Implications of Post-9/11 Immigration Policy for Muslim Americans: National Security and Human Rights Considerations

**MPP Professional Paper**

In Partial Fulfillment of the Master of Public Policy Degree Requirements
The Hubert H. Humphrey School of Public Affairs
The University of Minnesota

Elizabeth Shaffer-Wishner
December 14, 2011

*Signature below of Paper Supervisor certifies successful completion of oral presentation and completion of final written version:*

_________________________________________  ________________  ________________
Katherine Fennelly, Faculty, HHH          December 14, 2011  December 8, 2011
Typed Name & Title, Paper Supervisor     Date, oral presentation  Date, paper completion

_________________________________________  __________________
Cawo Abdi, Faculty, Sociology
Typed Name & Title, Second Committee Member
Signature of Second Committee Member, certifying successful completion of professional paper

December 14, 2011
Implications of Post-9/11 Immigration Policy for Muslim Americans: National Security and Human Rights Considerations

Elizabeth Shaffer-Wishner
Master of Public Policy, Hubert H. Humphrey School of Public Affairs
University of Minnesota

Introduction

“In an effort to keep out anyone who might again inflict such grievous harm, the United States is building a system of border controls that could rob it of much of what has made it such an impressive and successful country.”

The shift in immigration policy immediately following the attacks of September 11, 2001 had, and continues to have, significant implications for Muslims in the United States. Immediately following the attacks, immigration policy as it previously existed was heavily revised, and some believe, used as a substitute for national security policy (Salehyan, 2009; Mittelstadt et al., 2011; Rodriguez, 2008). Some argue that the policy changes, regardless of their effectiveness at maintaining national security interests, presented violations of civil and human rights (Brane and Lundholm, 2008; Bachman, 2008). This work will examine the post-9/11 shift in immigration policy as it affected Muslims in the U.S. through frameworks of national security and human rights.

Impetus and Methods

According to Tumlin, post-9/11 immigration policy was designed and implemented explicitly to prevent another terrorist attack. As such, the policies set out to identify and apprehend a specific subset of the population which mirrored the identities and activities of the individuals who had masterminded the 9/11 attacks. However, the policies drafted post-9/11 yielded varying degrees of success, and some policy analysts suggest that the means they utilized
did not justify the ends that resulted. “The new terrorism policy [sent] the message that immigrants of certain nationalities should be viewed as potential terror suspects first and welcomed as newcomers second, if at all” writes Tumlin (p. 1177).

This work builds on existing research and analysis. There are academic works which list and analyze the changes in immigration policy in response to 9/11 (Andreas, 2002; Rodriguez, 2008; Alden, 2008). Some of these works evaluate post-9/11 policies through the frameworks of human rights or national security (Mittelstadt et al., 2011; Migration Policy Institute, 2003; Rudolph, 2006; Salehyan, 2009). Finally, some of these works assess the impact of post-9/11 policies on Muslim-Americans and Muslim immigrants (Cainkar, 2004; ADC 2003, 2008; Rodriguez, 2008). However, little literature exists which evaluates post-9/11 policies—as they pertain to Muslims in the United States—through frameworks of both national security and human rights.

This work therefore attempts to supplement policy analysis literature by identifying how policies implemented after 9/11 which affected Muslims were justified using a framework of national security, and how they may have simultaneously violated frameworks of human rights.

In order to complete this analysis, I undertook an academic review of literature and reports relevant to post-9/11 immigration policy, national security frameworks, and human rights frameworks. After identifying one national security framework which best reflects the post-9/11 policy environment, I attempt to describe how this framework was used to justify the policies implemented after the attacks. I then explore a foundational human rights framework, and use it to critique those post-attack policies as they infringed on international guarantees of human rights. Finally, I consider how the two frameworks might best be coupled in order to maintain U.S. national security interests without infringing on international human rights protocols.
The first section of this paper reviews major immigration policy shifts after the 9/11 attacks. (See Appendix A for a chronological list of these policies.) The second section identifies the national security and human rights frameworks relevant to this analysis, and evaluates post-9/11 policies through them. The third section describes revisions of some post-9/11 policies, and questions the effectiveness and appropriateness of the national security framework used to justify their implementation. The final section considers long-term implications of post-9/11 policies, and offers recommendations for policies going forward.

Part I
Immigration and Post-9/11 Policies

“In many ways the story of immigration and border policy development in the United States is about the evolution of American national identity.”
- Christopher Rudolph, National Security and Immigration, 2006

News accounts indicate that prior to the attacks on 9/11, then-President Bush was moving immigration and commerce policy toward an “open borders” state (PBS, 2000; Alden, 2008). Following the attacks of September 11, 2001, the shift in federal immigration policy was immediate. The results were hardened U.S. borders, and hardened attitudes toward foreigners. “Literally overnight, the terrorist bombings have reversed what had been a softening of the U.S. immigration policy debate” (Andreas, 2002, p. 196).

Secrecy was an often-utilized protocol after the attacks. An “information blackout” took place ten days after 9/11: Chief Immigration Judge Michael Creppy ordered that deportation proceedings be closed to the public and press in the event that they were cases of “special interest” (Tumlin, 2004). By November of 2011, more than 1,200 people had been detained – the majority of them of Middle Eastern or South Asian descent (Tumlin; Salehyan, 2009). The Justice Department Office of Inspector General said that individuals detained on immigration
charges and identified as “special interest” cases were initially prevented from contacting attorneys (Mittelstadt et al., 2011).

Six weeks after the attack, the Patriot Act was signed into law. The act expanded the federal government’s ability to conduct surveillance of individuals, implemented surveillance along geographic borders, and increased grounds for immigrant inadmissibility based on perceived terrorist affiliation. Although it passed with extreme bipartisan support, there have since been numerous challenges to its constitutionality.

In January 2002, the Department of Justice (DOJ) announced that it would seek out “priority absconders” (Mittelstadt et al., 2011; Cainkar, 2004). Immigrant absconders are those who had been ordered to leave the country following visa expiration or other immigration legislation, but did not. Following the attacks, the “priority absconders” sought by law enforcement were 6,000 individuals from Muslim or Middle Eastern countries. Within five months of the order, 585 absconders had been detained (Cainkar). By early 2003, only 38% of those priority absconder cases had been resolved – either by detaining the individuals, or confirming they had left the country or acquired legal status (Sheridan, 2005).

Immigration policy change continued to reflect specific concerns resulting from the 9/11 attacks. In June of 2002, the DOJ stated that all Yemenis entering the U.S. would be searched upon arrival at the receiving airport (Cainkar, 2004). Later that year, the National Security Entry-Exit Registration System (NSEERS) was implemented. NSEERS broadened the scope of preexisting nationality-based registration requirements, and mandated that noncitizens from 25 countries – 24 of which have majority Muslim populations – register with the federal program (see Appendix B; Department of Homeland Security, 2003). The program was originally intended to grow and encompass individuals from other, non-Middle East countries. Although
individuals from 150 countries were ultimately registered through NSEERS (Department of Homeland Security, 2003) the program never expanded and obliged anyone but those individuals from the original 25 designated countries to register (Cainkar, 2004).

Immigrant tracking and record-keeping programs like NSEERS were highly prioritized in the months and years after the attacks. The Student and Exchange Visitor Information System (SEVIS) had been approved by Congress in 1996, but was not implemented until after the attacks. SEVIS required regular reporting by educational institutions on the enrollment status of their international students (Mittelstadt et al., 2011). The SEVIS program interfaces with other data-tracking programs like the US-VISIT program (described below) in order to track the activities of visitors to the U.S.

One year after the introduction of NSEERS and the implementation of SEVIS, the Department of Homeland Security unveiled a similar program: Like NSEERS, the United States Visitor and Immigrant Status Indicator Technology (US-VISIT) program also required registration of arriving foreigners, but was lauded for its biometric components that distinguished it from previous registration and tracking programs. At ports of entry to the U.S., US-VISIT officials collected digital fingerprints and photographs of all arriving individuals. Alden states that “US-VISIT was the first program to contemplate a far more ambitious goal – that the United States might actually be able [to] identify every foreign traveler who had come legally to the United States and know whether they had left the country when they were required to” (2008, p. 259). This program is in practice today – primarily at airports. It would eventually entirely replace NSEERS (Immigration and Customs Enforcement, 2003; Alden, 2008). US-VISIT is considered to be highly effective, although the program does not address the population which
entered the U.S. prior to its establishment, or who did not enter through established ports of entry.

In an effort to establish consistent and legitimate identification practices which furthered federal abilities to locate and track individuals, the Real ID Act was passed in 2005 (Thomas.gov, 2005; Department of Homeland Security, 2011-2). The act requires individuals to be in possession of a federally-approved driver’s license or state ID in order to drive, visit a federal government building, collect Social Security, access a federal government service, or use the services of private entities like banks and airlines that are required to verify customer identity.

In November of 2002, the Homeland Security Act was signed into law, bringing more than 20 federal agencies under the auspices of the Department of Homeland Security. The act intended to decrease U.S. susceptibility to terrorist attacks, and minimize repercussions of attacks that do take place (Department of Homeland Security, 2011). The U.S. Immigration and Naturalization Service (INS), in existence since 1933, was dissolved and replaced in early 2003 by the Department of Homeland Security (DHS). The DHS has three components that handle immigration: the enforcement branch of Immigration and Customs Enforcement (ICE), the border security branch of the Customs and Border Protection (CBP), and the immigration branch of the U.S. Citizenship and Immigration Services (USCIS).

On March 20, 2003 the U.S. launched its offensive attack on Iraq. Preceding the war by three days, Operation Liberty Shield was announced and implemented. According to the Department of Homeland Security (2003-2), the measure was intended to increase border and airport security, establish airspace controls over major U.S. cities, and take measures to ensure rail, road, cyber and public health safety. It also called for the systematic detention of asylum
seekers from approximately 33 nations in which al-Qaeda has ever operated for the duration of time during which their asylum status was processed (see Appendix C; Tumlin, 2004; Mittelstadt et al., 2011).

In the month following the start of the Iraq War, the U.S. government implemented the Iraqi Task Force Project. This task force conducted voluntary interviews with 10,000 Iraqis in the U.S. in the month following Iraq War. Some of these individuals had been under surveillance prior to the start of the war (Anderson, 2003). The project was intended to identify terrorist ties in the U.S., and ostensibly, to report incidents of hate crimes. The interviews resulted in 30 immigration-based arrests (Anderson) and 250 reports that were of use to U.S. intelligence agents (CNN Justice, 2003). Interviews continued through the next year, broadening to non-Iraqi Arabs and Muslims in an attempt to solicit leads on terrorist activity (Sheridan, 2004).

Prior to the attacks, immigration legislation drafted for the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 served to add section 287(g) to the protocols established in the 1952 Immigration and Nationality Act. Section 287(g) established a partnership between the federal government and state and local municipalities. The partnership trained law enforcement officials to screen individuals who are engaged in police operations on their immigration status (Immigration and Customs Enforcement, 2011). Although established in 1996, the program was not implemented until the Department of Homeland Security was established in 2002, and under it, the Immigration and Customs Enforcement (ICE) branch created.

Secure Communities is a program quite similar to 287(g), though it was drafted several years following the attacks, and it specifically establishes a federal partnership with local U.S. jails, whereas 287(g) trains law enforcement officials to perform federal status screenings while
in their community of jurisdiction. Under Secure Communities, individuals who are booked in local jails and are suspected of being “out of status” are fingerprinted. Those fingerprints are then checked against a larger federal criminal database. This biometric record-keeping is similar to the fingerprinting and photographing requirements of the US-VISIT tracking program.

As seen here, post-9/11 immigration policies intended to close loopholes which led to the security environment in which the attacks took place. Were these policies justified in the name of national security? Did their outcomes legitimize the structural and economic commitments needed to implement them? The following sections will identify relevant frameworks through which we can evaluate the above policies and their results, and conclude whether or not the repercussions were worth the security outcomes.

**Part II**

**Useful Frameworks**

“The sad fact is that international politics has always been a ruthless and dangerous business.”

Prior to the attacks on 9/11, the U.S. immigration system was overburdened and underfunded (Salehyan, 2009). Following the attacks, the backlog of requests for student visas, visa extensions, family reunification petitions, and immigration requests was no longer seen as a departmental headache, but as an issue of national security. As previously stated, immigration policy change was swift and specific, and intended to prevent an attack similar to the one which took place on 9/11. However, in considering the policies mentioned above, it is necessary to consider the assumptions which informed their creation.

National security has proved an infallible justification for policy development since the attacks. At times, the policies written to respond to the attacks no longer reflected the terrorist
actions which motivated the creation of new policies. For example: Although intended to respond to the attacks and prevent similar attacks in the future, two of the policies listed above – both Operation Liberty Shield and the National Security Entry/Exit Registration System (NSEERS) – targeted men from all predominantly Muslim countries for detention and registration, despite the fact that the 9/11 attackers were almost exclusively from Saudi Arabia. Why did the U.S. use the 9/11 attacks to justify the special registration of people not only from Saudi Arabia, but also from countries like North Korea, Thailand and Indonesia (see Appendix C)? Furthermore, was the profiling justified in the name of national security?

As another example, the Real ID act – slated for full implementation by 2013 – will require all individuals visiting certain establishments and structures in the U.S. to possess a federally-approved identification card, despite the fact that all but one of the 9/11 hijackers acquired some form of U.S. identification document, albeit some by fraud (9/11 Commission, 2004).

Finally, the Department of Homeland Security spends most its funding on fortifying the U.S. border with Mexico, which has “almost nothing to do with its core mission of preventing another terrorist attack” (Alden, 2008, p. 295). What justifies these actions, some of which seem irrelevant to the attacks on 9/11? The answer is national security.

This section will identify the most influential national security framework used by the Bush administration and Congress in designing post-9/11 immigration policies, and will use that framework to analyze some of these policies. Following this national security discussion is a description of a crucial international human rights framework, and an analysis of post-9/11 policies through it.
Immigration Policy as National Security

The most basic tenet within the concept of national security, according to Rudolph (2006), is survival of the State. This concept of State survival arose during the Cold War standoff between the U.S. and the Soviet Union, and became extremely salient in the months following 9/11. “Within hours of the 9/11 attacks, [President Bush] had made prevention of another terrorist attack the single, unequivocal, overriding priority of his presidency” (Alden, 2008, p. 9). In order to see the president’s priority through, the administration would need to prioritize some actions and policies over others.

Specifically, the administration would prioritize national security and the prevention of another attack over reforming border relations with Mexico, allowing the unfettered study and research of certain students, and ensuring privacy of personal life and communications. In a hearing before the 107th Congress, then-Attorney General John Ashcroft stated “Our fight against terrorism is not merely or primarily a criminal justice endeavor. It is defense of our nation and its citizens. We cannot wait for terrorists to strike to begin investigations and to take action. The death tolls are too high, the consequences too great. We must prevent first. We must prosecute second” (107th Congress, 2001, p. 13).

Identifying an existing framework of national security which mirrors the post-9/11 administrational priority of national preservation is therefore relatively simple: If the reality of federal prioritization was ensuring the safety and survival of the U.S. against terrorist activities, we must therefore identify a framework of national security which does the same. International Relations theory provides us with the framework of political realism. Though within the theory
there are multiple approaches,¹ realism generally holds that *states act solely in the interest of security and survival.*

Realism, according to Rudolph, is “the most venerable school of thought in international relations theory” (2006, p. 23). He states that the ability to realize national interests is a function of power. In a piece on the role of realism in U.S. public perception and policy, Drezner (2008) describes the following:

Realists stress that the anarchic world structure makes it impossible for governments to fully trust each other, forcing all states to be guided solely by national interest. Because all states can only count on their own resources and capabilities, realists are skeptical of the utility of international institutions to regulate world politics. …The question, for realists, is not ‘will both of us gain?’ but ‘who will gain more?’ (p. 54)

Realism as described by one of its forefathers, Hans Morgenthau, maintains that foreign policy can be determined by a state’s political acts, and these acts are made with consideration paid to the consequences of those actions (Morgenthau, 1948). “The statesman must think in terms of the national interest, conceived as power among other powers” (Morgenthau, as cited in Drezner, 2008, p. 52). Thus, through the framework of political realism, survival of the State is held as highest priority.

Mearsheimer is perhaps the most recent international relations theorist to have made significant contributions to the theory of realism. He justifies his notion of “offensive realism” by stating “The sad fact is that international politics has always been a ruthless and dangerous business, and is likely to remain that way” (2001, p. 2). Through the framework of realism, Mearsheimer says, global “great powers” are determined by the extent of their military capacity, and play the most influential roles in determining international politics. It is this lens of realism that best describes the defensive and offensive actions and policy responses of the U.S. following the 9/11 attacks.

¹ Drezner (2008) states that varieties of realism include classical realism, neoclassical realism, post-classical realism, offensive realism, defensive realism, structural neorealism, and others.
It is clear that the administration under then-President Bush used a realist approach to ensure U.S. national security. The administration, for example, prioritized finding and fighting Al Qaeda operatives despite making relatively little headway with several post-9/11 policies:

“Al-Qa’ida is and will remain the most serious terrorist threat to the Homeland … Although we have discovered only a handful of individuals in the United States with ties to al-Qa’ida senior leadership since 9/11, we judge that al-Qa’ida will intensify its efforts to put operatives here.” (National Intelligence Estimate, 2007).

Despite the fact that 15 of the 19 September 11 hijackers came from Saudi Arabia (Associated Press, 2002), a realist approach – attempting to guarantee security and survival of the State at any cost – explains why these policies prioritized screening individuals from any countries with even a remote connection to Al-Qaeda.

Other policy actions after 9/11 indicate the ultimate prioritization of a realist approach to national security. According to Mittelstadt et al. (2011), Homeland Security spending increased 183% between 2002 and 2010: such a drastic increase in funding is justified when realism defines national security priorities. Similarly, despite bipartisan opposition to what some opponents claim were violations to civil liberties, the Patriot Act received a four-year extension in 2006, and later in May of 2011 (Mascaro, 2011). Those who voted in favor of the extensions justified their support with arguments based in realism: that continued information gathering with the intent of protecting the State is justified at nearly any cost.

Two further examples of realism justifying post-9/11 policies are 287(g) and Secure Communities. The 287(g) program intended to identify dangerous criminals through a local-federal partnership, although in practice, a significant portion of those arrested and detained under 287(g) were caught on minor violations like traffic offenses (Mittelstadt et al., 2011; Aizenman, 2009). Similarly, the Secure Communities Task Force found that, although Secure Communities intended to identify and deport convicted criminals, almost 60% of those deported
had no criminal record, or were charged with only a misdemeanor (Homeland Security Advisory Council, 2011). If we use the theory of political realism to explain the continued use of 287(g) and Secure Communities despite their lukewarm success, it is possible to claim that they are justified by virtue of their ability to ostensibly protect the survival and safety of the State. Without this lens, the local-federal partnerships would be less easily justified.

**Immigration Policy and Human Rights**

Following the conclusion of World War II in 1948, the U.N. issued the Universal Declaration of Human Rights, and shortly thereafter, the International Bill of Human Rights. Nestled within the Bill is the International Covenant on Civil and Political Rights (ICCPR), which was ratified by the U.S. in 1992. The Covenant encompasses most of what will comprise this analysis of post-9/11 immigration policy through a framework of human rights. The Covenant was established to guarantee the rights of personal expression, liberty and security, and freedom from torture or arbitrary arrest. Within the ICCPR is the highly relevant Article 9, stating (in part):

> Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

This article from the ICCPR is crucial to a discussion of post-9/11 immigration policies through a framework of human rights. Detention was an unfortunate facet of the federal government’s reaction to the attacks: as previously stated, more than 1,200 individuals were detained in the two months following 9/11. The Migration Policy Institute gathered data on as many of the 1,200 individuals detained immediately following 9/11 as possible. Over half of those detainees were held for more than five weeks, and nine percent were held for more than nine months before being released and repatriated (2003).
Additionally, the short-lived Operation Liberty Shield mandated detention of all asylum seekers from certain countries, which some human rights groups deemed a violation of the “arbitrary arrest or detention” component of the ICCPR (Human Rights First, 2007). “Detention is intrinsically a violation of refugee and human rights law,” Brane and Lundholm state (Sec. IIA para 1, 2008). Although the ICCPR does not entirely prohibit detention, nor does it prohibit the detention of asylum seekers, it strongly discourages the practice of widespread detention, and most specifically, detention that is arbitrary. “Prolonged detentions without charge pose the strongest threat to civil liberties,” write the authors of a 2003 Migration Policy Institute report (p. 16). It is clear that the detentions which followed the attacks, and which took place during Operation Liberty Shield, were based solely on the fear of similar attacks and were an attempt to protect the State by any means necessary. In no way was the across-the-board detention determined by any individual’s actions. The post-9/11 widespread detention could therefore be considered arbitrary, and a violation of Article 9 of the ICCPR.

In addition to the issue of detention, Article 26 of the ICCPR directly confronts the issue of discrimination:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

In the context of this analysis of post-9/11 immigration policies, it is undeniable that many post-9/11 policies relied exclusively on discrimination. In their review of immigrant detainees and human rights standards after 9/11, Brane and Lundholm illustrate that the ICCPR states its provisions shall be implemented without regard to national origin, yet U.S. policies of mandatory detention for immigrant arrivals of certain nationalities are not in accordance with international legal standards of nondiscrimination (2008). After the terrorist attacks, nationality-based
interview programs, detention policies and deportation proceedings sought out Muslim and Middle Eastern individuals and communities despite ratified protocols mandating nondiscrimination (Anderson, 2003; CNN Justice, 2003; Cainkar, 2004; Sheridan, 2004; Mittelstadt et al., 2011).

Some post-9/11 policies were rooted in a desire to protect the security of the U.S., but in attempting that securitization, relied partially or exclusively on acts of discrimination. A 2003 report by the Migration Policy Institute states that the absconder initiative was actually a “legitimate and important” program – save for changes to the program post-9/11 which made it nationality-specific. Similarly, the National Security Entry/Exit Registration System (NSEERS) intended to identify and track all foreign individuals both residing in the U.S. and arriving at its ports of entry. It was established in late 2002, and by December of 2003, NSEERS had 290,500 registrations. Of those registrants, the program identified 143 criminals – a .04% hit rate (Department of Homeland Security, 2003). Cainkar writes: “Arabs and Muslims who are ‘out of status’ compose a highly select group, comprising less than one per cent of the estimated 3.2-3.6 million “out of status” and the eight million\(^2\) undocumented persons in the U.S. The magnitude of this selective immigration policy enforcement is without historic precedence in the United States” (p. 246). Alden cites a DHS official who says of NSEERS, in retrospect: “The intention seemed at times almost to be to harass people who were somehow seen as being to blame for 9/11” (2008, p. 248).

These policies – the post-attack detentions, NSEERS, Operation Liberty Shield, and the nationality-specific interviews – may have been justified by a collective administrative adherence to political realism, but were implemented despite violating established human rights

---

\(^2\) As of the time of the drafting of this analysis – late 2011 – estimates of the number of undocumented individuals in the U.S. are given at around 11 million.
protocols. The Human Rights Committee met in 2006 to assess U.S. adherence to the ICCPR, and identified several facets of U.S. policy worthy of concern (Human Rights Committee, 2006). The issues identified in the subsequent report were included the following:

- Concern that the definition of “terrorist” under domestic law was too broad;
- Concern with U.S. detention practices violating of Articles 7 and 9 of the ICCPR regarding cruel and unusual punishment and arbitrary arrest and detention;
- Concern with State (that is to say, U.S.) authorization of “enhanced interrogation techniques;”
- Concern that the Patriot Act and Real ID Act do not differentiate between voluntary and coerced provision of material support to terrorist organizations; and
- Concern that section 213 of the Patriot Act, which expands upon the ability to delay notification of home and office searches, violates Article 17 of ICCPR, and that the U.S. has and continues to monitor phone, e-mail and fax communication with little to no oversight.

A U.S. report to the Human Rights Committee addressing progress by the U.S. to alleviate these contradictions to the ICCPR was due August 1, 2010. As of late July 2011, that report had not yet been received by the General Assembly of the Human Rights Committee (Human Rights Committee, 2010).

Part III
After the Scare: Post-9/11 Policy Results and Ongoing Initiatives

“It is worth noting that all immigration and immigration law enforcement policies based on stereotyping or simple ethnic, religious or national identities have proven absolutely useless as counter-terrorism measures, while creating damaging and unnecessary divisions between the government and the Arab-American and American Muslim communities.”

-American-Arab Anti-Discrimination Committee (ADC), 2008

After the implementation of the above policies, legislators, public interest groups, affected communities and other interested parties reported on the effectiveness of these policies at maintaining U.S. national security interests. The reports, as well as lobbying attempts from public interest groups, led policies to be revised, extended or discontinued. It is clear that some
policy changes were motivated by human rights concerns, and others by ongoing security priorities.

Several policy revisions have been informed by human rights concerns, particularly guarantees to human rights made in the ICCPR. In the aftermath of the attacks, workplace discrimination against Arabs, Muslims and South Asian workers increased to the point that the Equal Employment Opportunity Commission (EEOC) created a separate filing category to track these acts. In the 15 months after 9/11, the EEOC received 705 such complaints (Migration Policy Institute, 2003). Tracking these complaints was the first step in codifying and legitimizing the nation-wide increase in discrimination. Additionally, in recent years bills to reform federal immigration policy have been introduced in response to anti-Latino sentiment which piggybacked on anti-Muslim reactions to 9/11. These policy responses include comprehensive immigration reform acts introduced in the 2006 and 2007 federal legislature, and the proposed DREAM Act, which – although it has not been passed federally – has been implemented on a state level in several instances.

Public perception played a key role in the post-9/11 world. On September 25, 2001, a Gallup poll showed that one in three Americans polled favored interning legal immigrants from “unfriendly” countries. Half of those polled favored requiring all Arabs to carry a special ID (Jones, 2001). In addition to this survey of public opinion, the American-Arab Anti-Discrimination Committee (ADC) reports that 700 violent incidents targeting Arab Americans and those perceived to be of Arab descent took place in the nine weeks after the attacks. The ADC also received 800 reports of employment discrimination in the year after the attacks. Despite this fourfold increase in discrimination over previous years, the prevalence of discrimination actually decreased in the weeks and months following the initial burst of reports.
The ADC states that this was likely due in part to certain positive policy responses, including statements of support for Arab Americans made by then-President Bush, Secretary Powell and both houses of Congress, among others:

“Those who feel like they can intimidate our fellow citizens to take out their anger don’t represent the best of America, they represent the worst of humankind, and they should be ashamed of that kind of behavior.” – George W. Bush; September 17, 2001; at the Islamic Center of Washington, D.C.

“If Americans strike out at their neighbors because of the way they look, dress or worship; if we use our anger as an excuse to trample basic rights, the terrorists will have struck a blow against everything we stand for.” – Sen. Tom Daschle; September 26, 2001, at the Tolerance and Unity Press Conference in Washington, D.C.

“In the aftermath of these shameful attacks, there is understandable anger across the nation. But it is wrong and irresponsible to jump to conclusions and make false accusations against Arabs and Muslims in our communities. Above all, we must guard against any acts of violence based on such bigotry.” – Sen. Edward Kennedy; September 12, 2001.

(ADC, 2003)

Additionally, some communities responded to anti-Muslim backlash with specific efforts to support Muslim-run businesses, and to demonstrate support at community mosques and cultural centers.

Immediately following the attacks, the number of admitted immigrants and refugees from predominantly Muslim countries had dropped precipitously (New York Times, 2006; Office of Refugee Resettlement, 2010). However: despite ongoing programs which targeted Muslim individuals for interviews, registration and detention, despite ongoing negative public sentiment toward Muslims, and despite security and employer discrimination against Muslims, more Muslims arrived in US in 2005 than in the previous two decades (Elliott, 2006). In 2009, after significant stagnation in refugee resettlement and immigrant arrivals following both the 9/11 attacks and the start of the Iraq War, the U.S. resettled the largest number of total refugees in a decade (Department of Homeland Security, 2011-3). This policy response of un-restricting
arrivals of individuals from Muslim countries indicates a federal effort to overcome public
perception of Muslims as threats or as reflections of the 9/11 terrorists.

By December of 2003, domestic registration of Muslims already present in the U.S. was
abolished in lieu of the biometric record-keeping of US-VISIT. Partially as a result of this more
comprehensive program, and partially due to its lack of effectiveness, the Department of
Homeland Security announced in April 2011 that individuals from 25 Muslim-majority countries
required to register with NSEERS would no longer be obligated to this registration (see
Appendix B; Mittelstadt et al., 2011; Department of Homeland Security, 2011-4; Alden, 2008).

Finally, the controversial Operation Liberty Shield initiative, mandating that asylum-
seeking individuals from 33 predominantly Muslim countries be held in detention for the
duration of their asylum hearings, was discontinued in April, 2003 – a mere month after it was
implemented (Human Rights First, 2003).

These aforementioned policy responses legitimize concerns that have been raised
regarding human rights violations in post-9/11 policies. Alternatively, several policy
developments in the decade since the attacks have been informed by the prioritization of national
security in immigration policy. To begin: Following the sunset stipulations of many of the act’s
provisions, President Bush signed into law extension of the Patriot Act in March, 2006
(Thomas.gov, 2005-2), and despite the concerns of many public interest groups and Congress
members, in May 2011 President Obama signed another four-year extension of the Act
(Mascaro, 2011).

In March of 2011, news outlets received word that anti-Muslim bias was being
propagated in federal FBI counterterrorism trainings (Temple-Raston, 2011). In response to this
discovery, the FBI ordered that all training materials be submitted for review. The FBI theorizes
that the bias may have been the result of the autonomy allotted to its counterterrorism
department, as its near-guarantee of future funding precluded the department from systematic
review.

By September of 2004, the biometric registration and tracking system, US-VISIT, was
expanded to include not just the 25 countries of origin prioritized for immigrant registration
through NSEERS, but also countries that had not previously been required to register at ports of
entry, nor had required visas to visit the United States. In the program’s first four years, it
captured the fingerprints of 90 million visitors to the United States. Of them, 1,500 were denied
entry because of damning information about them. Mostly, this information identified the
individuals as visa overstayers, but some were in fact identified as criminals (Alden, 2008).

Although the purpose of this analysis is to identify and discuss policies aimed at Muslim
immigrants in the U.S., each administration since the 9/11 attacks has recognized that its national
security is potentially threatened by the internal population of unknown, unauthorized residents.
“Indeed, if 9/11 produced public anxieties toward Arabs and Muslims, it also exacerbated
already existing tensions around Mexican immigration” (Rodriguez, 2008, p. 383). These
tensions, Rodriguez writes, have triggered new legislative debates: The 287(g) and Secure
Communities initiatives intend almost exclusively to identify and remove unauthorized,
criminally-convicted individuals from the United States. However, this national security priority
has backlogged immigration offices and courts across the country.

The federal 287(g) and Secure Community programs have been criticized recently for
both filling the judicial system with unmanageable numbers of deportation cases, and for failing
to follow their own implementation protocols. A 2009 GAO report stated that 287(g)
identification priorities were not being met, and could result in an "unmanageable number" of
low-priority illegal immigrants to ICE as well as "misuse of authority" by local officials (Aizenman, 2009). Similarly, the Secure Communities program has been criticized both for its failure to prioritize convicted criminals over simple status violators (Homeland Security Advisory Council, 2011), and for its lack of clarity regarding the voluntary nature of its implementation. For the first two years of its implementation, participating jurisdictions signed Memoranda of Understanding (MOUs) with ICE Director John Morton. Following widespread confusion over whether jurisdiction participation was voluntary, Morton announced on August 5 that all existing MOUs would be terminated. “ICE has determined that an MOU is not required to activate or operate Secure Communities for any jurisdiction.” This logically leads us to ask: Is federal action sans state consent justified even with a realist perspective on national security?

In June of 2011, Department of Homeland Security director John Morton issued two memoranda stating that all deportation orders currently in process – approximately 300,000 – will be reviewed to identify only the high-priority removal cases, and to consider certain circumstances surrounding an individual’s unauthorized presence in the U.S. prior to enforcing deportation proceedings. In the months that followed these announcements, public interest groups and immigration attorneys noted that “prosecutorial discretion” was not being consistently implemented nation-wide, and that judicial backlogs were not being remedied as planned (Preston, 2011; American Immigration Lawyers Association, 2011).

It is worth noting that in the midst of the announced intent of Immigration and Customs Enforcement to prioritize its deportation cases in order to lessen its caseload and decrease waiting times, in October of 2011 the department announced that in the previous fiscal year, ICE had deported the largest number of individuals in the agency’s history (Immigration and

---

3 In mid-November 2011, ICE announced its final intentions to begin implementing training programs designed to facilitate the immigration caseload review and eradicate a backlog of immigration proceedings (Preston, 2011-2).
Customs Enforcement, 2011-4). Of the almost 400,000 individuals removed, 55% were removed for felonies or misdemeanors – and of those felonies and misdemeanors, 37% were arrested and deported for drug-related or traffic offenses. ICE deported the highest number of individuals for *traffic-related offenses* last year than at any point in the last 11 years (McCombs, 2011). These cases can hardly be considered priorities, and demonstrate the need for effective prosecutorial discretion in deportation cases.

**Questioning Realism**

Despite concerns over the effectiveness, accuracy and legality of some of these programs and policies, acting administrations continue to justify them utilizing a realist perspective on national security. When acting officials see the safety of the State as the highest priority, it has proved difficult to ensure objectivity in counterterrorism initiatives (as with the FBI training), and to guarantee the proclaimed voluntary nature of state-federal partnerships (as 287(g) and Secure Communities maintain).

It *is* undeniable that protecting the security of the U.S. is a critical priority. As a component of ensuring national security, immigration oversight and control is unequivocally necessary. The Migration Policy Institute states that NSEERS, or its successor US-VISIT, “is a defensible and long-needed immigration control measure as long as it is not nationality-specific, and is driven by intelligence criteria” (2003, p. 17). Should current and future administrations continue to use realism as a justification for national security and immigration policy?

Although clearly an administrative priority after the 9/11 attacks, we have seen in this analysis that realism’s approach to protecting national security interests is simplistically offensive and suspicious. Realism can and has been used to justify nearly any action with the intent of preventing future terrorist attacks. However, as we have seen, some post-9/11
immigration policies justified by an unerring commitment to preventing future attacks have been tremendously ineffective:

- The “priority absconder” initiative resolved only 38% of its cases within 18 months of the attacks, and today seeks out hundreds of thousands of immigrant absconders despite a lack of funding or workforce to see through the removal orders (Sheridan, 2005).

- In the month after the start of the Iraq war, the Iraqi Task Force Project conducted 10,000 interviews with Iraqis in the United States. Of these interviews, 250 - or 2.5% - yielded reports that were of use to intelligence agents, and 30 – or 0.3% - resulted in immigration-based arrests (Anderson, 2003; CNN Justice, 2003).

- Finally, in the first year of the domestic and port-of-entry registration mandated by NSEERS, 143 criminals had been identified out of 290,500 registrants, which is a .04% hit rate (Department of Homeland Security, 2003).

Is a realist approach justified when these unimpressive results are yielded? Is massive federal funding, manpower, and community disruption simply collateral damage and worthwhile if it yields in even one arrest or deportation? These inquiries, though rhetorical here, must be raised within federal administrations in order to confirm or discredit the ongoing use of political realism in justifying immigration policy.

What is necessary in U.S. immigration policy is a thoughtful marriage of national security strategy and human rights protocols. A realist strategy should not be implemented at the expense of upholding the guarantees of – at the least – the International Covenant on Civil and Political Rights. Furthermore, applying a human rights framework to immigration policy creation should not be relegated to retroactive analysis: policies should be drafted such that rote discrimination based on nationality, religion, ethnicity, language, and other defining characteristics is not an issue to begin with.

U.S. administrations for decades to come will be tasked with reconciling the effectiveness, fairness and sustainability of post-9/11 immigration policies with ongoing
immigration and security priorities. It is crucial that future policies not forego basic human rights guarantees for realist priorities. The concluding section of this paper will consider long-term implications of post-9/11 policies, and offer recommendations of ways to reconcile existing policies with both national security priorities and human rights protocols.

Part IV
Implications and Recommendations

“Our long-term security will come not from our ability to instill fear in other peoples, but through our capacity to speak to their hopes.”
– President Barack Obama, preface to the 2010 National Security Strategy

A report by the Migration Policy Institute states that the U.S. immigration system came to be dominated by national security and enforcement considerations after 9/11 (Mittelstadt et al., 2011). Some analysts say that U.S. counter-terrorism efforts after 9/11 cast too wide a net. Post-9/11 immigration policies, for a time, steeply decreased the number of arriving immigrants (Office of Refugee Resettlement, 2010). Alden (2008) writes that between 2001 and 2003, visas issued to foreigners fell by a third, and 10 million fewer people traveled to the U.S. than had the year before the attacks. Other sources show that the number of admitted immigrants from predominantly Muslim countries after 9/11 dropped significantly, as did the number of refugees accepted to the U.S. for resettlement – both from Muslim countries, and in total (New York Times, 2006). Alden also states that this decrease in immigration and issuance of visas for high-skilled workers jeopardized the reputation of the U.S. as a haven for higher education, and a highly desirable destination for the world’s most innovative and successful individuals.

Rodriguez (2008) writes that national security-related immigration policies exacerbate existing tensions in foreign relations, and have created new ethnic and racial conflicts within the U.S. “The interiorization of immigration enforcement coupled with the emergence of a highly
securitized immigration policy has had specific effects for Arab and Muslim immigrants in different communities” (p. 382). These tensions carry significant implications: Visa delays, complex immigration protocols, and a culture of distrust may disincentivize continuing immigration, and therefore the economic and intellectual contribution of arriving individuals. “In an effort to keep out anyone who might again inflict such grievous harm, the United States is building a system of border controls that could rob it of much of what has made it such an impressive and successful country” (Alden, 2008, p. 20). Even the U.S. National Security Strategy recognizes the danger of reactions based too simply on realist-informed policies: “The goal of those who perpetrate terrorist attacks is in part to sow fear. …Overreacting in a way that creates fissures between America and certain regions or religions will undercut our leadership and make us less safe” (2010, p. 22).

Several authors and organizations have conducted their own analyses of post-9/11 policies, and concluded that the policies were less effective than intended (e.g. Tumlin, 2004; Rodriguez, 2008; Mittelstadt et al., 2011.) The report by the Migration Policy Institute (2003) states that despite national security priorities and extensive immigration policy changes, many of the individuals who conducted the 9/11 attacks would be readmitted under today’s immigration screening procedures.

We know that the U.S. built its national security priorities and immigration policy after 9/11 using the guiding priorities of realism. But what are the potential long-term implications of using a realist strategy to build immigration policy? Given U.S. security concerns, as well as the country’s commitment to human rights, what could the administration do differently to both ensure the nation’s security and decrease its breach of human rights guarantees?
It is clear, through a realist framework of national security, why the U.S. devised even its most draconian post-9/11 immigration policies. It is also clear that those policies relaxed somewhat in the decade after 9/11. However, using this realist justification for national security and immigration policy, the U.S. sacrificed families, some of its most promising scholars, and future generations of immigrants who might have made the U.S. their home. It is impossible to identify how many contributing individuals have moved or studied elsewhere, or have been turned away at ports of entry, just as it is impossible to gauge how many terrorists its offensive and defensive actions have deterred.

In considering the above descriptions of national security and human rights frameworks, analyses of policy effectiveness, and presentation of ongoing concerns, I present the following four recommendations of ways to reconcile existing policies with both national security priorities and human rights protocols:

**First**, the U.S. must *separate its immigration enforcement from its counterterrorism practices*. Alden writes that “Immigration and terrorism have become intertwined to the point where it has become almost impossible to separate them” (2008, p. 292). It is crucial that the U.S. develop and implement clear immigration policies intended to attract and keep the world’s most talented individuals, while maintaining screening and tracking protocols that effectively prevent future terrorist activities. One of these policy priorities cannot preclude the other.

**Second**, the U.S. must *maintain its status as a desirable destination for the world’s immigrants* in order to ensure its global competitiveness. It is critical that national security priorities not preclude international diplomacy. In the 2010 National Security Strategy, President Barack Obama announced that international engagement is one of the administration’s greatest national security priorities. Alden also conjectures extensively on the potential loss to
productivity the U.S. experienced in the wake of post-9/11 immigration policies. He quotes former Congressman Bill Reinsch as saying “One of our secret weapons has always been bringing people here to see what America is like. The ones that stay enrich our society and the ones that go back enrich their societies because they take our values with them. We’re throwing all that away. The long-term consequences of this are horrible” (2008, p. 24). This, combined with the potential for loss of diplomatic footing, would result in incalculable loss to the U.S. economy and intellectual community.

Third, the U.S. must effectively implement its recent decision to prioritize the deportation of unauthorized individuals with criminal records, and not those simply caught in the gap of insufficient domestic policy. A strategy of rote removal is insufficient to ensure national security, but has required staggering human and monetary resources. Redirecting federal funding for domestic identification and removal toward, say, a program of comprehensive identification and registration will not only close an existing gap in U.S. national security and immigration policy, but will preserve diplomatic relations with immigrant groups which may aid in future counterterrorism efforts.

Fourth, the U.S. should continue its efforts to capture and record the entry and exit of foreign individuals to and from the country, as the US-VISIT program achieves. As stated in the 2003 Migration Policy Institute report, efforts to register and identify all non-citizens in the country are legitimate and important. The U.S. can strengthen this approach if it attempts to encompass its domestic, undocumented population in identification and registration efforts that do not result in the profiling of immigrant communities, or in costly removal efforts.

Salehyan (2009) notes that geopolitics and security concerns have influenced immigration policies for far longer than the decade since 9/11. “In times of similar crisis in the
past, U.S. immigration law has often been misused to selectively target noncitizens based on their nationality and/or ethnicity under the pretext of protecting domestic security” (Migration Policy Institute, 2003, p. 14). The policies and their revisions listed above are specific reactions to the events of September 11, 2001, but the process of reacting follows a pattern inherent in human governance and protectionism.

What is crucial as the 9/11 attacks become part of U.S. history, and policy analysis continues, is to recognize ineffective tendencies in post-crisis policy approaches, and build a framework for response which weaves together national security priorities with human rights guarantees. The manner in which realism has been used to justify any and all actions under the guise of preventing future terrorist attacks is ineffective, and has cost the U.S. tremendous resources. In the terrible circumstance that terrorist attacks should mar the future of the U.S., policy reaction must draw from its past successes and failures, and uphold contemporary national security priorities without sacrificing basic human rights guarantees.
Appendix A
Post-9/11 immigration policy timeline*

September 11, 2001: 9/11 attacks

September 21, 2001: Deportation proceedings of “special interest” cases closed to the public

October, 2001: Patriot Act signed into law

January, 2002: “Priority absconder” initiative announced

June, 2002: DOJ announced that Yemenis arriving in U.S. would be searched

September, 2002: NSEERS implemented

November, 2002: Homeland Security Act brought 20 federal agencies together under DHS

November, 2002: Section 287(g) of 1996 IIRIRA legislation begun to be enforced.

January, 2003: All schools and programs in the U.S. hosting international students required to start using SEVIS, which had been authored in the 1996 IIRIRA

March 17, 2003: Operation Liberty Shield announced

March 20, 2003: Offensive actions against Iraq begun

April, 2003: Iraqi Task Force Project launched

April 17, 2003: Operation Liberty Shield discontinued

December, 2003: NSEERS abolished

January, 2004: US-VISIT employed

May, 2005: Real ID Act passed

March, 2006: President Bush extends Patriot Act

March, 2008: Secure Communities first implemented in a pilot jurisdiction

March, 2011: Evidence surfaces of anti-Muslim bias in FBI training

May, 2011: President Obama extends Patriot Act

June, 2011: ICE director mandates prosecutorial discretion in deportation cases

* Note that this is not a comprehensive list of post-9/11 immigration policies. Rather, this is a list of all policies described within this analysis which are pertinent to its thesis.
Appendix B
Countries of origin with registration requirement under NSEERS
(September 2002-December 2003)

Countries required of NSEERS registration included Afghanistan, Algeria, Bahrain, Bangladesh, Egypt, Eritrea, Indonesia, Iran, Iraq, Jordan, Kuwait, Lebanon, Libya, Morocco, North Korea, Oman, Pakistan, Qatar, Saudi Arabia, Somalia, Sudan, Syria, Tunisia, the United Arab Emirates, and Yemen (Department of Homeland Security, 2003).

Appendix C
Countries of origin with detention requirement throughout asylum proceedings under Operation Liberty Shield
(May 17, 2003-April 17, 2003)

Retrieving a list of the countries of origin from which individuals seeking asylum were ordered to be detained under Operation Liberty Shield proved nearly impossible. One report from Human Rights First (2007) stated in a footnote that the Department of Homeland Security “refused to officially disclose the list of affected nationalities, stating that the complete list was ‘law enforcement sensitive,’” but indicated that the operation’s affected countries of origin appeared to include Afghanistan, Algeria, Bahrain, Bangladesh, Djibouti, Egypt, Eritrea, Indonesia, Iran, Iraq, Jordan, Kazakhstan, Kuwait, Lebanon, Libya, Malaysia, Morocco, Oman, Pakistan, Philippines, Qatar, Saudi Arabia, Somalia, Sudan, Syria, Thailand, Tajikistan, Tunisia, Turkey, Turkmenistan, the United Arab Emirates, Uzbekistan, and Yemen as well as Gaza and the West Bank.
References


