



## UNDER THE RADAR

### Muslims Deported, Detained, and Denied on Unsubstantiated Terrorism Allegations

The U.S. government's aggressive use of the immigration system in its counterterrorism efforts discriminates against Muslims and violates international human rights law.

Through the targeted use of a wide set of immigration and law enforcement policies and practices, the U.S. government has cast Muslim immigrants as dangerous threats to national security, leaving communities across the United States vulnerable to abuse and discriminatory profiling. A number of particular immigration programs and practices have received critical attention for their discriminatory impact on Muslim communities. This Briefing Paper—jointly published by the Center for Human Rights and Global Justice at NYU School of Law and the Asian American Legal Defense and Education Fund—identifies five key under-documented patterns of government practices that appear to be targeting Muslim communities through the immigration system.

Drawing on interviews with immigration and criminal defense attorneys, community-based groups, and on court documents and media accounts, this Briefing Paper includes a number of case studies that suggest that the U.S. government is deporting, detaining, and denying benefits to Muslim immigrants on the basis of innuendo, religious and cultural affiliations, political beliefs, employment histories, and immigrants' ties to their home countries. The Briefing Paper concludes that these practices violate fundamental human rights and calls on the U.S. government to stop the discriminatory targeting of Muslims and ensure greater transparency and accountability in the immigration system.



# UNDER THE RADAR

MUSLIMS DEPORTED, DETAINED, AND DENIED  
ON UNSUBSTANTIATED TERRORISM ALLEGATIONS

## CENTER FOR HUMAN RIGHTS AND GLOBAL JUSTICE

New York University School of Law  
139 MacDougal Street, 5th Floor  
New York, NY 10012

[www.chrgj.org](http://www.chrgj.org)



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## **ABOUT THE AUTHORS**

The **Center for Human Rights and Global Justice** (CHRGJ) at New York University School of Law was established in 2002 to bring together the law school's teaching, research, clinical, internship, and publishing activities around issues of international human rights law. Through its litigation, advocacy, and research work, CHRGJ plays a critical role in identifying, denouncing, and fighting human rights abuses in several key areas of focus, including: Business and Human Rights; Economic, Social and Cultural Rights; Caste Discrimination; Human Rights and Counter-Terrorism; Extrajudicial Executions; and Transitional Justice. Philip Alston and Ryan Goodman are the Center's Faculty Chairs; Smita Narula and Margaret Satterthwaite are Faculty Directors; Jayne Huckerby is Research Director; and Veerle Ogenhaffen is Senior Program Director.

The **International Human Rights Clinic** (IHRC) at New York University School of Law provides high quality, professional human rights lawyering services to community-based organizations, nongovernmental human rights organizations, and intergovernmental human rights experts and bodies. The Clinic partners with groups based in the United States and abroad. Working as researchers, legal advisers, and advocacy partners, Clinic students work side-by-side with human rights advocates from around the world. The Clinic is directed by Professor Smita Narula of the NYU faculty; Amna Akbar is Senior Research Scholar and Advocacy Fellow; and Susan Hodges is Clinic Administrator.

The **Asian American Legal Defense and Education Fund** (AALDEF), founded in 1974, is a national organization that protects and promotes the civil rights of Asian Americans. By combining litigation, advocacy, education, and organizing, AALDEF works with Asian American communities across the country to secure human rights for all. AALDEF focuses on critical issues affecting Asian Americans, including immigrant rights, civic participation and voting rights, economic justice for workers, language access to services, Census policy, affirmative action, youth rights and educational equity, housing and environmental justice, and the elimination of anti-Asian violence, police misconduct, and human trafficking. AALDEF has a 21-person staff, including 11 lawyers. The organization is assisted by over 300 volunteers, including pro bono attorneys, community workers, and students. AALDEF receives financial support from foundations, corporations, individual contributions and special fundraising events. AALDEF receives no government funds.

All publications and statements of the CHRGJ and AALDEF can be found on their websites: [www.chrgj.org](http://www.chrgj.org) and [www.aaldef.org](http://www.aaldef.org).

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### **Project Directors**

Sameer Ahmed, Skadden Fellow/Attorney, AALDEF  
Amna Akbar, Senior Research Scholar & Advocacy Fellow, CHRGJ/IHRC  
Smita Narula, Faculty Director, CHRGJ/IHRC

### **Authors and Researchers**

Sameer Ahmed, AALDEF  
Amna Akbar, CHRGJ/IHRC  
Caroline Burrell, IHRC  
Kibum Kim, IHRC  
Smita Narula, CHRGJ/IHRC

### **Review and Editorial**

Jayne Huckerby, Research Director, CHRGJ  
Veerle Opgenhaffen, Senior Program Director, CHRGJ  
Jennifer Reiss, Associate, CHRGJ

### **Additional Research, Writing, Production, or Other Assistance**

Christine Chiu, IHRC  
Susan Hodges, Clinic Administrator, IHRC  
Jennifer Reiss, Associate, CHRGJ  
Times Wang, IHRC  
Audrey Watne, Program Assistant, CHRGJ

### **Cover Design**

Joe Namy

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**GLOSSARY**

AALDEF	Asian American Legal Defense and Education Fund
Absconder Apprehension Initiative	A program to arrest non-citizens from predominantly Muslim countries with outstanding deportation orders.
ACLU	American Civil Liberties Union
BIA	Board of Immigration Appeals, the Executive Branch appellate body that reviews decisions of Immigration Judges and some decisions of the U.S. Citizenship and Immigration Services.
BIF	Benevolence International Foundation, a Muslim charity
CHRGJ	Center for Human Rights and Global Justice
CERD Committee	The United Nations Committee on the Elimination of Racial Discrimination
DHS	Department of Homeland Security
DOJ	Department of Justice
EOIR	Executive Office for Immigration Review, the Executive Branch office overseeing the work of the BIA and Immigration Judges.
FBI	Federal Bureau of Investigation
FOIA	Freedom of Information Act
HLF	Holy Land Foundation for Relief and Development, a Muslim charity
IACHR	Inter-American Commission on Human Rights
ICCPR	The United Nation's International Covenant on Civil and Political Rights, which is overseen by the Human Rights Committee.
ICE	Immigration and Customs Enforcement, a DHS agency tasked with the enforcement of immigration law.
ICERD	The United Nation's International Convention on the Elimination of all Forms of Racial Discrimination, which is overseen by the Committee on the Elimination of Racial

Discrimination.

Immigration Judge	Non-judicial, executive branch official who determines the fate of persons charged with removability from the United States, and who are not bound by the same due process rules as Article III judges under standard criminal law.
INA	Immigration and Nationality Act, the statute governing U.S. immigration law.
NSEERS	National Security Entry-Exit Registration System, which required noncitizen men between the ages of 16 to 45, mostly from Muslim-majority countries, to submit to fingerprinting, photographs, intensive questioning, and periodic registration with the government.
Operation Frontline	U.S. government program, which in 2004, targeted alleged immigration violators whom the government had identified as national security concerns, the vast majority of whom were from Muslim-majority countries.
Third Agency Check procedure	Wherein all immigration detainees who are nationals of “special interest countries” are continuously detained by ICE until they are cleared by other intelligence agencies.
USCIS	U.S. Citizenship and Immigration Services, a DHS agency tasked with processing immigration benefits and related issues.

**CONTENTS**

EXECUTIVE SUMMARY..... 1

I. INTRODUCTION..... 3

II. DISCRIMINATORY PATTERNS OF IMMIGRATION ENFORCEMENT..... 3

    A. Lurking Terrorism Allegations ..... 4

        Case Study: Foad Farahi ..... 4

        Case Study: Abdelrehim Kewan ..... 5

        Case Study: Sabri Samirah..... 5

    B. Abusive Use of Immigration Detention ..... 5

        Case Study: Imam A.A..... 6

        Case Study: F.Q..... 6

        Case Study: G.M..... 6

        Case Study: Mohamad Masfaka ..... 7

    C. Flimsy Immigration Charges..... 8

        1. False statement charges based on an alleged association with a Muslim charity or group..... 8

            Case Study: Tarek Hamdi ..... 9

            Case Study: “B.B.” ..... 9

        2. Unsubstantiated or irrational charges ..... 10

            Case Study: Zoubir Bouchikhi..... 10

            Case Study: “Imam C.C.” ..... 10

    D. The Terrorism Bars Provisions ..... 10

        Case Study: Youssef Megahed ..... 11

        Case Study: Tareq Abu Fayad..... 12

        Case Study: Tariq Ramadan..... 12

    E. FBI Influence on Immigration Proceedings..... 13

        Case Study: Yassine Ouassif..... 13

        Case Study: Zuhair Mahd ..... 14

III. INTERNATIONAL HUMAN RIGHTS IMPLICATIONS AND OBLIGATIONS ..... 14

    A. Non-discrimination ..... 15

        1. Do the government’s immigration policies have the purpose or effect of disproportionately burdening a particular racial, religious, ethnic or national group?..... 15

        2. Is the disproportionate burden justified? ..... 16

        3. The disproportionate burden on Muslim communities is illegal under international law..... 17

    B. OTHER FUNDAMENTAL RIGHTS ..... 17

1. The right to due process.....	17
2. The right to liberty and security of person.....	18
3. The right to freedom of religion.....	19
4. The right to freedom of opinion and expression.....	20
5. The right to private life and family.....	20
IV. RECOMMEDATIONS AND CONCLUDING OBSERVATIONS .....	20

# UNDER THE RADAR: MUSLIMS DEPORTED, DETAINED, AND DENIED ON UNSUBSTANTIATED TERRORISM ALLEGATIONS

## EXECUTIVE SUMMARY

Through the targeted use of a wide set of immigration and law enforcement policies and actions, the U.S. government has cast Muslims as dangerous threats to national security, leaving Muslim communities across the United States vulnerable to discrimination and discriminatory profiling.<sup>1</sup> This Briefing Paper by the Center for Human Rights and Global Justice (CHRGJ) and the Asian American Legal Defense and Education Fund (AALDEF) documents the U.S. government's deployment of lower evidentiary standards and lack of due process guarantees in the immigration system against Muslims to further marginalize this targeted group in the name of national security and counterterrorism.

A number of particular immigration programs and practices—such as the National Security Entry-Exit Registration System (NSEERS),<sup>2</sup> the Federal Bureau of Investigation (FBI) name-check system in the naturalization process,<sup>3</sup> and racial profiling at U.S. borders<sup>4</sup> have received critical attention for their discriminatory impacts on Muslim communities. This Briefing Paper draws on interviews with immigration and criminal defense attorneys and community-based groups, court documents, and media accounts to identify five key under-documented patterns of government practices that appear to be targeting Muslim communities through the immigration system:<sup>5</sup>

1. *The U.S. government's use of unsubstantiated terrorism-related allegations without bringing official charges in cases involving ordinary immigration violations.* This practice has the effect of prejudicing the immigration judge or placing the Muslim immigrant in a precarious situation where he is unable to defend himself against the allegations. As a result, he is often pressured to self-deport.
2. *The U.S. government's practice of subjecting Muslim immigrants to detention ostensibly for posing national security threats in cases involving minor violations that ordinarily do not warrant detention.* Detention and threat of immigration detention are also used to coerce Muslims to drop challenges to immigration charges or accept plea deals in criminal cases.
3. *The U.S. government's use of flimsy immigration charges.* For example, the government often uses false statement charges for failure to disclose tenuous ties to Muslim charitable organizations in such a way that seems to target Muslim immigrants for religious and political activities and affiliations.
4. *The U.S. government's unfair application of overbroad statutory language of the terrorism bar provisions of the Immigration and Nationality Act (INA) to remove, bar, and detain Muslims.*
5. *The undue influence of the FBI on U.S. Citizenship and Immigration Services (USCIS) and Immigration and Customs Enforcement (ICE) activities.* The FBI is known to exploit the vulnerability of Muslim non-citizens as a way to facilitate its preventative counterterrorism policing objectives in prejudicial ways.

Although we welcome the Department of Homeland Security's April 27, 2011, announcement of the indefinite suspension of the NSEERS program,<sup>6</sup> our documentation suggests the government



continues to use subtler—though no less abusive—practices of detention, deportation, and denial of immigration benefits.

The overall effect of these practices is that religious, cultural, and political affiliations and lawful activities of Muslims are being construed as dangerous terrorism-related factors to justify detention, deportation, and denial of immigration benefits. The government seems to be targeting Muslim immigrants not for any particular acts, but on the basis of unsubstantiated innuendo drawing largely on their religious and ethnic identities, political views, employment histories, and ties to their home countries. Tareq Abu Fayad,<sup>7</sup> for example, has been in immigration detention for more than four years because, according to the government, he is a *likely* target for terrorist recruiters. The factors the government has relied on in making this claim do not point to any criminal wrongdoing and include his education, green card, clean criminal record, and the fact that the imam at his local mosque in Gaza later joined the Hamas government. The FBI also seems to be exploiting vulnerabilities associated with the immigration system to target Muslims in various ways. For example, the FBI visited Zuhair Mahd<sup>8</sup> on multiple occasions, encouraging him to become an informant while his naturalization application was pending. Mahd refused and his naturalization application was later denied. USCIS later reversed its decision after Mahd filed a *pro se* lawsuit, and Mahd was sworn in as a citizen in 2009.

These practices are also marked by a profound lack of transparency. Many times, Muslim immigrants do not even know the basis of the allegations against them, because the government does not share them. In the opaque “Third Agency Check” program, for example, thousands have been detained by immigration authorities for weeks and even months after an Immigration Judge has ordered them removed or released from detention on the basis that they are nationals of “special interest countries.”<sup>9</sup> While the government has not publicly released a list of “special interest countries” for the Third Agency Check procedure, media reports suggest they are almost all Muslim-majority countries.<sup>10</sup>

When overbroad counterterrorism policies manifest in the immigration context—where there is an absolute void of checks and balances and a fundamental lack of transparency—there is all the more potential for government abuse. We are concerned that the practices outlined in this Briefing Paper are guided by racial and religious stereotypes, in a way that constitutes discrimination in violation of U.S. obligations under international human rights law. The practices identified in this Briefing Paper also suggest the United States is failing to uphold its international human rights obligations to guarantee the rights to due process; liberty and security of person; freedom of religion; freedom of expression and opinion; and the right to privacy and family.

The government must stop targeting and punishing individuals for what it *predicts* they will do, especially when these predictions are not based on fact, but instead on religious and racial stereotypes and flimsy “evidence.” CHRGJ and AALDEF call on the government to put an immediate stop to the discriminatory targeting of Muslims through the immigration system as outlined in this Briefing Paper, to provide greater transparency and accountability for immigration policies and enforcement.

## **I. INTRODUCTION**

Since September 11, 2001, the federal government has relied heavily on immigration law and policy to prosecute the so-called ‘War on Terror.’<sup>11</sup> With fewer checks and balances, it is much easier for the government to arrest, detain, and investigate an individual under immigration law than criminal law. In the American criminal legal system, a defendant has various rights and procedural protections: the right to an attorney; the right to a speedy trial in front of a jury of your peers; and the necessity to prove guilt beyond a reasonable doubt.<sup>12</sup> By contrast, in immigration court, a non-citizen is permitted to have an attorney, but counsel is not provided for indigent persons and more than 80 percent of individuals in removal proceedings are *pro se*.<sup>13</sup> Furthermore, in immigration court, an immigration judge—an executive branch official and not an independent Article III judge<sup>14</sup>—is both judge and jury, and a non-citizen can be mandatorily detained for months, or even years, before being released or removed from the United States.<sup>15</sup> Finally, in immigration court, the Department of Homeland Security (DHS) only has to prove an individual is removable by “clear and convincing evidence.”<sup>16</sup>

These lesser substantive and procedural protections have allowed federal officials to undertake several initiatives that have targeted immigrants, primarily those from Muslim-majority countries, in the name of national security.<sup>17</sup> Under the guise of executing the nation’s immigration laws, Muslim non-citizens have been subjected to large-scale, secret, and often lengthy preventive detention; exclusion based solely on their political views; guilt by association; unilateral detention by the executive branch; and nation-wide national security policies that have amounted to little more than wide-scale racial profiling,<sup>18</sup> such as the Absconder Apprehension Initiative,<sup>19</sup> the NSEERS special registration policy,<sup>20</sup> and Operation Frontline.<sup>21</sup> Over the past few years, both CHRJ and AALDEF have been involved in documenting and challenging many of these policies.<sup>22</sup>

## **II. DISCRIMINATORY PATTERNS OF IMMIGRATION ENFORCEMENT**

This Briefing Paper identifies cases suggestive of five patterns of immigration enforcement practices against Muslim non-citizens.<sup>23</sup> These cases and patterns were drawn from numerous interviews with immigration and criminal defense lawyers from across the country, as well as leaders of community-based organizations predominantly servicing Muslim communities. CHRJ and AALDEF also relied on court documents and news stories to verify the details of particular cases. Taken in context with prior well-known, nation-wide policies like NSEERS,<sup>24</sup> the Absconder Apprehension Initiative, and Operation Frontline, the cases suggest that the government is targeting this group for detention, deportation, and denials of temporary visas, green cards, and naturalization.

The lack of transparency and vulnerability involved in immigration proceedings and decisions makes it difficult to fully document these cases. Decisions by immigration courts and USCIS are rarely published, while the Board of Immigration Appeals (BIA) only publishes precedential opinions. Moreover, many immigrants fear discussing their cases publicly due to their vulnerable immigration status in the United States, especially when confronting unsubstantiated terrorism-related allegations. Others have been deported from the United States and are either unable to be

reached or fear talking because of the political situation in their own home countries. Where the case studies in this Briefing Paper are anonymous, we have not cited to the materials relied upon out of the need to protect the individual's identity.

Many of the cases described in detail below exhibit more than one of the patterns, demonstrating the aggressive nature of the government's actions towards Muslims. Greater transparency and accountability within the immigration system is needed to allow for a fuller understanding of the nature and extent of these practices, to enable reform, and to provide remedies for those affected.<sup>25</sup>

### A. LURKING TERRORISM ALLEGATIONS

The charges brought against Muslim immigrants are almost always ordinary immigration violations.<sup>26</sup> Unlike ordinary immigration proceedings, however, the government often insinuates the immigrant's involvement in some sort of terrorist activity, without providing either the basis or the evidence for its allegations.<sup>27</sup> The low evidentiary standards of the immigration system permit the government to make these accusations without proof, which they would not be able to do in a criminal trial.<sup>28</sup> The *Washington Post* has described the terrorism aspects of these immigration cases as "barely visible in the court files of those charged."<sup>29</sup>

Once the government makes these often-unsubstantiated allegations, the immigrant is placed in the impossible position of having to defend himself without knowing the allegations levied against him. "The difficulty of these cases, and I see them continually, is that the government will throw out [terrorism-related] allegations and never substantiate them, and you're in a position where you have to respond," states Sin Yen Ling, a lawyer with the Asian Law Caucus who has handled numerous immigration cases involving Muslim non-citizens.<sup>30</sup> In some cases, the specter of 'possible terrorist activity' appears to have prejudiced the immigration judge; in others, the government uses the potential charges to pressure the immigrant himself into dropping immigration challenges and leaving the country.

#### Case Study: Foad Farahi<sup>31</sup>

Foad Farahi, an Iranian imam living in Florida, entered the U.S. on a student visa in 1994. Starting in 2004, the FBI approached him multiple times to become an informant. He consistently refused. In 2007, he appeared at a local immigration court for what he thought would be a routine hearing on his political asylum application. Instead, ICE agents met him at the court, claiming that they had a file with evidence demonstrating he supported a terrorist group. He could have either dropped the asylum case and left the U.S. voluntarily, or been detained and charged as a terrorist.

Farahi chose voluntary departure, a form of immigration relief permitting an individual to leave the United States on his own recognizance. Deportation would have meant being sent to Iran, where he feared religious persecution. However, he later realized that the government's claim was a bluff. Despite repeated requests, the government refused to share with Farahi or his attorney any information about the alleged terrorism evidence, and he was never charged with any crime. Farahi challenged the voluntary departure order, but the immigration judge ruled against him and the BIA dismissed his appeal. However, in 2010, after three years of fighting, Farahi's lawyer was able to

undo the voluntary departure order. The government agreed to re-open his asylum case, which is now pending.

#### **Case Study: Abdelrehim Kewan<sup>32</sup>**

Abdelrehim Kewan, an Egyptian national, had a pending green card application based on his status as a battered spouse. In 2002, while working as a housepainter, he lost his way driving to a paint job approximately 40 miles from his home in Southern California and ended up at the gates of a Marine base. After his car was searched, he was allowed to leave. Two weeks later, ICE officials arrested and detained him. Despite the testimony of both FBI and Naval Criminal Investigative Services officials that Kewan was nothing more than a lost motorist, the immigration judge characterized him as a danger to the community and refused to grant him bond. “Painters don’t get lost,” stated the immigration judge.<sup>33</sup>

The immigration judge subsequently denied Kewan’s green card application, Despite official recognition by DHS officials on two previous occasions that he had been subject to mental and physical abuse by his former wife, the judge stated she doubted Kewan’s abuse. He was detained for a total of 16 months before being deported.

#### **Case Study: Sabri Samirah<sup>34</sup>**

Sabri Samirah, a Jordanian citizen, came to the United States in 1987 on a student visa. He twice applied to change his immigration status to become a lawful permanent resident and was denied both times. In the course of the second rejection, based on a visa technicality, the government referenced news reports stating that Samirah was affiliated with groups endorsing Hamas. In 2002, USCIS granted Samirah permission (called ‘advance parole’) to visit his ill mother in Jordan. When he attempted to reenter the United States, however, DHS revoked his parole and denied him reentry, claiming he was a security risk. The government refused to reveal the evidence behind its determination. When pressed at oral argument to disclose the grounds for the denial, the government’s lawyer made only a “cryptic statement... redolent of guilt by association, that maybe [Samirah] ‘needs better friends.’”<sup>35</sup> The Seventh Circuit overturned the DHS decision, stating that the government had offered no evidence that Samirah was connected to Hamas, and remanding the case to the district court to order the Attorney General to allow Samirah back into the country so that he may apply to obtain legal status.

As described in the case studies above, the government takes advantage of the lower protections offered to non-citizens during immigration proceedings to make coercive or prejudicial accusations against Muslim immigrants. Without any genuine opportunity to rebut the claims, Muslims must consequently attempt to make their immigration cases in a more hostile environment.

## **B. ABUSIVE USE OF IMMIGRATION DETENTION**

The U.S. immigration system permits detention of non-citizens in the process of removal proceedings. Although all non-citizens are potentially subject to detention, most of those charged

with ordinary immigration violations and detained by ICE are provided a bond hearing and released after demonstrating that they are not a danger, threat to national security, or flight risk.<sup>36</sup> However, lawyers report a recurring phenomenon in which Muslim non-citizens charged with minor immigration violations are detained in situations in which it is otherwise customary to release individuals. Other Muslim immigrants have reportedly been subjected to mandatory detention under a vague terrorism bar provision of the INA.<sup>37</sup> Finally, thousands continue to be detained by immigration authorities for weeks—and even months—after an Immigration Judge has ordered them removed or released from detention based on a government procedure called a “Third Agency Check.”<sup>38</sup> Under the Third Agency Check process, all immigration detainees who are nationals of “special interest countries” are continuously detained by ICE until they are cleared by other intelligence agencies. While the government has not publicly released a list of “special interest countries” for the Third Agency Check procedure, media reports in other contexts suggest they are almost all Muslim-majority countries.<sup>39</sup>

### **Case Study: Imam A.A.**<sup>40</sup>

“Imam A.A.,” a permanent resident of the United States since 1997, applied for naturalization after receiving his green card based on his marriage to a U.S. citizen. An ICE agent sat in on his naturalization interview and, shortly thereafter, immigration officials arrested him. Government lawyers alleged that because Imam A.A.’s divorce from a previous marriage was not finalized when he entered the marriage upon which his green card was based, the green card was invalid. ICE placed him in detention to await the commencement of removal proceedings. An immigration judge eventually ordered him released, stating in the written order that “[i]t appears the only reason he is being detained is because he is Muslim.”

After his release, the government continued to fight the case for years, despite the testimony of a Swedish law expert on the legitimacy of the divorce proceedings. Imam A.A. finally won five years after his initial arrest. Even then, however, USCIS refused to re-open his naturalization case.

### **Case Study: F.Q.**<sup>41</sup>

“F.Q.,” originally from Pakistan, was arrested in 2009 for illegal entry into the U.S. after the company he worked for ran a security check on its employees. Although he was not charged with any terrorism-related immigration violation or crime, the government subjected him to mandatory detention under INA § 236(c)(1)(D), the provision of the immigration code relating to detention for terrorism suspects. The government put forward no evidence to support its allegations of terrorism, other than a 1999 asylum application, which stated that in 1996 he briefly volunteered for Jamiat-e-Islami, a Pakistani political party. The group, one of the largest political parties in Pakistan, has never been designated a terrorist group by the U.S. Because he was subject to mandatory detention, F.Q. was not even provided a bond hearing to demonstrate that he was neither a flight risk, nor a security threat. Despite the fact that he had a wife and children who were all U.S. citizens, as well as strong ties to his local community, he was mandatorily detained for months before being deported to Pakistan, where he currently resides.

### **Case Study: G.M.**<sup>42</sup>

“G.M.,” who had studied and worked in the United States for more than a decade, was arrested in a humiliating fashion in front of his neighbors by immigration officials in 2004. At all times legally present in the United States, he was never charged with a terrorism-related immigration charge or any crime. While detained, ICE agents interrogated him about his knowledge of extremist groups and other national security-related issues. He was subsequently coerced into accepting

voluntary departure, a form of immigration relief where individuals are usually given a few weeks to pack their belongings and voluntarily leave the United States. An ICE official told him he'd be released within a week, but instead he was detained for nearly two months in prison, where he was denied his medication for a gastrointestinal disease, as well as his right to fast during the Muslim holy month of Ramadan. His prolonged detention was likely due to a "Third Agency Check," a government policy where an immigration detainee is not released by ICE until cleared by other intelligence agencies. An immigration detainee is subjected to a "Third Agency Check" not based on any actual intelligence, but rather solely based on the immigrant's nationality. After his lengthy detention, G.M. was deported to his home country.

The government also uses the threat of immigration detention to coerce Muslims into dropping challenges to immigration—and criminal—decisions. This practice was used in the case of Foad Farahi, described above, as well the recent case of Mohamad Masfaka.

### **Case Study: Mohamad Masfaka<sup>43</sup>**

Mohamad Masfaka, a legal permanent resident originally from Syria, was periodically hired as a musician for the Holy Land Foundation for Relief and Development (HLF) from 1998-99. At the time, HLF was the largest Muslim charity in the U.S., providing humanitarian assistance to children and families in Muslim majority countries around the world. In 2001—two years after Masfaka's work with them—HLF was designated a Specially Designated Global Terrorist under questionable circumstances by the U.S. government. The government claimed that HLF's provision of humanitarian aid to Gaza freed up resources that Hamas used to fund terrorist activities.<sup>44</sup>

In 2002, Masfaka applied for naturalization, stating on his forms that he had been associated with HLF. His application was never approved. In 2008, he was criminally charged with making false statements, taking a false oath in a matter relating to naturalization, and attempting unlawful procurement of naturalization. The government claimed that he had actually been *employed* by HLF, rather than *associated* with it, and then charged that his failure to disclose his employment was an attempt to cover up ties to a terrorist organization.

Government officials simultaneously commenced removal proceedings against Masfaka, which threatened to subject him to mandatory immigration detention if he did not agree to a plea deal requiring self-deportation. Although Masfaka's lawyers felt there was a good chance he could have won the criminal case, the threat of removal proceedings and mandatory detention made pursuing his criminal case moot. Masfaka's choices were to either lose the criminal trial, be jailed, and then face the prospect of deportation, or win the trial and subsequently be placed in immigration detention for a lengthy period, while facing removal proceedings under the lower evidentiary standards of the immigration system.

Faced with this Catch-22, Masfaka accepted a plea agreement that resulted in a sentence of time-served but required him to self-deport to a country of his choosing. He cannot return to Syria for fear of persecution, however, and the stigma of the implied terrorism-related charges against him will likely have an adverse effect on his prospects of obtaining asylum in a third country. The government's actions have effectively rendered him a stateless person.

These case studies represent only a handful of the cases we have encountered in which it appeared that immigration detention and immigration detention procedures are being used either selectively or coercively against Muslim non-citizens. Immigration detention has long been a tool the government has used against Muslim communities.<sup>45</sup> Despite the backlash in response to the post-September 11, 2001 mass detentions, our documentation suggests that the government continues to resort to subtler, but nonetheless abusive, detention practices.

### **C. FLIMSY IMMIGRATION CHARGES**

Immigration lawyers have reported that the charges levied against Muslims non-citizens—whether ordinary immigration charges or terrorism-related charges—rely on extreme interpretations of statutory language. In other cases, charges have construed innocent behavior as criminal. These practices suggest that the government is actively trying to deport and deny entrance, green cards, or citizenship to Muslim individuals.<sup>46</sup> “The approach is basically to target the Muslim and Arab community with a kind of zero-tolerance immigration policy,” says David Cole, a law professor at Georgetown University.<sup>47</sup> According to Cole, “No other community in the U.S. is treated to zero-tolerance enforcement.”<sup>48</sup>

**The use of flimsy immigration charges can be broken down into two main groups:**

#### **1. False statement charges based on an alleged association with a Muslim charity or group**

Muslim non-citizens have been deported or denied naturalization, green cards, and visas for minor misrepresentations related to past, often tenuous, affiliations with Muslim organizations.<sup>49</sup> Government officials allege these individuals have committed immigration fraud, or have failed to demonstrate “good moral character” for providing false testimony with the purpose of gaining an immigration benefit.<sup>50</sup> In many cases, government officials interview individuals multiple times, asking the same questions over and over. According to Jennie Pasquarella, Staff Attorney with the ACLU-Southern California, the nature of the repeated interviews suggest the officials are attempting to trip individuals into making minor mistakes or inconsistencies which can subsequently be construed as false statements.<sup>51</sup> This practice is in tension with the USCIS Adjudicator’s Field Manual, which requires that immigration officials provide applicants with an opportunity to explain seemingly false statements.<sup>52</sup>

Serious questions have been raised about the process by which the U.S. government has designated a number of major Muslim charities as terrorist entities, including the Holy Land Foundation and Benevolence International Foundation (BIF).<sup>53</sup> The ACLU has noted that:

“The Treasury Department has virtually unchecked power to designate groups as terrorist organizations. . . . The government’s actions against [HLF, BIF, and Global Relief Foundation] were the start of a pattern of conduct that violated the fundamental rights of American Muslim charities and has chilled American Muslims’ charitable giving in accordance with their faith, seriously undermining American values of due process and commitment to First Amendment freedoms.”<sup>54</sup>

Similar concerns have been raised about the designation of individuals on such lists.<sup>55</sup>

### **Case Study: Tarek Hamdi**<sup>56</sup>

Tarek Hamdi, an Egyptian national, has been a U.S. resident since 1988. After passing his naturalization exam in 2002, USCIS scheduled Hamdi for an oath ceremony. He then heard nothing from USCIS for four years. In 2006, he received a letter from USCIS scheduling him for a second interview. Because he was abroad at the time, he did not receive the letter until the interview date had passed. USCIS subsequently denied his application and Hamdi applied to naturalize a second time in 2007. USCIS denied his application on ‘good moral character’ grounds. It alleged that he failed to reveal his affiliation with the Benevolence International Foundation (BIF), a humanitarian aid organization designated under questionable circumstances as a financier of terrorism in 2002.<sup>57</sup> USCIS denied his application on the grounds that he made false statements during his interview.

Regarding his situation, Hamdi stated:

“I always played by the rules. I paid taxes, contributed to society and raised a beautiful family. I have been treated differently because I am a Muslim man. This has been incredibly frustrating and truly demoralizing. No person of faith, no honest man should have to face the discrimination I have, especially when striving to take an oath of allegiance to the United States.”<sup>58</sup>

In 2000, *prior to* BIF’s designation, Hamdi attended a BIF fundraiser and wrote a check for \$8,000 to the group. He stated that the check was a compilation of donations from friends who could not attend the event. In 2009, Hamdi appealed USCIS’s denial. He acknowledged that he made donations to BIF, but stated that he did not understand that his donations to BIF constituted an “association” with that organization.<sup>59</sup> His appeal was denied in April 2010, again on false statement grounds regarding his association with the BIF. The ACLU of Southern California is currently representing Hamdi in an appeal of USCIS’s decision to the District Court for the Central District of California.

### **Case Study: “B.B.”**<sup>60</sup>

“B.B.,” a 70-year-old Iranian citizen, was granted political asylum in 1990. He filed his naturalization application in 2005. In 2010,<sup>61</sup> USCIS denied the application on the grounds that B.B. provided false testimony during his naturalization interview. Specifically, it claimed that he lied about his membership in Mujahedin E-Khalq (MEK), an Iranian organization designated by the U.S. as a terrorist organization.<sup>62</sup> USCIS’s evidence of membership was based solely on an FBI interview with B.B. in 1999, in which USCIS alleges he “admitted he was a member of the MEK” and “admitted to attending meetings of the MEK in Los Angeles.”<sup>63</sup> B.B. denies that he was a member of MEK or that he ever admitted to such.

B.B. missed the deadline to file an appeal. The ACLU has written a letter to USCIS on B.B.’s behalf requesting an opportunity to appeal the decision despite the missed deadline. B.B. is awaiting a response.



## 2. Unsubstantiated or irrational charges

Many cases we investigated involved government conduct that seemed to lack legitimate basis.

### Case Study: Zoubir Bouchikhi<sup>64</sup>

Zoubir Bouchikhi, an Algerian-born imam, applied for permanent residency in 2003. His application was denied in 2007 because his employer, the Islamic Society of Greater Houston (ISGH), “failed to prove Bouchikhi had been continuously employed for the two years prior to filling out his petition and had not demonstrated its ability to pay Bouchikhi’s salary.... [and] had not proved Bouchikhi was an imam by submitting a formal certificate of ordination.” According to Bouchikhi, all documents requested by USCIS to prove these details were made available within weeks of the initial denial and before the subsequent appeal. USCIS then *altered* its reason for the denial, stating that he was inadmissible in 2006 when he returned from travel abroad—even though that travel had been authorized by USCIS.

In 2008, ICE arrested and detained Bouchikhi. Although bond was initially granted for \$20,000, Bouchikhi was later detained for five months before finally being released. Then, weeks before his scheduled date of deportation in January 2011, he was again picked up and detained by ICE agents. ICE claimed it had evidence that he would not leave the country on his scheduled deportation date, but refused to state what that evidence was. Bouchikhi’s appeal is currently pending before the Fifth Circuit Court of Appeals.<sup>65</sup>

### Case Study: “Imam C.C.”<sup>66</sup>

“Imam C.C.,” admitted to the United States on a special immigrant visa as an imam in 1997, applied for naturalization in 2002. USCIS granted his naturalization application, but twice sent the notice of the oath ceremony to the wrong address. Because he never received this information, Imam C.C. did not attend the ceremony. In 2006, after repeated inquiries into the status of his naturalization, his attorney filed a mandamus action to compel the agency to reschedule his oath ceremony. USCIS then reopened the case on its own motion, based on the ‘derogatory’ information that he had failed to appear at his oath ceremony. His naturalization application was subsequently denied because of three traffic violations he had incurred over a period of 11 years, a rationale labeled as “unheard of” by his attorney.

According to the *Washington Post*, Muslim activists report that the government is “scouring the immigration papers of Arabs and Muslims it considers suspicious.”<sup>67</sup> The cases above demonstrate how it then strains facts and legal interpretations beyond any reasonable understanding in order to find them deportable or ineligible for naturalization, green cards, and temporary visas.<sup>68</sup>

## D. THE TERRORISM BARS PROVISIONS

Akin to the material support ban in the federal criminal code,<sup>69</sup> the ‘terrorism bars’ provisions of the immigration code, INA § 212(a)(3)(B) and § 237 (a)(4)(B), provide for the removal or denial of admission of non-citizens suspected of terrorist activity or of providing support to terrorist activity. The problems created by the breadth and vagueness of the terrorism bars have been well-documented in the asylum context: refugees have been caught under material support provisions for having been kidnapping victims who became child soldiers and for such acts as providing help or money under duress, often turning the facts of their claims for asylum against them.<sup>70</sup> Extreme

applications of the provisions have been used to deport or deny admission to Muslim non-citizens outside of the asylum context as well.<sup>71</sup>

The terrorism bars cases suggest targeting of Muslims on the basis of expression of political and religious views and beliefs, violating not only international law guaranteeing freedom of expression, but also First Amendment protections.

### **Case Study: Michel Shehadeh and Khader Hamide (LA8)<sup>72</sup>**

One of the most prominent terrorism bars cases involved two men, Michel Shehadeh and Khader Hamide, who were a part of the famed Los Angeles 8 or LA8. The LA8 are activists for the liberation of Palestine whom the government had tried to deport since 1987 under a McCarthy-era law that made affiliations with communist groups a deportable offense.<sup>73</sup> In going after the LA8, the government openly admitted the political motivations behind the charges: “William Webster, the director of the FBI at the time of the arrests, testified in Congress that the eight had not engaged in criminal activity and could not have been legally arrested if they had been U.S. citizens.”<sup>74</sup> The law under which the LA8 were originally charged was declared unconstitutional by the Ninth Circuit in 1989 and repealed by Congress in 1990.<sup>75</sup> Then, in 2005, the government attempted to retroactively apply the terrorism bars to remove Shehadeh and Hamide. In 2007, the immigration judge threw out the case, characterizing the 20-year effort to deport the men as “an embarrassment to the rule of law.”<sup>76</sup>

In some cases, the government has used the terrorism bars provisions in attempts to deport individuals for the very same acts they had already been acquitted of in criminal cases.

### **Case Study: Youssef Megahed<sup>77</sup>**

Youssef Megahed, a legal U.S. resident of Egyptian origin, was a 21-year-old student at the University of South Florida when he was arrested with his friend Ahmed Mohamed in August 2007. A police officer stopped Mohamed’s car for speeding and found material for model rockets in the trunk, which the government later characterized as explosives for terrorist activity. Both Mohamed and Megahed were indicted for carrying explosives across state lines.<sup>78</sup> While co-defendant Mohamed took a plea deal, Megahed opted to go to trial. The jury accepted Megahed’s defense that he was unaware of the materials in Mohamed’s trunk and acquitted Megahed of criminal charges for possessing and transporting explosives.

Three days after his acquittal, ICE arrested Megahed and brought deportation proceedings against him for the very same facts in his criminal case, alleging that Megahed was “engaged or likely to become engaged in... terrorist activity.” Evidence presented by ICE included materials found on the family computer at Megahed’s home, which ICE alleged contained, “numerous videos, documents and an Internet search history that supports Islamic extremism, jihad against the United States.”<sup>79</sup> Megahed was held in Glades County Detention Center for almost four months until an immigration judge dismissed his deportation case in late August 2009, finding that the government had not presented enough evidence to conclude that Megahed was likely to engage in terrorism.<sup>80</sup> Megahed was mandated, however, to report monthly to ICE in Tampa. By the time the case was dismissed Megahed had been under house arrest or detention for almost two years.<sup>81</sup> Megahed felt

the immigration case brought against him constituted “double jeopardy because the same allegations [in the immigration case were] the same allegations that was there, in the court, in the trial.”<sup>82</sup>

In other cases, the terrorism bars provisions have been used to deny non-citizens entrance into the United States. The case of Tareq Abu Fayad shows the extremely broad reach of terrorism bars laws and the government’s willingness to use the law against Muslims. Section 212(a)(3)(B) was interpreted to allow the detention of a young Palestinian student for more than four years as someone ‘likely to engage in terrorism,’ despite the lack of any actions, hard evidence or criminal activity whatsoever—which the government conceded.

### Case Study: Tareq Abu Fayad<sup>83</sup>

Tareq Abu Fayad, a Saudi-born Palestinian national, came to the United States in February 2007 as the 24-year-old son of a U.S. citizen and a computer science student with a valid immigrant visa. However, upon arrival he was denied entry into the country; he was deemed inadmissible when customs agents at the San Francisco International Airport found “anti-American” material—consisting of, *inter alia* al Jazeera news stories on his hard drive and a September 11 conspiracy theory series downloaded onto his hard drive—in his possession. He has been in immigration detention ever since.

The government never alleged that Abu Fayad had taken any actions toward terrorist or criminal activity. But the Ninth Circuit Court of Appeals sustained the government’s claim that Abu Fayad was deportable on the grounds that he is *likely* to engage in terrorist activity at some point in the future. In making this claim, the government relied on the following rationales: an FBI ‘expert’ on radical Islam who pointed to the materials found on Abu Fayad’s computer; the fact that Abu Fayad’s childhood mosque was led by an imam who later became a famous Hamas politician; the fact that two of his cousins were members of Hamas; and the fact that he had been assigned roommates who were members of Hamas for a brief period in college.<sup>84</sup> The so-called expert did not properly account for the tenuous nature of Abu Fayad’s relationships with Hamas members, or for the fact that Hamas is the political party governing Gaza, where Abu Fayad grew up. The Court also pointed to the DHS expert’s conclusion that Abu Fayad’s computer science training, college-education, clean criminal record, and green card would make him an “exceptionally attractive target for recruitment” by Hamas.<sup>85</sup> As a result, Abu Fayad has been languishing in immigration detention for more than four years.

Other lawyers report receiving denials under the terrorism bars provisions in response to applications for temporary visas, green cards, and naturalization.

### Case Study: Tariq Ramadan

Tariq Ramadan, a citizen of Switzerland and professor at Oxford University—a leading reformist Islamic scholar whose intellectual aims include bridging the so-called gulf between Western and Islamic values<sup>86</sup>—was prevented from taking up a professorship at Notre Dame in 2004 when the State Department revoked his work visa based on an “ideological exclusion” provision under the terrorism bars.<sup>87</sup> Ramadan was subsequently denied even visitor visas to come

to the United States on speaking engagements for being deemed inadmissible for “providing material support to a terrorist organization.”<sup>88</sup> The factual grounds for the material support charge was that Ramadan donated 600 Euros (approximately \$900) to two charitable organizations in France and Switzerland<sup>89</sup> that were alleged to have ties to Hamas, even though Ramadan claims he had no knowledge of these alleged ties.

In January 2006, the ACLU filed a suit on behalf of groups that had intended to invite Ramadan for meetings and speaking engagements on First Amendment grounds. The case reached the Second Circuit Court of Appeals which ruled that the First Amendment had been violated and that the government cannot exclude someone for material support without affording them the opportunity to present clear and convincing evidence that he did not know that the recipient of his contributions had been deemed a terrorist organization.<sup>90</sup> In January 2010, Secretary of State Hillary Clinton lifted Ramadan’s ban.<sup>91</sup> Since then, he has traveled to the United States on multiple occasions for speaking engagements.<sup>92</sup>

## **E. FBI INFLUENCE ON IMMIGRATION PROCEEDINGS**

Lawyers report that the FBI has a strong influence on immigration officials’ actions regarding Muslim non-citizens. They say that the FBI takes advantage of the lowered due process protections in the immigration system to more easily promote law enforcement goals. Lawyers cite the presence of FBI agents during immigration proceedings, ICE’s reliance on statements made in old FBI interviews in its decisions, and the FBI’s submission of prejudicial affidavits raising national security concerns without providing the basis of the allegations.<sup>93</sup> In addition, as with the Farahi case noted above, FBI agents have used the vulnerabilities associated with immigration processes to coerce Muslim immigrants into becoming informants or retaliate against them if they refuse.<sup>94</sup>

### **Case Study: Yassine Ouassif<sup>95</sup>**

Ouassif, a Moroccan national, received his green card in 2001. In 2005, U.S. border agents stopped him when he attempted to enter the country from Canada. They took away his green card and an FBI official told him he would get it back only if he agreed to become a government informant. If he refused, he was told, the FBI agent would work to deport him back to Morocco. Ouassif refused.

Two weeks later, Ouassif reported for an immigration interview to determine whether he would get his green card back. The immigration officials interrogated him at length about a former roommate who had returned home to Baghdad, Iraq shortly after Ouassif moved in. The immigration officials then told Ouassif that they intended to detain him prior to deportation and asked him whether he still wished to fight deportation. He said yes.

However, the DHS lawyer on duty refused to sign off on his detention, citing a lack of evidence. Three months later, DHS officials returned Ouassif’s green card

### Case Study: Zuhair Mahd<sup>96</sup>

Zuhair Mahd, a Jordanian national and blind adaptive technologies specialist, became a permanent U.S. resident in 1999. In 2004, he applied for citizenship and successfully completed his interview, but USCIS did not schedule his oath ceremony. In January 2005, while Mahd was waiting to hear the final decision on his naturalization application, the FBI visited him, interrogated him on his immigration status, background, work, home, friends, political views, and travels, and eventually asked him to become a “source of information.” He refused. After applying a great deal of pressure, the agents eventually relented and instructed Mahd not to tell anyone about the interview.

A different set of FBI agents visited him in December 2005 and asked him to become an informant tracking suspicious Internet activities. Once again, he refused. During the interview, the agents posed several accusatory questions about an Internet domain name Mahd had registered for a company he co-founded that produced a screen reader in Arabic for the visually-impaired and about an interview posted on his website with Al-Jazeera about the screen reader. The FBI approached him a third and final time in August 2006, and the agents offered to help him with his citizenship application for his cooperation. By this time, Mahd had filed a suit to compel the government to process his application and he informed the agents of this. He later returned to USCIS to check the status of his application and was told that his file had been lost. On June 20, 2007, USCIS denied his naturalization application. After five years and a *pro se* lawsuit, USCIS reversed its decision and in 2009 Mahd was sworn in as a U.S. citizen.

The patterns detailed in this Briefing Paper implicate a number of fundamental human rights guaranteed to citizens and non-citizens alike. The following section identifies the nature and scope of U.S. obligations to afford these protections under international law.

### III. INTERNATIONAL HUMAN RIGHTS IMPLICATIONS AND OBLIGATIONS

The United States has ratified two of the key international instruments that confer rights guarantees upon non-citizens: the International Convention on the Elimination of all Forms of Racial Discrimination (ICERD)<sup>97</sup> and the International Covenant on Civil and Political Rights (ICCPR).<sup>98</sup> Although international human rights law recognizes that States can make distinctions between citizens and non-citizens for the provision of certain rights,<sup>99</sup> international law also guarantees a number of rights to non-citizens.<sup>100</sup> As noted by the Human Rights Committee, the oversight body for ICCPR, “the general rule is that each one of the rights of [ICCPR] must be guaranteed without discrimination between citizens and aliens” and all rights in the Covenant apply, even in cases of entry and residence if discrimination is involved.<sup>101</sup> In addition, international law requires States to ensure equality between citizens and non-citizens in the enjoyment of civil, political, economic, social and cultural rights to the extent recognized under international law.<sup>102</sup> ICERD specifically prohibits the United States from discriminating between non-citizens based on race or ethnic or national origin within the immigration system.<sup>103</sup>

## **A. NON-DISCRIMINATION**

Non-discrimination is a non-derogable peremptory norm of international human rights law.<sup>104</sup> Non-discrimination features prominently in ICERD and ICCPR. Although ICERD does not on its face cover discrimination based on religion,<sup>105</sup> the ICCPR does.<sup>106</sup> Moreover, ICERD has been interpreted to prohibit religious discrimination, especially when consistently tied to racial discrimination.<sup>107</sup> Furthermore, the construction of a terrorist ‘other’ in the post-9/11 context has conflated notions of race, ethnicity, religion, national origin, gender, and political views, effectively racializing Islam, Muslims, and Muslim religious practice as radical and dangerous to U.S. national security interests.<sup>108</sup>

To assess whether the U.S. government’s use of the immigration system against Muslims in the ways described above is illegal under international law, two key questions must be addressed.

First, *Do the government’s immigration policies have the purpose or effect of disproportionately burdening a particular racial, ethnic, religious, or national group?* International law prohibits both direct (discriminatory purpose) and indirect (disparate impact) discrimination.<sup>109</sup>

Second, *Is this disproportionate burden justified?* International law allows discrimination to be justified in certain circumstances, where the aim of the measure is legitimate and the differentiation is objective, reasonable, and proportional to that aim.<sup>110</sup>

### **1. Do the government’s immigration policies have the purpose or effect of disproportionately burdening a particular racial, religious, ethnic or national group?**

The patterns identified in this Briefing Paper suggest that the government is targeting Muslim non-citizens for detention, deportation, and denials of temporary visas, green cards, and naturalization. While there may be no statutory provisions explicitly targeting Muslims in the ways described above, the implementation of immigration law suggests a pattern of discrimination. Moreover, it is worth noting that the Third Agency Check procedure targets for extra detention based on whether someone is from a “special interest country” and media reports suggest these are Muslim majority countries.<sup>111</sup> Government actions appear to be targeting Muslims when they are: subjected to multiple interviews to get conflicting statements to make false statement charges; targeted for deportation because of political activities;<sup>112</sup> and considered national security threats based on factors such as where they grew up.<sup>113</sup> The government has also previously targeted Muslim non-citizens in several large-scale immigration or immigration-related programs, such as NSEERS, that were widely viewed as discriminatory.<sup>114</sup>

Even if these immigration policies do not have a discriminatory purpose, they nonetheless often result in a discriminatory effect. The government has increasingly conflated immigration and counterterrorism laws since September 11, 2001, and has explicitly promulgated the notion that the immigration system should be used as a tool in the “War on Terror.”<sup>115</sup> The lurking terrorism allegations, the charges based on links to Muslim charities, the detention of Muslim immigrants on

flimsy charges,<sup>116</sup> and the influence of the FBI on immigration proceedings involving Muslims are the results of this conflation of immigration and counterterrorism policies. Because counterterrorism efforts predominantly concentrate on Muslim communities,<sup>117</sup> the merging of these two areas has resulted in aggressive, heightened scrutiny of Muslims by immigration authorities.<sup>118</sup>

### **2. Is the disproportionate burden justified?**

Under international law, policies that discriminate against particular groups (either in purpose or effect) must be justified in order not to constitute prohibited discrimination. Some of the factors that may be considered in determining whether a burden is justified include:

- The importance of the right sought to be infringed by the measure;<sup>119</sup>
- The aim or objective of the measure, including its legitimacy;<sup>120</sup>
- The nature of the differentiation (whether it uses criteria that are “objective and reasonable”);<sup>121</sup> *and*,
- The proportionality between the effects of the means used and the ends or aim sought (including an assessment of whether the means effectively advance the end).<sup>122</sup>

With regard to the importance of the right infringed by the measure, the prohibition on discrimination is a peremptory norm of international law and applies to all parts of a State’s immigration policy, including deportation proceedings and naturalization applications.<sup>123</sup> Moreover, the other rights laid out in this Briefing Paper as being affected—such as the rights to due process and liberty and security of person—are at the very core of human rights protections.

The U.S. government would argue that its use of the immigration system as a counterterrorism tool serves the legitimate purposes of national security.<sup>124</sup> While national security in itself is a legitimate aim, the objective of removing Muslim individuals—who often have built careers, lives, and families in the United States—on the basis of racial and religious stereotypes does not comply with human rights norms. The CERD Committee—the oversight body for ICERD—has stated that States must continue to comply with their nondiscrimination obligations in any actions undertaken in the context of the “War on Terror.”<sup>125</sup> The U.N. Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, Martin Scheinin, has also urged the U.S. government “not to act in a manner which might be seen as advocating the use of race and religion for the identification of persons as terrorists.”<sup>126</sup>

The remaining criteria—whether the means used are proportional and reasonable—further suggest that the government’s immigration policies are not justified. As for the effectiveness of the policies, the reliance on a racialized construct of religion to identify potential terrorists rests on the premise that Muslims are more likely to commit terrorist attacks. This assumption has been invalidated on numerous occasions.<sup>127</sup> Additionally, the targeting of individuals based on their religious background, rather than on actual violent or criminal activity, disrupts Muslim communities’ ability to exercise fundamental rights to religion, speech, and association.<sup>128</sup> Thus, the

use of religious and racial profiling as a proxy for identifying and disabling potential terrorists is not an effective or proportional means to achieving the government's national security purposes.

### **3. The disproportionate burden on Muslim communities is illegal under international law.**

The importance of the rights to be infringed by targeted immigration policies, combined with the lack of effectiveness and reasonableness, render such a disproportionate burden unjustified and illegal under international law.

## **B. OTHER FUNDAMENTAL RIGHTS**

In addition to non-discrimination, the U.S. government's targeting of Muslims through the immigration system implicates other fundamental rights under international law.

### **1. The right to due process**

Under international law, the United States must guarantee due process and equal treatment in tribunals, to citizens and non-citizens alike, including in immigration proceedings.<sup>129</sup> The Inter-American Commission on Human Rights (IACHR) has concluded that immigration detention and deportation proceedings require "as broad as possible" interpretation of due process requirements.<sup>130</sup>

The ICCPR's Article 13 also states that a non-citizen who is lawfully in a State can be "expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by" competent authorities.<sup>131</sup> The Human Rights Committee has interpreted the language of Article 13 as covering non-citizens who wish to challenge the legality of their status and further explained that such a non-citizen "must be given full facilities for pursuing his remedy against expulsion so that this right will in all the circumstances of his case be an effective one."<sup>132</sup> The IACHR has stated that detention review procedures should include "the defendant's right to an impartial hearing in decisions that affect his or her fate, his or her right to present evidence and refute the State's arguments, and the opportunity to be represented by counsel."<sup>133</sup> The United States is also obligated to ensure the principle of *non-refoulement* in its deportation policies, by not transferring anyone to a State where there is a substantial risk of torture.<sup>134</sup>

The U.S. immigration system fails to provide due process to non-citizens. Jorge Bustamante, the current U.N. Special Rapporteur on the Human Rights of Migrants, has stated that U.S. "deportation policies violate the right to fair deportation procedures, including cases in which the lawful presence of the migrant in question is in dispute."<sup>135</sup> Bustamante has highlighted the lack of adequate due process in detention appeals, saying that immigration enforcement authorities have "absolute discretion to determine whether a non-citizen may be released from detention" and since "these discretionary decisions are not subject to judicial review, current United States practice violates international law."<sup>136</sup> He has also stated that mandatory detention furthermore "severely



impairs the right of a respondent in removal proceedings to present evidence in her or his own defense.”<sup>137</sup>

In addition to the failure to provide due process in its immigration system generally, the United States further exacerbates the due process violations for Muslims by introducing unsubstantiated and immaterial terrorism-related allegations during immigration hearings that may potentially prejudice the immigration judge; presenting evidence and calling in witnesses without disclosure or warning to the defendants; and using immigration consequences as coercive tools in criminal cases.<sup>138</sup>

## **2. The right to liberty and security of person**

Under the ICCPR, the United States must guarantee “the right to liberty and security of person,” which includes the prohibition of “arbitrary arrest or detention.”<sup>139</sup> International law thus requires that “the decision to detain someone should be made on a case-by-case basis after an assessment of the functional need to detain a particular individual.”<sup>140</sup>

The Human Rights Committee has stated that “the notion of ‘arbitrariness’ must not be equated with ‘against the law’ but be interpreted more broadly to include such elements as inappropriateness and injustice,” and that, “remand in custody could be considered arbitrary if it is not necessary in all the circumstances of the case.”<sup>141</sup> In the immigration context, illegal entry by itself would not justify detention for any particular period of time.<sup>142</sup> In fact, IACHR has concluded that for immigration detention, “the standard for the exceptionality of pre-trial detention must be even higher because immigration violations ought not to be construed as criminal offenses.”<sup>143</sup> Gabriela Rodríguez Pizarro, the former Special Rapporteur on the Human Rights of Migrants, has stated that the “[d]etention of migrants on the ground of their irregular status should under no circumstances be of a punitive nature.”<sup>144</sup>

The U.N. Working Group on Arbitrary Detention adds that,

“detention should be the last resort and permissible only for the shortest period of time and that alternatives to detention should be sought whenever possible. Grounds for detention must be clearly and exhaustively defined and the legality of detention must be open for challenge before a court and regular review within fixed times limits.”<sup>145</sup>

When a State fails to provide such legal guarantees while detaining and deporting non-citizens, “their continued detention and subsequent expulsion are to be considered as arbitrary.”<sup>146</sup>

In the context of assessing U.S. immigration detention policies as a whole, the current U.N. Special Rapporteur on the Rights of Migrants, Jorge A. Bustamante, has concluded that these policies violate international laws that bar arbitrary detention by: “Failing to promptly inform detainees of the charges against them; Failing to promptly bring detainees before a judicial authority; Denying broad categories of detainees release on bond without individualized assessments; Subjecting detainees to investigative detention without judicial oversight; [and] Denying detainees access to legal counsel.”<sup>147</sup>

Mandatory detention laws, in particular, present problems as “[u]nder United States law, migrant detainees about whom the United States has certain national security concerns are subject to the possibility of indefinite detention, in contravention of international standards.”<sup>148</sup> Mandatory detention also “strips immigration judges of the authority to determine during a full and fair hearing whether or not an individual presents a danger or a flight risk.”<sup>149</sup> While serving as the U.N. Special Rapporteur on the Human Rights of Migrants Workers, Gabriela Rodríguez Pizarro expressed concern that anti-terrorism legislation “allowing for the detention of migrants on the basis of vague, unspecified allegations of threats to national security” poses a threat to human rights.<sup>150</sup> The terrorism bars provisions and the practice of pressing flimsy immigration charges to detain and deport Muslims outlined in this Briefing Paper are prime examples of such laws.

### **3. The right to freedom of religion**

Article 18 of the ICCPR mandates that “[e]veryone shall have the right to freedom of thought, conscience and religion,” and makes this a non-derogable right.<sup>151</sup> The U.N. Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, Martin Scheinin, has recommended in light of his review of U.S. practices that States “not use the country of origin of a person as a proxy for racial or religious profiling” and has urged States “not to act in a manner which might be seen as advocating the use of race and religion for the identification of persons as terrorists.”<sup>152</sup>

A larger set of discriminatory law enforcement and surveillance patterns against Muslims, coupled with the trends identified in this Briefing Paper—such as subjecting Muslims to multiple immigration process interviews to ask about their religious and social activities and charging Muslims with making false statements for failure to disclose donations or affiliations to Muslim charities—have a chilling effect on charitable giving and religious worship<sup>153</sup> and thus collectively impinge on Muslims’ fundamental rights to freedom of religion.

### **4. The right to freedom of opinion and expression**

International law requires states to guarantee freedom of opinion and expression.<sup>154</sup> The use of political opinions and activities as bases for immigration consequences illustrates how U.S. immigration policies contravene international law. The Human Rights Committee has explicitly criticized terrorism bars provisions for their effects on freedom of opinion and expression, voicing concern over the “potentially overbroad reach of the definitions of terrorism under domestic law, in particular under 8 U.S.C. § 1182 (a) (3) (B) and Executive Order 13224 which seem to extend to conduct, e.g. in the context of political dissent, which, although unlawful, should not be understood as constituting terrorism.”<sup>155</sup>

### **5. The right to private life and family**

Under international law, the United States must uphold an individual’s rights to private life and family.<sup>156</sup> The Human Rights Committee has explicitly stated that the right to family life imposes limits on States’ powers to deport non-citizens.<sup>157</sup> The U.S. government’s punitive deportation procedures violate the right to private life and family unity: as the current U.N. Special Rapporteur

on the Human Rights of Migrants has concluded, “[b]ecause United States immigration laws impose mandatory deportation without a discretionary hearing where family and community ties can be considered, these laws fail to protect the right to private life, in violation of the applicable human rights standards.”<sup>158</sup>

In sum, the practices highlighted in this Briefing Paper suggest that above and beyond the myriad problems all immigrants to the United States face in the immigration system, the U.S. government is targeting Muslim communities through its immigration system in particular ways that have serious human rights implications. These policies and practices violate U.S. obligations to: uphold the right to non-discrimination; ensure equality between citizens and non-citizens in the provision of fundamental rights; and, to protect rights to due process, liberty, and security of person, religion, opinion, and expression, as well as family.

## IV. RECOMMENDATIONS AND CONCLUDING OBSERVATIONS

The United States should uphold its obligations under international human rights law to guarantee fundamental human rights for citizens and non-citizens alike. CHRGJ and AALDEF urge the U.S. government to immediately take steps toward the following:

- *Ensure due process and fair trial rights, including right to counsel, in the immigration context by:*
  - Disallowing the DHS or FBI from introducing unsubstantiated, unverified, and uncharged terrorism-related allegations into immigration proceedings;
  - Requiring DHS lawyers to reveal the basis of terrorism allegations raised in immigration proceedings; *and,*
  - Applying the Federal Rules of Criminal Procedure, Federal Rules of Evidence, and constitutional guarantees available in criminal court to immigration court proceedings.<sup>159</sup>
- *End the discriminatory enforcement of immigration laws against Muslim communities and other affected communities—including the use of repeat interviews without legitimate purpose—by:*
  - Precluding reliance on religious and political activities as admissible evidence to suggest an individual is a potential threat, or as reason to deny immigration benefits or relief; *and,*
  - Ending the “third agency check” process in as much as it delays an individual’s removal and release from detention solely on the basis of his nationality.
- *Scrutinize the FBI-DHS collusion in the immigration system, implement greater checks and balances, and provide more transparency about the role of the FBI in immigration enforcement by:*
  - Disallowing the FBI from relying on vulnerable immigration status as a grounds on which to approach or request someone to become an informant; *and,*
  - Requiring FBI agents to make purpose of presence known during immigration interviews, allowing individuals to seek legal advice before proceeding.
- *Provide for greater transparency in decision-making in the immigration process so that immigrants know why they are being denied relief of any sort and on what basis.*

Over the past several years, the U.S. human rights record has been reviewed annually as part of the U.N.'s intergovernmental Universal Periodic Review, as well as by the U.N. Committee on the Elimination of Racial Discrimination. Both processes have raised concerns about, *inter alia*, racial and religious profiling in counterterrorism policies, rising Islamophobia and xenophobia, and harsh immigration detention policies, echoing many of the concerns raised in this Briefing Paper.<sup>160</sup> A number of U.N. Special Rapporteurs have also recently had occasion to review the U.S. government's compliance with its human rights obligations. CHRGI and AALDEF urge the U.S. government to implement relevant recommendations arising out of these processes, including the following recommendations made by a range of U.N. Special Rapporteurs that the United States should:<sup>161</sup>

- Eliminate mandatory detention and require the DHS to make individualized determinations of whether or not a non-citizen presents a danger to society or a flight risk sufficient to justify their detention;<sup>162</sup>
- Clarify law enforcement's obligation of equal treatment and the prohibition of racial profiling as well as pass the End Racial Profiling Act and comprehensive State legislation prohibiting racial profiling;<sup>163</sup>
- Restrict definitions of "international terrorism," "domestic terrorism," and "material support to terrorist organizations" in a way that is precise and restricted to the type of conduct identified by the U.N. Security Council as conduct to be suppressed in the global fight against terrorism;<sup>164</sup> *and,*
- Refrain from relying on a person's country of origin as a proxy for racial or religious profiling and refrain from using race and religion as the bases for identifying individuals as terrorists.<sup>165</sup>

Ten years after the events of September 11, 2011, xenophobia and Islamophobia continue to rise in the United States. Both private and government actions have facilitated and contributed to what now appears to have become entrenched social bias with real legal consequences. This Briefing Paper has documented a number of those consequences, in the form of cases suggesting patterns of the ongoing discriminatory use of the immigration system against Muslim communities in the United States. In order to honor its human rights law obligations, the United States should take immediate steps to end the discriminatory targeting of Muslims through its immigration and law enforcement activities.

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<sup>1</sup> Targeting of Muslims through the immigration system was occurring prior to 9/11. The INS was using secret evidence—undisclosed to defendants and, hence, virtually impossible to rebut—against Arabs and Muslims as early as the 1990s. Susan Akram and Kevin Johnson's research found not a "single secret evidence case not involving an Arab or Muslim noncitizen." *Susan M. Akram and Kevin R. Johnson, Race, Civil Rights, and Immigration Law after September 11, 2001: The Targeting of Arabs and Muslims*, 58 N.Y.U. ANN. SURV. AM. LAW 295, 322 (2002).

<sup>2</sup> Also known as "special registration," on April 27, 2011, the DHS announced an indefinite suspension of the program, "though there remains much damage to rectify from NSEERS' discriminatory immigration enforcement." Press Release, American Civil Liberties Union [hereinafter ACLU], DHS Announces Indefinite Suspension of Controversial and Ineffective Immigrant Registration and Tracking System (Apr. 27, 2011) *available at* <http://www.aclu.org/immigrants-rights/dhs-announces-indefinite-suspension-controversial-and-ineffective-immigrant-regist>. *See, e.g.*, SHOBA WAHEEDA, CENTER FOR IMMIGRANT RIGHTS – DICKINSON LAW SCHOOL (PENNSYLVANIA STATE UNIVERSITY), NSEERS: THE CONSEQUENCES OF AMERICA'S EFFORTS TO SECURE ITS BORDERS (2009), *available at* <http://www.adc.org/PDF/nseerspaper.pdf>; RIGHTS WORKING GROUP, FACES OF RACIAL PROFILING: A REPORT

FROM COMMUNITIES ACROSS AMERICA 29-31 (2010) (discussing NSEERS and Operation Front Line). *See also infra* notes 20, 21 (discussing the specifics of the NSEERS program and Operation Front Line, respectively).

<sup>3</sup> CENTER FOR HUMAN RIGHTS AND GLOBAL JUSTICE, NYU SCHOOL OF LAW, AMERICANS ON HOLD: PROFILING, CITIZENSHIP, AND THE “WAR ON TERROR” (2007) [hereinafter AMERICANS ON HOLD 2007].

<sup>4</sup> *Id.*; Documentary: Americans on Hold – Profiling, Prejudice, and National Security (Center for Human Rights and Global Justice 2010) [hereinafter Americans on Hold 2010]; ASIAN LAW CAUCUS, RETURNING HOME: HOW U.S. GOVERNMENT PRACTICES UNDERMINE CIVIL RIGHTS AT OUR NATION’S DOORSTEPS (2009), *available at* <http://www.asianlawcaucus.org/wp-content/uploads/2009/04/Returning%20Home.pdf>.

<sup>5</sup> The use of the term “targeting” in this Briefing Paper encompasses both differentiation as well as targeting in purpose or effect, both of which raise concerns under international human rights law prohibitions on discrimination, as explored later in the Paper.

<sup>6</sup> Press Release, ACLU, *supra* note 2. There continue to be concerns about the ongoing ramifications of NSEERS. *See, e.g.*, Press Release, Desis Rising Up and Moving, DRUM Welcomes Victory in Ending NSEERS and Calls for Accountability for Thousands of Muslim Families Already Torn Apart (Apr. 28, 2011).

<sup>7</sup> *See infra* Part II.D.

<sup>8</sup> *See infra* Part II.E.

<sup>9</sup> *See infra* note 38.

<sup>10</sup> *See* Marisa Taylor, *Law Enforcement Officials Secretly Profiling Immigrants*, MCCLATCHY NEWSPAPERS, March 4, 2008, *available at* <http://www.mcclatchydc.com/227/v-print/story/29282.html>.

<sup>11</sup> In October 2001, then-Attorney General John Ashcroft stated, “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 . . . Our single objective is to prevent terrorist attacks by taking suspected terrorists off the street.” John Ashcroft, Attorney General, Prepared Remarks for the US Mayors Conference (Oct. 25, 2001), *available at* [http://www.usdoj.gov/archive/ag/speeches/2001/agcrisisremarks10\\_25.htm](http://www.usdoj.gov/archive/ag/speeches/2001/agcrisisremarks10_25.htm). *See* *Rajah v. Mukasey*, 544 F.3d 427, 438 (2d Cir. 2008) (citing NAT’L COMMISSION ON TERRORIST ATTACKS UPON THE U.S., SEPTEMBER 11TH COMMISSION REPORT 384 (2004): “The terrorist attacks on September 11, 2001 were facilitated by the lax enforcement of immigration laws.”). *See generally* David A. Martin, *Refining Immigration Law’s Role in Counterterrorism, A Working Paper of the Series on Counterterrorism and American Statutory Law* (Brookings Inst., Georgetown Univ. Law Ctr. & Hoover Inst. Working Paper Series, Jan. 2009), *available at* [http://www.brookings.edu/~media/Files/rc/papers/2009/0310\\_immigration\\_martin/0310\\_immigration\\_martin.pdf](http://www.brookings.edu/~media/Files/rc/papers/2009/0310_immigration_martin/0310_immigration_martin.pdf); David D. Cole, *Enemy Aliens*, 54 STAN. L. REV. 953 (2002).

<sup>12</sup> *See* U.S. Const. Amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense [sic].”); *Sullivan v. Louisiana*, 508 U.S. 275 (1993) (Sixth Amendment guarantee of trial by jury requires a jury verdict of guilty beyond a reasonable doubt).

<sup>13</sup> *See* HUMAN RIGHTS WATCH, LOCKED UP FAR AWAY 42-43 (2009), *available at* <http://www.hrw.org/node/86789>.

<sup>14</sup> *See* U.S. Dep’t of Justice, Executive Office for Immigration Review, About the Office, <http://www.justice.gov/eoir/orginfo.htm> (last visited Apr. 27, 2011). The Executive Office for Immigration Review (EOIR) was created on January 9, 1983, through an internal Department of Justice (DOJ) reorganization which combined the Board of Immigration Appeals (BIA or Board) with the Immigration Judge function previously performed by the former Immigration and Naturalization Service (INS) (now part of the Department of Homeland Security).

<sup>15</sup> *See* Immigration and Nationality Act § 236(c), 8 U.S.C. 1226(c) (2000) [hereinafter cited as INA with original section number in the session law]; *Demore v. Kim*, 538 U.S. 510 (2003); *Zadvydas v. Davis*, 533 U.S. 678 (2001).

<sup>16</sup> INA § 240(c)(3). If the individual is suspected of having entered the United States without inspection by DHS officials, he may also be charged under INA § 212(a) and must himself establish by clear and convincing evidence that he was lawfully admitted. *See* INA § 240(c)(2)(A). The U.S. government has even argued that the Fourth Amendment’s protection from unreasonable searches and seizures does not regularly apply in the immigration context. *See* *INS v. Lopez Mendoza*, 468 U.S. 1032, 1050-51 (1984) (stating that the exclusionary rule only applies in removal proceedings in the case of “egregious violations of the Fourth Amendment or other liberties” or “widespread” violations of those liberties by immigration agents); Stella Burch Elias, *Good Reason to Believe: Widespread Constitutional Violations in the Course of Immigration Enforcement and the Case for Revisiting Lopez-Mendoza*, 2008 WIS. L. REV. 1109 (2008) (arguing that the “widespread violation” standard in *Lopez-Mendoza* has been met, requiring the reinstatement of the exclusionary rule in immigration proceedings).

<sup>17</sup> As David Cole has stated, “It is often said that civil liberties are the first casualty of war. It would be more accurate to say that noncitizens’ liberties are the first to go. The current war on terrorism is no exception.” Cole, *supra* note 7, at 955.

<sup>18</sup> See *id.* at 957. See, e.g., AMERICANS ON HOLD 2007, *supra* note 3; Americans on Hold 2010, *supra* note 4.

<sup>19</sup> Initiated in January 2002, the Absconder Apprehension Initiative was a program aimed at arresting non-citizens from predominantly Muslim countries who had outstanding deportation orders. See Dan Eggen, *Deportee Sweep Will Start With Mideast Focus*, WASH. POST., Feb. 8, 2002, at A01; Susan Sachs, *U.S. Begins Crackdown On Muslims Who Defy Orders to Leave Country*, N.Y. TIMES, Apr. 2, 2002, available at <http://www.nytimes.com/2002/04/02/nyregion/nation-challenged-deportations-us-begins-crackdown-muslims-who-defy-orders-leave.html>.

<sup>20</sup> The call-in registration phase of NSEERS required almost all noncitizen men between the ages of 16 to 45 from 25 countries (all Muslim-majority except North Korea) to submit to fingerprinting, photographs, intensive questioning, and periodic registration with the government. Of the 83,519 men who registered with authorities under this program, 13,799 were placed in removal proceedings. Although the government discontinued the call-in program in December 2003, individuals who failed to register with the program are still subject to grounds of deportability and inadmissibility. See WAHIDA, *supra* note 2, at 10.

<sup>21</sup> Established in the spring of 2004, one of the primary purposes of Operation Frontline was to prevent a terrorist attack around the November 2004 presidential elections. As part of Operation Frontline, ICE claimed it was targeting immigration violators whom the government had identified posed national security concerns. Under the program, thousands of non-citizens were investigated and hundreds arrested, primarily on minor visa violations. Even though the government has denied explicitly targeting individuals based on ethnicity or religion, more than 80 percent of the individuals investigated under the program were from Muslim-majority countries. See Eric Lichtblau, *Inquiry Targeted 2,000 Foreign Muslims in 2004*, N.Y. TIMES, Oct. 31, 2008, at A17.

<sup>22</sup> See AMERICANS ON HOLD 2007, *supra* note 2; Americans on Hold 2010, *supra* note 3; CENTER FOR HUMAN RIGHTS AND GLOBAL JUSTICE, NYU SCHOOL OF LAW, IRREVERSIBLE CONSEQUENCES: RACIAL PROFILING AND LETHAL FORCE IN THE “WAR ON TERROR” 19 (2006), available at <http://www.chrgj.org/docs/CHRGJ%20Irreversible%20Consequences%20June%202006.pdf> [hereinafter, IRREVERSIBLE CONSEQUENCES]; ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND, SPECIAL REGISTRATION: DISCRIMINATION AND XENOPHOBIA AS GOVERNMENT POLICY (2004), available at [www.aaldef.org/docs/AALDEF-Special-Registration-2004.pdf](http://www.aaldef.org/docs/AALDEF-Special-Registration-2004.pdf) (detailing AALDEF’s survey findings of 219 individuals who were affected by the NSEERS Special Registration program).

<sup>23</sup> The case studies featured in this Briefing Paper, and the instances of troubling enforcement against Muslims that we learned about in our fact-finding, consist primarily of Muslim men.

<sup>24</sup> On April 27, 2011, the Department of Homeland Security announced an indefinite suspension of the program, “though there remains much damage to rectify from NSEERS’ discriminatory immigration enforcement.” Press Release, American Civil Liberties Union, *supra* note 2.

<sup>25</sup> In February 2011, CHRGJ and AALDEF sent Freedom of Information Act (FOIA) requests to the DOJ’s Executive Office of Immigration Review (EOIR) and ICE in order to obtain additional government data to further understand the extent of the patterns of government practices targeting Muslims through the immigration system, as outlined in this briefing paper. The FOIA requests asked for, *inter alia*, data to confirm the number of individuals charged under the various terrorism bar provisions of the Immigration and Nationality Act (INA); written transcripts and audio tapes of oral proceedings; and written briefs submitted by all parties, from removal proceedings before Immigration Judges in which individuals were charged under the terrorism bar provisions. To date, CHRGJ and AALDEF have not received adequate responses from the EOIR and ICE.

<sup>26</sup> Telephone Interview with Sin Yen Ling, Staff Attorney at Asian Law Caucus (Feb. 11, 2011) (notes on file with CHRGJ).

<sup>27</sup> *Id.*; Telephone Interview with Cecillia Wang, Managing Attorney at ACLU-San Francisco (Feb. 10, 2011) (notes on file with CHRGJ); Telephone Interview with Valerie Curtis-Diop, Owner at A.D.I.L.A. Law Group (Apr. 4, 2011) (notes on file with CHRGJ).

<sup>28</sup> Ling, *supra* note 26; Wang, *supra* note 27.

<sup>29</sup> Mary Beth Sheridan, *Immigration Law as Anti-Terrorism Tool*, WASH. POST, Jun. 13, 2005, at A1.

<sup>30</sup> Ling, *supra* note 26.

<sup>31</sup> Information contained in this case study is drawn from the following sources: *Farahi v. United States*, No. 07-cv-23116) 2009 U.S. Dist. LEXIS 52974 (S.D. Fla. 2009); Trevor Aaronson, *FBI Tries to Deport Muslim Man for Refusing to Be an Informant*, MIAMI NEW TIMES, Oct. 8, 2009, available at <http://www.miaminewtimes.com/2009-10-08/news/unholy->

war-fbi-tries-to-deport-north-miami-beach-imam-foad-farahi-for-refusing-to-be-an-informant/; Muslim Legal Fund of America, Imam Foad Farahi, <http://www.mlfa.org/imam-foad-farahi> (last visited Apr. 16, 2011).

<sup>32</sup> Information contained in this case study is drawn from the following sources: Telephone Interview with Jonathan Montag, Lawyer for Abdelrehim Kewan (Mar. 2, 2011) (notes on file with CHRGJ); Matter of Abdelrehim Mohamed Kewan (IJ Boone, San Diego, CA, Feb. 3, 2004) (unpublished) (on file with CHRGJ); Matter of Abdelrehim Mohamed Kewan (BIA San Diego, CA, Aug. 22, 2003) (unpublished) (on file with CHRGJ). *See also* Joe Cantlupe, *‘Lost’ Egyptian Gets Caught Up in the Justice System*, SAN DIEGO UNION TRIB., Apr. 29, 2003, available at [http://legacy.signonsandiego.com/news/nation/terror/20030429-9999\\_1n29jail.html](http://legacy.signonsandiego.com/news/nation/terror/20030429-9999_1n29jail.html); Michael Stetz, *Egyptian Is Ordered Deported by Judge*, SAN DIEGO UNION TRIB., Aug. 29, 2003, available at [http://www.signonsandiego.com/news/metro/20030829-9999\\_7m29deport.html](http://www.signonsandiego.com/news/metro/20030829-9999_7m29deport.html); *Judge Orders Deportation of Detainee*, L.A. TIMES, Aug. 30, 2003, available at <http://articles.latimes.com/2003/aug/30/local/me-sbriefs30.4>

<sup>33</sup> Michael Stetz, *Egyptian Is Ordered Deported by Judge*, SAN DIEGO UNION TRIB., Aug. 29, 2003, available at [http://www.signonsandiego.com/news/metro/20030829-9999\\_7m29deport.html](http://www.signonsandiego.com/news/metro/20030829-9999_7m29deport.html).

<sup>34</sup> Information contained in this case study is drawn from the following sources: *Samirah v. Holder*, 627 F.3d 652 (7th Cir. 2010); *Samirah v. O’Connell*, 335 F.3d 545 (7th Cir. 2003). *See* Lori Cohen et al. *Muslim Leader Kept from return to U.S.*, CHI. TRIB., Jan. 25, 2003, available at <http://dupagepeacethroughjustice.org/samirah1.html>.

<sup>35</sup> *Samirah*, 627 F.3d at 662.

<sup>36</sup> Executive Office of Immigration Review, Department of Justice, Immigration Judge Benchbook, <http://www.justice.gov/eoir/vll/benchbook/index.html> (last visited Apr. 27, 2011) (“Under BIA case law addressing general bond provisions of prior law, an alien ordinarily would not be detained unless he or she presented a threat to national security or a risk of flight. *See* Matter of Patel, 15 I&N Dec. 666 (BIA 1976). By virtue of 8 C.F.R. § 1236.1(c)(8) (2006), a criminal alien must demonstrate that he is not a threat to the national security, that his release would not pose a danger to property or persons, and that he is likely to appear for any future proceedings. Matter of Guerra, 24 I&N Dec. 37 (BIA 2006); Matter of Adeniji, 22 I&N Dec. 1102 (BIA 1999)”).

<sup>37</sup> *See* INA § 236(c)(1)(D).

<sup>38</sup> *See* U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, ICE FISCAL YEAR 2006 ANNUAL REPORT: PROTECTING NATIONAL SECURITY AND PUBLIC SAFETY (2006), available at <http://www.ice.gov/doclib/news/library/reports/annual-report/2006annual-report.pdf>.

<sup>39</sup> Taylor, *supra* note 10.

<sup>40</sup> Initials used to protect identity. Curtis-Diop, *supra* note 27.

<sup>41</sup> Initials used to protect identity. Notes of Sameer Ahmed, Asian American Legal Defense and Education Fund (accessed Apr. 25, 2011).

<sup>42</sup> Initials used to protect identity. Notes of Sameer Ahmed, Asian American Legal Defense and Education Fund (accessed Apr. 25, 2011).

<sup>43</sup> Information contained in this case study is drawn from the following sources: Telephone Interview with Ahmed Ghappour (Dec. 14, 2010) (notes on file with CHRGJ); *United States v. Masfaka*, First Superseding Indictment, Dec. 3, 2008 (E.D. Mi. 2:08-cr-20458).

<sup>44</sup> Neil MacFarquhar, *Muslim Charity Sues Treasury Dept. and Seeks Dismissal of Charges of Terrorism*, N.Y. TIMES, Dec. 12, 2006, available at <http://www.nytimes.com/2006/12/12/washington/12charity.html>; AMERICAN CIVIL LIBERTIES UNION, BLOCKING FAITH, FREEZING CHARITY: CHILLING MUSLIM CHARITABLE GIVING IN THE WAR ON TERRORISM FINANCING 8, 61-63 (2009), available at <http://www.aclu.org/human-rights-religion-belief/charitable-giving-and-war-terrorism-financing>. *See infra* Part II.C.1.

<sup>45</sup> In the months immediately following 9/11, the government detained 762 non-citizens on immigration violations, mainly from predominantly Muslim countries. None were ever charged with any terrorism-related offenses. IRUM SHIEKH, DETAINED WITHOUT CAUSE: MUSLIMS’ STORIES OF DETENTION AND DEPORTATION IN AMERICA AFTER 9/11 (2011); OFFICE OF THE INSPECTOR GENERAL, DEPARTMENT OF JUSTICE, THE SEPTEMBER 11 DETAINEES: A REVIEW OF THE TREATMENT OF ALIENS HELD ON IMMIGRATION CHARGES IN CONNECTION WITH THE INVESTIGATION OF THE SEPTEMBER 11 ATTACKS (2003). In addition, the NSEERS program resulted in the detention of many individuals for minor immigration violations. *See* Waheeda, *supra* note 2.

<sup>46</sup> *See also* STEPHEN DOWNS, PROJECT SALAM, VICTIMS OF AMERICA’S DIRTY WARS 48 (2011).

<sup>47</sup> Sheridan, *supra* note 29.

<sup>48</sup> *Id.*

<sup>49</sup> Many false statement allegations are based on prior associations with the Holy Land Foundation (HLF), which used to be the largest Muslim charity in the United States. After the 2007 trial of the group’s founders, individuals who had any contact, however minimal, with the organization were investigated by immigration officials and eventually charged with not revealing this earlier association. Telephone Interview with Linda Moreno, Attorney at the Law Office of Linda

Moreno (February 21, 2011) (notes on file with CHRJG). Mohamad Masfaka, described above, provides one example of such a case.

<sup>50</sup> See, e.g. INA § 316 (stating the “good moral character” requirement for naturalization).

<sup>51</sup> Telephone Interview with Jennie Pasquarella, Staff Attorney at ACLU-Southern California (Feb. 24, 2011) (notes on file with CHRJG).

<sup>52</sup> When an immigration official believes an individual is providing false testimony, he must 1) ensure the individual understands the particular question asked and “ask enough questions, in different forms, to give the applicant ample opportunity to understand the intent and scope of the particular question”; 2) confront the applicant about the false statement and attempt to determine whether it was made because s/he believed the truth would negatively affect the application; and 3) take a statement of the applicant’s claimed motivation for the false testimony, and, if the statement does credibly establish an innocent motive for the false testimony, approve the application. USCIS, ADJUDICATOR’S FIELD MANUAL, ch. 74 (2011), available at <http://www.uscis.gov/portal/site/uscis/menuitem.f6da51a2342135be7e9d7a10e0dc91a0/?vgnnextoid=fa7e539dc4bed010VgnVCM1000000ecd190aRCRD&vgnnextchannel=fa7e539dc4bed010VgnVCM1000000ecd190aRCRD&CH=afm>

<sup>53</sup> See ACLU, *supra* note 44.

<sup>54</sup> *Id.* at 7-8, 61-63.

<sup>55</sup> SHIRIN SINNAR, LAWYERS COMMITTEE FOR CIVIL RIGHTS, THE OFAC LIST, HOW A TREASURY DEPARTMENT TERRORIST WATCHLIST ENSNARES EVERYDAY CONSUMERS (2007).

<sup>56</sup> Information contained in this case study is drawn from the following sources: Pasquarella, *supra* note 51; Petition for *De Novo* Review of Denial of Application for Naturalization and Request for a Hearing Pursuant to 8 U.S.C. § 1421(c), No. 10-cv-00894, Hamdi v. U.S. Citizenship and Immigration Services (C.D. Ca. No. 16, 2010); USCIS Decision on Application of Tarek Hamdi, June 8, 2009 (on file with CHRJG); USCIS Decision on Hearing of Tarek Hamdi, April 8, 2010 (on file with CHRJG). See also Press Release, ACLU, Muslim Denied Citizenship because of Discriminatory Practices in Naturalization Process: Civil Rights Groups File FOIA to Uncover Racial and Religious Profiling, June 16, 2010.

<sup>57</sup> As with the Holy Land Foundation, serious concerns have been expressed about the way in which the U.S. government designated Benevolence Financial International. “In designating [BIF] . . . [the Office of Foreign Assets Control] relied on newspaper articles and other evidence that would not be admissible in a judicial proceeding.” ACLU, *supra* note 44, at 47; Matthew J. Piers, *Malevolent Destruction of a Muslim Charity: A Commentary on the Prosecution of Benevolence International Foundation*, 25 PACE L. REV. 339 (2005). The ACLU report stated that 9/11 Commission staff noted with regard to BIF that “Although the OFAC action shut down BIF . . . that victory came at considerable cost of negative public opinion in the Muslim and Arab communities, who contend that the government’s destruction of these charities reflects bias and injustice with no measurable gain to national security.” ACLU, *supra* note 44, at 119 (internal quotation marks and citations omitted).

<sup>58</sup> ACLU Press Release, *supra* note 56.

<sup>59</sup> If the government’s argument were true, then, theoretically, all immigrants would have to list every organization they donated to in their immigration applications. This is an overly burdensome request that has no basis in immigration law or regulations.

<sup>60</sup> Initials used to protect identity. Information contained in this case study is drawn from the following sources: Pasquarella, *supra* note 51; USCIS Decision on Application of BB, May 26, 2010 (on file with CHRJG).

<sup>61</sup> Such inordinate delays in naturalization applications are the result of name check procedures that have discriminatory impacts on Muslim immigrants. See generally AMERICANS ON HOLD 2007, *supra* note 3.

<sup>62</sup> This past year, former Attorney General Michael Mukasey, former New York Mayor Rudolph Giuliani, former Department of Homeland Security Secretary Tom Ridge, and former national security advisor Frances Townsend attended and spoke at a conference in support of the MEK in Paris, sparking a controversy about the group’s designation and whether the trip constituted criminal material support. See, e.g., David Cole, *Cheewing Gum for Terrorists*, N.Y. TIMES, Jan. 2, 2011, available at [http://www.nytimes.com/2011/01/03/opinion/03cole.html?\\_r=1](http://www.nytimes.com/2011/01/03/opinion/03cole.html?_r=1); Brian Montopoli, *Rudy Giuliani Denies Supporting Terrorist Organization*, CBS NEWS, Jan. 10, 2011, available at [http://www.cbsnews.com/8301-503544\\_162-20028081-503544.html](http://www.cbsnews.com/8301-503544_162-20028081-503544.html).

<sup>63</sup> USCIS Decision on Application of BB, May 26, 2010 (on file with CHRJG)

<sup>64</sup> Information contained in this case study is drawn from the following sources: *Jailed Houston Imam Zoubir Bouchikhi Speaks from Private Immigration Prison*, DEMOCRACY NOW!, Apr. 29, 2009, [http://www.democracynow.org/2009/4/29/exclusive\\_jailed\\_houston\\_imam\\_zoubir\\_bouchikhi](http://www.democracynow.org/2009/4/29/exclusive_jailed_houston_imam_zoubir_bouchikhi); Paula Beltrán, *Imam*



*Zoubir Bouchikhi: Arrested Shortly Before Deportation*, HOUSTON PRESS, Jan 13, 2011, available at [http://blogs.houstonpress.com/hairballs/2011/01/zoubir\\_bouchiki\\_imam.php](http://blogs.houstonpress.com/hairballs/2011/01/zoubir_bouchiki_imam.php).

<sup>65</sup> Bouchikhi v. Holder, No. 10-60982 (5th Cir.).

<sup>66</sup> Initials used to protect identity. Curtis-Diop, *supra* note 27.

<sup>67</sup> Sheridan, *supra* note 29.

<sup>68</sup> For examples of similar cases, see Tina Kelly & Elizabeth Dwoskin, *Revered New Jersey Imam, Facing Deportation, Has Interfaith Support*, N.Y. TIMES, Apr. 24, 2008, available at <http://www.nytimes.com/2008/04/24/nyregion/24imam.html>; Paul Vitello & Kirk Semple, *Muslims Say F.B.I. Tactics Sow Anger and Fear*, N.Y. TIMES, Dec. 17, 2009, available at <http://www.nytimes.com/2009/12/18/us/18muslims.html> (discussing Tareq Saleh's permanent residency denial based on false statements).

<sup>69</sup> See Humanitarian Law Project v. Holder, 561 U.S. \_\_\_ (2010) (upholding the constitutionality of the §2339B material support provision of the PATRIOT Act).

<sup>70</sup> See, e.g., HUMAN RIGHTS FIRST, DENIAL AND DELAY: THE IMPACT OF THE IMMIGRATION LAW'S "TERRORISM BARS" ON ASYLUM SEEKERS AND REFUGEES IN THE UNITED STATES (2009).

<sup>71</sup> A notable case in the asylum context in which terrorism bars provisions have been used in a discriminatory way against a Muslim is that of Ismoil Samadov. See Yusupov, Samadov v. Attorney General, No. 09-3074. (3d. Cir., now pending) Samadov, an Uzbek citizen, has been detained by ICE since 2004 based on an extradition warrant from the Uzbek government. The U.S. has acknowledged that Samadov faces religious persecution and torture upon return to Uzbekistan but the Immigration Judge and BIA denied asylum and withholding of removal, claiming Samadov poses an "an actual danger to national security." The government has not provided any evidence that Samadov himself has any ties to terrorist activity. The evidence presented by the U.S. government claiming Samadov "is a threat to the national security of the United States" includes facts about his housemates, for example that one had viewed certain videos and that another had received an email containing the word "jihad" in it. Alongside other amici, AALDEF filed an amicus brief on behalf of Samadov, highlighting how the Immigration Judge and BIA's rulings were based on "stereotypical inferences and assumptions that Muslims in the [U.S.] are insular and inherently dangerous." Asian American Legal Defense and Education Fund, Litigation Docket, <http://aaldef.org/litigation-docket/> (last visited Apr. 27, 2011).

<sup>72</sup> See David Cole and James X. Dempsey, TERRORISM AND THE CONSTITUTION: SACRIFICING CIVIL LIBERTIES IN THE NAME OF NATIONAL SECURITY 41-52 (2002); David Cole, *9/11 and the LA 8*, THE NATION, Oct. 23, 2003, available at <http://www.thenation.com/archive/911-and-la-8>; *The Case of LA8: U.S. Drops Twenty-Year Effort to Deport Arab Americans for Supporting Palestinian Rights*, DEMOCRACY NOW!, Nov. 2, 2007, available at [http://www.democracynow.org/2007/11/2/the\\_case\\_of\\_the\\_la8\\_u](http://www.democracynow.org/2007/11/2/the_case_of_the_la8_u); Press Release, Center for Constitutional Rights, Judge Throws Out Charges in 'Los Angeles Eight' Case, available at <http://ccrjustice.org/newsroom/press-releases/judge-throws-out-charges-%E2%80%99Clos-angeles-eight%E2%80%9D-case>.

<sup>73</sup> The McCarran-Walter Act prohibited membership in communist groups.

<sup>74</sup> Muna Coobtee, *U.S. Government Tries to Deport Palestinian Activists*, PSLWEB, Jun. 1, 2005, available at [http://www2.pslweb.org/site/News2?page=NewsArticle&id=11076&news\\_iv\\_ctrl=-1](http://www2.pslweb.org/site/News2?page=NewsArticle&id=11076&news_iv_ctrl=-1).

<sup>75</sup> The anti-communism provisions of the McCarran-Walter Act were declared as unconstitutional infringement of free speech. *American-Arab Anti-Discrimination Comm. v. Meese*, 714 F. Supp. 1060 (C.D. Cal 1989), *aff'd in part, rev'd in part*, *American-Arab Anti-Discrimination Comm. v. Thornburgh*, 970 F.2d 501 (9th Cir. 1991). The Ninth Circuit ruling came in 1991 after Congress already repealed the McCarran-Walter Act in 1990. See also R. Jeffrey Smith, *Patriot Act Used in 16-Year-Old Deportation Case*, WASH. POST, Sep. 23, 2003, available at <http://www.washingtonpost.com/ac2/wp-dyn/A49517-2003Sep22?language=printer>.

<sup>76</sup> Press Release, ACLU, California Judge Ends 20-Year-Old Deportation Case Against Palestinians, Jan. 30, 2007, available at <http://www.aclu.org/immigrants-rights/california-judge-ends-20-year-old-deportation-case-against-palestinians> (last visited May 3, 2011).

<sup>77</sup> Telephone Interview with Charles Kuck, Immigration Attorney (Feb. 25, 2011) (notes on file with CHRGJ).

<sup>78</sup> Mohamed's indictment also included material support to terrorism and weapons charges. Elaine Silvestrini, *Indictment Revises Charges Against Mohamed Megahed*, TAMPA TRIB., Apr. 17, 2008, available at <http://www.freerepublic.com/focus/f-news/2003122/posts>.

<sup>79</sup> Rich Phillips, *Cleared by a Jury, Man is Labeled a Terrorist*, CNN, Jun. 29, 2009, available at <http://www.cnn.com/2009/CRIME/06/29/florida.terror.redo/>.

<sup>80</sup> Elaine Silvestrini, *Megahed Freed After Judge Tosses Deportation Case*, TAMPA TRIB., Aug. 21, 2009, available at <http://www2.tbo.com/content/2009/aug/21/211832/judge-tosses-deportation-case-against-megahed/news-metro/>.

In another case, a Haitian U.S. permanent resident Lyglenson Lemorin was charged under terrorism bars for removal after being acquitted in a criminal terrorism-related case. Lemorin was a part of the so-called "Liberty City Seven" that the government alleged were a part of Al-Qaeda and plotted to blow up the Sears Tower in Chicago. The case involved

informants and heavy government orchestration. The immigration judge presiding over Lemorin's case (the same judge who cleared Youssef Megahed) found Lemorin removable primarily for a taped oath pledging allegiance to Al-Qaeda that the government informant goaded Lemorin to make. Kuck, *supra* note 77.

<sup>81</sup> *Youssef Megahed Freed After Immigration Judge Throws Out Government's Deportation Case*, DEMOCRACY NOW!, Aug. 29, 2009, available at [http://www.democracynow.org/2009/8/24/youssef\\_megahed\\_freed\\_after\\_immigration\\_judge](http://www.democracynow.org/2009/8/24/youssef_megahed_freed_after_immigration_judge).

<sup>82</sup> Phillips, *supra* note 79.

<sup>83</sup> Information contained in this case study is drawn from the following sources: Tareq I.J. Abu Fayad v. Eric Holder, 632 F.3d 623 (9th Cir. 2011); Telephone Interview with Love Suh (Feb. 28, 2011) (notes on file with CHRGJ); Bob Egelko, *Man with Hamas Items on Computer can be Deported*, S.F. GATE, Feb. 17, 2011, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2011/02/16/BANB1HO1BJ.DTL>.

<sup>84</sup> Abu Fayad, 632 F.3d at 631.

<sup>85</sup> *Id.* at 630.

<sup>86</sup> In 2009, *Foreign Policy* magazine ranked him as 49th among the world's top 100 contemporary intellectuals. *The FP Top 100 Global Thinkers*, FOREIGN POLICY, December 2009, available at [http://www.foreignpolicy.com/articles/2009/11/30/the\\_fp\\_top\\_100\\_global\\_thinkers?page=full](http://www.foreignpolicy.com/articles/2009/11/30/the_fp_top_100_global_thinkers?page=full). Ironically, he has been criticized for his conciliatory approach and has been banned from Egypt, Saudi Arabia, Tunisia, Libya, and Syria for his criticisms of those regimes' human rights violations. Tariq Ramadan, *Tariq Ramadan Answers His Dutch Detractors*, NRC HANDELSBLAD, Aug. 18, 2009, available at <http://www.nrc.nl/international/opinion/article2331989.ece>.

<sup>87</sup> The ideological exclusion provision allows the government to ban from entry individuals it believes "endorse[d] or espouse[d] terrorist activity." INA §212(a)(3)(B)(i)(VII).

<sup>88</sup> Josh Gerstein, *Oxford Scholar Denied Visa Due to Alleged Hamas Links*, N.Y. SUN, Sep. 26, 2006, available at <http://www.nysun.com/national/oxford-scholar-denied-visa-due-to-alleged-hamas/40328/>.

<sup>89</sup> Comité de Bienfaisance et Secours aux Palestiniens and the Association de Secours Palestinien are considered legitimate charities in Europe but were designated as "Specially Designated Global Terrorist" organizations by the U.S. Treasury in 2003. Ramadan made his contributions to the charities between 1998 and 2002, before the Treasury's designation. Tariq Ramadan, *Why I'm Banned in the USA*, WASH. POST, Oct. 1, 2006, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/09/29/AR2006092901334.html>.

<sup>90</sup> *Am. Acad. of Religion v. Napolitano*, 573 F.3d 115 (2d. Cir. 2009); ACLU, *Federal Appeals Court Rules in Favor of U.S. Organizations That Challenged Exclusion of Prominent Muslim Scholar*, July 17, 2009, available at <http://www.aclu.org/national-security/federal-appeals-court-rules-favor-us-organizations-challenged-exclusion-prominent->

<sup>91</sup> Kirk Semple, *At Last Allowed, Muslim Scholar Visits*, N.Y. TIMES, Apr. 8, 2011, available at [http://www.nytimes.com/2010/04/08/nyregion/08muslim.html?\\_r=1&scp=3&sq=tariq%20ramadan&st=cse](http://www.nytimes.com/2010/04/08/nyregion/08muslim.html?_r=1&scp=3&sq=tariq%20ramadan&st=cse).

<sup>92</sup> His first appearance in the United States after the government lifted the six-year ban on his entry was at Cooper Union in New York City. See George Packer, *An Evening with Tariq Ramadan*, THE NEW YORKER: INTERESTING TIMES BLOG, April 9, 2010, <http://www.newyorker.com/online/blogs/georgepacker/2010/04/an-evening-with-ramadan.html> (last visited Apr. 27, 2011).

<sup>93</sup> Telephone Interview with Mike German, ACLU Policy Counsel on National Security (Mar. 9, 2011) (notes on file with CHRGJ); Ling, *supra* note 20.

<sup>94</sup> This trend is also seen in the case of Foad Farahi, described in Part II.A. In another example, officials offered to drop immigration charges against Waheeda Tahseen, a Pakistani EPA official, if she became an informant. She was deported after refusing. Sheridan, *supra* note 29. Tareq Saleh, whose case is described *supra* note 68, claims his green card application was denied after he refused FBI requests to become an informant. See generally Downs, *supra* note 46, at 47-50 (documenting the FBI's pressuring of non-citizen Muslim individuals to become informants and the denial of immigration benefits and deportation upon refusal); Council on American Islamic Relations (CAIR) California, *The FBI's Use of Informants, Recruitment and Intimidation within Muslim Communities*, available at [ca.cair.com/download.php?f=/downloads/CAIR\\_FBI\\_Abuses\\_Annotated\\_Source\\_List--Articles\\_and\\_Cases.pdf](http://ca.cair.com/download.php?f=/downloads/CAIR_FBI_Abuses_Annotated_Source_List--Articles_and_Cases.pdf) (last visited April 27, 2011).

<sup>95</sup> Information contained in this case study is drawn from the following source: Peter Waldman, *A Muslim's Choice: Turn U.S. Informant or Risk Losing Visa*, WALL ST. J., Jul. 11, 2006, at A1.

<sup>96</sup> Americans on Hold 2010, *supra* note 4; Email from Zuhair Mahd to Amna Akbar (Apr. 27, 2011) (on file with CHRGJ); Telephone Interview with Zuhair Mahd (April 29, 2011) (notes on file with CHRGJ); Affidavit of Zuhair Mahd with respect to prior FBI visits, Civil Action No. 1:06-CV-01023-wdm-pac (D.Co. Aug. 25, 2006).

<sup>97</sup> International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), G.A. Res. 2106 (XX), Annex, 20 U.N. GAOR Supp. (No. 14) at 47, U.N. Doc. A/6014 (1966), 660 U.N.T.S. 195, *entered into force* Jan. 4, 1969, *available at* <http://www2.ohchr.org/english/law/cerd.htm> [hereinafter ICERD]; United Nations Treaty Collection, Status of International Convention on the Elimination of All Forms of Racial Discrimination, *available at* [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-2&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-2&chapter=4&lang=en) (last visited Apr. 28, 2011).

<sup>98</sup> International Covenant on Civil and Political Rights (ICCPR), G.A. Res. 2200A (XXI), UN GAOR, 21st Sess., Supp. No. 16, at 52, UN Doc. A/6316 Dec. 16, 1966, *entered into force* 23 March 1976, 999 U.N.T.S. 171, *available at* <http://www.ohchr.org/english/law/ccpr.htm> [hereinafter ICCPR]; United Nations Treaty Collection, Status of International Covenant on Civil and Political Rights, *available at* [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-4&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en) (last visited Apr. 28, 2011).

<sup>99</sup> “This Convention shall not apply to distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens.” Art. 1(2), ICERD; “Exceptionally, some of the rights recognized in the Covenant are expressly applicable only to citizens (art. 25), while article 13 applies only to aliens. However, the Committee’s experience in examining reports shows that in a number of countries other rights that aliens should enjoy under the Covenant are denied to them or are subject to limitations that cannot always be justified under the Covenant.” UN Human Rights Committee, *General Comment 15: The Position of Aliens under the Covenant* (Twenty-Seventh session, 1986), ¶2 [hereinafter *HRC General Comment 15*] reprinted in COMPILATION OF GENERAL COMMENTS AND GENERAL RECOMMENDATIONS ADOPTED BY HUMAN RIGHTS TREATY BODIES, U.N. Doc. HRI/GEN/1/Rev.6 at 140 (2003), *available at* <http://www.unhchr.ch/tbs/doc.nsf/%28Symbol%29/bc561aa81bc5d86ec12563ed004aaa1b?Opendocument>; “It is in principle a matter for the State to decide who it will admit to its territory.” *Id.*, ¶3.

<sup>100</sup> As noted by the Human Rights Committee, “[E]ach State party must ensure the rights in the Covenant to ‘all individuals within its territory and subject to its jurisdiction’ (art. 2, para. 1). In general, the rights set forth in the Covenant apply to everyone, irrespective of reciprocity, and irrespective of his or her nationality or statelessness.” *Id.* ¶ 1. Furthermore, the Committee noted that “[a]liens thus have an inherent right to life, protected by law, and may not be arbitrarily deprived of life... They have the right to liberty of movement and free choice of residence; they shall be free to leave the country... They may not be subjected to arbitrary or unlawful interference with their privacy, family, home or correspondence... Aliens receive the benefit of the right of peaceful assembly and of freedom of association... Aliens are entitled to equal protection by the law. There shall be no discrimination between aliens and citizens in the application of these rights. These rights of aliens may be qualified only by such limitations as may be lawfully imposed under the Covenant.” *Id.* ¶ 7. ICCPR does allow States to treat citizens and non-citizens differently with respect to political rights (e.g. right to vote) and freedom of movement (for unlawful aliens); however, the rights concerned in this paper apply to non-citizens equally. *See* OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, *THE RIGHTS OF NON-CITIZENS* (2006), *available at* <http://www.ohchr.org/Documents/Publications/noncitizensen.pdf>.

<sup>101</sup> *HRC General Comment 15*, *supra* note 99, ¶3.

<sup>102</sup> The CERD Committee, the oversight body for ICERD, has made clear that even though ICERD permits States to differentiate between citizens and non-citizens, they must still “avoid undermining the basic prohibition on discrimination.” U.N. Committee on the Elimination of Racial Discrimination, *General Recommendation No. 30: Discrimination Against Non Citizens*, ¶¶ 1-3, U.N. Doc. CERD/C/64/Misc.11/rev.3 (Oct. 1, 2004) [hereinafter *CERD General Recommendation 30*]. In other words, States should not detract in any way from the rights and freedoms recognized in particular in the Universal Declaration of Human Rights [hereinafter UDHR], the International Covenant on Economic, Social and Cultural Rights (ICESCR), and the ICCPR. *Id.* ¶2. The CERD Committee has also noted that “differential treatment based on citizenship or immigration status will constitute discrimination if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim.” *Id.* ¶¶ 2, 4.

<sup>103</sup> *Id.* ¶ 25 (states must “[e]nsure that laws concerning deportation or other forms of removal of non-citizens from the jurisdiction of the State party do not discriminate in purpose or effect among non-citizens on the basis of race, color or ethnic or national origin”); *id.* at ¶ 13 (requiring states to “[e]nsure that particular groups of non-citizens are not discriminated against with regard to access to citizenship or naturalization”).

<sup>104</sup> U.N. Committee on the Elimination of Racial Discrimination, *Statement on Racial Discrimination and Measures to Combat Terrorism*, ¶ 4, U.N. Doc. E/CN.4/Sub.2/2003/23/Add. 1 (Nov. 1, 2002) [hereinafter *CERD Committee Statement on Racial Discrimination*] (recalling that “the prohibition on racial discrimination is a peremptory norm of international law from which no derogation is permitted”). *See also*, Juridical Condition and Rights of Undocumented Migrants, Advisory Opinion, OC-18/03, Inter-Am. Ct. H.R. (Ser. A) No. 18, ¶101 (Sep. 17, 2003) (“This Court considers that the principle

of equality before the law, equal protection before the law and non-discrimination belongs to *jus cogens*, because the whole legal structure of national and international public order rests on it and it is a fundamental principle that permeates all laws.”)

<sup>105</sup> ICERD defines prohibited “racial discrimination” to include “any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.” Art. 1(1) ICERD.

<sup>106</sup> Arts. 2 and 26 ICCPR. “[T]he term ‘discrimination’ as used in the Covenant should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” U.N. Human Rights Committee, *General Comment 18: Non-discrimination* (Thirty-Seventh session, 1989), ¶7 [hereinafter *HRC General Comment 18*].

<sup>107</sup> “The Committee notes that the State party recognizes the “intersectionality” of racial and religious discrimination, as illustrated by the prohibition of discrimination on ethnic grounds against such communities as Jews and Sikhs, and recommends that religious discrimination against other immigrant religious minorities be likewise prohibited.” UN Committee on the Elimination of Racial Discrimination, *Concluding Observations of the Committee on the Elimination of Racial Discrimination: The United Kingdom of Great Britain and Northern Ireland*, ¶ 20, U.N. Doc. CERD/C/63/CO/11 (Dec. 10, 2003). “[A]lthough religion was not included in the Convention as one of the grounds on which racial discrimination was prohibited... The Committee itself sometimes had to take into account religious aspects when they appeared to be part of a consistent trend of discrimination against some people.” U.N. HR Comm., *Implementation of the Programme of Action for the Third Decade to Combat Racism and Racial Discrimination*, U.N. Doc. E/CN.4/1997/68/Add.1 (Dec. 5, 1996).

<sup>108</sup> IRREVERSIBLE CONSEQUENCES, *supra* note 22, at 19. (citing Margaret Chon & Donna E. Arzt, *Walking While Muslim*, 68 LAW & CONTEMP. PROBS. 215, 221–22 (2005)). See also RIGHTS WORKING GROUP, *FACES OF RACIAL PROFILING: A REPORT FROM COMMUNITIES ACROSS AMERICA* 24-34 (2010) (“Following the tragic events of Sept. 11, 2001, members of Arab, Middle Eastern, Muslim and South Asian communities became automatically suspect as the government, in the name of national security, implemented programs and policies that profiled individuals of these communities based on their perceived race, ethnicity, religion or national origin. Members of these communities were increasingly and disproportionately placed under surveillance, stopped, searched, interrogated, detained and labeled ‘terrorism suspects.’ The government also began aggressively using civil immigration laws, criminal laws and criminal procedure in a sweeping and discriminatory manner to target members of these communities.”); Muneer I. Ahmad, *A Rage Shared by Lam: Post-September 11 Racial Violence as Crimes of Passion*, 92 CAL. L. REV. 1259, 1259 (2004) (“The physical violence exercised upon the bodies of Arabs, Muslims, and South Asians has been accompanied by a legal and political violence toward these communities. . . . Taken together, the multiple assaults on the bodies and rights of Arabs, Muslims, and South Asians produce a psychological violence as well and racialize the communities they target as ‘Muslim-looking’ foreigners unworthy of membership in the national polity.”); Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575 (2002); Murad Hussain, *Defending the Faithful: Speaking the Language of Group Harm in Free Exercise Challenges to Counterterrorism Profiling*, 117 YALE L.J. 920, 926 (2008); FAIZA PATEL, BRENNAN CENTER FOR JUSTICE, *RETHINKING RADICALIZATION* (2011), available at [http://www.brennancenter.org/content/resource/rethinking\\_radicalization/](http://www.brennancenter.org/content/resource/rethinking_radicalization/).

<sup>109</sup> IRREVERSIBLE CONSEQUENCES, *supra* note 22, at 21. U.N. Committee on the Elimination of Racial Discrimination, *General Recommendation No. 14: Definition of Racial Discrimination*, ¶ 2 (Forty-second session, 1993), U.N. Doc A/48/18 at 114 (1994) [hereinafter *CERD General Recommendation 14*]. *HRC General Comment 18*, *supra* note 106, ¶ 7.

<sup>110</sup> Art. 1(3) ICERD; “Under the Convention, differential treatment based on citizenship or immigration status will constitute discrimination if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim.” *CERD Committee General Recommendation 30*, *supra* note 102, ¶ 4. See also *CERD General Recommendation 14*, *supra* note 109, ¶ 2; U. N. Committee on the Elimination of Racial Discrimination, *General Recommendation No. 20: Non-discriminatory implementation of rights and freedoms (Art. 5)*, ¶ 2, U.N. Doc. HRI\GEN\1\Rev.6 at 208 (Mar. 15, 1996); IRREVERSIBLE CONSEQUENCES, *supra* note 22, at 20. The Human Rights Committee has also stated that distinctions under Article 26 can only be consistent with the Covenant if they are reasonable, objective, and aimed at achieving a purpose which is reasonable under the Covenant. *HRC General Comment 18*, *supra* note 106, at ¶ 13 (“the Committee observes that not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant.”). *Karakurt v. Austria*, Communication No. 965/2000, ¶ 8.3, U.N. Doc. CCPR/C/74/D/965/2000 (UN H.R. Comm. 2002); *Broeks v. The Netherlands*, Communication No. 172/1984, U.N. Doc. CCPR/C/OP/2 at 196 (UN H.R. Comm. 1984); *Sprenger v.*

The Netherlands, Communication No. 395/1990, U.N. Doc. CCPR/C/44/D/395/1990 (UN H.R. Comm. 1992); Kavanagh v. Ireland, Communication No. 819/1998 U.N. Doc. CCPR/C/76/D/1114/2002/Rev.1 (UN H.R. Comm. 1999).

<sup>111</sup> Taylor, *supra* note 10.

<sup>112</sup> See the LA8 case, recounted *supra* Part II.D.

<sup>113</sup> See, e.g., the Abu Fayad case, *infra* Part II.D.

<sup>114</sup> WAHEEDA, *supra* note 2; RIGHTS WORKING GROUP, *supra* note 2, at 29-31. AMERICANS ON HOLD 2007, *supra* note 3, at 27.

<sup>115</sup> U.S. Department of Justice, Counterterrorism White Paper 29 (2006), available at <http://trac.syr.edu/tracreports/terrorism/169/include/terrorism.whitepaper.pdf>

<sup>116</sup> ACLU, ENDURING ABUSE: TORTURE AND CRUEL TREATMENT BY THE UNITED STATES AT HOME AND ABROAD (2006), available at [http://www.aclu.org/safefree/torture/torture\\_report.pdf](http://www.aclu.org/safefree/torture/torture_report.pdf).

<sup>117</sup> See, e.g., *The Extent of Radicalization in the American Muslim Community and that Community's Response: Hearing Before H. Homeland Security Comm.*, 112th Cong. (Mar. 10, 2011), available at <http://homeland.house.gov/hearing/hearing-%E2%80%9Cextent-radicalization-american-muslim-community-and-communitys-response%E2%80%9D>.

<sup>118</sup> US Immigration and Customs Enforcement, Priorities for the Apprehension, Detention and Removal of Aliens, <http://www.ice.gov/doclib/news/releases/2011/110302washingtondc.pdf> (listing aliens who engaged in or suspected of terrorism within the highest priority for ICE enforcement) (last visited Apr. 28, 2011).

<sup>119</sup> IRREVERSIBLE CONSEQUENCES, *supra* note 22, at 31 (citing Abdulaziz, Cabales and Balkandali v. the United Kingdom, App. nos. 9214/80, 9473/81, and 9474/81 (Plenary Court Judgment) May 28, 1985, ¶ 78, available at <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=695293&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>)).

<sup>120</sup> IRREVERSIBLE CONSEQUENCES, *supra* note 22, at 31; HRC *General Comment 18*, *supra* note 106 at ¶ 13. For examples of how this test is applied, see, e.g., Araujo-Jongen v. The Netherlands, Communication No. 418/1990, U.N. Doc. CCPR/C/49/D/418/1990, ¶7.4, (UN H.R. Comm. Oct. 22, 1993) (finding that the requirement that applicants for unemployment benefits be unemployed at time of application is reasonable and objective given that the purpose of unemployment-benefits legislation is to provide assistance to the unemployed); Danning v. The Netherlands, Communication No. 180/1984, U.N. Doc. CCPR/C/OP/2 at 205, ¶ 1.4 (UN H.R. Comm. Apr. 9, 1997) (finding that differentiation between benefits received by married couples and couples merely cohabiting are based on reasonable and objective criteria); Foin v. France, Communication No. 666/1995, U.N. Doc. CCPR/C/67/D/666/1995, ¶ 10.3 (UN H.R. Comm. Nov. 9, 1999) (finding that the decision by France to require conscientious objectors to serve double the period of military service violates Article 26 of the ICCPR as differentiation was based on purported need to ascertain whether beliefs of conscientious objectors was genuine, which is not reasonable and objective); Gueye v. France, Communication No. 196/1985, U.N. Doc. CCPR/C/35/D/196/1985, ¶ 9.5 (UN H.R. Comm. Apr. 6, 1989) (finding that differentiation by which soldiers of Senegalese origin were paid inferior pensions to soldiers of French origin in the French army serving in Senegal was not reasonable and objective and noted that mere administrative convenience is not a sufficient justification for differentiating in conflict with Article 26 of the ICCPR); Järvinen v. Finland, Communication No. 295/1988, U.N. Doc. CCPR/C/39/D/295/1988, ¶¶ 6.4 - 6.6 (UN H.R. Comm. Aug. 15, 1990) (finding that a 16-month period of civilian, non-combat service for conscientious objectors, compared to only 8 months for combat service, was non-punitive and justifiable); Snijders v. The Netherlands, Communication No. 651/1995, U.N. Doc. CCPR/C/63/D/651/1995, ¶ 8.3 (UN H.R. Comm. Jul. 27, 1998) (finding that the requirement that non-resident beneficiaries of state health insurance pay a contribution when resident beneficiaries are not required to do so was justified on the basis that failure to make this differentiation would deplete the funds available to the insurance scheme). See also CERD *General Recommendation 14*, *supra* note 109, at ¶ 2.

<sup>121</sup> IRREVERSIBLE CONSEQUENCES, *supra* note 22, at 31. Broeks v. The Netherlands, *supra* note 110, at ¶ 13. See, e.g., Danning v. the Netherlands, *supra* note 120, ¶ 13 (“The right to equality before the law and to equal protection of the law without any discrimination does not make all differences of treatment discriminatory. A differentiation based on reasonable and objective criteria does not amount to prohibited discrimination within the meaning of article 26.”); Gueye v. France, *supra* note 120 ¶ 9.4 (“the right to equality before the law and to equal protection of the law without any discrimination does not make all differences of treatment discriminatory. A differentiation based on reasonable and objective criteria does not amount to prohibited discrimination within the meaning of article 26”); Cheban v. Russian Federation, Communication No. 790/1997, U.N. Doc. CCPR/C/72/D/790/1997, ¶ 7.2 (UN H.R. Comm. Jul. 24, 2001) (“If distinctions are made, they must be based on objective and reasonable grounds”); Julian v. New Zealand, Communication No. 601/1994, U.N. Doc. CCPR/C/59/D/601/1994, ¶ 8.5 (UN H.R. Comm. Apr. 3, 1997) (noting the Committee’s prior jurisprudence “according to which a distinction based on objective and reasonable criteria does not constitute discrimination within the meaning of article 26 of the Covenant...”); Neefs v. The Netherlands, Communication No. 425/1991, U.N. Doc. CCPR/C/51/D/425/1990, ¶ 7.2 (UN H.R. Comm. Jul. 15, 1994) (“the right

to equality before the law and to the equal protection 55 of the law without any discrimination does not make all differences of treatment discriminatory. A differentiation based on reasonable and objective criteria does not amount to prohibited discrimination within the meaning of article 26.”); *Oulajin v. The Netherlands*, Communication No. 426/1990, U.N. Doc. CCPR/C/46/D/406/1990/426/1990, ¶ 7.3 (UN H.R. Comm. Oct. 23, 1992) (“The principle of non-discrimination and equality before the law implies that any distinctions in the enjoyment of benefits must be based on reasonable and objective criteria.”); *Pauger v. Austria*, Communication No. 716/1996, U.N. Doc. CCPR/C/44/D/415/1990, ¶ 7.3 (UN H.R. Comm. Mar. 26, 1992) (“The Committee reiterates its constant jurisprudence that the right to equality before the law and to the equal protection of the law without any discrimination does not make all differences of treatment discriminatory. A differentiation based on reasonable and objective criteria does not amount to prohibited discrimination within the meaning of article 26”).

<sup>122</sup> IRREVERSIBLE CONSEQUENCES, *supra* note 22, at 31. *See, e.g., Kall v. Poland*, Communication No. 552/1993, U.N. Doc. CCPR/C/60/D/552/1993 (UN H.R. Comm. Jul. 14, 1997) (individual opinion by Committee members Elizabeth Evatt and Cecilia Medina Quiroga, cosigned by Christine Chanet, dissenting) (disagreeing with the Committee’s finding that the rights of the applicant had not been violated, and stating that the test of “discrimination” under the Covenant requires the Committee to examine whether the classification in question “was both a necessary and proportionate means for securing a legitimate objective”); *Toonen v. Australia*, Communication No. 488/1992, U.N. Doc. CCPR/C/50/D/488/1992, ¶¶ 6.2 - 6.4 (UN H.R. Comm. 2004) (with Australia identifying the following test to determine whether a measure constitutes “discrimination”: (a) Whether Tasmanian laws draw a distinction on the basis of sex or sexual orientation; (b) Whether Mr. Toonen is a victim of discrimination; (c) Whether there are reasonable and objective criteria for the distinction; (d) Whether Tasmanian laws are a proportional means to achieve a legitimate aim under the Covenant); *Kristjánsson v. Iceland*, Communication No. 951/2000, U.N. Doc. CCPR/C/78/D/951/2000, ¶ 7.2 (UN H.R. Comm. Jul. 16, 2003) (State party arguing that “the aim of the differentiation is lawful and based on objective and reasonable considerations and that there is reasonable proportionality between the means employed and the aim pursued”); *Abdulaziz, Cabales and Balkandali*, *supra* note 119 ¶ 81 (noting that “The Court accepts that the... Rules also had, as the Government stated, the aim of advancing public tranquility. However, it is not persuaded that this aim was served by the distinction drawn in those rules [in this case].”).

<sup>123</sup> CERD Committee Statement on Racial Discrimination, *supra* note 104.

<sup>124</sup> *See* DOJ White Paper, *supra* note 115.

<sup>125</sup> CERD General Recommendation 30, *supra* note 102, ¶ 4.

<sup>126</sup> Martin Scheinin, United Nations Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, *Report on Mission to the United States of America*, UN Doc. A/HRC/6/17/Add.3, (Nov. 22, 2007), ¶65.

<sup>127</sup> *See, e.g.,* Alejandro J. Beutel, Muslim Public Affairs Council, *Data on Post-9/11 Terrorism in the United States 2* (last updated April 18, 2011), available at <http://www.mpac.org/assets/docs/publications/MPAC-Post-911-Terrorism-Data.pdf>; MARK POTOK, SOUTHERN POVERTY LAW CENTER, INTELLIGENCE REPORT NO. 141: THE YEAR IN HATE AND EXTREMISM (Spring 2011), available at <http://www.splcenter.org/get-informed/intelligence-report/browse-all-issues/2011/spring/the-year-in-hate-extremism-2010>; PATEL, *supra* note 108.

<sup>128</sup> *See supra* Part III.B.

<sup>129</sup> Art. 14 ICCPR; Art. 5(a) ICERD. Although the treaties do not explicitly use the term “due process,” the discrete rights to such things as fair trial and equal treatment in front of tribunals have been interpreted as due process by U.N. human rights experts and bodies. For example, the U.N. Special Rapporteur on the Human Rights of Migrants Jorge Bustamante has stated that the U.S. practice of not conducting case-by-case review of immigration detention constitutes “serious violations of international due process standards.” Jorge Bustamante, United Nations Special Rapporteur on the Human Rights of Migrants, *Report on the Mission to the United States of America*, U.N. Doc. A/HRC/7/12/Add.2 (March 5, 2008), ¶ 23. *See also* U. N. Committee on the Elimination of Racial Discrimination, *Statement on racial discrimination and measures to combat terrorism*, ¶ 6, U.N. Doc. E/CN.4/Sub.2/2003/23/Add. 1 (Nov. 1, 2002) (“Insists that the principle of non-discrimination must be observed in all matters, in particular in those concerning liberty, security and dignity of the person, equality before the courts and due process of law.”).

<sup>130</sup> *Loren Laroye Riebe Star, Jorge Alberto Baro Guttlein and Rodolfo Izal Elorz v. Mexico*, Inter-Am. Comm. on H.R., Report No. 49/99, Case 11,610 (Apr. 13, 1999), ¶ 70.

<sup>131</sup> Art. 13 ICCPR. *See Mansour Ahani v. Canada*, Communication No. 1051/2002, U.N. Doc. CCPR/C/80/D/1051/2002, ¶10.8-10.9 (UN H.R. Comm. 2004) (finding no compelling reasons of national security

where domestic procedure provided for expulsion review and noting that Article 13 “incorporates notions of due process.”).

<sup>132</sup> HRC *General Comment 15*, *supra* note 99, ¶ 2, 5.

<sup>133</sup> INTER-AM. COMM. ON H.R., REPORT ON IMMIGRATION IN THE UNITED STATES: DETENTION AND DUE PROCESS ¶40 (2010).

<sup>134</sup> United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Art. 3, G.A. res. 39/46, annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984), *entered into force* June 26, 1987, 1465 U.N.T.S. 85, *available at* <http://www2.ohchr.org/english/law/cat.htm>. *See* arts. 2, 7 ICCPR. The ICCPR has been authoritatively interpreted to prohibit transfer in cases where there are “substantial grounds for believing that there is a real risk of irreparable harm” from torture or CID treatment. U.N. H.R. Comm, *General Comment No. 31: The Nature of The General Legal Obligation Imposed on States Parties to the Covenant* (Eightieth session, 2004), U.N. Doc. CCPR/C/21/Rev.1/Add.13 [hereinafter *HRC General Comment 31*].

<sup>135</sup> Bustamante, *supra* note 129, ¶10.

<sup>136</sup> *Id.* ¶22, Bustamante also said, “those released from detention as a result of a post-order custody review are released under conditions of supervision, which in turn are monitored by ICE deportation officers. Again, ICE officers have absolute authority to determine whether an individual must return to custody.”

<sup>137</sup> *Id.* ¶70.

<sup>138</sup> In the context of criminal cases, the government’s practice of using a defendant’s immigration status to exert further pressure shows discriminatory prosecution that violates the defendant’s due process rights. The Inter-American Court of Human Rights (IACHR) has stated that “for ‘the due process of law’ a defendant must be able to exercise his rights and defend his interests effectively and in full procedural equality with other defendants.” INTER-AM CT. H.R., *supra* note 133 ¶121. The Human Rights Committee in its review of the United States stated, “[t]he State party should review its practice with a view to ensuring that... immigration laws are not used so as to detain persons suspected of terrorism or any other criminal offences with fewer guarantees than in criminal proceedings.” U.N. HR Comm., *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, Concluding Observations – United States of America*, U.N. Doc. CCPR/C/USA/CO/3/Rev.1 (Dec. 18, 2006), ¶19.

<sup>139</sup> Art. 9 ICCPR.

<sup>140</sup> Bustamante, *supra* note 129, ¶23.

<sup>141</sup> A. v. Australia, Communication No. 560/1993 UN Doc. CCPR/C/59/D/560/1993, ¶9.2 (U.N. H.R. Comm., Apr. 30, 1997), *available at* <http://www1.umn.edu/humanrts/undocs/html/vws560.html>.

<sup>142</sup> *Id.* ¶9.4.

<sup>143</sup> INTER-AM. COMM. ON H.R., *supra* note 133, ¶38.

<sup>144</sup> Gabriela Rodríguez Pizarro, Report of the United Nations Special Rapporteur on the Human Rights of Migrant Workers, UN Doc. E/CN.4/2003/85 (Dec. 30, 2002), ¶73.

<sup>145</sup> U.N. Working Group on Arbitrary Detention, Report, U.N. Doc. A/HRC/10/21 (Feb. 16, 2009), ¶67

<sup>146</sup> U.N. Working Group on Arbitrary Detention, Conclusions and Recommendations, U.N. Doc. E/CN.4/2004/3 (Dec. 15, 2003), ¶86.

<sup>147</sup> Bustamante, *supra* note 129, ¶23.

<sup>148</sup> *Id.* ¶30.

<sup>149</sup> *Id.* ¶37.

<sup>150</sup> Pizarro, *supra* note 144, ¶37.

<sup>151</sup> Art. 18 ICCPR. The United States has signed and ratified the Convention without reservations. Article 18(3) does qualify that, “Freedom to manifest one’s religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.” However, these limitations are not applicable to the issues that are the subject of this Briefing Paper. The Human Rights Committee has interpreted that “paragraph 3 of article 18 is to be strictly interpreted: restrictions are not allowed on grounds not specified there, even if they would be allowed as restrictions to other rights protected in the Covenant, such as national security.” The Committee also asserted that: “Limitations may be applied only for those purposes for which they were prescribed and must be directly related and proportionate to the specific need on which they are predicated. Restrictions may not be imposed for discriminatory purposes or applied in a discriminatory manner.” U.N. H.R. Comm, *General Comment No. 22, Article 18: The Right to Freedom of Thought, Conscience and Religion*, (Forty-Eighth session, 1993), ¶7, U.N. Doc. CCPR/C/21/Rev.1/Add.4.

<sup>152</sup> Scheinin, *supra* note 126, ¶65.

<sup>153</sup> *See, e.g.,* Neil MacFarquhar, *Fears of Inquiry Dampen Giving by U.S. Muslims*, N.Y. TIMES, Oct. 30, 2006, at A1; Laurie Goodstein, *Since 9/11, Muslims Look Closer to Home*, N.Y. TIMES, Nov. 15, 2004, at F1; Teresa Watanabe, *U.S. Muslims Temper Ramadan Giving with Caution*, L.A. TIMES, Nov. 6, 2004, at B2; Alan Cooperman, *Muslim Charities Say Fear Is*

*Damming Flow of Money*, WASH. POST, Aug. 9, 2006, at A3; Kathryn A. Ruff, *Scared To Donate: An Examination of the Effects of Designating Muslim Charities as Terrorist Organizations on the First Amendment Rights of Muslim Donors*, 9 N.Y.U. J. LEGIS. & PUB. POL'Y 447 (2005).

<sup>154</sup> Art. 19 ICCPR; Art. 5(d)(viii) ICERD.

<sup>155</sup> U.N. H.R. Comm., *supra* note 138, ¶11.

<sup>156</sup> Art. 16 UDHR; Art. 17 ICCPR: “No one shall be subjected to arbitrary or unlawful interference with his privacy, family or correspondence ...;” Art. 23(1) ICCPR: “The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.”

<sup>157</sup> HRC General Comment 15, *supra* note 99, ¶ 5.

<sup>158</sup> Bustamante, *supra* note 129, ¶15.

<sup>159</sup> In criminal law, the government has to reveal the basis of all charges and crimes as well as all evidence (including exculpatory evidence) before trial. *See, e.g.*, FED. R. CRIM. P. 7 [The Indictment and the Information], *available at* <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/CR2009.pdf>.

<sup>160</sup> U.N. HR Council, Report of the Working Group on the Universal Periodic Review, United States of America, U.N. Doc. A/HRC/16/11 (Jan. 4, 2011), ¶¶92.58, 92.64, 92.82, 92.99, 92.182, 92.183, 92.186, 92.190, 92.207, 92.210, 92.212, 92.219.

In its Concluding Observations, the CERD Committee noted: “The Committee also draws the attention of the State party to its general recommendation no. 30 (2004) on discrimination against non-citizens, according to which measures taken in the fight against terrorism must not discriminate, in purpose or effect, on the grounds of race, colour, descent, or national or ethnic origin, and urges the State party, in accordance with article 2, paragraph 1 (c), of the Convention, to put an end to the National Entry and Exit Registration System (NSEERS) and to eliminate other forms of racial profiling against Arabs, Muslims and South Asians. ... Bearing in mind its general recommendation no. 30 (2004) on non-citizens, the Committee wishes to reiterate that States parties are under an obligation to guarantee equality between citizens and non-citizens in the enjoyment of the rights set forth in article 5 of the Convention, including the right to equal treatment before the tribunals and all other organs administering justice, to the extent recognised under international law, and that Article 1, paragraph 2, must be construed so as to avoid undermining the basic prohibition of discrimination set out in article 1, paragraph 1, of the Convention. The Committee also recalls its Statement on racial discrimination and measures to combat terrorism (A/57/18), according to which States parties to the Convention are under an obligation to ensure that measures taken in the struggle against terrorism do not discriminate in purpose or effect on grounds of race, colour, descent or national or ethnic origin. The Committee therefore urges the State party to adopt all necessary measures to guarantee the right of foreign detainees held as “enemy combatants” to judicial review of the lawfulness and conditions of detention, as well as their right to remedy for human rights violations. The Committee further requests the State party to ensure that non-citizens detained or arrested in the fight against terrorism are effectively protected by domestic law, in compliance with international human rights, refugee and humanitarian law.”

U.N. Committee on the Elimination of Racial Discrimination, Concluding Observations – United States of America, U.N. Doc. CERD/C/USA/CO/6 (Feb. 2008), ¶¶14, 24.

<sup>161</sup> In addition, the government should comply with the following recommendations of the U.N. Special Rapporteur on the Human Rights of Migrants: “The Department of Homeland Security must comply with the Supreme Court’s decision in *Zadydas v. Davis* and *Clark v. Martinez*; Individuals who cannot be returned to their home countries within the foreseeable future should be released as soon as that determination is made, and certainly no longer than six months after the issuance of a final order. Upon release, such individuals should be released with employment authorization, so that they can immediately obtain employment. ...United States immigration laws should be amended to ensure that all non-citizens have access to a hearing before an impartial adjudicator, who will weigh the non-citizen’s interest in remaining in the United States (including their rights to found a family and to a private life) against the Government’s interest in deporting him or her. ...The Department of Homeland Security and the Department of Justice should work together to ensure that immigration detainees are given the chance to have their custody reviewed in a hearing before an immigration judge.” Bustamante, *supra* note 129 ¶¶111, 116, 123.

<sup>162</sup> *Id.* ¶110.

<sup>163</sup> Doudou Diene, United Nations Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, Report on the Mission to the United States of America, U.N. Doc. A/HRC/11/36/Add.3 (Apr. 28, 2009), ¶101.

<sup>164</sup> Scheinin, *supra* note 126 ¶64; The United States should also pass the JUSTICE Act, which amends the material support provisions so that one can only be prosecuted if one knew or intended the money or other support would



further terrorist activities. The JUSTICE Act would help prevent the prosecution of people who contribute to or work for charities that give humanitarian aid in good faith to war-torn countries. ACLU, A Breakdown of the JUSTICE Act, Jan. 6, 2011, <http://www.aclu.org/national-security/breakdown-justice-act> (last visited Apr. 28, 2011).

<sup>165</sup> Scheinin, *supra* note 126 ¶65.