How Racial Profiling & Other Unnecessary Post-9/11 Anti-Immigrant Measures Have Exacerbated Long-Standing Discrimination Against Latino Immigrants & Citizens

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In the Aftermath of September 11: Defending Civil Liberties in the Nation's Capital

The Treatment of Immigrants:

*141 HOW RACIAL PROFILING AND OTHER UNNECESSARY POST-9/11 ANTI-IMMIGRANT MEASURES HAVE EXACERBATED LONG-STANDING DISCRIMINATION AGAINST LATINO CITIZENS AND IMMIGRANTS

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Latinos are uniting with other immigrant communities and people of color in being extremely concerned about unnecessary post-9/11 actions that have led to civil liberties and civil rights violations. [FN1][FN1] Although the Latino voting power has presumably increased, infringements of Latinos' and Latinas' civil rights appear to be on the rise. This is because many of the measures taken in the name of fighting terrorism have not been effective at finding terrorists, but have resulted in civil liberties and civil rights violations. Lessening of civil liberties and due process protections disproportionately affects Latino communities, who are less likely to have access to counsel and other legal and economic safeguards that other Americans enjoy. [FN2][FN2] Furthermore, Latino communities are about forty per cent immigrant, and it is immigrants who are being wrongfully targeted since 9/11. [FN3][FN3] The wrongful targeting of immigrants and people of color who may “look like” immigrants has led to serious infringements of Latino civil rights since 9/11. This article and the author's November 2003 Senate Judiciary Committee testimony*142 document and analyze some of the most egregious infringements of Latino immigrants' rights in the post-9/11 climate.

The first section of this article focuses on the exacerbation of racial profiling caused by certain discriminatory post-9/11 measures; the next section documents ten ways in which Latino immigrants' rights have been unfairly infringed by unnecessary measures taken in the name of national security; and the final section sets forth conclusions and recommendations for corrective measures that the Congress and the Administration must take in order to protect homeland security and restore fundamental civil rights.

Increasing Use of Racial Profiling by Law Enforcement Officials

Arab and Muslim communities have been wrongfully targeted and their civil liberties limited since 9/11. [FN4][FN4] Moreover, the use of racial profiling, i.e., profiling based on race, ethnicity, or national origin or religion, through Special Registration and similar post-9/11 policies--none of which has made America safer [FN5][FN5]--has exacerbated the long-standing problem of racial profiling of Latinos. [FN6][FN6]

*143 In June 2003, the Department of Justice (DOJ) issued “Guidance Regarding the Use of Race by Federal Law Enforcement Agencies” (“Guidance”), [FN7][FN7] as requested by President Bush, prohibiting racial profiling
by federal law enforcement agencies. However, the DOJ left open the possibility for exceptions to the new federal rules against racial profiling “for law enforcement activities or other efforts to defend and safeguard against threats to national security or the integrity of the nation's borders.” [FN8]“Guidance” leaves too much discretion as to whether and how race and national origin profiling could be used. The exceptions to the racial profiling prohibition could easily swallow the rule.

The DOJ and the DHS have not yet clarified that the use of racial profiling—e.g., profiling based on race, ethnicity or national origin—should also be prohibited in national security measures, at the borders, and in matters involving immigration. This directly impacts Latino communities, forty percent of whom are immigrants. The long history of unconstitutional racial profiling at the Southwestern border has been exacerbated and allowed to spread by the federal government's failure to clarify that racial profiling was not only wrong then (pre-9/11), but is also wrong now (post-9/11). [FN9][FN9]

While MALDEF is very concerned about national security, it is of equal concern that these civil rights and civil liberties violations have not made America any safer. Americans need to be united in the war against terrorism. Tactics such as racial profiling lead to alienating the very communities who may have valuable information about possible criminals and terrorists. [FN10][FN10]

Post-9/11 Policies Have Negatively Affected Latino Immigrants' Rights

While most of the reports that have been issued regarding civil rights and due process violations, such as the Office of Inspector General (OIG) of the Department of Justice Report criticizing the treatment of 762 immigrants held since 9/11, [FN11]have focused on Arabs, Muslims, and Sikhs, Latinos have also been negatively affected by post-9/11 strategies and tactics.

Below is a short list of ten tactics or policies that have adversely affected Latinos:

1. Since 9/11, a number of Latino workers have been rounded up through aggressive enforcement measures such as “Operation Tarmac.” The premise that airport workers pose security risks was doubtful to begin with, and shown to be false after no terrorists were identified through this operation. [FN12]If immigrants, including Legal Permanent Residents (LPRs), pose too much risk because of their immigration status to work in airport food services, it seems ironic that they are serving so honorably in the war in Iraq.

2. Former Secretary of Homeland Security Tom Ridge made a statement to the Hispanic press that undocumented persons pose no per se national security risk, yet immigration enforcement and unconstitutional profiling of Latino immigrants in the name of national security has become the new status quo.

3. A NOW Legal Defense Fund survey demonstrated that fear of deportation was the most significant reason that battered immigrant women are much less likely to report abuse. This reality has been exacerbated by state and local police threatening to enforce civil immigration laws, in the name of fighting the war against terrorism.

4. Because community policing is a valuable tool for public safety, numerous police departments across the country have made public statements against becoming involved in civil immigration enforcement. Yet former Attorney General Ashcroft and the 111 House co-sponsors of the Clear Law Enforcement for Criminal Alien Removal Act of 2003 (CLEAR Act) continue to misstate that state and local police have “inherent authority” to enforce federal civil immigration laws. Such misstatements have already resulted in serious and widespread local police abuse of the fundamental civil rights of Latino immigrants and citizens alike.
5. Abuses of the 9/11 detainees happened in the context of immigration detention, setting questionable precedents. Immigration detention conditions, which were already abysmal, are unlikely to improve. For children and adults, many of whom may have valid immigration claims and are Latino, detention conditions in general have been substandard. Immigrants are mixed with criminals, and cases of physical abuse and substandard facilities have been common. [FN19]

6. Latino immigrants’ due process rights are limited by the precedent set through the mistreatment of the 9/11 detainees. Access to counsel, the right to know the charges, the right to bail and the right to a defense have all been put into question for immigrants. [FN20] These are all fundamental*146 rights that belong to every person, under the Bill of Rights, and yet they are being taken away from immigrants. [FN21]

7. Human rights violations at the southwestern border have increased. Thousands of people have been detained and deported, but no terrorist suspects have been identified. Violence and deaths in the desert have increased since 9/11. [FN22]

8. Despite an increase in interior enforcement agents to 5,500 officers, the Bureau of Customs and Border Patrol Chief Bonner recently reversed the long-standing policy that the Border Patrol should not conduct interior enforcement. Chief Bonner’s decision overrides an August 8, 2003 memo, issued by San Diego Border Patrol Chief William Veal, which reaffirmed a “long standing agency policy” preventing Border Patrol agents from conducting sweeps near residential areas and places of employment. Chief Veal had also restated that interior enforcement should be conducted by the properly authorized federal immigration agency, not the Border Patrol. This older directive was based on legal decisions supporting community safety and just access to social services. Its reversal has caused fear and violence in faith-based service centers and on border city streets, and it is very likely to lead to racial profiling. [FN23]

9. Despite the Administration’s promises and the express requirements of Section 458 of the Homeland Security Act, [FN24] backlogs in immigration services have been increasing, in part because the new Bureau of Citizenship and Immigration Services (BCIS) is doing enforcement work. [FN25] The former Immigration and Naturalization Service bureaucracy was so mismanaged that it will take years to re-organize the new BCIS to ensure accuracy and efficiency. This leaves many Latino immigrants out of status through no fault of their own. [FN26]

10. Family- and employer-sponsored visas from Mexico have current backlogs of ten years. Citizens and LPRs who want to reunite their families either have to wait up to ten years, or they risk undocumented immigration. Employers who hire hard-working Latino immigrants, upon whom the U.S. economy depends, must wait years and years for the current “legal” procedures to be completed. Due to this irony, millions of hard-working immigrants and close family members are in an undocumented status. [FN27] The backlogs must be reduced, and the only way to do so is through comprehensive immigration reform, which has been delayed and perhaps even derailed by the post-9/11 anti-immigrant backlash.

Conclusions and Recommendations

MALDEF urges Congress and the Administration to restore immigrants’ civil rights, so that we can identify the real terrorists and preserve American democracy. The anti-immigrant backlash since 9/11 has severely and negatively affected Latino communities in ways that Congress and the Administration must recognize and correct.

The Department of Justice (DOJ) and the Department of Homeland Security (DHS) must immediately enact policies prohibiting racial profiling under any circumstances. Current policies are undermining our collective national security and violating peoples' fundamental constitutional rights to freedom from discrimination. It is up to
the DOJ and the DHS to enact anti-racial profiling policies, before further damage is done.

For its part, Congress should enact the 2003 End Racial Profiling Act (ERPA), in order to clarify that racial profiling is prohibited for federal as well as state and local police, under any circumstances, including post-9/11 national security, border and immigration issues. Under ERPA and under current constitutional law, there are certain limited exceptions when race, ethnicity or national origin may be used to identify suspects or groups of suspects. In those cases, race, etc. may be only one of many factors used to identify suspects. Moreover, race, ethnicity or national origin may not, in any circumstances, be used before reasonable suspicion based on individualized behavior has developed. [FN28][FN28]

First responders, such as state and local police, should concentrate on protecting against crime and terrorism, while maintaining community policing practices, recognizing America as a nation of immigrants. Congress and the DHS should re-clarify that civil immigration enforcement is under the exclusive jurisdiction of the DHS.

Congress and the Administration must restore all of the due process rights put in jeopardy through the policies practiced during the detention of the “September 11th Detainees.” At the very least, the recommendations of the Office of Inspector General of the Department of Justice must be enacted, and Congress must ensure continued oversight of immigration detention conditions and all immigration proceedings.

Effective access to the protections of the rights of battered immigrant women, asylum seekers, and persons entitled to the new T-visa must be effectively ensured and guaranteed by the DOJ and the DHS.

Congressional oversight of the DHS immigration bureaus (the Bureau of Immigration and Customs Enforcement, the Bureau of Customs and Border Patrol, and the Bureau of Citizenship and Immigration Services) must include input from immigrants and civil rights groups, and work to effectively ensure against abuses of immigrants' rights.

MALDEF supports the rule of law and is not against enforcement of federal immigration laws. But Congress and the Administration have acknowledged that the system is broken; therefore, comprehensive immigration reform is needed before any massive enforcement effort would not lead to serious due process violations and permanent damage to democracy and the American economy.

The same reasons for immigration reform that existed prior to 9/11 are even more important today. America is a nation of immigrants, and our economy is dependent upon immigrant labor. The former Immigration and Naturalization Service and former immigration policy reflected a system that was badly broken and out of touch with reality. Comprehensive immigration reform must be a priority for Congress and the Administration.

[FNa1]. Mexican American Legal Defense and Educational Fund (MALDEF) Legislative Attorney, J.D., American University, Washington College of Law. Ms. Culliton has been awarded Ford Foundation and Fulbright scholarships to support her work in expanding human rights law to address discrimination in the Americas. She has been practicing human rights and civil rights law, in the U.S. and abroad, for ten years. Many thanks to the UDC/DCSL L. Rev. staff for organizing this symposium and bringing immigrants' rights to the forefront of the debate I am also very grateful for the thoughtful review of Marisa Demko, former Director of MALDEF's D.C. Office, for the inspiration of many friends in the immigrants' rights movement, especially those who participated in the 2004 Immigrant Worker Freedom Rides, and for the support of my own immigrant family and community.

[FN1]. The substance of this law review article was submitted as written testimony by the author on behalf of the Mexican American Legal Defense and Educational Fund (MALDEF) at the November 18, 2003, Senate Judiciary Committee Hearing on “America After 9/11: Freedom Preserved or Freedom Lost?” (Transcripts of the hearing and all testimony submitted on file with the author.) MALDEF is a national, non-profit, non-partisan organization that
has been defending the civil rights of Latinos for thirty-five years. The author is pleased to present this article as part of the UDC-DCSL Law Review symposium In the Aftermath of September 11: Defending Civil Liberties in the Nation's Capital.


[FN5] See, e.g., Bill Dedman, Fighting Terror/Words of Caution Airport Security: Memo Warns Against Use of Profiling as a Defense, Boston Globe, Oct. 12, 2001, at A27 (discussing the Assessing Behaviors memorandum by senior U.S. law enforcement officials, circulated to American law enforcement agents worldwide, suggesting that over-reliance on profiles “is not as useful as looking for behavior that might precede another attack”); David A. Harris, Racial Profiling Revisited: ‘Just Common Sense’ in the Fight Against Terror?, Criminal Justice 40-41 (Summer 2002). See also Muzaffar A. Chishti, Doris Meissner, Demetrios G. Papademetriou, Jay Peterzelli, Michael J. Wishnie, & Stephen W. Yale-Loehr, Migration Policy Institute, America’s Challenge: Domestic Security, Civil Liberties and National Unity after September 11 (June 2003), available at www.migrationpolicy.org; Fiona Doherty, Kenneth Hurwitz, Elisa Massimino, Michael McClintock, Raj Purohit, Cory Smith, Rebecca Thornton & Stephen Vladeck, Lawyers Committee for Human Rights, A year of Loss: Reexamining Civil Liberties Since September 11 24 (2002) (“Vincent Cannistraro, former head of counterterrorism at the CIA, believes the FBI’s decision to round up 5,000 Arabs for questioning is ‘counter-productive…. It is a false lead. It may be intuitive to stereotype people, but profiling is too crude to be effective. I can’t think of any examples where profiling has caught a terrorist.’”), available at http://www.watchingjustice.org/pub/doc_160/loss.report.pdf.


[FN8] Id.

[FN9] See Wrong Then, Wrong Now, supra note 3.

[FN10] More than eighty anti-immigrant legislative and administrative policies have been implemented since 9/11, and they have not been effective in finding terrorists. Donald Kerwin, Counterterrorism and Immigrants’ Rights Two Years Later, 80 Interpreter Releases (Oct. 13, 2003) (“Many immigration policy changes adopted in the guise of
national security since 9/11 did not make us safer and, in fact, may even undermine our national security.”); Roberto Suro, Who are “We” Now? The Collateral Damage to Immigration, in The War on Our Freedoms: Civil Liberties in an Age of Terrorism (Richard C. Leone & Greg Anrig, Jr., ed., 2003) (discussing lack of effectiveness); Mark Fazlollah, Agency Inflates Terrorism Charges, Duluth News Tribune, May 16, 2003, available at http://www.duluthsuperior.com/ml/duluthtribune/5874897.htm; See also Chishti et al., America’s Challenge, supra note 5 (also discussing counter-effectiveness of post-9/11 measures targeting immigrants).


[FN14]. MALDEF Civil Rights Concerns, supra note 6.


[FN22]. Niko Price, U.S.-Mexico Border Patrol Failing, Crackdown along U.S.-Mexico Border to Prevent Terrorists from Entering the U.S. Hasn't Stopped Even One Known Militant Since Sept. 11, available at http://stevequayle.com/News.alert/03_Global/031103.border.porous.html (“A crackdown along the U.S.-Mexico border designed to prevent terrorists from entering the United States hasn't stopped even one known militant from slipping into America since Sept. 11, an Associated Press investigation has found. Instead, the tightening net of Border Patrol and Immigration agents has slowed trade, snarled traffic and cost American taxpayers millions, perhaps billions, while hundreds of migrants have died trying to evade the growing army of border authorities.”).


[FN26]. See, e.g., Padilla v. Ridge, Complaint No. M-03-126 (S.D. Tex. 2003) (class action of persons with valid immigration rights approved by the judiciary unable to receive documentation from the DHS due to backlogs and other breaches of due process rights under the 4th Amendment of the U.S. Constitution) (copy on file with author).


[FN28]. For further information on ERPA, which will be reintroduced in the 109th Congress, contact the offices of Representative Conyers or Senator Feingold. For further information on applicable law, see Wrong Then, Wrong Now, supra note 3.

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