

## Coming to America: The Weaponization of Immigration

Cato\*

*Fellow-citizens, we cannot escape history. . . . We shall nobly save, or meanly lose, the last best hope of Earth.*<sup>1</sup>

### I. INTRODUCTION

The rhetoric of our past informs the debates of our present. On December 1, 1862, President Abraham Lincoln invited Congress, and an America in its eighty-fifth year, to bear witness to the huge and awful costs of wresting from battlefields freedom for an enslaved people. “[T]he fiery trial through which we pass,” he wrote, “will light us down, in honor or dishonor, to the latest generation.”<sup>2</sup> Barely two years and four months later, Lincoln would observe that the “fiery trial” through which America had passed bore results “fundamental and astounding.”<sup>3</sup>

These words are a distant mirror through which to examine another war, this one against terror, the front line of which is not, as some would argue, the mountains of Afghanistan or the plains of Iraq, but instead the nation’s borders and ports of entry.<sup>4</sup> The picket lines of this war are contested in the New World rather than the Old, with staging areas located in the triple borders of Argentina, Brazil, and Paraguay, and the Texas border with Mexico. It is not a set-piece war, but, as John Kennedy described the Cold War, a “long twilight struggle,”<sup>5</sup> pitting a West of pluralism, private enterprise, and the rule of law against an ide-

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\* Cato is a former Senior Counsel at the United States Department of Justice.

1. Abraham Lincoln, President of the United States, Second Annual Message to Congress (Dec. 1, 1862), *available at* <http://showcase.netins.net/web/creative/lincoln/speeches/congress.htm>.

2. *Id.*

3. Abraham Lincoln, President of the United States, Second Inaugural Address (Mar. 4, 1865), *available at* <http://www.bartleby.com/124/pres32.html>. Lincoln and a Republican Congress dealt with myriad issues. Momentously, they wrestled with the issue of slaves becoming not only free laborers, but also citizens. They presided over an economy that successfully supported a gigantic civil war, westward migration, a transcontinental railroad, trans-Atlantic and trans-Pacific telegraphs, and a newly formed Department of Agriculture. *See generally* Lincoln, *supra* note 1.

4. *See* Mark Krikorian, *Safety Through Immigration Control*, THE PROVIDENCE JOURNAL, Apr. 24, 2004, at B-06. In October 2002, former Deputy Defense Secretary Paul Wolfowitz said: “Sixty years ago, when we said, ‘home front,’ we were referring to citizens back home, doing their part to support the war front. Since last September, however, the home front has become a battlefield, every bit as real as any we’ve known before.” *Id.*

5. John F. Kennedy, President of the United States, Inaugural Address (Jan. 20, 1961), *available at* [www.bartleby.com/124/pres56.html](http://www.bartleby.com/124/pres56.html).

ology that has taken the ancient and honored faith of Islam, corrupted it with hatred and called for “Holy War.”

Islam, as interpreted by extremists who adopt terror as a means to political ends, bears only remote resemblance to the Islam of antiquity that centuries ago offered safe harbors for the thinkers and scientists of Europe and produced physicians and mathematicians of renown. It is remote also to those nations whose Muslim communities are a source of commerce, invention, and civic pride. Of the world’s Muslim faithful, terrorists compose the slimmest fraction. Yet this militant, violent fraction and those who make common cause with it today, from the terror cells of the Middle East to the clandestine enclaves of South America, strive to impose on the Free World that “uncertain balance of terror”<sup>6</sup> that crashes planes into skyscrapers, blows up passenger-laden trains, and would detonate a nuclear weapon if given the opportunity.

This threat is not a monolith. It is, instead, expressed through competing iterations of Sunni and Shia in the same way communism, always inimical to the West, could be understood through Soviet and Chinese models and variations on their themes. Like their communist predecessors, who predicted the hammer and sickle of revolution would overwhelm the industrialized—and free—nations of the West, only to find the most backward countries could be recruited to their cause and then most often at the point of a gun, militant Islam has the same provenance and pretense.

Militant, terroristic Islam has its foundations in the poorest corners of the earth. It is borderless, furtive, and fugitive—and, when not fugitive, it is the guest of nations that deny its presence. But for illicit trade, extorted payoffs, and secreted sums from nations that practice terror, it is financially insolvent; yet, because of this support, it is adequately financed. It is the antithesis of any government which opposes its ends of regional dominance and world influence. When expressed through its Iranian principals and their Hezbollah agents, it is the calculated product of a sovereign nation making war without declaration, seeking through nuclear ambitions and violence what it cannot persuade a doubting world to extend through diplomacy. Its divisive, sectarian roots assure that in time it will turn on itself<sup>7</sup>—but not before it attempts to set the world on fire. While its messages of hate and intolerance limit its appeal, its ultra-violent character warns of unlimited peril.

America, historically secure and prosperous, with vast oceans as moats and peaceful trading partners buffering its unguarded frontiers, is the spiritual and material envy of the world. Yet the changing dynamics

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6. *Id.*

7. See generally Bobby Ghosh, *Behind the Sunni-Shi’ite Divide*, TIME, Feb. 22, 2007, available at <http://www.time.com/time/magazine/article/0,9171,1592849,00.html>.

of war and warfare, from symmetrical to asymmetrical,<sup>8</sup> confront it with the ugly reality that a nation uncertain in the defense of its borders, from even the casual trespass of those fleeing hunger to seek work, is, in turn, at the mercy of those whose trespass is malign. The war on terror affirms that threats to liberty abound. America's borders are the tripwires of this war. Their violations sound an alarm heard in debates over immigration, terrorism, and national security. Over these debates looms the memory of laws and borders easily and violently broken on September 11, 2001.<sup>9</sup> The story of 9/11 reveals this breaking began well before American Airlines Flight 11 struck the North Tower of the World Trade Center at 8:46 on that fate-filled Tuesday morning. If American intelligence is correct, that breaking continues and with it the sieve-like migration of terror across United States borders, especially those of the Southwest.

Ignoring illegal immigration then, regardless of its purpose or means, as an expedient of war or politics or humanitarianism, is to make the issue itself a casualty—and a risk which will only worsen. Rejecting lawful immigration out of hand invites the backwardness of the Know Nothings, which Lincoln and a nascent Republican Party defeated in the Nineteenth Century<sup>10</sup> and, if unchecked in our own time, will repel the

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8. See THE NATIONAL DEFENSE UNIVERSITY'S 1998 STRATEGIC ASSESSMENT: ENGAGING POWER FOR PEACE, ASYMMETRIC THREATS (1998), available at <http://www.au.af.mil/au/awc/awcgate/sa98/sa98ch11.htm> ("Put simply, asymmetric threats or techniques are a version of not 'fighting fair,' which can include the use of surprise in all its operational and strategic dimensions and the use of weapons in ways unplanned by the United States. Not fighting fair also includes the prospect of an opponent designing a strategy that fundamentally alters the terrain on which a conflict is fought."). The National Strategy for Homeland Security further illustrates asymmetric challenges:

Our great power leaves these enemies [terrorists] with few conventional options for doing us harm. One such option is to take advantage of our freedom and openness by secretly inserting terrorists into our country to attack our homeland. Homeland security seeks to deny this avenue of attack to our enemies and thus to provide a secure foundation for America's ongoing global engagement.

OFFICE OF HOMELAND SECURITY, NATIONAL STRATEGY FOR HOMELAND SECURITY 5 (2002), available at [http://www.whitehouse.gov/homeland/book/nat\\_strat\\_hls.pdf](http://www.whitehouse.gov/homeland/book/nat_strat_hls.pdf).

9. *State and Local Authority to Enforce Immigration Law: Evaluating A Unified Approach for Stopping Terrorists*, Hearing Before the S. Comm. on the Judiciary, 108th Cong. (2004) (statement of Kris Kobach, former Counsel to the U.S. Attorney General, presently Professor of Law, University of Missouri School of Law at Kansas City) [hereinafter Kobach Statement], available at [http://judiciary.senate.gov/testimony.cfm?id=1156&wit\\_id=3325](http://judiciary.senate.gov/testimony.cfm?id=1156&wit_id=3325). In his testimony, Professor Kobach sets forth the vulnerabilities of the border and some results of unenforced immigration laws:

The terrorist attacks of September 11, 2001 underscored for all Americans the need to restore the rule of law in the immigration arena. Terrorists were able to enter the country undetected, overstay their visas with impunity, and move freely within the country without interference from local law enforcement officers. Each of these realities created a vulnerability that the hijackers of September 11 exploited. . . . Enforcing our nation's immigration laws is one of the most daunting challenges faced by the Federal government.

*Id.*

10. Said Lincoln:

I am not a Know-Nothing. That is certain. How could I be? How can any one who abhors the oppression of negroes, be in favor of degrading classes of white people? Our progress in degeneracy appears to me to be pretty rapid. As a nation, we begin by declaring that '*all men are created equal*.' We now practically read it '*all men are created equal, except negroes*['.] When the Know-Nothings get control, it will read '*all men are created equal, except negroes, and foreigners, and Catholics*.' When it comes to this I should prefer emigrat-

intelligent, creative, and industrious from the world's largest and most dynamic economy.<sup>11</sup> America's support for policies that offer citizenship to deserving persons and safeguard its borders are as essential to liberty as its brave men and women at arms. A wise and implacable urgency should inform our actions as a nation and a people. Nothing less than the survival of America is at stake. The outcome of this conflict will indeed be "fundamental and astounding."

## II. AVENUES OF OPPORTUNITY, ROADS TO RUIN

When 9/11 ringleader Mohammed Atta entered the United States on May 17, 2000,<sup>12</sup> to set in motion final preparations for the attacks on the World Trade Center, he knew what he was doing. He and his co-conspirators were patient; his plan had been at least two years and five months in the making.<sup>13</sup> Atta calculated the weaknesses of an American immigration and border security apparatus intended to process millions of peaceful visitors into the United States and to apprehend known criminals, not hidden terrorists.<sup>14</sup> The consular officers, immigration inspectors, and flight screeners who served as America's first line of defense were, in the days and weeks leading up to the attacks, more than overmatched by al Qaeda operatives. As the 9/11 Commission staff would later write, "The entry of the hijackers into the United States . . . represented the culmination of years of practice and experience in penetrating international borders."<sup>15</sup>

Penetrating United States borders, as it turned out, was not all that hard. Though calculation was required to enter and remain, this was for the terrorists merely the cost of doing business. The many paths of entry terrorists used before and since 9/11 revealed a manipulation of

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ing to some country where they make no pretence of loving liberty—to Russia, for instance, where despotism can be taken pure, and without the base alloy of hypocrisy.

Letter from Abraham Lincoln to Joshua Speed (Aug. 24, 1855), *available at* <http://showcase.netins.net/web/creative/lincoln/speeches/speed.htm>.

11. Richard N. Haas, Director, Office of the Policy Planning Staff, Remarks to the National Defense University, (Sept. 21, 2001), *available at* <http://yaleglobal.yale.edu/about/pdfs/bush.pdf>. Mr. Haas stated:

The United States constitutes the world's largest and most dynamic economy. With its flexible, well educated, and productive workforce and its proven capacity to embrace change, the United States will remain the leader of economic innovation well into the 21st century. Our trade and investment are distributed throughout the world. Our economic institutions are sound. . . . That the United States still remains a goal for immigrants from every part of the globe testifies to its strength—both material and spiritual.

*Id.*

12. THOMAS R. ELDRIDGE ET AL., 9/11 AND TERRORIST TRAVEL: STAFF REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES 10 (2004), *available at* [http://www.9-11commission.gov/staff\\_statements/911\\_TerrTrav\\_Monograph.pdf](http://www.9-11commission.gov/staff_statements/911_TerrTrav_Monograph.pdf).

13. *See id.* at 2.

14. The 9/11 hijackers entered "during a period when approximately 20 million people applied for visas, and more than 10 million people came into the United States through 220 airports of entry."

*Id.* at 3.

15. *Id.* at 1.

every status under The Immigration and Nationality Act. “[T]errorists have used almost every type of immigration in the last decade” to enter and remain in the United States, writes Steven Camarota of the Center for Immigration Studies.<sup>16</sup> He continues:

They [terrorists] have been lawful permanent residents, naturalized U.S.-citizens, temporary visitors, illegal aliens, and asylum applicants. Thus, it is not possible to focus reform efforts on just one type of immigration, such as student visas or temporary immigration in general. America’s entire immigration system has been used by terrorists and thus our response must be equally broad.<sup>17</sup>

Despite this knowledge of illegal immigration and terrorist movement, more than half a million people about whom American law enforcement knows little or nothing will enter and remain in the United States in 2007.<sup>18</sup> The overwhelming number of these people are those seeking nothing more than a job and a paycheck. It is within the background of these immigrants that terrorists lurk. The urgency to secure America’s borders, and consequently its interior, from agents of terror could not be greater and requires no justification beyond American sovereignty. Falling towers in New York and a burning Pentagon in Washington describe better than words the need for heightened vigilance and enforcement at American ports and borders. Yet in August 2004, three years after the attacks, 9/11 Commission staff wrote:

It is perhaps obvious to state that terrorists cannot plan and carry out attacks in the United States if they are unable to enter the country. Yet prior to September 11th . . . no agency of the U.S. government thought of border security as a tool in the counterterrorism arsenal. Indeed, even after 19 hijackers demonstrated the relative ease of obtaining a U.S. visa and gaining admission into the United States, border security still is not considered a cornerstone of national security.<sup>19</sup>

Immigration, secure borders, and terrorism are linked, not because all immigrants are terrorists, but because nearly all terrorists in the West have been immigrants.<sup>20</sup> Terrorists have shrewdly manipulated the openness of the United States and exploited America’s traditions of inclusion, invoking the compassion expressed in our laws to enable their crimes. Gaming these generous laws, Islamic terrorism has sought before and since 9/11 to “infiltrate recruiters, facilitators, sleeper cells, and

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16. STEVEN A. CAMAROTA, *THE OPEN DOOR: HOW ISLAMIC TERRORISTS ENTERED AND REMAINED IN THE UNITED STATES, 1993-2001*, at 59 (2002), available at <http://www.cis.org/articles/2002/theopendoor.pdf>.

17. *Id.*

18. See *Illegal Immigration*, Center for Immigration Studies, *Illegal Immigration*, <http://www.cis.org/topics/illegalimmigration.html> (last visited Mar. 1, 2007).

19. ELDRIDGE ET AL., *supra* note 12, at preface.

20. ROBERT S. LEIKEN, *BEARERS OF GLOBAL JIHAD? IMMIGRATION AND NATIONAL SECURITY AFTER 9/11*, at 6 (2004) [http://www.nixoncenter.org/publications/monographs/Leiken\\_Bearers\\_of\\_Global\\_Jihad.pdf](http://www.nixoncenter.org/publications/monographs/Leiken_Bearers_of_Global_Jihad.pdf).

hit squads as weapons in an asymmetric war.”<sup>21</sup> Immigration, then, is terrorism’s “indispensable asymmetric weapon,” the suicide bomber or the suicide-bound hijacker, by extension, the “organic synthesis” of combatant and weapon.<sup>22</sup> The conversion of immigration, as refuge from persecution to the means by which terror is imposed upon innocent peoples, inspires fear that arguably diminishes the stature of authentic immigrants, many of whose entry into America is compelled by the same violence terrorists would bring to American shores. That immigration is now used as a weapon cannot be doubted. The facts are plain.

Beginning on January 25, 1993, with the murder of two CIA employees in McLean, Virginia, through October 8, 2004, with the foiled attacks on Jewish community centers in Nashville, Tennessee, terrorists who came to America under the guise of innocent visitors and refugees have murdered or plotted the murders of Americans with all the attendant physical and economic damage they could imagine. With few exceptions, they sought spectacular destruction so that Jihad would be waged not against those bearing arms, but against civilians in shopping malls, bridges, tunnels, office buildings, and airports.<sup>23</sup> Their violence was and is equaled by a savvyness in finance. A recent example, the thwarted February 21, 2006, Islamist conspiracy to fund and assist attacks against United States military personnel in Iraq, illustrates that America is not only a target of terrorism, but also a staging ground for attacks against Americans who defend America abroad.<sup>24</sup> The discovery of this plot concluded with the arrest of three Islamist terrorists (two naturalized citizens and one lawful resident) in Toledo, Ohio.<sup>25</sup> Funding for this conspiracy came from the ostensibly legitimate fronts of used car lots<sup>26</sup> and a phony nonprofit corporation created to divert federal education grants (i.e., taxpayer monies) to Jihadist paramilitaries.<sup>27</sup>

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21. *Id.* at 24.

22. *Id.*; see also MARK KRIKORIAN, ASYMMETRICAL WARFARE AND IMMIGRATION (2002), <http://www.cis.org/articles/2002/mskni1016.html>; MARK KRIKORIAN, KEEPING TERROR OUT: IMMIGRATION POLICY AND ASYMMETRIC WARFARE (2004), <http://www.cis.org/articles/2004/mskoped050104.html>.

23. See JANICE L. KEPHART, IMMIGRATION AND TERRORISM: MOVING BEYOND THE 9/11 STAFF REPORT ON TERRORIST TRAVEL 8-9 (2005), available at <http://www.cis.org/articles/2005/kephart.pdf>.

24. See Joshua Boak, *Detainee Served as Imam at Prison*, THE TOLEDO BLADE, Feb. 23, 2006, available at <http://www.toledoblade.com/apps/pbcs.dll/article?AID=/20060223/NEWS03/602230437/-1/NEWS>; see also *Indictment, United States v. Amawi* (N.D. Ohio Feb. 21, 2006), available at <http://www.toledoblade.com/assets/pdf/TO4697221.pdf>.

25. See *supra* note 24.

26. Mike Wilkinson & Christina Hall, *3 Charged In Terror Plot; Local Suspects Planned Attacks in Iraq, U.S. Says*, THE TOLEDO BLADE, Feb. 22, 2006, available at <http://www.toledoblade.com/apps/pbcs.dll/article?AID=/20060222/NEWS03/60222005>.

27. Mark Reiter, *Terror Case Accountant Will Agree to Plea Deal*, THE TOLEDO BLADE, Oct. 19, 2006, available at <http://www.toledoblade.com/apps/pbcs.dll/article?AID=/20061019/NEWS02/610190394>.

The five completed terrorist attacks in the United States (including the CIA murders, the first and second World Trade Center bombings, and the Los Angeles International Airports (LAX) shootings) and its embassies in East Africa (Tanzania and Kenya) killed 3,341 people and injured 8,463. These five attacks, occurring between January 25, 1993, and July 4, 2002, involved twenty conspirators with at least one immigration violation each. Twelve thwarted terrorist attacks (among them the New York City landmarks plot, the Manila jetliners conspiracy, the New York City subway bomb plan, the Millennium bombings plot in Seattle, Washington, and the foiled bombing of the MGM Grand in Las Vegas) involved twenty-nine terrorists, each with at least one immigration violation.<sup>28</sup> Illegal immigration is the strategy and the tactic by which America has been attacked and without greater safeguards will be attacked. Whether the next attack comes from those who enter through a port or steal across a border, the fact remains that terrorists will try, and the only reasonable assurance against their success is American resolve in prudently hardening its borders. The findings of the 9/11 Commission, and the experience of American law enforcement before and since, confirm that the greatest risks are those posed by illegal entry.

Of the ninety-four foreign-born terrorists who operated in the United States between 1993 and 2004, fully two-thirds of them (fifty-nine) committed immigration fraud in conjunction with their terrorist activity. Of these fifty-nine, many committed multiple immigration offenses, totaling seventy-nine violations in all. In forty-seven instances, immigration benefits sought or acquired prior to September 11th enabled these terrorists to stay in the United States after September 11th and continue their conspiracies. In at least two instances, terrorists were still able to acquire immigration benefits after September 11th.<sup>29</sup>

To enter the United States, terrorists frequently sought, and usually received, visas.<sup>30</sup> Of the ninety-four terrorists involved in actual and

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28. KEPHART, *supra* note 23.

29. *Id.* at 5.

30. A visa is a permit to apply to enter the United States. A visa, however, does not guarantee entry into the United States. Most visas are issued by a Department of State Bureau of Consular Affairs official located abroad in an embassy or consulate. A separate United States agency, the United States Citizenship and Immigration Services (USCIS; an agency of the Department of Homeland Security), has authority to deny admission at port of entry. The period for which a person is authorized to remain in the United States is determined by USCIS, not the Department of State. At port of entry, a USCIS official must authorize admission to the United States. There are two major types of visas: immigrant visas and non-immigrant (visitor) visas. Generally, an immigrant visa is issued to a person who intends to live and work permanently in the United States. In these cases, a relative or employer sends an application to USCIS requesting a visa be granted to the person intending to immigrate. Some applicants, such as workers with extraordinary ability and certain special immigrants, can apply on their own behalf. A non-immigrant visa is issued to a person who wishes to come to the United States for a specific purpose. Such non-immigrant visas are given to people such as tourists, business people, students, temporary workers, and diplomats. *See generally* United States Immigration Assistance Center, Visa Frequently Asked Questions, [https://www.immigration-bureau.org/visa\\_faq.htm](https://www.immigration-bureau.org/visa_faq.htm) (last visited Mar. 1, 2007); U.S. Citizenship and Immigration Services,

thwarted attacks between 1993 and 2004, eighteen had student visas (F1 visas) and another four had applications approved to study in the United States. Records reveal at least seventeen of these terrorists used a visitor visa, either business (B1) or tourist (B2). Their fraud did not end there. Thirty-four of them were charged with making false statements to immigration officials. Thirteen terrorists overstayed the expiration of their visas. In seventeen instances, terrorists lacking proper travel documents and, facing denial of admission, preempted their removal by seeking asylum upon reaching the United States.<sup>31</sup> Every one of the ninety-four terrorists who entered the United States had committed at least one immigration violation in their bid to enter or remain in America.<sup>32</sup> Tellingly, each of the ninety-four, once successfully entering, sought to stay.<sup>33</sup>

Fraud was not merely used to gain entry into the United States upon arrival, but also to remain, or “embed,” in the country. Of the same ninety-four, seven were indicted for acquiring or using various forms of fake identification, including driver’s licenses, birth certificates, Social Security cards, and immigration arrival records. Once in the United States, sixteen terrorists became lawful permanent residents, often by marrying an American (there appears to have been ten sham marriages). In total, twenty of twenty-one terrorists seeking citizenship became naturalized United States citizens.<sup>34</sup>

The nineteen 9/11 hijackers present a special case in point. Altogether, they “applied for twenty-three visas and obtained twenty-two.”<sup>35</sup> All of them entered the United States using temporary or non-immigrant visas and sixteen were in the United States legally on September 11th.<sup>36</sup> Fifteen of the nineteen hijackers possessed thirteen state-issued driver’s licenses and twenty-one other state or United States-issued identification cards,<sup>37</sup> for a total of thirty-four identifica-

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<http://www.uscis.gov/portal/site/uscis> (last visited Mar. 1, 2007).

31. KEPHART, *supra* note 23, at 11.

32. *Id.* at 9.

33. *Id.* at 10.

34. *Id.* at 10-11.

35. ELDRIDGE ET AL., *supra* note 12, at 2.

36. CAMAROTA, *supra* note 16, at 17.

37. *Border Security and Enforcement: The 9/11 Commission Staff Report on Training for Border Inspectors, Document Integrity, and Defects in the U.S. Visa Program: Hearing on Terrorist Travel Before the Subcomm. on Terrorism, Technology, and Homeland Security and Subcomm. on Immigration, Border Security, and Citizenship of the S. Comm. on the Judiciary*, 109th Cong. (2005) [hereinafter Kephart Testimony I] (testimony of Janice L. Kephart, Senior Consultant, the Investigative Project on Terrorism), available at <http://www.numbersusa.com/PDFs/KephartTestimony.pdf>. Said Ms. Kephart:

The hijackers acquired a total of thirty-four identifications: thirteen driver’s licenses, two of which were duplicates, and twenty-one US or state issued identification cards, usually used for showing residence in the United States or a state. Seven hijackers used fraudulent means to acquire legitimate identifications in Virginia, through fake residency certificates provided by bribed Virginia residents. If a birth certificate or social security card had been required (whose verification was also required) the hijackers would have

tion documents. Across the nineteen hijackers, 364 aliases were used<sup>38</sup> and at least eight of the nineteen hijackers who attacked the World Trade Center and the Pentagon were registered to vote in either Virginia or Florida.<sup>39</sup> Peter Gadiel, a 9/11 Commission witness and father whose son was lost in the attacks, testified that in obtaining these American-issued identification documents, the hijackers had all that was necessary to complete routine commercial transactions enabling the conspiracy and its completion.<sup>40</sup> Janice Kephart, former counsel to the 9/11 Commission, argues the hijackers' ability to acquire driver's licenses and identification cards was part of a strategy that included fraudulent travel, beginning with fraudulently altered passports with which to obtain visas and immigration benefits. These documents allowed the terrorists to move freely in planning, casing targets, opening bank accounts, renting cars, taking flight lessons, and ultimately boarding aircraft on September 11th. FAA regulations then, as now, require that security personnel view government-issued identification as a part of airline screening. With these documents, Ms. Kephart adds, the terrorists acquired attributes of citizenship, lending the indicia of reliability to their every word and action.<sup>41</sup> In short, they appeared to be what they were not: citizens or, at worst, merely non-threatening visitors.

Airline personnel, later interviewed by the FBI, recalled that at least six hijackers boarding aircraft on the morning of September 11th

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been hard pressed to obtain validly issued state/U.S. identifications. We do not know how the other identifications were obtained; except for recent information that one hijacker's California license was apparently acquired through a loophole in identification requirements under California law.

*Id.*

38. ELDRIDGE ET AL., *supra* note 12, at 1.

39. JOHN FUND, *STEALING ELECTIONS: HOW VOTER FRAUD THREATENS OUR DEMOCRACY*, Introduction (2004).

40. See *The Role of Non-Enforcement of Immigration Law In Permitting the Terrorist Acts of September 11: Hearing Before the National Comm'n on the Terrorist Attacks Upon the United States* (2005) (testimony of Peter Gadiel), available at [http://www.9-11commission.gov/hearings/hearing7/for\\_the\\_record\\_gadiel.pdf](http://www.9-11commission.gov/hearings/hearing7/for_the_record_gadiel.pdf). Gadiel stated:

Obtaining them [driver's licenses] was among the first things the terrorists did on arrival in the US. With those licenses they could then open bank accounts, transfer funds, obtain credit cards, rent apartments, rent cars and hotel rooms. Finally, these US-issued driver's licenses were the "valid ID" that the terrorists used to board the planes they used to attack us.

*Id.*

41. Kephart Testimony I, *supra* note 37. Said Ms. Kephart:

The hijackers' acquisition of driver's licenses and identification cards was clearly part of the hijackers' overall travel strategy that included fraud in every aspect of their travel: using fraudulently altered passports to obtain visas, entry, and immigration benefits through fraud. I, along with my 9/11 border team, think they obtained the U.S. issued identifications to help them stage their operation inside the United States, as these identifications allowed them to move freely around the country to meet, plan, and case targets, open bank accounts, rent cars, take flying lessons, and ultimately, board the airplanes on 9/11.

*Strengthening Enforcement and Border Security: The 9/11 Commission Staff Report on Terrorist Travel: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. (2005) [hereinafter Kephart Testimony II] (testimony of Janice Kephart, Senior Consultant, The Investigative Project on Terrorism), available at [http://judiciary.senate.gov/print\\_testimony.cfm?id=1414&wit\\_id=4067](http://judiciary.senate.gov/print_testimony.cfm?id=1414&wit_id=4067).

offered, consistent with federal policy, some form of government-issued identification when checking in. Investigation revealed at least three of these “government-issued” IDs were fraudulently obtained in Virginia and ultimately used at Dulles Airport (in northern Virginia) to board flight 77 (bound eventually for the Pentagon). Predictably, the hijackers showed the Dulles flight screeners Virginia identification documents,<sup>42</sup> thereby allaying suspicion that use of their authentic Saudi passports might have sharpened. These airline personnel confirmed that the hijackers’ Virginia IDs were critical to their being permitted to board the flight.<sup>43</sup>

Perhaps the most manipulative of all avenues by which terrorists have entered the United States is that same route by which victims of persecution invoke sympathy and find safe haven in the United States: political asylum. Janice Kephart’s findings confirm that laws intended to relieve suffering are used by terrorists to stave off deportation. Ms. Kephart found that seventeen terrorists, who lacked proper travel documents or who, as a last ditch measure, sought to avoid deportation, claimed political asylum.<sup>44</sup> Notable examples of such terrorists include:

- Shahawar Matin Siraj: Siraj planned to detonate high explosives about a block from the Republican National Convention in August 2004. He was picked up after wiretaps recorded him asking an informant for help building a bomb. Siraj was convicted on May 24, 2006, by a federal jury in New York and faces life in prison. Siraj’s family had requested political asylum in 1998.<sup>45</sup>
- Nuradin Abdi: Abdi, a native of Somalia, was indicted in June 2004 for his part in an al Qaeda plot to bomb a shopping mall in Columbus, Ohio. Abdi fraudulently received asylum in 1999.<sup>46</sup> A co-conspirator, Iyman Faris, is serving a twenty-year sentence for materially assisting al Qaeda.<sup>47</sup>
- “At least three people closely associated with the September 11th hijackers claimed political asylum:” Eyad Mo-

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42. Brooke A. Masters, *Two Charged In Scheme That Helped Terrorists*, WASH. POST, Oct. 2, 2001, at B1. Hijackers Hanni Hanjour and Khalid Al-Midhar obtained Virginia licenses by hiring another illegal alien to co-sign their residency forms. *Id.* They then listed his address as theirs. *Id.* The day after they got their licenses, they sponsored two other hijackers, Salem Al-Hamzi and Majed Moqed, to get their own Virginia driver’s licenses. *Id.*

43. Kephart Testimony I, *supra* note 37.

44. KEPHART, *supra* note 23, at 11.

45. Press Release, United States Attorney’s Office Eastern District of New York, Shahawar Matin Siraj Convicted of Conspiring to Place Explosives at the 34th Street Subway Station (May 24, 2006), available at <http://newyork.fbi.gov/dojpressrel/pressrel06/siraj052406.htm>; see also Patrick Galahue, *All of Gotham in Cross Hairs*, N.Y. POST, Aug. 29, 2004, at 2.

46. See Kephart Testimony I, *supra* note 37, at 11.

47. Press Release, United States Department of Justice, Ohio Man Indicted for Providing Material Support to Al Qaeda, Falsely Obtaining and Using Travel Documents (May 24, 2004), available at [http://www.usdoj.gov/opa/pr/2004/June/04\\_crm\\_399.htm](http://www.usdoj.gov/opa/pr/2004/June/04_crm_399.htm).

ammed Mohammed Mustafa,<sup>48</sup> who aided hijackers in fraudulently obtaining Virginia identification cards; Anwar Nasser Aulaqi, spiritual advisor to two hijackers,<sup>49</sup> and Mohdar Mohamed Abdullah, who helped two hijackers in California and claimed to know about 9/11 weeks prior to the attacks.<sup>50</sup>

- Three terrorists involved in the February 26, 1993, World Trade Center bombing, Ramzi Yousef, Biblal Alkaisi, and Sheik Omar Abdel Rahman, all sought political asylum. Yousef, mastermind of the bombing, was initially arrested with fraudulent travel documents upon entry at JFK.<sup>51</sup>

Religious sanction inspires and fuels this weaponization of immigration and its strategic and tactical use by al Qaeda, Hezbollah, and other Islamic terrorists. Immigration is preached as an attribute of Jihad.<sup>52</sup> Imam Abu Baseer, a radical Saudi cleric and al Qaeda supporter, urged worshipers:

Just as Muslims can drink wine or eat pork in order to save them[selves] from starving, so they can immigrate to the Western 'infidel countries' to save themselves from the oppression of the governments of their homelands. [Immigration is also allowed] . . . in order to enforce the Muslims and weaken the infidels. One of the goals of immigration is the revival of the duty of Jihad and enforcement of their power over the infidels. Immigration and Jihad go together. One is the consequence of the other and dependent upon it. The continuance of the one is dependent upon the continuance of the other.<sup>53</sup>

On May 24, 2004, Spanish intelligence recorded terrorist leader Rabei Osman speaking to a follower named "Yahia." The Saudi terrorist advised his follower that the end justifies the means in the cause of Jihad: "Everything is permitted including marrying with Christian women, because we need [immigration] papers. We have to be everywhere, in Germany, in Holland, in London. We are dominating Europe with our presence. The women serve to obtain documents, because we are in favor of the cause of God."<sup>54</sup>

Complicating the response of the United States to terrorism and border security is the inconsistent response among the states in treating

48. KEPHART, *supra* note 23, at 28; *see also* ELDRIDGE ET AL., *supra* note 12, at 227.

49. KEPHART, *supra* note 23, at 21; *see also* ELDRIDGE ET AL., *supra* note 12, at 228.

50. KEPHART, *supra* note 23, at 28; *see also* ELDRIDGE ET AL., *supra* note 12, at 229.

51. KEPHART, *supra* note 23, at 28; *see also* ELDRIDGE ET AL., *supra* note 12, at 47.

52. LEIKEN, *supra* note 20, at 24.

53. Reuven Paz, *Middle East Islamism in the European Arena*, 6 MIDDLE EAST REV. OF INT'L AFF. 67, 73 (Sept. 2002). "Abu Baseer is a Saudi cleric who practices a neo-wahabbist form of Islam. A supporter of Salafi Jihadism, he is cited by terrorist groups, including the Saudi-based group al Rayat al Sud, or the Black Banners. Abu Baseer also maintains his own following through his website, www.abubaseer.com." LEIKEN, *supra* note 20, at 24.

54. KEPHART, *supra* note 23, at 13 (alterations in original) (recorded conversation June 2, 2004).

illegal immigration. Border security depends not only upon denying entry to America by means that harden the border, but which likewise assure those who enter illegally, by whatever means, that their status will be routinely examined by public and, where appropriate, private agencies. This lack of consonance extends to the most basic privileges and the least imposing responsibilities associated with simple presence in the United States. These, to name only a few, include the grant or denial of driver's licenses<sup>55</sup> and the refusal of many jurisdictions to enforce federal law regarding an alien's illegal presence (a civil offense) in the United States, extending even to inquiry of a suspect's citizenship or residence status at routine police stops, despite the inherent and express authority to do so.<sup>56</sup> Indeed, the Internal Revenue Service has been criticized for issuing to illegal aliens Individual Tax Identification Numbers (ITIN) which in turn are being used as personal identification, permitting the illegal alien and the terrorist alike the means to "meld unnoticed" into American society.<sup>57</sup> Some municipalities have announced amendments to their city codes expressly refusing public and private housing to those who cannot prove they are legally present in the United States.<sup>58</sup> Others have taken the opposite view, openly inviting those present in the United States without legal status to settle in their communities, providing assurance that federal mandates will be ig-

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55. See generally ALISON M. SMITH, CONGRESSIONAL RESEARCH SERVICE REPORT FOR CONGRESS: SUMMARY OF STATE LAWS ON THE ISSUANCE OF DRIVER'S LICENSES TO UNDOCUMENTED ALIENS 5 (2005), available at <http://www.ilw.com/weekly/editorial/2005,1011-crs.pdf>.

56. See Kobach Statement, *supra* note 9. Professor Kris W. Kobach, testifying before the United States Senate Judiciary Committee on April 22, 2004, stated:

It is well established that the authority of state police to make arrests for violation of federal law is not limited to those situations in which they are exercising delegated federal power. Rather, such arrest authority inheres in the States' status as sovereign entities. It stems from the basic power of one sovereign to assist another sovereign. This is the same inherent authority that is exercised whenever a state law enforcement officer witnesses a federal crime being committed and makes an arrest. That officer is not acting pursuant to delegated federal power. Rather, he is exercising the inherent power of his state to assist another sovereign.

In 1996, Congress expressly put to rest any suspicion that it did not welcome state and local assistance in making immigration arrests. Congress added section 287(g) to the INA, providing for the establishment of written agreements with state law enforcement agencies to convey federal immigration enforcement functions to such agencies. In doing so, Congress reiterated its understanding that states and localities may make immigration arrests regardless of whether a 287(g) agreement exists. Congress stated that a formal agreement is not necessary for 'any officer or employee of a State or political subdivision of a state . . . to communicate with the Attorney General regarding the immigration status of any individual, including reporting knowledge that a particular alien is not lawfully present in the United States,' or 'otherwise to cooperate with the Attorney General in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States.'

*Id.*

57. MARTI DINERSTEIN, GIVING COVER TO ILLEGAL ALIENS: IRS TAX ID NUMBERS SUBVERT IMMIGRATION LAW 1-2 (2002), available at <http://www.cis.org/articles/2002/back1202.pdf>.

58. David Fried, *Escondido Council Approves Illegal Immigrant Rental Ban*, THE NORTH COUNTY TIMES, Oct. 5, 2006, available at [http://www.nctimes.com/articles/2006/10/05/news/top\\_stories/3\\_00\\_0010\\_4\\_06.txt](http://www.nctimes.com/articles/2006/10/05/news/top_stories/3_00_0010_4_06.txt).

nored.<sup>59</sup> This gap in American unity will not go unexploited by those seeking to harm the United States, since the camouflage of peaceful co-ethnic communities is yet another means by which terrorists embed in the fabric of this nation.<sup>60</sup>

Nothing in this debate is new. The signers of the Declaration of Independence included the grievance that George III had “obstruct[ed] the Laws for Naturalization of Foreigners.”<sup>61</sup> Equally organic documents of the United States reflect that from the earliest days of the Republic the knotty problems of immigration frustrated even the signers of the Constitution and that the solutions then, as now, required uniformity both in law and the enforcement of that law. The supple language of both Alexander Hamilton and James Madison, writing in *The Federalist Papers*, still instructs.

Admitting the problematic nature of naturalization and the need for consonance—a consonance he argued would be obtained with passage of the new Constitution of the United States—Madison specified as a failure of the castoff Articles of Confederation, the disunion they imposed on the infant nation. Madison described three classes of powers in the new charter. Of the third, he wrote:

The powers included in the THIRD class are those which provide for the harmony and proper intercourse among the States . . . [to] establish a uniform rule of naturalization . . . .

. . . .

The dissimilarity in the rules of naturalization has long been remarked as a fault in our system, and as laying a foundation for intricate and delicate questions. . . . It seems to be a construction scarcely avoidable, however, that those who come under the denomination of FREE INHABITANTS of a State, although not citizens of such State, are entitled, in every other State, to all the privileges of FREE CITIZENS of the latter; that is, to greater privileges than they may be entitled to in their own State. . . . In one State, residence for a short term confirms all the rights of citizenship: in another, qualifications of greater importance are required. An alien, therefore, legally incapacitated for certain rights in the latter, may, by previous residence only in the former, elude his incapacity; and thus the law of one State be preposterously rendered para-

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59. See *Immigration and the Alien Gang Epidemic: Problems and Solutions: Hearing Before the Subcomm. on Immigration, Border Security, and Claims of the H. Comm. on the Judiciary*, 109th Cong. (Apr. 13, 2005) (testimony of Heather MacDonald, Senior Fellow, Manhattan Institute for Policy Research), available at [http://www.manhattan-institute.org/html/mac\\_donald04-13-05.htm](http://www.manhattan-institute.org/html/mac_donald04-13-05.htm).

60. John L. Helgerson, *The Terrorist Challenge to US National Security*, Remarks at the Tenth Cosmos Club Spring Symposium (March 23, 2002), available at [http://www.dni.gov/nic/speeches\\_terrorchallenge.html](http://www.dni.gov/nic/speeches_terrorchallenge.html). Mr. Helgerson stated:

Ease of migration, especially owing to the liberalization of immigration laws and policies in many countries, is aiding the growth of international terrorist networks. More than 140 million people now live outside their countries of birth, and migrants comprise more than 15 percent of the population in over 50 countries. Terrorists typically blend into, and recruit among, co-ethnic immigrant communities.

*Id.*

61. THE DECLARATION OF INDEPENDENCE para. 9 (U.S. 1776).

mount to the law of another, within the jurisdiction of the other.<sup>62</sup>

Hamilton was no less critical. Writing in *The Federalist* No. 32, he argued that “a UNIFORM RULE of naturalization . . . must necessarily be exclusive; because if each State had power to prescribe a DISTINCT RULE, there could not be a UNIFORM RULE.”<sup>63</sup> In *Chirac v. Lessee of Chirac*,<sup>64</sup> the Supreme Court affirmed the primacy of Article I, Section 8, Clause 4 of the Constitution (therein “The Congress shall have Power To . . . establish a uniform Rule of Naturalization . . .”). The Court held that “the power of naturalization is exclusively in Congress.”<sup>65</sup> Later commentary reinforces this holding. “Few powers,” writes Joseph Bessette, “are more fundamental to sovereignty than the control over immigration and the vesting of citizenship in aliens (naturalization).”<sup>66</sup>

No practical example of their criticism stands out more clearly than the granting of driver’s licenses to illegal aliens in one state, with less strict requirements for issuance, which then serve as a grant to operate a vehicle in every state and, in most instances, as identification in every state, even in those states with more strict requirements for issuance to their own citizens.<sup>67</sup> As the 9/11 hijackers correctly guessed, their driver’s licenses and boarding passes were all they needed to enter the Dulles flight before they slammed it into the northwest corner of the Pentagon.<sup>68</sup> In this instance, terrorists holding Virginia-issued driver’s licenses were accorded the dignity federal law gave any holder of an ostensibly valid ID: admission and passage. Though The Real ID Act of

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62. THE FEDERALIST No. 42 (James Madison), available at <http://www.yale.edu/lawweb/avalon/federal/fed42.htm>.

63. THE FEDERALIST No. 32 (Alexander Hamilton) (internal quotations omitted), available at <http://www.yale.edu/lawweb/avalon/federal/fed32.htm>.

64. 15 U.S. (2 Wheat.) 259 (1817).

65. *Id.*

66. Joseph Bessette, *Naturalization*, in THE HERITAGE GUIDE TO THE CONSTITUTION 109, 109 (2005).

67. Illegal aliens quickly took advantage of the opportunity to obtain driver’s licenses in those states where standards for issuance are less strict. When Tennessee dropped its Social Security number requirement in May 2001, thousands of illegal aliens applied to get driver’s licenses, to the point they overwhelmed local DMV offices. In some counties, applications increased thirty-fold. In response, the Tennessee Department of Safety suspended those provisions that allowed applications from persons unable to legally obtain Social Security numbers. A federal investigation later uncovered black market shuttles bringing illegal aliens to Tennessee to obtain licenses. See Monica Whitaker, *Driver’s License Law Easing for Aliens*, THE TENNESSEAN, Apr. 24, 2001, available at <http://www.tennessean.com/local/archives/01/04/04433088.shtml>; Monica Whitaker, *Avalanche of Driver’s License Applicants Sparks Debate on Legal, Illegal Workers*, THE TENNESSEAN, June 17, 2001; Harry Austin, *A Uniform Driver’s License*, CHATTANOOGA TIMES FREE PRESS, Feb. 26, 2002; Immigrant Drivers Hope Program Restored, THE KNOXVILLE NEWS-SENTINEL, Dec. 25, 2006.

68. In the United States, the driver’s license is more than proof of legal permission to drive. The driver’s license is commonly used as proof of identity. With few other government-issued photo identification documents upon which to rely (except for the federal passport), it is generally understood that a driver’s license (or other state ID) represents the holder is legally present in the United States. See generally Federation for American Immigration Reform, <http://www.fairus.org> (last visited Jan. 21, 2007).

2005 is intended to fix this disconnect<sup>69</sup> and establish uniform rules for issuance of driver's licenses and those licenses used as personal IDs, compliance by the states is not required before May 11, 2008.<sup>70</sup> The Act is not without its detractors. State reaction to this measure is mixed and demonstrates a reluctance to adopt norms declared expensive and absent meaningful protections against fraud.<sup>71</sup>

Refusal by some states and their subdivisions to enforce federal law and the apparent reluctance of the federal government to require greater cooperation from and among these political entities reveals a profound challenge to American federalism and the pressing need that the threats arrayed against the United States be fully understood by those who stand to lose the most. The patient, asymmetric warfare of terror presents the most daunting challenges this nation has faced since the earliest days of the Cold War, as a former ally and superpower became a sworn foe. The deliberate efforts now underway to more nearly

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69. See generally SMITH, *supra* note 55. According to the Report, the states, and not the federal government, have historically set eligibility standards and routines for obtaining drivers' licenses. This report's state-by-state summary of statutes and regulations "bear[s] on the eligibility of illegal aliens for driver's licenses" based on two criteria:

(1) evidence of legal presence in the U.S. and (2) the provision of a valid Social Security number. States take a variety of approaches. About half the states have some explicit statutory or published regulatory requirement that an applicant demonstrate lawful presence in the U.S. On the other hand, over 40 states require that an applicant submit a valid Social Security number, a requirement that can prevent the issuance of licenses to illegal aliens because they are ineligible to receive such numbers. However, Social Security number requirements in many states are limited. For example, some states [authorize] exceptions for applicants who demonstrate [] they are exempt or ineligible under law from [acquiring] or disclosing a Social Security number. . . . At least three states—Maryland, Oregon, and Vermont—do not explicitly require, [by statute or regulation, either] proof of legal presence or a Social Security number.

*Id.* The report makes clear that each state's enforcement of these requirements may provide results not anticipated from the actual language of the statutes and regulations. Rather, the states' interpretations of their laws and the enforcement of those interpretations are uneven and, given the experience of only a few, Maryland and Tennessee, for example, their enforcement measures are predictably a reaction, not only to the demands of illegal immigration, but to the attacks of 9/11. *Id.*

70. NATIONAL CONFERENCE OF STATE LEGISLATURES, REAL ID ACT OF 2005 DRIVER'S LICENSE TITLE SUMMARY, available at <http://www.ncsl.org/print/standcomm/setran/realidsummary05.pdf> (last visited Jan. 21, 2007) (Verification of U.S. Citizenship and Lawful Status (per §202(c)(2)(A), (B) of Title II of The Real ID Act)). One of the stated purposes of The Real ID Act is the "Improved Security for Driver's Licenses and Personal Identification Cards." Among several substantive requirements, the Act provides that

[b]efore issuing a DL/ID [driver's license/personal identification], a state shall require and verify valid documentary evidence that the person: (i) is a U.S. citizen, (ii) is an alien lawfully admitted for permanent or temporary residence, (iii) has a conditional permanent resident status, (iv) is a refugee or has been granted asylum, (v) has a valid, unexpired non-immigrant visa or non-immigrant visa status, (vi) has a pending application for asylum, (vii) has a pending or approved application for temporary protected status, (viii) has approved deferred status, or (ix) has a pending application for adjustment of status to that of an alien lawfully admitted for permanent residence or conditional permanent resident status.

*Id.*

71. Jason Szep, *Maine Revolts Against Digital U.S. ID Card*, REUTERS, Jan. 25, 2007, [http://today.reuters.com/news/articlenews.aspx?type=domesticNews&storyID=2007-01-26T012738Z\\_01\\_N25298122\\_RTRUKOC\\_0\\_US-USA-IDCARD.xml](http://today.reuters.com/news/articlenews.aspx?type=domesticNews&storyID=2007-01-26T012738Z_01_N25298122_RTRUKOC_0_US-USA-IDCARD.xml). Reuters reported that "Maine lawmakers passed a resolution urging repeal of the Real ID Act, which would create a national digital identification system by 2008. The lawmakers said it would cost Maine about \$185 million, fail to boost security and put people at greater risk of identity theft." *Id.*

secure the Southwest border and enlist states and their localities in this national enterprise are not a delayed recognition of the harm terrorists and lesser criminals pose to the United States.<sup>72</sup> Instead, they comprise the sometimes painful sorting out within a democratic republic of those measures properly calculated to combat these threats and simultaneously maintain the support and consensus of a nation truly at war. Where America's enemies perceive drift, they mistake it for the proper processes of a democracy at work. Nevertheless, it serves American interests well to know that terrorists will not wait and that urgency is imperative.

As the public and the government it supports struggle to reach consensus on the wrenching issues of who enters and remains in America and how it is accomplished that some are barred and others enter without difficulty, America's enemies watch. Critically important and necessary, such deliberation, in the context of federalism, succeeds as it produces a wise and working consensus. For federalism is not only the balancing of the national government's relationship with the states, but the deeper one of creating and maintaining a "political community," a community of the governed that can summon, where constitutional, the certain response of their government and upon which the government may, with the consent of the governed, accomplish works great and small.<sup>73</sup>

The continued success of the political community of the United States is the predicate for immigration. Without that success, without the security and sovereignty of America's international borders and without consensus that identifies the challenges facing America and the solutions to those challenges, no meaningful progress can occur. What must be assumed in this debate over how we secure this nation's borders, and not only fight, but defeat terrorism, is the agreement that America's borders must be secure. What must be demonstrated is that federal and state conviction is equal to the challenge of the threats America confronts.

The arsenal of terrorism is scalable. It leverages and converts the

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72. Michael A. Fletcher & Jonathan Weisman, *Bush Signs Bill Authorizing 700-Mile Fence for Border*, WASH. POST, Oct. 26, 2006, at A04, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/10/26/AR2006102600120.html>. President Bush's approval of the bill authorizing the construction of a fence along 700 miles of the United States-Mexico border is one of several measures, including the use of the National Guard on the Southwest Border, that demonstrates progress in defending this boundary. Said the President:

Unfortunately, the United States has not been in complete control of its borders for decades and, therefore, illegal immigration has been on the rise. . . . We have a responsibility to address these challenges. We have a responsibility to enforce our laws. We have a responsibility to secure our borders. We take this responsibility seriously.

*Id.*

73. Edwin Meese III, *The Meaning of the Constitution*, in THE HERITAGE GUIDE TO THE CONSTITUTION 1, 4-5 (2005).

peaceful airliner to a giant warhead and its delivery system. It stretches the compassionate expressions found in the jurisprudence of the West, especially that of America, to gigantic gaps through which terrorists seek, if not obtain, immigration benefits. Adding risk upon risk, the uneven approach of the states in police enforcement, the granting of driver's licenses, and providing access to public and private housing without regard to status assures the calculus of terror will include like variables in the equation of the next plot. Recent evidence points to a leveraging of the borders so that the terrorist, who once masqueraded as a refugee or visitor, enters the United States undetected across an undefended border.

In the end, illegal immigration and terrorism, like water, seek the path of least resistance. The Southwest border, with its vast openness and proximity to transnational crime groups, hostile nation-states, and powerful highways, is the singular approach for terrorism into America. Illegal entry—once perceived as the least threatening means of terrorist infiltration<sup>74</sup>—now presents the greatest threat in the universe of risks. Assessing and addressing this threat, this deadly avenue of opportunity, is vital to American security and sovereignty.

### III. NATIONAL SECURITY ON THE BORDER

The alignment of terrorists with hostile nations and transnational crime groups is a fact. Deputy Secretary of Homeland Security James Loy, testifying before the Senate Select Committee on Intelligence on February 16, 2005, did not equivocate:

Recent information from ongoing investigations, detentions, and emerging threat streams strongly suggests that al Qaeda has considered using the Southwest Border to infiltrate the United States. Several al Qaeda leaders believe operatives can pay their way into the country through Mexico and also believe illegal entry is more advantageous than legal entry for operational security reasons.<sup>75</sup>

Deputy Secretary Loy emphasized the threat saying that “[e]ntrenched human-smuggling networks and corruption in areas beyond our borders can be exploited by terrorist organizations.”<sup>76</sup> An unclassified post-September 11th Border Patrol bulletin, reviewed by 9/11 Commission staff, warned of meetings in Madrid, Spain between members of al Qaeda and the Revolutionary Armed Forces of Colombia (FARC). These terrorists discussed using Mexican Islamist converts to infiltrate the United States across its southwest border. Recent reports

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74. See generally LEIKEN, *supra* note 20, at 6-7.

75. *The Worldwide Threat: Hearing Before the S. Select Comm. on Intelligence*, 109th Cong. (Feb. 16, 2005) (testimony of Admiral James C. Loy, Deputy Secretary of Homeland Security), available at [http://www.fas.org/irp/congress/2005\\_hr/021605loy.pdf](http://www.fas.org/irp/congress/2005_hr/021605loy.pdf).

76. *Id.*

signal that a “growing number [of illegal aliens picked up by the Border Patrol on the southwest border] hail from Central and South America, Asia, even Mideast countries such as Syria and Iran.”<sup>77</sup> Such illegal immigrants are referred to by the acronym “OTM,” meaning “other-than-Mexicans.”<sup>78</sup> “In 2003, the United States Border Patrol arrested 39,215 so-called ‘OTMs’ . . . . In 2004, the number jumped to 65,814.”<sup>79</sup> For fiscal year 2005, this number had more than doubled to 165,178.<sup>80</sup> In 2006, OTMs arrested at the border declined to 108,025.<sup>81</sup> These statistics reflect, however, only those OTMs apprehended crossing the border, not those who made successful entry.<sup>82</sup> Among these OTMs are “special interest aliens” whose countries of origin are among the thirty-five nations designated by the United States Department of Homeland Security as “special interest” countries. Special interest countries are so labeled because American intelligence identifies them as likely exporters of terrorism.<sup>83</sup> “Since September 11, 2001 to the present hundreds of illegal aliens from special interest countries (such as Iran, Jordan, Lebanon, Syria, Egypt, Saudi Arabia, Kuwait, Pakistan, Cuba, Brazil, Ecuador, China, Russia, Yemen, Albania, Yugoslavia and Afghanistan) were apprehended within the South Texas region alone.”<sup>84</sup> It is now nearly commonplace that illegal aliens from countries known to “harbor terrorists or promote terrorism are routinely encountered and apprehended”<sup>85</sup> attempting to enter the United States undetected along the Texas-Mexico border. For example, United States intelligence officials reported in June 2006 that seven Iraqis were discovered in Brownsville, Texas.<sup>86</sup>

Foreshadowing these incidents, a Census Bureau report released on January 22, 2002, revealed the presence of 165,000 illegal immigrants from the Middle East, 6,000 of which were men then being sought by the Department of Justice for ignoring deportation orders.<sup>87</sup> Equally omi-

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77. Kephart Testimony I, *supra* note 37, at 8 (quoting Mimi Hall, *Despite New Technology, Border Patrol Overwhelmed*, USA TODAY, Feb. 22, 2005).

78. *Id.*

79. *Id.*

80. MAJORITY STAFF OF THE SUBCOMM. ON INVESTIGATIONS OF THE H. COMM. ON HOMELAND SECURITY, 109th Cong., *A LINE IN THE SAND: CONFRONTING THE THREAT AT THE SOUTHWEST BORDER* 27 (Comm. Print 2006) [hereinafter *A LINE IN THE SAND*], available at <http://www.house.gov/mccaul/pdf/Investigaions-Border-Report.pdf>; see also BLAS NUÑEZ-NETO, ET AL., CONGRESSIONAL RESEARCH SERVICE REPORT FOR CONGRESS: BORDER SECURITY: APPREHENSIONS OF “OTHER THAN MEXICAN” ALIENS 11 (2005), available at <http://trac.syr.edu/immigration/library/P1.pdf>.

81. *A LINE IN THE SAND*, *supra* note 80.

82. *See id.*

83. *Id.*

84. *Id.* at 28.

85. *Id.*

86. *Id.*

87. Christopher Marquis, *Census Bureau Estimates 115,000 Middle Eastern Immigrants Are in the U.S. Illegally*, N.Y. TIMES, Jan. 23, 2002, at A10, available at <http://www.cis.org/articles/2001/nytimescensus.html>.

nous were the arrests of three Hezbollah agents at the Mexican border that same year. Their indictments, unsealed on December 13, 2002, in the United States District Court for the Southern District of California,<sup>88</sup> resulted in convictions and, in the case of their Mexico-based ring-leader, Salim Boughader, extradition to the United States for further prosecution.<sup>89</sup>

The threat of terrorists aligning themselves with transnational crime groups was a dynamic well understood by American lawmakers before Deputy Secretary Loy's testimony. "In July 2001, the CIA warned of a possible link between human smugglers and terrorist groups, including Hamas, Hezbollah, and Egyptian Islamic Jihad."<sup>90</sup> Evidence then suggested that human smugglers had been facilitating terrorist travel since 1999. These smugglers possessed "connections to fraudulent document vendors and corrupt government officials," making them critical to plotters intent upon attacking the United States.<sup>91</sup>

The history of immigration, both legal and illegal, is instructive and a prism on the risks America bears. "If there is a single 'law' in migration," wrote one researcher,

it is that a migration flow, once begun, induces its own flow. Migrants enable their friends and relatives back home to migrate by providing them with information about how to migrate, resources to facilitate movement, and assistance in finding jobs and housing.<sup>92</sup>

Explaining this "law" through its corollaries, Robert S. Leiken distills the problematic trend of illegal immigration as it intersects terrorism:

In our times this chain migration has given rise to an unprecedented institutionalization of immigration. Aspects of *institutionalization* include, among other things, the rise of remittances as a major factor in current account balances in developing countries, alien smuggling networks, original phenomena such as transnationality and dual citizenship, and "the migrant syndrome" which carves out adult populations from sender communities leaving the latter merely hollow juxtapositions of nurseries and nursing homes. But the aspect of institutionalization most relevant to terrorism is "channeling," *ad hoc* immigrant streams that run from specific sender communities to specific host communities.<sup>93</sup>

What America confronts in illegal immigration is the calculated advance of cloaked terrorists using those same means by which the impoverished enter and remain in the United States. The paths which once and still serve refugees from want now provide the framework for illegal

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88. LEIKEN, *supra* note 20, at 130 (citing *United States v. Salim Boughader-Mucharrafille, et al.*, Indictment, U.S. District Court for the Southern District of California, Aug. 8, 2001).

89. *Terror-Linked Migrants Channeled Into U.S.*, ASSOCIATED PRESS, July 3, 2005, available at <http://www.foxnews.com/story/0,2933,161473,00.html>.

90. ELDRIDGE ET AL., *supra* note 12, at 61.

91. *Id.*

92. MYRON WEINER, *THE GLOBAL MIGRATION CRISIS* 28 (1995).

93. ROBERT S. LEIKEN, *EUROPE'S MUJAHIDEEN: WHERE MASS IMMIGRATION MEETS GLOBAL TERRORISM* 25 (2005), available at <http://www.cis.org/articles/2005/back405.pdf>.

entry—entry that is plotted to avoid not only recognition, but detection.<sup>94</sup> It is among the same means by which drug traffickers cross the frontiers of the United States to complete their illicit trade. This “law” helps explain the importance of co-ethnic communities as destinations offering camouflage to the lone terrorist and the terrorist cell and the risk posed by a Southwest border still porous, despite mounting evidence of trafficking in drugs and human beings, and surreptitious entry by those from nations on terrorist watch lists. This pioneering phenomenon that describes the establishment of anchor communities produced from earlier immigration, and which today offers haven to both the authentic immigrant and the malignant terrorist, is enabled by the insecurity of borders where American law enforcement is overwhelmed by criminals equipped in many cases as well as, if not better than, the men and women guarding them.<sup>95</sup>

Immigration and Customs Enforcement officials (ICE) testifying in oversight hearings before Congress on September 8, 2004, illustrated the peril America faces on the Southwest border. ICE agents, they explained, arrested Neeran Zaia and Basima Sesi, principals in a human smuggling ring operating on the Southwest border. Zaia, the organization’s chief, specialized in smuggling Iraqi, Jordanian, and Syrian Nationals. While under surveillance, Zaia brought more than 200 illegal aliens from the Middle East into the United States. Investigation revealed the aliens traveled “from the Middle East to staging areas in Central and South America.” Once in these areas, the conspirators arranged to smuggle them into the United States. Nor was this a one time affair; Zaia had been convicted of alien smuggling in the past.<sup>96</sup> Later

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94. *Terror-Linked Migrants Channeled Into the U.S.*, *supra* note 89. The article states in detail:

The AP reviewed hundreds of pages of court indictments, affidavits, congressional testimony and government reports, and conducted dozens of interviews in Mexico and the United States to determine how migrants from countries with terrorist ties were brought illegally to America—and how the smugglers they hired operated throughout the world.

Many of the travelers, unassociated with any extremist group, genuinely came fleeing war or in search of economic opportunity. But some, once in the United States, committed fraud to obtain Social Security numbers, driver’s licenses or false immigration documents, U.S. court records showed.

Worse, the boldness of the smuggling enterprises, the difficulty of shutting them down and their potential to be used as terrorist conduits trouble many security officials.

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“If you’re a terrorist group looking to do something . . . why not send them another route?” said Walter Purdy, director of the Terrorism Research Center in Burke, Va. “These people on the border, they don’t come up and say, ‘We’re part of Hezbollah.’ They say, ‘I want to get a job in America’ or ‘I’m going to see my cousin in New York. Can you get me in?’ The guy will say, ‘How much money do you have?’”

Dismantling groups smuggling people from countries with terrorist ties is a priority, said Torres, the U.S. immigration official. But often when one smuggler is busted another eagerly fills his shoes.

*Id.*

95. See *A LINE IN THE SAND*, *supra* note 80, at 24.

96. See *id.* at 29.

congressional hearings portrayed the clandestine atmosphere on the border to be commonplace. In short, the range of criminal activity on the Southwest Border is limited only by the demands of the illicit markets served.

At hearings on July 5, 2006, the then-Chairman of the Subcommittee on International Terrorism and Nonproliferation (of the Committee on International Relations), Edward Royce, opened testimony with this statement:

It's elementary that to defend ourselves against our determined and resourceful enemies, our border must be secure; or in the words of the Border Patrol, we must have "operational control." The Border Patrol acknowledges that we don't have this now, which is obvious, especially to those Americans who live in border communities and suffer the consequences of illegal immigration. As we'll hear today from two Texas sheriffs: drug cartels, smuggling rings, and gangs, operating on both the Mexico and U.S. sides, are increasingly well-equipped and more brazen than ever in attacking federal, state and local law enforcement officials. Border Patrol agents are being assaulted in increasing numbers, including here in Laredo. Some border areas can be accurately described as war zones. . . .

These border vulnerabilities are opportunities for terrorists. Last year, a top Department of Homeland Security official testified to Congress that al Qaeda has considered crossing our southwest border. It may have already happened. Admiral James Loy, then the Department of Homeland Security's deputy secretary, also noted that al Qaeda leaders believe that illegal entry is more advantageous than legal entry for operational security reasons. The National Border Patrol Strategy warns of an "ever-present threat" of potential terrorists employing the same smuggling and transportation networks illegal aliens use to cross our border. These terrorists, the Strategy states, could cross the border undetected with biological or chemical weapons. One of our witnesses smuggled radioactive material, enough to make a dirty bomb, through two land ports of entry, one on the northern border, one on the southwestern border. Laredo, Texas, I would note, is the busiest trading port on the U.S.-Mexico border. Our Border Patrol witness will testify that reducing illegal entries across our border is now more than ever a matter of national security. Post 9/11, I don't know how you look at the porous and in some places violent state of the border, including the sophisticated cross-border tunnels that are being dug, without being very concerned.<sup>97</sup>

Chairman Royce's statement illustrated further risks to national security playing out on the Southwest Border, risks addressed in studies authored by the Library of Congress and reduced to testimony on July 5, 2006:

Lately there has been a spike in the number of individuals from countries other than Mexico illegally crossing our borders. Last year, the

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97. *Border Vulnerabilities and International Terrorism: Hearings Before the Subcomm. on International Terrorism and Nonproliferation of the H. Comm. on International Relations*, 109th Cong. (2006) (statement of Rep. Royce, Chairman, Subcomm. on International Terrorism and Nonproliferation), available at <http://www.royce.house.gov/News/DocumentSingle.aspx?DocumentID=46584>.

Border Patrol apprehended individuals from Syria, Iran, and Somalia crossing the southern border. These countries are either designated “state sponsors of terrorism,” or countries where al Qaeda and affiliated terrorist organizations are active. In 2005, over 30,000 Brazilian nationals were apprehended, a 900 percent increase from the previous year. Hezbollah is active in the Argentina-Paraguay-Brazil border area. The FBI has testified to Congress that individuals from countries where al Qaeda is operational are changing Islamic surnames to Hispanic surnames, a cause of concern. Too often illegal immigrants who are not from Mexico are apprehended, released with a promise to report to court, and are never heard from again. Immigration reform must be national security reform.<sup>98</sup>

The 2003 Library of Congress report to which Chairman Royce referred, describing terrorist and criminal organization activity in the Tri-Border Area (TBA) from 1999-2003, provides “substantial evidence” for concluding that various Islamic terrorist groups have used it for fund-raising, drug trafficking, money laundering (\$6 billion over five years), and plotting terrorist attacks against TBA countries or the Americas in general. The report identifies the presence of the Egyptian Al-Gama’a al-Islamiyya and al-Jihad, al Qaeda, Hamas, Hezbollah, and al-Muqawamah, a pro-Iranian wing of Lebanon-based Hezbollah. Large Arab communities thrive in the TBA, making it conducive to the formation of sleeper cells, especially for those terror groups already there, Hezbollah, and al Qaeda. Yet, since late 2001, as many as 11,000 members of the Islamic community in the TBA may have moved, perhaps as a result of greater scrutiny, “to other less closely watched Arab population centers in South America.”<sup>99</sup>

That Iranian influence is felt in the TBA cannot be doubted. Hezbollah clearly derives substantial support from the government of Iran, in addition to income derived from its narcotics trafficking in Lebanon’s Al Beqa’a Valley. Since the early 1990s, Iranian intelligence agents have been implicated in Hezbollah-linked activities in the TBA, and news reports also speak to al Qaeda’s presence in the region. Cooperative efforts in the TBA between al Qaeda and Hezbollah surfaced in mid-1999 and are validated by identification of al Qaeda operatives in the TBA by Argentine intelligence. Conventional thinking would suggest “that the Sunni-oriented al Qaeda and the Shi’ite-oriented [Hezbollah] would never cooperate,” but, if true, it heralds a “larger strategic alliance between the two organizations.”<sup>100</sup> News reports of foiled terrorist plots in 1999 against United States embassies and the arrest of terrorists linked to al Qaeda strongly confirm an al Qaeda presence in the

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98. *Id.*

99. REX HUDSON, FEDERAL RESEARCH DIVISION, LIBRARY OF CONGRESS, TERRORIST AND ORGANIZED CRIME GROUPS IN THE TRI-BORDER AREA (TBA) OF SOUTH AMERICA 1 (2003) (prepared under an Interagency Agreement with the United States Government), available at [http://www.loc.gov/rr/frd/pdf-files/TerrOrgCrime\\_TBA.pdf](http://www.loc.gov/rr/frd/pdf-files/TerrOrgCrime_TBA.pdf).

100. *Id.* at 1-2.

region.<sup>101</sup>

Terrorist interest in the TBA is not a recent development. Al Qaeda's presence there may be dated to a visit by Osama bin Laden and Khalid Sheikh Mohammed in 1995. Since that time at least, al Qaeda's activities in the TBA have involved the usual and not so usual means to fund their operations: trafficking in arms, drugs, and, most troubling, uranium. Money laundering also earmarks these enterprises, as associations with Chinese and Chechen mafias demonstrate networks that span oceans and continents.<sup>102</sup> It practically goes without saying that these efforts are the means to an end, not the end in themselves. The end is an authority in the world presently enjoyed in few places by the extremes of Islam. Its efforts to establish footholds in the Americas, which over time become strongholds, are the ominous signs that declare American vigilance is prudently warranted and American power properly extended.

Islamic terrorism's efforts to threaten and interrupt the United States from its historic and benign presence in the Americas has been contested for some time. A CNN report from November 8, 2002, warns of an Islamic terrorist summit held in the TBA city of Ciudad del Este, Paraguay, the same month in which plans to attack United States and Israeli diplomatic missions in South America were discussed.<sup>103</sup> Just six years earlier, in 1996, TBA-based terrorists linked to Hezbollah and al Qaeda plotted to destroy the United States Embassy in Asunción, Paraguay. As the nineties waned, al Qaeda grew bolder. Intelligence reveals it expanded its targeting to include United States and Israeli embassies in Montevideo, Uruguay, and Quito, Ecuador—Israel eventually closed

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101. *Id.* at 2. These terrorists included Ali Khalil Mehri, El Said Hassan Ali Mohammed Mukhlis, Marwan 'Adnan al-Qadi, and Mohamed Ali Aboul-Ezz Al-Mahdi Ibrahim Soliman. *Id.*

102. *Id.*

103. *See id.* at 23. In pertinent part, CNN reported:

CNN has learned from coalition intelligence sources that several top terrorist operatives met recently in the area—where the borders of Argentina, Brazil and Paraguay intersect—to plan attacks against U.S. and Israeli targets in the Western hemisphere.

Sources said the meetings, which took place in and around Ciudad del Este, were attended by representatives of Hezbollah and other groups sympathetic to Osama bin Laden's al Qaeda terrorist network.

Two weeks ago, Argentina's security agencies issued a strong terrorist warning.

"We had intelligence that pointed to increased terrorist activity," said Miguel Toma, who runs SIDE, the Argentine equivalent of the U.S. CIA. "It is not unrealistic that there could be some action to prevent or to react to an attack on Iraq. So we need to react because of the global conflict."

Other indications of the threat came from intelligence sources in the Middle East, who told CNN of a new terrorist effort aimed at U.S. and Israeli interests and coordinated by a man named Imad Mugniyeh.

The sources say Mugniyeh—working from his bases in Iran and Hezbollah-controlled areas of Lebanon—is directing the activities of terrorists in South America, planning to hit U.S. and Israeli targets if the United States attacks Iraq, or if Israel is drawn into the conflict.

Mike Boettcher, *South America's 'Tri-Border' Back on Terrorism Radar*, CNN, Nov. 8, 2002, <http://archives.cnn.com/2002/WORLD/americas/11/07/terror.triborder/index.html>.

its Asunción embassy in 2002. These plots were foiled, but their intent cannot be disregarded. TBA terrorists will likely again attempt attacks against United States posts in South America. Such efforts “could also include hotels, tourism centers, airports, or multinational companies” offering softer opportunities for spectacular destruction. Not only American, but Israeli, German, and French targets in these areas remain vulnerable.<sup>104</sup>

Terrorist outposts in South America are one of many predicates for terrorism’s efforts elsewhere. The recruitment and training of soldiers to their cause, secure sites for illicit trade and profits, and places from which to launch attacks into the United States all reveal a calculated effort to eventually penetrate American borders and lay waste to American cities and institutions.

#### IV. CONCLUSION

The Americas are a platform and springboard for Islamic terrorism to make its way into the United States. In the same way that terrorists broke laws to enter America to board jets and attack innocent people, violated borders—borders of opportunity—now beckon terrorists to do the same by other means. Americans, lawmakers, and ordinary citizens alike understand the cost of failure is greater than the cost of success. An ABC news report on the costs of the attacks of 9/11, two years later in 2003, reveals a price tag of \$600 billion in direct losses, added costs, and reduction in economic activity.<sup>105</sup> To date, four years of war in Iraq and Afghanistan have witnessed congressional appropriations of approximately \$437 billion.<sup>106</sup> The costs of defending American borders, therefore, whether by bricks and mortar, virtual means, greater enforcement, or by elements of all three, cannot exceed the costs of another attack or the costs of further war. Indeed, given the risks and costs of failure, the costs of not defending these borders against the surreptitious or those posing as the worthy or pitiful can exceed in generations of lost lives, treasure, and liberty, that which has taken more than two hundred years to secure.

More than any other American president since Franklin Roosevelt, George W. Bush has understood the stakes of a war that began with a sneak attack during the most severe economic downturn since the Great Depression. With his best lights, the President responded and has in

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104. HUDSON, *supra* note 99, at 2.

105. See MP3 File: ABC News Money Minute, The Cost of 9/11 (Sept. 12, 2006), available at <http://odeo.com/audio/1884574/view>.

106. AMY BELASCO, CONGRESSIONAL RESEARCH SERVICE REPORT FOR CONGRESS: THE COST OF IRAQ, AFGHANISTAN, AND OTHER GLOBAL WAR ON TERROR OPERATIONS SINCE 9/11, at 5 (2006), available at <http://www.fas.org/sgp/crs/natsec/RL33110.pdf>.

many respects succeeded and succeeded well. Despite condemnation of the war now waged in Iraq and Afghanistan, this fact remains undisputed: all other plots against the American homeland have been foiled, and the plotters arrested and prosecuted according to the rule of law.

This successful defense of the American homeland has enabled a shift in our public discourse from investigating the failures of 9/11 and assigning blame for further attacks to debating the proper role of America's armed forces in a post-9/11 world. Regardless, the heavy toll American and allied forces have imposed on terrorists around the globe has been essential in preventing further attacks on the order of 9/11. The anti-terror provisions of The Patriot Act, approved with bi-partisan support, have helped cripple terrorism's financing mechanisms and aided American intelligence with transparency as it takes counsel across a wide array of its committed resources. While some voices seek to focus blame for a war upon the shoulders of a few, it cannot be ignored that there is much credit also to be shared. This nation, its President, and Congress, to different degrees certainly, have supported and executed policies that, since the attacks of 9/11, have made the American homeland safe from attack. That is no small accomplishment.

The brave men and women wearing the cloth of their country today have successfully taken the fight of this generation to an enemy sworn to destroy a nation of many peoples and impose upon the world an ideology that cannot tolerate dissent—even that which respectfully differs with its creed. Their creditable fight speaks more than volumes of arms skillfully employed in this nation's service.

The fixed resolve of the American people, an American Congress of Democrats and Republicans, and an American President who has defined his terms of office in the security of this country will by design, and not by default, assure the success of the Republic against its greatest threat since communism. Securing America's borders is a certain tool of this success.