

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

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

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Fax: 202-266-1900

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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.

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ABOUT THE BOOK

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

Muzaffar Chishti is a Senior Policy Analyst at the Migration Policy Institute and a professor at the New York University School of Law. **Doris Meissner** is a Senior Fellow at the Migration Policy Institute and the former commissioner of the Immigration and Naturalization Service. **Demetrios G. Papademetriou** is a Co-Director of the Migration Policy Institute. **Jay Peterzell** is a former national security reporter for *Time* magazine. **Michael J. Wishnie** is Associate Professor of Clinical Law at the New York University School of Law. **Stephen W. Yale-Loehr** teaches immigration law at Cornell Law School and is co-author of *Immigration Law and Procedure*, a 20-volume immigration law treatise.

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