

America's Challenge:

Domestic Security, Civil Liberties, and National Unity After September 11



Muzaffar A. Chishti
Doris Meissner
Demetrios G. Papademetriou
Jay Peterzell
Michael J. Wishnie
Stephen W. Yale-Loehr

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AUTHORS

Muzaffer A. Chishti
Doris Meissner
Demetrios G. Papademetriou
Jay Peterzell
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Stephen W. Yale-Loehr

*MPI gratefully acknowledges the assistance of
Cleary, Gottlieb, Steen & Hamilton in the preparation of this report.*

Migration Policy Institute

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Migration Policy Institute
1400 16th Street, NW, Suite 300
Washington, DC 20036 USA
www.migrationpolicy.org

Tel: 202-266-1940
Fax: 202-266-1900

Printed in the United States of America

Interior design by Creative Media Group of Corporate Press. Text set in Adobe Caslon Regular.

“The very qualities that bring immigrants and refugees to this country in the thousands every day, made us vulnerable to the attack of September 11, but those are also the qualities that will make us victorious and unvanquished in the end.”

U.S. Solicitor General Theodore Olson

Speech to the Federalist Society, Nov. 16, 2001.

Mr. Olson's wife Barbara was one of the airplane passengers murdered on September 11.

Foreword

The intersection of civil liberties, national security and immigration policy is an area of special concern for the Migration Policy Institute (MPI). The ability to understand and untangle these forces is critical to our identity as a nation. Understanding the vitality of immigrant communities and engaging these communities in combating terrorism is necessary both to resolve contradictions between security and liberty and to strengthen fundamental principles of justice.

This report illustrates MPI's commitment to generating informed and thought-provoking proposals that support sound immigration policy. The report's findings and recommendations point the way toward answers to some of the most difficult challenges facing the United States today. They also reveal the promise and the strength of the country's diversity and the fundamental values that have evolved through the experience of this nation of immigrants.

Led by two of MPI's most senior staff, an experienced team of authors has drawn on the public record as well as a unique set of interviews with immigrant leaders and communities most directly affected by post-September 11 domestic security measures. The report describes and evaluates the impact of government policies on the country's vulnerability to terrorism, on civil liberties—especially as experienced by Arab- and Muslim-Americans—and on the sense of national unity that has long been one of the United States' great strengths. The authors had the benefit of advice from a distinguished panel of experts, as well as invaluable pro bono research from one of the country's most respected law firms. This report thus brings together an unprecedented body of original research and expert analysis to support policy recommendations in which security and civil liberties are complementary rather than competitive.

The Migration Policy Institute (MPI) is an independent, non-partisan, non-profit think-tank dedicated to the study of the movement of people worldwide. The Institute provides analysis grounded in research and practical experience, develops policy proposals and offers evaluation of migration and refugee policies and programs at the local, national, and international levels. It aims to meet the rising demand for pragmatic responses to the challenges and opportunities that large-scale migration, whether voluntary or forced, presents to communities and institutions in an increasingly integrated world.

The importance of thoughtful migration policymaking has increased exponentially in recent years as states have been compelled to balance their interests in economic growth, humanitarian response, national security, and social cohesion in the face of sweeping demographic change. This report aims to enlarge the range of options that governments and societies may consider in pursuit of policies that simultaneously strengthen their nations' cohesion, security and liberty.

Kathleen Newland and Demetrios G. Papademetriou

Co-Directors, Migration Policy Institute

Acknowledgments

The creation of this report has truly been a team effort. Many institutions and individuals have contributed to an undertaking that lasted over 18 months. September 11, 2001, and the events that followed, profoundly touched the lives of many of us. The need to respond in some tangible way was perhaps partly responsible for the generosity and willingness with which many offered to work on the report. They deserve our deepest gratitude.

This report would not have been possible without the extraordinary support that the Migration Policy Institute (MPI) received from the law firm of Cleary, Gottlieb, Steen & Hamilton. The firm contributed its resources and thousands of hours of time of its associates, summer associates, paralegals, and partners over the last year. MPI and the authors are grateful to the firm particularly for its assistance with Chapters Two and Three, and its compilation of empirical data and statistical tabulations on detainees and other appendix materials. Although it is not possible to individually recognize each of the attorneys and staff who assisted with this report, we particularly thank Jeff Lewis, Evan Davis, Aslı Bâlı, Adam Barcan, Stephen Foundos, Sabra Gandhi, Michael Hanna, Anil Kalhan, Tal Kastner, Rupa Mitra, Katherine Mooney, Diana Moreno, Greg Tzeutschler, and Amélie von Briesen. We especially thank Aslı Bâlı for the sustained energy she brought to her role coordinating the work of the Cleary team.

Three other institutions made significant contributions to the report: Cornell Law School students Lauren Harris, Sarah Schuette, Rachana Trivedi and Cristina Velez prepared the initial draft of the chronology of post-September 11 actions and interviewed numerous lawyers to prepare summaries of people detained after September 11. Cornell Law School students Mary Mulhearn and Jonathan D. Rosenblatt assisted in finalizing the detainee summaries. Rebecca Miller and Sandeep Solanki, two students from the Immigrants Rights Clinic at New York University School of Law, also interviewed detainees and lawyers. Sameer Ashar supervised their work. Mehdi Bozorgmehr and Anny Bakalian of the Middle East and Middle Eastern American Center of the City University of New York provided valuable insight and guidance in the development of Chapter Three.

Although the authors are responsible for the overall report, individual chapters were penned by different people; thus the different styles in which the chapters are written. Chapter One was principally written by Jay Peterzell; Chapter Two by Michael Wishnie, with the assistance of the Cleary team; Chapter Three by Muzaffar Chishti and Stephen Yale-Loehr, with the assistance of the Cleary team; and Chapter Four by Doris Meissner. Demetrios Papademetriou contributed to all the parts. Finally, Paul Sherer's astute and masterful editing of an often unwieldy manuscript provided the final important touches to the entire effort.

At MPI, various colleagues assisted in the many tasks that go into a report of this size. We especially thank Kathleen Newland, Alex Aleinikoff, Kim Hamilton, Amy Mehringer, Jon Pattee and Adam Mugavero for their comments and contributions.

We gratefully acknowledge the generosity of the Ford Foundation, the Open Society Institute, the Carnegie Corporation of New York, and the Charles Evans Hughes Memorial Foundation for funding this project.

The members of our Advisory Panel deserve special gratitude. They were patient and understanding with the long drafts they reviewed. Their ideas, debates, and judgments contributed significantly to our analysis and recommendations. However, final responsibility for the content and conclusions herein rests with the authors alone and does not reflect the positions of the other individuals or organizations that participated in the report's preparation.

Advisory Panel Members*

Ishmael Ahmed

*Executive Director
Arab Community Center for
Economic and Social Services
(ACCESS), Dearborn, Michigan*

Vincent Cannistraro

*Consultant on International
Security Affairs
Former Senior Intelligence Officer,
Head of Counterterrorism
Operations & Analysis,
Central Intelligence Agency (CIA)*

David Cole

*Professor of Law
Georgetown University Law Center*

Stephen E. Flynn

*Jeane J. Kirkpatrick Senior Fellow
in National Security Studies
Council on Foreign Relations,
Former Commander (ret.),
United States Coast Guard*

Nathan Glazer

*Professor Emeritus,
Graduate School of Education,
Harvard University
Co-editor, *The Public Interest**

Philip Heymann

*James Barr Ames Professor of Law,
Harvard University
Former Deputy Attorney General,
United States Department of Justice*

Charles Kamasaki

*Senior Vice President
National Council of La Raza*

Juliette Kayyem

*Executive Director,
Domestic Preparedness Project
Kennedy School of Government,
Harvard University
Former member, National
Commission on Terrorism*

Alan Kraut

*Professor of History &
President of the Immigration
and Ethnic History Society,
American University*

Charles William Maynes

*President, Eurasia Foundation
Former Assistant Secretary of State
for International Organizations
Affairs, United States
Department of State*

Doris Meissner

*Senior Fellow, Migration Policy
Institute (MPI) and panel chair
Former Commissioner,
United States Immigration
& Naturalization Service*

Demetrios Papademetriou

*Co-Founder and Co-Director,
Migration Policy Institute (MPI)*

Anthony Romero

*Executive Director
American Civil Liberties Union
(ACLU)*

Frank Sharry

*Executive Director
National Immigration Forum*

Mary Jo White

*Chair, Litigation Department
Debevoise & Plimpton
Former United States Attorney,
Southern District of New York*

James Ziglar

*Distinguished Visiting Professor
George Washington University
School of Law, Former Commissioner
United States Immigration &
Naturalization Service (INS)*

James Zogby

*President
Arab American Institute
Washington, D.C.*

* Members provided valuable advice and guidance for this project. The views presented in the report are those of the authors alone.

America's Challenge: Domestic Security, Civil Liberties, and National Unity After September 11

Summary

The U.S. government's harsh measures against immigrants since September 11 have failed to make us safer, have violated our fundamental civil liberties, and have undermined national unity.

The devastating attacks of September 11 demanded a wide-ranging response. The United States has responded with military action, as in Afghanistan; through intelligence operations to disrupt al Qaeda and arrest its members; and by re-organizing homeland security.

But our new security measures must be effective rather than merely dramatic, and must not destroy what we are trying to defend. The government's post-September 11 immigration measures have failed these tests.

These actions have not only done great harm to the nation; they have also been largely ineffective in their stated goal of improving our domestic security. Despite the government's heavy-handed immigration tactics, many of the September 11 terrorists would probably be admitted to the United States today.

Al Qaeda's hijackers were carefully chosen to avoid detection: all but two were educated young men from middle-class families with no criminal records and no known connection to terrorism. To apprehend such individuals before they attack requires a laser-like focus on the gathering, sharing, and analysis of intelligence, working hand-in-glove with well-targeted criminal and immigration law enforcement.

Instead, the government conducted roundups of individuals based on their national origin and religion. These roundups failed to locate terrorists, and damaged one of our great potential assets in the war on terrorism: the communities of Arab- and Muslim-Americans.

We believe it is possible both to defend our nation and to protect core American values and principles, but doing so requires a different approach. It is too easy to say that if we abandon our civil liberties the terrorists win. It is just as easy to say that without security there will be little room for liberty. What is hard is to take

both arguments with equal seriousness and to integrate them within a single framework. We set out to reach that important balance in this report.

As we worked on this project we became convinced that more than security and civil liberties—that is, the rights of individuals—are at stake. There is a third element: the character of the nation. Our humblest coin, the penny, bears the words *e pluribus unum*, or “from many, one.” The phrase goes to the heart of our identity as a nation and to the strength we derive from diversity. We strongly believe that fully embracing Muslim and Arab communities as part of the larger American society would not only serve this American value but help break the impasse between security and liberty, strengthening both.

Harsh Measures Against Immigrants Have Failed to Make Us Safer

Our 18-month-long review of post-September 11 immigration measures determined that:

- The U.S. government overemphasized the use of the immigration system;
- As an antiterrorism measure, immigration enforcement is of limited effectiveness; and
- Arresting a large number of noncitizens on grounds not related to domestic security only gives the nation a false sense of security.

In some cases, the administration simply used immigration law as a proxy for criminal law enforcement, circumventing constitutional safeguards. In others, the government seems to have acted out of political expediency, creating a false appearance of effectiveness without regard to the cost.

Our research indicates that the government's major successes in apprehending terrorists have not come from post-September 11 immigration initiatives but from other efforts such as international intelligence activities, law enforcement cooperation, and information provided by arrests made abroad. A few noncitizens detained through these immigration initiatives have been

characterized as terrorists, but the only charges brought against them were actually for routine immigration violations or ordinary crimes.

Many of the government's post-September 11 immigration actions have been poorly planned and have undermined their own objectives. For example, the goals of the special call-in registration program have been contradictory: gathering information about nonimmigrants present in the United States, and deporting those with immigration violations. Many nonimmigrants have rightly feared they will be detained or deported if they attempt to comply, so they have not registered.

Our research also found serious problems at the Federal Bureau of Investigation (FBI) that are hampering our nation's counterterrorism efforts and damaging other key national interests. The State Department has tried for 10 years to get access to FBI information to add to its terrorist watchlists; those discussions are still going on. Automating this process would help to overcome long delays in visa approvals that are damaging U.S. political and economic relations abroad. It would also allow agencies to focus on a more in-depth risk assessment of visa applicants who raise legitimate security concerns.

Finally, the Justice Department's efforts to enlist state and local law enforcement agencies into enforcing federal immigration law risks making our cities and towns more dangerous while hurting the effort to fight terrorism. Such action undercuts the trust that local law enforcement agencies have built with immigrant communities, making immigrants less likely to report crimes, come forward as witnesses, or provide intelligence information, out of fear that they or their families risk detention or deportation.

Government Immigration Actions Threaten Fundamental Civil Liberties

The U.S. government has imposed some immigration measures more commonly associated with totalitarian regimes. As this report details, there have been too many instances of long-time U.S. residents deprived of their liberty without due process of law, detained by the government and held without charge, denied effective access to legal counsel, or subjected to closed hearings. These actions violate bedrock principles of U.S. law and society.

Take the experience of Tarek Mohamed Fayad, an Egyptian dentist arrested in southern California on Sept. 13, 2001, for violating his student visa. During Fayad's first 10 days of incarceration he was not allowed to make any telephone calls. Thereafter, he was allowed sporadic "legal" calls and only a single "social" call per month. The "legal" call was placed by a Bureau of Prisons counselor either to a designated law office or to one of the organizations on the INS's list of organizations providing free legal services in the region. The privilege of making a call was deemed satisfied once the call was placed, regardless of whether the call was answered. Of the agencies on the list provided to Fayad, only one number was a working contact for an agency providing legal counseling to detainees and none of the organizations agreed to provide representation. In the meantime, Fayad's friends had hired an attorney for him, but the attorney was unable to determine his location for more than a month. Even after the attorney found out that Fayad was being detained at a federal facility in New York, the Bureau of Prisons continued to deny that Fayad was in custody.

Rather than relying on individualized suspicion or intelligence-driven criteria, the government has used national origin as a proxy for evidence of dangerousness. By targeting specific ethnic groups with its new measures, the government has violated another core principle of American justice: the Fifth Amendment guarantee of equal protection.

The government also conducted a determined effort to hide the identity, number and whereabouts of its detainees, violating the First Amendment's protection of the public's right to be informed about government actions. This right is at the heart of our democracy, and is crucial to maintaining government accountability to the public.

The government's post-September 11 actions follow a repeating pattern in American history of rounding up immigrant groups during national security crises, a history we review as part of this report. Like the internment of Japanese-Americans during World War II, the deportation of Eastern-European immigrants during the Red Scare of 1919–20, and the harassment and internment of German-Americans during World War I, these actions will come to be seen as a stain on America's heritage as a nation of immigrants and a land where individual rights are valued and protected.

Report Profiles 406 Detainees, Despite Government Secrecy

More than 1,200 people—the government has refused to say exactly how many, who they are, or what has happened to all of them—were detained after September 11. Despite the government’s determined efforts to shroud these actions in secrecy, as part of our research we were able to obtain information about 406 of these detainees. The appendix to this report contains summaries of each of these individuals, which we believe to be the most comprehensive survey conducted of the detainees. They reveal the following:

- Unlike the hijackers, the majority of noncitizens detained since September 11 had significant ties to the United States and roots in their communities. Of the detainees for whom relevant information was available, over 46 percent had been in the United States at least six years. Almost half had spouses, children, or other family relationships in the United States.
- Even in an immigration system known for its systemic problems, the post-September 11 detainees suffered exceptionally harsh treatment. Many were detained for weeks or months without charge or after a judge ordered them released. Of the detainees for whom such information was available, nearly 52 percent were subject to an “FBI hold,” keeping them detained after a judge released them or ordered them removed from the United States. More than 42 percent of detainees were denied the opportunity to post bond. Many of the detainees were subjected to solitary confinement, 24-hour lighting of cells, and physical abuse.
- Although detainees in theory had the legal right to secure counsel at their own expense and to contact family members and consular representatives, the government frequently denied them these rights, especially in the first weeks after September 11.
- Many of the detainees were incarcerated because of profiling by ordinary citizens, who called government agencies about neighbors, coworkers, and strangers based on their ethnicity, religion, name, or appearance. In Louisville, KY, the FBI and INS detained 27 Mauritians after an outpouring of tips from the public; these included a tip from a suspicious neighbor, who called the FBI when a

delivery service dropped off a box with Arabic writing on it.

In New York, a man studying airplane design at the New York Institute of Technology went to a Kinko’s store to make copies of airplane photos. An employee went into the wastebasket to get his information and then called the FBI; after nearly two months in detention, he accepted voluntary departure. Nearly 28 percent of the detainees were arrested because of a tip to the authorities by private citizens.

Most important, immigration arrests based upon tips, sweeps, and profiling have not resulted in any terrorism-related convictions against these detainees. Of the four detainees in our sample who had terrorism-related charges brought against them, all four were arrested based on traditional investigative techniques, not as the result of immigration enforcement initiatives. One has since been convicted and two have been acquitted; charges were dropped against the fourth individual, and he was deported.

Government Targeting of Arab- and Muslim-Americans Undermines National Unity

The government’s actions against Arabs and Muslims have terrified and alienated hard-working communities across the nation.

President Bush’s visit to a Washington mosque shortly after September 11 had a temporary positive impact on Arab- and Muslim-American communities. But the subsequent failure of government leaders to speak out on a sustained basis against discrimination, coupled with the Justice Department’s aggressive immigration initiatives, sent a message to individuals and companies that discrimination against Arabs and Muslims was acceptable, leaders of these communities said. These views emerged in a coast-to-coast series of interviews that the Migration Policy Institute conducted to gauge the impact of the crisis on Arab- and Muslim-Americans.

“September 11 has created an atmosphere which suggests that it is okay to be biased against Arab-Americans and Muslims,” said a regional director of an Arab-American civil rights organization.

The Justice Department’s decision to conduct closed immigration proceedings for many of the detainees only increased suspicion that Arab- and Muslim-Americans were being treated under a different standard of due

process. “The automatic association with terrorism is present in all these proceedings,” said a prominent Arab-American lawyer in Michigan.

There is a strong belief among Arab- and Muslim-Americans that these measures are ineffective in responding to threats of terrorism, but are being undertaken for political expediency or public relations at a huge price to their communities. “This is political smoke to make people feel good,” said the spokesman of a national Arab-American organization.

In a striking consensus, however, many leaders of the community have developed a positive reaction to law enforcement agencies since September 11, especially to local police. “The local police are our friends,” said the chief imam of a New York Islamic center, citing their constant presence to protect his mosque.

Discrimination in the workplace soared after September 11. So overwhelming was the number of complaints it received that the Equal Employment Opportunity Commission (EEOC) created a new category to track acts of discrimination against Middle Eastern, Muslim and South Asian workers after September 11. In the 15 months between Sept. 11, 2001, and Dec. 11, 2002, the EEOC received 705 such complaints. Many more went unreported. And to add insult to injury, some of those who were detained after September 11 have been fired by their employers as a result.

Yet the experience of Arabs and Muslims in America post-September 11 is more than a story of fear and victimization. It is, in many ways, an impressive story of a community that at first felt intimidated but has since started to assert its place in the American body politic. Naturalization applications from Arab and Muslim immigrants have jumped and voter registration has risen since September 11.

September 11 and its aftermath have ushered in what could be called the “Muslim moment:” a period of rising Muslim self-consciousness, new alliances outside their own communities, interfaith dialogue, and generational change. The sense of siege has strengthened some Muslim- and Arab-American political organizations and has led them to a greater focus on civil rights, social services, economic development, and engagement with government agencies. The notion of a distinct “American Muslim” identity has gained new currency. It is an identity that seeks to assert its independence from forces abroad, one that combines the essential elements of Islam and the values of U.S. constitutional democracy.

An Alternative Framework for Immigration Enforcement and Domestic Security—Defending Our Nation and its Core Values

America’s challenge is to meet new security demands while defending and strengthening the civil liberties and national unity that contribute to our great strength as a nation. The terrorist threat demands a reaction that is strong but also smart. The necessary measures may please neither civil libertarians nor those who believe civil liberties are a luxury we can no longer afford.

To meet this challenge, Congress must reassert leadership. Congress has accorded extraordinary deference to the executive branch since September 11. This may have been understandable immediately after the attacks. But in our constitutional system, it is now vital for Congress to assert its policy and oversight role, and to closely monitor the executive branch’s use of its expanded domestic security powers.

The primary domestic security responses to terrorism should be strengthened intelligence and analysis, compatible information systems and information-sharing, and vigorous law enforcement and investigations. Improved immigration controls and enforcement can support good antiterrorism enforcement, but they are not enough by themselves.

The broad framework that should guide the nexus between immigration policy and counterterrorism should center on four broad policy imperatives:

- **Mobilizing intelligence and information capabilities:** More than anything else, September 11 demonstrated the need to dramatically improve the nation’s intelligence capabilities. The immigration system captures voluminous amounts of data that can be important in “connecting the dots” about individuals under investigation. But for this to be effective, information from visa and immigration data systems must be fully linked to establish complete immigration histories of visitors and residents, and government agencies must greatly improve their information-sharing and their systems for maintaining watchlists.
- **Protecting the security of air, land and sea borders and beyond:** Border enforcement must permit vast numbers of legitimate crossings while identifying and stopping a very small, but potentially lethal, number of wrongdoers. This calls for new systems,

infrastructure, and policies rooted in risk management principles that identify reliable people and traffic, so that enforcement officials can concentrate on unknown and high-risk travelers that may constitute security threats.

- **Supporting vigorous law enforcement and law enforcement cooperation:** Strengthened enforcement of immigration laws can play an important role in combating terrorism. In specific cases, immigration violations and charges may be a method for identifying or developing criminal or terrorism-related charges, just as tax evasion has been used to thwart organized crime. But safeguards must also be established so that violations of immigration status requirements, for example, do not serve as a pretext for avoiding due process requirements.

Tools such as the use of classified information in terrorism prosecutions should be allowed only on a case-by-case basis and only with judicial authorization. Arrests and detentions for immigration violations should be subject to time limits that may be extended, but only in exceptional instances, case-by-case, and with a showing before and authorization from an immigration judge. And individuals detained for immigration violations, who do not now enjoy the right to government-appointed counsel because immigration proceedings are civil matters, should be granted that right when immigration charges result in detention.

- **Engaging Arab- and Muslim-American communities:** It is crucial for law enforcement to engage Arab- and Muslim-American communities as it works to identify terrorism-related conspiracies, recruitment, and financial networks. This requires cultivating new relationships and building trust. The government should also embrace these communities as bridges of understanding to societies and peoples around the world who are deeply alienated from the United States.

Immigration strategies grounded in this framework will make us safer and can be designed to respect civil liberties and uphold constitutional standards. They also recognize, strengthen and use the advantage Arab and Muslim immigrant communities offer the United States in advancing its long-term domestic and foreign policy interests.

Instead, by targeting and alienating these communities, immigration actions since September 11 have deepened

the perception abroad that America is anti-Muslim and that its principles are hypocritical. This strengthens the voices of radicals in their drive to recruit followers and expand influence, at the expense of moderates and others more sympathetic to Western philosophies and goals. Thus, in the name of buttressing security, current U.S. immigration policy may be making us *more* vulnerable to terrorism.

In the post-September 11 era, immigration policy must be part of a new security system in which the measures we take to protect ourselves also help us win the war for hearts and minds around the world.

Findings and Recommendations

They that can give up essential liberty to obtain a little temporary safety deserve neither liberty nor safety.

Benjamin Franklin

I. Findings

To combat terrorism since September 11, the U.S. government has relied to an excessive degree on its broad power to regulate immigration.

Although parts of the immigration system have been tightened to good effect, even under the best immigration controls most of the September 11 terrorists would still be admitted to the United States today. That is because they had no criminal records, no known terrorist connections, and had not been identified by intelligence methods for special scrutiny. The innovation al Qaeda introduced is “clean operatives” who can pass through immigration controls.

Immigration measures are an important tool in the domestic war against terrorism, but they are not effective by themselves in identifying terrorists of this new type. The immigration system can only set up gateways and tracking systems that: (1) exclude terrorists about whom the United States already has information; and/or (2) enable authorities to find “clean” operatives already in the country if new information is provided by intelligence agencies. The immigration and intelligence systems must work together for either to be effective.

To that end, the lead domestic security responses to terrorism should be strengthened intelligence and analysis, compatible information systems and information-sharing, and vigorous law enforcement and investigations. Improved immigration controls and enforcement are needed and can support good anti-terrorism enforcement, but they are not enough by themselves.

The government’s use of immigration law as a primary means of fighting terrorism has substantially diminished civil liberties and stigmatized Arab- and Muslim-American communities in this country. These

measures, which were primarily targeted at Muslims, have diminished the openness of U.S. society and eroded national unity.

Congress has accorded extraordinary deference to the executive branch. This may have been understandable immediately after September 11. But in our constitutional system, it is now vital for Congress to assert its policy and oversight role.

Despite the government’s refusal to provide information about the more than 1,200 noncitizens detained immediately after September 11, we were able to obtain information on 406 of them. We believe this to be the most comprehensive survey conducted of these detainees. The summaries, which are contained in the Appendix to this report, reveal the following:

- One-third of the detainees in our survey were from just two countries: Egypt and Pakistan. We found no rational basis for this disproportionate concentration.
- Of the detainees for which information about the total amount of time spent in the United States was available, over 46 percent had been in the United States at least six years. Of those for whom relevant information was available, almost half had spouses, children, or other family relationships in the United States. This suggests that the majority of noncitizens detained since September 11 had significant ties to the United States and roots in their communities, unlike the hijackers.
- We did not find any substantial evidence that government officials systematically used Middle Eastern appearance as the primary basis for apprehending these detainees. However, we found that many of the detainees were incarcerated because of profiling by ordinary citizens, who called government agencies about neighbors, coworkers and strangers based on their ethnicity or appearance. We also found that law enforcement agencies selectively followed up on such tips for persons of Arab or Muslim extraction. These findings are based on our

- review of these 406 cases and on interviews with community leaders, lawyers, and advocates who had contact with the detainees.
- Large numbers of detainees were held for long periods of time. Over half of the detainees for whom such information was available were detained for more than five weeks. Almost 9 percent were detained more than nine months before being released or repatriated.
 - Even in an immigration system known for its systemic problems, the post-September 11 detainees have suffered exceptionally harsh treatment. Many of these detainees had severe problems notifying or communicating with their family members and lawyers or arranging for representation at all. Many were held for extensive periods of time before they were charged on immigration violations. Many had exceptionally high bonds posted against them or were not allowed to post bond. Of the detainees for whom such information was available, approximately 52 percent were believed to be subject to an FBI hold, preventing their repatriation for weeks or months even after they were ordered removed from the United States and did not appeal.
 - Most importantly, from our research it appears that the government's major successes in apprehending terrorists have not come from post-September 11 detentions but from other efforts such as international intelligence initiatives, law enforcement cooperation, and information provided by arrests made abroad. A few noncitizens detained after September 11 have been characterized as terrorists, but the charges brought against them were actually for routine immigration violations or unrelated crimes.
 - We found that established due process protections have been seriously compromised:
 - Nearly 50 people have been held as material witnesses since September 11. The use of the material witness statute allowed the government to hold them for long periods without bringing charges against them. Many were held as high security inmates subjected to the harshest conditions of detention. The government's use of the material witness statute effectively resulted in preventive detention, which is not constitutionally permissible.
 - Over 600 immigration hearings were closed because the government designated the detainees to be of "special interest" to the government. Such hearings raise serious constitutional concerns and have been applied primarily to Muslim detainees.
 - Although detainees had the legal right to secure counsel at their own expense and to contact family members and consular representatives, the reality of the detentions frequently belied the government's assertions regarding these rights.
 - The government has selectively enforced immigration laws based on nationality since September 11. Though claiming to include other factors, the record is one of de facto national origin-based enforcement. In addition to arrest and detention policies, examples of nationality-based enforcement include:
 - *The voluntary interview program.*
This program greatly alarmed Arab- and Muslim-American communities. In some places, the FBI worked to establish good relations with the community and conducted the program in a non-threatening manner. Problems occurred, however, when poorly-trained police officials were tasked to implement the program. Moreover, the goals of the program (investigating the September 11 terrorist attacks, intimidating potential terrorists, recruiting informants, and enforcing immigration violations) were contradictory. The immigration enforcement focus and public fanfare that surrounded the program worked against its potential for intelligence gathering.
 - *The absconder initiative.*
As a general immigration enforcement measure, the absconder apprehension initiative is legitimate and important. However, after September 11 the government changed the character of the program to make it nationality-specific. This has marginal security benefits, while further equating national origin with dangerousness. Although stepped-up absconder apprehension efforts are eventually to encompass all nationalities, this has not happened so far.
 - *Special registration.*
The "call-in" special registration program (part of the National Security Entry-Exit

Registration System (NSEERS)) has been poorly planned and has not achieved its objectives. Its goals have been contradictory: gathering information about non-immigrants present in the United States, and deporting those with immigration violations. Many nonimmigrants have rightly feared they will be detained or deported if they attempt to comply, so they have not registered. Moreover, any potential security benefits of registering people inside the United States will fade over time as new non-immigrants are required to register at the border.

- Another critical civil liberties concern is the administration's assertion that local police officials have inherent authority to enforce federal immigration statutes and enter information about civil immigration violations into the National Crime Information Center (NCIC) database. We found no clear statutory authority to allow immigration information to be stored in NCIC. Such measures undercut the trust that local law enforcement agencies have built and need with immigrant communities to fight terrorism and other crimes.
- Arabs and Muslims in America feel under siege, isolated, and stigmatized. They believe they have been victimized twice: once by the terrorists and a second time by the reaction to that terrorism.

The President's visit to a Washington, D.C. mosque shortly after September 11 had a profound positive impact on Arab- and Muslim-American communities. Community and religious leaders all emphasized the symbolic importance of such actions and a critical need for senior government officials to deliver sustained messages of inclusiveness, tolerance, and the value of diversity.

Hate crimes against Muslims soared after September 11, rising more than 1,500 percent. The number of violent hate crimes has since tapered off.

Employment discrimination against Muslim-Americans, Arab-Americans, and South Asians also increased dramatically. The federal Equal Employment Opportunity Commission (EEOC) received over 700 complaints concerning September 11-related employment discrimination in the first 15 months after the attacks. Community leaders believe many hate crimes and acts of employment discrimination have gone unreported. Government officials have spoken out only occasionally against such incidents.

Paradoxically, the sense of siege has also resulted in some communities starting to assert their civil and political rights and engage in the political process in new, classically American ways. And Arab- and Muslim-American organizations have started to react to the crisis of the attacks as a significant opportunity to strengthen their organizational structures, build new alliances, and increase their profile as advocates.

We also reviewed the historical record. In times of similar crisis in the past, U.S. immigration law has often been misused to selectively target noncitizens based on their nationality and/or ethnicity under the pretext of protecting domestic security. In most of these cases, the government failed to prove the existence of the alleged threat from within these communities, and the U.S. public has come to regret our government's actions. Targeting whole communities as disloyal or suspect has damaged the social fabric of our country as a nation of immigrants.

- Finally, we found an important international echo effect from domestic immigration policy. By targeting Muslim and Arab immigrants the U.S. government has deepened the perception abroad that the United States is anti-Muslim and that its democratic values and principles are hypocritical. This echo effect is undermining U.S. relationships with exactly the moderate, pro-Western nations and social groups whom we need in our fight against terrorism.

II. Recommendations

The issues examined in this report touch wide-ranging aspects of our national life. They span the distance from how we interact with one another individually to the policymaking role of Congress under the Constitution. They truly are "America's Challenge." To reflect this range, we have grouped our recommendations into six themes.

A. Congressional Oversight and Legislation

1. New executive branch powers, especially those provided by the USA Patriot Act, should be carefully monitored on an ongoing basis. Congress sensibly included sunset provisions in that legislation, recognizing that emergency measures passed to deal with the unprecedented threat presented by the rise of terrorism deserve ongoing evaluation, oversight, and reconsideration before becoming a permanent part of our legal tradition. This decision was particularly

appropriate given the amorphous and open-ended character of the terrorist threat and the uncertainty of the long-run costs and benefits of these measures. These sunset provisions in the USA PATRIOT Act should be retained, and Congress should use the oversight opportunities that they invite. Any new anti-terrorism legislation should include similar sunset provisions to ensure that such measures receive the ongoing reassessment and reevaluation that they deserve before becoming a permanent part of our law.

2. Congress has accorded extraordinary deference to the executive branch. This may have been understandable immediately after September 11. But in our constitutional system, it is vital for Congress to assert its policy and oversight role. Among the issues for review should be the USA PATRIOT Act's amendments to the Foreign Intelligence Surveillance Act (FISA) that allow surveillance where foreign intelligence is a "significant purpose" rather than "the purpose," as originally enacted. This does not enhance collection of information on foreign terrorists and raises the possibility that FISA will be used to gather evidence of ordinary crimes, which we believe is unconstitutional. The original language should be restored and language added making it clear that the law permits gathering evidence to prosecute specified foreign intelligence crimes.
3. Congressional committees should also assert their oversight role in evaluating how immigration law provisions have been used since September 11. For example, the government asserts that closed immigration hearings in which the person's name is kept secret are useful to recruit informants. Congress should evaluate the validity of this assertion, especially in light of the Supreme Court's recent decision not to hear a case on this issue. Even if determined to be useful, the practice is so counter to U.S. notions of justice that Congress should carefully consider whether it should be used at all. Congressional review should similarly include the government's practice of withholding information on the post-September 11 detainees, and the use of the material witness statute. Based on their assessment, the Intelligence committees should issue a report so that public debate is possible.
4. The Intelligence and Judiciary Committees should carefully examine the many issues raised by data-

mining, a technique that officials hope will identify terrorist suspects and networks among general populations. Does it work? How should officials handle the many false-positives that are produced? Will people identified this way be subject to further investigation based on previously unknown forms of reasonable suspicion? Will data-miners range over private sector as well as government information? Will they examine IRS or other confidential government files?

B. Information-Sharing and Analysis

1. Unifying and automating government watch lists must be completed on an urgent basis. As the CIA has done, the FBI should provide all relevant information for inclusion in TIPOFF, the State Department's terrorist watch list. Centralizing this information in TIPOFF will avoid long visa processing delays, which damage U.S. political and economic relations abroad.
2. To protect against violations of individual rights caused by mistaken or incomplete information, clear procedures for who is placed on and taken off watch lists should be developed. These procedures should be subject to public comment and review and should:
 - Establish explicit criteria for listing names;
 - Provide for regular review of names listed; and
 - Set out steps for assessing the quality of information that can result in listing or removing names.
3. The State Department, CIA, and FBI should devise mechanisms for doing in-depth risk-assessments of particular visa applicants who are of plausible security concern. To be effective, these must be based on narrower intelligence criteria than mere citizenship in a country where al Qaeda or other terrorist organizations have a presence.

C. Due Process and Immigration Procedure Issues

1. A disturbing trend exists in recent legislation to criminalize minor immigration violations. In addition, immigration violations are now being widely used as a basis for investigating more severe criminal violations. For these reasons, immigration detainees, who traditionally have not enjoyed the right to government-appointed counsel because

- immigration proceedings are considered civil matters, should be granted the right to such counsel.
2. Closed proceedings should be allowed only on a case-by-case basis. Arguments and evidence to close some or all of a hearing should be presented to a court for its approval. Similarly, classified information should be allowed only on a case-by-case basis.
 3. Prolonged detentions without charge pose the strongest threat to civil liberties. A charge should be brought within two days of detention unless there are extraordinary circumstances that require an additional period of initial detention. The case for extraordinary circumstances should be presented to an immigration judge. Pre-charge detentions beyond two days and FBI holds should be subject to judicial review.
 4. Detention is the most onerous power of the state, and should rarely be used as a preventive or investigative tool absent a charge. Bringing timely charges when evidence is available has no security cost. If the government requires additional time in extraordinary circumstances, an individual showing should be made to a judge.
 5. Those detained should be released on bond unless there is a clear flight risk. Immigration authorities should not have automatic authority to overrule an immigration judge's bond determination. If the government disagrees with a bond decision, it can appeal and obtain a stay while the decision is pending. The Attorney General's recent decision challenging immigration judges' discretion to grant bonds lends special urgency to address this issue.
 6. According to an "automatic stay" rule issued shortly after September 11, immigration authorities can automatically stay an immigration judge's decision to order a noncitizen's release from detention if the bond has been set at \$10,000 or higher. The rule should be rescinded. Immigration judges balance security, flight risk and right-to-release claims. If the government disagrees, the decision can be appealed.
 7. Individuals should be promptly released or repatriated after a final determination of their cases. The government should only be able to detain an individual for security reasons after a final removal order if a court approves the continued detention. The detainee should have full due process rights in such a proceeding.
 8. With the secrecy, erosion of rights, and fear surrounding immigration, it is more important than ever that immigration officials take special care to uphold the following policies:
 - Informed consent to waivers of the right to counsel should be guaranteed and should be in writing in the detainee's own language.
 - Those offering legal counseling or pastoral services should have access to detainees, as should consular officers for their nationals.
 - When detainees are transferred to locations away from their families or to places where access to counsel is limited, notice should be promptly provided.
 - INS detention standards should be upheld to prevent abusive conditions (solitary confinement, lack of appropriate and adequate food, 24-hour exposure to lights, physical abuse, the inability to engage in religious practices, and harassment), especially when the INS contracts with non-federal facilities. Investigations of alleged abuses should be prompt and thorough.
 9. The material witness statute should not be used to circumvent established criminal procedures. Any individual detained as a material witness should be entitled to the full procedural protections of the Fifth and Sixth Amendments, including due process and the immediate right to counsel.

D. Law Enforcement Programs

1. Revised FBI guidelines allow field offices to approve terrorism investigations. That authority should be returned to FBI headquarters officials. New Attorney General guidelines for domestic and foreign terrorist investigations have given the FBI broad authority to collect information on First Amendment activity to enhance domestic security. The breadth of these new powers calls for improved agency oversight to address legitimate civil liberties concerns.
2. Law enforcement officials at all levels must build ties with immigrant communities to obtain information on unforeseen threats. If special circumstances arise in the future that require interviews of immigrants, such interviews must be truly voluntary. As our research and a recent General Accounting Office report found, interviewees in the recently concluded voluntary interview program did not

believe the program was truly voluntary. If special contingencies require voluntary interview programs again in the future, the model adopted by law enforcement officials in Dearborn, Michigan should be followed. Individuals should receive written requests informing them of the voluntary nature of the program and have the opportunity to have counsel present during the interview. Participants should be assured that no immigration consequences will flow from coming forward to be interviewed.

3. In pursuing absconders, immigration authorities should enforce final orders of removal based either on nationality-neutral criteria, such as dangerousness, criminal records, or ability to locate, or on intelligence-driven characteristics, which can include nationality but only in combination with these other characteristics.
4. Absconders who are apprehended should be able to reopen their final orders if they are eligible for immigration remedies or if they can establish that their in absentia orders were entered through no fault of their own.
5. Registration of nonimmigrants entering the country is part of entry-exit controls that have been mandated by Congress. It is a defensible and long-needed immigration control measure as long as it is not nationality-specific and is driven by intelligence criteria. But the “call-in” registration program, which has been mischaracterized as part of the entry-exit system, is nationality-specific and is being implemented with contradictory goals of compliance and immigration law enforcement. Since the government has not extended call-in registration to all countries, which was its original stated intent, follow-up reporting requirements for those who have already registered should be terminated.
6. Any future registration of nonimmigrants already in the country should only be carried out under the following circumstances:
 - Compliance should be the goal. This requires providing meaningful incentives for out-of-status individuals to register, including eventual regularization of their status.
 - To be meaningful, registration must be nationality-neutral and must include all non-immigrants in the country, including the large undocumented population.

- Registrants with pending applications for adjustment of status, including under section 245(i) of the Immigration and Nationality Act, should not be put into immigration proceedings or detained.
 - Registrants who are unlawfully present in the United States should be allowed to apply for a waiver of the three- and ten-year bars that normally apply to them.
 - A registration program must be carefully planned, with sufficient lead-time and resources to handle literally millions of registrants, and be accompanied by a major outreach and public education program.
7. The government should reaffirm that state and local law enforcement agencies do not have inherent authority to enforce federal immigration law. Cooperative agreements between the Justice Department and the state governments (allowed under a 1996 law) that permit state and local officials to enforce immigration law should contain detailed plans regarding training such officials in immigration procedures. State and local law enforcement agencies should not affirmatively enforce federal immigration law.
 8. Civil immigration information should not be entered into the NCIC, and the Justice Department’s proposal to waive privacy standards for NCIC information should be abandoned.
 9. To ensure effective oversight of civil rights issues in the work of the new Department of Homeland Security (DHS) and to aggressively investigate complaints alleging civil rights abuses, the Secretary of Homeland Security should establish a new position of Deputy Inspector General for Civil Rights in the DHS Office of Inspector General. Only with a dedicated senior official able to dedicate full attention to this portfolio will there be the oversight and accountability these sensitive issues require.

E. National Unity

1. An independent national commission on integration, made up of a wide spectrum of distinguished civic leaders, should be created to address the specific challenges of national unity presented by post-September 11 events and actions. The commission’s goals should be guided by the principle that long-term interests of the nation lie in policies that

strengthen our social and political fabric by weaving into it, rather than pulling out of it, all immigrant and ethnic communities. In the post-September 11 world, this means paying special attention to the experiences of Arab and Muslim communities, as well as to South Asian communities who are sometimes mistaken to be Muslim or Arab. Examples of issues the commission might address include:

- Policies that consciously and systematically prevent stigmatization of Muslim and Arab communities and actively turn them into social, political, and security assets.
 - Sensitivity by airport personnel and other private and public entities to dress codes and protocols of Muslims, Arabs, and South Asians.
 - The need for educational instruction about Islam and Muslims in schools and workplaces.
 - Encouragement for interfaith dialogue at national and local community levels that leads to common programs across faiths.
 - The role that charitable giving plays in the lives of Muslims and the implications on religious freedom of new bans on or monitoring of Muslim charities.
2. Public leadership and government policies and actions also have important roles to play:
- To reassure the Muslim and Arab community in the United States, the President should use the moral authority of his office to deliver sustained messages of inclusiveness, tolerance, and the importance of diversity in our society.
 - Senior administration officials should consistently address conferences and other public events hosted by Arab and Muslim community groups. Similarly, issue-specific meetings should regularly be held with leaders of those communities.
 - There should be an increased and visible presence of Arab- and Muslim-Americans in key policymaking roles in the government. In particular, the FBI and other law enforcement agencies should expand efforts to hire Arab- and Muslim-American agents.
 - Widespread bans on Islamic charities should be re-examined. The U.S. government should issue guidelines to Muslim not-for-profit agencies regarding distribution of funds for charity purposes.
- The government should aggressively pursue acts of private discrimination.
 - Relevant government agencies should use “testers” to track housing and employment discrimination against Muslims, Arabs, and South Asians to determine whether there has been a sustained increase in discrimination against such groups since September 11 and whether additional efforts to address it are needed.
3. Islam is misunderstood in America. This creates a special burden for Muslim Americans and Muslim immigrants living in America who have to cope with prejudices about their communities and their religious beliefs, while also experiencing the more general post-September 11 security fears that they share with other Americans. But many of the leaders also recognize the extraordinary opportunity they are presented with. Community, business, and religious leaders in Arab and Muslim communities should take a more active role both in promoting democratic values overseas and in promoting their own rights and interests through the political process in the United States.
4. A small number of extremists have misappropriated Islam to promote acts of terrorism and preach hatred. Muslims have a special obligation to denounce such acts. Similarly, leaders of other religions have a responsibility for fostering an understanding of Islam and to denounce hate speech within their own faiths.
5. It is especially important that Islam’s impressive history of tolerance and respect for pluralism be promoted and publicized. This is a huge challenge that can only partially be met through the efforts of the Muslim community in the United States. Like so many other ethnic and religious minorities, Muslim-Americans cannot alone dispel the prejudices about their communities and religion. Rather, Americans generally, and the U.S. government in particular, must share the responsibility to learn about the different traditions and faiths that make up the true mosaic that is American society.
6. The advocacy, representational, and service capacities of Arab- and Muslim-American organizations

should be expanded and strengthened. The donor community has a special role to play here.

F. Foreign Policy

1. Immigration policy has always had foreign policy dimensions and implications. But rarely has it had the resonance in national security matters that it has today. In re-examining domestic policies to strengthen national security, policymakers should also weigh the impact U.S. immigration policies have on our nation's long-term foreign policy goals in combating terrorism.
2. Immigration policy should not rely on enforcement programs that give propaganda advantages to terrorist foes and contribute to their ability to influence and recruit alienated younger generations. Immigration policy should also not undermine the great comparative advantage we have as a nation, which is openness to the world and to people of all nationalities and cultures. Instead, immigration policy should be actively used to promote cultural exchange, education, and economic activities that serve America's national interests abroad.

America's Challenge:

Domestic Security, Civil Liberties, and National Unity after September 11

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"This report is a crucial appraisal of the challenge to America: how to ensure security for our country while remaining an open society that protects the rights of all its residents. It is both a courageous and practical report that requires serious attention by our legislators and policymakers."

Vincent Cannistraro

Former Senior Intelligence Official, Head of Counter-terrorism Operations and Analysis, Central Intelligence Agency (CIA)

"The 'America's Challenge' report provides vitally important information for some of the most significant policy debates that now confront the American public and policymakers. How we keep America both safe and free is one of the most important and yet vexing issues of our generation.

The Migration Policy Institute report provides definitive recommendations in the areas of immigration, national security, and inter-group relations. It will certainly be one of the most significant documents consulted by future historians as they assess how this generation of Americans has fared in assuring national security without sacrificing our cherished freedoms."

Anthony D. Romero

Executive Director, American Civil Liberties Union (ACLU)

"While concern for national security allowed some to initially justify many of the laws and programs implemented in the wake of September 11, 2001, the costs and consequences experienced by thousands of recent Arab and South Asian Muslim immigrants were devastatingly high.

The work of the Migration Policy Institute provides a sober and detailed assessment of the constitutional, human and political impact of these Department of Justice initiatives, complete with valuable recommendations that will enable us to correct our course."

James Zogby

President, Arab American Institute (AAI)

