

IMMIGRATION POLICY FOCUS

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THE LESSONS OF 9/11:

*A Failure of Intelligence,
Not Immigration Law*

IMMIGRATION POLICY CENTER

American Immigration Law Foundation

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EXECUTIVE SUMMARY & POLICY RECOMMENDATIONS

In the hours following the deadly terrorist attacks of September 11, 2001, the United States government took the extraordinary step of sealing U.S. borders to traffic and trade by grounding all aircraft flying into or out of the country and imposing a lock-down on the networks of transportation and commerce that are the lifeblood of our economy and society. Given the uncertainty over what might happen next, these emergency procedures were a necessary and appropriate short-term response to the attacks. In the long run, however, a siege mentality and the construction of a fortress America are ineffective and unrealistic responses to the dangers we face.

If we are to succeed in reducing our vulnerability to further terrorist attacks, we must focus our attention and resources on the gaps in intelligence gathering and information sharing that allowed nineteen terrorists to enter the United States. National security is most effectively enhanced by improving the mechanisms for identifying actual terrorists, not by implementing harsher immigration laws or blindly treating all foreigners as potential terrorists. Policies and practices that fail to properly distinguish between terrorists and legitimate foreign travelers are ineffective security tools that waste limited resources, damage the U.S. economy, alienate those groups whose cooperation the U.S. government needs to prevent terrorism, and foster a false sense of security by promoting the illusion that we are reducing the threat of terrorism.

Immigration reform measures that can enhance our security without jeopardizing the important role immigration plays in the war against terrorism and in our economy include:

1. Adequately funding the development of new technology that uses biometric data to identify and track individuals who travel to and from the United States.
2. Continuing the integration of information sharing among federal agencies through the Terrorist Threat Integration Center. Security databases also must include safeguards against potential abuse of data, ensure the security and confidentiality of information, protect the privacy rights of individuals about whom information is collected, and establish procedures to determine how information is entered into and removed from the databases.
3. Implementing a comprehensive, adequately funded, and workable entry-exit system that allows for evaluation of threats on a case-by-

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case basis, rather than by profiling entire groups, and also allows legitimate travelers to get quickly through immigration checkpoints.

4. Making the U.S. border the last line of defense against terrorism, not the first, by pursuing multilateral strategies with Canada and Mexico to create a North American Perimeter Safety Zone; requiring all airlines flying to the United States, including foreign airlines, to transmit passengers' names at take-off to the destination airport so that they can be checked against the look-out list; and increasing the use of pre-clearance and pre-inspection programs that provide U.S. officials the opportunity to check passengers for admission prior to their boarding a flight to the United States (while including safeguards to allow asylum protection for those who truly deserve it).
5. Creating an office within the Department of Homeland Security whose mission will be to gain the cooperation of immigrants in the war on terrorism through policies that have an intelligence, rather than an enforcement perspective.
6. Training immigration officials to understand the tactics, techniques, and procedures used by terrorists, as well as in ways to obtain community cooperation in uncovering threats.
7. Simplifying immigration laws in order to address security threats, while eliminating extraneous or obsolete provisions and repealing provisions that tie up resources and add to the complexity and confusion of our immigration system without measurably enhancing our security (i.e., repeal INA §212(a)(9)(B)).
8. Expanding the grounds of eligibility and the number of visas available to persons who provide valuable information on terrorist threats.
9. Developing a comprehensive legalization program to allow undocumented immigrants in the United States to obtain legal status, along with a guest-worker program to provide a legal and orderly flow of immigrants to fill legitimate labor market needs, in order to allow enforcement efforts to focus on terrorists.
10. Restoring integrity to the system by creating a judicial review process for overseas visa denials, in order to be ensure that consular officers are applying consistent policies; and restoring discretion to immigration judges and officials so they can allow aliens who are not security threats to stay in the United States, rather than wasting resources on deporting deserving individuals with ties to our country (i.e., restoration of the old "suspension of deportation" provisions).



UNDERSTANDING THE ROLE OF IMMIGRATION

Because all nineteen of the September 11th terrorists were foreigners, some observers have been quick to blame our vulnerability to terrorist attacks on lax immigration laws.¹ While such a response was predictable, it was misguided and has inevitably resulted in overreaction. Calls to impose a “moratorium” on immigration,² halt the issuance of student visas,³ close the borders with Canada and Mexico,⁴ eliminate the Diversity Lottery visa program,⁵ draft harsher immigration laws,⁶ and similar types of proposals reflect a serious misunderstanding of the relationship between immigration policy and national security.

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

The recent Joint Inquiry into the events of September 11th, conducted by the Senate Select Committee on Intelligence and the House Permanent Select Committee on Intelligence,⁷ confirms that better intelligence - and action on that intelligence - might have prevented the attacks on the Pentagon and World Trade Center. Similarly, a recent comprehensive study by the Migration Policy Institute points out that “Immigration measures are an important tool in the domestic war against terrorism, but they are not effective by themselves...the lead domestic security response to terrorism should be strengthened intelligence and analysis, compatible information systems and information-sharing and vigorous law enforcement and investigations.”⁸ In fact, tightening immigration laws and policies in an unfocused manner might very well make it more difficult for the United States to win the global war on terrorism by damaging the U.S. economy and alienating the immigrant communities and foreign allies whose cooperation the U.S. government most needs.

A careful analysis of the September 11th attacks reveals that deficiencies in U.S. intelligence collection and information sharing – not immigration laws – prevented the terrorists’ plans from being discovered.

THE LEGAL ARSENAL



Far from being too lax, U.S. immigration law in many areas has become an inflexible body of harsh and complex rules that make it difficult for enforcement agencies to focus their resources on people who pose a real threat to national security or public safety.

At the outset, we must disabuse ourselves of the notion that the United States has lax immigration laws. In fact, U.S. immigration laws have long provided the government with broad powers to deny admission to any person suspected of attempting to enter the United States to violate U.S. laws or endanger public safety. Since 1990, Consular officers in posts around the world have had virtually unreviewable discretion to deny a visa to any person who they have “reasonable grounds to believe seeks to enter the United States to engage solely, principally, or incidentally” in any terrorist activity or “any other unlawful activity.”⁹ Similarly, the definition of what it means to “engage in terrorist activity” has long been broadly defined to include “the preparation or planning of a terrorist activity...the gathering of information on potential targets for terrorist activity...providing any type of material support, including a safe house, transportation, communications, funds, false identification, weapons, explosives, or training,” or “the solicitation of any individual for membership in a terrorist organization, terrorist government, or to engage in terrorist activity.”¹⁰ Any one of the September 11th hijackers could have been excluded from the United States under these broad powers, had U.S. officials known their intentions. The far more difficult and important task is to provide accurate intelligence information in a timely fashion to the various agencies that enforce these laws, so that the laws can be applied to the terrorists. Simply passing “tougher” immigration laws does nothing to improve the quality or flow of intelligence information.

Far from being too lax, U.S. immigration law in many areas has become an inflexible body of harsh and complex rules that make it difficult for enforcement agencies to focus their resources on people who pose a real threat to national security or public safety. Under current immigration law, for example, the definition of an “aggravated felony” lumps together those who have committed a minor offense with those who have committed murder.¹¹ Furthermore, there is little that is “lax” about laws that subject a long-term permanent resident to deportation for pulling someone’s hair;¹² make it a deportable offense to vote mistakenly in an election;¹³ and deport a person who has been in the country since childhood solely because that person took a wrong turn into a school parking lot and had a lawfully registered firearm in his car.¹⁴ Since 1996, more than 11 million people have been refused entry to the United States, told to depart “voluntarily,” or actually deported.¹⁵ Millions more have had their application for a visa denied by U.S. consulates abroad. This is hardly the result one would expect from “lax” laws.

U.S. immigration laws not only can be extraordinarily harsh, they also are among the most complicated in the world – so complicated, in fact, that the agency charged with enforcing them has called them a “mystery and a mastery of obfuscation.”¹⁶ Federal immigration authorities routinely give out erroneous information about these laws because they themselves

often do not fully understand them.¹⁷ Even if an individual qualifies to immigrate to the United States, he or she often must wait years, or even decades, to get here. The United States calls itself a “nation of immigrants,” but immigrating legally is a process fraught with bureaucratic confusion and delays. Making these already convoluted laws even more harsh and complex does not stop terrorists, but it does have the perverse effect of creating more undocumented immigrants, who are then targeted for deportation and removal and whose status becomes a focus of enforcement.

One of the most revealing, yet often ignored, facts about the nineteen hijackers is that they successfully navigated our complicated immigration laws.¹⁸ The terrorists studied our laws carefully and made every attempt to follow them. They hid their true intentions, were issued valid visas by the Department of State, and were allowed into the United States by Immigration and Naturalization Service (INS) agents.¹⁹ When one terrorist did fail to comply with the complicated rules governing his visa, the INS waived those rules, apparently because INS agents misunderstood how the rules were supposed to be applied.²⁰

We must accept the reality that harsher immigration laws would not have stopped the terrorists. Al Qaeda has shown a rare diligence and capacity to comply with the laws, or at least to appear to comply with them. For example, there were indications in the early 1990s that terrorists were trying to use the asylum system to gain entry to the United States. When the U.S. Government became aware of this and started detaining asylum applicants who were suspected terrorists, the terrorists switched their tactics and began using tourist and student visas. More recently, they have been recruiting American citizens, who cannot be excluded from the United States no matter how harsh our immigration laws. As immigration laws change, terrorists simply adapt.

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IGNORING HISTORY

The United States has tried before to use immigration policy to prevent terrorism, and failed. In 1993, Islamic terrorists bombed the World Trade Center, killing six people and injuring more than a thousand. Senator Charles Schumer (D-NY) reacted immediately by proposing the Terrorist Prevention and Protection Act of 1993.²¹ Had this bill become law, however, it would have done nothing to stop Timothy McVeigh, a U.S. citizen, from blowing up the Oklahoma City Murrah Federal Building in April 1995. Ironically, congressional leaders responded to that attack just as they had responded in 1993: by passing more legislation targeting non-citizens, in this case, the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA)²² and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA).²³ Billed as measures to enhance national security by improving our ability to exclude and deport foreigners, in reality the immigration provisions of these laws did little or nothing to

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improve security. Instead, they caused the INS to expend enormous effort deporting long-term immigrants for reasons entirely unrelated to terrorism. Despite statements from lawmakers that these laws would prevent future terrorist attacks, nothing in AEDPA or IIRAIRA stopped Mohammed Atta and his comrades from carrying out the September 11th attacks.

There is significant evidence that, since September 11th, the U.S. government again is wasting precious resources on immigration policies that do very little to enhance national security. For example, Attorney General John Ashcroft has implemented a program to more rigorously enforce the law requiring immigrants to notify the federal government of any change of address within ten days. This program was billed as an “anti-terrorism” measure, despite the fact that it does little or nothing to detect terrorists. Soon after this program was announced, the federal government was swamped with hundreds of thousands of change-of-address notices, which it was unable to process.²⁴ There is no reason to believe that forcing potential terrorists to file change-of-address notices would stop them for committing acts of terrorism, but the wheels of bureaucracy churn on, processing the forms anyway. Similarly, with a program called “Special Registration,” the government required thousands of mostly male and Muslim foreigners to report repeatedly to immigration offices, where immigration officials collected reams of personal information on them, including their credit card numbers, and made them wait for hours or risk deportation. Not a single terrorist was uncovered through this program, but thousands of immigrants were detained and sometimes abused when they attempted to comply with it. Significant government resources have gone into enforcing this and other similarly ill-conceived bureaucratic responses to September 11th.

U.S. immigration laws are already tougher than most people appreciate. Making them even harsher will do little to enhance security, and actually may do far more to harm it. Harsher immigration laws can exclude the wrong people—people we need to fight the war on terrorism and to build our economy. Moreover, harsher laws must be enforced, and thus require additional law enforcement resources that already are in short supply. While increased enforcement efforts can enhance security if the laws being enforced are carefully focused on security, increased enforcement of harsher laws that are not narrowly tailored to address security concerns simply diverts the limited resources available to target terrorism. Finally, harsher laws give us a false sense of security, a lesson we have failed to learn from prior terrorist attacks.

FAILURES OF INTELLIGENCE

The attacks of September 11th did not stem from a failure of immigration law, but a failure of intelligence. The attacks also demonstrated that U.S. policymakers had neglected to focus resources on the real threats to national security. While the Federal Government was spending

millions of dollars rounding up and deporting undocumented Mexican workers at restaurants and factories around the United States, Mohammed Atta and his terrorist comrades were issued visitor's visas and waved through airport immigration checkpoints.

In 2002, the House and Senate Intelligence Committees held numerous closed and open hearings concerning the intelligence aspects of the September 11th attacks. Among the Committees' findings was that a failure by the intelligence community to share intelligence information with the INS and State Department resulted in missed opportunities to stop or apprehend at least two of the hijackers. The report of the Joint Inquiry states: "For a variety of reasons, the Intelligence Community failed to capitalize on both the individual and collective significance of available information that appears relevant to the events of September 11th. As a result, the Community missed opportunities to disrupt the September 11th plot by denying entry to or detaining would-be hijackers; to at least try to unravel the plot through surveillance and other investigative work within the United States; and, finally, to generate a heightened state of alert and thus harden the homeland against attack."²⁵

In additional comments, Vice Chairman of the Senate Select Committee on Intelligence Senator Richard C. Shelby (R-AL) stated, "One of the serious problems identified by our Joint Inquiry is the pervasive refusal of the CIA [Central Intelligence Agency], in the months and years before September 11, to share information about suspected terrorists with the very U.S. Government officials whose responsibility it is to keep them out of the United States: the State Department consular officials who issue visas and the INS officials who man immigration posts at every American port of entry."²⁶

Senator Shelby went on to note that INS and State Department personnel regularly screen visa applicants and U.S. arrivals against the TIPOFF system, which serves as a "watchlist" for suspected terrorists and other criminals. "With respect to suspected terrorists," he states, "the TIPOFF database is populated principally through the submission of names from the CIA. Crucially, however, without CIA input, these officials cannot do their job - and even terrorists known to the CIA will be able freely to acquire visas and be granted entry if the CIA has neglected to share their names with TIPOFF. Alarming this is apparently precisely what happened for years, because CIA was unwilling to share more than a small fraction of its information about suspected terrorists with State and INS."²⁷

In addition to problems with the TIPOFF system, the Joint Inquiry discovered that two of the hijackers - Khalid Almidhar and Nawag Alhazmi - were allowed visas and entry to the country even though the CIA had information indicating the men were suspected terrorists. Both men received visas and entered the United States on January 15, 2000. Almidhar departed in June 2000 and returned on a visitor visa on July 4, 2001.

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- Senator Richard Shelby,
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Senate Select Committee on Intelligence



However, it was not until August 2001 that a CIA cable requested the FBI, INS, and other agencies to look out for Almidhar and Alhazmi.

Eleanor Hill, Staff Director of the Congressional inquiry, testified that the CIA cable did not request an active search for the suspected terrorists. The cable, she said, was not accompanied by any specific notation indicating the INS should use all means possible to find these two suspects. Then INS Assistant Commissioner for Investigations Joseph Greene testified that INS might have captured the men at the port of entry or elsewhere had the agency received timely information concerning the potential security threat they represented. “We think there is a likelihood that that could have happened,” he said. “The capacity is there for us to make a contribution, had we been asked.”²⁸

Hill said the committees’ investigators discovered that an FBI report in July 2001 (“the Phoenix memo”) warning about Al Qaeda possibly training terrorist pilots in America was not turned over to the Federal Aviation Administration (FAA) until a number of months after September 11th. “This lapse in sharing intelligence, and the failure to add the names of at least two of the hijackers to the State watch list prior to September 11, were attributed to a lack both of resources and of awareness of watch listing.”²⁹ Claudio Manno, a senior intelligence official at the Transportation Security Administration, testified, “Had we had information that those two individuals presented a threat to aviation or posed a great danger, we would have put them on the list and they should have been picked up in the reservation process.”³⁰

In a 2003 report that comprehensively reviews the federal government’s response to the September 11th attacks, the Migration Policy Institute (MPI) not only reinforces many of the Joint Inquiry’s findings concerning the importance of intelligence gathering and information sharing, but goes a step further by examining the relationship between immigration policy and national security. A central conclusion of the report is that immigration controls in and of themselves are not effective means of reducing the vulnerability of the United States to terrorist attack. The report notes that immigration measures are able to “bar terrorists about whom the government already has information from entering the country, and set up gateways and tracking systems so that someone already here can be found if intelligence agencies identify him as a suspect.”³¹ In other words, as one “senior Western intelligence official” told the report’s authors, “tightening immigration controls doesn’t help you that much until the intelligence side gives you a name, and then it helps you track them.”³²

A key, albeit disturbing, finding of the MPI report is that “even under the best immigration controls most of the September 11th terrorists would still be admitted to the United States today. That is because they had no criminal records and had not been singled out for special scrutiny by intelligence agencies. The innovation al Qaeda introduced is ‘clean operatives’ who can pass through immigration controls.” As a result, immigration measures “are not effective by themselves in identifying terrorists of this new type.”³³

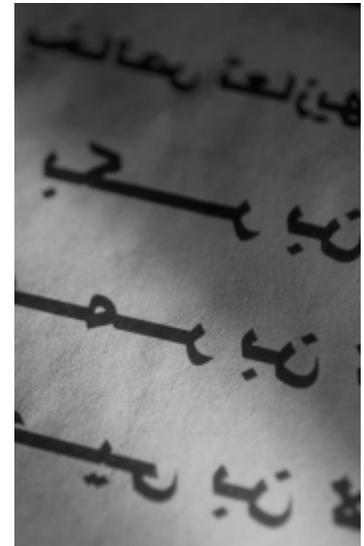
According to many experts, the broad immigration restrictions implemented by the U.S. government after September 11th, particularly those directed at Muslims and Arabs, are not only too unfocused to effectively enhance security, but may actually hinder intelligence investigations by fostering resentment among these groups both within the United States and abroad.³⁴ Moreover, harsh immigration policies aggravate two key intelligence shortcomings identified after September 11th: the need for human intelligence sources who can infiltrate terrorists' communities, and the need for translators who speak the relevant languages.

Vincent Cannistraro, former director of Counterterrorism Operations and Analysis at the CIA, observes that some immigration policies have “alienated a lot of these [Arab and Muslim] communities, caused a great deal of fear and reinforced the tendency of immigrant communities to huddle together and not trust authorities, which works against intelligence gathering by law enforcement, particularly the FBI...The idea that you stigmatize whole classes of people and profile them because you think this is going to prevent the next terrorist attack is exactly the wrong way [to go about it]...There may very well be another clandestine al-Qaeda cell in North America, but none of these methodologies has contributed to identifying them.”³⁵

Mr. Cannistraro's comments highlight one of the lessons we have not yet learned about the role immigration law and policy must play in the war against terrorism: The United States needs immigrants in order to fight this war. Rather than turning away immigrants, we must recruit them. The best defense against terrorism, to quote Jack Dempsey and to paraphrase George Washington, is a good offense.³⁶ This entails improving the human intelligence (HUMINT) from members of the communities in which terrorists live. Immigrants can provide this intelligence.

As the Joint Inquiry noted, the United States lacks the human assets needed to analyze intelligence about terrorists, in large part because intelligence agencies do not have enough people who speak the relevant languages.³⁷ Margaret Gulotta, chief of the FBI's Language Services Section, has said that most intelligence analysts may not recognize terrorist threats because of language barriers. Although the FBI has hired hundreds of linguists since September 11th, there is still a severe shortage.³⁸ “Warnings of terrorist attacks may not be translated in time unless more people are hired by the nation's defense and intelligence agencies,” Gulotta has said.³⁹ Only about six hundred American students are now studying Pashto, Dari, Farsi, and Uzbek at U.S. colleges, although 40 million people worldwide speak those languages.⁴⁰ The United States simply does not produce enough native speakers of many critical languages.⁴¹

The State Department – which is responsible for communicating U.S. policies to the Arabic speaking world – has only 54 fluent Arabic speak-



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ers.⁴² Very few American schools even teach the languages needed for the war on terror. Even the Defense Language Institute in Monterey, California, does not teach some of them. As a result, the United States can either utilize immigrants or outsource translation overseas in order to gain access to sufficient foreign-language speakers to translate the massive amounts of information the Intelligence Community gathers each day.

One can draw similar conclusions about human intelligence. Very few native-born Americans have the ability to infiltrate Al Qaeda camps. The few who have done so – John Walker Lindh and Jose Padilla, for example – have not been used as counterintelligence assets. It will take years to train native-born Americans to infiltrate Al Qaeda terrorist organizations. As a result, the United States must recruit immigrants. The U.S. government, however, is unlikely to gain the cooperation of immigrants by terrifying them and making them unsympathetic to U.S. policies.

The federal government has sometimes lacked sensitivity to this key security issue. For example, shortly after September 11th, Attorney General John Ashcroft announced a crackdown on immigrants. A few days later, he announced that any immigrants who came forward and provided useful information would be rewarded with a visa.⁴³ Inconsistent messages like these do not encourage immigrants to come forward and help.

The government also has summarily deported many individuals who could have provided useful intelligence or acted as counterintelligence agents. Rather than dumping immigrants in Somalia,⁴⁴ where they are likely to be killed or turned into future terrorists as a matter of survival, it might have been smarter to consider their value as intelligence sources and treat them accordingly. Creating new terrorists – more angry people who have nothing to lose by attacking the United States – is not a logical strategy.⁴⁵

A strategy that does succeed in fighting terrorists is one that enlists the aid of members of the communities in which the terrorists live and work. Such a strategy was enormously successful in fighting U.S. domestic terrorism after the Oklahoma City bombing.⁴⁶ A similar strategy can be applied to fighting Al Qaeda, but it requires government officials to think creatively about how to separate the terrorists from the community in which they live, so that this community will identify with the government and not with the terrorists, and thus provide assistance to the government. This is the only strategy that is likely to be successful in the long term.

Despite the urgent need for assistance from the immigrant community, the U.S. government persists in responding to terrorism by enacting increasingly harsh immigration laws. The assumption underlying this approach is that stricter laws will inevitably increase our security by somehow preventing terrorism. In fact, harsher immigration laws undermine national security if they cause us to exclude the wrong people, deprive the government of the human intelligence needed to assess the terrorist threat, waste resources on deporting people who pose no threat to security, and foster the mistaken belief that limiting the number of foreigners who come to the United States will reduce the threat of terrorism.

COLLATERAL DAMAGE

Although harsh immigration policies do little to enhance national security, they do harm the U.S. economy. As immigration laws are tightened in the name of security, many people are excluded who otherwise would immigrate to America or seek to enter for legitimate reasons. Some are deterred by what they perceive as an anti-immigrant political climate, others because they cannot meet the requirements of ever harsher laws. The end result is that these people go elsewhere. The U.S. economy therefore is left with fewer and fewer young, immigrant workers who pay taxes that support a rapidly aging native-born population. In addition, recent declines in the arrival of researchers and scientists, foreign patients, and tourists are having an adverse impact on important sectors of our economy.

Already, more foreign students are choosing to study in countries more hospitable than the United States.⁴⁷ As a result, we will not benefit from their talents; instead, Canada, Australia, Russia, Japan, and China will benefit. Students who in the past came to the United States to study and stayed on to become doctors, engineers, and computer scientists will instead go to other, more welcoming countries.

Losing foreign students serves only to hurt national security and benefit U.S. competitors. Consider India, a country that has traditionally supplied large numbers of foreign students to the United States, many of whom have stayed on to become highly productive members of society. In the backlash against immigrants after September 11th, many of these people are either staying in India or choosing to study elsewhere, fearful of coming to the United States. India is already starting to outstrip the United States technologically. Will U.S. security be enhanced when India holds the keys to high technology?

It is easy to see how harsher laws can exclude the wrong people if we look at a historical example. In December 1932, Albert Einstein sought a visa to escape Nazi Germany and come to the United States. But there was a problem – a U.S. government file showed that Einstein was a suspected socialist and had ties to socialist groups. A conservative organization had sent a sixteen-page report on Einstein to the State Department, urging that he be denied entry to the United States. Einstein was only able to obtain a visa after applying media pressure through the *New York Times* and the Associated Press. He escaped Germany just a few weeks before Hitler seized power in Berlin.⁴⁸

Decline in International Travel to the U.S. 2000-2003

Change in Number of Admissions	- 21.3%
Loss to the U.S. Economy	\$15.3 billion

Source: Testimony of William S. Norman, President and CEO, The Travel Industry Association of America, Before The House Committee on Small Business, November 20, 2003.

In 2003, seventy years later, if Einstein had made the same application, he would no doubt be excluded from the United States – inadmissible as a terrorist sympathizer. Einstein’s documented ties to various subversive groups would mark him as someone to be barred from entry to the United States. If this had been the case in 1932, he would have been left in Nazi Germany, probably to become a victim of the Nazi Holocaust. If he had not been imprisoned and executed, his scientific talents would surely have been put to use by the Nazis to develop nuclear weapons before the United States. As this example illustrates, adopting blanket rules that exclude whole classes of people may keep out individuals who could make invaluable contributions to our national security as well as our economy.

“SOFT POWER”

Those who perceive the United States as a land of opportunity and freedom are likely to join in the war on terrorism. Creating an image of America as xenophobic and isolationist squanders this asset.

One of the greatest national security assets of the United States is the “soft power” of its image. Like the “goodwill” of a corporation, this asset is not easily measured, but it is clear that it currently is being wasted. The United States is safest when she is viewed favorably by others. The image of the United States as a land of freedom is an invaluable national security asset. This image is what makes Americans and others willing to fight and die for her. Preserving this image is in large part a function of keeping America a country where the “rule of law,” fairness, and justice prevail.

One of the frequently overlooked “soft power” aspects of U.S. national security is the treatment of immigrants. Those who perceive the United States as a land of opportunity and freedom are likely to join in the war on terrorism. Creating an image of America as xenophobic and isolationist squanders this asset.

Harsher immigration laws also make it more likely that government power will be abused and directed at the wrong people. While harsher laws do not stop terrorists, they do stop legitimate visitors to the United States: foreign students, investors who could increase the nation’s productivity, and workers willing to work long hours in jobs most Americans don’t want. Restrictive laws keep families from being united, causing untold hardship to U.S. citizens and their children. Legitimate refugees are denied safe haven. More and more immigrants are likely to be deported or mistakenly excluded.

A more practical harm to national security comes, however, from laws and policies that divert attention and resources away from real threats. As the Joint Inquiry found, the attacks of September 11th might have been prevented with better intelligence. But targeting immigrants rather than terrorists does nothing to enhance intelligence capabilities.

Consider, for example, proposals to legalize undocumented immigrants. Some critics have argued that legalization would harm national security.⁴⁹

In fact, a comprehensive legalization program is much more likely to enhance national security. Mexican and other foreign workers pose very little security threat to the United States. Most have no criminal record. Repeatedly hunting them down and deporting them does nothing to enhance security, but merely advertises to the world that the United States cannot stop the determined from coming. A comprehensive legalization program would free DHS from having to waste its limited resources on finding and deporting undocumented workers. Instead, these workers could come forward, be fingerprinted, have their backgrounds checked, be interviewed, pay taxes, and provide information to DHS about their means of entry into the United States. From a security perspective, it is much better to have comprehensive records on these people than to have the current situation, where locating them is entirely hit or miss. Undocumented immigrants who come out of the shadows represent an unused source of intelligence as well as a vast economic benefit to the United States.

CONCLUSION

The primary fault for the September 11th attacks rests with the terrorists who murdered thousands of human beings. The terrorists died with the blood of innocent people on their hands. The success of the United States in tracking down those who helped finance and mastermind the attacks has improved the chances that such acts can be prevented in the future.

Beyond the terrorists themselves, intelligence shortcomings contributed to the September 11th attacks. As the Joint Inquiry of the Intelligence Committees states, “No one will ever know what might have happened had more connections been drawn between these disparate pieces of information. We will never definitively know to what extent the [Intelligence] Community would have been able and willing to exploit fully all the opportunities that may have emerged. The important point is that the Intelligence Community, for a variety of reasons, did not bring together and fully appreciate a range of information that could have greatly enhanced its chances of uncovering and preventing Osama Bin Laden’s plan to attack these United States on September 11, 2001.”⁵⁰

The federal government has a history of responding to terrorism by enacting increasingly harsh immigration laws, based on the flawed assumption that stricter laws will inevitably increase security. In fact, harsher immigration laws may actually harm national security if they undermine U.S. economic and “soft” power, reduce the human resources needed to fight terrorism, and allow other nations with more generous policies to pull ahead. “Implicit in the term ‘national defense’ is the notion of defending those values and ideals which set this nation apart...”⁵¹ Before enacting harsher laws, policymakers must ask whether these laws will actually make

Although harsher laws might give Americans a sense of security, in practical terms they serve mainly to deflect attention and resources away from the key goal of improving intelligence gathering and information sharing.



the nation safer by preventing terrorism. Measures taken to enhance national security in the post-September 11th era must be focused and effective, rather than expending scarce resources to hit non-threatening targets.

While September 11th clearly revealed the need for improved counter-terrorism and security policies, it should not serve as a pretext to abandon the traditional openness of the United States to newcomers. We should take note of the words spoken by Solicitor General Ted Olson, who lost his wife, Barbara, in the September 11th attack on the Pentagon:

“We cannot, and we will not, dishonor or wash away the memories of those who somehow clawed their way out of poverty, tyranny and persecution to come to this country because it was America, and because they were willing to risk death to become Americans, and to give their children and grandchildren the opportunity and freedom and inspiration that makes this place America. Americans could no longer call themselves Americans if they could walk away from that legacy.”

He added, “We will prevail for the very reason that we have been attacked. Because we are Americans. Because the values that made us free, make us strong.”⁵²

Understanding the true role of immigration law and policy in the events of September 11th is essential in order to craft reforms that strengthen national security while avoiding the divisive and historically ineffective impulse to scapegoat non-citizens. Although harsher laws might give Americans a sense of security, in practical terms they serve mainly to deflect attention and resources away from the key goal of improving intelligence gathering and information sharing. If the United States is to prevent another terrorist attack, the federal government must direct its resources at correcting the specific intelligence failings that made September 11th possible. If the government squanders its resources, however, by attempting to cast a security net over the entire foreign-born population, rather than actually identifying terrorists, the country will remain vulnerable to attack. Moreover, we will have sacrificed some of the core values and freedoms that define our nation; inflicted long-term damage on our economy; and fostered growing anger and resentment among immigrants and the international community, without whom the war on terrorism cannot be won.

ENDNOTES

- ¹ Most prominently, the Center for Immigration Studies published a series of papers in which it claimed that current laws were inadequate to meet the threat of terrorism. See, e.g., Mark Krikorian & Steven A. Camarota, *Immigration & Terrorism: What Is To Be Done?* Washington, DC: Center for Immigration Studies, November 2001.
- ² Steven Camarota, *Safety in (Lower) Numbers: Immigration & Homeland Security*. Washington, DC: Center for Immigration Studies, October 2002 (arguing that the best way to give INS “breathing room” and to address homeland security concerns is to reduce temporary and permanent immigration).
- ³ Holly Step, “Curbs Feared On Foreign Student Body,” *Miami Herald*, September 26, 2001.
- ⁴ Thomas Ginsburg, “U.S. immigration policy to undergo scrutiny,” *Philadelphia Enquirer*, September 18, 2001, at A17 (“We must close the borders now, and have all illegal aliens deported.”).
- ⁵ Mark Krikorian, “Feel Safer Yet?,” *National Review* Online, September 10, 2002.
- ⁶ Neil Munro & Elisabeth Frater, “Wanted: New Watch Powers,” *National Journal*, September 29, 2001.
- ⁷ *Findings of the Final Report of the Senate Select Committee on Intelligence and the House Permanent Select Committee on Intelligence Joint Inquiry into the Terrorist Attacks of September 11, 2001*, December 2002, the Context, Part 1, Findings and Conclusions, at 5. The entire report of the Joint Inquiry is available at <http://intelligence.senate.gov/pubs107.htm>.
- ⁸ Muzaffar A. Chishti, Doris Meissner, Demetrios G. Papademetriou, Jay Peterzell, Michael J. Wishnie & Stephen W. Yale-Loehr, *America’s Challenge: Domestic Security, Civil Liberties, and National Unity After September 11*. Washington, DC: Migration Policy Institute, 2003, at 153.
- ⁹ Section 212(a)(3)(A) of the Immigration and Nationality Act (INA) as amended by the Immigration Act of 1990.
- ¹⁰ *Id.* at Section 212(a)(3)(B)(iii).
- ¹¹ Under Section 101(a)(43) of the INA, the term “aggravated felony” means “murder, rape, or sexual abuse of a minor,” but also includes “a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment is at least 1 year.” Under Section 101(a)(48)(B), the definition of “term of imprisonment” is not limited to time actually served in custody but includes any “suspension of the imposition or execution of that imprisonment or sentence in whole or in part.”
- ¹² Michael D. Goldhaber, “Deportation Horror Tales Encouraging Changes in Arbitrary Immigration Laws,” *Fulton County Daily Report*, September 13, 2000.
- ¹³ “Non-citizens to Choose Next President Says U.S. Border Control,” PR Newswire, November 9, 2000 (describing how “motor voter” laws have led many aliens to register to vote because states don’t always verify citizenship status, but explaining that voting is a deportable act for a non-citizen).
- ¹⁴ The author, Margaret Stock, represented this individual several years ago. A member of the Alaska National Guard, he was a citizen of the Philippines and a lawful permanent resident of the United States who was the stepson of a U.S. Government employee. He paid a municipal traffic ticket after being stopped by a school security guard for having a firearm in his car on school property. The firearm was legally registered. After he paid his traffic ticket, INS served him with papers to have him deported to the Philippines because, under the Immigration & Nationality Act, any firearms conviction, however minor, requires deportation. See 8 U.S.C. §1227(a)(2)(C) (“Any alien who at any time after admission is convicted under any law of purchasing, selling, offering for sale, ex-

changing, using, owning, possessing, or carrying, or of attempting or conspiring to purchase, sell, offer for sale, exchange, use, own, possess, or carry, any weapon, part, or accessory which is a firearm or destructive device (as defined in section 921(a) of title 18, United States Code) in violation of any law is deportable”).

¹⁵ Randall Richard, “Criminal deportees from U.S. wreak havoc around world,” *Chattanooga Times Free Press*, October 26, 2003, at A10.

¹⁶ “Metro: In Brief,” *Washington Post*, April 24, 2001, at B1 (quoting INS spokeswoman Karen Kraushaar as stating “Immigration is a mystery and a mastery of obfuscation, and the lawyers who can figure it out are worth their weight in gold”).

¹⁷ U.S. General Accounting Office, “Several Factors Impede Timeliness Of Application Processing,” GAO-01-488, May 4, 2001 (describing how “information provided by INS field offices was often incorrect and misleading”).

¹⁸ Calvin Woodward, “Thicket of visa rules does not necessarily stop those versed in making trouble,” Associated Press, July 11, 2002; see also U.S. Department of Justice, Office of the Inspector General, “The Immigration and Naturalization Service’s Contacts With Two September 11 Terrorists: A Review of the INS’s Admissions of Mohamed Atta and Marwan Alshehhi, its Processing of their Change of Status Applications, and its Efforts to Track Foreign Students in the United States,” May 20, 2002, available at <http://www.usdoj.gov/oig/special/02-05/fullreport.pdf>.

¹⁹ Id.

²⁰ Alfonso Chardy, “Application for Pilot Visa Made Suspect’s U.S. Entry Legal, INS Says,” *Miami Herald*, October 21, 2001, at 10A; see also Margaret D. Stock, “United States Immigration Law in a World of Terror,” National Security White Paper, The Federalist Society for Law & Public Policy (2001).

²¹ H.R. 1301, Terrorist Prevention & Protection Act of 1993, 103rd Cong. (1993).

²² Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, 110 Stat. 279 (Apr. 24, 1996)

²³ Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208, 110 Stat. 3009 (Sept. 30, 1996).

²⁴ Julie Sullivan & Richard Read, “INS Crumbles Amid 9/11 Reforms,” *Portland Oregonian*, September 10, 2002, at A01 (stating that when INS announced it was going to enforce the change-of-address notification requirements, “[f]oreigners complied, flooding the INS with more than 700,000 change of address cards, which the agency announced last week it had no time to process”); see also “INS Backlog Shows Folly of Casting Too Large A Net,” *Portland Press Herald*, August 7, 2002, at 8A (describing how INS officials admitted that a Missouri warehouse held two million unprocessed documents, including change of address cards, that the agency was unable to manage).

²⁵ *Findings of the Final Report of the Senate Select Committee on Intelligence and the House Permanent Select Committee on Intelligence Joint Inquiry into the Terrorist Attacks of September 11, 2001*, the Context, Part 1, Findings and Conclusions, at 5.

²⁶ Additional Views of Senate Richard C. Shelby, Vice Chairman, Senate Select Committee on Intelligence, September 11 and the Imperative of Reform in the U.S. Intelligence Community, p.24.

²⁷ Id., at 24 (emphasis added). The General Accounting Office recently criticized information sharing within the federal government as less than optimal due to competing technology systems and other problems.

²⁸ Philip Shenon & David Johnston, “Threats and Responses: The Inquiry; 2 Agencies Say Silence Prevented Pair’s Tracking,” *New York Times*, October 2, 2002, at A1.

²⁹ Id.

³⁰ Id.

³¹ *America’s Challenge*, at 6.

³² Id., at 17.

³³ Id., at 153.

³⁴ John N. Paden & Peter W. Singer, “America Slams the Door (On Its Foot): Washington’s Destructive New Visa Policies,” *Foreign Affairs*, May/June 2003.

³⁵ Joe Feuerherd, “Critics say immigration tactics

- threaten security,” *National Catholic Reporter*, March 28, 2003.
- ³⁶ William Safire, “Preemption Proves Itself,” *International Herald Tribune*, April 15, 2003, at 6.
- ³⁷ Rowan Scarborough, “Troops Lack Intel Support,” *Washington Times*, September 4, 2002 (“agencies on which they depend to provide enemy locations, such as the Defense Intelligence Agency and the CIA, lack reliable human sources and enough foreign-language speakers”).
- ³⁸ Daniel Klaidman & Michael Isikoff, “Lost in Translation,” *Newsweek*, October 27, 2003, p.26 (“hundreds of hours of tapes from wiretaps and bugs pile up in secure lockers, waiting, sometimes for months on end, to be deciphered.”).
- ³⁹ Mark Niese, “Translator Shortage Hampers Intelligence,” Associated Press, November 8, 2002.
- ⁴⁰ *Id.*
- ⁴¹ See Richard D. Brecht & William P. Rivers, *Language & National Security in the 21st Century* (National Foreign Language Center, 2000), at 119 (“The nation’s capacity in the so-called LCTLs [Less Commonly Taught Languages] is shockingly thin, particularly outside of Arabic, Chinese, Japanese, and Russian.”).
- ⁴² Charles Leroux, “U.S. not using its technical edge to win ‘public diplomacy’ war,” *Chicago Tribune*, October 14, 2003, at 1C.
- ⁴³ Thomas Ginsburg, “Visa program sees few post-9/11 takers,” *San Diego Union-Tribune*, February 12, 2003, at A18.
- ⁴⁴ See, e.g., Janine di Giovanni, “How American Dream faded in downtown Mogadishu,” *The Times of London*, February 26, 2002 (describing how the United States Government deported a group of men – including an Intel Corporation employee – to Mogadishu, Somalia, where there is no functioning government).
- ⁴⁵ Ironically, we have also created a threat to other nations’ security by deporting large numbers of American-trained criminals. See, e.g., Randall Richard, “Criminal deportees from U.S. wreak havoc around world,” *Chattanooga Times Free Press*, October 26, 2003, at A10.
- ⁴⁶ See Lane Crothers, *Rage on the Right: The American Militia Movement from Ruby Ridge to Homeland Security* (2003).
- ⁴⁷ Peter Delevett, “Visa Process Frustrates International Students in U.S.,” *San Jose Mercury News*, Oct. 10, 2003 (describing foreign students who grew frustrated with the lengthy U.S. visa process and decided to study elsewhere).
- ⁴⁸ Fred Jerome, *The Einstein File* (St. Martin’s Press, 2002).
- ⁴⁹ Jerry Seper, “Bush’s ‘open door’ slammed; Tancredo calls his ‘altruistic views’ a threat to security,” *Washington Times*, April 19, 2002, at A01.
- ⁵⁰ *Findings of the Final Report of the Senate Select Committee on Intelligence and the House Permanent Select Committee on Intelligence Joint Inquiry into the Terrorist Attacks of September 11, 2001*, at 5.
- ⁵¹ United States v. Robel, 389 U.S. 258, 264 (1967).
- ⁵² Speech by Ted Olson to the Federalist Society, November 16, 2001.

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The American Immigration Law Foundation is a 501(c)(3) non-profit organization dedicated to increasing public understanding of immigration law and policy and the value of immigration to American society; to promoting public service and excellence in the practice of immigration law; and to advancing fundamental fairness and due process under the law for immigrants.



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