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STOLEN FREEDOMS: ARABS, MUSLIMS, AND SOUTH ASIANS IN THE WAKE OF POST 9/11 BACKLASH

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Since 9/11, the United States government's "War on Terror" has, in large part, been an attack on innocent Arabs, people from the Middle East and South Asia, and Muslims. Using race, ethnicity and religion as a proxy for criminal behavior, law enforcement has zeroed in on people of certain ethnicities and a single faith. The Department of Justice (DOJ), now engulfed in the Department of Homeland Security, has rolled out programs and established policies that target, harass and in many instances, make life miserable for Arabs and Muslims in this country. The overwhelming majority in these groups are innocent of any criminal activity, however their persecution by zealous law enforcement results in thousands of needless tragedies. For every day that has passed since 9/11, there are dozens of painful stories borne of government-instituted discrimination and racist implementation of policy.

I. SALMAN HAMDANI

One of my favorite stories is incredibly painful. It speaks volumes about American law enforcement's willingness to blindly approach the "War on Terror" by using the failed tools of ethnic and religious profiling. On the morning of September 11th, 2001, Mohammed Salman Hamdani, a 23 year-old Pakistani Muslim left his home in Bayside, Queens, a borough of New York City.¹ "Salman," as he was known, was headed toward his new job as a lab technician in Rockefeller Center, right in the middle of Manhattan.² He'd been there just a month.³ A sports enthusiast, a *Star Wars* fan, an excellent student who aspired to be a doctor, he was a beloved son, brother and friend.⁴ The last hours of his life tell you something about his character. He had stayed up late on September 10th, working on an application for medical school and tending to his father, who had a history of heart problems.⁵ Salman sat up with him until 2:30 in the morning, checking his blood pressure and taking his pulse.⁶ A remarkable young man, he had worked as a police cadet and a

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1. Scott Shane, *Out of Loss, a Struggle for Meaning*, BALTIMORE SUN, Sept. 11, 2002, at 3G.
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*

part time ambulance rider.⁷ He was a first responder, trained to be first on the scene of an accident. Indeed, he took his training, experience and the values of assisting people in need so seriously that the previous summer, on a road trip with his father, he insisted on stopping to help people pulled over on the side of the road.⁸ Generosity of spirit and service extended to all aspects of Salman's life. His brother likes to tell of how he would drop a \$20 bill near a homeless person so that they would not have to suffer the indignity of asking.⁹ By all accounts, Salman was a charitable and kind-hearted person.

Judging by the time he had left the house, Salman should have been somewhere on the number seven subway line, an elevated train that connects Queens, a New York City borough, to Manhattan.¹⁰ He should have been far from the chaos of the downtown disaster and maybe even in a position to view the smoke and devastation at the World Trade Center.¹¹ Knowing her son's generous nature, his mother Talat Hamdani worried that he might have gone down to the World Trade Center to help.¹² The Hamdanis did not sleep that night, waiting for their son who never came home. The next day, family gathered at the Hamdani household and created a flyer like so many thousands of other New York families that day, posting it throughout the city and searching for anyone who might have seen him.¹³ A picture of Salman wearing a tie and a big smile stood right above the word "MISSING."

The Hamdani family spread out to the local area hospitals, and plastered the flier all over New York City, hoping that someone, somewhere, could help them find Salman.¹⁴ Nothing resulted.¹⁵ Then one day, members of the press from the New York Post, New York Daily News, and Newsday showed up at their front door, telling Salman's parents that the government had created their own flier.¹⁶ They too were looking for Salman who was "wanted for questioning" in connection with the 9/11 terrorist attacks.¹⁷ The flier was being distributed among police stations.¹⁸ There was a big picture of Salman, indicating that he was 23 years old, Pakistani, Muslim, and last seen on the morning of September 11th; but this one didn't say "MISSING." Reporters contacted the Ham-

7. *Id.*

8. *Id.*

9. Austin Fenner, *Muslim Cop Cadet Mourned*, N.Y. DAILY NEWS, Apr. 6, 2002, at 10.

10. Shane, *supra* note 1, at 3G.

11. *Id.*

12. Newsweek Web Exclusive, *First Person: One Year Later - For Victims' Families, Rescue Workers and Survivors, Life Will Never Be the Same* (Sept. 11, 2002), at <http://msnbc.msn.com/id/3068112> (last visited May 25, 2004) [hereinafter *First Person*].

13. Shane, *supra* note 1, at 3G.

14. *Id.*

15. *See id.*

16. *First Person*, *supra* note 12.

17. Shane, *supra* note 1, at 3G.

18. *First Person*, *supra* note 12.

dani family about the flyer.¹⁹ The New York Post Headline on October 12, 2001, read “Missing – or Hiding?”²⁰ The New York Times reported that the New York Police Department (NYPD) and the Federal Bureau of Investigation (FBI) were looking for Salman.²¹ And indeed they were. The FBI started harassing the Hamdani family.²² They searched through Salman’s room and things, questioning family and friends, wanting to know where he was. Asking these questions of parents who still slept in the living room with the lights on, worried that they might not hear him if Salman came home in the middle of the night.²³ He never came home. The harassment and the suspicion, however, continued to visit them through continued government questioning. Then one day, police were again knocking on the door. Salman’s mother recalled:

It was 11:30 p.m. on the 20th of March, a Wednesday, when two police officers came. We still slept in the living room expecting Salman. My husband opened the door and they walked in. They did not tell my husband to take a seat. They told my husband “Your son has been identified through DNA. Your son is dead.” And my husband sat down on the floor. I told my husband, “They’re lying.” But I believed it. Salman worked as a DNA lab analyst, and he had said, “Mom, DNA is a one in a billion chance to match.” The next morning we told the family and went down to the medical examiner’s office. They found the lower part of his body.

My brother called NYPD, and he asked “How does the department handle the death of a cadet?” They said they’d handle it. Commissioner Kelly was the first to say he would come. I’m grateful that [they] honored him as a son of New York. He got a wonderful salute. He has become our role model now.²⁴

Mayor Bloomberg and Police Commissioner Raymond Kelly showed up to honor Salman at his hero’s funeral with 500 people in attendance.²⁵ His body was found at the World Trade Center site along with his medical bag and Emergency Medical Technician (EMT) identification.²⁶ It seems that, as his parents suspected, Salman used his police cadet and EMT identification cards to hitch a ride with a police or fire truck into lower Manhattan where he died trying to help other people who found themselves at the wrong place, at the wrong time.²⁷

19. Shane, *supra* note 1, at 3G.

20. William J. Gorta & Simon Crittle, *Missing – or Hiding? – Mystery of NYPD Cadet from Pakistan*, N.Y. POST, Oct. 12, 2001, at 11.

21. Shane, *supra* note 1, at 3G.

22. *See id.*

23. *First Person*, *supra* note 12.

24. *Id.*

25. Fenner, *supra* note 9, at 10.

26. *Id.*

27. Shane, *supra* note 1, at 3G.

There is something here that doesn't make sense. One day, Mohammed Salman Hamdani is a suspected terrorist, the next he is recognized as a hero. What made him a suspect in the first place? The answer reveals an incredibly frightening truth about post 9/11 America. Salman was a suspect because he was a Muslim, because he was Pakistani, and because he did well as a biochemistry major.²⁸ That's it. And in post 9/11 America, that is all it takes.

Salman Hamdani's story is emblematic of the turn taken by this country after 9/11. Innocent people's reputations and lives maligned and even destroyed simply because they are from certain immigrant groups. Since 9/11, a series of policies and practices embody this administration's commitment to fighting the "War on Terror" by attacking Arabs, Muslims and South Asians. The following are a few highlights and examples of the broader attack on civil liberties that will affect every one of us.

II. GOVERNMENT SWEEPS AND DETENTION

After September 11th, Attorney General John Ashcroft held a series of press conferences, updating the public on the administration's actions to apprehend the terrorists responsible for September 11th and prevent any future attack. At a press briefing, Ashcroft described the government campaign:

The Department of Justice is waging a deliberate campaign of arrest and detention to protect American lives. We're removing suspected terrorists who violate the law from our streets to prevent further terrorist attack. We believe we have al Qaeda membership in custody, and we will use every constitutional tool to keep suspected terrorists locked up.²⁹

Indeed, the Department of Justice (DOJ) was waging a fierce campaign of preventative "arrest and detention."³⁰ Contrary to the impression given by Ashcroft, the results were doing nothing to protect American lives. Instead of pulling criminals from America's streets, law enforcement questioned, harassed and arrested thousands of people who did nothing more than come from a Muslim or Arab background. These were not al-Qaeda members in custody, rather they were Arab and Muslim immigrant men working at fast food restaurants, getting an education at an American university, driving a cab – normal people. In government conflation of religious and ethnic identity with criminal behavior, thou-

28. *See id.*

29. Attorney General John Ashcroft, *Attorney General Provides Total Number of Federal Criminal Charges and INS Detainees* (Nov. 27, 2001), at http://www.usdoj.gov/ag/speeches/2001/agcrisisremarks11_27.htm (last visited May 25, 2004) (providing the total number of federal criminal charges and INS detainees).

30. *Id.*

sands of people found themselves at imminent risk of being labeled suspected terrorists and indefinitely losing their legal rights. FBI and Immigration and Naturalization Services (INS) agents descended on Arab and Muslim men in their homes, mosques and workplaces, often arresting them simply on the basis of their ethnicity or religion and minor immigration violations. While the term is loaded, an immigration violation can happen quite easily, and the civil violation is generally not connected to any criminal activity. These “immigration violations” could be as minor as not notifying the INS of a move within ten days or working at Dunkin’ Donuts on a tourist visa. In many instances, immigration violations occurred because of the notoriously slow backlog at the INS. Many Arab and Muslim men married to U.S. citizens were still waiting for the INS to process their forms when they were swept up, jailed and even deported for “immigration violations.” In some cases, there was no immigration violation to speak of. Thousands of Arab and Muslim men disappeared off the streets of their neighborhoods, never having committed a criminal act.

Far from denying the use of visa violations as a predicate for arresting people absent criminal suspicion, Ashcroft proudly declared the U.S. government strategy of using immigration law as a surrogate for criminal behavior:

Robert Kennedy’s Justice Department, it is said, would arrest mobsters for “spitting on the sidewalk” if it would help in the battle against organized crime. It has been and will be the policy of this Department of Justice to use the same aggressive arrest and detention tactics in the war on terror.

Let the terrorists among us be warned: If you overstay your visa – even by one day – we will arrest you. If you violate a local law, you will be put in jail and kept in custody as long as possible.³¹

[It is] estimated [that] thousands were arrested on minor immigration violations, like overstaying tourist visas. Ashcroft continually reminded the American public the U.S. government was successfully removing suspected terrorists from our streets. Time and again, Ashcroft held press briefings to update America on their progress. It started out shortly after 9/11 when we were told that suspected terrorists were picked up and in government custody. The number of “suspects” continued to increase until the first week of November 5, 2001 when the number announced by Ashcroft climbed to just under 1,200.³²

31. Attorney General John Ashcroft, *Prepared Remarks at the U.S. Mayors Conference* (Oct. 25, 2001), available at http://www.usdoj.gov/ag/speeches/2001/agcrisisremarks10_25.htm (last visited May 25, 2004).

32. Dan Eggen & Susan Schmidt, *Count of Released Detainees Is Hard to Pin Down*, WASH. POST, Nov. 6, 2001, at A10.

The American Civil Liberties Union (ACLU) was among the concerned voices, demanding to know who was being held, where and why. In what became a hallmark of this administration, Ashcroft grew more secretive. Not only would the Attorney General refuse to respond to those concerns, he declined to release further information on the numbers of people being detained. We often hear 1,200 bantered around as the number of Arabs and Muslims detained after 9/11. That number is a fiction representing only the last number Ashcroft disclosed. Long after that last disclosure, Muslim and Arab men continued to disappear off of America's streets.

Due to information derived from family, friends and detainees themselves, immigration advocates estimate that the total number of Arabs and Muslims detained in the post 9/11 sweeps falls at around several thousand. It turns out that these men were not the terror suspects Ashcroft described. Advocate groups rightly point out that those detained in these sweeps were not publicly charged with a crime of terrorism; however, they all have one thing in common – they are Arab and Muslim men. Many with minor immigration violations, some whose status was just fine.

Law enforcement stopped men with an Arab, Middle Eastern, South Asian or Muslim appearance, detaining many. As the testimony of one man shows, after September 11th, that was, in and of itself, crime enough to warrant arrest:

On September 11th, 2001, I was driving my car and a cop pulled me over. He asked me where I'm from. This is the first time a cop pulled me over and asked me where I'm from before I talked. Usually they ask after you talk. By the accent they are interested to know where you are from. He was angry. He wants to know where I am from or the reason to stop me is just to ask where I am from. So I said, "why stop me?" He said, "I stop you for a red light. Give me your license." I gave him the license. He went to his car. Two or three minutes later, he comes back and says "where are you from?" I said, "I am from Israel." He said, "Arabic or Jewish?" I said, "What's the difference?" He said, "It's a big difference." I said, "I'm Arabic," and he said, "you are under arrest."³³

Once detained, these men found themselves lost within a system that no longer seemed to recognize basic due process rights. In June of 2003, the Office of the Inspector General (OIG), the DOJ's internal watchdog issued a report about the post 9/11 detentions that amounted to a sweeping indictment of the Bush Administration.³⁴ The report con-

33. PERSONS OF INTEREST. (The Documentary Campaign 2003).

34. OFFICE OF THE INSPECTOR GENERAL, U.S. DEP'T OF JUSTICE, THE SEPTEMBER 11 DETAINEES: A REVIEW OF THE TREATMENT OF ALIENS HELD ON IMMIGRATION CHARGES IN

firmed what the ACLU had been publicly alleging: Immigrants with no connection to the terror attacks spent months in detention under conditions where they were denied basic rights.³⁵ The specific findings of the report include:

- A “communications blackout” was imposed, preventing detainees from calling anyone including attorneys, family and the press.³⁶ When the “blackout” ended, the Justice Department told prison officials “not to be in a hurry” to assist detainees in contacting attorneys or consulates;³⁷
- The DOJ instituted an official “no bond” policy that prevented detainees from access the justice system;³⁸
- The government process for clearing immigrants of any connection to the terrorist attacks was understaffed and not given “sufficient priority;” clearance took an average of 80 days and in some cases more than 200;³⁹
- The OIG found that immigrants “who had no connection to terrorism” were labeled suspects in an “indiscriminate and haphazard manner.”⁴⁰

In a country that is supposed to be committed to liberty, these abuses, reported by our own government, should shock every American. They certainly astonished these immigrants. No one should be subject to lengthy detentions without charge and certainly not subject to these described conditions.

Announced by Attorney General, John Ashcroft, the FBI commenced a massive program of finding and questioning Arabs. Between September 11th and November 9th, 2001, the INS compiled a list of immigrants whose characteristics were similar to those of the 9/11 hijackers. Based on visa type, gender, age, sex and date of entry into the U.S, initially 5,000 men found themselves targets of the questioning, then 3,000. Subsequently, Ashcroft initiated a program to question thousands of Iraqi nationals and Iraqi-Americans. Absent any individualized suspicion, the FBI showed up, almost always unannounced, at the homes and workplaces of men and women who had no connection to wrongdoing and no useful information to offer up. While touted as voluntary, the questioning tactics where often so aggressive and the presence of unex-

CONNECTION WITH THE INVESTIGATION OF THE SEPTEMBER 11 ATTACKS (2003), *available at* <http://www.usdoj.gov/oig/special/0306/full.pdf> (last visited May 24, 2004).

35. *Id.* at 195-97.

36. *Id.* at 113.

37. *Id.*

38. *Id.* at 76-88.

39. *Id.* at 51.

40. *Id.* at 70.

pected federal authorities sufficiently intimidating, that the interviews were inherently coercive. Most citizens and immigrants alike did not feel free to refuse. Government authorities took great license in executing the questioning, sometimes walking into a home, workplace or mosque to question one person and taking names and extending interrogation to everyone there.

The FBI and appropriate law enforcement agencies have not only the right, but a responsibility to conduct appropriate investigation into terrorism related activity. Discriminatory profiling, however, is neither a legitimate investigative technique, nor is it a substitute for individualized suspicion of wrongdoing. In determining who to interview, the government neglected to exhibit any belief, reasonable or otherwise, that the people it sought to question possessed relevant knowledge of criminal activity. Religion and ethnicity were the only identifying factors. Furthermore, many of the queries posed to those interrogated were not relevant to questions that should be asked of suspects or potential witnesses to crimes.

Subjects of the interviews reported that authorities often used inappropriate intimidation tactics, questionable methods of interrogation and delved into inappropriate subject matters. People were asked questions such as:

How religious of a Muslim are you?

How many times a day do you pray?

What mosque do you attend?

How do you feel about the war in Afghanistan? The war in Iraq?

What do you think of U.S. foreign policy?

How do you feel about Israel?

Name every Palestinian that you know. Name every Iraqi that you know.⁴¹

All of the information collected during these interviews was put into a searchable federal database.

After hearing of some of the interviews, where possible, the ACLU started offering free legal representation for those targeted for interviews. When subjects informed the FBI that an attorney would be representing them at the interview, an interesting thing started to happen – many agents lost interest and canceled the interview. When the agents' cancellations developed into a pattern, some subjects did not tell the FBI that

41. Taken from internal ACLU debriefings of interviews (on file with author).

they would be accompanied by an attorney and just showed up to the interview with their lawyers. Any sort of legitimate questioning should be able to take place in front of an attorney and yet, time and again, FBI agents cut short the questioning and walked out or canceled the interview, sometimes angrily. In one instance, an angry FBI agent told an ACLU attorney that she had “wasted” his time. This worrying behavior, on the part of federal officers, leads one to ask: What kind of questioning does our government want to conduct if agents feel that they can’t do it in front of legal witnesses?

III. SPECIAL REGISTRATION

The harassment of Arabs and Muslims is not only carried out by having federal agents go to them. In June of 2002, Ashcroft announced the impending implementation of a program, the National Security Entry-Exit Registration System (NSEERS), which would have Arabs and Muslims go to the government.⁴² One of the most highly publicized aspects of the program is the “Special Call-In Registration” which required male nationals from 25 Muslim countries and North Korea to submit to INS offices for questioning, fingerprinting and photographing.⁴³ The DOJ allotted specific time periods of weeks during which non-immigrants from these designated countries were required to comply.⁴⁴ Those who did not appear at INS offices during the designated time period would presumptively lose their status, become “illegal” and risk criminal jail penalties.⁴⁵

It appeared, however, that the government was more interested in making Arabs and Muslims subject to deportation than securing additional registration information. The government provided no individualized notice of the new requirements – no letters appeared mailboxes, no phone calls made, and no press conference describing the requirements held. Instead, the DOJ just issued an obscure notice published on the federal registry so complicated that even attorneys experienced difficulty in sorting out its meaning.⁴⁶ People who followed every infinitesimal rule and detailed requirement since the moment they entered this country went from good status to illegal status simply for not complying with a requirement of which they had no knowledge. The program was publicly

42. Attorney General John Ashcroft, *Attorney General Prepared Remarks on the National Security Entry-Exit Registration System* (June 6, 2002), available at <http://www.usdoj.gov/ag/speeches/2002/060502agpreparedremarks.htm> (last visited May 24, 2004) [hereinafter Ashcroft June 6, 2002, Press Conference].

43. National Immigration Law Center, *DOJ Expands “Call-In” Special Registration, Grants Extensions of the Registration Periods for All Groups*, IMMIGRANTS’ RIGHTS UPDATE (Feb. 21, 2003), available at <http://www.nilc.org/immlawpolicy/arrestdet/ad062.htm> (last visited May 24, 2004).

44. *Id.*

45. *Id.*

46. See, e.g., Registration of Certain Nonimmigrant Aliens From Designated Countries, 67 Fed. Reg. 67,766 (Nov. 6, 2002).

offered as a tool to apprehend terrorists.⁴⁷ Yet, there is no terrorist who will stand in line for hours to be fingerprinted, photographed and respond honestly to questions like: "Are you a terrorist?"

Initially touted as a program that would register foreign visitors from all nations, Ashcroft called an end to it as soon as most of the majority Muslim and Arab countries were registered. This came as no surprise. The administration's meager protests failed to veil Special Registration as a discriminatory program to register Arabs and Muslim South Asians. The entire initiative represents horrifying backpedaling into discriminatory profiling. In the history of this country, indeed, in the history of the world, subjecting people to special government regulations and requirements on the basis of race, religion or ethnicity, is always looked at in retrospect with extreme regret, shame and embarrassment. Not once, have we looked back on an instance of this kind of profiling and thought it was a good idea.

For many, the current period bears striking similarities to another disgraceful period. In 1942, President Roosevelt signed Executive Order 9066, giving the Secretary of War authority to intern over 110,000 Japanese-Americans, two-thirds of whom were U.S. citizens.⁴⁸ As a country, we have since apologized, paid \$20,000 to each survivor in reparations and yet appear not to have learned the fundamental lesson of not repeating past mistakes.⁴⁹ The Japanese-American community, particularly horrified at government policies singling out Arabs and Muslims for discriminatory treatment, has voiced strong opposition to the discrimination and solidarity with oppressed communities.

IV. WE ARE ALL AT RISK

Many people are complacent with some of the attacks on civil liberties because they are seen as affecting religious and ethnic minorities, not the average person. James Baldwin voiced a beautiful truth, "we live in an age in which silence is not only criminal but suicidal . . . For, if they take you in the morning, they will be coming for us that night."⁵⁰ Often, laws destructing civil liberties start with the most marginalized in our society and eventually effect us all. We saw the progression in the use of the "enemy combatant" status, as defined by President George W. Bush, which originally only applied to non-citizens, but soon thereafter applied to U.S. citizens as well. First Yasser Esam Hamdi, a U.S. citizen alleg-

47. Ashcroft June 6, 2002, Press Conference, *supra* note 42.

48. Exec. Order No. 9066: Authorizing the Secretary of War to Prescribe Military Areas, 7 Fed. Reg. 1407 (Feb. 19, 1942).

49. See Civil Liberties Act of 1988, Pub. L. No. 100-383, 102 Stat. 903, 903 (codified as amended at 50 U.S.C. app. §§ 1989-1989d (2000)). A listed purpose of the statute is to "make restitution to those individuals of Japanese ancestry who were interned." *Id.* at 903.

50. James Baldwin, *An Open Letter to My Sister, Angela Davis, in IF THEY COME IN THE MORNING: VOICES OF RESISTANCE* 13 (Angela Yvonne Davis ed., 1971).

edly captured in Afghanistan,⁵¹ and then Jose Padilla, another U.S. citizen arrested in Chicago's O'Hare airport.⁵²

Similarly, government scrutiny on America's airways is following the same pattern. When government starts targeting people though circumstantial characteristics rather than criminally suspect behavior, it is a short leap to encompassing increasingly wider groups of innocent people in a web of undeserved suspicion.

The United States Transportation Security Administration (TSA), recently announced plans to implement a program known as Computer Assisted Passenger Prescreening Program II (CAPPS II).⁵³ This program proposes to screen passenger profiles in order to identify national security risks to America's airways.⁵⁴ It would require the submission of personal information, which would be checked against other private facts in government and third party databases.⁵⁵ It would apply to all of the people who fly America's airways.⁵⁶

In making travel reservations, airlines and travel agencies would be required to collect the passenger's name, birth date, home phone number and home address to create a Passenger Name Record (PNR).⁵⁷ Included in the PNR are details such as the passenger's travel itinerary, credit card information, hotel information, and emergency contact information.⁵⁸ Some of the seemingly innocuous facts actually provide very personal information that should have no bearing on a person's ability to travel, but is easily subject to discriminatory scrutiny. For example, a person's choice of Muslim or Kosher meal, included in the PNR,⁵⁹ could indicate their religion and lead to unfavorable ratings.

The information collected, forming the PNR, will be submitted to both government and commercial databases which have data mined consumers' private information from various resources such as driving records, credit reports, real estate transactions and voter registration infor-

51. See Brief for Petitioner, *Hamdi v. Rumsfeld*, 124 S. Ct. 981 (2004) (No. 03-6696) (arguing that detention of a United States citizen by the United States government as an enemy combatant is unlawful).

52. See *Padilla v. Rumsfeld*, 352 F.3d 695 (2d Cir. 2003) (United States citizen challenging his detention by the United States government as an enemy combatant), *cert. granted*, 124 S. Ct. 1353 (2004).

53. Press Release, United States Transportation Security Administration, *TSA's CAPPS II Gives Equal Weight to Privacy Security* (Mar. 11, 2003), at <http://www.tsa.gov/public/display?theme=44&content=09000519800193c2> (last visited May 25, 2004) [hereinafter TSA Press Release].

54. *Id.*

55. *Id.*

56. See U. S. GEN. ACCOUNTING OFFICE, REPORT TO CONGRESSIONAL COMMITTEES, AVIATION SECURITY: COMPUTER-ASSISTED PASSENGER PRESCREENING SYSTEM FACES SIGNIFICANT IMPLEMENTATION CHALLENGES 2 (2004), available at <http://www.gao.gov/new.items/d04385.pdf> (last visited May 24, 2004) [hereinafter GAO REPORT].

57. *Id.*

58. See *id.* at 6 n.8.

59. See *id.* at 5.

mation.⁶⁰ These companies will compare the information from the PNR with information that they have in their databases.⁶¹ Red flags will be raised if any information does not exactly match.⁶² Think of how easily this could happen. Anyone who has recently moved and has not yet updated all of his or her credit companies, obtained a new driver's license, or re-registered to vote will be marked as suspicious. Bias will attach itself to those who have not established applicable records, resulting in increased inspection of those with low incomes and young passengers – all people whose conditions in no way reflect a threat to national security.

The data mining companies return the results of their information in the form of a score to the TSA.⁶³ TSA enters the particulars into the CAPPs II scheme resulting in a “threat level” for each traveler, assigning each person a color: red, yellow or green.⁶⁴ Red indicating that the person is a national security threat and should not be permitted to fly; yellow indicating that the person is a potential risk requiring scrutiny and investigation; green applying to those who pose little risk and are permitted to fly.⁶⁵ The exact criteria by which the “risk level” will be determined are still secret and may never be revealed.⁶⁶ Furthermore, once a person is assigned a red or yellow, there is no procedure for him or her to find out why that label was designated or how to remove themselves from those lists.⁶⁷

For those who can afford it, the TSA intends to create a “trusted traveler” program.⁶⁸ Those who can and wish to participate would submit to comprehensive scrutiny, pay a fee, and in exchange, TSA will issue them an identification card which will allow them to bypass any extra security checks at the airport.⁶⁹ This leaves the airways vulnerable to threats created via identity theft.

Although, for a period of time, Delta Airlines conducted a pilot program for CAPPs II, it has not yet been officially implemented industry wide.⁷⁰ Congress indicated that CAPPs II would not be funded until the

60. *See id.* at 6.

61. *Id.* at 7.

62. *See id.*

63. *Id.*

64. American Civil Liberties Union, *ACLU Criticizes Plan to Go Forward with CAPPs II, Call Dragnet Profiling Approach Fake Security on the Cheap* (Jan. 12, 2004), at <http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=14699&c=206> (last visited May 25, 2004) [hereinafter *ACLU Dragnet*].

65. *Id.*

66. American Civil Liberties Union, *The Five Problems with CAPPs II: Why the Airline Passenger Profiling Proposal Should Be Abandoned* (Aug. 25, 2003), at <http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=13356&c=206> (last visited May 25, 2004).

67. *Id.*

68. *ACLU Dragnet*, *supra* note 64.

69. *Id.*

70. TSA Press Release, *supra* note 53.

program passed eight specified criteria. The General Accounting Office (GAO), Congresses “regulatory arm,” released an assessment of the program. According to the GAO, as of January 2004, the CAPPS II program failed to meet all but one of the Congressional requirements for funding.⁷¹ TSA is unsuccessful in: sufficiently testing CAPPS II for efficacy and accuracy; adequately assessing the accuracy of information in databases used for CAPPS II; installing security measures to protect unauthorized access to travelers’ personal data; establishing effective oversight of the system’s use and operation; addressing privacy concerns; and creating redress procedures for passengers to correct erroneous information. While Congress has made clear their intention that the program should not proceed without correcting these problems, President Bush indicates that the stated requirements are merely advisory recommendations, not requirements necessitating fulfillment.

CONCLUSION

From sweeping arrests and detentions absent probable cause of criminal activity, to FBI questioning and Special Registration without individualized suspicion, to data-mining programs that invade the integrity of our right to privacy without making us safer, we are quickly changing as a nation. Targeting innocent immigrants is not the answer. These and other measures do not make us safer as a country and they destroy fundamental freedoms that have distinguished America. Almost 250 years ago, Benjamin Franklin said, “Those that give up essential liberty to obtain a little temporary safety, deserve neither liberty nor safety.” There must be a response to terrorism, but the response must recognize our ability to be both safe and free.

71. GAO REPORT, *supra* note 56, at 4.

