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The Alien Terrorist Removal Court and Other National Security Measures You May Have Never Heard Of: The Need for Comprehensive National Security Reform

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THE ALIEN TERRORIST REMOVAL COURT AND OTHER NATIONAL SECURITY MEASURES YOU MAY HAVE NEVER HEARD OF: THE NEED FOR COMPREHENSIVE NATIONAL SECURITY REFORM

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I. INTRODUCTION

Ahmed Khalfan Ghailani is famous for several reasons, not the least of which is his status as the very first Guantanamo detainee tried

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in a civilian court.[1] Charged with 280 counts of conspiracy and murder, Mr. Ghailani was convicted of one count of conspiracy to destroy government buildings and property, and was acquitted of four counts of conspiracy, including conspiracy to kill Americans and to use weapons of mass destruction.[2] His trial occurred in late November 2010, even though Mr. Ghailani had been apprehended initially back in 2004 when the CIA captured him in Pakistan.[3] His case was significantly delayed in part because he was held in Guantanamo Bay.[4]

Mr. Ghailani committed terrorist crimes in connection with the 1998 bombings of the United States' embassies in Nairobi, Kenya, and Dar es Salaam, Tanzania.[5] However, it took the U.S. six years to apprehend him and another five years to compile a case against him.[6] This prolonged delay in progressing the case to trial moved some family members of those who were killed in the embassy attacks to state that they believe the evidence would have been stronger, and thus Mr. Ghailani would have been convicted of more criminal charges, had he been brought to trial when he was captured in 2004, or soon thereafter.[7]

In the context of trial expediency, Mr. Ghailani is one of the lucky ones. Established in 2002 and having held nearly 800 detainees since its founding, Guantanamo Bay has still only seen one of its inmates proceed with his case to trial—Mr. Ghailani.[8] This bottleneck has resulted in numerous implications, not the least of which includes political, legal, and ethical ramifications that have reverberated throughout U.S. national security policy for nearly a decade.

This delay in bringing Guantanamo Bay prisoners to trial is also symptomatic of an overarching illness that has plagued U.S. national security law. Specifically, Mr. Ghailani's six-year delay between apprehension and trial serves as a prime example of the detrimental legal processing backlog resulting from the implementation of numerous policies and laws since September 11. In the years following America's greatest tragedy, the country's leaders have strived to

1. Benjamin Weiser, *Detainee Acquitted on Most Counts in '98 Bombings*, N.Y. TIMES, Nov. 17, 2010, http://www.nytimes.com/2010/11/18/nyregion/18ghailani.html.

2. *Id.*

3. Basil Katz, *U.S. Jury Clears Ghailani of Terrorism Charges*, REUTERS, Nov. 17, 2010, http://www.reuters.com/article/2010/11/17/us-security-guantanamo-ghailani-idUSTRE6AG62O20101117.

4. Wil Longbottom, *Terror Trial of Guantanamo Bay Detainee Charged with Buying Explosives for U.S. Embassy Bombings Begins in New York*, DAILY MAIL, Oct. 6, 2010, http://www.dailymail.co.uk/news/article-1318153/First-civilian-terror-trial-Guantanamo-Bay-detainee-begins-New-York.html.

5. Carol J. Williams & Geraldine Baum, *U.S. Civilian Court Acquits Ex-Guantanamo Detainee of All Major Terrorism Charges*, L.A. TIMES (Nov. 18, 2010).

6. *Id.*

7. Weiser, *supra* note 1.

8. Carol J. Williams & Geraldine Baum, *U.S. Civilian Court Acquits Ex-Guantanamo Detainee of All Major Terrorism Charges*, L.A. TIMES (Nov. 18, 2010).

safeguard the borders and people of the U.S., and their efforts have generally resulted in success. However, the crazy quilt of laws and policies that have been enacted since 2001 have also exerted a *harmful* effect on U.S. national security, most notably with regards to immigration processing and border security.

In light of the decade that has passed since 2001, cooler heads have prevailed. Advancements in technology and information-seeking have paved the way to prune unnecessary laws that are archaic, redundant, in many instances contradictory, and which merely frustrate the real policy behind these laws: safeguarding the U.S. and its citizens. To assist in this pruning, this Article presents a comprehensive plan for national security reform, specifically involving immigration, with an emphasis on the agency tasked with its implementation—the Department of Homeland Security. In light of this goal, Section II provides a brief background into the U.S.'s current approach to immigration policy, including a history of the Department of Homeland Security and a highlight of relevant national security legislation. Section III outlines the successes and failures of the current policies with respect to preventing, stopping, and quickly responding to terrorist attacks. Section IV elucidates areas within national security policy capable of augmentation, alteration, or repudiation altogether. Finally, Section V offers additional recommendations to further improve our nation's security.

The tragedies of September 11, and to a large extent other events that have occurred in its wake, may have justified an overhaul of the country's national security policies. However, the actual practices and results these changes have yielded demonstrate that even the best conceived ideas are at times ill-suited for practical implementation. In revamping the country's laws, the U.S. will achieve its goals of increasing the security of the nation's borders and ensuring a safe homeland for all.

II. OPENING THE DOOR TO CLOSE THE BORDERS—SEPTEMBER 11TH, ITS AFTERMATH AND THE "RISE" OF NATIONAL SECURITY

As avowed in support of domestic and foreign policies alike, as touted in Supreme Court decisions, and as repeatedly stated by political candidates and representatives, "September 11 changed everything."[9] With each passing year, it may be supposed that this statement and the justification it offers holds less and less power but in actuality, the opposite is true: the justification has been so engrained in the American consciousness that the words need hardly be spoken for the sentiment to be conveyed. In order to fully appreciate how the terrorist events of September 11 gave birth to a network of

9. Joseph Margulies, *Terrorizing Academia*, 60 J. LEGAL EDUC. 433, 433 (2011).

national security policy never before seen in this country, a brief background of the origin of homeland security is presented.

A. *History of the Department of Homeland Security*

For the purposes of this Article, homeland security and national security should be recognized as synonymous terms and defined as:

> A collective term encompassing both national defense and foreign relations of the United States. Specifically, the condition provided by: a. a military or defense advantage over any foreign nation or group of nations; b. a favorable foreign relations position; or c. a defense posture capable of successfully resisting hostile or destructive action from within or without, overt or covert.[10]

The terrorist attacks on September 11 spurred the creation of the Department of Homeland Security ("DHS" or "the Department").[11] Over time it may be difficult to imagine the country's national security policies without this Department, but prior to the establishment of DHS, more than forty agencies attended to the nation's security.[12] Interestingly, there were two bills proposed to enact an agency similar to DHS before the September 11 attacks, but both of these initiatives failed in Congress.[13] Apparently, the terrorist attacks proved to be the catalyst necessary to bring DHS out of congressional committee and manifest it into one of the largest federal agencies in the country.

A mere eleven days following the attacks, then President Bush proposed the creation of an Office of Homeland Security in the White House, and he proposed that this Office would oversee and coordinate a comprehensive security strategy to be implemented on a nationwide level.[14] The plan would encompass the nation's response policies to future attacks and methods to prevent these attacks as well.[15] This announcement was soon followed by Executive Order 13228, issued on October 8, 2001, through which the President created the Office of Homeland Security within the Executive Office of the President, as well as the Homeland Security Council.[16] Although as President, Bush could propose legislation, Congress is the only body that can sponsor and pass legislation to create a new cabinet-level de-

10. DEPARTMENT OF DEFENSE DICTIONARY OF MILITARY AND ASSOCIATED TERMS, JOINT PUBL'N 1-02 at 236 (2010, as amended through Aug. 15, 2011).

11. Taryn M. Byrne & Gary L. Tomasulo, *Executive Power, National Security & Federal Employee Collective Bargaining Rights: The New Department of Homeland Security*, 21 HOFSTRA LAB. & EMP. L.J. 293, 305 (2003).

12. *See* ELIZABETH C. BORJA, DEP'T OF HOMELAND SEC. HISTORY OFFICE, BRIEF DOCUMENTARY HISTORY OF THE DEPARTMENT OF HOMELAND SECURITY 2001-2008, at 3 (2008).

13. *Id.*

14. *Id.* at 4.

15. *Id.*

16. *Id.*

partment.[17] Therefore, on June 18, 2002, President Bush submitted his proposal to Congress for them to sponsor the Homeland Security Act of 2002.[18] After markup and debate, the Homeland Security Act was signed into law on November 25, 2002.[19]

Since 2002, the Department has grown to encompass numerous agencies and sub-agencies.[20] Just a portion of the entities that are under the purview of DHS's authority include United States Citizenship and Immigration Services, U.S. Customs and Border Protection, U.S. Immigration and Customs Enforcement, the Transportation Security Administration, the United States Coast Guard, the United States Secret Service, and the Federal Emergency Management Agency.

It should also be highlighted that although the crux of the nation's security policies either have their origination, implementation, or execution in the Department, almost all national security efforts depend on the inter-departmental cooperation of many government branches. Therefore, the scope of this Article will also address national security efforts expended by the U.S. Department of Justice and other agencies in order to offer the most comprehensive plan for reform possible.

B. *USA Patriot Act*

Just as the Department of Homeland Security itself was created through an act of Congress, the vast majority of national security policies also originate, by constitutional mandate, from the legislative body of the U.S. government. The USA Patriot Act is probably the most well-known and controversial national security legislation enacted in this country.

Following the September 11 attacks, President Bush declared the country to be in a state of emergency on September 14, 2001.[21] The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act, much more commonly referred to as the USA Patriot Act, is a compilation of amendments to existing statues, along with a small number of new statutes, which were presented with the goal of preventing future terrorist at-

17. *Id.* at 6.

18. *Id.*

19. *Id.* at 7; *see also* Jacqueline Hagan, Brianna Castro & Nestor Rodriguez, *The Effects of U.S. Deportation Policies on Immigrant Families and Communities: Cross-Border Perspectives*, 88 N.C. L. REV. 1799, 1805 (2010).

20. U.S. Department of Homeland Security Organizational Chart, *available at* http://www.dhs.gov/xlibrary/assets/dhs-orgchart.pdf.

21. John W. Whitehead & Steven H. Aden, *Forfeiting "Enduring Freedom" for "Homeland Security": A Constitutional Analysis of the USA PATRIOT Act and the Justice Department's Anti-Terrorism Initiatives*, 51 AM. U. L. REV. 1081, 1086 (2002); Tara Mythri Raghavan, *In Fear of Cyberterrorism: An Analysis of the Congressional Response*, 2003 U. ILL. J.L. TECH. & POL'Y 297, 304.

tacks.[22] The House version of the bill was introduced on October 2, 2001 and passed on October 24, 2001, and the bill passed the Senate on October 25, 2001.[23] President Bush signed the bill into law on October 26, 2001.[24]

The USA Patriot Act, which spans more than 100 pages, featured several measures aimed at giving federal officials greater authority and more tools to combat terrorism.[25] One of the main subject areas addressed by the Act includes increasing the federal government's ability to track and intercept communications to further law enforcement and foreign intelligence gathering efforts.[26] Additionally, the Act provides the Secretary of the Treasury with increased regulatory powers that prevent the use of U.S. financial institutions for the benefit of foreign money laundering purposes.[27] The Act also addresses border security, reinforces aspects of immigration law in order to ensure that foreign terrorists are detained and removed from our borders, and proactively works to prevent their initial admissions into the U.S.[28] The USA Patriot Act also creates new crimes, new penalties, and new procedural policies for use against domestic and international terrorists.[29]

C. *Immigration Laws*

In recent years, the vast majority of those prosecuted as terrorists were foreign nationals (i.e., not citizens or permanent residents of the United States). Due to this significant pattern, following terrorist attacks or threats, our nation's immigration laws are scrutinized and often revolutionized in order to address faults that have been discovered or to prevent future catastrophes, even by instituting policies that go beyond the scope of the problem at hand. For instance, after September 11, the U.S. completely shut down the refugee resettlement program for months, with the result that millions of refugees faced continued persecution in their home countries.[30] Additionally, in the

22. Ronald B. Standler, *A Brief History of the USA PATRIOT Act of 2001*, RBS0.COM, 3 (2008), http://www.rbs0.com/patriot.pdf; *see also* Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (Oct. 26, 2001) (codified at various code sections).

23. *Id.*

24. USA PATRIOT Act, 115 Stat. 272.

25. *Id.*

26. CHARLES DOYLE, CONG. RESEARCH SERV., ORDER NO. RS21203, THE USA PATRIOT ACT: A SKETCH, at CRS-1 (2002).

27. Emily Christine Kendall, *The U.S. Guards the Guards Themselves: The International Law Implications of the Swiss Bank and IRS Controversy*, 2 TRADE L. & DEVELOP. 329, 336 (2010).

28. USA PATRIOT Act, 115 Stat. 272.

29. DOYLE, *supra* note 26, at CRS-1.

30. *See, e.g.*, Eleanor Acer, *Refuge in an Insecure Time: Seeking Asylum in the Post-9/11 United States*, 28 FORDHAM INT'L L.J. 1361, 1364–65 (2005); Alice Farmer,

aftermath of the attacks there was a resounding clamor to amend the Citizenship Clause of the Fourteenth Amendment to ensure children of foreigners who are illegally present in the U.S. are not accorded birthright citizenship.[31] Even before September 11, U.S. immigration law contained many provisions aimed at preventing terrorists from entering the country, as well as provided for the swift removal of terrorists once they were apprehended within our borders.[32] Although there is a plethora of acts that relate to immigration and terrorism, the two that are most relevant to the present discussion are presented below.

1. Immigration and Nationality Act of 1990

The most comprehensive immigration legislation is the Immigration and Nationality Act of 1990 ("INA").[33] Included in this Act are provisions for both the deportation and inadmissibility of terrorists.[34] Specifically, one of the six broad reasons for inadmissibility is "security and related grounds," also referred to as national security grounds.[35] This section of the law qualifies as inadmissible to the U.S., in general, any alien who seeks to enter the U.S. to engage in any activity in violation of U.S. law relating to espionage, any other unlawful activity, or any activity a purpose of which is the opposition to or the overthrow of the U.S. government.[36] The INA goes on to define terrorist activities, what it means to engage in terrorist activities, and what entities will be considered terrorist organizations.[37] If an alien is found to be inadmissible under these (or any other) provisions of the INA, the alien will be prohibited from entering the U.S.[38]

In addition to the prohibition of entry into the U.S., the INA also forbids an alien who falls within any of the terrorism-related grounds of inadmissibility from seeking either asylum or withholding of removal, two immigration benefits that can typically be sought by an alien in removal proceedings. Essentially, the asylum and withholding of removal provisions prevent or delay the alien's removal from the U.S. in broader ways that are not relevant to the policies in this discus-

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Non-Refoulment and Jus Cogens: Limiting Anti-Terror Measures that Threaten Refugee Protection, 23 GEO. IMMIGR. L.J. 1, 14 (2008).

31. Raquel Aldana, *They Are America*, N.Y. TIMES, Feb. 18, 2007, http://www.nytimes.com/2007/02/18/opinion/18sun1.html.

32. Kristen McCane & Doris Meissner, Immigration and the United States: Recession Affects Flows, Prospects for Reform, Migration Policy Institute (Jan. 2010).

33. Immigration and Nationality Act, 8 U.S.C.A § 1182(a)(3) (2005 & Supp. 2011).

34. *Id.* § 1182(a)(3)(B)(i)(1). Deportation is the process by which the U.S. government removes aliens already in the U.S. whereas inadmissibility refers to aliens who are prohibited from entering the U.S. at ports of entry.

35. *Id.* § 1182(a)(3).

36. *Id.* § 1182(a)(3)(B)(i)-(ii).

37. *Id.* § 1182(a)(3)(B)(iii)–(iv), (vi).

38. *Id.* § 1182(a).

sion.[39] What is important is that the U.S. forecloses *almost* every door to immigration relief to those foreign nationals who are associated with terrorist groups or who have committed terrorist acts. The one exception to this rule is detailed further in Section II(c)(3), *infra.*

2. Antiterrorism and Effective Death Penalty Act and Illegal Immigration Reform and Immigrant Responsibility Act

The Antiterrorism and Effective Death Penalty Act ("AEDPA") and the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA") are often discussed in conjunction with homeland security because both acts were passed in 1996 and are largely viewed as inextricably linked to each other. Both of these laws significantly changed immigration laws by enlarging the scope of the mandatory detention of aliens who were found to have committed crimes, as well as those found to be inadmissible or deportable on terrorism grounds.[40]

Additionally, specifically passed in response to the Oklahoma City bombing in 1996, the AEDPA also expanded the definition of terrorism to include representatives and non-active members of terrorist organizations (in addition to those who had engaged in or were likely to engage in terrorist activity).[41] Moreover, the AEDPA mandated the denial of essentially every form of immigration relief otherwise available to aliens in removal proceedings,[42] and the IIRIRA restricted the ability of aliens to appeal deportation.[43]

3. Convention Against Torture

As previously stated, the majority of immigration relief is not available to aliens found to be inadmissible or deportable because of terrorism-related grounds. However, there is one very important exception to this general rule, which is found in the Convention Against Torture ("CAT").[44] Pursuant to CAT, the provisions of which are codified in U.S. immigration law, the U.S. is wholly prohibited

39. *Id.* § 1182(b)(1); § 1231(b)(3).

40. Annette De La Torre, *Is Ze an American or Foreigner? Male or Female? Ze's Trapped*, 17 CARDOZO J.L. & GENDER 389, 396 (2011).

41. Andrea A. Kochan, *The Antitierrorism and Effective Death Penalty Act of 1996: Habeas Corpus Reform* 52 J. URB. & CONTEMP. L. 399 (2011).

42. Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2254 (2006).

43. Jacqueline Hagan, Brianna Castro & Nestor Rodriguez, *The Effects of U.S. Deportation Policies on Immigrant Families and Communities: Cross-Border Perspectives*, 88 N.C. L. REV. 1799, 1804 (2010).

44. Please note that the full name of the treaty is the United Nations Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment, but is almost universally abbreviated to the U.N. Convention Against Torture. United Nations Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment, Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85 (entered into force June 26, 1987).

from deporting any individual to a country where there are substantial grounds to believe that the individual would be in danger of being tortured.[45] Under CAT, the definition of torture is:

> [Any] act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.[46]

As described in greater detail below, CAT often operates to achieve exactly what the nation's other homeland security measures are striving to prevent by keeping proven terrorists in the country even while they continue to pose significant dangers to the U.S. and its citizens. Essentially, if a terrorist is found within America's borders, the U.S. government or immigration officials are prohibited, by law, from deporting the terrorist if the person is able to demonstrate that deportation to his home country would result in a substantial likelihood of torture.[47]

The above-described legislation represents merely a small sampling of the numerous laws that the U.S. adopted to protect the homeland and enhance national security. These laws, while drafted, debated, passed, and executed with great care, have not yielded all of the results contemplated and predicted as rationalization for their passage. While the U.S. has achieved a portion of its goals, the mass of national security laws has also substantially frustrated a number of other important immigration policies, including reunification of families, facilitating employment-based immigration, and encouraging economic development through international tourism and foreign investment.[48] Considering the many benefits posed to the U.S. through these policies, it is critical to re-evaluate the aforementioned national security measures in order to promote these national interests.

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45. United Nations Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment, art. 3 (1), Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85 (entered into force June 26, 1987) [hereinafter UNCAT]; *see also* Khouzam v. Ashcroft, 361 F.3d 161, 169 (2d Cir. 2004).

46. UNCAT, *supra* note 39, at art. 1.

47. UNCAT, *supra* note 39, at art. 3.

48. Mark Metcalf, *Built to Fail: America's Immigration Courts are Failing America*, Center for Immigration Studies (Aug. 2011).

III. HOMELAND SECURITIES AND INSECURITIES: THE SUCCESSES AND FAILURES OF CURRENT U.S. POLICIES.

The DHS's directive is to "lead the unified national effort to secure the country."[49] Therefore, it is only appropriate to evaluate the necessity of the laws and policies enacted for this purpose by the success rate they have enjoyed with regard to stopping and preventing terrorist attacks against the U.S., its citizens, and its interests. With this examination, the need for re-evaluating our policies and instituting more effective security measures will be made clear.

A. *No Flys and Deportations: The Triumphs in the War on Terror*

Given its nature as a non-occurrence, it is extraordinarily difficult to report exact numbers of the proposed terrorist plots prevented as a result of the U.S.'s national security policies. Additionally, the little extant data that is available regarding these events is protected by the highest state secrecy laws, which is another reason for the dearth of information concerning apprehended terrorists and thwarted plots. However, there are a few statistics that can be looked to as strong proof that our homeland security policies are extremely effective.

One such indicator of the efficacy of our national security policies is the amount of names added to the No Fly List as a result of more in-depth and extensive investigations of possible terrorist connections and/or activities.[50] The No Fly List is a list that was created and is maintained by the Terrorist Screening Center.[51] The purpose of the list is to prevent suspected terrorists from boarding U.S. airplanes or airplanes that are flying to a U.S. port of entry.[52] The list accomplishes this goal by offering airport security a tool to check the names of passengers and whether they have been deemed a security threat and not allowed in the U.S.[53]

On September 11, 2001, the FBI had a list of sixteen people that the Bureau decided "presented a specific known or suspected threat to [the nation's] aviation."[54] In just two months after the attacks, this list

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49. U.S. DEP'T OF HOMELAND SEC., ONE TEAM, ONE MISSION, SECURING OUR HOMELAND, U.S. DEPT. OF HOMELAND SECURITY STRATEGIC PLAN, FISCAL YEARS 2008-2013, at 2 (2008), *available at* http://www.dhs.gov/xlibrary/assets/DHS_StratPlan_FINAL_spread.pdf.

50. Dan Froomkin, *Little Girl Who Challenged First Lady Is Right: Obama is Deporting More Immigrants Than Ever*, HUFFINGTON POST, May 20, 2010, http://www.huffingtonpost.com/2010/05/20/little-girl-who-challenge_n_583432.html.

51. Transp. Sec. Intelligence Serv., TSA Watch Lists, (Dec. 2002), *available at* http://www.aclunc.org/cases/landmark_cases/asset_upload_file371_3549.pdf.

52. Linda L. Lane, *The Discoverability of Sensitive Security Information In Aviation Litigation*, 71 J. AIR L. & COM. 427, 428 (2006).

53. *Id.*

54. Memorandum from the Acting Associate Under Secretary of Transp. Sec. Intelligence to the Associate Under Secretary of Sec. Regulation and Policy (Oct. 16, 2002), *available at* http://www.aclunc.org/cases/landmark_cases/asset_upload_file371_3549.pdf.

grew by more than 400 names.[55] Again, state secrecy policies prevent the full publication of this list, but estimates put the number of individuals on the No Fly List at approximately 30,000 to 40,000.[56] One explanation for this dramatic increase in numbers is that the more extensive terrorist investigation and screening efforts promulgated under national security laws have resulted in the discovery and apprehension of thousands of individuals who pose potential threats to the U.S. and its interests.

In addition to the increased number of people prohibited from entering the U.S. due to their possible terrorist activities, the success of DHS can also be found in the large amount of deportations resulting from the increase in our national security efforts. In 2001, 189,026 people were deported from the U.S.; in 2006, the number grew to 280,974; and most recently in 2010, to 400,000.[57] Although these numbers are not specific to the aliens who were deported on national security grounds, that class is of course represented in this figure, which indicates that the U.S. has greatly augmented its efforts to investigate, identify, and remove those individuals who threaten America's security.

B. *Plots, Visitors, and False Positives: Our Losses in the War on Terror*

Given this positive track record in the U.S.'s labors to prevent future terrorist attacks, it may be argued that the status quo should be maintained in order to preserve these efforts already shown to be successful. However, resting on our laurels is neither easy nor even recommended. As much as the U.S. may laud its victories in the war on terror, it cannot ignore that its record of victories is also marred by failures, both in the form of missed terrorists and their plots, as well as mistakenly detaining and deporting individuals who pose no threat to the U.S. whatsoever, thus violating these people's rights and weakening American security.

First, the U.S. established an incredibly (and understandably) high goal for itself in ensuring that no terrorist attacks ever occur on American soil again.[58] One of the measures utilized to ensure the safety of American soil and the safety of those who live on it is to enhance the security of the borders. This enhanced security was accomplished

55. *Id.*

56. Lane, *supra* note 52, at 428.

57. U.S. DEP'T OF HOMELAND SEC. OFFICE OF IMMIGRATION STATISTICS, 2010 YEARBOOK OF IMMIGRATION STATISTICS 95 (2008); Froomkin, *supra* note 50.

58. President Bush specifically articulated the goals of the U.S. war on terror when he stated that this "[war] will not end until every terrorist group of global reach has been found, stopped and defeated." President George W. Bush, Address to a Joint Session of Congress and the American People (Sept. 20, 2001) (transcript available at http://georgewbush-whitehouse.archives.gov/news/releases/2001/09/print/20010920-8.html).

through the aforementioned immigration laws. One of the main aspects of immigration law is regulating who is eligible to obtain a visa to enter the U.S. There are many types of visas that allow foreign nationals to the enter U.S. temporarily for tourism purposes, to attend American schools, and to be employed on a temporary basis for American companies.[59] Once a foreign national is issued a visa, he is entitled to visit and reside in the U.S. untroubled by the U.S. government and immigration officials, as long as that person maintains the condition of his status, such as working at the place of employment listed on the visa application or attending the school that was approved for the educational studies.

One of the ways in which the U.S. has been less than successful is through its mistaken issuance of visas to terrorists. Notably, one of the most celebrated successes of U.S. national security policies, when scrutinized more closely, is actually one of its most blatant failures. The apprehension of the "Christmas Day Bomber" is a prime example of the U.S. approving a visa application for a foreign national who posed a significant threat to the country. On December 25, 2009, Nigerian citizen Umar Farouk Abdulmutallab attempted to detonate a homemade bomb, which he smuggled onto Northwest Airlines flight 253, while the plane was over Detroit.[60] When the device failed to detonate correctly, Abdulmutallab was subdued by the other passengers on the plane and taken to the authorities when the flight made its emergency landing.[61] Once in custody, Abdulmutallab told the police that he had been directed by al Qaeda to make this attack and that he had obtained the explosive device while in Yemen.[62] Abdulmutallab is currently in U.S. custody awaiting trial and preparing his own defense.[63]

Thankfully, Abulmutallab's homemade explosive malfunctioned, and he was unable to harm the innocent people on the plane. However, he shouldn't have been on the plane at all, but was allowed to board because he was in possession of a valid U.S. visitor visa.[64] Abdulmutallab exemplifies one of the main deficiencies in U.S. national security policy that is exceptionally difficult for the U.S. to address. The only guaranteed method to ensure that terrorists are not

59. 8 CFR 214.2(b),(j),(f).

60. Ashley C. Pope, *After Guantanamo: Legal Rights of Foreign Detainees Held in the United States in the 'War on Terror,'* 34 FORDHAM INT'L L.J. 504, 533–34 (2011).

61. Harry Siegel & Carol E. Lee, *'High Explosive' – U.S. Charges Abdulmutallab*, POLITICO (Dec. 25, 2009), http://www.politico.com/news/stories/1209/30973.html.

62. *Id.*

63. Associated Press, *Michigan: Man Accused in Bomb Plot is Allowed to Be His Own Lawyer*, N.Y. TIMES, Sept. 13, 2010, http://www.nytimes.com/2010/09/14/us/14brfs-MANACCUSEDIN_BRF.html.

64. Michael Leahy & Spencer S. Hsu, *Nigerian Arrested in Failed Jet Attack*, WASH. POST, Dec. 26, 2009, at A1; *see also* Representative Bennie G. Thompson, *A Legislative Prescription for Confronting 21st-Century Risks to the Homeland*, 47 HARV. J. ON LEGIS. 277, 320 (2010).

given visas is to not award visas to any one at all. Of course, this is not an option; and therefore, the U.S. is faced with the considerable difficulty of processing millions of visa applications and identifying and separating the few applicants who are dangerous from the vast majority of those who are not.

Along with the mistakenly issued visas, the U.S. has also made several grave errors with regard to people it holds in detention and those who it deports due to a mistaken finding that the person engaged in terrorist activity. To be fair, by nature of the word "suspect" there is an understandable degree of unknown alliance and activities with these people, and the vast majority of those affected by U.S. policies *have* engaged in some sort of activity that gives rise to a justifiable suspicion. However, similar to the way an innocent man is set free after exoneration, these once suspected individuals should be allowed to return to their normal lives once it is proven that they pose no threat to the U.S. Unfortunately, it is often difficult, bordering on impossible, to return to the status quo ante, with the result that these people's lives are significantly and detrimentally impacted by U.S.'s suspicions of terrorism. Hundreds of aliens who have been detained or deported after September 11 have subsequently been "cleared of wrongdoing," and the Government stated that "none [were] linked to the terrorist attacks on the World Trade Center and the Pentagon."[65]

It is to be expected that a number of mistakes will be made during the course of hundreds of investigations into terrorist activities, and incoming foreign nationals must understand that they will be subject to background checks and other investigations. The problem arises in the U.S.'s inability to effectively rectify its mistakes and remove barriers for these foreign nationals to return to the U.S. once they have been found to pose no threats to national security. A clear representation of this inability is evident in the false positives inherent in the No Fly List processing. A false positive occurs when a passenger who is not on the No Fly List is nonetheless prevented from air travel because the passenger has a name that matches or is otherwise similar to a name on the list.[66] When false positives occur, it is tremendously difficult to have the listing corrected to ensure the legitimate traveler can board planes because the only recourse available is a lengthy application through DHS's Traveler Redress Inquiry Program ("TRIP") which can take months and even years to complete.[67] These false

65. Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice, 215 F. Supp. 2d 94, 98 n.4 (D.D.C. 2002); *see also* Stephen J. Ellmann, *Racial Profiling and Terrorism*, 46 N.Y.L. SCH. L. REV. 675, 725–26 (2002–2003).

66. *Quebec Man Changes Name to Dodge Relentless Airport Screening*, CBCNEWS, Sept. 11, 2008, http://www.cbc.ca/news/canada/montreal/story/2008/09/11/nofly-name.html.

67. *DHS Traveler Redress Inquiry Program (DHS TRRIP)*, U.S. DEP'T OF HOMELAND SEC., http://www.dhs.gov/files/programs/gc_1169676919316.shtm (last updated Feb. 10, 2011).

positives happened so frequently to one Canadian businessman that he officially changed his name in a drastic effort to stop delays in traveling abilities.[68]

Not only has the No Fly List erroneously prevented numerous foreign nationals from traveling, but this system has adversely affected many Americans' lives as well. For instance, Senator Ted Kennedy was repeatedly delayed at airports because a name similar to his was on the No Fly List, and the Senator had to resort to appealing directly to the DHS Secretary in order to have his name removed from the list.[69] Along with Senator Kennedy, names of other members of Congress, U.S. veterans, and several children under the age of five have also resulted in false positives and travel difficulties.[70]

Along with the issues of inconvenience concerning this wrongful prohibition from travel, individuals who are mistakenly detained as terrorists face much more exceptional dangers including torture, starvation, and loss of life and limb. Numerous news stories and articles alerted the American public to the atrocities committed at Abu Ghraib, Guantanamo Bay, and other terrorist detention centers; the orchestrators of these atrocities are now being brought to justice. However, the increased measures to ensure that only proven terrorists are detained against their will has not kept the innocent out of harm's way. Reports revealing the innocence of several Guantanamo detainees have been continuously aired in major media, culminating in the recent release of the official investigation documents from the U.S. government workers who examined and investigated the detainees.[71] As these files disclosed, many innocent people were erroneously housed in Guantanamo Bay for years, even after it was confirmed that they had no ties to terrorist groups, including a farm laborer who was imprisoned because his name was similar to a Taliban suspect, an 89-year-old man suffering from dementia, and twenty children under the age of eighteen.[72]

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68. *Quebec Man Changes Name to Dodge Relentless Airport Screening*, CBCNEWS, Sept. 11, 2008, http://www.cbc.ca/news/canada/montreal/story/2008/09/11/nofly-name.html.

69. Thomas C. Greene, *Database Snafu Puts US Senator on Terror Watch List*, THE REGISTER (Aug. 19, 2004), http://www.theregister.co.uk/2004/08/19/senator_on_terror_watch/.

70. *Kennedy Has Company on Airline Watch List*, CNN.COM (Aug. 20, 2004), http://www.cnn.com/2004/ALLPOLITICS/08/20/lewis.watchlist/; Associated Press, *'No-fly' List Delays Marine's Iraq Homecoming*, MSNBC.COM (Apr. 12, 2006), http://www.msnbc.msn.com/id/12284855/ns/world_news-mideast_n_africa/t/no-fly-list-delays-marines-iraq-homecoming/; Leslie Miller, *'No-Fly List' Grounds Some Unusual Young Suspects*, BOSTON.COM (Aug. 16, 2005), http://www.boston.com/news/nation/articles/2005/08/16/no_fly_list_grounds_some_unusual_young_suspects/?comments=all.

71. Tim Shipman & Daniel Martin, *How Did Senile Man of 89 and 14-Year-Old Boy Kidnapped by the Taliban End Up at Guantanamo?*, THE DAILY MAIL, Apr. 26, 2011, *available at* http://www.dailymail.co.uk/news/article-1380629/Among-inmates-Guantanamo-Bay-A-senile-man-89-14-year-old-boy-kidnapped-Taliban.html.

72. *Id.*

By identifying how the U.S. has kept its promise to safeguard our country's borders, and by pointing out the areas that hold room for improvement, the U.S. has undertaken the important process of reevaluating and adapting its policies to more appropriately address the security needs of the country.

IV. TERRORISTS x DEPORTATION x INADMISSIBILITY = THE MULTIPLICITOUS NATURE OF IMMIGRATION HOMELAND SECURITY LAWS

The root of the problem of U.S. national security is in the duplicitous nature of its policies. The tremendously complicated network of laws, the complex and enormously extensive investigation procedures, and the lengthy judicial process created to address suspected terrorists actually compromises the security of the country rather than enhances it. Just within the context of the immigration aspect of national security, multiple agencies have been established that perform many of the same functions, including conducting background checks, reviewing documents, researching past histories, and confirming biographic details, resulting in a backup of millions of cases and years-long delays in immigration processing.

With so many cooks in the kitchen and an increased public pressure to streamline these procedures, cases slip through the cracks and people who should not be allowed into the U.S., such as the aforementioned terrorists who were in possession of valid U.S. visas, are given travel documents and allowed to cross our borders. Under the sense of urgency that blanketed the country in the immediate wake of September 11, the U.S. Government was pushed to "do something, even if it's wrong," with the result that the country has spread its national security efforts too thin. The following Section will provide a brief description of a portion of the extraneous measures our country employs to promote national safety, offers an explanation as to why the particular policy or institution should be abolished, and discusses the positive and negative impacts resulting from these alternatives.

A prime example of an unnecessarily redundant aspect of our national security policy is evidenced in one the most basic foundations of this area of law: the U.S. government's definition of terrorism. As one of the premier experts in terrorism related immigration, Professor and U.S. Attorney Nicholas J. Perry explained, federal law contains twenty-two different definitions or descriptions for terrorism and related terms.[73] One may think the ever-vacillating definition of this critical term would worry the conscience of the legal community as these mutable meanings could strongly imply terrorism law is unconstitutionally void for vagueness. According to Professor Perry, several

73. Nicholas J. Perry, *The Numerous Federal Legal Definitions of Terrorism: The Problem of Too Many Grails*, 30 J. LEGIS. 249, 249 (2003).

reasons for this lack of an accepted definition have been posited.[74] For instance, some scholars on the topic have argued that the nature of terrorism is continuously changing.[75] Others attribute the multiple definitions to the reckless use of the term in the media.[76]

How could these numerous definitions of terrorism compromise national security? The promoters of retaining all of these definitions would point to the "better to have too much than not enough" justification. But that reasoning fails to stand in the face of the reality of immigration processing. These multiple definitions are undoubtedly a contributing factor to the enormous amount of confusion, mistakes, and errors in immigration processing.

In order to make immigration laws easier to navigate and thus reduce the potential for oversight, blunders, and delays, it would be prudent to at least condense the number of terrorism definitions found in federal law. In doing so, the country would develop a single, comprehensive definition of terrorism which will allow it to better focus its efforts in the war on terror upon only those who truly mean the country harm. Of course, it can be argued that each definition of terrorism is specifically suited for that section of the law to which it pertains. Because different crimes necessarily involve different elements, maybe it does in fact make sense to have multiple definitions of terrorism. For example, diverse definitions of terrorism are found in the Foreign Intelligence Surveillance Act,[77] which includes definitions of "animal enterprise terrorism,"[78] "international terrorism,"[79] and "domestic terrorism,"[80] as well as in multiple sections of immigration law.[81] It need hardly be stated that "animal enterprises" and immigration situations establish completely different contexts for terrorism and terrorist activities. Therefore, it is possible that the multiple definitions arose simply out of necessity. However, given the extant waste in national security policies, even though this consideration is duly noted, it would be in the best interests of the country to at least try to come to a single, unified definition of terrorism. If the definition does not work, the U.S. can always reinstate the previous multitude of definitions. But the simplification of this term, a simplification that would strike at the very core of national security policy, is certainly worth a try in the interest of overhauling these policies.

Perhaps the most unnecessary aspect of immigration-specific national security law would have an intimate familiarity with all of these definitions for terrorism—if this institution were ever utilized. The

74. *Id.* at 252.
75. *Id.*
76. *Id.*
77. 50 U.S.C. § 1801(c) (2006).
78. 18 U.S.C. § 43(a)(1) (2006).
79. 18 U.S.C. § 2331(1) (2006).
80. 18 U.S.C. § 2331(5)(c).
81. 8 U.S.C. § 1182(a)(3)(B)(iii)(II)–(III), (a)(3)(B)(iv) (2006).

Alien Terrorist Removal Court ("ATRC") was created in 1996 to give the U.S. a specific court to be used only for expedited deportation proceedings.[82] By Statute, the ATRC has been given the jurisdiction to adjudicate deportation proceedings "in any case in which the Attorney General has classified information that an alien is an alien terrorist."[83] The U.S. Constitution requires that the Government guarantee a certain level of due process to aliens who are in deportation proceedings. For example, the Government must provide the alien adequate notice of deportation proceedings, an opportunity to be heard, and the Government must disclose its reasons for seeking deportation.[84] These due process requirements often result in placing two national security goals directly at odds with each other. In these situations, the government has to choose between allowing the alien's continued stay in the U.S., which threatens national security, or to disclose its reasons for initiating the alien's deportation, a disclosure which in itself could endanger the country.[85] It has been argued that the ATRC was created to allow the Government to avoid making this difficult choice, since the ATRC empowers the U.S. Attorney General to deport an alien without disclosing the reasons for deportation or the evidence in its support, as long as the judge finds that "the continued presence of the alien in the U.S. would likely cause serious and irreparable harm to the national security."[86]

However, in the fifteen years since its establishment, the ATRC and its judges have never heard a case.[87] It is unclear exactly why this court has existed for so long without ever having a case brought before it. But what is perfectly clear is that the U.S.'s national security is in no way being served by this hitherto useless institution. Notably, this court is composed of five presiding judges, each with their own clerk, and they all collect federal salaries.[88] Therefore, in disbanding the ATRC, not only will the U.S. Government rid itself of a wholly extraneous institution that does not contribute to the nation's safety, but it will also save money during the economic crisis. The only downside to this disbanding would be purely political, but is a significant hurdle nonetheless. Essentially, there are most likely not many congressmen or senators who are willing to posit disbanding the

82. Antiterrorism and Effective Death Penalty Act of 1996, 8 U.S.C. §§ 1531–37 (2006).

83. 8 U.S.C. § 1533(a)(1) (2006).

84. *Ex rel Knauff.*

85. Michael Scaperanda, *Are We That Far Gone?: Due Process and Secret Deportation Proceedings*, 7 STAN. L. & POL'Y REV. 23, 29 (1996); *see also* John Dorsett Niles, *Assessing the Constitutionality of the Alien Terrorist Removal Court*, 57 DUKE L.J. 1833, 1835 (2008).

86. Scaperanda, *supra* note 69, at 29; *see also* Niles, *supra* note 69, at 1835; 8 U.S.C. § 1534(e)(3)(D)(iii) (2006).

87. Daphne Barak-Erez & Matthew C. Waxman, *Secret Evidence and the Due Process of Terrorist Detentions*, 48 COLUM. J. TRANSNAT'L L. 3, 42 (2009).

88. *Id.*

ATRC for fear of being labeled the "terrorist sympathizer" or otherwise taking a soft position on national security. Of course, this knee-jerk reaction would be ridiculous and unwarranted, but upsetting the public's mindset regarding national security policy is a very real disadvantage for the U.S. government that should be taken into consideration when deciding whether to do away with the ATRC. However, in balancing the benefits that would flow from ending the ATRC against the shortcomings that could potentially arise from this decision, it would be worth the risk to end this institution that wastes money, manpower, and resources that could be put to much better use in other facets of homeland security.

Importantly, recent events seem to indicate that the U.S. has acknowledged that a portion of its national security laws have become superfluous and redundant, and it has taken steps to address these problems. For instance, DHS just announced that, effective April 28, 2011, the Agency is "eliminating redundant programs" by removing multiple countries from the special registration procedures under the National Security Entry-Exit Registration System ("NSEERS"), including Afghanistan, North Korea, Iran, Iraq, Jordan, United Arab Emirates, Saudi Arabia, and Syria.[89] NSEERS, also referred to as special registration, required nonimmigrant foreign nationals of certain countries to comply with elevated security procedures.[90] Specifically, those foreign nationals were required to report to a designated DHS office once they entered the U.S.; undergo fingerprinting, photographing, and an interview; report for follow-up interviews if asked; and register and depart the U.S. only through designated ports of departure.[91] NSEERS was established in June 2002 and since its implementation, tens of thousands of people have been subject to its requirements.[92] However, as DHS openly states in the Federal Register, in the past six years the Agency has implemented several new systems that capture the same information previously received through special registration procedures and stated that the Agency determined that, in light of these other measures, special registration does not provide any increase in security.[93]

The repudiation of NSEERS is a landmark change in national security policy and is very encouraging in light of the goal to streamline these policies. With this move, DHS demonstrated that it is willing to perform the very difficult task of policing its own policies and objectively identifying errors in its own procedures. DHS should be praised

89. Removing Designated Countries From the National Security Entry-Exit Registration System (NSEERS), 76 Fed. Reg. 23,830-31 (Apr. 28, 2011).

90. *Id.*

91. *See generally* 8 C.F.R § 264.1 (2010) (describing required actions for foreign nationals).

92. Removing Designated Countries From the National Security Entry-Exit Registration System (NSEERS), 76 Fed. Reg. 23,830-31 (Apr. 28, 2011).

93. *Id.*

for eliminating NSEERS, and it is hoped that it will continue to restructure and truncate policies as necessary to best allocate resources within the Department.

In weighing the advantages and disadvantages that could arise from consolidating all terrorism definitions into one, as well as from disbanding the ATRC, it is clear that the benefits outweigh the detriments and that these measures should be implemented to help improve the body of national security policy. Although there is no guarantee that these alternatives will have their desired effects, the advantage of working with law and policy is its mutable nature and the ability to propose other options until the U.S. develops and implements the most successful homeland security strategies.

V. WOULD THE TERRORISTS REALLY WIN IF THE U.S. LOST NATIONAL SECURITY LAWS?

In addition to the extraneous aspects of national security law and policy that were discussed in the preceding Section, other critical changes are recommended that would prospectively improve homeland security to a significant degree. This Section outlines the suggested measures that can be taken to overhaul U.S. security policies and also explains the rationale in support of their implementation.

First, the U.S. should reconsider its position as a signatory to CAT. It is extremely counterintuitive for the U.S. to agree to withhold deportation of terrorists who are extraordinarily dangerous to the country. The U.S. agreed to do so because it joined in the international community's efforts to end torture around the world. However, this emphasis on ending torture is misplaced since the U.S. has already implemented measures of its own to aid victims of past and future persecution.[94] Instead, the U.S. should focus on how its role as a party to CAT frustrates its national goals of deporting terrorists at all costs. By repudiating its membership with CAT, the U.S. will reclaim its power to deport terrorist aliens instead of being forced to keep these dangerous individuals in the country. The disadvantage to this decision is that the U.S. will most likely be criticized by the other signatories to CAT. Nonetheless, the country's highest priority must be serving its own interests and the interests of its citizens. It is questionable how CAT serves the interests of the American people. Therefore, to ensure that U.S. national security is not compromised for the sake of international harmony, the country should consider ending its membership with CAT in order to empower the government to deport known terrorists out of the country and away from our citizens.

Second, it would greatly behoove the U.S. to reconsider one of the most open-door immigration policies it currently maintains: the Visa Waiver Program ("VWP"). Under the VWP, citizens of certain coun-

94. Immigration and Nationality Act, 8 U.S.C. § 1101(a)(42) (2006).

tries are able to travel to the U.S. on a temporary basis without a visa.[95] The Program was created to reduce unnecessary barriers to travel and stimulate the tourism industry between the U.S. and nations with whom the country had enjoyed friendly and positive relations.[96] Currently, thirty-six countries participate in the VWP including Australia, Belgium, France, and the United Kingdom.[97] Because the VWP allows for foreign citizens to visit the U.S. more easily, in the fiscal year 2008 more than seventeen million admissions took place under the Program.[98]

The reason why the U.S. should reconsider its VWP, or at the very least the countries who benefit from the program, is because of the rising number of terrorists who are able to enter the U.S. through one of the VWP countries. With the VWP, the U.S. is essentially placing a large portion of its national security in the hands of the thirty-six nations whose citizens are not subject to the same procedures necessary to obtain a visa to enter the U.S.[99] For instance, before the DHS discontinued the use of NSEERS, it would have been an option for a terrorist from Saudi Arabia to obtain citizenship from the United Kingdom and then be allowed into the U.S. under the VWP. It is almost like money laundering in the context of citizenship. Terrorists can obtain multiple passports and citizenship from numerous countries in order to utilize that nation's relationship with the U.S. to enter the country and threaten its national security. The U.S. does not and cannot control the citizenship policies of other countries, and it would be unwise for the country to rely on these nations to police its borders with the same care and scrutiny that the U.S. exercises. Considering these possible issues, it would be in the best interest of the U.S. to rethink its VWP in favor of equalizing visa procedures for all countries instead of placing a higher degree of trust in some countries over others.

Third, in the same vein as repudiating VWP, it is recommended that the U.S. also reconsider its open-border policies *vis-à-vis* Canadian citizens. Pursuant to the Immigration and Nationality Act, Canadian citizens are not required to have a U.S visa to visit the U.S. for a temporary stay.[100] Similar to the rationale in support of rethinking the VWP, this open policy for Canadian citizens potentially com-

95. 8 U.S.C § 1187(a) (2006).

96. *Visa Waiver Program (VWP)*, U.S. DEP'T OF STATE, http://travel.state.gov/visa/temp/without/without_1990.html#vwp (last visited Oct. 2, 2011).

97. *Id.*

98. RANDALL MONGER & MACREADIE BARR, DEP'T OF HOMELAND SEC., OFFICE OF IMMIGRATION STATISTICS, ANNUAL FLOW REPORT, NONIMMIGRANT ADMISSIONS TO THE UNITED STATES: 2008, at 7 tbl.9 (2009), *available at* http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_ni_fr_2008.pdf.

99. U.S. Department of State, "Visa Waiver Program (VWP)" *available at* http://travel.state.gov/visa/temp/without/without_1990.html.

100. 8 C.F.R. § 212.1(a) (2011).

promises U.S. national security. Notably, this policy has already almost proved disastrous for U.S. interests. Ahmed Ressam, also referred to as the "Millennium Bomber," arrived in the U.S. by a ferry from Canada, and was intercepted at the U.S. port of entry before he was able to detonate his explosives at the intended target Los Angeles International Airport.[101] Luckily, Mr. Ressam's terrorist efforts were thwarted, but it is not difficult to imagine a repeat of this episode that would not end so fortuitously. Therefore, the U.S. should consider treating Canada just as it treats other countries and institute similar visa procedures for its citizens.

Finally, U.S. national security could tremendously benefit from the repudiation of consular immunity. Every day at more than 150 U.S. State Department posts around the world, consular officers review, interview, and approve and deny visa applications. Apart from a rarely used exception, consular officers' decisions to approve or deny visa applications are not subject to judicial review, a doctrine that is referred to as consular absolutism.[102] Sixty years ago in *United States ex rel. Knauff v. Shaughnessy*, the Supreme Court established this doctrine, stating that "whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned."[103] The majority of courts have followed this doctrine of consular non-reviewability and created dicta in their wake, including the conviction that the consular officers' decisions are "beyond the jurisdiction of the court."[104] To be clear, some denied applications can be reviewed by the State Department, but these reviews are generally limited to legal questions and can only occur upon the request of the *consular officer*—a visa applicant has no right or ability to request this review.[105]

Consular absolutism is typically castigated by immigration attorneys whose clients' visa petitions have been approved but whose visas are subsequently denied without any possibility of recourse. However, in the context of national security, the flip side of the tarnished coin must be examined. It is widely known that a number of the September 11 terrorists entered the country with valid U.S. visas. These visas were most likely issued erroneously because of misrepresentations provided by the terrorists and not through any malicious actions on the part of the consular officer who approved the application. If consular absolu-

101. *See* Representative Bennie G. Thompson, *A Legislative Prescription for Confronting 21st-Century Risks to the Homeland*, 47 HARV. J. ON LEGIS. 277, 320 (2010). *See generally* Eric Lichtblau, *U.S. Airports to Tighten Over Terror Fears,* L.A. TIMES, Dec. 22, 1999, at 1.

102. United States *ex rel.* London v. Phelps, 22 F.2d 288, 290 n.4 (2d Cir. 1927).

103. United States *ex rel.* Knauff v. Shaughessy, 338 U.S. 537, 544 (1950); *see also* Donald S. Dobkin, *Challenging the Doctrine of Consular Nonreviewability in Immigration Cases*, 24 GEO. IMMIGR. L.J. 113, 114 (2010) (explaining problems with the doctrine).

104. United States *ex rel.* London v. Phelps, 22 F.2d 288, 290 n.4 (2d Cir. 1927).

105. James A.R. Nafziger, *Review of Visa Denials by Consular Officers*, 66 WASH. L. REV. 1, 22 (1991); *see also* Dobkin, *supra* note 82, at 114.

tism were abolished, then these terrorists' files could be reopened and the consular officer who interviewed them could be questioned on why he issued the visa. In doing so, U.S. immigration officers would be put on alert to specifically look for certain alibis and explanations for events that raise red flags and would be able to better understand and prepare counter actions for the terrorists' previously successful strategies for obtaining U.S. visas.

VI. PREPARING FOR THE FUTURE INSTEAD OF LOOKING TO THE PAST: ESTABLISHING GUIDING PRINCIPLES FOR NATIONAL SECURITY LAW

The analysis conducted above evidences that the overarching goal of the future of national security policy should be "slow and steady wins the race." As already conceded, immediate threats to U.S. security undoubtedly demand immediate action. Fortunately the U.S. has not experienced an immediate threat to its borders that equals September 11 in more than a decade. To ensure this positive record continues, it is incumbent upon DHS, as well as the other agencies and branches of government, to continuously review their laws and regulations in order to identify redundancies or gaps in our homeland security policies. With these consistent evaluations, the officials charged with promoting America's safety will better direct manpower and resources, with the result that U.S. national security will continue to improve.

As explained, the U.S. has made significant strides in its pursuit of enhancing national security in such a way as to benefit both U.S. citizens and the foreign nationals who seek to enter the U.S. for positive reasons. The balancing act between international comity and national safety will forever fluctuate, thereby requiring the U.S. to constantly self-reflect on its policies. By ending its participation in CAT, disbanding the ATRC, rethinking the scope of the VWP, and abolishing consular absolutism, the U.S. will be making substantial changes to its immigration laws that could potentially yield substantial benefits. In doing so, the country will move ever closer to its goal of securing the safety of the land of the free and the home of the brave.