indicates there has been limited progress since the internment camps and the Supreme Court's validation of those internments in *Korematsu v. United States*.") (footnotes omitted).

551. See, e.g., Nathan Watanabe, *Internment, Civil Liberties, and a Nation in Crisis*, 13 S. CAL. INTERDISC. L.J. 167, 192 (2003). "The Internment Cases, *Hirabayashi* and *Korematsu* . . . still represent good law today and may have a profound effect on the authority government officials have in tackling the current terrorist crises. . . . [T]he Internment Cases now become available as dangerous precedents, permitting the racial targeting of suspect groups . . ." *Id.*; see also Natsu Taylor Saito, *The Enduring Effect of the Chinese Exclusion Cases: The "Plenary Power" Justification for On-Going Abuses of Human Rights*, 10 ASIAN L.J. 13, 35–36 (2003).

The plenary power doctrine was first articulated in the Chinese exclusion cases to allow the government to exclude a disfavored minority who were portrayed as outsiders by virtue of their race, ethnicity, national origin or culture

The law embodied in the Chinese exclusion cases is very much alive and well today.

When we see the plenary power of the government being asserted . . . [against] Muslim and Arab-American immigrants, . . . we have a responsibility to call into question the broader framework of American jurisprudence

Id.

552. KENNEDY, *supra* note 3, at 750–51.

the change in U.S. public opinion⁵⁵³ regarding racial profiling after September 11th,⁵⁵⁴ and the possibility of another terrorist attack that might even include an Arab or Muslim American, could very likely lead to the internment of Arab⁵⁵⁵ and Muslim aliens, or even citizens. Kennedy writes: “Two days later, DeWitte reported ‘a tremendous volume of public opinion now developing against the Japanese of all classes, that is aliens and non-aliens.’”⁵⁵⁶

553. See Kendrick, *supra* note 98, at 992.

Prior to September 11, 2001, the majority of Americans opposed law enforcement’s use of tactics that focused, not on suspicious behavior, but rather targeted persons based on race, ethnicity, or national origin. After the attacks on the World Trade Center Towers and the Pentagon, however, the majority of Americans were in support of law enforcement tactics that targeted persons based on race, ethnicity, or national origin.

Id. (footnotes omitted).

554. See Cole, *Enemy Aliens*, *supra* note 21, at 974–75.

After September 11, however, polls reported that nearly 60 percent of the American public favored ethnic profiling, at least as long as it was directed at Arabs and Muslims. . . . Stuart Taylor, a columnist for *Newsweek*, the *National Journal*, and *Legal Times*, who had previously been highly critical of racial profiling, wrote shortly after the attacks in favor of ethnic profiling of Arab men on airplanes.

Id. (footnotes omitted).

555. See ABUKHALIL, *supra* note 421, at 82. “According to a *USA Today* poll, approximately 49 percent of the population supports issuing special ID cards to citizens of Arab descent. The Governor of New Jersey bluntly asked the police in his state to be on the lookout for Arab looking men . . .” *Id.*

556. KENNEDY, *supra* note 3, at 751.

CONCLUSION: THE DAY OF EVACUATION

*My Mom, Pop, & me
 Us living three
 Dreaded the day
 When we rode away,
 Away to the land
 With lots of sand
 My mom, pop, & me.*

*The day of evacuation*⁵⁵⁷
*We left our little station
 Leaving our friends
 And my tree that bends
 Away to the land
 With lots of sand
 My mom, pop, & me.*⁵⁵⁸

557. See Muller, *supra* note 30, at 111–12.

“Evacuation” day brought the anxiety, confusion, and shame of forced and public displacement. Nobody really knew what conditions awaited them in their places of confinement. . . . The Denver Post of April 10, 1942, carried a story with the headline “Army Evacuates Jap Who Served 30 Years in the U.S. Navy.” Its first sentence captures the indignity of what the Nikkei endured:

[“]A 67-year-old Japanese who served thirty years in the United States navy and who protested vigorously, “I’m no Jap,” departed for the Santa Anita reception center Friday under military escort.[”]

Id.

558. Itsuko Taniguchi, *My Mom, Pop, and Me*, in GESENSWAY & ROSEMAN, *supra* note 1, at 91, 94.