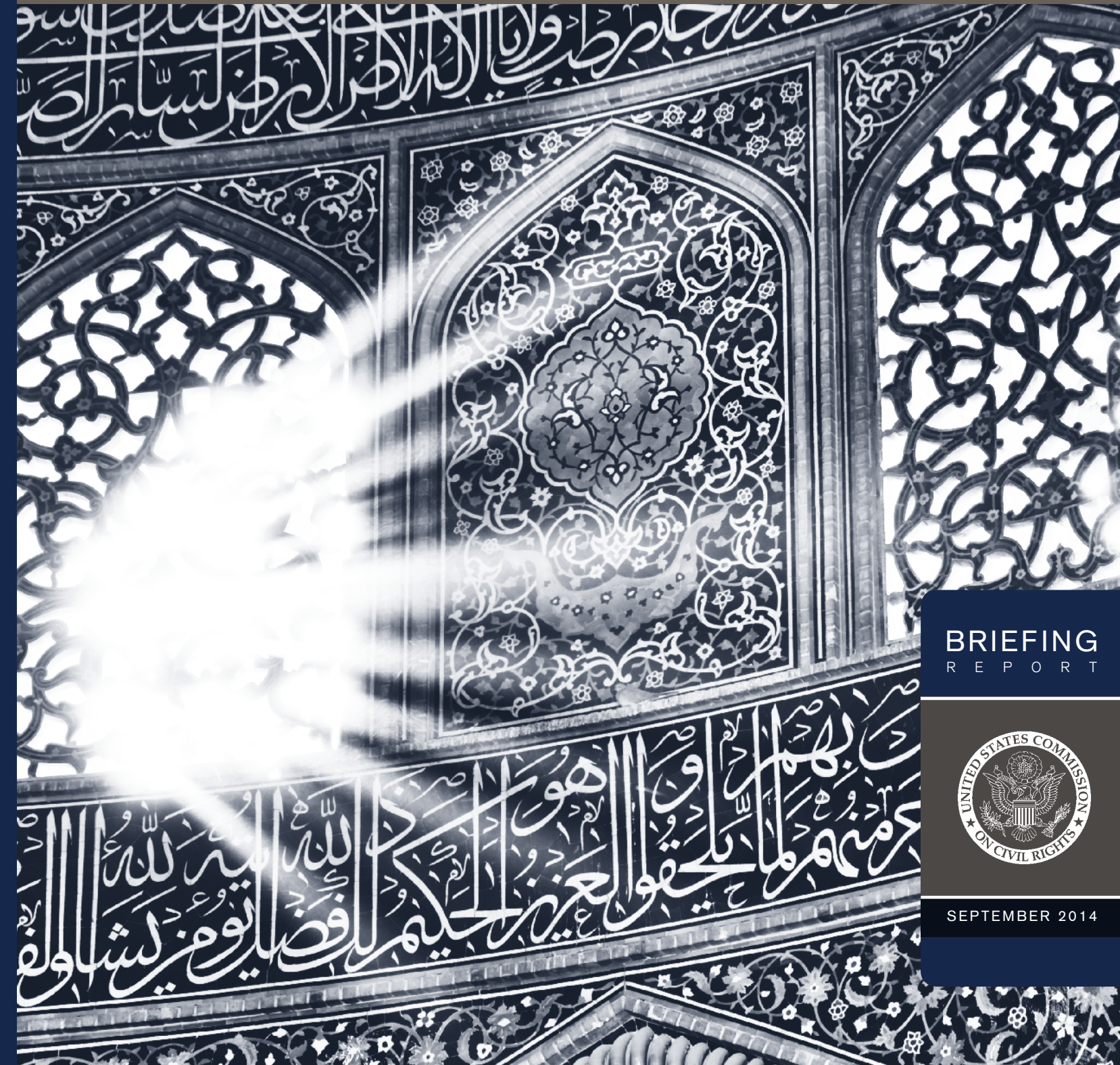


FEDERAL CIVIL RIGHTS ENGAGEMENT WITH
ARAB AND MUSLIM AMERICAN COMMUNITIES

— POST 9/11 —



U.S. COMMISSION ON CIVIL RIGHTS

Washington, DC 20425
Official Business
Penalty for Private Use \$300

Visit us on the Web: www.usccr.gov

BRIEFING
REPORT



SEPTEMBER 2014

U.S. Commission on Civil Rights

The U.S. Commission on Civil Rights is an independent, bipartisan agency established by Congress in 1957. It is directed to:

- Investigate complaints alleging that citizens are being deprived of their right to vote by reason of their race, color, religion, sex, age, disability, or national origin, or by reason of fraudulent practices.
- Study and collect information relating to discrimination or a denial of equal protection of the laws under the Constitution because of race, color, religion, sex, age, disability, or national origin, or in the administration of justice.
- Appraise federal laws and policies with respect to discrimination or denial of equal protection of the laws because of race, color, religion, sex, age, disability, or national origin, or in the administration of justice.
- Serve as a national clearinghouse for information in respect to discrimination or denial of equal protection of the laws because of race, color, religion, sex, age, disability, or national origin.
- Submit reports, findings, and recommendations to the President and Congress.
- Issue public service announcements to discourage discrimination or denial of equal protection of the laws.

Members of the Commission:

Martin R. Castro, Chair

Abigail Thernstrom, Vice Chair (term expired December 5, 2013)

Roberta Achtenberg

Todd F. Gaziano (term expired December 15, 2013)

Gail L. Heriot

Peter N. Kirsanow

David Kladney

Michael Yaki

Marlene Sallo, Staff Director

U.S. Commission on Civil Rights

1331 Pennsylvania Avenue, NW, Suite 1150

Washington, DC 20425

(202) 376-8128 (202-376-8116 for the hearing impaired)

www.usccr.gov

This report is available on CD/DVD in ASCII Text, Microsoft Word, and/or Adobe Acrobat. Alternative formats are available for persons with disabilities (large print, electronic files) by sending an email to publications@usccr.gov or calling 202-376-8110.

Federal Civil Rights Engagement with Arab and Muslim American Communities Post 9/11

A Briefing Before
The United States Commission on Civil Rights
Held in Washington, DC

President Barack Obama
Vice President Joe Biden
Speaker of the House John Boehner

The United States Commission on Civil Rights (“the Commission”) is pleased to transmit our briefing report, *Federal Civil Rights Engagement with Arab and Muslim-American Communities*. The report is also available in full on the Commission’s website at www.usccr.gov. The purpose of the report is to examine federal efforts to eliminate and prevent civil rights violations, including incidents of hate crimes, prejudice, bias, stereotyping and travel discrimination against Arab and Muslim-Americans spurred by the reactions to the September 11, 2001 terrorist attacks in New York, Pennsylvania and Washington.

The Commission heard testimony from experts and scholars in the field and made findings and recommendations as follows:

Findings:

- While the United States government has taken important steps to work with the American Muslim community, many American Muslims still feel their civil rights are violated through stereotyping, profiling and other forms of discrimination and are reluctant to report civil rights and labor violations.¹
- Ethnic, religious and racial profiling has led to the wide-spread singling out of Arabs and American Muslims by Customs and Border Patrol, the Transportation Safety Administration and the Federal Bureau of Investigation.²
- In the last ten years, the Muslim community has seen a rise in anti-Muslim sentiment, anti-Muslim discrimination and policies that unfairly impact American Muslims. One example is the oftentimes secret placement of Muslim Americans on government watch lists.³
- Training materials often used by federal government agencies mislead the American public by presenting a homogeneous view of the Muslim community which often excludes many from the American Muslim community.⁴

¹ al-Suwaij Testimony, *Briefing Transcript*, p. 13; Rehman Testimony, *Briefing Transcript*, pp. 40-41.

² Zogby Written Statement, *Briefing Report*, pp. 42-43.

³ Rehman Written Statement, *Briefing Report*, pp. 68, 79; Aziz Written Statement, *Briefing Report*, p.118.

⁴ al-Suwaij Testimony, *Briefing Transcript*, pp. 13-14; Rehman Written Statement, *Briefing Report*, pp. 69, 77-78.

- Federal government outreach efforts focus only on a portion of the American Muslim community, those who are Arabs (which represent 18% of the Muslim community), while excluding African American Muslims (25% of the Muslim community), South Asians (15% of the Muslim community) and other American Muslims of Persian, Bosnian and other descent.⁵
- Overzealous government monitoring programs have eroded the confidence of American Muslims in law enforcement and to law enforcement efforts.⁶
- Materials used by federal government agencies to train law enforcement officials and other service professionals are insensitive to the cultural diversity of the American Muslim community and often feed the fear about the American Muslim community.⁷
- American Muslims have played an important role in protecting our nation and in partnering with government and law enforcement to ensure a safer country while at the same time preserving civil liberties in their communities. A Triangle Center on Terrorism and Homeland Security study indicates that in one-third of the violent terror attacks thwarted since 9/11, law enforcement was first tipped off to the plot by American Muslim communities.⁸
- There are two trends in addressing major civil rights and national security challenges: the “suspect trend of engagement” which encourages aggressive intelligence and surveillance activities; and the “partnership trend of engagement” where local communities have developed strong relationships with law enforcement agencies and local government agencies.⁹
- Fear of government surveillance has created a chill over freedom of expression and freedom of association on college campuses and congregations for American Muslims. The American Civil Liberties Union identified over 60 incidents of anti-mosque activity throughout the nation in the last six years, and the Pew Forum on Religious and Public Life indicated that from 2009 to 2011, there were at least 35 proposed mosques and Islamic centers that encountered local resistance. In addition, according to the Justice Department, since 2000 there have been 24 cases concerning mosques under the Religious Land Use and Institutionalized

⁵ al-Suwaij Testimony, *Briefing Transcript*, p. 14.

⁶ Zogby Testimony, *Briefing Transcript*, pp. 21-22; Rehman Written Statement, *Briefing Report*, p. 76.

⁷ *Ibid.*, p. 22-23.

⁸ Marcus Testimony, *Briefing Transcript*, p. 33.

⁹ Tarin Testimony, *Briefing Transcript*, pp. 33-37.

Persons Act, 14 of which have emerged since 2010. Opposition has ranged from vandalism and destruction of property to zoning challenges based on so-called “quality of life” concerns.¹⁰

- The Travel Redress Inquiry Program (TRIP) developed by DHS based on congressional mandate as a process by which the federal government provides redress to persons who have been referred for additional screening while traveling or are delayed or denied airline boarding for any reason, is too opaque and takes too long to resolve issues reported.¹¹
- During the period from 2001 to 2009, according to FBI data, 1,552 incidents of anti-Islamic hate crimes were reported resulting in 1,785 offenses. Testimony revealed that that number is likely low because of the way that hate crimes data is reported.¹²
- During the period from 2009-2010, hate crimes against Muslims increased by 50%.¹³
- Hate crimes directed against Arab Americans or Muslims, or against those who have come from Arab countries are difficult to track because in the past, crime record keeping, whether dealing with victims of hate crimes or otherwise, has not attempted to separate out Arab Americans, or Muslims, or others of American Muslim descents.¹⁴
- In 2010 the FBI reported that hate crimes committed against Muslims accounted for 13.2 percent of all religion-motivated hate crimes in the U.S.¹⁵
- Title VI of the Civil Rights of 1964 does not offer any protection for students against harassment solely based on their religious faith.¹⁶
- While no national statistics on faith-based bullying exist, Muslim Mothers Against Violence polled 78 male and female students in Northern Virginia

¹⁰ Rehman Written Statement, *Briefing Report*, p. 71.

¹¹ Aziz Testimony, *Briefing Transcript*, pp. 132-134; Gersten Testimony, *Briefing Transcript*, pp. 152-153.

¹² Rehman and Tarin Testimony, *Briefing Transcript*, pp. 55-56.

¹³ Treene Testimony, *Briefing Report*, p. 28.

¹⁴ Chairman Castro’s line of questioning and panelist Eric Treene’s response, *Briefing Transcript*, pp. 165-168.

¹⁵ Marcus Written Statement, *Briefing Report*, p. 47.

¹⁶ *Ibid.*, p. 48.

between the ages of 12-17. 80 percent reported being bullied with 75 percent saying it happened more than once.¹⁷

- During 2001-2006, Muslims brought the greatest number of religious discrimination claims under the Religious Land Use and Institutionalized Persons Act of 2000. 62 of the 229 cases analyzed were brought by Muslims, 27 percent of all cases.¹⁸
- Federal programs which intertwine civil rights protections with other policy and legal priorities undermine efforts to reduce prejudice and discrimination against American Arabs and Muslims.¹⁹
- There has been a backlash against Americans identified as, or mistakenly perceived to be, Muslim and/or Arab. For example, Muslims and people thought to be Muslim have been removed from airline flights because fellow passengers were nervous or fearful; mosques have been subject to vandalism and arson; persons suspected of being Arab or Muslim have been subjected to violent, sometimes fatal attacks.²⁰
- Arab and Muslim Americans have contributed greatly to, and are an important part of, the diverse fabric of America.²¹
- There exists discrimination against Muslim prisoners in American penal institutions. Panelist Kenneth Marcus cited recent empirical research that Muslim litigants who file claims of religious discrimination are much less likely to prevail in court than non-Muslim litigants, particularly if they are Muslim prisoners compared to non-Muslim prisoners.²²
- The federal government's "counter-radicalization" efforts create a danger of creating a government-approved "Official Islam," which adversely impacts religious freedom and potentially violates the Establishment Clause.²³

¹⁷ Rehman Written Statement, *Briefing Report*, p. 74.

¹⁸ Marcus Written Statement, *Briefing Report*, p. 52.

¹⁹ Federal Civil Rights Engagement with Muslim and American Communities Post 9/11 Executive Summary, *Briefing Report*, p. 3.

²⁰ *Ibid.*, pp. 3-4.

²¹ *Ibid.*, p. 4.

²² Marcus Testimony, *Briefing Report*, p. 11.

²³ Rascoff Testimony, *Briefing Report*, p. 22.

Recommendations:

- Federal government agencies, including but not limited to, the U.S. Department of Justice (DOJ), the Federal Bureau of Investigations (FBI) and the U.S. Department of Homeland Security (DHS) should expand their outreach efforts to the American Muslim community beyond the mosques and Imams to encompass the vast diversity of perspectives, experiences and ethnicities of the community.²⁴
- In order to create a comprehensive and unified message and approach across the federal government for outreach and training purposes, federal agencies should collaborate with local government agencies and advocacy groups that regularly engage and serve the diverse American Muslim community.²⁵
- Congress should allocate funds to DOJ, DHS, the FBI and other agencies to expand their outreach efforts at the local level and to increase access to the redress processes.
- The following are useful recommendations presented by Professor Sahar Aziz that lend a thoughtful and instructive view to improving the federal agency engagement with the American Muslim community:²⁶
- The government should not use community engagement meetings in furtherance of national security surveillance, investigative and prosecutorial objectives, but rather to develop trust and robust relations with constituents towards the shared goal of protecting individual rights and public safety for all Americans.
- Increase independent oversight of use of informants in counterterrorism.
- Counterterrorism trainers and training materials should be vetted through a transparent and professional process wherein individuals with the requisite educational and professional qualifications are selected to train those tasked with the important task of protecting us from danger.
- Government engagement efforts should be “de-securitized” to holistically focus on the host of social, economic, and political factors that affect the vitality of Arab and Muslim communities.

²⁴ al-Suwaij Written Statement, *Briefing Report*, p. 37; Aziz Written Statement, *Briefing Report*, p. 132;

²⁵ Tarin Written Statement, *Briefing Report*, p. 67.

²⁶ Aziz Written Statement, *Briefing Report*, pp. 132-133.

- Government engagement programs should be subject to citizen and Congressional oversight to ensure stated objectives are in fact met and government resources are not wasted.
- The following are useful recommendations presented by panelist Asim Rehman which offer insightful suggestions gained from professional experience and collaboration with other advocacy organizations servicing the American Muslim community:²⁷
- Request that the Department of Justice, Department of Homeland Security, Federal Bureau of Investigation, and other law enforcement agencies and departments:
 - Rigorously enforce all guidelines and rules prohibiting the use of race and racial profiling in all law enforcement activities and extend such prohibitions to religion and religious profiling.
 - Require a factual predicate before the commencement of investigation or assessment and require heightened supervisory approval for assessments or investigations implicating First Amendment protected activity, including the use of informants and agent provocateurs in houses of worship.
 - Review all training materials and purge all use of materials with hateful and stereotypical depictions of Islam and Muslims.
 - Continue local outreach efforts with Muslim communities, but forbid all offices engaging in such outreach from maintaining and sharing information gained through such efforts for investigative or surveillance purposes.
 - Establish effective remedial measures to receive and adequately address civilian complaints, particularly with respect to surveillance and monitoring.
 - Educate local law enforcement partners about the need for nondiscrimination in law enforcement and investigate local law enforcement partners when civil liberties failures persist.
 - Request that the DHS conduct a thorough investigation of how Muslims are being interrogated and searched at the border and prohibit Customs and Border Patrol officers from asking questions related to First Amendment-protected activity.

²⁷ Rehman Written Statement, *Briefing Report*, p. 85.

- Request that the Justice Department and Treasury Department issue agency orders providing a safe harbor for well-intentioned donors and to establish a single, user-friendly database for determining whether an entity or individual is on a Prohibited List.
- Request that the Justice Department dedicate additional resources and personnel to bullying prevention programs and to hate crimes reporting, investigation and prosecution.
- The FBI should use the Muslim community as a resource in designing training, as the Department of Homeland Security has done.²⁸
- In order to address discrimination against Muslim prisoners, appropriate reforms must address the balance between prison security and homeland security versus the wide prevalence of discrimination.²⁹
- The federal government should improve its tracking and prosecution of hate crimes against American Arabs and Muslims.³⁰
- The federal government's counter-radicalization programs must be revised so as not to infringe on religious freedom or violate the Establishment Clause.
- The standards and information by which American citizens are placed on the No-Fly List, Selectee List or on the Watch list must be made clear and shared with the person placed on the list, without compromising security issues.
- Placement on the No Fly List should be subject to judicial review or oversight.
- The TRIP process should be substantially improved and there should be a process by which Americans who are placed on those lists have a meaningful opportunity to challenging their placement on lists that result in the delay or denial of their right to travel

²⁸ Zogby Testimony, *Briefing Report*, p. 10.

²⁹ Marcus Testimony, *Briefing Report*, p. 11.

³⁰ Rehman Testimony, *Briefing Report*, p. 14.

The Commission believes the report is helpful in identifying specific actions that can be taken to vastly improve federal efforts in this endeavor. Our country has long been a beacon of hope to so many immigrants and other Americans. It is time to assure everyone, regardless of creed, the same safety and protection that so many of us already enjoy

For the Commission,

A handwritten signature in black ink, appearing to read "Martin R. Castro". The signature is fluid and cursive, with a long horizontal flourish extending to the right.

Martin R. Castro
Chairman

TABLE OF CONTENTS

EXECUTIVE SUMMARY	5
SUMMARY OF PROCEEDINGS	13
Panel One Presentations	13
Zainab al-Suwaij.....	13
Dr. James Zogby.....	15
Kenneth Marcus.....	16
Haris Tarin	17
Asim Rehman	19
Discussion	20
Hate Crimes Categorization and the Definition of Harassment	20
Federal, State, and Local Engagement Differences and Interactions	21
Government Department and Agency Trust Ratings.....	21
Solutions	23
Panel Two Presentations	23
Dr. Jytte Klausen	23
Sahar Aziz.....	25
Eugene Volokh	26
Sam Rascoff.....	28
Dr. Peter Skerry	29
Discussion	30
The Organization of the Government’s Outreach and Investigative Efforts	30
The Counter-Radicalization of Foreign Countries	31
The Application of the First Amendment.....	32
Panel Three Presentations	33
Eric Treene.....	33
David Gersten	34
Discussion	35
The Organization, Partnerships, and Unique Features of the Panelists’ Divisions	36

Lessons for the Panelists to Report to Their Respective Departments and Clarifications of Issues Discussed in Panel Two.....	37
Data Collection on Religious-Based Hate Crimes.....	37
KEY ISSUES AND QUESTIONS	39
Key Issues	39
Key Questions Going Forward	40
FINDINGS AND RECOMMENDATIONS.....	41
Findings	41
Recommendations	44
COMMISSIONERS' STATEMENTS AND REBUTTALS.....	49
Statement of Chairman Martin R. Castro joined by Commissioner Michael Yaki	49
Statement of Commissioners Roberta Achtenberg & David Kladney with concurrences	53
Statement of Commissioner Michael Yaki joined by Chairman Martin R. Castro	56
Rebuttal of Commissioner Gail Heriot	75
PANELISTS' WRITTEN STATEMENTS	77
Zainab al-Suwajj.....	77
Dr. James J. Zogby	80
Honorable Kenneth L. Marcus	85
Haris Tarin	105
Asim Rehman	108
Dr. Jytte Klausen	126
Sahar F. Aziz	146
Eugene Volokh	174
Samuel J. Rascoff	182
Dr. Peter Skerry	185
Eric Treene.....	193
David Gersten	198
PANELISTS' BIOGRAPHIES.....	205
Zainab al-Suwajj.....	205
James Zogby	205

Kenneth Marcus	206
Haris Tarin	206
Asim Rehman	207
Jytte Klausen.....	207
Sahar Aziz.....	208
Eugene Volokh	209
Samuel J. Rascoff	210
Peter Skerry	210
Eric Treene.....	211
David Gersten	211
APPENDIX.....	213

EXECUTIVE SUMMARY

The following report examines the methods, goals and effectiveness of the federal government's engagement with Arab and Muslim-American individuals and communities. Specifically, the report focuses on actions taken by the federal government to address, prevent and eradicate violations of civil rights laws against the Arab and Muslim-American communities, as well as efforts taken to ameliorate, eliminate or reduce religious, national-origin, and ethnic bias.

Background

In the wake of September 11, 2001, proactive engagement with the Arab and Muslim-American community became a new, distinct, and national civil rights priority for federal government enforcement components. This was a novel¹ effort. Not since the early years of the civil rights era had such a broad range of federal civil rights authorities worked in such a coordinated, ongoing, preemptive manner. Prior to 9/11, civil rights incidents had been local or regional in nature, and had been addressed in a piecemeal fashion by federal agencies. The federal response had been narrowly targeted toward a short-term calming of tensions and boosting of resources to enforcement. But the sustained national security emergency that began on September 11, 2001, prompted a new, more comprehensive approach—with resources and attention from those who saw in religious, national, and ethnic bias the seeds of a national security threat. Evaluating the experience of the federal government in engaging the Arab and Muslim American communities post-9/11 is significant both in terms of redressing the widespread reports of discrimination faced by those communities and also as an example of how the federal government might respond to similar future events.

¹ A news account reports:

Ralph Boyd, who served as the Assistant Attorney General for Civil Rights in the aftermath of the Sept. 11 attacks, recalled that the Department of Justice (DOJ) “didn’t have a template” for dealing with the “multitude of issues” which they had to face.

Boyd said DOJ had to develop a response “on the fly,” and the government had to make a very clear statement against discrimination immediately.

“The first message we wanted to convey... was to encourage the American people not to tolerate difference and diversity... but rather to embrace them as being us and part of us,” Boyd said. Boyd said it was important to remind people that Muslims were victims and first responders during the Sept. 11 attacks.

Boyd said that the good news was that the bulk of the criminal activity occurred in the first few weeks following Sept. 11, adding that a chart of discriminatory activity would show a “huge cliff” drop-off after 2001.

See Ryan J. Reilly, “Advocates Give Government ‘Mixed Review’ On Combatting Post-9/11 Backlash,” *TPM Muckraker*, Oct. 19, 2011, <http://talkingpointsmemo.com/muckraker/advocates-give-government-mixed-review-on-combatting-post-9-11-backlash> (last accessed Sept. 17, 2014).

The federal response has emerged organically and fitfully, but now proceeds² along three lines: (1) training of government employees who might interact with members of the Arab and Muslim communities; (2) outreach programs at the Federal Bureau of Investigation (FBI),³ the Justice Department's (DOJ's) Civil Rights Division (CRT),⁴ the Department of Homeland Security's (DHS's) Office for Civil Rights and Civil Liberties (CRCL)⁵ and other agencies; and (3) public acts of support for the Arab and Muslim American communities and the worldwide practice of Islam.⁶

With few exceptions, these outreach efforts are intertwined with national security concerns. The White House's August 2011 release of its strategic plan entitled *Empowering Local Partners to Prevent Violent Extremism in the United States* is an articulation of this connection:

Violent extremists prey on the disenchantment and alienation that discrimination creates, and they have a vested interest in anti-Muslim sentiment. It is for this reason that our security—preventing radicalization

² *Infra* note 7, at pp. 5–7 where the White House describes “three broad areas of action.”

³ See The Federal Bureau of Investigation (FBI), “Community Outreach: The better we know our communities, the better we can protect them,” no date, http://www.fbi.gov/about-us/partnerships_and_outreach/community_outreach (last accessed Sept. 19, 2014).

⁴ See U.S. Department of Justice, “Initiative to Combat Post-9/11 Discriminatory Backlash: Enforcement and Outreach,” no date, p. 4, <http://www.justice.gov/crt/legalinfo/discrimupdate.php> (last accessed Sept. 19, 2014) (“Since September 11, 2001, the Civil Rights Division has engaged in an extensive program of outreach to Muslim, Sikh, Arab, and South-Asian American organizations. This outreach has included meetings of senior Civil Rights Division officials with community leaders to address backlash-related civil rights issues, providing speakers at national and regional conventions and other community events, and hosting a quarterly meeting that brings together leaders from these communities with officials from a variety of federal agencies including the Department of Homeland Security, the FBI, the Department of Transportation, and others, to address civil rights issues in a comprehensive way. The Justice Department's Community Relations Service (CRS) has held more than 750 town and community meetings around the country addressing backlash-related issues, and deployed conflict resolution experts to communities across the country. CRS also has worked with local community leaders to provide cultural professionalism programs for law enforcement and government officials, and developed two films for law enforcement officers that can be downloaded from its website: *The First Three to Five Seconds - Law Enforcement Roll Call Training Video on Arab and Muslim Cultural Awareness*, and *On Common Ground - Law Enforcement Training Video on Sikhism*.”)

⁵ See U.S. Department of Homeland Security, Office for Civil Rights and Civil Liberties, “About the Office for Civil Rights and Civil Liberties,” no date, <http://www.dhs.gov/office-civil-rights-and-civil-liberties> (last accessed Sept. 25, 2014).

⁶ See Nikki Sutton, The White House Blog, “President Obama Hosts an Iftar Dinner to Celebrate Ramadan,” Aug. 11, 2011, <http://www.whitehouse.gov/blog/2011/08/11/president-obama-hosts-iftar-dinner-celebrate-ramadan> (last accessed Sept. 25, 2014).

that leads to violence—is inextricably linked to our values: the protection of civil rights and civil liberties and the promotion of an inclusive society.⁷

Some claim that the interfacing of civil rights protection with other policy and legal priorities may undermine the otherwise laudable effort toward reducing prejudice against American Arabs and Muslims and protecting them against discrimination.

In particular, several 2011 reports suggested that civil rights were possibly being abused:

- In September 2011, the media reported that the Central Intelligence Agency (CIA) inspector general was looking into CIA connections to the New York Police Department's (NYPD's) surveillance of Muslim communities,⁸ and in mid-December over thirty members of Congress asked DOJ to investigate reports of CIA involvement in surveillance of Muslim Americans in the New York City area.⁹
- In September 2011, the media reported that FBI training at Quantico, VA included highly prejudiced materials about Muslims.¹⁰
- In early December 2011, there were numerous news reports that the FBI was illegally conducting surveillance during its outreach efforts.¹¹

Some have expressed concerns that, since the attacks on the World Trade Center and the Pentagon on September 11, 2001, fear and misunderstanding of adherents of the Islamic faith have risen dramatically in the United States. There are claims that there has been a backlash against Americans identified as, or mistakenly perceived to be Muslim and/or Arab, including stereotyping, profiling, discrimination and hate crimes. For example, airlines have removed people thought to be Muslim from flights because their fellow passengers were nervous or

⁷ The White House, *Empowering Local Partners to Prevent Violent Extremism in the United States*, August 2011, p. 2, http://www.whitehouse.gov/sites/default/files/empowering_local_partners.pdf (last accessed Sept. 25, 2014).

⁸ “CIA investigates whether laws broken helping NYPD,” *USA Today*, Sept. 13, 2011, <http://usatoday30.usatoday.com/news/washington/story/2011-09-13/cia-nypd-investigation/50384884/1> (last accessed Sept. 25, 2014).

⁹ “Congress Members Call For Probe Into NYPD-CIA Collaboration Targeting NY Muslim Communities,” *Huffington Post*, Dec. 21, 2011, http://www.huffingtonpost.com/2011/12/21/congress-calls-for-probe-nypd-cia-relationship_n_1163154.html (last accessed Sept. 25, 2014).

¹⁰ Dina Temple-Raston, “How Did Anti-Muslim Bias Seep Into FBI Training,” *NPR*, Sept., 29, 2011, <http://www.npr.org/2011/09/29/140902739/units-autonomy-may-be-why-fbi-missed-bias> (last accessed Sept. 25, 2014).

¹¹ See Jerry Markon, “FBI illegally using community outreach to gather intelligence, ACLU alleges,” Dec. 1, 2011, updated Dec. 2, 2011, http://www.washingtonpost.com/politics/fbi-illegally-using-community-outreach-to-gather-intelligence-aclu-alleges/2011/11/30/gIQA1qxyGO_story.html (last accessed Sept. 25, 2014).

fearful.¹² Mosques have been subject to vandalism and arson.¹³ Persons suspected of being Arab or Muslim have been subject to violent, sometimes fatal attacks.¹⁴ Perhaps the most prominent example of hostility toward American Muslims has been the controversy over the so-called “Ground Zero Mosque” in New York City, which resulted in a wide variety of anti-Islam activities and statements.¹⁵

A Gallup Poll, released on August 2, 2011, found that 93 percent of Muslim Americans believe that those in their faith group are loyal to the United States, yet 60 percent of Muslim Americans state that other Americans are prejudiced against them.¹⁶ Indeed, 48 percent of Muslims in that survey reported that in the previous 12 months they had personally been victims of racial or religious discrimination. A September 2010 Zogby poll revealed that 55 percent of those surveyed had an unfavorable opinion of Muslims, and 41 percent had an unfavorable opinion of

¹² See, e.g., Liz Robins, “9 Muslims Are Pulled From Plane and Denied Re-entry; Airline Apologizes Next Day,” *New York Times*, Jan. 2, 2009 (“[A]irline officials pulled nine Muslim passengers off a domestic flight and refused to rebook them, even though F.B.I. agents said they had done nothing wrong.”) <http://www.nytimes.com/2009/01/03/us/03muslims.html> (last accessed Sept. 25, 2014).

¹³ Robbie Brown, “Incidents at Mosque in Tennessee Spread Fear,” *New York Times*, Aug. 30, 2010, www.nytimes.com/2010/08/31/us/31mosque.html?scp=1&sq=murfreesboro%20arson&st=cse (last accessed Sept. 25, 2014); Press Release, U.S. Dept. of Justice, “Texas Man Pleads Guilty to Federal Hate Crime in Connection with Mosque Arson in Arlington, Texas,” Feb. 23, 2011, <http://www.fbi.gov/dallas/press-releases/2011/dl022311.htm> (Sept. 25, 2014).

¹⁴ See, e.g., Tamar Lewin, “Sikh Owner Of Gas Station Is Fatally Shot In Rampage,” *New York Times*, Sept. 17, 2001, www.nytimes.com/2001/09/17/us/sikh-owner-of-gas-station-is-fatally-shot-in-rampage.html (last accessed Sept. 25, 2014); Robert F. Worth, “Police Arrest Brooklyn Man In Slayings of 4 Shopkeepers,” *New York Times*, Mar. 31, 2003, www.nytimes.com/2003/03/31/nyregion/police-arrest-brooklyn-man-in-slayings-of-4-shopkeepers.html (last accessed Sept. 25, 2014).

¹⁵ See, e.g., Mike Kelly, “Op/Ed, On this Ground, Zero Tolerance,” *The Record*, Jun. 7, 2010, <http://www.northjersey.com/opinion/on-this-ground-zero-tolerance-1.320911> (last accessed Sept. 25, 2014). (“The protesters had become so angry at what they thought were Muslims that New York City police officers had to rush in and pull [fellow protestors and Coptic Christians] Nassralla and El Masry to safety.”). In addition to incidents in New York City inspired by antipathy to the Park51 project, the controversy over the proposed community center seems to have inflamed anti-Muslim around the country, leading to violent acts by private individuals and public hostility toward Muslims by means of “anti-Sharia” legislation and regulatory challenges of mosque construction projects.

¹⁶ Abu Dhabi Gallup Center, “Muslim Americans: Faith, Freedom, and the Future - Examining U.S. Muslims’ Political, Social, and Spiritual Engagement 10 Years After September 11,” (August 2011) <http://www.gallup.com/strategicconsulting/148805/Muslim-Americans-Faith-Freedom-Future.aspx> (last accessed Sept. 25, 2014).

Arabs.¹⁷ A recent Zogby poll reveals a continued unfavorable sentiment with 55 percent of those surveyed having an unfavorable opinion of Muslims, and 39 percent having an unfavorable opinion of Arabs.¹⁸

Arab and Muslim Americans have contributed greatly to, and are an important part of, the diverse fabric of America. Many have succeeded in achieving the American Dream. Indeed, more than 80 percent of the people of Arab descent living in the United States are American citizens.¹⁹ Despite this, some claim that Arab and Muslim Americans continue to face illegal and unconscionable discrimination and prejudice.²⁰

The Commission was significantly involved in the federal civil rights response to 9/11. The full Commission issued two publications specifically on the effects of 9/11,²¹ and the Commission's State Advisory Committees issued nine such reports.²² The agency also set up a special hotline

¹⁷ Arab American Institute, "American Views on Arab and Muslim Americans," (September 2010) http://www.aaiusa.org/page/-/Polls/AmericanOpinion/AmericanViewsOnArabMuslimAmericans_2010.pdf (last accessed Sept. 26, 2014).

¹⁸ Arab American Institute, "American Views on Arab and Muslim Americans," (July 29, 2014) http://b.3cdn.net/aai/3e05a493869e6b44b0_76m6iyjon.pdf (last accessed Sept. 26, 2014).

¹⁹ See, for example, Arab American Institute Foundation, *Quick Facts About Arab Americans*, (citing U.S. Census Bureau, *American Community Survey 3-Year Estimates (2007-2009)*), http://b.3cdn.net/aai/fcc68db3efdd45f613_vim6ii3a7.pdf (last accessed Sept. 26, 2014).

²⁰ See, for example, "Muslim Discrimination Cases Disproportionately High in U.S.," *The Huffington Post*, Mar. 29, 2011, <http://www.huffingtonpost.com/2011/03/29/muslim-discrimination-cas n 842076.html> (last accessed Sept. 26, 2014).

²¹ U.S. Commission on Civil Rights (USCCR), *Boundaries of Justice: Immigration Policies Post-September 11th* (October 12, 2001) and *Anniversary Update on Commission Activities Related to September 11* (September 2002).

²² District of Columbia, Maryland, and Virginia Advisory Committees to the USCCR, *Civil Rights Concerns in the Metropolitan Washington, D.C., Area in the Aftermath of the September 11, 2001, Tragedies* (June 2003); Illinois Advisory Committee to the USCCR, *Arab and Muslim Civil Rights Issues in the Chicago Metropolitan Area Post-September 11* (May 2003); Indiana Advisory Committee to USCCR, *Civil Rights Issues Facing Muslims and Arab Americans in Indiana Post-September 11* (May 2002); Michigan Advisory Committee to the USCCR, *Civil Rights Issues Facing Arab Americans in Michigan* (May 2001); Minnesota Advisory Committee to the USCCR, *Civil Rights Issues Facing Muslims and Arab Americans in Minnesota Post-September 11* (Feb. 2002); New York Advisory Committee to the USCCR, *Civil Rights Implications of Post-September 11 Law Enforcement Practices in New York* (March 2004); North Dakota Advisory Committee to the USCCR, *Briefing on Civil Rights Issues Facing Muslims and Arab Americans in North Dakota Post-September 11* (May 2002); Ohio Advisory Committee to USCCR, *Civil Rights Issues Facing Muslims and Arab Americans in Ohio Post-September 11, 2002* (November 2001); Wisconsin Advisory Committee to USCCR, *Civil Rights Issues Facing Muslims and Arab Americans in Wisconsin Post-September 11* (May 2002). **To obtain copies of these State Advisory Committee reports, see:** <http://www.usccr.gov/pubs/sac.php>, or <http://www.usccr.gov/pubs/orderpub.php>.

that received almost 600 complaints of discrimination, and then-Chairwoman Mary Frances Berry appeared in a variety of public service announcements and even an episode of *America's Most Wanted* to spread a message of tolerance toward Arab Americans. Since 2002, however, the Commission revisited these issues only tangentially.²³

Thus, on November 9, 2012, the U.S. Commission on Civil Rights held a briefing to examine the methods, goals, and effectiveness of the federal government's post-9/11 civil rights engagement with the Arab and Muslim American community, including federal outreach to the general public to end bias and discrimination against these communities.

Briefing Outcomes

In the briefing, the Commission heard from experts of varying views. The first panel consisted of individuals in the Arab and Muslim American communities who could speak to the attitudes and experiences of those affected by government policies. They represented the following organizations: the American Islamic Congress, the Arab American Institute, the Louis D. Brandeis Center for Human Rights under Law, the Muslim Public Affairs Council, and the Muslim Bar Association of New York. The speakers asserted continuing profiling, stereotyping, hate crimes, and other kinds of discrimination despite the vast differences among members of the community on virtually any point of identification, including racial and ethnic differences, national origin differences, religious differences and cultural background and practices.

The Commission also heard from scholars who have studied civil rights law, constitutional law, community outreach, federal program planning, and techniques to measure and change biases with respect to such communities. They are affiliated with Brandeis University, Texas Wesleyan University School of Law, the University of California Los Angeles School of Law, New York University School of Law, and Boston College. The scholars addressed the censoring of books and articles, inadequately trained law enforcement agents, insufficient or counterproductive outreach efforts, overemphasis on national security issues, and lack of oversight of engagement programs. They also addressed suppression of First Amendment freedoms of speech and assembly using illegal seizures of written materials and intimidation aimed at critics of Islam.

The Commission's third panel consisted of lawyers from the U.S. Department of Justice, Civil Rights Division's Special Counsel for Religious Discrimination, and from the U.S. Department of Homeland Security's Office for Civil Rights and Civil Liberties, which are charged with enforcing civil rights laws and encouraging community outreach. Both have fostered many

²³ See e.g., USCCR, *Domestic Wiretapping in the War on Terror* (January 2010) at 37–40; and USCCR, *Peer-to-Peer Violence and Bullying: Examining the Federal Response* (September 2011) at 21–22.

outreach efforts to communities and obtained feedback, in addition to investigating complaints and creating programs designed to counter violent extremism. The Department of Justice recorded a 50% increase of hate crimes against Muslims in the last ten years, and in land cases under the Religious Land Use and Institutionalized Persons Act, found a sharp rise in cases involving mosques.

Throughout the discussion, three major themes emerged:

1. A call for the federal government to further address the continued profiling, stereotyping, hate crimes, and other kinds of discrimination against Arab and Muslim-American communities in the aftermath of 9-11
2. A need to further examine the following issues as they relate to Arab and Muslim American communities: training of law enforcement agents; outreach efforts by federal, state and local governments; and rhetoric surrounding national security issues.
3. A need to further analyze the legality and constitutionality of protocols and procedures surrounding the seizure by federal, state and local entities of written materials about the Islamic religion.

Accordingly, the Commission offers a series of recommendations, which if fully implemented will yield:

1. Greater funding to support expanded outreach efforts by the federal government to the American Muslim community to reach the vast diversity of the community;
2. Enhanced collaboration that leads to a greater trust between and among federal agencies, local government agencies, advocacy groups, and the American Muslim community; and,
3. Improved standards and protocols for national security, surveillance and border protection programs; superior government oversight; and insightful training and training materials for federal, local and state law enforcement agencies that bolster relationships with the American Muslim community.

In addition, the Commission poses a series of useful questions, the answers to which would yield beneficial results in determining methods for addressing the varied concerns of the Arab and Muslim community following 9/11:

1. What can federal agencies do to reduce or eliminate the notion that they provide misinformation about Arab and Muslim Americans in their training, investigations, and other activities?

2. How can agencies better divide their investigatory/enforcement activities from their community outreach efforts? What steps can be taken to prevent Arab and Muslim Americans from feeling pursued in their mosques and community centers, schools and homes, by the same agencies that should be protecting their safety and civil rights?
3. What more can be done to protect the privacy rights of Arab and Muslim Americans (and in fact, all Americans) as the NSA and other agencies pursue suspected terrorists?
4. Why did the FBI refuse to share information regarding the inappropriate training materials it ultimately removed from use? What more can be done to avoid spreading such misinformation in the future?
5. What positive actions can the federal government take to avoid racial profiling and instead focus on individual behavior?
6. What is the current rate of hate crimes and discrimination against Arab and Muslim Americans, which we saw rise significantly post-9/11? What new efforts have been planned to further address this?
7. In what ways has oversight been improved at agencies that have been viewed by some as having a chilling effect on crime reporting and on the First Amendment generally for Arab and Muslim Americans?
8. When will relevant federal agencies such as the Department of Homeland Security and the Department of Justice disclose more complete details regarding the mass detention of Arabs and Muslims that occurred post-9/11?
9. What are agencies doing and what more may they do to develop a more positive relationship with Arab and Muslim American communities? At our briefing, the Department of Justice's Civil Rights Division generally got favorable feedback based on a positive attitude and on actually obtaining results. What can the agencies that received a less positive response learn from DOJ and others?

The Commission believes that the issues and questions raised by this report will be helpful in identifying specific actions that can be taken to vastly improve federal engagement with Arab and Muslim-American communities post 9/11.

SUMMARY OF PROCEEDINGS

The Commission sought and invited speakers of varying perspectives, and the resulting briefing consisted of three panels of speakers.

The first panel consisted of individuals in the Arab and Muslim American communities who, by virtue of their personal experience and/or organizational resources, could speak to the attitudes and experiences of those community members affected by government policies.

The second panel was made up of scholars who have studied topics of community outreach, federal program planning, and techniques to measure and change biases with respect to the Arab and Muslim American communities.

The third panel had representatives of federal agency components engaged in outreach to the Arab and Muslim American communities.

The panelists fielded questions from the Commissioners, dealing with the following issues: 1) federal, state and local differences in engagement and interactions; 2) the Arab and Muslim communities' ratings of trust for government departments and their components; 3) solutions for improving the federal government's engagement with Arab and Muslim American communities; 4) organization of the government's outreach and investigative efforts; 5) counter-radicalization (i.e., official efforts to shape the ideation underpinning violence in order to prevent future terrorism) of foreign countries; 6) nuances of applying the First Amendment; 7) organization, partnerships, and unique features of federal agency divisions with responsibilities for civil rights or national security that affect the Arab and Muslim American communities; 8) lessons from the briefing for federal representatives to report to their respective divisions; and 9) data reporting and categorization of religious-based hate crimes.

The public was also invited to submit comments in response to the briefing. The Commission received eight submissions, four of which were published articles provided by or on behalf of panelists who spoke at the briefing. Three of the other four were offerings from advocacy groups: a letter signed by 23 Muslim student associations; a collection of attachments from the American Islamic Forum for Democracy, all of which are available on the Forum's Web site; and an e-mail from the South Asian Americans Leading Together (SAALT). A final submission came from the Coalition on National Security and Rights. (*See* the Appendix.)

Panel One Presentations

Zainab al-Suwaij, Co-founder, American Islamic Congress

Ms. Al-Suwaij co-founded the American Islamic Congress after the attacks on September 11 to promote tolerance and the exchange of ideas among people of differing backgrounds. She

discussed how the United States government can best engage with the American Muslim community. She recommended that all federal agencies recognize diversity in the American Muslim community and use this perspective to drive policy decisions.¹

Ms. Al-Suwaij asserted that although the United States government has been on the right track in working with the American Muslim community, many American Muslims still feel as though their civil rights continue to be violated through stereotyping and profiling and other forms of discrimination. Furthermore, some of the government's attempts to address this have actually created additional problems. For example, the U.S. Department of Justice (DOJ) developed special training programs to increase understanding of the Sikh population. Yet, in attempting to distinguish Sikhs from Muslims, these materials seemed to suggest that Sikhs were harmless and Muslims were not. Ms. Al-Suwaij further discussed how the federal government's recently developed sensitivity training presented a homogeneous image of Muslims, and did not recognize their diversity. In order to engage effectively with the Muslim community, government officials must acknowledge the diversity of the Muslim people, their interests, and their problems, she said. The federal government reaches out to Arabs, who are 18 percent of the Muslim community, but not the 25 percent of American Muslims, who are African American, the 15 percent who are South Asian, nor the American Muslims who are Persian, Bosnian, Turk, West African, and other ethnicities.

Ms. Al-Suwaij recommended that the United States government take several steps to develop more inclusive engagement with the American Muslim community. First, government agencies must recognize the diversity of the Muslim community, individual Muslims' backgrounds, and religious practices, and use this understanding to shape government policy. Second, outreach programs must engage members of the community from a variety of backgrounds and not rely solely on Mosques and Imams to connect to the community. Third, Ms. Al-Suwaij said, the government must consult a broad range of American Muslims, not only a few leaders who may not represent the full community, to develop sensitivity training materials. Finally, she stressed that the Commission must continue monitoring civil rights violations and discrimination against American Muslims, particularly to ensure that simplistic assumptions about the community do not result in unfair or illegal treatment.

Ms. Al-Suwaij stated that the American Islamic Congress is working on educating government officials to implement these changes by inviting them to events that showcase the diversity of Muslims. By working together, the Commission, other federal officials, the American Islamic

¹ Zainab al-Suwaij, Testimony, Briefing before the U.S. Commission on Civil Rights, on Federal Civil Rights Engagement with Arab and Muslim American Communities Post 9/11, Washington, DC, Nov. 9, 2012, transcript, pp. 11–17, (hereafter cited as *Briefing Transcript*), http://www.usccr.gov/calendar/trnscript/Transcript_Final_8-2-13.pdf.

Congress, and their many community partners can effectively overcome stereotypes and simplistic assumptions about American Muslims and ensure that government agencies reform their policies and training materials to promote better understanding of and engagement with this diverse group, Ms. Al-Suwaij said.

Dr. James Zogby, President, Arab American Institute

Dr. Zogby described a period in America preceding 9/11 in which the relationship between Muslim Americans and law enforcement was deteriorating, civil rights claims were frequently ignored, and a sense of distrust and fear was prevalent in the community.² Dr. Zogby said he presented the FBI with 100 affidavits from people in his community filing claims of harassment by law enforcement and 12 affidavits of death threats. No official action resulted from these claims, he said. During this period—in 1980—Dr. Zogby’s Washington D.C. office was fire bombed, but no arrests were made and no convictions occurred.

The Clinton Administration brought significant changes through DOJ’s Civil Rights Division (CRT) officials’ outreach meetings with the Muslim American community to address profiling in the airport and secret evidence issues, for example. Only through these meetings and a series of subsequent improvements, Dr. Zogby claimed, was the Muslim American community able to interact with law enforcement after the attacks of 9/11. Today, representatives of his community meet with an interagency group of federal officials at DOJ on a regular basis to solve further problems and demand resolutions, all with a fair amount of success thus far.

Yet, while DOJ/CRT made progress in some areas, other DOJ activities were detrimental to the Muslim American community’s efforts to reduce discriminatory perceptions and acts. For example, Dr. Zogby said, DOJ profiling guidelines issued in 2003 under then Attorney General John Ashcroft, and revised in 2008 by Attorney General Mukasey, failed to protect Arab and Muslim Americans. Furthermore, in Dr. Zogby’s opinion, the National Security Entry-Exit Registration System (NSEERS) resulted in deportation orders and hence created fear among the Muslim community and suspicion about it, instead of protecting the country against terrorism.

The election of Barack Obama to the presidency of the United States, Dr. Zogby said, did not produce the significant changes for which his community hoped. For example, Dr. Zogby stated that the Customs and Border Patrol treats the Muslim community outrageously at the Canadian border. According to Dr. Zogby, the New York Police Department’s surveillance program, which identifies every Muslim American-owned restaurant, store, and business in the Brooklyn area along with the owners and customers, broke the Arab/Muslim communities’ trust and created a sense that they are always watched.

² Zogby Testimony, *Briefing Transcript*, pp. 17–24.

The FBI's relationship with the community was undermined first through the release of the agency's training manuals containing information about Muslims that this community perceived as stereotypical and discriminatory, Dr. Zogby said.³ Initially, the FBI denied the existence of such materials, and then later claimed that it would remove 800 pages from the manuals. The FBI, however, has failed to reveal the content to the Muslim community.⁴ Dr. Zogby opined that the training about the Muslim community offered to FBI agents should not be a matter of national security requiring top-level clearance, but should be open to the public. The Department of Homeland Security has used the Muslim community as a resource in designing training programs, and Mr. Zogby recommended that the FBI do the same. Second, the ACLU's news that the FBI used community outreach programs in Washington as intelligence gathering operations also created distrust of the government, according to Dr. Zogby. He concluded that civil liberties protections for his community are weak. He believes that they should be strengthened not just to protect the civil rights of the Muslim community, but those of all Americans.

Kenneth Marcus, President, the Louis D. Brandeis Center for Human Rights Under Law

Mr. Marcus first explained that he was not a representative of an Arab or Muslim organization, but rather of a Jewish civil rights organization, the Louis D. Brandeis Center for Human Rights Under Law. He stated that his organization promotes justice not only for Jewish people but for everyone.⁵ Mr. Marcus had previously spoken to the Commission about religious discrimination and harassment against Muslim school children and other religious minorities at a briefing on bullying in 2011.⁶ According to Mr. Marcus, the resultant bullying report describes his previous testimony and the extent of discrimination against religious minorities in American schools.⁷ It also looks at the significant gap in American civil rights protections wherein laws do not prohibit religious discrimination in the federally-assisted educational programs and activities as they

³ Ibid. For further description of the FBI training materials controversy, see Erica Goode, "FBI Chided for Training that Was Critical of Islam," *The New York Times*, Sept. 16, 2011.

⁴ Zogby Testimony, *Briefing Transcript*, pp. 22–23. Since the Commission's briefing, the public interest law firm Judicial Watch obtained, through a Freedom of Information Act request, some of the removed training materials. Some have claimed that the FBI went too far in removing accurate or useful material from training manuals. See Mark Flatten, "Newly released docs show inconsistencies in FBI training manual censorship," *The Washington Examiner*, May 22, 2013. The obtained training materials are available to the public online at <http://www.judicialwatch.org/press-room/press-releases/documents-obtained-by-judicial-watch-reveal-fbi-training-curricula-purged-of-material-deemed-offensive-to-muslims/>. Ibid.

⁵ Marcus Testimony, *Briefing Transcript*, pp.24–31.

⁶ See UCCR, *Peer to Peer Violence and Bullying: Examining the Federal Response* (September 2011).

⁷ Ibid.

protect students from discrimination on the basis of race, color, national origin, sex, disability, and even membership in patriotic youth organizations. This prevents the Department of Education from protecting students from various forms of religious bigotry, affecting many Muslim and Sikh students, particularly in recent years.

Mr. Marcus stated that the absence of legislation protecting religious minorities creates many potential problems. First, federal agencies could potentially allocate funds in a discriminatory manner in education. Moreover, the law protects students and teachers who are discriminated against based on both racial and religious characteristics from only racial discrimination. Mr. Marcus advocated for a prohibition of religious discrimination in schools, because of an expectation that religious institutions may prefer to hire staff or admit students of their own faith. He reported, however, that despite widespread agreement on this prohibition and on an exception for religious institutions, the scope of the exception remains controversial. To overcome the controversy, Mr. Marcus recommended that Congress at least prohibit religious discrimination in public schools, similar to federal civil rights laws on harassment on the basis of race, gender, or disability.

Mr. Marcus also discussed discrimination against Muslim prisoners in American penal institutions. He said very recent empirical research presented in his written statement showed that Muslim litigants who file claims of religious discrimination are much less likely to prevail in court than non-Muslims, particularly if they are Muslim prisoners compared to non-Muslim prisoners. Appropriate reforms must address the balance between prison security and homeland security versus the wide prevalence of discrimination.

Mr. Marcus said that federal officials should speak out against anti-Arab stereotypes. Finally, he stated that Sikh Americans often face discrimination because others perceive them as Arabs or Muslims. He suggested that DOJ track anti-Sikh discrimination in the same manner as it does anti-Jewish and Muslim discrimination.⁸

Haris Tarin, Director, the Washington Office of the Muslim Public Affairs Council

Mr. Tarin explained that his organization—the “MPAC”—supports federal, state, and local government and law enforcement engagement with American Muslim communities to promote a healthy democratic process and build trust.⁹ The 9/11 attack did not differentiate among victims

⁸ In June 2013, months after the Commission’s briefing, FBI officials decided to begin formally tracking hate crimes against Sikhs, Hindus and Arabs. The changes will take effect in 2015. See Jaweed Kaleem, “FBI To Start Tracking Hate Crimes Against Sikhs, Hindus and Arabs,” *Huffington Post*, Jun. 5, 2013, updated Jun. 6, 2013, http://www.huffingtonpost.com/2013/06/05/hate-crimes-sikhs-hindus-arabs-fbi_n_3392760.html (last accessed Apr. 9, 2014).

⁹ Tarin Testimony, *Briefing Transcript*, pp. 31–37.

by religion, color, creed, or national origin. Mr. Tarin stressed the need to highlight American Muslims' contributions since the attack in protecting the nation, and in partnering with government and law enforcement to ensure a safer society, and in preserving civil liberties within their communities. Several studies have shown the critical role American Muslims have played in keeping the nation safe. A Triangle Center on Terrorism and Homeland Security study indicated that in one-third of the violent terror attacks thwarted since 9/11, American Muslim communities first tipped off law enforcement to the plot. Additionally, an MPAC study found that Muslims have been responsible in thwarting one out of three plots against the American homeland. Communities and citizens are the nation's best assets in addressing the challenges our country faces, and government agencies and the communities themselves should invest in these partnerships to provide for a safer nation.

According to Mr. Tarin, experts and law enforcement agencies have two approaches to American Muslim civil rights and the nation's security challenges with very different consequences on American Muslim civil rights and civil liberties. First, a "suspect trend" of engagement encourages aggressive intelligence and surveillance activities in communities, suggesting that many in the community are suspects. Mr. Tarin referred to New York and New Jersey law enforcement agencies' surveillance of Muslim students' harmless activities, such as visiting local restaurants and hookah bars. He also cited instances in which federal law enforcement agencies, including FBI, have used community engagement to collect information and then categorize it as intelligence. Misinformation and fear has dominated the discourse around American Muslims as a result of the "suspect trend," according to him. Mr. Tarin said that over the past decade, the U.S. government has spent \$40 million on spreading misinformation about American Muslims, with much of it directed towards law enforcement training. Public officials and members of Congress have made false statements and accusations without repercussions, he said. The climate of fear, according to Mr. Tarin, has had a chilling effect on American Muslim communities, especially on college campuses, in terms of exercising their rights to practice their faith and to hold political views.

The second approach is a partnership model in which local communities develop strong relationships with law enforcement agencies and local government agencies, characterized by trust and communication. Cities such as Houston, Los Angeles, Dallas, and Chicago have built partnerships with local advisory or multi-cultural boards, community members, local officials, and law enforcement agencies, in which participating members provide policy recommendations and actually work through difficult issues together despite disagreements. Mr. Tarin recommended that to promote this type of partnership, public officials must discourage misinformation regarding American Muslims. Mr. Tarin recommended more leadership from public officials and more funding for outreach programs, especially at the local level. At the federal level, mechanisms for change must be more vigorous. DHS, DOJ, and other agencies must increase outreach and engagement at the local level and ensure that Muslim American communities have access to the redress process.

Asim Rehman, President, the Muslim Bar Association of New York

The Muslim Bar Association of New York provides traditional legal services, works with New York mosques and community organizations on civil rights issues and, according to Mr. Rehman, is one of the nation's most active Bar Associations for Muslim lawyers. This work directly exposes the Association to members of the Muslim community whose civil rights have been violated, and provides the opportunity to work with government engagement efforts regarding civil rights. Mr. Rehman explained that one must first identify the problem to see how the government addresses it. After witnessing the attacks of September 11 first hand, Mr. Rehman sought solace in prayer only to find himself harassed by a man yelling, "Go home," when he left the mosque.¹⁰ Eleven years later, Mr. Rehman observes that anti-Muslim sentiment has spread across the nation—into schools, local communities, the media, and among government officials and political candidates. This anti-Muslim sentiment has led to a rise in civil rights violations, he concluded.

Muslims in America have faced numerous civil rights challenges since 9/11, varying from bullying, hate crimes, discrimination, border patrol officers' improper questioning, and law enforcement policies and practices that unfairly target and profile Muslim Americans. Federal and local law enforcement agencies, since 9/11, have subjected American Muslims to various improper interviews, targeting, and more. Now, while federal and local law enforcement agencies have defended such tactics as legal and based on legitimate leads, the civil rights impact of such profiling on American Muslims cannot be denied. Mr. Rehman listed a few of the civil rights violations and challenges that Muslim Americans face. First, the profiling by government officials often fuels public suspicion of American Muslims, which can give license to private actors to believe that they can take matters into their own hands. Second, the fear of government surveillance sends a chilling effect throughout congregations and campuses, hampering the rights of free speech and free association. Third, the security of cities and the nation depends on a strong trust between law enforcement and local communities, and programs that cast suspicion on an entire community of faith threaten to damage that trust.

Mr. Rehman stated that the federal government's engagement efforts need much improvement, although some divisions such as DOJ/CRT deserve credit. The CRT has worked to protect many mosques, illustrating the administration's commitment to the cherished American right to freely worship. In contrast, unfair and discriminatory federal law enforcement and immigration policies continue to negatively affect Muslim American communities, he said summarizing details in his written statement.¹¹ Despite efforts of advocacy groups, little has changed, according to Mr.

¹⁰ Rehman Testimony, *Briefing Transcript*, pp. 37–44.

¹¹ *Ibid*, 40 .

Rehman. Outreach meetings with law enforcement and government agencies are positive steps in building relationships between Muslim American communities and the government, but appear ineffective when negative law enforcement practices continue, Mr. Rehman said. Instances, even in other cities, in which the FBI has taken information from outreach meetings for use in investigative purposes has undermined local engagement efforts.

Despite persistent efforts, engagement and outreach can only go so far when problematic policies endure, he said. Civil rights engagement with various American Muslim communities that would include increasing outreach efforts without commingling investigative work would improve American Muslim engagement as a whole, in his view. Government agencies and law enforcement should focus on tracking and prosecuting hate crimes, while also strengthening their own internal rules to ensure that they do not engage in ethnic and racial profiling, and they should pressure local agencies to do the same, according to Mr. Rehman. He concluded that while, as a whole, the nation has come a long way since 9/11, the government's civil rights engagement with the American Muslim community must still improve.

Discussion

The discussion between the Commissioners and panelists focused on four themes: (1) hate crimes categorization and the definition of harassment; (2) federal, state and local engagement differences and interactions; (3) government department and agency trust ratings; and (4) solutions.

Hate Crimes Categorization and the Definition of Harassment

Dr. Zogby noted that as the FBI considers creating a new reporting category for hate crimes committed against Sikhs, he would add Hindu and Arab discrimination categories as well. This would separate the politically-based Arab hate crimes from the religious-based Muslim hate crimes, as they sometimes get conflated.¹²

Commissioner Gaziano asked how broadly harassment should be defined if Title VI were expanded to prohibit it based on religion.¹³ Mr. Marcus said that if Congress tries to legislatively define harassment, disagreement over the term would likely create a host of political problems. For example, the courts define harassment in money damages cases very differently from the manner in which the Office for Civil Rights defines harassment in its administrative cases. Mr. Marcus suggested that the courts and OCR be allowed to continue to define harassment in

¹² *Briefing Transcript*, pp. 52–53.

¹³ *Ibid.*, 62–63.

the religious context in the same way that they define harassment in the racial and gender contexts, which would ensure more consistency.¹⁴

Federal, State, and Local Engagement Differences and Interactions

Commissioner Kirsanow asked which federal, state, or local agencies have good or poor outreach.¹⁵ Mr. Tarin replied that New York, specifically NYPD engagement, has been troubling, but that Texas and California have been exemplary in their engagement progress.¹⁶

Commissioner Yaki brought to the panelists' attention the reports of CIA officers advising local law enforcement on domestic surveillance information.¹⁷ Mr. Zogby said that the only information that the public knows is from Associated Press accounts, which, according to him, have shown that the CIA's activities are well beyond the scope of what the agency ought to be doing.¹⁸

Mr. Tarin noted that Americans often feel more comfortable with local law enforcement agencies rather than federal agencies. He explained that local law enforcement agencies politicize their work much less and are accessible for engagement.¹⁹ Mr. Rehman concurred, saying that the local Customs and Border Patrol heads of office have come and listened to concerns and have even given out their phone numbers to members of the community. The problem, Mr. Rehman said, is that these productive developments occur at the local level and are temporary.²⁰ Additionally, a lack of transparency between federal and local law enforcement creates confusion that leads to a breakdown in trust, and the line between federal and local law enforcement is unclear.²¹ The country needs national solutions and changes in policy and in training, Mr. Rehman concluded.²²

Government Department and Agency Trust Ratings

Commissioner Yaki asked the panelists to rate the government departments and agencies relevant to this briefing, on a scale of zero to ten, in terms of whether and how the panelists'

¹⁴ Ibid., 64–65.

¹⁵ Ibid., 44–45, 48.

¹⁶ Ibid., 48–49.

¹⁷ Ibid., 66.

¹⁸ Ibid., 66–67.

¹⁹ Ibid., 55–56.

²⁰ Ibid., 45–46.

²¹ Ibid., 67–68.

²² Ibid., 45–46.

represented communities trust the agencies – ten being full trust, and zero being no trust at all. The panelists agreed to parse each department’s enforcement side and rights-based side.²³

For DHS, Mr. Rehman and Mr. Tarin rated the Customs and Border Patrol with a three or four and a two or three, respectively; they then rated DHS’ Office for Civil Rights and Civil Liberties (CRCL) with a six or seven and a seven, and Ms. Al-Suwaij gave the office an eight.²⁴

For DOJ, Mr. Rehman and Mr. Tarin rated the FBI with a three and a two or three, citing troubling policies; however, they rated DOJ/CRT with a seven or eight and an eight, due to the Division’s engagement and litigation.²⁵ Mr. Zogby stated that he would have given the FBI a rating of zero due to its training programs had the Bureau not handled the investigation on his death threats so well. However, he said that he would still give the FBI a low grade and CRT a very high grade.²⁶ Ms. Al-Suwaij gave the Transportation Security Administration a rating of one.²⁷

Later, following panel II, Commissioner Yaki asked Dr. Sahar Aziz, who spoke on that panel, to rate federal government efforts.²⁸ In response, Professor Aziz said she held DOJ/CRT and the Equal Employment Opportunity Commission in the highest regard because they investigate and litigate civil rights grievances. However, she said, these agencies need more lawyers because of the increasing volume of complaints. She rated DHS’s CRCL above a five for effort but observed that effective changes in policies were still lacking, particularly with regard to the Travel Redress Inquiry Program,²⁹ in which redress is long in coming.³⁰

²³ Ibid., 65–68.

²⁴ Ibid., 68–70.

²⁵ Ibid., 68–69.

²⁶ Ibid., 49–53.

²⁷ Ibid., 70.

²⁸ Ibid., 132.

²⁹ The Travel Redress Inquiry Program serves as a

point of contact for individuals who have inquiries or seek resolution regarding difficulties they experienced during their travel screening at transportation hubs—like airports and train stations—or crossing U.S. borders, including:

- watch list issues,
- screening problems at ports of entry, [and]
- situations where travelers believe they have been unfairly or incorrectly delayed, denied boarding or identified for additional screening at our nation’s transportation hubs.

Solutions

Commissioner Kladney asked the panelists about possible ways to increase the trust between law enforcement and Arab and Muslim communities.³¹ Mr. Tarin called for increased oversight from Congress and from within law enforcement agencies as well as for more accountability. He also stressed the importance of engagement and the need for discussions regarding policies, redress processes, and issues affecting local communities. A relationship based only on security does not promote the positive civic identity of a community, he said.³²

Mr. Zogby suggested a firewall so that when people report hate crimes, the law enforcement unit to which they report cannot conduct investigations of the person providing the information. This might ease the reporting process, because many people fail to report hate crimes out of fear of bad consequences or out of guilt at perhaps having evoked the crime, according to Mr. Zogby.³³ Indeed, the Justice Department's Bureau of Statistics found that hate crime statistics are probably low because only 44 percent of crimes are reported to the police, Mr. Rehman reported. From 2001 to 2009, 1,552 incidents of anti-Islamic hate crimes resulted in 1,785 offenses, he cited from FBI statistics.³⁴ Mr. Marcus clarified that the number of hate crimes against Muslims is unacceptably high, even if other groups have even higher numbers of hate crimes against them.³⁵

Panel Two Presentations

Dr. Jytte Klausen, Lawrence A. Wien Professor of International Cooperation, Brandeis University

Dr. Klausen said that she is concerned with the way that the federal government has dealt with threats made in the name of Islam and how the government's response quite too often reinforces Islamic stereotypes and overly restricts expression related to Islam.³⁶

See U.S. Department of Homeland Security, "DHS Traveler Redress Inquiry Program (DHS TRIP)," no date, <http://www.dhs.gov/dhs-trip> (last accessed Apr. 7, 2014).

³⁰ *Briefing Transcript*, pp. 132–34.

³¹ *Ibid.*, 59–60.

³² *Ibid.*, 47, 60–61.

³³ *Ibid.*, 57–58, 61–62.

³⁴ *Ibid.*, 53.

³⁵ *Ibid.*, 54–55.

³⁶ Klausen Testimony, *Briefing Transcript*, pp. 72–78

In 2009, for example, Yale University removed several illustrations from a book she had written about the global controversy sparked by the publication in a Danish newspaper of twelve cartoons that featured satirical images of Muhammad. Yale University Press had originally agreed to publish these illustrations but removed them on the grounds that the images might offend Muslims and lead to violence, although neither Dr. Klausen nor the university received any threats. Because the university's charter states that "shock, hurt, and anger are not sufficient grounds for compromising the free access to information," the university was compelled to defend the decision and assembled an advisory panel of diplomats, academics, as well as British and American counter-terrorism officials to develop a memorandum explaining how the illustrations would be dangerous to national security.³⁷

Additionally, in 2010, Zachary Chesser posted a threat against the creators of "South Park" for depicting Muhammad wearing a bear suit on the cartoon show, hoping that his threat would mobilize Muslims in the United States in the same way that the 1989 fatwā that Ayatollah Khomeini issued against Salman Rushdie had galvanized British Muslims. Chesser was arrested for his threat although there was no evidence that any U.S.-based Muslims responded to Chesser's incitement to violence. Also, cartoonist Molly Norris, who proposed the creation of a Facebook event called Draw Mohammed Day, later went underground on FBI's recommendation.³⁸

This preemptive removal of images that might offend Muslims, Dr. Klausen said, deprives Muslim and non-Muslim students and readers of the opportunity to become acquainted with historical perspectives of Muhammad. This reaffirms prejudice about Muslims' closed-mindedness and indirectly takes sides in a disagreement among Muslims about the role of scripture in secular life.³⁹

Dr. Klausen said that the government, academics, and others must recognize the ability of the internet to provide extremists with networks to amplify their threats. She recommended that evading a knowable or even perceived threat is simply insufficient grounds for censorship, citing the Washington D.C. Transit Authority's attempt to prohibit a "Defeat Jihad" ad.⁴⁰ She also suggested that when real and credible threats do exist, federal agencies should be obligated to provide specific information about the nature of the risk, including a plan for how to restore free

³⁷ Ibid., 73-74.

³⁸ Ibid., 75-76.

³⁹ Ibid., 75.

⁴⁰ See Zoe Tillman, "Judge Orders D.C. Metro to Post 'Defeat Jihad' Ads," *The BLT (Blog of the Legal Times)*, Oct. 5, 2012, <http://legaltimes.typepad.com/blt/2012/10/judge-orders-metro-to-post-defeat-jihad-ads.html> (last accessed Apr. 7, 2014).

expression. Her last recommendation was to require the FBI to produce a transparency report listing any instances of preventative censorship and those when federal officials have recommended that Americans refrain from engaging in certain artistic expressions. Through such reports and her other recommendations, she hoped for a more realistic sense of actual threats, freer expression, and better protection of American Muslims.⁴¹

Sahar Aziz, Associate Professor of law, Texas Wesleyan University School of Law

Professor Aziz's research and scholarship focuses on the intersection of national security and civil rights as it relates to Arabs, Muslims, and South Asians in the post 9/11 era. She has spent seven years working with nonprofit organizations on behalf of individuals directly affected by post-9/11 national security laws, practices, and policies, and also, as a government employee, coordinating federal engagement programs across the country.⁴²

Professor Aziz presented five key points that in her view are necessary for a successful federal civil rights engagement program. First, for federal engagement to be effective, community representatives at engagement meetings must encompass the rich diversity of the Arab and Muslim American communities. Often, federal organizers invite the same few individuals, typically male, Arab or South Asian, and over the age of 35, to government engagement meetings, thereby limiting the discussion to the experiences and viewpoints of these select few who are purportedly representing tremendously diverse communities. Professor Aziz recommended inviting females, who should constitute 50 percent of the community attendees, youth, and African American Muslims. Organizers should not limit the invited community leaders to only regular mosque goers and should include newer immigrants as well as those who have been in the United States for multiple generations. Additionally, the meetings should include individuals with contrarian and dissenting viewpoints. Attendees should be required to disclose conflicts of interest that may compromise their ability to represent community interests independent of their own personal interest. The government should not entangle itself in determining who is or is not a leader within the Muslim communities, as that should be an internal organic community process, according to Professor Aziz.⁴³

Second, Professor Aziz said the federal government should not use community engagement meetings in furtherance of investigative and prosecutorial objectives, but rather to develop trust and constructive relations with their constituents towards the common goal of protecting individual rights and public safety for all Americans. Recent news reports prompt serious

⁴¹ Ibid., 76-77.

⁴² Aziz Testimony, *Briefing Transcript*, p. 78.

⁴³ Ibid., 80.

concerns that some government engagement meetings are pretexts for gathering intelligence, conducting investigations, and eventually pursuing prosecution of meeting attendees or their families and associates, as opposed to good faith efforts to build relationships between government and constituents.

Third, professionally trained law enforcement agents are necessary for a safe, fair, and just society. Professor Aziz said that many unqualified and biased trainers teach officers, first responders, and counter-terrorism expert analysts about Muslims and Islam in the United States and abroad, characterizing Muslims and Islam as a necessarily violent and inherently terrorism-prone identity. This is a threat to public safety for all Americans because misinformed officers risk making ill-informed, ineffective choices, which may lead to costly civil rights litigation arising from biased policing, she said.

Fourth, government engagement efforts with Arabs and Muslims must holistically focus on the social, economic, and political factors—such as economic security, high-quality education, affordable health care, and freedom from discrimination—that affect the vitality of Arab and Muslim communities across the nation. Most federal engagement programs focus primarily on national security issues, which signals to the public that Muslims warrant extra scrutiny and leads to increased suspicion and discrimination by private actors.

Professor Aziz's final point was that government civil rights engagement programs, as well as their budgetary information, must be subject to independent citizen and congressional oversight to ensure that stated objectives are in fact met. For better oversight of engagement programs, Professor Aziz urged having a coherent implementation plan across the government designed to minimize redundancy, adhere to Presidential directives, provide metrics to objectively evaluate engagement efforts, and reveal how and where federal agencies spend money on engagement. The FBI and Immigration and Customs Enforcement's exploitation of engagement to collect intelligence, she said, undermines the notable progress on civil rights made by the U.S. Department of Justice's Civil Rights Division and the Equal Employment Opportunity Commission.

Eugene Volokh, Professor, University of California, Los Angeles, School of Law

Professor Volokh said that although he agrees with, and has publicly supported, the need to safeguard the religious freedom and other rights of American Muslims (along with the rights of all Americans), he believes that attempts to make adherents of minority religions feel welcome should not suppress the free speech rights of others who seek to criticize those religions. Despite the fact that the First Amendment protects the evaluation and criticism of Islam, he said, various

actors have attempted to suppress such criticism in quite a few incidents, especially over the last 10 years.⁴⁴

Professor Volokh cited several cases in which universities and student government associations have restricted anti-Muslim speech. For example, San Francisco State University's College Republicans held an anti-terrorism rally at which students stepped on homemade replicas of Hamas and Hezbollah flags containing the word "Allah" in Arabic. Offended students filed charges of a hostile educational environment. This prompted a university investigation about "the desecration of Allah." A federal lawsuit and injunction eventually struck down as unconstitutional the speech code against which these complaints were filed.⁴⁵

Professor Volokh cited numerous other incidents which evoked efforts to suppress expression on campuses—professors posting the Muhammad cartoons on their bulletin boards; a professor's statements criticizing Muslims on his Facebook page, which led to allegations of harassment and discrimination and calls for his firing; a University of California, Santa Barbara, student government effort to have the noted conservative and critic of Islam, David Horowitz, speak at a public forum; and student newspapers at UC Berkeley and San Diego State University printing a cartoon perceived as anti-Muslim, the latter of which led to Muslim students' seizure and destruction of thousands of copies of the offending newspaper, for example. Many such incidents brought restrictions on the display of Muhammad cartoons (and punishment for any disregard of such rules) which, according to Volokh, either violated the First Amendment or academic freedom principles, and carried rationalizations of attempting to prevent hostile educational environments.⁴⁶

Professor Volokh also cited cases of attempts to restrict anti-Muslim off-the-job speech by government employees, speech in public places, and speech in ads on government property. New Jersey public transit, for example, fired an employee for his off-the-job burning of a Koran; New Jersey officials reinstated the employee with back pay and a \$25,000 settlement after an ACLU lawsuit.⁴⁷

Additionally, when New York City and District of Columbia transit agencies refused to run an ad saying, "In any war between the civilized man and the savage, support the civilized man. Support Israel. Defeat Jihad," the transit agencies interpreted this ad as labeling all Muslims as "savages." Professor Volokh disagreed: he said that because Israel is not in a "war" with all Muslims but

⁴⁴ Volokh Testimony, *Briefing Transcript*, pp. 86–93.

⁴⁵ *Ibid.*, 87–88.

⁴⁶ *Ibid.*, 88–89.

⁴⁷ *Ibid.*, 89.

only with terrorists who engage in “jihad,” the ad refers to Israel’s attackers as “savage,” much like the Libyan consulate attackers who Secretary of State Clinton described as a “small and savage group.” However, even if most viewers interpreted the ad as condemning all Muslims, the exclusion of the ad was a First Amendment violation, according to Professor Volokh.⁴⁸

In the wake of the “Innocence of Muslims” anti-Islam video, several legal commentators have proposed criminalizing speech that is hostile to Islam and poses a risk of violent retaliation. Whether respect for peaceful Muslims or fear of violent extremist Muslims motivated these attempts does not matter, according to Professor Volokh, for suppressing such speech is unconstitutional for either purpose. The government must protect all speakers and religious observers whether they are Muslim or non-Muslim, or pro-Islam or anti-Islam, he concluded.⁴⁹

Sam Rascoff, Faculty Director, Center on Law and Security, New York University School of Law

Professor Rascoff said the core concept behind counter-radicalization is that the prevention of future terrorist violence requires official involvement in shaping the ideational currents that are thought to underpin that violence. According to Professor Rascoff, the government’s involvement in the management of Islam in the name of securing potential national security benefits is fraudulent because it poses a strategic risk and is unproductive. These programs risk the establishment of a government sanctioned version of Islam that is palatable to American officials but that might actually be significantly out of line with the ideas, theology, and practices of American Muslims.⁵⁰

According to Professor Rascoff, the government currently engages in three types of counter-radicalization programs. First, he explained engagement—outreach to Muslim communities and organizations in order to make “Official Islam” a social reality. The FBI, Department of Homeland Security, DOJ, and other federal agencies participate in engagement and notably must choose interlocutors based on the government’s ideology. Second, he mentioned bureaucratic entrenchment—government-created official posts intended to implement programs to counter violent extremism. Examples include the State Department’s Special Representative to Muslim Communities as well as DHS’s Office for Civil Rights and Civil Liberties. Third, Professor Rascoff noted the expressive dimension to counter-radicalization—officials’ claims on the meaning of contested concepts within Islam. This raises an issue because national security officials may not possess the requisite expertise to know how to draw distinctions within a

⁴⁸ Statement of Eugene Volokh submitted to U.S. Commission on Civil Rights, p. 184.

⁴⁹ Ibid.

⁵⁰ Rascoff Testimony *Briefing Transcript*, pp. 93–99.

concept of Islam, or Muslims may regard officials as having a mixed motive in espousing a particular concept of Islam.

Counter-radicalization programs risk conflict with core American commitments to religious freedom embodied in the First Amendment, since the government's endorsement of a preferred conception of Islam raises potentially serious concerns rooted in the Establishment Clause, which requires the government to remove itself from defining what religion is or what criteria make up a particular faith, Professor Rascoff concluded.

Dr. Peter Skerry, Professor of political science, Boston College

Dr. Skerry began by emphasizing that safe-guarding civil rights is critical to Muslim Americans and to all Americans. Although Americans must be realistic about the persistence and virtual inevitability of prejudice in a free society, he noted, the government has made progress and avoided some of the injustices of the past, citing the internment of Japanese Americans during World War II as an example. The highest public authorities, including President George W. Bush, have refused to condone prejudice and vigilantism in many ways that Presidents Woodrow Wilson and Franklin Roosevelt never did.⁵¹

Not all of the misunderstanding and prejudice in America about Muslims today emanates from non-Muslims, Dr. Skerry said. Muslims themselves are a source of misunderstanding and prejudice toward American culture, institutions, and society, according to Dr. Skerry. Recent history saw Muslim leaders urging their people to isolate themselves from the mainstream of American society, with results that are still felt in American society. Many Muslim newcomers came to the U.S. planning to eventually return home, and were alienated from American culture and society because they feared that their very presence in America threatened their salvation. Muzammil Siddiqi, a prominent Muslim leader, claimed in a 1986 article that Muslims “are in real danger of assimilation to a non-Islamic culture.” According to Dr. Skerry, Siddiqi urged Muslims in America to build mosques and Islamic schools and to practice traditional marriage customs, and presented da’wah – the Muslim missionary work of converting non-Muslims to Islam – as the only possible justification for permanent residence in America.⁵²

However, according to Dr. Skerry, since 9/11, many Muslim American leaders have urged their followers to join the American mainstream. The government must assess these efforts with clear-sighted realism, particularly given the diversity of the Muslim American community, with religious, ethnic, national-origin, linguistic, and political differences fragmenting it. In joining

⁵¹ Skerry Testimony, *Briefing Transcript*, pp. 99–106.

⁵² *Ibid.*, 103.

the “mainstream,” civil rights efforts have emerged as Muslim leaders’ most salient and powerful tool for mobilizing and unifying their coreligionists.⁵³

Finally, Dr. Skerry acknowledged that the onus for Muslim Americans not joining “mainstream” American society falls not just on Muslim American leaders but also on Americans who, more than a decade after 9/11, still fear their Muslim neighbors and fellow citizens, and on zealous investigative reporters who rehash the Islamist origins of many Muslim leaders and organizations.

Discussion

The discussion between the Commissioners and panelists focused on three themes: 1) the organization of the government’s outreach and investigative efforts; 2) the counter-radicalization of foreign countries; and 3) the application of the First Amendment.

The Organization of the Government’s Outreach and Investigative Efforts

Commissioner Kladney asked Professor Aziz and Professor Rascoff to comment on the idea of separating the government’s outreach and investigative efforts.⁵⁴ Professor Rascoff claimed that the FBI would garner much more trust and support from the Muslim community if it made a clear boundary between its outreach and investigative missions.⁵⁵ Professor Aziz identified a paradox within the government engagement model, which is based on the community policing concept of having community members work with the police to protect themselves from crime in their neighborhoods. In contrast, she said, Muslim leaders often attend engagement events to tell the government to stop targeting them and spying on them. They essentially engage with the government to protect themselves from the government. Professor Aziz said that government officials must avoid making any biased statements in this context lest they become magnified within the Arab/Muslim American community. Professor Aziz was hesitant to condone completely separating outreach and investigative efforts because of the benefits of information sharing but concluded that engagement efforts should not be used for surveillance, investigations, intelligence, or prosecutorial purposes.⁵⁶ She also stressed the need to remove the tension between the prosecutorial objectives and the civil rights objectives in government agencies. Chairman Castro noted that the Immigration and Naturalization Service split its

⁵³ Ibid., 105.

⁵⁴ *Briefing Transcript*, pp. 120–22.

⁵⁵ Ibid., 121.

⁵⁶ Ibid., 122–25, 135.

enforcement and naturalization efforts into U.S. Immigration and Customs Enforcement (ICE) and U.S. Citizenship and Immigration Services (USCIS), respectively, which may work as a model of a possible bifurcation.⁵⁷

Commissioner Kladney then asked whether fusion centers⁵⁸ were effective. Professor Rascoff said that fusion centers, intended to distribute state and local governments' massive collection of useful information to the proper federal officials and agencies, have not yet proven their worth and have not contributed much to national security, as the idea of the centers has never been fully developed in a productive way.⁵⁹ Professor Aziz added that the problem with fusion centers is their lack of transparency. They gather intelligence about people's religious activities, their First Amendment protected speech, and about Muslims who are stereotypically identified as terrorists, she said.⁶⁰

The Counter-Radicalization of Foreign Countries

Commissioner Gaziano raised the issue of counter-radicalization in Muslim countries that receive foreign aid from the U.S. while teaching their children hateful things about Jews and Christians.⁶¹ Professor Rascoff replied that this issue is complicated with the extraterritorial application of the Constitution. The degree to which the Establishment Clause binds the U.S. government in its activities overseas is a common topic of debate, and Professor Rascoff opined

⁵⁷ Ibid., 128.

⁵⁸ The Department of Homeland Security website defines "fusion centers" as

primary focal points within the state and local environment for the receipt, analysis, gathering, and sharing of threat-related information among federal, state, local, tribal, and territorial ... partners. Located in states and major urban areas throughout the country, fusion centers are uniquely situated to empower front-line law enforcement, public safety, fire service..., emergency response, public health, critical infrastructure protection... and private sector security personnel to lawfully gather and share threat-related information. They provide interdisciplinary expertise and situational awareness to inform decision-making at all levels of government. Fusion centers conduct analysis and facilitate information sharing, assisting law enforcement and homeland security partners in preventing, protecting against, and responding to crime and terrorism. Fusion centers are owned and operated by state and local entities with support from federal partners....

See U.S. Department of Homeland Security, "National Network of Fusion Centers Fact Sheet," no date, <http://www.dhs.gov/national-network-fusion-centers-fact-sheet> (last accessed Apr. 7, 2014).

⁵⁹ *Briefing Transcript*, pp. 125–26.

⁶⁰ Ibid., 125–27.

⁶¹ Ibid., 128–30.

that the Establishment Clause must tie together foreign policy and military activities in a very different way and degree than it binds the U.S. government in its relation to its citizens.⁶²

The Application of the First Amendment

Chairman Castro proposed a hypothetical situation to Professor Volokh in which the flags on which the students trampled had said “God” in English rather than “Allah” in Arabic and whether this act would also render First Amendment protection.⁶³ Professor Volokh responded that this act would also be a constitutionally-protected expression, as the courts have decided that blasphemy is not punishable.⁶⁴ Chairman Castro also asked whether the First Amendment protects speech opposing the “war on Christmas.”⁶⁵ Professor Volokh replied that with regard to retailers who tell their employees to say “Happy Holidays” instead of “Merry Christmas,” this is private speech aimed at influencing private institutions’ behavior and that it is constitutionally protected, but not a First Amendment violation, such as might arise if a law mandated that employees say “Merry Christmas.” Attempts to bar certain Christmas-related displays from government property are also not a First Amendment issue, but are an Establishment Clause one, which the Supreme Court settled in concluding that sufficiently secularized displays such as Christmas trees do not invoke the Establishment Clause, but crèches do.⁶⁶

Chairman Castro then asked where the courts draw the line between constitutionally protected and unprotected speech, since either type may lead to discrimination, exclusion, or profiling.⁶⁷ Professor Volokh replied that the law may or may not protect discrimination, but the First Amendment protects criticism. Dr. Skerry noted that the Supreme Court has addressed the question of whether criticism that leads to crime should be restricted, allowing such only in extraordinarily narrow circumstances such as intentional incitement of imminent illegal conduct.⁶⁸

Commissioner Kirsanow asked Professor Volokh whether tension between the First Amendment and a state actor’s attempt to proscribe certain speech is generally greater in academia or in the

⁶² Ibid., 130–32.

⁶³ Ibid., 111.

⁶⁴ Ibid., 111–12.

⁶⁵ Ibid., 112.

⁶⁶ Ibid., 112–14.

⁶⁷ Ibid., 114.

⁶⁸ Ibid., 114–16.

public domain.⁶⁹ Professor Volokh replied that instances in which speech critical of Islam has led to legal trouble are uncommon in either case and that such speech ought never to lead to legal concerns.⁷⁰ Earlier, in response to a request for elaboration from Commissioner Achtenberg, Professor Aziz said that in university settings, Arab and Muslim Americans are concerned that Arabists are taking over Middle Eastern studies departments and making them anti-Semitic, an issue that contrasts to Professor Volokh's concern about censorship of those who express anti-Muslim rhetoric. She said that everyone should have freedom (i.e., equal opportunity in speaking time or publication space for people with different views) to say what they need to express; one can counter speech that is offensive with speech. Reasonable minds can then agree as to what is right and, thereby marginalize the bigots and extremists. With regard to governmental settings, she urged that federal Muslim American engagement efforts use an objective, neutral, and transparent process in selecting representative speakers, and that the procedures include oversight to ensure that expenditures are appropriately allocated among those with differing perspectives.⁷¹

Panel Three Presentations

Eric Treene, Special Counsel for Religious Discrimination, Civil Rights Division, U.S. Department of Justice

Mr. Treene said that prior to 9/11, Department of Justice cases involving Arab Americans and Muslims were relatively few and far between. After 9/11, he stated the department saw a dramatic rise in hate crimes and discrimination against Muslims, Arabs, and people perceived as being members of these groups such as Sikhs and South Asians, and opened 300 investigations of hate crimes against these groups in the three months after the attacks. The number of discrimination cases filed with the Equal Employment Opportunity Commission concerning Muslims doubled between 2000 and 2002. The Civil Rights Division moved quickly to respond to similar incidents by regularly meeting with many Arab, Muslim, Sikh, and South Asian leaders and prosecuting a number of hate crimes that led to convictions.⁷²

Mr. Treene indicated that the spike in hate crimes receded after several months, but the amount of hate crimes and employment discrimination incidents still remained higher than what the

⁶⁹ Ibid., 116–17.

⁷⁰ Ibid., 117.

⁷¹ Ibid., 107–10.

⁷² Treene Testimony, *Briefing Transcript*, pp. 136–43.

Department saw prior to 9/11.⁷³ The DOJ formed the Muslim-Arab Engagement Advisory Group. In addition, departmental officials participated in interfaith group assemblies to discuss the perceived increases in anti-Muslim animus, and in interagency meetings to help resolve incidents involving multiple federal agencies, according to Mr. Treene. The DOJ also leverages the U.S. Attorneys' offices and the Community Relations Service's regional offices for outreach and engagement in communities and for training law enforcement on cultural competence. As part of this effort, in 2010, DOJ brought together about a third of U.S. Attorneys to talk about Muslim and Arab community engagement. Also, DOJ/CRT has established many civil rights units in U.S. Attorneys' offices and developed civil rights expertise among attorneys in those without such units.⁷⁴

More than ten years have passed since 9/11, yet DOJ continues to face challenges. Mr. Treene asserted that from 2009 to 2010, hate crimes against Muslims jumped 50 percent.⁷⁵ In religious land use cases growing out of RLUIPA (the Religious Land Use and Institutionalized Persons Act), the Department has seen a sharp rise in cases involving mosques. The CRT has opened 21 such cases in the last two years, with a total of 31 cases involving mosques opened in the last 11 years.⁷⁶ Education—including the distribution of information regarding civil rights in 17 languages among potential victims of discrimination—and engagement with communities remain a critical part of DOJ's enforcement efforts.⁷⁷

David Gersten, Senior Executive, Office for Civil Rights and Civil Liberties, U.S. Department of Homeland Security

Mr. Gersten has led scores of his Office's regularly-established roundtable meetings with American Arab, Muslim, Sikh, and South Asian community leaders, and averred that these meetings have both advanced the respect for rights and liberties of these communities and beneficially countered violent extremism. As the federal office that conducts the most extensive outreach efforts involving Arab, Muslim, Sikh, and South Asian communities across the nation, the Office for Civil Rights and Civil Liberties' (CRCL's) community engagement section leads a wide variety of outreach endeavors with quarterly roundtables in 13 cities, as well as town hall

⁷³ In his remarks, Mr. Treene did not discuss whether the complaints DOJ received rose sharply because of the increased frequency of anti-Muslim incidents after 9/11, or because victims more likely reported them after media and advocacy groups were better able to garner attention and raise public awareness about bias against Muslims.

⁷⁴ Treene Testimony, *Briefing Transcript*, p. 141.

⁷⁵ *Ibid.*

⁷⁶ *Ibid.*, 142.

⁷⁷ *Ibid.*, 143.

meetings and other events throughout the country.⁷⁸ According to Mr. Gersten, CRCL's engagement program aims to communicate and share reliable information about federal programs and policies, obtain feedback about community concerns, incorporate community ideas into policy making, and deepen the channels of communication between communities, regional Department of Homeland Security (DHS) leadership, and other government officials, not just from DHS but also from other federal agencies.⁷⁹

The CRCL has two branches: one that investigates complaints and issues recommendations to departmental leadership, and one that promotes rights and liberties and advises department, state, and local leadership in policy creation and implementation. Citing Margo Schlanger, the former CRCL officer, Mr. Gersten said that although CRCL's activities do contribute to DOJ's mission of countering violent extremism (CVE), this mission is neither the principal reason for community engagement nor the lens through which the department views this engagement. CRCL has aided DOJ's CVE efforts by offering cultural competency training for officials operating in fusion centers and for law enforcement working to counter violent extremism.

Mr. Gersten pointed out that CRCL has also aided the White House's CVE efforts. In August 2011, the White House released the National Strategy on Empowering Local Partners to Prevent Violent Extremism in the United States, also known as the National CVE Strategy. It is the first U.S. strategy that focuses on using community-based approaches to address ideologically inspired radicalization to violence in the homeland. A strategic implementation plan (SIP) outlines how government will support and help empower American communities and their local partners in their grassroots efforts to prevent violent extremism. The CRCL co-chairs the National Task Force on CVE Engagement, which is charged to fulfill one key SIP objective—to enhance federal engagement by providing support to the local communities that violent extremists target. According to Mr. Gersten, such an approach to CVE does not separate it from civil rights but, in fact, makes civil rights a useful part of CVE and CVE a useful part of promoting civil rights.

Discussion

The discussion between the Commissioners and panelists focused on three themes: (1) the organization, partnerships, and unique features of the panelists' divisions; (2) lessons for the panelists to report to their respective divisions and clarifications of issues discussed in panel two; and (3) data collections on religious-based hate crimes.

⁷⁸ Gersten Testimony, *Briefing Transcript*, pp. 143–50.

⁷⁹ *Ibid.*, 144.

The Organization, Partnerships, and Unique Features of the Panelists' Divisions

Commissioner Achtenberg raised Professor Aziz's point that clear divisions of a department's various functions are important in fostering more faith and confidence in engagement efforts,⁸⁰ and Commissioner Kladney asked about the manner in which the divisions maintain a network or receive feedback from Arab and Muslim American communities.⁸¹

Mr. Treene replied that DOJ/CRT contains sections specializing in employment, hate crimes, and so forth, all of which were in place when 9/11 occurred and provided an enforcement mechanism to handle the aftermath. Among these sections, the Community Relations Service's (CRS's) mission is to listen to and mediate conflict, but by design it is without enforcement power. CRS focuses on reaching sheriff's offices and local law enforcement with programs to train trainers on Arab, Muslim, and Sikh cultural awareness. Mr. Treene stated that since 9/11, however, Assistant Attorney General Perez has moved in a new direction. He has sought to change the culture of U.S. Attorneys' offices by creating civil rights units within all these offices so that the government sues as plaintiff regarding civil rights matters, in contrast to the more traditional approach of defending the government in myriad other matters.⁸² In addition, the U.S. Attorneys' offices contribute to engagement efforts and report back to CRT's Arab-Muslim Engagement Advisory Group. Also, the Attorney General's Advisory Council, whose members are U.S. Attorneys, holds regular meetings and forms subcommittees, such as a Civil Rights Group that engages with the community.⁸³ In response to Commissioner Yaki's question about CRT's role in preventing the FBI from using offensive training materials,⁸⁴ Mr. Treene said that although the FBI is a part of DOJ, all of DOJ is responsible for anything produced under the agency's name. He added that FBI representatives participate in CRT's Arab-Muslim Engagement Working Group, contribute to setting forth the required basic principles for all DOJ-funded or conducted trainings, and have worked to fix the recent problems found in their training materials.⁸⁵

Mr. Gersten added that the U.S. Attorneys partner with DHS's CRCL in many of the cities in which CRCL holds roundtables.⁸⁶ DHS also partners with the FBI and CIA on numerous programs, including the creation of training programs for law enforcement, for example, on

⁸⁰ *Briefing Transcript*, pp. 160–61.

⁸¹ *Ibid.*, 156.

⁸² *Ibid.*, 161–63.

⁸³ *Ibid.*, 156–57.

⁸⁴ *Ibid.*, 172–73.

⁸⁵ *Ibid.*, 173–74.

⁸⁶ *Ibid.*, 157–58.

cultural competency. Additionally, although DHS is not responsible for fusion centers, the Department does supply them with grant funding and intelligence analysts. At the same time, Mr. Gersten said, DHS has only limited authority to change disputed training if states and localities are not receiving federal funding.⁸⁷

Mr. Gersten highlighted the unique features of CRCL, in that it explores whether or not its own agency respects rights, given DHS's extensive daily contact with the public. Additionally, although it is now one of several privacy and civil liberties offices throughout the government since the 9/11 Act, CRCL remains the only one that couples civil rights and civil liberties.⁸⁸

Lessons for the Panelists to Report to Their Respective Departments and Clarifications of Issues Discussed in Panel Two

Commissioner Kladney asked the panelists what information from earlier panels they would take back to their respective departments and what conclusions from earlier testimony they thought were correct or incorrect.⁸⁹ Mr. Gersten said that CRCL must do better at promoting the success of its engagement programs, and finding solutions for its Traveler Redress Inquiry Program, in which a database may misidentify or mismatch travelers with negative information. Addressing the issue regarding engagement bias against female participants and youth, Mr. Gersten clarified that CRCL's most recent roundtables are diverse with significant participation of women and youth.⁹⁰

Mr. Treene replied that Dr. Aziz's point that engagement should not focus on a limited group of people is an issue that DOJ and CRT are currently working to overcome by using U.S. Attorneys to develop relationships in their districts. Addressing the issue regarding biased and offensive training manuals, Mr. Treene said that the Attorney General's Arab-Muslim Advisory Group has a training workgroup in CRT to review DOJ's internal materials to ensure that they are not gratuitously offensive.⁹¹

Data Collection on Religious-Based Hate Crimes

Chairman Castro quoted a decade-old Illinois State Advisory Committee report to the Commission, saying that record-keeping on hate crimes does not distinguish Arab American or

⁸⁷ Ibid., 170–72.

⁸⁸ Ibid., 163–64.

⁸⁹ Ibid., 150–51.

⁹⁰ Ibid., 150–53, 158.

⁹¹ Ibid., 153–57.

Muslim victims although such statistics would help track changes in discrimination and in the incidents of hate crimes affecting these communities. He asked the panelists whether their agencies were making any effort to better track and disaggregate this information.⁹²

Mr. Treene responded that the Oak Creek Massacre⁹³ raised the issue of why Sikhs were not tallied separately. In response to this, CRT held a town hall meeting in which diverse religious groups discussed the coding of religious-based hate crimes. The CRT and the Community Relations Service then formally recommended to the Advisory Policy Board Subcommittee on the Uniform Crime Reports that the FBI implement separate tallying of hate crimes against Sikhs, Hindu Americans, Jews, and Arab Americans.⁹⁴

⁹² Ibid., 164–66.

⁹³ On Sunday, August 5, 2012, as Sikhs were gathering to worship at a temple in Oak Creek Wisconsin, a gunman killed six people and injured others, including a police officer, before dying of gunshot wounds. *See for example*, Jay Sorgi, “7 dead, including shooter, after massacre at Sikh temple in Oak Creek,” *Today’s TMJ4* (Journal Broadcast Group, Wisconsin), Aug. 5, 2012, <http://www.jm.com/tmj4/news/165061026.html> (last accessed Apr. 8, 2014).

⁹⁴ *Briefing Transcript*, pp. 166–68.

KEY ISSUES AND QUESTIONS

Key Issues

1. Post-9/11, many Arab and Muslim Americans experienced heightened prejudice, hostility, and discrimination, despite the fact that, after the horrid September attack, Arab and Muslims played a significant role, along with all sorts of Americans, in helping keep the nation safe.
2. The Department of Justice saw a tremendous increase in hate crimes and discrimination against Arabs, Muslims, and those perceived as Arabs and Muslims (such as Sikhs and South Asians) post-9/11.
3. Investigatory/enforcement techniques used by some federal agencies have had excessive overlap with those same agencies' community engagement activities. This has made numerous Arab and Muslim Americans feel that they were being harassed and denied civil rights, and for some, lessened their trust in the very federal agencies that were in part supposed to be protecting them.
4. Training materials used by the FBI post-9/11 undermined their relationship with (and were harmful to) the Arab and Muslim American communities due to incorrect and discriminatory content. The FBI's initial denial of the materials' existence, and later refusal to reveal the content, further lowered the communities' trust.
5. Racial profiling has a negative impact on the civil rights of Arab and Muslim Americans, and may increase public suspicion of these communities.
6. Intense surveillance activities have had a fear-inducing and chilling effect on Arab and Muslim American communities.
7. Mass detention of Arab and Muslim individuals post-9/11, with little specific information released regarding the grounds for and length of said detention, or the number of individuals detained, raised concern. This issue was not discussed at length at the briefing, and requires further attention.
8. Some agencies have received positive feedback on their outreach to and work for Arab and Muslim American communities post-9/11. For example, the work of the Department of Justice's Civil Rights Division was viewed by many as having strong engagement activities and litigation efforts with real results.
9. Ultimately, the protection of Arab and Muslim Americans' civil rights and liberties will enhance, not minimize, the nation's security.

Key Questions Going Forward

1. What can federal agencies do to reduce or eliminate the notion that they provide misinformation about Arab and Muslim Americans in their training, investigations, and other activities?
2. How can agencies better divide their investigatory/enforcement activities from their community outreach efforts? What steps can be taken to prevent Arab and Muslim Americans from feeling pursued in their mosques and community centers, schools and homes, by the same agencies that should be protecting their safety and civil rights?
3. What more can be done to protect the privacy rights of Arab and Muslim Americans (and in fact, all Americans) as the NSA and other agencies pursue suspected terrorists?
4. Why did the FBI refuse to share information regarding the inappropriate training materials it ultimately removed from use? What more can be done to avoid spreading such misinformation in the future?
5. What positive actions can the federal government take to avoid racial profiling and instead focus on individual behavior?
6. What is the current rate of hate crimes and discrimination against Arab and Muslim Americans, which we saw rise significantly post-9/11? What new efforts have been planned to further address this?
7. In what ways has oversight been improved at agencies that have been viewed by some as having a chilling effect on crime reporting and on the First Amendment generally for Arab and Muslim Americans?
8. When will relevant federal agencies such as the Department of Homeland Security and the Department of Justice disclose more complete details regarding the mass detention of Arabs and Muslims that occurred post-9/11?
9. What are agencies doing and what more may they do to develop a more positive relationship with Arab and Muslim American communities? At our briefing, the Department of Justice's Civil Rights Division generally got favorable feedback based on a positive attitude and on actually obtaining results. What can the agencies that received a less positive response learn from DOJ and others?

FINDINGS AND RECOMMENDATIONS

Findings

1. While the United States government has taken important steps to work with the American Muslim community, many American Muslims still feel their civil rights are violated through stereotyping, profiling and other forms of discrimination and are reluctant to report civil rights and labor violations.¹
2. Ethnic, religious and racial profiling has led to the wide-spread singling out of Arabs and American Muslims by Customs and Border Patrol, the Transportation Safety Administration and the Federal Bureau of Investigation.²
3. In the last ten years, the Muslim community has seen a rise in anti-Muslim sentiment, anti-Muslim discrimination and policies that unfairly impact American Muslims. One example is the oftentimes secret placement of Muslim Americans on government watch lists.³
4. Training materials often used by federal government agencies mislead the American public by presenting a homogeneous view of the Muslim community which often excludes many from the American Muslim community.⁴
5. Federal government outreach efforts focus only on a portion of the American Muslim community, those who are Arabs (which represent 18% of the Muslim community), while excluding African American Muslims (25% of the Muslim community), South Asians (15% of the Muslim community) and other American Muslims of Persian, Bosnian and other descent.⁵
6. Overzealous government monitoring programs have eroded the confidence of American Muslims in law enforcement and to law enforcement efforts.⁶

¹ al-Suwaij Testimony, *Briefing Transcript*, p. 13; Rehman Testimony, *Briefing Transcript*, pp. 40-41.

² Zogby Written Statement, *Briefing Report*, pp. 42-43.

³ Rehman Written Statement, *Briefing Report*, pp. 68, 79; Aziz Written Statement, *Briefing Report*, p.118.

⁴ al-Suwaij Testimony, *Briefing Transcript*, pp. 13-14; Rehman Written Statement, *Briefing Report*, pp. 69, 77-78.

⁵ al-Suwaij Testimony, *Briefing Transcript*, p. 14.

⁶ Zogby Testimony, *Briefing Transcript*, pp. 21-22; Rehman Written Statement, *Briefing Report*, p. 76.

7. Materials used by federal government agencies to train law enforcement officials and other service professionals are insensitive to the cultural diversity of the American Muslim community and often feed the fear about the American Muslim community.⁷
8. American Muslims have played an important role in protecting our nation and in partnering with government and law enforcement to ensure a safer country while at the same time preserving civil liberties in their communities. A Triangle Center on Terrorism and Homeland Security study indicates that in one-third of the violent terror attacks thwarted since 9/11, law enforcement was first tipped off to the plot by American Muslim communities.⁸
9. There are two trends in addressing major civil rights and national security challenges: the “suspect trend of engagement” which encourages aggressive intelligence and surveillance activities; and the “partnership trend of engagement” where local communities have developed strong relationships with law enforcement agencies and local government agencies.⁹
10. Fear of government surveillance has created a chill over freedom of expression and freedom of association on college campuses and congregations for American Muslims. The American Civil Liberties Union identified over 60 incidents of anti-mosque activity throughout the nation in the last six years, and the Pew Forum on Religious and Public Life indicated that from 2009 to 2011, there were at least 35 proposed mosques and Islamic centers that encountered local resistance. In addition, according to the Justice Department, since 2000 there have been 24 cases concerning mosques under the Religious Land Use and Institutionalized Persons Act, 14 of which have emerged since 2010. Opposition has ranged from vandalism and destruction of property to zoning challenges based on so-called “quality of life” concerns.¹⁰
11. The Travel Redress Inquiry Program (TRIP) developed by DHS based on congressional mandate as a process by which the federal government provides redress to persons who have been referred for additional screening while traveling or are delayed or denied airline boarding for any reason, is too opaque and takes too long to resolve issues reported.¹¹

⁷ Ibid., p. 22-23.

⁸ Marcus Testimony, *Briefing Transcript*, p. 33.

⁹ Tarin Testimony, *Briefing Transcript*, pp. 33-37.

¹⁰ Rehman Written Statement, *Briefing Report*, p. 71.

¹¹ Aziz Testimony, *Briefing Transcript*, pp. 132-134; Gersten Testimony, *Briefing Transcript*, pp. 152-153.

12. During the period from 2001 to 2009, according to FBI data, 1,552 incidents of anti-Islamic hate crimes were reported resulting in 1,785 offenses. Testimony revealed that that number is likely low because of the way that hate crimes data is reported.¹²
13. During the period from 2009-2010, hate crimes against Muslims increased by 50%.¹³
14. Hate crimes directed against Arab Americans or Muslims, or against those who have come from Arab countries are difficult to track because in the past, crime record keeping, whether dealing with victims of hate crimes or otherwise, has not attempted to separate out Arab Americans, or Muslims, or others of American Muslim descents.¹⁴
15. In 2010 the FBI reported that hate crimes committed against Muslims accounted for 13.2 percent of all religion-motivated hate crimes in the U.S.¹⁵
16. Title VI of the Civil Rights of 1964 does not offer any protection for students against harassment solely based on their religious faith.¹⁶
17. While no national statistics on faith-based bullying exist, Muslim Mothers Against Violence polled 78 male and female students in Northern Virginia between the ages of 12-17. 80 percent reported being bullied with 75 percent saying it happened more than once.¹⁷
18. During 2001-2006, Muslims brought the greatest number of religious discrimination claims under the Religious Land Use and Institutionalized Persons Act of 2000. 62 of the 229 cases analyzed were brought by Muslims, 27 percent of all cases.¹⁸
19. Federal programs which intertwine civil rights protections with other policy and legal priorities undermine efforts to reduce prejudice and discrimination against American Arabs and Muslims.¹⁹

¹² Rehman and Tarin Testimony, *Briefing Transcript*, pp. 55-56.

¹³ Treene Testimony, *Briefing Report*, p. 28.

¹⁴ Chairman Castro's line of questioning and panelist Eric Treene's response, *Briefing Transcript*, pp. 165-168.

¹⁵ Marcus Written Statement, *Briefing Report*, p. 47.

¹⁶ *Ibid.*, p. 48.

¹⁷ Rehman Written Statement, *Briefing Report*, p. 74.

¹⁸ Marcus Written Statement, *Briefing Report*, p. 52.

¹⁹ Federal Civil Rights Engagement with Muslim and American Communities Post 9/11 Executive Summary, *Briefing Report*, p. 3.

20. There has been a backlash against Americans identified as, or mistakenly perceived to be, Muslim and/or Arab. For example, Muslims and people thought to be Muslim have been removed from airline flights because fellow passengers were nervous or fearful; mosques have been subject to vandalism and arson; persons suspected of being Arab or Muslim have been subjected to violent, sometimes fatal attacks.²⁰
21. Arab and Muslim Americans have contributed greatly to, and are an important part of, the diverse fabric of America.²¹
22. There exists discrimination against Muslim prisoners in American penal institutions. Panelist Kenneth Marcus cited recent empirical research that Muslim litigants who file claims of religious discrimination are much less likely to prevail in court than non-Muslim litigants, particularly if they are Muslim prisoners compared to non-Muslim prisoners.²²
23. The federal government's "counter-radicalization" efforts create a danger of creating a government-approved "Official Islam," which adversely impacts religious freedom and potentially violates the Establishment Clause.²³

Recommendations

1. Federal government agencies, including but not limited to, the U.S. Department of Justice (DOJ), the Federal Bureau of Investigations (FBI) and the U.S. Department of Homeland Security (DHS) should expand their outreach efforts to the American Muslim community beyond the mosques and Imams to encompass the vast diversity of perspectives, experiences and ethnicities of the community.²⁴
2. In order to create a comprehensive and unified message and approach across the federal government for outreach and training purposes, federal agencies should collaborate with local government agencies and advocacy groups that regularly engage and serve the diverse American Muslim community.²⁵

²⁰ Ibid., pp. 3-4.

²¹ Ibid., p. 4.

²² Marcus Testimony, *Briefing Report*, p. 11.

²³ Rascoff Testimony, *Briefing Report*, p. 22.

²⁴ al-Suwaij Written Statement, *Briefing Report*, p. 37; Aziz Written Statement, *Briefing Report*, p. 132;

²⁵ Tarin Written Statement, *Briefing Report*, p. 67.

3. Congress should allocate funds to DOJ, DHS, the FBI and other agencies to expand their outreach efforts at the local level and to increase access to the redress processes.
4. The following are useful recommendations presented by Professor Sahar Aziz that lend a thoughtful and instructive view to improving the federal agency engagement with the American Muslim community:²⁶
 - a. The government should not use community engagement meetings in furtherance of national security surveillance, investigative and prosecutorial objectives, but rather to develop trust and robust relations with constituents towards the shared goal of protecting individual rights and public safety for all Americans.
 - b. Increase independent oversight of use of informants in counterterrorism.
 - c. Counterterrorism trainers and training materials should be vetted through a transparent and professional process wherein individuals with the requisite educational and professional qualifications are selected to train those tasked with the important task of protecting us from danger.
 - d. Government engagement efforts should be “de-securitized” to holistically focus on the host of social, economic, and political factors that affect the vitality of Arab and Muslim communities.
 - e. Government engagement programs should be subject to citizen and Congressional oversight to ensure stated objectives are in fact met and government resources are not wasted.
5. The following are useful recommendations presented by panelist Asim Rehman which offer insightful suggestions gained from professional experience and collaboration with other advocacy organizations servicing the American Muslim community:²⁷
 - a. Request that the Department of Justice, Department of Homeland Security, Federal Bureau of Investigation, and other law enforcement agencies and departments:
 - i. Rigorously enforce all guidelines and rules prohibiting the use of race and racial profiling in all law enforcement activities and extend such prohibitions to religion and religious profiling.

²⁶ Aziz Written Statement, *Briefing Report*, pp. 132-133.

²⁷ Rehman Written Statement, *Briefing Report*, p. 85.

- ii. Require a factual predicate before the commencement of investigation or assessment and require heightened supervisory approval for assessments or investigations implicating First Amendment protected activity, including the use of informants and agent provocateurs in houses of worship.
 - iii. Review all training materials and purge all use of materials with hateful and stereotypical depictions of Islam and Muslims.
 - iv. Continue local outreach efforts with Muslim communities, but forbid all offices engaging in such outreach from maintaining and sharing information gained through such efforts for investigative or surveillance purposes.
 - v. Establish effective remedial measures to receive and adequately address civilian complaints, particularly with respect to surveillance and monitoring.
 - vi. Educate local law enforcement partners about the need for nondiscrimination in law enforcement and investigate local law enforcement partners when civil liberties failures persist.
- b. Request that the DHS conduct a thorough investigation of how Muslims are being interrogated and searched at the border and prohibit Customs and Border Patrol officers from asking questions related to First Amendment-protected activity.
 - c. Request that the Justice Department and Treasury Department issue agency orders providing a safe harbor for well-intentioned donors and to establish a single, user-friendly database for determining whether an entity or individual is on a Prohibited List.
 - d. Request that the Justice Department dedicate additional resources and personnel to bullying prevention programs and to hate crimes reporting, investigation and prosecution.
6. The FBI should use the Muslim community as a resource in designing training, as the Department of Homeland Security has done.²⁸
7. In order to address discrimination against Muslim prisoners, appropriate reforms must address the balance between prison security and homeland security versus the wide prevalence of discrimination.²⁹

²⁸ Zogby Testimony, *Briefing Report*, p. 10.

²⁹ Marcus Testimony, *Briefing Report*, p. 11.

8. The federal government should improve its tracking and prosecution of hate crimes against American Arabs and Muslims.³⁰

9. The federal government's counter-radicalization programs must be revised so as not to infringe on religious freedom or violate the Establishment Clause.

10. The standards and information by which American citizens are placed on the No-Fly List, Selectee List or on the Watch list must be made clear and shared with the person placed on the list, without compromising security issues.

11. Placement on the No Fly List should be subject to judicial review or oversight.

12. The TRIP process should be substantially improved and there should be a process by which Americans who are placed on those lists have a meaningful opportunity to challenging their placement on lists that result in the delay or denial of their right to travel.

³⁰ Rehman Testimony, *Briefing Report*, p. 14.

COMMISSIONERS' STATEMENTS AND REBUTTALS

Statement of Chairman Martin R. Castro joined by Commissioner Michael Yaki

“I challenge anyone to understand Islam, its spirit, and not to love it. It is a beautiful religion of brotherhood and devotion.”

— Yann Martel, *Life of Pi* (Book)

"Faith is a house with many rooms."

— Pi Patel, *Life of Pi* (Movie)

United States Commission on Civil Rights

July 19, 2014

My first introduction to the U.S. Commission on Civil Rights was in 2003 on the very issue that is the subject of the present Report: the civil rights of Muslim and Arab Americans. It was my first day as a member of the Commission's Illinois State Advisory Committee ("SAC") and we held a press conference to issue a report entitled “Arab and Muslim Civil Rights Issues in the Chicago Metropolitan Area Post September 11.” While I was not a SAC member during the hearing, I was upon the report's publication and I am proud that the report bears my name among the SAC membership.

Some of the Illinois SAC’s “Observations” in its 2003 report are relevant to our work today:

“*The number of cases of alleged discrimination in the workplace, at school, in housing, and at airports since September 11 is alarming and indicative of wide-reaching societal bias, or at least misunderstanding, of the Arab and Muslim communities. The Committee does not deem racial or ethnic profiling by any sector of society to be justified.¹

*Arab and Muslim community leaders clearly expressed concern about government policies. Despite the increases in hate crimes against their community members, most leaders who testified to the Committee were far more disturbed by the government’s national interview project of young Arab and Muslim men, the use of secret evidence, and the closure of Islamic charities. Many spokespeople for the Arab and

¹ Arab and Muslim Civil Rights Issues in the Chicago Metropolitan Area Post-September 11 Briefing Report, Illinois Advisory Committee to the U.S. Commission on Civil Rights, p. 41, found here: <http://www.usccr.gov/pubs/sac/il0503/il0503.pdf>.

Muslim communities saw these actions as profiling their communities and not as effective policing measures.²

*Fear pervades the Arab and Muslim communities. In addition to being afraid of the possibility of further terrorist attacks as most Americans are, many people in these communities are afraid of discriminatory actions by their fellow Americans and their government. Seemingly innocuous acts like giving to charity are now done with trepidation at the uncertain ramifications for such acts. If a community is overwhelmed with fear, it is less likely to cooperate with law enforcement.³

*...various religious communities have established meaningful relations with Muslim centers since September 11. Such activities should be encouraged and commended. However, the general public appears to still know little about these communities and rely heavily on stereotypes for their knowledge.”⁴

It is disappointing to see that many of the challenges faced by Muslim and Arab Americans identified in the 2003 Illinois SAC report persist today.

While Americans of the Muslim faith have been victims of discrimination, bullying, violence, hate crimes and profiling for many years before September 11, 2001, that sad day in our Nation's history also marked the point when anti-Muslim sentiment and actions took a new and more virulent turn in our country, directed at Muslims and Arab Americans and those persons perceived to be Muslims and Arabs.

But not only has it been the action of fellow Americans that have impinged on the rights of Muslim Americans. Often times, it has been the action of our own government. Such an example is the creation of the “no fly” list. The “no fly” list has had a devastating effect on American Muslims who have been placed on the list for reasons that appear questionable. In a recent meeting I had with representatives of the Council of American Islamic Relations (“CAIR”), I learned of a number of individual instances of Muslim Americans placed on the “no fly” list either for unknown or unjustified reasons. CAIR has been working hard, through litigation, at bringing some level of transparency and accountability in the process of inclusion of persons on the list, while at the same time seeking not to jeopardize national security. In a federal case in Oregon brought by CAIR, a judge ruled in June 2014 that persons placed on the “no fly” list have had their right to due process violated.⁵ While this is an important step in addressing this issue, more should be done. That is why I am pleased that the Commission has recommended in our Report:

² *Id.* at pp. 41-42.

³ *Id.* at p. 42.

⁴ *Id.*

⁵ CAIR Welcomes Ruling that No-fly List Appeals Process is Unconstitutional, [CAIR.com](http://www.cair.com/press-center/press-releases/12536-cair-welcomes-ruling-that-no-fly-list-appeals-process-is-unconstitutional.html) Press Center, June 24, 2014, <http://www.cair.com/press-center/press-releases/12536-cair-welcomes-ruling-that-no-fly-list-appeals-process-is-unconstitutional.html>.

“10. The standards and information by which American citizens are placed on the No-Fly List, Selectee List or on the Watch list must be made clear and shared with the person placed on the list, without compromising security issues.

11. Placement on the No Fly List should be subject to judicial review or oversight.

12. The TRIP (the Travel Redress Inquiry Program) process should be substantially improved and there should be a process by which Americans who are placed on those lists have a meaningful opportunity to challenging their placement on lists that result in the delay or denial of their right to travel.”

Muslim Americans have been an important and positive part of the fabric of our country since its birth. Many Muslims fought in George Washington's Army to help us gain our independence, and Muslims serve honorably to this day in the United States Armed Forces to continue to defend that liberty and many have given their lives in the line of duty.⁶

Furthermore, on a recent visit to the U.S. Supreme Court, I saw a display explaining the carvings on the lintels above that august body. Enshrined in marble among the other great "lawgivers" of history is a carving of the Prophet Muhammad.

Yet, despite their many contributions to our country, Muslim Americans continue to face discrimination and violations of their civil rights based on religious bigotry, fear and ignorance.

Religious bigotry, unfortunately, has been a part of our nation since its birth, and even during our colonial period.⁷ Religious discrimination has taken many forms in our "One Nation, Under God," over the centuries. In 1844, fueled also by an anti-immigrant sentiment, that bigotry was directed at Catholics. The “Bible Riots of 1844,” resulted in the burning of Catholic churches and homes.⁸ Today, Muslims are targeted and their mosques are defaced or blocked from construction and Qurans are burned. No doubt, in addition to religious intolerance, there is some measure of anti-immigrant sentiment involved here as well.

So much time has been wasted since 9/11 as a result of misplaced and biased approaches. As a result, the civil rights of Muslims of all backgrounds and ages in the United States have been violated. It is important for the government to protect our country against terrorists, but we are working against each other when we profile and stereotype Muslims, and those perceived to be Muslims, the way we have done for the past 13 years. This must change.

⁶ Honoring Muslim American Veterans on Memorial Day, by Craig Considine, Huff Post Religion, May 26, 2013, http://www.huffingtonpost.com/craig-considine/lets-honor-muslim-america_b_3339838.html.

⁷ America's True History of Religious Tolerance, by Kenneth C. Davis, Smithsonian Magazine, October 2010, <http://www.smithsonianmag.com/history/americas-true-history-of-religious-tolerance-61312684/>.

⁸ Id.

Just as "faith is a house with many rooms," so we must always work to ensure that our nation has room for those of many faiths.

I believe greatly that the bias and bigotry directed at America's (and the world's) Muslims is due to a lack of knowledge about Islam and a painting of all Muslims with the same brush as that used for extremists. As Martel says, Islam is "a beautiful religion of brotherhood and devotion." We must take more time to understand the diverse Muslim community in the United States and become more educated about Islam—and other religions for that matter. What we don't know or understand, we will always perceive to be the "other." Islam is a religion, just like Christianity, and Judaism--and there are extremists in every religion. Unfortunately, over the ages religion has been used as a weapon to fight or justify political battles and actual wars. Yet, if we come to know the true meaning of Islam and the practitioners of that faith, we would, I hope and believe, see less of the hate and harm hurled at them, especially since 9/11.

Therefore, I believe one of the most powerful tools at our disposal is education: educating government, law enforcement and the general public. First, bringing awareness to the discrimination directed against Muslim Americans in the United States. Second, working together with public officials and law enforcement to strengthen a united front in the fight against terrorism--NOT against Islam. Lastly, developing concrete approaches and solutions to address these issues. I believe our Report's recommendations do just that.

While we must be ever vigilant in protecting the Homeland, we must be equally vigilant that in doing so we do not destroy it from within by compromising our principles and wrongly denying our own people the rights which make our Union so special and worth fighting for.

**Statement of Commissioner Roberta Achtenberg
and Commissioner David Kladney
with the concurrences of Chairman Martin R. Castro
and Commissioner Michael Yaki**

We whole-heartedly endorse the detailed Findings, Recommendations, Key Issues, and Questions Going Forward as adopted by the Commission. We appreciate the work that Commissioner Michael Yaki did in bringing this important project before the Commission.

In its examination, the Commission found that

[t]here are two trends in addressing major civil rights and national security challenges: the “suspect trend of engagement” which encourages aggressive intelligence and surveillance activities; and the “partnership trend of engagement” where local communities have developed strong relationships with law enforcement agencies and local government agencies.¹

The goals of constructive “partnership” engagement and “aggressive” intelligence gathering are prone to work at cross purposes. As the Commission found, “[f]ederal programs which intertwine civil rights protections with other policy and legal priorities undermine efforts to reduce prejudice and discrimination against American Arabs and Muslims.”² The Commission also identified as a Key Issue the fact that

[i]nvestigatory/enforcement techniques used by some federal agencies have had excessive overlap with those same agencies’ community engagement activities. This has made numerous Arab and Muslim Americans feel that they were being harassed and denied civil rights, and for some, lessened their trust in the very federal agencies that were in part supposed to be protecting them.³

¹ *Federal Civil Rights Engagement with Arab and Muslim American Communities Post 9/11*, United States Commission on Civil Rights, 2014, *Finding 9*, p. 42.

² *Id.*, *Finding 18*, p. 43.

³ *Id.*, *Key Issue 3*, p. 39.

Unfortunately, some of the government's actions not only deepened mistrust, but became flagrant violations of the civil rights of Arab and Muslim Americans. The government's conduct in the name of national security has been egregious in a number of circumstances. For example, the Commission found large-scale profiling by "Customs and Border Patrol, the Transportation Safety Administration and the [FBI]." ⁴ The Commission found that the federal government has maintained secret watch lists. ⁵ Also of concern is the fact that

[t]raining materials used by the FBI post-9/11 undermined their relationship with (and were harmful to) the Arab and Muslim American communities due to incorrect and discriminatory content. The FBI's initial denial of the materials' existence, and later refusal to reveal the content, further lowered the communities' trust. ⁶

It is well past time for all involved federal agencies to countenance any violations of the civil rights of Arab and Muslim Americans. To the extent that ongoing engagement with these communities is important for purposes of legitimate information-gathering, it should be carried out through as much constructive engagement as is feasible. This engagement must respect to the fullest extent possible the distinction between the suspect trend of engagement and the partnership trend of engagement. A solid example of an agency which has done so is the U.S. Department of Justice's (DOJ) Civil Rights Division (CRD).

The Commission learned from Eric Treene, Special Counsel for Religious Discrimination in DOJ's CRD, that DOJ has engaged in a number of proactive, sustained undertakings – separate and apart from intelligence gathering -- to facilitate the growth of trust of Arab Americans and Muslim Americans.

After 9/11, DOJ's CRD formed a Muslim-American Engagement Advisory Group to seek input from stakeholders. It has also "moved aggressively to respond to these [increased number of post-9/11 reports of] hate crimes and acts of discrimination" ⁷ against Arab Americans and Muslim Americans. During the period of rapid post-9/11 increase in anti-Arab American and Muslim American hate crime reports, DOJ's CRD held

daily meetings with the FBI to coordinate investigation efforts, and holding numerous meetings with Muslim, Arab, Sikh and South Asian leaders about the

⁴ Id., *Finding 2*, p. 41.

⁵ Id., *Finding 3*, p. 41.

⁶ Id., *Key Issue 4*, p. 39. See also Id., *Finding 4*, p. 39 and *Finding 7*, p. 42.

⁷ Id., p. 193.

situation on the ground and the Division's response... [and] vigorously prosecuted [anti-Arab and anti-Muslim hate crime] cases....⁸

Beginning under the leadership of U.S. Attorney General Eric Holder and former Assistant Attorney General Thomas Perez,

DOJ also leverages the U.S. Attorneys' offices and the Community Relations Service's regional offices for outreach and engagement in communities and for training law enforcement on cultural competence. As part of this effort, in 2010, DOJ brought together about a third of U.S. Attorneys to talk about Muslim and Arab community engagement. Also, DOJ/CRD has established many civil rights units in U.S. Attorneys' offices and developed civil rights expertise among attorneys in those without such units.⁹

It is also important to recognize that "DOJ's Community Relations Service has regional offices around the country, and has held hundreds of town hall meetings, trainings, and other outreach efforts involving Muslim and Arab communities since 9/11."¹⁰ The CRD has deepened its commitment to vigorous enforcement of the Religious Land Use and Institutionalized Persons Act of 2000 by opening more cases fighting opposition to the construction of mosques since 2012 than ever before. The effectiveness of its community outreach and engagement has led the CRD to be involved not only in hate crimes litigation but also in cases emanating from the U.S. Department of Education, the U.S. Department of Housing and Urban Development, and the U.S. Equal Employment Opportunity Commission.¹¹ DOJ has laid the foundation for community trust which other agencies would be well-advised to emulate.

⁸ Id., p. 194.

⁹ Id., p. 34. *See also* Id., p. 195.

¹⁰ Id., p. 195.

¹¹ Id., pp. 195 - 196.

Statement of Commissioner Michael Yaki joined by Chairman Martin R. Castro

PREFACE

On September 11, 2001, a series of coordinated attacks utilizing civilian passenger planes killed over 2,900 innocent Americans. Shortly thereafter, U.S intelligence and the media became informed that the attacks were carried out by a terrorist organization called al-Qaeda, a group that believed in a radical, extreme and violent interpretation of Islam. The reaction by some Americans was swift and misguided. On September 15, Balbir Singh Sodhi, a gas station owner in Mesa, Arizona, was murdered by a man seeking revenge for the 9/11 attacks.¹² Mr. Sodhi was a Sikh, not a follower of Islam. But while fortunately Mr. Sodhi's death did not portend widespread violence against those assumed to be Arab or Muslim Americans, Arab and Muslim American communities have faced a wide range of heightened intrusion and assault: rudeness and hatred from people in our nation who cruelly associate law-abiding patriots with terrorists simply based on their religion and/or race; blatant employment discrimination; damage to mosques; and perhaps most concerning of all, continuing surveillance and infringement of their civil rights by government agents and officials.

The briefing we held, and this resulting report, was designed to move the U.S. Commission on Civil Rights forward in assessing the federal engagement with Arab and Muslim Americans from September 11th through today, and offer recommendations for much needed improvement. Yet while some federal efforts have been praised by advocacy and civil rights organizations, others have been seen as ineffective and even harmful. Worst of all, recent revelations regarding the extent of our nation's domestic surveillance programs throw into question the sincerity of any pro-active efforts of our government.

The unanswered question of this briefing is whether, for the Arab and Muslim American communities, security and liberty in the post 9/11 world can co-exist.¹³

¹² Tamar Lewin, *Sikh Owner of Gas Station Is Fatally Shot in Rampage*, NYT (September 17, 2001). Available at <http://www.nytimes.com/2001/09/17/us/sikh-owner-of-gas-station-is-fatally-shot-in-rampage.html> (last accessed July 20, 2014).

¹³ As the President's Review Group on Intelligence and Communications Technologies wrote, the word "security" has multiple meanings. "In contemporary parlance, it often refers to national security or homeland security." But "[a]t the same time, the idea of security refers to a quite different and equally fundamental value, captured in the Fourth Amendment to the United States Constitution: 'The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.' Both forms of security must

I. Commission Work on this Crucial Matter

As I stated at the briefing on this matter, staff did a sound job of organizing the event and assembling a number of excellent, well-informed panelists.

The limitations of a briefing, regardless of the caliber and depth of the witnesses invited, are illustrated amply for this subject matter. Many of the government agencies that could or should be in attendance were either unavailable or unwilling to attend absent the use of our subpoena power. The time restrictions of a briefing make detailed inquiry and the use of interrogatories and document requests almost non-existent.

More work needs to be done. This report should include additional research from an even wider variety of substantial experts on the matter,¹⁴ and from those who have endured the post September 11th results first-hand. The Commission must continue to monitor the federal agency actions raised by panelists who attended the briefing, as well as issues that have been raised since the 2012 briefing, including concerns raised by revelations regarding the NSA and other federal entities' intense surveillance conduct.

II. Assessment of Federal Agency Engagement Efforts

Despite the constrictions of the format, some valuable information arose at the Commission's briefing. One important part of the briefing involved panelists addressing and rating the post 9/11 policies and actions of the federal agencies relevant to this report. There was a notably wide difference in the assessments of specific agencies. Some assessments raised serious concerns. For my statement, I wanted to highlight my particular concerns.

Federal Bureau of Investigation

Training Manuals

In 1990, during what is now referred to as the First Gulf War, I was working for Congresswoman Nancy Pelosi. A number of members of the San Francisco Arab American community came to visit me with disturbing reports that the FBI had begun "requesting" that individuals come to their offices for "interviews." During these sessions, Bureau agents began questioning them about whether there were any "suspicious" or "disloyal" members of their community. Soon, FBI agents were seen observing or attending Arab American community events. In a meeting convened with the Special Agent in Charge (SAC) of the San Francisco office by

be protected." *Liberty and Security in a Changing World*, REPORT AND RECOMMENDATIONS OF THE PRESIDENT'S REVIEW GROUP ON INTELLIGENCE AND COMMUNICATIONS TECHNOLOGIES, 15 (December 2013).

¹⁴ Some of which is included below in this Statement.

Congresswoman Pelosi, the SAC admitted that they were engaged in broad-based surveillance and information-gathering potential “hostiles” in the Arab American community. When asked if he had any evidence of disloyalty or espionage in the community, he said there was none but that “you never know.”

More than a decade later, questions about FBI tactics with regard to the Arab and Muslim American communities came up with regard to something called a “training manual.” As panelist Asim Rehman, President of the Muslim Bar Association of New York, said in his written statement for this report,

Last year, MuBANY joined dozens of organizations in asking then Deputy National Security Advisor (now CIA director), John Brennan to address the federal government’s use of highly offensive trainers and training materials. Outrage came from other circles, and both the FBI and the U.S. military ultimately launched a probe to identify and remove such materials. The tone was set at the highest level, with Chairman of the Joint Chiefs of Staff General Martin Dempsey expressing his concern about materials “which goes well beyond merely presenting alternative intellectual viewpoints on radicalism to advocating ideas, beliefs and actions that are contrary to our national policy, inconsistent with values of our profession, and disrespectful of the Islamic religion.” The FBI ultimately identified 876 pages and 392 presentations that failed to meet standards or could be considered offensive and the military suspended an offensive course.¹⁵

Panelist James Zogby, Founder and President of the Arab American Institute (AAI) said of the training:

When I look at these training manuals, I say thousands of people worked with them, and somebody approved them. Somebody wrote it up, somebody approved it, somebody paid for it, and they went and did it. When they will not be responsive to us to be transparent about it, to hold anyone accountable for it, it's shocking. We can't get into that. Why? It's a -- you're teaching people about us. I can't understand their refusal to engage us in an effort to get to the bottom of where these manuals -- and it didn't stop with the FBI, because there have been federal funding of these training programs for local law enforcement agencies that were done. They're the very people who've been harassing us, and defaming us, and propagandizing

¹⁵ Briefing Report, at 83. In September 2011, National Public Radio aired a Morning Edition story, *How Did Anti-Muslim Bias Seep Into FBI Training?* In the story was the assertion that “[t]he slides of the [FBI] Power Point presentation obtained by Wired magazine made clear that the instructor was teaching agents not only that Islam was a violent religion, but also was erroneously linking religiosity to terrorism. He said the more religious a Muslim in this country was, the more he should be seen as a potential suspect.” The NPR report did observe two actions by the FBI to “stem the damage,” indicating that they “sent out an email requesting that all training materials that related to religion and culture be sent to headquarters and essentially taken offline until they could be vetted” and “asked all 56 of its internal offices to do an internal scrub of all their counterterrorism training to look for hints of possible bias.” Dina Temple-Raston, MORNING EDITION, NPR, *How Did Anti-Muslim Bias Seep Into FBI Training?* September 29, 2011. Available at <http://www.npr.org/2011/09/29/140902739/units-autonomy-may-be-why-fbi-missed-bias> (last accessed May 22, 2014).

against us, and they're getting government contracts to go and train people. I don't understand that. That's ridiculous.¹⁶

Despite the subsequent disavowal of these training manuals and reported purging of many of the offensive references contained therein, the questions raised by Mr. Zogby are important. Who prepared these manuals? Where did they obtain their information that violence was part of “mainstream” Islamic theology? Were there experts hired, and who were they? To make a parallel metaphor, if an “expert” based their reading of Christianity without any comprehension of Jesus’s mission, how legitimate would that be? The tone and rhetoric used in these manuals is reminiscent of the conclusory and inflammatory rhetoric used by the government to characterize the Japanese Americans after the attack at Pearl Harbor. The refusal of the FBI, and the limitations of this proceeding to delve further into that refusal, is a gap that should and must be closed by the Administration and Congress.

Overlap of Community Engagement and Intelligence Gathering/Targeting of Arab and Muslim Americans

The FBI’s use of community engagement work to gather intelligence, as I personally witnessed in 1990, repeated itself after 9-11. Panelist Haris Tarin, Director, Washington, DC Office of the Muslim Public Affairs Council raised this issue, and referenced reports that this had been a particular problem in Northern California.¹⁷ He stated that this practice “has developed in the context of misinformation and fear that has dominated discourse around American Muslims.”¹⁸ Panelist Rehman also believes that meetings with the FBI are difficult, “because it is law enforcement. People are very skeptical to attend these meetings, and when they do, there’s often a new face.”¹⁹

I want to note grave concerns rose from sources outside of the briefing as well. For example, Diala Shamas, an attorney working with New York’s Muslim Communities at the Creating Law Enforcement Accountability & Responsibility (CLEAR) project at the CUNY School of Law, had very strong words about the FBI’s aggressive intelligence gathering tactics within Muslim communities:

¹⁶ United States Commission on Civil Rights November 9, 2012 Briefing Transcript, p. 51. Earlier in the briefing, during his oral statement, Zogby had stated that “[t]he relationship with the FBI has been broken on several occasions. One is the release of these training manuals ... They denied that they existed. Then, finally, they admit they exist and they say we’re taking 800 pages out. We asked what 800 pages, and they won’t tell us.” *Id.* at 22-23.

¹⁷ *Id.* at 34.

¹⁸ *Id.* at 35.

¹⁹ *Id.* at 46. Zogby agreed, noting “the problem of it all being one department, it’s difficult when the guy is following you around to different events to make sure you’re okay ... and the guy is doing the investigating and reporting on a regular basis.” *Id.* at 49-50.

CLEAR clients' experiences also show us that the NYPD's tactics are not exceptional. Aggressively intrusive and harmful intelligence gathering on Muslims' daily lives is a national epidemic—and the chief culprit is the FBI.

...

[T]he majority of our clients at CLEAR are victims of aggressive intelligence gathering by the FBI, not the NYPD. Of the more than 100 clients—primarily Muslim New Yorkers—we have served, most have been targeted for what are often misleadingly termed “voluntary interviews.” In the office, we have come to view most of them as fishing expeditions.

...

On a daily basis, our clients are targeted by FBI agents inquiring into the most intimate and protected areas of their lives. They are approached at night at their homes, stopped in front of their neighbors or children, solicited outside their subway stops or interrogated at their workplaces in front of their colleagues and customers.²⁰

The issue of racial/ethnic and, in this case, religious profiling at times overlaps with the recent concerns regarding mass surveillance. Of course, racial/ethnic profiling has taken place in many different decades, under a variety of circumstances. It is quite often an abusive, unnecessary, and often ineffective practice. As Professor Cole put it,

[A]s the Japanese internment of World War II illustrated, it is perilous to predicate suspicion on ethnic identity even with respect to persons associated with a specific country on which we have declared war. It is another matter entirely to apply such treatment to citizens from a wide range of Arab countries, most of which are fighting on our side in the war on terrorism.²¹

Nevertheless, there are many reports of vastly increased profiling and surveillance based on race and religion.²² An article in the Chronicle of Higher Education addresses the extreme concentration of many forms of investigation/surveillance on Muslims, noting the disturbing fact

²⁰ Diala Shamas, *Where's the Outrage When the FBI Targets Muslims*, THE NATION (October 31, 2013). Available at <http://www.thenation.com/article/176911/wheres-outrage-when-fbi-targets-muslims#> (last accessed March 28, 2014).

²¹ Cole at 958.

²² One article noted,

On January 27, 2003, FBI field supervisors were ordered to count the number of mosques and Muslims in their areas, and use this information to establish a yardstick for the number of terrorism investigations they would carry out. In 2008, FBI guidelines were further revised to permit agents to use ethnicity and religion as a factor (as long as it was not the only one) in opening investigations and infiltrating groups ... Agents were also given the green light to recruit informers without identifying themselves.

Targets of the Surveillance System: Muslims, PRIVACY SOS. Available at <https://privacysos.org/targets> (last accessed March 28, 2014.)

of many Americans' approval of such targeted investigations so long as they were not targeted at them.²³

This is despite studies indicating that racial profiling is not effective. As an ACLU report points out:

We now have incontrovertible proof that racial profiling does not, in fact, give the police a 'leg up' in fighting crime. The premise upon which it is based – that certain ethnic minorities are more likely than whites to be in violation of the law – is simply wrong. Studies consistently show that "hit rates" – the discovery of contraband or evidence of other illegal conduct – among minorities stopped and searched by the police are lower than "hit rates" for whites who are stopped and searched.²⁴

²³ The CHRONICLE's author noted:

These broad fears have infected Americans once again as the American public has repeatedly sanctioned the curtailment of rights, particularly the rights of Muslims after September 11, 2001. According to a CBS News poll last week, while Americans surveyed voiced opposition to mass surveillance of the "average" person, an extraordinary 78 percent of responders said they had no problem with using NSA surveillance techniques against 'possible terrorists' (no definition provided) even if they were American.

Indeed, the immense controversy and political chatter that is still going on seems a bit hypocritical. After revelations came out of the New York City Police Department's intrusive surveillance of Muslims—including undercover surveillance of mosques, community centers, online chat rooms, restaurants, and Muslim Student Associations— 58 percent of New Yorkers found no problem with that. As of 2011, the FBI had 15,000 informants, mostly aimed at the Muslim community, and 45,000 "unofficial" ones providing extensive information on Muslim-American life and association. Informants are regularly instructed by their FBI or NYPD handlers to listen and probe for anti-American sentiments. And that is done under the cover of the law. In 2003, the Department of Justice issued guidelines outlawing racial profiling—made a blanket exception for 'national security' and 'border integrity'; the Obama administration has continued that exception. Faced with extensive revelations of the wide-reaching surveillance of Muslims, the American public has stood by; content that the Obama administration is doing what is necessary for 'our national security.'

Jeanne Theoharis, *Who is the Target of NSA Surveillance?*, THE CHRONICLE OF HIGHER EDUCATION (June 17, 2013). Available at <http://chronicle.com/blogs/conversation/2013/06/17/we-need-to-ask-who-is-the-target-of-nsa-surveillance/> (last accessed March 27, 2014).

²⁴ ACLU, *Sanctioned Bias: Racial Profiling Since 9/11*, 2 (February 2004). As Barbara A. Markham, a police officer in Texas since 1983 said,

Racial profiling is utilized when you have no intelligence and you're just casting a wide net and having to use a process of elimination out of that wide net. Racial profiling is a lazy method for law enforcement. You're not using investigative leads; you're not using any investigative skill, all you're doing is casting a wide net against one group, one segment of society, and that's what we call 'going fishing,' and you're going to come up empty-handed. The better way is to simply investigate terrorism by behaviors exhibited by specific individuals. It's not the color of one's skin or their ethnicity that should indict them or bring them under police scrutiny. It should be their behaviors or actions – what they do.

Id. at 8.

In the specific context of community policing, law Professor Sahar Aziz, who participated in the Commission's briefing, has written that

[C]ommunity policing in counterterrorism as currently envisioned betrays its rhetoric of empowerment and mutual trust, and serves as another weapon in the federal government's toolkit that perpetuates the "Terrorist Other" stereotype. Until this stereotype can be stripped away from "hard on terror" preventive counterterrorism strategies, the benefits gained in the traditional local community policing model of the 1990s are unlikely to be realized.²⁵

Contrary to the situation in traditional community policing, in the post-September 11th environment,

Muslim communities engage with federal law enforcement to dissuade them from spying on their mosques and social gatherings, targeting their vulnerable youth in informant-led terrorist plots, prosecuting their charities for giving humanitarian aid to conflict zones, and adopting invidious counterterrorism tactics that destroy community bonds. And as they beseech their government to respect their civil liberties, Muslims must also seek the protection of law enforcement against private acts of violence and discrimination. For many Muslims, the government may come across as more a foe than a friend.²⁶

At the same time that an agency like the FBI is supposed to be protecting Arab and Muslim Americans from hate crimes, it is also investigating these same communities for potential terrorist threats. This conflicting duality has never been adequately addressed by the Bureau. . Panelist Sahar Aziz had strong feelings about this, stating,

[T]he federal government and any participant local and state entity should not use community engagement meetings in furtherance of investigative and prosecutorial objectives, but rather to develop trust and constructive relations with their constituents towards the common goal of protecting individual rights and public safety for all Americans.

Unfortunately, recent news reports prompt serious concerns that some government engagement meetings are pretexts for gathering intelligence, conducting investigations, and eventually pursuing prosecution of

²⁵ Sahar F. Aziz, *Policing Terrorists in the Community*, 5 HVNSJ 147, 149 (internal citations omitted). Aziz set out three critiques of community policy in counterterrorism:

(1) it is more akin to counter-radicalization taken from military counterinsurgency strategy than the partnership-based, traditional community policing model; (2) to the collective detriment of Muslim communities, it divides them into "Good Muslims" willing to cooperate with law enforcement on the federal government's terms and "Bad Muslims" who demand a meaningful quid pro quo that ensures protection of Muslim communities' civil rights and liberties; and (3) it deputizes Muslim leaders to gather and share seemingly innocuous information about their communities that may be used against their collective interests as part of the predominantly federal prosecution-driven counterterrorism regime.

Id. at 147-148 (internal citations omitted).

²⁶ *Id.* at 150-51 (internal citations omitted).

meeting attendees or their families and associates, as opposed to good faith efforts to build relationships between government and constituents.²⁷

As I said at the briefing,

[I]t comes to the question posed by a Roman poet, actually about 1,500 years ago, which is, “Who watches the watchers?” And, when it comes to the FBI, when it comes to the CIA ... how do your departments deal with the fact that what you are doing is consistently and constantly undermined by public perception about other programs going on that seem to be completely counter to what it is that you’re trying to do.²⁸

Central Intelligence Agency

By its charter, the CIA is prohibited from engaging in domestic spying. Nevertheless, there were reports at the time of the briefing that alleged that the CIA was working with the New York Police Department, which raised concerns. When I specifically asked Professor Aziz to share her reaction to the ratings provided by the first panel, and the question of the appropriateness of potential CIA involvement with the New York Police Department surveillance efforts, she responded, “ ... well, with regard to the CIA, I facially do not find that comforting at all.”²⁹

Panelist Zogby also voiced an opinion, stating,

All we know about the CIA involvement is what we read in the Associated Press accounts which have been rather extensive, and is obviously very disturbing. And, the fine line of having an agent on leave working with the Department and then later on assuming a role with the Department and then being replaced by or

²⁷ U.S. Commission on Civil Rights Briefing, *The Federal Civil Rights Engagement with Arab and Muslim American Communities Post 9/11* (Nov. 9, 2012), Briefing Transcript at 81. She later went on to observe, that “we want to tell the government to stop persecuting us, to stop targeting us, to stop spying on us at our mosques in our community centers, and schools, et cetera. In other words, we’re engaging with the government to protect ourselves from the government, which is highly paradoxical and very sad in many ways.” *Id.* at 123.

²⁸ *Id.* at 170.

²⁹ *Id.* at 132. She continued,

I think without having researched, having been an expert in intelligence law, domestic intelligence law, I think that when someone tells me the CIA is working with the NYPD, I think of Co-Intel Pro and I think of some dark days in the 1960s and `70s, and it concerns me that we are regressing back to a state of affairs that will ultimately harm a significant number of Americans, because it sets a very high precedent and puts us backwards. So, I think it warrants investigations, meaningful investigations, not just kind of rhetorical ones, but somebody needs to at least get to the bottom of whether this is even legal, and even if it is, is it good public policy, because it will spread. It’s just a matter of time. We’ve seen it happen before. I don’t know why we think it won’t happen again, so I do feel very uncomfortable with that.

Id. at 132-133.

complemented by another CIA agent coming to set up this domestic surveillance program seems to me to be well beyond the scope of what the Central Intelligence Agency ought to be doing.³⁰

A year later, documents emerged showing that the CIA Inspector General had found that up to four CIA personnel had been embedded in the NYPD in the decade following 9/11. The Inspector General found that “risks associated with the Agency’s relationship with the N.Y.P.D. were not fully considered and that there was inadequate direction and control by the agency managers responsible for the relationship.”³¹

III. Mass Detention

One subject area that did not receive proper attention at the briefing has only been disclosed at the margins in the media and in post 9-11 literature. It is, however, an area that is of particular concern to me. According to law professor David Cole,

Perhaps the most troubling feature of the government’s response to the attacks of September 11 has been its campaign of mass preventative detention. The actual number detained is a mystery, because in early in November 2001, when the number was 1147, the government responded to growing criticism of the number of persons it was detaining by halting its practice of issuing a running tally.³²

Since that time, the number of people detained has not been known. One law review article notes that the Justice Department “disappeared and detained thousands of non-citizens, many of them permanent residents, holding them indefinitely without charge and interrogating them without access to counsel.”³³ The article states:

We do know that the Justice Department ultimately incarcerated over 5000 individuals allegedly suspected of terrorism, and that while only a handful were charged with terrorism-related offenses, hundreds were subsequently deported. Like the Japanese American internment, this program indefinitely detained a large number of persons in the name of “national security,” while investigating the equivalent of their “loyalty.” The criteria for arrest were never specified, but it appears that immigration status, country of origin, and religious or political association played a primary role in the selection of detainees.³⁴

³⁰ *Id.* at 66-67.

³¹ Charlie Savage, *C.I.A. Report Finds Concerns With Ties to New York Police*, NYT (June 26, 2013). Available at http://www.nytimes.com/2013/06/27/nyregion/cia-sees-concerns-on-ties-to-new-york-police.html?pagewanted=all&_r=0 (last accessed July 20 2014).

³² David Cole, *Enemy Aliens*, GEORGETOWN UNIVERSITY LAW CENTER 2002 WORKING PAPER IN BUSINESS, ECONOMICS, AND REGULATORY LAW, 960, Working Paper No. 320114 (internal citations omitted).

³³ Natsu Taylor Saito, *Internments, Then and Now: Constitutional Accountability in Post-9/11 America*, 72 DUKE FORUM FOR LAW & SOCIAL CHANGE 71, 76-77 (2009).

³⁴ *Id.* The article further notes that

[i]n February 2003, Howard Coble, head of the House Subcommittee on Terrorism and Domestic Security, said that the decision to intern Japanese Americans during World War II

One extremely troubling practice related to the detention process was the use of “special registration.”³⁵ This process applied to citizens and nationals of Iran, Iraq, Libya, Sudan, Syria, Afghanistan, Algeria, Bahrain, Eritrea, Lebanon, Morocco, North Korea, Oman, Qatar, Somalia, Tunisia, United Arab Emirates, Yemen, Pakistan, Saudi Arabia, Jordan, Kuwait, Bangladesh, Egypt, and Indonesia.³⁶ According to the Department of Homeland Security, “deportation orders were issued for 13,434 of the roughly 83,000 men who underwent call-in registration, based on visa irregularities.”³⁷ Despite its profound negative impact on thousands of families, the special registration program “did not lead to a single charge of terrorism.”³⁸

Notably, detention continues to be a serious issue over a decade after the 9/11 attacks. One South Asian organization observed in 2011,

Immigration and Customs Enforcement (ICE released enforcement statistics that over 363, people were detained during FY 2010 (Oct. 09- Sep. 10). This is twice the number of people detained in 2006 and about seven times the number of people detained in 1994. The U.S. has the largest immigration detention infrastructure in the world and with ICE’s current plan to expand the number of facilities and their nationwide implementation of the deportation program, Secure Communities, it will continue to grow.³⁹

had been appropriate. Coble denied supporting mass incarceration of Arab Americans, yet said that some Japanese Americans “probably were intent on doing harm to us, just as some of these Arab-Americans are probably intent on doing harm to us.”

Id. at 77.

³⁵ “Special registration” is the term often used for the National Security Entry-Exit Registration System (NSEERS), which “required male nonimmigrant aliens over the age of sixteen who are citizens and nationals from select countries to be interviewed under oath, fingerprinted, and photographed by an Immigration and Naturalization Service (INS) official.” Katharina Motyl, “No Longer a Promised Land – The Arab and Muslim Experience in the U.S. after 9/11,” 27 *REAL – YEARBOOK OF RESEARCH IN ENGLISH AND AMERICAN LITERATURE*, 217, 219 (2011).

³⁶ *Id.* at 220. The NSEERS program was publicized in a manner “reminiscent of the notices announcing the rounding up of Japanese Americans in the Western states during World War II.” *Id.* As this article notes, “[w]hat unites the countries subjected to registration, in fact, is that they are Muslim-majority countries ...special registration ‘reinscribed, through a legal mechanism, the cultural assumption that a terrorist is foreign-born, an alien in the United States, and a Muslim, and that all Muslim men who fit this profile are potential terrorists.’” *Id.* at 221 (citing Moustafa Bayoumi, “Racing Religion,” *CR: THE NEW CENTENNIAL REVIEW* 6.2 (2006) at 275).

³⁷ *Id.*

³⁸ *Id.*

³⁹ Silky Shah, *A Decade of Detention: The Post 9/11 Immigrant Dragnet*, *ISSUE 37: 9/11 A DECADE LATER*, SOUTH ASIAN MAGAZINE FOR ACTION AND REFLECTION (9/11/2011). Available at <http://samarmagazine.org/archive/articles/376> (last accessed July 16, 2014). This article further observed that

Over the last two decades a paradigm shift has taken place. Immigration law, once a set of civil administrative rules to regulate population flow – has become part of the enforcement apparatus of a government that functions increasingly as a police state. The politics of fear have changed the whole nature of the immigration system. Detaining people because of their

As a result of such massive detention, “[t]he docket of the Court of Appeals for the District of Columbia continues to be filled with cases filed by detainees challenging detentions that, in some cases, are entering a second decade.”⁴⁰

One important ongoing case is the Second Circuit class action *Turkmen v. Ashcroft*⁴¹ (the cross-appeal was heard in May 2014 and a decision is expected this year), alleging that plaintiffs, Muslim, South Asian, and Arab men, had their First, Fourth, and Fifth Amendment rights violated, and were

kept in solitary confinement with the lights on all day; placed under a communications blackout so they could not seek the assistance of their attorneys, families, and friends; subjected to physical and verbal abuse; forced to endure inhumane conditions of confinement; and obstructed in their efforts to practice their religion.⁴²

Three Japanese Americans who had close family members wrongfully detained as “enemy aliens” during World War II (including Karen Korematsu, the daughter of the late Fred T. Korematsu), have fought on behalf of the plaintiffs, including joining in an amicus brief.⁴³

immigration status is a relatively new practice in the U.S., only about 30 years old. And although the substance of immigration policies hasn’t changed much in the last 15 years, their implementation has. The White House and much of the media would like us to believe that the ever growing detention and deportation statistics reflect problems within immigrant communities – that people who are detained and deported are all undocumented and have crossed over the border to commit serious crimes, and that they therefore deserve to be wrenched from their families and communities, imprisoned in abuse-ridden jails without a single hearing, and eventually (often after months or years behind bars) expelled from the country. The truth, however, is not that immigrants are increasingly lawless, but that the methods of enforcing the law are becoming harsher and more arbitrary with every passing year.

Id.

⁴⁰ Oona Hathaway, *The Power to Detain: Detention of Terrorism Suspects After 9/11*, 38 YALE LAW SCHOOL LEGAL SCHOLARSHIP REPOSITORY 123, 124 (2013). As this article discusses, the key statutory authority for counterterrorism detention is the Authorization for Use of Military Force of 2001 (2001 AUMF), which “authorizes the President to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.” *Id.* at 125, *citing* Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

⁴¹ 589 F.3d 542 (2009).

⁴² <http://ccr.justice.org/Turkmen-v-Ashcroft> (last accessed July 14, 2014).

⁴³ The brief, filed after the June 2006 ruling that “the government had wide latitude to detain noncitizens indefinitely on the basis of race, religion, or national origin,” remarked that that ruling “‘painfully resurrects the long-discredited legal theory’ used to put their grandparents behind barbed wire,” and that their interest was “avoiding the repetition

In 2013, U.S. District Judge John Gleeson dismissed all claims against DOJ defendants Ashcroft, Mueller and Ziglar. He allowed claims based on conditions of confinement and unlawful strip searches to proceed against the Metropolitan Detention Center defendants.⁴⁴

The issue of mass detention points out the deficiencies of the briefing process, and the potential pitfalls of making findings and recommendations in the wake of such deficiencies. As the record shows, I only reluctantly voted in favor of the findings and recommendations as a potential “bridge” transition to what I believe would be a more accurate and less prone to obsolescence report highlighting the major issues and questions to be answered by policymakers in the Administration and Congress.

of a tragic episode in American history.” Nina Bernstein, *Relatives of Interned Japanese-Americans Side With Muslims*, NYT (April 3, 2007) Available at http://www.nytimes.com/2007/04/03/nyregion/03detain.html?pagewanted=all&_r=0 (last accessed July 15, 2014).

⁴⁴ *Turkmen v. Ashcroft*, 1:02-cv-02307-JG-SMG, Memorandum and Order (Jan. 15, 2013). The judge notes that the plaintiffs

were deemed to be potential terrorists despite the fact that they had been arrested based on immigration violations, not on suspicion of terrorist activity; they were subject to a hold-until cleared policy, under which they were held for lengthy periods of times – often for months after they were ordered removed from the country – until the FBI affirmatively cleared them of suspicion of wrongdoing; and they were held until their release in extremely restrictive conditions of confinement.

Id. at 5.

The judge also wrote that “[t]he harsh confinement policy was expressly directed at Arab and Muslim noncitizens who had violated immigration laws: it mandated restrictive conditions specifically for Arab and Muslim individuals. In other words, it was discriminatory on its face.” *Id.* at 6. Further, he described the conditions as follows:

[T]hey were confined in tiny cells for over 23 hours a day, provided with meager and barely edible food, and prohibited from moving around the unit, using the telephone freely, using the commissary, accessing the MDC handbooks (which explained how to file complaints about mistreatment), and keeping any property, including personal hygiene items like toilet paper and soap, in their cells.

Id. at 7.

Additionally, he stated that MDC officers

interfered with the Detainees’ ability to practice and observe their Muslim faith. Specifically, when the Detainees requested copies of the Koran, officers delayed for weeks or months before providing them; the MDC and the Passaic Jail failed to provide food that conformed to the Halal diet, despite the Detainees’ requests for such food; the MDC had no clock visible to the MDC detainees, and officers regularly refused to tell them the time of day or the date so they could conform to daily Islam prayer requirements and observe Ramadan; and officers constantly interrupted the Detainees’ prayers by banging on their cell doors, yelling and making noise, screaming derogatory anti-Muslim comments, videotaping them, dandling out hygiene supplies, and/or telling them to “shut the fuck up” while they were trying to pray. *Id.* at 9.

The issue of potential mass detention in the Arab and Muslim American communities post 9/11 is serious and substantial. At a time when the Korematsu case still stands in U.S. constitutional jurisprudence, the need for further exploration of this issue is incredibly important. For the Administration, which inherited a policy from the previous Administration and has yet to change it, there are serious explanations and justifications that need to be heard. For the Congress, its lack of any serious oversight on this issue should be remedied at the earliest opportunity.

For several generations of Japanese Americans – the Nisei, and their children – the memories and wounds created by the internment during World War II still remain. The parallels between the two events – Pearl Harbor and the 9/11 attacks – and the subsequent justification for mass detentions have changed little in nearly half a century. Regardless of whether the present detainees are citizens, immigrants, or visitors on visa status, no ethnic or religious group should be imprisoned, isolated, or interned simply by virtue of their birth or upbringing.

IV. Mass Surveillance

While surveillance was addressed at the briefing, there have been additional, quite jarring developments since that time.⁴⁵ The NSA surveillance technology has raised concerns from many Americans of all races and religions, and at times has specifically caused fear and unease on the part of Arab and Muslim Americans.⁴⁶

⁴⁵ Regarding more recent reporting,

When news broke earlier this month [June 2013] of the NSA's vast, intrusive surveillance programs, U.S. citizens had the uncomfortable experience of suddenly feeling like suspects.

Even for the majority of Americans who say they approve of the program, it was hard not to rack your brain for things you had said in a phone call or email that might have caught the government's attention.

But that feeling was nothing new for Arabs, Muslims, South Asians and other groups who have been subject to surveillance and prejudice since 9/11.

Arab and Muslim communities react to NSA surveillance leak, THE SEATTLE GLOBALIST (June 25, 2013). Available at <http://www.seattleglobalist.com/2013/06/25/arab-and-muslim-nsa-surveillance-leak/14225> (last accessed March 27, 2014).

⁴⁶ As one reporter pointed out:

[W]hat if your name is Ahmed, Jihad, Anwar or Abdulrahman? Fatima, Rania, Rasha or Shaima? What if some of your phone calls – which the NSA is tracking with particular interest – are made to loved ones in Pakistan, Yemen, Iraq, Syria, Iran, Lebanon, or Palestine? What if the language you speak on these phone calls is not English, but Arabic, Urdu, or Farsi, not because it is a special jihadist code, but because it is your native language that you still speak in your home.

In other words, what if you are one of America's 1.9 million Arab-Americans or 2.8 million Muslim-Americans?

In the Council on American-Islamic Relations (CAIR) report, “How NSA Spying Impacts Muslim Communities and Cultivates Islamophobia,” CAIR Staff Attorney Gadeir Abbass said, “I agree wholeheartedly that the fear of Islam, the fear of Muslims, is a notion I think has been cultivated by policy choices at the federal level.”⁴⁷

Of course, for all Americans of any race or religion, there are ethical and legal concerns regarding the intense surveillance conducted in recent years. As mentioned in my statement’s introduction, the President’s Review Group on Intelligence and Communication Technologies observed that, in addition to national security,

the idea of security refers to a quite different and equally fundamental value, captured in the Fourth Amendment to the United States Constitution: ‘The right of the people to be *secure* in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.’⁴⁸

The report continued by noting that this protection “is indispensable to the protection of security, properly conceived,” noting that “[i]n a free society, one that is genuinely committed to self-government, people are secure in the sense that they need not fear their conversations and activities are being watched, monitored, interrogated, or scrutinized.”⁴⁹

In this report, the President’s Review Group recommended a series of significant reforms. They felt that “the current storage by the government of bulk meta-data creates potential risks to public trust, personal privacy, and civil liberty,”⁵⁰ and that “there is no sufficient justification for allowing the government itself to collect and store bulk telephony data.”⁵¹

Anna Lekas Miller, *If your name is Ahmed or Fatima, you live in fear of NSA surveillance*, THE GUARDIAN (June 19, 2013). Available at <http://www.theguardian.com/commentisfree/2013/jun/19/nsa-surveillance-muslim-arab-americans> (last accessed May 22, 2014).

⁴⁷ Rania Khalek, *How NSA Spying Impacts Muslim Communities and Cultivates Islamophobia*, (Jan. 27, 2014) Available at <https://www.cair.com/press-center/cair-in-the-news/12344-how-nsa-spying-impacts-muslim-communities-and-cultivates-islamophobia.html> (last accessed March 27, 2014). Abbas also observed in the same report that “[o]ne of the key points that Muslims have been making for years now is that the spying and the surveillance that was disproportionately affecting the Muslim community would inevitably come to affect others outside the Muslim community. And as the Snowden revelations made crystal clear, that’s exactly what is happening now.” *Id.*

⁴⁸ President’s Review Group Report, p. 44 (emphasis added in Report).

⁴⁹ *Id.*

⁵⁰ *Id.* at 17.

⁵¹ *Id.* at 119. Other details of the Report include recommending “concrete steps to promote transparency and accountability, and thus to promote public trust, which is essential in this domain.” *Id.* at 18.

On January 17, 2014, President Obama gave a statement and issued a Directive outlining the changes he would like seen to the manner in which the government collects and uses telephone data, “acknowledging that high-tech surveillance poses a threat to civil liberties.”⁵² Changes included requiring “prior court approval each time an agency analyst wants access to calling records, except in emergencies.”⁵³ He also said that he “would ultimately move that data out of the hands of the government.”⁵⁴

On May 22, 2014, the House passed an NSA surveillance reform bill, the first “aimed specifically at curbing US surveillance abuses” revealed in the press.”⁵⁵ However, some last minute changes made to the USA Freedom Act were described as weakening key language, thus watering down protections.⁵⁶ The bill, H.R. 3361, continued to receive growing criticism as recently as the end of June of this year. The Center for Democracy and Technology noted that [c]oncerns over these changes were so strong that the bill lost support of a broad coalition of civil society advocates, many of America’s biggest tech companies, and half of the bill’s co-sponsors.”⁵⁷

Revelations and serious areas of concern regarding technological surveillance continue to grow.⁵⁸ Extremely troubling surveillance information came to light in early July of this year.

⁵² Mark Landler and Charlie Savage, *Obama Outlines Calibrated Curbs on Phone Spying*, NYT (Jan. 17, 2014).

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ Dan Roberts and Karen McVeigh, *NSA surveillance reform bill passes house by 303 votes to 121*, THE GUARDIAN (May 22, 2014). Available at <http://www.theguardian.com/world/2014/may/22/nsa-reform-bill-usa-freedom-act-passes-house> (last accessed May 22, 2014).

⁵⁶ Some critics of the changes, as they were negotiated over the last few days prior to the vote, warned “that the revisions, including changes to what sort of government data searches would be permitted, could provide loopholes that would allow massive data collection to continue.” Lisa Mascaro, *White House’s late changes to NSA spying bill shake support*, L.A. TIMES (May 21, 2014). Available at <http://www.latimes.com/nation/politics/la-na-nsa-reforms-legislation-20140522-story.html> (last accessed May 22, 2014).

⁵⁷ Jake Laperruque, *Key Changes Needed to The USA FREEDOM ACT*, CENTER FOR DEMOCRACY & TECHNOLOGY, Available at <https://cdt.org/blog/key-changes-needed-to-the-usa-freedom-act-h-r-3361/> (last accessed July 10, 2014). This article specifically listed key problems with the revised definition of “Specific Selection Term” (under the original bill, the government is required to base demands for records on a “specific selection term” when seeking information under Section 215 of the PATRIOT ACT) as being excessively ambiguous, potentially facilitating mass collection, having loopholes in new terms, and resulting in inefficiency of FISC disclosures.

⁵⁸ On a personal note, I would like to state that notwithstanding the role that Edward Snowden played in these revelations, as the son of a career U.S. Foreign Service Officer I do not condone, nor applaud, the revelations by Mr. Snowden of our foreign intelligence methodologies, as compared to the documents he stole showing the extent of our domestic surveillance. I believe – and this is my opinion only – that the revelations of our foreign surveillance

First, following an extensive study of NSA-intercepted data, the Washington Post found that “[o]rdinary Internet users, Americans and non-Americans alike, far outnumber legally targeted foreigners in the communications intercepted by the National Security Agency from U.S. digital networks.”⁵⁹ Of great concern, many of the surveillance files

described as useless by the analysts but nonetheless retained, have startlingly intimate, even voyeuristic quality. They tell stories of love and heartbreak, illicit sexual liaisons, mental-health crises, political and religious conversions, financial anxieties and disappointed hopes.^{60, 61}

has caused and will continue to cause irreparable harm to our intelligence gathering abilities from nations, organizations, and foreign nationals who wish to do our nation harm.

⁵⁹ Barton Gellman, Julie Tate, and Ashkan Soltani, *In NSA-intercepted data, those not targeted far outnumber the foreigners who are*, WASH. POST (July 5, 2014). Available at http://www.washingtonpost.com/world/national-security/in-nsa-intercepted-data-those-not-targeted-far-outnumber-the-foreigners-who-are/2014/07/05/8139adf8-045a-11e4-8572-4b1b969b6322_story.html (last accessed July 10, 2014). In fact, “[n]ine out of 10 account holders found in a large cache of intercepted conversations, which former NSA contractor Edward Snowden provided in full to the Post, were not the intended surveillance targets but were caught in a net the agency had cast for somebody else.” *Id.*

⁶⁰ *Id.* The POST’s investigation further revealed that these files included “medical records sent from one family member to another, resumes from job hunters and academic transcripts of schoolchildren. In one photo, a young girl in religious dress beams at a camera outside a mosque.” Additionally, “[s]cores of pictures show infants and toddlers in bathtubs, on swings, sprawled on their backs and kissed by their mothers.” *Id.*

⁶¹ Of course concerns of Americans regarding mass surveillance has led to litigation. One example is *Jewel v. NSA*, a case filed in 2008 “aimed at ending the NSA’s dragnet of ordinary Americans and holding accountable the government officials who illegally authorized it.” *Jewel v. NSA*, NSA SPYING ON AMERICANS, ELECTRONIC FRONTIER FOUNDATION. Available at <https://www.eff.org/cases/jewel> (last accessed July 18, 2014). Claims involved allegations of violations of constitutional rights “through unauthorized surveillance of their telephone and internet activity by the [NSA].” United States Courts, Case Summary, *Jewel v. NSA*, 08-cv-04373 (N.D. California). Available at <http://www.uscourts.gov/Multimedia/Cameras/NorthernDistrictofCalifornia/08-cv-04373.aspx> (last accessed July 18, 2013). In 2011, the Ninth Circuit Court of Appeals decided that “Jewel’s claims are not abstract, generalized grievances and instead meet the constitutional standing requirement of concrete injury,” and the court did “not impose, as suggested by the government, a heightened standing requirement simply because the case involves government officials in the national security context.” *Jewel v. National Security Agency*, 673 F.3d 902, 905 (2011). In July 2013, the U.S. District Court, N.D. California, rejected the government’s argument regarding state secrets, and ruled that “any properly classified details can be litigated under the procedures of the Foreign Intelligence Surveillance Act (FISA).” *Jewel v. NSA*, ELECTRONIC FRONTIER FOUNDATION. See 965 F.Supp. 2d 1090 (2013). Among others, First Amendment and Fourth Amendment claims continue. Another case to watch is *First Unitarian Church of Los Angeles v. NSA*, 3:2013 cv03287 (N.D. CA filed July 16, 2013). According to representatives in the matter, the Electronic Frontier Foundation, “Twenty-two organizations including Unitarian Church Groups, gun ownership advocates, and a broad coalition of membership and political activity organizations filed suit against the National Security Agency for violating their First Amendment right of association by illegally collecting their call records.” *First Unitarian Church of Los Angeles v. NSA*, NSA SPYING ON AMERICANS, ELECTRONIC FRONTIER FOUNDATION. Available at <https://www.eff.org/cases/first-unitarian-church-los-angeles-v-nsa> (last accessed July 18, 2014).

Of significant relevance to the subject matter of this briefing, but which occurred subsequent to the briefing, was a posting on the website “The Intercept.” On July 9, 2014, that site posted an article, “Meet the Muslim-American Leaders the FBI and NSA have been Spying On,” noting that both agencies “have covertly monitored the emails of prominent Muslim-Americans – including a political candidate and several civil rights activists, academics, and lawyers – under secretive procedures intended to target terrorists and foreign spies.”⁶² Among the five Muslim-Americans monitored were "Faisal Gill, a longtime Republican Party operative and one-time candidate for public office who held a top-secret security clearance and served in the Department of Homeland Security under President Bush" and "Nihad Awad, the executive director of the Council on American-Islamic Relations (CAIR), the largest Muslim civil rights organization in the country."⁶³

I am especially outraged by the surveillance on Mr. Awad. In preparation for the briefing, I and my staff had several lengthy conversations with staff at CAIR, including at least one personal conversation between myself and Mr. Awad. The mere thought that any of these conversations might have been the subject of an NSA eavesdrop is both chilling and infuriating, given that we were involved in constitutionally protected discussions regarding constitutionally protected rights.

Clearly the Commission will need to continue following these developing aspects of surveillance tactics, and, regarding this briefing report, persist in considering how Arab and Muslim Americans may be particularly affected.

V. COLLATERAL DAMAGE – THE UNINTENDED CONSEQUENCES OF MISGUIDED POLICIES

When a community feels threatened, imperiled, or disrespected by its government, there can be consequences. One such consequence which may be felt is the recruitment of Arabic speakers for the CIA, which has engaged in unprecedented public advertising to fill its ranks post 9-11.⁶⁴

⁶² <https://firstlook.org/theintercept/article/2014/07/09/under-surveillance/> (last accessed July 10, 2014).

⁶³ *Id.* In analyzing the potential lack of propriety of this monitoring, the article observed that

Under current law, the NSA may directly target a 'U.S. person' (an American citizen or legal permanent resident) for electronic surveillance only with a warrant approved by the Foreign Intelligence Surveillance Court. Because the FISC operates in complete secrecy ... it is impossible to assess how the court applies the standard of 'probable cause' in cases of suspected terrorism or espionage. But its rulings are notoriously one-sided: In its 35-year history, the court has approved 35,434 government requests for surveillance, while rejecting only 12. *Id.*

⁶⁴ <http://www.cnn.com/2011/US/05/18/cia.hiring.diversity/>.

There have been, and continue to be, questions of whether a community should work for a government that does not trust that community.⁶⁵

And while there are no facts or figures available, policymakers who are able should inquire about the efficacy of recruitment in the wake of the mistrust created by government policies.⁶⁶

CONCLUSION

There has been some good work by parts of the federal government and by dedicated non-profits and state and local organizations to improve the treatment of Arab and Muslim Americans and eliminate violations of their civil rights. However, there remain some serious shortcomings, and the complex set of issues involving – among others – safety, security, privacy, racial and ethnic stereotyping, and invasive investigations, will continue to require monitoring and aggressive and new approaches to improvement.

The government cannot continue to be schizophrenic in its treatment of our Arab and Muslim American brethren. On the one hand, it should and must be lauded for the statement by our public officials in the faith and patriotism of the community. On the other, the lack of transparency and forthrightness by its agencies – in particular, the FBI and the CIA – can and has created an aura of mistrust and cynicism in many parts of the Arab and Muslim American communities.

My father and his family were imprisoned in the Arizona desert for nearly three years because of their ethnicity. They and 120,000 other Japanese Americans endured privation that should never again be visited upon any community in our nation. Notwithstanding the colossal bravery and the ultimate sacrifice of many Japanese Americans who volunteered to serve their country while their relatives remained incarcerated at home, for years after the war, the stigma and racism perpetuated by the government affected their lives.

While we can never forget the Americans who lost their lives on September 11, 2001, we must also remember that it was not Americans who committed these heinous crimes. Regardless of what the attackers looked like, or what language they spoke, or what god they worshipped, their ideology was rooted in hatred for the United States. It bore and bears no relation or resemblance to Arab and Muslim Americans who are part of the fabric of our great American society.

⁶⁵ <http://articles.latimes.com/2011/sep/24/nation/la-na-cia-recruit-20110925>.

⁶⁶ This mistrust may also extend internationally as well. Given how well-publicized some of the issues related to the Arab and Muslim American communities have been, it may well be worth inquiring whether it has affected recruitment of foreign intelligence assets in the Middle East.

We owe it to our fallen that we continue to protect our nation against all enemies, foreign and domestic. But we also owe to them that we do so while protecting the civil rights and civil liberties that are the hallmark of this great country in which they lived.

Rebuttal of Commissioner Gail Heriot

I applaud the federal government's efforts to engage the many and varied Muslim communities in the United States and hope those efforts will continue. I therefore agree with portions of this report and its accompanying Key Issues and Questions and Findings and Recommendations. At the same time, I am not sure that the Commission has adequately thought through the many difficult issues in this area. For example, I question whether it is wise to use a "transparent" process to edit counterterrorism training materials, as Recommendation 4 suggests. I therefore chose to abstain from voting on it because I could not comfortably vote yes on the entire package.⁶⁷ I have had much the same response to the drafts of commissioners' statements presented to me. Alas, I don't think the Commission has an adequate record before it to allow us to give helpful advice on particular issues like the "No Fly" list that Chairman Castro mentions in his statement.⁶⁸

⁶⁷ See U.S. Commission on Civil Rights, Transcript of June 20, 2014 Business Meeting at 26.

⁶⁸ Draft Statement at 3.

PANELISTS' WRITTEN STATEMENTS

Zainab al-Suwaij, Executive Director, American Islamic Congress

Written Testimony Before the United States Commission on Civil Rights, November 9, 2012

To Chairman Castro, Vice Chairwoman Thernstrom, and Commission Members:

Thank you for the opportunity to submit this statement on behalf of the American Islamic Congress (AIC) on the importance of engagement of the Arab and Muslim American Communities.

As a Muslim and Arab who is an American citizen by choice, it is an honor to be invited to speak before you today. I grew up in Iraq under a dictatorship that denied basic civil rights and promoted ethnic and religious discrimination. In 1991 I joined an uprising against that dictatorship and experienced a brutal crackdown. After I had to flee my home, I came to America, drawn by our country's commitment to religious freedom and individual rights.

After the September 11 attacks, I co-founded the American Islamic Congress, a civil rights organization promoting tolerance and the exchange of ideas among all peoples. We are funded domestically, engage a broad cross-section of the American Muslim community, and promote inter-faith engagement with all religions.

The values driving AIC's work are embodied in our vision statement: "American Muslims must champion pluralism and condemn all forms of intolerance; we must be ambassadors who recognize and celebrate diversity, work to actively participate in the democratic process, and embrace civic engagement."

Based on my 11 years conducting community engagement and interfaith outreach, I want to provide insights on how to conduct the best engagement of the American Muslim community.

First, let us consider the challenges:

- (1) The U.S. government has taken important steps to build bridges with the American Muslim community. Yet, despite these efforts, some American Muslims still find themselves pulled off planes; are reluctant to report civil rights and labor violations; and endure stereotyping and profiling. The U.S. government's messaging at times inadvertently feeds this environment. For example, the U.S. Department of Justice developed a special training program meant to de-mystify the Sikh population for federal agencies. One key message was to distinguish Sikhs from Muslims. While an important diversity training tool, the materials fed a narrative that fosters a bias against Muslims by seeming to suggest: 'Don't mistake Sikhs – who are fine - for Muslims, who might be bad.'

- (2) U.S. government sensitivity training released in the past year regarding Muslims often presents an essentialized image of the community. Materials suggest that all Muslims pray five times a day, wear hijab, and conduct their prayers in one manner. Yet no two Muslims are the same, and our community is hardly homogeneous. American Muslims' diversity is not only ignored but also poorly prepares government officials to engage effectively with Muslim communities and individuals.
- (3) The essentializing of Muslims also extends to related ethnic outreach. Consider the title of this briefing. Why is the qualifier of "Arab" used when only 18 percent of the American Muslim community is Arab? We are 25 percent African American, 30 percent South Asian, and so on – including large populations of Persians, Bosnians, Turks, West Africans, and beyond. Yet engaging the Muslim community is all too associated with outreach to Arabs.

The overall problem is that U.S. government outreach and messaging is often simplistic. Because it essentializes who Muslims are – and who speaks for the American Muslim community – the approach actually harms meaningful engagement.

Let me suggest several concrete steps to develop inclusive engagement with many segments of the American Muslim community:

- (1) U.S. government policy must be driven by a common narrative – shared by all agencies – that recognizes the enormous diversity of the American Muslim community. This policy should emphasize that Muslims come from many backgrounds and have many different kinds of religious practice – including people who are not religious at all.
- (2) Because of this enormous diversity, U.S. officials must understand that Muslims do not comprise one single, unified community. Outreaching primarily to imams and mosques, for instance, is not sufficient for real dialogue. Federal officials should be encouraged to seek out a broad range of Muslim communities and leaders to engage. This includes artists, entrepreneurs, and leaders of ethnic communities. It also means engaging the many Muslim minority communities flourishing in America, including the Bohra, Ismailis, and Ahmadiyya.
- (3) The development of sensitivity training materials for U.S. agencies should be done in consultation with a broad range of American Muslims. It is not enough to allow one or two token Muslims to be consulted in the development of training materials. An integrated team with various Muslim viewpoints must be engaged – and the materials produced should underline and celebrate Muslim diversity.
- (4) U.S. government agencies should prioritize recruiting American Muslims – including a broad range of American Muslims.

- (5) This commission should continue to monitor civil rights discrimination against American Muslims, including discrimination driven by simplistic assumptions of who American Muslims are and how they express their identity.

I should note that my organization is not waiting for U.S. officials to make these changes. We are pro-actively trying to educate government officials by inviting them to AIC events that showcase Muslim diversity. Let me share with you one vignette.

AIC runs a cultural center in Boston, which hosted a multicultural iftar (break-fast) during Ramadan this past August. The center's hall was filled with Muslims of all kinds of backgrounds: Bosnians, South Asians, West Africans, Syrians, and beyond. Some women wore hijab, many did not. All kinds of food was served. Representatives from federal law enforcement agencies were in attendance. One official expressed his shock at what he saw, telling our staff: "After this I have to re-evaluate all the notions I have accumulated over the years about the existence of 'a' Muslim community."

I am glad that through AIC's work U.S. officials are beginning to see beyond stereotypes and simplistic assumptions about American Muslims. It is important that this commission do its part. I urge you to ensure U.S. agencies significantly reform their policies and training materials related to understanding and engaging with American Muslims.

We at the American Islamic Congress, and our many community partners, are eager to see progress and ready to assist this process. By working together, we can effectively address institutionalized discrimination and stereo-typing – even when driven by good intentions.

Dr. James J. Zogby, President, Arab American Institute

Relations Between Arab Americans and Law Enforcement Agencies Before and After 9/11

The story of Arab Americans coming of age as an organized community is a classic American tale of immigrants seeking opportunity, benefiting from America's freedoms, but also experiencing, at times, the dark side of exclusion and discrimination that has so often been a part of our nation's history.

During the period that preceded 9/11, law enforcement agencies not only failed to assist Arab Americans in their efforts to secure their rights; oftentimes these agencies were the problem. From FOIA releases and discoveries from law suits, we have learned of the extent of government harassment of Arab Americans and Arab student activists—from Operation Boulder in the Nixon era, and the broad surveillance program against Palestinian student organizations in the 70's and 80's, to the extensive intelligence files on Arab American activists maintained by the FBI sometimes in collaboration with outside groups, that were then used to harass and blacklist members of my community.

At the same time that these violations of rights were occurring, little was being done to defend the rights of Arab Americans. I, for example, had been subjected to repeated death threats from the early 1970's. My office here in Washington, DC, was fire-bombed in 1980. And the offices of another group I had co-founded were targeted in a spate of attacks in the mid-1980's. One of these attacks resulted in the murder of my friend Alex Odeh in October of 1985. During this entire time, there was not a single indictment, not a single arrest. I remember going to the FBI in early 1980's with over one hundred affidavits from Arab Americans complaining of harassment by law enforcement officials and twelve other affidavits reporting threats (including a few from Alex). I asked them "why was so much effort being expended to harass my community while so little was being done to defend our rights?"

In fact, the insensitive and questionable behavior of law enforcement agencies was so problematic, that it was one of the main reasons we formed the American Arab Anti-Discrimination Committee. It was the FBI's ABSCAM initiative that pushed former US Senator James Abourezk to ask me to join him in forming the ADC, a group we established to combat negative stereotypes and defamation, and to fight discrimination and harassment by law enforcement agencies.

With the Clinton Administration, my community's access to the White House improved, as did official responsiveness to our concerns. For example, in the 1990's, we experienced problems with wide-spread subjective airport profiling and the use of "secret evidence" and we felt the need to challenge these practices and build better ties with law enforcement agencies around the country. It was Vice President Al Gore, Attorney General Janet Reno, Deputy Attorney General Eric Holder and Assistant Attorney General for Civil Rights Bill Lan Lee who brought us in for a series of meetings that helped us work through and resolve many of these critical issues. To

facilitate these conversations, Deputy AG Holder and Assistant AG Bill Lan Lee initiated the first formal outreach effort to Arab Americans by the DOJ.

If it had not been for the advances we made, the access we gained, the empowerment we experienced and the allies we developed during the 1990's, I do not think we would have been able to withstand the challenges we faced in the aftermath of 9/11.

The horrific terrorist attacks of September 11 were a profound and painful tragedy for all Americans. The attacks were a dual tragedy for Arab Americans. We are Americans and it was our country that was attacked. Arab Americans died in the attacks. Arab Americans were also part of the rescue effort. Dozens of New York City Police and rescue workers who bravely toiled at Ground Zero were Arab American.

Sadly, however, many Arab Americans were torn away from mourning with our fellow Americans because we became the targets of hate crimes and discrimination. Some assumed our collective guilt because the terrorists were Arabs. Arab Americans and Muslims and others perceived to be Arab and Muslim were the victims of hundreds of incidents of bias.

But something very important happened, making it clear that despite the enormity of the crime that had been committed and new challenges we would face, a new dynamic was at work. The American people rallied to our defense.

President Bush spoke out forcefully against hate crimes, as did countless others across the nation. Both the Senate and the House of Representatives unanimously passed resolutions condemning hate crimes against Arab Americans and Muslims. Federal, state and local law enforcement investigated and prosecuted hate crimes, and ordinary citizens defended and protected us, refusing to allow bigots to define America. My family and I received death threats. That had happened before. But for the first time, the perpetrators were arrested by the FBI, prosecuted by the DOJ, and convicted and sentenced for hate crimes. It was a first—a first I shall never forget. My community and I, personally, will always be grateful that our fellow Americans defended us during that difficult time.

Arab Americans were proud to have played a crucial role in the post-9/11 era, serving on the front lines of the effort to keep our country and people secure. We served as police, firefighters, soldiers, FBI agents, and translators. My office worked with federal, state and local law enforcement to assist efforts to protect the homeland. We also helped to recruit Arab Americans with needed language skills and served as a bridge to connect law enforcement with our community.

Working with the Washington Field Office of the FBI, we helped to create the first Arab American Advisory Committee, an effort to facilitate communication between the Arab American community and the FBI. I served as a member of that FBI Advisory Committee, which

we believed could be a model to be copied across the United States (only to learn, more recently, that the FBI has used these efforts to engage in intelligence gathering).

The Civil Rights Division at the Department of Justice, at our request, began an important effort to continue the interagency information-sharing and problem-solving conversations we had begun during the Clinton years. Under then Assistant Attorney General for Civil Rights Ralph Boyd's leadership, the Civil Rights Division convened regular sessions for Arab American and American Muslim leaders with relevant DOJ offices, the FBI and other concerned agencies. These meetings played an important role in providing our community leadership with the opportunity to address and resolve the pressing problems that emerged in the aftermath of 9/11. [They have continued in the Obama Administration under the leadership of Assistant Attorney General for Civil Rights Tom Perez.]

But all was not well during the Bush Administration.

At the same time that these positive developments were occurring, an entirely different message was being sent as a result of initiatives launched by then Attorney General John Ashcroft. Of special concern were the 2003 Racial Profiling Guidelines that created a loophole allowing ethnic, religious, and racial profiling, and leading to wide-spread singling out of Arabs and Muslims by Customs and Border Patrol, TSA, and FBI officials.

These Ashcroft-era guidelines were enlarged upon in 2008 by Attorney General Mukasey, whose new guidelines for the FBI opened the door to even greater abuses. These are, of course, deeply troubling because as law enforcement profiles Arabs and Muslims and as officials carry out practices and issue statements conflating Arab and Muslim immigrants and visitors with terrorism, a cloud of suspicion is cast over the entire community which only contributes to increasing discrimination.

This problem of profiling, and the dangerous conflation of immigration policy and national security policy, took many forms in the post-9/11 era. In the immediate aftermath of the terror attacks there was a roundup of over 1,200 Arab and Muslim immigrants. They were imprisoned and deported. This was followed by two highly publicized "call-ups" of 5,000 and then 3,000 young male Arab immigrants and visitors. Finally there was the NSEERS program, a badly conceived, poorly planned and arbitrarily implemented program that resulted in the issuance of thousands of deportation orders – oftentimes without justification. Add to this the "October Plan" launched in the lead up to the 2004 election. Not only did officials once again profile Arab and Muslim immigrant communities, but the way the program was announced and implemented had a chilling effect on the participation of some Arab Americans in the electoral process itself. The net result of all these programs has been to create fear and to break trust with the recent immigrant Arab community.

As disturbing as these behaviors are, even more troubling is the fact that these profiling initiatives have made no contribution to making our country more secure. FBI and other officials

with whom I have spoken question the usefulness of these programs in national security efforts. They told me that these initiatives have involved a significant waste of time and resources, have produced little useful information, and have damaged community outreach efforts, alienating communities whose cooperation law enforcement needs. As such, they run counter to basic principles of community policing, which rejects the use of racial and ethnic profiling and focuses instead on building trust and respect by working cooperatively with community members. These profiling programs also threatened to erase many of the gains Arab Americans had won during the Clinton years.

With the election of Barack Obama, we had hopes that we would see an end to many of these abusive practices, but this has not been the case. Policies we had believed would change have not changed – in some cases they have become worse. The Justice Department profiling guidelines remain in place and continue to be used by a number of agencies to the detriment of my community. I recently returned from a visit to Michigan where, in discussions with partner organizations, I was briefed on the behavior of U.S. Customs and Border Patrol officials. I have spoken with Arab American citizens who told me about disgraceful and humiliating treatment they experienced crossing our border with Canada. In some cases the behavior has been so disturbing that Arab Americans have forfeited business opportunities or stopped visiting family members out of fear of dealing with USCBP.

We had hoped to see a sunset of the more controversial provisions of the Patriot Act. This, too, did not happen. We are also deeply disturbed as we have learned details of the NYPD/CIA surveillance program – a shocking violation of our community’s rights. As the details of this NYPD program have come to light, we have been horrified by its use of coerced informants, wide-spread “ethnic mapping”, and spying and reporting on innocent people going about their daily routines. This program has reminded us of the behavior of the “mukhabarrat” – the hated secret police that operate in some Arab dictatorships. That the White House has apparently given its approval and even provided funding for this NYPD effort is even more distressing.

We have been troubled by reports we have received from the ACLU establishing that the FBI has used the community outreach programs to “collect and illegally store intelligence information on Americans’ political and religious beliefs” - a clear violation of trust. And finally, we are deeply disappointed by the Justice Department and FBI’s failure to take decisive action in dealing with the scandal over the FBI’s use of bigoted anti-Arab and anti-Muslim training materials. We have asked for greater transparency and full disclosure in explaining how these materials were developed in the first place and how many agents have been trained with them. We have also offered to assist in crafting new training materials and we have asked the FBI to apologize. Our argument is that “educational programs” or “cultural proficiency training” should not be shrouded in secrecy. It is not about “methods and sources.” It is about educating agents about our community’s history, culture, and religions. For the DOJ and the FBI to not understand the damage they have done, the hurt they have created, and the trust they have broken, is incomprehensible.

Here is the problem: there can be no doubt that during the past several decades we have made gains and developed relationships with agencies of government that are important to our personal security and the security of the country we love. In all of this, the work of the DOJ's Civil Rights Division remains a shelter in the storm. And we remain forever indebted to those FBI agents and civil rights attorneys at DOJ who have investigated and then prosecuted hate crimes against us and have worked with us to ensure our safety. And finally, there are a number of US Attorneys who have developed relationships of trust and support with many communities around the country.

But the negative practices I have noted here threaten to undercut this good will and break trust between my community and law enforcement agencies. These behaviors create fear in my community and create suspicion about us in the broader society. This, in turn, leads to alienation and has the potential to radicalize some. It also leads to an atmosphere where hate and suspicion can grow – further marginalizing some in my community, while making others more vulnerable to hate crimes.

I have long argued that Arabs and Muslims were the weak link in America's civil liberty chain. When the rights of vulnerable minority groups are threatened, we recognize the need to demand a halt to abuse, because we have learned that when the rights of any group are compromised, the rights of all are at risk. It is worrisome that in the post-9/11 era the challenge to constitutional rights has all too often been met with silence—because it was Arabs and Muslims who were the targets. What we have failed to recognize is that if the rights to assemble, to speak freely, to be secure from unwarranted search, and to be guaranteed due process are put at risk by the FBI, CBP, ICE, NYPD and CIA, then these rights may ultimately be threatened for all Americans.

Honorable Kenneth L. Marcus, President & General Counsel, The Louis D. Brandeis Center for Human Rights Under Law

Combating Anti-Muslim and Anti-Arab Hate and Bias

Chairman Castro, Vice Chairman Thornstrom, and Members of the Commission:

It is a pleasure to appear again before you today.¹ I have been asked to testify on the problem of anti-Muslim and anti-Arab discrimination in the United States. As the President of a Jewish civil rights organization, the Louis D. Brandeis Center for Human Rights Under Law, I am particularly pleased by this opportunity to speak out against these forms of invidious discrimination. The mission of the Louis D. Brandeis Center is to advance the civil and human rights of the Jewish people and promote justice for all.² We believe that the civil and human rights of the Jewish people are inextricably bound to the pursuit of justice for all peoples. The Louis D. Brandeis Center promotes justice for all as a means of securing the rights of the Jewish people and secures the rights of the Jewish people as a means of advancing justice for all. We welcome the opportunity to speak out against anti-Muslim and anti-Arab discrimination and to support the equal rights of all Americans. Since my own expertise is more focused on religious discrimination, most of my testimony will address anti-Muslim, especially in American prisons and schools, rather than anti-Arab discrimination. However, I will have a few words to say at the end of my testimony about anti-Arab stereotyping and discrimination against persons incorrectly perceived to be Muslim or Arab, such as members of the Sikh community.

The Commission and Religious Discrimination

At the outset, let me commend the Commission for its continuing attention to discrimination against religious minorities, especially in the last half dozen years.³ Three decades ago, this Commission pointedly entitled its first report on this subject, “Religious Discrimination: A Neglected Issue.”⁴ The Commission revisited this understudied topic six years ago, during my tenure as Staff Director, issuing the influential 2006 report on anti-Semitism in higher education,

¹ Prof. Dawinder S. Sidhu provided helpful comments and suggestions on this testimony, while Jack Shaheen and Amrita Singh shared useful information on anti-Arab stereotypes and anti-Sikh discrimination, respectively. Nevertheless, ultimate responsibility for this testimony remains with the author.

² See Louis D. Brandeis Center, *Mission and Values Statements*, <http://brandeiscenter.com/index.php?/about/mission>.

³ See Kenneth L. Marcus, *The Right Frontier for Civil Rights Reform*, 19 GEO. MASON U. CIV. RTS. L.J. 77, 78 & note 8 (2008) (noting the prominence of religious freedom in the Commission’s recent agenda).

⁴ U.S. COMM’N ON CIV. RTS., RELIGIOUS DISCRIMINATION: A NEGLECTED ISSUE (1979).

Campus Anti-Semitism.⁵ The following year, the Commission turned to anti-Catholic discrimination in the briefing which led to its report on School Choice: The Blaine Amendments & Anti-Catholicism⁶ In 2008, the Commission returned again to the topic of religious discrimination, devoting its 2008 statutory report to the problem of religious freedom in penal institutions.⁷ In 2010, the Commission considered discrimination against Muslims and Arabs in its briefing report on Domestic Wiretapping in the War on Terror.⁸ Just last year, I was pleased to testify before the Commission at its briefing on bullying in the public schools, which included an important component on bullying of religious minorities.⁹ Today, it is proper that the Commission build upon this distinguished history, focusing on anti-Muslim and anti-Arab discrimination.

Context and Perspective

As a preliminary matter, it may be helpful to place the problem of anti-Muslim discrimination in proper context and perspective. Too often civil rights dialogues alternate between the extremes of denial and alarmism. This is true of contemporary discussions of virtually every form of discrimination. In each case, this amounts to polarized conversations in which participants present one-sided representations following into two categories. On the one side, advocates may overstate the nature or amount of discrimination, understate the effectiveness of enforcement efforts, or ignore countervailing considerations such as favorable public attitudes towards whatever minority group is in question. On the other side, skeptics may understate what advocates overstate, overstate what they understate, and ignore the converse set of countervailing considerations. I have written about this phenomenon in the context of anti-Semitism, but it is ubiquitous in the public conversation regarding virtually all forms of discrimination.¹⁰

⁵ U.S. COMM'N ON CIV. RTS., CAMPUS ANTI-SEMITISM (2006).

⁶ U.S. COMM'N ON CIV. RTS., SCHOOL CHOICE: THE BLAINE AMENDMENTS & ANTI-CATHOLICISM (2008).

⁷ U.S. COMM'N ON CIV. RTS., ENFORCING RELIGIOUS FREEDOM IN PRISON - 2008 STATUTORY REPORT (2008).

⁸ U.S. COMM'N ON CIV. RTS., DOMESTIC WIRETAPPING IN THE WAR ON TERROR (2010). The Commission's State Advisory Committees have also examined similar issues. *See, e.g.*, District of Columbia, Maryland, and Virginia Advisory Committees to the U.S. Commission on Civil Rights, CIVIL RIGHTS CONCERNS IN METROPOLITAN WASHINGTON, D.C., AREA IN THE AFTERMATH OF THE SEPTEMBER 11, 2001, TRAGEDIES (2003).

⁹ U.S. COMM'N ON CIV. RTS., PEER-TO-PEER VIOLENCE AND BULLYING: EXAMINING THE FEDERAL RESPONSE (2011).

¹⁰ Kenneth L. Marcus, *Title VI Debate Exaggerating On-Campus Anti-Semitism? Not as Big or Small a Problem as Sides Make It*, JEWISH WEEK (July 19, 2012), http://brandeiscenter.com/index.php?publications/research_opinion_full/title_vi_debate_exaggerating_on_campus_anti_semitism_not_as_big_or_small_a.

In the case of anti-Muslim discrimination, a similar pattern emerges. The skeptics should remember that in 2010 alone, the FBI reports that 160 documented American hate crimes were committed against Muslims.¹¹ This amounts to 13.2 percent of all religious motivated hate crimes in the United States. Moreover, these figures may understate actual incident rates for several reasons. For example, no agency can ever assume 100 percent reporting rates; some Muslims may be suspicious of federal law enforcement officials; and these figures address only specified hate crimes while excluding many serious hate and bias incidents that do not technically rise to the level of a hate crime. Any amount of hate crime is too much, and these figures should be considered entirely unacceptable, as well as reason for serious concern.

At the same time, advocates should remember that the federal government has developed numerous initiatives to address anti-Muslim and anti-Arab discrimination, including both outreach and enforcement initiatives. In addition, there have been numerous community efforts to mitigate discrimination or bias, such as social and civic engagement.¹² Moreover, the most recent figures for anti-Muslim discrimination, while serious and disturbing, fall considerably below the figures for some other groups. By way of comparison, the 2010 FBI Hate Crimes Statistics report 2,201 anti-black hate crimes and 739 hate crimes directed against gay males. In the religion category, anti-Jewish hate crimes amounted to 887 incidents, which is more than five times the number of anti-Muslim incidents. While deeply dismaying, the volume of anti-Muslim incidents since September 11, 2001 have not reached the levels that some of us in the civil rights community had feared. A proper civil rights policy should aim to reduce these levels to zero for all groups, including Muslims.

Anti-Muslim Harassment in American Schools

Last year, I had the honor of testifying before this Commission regarding harassment of Muslim school children and other religious minorities.¹³ In that testimony, I described in some detail the serious harassment and bullying that many Muslim and Sikh children have faced in American schools since 9/11. By way of example, I described the incident in which a Muslim junior high school student reported being beaten until he bled at a Staten Island middle school. “They punched me,” the student reported, “They spit in my face. They tripped me on the floor. They

¹¹ FEDERAL BUREAU OF INVESTIGATION, HATE CRIMES STATISTICS 2010, <http://www.fbi.gov/about-us/cjis/ucr/hate-crime/2010/tables/table-1-incidents-offenses-victims-and-known-offenders-by-bias-motivation-2010.xls>.

¹² Dawinder S. Sidhu, Blog posting, “Oak Creek and the Future of Sikhs in America,” WASHINGTON POST GUEST VOICES BLOG, http://www.washingtonpost.com/blogs/guest-voices/post/oak-creek-and-the-future-of-sikhs-in-america/2012/10/02/0c21c1f8-0cdc-11e2-bd1a-b868e65d57eb_blog.html (October 2, 2012).

¹³ Kenneth L. Marcus, “Religious Harassment in the Public Schools,” Testimony before U.S. Commission on Civil Rights (May 13, 2011), <http://jewishresearch.org/PDFs/usccr-bullying-testimony.pdf>.

kicked me with their feet and punched me.... And as they were kicking and laughing, they kept saying, ‘You f___ing terrorist, f___Muslim, you f___ing terrorist.’¹⁴ This young man reported being kicked so hard in the groin that he bled in his urine. In another Staten Island incident, students allegedly yanked a 13-year-old Muslim girl’s head scarf and beat her. “They just attacked me,” the girl reportedly charged, “They called me ‘terrorist.’ They called me ‘Muslim.’ I’m afraid they might come back and beat me again.”¹⁵

Since then, the Commission has issued an important report regarding anti-Muslim bullying, Peer-to-Peer Violence and Bullying: Examining the Federal Response (the “Bullying” report).¹⁶ The Bullying report describes the unacceptable levels of harassment which Muslim and Sikh students face in public schools, both in the text of the report and in its findings. In the Bullying report, the Commission described, *inter alia*, the harassment that Muslim and Sikh students face in many public schools, including these examples. In addition, the Commission described the troubling lacunae in federal civil rights law which I had brought to its attention:

Although [the U.S. Department of Education (“ED”)] enforces Title VI [of the Civil Rights Act of 1964] with respect to harassment of members of religious groups based on their shared ancestry or ethnic characteristics, Title VI itself leaves a hole in ED’s enforcement. That is, Title VI does not protect against harassment of students based solely on their religious faith, nor does it protect against harassment of students who belong to religious groups that do not have shared ancestry or ethnic characteristics.¹⁷

The Commission pointed out, quite correctly, that “[a]s a result, ED cannot protect students from the ‘peculiar harms created by religious bigotry.’ Furthermore, under current law, religious groups with shared ancestry or ethnic characteristics receive certain protections that religious groups without shared ancestry or ethnic characteristics do not receive, and would-be discriminators can evade Title VI liability by claiming that [their actions are] based solely on religious bigotry.”¹⁸ In order to address this problem, I argued that Congress should pass

¹⁴ Ikimulisa Livingston and Leonard Greene, *Terrorized for being a Muslim*, N.Y. Post (Oct. 12, 2010) http://www.nypost.com/p/news/local/staten_island/terrorized_for_being_muslim_8rQSU8Z5ibbMOeJnDGFOrO#ixzz1Kw0Zei1A.

¹⁵ Edgar Sandoval, Matthew Lysiak and Rich Shapiro, *Girl attacked for wearing a veil says 11-year-old bullied, beat her for months with another student*, N.Y. Daily News (Mar. 31, 2011), http://articles.nydailynews.com/2011-03-31/news/29386377_1_hate-crime-charges-muslim-girl-head-scarf.

¹⁶ U.S. COMM’N ON CIV. RTS., PEER-TO-PEER VIOLENCE AND BULLYING: EXAMINING THE FEDERAL RESPONSE (2011).

¹⁷ *Id.*, p. 59 (citing Marcus testimony).

¹⁸ *Id.* at 59-60 (citing and quoting Marcus testimony).

legislation to prohibit religious harassment in federally funded educational programs and activities.

The Commission made some important recommendations regarding federal civil rights enforcement in this area, but it has not yet adopted any recommendations which would fix these problems which the Commission has recognized. Now would be an appropriate time for the Commission to complete the task that it began with that report by urging Congress to prohibit religious harassment in federally funded educational programs and activities. This proposed recommendation may be bolder than what the “Bullying” report recommends, but it is more limited than what Commissioner Achtenberg rightly argued, in her concurring statement, that the record before the Commission credibly supports: “Congress should enact, and the President should sign into law, an amendment Title VI of the Civil Rights Act of 1964 to prohibit discrimination on the basis of religion.”¹⁹

For several years, I argued that Congress should do precisely as Commissioner Achtenberg recommends, although I also advocated an exception for religious institutions.²⁰ Like most commentators, I believe that religiously affiliated educational institutions should be able to discriminate in favor of co-religionists in certain circumstances, such as hiring, promotions and admissions. The problem is that the scope of this exception remains controversial, and fears that it could become too broad or too narrow have long delayed passage of legislation that would bar religious discrimination in federally funded educational institutions. In addition, some commentators have worried about the extent of reasonable accommodations that would be required if Congress were to bar religious discrimination, and some have questioned whether an overly aggressive interpretation could lead to Establishment Clause problems.

In order to resolve this disagreement, many thoughtful advocates have urged a more modest version of religious freedom in education legislation. Specifically, they argue that Congress should merely bar religious *harassment*, rather than religious discrimination *per se*. The rationale for this more modest recommendation is that it would avoid arguments over either the scope of requisite reasonable accommodations or disputes over the extent to which religious institutions should be exempted from the general rule. Moreover, advocates generally agree that the most pressing form of religious discrimination facing religious minorities is harassment or bullying. This Commission would provide a considerable service if it supported this more modest version

¹⁹ *Id.* at 101, 126 (Statement of Commissioner Roberta Achtenberg).

²⁰ See, e.g., Kenneth L. Marcus, *Privileging and Protecting Schoolhouse Religion*, 37 J. OF LAW & ED. 505 (Oct. 2008); Kenneth L. Marcus, *The Most Important Right We Think We have but Don't: Freedom from Religious Discrimination in Education*, 7 NEVADA L. J. 171 (Fall 2006).

of the legislation which I discussed last year and which Commissioner Achtenberg recommended.

Unfortunately, the underlying problems have not abated, and Congress has not acted to address the relevant policy deficiencies. As the incoming Congress approaches the task of reauthorizing the Elementary and Secondary Education Act, it will be important for the Commission to make its voice heard as to how Muslim students, as well other religious minorities, can be more effectively protected. The Commission has already acknowledged the severity of the problem facing Muslim and other religious minority school children, and it has eloquently explained the reasons why new legislation is need. The obvious next step would be for the Commission to recommend legislation to prohibit religious harassment in federally assisted programs and activities.

Anti-Muslim Discrimination in American Prisons²¹

The Commission has also recently examined the problem of religious minorities, including Muslims, in American penal institutions.²² This is a serious topic worthy of further consideration. Prisoners' rights are an important and appropriate issue for the Commission, given the large percentage of complaints which the Commission receives from prisoners. This is a particularly salient issue for Muslims, given the disproportionate rate of Muslim incarceration.²³ Muslims constitute nearly a tenth of the American prison population, although they are only 0.6 percent of the general population.²⁴

The post 9/11 surge in Muslim prison population has stirred deep-seated fears and resentments, including the specter that the American prison system will become a breeding system for "radicalized Islam."²⁵ With these fears have come restraints on Muslim religious expression, as prison officials cite a need to maintain orderly prison administration and ensure homeland

²¹ This section draws heavily upon Kenneth L. Marcus, *Jailhouse Islamophobia: Anti-Muslim Discrimination in American Prisons*, 1 RACE & SOCIAL PROBLEMS 36-44 (March 2009).

²² U.S. COMM'N ON CIV. RTS., ENFORCING RELIGIOUS FREEDOM IN PRISON - 2008 STATUTORY REPORT (2008).

²³ It should be noted that these rates result in part from conversions undertaken by prisoners while under incarceration.

²⁴ *Id.*, p. 13, Table 2.1

²⁵ See, e.g., Colson 2002; Marks 2006, available at <http://www.csmonitor.com/2006/0920/p03s02-ussc.html> ("The radicalization and recruitment of terrorists present a threat of 'unknown magnitude,' according to national security experts.")

security.²⁶ This is a very complex issue involving legitimate questions of prison as well as homeland security together with civil rights challenges.

Recent anti-Muslim allegations have included, for example, refusal to honor *hallal* dietary restrictions, to allow prisoners to wear religious garb (such as the *keffiyeh* or *hijab*), or to obtain access to chapels or religious services; denial of Qur'ans and other religious materials; interference with observance of holidays such as *Ramadan*, *Eid-Ghadir*, and *Muharram*; and forced participation in Christian religious services. Such cases have increased sharply over the last few years.²⁷

Some experts argue that religious activity is “often barely tolerated and in some institutions even discouraged” in American prisons today.²⁸ Members of virtually all religions, including mainstream Christian denominations, have testified that they have been denied basic religious freedoms while under incarceration, including access to Bibles and religious services and programs.²⁹

Prison staff, fellow inmates, chaplains, and faith-based service providers have all been involved in perpetrating religious discrimination in prison. Prison chaplains report that religious services are often delayed, interrupted or cancelled for no apparent reason; and custodial staffs are perceived as dismissive or contemptuous of those who participate in religious self-improvement programs.³⁰ Correctional staff frequently distrust prison chaplains, questioning the motives of those who minister to people who have not conformed to social conventions.³¹ Further, some staff may consider it appropriate to punish prisoners, on an *ad hoc* basis, by denying them access

²⁶ See, e.g., A. Al-Amin, “Religious Discrimination and Prisoners’ Rights: A Muslim’s Point of View,” p. 2 (“Prison radicalization primarily occurs through anti-U.S. sermons provided by contract, volunteer, or staff imams...”).

²⁷ Kenneth L. Marcus, *Jailhouse Islamophobia: Anti-Muslim Discrimination in American Prisons*, 1 RACE & SOCIAL PROBLEMS 36-44 (March 2009).

²⁸ P. Nolan, Vice President of Prison Fellowship, “Religious Discrimination and Prisoners’ Rights,” testimony before U.S. Commission on Civil Rights, Br. on Religious Discrimination and Prisoners’ Rights, Feb. 8, 2008, at 2, 3-5.

²⁹ *Id.* at 2.

³⁰ Al-Amin 2008.

³¹ C. Atkins, Warden, Maryland Correctional Institution—Jessup, “Prison Security and Compliance with Religious Land Use Institutionalized Persons Act and the Religious Freedom Restoration Act,” testimony before U.S. Commission on Civil Rights, Br. on Religious Discrimination and Prisoners’ Rights, Feb. 8. at 1.

to religious worship.³² Additionally, religious minority inmates may face persecution by other inmates; after all, prisons house neo-Nazis, “Christian Identity” supremacists, and others convicted of religiously motivated hate crimes.³³ Finally, faith-based service providers, servicing contracts with federal and state prisons, have provided various special material benefits to inmates of their faith that are denied to others,³⁴ and have disparaged prisoners of other faiths.³⁵ In some cases, discrimination may arise from an unconscious presumption in favor of mainstream Protestant religious practice³⁶ (which Chaplain Patrick M. McCollum calls the “Dominant Religion Lens Factor”)³⁷ or an explicit bias in favor of fundamentalist or evangelical programming.³⁸ As a consequence of these policies and behaviors, non-mainstream religions of all kinds report higher levels of religious animus.³⁹ This particularly includes Muslim inmates but also extends to institutionalized persons of other faiths.⁴⁰

While other minority religious prisoners face considerable discrimination, the situation facing Muslim prisoners is both larger and more complex. This is due to their substantial percentage of the prison population, concerns about Islamic radicalization in prison, and particular animosities held towards members of the Muslim faith.⁴¹ During the 2001-2006 period, Muslims brought the greatest number of prisoners’ religious discrimination claims under Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA). During that period, Muslims brought 62 out of

³² G. Friedman, Chairman, Jewish Prisoner Services International, “Religious Discrimination in U.S. Prison and Jails,” testimony before U.S. Commission on Civil Rights, Br. On Religious Discrimination and Prisoners’ Rights, Feb. 8. at 1.

³³ *Id.* at 1.

³⁴ *Americans United for Separation of Church & State v. Prison Fellowship Ministries*, 432 F. Supp. 862, (S.D. Iowa 2006), *aff’d in part and rev’d in part on other grounds*, 509 F.3d 406, 413-16, 424 (8th Cir. 2007); *Luchenitser* 2008 at 1, 4-6.

³⁵ *Id.* at 3-4; *Americans United*, 432 F. Supp.2d at 899, 900, 909-910; *Americans United*, 509 F.3d at 425.

³⁶ *Friedman* 2008 at 2.

³⁷ *McCollum* 2008, p. 3.

³⁸ *Friedman* 2008 at 2.

³⁹ *McCollum*, Rev. Patrick M. (2008). Director and Chair, National Correctional Chaplancy Directors Association and Statewide Wiccan Chaplain, California Department of Corrections, “Position Statement on Religious Discrimination in Prisons,” Testimony before U.S. Commission on Civil Rights, Br. On Religious Discrimination and Prisoners’ Rights, Feb. 8., p. 1-2 (“While practices differ from state to state, I have found discrimination against non-traditional religions everywhere.”)

⁴⁰ *Al-Amin* 2008 at 7.

⁴¹ For a general discussion of contemporary anti-Muslim attitudes, see Gottschalk, P., & Greenberg, G. *ISLAMOPHOBIA* (2008).

the 229 cases analyzed.⁴² This represents 27 percent of the cases, or roughly three times Muslims' share of the prison population.

Moreover, as a general rule, empirical research shows that Muslims are substantially less likely to prevail in religious freedom litigation than member of other religious groups.⁴³ This is especially true in prisoners' rights cases. This month, the Iowa Law Review is publishing new data which shows, based on a large sample of religious freedom cases from 1996-2005, a striking comparison of success rates for Muslims versus non-Muslims in both prison and non-prison cases, holding all other variables constant. This research shows that Muslims succeed before federal judges at a rate of 15.5 percent in prisoner cases and 17.9 percent in non-prison cases.⁴⁴ By contrast, non-Muslims succeed before federal judges at a rate of 44.8 percent in prison cases and 37.3 percent in non-prison case.⁴⁵ Therefore, a Muslim prisoner raising a Free Exercise or Accommodation claim has only about a third the chance for success as a non-Muslim prisoner, while Muslims raising claims outside a prison context succeed at a rate that is roughly half that of non-Muslim claimants.⁴⁶

Homeland Security Justifications

In many cases, prison authorities have justified restrictions on Muslim prisoners as a necessary means of ensuring not only prison safety but also homeland security. Their argument is that Muslim religious services may be used as a means of fostering Islamic radicalization. Prison radicalization is a phenomenon that has been defined as "the process by which inmates ... adopt extreme views, including beliefs that violent measures need to be taken for political or religious purposes."⁴⁷ It is a global phenomenon, encountered to a greater extent in Europe, the Middle East and Latin America than in the United States.⁴⁸ However, it is a particular source of concern the United States, with the world's largest prison population and highest incarceration rates, and an enormous challenge in the prospect that radicalized prisoners could become terrorists as a

⁴² U.S. Commission on Civil Rights 2008.

⁴³ Gregory C. Sisk and Michael Heise, *Muslims and Religious Liberty in the Era of 9/11: Empirical Evidence from the Federal Courts*, 98 IOWA L. REV. 231 (Nov. 2012).

⁴⁴ *Id.* at 237.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ The George Washington University Homeland Security Policy Institute and the University of Virginia Critical Incident Analysis Group, 2004.

⁴⁸ F. J. Cilluffo, Director, Homeland Security Policy Institute, The George Washington University, testimony before U.S. Commission on Civil Rights, Br. on Religious Discrimination and Prisoners' Rights, Feb. 8, 2008 pp. 3, 5.

result of their experiences under incarceration.⁴⁹ This concern has developed in response to numerous examples of terrorist incidents that were advanced in some measure by the radicalization of certain prison inmates.⁵⁰ As Abu Musab al-Zarqawi has said, “prison makes our fight stronger.”⁵¹

This phenomenon takes many forms, but observers have expressed concern with two particular variations: the so-called “Jailhouse Islam,” which incorporate violent prison culture into religious practice using a “cut-and-paste” version of the Qur’an and “Prislam,” in which prisoners join Islamic gangs for protection and convert out of necessity (see Hamm’s Chapter for details).⁵² Prisons are fertile environments for radicalization, since inmates exhibit high-risk characteristics such as unemployment and alienation, as well as psychological factors such as high levels of personal distress, cultural disillusionment, lack of intrinsic beliefs or values, dysfunctional families and dependent personality tendencies,⁵³ exacerbated by overcrowding and prisoners’ need for protection,⁵⁴ in an inherently violent environment.⁵⁵

Ironically, anti-Muslim discrimination in American prisons may exacerbate the problem of prison radicalization. For example, the inadequate number of legitimate Muslim religious providers may create an opportunity for extremists to fill the role of religious service providers.⁵⁶ As Frank Cilluffo has observed, increasing the availability of legitimate Muslim religious services may decrease the opportunities for prison radicalization.⁵⁷ Similarly, religious faith and practice can help to ameliorate the problem.⁵⁸

⁴⁹ *Id.*, p. 2.

⁵⁰ *See, e.g.*, The George Washington University Homeland Security Policy Institute and The University of Virginia Critical Incident Analysis Group, p. 3.

⁵¹ *Id.*, p. 1.

⁵² Cilluffo 2008 at 2.

⁵³ The George Washington University Homeland Security Policy Institute and The University of Virginia Critical Incident Analysis Group 2004, pp. 1, 4.

⁵⁴ Cilluffo 2008 at 1.

⁵⁵ The George Washington University Homeland Security Policy Institute and The University of Virginia Critical Incident Analysis Group, Special Report 2004, p. 4.

⁵⁶ Cilluffo 2008 at 4; The George Washington University Homeland Security Policy Institute and The University of Virginia Critical Incident Analysis Group 2004, p. 6.

⁵⁷ Cilluffo 2008, p. 4.

⁵⁸ *Id.*, p.6.

Religious Land Use and Institutionalized Persons Act of 2000

RLUIPA was enacted in part to address religious discrimination in the prison system, but it has not fully lived up to its promise.⁵⁹ Five years after its passage, in the case of *Cutter v. Wilkinson*,⁶⁰ the United States Supreme Court unanimously upheld RLUIPA against constitutional challenge. Despite this legislation, Muslim prisoners continue to report countless examples of discrimination in facilities around the country.⁶¹ While these reports may vary in veracity, they paint a picture which should be reason for concern.

Ironically, while Congress directed the courts to apply the most stringent form of judicial scrutiny to these cases, the courts continue to reject most claims. One reason is that, despite RLUIPA and *Cutter v. Wilkinson*, many courts are applying a diluted form of the applicable legal standard. Indeed, the “war on terror” has justified increasing deference to prison administration to the detriment of incarcerated Muslims.

Against this backdrop, RLUIPA appeared to represent a remarkable change.⁶² In 2000, responding to RFRA’s partial invalidation, Congress held a number of hearings, over a three-year period, to gather facts about the extent of religious discrimination across the country.⁶³ For example, Congress heard that in one Ohio prison officials refused to provide Muslims with Hallal food, although they provided Kosher food to Jewish inmates and that Qur’ans and other prayer books were frequently confiscated, damaged, or discarded.⁶⁴ In a joint statement, the bill’s sponsors, Senators Edward Kennedy and Orrin Hatch, concluded that “[w]hether from indifference, ignorance, bigotry, or lack of resources, some institutions restrict religious liberty in egregious and unnecessary ways.”⁶⁵

Congress passed RLUIPA to ensure that state and local prison inmates would provide the same stringent standard of review applied to federal prisoners under RFRA. Strikingly, both the Senate and the House of Representatives were unanimous in its passage.⁶⁶ RLUIPA prohibits federal

⁵⁹ 42 U.S.C. §§ 2000cc *et seq.*

⁶⁰ 544 U.S. 709 (2005).

⁶¹ *See, e.g.*, Al-Amin.

⁶² Derek Gaubatz, *RLUIPA at Four*, 28 HARV. J.L. & PUB. POL’Y 504 (2005).

⁶³ *Cutter*, 544 U.S. 709, 716 n.5 (2005); *see, generally*, Gaubatz 2005, p. 510.

⁶⁴ *Cutter*, 544 U.S. at 716 n.5.

⁶⁵ *Id.* at 716 (*quoting* 146 Cong. Rec. S7774, S7775) (joint statement of Sen. Hatch and Sen. Kennedy on RLUIPA).

⁶⁶ *See* S.2869, Bill Summary and Status for 106th Congress (2000), available at <http://thomas.loc.gov/cgi-bin/bdquery/z?d106:SN02869:222L&summ2:m&>; Gaubatz 2005, p. 504-505.

and state agencies from undertaking actions that impose a “substantial burden” on the religious exercise of an incarcerated person, even if the burden results from a rule of general applicability, unless the government can demonstrate that imposition of the burden furthers a “compelling governmental interest” and is the “least restrictive means” of furthering that interest.⁶⁷ While RLUIPA does not define such terms as “compelling governmental interest” or “least restrictive means,” the legislation clearly intends to reinstate the strict scrutiny test that prevailed, at least in theory, between *Sherbert* and *O’Lone/Smith*.

The Supreme Court unanimously affirmed RLUIPA against an Establishment Clause challenge in *Cutter v. Wilkinson*.⁶⁸ In *Cutter*, Ohio prison inmates sued the state’s department of corrections for failing to accommodate their religious exercise of non-mainstream religions (e.g., Satanist, Wicca, and Asatru religions, and the Church of Jesus Christ Christian).⁶⁹ Specifically, they alleged that prison officials retaliated and discriminated against them by denying them access to religious literature, denying them the same opportunities for group worship afforded to adherents of mainstream religions, forbidding them to adhere to religiously required codes of dress and conduct, withholding religious ceremonial objects, and failing to provide them with a chaplain trained in their faith.⁷⁰ In response, the prison officials contended that RLUIPA’s institutionalized persons provision improperly advances religion in violation of the Establishment Clause.⁷¹

Justice Ruth Bader Ginsburg wrote the unanimous opinion for the Court, affirming RLUIPA against this challenge, but doing so in a way that may undermine the statute’s effectiveness. The decision was initially received as a significant victory for religious freedom,⁷² but a closer look suggests that the victory was far from complete. While Justice Ginsburg reasoned that the statute alleviates “exceptional government-created burdens” on religious exercise,⁷³ she also emphasized, that the statute does not improperly elevate accommodation of religion over penal officers’ interest in maintaining order and safety.⁷⁴ In particular, Ginsburg indicated that

⁶⁷ 42 U.S.C. at § 2000cc-1(a).

⁶⁸ 544 U.S. 709 (2005).

⁶⁹ *Id.* at 712.

⁷⁰ *Id.* at 712-13.

⁷¹ *Id.* at 713.

⁷² Goldberg, p. 1404 (arguing that “[u]nder *Cutter*, religion has achieved a special status it has not enjoyed in years, and this result can only be explained by the Free Exercise Clause...religion has not only regained parity with free speech, it now receives greater protection in the prison setting.”).

⁷³ *Id.* at 720.

⁷⁴ *Id.* at 722.

lawmakers were mindful of the urgency of prison security, and that they anticipated that courts would apply RLUIPA with “due deference” to the “experience and expertise” of prison administrators in establishing rules to maintain order, security and discipline, consistent with budgetary considerations.⁷⁵ For this reason, Ginsburg stated that while “prison security is a compelling state interest,” nevertheless “deference is due to institutional officials’ expertise in this area.”⁷⁶

There is an unavoidable tension between Justice Ginsburg’s affirmance of RLUIPA’s strict scrutiny test – which is by definition the opposite of deferential – and her insistence that the courts should nevertheless apply it in a deferential manner. By having it both ways, as it were, Ginsburg may appear to strike a moderate compromise, but the result is an incoherent legal doctrine. Courts are directed to apply the strict scrutiny but to do so in a manner which is inconsistent with the requirements of that standard. Ironically, Ginsburg explicitly relies on an earlier opinion which has been criticized on particularly that basis. Citing the Supreme Court’s earlier decision in the University of Michigan affirmative action litigation, Ginsburg explains that “context matters” in the application of strict scrutiny, by which she means that different degrees of deference are required depending on the circumstances.⁷⁷ In that case, Justice Sandra Day O’Connor’s opinion, applying the same test in a deferential manner to the use of race-preferential affirmative action in university admission, was strongly criticized for undermining the standard of review.⁷⁸

Moreover, in relying upon the deferential language of Senators Kennedy and Hatch, Justice Ginsburg tacitly incorporated the very language that had created problems for prison inmates under RFRA: “the courts will continue the tradition of giving due deference to the experience and expertise of prison and jail administrators in establishing necessary regulations and procedures to maintain good order, security and discipline, consistent with consideration of costs and limited resources.”⁷⁹ Unfortunately, it is precisely this same language that RLUIPA’s co-sponsors repeated in their joint statement and which Justice Ginsburg approvingly quoted. Furthermore, Ginsburg failed to cite the following sentence in both the RFRA Senate Committee Report and the RLUIPA joint statement: “At the same time, however, inadequately formulated

⁷⁵ *Id.* at 723 (quoting Joint Statement 775, in turn quoting S. Rep. No. 103-111 at 10).

⁷⁶ *Cutter*, 544 U.S. at 725 n. 13.

⁷⁷ *Id.* at 723 (quoting *Grutter v. Bollinger*, 539 U.S. 306 (2003)).

⁷⁸ *Grutter*, 539 U.S. at 374-75 (Kennedy, J., dissenting).

⁷⁹ Senate Report 103-111 at 10 (1993); 146 *Cong. Rec.* S7775 (daily ed. July 27, 2000).

prison regulations and policies grounded on mere speculation, exaggerated fears, or post-hoc rationalizations will not suffice to meet the act's requirements."⁸⁰

Although some courts now give prisoners' religious freedom claims the "hard look" which RLUIPA and its strict scrutiny standard require, others do not.⁸¹ Despite the traditional requirements of strict scrutiny, some lower courts uphold substantial burdens on prisoners' religious rights based on considerations of mere administrative convenience or budgetary considerations; accept cursory assertions by prison officials rather than requiring convincing demonstration; forgive the absence of serious consideration, or any consideration, of less restrictive means of achieving governmental objectives; refuse to make institutional comparisons to determine whether other facilities have been able to extend religious accommodations without suffering adverse consequences; and tolerate wide inconsistencies among the treatment of prisoners.⁸² At least one court has acknowledged this problem with surprising candor:

Some courts, in examining prison regulations under RFRA and RLUIPA, have softened the compelling interest test to allow speculative administrative judgments concerning security and cost to suffice to allow the regulation to survive strict scrutiny ...It is also an approach that is dangerous for the protection of the constitutional rights of individuals outside of prison. Watering down strict scrutiny in a result-oriented manner in the prison context could subvert its rigor in other fields where it is applied.⁸³

Unfortunately, this has indeed been a consequence of the manner in which the Ginsburg opinion selectively incorporated the legislative record.

The Need for Change

In short, the *Cutter* court's strong reliance on legislative "deference" comments has undercut RLUIPA's facial insistence upon strict scrutiny, leading to weak, inconsistent opinions by the lower courts. Unfortunately, as long as the courts continue to apply diluted versions of the compelling interest standard, they will countenance improper, discriminatory conduct by prison officials. The degree of deference provided by many lower courts, with apparent congressional and Supreme Court approval, is inconsistent not only with the concept of strict scrutiny, but also with everything that we know about the conduct of prison officials in matters of religious free exercise. This failure to apply proper strict scrutiny standards amounts to a willful blindness by

⁸⁰ *Id.*

⁸¹ J.D. Nelson, Note, *Incarceration, Accommodation, and Strict Scrutiny*, 95 VA. L. REV. 2053 (2009).

⁸² See *id.*, pp. 2080-2092, and cases cited therein.

⁸³ *Madison v. Riter*, 240 F. Supp. 2d 566, 578 n.10 (W.D. Va. 2003), *overruled on other grounds* 355 F.3d 310 (4th Cir. 2003).

the courts to the documented discrimination, which Muslim inmates and other incarcerated persons continue to face.

A decade after Congress unanimously passed RLUIPA, incarcerated persons still face the same challenge that motivated the bill's sponsors to initiate the legislation. As Senators Orin Hatch and Ted Kennedy had jointly announced at the time: "[i]nstitutional residents' rights to practice their faith is at the mercy of those running the institutions."⁸⁴ The condition of Muslim prisoners is important, not only for obvious humanitarian reasons, but also because prisoners now represent more than one percent of the American population.⁸⁵ Moreover, when freedoms are denied incarcerated persons, they may soon be denied to others as well. In this sense, the increased deference afforded prison administrators under the war on terror has potential hidden civil liberties costs not only for incarcerated Muslims but also for the population at large.

Civil liberties aside, the failure of American courts and prison administrators to fulfill the promise of RLUIPA during the post-9/11 period may not be surprising, but it creates additional non-obvious risks for the general population. Ironically, the failure to accommodate mainstream Muslim religious practice in American prisons has negative ramifications for homeland security to the extent that it creates a vacuum within the prison system which radicals may then fill. In this sense, homeland security justifications for limiting Muslim religious practice tend to have the perverse effect of frustrating the very interests that they are intended to serve.

One way to effectively prevent anti-Muslim discrimination in American prisons is for courts to apply RLUIPA's liability standard as written, rather than by giving undue deference to prison officials in a manner that is inconsistent with the rigors of judicial strict scrutiny; for the Justice Department to aggressively enforce these cases; and for Congress to establish a process for administrative complaint resolution. Currently, processes exist for prisoners to raise complaints within their own prison systems and, if necessary, to seek Justice Department intervention. Given the rarity of Justice Department involvement, and the weakness of internal administrative reviews, Congress should provide for federal administrative review of prisoner complaints at federally assisted state and private prisons, just as such review is provided in the educational, health, employment and housing sectors.

Anti-Muslim and Anti-Arab Stereotypes in Popular Culture

Although my testimony primarily addresses anti-Muslim discrimination, I would remiss if I did not say at least a word about a disturbing related issue, which I believe to be within the scope of

⁸⁴ Joint Statement of Senators Hatch & Kennedy, 146 Cong. Rec. at S7775.

⁸⁵ The Pew Center on the States, ONE IN 100: BEHIND BARS IN AMERICA 2008, available at <http://www.pewcenteronthestates.org/uploadedFiles/One520in520100.pdf>.

this briefing: anti-Arab and anti-Muslim stereotypes in popular culture. This issue relates not to federal civil rights enforcement but to a form of bias which public officials might use their bully pulpit to address and to condemn. Since at least 1918, American movies have been ridden with negative images of Arab men and women.

As Jack Shaheen explains, “Despite the diversity of Arab and Muslim experience, reel Arab women have appeared mostly mute and submissive—belly dancers, bundles in black and beasts of burden. Arab men have fared no better, appearing as Bedouin bandits, sinister sheiks, comic buffoons and weapon-wielding terrorists.”⁸⁶ As a result, moviegoers tend to see Arabs primarily as oil producers or terrorists. In the Arab American community, this is sometimes called the “three B syndrome”: Arab Americans are portrayed in movies and television as either “bombers, belly dancers, or billionaires.”⁸⁷ Laila Lailami illustrates this point memorably in her “12-step guide to making a successful Arab-bashing movie,” which conveys a serious message beneath its tongue-in-check delivery:

Step 1: The villains must all have beards....

Step 2: They must all wear kaffiyehs, regardless of where they are from....

Step 3: Naturally, all the villains must speak broken English and be rude in their manner.

Step 4: They must all have easily recognizable names like Ali, Abdul or Mustapha.

Step 5: They should all smoke....

Step 6: Find a reason for them to have or steal nuclear weapons....

Step 7: Have them threaten to blow something up. Great care must be used in the threat scene. The danger must be clear and immediate.... In all cases, you must make it clear that the motive has to do with holy war.

Step 8: Have a prayer scene....

Step 9: If your movie is set in a plane, do not worry because you can still have the protagonists pray in the aisles.

⁸⁶ Jack Shaheen, *The Making of the ‘Green Menace’: From Reel Arab Bandits to Big-Screen Muslim Monsters: How the Media Have Stoked the Hate*, *THE NATION* (July 2/9, 2012).

⁸⁷ Mazin B. Qumsiyeh, *100 Years of Anti-Arab and Anti-Muslim Stereotyping*, *THE PRISM* (Jan. 1998), http://www.ibiblio.org/prism/jan98/anti_arab.html.

Step 10: Never, ever cast a woman as part of the group. But if you must, she should be entirely veiled in black; preferably, she should be mistreated by other Arabs....

Step 11: It is most useful to have the villains scream “Die, infidels” before the final confrontation.

Step 12: When all previous steps are completed, have your hero kick some Middle Eastern butt. Everyone will cheer and go home happy, and you can sit back and watch the money roll in.⁸⁸

While Dr. Lailami’s style is satirical, it conveys the extent to which anti-Arab and anti-Muslim stereotypes have become ingrained in Hollywood moviemaking conventions. Moreover, these stereotypes must be viewed in the context of the continuing discrimination and hate which is directed at Arab and Muslim Americans.

Arabs and Muslims are not, of course, the only groups that are portrayed negatively in movies or elsewhere in popular culture. However, the frequency and severity of these adverse stereotypes have reached the point where it may be salutary to remind both producers and audiences of the need for more realistic and balanced portrayals. Public officials should use the bully pulpit to remind popular culture’s producers and consumers of the variety of Arab and Muslim experience in the United States, as well as the hurtfulness and hollowness of the way in which these groups are often portrayed. Needless to say, governmental officials should not censor private speech in any manner cognizable to the First Amendment, nor to intimidate those who choose to misuse their constitutional rights in these ways. However, there is much room for public officials to address pernicious stereotypes without encroaching upon protected expression.

Discrimination Against Perceived Muslims

It is impossible to conduct a comprehensive review of post-9/11 discrimination or government engagement without considering the challenges facing the Sikh community. Last year, the Commission heard considerable testimony concerning anti-Sikh bullying and harassment in the public schools. The Commission’s Bullying report describes some of these serious incidents. The volume and severity of post-9/11 anti-Sikh discrimination provides yet another reason why the

⁸⁸ Laila Lailami, *Arab-Bashing for Fun and Profit*, L.A. Times (July 28, 1997), <http://articles.latimes.com/1997/jul/28/entertainment/ca-16983>.

government must address school house religious harassment.⁸⁹ Sikhs are subject to abuse in other venues as well, such as airports in particular.⁹⁰

In many cases, Sikhs apparently are targeted based on a misperception that they are Arabs or Muslims. In others, they may be persecuted based on their Sikh identity. A 2006 Harvard University survey of Sikh Americans revealed that 83 percent of respondents either personally experienced or knew someone who experienced a hate crime or incident on account of their religion. In light of the volume and severity of these incidents, federal post-9/11 outreach, policy and enforcement should always include Sikhs to the same extent as other groups.

Moreover, and equally importantly, federal statistics programs should include Sikhs (and also Arabs) as a separate category, in order to track and better understand the volume of these incidents. Two major national Sikh organizations (the Sikh American Legal Defense and Education Fund and the Sikh Coalition) have recently made this request:

We believe that the practice of enumerating vulnerable religious groups on the Hate Crime Incident Report (Form 1-699) makes it more likely that hate crime victims in such groups will report hate crimes to law enforcement agencies. We also believe that enumerating vulnerable religious groups on Form 1-699 strengthens efforts by law enforcement agencies to identify, learn about, foster partnerships with, and accurately prosecute hate crimes on behalf of the affected communities. These hypotheses are underscored by social research in the school bullying context, which suggests that enumerated anti-bullying policies are more effectively enforced than those which lack enumerated categories. By analogy, we believe that adding an Anti-Sikh category to Form 1-699 will enhance partnerships between law enforcement agencies and Sikh communities nationwide and increase hate crime reporting by Sikhs.

The FBI has the capacity to take a nuanced and granular approach to hate crime data collection. Nowhere is this more apparent than the agency's documentation of hate crimes against the LGBT community. Although it could be argued that hate crimes against bisexuals presumptively result from "anti-gay" bias and should be documented accordingly, the FBI—apparently on its own volition—has created a distinct category for crimes motivated by bias toward bisexuals on

⁸⁹ *See, generally*, THE SIKH COALITION, ET AL., BIAS-BASED HARASSMENT IN NEW YORK CITY PUBLIC SCHOOLS: A REPORT CARD ON THE DEPARTMENT OF EDUCATION'S IMPLEMENTATION OF CHANCELLOR'S REGULATION A-832 <http://www.sikhcoalition.org/documents/pdf/Bias-based-Harassment-in-NYC-Public-Schools.pdf> (2009).

⁹⁰ For other examples of post-9/11 discrimination against Sikhs in various contexts, *see* DAWINDER S. SIDHU AND NEHA SINGH GOHIL, CIVIL RIGHTS IN WARTIME: THE POST-9/11 SIKH EXPERIENCE (2009).

Form 1-699 and rightfully adopted a thorough approach to data collection about anti-LGBT hate crimes. We request the same for the Sikh community.⁹¹

In light of these powerful arguments, SALDEF and the Sikh Coalition have made the following two reasonable recommendations, *inter alia*, which the Civil Rights Commission should considering joining:

- (1) We request that the FBI create a distinct category for Anti-Sikh hate crimes on Form 1-699 for crimes motivated by bias toward Sikhs, as evidenced, for example, by epithets about the Sikh religion or articles of faith, or intentional targeting of Sikh places of worship or articles of faith.
- (2) We recommend that the FBI use the Anti-Multiple Religions, Group category on Form 1-699 to document crimes against Sikhs that would not have occurred but for the victim's conspicuous Sikh identity, but which are also marked by the presence of anti-Muslim bias. Under this approach, it is critically important that such entries be supplemented with disaggregated, published information about the bias motivations underlying each crime in the FBI's periodic hate crime statistics reports. As alternatives, the FBI can record such crimes by marking two categories—a new Anti-Sikh category and the existing Anti-Islamic (Muslim) category—or by creating a distinct Anti-Muslim (Sikh Victim) category. For data collection requiring this level of nuance, we believe that the FBI should have the flexibility to develop a workable solution, and we are committed to partnering with the FBI to ensure that the best solution is implemented.⁹²

These are very reasonable suggestions, and the Commission could play a very helpful role in advancing them.

Conclusion and Recommendations

Anti-Muslim and anti-Arab discrimination are a serious post-9/11 problem in the United States, and they warrant serious attention by federal civil rights authorities. The extent of the problem may not be as great as some had feared a decade ago, due in part to federal initiatives, but it certainly deserves focused efforts at elimination. In the schools, federal authorities will not be able to ensure effective protection of Muslim student rights absent legislation to prohibit religious harassment in federally assisted educational programs and activities. In the prisons,

⁹¹ Letter of Sikh American Legal Defense and Education Fund (SALDEF) and The Sikh Coalition to The Honorable Thomas E. Perez, Assistant Attorney General Civil Rights Division, U.S. Department of Justice, dated September 28, 2012, Re: Tracking Hate Crimes Against Sikhs in the United States, p. 2.

⁹² *Id.* at pp. 2-3.

federal authorities should seek a more vigorous application of RLIUPA, in keeping with the plain language of that statute. Congress should create a federal administrative complaint-resolution system for prisoners' religious (and other civil rights) complaints comparable to what exists in other federally assisted institutions. Public officials should also speak out against pernicious stereotypes of Arabs and Muslims in popular culture. Finally, other religious minority groups, such as Sikhs, face similar post-9/11 hate and bias based at least partly on incorrect perception of Arab or Muslim status. Sikhs should be afforded the same protections, as well as the same outreach and engagement, as Arabs and Muslims. For example, federal statistics programs should track and monitor anti-Sikh discrimination to the same extent as it tracks discrimination against other groups.

Haris Tarin, Director, Washington DC Office Muslim Public Affairs Council

Federal Civil Rights Engagement With Arab and Muslim American Communities Post 9/11

Mr. Chairman and members of the commission thank you for giving me the opportunity to testify before you on this very pertinent and timely topic. My name is Haris Tarin and I am the Director of the Washington DC office of the Muslim Public Affairs Council (MPAC). The Muslim Public Affairs Council was established in 1988, years before the idea of engaging American Muslim communities was on government agency agendas. It has been our belief since then that engagement at all levels, federal, state and local with government offices, law enforcement agencies and public officials is integral to a healthy democratic process and important at times of distress and crises, so that the lines of communication are open and there is a level of trust built to address and solve difficult issues.

On 9/11 when America was attacked there was no differentiation by the attackers as to the color, creed or origin of the victims. On that day inside of the towers, in the Pentagon and inside of the planes there were Christians, Jews, Muslims and Americans of various other faiths. Our nation was attacked as a whole and we all endured that tragedy together.

Today it is important to highlight the contributions American Muslims have made since then in protecting our nation and engaging government and law enforcement agencies in partnering to address threats that might jeopardize its security. The key word here is partnership; it is this partnership that yields results both in making us a safer society and in ensuring that the civil liberties of our communities are preserved so that the foundation of our democracy remains strong.

This belief in partnership is not based on feel good conversations or wishes of better relationships for news cameras, it has proven results in over five decades of American local community policing and partnership.

In the middle of the FBI headquarters, is an outside open courtyard, and on the wall is a bronze inscription, a quote by J Edgar Hoover himself which reads, “The most effective weapon against crime is co-operation.... the efforts of all law enforcement agencies with the support and understanding of all American people.” This partnership, which is based on trust, in the opinion of our organization is the key to making our society stronger, safer and more democratic.

Several studies have shown the critical role American Muslim have played in keeping our nation safe. One study completed by the prestigious Triangle Center on Terrorism and Homeland Security (whose partners include the University of North Carolina and Duke University), indicates that in one-third of the violent terror attacks thwarted since 9/11, law enforcement was first tipped off to the plot by tips from the American-Muslim community.

In a second study done by our organization the Muslim Public Affairs Council, after reviewing and assessing all terrorist attempts through open source material, Muslims have been responsible in thwarting 1 out of 3 plots against the American homeland.

These numbers and our history as a nation prove that communities and citizens are our best assets in addressing challenges facing our country. Investing in these partnerships should be of utmost importance to both government agencies and communities themselves.

Two Approaches

There is no question that when it comes to addressing some of our major civil rights and security challenges there seems to be two varying trends promoted and used by experts and law enforcement agencies to engage communities; which in turn have immensely different consequences on the civil rights and liberties of these communities.

First there is the “suspect trend” of engagement that encourages aggressive intelligence and surveillance activities in communities and sees major components of American Muslim, Arab American and South Asian Americans as suspects that must be watched. We have seen this trend play out in both federal and local law enforcement agencies. There have been instances in places such as New York and New Jersey where innocuous activities by Muslim students such as whitewater rafting trips and local restaurants have been surveyed by law enforcement agencies. We have even seen instances where community engagement settings have been used to collect information and then categorized as intelligence by federal law enforcement agencies in Northern California as reported by the American Civil Liberties Union.

This trend has developed in a context of misinformation and fear that that has dominated the discourse around American Muslims in certain government and law enforcement circles. A 2011 report by the Center for American Progress has highlighted an industry of fear that has developed that works towards marginalizing American Muslims. Over the past decade over 40 million dollars have been spent on spreading misinformation about American Muslims and much of that has impacted training of law enforcement agents. This misinformation has also normalized a climate of fear against American Muslims where public officials have made false statements and accusations and have not had any significant consequences to their words or actions.

This has had a chilling effect on American Muslim communities and their rights to practice their faith and hold political viewpoints. On college campuses we regularly receive reports from students whose parents do not want them to engage in constitutionally protected activities due to fear of surveillance. This climate of fear has also impacted political activities on college campuses, especially in California where outside influences have had a detrimental impact on student free expression.

The second trend of engagement is “partnership” where local communities have developed strong relationships with law enforcement agencies and there exists a level of trust and communication which allows them to work through difficult issues. Cities such as Houston, Los Angeles, Dallas, Chicago and other local communities have built strong and enduring partnerships with local Advisory and multi-cultural boards that are made up of community members, local officials and law enforcement agencies which provide policy recommendations and work on civil rights issues together.

Recommendation:

In closing to ensure that this partnership is strengthened and that the civil rights of all American are preserved we would recommend the following:

- There must be more rigorous pushback by public officials on the misinformation that exists about American Muslims. To President Bush’s credit, his visit to a Mosque was integral to helping perceptions immediately following 9/11.
- Congress should allocate funding DHS or the US Attorney’s Office for outreach programs, especially for smaller law enforcement agencies at the local level whose budgets are already thinning in the fiscal climate.
- Mechanisms for redress must become more robust at the Federal level. DHS, DOJ and other federal agencies must conduct more outreach programs at the local level to ensure communities have access to civil rights divisions and redress education.

Asim Rehman, President and Co-Founder, Muslim Bar Association of New York

Federal Civil Rights Engagement With Arab and Muslim American Communities Post 9/11

I. Introduction

On behalf of the Muslim Bar Association of New York, I would like to thank the United States Commission on Civil Rights for the opportunity to submit this testimony on Federal Civil Rights Engagement with Arab and Muslim American Communities Post 9/11.

The Muslim Bar Association of New York (MuBANY) is a professional association serving the needs of Muslim lawyers and law students living and working in the New York area. Founded in 2006, MuBANY is one of the nation's most active professional associations for Muslim lawyers. In addition to providing traditional bar association services to members, MuBANY works closely with mosques and Muslim community organizations in New York and regularly advocates for the protection and promotion of the civil rights of all Americans.

As the Commission is well aware, the last ten years have brought with them a nationwide rise in anti-Muslim sentiment, anti-Muslim discrimination, and policies which unfairly impact American Muslims. In my capacity as President of MuBANY, I have seen this trend firsthand. Our association is regularly contacted regarding individuals who feel they have been discriminated against at work against because of their religion. We hear from people who want a lawyer because they have been targeted by law enforcement or because they have unknowingly been placed on a watch list. We hear from mosque leadership about police surveillance of their houses of worship. We talk to community groups who are facing public and private opposition to the legitimate construction of a mosque in their neighborhood.

These are challenges, but what sets America apart is how we respond. How communities respond. How the government responds. How our leaders respond. In America, we do not simply speak about tolerance, justice and equality, but we put those words into action. We pass legislation like the Civil Rights Act and we arm our agencies with the tools necessary to meet these challenges.

I'm proud to be from a city where the American Muslim community has stepped up to the challenge. In the face of intolerance, Muslim New Yorkers have responded with education. In the face of discrimination, Muslim New Yorkers have exercised their rights to free speech and equal protection. When concerned about government policies that unfairly target the Muslim community, Muslim New Yorkers have engaged with government officials, met with elected leaders, spoken out, and, where necessary, have taken legal action.

Today the Commission is examining how the federal government has responded to the civil rights challenges facing American Muslims. This testimony will first provide an overview of some of the civil rights challenges that American Muslims have faced since 9/11. This testimony

will then examine some of the ways that the federal government has engaged with American Muslim communities on these issues. Lastly, this testimony will offer some recommendations for the Commission on how such engagement can be strengthened.

II. American Muslims & Civil Rights Since 9/11

Before examining federal civil rights engagement with American Muslims, it is worth reviewing the nature and character of the our nation's Muslim communities as well as the types of civil rights challenges these communities have faced since 9/11.

A. Muslims in America

The greatest myth about American Muslims is that they belong to a monolithic, homogenous community. To the contrary, American Muslims make up one of the most diverse religious communities in the United States. According to recent polls, 30 percent of Muslims in America identify as white, 23 percent as African American, 21 percent as Asian, 6 percent as Hispanic, and 19 percent as other/mixed race. One in five American Muslims is a convert. While almost two-thirds of American Muslims are first-generation immigrants, there have been Muslims in America since the first slave ships arrived and today about 80 percent of American Muslims are citizens.¹

American Muslims span all socio-economic levels and hold professions in all levels of American society. As a simple example, in the legal profession – where MuBANY has its expertise – we have Muslim judges and court professionals, Muslim prosecutors and defense counsel, Muslims as chief legal officers for companies and not-for-profit organizations, Muslim partners and associates in law firms, Muslim lawyers at various levels of government, and Muslim law professors.

Likewise, political views vary among American Muslims. According to those surveyed in a Gallup poll, “39% of young American Muslims describe their views as moderate, 28% say they are either liberal or very liberal, while 20% consider themselves politically conservative or very conservative.”²

¹ Farid Senzai, *Engaging American Muslims: Political Trends and Attitudes*, Institute for Social Policy & Understanding, 2012, at 14. Available at http://www.ispu.org/pdfs/ISPU%20Report_Political%20Participation_Senzai_WEB.pdf.

² Mohamed Younis, “Muslim Americans Exemplify Diversity, Potential Key findings from a new report by the Gallup Center for Muslim Studies,” Gallup, March 2, 2009, available at <http://www.gallup.com/poll/116260/muslim-americans-exemplify-diversity-potential.aspx>.

Notwithstanding this diversity, certain trends do appear across all spectrums of the American Muslim community. Importantly, American Muslims are just as “American” as they are “Muslim.” According to polls, American Muslims overwhelmingly believe that there is no conflict between Islam and modern society and that they should adopt American culture.³ An admirable 86 percent of Muslims believe that it is important to participate in the American political process and many American Muslims are civically engaged in their local communities.⁴ Lastly, despite the fact that more than 40 percent of Americans currently have an unfavorable view of Muslims⁵, a 2011 Gallup report found that American Muslims, along with Mormons, hold the highest degree of tolerance towards other faiths.⁶

The diverse and complex nature of our American Muslim communities suggests that federal engagement with American Muslims– and how to measure the success of that engagement – is equally complex.

B. Civil Rights Issues Facing American Muslims

Unfortunately, despite the truly American character of our nation’s diverse Muslim communities, there are many who believe that American Muslims do not deserve the same treatment as other Americans. The last ten years have seen a rise in anti-Muslim sentiment, and as this Commission well knows, prejudicial and hate-fueled attitudes towards certain groups often give rise to civil rights violations. We now live in an American where it is publicly acceptable to voice anti-Muslim sentiments, and where doing so can even score points in a local election or presidential primary.

Furthermore, in the last ten years we have seen a growth of government policies which disproportionately impact American Muslims. Whether driven by anti-Muslim sentiment or not, such policies run the risk of establishing a separate system of treatment for American Muslims.

What follows are just some of the civil rights challenges that American Muslims have experienced since 9/11. This information is based on my own work with MuBANY as well as research and documentation by important partners such as Muslim Advocates, Council on American-Islamic Relations, the Muslim Public Affairs Council, South Asian Americans

³ Senzai at 19.

⁴ Senzai at 22-23.

⁵ Omar Sacirbey, “New poll finds Americans evenly divided in views of Muslims,” Washington Post, August 24, 2012, available at http://www.washingtonpost.com/national/on-faith/new-poll-finds-americans-evenly-divided-in-views-of-muslims/2012/08/24/1cddd588-ee30-11e1-b624-99dee49d8d67_story.html.

⁶ Muqtedar Khan, “2011 Gallup Poll: American Muslims most tolerant in America,” August 24, 2011 available at http://www.patheos.com/blogs/altmuslim/2011/08/american_muslims_most_tolerant_in_america1/.

Leading Together, the American Civil Liberties Union, the Brennan Center of Justice. Desis Rising Up and Moving, and others.

1. Discrimination & Violations by Private Actors

Some of the civil rights issues facing American Muslims have been linked to the conduct of private actors.

- **Opposition to Mosques and Islamic Centers:** One of our most cherished rights as Americans is the right to freely practice one's faith. Sadly, individuals and communities have sought to deny this right to Muslims across the nation by opposing the construction of mosques and community centers and by attacking existing houses of worship. The American Civil Liberties Union has identified over 60 incidents of anti-mosque activity throughout the nation in the last six years,⁷ and the Pew Forum on Religious and Public Life has indicated that from 2009 to 2011, there were at least 35 proposed mosques and Islamic centers that encountered local resistance.⁸ In addition, according to the Justice Department, since 2000 there have been 24 cases concerning mosques under the Religious Land Use and Institutionalized Persons Act, 14 of which have emerged since 2010.⁹ Opposition has ranged from vandalism and destruction of property to zoning challenges based on so-called "quality of life" concerns.

In my own hometown, we have seen public opposition to mosques throughout New York City. While national attention was focused on the Park51 community center project in downtown Manhattan (the so-called "Ground Zero" mosque), Muslim New Yorkers were also fighting public opposition and legal battles concerning mosques and Islamic Centers in Sheepshead Bay, Brooklyn and in Staten Island. Nearby, our neighbors in Norwalk, Connecticut and Bridgewater, New Jersey are involved in legal actions regarding mosque construction. In places like Murfreesboro, Tennessee, opponents went so far as to file a lawsuit against the construction of a

⁷ American Civil Liberties Union, "Map - Nationwide Anti-Mosque Activity," available at <http://www.aclu.org/map-nationwide-anti-mosque-activity>.

⁸ Pew Forum on Religion & Public Life, "Controversies Over Mosques and Islamic Centers Across the U.S.," September 24, 2010, available at <http://features.pewforum.org/muslim/controversies-over-mosque-and-islamic-centers-across-the-us.html>.

⁹ *Protecting the Civil Rights of American Muslims: Hearing Before the U.S. Senate Judiciary Committee, U.S. Senate Judiciary Committee, 112th Congress* (March 29, 2011) (statement of Thomas Perez, Ass't Attorney General for Civil Rights).

mosque claiming that the congregants are not entitled to First Amendment protection because Islam is not a religion.¹⁰

In some of these cases, the opposition has been driven by private actors. In other cases, however, we have seen elected officials, zoning boards, and other public bodies join the efforts to deny Muslims their right to gather and worship. Such adoption of anti-Muslim rhetoric by public officials only reinforces the efforts by private actors to deny American Muslims their free exercise rights.

- **Workplace Discrimination:** Although American Muslims make up no more than two percent of the U.S. population, complaints of anti-Muslim bias accounted for a distressing 25 percent of the total number of complaints received by the Equal Employment Opportunity Commission from 2001-2010. The complaints describe workplaces where employees freely exchange epithets like “terrorist” and “camel jockey” and concern employer failures to make reasonable accommodations for Muslim workers (e.g. prayer breaks).¹¹ As one EEOC regional attorney put it, “I’ve been doing this for 31 years, and I have never seen such antipathy towards Muslim workers.”¹²
- **Hate Crimes:** Since 9/11, the nation has seen an alarming number of crimes motivated by anti-Muslim hate. These include violent crimes against individuals as well as crimes against personal property and houses of worship. As a sample, the following illustrates just some of the attacks that took place in a two month period this year:
 - On August 3, 2012, vandals fired pellets and threw fruit at the American Muslim Association in Hayward, California while worshipers were inside. This was the fourth attack on this mosque in eight months.
 - On August 5, 2012, a man vandalized a sign in front of a mosque in North Smithfield, Rhode Island.
 - On August 6, 2012, a suspected arson attack burned The Islamic Society of Joplin in Missouri to the ground just one month after the building was damaged by an arson attack.

¹⁰ “Tennessee Mosque opens after years of controversy,” New York Daily News, August 10, 2012, available at http://articles.nydailynews.com/2012-08-10/news/33141829_1_tennessee-mosque-islamic-center-new-mosque.

¹¹ See generally, *Protecting the Civil Rights of American Muslims: Hearing Before the U.S. Senate Judiciary Committee, U.S. Senate Judiciary Committee, 112th Congress* (March 29, 2011) (statement of Farhana Khera, President & Executive Director, Muslim Advocates).

¹² Steven Greenhouse, “Muslims Report Rising Discrimination at Work,” New York Times, September 23, 2010, available at <http://www.nytimes.com/2010/09/24/business/24muslim.html>.

- On August 7, 2012, animal carcass parts (pig legs) were left at the building site of Al-Nur Islamic Center in Ontario, California.
- On August 10, 2012, rifle pellets were fired at the Muslim Education Center mosque in Morton Grove, Illinois while nearly 500 congregants prayed inside.
- On August 12, 2012, while congregants were engaged in evening prayer, a bottle filled with acid and other unspecified chemicals was thrown at the College Preparatory School of America, an Islamic school in Lombard, Illinois.
- Also on August 12, 2012, vandals shot paintballs at the doors of the Grand Mosque of Oklahoma City, Oklahoma.
- On August 15, 2012, a firebomb was thrown at the home of a Muslim family in Panama City, Florida. The device set fire to the family's lawn.
- On August 17, 2012, and on September 3, 2012, Muslim gravestones were desecrated at the Evergreen Cemetery in Evergreen Park, Illinois. The graffiti included slurs like "Raghead killer" and insults to Prophet Muhammad. The incident in August was reported as the sixth time the grave markers had been vandalized in a 17-month period.
- On September 1, 2012, a rental car belonging to a group of Muslim students was vandalized with racial slurs in Lake Chelan, Seattle.
- On September 14, 2012, a group of 20-30 individuals protested outside a mosque in Little Rock, Arkansas during the congregation's Friday prayer.
- On September 30, 2012, a fire was deliberately set in the prayer area of the third largest mosque in the U.S. – the Islamic Center of Toledo in Ohio. The fire and water damage from the sprinklers touched every room in the Islamic Center, causing more than \$1 million in damage.¹³

These are just some examples of how anti-Muslim sentiment has turned into anti-Muslim crimes. In my own city, a cab driver was stabbed in 2010 after telling a passenger that he was Muslim.¹⁴

¹³ Muslim Advocates, "Bigotry and Hateful Attacks on Religious Minorities: The American Muslim Experience" (available upon request).

¹⁴ "Film Student Accused of Stabbing Muslim Cabbie Charged with Hate Crime," DNAInfo, Aug. 26, 2010, available at <http://www.dnainfo.com/20100825/murray-hill-gramercy/muslim-cab-driver-stabbed-hate-crime>.

Just two months ago, I was celebrating the Eid holiday with my family on Staten Island when I learned that someone had scattered bacon on a field where Muslims had gathered to pray.¹⁵

This spike in hate crimes comes on the heels of a steady rise in hate crimes targeting American Muslims over the last decade. During the period from 2001 to 2009, the FBI has record of 1,552 incidents of hate crimes based on “anti-Islamic” bias, resulting in 1,785 offenses.¹⁶ However, because federal hate crimes statistics rely on data from local law enforcement, and because many hate crimes go either unreported or not classified as hate crimes, we believe that these figures are lower than the actual rate.

- **Bullying:** Sadly, Muslim children have not been spared from the anti-Muslim hate. While there are no national statistics on faith-based bullying, in March 2010, Muslim Mothers Against Violence conducted a survey of 78 Muslim male and female youth between 12 and 17 years of age in Northern Virginia. A shocking 80 percent responded that they had been subjected to bigoted taunts and epithets and harassment, with 75 percent of them indicating that such treatment occurred more than once.¹⁷ In my own hometown, we learned of a Muslim high school student who was frequently called a “terrorist,” punched in the groin, and spat on by fellow teenagers.¹⁸ This young man was beaten so severely that there was blood in his urine, and he suffered from headaches and memory loss. We have also seen incidents of teachers bullying students, such as a Texas teacher who suggested that Osama bin Laden was the family member of one of her students.¹⁹

In each of these examples, American Muslims have remained resilient. In my own city, when faced with opposition to the construction of mosques, many Muslim communities have opened their doors to their neighbors to educate them about the Muslim community. With respect to employment discrimination, American Muslims have also sought to educate employers about the needs of Muslim employees. For example, at the request of law firms and legal employers, our bar association published a guide for legal employers about Islam and Muslim employees. We

¹⁵ “NYPD Probing Hate Crime After Bacon Found At Staten Island Ramadan Site,” August 20, 2012, available at <http://newyork.cbslocal.com/2012/08/20/police-investigating-possible-bias-crime-after-bacon-found-at-s-i-ramadan-site/>.

¹⁶ FBI Hate Crimes Statistics for 2001-2009, available at <http://www.fbi.gov/about-us/cjis/ucr/ucr>.

¹⁷ See Khera testimony at 15.

¹⁸ “Terrorized for being a Muslim - SI kid’s school horror,” New York Post, October 12, 2010, available at http://www.nypost.com/p/news/local/staten_island/terrorized_for_being_muslim_8rQSU8Z5ibbMOeJnDGFOrO.

¹⁹ “‘I heard about your uncle’: Texas teacher suspended for mocking Muslim girl over Bin Laden,” Daily Mail, May 5, 2011, available at <http://www.dailymail.co.uk/news/article-1383687/Osama-Bin-Laden-dead-Texas-teacher-suspended-mocking-Muslim-girl.html>.

now have law firms across the country and in Canada requesting copies. In addition, Muslims in the New York area work with law enforcement to address hate crime issues and participate in anti-bullying campaigns with other affected communities. And with each of these civil rights challenges, American Muslims have, when necessary, rightfully sought protection from our courts.

2. Public Policies & Public Actors

In addition, American Muslims have also been on the receiving end of public policies and public actions which intentionally or indirectly target American Muslims.

- **Anti-Islam Legislation:** In the past several years, anti-Muslim hate groups have turned to state legislatures to codify their opposition to Muslims. Through a carefully orchestrated campaign,²⁰ laws aimed at interfering with constitutionally protected religious practices have been considered in 31 states and in the U.S. Congress. Such laws have the potential of denying an American Muslim the right to marry, probate a will, or congregate for prayer in accordance with his or her religious tradition. In one case, a law in Oklahoma which explicitly referred to Islamic law was enacted by the state and was halted by a federal court that found it potentially unconstitutional.²¹

In other states, the proposed legislation does not mention Islam or Muslims but instead refers generally to foreign laws. However, most of these have been based on model legislation drafted by an individual who is widely known to have an anti-Muslim agenda.²² Moreover, the public discourse around these seemingly neutral laws is often rife with anti-Muslim propaganda.

The adoption of laws that target the legitimate and constitutionally protected activities of a religious group should not be tolerated. Moreover, beyond the potential impact on American Muslims, these laws may create serious difficulties for the American business community (e.g., effectively forbid a court from adjudicating a multi-million dollar commercial dispute if the contract is governed by non-U.S. law).²³ Ultimately, the passage of laws that are based on anti-

²⁰ Andrea Elliot, "The Man Behind the Anti-Shariah Movement," *The New York Times*, July 30, 2011, available at www.nytimes.com/2011/07/31/us/31shariah.html.

²¹ "Appeals court affirms order blocking Oklahoma sharia law ban," *Los Angeles Times*, January 10, 2012, available at <http://latimesblogs.latimes.com/nationnow/2012/01/federal-appeals-court-blocks-oklahomas-ban-on-sharia-law.html>.

²² See generally, Center for American Progress, *Fear, Inc. – The Roots of the Islamophobia Network in America*, August 2011

²³ New York City Bar Association, *The Unconstitutionality of Oklahoma Referendum 755 – The "Save Our State Amendment,"* Committee on Foreign & Comparative Law, December 2010.

Muslim hate is an affront to the Free Exercise and Establishment clauses of the U.S. constitution and only serves to encourage other civil rights violations against American Muslims.

- **Improper Inspections at the Border:** Since 9/11, American Muslims returning home from international travel have been subject to inspection and questioning that is improper, invasive, and often completed unrelated to travel. These instances, which are well documented,²⁴ include questions like:
 - “What mosque to you attend?”
 - “How many times a day do you pray?”
 - “How many gods to you believe in?”
 - “Are you Sunni or Shia?”
 - “Why do you send your children to Islamic schools?”
 - “What are your views of the Israeli/Palestinian conflict?”

Muslim travelers have also been subject to invasive searches of belongings, electronic devices, photos and contacts on phones and computers, and other personal materials. Some individuals have been pulled out of line and handcuffed in front of family members before taken for hours of additional screening. Others have been stopped at gunpoint, surrounded by armed agents and effectively treated as criminals without explanation.

These problems are not limited to the border. We have likewise become aware of potential anti-Muslim bias at other levels of the immigration process, manifesting in delayed application processing and questionable requests for interviews and additional information.

While the government has a legitimate interest in confirming the identify of individuals entering the country and ensuring that they are not security threats, inquiry into activities protected by the First Amendment are improper and infringe upon the rights of law-abiding Americans. In response, American Muslims have filed complaints with Customs and Border Patrol officials but have not seen much change.²⁵ In New York, MuBANY and community organizations have had productive meeting with local CBP leadership about these issues, but more is necessary on a federal policy level.

²⁴ Muslim Advocates, *Unreasonable Intrusions: Investigating the Politics, Faith & Finances of Americans Returning Home*, 2009.

²⁵ “Groups Seek End to Religious Questioning At The Border by Federal Agents,” December 16, 2010, available at http://www.muslimadvocates.org/latest/profiling_update/community_alert_seek_legal_adv.html.

- **Anti-Muslim Training:** Over the past few years, we have learned of the federal government's use of biased, false and highly offensive training materials about Muslims and Islam. Among other things, these materials stated that there is a close association between Islam and violence, that certain benign and legally permissible activities – such as travel to Muslim countries, attending prayer, and growing facial hair – were markers of homegrown extremism, that the Islamic requirement to donate to charity is mechanism for funding combat, and effectively that all Muslims should be treated as suspect. The agencies utilizing these materials included the FBI, the Department of Homeland Security, and the U.S. Army.²⁶

The use of such materials by our federal government is not only highly offensive, belittling the faith of millions of Americans, but leads to biased policing that targets individuals and communities based on religion. Inaccurate and bigoted training materials also foster fear and suspicion of American Muslims amongst law enforcement and the general public, increasing discrimination, bullying, harassment and anti- Muslim violence. The government's response on this issue is discussed below.

- **Law Enforcement Surveillance & Profiling:** Since 9/11, American Muslims and their institutions have been subject to ongoing surveillance and religious profiling by federal and state law enforcement agencies. Court documents have illustrated how both the FBI and local law enforcement have sent informants and agent provocateurs into mosques to gather information and identify potential targets. In one well known case, a congregation in California was concerned about a new member who espoused radical views. They alerted the authorities, only later to learn that this individual was a government informant.²⁷

At the federal level, in 2003 the FBI began keeping data on Muslims and mosques in America and began conducting over 500,000 “voluntary” investigative interviews with Muslim, Arab, Middle Eastern and South Asian individuals living in the U.S. These practices were codified in FBI and DOJ guidelines and manuals, which gave the federal authorities license to monitor and track innocent Americans without objective evidence of suspicious activity or wrongdoing. The

²⁶ See generally, Spencer Ackerman, “FBI Teaches Agents: ‘Mainstream’ Muslims Are ‘Violent, Radical’,” *Wired*, September 14, 2011.

²⁷ Paul Harris, “The ex-FBI informant with a change of heart: ‘There is no real hunt. It’s fixed’,” *The Guardian*, March 20, 2012.

FBI has likewise used undercover tactics to target member of the Muslim community engaged in lawful activities.²⁸

We are currently dealing with this issue in New York. In 2007, the NYPD released “Radicalization in the West – The Homegrown Threat,” a report that was widely endorsed and cited by federal and local officials nationwide. The report broadly coupled Islam with terror, drew offensive and dangerous connections between benign and legally protected conduct (like praying or growing a beard) with violent extremism, and effectively endorsed the profiling and surveillance of Muslims. Only after two years of multiple meetings and correspondence with the NYPD and the release of a critique by a local civil rights coalition²⁹ did the NYPD quietly include a “Statement of Clarification” which says that “the NYPD report should not be read to characterize Muslims as intrinsically dangerous or intrinsically linked to terrorism, and that it cannot be a license for racial, religious, or ethnic profiling.”³⁰

Then, last year, a series of Pulitzer Prize winning articles put a spotlight on how the New York Police Department’s (NYPD) Intelligence Division has been collecting information on New York Muslim communities, surveilling mosques and neighborhood, and sending informants on campus to monitor student groups.³¹ To illustrate how closely this hits to home, the official NYPD documents published by the Associated Press focused on the mosque where I was married and quoted a sermon at a different mosque that I regularly attend. These are peaceful places, and yet law enforcement feels a need to monitor them without any identifiable suspicion of wrongdoing. As a result, many Muslim new Yorkers feel a deep conflict with respect to a law enforcement agency which they rely on for safety but which they feel is unfairly profiling them.³² Unfortunately, when MuBANY and other local groups pressed the NYPD, the Mayor’s Office, the New York Attorney General, and other local city and state officials for change, no action was taken. Accordingly, the community took the matter into their own hands. Attorneys in a landmark civil rights matter asked a federal judge to determine if the surveillance had violated a 27 year old consent decree that governed NYPD investigations. Plaintiffs in New Jersey, with

²⁸ See generally, Muslim Advocates, *Losing Liberty – The State of Freedom 10 Years After the Patriot Act*, October 2011.

²⁹ *CountertERRORism Policy: MACLC’s Critique of the NYPD’s Report on Homegrown Radicalism*, available at <http://maclcnypdcritique.wordpress.com/>.

³⁰ See <http://www.mpac.org/issues/national-security/nypd-clarification-of-radicalization-report-a-welcome-first-step.php>.

³¹ See generally, <http://www.ap.org/media-center/nypd/investigation>.

³² See generally, *In Our Own Words, Narratives of South Asian New Yorkers Affected by Racial and Religious Profiling*, March 2012, available at <http://www.saalt.org/filestore/Reports/In%20Our%20Own%20Words%20Web%20FINAL.pdf>

the help of Muslim Advocates, filed a lawsuit against the NYPD. And a broad-based coalition is currently pushing legislation through the New York City Council which would establish an Inspector General for the NYPD.

While federal and local law enforcement agencies have defended their tactics as legal and based on legitimate leads, the impact of such surveillance and profiling on the civil rights and security of the American Muslim community cannot be denied. First, whether intended or not, profiling by government officials often fuels public suspicion of American Muslims and gives license to private actors to themselves profile and discriminate against American Muslims. Second, the fear of government surveillance sends a chilling effect throughout congregations, hampering the rights of free speech, free assembly and free association. Lastly, and most critically, the security of our cities and our nation relies heavily on strong relationships of trust between law enforcement and local communities, and programs that cast suspicion on an entire community – and lackluster responses to complaints about such programs – threaten to damage this trust.

- **Charitable Giving:** The act of giving charity is a core religious obligation for Muslims. “Zakat” donations made by American Muslims help feed our poor, house our homeless, educate children, and support the needy in the U.S and abroad. Unfortunately, federal laws, programs and inquiries have made it difficult for Muslims to fulfill this important duty. The material support statute could render someone guilty of supporting terrorism if, for example, their donation for food, clothing, or humanitarian relief is later transferred to an extremist organization by a third party, even if the donor had no knowledge of the organization. Moreover, the federal databases that identify prohibited entities and individuals are unduly difficult to navigate. Lastly, Muslims across the United States have been subject to intrusive and intimidating interviews by law enforcement regarding their charitable donations, even in cases where the donations were made to charities *before* those charities were placed on a government watch list.³³ As a result, many American Muslims have limited or altered their charitable activities out of fear of government scrutiny. In today’s America, we want our citizenry donating more, not less.

To be clear, not every public actor example listed above is driven by anti-Muslim sentiment. Members of both the federal and local government have often gone to great lengths to state that their focus is not on Muslims or Islam. However, these policies can often have a disparate impact on American Muslims and on other Americans who are mistakenly associated with the Muslim community. Thus, even when certain policies or actions are implemented with non-

³³ See generally, Muslim Advocates, *Losing Liberty – The State of Freedom 10 Years After the Patriot Act*, October 2011.

discriminatory intentions, the result still brings us dangerously close to what the Civil Rights Act was meant to prevent – a separate system of justice for a class of Americans.

* * * * *

These are just some of the civil rights issues that American Muslims have faced since 9/11. As illustrated, these challenges are not limited to one sector and are not driven by any one particular actor. Instead, the challenges are varied and interrelated. Many of these examples are fueled by each other. When a public policy targets American Muslims or when a political candidate promotes anti-Muslim sentiment for political gain, private actors feel that they have license to discriminate against Muslims. When there is opposition to the construction of a mosque, children in school feel that it is permissible to bully Muslim children. When law enforcement at the border or in a neighborhood uses religion as a basis for profiling or suspicion, members of the public become suspicious of Muslims. The end result is, unfortunately, a situation where it has become socially acceptable to harbor, vocalize, and act on anti-Muslim sentiments.

Taken as a whole, these challenges affect an individual's entire lifestyle. In New York we have community members who are afraid to speak their mind in their workplace, in schools or even at the mosque because they are concerned about surveillance. We have seen a drop in charitable giving and I have been personally informed by donors who are afraid that their well-intentioned donations might come under scrutiny. I know well-educated professionals at highly respected institutions who have stopped using their first name – Muhammad – out of fear of ill-treatment at work. And while all of this is taking place, we have politicians and elected officials – in both New York and in Washington, DC – who feel that it is necessary to cast suspicions on our entire community of faith.

This atmosphere of suspicion and intolerance breeds civil rights violations. It is an atmosphere that many other American communities have faced and still face today. It is an atmosphere that drove our Congress to pass legislation like the Civil Rights Act and is an atmosphere that this Commission has focused on before. But, in keeping with our values and ideals as Americans, it is an atmosphere that people of all faiths and backgrounds work so hard to combat. At MuBANY, we have learned of many individuals who were subject to the various violations listed above, but we know just as many who have spoken out against this treatment and have mobilized for positive change.

III. Federal Civil Rights Engagement with American Muslim Communities Post 9/11

There is no one solution to the civil rights challenges enumerated above. Still, the federal government is in a position to help combat these challenges. As an organization that has met directly with federal government representatives on civil rights issues and hears frequently from Muslim community organizations about federal government responsiveness to civil rights concerns, MuBANY believes that the federal government has taken certain steps in the right direction but that more work is required.

A. Setting the Tone

Since 9/11, both President Bush and President Obama have sent clear signals to the American public that Muslims Americans are full members of American society and their loyalty should not be questioned. From a community perspective, such “tone at the top” messages are critical components of government engagement on civil rights issues. Communities need to know that their elected leaders take these matters seriously. Unfortunately, while we have seen positive signals at the presidential level, the message does not always flow down. We still have federal policies and practices that are anti-Muslim in nature or which unfairly impact American Muslims. This matter is discussed further below.

B. Direct Community Outreach

The level of community outreach by federal agencies in New York has risen noticeably since 9/11. In New York, representatives from the Federal Bureau of Investigation, Customs and Border Patrol, DHS Office for Civil Rights and Civil Liberties, and other agencies have sought to build relationships with local leaders, have attended community events, and have met with Muslim New Yorkers to listen to concerns about government policies. These outreach efforts have been ongoing and are regarded by some Muslim New Yorkers as a positive developments.

The impact of such outreach, however, has been inconsistent. In New York, some outreach efforts have led to constructive relationships between federal officials and community members, through which community members have felt that their concerns are being heard and addressed. Other outreach efforts have been less effective, at times due to the inability of the federal agencies to address certain policy issues. While my New York colleagues have expressed to me the value in establishing relationships, the lack of meaningful follow-up and the continuation of policies that affect their communities has made them question the utility of such meetings. As a result, while such outreach efforts come and go in fits and starts, the policies that impact Muslim New Yorkers continue with little interruption. Moreover, recent news that the FBI in San Francisco was using information gained from outreach efforts for intelligence gathering purposes has understandably caused alarm among some of the community groups that MuBANY works with in New York.³⁴

As an example, when the FBI and other law enforcement agencies attended a Muslim student career fair in Brooklyn, some community members were happy to see their children learn about public service. However, many individuals and organizations in the Muslim community had serious concerns about bringing their children to an event organized by the very agencies that

³⁴ See <http://www.aclu.org/national-security/foia-documents-show-fbi-using-mosque-outreach-intelligence-gathering>.

have been sending agents and informants into their neighborhoods and mosques to ask questions and gather information.

C. Other Forms of Engagement

Beyond traditional forms of outreach, the federal government's response to certain civil rights issues is itself an important form of engagement.

1. Anti-Mosque Movements

As discussed, Muslim communities across the U.S. have seen growing opposition to mosques and Muslim community centers. In a highly positive development, we have seen the federal government step in to defend the rights of American Muslims to establish houses of worship. In the lawsuit involving the proposed mosque in Murfreesboro, Tennessee, the Department of Justice filed an important amicus brief in 2009 informing the court of the federal government's position that Islam is indeed a religion and that denying the community the right to build the mosque would potentially violate federal law.³⁵ When the local county ultimately refused to issue a certificate of occupancy to the Islamic center, the Civil Rights Division Department of Justice filed a lawsuit this summer against the county alleging violations of the Religious Land Use and Institutionalized Persons Act of 2000.³⁶ The federal judge issued a temporary order that allowed the Muslims community to proceed with activities in time for the holy month of Ramadan. In addition, just last month the Civil Rights Division opened an investigation into the city of St. Anthony's decision to turn down plans for a local Islamic Center in Minnesota.³⁷

The Civil Rights Division's leadership on this issue is a commendable example of how the federal government can leverage its resources to protect the civil rights of American Muslims in the face of challenges by private actors and local government.

a. Addressing Hate Crimes

Since 9/11, the U.S. Department of Justice has made increased efforts to investigate and prosecute crimes motivated by anti-Muslim hate. A major development was the passage of the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act of 2009, which gave the federal government increased authority to engage in hate crimes investigations which could not be pursued at the local level. The law, and the increase in hate crimes convictions since its

³⁵ See <http://www.justice.gov/opa/pr/2010/October/10-crt-1162.html>.

³⁶ See <http://www.justice.gov/opa/pr/2012/July/12-crt-883.html>.

³⁷ Amy Forliti, "Feds probe rejection of St. Anthony mosque," Associated Press, October 29, 2012

passage, has illustrated the federal government's commitment to protecting all Americans from crimes that are motivated by hate.

Still, more needs to be done. Hate crime tracking needs to be improved and the public needs greater education on how to report hate crimes. The federal forms that track hate crimes need expansion and revision so that they track crimes against other groups such as the American Sikh community.

b. Offensive Training Materials

Last year, MuBANY joined dozens of organizations in asking then Deputy National Security Advisor (now CIA director), John Brennan to address the federal government's use of highly offensive trainers and training materials.³⁸ Outrage came from other circles, and both the FBI and the U.S. military ultimately launched a probe to identify and remove such materials. The tone was set at the highest level, with Chairman of the Joint Chief of Staff Gen. Martin Dempsey expressing his concern about materials "which goes well beyond merely presenting alternative intellectual viewpoints on radicalism to advocating ideas, beliefs and actions that are contrary to our national policy, inconsistent with values of our profession, and disrespectful of the Islamic religion."³⁹ The FBI ultimately identified 876 pages and 392 presentations that failed to meet standards or could be considered offensive⁴⁰ and the military suspended an offensive course.⁴¹

While further steps should have been taken – such as the retraining of federal employees who were exposed to the hateful materials – the review and removal of offensive training materials is a noteworthy development that illustrates the government's interest to addressing civil rights issues.

c. Obstacles and Limitations

Despite the positive developments discussed above, serious hurdles exist in federal civil rights engagement efforts. Most notably, the continuation of policies that unfairly impact American Muslims, coupled with the involvement of federal agencies in activities that are viewed as discriminatory, severely limits the efficacy of civil rights engagement by the federal government.

³⁸ See <http://www.muslimadvocates.org/Community%20letter%20to%20Brennan%20re%20FBI%20trainings%2C%2010-19-11%2C%20FINAL.pdf>.

³⁹ See <http://security.blogs.cnn.com/2012/04/25/military-reviewing-training-material-to-remove-anti-islamic-content/>.

⁴⁰ See <http://www.guardian.co.uk/world/2012/mar/28/fbi-training-materials-infringe-islam-rights>.

⁴¹ See <http://www.guardian.co.uk/world/2012/may/11/us-military-course-islam-enemy>.

As discussed above, Muslims continue to be questioned excessively about First Amendment religious practices and charitable giving at the border, and requests for changes in Customs and Border Protections procedures have been met with little response. American Muslims sought information about whether the FBI is monitoring Muslim communities and have raised concerns about the scrutiny of Muslim charities but have seen little change. At the same time, American Muslims have watched their neighbors become subject to invasive immigration processes that focused heavily on American Muslims but resulted in little, if any, national security benefits.⁴² American Muslims have likewise been troubled to learn that information shared with federal officials during community outreach events was later used for intelligence gathering purposes.⁴³

This experience is compounded by the lack of effective remedies. For example, individuals placed on travel watch-lists or subject to invasive interrogation at the border are rarely able to secure future relief from the government, despite the existence of traveler programs like “TRIP.”

The limited response to grievances, coupled with policies or activities that unfairly impact American Muslims, places a limit on the efficacy of federal civil rights engagement. The gains achieved by outreach, the defense of mosques, and the review of training materials are important developments but they do not erase the fact that many American Muslims feel that their government is targeting them at the border, through law enforcement, with respect to charitable giving, and in other aspects of their daily lives. Put simply, engagement can only go so far when problematic policies and programs persist.

In August 2011, the federal government released a strategy paper entitled “Empowering Local Partners to Prevent Violent Extremism in the United States.”⁴⁴ The close of the document set forth several “Guiding Principles,” including:

- “We must build partnerships and provide support to communities based on mutual trust, respect, and understanding.”
- “Government officials and the American public should not stigmatize or blame communities because of the actions of a handful of individuals.”
- “Strong religious beliefs should never be confused with violent extremism.”

⁴² Department of Homeland Security, Office of the Inspector General, Information Sharing on Foreign Nationals: Border Security (Redacted), February 2012, available at http://www.oig.dhs.gov/assets/Mgmt/2012/OIGr_12-39_Feb12.pdf.

⁴³ See <http://www.aclu.org/national-security/foia-documents-show-fbi-using-mosque-outreach-intelligence-gathering>.

⁴⁴ Available at <http://www.whitehouse.gov/the-press-office/2011/08/03/empowering-local-partners-prevent-violent-extremism-united-states>.

These guiding principles are important statements of our values as Americans. While the government is making efforts to follow these guidelines, many of the American Muslims whom MuBANY works with believe that local and federal agencies have not yet lived up to these promises. There is still more to do, and by working together we can meet these goals.

IV. Recommendations for the Commission

- Request that the Department of Justice, Department of Homeland Security, Federal Bureau of Investigation, and other law enforcement agencies and departments:
 - Rigorously enforce all guidelines and rules prohibiting the use of race and racial profiling in all law enforcement activities and extend such prohibitions to religion and religious profiling.
 - Require a factual predicate before the commencement of investigation or assessment and require heightened supervisory approval for assessments or investigations implicating First Amendment protected activity, including the use of informants and agent provocateurs in houses of worship.
 - Review all training materials and purge all use of materials with hateful and stereotypical depictions of Islam and Muslims.
 - Continue local outreach efforts with Muslim communities, but forbid all offices engaging in such outreach from maintaining and sharing information gained through such efforts for investigative or surveillance purposes.
 - Establish effective remedial measures to receive and adequately address civilian complaints, particularly with respect to surveillance and monitoring.
 - Educate local law enforcement partners about the need for non-discrimination in law enforcement and investigate local law enforcement partners when civil liberties failures persist.
- Request that the DHS conduct a thorough investigation of how Muslims are being interrogated and searched at the border and prohibit Customs and Border Patrol officers from asking questions related to First Amendment-protected activity.
- Request that the Justice Department and Treasury Department issue agency orders providing a safe harbor for well-intentioned donors and to establish a single, user-friendly database for determining whether an entity or individual is on a Prohibited List.
- Request that the Justice Department dedicate additional resources and personnel to bullying prevention programs and to hate crimes reporting, investigation and prosecution.

Dr. Jytte Klausen, Lawrence A. Wien Professor of International Cooperation, Brandeis University

Federal Civil Rights Engagement With Arab and Muslim American Communities Post 9/11

1. Introduction: Bias Crime Trends Since 9/11

The term “Islamophobia” was coined in a 1997 report on the stereotyping of Muslims in the British media titled *Islamophobia: A Challenge for Us All* published by a British charity, the Runnymede Trust.¹ The term is now used to connote prejudice and stereotyping of Muslims, much as “anti-Semitism” is used to describe generalized bias against Jews. In this presentation I am particularly concerned with acts committed by Americans, on Americans, that have involved threats of violence in the name of Islam, sometimes vague and at other times credible, and sometimes committed by Muslim extremists and sometimes by anti-Muslim activists. All have as consequence the stereotyping of Islam as a violent faith, and have led to the deterioration of civil discourse about the problems facing Arab and Muslim Americans.

American Muslims are overwhelmingly opposed to Islamist extremists. In a 2011 Pew Research Center Poll, only two to three percent of American Muslims born abroad reported holding a favorable view of Al Qaeda. In contrast, ten to eleven percent of native-born Muslims indicated support for Al Qaeda, and the highest level of support was found among black American converts, whose support for Al Qaeda cannot be explained by the same factors driving extremism in Muslim-majority countries.² Nevertheless, the argument that for reasons of their faith Muslims cannot accept American norms has become a central tenant of anti-Muslim groups.

Until recently Americans had little opportunity to meet Muslims or to have Muslims as neighbors or co-workers, but since 9/11 the number of Muslims living in the U.S. has doubled, primarily through immigration. In the past decade, Muslims have established themselves in more than two hundred counties where no Muslims had lived before. Over a thousand new mosques have been built. The encounter with new Muslim neighbors provides new opportunities for anti-Muslim bias crimes. And perceptions of Arab-Americans and Muslim Americans are colored by global events. Threats and abuse broadcast by Islamic radicals abroad (some of them American citizens, again often converts) rub off on perceptions of American Muslims at home. Unfamiliarity may explain a great deal but it is not until recently American Muslims have become subjected to persistent bias crime.

¹ Runnymede Trust. *Islamophobia: A Challenge For Us All*. London: The Runnymede Trust, 1997.

² Pew Research Center. Muslim Americans. No Signs of Growth in Alienation or Support for Extremism. August 2011, page 5.

The FBI's annual release of hate crime statistics revealed a jump in anti-Muslim bias incidents in 2001 following the 9/11 attacks, from 28 incidents in 2000 to 481 in 2001. In the following five years the number of incidents held steady at about 150 incidents annually, three-times the level experienced prior to 2001. Over the next few years, the incident figures dropped by about 20 percent.

With the exception of the post-9/11 backlash, incidents of hate crimes directed against other religious groups—a category that includes Sikhs who are sometimes confused with Muslims in bias crimes—generally match those recorded as anti-Muslim incidents. A comparison with anti-Jewish incidents and incidents targeting other religious groups is instructive. Anti-Jewish incidents have historically made up about two-thirds of all religious bias incidents, but started to decline in 2000 and dropped 23.5 percent between 2000 and 2005, the year in the last decade with the fewest religiously-motivated hate crimes overall.³

The FBI's annual release of bias crime statistics for 2011 was not available for the preparation of this paper, and the 2010 statistics are therefore used. In 2010, the FBI recorded 186 anti-Muslim and 992 anti-Jewish bias crime offenses. The total number of offense was 7,699, of which 80 percent was based upon race, ethnicity, or sexual orientation.⁴ 18.9 percent were based upon religious bias. 207 incidents targeted a temple, synagogue, church, or mosque, with one instance of arson against a mosque recorded in 2010.⁵ (See table 1 for a detailed breakdown by type of bias offenses.)

The American Jewish population is significantly larger than the American Muslim population and the figures have little meaning as an indicator of Muslim-American exposure to bias crime unless weighted for population size. Based on the population information published by the U.S. Religious Landscape Survey published by the Pew Research Center's Forum on Religion & Public Life and the Center's survey reporting on the size of the Muslim population in the U.S., the American Jewish population was approximately 5,242,800 in 2010. The estimated Muslim

³ U.S. Department of Justice. Federal Bureau of Investigation. Hate Crime Statistics 2010 and previous years. Criminal Justice Information Services Division. Available at <http://www.fbi.gov/about-us/cjis/ucr/hate-crime/2010/narratives/hate-crime-2010-victims>.

⁴ The figures for bias crimes based upon ethnicity refer to offenses that are classified as anti-Hispanic and also people who may have been targeted because they are of Arab or Middle Eastern origin. The statistics are not reported in a way that allows us to include bias crimes targeting Arab American bias crimes with anti-Muslim offenses.

⁵ In 2002, there were 155 anti-Islamic incidents recorded with a total of 170 offenses recorded, and 174 victims. (Some incidents involve multiple offenses). In contrast, 931 anti-Jewish incidents were recorded with 1,039 offenses, 1,084 victims.

population was 2,595,000.⁶ Using all types of incidents—both property and personal hate crimes—to create a weighted measure of the impact of hate crimes relative to the size of religious groups, we arrive at a standardized measure for the incidence of bias crimes in 2010.

Using this methodology, there were 0.176 bias-crime offenses per 1,000 Jews and 0.072 offenses per 1,000 Muslims. Two conclusions follow. American Jews are more than twice as likely to become exposed to religious hate crimes as are American Muslims. And, second, aside from the post-9/11 spike in hate crimes, the prevalence of such crimes against American Muslims stabilized in the following years, and if measured against a growing population even declined. Anti-Muslim bias crimes have, however, increased in a number of smaller states which previously had few such crimes.⁷ This is consistent with the shift of Muslim settlement away from the large metropolitan areas.

⁶ Pew Research Center's Forum on Religion & Public Life. U.S. Religious Landscape Survey. Affiliations. Available at <http://religions.pewforum.org/>; same, The Future of the Global Muslim Population, January 2011. Table on the Americas, available at <http://features.pewforum.org/muslim-population/>.

⁷ The large states with many immigrant-origin populations lead in reporting anti-Muslim incidents, New York (275 incidents), New Jersey (221 incidents), and California (198 incidents). A number of small states now report proportionally high numbers of incidents, Massachusetts (57 incidents), Arizona (48 incidents), Ohio (37 incidents) and Washington (34 incidents).

Table 1. Hate Crime Statistics 2010. Bias Crime Offenses Based upon Religion.

	<i>Crimes against persons</i>				<i>Crimes against property</i>					
	<i>Total</i>	<i>Murder/ manslaughter</i>	<i>Aggravated assault</i>	<i>Simple assault</i>	<i>Intimidation</i>	<i>Robbery</i>	<i>Burglary</i>	<i>Larceny- theft</i>	<i>Arson</i>	<i>Destruction/ damage/ vandalism</i>
Religion:	1,409	3	35	133	321	11	29	38	17	816
Anti-Jewish	922	0	12	65	201	9	6	8	2	619
Anti-Catholic	61	0	0	5	7	0	6	10	0	31
Anti-Protestant	46	0	0	1	3	0	5	3	1	33
Anti-Islamic	186	0	17	46	69	1	1	3	1	47
Anti-Other Religion	134	3	4	11	25	1	9	8	12	59
Anti-Multiple Religions	53	0	2	5	15	0	1	5	1	23

Comments: Includes single and multiple-bias crimes. In a multiple-bias incident, two conditions must be met: (a) more than one offense type must occur in the incident and (b) at least two offense types must be motivated by different biases. Forcible rape: no religious bias incidents; Motor vehicle theft: 1 incident labeled as anti-Catholic is excluded from the table.

Source: U.S. Department of Justice. Federal Bureau of Investigation. Hate Crime Statistics 2010. Criminal Justice Information Services Division. Based upon Table 4. Available at <http://www.fbi.gov/about-us/cjis/ucr/hate-crime/2010/narratives/hate-crime-2010-victims>.

Nobody should find comfort in these numbers. In fact, the findings highlight the reason that we should be extremely concerned over evidence of a rapidly worsening situation in the past year with respect to toleration and bias crimes vis-a-vis Muslim Americans and other largely immigrant-origin non-Christian faith groups. Religious bias crimes have increased in importance relative to other bias crimes. From 2002 to 2010, the total number of hate crime offenses declined by 17.8 percent but religiously motivated offenses decline at half the rate, at 9.9 percent.

White men are disproportionately responsible for religiously motivated bias crimes, and white supremacists or individuals expressing sympathy for supremacist ideas have been identified as the perpetrators in a number of cases. Supremacists are proven to be willing to attack members or symbols of any non-Christian faith group, and we should be careful not to focus on crimes committed against Arab Americans and Muslim Americans to the exclusion of attacks on other non-Christian religious groups and their members.

Not reflected in the hate crime statistics released by the FBI are a wave of attacks on mosques and Hindu and Sikh temples. The increasing severity of the recent attacks on mosques is a source of particular concern. (See table 2 for a listing of mosque attacks and attacks on Sikh temples likely involving identity confusion.) Some arson attacks and shootings at mosques and Sikh and Hindu temples have led to fatalities, and in other cases there was a high risk of fatalities.

2. The Extremist Feedback Loop: Free Speech and Anti-Muslim Agitation

Twice, in recent months, federal courts have ruled that efforts on the part of the New York City and Washington D.C. transit authorities to prohibit an ad implying that the Muslims are “savage” are violations of the First Amendment. The ad reads: “In any war between the civilized man and the savage, support the civilized man. Support Israel. Defeat Jihad.”

In July, an attempt by the New York metropolitan Transit Authority to disallow the ad on the grounds that the language was demeaning was struck down by the U.S. District Court for the Southern District of New York. Judge Paul A. Engelmayer argued that while the reference to “jihad” could reasonably be seen as singling out Muslims, a refusal to allow the term “savage” would imply that the term could not be used in reference to any of the groups protected under current policy. This, the judge concluded, was an excessively broad interpretation of the Transit Authority’s right to regulate the content of ads.⁸ (The Transit Authority’s policy prohibits the display of images and texts that “demean an individual or group of individuals on account of race, color, religion, national origin, ancestry, gender, age, disability or sexual orientation.”)

⁸ *American Freedom Defense Initiative v. Metropolitan Transportation Authority*, U.S. District Court for the Southern District of New York (11cv6774). July 20, 2012.

The MTA's concern that Muslim and Arab American subway riders have a right not to be described as savages is reasonable enough. It is a different matter to argue, however, as did the Washington Metropolitan Area Transit Authority, that the ad should be censored because it contains "fighting words" and represents a risk to public safety. Citing a hypothetical risk for violence, the Washington transit authorities implied that Muslims are aggressors rather than the victims. The transit authorities thereby reinforced the message of the ad that Muslims are particularly liable to take violent umbrage. The ads went up in the Washington D.C. Metro system after the U.S. District Court for the District Court of Columbia overruled the transit authority's decision in early October.⁹

⁹ *American Freedom Defense Initiative, et al. v. Washington Metropolitan Area Transit Authority*, U.S. District Court for the District of Columbia (12cv1564). October 5, 2012.

Table 2. Attacks on Muslim and Sikh Homes, Businesses, and Places of Worship, September 1, 2011, to September 30, 2012.

Date	Location	Nature of attack	Motivation
September 30, 2012	Islamic Center of Greater Toledo, Ohio	Arson. 52-year-old Randy Linn, an ex-marine from Indiana, was captured on a surveillance camera and has been charged with hate crimes.	Motivated according to affidavit by “the deaths of U.S. military members in the Middle East, recent attacks on U.S. embassies and Muslims’ angry reactions to an anti-Islam video posted online.
September 21, 2012	Bay Shore Mosque, Bay Shore, NY	Graffiti on building.	“Anti-Muslim epithets were spray-painted on a mosque” (source: http://www.splcenter.org/get-informed/hate-incident)
September 14, 2012	Dar al-Hijrah mosque, Falls Church, VA	Windows smashed.	Investigation ongoing (source: http://wapo.st/Piqnvq)
September 13, 2012	Islamic Center of the Shenandoah Valley in Harrisonburg	Graffiti on building.	Investigation ongoing (source: http://wapo.st/Piqnvq)
August 12, 2012	Grand Mosque of Oklahoma City, OK	Paintballs were shot at the mosque	(sources: http://www.salon.com/2012/08/14/eight_attacks_11_days/ and http://www.cair.com/portals/0/pdf/Ramadan2012incidents.pdf)
August 12, 2012	Islamic School in Lombard, IL	“An assailant flung a homemade “MacGyver bomb” at the building, but the bomb did not break the glass. No one was harmed.	Under investigation. (Source: http://www.salon.com/2012/08/14/eight_attacks_11_days/)
August 10, 2012	Muslim Education Center in Morton Grove, IL	Pellet rifle was shot at the mosque wall.	Under investigation. (Source: http://www.salon.com/2012/08/14/eight_attacks_11_days/)
August 8 & July 4, 2012	Islamic Society of Joplin, MO	Arson. Mosque burned to the ground in a second arson attack.	Investigation ongoing

Date	Location	Nature of attack	Motivation
August 5, 2012	Masjid Al-Islam, Providence, RI	Vandalism*	* Now deemed not religiously motivated.
August 5, 2012	Sikh temple in Oak Creek, WI	Shooting attack. Six people killed.	The gunman, Wade Michael Page, 40, was a white supremacist. Page had ranted about "holy war", and it is assumed that he mistook the Sikh temple for a mosque. Page was killed by police.
August 3, 2012	Mosque in Hayward, CA	Harassment and Vandalism	"Four teens, ages 13-16, were arrested on suspicion of defacing property and a hate crime for allegedly throwing lemons at a local mosque, striking at least one person." (source: http://www.splcenter.org/get-informed/hate-incidents)
July 17, 2012	Muslim Community Center, West Seattle, WA	Harassment and Vandalism	"A man was charged with malicious harassment and malicious mischief after he allegedly smashed a window of a Muslim community center and said he committed the act because he hates Muslims." (source: http://www.splcenter.org/get-informed/hate-incidents)
June 12, 2012	American Muslim Center storage building in Dearborn, MI	Arson. Graffiti on building.	Under investigation.
February 23, 2012	Business in Brooklyn Park, NY	Graffiti on building.	"Anti-Muslim graffiti was spray-painted on a business" (source: http://www.splcenter.org/get-informed/hate-incidents)
February 22, 2012	Islamic Society of Nevada, Las Vegas, NV	Arson. Funeral home under construction burned down.	Under investigation.
February 14, 2012	Islamic Center in Dearborn, MI	Graffiti on building.	"Possible anti-Muslim graffiti was spray-painted on an Islamic Center" (source: http://www.splcenter.org/get-informed/hate-incidents)
February 6, 2012	Sikh temple in Sterling Heights, MI	Graffiti on building.	"Hate graffiti was scrawled on a Sikh place of worship" (source: http://www.splcenter.org/get-informed/hate-incidents)
January 20, 2012	Ahmadiyya Muslim Community Mosque, Chantilly, VA	Vandalism, broken windows and door glass.	Investigation ongoing.

Date	Location	Nature of attack	Motivation
January 16, 2012	A residence in Hillard, OH	Arson. Graffiti on building.	"A residence occupied by the son of an Egyptian native was set afire. The house had been painted with anti-Arab and anti-Islamic slurs several months earlier" (source: http://www.splcenter.org/get-informed/hate-incidents)
January 1, 2012	Imam Al-Khoei Foundation and Hindu Temple Queens, NY	Molotov cocktails thrown at mosque and a Hindu temple, together with two other locations associated with	"A New York man told police he intended to kill "as many Muslims and Arabs as possible" (source: http://www.splcenter.org/get-informed/intelligence-report/browse-all-issues/2012/summer/man-charged-with-firebombing-ny-mosque)
October 31, 2011	Islamic Association of Mid-Kansas mosque in Wichita, KS.	Arson. Mosque severely damaged.	Under investigation.
September 11, 2011	Islamic Center of Murfreesboro, TN	Arson. Vandalism. Bomb threat.	A Texas man was indicted in June on charges that he left messages threatening to detonate a bomb at the center.
September 11, 2011	Dry Cleaning Business in Orangevale, CA	Graffiti on building.	"Anti-Arab graffiti and a swastika were painted on a dry cleaners owned by Palestinian immigrants" (source: http://www.splcenter.org/get-informed/hate-incidents)
September 9, 2011	Grocery Store in Hayesville, NC	A Molotov cocktail was thrown into the building. Graffiti was also painted on the building.	"The words '9/11 go home' were painted on a grocery store owned by a Sikh family" (source: http://www.splcenter.org/get-informed/hate-incidents)

Source: Own research based upon local and national media outlets.

The ad was purchased by Pamela Geller, who is co-founder with Robert Spencer of “Stop the Islamization of America” and the “Freedom Defense Initiative,” U.S.-based organizations modeled on what in Europe has become known as the “counter-Jihad” movement. Geller and Spencer are inspired by the Dutch politician, Geert Wilders, who is famous, among other things, for having proposed that the Koran should be banned in the Netherlands, as is Hitler’s *Mein Kampf*, because Islam is not a religion but a fascist ideology.

The important issue is that uncivil discourse may escalate into incitement to violence. In Europe, anti-Muslim and extremist Islamist groups are locked in a dangerous dialectic of mutual provocation, maintaining a symbiotic relationship as “best enemies.” They coordinate demonstrations, for example, mobilizing members to turn up for street fights at each other’s meetings and often repost each other’s incendiary material online.¹⁰ Their message is essentially the same, namely, that democracy is “disallowed” for Muslims who must live only in a state regulated by the Sharia.

The feedback loop between the provocations of the far right and the violent responses of Muslim extremists was dramatically and tragically illustrated by the events that led to the death in Benghazi of the U.S. ambassador to Libya, J. Christopher Stevens, on September 11, 2012. The attack was initially attributed—an oversimplification, as it turned out—to local protests against an American-made film, uploaded on YouTube, titled “Innocence of Muslims.” The YouTube clip is an amateur production made up of sophomoric sacrilegious sketches of the Prophet Muhammad already featured on sites on the Internet. A trailer for the production was posted on YouTube months before violence occurred in Egypt and elsewhere, but it came to the attention of Egyptian authorities after excerpts were broadcast on the Cairo-based ultraconservative religious al-Nas television. The TV station was alerted to the existence of the YouTube clips by a Twitter campaign, promoted by a U.S.-based Coptic Christian activist and a pastor in Gainesville, Florida, Terry Jones. Jones got everyone’s attention in 2010, and then again in 2011, for his plans to burn copies of the Koran in a bonfire.

The producer of the film, Nakoula Basseley Nakoula, known initially as Sam Bacile, claimed that he was an Israeli-American, and that he raised \$5 million from about 100 Jewish donors to fund the film. The deception was widely broadcast in Middle East media. A Coptic Christian based in the U.S. named Morris Sadek dubbed an excerpt into Arabic and began advertising it on

¹⁰ Paul Jackson, *The EDL. Britain’s ‘New Far Right’ Social Movement*. The University of Northampton’s Radicalism and New Media Research Group. 2011; Jytte Klausen et al., “Keyboard Jihadism: A Social Network Analysis of Al-Muhajiroun’s YouTube Propaganda Network,” *Perspectives on Terrorism*, 6 (1), 2012. Available at <http://www.terrorismanalysts.com/pt/index.php/pot/article/view/klausen-et-al-youtube-jihadists>.

his Arabic-language blog during the first week of September.¹¹ The promotion included, among other items, a picture of Pastor Jones in front of the White House and a bloody cartoon purporting to show the Muslim Prophet. The “screening” of the video was announced to coincide with “The International Judge Muhammad Day,” scheduled for September 11 in Gainesville, Florida. (See illustration 1.)



Muhammad depicted with his face obscured, “The Prophet Muhammad and the Muslim army at the battle of Uhud,” (Medina, year 625). From *Siyar-i-Nabi*, made for Sultan Murad III, Ottoman, Constantinople, c.1594. (David Collection.)

Redacted by Yale University from “The Cartoons That Shook the World” (Yale UP 2009)

YouTube, which is essentially an Internet-based utility guided by private guidelines allowing the removal of material that violates certain norms, has decided not to remove the clip. As for demands from the Organization of the Islamic Conference and the Egyptian government that the U.S. criminalizes blasphemous representations of the Muslim prophet, the First Amendment protects us against having religious doctrine determine what is permissible expression, and protects the rights of Americans freely to seek out information.

The First Amendment does not, however, extend automatic protection to speech intended to incite violence or, as the Washington transit authorities tried to maintain, “fighting words” that

¹¹ The Daily Kos, From Film to Protests: the Publicization of “Innocence of Muslims” in Egypt. September 25. Available at <http://www.dailykos.com/story/2012/09/24/1135744/-From-Film-to-Protests-the-Publicization-of-Innocence-of-Muslims-in-Egypt>.

pose a risk to public safety. It is fair to conclude that the trio promoted the “Innocence of Muslims” YouTube production in the hope that it would stimulate violent demonstrations, following the precedent of the 2006 cartoon protest, and using the anniversary of September 11 for the purpose of achieving coordination with Islamist extremists. They achieved their objective because Islamist extremists in the Middle East were similarly intent on marking the day.

Pastor Jones has at various times been urged by Robert Gates, the Secretary of Defense, and General Martin E. Dempsey, the Chairman of the U.S. military’s Joint Chiefs of Staff, and possibly other federal officials, not to proceed with Koran-burning demonstrations. The federal government’s intervention is understandable but carries the risk of tarring Muslims with the blame for limiting what has previously been regarded as an essential aspect of American civil liberties.

3. Anticipatory Conflict Avoidance: Yale University’s Redaction of Illustrations from Book on the Protests Against the Danish Cartoons

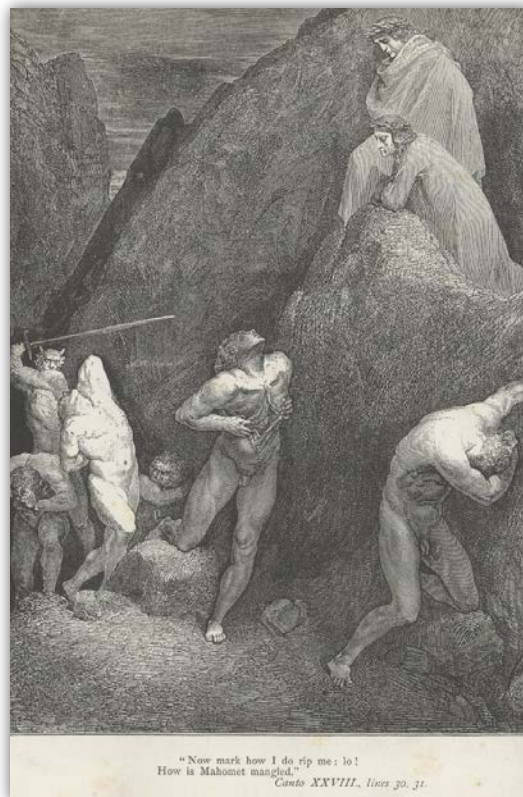
A second issue, sometimes presented, in my view mistakenly, as a proper response to Islamophobia, is the pre-emptive censorship of speech and images deemed dangerous or offensive. I would agree with Paul Marshall and Nina Shea that rules and norms which anticipate religious complaints about “insults to Islam” serve as proxies for restrictions on speech. In effect, they incorporate religious prohibitions into secular law.¹²

In 2009, Yale University removed several illustrations from a book I had written about the global controversy sparked by the publication in a Danish newspaper of twelve cartoons that featured satirical images of Muhammad. Yale University Press argued that the images could be considered offensive by Muslims and lead to violence, including attacks on Yale and other American institutions. In an Orwellian twist, Yale University cited my own book as evidence that reproduction of the cartoons was dangerous. The Press defended its decision with reference to the advice of an expert panel (of which more later) “that there existed a substantial likelihood of violence that might take the lives of innocent victims.”

¹² Paul Marshall and Nina Shea, *Silence. How Apostasy and Blasphemy Codes Are Choking Freedom Worldwide*. New York: Oxford University Press, 2011, page 328.

Illustration by Gustave Doré (1832-1883) of verse in Dante Alighieri's epic poem, "The Divine Comedy"

Redacted by Yale University from "The Cartoons That Shook the World" (Yale UP 2009)



The censored illustrations in my book included a reproduction of the page from the Danish newspaper with the cartoons and two other illustrations. One was a page from a sixteenth-century Ottoman illustrated manuscript, *Siyar-i-Nebi* (The Life of the Prophet), depicting the Prophet leading the Muslim forces in a decisive battle near Medina in year 625. The other was an engraving made by a nineteenth-century French print maker, Gustave Doré, to illustrate a chapter in Dante's *Divine Comedy*, a classic early fourteenth-century narrative poem. In this illustration Dante encounters Muhammad together with other "sowers of discord" during his travels through the realms of the Christian after-life. Dante's poem may have been inspired by a story alluded to in the Koran about Muhammad's journey in one night to meet with the angel Gabriel, an episode that has been the subject of some of the most vivid and glorious illustrations in Islamic art history.

Satanic Verses Book Burning,
Bradford, UK, January 9, 1989

Copyright: Garry Clarkson. Used
with permission from the
photographer.



The censored illustrations accompanied a discussion in my book about iconoclasm and the history of depicting Muhammad in Western and Islamic art. I pointed out that only some branches of Islam embraced what scholars now call aniconism, the prohibition of human images, and the prohibition was never systematically applied. One of the arguments of my book was that the 2006 cartoon conflict had been misreported as an instance of Muslims spontaneously exploding in riots when confronted with “bad” pictures. In fact, various interest groups, including state actors, exploited the cartoon issue to make the case that democracy and free speech are bad for Muslims. Having yielded to the notion that “depiction of the Prophet” is forbidden to Muslims in the aftermath of the cartoon “affair”, Western media and cultural institutions now contribute to the misrepresentation of Islam as a censorious faith and to a restriction on the opportunities available to both Muslim and non-Muslim readers and students to learn about the diversity of Islam.

The charter of Yale University states that causing offense and “shock, hurt, and anger” are not sufficient grounds for compromising “the free access to information”.¹³ The President’s office

¹³ Yale College. Statement on Policies with Respect to Free Expression, Peaceful Dissent, and Demonstrations, available at <http://yalecollege.yale.edu/content/free-expression-peaceful-dissent-and-demonstrations>.

was therefore compelled to defend its decision to censor my book on the grounds that the images would cause such offense in the Middle East that there would be a risk of violence. To that end, the President's office assembled an advisory panel of diplomats, academics and US and UK counter-terrorism officials who apparently concluded that there was a strong chance of violence breaking out if the cartoons were published. Based upon the panel's recommendations the university developed a 15-page memorandum explaining how dangerous to national security and the university's students and personnel the publication of the particular images would be. The memorandum was to be made available to me only on the condition that I sign a gag order, which would prevent me from mentioning the content of the memorandum and the identity of the consultants. I refused to sign the non-disclosure agreement, and I therefore never saw the memorandum.

Thus it was established, without any threats ever having been received, that certain images famous in the art history of both Western and Islamic art had become too dangerous to be published in an academic book because they might incite the violent anger of unnamed Muslims. Yale University has not produced any threatening letters as evidence of this risk, nor have I ever received any threats.

In the public debate that followed it became clear that such acts of censorship were by no means unique. The late Oleg Grabar, a distinguished historian of Islamic Art at Princeton University, revealed in his discussion of what he described as Yale's "gratuitous betrayal of scholarship" that a few years earlier Harvard University Press had similarly deleted an image from one of his books citing a vague concern about "trouble".¹⁴

Yale University was widely condemned. Citing Yale's actions and a number of other incidents from the death threats against Ayaan Hirsi Ali, the Dutch-Somali law maker now living in the U.S., to Random House's cancellation of a contract to public Sherry Jones' book, *The Jewel of Medina*, twenty organizations, among them The National Coalition Against Censorship and the American Association of University Professors, issued a Statement of Principle and Call to Action declaration urging governments, institutions and private individuals to support freedom of expression and academic freedom, and to resist caving in to threats of violence, real and imagined. The statement concluded by paraphrasing Benjamin Franklin to the effect that, "those who would give up essential liberty to purchase a little temporary safety, will get neither liberty nor safety."¹⁵ PEN issued a public letter noting that the organization's international membership debated the issues posed by the cartoon's original publication at great length, but that those

¹⁴ Oleg Grabar, Seeing and Believing. The image of the prophet in Islam: the real story, *The New Republic*, October 30, 2009. Available at <http://www.tnr.com/article/books-and-arts/seeing-and-believing?page=0.0>.

¹⁵ <http://ncac.org/STATEMENT-OF-PRINCIPLE-Free-Expression-at-Risk-at-Yale-and-Elsewhere>.

discussions inevitably “reach[ed] one clear, consensus position: the introduction of violence or threats of violence into debates over art and ideas is to be rejected and condemned,” and that the organization was “troubled” by the decision to “pull the images based on speculative threats.”¹⁶

Yale’s arguments highlighted the difficulties faced by an international university that tries to temper domestic research and education to the tastes of foreign governments. At one point, during a meeting chaired by the Vice-President of Yale, Linda Lorimer, Professor Marcia Inhorn, chair of Yale’s Islamic Studies program, asked me why I did not fear for my life—or the safety of my children?—since the death penalty applies to blasphemy offense in Pakistan. No evidence existed that Pakistani death squads were on the way to New Haven (or Boston).

I am grateful that, as an American, I have since 2010 been protected by the Securing the Protection of our Enduring and Established Constitutional Heritage (SPEECH) Act against the enforcement of foreign libel laws in U.S. court, except in such cases where a judgment is in conformity with the First Amendment. But foreign restrictions on allowable expression easily slip in through the backdoor.

Several current and former federal officials were complicit in Yale’s censorship of my book. Yale publicized some of the names of the people who supported the censorship, and others identified themselves in interviews. Some names were revealed to me in an effort to put me under pressure. Among them were John Negroponte, the former Deputy Secretary of State and Director of National Intelligence in 2005-2007, and a number of former and current government officials. The university told me that the head of U.S. Homeland Security’s New Haven office recommended that the university refrain from publishing my book on the grounds that it was contrary to the national interest. Linda Lorimer, on my suggestion, contacted Ambassador Daniel Benjamin, The Office of the Coordinator for Counter-Terrorism, whose deputy called me and conveyed the ambassador’s views.¹⁷ To my surprise, Ambassador Benjamin’s deputy told me to remove not only the page with the Danish cartoons but also the Doré illustration and the reproduction of the Ottoman-era manuscript on the grounds that printing them would be dangerous to my safety, the safety of Yale University, and not in the nation’s interest.

Preventive free speech restrictions put us in the awkward position of having to anticipate what might offend the easily offended. This is an enhanced version of the heckler’s veto. Offending Mormons is safe, as Brett Stephens wrote recently in *The Wall Street Journal*, but offending

¹⁶ PEN. September 11, 2009. Available at <http://www.pen.org/viewmedia.php/prmMID/3876/prmID/2021>.

¹⁷ Emails were exchanged between Lorimer, Ambassador Benjamin’s office, and myself on July 27 and July 28, 2009. The conversation took place July 28.

Muslims is dangerous, and therefore subject to anticipatory restraint.¹⁸ Decisions as to what is permissible are thus farmed out to foreign governments or to violent extremists, and the standard for what is permissible expression becomes essentially unknowable.

4. Credible Threats: Al Qaeda-Inspired Threats Against American Artists and Writers

But what should be the response of the federal government and the media—and U.S. corporations and institutions in the news or culture business—when credible threats *are* made? In 2009, six weeks after my dispute with Yale, a Chicago resident and U.S. citizen, David Coleman Headley (a.k.a. Daood Saleem Gilani), was arrested on charges related to the deadly attack in Mumbai in 2008. Headley confessed to his role in the plot and also to involvement in a plot to attack the offices of the Danish paper responsible for publishing the cartoons. Headley's on-line communications with his handlers named as another target for assassination Sherry Jones, the author of *The Jewel of Medina*, whose novel the Islamists considered another suitable symbol of Western "insults to Islam."

It proved to be just one incident in a string of "suggestions" to kill people identified as responsible for "insults to Islam." In none of the cases has evidence of a direct and imminent threat been made publicly known. Zachary Chesser, a 22-year old American, was sentenced in 2011 to 25 years in prison on charges of material support for terrorism. In April 2010, using the name Abu Talha al-Amriki, Chesser posted a "warning" to the creators of "South Park," a cartoon show on Comedy Central, suggesting that "someone" should kill the creators of the show, Trey Parker and Matt Stone, for depicting Muhammad wearing a bear suit in an episode. Chesser was a neophyte keyboard jihadist who a few months earlier had started blogging on a U.S. based website called RevolutionMuslim.com and on the al-Qimmah Forum, the official forum of al-Shabaab. Chesser's wife, a Ugandan, whom he had met in the online jihadi chat rooms, helped spread Chesser's South Park threat on YouTube. Both were adherents of Anwar al-Awlaki, the Yemen-based American propagandist for Al Qaeda, and frequent participants on websites sponsored by Awlaki's group. (The wife, Proscovia Kampire Nzabanita, pleaded guilty in November 2010 to posting online threats.¹⁹)

A year later, the U.S. government filed an indictment in the same case against Jesse Curtis Morton, also an American convert who went by the name Younus Abdullah Mohammad online. The files released in connection with the charges included Chesser's confession that he had

¹⁸ Brett Stephens, "Muslims, Mormons and Liberals. Why is it OK to mock one religion but not another?" *The Wall Street Journal*, September 19, 2012.

¹⁹ "Wife of terrorism convict pleads guilty; will have to leave U.S.," *CNN*. November 08, 2010. Available at http://articles.cnn.com/2010-11-08/justice/us.guilty.plea_1_guilty-plea-plea-agreement-infant-son?s=PM:CRIME.

hoped his campaign against South Park would mobilize Muslims in the US the same way as the 1989 fatwā issued by Ayatollah Khomeini against Salman Rushdie in retribution for his book, *Satanic Verses*, had galvanized British Muslims.²⁰

No evidence has ever been produced that any U.S. based Muslims responded to Chesser's incitement to violence. Nonetheless, Comedy Central redacted the bear suit-clad figure from reruns of the episode.

In response to Comedy Central's censorship, Molly Norris, a cartoonist for *The Seattle Weekly*, drew a cartoon depicting various objects, including a spoon and a spool of thread, inviting people to contribute to a Facebook event that she called "Everybody Draw Mohammed Day." She immediately became the target of threats from Awlaki's small group of Americans who wanted to bring the jihad 'home.' *Inspire* magazine, an English-language online jihadist magazine produced in Yemen and edited by Samir Khan, a U.S. citizen from Charlotte, North Carolina, published a death threat in the form of a fatwā from Awlaki calling for the execution of the Danish editor, Flemming Rose, the cartoonist, Kurt Westergaard, and Norris.

Reportedly on the advice of the FBI, Norris went underground. The only explanation provided was a statement in *The Seattle Weekly* explaining in the language of a spy thriller that Norris was "going ghost." "She is, in effect, being put into a witness-protection program—except, as she notes, without the government picking up the tab."²¹ (I have unsuccessfully tried to reach Norris. The name is apparently a pseudonym.) Norris's drawing was reprinted in the *Washington Post*, but few other national newspapers followed suit.²² Meanwhile, in Denmark, Rose went to work as usual, as did the other people singled out for punishment by Awlaki, trusting, as they have now for years, that the police will keep them safe.

5. Recommendations

Demands that everyone show respect for Islam, emanating for the most part from extremists or foreign governments pursuing their own political agendas, contribute to the mischaracterization and stereotyping of the aspirations and desires of Muslim Americans. Submission to such demands risk endorsing particular versions of Islam or what might be described as "official

²⁰ *United States of America v. Jesse Curtis Morton*, U.S. District Court for the Eastern District of Virginia (11mj00386). See docket entry #3, available at http://www.investigativeproject.org/documents/case_docs/1561.pdf. Last accessed October 28, 2012.

²¹ "On the Advice of the FBI, Cartoonist Molly Norris Disappears From View." *The Seattle Weekly*, September 15 2010, <http://www.seattleweekly.com/2010-09-15/news/on-the-advice-of-the-fbi-cartoonist-molly-norris-disappears-from-view/>.

²² *The Washington Post*, April 26, 2010. Available at http://voices.washingtonpost.com/comic-riffs/2010/04/everybody_draw_mohammed_day_ga.html. Last accessed October 28, 2012.

Islam”, laid out by the Al-Azhar University in Cairo, for example, or by more suspect sources of doctrinal authority. Acts of direct or indirect censorship in the name of avoiding religious offense may also infringe the civil rights of individual Arab and Muslim Americans to decide for themselves what they think or believe Islam to be.

The desecration of Muslim symbols may nonetheless in certain contexts constitute unacceptable violations of the civil rights of Muslims and Arab Americans, not because of the religious content of the symbols, but because of the threat implied. Intent matters, and the real and intended consequences of particular acts of hate speech must be weighed.

Other issues arise. In what circumstances do insults and abuse infringe upon American Muslims’ civil rights? And when does deliberate provocation amount to incitement to violence? Book burning is a type of constitutionally protected political protest. Burning the Koran is, taken as a single incident, much like angry Muslim protesters burning Rushdie’s book. (See illustration 3.) Burning the Koran is not per se an anti-Muslim offense. I am after all not a Muslim and may burn the Koran in my back yard, should I so decide. The prohibition on the destruction of the holy book applies only to believers, and is not part of U.S. law. Were I to stage as part of a demonstration a bonfire of the Koran in front of a mosque, or a Muslim family’s home, the act takes on another meaning and may be considered a crime. If done in a particular context, cross burning—in front of a black church, for example—ceases to be a protected expression of political sentiment and becomes an act of intimidation. We are not accustomed to understanding the manipulation of symbols connoting hatred of Muslims but the issue must be seen as an analog to how our views of cross burning has evolved to become expressions of hatred of blacks, or how the use of Nazi symbols or caricatures to vilify Jews in some contexts are a civil rights violation and could constitute acts that do not merit the protection of our constitution.

Complications arise when anti-Muslim provocations are intended to provoke violence abroad, and to have a “boomerang” effect on American Muslims and Arab Americans. To take an example, Pastor Jones may burn copies of the Koran in his own front yard. He may also upload pictures of his event onto YouTube. But once he starts to promote his pictures to extremist media outlets in the Middle East, in Arabic, and presenting them to be part of a “judge Muhammad demonstration” to be held on September 11, those actions are clearly an incitement to violence. It is also possible that such acts may create a hostile environment, for black or Jewish families, for instance, or for Muslims. A failure to take action may amount to a violation of civil rights of the victims.

We should, however, resist the retreat to anticipatory censorship in the face of threats. Militants and extremists have been far too successful in the manipulation of symbols in order to suppress speech, violating the rights of speakers and consumers of speech acts.

Then there is the question of how to deal with threats. Stifling debate in order to evade unknowable or vaguely perceived threats—even credible threats—may seem a reasonable

tradeoff at the moment, but it has corrosive effects on debate and the dissemination of knowledge over the long-term. The federal government should be put under an obligation not only to aim for enforcement strategies that keep us safe but also to preserve the benefits of an open society and a diverse media.

Preventive or anticipatory censorship turns the “true threat” standard on its head by suppressing expressions that might *invite* violence. In its decision in *United States v. Bagdasarian*, the U.S. Court of Appeals for the Ninth Circuit established that “It is [therefore] not sufficient that objective observers would reasonably perceive such speech as a threat of injury or death.”²³ There must be a “true threat” which the court defined as evidence that the speaker intended the speech as a threat and evidence of an expectation or an intent on the part of the speaker to take violent action or knowledge that someone would take violent action. This is a tough standard, and we may soon find it insufficient in view of the demonstrated ability of extremists to use social media networking sites to impart threats. But nowhere does it endorse suppressing speakers or expressions that are the *target* of violence.

²³ *United States of America v. Walter Edward Bagdasarian*, U.S. Court of Appeals for the Ninth Circuit, No. 09-50529. July 19, 2011.

Sahar F. Aziz,¹ Associate Professor, Texas Wesleyan University School of Law² and Fellow, Institute for Social Policy and Understanding

Federal Civil Rights Engagement With Arab and Muslim American Communities Post 9/11

Chairman Castro, Members of the Committee my name is Sahar F. Aziz. Thank you for the opportunity to testify today in my capacity as a law professor whose scholarship focuses on the intersection of national security and civil rights as it relates to Arabs, Muslims, and South Asians in the post-9/11 era. I want to note, at the outset of my testimony today regarding federal civil rights engagement with Arab and Muslim American communities post-9/11, that the views I present today are my own and do not necessarily represent the views of my law school.

Prior to joining the legal academy, I spent over seven years representing individuals and working with nonprofit organizations that were directly, and often adversely, impacted by post-9/11 national security laws, practices, and policies. I also had the privilege of serving as a Senior Policy Advisor for the Office for Civil Rights at the United States Department of Homeland Security in Washington, D.C. where I coordinated federal engagement programs across the country. Accordingly, I have participated in various federal civil rights engagement efforts with the Arab and Muslim American communities both as a government official and an advocate representing community interests. My testimony today reflects my experiences, observations,

¹ Sahar F. Aziz is an associate professor of law at Texas Wesleyan University School of Law and a fellow for the Institute for Social Policy and Understanding. Professor Aziz previously served as a Senior Policy Advisor at the Office for Civil Rights and Civil Liberties at the U.S. Department of Homeland Security where she led multiple federal civil rights engagement programs with Muslim, Arab, and South Asian communities across the country. Professor Aziz's scholarship focuses on the intersection of national security and civil rights with a focus on Arab, Muslim, and South Asian communities in the post-9/11 era. Professor Aziz's scholarship has been published in the *Gonzaga Law Review*, *Texas Civil Rights and Civil Liberties Law Review*, *Hastings Race and Poverty Law Review*, *New York City Law Review*, and *George Washington International Law Review*. Professor Aziz has been featured on CSPAN and Al Jazeera English and published numerous commentaries on national security and civil rights issues on CNN.com, the *Houston Chronicle*, the *Huffington Post*, Truthout.com, altmuslim.com, the American Constitution Society's blog, JURIST.com, *The Guardian* and the *Christian Science Monitor*. Professor Aziz has presented her work in various forums including at U.S. Congressional Briefings, the Aspen Institute, the National Endowment for Democracy, the American Bar Association, the National Employment Lawyers Association, the U.S. Equal Employment Opportunity Commission and the Texas Bar Association. Professor Aziz clerked for the Honorable Andre M. Davis when he was on the United States District Court for the District of Maryland and earned her J.D. and M.A. in Middle Eastern Studies from the University of Texas in Austin.

² The views expressed herein are solely those of the author and do not represent the views of the Texas Wesleyan University School of Law. Professor Aziz thanks Rusty Roeger, a graduate of Texas Wesleyan School of Law, Danielle Jefferis, a graduate of Georgetown University Law Center, and Texas Wesleyan Law Student Natalia Cashen for their diligence and invaluable assistance in preparing this testimony.

and academic research on the important, albeit imperfect, project of government engagement with Arab and Muslim American communities.

The topic of today's hearing—federal civil rights engagement with Arab and Muslim American communities—bears a great deal of importance on the question of how the federal government should balance its protection of civil rights and liberties of all Americans with America's national security needs.

While this topic warrants a more extensive analysis, my testimony highlights four key points that I believe are paramount to a successful federal civil rights engagement program with Arab and Muslim American communities.

First, for federal engagement to be effective, community representatives at engagement meetings must encompass the rich diversity of the Arab and Muslim American communities, including but not limited to, ethnicity, socio-economic background, youth, women, political viewpoint, and race. Often times, a limited number of individuals who are male, Arab or South Asian, and over the age of 35 are repeatedly invited to government engagement meetings. As a result, discussions are constrained by the limited experiences and viewpoints of a select few purportedly representing tremendously diverse communities. This impedes the communities' efforts to seek redress on civil rights grievances as well as the government's ability to meaningfully identify and resolve civil rights issues.

Second, the federal government and any participant local and state entities should not use community engagement meetings in furtherance of national security, surveillance, investigative and prosecutorial objectives, but rather to develop trust and constructive relations with their constituents towards the common goal of protecting individual rights and public safety for all Americans. Unfortunately, recent news reports prompt serious concerns that some government engagement meetings are pretext for gathering intelligence, conducting investigations, and eventually pursuing prosecution of meeting attendees or their families and associates – as opposed to good faith efforts to build relationships between government and constituents. Absent credible evidence and binding mechanisms that guarantee the government is not conducting engagement based on false pretenses, engagement efforts are doomed to fail as mere public relations exercises aimed at diverting attention from critiques of government overreaching.

Third, government engagement efforts with Arabs and Muslims must be holistically focused on the host of social, economic, and political factors that affect the vitality of Arab and Muslim communities across the nation. The government's primary interest in working with Arab and Muslim communities based solely on national security issues reinforces false stereotypes that

these communities warrant extra scrutiny,³ thereby increasing the risk of private acts of discrimination and perpetuating counterproductive counterterrorism tactics. Moreover, communities' suspicions that engagement efforts are merely investigative tools employed as part of broader counterterrorism objectives are reinforced, thereby hindering the potential for developing sustainable relationships based on trust and mutual respect.

Finally, government civil rights engagement programs must be subject to independent citizen and Congressional oversight to ensure stated objectives are in fact met. Notwithstanding the best of intentions, the efficacy of government engagement programs should not be left to the discretion of government employees left unaccountable to impartial and independent third parties. Various models of citizen oversight used in other contexts can guide the creation of effective monitoring and oversight mechanisms for government engagement projects.⁴

In the end, failed engagement efforts risk worsening relations between Arab and Muslim communities and government, in addition to wasting limited government resources during challenging economic times.

I. Community representatives at federal engagement meetings must encompass the rich diversity of the Arab and Muslim American communities, including but not limited to, ethnicity, socio-economic background, youth, women, political viewpoint, and race.

As the adage goes, garbage in leads to garbage out. Investment on the front end designing holistic civil rights engagement programs at the systemic level saves time, resources, and grief on the back end. For these reasons, I cannot over-emphasize the importance of ensuring community attendees at government engagement meetings adequately represent the rich diversity of the Arab and Muslim American communities across the United States.⁵ With over 1 billion followers across the globe, Islam has followers who live on every continent, speak nearly every language, and originate from diverse ethnicities and races.⁶ Muslim communities in the United

³ Omar Sacirbey, New poll finds Americans evenly divided in views of Muslims, WASH. POST, August 24, 2012, available at http://www.washingtonpost.com/national/on-faith/new-poll-findsamericans-evenly-divided-in-views-of-muslims/2012/08/24/1cddd588-ee30-11e1-b624-99dee49d8d67_story.html.

⁴ Sahar F. Aziz, *Caught in a Preventive Dragnet: Selective Counterterrorism in a Post-9/11 America*, 47 GONZ. L. REV. 429 (2012).

⁵ Farid Sensai, *Engaging American Muslims: Political Trends and Attitudes*, Institute for Social Policy & Understanding, 2012, at 14. Available at http://www.ispu.org/pdfs/ISPU%20Report_Political%20Participation_Senzai_WEB.pdf.

⁶ Pew Forum, *The Future of the Global Muslim Population*, January 27, 2011, The Pew Forum on Religion and Public life, <http://www.pewforum.org/The-Future-of-the-Global-Muslim-Population.aspx/>.

States reflect this extensive diversity, resulting in a myriad of personal experiences and viewpoints based on differences in national origin, culture, race, languages spoken, socio-economic backgrounds, gender, immigration experiences, and generational positioning.⁷ Accordingly, sufficient effort must be invested towards ensuring full representation of diverse communities that are often erroneously treated as a homogenous “Muslim community” in the United States.

Presumably, neither the communities nor the government is interested in a check-the-box exercise that wastes government and the communities’ time on mere public relations. Hence communities and government counterparts should thoughtfully select credible and representative community members to participate at engagement meetings. “Representing the Muslim community” simply cannot be conducted by a few, select individuals. Rather, affirmative efforts are warranted to expand representation beyond those who are male, older than 35, and Arab or South Asian. Similarly, engagement meetings must include the diverse political viewpoints within Muslim communities to assure honest conversations that lead to effective and sustainable solutions.⁸ While the path of least resistance may be to invite the same individuals whose interests in being re-invited to meetings trump the broader interests of the communities and thereby compromise their willingness to criticize government officials, such practices are doomed to fail. Not only are government resources wasted speaking to unrepresentative individuals who hold little credibility in the communities they claim to represent, but the engagement effort is discredited as a public relations stunt aimed at diffusing, rather than meaningfully addressing, civil rights grievances.⁹

Further aggravating representational problems is anecdotal evidence that government employees call invited community members requesting that they not ask embarrassing or politically sensitive questions when high level officials are in attendance. Similarly, those who voice views unpopular to or critical of government officials find themselves excluded in future meetings notwithstanding that their concerns reflect views held within parts of the communities. Failure to rectify these structural flaws understandably causes credible community leaders to decline

⁷ Gallup Report, Muslim Americans: A National Portrait, 2009, Gallup, available at <http://www.gallup.com/strategicconsulting/153572/REPORT-Muslim-Americans-National-Portrait.aspx>.

⁸ Mohamed Younis, Muslim Americans Exemplify Diversity, Potential Key findings from a new report by the Gallup Center for Muslim Studies, Gallup, March 2, 2009, available at <http://www.gallup.com/poll/116260/muslim-americans-exemplify-diversity-potential.aspx>

⁹ Aref Assaf, Am. Muslims: America’s Best Ambassadors, N.J. On-Line (Sep. 18, 2012, 8:33 PM), <http://blog.nj.com/drarefassaf/2012/09/whatwouldprophetmuhammadhavedoneamericanmuslims-americasbestambassadors.html/>.

invitations to participate in engagement efforts because they find them to be a futile and duplicitous endeavor.¹⁰

Admittedly, the issue of adequate representation is not easy to resolve by virtue of the intersectional complexities of race, ethnicity, gender, and socio-economics at play in such diverse communities. Merely asking community members to identify persons who represent them in a particular city is flawed by design. The responses are constrained by the very process in which the solicitations are made. In light of such concerns, representational challenges are best addressed on a systemic scale as a joint effort between communities and government agencies wherein neutral criteria are employed to select individuals participating in engagement efforts.

Keeping in mind that a more extensive discussion of representational problems is warranted, I propose the following criteria as a starting point for discussion:

- **Females should constitute fifty percent of the community attendees.** Excuses by the government that Muslim and Arab communities do not have sufficient numbers of female leaders or that Muslim women are hesitant to participate in public meetings are not supported by the facts and usually represent incompetency or gender bias by those assigned to conduct community engagement on behalf of the government. As a matter of practice, all engagement meetings should be comprised of 50% female and 50% male attendees as reflected in the population.
- **Youth should be adequately represented in engagement meetings.** By youth, I am referring to high school students, college students, and persons in their twenties. Youth often have a vastly different experience than their parents' generation in terms of civil rights grievances, political and social viewpoints, and immigrant experiences. As in all communities, youth also bring with them creative solutions and refreshing candor that inform the engagement process.
- **African American Muslims should be represented proportionate to their population.** Notwithstanding that they comprise approximately 35 percent of Muslims in America,¹¹ African American Muslims have been under-represented in American Muslim communities resulting in a physical and political divide between Muslims who recently immigrated and African Americans whose families have lived in the United States for

¹⁰ Kate Taylor, 14 Muslim Leaders Plan Boycott of Breakfast With Mayor, N.Y. Times, December 28, 2011, <http://www.nytimes.com/2011/12/29/nyregion/14-muslim-leaders-plan-boycott-of-bloomberg-interfaith-breakfast.html/>; Jenna Portnoy, Christie Slams NYPD over Muslim Spying Program in NJ, N.J. On-Line, February 29, 2012, <http://www.nj.com/news/index.ssf/2012/02/christieslamsnypdovermusli.html>.

¹¹ Gallup, *Muslim Americans*, 12.

generations.¹² Such under-representation may be a product of cultural differences or racial bias found in some immigrant Muslim communities. Regardless of the causes, government engagement efforts should affirmatively seek to change the status quo by ensuring that African American Muslims are provided equal opportunity to participate in government engagement efforts.

- **Community leaders should not be limited only to regular mosque goers.** Of the estimated 3 million Muslims in America,¹³ a significant number do not regularly attend mosques¹⁴ for reasons that are beyond the scope of my testimony. Yet, they share common experiences with frequent mosque goers with regard to discrimination in employment, profiling at airports, bullying in schools, unwarranted surveillance and investigation by government authorities. Moreover, those who do not attend mosques on a regular basis often represent different cultural and social circles that encompass the broader Muslim communities. Failure to reach beyond the regular mosque going communities restricts the government's exposure to perspectives of a significant number of Muslims in America.
- **Proportionate representation between Arabs and South Asians, and within Arab and South Asian communities, prevents counterproductive competition for attention and government resources.** For a variety of reasons and in varying degrees of severity depending on the locale, historic divisions exist between Arab and South Asian Muslim communities.¹⁵ Such divisions are most often found among first generation immigrants with widely different cultural and linguistic backgrounds. With each subsequent generation in the United States, these divisions are diluted and Muslims of diverse ethnic and racial backgrounds find more in common in their shared American identity. That said, engagement efforts insensitive to historic divisions may become delegitimized by virtue of inadvertently having a disproportionate representation of Arab Muslims or South Asian Muslims. While it is not the role of government to mediate inter- or

¹² *Id.*

¹³ Rhys H. Williams, *The Second Generation: Americans Who Happen to be Muslims*, UIC Dept. of Sociology: Youth and Religion Project, 2002, <http://www.uic.edu/depts/soci/yrp/pdf/mod6.pdf>; Meghan Neal, Number of American Muslims in the U.S. doubles since 9/11, Daily News, May 3, 2012, <http://articles.nydailynews.com/2012-05-03/news/315605881muslim-community-religious-groupislamic>.

¹⁴ Gallup, *Muslim Americans*, 30; Pew Research Poll, *The World's Muslims: Unity and Diversity*, August 9, 2012, The Pew Forum on Religion and Public Life, <http://www.pewforum.org/Muslim/the-worlds-muslims-unityand-diversity-appendix-a.aspx>.

¹⁵ Sahar F. Aziz, *Sticks and Stones, The Words That Hurt: Entrenched Stereotypes Eight Years After 9/11*, 13 N.Y. CITY L. REV. 33, 43-48 (2009).

intracommunity disputes, government officials must be sufficiently informed to minimize the appearance, or practice, of favoritism toward particular ethnicities.

- **Invite persons that represent the different experiences of newer immigrants as well as second or third generation American Muslims.** Like Americans of other faiths, ethnicities, and national origins, Muslims are part of America's proud immigrant tradition. Some have been here for multiple generations while others are recent arrivals adapting to a new environment that entails significant linguistic, cultural, and social differences from their countries of origin.¹⁶ Thus, the nature and type of concerns expressed vary greatly depending on their socio-economic status, education, skin color, and familiarity with American society. Limiting community participants to multi-generation Americans or newer immigrants skews engagement meetings towards a particular experience at the expense of others, ultimately leading to inadequate solutions to complex challenges.
- **Avoid excluding individuals with contrarian or dissenting viewpoints.** At the operational level, it may be less hassle to conduct engagement meetings where attendees agree on the problems and the solutions, but it comes at a high price. Specifically, government representatives will obtain an inaccurate portrayal of the concerns of the diverse communities if they fail to include those with contrarian or political controversial viewpoints that hold some representational value.¹⁷ Often times, such individuals have the courage to speak truth to power despite the discomfort it may produce. These contrarian voices, often arising from younger generations or marginalized groups within the Muslim and Arab communities, add value to the civil rights engagement process.
- **Verify representational capacity of community leaders.** Engagement efforts need not be limited to community leaders. But for those individuals who participate on grounds that they represent a particular sub-group within the Muslim communities, their positions should be verifiable. In some cases, a person's status as the president, chairman, or other leadership title of a community organization provides sufficient proof of a representational capacity. In contrast, many individuals claim to play a representational capacity when in fact their views are merely their own, or worse, may misrepresent the views of those they proclaim to speak on behalf.

¹⁶ Pew Research Center, *Muslim Americans: Middle Class and Mostly Mainstream* (May 2007) <http://pewresearch.org/assets/pdf/muslim-americans.pdf>.

¹⁷ American Civil Liberties Union, National Security, <http://www.aclu.org/national-security>; Farbod Faraji, *ACLU Asks State Dept. to Issue Visa to Palestinian Poet* (April 4, 2012, 6:09 PM), <http://www.aclu.org/blog/free-speech/aclu-asks-state-department-issue-visa-palestinian-poet>.

- **Require disclosure of conflicts of interests.** Community attendees hold various positions in the private, public, and nonprofit sector. In some cases, their jobs involve a government grant, contract, or other relationships with government agencies. Facially, such dealings are not problematic. But in the context of engagement efforts they may compromise these individuals' inclination to criticize the same agencies with which they have pre-existing relationships in other contexts. To preserve the integrity of the engagement process, such relationships should be disclosed to all attendees to minimize the risk of a conflict of interest. An unwillingness to make such disclosures is a red flag that these individuals are unable or unwilling to represent community interests independent of their own personal interests.

The fore mentioned recommendations are not intended to be comprehensive or dispositive, but rather offer a starting point for a more in-depth conversation between Muslim and Arab communities and government agencies involved in engagement efforts. Notably, the government should not entangle itself in determining who is or is not a leader in the Muslim communities, as that should be an internal, organic community process. However, the absence of objective, neutral criteria may produce the same bad outcome – a meeting of individuals who do not fully and accurately represent the diverse Muslim communities.¹⁸

II. The government should not use community engagement meetings in furtherance of national security surveillance, investigative and prosecutorial objectives, but rather to develop trust and robust relations with constituents towards the shared goal of protecting individual rights and public safety for all Americans.

It is an abuse of trust to use community engagement meetings as pretext to pursue national security surveillance, investigatory, and prosecutorial objectives. Community-government engagement efforts, whether with Arabs and Muslims or any other communities, are intended to develop trust, honest dialogue, and robust relationships between government and constituents – all of which further the shared goal of protecting individual rights and public safety for all Americans.

Media reports over the past few years expose a troubling pattern of pretextual counterterrorism tactics that misguidedly use political beliefs and religious practices as proxies for criminal

¹⁸ David A. Harris, *Law Enforcement and Intelligence Gathering in Muslim and Immigrant Communities After 9/11*, 34 N.Y.U. REV. LAW & SOC. CHANGE 1 (2009). Sahar Aziz, *The Contradictions of Obama's Outreach to American Muslims*, The Huff. Post, December 19, 2011, <http://www.huffingtonpost.com/sahar-aziz/obamaamerican-muslim-outreachb1152359.html>.

activity.¹⁹ Specifically, orthodox Muslims or those who openly critique U.S. government policies find themselves targeted by dubious informants, sting operations, and other aggressive counterterrorism tactics. Not only do such practices undermine civil liberties, they waste limited law enforcement resources by monitoring constitutionally protected activity while ignoring unlawful activity committed by those not fitting a particular religious, racial, or ethnic profile. Looking for evidence of radicalization through an individual's clothing, facial hair, or religious observances, as recommended by a controversial New York Police Department Report, diverts resources from investigations of true threats.²⁰

Accordingly, some Arab, Muslim, and South Asian communities are reasonably concerned that some engagement meetings are used as pretext for gathering intelligence, recruiting informants, conducting investigations, and eventually pursuing prosecution of meeting attendees or their

¹⁹ See, e.g., COLE & LOBEL, *Less Safe, Less Free* 30-33 (2007), (“[I]nstead of incarcerating people on the basis of proof beyond a reasonable doubt that they committed a past infraction, the preventive paradigm turns to detention as a preventive matter and employs it against individuals deemed suspect by virtue of their group identity or political affiliations.”); Mitchell D. Silber & Arvin Bhatt, N.Y.C. POLICE DEP’T, RADICALIZATION IN THE WEST: THE HOMEGROWN THREAT 31 (2007), available at http://www.nypdshield.org/public/SiteFiles/documents/NYPD_Report-Radicalization_in_the_West.pdf (asserting that “[w]earing traditional Islamic clothing, growing a beard,” and “[b]ecoming involved in social activism and community issues” are signs of “radicalization”); Michael Powell, *In Police Training, a Dark Film on U.S. Muslims*, N.Y. TIMES, Jan. 24, 2012, at A1, available at <http://www.nytimes.com/2012/01/24/nyregion/in-police-training-a-dark-film-on-us-muslims.html?pagewanted=1&r=2&hp> (reporting that the NYPD showed over 1400 of its officers a film titled *The Third Jihad*, which accuses American Muslims of “deception” and waging jihad “covertly throughout the West today”).

²⁰ See, e.g., Mitchell D. Silber & Arvin Bhatt, *N.Y.C. Police Dep’t, Radicalization in the West: The Homegrown Threat* 18 (2007), available at http://www.nypdshield.org/public/SiteFiles/documents/NYPD_Report-Radicalization_in_the_West.pdf; Aziz Huq, *Concerns with Mitchell D. Silber and Arvin Bhatt, N.Y. Police Dep’t, Radicalization in the West: The Homegrown Threat*, New York University School of Law, Brennan Center for Justice, (Aug. 30, 2007), at: http://brennan.3cdn.net/436ea44aae969ab3c5_sbm6vtxgi.pdf. See also, Coalition Memo to the Senate Committee on Homeland Security and Governmental Affairs Regarding “Homegrown Terrorism,” American Civil Liberties Union et al. (May 7, 2008) available at <http://www.aclu.org/safefree/general/35209leg20080507.html>; Muslim American Civil Liberties Coalition, *Counterterrorism Policy: MACLC’s Critique of the NYPD’s Report on Homegrown Terrorism*, (2008), at: <http://maclcnypdcritique.files.wordpress.com/2008/11/counterterrorism-policy-final-paper3.pdf>; “Statement of Clarification,” p. 11-12, (added in 2009), to Mitchell Silber and Arvin Bhatt, New York Police Department, *Radicalization in the West: The Homegrown Threat*, p. 6, (2007), at: http://www.nyc.gov/html/nypd/downloads/pdf/public_information/NYPD_Report-Radicalization_in_the_West.pdf; and, Muslim American Civil Liberties Coalition Letter to Raymond Kelly, *Response to NYPD ‘Statement of Clarification,’* (Sept. 2009), at: <http://maclc1.wordpress.com/2009/09/08/maclc-90809-letter-response-to-nypd-statement-of-clarification>.

family and associates.²¹ Moreover, there are serious and legitimate concerns within Muslim communities that personal information about attendees is collected and distributed to other government agencies with intelligence gathering and prosecutorial authorities. Absent binding mechanisms that guarantee the government is not participating in engagement programs based on false pretenses;²² engagement efforts will not meet the stated objective of building trust and constructive relationships between government and Muslim, Arab, and South Asian communities.²³ Specifically, community leaders will understandably decline to attend out of concern for their and their constituents' civil liberties, leaving those with minimal representational capacity and self-promotion interests at meetings where they will say whatever the government wants to hear.²⁴ Ultimately, this results in a colossal waste of government resources.

Two particularly troubling tactics engender distrust of engagement programs: 1) using engagement meetings to gather intelligence, surveil, and investigate Muslims absent proof of a factual predicate of wrongdoing and 2) the use of dubious informants to induce vulnerable young

²¹ Jerry Markon, *FBI Illegally Using Community Outreach to Gather Intelligence*, *ACLU Alleged*, WASH. POST, Dec. 1, 2011, available at <http://www.washingtonpost.com/politics/fbi-illegally-using-community-outreach-to-gather-intelligence-aclu-alleges/2011/11/30/gIQA1qxyGOstory.html>; Jerry Markon, *Lawsuit Alleges FBI Violated Muslims' Freedom of Religion*, WASH. POST, Feb. 22, 2011, available at <http://www.washingtonpost.com/politics/lawsuit-alleges-fbi-violated-muslims-freedom-of-religion/2011/02/22/ABNOXZQstory.html> (alleging "an FBI informant who infiltrated a California mosque violated the constitutional rights of hundreds of Muslims by targeting them for surveillance because of their religion"). Adam Godman, *Informant: NYPD paid me to 'bait' Muslims*, *Assoc. Press*, October 23, 2012, <http://www.google.com/hostednews/ap/article/ALeqM5is2wtkrieQfRMyc5SchJoitrbiA>; *Terror Probes Have FBI's informant Numbers Soaring*, NPR, August 21, 2011, <http://www.npr.org/2011/08/21/139836377/thesurge-in-fbi-informants>; Paul Harris, *The ex-FBI informant with a change of heart: 'There is not real hunt. It's fixed'*, *Guardian*, March 20, 2012, <http://www.guardian.co.uk/world/2012/mar/20/fbi-informant>.

²² David A. Harris, *Law Enforcement and Intelligence Gathering in Muslim and Immigrant Communities After 9/11*, 34 N.Y.U. Rev. Law & Soc. Change 1 (2009).

²³ Sahar F. Aziz, *Protecting Rights as a Counterterrorism Tool: The Case of American Muslims*, *Countering Violent Extremism: Dialogue, Training and Research* (Fall 2012).

²⁴ Faiza Patel, *Brennan Ctr. for Justice, N.Y. Univ. Sch. of Law, Rethinking Radicalization* 26-27 (2011), available at http://brennan.3cdn.net/3ff468de1211ff853e_hwm6beu15.pdf (explaining that outreach meetings are generally perceived "as insincere" and "as a one-way means for the government to gather information about community members' religious practices"); Abukar Arman, *Op-Ed., Bridges of Rhetoric and Suspicion*, [Worldpress.org](http://www.worldpress.org) (Aug. 16, 2009), <http://www.worldpress.org/Americas/3398.cfm>. ("The reality on the ground tells a different story - one in which rhetoric is abundant and substance is scarce."); *NYPD Spying on Muslims Leads to Spiral of Mistrust*, *Homeland Sec. NewsWire* (Nov. 23, 2011, 1:51 PM), <http://www.homelandsecuritynewswire.com/dr20111123-nypd-spying-on-muslims-leads-to-spiral-of-mistrust> ("Following the revelation that the New York City police department was spying on the daily lives of ordinary Muslims, community activists have launched a campaign encouraging people to avoid directly reporting suspicious activity to the police.").

Muslim men into fake terrorist plots. Coupled with reports of inaccurate and biased trainings on Muslims and Islam delivered to federal law enforcement officers by unqualified individuals,²⁵ these tactics thwart community engagement efforts and corroborate allegations of government overreaching at the expense of civil rights and liberties of Muslims, Arabs, and South Asians.

A. Using Engagement Meetings to Gather Intelligence, Surveil, and Investigate Absent Proof of a Predicate Act of Wrongdoing Breeds Distrust

Federal regulatory prohibitions against racial profiling in law enforcement are not binding and do not apply to religious or ethnic origin profiling.²⁶ As a result, government agents may, and often do, profile on account of religion and ethnic origin in counterterrorism enforcement cognizant that there is no practical legal recourse for those targeted.²⁷ Despite failures in the law to protect against ethnic and religious profiling, these practices significantly undermine the formation of constructive relationships between Arab, Muslim, and South Asian communities.

Corroborating the communities' concerns, in 2011 and 2012 the ACLU obtained official FBI documents revealing a "mosque outreach" program that served as a cover-up for illegal spying

²⁵ Dina Temple-Raston, *New Concern About Bias in Counterterrorism Training*, NPR (Mar. 9, 2011), <http://www.npr.org/2011/03/09/134374232/new-concern-about-bias-in-counterterror-training>; Spencer Ackerman, *FBI Teaches Agents: 'Mainstream' Muslims Are 'Violent, Radical'*, *Wired*, September 14, 2011

²⁶ See U.S. DEP'T OF JUSTICE, *Guidance Regarding the Use of Race by Federal Law Enforcement Agencies*, June 2003, http://www.fletc.gov/training/programs/legaldivision/the-informer/research-by-subject/departement-of-justice-guidance/_useofrace.pdf/view; U.S. DEP'T OF JUSTICE, *RACIAL PROFILING* (2003), *available at* http://www.justice.gov/opa/pr/2003/June/racial_profiling_fact_sheet.pdf (outlining Justice Department guidelines making clear that racial profiling is illegal and notably excluding religion or ethnic origin). But see *Whren v. United States*, 517 U.S. 806 (1996) (permitting law enforcement to make pretextual stops so long as there is probable cause of some violation of law, such as a traffic infraction, that would otherwise justify the stop).

²⁷ See, e.g., ASIAN LAW CAUCUS, *RETURNING HOME: HOW U.S. GOVERNMENT PRACTICES UNDERMINE CIVIL RIGHTS AT OUR NATION'S DOORSTEP* 4, 7, 10-12, 14, 23 (2009) *available at* <http://www.asianlawcaucus.org/wpcontent/uploads/2009/04/Returning%20Home.pdf>; CTR. FOR IMMIGRANTS' RIGHTS, PA. STATE UNIV. DICKINSON SCH. OF LAW, *FOR AM.-ARAB ANTI-DISCRIMINATION COMM., NSEERS: THE CONSEQUENCES OF AMERICA'S EFFORTS TO SECURE ITS BORDERS* 34, 38 (2009), *available at* <http://www.adc.org/PDF/nseerspaper.pdf>; Press Release, Muslim Advocates & Am. Civil Liberties Union, *Groups Seek End to Religious Questioning at the Border by Federal Agents* (Dec. 16, 2010), http://www.muslimadvocates.org/FINAL_DHS%20CBP%20letter%20release.pdf; Press Release, Am.-Arab Anti-Discrimination Comm. & Yale Law Sch., *ICE Targets Immigrants from Muslim Majority Countries Prior to 2004 Presidential Election* (Oct. 20, 2008), <http://www.adc.org/PDF/frontline.pdf>. See also Aarti Kohli, Peter L. Markowitz and Lisa Chavez, *Secure Communities by the Numbers: An Analysis of Demographics and Due Process*, The Chief Justice Earl Warren Institute on Law and Social Policy, October 2011 *available at* <http://www.law.berkeley.edu/files/SecureCommunitiesbytheNumbers.pdf> (finding evidence of racial and ethnic profiling in immigration enforcement).

based solely on religious activity. From 2004 through at least 2008, the FBI collected and illegally stored intelligence on American Muslim organizations and mosque congregants with no suspicion of wrongdoing.²⁸ Documents show that agents documented Muslims' conversations regarding frustrations over airline travel and where attendees would pray in a new mosque, as well as the subject of a particular sermon. One 2008 document shows that an FBI agent "collected and documented individuals' contact information and First Amendment-protected opinions and associations, and conducted internet searches to obtain further information about the individuals in attendance, including, in one instance, the photo of a dinner participant."²⁹ In a 2009 memo, an FBI agent in Sacramento used community outreach efforts to monitor the Saudi Student Association at California State University.³⁰

These troubling revelations prompt several threshold questions:

1. Should government officials be permitted to record and retain information obtained during engagement meetings?
2. Assuming they must retain some information as part of their efforts to address community civil rights concerns expressed at engagement meetings:
 - a. What type of information can the government collect?
 - b. Who in the government has the authority to view this information?
 - c. What checks are in place to assure the information is used for the purposes stated in the engagement meetings as opposed to intelligence gathering, investigative, and prosecutorial purposes
3. What oversight mechanisms are in place to assure the government is using information in accordance with its stated non-prosecutorial purpose?

²⁸ ACLU Eye on the FBI (Mar. 27, 2012), available at [http://msnbcmedia.msn.com/i/MSNBC/Sections/NEWS/z_Personal/Huus/aclu_eye_on_the_fbi_-_mosque_outreach_03272012_0\[1\].pdf](http://msnbcmedia.msn.com/i/MSNBC/Sections/NEWS/z_Personal/Huus/aclu_eye_on_the_fbi_-_mosque_outreach_03272012_0[1].pdf).

²⁹ Ryan J. Reilly, *Muslim Officials Want Answers from FBI over Data Collection During Outreach Efforts*, TPM Muckraker (Dec. 1, 2011, 5:45 PM), available at http://tpmmuckraker.talkingpointsmemo.com/2011/12/muslim_officials_want_answers_from_fbi_over_data_collection_during_outreach_efforts.php

³⁰ Jerry Markon, *FBI Illegally Using Community Outreach to Gather Intelligence, ACLU Alleged*, WASH. POST, Dec. 1, 2011, available at <http://www.washingtonpost.com/politics/fbi-illegally-using-community-outreach-to-gather-intelligence-aclu-alleges/2011/11/30/gIQA1qxyGOstory.html>.

It goes without saying that information discovered in engagement meetings that has a clear nexus to criminal activity should be acted on by law enforcement. However, that is not the nature of information of concern to Muslim and Arab communities who have a shared interest in promoting public safety. Instead, communities worry their personal information, religious and political beliefs and activities, and immigration statuses are recorded in an adversarial process wherein their participation in engagement makes them a target of counterterrorism and immigration enforcement. If this is indeed the case, then community engagement is a misnomer and instead the process is more accurately described as a fishing expedition into Muslim communities' lives and affairs that has a devastating chilling effect.

Additionally, thousands of individuals have been subjected to the FBI's abuse of "voluntary" interviews some of which are used to coerce Muslims into becoming informants.³¹ In some instances, the FBI recruits potential informants from attendees at engagement meetings. Many well-intentioned Muslims accept the FBI's requests to speak with them (often without a lawyer) only to find themselves prosecuted for making false statements on issues unrelated to terrorism.³² Others are coerced into serving as informants under threat of prosecution for making false statements unrelated to terrorism.³³ Indeed, the problem has become so endemic that advocacy groups are proactively educating these communities on their right to refuse to submit to voluntary interviews and the importance of retaining counsel to protect them from this coercive tactic.³⁴ Astonishingly, these advocacy groups' campaigns to educate predominantly immigrant

³¹ See, e.g., Petra Bartosiewicz, *To Catch a Terrorist: The FBI Hunts for the Enemy Within*, HARPER'S MAG., Aug. 2011, at 37, available at <http://harpers.org/archive/2011/08/0083545> ("In November 2001, the Department of Justice began conducting 'voluntary interviews' with 5,000 Middle Eastern non-citizens. Hundreds of FBI agents were dispatched across the country to conduct the interviews, with standard questions like 'Are you aware of anybody who reacted in a surprising way about the terrorist attacks?'); Mary Beth Sheridan, *Interviews of Muslims to Broaden: FBI Hopes to Avert a Terrorist Attack*, WASH. POST, July 17, 2004, at A01, available at <http://www.washingtonpost.com/wpdyn/articles/A56080-2004Jul16.html>.

³² See, e.g., Nick Meyer, *Prominent Attorney Who Refused to Betray Arab and Muslim Clients Speaks on Civil Liberties, Life on Terror Watch List*, ARAB-AM. NEWS (Aug. 21, 2011, 2:25 AM), <http://www.arabamericanews.com/news/index.php?mod=article&cat=Community&article=4627> ("[A]bout 1,200 non-citizens were rounded up immediately after the 9/11 attacks and . . . the only charges brought against them were actually for routine immigration violations or in some cases ordinary crimes . . ."); Wajahat Ali, *Time for FBI to Stop Spying on American Muslims*, GUARDIAN (Dec. 7, 2010, 10:30 AM), <http://www.guardian.co.uk/commentisfree/cifamerica/2010/dec/07/islam-terrorism>.

³³ See, e.g., Aaronson, *supra* note at 30, 32-33.

³⁴ See, e.g., AM. CIVIL LIBERTIES UNION, KNOW YOUR RIGHTS WHEN ENCOUNTERING LAW ENFORCEMENT 4-5 (2004), available at http://www.aclu.org/files/kyr/kyr_english.pdf; GOT RIGHTS?, MUSLIM ADVOCATES, http://www.muslimadvocates.org/get_involved/got_rights.html (last visited Jan. 8, 2012); *Know Your Rights*, COUNCIL ON AM.-ISLAMIC RELATIONS (2011), <http://www.cair.com/CivilRights/KnowYourRights.aspx#9>; *Urgent*

communities about their civil and constitutional rights then serve as a basis for allegations of disloyalty and support of terrorism by right wing, anti-Muslim ideologues.³⁵ When an attorney's fulfillment of her obligation to defend the constitution through public education becomes a basis for attacking her loyalty to that same constitution, all Americans should be outraged. Sadly, this is the precarious position faced by Muslims in America.

B. Use of dubious informants to induce vulnerable young Muslim men into fake terror plots undermines legitimacy of criminal justice system

The use of dubious informants to induce vulnerable young Muslim men into fake terror plots is another troubling tactic that undermines community trust in law enforcement. For decades, informants have been an integral part of law enforcement.³⁶ However, their pervasive presence in post-9/11 counterterrorism campaigns appears to be unprecedented. Compared to 1500 informants in 1975 and 2800 in 1980, reports indicate that there are now 15,000 FBI informants.³⁷ According to various news outlets, many of the informants are tasked to spy on and infiltrate American Arab and Muslim communities.³⁸ Coupled with recent discoveries that informants aggressively seek to induce Muslim men towards violence, it should come as no

Community Alert: Seek Legal Advice Before Talking to FBI, MUSLIM ADVOCATES 1-2, http://www.muslimadvocates.org/FBI_IVU_COMMUNITY%20ALERT.pdf (last visited Jan. 8, 2012).

³⁵ Matt Gertz, *Right-Wing Media Attacked Muslim Advocates For Giving Muslims Common Legal Advice*, Media Matters, March 29, 2011, <http://mediamatters.org/research/2011/03/29/right-wing-media-attackedmuslim-advocates-for/178059>.

³⁶ See generally Alexandra Natapoff, *Snitching: The Institutional and Communal Consequences*, 73 CIN. L. REV. 645 (2006).

³⁷ *The Informants: How the FBI's Massive Informant Network Actually Created Most Plots "Foiled" in U.S. Since 9/11*, OLDSPEAK J. (Oct. 11, 2011, 4:57 PM), <http://theoldspeakjournal.wordpress.com/2011/10/11/the-informants-how-the-fbis-massive-informant-network-actually-created-most-terrorist-plots-foiled-in-u-s-since-911/>.

³⁸ Trevor Aaronson, *FBI Tries to Deport Muslim Man for Refusing to Be an Informant*, Miami New Times at 32 (Oct. 8, 2009), available at <http://www.miaminewtimes.com/2009-10-08/news/unholy-war-fbi-tries-to-deport-northmiami-beach-imam-foad-farahi-for-refusing-to-be-an-informant/>; *Bloomberg Backs Law Enforcement Ahead of Muslim Leaders' Breakfast Boycott*, CNN (Dec. 29, 2011), http://articles.cnn.com/2011-12-29/us/us_newyork-bloomberg_1_muslim-leaders-spy-agency-cia?_s=PM:US; *FBI Used Outreach Programmes 'to Spy on Muslims'*, TELEGRAPH (Dec. 2, 2011, 12:59 AM), <http://www.telegraph.co.uk/news/worldnews/northamerica/usa/8929931/FBI-used-outreach-programmes-to-spy-on-Muslims.html>.

surprise that Muslim, Arab, and South Asian communities are distrustful of federal law enforcement agencies.³⁹

The abuse of informants is spreading to state and local law enforcement agencies. Just last month, a paid informant for the New York Police Department (“NYPD”) stated publicly that he was under orders to “bait” Muslims into making incriminating statements, all while he was taking photographs inside mosques and collecting the names of Muslims attending religious study groups.⁴⁰ His account was corroborated by the Associated Press through arrest records and text messages between the informant and his handler.⁴¹

Last year the NYPD was ordered to release documents revealing that agents and informants had repeatedly targeted New York City mosques, restaurants, and other Muslim-owned businesses viewed as “security risks” for “endorsing conservative religious views or having devout customers.”⁴² Indeed, the NYPD explicitly used “ethnic orientation, leadership and group affiliations” to mark fifty-three “mosques of concern.”⁴³ According to the Associated Press, the documents “paint the clearest picture yet of how the past decade’s hunt for terrorists also put huge numbers of innocent people under scrutiny as they went about their daily lives in mosques, restaurants and social groups.”⁴⁴

In addition to their orders to trap Muslims into making incriminating statements that can be used out of context at trial, some of the informants boast suspect or downright criminal pasts.⁴⁵ A

³⁹ Trevor Aaronson, *FBI Tries to Deport Muslim Man for Refusing to Be an Informant*, Miami New Times 32, 35 (Oct. 8, 2009), <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/>.

⁴⁰ *Informant: NYPD paid me to “bait” Muslims*, Oct. 23, 2012, http://www.cbsnews.com/8301-201_162-57538013/informant-nypd-paid-me-to-bait-muslims/.

⁴¹ *Id.*

⁴² *Documents Show NY Police Watched Devout Muslims*, WALL ST. J. (Sept. 6, 2011, 6:32 PM), <http://online.wsj.com/article/APfd1a04fa820c44bd820aae6bc75d33e3.html>; see also Joe Coscarelli, *NYPD Even Spied on the Muslim Leaders Who Were Helping Them*, N.Y. Mag. (Oct. 6, 2011, 10:36 AM), http://nymag.com/daily/intel/2011/10/nypd_even_spied_on_the_muslim.html (reporting imam welcomed NYPD officers into his mosque and attended meetings with Mayor Bloomberg and Commissioner Kelly, while at same time he was target of NYPD surveillance).

⁴³ *Id.* (emphasis added).

⁴⁴ *Id.*

⁴⁵ For example, in 2005, a British businessman was convicted of providing material support to terrorists after law enforcement officials—acting as both the buyer and seller—reportedly caught him “brokering the sale of a surface-to-air missile.” See Petra Bartosiewicz, *To Catch a Terrorist: The FBI Hunts for the Enemy Within*, Harper’s Mag., Aug. 2011. The informant involved in this sting operation had previously incriminated an innocent man during a

telling case study involves a convicted felon, Craig Monteilh, who was paid by the FBI to fake his conversion to Islam in order to infiltrate mosques and instigate terror plots among the Los Angeles Muslim communities.⁴⁶ Ironically, the informant's tactics were so aggressive that targeted Muslims actually reported *him* to the FBI as a potential terrorist.⁴⁷ Unbeknownst to the community leaders, the suspected terrorist was in fact an informant tasked with creating a fake terrorist plot.⁴⁸ Discovery of his real identity, along with other informants across the country, put into serious question the intentions of law enforcement in counterterrorism operations. Some in the Muslim, Arab, and South Asian communities reasonably suspected the government was more concerned with scoring political points by bolstering terrorism statistics than protecting public safety.⁴⁹

Likewise, in a case sensationally coined “the Albany missile plot,” the FBI targeted two Muslims at a local mosque using a paid informant.⁵⁰ The targets, Yassin Aref and Mohammed Hossain, were “well-known members of the [local] community . . . with no prior criminal record and no history of violence.”⁵¹ The FBI's investigation began shortly after 9/11, when one of the mosque's founders was seen “celebrating the 9/11 attacks in the streets.”⁵² That individual was never charged with a crime and was eventually deported.⁵³ However, surveillance of the mosque continued, culminating in an eight-month sting operation.⁵⁴ In that operation, government informant Shahed Hussain led a fictitious money-laundering plot involving the sale of a

DEA drug sting. *Id.* In an alleged 2007 plot involving destruction of fuel tanks at JFK Airport, the informant was a former drug dealer busted for possessing \$2 million in cocaine and conspiring to murder a rival dealer. *Id.*

⁴⁶ See, e.g., Shan Li, *FBI Violated 1st Amendment Rights of Muslims, Suit Alleges*, L.A. TIMES (Feb. 24, 2011), <http://www.latimes.com/news/local/la-me-fbi-muslims-20110224,0,2886967.story>; Jerry Markon, *Mosque Infiltration Feeds Muslims' Distrust of FBI*, Wash. Post, Dec. 5, 2010; Paul Harris, *The ex-FBI informant with a change of heart: 'There is no real hunt. It's fixed.'* THE GUARDIAN (Mar. 20, 2012).

⁴⁷ Jerry Markon, *Mosque Infiltration Feeds Muslims' Distrust of FBI*, Wash. Post, Dec. 5, 2010 (“Muslims were so alarmed by [an informant's] talk of violent jihad that they obtained a restraining order against him.”).

⁴⁸ *Id.*

⁴⁹ See, e.g., David Bario, *By Any Means Necessary*, AM. LAW. (Oct. 1, 2008),

<http://www.law.com/jsp/tal/PubArticleTAL.jsp?id=1196279828736> (stating that the federal government's 2003 guidelines for prosecuting terrorism “encouraged strategic over-inclusiveness in charging terrorism suspects,” causing prosecutors to “throw the kitchen sink at suspects to get them off the streets before they could act”).

⁵⁰ See Petra Bartosiewicz, *To Catch a Terrorist: The FBI Hunts for the Enemy Within*, Harper's Mag., Aug. 2011.

⁵¹ *Id.*

⁵² *Id.* (internal quotation marks omitted).

⁵³ *Id.*

⁵⁴ *Id.*

shoulder-fired missile provided by the FBI.⁵⁵ Shahed Hussain was the same informant used in the Newburgh Four case—another sting operation where the government’s informant played a leading role in the fake terrorist plot.⁵⁶

After befriending Mohammed Hossain, apparently to induce him into a fictitious plot, the informant offered him a loan for his struggling pizzeria.⁵⁷ The informant disclosed to Hossain that the loan had come from the sale of a missile to a terrorist group.⁵⁸ As soon as Hossain accepted the loan and asked Aref to witness it, they were both arrested on charges of conspiring to aid a terrorist group, providing support for a weapon of mass destruction, money-laundering, and supporting a foreign terrorist organization.⁵⁹

A federal court in Albany sentenced the two defendants to fifteen years in federal prison after they pleaded guilty, and the case “became one of the government’s most lauded victories in the fight against domestic terrorism—even though, by the government’s own acknowledgment, it involved no terrorists, no terrorism plot, and a missile provided by the FBI.”⁶⁰

And in Iowa, members of the small Muslim community in Des Moines were surprised to learn that Arvinder Singh, an Indian-born Sikh, was sent into their mosques to spy for the FBI.⁶¹ Singh stated that he felt “obliged” to obey the FBI after he was charged with selling more than the legal

⁵⁵ Paul Grondahl, *Suspicion, Acceptance in Wake of Terror Trial*, TIMES UNION (Albany), Oct. 12, 2006, at B1, available at <http://albarchive.merlinone.net/mweb/wmsql.wm.request?oneimage&imageid=6362940>.

⁵⁶ Ctr. for Human Rights & Global Justice, *N.Y. Univ. Sch. of Law, Targeted and Entrapped: Manufacturing the “Homegrown Threat” in the United States* 22 & 64 (2011), available at <http://www.chrgj.org/projects/docs/targetedandentrapped.pdf>.

⁵⁷ Ted Conover, *The Pathetic Newburgh Four*, SLATE MAG. (Nov. 23, 2010, 12:21 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2010/11/the_pathetic_newburgh_four.html (reporting allegations that Hussain offered \$250,000, a BMW, and other encouragement to induce the Newburgh Four—one of which suffered from paranoid schizophrenia and two of which had histories of drug offenses and minimum-wage jobs, but not anti-American sentiment—to pursue terrorist acts); Anjali Kamat & Jacquie Soohen, *Entrapment or Foiling Terror? FBI’s Reliance on Paid Informants Raises Questions About Validity of Terrorism Cases*, DEMOCRACYNOW.ORG (Oct. 6, 2010), http://www.democracynow.org/2010/10/6/entrapment_or_foiling_terror_fbis_reliance.

⁵⁸ Anjali Kamat & Jacquie Soohen, *Entrapment or Foiling Terror? FBI’s Reliance on Paid Informants Raises Questions About Validity of Terrorism Cases*, DEMOCRACYNOW.ORG (Oct. 6, 2010), available at http://www.democracynow.org/2010/10/6/entrapment_or_foiling_terror_fbis_reliance.

⁵⁹ *Id.*

⁶⁰ Petra Bartosiewicz, *To Catch a Terrorist: The FBI Hunts for the Enemy Within*, Harper’s Mag., Aug. 2011.

⁶¹ Kiran Khalid, *Iowa Muslim leader: Law enforcement betrayed us*, CNN (Feb. 3, 2012, 8:48 PM), <http://inamerica.blogs.cnn.com/2012/02/03/iowa-muslim-leader-law-enforcement-betrayed-us/>.

limit of Sudafed, an offense that Singh claims he committed unwillingly.⁶² But the FBI promised to expunge the offense from Singh's record and to help him acquire American citizenship – an offer that Singh “desperately wanted.”⁶³ The FBI reportedly told Singh, “You look Middle Eastern, and we need your help for the war against terror.”⁶⁴ After assuming a Muslim identity, Singh frequented mosques throughout Iowa but attended four mosques in Iowa regularly for seven years, occasionally taping conversations with congregants.⁶⁵ Yet despite the FBI's promise and his cooperation, Singh was arrested and placed into deportation proceedings when he tried to apply for citizenship.⁶⁶

In November 2011, the FBI effectively admitted to the NYPD's misuse of informants to entrap vulnerable young Muslim men.⁶⁷ The NYPD had paid an informant to train and lead Muslim convert Joseph Pimentel, a drug user with suspected mental illness problems, to attempt a terrorist plot.⁶⁸ Absent the informant's infusion of funds and expertise, Pimentel had no money, no knowledge of how to create a bomb, and arguably little inclination to follow through on violent acts.⁶⁹ By declining to get involved in the investigation because agents “were concern[ed] that the informer might have played too active a role in helping Mr. Pimentel,”⁷⁰ the FBI confirmed one of the American Muslim communities' worst fears:⁷¹ law enforcement agencies are so desperate to show they are effectively countering terrorism that they poach on vulnerable

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ See, e.g., William K. Rashbaum & Joseph Goldstein, *Informer's Role in Terror Case Is Said to Have Deterred F.B.I.*, N.Y. TIMES, Nov. 22, 2011, at A1, available at <http://www.nytimes.com/2011/11/22/nyregion/for-jose-pimentel-bomb-plot-suspect-an-online-trail.html?pagewanted=1&r=1> (“But it was the informer's role, and that of his police handlers, that have now been cited as among the reasons the F.B.I., which had its own parallel investigation of Mr. Pimentel, did not pursue the case . . .”).

⁶⁸ *Id.*

⁶⁹ *Id.* (“The suspect had little money to speak of, was unable to pay his cellphone bill and scrounged for money to buy the drill bits that court papers said he required to make his pipe bombs. Initially, he had trouble drilling the small holes that needed to be made in the metal tubes.”).

⁷⁰ *Id.*

⁷¹ MUSLIM ADVOCATES, LOSING LIBERTY: THE STATE OF FREEDOM 10 YEARS AFTER THE PATRIOT ACT 1, 4, 12 (2011), available at http://d3n8a8pro7vhmx.cloudfront.net/muslimadvocates/pages/47/attachments/original/Losing_Liberty_The_State_of_Freedom_10_Years_After_the_PATRIOT_Act.pdf?1330650785; MPAC Sends Letter to FBI over Use of Informants, MUSLIM PUB. AFFAIRS COUNCIL (May 26, 2009), <http://www.mpac.org/issues/civil-rights/mpac-sends-letter-to-fbi-director-over-use-of-informants.php>.

Muslim targets.⁷² Skeptics of these entrapment allegations may interpret the FBI's decision not to participate in the Pimentel case as evidence that the FBI does not, in fact, engage in entrapment. However, when coupled with the aforementioned cases and others,⁷³ the Pimentel case offers compelling evidence that the misuse of informants is a real problem in counterterrorism—notwithstanding denials by the FBI and other law enforcement agencies.

To be sure, not all terrorism cases involving informants raise concerns of entrapment, religious and ethnic profiling, or politicized prosecutions.⁷⁴ But there are enough problematic cases to warrant more independent oversight of counterterrorism prosecutions. In the end, the government and the public, including Muslim communities, have a shared interest in directing limited law enforcement resources on real criminals rather than target vulnerable scapegoats.

C. Inaccurate and Biased Trainings on Muslims and Islam by Unqualified Individuals Threatens Public Safety, Produces Biased Policing, and Increases Exposure to Civil Rights Litigation

A professional police force is necessary for a safe, fair, and just society. Countries with corrupt and abusive law enforcement agencies often have in common an absence of professional, accurate, and neutral criminal justice training programs. Counterterrorism trainings are no exception. Thus, training our law enforcement officers with inaccurate, biased, and politicized information is a threat to public safety for all Americans. Indeed, misinformed officers risk making bad decisions that fail to prevent crime and invite costly civil rights litigation arising from biased policing.

Thus, our government has an obligation to taxpayers to reform counterterrorism training programs by implementing a rigorous and transparent process for selecting trainers and training materials based on peer-reviewed, professional standards. To the disservice of our law enforcement, unqualified and biased trainers have been hired to teach officers, first responders, and counterterrorism analysts about Muslims and Islam in the United States and abroad.⁷⁵ Based

⁷² See also Kristin Wright, *Family of Plot Suspect Says He Is Innocent*, [MYFOXTAMPABAY.COM](http://www.myfoxtampabay.com/dpp/news/local/hillsborough/family-of-plot-suspect-says-he-is-innocent-01092012) (Jan. 9, 2012, 8:37 PM), <http://www.myfoxtampabay.com/dpp/news/local/hillsborough/family-of-plot-suspect-says-he-is-innocent-01092012> (reporting on statements by the family of terror suspect Sami Osmakac that he could not have had the amount of cash he was suspected of providing to an FBI informant in order to purchase the supposed weapons).

⁷³ See Ctr. for Human Rights & Global Justice, *N.Y. Univ. Sch. of Law, Targeted and Entrapped: Manufacturing the "Homegrown Threat" in the United States* (2011).

⁷⁴ See, e.g., A.G. Sulzberger and William Rashbaum, *Guilty Plea Made in Plot to Bomb New York Subway*, N.Y. Times, February 22, 2010, <http://www.nytimes.com/2010/02/23/nyregion/23terror.html>.

⁷⁵ Dina Temple-Raston, *New Concern About Bias in Counterterror Training*, NPR (Mar. 9, 2011), <http://www.npr.org/2011/03/09/134374232/new-concern-about-bias-in-counterterror-training>.

on training materials disclosed by the media, these trainings characterize Muslims and Islam as a necessarily violent and “terrorism-prone” identity. Our federal officers are left with a biased, skewed, and highly inaccurate set of information and skill sets with which they approach counterterrorism—all funded by our taxpayer dollars.

Excerpts and statements pulled from a variety of trainings demonstrate the depth and breadth of the inaccurate and biased information. For instance, the FBI has taught its agents that mainstream American Muslims “are likely to be terrorist sympathizers,” that the “Prophet Mohammed was a ‘cult leader,’” and that “the Islamic practice of giving charity is no more than a ‘funding mechanism for combat.’”⁷⁶ The popular, yet unqualified and biased, instructor Sam Kharoba has publicly stated his belief that the Prophet Muhammad was a “pedophile, a serial killer, a rapist” and that “[a]nyone who says that Islam is a religion of peace is either ignorant or flat out lying.”⁷⁷ He has instructed officers that the “best way to handle these people [Muslims] is . . . legal harassment.”⁷⁸

Complaints by training attendees and experienced public servants are telling. NPR obtained emails from FBI agents who attended a counterterrorism training session in April 2011.⁷⁹ Attendees complained that the “Prophet Muhammad was being portrayed as a warring military leader,” that the Qu’ran was actually “part of an epileptic fit,” and that a “true Muslim” must “support or take part in the killing of non-Muslims.”⁸⁰ Regarding the trainings in general, Army Lt. Col. Reid Sawyer, a career intelligence officer who runs the Combating Terrorism Center in West Point, explained that these courses are taught by “a lot of individuals who are not academically qualified to be instructing in these venues, and more importantly, they are speaking with authority, which empowers the audience with knowledge that is not necessarily accurate.”⁸¹ He argues that these trainings stereotype Muslims to the detriment of officials’ counterterrorism efforts.⁸² In Columbus, Ohio, the deputy chief of the city’s division of police and head of the department’s Homeland Security Division canceled a two-day training after the first day

⁷⁶ Spencer Ackerman, *FBI Teaches Agents: ‘Mainstream’ Muslims are ‘Violent, Radical’*, *Wired* (Sept. 14, 2011), <http://www.wired.com/dangerroom/2011/09/fbi-muslims-radical/>.

⁷⁷ Meg Stalcup & Joshua Craze, *How We Train Our Cops to Fear Islam*, *Wash. Monthly* (March/April 2011).

⁷⁸ *Id.*

⁷⁹ Dina Temple-Raston, *How Did Anti-Muslim Bias Seep Into FBI Training?*, *NPR* (Sept. 29, 2011), <http://www.npr.org/2011/09/29/140902739/units-autonomy-may-be-why-fbi-missed-bias>.

⁸⁰ *Id.*

⁸¹ Dina Temple-Raston, *New Concern About Bias in Counterterror Training*, *NPR* (Mar. 9, 2011), <http://www.npr.org/2011/03/09/134374232/new-concern-about-bias-in-counterterror-training>.

⁸² *Id.*

because, in his words, “the information being relayed was not accurate. They made some very blanket statements about who might be involved in terrorist activity. These individuals tried to make the other officers attending the class believe it was a very simple profile to follow, and in reality it is not.”⁸³

Objective analysis of these trainings confirms these critiques. Sam Rascoff, former head of intelligence analysis with the NYPD and now a law professor at New York University, has stated, “That’s not the kind of information that is going to make our cops or federal officials smarter about terrorism . . . That’s the sort of stuff that is going to paint the wrong sort of picture and cause them to go looking in the wrong places for the wrong sorts of things.”⁸⁴

Some government agencies recognize the critical need to hire vetted instructors and conduct well regarded trainings. The DHS Office of Civil Rights and Civil Liberties (CRCL), for example, cites the need to “[t]horoughly review the prospective trainer’s resume to ensure he or she has the subject matter expertise and subject-specific training experience [and c]ontact other agencies who have received training to get feedback, check with knowledgeable community leaders, and research media coverage.”⁸⁵ Notably, CRCL admonishes agencies not to “assume that because a trainer has a particular cultural background, or has law enforcement experience, that he or she is a qualified cultural competency trainer.” Instructors should be interviewed and written materials must be carefully reviewed by competent and knowledgeable persons.⁸⁶ And trainings must “use[] examples to demonstrate that terrorists and violent extremists vary in ethnicity, race, gender, and religion.”⁸⁷ By training our law enforcement officers to “focus on behavior, not appearance or membership in particular ethnic or religious communities,” we remove the undue scrutiny on American Muslim communities and thereby begin to foster positive relationships among those communities and law enforcement.

Consistent with standard good practice, all counterterrorism trainers and training materials must be vetted through a transparent and professionalized process wherein individuals with the requisite educational and professional qualifications are selected to train those tasked with the important task of protecting us from danger. Names of trainers, their resumes, and their fees should also publicly disclosed in furtherance of transparent good governance.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ Office of Civil Rights and Civil Liberties, *Countering Violent Extremism (CVE) Training Guidance & Best Practices* (Oct. 2011).

⁸⁶ *Id.*

⁸⁷ *Id.*

III. Government engagement efforts should be “de-securitized” to holistically focus on the host of social, economic, and political factors that affect the vitality of Arab and Muslim communities.

Like all other communities in the United States, Muslim and Arab communities are largely comprised of law abiding individuals who work, study, worship, and seek a healthy and prosperous life for their families.⁸⁸ They have the same concerns as their compatriots – economic security, public safety, high quality education, freedom from discrimination, and access to affordable health care. The vast majority have no interaction with terrorists or terrorism such that it is no more relevant to their lives than it is to the lives of any other American. And yet, most federal engagement programs focus primarily on national security issues thereby “securitizing” their relationship with Muslim communities.⁸⁹ This signals to the public that Muslims warrant extra scrutiny, which leads to increased suspicion and discrimination by members of the public. Moreover, it makes engagement programs of little relevance to the vast majority of Muslims whose concerns reflect those of mainstream America.

Over fifty-five percent of Muslims in America immigrated to the United States over the past 30 years.⁹⁰ Some immigrated with the resources necessary to quickly adapt and succeed in their new country of residence and citizenship. Others came as refugees fleeing from war torn countries with little more than the clothes on their back.⁹¹ Similar to their counterparts in other immigrant communities, they face economic and social challenges that require assistance from others. In most cases, communities provide the needed support through charity and public service. But in other cases, families need state support for provision of basic needs such as food, childcare, shelter, health care, skills training, and English language classes.

⁸⁸ Gallup Report, “Muslim Americans: A National Portrait,” 2009, Gallup, available online at <http://www.gallup.com/strategicconsulting/153572/REPORT-Muslim-Americans-National-Portrait.aspx>, accessed on 6 November 2012.

⁸⁹ Department of Homeland Security, Community Engagement, <http://www.dhs.gov/community-engagement>; Federal Bureau of Investigation, Enhanced Engagement with Arab and Muslim American Communities, <http://www.fbi.gov/minneapolis/news-and-outreach/outreach/enhanced-engagement-with-arab-andmuslim-american-communities>.

⁹⁰ A majority of the foreign-born arrived in the U.S. in the 1990s (33%) or in this decade (28%). An additional 23% came during the 1980s, while just 16% came earlier than that. Pew Research Center, *Muslim Americans: Middle Class and Mostly Mainstream* (May 22, 2012), available at <http://pewresearch.org/assets/pdf/muslim-americans.pdf>.

⁹¹ As of 2011, Somalis comprise 5.6% of total admitted refugees and Iraqis make up 17%: See Daniel C. Martin and James E. Yankay, “Refugees and Asylees: 2011,” *DHS Annual Flow Report*, (May 2012), <http://www.dhs.gov/xlibrary/assets/statistics/publications/oisrfafr2011.pdf>.

Accordingly, engagement programs aimed at addressing the needs and concerns of Muslim communities should focus on social services most relevant to the particular communities in that locale.⁹² Educating communities about their civil rights and liberties is also of critical importance as they may face discrimination on account of their religion, ethnicity, race, accents, skin color, and other immutable characteristics. Unaddressed discrimination may lead to political marginalization and social isolation from mainstream society, truancy among youth, mental health problems, and other adverse consequences.⁹³ To the extent terrorist recruiters, or in some cases government informants, prey on vulnerable young men with untreated mental health illnesses or an unstable family life, a holistic approach in engagement efforts is vital.

It is beyond the scope of my testimony to address the myriad issues of interest to the diverse Muslim and Arab communities. This deserves an in-depth conversation between the government and the communities.

For our purposes today, the following are some key structural issues that I believe are essential to adopting an effectively holistic approach to engagement:

- **Community members should take the lead in setting the meeting agenda** – Often times government employees manage the engagement process, including setting the agenda for meetings and selecting the community attendees. Community policing studies in the 1990s have found that meetings dominated by law enforcement undermine the effectiveness of the process and marginalize community concerns.⁹⁴ Thus, Arab and Muslim communities should be equal partners in shaping the agenda, format, and attendee list.
- **Without support from the highest political leaders at the local, state, and federal levels, engagement is doomed to become a check-the-box exercise in public relations** – Meaningfully addressing community concerns expressed in engagement meetings sometimes require changes in policies and practices, depending on a variety of factors. Without support from the highest political leaders, policies and practices will not change because government representatives involved at the operational level of community engagement are usually entry level civil servants lacking the political power to make

⁹² Aisha Peña, *Protecting Muslim Civil and Human Rights in America: The Role of Islamic, National, and International Organizations*, 27 J. Mus. Min. Affairs 387 (2007).

⁹³ PEW RESEARCH CENTER, *Muslim Americans: Middle Class and Mostly Mainstream* 36 (May 22, 2007), <http://pewresearch.org/assets/pdf/muslim-americans.pdf>; DISCRIMINATION RESEARCH CENTER, *Names Make a Difference: The Screening of Resumes by Temporary Employment Agencies in California* (Oct. 2004).

⁹⁴ See generally Wesley G. Skogan & Susan M. Hartnett, *COMMUNITY POLICING, CHICAGO STYLE* (1999).

necessary changes in government actions and policies.⁹⁵ Unless they have the attention and support of their top political leadership, engagement meetings will deteriorate into venting sessions of little import to the communities.

- **Representatives from social services should be integrated as regular participants in the engagement process** – Studies of community policing in the 1990s show that cross-agency coordination is vital for addressing social and economic problems that contribute towards crime.⁹⁶ Thus, representatives from each respective agency should be regular participants in engagement meetings such that they can build relationships with different community leaders to proactively address issues.
- **Include Muslim and Arab community representatives in stakeholder meetings with other communities that address issues affecting members of Muslim communities.** - Special meetings for Muslims or Arabs on topics that are of concern to other communities are a waste of resources and can counterproductively cause backlash against these communities for misperceptions of special treatment. In some cases such as civil rights violations, their experiences are unique to their communities because of the troubling uptick of anti-Muslim bias in mainstream America.⁹⁷ For example, other religious communities do not appear to be facing the same level of vandalization of their houses of worship, physical attacks on women wearing markers of religiosity such as a headscarf, or unabashed slandering of Muslims en masse by ambitious political candidates.⁹⁸ But on most issues, Muslims and Arabs have much in common with other communities with which the government is engaging, and thus should be included in those meetings.

An exclusive interest in national security and counterterrorism for engaging with the community evinces the primacy of the government's prosecutorial motives over any purported civil rights

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ See, e.g., Steven Greenhouse, *Muslims Report Rising Discrimination at Work*, N.Y. TIMES, September 23, 2010, available at <http://www.nytimes.com/2010/09/24/business/24muslim.html>; Muslim Advocates, *Losing Liberty – The State of Freedom 10 Years After the Patriot Act* (October 2011).

⁹⁸ See, e.g., Sahar F. Aziz, *Sticks and Stones, The Words That Hurt: Entrenched Stereotypes Eight Years After 9/11*, 13 N.Y. CITY L. REV. 33, 43-48 (2009); Sahar F. Aziz, *From the Oppressed to the Terrorist: American Muslim Women Caught in the Crosshairs of Intersectionality*, 9 HASTINGS R. & POV. LAW J. 1 (2012); American Civil Liberties Union, *Map - Nationwide Anti-Mosque Activity*, available at <http://www.aclu.org/map-nationwide-anti-mosque-activity>; Pew Forum on Religion & Public Life, *Controversies Over Mosques and Islamic Centers Across the U.S.*, September 24, 2010, available at

<http://features.pewforum.org/muslim/controversies-overmosque-and-islamic-centers-across-the-us.html>.

objectives. Muslim and Arab communities are no different than other diverse communities. They are law abiding people who work hard to provide the healthy and prosperous lives for their families free of injustice, hardship, and discrimination. Engagement efforts that fail to reflect that reality are flawed by design.

IV. Government engagement programs must be subject to citizen and Congressional oversight to ensure stated objectives are in fact met and government resources are not wasted.

Beyond aspirational statements laying out broad principles, little information is available about the efficacy of the various, and seemingly disjointed, federal engagement efforts.⁹⁹ Indeed, one is hard pressed to find concrete evidence of a coherent implementation plan across the government that minimizes redundancy, adheres to proclaimed presidential strategies, and provides metrics for which engagement efforts can be objectively evaluated.¹⁰⁰

While there is some inter-agency coordination, engagement is dispersed among agencies in a hodgepodge of seemingly uncoordinated programs. As a result, the U.S Department of Justice Civil Rights Division and the Equal Employment Opportunity Commission's notable progress on civil rights is undermined by discoveries that the Federal Bureau of Investigation and Immigration and Customs Enforcement exploits the engagement process in furtherance of adversarial investigative objectives. Similarly, the U.S Department of Homeland Security Office for Civil Rights and Civil Liberties' outreach efforts result in minimal policy changes because the jurisdiction lies within other agencies that have little incentive to cooperate with CRCL's engagement efforts. Further complicating matters, local and state agencies conduct their own outreach efforts, often funded by federal grants, without coordinating with federal agencies. This leaves Muslim and Arab communities frustrated with the lack of coordination, double speak among agencies, and unfulfilled promises.

⁹⁹ See, e.g., The White House, *Empowering Local Partners to Prevent Violent Extremism in the United States*, August 2011, available at <http://www.whitehouse.gov/the-press-office/2011/08/03/empowering-local-partnersprevent-violent-extremism-united-states>; *Testimony of Secretary of Homeland Security Janet Napolitano before the Committee on Homeland Security and Government Affairs*, September 19, 2012, <http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=9&cad=rja&ved=0CFUQFjAI&url=http%3A%2F%2Fwww.hsgac.senate.gov%2Fdownload%2F%3Fid%3D03d503e5-6631-4983-b82e-a80c5016373b&ei=PhGXUMDNDof49QSzpoDgCg&usg=AFQjCNHrWq6j1x0rtUGYea9-I7yZAfdMw&sig2=UqszzJrK9mKFd8H5kA4KVg>; *Protecting the Civil Rights of American Muslims: Hearing Before the U.S. Senate Judiciary Committee, U.S. Senate Judiciary Committee*, 112th Congress (March 29, 2011) (statement of Thomas Perez, Ass't Attorney General for Civil Rights).

¹⁰⁰ Although The White House Implementation Plan for Empowering Local Partners to Prevent Violent Extremism in the United States purports to set out an executive level plan, this initiative does not appear to have become operational on a nationwide basis. <http://www.whitehouse.gov/sites/default/files/sip-final.pdf>.

Nor is detailed budgetary information available describing how and where money is spent on engagement within each federal agency. Preliminary research shows that funding for countering violent extremism programs (another term for federal engagement) are included under the State and Local grants title under Federal Emergency Management Agency (FEMA).¹⁰¹ According to DHS, state and local grants are offered to “sustain federal funding for state and local preparedness grants totaling over \$3.8 billion, highlighting the Department’s commitment to moving resources out of Washington, D.C. and into the hands of state and local first responders who are often best positioned to detect and respond to terrorism, other threats, and natural disasters.”¹⁰²

In FY 2010, FEMA awarded more than \$3.8 billion in grants, including approximately \$615.5 million to protect the Nation’s ports, rail, and mass transit systems; trucking industry; intercity bus systems; and other critical infrastructure from acts of terrorism.¹⁰³ DHS’s budget report states “the Homeland Security Advisory Council’s Countering Violent Extremism Working Group, comprised of chiefs of police, sheriffs, community leaders and homeland security experts, issued a series of recommendations on ways DHS can better support community-based efforts to counter violent extremism domestically – focusing on the issues of training, information sharing, and the adoption of community oriented law enforcement approaches to this issue.” But the report does not specify how much of DHS funding goes toward community outreach and engagement. The same opacity exists with DOJ, CRCL, EEOC and other federal agencies participating in engagement programs.

As proven by studies of community policing in the 1990s, for government outreach to communities to be effective and sustainable it must be subjected to oversight by citizens and independent bodies.¹⁰⁴ No such mechanisms currently exist for federal engagement. This oversight could be conducted by this Commission on Civil Rights or the Privacy and Civil Liberties Oversight Board once all of its members are appointed and confirmed. In the alternative, a decentralized oversight system may be put in place that operates at the local level

¹⁰¹ Department of Homeland Security, FY 2012 Budget in Brief, January 27, 2011 available at <http://www.dhs.gov/xlibrary/assets/budget-bib-fy2012.pdf>.

¹⁰² *Id.* at 10.

¹⁰³ According to DHS reports, FEMA awarded, among other grants, 56 State Homeland Security grants totaling \$852 million; 64 UASI grants totaling \$832.5 million; 270 UASI nonprofit grants totaling \$19 million; 57 Emergency Management Performance grants totaling \$338.4 million; 56 Interoperable Emergency Communication grants totaling \$148 million. *Id.* at 133.

¹⁰⁴ See, e.g., Wesley G. Skogan, *COMMUNITY POLICING: CAN IT WORK?* (2003); Wesley G. Skogan & Susan M. Hartnett, *COMMUNITY POLICING, CHICAGO STYLE* (1999); see also Sahar F. Aziz, *Who’s Policing Whom? Community Policing in Counterterrorism* (forthcoming 2013).

where communities can play a more direct role. Whatever model is developed, which should be a product of collaboration between communities and government, there must be transparent monetary and programmatic oversight of engagement.

The stakes are too high and federal resources are too limited. It is time to transition federal engagement from a set of ad-hoc, opaque meetings into a transparent, coherent, and accountable system whose objectives can be evaluated.

V. Recommendations for the Commission

Based on the fore-mentioned analysis, I propose the following structural reforms to government engagement with Muslim and Arab communities in the United States.

- 1. Community representatives at federal engagement meetings should encompass the rich diversity of the Arab and Muslim American communities, including but not limited to, ethnicity, socio-economic background, youth, women, political viewpoint, and race.**
 - a. Females should constitute fifty percent of the community attendees
 - b. Youth should be adequately represented in engagement meetings
 - c. African American Muslims should be adequately represented
 - d. Community leaders should not be limited only to regular mosque goers
 - e. Proportionate representation between Arabs and South Asians, and within Arab and South Asian communities, prevents counterproductive competition for attention and government resources
 - f. Invite persons that exemplify the different experiences of newer immigrants as well as second or third generation American Muslims
 - g. Avoid excluding individuals with contrarian or dissenting viewpoints
 - h. Verify representational capacity of community leaders
 - i. Require disclosure of conflicts of interests
- 2. The government should not use community engagement meetings in furtherance of national security surveillance, investigative and prosecutorial objectives, but rather to develop trust and robust relations with constituents towards the shared goal of protecting individual rights and public safety for all Americans**
- 3. Increase independent oversight of use of informants in counterterrorism**

- 4. Counterterrorism trainers and training materials should be vetted through a transparent and professional process wherein individuals with the requisite educational and professional qualifications are selected to train those tasked with the important task of protecting us from danger**
- 5. Government engagement efforts should be “de-securitized” to holistically focus on the host of social, economic, and political factors that affect the vitality of Arab and Muslim communities**
- 6. There must be a serious commitment from the top political levels to reform policies necessary to protect civil rights and civil liberties**
- 7. Community members should take the lead in setting the engagement agenda**
- 8. Representatives from social services must be integrated as regular participants in the engagement process**
- 9. Include Muslim and Arab community representatives in stakeholder meetings with other communities that address issues of common concern**
- 10. Government engagement programs should be subject to citizen and Congressional oversight to ensure stated objectives are in fact met and government resources are not wasted**

Eugene Volokh, Gary T. Schwartz Professor of Law, UCLA School of Law

October 29, 2012, Letter to Members of the Commission on Civil Rights Re: Federal Civil Rights Engagement With Arab and Muslim American Communities Post 9/11

I entirely agree that the religious freedom rights and free speech rights of Muslim Americans, as well as all other Americans, should be protected. I have publicly spoken out, for instance, in favor of applying religious accommodation law to Muslim employees as well as to others.¹ I have condemned attempts to criticize Muslim office-holders for taking their oath of office on a Koran.² I have spoken in favor of extending mosques the same property rights extended to other property owners,³ and against attempts to exclude mosques from particular areas.⁴ And I agree that the government should take steps to make Muslim Americans, like Americans of all religions, feel welcome in America.

At the same time, attempts to make adherents of minority religions feel welcome should not end up suppressing the free speech rights of others who seek to criticize those religions. Islam, like other belief systems—Catholicism, Scientology, libertarianism, feminism, or what have you—merits evaluation and, at times, criticism. And under the First Amendment, even intemperate and wrong-headed criticism is fully constitutionally protected. Yet unfortunately attempts at suppression of criticism of Islam have been distressingly frequent.

Universities

Thus, for instance, San Francisco State University's College Republicans held an anti-terrorism rally at which they stepped on homemade replicas of Hamas and Hezbollah flags, which contain the word "Allah" in Arabic.⁵ The students were apparently unaware of the flags' Arabic content, but the students' symbolic expression of contempt for Hamas and Hezbollah would be constitutionally protected even if they knew what the flags contained—Hamas and Hezbollah are not immunized from such expressions by the religious content of their flags.

¹ See, e.g., Eugene Volokh, *Under the Veil: Religious Exemptions and Muslims*, NAT'L REV. ONLINE, June 22, 2007, at <http://www.nationalreview.com/articles/221360/under-veil/eugene-volokh>.

² Eugene Volokh, *Oh Say, Can You Swear on a Koran?*, NAT'L REV. ONLINE, Nov. 29, 2006, <http://www.nationalreview.com/articles/219360/oh-say-can-you-swear-koran/eugene-volokh>.

³ Eugene Volokh, "What Are D.C. Police Doing Enforcing Shariah Law?", Sept. 16, 2010, <http://www.volokh.com/2010/09/16/what-are-d-c-police-doing-enforcing-shariah-law/> (criticizing a column that asked that question).

⁴ Eugene Volokh, *Ground Zero Mosque (Actually, Two-Blocks-from-Ground-Zero Mosque)*, Aug. 9, 2010, <http://www.volokh.com/2010/08/09/ground-zero-mosque-actually-two-blocks-from-ground-zero-mosque/>.

⁵ *Coll. Republicans at San Francisco State Univ. v. Reed*, 523 F. Supp. 2d 1005, 1007 (N.D. Cal. 2007).

Yet offended students filed charges of “attempts to incite violence and create a hostile environment” and “actions of incivility,” prompting a university “investigation” that lasted five months.⁶ The university defended the process, noting that the complaint was not “about the desecration of the flag,” but about “the desecration of Allah.”⁷ It took a federal lawsuit and an injunction by a federal judge to strike down the unconstitutional speech code under which these complaints were filed.⁸

Likewise, at Century College, a public school in Minnesota, administrators ordered a professor to take down copies of the Mohammed cartoons that she had posted on a bulletin board outside her office.⁹ At Purdue University, Muslim students claimed that a professor’s statements criticizing Muslims on his Facebook page were “discrimination” and “harassment,” and called for his firing; it took several months for the university investigation to absolve the professor of these charges.¹⁰

At UC Santa Barbara, the student government refused to let the College Republicans participate in a program that funds student group events, apparently because the Republicans’ proposed event was a speech by the noted conservative and critic of radical Islam, David Horowitz.¹¹ This refusal likely violated the First Amendment, because the Supreme Court has held that student government groups may not discriminate based on viewpoint in such funding decisions.¹²

At UC Berkeley, the student government likewise tried to limit the student newspaper’s funding based on its viewpoint: When the newspaper ran a cartoon, not long after the 9/11 attacks, showing “two turbaned terrorists ready to ‘meet Allah and be fed grapes,’ but finding themselves instead burning in hell,” the student government demanded that the newspaper apologize; when

⁶ *Id.* at 1009.

⁷ Debra J. Saunders, *S.F. State—Hecklers’ Paradise*, S.F. CHRON., Feb. 8, 2007, at B7 (quoting university spokeswoman Ellen Griffin).

⁸ *Id.*

⁹ See, e.g., Nat Hentoff, ‘Free Speech’ Cries Ring Hollow on College Campuses and Beyond, USA TODAY, Apr. 19, 2006, at 11A; Foundation for Individual Rights in Education, *Century College: Censorship of Mohammed Cartoons*, <http://thefire.org/case/722.html> (also citing other sources and documents).

¹⁰ See Eric Weddle, *Purdue Professor Cleared in Free Speech Case*, JOURNAL & COURIER (Lafayette, Ind.), Feb. 28, 2012, at A1.

¹¹ See, e.g., Adam Kissel, Foundation for Individual Rights in Education, *UC Santa Barbara Student Government Tries to Derail David Horowitz Event, Lies About It*, May 26, 2011, <http://thefire.org/article/13226.html> (also citing other sources and documents that show that part of the concern about Horowitz was his viewpoint, and in particular his perceived hostility to Muslims).

¹² *Board of Regents v. Southworth*, 529 U.S. 217, 233–36 (2000).

the newspaper refused, the student government tried to raise the newspaper's rent, with the coauthor of the bill arguing that the cartoon "perpetuated the kind of ignorance that would lead to harassment."¹³ And at San Diego State University, some Muslim students seized and destroyed several thousand copies of the student newspaper because they "depicted Iraqi President Saddam Hussein and Palestinian leader Yasser Arafat as camels with President Bush in the middle, thinking, 'Definitely time for a regime change.'"¹⁴

Likewise, at NYU, Muslim groups urged the school to ban the display of the Mohammed cartoons at a student group event held to discuss those cartoons. NYU ultimately prohibited the student group from displaying the cartoons, unless the group limited attendance to students only—an attendance restriction that the group was understandably unwilling to impose, given that it, like many groups, was trying to reach out to the community at large.¹⁵

Tufts University held that a student newspaper "harassed Muslim students at Tufts, and created a hostile environment for them" by publishing a critical parody of Islamic Awareness Week.¹⁶ A University of Chicago student faced university discipline for posting a cartoon of Mohammed, with the caption "Mo' Mohammed, Mo' Problems," referring to the then-existing controversy about the Mohammed cartoons, though the investigation was stopped when the student apologized for his speech.¹⁷

The NYU, Tufts, and Chicago examples occurred at private universities, which are not themselves bound by the First Amendment. But the incidents still involved troubling violations of academic freedom principles; and, as the preceding paragraphs suggested, public universities have imposed similar restraints.

Moreover, the equation of anti-Muslim speech—including speech in a newspaper—with "harass[ment]" and creation of a "hostile environment" suggests that such speech *must*, by law, be restricted (since religious harassment and creation of a religiously hostile environment in

¹³ Debra J. Saunders, *University of Censorship's Fall Semester*, S.F. CHRON., Oct. 11, 2001.

¹⁴ See Eleanor Yang, *Cartoons Stir Protest at SDSU: Students Cry Racism, Take Copies off Racks*, SAN DIEGO UNION-TRIB., Nov. 1, 2002.

¹⁵ See, e.g., Hentoff, *supra* note 7; Foundation for Individual Rights in Education, *New York University: Suppression of Discussion of Mohammed Cartoons*, <http://thefire.org/case/707.html> (also citing other sources and documents).

¹⁶ Foundation for Individual Rights in Education, *Tyranny at Tufts: Breaking Promises of Free Expression, University Punishes Student Publication for Political Satire*, May 11, 2007, <http://thefire.org/article/8045.html>.

¹⁷ John Leo, *Post-Cartoon Censorship*, USNEWS.COM, Mar. 8, 2006.

education is prohibited by state antidiscrimination statutes¹⁸). Protecting free speech requires a rejection of the arguments that universities such as Tufts have endorsed.

Off-the-Job Speech by Government Employees

Attempts to restrict anti-Muslim speech are not limited to universities. A New Jersey public transit employee was fired for his off-the-job burning of a Koran; it took an ACLU lawsuit for the employee to get his job back, with back pay and a \$25,000 settlement.¹⁹

Speech in Public Places

Likewise, Terry Jones, the anti-Muslim minister, was barred by a court from organizing a demonstration outside a Dearborn, Michigan mosque.²⁰ Some time later, Dearborn also refused to issue Jones a demonstration permit unless he indemnified the city against “any and all claims, liabilities, or lawsuits, including legal costs and reasonable attorney fees, resulting from their activities on the City of Dearborn property.” A federal court held this unconstitutional, because “permittees cannot be required to waive their right to hold the City liable for its otherwise actionable conduct as a condition of exercising their right to free speech,” and because permit recipients cannot be required “to assume legal and financial responsibility even for those activities at the event that are outside of the permittee’s control, including activities of the City.”²¹

Also in Dearborn, Christian missionaries were prosecuted for allegedly inciting a hostile crowd by “proselytizing to Muslims at the Dearborn Arab International Festival.”²² And Dearborn set

¹⁸ See, e.g., MASS. GEN. LAWS ANN. ch. 151C, §§ 1(b), 2(a) (barring discrimination based on religion in educational institutions, including private educational institutions); *College-Town, Division of Interco, Inc. v. Massachusetts Comm’n Against Discrimination*, 508 N.E.2d 587 (Mass. 1987) (concluding that statutory bans on discrimination should also be read as requiring organizations to prevent or suppress behavior that creates a hostile work environment).

¹⁹ Larry McShane, *Derek Fenton, Koran-Burning Transit Worker Fired from His Job After Ground Zero Protest, Re-Hired*, N.Y. DAILY NEWS, Apr. 22, 2011.

²⁰ Niraj Warikoo, *Terry Jones Goes Free on \$1 Bond After Jailing; Judge Bars Him from Mosque for 3 Years*, DETROIT FREE PRESS, Apr. 23, 2011. The ACLU of Michigan strongly criticized the result; a spokeswoman said, “This is a complete abuse of the court process, and all those involved should be ashamed. . . . The prosecutor’s office and the Dearborn court turned the First Amendment on its head. What happened today should never have happened.” *Id.*

²¹ *Stand Up America Now v. City of Dearborn*, 2012 WL 1145075 (E.D. Mich. Apr. 15) (internal quotation marks omitted).

²² Naomi R. Patton & Niraj Warikoo, *4 Missionaries Acquitted of Inciting Crowd*, DETROIT FREE PRESS, Sept. 25, 2010, at A4; see also Steve Pardo, *Missionaries Want Case Tossed*, DETROIT NEWS, Aug. 31, 2010, at A4.

up rules that banned leafleting on the sidewalks near the Arab International Festival; Christian proselytizers had to sue to have those rules set aside.²³

In New Jersey, an atheist marcher in a Halloween parade dressed up as a “Zombie Mohammed,” shouted “I am the prophet Mohammed, zombie from the dead,” and apparently carried a sign that said “Muhammed of Islam” on one side and “only Muhammed can rape America” on the other. (A fellow marcher had dressed up as a “Zombie Pope” who “wants your boys,” apparently as a reference to the Catholic Church’s child sexual abuse scandals.) The marcher was then attacked, apparently by a man who was upset by the sign; the police concluded that the guilty party was Talaag Elbayomy, and he was prosecuted.

But the trial judge acquitted Elbayomy for lack of evidence, in the process berating the *victim* of the attack for his speech:

Then what you have done is you have completely trashed [Muslim observers’] essence, their being. They find it very, very, very, offensive. . . . I find it offensive. I find what’s on the other side of this [sign] very offensive. But you have that right, but you’re way outside your bounds of first amendment rights.²⁴

This understandably made those who are critical of Islam concerned that they would not be legally protected against attacks, and the Pennsylvania Judicial Conduct Board ultimately formally rebuked the judge.²⁵

Speech in Ads on Government Property

In New York and D.C., transit agencies—which, under the Supreme Court’s precedents, may not discriminate based on viewpoint in selecting ads—refused to run an ad saying, “In any war between the civilized man and the savage, support the civilized man. / Support Israel / Defeat Jihad.”

The agencies took the view that this ad labeled all Muslims as “savages,” a view that I think is incorrect: Israel is not in a “war” with all Muslims, but only with terrorists who engage in what most American observers would view as “jihad,” which is to say armed “holy war” against Israelis, including against Israeli civilians. Such attacks are indeed “savage,” in the same sense

²³ *Saieg v. City of Dearborn*, 641 F.3d 727 (6th Cir. 2011).

²⁴ See Eugene Volokh, *Charges Dismissed in Pennsylvania Prosecution for Attack on Zombie Mohammed Atheist Parader*, Feb. 24, 2012, <http://www.volokh.com/2012/02/24/charges-dismissed-in-pennsylvania-prosecution-for-attack-on-zombie-mohammed-atheist-parader/>.

²⁵ Pennsylvania Judicial Conduct Board, Letter to John P. McTernan, June 6, 2012, <http://www.volokh.com/wp-content/uploads/2012/08/MartinRebukeLetter.pdf>.

that Secretary of State Clinton described the Libyan consulate attackers—who likely saw themselves as indeed waging “jihad,” though against America rather than Israel—as a “small and savage group.”²⁶ But even if the ad was generally seen as condemning all Muslims (something that I certainly would not endorse), the exclusion of the ad was a First Amendment violation, as two federal district courts ultimately held.²⁷

Proposals to Criminalize Speech

Some legal commentators have argued for even broader restrictions. In the wake of the “Innocence of Muslims” anti-Islam video, Prof. Eric Posner of the University of Chicago,²⁸ Prof. Noah Feldman of Harvard,²⁹ Prof. Peter Spiro of Hofstra,³⁰ and the Carnegie Endowment’s Sarah Chayes, former special assistant to the chairman of the Joint Chiefs of Staff,³¹ all argued that such speech should be criminalizable. (These suggestions were all made during the weeks when many believed that the murders of our Ambassador to Libya and three other Americans developed from protests against the video; it is now known that the murders were instead preplanned terrorist attacks.³²) The rationale, which is that the speech could lead to murderous attacks on American interests by those offended by the speech, is formally religion-neutral. But given the events of the past decades (at least since then the riots and murders triggered by disapproval of the *Satanic Verses*), it’s clear that the speech suppressed under such proposals would be almost entirely speech that is offensive to Muslim extremists.

²⁶ Secretary of State Hillary Clinton, *Remarks on the Deaths of American Personnel in Benghazi, Libya*, Sept. 12, 2012, <http://www.state.gov/secretary/rm/2012/09/197654.htm>.

²⁷ *American Freedom Defense Initiative v. Metropolitan Transp. Authority*, 2012 WL 2958178 (S.D.N.Y. July 20, 2012); *American Freedom Defense Initiative v. Washington Metropolitan Area Transit Authority*, 2012 WL 4845643 (D.D.C. Oct. 12, 2012). A different case, *American Freedom Defense Initiative v. Suburban Mobility Authority for Regional Transportation*, 2012 WL 2012 WL 5258999 (6th Cir. Oct 25, 2012), upheld the exclusion of another ad that expressed disapproval of Islam, but only because the court concluded that the transit agency generally excluded all political messages, regardless of viewpoint.

²⁸ Eric Posner, *The World Doesn’t Love the First Amendment: The Vile Anti-Muslim Video Shows That the U.S. Overvalues Free Speech*, SLATE, Sept. 25, 2012.

²⁹ Noah Feldman, *Feldman: Should the Internet Age Change Free Speech?*, NEWSDAY, Sept. 28, 2012.

³⁰ Peter Spiro, *US Envoy Killing Bolsters Case for Hate Speech Ban*, Sept. 12, 2012, <http://opiniojuris.org/2012/09/12/us-envoy-killing-bolsters-case-for-hate-speech-ban/>.

³¹ Sarah Chayes, *Does ‘Innocence of Muslims’ Meet the Free-Speech Test?*, L.A. TIMES, Sept. 18, 2012.

³² David D. Kirkpatrick, *Election-Year Stakes Overshadow Nuances of Libya Investigation*, N.Y. TIMES, Oct. 16, 2012, at A6.

Now some of these actions have been motivated by a concern about protecting Muslims from offense,³³ and others by a concern about violent reactions by Muslim extremists.³⁴ But, either way, we are seeing attempts to restrict the First Amendment rights of those who want to express views critical of Islam and of Muslims.

Whether these attempts are motivated by respect for peaceful Muslims or fear of violent extremist Muslims does not matter. Just as the government must never suppress Muslim speech and religious practice on the grounds that such speech and religious practice might lead to violent retaliation from a few bigoted extremists, so it must never suppress anti-Islam speech on the grounds that such speech might lead to similar violent retaliation.³⁵

Implications

As I said at the outset, I firmly support the free speech, religious freedom, and property rights of Muslims. My concern is simply that all speakers and religious observers be protected, whether they are Muslim or non-Muslim, or pro-Islam or anti-Islam. Nor does this need to be difficult: The government should tell Muslims (as it tells other groups), “We respect you and your rights, and we will defend you and your rights from violence and government oppression, but if you find certain kinds of speech offensive you should respond with speech of your own; we cannot respond by trying to suppress such speech.”

But the government ought not try to define political and religious speech as “discrimination” or “harassment,” and then suppress it in the name of civil rights. Nor should the government conclude that the speech is stripped of protection because it is supposedly constitutes “hate speech”; the Supreme Court’s precedents solidly reject the view that there is a “hate speech” exception to the First Amendment.³⁶ Nor should it surrender to the threat of violence, a course of

³³ See, e.g., the Zombie Mohammed case and the SFSU and Tufts controversies.

³⁴ See, e.g., the Terry Jones Dearborn incident, the Washington anti-Islam ad incident, and the calls for criminalizing blasphemous speech in the wake of the “Innocence of Muslims” videos.

³⁵ For instance, the fear of a violent reaction to a demonstration can’t justify even the modest burden of requiring the demonstrators to pay more for their permit in order to cover security costs. See, e.g., *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 134 (1992) (concluding that such a greater fee on “[t]hose wishing to express views unpopular with bottle throwers” is unconstitutional). It follows that such a fear can’t justify the much more severe burden of suppressing the speech outright.

³⁶ See, e.g., *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992); *Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992).

action that only encourages more such threats in the future.³⁷ Instead, the government should protect the civil rights of all, regardless of their religion or ideology.

Some foreign countries, to be sure, do indeed seem to prohibit speech that is perceived as blasphemy or undue criticism of religion—not just Islam but also, for instance, Christianity: Consider, just over the last two years, foreign incidents involving *Jesus Christ Superstar*,³⁸ a parody of the venerated Greek Orthodox monk Elder Paisios,³⁹ mockery of the Bible,⁴⁰ and a painting of Jesus with a Mickey Mouse head.⁴¹ But in America, such speech is of course fully protected against government suppression. That must remain so, whatever religion is targeted.

Please let me know if I can elaborate further on these statements.

³⁷ See Eugene Volokh, *Why Punishing Blasphemous Speech That Triggers Murderous Reactions Would Likely Lead to More Deaths*, Sept. 15, 2012, <http://www.volokh.com/?p=65062>.

³⁸ Eugene Volokh, *Sales of Tickets for Jesus Christ Superstar Blocked by Russian City Government*, Sept. 30, 2012, <http://www.volokh.com/2012/09/30/sales-of-tickets-for-jesus-christ-superstar-blocked-by-russian-city-government/>.

³⁹ Eugene Volokh, *Blasphemy Prosecution*, Sept. 24, 2012, <http://www.volokh.com/2012/09/24/blasphemy-prosecution/> (describing prosecution in Greece).

⁴⁰ Eugene Volokh, *Another Conviction in Europe for Insulting Religion*, Jan. 17, 2012, <http://www.volokh.com/2012/01/17/another-conviction-in-europe-for-insulting-religion/> (describing conviction in Poland).

⁴¹ Eugene Volokh, *Mickey Jesus Banned in Russia*, Aug. 28, 2011, <http://www.volokh.com/2011/08/28/mickey-jesus-banned-in-russia/>.

Samuel J. Rascoff, Director, Center on Law and Security, NYU School of Law

Federal Civil Rights Engagement With Arab and Muslim American Communities

I am honored for the opportunity to share my perspectives on the civil-liberties implications of counter-radicalization,¹ and commend the Commission for taking up these important issues.

While counter-radicalization remains an open-ended and under-theorized concept, the core intuition behind it is that the prevention of future terrorist violence requires official involvement in shaping the ideational currents that are thought to underpin that violence. The arrival of counter-radicalization on the domestic scene—it has been part of American foreign policy for some time—represents a significant, if still largely unheralded, development in American counterterrorism.

Three types of counter-radicalization programs deserve critical attention. First, there is engagement—outreach to certain Muslim communities in order to make Official Islam a social reality. The precise nature of outreach programs of this sort varies within agencies and from one agency to the next. The FBI, the Department of Homeland Security, the National Counterterrorism Center, and the Department of Justice have each engaged with members of the Muslim-American community for the purpose of counter-radicalization. For example, officials from the Department of Homeland Security and the National Counterterrorism Center recently participated in a community awareness briefing for Muslim leaders in Hartford, Connecticut, devoted to “Understanding Radicalization and De-Radicalization Strategies.” Among the panel discussions was a session devoted to “Seeking a Counter-Reformation in Islam.” The U.S. Attorney in Oregon created his own “network of Muslim community leaders” motivated by the desire to “educate Muslim partners and give them resources and support so they can counter radicalization on their own.” Meanwhile, the U.S. government has sponsored multiple overseas trips by the Washington D.C.-based Islamic hip-hop group Native Deen, whose tracks include “Only Fear Allah” and “Ramadan is Here.” Similarly, the State Department has underwritten overseas trips by the charismatic Islamic Chaplain of the New York City Police Department, Khaled Latif, who has lectured in the Maldives about tolerance within Islam.

The second phenomenon is what I call bureaucratic entrenchment. The government has created new official posts—and repurposed others—to implement its counter-radicalization strategy. Examples include the recently developed State Department position of Special Representative to

¹ This testimony draws extensively, and without references, on my article *Establishing Official Islam: The Law and Strategy of Counter-Radicalization*, 64 STANFORD LAW REVIEW 125 (2012). That article appears as Appendix A to this testimony. Appendix B is an op-ed that I published in the NEW YORK TIMES on February 20, 2012 entitled *Uncle Sam is No Imam*.

Muslim Communities. Although her position ostensibly focuses on foreign policy, the Special Representative has also weighed in on matters of domestic radicalization and addressed Muslim-American audiences on such issues. In other cases, preexisting offices within the government have been recast to address radicalization. For example, the Department of Homeland Security's Office for Civil Liberties and Civil Rights (OCLCR) was initially created to address concerns raised by American Arabs, Muslims, and Sikhs about violations of civil liberties. That office's purpose has gradually shifted to include counter-radicalization, a change which has entailed tension, with a former head of the office expressing the view that counter-radicalization "is neither the principal reason we engage these communities nor the lens through which we view this engagement."

Third, there is an expressive dimension to counter-radicalization. Officials make claims about the nature of Islam, frequently in order to further the goal of counter-radicalization. Those claims are embedded in everything from presidential rhetoric to government-issued handbooks. Members of President Obama's staff have elaborated on the nature of Islam (and specific concepts within it) in addresses focused on domestic counter-radicalization. For example, addressing a gathering on the topic of American counterterrorism and its relationship to American Muslims, senior national security official John Brennan expressed the opinion that *jihad* does not refer to "murdering innocent men, women and children" but rather to "holy struggle, a legitimate tenet of Islam meaning to purify oneself [or] one's community."

Counter-radicalization programs within the United States raise legal and strategic concerns. On the legal side, counter-radicalization risks conflict with core American commitments to religious freedom embodied in the First Amendment's Religion Clauses. Of particular concern is the manner in which counter-radicalization may contribute to the "establishment" of what I call "Official Islam": a government-sponsored account of "mainstream Islam" offered by the state in place of radical doctrinal alternatives. For the government to formulate (or to pick out from among rival options) and endorse a preferred conception of Islam—in effect to play the role of theologian and missionary—raises potentially serious concerns rooted in the Establishment Clause and the values it enshrines. The Framers were deeply concerned with attempts by the state to harness the power of religion to achieve "secular" political goals, and they conceived of the Establishment Clause as a bulwark against precisely this sort of aggrandizement of the state. They were also concerned about the deleterious consequences of such official interventions for the exercise of religious conscience.

The values embedded in the First Amendment overlap with, and are reinforced by, a series of pragmatic and strategic concerns about the efficacy of counter-radicalization—concerns which have actually surfaced in the context of counter-radicalization efforts undertaken in recent years by American allies overseas, most prominently the United Kingdom. Does the government possess the right sort of institutional capacity and legitimacy to intervene in the religious lives of Muslim citizens in a manner that will ultimately reduce the threat of terrorism? Might not the institutional focus on winning Muslim "hearts and minds" carry unintended risks, and possibly

even backfire, producing a net loss to security? What toll might counter-radicalization exact on the fragile and hard-won ecosystem of American religious pluralism given its potential for sowing social disunity among and within religious groups?

Some important caveats are order. First, while I call attention to legal tensions, that is not to suggest that current programs are illegal or are at risk of being declared unconstitutional in court. Second, not all programs are equally in tension with law and strategy. Broadly speaking, engagement and entrenchment raise more pronounced concerns than expressive counter-radicalization. Third, certain government officials engaged in counter-radicalization are powerfully aware of these tensions and aim to mute them. One approach is to have the government play a more hands-off role, coordinating counter-radicalization efforts the substance of which is determined by NGOs and private-sector actors. But civil-liberties and strategic concerns about counter-radicalization persist. As counter-radicalization programs continue to take root and mature, these concerns increasingly need to be accounted for and addressed.

Dr. Peter Skerry, Professor of Political Science, Boston College, and Non-resident Senior Fellow, Brookings Institute or Institution

Civil Rights and Islam in America

Let me begin by emphasizing that safe-guarding our civil rights is critical not only to Muslim Americans but to all Americans. We must all be vigilant against any infringement on the values that uniquely define us as a nation. In addition, we need to minimize the alienation and ensure the continued cooperation and loyalty of Muslim Americans in the struggle against Islamist terrorists.

Yet we must also address this challenge with realism. We must be mindful of the inevitable conflicts between civil rights and national security. So, too, must we be realistic about the persistence and virtual inevitability of prejudice in a free society. Yet as historian John Higham has also reminded us, in an open and dynamic society such as ours, group conflict is not necessarily the result of irrational prejudice or racism but more typically the product of inevitable competition for material goods, recognition, and status.

At the same time, we have as a society made progress in this domain and avoided some of the excesses and injustices of our past. Realism requires that these, too, be acknowledged. Surveying what he refers to as “the rights scorecard” in the aftermath of 9/11, legal scholar Peter J. Spiro cites concerns about controversial provisions of the Patriot Act as well as reliance on much criticized military tribunals. Yet he pointedly concludes:

Whatever civil liberties concerns persist, they are a far cry from such historical anti-alien episodes as the Japanese internment or the Palmer raids, often invoked in the early days after September 11.

Historian Gary Gerstle similarly reviews and then criticizes the mistreatment of German Americans during World War I as well as the internment of 127,000 Japanese during World War II. He then turns to post-9/11 America and concludes:

An evaluation of current government efforts to provide security to America in the ongoing “War on Terror” allows us to say that, in some respects, we have learned from past experiences.

Like Spiro, Gerstle then contrasts specific historical episodes with post-9/11 treatment of Arabs and Muslims and emphasizes:

While many Americans have verbally abused or physically attacked individual Arabs and Muslims since September 2001, the highest public authorities have refused to condone such popular prejudice and vigilantism. President George W. Bush has made it clear in ways that Woodrow Wilson and Franklin Roosevelt never did that it is simply not acceptable to stigmatize an entire racial, cultural, or religious group because of the small number of terrorists and enemies who reside in their ranks.

In like manner, Americans generally must acknowledge and seek to remedy the unfair treatment and abuse – at the hands of private citizens and government officials alike – experienced by our Muslim neighbors, colleagues, and fellow citizens. But we must also assess with realism the larger context within which these events have unfolded.

For not all of the misunderstanding and prejudice in America today emanates from non-Muslims. Like many immigrants before them, Muslims themselves are the source of a good deal of misunderstanding and prejudice toward American culture, institutions, and society. Much of this reflects a now overlooked but not-so-long-ago history of Muslim leaders urging their people to isolate themselves from the mainstream of American society. Moreover, this history should remind us of the lingering influence of Islamism on Muslim leaders and organizations today.

To be sure, over the past decade, since 9/11, Muslim American leaders have seriously endeavored to get ordinary Muslims to engage with the broader society and its politics. And while there is a dearth of hard data, there is a good deal of anecdotal, fragmentary evidence underscoring how much Muslims have adapted to life here. Nevertheless, there remain strong counter-currents that reflect decades of many of these same leaders urging their followers to avoid settling into the American mainstream. I have been struck, for example, how at meetings nominally devoted to Islamophobia or civil rights issues, Muslim attendees not infrequently change the subject and ask leaders if it is permissible to befriend non-Muslims or attend business luncheons where alcohol is served.

Like many other immigrants to America, the Muslim students who began arriving here in the late 1960s did not typically intend to remain permanently. Even among those who managed to secure jobs here in their chosen professions, most planned eventually to return home. But to a degree greater than among most other immigrants, these newcomers were profoundly alienated from American culture and society. Not only did they regard Islam as superior to Judaism and Christianity, they also feared that their salvation was threatened by their very presence in America.

This was certainly what their leaders were saying. Consider, for example, the *Parents' Manual: A Guide for Muslim Parents Living in North America*, authored by the Women's Committee of the Muslim Students' Association of the United States and Canada and published in 1976 and reissued in 1992 by American Trust Publications. Widely available at organizational meetings and mosques throughout the US until quite recently, the manual states that "Islam is a total system of life for man and his society . . . hence it is infinitely superior to any system or ideology which man can devise." And the chapter on sex and marriage declares, "We are actually living in an environment in which our Islamic standards of purity and modesty meet with a continual threat and can easily be destroyed altogether." The authors then urge Muslims to avoid Christmas, Easter, Halloween, Valentine's Day, Mother's Day – and even birthdays:

The sincere Muslim is very modest about himself and is shy of being the center of attention. He knows that he did not create his own life, does not sustain it day by day and year by year, and does not consider his particular existence as deserving public attention on the anniversary of his birth.

Even more revealing is the manual's depiction of America as *jahiliyyah*. As the authors explain, the term designates "a society which is ignorant of the purposes of man's creation, his relationship and responsibility to his Creator, and the goals for which he should strive in this world." *Jahiliyyah* comes from the lexicon of Islamist intellectuals such as Abul A'la Mawdudi and Sayyid Qutb, and in the hands of violent Islamists, it has justified terrorism. The manual does *not* use the term this way, but it does urge parents to "strive to keep our Islam and the Islam which we pass on to our children pure and uncontaminated by the attitudes of this *jahiliyyah*, and ... to change this *jahiliyyah* little by little into Islam."

At the same time, though, the manual states that "none of these ideas is offered as a *fatwa* or dogma," and invites readers to be reasonable and rely on common sense. Indeed, despite its clear condemnation of birthday celebrations, the manual acknowledges that "if the young Muslim child feels very strongly about it, probably little harm will be done to celebrate his birthdays in a moderate manner during his early years." Regarding non-Muslim acquaintances, it says that while one's closest friends ought necessarily to be Muslims, parents should teach their children that "Muslims must treat non-Muslims just as kindly and fairly as they treat Muslims so that he will never use their being non-Muslim as an excuse for misconduct toward them."

A similar perspective can be observed in a still more authoritative source: Muzammil Siddiqi, a graduate of the Islamic University of Madina, former staffer with the Saudi-backed Muslim World League, and long-time member and current chairman of the executive council of the Fiqh Council of North America, the juridical body interpreting sharia law for Muslims here. In a 1986 article in *Islamic Horizons* (a glossy periodical sent out to thousands of households by the Islamic Society of North America, the largest organization of Muslims in the US), Siddiqi invokes the classic distinction between *Darul-Islam*, where Islamic law prevails, and *Darul-kufr*, where it does not. Citing the teaching that a Muslim may reside in the latter to perform a specified task but "must return to *Darul-Islam* as soon as the task is finished," Siddiqi leaves no doubt that America is *Darul-kufr*, and that "we are in real danger of assimilation to a non-Islamic culture." But then, surprisingly, Siddiqi concludes, "We do not suggest that Muslims should leave America or go back home whence they came." And he reassures his readers that his proposed course of action "will not deprive you of your jobs or your professions."

So what does this leading Islamic jurist propose? That Muslims "make the intention of hijra for the sake of Allah." *Hijra* literally means migration, but here the allusion is to the flight of Mohammed and his followers from Mecca, where they were being persecuted, to Medina, where they formed the first Muslim community (*ummah*). In contemporary Islamist thought, *hijra* refers specifically to withdrawing from modern secular society. Accordingly, Siddiqi urges

Muslims in America to establish and support mosques; to build Islamic schools and colleges; to read Islamic books and magazines; and to ensure “an Islamic system of marriage for Muslim youth.”

Was this a viable strategy? Siddiqi was proposing a bargain that other immigrants have managed to pull off, at least for a generation or so. But the stakes are different – and higher – for Muslims. Indeed, Siddiqi, authors of the *Parents’ Manual*, and other Islamists have left their people in a real dilemma: You have chosen to live in a corrupt and ungodly society where the fabric of daily life is completely at odds with how Allah has taught you live. But it’s OK to be nice to your non-Muslim neighbors and coworkers, pursue your careers in medicine and engineering, and send your children to American universities – as long as you stick close to your mosques and schools and make sure your daughter marries a good Muslim.

In his 1986 article, Siddiqi did offer another way out of the bind that he helped put them in: *da’wah*, inviting others to accept Islam. *Da’wah* is analogous to Christian missionary work, though it is important not to lose sight of contemporary Islam’s particular dynamism and the triumphalism of many of its adherents. Muslims debate the precise nature of the obligation to do *da’wah*, but because there are no clergy specifically tasked with it, Muslims regard it, one way or another, as the responsibility of each individual.

Siddiqi presents *da’wah* as the only possible justification for permanent residence in America. The notorious Islamist Yusuf Qaradawi has taken this further and declared: “We will conquer Europe, we will conquer America, not through the sword but through *da’wah*.” Yet what these leaders – and many of their non-Muslim critics – fail to consider is how *da’wah* is to be pursued by Muslims holed up in their self-protective cocoons. How can Muslims engage non-Muslims about the virtues of Islam if they are not allowed to have lunch with them?

One legitimate response has been to do *da’wah* among fallen-away Muslims. Yet this has only exacerbated the isolation mentioned above. The social dynamics at work here are deep-seated and not easily changed. So even today, after a decade of calling for more engagement with non-Muslims, Muslim leaders are themselves caught up in habits that vitiate their words.

No wonder so many Muslims have shunned such advice. If Muslim immigrants have not assimilated to mainstream American values, many of their children have, just as Siddiqi feared. Some immigrants arrived here highly secularized; others have abandoned their faith; still others, maybe more, have become more religious. However these complicated cross-currents play out, the available evidence indicates that mosques and Islamic schools have been bypassed by the vast majority of Muslims in America.

From another perspective, though, Siddiqi’s formula has succeeded. Before 9/11, many Muslims managed to pursue careers and education while remaining aloof from the mainstream of American life. Fueled in part by continuing immigration and some conversions, mosques and Islamic schools grew in size and number. The few Muslim forays into the wider society,

particularly in politics, were defensive in nature – for example, in response to fallout from the 1993 bombing of the World Trade Center. Many Muslims, probably most, continued to believe that it was *haram* (forbidden) to vote in America. In any event, those interested in politics tended to focus on developments back home, where many still planned to return.

By the 1990s, a few Muslims were heard to complain that mosques had become “ethnic country clubs” and “Islamic fortresses” and that Islamic schools were too isolating. But as countless Muslims have recounted to me, it took the events of 9/11 to finally “force us out of our cocoons.” And now that Muslim American leaders are urgently striving to overcome this legacy and encouraging their followers to engage with American society and politics, once again their efforts must be assessed with clear-sighted realism.

For example, we speak freely of “Muslim Americans” and of “the Muslim American community.” Yet these are highly misleading terms. As Muslim leaders well know, it is highly problematic to speak of a single “Muslim American community.” Indeed, the overriding challenge of overcoming ethnic, racial, and sectarian fragmentation and forging a true “Muslim American” political identity explains a good deal about the behavior of both these leaders and their organizations.

Frequently remarked upon but little appreciated is the enormous diversity of this small but growing population. America is home to the most diverse agglomeration of Muslims on the planet. The overwhelming majority are Sunni, but Shia represent nearly a tenth. An alternative current is evident among Sufis, who are reviled by Sunni fundamentalists. Among Sunnis, disagreements flow from the various interpretive legal traditions, or *madhhabs*. There are even stronger divisions between orthodox Sunni and sects such as Ahmadiyya, Druze, and Alewites.

Then there are the racial and ethnic differences. Most visible and important is that between immigrant-origin and African American Muslims. Less stark but nevertheless important are ethnic, national-origin, and linguistic differences. The Pew Research Center identifies at least 77 source countries for Muslims residing in the United States. The most dominant divide is between Arabic speakers from the Middle East and Urdu, Pashtun, and Hindi speakers from South Asia.

But of course, Arabs have very divergent histories and contemporary political realities. As the Arab Spring reminds us, when it comes to U.S. policy, individuals tend to organize not as Muslim Americans but as Libyan Americans, Syrian Americans, and so forth. The same is true of Afghan Americans and Pakistani Americans. Palestinians have their own unique and tragic experience.

Another overlooked fault line involves the salience of Islam to Muslims here. The vast majority of Muslims in America do not attend mosque regularly. Many simply regard religion as a private matter that does not belong in the public square. Then there are many immigrants of Muslim origin who have rejected the faith. Such individuals are likely to identify themselves simply in terms of their national origins.

Taken together, these differences make it highly problematic to speak of a single “Muslim American community.” Indeed, the overriding challenge of overcoming fragmentation and forging a “Muslim American” political identity explains a good deal about the behavior of both the leaders and their organizations.

This has long been a fact of life for Muslim leaders here in the US. Before 9/11, one means of overcoming such fragmentation was to appeal to the Palestinian cause. This worked at times, but generally the issue was too fraught with disagreement to promote genuine cohesion. Another potentially effective rallying point was concern about threats to Muslims’ civil rights as a religious and political minority. And since 9/11 and the resulting scrutiny under which Muslims have come, civil rights has emerged as the leaders’ most salient and powerful tool for mobilizing and unifying their coreligionists. Indeed, highlighting civil rights abuses has become the principle means by which several prominent Muslim organizations sustain themselves financially and maintain their visibility.

In the spirit of realism, a further point about the major Muslim American organizations must be made. Virtually without exception, they were all initiated and shaped by Islamists – though they also differ in revealing but overlooked ways that unfortunately cannot be explored here. Many of their leaders continue to have ties to the Muslim Brotherhood or to its South Asian counterpart, the Jama’at-I Islami. To be sure, as a recent Gallup survey confirms, only a small segment of American Muslims (12 percent at most) regard any of these organizations as representing their interests. Nevertheless, these groups define and articulate the Muslim-America agenda, and they are where non-Muslim elites in the media, the government, and the academy turn for Muslim interlocutors.

These organizations typically stage conventions where various speakers can be heard and old friends can reconnect. To a non-Muslim observer, perhaps the most striking aspect of these gatherings is the almost complete absence of any acknowledged tie of obligation to the United States. While immigrant organizations often demonstrate loyalty to their adopted country, many of these Islamist organizations do not. No one pledges allegiance to the flag, and there are few, if any, flags on display. (This is also true in the typical Islamic school.) When attending one such convention over a recent Fourth of July weekend, I heard not a word about the significance of that date in American history. Convention-goers are routinely urged to mobilize and vote to overturn the Patriot Act and protect their civil rights, but they are almost never urged to consider the demands that American citizenship places on them.

Now, this lack of any overt display of loyalty to America is hardly unique to Muslims. Indeed, it almost certainly reflects the disdain expressed by non-Muslim elites toward patriotism and indeed toward the nation-state as outdated, unnecessary, even dangerous. Cosmopolitan elites also argue that in a globalized world, dual or even multiple citizenship is acceptable, even preferable. And with elimination of the draft and reliance on a professional military, the signal

sent to earlier immigrant groups in our history about the importance of military service as a way to demonstrate commitment is far weaker.

Yet the absence of acknowledged obligations to America at these gatherings is also directly attributable to Islamist ideology. For instance, the leaders of many of these organizations have never explicitly renounced the caliphate, a failure that engenders confusion among many Muslim Americans, especially youth. Similarly, the routine invocation of the *ummah*, the worldwide community of Muslims that transcends all barriers of ethnicity, race, and nationality, fosters ambivalence and confusion, and reinforces already widespread sentiment to avoid military service or to oppose *any* use of American force in Muslim countries.

To be sure, as their leaders continue over time to urge Muslims to demand their rights and get engaged in the mainstream of American society and politics, such Islamist views may well change and even fade away. But in the meantime, Muslim leaders have yet to reconcile their pragmatic accommodations to American realities with the Islamist ideology that they continue to uphold, or that they at least have yet to renounce.

Yet I do not mean to place all the onus on Muslim-American leaders. More than a decade after 9/11, America has reached a political and intellectual stalemate regarding the Muslims in its midst. Americans continue to fear their Muslim neighbors and fellow citizens, if not as potential terrorists then as terrorist sympathizers, or more generally, as the bearers of an alien culture shared by America's enemies. Stoking these fears are zealous investigative reporters who rehash and recycle a body of facts about the Islamist origins and goals of most Muslim leaders and virtually all their major organizations. Largely taken from the federal government's successful prosecution of the Holy Land Foundation, a Hamas front group, and routinely ignored by our political, media, and intellectual elites, this evidence is incontrovertible.

Yet the implications of these facts are far from clear. On the one hand, as critics repeat and re-examine them, they take on a frozen-in-time quality, like artifacts of political archeology never put into any wider sociological or historical context. What the critics fail to acknowledge is that individuals who once worked with the Muslim Brotherhood or its various U.S. fronts do not necessarily remain committed to an Islamist agenda. People mature beyond youthful folly and rage, and America causes immigrants to change.

On the other hand, our elites routinely dismiss these findings as irrelevant ancient history. This is a mistake, both substantively and politically. For though these leaders and organizations do not represent all or even most Muslim Americans, they do dominate the relevant political space. Moreover, their Islamist ideology has had, and continues to have, a formative influence on how Muslims think of their place in America and of America's relationship to the Islamic world.

Elite opinion also systematically denies or ignores that Islam is a dynamic, even aggressively proselytizing religion. To say this is not to suggest that Muslim American leaders are terrorists or terrorist sympathizers. Nor is it to address exactly how they interpret the call to advance Islam.

As do many Christians, many Muslims regard their own actions as the best way to spread their faith. Nevertheless, Muslim leaders readily acknowledge that not so long ago they dreamt of “the crescent flag one day flying over the White House.” For many, this fantasy long since collided with reality, but for others, it persists. And like Catholics a generation or two ago, Muslims today tend to regard their religion as superior to all others.

The failure of our elites to acknowledge such evidence has fueled the anxieties of Americans. But if elites have been too cavalier about the challenges Islam poses to America, ordinary citizens and their tribunes have been too alarmist, depicting scenarios in which Muslim leaders are not only devious (which many have been) but also omniscient to the point of not having to address the difficult trade-offs political actors must inevitably confront. In fact, Muslim leaders have typically been recent arrivals largely ignorant of this huge, dynamic society and its complicated politics. And like other immigrants forced to learn and adapt, they have made mistakes – lots of them.

Remarkably absent from both the elite and popular scenarios is any appreciation of how America has changed Muslims – or any recognition of the irony that America might have changed or subverted those who have been out to change or subvert us! To be sure, not all of these changes have been benign, or what we might have anticipated. But we must reckon with them all the same. Such a reckoning would not only abate our credulity about the competence of Islamists, it would also help restore our faith in the resilience of American values and institutions – a faith that has been strikingly absent among Islam’s most strident critics. And most important, it would facilitate our addressing the genuine challenges posed to America by Islam.

Among these, the most salient is the political loyalty of Muslim Americans. This is *not* to suggest that Muslims are actively disloyal. Yet their loyalty is muddled and confused, due in part to the influence of cosmopolitan values and corresponding policies such as dual citizenship; and to America’s overall inability or unwillingness to place serious demands on its citizens. But beyond these factors, the Muslim American muddle over loyalty reflects the enduring influence of Islamist leaders, institutions, and ideology. Hardly unprecedented in our history as a nation of immigrants, this more subtle challenge has been overlooked both by complacent elites and by alarmist populists.

Eric Treene, Department of Justice, Civil Rights Division

Federal Civil Rights Engagement With Arab and Muslim American Communities Post 9/11

Good afternoon, Chairman Castro and Commissioners. Thank you for providing the Civil Rights Division with an opportunity to speak to you about our work protecting the civil rights of Arab and Muslim Americans and our engagement with these communities.

Since it was established by the Civil Rights Act of 1957, the Civil Rights Division has protected the civil rights of all persons, in areas that have ranged from prosecuting hate crimes to enforcement of employment discrimination laws, the Fair Housing Act, the Americans with Disabilities Act, and numerous other statutes. While the driving force behind the 1957 Act, and other seminal civil rights laws such as the Civil Rights Act of 1964, was the protection of the rights of African Americans, the civil rights laws were written broadly to protect all individuals from discrimination based on race, sex, religion, national origin, and other protected bases. Various civil rights laws over the years, most recently the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, broadened the scope of protection even further. The Civil Rights Division's enforcement work over the years has similarly protected the rights of all individuals, and its outreach efforts have likewise included a diverse range of communities and individuals.

Prior to the terrorist attacks of 9/11, the Department saw relatively few cases involving Arabs and Muslims. These were important cases: for example, for more than 25 years, the FBI has been investigating the bombing murder of Alex Odeh, the west-coast director of the American Arab Anti-Discrimination Committee. In the late 1980's, the Civil Rights Division brought an employment discrimination suit involving a Muslim teacher's efforts to be allowed to wear religiously significant clothing on the job, and in the late 1990's, we brought an employment discrimination case involving the rights of Muslim police officers in Newark, New Jersey to wear beards. But such cases were few and far between, reflecting the small number of incidents. The FBI hate crime statistics for Muslims in the late 1990's show around 25 to 30 reported incidents a year. And employment discrimination complaints filed with the Equal Employment Opportunity Commission by Muslims in the late 1990's were approximately one quarter of the number filed today.

This all changed with 9/11. After 9/11, we saw a dramatic rise in reported hate crimes against Muslims, Arabs, and persons perceived as being Muslim or Arab, such as Sikhs and South Asians. In the three months after 9/11, we investigated more than 300 such hate crimes. The rate of hate crimes against Muslims, according to FBI statistics, went up 1,600% from 2000 to 2001. The number of complaints of discrimination filed with the Equal Employment Opportunity Commission more than doubled from 2000 to 2002.

The Civil Rights Division moved aggressively to respond to these hate crimes and acts of discrimination. The tone was set from the top, both in terms of engagement and enforcement. President Bush appeared with Muslim leaders at the Islamic Center of Washington, D.C. six days

after 9/11, stating that the terrorists did not speak for the religion of Islam, and that Muslim Americans were Americans who were attacked on that day just like every other American. He stated “Those who feel like they can intimidate our fellow citizens to take out their anger don’t represent the best of America, they represent the worst of humankind.” Similarly, then-Attorney General Ashcroft stated: “We must not descend to the level of those who perpetrated Tuesday’s violence by targeting individuals based on their race, their religion, or their national origin. Such . . . violence and threats are in direct opposition to the very principles and laws of the United States and will not be tolerated.” The Civil Rights Division responded quickly to the rise of hate crimes under the leadership of then-Assistant Attorney General Ralph Boyd, holding daily meetings with the FBI to coordinate investigation efforts, and holding numerous meetings with Muslim, Arab, Sikh and South Asian leaders about the situation on the ground and the Division’s response. The Division vigorously prosecuted these cases, including a man in Seattle who set fire to cars in the parking lot of a mosque and fired a gun at worshippers, and a man who poured gasoline on and set fire to the wall of a Pakistani-American restaurant in Salt Lake City.

While the spike in hate crimes receded after months after 9/11, the number of incidents remains significantly higher than before 9/11, ranging from four to six times the number of incidents. The same is true with the rate of employment discrimination claims, which today is up by a factor of four from the late 1990’s. We also have continued to see increased incidents of school harassment, with Muslim harassment cases making up the single largest category of claims of religious discrimination in education handled by the Division throughout the decade.

The Division’s enforcement and outreach in response to post-9/11 backlash has remained a significant focus of its work. Attorney General Holder has repeatedly stressed the importance of protecting the civil rights of all Americans, and has emphasized that this includes Muslim and Arab-Americans. He has denounced the continued problem of 9/11 backlash violence, stating that we must counter “the twisted logic that an attack on innocents can somehow be avenged by another attack on innocents.” He has stepped up engagement efforts, including establishing an Arab-American and Muslim Engagement Advisory Group within the Department to foster greater outreach to these communities. He has been personally involved in outreach, meeting with and speaking to diverse organizations, including holding a summit with interfaith leaders a few days before the 10th anniversary of 9/11 to address a perceived rise in anti-Muslim sentiment. This has followed the leadership of President Obama, who stated in his speech at Al-Azhar University in Cairo in 2009: “Let there be no doubt: Islam is a part of America. And I believe that America holds within her the truth that regardless of race, religion, or station in life, all of us share common aspirations – to live in peace and security; to get an education and to work with dignity; to love our families, our communities, and our God. These things we share. This is the hope of all humanity.”

Since 9/11, the Civil Rights Division also has developed a sustained program to address the increased challenges facing the Muslim and Arab American communities. Assistant Attorney General Thomas Perez has met with leaders around the country to hear their concerns. He also

hosts a quarterly “interagency meeting” that brings together diverse federal agencies, including the FBI, DHS, Treasury, the Department of Transportation, the State Department, and others to meet with Muslim, Arab, Sikh, and South-Asian community leaders about civil rights issues. This meeting, started under Assistant Attorney General Boyd, serves as an important one-stop center to help community leaders untangle complex issues that cut across agencies. My position, Special Counsel for Religious Discrimination, was created in 2002 to coordinate the Division’s enforcement and outreach in the area of religious discrimination, and my work has included coordinating 9/11backlash outreach and enforcement, including scores of meetings, speeches, and panel discussions with Muslim and Arab organizations. Our various litigating sections also engage Muslim and Arab communities in their areas of expertise. The work of the Division in this area was highlighted in a conference we held last year in conjunction with the George Washington University Law School, and an accompanying report, entitled “Confronting Discrimination in the Post-9/11 Era: Challenges and Opportunities Ten Years Later.” I have submitted a copy of this report along with my testimony.

The Civil Rights Division is based in Washington, D.C., but it has leveraged the resources of the Department throughout the United States. Assistant Attorney General Perez has placed an emphasis on United States Attorney’s offices using their talents and resources to bring more civil rights cases, either through establishing formal civil rights units or developing expertise in civil rights among Assistant U.S. Attorneys. In the area of Muslim and Arab engagement, one third of the U.S. Attorneys met in December 2010 to discuss outreach to Muslim and Arab communities and ways to strengthen outreach in their districts. Since then, many additional U.S. Attorneys have been involved in similar efforts. U.S. Attorneys like Barbara McQuade in Detroit and Ben Wagner in Sacramento have tirelessly and creatively worked to reach out to the diverse Muslim, Arab, Sikh and South Asian communities in their districts. Similarly, the DOJ’s Community Relations Service has regional offices around the country, and has held hundreds of town hall meetings, trainings, and other outreach efforts involving Muslim and Arab communities since 9/11. These efforts include the creation of a cultural competency training for law enforcement on Muslim and Arab communities, and the creation of a cultural competency video designed to be shown at police department roll-calls, all of which were created with the help of the communities involved.

Now, more than eleven years after 9/11, we continue to face significant challenges in protecting the civil rights of Muslim and Arab Americans. The rate of hate crimes remains elevated considerably compared to pre-9/11, and most notably rose 50% from 2009 to 2010. Trial is sent in January for a man charged with the arson of a mosque in Corvallis, Oregon in November 2010. We recently obtained an indictment of a man accused of setting a fire at a mosque near Toledo, Ohio. We also have seen a sharp rise in the number of disputes over mosque construction around the country. The Civil Rights Division enforces the Religious Land Use and Institutionalized Persons Act, or RLUIPA, a law passed in 2000 that protects the rights of individuals and groups to build places of worship and religious schools, and which protects the religious rights of

persons in institutions. Of the 31 RLUIPA cases that the Civil Rights Division has opened involving mosques since 2000, we have opened 21 in the last two years. This summer, we filed suit and won a temporary restraining order allowing the Islamic Center of Murfreesboro, Tennessee to move into its new mosque despite the efforts of county residents to stop it. We also have a trial scheduled for November 27 against a man charged with sending a bomb threat to the very same mosque after our successful civil litigation. Last year we reached consent decrees with Henrico County, Virginia and Lilburn County, Georgia in suits involving the denial of permits to build mosques. We also have seen, as noted before, considerable numbers of harassment cases involving Muslims students in public schools and an increase in employment discrimination cases involving Muslims.

Addressing these problems is in part a question of the Division directing sufficient resources to bringing cases, which we have been able to do despite a difficult budget environment. But it is also a question of being in touch with the affected communities to help them educate people about their rights, and to make sure that they know where to turn when civil rights are violated. For example, an attorney from Karamah, a Muslim women's rights group that attends our interagency meetings, contacted us about an elementary school girl in Delaware who had been harassed so severely about being Muslim that she could not sleep and her hair began falling out from stress, leading her mother to keep her home from school. We were able to obtain an out-of-court settlement with the school. That case may never have come to our attention without effective outreach. While we have individual discrimination cases referred to us by the Department of Housing and Urban Development and the EEOC, we often learn about pattern or practice discrimination cases through community contacts, such as our recent case against the New York City Transit Authority, in which we reached a consent decree allowing Sikh and Muslim transit workers to wear religious headcoverings on the job. And through community education, we sometimes can avoid resource-intensive enforcement: a community leader armed with facts, including our civil rights outreach brochures (which we produce in 17 different languages) or a fact sheet from our website, can resolve misunderstandings with schools, employers, or local zoning boards without formally involving us.

Community outreach can also help us gather the information we need to develop civil rights policy. The massacre at the Gurdwara at Oak Creek this past August, in which six people were killed and four others wounded, focused attention on the issue of hate crimes against Sikhs. A number of leaders of the Sikh community raised questions about hate crime reporting, noting that Sikhs are not included as a category in hate crime data collection and reporting. In response, last month, the Civil Rights Division and the Community Relations Service held a town hall meeting with diverse religious and civil rights organizations. Based on the information we received at that meeting, and our enforcement experience, we recommended to the Advisory Policy Board's Uniform Crime Report subcommittee on October 18 that Sikh, Hindu, and Arab/Middle Eastern be added as categories.

In sum, our experience has shown us that engagement is a critical part of our effective enforcement of the civil rights of Muslim and Arab communities, as it is for all of our work. I look forward to discussing this further with you.

Thank you.

David Gersten, Director of the Civil Rights and Civil Liberties Program Branch in the Office for Civil Rights and Civil Liberties, U.S. Department of Homeland Security

Federal Civil Rights Engagement With Arab and Muslim American Communities Post 9/11

Thank you for inviting me to brief you on the on-going efforts to communicate and outreach with individuals and communities who may be affected by the U.S. Department of Homeland Security's policies. Your concept paper for this briefing includes several questions and a few assumptions that I hope to answer and clarify. In particular while acknowledging that recent strategies and implementation plans for preventing violent extremism state that respect for civil rights and civil liberties is critical to federal efforts, the concept paper claims that "context suggests that outreach to protect against discrimination and reduce Islamophobia may be subordinate, a mere limitation or hedge against more important security concerns," and later "[f]or better or worse, the example of Arab and Muslim American outreach is the model for what to do and what not to do with other communities."

I joined DHS in 2006 shortly after the Office for Civil Rights and Civil Liberties (CRCL) established regular roundtable meetings with American Arab, Muslim, Sikh, South Asian, and Middle Eastern community leaders in six cities throughout the country. I have personally led scores of such meetings and believe strongly that our efforts have advanced the respect for rights and liberties of these communities and also had a tangible benefit to countering violent extremism.

Congress established the Office for Civil Rights and Civil Liberties to, "assist the Secretary, directorates, and offices of the Department to develop, implement, and periodically review Department policies and procedures to ensure that the protection of civil rights and civil liberties is appropriately incorporated into Department programs and activities," and to "review and assess information concerning abuses of civil rights, civil liberties, and profiling on the basis of race, ethnicity, or religion, by employees and officials of the Department." 6 U.S.C. § 345(a). From its start, the Office has sought to accomplish these missions through direct engagement with communities affected by or perceived to be affected by the Department's policies and actions.

Today, CRCL's Community Engagement Section leads a wide variety of outreach endeavors to diverse community-based organizations, with core programs in 13 cities and other events throughout the country. As described prominently for the public on our website, CRCL's engagement program aims to:

- Communicate and share reliable information about federal programs and policies, including avenues for redress and complaints;
- Obtain information and feedback about community concerns and on-the-ground impact of DHS activities;

- Incorporate community ideas and issues relating to civil rights and civil liberties into the policymaking process; and
- Deepen channels of communication between communities, regional DHS leadership, and other federal officials to facilitate solutions to problems.

CRCL leads or plays a significant role in regular roundtable meetings among community leaders and federal, state, and local government officials. In the early days of our efforts, most of these roundtables brought together just American Arab, Muslim, South Asian, Middle Eastern, and Sikh communities with government representatives. In recent years we have expanded our approach to engagement to include many immigrant communities and others with frequent concerns relating to homeland security and civil rights and liberties. Yet, CRCL remains the federal office that conducts the most extensive outreach efforts involving Arab, Muslim, Sikh, and South Asian communities across the nation.

Community engagement roundtables give community leaders an opportunity to interface routinely and directly with DHS on the issues most important to them. Roundtables are held quarterly in each city, and usually hosted by federal agencies and community organizations on an alternating basis. Attendees can submit questions before-hand so that officials are prepared to respond, and the topics of discussion focus on concerns specific to each city's participants. These open forums bring all the relevant DHS Components to the table and other federal agencies and leaders also regularly attend, including the local FBI Special Agent-in-Charge, Community Relations Service, and U.S. Attorney's Offices.

CRCL's engagement activities are not limited to these quarterly roundtables. We occasionally convene town hall meetings to address local issues and concerns. Unlike roundtables, which are generally attended only by community leaders, town halls are hosted by faith-based or community organizations and are more widely open. In addition, we host "Incident Communication Coordination Team" calls, a conference call mechanism for rapid communication with national community leaders when some particular incident calls for speedy engagement of this type. These calls are used to inform leaders on the Department's position and actions, and also to receive feedback regarding community concerns. Over the years, we have convened several of these calls with American Arab, Muslim, Sikh, South Asian, Middle Eastern, and Somali community leaders in the aftermath of a terrorist act or attempt or other homeland security incident. Finally, we convene groups, both live and on the phone, to discuss particular issues as they arise—ranging from concerns about border searches to immigration detention issues. CRCL also meets regularly specifically with immigration advocacy organizations to hear their concerns regarding the civil and human rights and civil liberties implications of Department immigration programs, policies, procedures, and operations.

So, as you can see, the Department reaches a broad range of people on a number of issues. We learn from affected communities about their concerns and their ideas for solutions. CRCL has,

for example, coordinated meetings with religious leaders to hear their concerns about modesty prescriptions and airport screening; with communities of recent immigrants to discuss language access issues; and with disability groups to discuss accessibility issues at ports of entry.

On certain occasions, we formalize such consultations and develop a published product. For example, in January 2008, CRCL outlined recommendations made by a broad range of American Muslim leaders, regarding appropriate terminology to be used when describing the terrorist threat. More recently, we issued guidance on best practices for providing cultural competency and Countering Violent Extremism (commonly called “CVE”) training that noted the efforts of Muslim Public Affairs Council, a community group you heard from earlier today.

For the most part, the direct effects of our engagement are less obvious but no less important. Engagement work helped CRCL understand the long-standing concerns with the National Security Entry-Exit Registration System and led to CRCL working with the Department to remove countries from NSEERS designation, effectively ending the program. Beginning last year and continuing today, CRCL has done aggressive and sustained engagement on the Immigration and Customs Enforcement Secure Communities program and worked with ICE on a series of reforms including a host of training videos meant to ensure civil rights compliance.

I’ll describe another tangible example. There are many circumstances in which DHS, in carrying out its varied missions, requires individuals to pose for or provide a photograph or provide fingerprints. Accordingly, after hearing concerns through our engagement activities, the Department recently issued guidance for DHS Components to develop policies for accommodating religious beliefs as individuals pose for or provide photographs or submit to fingerprinting.

CRCL also works behind the scenes to improve the respect for civil rights in the incredible swath of missions and activities fulfilled by DHS. These efforts are described in our annual reports to Congress. We have a branch dedicated to investigating complaints and information indicating possible abuses of civil rights or civil liberties and issuing recommendation memos to DHS Components where violations occur. In the branch I direct, the efforts involve promoting rights and liberties in policy creation and implementation by advising Department leadership and personnel, and state and local partners. For instance, we work closely with the Office for Public Affairs and the “*If You See Something, Say Something*™” Campaign to review its public materials to ensure they do not somehow encourage ethnic or religious profiling. We have reviewed thousands of classified and unclassified Intelligence products, providing comments and working with the DHS Office of Intelligence and Analysis to quickly resolve civil rights and civil liberties issues. We collaborate with others in the Department to develop Information Sharing Access Agreements to share DHS datasets with the National Counterterrorism Center all with an awareness of the need to respect civil rights and civil liberties.

Now, to address the specific concern described in the Commission's concept paper and discussed in earlier panels by several distinguished guests, allow me to describe how our work relates to efforts to counter violent extremism. Margo Schlanger, CRCL's former Officer, gave testimony to a Subcommittee of the House Committee on Homeland Security that captures the relationship well. She stated that, "[a]lthough our activities do contribute to the Department's mission of countering violent extremism; the linkage is indirect. Although we can and should collaborate with community leaders to address this shared problem, "countering violent extremism" is neither the principal reason we engage these communities nor the lens through which we view this engagement."

CRCL has long aided the Department's CVE efforts by working with communities and state and local law enforcement. Maintaining strong partnerships between communities and law enforcement can reduce violent crime and inhibit ideologically motivated crime. In its efforts to increase cultural competency and awareness to state and local law enforcement, CRCL has for several years offered training for officials operating in fusion centers and for law enforcement working to counter violent extremism. CRCL's training covers key cultural and religious factors as well as guidance on effective community policing strategies without the use of ethnic and religious profiling.

Since her testimony was given in March of 2010, the Administration has made significant attempts to clarify its approach to countering violent extremism and the role communities can play in assisting government. In August 2011, the White House released the National Strategy on Empowering Local Partners to Prevent Violent Extremism in the United States, or as we refer to it, the National CVE Strategy.

This is the first US strategy to address ideologically inspired radicalization to violence in the homeland focusing on a community-based approach. A Strategic Implementation Plan (hereinafter referred to as the "SIP") outlines how the government will support and help empower American communities and their local partners in their grassroots efforts to prevent violent extremism. Throughout the process of developing the SIP, careful consideration was given to the rule of law and constitutional principles, particularly those that address civil rights and civil liberties.

The SIP resulted from the identification of violent extremism and terrorism inspired by "al-Qa'ida and its affiliates and adherents," as the "preeminent security threats" to the United States by the 2010 National Security Strategy and the 2011 National Strategy for Counterterrorism and National CVE Strategy. The SIP can be applied to all forms of violent extremism, but states "we will prioritize preventing violent extremism and terrorism that is inspired by al-Qa'ida's and adherents..."

The SIP details three objectives and current activities and efforts that are occurring to meet these goals. The first objective is to enhance "federal engagement with and support to local

communities that may be targeted by violent extremists.” Within this broad goal are two sub-objectives:

- 1.1 “Improve the depth, breadth, and frequency of federal government engagement with and among communities on the wide range of issues they care about.”
- 1.2 “Foster community-led partnerships and preventative programming to build resilience against violent extremist radicalization.”

There are two other objectives involving building government CVE expertise and countering the violent extremist narrative that you can find details about in the SIP and National CVE Strategy. For our part in implementing the first objective, the Department has tasked CRCL to represent DHS in co-chairing the National Task Force on CVE Engagement. The Task Force attempts to fulfill the sub-objectives by helping to coordinate federal community engagement efforts at the national level. This taskforce includes many departments and agencies involved in relevant community engagement efforts and focuses on compiling local, national and international best practices and disseminating these out to the field, including but not limited to the U.S. Attorneys’ Offices.

Additionally, CRCL has provided briefings on the SIP and National CVE Strategy to nearly all of its roundtable locations. Since CVE is one of the homeland security missions that CRCL feels responsible for educating community leaders about, just as we do for screening procedures, immigration enforcement, information sharing, disaster response and cybersecurity, we have made ourselves available to discuss the SIP and received very positive feedback.

Though the SIP and CRCL’s efforts to support it could be perceived to directly tie the work of a civil rights office to a security mission, our engagement activities remain overwhelmingly focused on promoting civil rights for all people affected by the Department and its partners. As noted in the SIP, “[v]iolent extremist narratives espouse a rigid division between ‘us’ and ‘them’ that argues for exclusion from the broader society and a hostile relationship with government and other communities. Activities that reinforce our shared sense of belonging and productive interactions between government and the people undercut this narrative and emphasize, through our actions, that we are all part of the social fabric of America.” I hope you will agree that such an approach to CVE does not separate it from civil rights but in fact makes civil rights a useful part of CVE and CVE a useful part of promoting civil rights. CRCL roundtables and other engagement activities are the model of the good governance programs called for expressly in the National CVE Strategy, “including those that promote immigrant integration and civil engagement, protect civil rights, and provide social services, [and] which may also help prevent radicalization that leads to violence.”

As Secretary Napolitano has stated, “It is important to note that such engagement with the many key groups with which CRCL holds dialogues—such as Arab and Somali American communities, as well as Muslim and Sikh leaders—is important in and of itself as a matter of

civil rights protection and smart, effective law enforcement. But by helping communities more fully engage with their government, DHS is also preempting alienation and creating buy-in to the broader shared responsibility of homeland security.”

I thank you for the opportunity to help the Commission explore this subject and I welcome your questions.

PANELISTS' BIOGRAPHIES

Zainab al-Suwaij

Zainab Al-Suwaij is a co-founder of the American Islamic Congress (AIC) and has been its Executive Director since its inception in 2001. In the wake of the 9/11 terror attacks, Zainab left her teaching position at Yale to launch AIC with the mission of building interfaith and interethnic understanding and to represent the diversity of American Muslim life. Over the past decade, Zainab's leadership has expanded AIC into an international organization with six bureaus worldwide, including the U.S., Egypt, Iraq, and its newest location, Tunisia. Under her direction, AIC has trained hundreds of young Middle Eastern activists in the methods of non-violent protest and social media mobilization, empowering them to take on regimes during the Arab Spring. In Iraq, she launched a program that disrupts and mediates tribal and sectarian violence as it happens, saving dozens of lives in Basra and Baghdad. Zainab's vision for acceptance and understanding in the U.S. is being realized through AIC's growing campus initiative, Project Nur, as well as its Interfaith Councils and groundbreaking Witness Series. Zainab is an outspoken advocate for women's equality, civil rights, and interfaith understanding. She has briefed Congress and the White House and has been invited to speak at numerous panel events, universities, and think tanks. Zainab has published editorials in the three largest American newspapers: *The New York Times*, *Wall Street Journal*, and *USA Today*. She has appeared on *NPR*, *BBC*, *Al-Jazeera*, *CBS*, *ABC*, *MSNBC*, *CNN*, and *Fox*. Named an "Ambassador of Peace" by the Interreligious and International Peace Council, Zainab has received Dialogue on Diversity's Liberty Award and was recognized as "2006 International Person of the Year" by the National Liberty Museum. Raised in Basra, Iraq, Zainab fled the country after participating in the 1991 uprising against Saddam Hussein and now is a U.S. citizen living in the Washington, D.C. area.

James Zogby

Dr. James J. Zogby is the president of the Arab American Institute (AAI), which he founded in 1985. He also co-founded the American-Arab Anti-Discrimination Committee in 1982. In 1993, following the signing of the Israeli-Palestinian peace agreement, he was asked by Vice President Al Gore to lead Builders for Peace, a private sector committee dedicated to promoting U.S. business investment in the West Bank and Gaza.

Dr. Zogby hosted "A Capital View" on the Arab Network of America (1993- 2001), and since 2001 has hosted the award-winning "Viewpoint with James Zogby," which airs on Abu Dhabi Television and several satellite networks in the United States. Since 1992, he has written for the weekly column "Washington Watch," which is published in 14 Arab and South Asian countries. He is author of *Arab Voices* (Palgrave Macmillan, 2012) and *What Arab's Think: Values, Beliefs, and Concerns* (2002). Dr. Zogby received his doctorate from Temple University's Department of Religion and served as a National Endowment for the Humanities Postdoctoral Fellow at

Princeton University. He serves as a member of the Executive Committee of the Democratic National Committee and was a founding member of the DNC's Ethnic Coordination Committee. Dr. Zogby also directs Zogby Research Services which conducts groundbreaking public opinion polling across the Arab world. He lives in Washington DC with his wife.

Kenneth Marcus

Kenneth L. Marcus is President of the Louis D. Brandeis Center for Human Rights Under Law and author of the award-winning *Jewish Identity and Civil Rights in America* (New York: Cambridge University Press: 2010). Marcus founded LDB to combat the resurgence of anti-Semitism on American college campuses. During his public service career, Marcus served as Staff Director at the United States Commission on Civil Rights and was delegated the authority of Assistant Secretary of Education for Civil Rights and Assistant Secretary of Housing and Urban Development for Fair Housing and Equal Opportunity. Shortly before his departure from the Civil Rights Commission, the Wall Street Journal observed that "the Commission has rarely been better managed," and that it "deserves a medal for good governance." As head of the Office for Civil Rights, Marcus spearheaded nationwide enforcement initiatives addressing misplacement of minority students in special education, gender equity compliance procedures, and access for students with disabilities. During this period, he also authored landmark federal guidance establishing that Jewish students would receive the same civil rights protections as other minority groups when they face discrimination in federally funded educational programs or activities. For his work in government, Marcus was named the first recipient of the Justice and Ethics Award for Outstanding Work in the Field of Civil Rights. Marcus also serves as Associate Editor of the *Journal for the Study of Anti-Semitism* and Vice President of the International Association for the Study of Anti-Semitism. Marcus previously held the Lillie and Nathan Ackerman Chair in Equality and Justice in America at the City University of New York's Bernard M. Baruch College School of Public Affairs (2008-2011) and served as Chair of the Scholars for Peace in the Middle East Legal Task Force. Before entering public service, Mr. Marcus was a litigation partner in two major law firms, where he conducted complex commercial and constitutional litigation. He publishes frequently in academic journals as well as in more popular venues such as *Commentary*, *The Weekly Standard*, and *The Christian Science Monitor*. Mr. Marcus is a graduate of Williams College, magna cum laude, and the University of California at Berkeley School of Law.

Haris Tarin

Haris Tarin is currently the Director of the Washington, D.C., office of the Muslim Public Affairs Council (MPAC). He was raised and educated in Southern California where he received his undergraduate education and is currently pursuing his graduate work in Washington, D.C.

In his capacity as the DC Director of MPAC he engages various agencies within government including the White House, Department of Justice, State Department, Department of Homeland

Security and offices on Capitol Hill. This past summer President Obama chose to call three leading young Americans to discuss various policy issues; the President called and then met with Haris to discuss policies pertaining to national security, countering violent extremism, the American Muslim community and civic engagement. Haris has been published in various national and international publications including the LA Times, CNN and has a regular column on the Huffington Post. He has spoken at various domestic and international conferences and media outlets on topics such as National Security, Islam and governance, US-Muslim World Relations, Role of the American Muslim institutions in Policy Formation, Religion and Public Life, and Civic Engagement. Haris is a Truman National Security Fellow and a USC/Georgetown AMCLI Fellow and is also the author of *Intro to Muslim America*.

He currently resides in Northern Virginia with his wife, Ghada and two children.

Asim Rehman

Asim Rehman is President and co-founder of the Muslim Bar Association of New York (MuBANY), a professional organization for Muslim lawyers, law students, and legal professionals in the New York area. MuBANY provides bar services to members, builds bridges with members of the legal community, and advocates for rights of the Muslim Americans. MuBANY is a member of the Muslim American Civil Liberties Coalition, which works towards greater accountability within the NYPD and other law enforcement agencies.

Through MuBANY, Mr. Rehman regularly consults with New York community organizations on matters concerning civil liberties and law enforcement engagement. He writes and speaks on issues concerning the rights of the Muslim American community and has been a liaison between national civil rights organizations and grassroots Muslim groups. In 2010, Mr. Rehman was asked to serve on the Department of Homeland Security's HSAC Working Group on Countering Violent Extremism, which developed a series of recommendations for DHS training, community policing, and information sharing.

Mr. Rehman is currently a litigator for a Fortune 100 company, where he advises on domestic and international disputes, internal investigations, and corporate risk. He began his legal career as a clerk for a Federal District Judge in New York before joining an international law firm. In 2005, he took leave from the private sector to serve as a Special Assistant District Attorney in the Brooklyn District Attorney's Office. Mr. Rehman was a Term Member with the Council on Foreign Relations and is a graduate of the University of Michigan Law School and Haverford College.

Jytte Klausen

Jytte Klausen (born Denmark, 21 February 1954) is the Lawrence A. Wien Professor of International Cooperation at Brandeis University in Massachusetts and an Affiliate at the Center for European Studies at Harvard University. A graduate of Denmark's University of Aarhus, she

earned her Ph.D. at The Graduate Faculty at The New School for Social Research in New York. She is a recipient of the Carnegie Scholars Award, and she has been a fellow at the American Academy in Berlin, at Nuffield College, Oxford University, at the University of Copenhagen, and at The Bunting Institute at Radcliffe College, Harvard University.

Klausen's current research is on Islamist extremist groups in the West. At Brandeis University, she leads a team of researchers who are studying Islamist terrorist networks. The research was funded initially by the UK Home Office, and now by an award from the National Institute of Justice at the U.S. Department of Justice.

A political scientist, Klausen began her career as a specialist in the development of the welfare state in Western Europe, publishing several books on the topic. A decade ago she started researching the politics of Muslims in Europe and North America. Her book *The Islamic Challenge* (Oxford University Press, 2005) is based on interviews with three hundred Muslim association leaders, parliamentarians, and councilors in Western Europe. The book was translated into German and Turkish.

In 2009, Yale University Press published Klausen's *The Cartoons that Shook the World*, a scholarly analysis of the international crisis caused by the publication of cartoons depicting Muhammad in a Danish newspaper. Shortly before the book's publication, Yale insisted that reproductions of the cartoons along with all other images of Muhammad should be dropped, igniting a firestorm of controversy that highlighted the threat to free speech and academic independence.

Klausen has written for *Foreign Affairs*, the *Wall Street Journal*, the *Boston Globe*, and other national and international outlets, and has contributed as commentator on the BBC, Voice of America, PBS, and other U.S. and international media. She is also frequently consulted by government agencies in the U.S. and Western Europe.

Sahar Aziz

Sahar F. Aziz is an associate professor of law at Texas Wesleyan University School of Law where she teaches national security, civil rights litigation, torts, and race and the law. Professor Aziz is also a fellow at the Institute for Social Policy and Understanding. Prior to joining Texas Wesleyan University School of Law, Professor Aziz was an adjunct professor at the Georgetown University Law Center where she taught national security and civil rights law. Prior to joining academia, Professor Aziz served as a senior policy advisor for the Office for Civil Rights and Civil Liberties at the U.S. Department of Homeland Security (DHS) where she worked on law and policy at the intersection of national security and civil rights. Prior to joining DHS, Professor Aziz was an associate at Cohen Milstein Sellers and Toll PLLP in Washington, D.C. where she litigated class action civil rights lawsuits alleging a nationwide pattern and practice of gender discrimination in pay and promotion.

Professor Aziz began her legal career as an associate at WilmerHale in Washington, D.C. where she conducted internal white collar crime investigations and an independent investigation on child trafficking in the Persian Gulf. Professor Aziz clerked for the Honorable Andre M. Davis on the United States District Court for the District of Maryland, prior to his confirmation to the United States Court of Appeals for the Fourth Circuit.

Professor Aziz's scholarship focuses on the intersection of national security and civil rights law with a focus on the post-9/11 era. Professor Aziz incorporates critical race theory, feminist theory, and constitutional law into her examination of the disparate impact of post-9/11 laws and public policy on ethnic, racial, and religious minority groups in the United States. Professor Aziz analyzes these issues in various contexts including immigration, counterterrorism, criminal justice, and civil rights litigation. Professor Aziz applies her scholarship in the American context towards her scholarship on rule of law and democracy promotion in post-revolution Egypt.

Professor Aziz has been featured on CSPAN, Russia Today, and Al Jazeera English and published numerous commentaries on national security and civil rights issues on CNN.com, the *Houston Chronicle*, the *Huffington Post*, Truthout.com, altmuslim.com, the American Constitution Society's blog, JURIST.com, *The Guardian* and the *Christian Science Monitor*. Professor Aziz has presented her work in various forums including at U.S. Congressional Briefings, the Aspen Institute, the National Endowment for Democracy, the American Bar Association, the National Employment Lawyers Association, the U.S. Equal Employment Opportunity Commission and the Texas Bar Association.

Professor Aziz earned her J.D. and M.A. in Middle Eastern Studies from the University of Texas. She received her B.S. from the University of Texas in Arlington. She is a board member of the Egyptian American Rule of Law Association (www.earla.org).

Eugene Volokh

Eugene Volokh teaches First Amendment law at UCLA School of Law, has written the textbook *The First Amendment and Related Statutes* (4th ed. 2011), and has written or cowritten more than 35 law review articles on the First Amendment, published in, among other places, the *Harvard Law Review*, *Yale Law Journal*, and *Stanford Law Review*. His articles on religion and the law include *A Common-Law Model for Religious Exemptions*, 46 *UCLA Law Review* 1465 (1999), *Freedom of Speech, Religious Harassment Law, and Religious Accommodation Law*, 33 *Loyola University of Chicago Law Journal* 57 (2001), *Intermediate Questions of Religious Exemptions — A Research Agenda With Test Suites*, 21 *Cardozo Law Review* 595 (1999), and *Equal Treatment Is Not Establishment*, 13 *Notre Dame Journal of Law, Ethics & Public Policy* 341 (1999). He is also the author of *Under the Veil: Religious Exemption and Muslims*, *National Review Online*, June 22, 2007, and *Oh Say, Can You Swear on a Koran?*, *National Review Online*, Nov. 29, 2006.

Samuel J. Rascoff

An emerging leader in the field of national security law, Samuel Rascoff teaches and writes in the area, and serves as Faculty Director of the Center on Law and Security. Named a Carnegie Scholar in 2009, Rascoff came to the Law School from the New York City Police Department, where, as director of intelligence analysis, he created and led a team responsible for assessing the terrorist threat to the city. A graduate of Harvard summa cum laude, Oxford with first class honors, and Yale Law School, Rascoff previously served as a law clerk to U.S. Supreme Court Justice David H. Souter and to Judge Pierre N. Leval of the U.S. Court of Appeals for the Second Circuit. He was also a special assistant with the Coalition Provisional Authority in Iraq and an associate at Wachtell, Lipton, Rosen & Katz. Rascoff's recent publications include "Establishing Official Islam? The Law and Strategy of Counter-Radicalization" (*Stanford Law Review*); "Domesticating Intelligence" (*Southern California Law Review*) and "The Law of Homegrown (Counter-) Terrorism" (*Texas Law Review*).

Peter Skerry

Peter Skerry is a professor of political science at Boston College and non-resident senior fellow at the Brookings Institution. He is co-director of the Dialogue on Islam in America at the American Enterprise Institute, and is a member of the Malta Forum, a continuing dialogue between public intellectuals from the Western and Islamic worlds, sponsored in the U.S. by the Institute for American Values. He has also served as co-director of the Brookings-Duke Immigration Policy Roundtable.

Skerry has also served on the board of the United Neighborhood Organization, a Chicago-based Latino community organization and charter school operator and on the Advisory Council on European/Transatlantic Issues at the Heinrich Böll Foundation of Bündnis 90/Die Grünen (the German Green Party). He has been awarded fellowships at the Woodrow Wilson International Center for Scholars, the American Academy in Berlin, and the Russell Sage Foundation.

Skerry currently serves on the editorial advisory boards of *American Politics Research*, the *Wilson Quarterly*, *Society*, and *The Forum: A Journal of Applied Research in Contemporary Politics*. He has written about race, ethnicity, religion, immigration, and social policy for *Publius*, the *Journal of Policy History*, the *Wall Street Journal*, the *Los Angeles Times*, the *Boston Globe*, the *Washington Post*, *New Republic*, *The Public Interest*, and *National Affairs*.

Skerry has taught political science at Claremont McKenna College and at UCLA, where he was also Washington administrator of the Center for American Politics and Public Policy. He has been a resident fellow at the American Enterprise Institute and served as Legislative Director for Senator Daniel Patrick Moynihan. He is the author of *Counting on the Census: Race Group Identity*, and *the Evasion of Politics* and *Mexican Americans: The Ambivalent Minority*, which

was awarded the Los Angeles Times Book Prize. He is currently completing a book about Muslims in the United States.

Eric Treene

Eric W. Treene, Special Counsel for Religious Discrimination, coordinates the U.S. Department of Justice's Civil Rights Division's religious discrimination enforcement efforts in education, employment, housing, public accommodations, public facilities, zoning, and prisons, as well as religious hate crimes and attacks against houses of worship. He also coordinates outreach to religious communities and the Department's outreach efforts to the Muslim, Arab, Sikh, and South Asian communities regarding post-9/11 discrimination and hate crimes. Before joining the Department of Justice in 2002, he was Director of Litigation at the Becket Fund for Religious Liberty, where he represented Christians, Muslims, Jews, Sikhs, Buddhists, and Native Americans in a wide range of religious freedom cases. He is a graduate of Harvard Law School and Amherst College, and is a former law clerk to Judge John M. Walker, Jr., of the United States Court of Appeals for the Second Circuit. He is the author of a number of articles and a contributor to two books on constitutional law and civil rights.

David Gersten

David Gersten is a Senior Executive in the U.S. Department of Homeland Security serving as the Director of the Civil Rights and Civil Liberties Programs Branch in the Office for Civil Rights and Civil Liberties (CRCL). He is responsible for promoting respect for civil rights and civil liberties in policy creation and implementation by advising Department leadership and personnel, and state and local partners. Gersten also leads efforts to communicate with individuals and communities whose civil rights and civil liberties may be affected by Department activities, informing them about policies and avenues of redress, and promoting appropriate attention within the Department to their experiences and concerns. The CRCL Programs Branch includes units and individuals dedicated to conducting Impact Assessments, engagement with American Arab, Muslim and other religious and ethnic communities affected by DHS security policies, improving emergency preparedness, maintaining a Civil Rights and Civil Liberties Institute to provide training for DHS personnel and partners, appraisal of immigration and refugee policy, Departmental fulfillment of international civil rights and human rights treaties, and review of how the Department's use of technology and its approach to information sharing and Intelligence gathering impact civil liberties.

He has personally led scores of discussions with community leaders in sixteen cities where CRCL hosts engagement roundtables, including Los Angeles, Chicago, Detroit, Houston, Atlanta, Minneapolis and Denver. Gersten has testified before Congress on the subjects of Intelligence Fusion Centers and Homegrown Violent Extremism and has worked closely with the DHS Office of Intelligence and Analysis and the Privacy Office to provide onsite Civil Liberties training to fusion centers.

Before joining DHS, Mr. Gersten led customer service efforts for the U.S. Department of Education Office of Civil Rights. Prior to his work at the Department of Education, he served as executive director of the Center for Equal Opportunity, providing assistance and scrutiny for the public and private sector on civil rights, immigration and assimilation policy making. Gersten is a native of Denver, Colorado and is the proud parent of five children, including nine year old triplets.

APPENDIX: LIST OF DOCUMENTS SUBMITTED AS PUBLIC COMMENTS

Panelists' publications submitted to the Commission by or for them

- Samuel J. Rascoff, *Establishing Official Islam? The Law and Strategy of Counter-Radicalization*, 64 Stanford L. Rev. 125–190 (2012) [submitted by the author].
- Samuel J. Rascoff, “Uncle Sam Is No Iman,” *The New York Times*, Feb. 20, 2012 [submitted by the author].
- U.S. Department of Justice, *Confronting Discrimination in the Post-9/11 Era: Challenges and Opportunities Ten Years Later*, [A Report on the Civil Rights Division’s Post-9/11 Civil Rights Summit Hosted by George Washington University Law School, October 19, 2011], no date [submitted by Eric W. Treene].
- Peter Skerry, *The Muslim-American Muddle*, National Affairs, Fall 2011, pp. 14–37 [submitted by Vice Chair of the Commission on Civil Rights, Abigail Thernstrom].

Letters and materials that members of the public submitted to the Commission

- Nov. 7, 2012, Joint letter (via e-mail) of 23 student organizations of California universities to Commissioners, U.S. Commission on Civil Rights. The letter was signed by the Muslim Student Association – West Coast; the Muslim Student Associations of University of California (UC) – Berkeley, UC Davis, UC Irvine, UC Los Angeles, UC Riverside, UC San Diego, San Jose State University, Cal State University – Chico, Cal Poly Pomona, and Diablo Valley Community College; the Muslim Student Unions of UC Irvine, and University of Southern California; the Arab Recruitment and Retention Center at UC Berkeley; and Students for Justice in Palestine at UC Berkeley, UC Davis, UC Irvine, UC Los Angeles, UC Riverside, UC San Diego, UC Santa Barbara, and University of Southern California; and the Committee for Justice in Palestine at UC Santa Cruz.
- Nov. 13, 2012 e-mail with attachments from M. Zuhdi Jasser, MD, President, American Islamic Forum for Democracy, Phoenix, AZ. The attachments include:
 - M. Zuhdi Jasser, MD., American Islamic Forum for Democracy, “Lessons Learned for the Federal Government with regards to Arab and Muslim civil rights in America eleven years post 9/11,” Written statement, U.S. Commission on Civil Rights Hearing, Nov. 9, 2012.
 - “Jasser unmoved by radical foes,” *The Arizona Republic*, Apr. 24, 2012,” [Reprinted by American Islamic Forum for Democracy, at www.aifdemocracy.org].

- M. Zuhdi Jasser, “Religious tolerance starts at home,” [*Journal Sentinel*] JSOnline, Milwaukee, WI, Mar. 27, 2010.
- M. Zuhdi Jasser, “M.Zuhdi Jasser: Why ‘tough love’ is best answer for Arab world,” *The Dallas morning News*, Sept. 26, 2012, [Reprinted by American Islamic Forum for Democracy, at www.aifdemocracy.org].
- Dec. 6, 2012 e-mail with attached Dec. 5, 2012 letter, both from Nina Farnia, JD, National Campaign Coordinator, Coalition on National Security and Rights, Oakland, CA.
- Dec. 6, 2012 email from Manar Waheed, policy director, South Asian Americans Leading Together (SAALT), Takoma Park, MD, with attachment: Deepa Iyer, executive director, SAALT, “Written Statement ... [on] Federal Civil Rights Engagement with Arab & Muslim American Communities Post-9/11, United States Commission on Civil Rights,” Dec. 5, 2012.