



THE 9/11 EFFECT *and* ITS LEGACY ON U.S. IMMIGRATION LAWS

ESSAYS, REMARKS, AND PHOTOGRAPHS

PENN STATE LAW

The Pennsylvania State University

SCHOOL *of* INTERNATIONAL AFFAIRS



Cover and featured photography by Steven Rubin

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OPENING REMARKS BY

SHOBA SIVAPRASAD WADHIA¹

PROFESSOR, PENN STATE LAW

The 9/11 Effect and its Legacy on U.S. Immigration Laws
Penn State Law, September 16, 2011

Good morning. My name is Shoba Sivaprasad Wadhia and I will be your M.C. for today. It is an honor to welcome you to Penn State's Immigration Symposium to mark the 10-year anniversary of 9/11. Today's symposium is being co-sponsored by Penn State Law's Center for Immigrants' Rights and School of International Affairs.

In the early months of 2001, immigration enjoyed appeal as both a political and policy matter. Former President George W. Bush and Mexican President Vincente Fox had met several times to discuss the terms of U.S.-Mexico relations and immigration reform in particular.² Bush and Fox were both former state governors who reached some common ground on how Congress can comprehensively fix the immigration system or at the very least craft a legalization program for the then 3 million undocumented Mexicans living in the U.S.

The narrative on immigration changed dramatically following the tragic events of 9/11. The majority of the 9/11 hijackers were able to obtain a visa from a U.S. consulate and enter through a point of inspection into the United States without detection. This fact alone revealed a vulnerability in the immigration system, and presented the U.S. government with a challenging task of both addressing the failures of intelligence and gaps in domestic immigration laws that may have contributed to 9/11, and also preserving American values of freedom, democracy, and an open society.

Following 9/11, the conflation of immigration and terrorism can be illustrated by the remarks of former Attorney General John Ashcroft – he spoke at a conference to the U.S. Mayors and in describing the zealotry with which potential “terrorists” in the September 11, 2001 should be punished, remarked:

Let the terrorists among us be warned: If you overstay your visa— even by one day—we will arrest you. If you violate a local law, you will be put in jail and kept in custody as long as possible. We will use every available statute. We will seek every prosecutorial advantage. We will use all our weapons within the law and under the Constitution to protect life and enhance security for America.³

Congress made significant changes to immigration law and policy as a result of 9/11. In 2002, Congress passed legislation abolishing the Immigration and Naturalization Service (INS) and creating a cabinet level Department of Homeland Security⁴ that among numerous functions houses immigration enforcement and services, a civil rights office, and a policy directorate. Leaving aside the coordination and leadership challenges of this new Department, moving the majority of immigration functions into a homeland security department sent a powerful message to noncitizens and countries around the world.

¹Shoba Sivaprasad Wadhia, Clinical Professor of Law and Director, Center for Immigrants' Rights, Penn State Law, Opening Remarks: The 9/11 Effect and its Legacy on U.S. Immigration Laws (Sept. 16, 2011), available at http://law.psu.edu/9_11_effect.

²Eric Schmitt, *Getting to Know You: America Fills Fox's Dance Card*, N.Y. TIMES, Apr. 8, 2001.

³Attorney General John Ashcroft, Speech to U.S. Conference of Mayors (Oct. 25, 2001).

⁴Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (2002).

The Executive branch also issued a number of regulatory and policy changes to immigration law and policy, many of which targeted Arab, Muslim and South Asian communities. These policies (which will be discussed in more detail by our speakers) included a new mechanism for tracking students and visitors entering and leaving the U.S.; collecting information from males from specific countries; and enabling immigration officers to hold immigrants in detention without charges for longer than 48 hours if an undefined exceptional circumstance was present.

In the meantime, many of the same communities impacted by the changes made to immigration law and policy after 9/11 forged alliances with political and civil rights organizations, built pro-democratic civil liberties institutions of their own, and engaged in direct dialogue government agencies about the excesses of select post 9/11 laws.

Ten years later, several questions remain. Did the reorganization of immigration into the Department of Homeland Security and immigration policies crafted by the executive branch serve as effective national security tools? Were these policies consistent with human rights instruments? Were these policies racially motivated? Are the communities impacted by 9/11 immigration policies still subject to heightened scrutiny? If so, is the scrutiny legitimate? Where do we go from here?

Today's speakers will describe the lessons and impacts of post 9/11 immigration laws and policies against the narratives of human rights, national security, and race. Our speakers include the former head of Immigration Customs Enforcement, a community leader for the South Asian community, a renowned writer and leader in migration policy, a lawyer who represented dozens of Muslim men in New York after 9/11, a leading scholar in immigration and race, a photography professor whose photos of U.S. immigration detention centers touched America, and a couple subjected to unequal treatment after 9/11 allegedly based on religion.

In the several months and years following 9/11, my work took me to small offices drafting and advancing legislation associated with the creation of the Department of Homeland Security and basic protections for communities impacted by overreaching policies; mosques and classrooms to engage community leaders and advocates across America around policy change; a closed office door to write public comments to the latest proposed rule in the Federal Register; and security lines filled with anticipation for a productive dialogue with key members of agencies responsible for administering immigration. My experiences were life changing, and challenged me to place myself in many different shoes, even if just temporarily. These experiences also influenced my desire to bring together a diverse composition of speakers for today's event. I believe an honest discussion about immigration issues ten years later requires exposure to many different shoes – those worn by the scholar, community member, government official, and lawyer and so on. I hope that today's speakers challenge your preconceptions and inspire discussion-- they have certainly been an inspiration to me. ■



OPENING REMARKS BY

TIYANJANA MALUWA⁵

DIRECTOR, PENN STATE SCHOOL OF INTERNATIONAL AFFAIRS

The 9/11 Effect and its Legacy on U.S. Immigration Laws
Penn State Law, September 16, 2011

A Word of Welcome From The School of International Affairs

The Penn State School of International Affairs (SIA) is honored to be a co-sponsor, with the Center for Immigrants' Rights, of the *Symposium on The 9/11 Effect and its Legacy on U.S. Immigration Laws*. For the SIA, this event is relevant to its mission, namely to provide a unique environment for learning and professional development for Penn State graduate students and to prepare them for leadership positions in both national and international public service in an increasingly interdependent world. The principal objective of our educational program is to increase the students' understanding of international affairs. The program is designed to meet the needs and interests of students seeking to acquire substantive knowledge, practical skills and training necessary for them to become nationally and internationally competitive in the host of international endeavors that increasingly intersect with international affairs. More specifically, we aim to prepare students for the global work place of the 21st century by combining multidisciplinary, policy-oriented studies with career development.

One area that has become increasingly important for students and practitioners of international affairs to understand more deeply is the subject of counter-terrorism and human rights. The subject has attracted considerable interest since the shocking and tragic events of 9/11, as the U.S. and other nations around the world, as well as the United Nations and other regional organizations, have grappled with the challenges of formulating and implementing policies and measures aimed at fighting international terrorism while ensuring compliance with their obligations under international law, in particular international human rights, refugee and humanitarian law. The tensions between ensuring the public safety and security of nations while holding fast to long established traditions of respect for human rights and civil liberties of citizens and non-citizens alike has been the focus of intense debates among politicians and policymakers, and scholarly inquiry and discourses. While most of these debates have been played out in the legal community—among legal academics and practitioners—students of international affairs broadly speaking have also been significant participants in these conversations. Among the issues that have been the focus of these debates are the subjects chosen for the three panels in this symposium: immigration and human rights, immigration and national security, and immigration and race.

The SIA is thus most pleased to welcome to the symposium the presenters and participants who have responded positively to the invitation to pursue this conversation from the various perspectives today. The symposium is not intended to be simply a forum for academic debates; rather we view it as an opportunity for participants to exchange views, debate ideas, interrogate current policies and offer practical suggestions and recommendations that can contribute to a better understanding of the effect and legacy of 9/11 on the nation's immigration laws and more enlightened legislative policymaking by governments in future.

Once again, on behalf of the Penn State SIA community, I heartily welcome all the participants in this symposium and thank them for their contributions. — Tiyanjana Maluwa ■

⁵Tiyanjana Maluwa, Associate Dean for International Affairs and H. Laddie Montague Chair in Law; Director of the Penn State School of International Affairs, Penn State University, Opening Remarks: The 9/11 Effect and its Legacy on U.S. Immigration Laws (Sept. 16, 2011).

THE 9/11 EFFECT AND ITS LEGACY ON U.S. IMMIGRATION LAWS • SEPTEMBER 16, 2011

PROGRAM AGENDA**9:30 - 9:45 a.m. — Welcome**

Shoba Sivaprasad Wadhia, Penn State Law

9:45 - 11:15 a.m. — Immigration and Human Rights

Tiyanjana Maluwa, Moderator, Penn State School of International Affairs

Jumana Musa, Rights Working Group

Sarah Paoletti, University of Pennsylvania Law School

Wendy Patten, Open Society Foundations

Many of the 9/11 immigration policies have been analyzed under a human rights framework and in some cases have been challenged as violating international treaties and conventions on human rights. To illustrate, the Justice Department's own Inspector General found that many of the "special interest" detainees held in prisons as suspected terrorists in the aftermath of 9/11 were physically and verbally abused, denied basic access to counsel or family members, and ultimately charged with immigration violations.

11:30 a.m. - 1:00 p.m. — Immigration and National Security

Margaret Stock, Moderator, Lane Powell PC and University of Alaska

Donald Kerwin Jr., Center for Migration Studies

Kareem Shora, Department of Homeland Security

Julie Myers Wood, ICS Consulting, LLC and Immigration and Customs Solutions, LLC

Immediately following 9/11, the United States made many changes to immigration laws and policies, with "national security" needs given as a justification for many of those changes. Some of these changes were prudent responses and improved the general effectiveness of U.S. law enforcement by more fully integrating immigration violations into other significant law enforcement investigations, and more directly addressing the potential vulnerabilities in our immigration system. The efficacy of other changes, however, has been questioned. In some cases, the changes were not particularly intelligence-based and were not even found to "catch terrorists" or improve security in a meaningful way. In other cases, the agencies and actors responsible for changing some policies were not questioned or held accountable on their efficacy.

1:00 - 2:00 p.m. — Lunch and Plenary

Erich Scherfen and Rubina Tareen

Steven Rubin — **Photographs featuring U.S. prisons holding immigration detainees**

2:00 - 3:30 p.m. — Immigration and Race

Victor Romero, Moderator, Penn State Law

Susan M. Akram, Boston University School of Law

Sin Yen Ling, Asian Law Caucus

Priya Murthy, South Asian Americans Leading Together

The impact of 9/11 immigration policies on communities of color and in particular Arabs and South Asians from Muslim-majority countries is striking. The most controversial domestic program was a "special registration" rule that enlisted tens of thousands of young males from 24 Muslim countries (plus North Korea) and resulted in the prosecution of thousands of individuals with minor visa violations. Ten years later, many people impacted by programs like the special registration program continue to fight their immigration cases.

3:30 - 3:45 p.m. — Conclusion

Shoba Sivaprasad Wadhia, Penn State Law

3:45 - 5:15 p.m. — Reception



WENDY PATTEN

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The 9/11 Effect and its Legacy on U.S. Immigration Laws
Penn State Law, September 16, 2011

Human Rights Implications of Post-9/11 Immigration Policies: A Look Back Ten Years Later

In the weeks and months following the terrorist attacks of September 11, 2001, several high-profile counter-terrorism measures were put in place, such as the enactment of the USA PATRIOT Act, the issuance of an Executive Order authorizing military commission trials, and the opening of the detention center at Guantanamo Bay, Cuba. Another very significant shift played out less publicly in the Department of Justice's reworking of U.S. immigration laws. In the wake of 9/11, the Bush Administration moved swiftly to implement new policies that vastly expanded its authority to detain and investigate non-citizens, using its considerable discretion in implementing immigration laws in ways that undermined the basic rights of non-citizens. Whether they were held as so-called special interest detainees, or subjected to special entry-exit registration requirements, or removed to countries where they faced a risk of torture, non-citizens encountered immigration policies that were profoundly altered in the aftermath of 9/11.

While some of these measures are not currently in use and some, in particular the special interest detentions, have not been used for years, many of these authorities remain on the books and could be used in the future. It is critically important to understand and assess these measures and ensure that misguided policies that violate basic rights are not reinstituted in a future time of crisis.

Special Interest Detentions

In the wake of the 9/11 attacks, supporters of anti-immigrant measures found common cause with the Bush Administration in justifying expansive new immigration authorities in the name of national security. The Department of Justice (DOJ) began focusing on immigrants almost immediately. In the weeks following the attacks, DOJ implemented a new set of policies for a growing category of non-citizens who became known as special interest detainees. In total, more than 760 predominantly Muslim men were held as special interest detainees. Many of the detainees were held for weeks, even months, without being charged. Ultimately, none was charged with a crime related to the attacks of 9/11; many were deported for visa violations.

The special interest detentions raised numerous human rights concerns ranging from prolonged arbitrary detention to interference with the right to counsel to unduly harsh conditions of confinement. The special policies put in place for these immigrant detainees in the aftermath of 9/11 are described below. An overarching problem was the haphazard way in which individuals were placed in the special immigrant category, which then resulted in their being subjected to this special set of policies that violated basic rights.

"Hold Until Cleared"

In the days after 9/11, DOJ implemented a policy that required immigration officials to hold all special interest detainees until the Federal Bureau of Investigation (FBI) had cleared them of any terrorist connections. This policy resulted in persons being held far longer than normally would have been the case. Furthermore, in some cases, special interest detainees remained in custody well *after* their immigration cases had concluded with an order that

they be removed from the United States. Rather than effectuating the removal orders, the Immigration and Naturalization Service (INS) kept them in custody while the FBI continued to investigate them.

Critical to understanding the “hold until cleared” policy was the process by which non-citizens were placed in the special interest category in the first place, a process which DOJ’s own Inspector General criticized as haphazard and indiscriminate.⁶ The criteria for determining whether a non-citizen was of interest to the 9/11 investigation were never made clear. For example, non-citizens who were encountered randomly by law enforcement officials in the course of their investigation of the attacks were often placed in special interest detention, even if they had no connection to terrorism. What is clear is that special interest detentions focused on Arab and Muslim men. The vast majority of non-citizens placed on the special interest list were of Middle Eastern, Arab, or South Asian origin. Just under half of the detainees were from Egypt and Pakistan.

Most of the special interest detainees were arrested for routine immigration violations, such as overstaying their visas, which would not have warranted lengthy detention prior to 9/11. However, DOJ kept these individuals detained on immigration grounds while it investigated them for ties to terrorist activity, despite legal prohibitions against criminal detention in the absence of probable cause that the person had committed a crime.

Prolonged Arbitrary Detention

On September 20, 2001, the INS increased the length of time that immigration authorities could detain a non-citizen without charging him with an immigration violation. Previously, the rule was 24 hours with no exception for emergency situations; this regulation was quietly changed to 48 hours with “an additional reasonable period of time” in cases of emergency or other extraordinary circumstance.⁷ What constituted an emergency or extraordinary circumstance was left undefined and the new rule set no limit on the time period for which a person could be held in such situations. Thus, immigration detainees could be held indefinitely without charge and denied the due process rights typically afforded to criminal suspects, even if they were being held in connection with a criminal investigation (i.e., in connection with the 9/11 attacks). The impact of this rule change was felt immediately. Human Rights Watch documented many instances of prolonged detention without charge, including some cases of up to four months.⁸ This practice of arbitrary detention contravenes both international and U.S. constitutional law.

Overriding Judicial Orders to Release Individuals on Bond

In an immigration bond hearing, a judge determines whether a non-citizen arrested on immigration charges is a danger to the community or a flight risk and thus should remain in detention pending immigration proceedings. Prior to 9/11, aliens without criminal records who had committed minor visa violations were typically released with either a low bond or no bond at all. However, after 9/11, DOJ instituted a “no-bond” policy for all special interest detainees and set extremely high bonds for others. In October 2001, the INS issued an “automatic stay” rule that allowed DOJ to override judicial decisions to release non-citizens on bond in cases in which the government had requested either no bond or a bond over \$10,000.⁹ After a bond hearing in an individual case, DOJ could simply invoke the new regulation to stay the judge’s decision automatically and keep the person detained, notwithstanding a judicial ruling that the person should be released.

Interference with the Right to Counsel

Both domestic and international human rights laws protect an individual’s right to be represented by legal counsel when detained for criminal or immigration violations. Having a lawyer present is a particularly important safeguard for immigrant detainees who are often unfamiliar with the U.S. legal system and unaware of their rights. Under U.S. constitutional law, anyone in custodial interrogation for criminal matters has the right to have an attorney present, including free representation if needed. Those detained for immigration proceedings do not automatically have such a right but must be permitted to secure representation on their own.

Special interest detainees encountered challenges in accessing representation in their immigration cases, in particular due to a communications blackout at the principal detention center where detainees were held in the first few

⁶U.S. DEP’T 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 (June 2003), available at <http://www.justice.gov/oig/special/0306/full.pdf>.

⁷8 C.F.R. § 287, INS No. 2171-01.

⁸HUMAN RIGHTS WATCH, PRESUMPTION OF GUILT: HUMAN RIGHTS ABUSES OF POST-SEPTEMBER 11 DETAINEES 50 (2002), available at <http://www.hrw.org/reports/2002/us911/>.

⁹8 C.F.R. Part 3, INS No. 2172-01; AG Order No. 2528-2001.

weeks after 9/11. Equally troubling was the way the FBI circumvented the right to counsel by interrogating detainees being held on immigration charges about criminal matters without affording them their Miranda rights, as is required in custodial interrogation of criminal suspects. In some cases, the detainees were not told they had a right to counsel until after being questioned by the FBI; others simply had their requests for counsel ignored. By unlawfully engaging in criminal questioning of detainees in immigration custody, DOJ misused the immigration laws in order to circumvent fundamental human rights and constitutional protections for criminal suspects.

Unduly Harsh Detention Conditions

In 2003, the DOJ's Office of Inspector General issued a report detailing the abusive conditions to which some September 11 detainees were subjected, notably those held at New York's Metropolitan Detention Center. The Inspector General found evidence of a pattern of physical and verbal abuse. The physical abuse included slamming detainees into walls, twisting their arms and hands, and stepping on the chains of their leg restraints.¹⁰ Many detainees were held on 23-hour per day lockdown and in cells that were illuminated 24 hours per day for months, interfering with their ability to sleep. Many were prevented from communicating with their families and even with attorneys, and later had only very limited telephone access that made family and counsel contacts difficult. Such treatment and detention conditions are inconsistent with human rights standards.¹¹

NSEERS (Special Registration)

In mid-2002, the government announced a new program called the National Security Entry-Exit Registration System (NSEERS), which required visitors from designated countries, as well as individuals meeting undisclosed criteria, to be registered, fingerprinted, and photographed upon entering the United States. They subsequently had to report for follow-up interviews after 30 days and then again after one year, as well as register their departure. In the call-in registration program, nationals of 24 Muslim-majority countries and North Korea who were already in the United States were required to report to immigration authorities to be similarly documented and interviewed. Call-in registration applied to men and boys over age 16 who had entered the United States before September 2002.

The NSEERS rules and deadlines were "complex, confusing, poorly publicized, and rolled out piecemeal."¹² Even seasoned immigration attorneys were unsure as to who was required to register. A Canadian citizen living in the United States could be considered an Iraqi national if he had been born in Iraq even if he had lived in Canada his entire life. The inconsistent application of the program and its unclear rules led to many individuals being put into removal proceedings after making innocent mistakes in their attempts to comply.

While the Bush Administration made some limited adjustments to the NSEERS program, its core elements remained in effect despite serious concerns about both its ineffectiveness and its discriminatory nature. NSEERS reflects a tendency toward programs that sweep too broadly, often using national origin as a basis for enforcement rather than individualized behavior. Such blunt instruments for countering terrorism are far less likely to be successful than policies that are appropriately targeted to detecting actual threats. Such programs are not only ineffective but also counterproductive, giving rise to charges of profiling and discrimination based on national origin or religion. NSEERS targeted entire communities, making them feel suspect and unfairly subjected to special scrutiny based solely on their religion, ethnicity, or country of origin.

In April 2011, after years of criticism of NSEERS and calls for its termination, the Department of Homeland Security (DHS) ended the NSEERS program. Instead of rescinding the regulation, however, DHS "de-listed" all of the countries whose nationals were subject to the NSEERS registration requirements.¹³ While advocates welcomed the termination of the program, they voiced concern that the regulation had not been rescinded and that a list of countries could be easily reinstated should DHS choose to do so. Advocates for affected communities continue to urge DHS to deal appropriately and humanely with those who have suffered negative consequences due to this confusing and discriminatory policy.

¹⁰U.S. DEP'T OF JUSTICE, *supra* note 6.

¹¹For more on the special interest detentions and efforts to challenge them, see Wendy Patten, *The Impact of September 11 and the Struggle against Terrorism on the U.S. Domestic Human Rights Movement*, in BRINGING HUMAN RIGHTS HOME: A HISTORY OF HUMAN RIGHTS IN THE UNITED STATES (Cynthia Soohoo et al., Praeger Publishers, 2008).

¹²IMMIGRATION POLICY CENTER, TARGETS OF SUSPICION: THE IMPACT OF POST 9/11 POLICIES ON MUSLIMS, ARABS AND SOUTH ASIANS IN THE UNITED STATES 4 (2004), available at <http://www.immigrationpolicy.org/sites/default/files/docs/Targets%20of%20Suspicion.pdf>.

Extraordinary Rendition: Transfer to Risk of Torture

Extraordinary rendition involves the transfer, most often outside of legal procedures, of a person to another country where he or she may be at risk of torture. Such transfers are prohibited by the UN Convention Against Torture and the International Covenant on Civil and Political Rights, both of which were ratified by the United States in the early 1990s. After the 9/11 attacks, however, individuals suspected of terrorism were secretly and unlawfully transferred to other countries for detention and interrogation despite the risk that they would be tortured.

In what has become one of the most well-known rendition cases, Maher Arar, a Syrian-born Canadian citizen, was detained at New York's Kennedy airport while en route to his home in Canada on September 26, 2002.¹⁴ After eight hours of interrogation by the FBI, the INS, and the New York Police Department, Arar was transferred to a nearby detention center and held for nearly two weeks. During his detention, he was held in solitary confinement and subjected to prolonged interrogation without his lawyer present. When asked to return voluntarily to Syria, Arar refused, fearing that he would be tortured. He stated that he wanted to return to his home in Canada. On October 9, he was flown to Jordan and then transferred to a prison in Syria. He spent nearly a year in a tiny cell in a Syrian jail where he was beaten and brutally interrogated by Syrian intelligence agents. Finally, in October 2003, Arar was released and sent home.

The Bush Administration failed to adequately explain why it sent Maher Arar to Syria and not to Canada. In the face of concerns about torture in Syria, the U.S. government sought "diplomatic assurances" from the Syrian government, despite the fact that it was widely known to use torture in interrogating prisoners. The Bush Administration never justified how the transfer could have been deemed lawful given the absolute prohibition on transfers to risk of torture under U.S. and international law. Arar's lawsuit against U.S. officials responsible for his rendition to Syria was dismissed by U.S. courts on national security and foreign policy grounds. While the Canadian government formally apologized to Arar and paid him substantial compensation, the United States has neither apologized nor accepted responsibility for its handling of his rendition to Syria through an immigration removal case.

Citizens and Non-Citizens: A Hierarchy of Rights

The immigration policies put in place as counter-terrorism measures after 9/11 tended to expand and reinforce a perception of a hierarchy of rights between citizens and non-citizens. Many justified these and other new counter-terrorism policies by arguing that non-citizens were not entitled to the same rights as citizens. Human rights advocates, however, pointed to international human rights standards to underscore that human rights are rooted in the inherent dignity of all human beings, regardless of citizenship status. They also pointed out that the U.S. Constitution distinguishes between citizens and non-citizens only with regard to voting and holding federal elective office. Otherwise, the Constitution refers to persons, not citizens. As a constitutional matter, the assertion that immigrants are not entitled to, for example, the same right to a fair trial as citizens is clearly incorrect.

Still, this erroneous idea has continued to influence policy debates about counter-terrorism, reaching beyond immigration enforcement to other measures that apply only to non-citizens. Numerous counter-terrorism policies, such as military commissions, have drawn distinctions between citizens and non-citizens in ways that are inconsistent with both human rights standards and U.S. constitutional principles. In many ways, this hierarchy of rights may be the most problematic and enduring impact of these policies in human rights terms.

Today, 10 years after the 9/11 attacks, our national conversation about immigration policy is a different one – one that is largely framed by national security concerns. The three policies discussed in this paper – special interest detentions, NSEERS, and rendition in the form of removal of immigrants to risk of torture – were implemented in the aftermath of the attacks. While some of these new immigration policies have since been abandoned, their effects remain. It is important to reflect on these policies, learn from the mistakes that were made, and ensure that they are not repeated in the future. ■

¹³U.S. Customs & Border Patrol, Important NSEERS Information (May 20, 2011), http://www.cbp.gov/xp/cgov/travel/id_visa/nseers/imp_nseers_info.xml (May 20, 2011).

¹⁴CENTER FOR CONSTITUTIONAL RIGHTS, EXTRAORDINARY RENDITION: THE STORY OF MAHER ARAR (2010), available at <http://ccrjustice.org/files/New%20Arar%20Factsheet%2011.2010.pdf>.



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The 9/11 Effect and its Legacy on U.S. Immigration Laws
Penn State Law, September 16, 2011

The Lessons of 9/11 and Immigration: Some Progress, Many Missed Opportunities, and A Long Way to Go

Shortly after 9/11, Benjamin Johnson and I argued in a paper on immigration and national security¹⁵ that to prevent future terrorist attacks, the United States must focus its attention and resources on the gaps in intelligence gathering and information sharing that allowed nineteen terrorists to enter and attack the United States. We argued that national security is most effectively enhanced by improving the mechanisms for identifying actual terrorists, not by implementing harsher immigration laws or blindly treating all foreigners as potential terrorists. We pointed out that policies and practices that fail to properly distinguish between terrorists and legitimate foreign travelers are ineffective security tools that waste limited resources, damage the U.S. economy, alienate those groups whose cooperation the U.S. government needs to prevent terrorism, and foster a false sense of security.

We offered ten immigration policy prescriptions that would improve US national security and yet not jeopardize the immigration system's ability to be an effective tool in the fight against terrorism. Ten years after 9/11, how is the United States doing on each of these recommendations?

1. We recommended that the United States adequately fund the development of new technology that uses biometric data to identify and track individuals who travel to and from the United States. Today, that goal has mostly been achieved on the front end, as the United States today has an entry system that uses biometric data (fingerprints and photographs) to identify persons entering the United States. A full exit system remains an unachieved and extraordinarily expensive goal, although a partial exit tracking system exists.¹⁶
2. We recommended the integration of information sharing among federal agencies, and that goal has also largely been met. But work remains to be done on related issues that we identified: Security databases do not include full safe guards against potential abuse of data, do not ensure the security and confidentiality of information, and do not fully protect the privacy rights of individuals about whom information is collected. Some progress has been made on procedures to determine how information is entered into and removed from the databases, but erroneous data is still a significant issue. Privacy protections and information accuracy can enhance security and should be given the same level of attention that is given to the collection of data.
3. We recommended implementing a comprehensive, adequately funded, and workable entry-exit system that allows for evaluation of threats on a case-by-case basis, rather than profiling entire groups. We also emphasized that legitimate travelers should be allowed to get through immigration checkpoints quickly. The United States has made substantial progress in this area, although much work remains to be done. Legitimate travelers still re-

¹⁵BENJAMIN JOHNSON & MARGARET D. STOCK, IMMIGRATION POLICY CENTER, THE LESSONS OF 9/11: A FAILURE OF INTELLIGENCE, NOT IMMIGRATION LAW (2003), available at <http://www.immigrationpolicy.org/sites/default/files/docs/PF%20911%20final.pdf>.

¹⁶Julia Preston, *U.S. Inquiry Traces Foreigners With Visas*, N.Y. TIMES, Sept. 13, 2011, at A19.

port problems with “security” rules being blindly applied to exclude persons who pose no real threat to the United States.

4. We recommended making the U.S. border the last line of defense against terrorism, not the first, by pursuing multilateral strategies with Canada and Mexico to create a North American Perimeter Safety Zone; requiring all airlines flying to the United States, including foreign airlines, to transmit passengers' names at take-off to the destination airport so that they can be checked against the look-out list; and increasing the use of pre-clearance and pre-inspection programs that provide U.S. officials the opportunity to check passengers for admission prior to their boarding a flight to the United States (while including safeguards to allow asylum protection for those who truly deserve it). The United States has made substantial progress in achieving these goals. Travelers from many countries can now log onto the ESTA system and find out in advance of boarding a flight whether they are likely to be denied admission to the United States. Incidents like the infamous Cat Stevens scenario—where the British rock star’s US-bound plane was diverted and the rock star expeditiously removed from the US because of a past contribution to a Muslim charitable organization—have been reduced. The United States and Canada have formalized much border cooperation and information-sharing through bilateral agreements and cooperative arrangements such as Integrated Border Enforcement Teams (IBETs). Mexico and the U.S. are also attempting to cooperate on many border security issues.

5. We recommended creating an office within the Department of Homeland Security whose mission would be to gain the cooperation of immigrants in the war on terrorism through policies that have an intelligence, rather than an enforcement, perspective. This goal has not been achieved. Within DHS, agencies continue to follow the old path of gaining the cooperation of immigrants only on an ad hoc basis as enforcement officers encounter them in the course of traditional investigative work. The FBI has a more formal program to gain the cooperation of immigrants, but it has been heavily criticized as being ineffective and misdirected.¹⁷

6. We recommended training immigration officials to understand the tactics, techniques, and procedures used by terrorists, as well as in ways to obtain community cooperation in uncovering threats. DHS has made improvements in this regard, although much work remains to be done in obtaining community cooperation in uncovering threats. The agency still relies too much on blind application of rules without individualized evaluation of the threat that a particular person might pose.

7. We recommended simplifying immigration laws in order to address security threats, while eliminating extraneous or provisions and repealing provisions that tie up resources and add to the complexity and confusion of our immigration system without measurably enhancing our security (i.e., INA §212(a)(9)(B)). Little or no progress has been made on this front, although some relatively minor improvements have been made to the “material support to terrorism” provisions of the laws, which previously resulted in anomalous situations where US allies were barred from the United States for having helped to overthrow Saddam Hussein, to give just one example.¹⁸

8. We recommended expanding the grounds of eligibility and the number of visas available to persons who provide valuable information on terrorist threats. Some progress has been made with regard to the issuance of S, T, and U visas, but work on this issue continues to be necessary. After 9/11, Congress did enact legislation to provide visas to certain persons who worked with the United States in Iraq and Afghanistan, but problems with processing those visas still persist.

9. We recommended developing a comprehensive legalization program to allow unauthorized immigrants in the United States to obtain legal status, along with a guest-worker program to provide a legal and orderly flow of immigrants to fill legitimate labor market needs, in order to allow enforcement efforts to focus on terrorists. No progress has been made on this objective, although recently the Obama Administration announced that it would use “prosecutorial discretion” to try to prioritize its enforcement efforts. Unfortunately, a program allowing for

¹⁷Petra Bartosiewicz, *To Catch A Terrorist: The FBI Hunts for the Enemy Within*, HARPER’S MAGAZINE, Aug. 2011.

¹⁸Karen DeYoung, *Stalwart Service for U.S. in Iraq Is Not Enough to Gain Green Card*, WASH. POST, Mar. 23, 2008, at A01.

the limited use of prosecutorial discretion in some cases does not allow most immigrants to come out of the shadows, become documented, pay penalties, pay taxes, or buy health insurance. The more formal use of prosecutorial discretion is a small step forward in the appropriate use of enforcement resources, but does little to address the underlying problem.

10. We recommended restoring integrity to the system by creating a judicial review process for overseas visa denials, to ensure that consular officers are applying consistent policies, and restoring discretion to immigration judges and officials so they can allow aliens who are not security threats to stay in the United States, rather than wasting resources on deporting deserving individuals with ties to our country (i.e., restoration of the old "suspension of deportation" provisions). Little to no progress has been made in this area; clients continue to report that consular officers make arbitrary decisions that are not supported by law, and agency resources continue to focus on non-citizens who are no threat to the United States, and who could make valuable contributions to the U.S. if they were permitted to reside here legally. For example, the Department of State recently denied an immigrant visa to the spouse of a US soldier because the spouse had worked unlawfully in the United States; a consular officer determined that she was permanently barred from the United States because of the unlawful employment on "false claim to US citizen" grounds. Because his wife was permanently barred from living in the US and was unable to obtain parole from USCIS, the soldier was forced to leave the US Army so that he could live—outside the United States—with his wife and children. The United States is not better protected when consular officers make such decisions and immigrants have no recourse to review them.

There have been many negative developments in the immigration policy arena since 9/11, and it is now generally conceded that the government overreacted in some areas. Yet even after government officials have admitted to an overreaction and rescind faulty policies, the after effects of failed policies linger on.¹⁹ Other problems have resulted from the federal government's failure to exercise leadership in resolving problems; emotion and fear have overcome reasoned cost-benefit analysis in many areas. The federal government's inability to convince state and local governments that it is adequately addressing immigration issues has led some of those governments to try to take matters into their own hands, creating costly problems for the federal government and leading to an overload of immigration cases in the court system. The explosive growth in the immigration detention system has not measurably added to American security, but has cost the US taxpayer billions and created a new prison-industrial complex. The climate of fear of immigrants has not abated since 9/11, and many seem to be profiting from it. Agencies continue to report difficulty in integrating intelligence analysis into law enforcement operations.²⁰ In the words of Stephen Flynn, "stepped-up enforcement along the Mexican border suggests that U.S. efforts aimed at hardening its borders can have the unintended consequences of creating the kind of environment that is conducive to terrorists and criminals," a phenomenon Flynn calls the "hardened border paradox."²¹ Finally, DHS has "failed to develop a border security strategy that complements US domestic and national security objectives."²²

Nor has the poor health of the economy caused policymakers to re-think immigration rules in a way that enhances our economic security. Foreigners with legitimate business in the United States or who seek to invest here continue to report arbitrary behavior by government agencies. Within the US, United States Citizenship & Immigration Services has become legendary for its oppressive "requests for evidence" and denials of legitimate petitions for employment-related visas. American employers find that it is often easier to outsource jobs than to comply with legal immigration procedures. Immigration policies are not supporting America's need for economic security.

¹⁹For example, the Department of Homeland Security has admitted that the costly National Security Entry Exit Registration System (NSEERS) was a failure, and has removed countries from the NSEERS list, but has failed to rescind NSEERS regulations or address the impact on persons wrongly targeted by NSEERS.

²⁰LOIS M. DAVIS ET AL., LONG TERM EFFECTS OF LAW ENFORCEMENT'S POST-9/11 FOCUS ON COUNTERTERRORISM AND HOMELAND SECURITY (2010) ("LEAs are finding it harder and harder to make the case for investigating in [counterterrorism] and [homeland security] and the long-term benefits of such investments").

²¹STEPHEN FLYNN, AMERICA THE VULNERABLE: HOW OUR GOVERNMENT IS FAILING TO PROTECT US FROM TERRORISM (2004).

²²Tom Barry, Border Security After 9/11: Ten Years of Waste, Immigrant Crackdowns and New Drug Wars, TRUTHOUT (Sep. 11, 2011), <http://www.truth-out.org/border-security-after-911-ten-years-waste-immigrant-crackdowns-and-new-drug-wars/1315606529>.

There have been a few bright spots on the immigration and security front: The Department of Defense and the Department of Homeland Security have cooperated on new initiatives to benefit the US military, and those initiatives have helped military members and their families in ways that directly benefit US national security. Immigrants who enlist in the Army and Navy now can usually obtain expedited citizenship at basic training.²³ Military members and their families have benefitted from the use of prosecutorial discretion in appropriate cases.²⁴ The MAVNI (Military Accessions Vital to the National Interest) pilot program, started under the Bush Administration but run as a pilot program in 2009, brought a thousand legal non-citizens into the US military to fill vital language and health care jobs, saving the U.S. government hundreds of thousands of dollars in the process. Unfortunately, the Obama Administration has to date—through bureaucratic inefficiency—failed to extend the program, despite MAVNI’s demonstrated value to the war on terrorism.²⁵ Nor has the administration made it a high priority to ease the visa process for those Iraqis and Afghans who have helped the US in overseas conflicts, although new visa categories were created for such persons under the Bush Administration.

Overall, the US has made some progress in addressing immigration and security issues in the decade since 9/11—but much time and many resources have also been squandered on missteps, and much remains to be done. The United States still lacks an overall immigration-and-national security strategy. And most of the criticisms that Benjamin Johnson and I made in our paper remain true today: Harsher immigration laws may give Americans the impression that security has been enhanced, but in reality, they serve mainly to deflect attention and resources away from the key goal of improving intelligence gathering and information sharing. Ten years later, we still have a long way to go. ■

²³Inexplicably, the Air Force and Marine Corps do not participate in this program, although its benefits to the military are tangible and substantial.

²⁴Jason Buch, *Immigration Provision Can Benefit Military Spouses*, SAN ANTONIO NEWS-EXPRESS (June 30, 2011), available at <http://www.mysanantonio.com/news/article/Immigration-provision-can-benefit-military-spouses-1446014.php>.

²⁵Julia Preston, *Thriving Military Recruitment Program Blocked*, N.Y. TIMES, Jan. 21, 2010 (“Recruiting officials said they were waiting for senior readiness officials in the office of Defense Secretary Robert M. Gates to approve an extension of the program.”).



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The 9/11 Effect and its Legacy on U.S. Immigration Laws
Penn State Law, September 16, 2011

US Refugee Protection Policy Ten years After 9/11

The George W. Bush administration responded to the 9/11 terrorist attacks with a succession of immigration-related security measures. It also invoked national security to justify longstanding immigration control policies and practices. Over the last decade, significant progress has been made in reducing the immigration-related vulnerabilities exposed by the attacks, particularly in the areas of information sharing and screening. However, national security proved a poor rubric for many immigration control measures, and some post-9/11 strategies – like the call-in registration program for men from select Middle-Eastern and South Asian nations – failed to increase security and raised civil rights concerns.²⁷ In addition, anti-terror measures have perversely resulted in reduced protections to the victims of terrorism and persecution.²⁸ This short paper will review the US refugee protection system ten years after the 9/11 attacks.

Pre-9/11 Restrictions

The Refugee Act of 1980 represented a high water mark in the establishment of the US refugee protection system, creating the formal US refugee resettlement program and bringing domestic law into conformity with international refugee law.²⁹

Between 1980 and the 9/11 attacks, several developments eroded the US refugee protection edifice. In 1993, for example, the US Supreme Court held that the legal prohibition on return of persons to countries where their lives or freedom would be threatened – contained in Article 33 of the UN Convention relating to the Status of Refugees and the Immigration and Nationality Act (INA) -- did not apply to foreign nationals interdicted on the high seas.³⁰ UNHCR's Executive Committee (EXCOM), as well as numerous commentators, vehemently disagreed with this decision, arguing that it eviscerated the principle of *non-refoulement*.³¹

The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) created the “expedited removal” process, which summarily turns away migrants caught near land and sea borders or stopped at ports of entry, who lack proper documents and who do not request asylum or express a fear of persecution.³² The number of expedited removals has ranged between 106,025 and 112,716 in each of the last five years.³³ The US Commission on

²⁶Different arms of the federal government, for example, cited national security concerns to support the interdiction, repatriation and detention of Haitian boat people, the Safe Third country asylum agreement with Canada, and the indefinite detention of persons who could not be removed.

²⁷Donald Kerwin, *The Use and Misuse of 'National Security' Rationale in Crafting US Refugee and Immigration Policies*, 17 Int'l J. Refugee L. 749 (2005).

²⁸DONALD KERWIN, MIGRATION POLICY CENTER, THE FALTERING US REFUGEE PROTECTION PROGRAM: LEGAL AND POLICY RESPONSES TO REFUGEES, ASYLUM SEEKERS, AND OTHERS IN NEED OF PROTECTION (2011), available at <http://www.migrationpolicy.org/pubs/refugeeprotection-2011.pdf>.

²⁹The Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (March 17, 1980), US Statutes at Large 94 (1980): 103.

³⁰*Sale v. Haitian Centers Council*, 509 U.S. 155 (1993).

³¹UNHCR, Executive Committee, Interception of Asylum-Seekers and Refugees: The International Framework and Recommendations for a Comprehensive Approach, ¶ 23, UN Doc. EC/50/SC/CRP.17, (June 9, 2000), available at www.unhcr.org/4963237411.html.

³²The Illegal Immigrant Reform and Immigrant Responsibility Act (IIRIRA) of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (Sept. 30, 1996). US Statutes at Large 110 (1996): 3009.

³³US DEPARTMENT OF HOMELAND SECURITY (DHS), IMMIGRATION ENFORCEMENT ACTIONS: 2010 4 (2010), available at <http://www.dhs.gov/xlibrary/assets/statistics/publications/enforcement-ar-2010.pdf>.

International Religious Freedom found that one of every six migrants subject to this process who expressed a fear of return was summarily removed in contravention of the law.³⁴

IIRIRA also added the requirement that asylum-seekers file their claims within one year of entry. A recent study on the impact of this requirement in affirmative asylum cases found that over an 11-year period, 31 percent failed to meet the filing deadline.³⁵ According to the US Department of Homeland Security (DHS), US Citizenship and Immigration Services (USCIS), 71 percent of affirmative Mexican asylum applicants between FY 1998 and FY 2010 did not file for asylum within one year. Another important study found that in one in five administratively appealed cases the appellant missed the filing deadline.³⁶ Security concerns have also affected the interpretation of refugee protection laws and policies. The affirmative asylum study, for example, found that asylum officers had been advised to interpret the one-year deadline more stringently following 9/11.³⁷

Lack of legal counsel has undermined the integrity of the removal adjudication system since long before 9/11 or even The Refugee Act of 1980. Immigrants cannot effectively represent themselves in removal proceedings, but most are not able to afford legal counsel.³⁸ In recent years, only 15 percent of detained immigrants have been able to secure legal representation.³⁹ Detained asylum-seekers also abandon their claims at higher rates than do non-detained immigrants.⁴⁰ Represented asylum-seekers have repeatedly been found to prevail in their cases at far higher rates than those without representation. Legal representation has been identified as “the single most important factor affecting the outcome” of an asylum case.⁴¹

As these examples illustrate, US refugee protections had weakened even prior to 9/11. The 9/11 attacks led to further restrictions and made national security the dominant immigration paradigm, as evidenced by the creation of the DHS in 2003.

The US Refugee Resettlement Program

The United States has admitted roughly 3 million refugees since 1975, with record high admission levels of 207,116 in 1980 and 159,252 in 1981.⁴² Following 9/11, admissions fell sharply – to 26,785 in 2001 and 28,286 in 2002 – while DHS initiated a necessary review of the program’s security vulnerabilities. By FY 2009, admissions had rebounded to nearly 75,000. However, they will likely fall below this figure in FY 2011 due to overlapping security clearance processes. With two months remaining in FY 2011, only 43,687 refugees had been admitted, despite an admissions ceiling of 80,000.⁴³

Beyond the normal clearance process, select refugees must undergo Security Advisory Opinion reviews (SAOs). The classified criteria that determines who receives SAOs has reportedly not changed since shortly after 9/11, belying the post-9/11 consensus that improved intelligence would lead to evolving and more targeted screening decisions.

³⁴US COMMISSION ON INTERNATIONAL RELIGIOUS FREEDOM (USCIRF), REPORT ON ASYLUM SEEKERS IN EXPEDITED REMOVAL, VOLUME II 20-23 (2005), available at www.uscirf.gov/images/stories/pdf/asylum_seekers/evalCredibleFear.pdf.

³⁵J. Dombach, J. Ramji-Nogales, P. Schrag & A. Schoenholtz, *Rejecting Refugees: Homeland Security’s Administration of the One-Year Bar to Asylum*, 52 WM. & MARY L. REV. 651, 688 (2010).

³⁶NATIONAL IMMIGRANT JUSTICE CENTER, HUMAN RIGHTS FIRST (HRF), PENN STATE LAW’S CENTER FOR IMMIGRANT RIGHTS, THE ONE-YEAR ASYLUM DEADLINE AND THE BIA: AN ANALYSIS OF BOARD OF IMMIGRATION APPEALS DECISION 2005-2008, 6-7 (2010), available at www.humanrightsfirst.org/wp-content/uploads/pdf/1YD-report-FULL.pdf.

³⁷Dombach, *supra* note 35, at 717-718.

³⁸Between FY 2006 and FY 2010, the rates of legal representation in removal proceedings ranged from 35 to 43 percent.

³⁹Juan Osuna, Acting Director, Executive Office for Immigration Review (EOIR), Presentation at Migration Policy Institute (MPI), Mar. 14, 2011, available at <http://events.powerstream.net/002/00592/20110314MPI/#powershow>.

⁴⁰USCIRF, *supra* note 34, at 197-198, 412-413.

⁴¹J. Ramji-Nogales, A. Schoenholtz, & P. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 Stan. L. Rev. 295 (2007).

⁴²U.S. Dep’t of Homeland Security (DHS), *Yearbook of Immigration Statistics: 2010*, Table 13 (2011), <http://www.dhs.gov/files/statistics/publications/LPR10.shtm>.

⁴³U.S. DEP’T OF STATE (DOS), BUREAU OF POPULATION, REFUGEES AND MIGRATION (PRM), SUMMARY OF REFUGEE ADMISSIONS AS OF 31-JULY-2011 (2011), available at <http://www.wrapsnet.org/WRAPs/Reports/AdmissionsArrivals/tabid/211/Default.aspx>.

Substantial delays result from the SAO process when the name of an intending refugee approximates or matches a name in a government database. In such a case, the US Department of State (DOS) or another federal agency must ensure that the intending refugee is not the person listed in the database. In the meantime, the screened refugee, his or her family, and others with links to the case remain in dangerous situations for extended periods.⁴⁴

Rather than streamline the SAO process, DHS initiated an additional security screening process, the inter-agency check (IAC), in February 2011. While only certain refugees are subject to the SAO, all refugees receive the IAC. The new procedure has both led to significant delays in admissions and has exposed refugees to a cycle of additional delays due to lapsed SAO checks, medical examinations and interviews. DOS officials estimated that as of July 2011 nearly 70,000 approved refugees awaited clearance to travel to the United States.

USA PATRIOT Act and REAL ID Act

The *USA PATRIOT Act of 2001* and the *REAL ID Act of 2005* significantly expanded the grounds of inadmissibility based on “terrorist activity.”⁴⁵ Under current law, a non-citizen is inadmissible for committing an act that he or she knew or should have known afforded “material support” to a “terrorist organization” or to “terrorist activity.”⁴⁶ The INA expansively defines each of these three terms.

A terrorist activity can be unlawful under the laws where it was committed or under US federal or state law. It requires “intent to endanger ... one or more individuals or to cause substantial damage to property.”⁴⁷ This language has been interpreted to cover “virtually any use of armed force by a non-state actor, directed at anyone or anything, for any purpose other than personal enrichment.”⁴⁸

A “terrorist organization” need not be formally designated as such by the federal government.⁴⁹ “Tier III” groups consist of “two or more individuals, whether organized or not” that engage in “terrorist activity.”⁵⁰ They include groups that opposed repressive and genocidal regimes. According to federal officials, an inter-agency working group is reviewing delayed cases involving support to more than 300 “terrorist” organizations.⁵¹

“Material support” can entail providing “a safe house, transportation, communications, funds, transfer of funds or other material financial benefit, false documentation or identification, weapons (including chemical, biological, or radiological weapons), explosives, or training.”⁵² Because the material support bar does not turn on intent, level of support, or the type of regime opposed, it has been used to deny protection to victims of terror and other human rights violations.

The REAL ID Act of 2005 required that asylum applicants establish that race, religion, nationality, social group membership, or political opinion “was and will be at least one central reason” for their persecution.⁵³ It also added the requirement that asylum-seekers produce corroborating evidence of “otherwise credible testimony,” unless they do not have or cannot reasonably obtain such evidence.⁵⁴ Many refugees and asylum-seekers cannot *prove* the motives of their persecutors or conclusively document their claims. The new requirements make it far more difficult to prevail in these circumstances.

⁴⁴HUMAN RIGHTS FIRST, LIVING IN LIMBO: IRAQI REFUGEES AND US RESETTLEMENT 21-26 (2010), available at www.humanrightsfirst.org/wp-content/uploads/Living-in-Limbo-final.pdf. See also U.S. Gov’t Accountability Office (GAO), GAO-09-120, IRAQI REFUGEE ASSISTANCE: IMPROVEMENTS NEEDED IN MEASURING PROGRESS, ASSESSING NEEDS, TRACKING FUNDS, AND DEVELOPING AN INTERNATIONAL STRATEGIC PLAN 33 (2009), available at www.gao.gov/new.items/d09120.pdf.

⁴⁵The *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001*, Public Law 107-56, US Statutes at Large 115 (2001): 272; The *REAL ID Act of 2005*, Public Law 109-13, US Statutes at Large 119 (2005): 231.

⁴⁶INA § 212(a)(3)(B).

⁴⁷INA § 212(a)(3)(B)(iii).

⁴⁸HUMAN RIGHTS FIRST, DENIAL AND DELAY: THE IMPACT OF THE IMMIGRATION LAW’S “TERRORISM BARS” ON ASYLUM SEEKERS AND REFUGEES IN THE UNITED STATES 19-20 (2009), available at www.humanrightsfirst.org/wp-content/uploads/pdf/RPP-DenialandDelay-FULL-111009-web.pdf.

⁴⁹INA § 212(a)(3)(B)(vi).

⁵⁰INA § 212(a)(3)(B)(vi).

⁵¹The *Consolidated Appropriations Act of 2008* allowed the Secretaries of DOS and DHS, in consultation with each other and with the Attorney General, to waive the “material support” grounds of inadmissibility to Tier III terrorist organizations, provided that the organization had not engaged in terrorist activity against the US or another democratic country and had not “purposefully engaged in a pattern or practice of terrorist activity [...] directed at civilians.”

⁵²INA § 212 (a)(3)(B)(iv)(VI).

⁵³INA § 208(b)(1)(B)(i).

⁵⁴INA § 208(b)(1)(B)(ii).

Prior to 2007, the Board of Immigration Appeals (BIA) had defined a “social group” as one whose members “share a common, immutable characteristic” that they could not or should not be required to change “because it is fundamental to their individual identities or consciences.”⁵⁵ In 2007, the BIA held that a social group must also possess a sufficient degree of “social visibility.”⁵⁶ Because many persecuted groups understandably seek to maintain a low profile, this requirement presents an additional barrier to securing asylum in relevant cases.

The US asylum system

The US system of refugee protection rests on the ability of persons fleeing persecution to access US territory. Yet post-9/11 immigration-related security measures, combined with border enforcement and interdiction policies, prevent untold numbers of asylum-seekers from reaching the United States.⁵⁷

Since 9/11, the United States has:

- entered various agreements to share national security and law enforcement information;
- improved the integrity of US passports and promoted passport security standards internationally;
- required most applicants for nonimmigrant visas to submit to in-person consular interviews;
- required visa free travelers to obtain pre-travel authorization;
- expanded the US Visitor and Immigrant Status Indicator Technology program (US-VISIT), which biometrically screens visa applicants, temporary visitors, and lawful permanent residents against criminal and terrorist databases; and,
- expanded the Border Patrol and invested in border enforcement technology.⁵⁸

These measures have advanced security and reduced illegal migration. Yet persons fleeing persecution must often resort to using false travel documents. Others cross the border illegally or obtain temporary visas but do not intend to return home. The above measures have made it far more difficult to access these “illegal” pathways, thus contributing to significant declines in asylum filings since 9/11. DHS/USCIS does not consistently report on affirmative asylum filings. However, asylum claims in the immigration court system nosedived between FY 2002 (74,634) and FY 2010 (32,961).⁵⁹ Over the same period, total affirmative and defensive asylum grants fell from 36,923 to 21,113.⁶⁰

Conclusion

In summary, the response to the 9/11 attacks both improved security and hastened the erosion of US refugee protection policies post-1980. In addition, new protection mechanisms have not been created to mitigate the effects of these measures. Among the major developments:

- Security reviews have left *bona fide* refugees and their families in dangerous situations for protracted periods.
- Interdiction policies, expedited removal, post-9/11 visa controls and other immigration-related security measures prevent asylum-seekers from reaching territorial protection.
- The one-year filing deadline, new corroboration requirements, and a stricter definition of social group membership have prevented asylum-seekers from prevailing in their cases.
- Security-related grounds of inadmissibility have delayed and denied protection to persons who opposed repressive regimes or were compelled to support terrorist groups. ■

⁵⁵*Matter of Acosta*, 19 I&N Dec. 211, 233 (BIA 1985).

⁵⁶*In re A-M-E- & J-G-U-*, 24 I&N Dec. 69, 74 (BIA 2007).

⁵⁷VINCENT CHETAIL & CÉLINE BAULOZ, THE EUROPEAN UNION AND THE CHALLENGES OF FORCED MIGRATION: FROM ECONOMIC CRISIS TO PROTECTION CRISIS? 4-10 (2011), available at <http://www.eui.eu/Projects/TransatlanticProject/Documents/BackgroundPapers/EU-USHumanRights.pdf>. A pillar of the Common European Asylum System has been to prevent access to EU territory, and to contain refugees in developing countries where 80 percent of the world's refugees reside. This goal has been accomplished through visa controls, interception programs, safe-third country practices, and weighing asylum claims abroad.

⁵⁸SUSAN GINSBURG, SECURING HUMAN MOBILITY IN THE AGE OF RISK: NEW CHALLENGES FOR TRAVEL, MIGRATION, AND BORDERS (2010). See also Susan Ginsburg, MPI Senior Nonresident Fellow, Presentation at MPI: Securing Human Mobility in the Age of Risk: New Challenges for Travel, Migration, and Borders (Apr. 22, 2010), available at http://my.migrationpolicy.org/p/salsa/event/common/public/?event_KEY=21243.

⁵⁹U.S. Dep't of Justice (DOJ), Executive Office for Immigration Review (EOIR), FY 2005 Statistical Yearbook 12 (2006) <http://www.justice.gov/eoir/statpub/fy05syb.pdf>; DOJ, EOIR, FY 2010 Statistical Year Book, 11.

⁶⁰DHS, *supra* note 42, at Table 16; DANIEL C. MARTIN, U.S. DEP'T OF HOMELAND SECURITY, OFFICE OF IMMIGRATION STATISTICS, REFUGEES AND ASYLEES: 2010, 5 (2011), available at http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_rfa_fr_2010.pdf.

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The 9/11 Effect and its Legacy on U.S. Immigration Laws
Penn State Law, September 16, 2011

The Department of Homeland Security has a vital mission: to secure the nation from the many threats we face. This requires the dedication of more than 230,000 employees in jobs that range from aviation and border security to emergency response, from cybersecurity analyst to chemical facility inspector. Our duties are wide-ranging, but our goal is clear – keeping America safe. A safe and secure homeland means more than preventing terrorist attacks from being carried out. We must also ensure that civil rights and civil liberties remain secure.

The Office for Civil Rights and Civil Liberties (CRCL),⁶² which is part of the Office of the Secretary, supports the Department's mission to secure the Nation while preserving individual liberty, fairness, and equality under the law. CRCL integrates civil rights and civil liberties into all the Department's activities:

- Promoting respect for civil rights and civil liberties in policy creation and implementation by advising Department leadership and personnel, and state and local partners.
- Communicating with individuals and communities whose civil rights and civil liberties may be affected by Department activities, informing them about policies and avenues of redress, and promoting appropriate attention within the Department to their experiences and concerns.
- Investigating and resolving civil rights and civil liberties complaints filed by the public regarding Department policies or activities, or actions taken by Department personnel.
- Leading the Department's equal employment opportunity programs and promoting workforce diversity and merit system principles.

CRCL has helped the Department advance civil rights and civil liberties by:

- Providing advice and support for incorporation of civil rights and civil liberties protections into the Department's immigration-related activities and policies.
- Ensuring that the Department's intelligence, security, and information sharing activities comply with Constitutional, statutory, regulatory, and other requirements relating to civil rights and civil liberties.
- Investigating complaints alleging abuses of civil rights or civil liberties, including racial, ethnic, or religious profiling.
- Conducting civil rights and civil liberties impact assessments to improve the civil rights protections afforded by Department programs, policies, and activities.
- Delivering targeted and effective training to assist Department personnel to fulfill their roles and complete their missions while respecting civil rights and civil liberties.
- Engaging with diverse communities throughout the country to raise awareness about CRCL's mission and function, and serving as an entry point for individuals and groups to raise issues of concern with DHS.

⁶¹Kareem Shora, Senior Policy Advisor/Section Lead, U.S. Dep't of Homeland Security, Office for Civil Rights and Civil Liberties (CRCL), Remarks: The 9/11 Effect and its Legacy on U.S. Immigration Laws (Sept. 16, 2011).

⁶²U.S. Dep't of Homeland Security, Office for Civil Rights and Civil Liberties (CRCL), <http://www.dhs.gov/xabout/structure/crcl.shtm>.

- Supporting resilience to natural disasters, acts of terrorism, and other emergencies by ensuring federal emergency management planning and response fully incorporate the perspectives and needs of diverse populations, across demographic groups and disabilities.
- Leading the Department's efforts to implement proactive and effective programs for equal employment opportunity and diversity.

Public engagement with diverse American communities whose civil rights and civil liberties may be affected by DHS activities is a priority for CRCL. Our Community Engagement Section responds to community concerns and provides information on DHS programs, activities, and issues by building trust and establishing a routine process for communication and coordination with diverse community leaders and organizations.

The goals of our community engagement program are to:

- **Communicate and share reliable information about Federal programs and policies, including avenues for redress and complaints;**
- **Obtain information and feedback about community concerns and on-the-ground impacts of DHS activities;**
- **Incorporate community ideas and issues relating to civil rights and civil liberties into the policymaking process;**
- **Deepen channels of communication between communities, regional DHS leadership and other federal officials in order to facilitate solution of problems.**

CRCL is currently active with quarterly roundtable meetings in thirteen metropolitan areas: Washington, DC; Chicago, IL; Los Angeles, CA; Boston, MA; Detroit, MI; Columbus, OH; Seattle, WA; Atlanta, GA; Minneapolis, MN; Tampa, FL; Houston, TX; Denver, CO, and Portland, ME. This activity consists of leading quarterly roundtable meetings among diverse community leaders representing the Latino, Asian/Asian Pacific Islander, South Asian, Arab, Muslim, and African communities and Federal, State, and local government officials. Townhalls and stand-alone engagement events throughout the country and internationally allow CRCL to magnify its reach beyond its regular roundtables. CRCL also leads efforts to improve the cultural competency of DHS personnel and its federal, state, local, and tribal partners. The Office has developed training resources including the use of religious garments and articles. CRCL also leads a training program for Federal, State, and local law enforcement, which aims to improve communication, build trust, and encourage collaboration between officers and the communities they serve and protect.

U.S. citizens, lawful permanent residents, asylum seekers, refugees, non-immigrant and immigrant visa holders, migrant workers, undocumented persons, and persons in detention are all affected by DHS immigration-related programs. CRCL works with DHS component offices and agencies to:

- Ensure that civil rights and civil liberties protections are incorporated into immigration-related programs, policies, and procedures throughout the Department;
- Communicate with and inform the public about the civil and human rights and civil liberties implications of DHS immigration programs, policies and procedures – including individual rights and responsibilities; and
- Provide civil and human rights and civil liberties training to DHS component agencies.

CRCL advises DHS leadership on a range of issues at the nexus of immigration and civil rights law and policy. CRCL reviews existing programs, provides policy recommendations and other guidance to ensure compliance with civil rights laws, creates training materials, educates the public, works to ensure equal access, and facilitates dialogue between and among government agencies and immigration and civil rights organizations.

- **State and Local Immigration Enforcement Programs:** We work closely with ICE to monitor its various partnerships with state and local law enforcement, including Secure Communities and the 287(g) program.
- **Worksite Immigration Issues:** We engage with stakeholders and work with other components to troubleshoot issues at the intersection of immigration enforcement and civil rights and civil liberties protections for those who work in the United States.

o *Verification Databases and Programs:* E-Verify and the Systematic Alien Verification for Entitlements (SAVE) program may affect people's ability to work and their eligibility for public benefits at the local, state, and federal levels. We actively review these programs' monitoring and compliance products and system design. We also co-produced educational videos and written outreach material for employers and workers about E-Verify. For more information about this program, please visit: www.uscis.gov/e-verify or www.uscis.gov/save.

- **Human Rights and Vulnerable Populations:** CRCL is the DHS single point of contact for international human rights treaty reporting and coordination. We work with federal agencies and departments to ensure that human rights are considered in policy and programs. We have developed and advanced protective policies and procedures for victims of torture and persecution, battered women, and trafficked persons, among others.
- **Conditions of Immigration Detention:** We work with ICE to design and implement detention reforms that better protect the civil and human rights of immigrant detainees. Reforms include: an online detainee locator system, enhanced alternatives to detention, improved risk assessment tools, better medical care and medical classification of detainees, and Performance-Based National Detention Standards (PBNDS) for detention facilities. We also offer civil rights and civil liberties training for detention services managers.
- **Access to DHS Programs and Activities:** We work across the Department to ensure that individuals encountering language, cultural, and literacy barriers can access DHS activities, including, but not limited to, immigration proceedings, detention information, and disaster relief services. ■



JULIE MYERS WOOD

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The 9/11 Effect and its Legacy on U.S. Immigration Laws
Penn State Law, September 16, 2011

Reflections on Immigration Enforcement and National Security Ten Years Later

Hindsight is 20/20 and conferences such as this are critically important in reviewing where we have made errors or poor judgments in the past. It's appropriate that we should use these reflective opportunities so we can address vulnerabilities, change course where we have been misguided, and generally consider the lessons learned. When it comes to the issue of immigration enforcement in the post-9/11 environment, it's clear that many decisions were made that may not have been prudent.

However, there are many areas in which the events of 9/11 sharpened our focus and improved the general effectiveness of U.S. law enforcement by more fully integrating immigration violations into other significant law enforcement investigations, and more directly addressing the potential vulnerabilities in our immigration system. This occurred through organizational improvements to the enforcement of immigration laws, as well as the development of terrorism and national security-specific initiatives.

When assessing changes made due to national security concerns, it is important to remember the context of the challenge we collectively feared and faced on 9/11, and shortly thereafter. The brutal attacks to our country and the flagrant abuses of our immigration system caused widespread concern about our country's ability to effectively enforce immigration laws, and widespread frustration about our inability to prevent the horrific loss of life on that day.

Some discussions of post-9/11 changes to immigration enforcement downplay the extent of immigration and document fraud violations committed by the 9/11 hijackers. There were many failures of government related to this catastrophic event, but few are as clearly recognizable as the failure of the integrity of our immigration system leading up to the events. The 9/11 Staff Report on Terrorist Travel succinctly identifies this shortcoming. As stated in the report:

We endeavor to dispel the myth that [the hijackers'] entry into the United States was 'clean and legal.' It was not. Three hijackers carried passports with indicators of Islamic extremism linked to al Qaeda; two others carried passports manipulated in a fraudulent manner. It is likely that several more hijackers carried passports with similar fraudulent manipulation. Two hijackers lied on their visa applications. Once in the United States, two hijackers violated the terms of their visas. One overstayed his visa. And all but one obtained some form of state identification. We know that six of the hijackers used these state issued identifications to check in for their flights on September 11. Three of them were fraudulently obtained.⁶³

⁶³NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES, 9/11 AND TERRORIST TRAVEL: STAFF REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES, Preface (2004), available at http://www.9-11commission.gov/staff_statements/911_TerrTrav_Monograph.pdf.

While I fully acknowledge that there were many areas where our reaction to 9/11 may have been imperfect, my remarks today will highlight just a few of the organizational and programmatic changes made to immigration enforcement after 9/11 where I think we acted prudently, and discuss next steps for the enforcement community.

Selected Organizational Improvements

Prior to 9/11, the Immigration and Naturalization Service's (INS) law enforcement authorities were not fully integrated with other law enforcement agencies. The INS itself was part of the Department of Justice (DOJ). It had a multi-purpose mission, with a Commissioner tasked with increasing services and improving the flow of legal immigrants into the United States especially in the late 90's in response to an economy hungry for eligible workers. At the same time, the INS was working under increasing scrutiny with regards to their mandate to keep illegal immigrants from coming across the border illegally and investigating internal immigration issues, complicating success in this area.

Despite the international nature of the work, the INS had a somewhat limited overseas presence, focused primarily on refugee processing, and service-type tasks. The overseas positions were not classified as Special Agent (1811) positions, and as such, generally did not involve significant investigative work.

The INS was reorganized as a result of the legislative creation of the Department of Homeland Security (DHS).⁶⁴ The service responsibilities of the INS primarily went to the United States Citizenship and Immigration Services (USCIS). The Border Patrol and inspectors from the INS were combined with the customs inspectors to form United States Customs and Border Protection (CBP), although the Border Patrol remained a distinct entity. The INS Special Agents, attorneys, intelligence analysts and detention and removal officers were combined with the Special Agents from the United States Customs Service (USCS) into a new agency, Immigration and Customs Enforcement (ICE).⁶⁵

The organizational changes affected the culture and the substantive work done by INS employees. The changes were not always easy, particularly on the law enforcement side. DHS as a whole was described as building an airplane while flying it. The ICE merger has often been described as a shotgun marriage of two agencies (USCS and INS) in which each had strong reservations about the entire thing.

Despite the difficulties, many of these organizational changes brought real improvement to the enforcement mission. For example, the ICE merger brought about some immediate improvement in terms of addressing national security vulnerabilities and also provided long term potential for improvements as well. More specifically, with the ICE merger, there was now one investigative agency that had all the customs authorities, including expertise on money laundering and financial transactions, and an agency that had all the immigration authorities. ICE Special Agents were cross-trained on all the legacy authorities and ICE soon began utilizing a mixture of authorities to best address cross-border threats. This caused an increase in effectiveness when pursuing various types of investigations. For example, in international smuggling investigations, ICE agents began to add forfeiture and money laundering counts to the smuggling indictments. This was rarely, if ever done, prior to the creation of ICE. Adding a financial target was effective because these criminals were motivated by financial gain. Similarly, on the other side, ICE agents began looking at administrative immigration charges to help dismantle gang organizations or drug organizations. This type of approach was rarely pursued before, as USCS agents were not trained in the use of administrative immigration authorities and often hesitant to bring in other agencies.

As part of the organizational shift, ICE also established foreign attaché offices headed by Special Agents. These Special Agents could conduct or oversee appropriate investigations, using both the customs and immigration authorities available to ICE. This investigative focus strengthened the ability of the attaché offices to support significant ICE national security and other investigations.

⁶⁴DHS was created by the passage of the Homeland Security Act in November 2002, and opened its doors on March 1, 2003. The INS components were merged into DHS the same year.

⁶⁵ICE also assumed responsibility for the student visa program, the Student Exchange Visitors Program (SEVP), as well as the humanitarian parole program. The humanitarian parole program later was transferred over to USCIS.

Selected Terrorism-Specific Program Improvements

In addition to organizational changes, the INS, and then ICE developed and implemented a number of investigative programs to address potential vulnerabilities in the immigration system. Many of these programs focused on ICE's role in prohibiting terrorist travel to address vulnerabilities identified on 9/11.

The investigative programs included the Visa Security Program (VSP). The Visa Security Program places ICE personnel overseas to work directly with the Department of State Consular Affairs officers to help screen visa applicants. Integrating ICE agents at the front end of the application process helps ensure that fewer potential threats are admitted to the United States. VSP officers are on the ground at high-risk locations and able to assess risks and conduct targeted investigations where needed. Currently, the VSP has 19 posts in 15 high-risk locations. ICE has a strategic plan to expand the VSPs, but this plan has not been fully executed. One of the challenges in expanding the VSPs has been some resistance from the State Department, and needless turf and office space battles.

In addition, the failure of an appropriate exit system to track visa overstays was highlighted by the 9/11 failures. Although there is not a comprehensive exit system in place, ICE developed a number of methods to more closely track visa overstays, and a dedicated unit to focus on high-risk overstays. This unit is able to focus on national security and other risks, as defined by the intelligence agencies or other investigative partners. ICE and DHS are continuing to improve the information provided to ICE to timely track high-risk visa overstays.

Other programmatic steps taken since 9/11 included the Human Smuggling and Trafficking Center (HSTC), which is an interagency center that shares intelligence regarding human smuggling and illicit and terrorist travel. The center prepares strategic assessments and broadly disseminates open source information. ICE also partnered with the Criminal Division at the Department of Justice in the creation of the Extraterritorial Criminal Travel Strike Force, which focuses on the prosecution and apprehension of high-level criminal organizational targets.

In addition, after 9/11 there was a fuller integration of the INS and then ICE agents into the Federal Bureau of Investigation's Joint Terrorism Task Forces (JTTFs). In supporting the JTTFs, ICE agents are able to actively work high priority terrorism and national security cases. In addition, in supporting the JTTF, on some occasions ICE is able to utilize administrative authorities to bring effective enforcement actions against significant targets for which there was not an existing criminal case. This does not always mean that the charges were brought as terrorism charges. Instead, in many instances, routine charges of visa fraud or overstaying visas were brought against national security risks. This further highlights the benefits of expanded authorities held by individual agents.

Finally, for a number of years after the creation of DHS, ICE also implemented a national security strategy that included an emphasis on "routine" enforcement. As part of a layered enforcement strategy, the goal was to ensure that illegal immigrants could not be sure that they were escaping authorities at any time.

Ensuring Effective Immigration Enforcement Going Forward

To effectively attack transnational crime, protect national security and prevent terrorism, immigration authorities must be utilized smartly. Ten years after 9/11, it is appropriate to assess the steps that have been taken, both organizational and specific, and identify what is working, what is not working, and what the intelligence suggests the law enforcement community should be targeting. It would be unwise to ignore the connections to national security and vulnerabilities posed by misuse of our immigration system. Over the past few years, Al Qaeda has changed its tactics, with an emphasis on smaller scale attacks and utilizing more U.S. citizens as a way to avoid detection. Other terrorist and criminal organizations also continue to utilize weak points within the immigration system.

ICE should continuously reassess intelligence and threat streams to determine whether any particular category of visa holders or method of illegal entry is of highest risk, and initiate targeted investigative initiatives to address those. The evaluation of the effectiveness of these initiatives should be an ongoing process. Given the agency's limited resources, it is important not to blindly continue with initiatives that do not show results. On some occa-

sions, the government has known that a prospective program has not produced significant useful results, like the National Security Exit and Entry Registration Service (NSEERS), and yet the government has kept the program in place for years after its arguable initial usefulness had expired.

At the same time, given the changing methods of criminal organizations, it is important not to pin law enforcement's focus solely to overly targeted methods that may not reach the mark, while ignoring other methods that might ensure the integrity of the immigration system and serve as an additional layer of protection. One example of this is the current focus of ICE regarding previously convicted criminal aliens. It is critical that the agency continue a strong focus on convicted criminals. However, as the examples of the 9/11 hijackers show, many individuals who may want to cause harm to the United States may not be previously convicted criminals. The Administration has issued guidance that provides that illegal immigrants who have committed crimes only relating to their entry and illegal stay in the United States may be excused from deportation and obtain work authorization in certain cases.⁶⁶ This guidance could cover individuals like several of the 9/11 hijackers, who "merely" lied to obtain state identification documents or on their visa applications. The idea that routine immigration or documentation violations should be ignored, or considered insignificant poses a potentially serious threat to our system. It sends a message to those that seek to cause harm: if they can come in the United States illegally, but not commit any additional crimes, they are likely to be left alone. Left alone to plan, take steps, cause harm. This explicit movement away from the New York policing model of addressing small and large violations – where even the turnstile jumpers were held accountable – should be closely watched as it may have broad implications for the ability of law enforcement to effectively prevent serious abuses in the immigration system.

Despite some of the positive improvements to our immigration enforcement efforts implemented after 9/11, many people are frustrated by the perception that all these efforts have caused the United States to become a less-inviting nation. In many respects, our immigration policy is bi-polar, lacking a clear sense of our nation's priorities and values. It's not the law enforcement agents who are merely seeking to more effectively enforce the laws on our books that are to blame, but rather the legislators that allow for such a dysfunctional system to exist. We need to pressure our legislators to consider sensible steps to expand legal immigration into the U.S. to correspond to the realities of our needs and national values. At the same time, having served at the highest levels of the Department of Homeland Security, I am keenly aware of the ongoing threats to our national security and the vulnerabilities within our immigration system. We can and must have a strong immigration enforcement strategy that focuses on national security and restoring integrity to the immigration laws on our books. But we cannot rely on enforcement alone. Without a meaningful consideration for other sensible immigration reform, to include a more welcoming stance, we risk projecting an image of an unwelcoming nation – which could be another tragic outcome of the 9/11 era. ■

⁶⁶The actual effects of this guidance may vary considerably; as DHS has not yet issued guidelines that fully state who will qualify under the policy and who will not. Reasonably drafted guidelines may mitigate some of the concern identified here.



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The 9/11 Effect and its Legacy on U.S. Immigration Laws
Penn State Law, September 16, 2011

Phantoms of Lost Liberty

I first started investigating immigrant detention back in the summer of 1993, in the time immediately after the ship *Golden Venture* ran aground on a beach in Queens carrying close to 300 Chinese immigrants – another pivotal New York event that also altered both the rhetoric and landscape of immigration policy. Working as a freelance photojournalist for newsmagazines at the time, I began photographing along the California/Mexico border covering the Border Patrol and deportations, and even made brief visits inside detention centers. But ultimately media interest seemed largely confined to southern border issues (and the occasional stray ship), and the matter, or at least my coverage of it, seemed to languish.

It wasn't until 1999 when the issue returned to become a central focus for my lens. First researching the topic in journalistic accounts I was immediately struck by the size and severity of the issue, as well as by the immensity of the problems surrounding the government agency in *charge at the time* - the *Immigration and Naturalization Service*, or INS. Reading in media publications about the detention of asylum seekers, unaccompanied minors and other detainees, I was also surprised by how few of these articles included actual photographs of immigrants in detention. The text was there and was often quite compelling, but photographs were noticeably absent, and, in my view, sorely lacking. Seeing this void, and sensing the need for persuasive photographic documentation to help bring the issue to light, I secured funding from the Open Society Institute and set about trying to gain access to be able to photograph on this topic across the country.

Little did I realize at the time that one of the main reasons there were so few photographs accompanying these articles was because it was so difficult to get in with a camera to take them.

Outside cameras rarely if ever go inside where most detainees are held. That was true then and remains true today. My entrance required lengthy, repeated, occasionally exasperating and often futile negotiations with press officers with the immigration service or with county jails. Occasionally, I would have to deal with both bureaucratic layers simultaneously, an experience bordering on the Kafkaesque. When permitted, access was normally restricted to meeting with a detainee inside a small room normally used for attorney-client meetings within a detention facility. Typically, the room would have white walls, a desk and two chairs, and would offer no visual hint whatsoever that one was sitting inside a detention center or jail. Time allowed to photograph inside these rooms was also frequently limited. Little wonder so many of the articles were all text and no photos.

Working under such restrictions presented many challenges, not the least of which was the difficulty posed in “documenting” detainees in this decontextualized and sanitized environment. On occasion, my short leash would be stretched a little, allowing a slightly expanded view of detainee life beyond the interview room. But the leash was never fully removed. While the difficulties and frustrations I faced in gaining access to detention facilities with a camera were many, the testimonies I encountered once inside reminded me that no matter how difficult it was for me to get in, it was always far more difficult for detainees to get out – or, more precisely, to be released from detention in a manner that did not involve a one-way trip on an airplane back to the far away land of their birth.

⁶⁷Steve Rubin, Assistant Professor of Art, Penn State University, Photography Presentation: The 9/11 Effect and its Legacy on U.S. Immigration Laws (Sept. 16, 2011).

If it was extremely difficult to gain entry to photograph inside detention centers prior to 9/11, it became impossible to do so afterwards, at least in the short term. My prior requests to obtain admittance were suddenly put on indefinite hold. New requests were summarily denied. I was informed there were now other priorities. In the words of Attorney General John Ashcroft, "a new paradigm" had arrived.

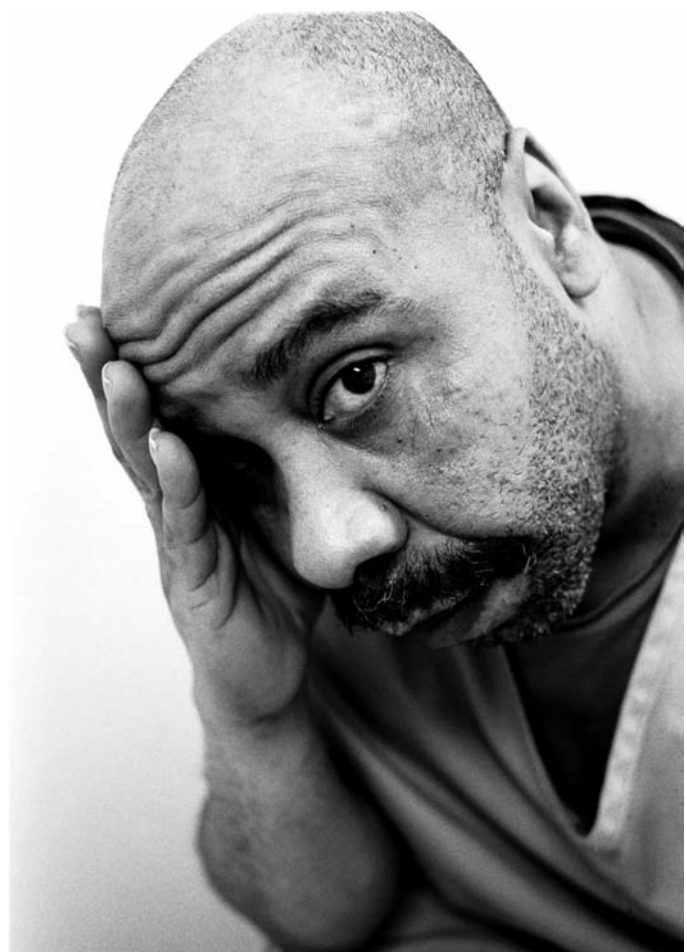
Ten years hence it's hard to summon the authentic political atmosphere of the period immediately following the attacks, or even to faithfully recall much of the emotion and language expressed at the time. However, what has never faded from my memory, at least, are the words Attorney General Ashcroft spoke before the Senate Judiciary Committee on December 6, 2001. Lashing out at critics of the administration's response to immigrants and terrorism, he warned:

"...to those who scare peace-loving people with phantoms of lost liberty, my message is this:
Your tactics only aid terrorists." ...

Like other members of the media, I was not permitted to photograph the thousands of men, mostly of Arab and South Asian origin, who were rounded up and held in secretive federal custody for weeks and months in the immediate aftermath of the attacks of September 11. Nor was I able to photograph those held for additional months even after a court ordered their immediate release. But what I did photograph in the pre- 9/11 period, as well as during the years after 9/11 (once I was able finally to gain limited access again) form a body of work selections of which I present here. The images include a mother and her children impacted by the detention of her husband – the children's father and the family's main breadwinner – and the fallout from his deportation to Lebanon. They include a Pakistani family protesting the disappearance of their loved one outside the Metropolitan Detention Center in Brooklyn. They portray asylum seekers in detention prior to 9/11 whose cases became complicated and prolonged by the crackdown following that day. They include portraits of detainees relatively unaffected by 9/11 but whose cases exemplify some of the severe problems in the detention system that existed prior to that date and that remain problematic to this day.

These images aim to put a face on the staggeringly large numbers of detainees (estimated now at around 400,000 per year), and to help make their situations less deniable and more real. Ultimately, they challenge Ashcroft's insistence that concerns about the degradation of civil liberties serve only to support terrorists and are but empty and delusional protests about "phantoms of lost liberty." — Steven Rubin ■



















PLENARY Q&A WITH

ERICH SCHERFEN AND RUBINA TAREEN⁶⁸

The 9/11 Effect and its Legacy on U.S. Immigration Laws
Penn State Law, September 16, 2011

For Mr. Scherfen:

You received an honorable discharge from the United States Army in 2006, about 5 years following the September 11, 2001 attacks. In those intervening years, did you ever feel that your religion factored into your treatment as a member of the armed forces?

Yes. There were 2 Muslim flight officers in my Attack Helicopter Battalion, an African American Muslim and myself. He saw the trouble coming and managed to work his way out of the military by early 2002. I stayed on until they began to target me and my practice of religion.

However, later on, I received 2 visits from the FBI (and not Army CID) while training for the AH-64 Apache at Fort Rucker, AL in January 2002. On the first visit they said, "We heard from someone up your way that you have some information about 9/11 and we would like to hear about it." As is my right, I refused to answer their questions and instead started explaining what Islam really is supposed to be. I even gave them a PBS DVD on the subject as a gift. They left.

Later on (like US Army Captain and Muslim-James Yee) I was accused of passing sensitive information to an Egyptian Colonel that was living next door to me on the US army base. That was the most embarrassing, and potentially fatal accusation they made, since I was the Apache class leader and everyone in my class knew about it. What made this claim more ridiculous was that the Egyptian colonel was in class at Fort Rucker to be an Apache instructor, and in a more advanced version of the helicopter than I was to fly in the National Guard. I had nothing to offer. As a result, I received another visit from the FBI. Again, I said nothing but a friendly greeting.

For Ms. Tareen:

You emigrated to the U.S. from Pakistan at a fairly young age. You later naturalized to a U.S. citizen. How have your experiences with the "no fly" lists changed your views of the United States or decision to naturalize?

It hasn't changed my decision to naturalize. I am still happy with my decision to be an American citizen. Unfortunately, there are no utopias in this world. I have many criticisms of this country but, for the most part, I am able to voice those criticisms. I wouldn't be able to do that in Pakistan. Plus, Pakistan is basically in a state of War right now, there are still drone attacks happening by the US.

When you talked about your experiences to your friends and family outside of the United States, what was their reaction? Did your experiences raise doubts in their minds about the United States' commitment immigration policies after 9/11?

⁶⁸Erich Scherfen & Rubina Tareen, Plenary Q&A: The 9/11 Effect and its Legacy on U.S. Immigration Laws (Sept. 16, 2011).

After 9/11, I sponsored my sister and her son in their applications for permanent legal residence in the United States. When they went through the interview process, my sister said it was more of an interrogation than an interview. She and her son were detained for a whole day when they came. After receiving the visa and coming to the states they decided not to settle here because they felt like they were already suspects. My nephew has actually refused to come back to the States because of that experience.

On the other hand, my brother applied for immigration and had absolutely no problems. He was never interrogated nor detained and enjoys living in the States. When I reflect on the difference between these two cases the only discrepancy I can find between 2 people, who lived under the same roof in Pakistan and know the same people, is that my sister is religious and my brother is very secular.

For Mr. Scherfen & Ms. Tareen:

Where were you and your family on September 11, 2011?

SCHERFEN: Ironically, as the last US Army pilot trained on the AH-1(f) Cobra, I was to fly out of my Army National Guard Base at Mercer County Airport (in Trenton, NJ) with reporters and camera men from ABC news New York, who were covering the last flights of the iconic, 2nd-generation attack helicopter from the Vietnam War. Ironically, our flight was going to be to the Lakehurst practice area, the scene of another big air disaster of the 1930s: Nazi Germany's Hindenburg crash.

I zipped up my flight suit, got in my car and headed toward Trenton. I listened to CBS 880am for a traffic report to avoid the notorious Jersey traffic jams. That 's when I heard that a plane had struck one of the World Trade Towers. After I heard the second plane had hit, I stopped and called into my Battalion headquarters. The Sergeant on duty at the flight line was breaking down. She told me, "Stand down, don't come in. Nobody but active duty Air Force is allowed in the air. We just tried to send a UH-60 Medivac out from the base to aid the NYFD but they were intercepted by F-15s from God-knows Where and were contacted on "guard frequency" and told to land immediately...or they would be shot down. The ABC news crew just ripped their camera equipment off the helicopter and sped away before we even knew what happened. We will call you if we need you!"

I went home and listened to all the details on the radio. For the first time in my life, the skies over the busiest airspace in the world were eerily quiet, with the exception of a low flying fighter jet. Nobody knew who did it yet. But I was worried for the Muslim half of my family and sped home.

What is a "no-fly" list? How did you come to learn that you were on the "no-fly" list? Have your experiences with the "no fly" lists and this lawsuit had a negative impact on your willingness to be active members of the Islamic community?

SCHERFEN: I wish I really knew what a no-fly list is, or how you get on it, and how you get off of it. But it seems to have different levels. In 2006, My family and I had a 4 hour detention on the ground at the US-Canadian DHS border check point. The DHS agents surrounded us at the tollbooth and forced my family out of our SUV. With their hands on their guns, the DHS agents marched us to a detention center. They took our car and went through all of our stuff. We were all questioned and eventually released, not knowing why we were stopped or why they released us if we were so dangerous.

I asked one officer why they had to do all of this, they didn't know. They gave me a DHS TRIP form that you can use to file a claim to get you off the list. When I got back home, I filed the form and was given a "control number" and told it would be looked into.

Some time passed and I had no problem. I applied for my first airline job in 2007 and was hired. As part of my duties as a pilot, I would have to go to an airport and pick up a plane and reposition it for flight in another airport. To get from place to place, I had to "dead-head" fly as a passenger, sometimes on other airlines, but paid for by my

airline. I would have to show up in uniform with my airport ID and be ready for work. This was smooth until about 3 months after I was hired. I couldn't seem to deadhead with out a lot of trouble at the ticket counter. Usually it meant just a check of my Airport ID and one other form of ID, and sometimes they asked me for my birthday. The wait started getting longer and longer, but I was still flying. My wife was also getting stopped more. Then, on the last day of April 2008, on the way back from a flight from Washington Dulles Airport (following from my diary):

I arrived at home and checked the phone messages. I noticed there were an unusually high number of calls from the 703 area code, probably my airline's Manassas Headquarters. I usually would blow this off as an attempt by the crew-scheduling department to get me to come in and work an extra flight. I was advised by "street smart" people in our company to avoid responding to these, and I did. But just then another call came in from the 703 area code. I looked at the caller ID it was Vice President Mary Finnagin, who you only get a call from if you're in trouble. "Oh no!" I thought as I tabbed through my mental rolodex of any possible "sins" I might of committed in the past 3 days of flying and came up blank. After a rough start to my airline career, I had finally felt comfortable and had few, if any, complaints from the Captains I flew with.

After a pause, I picked up the phone.

"Hello"

"Erich, this is Mary Finnagin from Colgan Air. I don't know what is going on here, but our security officer Rob Runion gave me a call just an hour ago and said that your name has appeared on a terrorist watch list."

I paused, as I got my usual feverish, sweaty galvanic skin response going.

"Well...I don't know what to say. I have had a few problems boarding flights on my deadhead employee travel, but nothing that kicked me off any flight."

"You really don't seemed surprised," Mary said with a bit of anger in her voice. And I did not know if that was anger of accusation or anger at the system. Either way there was a problem.

Mary broke up the silence, " I'm sorry, but you will have to go back to Allentown turn in your ID card...like right now. Since you haven't taken a single sick day or any vacation since you been with us, I'm going to put you on paid leave for the next 2 weeks while we try to sort this mess out. After that...well we're going to have to let you go. Any questions"

"No!"

"Well, with that said, I have our security coordinator Rob Runion on the line right now and he'd like to talk to you. I'll put him on now...good luck!"

"Thanks."

I heard the phone clicked as Mary transferred me over to Rob Runion.

"Hi Erich, I guess you heard the bad news. I'm sorry; we will do all that we can to fix this mess up. It seems that you have been put on a list that I cannot even access, I don't know how you got on it or even if your on it, but we run a daily check of all the names on our data base against the DHS /TSA list and you came up hot. Were doing everything we can, but for now, I need you to go back to Allentown and give Captain John Mac Elwy your ID card. I'm not letting him go home till he gets it."

I hung up the phone and reluctantly got in the car and made the long 50-minute drive back to Allentown. I didn't want John, the father of 3 waiting any longer than he had to. That was my only motivation. He just wasn't allowed to leave before I gave him my airport ID.

I arrived in the small employee parking lot in front of Allentown airport. John Mc Elwy was waiting. I got out of the car and said my hellos. He smiled then laughed and said jokingly, "What did you do?"

"I don't know." I said. "Maybe you could tell me."

"Well, I don't have a clue!" He said. "I just have to take your ID card back to Manassas till this is cleared up. Sorry! I knew of another guy at Cape Air... had the last name O'Brian... I think... out of a job for 6 months...they said he matched a name of some Irish Republican Army fellow. Them Poor Irish! Well good luck with it all and keep me posted. I'm real sorry!"

We shook hand and got in our cars and drove off. Despite being a bit of right winger, John Mc Elwy, who was one of a few pilots who was aloud to carry a gun on board an airliner, was a lot kinder than I expected and very sympathetic. In the circles of pilot gossip, I heard he continually blamed the company and TSA policy instead of me. He just couldn't stereotype me as a terrorist. — *One Soldier's Story*

SCHERFEN: As far as being more or less active in the Muslim community: I have always been most active in the interfaith community. That helped, as it was a Rabbi that helped me get the ear of the ACLU. And with all that has happened, I have stepped up my efforts to educate people on my current faith group. I have given speeches in countless Churches, Synagogues, Civic, and Military organizations, including the Carlisle War College.

TAREEN: Prior to 9/11, I was having trouble with traveling. I took my mother to North Carolina to visit my sister in 2000, and I was taken off of the plane to be searched. So being on any type of "watch list" has been an issue for me before 9/11. After 9/11, it was still bad. I would require special screening through TSA lines and would be questioned when I returned back to the states from a visit to Pakistan.

That never prevented me from remaining active in the Muslim Community. It actually motivated me to be more active so I can tell people about the trouble I receive and remind Muslims to be vigilant in making sure their civil liberties are not violated.

Do you believe your names still appear on a "List?"

SCHERFEN: Yes! But it must be at a lower level. Now, when I "deadhead," the ticket counter only asks my birthday and checks my drivers license. Although they don't ask the other pilots for this information, I haven't been stopped in any way since October of 2008

TAREEN: I am stopped as part of general religious profiling at the TSA screening points because I wear a headscarf. This, from my understanding, is standard procedure across the board for Seikhs, Nuns, Muslims or any one who has something on their head that can't ordinarily be removed. But on paper it appears my name is clear, for now.

As you reflect on the 10-year anniversary of 9/11 what do you think are the most important lessons?

TAREEN: I find it sad that in America, most immigrant groups have had their share of prejudice and persecution. The Irish Catholics, the Japanese, the Chinese, they all had to get their share of difficulty before they got respect. Unfortunately, not much has changed over the centuries. ■



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The 9/11 Effect and its Legacy on U.S. Immigration Law
September 16, 2011

National Security, International Terrorism and Immigration Policy: What Difference Has Ten Years Made?

The Arabic expression is ‘illifat mat,’ the past is dead. And so we would like to think about the worst of the post 9/11 policies rushed into place to combat terrorism that singled out Arabs and Muslims in the US and outside for harsh and extraordinary treatment, including torture. The ‘special interest’ designations; the Absconder Apprehension Initiative; the Voluntary Interview programs; NSEERs; the immigration provisions of USAPA that resulted in the detentions, interrogations, arrests or deportations of thousands of overwhelmingly Arab and Muslim foreign nationals, even torture at Abu Ghraib and Guantanamo—some say—are a thing of the past. Many of our foremost legal scholars have argued that the worst is over, and the law has won. David Cole, in his just-published piece in the NYRB, states: “one of the most important lessons of the past decade may be that the rule of law, seemingly so vulnerable in the attacks’ aftermath, proved far more resilient than many would have predicted.”⁷⁰ I beg to differ, preferring the sagacity of Faulkner: “the past is never dead, it’s not even past.”

In the book, *Civil Rights in Peril*, Kevin Johnson, myself and other authors argued back in 2004 that the targeting of Arabs and Muslims in the US for discriminatory, unconstitutional and harmful treatment began before 9/11, and that it was closely tied to US foreign policy. In response to the government’s post-9/11 claims that new ‘anti-terrorist’ measures targeted only non-immigrants who, like some in the Arab/Muslim communities posed a particular threat, in our article in 2005, Maritza Karmely and I traced the combination of publicized and lesser-known measures that clearly targeted Arabs and Muslims both non-citizens and citizens to prove that unlawful immigration was not the issue. We drew a number of conclusions in that work:

First, that the communities targeted since 9/11 were not exclusively non-citizens; they were, and continue to be, Arabs and Muslims in the US, both citizens and non-citizens, whom the government has not suspected of criminal activity, let alone suspicion of terrorist involvement.⁷¹

Second, that many of these new government measures were new legal strategies that avoided constitutional protections for Arabs and Muslims that would not be tolerated in other contexts.⁷²

Third, that secrecy was a major weapon in accomplishing the governments’ objectives: using relatively unknown provisions in the Patriot Act, tax, banking, and other laws to allow the government to take action without notice or opportunity for the individual to defend himself.⁷³

⁶⁹The author thanks BUSL student Kevin Gregg for his able assistance in the research for this paper.

⁷⁰David Cole, *After September 11: What We Still Don’t Know*, THE NEW YORK REVIEW OF BOOKS, Sept. 29, 2011, at 1.

⁷¹For example, the Iraqi voluntary interview program; the terrorist organization and material support provisions of the Patriot Act; the asset forfeiture, bank account freezing measures; production of census records and tax information demanded from the Census Bureau and the IRS by the Senate; the systematic counting and surveillance of mosques; the subpoenaing of charitable donation records—all target US citizens, not just immigrants.

⁷²For example, the material witness statute cases, the use of the material support provisions, the enemy combatant labels to avoid judicial process—were all designed and implemented to sidestep constitutional rights.

⁷³The government has been able to freeze the assets of the largest Muslim charitable institutions, arrest and detain prominent members of Muslim organizations, require disclosure of donors of the charities, and shut down the largest Muslim charities in the US. The IRS has been required to turn over confidential tax and financial records of the charities, and the FBI has visited mosques all over the country demanding membership lists. The evidence the government uses to designate FTOs or STDGs is confidential, as is the subpoenaing of charity and tax records, and cannot be challenged through court proceedings.

In the decade since 9/11, what has changed? Is the worst over? Has the law won? And, finally, are we safer? In an admittedly as-yet-incomplete study of more recent policies, my tentative conclusions are that: 1) The wars abroad have become the wars at home: there is little to differentiate foreign policies from domestic policies, a foregone conclusion when the “war” was designated a war on terror rather than a war on any particular nation or group. 2) Bush-era secrecy policies are viral and permanent. In the words of Dana Priest, Top Secret America is here to stay. The uncontrolled use of security classifications, expansion of secret surveillance, use of ‘national security letters,’ and the new industry of contract surveillance has made it impossible to determine what is legitimate government security concern and what is, for example, routine immigration process. 3) Local law enforcement has been deeply and inextricably infused with federal and immigration law enforcement, and all three have become deeply intertwined with US international intelligence gathering and data mining. 4) The institutionalization of Arab-Muslim racism has reached a new phase--entrenching Islamophobia into law enforcement. 5) Finally, it is all terrorism, and not much about terrorism—whether the issue is border policy with Mexico, routine traffic stops, or recruiting riders on the subway to ‘see something, say something,’ terrorism has become a marketing tool, recruiting tool, and cover for draining billions from the public coffers, with no end in sight. Meanwhile, there is little evidence that the costs are justified, whether in preventing terrorism or are being directed towards real threats.

I will take up the last three of the above points, and only touch on some of the evidence for each of these points before returning to my last question: are we safer?

Local law enforcement has been deeply and inextricably infused with federal and immigration law enforcement, and all three have become deeply intertwined with US international intelligence gathering and data mining.

The Nationwide Suspicious Activity Reporting Initiative (NSI) and Federally Funded “Anti-Terrorism” Law Enforcement Training

Since 2006, the Department of Justice has been developing a program called the Nationwide Suspicious Activity Reporting Initiative (NSI), through which local police act as intelligence gatherers on the ground, feeding reports of suspicious activity to a network of electronic data “fusion centers” spread across the country.⁷⁴ The system is scheduled to be up and running in all seventy-two of the nation’s fusion centers by the end of 2011.⁷⁵ The goal of NSI is to make information on possible terrorist activities available to “those who need it in time to protect our people and institutions while at the same time ensure[] that privacy, civil liberties, and other legal rights are adequately protected.”⁷⁶ The nationwide database will hold information on both “terrorism related specific activity” and “those involving other criminal activity.”⁷⁷ The initiative is based on the new concept of “intelligence led policing,” which emphasizes surveillance and seizures of individuals before an actual terrorist act is committed.⁷⁸ The program makes local police officers information gatherers, encouraging them to dig into the personal lives of potential terrorists.

Based on the theory that greater terrorist acts are preceded by “precursor crimes,”⁷⁹ police are expected to nationally share information attained from even petty crimes including traffic violations. However, because traffic enforcement is more prone to racial, ethnic, and religious profiling, information gathered through traffic stops and submitted into the “terrorism” database inevitably leads to increased attention and suspicions of Middle Eastern, Arab, South East Asian, and Muslim individuals.⁸⁰ The Initiative’s new information sharing systems allow racialized fears about terrorism to be magnified on the national level in a self-perpetuating cycle, in which ethnic fears and heightened suspicions in one town can be transmitted throughout the country’s police offices on a national level, leading to increased surveillance and suspicions.⁸¹

⁷⁴Meg Stalcup & Joshua Craze, *How We Train Our Cops to Fear Islam*, WASH. MONTHLY, March/April 2011, available at <http://www.washingtonmonthly.com/features/2011/1103.stalcup-craze.html>.

⁷⁵*Id.*

⁷⁶OFFICE OF THE PROGRAM MANAGER, INFORMATION SHARING ENVIRONMENT, NATIONWIDE SUSPICIOUS ACTIVITY REPORTING INITIATIVE (NSI) TECHNICAL IMPLEMENTATION OPTIONS 1 (2010), available at http://www.ise.gov/sites/default/files/NSI_Tech_Impl_Options_Version_1_FINAL_2010-03-09.pdf.

⁷⁷*Id.* at 2-3.

⁷⁸THOMAS CINCOтта, POLITICAL RESEARCH ASSOCIATES, PLATFORM FOR PREJUDICE: HOW THE NATIONWIDE SUSPICIOUS ACTIVITY REPORTING INITIATIVE INVITES RACIAL PROFILING, ERODES CIVIL LIBERTIES, AND UNDERMINES SECURITY 17 (2010), available at http://www.publiceye.org/liberty/matrix/reports/sar_initiative/sar-full-report.pdf.

⁷⁹*Id.* at 37.

⁸⁰*Id.* at 17.

⁸¹*Id.* at 18, 44.

While the Initiative does not officially condone racial or ethnic profiling, Patriot Act provisions (such as allowing police to monitor and enter places of worship without identifying themselves) combined with personal prejudices and local racial-profiling techniques lead to measures targeting Middle-Eastern groups and meritless harassment.⁸²

The institutionalization of Arab-Muslim racism has reached a new phase—entrenching Islamophobia into law enforcement.

Educating Police in the Service of the 'Anti-Terrorist' state

Many in the Obama administration believe that “all terrorism is local,” and that local police are the front line of defense.⁸³ As a result, the administration has set aside millions of dollars to fund a nationwide initiative aimed at helping local law enforcement agencies understand and stop terrorism.⁸⁴ Through use of these funds, local law enforcement agencies have hired a motley crew of instructors, some with experience in federal anti-terrorism, others simply of Middle-Eastern descent with anti-Muslim biases.⁸⁵ Thom Cincotta’s 80-page study, “Manufacturing the Muslim Menace: Private Firms, Public Servants, and the Threat to Rights and Security” describes the growth of the private industry of ‘Islamic terrorism’ experts being hired to teach law enforcement personnel across the country. These “expert’s” programs give police a three-day crash course in the “tenets of Islam” and Islam’s links to terrorism.⁸⁶ Some of the “experts” are parts of large security firms while others are independent contractors.⁸⁷ In one such training, the “expert,” a Jordanian-American named Sam Kharoba, taught 60 South Florida police officers how to spot a terrorist:

“[Wh]en you have a Muslim that wears a headband, regardless of color or insignia, basically what that is telling you is ‘I am willing to be a martyr.’” “From the perspective of operational security, there are two things I am always looking out for: a shaved body and moving lips...”⁸⁸

After a police officer in the crowd asked Kharoba what to do, he responded that the only Muslim immigrants not immediately under suspicion are ones who “Americanize” their names, and that

“[t]he best way to handle these people is what I call legal harassment.” “Start to identify who is coming into your area.” “Go to the DMV and see who has applied for a driving license. Look at the owners of convenience stores. Corner stores are one of the principal ways Hezbollah launders money in the United States.” “You only need one precedent.” “Health inspectors, alcohol trade officers, these guys can turn a convenience store upside down without a warrant.”⁸⁹

After leaving one of Kharoba’s trainings, one police officer was quoted as saying: “yeah, the gangs are a threat . . . but they don’t have 1.5 billion members.”⁹⁰

Many “expert” instructors surveyed share a common world-view: “a conflict against Islam that involves everyone, without distinction between combatant and noncombatant, law enforcement and military.”⁹¹ There are almost no guidelines or oversight for such instructors, yet they have trained tens of thousands of law enforcement officers.⁹² Reports of discriminatory policies tied to these trainings have led to inquiries by Senators Joe Lieberman and Susan Collins, putting the Department of Homeland Security (DHS) on the defensive.⁹³ Even federal agencies seem to have lowered their content standards. The Federal Law Enforcement Training Center (FLETC) provides training to

⁸²*Id.* at 20, 40-41 (listing a variety of incidences of meritless ethnic police targeting).

⁸³*Id.* at 36.

⁸⁴Dina Temple-Raston, *Terrorism Training Cast Pall Over Muslim Employee*, NPR, July 18, 2011, available at <http://www.npr.org/2011/07/18/137712352/terrorism-training-casts-pall-over-muslim-employee>.

⁸⁵*Id.*

⁸⁶Stalcup, *supra* note 74.

⁸⁷*Id.*

⁸⁸*Id.*

⁸⁹*Id.*

⁹⁰*Id.*

⁹¹*Id.*

⁹²Stalcup, *supra* note 74.

⁹³Adam Serwer, *What the “Stealth Jihad” Does to Law Enforcement*, THE AMERICAN PROSPECT, July 18, 2011, available at http://prospect.org/csnc/blogs/adam_serwer_archive?month=07&year=2011&base_name=what_the_stealth_jihad_does_to.

more than eighty federal law enforcement agencies;⁹⁴ Kharoba was courted and allowed to teach his course at FLETC for over a year until students complained about the Islamophobic content.⁹⁵ He has since been barred from teaching. But he is one of dozens of such pseudo-Islamic-experts educating law enforcement around the country.⁹⁶ *Nationality-Based Profiling and Air Travel*

Following the 2009 Christmas Day airplane-bombing attempt, the Obama administration announced that the TSA would begin “country based” profiling.⁹⁷ Since 2010, travelers from 14 countries have automatically received extra airport scrutiny, including pat-downs and full body scans.⁹⁸ Citizens arriving from or with passports from “state sponsors of terrorism” (Cuba, Iran, Sudan, and Syria) and “countries of interest” (Afghanistan, Algeria, Lebanon, Libya, Iraq, Nigeria, Pakistan, Saudi Arabia, Somalia, Yemen) are subject to the added scrutiny.⁹⁹ The TSA has claimed to avoid “racial profiling,” and a Homeland Security officer defended the program, saying it used an “abundance of caution.”¹⁰⁰ Similar systems were put into effect in the 1990s and immediately post-9/11, but did not result in a single documented terrorist apprehension.¹⁰¹ Some argue that instead of catching terrorists, the programs “make entry into the United States more burdensome and unwelcoming, creating a clear sense among Muslims worldwide that they were being discriminated against.”¹⁰²

The Effects of New Police Counter-Terrorism Policies on Arabs and Muslims

Use of Informants and Creative Prosecutions

The government has drastically increased the use of informants to arrest, detain and charge persons within the Arab and Muslim communities on terrorism-related grounds. The increasing number of cases in which convictions are obtained on terrorist-related grounds based on the use of informants in mosques and other community spaces, is raising concerns about whether government operatives are facilitating terrorist intent or activities that were previously nonexistent.¹⁰³ The technique is controversial because it “creates” terrorist intent and allows arrest of a suspect after an overt act that may not have led to a criminal act, or may not have led to any act at all without the instigation of the informant. In many instances, government operatives are fellow Middle Eastern or Muslim immigrants. Some Muslim community activists fear that law enforcement officials coerce immigrants into becoming informants and operatives, especially immigrants with legal problems or those applying for green cards.¹⁰⁴ Others fear that informants target and potentially entice impressionable youths into fictitious terrorist plots.¹⁰⁵ Regardless, it is clear that Middle Eastern and Muslim individuals, whether petty criminal or regular civilian, have been targeted for use as government operatives. There have been reports of individuals forced to leave the country after refusing to act as informants,¹⁰⁶ and many prospective asylum seekers fear the threat of deportation if they do not cooperate.

The material support statutes are an attempt to create a specific inchoate crime of ‘supporting terrorism.’ The fundamental problem is that there is no clear line between criminal support for terrorism and the legitimate exercise of protected First Amendment speech and association rights. The current approach is to categorize almost everything as material support, but to criminalize it when given only to listed recipients. Currently, 31 of the 46 designated Foreign Terrorist Organizations are Arab or Muslim, and of the four countries designated as State Sponsors of Terrorism, 3 are Arab or Muslim majority countries—Cuba is the single non-Arab/Muslim state on the list.

⁹⁴*Id.*

⁹⁵*Id.*

⁹⁶See Cincotta, *supra* note 78.

⁹⁷Dr James J Zogby (President Arab American Institute), *Profiling is back.!*, GULF DAILY NEWS, Jan. 14, 2010, available at 2010 WLNR 748244.

⁹⁸Eric Lipton, *U.S. Intensifies Air Screening for Fliers From 14 Nations*, N.Y. TIMES, Jan 3, 2010, available at <http://www.nytimes.com/2010/01/04/us/04webtsa.html?pagewanted=all>.

⁹⁹*Id.*

¹⁰⁰*Id.*

¹⁰¹Zogby, *supra* note 97.

¹⁰²*Id.*

¹⁰³*Id.* at 4.

¹⁰⁴*Id.* at 5.

¹⁰⁵*Id.*

¹⁰⁶See Zogby, *supra* note 97, at 57-58 (citing the cases of Foad Farahi and Yassine Ouassif).

The difficulty of prosecuting material support terrorism cases is illustrated by David Cole's characterization: "Now the administration is defending on appeal a conviction... of members of the board of the Holy Land Foundation, the nation's largest Muslim charity, who were sentenced to as much as sixty-five years in prison for providing humanitarian aid to hungry and indigent families in the West Bank—even though, according to the government's own evidence, not a penny went to any group designated as terrorist, and not a penny was used for anything but humanitarian purposes."¹⁰⁷

Most interesting, all of the material support prosecutions have been brought through the use of informants—usually through FBI surveillance of mosques and intimidation of an individual identified as vulnerable for some reason through that surveillance. Wadie Said, whose 2010 article is thus far the most detailed review of the use of informants and material support, terrorism-related prosecutions, concludes: "The use of informants in federal terrorist prosecutions has been an overall failure, despite its successes in procuring convictions in the courtroom. Individuals have been prosecuted where they did not represent a threat and the informant's behavior could very well have prompted, as opposed to discovered, the criminal activity. When placed in the context of the racialization of Arabs and Muslims as terrorists, the results are understandable but not justifiable."¹⁰⁸

The ACLU has been tracking the increased surveillance of mosques around the country by the FBI, and FBI planting or generating informants from that surveillance. "[T]he FBI is using Attorney General Ashcroft's loosened profiling standards, together with broader authority to use paid informants, to conduct surveillance of American Muslims in case they might engage in wrongdoing. For more than 14 months between 2006 and 2007, for example, FBI agents planted an informant in mainstream mosques in Orange County, California. The informant posed as a convert to Islam and collected names, telephone numbers, e-mails and other information on hundreds of American Muslims who were not suspected of wrongdoing. Predictably, this dragnet surveillance did not result in a single terrorism conviction."¹⁰⁹

Communication Management Units (CMUs)

Communication Management Units (CMUs) are maximum-security prison facilities designed to "house inmates who, due to their current offense of conviction, offense conduct, or other verified information, require increased monitoring of communication."¹¹⁰ Many believe these facilities necessary to combat increasing homegrown terrorism.¹¹¹ There are currently two CMUs: one in the former death row unit at Terre Haute, Indiana (established Dec. 11, 2006), and one in Marion, Illinois (established March 20, 2008).¹¹² The facilities were created under the George W. Bush administration, and originated as independent initiatives of the Federal Bureau of Prisons (BOP).¹¹³ CMU inmates are under 24-hour surveillance, and allotted two fifteen minutes phone calls every week (in contrast to the 300 monthly phone hours allotted to many super-max inmates).¹¹⁴ These inmates receive eight visiting hours each month;¹¹⁵ only family members can visit, and visits must be done through Plexiglas without physical contact, and in English (unless an interpreter is present).¹¹⁶ The units have been described as "experiments in social isolation."¹¹⁷

As of June 2011, the two CMU's housed 82 inmates.¹¹⁸ Between 66%-72% of these inmates were Muslim or of Middle Eastern descent, even though they make up only 6% of the total prison population.¹¹⁹ Several of the defendants in the Holy Land Fund prosecution have been placed in CMUs. The units house inmates (1) with current offense(s) of conviction, conduct, association, communication, or involvement, related to international or domestic terrorisms; (2) with current offense(s) of conviction, offense conduct, or activity while incarcerated, which indicates a propensity to encourage, coordinate, facilitate, or otherwise act in furtherance of, illegal activity through communication with persons in the community; (3) who have attempted, or indicate a propensity, to contact victims of the

¹⁰⁷Cole, *supra* note 70, at 8.

¹⁰⁸Wadie E. Said, *The Terrorist Informant*, 85 Wash. L. Rev. 687, 738 (2010).

¹⁰⁹American Civil Liberties Union (ACLU), *A Call to Courage: Reclaiming our Liberties Ten Years After 9/11* 23 (2011), available at <http://www.aclu.org/national-security/report-call-courage-reclaiming-our-liberties-ten-years-after-911>.

¹¹⁰*Aref v. Holder*, No. 10-0539, 2011 WL 1195813, at *1 (D.D.C. Mar. 30, 2011).

¹¹¹Christopher S. Stewart, *Little Gitmo*, NEW YORK MAGAZINE, July 10, 2011, at 1, available at <http://nymag.com/news/features/yassin-aref-2011-7/>.

¹¹²*Id.* at 1, 3; Margot Williams, *TIMELINE: The History Of 'Guantanamo North'*, NPR, <http://www.npr.org/2011/03/03/133629696/timeline-the-history-of-guantanamo-north>.

¹¹³Williams, *supra* note 112.

¹¹⁴Stewart, *supra* note 111.

¹¹⁵*Aref v. Holder*, No. 10-0539, 2011 WL 1195813, at *2 (D.D.C. March 30, 2011).

¹¹⁶Stewart, *supra* note 111, at 2.

¹¹⁷CENTER FOR CONSTITUTIONAL RIGHTS, COMMUNICATION MANAGEMENT UNITS: THE FEDERAL PRISON SYSTEM'S EXPERIMENT IN SOCIAL ISOLATION, available at http://www.ccrjustice.org/files/CCR_CMU_Factsheet.pdf.

¹¹⁸Stewart, *supra* note 111, at 1.

¹¹⁹*Id.*

inmate's current offense(s) of conviction; or (4) who have committed prohibited activity related to misuse/abuse of approved communication methods while incarcerated.¹²⁰ BOP regulations clearly indicate that the CMUs are designed to totally control prisoner communication, especially amongst prisoners with suspected terrorist links.¹²¹ The federal bureau of prisons recognizes that CMUs differ from other units, noting, "inmates in this unit represent multiple ethnic backgrounds which include an international flavor."¹²² Shortly after President Obama took office, "balancers" (as called by CMU guards) were reportedly blended into the population in order to address the criticism that the CMUs housed only Muslims.¹²³ These "balancers" included environmental activists, sexual predators, and bank robbers: anyone who prison officials claimed "recruit and radicalize."¹²⁴ Although the CMUs remain disproportionately Muslim, a D.C. District Court recently ruled that Muslim inmates could not bring a 14th Amendment discrimination claim because they could not prove that the BOP acted with discriminatory intent.¹²⁵ The court also ruled that CMU confinement did not constitute 8th Amendment Cruel and Unusual Punishment.¹²⁶ The CMU's, housing almost exclusively Muslim inmates, and many convicted on inchoate crimes such as 'material support to terrorism,' appear to single out the Muslim population for special punishment for the very fact of being Muslim, because they practice, and hence 'communicate' their faith.

It is all terrorism, and not much about terrorism

Whether the issue is border policy with Mexico, routine traffic stops, or recruiting riders on the subway to 'see something, say something,' terrorism has become a marketing tool, recruiting tool, and cover for draining billions from the public coffers, with no end in sight. The example of the US-Mexico border 'fence' will suffice to illustrate the point.

In his just-published book *The Fence*, Robert Lee Maril gives an expose of the corruption of so-called border 'security' policies.¹²⁷ He describes the cronyism of Congress and federal agencies with private contractors, using anti-terrorism as the justification, to award several billion dollars in secret no-bid contracts, which, he contends, have neither slowed undocumented immigration nor had anything to do with countering terrorism.

The Clinton administration first authorized the construction of sophisticated border fencing that was supposed to combine computers, radar, satellite links and cameras to provide an all-encompassing high-tech barrier between the US and Mexico. The 'virtual' and concrete fence was to cover about 650 miles of the 2,000-mile border. First put in place in 1998 as ISIS (the Integrated Surveillance Intelligence System), constructed by L-3 Communications, the fence cost \$250 million and then was found not to function properly. Several incarnations later, post-9/11 it then morphed into SBInet, or Security Border Initiative network. In 2005 Boeing received a contract to design and build a virtual fence across the entire border. According to Maril, "they built only about ten sensor towers and fifteen communications towers, but according to the Government Accountability Office reports none of them ever worked. In my opinion they wasted more than \$1 billion of taxpayer money."¹²⁸ Despite the lack of accountability for the billions lost on the prior virtual and actual fencing, the government has put out bids worth \$750 million for another high-tech virtual fence just on the Arizona border named the Alternative Southwest Border Technology Plan. Again, the bids are secret, so the public does not have access to the specifics; presumably the same companies that built the prior versions will bid again for another round of massive profits. Justification for the fence has been threefold: 1) decrease illegal migration; 2) increase drug interception; and 3) stop alleged terrorists. As to whether the goals have been met, Maril responds that illegal migration is down, but it's unclear whether that is related to the border fencing or to the recession, and, at the same time, more people are losing their lives trying to cross. On the second point, although more drugs have been intercepted in the last few years, more hard drugs are coming in to the US than ever before.¹²⁹ And on the third point, Maril states:

¹²⁰Communication Management Units, 75 Fed. Reg. 17324-01 (Proposed April 6, 2010) (to be codified as 28 C.F.R. pt. 540), at 17327.

¹²¹See *id.* at 17326 (stating that "past behaviors of terrorist inmates provide sufficient grounds to suggest a substantial risk that they may inspire or incite terrorist-related activity, especially if communicated to groups willing to engage in or to provide equipment or logistics to facilitate terrorist-related activity. The potential ramifications of this activity outweigh the inmate's interest in unlimited communication with persons in the community.").

¹²²U.S. DEPT OF JUSTICE FEDERAL BUREAU OF PRISONS, FEDERAL CORRECTIONAL COMPLEX TERRE HAUTE, INDIANA: PREDOCTORAL PSYCHOLOGY INTERNSHIP 9 (2011-2012), available at <http://www.bop.gov/jobs/students/cpdiphx2.pdf>.

¹²³Stewart, *supra* note 111, at 5 (discussing how the BOP has rejected claims that it adds balancers).

¹²⁴*Id.*

¹²⁵*Aref v. Holder*, No. 10-0539, 2011 WL 1195813, at *18 (D.D.C. March 30, 2011).

¹²⁶*Id.*

¹²⁷ROBERT LEE MARIL, *THE FENCE: NATIONAL SECURITY, PUBLIC SAFETY AND ILLEGAL IMMIGRATION ALONG THE US-MEXICO BORDER* (2011).

¹²⁸Justin Elliott, Obama Mimics Bush on the Border Fence, SALON (May 14, 2011), http://www.salon.com/news/politics/war_room/2011/05/14/obama_mexico_border_wall (interview with Robert Lee Maril).

¹²⁹Maril, *supra* note 127.

I can find no known public record of any terrorist ever being stopped since 2005-06 when construction of the wall began. That was one of the three major reasons that the wall was built. What my law enforcement informants tell me is that a terrorist group would be foolish to risk bringing someone in from Mexico when they can come in from so many other places with false documents.¹³⁰

What are all these measures costing us? "According to Admiral (Ret.) Dennis Blair, who served as director of national intelligence under both Bush and Obama, the United States today spends about \$80 billion a year, not including expenditures in Iraq and Afghanistan (which of course dwarf that sum). Generous estimates of the strength of al-Qaeda and its affiliates, Blair reports, put them at between three thousand and five thousand men. That means we are spending between \$16 million and \$27 million per year on each potential terrorist..."¹³¹

Does all this make us safer? Official FBI records show that only 6% of terrorist attacks on US soil from 1980-2005 were carried out by Islamic extremists. The remaining 94% were from other groups (42% from Latinos, 24% from extreme left wing groups, 7% from extremist Jews, 5% from communists, and 16% from all other groups).¹³² Data gathered by Europol in its annual reports shows a similar low rate of 'Muslim' terrorism. The 'EU Terrorism Situation and Trend Report,' shows 99.6% of terrorist attacks in Europe were by non-Muslim groups; 84.8% were from separatist groups unrelated to Islam; leftist groups were responsible for 16 times as many terrorist acts as radical Islamic groups. From 2007-2009, 0.4% of terrorist attacks in Europe could be attributed to extremist Muslims.¹³³

The Response to Non-Muslim Terrorism?

As the evidence itself shows, "terrorism is not a 'Muslim' phenomenon."¹³⁴ A 2009 DHS report written by Daryl Johnson (then senior domestic terrorism analyst with the DHS) found right-wing extremism rapidly on the rise. The report claims right-wing terrorism is being fueled by such factors as the recession, real-estate slump, job outsourcing, illegal immigration, increased gun control laws, and the return of military veterans.¹³⁵ The report states that the "DHS/I&A will be working with its state and local partners over the next several months to ascertain with greater regional specificity the rise in rightwing extremist activity in the United States, with a particular emphasis on the political, economic, and social factors that drive rightwing extremist radicalization."¹³⁶

Shortly after it was issued internally, the report was leaked and immediately attacked by right-wing conservative groups and politicians, leading DHS to claim the report was unauthorized.¹³⁷ Now, according to the Washington Post, the DHS "has stepped back . . . from conducting its own intelligence and analysis of home-grown extremism . . . even though law enforcement and civil rights experts have warned of rising extremist threats."¹³⁸ Additionally, the Post reported that "the department has cut the number of personnel studying domestic terrorism unrelated to Islam..."¹³⁹ Despite the report, the DHS has continued to focus its resources on investigating the threat of Muslim/Middle-Eastern terrorism.¹⁴⁰

So if Muslims in the US account for approximately 6% of terrorist acts, less than extremist Jews and far less than Latinos, why can't we find reports of counting and surveillance of synagogues, the Latino churches, or--as would be suggested from the DHS' own report--the fundamentalist churches of right wing extremists? Why is there no evidence of law enforcement being trained on the "right-wing extremist threat," or "Jewish terrorism" or "Latino terrorism?" Why does the population of the CMUs not more closely approximate the 42% Latino, 24% left wingers, 7% Jews, 5% communists, and 16% all other groups that the data suggests represent the full panoply of terrorist threats? It might be that, unlike Muslims, targeting of other religious groups would not be tolerated, and Muslim terrorism is the only package that gives the behemoth security apparatus a blank check. ■

¹³⁰Elliott, *supra* note 128.

¹³¹Cole, *supra* note 70, at 2

¹³³*Id.*

¹³⁴ACLU, *supra* note 109.

¹³⁵U.S. DEP'T OF HOMELAND SECURITY, IA-0257-09, RIGHTWING EXTREMISM: CURRENT ECONOMIC AND POLITICAL CLIMATE FUELING RESURGENCE IN RADICALIZATION AND RECRUITMENT 2-7 (2009), available at <http://www.fas.org/irp/eprint/rightwing.pdf>.

¹³⁶*Id.* at 8.

¹³⁷*Id.*

¹³⁸*Id.*

¹³⁹*Id.*

¹⁴⁰Bill Berkowitz, *Is the DHS Dropping the Ball on Tracking Rightwing Domestic Terrorists?*, TALK TO ACTION BLOG (Jul 07, 2011, 9:55 AM), <http://www.talk2action.org/story/2011/7/7/95533/80670>.



SIN YEN LING

ASIAN LAW CAUCUS

The 9/11 Effect and its Legacy on U.S. Immigration Law
September 16, 2011

Post 9/11 A Decade Later: Keeping Immigrants Out

On May 1, 2011, major television stations interrupted the evening with the announcement that Osama Bin Laden was dead. President Obama went live at 11:00 p.m. pacific standard time. As the details trickled in, I felt an immediate rush of emotions: grief, sadness, and anguish. Memories came rushing back to me. I remembered where I was when the World Trade Center came down that morning. I remembered the immediate days after 9/11 when I was triaging emails and phone calls at the Asian American Legal Defense and Education Fund (“AALDEF”) concerning hate incidents targeting Sikhs in New York City and around the country. I remembered the hundreds of South Asian, Arab and Muslim men I represented in immigration detention months and years after September 11th. While the memories seemed so long ago, on the night of May 1st, the memories came back like it had all happened yesterday.

In the immediate aftermath of 9/11, the Bush Administration implemented policies such as secret detention, special registration and the absconder initiative, specifically, targeting South Asian, Arab and Muslim communities. On September 21, 2001, Chief Immigration Judge Michael Creppy issued a memorandum ordering all courts to be closed and to adhere to secret procedures when an immigrant detainee is labeled as “special interest.”¹⁴¹ In August 2002, the call-in registration portion of the National Security Entry-Exit Registration System (“NSEERS”) mandated that certain men (and boys over 16) from twenty-five predominantly Muslim countries and North Korea were required to report to local immigration offices between November 2002 and April 2003.¹⁴² At the conclusion of the special registration program, 82,581 individuals nationwide had been questioned, fingerprinted and interrogated under oath.¹⁴³ These blanket policies were intended to racially profile members of these communities, indefinitely detain them pending terrorism investigations based solely on race and religion and then deport them back to their home countries without ever charging them with terrorism. There is no question as to the racial and religious overtones of these policies. At AALDEF, in New York City, I represented many of these individuals from 2001 to 2005. These individuals were predominantly male, 16-45 years of age, and recent immigrants from South Asian, Arab and Muslim countries.

Throughout this decade, many of these post 9/11 policies have reached beyond the racial scope of the South Asian, Arab and Muslim diaspora. The threat of another 9/11 has become a reason to expand these policies to exclude all immigrants, regardless of their race and religion. It was no longer just about race and religion, but about national origin. Many of these policies are now aimed at preventing noncitizens from obtaining immigration status, including political asylum and lawful permanent residency, by alleging that these individuals engaged in “material support to terrorism.” These same allegations were used to prevent individuals from immigrating to the United States to join their families or to work or attend conferences in the U.S. Other remnants of post 9/11, called the FBI “Name

¹⁴¹Memorandum from the Chief Immigration Judge Michael Creppy to all Immigration Judges and Court administrators (Sept. 21, 2001)(on file with the Executive Office for Immigration Review); see also INTERPRETER RELEASES, Dec. 3, 2001, at 1816, 1819.

¹⁴²Registration of Certain Nonimmigrant Aliens from Designated Countries, 67 Fed. Reg. 66765, 77641 (2002); 68 *id.* 2363-64 (2003); Permission for Certain Nonimmigrant Aliens from Designated Countries to Register in a Timely Fashion, *id.* at 2366; Registration of Certain Nonimmigrant Aliens from Designated Countries, 68 *id.* at 8046.

¹⁴³Rachel L. Swarns, *Thousands of Arabs and Muslims Could Be Deported, Officials Say*, N.Y. TIMES, June 7, 2003 at A1.

Check,” delayed applications for citizenship because of a “hit” using some variation of their names. Communities impacted by these policies expanded to include Asians, Latinos, Eastern Europeans, Russians, and Africans. While the earlier policies worked towards ferreting out individuals based on their race and religion, later policies aimed at excluding individuals and keeping them out of the country because they were not American citizens.

After four years of post 9/11 cases, I was burnt out and exhausted. I moved to San Francisco, California hoping to take a break from these cases to focus on broader immigrants’ rights issues. To my surprise, I found that it was impossible to avoid these issues because the post 9/11 policies had become deeply entrenched in the immigration system. Since 2006, I have been working at the Asian Law Caucus, the first civil rights organization serving the Asian Pacific American community. At the Caucus, my work ranges from representing immigrants facing deportation while in ICE custody to affirmative litigation in the SB1070 cases in the South, ie., Georgia and Alabama.

On July 2, 2007, the Asian Law Caucus, along with the American Civil Liberties Union (“ACLU”) of Northern California and Council for American Islamic Relations, brought a lawsuit in the Northern District of California challenging the FBI “Name Check” process as applied to the naturalization process.¹⁴⁴ Lawful permanent residents eligible to become a citizen must file an N-400 application. U.S. Citizenship and Immigration Services (CIS) runs each of these applications against a number of databases, including the FBI “name check.” In response to 9/11, the FBI “name check” was expanded to include not only the FBI’s “main files” but also “references.” Applicants’ names register a “hit” if they were merely a witness or victim of a crime, if they had assisted with the FBI with an investigation, or if they had undergone an employment-related security clearance in the past. The name checks also turn up a high number of false positives because they use alternate permutations of applicants’ names. If there is a “hit,” CIS will not continue to process a naturalization application even when the law required that an adjudication be made within 120 days of an examination.¹⁴⁵ By May 2008, the number of pending citizenship cases had ballooned up to 329,000 cases, with 64% of these cases stalled for more than 90 days.¹⁴⁶

In *Ahmadi v. Chertoff*, our class plaintiffs came from countries including China (including Hong Kong), India, Pakistan, Russia, Canada, Belgium, Bulgaria, Czech Republic, and Afghanistan. At the Asian Law Caucus, we received over 300 intakes involving naturalization delays due to the FBI name check, with a disproportionate impact on the Chinese, Russian and Muslim communities. The expansion of the FBI “name check” after 9/11 was intended to exclude as many noncitizens from obtaining the rights and benefits of citizenship which includes the right to vote, the right to file visa petitions for immediate family members, and the right to federal benefits, as possible. *Ahmadi v. Chertoff* settled in 2008 as did most of the class action lawsuits filed in response to the FBI “name check.”

On January 25, 2002, the Department of Justice issued the Absconder Initiative Memorandum which outlined the goal of identifying, apprehending and deporting individuals with final orders of removal.¹⁴⁷ Individuals arrested under the Absconder Initiative in the months following 9/11 were predominantly Muslims.¹⁴⁸ By 2008, 33,997 noncitizens were detained as part of the Fugitive Operations Apprehensions which morphed from the Alien Absconder Initiative initially targeting terrorists. Ten years ago, I only represented Muslims who were arrested under the fugitive operations initiative. Today, in California, there isn’t a week that passes where I do not receive a phone call involving a fugitive operations case; however the individuals are no longer Muslim, but Asian and/or Latino. The most notable fugitive operations case I recently handled involved the arrest of Steve Li, a Peruvian Chinese DREAM Act student whose case garnered national attention. He was 12-years old when he came to the United States. He was 15-years old when he was ordered removed by the Board of Immigration Appeals. He was 20-years old and studying at City College of San Francisco when ICE raided his home and arrested him. He was involuntarily transferred to the Florence Detention Center in Arizona and detained for approximately three months before California Senator Dianne Feinstein intervened with a private immigration bill. Illinois Senator Dick Durbin cited Steve’s

¹⁴⁴*Ahmadi v. Chertoff*, No. C 07-03455-WHA, 2008 U.S. Dist. LEXIS 108555 (N.D. CA. 2008).

¹⁴⁵8 U.S.C. § 1447(b).

¹⁴⁶N.C. Aizenman & Spencer S. Hsu, *FBI Name Check Cited in Naturalization Delays Official Calls Backlog ‘Unacceptable’*, WASH. POST, June 17, 2007, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/06/16/AR2007061601360.html>.

¹⁴⁷Memorandum from the Deputy Attorney General to the INA, FBI, U.S. Marshals and U.S. Attorneys Office (Jan. 25, 2002)(on file with the Office of the Attorney General).

¹⁴⁸Susan Sachs, *U.S. Begins Crackdown on Muslims Who Defy Orders to Leave Country*, N.Y. TIMES, Apr. 2, 2002, at A13, available at <http://www.nytimes.com/2002/04/02/nyregion/nation-challenged-deportations-us-begins-crackdown-muslims-who-defy-orders-leave.html>.

case when he reintroduced the DREAM Act on May 11, 2011. Steve is not South Asian, Arab or Muslim, nor is he a terrorist or has never engaged in terrorist activities.

Today's post 9/11 policies aim at preventing Muslims from entering the country even if they were properly petitioned by family members and then granted an immigrant visa. In February 2010, the Asian Law Caucus filed a complaint with the Northern District of California on behalf of Fauzia Din, a U.S. Citizen and Afghani national, who petitioned on behalf of her husband, an Afghani citizen. Fauzia's husband had been employed as a government clerk in the Afghan Ministry of Education since 2003. His job duties involved processing paperwork and other low-level administrative duties. From 1992 to 2003, he worked as a payroll clerk in the Afghan Ministry of Social Welfare, where he processed payroll for school teachers and performed other low-level administrative duties. From 1996 to 2001, during the Taliban occupation of Afghanistan, he continued to work in the Ministry of Social Welfare in the same capacity as before, and after, the Taliban occupation. During the Taliban occupation of Afghanistan, he never implemented any policy changes on the Taliban's behalf.

In 2006, Fauzia filed an I-130 Petition for Alien Relative for her husband and it was approved on 2008. On July 13, 2009, the American Embassy denied the visa petition under INA § 212(a)(3)(B), a provision of the Act applicable to "terrorist activities." However, the Government never explained what the terrorist activities involved. Under consular process rules, a consulate decision to issue or withhold a visa is not subject to either administrative or judicial review unless the denial of the visa implicates the constitutional rights of American citizens.¹⁴⁹ Our lawsuit argued that the consular officer's denial of her immigrant visa petition on behalf of her husband violated her constitutional right to due process. The case is currently before the Ninth Circuit Court of Appeals.¹⁵⁰ Fauzia has been separated from her husband for the past five years.

Similarly, in 2009, the Asian Law Caucus represented the family member of Umar Hayat. Hayat is best known for his association with the Lodi Terrorism Case. Umar Hayat, an ice cream truck driver, and his son, Hamid Hayat were arrested in 2006 when an informant provided bad intelligence claiming that Osama Bin Laden's deputy, Ayman Al Zawahiri, had visited Lodi, California. Later, this intelligence turned out to be false. The Government dropped charges against Umar Hayat, but his son was sentenced to 24 years in prison for attending a training camp in Pakistan. In 2009, Mr. Hayat's relative was granted an immigrant visa based on his U.S. Citizen wife's visa petition. He interviewed at the American Embassy in Islamabad and consular processed with a visa issued on September 2009. Mid-air through his travels and before he arrived at the San Francisco International Airport ("SFO"), the Government revoked his visa without explanation and instead, paroled him into the United States. He was detained at SFO for approximately five hours. He was allowed to enter the U.S. through the parole status, but was not considered to have been admitted for the purposes of immigration laws. About three months later, he was given an appointment to return to Borders and Customs expecting that he would be issued a Notice to Appear and be allowed to appear before an Immigration Judge. Instead, he was interrogated for several hours, arrested, detained and expeditiously removed after hours of interrogation. As his counsel, I was not allowed to represent my client and was kicked out of the interview when I asked to speak with my client privately when he was asked whether he feared returning to Pakistan. A frail, old, diabetic man who requires insulin shots was hauled off to a local county jail before he was put on a plane back to Pakistan. It was clear that Mr. Hayat's relative was paroled into the U.S. only for the purposes of gathering intelligence. As soon as they obtained information, they deported him from the United States.

On the night of May 1st, we all watched images broadcast from outside the White House and near Ground Zero in New York City. We watched hordes of young people, mostly college students, celebrating in jubilation and extreme jingoism. These are the children of 9/11 --- young people who were only 8-10 years old and are now in their late teens and early 20's. They grew up with catch phrases like "war on terrorism" and "weapons of mass destruction." The celebrations in front of the White House were seen and heard around the world. These disturbing images reflect on all Americans and the fact that we have not progressed in the past decade. In spite of the great work of lawyers and advocates immediately after 9/11, we have failed to learn and reflect from lessons of the past, times like Japanese American internment when we forfeited people's rights in search of a false sense of security. On September 11th of this year, we will mark the ten-year anniversary of the day that changed all of our lives, and

¹⁴⁹*Bustamante v. Mukasey*, 531 F.3d 1059, 1061 (9th Cir. 2008).

¹⁵⁰*Din v. Clinton*, Case No. 10-16772 (9th Cir.).

particularly, the lives of immigrants, South Asians, Arabs and Muslims. A new paradigm was created after 9/11 where the balance tipped in favor of creating greater power in government over the rights of the people. It permits us to interpret the Constitution in a way that justifies the detention of individuals in Guantanamo for nearly a decade without charging them. It refuses these men access to civilian courts so that they can be properly tried. The new norm justifies acts of water boarding and other forms of torture, because we have convinced ourselves that the information we retrieved led to Bin Laden. It is a paradigm that fails to question government conduct that includes illegal wiretapping and then permits the government to hide behind the doctrine of "states secrets." When we look at the images of the young people in front of the White House that night, sitting on trees, and celebrating like it was the Super Bowl, I am anxious at how much we are willing to give up and accept as the norm. If we do not challenge this paradigm, it will continue to be sanctioned by the courts and supported by the Obama Administration. ■



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The 9/11 Effect and its Legacy on U.S. Immigration Law
September 16, 2011

Immigration, Race, and September 11th: Perspectives on Policy Advocacy

On the morning of September 11, 2001, I woke up bleary-eyed as I made my way to breakfast at my parents' home in California. As the television was on in our kitchen during the normal hustle of our morning routines, I caught a glimpse of two burning towers marring the bright skyline of New York City. Thinking that it was just an action film on the screen, at first, I did not give these images much more than a passing thought. Only after watching for a few more minutes did I realize that this was real and the shock sank in – terror had struck American soil and the sheer magnitude of loss and destruction was overwhelming.

Upon witnessing the attacks on television and being inescapably gripped by news coverage, there was a numbness that I felt, along with so many other Americans grappling with the immense and profound tragedy. In a matter of mere days, however, a sense of fear and insecurity set in as reports of backlash and discrimination came pouring in. At the time, I was working for Amnesty International's National Refugee Office in San Francisco, where I was scouring newspapers to compile lists upon lists of hate crimes being committed against Arabs, Muslims, Sikhs, and South Asians across the country. Reading about one incident of a South Asian man beaten to the point where his mouth needed to be wired shut at a restaurant in my hometown and seeing effigies of non-descript brown bodies with turbans and robes strung up at house on my block, I knew that, if I was not before, I was certainly now part of the "other" America. Albeit naively, I had still thought that such hatred was an anomaly and that pernicious stereotypes equating Arabs, Muslims, Sikhs, and South Asians as terrorists would not seep into the government charged with protecting us. Yet, what soon developed were immigration and national security policies that were steeped in the targeting of these very communities on the basis of race.

September 11th and the policies that took hold in its aftermath were a redux of a history of state-sanctioned discrimination that has been perpetrated against other communities of color – from the internment of Japanese Americans during World War II to the denial of rights from African Americans to migration restrictions affecting Latino immigrants. Indeed, an era emerged where immigrants of all backgrounds have been turned away or ferreted out by the government as never before. But while the impetus and the impact of post-September 11th immigration and national security policies were and continue to be driven by the race, the advocacy strategies to counter such programs at the local and national levels have had additional layers. Specifically, this has required: 1) presenting how religion and national origin have now become stand-ins for race; 2) revealing how these policies are ineffective at keeping our country secure, with safety being a concern that transcends race; and 3) appealing to the ideals of compassion, fairness, and equality to which Americans across races aspire. With a spotlight on one program that has especially impacted South Asian, Arab, and Muslim populations, this essays aims to explore how these tactics have influenced advocacy strategies for immigrant rights.

"Race Plus" – Religion and National Origin as Race Proxies and Advocacy Strategies

In addition to race, national origin and religion have become its proxy in immigration enforcement as applied to South Asians, Arabs, and Muslims over the past decade. One can draw from a litany of examples to see how members of these communities were placed within the crosshairs of immigration authorities, based on the misguided

notion that their faith or their country of origin made them threats and ripe for removal. Soon after the attacks, the government conducted “voluntary” interviews of over 3,000 nonimmigrant men from countries in which Al Qaeda was suspected to have links or activities. Despite the voluntary nature of the interviews and their supposed information-gathering motive, some of the men questioned were arrested for violating immigration laws, such as overstaying past the expiration dates of their visas or working without authorization.¹⁵¹ In January 2002, the Department of Justice (DOJ) and the then-Immigration and Naturalization Service (INS)¹⁵² began implementing the Alien Absconder Apprehension Initiative to locate over 300,000 individuals with court orders of deportation already against them; the program was “aimed at aggressively tracking, apprehending, and removing aliens who [had] violated U.S. immigration law, been ordered deported, then fled before the order could be carried out.”¹⁵³ The Federal Bureau of Investigation and immigration authorities conducted nationwide sweeps to detain individuals who might have links to terrorist activities. The Office of Inspector General at DOJ reported 762 individuals were detained.¹⁵⁴ Detainees could be held without being charged, and, in cases where it was revealed that detainees had broken immigration laws, they were held for prolonged periods of time for even minor visa violations that would never have previously resulted in jail time.¹⁵⁵ The government also held over 600 secret immigration hearings where the public, the media, and even family and friends were excluded, effectively foreclosing any chance to hold the government accountable by scrutinizing its actions.¹⁵⁶

Arguably, the most telling and explicit example of how the government’s immigration enforcement priorities have been driven by factors such as race, religion, and national origin was the National Security Entry-Exit Registration System (NSEERS). Initiated by DOJ in 2002 and subsequently administered by the Department of Homeland Security (DHS), NSEERS’ purported intent was to track immigrants in the United States in order to prevent terrorism. One aspect of the program required certain male nationals of 25 predominantly Muslim-majority countries to be fingerprinted, photographed, and questioned by immigration authorities. Arabs, Muslims, and South Asians across the country had no choice but to comply. As a result of the program, more than 83,000 men registered, over 13,000 were placed in removal proceedings, and nearly 3,000 were detained.¹⁵⁷ But DHS has yet to show that anyone was brought up on terrorism-related charges through the program. In fact, enforcement of this magnitude ended up ensnaring many with minor immigration violations who posed no demonstrable threat to this country.

With NSEERS as an example, there is no doubt that the policy’s virtually exclusive focus on nationals of Muslim-majority countries was not only racial but also religious and national origin profiling. An individual’s skin color, faith, and country of citizenship essentially determined the likelihood of whether they would be required to participate in the program or not. But the existing anti-profiling measures have, not surprisingly and likely intentionally, failed to keep up with morphing nature of profiling and immigration enforcement in the post-September 11th world. In 2003, DOJ issued its Guidance Regarding the Use of Race by Law Enforcement (“DOJ Guidance”).¹⁵⁸ While, on paper, it does indeed prohibit racial profiling, it is woefully incomplete. Particularly as it relates to post-September 11th immigration enforcement, it allows for profiling based on religion and national origin; it also includes loopholes that permit profiling to occur at borders or in the name of national security. (Even if the guidance were more comprehensive, it lacks any meaningful enforcement mechanism and does not consistently apply to state and local law enforcement agencies.) As a result, national security and border rationales have been exceptions that have effectively swallowed the rule as it relates to immigration and counterterrorism policies; and profiling that uses religion or national origin as a proxy for race can still occur as a matter of both law and practice.

¹⁵¹U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-03-459, JUSTICE DEPARTMENT’S PROJECT TO INTERVIEW ALIENS AFTER SEPTEMBER 11, 2001 (2003).

¹⁵²On March 1, 2003, the function of providing immigration-related services and benefits of the Immigration and Naturalization Service (INS) - formerly part of the Department of Justice - was transferred to the U.S. Citizenship and Immigration Services (USCIS) in the Department of Homeland Security.

¹⁵³Hearing on Department of Homeland Security Transition: Bureau of Immigration and Customs Enforcement Before the House Subcomm. on Immigration, Border Security, and Claims of the H. Comm. on the Judiciary, 108th Cong. (2003) (statement of Asa Hutchinson).

¹⁵⁴U.S. DEP’T 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 (June 2003), available at <http://www.justice.gov/oig/special/0306/full.pdf>.

¹⁵⁵HUMAN RIGHTS WATCH, PRESUMPTION OF GUILT: HUMAN RIGHTS ABUSES OF POST-SEPTEMBER 11 DETAINEES 50 (2002), available at <http://www.hrw.org/reports/2002/us911/>.

¹⁵⁶Kate Martin, *Secret Arrests and Preventive Detention*, in LOST LIBERTIES: ASHCROFT AND THE ASSAULT ON PERSONAL FREEDOM 79 (Cynthia Brown, ed., 2003).

¹⁵⁷Nurith C. Aizenmann & Edward Walsh, *Immigrants Fear Deportation After Registration; Number of Mideast, Muslim Men Expelled Rises Sharply*, WASH. POST, July 28, 2003, at A01.

¹⁵⁸U.S. DEP’T OF JUSTICE, CIVIL RIGHTS DIVISION, GUIDANCE ON REGARDING THE USE OF RACE BY FEDERAL LAW ENFORCEMENT AGENCIES (2003), available at http://www.justice.gov/crt/about/spl/documents/guidance_on_race.pdf.

After September 11th, the prevalence of religious and national origin profiling in the immigration context, along with the inadequate protections on the books, spurred South Asian, Arab, and Muslim communities to partner with other communities of color. Although work remains to be done in order to truly solidify these relationships, these communities have partnered with African American communities historically plagued by profiling in the criminal context and Latino communities long affected by profiling in the immigration context. Presenting a coalition force at the local and national levels, these communities have called for reforming the DOJ Guidance on racial profiling as well as passage of federal anti-profiling legislation, such as the *End Racial Profiling Act*.

We are All American: An Appeal for the Safety of All

Regardless of the clear racial and religious discrimination resulting from post-September 11th policies, one aspect of advocacy strategies to combat enforcement has also required moving beyond an exclusively race-based narrative to one that speaks to all Americans. A crucial tool has been to highlight how the government's reliance on immigration law has not demonstrably made the country any safer.¹⁵⁹ National security and safety is of paramount concern to all Americans, government agencies, and lawmakers, thus making efforts that fail to meet this object more difficult to justify.

Those opposing post-September 11th immigration enforcement measures have relied upon the government's own statements (as well those of former officials) to show the fallacy of these types of programs. Using NSEERS as an example, in urging for its elimination, advocates have highlighted alternative programs that the government has considered or implemented that would not be discriminatory in nature and could be more effective at determining threats in the United States.¹⁶⁰ One example, while still raising concerns in terms of privacy and data-sharing, is the United States Visitor and Immigrant Status Technology (US-VISIT) program, which requires all temporary immigrants to register. In fact, the implementation of this program was the rationale behind DHS' initial suspension of certain aspects of NSEERS, such as interview requirements¹⁶¹ as well as the delisting of the 25 countries in the regulations governing NSEERS.

In addition, these assurances were affirmed by various government officials, such as former DHS Undersecretary for Border and Transportation Security Asa Hutchinson, and former DHS Secretary Tom Ridge.¹⁶² Former government officials also acknowledged that racial and religious targeting through immigration enforcement could not be effective at identifying national security threats. For example, James W. Ziglar, former INS commissioner, said that his office was skeptical about what exactly NSEERS would yield given that actual terrorists would likely not report to the government on their own for interviews and questioned whether this was a valuable use of limited national security resources.¹⁶³ In fact, he went on to say, "[t]o my knowledge, not one actual terrorist was identified. But 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."¹⁶⁴

Such statements have bolstered advocacy efforts on the Congressional front to have lawmakers speak out against post-September 11th immigration enforcement programs. In 2004, the Civil Liberties Restoration Act (CLRA) was introduced in the Senate and House of Representatives, with reintroduction in the House in 2005.¹⁶⁵ This proposed legislation would have eliminated NSEERS-related regulations and "administratively closed" the cases of NSEERS-related cases that met certain criteria.¹⁶⁶ Although the bill ultimately did not succeed, a range of Senators and mem-

¹⁵⁹NATIONAL IMMIGRATION FORUM, TERRORISM AND THE GOVERNMENT'S RESPONSE: BROAD INITIATIVES DO NOT MAKE US SAFER (2003), available at <http://www.immigrationforum.org/images/uploads/GovernmentResponseToTerrorism.pdf>.

¹⁶⁰For more information on US-VISIT, see <http://www.dhs.gov/files/programs/usv.shtm>.

¹⁶¹69 Fed. Reg. 468 (2008).

¹⁶²Press Release, U.S. Dep't of Homeland Security, NSEERS 30-day and Annual Interview Requirements to be Suspended (Dec. 1, 2003), available at http://www.dhs.gov/xnews/releases/press_release_0306.shtm.

¹⁶³Rachel L. Swarns, Program's Value in Dispute as a Tool to Fight Terrorism, N.Y. Times, Dec. 21, 2004, at A26, available at <http://query.nytimes.com/gst/fullpage.html?res=950CE0DB1330F932A15751C1A9629C8B63>.

¹⁶⁴*Id.*

¹⁶⁵Civil Liberties Restoration Act, S.B. 2528/ H.R. 4591, 108th Cong. (2004); reintroduced in the House as H.R. 1502, 109th Cong. (2005).

¹⁶⁶Civil Liberties Restoration Act, H.R. 1502, 109th Cong. § 301 (2005). It specifically closed cases of those placed in removal proceedings solely for failure to comply with NSEERS requirements or if they complied with NSEERS and either had a pending application for an immigration benefit or were eligible to apply for such a benefit.

bers of Congress continued to express vocal opposition to such discriminatory enforcement and questioned its effectiveness. Senators Russell Feingold, Edward Kennedy, and Dick Durbin and Congressman John Conyers have led the charge in placing pressure on DOJ and, subsequently, DHS to demonstrate its impact and urging its elimination.¹⁶⁷ A drumbeat of pressure from federal lawmakers lasting nearly ten years was crucial in ensuring the government was aware the American public had not forgotten about the program – both in terms of its devastating impact on immigrant communities and its inability to keep the country safe.

Raising Voices: Conveying the Human Impact of Enforcement in Advocacy

In order to move both policymakers and the public, South Asian, Arab, and Muslim community members have joined other immigrant and minority communities to mobilize and present the human face behind those impacted by post-September 11th immigration enforcement. A national security gloss over immigration gives mainstream America the impression that those who are being rounded up and deported are dangerous, different, and do not belong here. But, in the case of NSEERS, as in so many other immigration enforcement contexts, those who have been caught up by such policies have been parents, siblings, and youth. And their removals have wreaked havoc on those whom they have left behind.

Showcasing how the casualties of this type of enforcement have been individuals in many ways no different than other Americans has been instrumental to this movement. Illustrating stories such as the ones below from the South Asian community members affected by NSEERS (and can indeed be found in virtually any immigrant community affected by immigration enforcement) are intended to tell policymakers and the public: “we are not terrorists, we are families.”

- In San Francisco, two brothers from Pakistan were placed in deportation proceedings as a result of NSEERS. They shared their stories at a news conference convened by the American Civil Liberties Union of Northern California, the American Muslim Voice, and the Pakistani-American Alliance. They were no more than 17 and 19 years old and had lived in the United States virtually their entire lives. Their mother, a teacher, said, “In 1998, we sold our house in Pakistan to come to this country so that my sons could have a better education ... My sons cannot go back to Pakistan, there is no home for them there.”¹⁶⁸

- Harun Ur Rasheed moved to New York from Bangladesh in 1997 to seek medical care for advanced glaucoma. He spent thousands of his hard-earned dollars on treatments which failed to cure his condition and decided to stay in the country. In order to support his family back home, he got a job as a construction worker. Due to the rampant misinformation circulating around special registration, he thought by participating he could legalize his status. To his surprise, after he voluntarily showed up at the immigration offices at 26 Federal Plaza, he was placed into deportation proceedings. Ultimately, he chose to leave the country voluntarily rather than endure the ordeal of immigration court.¹⁶⁹

Even in the face of pervasive anti-immigrant sentiment that has ratcheted up since September 11th, community members have courageously stepped forward to speak out against unjust enforcement and appealed to the American values of fairness and family. Before leaving for Bangladesh, Mr. Rasheed vowed to speak out against the injustices the community underwent after NSEERS and held a press conference outside his Brooklyn mosque. During the event, coordinated by the organization Families for Freedom, he said:

I honored your law, Mr. Ashcroft, and you gave me deportation. You say this is a human rights country? You should have given me a way to fix my immigration status. I have no other option, but I will not leave quietly.

¹⁶⁷Press Release, Arab-American Anti-Discrimination Committee (ADC), Senators and Congressman Demand Ashcroft Suspend INS Special Registration (Dec. 26, 2002), available at <http://www.adc.org/media/press-releases/2002/december-2002/senators-and-congressman-demand-ashcroft-suspend-ins-special-registration/>.

¹⁶⁸Press Release, American Civil Liberties Union, American Muslim Voice & Pakistani-American Alliance, Immigrants targeted for deportation after participating in INS Special Registration program speak out at the ACLU-AMV-PAA Press Conference (July 1, 2003).

¹⁶⁹SPECIAL REGISTRANTS ACTION NETWORK, REPORT TO THE 9/11 COMMISSION FROM THE SPECIAL REGISTRANTS ACTION NETWORK (2003). See also Harun, FAMILIES FOR FREEDOM, http://www.familiesforfreedom.org/httpdocs/our_families/harun.html.

Efforts to organize, mobilize, and document the experiences of those whose lives were disrupted by policies such as NSEERS became critical tools used by entities engaged in policy advocacy efforts. Organizations such as the Coney Island Avenue Project, Council of Peoples Organization, Desis Rising Up and Moving (DRUM), Families for Freedom, and South Asian Network sprung into action to lend a voice to affected South Asians. Parallel and collaborative efforts were done in other immigrant communities as well. DRUM, along with the Immigrant Justice Solidarity Project and the Prison Moratorium Project, launched the Stop the Disappearances Campaign. Through the campaign, community members rallied to urge government agencies to process backlogged immigration applications, particularly of those who had pending petitions before the government initiated special registration. In addition, mobilization and advocacy was done side-by-side Latino communities suffering from increased border enforcement and immigration raids since September 11th. Using these real-life stories of community members, national organizations have elevated these tragedies to policymakers and the public to underscore the consequences of these policy choices.

Recommendations and Looking Ahead

Ten years after September 11th, the convoluted ways in which immigration enforcement has manifested itself have only multiplied. In the name of national security and border integrity, federal programs allowing state and local law enforcement to carry out immigration laws have emerged in full force. Immigrants are being increasingly searched, questioned, and detained upon entry into the country. And states and municipalities have jumped into the fray with their own anti-immigrant measures. With what has transpired over the past ten years and what lays ahead, it is vital that policy analyses, advocacy efforts, and mobilization strategies be rooted in lenses that both include and expand beyond race. The realities have shown us that immigration enforcement has adapted to targeting on the basis of religion, ethnicity and national origin; that often the strongest tools are to show how current enforcement measures endanger all Americans; and that, fundamentally, there are real people and communities whose lives are left in shambles as a result.

As a glimmer of hope, by adopting some of these approaches over the past ten years, local and national efforts undertaken by community members and organizations have recently borne at least some fruit. In April 2011, after over eight years of mobilizations and advocacy, DHS modified NSEERS so that individuals from the 25 listed countries were no longer subject to its requirements. While the fate of those who were placed in deportation proceedings still remains in question, the call for fairness and justice within our country's immigration system was heard. Challenges persist for all immigrants in the post-September 11th era, but the diversity of voices urging humane policies that reaffirm our country's commitment to diversity, inclusion, and fairness continue as well. As I recall that fateful day ten years ago, the unity and compassion of Americans that spread for at least a few fleeting moments is the spirit that needs to continue in the paths before us. ■



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The 9/11 Effect and its Legacy on U.S. Immigration Law
September 16, 2011

The Human Rights of Immigrants: Confronting the Legacy of 9/11

I. Introduction

International rights law is based on the fundamental premise that “All human beings are born free and equal in dignity and rights.”¹⁷⁰ That promise of equality and dignity in rights, and the accompanying obligation to take affirmative measures to ensure the realization of those rights, has motivated a growing advocacy community to engage with international human rights mechanisms in an effort to realize equality in dignity and rights for communities, particularly immigrant communities, confronting the legacies of 9/11, challenging the policies and practices that have resulted in ongoing violations of their fundamental human rights.

Advocates are increasingly engaging in international human rights mechanisms for multiple reasons. The leading reason is that the domestic legal regime has failed to adequately address the rights at issue. With regard to immigrants, it reflects an effort to change the narrative of immigration and the characterization of immigrants, not as human beings equal in dignity and rights, but “aliens” or “illegals” or any other of a number of monikers used to distinguish non-citizens from citizens, a distinction used to justify discrimination in the enjoyment and enforcement of rights. Furthermore, international human rights law creates affirmative obligations to protect and promote rights, rather than merely provide remedies to be pursued after those rights have been violated. By bringing these debates before the international community, advocates also seek to gain the U.S. government’s explicit recognition of immigrant rights, and in response to that recognition, to gain the United States’ commitments on the international stage to take measures to ensure the protection and promotion of those rights. Advocates also seek to employ and leverage the support of the international community in their efforts to pressure the U.S. government in taking those affirmative steps towards the protection and promotion of the fundamental human rights of immigrants, adding a layer of accountability. Furthermore, through engaging in an international dialogue on the subject of immigration – a subject of debate not unique to the United States – advocates can join a collective movement to strengthen applicable international human rights norms, and to establish a set of best practices that serve to promote and protect the fundamental rights of all immigrants.

While there has been progress in the rhetoric of rights as applied to immigrants, there is still significant work to be done to translate that rhetoric into reality. Before addressing the challenges confronting immigrants in the post-9/11 period as they seek to convert rights to realities, it is important to put those challenges in their historical context, and to recognize the United States’ long and troubled history of immigration. We remember the history Japanese internment during World War II.¹⁷¹ We remember how quickly the then Immigration and Naturalization

¹⁷⁰Universal Declaration of Human Rights, G.A. Res. 217, U.N. GAOR, 3d Sess., pt. 1, art. 1, UN Doc. A/810 (1948).

¹⁷¹See Archives Library Information Center, *Japanese Relocation and Internment During World War II*, NATIONAL ARCHIVES, <http://www.archives.gov/research/alic/reference/military/japanese-internment.html>.

Service stripped asylum seekers of employment authorization and otherwise sought to restrict the rights of asylum seekers after terrorists drove a truck into the World Trade Center in 1993.¹⁷² And, we remember the furor with which Congress made numerous and significant changes to our welfare and immigration laws 1996, denying immigrants access to life-saving public benefits, establishing a one-year filing deadline for persons seeking asylum, implementing summary exclusion for persons arriving at our borders, creating mandatory detention for immigrants based on a dramatically expanded list of crimes, severely restricting judicial review, and putting into place numerous other provisions limiting the rights of all immigrants, from those seeking admission to those with lawful permanent resident status.¹⁷³ And so the pendulum has swung: towards increased restrictions and deprivation of rights fueled by the winds of fear, with an occasional and slight swing back towards a more even-handed and practical regulatory approach in times of calm and security. That time of calm and security was the start of the 21st Century and the pendulum was starting to swing back, and then the tragedies of September 11, 2001 happened.

Since 9/11, the United States' policies and practices vis-à-vis immigrants and immigrant communities have been assessed before a variety of UN human rights review processes, through treaty review mechanisms measuring compliance with ratified treaties, including the International Covenant on Civil and Political Rights (ICCPR), the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), and the Convention Against Torture (CAT), as well as through the Universal Periodic Review, which assesses human rights compliance based not only on the standards set forth in the treaties the United States has ratified, but also on standards set forth in the Universal Declaration of Human Rights (UDHR) and the UN Charter. At the regional level, the Inter-American Commission on Human Rights has conducted an extensive multi-year review of U.S. immigrant detention and due process that resulted in the publication of a comprehensive report of that title in March 2011. Through its engagement in these processes over the past decade, the United States' level of engagement has increased, and with the Obama Administration we have seen a slight shift in the rhetoric employed consistent with its renewed international engagement, but significant shortcomings in implementation persist.

Others have and will continue to discuss and debate the immigration policies and practices put into place in the days, weeks, and years after 9/11. My purpose here is to briefly elaborate on the international human rights advocacy undertaken before the United Nations and the Inter-American Human Rights Commission, and to call attention to specific recommendations that have followed.

II. Immigration and Human Rights As Assessed By and Before the International Community

On November 5, 2010, the United States underwent its first Universal Periodic Review (UPR) before the United Nations. The UPR is a relatively new review process established with the creation of the UN Human Rights Council in 2006, and it is a process by which all UN Member States undergo an assessment of the situation of human rights in their country, as measured against the rights contained in the human rights treaty that State has ratified, as well as the Universal Declaration on Human Rights (UDHR) and the UN Charter.¹⁷⁴ As with reviews before other international human rights mechanisms, the rights of immigrants featured prominently throughout the process.

In its written report submitted in advance of the UPR, the United States affirmed its commitment to human rights in the United States, noting: "This basic truth [that all persons are born equal in dignity and rights] suggests the kinds of obligations—both positive and negative—that governments have with regard to their citizens."¹⁷⁵ Unfortunately, the U.S. Report seems to imply these rights and obligations apply specifically to citizens, but UDHR explicitly provides "[e]veryone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, prop-

¹⁷²See CONGRESSIONAL RESEARCH SERVICE, LIBRARY OF CONGRESS, U.S. IMMIGRATION POLICY ON ASYLUM SEEKERS 4, 6 (2005), available at <http://www.fas.org/sgp/crs/misc/RL32621.pdf>.

¹⁷³See NATIONAL IMMIGRATION FORUM, 1996 IMMIGRATION LEGISLATION SUMMARY (1996), available at <http://www.immigrationforum.org/images/uploads/1996%20Legislation%20Summary.pdf>. See also The Anti-Terrorism and Effective Death Penalty Act, Pub. L. No. 104-132, 110 Stat. 1214, enacted April 24, 1996 (following the Oklahoma City bombing) (also referred to as AEDPA); Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208, 110 Stat. 3009-546, enacted Sept. 30, 1996.

¹⁷⁴See Human Rights Council, G.A. Res. 60/251, U.N. GAOR, 60th Sess., U.N. Doc. A/RES/60/251 (Mar. 15, 2006) (establishing the Human Rights Council). See also Human Rights Council, Res. 5/1 (June 18, 2007), Annex I (establishing the modalities for the Universal Periodic Review).

¹⁷⁵See Universal Periodic Review of the United States of America: National Report Submitted to the Office of the United Nations High Commissioner for Human Rights ¶ 12 (2011), available at <http://www.state.gov/g/drl/upr/index.htm> [hereinafter National Report].

erty, birth or other status.”¹⁷⁶ Nonetheless, the Report is significant in the United States’ recognition of government’s positive and negative obligations, noting governments’ obligations to “create the laws and institutions that secure [fundamental] freedoms,” and recognizing “[p]eople should enjoy fair treatment reflected in due process and equality before the law,” noting governments’ obligations “not to discriminate or persecute” and to “establish mechanisms for protection and redress,” and finally noting governments’ “obligation to protect the security of the person and to respect human dignity.”¹⁷⁷ Significant work remains, however, to ensure that those rights and obligations are reflected in affirmative action aimed to effectuate meaningful and positive change in the daily lives of immigrants and their families.

A. Right to be Free from Discrimination

The UDHR, ICERD, and the ICCPR all contain inclusive and expansive provisions related to protections against discrimination. Through the various review processes, advocates have worked to ensure the discrimination endured by immigrants in all sectors of life throughout the United States is raised and addressed. The U.S. UPR process was just the latest of those review processes in which the United States was challenged to confront the persistence of discrimination and other acts of intolerance directed towards immigrants and immigrant communities.

Following its 2008 review of U.S. compliance with its obligations under ICERD, the Committee on the Elimination of All Forms of Discrimination noted its concern that “racial profiling ... continues to be widespread,” and specifically provided that it was “deeply concerned about the increase in racial profiling against Arabs, Muslims and South Asians in the wake of the 9/11 attack,” and the development of the National Entry and Exit Registration System (NEERS). The Committee recommended the United States:

[S]trengthen its efforts to combat racial profiling at the federal and state levels, *inter alia* by moving expeditiously towards the adoption of the End Racial Profiling Act, or similar federal legislation. The Committee also draws the attention of the State party to its general recommendation no. 30 (2004) on discrimination against non-citizens, according to which measures taken in the fight against terrorism must not discriminate, in purpose or effect, on the grounds of race, colour, descent, or national or ethnic origin, and urges the State party, in accordance with article 2, paragraph 1 (c), of the Convention, to put an end to the National [Security Entry-Exit] Registration System (N[SEERS]) and to eliminate other forms of racial profiling against Arabs, Muslims and South Asians.¹⁷⁸

The U.S. National Report for the UPR process briefly acknowledged discrimination and other acts of intolerance experienced by the Muslim, Arab-American, and South Asian communities in the post-9/11 era, and noted its commitment to “ongoing efforts to combat discrimination.” As a reflection of that commitment, the United States de-populated the NSEERS program in April 2011, removing from the program all countries subjected to NSEERS. But, importantly, it did not do away with the program, leaving in place a mechanism through which discriminatory immigration enforcement can readily be implemented again.

With regard to racial profiling, the U.S. National Report makes brief mention of the Attorney General’s review of the 2003 Guidance Regarding the Use of Race by Federal Law Enforcement Agencies, but fails to identify programs such as 287(g) and Secure Communities as direct contributors to persistent racial profiling.¹⁷⁹ While the U.S. is right to take note of the work of the Office of Civil Rights and Civil Liberties within the Department of Homeland Security in investigating and pursuing complaints of discrimination and other civil rights and civil liberties violations, it fails to address affirmative measures – beyond its training program and guidelines that to date have proven ineffective in

¹⁷⁶UDHR, *supra* note 170, at art. 2.

¹⁷⁷National Report, *supra* note 175, ¶ 12-15.

¹⁷⁸See U.N. Committee on the Elimination of Racial Discrimination, *Concluding Observations of the Committee on the Elimination of Racial Discrimination: United States of America*, ¶ 14, U.N. Doc. CERD/C/USA/CO/6 (May 8, 2008), available at <http://www2.ohchr.org/english/bodies/cerd/cerds72.htm> [hereinafter *CERD Concluding Observations and Recommendations*].

¹⁷⁹See Submission to the United Nations Universal Periodic Review Ninth Session of the UPR Working Group of the Human Rights Council, *The Persistence, in the United States, of Discriminatory Profiling Based on Race, Ethnicity, Religion and National Origin* (Nov. 2010), available at <http://www.ushrnetwork.org/sites/default/files/Racial%20Profiling%20Joint%20Report%20USA.pdf>.

protecting against abuses – to be taken to ensure those violations do not occur at the outset.¹⁸⁰ The failure of the Department of Homeland Security to suspend or terminate the 287(g) agreement with Maricopa County, AZ, despite an ongoing federal investigation into persistent rights violations committed by Sheriff Joe Arpaio and his police department under the guise of authority granted him by the 287(g) agreement, is among the clearer examples of where the Administration has not fulfilled its obligations to ensure the dignity and security of all human beings.

Furthermore, while the US takes pride in the “Equal Employment Opportunity Commission’s enforcement efforts to combat backlash-related employment discrimination which resulted in over \$5 million for victims from 2001-2006,” it does not address the numerous other ways in which immigrants are discriminated against in the workplace. Specifically, it fails to acknowledge how the denial of federally-funded legal services to undocumented workers and H-2B visa holders, industry specific statutory exclusions from protections under federal minimum wage and overtime protections, the judicially created denial of individualized remedies for undocumented migrants whose rights under the National Labor Relations Act resulting in the denial of the right to freedom of association, and immigration enforcement more generally, contribute to and allow for persistent discrimination in rights and remedies available to immigrants in the workplace.¹⁸¹

B. Due Process, Human Rights, and Immigration

Immigration policies and practices are addressed more directly in the National Report under the category of “Human Rights, Values, and National Security,” explicitly introducing and privileging national security into the narrative. More specifically, the Report addresses Immigration under the subheading, “Values and Immigration,” rather than “Human Rights and Immigration,”¹⁸² taking pride in the U.S.’ history of immigration while at the same time understating its obligations, and limiting its discussion around enforcement to issues pertaining to immigrant detention. Specifically, the Report notes the Department of Homeland Security’s efforts “to improve detention center management and prioritize health, safety, and uniformity among immigration detention facilities, while ensuring security and efficiency. As part of this effort, in conjunction with ongoing consultations with non-governmental organizations and outside experts, DHS issued revised parole guidelines, effective January 2010, for arriving aliens in expedited removal found to have a credible fear of persecution or torture.”¹⁸³

DHS’ detention guidelines set forth a set of principles aimed at protecting the due process, dignity, and security of immigrants subject to detention, and go a long way towards ensuring – on paper – a number of fundamental human rights at issue. However, the guidelines are not uniformly followed and there is insufficient transparency, oversight and accountability in the system to ensure the protection of the human rights not only of the immigrants subject to detention, but also their family members. From 2008 through 2010, the Inter-American Commission on Human Rights took up a study of U.S. immigrant detention policies and practices, looking at all aspects of detention, from the means by which individuals are taken into detention, their rights in detention, and the opportunities for release. In March 2011, the Commission released Report on Immigration in the United States: Detention and Due Process, in which it “expressed its concern with the increasing use of detention of migrants based on the presumption of its necessity, when in fact detention should be the exception,” and its concern with “the impact of detention on due process.” Furthermore, the Commission noted, “even in those cases in which detention is strictly necessary, there is no genuinely civil system where the general conditions comply with standards of respect for

¹⁸⁰See National Report, *supra* note 175, ¶ 94 (noting: “DHS has made improvements to the 287(g) program, including implementing a new, standardized Memorandum of Agreement with state and local partners that strengthens program oversight and provides uniform guidelines for DHS supervision of state and local agency officer operations; information reporting and tracking; complaint procedures; and implementation measures. DHS continues to evaluate the program, incorporating additional safeguards as necessary to aid in the prevention of racial profiling and civil rights violations and improve accountability for protecting human rights.”).

¹⁸¹See Submission to the United Nations Universal Periodic Review Ninth Session of the UPR Working Group of the Human Rights Council, *Migrant Labor Rights* (April 2010), available at <http://www.ushrnetwork.org/sites/default/files/declaration-treaty/Migrant%20Labor%20Joint%20Report%20USA.pdf>. See also CERD *Concluding Observations and Recommendations*, *supra* note 178, ¶ 28.

¹⁸²National Report, *supra* note 175, ¶ 92-96.

¹⁸³See National Report, *supra* note 175, ¶ 93. Unfortunately, the United States did not address in the UPR process concerns raised by CERD about use of excessive force and brutality by law enforcement officials, including toward Latino and African-American persons and undocumented migrants at the U.S.-Mexico border, see CERD *Concluding Observations and Recommendations*, *supra* note 178, ¶ 25, or the number of deaths on the U.S.-Mexico border that have resulted from zealous immigration enforcement and private acts of vigilantism.

human dignity and humane treatment; there is also a lack of the special conditions required for in cases of non-punitive detention.”¹⁸⁴ The Commission then issued a series of recommendations related to interior enforcement, detention, civil detention conditions, due process, and the rights of families and unaccompanied children.

III. Conclusion: What Next in the Effort to Convert Rights into Reality in the Post-9/11 World

The U.S. Universal Periodic Review culminated in a Report containing over 200 recommendations to the United States made by countries across the world.¹⁸⁵ A significant number of those specifically addressed the rights of immigrants, reflecting the priorities set forth by civil society in its advocacy efforts throughout the process, and can be placed into two categories: recommendations addressing racial profiling and discrimination;¹⁸⁶ and recommendations addressing immigrant detention.¹⁸⁷ In responding to the recommendations, the Administration stated, “With respect to immigration, the United States is committed to addressing concerns about detention, discrimination, and racial and ethnic profiling. We are committed to advancing comprehensive immigration reform as an alternative to piecemeal state and local measures.”¹⁸⁸

It is now incumbent upon the advocacy community to ensure the recommendations coming out of the Universal Periodic Review and the other international human rights mechanisms are translated into effective policies and practices that include systems of transparency and accountability. The shift in rhetoric, stated commitments, and the dialogues that have taken place in Geneva and in Washington, DC, give advocates entry points through which they can press for meaningful advancements in human rights. As they do so, it is important to push beyond individual complaints, beyond changes in guidelines and memoranda that can be changed with the next Administration or the next tragedy that breathes new fear into the debate on immigration. International human rights can provide the framework for advocating for and creating lasting and systemic change based on notions of human dignity rather than national security, but it is advocates, civil society, and the immigrant communities themselves that must meet the challenge, confront the legacies, and make change happen. ■

¹⁸⁴INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, REPORT IMMIGRATION IN THE UNITED STATES: DETENTION AND DUE PROCESS ¶ 416, 418-19 (2011), *available at* <http://cidh.org/countryrep/USImmigration/TOC.htm>.

¹⁸⁵See U.N. General Assembly, Human Rights Council, Report of the Working Group on the Universal Periodic Review, United States of America, U.N. Doc. A/HRC/16/11 (Jan. 4, 2011), *available at* <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G11/100/69/PDF/G1110069.pdf?OpenElement>.

¹⁸⁶*Id.*, ¶ 92.64, 92.68, 92.79, 92.82, 92.101, 92.104, 92.108, 92.110, 92.219, 92.220.

¹⁸⁷*Id.*, ¶ 92.105, 92.182-185, 92.212.

¹⁸⁸See Harold Hongju Koh, Legal Advisor U.S. Department of State, Response of the United States of America to Recommendations of the United Nations Human Rights Council, at para.5 (Nov. 9, 2010), *available at* <http://www.state.gov/s/l/releases/remarks/150677.htm>.

ABOUT THE AUTHORS

SUSAN M. AKRAM

Susan Akram, Professor of Law at the Boston University School of Law, was born and raised in Lahore, Pakistan, in a multicultural, multiethnic, multilingual household. “My father’s family were refugees from the 1947 India-Pakistan partition, and my own life experiences and professional choices have been indelibly marked by that legacy,” she says.

Her early exposure to the plight of refugees steered her into a legal career in immigration and refugee law. Professor Akram worked for many years as an immigration lawyer before joining the BU faculty in 1993. She has served as executive director of Boston’s Political Asylum/Immigration Representation Project and as directing attorney of the immigration project at Public Counsel, a public interest law firm in Los Angeles. In 1992 she was interim director of the agency overseeing the resettlement of Gulf War Iraqi refugees in Saudi Arabia.

At BU, Professor Akram teaches in the Civil Litigation Clinic, where she supervises law students in their representation of indigent clients in immigration and refugee cases. She also teaches Immigration Law and Policy and Comparative Refugee Law. Her distinguished research was recognized with a Fulbright Senior Scholar Teaching and Research Award for the 1999-2000 academic year. She used the grant to research and write recommendations for a durable solution for Palestinian refugees in light of the 1993 Oslo Talks, and to teach at the Palestine School of Law at Al-Quds University in East Jerusalem.

“My areas of teaching and practice are an extension of my personal, political and philosophical beliefs about law as a change agent for social justice,” she says. “The rewards are many, from restoring safety and security to individual lives, to giving students the satisfaction of using law for positive change.”

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Donald Kerwin is the Executive Director of the Center for Migration Studies (CMS), an institute established in 1969 to study migration policy issues and to safeguard the dignity and rights of migrants, refugees, and newcomers. Prior to joining CMS, Mr. Kerwin served as Vice-President for Programs at the Migration Policy Institute (MPI), where he remains a non-resident senior fellow.

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Mr. Kerwin serves as an associate fellow at the Woodstock Theological Center. He also serves on the American Bar Association’s Commission on Immigration and the board of directors of the Border Network for Human Rights. He previously participated on the Council on Foreign Relations’ Immigration Task Force and the board of the Capitol Area Immigrant Rights Coalition. He chairs the advocacy committee of Jesuit Refugee Services—USA, and writes and speaks extensively on immigration policy issues.

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Sin Yen Ling is a staff attorney at the Asian Law Caucus focusing on immigrants' rights. Her most current litigation includes *Ahmadi v. Chertoff*, a class action lawsuit addressing naturalization delays caused by the FBI name check process. It also includes complex litigation involving illegal detention of U.S. citizens; suppression cases in deportation involving constitutional violations; challenging material support to terrorism and general detention/deportation issues in Federal Court. She is a former staff attorney at the New York-based Asian American Legal Defense and Education Fund (AALDEF) where she has spent 6 years conducting litigation and advocacy in the areas of anti-Asian violence, racial profiling and immigrant detention/deportation. A native New Yorker, Ms. Ling was born in Manhattan's Chinatown to immigrant parents who worked in garment factories and restaurants. She is a graduate of New York University and City University of New York School of Law. Ms. Ling managed AALDEF's Immigrant Access to Justice Project which has been at the forefront of providing direct representation to South Asian, Arab, Filipino and Muslim immigrant detainees facing indefinite detention after September 11 and has been a leading advocate for the defense of civil liberties and civil rights of immigrants and their families.

Ms. Ling has been quoted in the *New York Times*, *Newsweek*, *New Jersey Law Journal*, *Crain's New York Business* and the *Financial Times*, and has been profiled in the *Village Voice*. In 2002, she was selected as one of the Top 25 Lawyers Under 40 by the National Asian Pacific American Bar Association. In 2003, she was awarded the New York County Lawyer's Association's Public Service Award and the Joseph Minsky Young Lawyers Award by the American Immigration Lawyers Association. In 2005, she received the Alumni award from CUNY Law School's Public Interest Law Association, Proclamation of Service from New York City's City Council, and the Community Service Award from the Islamic Circle of North America.

Ms. Ling is fluent in Cantonese and conversational in Mandarin. She is a member of the New York State Bar, National Immigration Project, and the American Immigration Lawyers Association.

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PRIYA MURTHY

Priya Murthy is the Policy Director at SAALT. As Policy Director, she monitors and analyzes legislative and administrative policies affecting the South Asian community; conducts advocacy on various policy issues; and develops educational materials for the South Asian community members and organizations. She also represents the organization as a member of immigrant and civil rights coalitions as well as before lawmakers and governmental agencies. She previously worked for various Immigration Courts, the Amnesty International Refugee Office and the U.N. High Commissioner for Refugees in New Delhi. Priya received her J.D. from Tulane University and her B.A. from the University of California at Berkeley in Peace and Conflict Studies.

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Sarah Paoletti currently directs the Transnational Legal Clinic at the University of Pennsylvania School of Law. Before coming to Penn Law, Paoletti taught in the International Human Rights Law Clinic at American University Washington College of Law, where she also taught a seminar on the labor and employment rights of immigrant workers. Her areas of specialty include international human rights, migrant and immigrant rights, asylum law, and labor and employment. She has presented on the rights of migrant workers before the United Nations and the Organization of American States, and also works closely with advocates seeking application of international human rights norms in the United States. Her recent scholarship includes: "Transnational Approaches to Transnational Exploitation: A Proposal for Bi-National Migrant Rights Clinics," 30 *University of Pennsylvania Journal of International Law* 1171 (Summer 2009).

WENDY PATTEN

Wendy Patten is a senior policy analyst at the Open Society Policy Center (OSPC) engaging in advocacy on U.S. human rights and civil liberties issues. She works to influence the public policy debate around counter-terrorism and human rights, including detention, interrogation, rendition, and surveillance. She also monitors immigration policy with a focus on due process.

Previously, Patten was the U.S. advocacy director at Human Rights Watch where she handled legislative, policy, and media advocacy on human rights in the United States. Patten was also senior counsel at the U.S. Department of Justice where she focused on a wide range of criminal justice and immigration policy issues. She worked extensively on implementation of U.S. anti-trafficking laws and the Violence Against Women Act with federal, state, and local prosecutors, law enforcement, judges, and non-governmental organizations. Patten has also served as director of Multilateral and Humanitarian Affairs at the National Security Council at the White House. In that capacity, she handled refugee, migration, and human rights issues.

Patten began her legal career as a Skadden Fellow and legal aid lawyer at Ayuda, where she represented immigrant and refugee women in domestic violence, family law, and immigration matters. She also worked on legal and judicial reform programs abroad at the American Bar Association's Rule of Law Initiative.

Patten received her J.D. from Harvard Law School and a B.A. from Princeton University. She studied international relations in Strasbourg, France and has taught international women's human rights at Georgetown University.

STEVE RUBIN

Steven Rubin, Assistant Professor of Art in the Photography Program at Penn State University, worked for many years as a photojournalist and documentary photographer, traveling on assignment in Iraq, Rwanda, Kosovo, Pakistan, Turkey, Chile and Cuba, and throughout the United States. His photographs have been published in magazines, including *The New York Times Magazine*, *National Geographic*, *Time*, *Newsweek*, *Stern*, *GEO*, *Focus*, *L'Express* and *The London Independent Magazine*, and in numerous books including *Schattenlicht – The Best of Black and White Photography* and *The Century* (Phaidon). His work has been exhibited in venues throughout the United States and featured at the International Festival Visa pour L'Image, in Perpignan, France. He is the recipient of the Leica Medal of Excellence, a New York Foundation for the Arts (NYFA) Fellowship, a Nieman Fellowship at Harvard, and an Alicia Patterson Journalism Fellowship. He was a Fellow with the Open Society Institute, which supported his photographic investigation of the U.S. government's detention of immigrants, and funded his development of Healing Images, a program providing digital cameras, instruction and therapy to survivors of torture. A graduate of Reed College in Portland, Oregon in Sociology, he obtained his MFA in Visual Arts from the University of California.

ERICH SCHERFEN

Erich Scherfen enlisted in the Army just after finishing High School in 1989. He graduated Infantry Basic Training, and earned his wings as a Parachutist at Ft. Benning, Georgia. He served in the U.S. Army as an infantryman during the First Persian Gulf War where he was awarded his CIB (combat infantry badge). Later, he left the full time Army, joined the New Jersey National Guard, and went to Kean University, where he received his Bachelor's in Fine Art. He also worked as a fixed-wing flight instructor and tour pilot around New York City.

Scherfen later received his commission as a U.S. Army Lieutenant and went on to pursue his love for flying in the U.S. Army's flight school at Fort Rucker, Alabama, where he gained qualifications on various helicopters including AH-64 Apache and AH-1 Cobra.

Scherfen converted to Islam after his military tour of the Middle East. He has been an avid student of the Islamic Sciences since his conversion and gives talks about Islam in universities and interfaith gatherings.

Scherfen currently flies for Continental Express. He is married and lives in Pennsylvania.

KAREEM SHORA

Kareem W. Shora, JD, LL.M. is Senior Policy Advisor and Section Lead of the Community Engagement Section with the US Department of Homeland Security (DHS) Office of the Secretary, Office for Civil Rights and Civil Liberties (CRCL), in Washington, DC. In his position, Shora serves as a key expert and advisor, represents the Department at high-level meetings with executives from other government agencies, Congressional staff, and non-governmental organizations, and provides expert analysis to propose and support leadership decisions such as justifying or settling matters involving significant and controversial program policies of national scope and impact. Shora also supervises the staff of the Community Engagement Section in their responsibilities and strengthens and builds strategic partnerships with key ethnic and religious communities through outreach and related activities that respond to public concerns regarding the policies and practices of DHS. He is responsible for creating effective channels of communication that allow for the rapid dissemination of information to those key communities in the event of a national security incident and assesses existing and proposed DHS programs, policies and activities for civil rights and civil liberties compliance, with a focus on possible disparate impact on key communities.

Shora joined DHS in October, 2009, after a ten-year tenure with the American-Arab Anti-Discrimination Committee (ADC) where he served as legal advisor, legal director, and national executive director. In June of 2009, he was appointed by Homeland Security Secretary Janet Napolitano as a member of the Homeland Security Advisory Council

(HSAC); the official advisory body for the DHS Secretary on homeland security matters. Shora is also a member of the Office of the Director of National Intelligence (ODNI) Heritage Community Liaison Council. His experience includes serving as a guest lecturer at the Yale University School of Law. He was also certified as an expert witness on xenophobia and anti-Arab discrimination by the United States Ninth Circuit Court of Appeals, Central District of California. Shora is a recipient of the 2003 American Immigration Lawyers Association (AILA) "Arthur C. Helton Human Rights Award" and has been published by the National Law Journal, TRIAL Magazine, the Georgetown University Law Center's Journal on Poverty Law and Public Policy, the Harvard University JFK School of Government Asian American Policy Review, the American Bar Association (ABA) Air and Space Lawyer, and the Yeshiva University Cardozo Public Law Policy and Ethics Journal among others.

A frequent guest on Al-Jazeera, Al Arabiya, BBC, and numerous American television programs, Shora has spoken about civil rights, civil liberties, immigration, and national security policy with many national and international media outlets. He has also testified before major international human rights bodies including regular testimonies before the Organization for Security and Cooperation in Europe (OSCE), where he was routinely consulted as a subject-matter expert on tolerance, diversity and integration. He was selected by the Ford Foundation as a member of the Foreign Policy Task Force designing their 2008 Laboratory for New Thinking on Foreign Policy. He was also selected by the Police Foundation to be part of their 2008 Advisory Board on the study of the role of local police in immigration enforcement. Shora was also the civil society representative on the G8 Experts Roundtable on Diversity, Integration, and the Prevention of Terrorism. Born in Damascus, Syria and fluent in Arabic, Shora is a native of Huntington, West Virginia, a graduate of Marshall University and holds a Doctor of Jurisprudence (JD) degree from the West Virginia University (WVU) College of Law and the LL.M. specialty in International Legal Studies (Public International Law) from the American University Washington College of Law.

MARGARET STOCK

Margaret Stock is an adjunct faculty member in the Department of Political Science at the University of Alaska Anchorage where she teaches Introduction to American Government. Professor Stock is interested in issues of immigration, citizenship, national security, military affairs, and constitutional law. Professor Stock has frequently testified before Congress on issues relating to immigration and national security, has authored numerous articles on immigration and citizenship topics, and frequently speaks at public events on topics such as birthright citizenship, immigration and the US military, and immigration and national security.

Professor Stock is an Alaska attorney and a retired military officer. She recently transferred to the Retired Reserve of the US Army Reserve after serving in the Military Police Corps, US Army Reserve for twenty-eight years. Professor Stock taught at the US Military Academy, West Point, New York from June 2001 until June 2010. In the fall of 2009, Professor Stock was a Visiting Fellow at the Border Policy Research Institute at Western Washington University. Professor Stock also recently concluded service as a member of the Council on Foreign Relations Independent Task Force on US Immigration Policy.

RUBINA TAREEN

Rubina Tareen is a business owner who has spent the last two decades as a community builder, activist, and volunteer. She currently serves on the boards of The ACLU-PA, The American Red Cross of Schuylkill and Northumberland counties, World Affairs Council of Harrisburg, Interfaith Health Network of Schuylkill County and serves as outreach director of the Islamic Center of Reading and Islamic Society of Schuylkill County. She is also an advisory board member of CAIR- PA. She frequently gives speeches about Islam and Muslims to religious institutions and colleges.

She became an ACLU client in 2008 when she and her husband were wrongfully put on the federal government's "Terrorist Watch List," seemingly because of their Muslim faith. Since then, she has become an active member and

at-large board member of ACLU-PA, working to build awareness in the Muslim community of the work the ACLU is doing to protect the civil liberties of Muslims in the U.S.

Ms. Tareen was born in Pakistan and moved to the United States at age sixteen. She is the mother of five children and lives in Pennsylvania.

SHOBA SIVAPRASAD WADHIA

Immigration law expert Shoba Sivaprasad Wadhia directs the Penn State Center for Immigrants' Rights, a clinic focused on innovative advocacy and policy projects relating to U.S. immigration policy. Professor Wadhia researches the role of prosecutorial discretion in immigration law; the association between detention, removal and due process; and the intersection between immigration, national security, and race. Professor Wadhia teaches or has taught asylum and refugee law, immigration law, and a clinical course on immigration law and policy.

Prior to joining Penn State Law, Professor Wadhia was deputy director for legal affairs at the National Immigration Forum in Washington, D.C., where she worked on issues surrounding the creation of the U.S. Department of Homeland Security and "post 9-11" executive branch policies impacting immigrant communities. Professor Wadhia has been honored by the Department of Homeland Security's Office for Inspector General and Office for Civil Rights and Civil Liberties, and in 2003, she was named Pro Bono Attorney of the Year by the Arab-American Anti-Discrimination Committee. She has also been an associate with Maggio Kattar, P.C. in Washington, D.C., where she litigated asylum, deportation, and employment-based immigration benefits matters.

Professor Wadhia serves on the ABA Commission on Immigration and is a member of the American Immigration Lawyers Association and National Immigration Project of the National Lawyers' Guild. Professor Wadhia currently serves on the boards of the Pennsylvania Immigration Resource Center and Pennsylvania Chapter of the American Civil Liberties Unions. Prior to embarking on a legal career, she conducted human rights work in India and South Africa.

JULIE MYERS WOOD

Julie Myers Wood is the President of ICS Consulting, LLC (ICS) and Immigration and Customs Solutions, LLC. In these capacities, Ms. Wood brings her extensive background to help build business solutions for companies, large and small. Ms. Wood has been instrumental in developing proprietary software products that assist employers with compliance issues, including SecureID.

Prior to founding these companies, Ms. Wood served as head of Immigration and Customs Enforcement (ICE) for nearly three years. In this role, she led the largest investigative component of the Department of Homeland Security and the second largest investigative agency in the federal government, with more than 17,000 employees and an annual budget of more than \$5 billion. During her tenure, ICE had five integrated divisions (Detention and Removal Operations, Investigations, Federal Protective Service, Intelligence, and International Affairs). Under her leadership, the agency set new enforcement records with respect to immigration enforcement, export enforcement, and intellectual property rights. Her tenure is best known for building efficiency and breaking the mold of traditional enforcement.

Ms. Wood is a frequent speaker and commentator on immigration and law enforcement issues. She has appeared on FOX, CNN, C-SPAN, ABC, CNBC, MSNBC, NPR, and numerous other television and radio stations. She is a member of the Advisory Committee for the American Bar Association's Commission on Immigration and the Constitution Project's Immigration Committee.

Her previous leadership positions in the federal government include service as Assistant Secretary for Export Enforcement at the Department of Commerce, Chief of Staff for the Criminal Division at the Department of Justice, and Deputy Assistant Secretary at the Treasury Department. Ms. Wood also served as an Assistant United States Attorney for the Eastern District of New York, where she prosecuted a variety of criminal cases, including financial crimes, immigration violations, securities fraud, and other white-collar criminal cases.

Before entering government service, Ms. Wood was an associate at Mayer, Brown & Platt in Chicago, Ill. She also clerked for the Honorable C. Arlen Beam of the United States Court of Appeals for the Eighth Circuit. Ms. Wood earned a bachelor's degree at Baylor University and a J.D. from Cornell Law School. ■

ACKNOWLEDGEMENTS

This journal is a joint publication of Penn State Law and Penn State School of International Affairs, and reflects the contributions of speakers at Penn State's Immigration Symposium "The 9/11 Effect and its Legacy on U.S. Immigration Laws" held on September 16, 2011. The publication was conceived and edited by Shoba Sivaprasad Wadhia, Director, Penn State Law Center for Immigrants' Rights. Editorial assistance was provided by Allie Sievers '12 and Elisa Galloway. Graphic design and layout was provided by Dian Franko. This publication would not have been possible without the generous written and artistic contributions of the authors and the support from Philip J. McConaughay, Dean, Penn State University Dickinson School of Law.

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