

Muslims in America after 9/11: The Legal Situation

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Introduction

A description of the legal situation of Muslims in America after 9/11 must be divided into a number of categories. The situation and the changes have been different for: (1) U.S. persons (citizens and resident aliens) who are Muslims; (2) aliens within the United States who are Muslim; and (3) Muslims seeking to enter the United States. Important as is the category that includes Guantanamo, I am not including Muslims who are not U.S. persons and who are living outside the United States. The critically important area of discrimination can be added to my categorization by turning it into the following simple matrix that has as columns Muslims and non-Muslims and has as rows: U.S. persons, aliens within the United States, and aliens hoping to enter the United States. The higher numbers indicate a greater likelihood of discrimination.

Table A

| | Non-Muslim | Muslim |
|--|------------|--------|
| U.S. person (citizen or lawful permanent resident) | 1 | 2 |
| Non-U.S. person within the U.S. | 4 | 5 |
| Non-U.S. person Seeking admission to the U.S. | 3 | 6 |

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The conference has asked me to focus on the categories of Muslims who are U.S. persons or aliens within the United States. As to these categories, the most important problem is discrimination -- not the results of any anti-terrorist measure whose effects are evenly distributed among Muslims and non-Muslims.

Since it would very probably be unconstitutional and certainly unfair and unwise to have a statute or a regulation that applied only to Muslims, whether U.S. persons or not, the subject can be fairly stated as: has the application of official discretion in applying new or traditional U.S. laws disproportionately affected Muslims? Still, there is one legislative aspect. The enactment of new statutory provisions designed to deal with terrorism -- and we have seen many -- can create new, widened zones of discretion. The more discretion, the more likely it is to be exercised in either a biased or foolish manner.

The answer to whether the exercise of discretion has been targeted on Muslims is obviously 'yes'. There is a strong temptation to condemn that answer by attaching the label 'profiling'. Undoubtedly, wrongs have been done and may well be occurring still, but it is not necessarily biased or invidious to pay more attention to -- to subject to increased suspicion and administrative burdens -- the members of any belief system in the name of which a terrorist group is operating. When an earlier terrorist group, the Jewish Defense League, was attacking targets within the United States in the name of the protection of Judaism against its enemies, it would not have been biased to focus

protective checks surrounding likely targets on people of the Jewish faith. If the Tamil Tigers from Sri Lanka were engaged in attacks within the United States, it would not be a sign of prejudice to focus attention on Hindus. Even if the chance that any Jew or Hindu was involved in these kinds of activities was 1 in 10,000, that figure might be ten times as great as the figure for the general population. It may be foolish to investigate all members of a population of 5 or 6 million to find a tiny fraction of dangerous individuals, but it may at least be less foolish than trying to investigate all members of a population of 300 million.

Any attempt to reduce danger by focusing preventive steps on all members of a group of which only a very small fraction is indeed dangerous, is likely to be foolish for a number of reasons, even if not biased in intent. It marks the entire group, within which a search for a rare terrorist is made, as suspicious, thus undermining the sense of shared citizenship on which personal security and resulting loyalty depend. Statistically it is guaranteed to produce high proportions of false positives to true positives. Thus, the program is automatically very expensive even for the government and is rarely the best use of whatever resources are committed to it because of its very low rate of return and its very high rate of mistakes. These disadvantages may have become increasingly apparent during the five years after September 11, 2001. Therefore, many of the statistics that I am about to cite may be more matters of recent American history than current problems.

The impact of governmental discrimination can be seen in the following poll responses of American Muslims. A survey conducted by Georgetown University and Zogby International in 2004 found that 26% of Muslims had experienced racial or ethnic profiling, while 70% said they have not been the target of profiling.¹

Private discrimination was a somewhat more common phenomenon. The Zogby figures indicate that 40% of American Muslim respondents have personally experienced anti-Muslim discrimination since the 9-11 attacks, and 57% know friends or family who have experienced discrimination, with most of such incidents reported in a work, school, or neighborhood setting.²

The non-Muslim U.S. public still has significant elements that would welcome discrimination against Muslims. In a poll conducted by Cornell University, 22% of American respondents agreed that citizens should be profiled based on being Muslim or of Middle Eastern heritage; 27% thought that Muslims should be required to register their whereabouts to the government; 26% believed that mosques should be closely monitored by law enforcement agencies; and 29% agreed that Muslim civic and volunteer organizations should be infiltrated by law enforcement.³ Forty-four percent of all

¹ Muslims in the American Public Square: Shifting Political Winds and Fallout from 9/11, Afghanistan, and Iraq 35-36 (Project MAPS, Center for Muslim-Christian Understanding, Georgetown University and Zogby International, eds., Oct. 2004), available at <http://www.projectmaps.com/AMP2004report.pdf>; Press Release, Georgetown University, Georgetown Announces Release of 2004 American Muslim Poll (Oct. 19, 2004), available at <http://explore.georgetown.edu/news/?ID=1310>.

² *Id.*

³ MSRG Special Report: Restrictions on Civil Liberties, Views of Islam, and Muslim Americans 6 (Cornell University Media & Society Research Group ed., Dec. 2004), available at <http://www.comm.cornell.edu/msrg/report1a.pdf>.

respondents agreed with at least one of the above proposals, while 48% agreed with none of the proposals.⁴

Republicans were more likely to agree with the proposals for restricting civil liberties for Muslims than Democrats or Independents, with 34% agreeing on profiling (17% D, 15% I), 40% agreeing with registration (24% D, 17% I), 34% agreeing with mosque monitoring (22% D, 24% I), and 41% agreeing with organization infiltration (21% D, 27% I).⁵ Those who indicated a higher level of religiosity also were more likely to support greater restrictions on and profiling of Muslims.⁶

On the other hand, according to a 2005 Pew survey, 55% of American respondents said that they have a favorable opinion of American Muslims, while 36% (down from 44% in 2003) said that Islam is more likely than other religions to encourage violence.⁷

Although the findings of the Pew survey were confirmed in another 2006 Pew survey,⁸ a 2006 Washington Post-ABC News poll found that 46% of American respondents have a negative view of Islam.⁹ That poll also indicated that one in four American respondents harbor prejudice towards Muslims and Arabs, with 33% having heard prejudiced comments against Muslims recently, and 43% having heard prejudiced remarks about

⁴ *Id.*

⁵ MSRG Special Report, *supra* note 3, at 6.

⁶ *Id.* at 7.

⁷ Pew Forum on Religion & Public Life, *Views of Muslim-Americans Hold Steady After London Bombings* (July 26, 2005), available at <http://pewforum.org/docs/index.php?DocID=89>.

⁸ The favorability figure of Muslims in America was also supported by a 2006 Pew Global Attitudes Project Poll, which indicated 54% of Americans held favorable views of Muslims. *The Great Divide: How Westerners and Muslims View Each Other 11* (Pew Global Attitudes Project ed., June 2006).

⁹ Claudia Deane and Darryl Fears, *Negative Perceptions of Islam Increasing*, Washington Post Mar. 9, 2006, et al, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/03/08/AR2006030802221.html>.

Arabs recently.¹⁰ Thus, public opinion in America is such that discriminatory policies will have some support, especially if the impact on U.S. persons (citizens or lawful permanent resident) is minimal.

Now, let's look at what is known about the post 9/11 use of governmental discretion to single out Muslims in various areas. One bit of introduction is necessary. Much of the discretion has been directed, according to government sources, not against Muslims but against individuals from states in which intelligence indicates Al Qaeda presence or activity. The dozen or more states overlap closely with those experiencing radical Islamist movements, and no evidence of the extent of terrorist conspiracy is proffered. So I will describe the basis as religious, not national. The difference is important in terms of the sense and reality of equality for U.S. Muslims.

Early Detentions

Immediately after the 9/11 attacks, the FBI initiated a massive investigation called "PENTTBOM", which sought to identify individuals involved in the attacks.¹¹ Within 2 months, PENTTBOM led to the detention of over 1,200 individuals nationwide, at which point the DOJ stopped releasing detention figures.¹² According to the DOJ Office of the Inspector General (OIG), 762 aliens were detained as a result of PENTTBOM and placed in INS custody.¹³ Based on the countries of origin of the 762 aliens, which included 254

¹⁰ *Id.*

¹¹ Office of Inspector Gen., U.S. Dept. Justice, *The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks* 1 (Apr. 2003).

¹² *Id.*

¹³ *Id.* at 2.

from Pakistan, 111 from Egypt, nearly 50 from Turkey, and others from Jordan, Yemen, India, Saudi Arabia, Morocco, Tunisia, Syria, Lebanon, Israel, Iran, Guyana, Algeria, Bangladesh, and Afghanistan, the PENTTBOM investigation clearly focused on Muslims.¹⁴

Sixty-four percent of the detainees were arrested in New York, and 86% were arrested in the first 3 months after the attacks.¹⁵ Forty percent of the detainees were not served with a Notice to Appear (NTA), which noted the reason for their detention, within the statutory 72 hour period.¹⁶ At least 192 aliens had to wait for more than 3 days for their NTA, with at least 48 aliens waiting over 25 days for their NTA.¹⁷ The OIG noted that the FBI was operating under a “hold until cleared” policy for the detainees.¹⁸ The average hold time for the detainees was 80 days, and the maximum amount of time recorded was 244 days.¹⁹ Most of the other procedural protections that should have been afforded to the aliens was either denied or delayed.²⁰ In addition, the OIG found that the aliens were subjected to a “pattern of physical and verbal abuse” in the detention facilities, particularly at the Metropolitan Detention Center in New York.²¹

Material Witness Statute

¹⁴ *Id.* at 21.

¹⁵ *Id.* at 22.

¹⁶ *Id.* at 29.

¹⁷ *Id.* at 30.

¹⁸ *Id.* at 37.

¹⁹ *Id.* at 52.

²⁰ *Id.* at 55-140.

²¹ *Id.* at 142. For a detailed report on the MDC, *see* Office of Inspector Gen., U.S. Dept. of Justice, Supplemental Report on September 11 Detainees’ Allegations of Abuse at the Metropolitan Detention Center in Brooklyn, New York (Dec. 2003).

The Material Witness Statute, 18 U.S.C. §3144, grants the government the authority to arrest and detain an individual to secure his testimony for a criminal proceeding if a) the witness can provide information material to a criminal proceeding, and b) it would be impracticable to secure the witness's testimony without a subpoena.²² The statute has been in operation for a number of years, and has most often been used to secure testimony in immigration proceedings involving witnesses who are foreign nationals.²³ For example, U.S. magistrate judges conducted 3,230 material witness hearings in FY1977, 6,865 hearings in FY1981, 3602 in FY2000, and 4,882 in FY2004.²⁴

The Bush Administration used the Material Witness Statute as a tool in anti-terror investigations as a means to detain Muslims pending further investigation into the individual being detained. According to a report co-authored by Human Rights Watch and the ACLU, at least 70 men living in the United States, all but one of whom are Muslims were detained without charges under the Material Witness Statute.²⁵ Sixty-four of the 70 were of South Asian or Middle Eastern descent, and at least one-quarter of the 70 were U.S. citizens.²⁶ One such U.S. citizen, Oregon attorney Brandon Mayfield,

²² Anjana Malhotra, *Overlooking Innocence: Refashioning the Material Witness Law to Indefinitely Detain Muslims without Charges*, 2004 ACLU Intl C.L. Rep. 2 (2004), available at <http://www.aclu.org/iclr/malhotra.pdf>.

²³ Charles Doyle, CRS Report for Congress RL 330077, Arrest and Detention of Material Witnesses: Federal Law in Brief and Section 12 of the USA Patriot and Terrorism Prevention Reauthorization Act (H.R. 3199) 3 (Sept. 8, 2005), available at <http://www.au.af.mil/au/awc/awcgate/crs/r133077.pdf>.

²⁴ *Id.* at 3 n. 10.

²⁵ Human Rights Watch and ACLU, *Witness to Abuse: Human Rights Abuses under the Material Witness Law since September 11 1 (2005)*, available at <http://hrw.org/reports/2005/us0605/>.

²⁶ *Id.* at 2-3.

recently received a \$2 million settlement from the government to settle his civil rights suit against the government for his detention.²⁷

Because the Material Witness Statute does not specify a time period for the detention, it is especially open to potential abuse. One-third of the 70 detainees were incarcerated for at least 2 months, some for over 6 months, and one for over a year.²⁸ Of the 70 detained, 42 were ultimately released with no charges filed against them; 24 were deported; 20 were charged with non-terrorism-related crimes; 7 were charged with material support under 18 U.S.C. §2339B (4 of whom were convicted with the other trials pending as of May 2005); and 2 were designated enemy combatants.²⁹ Most importantly, at least 30 of the 70 were never brought before a tribunal to testify.³⁰ It is clear that the Material Witness Statute was used as a means to ensure preventive detention of Muslim terrorism suspects.

Mass “Interviews”

In November 2001, Attorney General Ashcroft initiated an interview program for a list of 5,146 men aged 18 to 33 from countries in “which intelligence indicates al Qaeda terrorist presence or activity” who had entered the country after 2000 or who were currently college student visa holders.³¹ That category of countries has never been

²⁷ Eric Lichtblau, *U.S. will Pay \$2 Million to Lawyer Wrongly Jailed*, N.Y. Times Nov. 30, 2006 at <http://www.nytimes.com/2006/11/30/us/30settle.html?cm&ex=1165122000&en=Oca1f656ca46883a&ei=5087%OA>.

²⁸ Human Rights Watch and ACLU, *supra* note 25, at 3.

²⁹ *Id.* at 5.

³⁰ *Id.* at 2.

³¹ Kevin Lapp, *Pressing Public Necessity: The Unconstitutionality of the Absconder Apprehension Initiative*, 29 N.Y.U. Rev. L. & Soc. Change 573, 579 (2005); Press Release, Dept. Justice, *5000 Interview Status Report*, Dec. 21, 2001 available at http://www.justice.gov/opa/pr/2001/December/01_ag_663.htm.

clearly defined, and could in theory include the United States, Spain, the U.K., and other European countries. But according to enforcement practices, it really meant individuals, overwhelmingly Muslim, primarily from Afghanistan, Algeria, Egypt, Iran, Jordan, Lebanon, Morocco, Pakistan, Philippines, the Occupied Palestinian Territories, Saudi Arabia, Somalia, Sudan, and Syria.³² A total of 2,261 individuals were interviewed, and less than 20 individuals were taken into custody, most for minor immigration violations, 3 on criminal charges, but none on terrorism-related charges.³³

Soon after, in March 2002, Ashcroft called for another round of 3,000 interviews of men aged 17 to 47 who had entered the country since 2002 and who were citizens of countries with a significant al Qaeda presence.³⁴ This round brought the total number of people interviewed to 3,216 as of March 2003.³⁵ It is unclear what ultimate benefit was expected from this interview program, but it is clear that its impact fell on alien Muslims in America.

National Security Entry-Exit Registration Systems (NSEERS)

In June 2002, Ashcroft announced the implementation of the NSEERS program, which required digital fingerprinting and photographing of aliens as they entered the U.S., regular yearly registration for those in the country longer than 30 days, and exit

³² This country list comes from an analysis of the Absconder Apprehension Initiative, which uses the same reference to countries with al Qaeda activity or presence. Lapp, *supra* note 31, at 584.

³³ *Id.* at 579.

³⁴ *Id.* at 580.

³⁵ Gen. Accounting Office, Homeland Security: Justice Department's Project to Interview Aliens after September 11, 2001, Report GAO-03-459 5 (Apr. 2004), *available at* <http://www.gao.gov/new.items/d03459.pdf>.

procedures to track an alien's exit from the country.³⁶ The registration requirement, also known as Special Registration, applied to those currently in the country who were from countries of elevated national security concern. Of the 25 countries designated for Special Registration, only one - North Korea - was not a predominantly Arab or Muslim state.³⁷ The enforcement of NSEERS violations also primarily impacted Muslims. In December 2002, nearly 700 men and boys from Iraq, Iran, Libya, Syria, and Sudan who complied with NSEERS registration requirements were arrested in Southern California primarily for minor visa violations.³⁸ In one year of operation, Special Registration registered 83,310 aliens, and placed 13,740 of them into deportation proceedings.³⁹ While NSEERS is still in place, Special Registration was suspended in December, 2003.⁴⁰

Absconder Apprehension Initiative (AAI)

Announced in January 2002, the AAI is a program intended to locate, apprehend, and deport nearly 314,000 alien absconders who have deportation orders issued against them but still remain in the U.S.⁴¹ Names of the absconders were entered into the National Crime Information Center Database, which allowed local INS offices and other local law enforcement agencies to access the information on absconders in their relevant jurisdictions.⁴² The Administration declared that it would initially target absconders from countries of al Qaeda presence or activity - again, plainly pursuing a policy of

³⁶ Lapp, *supra* note 31, at 580.

³⁷ *Id.* at 581.

³⁸ American Civil Liberties Union, Sanctioned Bias: Racial Profiling Since 9/11 7 (2004).

³⁹ *Id.*

⁴⁰ Cam Simpson and Flynn McRoberts, *U.S. Ends Muslim Registry*, Chi. Trib. Dec. 2, 2003 at <http://www.chicagotribune.com/news/nationworld/chi-0312020136dec02,1,1139323.story>.

⁴¹ Lapp, *supra* note 31, at 574.

⁴² *Id.* at 582.

religious profiling.⁴³ By May 2003, the AAI had arrested over 1,100 absconders and deported two-thirds of them.⁴⁴ That same month, as a part of the National Fugitive Operations Initiative, the government shifted the AAI focus onto absconders who had been convicted of a serious crime in the U.S.⁴⁵

Deportation figures from late 2003, as published in the Chicago Tribune, confirm the focus on the deportation of Muslims from Muslim countries. According to their analysis, the two years after 9/11, as compared to the two years prior to 9/11, have registered a 193.5% increase in deportations of Indonesian nationals, 45.8% increase for Pakistani nationals, 119.2% increase for Egyptians, 80.3% for Jordanians, 136.9% for Moroccans, 73.2% for Iraqis, 292.6% for Tunisians, 229.1% for Saudi Arabians, 53% for Sudanese, and 65.4% for Yemenis.⁴⁶ Overall, the number of deportations from the countries included in the NSEERS and AAI lists increased 31.4 percent in the 2 years following 9/11, compared to a 3.4% increase in deportation orders for nationals of other countries.⁴⁷ In addition to the figures and policies noted above, other high profile immigration law enforcement actions have helped alienate the Muslim community from law enforcement. Here in Boston, for example, the recent arrest of 2 local imams for alleged visa fraud charges caused great concern within the Muslim community.⁴⁸ Other instances include

⁴³ *Id.*

⁴⁴ *Id.* at 575.

⁴⁵ *Id.*

⁴⁶ Cam Simpson, Flynn McRoberts, and Liz Sly, *Immigration Crackdown Shatters Muslims' Lives*, Nov. 16, 2003, at C1.

⁴⁷ Randa, A. Kayyali. *The People Perceived as a Threat to Security: Arab-Americans Since September 11*, July 1, 2006, available at <http://www.migrationinformation.org/Feature/display.cfm?id=409>.

⁴⁸ Yvonne Abraham and Raja Mishra, *2 Local Imams Arrested in Alleged Visa Scheme*, Boston Globe, Nov. 16, 2006 at http://www.boston.com/news/local/articles/2006/11/16/2_local_imams_arrested_in_alleged_visa_scheme/

the visa denials for noted Professor Tariq Ramadan and former pop singer Cat Stevens, now named Yusuf Islam.

Material Support Prosecutions

Laws prohibiting the provision of material support to terrorists and terrorist organizations have been critical to and central in the Administration's anti-terrorism law enforcement strategy. The material support laws are codified in 18 U.S.C. §§2339A and 2339B.

Section 2339A was passed in 1994 in response to the first World Trade Center bombing, and it criminalizes the provision of material support or resources to anyone that the provider knows will use the resources to prepare for or commit any one of a number of listed terrorism-related crimes.⁴⁹ Section 2339BH criminalizes providing, and attempting or conspiring to provide, material support to an organization officially a designated foreign terrorist organization regardless of any knowledge or intent to further terrorism. It was passed in 1996 as part of the Antiterrorism and Effective Death Penalty Act (AEDPA).⁵⁰

These material support laws are unbiased on their face, but they are very broad. First, as I have mentioned, §2339B, unlike §2339A, disregards intent, which means that a contribution of funds never intended to further terrorism could subject someone to terrorism support charges. Second, the term "material support" is defined very expansively to include any physical asset (*e.g.*, a book), training, expert advice or assistance, and personnel, including the person being charged himself. The personnel

⁴⁹ Robert M. Chesney, *The Sleeper Scenario: Terrorism-Support Laws and the Demands of Prevention*, Harv. J. on Legis. 1, 12-13 (2005).

⁵⁰ *Id.* at 17-18.

definition has raised first amendment concerns in that it could be seen as criminalizing mere membership or association with a group.⁵¹ This broad scope has allowed the Administration to press ahead with many material support indictments that have targeted Muslims and Muslim charities.

Non-criminal sanctions against any money transfers that support a designated agency are based on the President's powers under the International Emergency Economic powers Act (IEEPA) to seize assets from and regulate or prohibit various economic transactions with foreign states or individuals upon a formal declaration of a national emergency.⁵² The USA PATRIOT ACT amended IEEPA to authorize the Treasury Department to freeze all the assets of an organization that is being investigated for violations of the IEEPA, which can be defended in court with secret evidence presented to the court *in camera* and *ex parte*.⁵³

Prior to 9/11, §2339A was used on as few as two occasions, §2339B was used only four times, and there was limited use of IEEPA orders and no prosecutions for violations of those IEEPA orders.⁵⁴ In the three years following 9/11, however, 56 individuals -- the overwhelming majority of whom are Muslim⁵⁵ -- have been charged under §2339B, 36 have been charged under §2339A, and 37 have been charged with violating IEEPA

⁵¹ For a discussion of this issue, see Robert M. Chesney, *Civil Liberties and the Terrorism Prevention Paradigm: The Guilt by Association Critique*, 101 Mich. L. Rev. 1408 (2003).

⁵² *Id.* at 5.

⁵³ David Cole, *The New McCarthyism: Repeating History in the War on Terrorism*, 38 Harv. C.R.-C.L.L. Rev. 1, 27 (2003).

⁵⁴ Chesney, *supra* note 49, at 19.

⁵⁵ *Id.* at 20.

regulations. These actions⁵⁶ have noticeably chilled charitable contributions by Muslims in America, with many Muslim charities and mosques reporting receipts that are far below intake in previous years.⁵⁷

Invisible Investigative Steps

A number of investigative steps initiated after 9/11 have been handled in secret. It is therefore difficult to assess to what extent the fact that one is a Muslim has determined the likelihood of profiling at airports, NSA monitoring of his electronic communications, or FBI review of his records under new provisions of the Patriot Act.

Enemy Combatants

Lindh, Padilla, and Hamdi were three U.S. citizens whose detention and trials as terrorism suspects were special. John Walker Lindh pled guilty to one count of serving in the Taliban and carrying a weapon while doing so, and is now serving a 20 years sentence. Jose Padilla was initially arrested as a material witness, but was later transferred to military custody as an enemy combatant. After a long legal drama, he was transferred to a civilian court in Miami and charged with conspiring to commit murder overseas. Yaser Esam Hamdi was captured and held as an enemy combatant, but the government struck a deal whereby he would be deported to Saudi Arabia in exchange for travel restrictions and his renunciation of his U.S. citizenship.

⁵⁶ Cole, *supra* note 53, at 9; Press Release, U.S. Treasury, Treasury Freezes Assets of Organization Tied to Hamas (Feb. 19, 2006), available at <http://www.ustreas.gov/press/release/js4058.htm>; Neil MacFarquhar, *Fear of Inquiry Dampen Giving by U.S. Muslims*, N.Y. Times Oct. 30, 2006, at A1.

⁵⁷ Neil MacFarquhar, *Fear of Inquiry Dampen Giving by U.S. Muslims*, N.Y. Times Oct. 30, 2006, at A1.

Although these three men are or were U.S. citizens, they were still subject to capture and detention by the President in the context of the war against al Qaeda. The acute civil liberties concerns presented by these cases are equally applicable to all U.S. citizens, not just Muslim citizens, though Muslims are more likely to face such circumstances.

Prosecution of Hate Crimes

As noted above, of the many legal tools available to address terrorism, a number have been disproportionately applied to Muslims, although what part of such disproportion is attributable to bias and what part was unnecessary, unfair or unwise are subjects that require careful and fact-based consideration. Another way to assess the legal environment, however, is to gauge the government's response to private harms committed against Muslims. Private reports of civil rights cases have been steadily increasing. The Council on American-Islamic Relations (CAIR) processed 1,019 civil rights incident reports in 2003, 1,522 reports in 2004, and 1,972 in 2005 -- a steadily upward trend.⁵⁸ CAIR's reports of anti-Muslim hate crimes are also steadily increasing, from 93 in 2003, 141 in 2004, and 153 in 2005.⁵⁹ High profile incidents, like the recent case of 6 imams being asked to leave a U.S. Airways flight after having prayed their evening prayers before entering the plane, also contribute to a generally negative atmosphere of fear of discrimination.⁶⁰

⁵⁸ Council on American-Islamic Relations: The Status of Muslim Civil Rights in the United States 2005: Unequal Protection 5 (2005); Council on American-Islamic Relations, The Status of Muslim Civil Rights in the United States (2006): The Struggle for Equality 4 (2006).

⁵⁹ *Id.*

⁶⁰ Bob Von Sternberg and Pamela Miller, *Uproar Follows Imams' Detention*, Minneapolis Star Tribune, Nov. 21, 2006, at <http://www.startribune.com/462/story/826056.html>.

The government has tried to respond to various hate crimes committed against Muslims. The FBI reported a 1,600 percent increase in anti-Muslim hate crimes in 2001, and a nearly 500 percent increase in ethnic-based hate crimes against Arabs.⁶¹ In response, the FBI has increased its investigation of anti-Muslim hate crimes, probing 128 potential hate crimes in 2005 compared to 28 probed in 2000.⁶² Since 9/11, the DOJ, FBI, and U.S. Attorney offices have investigated 742 hate crime incidents, with federal charges having been brought in 27 cases against 35 defendants, resulting in 32 convictions to date.⁶³

Conclusion

I would like to return, by way of conclusion, to the categories with which I began. In discussing the legal situation of Muslims in the United States after September 11, discrimination based on religious stereotyping is the most important concern. It may not be biased to use the religious beliefs of an individual as one factor to consider in assessing the extent of a terrorist danger that is believed to be motivated by a religious cause such as an Islamist movement. But it is unwise. The costs in terms of the lives of American Muslims of feeling suspected and distrusted by their neighbors are very high. The costs of anything that isolates and separates parts of the population of citizens from the great majority of citizens are also extremely great for the country as a whole. Since the vast majority of American Muslims pose no threat at all, there is no likely benefit from focusing discretionary preventive measures on all American Muslims that could compensate for those costs. Such discrimination should be rejected outright.

⁶¹ Alexandra Marks, *U.S. Works to Bridge its Muslim Trust Gap*, Nov. 27, 2006, at <http://www.csmonitor.com/2006/1127/p01s03-ussc.html>

⁶² *Id.*

⁶³ Dept. of Justice, Civil Rights Division, Post 9/11 Activity Update, Enforcement and Outreach Following the September 11 Terrorist Attacks, <http://www.usdoj.gov/crt/legalinfo/discrimupdate.htm>

In fact, few of the activities that I have reviewed are inconsistent with that very important rule, although it is impossible to assess the targeting of secret programs such as airport screening and NSA wiretaps.

There are also real but lesser harms from discrimination on the basis of religion against aliens visiting the United States. The costs of being separated off from one's trusted countrymen are absent. So are many of the risks of national division. But still there are costs. That discrimination inevitably poses a threat to co-religionists who are U.S. persons. It seems inconsistent with the religious neutrality built into our constitution. It affects our relations with the nations whose citizens the aliens are. If we are prepared to learn from the experience of the last five years, the benefits are very little. The very low payoff of the programs that the United States has attempted for those within the United States who have come from countries with strong Islamist movements does not suggest that any extensive reliance on religion is worth its costs even for the category of visiting aliens.

The fewest costs from attention to religion or to the strength of local Islamist movements come with regard to admission to the United States. The benefits may be low because of the very low proportion of the population that will in fact turn out to be dangerous, but the costs are also low.

It is in the context of such categories that we must assess the status of Muslims in America after 9/11. On the whole, the situation has been far from terrible. But the stakes are so high for those U.S. citizens and for the nation as a whole that very careful attention should be given to eliminate any form of religious discrimination for which a very clear case has not been made as well as forbidding such discrimination entirely in the case of U.S. persons.