CHAPTER THREE

IMMIGRANTS, REFUGEES, AND MINORITIES

INTRODUCTION

Two years after September 11, a number of the most controversial initiatives that the executive branch directed against certain categories of non-citizens in the aftermath of the attacks have ended, or at least subsided. The mass round-ups of predominantly Arab and Muslim immigrants that occurred in the weeks and months following September 11 have ended, although immigration laws are still being enforced disproportionately against those communities. The Justice Department and Department of Homeland Security (DHS) have indicated that they will take steps to help ensure that the egregious mistakes made during these round-ups do not happen again. The Justice Department's temporary "call-in" registration program – a source of fear and confusion for non-citizens from the 25 predominantly Arab and Muslim nations targeted by the program – officially concluded in April 2003. The series of "voluntary" interviews initially conducted by the Justice Department of nationals from predominantly Arab and Muslim nations (and then of "Iraqi-born" individuals this past spring) do not appear to be currently occurring.

Despite these important recent changes, the nationality-based information and detention sweeps of the past two years have taken a serious toll on immigrant communities in the United States. Arab and Muslim organizations describe the "chilling effect" that these programs have had on community relations, relating feelings of anxiety, isolation, and ostracism – even among longtime, lawful permanent residents of the United States. From a security standpoint, these blanket immigration measures have alienated the very communities whose intelligence and cooperation is needed most. As one visiting Pakistani scholar put it: "A worse way of [improving security] could hardly be imagined…. Not only is it likely to fail in securing the homeland, it is creating more resentment against the United States. Does America need a policy that fails to differentiate between friend and foe?"[229]

At the same time, the administration continues to direct a set of ongoing initiatives that threaten to exacerbate this already troubling status quo. Foremost among these, the Justice Department is aggressively pursuing efforts to involve local police in the enforcement of federal immigration law. Local officials have cautioned that these efforts will overburden already scarce 'front-line' resources and undermine already fragile community relations. As one police chief put it: "To get into the enforcement of immigration laws would build wedges and walls that have taken a long time to break down."[230] Separately, refugee resettlement levels, which plummeted following the September 11 attacks, have yet to rebound – due to a range of failures from funding shortfalls to ongoing mismanagement. And a recent Attorney General decision on Haitian refugees has raised concerns of a new "national security" exception to the procedures by which detained asylum seekers and other immigrants can seek release. In short, the "new normal" in immigration has left much repair work to be done.

LEGAL BACKGROUND

Walt Whitman's description of the United States as "a teeming nation of nations" remains apt.[231] The overwhelming majority of Americans are immigrants or descendants of immigrants. Indeed, for the first hundred years of its history, immigrants were at the forefront of building and settling a vast and undeveloped continent, and the United States absorbed almost everyone who arrived on its shores.[232]

But the United States has two distinct, often conflicting histories of immigration. These two histories – one of welcoming new immigrants and the other of xenophobia and restrictiveness – have competed with each other from the early days of the republic. The Alien and Sedition Acts of 1798 – a reaction to the social upheavals of the French Revolution – gave the president the authority to deport any non-citizen he considered dangerous to the welfare of the nation.[233] Opposition to these statutes helped propel Thomas Jefferson to the presidency two years later. The 1850s witnessed the rise of the Know Nothing Party which sought to halt the immigration of Catholics and to deny naturalized citizens the vote.[234] But the nation ultimately rejected the Know Nothings, and the party was disbanded. Beginning in the late nineteenth century, Congress passed a string of selective exclusion laws, directed primarily at a new wave of immigrants from Asia and from Southern and Eastern Europe.[235] It was in a challenge to an 1888 statute refusing entrance to Chinese immigrants that the U.S. Supreme Court adopted the view that Congress had plenary power over immigration matters – upholding Congress' selective policies of exclusion.[236] Four years later, the United States opened an immigration station at Ellis Island within view of the Statue of Liberty. Over the next twenty years, millions of new immigrants entered the United States through Ellis Island.[237]

Viewed against these conflicting histories, it is clearly during periods of war or national emergency that immigrants and non-citizens have been most vulnerable to high-profile federal crackdowns. During the "red scare" just after World War I, for example, then-U.S. Attorney General A. Mitchell Palmer responded to a set of bombings in eight U.S. cities by launching a series of raids against suspected Communists, detaining thousands of non-citizens without charge, and interrogating them without counsel.[238] He claimed these were foreign agents who had come to America disguised as immigrants in order to overthrow the U.S. government.[239] Twenty years later, in the wake of the Japanese attack on Pearl Harbor, President Roosevelt approved a military order mandating the forced removal and detention of Japanese immigrants and U.S. citizens of Japanese ancestry from numerous communities along the Pacific Coast.[240] Between 1942 and 1946, more than 100,000 people were held in "relocation camps."[241] Both the Palmer raids and the World War II internment camps have since earned universal reprobation – and indeed, the U.S. government has formally apologized and granted reparations to the surviving victims of the World War II internment camps.[242] Nonetheless, these actions were widely supported at the time they were implemented.

Under U.S. law, as in the law of most nations, non-citizens are still not "entitled to enjoy all the advantages of citizenship," and a long list of statutes excludes them from many of the protections and benefits available to citizens.[243] But the U.S. Supreme Court has made clear repeatedly that the U.S. Constitution protects citizens and non-citizens alike from deprivations of

life, liberty, or property without due process of law. As the Court has explained: "[T]he Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent."[244]

The first international human rights standards protecting non-citizens emerged in the immediate aftermath of World War II with the Universal Declaration of Human Rights, followed by norms to protect those seeking refuge from persecution in their own countries. The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol prohibit governments from returning a non-citizen to a country in which his or her "life or freedom would be threatened on account of his race, religion, nationality, membership in a particular social group or political opinion."[245] In 1980, Congress incorporated provisions of the 1951 UN Convention and its 1967 Protocol into domestic law. The 1980 Refugee Act embraced the Convention's language concerning the obligation of states to protect refugees and reiterated the Convention's prohibition against returning non-citizens to persecution.[246]

The International Covenant on Civil and Political Rights (ICCPR), ratified by the United States in 1992, provides that: "No one shall be subjected to arbitrary arrest or detention."[247] Article 9(4) of the ICCPR provides that: "Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful."[248] This provision applies to all detainees, including immigration detainees.[249] The UN Human Rights Committee, in its decision in *Torres v. Finland*, has explained that Article 9(4) of the ICCPR "envisages that the legality of detention will be determined by a court so as to ensure a higher degree of objectivity and independence."[250]

ASSESSING THE IMPACT OF POLICIES PAST

A number of the policies that have been the source of greatest concern in the two years since September 11 have ended. The Justice Department Office of the Inspector General (OIG) – having issued a report strongly critical of the Department's treatment of those detained in the round-ups immediately following the attacks – released a supplemental report on September 8, 2003, noting that DHS and the Justice Department are taking steps to address many of the concerns identified. And based on scores of interviews conducted by the Lawyers Committee with immigration practitioners, it appears that detainees are no longer generally being held for extended periods without charge as they were in the months following September 11.[251] Despite this, two important concerns remain. First, the policies described in the following pages appear to have caused lasting damage to the relationship between immigrant communities and the U.S. government. Second, the expansive new custody and detention regulations adopted in the wake of September 11 – the regulations that led to the abuses the OIG has described – remain on the books. Until these are removed, there is little to prevent such abuses from occurring again.

The September 11 Detainees

> *Neither the fact that the department was operating under unprecedented trying conditions, nor the fact that 9/11 detainees were in our country illegally, justifies entirely the way in which some of the detainees were treated.*[252]
>
> **Senator Orrin Hatch (R-UT)**

More than 1,200 people were detained in the two months following the September 11 attacks.[253] The Justice Department classified 762 of them as "September 11 detainees," defined as those detained on immigration violations purportedly in connection with the investigation of the attacks.[254] A 198-page report issued by the OIG in June 2003 makes clear, however, that many of the detainees did not receive core due process protections, and the decision to detain them was at times "extremely attenuated" from the focus of the September 11 investigation.[255]

The OIG's finding that the "vast majority" of the detainees were accused not of terrorism-related offenses, but of civil violations of federal immigration law,[256] calls into serious question a recent decision of the U.S. Court of Appeals for the D.C. Circuit upholding the Justice Department's decision to withhold the names of the September 11 detainees. The court's opinion relied explicitly on its conclusion that "many of the detainees had links to terrorism," and therefore that public access to any of their names could interfere with the government's ongoing efforts to fight terrorism.[257] The OIG's conclusion that the designation of the detainees as of interest to the September 11 investigation was made in an "indiscriminate and haphazard manner," catching "many aliens who had no connection to terrorism" in their net,[258] seriously undermines the basis of the court of appeals' holding.

Beyond this, the September 11 detainees were subject to a set of Justice Department policies that resulted in serious violations of their due process rights. First, the Justice Department implemented a "hold until cleared" policy – a policy under which all non-citizens in whom the FBI had an interest required clearance by the FBI of any connection to terrorism before they could be released.[259] The Inspector General concluded that the clearance process was not conducted in a timely manner: it was understaffed and was not accorded sufficient priority.[260] The OIG reported that "the average time from arrest to clearance was 80 days and less than 3 percent of the detainees were cleared within 3 weeks of arrest."[261]

Second, the Justice Department issued a regulation that increased from 24 to 48 hours the time that the Immigration and Naturalization Service (INS) could detain someone in custody without charge.[262] Detention without charge could continue beyond this for a "reasonable period of time" in the event of an "emergency or other extraordinary circumstance."[263] The terms "reasonable period of time," "emergency" and "extraordinary circumstance" were not defined. The expanded authority applied even to detainees who were not charged with a crime or suspected of presenting a risk to the community. With the new regulations in place, many detainees did not receive notice of the charges against them for weeks, and some for more than a month after being arrested.[264] Consistent with early data,[265] the OIG reports that 192 detainees waited longer than 72 hours to be served with charges; 24 were held between 25-31 days before being served; 24 were held more than 31 days before being served; and five were held an

average of 168 days before being served.[266] Further, because INS did not record when a charging decision was made, the OIG concluded that it was "impossible" to determine how often the INS took advantage of the "reasonable time" exception to the charging rule.[267]

Third, the lack of timely notice of the charges against them undermined the detainees' ability to obtain legal representation, to request bond, and to understand why they were being detained.[268] In addition, the Inspector General found that detainees had been prevented from contacting lawyers during a "communications blackout" at the Metropolitan Detention Center (MDC) in Brooklyn, New York, and detainees' families and attorneys were unable to receive any information about them, including where they were held.[269] In some cases, attorneys were told that their clients were not detained at MDC when in fact they were. According to the OIG report, the first legal call made by any September 11 detainee held at MDC was not until October 15, 2001.[270] This "blackout," in conjunction with access-to-counsel problems created by the charging delays and restrictive legal access policies like that at MDC, seriously impaired detainees' ability to obtain counsel's advice precisely when they needed it most.

LIFE AT THE BROOKLYN METROPOLITAN DETENTION CENTER

Conditions of confinement at MDC were often harsh for the September 11 detainees. Their cells were illuminated 24 hours a day; they wore hand-cuffs, leg irons, and heavy chains during non-contact visits with family and attorneys; and they were subject to 23-hour "lock-down" – a period of strict confinement to their cells. The OIG report identifies "a pattern of physical and verbal abuse by some correctional officers at the MDC against some September 11 detainees, particularly during the first months after the attacks."[271] The physical abuse reports included the use of painfully tight handcuffs and allegations that MDC staff slammed detainees against the wall. Some detainees reported slurs and verbal abuse such as "Bin Laden Junior" and "you're going to die here,"[272] as well as being told by MDC staff to "shut up" while they were praying.[273] In addition, MDC Bureau of Prisons officials "adopted a practice" of permitting September 11 detainees no more than one phone call a week to any outside counsel. Based on examination of a sample of 19 detainees held at MDC, the Inspector General concluded that, "at best," detainees were offered "far less than one legal call" per week.[274] The weekly call was considered made in some cases when the detainee reached only voicemail, a busy signal, or a wrong number.[275] The OIG report criticizes the practice as "unduly restrictive and inappropriate."[276]

Fourth, the INS adopted a policy of denying bond in all cases related to the September 11 investigation.[277] And INS attorneys were given unilateral authority to affect an "automatic stay" of any bond-release ruling an immigration judge might issue.[278] The "no bond" policy immediately created an ethical dilemma for INS attorneys. As the INS Deputy General Counsel explained in a June 2002 memorandum, "[i]t was and continues to be a rare occasion when there is any evidence available for use in the immigration court to sustain a 'no bond' determination."[279] INS attorneys were thus placed in the position of arguing to immigration judges that individual detainees should not be released on bond even when there was no information to support such a position.[280] Many INS attorneys addressed this dilemma by first seeking continuances of bond hearings. As early as October 2001 and as late as June 2002, INS attorneys, including the INS General Counsel, raised concerns with INS headquarters and with Justice Department officials about the lack of evidence justifying opposition of bond, and the lengthy delays in obtaining clearance for detainees from the FBI.[281] The OIG concluded that the

Justice Department should have reevaluated its decision to deny bond in all cases as the Justice Department learned more about these detainees, particularly the "many detainees" who "were not tied to terrorism."[282]

The "automatic stay" authority was routinely invoked by government immigration attorneys to prevent the release of September 11 detainees in cases where an immigration judge had concluded that the detainee should be released from detention on bond.[283] Government attorneys also used the threat of the "automatic stay" power to discourage immigration attorneys from requesting immigration judge bond hearings for their clients – explaining that if an immigration judge were to rule in favor of releasing the detainee on bond, the government immigration attorney would simply invoke the "automatic stay." The detainee's release would then be further delayed while the bond decision awaited review on appeal.[284]

On September 8, 2003, the OIG released a new report analyzing the written responses of the Justice Department and DHS to its June 2003 recommendations. The OIG made clear that both agencies are "taking the recommendations seriously and are taking steps to address many of the concerns" identified. [285] DHS has implemented two of the recommendations, and both agencies have agreed in principle with most of the remaining 19.

But the OIG also made clear that "significant work" remained before its remaining recommendations would be fully implemented. With regard to its recommendation on the service of charges on immigrants, for example, the OIG emphasized the "serious deficiencies" outlined by its June 2003 report and asked for a copy of the agency's new charging requirements by October 3, 2003. The OIG also requested further, more specific responses to the other recommendations by October 3, 2003, and reiterated the two recommendations that had been rejected as unnecessary by the Justice Department in its written responses. These two recommendations called on the Justice Department to set up formal internal processes for re-evaluating policies and resolving legal concerns during times of crisis.

While the steps taken by the Justice Department and DHS are welcome, there remains cause to be concerned that the broad new custody policies under which these detentions were effected are still on the books. Indeed, wholly independent of the September 11 detainees, INS and DHS have already used the automatic stay power to prevent the release of Haitian asylum seekers who arrived by boat in Florida in October 2002, even in cases where immigration judges had ruled that the asylum seekers were entitled to release on bond.[286] And the Lawyers Committee has learned through interviews with immigration practitioners that the new stay power is still used on occasion by DHS immigration attorneys in order to discourage immigrants' attorneys from requesting a bond hearing for their clients.[287] Such ongoing use is an unsurprising effect of the availability of these new powers. But they make it all the more essential that the regulations be repealed.

Special Registration

> *The pure accumulation of massive amounts of data is not necessarily helpful, especially for an agency like the INS that already has problems keeping track of things. Basically, what this has become is an immigration sweep. The idea that this has anything to do with security, or is something the government can do to stop terrorism, is absurd.*[288]
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> **Juliette Kayyem**, former member of the National Commission on Terrorism and counterterrorism expert at Harvard's John F. Kennedy School of Government

On June 6, 2002, Attorney General Ashcroft announced the introduction of the National Security Exit-Entry Registration System (NSEERS) – popularly known as "special registration."[290] As part of this initiative, the Attorney General instituted a temporary "call-in" registration program that applied to males age 16 to age 45 from 25 predominantly Arab and Muslim countries who were residing in the United States on temporary visas. These individuals were required to report to INS offices during four specified phases to be fingerprinted, photographed, and questioned under oath by INS officers.[291] Failure to comply with special registration was made a deportable offense.[292]

Call-in registration officially ended on April 25, 2003. But the failures of the call-in registration program are now clear. First, the INS did not effectively distribute information about the program requirements to affected communities, instead announcing the program only through publication in the Federal Register, and later on the INS website.[293] Misinformation about the program, including inaccurate, unclear and conflicting notices distributed by the INS, led some men to unintentionally violate the program's requirements.[294] On several occasions flight attendants or travel agents gave registrants inaccurate information about departure rules, which required those subject to call-in registration to notify the INS before leaving the United States if they ever wanted to return.[295] Bill Strassberger, a spokesperson for the DHS Bureau of Immigration and Customs Enforcement, acknowledged that "[t]here have been problems in some locations" and that the Department

REPERCUSSIONS OF INS BACKLOGS

During special registration, INS and DHS representatives put many men and boys into deportation proceedings even when they had previously filed applications for immigration status which were still pending due to INS delays and backlogs. One eighteen-year-old high school student only avoided deportation after congressional intervention. A varsity basketball point guard at Jamaica High School in Queens, New York, Mohammad Sarfaraz Hussain was placed in removal proceedings when he tried to fulfill his call-in registration requirement. At the time, Hussain, who has four U.S. citizen siblings, already had a green card application pending which had been filed with the INS in April 2001, more than a year earlier. Hussain had come to the United States from Pakistan when he was eight years old, traveling with his mother who had come for cancer treatment. Hussain's mother died shortly after they arrived, and his father also passed away. It was only after the intervention of Representative Gary L. Ackerman (D-NY) that DHS agreed to stop pursuing Hussain's deportation.[289]

"need[ed] to look into" them. Ultimately, the inadequate information and confusion caused many men to be unnecessarily deported or barred from return.[296]

The story of Shahid Mahmood, a 38-year-old Pakistani doctor, provides a characteristic example. He was initially barred from returning to the United States – and the elderly and needy patients he served in Roxboro, North Carolina – because of the special registration program. Dr. Mahmood left the United States to visit his sick father in Lahore, Pakistan. He had previously registered under the call-in registration program at the Charlotte immigration office, but was unaware that he had to subsequently register at the airport if he intended to return to the United States. His travel agent had mistakenly confirmed that all he needed to do was to leave from one of the airports designated under the special registration program. Dr. Mahmood was only allowed to return to the United States after Senator Elizabeth Dole (R-NC), Senator John Edwards (D-NC), and Representative David Price (D-NC) intervened by writing letters to the U.S. embassy in Pakistan urging that the bar against Dr. Mahmood's return be lifted.[297]

Call-in registration was also marked by harsh uses of detention. According to DHS officials, 82,000 men complied with the call-in registration requirement.[298] As of March 18, 2003, the program had resulted in the detention of 1,854 people.[299] In Los Angeles, for example, about 400 men and boys were detained during the first phase of call-in registration.[300] Some were handcuffed and had their legs put in shackles; others were hosed down with cold water, or forced to sleep standing up because of overcrowding.[301] Attorneys reported that they were denied access to their clients during portions of the call-in registration interviews, and some of the registrants inadvertently waived their right to a removal hearing.[302]

Both human rights and security experts expressed deep concerns about the effect of such registration policies. Citing the special call-ins of Jews in Europe during the Holocaust era and expressing concern for programs that appear to target groups of migrants based on their ethnic or religious heritage, the Board of Directors of the Hebrew Immigrant Aid Society recommended a temporary suspension of the call-in program until a congressional review of the program could be conducted.[303] In a January 9, 2003 letter to President Bush, the American Jewish Committee, the Anti-Defamation League, and other Jewish organizations expressed their concern that the implementation of the registration procedure appeared to have "resulted in mistreatment and violations of the rights of many of those required to undergo registration, including detentions without particularized suspicion that the registrants were flight risks."[304] Emira Habiby Browne, executive director of the Arab-American Family Support Center echoed the sentiment: "Families who came to the United States to realize the American dream who chose to abide by the law and to cooperate with the immigration authorities, have been singled out on the basis of their ethnicity and religion."[305]

At the same time, security experts have found special registration to be ineffective. As Vincent Cannistraro, a former Director of Intelligence Programs at the National Security Council under President Reagan put it:

> [W]hen we alienate the communities, particularly immigrant communities, we undermine the very basis of our intelligence collection abilities because we need to have the trust and cooperation of people in those communities. If someone

> comes from the outside who is a stranger, comes into that community, the people who are long established in that community know it or are in a position to know it, and therefore to provide early warning information. But if the FBI conducts sensitive interviews with community leaders at the same time that that community has been rounded up by the INS, forced to report, and everyone who reports knows that if they are illegal, they are not a document holder, that they can and will be deported, you've really kind of eliminated the ability to get information that you really need.[306]

In the end, more than 13,000 of the men and boys who registered were found to be living illegally in the United States (often only because a pending application for adjustment of status was delayed due to INS backlogs) and were placed into deportation proceedings.[307] Some have already been deported.[308] The Justice Department claims that special registration resulted in the apprehension of 11 "suspected terrorists," but DHS officials have reported that none of the men or boys who registered has been charged with any terrorist activity.[309]

CHANGING COMMUNITIES

In Atlantic County, New Jersey, the Pakistani population has fallen to 1,000, from approximately 2,000.[310] In a Pakistani neighborhood in Brooklyn, New York, business is down in some stores by 40 percent; a local newspaper sells 60 percent fewer ads; and the mosque that used to be overcrowded for Friday prayers is one-third empty.[311] Pakistani government officials estimate that 15,000 Pakistani residents of that Brooklyn neighborhood and the immediately surrounding area have left the United States to move to Canada, Europe, or back to Pakistan.[312] Indeed, the exodus of Pakistani immigrants has reportedly stimulated a housing boom in Islamabad.[313] A comprehensive report prepared by the Migration Policy Institute explains the root of these fears: "Many have left countries that are governed by dictatorships, where the rule of law and the accountability of government are scare commodities…. It is a mindset used to tales of disappearances and to government secrecy."[314] Osama Siblani, a spokesman of the Arab-American Political Action Committee, agrees:

> "The dictator in the Middle East makes the law. Thus, mistrust of the government fits the Middle East mindset. Before September 11, there had been an evolving change in this mindset – they were gradually beginning to recognize that the [U.S.] government is here to respect their rights. All that was shattered by the events of September 11. Their rights are being violated by the government."[315]

"The [United States] is beginning to have trappings of a police state," adds Dr. Maher Hathout, Founder of the Islamic Center of Southern California. "It reminds me of Egypt…. You cannot understand unless you're from a culture of fear…. [It] leaves people emotionally intimidated."[316]

"Voluntary" Interviews

> *Clearly it is very important and legitimate for the government to want to get as much information and cooperation as possible from the Iraqi community in this country. That's what law enforcement does: gather information. But they need to create an atmosphere of safety. And that's not something [DHS] seem[s] to grasp yet.*[317]
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> **Doris Meissner**, Senior Fellow, Migration Policy Institute and Former Commissioner, INS

On November 9, 2001, Attorney General Ashcroft issued a memorandum to federal prosecutors and members of Anti-Terrorism Task Forces (ATTFs), announcing that the FBI would conduct "voluntary" interviews of 5,000 male non-citizens from 15 countries between the ages of 18 and 33 who had entered the United States after January 1, 2000. The list of countries was not released, but was defined as those countries having an "Al Qaeda terrorist presence."[318] On March 20, 2002, the attorney general announced a "second phase" of the project extending the list by an additional 3,000 men.[319] And on the eve of war with Iraq this year, DHS announced that the FBI had "identified a number of Iraqi-born individuals in the U.S. that may be invited to participate in voluntary interviews."[320] That the most recent plan applied to "Iraqi-born" individuals suggested that legal permanent residents and naturalized U.S. citizens would also be interviewed.[321]

In the wake of the widespread arrests and detentions of Muslim and Arab men in the weeks following September 11, community leaders warned that the interviews would aggravate growing fears.[322] Indeed, immigration attorneys and advocates have found that voluntary interviews had a "chilling effect" on community relations.[323] The American-Arab Anti-Discrimination Committee reported that the voluntary interviews "further drove a wedge of distrust between the Arab-American community and the government…. This dragnet profiling directed at Middle Eastern men appears to be based on the fallacy that ethnicity, age and country of origin alone merit an investigatory process."[324] Other advocates echoed this, saying that the community was "victimized" and interviewees "felt offended,"[325] expressions consistent with a general Arab-American sense of "isolat[ion] and ostraci[sm] from the mainstream since 9/11."[326] As one community leader in Southfield, Michigan put it: "There's a lot of apprehension and anxiety in the community about these visits. Most people are too scared to come out and complain about it…. But they'll tell you in private that they are very intimidated."[327]

Over time, several members of Congress have also expressed concerns about the interview programs. Representative John Conyers, Jr. (D-MI) wrote the attorney general in late 2001, explaining that "my constituents and others in the Detroit Metropolitan area have complained of intimidation by FBI agents seeking information from them at work and their places of worship… result[ing] in embarrassment, suspicion, and in some cases, termination."[328] On January 28, 2002, Representative Conyers was joined by Senator Russell Feingold (D-WI) in a letter to the U.S. General Accounting Office (GAO), the investigative arm of Congress, requesting an investigation into the conduct of the voluntary interviews.[329]

In April 2003, GAO released a report detailing its findings. The report found that most of the interviews were conducted in a "respectful and professional manner," but that many of the interviewees "did not feel the interviews were truly voluntary." They feared there could be "repercussions" for declining to participate. For example, as the GAO report notes, interviewees feared that "future requests for visa extensions or permanent residency would be denied if they did not agree to be interviewed."[330]

Notably, GAO was unable to determine whether or not the interview project has actually helped in combating terrorism. It noted that "information resulting from the interview project had not been analyzed as of March 2003" and that according to Justice Department officials, there were "no specific plans" to do so.[331] In addition, "[n]one of [the] law enforcement officials with whom [GAO] spoke could provide examples of investigative leads that resulted from the project."[332] As of February 2002, "fewer than 20" interviewees had been arrested – primarily on immigration charges. None of these cases appeared to have any connection to terrorism.[333] Indeed, "more than half the law enforcement officers [the GAO] spoke with expressed concerns about the quality of the questions asked and the value of the responses obtained in the interview project."[334]

While intelligence gains seem limited at best, a number of law enforcement officials believe that the voluntary interviews "had a negative effect on relations between the Arab community and law enforcement personnel."[335] As one INS field officer noted: "Most of the Attorney General's initiative is a lot of make-work with few returns, but it gets good press. It hasn't helped our community relations. It hurts because the FBI and the other agencies are making arrests using INS statutes."[336]

Operation Liberty Shield

> *We understand the legitimate role of the government to protect the security of U.S. citizens at this time of conflict. However, we need not adopt a blanket and discriminatory detention policy.*[337]
>
> **Bishop Thomas G. Wenski**, Auxiliary Bishop of Miami Chairman,
> U.S. Conference of Catholic Bishops' Committee on Migration

On the eve of war with Iraq, DHS announced that as part of "Operation Liberty Shield," it would detain asylum seekers from a group of 33 nations and territories where Al Qaeda or other such organizations were believed to operate. This was the first major DHS announcement on asylum since DHS took over INS functions on March 1, 2003. DHS Secretary Tom Ridge held a press conference on March 18, 2003, at which he described the purpose of the detention policy: "The detention of asylum seekers is basically predicated on one basic notion. We just want to make sure that those who are seeking asylum, number one, are who they say they are and, two, are legitimately seeking refuge in our country because of political repression at home, not because they choose to cause us harm or bring destruction to our shores."[338]

DHS refused officially to disclose the list of effected nationalities, stating that the complete list was "law enforcement sensitive." Written information released by DHS reflected

that Iraq was one of the countries. The Lawyers Committee learned that the list also included Afghanistan, Algeria, Bahrain, Bangladesh, Djibouti, Egypt, Eritrea, Indonesia, Iran, Jordan, Kazakhstan, Kuwait, Lebanon, Libya, Malaysia, Morocco, Oman, Pakistan, Philippines, Qatar, Saudi Arabia, Somalia, Sudan, Syria, Thailand, Tajikistan, Tunisia, Turkey, Turkmenistan, United Arab Emirates, Uzbekistan, and Yemen, as well as Gaza and the West Bank.

DHS subsequently advised that the policy did not apply to so-called "affirmative" asylum applicants (*i.e.*, individuals who apply after entering the United States by filing an asylum application), but instead to arriving asylum seekers – a group that is already subject to mandatory detention under an expedited deportation law that was enacted in 1996.[339] While these arriving asylum seekers are entitled to request release on parole after they successfully navigate the expedited procedure (by passing a screening interview), under Operation Liberty Shield, asylum seekers from the targeted countries were not to be released from detention *even* when they met the applicable parole criteria and presented no risk to the public. Instead, they were to be detained for the duration of their asylum proceedings. DHS estimated that the detentions would last on average six months, or longer if a case was appealed.[340] In effect, Operation Liberty Shield deprived a class of asylum seekers, defined by nationality, of the opportunity to have the need for their detention individually assessed.

The automatic detention policy was deeply troubling to human rights, faith-based, and refugee advocacy organizations.[341] The U.S. Conference of Catholic Bishops, in a statement issued by Bishop Thomas G. Wenski, declared that the policy "harms individuals who are fleeing terror, is inappropriately discriminatory, violates accepted norms of international law, and undermines our tradition as a safe haven for the oppressed."[342] Similarly, UN High Commissioner for Refugees Ruud Lubbers criticized the association of asylum seekers and refugees with terrorists as "a dangerous and erroneous one," since asylum seekers "have themselves escaped acts of persecution and violence, including terrorism, and have proven time and again that they are the victims and not the perpetrators of these attacks."[343]

In April 2003, following strong public criticism, DHS terminated Operation Liberty Shield.[344] DHS did not report on the number of asylum seekers who were detained as a result of the policy. Given that parole practices for asylum seekers have become even more restrictive in the past two years, and because the executive branch has refused to release information on the detainees, there is no public information on whether any of those who were detained under the policy were released from detention.

AN ONGOING SET OF CONCERNS

Local Immigration Enforcement – Our New Federalism

Since September 11, the federal government has moved to increase local law enforcement's participation in the implementation of federal immigration law. Where possible, the Justice Department has made use of existing law. Where no preexisting grant of authority was available, the Justice Department has unilaterally extended its own jurisdiction. In each instance, the federal government has encountered strong resistance from local officials and others

concerned both about the drain on scarce local law enforcement resources, and the danger of undermining already fragile community relations.

Existing law affords the Justice Department some authority to engage local assistance. The Immigration and Nationality Act (INA) has, since 1996, authorized the attorney general to enter into agreements with state and local officials to perform immigration enforcement tasks under the attorney general's direction and supervision.[345] The Justice Department entered into such an agreement with the State of Florida in July 2002.[346] South Carolina has entered into a similar agreement,[347] and Alabama is close to completing one.[348] No other states have yet followed suit. The INA also provides that the attorney general may authorize state and local law enforcement officials to perform federal immigration functions if the attorney general determines that such assistance is necessary during "an actual or imminent mass influx of aliens."[349] Before September 11, this provision had been used only once.[350] Since September 11, the Justice Department has standardized the process by which this assistance may function, adopting a new rule authorizing the attorney general to "waive normally required training requirements" if state or local law enforcement officers are unable to protect "public safety, public health, or national security" during a declared "mass influx of aliens."[351]

The lynchpin of Justice Department efforts to increase state and local involvement is its newfound understanding of the source of state and local officials' authority to participate in the enforcement of federal immigration law. Rather than rely on any particular state or local law affording officials such power, the Justice Department asserts that state and local officials have "inherent authority" to "arrest and detain persons who are in violation of immigration laws and whose names have been placed in the National Crime Information Center (NCIC)."[352] The legal basis for the Justice Department's new position is unclear, and a coalition of advocacy groups has filed a suit under the Freedom of Information Act in the U.S. District Court for the Southern District of New York to compel the disclosure of the underlying legal analysis.[353]

The NCIC is a database containing millions of criminal records entered by the FBI, designed to be accessible to federal, state, and local authorities nationwide. Although Congress intended the NCIC to be used for the national dissemination of criminal records, the Justice Department has proposed expanding the categories of data entered into it to include immigration information on "high-risk aliens who fit a terrorist profile."[354] The Justice Department has not stated what criteria it will use to determine who should be considered a "high risk alien" or who fits within the boundaries of a "terrorist profile." The Justice Department would also include in NCIC the names of some 355,000 non-citizens currently under final order of deportation or removal,[355] as well as photographs, fingerprints, and general information about individuals who are out of compliance with the special registration program.[356] The Justice Department has not indicated whether it will implement measures to ensure that NCIC information is correct or to make certain that incorrect information may be removed.[357]

Local officials nationwide have voiced their opposition to the federal government's efforts to have them enforce federal immigration law – opposition based on concerns that new responsibilities will compromise local officials' ability to ensure public safety, and concerns that immigration authority will compromise community relations critical to local policing.[358] For example, the chief of police in Arlington, Texas, asserted: "We can't and won't throw our scarce

resources at quasi-political, vaguely criminal, constitutionally questionable, [nor] any other evolving issues or unfunded mandates that aren't high priorities with our citizenry."[359] Chief Charles H. Ramsey of the Metropolitan Washington Police Department echoed this sentiment: "To begin in earnest checking immigration status, I can see where that could cause some tremendous strain. Unless there's some reasonable suspicion of a crime occurring, we need to be careful about the role we play."[360]

Raymond Flynn of Catholic Alliance, David Keene of the American Conservative Union, and Grover Norquist of Americans for Tax Reform, have together expressed their concern that the Justice Department's initiative will compromise effective policing techniques, "drain precious resources, [and] undermine the important relationships that these agencies have developed with the communities they serve."[361] And in Sacramento, California, Police Chief Arturo Venegas, Jr. also sounded a caution: "I don't think it's a good idea. We've made tremendous inroads into a lot of our immigrant communities. To get into the enforcement of immigration laws would build wedges and walls that have taken a long time to break down."[362]

In July 2003, Representative Charles Norwood (R-GA) introduced the "Clear Law Enforcement for Criminal Alien Removal Act of 2003" (CLEAR Act).[363] If enacted, the CLEAR Act would establish authority for state and local police to enforce civil immigration laws, and would require the entry of civil immigration information into the NCIC. More than 100 organizations that work with immigrants expressed concern about the CLEAR Act in a recent letter to members of Congress, noting that "[p]olice attribute plummeting crime rates over the last decade or so to the 'community policing' philosophy," and that "the CLEAR Act would undermine the efforts—and successes—of local police" who have used community policing "to gain the trust and confidence of the residents they are charged with protecting."[364]

Dwindling Refugee Resettlements

> *Our country can't seem to get its program back on track. The first year after September 11, everybody was willing to defer to the administration. By the middle of the second year, people had had it. If you want to give the management of the program a grade, it's a D-minus.*[365]
>
> **Leonard Glickman**, Chairperson of Refugee Council USA and President/CEO of the Hebrew Immigrant Aid Society

Nearly two years after September 11, the U.S. Refugee Resettlement Program appears destined to hit a record low for a second year in a row. The program continues to be hampered by lengthy delays in the conduct of new security checks and, as a bipartisan group of members of Congress stated, "a seeming chronic inability to meet the refugee admissions targets set in recent presidential determinations."[366] Ironically, the U.S. refugee resettlement program – which serves as a lifeline to victims of human rights abuses – appears poised to become a permanent victim of the administration's new approach to immigration in the wake of September 11.

The United States' humanitarian program to bring refugees from around the world to safety in the U.S. has long been a source of pride for Americans and a reminder of the country's

founding as a haven for the persecuted. As several members of Congress emphasized in a July 2003 letter to President Bush, "Protecting refugees who have fled severe religious, political, or other forms of persecution has been a critical component of the United States' strong commitment to freedom around the world."[367] Held up as a model for other countries, the program has provided a new life in safety and dignity for hundreds of thousands of refugees over the last two decades. Faith-based and other resettlement groups work with the U.S. government to welcome these refugees into the American community in a unique private-public partnership.

But since September 11, this humanitarian lifeline has frayed to a thread, dwindling from an average of 90,000 refugees resettled annually to an anticipated 27,000 expected this year. Although President Bush authorized the resettlement of 70,000 refugees from overseas during the last fiscal year (which ended September 30, 2002), a three-month suspension of the program immediately after September 11 and continued delays relating to new security procedures, meant that only 27,508 refugees came in last year.[368] In October 2002, the president again authorized resettlement of 70,000 refugees; but instead of investing in the staff and infrastructure needed to reach this number, the administration announced that it actually intended to resettle only 50,000 refugees during this fiscal year. Despite this projection, so far this year only 26,317 refugees had been resettled as of August 2003.[369]

The U.S. refugee resettlement program is currently being hampered by significant delays in the conduct of U.S. government security checks, a lack of sufficient resources, and a failure of management. Expressing concern for the plight of refugees, on April 9, 2003, members of the House of Representatives formed the "Bipartisan Congressional Refugee Caucus" which is dedicated to "affirming the United States' leadership and commitment to protection, humanitarian needs and compassionate treatment to refugees and persons in refugee-like circumstances throughout the world."[370] In a July 2003 letter expressing concern about the state of U.S. refugee resettlement, Representatives Chris Smith (R-NJ) and Howard Berman (D-CA) together with Senators Sam Brownback (R-KS) and Ted Kennedy (D-MA) asked President Bush to "honor our nation's longstanding tradition of providing a safe haven for refugees around the world" and urged that "the United States can and should do better."

Extending National Security to Haiti

> *Broad categories of foreigners who arrive in the United States illegally can be detained indefinitely without consideration of their individual circumstance if immigration officials say their release would endanger national security, according to a new ruling by Attorney General John Ashcroft. Previously, the government has jailed individuals or groups who arrived without visas and asked for asylum, but it had not asserted the right to indefinitely detain whole classes of illegal immigrants as security risks.*[371]
>
> **Federation for American Immigration Reform**

Citing national security and referring to the "current circumstances of a declared National Emergency," Attorney General Ashcroft issued a sweeping decision on April 17, 2003, preventing an 18-year-old Haitian asylum seeker from being released from detention. In the

decision (known as *In re D-J-*), the attorney general concluded that the asylum seeker, David Joseph, was not entitled to an individualized assessment of the need for his detention.[372]

There was no allegation that Joseph, who had arrived with about 200 other Haitians by boat in Biscayne Bay, Florida on October 29, 2002, presented any risk to the public. Instead, the attorney general's decision rested on two grounds. First, he concluded that if Joseph and others were released, their release "would come to the attention of others in Haiti," "encourag[ing] future surges in illegal migration by sea," and "injur[ing] national security by diverting valuable Coast Guard and [Defense Department] resources from counterterrorism and homeland security responsibilities."[373] Second, the attorney general asserted that the U.S. government lacked the resources to screen the Haitians before releasing them, raising further risks to national security.

This latter concern, the attorney general explained, was fully supported by the State Department. He said that the State Department had "observed an increase in aliens from countries such as Pakistan using Haiti as a staging point for migration to the United States."[374] Attorney General Ashcroft's remark, and particularly his use of the phrase "staging point," prompted an initial denial from the State Department. Stuart Pratt, a State Department spokesperson said, "We are all scratching our heads…. We are asking each other 'Where did they get that?'"[375] Although it was eventually confirmed that the State Department had indeed made the assertion, U.S. Representative Kendrick Meek (D-FL) stated: "This is outright discrimination and racism by this Bush Administration. There is justice in America for everybody but the Haitians. Someone needs to call the president and let him know we are at war against the Taliban and Al Qaeda, and not the Haitian people."[376]

The expansive wording of the *In re D-J-* decision raises concerns that the administration may seek to use it to justify the detention of broad categories of immigration detainees, beyond Haitian asylum seekers.[377] The decision directs immigration judges to consider national security arguments "in all future bond proceedings involving aliens seeking to enter the United States illegally, where the INS attorney offers evidence from sources in the executive branch with relevant expertise establishing that significant national security interests are implicated."[378] Further, the attorney general stated that even if Joseph were entitled to an individual hearing, such a hearing could be based on "general considerations applicable to a category of migrants" – an approach that would render any such hearing meaningless by disregarding the individual's specific circumstances.[379] Taken together, these pronouncements could be read to suggest that whenever the executive contends that "significant national security interests are implicated," an immigrant may be denied an individual assessment of whether her detention is necessary.

RECOMMENDATIONS

1. The Justice Department and DHS should continue cooperating with the OIG by implementing the remaining recommendations addressing the treatment of the September 11 detainees by the OIG's October 3, 2003 deadline. In addition, Congress should require the OIG to report semi-annually any complaints of alleged abuses of civil liberties by DHS employees and officials, including government efforts to address any such complaints.

2. The Justice Department should rescind the expanded custody procedures regulation that allows non-citizens to be detained for extended periods without notice of the charges against them, as well as the expanded regulation permitting automatic stays of immigration judge bond decisions.

3. The president should direct the attorney general to vacate his decision in *In re DJ* and restore prior law recognizing that immigration detainees are entitled to an individualized assessment of their eligibility for release from detention. Congress should enact a law making clear that arriving asylum seekers should also have their eligibility for release assessed by an immigration judge.

4. The administration should fully revive its Refugee Resettlement Program and publicly affirm the United States' commitment to restoring resettlement numbers to pre-2001 levels (90,000 refugees each year). It should ensure that adequate resources are devoted to refugee security checks so that these procedures do not cause unnecessary delays.

5. The Justice Department should respect the judgment of local law enforcement officials and cease efforts to enlist local officials in the enforcement of federal immigration law.