

Written Testimony of

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On the

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

Before the

United States Commission on Civil Rights

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Chairman Castro, Members of the Committee my name is Sahar F. Aziz. Thank you for the opportunity to testify today in my capacity as a law professor whose scholarship focuses on the intersection of national security and civil rights as it relates to Arabs, Muslims, and South Asians in the post-9/11 era. I want to note, at the outset of my testimony today regarding federal civil rights engagement with Arab and Muslim American communities post-9/11, that the views I present today are my own and do not necessarily represent the views of my law school.

Prior to joining the legal academy, I spent over seven years representing individuals and working with nonprofit organizations that were directly, and often adversely, impacted by post-9/11 national security laws, practices, and policies. I also had the privilege of serving as a Senior Policy Advisor for the Office for Civil Rights at the United States Department of Homeland Security in Washington, D.C. where I coordinated federal engagement programs across the country. Accordingly, I have participated in various federal civil rights engagement efforts with

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² The views expressed herein are solely those of the author and do not represent the views of the Texas Wesleyan University School of Law. Professor Aziz thanks Rusty Roeger, a graduate of Texas Wesleyan School of Law, Danielle Jefferis, a graduate of Georgetown University Law Center, and Texas Wesleyan Law Student Natalia Cashen for their diligence and invaluable assistance in preparing this testimony.

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the Arab and Muslim American communities both as a government official and an advocate representing community interests. My testimony today reflects my experiences, observations, and academic research on the important, albeit imperfect, project of government engagement with Arab and Muslim American communities.

The topic of today's hearing—federal civil rights engagement with Arab and Muslim American communities—bears a great deal of importance on the question of how the federal government should balance its protection of civil rights and liberties of all Americans with America's national security needs.

While this topic warrants a more extensive analysis, my testimony highlights four key points that I believe are paramount to a successful federal civil rights engagement program with Arab and Muslim American communities.

First, for federal engagement to be effective, community representatives at engagement meetings must encompass the rich diversity of the Arab and Muslim American communities, including but not limited to, ethnicity, socio-economic background, youth, women, political viewpoint, and race. Often times, a limited number of individuals who are male, Arab or South Asian, and over the age of 35 are repeatedly invited to government engagement meetings. As a result, discussions are constrained by the limited experiences and viewpoints of a select few purportedly representing tremendously diverse communities. This impedes the communities' efforts to seek redress on civil rights grievances as well as the government's ability to meaningfully identify and resolve civil rights issues.

Second, the federal government and any participant local and state entities should not use community engagement meetings in furtherance of national security, surveillance, investigative and prosecutorial objectives, but rather to develop trust and constructive relations with their constituents towards the common goal of protecting individual rights and public safety for all Americans. Unfortunately, recent news reports prompt serious concerns that some government engagement meetings are pretext for gathering intelligence, conducting investigations, and eventually pursuing prosecution of meeting attendees or their families and associates – as opposed to good faith efforts to build relationships between government and constituents. Absent credible evidence and binding mechanisms that guarantee the government is not conducting engagement based on false pretenses, engagement efforts are doomed to fail as mere public relations exercises aimed at diverting attention from critiques of government overreaching.

Third, government engagement efforts with Arabs and Muslims must be holistically focused on the host of social, economic, and political factors that affect the vitality of Arab and Muslim communities across the nation. The government's primary interest in working with Arab and Muslim communities based solely on national security issues reinforces false stereotypes that these communities warrant extra scrutiny,³ thereby increasing the risk of private acts of

³ Omar Sacirbey, *New poll finds Americans evenly divided in views of Muslims*, WASH. POST, August 24, 2012, available at <http://www.washingtonpost.com/national/on-faith/new-poll-findsamericans-evenly-divided-in-views-of-muslims/2012/08/24/1cddd588-ee30-11e1-b624->

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discrimination and perpetuating counterproductive counterterrorism tactics. Moreover, communities' suspicions that engagement efforts are merely investigative tools employed as part of broader counterterrorism objectives are reinforced, thereby hindering the potential for developing sustainable relationships based on trust and mutual respect.

Finally, government civil rights engagement programs must be subject to independent citizen and Congressional oversight to ensure stated objectives are in fact met. Notwithstanding the best of intentions, the efficacy of government engagement programs should not be left to the discretion of government employees left unaccountable to impartial and independent third parties. Various models of citizen oversight used in other contexts can guide the creation of effective monitoring and oversight mechanisms for government engagement projects.⁴

In the end, failed engagement efforts risk worsening relations between Arab and Muslim communities and government, in addition to wasting limited government resources during challenging economic times.

I. Community representatives at federal engagement meetings must encompass the rich diversity of the Arab and Muslim American communities, including but not limited to, ethnicity, socio-economic background, youth, women, political viewpoint, and race.

As the adage goes, garbage in leads to garbage out. Investment on the front end designing holistic civil rights engagement programs at the systemic level saves time, resources, and grief on the back end. For these reasons, I cannot over-emphasize the importance of ensuring community attendees at government engagement meetings adequately represent the rich diversity of the Arab and Muslim American communities across the United States.⁵ With over 1 billion followers across the globe, Islam has followers who live on every continent, speak nearly every language, and originate from diverse ethnicities and races.⁶ Muslim communities in the United States reflect this extensive diversity, resulting in a myriad of personal experiences and viewpoints based on differences in national origin, culture, race, languages spoken, socio-economic backgrounds, gender, immigration experiences, and generational positioning.⁷ Accordingly, sufficient effort must be invested towards ensuring full representation of diverse communities that are often erroneously treated as a homogenous "Muslim community" in the United States.

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⁴ Sahar F. Aziz, *Caught in a Preventive Dragnet: Selective Counterterrorism in a Post-9/11 America*, 47 GONZ. L. REV. 429 (2012).

⁵ Farid Senzai, *Engaging American Muslims: Political Trends and Attitudes*, Institute for Social Policy & Understanding, 2012, at 14. Available at

http://www.ispu.org/pdfs/ISPU%20Report_Political%20Participation_Senzai_WEB.pdf.

⁶ Pew Forum, *The Future of the Global Muslim Population*, January 27, 2011, The Pew Forum on Religion and Public life, <http://www.pewforum.org/The-Future-of-the-Global-Muslim-Population.aspx/>.

⁷ Gallup Report, *Muslim Americans: A National Portrait*, 2009, Gallup, available at

<http://www.gallup.com/strategicconsulting/153572/REPORT-Muslim-Americans-National-Portrait.aspx>.

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Presumably, neither the communities nor the government is interested in a check-the-box exercise that wastes government and the communities' time on mere public relations. Hence communities and government counterparts should thoughtfully select credible and representative community members to participate at engagement meetings. "Representing the Muslim community" simply cannot be conducted by a few, select individuals. Rather, affirmative efforts are warranted to expand representation beyond those who are male, older than 35, and Arab or South Asian. Similarly, engagement meetings must include the diverse political viewpoints within Muslim communities to assure honest conversations that lead to effective and sustainable solutions.⁸ While the path of least resistance may be to invite the same individuals whose interests in being re-invited to meetings trump the broader interests of the communities and thereby compromise their willingness to criticize government officials, such practices are doomed to fail. Not only are government resources wasted speaking to unrepresentative individuals who hold little credibility in the communities they claim to represent, but the engagement effort is discredited as a public relations stunt aimed at diffusing, rather than meaningfully addressing, civil rights grievances.⁹

Further aggravating representational problems is anecdotal evidence that government employees call invited community members requesting that they not ask embarrassing or politically sensitive questions when high level officials are in attendance. Similarly, those who voice views unpopular to or critical of government officials find themselves excluded in future meetings notwithstanding that their concerns reflect views held within parts of the communities. Failure to rectify these structural flaws understandably causes credible community leaders to decline invitations to participate in engagement efforts because they find them to be a futile and duplicitous endeavor.¹⁰

Admittedly, the issue of adequate representation is not easy to resolve by virtue of the intersectional complexities of race, ethnicity, gender, and socio-economics at play in such diverse communities. Merely asking community members to identify persons who represent them in a particular city is flawed by design. The responses are constrained by the very process in which the solicitations are made. In light of such concerns, representational challenges are best addressed on a systemic scale as a joint effort between communities and government agencies wherein neutral criteria are employed to select individuals participating in engagement efforts.

Keeping in mind that a more extensive discussion of representational problems is warranted, I propose the following criteria as a starting point for discussion:

⁸ Mohamed Younis, *Muslim Americans Exemplify Diversity, Potential Key findings from a new report by the Gallup Center for Muslim Studies*, Gallup, March 2, 2009, available at <http://www.gallup.com/poll/116260/muslim-americans-exemplify-diversity-potential.aspx>

⁹ Aref Assaf, *Am. Muslims: America's Best Ambassadors*, N.J. On-Line (Sep. 18, 2012, 8:33 PM), http://blog.nj.com/dr_aref_assaf/2012/09/what_would_prophet_muhammad_have_done_american_muslims_americas_best_ambassadors.html/.

¹⁰ Kate Taylor, *14 Muslim Leaders Plan Boycott of Breakfast With Mayor*, N.Y. Times, December 28, 2011, <http://www.nytimes.com/2011/12/29/nyregion/14-muslim-leaders-plan-boycott-of-bloomberg-interfaith-breakfast.html/>; Jenna Portnoy, *Christie Slams NYPD over Muslim Spying Program in NJ*, N.J. On-Line, February 29, 2012, http://www.nj.com/news/index.ssf/2012/02/christie_slams_nypd_over_musli.html.

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- **Females should constitute fifty percent of the community attendees.** Excuses by the government that Muslim and Arab communities do not have sufficient numbers of female leaders or that Muslim women are hesitant to participate in public meetings are not supported by the facts and usually represent incompetency or gender bias by those assigned to conduct community engagement on behalf of the government. As a matter of practice, all engagement meetings should be comprised of 50% female and 50% male attendees as reflected in the population.
- **Youth should be adequately represented in engagement meetings.** By youth, I am referring to high school students, college students, and persons in their twenties. Youth often have a vastly different experience than their parents' generation in terms of civil rights grievances, political and social viewpoints, and immigrant experiences. As in all communities, youth also bring with them creative solutions and refreshing candor that inform the engagement process.
- **African American Muslims should be represented proportionate to their population.** Notwithstanding that they comprise approximately 35% percent of Muslims in America,¹¹ African American Muslims have been under-represented in American Muslim communities resulting in a physical and political divide between Muslims who recently immigrated and African Americans whose families have lived in the United States for generations.¹² Such under-representation may be a product of cultural differences or racial bias found in some immigrant Muslim communities. Regardless of the causes, government engagement efforts should affirmatively seek to change the status quo by ensuring that African American Muslims are provided equal opportunity to participate in government engagement efforts.
- **Community leaders should not be limited only to regular mosque goers.** Of the estimated 3 million Muslims in America,¹³ a significant number do not regularly attend mosques¹⁴ for reasons that are beyond the scope of my testimony. Yet, they share common experiences with frequent mosque goers with regard to discrimination in employment, profiling at airports, bullying in schools, unwarranted surveillance and investigation by government authorities. Moreover, those who do not attend mosques on a regular basis often represent different cultural and social circles that encompass the broader Muslim communities. Failure to reach beyond the regular mosque going

¹¹ Gallup, *Muslim Americans*, 12.

¹² *Id.*

¹³ Rhys H. Williams, *The Second Generation: Americans Who Happen to be Muslims*, UIC Dept. of Sociology: Youth and Religion Project, 2002, <http://www.uic.edu/depts/soci/yyp/pdf/mod6.pdf>; Meghan Neal, *Number of American Muslims in the U.S. doubles since 9/11*, Daily News, May 3, 2012, http://articles.nydailynews.com/2012-05-03/news/31560588_1_muslim-community-religious-group-islamic.

¹⁴ Gallup, *Muslim Americans*, 30; Pew Research Poll, *The World's Muslims: Unity and Diversity*, August 9, 2012, The Pew Forum on Religion and Public Life, <http://www.pewforum.org/Muslim/the-worlds-muslims-unity-and-diversity-appendix-a.aspx>.

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communities restricts the government's exposure to perspectives of a significant number of Muslims in America.

- **Proportionate representation between Arabs and South Asians, and within Arab and South Asian communities, prevents counterproductive competition for attention and government resources.** For a variety of reasons and in varying degrees of severity depending on the locale, historic divisions exist between Arab and South Asian Muslim communities.¹⁵ Such divisions are most often found among first generation immigrants with widely different cultural and linguistic backgrounds. With each subsequent generation in the United States, these divisions are diluted and Muslims of diverse ethnic and racial backgrounds find more in common in their shared American identity. That said, engagement efforts insensitive to historic divisions may become delegitimized by virtue of inadvertently having a disproportionate representation of Arab Muslims or South Asian Muslims. While it is not the role of government to mediate inter- or intra-community disputes, government officials must be sufficiently informed to minimize the appearance, or practice, of favoritism toward particular ethnicities.
- **Invite persons that represent the different experiences of newer immigrants as well as second or third generation American Muslims.** Like Americans of other faiths, ethnicities, and national origins, Muslims are part of America's proud immigrant tradition. Some have been here for multiple generations while others are recent arrivals adapting to a new environment that entails significant linguistic, cultural, and social differences from their countries of origin.¹⁶ Thus, the nature and type of concerns expressed vary greatly depending on their socio-economic status, education, skin color, and familiarity with American society. Limiting community participants to multi-generation Americans or newer immigrants skews engagement meetings towards a particular experience at the expense of others, ultimately leading to inadequate solutions to complex challenges.
- **Avoid excluding individuals with contrarian or dissenting viewpoints.** At the operational level, it may be less hassle to conduct engagement meetings where attendees agree on the problems and the solutions, but it comes at a high price. Specifically, government representatives will obtain an inaccurate portrayal of the concerns of the diverse communities if they fail to include those with contrarian or political controversial viewpoints that hold some representational value.¹⁷ Often times, such individuals have the courage to speak truth to power despite the discomfort it may produce. These contrarian voices, often arising from younger generations or marginalized groups within the Muslim and Arab communities, add value to the civil rights engagement process.

¹⁵ Sahar F. Aziz, *Sticks and Stones, The Words That Hurt: Entrenched Stereotypes Eight Years After 9/11*, 13 N.Y. CITY L. REV. 33, 43-48 (2009).

¹⁶ Pew Research Center, *Muslim Americans: Middle Class and Mostly Mainstream* (May 2007) <http://pewresearch.org/assets/pdf/muslim-americans.pdf>.

¹⁷ American Civil Liberties Union, National Security, <http://www.aclu.org/national-security>; Farbod Faraji, *ACLU Asks State Dept. to Issue Visa to Palestinian Poet* (April 4, 2012, 6:09 PM), <http://www.aclu.org/blog/free-speech/aclu-asks-state-department-issue-visa-palestinian-poet>.

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- **Verify representational capacity of community leaders.** Engagement efforts need not be limited to community leaders. But for those individuals who participate on grounds that they represent a particular sub-group within the Muslim communities, their positions should be verifiable. In some cases, a person's status as the president, chairman, or other leadership title of a community organization provides sufficient proof of a representational capacity. In contrast, many individuals claim to play a representational capacity when in fact their views are merely their own, or worse, may misrepresent the views of those they proclaim to speak on behalf.
- **Require disclosure of conflicts of interests.** Community attendees hold various positions in the private, public, and nonprofit sector. In some cases, their jobs involve a government grant, contract, or other relationships with government agencies. Facially, such dealings are not problematic. But in the context of engagement efforts they may compromise these individuals' inclination to criticize the same agencies with which they have pre-existing relationships in other contexts. To preserve the integrity of the engagement process, such relationships should be disclosed to all attendees to minimize the risk of a conflict of interest. An unwillingness to make such disclosures is a red flag that these individuals are unable or unwilling to represent community interests independent of their own personal interests.

The fore mentioned recommendations are not intended to be comprehensive or dispositive, but rather offer a starting point for a more in-depth conversation between Muslim and Arab communities and government agencies involved in engagement efforts. Notably, the government should not entangle itself in determining who is or is not a leader in the Muslim communities, as that should be an internal, organic community process. However, the absence of objective, neutral criteria may produce the same bad outcome – a meeting of individuals who do not fully and accurately represent the diverse Muslim communities.¹⁸

II. The government should not use community engagement meetings in furtherance of national security surveillance, investigative and prosecutorial objectives, but rather to develop trust and robust relations with constituents towards the shared goal of protecting individual rights and public safety for all Americans.

It is an abuse of trust to use community engagement meetings as pretext to pursue national security surveillance, investigatory, and prosecutorial objectives. Community-government engagement efforts, whether with Arabs and Muslims or any other communities, are intended to develop trust, honest dialogue, and robust relationships between government and constituents – all of which further the shared goal of protecting individual rights and public safety for all Americans.

¹⁸ David A. Harris, *Law Enforcement and Intelligence Gathering in Muslim and Immigrant Communities After 9/11*, 34 N.Y.U. REV. LAW & SOC. CHANGE 1 (2009). Sahar Aziz, *The Contradictions of Obama's Outreach to American Muslims*, The Huff. Post, December 19, 2011, http://www.huffingtonpost.com/sahar-aziz/obama-american-muslim-outreach_b_1152359.html;

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Media reports over the past few years expose a troubling pattern of pretextual counterterrorism tactics that misguidedly use political beliefs and religious practices as proxies for criminal activity.¹⁹ Specifically, orthodox Muslims or those who openly critique U.S. government policies find themselves targeted by dubious informants, sting operations, and other aggressive counterterrorism tactics. Not only do such practices undermine civil liberties, they waste limited law enforcement resources by monitoring constitutionally protected activity while ignoring unlawful activity committed by those not fitting a particular religious, racial, or ethnic profile. Looking for evidence of radicalization through an individual's clothing, facial hair, or religious observances, as recommended by a controversial New York Police Department Report, diverts resources from investigations of true threats.²⁰

Accordingly, some Arab, Muslim, and South Asian communities are reasonably concerned that some engagement meetings are used as pretext for gathering intelligence, recruiting informants, conducting investigations, and eventually pursuing prosecution of meeting attendees or their family and associates.²¹ Moreover, there are serious and legitimate concerns within Muslim

¹⁹ See, e.g., COLE & LOBEL, *Less Safe, Less Free* 30-33 (2007), (“[I]nstead of incarcerating people on the basis of proof beyond a reasonable doubt that they committed a past infraction, the preventive paradigm turns to detention as a preventive matter and employs it against individuals deemed suspect by virtue of their group identity or political affiliations.”); MITCHELL D. SILBER & ARVIN BHATT, N.Y.C. POLICE DEP'T, *RADICALIZATION IN THE WEST: THE HOMEGROWN THREAT* 31 (2007), available at http://www.nypdshield.org/public/SiteFiles/documents/NYPD_Report-Radicalization_in_the_West.pdf (asserting that “[w]earing traditional Islamic clothing, growing a beard,” and “[b]ecoming involved in social activism and community issues” are signs of “radicalization”); Michael Powell, *In Police Training, a Dark Film on U.S. Muslims*, N.Y. TIMES, Jan. 24, 2012, at A1, available at <http://www.nytimes.com/2012/01/24/nyregion/in-police-training-a-dark-film-on-us-muslims.html?pagewanted=1&r=2&hp> (reporting that the NYPD showed over 1400 of its officers a film titled *The Third Jihad*, which accuses American Muslims of “deception” and waging jihad “covertly throughout the West today”).

²⁰ See, e.g., Mitchell D. Silber & Arvin Bhatt, *N.Y.C. Police Dep't, Radicalization in the West: The Homegrown Threat* 18 (2007), available at http://www.nypdshield.org/public/SiteFiles/documents/NYPD_Report-Radicalization_in_the_West.pdf; Aziz Huq, *Concerns with Mitchell D. Silber and Arvin Bhatt, N.Y. Police Dep't, Radicalization in the West: The Homegrown Threat*, New York University School of Law, Brennan Center for Justice, (Aug. 30, 2007), at: http://brennan.3cdn.net/436ea44aae969ab3c5_sbm6vtxgi.pdf. See also, Coalition Memo to the Senate Committee on Homeland Security and Governmental Affairs Regarding “Homegrown Terrorism,” American Civil Liberties Union et al. (May 7, 2008) available at <http://www.aclu.org/safefree/general/35209leg20080507.html>; Muslim American Civil Liberties Coalition, *CountertERRORism Policy: MACLC's Critique of the NYPD's Report on Homegrown Terrorism*, (2008), at: <http://maclcnypdcritique.files.wordpress.com/2008/11/counterterrorism-policy-final-paper3.pdf>; “Statement of Clarification,” p. 11-12, (added in 2009), to Mitchell Silber and Arvin Bhatt, New York Police Department, *Radicalization in the West: The Homegrown Threat*, p. 6, (2007), at: http://www.nyc.gov/html/nypd/downloads/pdf/public_information/NYPD_Report-Radicalization_in_the_West.pdf; and, Muslim American Civil Liberties Coalition Letter to Raymond Kelly, *Response to NYPD 'Statement of Clarification,'* (Sept. 2009), at: <http://maclc1.wordpress.com/2009/09/08/maclc-90809-letter-response-to-nypd-statement-of-clarification>.

²¹ Jerry Markon, *FBI Illegally Using Community Outreach to Gather Intelligence, ACLU Alleged*, WASH. POST, Dec. 1, 2011, available at http://www.washingtonpost.com/politics/fbi-illegally-using-community-outreach-to-gather-intelligence-aclu-alleges/2011/11/30/gIQA1qxyGO_story.html; Jerry Markon, *Lawsuit Alleges FBI Violated Muslims' Freedom of Religion*, WASH. POST, Feb. 22, 2011, available at http://www.washingtonpost.com/politics/lawsuit-alleges-fbi-violated-muslims-freedom-of-religion/2011/02/22/ABNOXZO_story.html (alleging “an FBI informant who infiltrated a California mosque

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communities that personal information about attendees is collected and distributed to other government agencies with intelligence gathering and prosecutorial authorities. Absent binding mechanisms that guarantee the government is not participating in engagement programs based on false pretenses;²² engagement efforts will not meet the stated objective of building trust and constructive relationships between government and Muslim, Arab, and South Asian communities.²³ Specifically, community leaders will understandably decline to attend out of concern for their and their constituents' civil liberties, leaving those with minimal representational capacity and self-promotion interests at meetings where they will say whatever the government wants to hear.²⁴ Ultimately, this results in a colossal waste of government resources.

Two particularly troubling tactics engender distrust of engagement programs: 1) using engagement meetings to gather intelligence, surveil, and investigate Muslims absent proof of a factual predicate of wrongdoing and 2) the use of dubious informants to induce vulnerable young Muslim men into fake terrorist plots. Coupled with reports of inaccurate and biased trainings on Muslims and Islam delivered to federal law enforcement officers by unqualified individuals,²⁵ these tactics thwart community engagement efforts and corroborate allegations of government overreaching at the expense of civil rights and liberties of Muslims, Arabs, and South Asians.

A. Using Engagement Meetings to Gather Intelligence, Surveil, and Investigate Absent Proof of a Predicate Act of Wrongdoing Breeds Distrust

violated the constitutional rights of hundreds of Muslims by targeting them for surveillance because of their religion"). Adam Godman, *Informant: NYPD paid me to 'bait' Muslims*, Assoc. Press, October 23, 2012, http://www.google.com/hostednews/ap/article/ALeqM5is2wtkrieQfRMyc5SchJoitrbi_A; *Terror Probes Have FBI's informant Numbers Soaring*, NPR, August 21, 2011, <http://www.npr.org/2011/08/21/139836377/the-surge-in-fbi-informants>; Paul Harris, *The ex-FBI informant with a change of heart: 'There is not real hunt. It's fixed'*, Guardian, March 20, 2012, <http://www.guardian.co.uk/world/2012/mar/20/fbi-informant>.

²² David A. Harris, *Law Enforcement and Intelligence Gathering in Muslim and Immigrant Communities After 9/11*, 34 N.Y.U. Rev. Law & Soc. Change 1 (2009).

²³ Sahar F. Aziz, *Protecting Rights as a Counterterrorism Tool: The Case of American Muslims*, Countering Violent Extremism: Dialogue, Training and Research (Fall 2012).

²⁴ Faiza Patel, Brennan Ctr. for Justice, N.Y. Univ. Sch. of Law, *Rethinking Radicalization* 26-27 (2011), available at http://brennan.3cdn.net/3ff468de1211ff853e_hwm6beu15.pdf (explaining that outreach meetings are generally perceived "as insincere" and "as a one-way means for the government to gather information about community members' religious practices"); Abukar Arman, Op-Ed., *Bridges of Rhetoric and Suspicion*, Wordpress.org (Aug. 16, 2009), <http://www.worldpress.org/Americas/3398.cfm>. ("The reality on the ground tells a different story - one in which rhetoric is abundant and substance is scarce."); NYPD Spying on Muslims Leads to Spiral of Mistrust, Homeland Sec. NewsWire (Nov. 23, 2011, 1:51 PM), <http://www.homelandsecuritynewswire.com/dr20111123-nypd-spying-on-muslims-leads-to-spiral-of-mistrust> ("Following the revelation that the New York City police department was spying on the daily lives of ordinary Muslims, community activists have launched a campaign encouraging people to avoid directly reporting suspicious activity to the police.").

²⁵ Dina Temple-Raston, *New Concern About Bias in Counterterrorism Training*, NPR (Mar. 9, 2011), <http://www.npr.org/2011/03/09/134374232/new-concern-about-bias-in-counterterror-training>; Spencer Ackerman, *FBI Teaches Agents: 'Mainstream' Muslims Are 'Violent, Radical'*, Wired, September 14, 2011.

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Federal regulatory prohibitions against racial profiling in law enforcement are not binding and do not apply to religious or ethnic origin profiling.²⁶ As a result, government agents may, and often do, profile on account of religion and ethnic origin in counterterrorism enforcement cognizant that there is no practical legal recourse for those targeted.²⁷ Despite failures in the law to protect against ethnic and religious profiling, these practices significantly undermine the formation of constructive relationships between Arab, Muslim, and South Asian communities.

Corroborating the communities' concerns, in 2011 and 2012 the ACLU obtained official FBI documents revealing a "mosque outreach" program that served as a cover-up for illegal spying based solely on religious activity. From 2004 through at least 2008, the FBI collected and illegally stored intelligence on American Muslim organizations and mosque congregants with no suspicion of wrongdoing.²⁸ Documents show that agents documented Muslims' conversations regarding frustrations over airline travel and where attendees would pray in a new mosque, as well as the subject of a particular sermon. One 2008 document shows that an FBI agent "collected and documented individuals' contact information and First Amendment-protected opinions and associations, and conducted internet searches to obtain further information about the individuals in attendance, including, in one instance, the photo of a dinner participant."²⁹ In a

²⁶ See U.S. DEP'T OF JUSTICE, *Guidance Regarding the Use of Race by Federal Law Enforcement Agencies*, June 2003, <http://www.fletc.gov/training/programs/legaldivision/the-informer/research-by-subject/departement-of-justice-guidance/useofrace.pdf/view>; U.S. DEP'T OF JUSTICE, RACIAL PROFILING (2003), available at http://www.justice.gov/opa/pr/2003/June/racial_profiling_fact_sheet.pdf (outlining Justice Department guidelines making clear that racial profiling is illegal and notably excluding religion or ethnic origin). *But see Whren v. United States*, 517 U.S. 806 (1996) (permitting law enforcement to make pretextual stops so long as there is probable cause of some violation of law, such as a traffic infraction, that would otherwise justify the stop).

²⁷ See, e.g., ASIAN LAW CAUCUS, RETURNING HOME: HOW U.S. GOVERNMENT PRACTICES UNDERMINE CIVIL RIGHTS AT OUR NATION'S DOORSTEP 4, 7, 10-12, 14, 23 (2009) available at <http://www.asianlawcaucus.org/wp-content/uploads/2009/04/Returning%20Home.pdf>; CTR. FOR IMMIGRANTS' RIGHTS, PA. STATE UNIV. DICKINSON SCH. OF LAW, FOR AM.-ARAB ANTI-DISCRIMINATION COMM., NSEERS: THE CONSEQUENCES OF AMERICA'S EFFORTS TO SECURE ITS BORDERS 34, 38 (2009), available at <http://www.adc.org/PDF/nseerspaper.pdf>; Press Release, Muslim Advocates & Am. Civil Liberties Union, *Groups Seek End to Religious Questioning at the Border by Federal Agents* (Dec. 16, 2010), http://www.muslimadvocates.org/FINAL_DHS%20CBP%20letter%20release.pdf; Press Release, Am.-Arab Anti-Discrimination Comm. & Yale Law Sch., ICE Targets Immigrants from Muslim Majority Countries Prior to 2004 Presidential Election (Oct. 20, 2008), <http://www.adc.org/PDF/frontline.pdf>. See also Aarti Kohli, Peter L. Markowitz and Lisa Chavez, *Secure Communities by the Numbers: An Analysis of Demographics and Due Process*, The Chief Justice Earl Warren Institute on Law and Social Policy, October 2011 available at http://www.law.berkeley.edu/files/Secure_Communities_by_the_Numbers.pdf (finding evidence of racial and ethnic profiling in immigration enforcement).

²⁸ ACLU Eye on the FBI (Mar. 27, 2012), available at [http://msnbcmedia.msn.com/i/MSNBC/Sections/NEWS/z_Personal/Huus/aclu_eye_on_the_fbi_-_mosque_outreach_03272012_0\[1\].pdf](http://msnbcmedia.msn.com/i/MSNBC/Sections/NEWS/z_Personal/Huus/aclu_eye_on_the_fbi_-_mosque_outreach_03272012_0[1].pdf).

²⁹ Ryan J. Reilly, *Muslim Officials Want Answers from FBI over Data Collection During Outreach Efforts*, TPM Muckraker (Dec. 1, 2011, 5:45 PM), available at http://tpmmuckraker.talkingpointsmemo.com/2011/12/muslim_officials_want_answers_from_fbi_over_data_collection_during_outreach_efforts.php

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2009 memo, an FBI agent in Sacramento used community outreach efforts to monitor the Saudi Student Association at California State University.³⁰

These troubling revelations prompt several threshold questions:

1. Should government officials be permitted to record and retain information obtained during engagement meetings?
2. Assuming they must retain some information as part of their efforts to address community civil rights concerns expressed at engagement meetings:
 - a. What type of information can the government collect?
 - b. Who in the government has the authority to view this information?
 - c. What checks are in place to assure the information is used for the purposes stated in the engagement meetings as opposed to intelligence gathering, investigative, and prosecutorial purposes
3. What oversight mechanisms are in place to assure the government is using information in accordance with its stated non-prosecutorial purpose?

It goes without saying that information discovered in engagement meetings that has a clear nexus to criminal activity should be acted on by law enforcement. However, that is not the nature of information of concern to Muslim and Arab communities who have a shared interest in promoting public safety. Instead, communities worry their personal information, religious and political beliefs and activities, and immigration statuses are recorded in an adversarial process wherein their participation in engagement makes them a target of counterterrorism and immigration enforcement. If this is indeed the case, then community engagement is a misnomer and instead the process is more accurately described as a fishing expedition into Muslim communities' lives and affairs that has a devastating chilling effect.

Additionally, thousands of individuals have been subjected to the FBI's abuse of "voluntary" interviews some of which are used to coerce Muslims into becoming informants.³¹ In some instances, the FBI recruits potential informants from attendees at engagement meetings. Many well-intentioned Muslims accept the FBI's requests to speak with them (often without a lawyer)

³⁰ Jerry Markon, *FBI Illegally Using Community Outreach to Gather Intelligence, ACLU Alleged*, WASH. POST, Dec. 1, 2011, available at http://www.washingtonpost.com/politics/fbi-illegally-using-community-outreach-to-gather-intelligence-aclu-alleges/2011/11/30/gIQA1qxyGO_story.html;

³¹ See, e.g., Petra Bartosiewicz, *To Catch a Terrorist: The FBI Hunts for the Enemy Within*, HARPER'S MAG., Aug. 2011, at 37, available at <http://harpers.org/archive/2011/08/0083545> ("In November 2001, the Department of Justice began conducting 'voluntary interviews' with 5,000 Middle Eastern non-citizens. Hundreds of FBI agents were dispatched across the country to conduct the interviews, with standard questions like 'Are you aware of anybody who reacted in a surprising way about the terrorist attacks?"); Mary Beth Sheridan, *Interviews of Muslims to Broaden: FBI Hopes to Avert a Terrorist Attack*, WASH. POST, July 17, 2004, at A01, available at <http://www.washingtonpost.com/wp-dyn/articles/A56080-2004jul16.html>.

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only to find themselves prosecuted for making false statements on issues unrelated to terrorism.³² Others are coerced into serving as informants under threat of prosecution for making false statements unrelated to terrorism.³³ Indeed, the problem has become so endemic that advocacy groups are proactively educating these communities on their right to refuse to submit to voluntary interviews and the importance of retaining counsel to protect them from this coercive tactic.³⁴ Astonishingly, these advocacy groups' campaigns to educate predominantly immigrant communities about their civil and constitutional rights then serve as a basis for allegations of disloyalty and support of terrorism by right wing, anti-Muslim ideologues.³⁵ When an attorney's fulfillment of her obligation to defend the constitution through public education becomes a basis for attacking her loyalty to that same constitution, all Americans should be outraged. Sadly, this is the precarious position faced by Muslims in America.

B. Use of dubious informants to induce vulnerable young Muslim men into fake terror plots undermines legitimacy of criminal justice system

The use of dubious informants to induce vulnerable young Muslim men into fake terror plots is another troubling tactic that undermines community trust in law enforcement. For decades, informants have been an integral part of law enforcement.³⁶ However, their pervasive presence in post-9/11 counterterrorism campaigns appears to be unprecedented. Compared to 1500 informants in 1975 and 2800 in 1980, reports indicate that there are now 15,000 FBI informants.³⁷ According to various news outlets, many of the informants are tasked to spy on and

³² See, e.g., Nick Meyer, *Prominent Attorney Who Refused to Betray Arab and Muslim Clients Speaks on Civil Liberties, Life on Terror Watch List*, ARAB-AM. NEWS (Aug. 21, 2011, 2:25 AM), <http://www.arabamericannews.com/news/index.php?mod=article&cat=Community&article=4627> (“[A]bout 1,200 non-citizens were rounded up immediately after the 9/11 attacks and . . . the only charges brought against them were actually for routine immigration violations or in some cases ordinary crimes . . .”); Wajahat Ali, *Time for FBI to Stop Spying on American Muslims*, GUARDIAN (Dec. 7, 2010, 10:30 AM), <http://www.guardian.co.uk/commentisfree/cifamerica/2010/dec/07/islam-terrorism>.

³³ See, e.g., Aaronson, *supra* note at 30, 32-33.

³⁴ See, e.g., AM. CIVIL LIBERTIES UNION, *KNOW YOUR RIGHTS WHEN ENCOUNTERING LAW ENFORCEMENT* 4-5 (2004), available at http://www.aclu.org/files/kyr/kyr_english.pdf; *Got Rights?*, MUSLIM ADVOCATES, http://www.muslimadvocates.org/get_involved/got_rights.html (last visited Jan. 8, 2012); *Know Your Rights*, COUNCIL ON AM.-ISLAMIC RELATIONS (2011), <http://www.cair.com/CivilRights/KnowYourRights.aspx#9>; *Urgent Community Alert: Seek Legal Advice Before Talking to FBI*, MUSLIM ADVOCATES 1-2, http://www.muslimadvocates.org/FBI_IVU_COMMUNITY%20ALERT.pdf (last visited Jan. 8, 2012).

³⁵ Matt Gertz, *Right-Wing Media Attacked Muslim Advocates For Giving Muslims Common Legal Advice*, Media Matters, March 29, 2011, <http://mediamatters.org/research/2011/03/29/right-wing-media-attacked-muslim-advocates-for/178059>.

³⁶ See generally Alexandra Natapoff, *Snitching: The Institutional and Communal Consequences*, 73 CIN. L. REV. 645 (2006).

³⁷ *The Informants: How the FBI's Massive Informant Network Actually Created Most Plots "Foiled" in U.S. Since 9/11*, OLDSPEAK J. (Oct. 11, 2011, 4:57 PM), <http://theoldspeakjournal.wordpress.com/2011/10/11/the-informants-how-the-fbis-massive-informant-network-actually-created-most-terrorist-plots-foiled-in-u-s-since-911/>.

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infiltrate American Arab and Muslim communities.³⁸ Coupled with recent discoveries that informants aggressively seek to induce Muslim men towards violence, it should come as no surprise that Muslim, Arab, and South Asian communities are distrustful of federal law enforcement agencies.³⁹

The abuse of informants is spreading to state and local law enforcement agencies. Just last month, a paid informant for the New York Police Department (“NYPD”) stated publicly that he was under orders to “bait” Muslims into making incriminating statements, all while he was taking photographs inside mosques and collecting the names of Muslims attending religious study groups.⁴⁰ His account was corroborated by the Associated Press through arrest records and text messages between the informant and his handler.⁴¹

Last year the NYPD was ordered to release documents revealing that agents and informants had repeatedly targeted New York City mosques, restaurants, and other Muslim-owned businesses viewed as “security risks” for “endorsing conservative religious views or having devout customers.”⁴² Indeed, the NYPD explicitly used “ethnic orientation, leadership and group affiliations” to mark fifty-three “mosques of concern.”⁴³ According to the Associated Press, the documents “paint the clearest picture yet of how the past decade’s hunt for terrorists also put huge numbers of innocent people under scrutiny as they went about their daily lives in mosques, restaurants and social groups.”⁴⁴

In addition to their orders to trap Muslims into making incriminating statements that can be used out of context at trial, some of the informants boast suspect or downright criminal pasts.⁴⁵ A

³⁸Trevor Aaronson, *FBI Tries to Deport Muslim Man for Refusing to Be an Informant*, Miami New Times at 32 (Oct. 8, 2009), available at <http://www.miaminewtimes.com/2009-10-08/news/unholy-war-fbi-tries-to-deport-north-miami-beach-imam-foad-farahi-for-refusing-to-be-an-informant/>; *Bloomberg Backs Law Enforcement Ahead of Muslim Leaders’ Breakfast Boycott*, CNN (Dec. 29, 2011), http://articles.cnn.com/2011-12-29/us/us_new-york-bloomberg_1_muslim-leaders-spy-agency-cia?s=PM:US; *FBI Used Outreach Programmes ‘to Spy on Muslims’*, TELEGRAPH (Dec. 2, 2011, 12:59 AM), <http://www.telegraph.co.uk/news/worldnews/northamerica/usa/8929931/FBI-used-outreach-programmes-to-spy-on-Muslims.html>.

³⁹ Trevor Aaronson, *FBI Tries to Deport Muslim Man for Refusing to Be an Informant*, Miami New Times 32, 35 (Oct. 8, 2009), <http://www.miaminewtimes.com/2009-10-08/news/unholy-war-fbi-tries-to-deport-north-miami-beach-imam-foad-farahi-for-refusing-to-be-an-informant/>.

⁴⁰ *Informant: NYPD paid me to “bait” Muslims*, Oct. 23, 2012, http://www.cbsnews.com/8301-201_162-57538013/informant-nypd-paid-me-to-bait-muslims/.

⁴¹ *Id.*

⁴² *Documents Show NY Police Watched Devout Muslims*, WALL ST. J. (Sept. 6, 2011, 6:32 PM), <http://online.wsj.com/article/APfd1a04fa820c44bd820aae6bc75d33e3.html>; *see also* Joe Coscarelli, *NYPD Even Spied on the Muslim Leaders Who Were Helping Them*, N.Y. Mag. (Oct. 6, 2011, 10:36 AM), http://nymag.com/daily/intel/2011/10/nypd_even_spied_on_the_muslim.html (reporting imam welcomed NYPD officers into his mosque and attended meetings with Mayor Bloomberg and Commissioner Kelly, while at same time he was target of NYPD surveillance).

⁴³ *Id.* (emphasis added).

⁴⁴ *Id.*

⁴⁵ For example, in 2005, a British businessman was convicted of providing material support to terrorists after law enforcement officials—acting as both the buyer and seller—reportedly caught him “brokering the sale of a surface-to-air missile.” *See* Petra Bartosiewicz, *To Catch a Terrorist: The FBI Hunts for the Enemy Within*, Harper’s Mag., Aug. 2011. The informant involved in this sting operation had previously incriminated an

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telling case study involves a convicted felon, Craig Monteilh, who was paid by the FBI to fake his conversion to Islam in order to infiltrate mosques and instigate terror plots among the Los Angeles Muslim communities.⁴⁶ Ironically, the informant's tactics were so aggressive that targeted Muslims actually reported *him* to the FBI as a potential terrorist.⁴⁷ Unbeknownst to the community leaders, the suspected terrorist was in fact an informant tasked with creating a fake terrorist plot.⁴⁸ Discovery of his real identity, along with other informants across the country, put into serious question the intentions of law enforcement in counterterrorism operations. Some in the Muslim, Arab, and South Asian communities reasonably suspected the government was more concerned with scoring political points by bolstering terrorism statistics than protecting public safety.⁴⁹

Likewise, in a case sensationally coined “the Albany missile plot,” the FBI targeted two Muslims at a local mosque using a paid informant.⁵⁰ The targets, Yassin Aref and Mohammed Hossain, were “well-known members of the [local] community . . . with no prior criminal record and no history of violence.”⁵¹ The FBI's investigation began shortly after 9/11, when one of the mosque's founders was seen “celebrating the 9/11 attacks in the streets.”⁵² That individual was never charged with a crime and was eventually deported.⁵³ However, surveillance of the mosque continued, culminating in an eight-month sting operation.⁵⁴ In that operation, government informant Shahed Hussain led a fictitious money-laundering plot involving the sale of a shoulder-fired missile provided by the FBI.⁵⁵ Shahed Hussein was the same informant used in the Newburgh Four case—another sting operation where the government's informant played a leading role in the fake terrorist plot.⁵⁶

innocent man during a DEA drug sting. *Id.* In an alleged 2007 plot involving destruction of fuel tanks at JFK Airport, the informant was a former drug dealer busted for possessing \$2 million in cocaine and conspiring to murder a rival dealer. *Id.*

⁴⁶ See, e.g., Shan Li, *FBI Violated 1st Amendment Rights of Muslims, Suit Alleges*, L.A. TIMES (Feb. 24, 2011), <http://www.latimes.com/news/local/la-me-fbi-muslims-20110224,0,2886967.story>; Jerry Markon, *Mosque Infiltration Feeds Muslims' Distrust of FBI*, Wash. Post, Dec. 5, 2010; Paul Harris, *The ex-FBI informant with a change of heart: 'There is no real hunt. It's fixed.'* THE GUARDIAN (Mar. 20, 2012).

⁴⁷ Jerry Markon, *Mosque Infiltration Feeds Muslims' Distrust of FBI*, Wash. Post, Dec. 5, 2010 (“Muslims were so alarmed by [an informant's] talk of violent jihad that they obtained a restraining order against him.”).

⁴⁸ *Id.*

⁴⁹ See, e.g., David Bario, *By Any Means Necessary*, AM. LAW. (Oct. 1, 2008), <http://www.law.com/jsp/tal/PubArticleTAL.jsp?id=1196279828736> (stating that the federal government's 2003 guidelines for prosecuting terrorism “encouraged strategic over-inclusiveness in charging terrorism suspects,” causing prosecutors to “throw the kitchen sink at suspects to get them off the streets before they could act”).

⁵⁰ See Petra Bartosiewicz, *To Catch a Terrorist: The FBI Hunts for the Enemy Within*, Harper's Mag., Aug. 2011.

⁵¹ *Id.*

⁵² *Id.* (internal quotation marks omitted).

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ Paul Grondahl, *Suspicion, Acceptance in Wake of Terror Trial*, TIMES UNION (Albany), Oct. 12, 2006, at B1, available at <http://albarchive.merlinone.net/mweb/wmsql.wm.request?oneimage&imageid=6362940>.

⁵⁶ Ctr. for Human Rights & Global Justice, *N.Y. Univ. Sch. of Law, Targeted and Entrapped: Manufacturing the "Homegrown Threat" in the United States* 22 & 64 (2011), available at <http://www.chrgj.org/projects/docs/targetedandentrapped.pdf>.

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After befriending Mohammed Hossain, apparently to induce him into a fictitious plot, the informant offered him a loan for his struggling pizzeria.⁵⁷ The informant disclosed to Hossain that the loan had come from the sale of a missile to a terrorist group.⁵⁸ As soon as Hossain accepted the loan and asked Aref to witness it, they were both arrested on charges of conspiring to aid a terrorist group, providing support for a weapon of mass destruction, money-laundering, and supporting a foreign terrorist organization.⁵⁹

A federal court in Albany sentenced the two defendants to fifteen years in federal prison after they pleaded guilty, and the case “became one of the government’s most lauded victories in the fight against domestic terrorism—even though, by the government’s own acknowledgment, it involved no terrorists, no terrorism plot, and a missile provided by the FBI.”⁶⁰

And in Iowa, members of the small Muslim community in Des Moines were surprised to learn that Arvinder Singh, an Indian-born Sikh, was sent into their mosques to spy for the FBI.⁶¹ Singh stated that he felt “obliged” to obey the FBI after he was charged with selling more than the legal limit of Sudafed, an offense that Singh claims he committed unwillingly.⁶² But the FBI promised to expunge the offense from Singh’s record and to help him acquire American citizenship – an offer that Singh “desperately wanted.”⁶³ The FBI reportedly told Singh, “You look Middle Eastern, and we need your help for the war against terror.”⁶⁴ After assuming a Muslim identity, Singh frequented mosques throughout Iowa but attended four mosques in Iowa regularly for seven years, occasionally taping conversations with congregants.⁶⁵ Yet despite the FBI’s promise and his cooperation, Singh was arrested and placed into deportation proceedings when he tried to apply for citizenship.⁶⁶

In November 2011, the FBI effectively admitted to the NYPD’s misuse of informants to entrap vulnerable young Muslim men.⁶⁷ The NYPD had paid an informant to train and lead Muslim

⁵⁷ Ted Conover, *The Pathetic Newburgh Four*, SLATE MAG. (Nov. 23, 2010, 12:21 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2010/11/the_pathetic_newburgh_four.html (reporting allegations that Hussain offered \$250,000, a BMW, and other encouragement to induce the Newburgh Four—one of which suffered from paranoid schizophrenia and two of which had histories of drug offenses and minimum-wage jobs, but not anti-American sentiment—to pursue terrorist acts); Anjali Kamat & Jacquie Soohen, *Entrapment or Foiling Terror? FBI’s Reliance on Paid Informants Raises Questions About Validity of Terrorism Cases*, DEMOCRACYNOW.ORG (Oct. 6, 2010), http://www.democracynow.org/2010/10/6/entrapment_or_foiling_terror_fbis_reliance.

⁵⁸ Anjali Kamat & Jacquie Soohen, *Entrapment or Foiling Terror? FBI’s Reliance on Paid Informants Raises Questions About Validity of Terrorism Cases*, DemocracyNow.org (Oct. 6, 2010), available at http://www.democracynow.org/2010/10/6/entrapment_or_foiling_terror_fbis_reliance.

⁵⁹ *Id.*

⁶⁰ Petra Bartosiewicz, *To Catch a Terrorist: The FBI Hunts for the Enemy Within*, Harper’s Mag., Aug. 2011.

⁶¹ Kiran Khalid, *Iowa Muslim leader: Law enforcement betrayed us*, CNN (Feb. 3, 2012, 8:48 PM), <http://inamerica.blogs.cnn.com/2012/02/03/iowa-muslim-leader-law-enforcement-betrayed-us/>.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ See, e.g., William K. Rashbaum & Joseph Goldstein, *Informer’s Role in Terror Case Is Said to Have Deterred F.B.I.*, N.Y. TIMES, Nov. 22, 2011, at A1, available at <http://www.nytimes.com/2011/11/22/nyregion/for-jose>

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convert Joseph Pimentel, a drug user with suspected mental illness problems, to attempt a terrorist plot.⁶⁸ Absent the informant's infusion of funds and expertise, Pimentel had no money, no knowledge of how to create a bomb, and arguably little inclination to follow through on violent acts.⁶⁹ By declining to get involved in the investigation because agents "were concern[ed] that the informer might have played too active a role in helping Mr. Pimentel,"⁷⁰ the FBI confirmed one of the American Muslim communities' worst fears:⁷¹ law enforcement agencies are so desperate to show they are effectively countering terrorism that they poach on vulnerable Muslim targets.⁷² Skeptics of these entrapment allegations may interpret the FBI's decision not to participate in the Pimentel case as evidence that the FBI does not, in fact, engage in entrapment. However, when coupled with the aforementioned cases and others,⁷³ the Pimentel case offers compelling evidence that the misuse of informants is a real problem in counterterrorism—notwithstanding denials by the FBI and other law enforcement agencies.

To be sure, not all terrorism cases involving informants raise concerns of entrapment, religious and ethnic profiling, or politicized prosecutions.⁷⁴ But there are enough problematic cases to warrant more independent oversight of counterterrorism prosecutions. In the end, the government and the public, including Muslim communities, have a shared interest in directing limited law enforcement resources on real criminals rather than target vulnerable scapegoats.

pimentel-bomb-plot-suspect-an-online-trail.html?pagewanted=1&r=1 ("But it was the informer's role, and that of his police handlers, that have now been cited as among the reasons the F.B.I., which had its own parallel investigation of Mr. Pimentel, did not pursue the case . . .").

⁶⁸ *Id.*

⁶⁹ *Id.* ("The suspect had little money to speak of, was unable to pay his cellphone bill and scrounged for money to buy the drill bits that court papers said he required to make his pipe bombs. Initially, he had trouble drilling the small holes that needed to be made in the metal tubes.")

⁷⁰ *Id.*

⁷¹ MUSLIM ADVOCATES, LOSING LIBERTY: THE STATE OF FREEDOM 10 YEARS AFTER THE PATRIOT ACT 1, 4, 12 (2011), available at

http://www.muslimadvocates.org/Losing_Liberty_The_State_of_Freedom_10_Years_After_the_PATRIOT_Act.pdf; MPAC Sends Letter to FBI over Use of Informants, MUSLIM PUB. AFFAIRS COUNCIL (May 26, 2009),

http://disqus.com/forums/mpac/mpac_sends_letter_to_fbi_director_over_use_of_informants_muslim_public_affairs_council_34/trackback/.

⁷² See also Kristin Wright, *Family of Plot Suspect Says He Is Innocent*, MYFOXTAMPABAY.COM (Jan. 9, 2012, 8:37 PM), <http://www.myfoxtampabay.com/dpp/news/local/hillsborough/family-of-plot-suspect-says-he-is-innocent-01092012> (reporting on statements by the family of terror suspect Sami Osmakac that he could not have had the amount of cash he was suspected of providing to an FBI informant in order to purchase the supposed weapons).

⁷³ See Ctr. for Human Rights & Global Justice, *N.Y. Univ. Sch. of Law, Targeted and Entrapped: Manufacturing the "Homegrown Threat" in the United States* (2011).

⁷⁴ See, e.g., A.G. SULZBERGER and William Rashbaum, *Guilty Plead Made in Plot to Bomb New York Subway*, N.Y. Times, February 22, 2010, <http://www.nytimes.com/2010/02/23/nyregion/23terror.html>.

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C. Inaccurate and Biased Trainings on Muslims and Islam by Unqualified Individuals Threatens Public Safety, Produces Biased Policing, and Increases Exposure to Civil Rights Litigation

A professional police force is necessary for a safe, fair, and just society. Countries with corrupt and abusive law enforcement agencies often have in common an absence of professional, accurate, and neutral criminal justice training programs. Counterterrorism trainings are no exception. Thus, training our law enforcement officers with inaccurate, biased, and politicized information is a threat to public safety for all Americans. Indeed, misinformed officers risk making bad decisions that fail to prevent crime and invite costly civil rights litigation arising from biased policing.

Thus, our government has an obligation to taxpayers to reform counterterrorism training programs by implementing a rigorous and transparent process for selecting trainers and training materials based on peer-reviewed, professional standards. To the disservice of our law enforcement, unqualified and biased trainers have been hired to teach officers, first responders, and counterterrorism analysts about Muslims and Islam in the United States and abroad.⁷⁵ Based on training materials disclosed by the media, these trainings characterize Muslims and Islam as a necessarily violent and “terrorism-prone” identity. Our federal officers are left with a biased, skewed, and highly inaccurate set of information and skill sets with which they approach counterterrorism—all funded by our taxpayer dollars.

Excerpts and statements pulled from a variety of trainings demonstrate the depth and breadth of the inaccurate and biased information. For instance, the FBI has taught its agents that mainstream American Muslims “are likely to be terrorist sympathizers,” that the “Prophet Mohammed was a ‘cult leader,’” and that “the Islamic practice of giving charity is no more than a ‘funding mechanism for combat.’”⁷⁶ The popular, yet unqualified and biased, instructor Sam Kharoba has publicly stated his belief that the Prophet Muhammad was a “pedophile, a serial killer, a rapist” and that “[a]nyone who says that Islam is a religion of peace is either ignorant or flat out lying.”⁷⁷ He has instructed officers that the “best way to handle these people [Muslims] is . . . legal harassment.”⁷⁸

Complaints by training attendees and experienced public servants are telling. NPR obtained emails from FBI agents who attended a counterterrorism training session in April 2011.⁷⁹ Attendees complained that the “Prophet Muhammad was being portrayed as a warring military leader,” that the Qu’ran was actually “part of an epileptic fit,” and that a “true Muslim” must “support or take part in the killing of non-Muslims.”⁸⁰ Regarding the trainings in general, Army

⁷⁵ Dina Temple-Raston, *New Concern About Bias in Counterterror Training*, NPR (Mar. 9, 2011), <http://www.npr.org/2011/03/09/134374232/new-concern-about-bias-in-counterterror-training>.

⁷⁶ Spencer Ackerman, *FBI Teaches Agents: ‘Mainstream’ Muslims are ‘Violent, Radical’*, Wired (Sept. 14, 2011), <http://www.wired.com/dangerroom/2011/09/fbi-muslims-radical/>.

⁷⁷ Meg Stalcup & Joshua Craze, *How We Train Our Cops to Fear Islam*, Wash. Monthly (March/April 2011).

⁷⁸ *Id.*

⁷⁹ Dina Temple-Raston, *How Did Anti-Muslim Bias Seep Into FBI Training?*, NPR (Sept. 29, 2011), <http://www.npr.org/2011/09/29/140902739/units-autonomy-may-be-why-fbi-missed-bias>.

⁸⁰ *Id.*

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Lt. Col. Reid Sawyer, a career intelligence officer who runs the Combating Terrorism Center in West Point, explained that these courses are taught by “a lot of individuals who are not academically qualified to be instructing in these venues, and more importantly, they are speaking with authority, which empowers the audience with knowledge that is not necessarily accurate.”⁸¹ He argues that these trainings stereotype Muslims to the detriment of officials’ counterterrorism efforts.⁸² In Columbus, Ohio, the deputy chief of the city’s division of police and head of the department’s Homeland Security Division canceled a two-day training after the first day because, in his words, “the information being relayed was not accurate. They made some very blanket statements about who might be involved in terrorist activity. These individuals tried to make the other officers attending the class believe it was a very simple profile to follow, and in reality it is not.”⁸³

Objective analysis of these trainings confirms these critiques. Sam Rascoff, former head of intelligence analysis with the NYPD and now a law professor at New York University, has stated, “That’s not the kind of information that is going to make our cops or federal officials smarter about terrorism . . . That’s the sort of stuff that is going to paint the wrong sort of picture and cause them to go looking in the wrong places for the wrong sorts of things.”⁸⁴

Some government agencies recognize the critical need to hire vetted instructors and conduct well regarded trainings. The DHS Office of Civil Rights and Civil Liberties (CRCL), for example, cites the need to “[t]horoughly review the prospective trainer’s resume to ensure he or she has the subject matter expertise and subject-specific training experience [and c]ontact other agencies who have received training to get feedback, check with knowledgeable community leaders, and research media coverage.”⁸⁵ Notably, CRCL admonishes agencies not to “assume that because a trainer has a particular cultural background, or has law enforcement experience, that he or she is a qualified cultural competency trainer.” Instructors should be interviewed and written materials must be carefully reviewed by competent and knowledgeable persons.⁸⁶ And trainings must “use[] examples to demonstrate that terrorists and violent extremists vary in ethnicity, race, gender, and religion.”⁸⁷ By training our law enforcement officers to “focus on behavior, not appearance or membership in particular ethnic or religious communities,” we remove the undue scrutiny on American Muslim communities and thereby begin to foster positive relationships among those communities and law enforcement.

Consistent with standard good practice, all counterterrorism trainers and training materials must be vetted through a transparent and professionalized process wherein individuals with the requisite educational and professional qualifications are selected to train those tasked with the

⁸¹ Dina Temple-Raston, *New Concern About Bias in Counterterror Training*, NPR (Mar. 9, 2011), <http://www.npr.org/2011/03/09/134374232/new-concern-about-bias-in-counterterror-training>.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ Office of Civil Rights and Civil Liberties, *Countering Violent Extremism (CVE) Training Guidance & Best Practices* (Oct. 2011).

⁸⁶ *Id.*

⁸⁷ *Id.*

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important task of protecting us from danger. Names of trainers, their resumes, and their fees should also publicly disclosed in furtherance of transparent good governance.

III. Government engagement efforts should be “de-securitized” to holistically focus on the host of social, economic, and political factors that affect the vitality of Arab and Muslim communities.

Like all other communities in the United States, Muslim and Arab communities are largely comprised of law abiding individuals who work, study, worship, and seek a healthy and prosperous life for their families.⁸⁸ They have the same concerns as their compatriots – economic security, public safety, high quality education, freedom from discrimination, and access to affordable health care. The vast majority have no interaction with terrorists or terrorism such that it is no more relevant to their lives than it is to the lives of any other American. And yet, most federal engagement programs focus primarily on national security issues thereby “securitizing” their relationship with Muslim communities.⁸⁹ This signals to the public that Muslims warrant extra scrutiny, which leads to increased suspicion and discrimination by members of the public. Moreover, it makes engagement programs of little relevance to the vast majority of Muslims whose concerns reflect those of mainstream America.

Over fifty-five percent of Muslims in America immigrated to the United States over the past 30 years.⁹⁰ Some immigrated with the resources necessary to quickly adapt and succeed in their new country of residence and citizenship. Others came as refugees fleeing from war torn countries with little more than the clothes on their back.⁹¹ Similar to their counterparts in other immigrant communities, they face economic and social challenges that require assistance from others. In most cases, communities provide the needed support through charity and public service. But in other cases, families need state support for provision of basic needs such as food, childcare, shelter, health care, skills training, and English language classes.

Accordingly, engagement programs aimed at addressing the needs and concerns of Muslim communities should focus on social services most relevant to the particular communities in that

⁸⁸ Gallup Report, “Muslim Americans: A National Portrait,” 2009, Gallup, available online at <http://www.gallup.com/strategicconsulting/153572/REPORT-Muslim-Americans-National-Portrait.aspx>, accessed on 6 November 2012.

⁸⁹ Department of Homeland Security, Community Engagement, <http://www.dhs.gov/community-engagement>; Federal Bureau of Investigation, Enhanced Engagement with Arab and Muslim American Communities, <http://www.fbi.gov/minneapolis/news-and-outreach/outreach/enhanced-engagement-with-arab-and-muslim-american-communities>.

⁹⁰ A majority of the foreign-born arrived in the U.S. in the 1990s (33%) or in this decade (28%). An additional 23% came during the 1980s, while just 16% came earlier than that. Pew Research Center, *Muslim Americans: Middle Class and Mostly Mainstream* (May 22, 2012), available at <http://pewresearch.org/assets/pdf/muslim-americans.pdf>.

⁹¹ As of 2011, Somalis comprise 5.6% of total admitted refugees and Iraqis make up 17%: See Daniel C. Martin and James E. Yankay, “Refugees and Asylees:2011,” *DHS Annual Flow Report*, (May 2012), http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_rfa_fr_2011.pdf.

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locale.⁹² Educating communities about their civil rights and liberties is also of critical importance as they may face discrimination on account of their religion, ethnicity, race, accents, skin color, and other immutable characteristics. Unaddressed discrimination may lead to political marginalization and social isolation from mainstream society, truancy among youth, mental health problems, and other adverse consequences.⁹³ To the extent terrorist recruiters, or in some cases government informants, prey on vulnerable young men with untreated mental health illnesses or an unstable family life, a holistic approach in engagement efforts is vital.

It is beyond the scope of my testimony to address the myriad issues of interest to the diverse Muslim and Arab communities. This deserves an in-depth conversation between the government and the communities.

For our purposes today, the following are some key structural issues that I believe are essential to adopting an effectively holistic approach to engagement:

- **Community members should take the lead in setting the meeting agenda** – Often times government employees manage the engagement process, including setting the agenda for meetings and selecting the community attendees. Community policing studies in the 1990s have found that meetings dominated by law enforcement undermine the effectiveness of the process and marginalize community concerns.⁹⁴ Thus, Arab and Muslim communities should be equal partners in shaping the agenda, format, and attendee list.
- **Without support from the highest political leaders at the local, state, and federal levels, engagement is doomed to become a check-the-box exercise in public relations** – Meaningfully addressing community concerns expressed in engagement meetings sometimes require changes in policies and practices, depending on a variety of factors. Without support from the highest political leaders, policies and practices will not change because government representatives involved at the operational level of community engagement are usually entry level civil servants lacking the political power to make necessary changes in government actions and policies.⁹⁵ Unless they have the attention and support of their top political leadership, engagement meetings will deteriorate into venting sessions of little import to the communities.
- **Representatives from social services should be integrated as regular participants in the engagement process** – Studies of community policing in the 1990s show that cross-agency coordination is vital for addressing social and economic problems that

⁹² Aisha Peña, *Protecting Muslim Civil and Human Rights in America: The Role of Islamic, National, and International Organizations*, 27 J. Mus. Min. Affairs 387 (2007).

⁹³ PEW RESEARCH CENTER, *Muslim Americans: Middle Class and Mostly Mainstream* 36 (May 22, 2007), <http://pewresearch.org/assets/pdf/muslim-americans.pdf>; DISCRIMINATION RESEARCH CENTER, *Names Make a Difference: The Screening of Resumes by Temporary Employment Agencies in California* (Oct. 2004).

⁹⁴ See generally Wesley G. Skogan & Susan M. Hartnett, *COMMUNITY POLICING, CHICAGO STYLE* (1999).

⁹⁵ *Id.*

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contribute towards crime.⁹⁶ Thus, representatives from each respective agency should be regular participants in engagement meetings such that they can build relationships with different community leaders to proactively address issues.

- **Include Muslim and Arab community representatives in stakeholder meetings with other communities that address issues affecting members of Muslim communities.** - Special meetings for Muslims or Arabs on topics that are of concern to other communities are a waste of resources and can counterproductively cause backlash against these communities for misperceptions of special treatment. In some cases such as civil rights violations, their experiences are unique to their communities because of the troubling uptick of anti-Muslim bias in mainstream America.⁹⁷ For example, other religious communities do not appear to be facing the same level of vandalization of their houses of worship, physical attacks on women wearing markers of religiosity such as a headscarf, or unabashed slandering of Muslims en masse by ambitious political candidates.⁹⁸ But on most issues, Muslims and Arabs have much in common with other communities with which the government is engaging, and thus should be included in those meetings.

An exclusive interest in national security and counterterrorism for engaging with the community evinces the primacy of the government's prosecutorial motives over any purported civil rights objectives. Muslim and Arab communities are no different than other diverse communities. They are law abiding people who work hard to provide the healthy and prosperous lives for their families free of injustice, hardship, and discrimination. Engagement efforts that fail to reflect that reality are flawed by design.

IV. Government engagement programs must be subject to citizen and Congressional oversight to ensure stated objectives are in fact met and government resources are not wasted.

Beyond aspirational statements laying out broad principles, little information is available about the efficacy of the various, and seemingly disjointed, federal engagement efforts.⁹⁹ Indeed, one is

⁹⁶ *Id.*

⁹⁷ See, e.g., Steven Greenhouse, *Muslims Report Rising Discrimination at Work*, N.Y. TIMES, September 23, 2010, available at <http://www.nytimes.com/2010/09/24/business/24muslim.html>; Muslim Advocates, *Losing Liberty – The State of Freedom 10 Years After the Patriot Act* (October 2011).

⁹⁸ See, e.g., Sahar F. Aziz, *Sticks and Stones, The Words That Hurt: Entrenched Stereotypes Eight Years After 9/11*, 13 N.Y. CITY L. REV. 33, 43-48 (2009).; Sahar F. Aziz, *From the Oppressed to the Terrorist: American Muslim Women Caught in the Crosshairs of Intersectionality*, 9 HASTINGS R. & POV. LAW J. 1 (2012); American Civil Liberties Union, *Map - Nationwide Anti-Mosque Activity*, available at <http://www.aclu.org/map-nationwide-anti-mosque-activity>; Pew Forum on Religion & Public Life, *Controversies Over Mosques and Islamic Centers Across the U.S.*, September 24, 2010, available at <http://features.pewforum.org/muslim/controversies-overmosque-and-islamic-centers-across-the-us.html>.

⁹⁹ See, e.g., The White House, *Empowering Local Partners to Prevent Violent Extremism in the United States*, August 2011, available at <http://www.whitehouse.gov/the-press-office/2011/08/03/empowering-local-partnersprevent-violent-extremism-united-states>; *Testimony of Secretary of Homeland Security Janet Napolitano before the Committee on Homeland Security and Government Affairs*, September 19, 2012, <http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=9&cad=rja&ved=0CFUQFjAI&url=http>

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hard pressed to find concrete evidence of a coherent implementation plan across the government that minimizes redundancy, adheres to proclaimed presidential strategies, and provides metrics for which engagement efforts can be objectively evaluated.¹⁰⁰

While there is some inter-agency coordination, engagement is dispersed among agencies in a hodgepodge of seemingly uncoordinated programs. As a result, the U.S Department of Justice Civil Rights Division and the Equal Employment Opportunity Commission's notable progress on civil rights is undermined by discoveries that the Federal Bureau of Investigation and Immigration and Customs Enforcement exploits the engagement process in furtherance of adversarial investigative objectives. Similarly, the U.S Department of Homeland Security Office for Civil Rights and Civil Liberties' outreach efforts result in minimal policy changes because the jurisdiction lies within other agencies that have little incentive to cooperate with CRCL's engagement efforts. Further complicating matters, local and state agencies conduct their own outreach efforts, often funded by federal grants, without coordinating with federal agencies. This leaves Muslim and Arab communities frustrated with the lack of coordination, double speak among agencies, and unfulfilled promises.

Nor is detailed budgetary information available describing how and where money is spent on engagement within each federal agency. Preliminary research shows that funding for countering violent extremism programs (another term for federal engagement) are included under the State and Local grants title under Federal Emergency Management Agency (FEMA).¹⁰¹ According to DHS, state and local grants are offered to "sustain federal funding for state and local preparedness grants totaling over \$3.8 billion, highlighting the Department's commitment to moving resources out of Washington, D.C. and into the hands of state and local first responders who are often best positioned to detect and respond to terrorism, other threats, and natural disasters."¹⁰²

In FY 2010, FEMA awarded more than \$3.8 billion in grants, including approximately \$615.5 million to protect the Nation's ports, rail, and mass transit systems; trucking industry; intercity bus systems; and other critical infrastructure from acts of terrorism.¹⁰³ DHS's budget report states "the Homeland Security Advisory Council's Countering Violent Extremism Working Group, comprised of chiefs of police, sheriffs, community leaders and homeland security experts,

http://www.hsgac.senate.gov/download%2F%3Fid%3D03d503e5-6631-4983-b82e-a80c5016373b&ei=PhGXUMDNDoF49QSzpoDgCg&usg=AFQjCNHrWq6j1x0r_tUGYea9-l7yZAfdMw&sig2=UqszzJrK9mKfD8H5kA4KVg; *Protecting the Civil Rights of American Muslims: Hearing Before the U.S. Senate Judiciary Committee, U.S. Senate Judiciary Committee, 112th Congress (March 29, 2011)* (statement of Thomas Perez, Ass't Attorney General for Civil Rights).

¹⁰⁰Although The White House Implementation Plan for Empowering Local Partners to Prevent Violent Extremism in the United States purports to set out an executive level plan, this initiative does not appear to have become operational on a nationwide basis. <http://www.whitehouse.gov/sites/default/files/sip-final.pdf>

¹⁰¹ Department of Homeland Security, FY 2012 Budget in Brief, January 27, 2011 available at <http://www.dhs.gov/xlibrary/assets/budget-bib-fy2012.pdf>.

¹⁰² *Id.* at 10.

¹⁰³ According to DHS reports, FEMA awarded, among other grants, 56 State Homeland Security grants totaling \$852 million; 64 UASI grants totaling \$832.5 million; 270 UASI nonprofit grants totaling \$19 million; 57 Emergency Management Performance grants totaling \$338.4 million; 56 Interoperable Emergency Communication grants totaling \$148 million. *Id.* at 133.

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issued a series of recommendations on ways DHS can better support community-based efforts to counter violent extremism domestically – focusing on the issues of training, information sharing, and the adoption of community oriented law enforcement approaches to this issue.” But the report does not specify how much of DHS funding goes toward community outreach and engagement. The same opacity exists with DOJ, CRCL, EEOC and other federal agencies participating in engagement programs.

As proven by studies of community policing in the 1990s, for government outreach to communities to be effective and sustainable it must be subjected to oversight by citizens and independent bodies.¹⁰⁴ No such mechanisms currently exist for federal engagement. This oversight could be conducted by this Commission on Civil Rights or the Privacy and Civil Liberties Oversight Board once all of its members are appointed and confirmed. In the alternative, a decentralized oversight system may be put in place that operates at the local level where communities can play a more direct role. Whatever model is developed, which should be a product of collaboration between communities and government, there must be transparent monetary and programmatic oversight of engagement.

The stakes are too high and federal resources are too limited. It is time to transition federal engagement from a set of ad-hoc, opaque meetings into a transparent, coherent, and accountable system whose objectives can be evaluated.

V. Recommendations for the Commission

Based on the fore-mentioned analysis, I propose the following structural reforms to government engagement with Muslim and Arab communities in the United States.

- 1. Community representatives at federal engagement meetings should encompass the rich diversity of the Arab and Muslim American communities, including but not limited to, ethnicity, socio-economic background, youth, women, political viewpoint, and race.**
 - a. Females should constitute fifty percent of the community attendees
 - b. Youth should be adequately represented in engagement meetings
 - c. African American Muslims should be adequately represented
 - d. Community leaders should not be limited only to regular mosque goers
 - e. Proportionate representation between Arabs and South Asians, and within Arab and South Asian communities, prevents counterproductive competition for attention and government resources

¹⁰⁴ See, e.g., Wesley G. Skogan, COMMUNITY POLICING: CAN IT WORK? (2003); Wesley G. Skogan & Susan M. Hartnett, COMMUNITY POLICING, CHICAGO STYLE (1999); see also Sahar F. Aziz, *Who's Policing Whom? Community Policing in Counterterrorism* (forthcoming 2013).

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- f. Invite persons that exemplify the different experiences of newer immigrants as well as second or third generation American Muslims
 - g. Avoid excluding individuals with contrarian or dissenting viewpoints
 - h. Verify representational capacity of community leaders
 - i. Require disclosure of conflicts of interests
- 2. The government should not use community engagement meetings in furtherance of national security surveillance, investigative and prosecutorial objectives, but rather to develop trust and robust relations with constituents towards the shared goal of protecting individual rights and public safety for all Americans**
 - 3. Increase independent oversight of use of informants in counterterrorism**
 - 4. Counterterrorism trainers and training materials should be vetted through a transparent and professional process wherein individuals with the requisite educational and professional qualifications are selected to train those tasked with the important task of protecting us from danger**
 - 5. Government engagement efforts should be "de-securitized" to holistically focus on the host of social, economic, and political factors that affect the vitality of Arab and Muslim communities**
 - 6. There must be a serious commitment from the top political levels to reform policies necessary to protect civil rights and civil liberties**
 - 7. Community members should take the lead in setting the engagement agenda**
 - 8. Representatives from social services must be integrated as regular participants in the engagement process**
 - 9. Include Muslim and Arab community representatives in stakeholder meetings with other communities that address issues of common concern**
 - 10. Government engagement programs should be subject to citizen and Congressional oversight to ensure stated objectives are in fact met and government resources are not wasted**