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Suspected illegal Mexican immigrants sit along interstate 8 near San Diego after being detained by the U.S. Border Patrol.

The decade since September 11, 2001, has seen a remarkable transformation of U.S. immigration law and policy. In the aftermath of the 9/11 attacks, as concerns grew about a possible terrorist presence in the United States, the federal government—along with many in the public at large—linked immigration screening and enforcement to the protection of national security. Consequently, lawmakers, federal agencies that engage with immigrants, and the courts that adjudicate immigration matters began to adapt their roles and responsibilities to meet the objectives of the War on Terror.

Indeed, during the last ten years, an emphasis on national security has seeped into U.S. immigration laws, policies, and agencies. Border areas and ports of entry are now framed as potential sources of vulnerability; correspondingly, the federal government has increased its oversight of noncitizens who seek to enter the United States and has imposed restrictions on arriving aliens, including asylum seekers. The federal government has also used immigration systems and policies as broad nets designed to catch persons who might engage in terrorist activities, whether now or at some point in the future. In particular, the government has scrutinized individuals of Muslim, Arab, and South Asian (MASA) descent. Moreover, the federal government has expanded the definition of "terrorist activity" to include a breathtakingly broad spectrum of conduct. In so doing, noncitizens who stumble into this controversial designation lose access to important immigration benefits. The responses by the federal government to 9/11 have led to an unprecedented increase in detentions and deportations and unease and confusion within immigrant communities.

Conflating Immigration and Security

The remarkable changes within the immigration system seemed to occur almost overnight and reflected the beginning of a pattern of utilizing immigration law and the country's immigration-related agencies to meet national security objectives. Fourteen months after the attacks, in November 2002, Congress enacted the Homeland Security Act (Pub. L. No. 107-296), which led to a significant overhaul of federal agencies. The law brought more than twenty federal agencies (such as the Immigration and Naturalization Service, formerly part of the U.S. Department of Justice (DOJ), as well as the Federal Emergency Management Agency, the Transportation Security Administration, and others) under the umbrella of the newly created U.S. Department of Homeland Security (DHS).

Congress created a new Cabinet-level position in the DHS secretary and defined the department's primary mission as preventing terrorism and minimizing the impact of terrorist attacks within the United States. The Immigration and Naturalization Service (INS) was separated into three components within DHS: the United States Citizenship and Immigration Services (USCIS), Customs and Border Protection (CBP), and Immigration and Customs Enforcement (ICE).

While these structural changes were being made, many interim rules and regulations were instituted that would have significant impact on immigrants, particularly those from MASA communities. Within weeks after the 9/11 attacks, Congress and the DOJ had made decisions to alter the authority and scope of federal agencies. For example, the DOJ issued a regulation that enabled the detention of noncitizens for forty-eight hours or longer in the event of "an emergency or other extraordinary circumstances" without making any charging determinations.

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(Custody Procedures, 66 Fed. Reg. 48331 (Sept. 20, 2001)). A report by the DOJ's Office of the Inspector General later found that the INS had used this authority to detain 762 noncitizens, most of whom were arrested between September 11, 2001, and August 6, 2002, and all of whom were placed on the "INS Custody List" under suspicion that they had some tie to the 9/11 attacks or terrorist activities. (OFFICE OF THE INSPECTOR GEN., THE SEPTEMBER 22 DETAINEES: A REVIEW OF THE TREATMENT OF ALIENS HELD ON IMMIGRATION CHARGES IN CONNECTION WITH THE INVESTIGATION OF THE SEPTEMBER 11 ATTACKS (Apr. 2003).)

Advocates and the media began to report on the mistreatment of many of these men. The government also refused to release information about the identities and locations of detainees, leaving families and community advocates with little information about those who had suddenly "disappeared." In addition, pursuant to a memorandum by former Chief Immigration Judge Michael Creppy, immigration judges were instructed to close selected immigration cases to the public, family members, and the media. More than 600 secret immigration hearings were held by May 2009; most of these involved men from MASA countries.

Controlling Entry into the United States

A defining feature of post-9/11 immigration policy has been the heightened scrutiny of those who seek to enter the United States. Soon after 9/11, the federal government tightened the process of issuing temporary visas to tourists, business visitors, students, and other foreign nationals. Specifically, through provisions in the Enhanced Border Security and Visa Reform Act of 2002 (Pub. L. No. 107-103) and the Homeland Security Act, the government called for machine-readable, tamper-proof visas; enhanced use of technology and data-sharing between agencies; training of consular officers on fraud terrorist identification; additional requirements for student visas; and more. As a result of these reforms, prospective students, business visitors, and others—often from countries perceived to be sources of terrorist threats—were denied entry to the United States. Universities and business groups criticized the restrictions on visa issuance, arguing that the United States might lose intellectual and entrepreneurial capital to countries with more permissive entry requirements. As an empirical matter, nonimmigrant admissions noticeably dropped in 2002 and 2003 but have increased across most visa categories since 2004. (DHS YEARBOOK OF IMMIGRATION STATISTICS: 2009.)

Entry controls have not been limited to the visa issuance process overseas. In 2004, DHS officially rolled out US-VISIT, a program that requires the capture of biometric data (digital fingerprints and photographs) of foreign nationals at visa-issuing overseas posts *and* at ports of entry in the United States. Since it was first introduced, US-VISIT has been expanded to include nearly all noncitizens, including lawful permanent residents. The stated purpose of US-VISIT is to ensure that terrorists and criminals are unable to enter the United States and to prevent visa and other document fraud. Civil liberties advocates have expressed concern about privacy and possible misuse of the data. Additionally, the process of fingerprinting and photographing foreign nationals—while perhaps understandable from a policy perspective—leaves many visitors with an unpleasant first impression of the United States.

The federal government has recently adopted a more flexible standard in dealing with arriving asylum seekers. Under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, arriving aliens who lack proper paperwork are subject to mandatory detention. This includes asylum seekers, who tend to lack papers or identification documents due to fear of persecution in their countries of origin. The 1996 laws allowed for the parole, or temporary admission, of certain noncitizens who affirmatively requested parole and met certain criteria. Advocacy groups, however, complained of inconsistent and arbitrary application of the parole guidelines by local immigration officers; advocates grew even more concerned when ICE issued stricter parole guidelines in 2007. (HUMAN RIGHTS FIRST, U.S. DETENTION OF ASYLUM SEEKERS (2009).) In response to these concerns, in December 2009, ICE announced more flexible parole procedures for arriving asylum seekers. Under the new guidance, an arriving noncitizen who can establish her identity, does not pose a flight risk or danger to the community, has a credible fear of persecution or torture, and has no adverse factors is to be *automatically* considered for parole.

The federal government has also sought to control entry of foreign nationals through enhanced patrolling along the country's southern and northern borders. The U.S.-Mexico border, which was traditionally seen (and operated) as an unofficial path for economic migrants, was framed as a porous entryway for cunning terrorists. Consequently, after 9/11, the U.S. government invested heavily in the construction of physical barriers and "virtual fences" along the U.S.-Mexico border and has increased funding to the Border Patrol. Additionally, although the Canadian border receives less media attention, DHS has stepped up its screening efforts on bus and train routes that traverse the northern border. Indeed, immigrant advocates have raised concerns about the profiling of passengers on Greyhound buses and Amtrak trains.

Weeding out "Terrorists in Our Midst": An Emphasis on National Origin and Past Affiliations

Immigration laws and programs since 9/11 have been deployed as tools to

monitor, remove, or otherwise limit the social membership of individuals who might pose a threat to national security. Government programs such as the Alien Absconder Initiative, the "voluntary" interviews of noncitizen men, and others were put into place; as a result, immigrants from MASA countries were interrogated, apprehended, and/or otherwise targeted.

The most controversial of these programs was the National Security Entry-Exit Registration System (NSEERS). Additionally, an expanded definition of "terrorist activity," as well as naturalization delays, has beleaguered foreign nationals in the United States since 9/11. Instituted in 2002 by the DOJ, NSEERS operated as a tracking program that set forth registration requirements for noncitizen males 16 years and older—specifically, those who were nonimmigrants, such as visitors, students, green card holders, and asylum/refugee status seekers. (67 Fed. Reg. 52584 (Aug. 12, 2002).) Yet, not everyone was required to meet these requirements. They only applied to individuals from twenty-five countries: Afghanistan, Algeria, Bahrain, Bangladesh, Egypt, Eritrea, Indonesia, Iran, Iraq, Jordan, Kuwait, Lebanon, Libya, Morocco, North Korea, Oman, Pakistan, Qatar, Saudi Arabia, Somalia, Sudan, Syria, Tunisia, United Arab Emirates, and Yemen.

Men from these countries were required to register with immigration authorities and upon entry into and exit from the United States at ports of entry. Those who registered reported that they were fingerprinted and asked personal questions related to their travel, bank accounts, and affiliations with political and religious organizations.

As a result of the NSEERS program, media reports recounted that nearly 83,000 men registered with immigration authorities and that more than 13,000 were placed into deportation proceedings. The program dealt a severe blow to MASA communities. Small businesses closed, families were torn apart, and immigrant neighborhoods were substantially altered.

In April 2011, DHS released a rule removing the list of countries whose nationals were subject to NSEERS. (76 Fed. Reg. 82 (April 28, 2011).) However, advocates remain concerned about the residual effects for individuals who did not comply with NSEERS or who registered and were then placed in deportation proceedings.

Another controversial change to the immigration laws is the expansion of the inadmissibility (exclusion) grounds relating to terrorist activity. These inadmissibility grounds are applied whenever a noncitizen applies for a green card or asylum and hence affect a significant portion of the population. With the passage of the USA PATRIOT Act in 2001 and the REAL ID Act in 2005, the terrorism-related inadmissibility grounds were expanded significantly. Under current law, the phrase "engaged in terrorist activity" has been defined to include the provision of "material support, including a safe house, transportation, communications, funds, . . . or other material financial benefit . . . [for the commission of a terrorist activity, or to a terrorist organization]." (INA § 212(a)(3)(B)(iv)(VI).) The plain language of the law suggests that an individual who provides a *de minimis* form of support to a "terrorist organization"—for example, a bag of rice—*even* while under duress, would be cut off from many different immigration benefits, including asylum and lawful permanent residence. Regrettably, a handful of court cases applied a plain-language reading of the law, denying relief to worthy noncitizens. Since 2007, DHS has issued a series of memos, carving out situations where the material support clause may be waived. Nevertheless, many asylum seekers and applicants for permanent residence are now stuck as DHS determines how broadly to interpret the terrorism exclusion grounds.

A related concern since 9/11 has been the delay in adjudicating naturalization applications for applicants born in certain countries. USCIS is required to grant or deny citizenship within 120 days of reviewing naturalization applications. In 2002, USCIS began to check naturalization applicants against databases of the Federal Bureau of Investigation. USCIS scrutinized applications for applicants who hailed from MASA countries, leading to delays of up to two years in some cases. Although USCIS never disclosed a specific reason beyond a "background check," the delays suggested a country-specific focus. As a result, advocates pursued litigation in federal court, forcing adjudication of applications and calling for transparency in the review process. In 2009, USCIS began efforts to address the citizenship delays. However, the use of profiling in the citizenship review process and the resultant effects on hundreds of citizens-in-waiting are not yet fully resolved.

Increased Detention, Increased Deportation, and Prospects for the Future

Since 9/11, national security concerns have merged with long-standing narratives about delinquency among immigrants. Consequently, the removal of "criminal aliens" and the focus on MASA communities have become prominent features of U.S. immigration law and policy. Since 9/11, ICE has increasingly relied upon criminal removability grounds, leading to an explosion in the population of immigrant detainees.

In the current political moment, national security is likely to retain a prominent role in discussions about U.S. immigration law. Moving forward, the challenge will be to identify approaches that balance these legitimate national security concerns with Americans' aspirations for a more humane and just immigration system.

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