

2010

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Recommended Citation

Hacking, Amany R. (2010) "A New Dawn for Muslims: Asserting Their Civil Rights in Post-9/11 America," *Saint Louis University Law Journal*: Vol. 54 : No. 3 , Article 15.
Available at: <https://scholarship.law.slu.edu/lj/vol54/iss3/15>

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**A NEW DAWN FOR MUSLIMS:
ASSERTING THEIR CIVIL RIGHTS IN POST-9/11 AMERICA**

AMANY R. HACKING*

INTRODUCTION

Islam is the fastest-growing religion in America and the world.¹ Many scholars predict that Islam will soon become the largest minority religion in the United States.² The questions remaining for many Americans: Who are these Muslims? Where do they fit in American society? For many legal scholars and attorneys, the questions more specifically are: Where do Muslims fit in our American legal system? Are their civil rights being protected in post-9/11 America?

In this Article, I will attempt to answer some of these questions. First, Part I will provide an historical and demographic background of Muslims in America. Part II will discuss post-9/11 discrimination that Muslims have faced, and continue to face today. Part III will analyze several key cases that Muslims have brought in an effort to assert their civil rights. Part IV will discuss what can be learned from this litigation, and Part V will offer a brief conclusion.

I. HISTORICAL AND DEMOGRAPHIC BACKGROUND OF MUSLIMS IN AMERICA

Muslims in America are primarily middle class and mainstream.³ There are approximately 1.5 million Muslims over the age of eighteen, and 850,000

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1. Patricia J. Ponder, *Walking a Fine Line—Religious Accommodation for an Increasingly Diverse Workforce*, 49 FOR DEF. 32, 32 (2007); see also Council on American-Islamic Relations, *About Islam and American Muslims*, <http://www.cair.com/AboutIslam/IslamBasics.aspx> (last visited March 29, 2010).

2. Bilal Zaheer, Note, *Accommodating Minority Religions Under Title VII: How Muslims Make the Case for a New Interpretation of Section 701(j)*, U. ILL. L. REV. 497, 498 (2007).

3. A Pew study found that most Muslims report that a large proportion of their closest friends are non-Muslim, and that there is no conflict between being a devout Muslim and living in a modern society. See PEW RESEARCH CTR., *MUSLIM AMERICANS: MIDDLE CLASS AND MOSTLY MAINSTREAM 2* (2007) [hereinafter 2007 STUDY], available at <http://pewresearch.org/assets/pdf/muslim-americans.pdf>. Yet, 47% of those surveyed said they think of themselves first as

under the age of eighteen in the United States—comprising 0.6% of the United States adult population.⁴ American Muslims are an educated group, with about one-half of them having attended college and earning annual incomes comparable with those of the general public.⁵ Additionally, a recent Gallup poll report found that American Muslim women are one of the most highly-educated female religious groups in the United States, with only Jewish American women attaining higher levels of education.⁶ A slightly larger portion of Muslims has not completed college (21%) compared with the population at large (16%).⁷ The annual income reported for American Muslims is within two percentage points of the population at large, with 16% making \$100,000 or more, 10% making \$75,000–\$99,999, 15% making \$50,000–\$74,999, 24% making \$30,000–\$49,999 and 35% making less than \$30,000.⁸

About 65% of adult Muslims in the United States were born in another country.⁹ Though a majority of American Muslims were born abroad, 77% are

Muslims then as Americans. *Id.* at 3. *See also* Roberta Mann, *Is Sharif's Castle Deductible: Islam and the Tax Treatment of Mortgage Debt*, 17 WM. & MARY BILL RTS. J. 1139, 1142 (2009) (noting that “Muslim American family income roughly tracks that of the population as a whole.”).

4. *See id.* at 3, 9–10 (basing results on data from its survey and available Census Bureau data on immigrants’ nativity and nationality). The survey notes that 56% of Muslim American adults are between the ages eighteen and thirty-nine, making the Muslim adult population in America substantially younger than the population at large with 40% between eighteen and thirty-nine. *Id.* at 17. *See also* Mann, *supra* note 3, at 1142 (noting the difficulty in determining the precise number of American Muslims because the U.S. Census is prohibited from collecting religious information and citing studies that “place the Muslim population at between three and nine million, with an average of 6.7 million.”).

5. *See* 2007 STUDY, *supra* note 3, at 18. At about half, the number of Muslim Americans who have attended college is lower than the number in the general public. *See id.* at 2, 18. About one quarter (23%) of Muslim Americans have completed some college, about 22% are currently enrolled in college, and about 10% of Muslim Americans have undertaken graduate studies. *Id.* at 18. In the general public of the United States, 29% of individuals have completed some college, 16% have college degrees, and about 9% have had some graduate level study. *Id.* *See also* Dr. Umar F. Abd-Allah, *Living Islam with Purpose*, 17 UCLA J. ISLAMIC & NEAR E. L. 17, 18 n.2 (2008) (describing American Muslims as “one of the most educated and prosperous Muslim communities in the world”).

6. Laurie Goodstein, *Poll Finds U.S. Muslims Thriving, but Not Content*, N.Y. TIMES, Mar. 2, 2009, at A11.

7. 2007 STUDY, *supra* note 3, at 18.

8. *Id.*; *see also* Mann, *supra* note 3, at 1142. There is a stark difference between the economic integration of Muslims in the United States and their integration in Western European Countries. 2007 STUDY, *supra* note 3, at 19. In a 2006 survey, Muslim populations in Spain, Germany, Great Britain, and France reported disproportionately high percentages of their Muslim population in the lowest income category (73%, 53%, 61%, and 61%, respectively). *Id.*

9. *Id.* at 1. Of foreign-born adult Muslims in America, 24% are from the Arab region, 8% are from Pakistan, 10% are from other parts of South Asia, 8% are from Iran, 5% are from Europe, 4% are from other parts of Africa, and 6% are from other regions of the world. *Id.*

American citizens.¹⁰ About 39% of Muslims have immigrated to the United States since 1990.¹¹ The reasons given by American Muslims for immigration vary greatly. Close to equal numbers cite educational opportunities (26%), economic opportunities (24%), and family reasons (24%).¹² Twenty percent say that they came to the United States because of persecution or conflict in their home country.¹³

With respect to racial composition, no single racial group constitutes a majority of the Muslim population in America, with 38% describing themselves as white, 26% describing themselves as black, 20% as Asian, and 16% choosing to answer other/mixed.¹⁴ Yet, in a different poll conducted by Gallup in March of 2009, only 28% of American Muslims identified as white, 35% as Black, 18% as Asian, and 18% as other.¹⁵

Most American Muslims say that religion is very important to them, and they accept the basic tenets of their faith.¹⁶ There is religious diversity within the American Muslim population. A Pew study found that 50% say they are Sunni, 22% are Muslim without any affiliation, 16% are Shia, 5% identify as other, and 7% did not give a response.¹⁷ Additionally, 23% of Muslims report

Native-born adult Muslims comprise 35% of Muslims in the United States; 20% are African-American, and 15% are "Other." *Id.* See also Nina J. Crimm, *Muslim-Americans' Charitable Giving Dilemma: What About a Centralized Terror-Free Donor Advised Fund*, 13 ROGER WILLIAMS U. L. REV. 375, 382 (2008). Another 7% of Muslim Americans have parents who were immigrants. *Id.* at 381. The Muslim immigrants come from at least sixty-eight different countries. *Id.* at 382.

10. *Id.* at 15.

11. See *id.* at 1. Years immigrated by the 65% of Muslims who are foreign-born: 18% immigrated between 2000–2007, 21% immigrated between 1990–1999, 15% immigrated between 1980–1989, and 11% immigrated before 1980. *Id.*

12. *Id.* at 16.

13. *Id.* Of those citing conflict or persecution as a reason for immigrating are those emigrating from: Iran (26%), Arab nations (19%), and South Asian countries (19%). *Id.*

14. 2007 STUDY, *supra* note 3, at 17. The survey further broke down each racial group into whether the Muslim was foreign born or native born with 56% of native-born Muslims describing themselves as black. *Id.*

15. THE MUSLIM WEST FACTS PROJECT, MUSLIM AMERICANS: A NATIONAL PORTRAIT 21 (2009) [hereinafter 2009 GALLUP POLL], available at <http://www.muslimwestfacts.com/mwf/File/116074/AmericanMuslimReport.pdf>. The Gallup poll also compared these statistics on race with Catholics, Protestants, Jews, and Mormons in the United States, where 76%–93% were reportedly white. *Id.*

16. 2007 STUDY, *supra* note 3, at 24. Seventy-two percent of Muslim Americans responded that religion was "very important" and 40% of Muslim Americans attend a mosque more than once a week. *Id.* A March 2009 Gallup Poll revealed that 80% of Muslim Americans answered in the affirmative when asked whether religion was an important part of their daily life. 2009 GALLUP POLL, *supra* note 15, at 28. Additionally, the report found that 41% of young Muslim Americans (18–29) attend their place of worship at least once a week. *Id.* at 97.

17. 2007 STUDY, *supra* note 3, at 21.

that they are converts to Islam.¹⁸ Ninety-one percent of converts were born in the United States and 59% of all converts are African-American.¹⁹ There are around 2000 Islamic schools, mosques, and centers in America.²⁰

Although Muslims have lived in the United States for over one hundred years, “they have lived largely at the margins of political history.”²¹ Their involvement in political and legal matters has been limited.²² For many years, American Muslims “enjoyed a degree of anonymity that allowed them to concentrate on economic advancement and pursuit of the American dream.”²³ It was not really until the 1990s that American Muslims began to mobilize at the local and national levels to assert themselves politically and legally—particularly to pursue violations of their civil rights.²⁴ As a result of this mobilization, organizations like the Council on American-Islamic Relations (CAIR) and the Islamic Society of North America, among others, were formed.²⁵

With regard to political views, the Pew study found that American Muslims are largely liberal with regard to the size and scope of government,²⁶ but socially conservative.²⁷ A majority of American Muslims either lean towards or identify with the Democratic Party (63%).²⁸ Of the general public, 51% lean toward or identify with the Democratic Party.²⁹

At the same time, many American Muslims—particularly second-generation American Muslims, are becoming actively involved in the political

18. *Id.* at 22.

19. *Id.* Fifty-five percent of converts subscribe to Sunni tradition, and 49% of converts converted before age twenty-one. *Id.*

20. Council on American-Islamic Relations, *supra* note 1.

21. See Kathleen M. Moore, *Muslims in the United States: Pluralism Under Exceptional Circumstances*, 612 ANNALS AM. ACAD. POL. & SOC. SCI. 116, 122 (2007).

22. *Id.*

23. *Id.* at 123.

24. *Id.* at 125.

25. *Id.* at 125–26.

26. 2007 STUDY, *supra* note 3, at 41. Seventy percent of U.S. Muslims reportedly prefer bigger government, versus the general public where 43% prefer bigger government. *Id.* at 41, 44. Additionally, 73% of Muslims say that the government should do more to aid the poor. *Id.* at 41.

27. See *id.* With regards to protecting morality, 59% say that the government should do more compared with the general public where only 37% believe the government should do more to protect morality. *Id.* at 41, 46. Also, 61% said that homosexually should be discouraged instead of accepted or neither. *Id.* at 45. Of the general public, 51% of Americans said that homosexuality should be accepted. *Id.*

28. *Id.* at 41. Seventy-one percent of Muslim Americans say they supported John Kerry in the 2004 presidential election. *Id.* The higher percentage of Muslims who voted Democratic may correlate to the Pew finding that 75% of Muslim Americans believe that going to war in Iraq was wrong. *Id.* at 49.

29. *Id.* at 42.

process.³⁰ In the past several years, the first two American Muslims were elected to Congress.³¹ Muslims strongly supported the candidacy of Barack Obama, although that support was not without controversy.³² In any event, like many immigrant communities that preceded them, American Muslims are starting to contribute to American society on a more active level.³³ “While their parents’ generation might prefer isolation from the mainstream, the political involvement of young Muslim Americans is increasing, demonstrated by the rising number of registered voters, civil servants, and candidates for public office.”³⁴

II. POST-9/11 CRIMES AND DISCRIMINATION AGAINST MUSLIMS³⁵

This working knowledge of the identity of American Muslims illuminates life for Muslims after the attacks of 9/11. A 2007 Pew Research Study found that 53% of American Muslims say it has become more difficult to be a Muslim in the United States since September 11, 2001.³⁶ This belief is widely held by wealthier and better-educated Muslims.³⁷ Twenty-five percent of Muslims in the United States say they have been victims of discrimination.³⁸ FBI Hate Crime Statistics from 2000 and 2001 indicated over a 1600% increase in hate crimes reported as “anti-Islamic.”³⁹ The number of actual crimes against Muslims rose from twenty-eight in 2000 to 481 in 2001.⁴⁰

30. Carla Power, *The New Islam*, NEWSWEEK, MAR. 16, 1998, at 37.

31. The first two Muslim Congressmen are Keith Ellison of Minnesota and Andre Carson of Indiana. See Noreen S. Ahmed-Ullah, *Muslims Seeking Greater Influence—Effort Puts Resumes of Top Candidates in White House Hands*, CHI. TRIB., Mar. 29, 2009, at 10.

32. See *id.* (documenting reports of Obama’s staff preventing Muslim women wearing hijab from being photographed behind him).

33. Kathleen M. Moore, *supra* note 21, at 122–23.

34. *Id.*

35. See generally AMNESTY INT’L, THREAT AND HUMILIATION: RACIAL PROFILING, DOMESTIC SECURITY, AND HUMAN RIGHTS IN THE UNITED STATES 1–12 (2004), available at www.amnestyusa.org/racial_profiling/report/rp_report.pdf (assessing the Civil Rights concerns of Muslim Americans and containing narratives of victims of racial profiling).

36. 2007 STUDY, *supra* note 3, at 4. Additionally, most American Muslims “believe that the government ‘singles out’ Muslims for increased surveillance and monitoring.” *Id.* at 2.

37. *Id.* at 35. Sixty-five percent of those who have attended graduate school and 68% of those with incomes of \$100,000 or more say it has become more difficult to be Muslim in post 9/11 America. *Id.*

38. *Id.* at 4. Forty-one percent of native-born Muslims claim they have been victims of discrimination versus 18% of foreign born. *Id.*

39. See Jonathan K. Stubbs, *The Bottom Rung of America’s Race Ladder: After the September 11 Catastrophe Are American Muslims Becoming America’s New N . . . s?*, 19 J.L. & RELIGION 115, 121 (2004) (citing Fed. Bureau of Investigation, Uniform Crime Reporting (foreword) (2002), available at <http://www.fbi.gov/ucr/01hate.pdf>).

40. James Curry Woods, *The Third Tower: The Effect of the September 11th Terrorist Attacks on the American Jury System*, 55 ALA. L. REV. 209, 211 (2003) (quoting Curt Anderson,

These crimes included assaults (both physical and verbal), threats, vandalism, and even murder.⁴¹ Specifically, shortly after the 9/11 attacks, men were charged in Seattle and Texas in attempting to burn down local mosques.⁴² In Arizona, an Indian Sikh gas station owner (apparently mistaken for a Muslim) was murdered in response to the attacks.⁴³

Discrimination against Muslims also took other forms. CAIR, a national civil rights advocacy group, reports yearly on the status of Muslim civil rights in the United States.⁴⁴ In its 2001 report (for the year 2000), CAIR reported a 15% increase in the number of civil-rights complaints from the previous year.⁴⁵ The main complaints were by Muslims for the lack of accommodation in their workplace and schools for daily prayers, Friday prayers, and other Islamic rituals.⁴⁶ The most numerous complaints were hijab related.⁴⁷

In its 2002 report (for the year 2001), CAIR reported that the United States government's action post-9/11 affected more than 60,000 American Muslims.⁴⁸ CAIR received 1516 complaints, which represented a three-fold increase in the number of complaints—most of which were bias-motivated harassment or violence.⁴⁹ Excluding September 11 backlash incidents, the normal reporting period contained 525 validated complaints—an increase of 43%.⁵⁰ Such incidents included firings or refusal to hire; failure to accommodate religious practices in schools, workplaces, and prisons; profiling in airports; the detention or interrogation of Muslims by federal or local authority; and denial of services or access to public accommodations.⁵¹

FBI Reports Jump in Violence Against Muslims, VICTORIA ADVOC., Nov. 25, 2002, available at <http://www.thevictoriaadvocate.com/24hour/nation/story/645165p-4867767c.html>.

41. Riad Z. Abdelkarim, M.D., *American Muslims and 9/11: A Community Looks Back and to the Future*, Washington Report on Middle East Affairs, Sept–Oct. 2002, at 82.

42. Woods, *supra* note 40, at 210.

43. *Id.*

44. CAIR is the largest American-Muslim civil rights organization in the United States, serving more than seven million American Muslims through its thirty-five chapters and offices nationwide and in Canada. COUNCIL FOR AMERICAN ISLAMIC RELATIONS, *THE STATUS OF MUSLIM CIVIL RIGHTS IN THE UNITED STATES* 1, 3 (2008), available at <http://www.cair.com/Portals/0/pdf/civilrights2008.pdf>.

45. CAIR, *THE STATUS OF MUSLIM CIVIL RIGHTS IN THE UNITED STATES* (2001), available at <http://www.cair.com/CivilRights/CivilRightsReports/2001Report.aspx>.

46. *Id.*

47. *Id.*

48. CAIR, *THE STATUS OF MUSLIM CIVIL RIGHTS IN THE UNITED STATES* (2002), available at <http://www.cair.com/CivilRights/CivilRightsReports/2002Report.aspx>.

49. *Id.*

50. *Id.*

51. *Id.*

More recently, in its 2008 Report (for the 2007 calendar year), CAIR processed a total of 2652 civil rights complaints.⁵² While there were decreased incidents of anti-Muslim hate crime complaints as well as alleged incidents at schools or incidents involving the police, they are still prevalent.⁵³

For instance, in June of 2007, a twenty-six-year-old Muslim man was attacked while leaving a St. Cloud, Minnesota mosque.⁵⁴ He was called a “Muslim terrorist” and shoved and elbowed in the head by the assailant.⁵⁵ The police were notified, and they called the attack a bias-motivated crime.⁵⁶

On August 8, 2007, an “acid bomb” was thrown out of a car window near Muslims (an imam and another mosque official) standing outside an Arizona mosque, the Albanian American Islamic Center of Arizona.⁵⁷ The bomb landed within twenty to twenty-five feet of them.⁵⁸ They reported “a chemical smell after the container exploded,” but no one was hurt.⁵⁹

In September of 2007, an Iranian American salon owner was opening her shop in New York when two assailants surprised and viciously beat her.⁶⁰ The men called her “terrorist” and wrote anti-Muslim slurs on a mirror in her salon.⁶¹

In addition to these hate crimes, “[d]iscrimination in the workplace increased by 18%, with 384 cases reported in 2006 and 452 cases reported in 2007.”⁶² In one report made to CAIR in April of 2007, a sixty-six-year-old Muslim worker reported that fellow co-workers at a BMW Manufacturing Co. plant in Spartanburg, South Carolina repeatedly made comments to him such as, “Muslims are no good. They should all be killed,” and, “We will f**k up your family, we’ll kill you all.”⁶³ This situation escalated when one of the co-workers confronted the Muslim in a restroom at work, put a boxcutter to his

52. CAIR, *THE STATUS OF MUSLIM CIVIL RIGHTS IN THE UNITED STATES* 5 (2008), available at <http://www.cair.com/Portals/0/pdf/civilrights2008.pdf>.

53. *Id.*

54. Associated Press, *Man Is Charged with Assault Allegedly Attacked Man After Prayer*, INFOCUS NEWS, June 26, 2007, available at <http://www.infocusnews.net/content/view/15499/327/>; see also CAIR, *supra* note 45, at 20.

55. Associated Press, *supra* note 48.

56. *Id.*

57. *Arizona Mosque Targeted in “Acid Bomb” Attack*, REUTERS, Aug. 8, 2007, <http://www.reuters.com/article/domesticNews/idUSN0833871920070808?feedType=RSS&rpc=22&sp=true>; CAIR, *supra* note 45, at 21.

58. CAIR, *supra* note 45, at 21.

59. *Id.*

60. James Fanelli, *Muslim Biz Gal Beaten*, N.Y. Post, Sep. 16, 2007; CAIR, *supra* note 45, at 21.

61. CAIR, *supra* note 45, at 21.

62. *Id.* at 5.

63. *Muslim BMW Worker Says He Was Threatened*, Columbia State, April 5, 2007; see also CAIR, *supra* note 45, at 23.

throat, and said: "I'll slice your throat and kill you."⁶⁴ The Muslim worker filed a report with the Spartanburg County Sheriff's Office.⁶⁵

Also in 2007, two Muslim workers were fired and three others left their employment with the Gold'n Plump Poultry plant in Arcadia, Wisconsin.⁶⁶ The workers' dispute arose out of the company's "floating break" policy.⁶⁷ During this break, the workers would perform the fajr prayer (the break-of-dawn prayer), one of five daily Islamic prayers.⁶⁸ The company previously accommodated the prayers with a floating break for several months, but subsequently issued a new policy that prevented the workers from performing their religious obligations.⁶⁹

While there were decreases in cases involving due process issues, physical violence, denials of service or access, and verbal harassment, they are still a part of the reality in which Muslims live in America. Women have reported discrimination based on wearing the hijab (traditional Islamic head covering). In July of 2007, a Muslim woman was denied entry into a municipal courtroom in Georgia because she was wearing a hijab.⁷⁰ This is despite the fact that she consented to walk through the metal detector and to allow the officers to scan her scarf with a handheld metal detector.⁷¹ Subsequently, in December of 2008, a Muslim woman was jailed after a dispute at another Georgia courthouse over whether she could enter the courtroom with her hijab.⁷²

CAIR reports that in 2007, passenger-profiling complaints jumped from thirty-two in 2006 to 141 in 2007, a 340% increase.⁷³ Most notably, in November of 2006, six imams (clerics in Islam) were removed from a US Airways flight reportedly because they were praying together before boarding the plane, which caused some staff and passengers to become suspicious.⁷⁴ The six imams were removed from the flight and questioned for several hours by law enforcement officials before being released.⁷⁵ No charges were filed

64. CAIR, *supra* note 45, at 23.

65. *Id.*

66. Oskar Garcia, *70 Somalis Who Quit Jobs over Prayer Time Return to Work*, JOURNALSTAR.COM, May 26, 2007, http://www.journalstar.com/business/article_c5a4ef36-5a73-5abb-97ec-5c7a2a2ea873.html. See also CAIR, *supra* note 45, at 23.

67. CAIR, *supra* note 45, at 23.

68. *Id.*

69. *Id.*

70. Ponder, *supra* note 1, at 38; see also Associated Press, *Muslim Woman Barred from Georgia Courtroom for Wearing Scarf*, July 1, 2007.

71. Ponder, *supra* note 1, at 38.

72. Associated Press, *U.S. Judge Jails Muslim Woman over Headscarf*, MSNBC, Dec. 17, 2008, <http://www.msnbc.msn.com/id/28278572/?gt1=43001>.

73. CAIR, *supra* note 45, at 5.

74. Heena Musabji & Christina Abraham, *The Threat to Civil Liberties and Its Effects on Muslims in America*, 1 DEPAUL J. SOC. JUST. 83, 96 (2007).

75. *Id.*

against these men.⁷⁶ These men subsequently filed suit, which will be discussed in more detail in the next section of this paper.⁷⁷

More recently, in January of 2009, nine Muslim passengers were removed from an AirTran Airways flight at Ronald Reagan Washington National Airport.⁷⁸ The Muslim passengers were reportedly removed from the flight because another passenger overheard one of the Muslims ask his wife where the safest place to sit on the plane would be.⁷⁹ These Muslims were not allowed to reboard the plane and were detained for interrogation by local law enforcement officers, the FBI and TSA.⁸⁰ They were later cleared after questioning and offered refunds.⁸¹ The airline later issued a public apology to the Muslim passengers as well as to the other passengers on the flight for their inconvenience, acknowledging the misunderstanding and made an offer to compensate the passengers.⁸²

Overall, nine states and the District of Columbia made up more than 80% of all the discriminatory complaints made to CAIR in 2007.⁸³ As is true with prior years, a person's ethnic background, religion, or "Muslim name" were the paramount factors that triggered discrimination.⁸⁴ These criteria are likely to have been responsible for 63% of all cases reported to CAIR in 2007.⁸⁵

III. RECENT CIVIL RIGHTS LITIGATION BY MUSLIMS

Much, though certainly not all, of the discrimination against American Muslims has been reported to law enforcement and civil rights groups. In some of these cases, American Muslims sought to challenge the discrimination in court. This section discusses these cases. This is not intended to be a laundry list of all American Muslim-inspired litigation, but rather seeks to analyze a few recently prominent decisions dealing with the civil rights of American Muslims in post-9/11 America.

76. *Id.*

77. *See* Part III.B *infra*.

78. Liz Robbins, *Muslim Family Excluded from AirTran Flight*, <http://thelede.blogs.nytimes.com/2009/01/02/muslim-family-excluded-from-airtran-flight/> (last visited Oct. 2, 2009); *see also* Part III.C *infra*.

79. Robbins, *supra* note 79.

80. *Id.*

81. *Id.*

82. *Id.*

83. CAIR, *supra* note 45, at 5.

84. *Id.*

85. *Id.*

A. *Work Place Discrimination Suits*

After the 9/11 attacks, discrimination against American Muslims in the workplace based on religion and/or national origin rose tremendously.⁸⁶ Some of these Muslims started going to the courthouses to address this discrimination—with some, although limited, success. Recently, in January 2009, Abraham Yasin filed a two-count complaint against Cook County Sheriff's Department of Corrections, the Sheriff of Cook County and the Cook County Sheriff's Office, alleging a Title VII hostile work environment claim based on national origin and a hostile work environment claim based on ancestry under 42 U.S.C. § 1981.⁸⁷ One defendant filed a motion for summary judgment arguing, "Yasin has failed to establish that the alleged conduct was severe or pervasive enough to alter the conditions of his employment and create a hostile and abusive work environment."⁸⁸ The district court disagreed and found that "[v]iewing the evidence and all reasonable inferences in Yasin's favor . . . he has presented evidence raising a genuine issue of material fact for trial that his co-workers' conduct was severe or pervasive enough to alter the conditions of his employment and create a hostile and abusive work environment."⁸⁹ Specifically, the court found that Yasin's co-workers made remarks about his ancestry and national origin at least one hundred times in over one-year—including remarks such as "terrorist," "sand nigger," "bin Laden," "shoe bomber," and "camel jockey."⁹⁰ The court concluded, "In sum, [we] would be hard-pressed to conclude, as a matter of law, that the correctional officers' conduct did not create a hostile work environment based on Yasin's national origin and ancestry."⁹¹

The defendant also argued that they were entitled to summary judgment because Yasin failed to present evidence that there was a basis for his employer's liability.⁹² The parties agreed that the defendant was aware of Yasin's allegations regarding the inappropriate conduct by his co-workers.⁹³ The question before the court was "whether the Sheriff's Office was negligent in discovering or remedying the alleged harassment."⁹⁴ The court found that "taking well over a year to address Yasin's harassment complaints is not a

86. Ponder, *supra* note 1, at 32–33.

87. Yasin v. Cook County Sheriff's Dept., 2009 WL 1210620, at *1 (N.D. Ill. May 4, 2009). Plaintiff's original complaint was filed in March of 2007 and the complaint filed in January of 2009 was a second amended complaint. See Complaint, Yasin v. Cook County Sheriff's Dept., No. C-01266 (N.D. Ill. Mar. 6, 2007).

88. Yasin, 2009 WL 1210620 at *4.

89. *Id.*

90. *Id.*

91. *Id.* at *5.

92. *Id.*

93. Yasin, 2009 WL 1210620 at *5.

94. *Id.*

‘prompt’ or ‘expeditious’ reaction to the complaints, especially in light of the numerous times Yasin complained to his supervisors and IAD.⁹⁵ The court concluded, “Based on these circumstances, Yasin has raised an issue of fact for trial whether the Sheriff’s Office took an ‘appropriate corrective action [that is] reasonably likely to prevent harassment from recurring.’”⁹⁶ Defendant’s motion for summary judgment was thereby denied and the case proceeded to trial.⁹⁷ In July of 2009, the jury returned a verdict for Yasin in the amount of “\$200,000 in damages for harassment it found to be so pervasive or severe to create a hostile and abusive work environment.”⁹⁸

Other Muslim plaintiffs have not been as successful. In April 2009, the Third Circuit affirmed a district court decision that police officer Kimberlie Webb’s request to wear a headscarf with her uniform could not be reasonably accommodated without imposing an undue burden upon the City of Philadelphia.⁹⁹

In February 2003, Webb, a practicing Muslim, was denied permission to wear a headscarf¹⁰⁰ while in uniform and on duty.¹⁰¹ Although the headscarf would cover neither Webb’s face nor ears, Philadelphia Police Department Directive 78¹⁰² did not authorize “the wearing of religious symbols or garb as part of the uniform.”¹⁰³ On August 12–14, 2003, Webb wore her headscarf to work, but was sent home each day when she refused to remove it.¹⁰⁴ After being informed on August 14, 2003 that her conduct could lead to disciplinary action, Webb discontinued wearing the headscarf to work.¹⁰⁵ Nevertheless, Webb received a thirteen-day suspension for insubordination.¹⁰⁶

Following her suspension, Webb brought suit alleging violations under Title VII for religious discrimination, retaliation/hostile work environment, and

95. *Id.* at *6.

96. *Id.*

97. *Id.*

98. Press Release, CAIR, CAIR-Chicago Wins Bias Suit for Arab-American Officer (July 24, 2009), available at <http://www.reuters.com/article/pressRelease/idUS202828+24-Jul-2009+PRN20090724>; see also Judgment in a civil case, *Yasin v. Cook County Sheriff’s Dept.*, No. C-01266 (N.D. Ill. July 24, 2009).

99. *Webb v. Philadelphia*, 562 F.3d 256, 258 (3d Cir. 2009).

100. “The headscarf (a khimar or hijab) is a traditional headcovering worn by Muslim women.” *Id.*

101. *Id.*

102. Directive 78 is “the authoritative memorandum which prescribes the approved Philadelphia police uniforms and equipment.” *Id.*

103. *Id.*

104. *Webb*, 562 F.3d at 258.

105. *Id.*

106. *Id.*

sex discrimination.¹⁰⁷ The district court granted summary judgment against Webb on all counts reasoning “the City would suffer an undue hardship if forced to permit Webb and other officers to wear religious clothing or ornamentation with their uniforms.”¹⁰⁸ Webb appealed the adverse judgments on the religious and sex discrimination to the Third Circuit.¹⁰⁹

The Third Circuit agreed with the district court’s holding that Webb established a *prima facie* case for religious discrimination in that: (1) “Webb’s religious beliefs are sincere;” (2) “her employer understood the conflict between her beliefs and her employment requirements;” and (3) “she was disciplined for failing to comply with a conflicting official requirement.”¹¹⁰ Thus, the burden shifted to the City to demonstrate that to reasonably accommodate Webb would impose an undue hardship.¹¹¹ The City contended an undue hardship existed because “[i]f not for the strict enforcement of Directive 78 . . . the essential values of impartiality, religious neutrality, uniformity, and the subordination of personal preference would be severely damaged to the detriment of the proper functioning of the police department.”¹¹² Webb contended genuine issues of material fact existed because “other police officers displayed religious symbols, such as cross pins on their uniforms, with no disciplinary repercussions.”¹¹³ The Third Circuit, having noted the “presumption of legislative validity” given to a police department’s choice of organization and dress,¹¹⁴ agreed with the City.¹¹⁵ In affirming the district court’s adverse judgment, the Third Circuit concluded that “uniform requirements are crucial to the safety of officers . . . morale and spirit de corps, and public confidence in the police.”¹¹⁶

Despite the mixed results of *Yasin* and *Webb*, American Muslims plaintiffs continue to battle workplace discrimination and attempt to assert their rights in court. For instance, Waheed Rehan, a Muslim man from Pakistan, filed a suit in July of 2009 in federal district court alleging that he suffered similar harassment at his place of employment, resulting in his unjustified

107. *Id.* Webb also brought one cause of action under the Pennsylvania Religious Freedom Protection Act.

108. *Id.* at 258–59. The District Court also stated, “[Directive 78’s] detailed standards with no accommodation for religious symbols and attire not only promote the need for uniformity, but also enhance cohesiveness, cooperation, and the esprit de corps of the police force.” *Webb v. Philadelphia*, 2007 WL 1866763, at *4 (E.D. Pa. 2007).

109. *Webb*, 562 F.3d at 259.

110. *Id.* at 261.

111. *Id.*

112. *Id.*

113. *Id.* at 262. The court held Webb presented no specific evidence of her assertions that would create a genuine issue of material fact. *Id.*

114. *Webb*, 562 F.3d at 260. (citing *Kelley v. Johnson*, 425 U.S. 238, 247 (1975)).

115. *Id.* at 262.

116. *Id.*

termination.¹¹⁷ Rehan claims that he faced discrimination by his co-workers at his former employer, Affiliated Computer Services.¹¹⁸ Rehan was subjected to such remarks as “terrorist” and “bin Laden.”¹¹⁹ In addition to verbal attacks, Rehan was subjected to physical abuse such as having aerosol cleaner sprayed on his head and eyes.¹²⁰ Rehan reported the conduct, but his bonuses were subsequently cut significantly, and his workload increased, before finally being terminated without justification.¹²¹ Rehan brought several causes of action alleging discrimination based on religion, national origin, and race, as well as for retaliation.¹²² The case is currently stayed pending arbitration.¹²³

B. Racial Profiling and Discrimination Against Muslims while Traveling

Another area where American Muslims face discrimination is in traveling. Since 2001, the Department of Transportation has received over 1000 complaints of discrimination against United States airlines.¹²⁴ Similarly, the Transportation Security Administration has received over 1000 complaints against its personnel.¹²⁵ American Arab and Muslim organizations continue to document this type of discrimination. American Muslims are reporting this conduct to the proper authorities and agencies—but they are also filing lawsuits.

In 2002, Assem Bayaa brought a claim for illegal discrimination against United Airlines following his removal from a flight.¹²⁶ Bayaa is “an American Citizen of Lebanese and Palestinian descent who works full time in Saudi Arabia, but travels to California frequently to visit family and to conduct business.”¹²⁷ United Airlines provided the most convenient route between the two countries, and was thus regularly used by Bayaa.¹²⁸ On December 23, 2001, Bayaa arrived at LAX to board a United Airlines flight back to Saudi Arabia.¹²⁹ When Bayaa checked his two suitcases that morning, one was

117. Complaint, *Rehan v. Affiliated Computer Servs., Inc.*, No. 09-04106 (N.D.Ill. July 8, 2009).

118. *Id.*

119. *Id.* at 3.

120. *Id.*

121. *Id.* at 4.

122. Complaint at 6, *Rehan*, No. 09-04106.

123. Order on Motion to Stay, *Rehan v. Affiliated Computer Services, Inc.*, No. 09-04106 (N.D.Ill. July 27, 2009).

124. Michael T. Kirkpatrick & Margaret B. Kwoka, *Title VI Disparate Impact Claims Would Not Harm National Security—A Response to Paul Taylor*, 46 HARV. J. ON LEGIS. 503, 513–14 (2009).

125. *Id.* at 514.

126. *Bayaa v. United Airlines, Inc.*, 249 F.Supp. 2d 1198, 1198 (C.D. Cal. 2002).

127. *Id.* at 1199.

128. *Id.*

129. *Id.* at 1200.

immediately “searched on the spot.”¹³⁰ After passing through security without incident, Bayaa arrived at his gate where he was searched with a hand-wand and his carry-on bag was inspected.¹³¹ Once aboard the plane, but before taking his seat, Bayaa was asked to exit the plane because “the crew [did] not feel comfortable having [him] on board.”¹³² After being removed from the flight, United Airlines attempted to book Bayaa another flight; however, “[e]mbarrassed and humiliated, Bayaa refused the flight, and traveled, instead, on another airline.”¹³³ Bayaa subsequently filed discrimination claims under § 1981 and Title VI seeking injunctive and declaratory relief that “the court declare illegal [United Airlines’] alleged pattern and practice of removing individuals from flights based on perceived Middle Eastern ethnicity, and to enjoin [United Airlines] from engaging in this conduct in the future.”¹³⁴

United Airlines filed a motion to dismiss, arguing Bayaa’s claims were preempted by the Warsaw Convention.¹³⁵ But the court rejected this contention holding the Warsaw Convention preempted claims for damages, not claims for equitable relief such as Bayaa’s.¹³⁶ Having decided Bayaa’s claims were not preempted, the court’s analysis turned to whether it could redress Bayaa’s alleged injury.¹³⁷ The court reasoned that because Bayaa is an American citizen who travels frequently on United Airlines from his place of work in Saudi Arabia to visit his family, and conduct business in America, he demonstrated “that he is realistically threatened by a repetition of [the violation].”¹³⁸ As such, Bayaa would be entitled to injunctive relief. In rejecting United Airlines’ final argument, that the injunction would conflict with its duty to use discretion under 49 U.S.C. § 44902,¹³⁹ the court stated that “[d]efendant’s duty under 49 U.S.C. § 44902 does not grant them a license to discriminate.”¹⁴⁰ Accordingly, the court denied United’s motion to dismiss.¹⁴¹

The parties ultimately agreed to settle the case.¹⁴² In addition to a \$94,000 payment, United Airlines agreed to provide various non-monetary relief, such

130. *Id.*

131. *Bayaa*, 249 F. Supp. 2d at 1200.

132. *Id.*

133. *Id.*

134. *Id.* at 1200, 1205.

135. *See id.* at 1201.

136. *Bayaa*, 249 F. Supp. 2d at 1201–02.

137. *Id.* at 1205.

138. *Id.*

139. *Id.* This statute addresses the regulations under which an air carrier may refuse to transport passengers and property. *See* 49 U.S.C. § 44902 (2006).

140. *Bayaa*, 249 F. Supp. 2d at 1205.

141. *Id.*

142. Motion of Entry into Comprehensive Settlement Agreement at 1, *Bayaa v. United Airlines*, No. 02-B-48191 (Bankr. N.D.Ill. Mar. 21, 2005).

as annual civil rights training to its public contact employees, and to ensure appropriate follow-up to any discrimination complaints.¹⁴³

More recently, six imams who were removed from a U.S. Airways flight brought causes of action for violations of their Fourth Amendment rights to freedom from unreasonable seizures and their Fourteenth Amendment rights to equal protection of the law.¹⁴⁴ On November 20, 2006, the imams were traveling back home after attending a conference in Minneapolis, Minnesota.¹⁴⁵ While waiting at the gate for their U.S. Airways flight, three of the six men decided to pray their final two prayers of the day—the other three remained in their seats.¹⁴⁶ The men prayed “for roughly five minutes” and boarded the plane soon after.¹⁴⁷ The men were not seated together, and took their seats throughout the cabin.¹⁴⁸ At some point, a passenger passed a note to the captain relating that he had seen “six Middle Eastern men praying loudly in Arabic in the gate area and saying ‘Allah, Allah.’”¹⁴⁹ Airport police were called in and the passenger who passed the note related his observations to the police and noted the “‘mysterious’ or ‘weird’ seating arrangement” of the imams.¹⁵⁰ The police decided the loud prayers and seating configuration “amounted to suspicious behavior” and the imams were removed from the plane and taken into custody.¹⁵¹ The imams were placed in police cars and taken to the police command center where they were separated, isolated, and interrogated for five to six hours before being released without being charged.¹⁵² When they then tried to rebook a flight, U.S. Airways denied them service.¹⁵³

In support of their unlawful seizure claim, the plaintiffs alleged there was a lack of reasonable articulable suspicion when the FBI officer requested their detention for questioning, or alternatively, there was a lack of probable cause to arrest the plaintiffs.¹⁵⁴ Upon reviewing the information available to the FBI and Metropolitan Airport Commission (“MAC”) officials at the time of the arrest,¹⁵⁵ the court reasoned “[the FBI agent] has not identified any crime, nor

143. *Id.* at 7.

144. *Shqairat v. U.S. Airways*, 645 F. Supp. 2d 765, 771, 774, 777, 789 (D.Minn. 2009).

145. *Id.* at 771.

146. *Id.*

147. *Id.* at 772.

148. *Id.*

149. *Shqairat*, 645 F. Supp. 2d at 772–73.

150. *Id.* at 773.

151. *Id.* at 774.

152. *Id.*

153. *Id.*

154. *Shqairat*, 645 F. Supp. 2d at 777.

155. This information was: “(1) three of the Plaintiffs observed the Muslim Maghreb prayer at the gate before boarding Flight 300; (2) Shahin and Sadeddin requested seatbelt extensions; (3)

does the court know of any crime, for which these allegations create arguable probable cause.”¹⁵⁶ As such, the court held the arrest of the plaintiffs constituted “a violation of Plaintiffs Fourth Amendment right to be free from unreasonable seizures.”¹⁵⁷ Moreover, the court denied the FBI agent’s claim for qualified immunity stating that “no reasonable officer could have believed that the arrest of Plaintiffs was proper.”¹⁵⁸

The court reached the same conclusions when analyzing the unlawful seizure claim against the MAC. In finding no basis for probable cause, the court stated:

After only a cursory, routine investigation, several of these concerns would have been eliminated leaving no basis for probable cause based on the remaining information. Praying in public, commenting on current events, and even criticizing governmental policy is protected speech under the First Amendment. Plaintiffs’ Middle Eastern descent does not change the analysis. Similar behavior by Russian Orthodox priests or Franciscan monks would likely not have elicited this response.¹⁵⁹

The court found the MAC’s attempt to use the events of September 11 as a defense for its actions unpersuasive:

Defendants suggest that the attacks of September 11, 2001—perpetrated by men of Middle Eastern descent who espoused a radical version of Islam—justifies a massive curtailment of liberty whenever terrorism, and in this case, the suspicion of Islamic terrorism, is concerned. Unquestionably the events of 9/11 changed the calculus in the balance American society chooses to make, especially in airport settings, between liberty and security. Ultimately, the proper balance will be achieved, in large part, because we have the most capable and diligent law enforcement and intelligence communities in the world. But when a law enforcement officer exercises the power of the Sovereign over its citizens, she or he has a responsibility to operate within the bounds of the Constitution and cannot raise the specter of 9/11 as an absolute exception to that responsibility.¹⁶⁰

Shahin left his seat to talk to Sadeddin; and (4) Plaintiffs were Muslim clerics, possibly of Middle Eastern origin.” *Id.* at 779.

156. *Id.*

157. *Id.*

158. *Id.* at 780.

159. *Shqeirat*, 645 F. Supp. 2d at 786.

160. *Id.* at 788; *See Chowdhury v. Nw. Airlines Corp.*, 238 F. Supp. 2d 1153, 1154 (N.D.Cal. 2002) (denying defendant’s motion to dismiss by reasoning “[t]he fact that the pilot is in control of the aircraft does not . . . ‘grant [the airlines] a license to discriminate.’”); *but see Dasrath v. Cont’l Airlines, Inc.* 467 F. Supp. 2d 431, 433 (D.N.J.,2006) (Muslim plaintiff’s case dismissed on summary judgment); *Cerqueira v. Am. Airlines, Inc.*, 520 F.3d 1, 4 (1st Cir. 2008) (reversing a jury verdict in favor of plaintiff).

The court also denied defendants' motion for summary judgment on the equal protection claim.¹⁶¹ Plaintiffs alleged the MAC "intentionally discriminated against them based on their race, religion, color, or national origin in violation of the Equal Protection Clause of the Fourteenth Amendment. . . ."¹⁶² The court found that among the factors considered in detaining the plaintiffs were: their "Middle Eastern ethnicity," their "Arabic dialect," and the chanting of the words "Allah, Allah, Allah."¹⁶³ The court reasoned these facts "could lead a reasonable jury to conclude that they were arrested at least partly on the basis of their race, religion, or national origin."¹⁶⁴ Accordingly, defendants' motion for summary judgment was denied.¹⁶⁵ The decision was appealed to the Eighth Circuit Court of Appeals.¹⁶⁶ Subsequently, the parties reached a confidential settlement.¹⁶⁷

These suits alleging post-9/11 racial profiling and discrimination by airlines have been met with some success. More importantly, these lawsuits have raised awareness of this significant problem, and potentially will begin to open dialogue, and promote education by airlines, regarding these discriminatory practices.

C. *Religious Charities*

Finally, one area of major concern to American Muslims is the treatment of Islamic charities in post-9/11 America. On September 23, 2001, just days removed from the attacks of 9/11, President Bush issued Executive Order 13,224 in response to the "grave acts of terrorism . . . and the continuing and immediate threat of further on United States nationals or the United States."¹⁶⁸ Executive Order 13,224 gave the Treasury Department's Office of Foreign Assets Control ("OFAC") "broad authority to designate individuals and organizations as 'Specially Designated Global Terrorists' ("SDGTs")."¹⁶⁹ Such a designation allows OFAC to freeze all assets of a SDGT pending investigation pursuant to a blocking order, and criminalize all transactions with

161. *Id.* at 789.

162. *Id.* at 788-89.

163. *Id.* at 789.

164. *Shqierat*, 645 F. Supp. 2d at 789.

165. *Id.*

166. *Shqierat v. U.S. Airways Group*, 645 F. Supp. 2d (D.Minn. 2009), *appeal docketed*, No. 09-2979 (8th Cir. Sept. 18, 2009).

167. *Shqierat v. U.S. Airways Group*, No. 07-1513 (D.Minn. filed Oct. 10, 2009) (confidential settlement agreement reached).

168. Exec. Order No. 13,224, 66 Fed. Reg. 49,079 (Sept. 23, 2001).

169. David Klass, *Asset Freezing of Islamic Charities Under the International Economic Emergency Powers Act: A Fourth Amendment Analysis*, 14 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 155, 156 (2007).

the designated entity.¹⁷⁰ In the years since 9/11, Executive Order 13,224 has been used to block the assets of American Muslim charity organizations. In response, these organizations have turned to the courts to challenge the constitutionality of these blocking orders.¹⁷¹

Initial efforts by Muslim charities to attack the blocking orders met with little success. On December 4, 2001, OFAC designated Holy Land Foundation as a SDGT due to allegedly acting for or on behalf of Hamas.¹⁷² At the time, Holy Land was the largest American Muslim charitable foundation with a budget of close to \$12 million.¹⁷³ In conjunction with the SDGT designation, OFAC issued a blocking order “freezing all of [Holy Land’s] funds, accounts and real property.”¹⁷⁴

Holy Land subsequently challenged the SDGT designation and blocking order in court, alleging various statutory and constitutional violations.¹⁷⁵ But the court rejected Holy Land’s claims,¹⁷⁶ including its Due Process¹⁷⁷ and Fourth Amendment unreasonable seizure challenges.¹⁷⁸ In rejecting the Due Process claim, the court reasoned the OFAC action “flows from a Presidentially declared national emergency”¹⁷⁹ thus qualifying as an “‘extraordinary’ situation in which postponement of notice and hearing until

170. *See id.* at 160. “Neither the IEEPA nor the Executive Orders specify what evidence is needed to issue a blocking order—apparently it is within OFAC’s discretion.” *Id.* at 161.

171. For further discussion of the statutory framework behind the blocking orders and the implementation against American Muslim charities, *see generally* Laila Al-Marayati, *American Muslim Charities: Easy Targets in the War on Terror*, 25 PACE L. REV. 321 (2005); Klass, *supra* note 169; Danielle Stampley, *Blocking Access to Assets: Compromising Civil Rights to Protect National Security or Unconstitutional Infringement on Due Process and the Right to Hire an Attorney?*, 57 AM. U. L. REV. 683 (2008).

172. *Holy Land Found. for Relief & Dev. v. Ashcroft*, 219 F. Supp. 2d 57, 62, 64 (D.D.C. 2002). Hamas is a large and influential militant Palestinian political group. *See Backgrounder: Hamas*, COUNCIL ON FOREIGN AFFAIRS, (Aug. 27, 2009) available at <http://www.cfr.org/publication/8968#p1>.

173. *See* Al-Marayati, *supra* note 171, at 324.

174. *Holy Land Found.*, 219 F. Supp. 2d at 64. OFAC also entered Holy Land’s headquarters, without a warrant, and removed “all documents, computers, and furniture.” *Id.*

175. *Id.* Holy Land filed a cause of action alleging violations of: (1) the Administrative Procedure Act; (2) the Due Process clause of the Fifth Amendment; (3) the Takings clause of the Fifth Amendment; (4) the Fourth Amendment; (5) the First Amendment rights to freedom of speech and association; and (6) the Religious Freedom Restoration Act. *Id.* *See also* Klass, *supra* note 169, at 169 (explaining the evidence that Holy Land was linked with Hamas).

176. *See Holy Land Found.*, 219 F. Supp. 2d at 65–85 (analyzing Holy Land’s various claims).

177. *Id.* at 76.

178. *See id.* at 78–80.

179. *Id.* at 76.

after seizure d[oes] not deny due process.”¹⁸⁰ Turning to the Fourth Amendment claim, the court held “blocking of this nature does not constitute a seizure.”¹⁸¹ The court reasoned the freezing of accounts was not an unlawful seizure because “the Government plainly had the authority to issue the blocking order pursuant to the IEEPA and the Executive Orders and the Court has determined that its actions were not arbitrary or capricious.”¹⁸²

Similar attempts by Muslim charities met with similar results. For example, on October 13, 2004, OFAC designated the Islamic American Relief Agency¹⁸³ (“IARA”) as a SDGT, and blocked the assets of IARA and five of its officials.¹⁸⁴ Like Holy Land, IARA challenged the action in court alleging various constitutional violations, including Due Process and Fourth Amendment claims.¹⁸⁵ But relying heavily on the *Holy Land* opinion,¹⁸⁶ the court ruled in favor of the government.¹⁸⁷

Although successful challenges to a SDGT designation and blocking order may be limited, a recent case out of Ohio may offer hope to Muslim charity plaintiffs in the future. The case, *KindHearts v. Geithner*,¹⁸⁸ has been heralded as “a victory for all Americans who value the constitutional rights to due process and freedom from unreasonable search and seizure.”¹⁸⁹

KindHearts is a nonprofit corporation, incorporated under Ohio law, with the stated goal to “provide humanitarian aid without regard to religious or political affiliation.”¹⁹⁰ On February 19, 2006, OFAC, without prior notice, issued a blocking order which froze all of KindHearts’ assets pending

180. *Id.* at 76–77 (quoting *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 680 (1974)).

181. *Holy Land Found.*, 219 F. Supp. 2d at 79.

182. *Id.* at 78. The circuit court affirmed the district court’s decision in 2003. *Holy Land Found. for Relief & Dev. v. Ashcroft*, 333 F.3d 156, 159 (D.C. Cir. 2003).

183. The Islamic American Relief Agency was based in Columbia, Missouri, and was established in 1985 as a nonprofit humanitarian relief organization. *Islamic Am. Relief Agency v. Unidentified FBI Agents*, 394 F. Supp. 2d 34, 39–40 (D.D.C. 2005).

184. *Id.* at 40.

185. *Id.* at 39.

186. *See id.* at 47–50 (analyzing IARA’s claims and repeatedly citing *Holy Land* for support).

187. On appeal, the circuit court affirmed the lower court decision. *Islamic Am. Relief Agency v. Gonzalez*, 477 F.3d 728, 730 (D.C. Cir. 2007) (affirming district court on other grounds).

188. *See infra* notes 192–205, 208–17 and accompanying text.

189. Press Release, CAIR, *CAIR Welcomes Ruling in Support of Muslim Charity’s Due Process Rights* (Aug. 19, 2009) (quoting Nahid Awad, CAIR National Executive Director), <http://www.cair.com/ArticleDetails.aspx?mid1=777&&ArticleID=26061&&name=n&&currPage=1#> (last visited Mar. 21, 2010).

190. *KindHearts for Charitable Humanitarian Dev. v. Geithner*, 647 F. Supp. 2d 857, 864 (N.D. Ohio 2009).

investigation.¹⁹¹ The blocking order “effectively shut the organization down”¹⁹² by indefinitely freezing all KindHearts’ assets and property, “including about one million dollars in bank accounts.”¹⁹³

In April 2006, and again in November 2006, KindHearts attempted to respond to the block via letter, but received no response from OFAC.¹⁹⁴ More than a year after the initial block, on May 25, 2007, the OFAC finally acknowledged receipt of KindHearts’ April and November correspondence and “notified KindHearts that OFAC had provisionally determined to designate KindHearts a [SDGT].”¹⁹⁵ OFAC never made a final designation as to KindHearts status as a SDGT; meanwhile, “[f]or almost three years OFAC has blocked KindHearts’ property and property interests and criminalized all transactions with it.”¹⁹⁶ During those three years, the OFAC “provided no explanation of the specific charges it was considering against KindHearts or why it thought the evidence supported a potential designation.”¹⁹⁷ Moreover, the OFAC restricted KindHearts access to its own documents needed to rebut OFAC claims as well as funds to pay for legal counsel.¹⁹⁸

KindHearts alleged OFAC’s actions were unconstitutional for a number of reasons, including that the actions amounted to a Fourth Amendment violation for unreasonable seizure, as well as a violation of due process.¹⁹⁹ Rather than dismissing the Fourth Amendment claim by relying on precedent, the court declined to follow the *Holy Land* and *IARA* holdings.²⁰⁰ The court concluded these prior cases had erroneously applied a Fifth Amendment Takings Clause analysis to the OFAC blocking actions, rather than the “lower threshold” of a

191. *Id.* at 865. The Treasury Department also issued a press release on its website announcing the block for alleged affiliations with Hamas. *Id.* at 867.

192. *Id.*

193. *Id.*

194. *Id.*

195. *KindHearts for Charitable Humanitarian Dev.*, 647 F. Supp. 2d at 867.

196. *Id.* at 870.

197. *Id.* at 868.

198. *Id.* at 868–69.

199. *Id.* at 864

KindHearts alleges that OFAC’s actions are unconstitutional because: 1) OFAC’s block is an unreasonable seizure in violation of the Fourth Amendment; 2) provisions authorizing OFAC to designate SDGT and block assets pending investigation are void for vagueness under the Fifth Amendment; 3) OFAC denied KindHearts procedural due process before provisionally determining it to be an SDGT and blocking its assets; and 4) OFAC has unconstitutionally restricted plaintiff’s access to the resources it needs to mount a defense. KindHearts further claims that OFAC blocked KindHearts’ assets without proper statutory authorization.

Id.

200. *See KindHearts for Charitable Humanitarian Dev.*, 647 F. Supp. 2d at 871–72.

Fourth Amendment seizure analysis.²⁰¹ The court reasoned that because the OFAC blocking actions interfere with possessory rights, and are not necessarily a permanent deprivation, they are properly considered a “seizure” under the Fourth Amendment.²⁰²

But the government argued OFAC blocking actions should be excluded from Fourth Amendment scrutiny because: (1) historically, the Fourth Amendment has not been applied to blocking actions; and (2) deference should be given to the President regarding foreign affairs.²⁰³ In rejecting the government’s first contention, the court noted none of the prior TWEA²⁰⁴ and IEEPA²⁰⁵ cases asserted a Fourth Amendment interest, as they involved economic sanctions on *foreign* governments.²⁰⁶ In contrast, the court reasoned:

KindHearts’ situation differs strikingly and significantly from that of the foreign governments and foreign assets at issue in the TWEA and IEEPA cases on which the government relies

KindHearts is indisputably one of “the people” protected by the Fourth Amendment. If the Constitution affords KindHearts no protection from unreasonable searches and seizures, whom among “the people” does it protect and who among the people can be certain of its protection?²⁰⁷

In addressing the historical argument advanced by the government, the court acknowledged “compelling parallels between the instant case and the colonial-era activities inspiring the Founders to include the Fourth Amendment in our fundamental charter of liberties.”²⁰⁸ The court completely dismissed the government’s first assertion by stating, “[t]o find the Fourth Amendment inapplicable to OFAC blocking actions would disregard the Amendment’s history and its role as a bulwark against the abuses and excesses of unchecked governmental power.”²⁰⁹

201. *Id.* at 872.

202. *Id.*

203. *Id.* at 872–73.

204. Trading with the Enemy Act of 1917, Pub. L. No. 65–91, 40 Stat. 411 (codified as amended at 50 U.S.C. app. §§ 1–44 (2006)). “During wartime, TWEA both made it a crime to engage in specified forms of commerce with America’s enemies, and delegated to the President the power to regulate or prohibit a variety of other economic transactions with both enemies and allies.” Robert M. Chesney, *The Sleeper Scenario: Terrorism-Support Laws and the Demands of Prevention*, 42 HARV. J. ON LEGIS. 1, 4 (2005).

205. International Emergency Economic Powers Act, 50 U.S.C. §§ 1701–07 (2006). The IEEPA was an attempt to improve upon the TWEA by specifying the President can invoke IEEPA powers only in limited circumstances and “authorizes the President to impose whole or partial economic embargoes during emergencies.” Chesney, *supra* note 204, at 5.

206. *KindHearts for Charitable Humanitarian Dev.*, 647 F. Supp. 2d at 873.

207. *Id.* at 874.

208. *Id.* at 874–76 (discussing the colonial era struggles with government as reason to include the Fourth Amendment in the Constitution).

209. *Id.* at 876.

The court also disagreed with the government's second argument that deference should be given to the executive on matters regarding foreign affairs.²¹⁰ The court reasoned that "[l]egislation cannot authorize the President to ignore the Bill of Rights. Under the Fourth Amendment, the federal government 'as an undivided whole' lacks entirely the power to conduct unreasonable searches and seizures."²¹¹ Finding no "special needs" or exigent circumstances that would excuse the general warrant and probable cause requirements of the Fourth Amendment, the court concluded that the OFAC block constituted an unreasonable seizure under the Fourth Amendment.²¹²

Turning to KindHearts' Due Process challenge, the court concluded "the government's actions regarding the blocking order failed to provide the two fundamental requirements of due process: meaningful notice and opportunity to be heard."²¹³ The court characterized the "notice"²¹⁴ given to KindHearts as "piecemeal and partial"²¹⁵ leaving the organization "largely uninformed about the basis for government's actions."²¹⁶ The court applied the three-factor *Mathews*²¹⁷ test to the notice given by OFAC and held "consideration of the *Mathews* factors leads inescapably to the conclusion that OFAC violated KindHearts' fundamental right to be told on what basis and for what reasons the government deprived it of all access to all its assets and shutdown its operations."²¹⁸ The court also held OFAC's lengthy and repeated delays in responding to KindHearts violated the "due process requirement of prompt post-deprivation hearing."²¹⁹ This decision, with its strong language and reasoning, serves as a significant victory for American Muslim charities as it upheld constitutional protections afforded all Americans, and curtailed the government's unfettered discretion in these types of cases.

210. *See id.* at 876–78.

211. *KindHearts for Charitable Humanitarian Dev.*, 647 F. Supp. 2d at 877 (emphasis removed).

212. *See id.* at 789–882 (discussing exceptions to probable cause and warrant requirements).

213. *Id.* at 897. The court however, found it could not presently determine the extent to which KindHearts had been prejudiced by the violation of its constitutional rights and that the due process challenge to the provisional SDGT designation is not ripe for adjudication. *Id.* at 908–10.

214. The notice given was summarized as "the letter KindHearts received informing it of the government's decision, the thirty-five unclassified, non-privileged exhibits, and a redacted version of the provisional determination evidentiary memo." *Id.* at 904.

215. *Id.* at 901.

216. *Id.* at 904.

217. *See Mathews v. Eldridge*, 424 U.S. 319 (1976). In applying the test, courts must weigh: "First, the private interest . . . affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used . . . ; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that . . . additional or substitute procedural requirement would entail." *Id.* at 335.

218. *KindHearts for Charitable Humanitarian Dev.*, 647 F. Supp. 2d at 904.

219. *Id.* at 906–08.

IV. Learning from This Litigation

Understandably, the United States underwent a dramatic political shift after the 9/11 attacks; but American Muslim litigants are working to keep those attacks from giving the government free reign to disregard basic civil rights in this country. As Judge Montgomery points out in the *Shqeirat* case “[W]hen a law enforcement officer exercises the power of the [s]overeign over its citizens, she or he has a responsibility to operate within the bounds of the Constitution and cannot raise the specter of 9/11 as an absolute exception to that responsibility.”²²⁰ In the *Shqeirat* case, Judge Montgomery reminds law enforcement and others that “[p]rayer in public, commenting on current events, and even criticizing governmental policy is protected speech under the First Amendment.”²²¹ Further, she emphasized that this is as true for Muslims and people of Middle Eastern descent as it is for Russian Orthodox priests or Franciscan monks.²²² Judge Montgomery suggests that if the government defendants in the *Shqeirat* case had only educated themselves, however briefly, about the exact situation of the Imams praying before entering the plane, they would have plainly seen the lack of probable cause for their detention.²²³

Sadly, for many American Muslims—particularly those challenging blocking orders used to essentially shut down American Muslim charities allegedly thought to be terrorist organizations—Judge Montgomery’s comments fall on deaf ears.²²⁴ As can be seen from the *Holy Land* and *IARA* decisions, those courts chose to approve of the government’s actions with respect to the blocking order because they found no Due Process violation, as well as no unlawful seizure under the Fourth Amendment.²²⁵

Judge Carr in the *KindHearts* decision, however, took the *Holy Land* and *IARA* cases and decisions head on, finding that in fact the government did violate the Fourth Amendment in its use of the blocking order against *KindHearts*.²²⁶ Specifically, as Judge Carr stated, “Kindhearts is indisputably

220. *Shqeirat v. U.S. Airways*, 645 F. Supp. 765, 788 (D.Minn. 2009) (emphasis added).

221. *Id.* at 786.

222. *Id.*

223. *Id.*

224. *See supra*, Part IV. Muslims have responded to the blocking orders in court, but also on a more practical level. A Muslim group called Muslim Advocates has started its own accreditation for Muslim charities. *See* Press Release, Muslim Advocates, First American Charities Accredited Through Ground Breaking Program (Aug. 25, 2009), available at http://www.muslimadvocates.org/documents/MCAP1_rls.pdf; Noreen S. Ahmed-Ullah, *Muslim Charities Learn Transparency*, CHI. TRIB., June 12, 2009; Jeff Karoub & David Grant, *Listing Clears Cloud Over Islamic Charities*, CHI. TRIB., Sep. 20, 2009.

225. *Id.*

226. *KindHearts for Charitable Humanitarian Dev. v. Geithner*, 2009 WL 2514057, at *17–21 (N.D. Ohio Aug. 18, 2009).

one of the people protected by the Fourth Amendment.”²²⁷ Here, like Judge Montgomery, we see a district court refusing to grant the government unfettered power, and reminding the government that it owes constitutional rights and protections to its citizens and organizations. Despite the losses in *Holy Land* and *IARA* decisions, the court in *KindHearts* reminds us, very directly, “If the Constitution affords Kindhearts no protection from unreasonable searches and seizures, whom among ‘the people’ does it protect and whom among the people can be certain of its protections.”²²⁸ After years of delay, this Muslim American organization was finally able to receive the relief it sought—protection of its civil and constitutional rights.

This and the few recent victories discussed in this article, however, do not significantly alter the present challenging reality of Muslims in America.

Along with fear over the present and future status of their civil rights, there is also a large degree of frustration among U.S. Muslims. The frustration involves what is actually a constant struggle against a type of civic blackmail which demands Muslims in the U.S. to be utterly compliant, or run the risk of having their patriotism called into question. As a result there is a certain pall of silence that has been cast over the community.²²⁹

Many American Muslims do not feel free to express themselves in a public setting,²³⁰ much less in a court room. While young American Muslims have become increasingly more active in American politics and society as a whole, “the vast majority of U.S. Muslims are simply trying to keep beneath the radar screen. They are understandably not asking questions and not challenging assumptions for fear of government reprisals.”²³¹ Those that do may face courts and judges who are willing to struggle to find the proper balance between the protections of civil rights and the exercise of government and police powers. This balance may or may not tip in their favor, as American Muslims saw in the *Webb* case.²³² While more judges appear willing, contrary to Judge Montgomery’s decision, to use 9/11 as a blanket justification for whatever action the government chooses to take,²³³ American Muslims have to continue to challenge this discrimination in court in hopes that the Constitution and the rule of law will prevail. Over time, with a succession of legal victories

227. *Id.* at 11.

228. *Id.*

229. Scott Alexander, *Inalienable Rights? Muslims in the U.S. Since September 11th*, 7 J. ISLAMIC L. & CULTURE 103, 119 (2002).

230. *Id.*

231. *Id.* at 119–20

232. See *Webb v. Philadelphia*, 562 F.3d 256 (3rd Cir. 2009).

233. See, e.g., *Dasrath v. Cont’l Airlines*, 228 F.Supp.2d 531, 540 (D.N.J. 2002) (“In this case Plaintiffs’ burden will be a heavy one considering the heightened actual dangers arising from the increased risk of terrorist acts . . .”).

and judicial support for American Muslims' civil rights, the fear and frustration they experience may begin to subside.

V. CONCLUSION

The future of these cases and the future of American Muslims' civil rights in post-9/11 America is still uncertain. What is certain, however, is that American Muslims can no longer afford the image that they are isolationists and removed from everyday civil rights struggles. While certain cases discussed in this Article have brought about some successful results and possibly further tolerance and understanding, the civil rights battles continue and American Muslims appear more prepared than ever to fight for these rights in court. Of course, these Muslims are not just fighting for their own rights, but the rights of all Americans. Just like so many immigrants and religious minorities before them, American Muslims are asserting themselves in an important part of American society, one civil rights case at a time.

