# Journal of International and Comparative Law

March 2016

# National Security and U.S. Immigration Policy

Edward Alden

Follow this and additional works at: https://scholarship.law.stjohns.edu/jicl

Part of the Immigration Law Commons

# NATIONAL SECURITY AND U.S. IMMIGRATION POLICY

*Edward Alden*[*]

The discussion of immigration and national security is rarely about what it should be about. What it ought to be about is how the U.S. government should use the various tools of immigration policy—visas, background checks, identity verification, border searches, and internal enforcement of immigration laws—to try to keep out or remove those who might pose a serious threat to the United States. Instead, since the September 11 terrorist attacks, national security arguments have been used to justify the expansion of enforcement measures that are part of a larger effort to identify and remove illegal immigrants, and have raised the hurdles for entry by all immigrants. The result has been a set of policy measures that are doing more to undermine U.S. national security than to enhance it.

Prior to 9/11, immigration was rarely considered as a national security issue. Most of the debates over immigration in the 1980s and 1990s had focused either on economic questions, such as the number and mix of legal immigrants the United States should be accepting, or on law enforcement questions, such as how best to discourage illegal immigrants from jumping the queue in search of economic opportunity. But the September 11 attacks changed the debate in fundamental ways that continue to ripple through many different facets of immigration law.

As the 9/11 Commission concluded, the failure of the U.S. government to detect and disrupt the September 11 plot was primarily a failure of intelligence sharing.[1] Immigration and visa policy mistakes also played a part in allowing the hijackers into the country, but the Commission's own judgment on their importance can be inferred from its decision to relegate

---

[1] THE 9/11 COMMISSION REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES (2004).

its investigation of that issue to a supplemental staff report.[2]

Others have found immigration policy more culpable, however. One of the first U.S. government officials to highlight the role of immigration policy in relation to the 9/11 attacks was Kris Kobach, a young Kansas law professor who was awarded a prestigious White House fellowship in 2001 and was detailed to the Justice Department to work on immigration issues. After September 11, like everyone else at Justice, he was looking for new ways to prevent another devastating terrorist attack. He seized on the question of whether a more aggressive campaign of immigration enforcement might have foiled the plot.

Of the nineteen September 11 hijackers, five of them were in violation of U.S. immigration law at the time of the attacks—having overstayed or otherwise violated the terms of the visas that admitted them to the United States. Four of those five, including three of the pilots, had actually been stopped by local police at some time in the previous year for traffic violations. One of the pilots, Ziad Jarrah, was pulled over by a Maryland police officer two days before the attacks. Jarrah was driving at 95 miles-per-hour heading north on Interstate 95 near the Delaware border. But when the officer ran the usual wants and warrants, nothing showed up. So he wrote Jarrah a $270 ticket and sent him on his way. At the time, however, Jarrah had overstayed his tourist visa and, thus, had no right to be in the United States. But that information was not in the data that was checked by local police officers. In theory, had such information been available to local police, three of the four pilots might have been identified as illegal immigrants, detained, and deported, and the plot would never have got off the ground.[3] As Kobach would later conclude: "The abuse of immigration laws was instrumental in the deaths of nearly 3,000 people."[4]

Tougher enforcement of immigration laws became central to the Bush administration response after 9/11. Most of the Muslim men who were rounded up and incarcerated for many months on suspicion of involvement

---

[2] *9/11 and Terrorist Travel: Staff Report of the National Commission on Terrorist Attacks Upon the United States* (2004), http://www.9-11commission.gov/staff_statements/911_Terr Trav_Monograph.pdf.

[3] EDWARD ALDEN, THE CLOSING OF THE AMERICAN BORDER: TERRORISM, IMMIGRATION AND SECURITY SINCE 9/11 (2009).

[4] Kris Kobach, *The Quintessential Force Multiplier: The Inherent Authority of Local Police to Make Immigration Arrests*, 69 ALB. L. REV. 179, 179 (2005).

with the attacks were held in custody on immigration violations.[5]  Kobach became the architect of the National Security Entry Exit Registration System (NSEERS), also known as Special Registration, which increased scrutiny of foreign male tourists, students, business travelers, and immigrants coming to the United States from about two dozen "countries of concern," most of them Muslim countries.[6]  The Bush administration ended a practice known as "catch and release," in which most illegal immigrants arrested on immigration charges would be released until their court dates before an immigration judge.  Fearing that a terrorist might be detained and then released, the U.S. government now incarcerates most of the illegal immigrants it detains until their court dates.  The Bush administration also aggressively expanded the authority of local police forces under an existing scheme that had not previously been used, known as 287(g), which allows the federal government to delegate to state and local police forces expanded immigration enforcement powers.[7]  The Justice Department's Office of Legal Counsel (OLC) went further, concluding that state and local law enforcement officials have inherent powers to enforce immigration laws, reversing a Clinton administration OLC opinion from 1996.[8]  And the Obama administration has developed its own program, known as Secure Communities, which involves checking the immigration status of those arrested for criminal violations.

There were certainly sound national security reasons for improving the

---

[5] 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*, http://www.fas.org/irp/agency/doj/oig/detainees.pdf.

[6] For a review of the NSEERS program and its impacts, *see* Shoba Sivraprasad Wadhia, *NSEERS: The Consequences of America's Efforts to Secure its Borders*, Dickinson School of Law, Penn State University (2009), http://www.adc.org/PDF/nseerspaper.pdf; *see also* Robert Bonner & Edward Alden, *The Wrong Way to Screen Visitors*, WASH. POST, Nov. 21, 2009.

[7] Nearly 70 state and local police forces have signed Memoranda of Agreement with Immigration and Customs Enforcement (ICE) to implement the 287(g) program.  Most of those agreements were entered into in 2007 and 2008 during the last two years of the Bush administration.  *See* ICE Fact Sheet, http://www.ice.gov/doclib/news/library/factsheets/pdf/287g.pdf; *see also* Cristina Rodriguez, Muzaffar Chishti, Randy Capps & Laura St. John, Migration Policy Institute, *A Program in Flux: New Priorities and Implementation Challenges for 287(g)* (2010), http://www.migrationpolicy.org/pubs/287g-March2010.pdf.

[8] U.S. Department of Justice, Office of Legal Counsel, Memorandum for the Attorney General re: Non-preemption of the Authority of State and Local Law Enforcement Officials to Arrest Aliens for Immigration Violations (Apr. 3, 2002).

enforcement of immigration laws.  The 9/11 attacks had shown that terrorists were capable of exploiting weaknesses in U.S. immigration and visa laws to enter the United States and remain here while they plotted the attacks.[9]  Many of the initiatives launched over the past decade—including greater security of passports and other identity documents, biometric verification of identity, and the collection of advanced information on incoming passengers—have made it harder for would-be terrorists to enter the United States.  And the FBI and the Department of Homeland Security have been able to use immigration violations to arrest and deport some individuals suspected of having ties with terrorist groups.

But the national security argument has also been exploited effectively by those whose primary agenda is not advancing national security, but rather restricting immigration.  Consider the publications of the Center for Immigration Studies (CIS), a research group that advocates lower levels of immigration.  Their website lists about 170 publications from 1986 through September 2001, not a single one of which focused on immigration policy and national security.  The pre-9/11 papers concerned matters such as the impact of immigration on labor markets, social welfare costs, cultural identity, rule of law and other issues that have long been a staple of the immigration debate in this country.  But since 9/11, roughly half of the CIS publications have been about various aspects of how U.S. immigration policies threaten national security.[10]  This shift in the discussion of immigration can be interpreted in different ways.  It is true that September 11 was a wake-up call for many that weak or poorly enforced immigration laws could pose a security risk.  But it is also clearly true that, after 9/11, the terrorist threat became a particularly compelling argument in favor of something that CIS and other groups had long advocated—namely lower immigration levels and a crackdown on illegal immigration.

Kris Kobach's subsequent career underscores the links between the national security argument and a traditional restrictionist agenda.  After leaving the government in 2003, Kobach was hired to mount a legal defense for the town of Hazleton, Pennsylvania, whose mayor Lou Barletta was championing an ordinance that would penalize local businesses and landlords for employing or renting to illegal immigrants.[11]  Kobach became

---

[9] For a fuller discussion of the shortcomings of pre-9/11 visa and immigration policies, *see* ALDEN, *supra* note 3 .

[10] Center for Immigration Studies, Publications*,* http://www.cis.org/publications.

[11] The Hazleton ordinance was recently struck down by the 3rd Circuit Court of Appeals,

the primary legal architect of SB 1070, the controversial Arizona law that would increase the powers of state and local police to question individuals on their immigration status. That law has been temporarily stayed as a result of a legal challenge by the Obama administration. Kobach has also defended Sheriff Joe Arpaio, the Arizona lawman who has been investigated by the United States Department of Justice Civil Rights Division amid accusations of discrimination and unconstitutional searches and seizures in connection with immigration enforcement. Kobach has argued that Arpaio can ignore Washington, because he and all local sheriffs have inherent authority to stop and question people on their immigration status, and to carry out immigration arrests.[12]

Whatever the motivations of the various players, there are two things that are clear about the relationship between national security and immigration law in the post 9/11 era. First, the United States in the past decade has greatly expanded its immigration enforcement efforts, largely in response to the terrorist attack. Secondly, the overwhelming majority of those affected by this stepped-up immigration enforcement do not pose any sort of national security threat, terrorist or otherwise.

What if we try to stand back, then, and simply ask the question: "What role can immigration policies play in preventing another terrorist attack in the United States?" The answer is a very limited role. There are two main reasons for this.

The first is what can be called the "targeting problem." We know enough about al-Qaeda and its operations to recognize that the United States is not facing a mass terrorist army, but rather a fairly small number of trained operatives with the capacity to inflict enormous damage. CIA director Leon Panetta has said that maybe 50 to 100 al-Qaeda fighters remain in Afghanistan, while National Counterterrorism Center Director Michael Leiter has estimated that there are probably another 300 in neighboring Pakistan.[13] Even accounting for the various other sympathetic

---

which ruled that the ordinance interfered with federal primacy in immigration law. *See* Lozano v. City of Hazleton, 620 F.3d 170 (3d Cir. 2010). Former Hazleton mayor Lou Barletta was elected to Congress in November, 2010 as a Republican candidate running on the Tea Party platform.

[12] Valeria Fernandez, *Arizona Sheriff Arpaio to Unleash 800 Deputies on Undocumented Immigrants*, NEW AM. MEDIA, Feb. 15, 2010.

[13] Peter Bergen, *The Evolving Nature of Terrorism Nine Years After the 9/11 Attacks, Testimony Before the House of Representatives Homeland Security Committee* (2010),

groups around the world, identifying terrorists is a needle in a haystack problem of figuring out who the bad guys are when they are swimming in a huge sea of ordinary people.  On any given day, about 1.1 million peoples enter the United States, of whom some 700,000 are foreign nationals.  Some of those will turn out not to have the proper documents or otherwise be ineligible to enter the United States, and Customs and Border Protection (CBP) officers will turn them around at the port-of-entry.  The Border Patrol is still apprehending about 2,000 people each day trying to cross the southern border illegally, which is less than half of the peak levels of a decade ago and the lowest since the early 1970s.  But that is still a lot of people.

For effective counterterrorism, however, you need good intelligence that helps to identify the genuine threats among this huge number of border crossers.  Take the case of Omar Farouk Abdulmutallab, the so-called Christmas bomber who narrowly failed to ignite explosives he had concealed in his underwear before boarding a trans-Atlantic airliner bound for Detroit.  He was legally entitled to get on a plane to the United States, since he possessed a valid U.S.-government issued tourist visa.  "Enforcing immigration laws" would have done nothing to keep him off the plane.  The failure was rather a targeting failure—the U.S. government as a whole knew enough about Abdulmutallab that his visa should have been revoked and his name placed on the "no-fly" list to keep him off the flight.  Instead, the State Department failed to act on what it knew, and while CBP officials identified him as a target of concern (thanks to the advanced passenger information that airlines must now provide), their plan was to question him after he arrived in Detroit.  The almost successful Christmas attack was a failure of timely intelligence analysis and synthesis, not a failure of immigration enforcement.[14]

A similar pattern can be seen in the use of immigration enforcement laws domestically.  Immigration and Customs Enforcement (ICE), the DHS branch responsible for interior immigration enforcement, periodically issues public updates on its use of immigration laws in terrorism-related cases.  The most recent update, in November 2008, details more than a dozen cases

---

http://health.newamerica.net/publications/resources/2010/the_evolving_nature_of_terroris
m_nine_years_after_the_911_attacks_0.

[14] For the declassified summary of the investigation into the failed bombing by the Senate Select Committee on Intelligence, *see* S. REP. NO. 111-199 (2010), *available at* http://intelligence.senate.gov/pdfs/111199.pdf.

in which individuals suspected of involvement in terrorism were order deported.  But in not a single one of those cases were the individuals identified as a result of immigration violations.  Instead, they were all targeted as a result of successful criminal or intelligence investigations, and immigration law was simply the means for removing them from the country.[15]

The most effective use of immigration powers is in support of intelligence gathering efforts.  Any measure that can help to target particular suspect individuals has a national security value.  These include the gathering detailed information on airline passengers, taking fingerprints from visa applicants and arriving travelers, and running background checks on a very limited number of individuals who may raise red flags.  There are civil liberty and privacy concerns that must be weighed in such efforts, but their contribution to security is demonstrable.  In contrast, broader measures such as the detention of all immigration violators, or the scrutiny of huge groups of individuals under programs like NSEERS have made little demonstrable contribution to security.  The most that could be said by the 9/11 Commission investigators was that better routine enforcement of immigration laws may "raise obstacles for and in some cases have a deterrent effect on individuals intending to commit terrorist attacks."[16]

The second reason that immigration policy has limited utility as a national security tool is what can be called the "adaptability problem."  If the United States relies on immigration-related controls to keep out or remove terrorists, the terrorists will adapt, by making sure their operatives comply with the relevant immigration laws and by finding recruits who are already inside the United States.  That appears to be exactly what has happened in the decade since 9/11.  The Center for Immigration Studies in 2002 did a study looking at some 48 individuals who were charged or convicted or admitted involvement in terrorist plots inside the United States between 1993 and 2001, including the 9/11 attacks.  The study found that one-third of those 48 were in the U.S. on legal temporary visas, another third were lawful permanent residents or naturalized U.S. citizens.  One-quarter of them, however, were illegal immigrants, mostly visa overstayers.

---

[15] The only individual who was not part of a targeted investigation was a Yemeni man intercepted by the Transportation Security Administration (TSA) after he tried to smuggle a knife aboard a domestic flight.  *See* Fact Sheet: ICE's Use of Immigration and Customs Authorities to Address National Security Threats (2008), http://www.ice.gov/news/library/factsheets/terrorism-threats.htm.

[16] *9/11 and Terrorist Travel*, *supra* note 2, at 160.

So there was a plausible argument that, prior to 9/11, tougher immigration enforcement could have disrupted some of these terrorist plots.[17]

But the picture has changed markedly in the past decade. According to a list compiled by the Heritage Foundation, between October 2001 and October 2010, there have been nearly 30 foiled terrorist plots inside the United States, directly involving 63 individuals who were in the United States at the time of their arrest.[18] From independent research, we found that of those 61 individuals, 31 were U.S.-born citizens, 14 were naturalized citizens, one was a dual citizen, nine were legal immigrants or visa-holders and only seven were illegal immigrants. One individual's status could not be determined. So, for the sake of argument, if the United States had in place a perfect immigration enforcement system, it might have preemptively arrested six of the plotters, or just over 10 percent of the total. A similar conclusion was reached in the detailed 2010 investigation of the terrorist threat to the United States led by terrorism experts Peter Bergen and Bruce Hoffman. Using a broader measure of terrorism-related incidents, they found that 43 U.S. citizens had been involved in terrorist activities in 2009 alone. They concluded that the key shift in recent years "is the increasingly prominent role in planning and operations that U.S. citizens and residents have played in the leadership of Al-Qaeda and aligned groups, and the higher number of Americans attaching themselves to these groups."[19]

It's almost certainly true that the number of illegal immigrants involved

---

[17] Steven Camarota, *The Open Door: How Militant Islamic Terrorists Entered and Remained in the United States, 1993–2001*, http://www.cis.org/articles/2002/Paper21/terrorism.html.

[18] Jena Baker McNeill*,* James Carafano & Jessica Zuckerman, *30 Terrorist Plots Foiled: How the System Worked* (2010), http://www.heritage.org/research/reports/2010/04/30-terrorist-plots-foiled-how-the-system-worked. Of this original list, we only took into consideration the plots that were planned after September 11, 2001 for execution on U.S. territory, including U.S. embassies and military facilities. These criteria exclude two of the plots that McNeill et al. include in their April 2010 report. These two excluded plots were the 2006 plot by 24 men, arrested in London, to blow up a commercial airline flight and the arrest of Khalid Sheikh Mohammed for his role in the 9/11 attacks. In addition, we included a subsequent plot, the attempted Times Square attack by Faisal Shahzad, the only such plot known to be foiled between April 2010 and October 2010.

[19] Peter Bergen & Bruce Hoffman*, Assessing the Terrorist Threat: A Report of the Bipartisan Policy Center's National Security Preparedness Group* (2010), http://www.bipartisanpolicy.org/sites/default/files/NSPG%20Final%20Threat%20Assessment.pdf.

in such plots has shrunk because immigration enforcement has made it harder to enter to the United States illegally, or to remain here.  But terrorist groups have just worked around the problem, in particular by recruiting U.S. citizens.  Similarly, Bergen and Hoffman found that terrorist groups had bypassed ethnic and racial profiling programs like NSEERS by recruiting jihadists "who do not fit any particular ethnic, economic, educational or social profile."  Given the adaptive capability of terrorist groups, enforcement of immigration laws is at best going to have a small role to play in preventing future terror attacks inside the U.S.

To be clear, the limited utility of immigration enforcement in national security is not an argument per se against immigration enforcement.  There are a host of very good and legitimate reasons for the United States to do a better job enforcing its immigration laws.  But preventing terrorist attacks is not one of those reasons.

The problem is that, by enforcing immigration laws as if U.S. national security were at stake, the U.S. government has inadvertently served to weaken some of the foundations that underpin U.S. national security.  The United States became the world's greatest military power because it developed and harnessed the most advanced technologies and techniques for warfare.  Its future security depends on maintaining that leadership.  Gordon England, the former deputy defense secretary in the Bush Administration, told investigators for the National Research Council in 2007 that: "The greatest long-term threat to U.S. national security is not terrorists wielding a nuclear or biological weapon, but the erosion of America's place as a world leader in science and technology."  After 9/11, that obvious conclusion was forgotten.

Immigrants have long been a critical part of the U.S. scientific and technological enterprise.  Foreign students and immigrants make up more than half of the scientific researchers in the United States.  Immigrants file 25 per cent of the patent applications, roughly twice their representation in the population.  In 2009, the Nobel Prizes in the sciences went to nine people—three Americans, two Canadians, and one each from Australia, Hong Kong, India and Israel.  All of them were educated at American universities, and eight made their careers in the United States.  If these people stop coming here and doing cutting edge scientific research, the costs to America's national security will be incalculable.  There is a straight-line connection between the U.S. ability to attract talented immigrants, and its economic and military prowess.  As Yale's Amy Chua has argued in her history of the great powers: "To pull away from its rivals

on a global scale, a society must pull into itself and motivate the world's
best and brightest, regardless of ethnicity, religion or background."[20]   No
country has done that better than the United States.

But in the name of national security, U.S. immigration policy since 9/11
has instead been driving many of those people away.[21]   New York Mayor
Michael Bloomberg has called recent U.S. immigration policy a road to
"national suicide."  The problems include visa delays, restrictive quotas for
skilled workers, and limited opportunities for gaining permanent residence,
especially for nationals of big countries like China and India.   Foreign
students had come to the United States in steadily increasingly numbers for
virtually all of the post-World War II period.  After 9/11, however, foreign
student enrollment declined for several years and has only recently
recovered to pre-9/11 levels.  More worrisome, foreign graduate student
numbers fell sharply and have still not fully recovered.  All this occurred in
a decade in which the international student population soared.  The UK
nearly doubled its inflows of foreign students, as did Australia, France and
New Zealand saw similar gains.  Overall, the U.S. share of the world's
foreign students fell from 28 per cent in 2000 to 21 percent by 2008. If the
pre-9/11 trends had instead continued, foreign student enrollment would
have been 25 per cent higher than it is today.[22]

The United States has also damaged its moral leadership.  This has long
been a country of immigrants, and, with some sad and notable historical
exceptions, the U.S. government has generally treated immigrants with
respect, fairness and dignity.  Unfortunately, in the aftermath of 9/11, the
past decade has been one of those periods that will not stand up well when
the history books are written.

To take just one of many possible examples, one of the policies adopted
by the Department of Homeland Security after September 11 was to end
what was known as "catch and release."  Catch and release was shorthand
for a practice in which, if an illegal immigrant were apprehended in the

---

[20] AMY CHUA, DAY OF EMPIRE: HOW HYPERPOWERS RISE TO GLOBAL DOMINANCE AND
WHY THEY FALL (2007).

[21] Posting of Edward Alden to World Politics Review, http://www.worldpoliticsreview.com
/articles/6142/u-s-losing-ground-in-competitive-immigration (July 27, 2010).

[22] Susan K. Brown & Frank D. Bean, *Post 9/11 International Graduate Enrollment in the
United States: Unintended Consequences of National Security Strategies*, *in* IMMIGRATION
POLICY AND SECURITY: U.S., EUROPEAN AND COMMONWEALTH PERSPECTIVES (Terri E.
Givens et al. eds., 2009).

United States, in most cases he or she would be released and told to appear on a certain date before an immigration judge, who would determine whether that individual would be deported.  Not surprisingly, many of those apprehended did not show up for their court dates.  One such individual, Ghazi Ibrahim Abu Maizar, came across illegally from Canada and was arrested and released, and turned out to be a Palestinian terrorist who in 1997 tried to set off a bomb in the Brooklyn subway.  After September 11, DHS took on the sizeable project of ending "catch and release" by building enough jail cells to incarcerate all those apprehended while they waited for their court dates.

As a result, on any given day there are about 32,000 of these people in jails, up from about 7,000 per day in the mid-90s.[23]  Only they are not terrorists; they are people who came to the United States illegally to work, or came here legally and fell out of status for one reason or another by, for example, overstaying a tourist visa or violating the terms of a student visa. The conditions of these jails are pretty horrific, although improvements are now being made.  Studies by the Migration Policy Institute, Human Rights Watch and other groups have documented woeful medical treatment, individuals moved across the continent from their families without family-notification, as well as families jailed with children.[24]  Incarceration is expensive as well; it costs about $100 a day to keep immigration violators in prison, compared with alternatives to detention that cost a fraction of that amount.  DHS has itself acknowledged these problems, and a priority of the Obama administration has been to try to fix the mess.  But it was a mess created by the idea that tough immigration enforcement was necessary to protect the United States from terrorist attacks.

The U.S. government has built many of the elements of a border and immigration control system that allow for intelligent judgments about who might pose a threat to the United States and should therefore not be admitted to the country.  There has been genuine progress in patching the many holes of the pre-9/11 regime.  But the laudable effort has been perverted by those who misuse the national security argument as a pretext for immigration restrictions.  The result has been significant damage, and if

---

[23] Donald Kerwin & Serena Yi-Ying Lin, Migration Policy Institute, *Immigrant Detention: Can ICE Meet Its Legal Imperatives and Case Management Responsibilities?* (2009), http://www.migrationpolicy.org/pubs/detentionreportSept1009.pdf.

[24] *See* Kerwin & Lin, *id.*; *see also* Human Rights Watch, *Locked Up Far Away: The Transfer of Immigrants to Remote Detention Centers in the United States* (2009), http://www.hrw.org/en/node/86789.

it is not addressed lasting damage, to some of the foundations of U.S. economic strength and its national security.