Immigration and National Sovereignty

Testimony by Mark Krikorian

> *Immigration is not a right guaranteed by the U.S. Constitution to everyone and anyone in the world who wishes to come to the United States. It is a privilege granted by the people of the United States to those whom we choose to admit.*
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> *– Barbara Jordan, August 12, 1995*

Thank you for the opportunity to participate in this briefing on immigration and civil rights in the wake of the September 11 jihadist atrocities. We are faced with two questions relating to civil liberties. First, Is immigration a civil right? And second, What is the best way to create an environment respectful of immigrants living among us?

Immigration Is Not a Civil Right

Article I, Section 8, Clause 4 of the Constitution grants Congress the power to establish a "uniform Rule of Naturalization." From this has developed the "plenary power doctrine," which holds that Congress has complete authority over immigration matters. The Supreme Court has said that "over no conceivable subject" is federal power greater than it is over immigration. As a consequence, as the Court has said elsewhere, "In the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens."

This is as it should be, since control over immigration is fundamental to national sovereignty. If "We the People of the United States" have ordained and established the Constitution, then we by definition retain the power to determine who is, and is not, a member of the American people. Thus, the decision to admit or exclude foreign citizens is a matter solely in the hands of the elected representatives of the people, and anyone from abroad who is admitted to travel or live among us does so as a guest, remaining here at our pleasure, until such time as we agree to permit him to become a member of our people. In effect, foreign citizens, even if they are here illegally, enjoy the human rights with which they are endowed by God, but they remain here at our discretion and the specifics of their due process rights are determined by Congress.

This is relevant in assessing many of the measures to tighten immigration control recommended in the wake of the September 11 attacks. All nineteen hijackers were, after all, foreign citizens, as are many of those detained as possible accomplices or witnesses. This was also the case with the conspirators in the first World Trade Center attack, the 1993 CIA assassinations, and the foiled bomb plots in New York in 1995 and in Washington state in 1999. Foreign citizens, or naturalized immigrants, are almost certain to be responsible for the next attack, whether it comes in the next few days, as the FBI has warned, or further in the future.

To begin at the first step in the process of coming to the United States, there is likely to be special scrutiny applied to visa applicants from Muslim countries and even to people of Middle Eastern birth who now hold other citizenship. Whether or not ethnic or religious profiling is an appropriate tool in the government's dealings with American citizens, there are no civil rights implications against such profiling of foreign citizens overseas. The United States government may refuse entry to any foreign citizen, for any reason, at any time. It is precisely to preserve this irreducible element of national sovereignty that repeated attempts to subject visa refusals to review have been rebuffed by Congress.

One of the grounds for exclusion may well be expanded as a result of the jihadist attacks, one that

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Mark Krikorian *is executive director of the Center for Immigration Studies (www.cis.org) in Washington, D.C. This statement was delivered before the U.S. Commission on Civil Rights, October 12, 2001.*

would be unacceptable if applied to citizens but clearly permitted, indeed mandated, when applied to non-citizens abroad. Current law makes it extremely difficult to turn down a visa applicant because of his "beliefs, statements, or associations, if such beliefs, statements, or associations would be lawful within the United States." To keep out a terrorist sympathizer, who publicly cheers the murder of Americans but who, as far as we know, hasn't yet raised money for terrorist groups or planned out their assaults, the Secretary of State must personally make the decision and then report each individual instance to four congressional committees. It is imperative that visa officers be given a freer hand in excluding enemies of America, even if their hatred for us would be constitutionally protected if articulated by citizens. The First Amendment does not apply to foreigners abroad.

Fingerprinting of visa applicants is another change likely in the wake of the attacks. Ideally, foreign visitors, students, and workers would have their fingerprints digitally scanned when applying for their visas, then scanned again when entering the country and again upon departure. Despite claims to the contrary, there are no civil rights implications of this security measure; this would simply be one of the conditions of being a guest in the United States.

The next stage in coming to the United States takes place at the border. Here, a tool to prevent the penetration of our system by terrorists and others has already been implemented. Although many have claimed that there are civil-rights consequences to the procedure known as "expedited exclusion," enacted in the 1996 immigration law, there are no such consequences. That provision sought to end asylum abuses through the expedited exclusion of false asylum claimants at airports; when a person who has arrived in the United States with no documents or with forged documents claims asylum, the initial plausibility of his claim may be judged by the immigration officer, to be reviewed by his supervisor if the officer makes a negative determination, and the alien may then be prevented from entering the United States and pursuing an asylum claim. Again, this is part of Congress's plenary power over immigration, and there are no civil-rights consequences of this policy.

And finally, within the country, non-citizens do have rights, more if they are permanent residents and thus candidate-members of the American people, and fewer if they are "nonimmigrants," i.e., on some sort of temporary visa. One change in the treatment of non-immigrants that is almost certain to be implemented in the wake of September 11 is the tracking of foreign students. Under a pilot program mandated by the 1996 immigration law, about two dozen colleges are participating in a program that requires the schools to update the INS on a quarterly basis about the academic status, address, field of study, etc., of all foreign students. This program was set to expand to all schools accepting foreign students over the next several years, but will now be accelerated. Many foreign students and university spokesmen have complained about this as "unfair" or "discriminatory," using civil rights language to express their displeasure. But of course, as I have discussed, these students are here purely as guests in our house, and we are entitled to place whatever conditions we deem appropriate on their stay.

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The same is true regarding the registration of lawful permanent residents. In 1940, as a security measure to try to prevent our enemies from infiltrating spies and saboteurs into immigrant communities, Congress required registration of all legal immigrants, which included a requirement that each alien notify the INS annually of his whereabouts. This notification requirement was discontinued in 1981 and shouldn't be revived in that form; members of terrorist sleeper cells cannot be expected to dutifully send in their addresses. However, a computerized system to verify the employment eligibility of new hires (pilot programs for this system were mandated by the 1996 immigration law) could be a very effective tool in tracking the whereabouts of non-citizen legal immigrants and would, in effect, serve as a registration program for most resident aliens.

Deportation policy is another area where some have warned that measures recently passed or now proposed would have civil-rights implications. The problem with this view is that deportation is not punishment; only non-citizens may be deported, and they are here either as our guests or as illegal aliens, and may be removed at any time so long as lawful procedures are followed. In the Supreme Court's 1999 ruling in Reno v. American-Arab Anti-Discrimination Committee, for instance, the free speech rights of, in this case, illegal aliens were sharply and appropriately limited in the context of deportation proceedings. In the wake of September 11, it is possible that further limitations on speech and affiliation will be imposed on non-citizens, entirely appropriate limitations in such a national emergency.

The 1996 anti-terrorism and immigration laws also allowed the use of classified evidence in deportation proceedings of suspected terrorists. Virtually all of the tiny number of cases using secret evidence have involved Arabs and/or Muslims, a result which has given rise to civil rights complaints. There has even been legislation to require that such classified evidence be disclosed, which would compromise intelligence sources and methods. Though little has been heard about this since September 11, complaints based on civil rights concerns will eventually resurface. Again, deportation is not punishment – immigration proceedings are administrative, not criminal, and their purpose, according to the Supreme Court, is to "provide a streamlined determination of eligibility to remain in this country, nothing more." Thus, as the FBI general counsel noted in testimony last year, "the full range of rights guaranteed a criminal defendant, including the Sixth Amendment's right to confrontation of evidence, are not applicable in immigration proceedings."

Even the deportation provision in the original version of the administration's anti-terrorism package would not have had any civil rights consequences. That provision, since dropped, would have allowed deportation of persons certified as having terrorist ties without the presentation of any evidence at all. This is admittedly an emergency measure, but it would have been entirely appropriate and may yet be implemented as further terrorist attacks take place. Any ability accorded the alien to appeal deportation decisions is an act of grace on the part of the American people, rather than a right possessed by the alien. The courts thus have a role in ensuring that the alien is accorded due process of law, but the content of the law regarding removal of aliens is not a proper object of constitutional review.

It would be unfortunate if, in our effort to prevent another 6,000 American deaths – or 60,000 or 600,000 – we were inadvertently to deport some foreign citizens who pose no threat to us. But their presence here is a privilege we grant, not a right they have exercised, and we may withdraw that privilege for any reason.

Detention is another matter. Although INS rules allowing longer detention for illegal aliens before instituting proceedings are simple common sense, indefinite denial of liberty is disturbing, as the Supreme Court concluded in the Zadvyas v. Davis case. Even non-citizens possess the natural rights of life, liberty, and property, and the situation of those colloquially called "lifers" – deportable aliens whose countries of citizenship will not accept them back – is untenable. Only those deemed by the INS to be a threat to others should be kept in detention, while the federal government should seek political solutions to coerce, if necessary, the sending countries to take back their criminal citizens. There are some instances, however, in which this simply won't happen, since the people finding themselves in this situation are almost always refugees fleeing communist or other despotic regimes hostile to the United States.

To Maintain a Pro-Immigrant Climate, We Need Lower Levels of Immigration

Given that coming to America is a privilege and not a right, we still should seek to create a climate welcoming to those immigrants we do admit. In other words, although we have the right, and the duty, to regulate immigration to the benefit of the American people, it is desirable as a policy matter that the climate we create for immigrants is as welcoming as possible. How may we accomplish this?

The United States admits between 700,000 and 900,000 legal immigrants per year, plus millions of long-term and short-term visitors (tourists, business travelers, students, workers, *et al.*). What's more, it is much easier for immigrants to become citizens in our country than in virtually any other – last year alone, almost 900,000 people began the year as foreigners and ended it as Americans.

The result is that today there are about thirty-one million foreign-born people in the United States, more than sixty percent of them non-citizens. This is the largest

wave of immigration in the nation's history, surpassing the period at the turn of the last century, and with no end in sight. This high level of immigration has a variety of economic, fiscal, social, demographic, and political costs and benefits, which are not appropriate subjects for this briefing. But it is appropriate to ask how this unprecedented flow of newcomers affects the treatment of immigrants and the nature of their welcome.

"[One option:]...a pro-immigrant policy of low immigration, one that admits fewer immigrants but extends a warmer welcome to those who are admitted."

Unfortunately, there is an inverse relationship between the level of immigration and the hospitality accorded newcomers. In other words, more immigration results in harsher treatment for the immigrants. We have seen this process over the past generation as immigration has steadily increased in tandem with restrictions on immigrants. Political responses to this increasing immigration began in 1994 with the overwhelming passage by Californians of Proposition 187, which sought to deny certain government services to illegal aliens, and continued through 1996, with the passage of laws aimed at terrorism, immigration, and welfare. Although all of these changes were within our power as a people to make and raise no legitimate constitutional concerns, some were unfortunately anti-immigrant, such as the sweeping welfare eligibility bans for legal immigrants or the retroactivity of the expanded definition of deportable offenses. Even the many elements of those laws which were positive were made necessary by high immigration, such as expedited exclusion or the rules making immigrant sponsorship agreements legally enforceable.

This contradiction is not merely a function of ethnic animus or fear of the other, though I have no doubt they play a role. Even in the absence of our darker impulses, mass immigration necessitates more restrictive treatment of immigrants. For instance, the presence of a large and continually increasing number of poor people forces us to set priorities regarding social spending, whereas a small number of immigrants, even if they made relatively heavy use of welfare, would not force such choices. Also, the rapid population growth driven mainly by high immigration fuels the growth in government regulation of all aspects of life, whereas lower population density necessitates less government regulation of society. More immigration also means more immigrant criminals, whatever the general crime rate among immigrants, and this requires more restrictive rules governing non-citizen criminals, whereas a lower level of immigration would not give rise to the need for such special rules.

Therefore, we cannot have pro-immigrant policy of high immigration, however much many on the left seek it. What we have now is an anti-immigrant policy of high immigration, crafted mainly by the libertarian wing of the Republican Party, and especially by Spencer Abraham, formerly a senator and now Secretary of Energy.

There are two other policy options. One is an anti-immigrant policy of low immigration. There are people who actually support this, but their number is small and their political impact is infinitesimal. The other option is a pro-immigrant policy of low immigration, one that admits fewer immigrants but extends a warmer welcome to those who are admitted. This is the only way in the real world to cultivate a pro-immigrant policy that would defuse many of the civil rights concerns, valid or not, surrounding our treatment of non-citizens. •