



THE USE AND ABUSE OF IMMIGRATION AUTHORITY AS A COUNTERTERRORISM TOOL: CONSTITUTIONAL AND POLICY CONSIDERATIONS

THE USE AND ABUSE OF IMMIGRATION
AUTHORITY AS A COUNTERTERRORISM TOOL

CONSTITUTIONAL AND POLICY CONSIDERATIONS

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PREFACE

The Constitution Project is a politically independent think tank established in 1997 to promote and defend the fundamental tenets of our nation's founding document. On a wide range of matters, the Constitution Project assembles committees that span partisan divides, forging consensus and transforming it into bipartisan political coalitions and broader public support for safeguarding our Constitution. The Project's Criminal Justice Program promotes fundamental rights and due process protections for those accused of crimes. The Project's Rule of Law Program addresses threats to our constitutional system and our civil liberties.

The Rule of Law Program's Liberty and Security Committee comprises an ideologically diverse group of prominent Americans who work with the Constitution Project to recommend ways to preserve individual rights while also ensuring public safety. The Committee addresses a wide range of issues, including the ones discussed in this report: the misuse of immigration authority as a counterterrorism tool and the ways in which the civil liberties violations that accompanied the abuse of this authority undermine our national security.

In the wake of the September 11, 2001, terrorist attacks on the United States, the government instituted a number of immigration initiatives and reforms in the name of national security. While some of these initiatives were helpful in improving immigration enforcement, many others raise serious constitutional concerns and have targeted individuals who have never played a role in terrorist activities. Through these initiatives, the government has allowed deportations from and denied entry into the United States of foreign nationals on the basis of political association or expression, engaged in preventive detention of immigrants, conducted secret arrests and trials, and employed ethnic profiling.

In addition, the staff of the 9/11 Commission, which examined the government's policies and actions leading up to and following the terrorist attacks, found no evidence that these policies have been effective as counterterrorism measures. Rather, these initiatives alienate Arab and Muslim groups and impede efforts to secure cooperation from those communities. This lack of effectiveness further demonstrates that the intrusions on constitutional rights and individual liberties cannot be legally justified.

The Constitution Project's Liberty and Security Committee examined the government's use of immigration law as a counterterrorism tool and is issuing this report and accompanying recommended reforms in response to these concerns.

The Constitution Project sincerely thanks David Cole, Professor of Law at Georgetown University Law Center and co-chair of the Liberty and Security Committee, and Linda Bosniak, Professor of Law at Rutgers School of Law-Camden, for sharing their expertise in immigration law and for their invaluable work in researching and drafting this report. We are also grateful to the Public Welfare Foundation, Community Foundation for the National Capital Region, Atlantic Philanthropies, Educational Foundation of America, and CS Fund/Warsh Mott Legacy for their support of the Rule of Law Program's work on the Constitution Project's *Use and Abuse of Immigration Authority as a Counterterrorism Tool: Constitutional and Policy Considerations*.

The Constitution Project also thanks the Community Foundation for the National Capital Region, Wallace Global Fund, Open Society Institute, Rockefellers Brothers Fund, Overbrook Foundation, Lawrence and Lillian Solomon Fund, and an anonymous donor for their support of the Constitution Project in all its work.

INTRODUCTION

In the wake of the terrorist attacks of September 11, 2001, the government undertook a wide range of immigration-related measures in the name of national security. Some of these initiatives, including increased resources for border control and record-keeping, were salutary, indeed necessary, as the pre-September 11 immigration regime was certainly in need of improvement. And exclusion and deportation of foreign terrorists is indisputably a legitimate tool in the country's national security arsenal. However, many of the post-September 11 immigration initiatives and reforms have unjustifiably violated the guarantees of liberty and equality on which our nation was founded. This report will focus on several government initiatives that raise particularly troubling constitutional concerns, including preventive detention, secret arrests and trials, ethnic profiling, and deportations for political association or expression. We will recommend reforms designed to avoid a repetition of these abuses.

While all of the administration's efforts were undertaken in the name of safeguarding national security, there is little evidence that many of its most controversial measures in fact led to any measurable increase in safety. As the bipartisan 9/11 Commission's staff found, there is no evidence that the post-September 11 immigration initiatives targeted at Arabs and Muslims succeeded in identifying any actual terrorists.¹ As measures to identify potential terrorist suspects they were overbroad, and, as discussed below, even had they been narrowly tailored, they suffered from additional constitutional flaws. At the same time, by breeding fear and distrust of government within Arab and Muslim immigrant communities, these measures have impeded cooperation from these communities and thereby undermined the very security objectives they were designed to serve.

Finally, these recent developments undermine the United States' justly celebrated openness to immigrants from around the world. They deter the admission and residence of productive, law-abiding visitors and risk fanning the flames of intolerance, even nativism, toward immigrants and minority citizens here at home. Accordingly, these measures have simultaneously compromised our constitutional commitments and also come at significant costs to our long-term security.

The Constitution Project is an independent think tank that promotes and defends constitutional safeguards by bringing together liberals and conservatives who share a common concern about preserving civil liberties. By forging consensus positions that bring together "unlikely allies" from across the political spectrum, the Project seeks to broaden support for constitutional protections both within government and in the public at large. The Project launched its Liberty and Security Committee in the aftermath of September 11 to develop and advance proposals to protect civil liberties even as our country works to make Americans safe. We, the undersigned members of the Constitution Project's Liberty and Security Committee, are issuing this report to urge policymakers to adopt critical reforms in the ways we use immigration law as a counterterrorism tool.

EXPANSION OF GROUNDS OF REMOVAL TO PENALIZE SPEECH AND ASSOCIATION

Since September 11, 2001, Congress has dramatically expanded both the grounds on which foreign nationals can be denied entry into the United States and the grounds for deportation from the country based upon the individuals' political views and associations. It first did so in the USA PATRIOT Act (hereinafter "Patriot Act"), and then in the REAL ID Act.² As a result, the standards for exclusion and removal today are almost as expansive as those enacted during the McCarthy era, when, under the McCarran-Walter Act, the United States barred people from entering and expelled immigrants already here for expressing disfavored views and associating with blacklisted organizations. Congress repealed the McCarran-Walter Act in 1990, after several of its provisions had been declared unconstitutional.³ But Congress has now reinserted into our immigration law both guilt by association and exclusion and deportation for one's speech. While foreign nationals who are involved in terrorism are appropriately subject to exclusion and removal, the current law goes far beyond that to reach people who have never played any role in terrorist conduct whatsoever.

Guilt by Association

The Supreme Court has condemned guilt by association as "alien to the traditions of a free society and the First Amendment itself."⁴ Before September 11, foreign nationals were deportable for engaging in or supporting terrorist *activity* but not for mere association.⁵ Foreign nationals could be deported for providing "material support" to an organization only if they knew or reasonably should have known that their activity would support the organization "in conducting a terrorist activity."⁶ In other words, the government had to demonstrate a nexus between the foreign national's conduct and terrorist activity.

The Patriot Act and REAL ID Act eliminated that nexus requirement and made guilt by association a centerpiece of our immigration law once again. Moreover, the definition of "terrorist organization" is so broad that numerous organizations involved in political protest and other fully lawful activities would qualify.

The Patriot Act made foreign nationals deportable for wholly innocent support of a "terrorist organization," even where there is no connection between the foreign national's support and any act of violence, much less terrorism, by the recipient group.⁷ The REAL ID Act went still further and made foreign nationals deportable for mere membership in a "terrorist organization," even if they have never provided any material support to the group.⁸ The immigration law defines "terrorist activity" to include virtually any use of or threat to use a weapon,

and it defines “terrorist organization” as any group of two or more persons that has used or threatened to use a weapon. Thus, the Act’s proscription on associations potentially reaches every organization that has ever been involved in a civil war or a crime of violence, including a pro-life group that once threatened workers at an abortion clinic, the African National Congress, Sinn Fein, or the Northern Alliance in Afghanistan. Furthermore, the Department of Homeland Security has taken the position that the “material support” provision applies even to foreign nationals who are *coerced* at gunpoint into providing aid to a terrorist organization.⁹

Had this law been on the books in the 1980s, the thousands of noncitizens in the United States who supported the African National Congress’s (ANC) lawful, nonviolent anti-apartheid activity in South Africa would have been deportable as terrorists, as would all ANC members, from Nelson Mandela on down. The ANC used violent as well as nonviolent means in its struggle against apartheid, and the U.S. State Department routinely designated it as a terrorist organization before it came to power in the 1990s.¹⁰ In fact, these immigration law provisions were being applied to require that Nelson Mandela and other members of the ANC seek special permission from the U.S. government to visit the United States. It took specific legislation by Congress, signed by President Bush on July 1, 2008, to exempt the ANC from these provisions.¹¹

Indeed, in a longstanding case involving two Palestinians, the Bush administration argued that the membership provisions of the Patriot Act and REAL ID Act are retroactive and therefore made the Palestinians deportable for distributing magazines and other associational activity dating back to the early 1980s, decades before the Patriot Act and REAL ID Act were passed.¹² The administration ultimately dropped the prosecution after an immigration judge dismissed the case for prosecutorial misconduct, but it has never abandoned its position that the Patriot Act and REAL ID Act amendments apply retroactively. Under that view, the law makes deportable and excludable today any South African who was associated with the ANC during its lengthy struggle against the apartheid regime in that country. Punishing someone today for past associations that were lawful at the time is fundamentally unfair and raises serious constitutional concerns not only under the First Amendment right of association, but also under the Fifth Amendment’s Due Process Clause.¹³

In December 2007, President Bush signed into law the Consolidated Appropriations Act of 2008.¹⁴ It included a provision expanding the discretionary authority of the Secretary of State and the Secretary of Homeland Security to exempt certain persons and groups from the application of the immigration law’s “terrorism”-related provisions. This amendment also removes a limited list of certain Burmese and other organizations from the immigration law’s definition of a “terrorist organization.” While this legislation leaves in place the overly broad immigration law definitions that have mislabeled many refugees and asylum seekers as supporters of “terrorist organizations” or as having engaged in “terrorist activity,” the expanded use of waivers—if properly implemented—should help address the protection needs of many refugees.¹⁵

Exclusion and Deportation for Speech

The Patriot Act and the REAL ID Act also resurrect the practice of excluding and expelling foreign nationals for speech, raising serious First Amendment concerns. The Patriot Act bars admission to the United States by those who “endorse or espouse terrorist activity” or who “persuade others to support terrorist activity or a terrorist organization,” in ways determined by the Secretary of State to undermine U.S. efforts to combat terrorism.¹⁶ It also excludes representatives of groups that “endorse acts of terrorist activity” in ways that undermine U.S. efforts to combat terrorism. These provisions were initially cited by the State Department in denying admission to Tariq Ramadan, a Swiss scholar of Islam who had been hired to fill an endowed chair at Notre Dame University.¹⁷

The REAL ID Act provided that these grounds for exclusion also apply as grounds for deporting noncitizens already legally present in the United States. Thus, a lawful permanent resident may now be deported simply for saying something that the government does not like, even if her speech would be fully protected from penalty under the First Amendment were she a U.S. citizen. Further, due to the breadth of the definition of “terrorist organization,” these laws would also empower the government to exclude or deport any foreign national who advocated support for the ANC, the Contras during the war against the Sandinistas, or opposition forces in Iran today. Because all of these groups have used force or violence, they would qualify as terrorist organizations, and anyone who urged people to support them could be denied entry or deported for their speech alone.

Citizens and foreign nationals living in the United States have a First Amendment right to endorse or espouse terrorist organizations or terrorist activity, as much as we disagree with such ideas, so long as their speech is not intended and likely to produce imminent lawless action.¹⁸ The First Amendment does not restrict its protections to citizens, and the Supreme Court has expressly said that neither the First Amendment nor the Fifth Amendment “acknowledges any distinction between citizens and resident aliens.”¹⁹ Thus, it is unconstitutional to deport a foreign national living here for speech or associations that would be protected by the First Amendment for citizens.²⁰

The constitutional analysis is somewhat different with respect to exclusion. In that context, the Supreme Court has ruled that foreign nationals seeking admission from outside our borders do not have due process rights with respect to the privilege of entry,²¹ and they may not have First Amendment rights under current law (although the Supreme Court has not yet decided that question directly). But the Court has recognized that excluding foreign nationals for their speech interferes with the speech rights of those within this country who would seek to exchange ideas with those who have been kept out.²² The First Amendment is designed to protect a robust public debate, and if our government can exclude persons who espouse disfavored ideas, our opportunity to hear and consider those ideas will be diminished. More broadly, excluding people for their ideas is contrary to the spirit of political freedom for which the United States stands.

In short, the amendments to the Immigration and Nationality Act (“INA”) made by the Patriot and REAL ID Acts violate fundamental principles of freedom of speech and association, and sweep far more broadly than is necessary to keep terrorists out of the United States. We can and should keep out and expel those who engage in terrorism, but we ought not use the legitimate interest in countering terrorism as a justification for penalizing speech and association.

POST-SEPTEMBER 11 DETENTION PRACTICES

In the wake of September 11, 2001, the executive branch exploited immigration law to effectuate an extensive campaign of preventive detention directed at Arab and Muslim foreign nationals. In doing so, the Justice Department deployed immigration law for purposes it was never designed to serve and engaged in practices that violate fundamental due process rights. In addition to other constitutional deficiencies, this preventive detention campaign was overbroad. The administration has admitted to detaining over 5,000 foreign nationals in preventive detention initiatives undertaken in the name of fighting terrorism in the first two years after September 11.²³ Six years later, not a single one of these foreign nationals stands convicted of any terrorist crime.²⁴ Most of the detainees were released or deported after being affirmatively cleared by the FBI of any involvement in terrorism. Despite the fact that not even one turned out to be a terrorist, thousands spent days, weeks, months, and in some instances, years, in preventive detention.

Many people were initially arrested without any charges at all—the definition of an arbitrary and unlawful arrest.²⁵ The detentions were carried out under an unprecedented veil of secrecy. The administration refused to release any details regarding the identity of the detainees. Hundreds of the detainees were tried in proceedings closed to the public, the press, legal observers, and even family members, on orders from the Attorney General—a practice that several courts held violated the First and Fifth Amendments.²⁶

When charges were filed against these detainees, they were generally for technical visa violations, not terrorism, despite the wide definition of “terrorism” under the immigration laws. In many instances, the immigration charges were swiftly resolved, as individuals were granted “voluntary departure” or agreed to leave the country with orders of deportation. But even when the immigration cases were resolved and there was no longer any immigration justification for their detention, individuals were kept in prison until the FBI satisfied itself that they were not connected to terrorism. Ultimately everyone was cleared.

A subsequent investigation by the Justice Department’s Inspector General found that individuals were arrested on such flimsy evidence as an anonymous tip that “too many” Middle Eastern men were working in a local convenience store. If the FBI could not immediately rule out the possibility that the men were terrorists, they would be arrested—often without charges of any kind. Then, *after* they were detained, the INS would look for an immigration violation to charge them with, and the FBI would investigate to see if they had any connections to terrorism.²⁷

When some immigration judges ordered that detainees be released on bond pending resolution of their deportation proceedings, because the government failed to show that the individuals were dangerous or a flight risk, Attorney General Ashcroft issued a regulation changing the rules. It provided that even if an immigration judge found no legal basis for detention, an immigration prosecutor could keep the foreign national locked up simply by filing an appeal of the release order—without regard to whether the appeal had any merit.²⁸ If the government can demonstrate that it is likely to succeed on appeal and that release will lead to irreparable harm, the traditional standard for stays pending appeal, it makes sense to continue detention in the meantime. But existing law already permitted that option. This regulatory change empowered the government to keep foreign nationals detained where it did not have a meritorious appeal. Several federal courts have declared this rule unconstitutional, but the Justice Department has kept it in place.²⁹

Immigration officials also kept foreign nationals detained long after any ostensible immigration purpose for the detention had evaporated. Immigration authorities have no freestanding authority to detain; they may do so only when necessary to effectuate a noncitizen's removal from the country. When a foreign national agrees to leave, and there are no obstacles to effectuating removal, there is no legitimate immigration purpose to keep the person detained any longer. Yet after September 11, many foreign nationals were held in custody for many months after they agreed to leave, while the FBI investigated them. The Supreme Court has held that immigration detention must be closely tied to its purpose of effectuating removal, and has ruled that even concededly dangerous foreign nationals whose removal is not reasonably foreseeable may not be detained beyond an initial six-month period in which the government seeks to remove them.³⁰ As INS General Counsel argued within the administration while these detentions were being maintained, it follows *a fortiori* that where there are no obstacles to removing a foreign national, further detention cannot be justified, as it furthers no immigration purpose.³¹

Detention pending resolution of a removal proceeding has an appropriate place in immigration enforcement. Just as those facing criminal trial may be held without bond where, in a fair hearing, they are shown to pose a danger to the community or a risk of flight, so foreign nationals in pending immigration proceedings may be detained where, in a fair proceeding, similar showings of danger or a risk of flight are made. But in the wake of September 11, federal law enforcement personnel detained thousands of foreign nationals without making such showings. Despite a harshly critical report from the Justice Department's Inspector General, the administration has not disavowed the practice of using immigration law as a preventive detention tool without adequate evidence of danger to the community or flight risk. Absent reform expressly requiring prompt bond hearings in which the government bears the burden of proving that a foreign national charged in immigration proceedings poses a danger to the community or a risk of flight, there is a grave risk that the abuses recounted above will be repeated in the wake of a future attack.

PATRIOT ACT DETENTION PROVISION

The Patriot Act expanded the government’s power to detain immigrants, although this expanded authority has yet to be invoked. It gives the Attorney General unprecedented power to detain foreign nationals for seven days without charge, and for extended, indeed indefinite, periods of time *without* a hearing and *without* a showing that they pose a danger to the community or a flight risk.

Section 412 of the Patriot Act authorizes the Attorney General to detain a foreign national for up to seven days without filing any charges. After seven days, the person must be either charged with a criminal offense or placed in immigration removal proceedings, or else he or she must be released. However, once immigration charges of any kind are filed, the provision appears to authorize detention both while immigration proceedings are pending and *after* they have concluded, even where the proceeding concludes with a determination that the alien is entitled to relief from removal and therefore may not be removed.

In order to trigger this authority, the Attorney General need only certify that he or she has “reasonable grounds to believe” that the alien is “described in” various antiterrorism provisions of the INA and the foreign national is then subject to potentially indefinite “mandatory detention.”³² The Attorney General does not need to charge the individual for seven days, and thereafter does not need to demonstrate that the individual poses a danger to the community or a risk of flight in order to justify continued detention. Moreover, as noted above, the INA’s antiterrorism provisions, in turn, include persons who are mere members of designated “terrorist organizations,”³³ as well as persons who have supported only the lawful activities of such organizations.³⁴ Because the INA defines “engage in terrorist activity” so broadly as to include the use of, or threat to use, a weapon with intent to endanger person or property,³⁵ it would encompass a permanent resident alien who brandished a kitchen knife in defending herself against her abusive husband. Surely all such persons do not warrant mandatory detention as “terrorists,” yet the Patriot Act empowers the Attorney General to detain such persons without any showing that they pose either a danger to the community or a risk of flight.

The Supreme Court has held that “[i]n our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.”³⁶ The Court has said that “government detention violates [the Constitution] unless the detention is ordered in a criminal proceeding with adequate procedural protections, *see United States v. Salerno*, 481 U.S. 739, 746 (1987), or, in certain special and ‘narrow’ non-punitive ‘circumstances,’ where a special justification, such as harm-threatening mental illness, outweighs the ‘individual’s constitutionally protected interest in avoiding physical restraint.’” *Kansas v. Hendricks*, 521 U.S. 346, 356 (1997).³⁷ Where there is no showing that a foreign national charged under the immigration laws poses a threat to the community or a risk of flight, there is no justification for detention, and any such detention would violate substantive due process.

SPECIAL REGISTRATION

In 2002 and 2003, the Justice Department initiated a special registration program that required nonimmigrant male aliens age sixteen and older from twenty-four predominantly Arab and Muslim countries (plus North Korea) to be fingerprinted, photographed and interviewed under oath.³⁸ Under this program, called National Security Entry-Exit Registration System (NSEERS), or “Special Registration,” more than 80,000 noncitizens living in the United States were subject to special registration.³⁹ Of these, 2,783 were detained for some period, and 13,400 were placed in deportation proceedings because of alleged visa violations.⁴⁰ Many of those removed were individuals awaiting priority dates for family reunification.⁴¹ At the end of the interview process, the administration claimed to have identified eleven terrorism “suspects.” To this day, however, none of those registered has been convicted of a terrorist crime.

“VOLUNTARY” INTERVIEW PROGRAM

Soon after September 11, the Department of Justice developed an interview program to be conducted in the nation’s Middle Eastern communities. The Department’s stated purpose was to obtain information from communities whose demographics resembled those of the September 11 hijackers.⁴² The target population was male “non-immigrants”⁴³ between seventeen and forty-seven years of age who had entered the United States between 2000 and 2002 and who were from predominantly Arab and Muslim countries that the Department characterized as sites of significant Al Qaeda presence. The Department identified 8,000 men for such interviews and ultimately interviewed approximately 3,200, in some cases with the assistance of local police departments.

The Justice Department described these interviews as “voluntary.” Yet by all reports, the interviewees did not perceive them as such. Indeed, according to a Government Accountability Office report on the program, interviewees “feared there could be repercussions to them for declining to participate.”⁴⁴ Additionally, many of those who did participate subsequently found themselves in removal proceedings. Participants experienced these interviews as ethnically and religiously motivated. According to the GAO report on the program, interviewees frequently felt “singled out and investigated because of their ethnicity or religious beliefs.”⁴⁵ Not one of those interviewed has been convicted of a terrorist offense.

* * *

After almost seven years of aggressive immigration enforcement, there is little evidence that any of the immigration initiatives targeted at the Arab and Muslim populations have been effective as counterterrorism measures. In fact, after a comprehensive review of immigration measures, the 9/11 Commission staff reported that it had found no evidence that any of the post-September 11 immigration initiatives had captured any terrorists.⁴⁶ This lack of effectiveness further demonstrates that the intrusions on constitutional rights and individual liberties cannot be legally justified.

At the same time, the focus on Arab and Muslim immigrants has generated counterproductive anxiety and suspicion in those communities in relation to law enforcement, thereby impeding efforts to cooperate with these communities for purposes of law enforcement.⁴⁷ As former INS Commissioner James Ziglar noted, commenting on the Special Registration program: “what we did get was a lot of bad publicity, litigation and disruption in our relationships with immigrant communities and countries that we needed help from in the war on terror.”⁴⁸

The executive branch's exploitation of immigration law to fight terrorism has infringed fundamental constitutional rights, including First Amendment freedoms of speech and association and Fifth Amendment due process protections. At a minimum, all persons within the United States, whether citizen or foreign national, whether here legally or illegally, are entitled to fundamental due process protections.⁴⁹ The emphasis on immigration law enforcement post-September 11 represents a concerted end-run around our system of individual constitutional protections.⁵⁰

The focus on Arabs and Muslims, without individualized grounds for suspicion, contravenes our society's commitment to equal justice. The nation's democratic commitments are undermined when the government selectively imposes burdens and obligations on foreign nationals, who are especially vulnerable given their lack of voice in the political process.⁵¹

RECOMMENDATIONS

For these reasons, we, the undersigned members of the Constitution Project's Liberty and Security Committee, make the following recommendations:

1. Amend the INA to eliminate deportation and exclusion based on speech and association. Deporting and excluding people for their political views and affiliations undermines fundamental First Amendment principles.
2. Amend the INA to eliminate retroactive deportation for conduct legal at the time it was undertaken. Punishing people today for conduct that was legal when they engaged in it is unconstitutional and fundamentally unfair.
3. Amend the INA to require that the DHS (a) charge detained individuals and bring them before an immigration judge promptly, presumptively within 48 hours, to establish a basis for their continued detention and (b) demonstrate in a fair hearing that a foreign national is a danger to the community or a risk of flight in order to detain the person pending the outcome of removal proceedings.
4. Repeal the immigration detention provision of the Patriot Act, Section 412.
5. Revoke the regulation authorizing automatic stays of immigration judge release orders upon the government's appeal and require the government to establish a likelihood of success on appeal in order to obtain a stay pending appeal.
6. Forbid detention of foreign nationals beyond the point at which they can be removed from the country, because at that point detention is no longer in aid of removal.
7. Amend the INA to (a) prohibit blanket closure of immigration removal hearings, (b) require that hearings be presumptively open to the public, and (c) specify that hearings may be closed to the public in whole or in part only by the immigration judge on a case-by-case basis in certain limited circumstances where there is a compelling governmental interest and where the closure is narrowly tailored to further that interest.
8. Adopt legislation or regulations requiring that DHS may not selectively target foreign nationals for deportation or other immigration enforcement on the basis of race, ethnicity, religion, or political association or ideology.

CONCLUSION

Immigration law enforcement in the aftermath of September 11 has resulted in widespread violations of constitutional rights. In the name of fighting terrorism, the federal government since September 11 has imprisoned thousands of foreign nationals who had nothing to do with terrorism, selectively targeted Arab and Muslim foreign nationals for burdens no other immigrant group must bear, detained people using immigration authority where the detention served no immigration purpose, authorized deportation and exclusion based on speech and associations that are protected under the First Amendment, and excluded foreign nationals who have been coerced into providing support to foreign guerilla groups. These measures are deeply troubling from a constitutional standpoint.

As a security matter, moreover, these initiatives have been counterproductive. They have identified few actual terrorists and have alienated communities with whom we should be working cooperatively to identify the actual terrorists planning to attack us. We would do far better to work on developing positive ties with Arab and Muslim communities here and throughout the world, while targeting our enforcement measures at foreign nationals who actually pose a threat of terrorist activity based on individualized objective criteria.

Members of the Liberty and Security Committee
Endorsing the Constitution Project's Report:
*The Use and Abuse of Immigration Law as a Counterterrorism Tool**

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* *Organizational information is listed for identification purposes only.*

ENDNOTES

- ¹ Nat'l Comm. on Terrorist Attacks, Threats and Responses in 2001: Staff Statement No. 10., April 15, 2004, http://www.9-11commission.gov/staff_statements/staff_statement_10.pdf.
- ² USA PATRIOT Act, 115 Stat. 272 (2001); REAL ID Act, Div. B Emergency Supplemental Appropriations Act for Defense, the Global War on Terrorism, and Tsunami Relief, Pub. L. No. 109-13 § 103, 119 Stat. 231 (2005).
- ³ See Immigration and Nationality Act of 1990, 8 U.S.C.S. § 1182(a)(3)(C) (repealing INA § 212(a)(27) and (28) (1952)), which excluded anarchists, members of the Communist party, aliens who advocated Communism or violent overthrow of the U.S. government, and aliens who wrote or published, or even knowingly had in their possession, material advocating such activities); see *American-Arab Anti-Discrimination Comm. v. Meese*, 714 F. Supp. 1060 (C.D. Cal. 1989) (declaring several provisions of the McCarran-Walter Act unconstitutional abridgements of the First Amendment freedoms of speech and association), *affirmed in part and reversed in part on other grounds*, 970 F.2d 501 (9th Cir. 1991).
- ⁴ *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 932 (1982) (citations omitted).
- ⁵ Immigration Act, 8 U.S.C. § 1227(a)(4)(B) (2000); *Id.* at § 1182(a)(3)(B)(iii).
- ⁶ Immigration Act, 8 U.S.C. § 1182(a)(3)(B)(iii) (2000).
- ⁷ USA PATRIOT Act, *supra* note 2, at § 411(a)(1)(F)(VI) (amending 8 U.S.C. § 1182(a)(3)). The Act defines as a deportable offense the solicitation of members or funds for, or the provision of material support to, any group designated as terrorist. There is no defense available even for those who can show that their support was neither intended to further, nor had the effect of furthering, terrorist activity.
- ⁸ REAL ID Act, *supra* note 2.
- ⁹ Tim Irwin, *Anti-terrorism legislation delays entry of refugees to United States*, September 6, 2006, U.N. Refugee Agency, <http://www.unhcr.org/news/NEWS/44fec79f4.html>; *High Commissioner in Washington D.C.*, May 5, 2006, U.N. Refugee Agency, <http://www.unhcr.org/news/NEWS/445b1f281c.html>. In 2007, DHS adopted a waiver policy, in which it would, in its discretion, waive exclusion or deportation for some foreign nationals who were coerced into supporting “terrorist organizations.” But this vests unchecked discretion in DHS. The more sensible approach would be to recognize that Congress did not intend to treat coerced support as a ground for deportation or exclusion.
- ¹⁰ See, e.g., U.S. Dep't of State, *Patterns of Global Terrorism: 1988*, at 82 (1989); U.S. Dep't of State, *Patterns of Global Terrorism: 1987*, at 65 (1988).
- ¹¹ An act to remove the African National Congress from treatment as a terrorist organization for certain acts or events, provide relief for certain members of the African National Congress regarding admissibility, and for other purposes, Pub. L. No. 110-257, amending Pub. L. No. 110-161, 121 Stat. 2365. This same Act also directed federal officials to update federal databases, including the terrorist watch list, to reflect this recognition that participation in the anti-apartheid movement does not constitute terrorist activity under immigration law. *Id.*; See also *Mandela taken off US terror list*, BBC News, July 1, 2008, <http://news.bbc.co.uk/go/pr/fr/-/2/hi/americas/7484517.stm>.
- ¹² See David Cole, *9/11 and the LA 8*, THE NATION, Oct. 27, 2003.

- ¹³ The Supreme Court upheld the retroactive application of an immigration law making past membership in the Communist Party a deportable offense in *Galvan v. Press*, 347 U.S. 522, 530 (1954), but due process has evolved considerably since then, and that case involved a situation in which Congress expanded the deportation grounds in response to the Communist Party's opportunistic formal expulsion of all its noncitizen members after the Supreme Court interpreted the immigration statute not to authorize deportation for past membership.
- ¹⁴ Pub.L. No. 110-161, 121 Stat. 1844 (2007).
- ¹⁵ See Human Rights First, "Newly Enacted Amendments to the 'Terrorism Bars' and Related Waivers Under the Immigration and Nationality Act," January 29, 2008, available at <http://www.humanrightsfirst.info/pdf/08130-asy-new-amendments-in-a.pdf>.
- ¹⁶ USA PATRIOT Act, *supra* note 2, at § 411(a)(1)(F)(VI) (amending 8 U.S.C. § 1182(a)(3)).
- ¹⁷ Stephen Kinzer, *Threats and Responses: The Teacher; Muslim Scholar Loses U.S. Visa as Query is Raised*, N.Y. TIMES, August 26, 2004, at A14.
- ¹⁸ See *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).
- ¹⁹ *Kwong Hai Chew v. Colding*, 344 U.S. 590, 598 n.5 (1953).
- ²⁰ *American-Arab Anti-Discrimination Comm. v. Meese*, 714 F. Supp. 1060 (C.D. Cal. 1989), *affirmed in part and reversed in part on other grounds*, 970 F.2d 501 (9th Cir. 1991).
- ²¹ See, e.g. *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950) (holding that a foreign national outside the United States does not have a right to due process in connection with the privilege of entering the country). This principle is not unique to foreign nationals, however, but applies generally where the government denies anyone—citizen or foreign national—a discretionary benefit, because doing so does not constitute a deprivation of liberty. Accordingly, prisoners do not have a due process right in connection with the denial of discretionary release on parole, because the denial of a discretionary benefit does not trigger a liberty interest. *Olim v. Wakinekona*, 461 U.S. 238, 248–49 (1983).
- ²² See, e.g., *Kleindienst v. Mandel*, 408 U.S. 753 (1972) (recognizing that exclusion of an alien for his or her political associations and views may infringe the rights of U.S. citizens to exchange ideas with the person); see also *id.* at 775 (Marshall, J., dissenting); *Abourezk v. Reagan*, 785 F.2d 1043 (D.C. Cir. 1986) (same), *aff'd per curiam*, 484 U.S. 1 (1987); Steven R. Shapiro, *Ideological Exclusions: Closing the Border to Political Dissidents*, 100 HARV. L. REV. 930 (1987).
- ²³ See U.S. Department of Homeland Security, Fact Sheet: Changes to the National Security Entry/Exit Registration System, http://www.dhs.gov/xnews/releases/press_release_0305.shtm; Nat'l Comm. on Terrorist Attacks, Threats and Responses in 2001: Staff Statement No 10., April 15, 2004, http://www.9-11commission.gov/staff_statements/staff_statement_10.pdf; Dan Eggen and Susan Schmidt, *Count of Released Detainees is Hard to Pin Down*, WASHINGTON POST, November 6, 2001, at A10; Todd S. Purdum, *A Nation Challenged: The Attorney General; Ashcroft's About Face on the Detainees*, N.Y. TIMES, November 28, 2001, at B7; Amy Goldstein and Dan Eggen, *U.S. to Stop Issuing Detention Tallies*, WASHINGTON POST, November 9, 2001, at A16.
- ²⁴ DAVID COLE, ENEMY ALIENS: DOUBLE STANDARDS AND CONSTITUTIONAL FREEDOMS IN THE WAR ON TERRORISM xx & n.25 (New Press, rev. ed., 2005). Three of the detainees were charged with terrorism-related crimes, but two were acquitted, and although the third was convicted, the conviction was subsequently thrown out. *Id.* at Foreword n.25.

- ²⁵ According to administration figures released in response to a lawsuit filed under the Freedom of Information Act, more than 317 detainees were held for more than 48 hours before being charged, 36 detainees were held for more than four weeks without charges, and nine were held for more than fifty days without charge. Amnesty International, *Amnesty International's Concerns Regarding Post September 11 Detentions in the USA*, at 10–11 (March 14, 2002), http://www.amnesty.org/en/alfresco_asset/026aa8e4-a3d8-11dc-9d08-fl45a8145d2b/amr510442002en.pdf.
- ²⁶ *Detroit Free Press v. Ashcroft*, 303 F.3d 681 (6th Cir. 2002) (closed proceedings violate First Amendment); *Haddad v. Ashcroft*, 221 F.Supp.2d 799 (E.D. Mich. 2002) (closed proceedings violate Fifth Amendment due process clause); *but see North Jersey Media v. Ashcroft*, 308 F.3d 198 (3d Cir. 2002) (finding that closed immigration proceedings do not violate First Amendment), *cert. denied*, 538 U.S. 1056 (2003).
- ²⁷ U.S. Department of Justice, Office of the Inspector General, *The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks* (April 2003) (released June 2, 2003), available at <http://www.fas.org/irp/agency/doj/oig/detainees.pdf>.
- ²⁸ Review of Custody Determinations, Interim Rule, 66 Fed. Reg. 54909 (Oct. 31, 2001) (codified at 8 C.F.R. § 1003.19). DHS revised this regulation in October 2006. 71 Fed. Reg. 57873, 57884 (Oct. 2, 2006). Among other things, that regulation limits the automatic stay to 90 days. Even as revised, however, the government may obtain a stay pending appeal without establishing a likelihood of success or irreparable harm, the traditional showing required for a stay pending appeal.
- ²⁹ 8 C.F.R. § 1003.19(i)(2); Many federal courts declared the regulation unconstitutional. *See, e.g., Vaccio v. Ashcroft*, 404 F.3d 663 (2nd Cir. 2005); *Zavala v. Ridge* 310 F.Supp.2d 1071 (N.D. Cal. 2004); *Ashley v. Ridge*, 288 F.Supp.2d 662 (D.N.J. 2003); *Uritsky v. Ridge*, 286 F.Supp.2d 842 (E.D. Mich. 2003); *Bezmen v. Ashcroft*, 245 F.Supp.2d 446 (D. Conn. 2003); *Vargas v. Elwood*, No. CIV.A. 02-CV-2666, 2002 WL 1471555 (E.D.Pa. June 28, 2002).
- ³⁰ *Zadvydas v. Davis*, 533 U.S. 678 (2001).
- ³¹ The INS General Counsel's advice is reported in the Inspector General's report, *supra* note 27, at 92.
- ³² USA PATRIOT Act, *supra* note 2, at § 412(a)(3) (amending 8 U.S.C. § 1226(a) (2001)).
- ³³ 8 U.S.C. § 1182(a)(3)(B)(I)(V) (2001).
- ³⁴ *See* 8 U.S.C. § 1227(a)(4)(B) (2001); 8 U.S.C. § 1182(a)(3)(B)(iv)(IV,VI) (2001).
- ³⁵ 8 U.S.C. § 1182(a)(3)(B)(iii)(V)(b) (2002).
- ³⁶ *United States v. Salerno*, 481 U.S. 739, 755 (1987) (upholding preventive detention pending a criminal trial only where there is a showing of a threat to others or risk of flight, the detention is limited in time, and adequate procedural safeguards are provided).
- ³⁷ *Zadvydas v. Davis*, 533 U.S. 678, 687–693 (2001) (explaining constitutional limits on preventive detention, and interpreting immigration statute not to permit indefinite detention of deportable aliens); *Foucha v. Louisiana*, 504 U.S. 71, 80–81 (1992) (holding civil commitment to be constitutional only where an individual is mentally ill, poses a danger to the community, and adequate procedural protections are provided); *Salerno*, 481 U.S. at 751–55.
- ³⁸ Registration of Certain Non-immigrants from Designated Countries, 67 Fed. Reg. 67, 766 (Nov. 6, 2002); 67 Fed. Reg. 70, 525 (November 22, 2002), 67 Fed. Reg. 77, 642 (Dec. 18, 2002); and AG Order 2643-2000 (Jan. 16, 2003).
- ³⁹ DHS: 9/11 Aftermath, *Visas Migration News* Vol. 10 No. 3, July 2003.

- ⁴⁰ Michael Powell, *An Exodus Grows in Brooklyn*, WASHINGTON POST, May 29, 2003, at A1; Alex Gourevitch, *Detention Disorder: Ashcroft's Clumsy Round-up of Foreigners Lurches Forward*, American Prospect, Web Exclusive, January 31, 2003.
- ⁴¹ Stephen H. Legomsky, *The Ethnic and Religious Profiling of Noncitizens: National Security and International Human Rights*, 25 BOSTON C. TH. W. L. J. 161, 169 (2005).
- ⁴² U.S. General Accounting Office, Report to Congressional Committees, Homeland Security: Justice Department's Project to Interview Aliens After September 11, 2001 (2003).
- ⁴³ "Non-immigrants" are foreign nationals who are not permanent residents but are here on temporary visas.
- ⁴⁴ GAO Report, *supra* note 42, at 8–9.
- ⁴⁵ *Id.* at 16.
- ⁴⁶ Nat'l Comm. on Terrorist Attacks, *supra* note 1.
- ⁴⁷ As Prof. Khaled El Fadl stated before the Senate (Hearings of the National Commission on Terrorist Attacks on the United States) (Dec. 2003), "An important part of winning the war against terrorism is actively resisting and guarding against the alienation of any part of our citizenry....When it comes to the protracted war against terrorism, we can ill afford even the appearance that the United States has turned against a segment of its own citizenry."
- ⁴⁸ Rachel L. Swarns, *Program's Value in Dispute as a Tool to Fight Terrorism*, N.Y. TIMES, Dec. 21, 2004, at A26.
- ⁴⁹ See *Zadvydas v. Davis*, 533 U.S. 678 (2001) (stating that "the Due Process Clause applies to all persons within the United States, including aliens, whether their presence is lawful, unlawful, temporary, or permanent").
- ⁵⁰ Migration Policy Institute, *America's Challenge: Domestic Security, Civil Liberties and National Unity After September 11* (2003).
- ⁵¹ DAVID COLE, ENEMY ALIENS, *supra* note 24; Neal Katyal, *Equal Protection in the War on Terror*, 59 STANFORD L. REV. 1365 (2007); *A(FC) and Others v. Secretary of State for the Home Department*, [2004] UKHL 56 (December 16, 2004) (declaring that law selectively imposing indefinite detention on foreign national suspected terrorists contravened the European Convention of Human Rights).



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