PREVENTING THE NEW INTERNMENT: A SECURITY-SENSITIVE STANDARD FOR EQUAL PROTECTION CLAIMS IN THE POST-9/11 ERA

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I. INTRODUCTION

As intelligence assessments suggest that another major terrorist attack on U.S. soil is inevitable, speculation abounds as to whether the implementation of an emergency measure akin to the internment of Japanese-Americans during World War II could ever again occur. Certainly, another attack, potentially larger in scale than those executed on September 11, 2001, would require a reassessment of whether law enforcement has the tools necessary to prevent catastrophic terrorism. While another episode of mass internment may be improbable, a similar tactic of targeting individuals who share the attackers' ethnic and religious backgrounds seems likely, and many innocent individuals will likely be detained and forced to leave the country. How can we give the government the tools it needs to fight terrorism while preventing such an outcome? Can selective enforcement of immigration laws against certain communities be constitutionally and effectively used to prevent terrorism, or will such an approach undermine security?

As Professor Neal Katyal recently wrote, "Equality challenges have the potential to be the next big thing in the legal war on terror."[1] How much constitutional protection should non-citizens receive? Is it legal to strip away fundamental rights of persons living in the United States because they are out-of-status? Can they be detained indefinitely? These questions have received renewed attention in the post-9/11 era as law enforcement and the legislature seek to prevent further terrorism in America. The unfortunate reality, however, remains: under current law, those affected by disparate treatment face a number of legal obstacles in mounting Equal Protection challenges to discriminatory policies.

In 2002, Attorney General Ashcroft articulated the government's position on the use of racial profiling:

> This administration . . . has been opposed to racial profiling and has done more to indicate its opposition [to it] than ever in history. The President said it's wrong and we'll end it in America, and I subscribe to that. Using race . . . as a proxy for potential criminal behavior is unconstitutional, and it undermines law enforcement by undermining the confidence that people can have in law enforcement.[2]

Despite this policy, some charge that since September 11, enforcement of counter-terrorism measures has significantly impacted South Asian, Arab, and Muslim visitors and immigrants. While many of

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1. Neal Katyal, *Equality in the War on Terror*, 59 STAN. L. REV. 1365, 1368 (2007).

2. U.S. DEP'T OF JUSTICE FACT SHEET ON RACIAL PROFILING 4 (2003), http://www.usdoj.gov/opa/pr/2003/June/racial_profiling_fact_sheet.pdf [hereinafter DOJ Racial Profiling Fact Sheet].

these tactics have failed to yield terrorism prosecutions, they have resulted in a large number of deportations and other legal proceedings. Often those deported have minor, routine visa violations, and in some cases individuals have been deported pending legal adjustment of their status.

As speculation of "sleeper cells" abounds, finding a terrorist can be somewhat like trying to find a needle in a haystack. Rather than focusing resources on investigating specific links to potential terrorist activity, it is tempting to shrink the haystack by targeting large communities based on broad categorizations of ethnicity and religion. Although a policy of internment is unlikely, if another major terrorist attack occurs, pretextual arrests and deportation may become a strategy for targeting specific communities. A security-sensitive legal mechanism—one that appreciates the compelling need for law enforcement to be armed with all appropriate tools to prevent terrorism—must be in place to prevent such a strategy.

According to the Department of Justice (DOJ), "[U]se of race or ethnicity is permitted only when the federal officer is pursuing a specific lead concerning the identifying characteristics of persons involved in an *identified* criminal activity."[3] The DOJ defines a lead as follows: "The information must be relevant to the locality or time frame of the criminal activity; the information must be trustworthy; and, the information concerning identifying characteristics must be tied to a particular criminal incident, a particular criminal scheme, or a particular criminal organization."[4]

New York City Police Commissioner Raymond Kelly has argued, in fact, that racial profiling is "ineffective"[5] and has questioned the feasibility of finding terrorists based on racial profiles:

> If you look at the London bombings, you have three British citizens of Pakistani descent. You have Germaine Lindsay [the fourth London suicide bomber], who is Jamaican. You have the next crew [in London], on July 21st, who are East African. You have a Chechen woman in Moscow in early 2004 who blows herself up in the subway station. So whom do you profile? Look at New York City. Forty per cent of New Yorkers are born outside the country. Look at the diversity here. Who am I supposed to profile?[6]

Critics charge that some anti-terrorism initiatives have nevertheless utilized impermissible profiling by targeting individuals based primarily

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3. *See id.* at 1.
4. *Id.*
5. Malcolm Gladwell, *Troublemakers: What Pit Bulls Can Teach Us About Profiling*, The New Yorker, Feb. 6, 2006, at 34 (quoting NYPD Police Commissioner Raymond Kelly).
6. *Id.*

on their ethnic and religious backgrounds, rather than on information of potentially incriminating activity. In many instances where law enforcement has discovered violations of the law, allegedly through the use of profiling, members of certain communities have been disproportionately prosecuted. Some argue that this practice of selective prosecution has been particularly common in the area of immigration law, where the government made it a top priority to target Arab and Muslim Americans with visa violations after the September 11 attacks.

History has taught us that during national emergencies, we should be more, not less, vigilant against government targeting of groups based on race, ethnicity, and religion. The standard for demonstrating selective prosecution of particular groups, however, remains almost insurmountable in the immigration context. As a consequence, there is virtually no legal remedy for aggressive efforts to profile non-immigrant ethnic groups. In June 2006, U.S. District Judge John Gleeson upheld the ethnic profiling of non-citizens by rejecting a selective prosecution claim by hundreds of Arabs and Muslims detained following September 11.[7] He cited the Supreme Court's opinion in *Reno v. Arab-American Anti-Discrimination Committee*, which stated:

> The Executive should not have to disclose its "real" reasons for deeming nationals of a particular country a special threat—or indeed for simply wishing to antagonize a particular foreign country by focusing on that country's nationals—and even if it did disclose them a court would be ill equipped to determine their authenticity and utterly unable to assess their adequacy.[8]

Judge Gleeson's decision appears to justify indefinite detention or deportation of non-citizens targeted on the basis of their national origin. This rationale can be extended to an individual's ethnicity, race, or religious background. Given the punitive impact of detention and deportation on the individuals and families of those detained and deported, this article argues that courts should apply an intelligence-sensitive standard in the criminal context to evaluate selective prosecution claims. While still a high threshold, this standard will make it possible for clear cases of discrimination to proceed.

This article will proceed as follows: Part II will describe the impact of post-9/11 terrorism-related initiatives on South Asian, Arab, and Muslim Americans and briefly assess the security benefits that have accrued from their implementation. Part III will trace the evolution of the due process and equal protection rights of non-citizens in the United States and describe how courts have treated claims of selective

7. Turkmen v. Ashcroft, Nos. 02-CV2307(JG), 04-CV1809(JG) 2006 U.S. Dist. LEXIS 39170 (E.D.N.Y. June 14, 2006).

8. 525 U.S. 471, 491 (1999).

prosecution against these particular communities and in the immigration context generally. Part IV will argue that, while federal courts may be hesitant to find that targeting these communities meets the high threshold for showing special prosecution in the immigration context, they can apply a security-sensitive version of the standard used in criminal cases to prevent disclosure of the government's foreign policy objectives. Finally, Part V will describe the security benefits of restricting the use of selective enforcement and working with immigrant communities to combat terrorism.

II. ENFORCEMENT OF ANTITERRORISM INITIATIVES IN THE POST-9/11 ERA

This section will outline five anti-terrorism initiatives that have impacted South Asian, Arab, and Muslim communities: the general round-up of non-citizens after 9/11 (Operation PENTTBOM), the National Security Exit-Entry Registration System (NSEERS), the Absconder Apprehension Initiative (AAI), the closure of "special interest" immigration proceedings (Creppy Directive), and the voluntary interview program. Overlap exists between these initiatives; some have been impacted by a combination of these programs. It is unclear whether these strategies are rooted primarily in religious, ethnic, or racial profiling, but the targeting likely stems from a combination of these factors. Of the twenty-five nations that the government targeted under NSEERS, twenty-four have predominantly Muslim populations. Seventeen of these twenty-four are Arab nations: Algeria, Iraq, Libya, Bahrain, Egypt, Jordan, Kuwait, Lebanon, Morocco, Oman, Qatar, Saudi Arabia, Sudan, Syria, Tunisia, United Arab Emirates, and Yemen.[9]

Some policies appear to be based on the notion that certain characteristics make one more likely to be a terrorist: e.g., membership in a particular religious group, having a particular national origin, and membership in a particular racial group. Selective enforcement and discrimination based on any of these categories is unconstitutional,[10] and may, in fact, be counter-productive from a national security perspective. University of Chicago law professor Bernard Harcourt found, "There is no empirical evidence whatsoever, nor a solid theoretical reason why racial profiling would be an effective measure—rather than a counterproductive step resulting in detrimental substitutions and

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9. "Arab nation" refers here to primarily Arabic speaking.

10. *See* United States v. Batchelder, 442 U.S. 114, 125 n. 9 (1979) ("The *Equal Protection Clause* prohibits selective enforcement 'based upon an unjustifiable standard such as race, religion, or other arbitrary classification.'" (quoting Oyler v. Boles, 368 U.S. 448, 456 (1962))). *See infra* Section IV(B), outlining the criminal selective prosecution standard.

increased terrorist attacks."[11] He further stated, "Racial profiling as a defensive counterterrorism measure is suspect for precisely this reason: it may well encourage the recruitment of terrorists from outside the core profile and the substitution of other terrorist acts."[12] This article will examine the enforcement of antiterrorism policies implemented after September 11, 2001, and assess whether they effectively used profiling in identifying terrorists.

A. *Detentions Following the September 11 Attacks*

1. Policy Implementation

In the immediate aftermath of September 11, the federal government appropriately made the investigation of the terrorist attacks its top priority. Law enforcement officials sought connections between the nineteen suspected hijackers, all of either Saudi or Egyptian origin, and any potential terrorists in the United States and abroad. The DOJ's Federal Bureau of Investigation (FBI) took the leading role in this investigation, also known as the Pentagon/Twin Towers Bombing Investigation or PENTTBOM.[13] Attorney General Ashcroft announced that law enforcement officials were to arrest and detain any individuals who "have been identified as persons who participate in, or lend support to, terrorist activities," and that "[f]ederal law enforcement agencies and the United States Attorneys' Offices will use every available law enforcement tool to incapacitate these individuals and their organizations."[14] Ashcroft summarized the government's approach in an October 25, 2001 speech at the U.S. Conference of Mayors:

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

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11. Bernard E. Harcourt, *Muslim Profiles Post 9/11: Is Racial Profiling an Effective Counterterrorist Measure and Does it Violate the Right to Be Free From Discrimination?*, 4, 28 (U. Chi. Public Law and Theory Working Paper No. 123).

12. *Id.*

13. OFFICE OF THE INSPECTOR GENERAL, THE SEPTEMBER 11 DETAINEES: A REVIEW OF THE TREATMENT OF ALIENS HELD ON IMMIGRATION CHARGES IN CONNECTION WITH THE INVESTIGATION OF THE SEPTEMBER 11 ATTACKS 10 (April 2003), http://www.fas.org/irp/agency/doj/oig/detainees.pdf, [hereinafter OIG Report].

14. *Id.* at 12.

enhance security for America.[15]

Rather than pursuing links to terrorism and relying on concrete leads, however, critics argue that law enforcement in some instances rounded up individuals in the United States based on their ethnic and religious background.

While there is a tendency to suspect those who share ethnic and religious characteristics with the hijackers, some line must be drawn when casting a broad net. Would it, for example, be acceptable to detain all Arabs and Muslims between the ages of eighteen and thirty-five? Would it be acceptable, from a moral or security perspective, to assume that those outside both of these ethnic and religious parameters could not commit these or similar crimes? President Bush campaigned against the use of racial profiling in 2000. In 2002, Attorney General Ashcroft stated:

> This administration . . . has been opposed to racial profiling and has done more to indicate its opposition [to it] than ever in history. The President said it's wrong and we'll end it in America, and I subscribe to that. Using race . . . as a proxy for potential criminal behavior is unconstitutional, and it undermines law enforcement by undermining the confidence that people can have in law enforcement.[16]

When establishing a limit on the use of race and religion in targeting suspects, it seems reasonable to also require at least some evidence of potential criminal activity. Indeed, the DOJ's policy states that ethnicity and race should only be used in an investigation when a "specific lead [exists] concerning the identifying characteristics of persons involved in an *identified* criminal activity."[17] Yet in the aftermath of the September 11 attacks, hundreds of individuals seemed to have been targeted not on the basis of a specific lead, but on the basis of their ethnic and religious backgrounds.

2. Program Results: Impact on Immigrant Communities and Security Benefits

The government has provided some information on those it detained after September 11 and has not revealed the identities of the

15. *Id.*

16. *See* DOJ Racial Profiling Fact Sheet, *supra* note 2, at 1. The fact sheet also declares, "Racial profiling sends the dehumanizing message to our citizens that they are judged by the color of their skin and harms the criminal justice system by eviscerating the trust that is necessary if law enforcement is to effectively protect our communities," and that "[r]acial profiling is discrimination, and it taints the entire criminal justice system." *Id.*

17. *See id.* at 4.

detainees. Citing logistical difficulties, the DOJ stopped disclosing the number of detainees in November 2001.[18] Until that point, the government admitted to detaining 1,182 individuals.[19] According to a 2003 report by the Office of the Inspector General, 762 individuals remained in detention as of August 2002.[20] Of this group, one-third were Pakistani and 15% were Egyptian.[21] Eleven of the thirteen most-represented countries were predominantly Muslim.[22]

In many cases, critics charge that detention was based not on "trustworthy leads," but on information regarding an individual's ethnic and religious background. According to immigration scholar David Cole, "[T]hey were arrested and linked to the September 11 investigation for the flimsiest of reasons—because of an anonymous tip that 'too many' Muslims worked at a convenience store, or that a Muslim neighbor kept odd hours, or simply because investigators happened upon an Arab or Muslim immigrant in a place the investigators visited."[23]

The case of Brandon Mayfield, who was detained following the Madrid Subway attacks in 2004, provides an example of how religious background can be used as a primary rationale for detention. Mayfield, an Oregon lawyer and convert to Islam, was arrested shortly after the attack. After searching his home, authorities claimed to have collected evidence potentially linking him to the attack, including what the search warrant return report described as "Spanish documents."[24] The documents turned out to be Mayfield's children's Spanish homework.[25] Mayfield's detention appears to have been based more on the fact that he was a Muslim convert than on any evidence of criminal activity. The U.S government later apologized to Mayfield and reached a settlement awarding him two million dollars.[26]

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18. Amy Goldstein and Dan Eggen, *U.S. to Stop Issuing Detention Tallies*, WASH. POST, Nov. 9, 2001, at A16.

19. *Id.*

20. *See* OIG Report, *supra* note 13, at 2

21. *Id.* at 21.

22. *Id.*

23. DAVID COLE, ENEMY ALIENS: DOUBLE STANDARDS AND CONSTITUTIONAL FREEDOMS IN THE WAR ON TERRORISM 30 (2003).

24. Sarah Kershaw, *Spain and U.S. at Odds on Mistaken Terror Arrest*, N.Y. TIMES, June 5, 2004, at A3.

25. *Id.*

26. Dan Eggen, *U.S. Settles Suit Filed by Oregon Lawyer*, WASH. POST, Nov. 30, 2006, at A3.

B. *The National Security Entry-Exit Registration System*

1. Policy Implementation

On June 6, 2002 the DOJ announced the implementation of NSEERS.[27] NSEERS required non-immigrant males from selected countries, who entered and remained in the United States for thirty days or longer, to be interviewed, fingerprinted, and photographed.[28] The program, which was intended to serve as a precursor to an eventual comprehensive registration program, also required aliens to reregister each year and to notify an Immigration and Naturalization Service (INS) officer when changing addresses or leaving the United States.[29]

NSEERS reinitiated the registration requirement of section 263 of the 1952 Immigration and Nationality Act (INA),[30] a provision that went unenforced through the 1980s due to fiscal concerns.[31] Enforcement of the registration provision first resurfaced in 1991, after the Gulf War, when non-immigrants from Iraq and Kuwait were required to be registered and fingerprinted.[32] In 1993, the DOJ lifted the requirement,[33] but issued a rule stating that the Attorney General could require non-immigrants from certain countries to be registered and fingerprinted by the INS at their U.S. port of entry.[34] The same day, the Attorney General

27. Press Release, U.S. Dep't of Justice, National Security Entry-Exit Registration System: Strengthening our Entry-Exit Registration System to Protect Americans from Possible Terrorist Threats (June 5, 2002), http://www.usdoj.gov/archive/ag/speeches/2002/060502agpreparedremarks.htm.

28. *Id.* Registrants who remained in the country for longer than thirty days were required to report to an immigration office between their thirtieth and fortieth days in the country. Registrants who remained in the United States for longer than one year were required to report to an immigration office within ten days of the one-year anniversary of their entry. All registrants could enter and exit the country only through ports designated by the Department of Homeland Security. *See* U.S. Citizenship and Immigration Servs., Dep't of Homeland Sec., Special Registration Procedures for Visitors and Temporary Residents (Sept. 26, 2002), http://uscis.gov/graphics/shared/lawenfor/specialreg/srprocl.htm. The special registration requirements for new visitors continued for approximately six months, and the Department of Homeland Security ended the thirty-day and one-year re-registration requirements for those who registered during that seven-month period on December 1, 2003. Audrey Hudson, *Registration of Muslims, Arabs Halted*, WASH. TIMES, Dec. 2, 2003, at A01.

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

30. Immigration and Nationality Act of 1952 § 263(a), 8 U.S.C. § 1303(a) (2003).

31. Eric Schmitt, *U.S. Will Seek To Fingerprint Visa Holders*, N.Y. TIMES, June 5, 2002, at A1.

32. Registration and Fingerprinting of Certain Nonimmigrants Bearing Iraqi and Kuwaiti Travel Documents, 56 Fed. Reg. 1,566 (Jan. 16, 1991) (repealed 1993).

33. Addition of Provision for the Registration and Fingerprinting of Nonimmigrants Designated by the Attorney General; Removal of the Requirement for the Registration and Fingerprinting of Certain Nonimmigrants Bearing Iraqi and Kuwaiti Travel Documents, 58 Fed. Reg. 68,024 (Dec. 23, 1993) (codified at 8 C.F.R. pt. 264).

34. *Id.*

announced that non-immigrants from Iraq and Sudan were required to register.[35] Iran and Libya were added in 1996,[36] and two years later, the DOJ issued a rule requiring non-immigrants from these four nations to be photographed upon admission into the United States.[37]

A congressional mandate in the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001 instructed the DOJ to create an exit-entry tracking system of all non-immigrants.[38] Eight months after the passage of the USA PATRIOT Act, without consulting Congress, the DOJ issued a proposed rule instituting NSEERS.[39] The final rule mandated that, beginning on September 11, 2002, registration was required of (1) non-immigrants from countries specified in future Federal Register notices and (2) non-immigrants designated for "close monitoring" by either consular officers abroad or inspection officers at a U.S. port of entry.[40] The criteria used by these offices to determine which aliens required "close monitoring" were not published.

Over the following months, the DOJ added twenty-one countries to the registration list, all of which were Arab or Muslim, with the exception of North Korea.[41] Criticisms of the programs focused on two main contentions: first, NSEERS was not an effective means of preventing terrorism; and second, the program's use of ethnic and racial profiling was an unacceptable law enforcement tactic.[42]

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35. Requirement for the Registration and Fingerprinting of Certain Nonimmigrants Bearing Iraqi and Sudanese Travel Documents, 58 Fed. Reg. 68,157 (Dec. 23, 1993).

36. Requirement for the Registration and Fingerprinting of Certain Nonimmigrants Bearing Iranian and Libyan Travel Documents, 61 Fed. Reg. 46,829 (Sept. 5, 1996).

37. Requirement for Registration and Fingerprinting of Certain Nonimmigrants, 63 Fed. Reg. 39,109 (July 21, 1998).

38. USA PATRIOT Act of 2001, Pub. L. No. 107-56, 414, 115 Stat. 272, 353 (2001).

39. Registration and Monitoring of Certain Nonimmigrants, 67 Fed. Reg. 40,581 (proposed June 13, 2002) (to be codified at 8 C.F.R. pts. 214, 264).

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

41. The twenty-one countries added in those months, in addition to Iran, Iraq, Libya, and Sudan, are: Afghanistan, Algeria, Bahrain, Bangladesh, Egypt, Eritrea, Indonesia, Jordan, Kuwait, Lebanon, Morocco, North Korea, Oman, Qatar, Pakistan, Saudi Arabia, Somalia, Syria, Tunisia, the United Arab Emirates, and Yemen. Department of Homeland Security, Fact Sheet: Changes to National Security Entry/Exit Registration System (NSEERS), http://www.dhs.gov/xnews/releases/press_release_0305.shtm (last visited November 11, 2007).

42. *See, e.g.*, Press Release, American Immigration Lawyers Association, AILA Urges Repeal of Special Registration (Jan. 9, 2003), http://www.aila.org/contentViewer.aspx?bc=9,594,2220; Letter from Amnesty International, to Attorney General John Ashcroft (Jan. 10, 2003), http://www.amnestyusa.org/news/2003/usa01102003-3.html ("The special registration order applies only to immigrants from selected countries while similarly situated immigrants from other countries are not affected. . . . If people are being targeted and detained under this system, or singled out for harsh treatment, solely on grounds of their nationality or gender, this would appear to be in breach of

2. Program Results: Impact on Immigrant Communities and Security Benefits

NSEERS was based on voluntary registration, and it resulted in the arrest and deportation of many out-of-status visitors who appeared at INS offices to fulfill their registration requirements. In many cases, these visitors had applied for lawful residency and their applications were pending at the time of their arrests and subsequent deportation. In fact, according to the American Immigration Lawyers Association (AILA), "Some INS offices are detaining and deporting people who are technically out-of-status, often due to INS delays and inefficiencies."[43] AILA has also reported that some of those detained have approved employment authorization documents and are thus eligible to adjust their status under section 245(i).[44]

Many of those detained were also among the 640,000 individuals who had attempted to legalize their status under a pre-September 11 special visa program that required them to pay a $1,000 fine to remain in the country.[45] Others were awaiting review of pending asylum applications. In fact, on March 18, 2003, Department of Homeland Security Director Tom Ridge announced that asylum seekers from thirty-four nations, including all of the countries on the registration list, would be detained automatically.[46]

Even student visa holders, including those who fell one credit short of fulfilling their visa requirements, were detained.[47] A college student in Colorado was jailed for such a violation after dropping a course earlier in the semester with the college's permission.[48] Thus, the program targeted individuals who voluntarily registered with the government to acquire legal status, rather than terrorists or criminals unlikely to appear at INS offices.

Another major factor contributing to the arrest of registrants was confusion regarding registration deadlines and requirements. Under NSEERS, failing to register caused aliens to become out-of-status and

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the right to non-discrimination recognized under international law.").

43. Letter from AILA to President George W. Bush (Jan. 13, 2003), http://aila.org/content/default.aspx?docid=8123; *see also* Letter from Sens. Russ Feingold and Edward Kennedy and Rep. John Conyers to Attorney General John Ashcroft (Dec. 23, 2002) [hereinafter Feingold Letter], http://www.shusterman.com/spreg-122302.html.

44. Immigration and Nationality Act of 1952 § 245(i), 8 U.S.C. § 1255(i) (2003).

45. Matthew Barakat, *Immigrant Advocates: Program Is Catch-22*, Associated Press, Apr. 15, 2003, *available at* http://www.kansas.com/mld/kansas/news/5713688.htm.

46. Mark Engler & Saurav Sarkar, *Agency Should Halt U.S. Abuse of Immigrants*, NEWSDAY, Apr. 25, 2003, at A37.

47. *Id.*

48. Mark Engler & Saurav Sarkar, *Ashcroft's Roundup; John Ashcroft's Special Registration*, THE PROGRESSIVE, Mar. 1, 2003.

subject to possible deportation.[49] Thus, even legal aliens who missed their registration deadlines could be deported under the regulation. In a hearing before the House Judiciary Committee, the Director of the American Civil Liberties Union's (ACLU) Washington National Office argued that "[a] series of inadequately publicized deadlines for the registration of temporary residents resulted in mass confusion and arrests. Problems have included conflicting advice about who must register and widespread denials of the statutory and constitutional rights of registrants . . . ."[50] Thus, rather than solely targeting illegal immigrants or potential terrorists, the program, due to confusion over its mandates, has created an entirely new class of out-of-status aliens.

Once visitors registered with the INS, it was also unclear how the government used the information it obtained through the fingerprinting, photographing, and interviewing of registrants to fight terrorism. Some questioned whether the INS possessed the resources necessary to process all the information it collected through NSEERS.[51] The information requested of registering aliens and collected by individual INS offices around the country varied, and it was often handwritten on forms rather than entered automatically into a computer system.[52] Some INS offices collected information such as eye color, height, weight, and family history, while others collected more personal information such as bank account information, credit card information, and even affiliations with political, religious, or social groups on university campuses.[53] Because NSEERS guidelines did not explain how the information would be analyzed or used, it remains unclear if the data was ever processed and eventually incorporated into the intelligence infrastructure.

Media reports documented large numbers of arrests of voluntary registrants, mostly visitors from Arab and Muslim nations. In December 2002, between 500 and 700 visitors were arrested in Southern California, including one-fourth of all registrants at the INS office in Los Angeles.[54] According to the INS, many of those arrested had submitted status-

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49. Lillian Thomas & Bill Schackner, *Immigration Officials Draw Heat from All Sides*, PITTSBURGH POST-GAZETTE, June 21, 2003, at A1 (quoting Crystal Williams, Staff Attorney, American Immigration Lawyers Association).

50. *War on Terrorism: Immigration Enforcement: Hearing Before the Subcomm. on Immigration, Border Security and Claims, H. Comm. on the Judiciary*, 108th Cong. 79 (2003) (statement of Laura W. Murphy, Director, ACLU Washington National Office), *available at* http://commdocs.house.gov/committees/judiciary/hju86954.000/hju86954_0f.htm.

51. Christian Bourge, *Analysis: Immigration Policy Spurs Debate*, UPI, July 15, 2003 (quoting Roberto Suro, Director of the Pew Hispanic Center), UNITED PRESS INTERNATIONAL, July 14, 2003.

52. Jane Black, *At Justice, NSEERS Spells Data Chaos*, BUS. WK. ONLINE, May 2, 2003, *available at* http://www.businessweek.com/technology/content/may2003/tc2003052_6532_tc073.htm.

53. *Id.*

54. Meagan Garvey, *Hundreds Are Detained After Visits to INS*, L.A. TIMES, Dec. 19, 2002, Metro Desk, at 1.

adjustment applications that had not been processed.[55] Others had pending green card applications, some with INS interviews already scheduled.[56] Thus, in some cases, the INS's inefficiency in processing applications resulted in the deportation of aliens whose status might otherwise have been legalized. While some of these individuals may have been out-of-status, in non-NSEERS cases, such violations typically did not result in deportation.

The arrests in Los Angeles prompted a lawsuit by the American-Arab Anti-Discrimination Committee (ADC), the Alliance of Iranian Americans (AIA), and the Council on American Islamic Relations (CAIR) seeking to prevent the government from detaining registrants without arrest warrants and deporting visitors qualified to legalize their status.[57] The request for an injunction was rejected by the U.S. District Court for the Central District of California, which found that the INS had broad discretion in deporting out-of-status visitors and that a pending application did not confer the right to defer removal.[58]

According to the Department of Homeland Security, more than 82,000 men were registered through NSEERS.[59] None were charged with engaging in terrorist activities or being a part of a terrorist network.[60] Considering that the majority of those deported voluntarily submitted themselves for registration, the effectiveness of the policy as a security tool is questionable. Perhaps the lack of terrorism arrests should not be surprising: it is unlikely that those plotting to inflict harm on the country would submit themselves to law enforcement for fingerprinting.

Visitors from Arab and Muslim nations were disproportionately targeted by NSEERS. While they were required to register and were often deported, the INS did not appear to take an equally aggressive approach to seeking out and deporting out-of-status visitors from other nations. Subject to two small modifications,[61] a form of the NSEERS program continues to remain in effect and continues to target the same twenty-five countries. While it is now a part of the broader United States Visitor and Immigrant Status Indicator Technology (US-VISIT)

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55. *Id.*

56. *Id.*

57. David Rosenzweig, *Groups Sue over Arrests of Arab Men*, L.A. TIMES, Dec. 25, 2002, Metro Desk, at 3.

58. American-Arab Anti-Discrimination Comm. v. Ashcroft, 241 F. Supp. 2d 1111, 1113 (C.D. Cal. 2003).

59. Tom McCann, *Special Registration Shows Key Changes*, CHI. LAW., Aug. 2003, at 23 (citing Department of Homeland Security spokesperson Marilu Cabrera).

60. *Id.*; *see also* U.S. Immigration and Customs Enforcement, Fact Sheet: *Changes to the NSEERS Process* (Dec. 1, 2003), http://www.ice.gov/pi/news/factsheets/NSEERSFAQ120103.htm.

61. Non-citizens from the 25 NSEERS nations with re-registration deadlines on or after December 2, 2003, are no longer subject to the thirty-day and annual re-registration requirements. Students who notify the Student and Exchange Visitor Information System (SEVIS) of address changes are no longer required to also inform NSEERS.

program,[62] strict registration requirements remain in place for the twenty-five NSEERS nations governing registration at ports of entry, departure registration, and change of personal information. NSEERS registrants may still be called in for follow-up interviews, and their non-compliance still subjects them to deportation.[63]

C. *The Absconder Apprehension Initiative (AAI)*

1. Policy Implementation

In addition to registering and deporting visitors under NSEERS, in January 2002, the DOJ announced a program to apprehend aliens who remained in the country despite deportation orders.[64] The implementation of the program continued the departure from the norm of separating immigration and criminal law enforcement efforts.[65] Under the program, absconders' names were first entered into the National Crime Information Center (NCIC) Database by the INS. The absconders were then assigned to judicial districts and their files were transferred to the INS field offices in these districts.[66] Apprehension teams consisting of the INS, FBI, and in some cases, members of the Anti-Terrorism Task Force (ATTF) were assigned to apprehend and interview absconders and record the results from the interviews in the NCIC.[67] Finally, the absconders were prosecuted or deported.[68]

Under the policy, of the estimated 314,000 absconders in the United States, top priority was given to finding individuals from countries where al-Qaeda operates.[69] Despite the controversial overlapping of law enforcement and immigration responsibilities, the policy appeared to be a reasonable security tool designed to remove those defying immigration orders.

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62. *See* U.S. Department of Homeland Security, US-VISIT Program (Jul. 13, 2007), http://www.dhs.gov/xtrvlsec/programs/content_multi_image_0006.shtm, (Implementation of US-VISIT).

63. American Immigration Lawyers Association (AILA) & ACLU Immigrants' Rights Project, Special Registration Has NOT Ended—Many Requirements Continue, AILA InfoNet Doc. No. 03120441 (Dec. 4, 2003), http://aila.org/Content/default.aspx?docid=9725; 68 Fed. Reg. 67578.

64. Memorandum from Office of the Deputy Attorney Gen., Guidance for Absconder Apprehension Initiative (Jan. 25, 2002), http://fl1.findlaw.com/news.findlaw.com/hdocs/docs/doj/abscndr012502mem.pdf.

65. Karen C. Tumlin, *How Terrorism Policy is Reshaping Immigration Policy*, 92 CAL. L. REV. 1173. 1177–78 (2004).

66. *See* Guidance for Absconder Apprehension Initiative, *supra* note 64, at 1.

67. *Id.* at 1–2.

68. *Id.* at 2.

69. *Id.* at 1.

2. Program Results: Impact on Immigrant Communities and Security Benefits

Evidence collected regarding the program's implementation demonstrates that the program has been used not to target all nations where al-Qaeda operates, but to target a group of predominantly Islamic nations.[70] The DOJ has not released statistics regarding the nationalities of those deported. Anecdotal evidence and news reports, however, indicate that from among the forty-five countries that the State Department identified in 2001 as nations from which al-Qaeda operates,[71] the government has targeted approximately fourteen nations, thirteen of which have predominantly Muslim populations.[72] Despite the DOJ's concession that the vast majority of the 314,000 absconders are from Latin American countries, its first priority has been to target 6,000 aliens from predominantly Muslim nations[73] even though some experts argue that the largest terrorist threat to the United States currently comes from Europe.[74] The program does not appear to have been used against aliens from non-Muslim nations with active al-Qaeda presences such as England, France, Germany, or Spain.[75]

While exact figures are unknown, in the initial phase of AAI, approximately 1,100 foreign nationals were detained and deported.[76] None of those detained under the program, however, were charged with terrorism-related offenses. Like the hundreds of thousands of other absconders, they were either out-of-status or convicted of a non-terrorism related crime that subjected them to deportation.

70. *See* Kevin Lapp, *Pressing Public Necessity: The Unconstitutionality of the Absconder Apprehension Initiative*, 29 N.Y.U. REV. L. & SOC. CHANGE 573, 584 n.61 (2005).

71. U.S. Department of State, Countries Where al-Qaeda Has Operated, previously *available at* http://usinfo.state.gov/products/pubs/terrornet/12.htm (website no longer functional). Summary of page available at http://www.fred.net/tds/Osama_bin_Laden_and_al_Qaeda_2001nov10/.

72. Lapp, *supra* note 70, at 584–85.

73. *See* Dan Eggen, *Deportee Sweep Will Start With Mideast Focus*, WASH. POST, Feb. 8, 2002, at A01; Susan Sachs, *A Nation Challenged: Deportations; U.S. Begins Crackdown on Muslims Who Defy Orders to Leave Country*, N.Y. TIMES, Apr. 2, 2002, at A13.

74. Benedict Brogan, *UK Poses Biggest Terror Threat to America*, THE DAILY MAIL (London), Aug. 29, 2006 *available at* http://www.dailymail.co.uk/pages/live/articles/news/news.html?in_article_id=402771&in_page_id=1770.

75. *See* Lapp, *supra* note 70, at 584 n.62.

76. DAVID COLE, ENEMY ALIENS: DOUBLE STANDARDS AND CONSTITUTIONAL FREEDOMS IN

D. Closure of Special Interest Immigration Proceedings

1. Policy Implementation

Ten days after the terrorist attacks of September 11, 2001, at the direction of the DOJ, Chief Immigration Judge Michael Creppy issued a directive instructing U.S. immigration judges to close to the press and public all portions of those deportation hearings designated as requiring special procedures by the Attorney General.[77] The Creppy directive did not list the criteria for determining which hearings were to be closed. Instead, it instructed immigration judges that "if any of these cases are filed in your court, you will be notified by OCIJ [Office of the Chief Immigration Judge] that special procedures are to be implemented" and that "[a] more detailed set of instructions will be forwarded . . . to the judge handling the case."[78] Whether the criteria included any specific reference to race or ethnicity is unknown; however, the vast majority of the 762 special interest detainees were Arab-American or Muslim.[79]

To justify closing these immigration proceedings, Dale Watson, the FBI Assistant Director for Counterterrorism and Counterintelligence, set forth a "mosaic" theory of intelligence. Watson argued that even information that seems innocuous in isolation, such as the names of those detained, may be pieced together by terrorist networks to the detriment of U.S. security interests.[80] Watson stated that "the government cannot proceed to close hearings on a case-by-case basis, as the identification of certain cases for closure, and the introduction of evidence to support that closure, could itself expose critical information about which activities and patterns of behavior merit such closure."[81]

The very nature of the mosaic theory rendered it overbroad. As the

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THE WAR ON TERRORISM 25 (2003).

77. E-mail from Michael J. Creppy, Chief Immigration Judge, to All Immigration Judges and Court Administrators (Sept. 21, 2001), http://news.findlaw.com/hdocs/docs/aclu/creppy092101memo.pdf.

78. *Id.*

79. *See* THE COMMITTEE ON IMMIGRATION AND NATIONALITY LAW AND THE COMMITTEE ON COMMUNICATIONS AND MEDIA LAW, DANGEROUS DOCTRINE: THE ATTORNEY GENERAL'S UNFOUNDED CLAIM OF UNLIMITED AUTHORITY TO ARREST AND DEPORT ALIENS IN SECRET, (2005); Lauren Gilbert, *When Democracy Dies Behind Closed Doors: The First Amendment and "Special Interest" Hearings*, 55 RUTGERS L. REV. 741, 743–44 (2003); Jawad B. Muaddi, Comment, *The Alienable Elements of Citizenship: Can Market Reasoning Help Solve America's Immigration Puzzle?*, 56 EMORY L.J. 229, 247 (2006); Ty S. Wahab Twibell, *The Road to Internment: Special Registration and other Human Rights Violations of Arabs and Muslims in the United States*, 29 VT. L. REV. 407, 431 (2005).

80. New Jersey Media Group v. Ashcroft, 308 F.3d 198, 219 (3d Cir. 2002); *see also* Detroit Free Press v. Ashcroft, 195 F. Supp. 2d 937, 946–47 (E.D. Mich. 2002), *aff'd*, 303 F.3d 681 (6th Cir. 2002); Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice, 331 F.3d 918 (D.C. Cir. 2003), *cert. denied*, 540 U.S. 1104 (2004).

81. *New Jersey Media Group*, 308 F.3d at 219.

Sixth Circuit noted:

> The Creppy directive does not apply to "a small segment of particularly dangerous" information, but a broad, indiscriminate range of information, including information likely to be entirely innocuous. Similarly, no definable standards used to determine whether a case is of "special interest" have been articulated. Nothing in the Creppy directive counsels that it is limited to "a small segment of particularly dangerous individuals." In fact, the Government so much as argues that certain non-citizens known to have no links to terrorism will be designated "special interest" cases. Supposedly, closing a more targeted class would allow terrorists to draw inferences from which hearings are open and which are closed.[82]

The closure of immigration proceedings had a potentially negative impact on the outcome of the detainees' cases because the Creppy directive's "special interest" label biased judicial determinations in evaluating whether an individual was a threat to society. As Judge Edmunds of the Eastern District of Michigan noted, the "special interest" designation "taints the immigration judge's decision" and "inevitably suggests a link between [the detainee] and terrorists or terrorism or, more specifically, the attacks of September 11."[83] Thus, those without connections to terrorism may have been implicated erroneously by the nonreviewable "special interest" label. The designation was based solely on the discretion of the Attorney General and was applied based on evidence not disclosed to aliens, their attorneys, or the judges hearing their cases.[84] Thus, regardless of any vitiating evidence, the risk remained that the Attorney General's label would be ingrained in a judge's mind.

2. Program Results: Impact on Immigrant Communities and Security Benefits

Nearly all of the "special interest" proceedings resulted in deportations. Yet, from a security perspective, it remains unclear whether the policy was necessary or effective. The policy was not necessary to secure deportation, since the government need not present

82. *See Detroit Free Press*, 303 F.3d at 691–92.

83. Haddad v. Ashcroft, 221 F. Supp. 2d 799, 804 (E.D. Mich. 2002), *vacated*, 76 Fed. Appx. 672 (6th Cir. 2003) (unpublished decision).

84. *See Detroit Free Press*, 303 F.3d at 710 ("The task of designating a case special interest is performed in secret, without any established standards or procedures, and the process is, thus, not subject to any sort of review, either by another administrative entity or the courts. Therefore, no real safeguard on this exercise of authority exists.").

classified information to remove terrorists guilty of visa violations. Deportation proceedings only require the government to demonstrate violations of immigration law.[85] In at least one instance, the government conceded that it used no classified evidence in a special interest hearing.[86]

Furthermore, even if a large majority of the special interest cases involved detainees with terrorist ties, it remains unclear whether a blanket policy addressed concerns about the disclosure of intelligence and methods of investigation. First, it is possible for aliens to disclose their own identities. In fact, subsequent to his detention, at least one detainee spoke with his attorney, his family, and members of the press—and even had excerpts of a letter describing the conditions of his detention published in a Detroit newspaper.[87] In this respect, the Creppy directive was under-inclusive, because it failed to protect what the government considers sensitive information. The DOJ attempted to remedy this problem by issuing a rule prohibiting detainees from disclosing hearing-related information sealed under a court-issued protective order.[88] This rule fails, however, to prevent detainees, their family members, and their acquaintances from disclosing sensitive information in the form of the detainees' identities.[89] Furthermore, nothing prevents detainees from revealing this information after they are deported.[90]

Second, even if terrorists are unable to communicate with their cohorts, their failure to contact other terrorists might itself signal their capture. If, as the mosaic theory postulates, networks such as al-Qaeda were sophisticated enough to piece together bits of information to discern patterns of investigation, they likely would be capable of determining whether or not their operatives have been caught. The blanket closure policy for detainees is another example of selective prosecution against Arab and Muslim communities resulting in numerous deportations with little, if any, benefit to national security.

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85. *See id.* at 708.

86. *See* Press Release, U.S. Department of Justice, Statement of Associate Attorney General Jay Stephens Regarding the Sixth Circuit Decision in the Haddad Case (Apr. 19, 2002), http://www.usdoj.gov/opa/pr/2002/April/02_ag_238.htm (stating that no evidence was presented during closed hearings that threatened the safety of the American people).

87. *See Detroit Free Press*, 303 F.3d at 707.

88. *See* Protective Orders in Immigration Administrative Proceedings, 67 Fed. Reg. 36,799–800 (May 28, 2002) (codified at 8 C.F.R. §§ 1003.27, .31, .46 (2004)).

89. In a decision upholding the government's refusal to reveal information regarding post-September 11 detainees, Judge Sentelle of the D.C. Circuit recognized, "In sum, each of the [INS, criminal, and material witness] detainees has had access to counsel, access to the courts, and freedom to contact the press or the public at large." Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice, 331 F.3d 918, 922 (D.C. Cir. 2003), *cert. denied*, 124 S. Ct. 1041 (2004).

90. In discussing the DOJ rule, Judge Keith of the Sixth Circuit wrote, "At this juncture [the end of deportation proceedings], nothing precludes the deportee from disclosing . . . information [like his name or the date and place of his arrest]. Thus, the interim rule does not remedy the under-

E. *Voluntary Interviews of Arabs and Muslims*

1. Policy Implementation

Following the September 11 attacks, the DOJ invited Arab and Muslim men to voluntarily interview with the FBI. In the first phase of the "Responsible Cooperators"[91] program, the government sought to interview 4,800 men between the ages of eighteen and thirty-three who arrived in the United States after January 1, 2000, on temporary student, tourist, or business visas.[92] Attorney General Ashcroft announced that "the list was generated by taking a population of individuals and applying to that population a set of *generic parameters*. . . . These individuals were selected for interviews because they fit the criteria of persons who might have knowledge of foreign-based terrorists."[93]

According to a special agent in charge of Detroit's FBI office, the "lion's share" of the targeted 5,000 interviewees lived in the Detroit area, home of the largest Arab-American population in the United States.[94] He conceded that because the program targeted Arab men between the ages of eighteen and thirty-three, the program could be seen as a form of profiling.[95] Although the DOJ indicated that the interviews were voluntary and did not constitute criminal investigations, some of those who received invitations to interview felt pressured to cooperate, fearing denials of visa extensions or even deportation.[96]

Interviewees were asked about their knowledge and feelings about the events of September 11; their involvement in terrorism; whether they knew anybody involved in advocating, planning, supporting, or committing terrorist activities; whether they or anybody they knew has access to guns, explosives, or harmful chemical compounds; and whether they had any training in the development or use of such weapons.[97]

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inclusiveness of the Creppy directive." *Detroit Free Press*, 303 F.3d at 708.

91. John Ashcroft, Attorney General John Ashcroft Announces Responsible Cooperators Program (Nov. 29, 2001) (transcript available at http://www.usdoj.gov/ag/speeches/2001/agcrisisremarks11_29.htm).

92. Homeland Security: Justice Department's Project to Interview Aliens after September 11, 2001: GAO-03-459, April 2003, http://www.gao.gov/htext/d03459.html [hereinafter GAO Report].

93. Memorandum from Attorney Gen. John Ashcroft to United States Attorneys and Members of the Anti-Terrorism Task Forces (Nov. 9, 2001), http://www.usdoj.gov/dag/readingroom/terrorism1.htm (emphasis added) [hereinafter Interview Guidelines].

94. Jim Schaefer, *840 Face Antiterror Net Locally; Men with Mideast Ties to be Questioned*, DET. FREE PRESS, Nov. 15, 2001, at A1.

95. *Id.*

96. *Id.*

97. *See* Memorandum from Attorney Gen. John Ashcroft to United States Attorneys and Members of the Anti-Terrorism Task Forces (Nov. 9, 2001), http://www.usdoj.gov/dag/readingroom/terrorism2.htm.

2. Program Results: Impact on Immigrant Communities and Security Benefits

In the first phase of the program, 2,261 men were interviewed.[98] Fewer than twenty men were taken into custody and charged with minor visa violations. Three men were charged with criminal offenses, but none related to terrorist activities.[99] In March 2003, the government initiated a second phase of the program, bringing the total number of interviews to 3,216.[100] While the DOJ claims that the interviews netted valuable information,[101] no terrorism arrests were made, leading other law enforcement officials to question the program's effectiveness. According to a GAO study on the interviews, immigrants' attorneys reported that the interview program had a "chilling effect" on relations between Arab-American communities and law enforcement; the interviewees felt that they were "singled out" because of their ethnic and religious backgrounds.[102] As I will later discuss, the detrimental impact of such policies on relations with Arab and Muslim communities may actually undermine counter-terrorism efforts.

F. Overall Impact

Since September 11, 2001, a number of anti-terrorism measures have significantly impacted large segments of immigrant communities. Some of these policies have explicitly targeted particular immigrant groups, while others have been disproportionately enforced against certain communities. The impact on Arab and Muslim communities following the September 11 attacks was clear. Only 2% of unauthorized immigrants were from twenty-four predominantly Muslim nations.[103] Within this group, there was a 31.4% increase in deportation in the years following 9/11.[104] The other 98% of the unauthorized population only experienced a 3.4% increase in deportation during this same period.[105] The disproportionate impact in enforcement has also "shrunk the haystack" by causing members of these communities to voluntarily leave

98. *See* GAO Report, *supra* note 92.
99. *Id.*
100. *Id.*
101. *Id.* at 18.
102. *Id.* at 16.
103. Cam Simpson, Flynn McRoberts & Liz Sly, *Immigration Crackdown Shatters Muslims' Lives*, CHI. TRIB., Nov. 16, 2003, at C1.
104. *Id.*
105. *Id.*

the country. In New York City alone, of the approximately 40,000 Pakistanis living in Brooklyn's "Little Pakistan," an estimated 4,000 were arrested, detained, or deported, and another estimated 15,000 left voluntarily.[106]

Despite the impact of these policies on immigrant communities, the threshold for demonstrating a showing of selective prosecution remains prohibitively high. The following section will examine the development of this standard, first by providing a brief history of the rights of non-citizens in the United States.

III. A BRIEF REVIEW OF NON-CITIZEN DUE PROCESS RIGHTS

A. *Plenary Power*

Fundamental to the sovereignty of any nation is the right to control its borders. Immigration authority, as it has evolved in the United States, however, operates on two conflicting principles: plenary authority to regulate the borders, and judicial authority to uphold the constitutional rights of non-citizens already in the country. The Constitution gives Congress plenary power over immigration.[107] Under the plenary power doctrine, the executive and legislative branches are given nearly total authority to determine who is allowed to enter the country.[108] Historically, Congress has used this authority to limit immigration based on race and national origin. The government began to restrict immigration in the 1880s, prior to which immigration was unregulated.[109] The Chinese Exclusion Act of 1882, the government's first major immigration act, banned immigration of Chinese laborers for ten years, permitted deportation of Chinese immigrants, and banned U.S. citizenship for Chinese immigrants.[110] The restriction was a response to claims that Chinese laborers contributed to economic depression by

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106. Tatsha Robinson, *Deportation Surge Leaves Void in Brooklyn's Little Pakistan*, BOSTON GLOBE, August 14, 2005, at A1.

107. U.S. CONST. art. 1, § 8, cl. 4; *see also* I.N.S. v. Chadha, 462 U.S. 919, 940–41 (1983); Buckley v. Valeo, 424 U.S. 1, 132 (1976) ("Congress has plenary authority in all areas in which it has substantive legislative jurisdiction, *M'Culloch v. Maryland*, 4 Wheat. 316 (1819), so long as the exercise of that authority does not offend some other constitutional restriction.").

108. *See* Boutilier v. INS, 387 U.S. 118, 123 (1967) ("Congress has plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden."); *see also* Fiallo v. Bell, 430 U.S. 787, 792 (1977) ("[O]ver no conceivable subject is the legislative power of Congress more complete.") (quoting Oceanic Navigation Co. v. Stranahan, 214 U.S. 320, 339 (1909)).

109. Adam C. Abrahms, *Closing the Immigration Loophole: the 14th Amendment's Jurisdiction Requirement*, 12 GEO IMMIGR. L.J. 469, 470.

110. Chinese Exclusion Act of 1882, ch. 126, 22 stat. 58 (1882).

displacing workers.[111] The Supreme Court upheld the Exclusion Act in the *Chinese Exclusion Case*, finding that:

> If, therefore, the government of the United States, through its legislative department, considers the presence of foreigners of a different race in this country, who will not assimilate with us, to be dangerous to its peace and security, their exclusion is not to be stayed because at the time there are no actual hostilities with the nation of which the foreigners are subjects. The existence of war would render the necessity of the proceeding only more obvious and pressing. The same necessity, in a less pressing degree, may arise when war does not exist, and the same authority which adjudges the necessity in one case must also determine it in the other. In both cases its determination is conclusive upon the judiciary.[112]

Reacting to further nativist calls in the 1920s, Congress implemented a national origins quota system to increase the proportion of European immigration by requiring that immigration flows reflected the ethnic composition of the United States.[113] During this time, federal courts also upheld the Palmer Raids, the round-up and deportation of Eastern Europeans who were allegedly members of the Communist Party. In one such case, the First Circuit noted that "an alien resident in the United States may be deported for any reason which Congress has determined will make his residence here inimical to the best interests of the government."[114] The Supreme Court reaffirmed plenary authority over immigration in another series of Communist era cases. In *Carlson v. Landon*, the Court upheld the deportation of alleged Communists so long as the government had a reasonable foundation to assert that they were engaged in communist activities.[115]

Importantly, the Court did recognize an elevated status for non-citizens already in the United States, finding:

> Since deportation is a particularly drastic remedy where aliens have become absorbed into our community life, Congress has been careful to provide for full hearing by the Immigration and Naturalization Service before deportation. Such legislative provision requires that those charged with that responsibility exercise it in a manner consistent with due

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111. EDWARD P. HUTCHINSON, LEGISLATIVE HISTORY OF AMERICAN IMMIGRATION POLICY 1798–1965, at 76 (1981).

112. Chae Chan Ping v. United States, 130 U.S. 581, 606 (1889).

113. James F. Smith, *United States Immigration Policy—A History of Prejudice and Economic Scapegoatism?: A Nation that Welcomes Immigrants? An Historical Examination of United States Immigration Policy*, 1 U.C. DAVIS J. INT'L L. & POL'Y 227, 232–33 (1995).

114. Skeffington v. Katzeff, 277 F. 129, 131 (1st Cir. 1922).

115. 342 U.S 524 (1952).

process.[116]

The government's decision to deport could therefore be overturned upon a showing of "clear abuse."[117] The Court also used a standard similar to the abuse-of-discretion standard to uphold the Alien Registration Act, which provided for the deportation of members of the Communist Party.[118]

Congress repealed exclusions based on race in 1952 in part to address concerns that such policies might alienate America's World War II and Korean War allies.[119] The national origin quotas remained in place until 1965 when Congress abandoned them in favor of family re-unification and uniform ceilings for all countries.[120] As the previous cases demonstrate, the political branches have historically exercised significant authority over immigration law, including decisions to deport those already in the country. Their power, however, is not absolute. Because the Equal Protection Clause of the Constitution applies to all persons, not just citizens, federal courts have been forced to balance plenary power with the constitutional rights of non-citizens. Questions remain, however, over whether and to what extent the Fourteenth Amendment protects non-citizens. The sections that follow will trace the steady retreat from the plenary power doctrine and the evolution of equal protection and due process protections for non-citizens. This paper's focus will later turn to the extent to which the Constitution requires equal protection and due process in selectively prosecuted deportation proceedings.

B. The Expansion of Non-Citizen's Rights to Equal Protection and Due Process

In perhaps the most famous example of selective prosecution of an immigrant community, the Court upheld the internment of 110,000 Japanese-Americans during World War II.[121] Because the case involved American citizens, the Court was required to apply the Equal Protection Clause. While the Court found that the national origin policy violated the Fourteenth Amendment, internment satisfied a strict scrutiny analysis:

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116. *Id.* at 537–38.
117. *Id.* at 540.
118. Harisiades v. Shaughnessy, 342 U.S. 580 (1952).
119. Smith, *supra* note 113, at 233.
120. Stephen H. Legomsky, *Immigration, Equality and Diversity*, 31 COLUM. J. TRANSNAT'L L. 319, 333 (1993).
121. Korematsu v. United States, 323 U.S. 214, 219–20 (1944).

> Compulsory exclusion of large groups of citizens from their homes, except under circumstances of direst emergency and peril, is inconsistent with our basic governmental institutions. But when under conditions of modern warfare our shores are threatened by hostile forces, the power to protect must be commensurate with the threatened danger.[122]

The constitutional mandate to apply the Equal Protection Clause was obvious; what remains unclear are the conditions under which federal courts will apply the Fourteenth Amendment to cases involving non-citizens.

Federal courts have applied the Equal Protection Clause to non-citizens based on three main factors: the non-citizen's visitor or immigration status, the nature of the constitutional protection sought, and whether national security considerations are involved. As the legal status of non-citizens progresses, courts are more willing to extend Fourteenth Amendment protections. Thus, almost no protection is offered for those seeking entry, increasing protections are afforded to those who have already entered the country, and full protections are given to those who have been naturalized.

Federal courts have also been more willing to apply equal protection to non-citizens in cases involving non-immigration matters. As noted in the plenary power discussion, the immigration power stems from the political and security motivations for protecting the nation's borders. While federal courts have given deference to the political branches in immigration cases, they have been less willing to defer in cases involving non-immigration matters, such as the provision of criminal protections, certain First Amendment rights, or government services.

The Court first recognized that non-citizens qualify as "persons" under the Equal Protection Clause in *Yick Wo v. Hopkins*.[123] In that case, the Court rejected a city ordinance criminalizing the establishment of laundry businesses designed to target Chinese immigrants. The Court held:

> The Fourteenth Amendment to the Constitution is not confined to the protection of citizens. It says: "Nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal

122. *Id.* at 220.

123. 118 U.S. 356 (1886).

> protection of the laws is a pledge of the protection of equal laws.[124]

While this case would seem to provide a remedy for selective prosecution for non-citizens in the United States, its scope is limited to the enforcement of a criminal ordinance. As its later jurisprudence reflects, the Court has interpreted the ruling to apply to selective enforcement of immigration laws against individuals of a particular race or religion.

Perhaps the Court's most extensive grant of equal protection rights was its decision to require Texas to allow illegal residents to enroll in state public schools.[125] In that case, the Court concluded:

> [E]ach aspect of the Fourteenth Amendment reflects an elementary limitation on state power. To permit a State to employ the phrase "within its jurisdiction" in order to identify subclasses of persons whom it would define as beyond its jurisdiction, thereby relieving itself of the obligation to assure that its laws are designed and applied equally to those persons, would undermine the principal purpose for which the Equal Protection Clause was incorporated in the Fourteenth Amendment. The Equal Protection Clause was intended to work nothing less than the abolition of all caste-based and invidious class-based legislation.[126]

The language of this decision, much like the language of the Fourteenth Amendment[127] and the language of *Yick Wo*, would seem to extend all equal protection rights to non-citizens. The protection of the right to attend public schools is outside the realm of immigration law and thus has been considered inapposite to equal protection claims in the deportation context.

To be sure, the Court has guaranteed some degree of due process and equal protection to non-citizens for immigration matters. In 1945, the Court recognized that deportation is a penalty and that the Due Process Clause protects non-citizens' interest in staying in the country, finding:

> Though deportation is not technically a criminal proceeding, it visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom.

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124. *Id.* at 369.
125. Plyler v. Doe, 457 U.S. 202 (1982).
126. *Id.* at 213.
127. *See* U.S. CONST. amend. XIV § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.").

> That deportation is a penalty—at times a most serious one—cannot be doubted. Meticulous care must be exercised lest the procedure by which he is deprived of that liberty not meet the essential standards of fairness.[128]

In deportation matters, "meticulous care" requires the government to provide non-citizens notice,[129] a hearing,[130] and the opportunity to be heard at the hearing.[131] The Supreme Court has also recognized a due process right against indefinite detention under certain limited circumstances after a deportation order has been secured.[132]

Along with a due process right, the Court has provided some equal protection to non-citizens in immigration matters. While the Court has upheld exclusion based on national origin as in the *Chinese Exclusion Case*,[133] exclusion based on Hispanic appearance,[134] and exclusion based on race and national origin in refusing entry to Haitians,[135] some federal courts have been less willing to allow discrimination on these grounds against non-citizens already in the United States. For example, a number of courts have rejected the use of racial profiling in arresting illegal Hispanic immigrants inside the country.[136]

In cases involving national security considerations, however, courts have deferred to the political branches in upholding discrimination against non-citizens based on national origin. In response to the American hostage crisis in 1979, the D.C. Circuit upheld an INS regulation requiring all non-immigrant alien students from Iran to report to the INS to verify their immigration status or be subject to deportation.[137] The court found that although the law discriminated on the basis of national origin, the judiciary should defer to the political branches in administering immigration laws unless their decisions are

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128. Bridges v. Wixon, 326 U.S. 135, 154 (1945).

129. Kwong Hai Chew v. Colding, 344 U.S. 590, 597 (1953).

130. *Id.*

131. *See* Landon v. Plasencia, 459 U.S. 21, 36 (1982).

132. Zadvydas v. Davis, 533 U.S. 678, 696 (2001) (addressing the question of how long a non-citizen may be detained when the government is unable to find a country that will accept the deportee. The Court stipulated in dicta, however, "Neither do we consider terrorism or other special circumstances where special arguments might be made for forms of preventive detention and for heightened deference to the judgments of the political branches with respect to matters of national security.").

133. Chae Chan Ping v. United States, 130 U.S. 581.

134. United States v. Brignoni-Ponce, 422 U.S. 873 (1975) (finding that although officers illegally pulled over a group of individuals in California because they appeared to be of Mexican ancestry, the officers would have been justified if they had prevented individuals from entering the U.S.).

135. *See* Bertrand v. Sava, 684 F.2d 204 (2d Cir. 1982).

136. *See Brignoni-Ponce*, 422 U.S. 873 (1975); United States v. Ortega-Serrano, 788 F.2d 299 (5th Cir. 1986); Ill. Migrant Council v. Pilliod, 540 F.2d 1062 (7th Cir. 1976); Ramirez v. Webb, 599 F. Supp. 1278 (W.D. Mich. 1984) (all rejecting arrests of Hispanic immigrants inside the United States based on their appearance).

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

"wholly irrational."[138] The court applied rationality review and held that the impact of the registration requirement "is a judgment to be made by the President and it is not for us to overrule him, in the absence of acts that are clearly in excess of his authority."[139]

The court failed to articulate standards for assessing whether policies are "wholly irrational" or "clearly in excess" of the executive's authority. It is uncertain whether a policy that went even further by requiring all Iranian non-immigrants to leave the country would be considered "wholly irrational" as long as the United States was involved in some dispute with Iran that it could claim might affect American security. The scope of equal protection rights afforded to non-citizens in immigration matters remains governed by vague standards providing dangerously broad discretion to the legislature and the executive. The "wholly irrational" rule might be applied to argue that extreme policies such as internment have at least some "rational justification," and demonstrates the need to apply a less stringent selective enforcement standard to the immigration context.

C. Contemporary Treatment of Non-Citizen Selective Prosecution Claims

In 1999, the Court established a prohibitively high standard for assessing selective prosecution of non-citizens in *Reno v. American-Arab Anti-Discrimination Committee.*[140] In *Reno*, eight Palestinian natives claimed that they were targeted for deportation because of their national origin and political activism.[141] The government charged that the eight belonged to the Popular Front for the Liberation of Palestine (PFLP), an allegedly communist and terrorist organization, and sought to deport them under the McCarran-Walter Act, a now-repealed law that provided for the deportation of aliens who "advocate . . . world communism."[142] The government further charged six of the eight with "routine status violations such as overstaying a visa and failure to maintain student status."[143]

In refusing to even address the selective prosecution claim, the Court held that the importance of deferring to the political branches' judgments about conducting foreign policy required a more stringent selective prosecution standard in the immigration context than in the

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138. *Id.* at 747–48.

139. *Id.* at 748.

140. 525 U.S. 471 (1999).

141. *Id.* at 473.

142. *Id.*

143. The two others were later granted legal status and were no longer deportable based on the status violations. *Id.*

criminal context.[144] Specifically, the Court found that allowing selective prosecution claims would: (1) prolong the alien's violation of immigration laws, possibly allowing the alien to obtain legal status through, for example, marriage to an American citizen, and (2) result in "the disclosure of foreign-policy objectives and . . . foreign-intelligence products and techniques."[145] The Court gave primacy to the government's foreign policy argument over the danger that non-citizens could be targeted based on factors such as national origin, holding:

> The Executive should not have to disclose its "real" reasons for deeming nationals of a particular country a special threat—or indeed for simply wishing to antagonize a particular foreign country by focusing on that country's nationals—and even if it did disclose them a court would be ill equipped to determine their authenticity and utterly unable to assess their adequacy.[146]

In reaching this holding, however, the Court did not rule out "the possibility of a rare case in which the alleged basis of discrimination is so outrageous that the foregoing considerations can be overcome."[147] The Court did not explain the meaning of "outrageous," nor did it outline any factors that might contribute to such a showing. Because of the vagueness of this standard, lower courts are likely to be hesitant in allowing selective enforcement claims to proceed, and are likely to defer to the political branches, particularly in cases involving security concerns.

Since the September 11 attacks and the implementation of the initiatives outlined in Part II,[148] one federal court has directly addressed the special prosecution issue. In *Turkmen v. Ashcroft*,[149] Judge Gleeson of the Eastern District of New York rejected a claim by eight detainees who argued that the government violated their equal protection rights because "race, religion, ethnicity, and national origin played a determinative role in the decisions to detain them, to hold them without bond in punitive conditions of confinement, and to keep them detained beyond the point at which removal or voluntary departure could have been effectuated."[150] Seven of the eight detainees were Muslims from the Middle East, and the eighth was a Hindu native of India.[151] All eight

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144. *Id.* at 491.
145. *Id.* at 490–91.
146. *Id.* at 491.
147. *Id.*
148. *Supra*, Part II.
149. Turkmen v. Ashcroft, Nos. 02-CV2307(JG), 04-CV1809(JG) 2006 U.S. Dist. LEXIS 39170 (E.D.N.Y. June 14, 2006).
150. *Id.* at 6–7.
151. *Id.* at 4.

were out-of-status.[152]

In dismissing the selective prosecution claim, Judge Gleeson quoted the Supreme Court's ruling in *Reno*, and found that the detention failed to meet the "outrageous" requirement:

> Although "outrageous" is not a self-defining term, a few things the Court did not consider to be outrageous are apparent: "deeming nationals of a particular country a special threat . . . [and] antagoniz[ing] a particular foreign country by focusing [enforcement efforts] on that country's nationals."
>
> There is thus nothing outrageous about the plaintiffs' claim of national-origin discrimination in this context; the executive is free to single out "nationals of a particular country" and "focus[]" enforcement efforts on them. This is, of course, an extraordinarily rough and overbroad sort of distinction of which, if applied to citizens, our courts would be highly suspicious. Yet the Supreme Court has repeatedly held that the political branches, "[i]n the exercise of [their] broad power over naturalization and immigration . . . regularly make[] rules that would be unacceptable if applied to citizens."[153]

Judge Gleeson's decision once again leaves observers to wonder what would qualify as "outrageous." All of the detainees were South Asian, Arab, or Muslim, and none were charged with terrorism-related offenses. Under his reading of *Reno*, "deeming nationals of a particular country a special threat . . . [and] antagoniz[ing] a particular foreign country by focusing [enforcement efforts] on that country's nationals" is one tactic that "the Court did not consider to be outrageous."[154] Gleeson thus appears to go even further than the *Reno* court in restricting non-citizen claims of selective prosecution in the immigration context. Under his reading, a policy requiring an immediate effort to target and indefinitely detain all out-of-status natives of Mexico, for example, could not be challenged on equal protection grounds. As Professor David Cole has argued, the decision "authorize[s] a repeat of the Japanese internment—as long as the internment is limited to foreign nationals charged with visa violations (a group that at last count numbered about 11 million people)."[155]

Such a reading would provide a sharp contrast to the criminal context, in which, for example, a policy targeting all Hispanic drug users would be patently unconstitutional. Federal courts and policymakers

152. *Id.*
153. *Id.* at 130–31(internal citations omitted).
154. *Id.*
155. David Cole, *Manzanar Redux?*, L.A. TIMES, June 16, 2006, at B16.

must decide whether this discrepancy is acceptable simply because the non-criminal context concerns foreign nationals. In the following section, I will argue that while federal courts may be hesitant to find that the current targeting of Arab and Muslim communities meets the high threshold for showing special prosecution in the immigration context, they can apply a security and intelligence-sensitive version of the standard used in criminal cases without sacrificing national security interests.

IV. SELECTIVE PROSECUTION OF SOUTH ASIANS, ARABS, AND MUSLIMS: APPLYING *RENO* AND THE CRIMINAL STANDARD

In analyzing whether the treatment of South Asians, Arabs, and Muslims fits under the Supreme Court's definition of "outrageous" in *AADC*, I will focus on the potential constitutional challenges of those deported under NSEERS and AAI. While similar analysis could be used to bring equal protection claims against the government for Operation PENTTBOM and the closure of special interest hearings, NSEERS and AAI provide the clearest examples of selective prosecution because they involve the explicit targeting of non-citizens from predominantly Arab or Muslim nations.

A. NSEERS and AAI

NSEERS was implemented to track the movement of visitors from certain countries and to deport those found to be out-of-status.[156] Under this program, the government targeted twenty-five countries: Afghanistan, Algeria, Bahrain, Bangladesh, Egypt, Eritrea, Indonesia, Iran, Iraq, Jordan, Kuwait, Lebanon, Libya, Morocco, North Korea, Oman, Pakistan, Saudi Arabia, Sudan, Syria, Qatar, Somalia, Tunisia, United Arab Emirates, and Yemen.[157] Twenty-four of these nations have predominantly Muslim populations and most of them are predominantly Arab. Non-citizens deported under this program have a basis for arguing that they were targeted based on their race, ethnicity, religion, or national origin.

Is there any racially, ethnically, or religiously neutral justification for targeting these countries? Some might argue that its list constitutes

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156. DEP'T OF HOMELAND SECURITY, FACT SHEET: CHANGES TO NATIONAL SECURITY ENTRY/EXIT REGISTRATION SYSTEM (NSEERS) (2003), http://www.dhs.gov/xnews/releases/press_release_0305.shtm.

157. *Id.*

the group of nations from which al-Qaeda operates. The NSEERS list, however, only contains some of the forty-five countries the State Department lists as nations with an al-Qaeda presence, omitting such countries as England, France, Germany, and Spain.[158]

Similarly, under the AAI, while the stated priority is to arrest absconders from nations where al-Qaeda operates, the government has targeted only fourteen nations: Afghanistan, Algeria, Egypt, Iran, Jordan, Lebanon, Morocco, Pakistan, the Philippines, the Palestinian territories, Saudi Arabia, Somalia, Sudan, and Syria.[159] All of these countries, with the exception of the Philippines, have predominantly Muslim populations.

Implicit in the decision to target these countries is perhaps the assumption that individuals from these nations are more likely to commit acts of terrorism. The basis of this assumption may be race, ethnicity, or religion; in any case, this type of targeting violates the government's own position on profiling, which states that the "[u]se of race or ethnicity is permitted only when the federal officer is pursuing a specific lead concerning the identifying characteristics of persons involved in an *identified* criminal activity."[160] In compiling the list of NSEERS countries, the government did not target criminal activity—it appeared to instead use guilt by association and profiling in assuming that certain nationals were more likely to engage in criminal activity.

Given the context of the war on terrorism, some may reject the discriminatory basis for this assumption and argue that the profile is "correct"—that nationals of the selected countries are in fact more likely to threaten American security. There is little evidence, however, to support this assertion. Of the approximately 82,000 individuals registered under NSEERS, none were charged with any terrorism-related activities.[161] Of the 1,110 foreign nationals deported under AAI, none were charged with terrorism-related offenses.

By the government's own admission, of the approximately 20,000 estimated absconders between 2002 and 2005, many of whom were scheduled to be deported for engaging in criminal activity, the vast majority were from Latin American countries.[162] AAI, however, did not

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158. U.S. DEP'T OF STATE, COUNTRIES WHERE AL-QAEDA HAS OPERATED, http://www.fred.net/tds/Osama_bin_Laden_and_al_Qaeda_2001nov10/.

159. Kevin Lapp, *Pressing Public Necessity: The Unconstitutionality of the Absconder Apprehension Initiative*, 29 N.Y.U. REV. L. & SOC. CHANGE 573, 584 n.61 (2005).

160. U.S. DEP'T OF JUSTICE, FACT SHEET ON RACIAL PROFILING, June 17, 2003 at 4, http://www.usdoj.gov/opal/pr/2003/June/racial_profiling_fact_sheet.pdf.

161. *Clear Law Enforcement for Criminal Alien Removal Act of 2003 (CLEAR Act): Hearing on H.R. 2671 Before the H. Judiciary Subcomm. on Immigration, Border Security, and Claims*, 108th Cong. (2003) (statement of James R. Edwards, Jr., Center for Immigration Studies); U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, FACT SHEET ON CHANGES TO THE NSEERS PROCESS (2003), http://www.ice.gov/pi/news/factsheets/NSEERSFAQ120103.htm.

162. *See* Dan Eggen, *Deportee Sweep Will Start With Mideast Focus*, WASH. POST, Feb. 8, 2002, at A1; Susan Sachs, *A Nation Challenged: Deportations; U.S. Begins Crackdown on Muslims Who Defy Orders to Leave Country*, N.Y. TIMES, Apr. 2, 2002, at A13.

target individuals from these countries. Because security is not defined exclusively by the ability to stop terrorism, but more accurately by the ability to stop all types of violent crime, any attempt to statistically demonstrate that certain ethnic, religious, or racial groups are more likely to threaten American security should consider not only terrorism, but also overall violent crime. Such a policy would, however, inevitably involve guilt by association: individuals would be targeted not because they are guilty, but because someone who shares their race, religion, or ethnicity previously engaged in criminal activity.

The targeting of non-citizens based on race, ethnicity, national origin, and religion under NSEERS could provide evidence of "outrageous" discrimination. But given the vagueness of this standard, the Court's lack of instruction for its interpretation in *Reno*, and the Southern District of New York's reading that discrimination against foreign nationals based on national origin cannot be "outrageous," a clearer standard should be used in selective prosecution cases. A new approach can be adopted based on the standard used in the criminal context. I will now describe the application of this standard to immigration cases.

B. The Selective Prosecution Standard in the Criminal Context

The discretion to prosecute in criminal cases is broad, but "is not 'unfettered'. . . . Selectivity in the enforcement of criminal laws is . . . subject to constitutional constraints."[163] The decision to prosecute may not be based on "an unjustifiable standard such as race, religion, or other arbitrary classification."[164] In *United States v. Armstrong*, the Supreme Court did not define selective prosecution as "a defense on the merits to the criminal charge itself, but an independent assertion that the prosecutor has brought the charge for reasons forbidden by the Constitution." [165] As described *supra*, the Court first upheld a criminal selective prosecution claim in an immigration-related case. In *Yick Wo,* the Court overturned the convictions of Chinese-Americans in San Francisco who were targeted by a city ordinance criminalizing the establishment of laundry businesses.[166]

In deciding *Armstrong*, the Court emphasized that because of the importance of preserving prosecutorial discretion, the standard used for demonstrating selective prosecution is a "demanding" one.[167] To make

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163. Wayte v. United States, 470 U.S. 598, 608 (1985) (quoting United States v. Batchelder, 442 U.S. 114, 125 (1979)).

164. *See* Oyler v. Boyles, 368 U.S. 448, 456 (1962).

165. 517 U.S. 456, 463 (1996).

166. Yick Wo v. Hopkins, 118 U.S. 356 (1886).

167. *Armstrong*, 517 U.S. at 463.

such a showing, the defendant must demonstrate that the government's policy has a discriminatory effect and was motivated by a discriminatory purpose.[168] To prove a discriminatory effect, "the claimant must show that similarly situated individuals of a different race were not prosecuted."[169]

Strangely, the Court continued to the next part of its analysis, explaining the government's burden of production, without defining "discriminatory purpose."[170] Although the Court has previously defined this term, its failure to do so in a way that is distinct from the "discriminatory effect" prong places additional emphasis on the manner in which the Court determines whether a policy had a discriminatory effect. In *Arlington Heights v. Metro Housing Development Corporation*, the Court defined discriminatory purpose primarily in terms of impact:

> [W]hether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available. The impact of the official action—whether it "bears more heavily on one race than another"—may provide an important starting point. Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face. The evidentiary inquiry is then relatively easy. But such cases are rare. Absent a pattern as stark as that in *Gomillion* or *Yick Wo*, impact alone is not determinative, and the Court must look to other evidence.[171]

Thus, in cases where a discriminatory purpose is not stated explicitly, federal courts look to the policy's impact along with other evidence to discern whether discriminatory intent was involved.

C. *Application of the Criminal Selective Prosecution Standard to the Immigration Context*

The NSEERS and AAI policies appear to have both a discriminatory effect and a discriminatory purpose. Although al-Qaeda operates in forty-five countries, NSEERS targets only twenty-five, twenty-four of which have predominantly Muslim populations. This

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168. *Id.* at 468.
169. *Id.* at 465.
170. *Id.*
171. Arlington Heights v. Metro Hous. Dev. Corp., 429 U.S. 252, 266 (1977) (internal citation omitted).

selection suggests that certain countries were selected or reaffirmed a particular course of action at least in part because of, not in spite of, its adverse effects upon an identifiable group. Similarly, the enforcement of AAI against foreign nationals of only the Arab and Muslim nations from which al-Qaeda operates suggests a discriminatory intent.

NSEERS also meets the test for discriminatory purpose because of the failure to include other nations is inexplicable except on grounds of national origin, race, or religion. The historical background of the policy also demonstrates a pattern in which only predominantly Arab or Muslim nations were selected.[172] The historical background of the AAI also reflects a pattern of targeting Arab or Muslim nations.

After this prima facie showing has been made in these cases, the government must show that it would not have targeted the defendants in the absence of the impermissible characteristic. For both NSEERS and AAI, it is clear that there is no enforcement in the absence of considerations such as race, ethnicity, and religion because only particular nations are targeted and the focus on these particular nations is explicable only in terms of race, ethnicity, and religion. Given its use of these impermissible characteristics, the proponents of these policies would have to show that its policy is narrowly tailored to achieve a compelling interest.

While preventing terrorism is undoubtedly a compelling interest, neither NSEERS nor AAI is narrowly tailored, nor do they achieve this interest. Rather than targeting non-citizens with ties to criminal activities, the government makes what Judge Gleeson concedes are "rough and overbroad" distinctions.[173] Although the definition of narrow tailoring varies in different contexts, if the government continues to target specific religious and ethnic groups to search for terrorists, it should individually determine whether there exists any evidence or reasonable suspicion of criminal activity. This approach would not require a detailed review of each suspect as the Court has required in other equal protection cases such as *Grutter*[174] and *Gratz*,[175] but merely evidence or reasonable suspicion of criminal activity.

The fact that neither of the policies has resulted in terrorism-related arrests also demonstrates the policies' ineffectiveness in achieving the government's compelling interest. Of the approximately 82,000 individuals registered under NSEERS, and the 1,110 foreign nationals deported under AAI, none are known to have been charged with terrorism offenses.

In addition to the need to protect non-citizens from the type of

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172. *See* COLE, *supra* note 23, at 183–97; *see also* Gil Gott, The Devil We Know, 50 VILL. L. REV. 1073, 1110 (2005).

173. *Turkmen*, 2006 U.S. Dist. LEXIS 39170, at 131

174. Grutter v. Bollinger, 539 U.S. 306, 334 (2003).

175. Gratz v. Bollinger, 539 U.S. 244, 271 (2003).

discrimination that would be illegal if applied to citizens, there is a particularly compelling reason for applying the criminal standard to the deportation context: deportation is in essence a criminal sanction. As mentioned earlier, the Supreme Court has held that while deportation is not technically a criminal proceeding, it serves as a penalty by inflicting great hardship on the individual."[176] Uprooting individuals and requiring that they set up a new life in another country has a punitive impact not only on them, but on their families as well.

The strategy behind AAI resembles criminal law enforcement in three ways: (1) the program contemplates criminal arrests by the FBI for immigration violations, (2) the absconder memo specifically instructs FBI officials to treat absconders as "criminal suspects" that are to be read Miranda rights, and (3) absconders are registered in the National Crime Information Center database.[177] Under AAI, then, absconders are both treated as criminals during FBI investigations and are deported when they are arrested.

D. Ensuring that Security and Foreign Policy Objectives Are Not Compromised: A Security Sensitive Approach

Despite these similarities to the criminal context, there are nevertheless two justifications unique to the immigration context for keeping immigration decisions immune from selective prosecution claims.[178] First, prolonging the alien's violation of immigration laws might allow the alien to obtain legal status through, for example, marriage to an American citizen.[179] Second, allowing selective prosecution claims to go forward might result in "the disclosure of foreign-policy objectives and . . . foreign-intelligence products and techniques."[180]

The government's concerns, while valid, can be addressed with legislatively. First, the government can prevent non-citizens who file selective prosecution claims from initiating attempts to gain legal status while their cases are pending. Second, mechanisms are already in place for the government to address the second concern, the disclosure of sensitive information. Such information could be submitted under seal or be presented to special forums, such as courts similar to the Alien Terrorist Removal Court (ATRC), which Congress has already

176. Bridges v. Wixon, 326 U.S. 135, 154 (1945).

177. Kevin Lapp, *Pressing Public Necessity: The Unconstitutionality of the Absconder Apprehension Initiative*, 29 N.Y.U. REV. L. & SOC. CHANGE 573, 601–02 (2005).

178. Reno v. American-Arab Anti-Discrimination Comm., 525 U.S. 471, 490–91 (1999).

179. *Id.*

180. *Id.* at 491.

established.

The Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996,[181] in conjunction with the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996,[182] created the ATRC to adjudicate the deportation of alleged terrorists.[183] Though the court has never been used and its procedures are not without flaws,[184] such a forum, as its name implies, appears at first glance to be tailor-made for terrorism-related cases.

Under ATRC procedures, the Attorney General is authorized to file an application to use the removal court, which is comprised of five district court judges selected by the Chief Justice of the United States.[185] One of the five judges then reviews any classified evidence submitted with the application, ex parte and in camera, to determine whether there is probable cause to believe that the alien has been correctly identified, whether he is a terrorist, and whether removal by normal proceedings would pose a threat to national security.[186] If the judge determines that normal proceedings would compromise security by revealing sensitive intelligence, the ATRC hears the case.[187]

Similarly, in cases in which the government asserts that allowing selective prosecution claims will require the government to justify its policy by disclosing sensitive information, the Attorney General can submit an application to use a special court to demonstrate that the government has bona fide foreign policy reasons for targeting particular groups. If necessary, the applications can be filed under seal and the hearings can be closed to the public.

Some would likely argue that judges lack the necessary expertise in national security to evaluate such claims. But even under current regulations, the government can seek protective orders from immigration judges to seal evidence if its revelation could harm national security.[188] This history of reliance on immigration judges undermines the government's contention that only the Attorney General is qualified to make such intelligence assessments. Furthermore, any Article III judges who have experience handling sensitive security matters could be called upon to review special interest cases. Such judges could include Foreign Intelligence Surveillance Court judges, who are specifically named as

181. Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified as amended in scattered sections of 8, 15, 18, 22, 28, 40, 42, and 50 U.S.C.).

182. Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, div. C, 110 Stat. 3009-546 (1996) (codified as amended in scattered sections of 8, 18, and 42 U.S.C.).

183. *See* 8 U.S.C. §§ 1531–1537 (2000).

184. *See* Matthew R. Hall, *Procedural Due Process Meets National Security: The Problem of Classified Evidence in Immigration Proceedings*, 35 CORNELL INT'L L.J. 515, 518 (2002).

185. *See* 8 U.S.C. § 1532(a) (2000).

186. *See id.* § 1533(c).

187. *See id.*

188. *See* 8 C.F.R. § 1003.46 (2003).

possible candidates in the ATRC statute.[189] The use of a forum such as the ATRC would alleviate the government's concern regarding the potential release of sensitive information, while ensuring that the government provides some justification for targeting immigrant communities.

V. THE SECURITY BENEFITS OF APPLYING THE CRIMINAL STANDARD TO THE IMMIGRATION CONTEXT

Prohibiting the use of selective prosecution bolsters, rather than undermines, counter-terrorism efforts. Instead of relying on a general profile to target efforts against certain communities, law enforcement officials will have an increased incentive to uncover and investigate evidence of criminal activity. The DOJ had stated that such a strategy is part of a best practice approach for law enforcement; its policy dictates: "Use of race or ethnicity is permitted only when the federal officer is pursuing a specific lead concerning the identifying characteristics of persons involved in an *identified* criminal activity."[190]

Ending the use of selective enforcement against certain communities can also help restore dialogue with immigrant communities, which have proven to be key allies in the war on terrorism. The DOJ's position is that "when law enforcement practices are perceived to be biased or unfair, the general public, and especially minority communities, are less willing to trust and confide in officers, report crimes, be witnesses at trials, or serve on juries."[191] The negative effects of targeting immigrant communities were manifest in Michigan, where voluntary interviews soured relations and undermined cooperation with Arab communities.[192]

The cooperation of immigrant communities where "sleeper cells" may be hiding has been critical in disrupting terrorist plots in America and abroad. For example, Deputy Attorney General Larry Thompson stressed the importance of working with these communities in September 2002, while describing the arrest of five suspected al-Qaeda operatives in Lackawanna, New York.[193] Thompson stated that the immigrant

189. *See* 8 U.S.C. § 1532(a) (2000).

190. DOJ Racial Profiling Fact Sheet, *supra* note 2, at 4.

191. *Id.* at 1.

192. NICOLE J. HENDERSON ET AL., LAW ENFORCEMENT AND ARAB AMERICAN COMMUNITY RELATIONS AFTER SEPTEMBER 11, 2001: ENGAGEMENT IN A TIME OF UNCERTAINTY 18, VERA INSTITUTE OF JUSTICE (2006), *available at* http://www.vera.org/publication_pdf/353_636.pdf (alteration in original).

193. *See* News Conference of Larry Thompson, Robert Mueller, & George Pataki (Sept. 14, 2002), LEXIS, News Library, FDCH Political Transcripts File (remarks of Larry Thompson, Deputy Attorney General).

community provided "extraordinary cooperation," and that "the assistance of Muslim-Americans in this case has helped to make the Buffalo community and our nation safer."[194] Law enforcement officials have also successfully recruited members of immigrant communities to serve as translators for the CIA and other intelligence agencies.[195] Tips from the Muslim community also uncovered a plot to blow up Transatlantic airliners traveling from Europe to the United States in the summer of 2006.[196] A recent study confirmed the intelligence gathering benefits of working with immigrant communities:

> [N]early all . . . FBI respondents (14 of 16) indicated that outreach and relationship-building with Arab American communities were valuable intelligence gathering efforts. As a head of a local Joint Terrorism Task Force (JTTF) stated, "[T]he natural by-product of [developing relationships] is intelligence building." "[Relationship building] allows us to get a better grasp of potential threats," said a special agent in charge.[197]

The study also found that "although community members also reported increases in hate victimization, they expressed greater concern about being victimized by federal policies and practices, such as special registration, voluntary interviews, and detention of community members."[198]

The full cooperation of all communities will continue to be integral to future counter-terrorism efforts; eliminating tactics that alienate certain groups will only aid these efforts.

VI. CONCLUSION

In times of heightened national anxiety, there has been an understandable tendency to excuse the use of tactics that target particular communities. In the post-9/11 era, policymakers once again will be forced to address questions about the extent to which protections against these illegal tactics ought to apply to foreign individuals within our borders who might constitute a foreign threat. While a repeat of

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194. *Id.*

195. David Johnston, *F.B.I. Is Accused of Bias by Arab-American Agent*, N.Y. TIMES, July 20, 2003, at 16; David Shepardson, *Feds Boost Michigan Terror Fight*, DETROIT NEWS, May 29, 2002, at A1.

196. *Terror Plot Leaves Britain on Highest Alert*, CNN, Aug. 11, 2006, http://www.cnn.com/2006/WORLD/europe/08/11/terror.plot/index.html ("The original information about the plan came from the Muslim community in Britain, according to a British intelligence official.").

197. Nicole J. Henderson, *supra* note 192, at 18.

198. *Id.* at Executive Summary Page.

shameful policies such as internment may be unlikely, legal mechanisms must be in place to prevent mass pretextual arrests and deportation of targeted communities, should another terrorist attack take place on American soil.

Our constitutional order does not allow us to strip fundamental protections from people who lack legal status to live in the country. Instead, it seeks to create a balance that gives primacy to the security of the country, while protecting the dignity of all persons. Such an approach is possible, and indeed optimal in addressing claims of selective prosecution by non-citizens. Federal law should adopt a standard that protects national security while forbidding the targeting of non-citizens solely on the basis of their racial, religious, or ethnic backgrounds. Such an approach is necessary not only to uphold our carefully constructed constitutional balance, but to sharpen security measures and law enforcement tactics that will be necessary to our continuing struggle against international terrorism.