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NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES

Sixth public hearing of the National Commission on Terrorist Attacks Upon the United States

Statement of Jan Ting to the National Commission on Terrorist Attacks Upon The United States
December 8, 2003

I. Profiling and the Shadow of the Internment

Several immigration related initiatives of the U.S. government since 9/11 have raised concerns about racial profiling and comparisons to the internment of Japanese aliens and Japanese Americans by the U.S. government during World War II. The first of these initiatives was the effort announced by the Department of Justice on November 9, 2001, to conduct voluntary interviews of up to 5,000 young men from countries suspected of harboring terrorists, who had entered the United States as temporary visitors since January 1, 2000.

The second controversial initiative announced by the Department of Justice on January 8, 2002, prioritized the apprehension and removal from the United States of four to six thousand men from particular countries of origin, out of more than 300,000 "absconders" whose deportability has been finalized and who have exhausted their administrative and judicial appeal rights.

A third initiative, announced on November 6, 2002, requires special registration of male visitors to the United States from specified countries. Initially limited to male visitors from Iraq, Iran, Libya, Sudan, and Syria, special registration has been expanded in phases to cover male visitors from another 20 countries.

The allegation of racial and ethnic profiling in criticism of these initiatives was perhaps predictable. However such concerns are misdirected. In fact, none of the three initiatives discriminates on the basis of appearance, skin color, race, ethnicity, or religion. The individuals subject to these initiatives are certainly being profiled, but the profiling is done on non-invidious factors such as age, gender, and the objective immigration documents presented on entry to the U.S., i.e. passports from designated countries. Legal precedent supports the legality and constitutionality of these initiatives. U.S. courts have recognized plenary power over immigration in the political branches of the U.S. government, and no constitutional challenge has ever been sustained against such discrimination by country of origin in screening immigrants or visitors to the United States. Such plenary power is justified by the foreign policy implications of U.S. immigration policy for which the two political branches share responsibility.

One prior case particularly relevant to the legality and constitutionality of these initiatives is the 1979 decision of the U.S. Court of Appeals for the District of Columbia in Narenji v. Civiletti where the court upheld against constitutional challenge a Federal regulation imposing special

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registration requirements solely on Iranian students in the U.S. following the seizure of U.S. diplomats as hostages in Iran. The U.S. Supreme Court declined to consider an appeal from that opinion.

Even if these government initiatives could somehow be construed as racial or ethnic profiling, that fact would not necessarily make the practices either illegal, unconstitutional, or wrong. We expect law enforcement to utilize racial or ethnic characteristics in seeking to apprehend criminal suspects and prevent further crimes. If, for example, the Ku Klux Klan was engaged in a bombing campaign against black churches, law enforcement, in trying to prevent further bombings, should be permitted to single out for attention all white males driving in the vicinity of black churches at night.

Racial profiling by the government should be subjected to strict scrutiny. It should be permitted where the government has a compelling governmental purpose, and where there is no less invasive method of pursuing that compelling purpose. It is hard to imagine a more compelling purpose for our government than trying to prevent further terrorist attacks on its citizens like that of 9/11.

Do these initiatives, as some suggest, put us on a slippery slope to something like the internment of Japanese aliens and Japanese-American during World War II? One of the few, if not the only, good things to come out of the current war on terror is the remembrance and reconsideration of the Japanese Internment which had been fading from our collective memories.

Nearly everyone now agrees that the Japanese Internment was wrong. But what, exactly, was objectionable about it? Two answers are offered: First, two-thirds of those interned without due process or any showing of reasonable cause were in fact U.S. citizens. If

only enemy aliens had been detained during wartime, it is unlikely that such internment would even be remembered, much less remembered as objectionable.

A second reason the Japanese Internment is considered objectionable is that the Japanese aliens and Japanese-Americans were treated very differently from their German and Italian counterparts and from German- and Italian-Americans. The latter were treated as individuals on a case by case basis, while the Japanese and Japanese-Americans within the restricted western United States were treated as a single group and subjected to internment solely on the basis of race and ethnicity.

In comparison to the almost universal condemnation of the Japanese Internment, almost nobody complains about mistreatment of the other groups. Internment during World War II on a case by case basis of Germans, Italians, and their American citizen descendents is so unobjectionable that it has been largely forgotten by history. And this is so despite the efforts of many to remember, and despite that fact that from the German and Italian communities in the U.S. more than 10,000 individuals were interned from each community.

Can we conclude that history accepts wartime internment of suspected individuals as long as they are selected for internment on the basis of their individual statements and actions, and not on the basis of arbitrary racial or ethnic characteristics? Even in comparison to such internment, the initiatives of the U.S. government so far are pretty small potatoes, limited as they have been to individuals charged with specific criminal or immigration law violations or pursuant to Federal court warrants.

II. Detention and Immigration Law Enforcement as Anti-Terror Tools

Much criticism has been directed at the U.S. government because of its arrest and detention of thousands of individuals since 9/11. Some of these individuals have been charged with criminal law violations. Some have been arrested and detained on material witness warrants issued by Federal courts. But the overwhelming majority of those arrested and detained have been charged with immigration law violations. And the majority of those so charged have been brought before immigration judges who have ordered them deported from the United States. Anything wrong here?

It is not uncommon for prosecutors to believe individuals guilty of crimes, but not to have sufficient evidence to prove those charges in court. So then what do they do? Often they bring lesser charges for which they do have the evidence. That's why the gangster Al Capone was never charged with murder, extortion or bribery. As dramatized in the movie The Untouchables starring Kevin Costner and Sean Connery, Al Capone was charged, convicted, and imprisoned only for underpaying his income tax. Anything wrong with that?

Are "immigrants" somehow bearing the brunt of the war on terrorism? The most common ground for deportation is overstaying a temporary, non-immigrant visa. Even if the Federal government does not believe an illegal alien is involved in terrorism, is there anything wrong with deporting aliens who overstay or violate the terms of their visas? Answer: Only if you think our immigration laws shouldn't be enforced.

I always ask my immigration law classes to describe U.S. immigration policy during the first century of our history as a nation. After eliciting the correct answer as open borders, I ask if anyone believes that such a policy is appropriate for the United States today. Usually not a single person can be found to advocate open borders as U.S. policy today. The closed borders position, ending immigration entirely, typically

also has no supporters. So then I ask the class what they do believe should be our policy.

In the ensuing discussion, what emerges is the description of an immigration system pretty much like the one we actually have. Most Americans, like most students in my classes, want some immigration for the economic and cultural benefits such immigration brings, but they don't want unlimited immigration. They want the U.S. to decide how many and what kind of immigrants to admit each year, which I refer to as a "pick and choose" system of limited immigration. Our government should then admit only those aliens selected by us to be immigrants, and should refuse entry to all others.

But what should we do with those aliens not selected by us to be immigrants but who come to the U.S. anyway, in violation of our rules? If the answer is to tolerate them or grant them amnesty, then we wouldn't really have a "pick and choose" system of limited immigration. What we would have then is open borders. Which is just fine if that's in fact what we want. But it's not what we want. What we want is "pick and choose".

So there's nothing per se wrong with simply enforcing our immigration laws regardless of whether those removed are terrorist suspects or not. Such removals indirectly serve the war on terrorism by reducing the number of illegal aliens and the resulting culture of fraudulent documents among whom and in which foreign terrorists can conceal themselves.

That the U.S. government lacks the resources to remove all of the estimated 10 million illegal aliens from the U.S. at once ought not preclude the U.S. from removing some of them. To the allegation of selective enforcement, Justice Antonin Scalia has said, "an alien unlawfully in this country has no constitutional right to assert selective enforcement as a defense against his

deportation.... When an alien's continuing presence in this country is in violation of the immigration laws, the Government does not offend the Constitution by deporting him for the additional reason that it believes him to be a member of an organization that supports terrorist activity."

The Inspector General of the U.S. Department of Justice issued a Report on the September 11 Detainees on June 2, 2003. The Report identified numerous problems in the way in which detainees were subjected to long detentions because of delays in FBI clearances, the unavailability of bond determinations, and problems in the conditions of confinement. The recommendations of the Inspector General have mostly been agreed to by the Departments of Justice and Homeland Security, with some details still in negotiation. The Inspector General's Report did not challenge the legal authority of the U.S. government to detain illegal aliens prior to removal as part of the effort to protect Americans.

III. Closed Hearings

After the September 11 terrorist attacks, the U. S. Department of Justice initiated procedures to conduct closed immigration removal hearings for certain "special interest" aliens charged with immigration law violations, without disclosure of information to the public. Attorney General John Ashcroft defended withholding the names of those aliens charged with immigration law violations, while noting their continuing access to lawyers of their choosing and to their families. He noted two reasons for not providing a list of detainees. First, the need to withhold valuable intelligence from the enemy, i.e., which of their agents may have been detained and which remain free. And second, a respect for the privacy of the individuals detained.

Lawsuits have been filed on behalf of media plaintiffs seeking access to the closed hearings

and to the names of those detained pending hearing. These lawsuits have resulted in two conflicting opinions from the U.S. Courts of Appeals for the Sixth and the Third Circuits.

In the first case, Detroit Free Press v. Ashcroft , published August 26, 2002, Judge Damon Keith, for a unanimous three-judge panel of the U.S. Court of Appeals for the Sixth Circuit in Cincinnati, framed the issue as "whether the First Amendment to the United States Constitution confers a public right of access to deportation hearings. If it does, then the Government must make a showing to overcome that right." First, Judge Keith dismissed the traditional deference of the courts to the political branches in immigration cases as being limited to areas of "substantive" immigration law, and not to issues of procedure. Second, he found it appropriate to apply the two-part test of Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980), in which the Supreme Court concluded that both past experience and public interest supported finding a First Amendment right of media plaintiffs to observe judicial proceedings.

The key problem, however, is that deportation proceedings are not judicial in nature. They are administrative and entirely within the executive branch of government. Nonetheless, Judge Keith found such proceedings to be "quasi-judicial" in nature, citing with approval N. Media Jersey Media Group, Inc. v. Ashcroft, 205 F. Supp. 2d 288, 301 (D.N.J. 2002) (since reversed by the Third Circuit). He therefore held the test of Richmond Newspapers to be applicable, and rejected the test of Houchins v. KQED, Inc., 438 U.S. 1 (1978), in which the Supreme Court rejected First Amendment claims of media plaintiffs to public access to a county jail.

Applying the two-part test of Richmond Newspapers, Judge Keith found both a tradition of public access to deportation proceedings and a significant public interest in public access to

deportation proceedings to insure fairness and prevent mistakes. Having found a First Amendment public right of access to deportation hearings, he turned to the question of whether the government had a sufficient reason for denial "necessitated by a compelling governmental interest, and... narrowly tailored to serve that interest." Globe Newspaper Co., 457 U.S. at 606-07. Moreover, "[t]he interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered." Press-Enter. II, 478 U.S. at 10. He concluded that the government's reasons for closure, though compelling, were not sufficiently particularized or narrowly tailored.

Judge Keith found the government's closure order in special interest removal hearings both over-inclusive, i.e., too broad and indiscriminate, and also under-inclusive, i.e., insufficient to prevent the disclosures of information by the detained aliens, their lawyers or their families. Judge Keith affirmed the District Court's injunction prohibiting the closure of deportation proceedings on the basis of the government's indiscriminate order, but leaving open the possibility of closing cases on a case-by-case basis upon a proper showing of compelling and particularized interests.

Less than three months after the Sixth Circuit's decision in Detroit Free Press, the U.S. Court of Appeals for the Third Circuit in Philadelphia published the opinion of Chief Judge Becker for the majority of the three-judge panel hearing a similar challenge on the identical facts. Judge Becker's opinion and order in North Jersey Media v. Ashcroft published on October 8, 2002, reversed a District Court injunction similar to that affirmed by the Sixth Circuit in Detroit Free Press. A conflict between the Circuits was thus created which can be resolved only by the U.S. Supreme Court, or by one of the Circuits en banc reversing its own panel, upon appeal by a losing party.

Judge Becker invites the U.S. Supreme Court to re-consider the applicability of Richmond Newspapers by stating, "the notion that Richmond Newspapers applies is open to debate as a theoretical matter". He concludes however that "we must yield to the prior precedent of this court, and hence will apply it to the facts." Applying the same two-part test of Richmond Newspapers as Judge Keith applied in Detroit Free Press, Judge Becker reaches diametrically opposite conclusions.

On the "experience" prong of the Richmond Newspapers test, Judge Becker finds that Congress has never guaranteed public access to deportation hearings, that such hearings have often been conducted in locations inaccessible to the public, and are sometimes mandatorily closed to the public by statute. He concludes that there is no "unbroken, uncontradicted history" of openness which Richmond Newspapers and its progeny require to establish a First Amendment right of access. He also upholds the Government claim of a "basic tenet of administrative law that agencies should be free to fashion their own rules of procedure."

On the second prong of the Richmond Newspapers test, "logic" or public interest, Judge Becker also disagrees with the Sixth Circuit by concluding the test requires consideration not only of the positive policy role openness plays in a particular proceeding, but also the extent to which openness impairs the public good. On balance, Judge Becker doubts that openness promotes the public good in this particular context. Because open deportation hearings to not pass the two-part Richmond Newspapers test, Judge Becker concludes that the press and the public possess no First Amendment right of access.

U.S. courts have long held that immigration law violations are civil, not criminal in nature, and that removal from the United States to one's

home country is not criminal punishment. Thus aliens in removal proceedings do not have the rights that a criminal defendant would have. They do not, for example, have the right to jury trial. They do not have the right to invoke the exclusionary rule against improperly seized evidence. They do not have right to legal representation paid for by the taxpayers.

Immigration hearings, by direction of Congress, are clearly administrative, occurring entirely within the executive branch, and not judicial. Until 1983, removal hearings were conducted within the INS itself. In 1983 the Reagan administration decided to designate the INS hearing officers as "immigration judges" and place those persons in a branch of the Department of Justice separate from the Immigration and Naturalization Service. Thus the agency charging the alien with removability would no longer also have to rule on the charge. For the any court now to rule that this 1983 action transformed an administrative proceeding into a judicial proceeding with government discretion substantially restricted, would be another instance of "no generous act goes unpunished".

The Sixth Circuit's holding in Detroit Free Press, to the extent that it relied upon the District Court's opinion in North Jersey Media, which was itself overturned by the Third Circuit, presents a theory without a firm foundation.

IV. Enemy Combatants

Another controversial initiative of the U.S. government is the detention of U.S. citizens Yaser Hamdi and Jose Padilla as enemy combatants, without bringing criminal charges or granting them access to lawyers or courts. The attention of lawyers and civil rights advocates to this practice us perhaps understandable. Yet it is well established under the laws of war that prisoners of war can be interned for the duration of the war without

rights to lawyers or courts. Thousands of German and Italian POW's were brought to the U.S. during World War II without such rights. But what if one of them happened to be a U.S. citizen?

The U.S. Court of Appeals for the 9th Circuit held in 1946 that U.S. citizenship made no difference in the status of a POW detained as such by the U.S. government. It is true that the government asserts that Hamdi and Padilla, like other detained enemy combatants, cannot be considered POW's because they did not operate in recognizable uniforms, as part of disciplined military units, or on behalf of legitimate governments. Such a distinction exists in the international law of war and is not the creation of the Bush administration. Thus these enemy combatants have even less rights than POW's, and the 9th Circuit's determination that U.S. citizenship makes no difference ought to apply equally to them.

The U.S. Court of Appeals for the Fourth Circuit recently upheld the continued detention of Yaser Hamdi as an enemy combatant without any special consideration for his U.S. citizenship by birth, and rejected a petition for a writ of habeas corpus and an order to the government to present evidence justifying detention. In a thoughtful, balanced opinion which deserves to be affirmed by the U.S. Supreme Court, the Fourth Circuit, having dismissed the government's suggestion that there is no role for the judiciary in a challenge to the exercise of war powers, concludes that the court will hear such challenges for the purpose of determining whether the government is in fact exercising constitutionally authorized war powers. Having concluded that it is, the Court finds itself ill-equipped to assess facts on the battlefield and declines to compel the executive branch to defend the particulars of its exercise of war powers delegated exclusively to the executive branch by the Constitution.

While the Fourth Circuit properly limits its holding and analysis to the facts of the Hamdi case, its opinion should be a guiding light for other courts considering challenges to the exercise of war powers to detain enemy combatants.

V. Reform Legal Immigration - Change Numbers and Categories

The United States admits more legal immigrants every year than all the rest of the nation's of the world combined. The exact number, which usually works out to around 800,000 to 900,000, is determined by a very complicated formula with multiple ceilings and caps embedded in the Immigration and Nationality Act as enacted by Congress and signed by the President. The overall number depends to a considerable extent on the number of immediate relatives of U.S. citizens applying to immigrate. This group is admitted without numerical limitation, to the possible detriment of other categories. The complexity of this formula is not by itself particularly problematical. Those who need to understand it manage to do so. The problem is in the numbers the formula produces.

An on-going debate among policy makers, advocates, scholars and students of immigration is whether the number of legal immigrants we admit each year is too large or too small. There is no answer and no end to that debate which is conducted at various levels, empirical, philosophical, and moral. I wish to add to the discussion only the suggestion that the formula is too rigid, too inflexible for a nation experiencing the changes which have occurred since 9/11.

The current formula applies regardless of economic conditions in the United States, regardless of the level of unemployment or of economic growth. It also applies regardless of the government's ability to actually process any

particular number of immigrants, and regardless of whether the government's capabilities are being temporarily or permanently directed elsewhere. The current formula applies regardless of whether we are at peace with the world or whether we are at war and searching for terrorists in our midst to prevent a recurrence of 9/11.

As an alternative to the current, rigid formula set by statute, I propose that Congress authorize the President before the start of each fiscal year to decide, in consultation with Congress, the appropriate number of immigrants to admit that fiscal year. The President could take into consideration economic data, the availability of government personnel and resources, and the national security needs of the country. This process would be very similar to that already in place for determining refugee admissions to the U.S. from abroad each year.

This flexibility in setting the overall level of immigration may prove useful in facilitating and supporting the war on terrorism and enhancing homeland security. And as part of a reform of our immigration laws we should also consider whether the current categories of immigrants whom we "pick and choose" under our current system are in fact the ones we want.

The large majority of legal immigrants to the U. S. enter as immediate relatives of U.S. citizens or in other family-sponsored categories. (The others are admitted in employment-based categories, on so-called diversity visas, a/k/a the green card lottery, and as refugees from persecution abroad.) Because immediate relatives of U.S. citizens are the only category admitted without numerical limitation, that is by far the fastest growing group of immigrants. Because the other family-sponsored categories are numerically limited, there is a waiting list for admission in most categories which may be as short as several months or as long as 20 years.

Does it make sense for us to admit the largest portion of our immigrants in family-sponsored categories which do not consider job skills or prospects, education, or ability to contribute to the country? And are those considered immediate relatives deserving of immediate admission regardless of their numbers?

Immediate relatives are defined as "the children, spouses and parents of a citizen of the United States". In the case of parents, the sponsoring citizen must be at least 21 years old. Children are unmarried persons under 21 years old.

It makes sense that U.S. citizens want and need to be immediately reunited with their spouses and minor children. But does an adult citizen have a similar need to be reunited with parents in the United States? Most of those citizens who sponsor parents were themselves immigrants who made a conscious decision to immigrate and leave their parents behind. The American family is typically a nuclear family. Adult Americans live with their spouses and minor children. Most do not live with their parents. And because of their age, the parents of citizens are less likely to contribute economically to the country through work, and more likely to require social services at an earlier date. The growing share of the statutory number of legal immigrants taken up by immediate relatives can and should be reduced by re-defining immediate relatives to include only spouses and children of U.S. citizens.

One way to reduce the number of immigration visas allocated to other family-sponsored categories is to eliminate the "fourth preference" for brothers and sisters of adult U.S. citizens. Although the statutory formula allocates around 65,000 visas each year to this category, the waiting lists in this category are extraordinarily long, varying from 11 years for most nationalities to more than 20 years for those

from the Philippines.

A third reduction in the existing visa categories can be made by eliminating the so-called diversity visas, a/k/a the green card lottery. Current law allocates 55,000 immigrant visas each year to those selected from applicants with at least a high school education. This category was created in stages between 1986 and 1990 in order to facilitate more immigration from Europe, thus diversifying the immigration flow which was becoming increasingly dark-skinned. One immigration scholar has characterized these visas as "anti-diversity visas". Persons born in certain "high admission states" such as Mexico, China, India, Jamaica, South Korea, and Vietnam are expressly ineligible to receive these visas. Other high admission states are allocated reduced numbers of visas.

Besides being explicitly discriminatory, diversity visas do not seem to be a logical way to allocate precious immigration visas, without regard to skills, advanced education, or employability.

The employment-based categories of immigrant visas generally require a complex "labor certification" process or other requirements similarly complex. As a result, most of these categories have no waiting list, and the allocated visas often go unclaimed. Those who are able to jump through all the statutory hoops to prove the requisite skills and employability, without displacing U.S. citizens or residents, can enter without waiting.

I believe the U.S. would be better served by taking the visas currently going to parents and siblings of adult U.S. citizens, and the diversity visas, and adding them to the employment-based visas. These visas should be allocated on a flexible but objective points system, without requiring a burdensome labor certification, similar to the immigration systems in Canada and Australia.

Points can be awarded for desirable characteristics such as youth, health, education, skills, including language skills, work experience, financial resources, or family sponsors. The cut-off point for admission each year can be set based on the number of immigrants we choose to admit. This would simplify the current immigration system, provide the U.S. with immigrants better able to contribute to our economy, and eliminate the discriminatory diversity visas, all without necessarily changing the number of immigrants who would otherwise be admitted.

VI. Limit the Duration of Legal Permanent Resident Status

Once granted, an immigrant visa, commonly called a "green card", entitles the holder to legal permanent residence forever, as long as certain disqualifying criminal or terrorist acts are not committed. There is no requirement that the legal permanent resident ever become a U.S. citizen or demonstrate any loyalty or gratitude to the United States. The legal permanent resident can get all the benefits of living and working in the U.S. while maintaining citizenship in and loyalty to another country. And millions choose to do this. How is this in the best interest of the United States?

We generally allow legal permanent residents to apply for citizenship only after five years (three years for spouses of U.S. citizens). This allows the alien time to decide if he or she wishes to become a citizen. It also allows the United States an opportunity to evaluate the alien's character and eligibility for citizenship.

I believe the U.S. should consider requiring legal permanent residents to apply for U.S. citizenship after five years. If they choose not to do so, they would lose their green cards and right to permanent residence in the U.S. This would reduce the size of the non-citizen portion

of our population which though permanently living among us owes no loyalty to this nation. This change would encourage and facilitate assimilation of immigrants.

VII. Limit Dual Citizenship

While dual citizenship may have benefits to the individuals concerned, it's not so clear that toleration of dual citizenship has benefits for the United States. Current U.S. law provides for expatriation by voluntary performance of one of seven specified acts done "with the intention of relinquishing U.S. nationality." This reflects U.S. Supreme Court opinions ruling that U.S. citizenship may be lost only through a voluntary expatriating act done with the intention to expatriate.

The seven expatriating acts specified in Sec. 349 of the INA are generally: obtaining naturalization in a foreign state, taking an oath of allegiance to a foreign state, entering the armed forces of a foreign state engaged in hostilities against the U.S. or as an officer, employment by a foreign state while a national of such state, formal renunciation before a U.S. consular officer, written renunciation in the U.S. during a state of war, and any act of treason.

Current U.S. policy, however, is very tolerant of dual citizenship and expressions of loyalty towards another country. The U.S. State Department has announced that it will presume that U.S. citizens intend to retain their U.S. citizenship when they obtain naturalization in a foreign state, take a "routine" oath of allegiance to a foreign state, or accept non-policy level employment with a foreign government. Citizenship renunciation contained in naturalization oaths of other countries are now considered pro forma declarations, without any intention to give up U.S. citizenship.

This State Department presumption of intent to

retain citizenship despite potentially expatriating acts seems unnecessarily tolerant. National security is enhanced by a nation's enjoying the exclusive loyalty of its own citizens. Sometimes dual citizenship is unavoidable because of the particular laws of another country and without any action on the part of the individual. But it should not be encouraged. We should not give the benefit of the doubt to actions which the Congress has named by law to be expatriating.

The presumption should be reversed, either by regulation or by statute. It should be presumed that any of the expatriating acts listed in INA Sec. 351, including naturalization in a foreign state, are committed with the intention to expatriate, with the burden on the individual to prove otherwise.

VIII. Require Visas of All Foreign Visitors - End Visa Waiver

Prior to 1986, the United States required that nearly all aliens (except Canadians and certain Mexicans) wishing to enter the United States to first obtain visas from a U.S. consulate. Aliens apply for visitor visas to the U.S. by submitting applications with their passports to a U.S. consulate. This gives the consulate an opportunity to inspect the passport to insure that it is not counterfeit and has not been stolen. The consulate also has an opportunity to investigate the applicant and may require a personal interview. These visitor visa applications may be denied for a variety of reasons including reasonable grounds to believe the alien seeks to enter the U.S. to engage in any unlawful activity. Production of U.S. visas were routinely required of aliens to obtain boarding passes for aircraft bound for the United States.

But in 1986, Congress enacted the visa waiver program , which authorized the entry of visitors from certain mainly European countries with a low nonimmigrant visa refusal rate. Persons

with passports from any of these now 28 countries may board airplanes bound for the U. S. merely by purchasing tickets and showing their passports. This reform was intended to facilitate entry of foreign tourists businesspersons to the U.S. and to relieve U.S. consulates of the considerable paperwork and cost surrounding issuance of visitor visas to citizens of these countries.

We now know that visa waiver allowed the entry without a visa of Zacarias Moussaoui, a French citizen of Moroccan descent, believed to have been "the 20th hijacker", currently charged with conspiracy to commit the murders of 9/11. We know that Richard Reid, the so-called "shoe bomber", as a British citizen and passport holder was able, because of the visa waiver program, to board an airplane headed for the United States without having to apply for or acquire a U. S. visa. It has also been reported that Ramzi Yousef and at least one other conspirator used false visa waiver passports to travel to the U.S. in furtherance of the 1993 World Trade Center bombing. Do we need more proof than that of the continuing threat to U.S. national security of the visa waiver program?

We know now that all the 9/11 hijackers spent time in Western Europe and that Western Europe as much as the Middle East is the source of Al-Qaida terrorism directed at the United States. We also know that thousands of blank Belgian and Italian passports have disappeared or been stolen from government offices, which might be doctored to facilitate entry to the U.S. via the visa waiver program.

As recently as February 28, 2002, however, the president and CEO of the Travel Industry Association of America testified to the Immigration Subcommittee of the House Judiciary Committee that, "In a post-September 11 world, the Visa Waiver Program is just as important as ever, and the rationale that underlies its creation and existence is as sound

as ever.... The Visa Waiver Program should be embraced by Congress and the Administration as part of our overall homeland security program, and should be viewed as a means of strengthening both our national security and economic security." The Deputy Commissioner of the INS agreed that, "eliminating the program will not eliminate the ability of terrorists to enter the United States."

Isn't that the wrong question? Of course eliminating visa waiver can't eliminate the ability of terrorists to enter the U.S. But will ending visa waiver to any significant extent reduce the ability of terrorists to enter the U.S.? Isn't that the right question to ask? And if the answer is yes, shouldn't Congress and the Administration end the visa waiver program immediately and restore the visa requirement for foreign visitors notwithstanding the lobbying of the travel industry?

Repeal of visa waiver will impose a significant burden on U.S. consulates to screen visa applicants. In fiscal year 2001 the number of foreign arrivals under the visa waiver program was 17 million. But the burden of screening visa applicants assumed by U.S. consulates will directly enhance U.S. national security. And the additional cost can be offset by the common international practice of assessing a fee for visa processing. There is also the possibility of retaliation by former visa waiver countries, which may choose to begin requiring visas of U. S. visitors. But each country's visa policy is determined by that country's perceived national interest, and it should be recalled that before 1986, most Western European countries did not require visas of U.S. visitors even though the U. S. required visas of European visitors.

As a Belgian police official stated to an American journalist regarding the problem of missing or stolen Belgian passports, "Strictly speaking,... Belgium does not have a problem with terrorism. You have a problem with terrorism."

IX. End Adjustment of Status

U.S. visas for immigration and permanent residence are only available from U.S. consular officials serving outside the U.S. So what should an alien do who is eligible for an immigration visa but who is already in the U.S. on a temporary non-resident visa as a tourist, perhaps, or a student? For many years the answer was return to your home country and obtain your immigrant visa from the U.S. consulate there.

Because of the expense and burden of such a return to home country, the INS began in 1935 the practice of allowing the alien to complete paperwork in the U.S. and then proceed to a U.S. consulate in Canada to obtain a pre-arranged immigrant visa. And because the trip to Canada seemed entirely pro forma, Congress in 1952 authorized "adjustment of status" by eligible immigrants to be completed entirely within the U.S.

Statutory adjustment of status is no doubt beneficial to those immigrants who make use of it. But is it also beneficial to the United States? Allowing adjustment of status in the U.S. precludes a reconsideration of the alien's admissibility by a U.S. consular officer in the alien's country of origin. This officer may be better able to assess admissibility than an immigration officer in the United States because the consular officer has better knowledge of country conditions and access to better intelligence from local sources in-country.

Returning to one's home country to apply for an immigration visa is no longer the practical or financial burden it was back in 1935 or 1952. In the context of a war on terrorism, the U.S. should obtain the best possible security assessment before granting an immigration visa authorizing permanent residence and eventual citizenship. That assessment can only be made

by a consular officer in-country. A balancing of the benefits to U.S. national security and the burdens to the alien of returning home to obtain the immigrant visa strongly favors the repeal of the adjustment of status statute.

X. Move EOIR and Consular Affairs to the Department of Homeland Security.

I was not originally a supporter of reorganizing the INS. I felt that the problems at INS were not organizational but due primarily to over-tasking, under-funding, and under-staffing. But I concluded that if a reorganization was politically unavoidable, consolidation of the INS with other border security agencies such as Customs and the Coast Guard in a cabinet-level department dedicated to border security, as has happened, was the least bad alternative and had some benefits. One of those benefits ought to be better coordination among all the Federal agencies and personnel whose mission includes border and homeland security.

The emergence of the new Department of Homeland Security on March 1, 2003, consolidates 177,000 government employees from 22 different agencies, and it seems clear to everyone that the transition to a new department will not be easy. But at least two pieces of the border and homeland security infrastructure are missing, the Bureau of Consular Affairs, which remains at the Department of State, and the Executive Office for Immigration Review, which remains at the Department of Justice.

The State Department's Bureau of Consular Affairs is the agency that actually issues non-immigrant and immigrant visas to aliens wishing to visit or immigrate to the United States. It is the agency which issued visas to the 19 hijackers who attacked the United States on 9/11. In a consolidation of all the agencies concerned with border security including the Coast Guard, Customs, INS and its Border

Patrol, and even the Agriculture Department's border inspectors, it is puzzling to see the Bureau of Consular Affairs escape consolidation into the new Department of Homeland Security.

The issuance of visas has never been the prestige work of the Department of State. Consular work has never been seen as the pathway to an ambassadorship and has been regarded in the department as a rite of passage for junior foreign service officers and a safe place for senior officers to work who for whatever reason are not assigned more meaningful diplomatic assignments. The Bureau of Consular Affairs has responded to both external and internal pressures to issue visas quickly to facilitate entry of alien visitors into the United States. The Bureau has declared the foreign visa applicant as the customer rather than the American people.

Both the original Bush administration proposal and the final legislative enactment for the new department lack clarity on exactly which department will control visa policy, though the bureau itself remains part of the State Department. That department has long maintained that visa policy needs to be subordinated to the larger diplomatic policies of the department. If transferred to the Department of Homeland Security, we may reasonably assume that visa policy will be subordinated to the national security interests of the United States. That seems preferable to me.

The other missing piece from the new Department of Homeland Security is the Executive Office of Immigration Review (EOIR) which remains at the Department of Justice. Prior to 1983, when the INS charged an alien with deportability, a hearing would be conducted before a INS special inquiry officer who was authorized by law to order the alien's removal from the U.S., with administrative appeal only to the Attorney-General, and judicial appeal only to the U.S. Circuit Courts of Appeal. Because of

the impracticality of the Attorney-General's personally considering immigration appeals, a Board of Immigration Appeals (BIA) was created by regulation to rule on appeals on behalf of the Attorney-General.

Because of real and perceived problems in the subordination of the special inquiry officers to the INS, the Department of Justice in 1983 promulgated regulations creating the Executive Office for Immigration Review to which the special inquiry officers, now designated immigration judges, were transferred along with the Board of Immigration Appeals. EOIR remained a part of the Department of Justice under the Attorney-General. The Attorney-General's authority over both INS and EOIR insured that there would never be two conflicting voices from the Federal government on U.S. immigration policy. Any serious policy dispute between INS and EOIR could be quickly settled by the Attorney-General or his designate.

But with the INS functions transferred to the Homeland Security Department and EOIR remaining at the Justice Department, the potential for conflicting voices on immigration policy is increased. Presumably a policy dispute between the immigration bureaus of DHS and the EOIR could now be resolved only at the cabinet level. This is not a satisfactory method of insuring uniform U.S. immigration policy, however well the current Secretary of DHS and the current Attorney-General get along with each other. The potential difficulty can and should be avoided by moving EOIR to the same department where the immigration powers of the INS now reside.

Conclusion

History reassures us that the emergency measures enacted by our government during previous wars, even Lincoln's suspension of habeas corpus during the Civil War, had no

lasting effect on American society once the war was won and peace restored. Indeed our sensitivity over civil liberties is greater now than it has ever been in our history. The liberty we should be most concerned about right now is the right of all Americans, and non-Americans, too, to live our lives in peace, free of the threat of terrorism. Defense of that civil liberty is what this war is all about. But if we lose this war against terrorism, nobody's civil liberties will survive.

So our national indecisiveness over immigration policy must end. Immigration law must finally be recognized for what it has always been, an instrument of national security policy. *Jan Ting, Professor of Law, joined the Temple law faculty in 1977, and served as Director of the Graduate Tax Program from 1994 to 2001. He is a 1970 graduate of Oberlin College, received an M.A. degree in Asian Studies from the East-West Center of the University of Hawaii in 1972, and received his law degree from Harvard Law School in 1975.*

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His summer 2002 article on "Federal Initiatives in Response to the September 11 Terrorist Attacks" appears at 34 Connecticut Law Review 1145. He has been quoted in news reports on legal developments, and has published commentary, in various media including the New York Times, the Wall Street Journal, the Washington Post, the Chicago Tribune, National Public Radio, PBS Newshour, ABC Nightline, and the NBC Today Show, Dateline, and Evening News programs.

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