Misusing Immigration Policies in the Name of Homeland Security

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Perhaps we should have expected a crackdown on non-citizens after 9/11. After all, the 19 hijackers were foreigners who somehow made it into the country to commit evil. Since they were adherents of Muslim extremism as advocated by Osama bin Laden, focusing the crackdown on Arab and Muslim noncitizens made sense—ethnic and religious profiling appeared to be in order. It seemed a natural response to implement new procedures and to reorganize administrative institutions, ensuring that all immigration visa processes and enforcement went through the lens of national security.

But did these responses really make sense? Had these changes been in force prior to 9/11, would the profiling and immigration-specific modifications have prevented the attacks? What do we have to show for the changes that have been made? What price have we paid?

The answers may be frustrating. In fact, we would not have caught the hijackers if the new systems were in place prior to 9/11. There is little to
show for the profiling that has occurred, and the country has paid a tremendous price in terms of civil liberties and relations with noncitizen communities—particularly Arab, Muslim, and South Asian communities. Profiling may make us feel more secure, but we are not. Actually, it may be making matters worse. Any real advances in homeland security are due more to efforts in place before 9/11, coupled with greater cooperation between agencies and better policing practices, than with crackdowns on noncitizens.

**LEGISLATIVE AND EXECUTIVE RESPONSE TO 9/11**

Since 9/11, Congress and the president have screened immigration policy proposals and enforcement procedures through the lens of national security. For anti-immigrant forces in the United States, 9/11 provided a once-in-a-lifetime opportunity to use the tragic events to draw linkages with virtually every aspect of their nativist agenda. However, this is a neo-nativist agenda born of old hate cloaked in suggestions of international intrigue.

The Bush White House helped set the foundation for the neo-nativist agenda in its legislative proposals that led to the USA PATRIOT Act, authorizing broad sweeps and scare tactics. The Bush White House demonstrated its philosophy in words such as these in its July 2002 National Strategy for Homeland Security:

> Our great power leaves these enemies with few conventional options for doing us harm. One such option is to take advantage of our freedom and openness by *secretly inserting terrorists into our country* to attack our homeland. Homeland security seeks to deny this avenue of attack to our enemies and thus to provide a secure foundation for America’s ongoing global engagement. (White House 2002, emphasis added).

A restrictive organization like the Center for Immigration Studies (CIS) takes these words and argues that in the Department of Homeland Security’s expansive portfolio, immigration is central. The reason is elementary: no matter the weapon or delivery system—hijacked airliners, shipping
containers, suitcase nukes, anthrax spores—operatives are required to carry out the attacks. Those operatives have to enter and work in the United States. . . . Thus keeping the terrorists out or apprehending them after they get in is indispensable to victory. (Krikorian 2004)

Thus, CIS used the opportunity presented by 9/11 to argue against issuing driver’s licenses to undocumented people and to advocate for sweeps and apprehensions. Apparently, the idea is to make it hard for potential terrorists (i.e., foreigners) to move around or make a living, so they will become discouraged and leave. And who can argue against keeping terrorists out or apprehending them after they arrive?

Congress and the Bush Administration heeded the appeals to implement harsh immigration policies. The events of 9/11 and the ensuing call to action from many quarters—including the anti-immigrant lobby—resulted in far-reaching legislative and enforcement actions. These enforcement actions had implications not only for suspected terrorists but also for immigrants already in the United States and noncitizens trying to enter as immigrants or with nonimmigrant visas.

The USA PATRIOT Act is the most notable enactment. The Act passed Congress with nearly unanimous support, and the president signed it into law a mere six weeks after 9/11. The vast powers embodied in the law provide expanded authority to search, monitor, and detain citizens and noncitizens alike, but its implementation since passage has preyed most heavily on noncitizen Arabs, Muslims, and Sikhs. Authority to detain, deport, or file criminal charges against noncitizens is specifically broadened. Consider the following noncitizen-related provisions in the law:

- Noncitizens are denied admission if they “endorse or espouse terrorist activity,” or “persuade others to support terrorist activity or a terrorist organization,” in ways that the State Department determines impede U.S. efforts to combat terrorism.
- The Act defines terrorist activity expansively to include support of otherwise lawful and nonviolent activities of almost any group that used violence.
• Noncitizens are deportable for associational activities that are wholly innocent, excludable for pure speech, and subject to incarceration without a finding that they pose a danger or are a flight risk.

• Foreign nationals can be detained for up to seven days while the government decides whether to file criminal or immigration charges.

• The attorney general has broad preventive detention authority to incarcerate noncitizens by certifying there are reasonable grounds to believe that a person is described in the antiterrorism provisions of the immigration law, and the individual is then subject to potentially indefinite detention.

• The attorney general can detain a noncitizen indefinitely even after that person prevails in a removal proceeding “until the Attorney General determines that the noncitizen is no longer a noncitizen who may be certified [as a suspected terrorist].”

• Wiretaps and searches are authorized without a demonstration of probable criminal conduct if the target is an “agent of a foreign power,” including any officer or employee of a foreign-based political organization (107–56).

To further emphasize how future visa issuance and immigration enforcement must be screened through the lens of national security, the Immigration and Naturalization Service (INS) was subsumed into the Department of Homeland Security (DHS) on November 25, 2002. Previously, the INS was under the control of the attorney general’s Justice Department—an enforcement-minded institution—but now the administration has institutionalized the clamping down on noncitizens in the name of national security. The new cabinet-level department merged all or parts of 22 federal agencies, with a combined budget of $40 billion and 170,000 workers, representing the biggest government reorganization in 50 years. DHS placed INS functions into two divisions: US Citizenship and Immigration Services (USCIS), which handles immigrant visa petitions, naturalization, and asylum and refugee applications, and the Under Secretary for Border and Transportation Security, which includes the Bureau of Customs and Border Protection along with Immigration and Customs Enforcement units, for enforcement matters.
Before and after the creation of DHS, and presumably using preexisting authority and newly found power under the PATRIOT Act, the administration implemented, in the name of national security, a number of policies and actions aimed at noncitizens:

- Amending its own regulations on September 17, 2001, INS authorized the detention of any alien for 48 hours without charge and with the possibility of extending the detention for an additional “reasonable period of time” in the event of an “emergency or other extraordinary circumstance” (Migration Policy Institute 2003).
- On September 21, 2001, the chief immigration judge ordered new procedures requiring all immigration judges to hold “secure” hearings separately from all other cases, to close the hearings to the public, and to avoid discussing the case or disclosing any information about the case to anyone outside the immigration court (Migration Policy Institute 2003).
- On October 31, 2001, Attorney General John Ashcroft asked the secretary of state to designate 46 new groups as terrorist organizations pursuant to the PATRIOT Act.
- On November 9, 2001, Attorney General Ashcroft called for the voluntary interviews of up to 5,000 aliens from countries suspected of harboring relatively large numbers of terrorists; interviewees may be jailed without bond if the attorney general finds they are violating immigration laws.
- On November 9, 2001, the State Department slowed the process for granting visas for men, ages 16 to 45, from certain Arab and Muslim countries by about 20 days.
- On November 13, President Bush issued an executive order authorizing the creation of military tribunals to try noncitizens on charges of terrorism.
- On December 6, 2001, INS Commissioner James Ziglar announced that the INS will send the names of more than 300,000 aliens who remain in the United States, despite prior deportation or removal orders, to the
FBI for inclusion in the National Crime Information Center database. This is known as the Alien Absconder Initiative.

- On January 8, 2002, the Department of Justice added to the FBI’s National Crime Information Center database the names of about 6,000 men from countries believed to be harboring al Qaeda members who have ignored deportation or removal orders.

- On January 25, 2002, the Deputy Attorney General issued instructions for the Alien Absconder Initiative to locate 314,000 people who have a final deportation order but who failed to surrender for removal. The deputy attorney general designated several thousand men from “countries in which there has been al Qaeda terrorist presence or activity” as “priority absconders” and entered them into the National Crime Information Center database (Migration Policy Institute 2003).

- On March 19, 2002, the Department of Justice announced interviews with 3,000 more Arabs and Muslims present in the United States as visitors or students.

- In June 2002, the INS proposed broadening special registration requirements for nonimmigrants from certain designated countries.

- On July 15, 2002, the Department of Justice announced a surveillance pilot program whereby U.S. citizens, including truckers, bus drivers, and others, can act as informants to report “suspicious activity.” The program is called Operation TIPS (Terrorism Information and Prevention System).

- On July 24, 2002, the Department of Justice authorized any state or local law enforcement officer—with the consent of those who cover the jurisdiction where the law enforcement officer is serving—to perform certain functions of INS officers during the period of a declared “mass influx of aliens” (Migration Policy Institute 2003).

- On August 21, 2002, the INS deported approximately 100 Pakistanis arrested on immigration violations.

- On September 16, 2002, Attorney General Ashcroft ordered the INS to launch a “prompt review” of political asylum cases to identify any immigrants who have admitted to accusations of terrorist activity or being members of any terrorist organizations.
• On November 6, 2002, INS expanded the special registration or National Security Entry-Exit Registration System (NSEERS) by requiring certain male nationals and citizens of Iran, Iraq, Libya, Sudan, and Syria admitted to the United States prior to September 10, 2002, to register with INS. Failure to report to an INS office for fingerprinting, a photo, and an interview results in deportation. On December 16, 2002, nonimmigrant males 16 years or older from Saudi Arabia and Pakistan were added to this list. On January 16, 2003, five more countries—Bangladesh, Egypt, Indonesia, Jordan, and Kuwait—were added to the list of 20 whose male citizens must register with INS.

• On November 18, 2002, the Foreign Intelligence Surveillance Court of Review ruled that the USA PATRIOT Act gives the Department of Justice broad authority to conduct wiretaps and other surveillance on terrorism suspects in the United States.

• On March 17, 2003, the Bush Administration launched Operation Liberty Shield to “increase security and readiness in the United States.” As part of this effort, DHS implemented a temporary policy of detaining asylum seekers from three countries where al Qaeda is known to have operated (Migration Policy Institute 2003).

• On March 20, 2003, the attorney general revealed that since December 18, 2002, FBI agents and U.S. marshals detained foreign nationals for alleged immigration violations in cases where there was not enough evidence to hold them on criminal charges. (Migration Policy Institute 2003)

In 2002, Congress created the National Commission on Terrorist Attacks upon the United States (the 9/11 Commission) that Congress charged with investigating the circumstances surrounding the 9/11 terrorist attacks and recommending responses. It released its final report and recommendations in July 2004. Soon after the report, Congress drafted legislation to implement its recommendations. During debates on the legislation, several members of Congress, most notably Representative James Sensenbrenner (R-Wis), the chair of the House Judiciary Committee, argued for the inclusion of a number of contentious immigration measures.
These measures went beyond the commission’s specific recommendations, nearly preventing the legislation’s passage. The immigration-related proposals would have expanded the government’s authority to arrest, detain, and deport immigrants; restricted judicial review and oversight; and reduced the number of documents immigrants may use to establish their identity. Sensenbrenner wanted to include a provision barring states from issuing driver’s licenses to undocumented aliens. But commission members and the relatives of some 9/11 victims spoke out against these provisions, arguing that the debate was delaying legislation and would not make any significant contribution to public safety and security. Congress removed Sensenbrenner’s proposal and the other anti-immigrant measures from the final version of the legislation, and Congress passed the Intelligence Reform and Terrorism Prevention Act of 2004.

In early 2005, Representative Sensenbrenner quickly reintroduced the controversial provisions (dubbed the REAL ID Act) he had removed, and on February 10, the House of Representatives passed Sensenbrenner’s full package. One month later, the same legislation was attached to a huge emergency appropriations bill—a must-sign piece of legislation—to fund U.S. military efforts in Iraq and Afghanistan. The House passed this massive funding bill without any public debate or hearings. When the debate shifted to the Senate, the legislation did not include the REAL ID Act. But when the bill went to the conference committee, House supporters pushed strongly for the provisions to be included. During debates, legislators removed a few of the most unsavory proposals, including one that would have created private bounty hunters to enforce immigration law. But the REAL ID Act provisions remained, and the Act was part of the package signed into law.³

THE RESULTS

Given the implementation of immigration-related laws and policies, the question is whether the changes have actually helped achieve the goal of apprehending terrorists. The answer is no.

Perhaps the failure and ill-advised use of immigration policies to catch terrorists is best illustrated by the results of the special registration (or
NSEERS) program. The call-in program required male noncitizens from 25 mostly Arab and Muslim countries to register with immigration authorities between November 2002 and April 2003. About 83,000 men came forward, and nearly 13,000 were placed in deportation proceedings. Many (the actual number is unknown) were, in fact, deported for minor immigration violations, but no one was charged with crimes related to terrorism. DHS officials, who inherited the program from the Justice Department, suspended the program saying that resources could be better used on other counterterrorism initiatives (Swarns 2004). The INS held closed hearings for over 600 immigrants because the government designated the detainees to be of special interest to the government—the detainees were Muslim. Again, the call-in program involved no actual terrorists.

James Ziglar, appointed by President Bush as INS commissioner before INS became part of DHS, raised doubts about the benefits of the special registration program when Justice Department officials first proposed it. He questioned devoting significant resources to the initiative because it was unlikely that terrorists would voluntarily submit to intensive scrutiny.

The people who could be identified as terrorist weren’t going to show up. This project was a huge exercise and caused us to use resources in the field that could have been much better deployed. . . . As expected, we got nothing out of it. To 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. (Swarns 2004)

Ziglar, who eventually left the Bush Administration, had expressed doubts about linking immigration law with homeland security a month after the 9/11 attacks when he recognized, “We’re not talking about immigration, we’re talking about evil” (Ashcroft 2001).

Certainly, the selective enforcement—racial profiling—program provided the government with fingerprints, photographs, and banking and credit card records about Arab and Muslim immigrants that were previously unavailable, but the government did not apprehend a single terrorist.
The sweeping roundup diverted resources from more pressing counterterrorism needs, strained relations with some Arab and Muslim nations, and alienated immigrants who might otherwise have been willing to help the government hunt for terror cells in this country. The roundups simply were not smart police work.

In its report, the 9/11 Commission noted that one detainee from al Qaeda implied that the special registration program had made al Qaeda operations more difficult. The commission said that if the detainee was credible, the program might have had a deterrent effect, but it was difficult to measure the success of operations that include deterrence as a goal. The commission also made it clear that concerns about the program extended beyond the INS. Some State Department officials feared that the program would offend Arab and Muslim nations that were cooperating with the United States in the global campaign against terrorism. Robert Mueller, director of the FBI, echoed those concerns in testimony before the commission, acknowledging that the program came at a cost to American relations with important allies (Swarns 2004).

Other profiling programs aimed at ensnaring terrorists were equally unsuccessful. In 2002, the Department of Justice reported on its project of interviewing approximately 5,000 Arab and Muslim men. About half—2,261—of those on the list were actually interviewed, and fewer than 20 interview subjects were taken into custody. The Department of Justice charged most of those taken into custody with immigration violations, and the department arrested three on criminal charges. The department linked none to terrorism (Migration Policy Institute 2003).

The absconder initiative, as a general immigration enforcement measure, might have been legitimate and important. But after 9/11, the government changed the program’s character to make it nationality-specific. The change had marginal security benefits and further equated national origin with dangerousness.

Examples of even highly publicized immigration-related arrests illustrate the ineffectiveness of the policies. Four brothers—Mohsen, Mojtaba, Mohammed, and Mostafa Mirmehdi—have been detained for four years—since October 2001—under the preventive detention policies used by the
Bush Administration after 9/11 for suspected terrorist links. Their chief offense appears to be that they once attended a rally held in the United States in support of the Mujahedin-e Khalq (MEK). The State Department designated MEK as a terrorist organization in 1997 despite the group’s long campaign to overthrow the fundamentalist Iranian regime, which the Bush Administration, ironically, labeled as part of the Axis of Evil. They remain in custody despite the fact that in the summer of 2004, a court cleared them of terrorism-related charges. The rally they attended took place before the MEK was placed on the State Department terrorist list and featured Congressman Gary Ackerman (D-N.Y) as one of the speakers. At the time, Missouri Senator John Ashcroft (who later became President Bush’s attorney general) also was an MEK backer (Collier 2005).

Noor Alocozy, a pizzeria owner, was arrested under the USA PATRIOT Act. He was charged with participating in an unlicensed money transfer operation that transferred funds for militants or terrorists in Pakistan and his native Afghanistan. But none of the terrorist support allegations were true. In fact, Noor and his wife fled Afghanistan nine years earlier during the civil war that brought the Taliban to power. Religious extremists killed Noor’s brother and mother, making the allegations of sending money to the people that he hated absurd. Noor actually had state and county business permits to engage in a money transfer business, but he did not know that a federal license also was required. A federal judge dropped all the allegations of terrorist support, fined Noor $5,000, and sentenced him to home detention for four months. Federal prosecutors supported the outcome because Noor had cooperated fully (Herron Zamora 2005).

The wrong-headedness of these immigration-related policies has another unfortunate effect. By creating an atmosphere where immigrants who look like terrorists are fair game, private citizens feel licensed to engage in racial profiling. The incarceration of many detainees was a result of profiling by ordinary citizens who called government agencies about neighbors, coworkers, and strangers based on their ethnicity, religion, name, or appearance. For example, the Migration Policy Institute (MPI) found that in “Louisville, Kentucky, the FBI and INS detained 27 Mauritanians after an outpouring of tips from the public; these included a tip from a suspicious neighbor who
called the FBI when a delivery service dropped off a box with Arabic writing on it” (Chishti 2003, 5). Private citizen tips to authorities resulted in arrests of well over a quarter of the detainees.

Of course, these tips were completely unreliable when it came to finding terrorists. Immigration arrests based upon tips, sweeps, and profiling resulted in no terrorism-related convictions against detainees. Four detainees with terrorism-related charges were interviewed by MPI researchers; their arrests resulted from traditional investigative techniques, not immigration enforcement initiatives. One detainee has since been convicted, and two have been acquitted; charges were dropped against the fourth individual, and he was deported.

In general, noncitizen detainees have suffered exceptionally unfair treatment. The government conducted a determined effort to hide the identity, number, and whereabouts of its detainees, raising First Amendment questions related to the public’s right to be informed about government actions. Many had severe problems notifying or communicating with their family members and lawyers or arranging for representation. The government held others for extended periods of time before charging them with immigration violations. Some had exceptionally high bonds imposed, and the government denied more than 42 percent of detainees the opportunity to post bond. The INS subjected many to closed hearings. Others suffered solitary confinement, 24-hour lighting of cells, and physical abuse. Of the detainees for whom MPI could obtain information, the MPI researchers believed approximately 52 percent to be subject to an FBI hold. The FBI hold prevented the repatriation of the detainees for weeks or months, even after the INS ordered them to be deported. In the view of MPI researchers, the immigration measures imposed are the type “commonly associated with totalitarian regimes” (Chishti 2003, 4).

Vigilantism by private citizens has had other ugly ramifications. At one point after 9/11, hate crimes against Muslims soared, rising more than 1,500 percent. Discrimination in the workplace also climbed after September 11. So overwhelming was the number of complaints the Equal Employment Opportunity Commission (EEOC) received that it created a new category to track acts of discrimination against Middle Eastern, Muslim, and South
Asian workers after September 11. In the 15 months between September 11, 2001, and December 11, 2002, the EEOC received 705 such complaints (Chishti 2003).

What is the result of the immigration-related, anti-terrorism initiatives? Certainly not the capture of terrorists. Instead, the initiatives have “created an atmosphere which suggests that it is okay to be biased against Arab-Americans and Muslims” (Chishti 2003, 6).

WHAT WE REALLY NEED AND WHY

Better Intelligence Strategies

Treating law-abiding Arab, Muslim, and South Asian noncitizens already in the United States as suspects is not smart police or intelligence work. In fact, this type of profiling may actually be harming our efforts to combat terrorism by alienating communities that could help our efforts to learn about dangerous extremists. To understand what strategies might make sense, one place to begin is by learning what we can about the terrorists who harmed us on 9/11.

The 9/11 Commission’s investigation revealed much about the hijackers (National Commission 2004, 383–4). The 19 hijackers entered the United States a total of 33 times using either tourist or student visas. They arrived through ten different airports, though more than half came in through Miami, JFK, or Newark. All but two of the hijackers obtained admission with tourist visas good for the customary six-month visitor’s period. One hijacker had a student visa and had admission for a stay of two years, while another sought and obtained admission for 20 days. Although U.S. law allows nationals of certain countries to enter without visas on a reciprocal basis under the visa waiver program, none of the 9/11 hijackers were nationals of a visa waiver country. Also, none of the 9/11 hijackers entered or tried to enter without inspection across the land borders with Mexico or Canada.

Of the five hijackers who entered the United States more than once, three of them violated immigration law. Ziad Farrah entered in June 2000, on a tourist visa and then promptly enrolled in flight school for six months.
He never filed an application to change his immigration status from tourist to student. Had the INS known he was out of status, it could have denied him entry on any of the three subsequent occasions he departed and returned while he was a student. Marwan al Shehhi came in through Newark in late May 2000, followed a week later by Mohammed Atta. Both gained admission as tourists and soon entered flight school in Florida. In September, they filed applications to change their status. Before 9/11, regulations allowed tourists to change their status at any time, so they were in compliance. However, both overstayed their periods of admission and completed flight school to obtain commercial pilot licenses. Both then left within a few days of one another and returned within a few days of one another in January 2001, while their change in visa status from tourist to student was still pending. When they lied upon being questioned about their student status on their reentries in January 2001, and when another hijacker failed to show up for the school for which the INS had issued him a visa in December 2000, a student-tracking system that would have informed immigration inspectors or agents was not available.

The entry and actions of the 9/11 hijackers have to be kept in context. U.S. consular officers process about 10 million applications each year for visitor visas at over 200 posts overseas. More than 500 million individuals (citizens and noncitizens) cross U.S. borders at over 200 designated crossing points every year; about 330 million of them are noncitizens, and some of that group may remain in the country longer than their visas permit. These numbers represent millions of important transactions daily. Of the noncitizens, 85 percent enter at land ports with Mexico and Canada, and the vast majority cross and return regularly, often daily. Perhaps another 500,000 or more enter without inspection across land borders (National Commission 2004, 383). We know that these entrants are vital to our continent’s interdependent economies. We also know from experience that the overwhelming numbers of individuals arriving on our shores—even those who enter surreptitiously or who overstay their visas—are not entering to engage in terrorism. So the challenge for us in terms of national security is to prevent the very few people who may pose risks from entering or remaining in the United States undetected.
Prior to 9/11, critics viewed the immigration system as dysfunctional. At that time, the system focused primarily on keeping individuals intending to immigrate from improperly entering the United States. In the visa process, the most common form of fraud is to get a visa to visit the United States as a tourist and then to stay to work and perhaps become a resident. Consular officers concentrated on interviewing visa applicants whom they suspected might not leave the United States. In national security terms, the pre-9/11 critique focused on the possibility of smuggling weapons of mass destruction, not the entry of terrorists who might use such weapons or the presence of associated foreign-born terrorists (National Commission 2004, 383).

The events of 9/11 have clarified matters. For terrorists, travel documents are as important as weapons. In order to attack, terrorists must travel clandestinely to meet, train, plan, case targets, and gain access. To them, international travel presents great danger, because they must surface to pass through regulated channels, present themselves to border security officials, or attempt to circumvent inspection points.

Apparently, al Qaeda chose the 9/11 hijackers carefully to avoid detection—all but two were educated young men from middle-class families with no criminal records and no known connection to terrorism. Al Qaeda’s strategy was to introduce clean operatives who could pass through immigration controls. Yet two of the hijackers’ passports that survived were clearly doctored and manipulated in a manner that was suspicious and was associated with al Qaeda. The 9/11 Commission believed that six more of the hijackers presented passports that had some of the same clues to their association with al Qaeda.

In their travels, terrorists use evasive methods, such as altered and counterfeit passports and visas, specific travel methods and routes, liaisons with corrupt government officials, human smuggling networks, supportive travel agencies, and immigration and identity fraud. These can sometimes be detected. Before 9/11, no agency of the U.S. government systematically analyzed terrorists’ travel strategies. Had this kind of analysis been done, the 9/11 Commission concluded, analysts could have discovered the ways in which the terrorist predecessors to al Qaeda had been systematically but
detectably exploiting weaknesses in our border security since the early 1990s. As many as 15 of the 19 hijackers were potentially vulnerable to interception by border authorities. Analyzing their characteristic travel documents and travel patterns could have allowed authorities to intercept four to 15 hijackers, and more effective use of information available in U.S. government databases could have identified up to three hijackers (National Commission 2004, 384).

Given this information and after serious study, investigation, and reflection, the 9/11 Commission did not recommend the types of ethnic profiling and nativist actions that anti-immigrant groups advocated and Congress implemented (e.g., the PATRIOT Act):

Our investigation showed that two systemic weaknesses came together in our border system’s inability to contribute to an effective defense against the 9/11 attacks: a lack of well-developed counterterrorism measures as a part of border security and an immigration system not able to deliver on its basic commitments, much less support counterterrorism. . . .

Recommendation: Targeting travel is at least as powerful a weapon against terrorists as targeting their money. The United States should combine terrorist travel intelligence, operations, and law enforcement in a strategy to intercept terrorists, find terrorist travel facilitators, and constrain terrorist mobility. (National Commission 2004, 384-85)

Thus, the findings and immigration-system recommendations of the 9/11 Commission focused on the need for better counterterrorism measures, travel intelligence, and assessment of terrorist mobility.

In fact, under the Clinton Administration, INS officials were taking steps to implement policies and systems at ports of entry that would manage the flow by segmenting populations, so that travel by the large, law-abiding majority could increasingly be certified in advance through biometric and other reliable techniques and then safely facilitated. In this way, valuable law enforcement resources, expertise, and attention could be devoted to more careful screening of high-risk or unknown travelers. In the words of former INS Commissioner Doris Meissner, “Control and
facilitation of movement are not contradictory. Rather, they constitute two sides of the same coin” (2004).

But the major entry/exit system stumbling block was the land borders. In 1998, INS tested available technologies for land border entry/exit activities in a simulation but was unable to recommend an approach that did not delay cross-border traffic. Widespread opposition to an entry/exit system from border communities in Canada and Mexico, cross-border commerce business representatives, and many others, including the administration, then led Congress to delay implementation until 2001 and again until late 2004. Today, the land border problem remains unresolved (Meissner 2004).4

We would be deluding ourselves if we thought that databases are all we need to catch terrorists. What good information systems, however, can do is give a comprehensive picture of an individual’s compliance with immigration requirements, travel to and from the country, applications for changes in status, and other information from which to validate proper or suspect behavior. Such information is important when issuing visas, admitting people to the country, deciding applications for immigration benefits, and following investigative leads. Any of these actions can contribute to thwarting terrorism. Such information can also yield important insights into trends and patterns of possible criminal or terrorist activities (Meissner 2004).

In short, the goal for DHS is to have the systems and structures in place to prevent wrongdoers from getting into the country. DHS should press for strong, comprehensive border controls, modern information systems, and interagency and international coordination. Major technology and systemic improvements must be a high priority. Many policy options are available that DHS can implement without excessive executive powers and with minimal compromise of important civil liberties. A fundamental review of our country’s intelligence infrastructure, better coordination of intelligence gathering, more focus on monitoring the tools of terrorism, better use of technology, improved training of screeners, and enhanced recruitment of translators and informants are among the policies that DHS has initiated and needs to expand.
Indeed, the government’s major successes in apprehending terrorists have not come from post–September 11 immigration initiatives but from other efforts such as international intelligence activities, law enforcement cooperation, and information provided by arrests made abroad. A few noncitizens detained through these immigration initiatives have been characterized as terrorists, but the only charges actually brought against them were for routine immigration violations or ordinary crimes.

Thus, the primary domestic security responses to terrorism should be strengthened intelligence and analysis, compatible information systems and information sharing, and vigorous law enforcement and investigations. Improved immigration controls and enforcement can support good anti-terrorism enforcement, but they are not enough by themselves. More than anything else, 9/11 demonstrated the need to improve dramatically the nation’s intelligence capabilities. The immigration system captures voluminous amounts of data that can be important in connecting the dots about individuals under investigation (Chishti 2003). But for this data to be effective, information from visa and immigration data systems must be fully linked to establish complete immigration histories of visitors and residents, and government agencies must greatly improve their information sharing and their systems for maintaining watch lists.

**Legalizing the Undocumented**

As part of growing political attention given the intersection of immigration and security issues, the administration and some members of Congress have become increasingly concerned about the growing undocumented population, estimated to be between nine and ten million. From a national security point of view, the presence of a large undocumented population—the size, composition, and movements of which cannot be monitored—represents to some an unacceptable obstacle to keeping the country secure.

After 9/11, the restrictionist Federation for American Immigration Reform (FAIR), as part of its national security position, criticized any proposals to grant legalization to undocumented aliens (Chishti 2003).
Linking the attacks of 9/11 and national security to the need to oppose legalization is puzzling.

As a matter of logic, granting legalization and encouraging the undocumented to surface would seem to be more conducive to national security. None of the 19 hijackers entered the country illegally across a land border. Most entered with tourist visas and one with a student visa. Fifteen were Saudi nationals (Strasser 2004, 3-10). All but one obtained some form of U.S. identification document, some by fraud (National Commission 2004, 390). Given the difference between the terrorists and undocumented migration from Mexico, taking actions that would further alienate the undocumented population in response to 9/11 is hard to justify. In fact, the opposite approach makes more sense.

Professor Margaret Stock, a national security expert on the faculty at West Point, has noted the following:

By bringing the people that are here out of the shadows, and creating an orderly mechanism for identifying and documenting the low-risk individuals who travel to this country to work, and by curbing policies such as separating families that entice otherwise low-risk individuals to cross the border illegally, a comprehensive immigration reform plan would help these initiatives better focus on those who have come here to do us harm. Quite simply, only an immigration reform program that deals with the current problem in its entirety would have such a positive effect. A program that fails to identify the reasons for illegal-crossings or one that inadequately deals with the undocumented population would not help [DHS] initiatives protect our citizens. . . .

Because all nineteen of the September 11th terrorists were foreigners, some observers have been quick to blame our vulnerability to terrorist attacks on lax immigration laws. While such a response was predictable, it was misguided and has inevitably resulted in overreaction. Calls to impose a “moratorium” on immigration, halt the issuance of student visas, close the borders with Canada and Mexico, eliminate the Diversity Lottery visa program, draft harsher immigration laws, and similar types of proposals
reflect a serious misunderstanding of the relationship between immigration policy and national security. (Stock 2004)

Although the attacks of September 11 revealed serious management and resource deficiencies in the bureaucracies that administer our borders, U.S. immigration laws in and of themselves did not increase our vulnerability to attack. In fact, U.S. immigration laws already are among the toughest in the world and have long provided the federal government with broad powers to prevent anti-American terrorists from entering or residing in the United States. A careful analysis of the September 11 attacks reveals that deficiencies in U.S. intelligence collection and information sharing, not immigration laws, prevented the plans of the terrorists from being discovered. The Cato Institute agrees:

Long-time opponents of immigration have seized on September 11 to argue against legalization of Mexican migration and in favor of drastic cuts in existing levels of legal immigration.

The connection between the September 11 attacks and illegal immigration from Mexico is tenuous. None of the 19 hijackers entered the country illegally or as immigrants. They all arrived in the United States with valid temporary nonimmigrant tourist or student visas. None of them arrived via Mexico. None of them were Mexican. Sealing the Mexican border with a three-tiered, 2,000-mile replica of the Berlin Wall patrolled by thousands of U.S. troops would not have kept a single September 11 terrorist out of the United States. . . .

[L]egalizing and regularizing the movement of workers across the U.S.-Mexican border could enhance our national security by bringing much of the underground labor market into the open, encouraging newly documented workers to cooperate fully with law enforcement officials, and freeing resources for border security and the war on terrorism.

Legalization of Mexican migration would drain a large part of the underground swamp that facilitates illegal immigration. It would reduce the demand for fraudulent documents, which in turn would reduce the supply available for terrorists trying to operate surreptitiously outside the
United States. It would encourage millions of currently undocumented workers to make themselves known to authorities by registering with the government, reducing cover for terrorists who manage to enter the country and overstay their visas.

A system that allows Mexican workers to enter the United States legally would free up thousands of government personnel and save an estimated $3 billion a year—resources that would then be available to fight terrorism. (Griswold 2002)

And journalist Peter Laufer, arguing for a more open border policy with Mexico, sees things unfolding in the same way:

There is no question that the United States’ southern border will be more secure if law-abiding Mexicans are allowed to pass freely. At present the bulk of the huge Border Patrol force and budget is used for chasing Mexicans. Once Mexicans no longer feel the need to sneak north, most of them undoubtedly will be happy to register with American authorities and carry whatever documents the United States requires for them to move between the two countries via official ports of entry. After that change occurs, the Border Patrol and other U.S. government agencies will be facing a trickle instead of tidal wave of illegal border crossers. With their advanced detection equipment and huge staff, the Border Patrol will then be well prepared to arrest and detain most of those who still try to cross into the United States illegally. . . . U.S. authorities will no longer be chasing Mexican workers needed and wanted in the north; they can pursue unwanted—and potentially dangerous—border violators. (Laufer 2004, 244)

National security experts have recognized the connection between legalization and the nation’s safety. On September 10, 2003, former Secretary of Homeland Security Tom Ridge suggested that some sort of legalization program may be necessary to “come to grips with the presence of 8 to 12 million illegals” (Seper 2003). Speaking at a town hall meeting in Miami, Secretary Ridge responded to a question from the audience saying that it would be unworkable for undocumented people to leave the country and petition for
reentry and that the government should consider some sort of legal status, short of citizenship. He emphasized that the government should not reward undocumented aliens for breaking the law but that some form of legalization was necessary along with stricter border enforcement. Ridge’s undersecretary of Border and Transportation Security, Asa Hutchinson, appearing before a Senate committee in 2004, noted, “Illegal entry across our borders makes more difficult the urgent task of securing the homeland. Our homeland will be more secure when we can better account for those who enter our country, instead of the current situation in which millions of people are unknown” (U.S. Guestworker Program 2004). Hutchinson later testified before a House subcommittee that a temporary worker program would represent good law enforcement because it would mean fewer problems with undocumented workers (Interpreter Releases 2004, 343).

The argument is clear: legalizing undocumented workers coupled with a large worker program is in the interest of our national security and constitutes a step that would aid our country in its efforts to combat terrorism. By offering a program that would encourage undocumented workers to come forward, we would be able to conduct background checks on a large group that currently lives underground, while freeing up investigative resources to concentrate on real threats of terror at the border and between our shores. These new community members would be more inclined to participate in civic society and aid law enforcement efforts directly. Legalization would promote family reunification, and individuals would enjoy the psychological benefits derived from the comfort of family. With more definite status, wages and working conditions for the new Americans and all Americans would improve.

WHAT WE DON’T NEED

In recognition of the overwhelming numbers of law-abiding, hardworking immigrants, the 9/11 Commission reminded Americans:

Our borders and immigration system, including law enforcement, ought to send a message of welcome, tolerance, and justice to members of immigrant
communities in the United States and in their countries of origin. We should reach out to immigrant communities. Good immigration services are one way of doing so that is valuable in every way—including intelligence. (Interpreter Releases 2004, 390)

What we do not need in the name of national security are immigration policies and administrative actions that send a “you’re not one of us” message to immigrant and other ethnic communities. Following the London subway suicide bombings on July 7, 2005, by home-grown Muslim terrorists, some commentators were quick to give the United States credit for purportedly being more welcoming to our own Muslim minorities. For example, Boris Johnson, a member of the British Parliament, noted that Americans did not grow their own suicide bombers who volunteered to slaughter their neighbors. The simple reason, according to Johnson, is that America takes immigrants and makes them into Americans. Pledging allegiance to and proudly flying the flag is a way of showing that every citizen “is not only American but equally American, and has an equal stake in society. . . . We [Brits must], in a way that is cheery and polite,” insist that our Muslim communities “acculturate to our way of life” (How They See Us 2005). Similarly, Fareed Zakaria, the editor of the international edition of Newsweek, says that the difference is that in the United States, Muslims advance and find economic and social acceptance (2005). Johnson and Zakaria overstate both the welcome and the assimilation of Muslims into U.S. society, but their point is well taken. Creating a welcoming environment can only be beneficial.

The immigration policy approach actually used by the Bush Administration and the Department of Justice did not follow this philosophy. To apprehend individuals like the 9/11 hijackers before they attack requires laser-like focus on the gathering, sharing, and analysis of intelligence, working with well-targeted criminal and immigration law enforcement (Chishti 2003). Instead, the government conducted roundups of individuals based on their national origin and religion. These roundups failed to locate terrorists and damaged one of our great potential assets in the war on terrorism—the American communities of Arabs and Muslims.
The government’s use of immigration law as a primary means of fighting terrorism has substantially diminished civil liberties and stigmatized the communities of Arab American and Muslim Americans in this country. These measures, which primarily target Muslims, have diminished the openness of U.S. society and eroded national unity. As a result, Arabs and Muslims in America feel under siege, isolated, and stigmatized.

For example, the so-called “voluntary interview program” greatly alarmed the Arab and Muslim communities in this country. In some places, the FBI worked to establish good relations with the community and conducted the program in a nonthreatening manner. But problems occurred when the FBI tasked poorly trained police officials to implement the program. Moreover, the goals of the program (investigating the 9/11 terrorist attacks, intimidating potential terrorists, recruiting informants, and enforcing immigration violations) were contradictory. The immigration enforcement focus and public fanfare that surrounded the program worked against its potential for intelligence gathering.

In its research, MPI also discovered an important international echo effect from domestic immigration policy. By targeting Muslim and Arab immigrants, the U.S. government has deepened the perception abroad that the United States is anti-Muslim and that its democratic values and principles are hypocritical. This echo effect is undermining U.S. relationships with exactly the moderate, pro-western nations and social groups that we need in our fight against terrorism (Chishti 2003).

In effect, the administration has engaged in offensive ethnic profiling of these communities by specifically targeting Muslims and Arabs in the United States. Adding an ethnic or racial component to the profiles used to screen people for visas abroad or even those seeking admission at ports of entry is problematic, but it may be easier to defend. However, extending that approach to civil society at large is very troubling. Rather than relying on individualized suspicion or intelligence-driven criteria, the government has used national origin as a proxy for evidence of dangerousness.

The effectiveness of profiling is questionable because it casts too wide a net around a community without providing any information about individual behavior. Many law enforcement professionals view profiling as a
crude and ultimately inadequate substitute for behavior-based enforcement and effective intelligence gathering. They also maintain that it leads to less rigorous scrutiny of individuals who may be dangerous but do not fit the profile (Chishti 2003). In fact, profiling can give a false sense of security—it would not have caught Atlanta Olympics bomber Eric James Rudolf, Oklahoma City bomber Timothy McVeigh, American Taliban fighter John Walker Lindh, or al Qaeda recruit Jose Padilla. Consider also the speculation in the law enforcement community that the person responsible for the anthrax mailings in the fall of 2001 was a trusted U.S. citizen with security clearance. In addition to being ineffective, profiling stigmatizes, intimidates, and alienates immigrant communities, and it makes their members less eager to cooperate with law enforcement agencies.

The passage of the REAL ID Act also is problematic in the fight against terrorism. The Sensenbrenner provision that bars states from issuing driver’s licenses to undocumented aliens actually threatens, rather than assists, law enforcement officials. Critics raised legitimate concerns that undocumented workers may drive their cars in spite of the bar, putting the public at risk through the absence of driver regulation and the inability of such drivers to obtain car insurance. But more serious effects on law enforcement are at stake. West Point Professor Margaret Stock points out that “the collective DMV databases are the largest law enforcement databases in the country, with records on more individual adults than any other law enforcement databases” (2004).

Denying driver’s licenses to illegal immigrants will hurt our national security by depriving law enforcement officials of critical information on substantial numbers of adults who are physically present in the United States. Law enforcement officials may be unable to find persons who may be security threats, and they will have less information with which to prevent and solve crimes. When a terrorist incident happens, it will be harder afterwards to determine what happened and when (Stock 2004).

In the wake of 9/11 law enforcement officials needed the driver license data after the fact to figure out where the terrorists had been, how they moved, and who helped them. As the American Association of Motor Vehicle Administrators stated in its October 2003 report:
Law enforcement agencies, federal, state and local, use the driver license image on a frequent basis to identify victims, criminal suspects, missing children and the elderly. Digital images from driver records have significantly aided law enforcement agencies charged with homeland security. The events of September 11, 2001 clearly demonstrate the value of the driver record photograph. The 19 terrorists obtained driver licenses from several states and federal authorities relied heavily on those images for the identification of the individuals responsible for the horrific criminal acts on that fateful day. (American Ass’n of Motor Vehicle Administrators 2003, emphasis added)

CLOSING

The MPI (which included former INS Commissioner Doris Meissner on its research staff) conducted a comprehensive study of U.S. immigration policies after 9/11, interviewing Arab and Muslim community leaders and senior intelligence and law enforcement officials while analyzing the profiles of more than 400 post 9/11 detainees. Not surprisingly, it concluded that harsh government measures against immigrants failed to make the nation safer, violated fundamental civil liberties, and undermined national unity. The MPI determined that

- the U.S. government overemphasized the use of the immigration system;
- as an antiterrorism measure, immigration enforcement is of limited effectiveness; and
- arresting a large number of noncitizens on grounds not related to domestic security only gives the nation a false sense of security (Chishti et al. 2003).

In calling for better intelligence strategies rather than targeting innocent immigrants—especially those of a particular ethnic or religious group—MPI researchers noted:
It is crucial for law enforcement to engage Arab- and Muslim-American communities as it works to identify terrorism-related conspiracies, recruitment, and financial networks. This requires cultivating new relationships and building trust. The government should also embrace these communities as bridges of understanding to societies and peoples around the world who are deeply alienated from the United States. (Chishti 2003)

Our nation must take the smart approach to national security to avoid another 9/11. A smart approach to national security is one that reaches out to noncitizen communities not simply because they are part of the United States but because they are allies in the fight to protect our homeland. A smart approach to national security recognizes the economic and social benefits that newcomers bring to our nation so that strengthened security strikes a balance between our need for those contributions and investigative intrusions into their lives.

Sadly, when government takes the lead in unreasonable profiling and private citizens follow, the targets are de-Americanized—told that they are not real Americans, not part of us. The de-Americanization process can reinvent itself generation after generation. We have seen this exclusionary process aimed at Jews, Asians, Mexicans, Haitians, and those of other descent throughout the nation’s history. De-Americanization is not simply xenophobia because more than fear of foreigners is at work. This is a brand of nativism cloaked in a Eurocentric sense of America that combines hate and racial profiling. Whenever we go through a period of de-Americanization like what is currently affecting South Asians, Arabs, and Muslim Americans, a whole new generation of Americans sees that exclusion and hate are acceptable, that the definition of who is an American can be narrow, and that they, too, have a license to profile. Their license is issued when others around them engage in hate with the government taking the lead with its own profiling. This is part of the sad process of racism that haunts our country.

Targeting noncitizens of a certain ethnic, religious, or racial background or closing our borders to newcomers or visitors is a national security
strategy that does not make our country safe. In fact, such strategies may diminish the opportunity to engage newcomer communities in assisting with smarter law enforcement approaches to public safety. Because the 9/11 hijackers were foreign born, cracking down on noncitizens—especially those who looked like or were of the same religion of the hijackers—made sense to some. But the crackdown apprehended no terrorists. By falling for the temptation of profiling, we actually sacrificed the fundamental values and principles of openness and inclusion that we ought to have been guarding. Those who would do us harm won an important battle when we chose to target Arab, Muslim, and South Asian members of our communities. We damaged that part of America, shaming ourselves in the process.

NOTES

1. The clumsy, complete title is the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act, i.e., the USA PATRIOT Act.

2. A subsequent proposal by the National Association of Immigration Judges (NAIJ) is noteworthy. On January 2002, NAIJ proposed the creation of a separate executive branch agency to house the trial-level immigration courts and Board of Immigration Appeals, citing “disturbing encroachments on judicial independence” taken by the president, the attorney general, and the Department of Justice in the aftermath of 9/11.

3. The REAL ID Act affects everyone in the United States. Beginning in 2008, anyone living or working in the United States must have a federally approved ID card to travel on an airplane, open a bank account, collect Social Security payments, or take advantage of nearly any government service. Practically speaking, every driver’s license likely will have to be reissued to meet federal standards. The REAL ID Act hands the Department of Homeland Security the power to set these standards and determine whether state driver’s licenses and other ID cards pass muster.


5. Full title of FAIR report is An Invitation to Terror: America Still at Risk: How Our Immigration System Still Leaves America at Risk.
STATUTES


REFERENCES

How They See Us: Britain’s Response to Terror Beats America. 2005. This Week, July 29, 13.


