Center for Immigration Studies

Memorandum

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Securing the Blessings of Liberty
Congress Should Consider Expanding Grounds for Exclusion and Deportation to Include Radical Beliefs

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Congress has recently debated the extension of expiring provisions of the USA PATRIOT Act. Though none of those measures directly involve immigration, this occasion provides a good time to consider security-related immigration issues.

America has excluded or ejected aliens from colonial times until the present. The reasons have ranged from their poverty to their radical political beliefs. This *Memorandum* briefly reviews the main U.S. laws barring entry to, or causing removal of, certain aliens on grounds related to national security. Next, it identifies several areas of concern that pose a threat to the United States but fall outside the present grounds for exclusion and deportation.

This *Memorandum* finds:

- Security-related immigration laws have become overly focused on terrorists and terrorism, as well as on a fairly narrow set of actions. Broader grounds for exclusion should be considered.
- Included in such a broadening of the grounds for exclusion might be advocacy of or sympathy for jihad, the imposition of shariah law on the United States, etc.
- Likewise, U.S. officials might weigh a visa applicant's participation in "death to America" rallies, issuance of a fatwa against a Westerner's exercise of free speech, or other manifestations of holding a radical ideology or an extremist worldview in making visa determinations.
- In-depth examination of visa applicants' beliefs and attitudes toward Western democracy and liberty could be part of the screening process.
- Having a worldview that might be legal if held by an American, but may well lead to dangerous manifestations, such as so-called "honor killings," could be considered grounds for inadmissibility of aliens.
- One option might limit foreign advocates of such dangerous ideologies to controlled, short-term visas, but not long-term visas or permanent residence.

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Introduction

Emma Lazarus mythology notwithstanding, America has always made provisions to keep out those foreigners who might burden or threaten this nation or its society in certain ways or whose presence would otherwise disserve the national interest. I have covered two such grounds for exclusion and removal at length in previous CIS *Backgrounders*, one on "public charge" doctrine[1] and another on ideological exclusion.[2] This *Memorandum* builds upon that base.

Section 212 of the Immigration and Nationality Act lists grounds for excluding aliens. Section 237 of the INA contains similar grounds for removal. For example, the United States declines admission to or may deport aliens because of their mental deficiency, physical illness, drug abuse, criminal record, drug trafficking or money laundering, terrorist group membership or support of terrorism, likelihood of becoming a public charge, unlawful presence, or misrepresentation of a material fact about their immigration application.

The right of the United States to exercise such powers springs inherently from her national sovereignty.[3] Naturally, any sovereign possesses the inherent right of self-preservation. It also owes a duty to those individuals subject to its jurisdiction — its citizens — a solemn duty to protect them in their persons and their property, preserve the public safety, and ensure law and order in pursuit of keeping the peace of that society. People owing allegiance to another sovereign may be accorded the privilege of entering a given sovereign state, but on the host state's terms. Certainly, the host state may refuse an alien entry or revoke at its will the privilege of an alien's residency. That principle constitutes the basis for exclusion and removal policies. This rests on the well-established principle of sovereignty, along with its corollaries of preserving the state, protecting its people, fending off enemies, and ensuring the state's security.

Exclusion and Removal Laws

Congress early on enacted immigration laws related to national security. This began with the Alien and Sedition Acts in 1798, as well as the Alien Enemies Act. These laws sprung up in response to exigencies connected with revolutionary France and its aggression toward our young nation. The Alien and Sedition Acts were soon repealed. However the Alien Enemies Act remains in force (found in title 50 of the U.S. Code). In case of declared war or "any invasion or predatory incursion" the president may seize and deport aliens not naturalized in the United States and native to the belligerent nation.

Following foreign-born anarchists' 1886 Haymarket Square bombing and the assassination of President James McKinley in 1901, security laws directed at keeping out foreign anarchists were adopted. The 1940 Alien Registration Act arose from pre-World War II threats. The 1950 Internal Security Act barred entry to alien subversives. The McCarran-Walter Act, or Immigration and Nationality Act (INA), furthered the exclusion and deportation of foreign radicals, particularly communists, at the crest of the Cold War. Liberals sought to weaken these ideologically focused provisions throughout the 1970s and 1980s, both in the legislature and the courts. The 1990 Immigration Act culminated liberals' efforts, practically striking ideological exclusion from the books. This law reduced the number of security-related exclusion and removal grounds significantly. Further, it shifted the emphasis from an alien's political beliefs to his actions. The 1990 Act expressly made terrorism a ground for exclusion.

The pendulum began to swing toward national security once again with the Antiterrorism and Effective Death Penalty Act (AEDPA) in 1996. This came after the 1993 World Trade Center and 1995 Oklahoma City bombings. Title IV of this law enhanced removal and exclusion of alien terrorists, primarily through additions and clarifications about the aliens and by procedural tightening. However, the focus remained on membership in or representation of a terrorist organization (Section 411) or engaging in terrorist activities (Section 413).[4] The 1996 Illegal Immigration Reform and Immigrant Responsibility Act further modified, usually relaxing, several of the AEDPA's immigration-related provisions.

Following the September 11, 2001, foreign terrorist attacks in New York and Washington, Congress enacted the USA PATRIOT Act. Its immigration provisions expanded the grounds for terrorism-related exclusion and the reach toward such activities and groups. The REAL ID Act of 2005 further broadened the INA's definitions of "terrorist organization" and "engage in terrorist activity." In particular, recruiting members and raising funds for terrorist groups (providing "material support" as being "engage[d] in terrorist activity") subject an alien to exclusion or removal from the United States.[5] The INA's definition of "engage in terrorist activity" (INA Sec. 212(a)(3)(B)) includes inciting someone to commit a terrorist activity.[6] Known associates of a terrorist organization are deemed inadmissible under the INA if they also intend "while in the United States to engage solely, principally, or incidentally in activities that could endanger the welfare, safety, or security of the United States" (INA Sec. 212(a)(3)(F)).

The statute makes an exception to barring aliens from the United States on account of their political beliefs. INA Sec. 212(a)(3)(C)(iii), exclusion grounds for foreign policy interests, says, "An alien, not described in clause (ii) [a foreign official], shall not be excludable or subject to restrictions or conditions on entry into the United States under clause (i) because of the alien's past, current, or expected beliefs, statements, or associations, if such beliefs, statements, or associations would be lawful within the United States, unless the Secretary of State personally determines that the alien's admission would compromise a compelling United States foreign policy interest."

Thus, security-related U.S. immigration laws now employ inadmissibility standards that involve an alien's activities, as opposed to beliefs. The majority of an alien's actions that may keep him out of the United States relate to terrorism.

New Circumstances, New Approaches

Certain circumstances now pose a threat to the survival of the United States, and they do not fall under the present grounds for barring radical foreigners. In light of those circumstances, U.S. policymakers should consider adopting new grounds for exclusion and removal of certain aliens.

In short, Congress should consider reintroducing a distinction in immigration law that makes inadmissible those aliens whose core beliefs dictate the destruction of the United States or the imposition of radical or otherwise unacceptable practices, standards, or other measures on this society. The fate of future generations of Americans' liberty and independence rests upon whether this generation closes such immigration loopholes.

For example, some foreign and immigrant advocates seek to impose shariah law, a strict, totalitarian, Islam-based code, on Western society. Others view it as proper, acceptable, and even desirable to make so-called "honor killings" part of daily life in the United States and other Western nations. Still others seek to establish a caliphate, or Islamic political regime, upon Western countries including the United States.

Psychiatrist Stephen N. Xenakis wrote, "Radical jihadism is an ideology — and can be embraced by the psychiatrically sane and insane alike."[7] However, other aliens hold a belief system, a worldview, that may not rise to the level of a political ideology, but equally justifies denial of entry, residence, or citizenship in the United States of America. Such political or social beliefs, as distinct from purely religious Muslim views, deserve serious, considered response. They have been referred to as Islamism, radical jihadism, and Islamofascism.

While membership in Al Qaeda or another Islamist organization certainly should make an alien inadmissible, the nature of the latest threat to America's existence as a preserve of freedom is much greater. No terrorist watch list or database could ever be complete, and consular officials are likely to err, as in the case of Umar Farouk Abdulmutallab.[8] Much less likely is it that intelligence or law enforcement officials will ever compile an exhaustive list of those whose worldview harbors the strong, illiberal, antidemocratic beliefs and attitudes likely to result in oppressive, antidemocratic practices becoming more common in American society.

To amend our immigration laws in such a way that would protect the American Constitution and our liberties, several new steps may be necessary. One reform might correlate advocacy of or sympathy for radical politics by any alien as grounds for inadmissibility. For instance, the Obama administration gave a visitor visa to Tariq Ramadan, a Swiss citizen and well-known advocate of a muscular Islam in the West. Ramadan had been denied a U.S. visa to join the Notre Dame faculty because of a variety of important factors. In question was his financial support of a group funding Hamas, his grandfather's Islamic radicalism in founding the Muslim Brotherhood,[9] his contacts with Al Qaeda, and his soft-spoken but extreme views regarding Islam in Western society.[10] Radicals, such as Imam Said Jaziri, issuing fatwas calling for the death of a Danish cartoonist who drew Mohammed or leading "death to America" rallies should be deemed inadmissible, whether they belong to a designated terrorist group or not. Individuals advocating jihad against America should not be afforded access to the very country they wish to see destroyed.

This and other measures would better distinguish between what those vested in this nation (i.e., U.S. citizens) and what those lacking allegiance to this nation may believe or express within our borders. In this regard, perhaps the exception at INA Sec. 212(a)(3)(C)(iii) for views that would be lawful for an American to hold should be tightened. Membership in a given society should extend more latitude in political, religious, or social discourse than that afforded nonmembers or guests. A step like this would help raise the value of citizenship.

Another reform might be to require in-depth questioning of visa applicants about their beliefs and attitudes toward democracy and liberty in modern, civilized society. For instance, do they support jihad against the United States? Exactly what do they mean by that? Are terrorism, subjugation, and expropriation

of private property acceptable toward non-Muslims? How do they view Christians and Jews, women and minorities, gays and secularists? In the civil sphere, is the U.S. Constitution superior to shariah law? Do they believe First Amendment freedoms are a two-way street in our society? Does shariah have any role in American society and, if so, what is that role? Is a caliphate desirable in the modern world? What do they see as their role in insinuating shariah, instating a caliphate, or mounting jihad? What is the proper role of religion in the United States? Do they accept that religious officials hold no official role in civil government here insofar as their religious office is concerned, apart from the chaplaincy? What do they think about "honor killings" or female genital mutilation, and do they consider such brutal conduct as having a place in civilized society?

Our immigration screening policy and practice should be made sufficient to identify and block the entry of individuals such as Faleh Almaleki. This Iraqi immigrant is charged with the 2009 murder of his 20-year-old daughter, Noor, in Arizona. Almaleki "was upset by his daughter's Westernization, furious that she had chosen to marry the man she loved and not the one her parents had selected, outraged that she dressed in blue jeans, wore makeup and lived not only in America, but as an American."[11] Aliens seeking access to the United States, on any kind of visa, must know that harboring the kinds of uncivilized beliefs that lead to such uncivilized behavior will keep them out of this nation. This amounts to protecting the public safety and taking a stand for liberty.

One option would be to differentiate between those foreigners with extreme beliefs seeking a very short-term visitor's visa and those requesting longer-term temporary visas or permanent residency visas. For instance, admitting notable foreign speakers on strict conditions, such as the five-day visa Ramadan received to make public appearances, would satisfy the argument American advocates of the Left have made that U.S. citizens were deprived of hearing their views. However, such radical mouthpieces could be denied lengthy terms of stay, such as to take a faculty position at a U.S. university.

Conclusion

As Congress debates renewal of certain provisions of the USA PATRIOT Act, this offers a good time to reflect on broader concerns. While fighting terrorism is clearly important, our immigration laws have become overly focused on terrorism per se and on conduct that ties individuals to terrorism or terrorist groups. It may be time to consider adding new grounds of inadmissibility that will keep out extremists, their sympathizers, advocates, and most likely adherents.

End Notes

[1] James R. Edwards, Jr., "Public Charge Doctrine: A Fundamental Principle of American Immigration Policy," Center for Immigration Studies *Backgrounder*, May 2001, http://www.cis.org/articles/2001/back701.pdf.

[2] James R. Edwards, Jr., "Keeping Extremists Out: The History of Ideological Exclusion and the Need for Its Revival," Center for Immigration Studies *Backgrounder*, September 2005, http://www.cis.org/articles/2005/back1005.pdf.

[3] For example, a unanimous U.S. Supreme Court in *Chae Chin Ping v. United States* (130 U.S. 581; 1889): "That the government of the United States, through the action of the legislative department, can exclude aliens from its territory is a proposition which we do not think open to controversy. Jurisdiction over its own territory to that extent is an incident of every independent nation. It is a part of its independence. If it could not exclude aliens it would be to that extent subject to the control of another power."

[4] See Charles Doyle, "Antiterrorism and Effective Death Penalty Act of 1996: A Summary," Congressional Research Service report 96-499A, June 3, 1996, http://www.fas.org/irp/crs/96-499.htm.

[5] Michael John Garcia and Ruth Ellen Wasem, "Immigration: Terrorist Grounds for Exclusion and Removal of Aliens," Congressional Research Service report RL32564, January 12, 2010, http://www.fas.org/sgp/crs/homesec/RL32564.pdf.

[6] Also, see INA Sec. 237(a)(4)(B) pertaining to removal on terrorism-related grounds.

[7] Stephen N. Xenakis, "Radical Jihadism Is Not a Mental Disorder," *The Washington Post*, December 5, 2010, http://www.washingtonpost.com/wp-dyn/content/article/2010/12/10/AR2010121002498.html.

[8] See Garcia and Wasem, pp. 19-20. Abdulmutallab, who allegedly tried to explode a bomb on Northwest Flight 253 on December 25, 2009, was a Nigerian national studying in London who obtained a U.S. tourist visa.

[9] For information about the Muslim Brotherhood's radicalism see, for example, Frank J. Gaffney, Jr., "The Muslim Brotherhood Is the Enemy," *Washington Times*, February 1, 2011, http://www.washingtontimes.com/news/2011/jan/31/the-muslim-brotherhood-is-the-enemy/.

[10] See Kirk Semple, "At Last Allowed, Muslim Scholar Visits," *The New York Times*, April 7, 2010; Stephen Kinzer, "Muslim Scholar Loses U.S. Visa as Query Is Raised," *The New York Times*, August 26, 2004.

[11] Abigail R. Esman, "Honor killings spur my icky alliance with the right," *Washington Times*, February 10, 2011, http://www.washingtontimes.com/news/2011/feb/9/honor-killings-spur-my-icky-alliance-with-the-righ/.