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National Security Efforts to Disrupt the Mobility of Terrorists - Keynote Address

Susan Ginsburg
9/11 Commission

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I. Opening Remarks

Thank you, Aaron Clay, Anwar Imam, the rest of the International Law Review staff and Professor Moses, for giving me an opportunity to speak before such a distinguished group of immigration law practitioners, policy leaders and such a dedicated group of law students. I am also pleased to be speaking in the city that is home to one of the 9/11 Commissioners, Governor Thompson, with Ambassador Perry, and the other distinguished panelists. As the daughter of a refugee from Nazi Europe, I share your belief in the central importance of the international legal framework for migration. And as a very engaged board member of an NGO involved in development projects all over the world, I value your contributions to define what it means for the United States to be a responsible member of the global society of nations.

The work you are doing through this symposium – advancing global society through a deeper understanding of international migration and its impact on oppressed individuals - is in the great tradition of Judge A. Leon Higginbotham, Jr. I clerked for Judge Higginbotham. I dedicate these remarks to Judge Higginbotham. And I applaud you for undertaking his mission and the hard work it entails.

II. Introduction

My focus at the 9/11 Commission was on the travel tactics of Al Qaeda's 9/11 conspirators, especially the entry of the hijackers. Since Congress' mandate dealt exclusively with the 9/11 attacks themselves, we only lightly touched upon the broader ripple effects on immigration, refugee, and asylum policy called forth by 9/11 that continue to this day.[1] This revealed links between two sets of phenomena – terrorist mobility and international migration. For economic, political, and social reasons, including its organized criminal underside, the link between terrorist mobility and international migration needs to be considered much more formally and carefully. This is essential in order to find ways to preserve the important goals and principles at stake in recognizing and defeating our enemies,

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[1] Intelligence Authorization Act For Fiscal Year 2003 Public Law 107-306 (2002).

in upholding human rights, and in advancing prosperity is an undertaking essential to our future as a nation and as a world leader.

As a necessary foundation for a broader dialogue about security and migration, I would like to share my perspective, which comes primarily from a close study of a small group of terrorists. First I will discuss the new enemies and the new type of war that was the broad subject of the Commission. Then I will turn to what the United States is doing, as a nation, to counter the international flow of terrorists and their ability to enter the United States.

III. A New War with New Enemies – Terrorist Mobility

Today's transnational mobile terrorist groups and individuals operate under cover and seek ways to exploit our immigration and transportation systems to kill people as we go about our daily lives. Safeguarding our citizens and people with whom we engage now depends heavily on preventing specific individuals from gaining access to the United States, to places at home, here and abroad, where Americans and American interests may be targeted.

Detecting and carrying out clandestine travel created some compelling Cold War spy dramas. In the last half of the last century, identifying and locating individuals has been a marginal problem for intelligence and national security professionals as compared with assessing the movements of conventional forces or the status of nuclear weapons.

In the law enforcement arena, some prosecutions of pre-9/11 Islamist terrorists involved in the first World Trade Center and later plots, were for immigration violations, including the use of fraudulent travel documents.[2] However, illegal terrorist travel had no impact on the thinking about laws and enforcement policies relating to international migration, or refugee and asylum rules and procedures.

Al Qaeda itself was intensely focused on international travel and immigration processes throughout the world. By 1998, Al Qaeda had a governing and organizational structure that included a passport office as part of its security function.[3] The passport office handled international travel and developed a number of schemes to keep Al Qaeda operatives supplied with secure travel documents.[4]

The visa policies of various countries emerged as a factor early on in the planning of the 9/11 attacks. For example, Khaled Sheik Mohamed realized that two Yemenis who volunteered for suicide operations would not be able to obtain visas as easily as Saudis, particularly to the United States.[5] He decided to split

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[2] Nat'l Comm'n on Terrorist Attacks Upon the United States, 9/11 AND TERRORIST TRAVEL, A STAFF REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES 48-58 (2004) [hereinafter 9/11 AND TERRORIST TRAVEL] *available at* http://www.9-11commission.gov/staff_statements/911_TerrTrav_Monograph.pdf#search='9%2F11%20and%20Terrorist%20Travel%2C%20A%20Staff%20Report%20of%20the%20National%20Commission%20on%20Terrorist%20Attacks%20Upon%20the%20United%20States'.

[3] *Id.* at 61; *see also* Nat'l Comm'n on Terrorist Attacks Upon the United States, THE 9/11 COMMISSION REPORT, 168-69 (Norton 2004) [hereinafter 9/11 COMMISSION REPORT].

[4] *Id.* at 69.

[5] *Id.* at 156.

"the planes operation," what became the 9/11 plot, into two components.[6] One would be in the United States. The other would involve hijacking planes, probably originating in Thailand, South Korea, Hong Kong, and Malaysia, where Yemenis would be able to enter without visas.[7] This latter part of the scheme was never carried out.

As these facts make clear, terrorist mobility is one of the critical new dimensions of national security. Today, national security interests require the United States to learn where terrorists are, how they cross borders, how they use transportation, and how they by-pass immigration controls; and then develop the means to detect, track, intercept, disrupt, and deter them. These are core security challenges. And the United States is just beginning to figure out how to accomplish them.

IV. Eliminating Terrorist Mobility

Eliminating terrorist mobility is only one aspect of counterterrorism and it presents the same fundamental issues as the broader problem:

- What methods will actually work to prevent terrorists from exploiting international travel routes, and from entering the United States now, and also reduce the likelihood that they and terrorists generally and transnational criminals will do so in the future;
- How to achieve these solution while and still preserving a free, just, and compassionate society, one that is a welcome guide and sought-after global partner as well as a security leader among nations; and
- How to stop terrorist mobility and access to targets with the minimum disruption of vital global travel and commerce.

I want review the actions taken by the U.S. government to resolve these questions on terrorist mobility. Then I want to share some ideas on where we need to be going in the next phase of our efforts in preventing terrorists from gaining access to U.S. targets here and abroad.

- First, there have been major improvements in the watch listing program, especially in giving access to state and local agencies.[8] This is making better intelligence more broadly available about known terrorists.
- Second, for non-citizens entering and exiting the United States, a biometric identification system is being developed that will be linked to immigration records.[9] From a counterterrorism perspective, biometric identification should make the use of multiple aliases and name spellings less effective. In addition, travel records linked to biometric identification can be the source of new leads once someone has been revealed as a

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6 *Id.*

7 *Id.*

8 U.S. Dept. of Justice Office of the Inspector Gen'l Audit Div., REVIEW OF THE TERRORIST SCREEN-ING CENTER, Audit Rpt. 05-27 (June 2005) *available at* http://www.fas.org/irp/agency/doj/oig/tsc.pdf.

9 US-VISIT program *available at* http://www.dhs.gov/dhspublic/display?theme=91.

terrorist. The success of this program is premised on an effective registered traveler program that permits known travelers to move quickly through border points so that inspectors have time to deal with travelers who are not easily identified.

• Third, there is ongoing reorganization of government, from the establishment of the Department of Homeland Security (DHS)[10] to the formation of new intelligence structures and organizational components mandated by the Intelligence Reform Act.[11] The goal of reorganization is to break down barriers among government entities so that crucial information can be shared, and to streamline government's ability to act quickly in a coordinated way.

• Fourth, there is an ongoing dialogue with agreements with Mexico, Canada, the European Union, other governments and regional organizations covering border control standards and related intelligence sharing. With Europe, the dialogue in the G-8 followed the precedent of discussions on human smuggling and trafficking that began in the 1990's.

• Finally, there have been substantial increases in border patrol enforcement and a series of immigration civil and criminal enforcement initiatives at least nominally linked to counterterrorism but that have had a significant impact on migrants without terrorist associations.

The United States is still at the beginning stages of each of these activities, and continues to encounter difficult substantive, procedural, and political problems.

It is not clear, for instance, which department is accountable for making sure the terrorist watch list is comprehensive and accessible by all parties that can benefit from it.[12] Nor is it clear what the U.S. plan should be for promoting international sharing of biometric information about terrorist suspects while protecting privacy.

However, what is clear is that more protections for individuals from government excesses and mistakes need to be included in the new systems being designed. The watch list system still designates members of Congress and senior military and law enforcement officials, as well as less prominent but equally trustworthy persons as being unacceptable flight risks, and then is unable to correct the error in a timely way. It is difficult to have confidence in such a system, and not to be concerned about the prospect for egregious false positives in the use of the many innovative technologies that are the topics of research and discussion.

Mistakes have been made in balancing anticipated security benefits with program costs. The unquantifiable costs in the lives of individuals and the perspec-

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[10] Homeland Security Act of 2002 5 U.S.C. § 101 (2002).

[11] Intelligence Reform and Terrorism Prevention Act of 2004, P.L. 108-408 §§ 7211-7214, 118 Stat. 3638, 3825-3832 (2004).

[12] DHS Inspector General Report, DHS CHALLENGES IN CONSOLIDATING TERRORIST WATCH LIST INFORMATION, OIG-04-21, (2004) *available at* http://www.dhs.gov/interweb/assetlibrary/OIG-04-31_ Watch_List.pdf.

tives and interests of foreign governments affect the United States ability to persuade other governments to cooperate with the United States.

Ineffectiveness from a counterterrorism perspective is another problem. The Alien Absconder Initiative launched after 9/11 sought to find and deport nearly 6,000 people of certain nationalities who had ignored valid removal orders.[13] Although some may have been important criminal offenders, none had been found during immigration proceedings to be associated with terrorism. None were prosecuted or removed from the United States on terrorism grounds. Fourteen individuals were referred to the FBI for further investigation relating to possible terrorist links, but the 9/11 Commission did not learn of any confirmed terrorist links.[14] To build confidence in U.S. counterterrorism efforts here, the resources have to be focused more productively.

Government law-making processes can be a double-edged sword; in the midst of a crisis, the United States is not good at making long-term policy decisions, even when given the luxury of time, it is often impossible to force through difficult decisions.

The post-9/11 crisis atmosphere and political conflict about immigration, combined with the actual unenforceability of current laws and the need in a democratic society for fair and equitably enforced administered laws, have blurred distinctions between the migration and security policy. As a consequence, counterterrorism is competing, at least indirectly, for resources with immigration enforcement in the necessary efforts to prevent terrorist entry and constrain terrorist mobility.

Three broad areas mark the next phase in building a domestic and international framework that constrains terrorist mobility. These three areas include eliminating terrorist mobility, using knowledge effectively, and reducing transnational organized crime.

A. Restricting Terrorists' Movements

Eliminating terrorist mobility must become a major focus of our defensive and offensive security efforts. This new objective should include at least four elements:

- Using the Achilles heel of the need to travel to find individual terrorists as they make travel plans, use transportation, and cross borders;
- Dismantling the infrastructure for illegal terrorist travel, through actions against human smuggling and trafficking networks that have terrorist customers, and against corruption among border and immigration officials and other governmental and civil society institutions, and vulnerable travel agents;
- Encouraging accessible, efficient, and secure international travel as a foundation for global prosperity, justice, and international understanding; and

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[13] 9/11 AND TERRORIST TRAVEL, *supra* note 2, at 152-55.
[14] *Id.*

- Preventing terrorists from successful clandestine entry into the United States and access to vulnerable facilities, which is the existing homeland security mission.

Eliminating terrorist mobility requires a full spectrum intelligence program – collection, analysis, technology development, human intelligence – specifically dedicated to the transportation practices and travel patterns of terrorists. It means an investment in new efforts to track and monitor terrorists. It means making an effort to anticipate where terrorists are going and what vulnerabilities they will exploit, including their responses to changes business and government make in the transportation and travel systems.

The new National Counterterrorism Center[15] and the Department of Homeland Security will have to harness the efforts of the intelligence community, the border agencies, all levels of law enforcement, and also the private sector, to build in this new dimension of security.

As this effort is shaped, it will compel new procedures and regulations in the fields of international relations and law, civil liberties, and the public-private sector relationship to answer issues such as what means are permissible in tracking suspected terrorists in foreign countries and what standards are applied to determining whether a foreign government is providing sufficient cooperation.

B. Knowledge Management: New Tools

In order to detect and intercept the few truly dangerous people in the flow of hundreds of millions of travelers, we need to collect, manage, analyze, and use information better.

New Technology

There is much discussion about sophisticated new technology to do this: facial heat sensors to detect stress; automated video cameras that use algorithms to detect anomalous movements and relay these discordant patterns to human analysts; and analysis of merged data systems to search for patterns and anomalies in those patterns. None of these technologies are actually developed, and even when developed will present serious questions of effectiveness and privacy.

In the short term, more emphasis needs to be placed on using available information about current terrorist practices to institute preventive measures. There are a few examples of potentially effective knowledge management systems to support counterterrorism.

Analyzing Investigative Information

Some of the terrorists who carried out the first World Trade Center attack and those implicated in later intercepted plots had been prosecuted on immigration

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[15] Intelligence Reform Act, P.L. 108-408 §§ 7211-7214 (2004) (which established it and laid out duties and responsibilities, Sec. 1021).

charges or related criminal charges.[16] This meant that their FBI or INS files contained detailed information about the tactics that they had used to cross borders and subvert the U.S. immigration system.

These old case files were extraordinarily revealing. They provided information that could have been used to intercept some of the 9/11 hijackers, and to contribute to a detailed picture of the terrorist travel and immigration infrastructure.

Information like this can support not only preventive measures here, but diplomatic, intelligence, and law enforcement efforts abroad.

For example, one of the terrorists had obtained a small batch of fraudulent Nicaraguan passports after a major Nicaraguan earthquake; citizens lost their documents and the government re-issued passports in large numbers in a short period of time.[17] Preventive measures could involve special checks on Nicaraguan passports issued during a certain period. Diplomatic efforts might involve offering assistance to upgrade passport security systems following natural disasters that make them vulnerable to less than rigorous issuance practices. Intelligence and investigative efforts might involve efforts to discern wider use of such passports among terrorist groups or in illegal passport markets. Law enforcement efforts might involve prosecutions of officials who misuse the passport issuance process or middlemen who profit from it by placing people at risk from crime or terrorism, along with publicity against such practices. To bring about such prosecutions, international dialogue and agreements about appropriate penalties and enforcement policies need to be developed.

The FBI's lack of a case management system is only one manifestation of how far we have yet to go to manage and exploit available knowledge about terrorist travel for the purpose of adding security to international travel. Law enforcement agencies generally have historically conducted their mission through case-by-case investigation to support prosecutions. The mining and recycling of investigative and incident information to find trends and patterns to support new counterterrorism or crime control measures, only some of which might involve prosecutions, is for the most part insignificant in the current environment. It would represent a major cultural change for most law enforcement agencies. This is one type of knowledge management that will make a difference.

Incident reviews

Incident reviews are a second type of knowledge management that can help constrain terrorist mobility and access. Today we don't study how terrorists actually manage to get in or try to get in, immediately after the discovery that they either entered or attempted to enter, and we should. A high level and high quality terrorist entry review system, activated immediately upon the discovery of any terrorist entry, with objective and thorough analysis and recommendations – and avoiding political attack and blame – would go a long way toward building

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[16] 9/11 AND TERRORIST TRAVEL, *supra* note 2, at 48-58.

[17] *Id.* at 52.

the kind of government and public confidence needed to reduce the harm from future attacks.

Travel and identification documents

Travel and identification documents are another much-neglected source of knowledge about terrorists. Name and biometric-based screening largely depend on intelligence, law enforcement, or immigration authorities having already provided information about the individual. The 9/11 Commission found that as many as 15 of the 19 hijackers had travel documents containing terrorist indicators, even though most of them could not have been detected as terrorists by checking their names, biometrics, or previous travel to the United States.

These document indicators were analyzed after 9/11. Most specialized terrorist indicators on documents are knowable only through intelligence reporting and analysis, including knowledge shared by friendly governments. For instance, the mark of a particular inspector who has been previously associated with terrorists, or a particular type of forged stamp, or a particular passport number provided by a source can only be known if this information is disseminated.

Document screening usually comes later in the travel process. Moreover, it isn't fully computerized, and most importantly, it is not linked with intelligence information. There is simply too much information for an inspector to retain and some of it requires special technology to detect. As a result, many inauthentic documents are not detected. When an inspector does detect a fraudulent document, because of a detectable flaw, perhaps using a black light or based on an alert notice, there is no systematic interagency process to determine whether those or other travel documents may have terrorist or organized crime sources. Thus, the individual who is deported with or without fraudulent documents may be a criminal or terrorist at liberty to try again.

From a counterterrorism perspective, the immediate challenge is in building the right set of linkages between the intelligence community that is needed to enable all agencies to decipher these documents fully and assist in deciding what actions are appropriate, and the immigration and law enforcement officials that encounter the travel and related identification documents in the first instance.

Focusing more on harnessing the knowledge base of law enforcement and the intelligence community on what terrorists are actually doing will have two important consequences. Trained terrorists use fraudulent practices to cross borders, and these are sometimes indistinguishable from other travel fraud. As knowledge of terrorist and criminal tactics increases, more fraud is also likely to be detected, and more migrants with no connection to terrorism who are attempting illegal entry will be detected. This makes continuing political dialogue about migration policies, including enforcement policies, all the more urgent.

At the same time, information collection, analysis, and enforcement information based on continuous, systematic examination of terrorist and criminal practices will shift law enforcement to focusing on suspect individuals and organizations, based on valid indicators, rather than on broad groups based on national origin or religion. This makes for a more just as well as more effective

security strategy. Since this approach places less emphasis on unfettered searches through citizen records, it also focuses the privacy concerns more narrowly.

C. Transnational Organized Crime

Transnational organized crime is the final major area of action that deserves more attention than it has received. Transnational organized crime is heavily involved in terrorist travel. Just as there needs to be shift toward using information differently, there needs to be a shift towards working to persuade and support law enforcement organizations and related organizations not to just arrest violators, but to adopt the goal of controlling crime.

Al Qaeda successfully gained access to the U.S. because it relied on a combination of successful deception, in-house forgery, stolen passports, and tapping into the network of organized criminal document forgers, human smugglers, and corruptible or sympathetic travel agents and officials.[18]

The United States needs to develop detailed knowledge about the criminal travel and transportation infrastructure, and work with allies in other nations to achieve better results in controlling the suppliers. This means writing new laws, creating new international norms, and finding more effective methods of deterrence.

The work done by the migration community in the 1990's on human smuggling and trafficking enforcement is providing a foundation for a sharpened focus on terrorist travel. This is one area where an infusion of new resources is likely also to benefit international efforts to fight human trafficking at the diplomatic and enforcement levels.

The chaos at our southern border and the lack of focus on vulnerabilities of the northern border pose a significant security issue. About 300 separate entities involved in people smuggling have been detected, and the number of arrests of illegal entrants is enormous.[19] As the ability to detect false passports and identities improves, the use of these channels to enter the United States becomes more attractive to terrorists.

V. Conclusion

What is even more dangerous to the United States is the lack of consensus on what to do about this grave risk. Political gridlock about immigration policy leaves the United States vulnerable to extreme responses and future terrorist attacks. Managing migration consistent with security, human rights, and economic requirements is becoming more critical every day.

My hope is that we will find solutions that are in the tradition of Judge Higginbotham: never leaving out of the formulation consideration of the poor and oppressed who are struggling to better themselves and join society on equal terms.

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[18] 9/11 AND TERRORIST TRAVEL, *supra* note 2, at 58-60.

[19] *Mexican people-smuggling trade worth billions*, JANE'S INTELLIGENCE REVIEW 30 (Dec. 2004).