National Security and Immigration Policy: Reclaiming Terms, Measuring Success, and Setting Priorities

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Preface

The U.S. debate on immigration has been characterized by a simplistic "human rights versus national security" paradigm that has inhibited serious discussion of the role of the U.S. immigration system in a coordinated national security strategy. The debate has been further hampered by the paucity of counter-terror experts who understand the immigration system, and by a lack of security expertise in the immigrant rights community. This project attempts to bridge that divide.

The stakes could not be higher. The threat of catastrophic terrorism, coupled with the vulnerabilities exposed by the September 11th attacks, demands that the U.S. immigration system be integrated into a comprehensive national security plan. At the same time, U.S. strength and prosperity—a key component of US national security—depends on America's openness to the foreign-born and, even more, on America's adherence to its defining values.

Shortly after the terrorist attacks of September 11, 2001, the Catholic Legal Immigration Network, Inc. (CLINIC) began to meet with counter-terror experts to explore how the U.S. immigration system should be reformed to further the nation's security. Vincent Cannistraro, former Chief of Operations and Analysis at the CIA's Counterterrorism Center, and Harry Brandon, former Deputy Assistant Director of the FBI and head of National Security and Counterterrorism, served as indispensable guides in the early stages of this process.

In 2004, CLINIC approached the law firm of Fried, Frank, Harris, Shriver & Jacobson, LLP for *pro bono* representation in a project that CLINIC hoped would produce a comprehensive analysis of the role of immigration policy in national security. Between November 2004 and April 2005, a team of Fried Frank attorneys—comprised of Michael Bromwich (lead partner), Beth Colleye, Alida Barletta, and Jennifer Wollenberg—conducted extensive research and interviews with eight security experts from a variety of backgrounds.

These experts were Daniel Benjamin, a Senior Fellow in the International Security Program at the Center for Strategic and International Studies, a former National Security Council director for transnational threats (1998-1999), and co-author of The Next Attack (Henry Holt and Co.,

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2005); Dr. Bruce Hoffman, Corporate Chair in Counterterrorism and Counterinsurgency at the RAND Corporation, and author of Inside Terrorism (Colombia University Press, 1998); Susan Ginsburg, Senior Counsel and team leader for the National Commission on Terrorist Attacks Upon the United States, and author of Countering Terrorist Mobility: Shaping an Operational Strategy (Migration Policy Institute, 2006); Admiral Bobby Ray Inman, the Lyndon B. Johnson Centennial Chair in National Policy at the University of Texas's School of Public Affairs, formerly Deputy Director for the CIA (1981-1982), and Director of the National Security Agency (1977-1981); Sheila Horan, former Deputy Assistant Director for the FBI's National Security Division (1999-2001) and Special Agent in Charge of the Washington Field Office's National Security Division (Counterintelligence and Counterterrorism) (1997-1999); Cmdr. Stephen E. Flynn, U.S.C.G., ret., Senior Fellow for National Security Studies at the Council on Foreign Relations, former consultant to the U.S. Commission on National Security (the Hart-Rudman Commission (2000-2001)), and author of America the Vulnerable (Harper Collins, 2004); Larry Johnson, CEO of BERG Associates, LLC, former Deputy Director of the U.S. State Department's Office of Counter Terrorism (1989-1993), and a former CIA employee (1985-1989); and James Ziglar, former INS Commissioner (2001-2002).

The interviews covered a range of issues, but the experts consistently returned to two key themes: (1) what the United States must do to reduce the threat of terrorism; and (2) what role the U.S. immigration system should play in a security strategy. This report attempts to answer those questions. It does not attempt to offer an inventory, assessment or consensus view of all the post-9/11 security-related immigration restrictions. Instead, it provides a framework for evaluating security-related immigration measures, and seeks to contribute to a richer debate on the role of immigration in national security.

The report will begin with a brief introduction to the post-9/11 security-related immigration restrictions. It will then discuss three broad concepts—national security, the rule of law, and human rights—concepts that have defined and limited the debate on immigration since September 11th. The report argues that these concepts, properly understood, allow for an enlarged and richer discussion of the relevant issues. The report will next set forth a methodology for measuring the success of immigration-related security measures, using the US-VISIT program as a case study. It will then discuss key counter-terror priorities that do not directly involve immigration. It will end by identifying the many roles that the U.S. immigration system—and immigrants themselves—should play in furthering the nation's security.

I.   Introduction

In reconstructing the September 11th attacks, the U.S. National Commission on Terrorist Attacks Upon the United States ("the 9/11 Commission") identified various immigration vulnerabilities that the terrorists exploited. The hijackers used fraudulent passports, obtained visas on false pretenses, and violated the terms of their visas. The names of two of the hijackers were known to the intelligence community and were the subject of intensive tracking, but this information was not shared with US immigration officials. The Commission concluded that 15 of the 19 hijackers could have been intercepted by immigration authorities had these authorities

been aware of and put in place measures to counter the terrorists' travel tactics, in particular those relating to the use of travel documents.[1] The Commission concluded that US authorities missed abundant opportunities for these and other reasons to intercept and arrest the terrorists prior to the attacks.

Why were the terrorists not intercepted? The Commission concluded that US immigration authorities, prior to 9/11, were not focused on security. Instead, their primary concern was preventing people from entering the United States and seeking unauthorized employment. Because the terrorists did not appear to have any interest in working illegally in the United States, they were not perceived to be threatening by US immigration officials, and were allowed into the United States. After finding his mien to be hostile and suspicious, immigration officials turned away the person who appears to have been selected as the "20th hijacker," Mohammed al-Qahtani, at the Orlando, Florida port of entry because he had no hotel reservation or return ticket.[2]

If prior to the attacks national security did not represent a major priority for the U.S. immigration system, after 9/11 the immigration system has been viewed almost exclusively through the lens of security. Security-related measures have transformed virtually all U.S. immigration procedures, and immigration has become a defining feature of U.S. efforts to strengthen homeland security.

In the name of national security, US officials took extraordinary measures after 9/11. Most visibly, federal officials arrested and detained 768 Middle-Eastern and South Asian men in the weeks following the attacks. The Federal Bureau of Investigation (FBI) encountered most of the detainees in its investigation and attempt to prevent further attacks. The use of the immigration system to prevent attacks and as a proxy for terrorist prosecutions had been previously considered but was now put into effect on a dramatic scale, and without the possibility of public scrutiny. This represented a dramatic shift in tactics. The Department of Justice (DOJ) held detainees for immigration violations and ultimately deported 531 after closed hearings.[3] DOJ reported to the 9/11 Commission that six detainees had direct links to terrorist organizations and that the overall preventive detention program had provided important leads. DOJ's internal watchdog, the Office of Inspector General, criticized the gross mistreatment of hundreds of detainees in U.S. custody and the lengthy detention and removal of those with only the most attenuated ties to the terrorist investigation.[4]

Congress also acted quickly to pass anti-terrorism legislation that included provisions relating to immigration on the theory that tougher immigration laws might have prevented 9/11 and

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[1] The National Commission on Terrorist Attacks Upon the United States, "The 9/11 Commission Report" (W.W. Norton and Company, Inc., 2004) at 384 [hereinafter "The 9/11 Commission Report"]; The National Commission on Terrorist Attacks Upon the United States, "9/11 and Terrorist Travel: A Staff Report of the National Commission on Terrorist Attacks Upon the United States" (Hillsboro Press, June 2004).

[2] D. Eggen, "9/11 Panel Faults US for Letting Hijackers In," Washington Post (January 27, 2004).

[3] "The 9/11 Commission Report" at 328.

[4] U.S. Department of Justice, Office of the Inspector General, "The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks" (Apr. 2003) [hereinafter "The September 11 Detainees."]

might stop a future attack. The United and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 ("USA PATRIOT Act")[5]—was signed into law on October 26, 2001, and expanded the security-related grounds for denying admission to and for removing (deporting) non-citizens. The USA PATRIOT Act also allowed for pre-charge detention for seven days of those non-citizens certified by the Attorney General as terrorists or terrorist supporters. (An earlier regulation had allowed pre-charge detention for a "reasonable period of time" in an "emergency or other extraordinary circumstances."[6]) Other detention measures rhetorically linked to counterterrorism included the decision to detain all Haitian boat people,[7] and to oppose the release of non-citizens denied admission to the United States at U.S. ports-of-entry, whose nations would not accept their repatriation.[8]

Several security-related changes likewise occurred in the issuance of visas and the admission of non-citizens. On January 11, 2002, the U.S. Department of State (DOS) began to require all male visa applicants between the ages of 16 and 45 and women at select consular posts to fill out a supplemental form that required detailed, security-relevant information. In July 2003, DOS mandated that consular officials conduct face-to-face interviews with most visa applicants.[9] The Intelligence Reform and Terrorist Prevention Act of 2004 formalized this policy.[10]

The Visa Waiver Program (VWP)—by which nationals of certain countries can enter the United States as visitors for business or pleasure without securing a visa, or undergoing a consular interview or pre-inspection procedures—has long been viewed as a source of vulnerability to the United States. Those opposed to the program argue that the lack of a consular application and interview for VWP participants means that non-citizens traveling under the provisions of the VWP are less likely to be scrutinized for terrorist connections. As a result of fears that the program created a security threat, the United States removed Argentina (February 2002) and Uruguay (April 2003) from the program, and Congress mandated regular reviews of participating countries.

The Enhanced Border Security and Visa Entry Reform Act of 2002[11] required DOS to determine that non-immigrant visa applicants from nations designated as "state sponsors of terror"—currently, North Korea, Cuba, Syria, the Sudan, Iran, and Libya—do not pose a security threat to the United States. Nationals from these countries who are aged 16 or over must

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[5] Pub. L. No. 107-56, 115 Stat. 272 (2001).

[6] 66 Fed. Reg. 48334 (Sept. 20, 2001).

[7] Fed. Reg. 68924 (Nov. 13, 2002) ("A surge in illegal migration by sea threatens national security by diverting valuable United States Coast Guard and other resources from counter-terrorism ..."); In re D-J-, 23 I & N Dec. 572 (A.G. 2003) ("[T]here is a substantial prospect that the release of such aliens .... [would] encourage future surges in illegal migration by sea ... diverting valuable Coast Guard and DOJ resources from counterterrorism and homeland security responsibilities.")

[8] Brief for the Petitioners, Clark v. Suarez Martinez, No. 03-878 (U.S. May 2004) ([A]s recent events have taught, the Cuban government is not the only foreign power or organization that thinks little of putting civilian lives at risk as part of its hostile endeavors. It is difficult to understate the damage that could occur to the United States' international relations and national security if ... foreign powers are told that the President and Congress cannot control the physical infiltration into the United States of criminals and other aliens ...")

[9] 68 Fed. Reg. 40127 (Jul. 7, 2003).

[10] Pub. L. No. 108-408, § 5301, 118 Stat. 3638 (Dec. 17, 2004).

[11] Pub. L. 107-173, § 306 (May 14, 2002).

complete a detailed form explaining their affiliations and travel history, and undergo consular interviews. In addition, the United States instituted new security advisory opinions for visa applicants from twenty-six (26) nations of security interest (the "Visa Condor" program), and for visa applicants who work in areas involving sensitive technology (the "Visa Mantis" program).

In December 2001, the United States and Canada concluded a "smart border" agreement designed to increase security while facilitating the lawful cross-border movement of persons and goods. As part of this agreement, the two nations entered into a safe-third country agreement that took effect on December 29, 2004. This agreement requires migrants, with exceptions, to seek asylum in whichever of the two countries they first enter.

As a feature of its National Security Entry/Exit Registration System (NSEERS), the Department of Homeland Security (DHS) required male visitors over the age of 16 from twenty-five (25) nations to register for fingerprinting, photographing, and interviews. Between November 2002 and December 2003, 83,519 persons reported to authorities to register under this program. DHS placed 13,799 registrants in removal proceedings and detained 2,870. The "call-in" registration requirement has since been suspended, although visitors continue to be summoned on a case-by-case basis.

Well before 9/11, the Illegal Immigration Reform & Immigrant Responsibility Act of 1996 ("the 1996 Act" or "IIRAIRA")[12] had required the INS to create a comprehensive "check in/check out" system for foreign visitors. This system had never been completed, but the task assumed a new life following the September 11th attacks. By the end of 2005, DHS had instituted "entry" (check-in) procedures for its U.S. Visitor and Immigration Status Indication Technology program (US-VISIT) at 115 airports, 15 seaports, and 154 land ports-of-entry (in secondary inspection), and exit procedures at 13 airports and two seaports.[13] US-VISIT is intended to verify the identity and run security checks on all temporary visitors to the United States, and will record their entry to and exit from the country. US-VISIT will ultimately subsume the Student Exchange and Visitor Information System (SEVIS), a student-tracking program that received significant attention after September 11th. It will likewise replace the NSEERS program.

On March 1, 2003, DHS came into being, incorporating the former INS and 21 other federal agencies. In one fell swoop, the U.S. immigration function became a homeland security concern. The creation of DHS represented the largest U.S. government restructuring since World War II, but it did not represent the extent of security-related institutional reforms. The FBI and CIA also began a process of significant restructuring and reform.

Several initiatives since September 11th have targeted the undocumented and unauthorized. Spending on border enforcement activities and on detention bed space has increased dramatically. In the 2006 appropriations bill, DHS received funding for 1,000 additional Border Patrol Agents and $90 million for additional detention beds. DHS has also conducted immigration raids at work places that terrorists might try to infiltrate, including "critical infrastructure" and nationally significant sites. Nuclear plants, airports, military bases, and

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[12] Pub. L. 104-208, § 110, 110 Stat. 3009 (Sept. 30, 1996).

[13] E. Lipton, "Border Control Takes One Leap Forward," New York Times (Dec. 30, 2005).

national sports venues have been a focus of these raids. On the legislative front, the REAL-ID Act of 2005[14] seeks to compel states to deny drivers' licenses to the undocumented. At the same time, the Bush Administration supports "guest worker" legislation and Congress is considering various immigration reform bills that would extend legal status to undocumented immigrant laborers.

In the two years following the attacks, the admission of refugees—persons with a well-founded fear of persecution based on political opinion, social group, race, religion, or nationality—dipped from 68,925 (2001) to 26,839 in 2002 and 28,306 in 2003.[15] The DHS also completed a comprehensive security review of this program after allegations that terrorists might use it to enter the United States. (Following the review, admissions rose to 52,868 in 2004 and 53,813 in 2005.)[16] Recently, the DHS has extended the "expedited removal" process beyond ports-of-entry to non-citizens, including asylum-seekers, caught along the U.S.-Mexico border. This decision comes in the wake of a comprehensive report by the U.S. Commission on International Religious Freedom that found that the expedited removal system directly (and improperly) repatriated many persons who expressed a fear of return to their countries.[17] Finally, the USA PATRIOT Act and the REAL-ID Act have created an overly broad bar on admission for those who provide "material support" for terrorist activity, terrorists or terrorist organizations. This provision has led to the exclusion of literally thousands of refugees and delays in the cases of hundreds of asylum-seekers who opposed brutal regimes or involuntarily supported anti-government groups.

Although hardly comprehensive, this short summary of post-9/11 security-related immigration reforms highlights the prominence of immigration in the current national security debate.

II.   *Reclaiming the Terms of the Debate*

It has been said that cliches should begin debates, not end them. Yet too often in the debate on immigration and security, catch phrases like "national security," "the rule of law," and "human rights" have been used to limit discussion. A robust analysis of these concepts is in order, because properly understood, they can serve as useful tools for analyzing immigration measures and making security choices.

A.   National Security

Although often viewed as synonymous with protection from physical harm, the term "national security" rightly deserves a more expansive meaning, going beyond mere physical protection to encompass the protection of "vital economic and political interests, the loss of which could

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[14] Pub. L. No. 109-13, 119 Stat. 231 (2005).

[15] U.S. Department of Homeland Security, "2004 Yearbook of Immigration Statistics" (2005), Table 14.

[16] Congressional Research Service, "Refugee Admissions and Resettlement Policy" (updated Jan. 25, 2006) at 2.

[17] United States Commission on International Religious Freedom, Report on Asylum Seekers in Expedited Removal, Volume II (Feb. 2005) at 20-23 [hereinafter "Report on Asylum Seekers"]

threaten the fundamental values and vitality of the state."[18] This broader sense of security recognizes how economic and political interests serve as a touchstone of state power.[19] Economic viability and strength contribute directly to security. So does adherence to values. Because "national security" policies and strategies in a democracy depend on public support, they must reflect "basic public values."[20] In the U.S. constitutional system, core "public values" include respect for civil liberties and human rights.

An expanded view of "national security" makes it more likely that our strategies will be coherent, and that the relevant government agencies and institutions will contribute to them. A broad concept of security also provides a framework for considering key trade-offs.[21] For example, detention of asylum-seekers at the border might initially appear to be a useful security tool if "security" were defined as keeping migrants in detention until their cases have been processed to a conclusion. Such detention might not be a sustainable tool, however, if it offends public values, or makes certain U.S. allies less likely to participate in counter-terror efforts or to share intelligence with the United States, or dissuades needed foreign workers from coming to the United States. Similarly, enhanced screening at ports-of-entry might appear to promote safety in the short-term, but could have economic consequences that would undermine the nation's long-term security if the difficulties of getting people and goods into the United States were to cause multi-national corporations to do business elsewhere.

The United States has recognized this kind of "security" trade-off in its "smart border" agreement with Canada, which attempts to increase safety while at the same time facilitating the flow of lawful border traffic. Security-related restrictions on the issuance of visas might be necessary, but they must be weighed against their impact on the employment needs of U.S. corporations and the long-term benefits of training and educating foreign students. An expanded view of security recognizes the importance of deciding who the United States will admit, as much as deciding who it keeps out.[22]

There may also be trade-offs between national security-related measures and other interests.[23] Since 9/11, the government has largely conflated national security and immigration enforcement,

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[18] Amos A. Jordan, William J. Taylor, Jr., and Michael J. Mazarr, American National Security (Johns Hopkins University Press, 5th edn., 1999) at 3 [hereinafter "American National Security"].

[19] Id.

[20] Id. at 50.

[21] Comments by James Jay Carafano, Senior Fellow at the Heritage Foundation, Second Annual Policy and Legal Conference of CLINIC, Migration Policy Institute, and Georgetown University Law School (May 24, 2005) ("Security-related concerns could be terrorism, criminality, public safety, economic security, and measures that further one may undermine another.")

[22] Testimony of Stephen E. Flynn, Senior Fellow in National Security Studies, Council on Foreign Relations, before the U.S. Senate Judiciary Committee on Technology, Terrorism, and Government Information, Subcommittee on Border Security, Citizenship and Immigration (Mar. 12, 2003) [hereinafter "Flynn Testimony of March 12, 2003] ("U.S. prosperity – and much of its power – relies on its ready access to North American and global networks of transport, energy, information, finance, and labor. It is self-defeating to embrace security measures that end up isolating it from those networks.")

[23] Interview with Cmdr. Stephen E. Flynn, U.S.C.G., ret., Senior Fellow for National Security Studies at the Council on Foreign Relations (Mar. 7, 2005) [hereinafter "Flynn Interview"] ("Security measures must be sustainable over the long-term and, in our system, they won't be if they violate civil rights.")

justifying virtually all of its immigration restrictions on national security grounds. This may be understandable, given that the U.S. immigration function now resides in a homeland security agency. It cannot be blindly assumed, however, that all immigration enforcement activities invariably further security. Among other concerns, they may make immigrants less likely to come forward with security-related intelligence.[24]

B. The Rule of Law

The "rule of law" plays an oversized role in the debate on immigration and security. The ancient Greeks used the term to refer to a legal system that subordinates government to the law. Most definitions of the rule of law continue to focus on the ends such a system should serve. These can include (1) government adherence to standing laws (with judicial review); (2) "law and order" in the sense of protection of the lives, rights and property of residents; (3) equality before the law; (4) human rights, and (5) efficient and predictable justice.[25] A dysfunctional legal system may not encompass all of these goals. For example, a repressive government might be bound by the law, but still violate human rights. In other words, government *by* law may be an essential, but not sufficient condition to the rule *of* law.[26] In addition, in a fledgling or fragile legal system, attempts to further one goal (respect for human rights) may undermine another (law and order).[27] Conversely, the failure to respect one goal (human rights) may create conditions that would undermine another (law and order). In a well-functioning system, however, these goals should reinforce one another.

Others define the rule of law not by the larger ends that such a system serves, but by its institutional attributes (its laws, judiciary, and police).[28] For example, a legal system might exemplify the rule of law if its rules were: (1) prospective and possible to comply with; (2) promulgated, clear, and coherent; (3) stable enough to allow persons to be guided by knowledge of their content; (4) the basis of decrees and orders governing specific situations; (5) binding on those with the authority to make, administer and apply rules; and (6) administered consistently.[29] The pre-conditions for such a system might include an independent judiciary, open court

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[24] Center for Migration Studies, Immigration Policy, Law Enforcement and National Security (2003) at 12 [hereinafter "CMS Special Report"] (As Vincent Cannistraro has put it: "[I]f the FBI conducts sensitive interviews with community leaders at the same time that that community's members have been rounded up ... forced to report— and everyone who reports knows that if they are illegal, they are not a document holder, that they can and will be deported—we have really eliminated the ability to get information that we really need.")

[25] Rachel Kleinfeld Belton, "Competing Definitions of the Rule of Law," Carnegie Papers, Rule of Law Series, No. 55 (Carnegie Endowment for International Peace, Jan. 2005) at 5-6 [hereinafter "Competing Definitions of the Rule of Law"].

[26] Id. at 9 ("Binding the government to rule by law is the sine qua non of the rule of law.")

[27] Id. at 24.

[28] Id. at 6.

[29] John Finnis, Natural Law and Natural Rights (Oxford University Press, 1980) at 270-271 [hereinafter "Natural Law and Natural Rights"]; see also Joseph Raz, "The Rule of Law & Its Virtue," The Authority of Law: Essays on Law & Morality (Oxford University Press, 1979); Brian Z. Tamanaha, On the Rule of Law: History, Politics, Theory (Cambridge University Press, 2004).

proceedings, judicial review, and legal counsel for the poor.[30] Still others adopt hybrid definitions, combining both ends and institutional attributes.[31]

Both sides of the immigration debate find "rule of law" problems in the U.S. immigration system. Immigration restrictionists see the "rule of law" as the answer to a chaotic immigration system and a burgeoning "illegal" population. They argue that poor enforcement of immigration violations contravenes the "rule of law." They ignore the traditional sense of the "rule of law" as a restraint on government, not a requirement that government fully enforce its laws. They focus on one goal of a legal system (law and order) and one institutional attribute (effective policing).

Immigrant advocates focus on how the U.S. immigration system violates human rights and does not serve appropriate "ends" such as predictable justice or equality under the law.[32] They also argue that the immigration system lacks the institutional attributes that characterize the rule of law. A growing body of legal reform reports, for example, have decried the retroactive application of certain immigration laws, and the lack of clarity in legal standards and decision-making, the inconsistent application of immigration law, the lack of coherence between immigration and other laws. By this view, closed deportation hearings, a summary appeals process, restrictions on judicial review, and the absence of government-appointed counsel undermine the rule of law.[33]

The "rule of law"—properly understood—allows for an expansive debate that embraces the concerns of both immigrant advocates and restrictionists. For present purposes, it also offers a way to think about an immigration system that would further security. To the extent that the US immigration system honors the "rule of law," it can be a source of support for the United States among immigrant communities and U.S. allies. However, a perception to the contrary can facilitate terrorist recruitment. As the Bush Administration has argued, the rule of law is an antidote to the conditions that produce terrorists and allow them to thrive. This is true not only in foreign lands, but here in the United States.

C.   Human rights

The national debate on immigration and security offers a case study in the misuse of human rights language. On the one hand, former Attorney General John Ashcroft has argued that immigration law is an essential tool in the defense of liberty, the source of all rights. On the

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[30] Id.

[31] Sen. Kay Bailey Hutchison, "Democracy and the Rule of Law," The International Lawyer, Vol. 39, No. 3 (Fall 2005), p. 663 ("The rule of law involves four basic requirements: Equality under the law. A respect for individual rights. An independent and honest judiciary. And transparent court proceedings. Without a strong commitment to every aspect, even a democratic society will not mature.")

[32] "Competing Definitions of the Rule of Law" at 28 ("By treating the rule of law as a set of institutions, reformers handicap themselves in bringing about the end goals of the rule of law – all of which require reform across institutions, as well as cultural and political changes that lie outside the concrete institutional realm.").

[33] American Bar Association, Commission on Immigration, "American Justice Through Immigrants' Eyes" (2004); Catholic Legal Immigration Network, Inc., "Placing Immigrants at Risk: The Impact of Our Laws and Policies on American Families" (2000); D. Kerwin, "Revisiting the Need for Appointed Counsel," MPI Insight , No. 4 (Apr. 2005).

other hand, civil libertarians have criticized many immigration measures as infringing on human rights. Mostly, the debate has been miscast as one that requires a trade-off between security and rights. Yet a human rights framework can embrace both individual rights and the ends they serve, including safety, liberty, and the common good. In short, the quality of the immigration debate depends on a more nuanced view of security and of human rights.

According to one scholar, human rights in U.S. public discourse tend to be formulated in absolute language, in individual terms, and without reference to their ends or to corresponding duties.[34] By this critique, not only has rights language become more strident and uncompromising in recent years, but the litany of claimed rights has expanded. In the immigration debate, there seems to be a sense that if only a desired outcome can be characterized as a "right," this will substantively resolve the underlying issues. "Rights"—so formulated -- may express desirable social outcomes, but they often have little reference to the "common good" or other ends.[35] This makes rights language less than useful in problem-solving, particularly in the face of conflicting rights.

Consider the potential rights at issue in the immigration debate. Migrants fleeing persecution or gross economic privation enjoy a right to self-preservation. Historically, this has been viewed as a right that carries with it a duty; that is, the right to self-preservation is an "inalienable" right.[36] To the extent that our immigration system poses a security threat by allowing terrorists to enter the United States freely, however, it could likewise be viewed as a threat to the self-preservation of our citizens. Certainly, many Americans view the immigration system as an ineffective line of defense against terrorism. On the other hand, many immigration advocates believe that our immigration laws offend the right to family reunification, the right to make a living, and the right to just working conditions. Yet many U.S. border residents believe that unauthorized migrants violate their right to security and to property. Some employers see their right to support themselves violated by immigration policies that prevent them from hiring willing (immigrant) workers. Some U.S. workers see their rights to a just wage and appropriate working conditions undermined by immigrants. In many ways, these competing sides talk past each other, a problem exacerbated by the way they use "rights" arguments.

It may seem counter-intuitive in our political culture to limit or define rights in reference to larger purposes. Yet the source documents recognize the necessity of meshing individual rights and the larger needs of society. Article 29 (2) of the Universal Declaration of Human Rights recognizes "limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society."[37] The U.S. Constitution aims to "form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the

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[34] See Mary Ann Glendon, Rights Talk (Free Press, 1991) at 12, 14.

[35] Brian Tierney, The Idea of Natural Rights (William B. Eerdmans Publishing Co., 1997) at 346-347 [hereinafter "The Idea of Natural Rights"].

[36] The Idea of Natural Rights at 236-237.

[37] Natural Law and Natural Rights at 212-213 (Human rights instruments, including the Universal Declaration, typically set forth rights in two forms: "everyone has the right to" and "no one shall be." By one reading, the former rights would be subject to limitation, but the latter would be absolute.)

Blessings of Liberty." Notions like the "common good" or "general welfare" do not conflict with rights.[38] Thomas Jefferson referred to freedom of religion, of the press, and of the person as "the road which alone leads to peace, liberty, and safety."[39] At the same time, Jefferson warned that "[a] strict observance of the written laws is doubtless *one* of the high duties of a good citizen, but it is not *the highest*. The laws of necessity, of self-preservation, of saving our country when in danger, are of higher obligation. To lose our country by a scrupulous adherence to written law, would be to lose the law itself, with life, liberty, property and all those who are enjoying them with us; thus absurdly sacrificing the end to the means."[40]

This begs the question of the relationship between rights and the "common good." By one view, rights can be seen as setting forth an outline of the "common good" by highlighting "the various aspects of individual well-being in community."[41] Claims of conflicting rights can be analyzed in relation to these ends and, thus, need not lead to a hopeless conflict.[42] Regardless, the "rights" framework can remain a useful way to address issues like immigration and security in the post-9/11 era.

III.   *Evaluating Security Strategies*

Immediately after September 11th, the United States adopted broad security measures designed to prevent further attacks. These measures did not capture significant number of terrorists, but they may have deterred or at least inhibited potential terrorists. To a degree, they also assuaged the public's fear and anger. The breadth of these measures reflected a paucity of intelligence on the terrorist threat and a resulting lack of options to address it.[43]

To adopt many of these measures, the government expanded existing powers and took on new ones. Given the American tradition of being wary of large-scale expansions of government power, the 9/11 Commission concluded that the government should bear the burden of demonstrating that its new powers "materially enhance security" and protect civil liberties.[44] As a preliminary matter, achieving this goal will require the government to describe how it evaluates the success of its tactics. The government must also be willing to abandon tactics that have proven ineffective or become unnecessary.[45]

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[38] Conferencia del Episcopado Mexicano and United States Conference of Catholic Bishops, "Strangers No Longer: Together on the Journey of Hope" (Jan. 2003), par. 39 ("... the common good is not served when the basic human rights of the individual are violated.")

[39] Thomas Jefferson, First Inaugural Address, Washington, D.C., March 4, 1801.

[40] Letter from Thomas Jefferson to John B. Colvin, September 20, 1810.

[41] Natural Law and Natural Rights at 214.

[42] Id. at 219.

[43] Interview with Sheila Horan, former Deputy Assistant Director of the FBI's National Security Division (Dec. 15, 2004) [hereinafter "Horan Interview"] ("The government sometimes has few options, but it needs to have some security measures in place. It does no good to say that because we cannot prevent terrorism, we should not do anything. At the least, we can make it uncomfortable for would-be terrorists. After 9/11, the measures needed to be draconian so that terrorists knew that they would be challenged.")

[44] "The 9/11 Commission Report" at 394-395.

[45] Interview with Bruce Hoffman, Corporate Chair in Counterterrorism and Counterinsurgency at the RAND

This report offers a three-pronged framework for evaluating immigration-related security measures and tactics. First, does the measure or strategy relate to a legitimate security goal? Second, what does the measure propose to accomplish, will it be successful in achieving that end, and how can its success (or failure) be assessed? Third, is the measure worth the cost both in resources and opportunities foregone?

A.   Does the Measure Relate to a Legitimate Security Goal?

Many commentators focus on the appropriate goals of an overall national security strategy aimed at the terrorist threat. Professor Phillip Heymann of Harvard Law School, for example, has set forth three goals: (1) reduction of the chance and harm of terrorism; (2) diminishment of public fear and anger; and (3) respect for civil liberties and national unity.[46]

Heymann's nuanced view of security does not turn exclusively on reducing the likelihood of an attack in the short-term. He takes a long-term view of what will be necessary to reduce the threat of terrorism. Of the three goals he posits, public fear and anger has not commonly been considered a core security concern, but it should be. Terrorists cannot militarily defeat the strongest nation in the world and its allies. Revulsion and fear of terrorism can, however, lead to an overreaction that tears at the fabric of our constitutional democracy and our unity as a nation.[47]

Heymann's emphasis on civil liberties and national unity encompasses the need to enlist key communities—like immigrants—in order to create sustained counter-terror strategies. Strategies that violate civil rights cannot be sustained over the long haul in our constitutional democracy. Strategies that target certain groups can alienate them from law enforcement efforts that depend upon their participation in preserving security.[48] National unity and civil liberties are linked; if the United States does not respect the latter, it cannot hope for the former.

Under Heymann's scheme, certain strategies may serve one goal, but undermine another. Security involves weighing the impact of particular strategies in relation to all three goals. Some tactics will be so detrimental to one goal or so crucial to another that they will override all other considerations. Torture, for example, violates human rights and undermines national unity, while making (at best) only marginal contributions to the other two goals. For Heymann, strategies that significantly reduce the likelihood and harm of terrorism and public fear, but that also undermine civil liberties and national unity, present the hardest choices. He particularly

Corporation (Feb. 25, 2005) [hereinafter "Hoffman Interview"] ("The danger is that security measures will never go away once they're in place. They're carved in stone, although they should go away with diminished risk or if they're proven ineffective. I worry about more programs and assurances being heaped on top of a number of previous programs without ever being revisited to see if the programs are working.")

[46] Phillip Heymann, Terrorism, Freedom and Security: Winning Without War (MIT Press, 2003) at 88-90 [hereinafter "Terrorism, Freedom and Security"].

[47] "Flynn Interview" ("The biggest danger is not terrorists; it's what we do to ourselves.")

[48] Id. ("The U.S. government will not be able to enlist the support of all of its residents, including immigrants, in the fight against terrorism unless everybody believes that the government represents them. Law enforcement must remain 'the good guys' in immigrant communities and elsewhere. At the end of the day, its about getting the broader polity to get to the point where they recognize that they are participants.")

resists "security" measures that would fundamentally alter the U.S. democratic system. As an example, he cites the Administration's claimed power to detain U.S. citizen "enemy combatants" without judicial review.

Finally, some "security" tactics may not further any of these goals. For example, denying properly screened migrants the right to seek asylum in their country of choice does not further security. U.S. officials have conceded that the U.S.-Canada safe-third country agreement, in itself, does not constitute a "counterterrorism measure."[49] Similarly, Haitian boat people as a group do not represent a terrorist threat, and their blanket detention does not enhance security.

B.   What Does the Measure Propose to Accomplish, Will it Be Successful, and How Can This Be Assessed?

Success in combating terrorism primarily means preventing attacks.[50] The threat of certain types of attacks (nuclear, chemical, or biological) deserve more resources and leeway in developing preventive tactics because the great potential for harm from those attacks.[51] Yet how can prevention be measured? Occasionally, one can point to an actual thwarted attack and can judge what measures led to prevention of the attack. For example, the 1997 attempt by two Palestinian suicide bombers to attack the New York City subway system was thwarted when a newly-arrived Muslim immigrant decided to tell the New York Police Department about the plot.[52] In December 1999, an astute inspector on the Canadian border stopped Ahmed Ressam, a member of the Armed Islamic Group, who planned to use explosives in his car to bomb Los Angeles International Airport on New Year's Day in 2000. More broadly, intelligence can identify successful or potentially successful terrorist tactics, and provide that information to policymakers who can determine counter-tactics. On occasion, for example, detained terrorists have explained what inhibited them. Khalid Sheikh Mohammed, the mastermind of the September 11th attacks, reportedly credited post-9/11 homeland security measures with forcing al Qaeda "to operate less freely in the United States."[53] If true, this constitutes a success. Short of capturing terrorists, counter-terror measures seek to increase the costs, limit the possibilities, and disrupt the patterns of terrorists.

In cases where terrorists succeed, as with the 9/11 terrorists, law enforcement can determine retroactively what security measures would have stopped an attack. Conversely, one can also analyze whether tactics designed to net terrorists have failed to do so. As an example, the fact that 137,000 Visas Condor security checks of nationals from 26 countries yielded no terrorists

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[49] Harvard Law Student Advocates for Human Rights, The International Human Rights CLINIC, Human Rights Program, Harvard Immigration and Refugee Clinical Program, "Bordering on Failure: the U.S.-Canada Safe Third Country Agreement Fifteen Months After Implementation" (Mar. 2006) at 10, nt. 45.

[50] "CMS Special Report" at 12.

[51] Interview with James Ziglar, former Commission of the Immigration and Naturalization Service (Apr. 4, 2005) [hereinafter "Ziglar Interview"] ("Protection of nuclear plants and materials and large infrastructure projects is crucial and must be given particularly high priority.")

[52] S. Katz, Jihad in Brooklyn (New American Library, 2005).

[53] "The 9/11 Commission Report" at 328.

should trigger a review of whether the program represents a good use of resources.[54] Some tactics may close potential loop-holes or address terrorist scenarios that have not, in fact, been exploited. "Red teaming" describes the process of asking experts to imagine what they might do if they were terrorists.[55] Based on these scenarios, counter-measures can be adopted. Similarly, security experts could identify a list of "indicators" that would trigger an alarm that a certain terrorist scenario was being acted upon.[56]

Often, the success of certain tactics will be subject to debate. A case in point is the arrest and detention of 768 non-citizens encountered during the post-9/11 investigation. Many commentators condemned this round-up as an ineffective security measure because of the fear created in immigrant communities that made many immigrants less willing to cooperate with law enforcement and intelligence officials. As stated, however, intelligence reports indicate that this sweep and other broad measures may have inhibited al Qaeda. In addition, DOJ officials informed the 9/11 Commission that six detainees arrested in this sweep had direct terrorist ties.

Putting aside the impact of the post-9/11 immigrant detentions on civil liberties and national unity, the efficacy of detention and deportation as a measure of success has been controversial. If a person really is a terrorist, releasing the person to his home country does not seem to be an effective way to stop a future attack. Thus, to some counter-terror experts, use of this tactic evidences just how few terrorists or terrorist supporters the post-9/11 investigation yielded: they do not believe that DOJ officials would deport and lose control over persons who legitimately threaten the United States.[57] Others maintain that in certain cases the difficulty of prosecuting suspected terrorists or detaining them indefinitely makes removal to a distant country the best of several bad security options.[58] In addition, lack of resources and constraints on interrogation may also make removal a preferred option.[59]

The House of Lords addressed the interplay between the rights of foreign nationals and national security in a case involving the detention of nine persons certified as suspected international terrorists.[60] After the 9/11 attacks, the United Kingdom (UK) enacted the Anti-

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[54] National Commission on Terrorist Attacks Upon the United States, "Threats and Responses in 2001, Staff Statement No. 10" (Apr. 13-14, 2004) at 13.

[55] "Terrorism, Freedom and Security" at 51.

[56] Id. at 74.

[57] D. Kerwin, "Undermining Antiterrorism: When National Security and Immigration Policy Collide," America at 11, 13 (Harry Brandon, former Deputy Assistant Director of the FBI and head of National Security and Counterterrorism, has stated: "I feel strongly that if they had much of any information to go on, they would keep custody and control.").

[58] "Horan Interview" ("There have been few substantive prosecutions. These cases are difficult to make and, when they cannot be, it's better to have them removed from the country.")

[59] Interview with Daniel Benjamin, Senior Fellow of International Security at the Center for Strategic and International Studies (Nov. 22, 2004) [hereinafter "Benjamin Interview"] ("Most of the deportees were small fish. However, in the case of presumed terrorist activity surrounding the millennium conspiracy in Boston and Brooklyn, the country decided to deport those individuals. Constraints on both resources and interrogation tactics may be leading the government to decide that deportation is the best method for handling individuals who are not very important in the terrorist world.")

[60] A (FC) and others (FC) (Appellants) v. Secretary of State for the Home Department (Respondent), [2004] UKHL 56.

terrorism, Crime and Security Act of 2001 which provided for the indefinite detention – without charge or trial -- of those certified as "suspected international terrorists" who could not be removed from the UK, either as a matter of law or because no country would accept them. The appellants challenged their detention as a violation of their rights to liberty (Article 5) and non-discrimination (Article 14) under The European Convention of Human Rights. Article 15 (1) of the Convention, which the UK had invoked, allows derogation from Convention obligations "in the time of war or other public emergency threatening the life of the nation" provided that such measures are "strictly required." The House of Lords concluded that the detention measures were not "strictly required" or "proportional" because they did not apply to UK nationals, permitted the departure of terrorists to countries willing to receive them, and covered persons not suspected of posing an active threat. Analyzing Article 5, the House of Lords reasoned that "the choice of an immigration measure to address a security problem had the inevitable result of failing adequately to address" the full threat, while leading to the indefinite detention of persons "suspected of having Al Qaeda links, who may harbor no hostile intentions towards the United Kingdom."[61] It concluded that the measure was impermissibly discriminatory under Article 14: "What cannot be justified here is the decision to detain one group of suspected international terrorists, defined by nationality or immigration status, and not another."[62]

   Terrorist prosecutions represent an objective measure of success, but this potential metric has been undercut by DOJ's practice of counting minor offenses as terrorism-related crimes. In the two years following September 11th, 6,400 persons were referred for prosecution for federal terrorism-related crimes, including immigration violations and document fraud.[63] "Terrorism" prosecutions increased more than three-fold during this period (341 cases in total), but only 16 convictions resulted in sentences of more than five years. In the two years preceding the attacks, there had been 24 such cases.

   If the record of post-9/11 prosecutions has been unimpressive,[64] this may be explained by the difficulty of gaining terrorist convictions and the use of Guantanamo Bay and other overseas detention facilities in serious cases.[65] To many, the failure to apply the civilian criminal justice system to suspected terrorists represents an opportunity foregone. Criminal trials present an opportunity to showcase what separates the United States from terrorists. [66] In addition, they can discredit and reduce terrorists in the public imagination, an important counter-terror goal. This occurred in Turkey, for example, during the trial of Abdullah Ocalan, leader of the Kurdistan

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[61] Id.,§ 43.

[62] Id., § 68

63 "The Transactional Records Access Clearinghouse, "Criminal Terrorism Enforcement Since the 9/11/01 Attacks: A TRAC Special Report," (Syracuse University, Dec. 8, 2003).

[64] "Benjamin Interview ("The prosecutorial record of terrorism cases in the last four years is appalling.")

[65] Interview with Larry Johnson, CEO of BERG Associates, LLC and former Deputy Director of the U.S. State Department's Office of Counter Terrorism (Dec. 21, 2004) [hereinafter "Johnson Interview"] ("Before 9/11, we had more terrorism-related prosecutions than we do now because the Administration is proceeding with military-style resolution of these cases.")

[66] "Johnson Interview" ("The difference between a terrorist state and a civilized nation is that civilized nations allow for due process.")

Workers' Party (PKK).[67] It is why terrorists often insist on being treated as political prisoners. For the same reason, the Israeli trial of Adolph Eichmann has been widely viewed as one of the most effective prosecutions of a terrorist.

Trials also establish the state's power in a way that extraordinary tribunals do not and affirmatively demonstrate success in combating terrorism.[68] Likewise, public trials may deter other terrorists in a way that a closed removal hearing or a military tribunal will not.[69]

C.   Is the Tactic Worth the Cost Both in Resources and Opportunities Foregone?

The final criterion for evaluating a security measure involves weighing the cost in resources expended and opportunities foregone against its benefit.[70] Given limited resources, the United States must use its counter-terror resources in ways that will eliminate the most significant risks.[71] As distasteful or politically unpopular as it may be, full security cannot be guaranteed and risk-management must be embraced. Thus, for example, it has been estimated that it would cost $206 billion over five years to deport the nation's estimated 12 million undocumented persons,[72] an amount projected to exceed the entire DHS budget for that period.[73] This costly and bitterly divisive measure would yield few security benefits. On the other extreme, few would dispute the need or cost associated with conducting identity and security screening of persons seeking visas to the United States.

D.   A Case Study in Measuring Success—Evaluating The US-VISIT Program

The Migration Policy Institute's (MPI's) report on the US-VISIT program provides the kind of

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67 B. Hoffman and K. Cragin, "Four Lessons from Five Countries," Rand Review (Summer 2002); C. Caryl, "Why They Do It," New York Review of Books (Sept. 22, 2005).

[68] "Johnson Interview" ("The post-9/11 arrests made Americans feel that the government was doing something to protect us, as did prosecutions for crimes that funded terrorism.")

[69] "Hoffman Interview" ("The visibility of a trial has a deterrent effect. While placing a terrorist in jail for two to three years is only a temporary fix in regards to that terrorist, jailing them has a demonstrable deterrent effect on other terrorists. Closed deportation hearings do not provide the visibility necessary for to create a demonstrable deterrent effect.")

[70] "The 9/11 Commission Report" at 164 ("No defenses are perfect. But risks must be calculated; hard choices must be made about allocating resources ... Planning does make a difference, identifying where a little money might have a large effect."); "Hoffman Interview ("It may well be that the resources spent on the formation of the DHS should have been expended on getting the FBI a modernized computer system. This kind of calculation needs to be made.")

[71] "Hoffman Interview" ("We cannot protect the United States from all of its vulnerabilities. The country's finite resources need to be applied wisely.")

[72] J. Passel, "The Size and Characteristics of the Unauthorized Migrant Population in the U.S. (Pew Hispanic Center, Mar. 7, 2006); see also, Robert Justich & Betty Ng, The Underground Labor Force Is Rising to the Surface, Bear Stearns Asset Management, Jan. 3, 2005, available at http://www.bearstearns.com/bear/bsportal/CorporateHome.do.

[73] Rajeev Goyle and David A. Jaegar, Ph.D, "Deporting the Undocumented: A Cost Assessment" (Center for American Progress, July 2005).

analysis contemplated by this report. It also offers a study in the complexities of evaluating particular security programs.[74] As stated earlier, US-VISIT attempts to track temporary visitors to the United States. Under the program, visitors provide biometric and biographical data at U.S. consulates and again when they enter the United States, and the US-VISIT system checks this data against various databases. US-VISIT is also intended to "check out" visitors, determining whether they have left within the permitted period. Relying on the MPI analysis, we will evaluate US-VISIT based on our three criteria.

1.   Does US-VISIT Relate to a Legitimate Security Goal?

US-VISIT attempts to address legitimate security goals: it seeks to prevent the admission of terrorists to the United States, to assure that visitors abide by the terms of their admission, and to identify potential terrorists who have already entered. In particular, US-VISIT responds to weaknesses exploited by the 9/11 terrorists who entered the United States on temporary visas. Many applied for their visas using fraudulent or altered documents and later violated the terms of their visas. Some of the hijackers' names were on government watchlists at the time they entered the United States. If fully implemented, US-VISIT would arguably have intercepted some of them. As the 9/11 Commission—now called the 9/11 Public Discourse Project— recently stated: "It is imperative for national security that the government knows who is coming into our country, can effectively verify identities, establishes how long people are here, and when they leave."[75] An effective entry/exit system would further these goals.

2.   What Does U.S.-VISIT Propose to Accomplish, Will it Be Successful, and How Can This Be Assessed?

MPI concluded that the utility of US-VISIT would be limited because "established terrorists" would not voluntarily submit biometric and biographical data, and those with "clean" records would not be included in watch lists.[76] In the alternative, the system might push terrorists to enter the United States in another way, perhaps by illegally crossing a border.[77] Its effectiveness in determining whether a visitor otherwise abided by the terms of his non-immigrant visa—or in other words, did what he or she was admitted to do—would be limited. In addition, US-VISIT covers only 42 percent of those who arrive at airports and seaports, and only two percent of those who enter at land borders.[78] It does not apply to U.S. citizens, lawful permanent residents,

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[74] Rey Koslowski, "Real Challenges for Virtual Borders: The Implementation of US-VISIT" (Migration Policy Institute, June 2005) [hereinafter "The Implementation of US-VISIT"].

[75] 9/11 Public Discourse Project, "Report on the Status of 9/11 Commission Recommendations, Part I: Homeland Security, Emergency Preparedness and Response" (Sept. 14, 2005).

[76] "The Implementation of US-VISIT" at 3, 25.

[77] Counterterrorism experts are well-aware that defensive counterterrorism measures such as US-VISIT often do not work well because of "substitution effects"—and sometimes they increase harm. See Cynthia Lum, Leslie W. Kennedy, & Alison J. Sherley, "The Effectiveness of Counter-Terrorism Strategies: A Campbell Systematic Review," working paper dated January 2006, at 3.

[78] E. Lipton, "Border Control Takes One Leap Forward," New York Times (Dec. 30, 2005).

Mexicans with border crossing cards, or most Canadians.[79]

The MPI report also set forth conditions that must be met for the program to succeed. The system must be accurate enough to assure that lack of an exit record means that the person has not left the country.[80] Ultimately, the program must collect data on all relevant entries and exits, or its data will be incomplete and suspect.[81] Finally, DHS must follow up on US-VISIT overstay reports. In a September 2005 report, however, the DHS Office of Inspector General found that only a "minuscule" number of potential visa violators reported by US-VISIT, SEVIS, NSEERS and the Department of State (DOS) were actually located and removed from the country.[82] The report faulted, in large part, inadequate US-VISIT data entry procedures and the failure to implement its exit system.[83]

US-VISIT will also require enhanced physical infrastructure and staffing.[84] This could be extremely expensive.[85] Measures must be taken to guard against fraud, particularly in the exit process.[86] US-VISIT must interface efficiently and securely with relevant databases that contain biometric and biographical data.[87] The system should not create its own security vulnerabilities through the collection of valuable identity information that could be stolen by unscrupulous insiders or hackers. Database security presents a massive challenge, particularly if data on international travelers will be shared between nations.[88] The program might also have unintended, negative consequences, including significant delays at the border.[89]

The program's success will be difficult to measure. If successful, US-VISIT will foreclose a potential avenue of terrorist entry and will serve as an important deterrent.[90] No terrorists have yet to be intercepted by the program, although it allegedly has stopped more than 970 persons with "histories of criminal or immigration violations."[91]

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[79] DHS has suggested that it may eventually enroll all of these groups in US-VISIT. In the interim, DHS and the Department of State have plans to address security concerns with the Western Hemisphere Travel Initiative (WHTI), a program that will require all North American border crossers to have a passport or other secure identification. WHTI has been controversial because of its anticipated economic harm to border communities.

[80] "The Implementation of US-VISIT" at 20.

[81] Id. at 44-45.

[82] U.S. Department of Homeland Security, Office of Inspector General, "Review of the Immigration and Customs Enforcement's Compliance Enforcement Unit," OIG-05-50 (Sept. 2005) at 17.

[83] Id. At 20-21.

[84] "The Implementation of US-VISIT"at 33-34.

[85] "Ziglar Interview" ("In order to have an effective exit-entry system, the United States needs to have an effective exit system, which is difficult because we lack the infrastructure at airports, seaports, and land ports. It will require significant resources to build this infrastructure.")

[86] "The Implementation of US-VISIT" at 41-43.

[87] Id. at 45.

[88] Id. at 52.

[89] Id. at 33-34.

[90] "Ziglar Interview" ("Even if the program was not one hundred percent effective, it could still serve as a deterrent and would catch some terrorists.").

[91] U.S. Department of Homeland Security, "US-VISIT Update: DHS Completes Foundation of Biometric Entry System" (Dec. 30, 2005).

3.   Is US-VISIT Worth the Cost in Resources and Opportunities Foregone?

The cost of US-VISIT's full implementation could be immense. In February 2003, DHS estimated that US-VISIT would cost $7.2 billion through 2014,[92] but with necessary system and infrastructure investments the 10-year cost could exceed twice that amount.[93]   By way of comparison, DHS's budget in 2006 for border and interior immigration enforcement is $9.85 billion.[94] Given this cost, MPI proposes that DHS weigh "the opportunity costs" of deploying US-VISIT in relation to other anti-terror strategies.[95]   In essence, US-VISIT as a tactic should be justified against other programs that promise to provide more security at a lower cost.[96] This should be a standard question for all security strategies.

IV.   *Key Priorities in Counter-Terror Fight*

The 9/11 Commission stressed that "long-term success [in the fight against terrorism] demands the use of all elements of national power: diplomacy, intelligence, covert action, law enforcement, economic policy, foreign aid, public diplomacy, and homeland defense."[97]   It identified three broad strategies: (1) attack terrorists and their organizations, and remove their sanctuaries; (2) prevent the growth of Islamist terrorism through engaging the struggle of ideas, stressing educational and economic opportunity, and expanding international cooperation; and (3) protect against and prepare for terrorist attacks.[98] Immigration, the theme of this report, mostly ties into the latter goal, although some immigration programs—such as recruitment of foreign language translators and exchange visitor programs—impact the former as well.

Because terrorism poses an asymmetrical threat—that is, very few terrorists can cause massive damage against a militarily superior foe—any security strategy must be "layered" and include redundancies. More than one government agency, as well as foreign allies and private partners, must be looking for terrorists in more than one way.[99] Multiple entities, including immigration

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[92] Testimony of Mr. Randolph C. Hite, Director, Information Technology Architecture and Systems Issues, U.S. General Accounting Office, before the House Committee on the Judiciary, Subcommittee on Immigration, Border Security, and Claims (Mar. 18, 2004).

[93] "The Implementation of US-VISIT" at 10.

[94] U.S. Department of Homeland Security, "DHS Receives $2.4 Billion Increase for 2006 Appropriations" (Oct. 18, 2005), available at http://www.dhs.gov/dhspublic/display?theme=43&content=4894&print=true.

[95] "The Implementation of US-VISIT" at 52.

[96] Recently, the Government Accountability Office reported that "progress in critical areas has been slow" and that DHS had not properly assessed the costs and benefits of the program. See Government Accountability Office, Recommendations to Improve Management of Key Border Security Program Need to Be Implemented, GAO-06-296 (February 2006).

[97] "The 9/11 Commission Report" at 363-364.

[98] Id. at 365-398.

[99] Interview with Susan Ginsburg, Senior Counsel and Team Leader for the National Commission on Terrorist Attacks Upon the United States (Dec. 16, 2004) [hereinafter "Ginsburg Interview"] ("A small number of terrorists can do a great deal of damage. Add to that the fact that there is a larger group of ambiguous 'supporters' of terrorism, and you see that you need to have a lot of people looking at a lot of different issues and types of data in order to track the most dangerous threats. You need to be sure that actions are going to be taken at different times

officials, must look at different data in order to identify and track the most dangerous threats. Interception strategies should focus on the resources (financial and other), systems (communication and travel), criminal activity (smuggling and document forgery), and training that terrorists need to carry out their work.

This paper will not attempt to describe the full range of strategies and resources that must be mobilized to reduce the threat of terrorism.[100]   It will instead highlight a few key counter-terror priorities that do not primarily relate to immigration, but which have implications for US immigration policy.

A.   The Battle for Hearts and Minds

The United States must break the cycle of terrorist recruitment and replenishment. Strategies to win the hearts and minds of citizens in terrorist-producing states will have positive long-term security implications.[101] Such strategies can be as simple as providing targeted foreign aid. For example, U.S. aid in response to the October 8th earthquake that killed more than 53,000 Pakistanis may improve U.S. standing in Pakistan.[102]

The war in Iraq looms large in this discussion. The Bush Administration argues that the war will catalyze political and economic reform throughout the Middle East. This will, in turn, diminish terrorism's appeal to potential recruits.[103]   On the other hand, a recent classified study by the State Department and Central Intelligence Agency has raised concerns that terrorists trained in Iraq will disperse and threaten other nations.[104]   Similarly, the National Intelligence Council has warned that "Iraq and other possible conflicts in the future could provide recruitment training grounds, technical skills and language proficiency for a new class of terrorists who are 'professionalized' and for whom political violence becomes an end in itself."[105]   The Soviet invasion of Afghanistan in 1979, which led eventually to the rise of Al Qaeda by providing the early Al Qaeda members with training camps and a laboratory for their tactics, provides a glimpse of what the future might hold.

and geographical points. To do this, there is a need to engage the Border Patrol, NGOs, employers, and the police. Counter-terror responsibility must be widespread but focused and many screening points must be used.")

[100] "Johnson Interview" ("The priorities are clear. We need a comprehensive approach that involves tracking, locating and capturing (or killing) would-be terrorist. We need increased international cooperation to disrupt terrorist training and recruitment; enhanced airline and cargo screening and security; improved intelligence cooperation between agencies and between federal, state and local authorities; improved entry-exit of travelers; tracking of money through cooperation with DEA and banking sources.")

101 John Adams used the term "hearts and minds" in reference to the American revolution: "The Revolution was effected before the War commenced. The Revolution was in the minds and hearts of the people …. This radical change in the principles, opinions, sentiments, and affections of the people, was the real American Revolution." Letter from John Adams, to Hezekiah Niles, Feb. 13, 1818.

[102] D. Rohde, "For Devout Pakistani Muslims, Aid Muddles Loyalties," New York Times, A3 (Oct. 26. 2005).

[103] The 9/11 Commission Report, 378-379.

[104] W. Strobel, "Iraq seen emerging as prime training ground for terrorists," Knight Ridder Newspapers (Jul. 4, 2005).

[105] National Intelligence Council, "Pervasive Insecurity: Report of the National Intelligence Council's 2020 Project," available at http://www.cia.gov/nic/NIC_globaltrend2020_s4.html.

Terrorist recruitment feeds on public opinion. For this reason, the well-publicized U.S. abuses at Abu Ghraib prison, the open-ended detention of "enemy combatants" at Guantanamo Naval Base, the use of secret CIA prisons abroad, and recent attempts to exempt the CIA from prohibitions against torture may undermine U.S. security in the long-term.

B.   Securing the Support of Allies

The United States depends on its allies in every aspect of its counter-terror strategy, particularly in intelligence gathering and military actions.[106] The prosecution of al Qaeda operative Iyman Farris—a naturalized U.S. citizen born in Kashmir—for his role in a plot to blow up the Brooklyn Bridge has highlighted the importance of overseas operations. Faris was arrested based on information obtained from an Al Qaeda leader detained overseas.[107]

Conversely, actions that isolate the United States or alienate its allies diminish America's ability to prevail in the battle against terrorism.[108] Recent months have seen, for example, a European Union inquiry into violations of international law related to the CIA's use of secret prisons in Eastern Europe,[109] a Canadian Commission of Inquiry into the return of a Canadian terrorist suspect from John F. Kennedy Airport to Syria where he reported suffered torture,[110] and an attempt by an Italian prosecutor to extradite 22 CIA officials for the kidnapping (and rendition to Egypt) of Osama Moustafa Hassan Nasr in Milan.[111]   Likewise, the treatment of immigrants in the United States affects U.S. diplomatic relations and public opinion in immigrant-sending states.[112] Visa restrictions and registration programs, in particular, have led to popular and diplomatic protests from Muslim countries.[113]

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[106] "Johnson Interview" ("The key to effective counter-terror strategy is international cooperation. We need to have cooperation and the ability to enter other countries. A 'lone cowboy' approach is ineffective because the United States either needs permission or an act of international war to enter a country to locate terrorists."); "Bearers of Global Jihad?" at 27 ("Since September 11th FBI officials say that a significant amount of their intelligence has come from overseas captures and detentions .... The second leading source of information is cooperation with foreign intelligence services that run informants.")

[107] R. Leiken, "Bearers of Global Jihad?: Immigration and National Security after 9/11," (The Nixon Center, 2004) at 17 [hereinafter "Bearers of Global Jihad?"].

[108] "Flynn Interview" ("U.S.-driven policing primarily is going to be what the United States most needs to manage the terrorist threat in North America. When you do things that alienate your neighbor and make it politically difficult for them to cooperate, then collaborative options become non-starters. If you are unilaterally draconian, your neighbors will say, 'take care of it yourself.'")

[109] G. Kessler, "E.U. Seeks Details on Secret CIA Jails," Washington Post (Dec. 1, 2005).

[110] Canadian Commission on Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, "Press Release: Commissioner Dennis O'Connor releases the Fact Finder's report on Maher Arar's treatment in Jordan and Syria" (Oct. 27, 2005), available at http://www.ararcommission.ca/eng/ReleaseFinal_oct27.pdf.

[111] J. Crewdson, "Italy Prosecutor, Boss Clash over CIA Case," Chicago Tribune (Nov. 23, 2005).

[112] Interview with Dr. James Zogby, President of the Arab American Institute (Feb. 13, 2004) ("When I travel abroad, I have found that the single most important concern, eclipsing all others, is how we treat Arab and Muslim visitors and immigrants to our country. These measures have made us less popular and make it far less popular for governments to cooperate with us.")

[113] J. Paden and P. Singer, "America Slams the Door (On Its Foot), Foreign Affairs, Vol. 82, No. 3 (May/June 2003) at 13 ("The new measures have such damaging implications for the conduct of foreign affairs that they should no

The irregular or extraordinary rendition of suspected terrorists has undermined public support for the United States abroad and strained U.S. relations with its allies. The United States engaged in such renditions during the 1990s.[114] In some cases, the CIA helped other governments to identify terrorist cells who operated within their borders. Suspects would be detained and, with logistical help from the United States, delivered to a third country for trial. These operations were kept secret so that the country in which the terrorist was found, or the one to which he was delivered, were protected from charges that they were acting as lackeys of the United States.[115] In theory, such renditions aid intelligence collection, advance foreign prosecutions, and stop individuals from committing acts of terrorism.[116] They can also move suspects out of countries that may lack the capability and evidence necessary to prosecute them.

The expanded use of irregular rendition post-9/11 and its connection to countries that practice torture has caused a backlash. At present, the practice of carrying out such renditions threatens to worsen perceptions of the United States in terrorist-producing countries and undermine America's relations to it allies.[117] In addition, evidence obtained by torture cannot be used in a criminal trial, possibly foreclosing one option for dealing with terrorists.

C.   Reform of Government Institutions

The September 11th attacks have led to the most far-reaching reform of the U.S. government's intelligence and security apparatus in its history.   The attacks highlighted, among others, the need for (1) the FBI to change from an agency that solved crimes to one that also prevented terrorist attacks; (2) the Central Intelligence Agency (CIA) to infiltrate terrorist groups; (3) the nation's immigration function to be part of a coordinated homeland security strategy; (4) improved information sharing between military, intelligence, and law enforcement agencies at all levels.[118] Yet institutional reform does not, in itself, solve the terrorism challenge.[119] It may lead

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longer be viewed in isolation. Already, the new programs are provoking widespread protests and indignation abroad. Nearly every Muslim ambassador to the United States has raised the matter with the State Department .... More widely, the new requirements have become major political issues within the Islamic world, helping to stoke the belief that the United States is hostile to Muslims in general.")

[114] "Benjamin Interview"

[115] Daniel Benjamin & Steven Simon, The Age of Sacred Terror 251-252 (Random House 2002).

[116] G. Kessler, "Rice Defends Tactics Used Against Suspects," Washington Post (Dec. 6, 2005).

[117] "Hoffman Interview" ("The use of rendition breeds cynicism and distrust of the United States across the world. The best face that we can put on our country's recent use of rendition is to attribute the use to the immediate emotional response to 9/11.").

[118] "Terrorism, Freedom and Security" at 63-64 ("At the gathering stage, the CIA paid too little attention to the strategic and tactical needs for human intelligence among radical Muslim groups abroad. The FBI paid too little attention to the suspicions and fears of its agents in the field. We were too deferential to the privacy of terrorists connected to religious charities and mosques at home. The raw information we got – including a strong warning on September 10, 2001 – was not translated in a timely fashion. The FBI was computer-challenged. The White House was slow to adopt a strategy for terrorism ... The FBI and the CIA were unwilling or unable to exchange information; this applied even more to furnishing information to the Immigration and Naturalization Service.")

[119] "Hoffman Interview" ("The United States government looks for bureaucratic solutions to problems that are too complex to be solved in that way. The shift of twenty-seven departments into the DHS does not mean that the problems that led to 9/11 have been solved. It could be just rearranging the deck chairs on the Titanic.")

to reduced productivity and diminished performance in the short-term.[120] In addition, the deeply ingrained cultures and distinct missions of the relevant federal agencies inhibit the cohesiveness that will be necessary to address the global terrorist threat.[121] The relevant agencies face an immense task with an uncertain outcome.[122]

The FBI offers a case study in the dramatic challenges federal agencies in reconstituting themselves to meet this threat. Terrorism had been an FBI priority prior to the September 11th attacks. The August 1998 al Qaeda attacks on the U.S. embassies in Nairobi, Kenya and Dar es Salaam, Tanzania underscored the international threat posed by terrorism, and led to the formation of Joint Terrorism Task Forces and counter-terrorism squads in almost every FBI field office.[123] After the 1993 World Trade Center bombing, the FBI initiated greater reconnaissance efforts in large U.S. cities believed to be potential targets. On a daily basis, squads of counter-intelligence and counter-terrorism agents built files on terrorist groups, tracked terrorist travel, and met with their law enforcement counterparts.

At the time, the FBI did not have a wealth of institutional knowledge concerning the Middle East, but it had the ability to establish electronic intercepts quickly. At the same time, it had to accommodate the political landscape and pressing criminal priorities. Its agents were mostly white males. Agents of Middle Eastern, Russian, or Vietnamese descent tended to be monopolized in overseas investigations.[124] The lack of diversity in FBI ranks reduced the Bureau's ability to gather information in local communities. In addition, the FBI suffered from a lack of capable translators. It aggressively recruited individuals of Middle-Eastern descent, but often good candidates did not pass the necessary background checks, typically because of relatives abroad.[125] The FBI also faced civil rights issues to the extent its work required it to infiltrate religious communities.[126]

Historically, the FBI had focused on solving and prosecuting crimes, not preventing attacks.[127] The attempt to change the agency's mission and culture post-9/11 assumes a competent, willing

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[120] "Benjamin Interview" ("It could take DHS five years to get back to the level of productivity that was achieved before the agency was created."); S. Glasser and M. Grunwald, "Department's Mission Was Undermined from Start: The Department of Homeland Security was only a month old, and already it had an image problem," Washington Post (Dec. 23, 2005).

[121] "Flynn Interview" ("The coordination between DHS and DOD is rocky at best. DOD remains agnostic at best about the DHS mission.")

[122] "Hoffman Interview" ("In the new national intelligence agency, there is another level of bureaucracy and the director is too removed from the actual agencies. Intelligence may become more myopic or politicized under the new agency.")

[123] "Horan Interview"

[124] *Id.*

[125] *Id.* ("I always felt that the FBI should lessen its background requirements in some areas, as the CIA has done, in order to find a better balance between security and suitable personnel.")

[126] Interview with Admiral Bobby Ray Inman, Lyndon B. Johnson Centennial Chair in National Policy at the University of Texas's School of Public Affairs (Dec. 9, 2004) [hereinafter "Inman Interview"] ("Seeking out clean terrorist operatives has to be a focus for the FBI. However, it is difficult for the FBI to identify clean operatives, especially with respect to individuals who display religious fervor which it will often be in these cases.")

[127] "Hoffman Interview" ("The DHS does not have the collection and analytic capabilities, and the FBI is a law enforcement and investigative agency, not an intelligence agency.")

staff.[128] Training in this area has increased, but it remains modest.[129] Field agents must also embrace the turn from a paradigm of traditional law-enforcement investigation to prevention of harm to the homeland. In the field offices where there are actual terrorism cases, the agents find that their work is satisfying.[130] In contrast, many field agents in smaller offices find the shift to terrorism prevention frustrating. It remains a challenge to create an intelligence gathering, terrorism prevention career path in a traditional law enforcement agency. Meanwhile, the FBI must maintain a talented and experienced pool of agents, despite the changes in its mission, new work demands, and recruitment of agents by private industry, the CIA, and other agencies.

The FBI's traditional law enforcement mission inhibits information sharing in two ways. First, intelligence agencies worry that information provided to the FBI will become publicly available.[131] Second, the FBI tends to withhold information that it wants to preserve for criminal prosecution.[132] The FBI did not share information routinely with the INS pre-9/11 largely because it did not regard INS as a partner in security issues.[133]

The 9/11 Public Discourse Project, comprised of former 9/11 Commission members, recently graded the FBI's progress in several areas. Highlighting the challenges of reform, the Project reported that the FBI had made "insufficient progress" toward developing a "specialized and integrated national security workforce" and "an institutional culture imbued with deep expertise in intelligence and national security."[134] In particular, it found "significant deficiencies in the FBI's analytic capabilities; information sharing with other agencies and with local law enforcement is still inadequate; leadership of counterterrorism and intelligence has changed repeatedly; to date, initiatives to improve information technology capabilities have failed."[135]

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[128] "Inman Interview" ("The intelligence community conducts extraordinarily sensitive information collection and has figured out how to distill this information and extract useful information quickly and to communicate the results quickly and efficiently. In contrast, there is nothing in the FBI's culture that would have accustomed agents to look for warning signs or threats.")

[129] "The 9/11 Commission Report" at 77 ("Only three days of a 16-week agents' course were devoted to counterintelligence and counterterrorism, and most subsequent training was received on the job."); "Benjamin Interview".

[130] "Horan Interview"

[131] "Inman Interview" ("The FBI's historical focus has been on a careful and thorough process of accumulating evidence. In contrast, on the intelligence side, the focus is on quick collection and analysis of information in order to identify warning signs. Culturally, the intelligence community is reluctant to share its information with the FBI or the public. It considers any information provided to the Department of Justice or to the FBI as likely to become available publicly through the discovery process. It would be helpful to find a way to share sensitive information among agencies without permitting it to be used in discovery.")

[132] "Ziglar Interview" ("The information sharing conflict was there in a big way when I was with the INS and, and as far as I can tell, it is still an issue, though it has clearly gotten better. The FBI prosecution side is still influencing its investigative side, which causes important information to be withheld. A solution would be to remove the investigative side of the FBI from the influence of prosecutors and the Justice Department.")

[133] "Horan Interview".

[134] The 9/11 Commission Report, 425-426.

[135] The 9/11 Public Discourse Project, "Report on the Status of 9/11 Commission Recommendations, Part II: Reforming the Institutions of Government" (Oct. 20, 2005) at 4.

D. Intelligence Collection, Mining, Analysis and Sharing

   Intelligence collection, mining, analysis, and dissemination undergird counter-terror activities.[136] Good intelligence allows for proactive counter-terror strategies.[137] It allows for targeted strategies that do not undermine civil rights and national unity.[138] The September 11th attacks highlighted grave deficiencies in all three areas. The US intelligence community had not infiltrated al Qaeda and had not collected actionable intelligence. Key information on Al Qaeda and the hijackers that was kept in various federal agencies had not been extracted and pieced together in an usable way. Furthermore, it was not shared in a timely enough way to prevent the attack.

1. Intelligence Collection

   Intelligence collection against an adversary like Al Qaeda cannot be effective without the cooperation of foreign governments and immigrant communities, and without the effective integration of law enforcement entities. The U.S. or its allies must infiltrate terrorist groups, work with often unsavory people who have access to these groups, or intercept information electronically.[139] Infiltration of terrorist groups represents a long-term, daunting challenge, and must be part of a multi-faceted strategy.[140] Yet its importance will grow as more Al Qaeda-inspired groups emerge, and these groups recruit new members who do not fit traditional terrorist profiles.

2. Information Mining

   Information collection must be coupled with the ability to extract (mine) relevant information from various sources and to piece it together in a way that reveals particular threats. Given the vast amount of information collected since 9/11 and the uncertainty regarding what much of it

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[136] "CMS Special Report" at 12 (As Vincent Cannistraro puts it: "[T]he problem of terrorism is one of getting intelligence, having the information that is necessary to act preemptively. If we are investigating an act of terrorism, then we have already failed, because the mission of anti-terrorism is to preempt terrorism from taking place in the first place.")

[137] "Flynn Interview" ("If the best defense in fighting terrorism is a good offense, as the administration maintains, they will fail at bringing the fight to the terrorists without underlying intelligence.")

[138] "CMS Special Report" at 18 (As Harry Brandon puts it: "If we have good intelligence, we do not have to be going out and causing problems with immigrant communities."); "Bearers of Global Jihad?" at 18.

[139] "Johnson Interview" ("To secure human intelligence, you need to recruit somebody in the terrorist group, insert an outsider, get to a friend of an insider, or use a foreign intelligence service.").

[140] "Bearers of Global Jihad?" at 11 ("[P]rocuring timely, usable intelligence on al Qaeda inc. has proved exceedingly difficult. This human intelligence gap may take years to fill, especially if al Qaeda inc. remains an array of networks. Meanwhile there is a pressing need to continue to detain terrorists abroad (as well as here) for they have proved our best source of information, for liaison with foreign intelligence agencies ... to train our own Arabists and other linguists, to modernize human intelligence, and to inculcate relations with our own domestic Muslim communities.")

means, information analysis represents a significant challenge.[141] This need is particularly acute in the immigration context, because only a small percentage of the intelligence collected by the traditional intelligence community is relevant to border officials.[142]

   "Mining" has been defined as "looking for suspicious patterns of behavior" or "the behavioral characteristics" of terrorists.[143] It involves "machine" processing of databases. Like mining, "profiling" requires that criteria be established and screens developed that can lead to terrorists or terrorist plots. Profiling has been controversial in the post-9/11 world. Civil libertarians criticize it, while national security experts laud it as "good law enforcement."[144] To a certain extent, both groups talk past each other. Properly constituted, profiles comprise patterns of behavior, experiences, and characteristics that are associated with criminality or terrorism. They can be developed by combining information (such as flight training, travel to certain terrorist hotbeds, and association with certain persons) or by starting with a category of behavior and subtracting information (such as those who purchase vast amounts of fertilizer, minus farmers).
[145] In the absence of specific or "actionable" intelligence, and properly conceived, mining and profiling are important counter-terror tools—but they also require trained security personnel or they may be ineffective. For example, profiles used by the Computer Aided Passenger Pre-Screening system (CAPPS), a tool used by airlines to assess passengers, identified several of the 9/11 terrorists.[146] At the time, however, this triggered only additional baggage screening, because airline security personnel were not trained to spot and question potential terrorists.[147]

   Profiles can be successful when based on intelligence and behavior.[148] For example, a profile based on how terrorists alter documents (which the 9/11 Commission refer to as "terrorist indicators"), how they travel, or the kinds of crimes they commit to support themselves can filter potential terror suspects from the mass of innocent people.[149] Profiles are much less useful, however, when based on broad religious, racial, or ethnic characteristics. Religion, by itself, would be a meaningless characteristic to profile. It would be an exercise in futility to create a profile that encompassed 1.5 billion Muslims, and a potential terrorist could fool the profile

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[141] "Johnson Interview" ("Better human intelligence is a key to preventing terrorist acts, if the information collected is properly integrated with information collected from other sources.")

[142] "Inman Interview" ("Only a tiny amount of information produced by the intelligence community is relevant to the border infrastructure.")

[143] American Bar Association, Standing Committee on Law and National Security, "Counterterrorism Technology and Privacy," a Report on the Cantigny Conference (June 23-25, 2004) at 3-4.

[144] "CMS Special Report" at 9 (Harry Brandon: "Profiling is a hot-button word. I will tell you that 'profiling' to me, in a very simple way, is effective law enforcement. What has happened is that law enforcement officers in the past – hopefully in the past – have in some cases dramatically abused their authority and under the guise of profiling, which to me means looking for logical suspects ..., have basically harassed people because of their national origin. This is not profiling, that is breaking the law.")

[145] "Terrorism, Freedom and Security" at 73.

[146] "The 9/11 Commission Report" at 1-4.

[147] Even today, TSA personnel in US airports are not trained to interrogate passengers who may be potential security threats.

[148] "Flynn Interview" ("Intelligence and observing aberrant behavior are the best way to locate terrorists.")

[149] Johnson Interview" ("We need to follow-up on identification theft, credit card theft, smuggling, and other crimes that terrorist commit to support themselves.")

simply by donning a cross and pretending to be Christian. Nationality, by itself, is not useful given the emergence of radicals from many countries—including the United States—whose first loyalty is to a world-wide movement, rather than a particular nation.[150] Profiling based on broad characteristics tends also to be more destructive of civil liberties and national unity. The more difficult question is whether religion or nationality should be used in profiles that also contain behavior or intelligence-based criteria. Many security experts regard these kinds of profiles as appropriate if they reflect solid intelligence; i.e., that terrorists tend to be male, Muslim, to come from certain countries, and to engage in certain types of behavior.[151] On the other hand, al Qaeda has proven adept at recruiting many who do not meet these criteria.

   The latter observation leads to another key point: Whatever the profiles, they must evolve because terrorists soon learn and adapt to them.[152] Sophisticated criminals do the same.[153] Terrorist profiles based on the 9/11 hijackers—young, single, Arab males—may already be outdated.[154] Even before 9/11, Al Qaeda sought recruits in non-Arab countries such as the Philippines and Indonesia, and even among disaffected groups in the United States. Intelligence has recently disclosed efforts by Islamic terrorist groups to train and develop "white" (non-Arab) terrorists in the Balkans who could launch attacks in Europe.[155] A Belgian woman, by birth, recently conducted a suicide attack against U.S. forces in Iraq. This appears part of a larger trend toward terrorist recruitment of European women.[156] Profiling may thus increase the likelihood of detecting terrorist attacks "in the short term, but create the possibility of dangerous substitutions in the long run."[157]

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[150] Benjamin Interview" ("Radical Muslim terrorists can increasingly be found in nations throughout the world. I am less concerned with a person's country of origin and more concerned with radicals who consider themselves members of the global Muslim community.")

[151] "Horan Interview" ("Although it is terrible and distasteful to pick out the Middle Eastern individuals, right now, the problem is with Middle Eastern individuals [and] if this is where the problem lies, then we have to consider nationality as part of our profiles.")

[152] "CMS Special Report" at 13 (Vincent Cannistraro argues: "[I]f a terrorist group understands that there are flags that have come to our attention, then they are going to avoid those flags."); "Benjamin Interview" ("Profiling is problematic because radicals understand profiling and have learned how to subvert the process.")

[153] "Johnson Interview" ("Profiling forces terrorists to become more creative with their appearance, but has little practical impact. Our experience with drug traffickers should serve as a lesson. Originally the profile of a drug trafficker was the 22-year-old man, but over time it evolved to include grandmothers and babies with cocaine in their diapers.")

[154] "Hoffman Interview" ("There is no longer a single Al Qaeda, but rather there are a number of organizations that are difficult to track and predict. In addition, terrorists are not limited to the usual profile. For example, Israel has had suicide bombers who were children, women, and people over forty years of age. Al Queda recruits outside the regular profile of young, Arab males in order to defeat profiling programs."). See also Andrew Zajac, "Al Qaeda Liked Family Man Ploy, Declassifed Papers Show," Chicago Tribune (April 7, 2006) (describing how Al Qaeda mastermind Khalid Sheikh Mohammed picked one operative "because the agent was married and had children," making him less likely to fit the government profile of a terrorist).

[155] R. Maroevic and D. Williams, "Terrorist Cells Find Foothold in Balkans," Washington Post (Dec. 1, 2005).

[156] "Bearers of Global Jihad?" at 26.

[157] Bernard E. Harcourt, Muslim Profiles Post 9/11: Is Racial Profiling An Effective Counterterrorist Measure & Does It Violate the Right to Be Free From Discrimination? John M. Olin Law & Economics Working Paper No. 288 (March 2006), at 1.

3.   Information Analysis and Sharing

Immigration officials can contribute to intelligence—particularly on terrorist "indicators" or techniques for entry—but they still largely depend on intelligence provided to them to stop a terrorist. This intelligence primarily takes two forms—the information available on government databases through which immigration officials run identity and security checks on those seeking admission, and intelligence on terrorist profiles and methods. It should be emphasized that information collected and mined must also be analyzed. This involves not simply categorizing the vast amounts of information collected, but putting it in context so that it can be used by intelligence, law enforcement, and immigration officials.

Although immigration officials are usually not reluctant to exercise their general authority to refuse admission to foreigners who strike them as suspicious, not all terrorists will raise such suspicions. Thus, immigration officials generally cannot be expected to stop a terrorist from entering the country if that person does not appear on a database or watch-list. In September 2003, the FBI announced plans to develop a single database of suspected terrorists that will be accessible to all agencies in the U.S. immigration process. In August 2004, the Office of Inspector General criticized DHS for failing to assume a lead role in consolidating watch lists.[158] Security experts have likewise criticized the lack of progress in this area.[159] Databases, of course, have significant limitations. For one, they do not capture "clean" operatives; i.e., those who have not come to the attention of law enforcement or intelligence officials.[160] As a result, it has become a priority to integrate human intelligence into them.[161] In addition, they must be continually updated.[162] To be useful, they must also include more than a person's name.[163] Most recently, the Government Accountability Office (GAO) criticized the absence of policies and procedures to manage the sharing of terrorism-related information.[164] The GAO found that federal agencies use 56 different designations for "sensitive but unclassified" information, and

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[158] U.S. Department of Homeland Security, Office of Inspector General, "DHS Challenges in Consolidating Terrorist Watch List Information," OIG-04-31 (Aug. 2004) at 6-8.

[159] "CMS Special Report" at 20 (As Harry Brandon puts it: '[E]ven after 9/11, even with the increased emphasis on intelligence collection ... the people who look at whether or not someone should be issued a visa are looking at virtually the same information they were looking at prior to September 11.').

[160] "Flynn Interview" ("Front-line immigration officials do not have essential information and this problem is getting worse. The main problem is that most resources are "gathered around incidents of crime, but the people we need to worry most about work very hard to have clean records.")

[161] "Ginsburg Interview" ("The system is grappling with how to incorporate street knowledge into the electronic system.")

[162] "Inman Interview" ("An alert list could be useful if it is updated regularly with the names of people known to relate to terrorist groups."); "Ginsburg Interview" ("The challenge is to create a process that is sufficiently nimble to get the information in the hands of border agents and keep the information updated."

[163] "Johnson Interview" ("The watch list must include information beyond simply a person's name. It needs to include biometric information if possible, a physical description, and date of birth. The odds are fairly remote that multiple persons would share the same name, physical description, and date of birth.")

[164] Government Accountability Office, "Information Sharing: The Federal Government Needs to Establish Policies and Processes for Sharing Terrorism-Related and Sensitive but Unclassified Information," GA)-06-385 (Mar. 2006).

they have no policies to "designate, mark, and handle" this information.[165]

Intelligence on terrorist methods and profiles affords immigration officials a tool to identify suspicious persons who may not appear on watch lists.[166] Usually this information is classified in an attempt to prevent terrorists from realizing that governments are aware of their techniques. Broad dissemination of this classified information carries the risk that terrorist methods and profiles will be leaked, and terrorists will abandon the leaked tactics in favor of new ones.[167] Prior to 1992, the Italian government distributed a "Red Book" of the documents used by terrorists for travel. This document allowed border authorities to stop several hundred people. In the mid-1990s, however, Italian authorities found a copy of the book in a mosque and abandoned this effort on the theory that the danger of the information reaching terrorists exceeded the enforcement benefits.[168] Others strongly believe that the benefits of providing border officials with sensitive information outweigh the risks.[169]

Finally, the importance of well-trained immigration officials cannot be discounted. An experienced inspector prevented Mohamed al Qahtani, a Saudi national later identified as the intended 20th hijacker, from entering the U.S. at the Orlando airport on August 4, 2001. Qahtani's documents appeared genuine, but actions and behavior aroused the suspicion of an immigration inspector.[170] Similarly, a border official in Port Angeles, Washington stopped Ahmed Ressam from entering the country, preventing a planned New Year's Day attack on the Los Angeles International Airport; in stopping him and conducting a thorough search of his vehicle, the border agent relied on her intuition that Ressam was a suspicious person. Inspectors represent an important last line of defense. The ability of border officials to identify and facilitate the entry of "low risk" travelers, also allows them to identify the high-risk, anomalous border crosser.[171] The importance of this human dimension argues for more training and investment in immigration officials.[172]

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[165] Id. at 21.

[166] "Ginsburg Interview" ("You need two levels of scrutiny in the case of border crossing documents: first, is it a fraudulent document and second, is it a terrorist-related document? The indicators on the documents used by fifteen of the hijackers were evident on their face and were attributable to Al Qaeda or Islamist extremist groups.")

[167] Intelligence sharing with the private sector, which controls most of the nation's critical infrastructure, raises additional concerns, as well as legal and technical challenges. See generally, Homeland Security Advisory Council, Private Sector Information Sharing Task Force, "Homeland Security and Information Sharing Between Government and the Private Sector" (Aug. 10, 2005).

[168] "Ginsburg interview."

[169] "Inman Interview"("The United States has the capacity to operationalize intelligence so that useful information can be shared with frontline agents, but at the same time ensure that sensitive information does not get into the hands of would-be terrorists. On balance, it is preferable to spread useful information to border agents -- such as the hallmarks of passport forgery -- rather than to withhold this information.")

[170] "Bearers of Global Jihad?" at 117.

[171] "Inman Interview" ("Terrorists tend to become anxious at border check points and the prospect that they would demonstrate suspicious behavior is higher if they expect to be highly scrutinized by experienced agents."); "Flynn Interview" ("There is a significant role for cross-border patrol personnel who can identify, by sight, frequent travelers. A human component is necessary to a comprehensive national security system because it allows us to facilitate low-risk players and concentrate on higher-risk individuals as well as those for whom we have no information.")

[172] "Flynn Interview" ("While military officers can spend up to 40 percent of their careers being trained and have the

E.   The Need to Enlist Local Law Enforcement

The 1996 Immigration Act allowed the Attorney General to negotiate agreements with states and localities that would permit qualified local officials to enforce federal immigration law.[173] Florida and Alabama state police, as well as the Arizona Department of Corrections, have entered into these agreements, and the City Counsel in Costa Mesa, California recently voted to do so. Local enforcement of federal immigration violations remains controversial. Many immigrants will not come forward to report crimes or otherwise to cooperate with the police if it will lead to their removal or the removal of a loved one. Similarly, state officials typically lack the expertise and resources to enforce specialized federal laws.

This issue should be distinguished from the need for federal law enforcement, including DHS, to coordinate with states and localities in pursuing suspected terrorists. Terrorists hide, plot, commit crimes to support themselves, and try to carry out attacks in states and localities.[174] The kinds of crimes that terrorists commit to support themselves would be more commonly investigated by local police. Local authorities may also be able to infiltrate communities in which terrorists attempt to hide.[175] In short, local police may be in a better position to collect intelligence, to contribute to investigations, and to monitor suspects, including certain visitors.[176]

In the New York City Police Department, roughly 1,000 officers work on counter-terrorism.[177] They collect intelligence from the community, from criminal investigations, from liaison with immigrant groups, from monitoring jihadist web-sites and foreign news media, from prisons, from tracking financial movements, from witnessing overseas terrorist investigations, from

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extra personnel to do this while filling all the positions on the front lines, the extraordinary statistic for border officials is that, after basic training, they have no flexibility to take people out of their jobs to receive extra training.")

[173] Immigration and Nationality Act (INA), §287(g).

[174] Remarks by Chairman Thomas H. Kean and Vice Chair Lee H. Hamilton, Final Report of the 9/11 Public Discourse Project (Dec. 5, 2005) ("We need improved information sharing not only within the federal government, but especially with state and local authorities. Disasters, whether natural or manmade, happen in localities. They happen in states. Their officials need the best information the federal government can provide. Right now, they are not getting it.")

[175] "Flynn Interview" ("Local and state law enforcement are not prepared to deal with immigration issues. However, if immigrant groups are to be penetrated, it will take local and state law enforcement who have the closest ties to these communities to succeed at it."); "Ginsburg Interview" ("Authorities want to know if a person is a terrorist. Whether information should be used to enforce our immigration laws is a separate question. Local law enforcement do not generally want to be involved in enforcing immigration law, in part because it decreases individuals' willingness to work with them.")

[176] "Benjamin Interview" ("DHS needs to have better contact with local law enforcement so that they can relay 'pings,' note license plates, and record where someone of interest is going. In addition, if there are outstanding warrants for arrest, local law enforcement could act without actually enforcing immigration law. However, local police forces would lose important community contacts if they were to enforce immigration law."); "Johnson Interview" ("Local law enforcement officials already gather significant information within immigrant communities, but that they do not have the tools to combine that information together with other information gathered from across the country and abroad in order to identify terrorist threats. There is no effective manner of sharing information."

[177] W. Finnegan, "The Terrorism Beat, How is the NYPD Defending the City?," New Yorker (Jul. 25, 2005) at 58, 60.

federal law enforcement and intelligence agencies, and from foreign agencies.[178] Terrorists' use of "clean operatives" and their attempts to embed members in different communities also argues for a broad and coordinated law enforcement approach.[179] At the very least, local police represent another line of defense against terrorist attacks.[180]

To play this role, however, they must have access to the appropriate databases and intelligence. Again, making classified information broadly available carries a risk that it will leak,[181] but the benefits may outweigh the risks. Prior to 9/11, state and local law enforcement officials had little access to relevant information; since 9/11, however, they have been given access to unclassified information on possible terrorists through the Violent Gang and Terrorist Organization File (VGTOF) of the National Crime Information Center (NCIC) system, which is accessible to almost every law enforcement officer in the United States. Federal agencies feed information into this file through the FBI's Terrorist Screening Center, which consolidates information from various watchlists and serves as a central point-of-contact for coordinating state and local responses to "hits" on the watchlists.[182]

Local and federal law enforcement must also coordinate their work so that they do not jeopardize each other's intelligence gathering efforts, for example, by arresting informants or persons being tracked.[183]

F.   Aviation and Cargo Security

The September 11th attacks highlighted deficiencies in aviation security.[184] Post-9/11 measures to enhance airline security, including privatization of airport security, searches of carry-on luggage, and the requirement that travelers show identification and a boarding pass,

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[178] Id. at 64-65

[179] "Hoffman Interview" ("It is necessary to get more information to lower levels of law enforcement to fight an adaptive and invisible network.")

[180] "Ginsburg Interview" ("The police who apprehend individuals should be able to ask for and review all immigration-related documents and should be linked to a system that would allow fraudulent and terrorist-related documents to be identified. There are simply too many entries and exits across the border to perform all screening at that point and some dangerous individuals are likely to slip through.")

[181] Id. ("To the extent that the system contains very classified information, it is difficult to determine how much information should be shared with local law enforcement. One possibility—perhaps not the wisest—is to treat terrorism in the same manner as drug trafficking and force the terrorists to innovate by constantly exposing and disseminating their techniques within law enforcement.")

[182] William J. Krouse, Terrorist Identification, Screening, & Tracking Under Homeland Security Presidential Directive 6, Congressional Research Service (August 4, 2004); "Flynn Interview" ("Local law enforcement does not uniformly have a direct link to the national electronic terrorist database. Making watch list information available to the squad car is important in situations where local law enforcement detain individuals that are of interest to federal enforcement agencies.")

[183] "Johnson Interview"; "Benjamin Interview" ("If a person of interest runs a red light in Arizona or commits a crime that might support his illegal activities, immigration officials need to find out about it.")

[184] "The 9/11 Commission Report" at 391 ("Major vulnerabilities still exist in cargo and general aviation security. These, together with inadequate screening and access controls, continue to present aviation security challenges.")

have been greeted with skepticism.[185] More effective measures include locking cockpit doors and effective screening for explosives.[186] The United States might also consider a "trusted traveler program" where travelers can pay a fee, receive biometric scans prior to traveling, and bypass security screening.[187]

Arriving cargo also represents an area of vulnerability. More than 9 million cargo containers—representing nearly one-half of incoming trade—arrive at U.S. seaports each year.[188] In addition, 11 million trucks and 2.4 million railcars enter each year.[189] To slow this process would have catastrophic financial implications. Thus far, the United States has adopted a strategy of trying to facilitate the entry of legitimate conveyances, while concentrating resources on unknown and high-risk traffic. This strategy also enlists the support of corporations that have a vested interest in a predictable and efficient border. In order to receive expedited treatment at the border, corporations must secure their own supply chains.[190] This system has been criticized by those who favor a "trust, but verify" approach to cargo security.[191]

V.   What Should Be Expected of the Immigration System as Part of a Coordinated National Security Strategy

Two conclusions underlie this paper. First, the United States must establish a consensus on what it expects from its immigration system as part of a coordinated security strategy. Establishing such a consensus will require a public discussion of the goals of the US immigration system.

The process of creating such a consensus would serve several purposes. It would further safety by setting forth clear and achievable goals. It would educate the public to the fact that absolute security cannot be guaranteed.[192]   In addition, developing a consensus would be an exercise in building unity. Finally, it would offer protection against the kind of overreaction that could result from further terrorist attacks. The United States must be able to isolate what

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[185] "Hoffman Interview" ("Without the continual development of attendant state-of-the-art technology, along with appropriate means of intelligence-driven profiling to facilitate more accurate screening, searches of carry-on luggage alone can amount to no more than a cosmetic exercise. While cosmetic and bureaucratic measures put in place may have a chilling effect on terrorists and would-be attackers for a while, they will eventually be laid bare."

[186] "Johnson Interview"

[187] "Hoffman Interview" Both DHS and the Transportation Security Administration (TSA) have implemented or proposed such programs since 9/11; DHS currently has different versions in place, including SENTRI (on the southern border) and NEXUS (on the Canadian border).

[188] U.S. Department of Homeland Security, Customs and Border Protection, "Fact Sheet: Container Security Initiative" (Nov. 2005).

[189] Congressional Research Service, "Border Security: Inspections Practices, Policies, and Issues" (Aug. 2, 2004) at 36.

[190] "Johnson Interview" ("It would be useful to have more detailed and specific information about the contents of arriving cargo. This would facilitate the ability to make periodic checks.")

[191] Testimony of Stephen E. Flynn, before the Senate Governmental Affairs Committee (Mar. 20, 2003).

[192] "The 9/11 Commission Report" at 395; "Hoffman Interview" ("I fear what could happen when people over-react to a terrorist attack in the future. People do not realize that the measures currently in place are not guarantees. The public needs to be better educated so that it realizes the United States is not a hermetically-sealed bubble.")

systems failed in case of an attack and fine-tune its strategies, not shut down entire systems in a self-defeating way.[193]

Second, the immigration system must be integrated into the national security apparatus. Prior to 9/11, security experts paid very little attention to the nexus between immigration and security. Part of this neglect had to do with the complexity of the immigration system.[194] Part of it had to do with the INS's failure—due to legal barriers, its distinct mission, lack of resources, or dysfunction—to meet the expectations of the FBI and other federal agencies. Federal agencies that turned to the INS for assistance in admitting intelligence assets or for other help[195] tended to write off the INS if this help was not forthcoming.[196] Whatever the cause, federal law enforcement and intelligence agencies did not treat INS as a partner in counter-terrorism. As an example, INS was not included in meetings run by Richard Clark, the anti-terrorism expert from the National Security Council.[197] The INS developed an anti-terrorism group to address "special interest" cases, but it did not focus on al Qaeda. Prior to the September 11th attacks, INS's attention and energies were mainly focused on its own growing workload and crises like the Elian Gonzalez case.

The low priority placed on immigration as a national security issue was apparent to the 9/11 Commission.[198] The Commission, for example, did not receive all of the immigration and customs records that it requested until July 2004, just few weeks before it published its report. This delay might be attributed to reluctance within the various agencies, but even more to the priority assigned to these requests.[199] In addition, the Commission found that, prior to their work, few had looked at the issue of border security from the perspective of terrorist mobility or travel. It recommended that greater priority and scrutiny be given to tracking terrorist travel, as much as is given to tracking terrorist finance.[200]

A.   The U.S. Immigration System Should Collect Intelligence on Terrorists

Rather than viewing the U.S. immigration system as solely a recipient of intelligence, the 9/11 Commission identified it as potentially a key source of intelligence. It concluded that immigration officers, properly trained, can be a unique asset in preventing terrorist attacks.

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[193] "Flynn Interview" ("After the 9/11 attack, the United States shut down airplanes and borders because there was too much uncertainty to risk additional flights. The approach to the crisis was to first freeze the system, so as to sort out the facts, and then proceed from there. We need to identify solutions that would not involve shutting down systems in the wake of a crisis.")

[194] "Hoffman Interview" ("Immigration is too messy and not well understood in the national security community.")

[195] "Horan Interview" ("INS was never really considered a partner in counterterrorism or counterintelligence efforts because they weren't useful in this work. In one case, we wanted to gain immigration status for a man with a tremendous amount of intelligence that was defecting from the Soviet Union. The INS treated that man like a beggar."); "CMS Special Report" at 9.

[196] "Benjamin Interview."

[197] "Ginsburg Interview."

[198] Id. ("Immigration was not considered a top-tier issue.").

[199] Id.

[200] "The 9/11 Commission Report" at 385.

Subsequently, Susan Ginsburg, Senior Counsel and team leader for the 9/11 Commission, has proposed a far broader strategy targeted at terrorist mobility.[201] Ginsburg would elevate terrorist travel to the top tier of counter-terror priorities, akin to the priority traditionally placed on troop movement.

1.   Terrorist Indicators

   In the course of their work, immigration officials often collect information on how people enter the United States, conditions in countries from which they come, and what documents they use to travel. This information could be just as valuable in fighting terrorism as it is in stopping smugglers, drug dealers, or those who seek to enter the US to work illegally. Immigration officials are uniquely situated to collect information on how terrorists operate, including how they forge documents and other techniques that they use to travel.[202] They can detect trends, patterns, and new terrorist strategies, and can also verify information provided to them on terrorist methods.[203] However, to date, this information has not been systematically collected, analyzed or disseminated.[204]

2.   Temporary Visitors

   The immigration system must be able to identify who has entered and left the country and, in ways that go well beyond even a fully operational US-VISIT program, it must partner with law enforcement agencies to collect and track more information on select visitors.[205] The 9/11 terrorist attacks exposed the need for increased scrutiny of non-immigrants, particularly students. The hijackers repeatedly entered the United States. U.S. immigration officials referred several of the men to secondary inspection, including one who spoke no English, had no clear address, and used a one-way ticket. Despite discrepancies in the hijackers' paperwork, immigration officials denied only one person admission. Of those who entered the country more than once, three violated the terms of their tourist visas by entering with a plan to enroll in flight school. One never applied to change his visa status from a tourist to student after enrollment. The other two applied to change status, but overstayed their visas, abandoned their change of status

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[201] S. Ginsburg, "Countering Terrorist Mobility" (Migration Policy Institute, Feb. 2006) at 18 [hereinafter "Countering Terrorist Mobility."]

[202] "Ginsburg Interview" ("Fraudulent documents can lead to a terrorist in cases where you do not know the person's identity.")

[203] "Hoffman Interview" ("Terrorists have been known to literally launder passports in order to remove stamps from certain countries and to use new passports. Immigration officials are in the best position to confirm the use of these techniques by terrorists and to act on them.")

[204] "Countering Terrorist Mobility" at 43 ("The well-established methods of developing knowledge through standard intelligence and investigative methods should be supplemented by doing a better job of capturing the knowledge of front-line officials, and making it available to their colleagues and to policymakers in usable form.")

[205] "Flynn Interview ("The U.S. should document visitor stays and departures. We should have a system in place to take the vast majority of law abiding individuals and quickly validate them as legitimate so as to expedite their travel. The real challenge is finding the political will to make the financial investment for so massive a program.")

applications by leaving the country, and failed to secure student visas abroad before attempting to re-enter. These violations did not, however, prevent their subsequent re-entries into the United States.

Based on this experience, security experts have identified an expanded information-collection role for the immigration system. To start, immigration authorities must conduct enhanced background checks on certain visitors, which might include running the applicant's name through the relevant databases, verifying his identity, assuring that he has not been involved in radical organizations abroad, and identifying the source of funding for his travel and activities (particularly education) in the United States.[206] Once here, immigration officials could partner with law enforcement to monitor with whom select visitors meet and whether they do what they were admitted to do.[207] If a student, for example, enters the country to study fine arts, but abandons or switches his course of studies, this information should be captured and perhaps trigger an inquiry into his intentions.[208] The immigration system should also be able to remove those who violate terms of their admission.

Few dispute the need to monitor whether foreign students are studying what they were admitted to study and otherwise are doing what they said they would. Universities, of course, must play a role in this process. This approach does not argue for decreasing the admission of foreign students. To the contrary, the United States should pursue a more liberal admissions policy, given the benefits in good will and talent.[209] After September 11th, one of the White House Committees had significant concern regarding students in courses of study that could potentially give them skills to menace the United States.[210] In particular, they worried that foreign students would receive access to secret technologies or learn to build nuclear or chemical weapons. In retrospect, this concern was likely overstated.[211]

3.   Intelligence on Conditions Abroad

In 2004, the United States admitted 52,835 refugees from overseas,[212] DHS officials awarded

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[206] "Benjamin Interview."

[207] Id. ("In a perfect system, DHS would gather and disseminate the maximum amount of information available, including: who has entered the country, where the person came from, a person's recorded alliances with radical groups, where a person is going, and who that person meets.")

[208] Id.

[209] "Inman Interview"

[210] "Ziglar Interview" ("A program was explored that would have controlled the courses and majors selected by visiting students following 9/11. This was high on the list, but was never implemented.").

[211] "Inman Interview" ("The United States does not need to limit the areas of study for foreign students. The danger of foreign students coming to the U.S. and learning how to build nuclear or chemical weapons is vastly overblown. Graduate student work normally involves basic research and does not have specific application. If this were a concern, when the federal government makes grants to universities, their guidelines could specify that the scientists could not hire foreign graduate students to work in their labs on sensitive projects. It could also require scientists to provide information about the individuals hired to work on specific projects, and that scientists hire only properly cleared students. However, very few research labs in the country would fall into this category.")

[212] U.S. Department of Homeland Security, "2004 Yearbook of Immigration Statistics" (Jan. 2006), Table 14.

political asylum to 14,359 persons,[213] and Immigration Judges granted political asylum to an additional 12,962 persons in removal (deportation) proceedings.[214] Asylees and refugees must demonstrate "a "well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion."[215] Many have fled persecution, including persecution by terrorists. While some in the policy community have emphasized the potential threat that asylees and refugees pose, there has been little attention to the benefits that they can bestow on the United States. Asylees and refugees can provide key intelligence on the conditions from which they have fled. The intelligence community should make use of this information to enhance US security by monitoring both individual claims and overall trends. An intentional effort to track asylum trends would also provide a timely record of security and human rights issues throughout the world. In short, refugees and asylees can be an important source of information on terrorist-producing conditions. In certain cases, they can also provide information on specific threats. Their cumulative knowledge, however, has not been tapped by the United States.

B.   The U.S. Immigration System Should Recognize that Immigrants Can Be the Foot Soldiers in Battle Against Terrorism

U.S. immigration policy can produce the foot soldiers needed for the U.S. fight against terrorism. Intelligence collection requires people with the appropriate language skills and cultural understanding. Immigrants possess these attributes.[216] They can infiltrate terrorist groups, translate electronic intercepts, and conduct outreach to communities into which terrorists might attempt to blend.

The battle against terrorism also has a military component. Immigrants play a key role in military operations. Thousands of immigrants serve in all branches of the US military. Without them, the U.S. military could not meet its recruiting goals, and it could not fill the need for foreign language translators, interpreters, and cultural experts. Immigrants add valuable diversity to the armed forces, and do extremely well, often having significantly lower attrition rates than other recruits.[217] The February 2006 Quadrennial Defense Review highlighted the key role that immigrants play in the Department of Defense and called for increased recruitment of native and heritage language speakers in all branches of the military.[218]

C. The U.S. Immigration System Should Identify the Foreign-Born Seeking

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[213] Id., Table 17.

[214] Executive Office for Immigration Review, "FY 2004 Statistical Yearbook" (Mar. 2005), K4.

[215] INA, §101(a)(42)(A).

[216] "Flynn Interview" ("We constantly hear from the intelligence community that they lack linguistic and cultural understanding of the groups they are most concerned about. This is nonsense. In the U.S., uniquely, we have immigrants from everywhere who have this understanding. However, when we view members of target groups as, by definition, infiltrated, that's dysfunctional. We rob ourselves of needed resources.").

[217] Anita U. Hattiangadi, Aline O. Quester, Gary Lee, Diana S. Lien, Ian MacLeod, David L. Reese, and Robert W. Shuford, Non-Citizens in Today's Military: Final Report (Alexandria, VA: Center for Naval Analyses, April 2005).

[218] Quadrennial Defense Review Report (February 2006), at 78-79.

to Enter and Stop Those Who Should Not be Admitted

In the post-9/11 world, the United States must know who is in the country for security purposes. A national identification number with biometric identifiers would be one way to accomplish this goal with U.S. citizens.[219] However, it would raise significant privacy and civil liberties issues.[220] It would also be expensive. In 1997, the Social Security Administration estimated that it would cost between $3.9 and $9.2 billion to re-issue social security cards with either a cardholder photograph or biometric information to 277 million persons.[221]

Biometric identifiers in passports can help to identify those non-citizens who have sought to enter the United States or have been admitted. They also contribute to a system that allows the quick validation of low-risk individuals at border crossing points, combined with greater scrutiny of others.[222]

1. Visa Waiver Program

Programs that make it difficult for the United States to learn the identity of those seeking to enter raise potential security vulnerabilities. At least three terrorists—Zacarias Moussaoui, Richard Reid, and Ahmed Ajaj—used the Visa Waiver Program (VWP) to try to carry out attacks on the United States.[223] Moussaoui, a French national and convicted 9/11 conspirator, entered the United States through the VWP program on February 23, 2001, enrolled in flight school, and stayed beyond the program's 90-day limit. Reid, a British national, attempted unsuccessfully to detonate a "shoe bomb" on a flight to Miami on December 22, 2001. Ajaj, a conspirator in the February 26, 1993 attack on the World Trade Center, used a fraudulent Swedish passport to attempt to enter the United States from Pakistan. Terrorists both live in VWP countries and can be expected to use stolen passports from VWP countries.[224] A recent quantitative study of more than 300 Islamic terrorists found that 41 percent were nationals of

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[219] "Inman Interview" ("We need to have some type of national identification card with biometric identifiers. The security verification process could be made more efficient with identification cards, but it would require a significant financial investment. The biometric technology needed to support an effective national ID has come a long way in the last few years, but linking information is still problematic.")

[220] "Johnson Interview" ("A national identification card with personal biometric information applied uniformly would, from security standpoint, allow the U.S. to protect the country more effectively. But civil liberties and federalism would be jeopardized.").

[221] U.S. Social Security Administration, "Report to Congress on Options for Enhancing the Social Security Card" (Sept. 22, 1997).

[222] "Flynn Interview" ("A move toward biometric identification could provide a rational solution to identification. What's needed is a system that validates low-risk individuals and concentrates resources on higher-risk individuals. One of the challenges is that if you set up a very low bar for validating low-risk and that bar is circumvented by a would-terrorist, then the reflex will be to perceive everyone to be high-risk and overcompensate. This is why we need to have a solid system where, if something goes wrong, we can isolate the cause and fix it.")

[223] U.S. Department of Homeland Security, Office of Inspections, Evaluations, and Special Reviews, OIG-04-26, "An Evaluation of the Security Implications of the Visa Waiver Program" (Apr. 2004) at 10-12.

[224] Testimony of James M. Sullivan, Director, U.S. National Central Bureau, International Criminal Police Organization (INTERPOL), before the House Committee on International Relations (June 23, 2004) ("While there are countless examples of the use of illegally obtained passports, it is difficult for INTERPOL to determine the extent of terrorist organizations involvement, direct or indirect. Suffice it to say, a fraudulently obtained passport provides criminals and terrorists alike with the opportunity to travel virtually unidentified, and we must assume that they will make every attempt to exploit that opportunity.")

Western countries; a quarter of them were Europeans.[225]

Because the VWP allows visitors for business or pleasure to enter the United States without a consular interview or pre-inspection, this program presents a significant security vulnerability.[226] Most visa holders undergo two interviews before being admitted to the United States—one interview at the consulate and another at the port of entry. With the VWP, there is only one opportunity for an interview, and that does not normally happen until the individual has reached US territory. Individual with stolen or fraudulently issued European passports have in the past entered the United States under the VWP without being detected.

The security vulnerabilities created by the VWP had become apparent before the September 11th attacks. The program was created as pilot program by the 1996 Immigration Act,[227] and became a permanent program in 2000.[228] During its pilot stage, the DOJ Office of Inspector General found that terrorists, including a conspirator in the 1993 World Trade Center bombing, had used stolen VWP nation passports to attempt to enter the United States.[229] INS inspectors thought that terrorists and criminals "believed they would receive less scrutiny during the inspection process if they applied under the VWP and would have a greater chance of entering without being intercepted."[230] INS efforts to tighten VWP requirements—prompted by information on lost or stolen passports in participating nations—encountered significant political and diplomatic resistance.[231] This comes as little surprise. Roughly one-half of temporary visitors to the United States use this program.[232] It would significantly increase the workload of consular offices to rescind the program.[233] In addition, the program provides significant economic benefits to the United States and convenience to U.S. travelers.[234]

The USA PATRIOT Act required that participating VWP countries certify that they have instituted a program to issue machine-readable passports with biometric identifiers, but allowed

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[225] Robert S. Leiken & Steven Brooke, A Quantitative Analysis of Terrorism and Immigration (Nixon Center, 2006).

[226] "Johnson Interview" ("Our largest vulnerability stems from countries with visa reciprocity with the United States, such as Germany, England, and France, because travelers from those countries are not subject to same type of scrutiny as travelers from other countries. We need to apply security procedures uniformly, otherwise we create security gaps that could be exploited by terrorists."); "Ginsburg Interview" ("The visa waiver program is an area of vulnerability. We need to increase standards for visa waiver program participation.")

[227] The 1996 Act, § 110.

[228] Visa Waiver Permanent Program Act, P.L. 106-396 (Jan. 24, 2000).

[229] U.S. Department of Justice, Office of Inspector General, "The Potential for Fraud and INS's Efforts to Reduce the Risks of the Visa Waiver Pilot Program," Report No. I-99-10 (Mar. 1999).

[230] Id.

[231] "Ziglar Interview" ("When INS investigated the Visa Waiver program, we found that Belgium had the highest rate of lost and stolen passports in the world, and it was easy to replace lost passports because new passports were easily issued out of county seats. Portugal was also a problem. When we tried to tighten down on countries and create conditions that had to be met for participation in this program, we received diplomatic and political resistance.")

[232] U.S. Department of Homeland Security, Office of Immigration Statistics, "Temporary Admissions of Nonimmigrants to the United States in 2004" (May 2005) at 4.

[233] Congressional Research Service, "Visa Waiver Program" (Oct. 18, 2004) at 13.

[234] U.S. Department of Homeland Security, Office of Inspections, Evaluations, and Special Reviews, OIG-04-26, "An Evaluation of the Security Implications of the Visa Waiver Program" (Apr. 2004) at 9 [hereinafter "An Evaluation of the Security Implications of the Visa Waiver Program"].

the Secretary of State to waive this requirement until October 1, 2007. The Enhanced Border Security and Visa Entry Reform Act of 2002[235] required Visa Waiver countries to report the theft of blank passports to the United States and required a review every two years of compliance by participating nations with the conditions of the program. It also postponed the deadline for issuing machine-readable passports with biometric identifiers until October 26, 2004. This deadline was subsequently extended to October 25, 2005. At present, all VWP travelers must present machine-readable passports. The media have reported significant negative impacts on travel for countries that have been unable to comply.[236]

An April 2004 report by the DHS Inspector General criticized: (1) the program's uncertain leadership; (2) its failure to perform mandatory reviews of participating countries; (3) its failure to collect information on the use of fraudulent passports in the program; (4) inadequate training on passport fraud for inspectors at ports-of-entry; and (5) the ability of VWP participants to avoid the US-VISIT entry/exit system.[237] The program remains the U.S. immigration system's area of greatest vulnerability.[238]

2. Refugees and Asylum-Seekers

Verifying the identity of those seeking admission allays concerns regarding the admission of persons in groups that terrorists might attempt to infiltrate. In 2004, United States admitted 52,835 refugees from overseas,[239] DHS officials awarded political asylum to 14,359 "affirmative" applicants,[240] and Immigration Judges granted political asylum to 12,962 persons in removal (deportation) proceedings.[241] Terrorists have exploited the U.S. asylum system in the past.[242] Their attempt to use the system argues for rigorous identity and security checks. It does not argue for reduced admissions, or for preventing those fleeing persecution from reaching U.S. borders through land interception, sea interdiction, or airport pre-inspection programs.[243] Nor does it argue for turning back migrants at ports-of-entry or even criminally prosecuting them for document fraud. Victims of terror should not become targets of anti-terror programs.[244] Unfortunately, this has occurred in the cases of thousands of Burmese, Colombian, and other

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[235] Pub. L. 107-173, Sec. 307 (a)(1)-(2) (May 14, 2002).

[236] Doreen Carvajal, "Another Blow to US-French Ties: A Visa Bottleneck," New York Times (February 2, 2006), at A13.

[237] "An Evaluation of the Security Implications of the Visa Waiver Program" at 13-30.

[238] "Bearers of Global Jihad?" at 8-9 ("[H]it squads could strike at the most vulnerable area of our immigration system: the current Visa Waiver Program which permits nationals of 27 countries (including Western Europe) to enter without so much as an interview by a U.S. official.")

[239] U.S. Department of Homeland Security, "2004 Yearbook of Immigration Statistics" (2005), Table 14.

[240] Id., Table 17.

[241] Executive Office for Immigration Review, "FY 2004 Statistical Yearbook" (Mar. 2005), K4.

[242] "Bearers of Global Jihad?" at 25; "CMS Special Report" at 22.

[243] M. Flynn, "Global Migration Coursing Through Mexico," (Silver City, NM: Dec. 21, 2005), available at http://americas.irc-online.org/am/3002 (According to Mexico's National Commission for Human Rights, Mexico detains roughly 200,000 migrants in transit to the United States each year.)

[244] "Flynn Interview" ("We do not need to cut admissions of refugees and asylum seekers in order to ensure national security. Instead, we need to make sure the system is rational and well-managed."); Ginsburg Interview ("The terrorist threat should not change the numbers of people admitted to this country as asylees and refugees. Vulnerabilities created by these populations could be reduced through other processes.")

refugees, as well as hundreds of U.S. asylum-seekers, who have allegedly provided "material support" for terrorists, terrorist activity, and terrorist organizations.[245] The "material support" ground of inadmissibility arguably applies to persons who support the overthrow of brutal dictatorships, as well as those who have involuntarily supported terrorist groups. To date, DHS and DOS have failed to issue guidelines that might ameliorate its harsh impact.

D. The U.S. Immigration System Should Legalize the Flow of Essential Workers to the United States and Focus its Resources of High-Risk Immigrants

U.S. border control policies have clearly failed.[246] The U.S. undocumented population—now estimated at 12 million persons—shows no sign of abating.[247] Since 1995, the number of unauthorized immigrants coming to the United States has exceeded the number of legally admitted immigrants.[248] Between 1993 and 2006, U.S. Border Patrol funding more than quadrupled from $362 million to $1.8 billion. Harsher immigration laws have made it harder for immigration violators to gain legal status without long waits outside the United States. Convictions for immigration-related crimes, primarily illegal entry and illegal re-entry, rose from 14,452 in 2001 to 31,208 in 2004, although median sentences fell from 15 month to one month during the same period.[249] Immigration offenses now represent 33.9 percent of all federal criminal convictions, more than twice as high as any other category of offense.[250]

At least 460 migrants—a record number—died trying to cross the U.S.-Mexico border in 2005.[251] According to Mexican officials, 3,600 migrants have perished since 1994.[252] Increased border enforcement has pushed migrants to more perilous crossing routes and has contributed to the emergence of ever more profitable and sophisticated organized criminal smuggling rings, which potential terrorists might try to use to enter the United States.[253] The DHS border strategy remains to apprehend, detain, and remove migrants at such a high rate that others will

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[245] INA § 212(a)(3)(B)(iv)(VI).

[246] "Ginsburg Interview" ("We need to move to a system that allows us to know who is living in the country. This includes dealing with the undocumented. As a bottom line, we need to have the capacity to know an individual's identity for security purposes.")

[247] Jeffrey. Passel, "Estimates of the Size and Characteristics of the Undocumented Population" (Pew Hispanic Center, Mar. 21, 2005) at 1 [hereinafter "Estimates of the Size and Characteristics of the Undocumented Population"].

[248] Jeffrey Passel, "Unauthorized Migrants: Numbers and Characteristics" (Pew Hispanic Center, June 14, 2005) at 6 [hereinafter "Unauthorized Migrants."].

[249] Transactional Records Access Clearinghouse (TRAC), "Immigration Enforcement, New Findings" (Syracuse University, 2005).

[250] Id.

[251] B. Coyne, "U.S. Immigration Policy Shift Causes Record Deaths," The New Standard (Oct. 4, 2005).

[252] T. Hendricks, "Record number Died Crossing Border in '05: Remote Routes, Hot Summer, Economic Upturn Called factors," San Francisco Chronicle (Oct. 1, 2005).

[253] "Flynn Testimony of March 12, 2003" ("[T]he experience over the past decade of stepped-up enforcement along the Mexican border suggests that U.S. efforts aimed at hardening its borders can have the unintended consequences of creating precisely the kind of an environment that is conducive to terrorists and criminals.")

presumably be deterred from coming.[254] Despite a record number of U.S. deportations of Mexican nationals in 2005—the Mexican government estimates that 850,000 were deported — Mexicans and others continue to migrate north.[255] Despite the obvious evidence that these policies are failing, many lawmakers and administration officials continue to pursue them.

Much of the support for these failed policies seems to rest on a faulty linkage between terrorists and the undocumented population. Lack of immigration status should not be seen as a proxy for heightened security risk.[256] Nearly three-quarters of U.S. undocumented residents come from Mexico and Latin America, countries not known to be Al Qaeda hotbeds.[257] In addition, Al Qaeda prefers to use operatives who do not appear on terrorist watch lists or criminal databases and who do not have immigration problems. A study of 212 suspected or convicted terrorists in North America and Western Europe concluded that the "main jihadist modes of infiltration are legal.".[258] A subsequent analysis of 373 terrorists in the same countries found that al Qaeda increased its effort to recruit "clean" operatives in the wake of the 9/11 attacks, that only six percent of Islamic terrorists entered their host country illegally, and that none entered the United States from Mexico.[259] These realities explain why it would be dangerous to focus security efforts only on undocumented laborers at critical infrastructure or nationally significant work sites; all employees should be scrutinized.[260] It is also why immigration measures that target the undocumented cannot be assumed to enhance security. They may distract security resources from the real threat, and more critically, they may drive the undocumented further underground.

On the other hand, the possibility of undocumented terrorists in the United States cannot be dismissed.[261] Terrorists have repeatedly breached the U.S.-Canada border. [262] In addition, as other means of entry become foreclosed to them, terrorists may also attempt to penetrate the

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[254] Statement of Michael Chertoff, Secretary of the Department of Homeland Security, at Press Conference (Dec. 1, 2005) ("[T]he critical element is to apprehend and intercept, detain and then remove people so that we have such a high percentage rate of interception that we actually begin to deter people from coming across the border.")

[255] Jenaro Villamil, "New Deportation Numbers Quoted," Proceso/Apro (April 6, 2006).

[256] "Horan Interview" ("The undocumented are not threat to security per se."); "Johnson Interview" ("There is no empirical evidence that ties illegal immigration to terrorism."); "CMS Special Report" at 21 (Harry Brandon: "I do not see illegal immigration per se as a national security threat.")

[257] "Bearers of Global Jihad?" at 72 ("America's 'problem' immigrants are mainly Latinos who actually present high rates of military enlistment and other indices of identification with the host country. America's immigration problem is not only of loyalty.")

[258] Id. at 26, 131.

[259] Robert S. Leiken & Steven Brooke, A Quantitative Analysis of Terrorism & Immigration (Nixon Center, 2006).

[260] "Johnson Interview" ("It is ridiculous to group together illegal immigration and terrorism. There is no empirical evidence to sustain the conclusion that illegal immigration is tied to terrorism.")

[261] "Hoffman Interview" ("Most sleepers probably have some form of legitimate documentation, but that doesn't mean that amateurs wouldn't act on their own. While undocumented persons may seem to be the most obvious threat, they are not the most likely.")

[262] American Bar Association, Immigration and Nationality Committee, "Balancing Trade, Security and Migrant Rights in the Post-9/11 Era (Winter 2005), 19 Georgetown Immigration Law Journal 199, 202-203; "Hoffman Interview" ("I worry as much about the Canadian border as the Mexican border. Francophones from Africa and North Africa, for instance, have been able to acquire residency in Canada and are easily concealed among Canadians in their expatriate communities.")

U.S.-Mexico border.[263] DHS has reported that Al Qaeda's leadership has considered this mode of entry, but has not apparently pursued it.[264] Security experts fear, in particular, that human and drug smuggling rings hardened enough to regularly abandon migrants to die in the desert would be just as willing to profit by conveying a terrorist across the U.S.-Mexico border.[265]

It would be preclusively expensive to remove the 12 million undocumented persons from the country. In 2004, the United States removed 202,842, nearly quadruple the number of a decade before and the largest number in history.[266] This figure, however, represents less than two percent of the nation's undocumented population. One recent study concludes that it would cost $206 billion over five years to remove the nation's undocumented persons.[267] Although this estimate would likely exceed the total DHS budget during this period, it does not include the colossal losses to the U.S. economy, which would undermine security much more than the benefit from the deportations. Undocumented workers constitute 5 percent of the U.S. workforce,[268] and much higher rates of workers in many industries. For example, they represent 25 percent of meat and poultry workers, 22 percent of maids, 20 percent of construction workers and 18 percent of sewing machine operators. These industries would collapse without them. The U.S. economy—which is projected to create 21.3 million jobs between 2002 and 2012, with some of the fastest growth occurring in immigrant-dominated jobs—would stall without these workers.[269]

Nor does the expense of removing the undocumented include the disastrous social and financial consequences for hundreds of thousands of U.S. "mixed-status" families. An estimated 3.2 million U.S. children have undocumented parents.[270] Sixteen percent of U.S. children age six and below, and 11 percent of U.S .children between six and 17, have non-citizen parents.[271]

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[263] "Benjamin Interview" ("I would be particularly concerned with security problems originating from the South American Tri-Border region of Paraguay, Brazil, and Argentina, which is known for its high quantity of contraband smuggling activity. The groups that have been growing in that region for 20 to 30 years may begin using the Mexican border as a passageway into the United States.")

[264] Testimony of Admiral James Loy, Deputy Secretary of the Department of Homeland Security, before the Senate Select Committee on Intelligence (Feb. 16, 2005) ("Recent information from ongoing investigations, detentions, and emerging threat streams strongly suggests that al Qaeda has considered using the Southwest Border to infiltrate the United States. Several al Qaeda leaders believe operatives can pay their way into the country through Mexico and also believe illegal entry is more advantageous than legal entry for operational security reasons. However, there is currently no conclusive evidence that indicate al Qaeda operatives have made successful penetrations into the United States via this method.")

[265] "Ginsburg Interview" ("We cannot ignore potential terrorist travel routes across our Southern border. Terrorists are constantly looking for other routes into the United States, and professional smugglers would not turn them away absent an effective form of deterrence.")

[266] U.S. Department of Homeland Security, Office of Immigration Statistics, "Immigration Enforcement Actions: 2004," (Nov. 2005), at 6.

[267] Rajeev Goyle and David A. Jaegar, Ph.D, "Deporting the Undocumented: A Cost Assessment" (Center for American Progress, July 2005).

[268] "Estimates of the Size and Characteristics of the Undocumented Population" at 1, 4.

[269] D. Hecker, "Occupational Employment Projections to 2012," Bureau of Labor Statistics, Monthly Labor Review (Feb. 2004) at 80-81, 87 and 91.

[270] "Unauthorized Migrants" at 20.

[271] R. Capps, M. Fix, J Ost, J. Reardon-Anderson, J. Passel, "The Health and Well-Being of Young Children of Immigrants (Urban Institute, 2004) at 6.

As has been repeatedly demonstrated, policies that destroy families most severely impact their children.[272] For these reasons, the Bush Administration recognizes the impossibility of mass deportations of the undocumented and unauthorized.[273]

The immigration system has not just failed to stem the flow of the undocumented. It has contributed to it. At a time when globalization has reduced barriers to the free flow of goods, services, and information, the United States has tightened its immigration policies related to the corresponding flow of immigrant labor.[274] This anomaly explains the growing U.S. population of undocumented laborers and border crossers.[275] Simply put, the U.S. immigration system does not offer sufficient legal avenues for needed workers and family members to enter the country.[276] U.S. employment-based visas overwhelming go to highly skilled and professional workers. Not more than 10,000 visas per year are available to less skilled workers. The inadequacy of this number is evidenced by a multi-year backlog in this visa category and by the hundreds of thousands of undocumented migrants who find work each year in the United States. Nor do heavily over-subscribed, non-immigrant (temporary) visas for workers come close to meeting the demand for foreign-born labor. Backlogs for family-based visas—depending on nationality and family relationship—can span decades.

1. A Path to Legal Status

Given that the status quo cannot be maintained and removal does not constitute a viable option, the question becomes how to bring the undocumented out of the shadows for identity and security screening. The Bush Administration recognizes the link between comprehensive immigration reform (including more liberalized admissions and legalization policies) and security.[277] To bring the undocumented forward and to reduce the number of illegal border

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[272] Catholic Legal Immigration Network, Inc., "Placing Immigrants at Risk: The Impact of our Laws and Policies on American Families" (2000).

[273] The White House, "The State of the Union Address," (Feb. 2, 2005) ("We should not be content with laws that punish hardworking people who want only to provide for their families and deny businesses willing workers and invite chaos at our border.")

[274] Catholic Legal Immigration Network, Inc., "Chaos on the U.S.-Mexican Border: A Report on Migrant Crossing Deaths, Immigrant Families and Subsistence-Level Laborers" (2001).

[275] D. Massey, "Backfire at the Border: Why Enforcement without Legalization Cannot Stop Illegal Immigration," (Cato Institute, June 13, 2005) at 5 [hereinafter "Backfire at the Border"] ("[E]verything that occurs in the course of integrating the North American market makes the cross-border movement of people – including workers – more rather than less likely in the short and medium run."); M. Flynn, "Global Migration Coursing Through Mexico," (Silver City, NM: Dec. 21, 2005), available at http://americas.irc-online.org/am/3002 ("[T]he Bush Administration is pushing two contradictory policies that will likely exacerbate the problem facing Mexico: hardening borders against migrants while pushing free trade agreements throughout the Americas that could contribute to the exodus of people from the south.")

[276] S. Anderson, "Making the Transition from Illegal to Legal Migration," The National Foundation for American Policy (Nov. 2003) at 5 ("[T]he absence of avenues to work legally in the United States is a primary reason for the current levels of illegal immigration.")

[277] Statement of Michael Chertoff, Secretary of the U.S. Department of Homeland Security before the U.S. Senate Judiciary Committee (Oct. 18, 2005) ("The effectiveness of our border security and interior enforcement initiatives is closely tied to creating a workable and enforceable TWP [temporary worker program] .... the TWP seeks to address two huge strains on the current immigration system: high U.S. employer demand for workers and active participation of an estimated eight million undocumented workers in the U.S. economy. A well-designed TWP will provide legal

crossers, there must be increased avenues for legal status for persons seeking to enter for valid reasons (like work or family). By reducing the undocumented population and illegal border crossing, immigration officials will be able to concentrate their resources on a more manageable pool of high-risk border crossers.[278] They may also be able to obtain significant intelligence on the organized criminal rings that smuggle the undocumented into the country. As Stephen Flynn puts it:

> Many take a draining of the swamp [approach] so any violation of immigration laws is viewed as a terrorism loophole. I prefer an approach whereby channels for terrorists to hide in become fewer by creating more reasonable immigration policies. If we legalize those who are here and are coming for valid purposes, we can concentrate law enforcement resources on the few bad actors. As it stands, it is not the rule-breakers who create the security risk; instead it is unenforceable laws. Our current system creates larger shadows for would-be terrorists to hide in.[279]

Immigration reform will also diminish the smuggling rings that have arisen in response to increased U.S. border enforcement policies.[280] Those smuggling rings in fact welcome the current push for "enforcement only," because this policy gives them more profits and a ready supply of desperate customers.

Commentators from a range of perspectives agree with the Bush Administration that expanding the legal avenues to immigration—to reflect labor and family realities—will reduce illegal migration, a result that will enhance security.[281] Demetrios Papademetriou, Executive Director of the non-partisan Migration Policy Institute, argues that "law and order measures alone are ineffective throughout the world."[282] The Global Commission on International Migration—an independent body established by 35 nations to make recommendations on international migration to the UN Secretary-General—has determined that the growth in illegal migration is, in part, "linked to a lack of regular migration opportunities."[283] The Commission

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channels for U.S. employers and foreign born workers to meet the needs of a vibrant and successful U.S. economy without disadvantaging American workers.")

[278] "Ziglar Interview ("Today's quota and visa systems are irrational at best and are the reason why there is so much illegal immigration. If it were possible and feasible for people to enter the country legally today, they would get in line and wait for the chance. Until the United States fixes its fundamental immigration laws, it will not have control over its borders. If basic immigration laws were changed, we could separate the wheat from the chaff for national security purposes.")

[279] "Flynn Interview"

[280] Id. ("U.S. border enforcement policies have created the kind of chaotic conditions that allow criminals to flourish and that terrorists could potentially exploit.")

[281] "Backfire at the Border" at 12 ("Current law itself is fundamentally at odds with the reality of the North American economy and labor market. As long as that remains true, enforcement alone will fail to stem the flow and growth of illegal immigration to the United States."); T. Jacoby, "Getting Beyond the 'A-Word,'" Wall Street Journal (Jun. 20, 2005).

[282] D. Papademetriou, "The Global Struggle with Illegal Migration: No End in Sight," Migration Information Source (Sept. 1, 2005).

[283] Global Commission on International Migration, "Migration in an interconnected world: New directions for action" (Oct. 2005) at 33.

recommended that states make "more regular migration opportunities available" for necessary workers, and offer "regularization" on a "case-by-case" basis for undocumented persons who have achieved "a substantial degree of integration in society."[284]

Scholars from the Heritage Foundation have argued that increased opportunities for lawful entry will "make the task of policing borders and coastline more manageable" and that "when the only individuals seeking to enter the United States illicitly are terrorists and transnational criminals, meeting the challenge of securing our borders will be more realistic."[285] Similarly, a coalition of former high-ranking Executive officials involved in immigration and security matters has written: "DHS apprehends over 1 million migrants illegally entering the United States each year, but perhaps as many as 500,000 get through our defenses every year and add to our already staggering illegal immigrant population. As believers in the free market and the laws of supply and demand, we believe border enforcement will fail so long as we refuse to allow these willing workers a chance to work legally for a willing employer."[286]

2. Drivers Licenses

If immigration reform represents a pro-security alternative to the status quo, programs that push the undocumented further away from government can only hurt security. The REAL ID Act of 2005[287] seeks to improve security by forcing states to deny drivers' licenses to the undocumented.

Rather than enhancing security, however, REAL ID promises to drive the undocumented further beyond the government's reach. Allowing the undocumented to secure drivers licenses brings them forward and registers them in what is effectively the nation's largest law enforcement database. The national debate about the connection between drivers licenses and security has been characterized by misinformation, and a lack of appreciation of the role that driver license and state identification databases play in national security and law enforcement.

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. The collective DMV databases are the only comprehensive internal security database. The DHS does not yet have a comprehensive database on all adult residents of the United States;[288] it maintains records only on a few categories of citizens and some aliens—aliens who have provided biometric information to DHS through US VISIT,[289] aliens who have applied for visas or benefits with

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[284] Id. at 38-39.

[285] Edwin Meese III, James Jay Carafano, Ph.D., Matthew Spaulding, Ph.D., and Paul Rosenzweig, "Alternatives to Amnesty: Proposals for Fair and Effective Immigration Reform," Backgrounder #1858 (Jun. 2, 2005).

[286] Statement of the Coalition of Immigration Security, on file with author.

[287] Pub. L. No. 109-13, 119 Stat. 231 (May 11, 2005).

[288] While a more comprehensive database is planned, it does not yet exist—and would have to incorporate DMV databases if it intends to be comprehensive. The Enhanced Border Security and Visa Entry Reform Act of 2002 required the integration of all data systems related to visa issuance and monitoring into "Chimera," an interoperable, interagency computer-based data management system. This system does not yet exist. Cynics will note that "chimera" is defined as "a foolish fancy." Webster's II New Riverside University Dictionary at 256 (1984 ed.).

[289] U.S. Visitor and Immigrant Status Indicator Technology (US VISIT) is an integrated, automated entry-exit security system that tracks the arrival and departure of aliens, verifies their identities, and authenticates their travel documents using biometric identifiers such as fingerprints and photographs.

DHS, some aliens who have been arrested by DHS, or aliens who have voluntarily reported their information to DHS. DHS's own databases are inferior to the DMV databases: When DHS wants to find someone, the primary government database it relies upon is the driver license database.[290]

Many reflexively view granting drivers licenses to undocumented immigrants as a reward and an act of complicity in their violation of the law. Yet refusing to give drivers licenses to illegal immigrants means taking 20 million illegal immigrants out of the largest law enforcement database in the country. Thus, denial of licenses is a policy prescription that hampers law enforcement far more than it enhances it. If those who oppose granting driver licenses and state identification documents to illegal immigrants have their way, only US citizens and legal aliens will be in the largest law enforcement database in the country. Thus, when a law enforcement official must find someone who happens to be an illegal immigrant, she will have no government database in which to look. Such a policy will make it harder to enforce laws, not easier. Denying licenses to illegal migrants creates a larger haystack of people who are not in any government database—but who are in the country, living and working here.

A policy of denying licenses and state identification documents to illegal migrants will inevitably hurt law enforcement. A multitude of state, local, and federal law enforcement agencies access this data on a daily basis to investigate crimes, track down suspects, and prove crimes.[291] Immigration enforcement authorities rely heavily on this data. For example, driver license data is frequently used to prosecute illegal immigrants for such things as criminal reentry after deportation. DMV data is also used to confirm aliens' eligibility for government benefits, as when an alien must prove that he was present in the United States at a particular point in time. Having DMV data on illegal migrants not only helps law enforcement, but it cuts down on fraud in benefits applications.

E. The U.S. Immigration System Should Help to Integrate the Foreign-Born

The recent riots in France by first- and second-generation French citizens of African and Arab descent have been attributed, in part, to France's failure to integrate its ethnic minorities. Over the course of roughly two weeks, the riots spread to 300 towns, led to 115 arrests, and resulted in the torching of 600 cars.[292] These riots followed the July 7, 2005 subway and bus bombings in London by four British citizens of Pakistani origin; the November 2, 2004 murder of film-maker Theo Van Gogh by a Dutch citizen of Moroccan descent; and the March 11, 2004 killing of 191

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[290] U.S. Government Accountability Office, "Alien Registration: Usefulness of a Nonimmigrant Alien Annual Address Reporting Requirement is Questionable," GAO-05-204 (January 2005) ("ICE agents said that they consider the data found in existing public source database systems such as department of motor vehicle records, credit bureaus, court filings, and Internet search engines that compile address and other information to be more current and reliable [than the DHS address database]") (emphasis added).

[291] Law enforcement agencies that rely on DMV databases daily include the US Department of State; the US Department of Justice; the US Department of Homeland Security; the Postal Inspection Service; the Department of Defense; the US Secret Service; the Department of the Army; the US Coast Guard; the National Center for Missing and Exploited Children; the Department of the Interior; the Veterans Administration; the National Insurance Crime Bureau; the Federal Protective Service; the Royal Canadian Mounted Police; Amtrak; and many others.

[292] "An Underclass Rebellion," The Economist Global Agenda (Nov. 14, 2005).

persons in Madrid by Moroccan and Algerian immigrants. These attacks have put the issue of integration on the European Union's front burner; integration has been identified as an antidote to the radicalization of ethnic minorities and immigrant communities.[293] Legal status, of course, represents a pre-condition to integration. [294] It should be emphasized, however, that the terrorist threat in Europe often does not originate with immigrants. [295] Many terrorist recruits have proven to be well-integrated in many ways, but they do not identify with or feel that they belong in their nations.

The United States has an immigration policy that governs who can enter or stay and who cannot, but it lacks a coordinated policy to integrate its record population of foreign-born persons. Still, integration has traditionally occurred in the United States in a way that it has not in Europe.[296] Immigrants have a sense that they can become—or have become—Americans. The United States must pursue policies that continue this historical trend. Such policies further prosperity by drawing out the talents of the foreign-born.[297] In addition, well-integrated immigrant communities represent a key asset in the fight against terrorism, as evidenced by the dismantling of a terrorist cell in Lackawanna, New York based on a community tip.[298] Conversely, as the European experience indicates, the United States must avoid policies that isolate or alienate immigrant communities.[299]

F. The U.S. Immigration System Should Be Able to Distinguish Between Measures that Target Immigration Violators and Those that Target Terrorists

U.S. officials need to distinguish between immigration measures that further security and those that do not. Since September 11th, DOJ and DHS have advanced a variety of national security

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[293] Commission of the European Parliament and the Council, "Concerning Terrorist Recruitment: addressing the factors contributing to violent radicalization," Sec. 2.4.1 (Sept. 21, 2005) ("[I]f integration fails it can provide fertile ground for violent radicalization to develop .... A holistic approach to integration is necessary that includes not only access to the labour market for all groups but also measures which deal with social, cultural, religious, linguistic and national differences. The right to non-discrimination ... is also a key aspect of integration.").

[294] Congressional Research Service, "Muslims in Europe: Integration Policies in Selected Countries" (Nov. 18, 2005) at 4 ("EU countries have struggled to integrate their growing Muslim populations. A disproportionately large number of Muslims in Europe are poor, unemployed, or imprisoned, and many feel a sense of cultural alienation and discrimination. For decades, countries such as Germany and Australia viewed Muslim immigrants as temporary 'guest workers.' As a result, little effort was made at integration and parallel societies developed.")

[295] "Bearers of Global Jihad?" at 9.

[296] Id. at 9 ("Thanks to the relative prosperity and assimilation of American Muslims, European Muslim immigrant extremism represents a greater danger. But we should not drop our guard against American sleeper cells which could be drawn from extensive Islamist support networks or alienated sections of Muslim communities ... To strike at the United States, it appears that al Qaeda generally must rely on infiltration rather than domestic recruitment.")

[297] Richard Florida, The Flight of the Creative Class: The New Global Competition for Talent (HarperBusiness, 2005) at 72 [hereinafter "The Flight of the Creative Class"] ("The economic importance of culture, in my view, lies in its ability to absorb and harness human talent. Since every human being has creative potential, the key role for culture is to create a society where that talent can be attracted, mobilized, and unleashed.")

[298] "Bearers of Global Jihad?" at 70.

[299] "Benjamin Interview" ("Europe has done a poor job of integrating Muslims into European society. Without effective integration, the radicalization of the indigenous Muslim population could occur next in the United States.")

theories to justify virtually every immigration control initiative. Invoking "national security" in an indiscriminate way makes it difficult to evaluate particular security measures or engage in risk assessment. It also associates immigrants with terrorism in the mind of the public. Finally, it undermines the government's credibility with the public and with immigrant communities. Consider the following examples.

The safe-third country agreement between the United States and Canada requires a migrant, with some exceptions, to apply for political asylum in whichever country (of the two) that he or she first reaches.[300] This agreement has led, as predicted, to plummeting political asylum claims in Canada.[301] It is part of a "smart border" accord that seeks to balance security and trade, but it lacks a security rationale.

The Administration has repeatedly claimed that the interdiction, repatriation, and detention of Haitian boat people, including asylum-seekers, serves the nation's security. Without these "deterrents," the Administration argues, the U.S. Coast Guard would be diverted by influxes of boat people.[302] However, Haitian boat people represent no security threat.[303]

DHS has argued that a three-year spike in illegal entries of non-Mexican border crossers presents a security risk. DHS uses its existing detention beds for criminals and national security threats, forcing the release of many non-Mexicans who do not ultimately appear for their removal hearings.[304] DHS has proposed, as a solution, expanding "expedited removal" procedures to cover all undocumented persons arrested within 100 miles of the U.S.-Mexico border within 14 days of entry.[305] Under this process, which was originally confined to ports-of-entry, migrants who attempt to enter the United States with false or with no documents must express a fear of persecution to U.S. immigration officials or face expedited removal.

On first blush, the illegal entry of non-Mexicans sounds like a daunting security problem, but existing procedures already address it. In FY 2004, Mexicans comprised 93 percent of those apprehended for illegal entry. Non-Mexican entrants overwhelmingly come from four Latin American countries—Honduras, Brazil, El Salvador, and Guatemala.[306] The government has not designated these countries as having an al Qaeda presence. More to the point, the Border Patrol does not release any immigrants without first identifying and running background checks on them through relevant databases.[307] If a non-Mexican comes from a "special interest country," the case receives heightened screening and referral to the FBI's Terrorist Screening

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[300] U.S.-Canada Safe Third Country Agreement, 30 Aug. 2002, available at http://www.cic.gc.ca/english/policy/safe-third.html.

[301] Canadian Council for Refugees, "Closing the Front Door on Refugees: Report on Safe Third Country Agreement 6 Months After Implementation," (Aug. 10-13, 2005).

[302] 67 Fed. Reg. 68924 (Nov. 13, 2002); In re D-J-, 23 I & N Dec. 572 (A.G. 2003).

[303] "Johnson Interview" ("Any sense that al Qaeda could exploit the flow of Haitian boat people to enter the United States carries an carries an exaggerated sense of al Qaeda's capabilities."); "Ginsburg Interview" ("I know of no credible security reason to bar entry of Haitians as a national group or to deny them bond.")

[304] Congressional Research Service, "Border Security: Apprehensions of 'Other Than Mexican' Aliens" (Sept. 22, 2005) at 2-6 [hereinafter"Border Security: Apprehensions of 'Other Than Mexican' Aliens"].

[305] 69 Fed. Reg. at 48879.

[306] "Border Security: Apprehensions of 'Other Than Mexican' Aliens" at 17.

[307] Id. at 3.

Center, the Joint Terrorism Task Force, and DHS's National Targeting Center.[308] Up until now, DHS policy has been to detain suspected terrorists, rather than releasing them.

The Border Patrol's new strategy finds that "an ever present threat" exists that terrorists will employ the smuggling infrastructure and the "cover" of illegal migrant flows to penetrate the United States.[309] However, expanding expedited removal will not disrupt smuggling networks. In fact, more sophisticated networks—that terrorists might exploit–have sprung up in direct response to heightened border enforcement efforts.[310] Expanded expedited removal may require shorter periods in detention, although it will require that far more people—most of whom represent no security threat—will be in detention. It will also result in more persons being returned to nations where they might be persecuted. Ironically, it will make it more likely that an actual terrorist will simply be liberated in a foreign country where he will be free to make another attempt to enter the United States. If DHS wants to expedite the removal of non-Mexicans to improve its control of the U.S.-Mexico border, it could simply hire more Immigration Judges to handle these cases in a more expedited fashion. In short, this measure does not solve a national security threat so much as it excuses DHS's inability to address a management and resource challenge.

On November 17, 2005, DHS announced its intention to try to dissolve an injunction in *Orantes-Hernandez v. Smith*.[311] The *Orantes* injunction attempted to provide El Salvadorans— who had been discouraged from applying for asylum because of extraordinarily low approval rates in the early 1980s—with the right to an asylum hearing and with access to legal counsel and materials. DHS argues that the injunction should be dissolved because, in part, it interferes with its ability to apply expedited removal to Salvadorans.

DHS claims that because "expedited removal" is crucial to its ability to control the border, the *Orantes* injunction jeopardizes national security.[312] Yet Salvadorans pose little security risk and procedures to grant them asylum hearings do not undermine security. Asylum proceedings are in reality a valuable opportunity for the government to gain intelligence on conditions within another country, cultivate intelligence sources, and investigate potential security threats. In addition, recent reports have confirmed that the expedited removal system returns migrants to countries where they may face persecution, torture, and death.[313]

It may be that the Coast Guard, Immigration Judges, and the Border Patrol need more resources to perform their important jobs. However, this does not make migration a national security issue. If it were, any number of resource-intensive measures could be seen to jeopardize

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[308] Id.

[309] U.S. Department of Homeland Security, Bureau of Customs and Border Protection, "National Border Patrol Strategy" (Mar. 1, 2005) at 5.

[310] "Border Security: Apprehensions of 'Other Than Mexican' Aliens" at 12 ("As the USBP has increased the number of agents assigned to the southwest border, making the border crossing more difficult and demanding for unauthorized aliens, there is growing evidence that a number of smuggling networks have sprung into existence to accommodate the increased demand.")

[311] Orantes-Hernandez v. Smith, 541 F. Supp. 351 (C.D. Cal. 1982).

[312] U.S. Department of Homeland Security, Press Release, "U.S. Government Seeks to End Litigation Undermining Expedited Removal of Salvadorans" (Nov. 17, 2005).

[313] "Report on Asylum Seekers" at 20-23.

security. For example, in August 2002, DOJ issued a regulation to streamline the work of the immigration appeals court, the Board of Immigration Appeals (BIA). The regulation reduced the number of BIA judges, limited de novo factual determinations, and limited panel review of cases. These changes have increased the number of BIA summary affirmances without an opinion and short boilerplate decisions. Predictably, this has led to a surge of appeals of immigration cases to federal appeals courts, particularly the Second and Ninth circuits.[314] Hundreds of DOJ lawyers have been diverted to handle these cases, with potentially significant implications for DOJ's ability to pursue other criminal matters. Yet the result of BIA streamlining has not been identified as a security concern.

Another group that has been identified as a security threat is arriving aliens who cannot be repatriated. The U.S. Solicitor General has argued that the detention of Cubans and other "arriving aliens" is necessary to avoid creating a gap in security that could be exploited by hostile governments or organizations.[315]   His theory seems to be that an enemy government could send its nationals to the United States (with terrorists in the mix), refuse to accept their return, and thus assure U.S. infiltration by terrorists. Yet under the USA PATRIOT Act, a non-citizen whom the Attorney General has 'reasonable grounds' to certify as a terrorist, terrorist supporter, or 'national security' threat must be detained until his removal.[316] If his removal cannot be accomplished, he can still be detained for six-month intervals so long as he poses a threat to 'national security' or the 'safety of the community.'[317] Thus, the Solicitor General's argument is disingenuous.

DHS has also conducted immigration enforcement activities at airports, utility plants, skyscrapers, military bases, and other worksites that terrorists might target. While increased security and screening of employees in these work sites is necessary, it should not be based solely or even primarily on immigration status. Yet federal officials have defended the arrest of low-level Latino airport workers by arguing that their undocumented status makes them vulnerable to coercion to commit terrorist acts.[318]

The U.S. immigration system has an important role to play in ensuring our nation's security. It obscures this role and undermines security to argue that Haitian boat people, Canadian asylum-seekers, El Salvadorans, or indefinite detainees threaten us.

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[314] S. Moore and A. Simmons, "Immigration Pleas Crushing Federal Appellate Courts," Los Angeles Times (May 2, 2005); P. MacLean, "Judges Blast Immigration Rulings," National Law Journal (Oct. 24, 2005).

[315] Brief for the Petitioners, Clark v. Suarez Martinez, No. 03-878 (U.S., May 2004) ('[A]s recent events have taught, the Cuban government is not the only foreign power or organization that thinks little of putting civilian lives at risk as part of its hostile endeavors. It is difficult to understate the damage that could occur to the United States' international relations and national security if the government does not speak with one voice in the handling of migration crises at the border, or if foreign powers are told that the President and Congress cannot control the physical infiltration into the United States of criminals and other aliens ...'); see also, Respondent's Opposition to Petitioner's Motion for Classwide Temporary Restraining Order, at 3-4, 36-37, Ali Ali v. Ashcroft, No. C 02-2304P (W.D. Wash., filed Dec. 9, 2002) (DOJ argues that it would jeopardize national security if Somali nationals could not be removed to Somalia, a nation with an Al Qaeda presence and no functional government.)

[316] INA § 236A(a)(2).

[317] INA § 236A(a)(6).

[318] J. Casey, "Operation Tarmac: Advocates: Hispanics unfairly targeted," Las Vegas Review-Journal (Feb. 9, 2002).

G. The U.S. Immigration Service Should Facilitate the Entry of Those Who Serve Our National Interest

After the September 11th attacks, the United States understandably adopted a cautious approach to the admission of foreigners.[319] This tendency to "err on the side of caution" has led to consequences that may, in the long run, threaten U.S. security. There is a need to reassess certain visa procedures,[320] and to facilitate border crossings for low-risk persons.[321] The U.S. immigration system must block the entry of dangerous persons, but it also furthers security when it facilitates the admission of persons who serve our national interests. As reflected in U.S. immigration laws, these include necessary skilled and less skilled workers, family members of U.S. citizens and lawful permanent, persons fleeing persecution and refugee-like conditions, and temporary visitors who provide a range of economic, cultural and other benefits to the United States.

The U.S.-Canada border provides an important focal point for how our immigration process serves U.S. economic interests. Trade between the United States and Canada reached $441.5 billion in 2003, 37,000 trucks cross the border each day, and 37 states count Canada as the largest foreign purchaser of their goods.[322] Canada sends 85.8 percent of its exports to the United States, and receives 23.4 percent of U.S. exports.[323] Overall, more than 200 million people cross the U.S.-Canadian border each year. [324]

Given this degree of trade and integration, even minor delays at the border can create immense losses, particularly for the industries that depend on "just-in-time" contracts to assemble their products. On September 11, 2001, ports-of-entry along this border effectively closed. Delays that averaged 12 hours on September 11th led to the closure of U.S. car assembly plants, presented hundreds of Canadian nurses from reporting to U.S. hospitals for work, and otherwise worked havoc on bi-national communities across the border.

In December 2001, the two nations entered a "smart border" agreement, with a 30-step action plan, designed to promote security and facilitate lawful border traffic. The prosperity and strength of both countries depends as much on an immigration system that reliably allows goods and persons to enter, as it does on one that keeps persons out.

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[319] "Ziglar Interview" ("After 9/11, INS inspectors were expected to be very cautious about who was standing in front of them asking to be admitted to the United States. The agents understood that they were not dealing with a normal crisis.")

[320] "Inman Interview" ("After 9/11, we moved to a make no mistake model with respect to foreign visitors. Americans would have been outraged if people were admitted who shouldn't have been, but would not have been as concerned if people who should have been admitted were barred from entry. If in doubt, keep them out, was the approach. No thought was given to the trade-offs of such a restrictive policy.")

[321] "Flynn Interview" ("The U.S. needs to improve the operations of border crossings, not harden them. It has an ideal opportunity to create new infrastructures and systems for low-risk travelers. It needs to funnel those who we may not know much about through more traditional inspection regimes. It is simply not sustainable to assume that everyone is a potential terrorist until proven otherwise.")

[322] Government of Canada, "United States-Canada: The World's Largest Trading Relationship" (Apr. 2004).

[323] Migration Policy Institute, "United States-Canada-Mexico Fact Sheet on Trade and Migration," No. 11 (Oct. 2005).

[324] U.S. Department of State, Bureau of Western Hemisphere Affairs, "Background Note: Canada" (Aug. 2005).

Similarly, the United States depends heavily on foreign students and workers. Foreign workers represent 22 percent of U.S. scientists and engineers, 40 percent of engineering professors, and more than 50 percent of all PhDs in engineering, computer science, and the life sciences.[325] Foreign skilled laborers, PhDs in science and engineering, and graduate students significantly increase U.S. scientific innovation, patenting, and research grants.[326] Foreign students not only contribute financially to universities, but often remain in the United States to work. Yet U.S. immigration policies limit the ability of the United States to attract talented foreign students and workers at a time when other nations have begun to court them actively.[327] After September 11th, the admission of foreign students and their families declined from 741,921 in 2001 to 656,373 in 2004.[328] Diminished foreign student enrollment also undermines U.S. standing and influence in the world, precluding the kind of positive attachment to the United States and to its values that many students develop.[329]

U.S. military superiority and homeland security also depend heavily on the scientific and technical expertise of foreign workers.[330] The fact that post-9/11 security-related immigration measures risk weakening a crucial source of scientific and technical expertise—the linchpin of U.S. military superiority—represents a bitter irony.[331] Policymakers must recognize that security has as much to do with admitting certain immigrants, as it does with denying entry to others.

H. The U.S. Immigration System Should Cultivate Immigrant Communities

Law enforcement depends on the cooperation of immigrant communities to provide them with intelligence on suspicious persons or terrorist plots. Many immigrant communities, in turn, have embraced opportunities to develop ties with the federal law enforcement.[332] Immigrants will not

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[325] "The Flight of the Creative Class" at 11, 99.

[326] G. Chellaraj, K. Maskus, A. Mattoo, "The Contribution of Skilled Immigration and International Graduate Students to U.S. Innovation," World Bank Policy Research Working Paper 3588 (May 2205) at 22-24.

[327] See generally, "The Flight of the Creative Class."

[328] U.S. Department of Homeland Security, Office of Immigration Statistics, "Temporary Admissions of Nonimmigrants to the United States in 2004" (May 2005) at 4; U.S. Immigration and Naturalization Service, "2001 Statistical Yearbook of the Immigration and Naturalization Service" (Feb. 2003) at 24.

[329] J. Paden and P. Singer, "America Slams the Door (On Its Foot), Foreign Affairs, Vol. 82, No. 3 (May/June 2003) at 9 ("What Washington seems not to recognize is that these guests are important not just for the nearly $12 billion they pump into the U.S. economy each year. They also provide bridges of knowledge and understanding that greatly improve the strategic position of the United States in the world ... As students at American schools, [many foreign leaders] developed strong ties to the country, laying the foundation for the productive relationships they have relied on later in their careers. American security has profited as a result.")

[330] R. Paarlberg, "Knowledge as Power: Science, Military Dominance, and U.S. Security," International Security, Vol. 29, No. 1 (Summer 2004), pp. 122, 125-126.

[331] Id. at 122, 146 ("More science will be good for security, but an overzealous pursuit of homeland security now risks a weakening of U.S. science. An excessive tightening of U.S. visa policies post-September 11 is reducing the vital flow of foreign scientists into the United States.")

[332] "Horan Interview" ("Agents should introduce themselves to immigrant communities and help protect immigrant communities from hate crimes. Director Mueller has conducted meet-and-greet sessions in Muslim communities across the United States. The Bureau is finding that the Muslim communities are hungry for this kind of relationship.")

cooperate with government officials, however, if they think such cooperation will result in their removal or some other punishment.[333]

Two of the more controversial, post-9/11 immigration initiatives from a security perspective were the large-scale arrests and detentions of mostly Muslim men and the call-in registration program. These programs may be viewed as a raw and even understandable response to an undefined threat.[334] To the extent that measures like these alienate immigrant communities or drive them underground, however, they can be self-defeating. [335]

Under the "special registration" program, Middle-Eastern and South Asian men from 25 countries, who had entered the United States on temporary visas, were required to come forward to be registered, photographed, fingerprinted, and interviewed.[336] Of the 83,519 people who participated, 13,799 were placed in removal proceedings and 2,870 were detained.[337] Thousands more fled to Canada and went underground. Only seven persons captured by this program were reported to have had a "potential connection" to terrorism.[338] It appears that the program captured no terrorists.[339] This comes as little surprise because terrorists could not be expected to register, and the nations selected for participation did not correspond closely with the nationalities of arrested al Qaeda terrorists.[340] In at least one case, an Immigration Judge terminated deportation proceedings against an Egyptian national whose due process rights had been violated when he voluntarily came forward to register for this program.[341] In contrast to "call in" registration, enhanced border screening for persons from select countries may be a less intrusive and more effective counter-terror tool, primarily as a deterrent to terrorist entry.[342]

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[333] "Flynn Interview" ("You can't enlist people in the security fight if they don't feel that they're part of the community being protected or that they're viewed as already suspect.")

[334] "Ginsburg Interview" ("In the immediate wake of 9/11, decision-makers were not in an ideal situation because they were so fearful of another attack. Effectively, they were rounding up people in an effort to prevent another attack."); "Horan Interview" ("At the very least, these programs make would-be terrorists uncomfortable. You have to understand that there are not always a lot of great options, and you can't do nothing.")

[335] "CMS Special Report" at 11-12 (Vincent Cannistraro cautions: "What I see as the problem today is that we are using immigration policy as a proxy for law enforcement, and it is a poor proxy because it alienates the very communities we need to depend upon for early warning.")

[336] "Ginsburg Interview" ("Beyond its negative impact on immigrant communities, call-in registration had damaging diplomatic consequences.")

[337] U.S. Department of Homeland Security, "Fact Sheet: Changes to National Security Entry/Exit Registration System (NSEERS)" (Dec. 1, 2003).

[338] "Ziglar Interview" ("The call-in component was dropped in 2003 because it was ineffective. People were not going to register if they were involved with terrorist activities. Only seven of the people who registered under that program were identified as having a 'potential connection' with a terrorist organization.")

[339] R. Swarns, "Programs Value in Dispute As a Tool to Fight Terrorism," New York Times (Dec. 21, 2004).

[340] "Bearers of Global Jihad?" at 8, 145-146 ("[T]here was little correlation between the countries required to register and those with individuals arrested for involvement in al Qaeda terrorism.")

[341] C. M. Russel, "A New York Immigration Court's Cure for Regulatory Due Process Violations In NSEERS Special Registration: Suppress Evidence and Terminate Proceedings," Interpreter Releases, Vol. 82, No. 36 (Sept. 19, 2005).

[342] "Horan Interview" ("Enhanced screening measures for nationals of certain countries could be effective in two ways. First, it could lead to deterrence – either a terrorist would not enter the country or would exercise more caution before entering the country. Second, it could help the government collect information by intercepting

The post-9/11 arrest and detention of 768 mostly Middle Eastern and South Asian men terrified the targeted communities. Many detainees were held for weeks without a formal charge, and 531 were deported following closed hearings. DOJ refused to release their names on national security grounds, arguing that to do so would give terrorists important clues about the U.S. investigation.[343] An April 2003 report by DOJ's Office of Inspector General studied the experience of detainees at the Metropolitan Detention Center in Brooklyn, New York and the Passaic County Jail in Paterson, New Jersey.[344] This report documents the arrest and detention of hundreds of persons with no connection to terrorism.[345] Detainees were held in harsh, maximum security conditions, and suffered mental and physical abuse.[346] The FBI took an average of 80 days to clear innocent detainees and held detainees even after it became clear that they had nothing to do with terrorism.[347] While these delays can be attributed to staffing shortages, they nonetheless undermined confidence in the program,[348] as did the program's excessive secrecy.[349]

In short, the program alienated both the targeted immigrant communities and their nations of origin.[350] The 9/11 Commission reported that this program netted six "special interest detainees" who had direct links to terrorist organizations and that the overall effort had provided important leads. However, this level of success may be overstated.[351]

VI. Recommendations

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individuals that may have useful knowledge. It's not going to catch a Richard Reid or Osama Bin Laden. And terrorists will still take their chances if they think the borders are porous. The system has to be perceived as having teeth."); "Hoffman Interview" ("Enhanced screening of groups of men from certain countries is inconvenient for legitimate travelers, but it is also probably effective because terrorists do not like to leave paper trails. It is another unpredictable element and hurdle for terrorists wanting to come to the U.S. However, if it turns out to be just a "make work" exercise that has no teeth, then the terrorists would soon realize that and the deterrence value of the program would be eroded.").

[343] N. Lewis, "U.S. Says Revealing Names Would Aid Al Qaeda," New York Times, 18 Nov. 2002.

[344] "The September 11 Detainees"

[345] Id. at 16, 41-42.

[346] Id. at 112.

[347] Id. at 47, 51; "Ziglar Interview" ("The FBI's procedure left people in detention for two to three months without the FBI ever interviewing or checking on them. If the FBI was really interested in an individual, it obtained a material witness warrant and took the detainee out of INS custody. It was eventually discovered that the vast majority of the other detainees had nothing to do with terrorism or the 9/11 attacks.")

[348] "Horan Interview" ("There were in fact investigations in progress to try to release as many individuals as possible, but it took a long time because of a lack of personnel. Holding people for legitimate reasons makes sense, but that holding them without cause makes no sense. This is not the most effective way to capture dangerous terrorists.")

[349] Id. ("There are circumstances where secrecy is important, for example, when you don't want the enemy to know sources that you have in custody, but the length of detention and level of secrecy have to be balanced with speed of processing and investigation to release as many as possible as soon as possible.")

[350] "Horan Interview" ("This approach was devastating to efforts to cultivate immigrant communities.")

[351] "Benjamin Interview" ("The post-9/11 round-up in the United States appears to have netted the smallest of the small fry.")

Our review of the relationship between immigration policy and national security compels us to offer five policy recommendations, some in the form of broad principles and others focused on individual strategies. First, we recommend that the United States adopt an expansive view of national security—that encompasses economic security and respect for core civic values—in crafting immigration policy. Our economic strength undergirds our anti-terror activities. In addition, only those security strategies that respect civil liberties can be sustained in the long-term in our constitutional democracy. Similarly, U.S. security strategies should respect the rule of law, both as a way to create durable programs and to secure the full support of our overseas allies and immigrant communities. In our view, the "rule of law" embraces a range of goals and institutional attributes that characterize well-functioning legal systems. We also support a view of individual rights that meshes with notions like the "common good" and the "general welfare."

Second, we recommend that immigration measures be rigorously evaluated to determine if they further legitimate security goals, will be likely to accomplish their purposes, and are worth the cost in resources expended and opportunities foregone. We agree that appropriate "security" goals will seek to reduce the chance and harm of terrorism, to diminish public fear and anger, and to promote civil liberties and national unity. We question the security rationale offered for immigration measures that have targeted Haitian boat people, indefinite detainees, Canadian-bound asylum seekers, detained El Salvadorans, and certain refugees and asylum-seekers accused of providing "material support" to terrorists. We support a "risk management" approach to counter-terrorism that seeks to realize the greatest security benefits from the finite resources available. We do not think that trying to prosecute and to deport 12 million undocumented persons represents a viable, much less a cost-effective security strategy.

Third, we agree with the 9/11 Commission on the need for the United States to develop a comprehensive and coordinated national security plan that incorporates military action, diplomacy, intelligence, covert action, law enforcement, economic policy, foreign aid, homeland security, and immigration policy. We think that the U.S. immigration system has an important role to play in a coordinated fight against terrorism. Having said this, we recognize that many counter-terror priorities do not primarily implicate our immigration system. According to our research, key components of a counter-terror strategy include: a multi-faceted strategy to break the cycle of terrorist recruitment and replenishment through an appeal to the "hearts and minds" of persons in terrorist-producing states; expedited restructuring of the U.S. intelligence, law enforcement, and homeland security infrastructure; strengthened intelligence collection, mining, analysis, and sharing capabilities; and the full engagement of local police in the attempt to identify, locate and infiltrate terrorist groups.

Fourth, we think that the U.S. immigration system should be able to conduct identity and security checks on those seeking to enter and to secure legal status. In addition, it should be able to stop those from entering who appear on watch lists or who otherwise meet behavior- and intelligence-based profiles. We distinguish between profiles based primarily on religion, nationality or race (which we oppose), and those based on behavior and evolving intelligence (which we support as indispensable security tools). Conversely, we think that the U.S. immigration system should facilitate the admission of persons who contribute to our economic

security and our safety. In particular, we support visa policies that would increase the admission of foreign students, scientists, engineers, and others. Our immigration system should also be able to help locate certain visitors to the country and to assure that they respect the conditions of their admission. As the 9/11 Commission recognized, immigration officials are uniquely situated to collect intelligence on terrorist travel methods. This information should be collected, analyzed and disseminated in a systematic way. An effective immigration system would improve U.S. standing in immigrant communities and in terrorist-producing countries. It would also significantly reduce illegal entries into the country. We recommend that the United States develop a coordinated program to integrate the foreign-born. Recent events in Europe have affirmed the importance of immigrant integration to security. Additionally, we view U.S. immigrant communities as vital players in military action, intelligence gathering, law enforcement and (indeed) all aspects of our fight against terrorism.

Fifth, we recommend that Congress pass comprehensive immigration reform as a way to enhance U.S. security. Expanded avenues for the legal entry of immigrant laborers and family members will necessarily reduce illegal entries, and will allow the United States to concentrate its enforcement resources on those who might present a danger. A path to legal status for a significant percentage of 12 undocumented persons will bring these people out of the shadows, and allow the United States to run identity and security checks on them. For the same reason, we support providing other incentives—like offering driver's licenses—that would bring the undocumented to the government's attention.   By contrast, an "enforcement only" approach to reform will drive immigrants further away from law enforcement. We think that comprehensive immigration reform may be the most pressing immigration-related security need facing our nation.