



50 F Street, NW, Suite 300

Washington, DC 20001

(202) 347-0040

Fax: (202) 347-0058

www.immigrationforum.org

Terrorism and the Government's Response: Broad Initiatives Do Not Make Us Safer

The terrorist attacks of September 11, 2001, demonstrated that our government must do a better job of identifying who among the millions of people crossing our borders each year is coming to do us harm. The challenge for the government has been, and will continue to be, to perform this screening while at the same time preserving the nature of our society—free, open, democratic, and welcoming to immigrants and visitors from all over the world.

In the months following the September 11 attacks, it was unclear whether the government, acting primarily through the Justice Department (at the time the parent agency of the Immigration and Naturalization Service, the immigration courts, and the Federal Bureau of Investigation), was up to the task of targeting people who want to do us harm. Instead of scrutinizing the very few, the Department issued edict after edict, aimed at whole populations of visitors and immigrants, overwhelming federal agencies with mostly useless information they didn't have the resources to use or sift through. Counter-terrorism experts were critical of the Justice Department. These criticisms and others were borne out when the Department's own internal watchdog, in an examination of the treatment of foreigners detained as a result of the September 11 investigation, found among other things that the FBI did not do a good job of trying to distinguish between aliens who it suspected of having a connection to terrorism from those who had no connection.

"The pure accumulation of just massive amounts of data is not necessarily helpful. The idea that this has anything to do with security, or is something the government can do to stop terrorism is absurd."

– Juliette Kayyem, Executive Director,
Domestic Preparedness Project,
Harvard University.

The Key to Success in Fighting Terrorism: Intelligence. Counterterrorism experts tell us that the key to fighting terrorism effectively is intelligence, analysis, and information sharing. We must learn who is planning to harm us, and that information must be shared with the agencies that serve as gatekeepers to our country. To do a better job, we must cooperate with intelligence agencies around the world that are collecting information on known or potential terrorists. We must disrupt their criminal and financial networks, and cripple their operations. In addition, we must have reliable travel documents that will identify persons entering the U.S. We also must work with our neighbors, Mexico and Canada, so that anyone trying to enter the North American continent will be screened in a similar way.

To that end, the government has been given new tools. The *Enhanced Border Security and Visa Entry Reform Act*, enacted in 2002, has given the government new powers to gather intelligence and identify potential terrorists, and to make sure that our gatekeeper agencies—the Department of Homeland Security and the State Department—have the information they need to keep terrorists out. The Bush administration has signed "Smart Border" agreements with Canada and Mexico to prevent terrorists from using those countries as staging grounds for attacks on the U.S.

By contrast, initiatives aimed at immigrants in general may make us less safe as anxiety increases in immigrant communities about contact with law enforcement. This is especially true of those most targeted by the Justice Department initiatives, Arabs and Muslims, as news of arbitrary arrests and detentions circulates through the community. As former CIA counterterrorism head Vincent Cannistraro noted, the Justice Department’s “detention of thousands of immigrant Muslims ... alienates the very people on whom law enforcement depends for leads and may turn out to be counterproductive.”

The chief responsibility for manning the gates to our nation shifted from the Justice Department to the Department of Homeland Security. That Department inherited the sweeping initiatives launched by the Attorney General, which have distracted the government from the mission of keeping us safe from terrorism. Many of these initiatives continue to generate controversy. Some are being reconsidered by the Department of Homeland Security; that agency’s responsibilities, which range from critical infrastructure protection to the inspection of imported plants and animals, demand that limited resources be effectively targeted. Described below are some of the overly broad initiatives that have gained headlines—most but not all initiated by the Department of Justice. Despite their continued application in most cases, their effectiveness in uncovering and stopping terrorists has not been demonstrated.

IMMIGRANTS IN THE CROSSHAIRS

Immigration Law Enforcement by State and Local Police. In April 2002, press reports revealed that the Justice Department would reverse a long-standing government policy that logically kept responsibility for enforcing civil immigration law with trained officers of the Immigration and Naturalization Service (INS). In the switch, the Department apparently declared that local and state police agencies have the “inherent authority” to enforce immigration laws. Millions may be affected by this rule as law enforcement officers, untrained in immigration law, stop and question foreigners and Americans who look or sound like they might be foreign.

Dozens of police agencies from big cities and small towns throughout the U.S. have already rejected this idea. They know that their ability to fight crime depends on building trust in their communities, and if immigrants fear being turned over to the immigration authorities, they will not turn to the police if they have been a victim or if they witness a crime—or if they have information that might be useful in deterring future terrorism.

Despite this opposition, some in Congress would force the issue. Legislation introduced in the summer of 2003—the Clear Law Enforcement for Criminal Alien Removal (CLEAR) Act—would require police to enforce federal immigration laws. The name of the legislation is deceptive. Its focus is not on criminal aliens, but rather it puts all state and local police nationwide in the position of having to enforce our complex immigration laws for which they have no training. Again, police departments and associations around the country have been quick to condemn this proposal.¹

“[T]his movement by the federal government to say that they want local officers to become INS agents is against the core values of community policing: partnerships, assisting people, and being there to solve problems. . . . I think it would be totally inappropriate to go down that path.”

– Montgomery County, Maryland, Police Chief Charles Moose

Justice Department OKs Inaccuracies in Enforcement Databases. In March 2003, the Justice Department published a regulation exempting the information police rely on in the

¹ For more information on the CLEAR Act, including statements and quotes from police departments and other groups opposed to the act, see <http://www.immigrationforum.org/CurrentIssues/CLEAR.htm>.

FBI's National Crime Information Center from the Privacy Act's requirement that the information be accurate. The Justice Department justified the action by saying that "it is impossible to determine in advance what information is accurate, relevant, timely and complete." Information in this database is used, for example, when police make a traffic stop and want to check if the driver may be wanted for other reasons. An exemption from the requirement for accuracy, the Justice Department said, "is necessary to avoid interference with law enforcement functions...." This little-noticed regulation could potentially affect any person in the U.S. stopped by the police for any reason.

Attorney General Announces Justice Department Will Retain Immigration Enforcement Duties. On March 1, 2003, the Department of Homeland Security absorbed the personnel and authority to enforce immigration laws from the Department of Justice. With immigration enforcement personnel moving out of his department, and failing to enlist the support of local police departments to enforce immigration laws, the Attorney General moved to retain his power over immigration law enforcement. At the 11th hour, the Justice Department published a sweeping regulation justifying its continued authority over most aspects of immigration law. FBI agents and U.S. Marshals—components of the Justice Department—were tapped to implement the Department's continued enforcement powers, despite lack of training in immigration law.

Non-Citizens Not Reporting Address Change May Be Deported. In July 2002, the Justice Department announced it would start enforcing a little-used, 50-year-old law making it a crime for an immigrant not to report a change of address to the INS within ten days of moving. The law also permits the government to begin deportation proceedings against anyone who fails to send in a change of address form. The problem is, millions of non-citizens (including perhaps as many as nine million legal permanent residents) who have moved since they were last in communication with the INS did not know about this rule. Potentially, they could all be facing criminal charges, and they are all at risk of deportation. This decision gives the government the option to pick up just about anyone who is not a citizen.

Those who do know about this law, and follow the rules, may not fare any better. In the three months after the announcement of this initiative, the INS received 700,000 forms that could not be processed, so they were boxed up and placed in storage. Some of the people who filled out the forms sitting in those boxes could be deported or held on criminal charges because the INS did not enter their change of address into a computer, and they would be unable to prove that they had indeed followed the rules.

Secret Arrests and Detention. The Justice Department's actions have hit American Muslims, Arab Americans, and visitors from Arab or Muslim countries the hardest. Immediately after September 11, 2001, hundreds of persons—mostly Arab or Muslim—were thrown in prison without being told why, without access to a lawyer, and without anyone on the outside—including their families—knowing where they were being held. Most were officially being held for minor immigration violations.

"I'll never forget going to Argentina and seeing the mothers marching in the streets asking for the names of those being held by the government. We must be careful in this country about taking people into custody without revealing their names."

– Warren Christopher, former Secretary of State.

In June of 2003, the Justice Department's Inspector General released a report highly critical of the treatment of these individuals. Hundreds were locked up, but once in detention, the FBI would not clear their release until the agency determined that those locked up were not connected to terrorism. However, the FBI did not make it a priority to determine whether these individuals were in fact connected to terrorism. Many were imprisoned for months—

sometimes even after they had stopped fighting the government's efforts to deport them. Many

of these individuals were held in harsh conditions we usually associate with more repressive regimes; they were physically and verbally abused, and were prevented from contacting lawyers or family members.

Secret Trials. In September 2001, the Justice Department's chief immigration judge issued instructions to hundreds of immigration judges to close to the public all immigration-related trials of individuals picked up in connection with the September 11 investigations. The order applied to more than 600 "special interest" immigration cases. Not only was the courtroom closed to visitors, family, and the press, but the restriction extended to even "confirming or denying whether such a case is on the docket." Because they were being held in secret, there was no way to determine if these trials were being conducted fairly, or if immigrants were being given proper due process as the government tried to deport them.

"Special Registration." In September 2002 the Justice Department began implementing a tracking scheme that requires visitors from certain countries—and others whom an immigration inspector decides meet certain secret criteria—to be fingerprinted, photographed, and interrogated when they enter the country. After thirty days, they have to appear again at an immigration office, at one year intervals after that, and finally they have to remember to check out with an immigration officer at particular airports when they leave the U.S. The scheme was expanded twice in November 2002 to cover males from 18 mostly Muslim and Arab countries who had already entered the U.S. prior to September 10th or 30th of 2002. This "call-in" registration program was expanded twice to cover individuals from an additional seven countries. This program led to the jailing, mostly for minor immigration violations, of those who complied with the order; chaos at local immigration offices as the overwhelmed agency was not prepared to handle the workload; cancellation of citizenship and other immigration interviews, as immigration staff were shifted to conduct Special Registration interviews and, ironically, a stream of refugees *leaving* the U.S. for Canada. In all, more than 80,000 foreigners from mostly Arab and Muslim countries were fingerprinted, photographed, and interrogated after reporting to an INS office. Of those who complied, 13,000 were placed in deportation proceedings. None have been found to be connected to terrorism and charged accordingly.

Security experts have criticized this program because it does not target individuals suspected of terrorism. Instead, it targets individuals based on nationality; it overwhelms federal agencies with useless information; and it creates problems with the governments of countries whose cooperation we need in helping us identify and prosecute real terrorists. A Justice Department internal investigation in June 2003 revealed that the Special Registration program may have in fact made us less safe. The program diverted staff resources that had been dedicated to integrating immigration and FBI fingerprint databases. As a result, the project is years behind schedule, and in the meantime, suspected terrorists might go undetected simply because these databases cannot communicate with each other.

Unless the Department of Homeland Security decides to end this selective immigration enforcement program, a new round of disruption will begin in November 2003 as Arabs and Muslims who registered one year ago must report for another interrogation.

Asylum Seekers Jailed. In April 2003, the Attorney General ruled that the government can indefinitely jail broad categories of foreigners who arrive here illegally without consideration of their individual circumstances, if the government asserts that their release will pose a national security threat. This decision was made after a judge ordered the release on bond of a Haitian asylum seeker. The government has a history of discriminating against Haitians fleeing their country. This administration is now using "national security" as an argument to continue the long-standing practice of making it more difficult for Haitians to apply for asylum in the U.S. Ironically, someone who may fear persecution in Haiti because of the threat of indefinite imprisonment without a hearing may find, upon arrival, that the same kind of persecution is

now official U.S. government policy. From prison, it is less likely that someone will get appropriate assistance that may be crucial to winning an asylum claim.

Summary Removal. In November of 2002, the INS announced that it was expanding a procedure called “expedited removal.” This procedure gives low-level immigration officers the power to immediately remove from the U.S. anyone who does not have proper travel documents. Up to then, the procedure had been used only as people tried to enter the U.S. at ports of entry. The expansion of expedited removal applies to all persons arriving by sea, if an immigration officer had not admitted them. Even persons living and working in this country for up to two years (and perhaps longer) will be subject to this treatment. Justified in part on national security grounds, this program also will be primarily focused not on terrorists, but on poor Haitians fleeing economic and political turmoil in Haiti.

Red Tape for Refugees. The terrorist attacks seem to have shaken America’s leadership in protecting the world’s persecuted. Our refugee resettlement program slowed to a trickle as refugees, already the most diligently-screened category of immigrants admitted to this country, became subject to additional security screening. In Fiscal Year 2002, the U.S. took in 27,113 refugees—less than half of the 70,000 target for that year. Fiscal Year 2003 was much the same story, with only 28,419 refugees admitted. Despite repeated promises made by the administration to speed up processing and get more refugees into the country, it is apparent that the United States is reducing its commitment to protect the world’s most vulnerable people.

Mass Firing of Baggage Screeners and Deportation of Airport Workers. After the terrorist attacks, Congress passed a law requiring all airport baggage screeners to be U.S. citizens. Thousands of immigrants who have not yet become citizens have been fired from jobs they have been trained for and often held for many years. In their place, airports have had to hire citizens who have to be trained anew.

The Justice Department, working with other federal, state, and local agencies around the country, has rounded up hundreds of airport workers, many of them immigrants in low-wage jobs who used false Social Security numbers to work. The actions were announced in press conferences where officials declared that workers were being arrested as part of the war on terrorism. The reality was quite different. In “Operation Flytrap” at Washington-area airports, for example, over 100 workers were arrested. None were found to have links to terrorism. This and other operations around the country became symptomatic of a government that seems increasingly unable to distinguish between immigrant workers and terrorists.

Next Target: Citizens. With little restraint on its actions so far, the Justice Department is looking for new targets. Without prior consultation with Congress, the Department began drafting what has been dubbed “Patriot II,” a new law that would cut the role of the courts in checking the government’s power to spy on Americans, authorize secret arrests and summary deportation of lawful permanent residents, and even strip Americans of their citizenship if they support even the lawful activities of organizations the government says are terrorist.

HAVE THESE POLICIES BEEN EFFECTIVE?

Will the broad attacks launched by the government on the rights and liberties of immigrants in this country make us safer? It is hard to see how. The Department of Justice and to a lesser extent other agencies, have placed new priority on collecting information such as change of address data from all immigrants, biographical and academic data from students, and detailed information about the visits of certain immigrants of “special concern.” All of this extra information is keeping data-enterers busy but is difficult to analyze, because it does not tell the

government which of the millions of foreigners from whom the information is collected may have harmful intent.

As wide a net as has been cast by the Justice Department, few of the people picked up have actually been charged with anything relating to terrorism, and most of those who the government claimed were connected to terrorism were deported—that is, released to another country even though they were ostensibly dangerous. None of the 13,000 persons placed in deportation proceedings after complying with Special Registration were charged with terrorism. Of the hundreds detained in the immediate aftermath of September 11, most were deported for violating their immigration status; none were charged with terrorism. Instead of getting the intelligence needed to ferret out terrorists, the government has selectively enforced immigration laws to pick up and detain immigrants and visitors—mostly from Arab or Muslim countries—who have been guilty of nothing more than violating their immigration status. Most were simply trying to provide a better life for their families.

UNINTENDED CONSEQUENCES

The many Justice Department edicts and other government measures targeting immigrants since the terrorist attacks have, however, had a number of unintended consequences. One has been to burden federal agencies with busywork, which diverts them from the kind of targeted intelligence work and analysis needed to identify potential terrorists. Instead of looking for the needle in the haystack, the government has added bale after bale of hay to that haystack. Another consequence is that, instead of gaining the trust of immigrant communities that might serve as sources of useful information, these communities are becoming more alienated and distrustful of authorities, as the news of roundups and deportations circulate. Government actions, including the efforts by some states to prevent immigrants from obtaining drivers licenses, have also made it more difficult for millions of immigrants to work and provide for their families, driving those without permission to be here further underground. This is not a good thing if we would like to know who is here and what information they might have for us. These government actions have hindered, rather than helped, the fight against terrorism.

The government's actions have also affected those not directly targeted by them. The Attorney General's edicts were announced *ad hoc*, with no plan for implementation, and without the provision of extra resources to carry them out. As a result, personnel were pulled away from their normal duties. For example in Boston, personnel who ordinarily conduct interviews of immigrants seeking permanent residence and citizenship were reassigned to conduct Special Registration interviews. Applicants for citizenship and permanent residence were stuck with longer waits while their application fees were diverted to carry out the Attorney General's enforcement edicts. This pattern was repeated to differing degrees in other cities. The Special Registration program diverted staff who were working on integrating two large fingerprint databases—from the former Immigration and Naturalization Service and the FBI. The resulting delays in this integration project, according to the Justice Department's Inspector General, "create continued risks to public safety and national security."

Another consequence of the government's actions has been the erosion of our democratic system of government. The legal system in the U.S. is built on the checks and balances of our three branches of government. The administration's actions, listed above, have been taken unilaterally—without consulting Congress, while limiting the possibility for judicial review of its actions. These actions, taken in the name of national security, have long-term costs. For the administration, the actions have eroded the trust of Congress. For those outside of Congress, there is the sinking feeling that our civil liberties are being taken away without clear rationale or result. The administration's plans to gain additional powers to spy on citizens are very troubling to a broad spectrum of Americans.

Actions the government has taken against immigrants have also had consequences in the realm of foreign policy. In the war on terrorism, we depend on the cooperation of governments whose citizens we are treating badly here in the U.S. The sweeping and poorly thought out actions of the Justice Department have caused resentment in some of the countries, like Pakistan, that can help us most in gaining intelligence on new terrorist threats.

OPPORTUNITY FOR CHANGE

The shift in responsibility for immigration enforcement to the Department of Homeland Security, presents the government with a new opportunity to focus on targeting potential terrorists, and to do a better job in making the distinction between immigrant workers, visitors, and terrorists. To accomplish these goals efficiently, however, the government must reconcile the reality of today's migration with the need to stop terrorists. Only comprehensive immigration reform—not a mere shift in enforcement policies—holds the promise of more effectively finding terrorists while remaining open to the people who come here to work, reunite with family, or visit. To begin, we must “shrink the haystack,” as the security experts would say. There are approximately eight million undocumented immigrants in the U.S. They are here working and providing for their families, but we know little about them. We need to bring these people out of the shadows by acknowledging they are here to work and are otherwise obeying our laws. Moving forward with a legalization program will give us a chance to scrutinize their backgrounds and determine whether or not they should remain in this country.

Another change would be to open more legal avenues for workers to come in the future, so that more immigration flows through legal channels and there is less incentive for people to come illegally. This will take the wind from the sails of the lucrative human smuggling business that thrives when so many are shut out from legal opportunities to come here. More legal channels will mean more immigrants will be subjected to background checks and given legal visas if they qualify.

Providing more legal opportunities for those who want to obey our laws will change the context of immigration enforcement. Immigration will become manageable and enforcement resources will be freed up to respond effectively to the challenge posed by terrorism.