

# Immigrants and the Government's War on Terrorism

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WHEN PLANES FLEW INTO THE WORLD TRADE CENTER AND THE Pentagon on September 11, 2001, few immigrants anticipated that they themselves would be one of the primary groups affected by those attacks—not just as direct victims of the attack, for many immigrants died in the attacks, but as the group most targeted by executive and legislative enforcement efforts both at the federal and state levels. With greater prescience, those effects should have been predicted—previous terrorist attacks, whether carried out by immigrants or native-born citizens, have drawn harsh legislative and executive responses.<sup>1</sup> Past wars have generated repressive measures directed at immigrants who, because of their precarious status under American constitutional law, can be detained or deported with the simple passage of legislation or the issuance of an executive order.<sup>2</sup>

Immigrants are noncitizens who have been admitted to the United States to take up permanent residence in this country.<sup>3</sup> Many of them become U.S. citizens. They constitute the group of noncitizens with the

strongest ties to the United States. Many of them are spouses, daughters, sons, and parents of U.S. citizens. In a sense, they are the noncitizens who have the greatest moral, political, and legal claim to protection in the American legal scheme other than citizens. Until they are naturalized, however, American law considers them to be guests whose membership in the American community may be terminated by Congress and the executive at any time. Although they are entitled to some level of due process prior to their removal from our community, under the current legal order, they have no legal entitlement to remain in the United States, regardless of the government's reason for removing them and regardless of their ties to the U.S. community.

Removal hearings are administrative proceedings, not federal court proceedings, and they enjoy little substantive judicial review. Noncitizens placed in removal hearings, for the most part, are afforded severely curtailed constitutional protections. The U.S. Supreme Court has held that removal or deportation is a civil proceeding, not a criminal proceeding. Thus, the Court has reasoned, most protections provided persons under the Fourth, Fifth, Sixth, and Eighth Amendments, including the right to counsel, do not apply to removal proceedings. Congress, in turn, has used removal as a tool ostensibly to battle terrorism, but in ways that make it clear that preventing terrorism is not the aim. These include attempts to remove immigrants for offenses such as driving a vehicle while intoxicated or for offenses that, when committed, did not render the immigrant deportable, or for offenses committed during the individual's youth, regardless of the passage of time or of whether the immigrant's current life exemplifies total rehabilitation. Consequently, immigrants have been severely affected by the government's use of immigration laws to battle terrorism.

Immigrants are also overwhelmingly racially and ethnically distinct from the majority white population in the United States. Thus, the population most affected and targeted by the government's war on terrorism is defined and identified by race, ethnicity, and, in some cases, religion. Again, because of the peculiar status of noncitizens under American constitutional law, the government's intentional discrimination on the basis of ethnicity, race, and sex may be constitutionally tolerated. Noncitizens are left without

remedy for governmental acts that would be unconstitutional if directed at citizens in the United States.<sup>4</sup>

To some extent, American immigration laws have, from the beginning, reflected nativist and racially discriminatory policies (Patel 2003; Medina 1997). National security concerns have spurred repressive legislation almost from the founding of the republic. The Alien and Sedition Acts of 1798, enacted during the presidency of John Adams, gave the president authority to remove any alien he deemed a danger to national security. During the first half of the twentieth century, dominated by two world wars and the beginning of the Cold War, immigrants were subject to harsh treatment in the American legal system. Some of the most criticized Supreme Court cases sharply curtailing the human rights of both citizens and noncitizens came out of this era.<sup>5</sup> The latter half of the twentieth century, however, witnessed much needed change in immigration law and policy. The Immigration and Nationality Act of 1952 eliminated or minimized distinctions between immigrants on the basis of race, ethnicity, or national origin (8 U.S.C. §§1101–1537). Constitutional law, under the strongly protective human rights jurisprudence of the Warren Court, seemed to promise the demise of the plenary power doctrine, the idea that immigrants had few rights under the U.S. Constitution that could be secured and enforced by federal courts.

That promise, however, has yet to be fulfilled. The plenary power doctrine, securely in place since the nineteenth century, provided that Congress and the executive enjoyed plenary power to make decisions about immigrants, including decisions impacting the most fundamental of their rights. Furthermore, courts were not authorized to review or second-guess those decisions (*Fong Yue Ting v. U.S.*; *Chae Chan Ping v. U.S.*).<sup>6</sup> The current Supreme Court remains divided on the extent of protection the Constitution provides immigrants and other noncitizens; it has abandoned the language of plenary power for the language of deference and while it has made clear that there are constitutional limits to the extent of power the government may exert over immigrants (*Zadvydas v. Davis*), it has also made it clear that all noncitizens continue to enjoy less constitutional protection from government action than citizens (*Demore v. Kim*). Current gov-

ernment and societal responses to the threat of terrorist activity on domestic soil make it clear that we have learned little from those past experiences that we are willing to put into practice today.

In 1996, Congress enacted substantial changes to the nation's immigration laws as a response to the 1993 World Trade Center bombing and the 1995 Oklahoma City bombing.<sup>7</sup> Congress viewed immigrants and immigration as tied closely to terrorism, despite the fact that the Oklahoma City bombing appears to have been planned and carried out solely by native-born citizens. Congress ignored the Oklahoma City bombing and other terrorist incidents carried out by Americans on native soil in developing legislation to respond to terrorism and focused its attention overwhelmingly on immigrants, immigration, and foreign-generated terrorism. As draconian as the 1996 acts were, they did nothing to prevent the 2001 attacks. The 1996 acts, however, increased the number of immigrants who could be detained and deported for nonterroristic-related reasons, made it harder for immigrants to secure employment in the United States, made it harder for aliens to qualify for the benefit of citizenship or immigrant status, sharply curtailed judicial review of immigration administrative decisions, and rendered immigrants ineligible for most forms of federal aid.<sup>8</sup>

Legislative and executive responses to terrorism in the post-2001 world have taken various forms. Some responses, such as provisions in the Patriot Act authorizing searches that may not be consistent with well-settled Fourth Amendment principles, directly affect both citizens and immigrant non-citizens, but their impact will be greater on immigrants, because of the precariousness of their status. Other measures specifically target immigrants and immigration. One of the most significant measures Congress enacted was the restructuring of federal executive authority over immigration into the Department of Homeland Security in the fall of 2002. Congress charged the Department of Homeland Security (DHS) with the mission of developing and implementing a coherent, comprehensive, and effective national response to terrorism (Homeland Security Act).<sup>9</sup> Until Hurricanes Katrina and Rita tested its emergency response function, none of the DHS functions had drawn as much attention and focus as immigration control. In the Homeland Security Act, Congress transferred primary control over

immigration policy and enforcement from the Immigration and Naturalization Service (INS) under the Department of Justice to the new DHS (6 U.S.C.A. §11). DHS took over primary control for immigration regulation, enforcement, and citizenship and immigration benefits. These functions were assigned to three separate bureaus: the Bureau of Citizenship and Immigration Services (BCIS) processes naturalization petitions and immigration benefits; the Bureau of Immigration and Customs Enforcement (ICE) handles enforcement functions including detentions, removals, and employer sanctions; and the Bureau of Customs and Border Protection (CBP) is responsible for border security and interdiction. Under the new regulatory scheme, the Department of Justice continues to play a substantial role in immigration because it oversees the immigration administrative adjudicators, both at the initial decision-making level through immigration judges and at the administrative appellate level through the Board of Immigration Appeals. Immigration adjudicators are subject to review by the attorney general who continues to exercise substantial policy-making authority in areas that come under the purview of immigration judges. Thus, to some extent, the immigration authority is shared by the two agencies.

The INS had long been criticized for inefficiency and an inability to perform both the enforcement and the benefits aspects of immigration law adequately (Manns 2002). Critics charged that administration of benefits, like the processing of naturalization petitions, were adversely affected by an agency that appeared to be more focused on policing borders, catching undocumented aliens, and removing deportable noncitizens, and other law enforcement goals. The U.S. Commission on Immigration Reform, created by Congress to study and make recommendations as to national immigration policy, recommended in 1997 that the agency be restructured to separate enforcement from the administration of benefits (U.S. Commission on Immigration Reform 1997, 148–83; Schuck 1984, 72–74). The restructuring of immigration into homeland security, however, appears to have created more problems than it has solved. Although the enforcement and benefits functions have been separated and placed within separate sub-agencies, little evidence is available to support a claim that the reorganization has actually improved the processing of benefits to immigrants.

Whether the new regulatory structure ultimately yields benefits in the administration of immigration law process and enforcement remains to be seen. What evidence there is so far indicates that the unwieldy bureaucratic mass has yet to function smoothly and efficiently in any of its areas of authority, including immigration.<sup>10</sup> Sparring over control and resource issues among the various entities subsumed within DHS continues. The immigration process, whether as a result of the reorganization or of new laws increasing the number of immigrants brought under the ambit of enforcement efforts, appears not to have benefited.<sup>11</sup> Communication between immigration petitioners and their attorneys and the agency has not improved. The processing of visas and other immigrant benefits, including citizenship applications, continues to be marked by lengthy delays in processing times (U.S. Citizenship and Immigration Services 2005). Courts have been flooded with cases challenging immigration administrative decisions and, to some extent, have set aside the most flagrant abuses of federal administrative authority (*Ssali v. Gonzales*; *Grupee v. Gonzales*).

A recent study by the Catholic Legal Immigration Network, Inc. (CLINIC), for example, to determine whether DHS is complying with U.S. Supreme Court decisions requiring DHS to review periodically the cases of immigrants who are being detained prior to removal found systemic problems with DHS's handling of custody review. CLINIC found "spotty internal record keeping of individual detainees' length of detention, failure to conduct custody reviews during the mandated time frame because of understaffed local offices, and lack of communication" (Glynn and Bronstein 2005, 2) that hampered agency compliance with the law, with the effect that detainees were sometimes spending long periods of time incarcerated when, under the guidelines, they were entitled to release.

But the reorganization's symbolic message to American society and the world at large was that immigration was inextricably intertwined with terrorism. Immigrant, to some, became synonymous with terrorist.<sup>12</sup> The administration of the peaceful and lawful admission of noncitizens to the United States was placed within the administrative and legal structure charged with battling terrorism. Immigrants seeking admission because of

their ties to the United States, either because of a close family relationship or because of an offer of employment in certain occupations with a U.S.-based entity willing to sponsor the immigrant, had their entitlement to the immigration benefit processed as part of the response to terrorism.

There is a threat that would-be terrorists may infiltrate the United States by seeking legal admission as immigrants, or as temporary visitors, or by attempting entry into the country without presenting themselves for formal admission or inspection at the border. Plainly, careful and pointed measures to detect these individuals in the visa-issuing and admission process or through interdiction at the country's borders are indicated. Some of these measures, like more careful visa application screening and the sharing of intelligence information between agencies, have been developed and, to an extent, adopted.<sup>13</sup> The overwhelming legislative and regulatory response, however, is too indiscriminate and unspecific, bringing within its ambit too many immigrants who have nothing to do with terrorism.

Immigration is not primarily or overwhelmingly about terrorism, and terrorists are as likely to be native-born as they are to be noncitizens. Congress erred in conflating the immigration and terrorism function as surely as if it had placed the Food and Drug Administration within the control of DHS simply because one of the methods through which terrorists may strike is by using food-borne diseases or bacteria. The effects of merging the functions encourages the most negative and pejorative connotations to the word immigrant—a word that in American folk heritage has traditionally defined American society and culture as a whole. DHS's inability to respond promptly and effectively to the recent natural disasters may prompt Congress to revisit the wisdom of creating such a behemoth through which to carry out so many diverse functions. Immigration should be one of the functions divested from DHS.

The restructuring of the immigration function, as part of a larger effort to combat terrorism, was accompanied by other legislative and executive measures directed at immigrants, many of them expanding the measures already in place as a result of the 1996 acts. These include more aggressive cooperation between federal and state enforcement of immigration law, including border controls (Department of Homeland Security 2005b;

Pham 2004); a substantial increase in the number of lawfully admitted immigrants with no link to terrorist activity of any type who are detained for long periods of time and deported from the United States for reasons that have nothing to do with terrorism (Cole 2004, 1754);<sup>14</sup> cessation of the efforts to deal comprehensively with the sizable undocumented migrant population in a humane manner that recognizes the significant ties that many in this population have to American society (Garcia 2003); the rise of visible vigilante groups operating along the U.S.-Mexico border (Armed Minutemen 2005); increased attempts to insulate immigration administrative process from meaningful judicial review (USA PATRIOT Act, REAL ID Act); curtailed process to deal with persons entering the United States without legal papers or formal inspection (Department of Homeland Security 2005a); the use of secret immigration hearings closed to the press and the public (Creppy 2001); the use of secret evidence to exclude and deport immigrants (*Hamdi v. Rumsfeld*; Note 2005); and the use of racial and ethnic profiling (Akram and Johnson 2002; Johnson 2004, 77–81; Ahmad 2004).

These measures are likely to yield few, if any, real benefits in either administering the immigration scheme or in combating terrorist activity. They all pose a serious threat to our civil liberties and fundamental human rights. They are all possible because, currently, the American understanding of fundamental human rights is that they may be affected by citizenship status.

The extent to which individual human rights are conditioned on citizenship is unsettled, to an extent, under U.S. constitutional law.<sup>15</sup> An individual's lack of citizenship status, however, affects her entitlement to reside in this country and, thus, her entitlement to individual human rights in that context. When the federal government exercises its immigration and foreign affairs powers, federal courts, as a rule, do not exact the kind of searching scrutiny they would in other contexts, regardless of citizenship status. So while zoning restrictions that interfere with a family's right to live together in the United States are likely unconstitutional, the government's decision to remove or deport the spouse, parent, or child of a U.S. citizen is not.<sup>16</sup> In the first case, the due process and equal protection clauses of the



Fifth and Fourteenth Amendments to the Constitution should protect the family regardless of whether some of the family members are noncitizens. In the second case, both citizens and noncitizens are adversely impacted by the government's decision to remove, and neither arguably is protected from the removal by constitutional norms. The status of the immigrant and the fact that the matter is deemed to be one of immigration law triggers judicial application of a very deferential standard of review to legislative and executive decision making.

All three branches of government must recognize that immigrants become more than just guests when they are granted formal admission to this country. Their status should encompass some degree of a substantive right to remain in the United States once they have been granted admission as permanent residents. Protection of fundamental human rights, like the right to physical liberty and the right to maintain intimate family relationships, should not be denied because of the lack of citizenship status.

Terrorism does not discriminate on the basis of citizenship status, but government and laws do. Because the immigrant noncitizen lacks the protections of citizenship status, she may be detained; deprived of access to her loved ones, her property, and her job; and removed and restricted from reentry into the country that, for all practical purposes, is her country, in a way no citizen can.<sup>17</sup> Effective responses to terrorism do not require harsh, repressive treatment of one of the most vulnerable groups in American society. Given the global or international nature of terrorism, it is not clear that removal or deportation is the best way to deal with suspected terrorists, and deportation of vast numbers of lawfully admitted immigrants who have no connection with terrorism is neither necessary to combat terrorism nor in the long-term interests of the American community. That community must be better informed about the effects of the government's response to terrorism and positioned to advocate for immigration reform that would eliminate the heart-breaking effects of the current system on American families.



## NOTES

1. The 1993 World Trade Center bombing and the Oklahoma bombing led Congress in 1996 to enact anti-terrorism legislation that severely impacted upon immigrant rights. See Illegal Immigration Reform and Immigrant Responsibility Act; Anti-Terrorism and Effective Death Penalty Act.
2. The Alien and Sedition Acts of 1798 gave the president authority to deport summarily any alien he deemed a danger to national security. See Neuman (1991, 927–34); *Harisiades v. Shaughnessy* (long-term permanent resident aliens deportable because of association with Communist Party at some point in their lives).
3. I am using the term “immigrant” narrowly, to emphasize the plight of permanent resident aliens. The term is also used in popular commentary to encompass naturalized citizens who are first generation immigrants and also persons who migrate to the United States without formal government authorization or without presenting themselves for formal inspection at a point of entry into the United States.
4. But see *Korematsu v. United States*, which upheld the exclusion of persons of Japanese descent, both citizens and noncitizens, from the West Coast of the United States during World War II.
5. Some examples are included in *Carlson v. Landon*; *Harisiades v. Shaughnessy*; *Korematsu v. United States*.
6. See also Motomura (1992); Motomura (1990).
7. For examples see Illegal Immigration Reform and Immigrant Responsibility Act; Anti-Terrorism and Effective Death Penalty Act; and Personal Responsibility and Work Opportunity Reconciliation Act. See H.R. Rep. No. 104–383, at 37; see also Lofgren (2005), 352–53.
8. For examples see Medina 1997, 669, 676, 692–96; Neuman 1997, 1396; Scaperlanda 1997; Medina 2005, 706–8.
9. See also Medina 2005, 742–43.
10. For examples see Glasser and White 2005; Marks 2005; Messenger Shot 2005.
11. Former Attorney General John Ashcroft sharply streamlined the immigration appellate process by reducing the number of judges who review immigration judge decisions, reducing the number of written opinions, and adopting other measures that are likely to increase the number of erroneous decisions. 67 Fed. Reg. 54878–54905. These streamlining measures have been sharply criticized. See Dorsey and Whitney LLP 2003, 20.
12. For examples see Romero 2003; Volpp 2002; Demleitner 1997, 42–45; Joo 2002.
13. The National Commission on Terrorist Attacks upon the United States, The 9/11 Report, made a number of recommendations concerning immigration. Among them were adoption of more rigorous travel security measures, the integration of border control with other infrastructure, the adoption of a biometric entry/exit screening system, and an international collaborative effort.
14. Note that, of an estimated 5,000 people charged, 700 of the arrests remained secret, 600 were tried in secret immigration hearings, and only one person was convicted on a terrorism-related charge.

15. Compare *Zadydas v. Davis* (statute construed not to authorize indefinite detention of deportable noncitizens to avoid serious constitutional due process concerns), *Matthews v. Diaz* (federal government may distinguish between citizens and noncitizens in administering federal benefit scheme), *Plyler v. Doe* (states may not discriminate against children of undocumented aliens in access to public education) and *Yick Wo v. Hopkins* (Chinese immigrants protected by equal protection clause of the Fourteenth Amendment from discrimination in a state permitting scheme).
16. For examples see *Moore v. City of East Cleveland* (city ordinance limiting which members of a family could live together held unconstitutional under the Fourteenth Amendment's due process clause); *U.S. ex rel. Knauff v. Shaughnessy* (spouse of U.S. citizen veteran may constitutionally be denied admission to the United States on the basis of secret evidence and minimal administrative process); and *Nguyen v. INS* (son of U.S. citizen may be deported from the U.S. because father failed to abide by immigration regulations requiring father to undergo formal process acknowledging paternity, even though father had raised and cared for child for most of child's life).
17. For examples see *Nguyen v. INS* (son of U.S. citizen may be deprived of derivative citizenship status because parent failed to abide by federal statute's requirement that father formally acknowledge paternity; consequently, son, a permanent resident alien raised in U.S. by father, was rendered removable); *Harisiades v. Shaughnessy* (permanent resident aliens deportable because of their association with Communist Party); *Carlson v. Landon* (permanent resident aliens may be subject to mandatory detention pending deportation because of their association with Communist Party).

## CASES, STATUTES, AND REGULATIONS

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- Anti-Terrorism and Effective Death Penalty Act, Pub. L. No. 104–32, 110 Stat. 1214 (1996).
- Carlson v. Landon*, 342 U.S. 524 (1952).
- Chae Chan Ping v. United States*, 130 U.S. 581 (1889).
- Demore v. Kim*, 538 U.S. 510 (2003).
- Fong Yue Ting v. United States*, 149 U.S. 698 (1893).
- Grupee v. Gonzales*, 400 F. 3d 1026 (7th Cir. 2005).
- Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).
- Harisiades v. Shaughnessy*, 342 U.S. 580 (1952).
- Homeland Security Act of 2002, 6 U.S.C.A. Sections 101 et seq.
- H.R. Rep. No. 104–383 (1995).
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- Immigration and Nationality Act of 1952, 8 U.S.C. §§1101–1537 (2005).
- Korematsu v. United States*, 323 U.S. 214 (1944).
- Matthews v. Diaz*, 426 U.S. 67 (1976).
- Moore v. City of East Cleveland*, 432 U.S. 595 (1977).

- Nguyen v. INS*, 533 U.S. 53 (2001).  
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*Plyler v. Doe*, 457 U.S. 202 (1982).  
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*Ssali v. Gonzales*, No. A79-274-867 (7th Cir. Sept. 14, 2005).  
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*U.S. ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950).  
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