IABA کانون وکلای ایرانی در آمریکا
IRANIAN-AMERICAN BAR ASSOCIATION

A Review of the Treatment of Iranian Nationals by the INS in Connection with the Implementation of NSEERS Special Registration Program

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February 6, 2004

Prepared by The Iranian American Bar Association

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PROLOGUE

As an organization dedicated to educating the public and government officials on legal issues affecting the Iranian-American community, the Iranian-American Bar Association (the "IABA") has prepared this independent report concerning the implementation of the special registration program under the National Security Entry-Exit System with three objectives. *First,* to ensure transparency and accountability in government. It is imperative and in our national interest that the American public at large, as well as members of Congress and other government officials, be fully informed of the actions of immigration officials in the course of implementing the special registration program. It is also imperative that, to the extent appropriate, such officials be held accountable for the shortcomings and failures of such implementation. *Second,* to facilitate redress for the individual harms suffered by those registrants who sought voluntarily to comply with the law but were unnecessarily and unjustifiably detained and mistreated. A*nd third,* to engage in a constructive dialogue with appropriate officials in order to more effectively voice the legitimate concerns of the Iranian-American community and to ensure that future policy decisions concerning the protection of homeland security are properly tailored to the aims they seek to promote and adequately reflect the concerns of the Iranian-American and other ethnic communities.

Since the tragic events of September 11, 2001, there has been a pervasive and justifiable sense of concern about national security through out the country. With large populations living in Washington, D.C. and New York City, the Iranian-American community has experienced the tragedy of September 11 first-hand. Therefore, we fully endorse the Government's legitimate efforts to address our homeland security needs and protect the citizenry from future acts of

terrorism. However, such efforts need not and should not be at the expense of the strengths upon which we stand as a nation or the rights and dignity of particular ethnic communities.

Homeland security measures that involve blanket requirements applicable to all persons of a particular ethnicity or national origin, as opposed to non-nationality-based security criteria applied on an individual basis, invariably fail to measure up to this standard of American ideals, and are at best of limited effectiveness. Blanket requirements are both underinclusive and overinclusive. Recent experience tells us that terrorism knows no national or ethnic boundaries. Likewise, there is no suggestion, nor can there be, that all members of any ethnic community pose security risks. Hence, blanket requirements constitute means not properly tailored to the legitimate security aims they seek to promote, and lead to unnecessary expenditure of enforcement resources that may in fact compromise homeland security. The findings of this report clearly demonstrate the foregoing with respect to the special registration program.

Moreover, based on the findings of this report, the IABA calls on Congress, the Department of Homeland Security, and other appropriate governmental authorities to take steps to (i) permanently abandon the special registration program in its current form, (ii) commence an open and inclusive dialogue regarding the failings of the special registration program and lessons to be learned from that experience, and (iii) consider and, as appropriate, provide redress for those aggrieved persons who voluntarily sought to comply with the special registration program.

Acknowledgments

Preparation of this report would not have been possible without the generous cooperation and assistance of others. The IABA would like to express its sincere gratitude to Banafsheh Akhlaghi, Shawn Matloob and Zohreh Mizrahi for facilitating our outreach to the registrants on whose accounts this report is based. Marshall Fitz's guidance was indispensable at many turns

during the project. The IABA is very grateful to John Payton and the law firm of Wilmer Cutler & Pickering for graciously contributing their resources to the compilation and completion of this report. The IABA would also like to thank the following attorneys at Wilmer, Cutler & Pickering who devoted substantial time to the report: Lisa Pearlman, Catherine Grosso, Mimi Liu, Pavneet Singh, Tammy Horn, Dmitri Evseev, Devon Leppink, Elizabeth Derbes, Mark Bieter, Laura Coon, Julie Selesnick, Josh Stebbins, and Cathy Ahn. Last, but certainly not least, the IABA owes a particular debt of gratitude to one of its own, Nader Salehi, also of Wilmer Cutler & Pickering, who guided the project from start to finish. Without Nader's diligence and persistence, the report would not have become a reality.

PART ONE: INTRODUCTION

I. BACKGROUND

On August 12, 2002, the Department of Justice ("DOJ") established the National Security Entry-Exit Registration System ("NSEERS"), a system designed to track the identity and movements of certain categories of non-immigrants living in the United States. One component of NSEERS, commonly referred to as the "special registration" program, required boys and men from 25 predominantly Muslim countries to appear and register at specified Immigration and Naturalization Service ("INS") offices throughout the United States.

As the special registration program was being implemented by the INS in late-2002 and early-2003, reports began to surface that hundreds and possibly thousands of non-immigrants had been arbitrarily detained and mistreated by INS officials when they voluntarily appeared to comply with the law. According to the reports, many were detained for technical infractions of their visa conditions, infractions which ordinarily would not have resulted in their detention. While these reports spread through and angered the communities subject to the special registration program, very little information was offered by DOJ or INS regarding the detentions.

In early 2003, The Iranian American Bar Association ("IABA") responded to questions and concern on the part of the Iranian-American community and commissioned an independent review of the detention and alleged mistreatment of voluntary registrants under the special registration program (the "Review").[1] This report (the "Report") sets forth the factual findings and legal conclusions resulting from that Review.

[1] Given that its resources are limited and that its strongest ties are to the Iranian American community, the IABA has focused its investigative efforts on registrants of Iranian origin. The IABA believes, however, that the experiences described in this Report are representative of other groups subject to the special registration program.

On December 2, 2003, the Department of Homeland Security ("DHS") suspended temporarily the annual re-registration requirement of the special registration program. DHS officials announced that the suspension would allow them to "target more effectively potential terrorists based on individual and not geographic factors."[2]

II. EXECUTIVE SUMMARY

As is set forth in Part Three of the Report, the Review uncovered substantial evidence that the implementation of the special registration program has resulted in the violation of the rights and dignity of a large number of registrants. More specifically, the Report finds that improper interrogations, arbitrary detentions under violative conditions, and demeaning treatment of registrants by INS officials have contravened both the letter and spirit of the immigration laws and, potentially, more fundamental constitutional protections such as the right to due process. The Report also concludes that the loss of resources and goodwill by the government, and the loss of rights and dignity on the part of the registrants, have been unreasonably high given the marginal national security benefits likely achieved by the program.

While the IABA welcomes the temporary suspension of the annual re-registration requirement of the special registration program, it recognizes the need for broader dialogue and more meaningful closure with regard to the past and on-going impact of the special registration program. The temporary suspension of the annual re-registration requirement does *not* represent an end to the violations detailed in the Report, does *not* provide redress for the individual harms suffered by those registrants who sought voluntarily to comply with the law, and does *not*

[2] Deborah Charles, "U.S. Changes Post-9/11 Foreign Registration Rule," Reuters, December 1, 2003, quoting DHS Undersecretary Asa Hutchinson.

address the general mistrust and fear created by the program in communities whose voluntary support the government will undoubtedly need in future efforts to prevent acts of terrorism.

Therefore, the IABA calls on Congress, DHS, and other appropriate governmental authorities to take steps to (i) permanently abandon the special registration program; (ii) commence an open and inclusive dialogue regarding the failings of the special registration program and lessons to be learned from that experience; and (iii) consider and, as appropriate, provide redress for those aggrieved parties who voluntarily sought to comply with the special registration program.

A. Improper Interrogation of Registrants

Part Three, Section I of the Report finds that the questioning of registrants by INS officials was frequently conducted in an arbitrary manner, and, in certain cases, went well beyond what was necessary to accomplish the purposes of the special registration program. In one case recounted to the IABA, a registrant was asked by an INS official whether he believed in the Bible. This case presents strong evidence that the special registration program was sometimes applied with precisely the same invidious and discriminatory motive that the INS has repeatedly disavowed. In other cases, INS officials questioned registrants about their personal financial affairs in a manner that (i) does not appear to have been related to the goals of the special registration program, and (ii) went beyond the scope of questioning suggested by the INS's public notices regarding the special registration. Finally, the interrogation process was flawed in a practical sense, and potentially a legal one, in that government officials refused to provide translators to numerous registrants who needed and asked for them.

B. Arbitrary Detentions of Registrants

Part Three, Section II of the Report finds that detention decisions were often made in an arbitrary manner, and without the particularized analysis that is legally required of the

government. Each individual detention decision should properly have been based on probable cause or "reason to believe" that the specific registrant in question was in violation of the immigration laws *and* was likely to escape. Twenty-four of the 34 registrants about whom the IABA gathered primary information were detained by the INS for some period of time. Yet every single one of these 24 detainees had voluntarily appeared to register at an INS office; 20 had applications already pending with the INS concerning their immigration status; 16 had lived in the United States for longer than five years; and 23 had immediate family members residing in the United States. In addition, there is no evidence that any of the 24 detainees were deemed to pose a national security threat. Therefore, the Report finds that the detentions at issue were unlikely to have been based on a full consideration of legally mandated factors. In addition, the Review revealed that detention decisions were greatly influenced by the ability (or inability) of individual INS offices to process the number of individuals who had voluntarily appeared for registration on any given day.

C. Violative Detention Conditions

Part Three, Section III of the Report finds that many registrants were detained under conditions that likely violated the INS's own Detention Operations Manual and, in certain cases, may have constituted pre-trial punishment in violation of the U.S. Constitution's Due Process clause. The Due Process clause is violated when the detention of a pre-trial detainee is tantamount to punishment, and virtually all of the detainees whom the IABA interviewed complained of the severe circumstances under which they were detained. Some were held for days in overcrowded and unsanitary detention facilities, without sufficient food or warm bedding. Others apparently were denied access to required medications or medical treatment. The IABA heard multiple accounts regarding one detainee who fainted and struck his head during a bus ride between two INS detention facilities. Despite the pleas of other passengers,

INS officials declined to stop the bus or otherwise assist in securing medical assistance and the fallen detainee was permitted to lie unconscious for over 20 minutes. Finally, several detainees complained that they were not provided with access to telephones, and were not otherwise able to establish contact with their families during their detention.

D. Demeaning and Humiliating Treatment of Registrants

Part Three, Section IV of the Report finds that, in a number of cases, INS officials demonstrated a troubling attitude by intentionally treating registrants in a demeaning and humiliating manner. One INS official referred to a group of Iranian registrants as "animals" that he was "tired of dealing with." Another stated that he was "cleaning up America" by detaining Iranian registrants. Yet another stated, upon learning that a detained group of registrants before him were Iranian, "let me go grab my shotgun." This demeaning and humiliating treatment of registrants also appears, in some cases, to have taken physical form. For instance, one detained registrant was reportedly "roughed-up" by an INS official when the registrant complained of the cold temperature in the detention facility. Another detained registrant was asked by INS officials about his sexual orientation, and upon saying that he was gay, was separated from other detainees and held in isolation for two days.

III. CONDUCT OF THE REVIEW

A. Investigative Effort

The Review was conducted by a legal team that included IABA members and attorneys from Wilmer, Cutler and Pickering ("WCP"). The IABA is an independent, Washington, D.C.-based organization established strictly for charitable and educational purposes, and is dedicated to protecting and advancing the interests of the Iranian American community. The IABA is not in any way affiliated with any other organization. WCP is an international law firm

headquartered in Washington, D.C. WCP served as *pro bono* counsel to the IABA in connection with the conduct of the review and the preparation of the Report.[3]

To collect the factual information required for the Report, the legal team: (i) established and publicized a toll-free hotline for Iranians subject to the special registration; (ii) notified contacts in the Iranian-American community about the Review and requested their assistance in reaching out to those who had complied with the special registration requirement; and (iii) collected and reviewed secondary reports, press accounts, and other information about the implementation of the special registration program.

Through these efforts, the legal team was able to interview 29 Iranian men who had registered with the INS in late-2002 and early-2003 in compliance with the special registration program. The legal team also obtained information about the experiences of 5 additional Iranians (whom the legal team could not reach directly, either because they were in detention or had been deported) through interviews with well-informed third parties such as the registrants' attorneys and family members.

Each of the 34 interviews conducted by the legal team lasted close to two hours. Twenty-four of the interviews were conducted in-person, and the remaining 10 were conducted by telephone. To assist with the interview process, the legal team developed and utilized a questionnaire that sought to gather the following categories of information: (i) background information, including the registrant's immigration status and ties to the United States; (ii) the registrant's advance knowledge of the special registration program; (iii) the registrant's experience during the special registration process; (iv) the registrant's experience during any

[3] This Report is the property of the IABA.

ensuing detention; (v) circumstances surrounding the interviewee's release; and (vi) any further contact between the registrant and the INS.

B. Registrants About Whom the IABA Collected Information

The 34 registrants about whom the IABA gathered primary information represented a broad spectrum of Iranians living in the United States. They ranged in age from 17 to 62, and the included physicians, businessmen, writers, general laborers, and students. Most identified their religious affiliation as Muslim (though not all were practicing); others were Christian, Jewish, or did not identify with any particular religion. Almost all the registrants had family members living in the United States, including spouses, children, parents, and siblings who were U.S. citizens. Most of the 34 registrants had lived continuously in the United States for a number of years--some for more than a decade--at the time of special registration. A third of them held citizenship in a non-Muslim country, including Canada, England, Germany, and Israel.

One half of the 34 registrants had complied with the special registration program by voluntarily appearing at the INS's Los Angeles District Office. The remainder had complied with the special registration requirement by voluntarily appearing at INS District Offices in San Bernardino, San Jose, San Francisco, Santa Ana, San Diego, Denver, Philadelphia, Houston, Austin, and Norfolk. All of them had voluntarily registered at various times between November 1, 2002, and February 7, 2003, with almost one-half registering on December 16, 2002.[4]

C. Limitations of the Review

The Review was conducted subject to certain limitations. First, the IABA could not and did not take steps to corroborate independently the accounts of those individuals whom it interviewed. The IABA does not have any reason, however, to doubt the veracity of the

[4] December 16, 2002, was the original deadline for subject Iranians to register. The deadline was subsequently extended to February 4, 2003.

interviewees. Second, the IABA could not and did not take steps to ascertain whether it had interviewed a statistically representative sample of Iranians subject to the special registration program. Given the process by which the Review was conducted, the IABA sample is likely to have been largely self-selecting. Therefore, some experiences may be over represented, while others may be underrepresented or absent from the sample altogether. Of particular concern is that some registrants contacted by the IABA refused to participate in the review because they feared potential repercussions. Many of the registrants who agreed to be interviewed requested that their names not be made a part of any public report. The IABA has honored those requests and excluded all names from the Report.

PART TWO: BACKGROUND ON NSEERS

I. LEGISLATIVE BACKGROUND

The roots of the NSEERS program lie in the Alien Registration Act of 1940, also known as the Smith Act. The Smith Act required the registration and fingerprinting of all aliens seeking to enter the United States, and all aliens staying in the United States for 30 days or longer who had not registered at entry. The Smith Act also granted the Attorney General the authority to "prescribe . . . special regulations for the registration and fingerprinting of . . . aliens . . . not lawfully admitted to the United States for permanent residence." Finally, the Smith Act mandated that every resident alien required to be registered notify the Commissioner of Immigration and Naturalization of his or her address every three months, and of any change of address within five days of the date of such change.

In 1952, Congress passed the Immigration and Nationality Act ("INA"), which to this day remains the bedrock of United States immigration law. The INA retained the fingerprinting, registration, and address notification requirements from the Smith Act, but granted the Attorney General the authority to waive fingerprinting and registration for citizens and nationals of countries not requiring registration of Americans. No country at the time registered Americans, and so the fingerprinting and registration of aliens ceased in the United States. In addition, the INS Efficiency Act of 1981 eliminated the address notification requirement; however, it conferred on the Attorney General the discretion to "require the natives of any one or more foreign states, or any class or group thereof, who are within the United States and who are required to be registered . . . to notify the Attorney General of their current addresses and furnish such additional information as the Attorney General may require."

The INA, like the predecessor Smith Act, gives the Attorney General the authority "to prescribe special regulations and forms for the registration and fingerprinting of . . . aliens . . .

not lawfully admitted to the United States for permanent residence." This authority was unused for decades. Then, on January 10, 1991, Attorney General Thornburgh adopted a rule in reaction to Iraq's invasion of Kuwait, prospectively requiring the registration, photographing, and fingerprinting at the port of entry to the United States of most nonimmigrant visitors traveling under Iraqi and Kuwaiti travel documents. That registration requirement was withdrawn in December 1993, but was replaced with a rule providing for the registration, photographing, and fingerprinting at the port of entry to the United States of most nonimmigrant visitors traveling under Iraqi and Sudanese travel documents. Effective September 5, 1996, identical requirements were imposed on non-immigrants traveling under Iranian and Libyan documents. Each of these actions was based explicitly on a concern for national security.

II. ESTABLISHMENT OF NSEERS

In response to "[r]ecent terrorist incidents," DOJ on August 12, 2002, promulgated a rule, based on its authority under the INA, establishing the NSEERS program.[5] The stated purpose of NSEERS was, in general, to "provide more detailed and frequent information to ensure that [nonimmigrant aliens] comply with the conditions of their visas and admissions." As described above, DOJ considers the program to be "a third line of defense" against terrorist or criminal actions:

> [T]here are national security and law enforcement reasons why some aliens who are admissible and have visas (or enter properly without a visa) require further monitoring. The final rule . . . provides a process under which such aliens will provide additional, confirmable information that will enable the INS to contact them quickly if necessary and will ensure that such aliens comply with the terms

[5] 8 C.F.R. 264.1(f).

> of their visas and the conditions of their admission. As for the terrorist who complies upon entry, but seeks to go underground immediately thereafter, this rule will provide a basis for alerting law enforcement organizations to that fact when the would-be terrorist fails to register at the 30-day point.[6]

The surrounding legislative context suggests that NSEERS was primarily established to monitor new entrants to the United States.[7] However, the regulation also permitted the Attorney General to impose special registration requirements "upon nonimmigrant aliens who are nationals, citizens, or residents of specified countries . . . who have already been admitted to the United States or who are otherwise in the United States." As described above, this component of the NSEERS program is known as the "special registration" provision.

Through a series of notices issued in the Federal Register between December 2002 and January 2003,[8] the Attorney General made the NSEERS registration requirement applicable to males over the age of 16 living in the United States, who are nationals or citizens of the following countries: Iran, Iraq, Libya, Sudan, Syria, Afghanistan, Algeria, Bahrain, Eritrea, Lebanon, Morocco, North Korea, Oman, Qatar, Somalia, Tunisia, United Arab Emirates, Yemen, Pakistan, Saudi Arabia, Bangladesh, Egypt, Indonesia, Jordan, and Kuwait.

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6 67 Fed. Reg. 40581.

7 On October 26, 2001, Congress passed the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism ("USA PATRIOT") Act of 2001. Title IV of that Act required, among other things, that the Justice, State, Treasury, and Transportation Departments report to Congress on the feasibility of enhancing the FBI's Integrated Automated Fingerprint Identification System for the purpose of identifying wanted individuals at the points of entry, exit and/or visa issuance. On May 14, 2002, Congress passed the Enhanced Border Security and Visa Entry Reform Act of 2002, which, among other things, set forth more detailed requirements for an integrated entry and exit data management system.

8 67 Fed. Reg. 67766; 67 Fed. Reg. 70526; 67 Fed. Reg. 77136; 67 Fed. Reg. 77642; 68 Fed. Reg. 2363.

III. IMPLEMENTATION OF THE SPECIAL REGISTRATION PROGRAM

Iranians were among the nationalities subjected to the first round of special registrations. Iranian men over 16 were instructed to appear by December 16, 2002 (later extended to February 4, 2003) before an immigration officer at a designated INS Interviewing Office and to comply with the following requirements: (1) answer questions under oath before an immigration officer, and have those answers recorded by the immigration office; (2) present travel documents, including passport and Form I-94 issued upon admission and any other forms of Government-issued identification, proof of residence, proof of matriculation at an educational institution or proof of employment, and other information requested by the immigration officer; and (3) be fingerprinted and photographed. These individuals were also obligated to notify the Government in writing of a new address, and to present themselves annually for re-registration. The penalties for non-compliance are deportation, future inadmissibility, and possible criminal prosecution.[9]

The INS was the original agency tasked with the implementation of NSEERS. It instructed its interviewing officers to perform an Interagency Border Inspection System check, to register the individual using the ENFORCE/IDENT database to record information, and to perform a check of supporting documentation. If information discovered during the registration process could subject the registrant to removal proceedings, that individual would be referred to the Investigations section, or subject to enforcement action.[10]

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[9] Failure to appear is punishable by deportation unless excused. Failure to comply with departure registration results in a presumption of future inadmissibility. Refusal to make an application or be fingerprinted is punishable by a fine of up to $1,000 and/or 6 months imprisonment. Failure to provide requested information is punishable by a fine of up to $200 and/or 30 days imprisonment.

[10] An INS memo explains "An officer will have the discretion to refer any nonimmigrant to the Investigations section that the officer believes warrants referral . . . Possible reasons for referral include (but are not limited to): law enforcement IBIS hits, registrants being out of status, or registrants giving evasive or inconsistent answers."

On March 1, 2003, DHS came into existence, and the Bureau of Immigration and Customs Enforcement (BICE) assumed responsibility for administering the NSEERS program, including the special registration program. BICE works in conjunction with the Bureau of Customs and Immigration Services (BCIS), which assumed other facets of the INS portfolio.

In early-2003, responding to reports of mistreatment of registering individuals, as well as general criticism of the registration requirement, members of Congress said that they would investigate the NSEERS program and instructed DOJ to deliver by March 1, 2003, all documents and materials relating to the special registration program. As of the date of this Report, DOJ had not, to the IABA's knowledge, complied with this instruction.

On April 29, 2003, Secretary of Homeland Security Tom Ridge announced the proposed establishment of the U.S. Visitor and Immigrant Status Indication Technology (U.S. VISIT), to "replace the currently existing NSEERS program, integrate the [student registration] program, and encompass the Congressional requirements of the automated entry exit system." The U.S. VISIT program, which was formally launched on January 5, 2004, will use a minimum of two biometric identifiers, such as photographs, fingerprints, or iris scans to build an electronic check-in/check-out system.[11]

In November 2003, faced with mounting concern and questions regarding the impending annual re-registration of all those who had complied with the special registration program in late-2002 and early-2003, DHS officials announced that they were "continuing to evaluate the effectiveness of the special registration program to determine if it is meeting efficiency goals and

[11] "DHS Announces New 'U.S. VISIT' System for Travelers as the Department Marks Its First 100 Days," April 29, 2003, at www.dhs.gov/dhspublic/display?content=588. *See also,* Dan Eggen, "U.S. Set to Revise How It Tracks Some Visitors," The Washington Post, November 21, 2003, quoting DHS Spokesperson Bill Strassberger.

national security needs."[12] Press reports suggested that DHS was in fact preparing to abandon the special registration program altogether.

On December 2, 2003, DHS issued an Interim Rule with Request for Comments which suspended temporarily the annual re-registration requirement of the special registration program.[13] Importantly, the Interim Rule did not permanently abandon the annual re-registration requirement, nor did it suspend or otherwise nullify other provisions of the special registration requirement. According to the Interim Rule, DHS will design and implement "a more tailored system in which it will notify individual aliens of future registration requirements." DHS Undersecretary Asa Hutchinson attributed the temporary suspension and review to the fact that annual re-registration requires a significant resource commitment on the part of DHS and yields "only minimal benefits in terms of national security."[14]

IV. RESULTS OF THE SPECIAL REGISTRATION PROGRAM

DHS reports that 81, 917 individuals have registered under the special registration program, and that Notices to Appear have been issued by immigration officials to 12,740 individuals (charging them with immigration violations). The Department further reports that 2,727 individuals have been detained as part of the special registration program.[15] When Undersecretary Hutchinson testified before the House Subcommittee on Immigration, Border Security, and Claims on April 10, 2003, he stated that the Government had through these efforts identified 11 aliens somehow linked to "terrorism." The Government has not provided, to the

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12 Dan Eggen, "U.S. Set to Revise How It Tracks Some Visitors," The Washington Post, November 21, 2003, quoting DHS Spokesperson Bill Strassberger.

13 8 C.F.R. Part 264.

14 Deborah Charles, "U.S. Changes Post-9/11 Foreign Registration Rule," Reuters, December 1, 2003, quoting DHS Undersecretary Asa Hutchinson.

15 As of April 28, 2003, 280 remained in custody.

IABA's knowledge, any additional information regarding the identity or activities of these individuals.

PART THREE: ANALYSIS OF THE EXPERIENCES OF IRANIANS SUBJECT TO THE SPECIAL REGISTRATION PROGRAM

I. IMPROPER INTERROGATION OF REGISTRANTS DURING THE REGISTRATION PROCESS

The Report finds that the questioning of registrants by INS officials was frequently conducted in an arbitrary manner, and, in certain cases, went well beyond what was necessary to accomplish the purposes of the special registration program.

A. Arbitrary Questioning of Registrants

1. Questions Regarding Religious Affiliation

Probably the most egregious interrogation reported to the IABA is one in which a registrant was asked by an INS official, during the special registration process, whether he "believed in the Bible." The fact that this question was asked, even once in a sample of 34 registrants, raises concerns that the special registration program was sometimes applied with precisely the same invidious and discriminatory motive that the INS has repeatedly disavowed. This concern is amplified by news reports describing the erratic and inconsistent questioning of registrants about their religious affiliations. For example, Business Week online reports that registrants in 7 of 76 INS regional offices were asked questions about their religious affiliations.[16] The Review did not uncover any explanation for why questions regarding religious affiliation appear to have been asked in some (but not all) INS offices.

As is set forth in greater detail below, the courts have held that INS abuses its discretion when its actions are without rational explanation or rest on an impermissible basis such as invidious discrimination against a particular race or group. Indeed, DOJ itself has acknowledged this limitation, stating that it "strongly disagrees with the implication that it would develop or

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[16] Jane Black, *At Justice, NSEERS Spells Data Chaos*, Business Week online, PRIVACY MATTERS May 2, 2003.

apply [special registration] criteria in an invidious manner on the basis of race, religion, or membership in a social group."[17] Tangentially, the Report questions whether this acknowledgment by DOJ is consistent, among other things, with the apparent recognition on the part of DHS that the special registration program has thus far been applied based on "geographic factors."[18]

2. *Legal Backdrop*

Although the requirement has been waived for the residents of many countries, the immigration statutes state that no visa may be issued to an alien until that alien has been registered and photographed.[19] If an alien has not been registered, is older than the age of 14, and has been in the United States for more than 30 days, the statutes require them to register. Congress has authorized and directed the Secretary of State and the Attorney General to prepare forms for such registration.[20] These forms "shall contain inquiries with respect to (1) the date and place of entry of the alien into the United States; (2) activities in which he has been and intends to be engaged; (3) the length of time he expects to remain in the United States; (4) the police and criminal record, if any, of such alien; and (5) such additional matters as may be prescribed."[21] Thus, Congress has provided the Attorney General, who is responsible for the registration of aliens already present in the United States, considerable latitude in fashioning

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17 *Registration and Monitoring of Certain Nonimmigrants (Final Rule)*, 67 Fed. Reg. 52584, 52585 (Aug. 12, 2002).

18 Deborah Charles, "U.S. Changes Post-9/11 Foreign Registration Rule," Reuters, December 1, 2003, quoting DHS Undersecretary Asa Hutchinson.

19 *See* 8 U.S.C. § 1301.

20 *See id.* § 1302 and 1303.

21 *Id.*

questions to pose to registrants.[22] The Attorney General has construed his own authority accordingly.[23]

Although the Attorney General's power to question aliens in connection with the special registration program is broad, it is not limitless. For example, the courts have made clear that INS abuses its discretion when its decisions are "without a rational explanation, inexplicably depart from established policies, or rest on an impermissible basis such as an invidious discrimination against a particular race or group, or . . . on other 'considerations that Congress could not have intended to make relevant.'"[24] Therefore, questions that demonstrate invidious discrimination are clearly out of bounds.[25]

B. Failings of the Interrogation Process

1. Unexpected Questions Regarding Personal Financial Matters

The INS's "Question & Answer" notice form regarding the special registration instructed registrants to bring their passports, I-94 forms, other government-issued forms of identification, proof of residence, employment, and school matriculation.[26] The notice made no indication of the necessity for personal financial information. That fact notwithstanding, a number of registrants were asked during the registration process to turn over credit cards or bank ATM

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22 The Immigration and Nationality Act also provides immigration officials the general power to interrogate, without a warrant, any alien or person believed to be an alien as to the person's right to be or remain in the United States. *See* 8 U.S.C. § 1357(a)(1).

23 *See* 8 C.F.R. § 264.1(f)(3)(ii) (stating that the registrant must provide information that shows "compliance with the conditions of his or her nonimmigrant status or visa," which may include "proof of residence, employment, or registration and matriculation at an approved school or educational institution," and adding that the "nonimmigrant alien subject to special registration shall provide any additional information required").

24 *Wong Wing Hang v. INS*, 360 F.2d 715, 719 (2d Cir. 1965) (Friendly, J.).

25 *Cf. Yam Sang Kwai v. INS*, 411 F.2d 683, 686-87 (D.C. Cir. 1969) (noting that interrogations of aliens may not constitute harassment).

26 Special Registration Procedures for Certain Nonimmigrants, Questions and Answers (http://www.immigration.gov/graphics/shared/lawenfor/specialreg/CALL_IN _ALL.pdf), last updated Nov. 26, 2002. *See also* 8 C.F.R. § 264.1(f)(4).

cards. In none of these instances was it made clear to the registrants why the additional personal financial information was necessary. Moreover, it appears that not all interviewees were asked for such information. Troublingly, the interviewees who were asked to turn over financial information have profiles that are generally similar to those who were not asked to submit such information. As such, it appears that the requests for financial information were, at best, arbitrary.

2. Failure to Provide Translators

Three registrants told the IABA that they requested but were not provided access to translators during the interrogation process. Putting aside any applicable legal requirements, the IABA can not identify any productive goal that was likely to have been advanced by INS's refusal to provide translators for those voluntary registrants who required them, especially if the goal of the special registration program is to gather detailed and accurate information from nonimmigrant aliens. Moreover, the failure to provide translators undoubtedly added to the confusion and anxiety experienced by many registrants during the interrogation process.

Beyond these practical considerations, INS likely had a legal duty to provide translators for those registrants who requested them. In determining the Government's responsibility for providing a translator in comparable contexts, courts have distinguished between "Government-initiated proceedings seeking to affect adversely a person's status and hearings arising from the person's affirmative application for a benefit."[27] While registration under NSEERS does not necessarily "seek[] to affect adversely a person's status," it is nevertheless mandatory, and the information provided may be used adversely to the registrant, in contrast to situations in which the applicant merely applies for a benefit. In light of these circumstances, the Government likely

[27] *Abdullah v. INS*, 184 F.3d 158, 165 (2d Cir. 1999).

should have, from a legal standpoint, made translators available to those registrants who required them.

II. ARBITRARY DETENTIONS OF REGISTRANTS

A. Lack of Particularized Analysis

1. No Flight Risk

Of the 34 voluntary registrants about whom the IABA obtained primary data, 24 were detained by INS officials for some period of time. Most were held for one to three nights, and nine were held for a week or longer. All of the 24 detainees had strong ties to the community. Sixteen have resided in the United States for more than five years, and nine of those 16 have resided in the United States for more than ten years. Twenty-three of the 24 detainees have immediate family residing in the United States, and 16 of these 23 have immediate family who are United States citizens. Seventeen of the 24 detainees were actively working as scholars, entrepreneurs, artists, journalists or students when they were detained. The IABA is unaware of any evidence that any of the 34 detainees about whom it gathered primary data were deemed by authorities to pose a national security threat.

Each of these detentions, if without a warrant,[28] must have been premised on "probable cause" or a "reason to believe" that the registrant was in violation of the immigration laws *and* was likely to escape.[29] In other words, there must have been probable cause as to both the immigration law violation and the escape risk.[30] Even assuming, *arguendo*, that each of the 24 detainees at issue had committed immigration law violations that would make them removable--

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[28] The IABA is unaware that a warrant was issued for the arrest of any of the detainees interviewed as part of the Review. The issuance of a warrant would, in all events, follow the same standards as a warrantless arrest.

[29] *See* 8 U.S.C. § 1357(a)(2); s*ee also Babula v. INS*, 665 F.2d 293, 298 (3d Cir. 1981).

[30] *See, e.g., Pearl Meadows Mushroom Farm v. Nelson*, 723 F. Supp. 432, 449 (N.D. Cal. 1989); *see also United States v. Cantu*, 519 F.2d 494, 496-97 (7th Cir. 1975).

a fact that is disputed strongly by many of the detainees-- the Report concludes that none posed a "flight risk" and, therefore, their detention was not justified.[31] Every single one of the detainees had appeared voluntarily at an INS office in order to comply with the law. Twenty of the 24 detainees had applications pending with the INS concerning their immigration status, and another was attempting to reinstitute an application for amnesty. And all of them, as is described above, had strong ties to the community.

2. Legal Backdrop

Immigration officials may detain an individual for up to 48 hours without a warrant, at which point the individual must be released or, if not, must be charged with an immigration violation, and either detained or released on bond or on the individual's own recognizance.[32] Even where an alien has been arrested on the suspicion that they may be deportable, "[t]he Board of Immigration Appeals has stated that '[a]n alien generally … should not be detained or required to post bond except on a finding that he is a threat to the national security … or that he is a poor bail risk.'"[33] This is consistent with the Supreme Court's recognition that, as a general matter, pre-trial detentions by the government violate the due process clause of the Fifth Amendment unless "the detention is ordered in a *criminal* proceeding with adequate procedural protections, or, in certain special and 'narrow' nonpunitive 'circumstances,' where a special justification, such as harm-threatening mental illness, outweighs the 'individual's

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31 *See Pearl Meadow*, 723 F. Supp. at 449 (setting forth the factors germane to determining the existence of a flight risk); *see also Marquez v. Kiley*, 436 F. Supp. 100, 105 (S.D.N.Y. 1977).

32 *See* 8 C.F.R. § 287.3(d).

33 *Reno v. Flores*, 507 U.S. 292, 295 (1993) (quoting *Matter of Patel*, 15 I. & N. Dec. 666 (1976)).

constitutionally protected interest in avoiding physical restraint.'"[34] The same principles apply to aliens.[35]

B. Inconsistent Standards and Practices

The conclusion reached by the Report that detention decisions were often made in an arbitrary manner is buttressed by the finding that INS offices in different cities applied different standards in making detention decisions. This failure by the INS to apply consistent standards in reaching detention decisions meant that similarly situated persons were detained in some offices but not in others.[36] For example, as was observed by The New York Times in April 2003, "In Baltimore, immigrants who [could not] prove that they [had] pending application for work permits or other visas [were] released on their own recognizance. In Arlington, people in the same situation [were] detained until they… pay a $1,500 bail."

Moreover, even with respect to an individual INS office, detention decisions appear to have been driven by the number of registrants who appeared for registration on any given day. Thus, for example, taking the pool of registrants about whom the IABA gathered primary data, all who registered on the December 16, 2002 deadline were detained, whereas only one-half of the registrants who presented themselves before or after that date were detained, even though their general profiles were similar.[37] The Report finds no explanation for this discrepancy other than the fact that INS officers were busier on December 16, 2002, than they were on other days.

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34 *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) (citations omitted) (emphasis in the original).

35 *See id.*

36 *See also* Rachel Swarns and Christopher Drew, 'Fear, Angry or Confused, Muslim Immigrants Register," The New York Times, April 25, 2003.

37 For example, a father and son who overstayed their visas but subsequently applied for a green card were able to register without difficulty in the Los Angeles INS Office in early December. Two weeks later, on December 16, 2002, INS officers in the very same location detained a person who showed proof that the INS had already approved his green card application.

Indeed, after the mass detentions in Southern California on December 16, 2002, a spokesperson for DOJ stated that the detentions were an "isolated incident," caused by the large number of registrants who had waited until the last minute to comply with the registration deadline.[38] A lack of resources and preparation on the part of INS obviously does not justify depriving individuals of their liberty, especially when the individuals at issue have appeared voluntarily to comply with the law.

III. VIOLATIVE DETENTION CONDITIONS

The Report finds that many registrants were detained under conditions that likely violated the INS's own Detention Operations Manual and, in certain cases, may have constituted pre-trial punishment in violation of the U.S. Constitution's Due Process clause.

A. General Detention Conditions

1. Accounts of the Interviewees

All of the detainees interviewed as part of the Review complained about the general detention conditions under which they were held. First, the detainees almost invariably complained of overcrowded detention facilities at the INS holding rooms, where many were held for hours, and some were held overnight. The holding rooms were described as not having sufficient or adequate seating or resting space or furnishings, such that most detainees had to stand for the entire time that they were detained in these rooms. Others wishing to sleep would sleep on the floor. The INS facilities in Los Angeles appear to have presented the greatest problems in this regard.

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[38] *See* Karen Brandon, "INS Detentions Spark Protests," Chicago Tribune, December 20, 2002; *see also* John Broder, 'Threats and Responses: The Dragnet," The New York Times, December 20, 2002 ("Immigration officials acknowledged today that they could not handle the flood of men who appeared to register this week and that they were not prepared for the chaos and anger the program provoked.").

Second, detainees invariably complained of frequent transfers between facilities and the long processing times attendant to the transfers. These transfers sometimes occurred more than once a day. Some detainees were transferred to and from multiple facilities. Transfers took long to complete and involved repeated searching as the detainees were processed before entering a new facility. Detainees reported that they were handcuffed, or shackled during the transfers.[39] Some detainees also complained about sleep deprivation during the transfers, many of which took place during the night.

Third, some detainees stated that, in part as a result of the transfers, they were not fed properly or regularly, at least for certain time intervals during their overall detention. Otherwise, a few detainees complained more generally about inadequate feeding; some even claimed that drinking water occasionally was provided only through the wash basin in the cells. In addition to stating that "[i]t is INS policy to provide detainees with nutritious, attractively presented meals, prepared in a sanitary manner," the INS Detention Operations Manual states that all facilities are required "to provide detainees requesting a religious diet reasonable and equitable opportunity to observe their religious dietary practice" subject only to budgetary and security considerations. Two detainees reported that religious dietary restrictions were not respected, as apparently observant Muslim detainees were served pork dishes over their request for meals otherwise prepared.

Fourth, a number of detainees complained about sanitation and hygiene matters. For example, a number of the detainees reported having sleeping rooms furnished with ripped, dirty mattresses and roofs leaking on the beds. The INS Detention Operations Manual requires that,

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[39] *See* John Broder, "Threats and Responses: The Dragnet," The New York Times, December 29, 2002 ("There was apparently no plan for mass detentions, so many were kept overnight in temporary lockups or local jails, some with no sleeping facilities, said people who went through the process.").

"at a minimum," each detainee receive a number of personal hygiene items, including a bar of soap, shampoo, a toothbrush, and toothpaste. Three detainees, however, raised concerns about difficulty maintaining personal hygiene. For example, one detainee was initially refused soap to wash his hands, and another was denied toilet paper. In addition, the constant transfers also appear to have had an impact on detainees' ability to maintain their sanitation. A few detainees who had been shuffled from facility to facility complained that they were not able to shower for several days.

And fifth, a number of interviewees complained that, even though the facilities generally were maintained at relatively cold temperatures, the detainees were not issued sufficiently warm clothing or blankets. The INS Detention Operations Manual requires INS officials to "issue detainees clothing and bedding in quantities and weights appropriate for the facility environment and local weather conditions." This requirement, however, was not always followed. A number of interviewees reported shivering and eventually becoming ill during their detention.

2. Legal Backdrop

As a general matter, conditions of confinement are subject to the strictures of the "cruel and unusual" punishment clause of the Eighth Amendment to the United States Constitution.[40] Strictly speaking, however, the Eighth Amendment's "cruel and unusual" punishment clause comes into play only when a detainee has already been convicted of a crime for which he or she may be punished.[41] With respect to circumstances present here, where the detainees essentially were akin to "pre-trial detainees," the Supreme Court has indicated that such detainees may be

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[40] *See, e.g.*, *Rhodes v. Chapman*, 452 U.S. 337, 348-49 (1981).

[41] *See, e.g.*, *Brogsdale v. Barry*, 926 F.2d 1184, 1188-89 & n.4 (D.C. Cir. 1991) (discussing *Bell v. Wolfish*, 441 U.S. 520 (1979)).

held only so long as their confinement does not constitute punishment.[42] The Due Process clause is violated when the detention of a pre-trial detainee is tantamount to punishment.[43] Thus, the bar for finding a violation of a pre-trial detainee's constitutional rights is lower than the bar for a detainee that has already been convicted.[44] The rationale behind this lower threshold of establishing violations of the Constitution applicable to pre-trial detainees is that, not having been adjudicated guilty of any wrongdoing, the legal system may not impose any "punishment" on them, let alone punishment that would qualify as "cruel and unusual."[45]

The test for distinguishing between measures that are legitimate incidents of the power to detain and those that cross the line to being punitive in nature is fact-intensive and circumstance-specific.[46] "[I]f a particular condition or restriction of a pretrial detention is reasonably related to a legitimate governmental objective, it does not, without more, amount to 'punishment.' Conversely, if a restriction or condition is not reasonably related to a legitimate goal– if it is arbitrary or purposeless– a court permissibly may infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted on detainees qua detainees."[47] In all events, if the conditions of a pre-trial detainee run afoul of the "cruel and unusual" punishment clause, then *a fortiori* there has been a due process violation.[48]

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42 *See Bell*, 441 U.S. 536-37.

43 *See id.* at 536.

44 *See Brogsdale*, 926 F.2d at 1188 n.4.

45 *See Bell*, 441 U.S. at 536-37.

46 *See, e.g., Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963).

47 *Bell*, 441 U.S. at 539.

48 *See Jones v. Johnson*, 781 F.2d 769, 771 (9th Cir. 1986).

Conditions of detention may result in violation of the "cruel and unusual" punishment clause if prison officials wantonly permit "deprivations of essential food, medical care, or sanitation."[49] Similarly, if prison circumstances are wantonly and unnecessarily permitted to spawn "violence among inmates or create other conditions intolerable for prison confinement," such conditions could give rise to constitutional violations.[50] Generally, even though any one particular condition may not be egregious to constitute a violation of law in and of itself, a detention facility's general squalor may give rise to "cruel and unusual" punishment.[51] These constitutional minima form the basis for detention standards outlined in the INS Detention Operations Manual, which was compiled to establish a number of mandatory standards designed to ensure "uniform policies and procedures for the safe, secure and humane treatment of foreign nationals in INS custody."[52]

B. Lack of Proper Medical Care

In its interviews with detainees, the IABA also received reports that give rise to concern regarding the propriety of detention personnel actions with respect to expressed medical needs. In one instance, a detainee who shortly before detention had undergone a hernia operation reported that he was refused his medication even though he repeatedly asked for it and even though he explained that, without the medication, he was in substantial pain. He allegedly was given his medication only on the eighth day of his detention. Another detainee reported that, during a flight by which the detainees were being transported to a facility in Florence, Arizona, detention officials confiscated medication of another detainee who was having trouble breathing.

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49 *Rhodes,* 452 U.S. at 348.

50 *Id.*

51 *See, e.g., Hoptowit v. Spellman*, 753 F.2d 779 (9th Cir. 1985).

52 Detention Operations Manual, www.immigration.gov/graphics/lawsregs/guidance.htm.

Finally, some detainees reported an incident on a bus ride between INS detention facilities where a detainee reportedly fainted and struck his head on the toilet in the back of the bus, remaining unconscious for approximately twenty minutes. Despite the pleas of the other detainees on the bus, the driver reportedly declined to stop the bus or otherwise assist in securing medical assistance.[53]

The INS Detention Operations Manual provides that all detainees are to have access to medical services "that promote detainee health and general well-being." As with conditions of detention generally, the INS Detention Operations Manual reflects more fundamental standards established by the Constitution. Under certain circumstances, lack of proper medical care can constitute a violation of the Eighth Amendment's cruel and unusual punishment clause. Specifically, to state an Eighth Amendment claim, a detainee must show that they had a serious medical need and that the detention officials were deliberately indifferent to that need.[54] An objectively "serious medical need" is one that "has been diagnosed by a physician as mandating treatment or one that is so obvious that even a lay person would easily recognize the necessity for a doctor's attention."[55] "Deliberate indifference" requires more than negligence; it involves showing that the prison official was subjectively aware of the serious medical need and disregarded an excessive risk that the absence of treatment posed to the detainee.[56]

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53 The IABA also was advised of two instances of ill detainees who received prompt medical attention: one elderly detainee was seen being taken to the hospital, and one detainee was given medication shortly after complaining of a herniated disc.

54 *See Garvin v. Armstrong*, 236 F.3d 896, 898 (7th Cir. 2001); *Gutierrez v. Peters*, 111 F.3d 1364, 1373 (7th Cir. 1997).

55 *Zentmeyer v. Kendall County, Illinois*, 220 F.3d 805, 810 (7th Cir. 2000).

56 *See Farmer v. Brennan*, 511 U.S. 825, 837 (1994).

C. Restrictions on Access to the Outside World

At least certain of the voluntary registrants who were detained as part of the special registration program were not provided with access to telephones in the manner required by the INS Detention Operations Manual. Three of the detainees interviewed by the IABA allegedly were refused permission to make any telephone calls at any point throughout their detention. Others reported miscellaneous difficulties in their ability to purchase calling cards (which they needed in order to contact the outside world). At least seven interviewees detained by the INS were placed in removal proceedings without being notified of the reasons for their arrest, and at least six of them were not informed of their right to counsel under applicable INS regulations . It can reasonably be assumed that the INS did not give these detainees a list of available free legal service providers particularly if they were not informed of their right to counsel in the first place. At least one detainee was ignored when he told a group of INS officers that he wanted to speak to a lawyer.

As is noted above, the INS Detention Operations Manual states generally that detainees must have "reasonable access to telephones." In relevant regard, INS regulations provide that, as an alien is taken into custody for potential removal proceedings, the examining officer must also provide the alien with a list of available free legal service providers.[57]

IV. DEMEANING AND HUMILIATING TREATMENT OF REGISTRANTS

The Review uncovered what appears to be a deeply troubling attitude on the part of INS officials, and finds that this attitude likely colored the actions of these officials in connection with the violations set forth above. This finding is poignantly corroborated by the demeaning

[57] *See* 8 C.F.R. § 287.3(c).

and humiliating treatment to which a number of Iranian registrants appear to have been subjected.

For instance, upon learning that the detainees before him were Iranian, one officer reportedly stated "Let me go grab my shotgun." Another officer reportedly called a group of detainees "animals" and said he was tired of dealing with them, while another informed a detainee that they were "cleaning up America" by detaining the Iranian special registrants. One interviewee reported that when his group of detainees asked for the heat to be turned on in the bus transporting them to a detention center, the driver responded that they "didn't deserve it." Another interviewee reported that, when a cellmate complained about the cold, he was "roughed-up" by an officer, while another officer said that he could "go back, if he wasn't happy here." While this interviewee noted that a superior later apologized for the physical abuse, two additional interviewees also reported that INS officers pushed or shoved them while moving them from place to place.

One detainee reported that INS officers asked if he was gay, and when he said yes, he was separated from the other detainees and held in isolation for two days. Approximately three weeks after his December 12, 2002 registration, this interviewee was deported to Denmark. Neither his family nor his lawyer was informed of the deportation.

A number of the registrants were further humiliated when required to submit to medical, x-ray, and eye examinations. At least one such registrant was not asked to sign any forms or releases before his examinations; at least two others stated they were not sure whether they had consented to being examined. Basic medical examinations may be a reasonable precaution when detaining groups of individuals in close quarters. Most registrants, however, did not need to be detained in the first place. The humiliation of detention was compounded by the humiliation of

the attendant screenings. Moreover, some examining officers unreasonably abused their discretion to conduct medical screenings. One detainee said that his examination included the question "Are you sane or insane?" The examining doctor in this case explained that he was checking to see if the detainee was infected with anthrax.

Whether these actions are reflective of a broader programmatic bias against the categories of immigrants who were subject to the special registration program, or whether they reflect only the unsanctioned outlook of a group of rogue INS officials, they clearly are antithetical to the principles of justice and equality on which this country has been built.