

America's Challenge:

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



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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.

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

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The Migration Policy Institute's new report, **America's Challenge: Domestic Security, Civil Liberties, and National Unity after September 11**, provides the most comprehensive analysis to date of our government's immigration actions from three distinct perspectives. America's challenge is to both defend our nation and protect core American values without alienating whole communities and groups. Doing so requires a different approach that is outlined in the report's analysis and detailed recommendations.

ABOUT THE REPORT'S AUTHORS

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