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**How ‘Comprehensive’ is the Comprehensive
Immigration Reform Bill?
S. 744 and its Implications for Muslims,
Arabs, South Asians, Somalis and Iranian
Immigrants**

Samira Afzali, Esq.¹

PART I - INTRODUCTION

At first glance, the past couple of years have been an exciting and promising opportunity for real immigration reform. Congress is considering a complete overhaul of our immigration system for the first time since the 1980s, under President Reagan’s administration. Today, practitioners and advocates are hopeful and are generally encouraged by President Obama’s promise to provide a ‘pathway to citizenship’ for undocumented immigrants, while Republicans discuss the risks of offering ‘amnesty’ to these aforementioned immigrants.² Immigration reform advocates and proponents of reform commonly remind us of the importance for the United States (US) to attract “highly skilled” immigrants,

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² Interestingly, the familiar trope of “good” and “bad” immigrants underscores many of the discussions and media presentations by politicians as they publicly weigh the advantages of providing immigration relief to millions of undocumented immigrants. See Prerna Lal, *But We are Criminals: Countering the Anti-Racial Justice Framework of Immigration Reform*, HUFFINGTON POST (Oct. 31, 2013), http://www.huffingtonpost.com/prerna-lal/immigration-reform-politics_b_4179890.html.

pointing to the number of immigrants behind the technology boom in Silicon Valley. However, upon closer inspection, what we see is an incomplete picture. For those of us practicing in immigration law, we have a vantage point that allows us to see some potential limitations and problems in the discourse of immigration reform. Notably, the emphasis on a “pathway to citizenship” for “undocumented” immigrants, while maintaining the integrity of our borders through “security” measures, and opening the borders to “highly skilled” immigrants has come to occupy the public imaginary as the totality of immigration issues that require attention.³

When the discussion centers on national security, it is to call into question immigration benefits and to restrict these benefits for problematic subjects, or “bad” immigrants. The most recent example includes US senators calling on the Senate Judiciary Committee to restrict provisions of the comprehensive immigration reform bill (“S. 744”) concerning refugee and asylum status for immigrants after the 2013 Boston Marathon bombing.⁴

It is difficult to imagine that before the 9/11 attacks, Congress was considering liberalizing immigration and opening

³ *AILA Encouraged by Release of House Republican Immigration Standards*, AMERICAN IMMIGRATION LAWYERS ASSOCIATION INFONET Doc. 14013030 (Jan. 30, 2014), <http://www.aila.org/content/default.aspx?bc=6729|47309>.

⁴ See Stephen Dinan, *Rethinking Immigration Rules for Asylum After Boston Bombing*, WASH. POST (May 19, 2013) <http://www.washingtontimes.com/news/2013/may/19/rethinking-immigration-rules-for-asylum/?page=all> (Senator Chuck Grassley (R-Iowa) comments after the Boston bombing). See also Ashley Parker & Michael D. Shear, *Senator Says Boston Bombing Should Be Factor in Immigration Debate*, N.Y. TIMES (April 19, 2013), http://www.nytimes.com/2013/04/20/us/politics/senator-says-boston-bombing-should-be-factor-in-immigrationdebate.html?_r=0 http://www.nytimes.com/2013/04/20/us/politics/senator-says-boston-bombing-should-be-factor-in-immigration-debate.html?_r=0; Maria Sacchetti, *After FBI Probes, Questions on Granting of Asylum*, BOSTON GLOBE (July 5, 2013), <http://www.bostonglobe.com/metro/2013/07/04/wake-marathon-attack-questions-about-safe-harbor-for-ibragim-todashev/iTe3zMwBZxh46u915N2SWL/story.html>. But see Erica Werner, *Janet Napolitano Defends Asylum Policy In Wake of Boston Marathon Bombings*, ASSOCIATED PRESS (April 23, 2013), http://www.huffingtonpost.com/2013/04/23/janet-napolitano-boston_n_3139482.html.

borders between the US and Mexico. Yet, after 9/11, the increased focus on securitizing the US from future terrorist attacks caused a complete overhaul of the country's immigration system.⁵ 9/11 provided an opportunity for lawmakers to shape immigration laws through the lens of national security interests.⁶ Such restrictive views on immigration policy were enabled by public opinion on immigration policies immediately after 9/11.⁷ A November 2001 Fox News poll found that sixty-five percent of Americans supported banning immigration, and a January 2002 Gallup poll found that fifty-eight percent of Americans felt that immigration levels should be decreased.⁸ A similar question posed by the Gallup poll in January 2001, eight months before the attacks, found that only forty-five percent of Americans favored restricting immigration.⁹ With each potential threat (and a color-coded system that reminded Americans on a daily basis of the possibility of an attack)¹⁰ there was a heightened awareness of the "other," namely, Arab and Muslims and the imminent risk they posed to our safety. The social and political consequences of associating Islam with terrorism cannot be ignored. More than one decade after 9/11, national security interests have broadened in scope to include securing the US border along Mexico and Canada, and viewing

⁵ Edward Alden & Bernard L. Schwartz, 9/11 Lessons: Immigration Policy, COUNCIL ON FOREIGN RELATIONS (Aug. 26, 2011), <http://www.cfr.org/911-impact/911-lessons-immigration-policy/p25674>. See also Christopher R. Counihan, American Immigration Policy Since 9/11: Impact on Muslim Migrants, 19 INST. FOR SOC. POL. AND UNDERSTANDING 1 (2007).

⁶ *Id.*

⁷ Counihan, *supra* note 5, at 2.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Chronology of Changes to the Homeland Security Advisory System*, DEP'T OF HOMELAND SEC., <http://www.dhs.gov/homeland-security-advisory-system> (last visited at April 21, 2014) (listing changes to the Department of Homeland Security's Advisory System from March 2002 to April 2010). See also John Schwartz, *U.S. to Drop Color-Coded Terror Alerts*, N.Y. TIMES (November 24, 2010), http://www.nytimes.com/2010/11/25/us/25colors.html?_r=0.

“illegal” immigration as a public safety issue.¹¹ In the last decade, due to the 9/11 attacks and a weakened economic system, the immigration system in this country is molded more by protectionist policies than policies that embrace an increasingly globalized world.

Many legal scholars have discussed how the national security discourse negatively affected immigrant communities (namely Arab and Muslim Americans) after 9/11.¹² The urgency to protect security at the expense of civil liberties gave rise to new legal categories for those considered “un-American.” Today, the national security discourse justifies the deportation-complex that is fueling the mass expulsion of Hispanic immigrants, and the degrading treatment of detained immigrants.¹³ 9/11 transformed how “others” were to be treated under the legal system.

Considering the restrictive and protectionist tone that immigration policy has taken in the last decade, framing the immigration debate in a way that limits the discussion to benefits primarily for undocumented immigrants of Hispanic origin, and conversely, “highly skilled” immigrants from South and East Asia (and categorizing immigration benefits by national origin) hinders an opportunity to genuinely assess the condition of our broken immigration system and to push for a more holistic immigration reform.¹⁴ Moreover, a popularly held notion that “illegal”

¹¹ Marc R. Rosenblum, *US Immigration Policy Since 9/11: Understanding the Stalemate over Comprehensive Immigration Reform*, MIGRATION POL. INST. (Aug. 2011), available at <http://www.migrationpolicy.org/sites/default/files/publications/RMSG-post-9-11policy.pdf>.

¹² Kevin R. Johnson & Bernard Trujillo, *Immigration Reform, National Security After September 11, and the Future of North American Integration*, U.C. DAVIS LEGAL STUD. RES. PAPER SERIES (Feb. 2007), available at <http://www.aila.org/content/default.aspx?bc=1016%7C12191%7C17311%7C27890%7C21699>. (2007).

¹³ William I. Robinson, *New Face of the War on Immigrants?: US Immigration Reform*, AL JAZEERA (July 10, 2013), <http://m.aljazeera.com/story/201372142250284963> (discussing the interconnectedness between the “war on terror” and the criminalization of undocumented immigrants).

¹⁴ *Immigration*, WHITE HOUSE WEBSITE, <http://www.whitehouse.gov/>

immigrants should “go to the back” of an imaginary line for immigration benefits, presents a false representation of how our immigration system works.¹⁵ Assuming that a line does exist, this analogy fails to address issues that immigrants who “do stand” in line face, due to undue burdens imposed at the various stages in obtaining immigration benefits. This limited and politicized approach to immigration reform means that certain stakeholders are “crowded out” of the discussion. In this article, these stakeholders include Muslim, Arab, South Asian, Somali and Iranian immigrants who are largely absent from the immigration debate, unless it is to discuss restrictions on immigration law. For the purposes of this article, this diverse group will be referred to as AMEMSA or Arab, Middle Eastern, Muslim and South Asian.¹⁶

In light of the serious limitations and constraints facing AMEMSA immigrant communities, S. 744 is not as “comprehensive” as the bill asserts. The bill provides opportunities to overhaul an unfair immigration system that punishes immigrants who have remained in the US with no status, or who unlawfully arrived in the US. It is an opportunity to give undocumented immigrants access to our immigration system while keeping the door closed on other immigrants who are viewed with suspicion.¹⁷

issues/immigration (last visited on January 18, 2014) (offering a “quick glance” at the President’s proposed initiative regarding his immigration agenda in which the President promises to fix a broken system for 11 million undocumented immigrants “living in the shadows.”).

¹⁵ Claire Bergeron, *Going to the Back of the Line: A Primer on Lines, Visa Categories and Wait Times*, 1 (Migration Policy Institute, 2013), available at <http://www.migrationpolicy.org/sites/default/files/publications/CIRbrief-BackofLine.pdf>.

¹⁶ This term is borrowed from the ACLU-SoCal’s report, *Muslims Need Not Apply* by Jennie Pasquarella, *Muslims Need Not Apply: How USCIS Secretly Mandates the Discriminatory Delay and Denial of Citizenship and Immigration Benefits to Aspiring Americans*, ACLU, August 2013, at ii.

¹⁷ Hayes Brown, *Civil Rights Groups Slam Amendment Targeting Muslim Immigrants*, THINK PROGRESS (May 22, 2013 9:36 AM), <http://thinkprogress.org/security/2013/05/22/2042061/civil-rights-groups-slam-amendment-targeting-muslim-immigrants/> (noting an amendment in S.744 that

The immigration debate is also an exercise in questions of citizenship and belonging. As the discourse denotes, undocumented immigrants are attempting to walk “out of the shadows” and live comfortably within our society. Yet at the same time, immigrants who are a perceived threat to our society are forced to remain “in the shadows” because it would be politically unpopular to support any reform that addresses the hurdles that immigrants from Muslim countries face.¹⁸ Certainly, there are many immigrants from AMEMSA origin with legal status in this country. Yet, the undue burdens placed on these groups’ processes towards participating as citizens in this country show a political distrust towards these communities. S. 744 reflects mostly the extent that the gatekeepers of the political system, including the political parties and its voting constituents (who are decidedly US citizens and can exercise a right to vote), are willing to move and change immigration laws in the US. To this end, S. 744 is predicated on reform that will help the Republican Party and the Democrat Party secure future votes from a growing Hispanic population in the US.¹⁹

This article advances the argument that popular discourses of immigration reform obscure real problems that immigrants with status face as a result of how their identities and country of origin intersect with national security discourse and policies. This article endeavors to make a small contribution to re-imagining the immigration debate and mapping areas of concern that are overshadowed by a particular discourse of immigration reform. Part II of this article will undertake a critical discourse analysis of the current immigration debate and its limitations. Part III discusses in

would require undocumented immigrants from Muslim countries to undergo three separate background checks).

¹⁸ *Id.*

¹⁹ Albert Sabaté, *More Latinos Likely to Vote Republican if Immigration Reform Passes*, FUSION.NET (Mar. 18, 2013 7:22 PM), http://fusion.net/abc_univision/news/story/latinos-vote-republican-immigration-reform-passes-poll-finds-18217. See also Matt Barreto, *New Poll: Immigration Policy Stance Directly Tied to Winning the Latino Vote*, LATINODECISIONS.COM (Mar. 05, 2013), <http://www.latinodecisions.com/blog/2013/03/05/new-poll-immigration-policy-stance-directly-tied-to-winning-the-latino-vote/>.

greater detail the failure of the current immigration reform debate in addressing immigration policies that affect highly unpopular and suspect immigrant communities from AMEMSA countries. In this part of the article, the author will illustrate the shortcomings of the current discourse by providing current examples of federal programs that target immigration benefits for immigrants from “Muslim” countries. In the conclusion, this article will explore some of the implications of this approach and provide recommendations.

PART II - THE DEBATE’S LIMITATIONS: A CRITICAL DISCOURSE ANALYSIS

Another Interpretative Framework: Critical Discourse Analysis

According to Fran Vavrus and Maude Seghers, critical discourse analysis is one way of “studying the social uses of language.”²⁰ Critical discourse analysis is a tool for the reader to understand discourse based on its social context.²¹ “Discourse” refers to the relationship between power and knowledge, and specifically, how relationships of power moderate what kind of knowledge can be thought of as “official” or “legitimate,” as articulated by Michel Foucault.²² For example, when the Gang of Eight, a bipartisan membership of US Senators,²³ proposed their

²⁰ Frances Vavrus & Maud Seghers, *Critical Discourse Analysis in Comparative Education: A Discursive Study of “Partnership” in Tanzania’s Poverty Reduction Policies*, 54 *COMPARATIVE EDUC. REV.* 77, 81 (2009), <http://www.jstor.org/stable/10.1086/647972>.

²¹ *Id.*

²² MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON*, 27 (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1997).

²³ Rachel Weiner, *Immigration’s Gang of 8: Who Are They?*, *WASH. POST* (Jan. 28, 2013 1:00 PM), <http://www.washingtonpost.com/blogs/the-fix/wp/2013/0128/immigrations-gang-of-8-who-are-they/> (“Gang of Eight” is a commonly used term to describe the eight US Senators who proposed the most recent version of comprehensive immigration reform on Capitol Hill. The “Gang”

bill, it was presented as an exhaustive list covering the spectrum of pressing immigration issues. While the scope of the bill is still a subject of debate, the elements of the Gang of Eight bill reflect the totality of the debate, including how we think about illegal, status, and border security. This impacts the way in which the public in turn defines immigrants as illegal or undocumented, because those notions are shaped by the way immigrants are depicted and understood on a macrocosmic level, in media representations, statements by elected officials, and policy documents.²⁴ Critical discourse analysis then is a technique by which we can identify how relationships of power influence the ways in which we think, discuss, and make sense of an issue. Analyzing trends and recurring language in official statements and media coverage about the subjects of immigration and immigration reform is one possible application of critical discourse analysis.²⁵

It is imperative to understand the immigration debate through a critical discourse analysis because the words used to define and to map out rights is heavily influenced by how knowledge and information about immigration has been produced in this country. In this section, examples of how the production of knowledge on immigrants (such as shaping the immigration debate as solely an issue that matters to Latino voters) is provided to demonstrate the limitations of the current debate and how narrowly defining problems by one immigrant group's interests benefits the status quo.

It is worth noting the various meanings that the word immigrant has in political and popular discourse and the specific meaning that the term immigrant has under the law. Commonly, immigrants refer to individuals and families who have recently settled in the US.²⁶ As such, the term immigrant is used very

includes: Sen. Robert Menendez (D-NJ); Sen. Michael Bennet (D-CO); Sen. Richard J. Durban (D-IL); Sen. Jeff Flake (R-AZ); Sen. Lindsey Graham (R-SC); Sen. John McCain (R-AZ); Sen. Marco Rubio (R-FL); and Sen. Chuck Schumer (D-NY)).

²⁴ Vavrus & Seghers, *supra* note 20, at 78.

²⁵ *Id.*

²⁶ Webster's New World Pocket Dictionary 160 (4th ed. 2000).

broadly to distinguish a person from natives. However, under federal immigration law, the term immigrant has a very specific meaning, and refers to an individual on a legal track towards permanent residence and then citizenship.²⁷ Specifically, an individual who is applying for immigration benefits in the US may receive an immigrant visa or a non-immigrant visa.²⁸ Immigrant visas allow the person to adjust, or change, his or her legal status from a temporary visa holder to a permanent resident.²⁹ Conversely, a non-immigrant visa is a temporary visa that allows a person to remain in the US for a short duration of time to study, work or visit the US.³⁰ The non-immigrant visa track does not feed into a pathway for permanent residency or citizenship.³¹ The immigrant and non-immigrant visas are short-term, temporary legal statuses.³² Interestingly, the US has a visa waiver program with several European and non-European countries that does not require an immigrant to obtain a visa to visit the US for less than ninety days.³³ Under federal law, the executive branch can also grant an individual permission to remain in the US without conferring any legal immigrant status on the individual.³⁴ Lastly, permanent residents are still considered an “alien” pursuant to federal law.³⁵

Moreover, in popular discourse, immigration status is presumed to be a fixed identity: citizen, immigrant, legal and illegal. In reality, however, immigration status is not liminal, but is subject to change and is fluid. For example, the famous pop singer, Justin Bieber, a Canadian citizen and US permanent resident, faces

²⁷ 8 U.S.C. § 1101(a)(15) (2013).

²⁸ *Id.* at §§ 1101(a)(17), (26). *See also Nonimmigrant v. Immigrant Status*, UNIVERSITY OF CALIFORNIA AT BERKELEY INTERNATIONAL OFFICE, http://internationaloffice.berkeley.edu/nonimmigrant_vs_immigrant.

²⁹ Webster’s, *supra* note 26.

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ 8 U.S.C. § 1187 (2010).

³⁴ Shoba S. Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, 9 CONN. PUB. INT. L.J. 243, 244 (2010).

³⁵ 8 U.S.C. § 1101(a)(3) (2013) (defining alien as “. . . any person not a citizen or national of the United States.”).

criminal charges, which normally causes US Immigration and Customs Enforcement (ICE) - the enforcement arm of the US immigration system - to issue an order to begin formal deportation proceedings against an immigrant.³⁶ If placed in proceedings, Bieber would lose his permanent resident status and could be ordered removed. A removal order would result in Bieber being barred from returning to the country for several years.

Contrary to the false binary of legal versus illegal, an individual's immigration status can change over time. For example, a permanent resident (commonly referred to green card holder) can lose her immigration status if she is out of the country for over six months.³⁷ If the green card holder is out of the country for over one year, she is presumed to have "abandoned" her permanent residency, thus having no legal immigration status in the US.³⁸ Similarly, a Chinese national who travels in the US on a tourist visa and overstays his visa is considered to have gone from having status to being out-of-status, or popularly referred to as illegal.³⁹ And an undocumented immigrant who crossed the border without being inspected and managed to stay in the US can, under the law, marry a US citizen and apply for permanent residency. Thus, a debate that centers on punishing immigrants who should get in the "back of the line" and who have broken the law does not accurately reflect the convoluted workings of our immigration system. With a nuanced understanding of status, we can now turn to how the media reproduces knowledge about immigrants.

³⁶ Esther Yu-Hsi Lee, *Criminal Charges Could Get Justin Bieber Deported*, THINK PROGRESS (January 23, 2014 11:37 AM), <http://thinkprogress.org/immigration/2014/01/23/3195411/justin-bieber-here-we-go-again/>.

³⁷ 8 U.S.C. § 1101(a)(13)(C)(i)-(ii) (2012).

³⁸ See *Maintaining Permanent Residence*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES OF STATE (Aug. 29, 2013), <http://www.uscis.gov/green-card/after-green-card-granted/maintaining-permanent-residence>.

³⁹ *What the Visa Expiration Date Means*, U.S. VISAS: BUREAU OF CONSULAR AFFAIRS, U.S. VISAS: U.S. DEP'T OF STATE, <http://travel.state.gov/content/visas/english/general/visa-expiration-date.html>.

Months before the 2012 presidential election, Time magazine issued a cover with the headline, “Yo Decido.”⁴⁰ The March 5, 2012 issue was the first time in the magazine’s history that the magazine ran a Spanish headline.⁴¹ Time made a bold claim with that cover: the magazine was ostensibly predicting that Arizona’s political race would be decided by the Hispanic vote; and the magazine was presenting the new face of “American voters.”⁴² Yet, what was missing from the magazine’s message was analogous to what was absent from the dominant claims in the national discourse about immigration.⁴³ The magazine’s cover made a convincing argument, that the future of a state’s political election would be decided by the Hispanic vote.⁴⁴ The same week that Time magazine released the issue, one of the men featured on the cover page revealed that he was not “Hispanic,” but in fact half-Asian and half-White. Time magazine came under fire for the mistake.⁴⁵ Several newspapers alleged that Time magazine’s cover demonstrated the misguided and ignorant representation of the “Hispanic” in the media.⁴⁶ Time magazine immediately apologized for the error.⁴⁷ Ironically, by attempting to make a “bold claim” that the Hispanic vote will be a considerable factor in the US electoral

⁴⁰ Marco Grob, *Yo Decido*, TIME (Mar. 5, 2012), available at <http://content.time.com/time/covers/0,16641,20120305,00.html>.

⁴¹ Teresa Puente, *Time Magazine “Yo Decido” Issue Gets it Right and Wrong*, CHICAGO NOW (Feb. 28, 2012, 11:27 AM), <http://www.chicagonow.com/chicanisima-latino-politics-news-and-culture/2012/02/time-magazine-yo-decido-issue-gets-it-right-and-wrong/>.

⁴² *What the Visa Expiration Date Means*, *supra* note 39.

⁴³ See Joe Coscarelli, *Time Magazine’s Latino Cover Features Misplaced Minority Man*, N.Y. MAG. (Feb. 23, 2012, 5:12 PM), <http://nymag.com/daily/intelligencer/2012/02/time-magazines-latinos-were-not-vetted.html>; Nadine DeNinno, *Time Magazine Apologizes for ‘Yo Decido’ Latino Cover, Was it Racist?*, INT’L BUS. TIMES (Feb. 24, 2012, 4:00 PM), <http://www.ibtimes.com/time-magazine-apologizes-yo-decido-latino-cover-was-it-racist-photo-416010>.

⁴⁴ *See What the Visa Expiration Date Means*, *supra* note 39.

⁴⁵ See Coscarelli, *supra* note 43; DeNinno, *supra* note 43.

⁴⁶ Coscarelli, *supra* note 43; DeNinno, *supra* note 43.

⁴⁷ DeNinno, *supra* note 43.

process, Time magazine's misrepresentation reflected the insignificance of "presenting" other immigrant identities in the discourse on a macrocosmic level. In this news report, "immigration" is significant as a political issue because of the impact Latino communities have on electoral politics in the US. There are other examples of this kind of framing as well.⁴⁸ Over time, this kind of framing in the news serves to conflate immigration as a Latino issue, and Latinos as the community most invested in the immigration debate. Through repetition of this discourse of immigration as a Latino issue, representations take on their own life as "facts." In this way, we can argue that one community's issues have largely determined the goals behind S. 744. Perhaps the over-representation of Hispanic immigrants in the news reflects the state of immigration reforms prior to September 11th, and the failure to capture the divergent issues confronting a broad immigrant population is also due to this country's inability to have a meaningful debate about the central role that national security issues play in shaping our immigration debate.

In reporting stories about immigration reform, there has also been a movement to force news organizations to drop the word "illegal" in representing undocumented immigrants. In 2010, Colorlines, an online magazine started the "Drop the I-word" campaign.⁴⁹ Journalists commented that the stylebook referenced in their field dictated that they use the term "illegal."⁵⁰ By 2013, the Associated Press took a very public stance by announcing that the news organization would stop using the word "illegal" to describe

⁴⁸ Adam Davidson, Q&A: Illegal Immigrants and the U.S. Economy, NPR (Mar. 30, 2006, 3:45 PM), <http://www.npr.org/templates/story/story.php?storyId=5312900>. See also David Bacon, How US Policies Fueled Mexico's Great Migration, THE NATION (Jan. 4, 2012), <http://www.thenation.com/article/165438/how-us-policies-fueled-mexicos-great-migration>

⁴⁹ *Drop the I-Word*, COLORLINES, <http://colorlines.com/droptheiword/>.

⁵⁰ Mallery Jean Tenore, Despite Criticism, AP Stylebook Dictates that Journalists use 'Illegal Immigrant', POYNTER (Nov. 7, 2011, 10:30 AM), <http://www.poynter.org/latest-news/top-stories/152290/despite-criticism-ap-stylebook-dictates-that-journalists-use-illegal-immigrant/>.

immigrants without authorization in the US.⁵¹ Not all news organizations have followed suit; the New York Times continues to use the term “illegal” despite public pressure to drop the term.⁵² Insisting on a particular way to describe immigrants who are present in the US without legal status or permission may seem like a linguistic exercise. However, the term “illegal” is not only a dehumanizing way to define a set of individuals in this country, but it also criminalizes individuals who are technically in violation of civil, not criminal law.⁵³ Indeed, immigration law and the immigration courts (which are not under the purview of the judiciary branch and benefit from the plenary doctrine thus making interference by Article III courts difficult) are governed by civil law. When an immigrant is removed, or previously referred to as “deported,” that individual has violated non-criminal regulations, unless the immigrant has committed a separate criminal offense.⁵⁴ Thus, a detained immigrant does not serve a criminal sentence for violating immigration laws. Yet, the term “illegal” infers that an individual is a criminal.⁵⁵ And some undocumented immigrants feel disenfranchised and live with undue stress as a result. As an analogy, when an individual is sued in civil court for negligence in

⁵¹ Paul Colford, ‘Illegal Immigrant’ No More, ASSOCIATED PRESS (Apr. 2, 2013), <http://blog.ap.org/2013/04/02/illegal-immigrant-no-more/>.

⁵² Christine Haughney, *The Time Shifts on ‘Illegal Immigrant,’ But Doesn’t Ban the Use*, N.Y. TIMES (Apr. 23, 2013), http://www.nytimes.com/2013/04/24/business/media/the-times-shifts-on-illegal-immigrant-but-doesnt-ban-the-use.html?pagewanted=all&_r=0.

⁵³ See *Criminalizing Undocumented Immigrants*, IMMIGRANTS’ RIGHTS PROJECT (Feb. 2010), https://www.aclu.org/files/assets/FINAL_criminalizing_undocumented_immigrants_issue_brief_PUBLIC_VERSION.pdf (arguing that an individual does not violate federal criminal law by merely being unlawfully present in the US); see also *Which Is Acceptable: ‘Undocumented vs. ‘Illegal’ Immigrant?*, NPR (Jan. 7, 2010, 12:00 PM), <http://www.npr.org/templates/story/story.php?storyId=122314131>.

⁵⁴ *Criminalizing Undocumented Immigrants*, *supra* note 54; see also Fong Yue Ting v. United States, 149 U.S. 698, 709 (1893) (arguing that deportation is not a form of criminal punishment).

⁵⁵ Haughney, *supra* note 52.

a personal injury case, and the defendant is found guilty, society does not call that person “illegal.” Thus, there is a clear advantage to using the term “illegal” rather than “undocumented” by politicians who favor nativist policies that restrict immigration benefits and increase enforcement at the borders. Similarly, a shift in how journalists, and their publications, report on the issue has an impact on the debate.⁵⁶

While the media is an important site of knowledge production about immigration and immigration reform, it is not the sole source of this discourse. Political figures from the executive and legislative branches have also framed the immigration debate as a “Hispanic” issue. In June 2013, former President George W. Bush’s senior advisor and political strategist, Karl Rove, wrote in the *Wall Street Journal* that the Hispanic vote would be crucial for the Republican Party’s future.⁵⁷ Interestingly, Rove began his opinion editorial with the assumption that Hispanic immigrants are the controlling force behind the immigration debate.⁵⁸ In the piece, Rove did not qualify his contention by providing any statistics or quantitative figures to explain why the “Hispanic vote” mattered.⁵⁹ With this assumption carrying his argument, Rove concluded his piece by stating that: “[I]mmigration reform is now a gateway issue: Many Hispanics won’t be open to Republicans until it is resolved, which could take the rest of the year. But there is little doubt next week’s Senate deliberations will shape for some time to come the Hispanic community’s perceptions of the GOP.”⁶⁰ Rove is correct to point out that Hispanic voters are unlikely to vote for Republican candidates because of the party’s aversion to a transformative

⁵⁶ Emily Guskin, ‘Illegal,’ ‘Undocumented,’ ‘Unauthorized’: News Media Shift Language on Immigration, PEW RESEARCH CENTER (June 17, 2013), <http://www.pewresearch.org/fact-tank/2013/06/17/illegal-undocumented-unauthorized-news-media-shift-language-on-immigration/>.

⁵⁷ Karl Rove, Immigration Reform and the Hispanic Vote, *WALL ST. J.* (June 5, 2013, 7:25 PM.), <http://online.wsj.com/news/articles/SB10001424127887323844804578527010474733462>.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

immigration reform; however, Rove has mistakenly characterized the immigration debate as a purely Hispanic issue. Again, we see that the immigration debate has become a “Hispanic” issue because both parties see their party’s future depending on winning votes from “Hispanic” Americans. Rove’s statement leaves out other stakeholders from engaging in the debate, because they are not seen as having political consequence. Rove’s comments illustrate how the immigration debate is framed to carry out the GOP’s political strategy, that heavily depends on a strong turnout for their candidates by Latino voters (interestingly, polls conducted of Latino/Hispanic voters around the 2012 presidential elections showed that Latino voters were less concerned about immigration and more concerned about the economy).⁶¹ In this respect, we see that the issue of immigration, and its political significance, is tied primarily to reflect the putative desires and political agenda of the GOP.

Indeed, considering that immigration in the US today is largely made up of Asian immigrants,⁶² and that some of the fastest growing immigrant communities are non-Hispanic,⁶³ Rove perpetuates a false assumption that the most important stakeholders in the immigration debate are Americans of Hispanic origin. Rove is not alone. A quick “google” search of immigration reform will show articles that feature stories reflecting this representation of the immigration debate.⁶⁴ Certainly, while Mexico accounts for the

⁶¹ Mark Hugo Lopez & Paul Taylor, *Latino Voters in the 2012 Election*, PEW RESEARCH HISPANIC TRENDS PROJECT (Nov. 7, 2012), <http://www.pewhispanic.org/2012/11/07/latino-voters-in-the-2012-election/> (finding that sixty percent of Hispanic voters said the economy was the most important issue of the elections).

⁶² Juliana Barrera, *Asian Immigrants Surpass Hispanics as Biggest Immigrant Wave to U.S.*, HUFFINGTON POST, (June 15, 2013, 9:31 AM), http://www.huffingtonpost.com/2013/06/15/asian-immigrants-surpass-hispanics_n_3446441.html; see also Kirk Semple, *In a Shift, Biggest Wave of Migrants is now Asian*, N.Y. TIMES (June 18, 2012), <http://www.nytimes.com/2012/06/19/us/asians-surpass-hispanics-as-biggest-immigrant-wave.html>.

⁶³ Semple, *supra* note 62.

⁶⁴ Pamela Constable, *As Hispanic Population Booms, Immigration Debate Comes to Key Republican’s Va. District*, WASH. POST (Mar. 2, 2014),

largest population of immigrants from a single country in the last decade, the top five immigrant groups to the US include China, the Philippines, Vietnam and India.⁶⁵ Rove's argument reflects a common theme in political debates about immigration; the traditionally held belief is that immigrants from Hispanic countries will dominate the political, cultural and linguistic landscape of the US and that the GOP and Democrats need to embrace them in order to remain electorally viable.

Yet, policymakers overlook policy considerations that concern immigrant communities in the US who may be less concerned about securing a "pathway to citizenship" due to their undocumented status.⁶⁶ By phrasing the discourse in terms of

http://www.washingtonpost.com/local/as-hispanic-population-booms-immigration-debate-comes-to-key-republicans-va-district/2014/03/02/07c17a0e-9a7f-11e3-80ac-63a8ba7f7942_story.html. By searching under the News section of Google, and typing the words "immigration reform" and "hispanic" or "immigration reform" and "US"; see also Lauren Fox, *Michigan Gov. Rick Snyder Leads GOP on Immigration Reform* U.S. NEWS (Mar. 18, 2014), <http://www.usnews.com/news/articles/2014/03/18/michigan-gov-rick-snyder-leads-gop-on-immigration-reform>; Sarah Herndon, *Is President Obama a Friend or Foe in the Fight for Immigration Reform?*, Aljazeera American (Mar. 19, 2014), <http://america.aljazeera.com/watch/shows/inside-story/Insiders/2014/3/19/is-president-obamaafriendorfoeinthefightforimmigrationreform.html>; Sylvan Lane, *Republicans All Dressed Up for Immigration Reform, But Nowhere to Go*, UPI (Mar. 19, 2014, 12:01 PM), http://www.upi.com/Top_News/US/2014/03/19/Republicans-all-dressed-up-for-immigration-reform-but-nowhere-to-go/6231395161195/. But see Mil Arcega, *Experts Debate Economic Impact of US Immigration Reform*, VOICE OF AMERICA (Feb. 20, 2014), <http://www.voanews.com/content/the-economics-of-immigration-reform/1855855.html> (article includes an interview with an international student from China about immigration reform).

⁶⁵ Steven A. Camarota, *Immigrants in the United States, 2010: A Profile of America's Foreign-Born Population*, CENTER FOR IMMIGRATION STUDIES (Aug. 2012), available at <http://cis.org/2012-profile-of-americas-foreign-born-population>; Monica Whatley & Jeanne Batalova, *Indian Immigrants in the United States*, MIGRATION POLICY INSTITUTE (Aug. 21, 2013), <http://migrationinformation.org/USfocus/display.cfm?ID=962>.

⁶⁶ Compare statistics of largest immigrant communities in the US to recipients of DACA, with applicants who have undocumented status and are seeking legal

Hispanic voters' concerns about a pathway to citizenship, policymakers can continue to restrict immigration benefits for more unpopular immigrant groups who are largely from the Middle East, North Africa and South Asia.

Rove's article touches on a political strategy that both Republicans and Democrats considered during the 2012 presidential and congressional elections. In 2011 and 2012, the Obama Administration announced two executive policies that promised to reduce the number of undocumented immigrants being deported by the Department of Homeland Security.⁶⁷ The 2011 'Morton memo', announcing that Immigration and Customs Enforcement (ICE) could employ 'prosecutorial discretion' on an individualized basis, was in response to grass-roots advocates and policymakers who had criticized President Obama for his administration's high deportation rate (which surpassed that of his predecessor's) and the administration coercing states into participating in the Secure Communities program.⁶⁸ Secure Communities was a federal program that allowed local law enforcement agencies to communicate with ICE by running background checks on apprehended suspects.⁶⁹

In June 2012, the Obama Administration announced the consideration of deferred action for childhood arrivals (commonly known as the Deferred Action or DACA) for immigrants who came to this country as children.⁷⁰ DACA specifically addressed temporary immigration relief for undocumented youth.⁷¹ Shortly

authorization to work in the US. Also compare statistics of where undocumented immigrants come from with total immigrant populations in the US.

⁶⁷ See Shoba Sivaprasad Wadhia, *Morton Memo and Prosecutorial Discretion*, IMMIGRATION POLICY CENTER (July 2001), available at <http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf>. See also *Deferred Action for Childhood Arrivals*, U.S. DEP'T OF HOMELAND SEC., <https://www.dhs.gov/deferred-action-childhood-arrivals>.

⁶⁸ *Supra* note 67. See also *infra* note 69.

⁶⁹ SECURE COMMUNITIES, ICE, http://www.ice.gov/secure_communities/.

⁷⁰ Sandra Lilley, *Obama's Immigration Policy Shift Sends Ripples Across the Country*, NBC LATINO (Jun. 12, 2012, 4:23PM), <http://nbclatino.com/2012/06/15/obamas-immigration-policy-shift-sends-ripples-across-the-country/>.

⁷¹ *Deferred Action for Childhood Arrivals*, *supra* note 67.

before DACA's inception, there was a growing movement around the DREAM Act characterized by grassroots mobilization and activist campaigns to bring attention to the DREAM Act in Congress.⁷² In response to Congress' unwillingness to move on the DREAM Act, President Obama presented DACA.⁷³

Both measures were aimed at addressing fears of deportation that many immigrants without status in this country face. However, both presidential policies were characterized and represented as issues facing Hispanic immigrants.

As both parties approached Election Day, there was a rise in "Latino" or "Hispanic" faces in Congress. From Senator Luis Gutierrez (D-IL) to Senator Robert Menendez (D-NJ), these politicians became the voice for immigration reform in Congress. And one key figure in the GOP rose to prominence thanks to his ability to attract the "Hispanic" vote: Marco Rubio (R-FL) used the immigration reform debate to catapult his own political aspirations.⁷⁴ Rubio, a second-generation Cuban American, was

⁷² The most recent version of the DREAM Act was formally introduced in the House of Representatives and the Senate on May 11, 2011 as H.R.1842 and S.952 respectively. H.R. 1842, 112th Cong. § 1 (2011); S.952, 112th Cong. § 1 (2011). Yet, the DREAM Act was first introduced on the Senate floor by Senator Orrin Hatch (R-Utah) one month before the 9/11 attacks. In his legislation, Senator Hatch wanted to repeal the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 to give states the ability to offer in-state residency to undocumented youth and to provide immigration relief to undocumented students. S. 1291.IS, 107th Cong. § 1 (2001); see also Trail of Dreams, the 2010 DREAMers March to Washington, <http://trail2010.org/about/>, see also Helga Salinas, *Undocumented and Unafraid: #11MillionDreams*, (last visited May 3, 2014) available at <http://cuj13.tysonevans.com/students/helga/website/resdreams.html#footnote-history-7> (documenting the timeline of the movement).

⁷³ Cesar Vargas, *If House GOP Can't Do Better, Obama Must Act on Immigration*, THE HILL (Aug. 23, 2013, 6:00 PM), <http://thehill.com/blogs/congress-blog/foreign-policy/318307-if-house-gop-cant-do-better-obama-must-act-on-immigration>.

⁷⁴ Ken Auletta, *War of Choice: Marco Rubio and the G.O.P. Play a Dangerous Game on Immigration*, THE NEW YORKER (Jan. 9, 2012), http://www.newyorker.com/reporting/2012/01/09/120109fa_fact_auletta. See also Steve Coll, *Nation of Immigrants*, THE NEW YORKER (July 2, 2012), <http://www>.

considered as a possible vice presidential runner and largely defined his purpose during the 2012 presidential race on his own recommendations for immigration reform.⁷⁵ Interestingly, Rubio's Cuban heritage presented questions about his authentic "Hispanic" voice and whether his immigrant story mirrored the "common" struggles faced by most "Hispanic" immigrants.⁷⁶

Certainly, during the wave of articles and news stories about immigration in 2012 and 2013, there were arguments made against framing the immigration debate to be exclusively about Hispanic voters and undocumented immigrants. Yet, even the critics fell victim to the same trap as they narrowed in addressing issues facing highly skilled immigrants and STEM (Science, Technology, Engineering and Mathematics) immigrants, giving the impression that the majority of these immigrants only come from South and East Asian countries.⁷⁷ Again, the focus on highly skilled immigrants grew from lobbying efforts by pro-immigration business interests. Even Mark Zuckerberg, the founder of Facebook, lent his name to the pro-immigration movement.⁷⁸

Similar to misplacing a half-Asian man on the Time magazine cover, the immigration debate has come to represent a debate about Hispanic immigrants and the representation of immigration as a predominantly "Hispanic" matter. The debate does

newyorker.com/talk/comment/2012/07/02/120702taco_talk_coll.

⁷⁵ Auletta, *supra* note 74.

⁷⁶ *Id.*

⁷⁷ Gary Endelman & Cyrus D. Mehta, *Wanted: Great Stem and Tandoori Chicken*, CYRUS D. MEHTA & ASSOCIATES, PLLC (March 9, 2013), <http://www.cyrusmehta.com/News.aspx?SubIdx=ocyrus201339133730>; see also Nikki Cicerani, *It's Time to Employ Skilled Immigrants Already Here*, NAT'L J. (Feb. 13, 2014), <http://www.nationaljournal.com/next-america/perspectives/it-s-time-to-employ-skilled-immigrants-already-here-20140213>.

⁷⁸ Elahe Izadi, *Mark Zuckerberg Affiliated Group Blast Airwaves to Back House GOP on Immigration*, NAT'L J. (Jan. 31, 2014), <http://www.nationaljournal.com/politics/mark-zuckerberg-affiliated-group-blast-airwaves-to-back-house-gop-on-immigration-20140131>. See also Michael Falcone, *Mark Zuckerberg's Immigration Reform Group Launches August Recess Ad Offensive*, ABC NEWS (Aug. 7, 2013, 5:57 PM), <http://abcnews.go.com/blogs/politics/2013/08/mark-zuckerbergs-immigration-reform-group-launches-august-recess-ad-offensive/>.

not take into consideration that the fastest growing immigrant groups in the US are migrating from East Asian and South Asian countries. Moreover, while the current debate and policy agendas on the national and state levels focus on addressing the status of eleven million undocumented immigrants,⁷⁹ the debate fails to take into consideration the significant hurdles facing immigrants with status. Specifically, some of the problems facing immigrants include the undue burden on their application process (administrative reviews), unfettered discretion by immigration officers, and secret reviews by secret agencies. These programs have placed serious challenges for immigrants with status and have obstructed their “pathway to citizenship.”

PART III - HOW THE DEBATE FAILS TO ADDRESS REAL PROBLEMS IN FEDERAL PROGRAMS FACING IMMIGRANTS FROM MUSLIM COUNTRIES

Since 9/11, individuals with ties to or origins in “Muslim” countries have increasingly become objects of state surveillance and security screening measures in the name of combating “terrorism.”⁸⁰ The impact of monitoring this group becomes difficult to appreciate when there are problems in establishing an accurate tally of this population, let alone measuring the effect of policies on this diverse community.⁸¹ These problems stem from

⁷⁹ Brad Plumer, *Can Obama Legalize 11 Million Immigrants on his own?*, WASH. POST (Nov. 14, 2013, 10:23 AM), <http://www.washingtonpost.com/blogs/wonkblog/wp/2013/11/14/can-obama-legalize-11-million-immigrants-on-his-own/>. See also *11 million Undocumented Immigrants: What's Behind This Number*, HUFFINGTON POST (February 13, 2013, 3:47 AM), http://www.huffingtonpost.com/2013/02/13/11-million-undocumented-i_n_2677911.html?

⁸⁰ Susan M. Akram & Kevin R. Johnson, *Migration Regulation Goes Local: The Role of States in U.S. Immigration Policy: Race, Civil Rights, and Immigration Law After September 11, 2001: The Targeting of Arabs and Muslims*, 58 N.Y.U. SURV. AM. ANN. SURV. AM. L. 295 (2002).

⁸¹ Tom W. Smith, *Estimating the Muslim Population in the United States*, AJC GLOBAL JEWISH ADVOCACY, <http://www.ajc.org/site/apps/nlnet/content3>.

practices by the federal government to collect data on “Muslims” to racially profile individuals at the border and in criminal matters since 9/11.⁸² Even though the federal government has amassed significant data on Muslim communities as part of its national security and counterterrorism efforts, this data is generally not available to the public. Moreover, the US Census does not track religious affiliations.⁸³ In spite of the challenges to measuring this population’s presence in the US, current estimates range from 2-7 million.⁸⁴ While the diversity of this population and the diversity of its political affiliations and religious practices makes it hard to speak meaningfully about a “Muslim” community, this religious identity often serves as a primary form of classification and differentiation among immigrant groups in the US.⁸⁵ A study conducted by the Center for Human Rights and Global Justice at New York University’s School of Law found that more than 40,000 people of “Muslim origin” have waited more than three years for a decision on their naturalization applications, whereas the process normally lasts no more than 180 days.⁸⁶ This delay may be understood through the recent revelations regarding the CARRP program, which mandated USCIS to delay and deny immigrant benefits for AMEMSA (Arab, Middle Eastern, Muslim, and South Asian) immigrants.⁸⁷

Acknowledging the shortcomings of the current immigration debate must not come at the expense of dismissing or rejecting the

aspx?c=7oJILSPwFfJSG&b=8451903&ct=12481869.

⁸² Salah Hassan, *Arabs, Race and the Post-September 11 National Security State*, MIDDLE E. RES. AND INFO. PROJECT (Fall 2002), <http://www.merip.org/mer/mer224/arabs-race-post-september-11-national-security-state>.

⁸³ *Id.*

⁸⁴ *Muslims in America – A Statistical Portrait*, DEPARTMENT OF STATE, EMBASSY OF THE UNITED STATES BAGHDAD, IRAQ, available at <http://iraq.usembassy.gov/resources/information/current/american/statistical.html>. (last visited March 30, 2014).

⁸⁵ Cathy Lynn Grossman, Number of U.S. Muslims to Double, USA TODAY (Jan. 26, 2011, 7:50 PM), http://usatoday30.usatoday.com/news/religion/2011-01-27-1Amuslim27_ST_N.htm.

⁸⁶ See *Muslims in America*, supra note 84.

⁸⁷ Pasquarella, supra note 16.

important efforts that are being made by policymakers and advocates to create legal status for the eleven million undocumented immigrants in the US. Neither should the debate ignore the important role that highly skilled migrants play in the US. However, by failing to acknowledge the onerous restrictions placed on certain immigrant communities, like AMEMSA, due to their perceived risk to US national security, the immigration debate becomes packaged as a co-opted message that appears to achieve genuine and comprehensive immigration reform that serves the political goals of political parties maintaining their power in the face of a shifting demography. Moreover, failing to capture the diversity in experiences and identities underscores that some immigrant communities are excluded from discussions about citizenship and their participation in society and politics because of various “threats” they represent.

Shaping the immigration debate as a Hispanic issue, and on the other end of the spectrum, framing the debate in terms of “good” immigrants that offer special skills and human capital to the country creates false binaries of identity that actually reflect the way in which the political system wants to define citizenship and belonging, rather than how immigrants self-identify. This is an important distinction because if we understand the immigration debate in terms of the political goals and less in terms of actual identities pushing for reform, then we see that the debate mirrors a larger concern in this country about who belongs and who is worthy enough to participate as a “citizen.”

When national security warrants federal agencies to intervene in an immigration case, the state ensures that immigration benefits are conferred upon immigrants who satisfy the threshold of “good immigrant.” This is readily identifiable when reviewing three federal programs that were designed after the 9/11 attacks with the aim of scrutinizing and monitoring immigrants with legal immigration status in the US. These programs have disproportionately affected immigrants from “Muslim” countries. The three programs that will be the focus of this part include the National Security Entry-Exit Registration System (NSEERS) program, the review of immigration benefits by the Fraud Detection

and National Security office, and the Controlled Application Review and Resolution Program (CARRP).

NSEERS

In response to the 9/11 attacks, the US Department of Justice implemented the NSEERS in 2002, which the US Department of Homeland Security (DHS) took over after the department's inception.⁸⁸ NSEERS required any noncitizen male from one of the twenty-five countries⁸⁹ listed on the NSEERS registration list to register with their (now defunct) local Immigrant and Naturalization Services office.⁹⁰ The federal government selected these twenty-five countries, which were coincidentally Muslim majority countries, because of their "national security" threat to the US.⁹¹ Any person in the US who was a noncitizen and was born in one of these twenty-five countries before 1986 (or 1987 in some cases) was required to register.⁹² The program was designed based on racial profiling of AMEMSA immigrants and their national origin.⁹³ The NSEERS also required noncitizens, including international students, traveling to the US to register if

⁸⁸ *Special Registration Procedures*, INS, available at <http://www.ice.gov/doclib/nseers/SRProc.pdf>.

⁸⁹ These twenty-five countries include all but one Muslim country. The countries included Iran, Iraq, Libya, Sudan, Syria, Afghanistan, Algeria, Bahrain, Eritrea, Lebanon, Morocco, North Korea, Oman, Qatar, Somalia, Tunisia, the United Arab Emirates, Yemen, Pakistan, Saudi Arabia, Bangladesh, Egypt, Indonesia, Jordan, and Kuwait. See *NSEERS – National Security Entry-Exit Registration System*, IMMIGRATION-LAW-ANSWERS-BLOG (Dec. 30, 2006), http://kraftlaw.typepad.com/immigrationlawanswersblog/2006/12/nseers_national.html?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+Immigration-law-answers-blog+%28Immigration+Law+Answers+Blog%29

⁹⁰ *DHS Deletes All Countries Listed on the Country-Based Profiling Registration Program*, COX SMITH MATTHEWS INC. (Apr. 27, 2011), <http://www.coxsmith.com/NewsEvents/ClientAlerts?find=29702>.

⁹¹ 76 Fed. Reg. 23, 830, <http://www.gpo.gov/fdsys/pkg/FR-2011-04-28/html/2011-10305.htm>.

⁹² See Smith, *supra* note 81.

⁹³ *Id.*

they were from the Middle East, North Africa, East Africa or a Muslim country in South East Asia.⁹⁴ Noncitizens arriving in the US were also required to register upon leaving one of the one and eighteen ports of entry in the US.⁹⁵ The most controversial feature of the program was a requirement for any male sixteen years old or older to mandatorily participate in the program.⁹⁶ The male noncitizens were required to “call-in” by a certain date, or had to comply with other requirements, which were poorly publicized.⁹⁷ The program was also criticized for providing unclear instructions for compliance.⁹⁸ Failure to participate in the program constituted grounds for deportation and loss of immigration benefits.⁹⁹ NSEERS used ethnic profiling to ensure that the public would be safe from future threats of terrorism. When the program was dismantled in 2009, the federal government was unable to prove that the program worked.¹⁰⁰

Ironically, some individuals who registered with NSEERS were consequently placed in removal proceedings. NSEERS systematically discriminated against foreign nationals of Arab, Muslim, Iranian, and South Asian origin.¹⁰¹ The program was designed with the terrorist attacks of September 11th shaping its intent. And while the program seemingly appeared to only require registration upon entry and exit, there were reports of noncitizen males from certain “Muslim” countries herded at federal buildings

⁹⁴ Id.

⁹⁵ Id.

⁹⁶ Id.

⁹⁷ *The NSEERS Effect: A Decade of Racial Profiling, Fear and Secrecy*, RIGHTS WORKING GROUP, PENN. STATE LAW (May 2012) https://law.psu.edu/_file/clinics/NSEERS_report.pdf at 4.

⁹⁸ See Smith, *supra* note 81.

⁹⁹ Id.

¹⁰⁰ Id.

¹⁰¹ RIGHTS WORKING GROUP, PENN ST. L., *THE NSEERS EFFECT: A DECADE OF RACIAL PROFILING, FEAR AND SECRECY* (2012), *available at* https://law.psu.edu/_file/clinics/NSEERS_report.pdf.

throughout the country and forced to undergo background checks under the pretense of “routine” immigration status checks.¹⁰²

NSEERS also substantially affected the US’s acceptance of international students and their immigration registration requirements.¹⁰³ International students from any of the twenty-five countries listed as “NSEERS countries” were required to register with NSEERS.¹⁰⁴ Female international students were also required to comply with the registration system.¹⁰⁵

During its existence, noncitizens that registered with NSEERS could expect unscheduled visits by FBI agents, and the FBI would use the NSEERS list to drop by university campuses to question international students about their home countries’ possible terrorist programs. The program created an atmosphere of surveillance and many people feared the consequences of participating in the program, not because they had something to hide, but NSEERS was a tool for law enforcement surveillance of individuals that were targeted only on the basis of their ethnicity. NSEERS was premised on racially profiling noncitizens from NSEERS countries, and its controversial mandate was widely reported by civil rights advocates. In 2011, DHS dismantled the program because DHS determined that the program “is redundant and no longer provides any increase in security.”¹⁰⁶ To this day, it is unclear if NSEERS resulted in successfully thwarting terrorist attacks and if the DHS collected any meaningful data.

Fortunately, NSEERS is a historical artifact from the post-September 11th era; however, the long-term consequences of the

¹⁰² Megan Garvey et al., *Hundreds Are Detained After Visits to INS*, L.A. TIMES (Dec. 19, 2002), <http://articles.latimes.com/2002/dec/19/local/me-register19> (last visited May 9, 2014).

¹⁰³ *Supra* note 101.

¹⁰⁴ *Special Registration Procedures, Immigration and Naturalization Service*, *supra* note 88.

¹⁰⁵ Posting of Bob Kraft to Immigration Law Answers Blog, *supra* note 89.

¹⁰⁶ 76 Fed. Reg. 23830 (Apr. 28, 2011), available at <http://www.gpo.gov/fdsys/pkg/FR-2011-04-28/html/2011-10305.htm>.

program continue to play out.¹⁰⁷ Any immigrant with status who failed to register with NSEERS because they consciously objected to the program, or feared being the subject of law enforcement surveillance, can be considered to have “knowingly” failed to comply with US law. As a result, these immigrants who seek a “pathway to citizenship” may not prevail on their adjustment of status application for permanent residence. Under the current version of the comprehensive immigration reform bill, many undocumented immigrants will not qualify for relief.¹⁰⁸ Lastly, failure to comply with NSEERS requirements by not registering upon entry to the US may be grounds for inadmissibility.¹⁰⁹

NSEERS illustrates the complicated nature of immigration law and how it intersects with other areas of the law as well as foreign policy. The program also illustrates the danger in reducing immigration law into simple binaries that fail to address the legal complexities.

Fraud Detection and National Security Directorate

In 2004, United States Citizenship and Immigration Services (USCIS) created the Fraud Detection and National Security

¹⁰⁷ See Chris Rickerd, *Homeland Security Suspends Ineffective Immigration Program* (May 06, 2011), <https://www.aclu.org/blog/immigrants-rights-racial-justice/homeland-security-suspends-ineffective-discriminatory>.

¹⁰⁸ USCIS, FORM I-485, APPLICATION TO REGISTER PERMANENT RESIDENCE OR ADJUST STATUS, (2013), <http://www.uscis.gov/sites/default/files/files/form/i-485.pdf>. See also, USCIS, N-400 APPLY FOR CITIZENSHIP (2013), <http://www.uscis.gov/sites/default/files/files/form/n-400.pdf>; *FAQ About S. 744*, NAT'L IMMIGRATION L. CENTER (JULY 2013), <http://www.nilc.org/irsenateS744faq.html>; Daniel Costa, *Future Flows and Worker Rights in S. 74*, ECON. POLICY INST. (Nov. 12, 2013), <http://www.epi.org/publication/future-flows-worker-rights-s744-guide-immigration/>.

¹⁰⁹ While NSEERS existed, failure to comply with the registration requirement or even appearing before the now defunct Immigration and Naturalization Services (INS) under the US Department of Justice to review your immigration status was grounds for removal. See Garvey et. al, *supra* note 102, an L.A. Times article that recounts the case of Iranian males in Los Angeles “rounded up” at the LA federal building in 2002, shortly after the September 11th attacks. See *id.*

Directorate (FDNS). The sub-agency is responsible for ensuring that applicants seeking immigration benefits are not committing fraud on the immigration system, and that individuals who are a national security risk are not approved for immigrant benefits.¹¹⁰ As the directorate's website states,

FDNS officers resolve background check information and other concerns that surface during the processing of immigration benefit applications and petitions. Resolution often requires communication with law enforcement or intelligence agencies to make sure that the information is relevant to the applicant or petitioner at hand and, if so, whether the information would have an impact on eligibility for the benefit.¹¹¹

FDNS reviews a broad spectrum of cases and is not limited to applicants from suspect countries. However, in practice, Middle Eastern and North African applicants are those typically "selected" for secondary review to run criminal background checks or to verify the statements in the immigrant's application. If an applicant's case is under review by FDNS, the applicant is not notified in advance and many times may not know that his application is held up by FDNS. The directorate communicates with the FBI and ICE in conducting its review. Usually, FDNS will also conduct unannounced investigations with an applicant's neighbor, or FDNS will stop by the applicant's residence to verify the applicant's location in the US. And in some cases, the applicant will be called in for an interview at the local USCIS field office, while the applicant's attorney is not notified about this unscheduled interview. Many of these cases will be held up for several months until the individual is "cleared." The FDNS process is opaque and

¹¹⁰ It is worth noting that among immigration practitioners, FDNS commonly reviews and investigates employment-based fraud for H-1B and L visa holders. *FDNS Investigators Contacting End-Clients to Verify Information*, MURTHY LAW FIRM (Aug. 16, 2013), <http://www.murthy.com/2013/08/16/fdns-investigators-contacting-end-clients-to-verify-information/>.

¹¹¹ *Fraud Detection and National Security Directorate*, U.S. CITIZENSHIP AND IMMIGR. SERVS. (Nov. 18, 2011) <http://www.uscis.gov/about-us/directorates-and-program-offices/fraud-detection-and-national-security/fraud-detection-and-national-security-directorate> (*emphasis added*).

does not provide a direct channel for an applicant to dispute or challenge the directorate's review.

If a case is pending review by FDNS, an applicant does not receive notice from the directorate. Generally, an applicant will be called in for further questioning at USCIS or the applicant will not receive any status update on his case. If the applicant successfully inquires with USCIS, the agency will notify the applicant that FDNS is reviewing their file; however, the application could be pending review with FDNS for months or for years.

Since FDNS is mandated with reviewing a variety of immigration cases for potential fraud, including previously approved cases, FDNS does not exclusively work on cases where an applicant may have possible ties with a "terrorist" entity. FDNS works to expose immigration fraud by sham companies that help "highly skilled" workers obtain non-immigrant visas, including H-1B or L-1 visas.¹¹² FDNS also assists state agencies to verify an immigrant's work authorization. The Systematic Alien Verification for Entitlements (SAVE) program, which is a computer system that the federal agency requires state agencies to use to verify an immigrant's visa status before obtaining state government benefits such as a driver's license, or a professional license.¹¹³

Similar to NSEERS and CARRP (which will be discussed in the next-subsection), FDNS' operations are run discretely; however, applicants may ultimately learn from USCIS that their case is under review by FDNS. FDNS is not a secret program that operates within the shadows of the federal agency. Even though some cases that fall under the programs scrutiny may take months to resolve, the directorate operates with more transparency than NSEERS and

¹¹² H-1B visas are non-immigrant visas for highly skilled workers. The H-1B does not provide an immigrant with a pathway towards applying for permanent residence and then citizenship. It is designed to provide US companies with short-term foreign workers. Similarly, the L-1 visa is a non-immigrant visa category for executive and high-level managers of foreign companies with offices in the US. Temporary Worker Visas, <http://travel.state.gov/content/visas/english/employment/temporary.html>

¹¹³ *What is SAVE?*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES (Sept. 29, 2013), <http://www.uscis.gov/save/what-save/what-save>.

CARRP. FDNS is a powerful tool for USCIS to identify visa fraud in employment and family based immigration cases, while preserving an applicant's right to a relatively fair adjudication process.

CARRP

In August 2013, the American Civil Liberties Union (ACLU) of Southern California (ACLU-SoCal) released information about a previously unknown program run by USCIS.¹¹⁴ For years, immigration practitioners and their Middle Eastern or South Asian clients would find their immigration benefits application blocked, and with meaningful updates, many of these clients assumed that their applications were pending indefinite FBI background checks.¹¹⁵ ACLU-SoCal discovered that USCIS created a covert program in 2008 to carefully examine immigrant benefit applications for applicants from AMEMSA countries for potential national security threats.¹¹⁶ Documents obtained by ACLU-SoCal show that CARRP had a specific mandate to systematically deny immigration benefits for a vast number of applicants from "Muslim" countries.¹¹⁷ The end-goal was to deny benefits even if the applicant passed an FBI background check and there was no evidence of fraud.¹¹⁸ Like any secret program, applicants and immigration practitioners do not know if their cases were reviewed by CARRP because USCIS did not (and does not) announce if CARRP is reviewing a case.¹¹⁹

¹¹⁴ Karen McVeigh, *FBI Granted Power to Delay Citizenship for Muslims*, *ACLU Report Says*, THE GUARDIAN (Aug. 21, 2013, 3:29 PM), <http://www.theguardian.com/world/2013/aug/21/fbi-power-delay-citizenship-muslims-aclu>.

¹¹⁵ Pasquarella, *Muslims Need Not Apply: How USCIS Secretly Mandates the Discriminatory Delay and Denial of Citizenship and Immigration Benefits to Aspiring Americans*, ACLU, August 2013, at 9.

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 2-3.

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 4.

If an applicant is selected for review by CARRP, his application could be under review indefinitely or denied. Before the revelation, CARRP did not provide an appeals process for applicants, or an opportunity for a hearing. In most cases, an applicant would have to sue USCIS in federal court to overcome the agency's unfavorable decision. CARRP is replete with inconsistencies and has resulted in numerous applicants from the Middle East, North Africa and South Asia being denied benefits.¹²⁰ In many cases, these applicants were applying for permanent residence based on an approved immigrant visa, or these applicants were in the US and applying for citizenship.¹²¹ Thus, the program impacted immigration benefits for applicants with status and who were planning to adjust their status or naturalize. As ACLU-SoCal notes, CARRP "mandated the discriminatory denial and delay" of immigration benefits to applicants based on their national origin and religion.¹²²

CARRP represents the ultimate nightmare scenario for an immigrant applicant whose immigration status is thrown into limbo because of nationality and religious affiliation. The covert program used unreliable data from the FBI and other federal agencies with terrorist lists in order to verify that each individual from a Muslim country was not a "national security" threat before granting an immigration application. CARRP operated on the premise a practicing Muslim or an immigrant from a Muslim country must be presumed guilty and vetted for any affiliation with a terrorist organization. CARRP embodied that post-September 11th paranoia and institutionalized discrimination of Muslims. The detailed questioning of an applicant's religious practices and the use of intimidation by the FBI to coerce cooperation with federal surveillance programs underscore how deeply entrenched law enforcement activities and counterterrorism measures have become in adjudicating simple immigration cases for Muslims. Lastly, it appears that the goal behind CARRP was not exclusively for

¹²⁰ McVeigh, *supra* note 114, at 2-4.

¹²¹ *Id.*

¹²² See Pasquarella, *supra* note 16.

identifying potential terrorists seeking immigration benefits, but, it also appears that immigration officers were allowed to deny benefits to an applicant even if there was no indication that the applicant posed a threat to national security.

Comparative Program Failures

What NSEERS, the FNDS Directorate and CARRP indicate is an effort by the federal government to treat immigration applications by applicants from “Muslim” countries with heightened scrutiny. The compelling interest behind these programs is to protect national security interests and to prevent future terrorist attacks. To some extent, these programs also demonstrate how the federal government treats certain immigrant groups differently and how the federal government tailors a program’s purpose by employing racial profiling. Just as debates about border security implicates undocumented immigration from Latin America, national security focused programs in immigration raise questions about the right to “immigration benefits” for applicants from Muslim countries and whether they have been properly vetted. National security concerns have occasionally come up in our national immigration debate. After the Boston marathon bombing on April 15, 2013, members of Congress called on tighter restrictions on US asylum and refugee laws. Customs and Border Patrol (CBP) responded by cracking down on student visa violations, including overstays by international students.¹²³

Closely related to preventing terrorist attacks, Congress is currently considering a provision to the comprehensive immigration reform bill that would allow law enforcement agencies to use racial profiling based on religion and national origin while banning racial profiling based on race and ethnicity.¹²⁴ Senator Ben Cardin (D-

¹²³ Alicia A. Caldwell, U.S. Customs Ordered to Verify All Int'l Student Visas, USA TODAY (May 3, 2013, 2:43 PM), <http://www.usatoday.com/story/news/nation/2013/05/03/customs-student-visas-tazhayakov-boston/2133009/>.

¹²⁴ See S.744, 113th Cong. 1st Sess. 2013-2014, at 548. See also *CAIR Action Alert #691: Tell Congress that Immigration Reform Should Ban All Forms of Profiling*, COUNCIL ON AMERICAN-ISLAMIC RELATIONS (Apr. 30, 2013, 9:46 PM)

MD) has proposed two amendments to S. 744 to ban religious profiling by law enforcement agents.¹²⁵ Clearly, the Associated Press' reports (from 2011 through 2012) about the New York Police Department's collaborative efforts with the FBI to secretly monitor and map Muslim communities in New York City and New Jersey provide context to the language in S. 744 allowing law enforcement to consider a person's religion and national security in immigration related investigations.¹²⁶ Since the September 11th attacks, law enforcements agencies on the local and federal level have employed profiling based on religion or national origin to keep track of Muslim Americans.¹²⁷ S. 744 is a commitment to allowing law enforcement agencies to discriminate against Muslim communities and immigrants from Arab, South Asian, Somali and Iranian backgrounds while improving other areas of immigration law.

<http://www.cair.com/action-alerts/11856-cair-action-alert-691-tell-congress-that-immigration-reform-should-ban-all-forms-of-profiling.html> (last updated Apr. 30, 2013).

¹²⁵ See Keith Rushing, Senator Cardin Proposes Amendments to Fix Prohibition of Racial Profiling in Immigration Reform, RIGHTS WORKING GROUP (June 20, 2013, 2:00 PM), <http://www.rightsworkinggroup.org/content/senator-cardin-proposes-amendments-fix-prohibition-racial-profiling-immigration-reform>. See also John Fritze, Racial Profiling Provision of Immigration Bill Scrutinized, THE BALTIMORE SUN (June 12, 2013), http://articles.baltimoresun.com/2013-06-12/news/bs-md-racial-profiling-immigration-20130612_1_immigration-bill-immigration-status-border-security.

¹²⁶ AP's Probe Into NYPD Intelligence Operations, ASSOCIATED PRESS, <http://www.ap.org/Index/AP-In-The-News/NYPD> (last visited Apr. 30, 2014).

¹²⁷ The author uses the term "Muslim Americans" very broadly. Many Americans and immigrants who do not self-identity as Muslim are commonly labeled as Muslim and are consequently subject to surveillance. The author does not believe that the term "Muslim American" correctly captures the way that many immigrants or US citizens from "Muslim" countries identify. It is a term that has increased in use after September 11, 2001 to collectively define individuals from the Middle East, North Africa, Eastern Europe, South Asia, East Asia and Southeast Asia.

PART IV - CONCLUSION

The US immigration system is a broken system, and it will remain a broken system after S. 744 becomes law. By focusing on immediate legal relief to millions of undocumented immigrants, S. 744 fails to address the larger systemic problem with the immigration system. The immigration process in this country lacks adequate procedural mechanisms and runs parallel to a shadow immigration process where covert programs decide the fate of innocent applicants. This proposed reform does not, therefore, offer a solution to the catastrophic consequences for immigrants who are deported or whose legal status hangs in the balance due to the abuse of discretion by immigration personnel, the opaqueness of the administrative procedure of our immigration system, and the dehumanizing experience that many immigrants confront in our immigration system. To address these structural problems, it is essential that any meaningful effort to reform the immigration system include the two policy considerations. First, the constitutional rights of immigrants (both detained and non-detained) must be expressly enumerated in any comprehensive immigration reform bill. To this end, a statutory provision must create a legal channel for immigrants whose constitutional rights are violated to challenge the federal agency's unconstitutional act. Lawmakers can maintain the integrity of the system while preserving the dignity of those who encounter the immigration system.

Secondly, any iteration of a comprehensive immigration reform bill must address the reality that many immigrants from AMEMSA countries confront. The fact that USCIS has a covert program to adjudicate cases from AMEMSA countries chips away at the integrity of our political system. National policies steeped in racial and ethnic profiling undermine the strong principles behind rule of law and political transparency. Secret programs are not conducive to molding future citizens and promoting a sense of belonging by "new Americans." Instead, covert programs only serve to disenfranchise immigrant communities. For these reasons, any bill proposing comprehensive immigration reform must

expressly reject the use of racial profiling and must terminate covert programs like CARRP.

Even if a comprehensive immigration reform bill were to dismantle CARRP and denounce the use of racial profiling by law enforcement agencies, Congress needs to revisit the impact of the USA PATRIOT Act (“PATRIOT Act”) on the immigration system. In particular, our immigration system was heavily shaped by the PATRIOT Act, which was passed into law a few months after 9/11. The Act sanctioned the use of racial profiling in the public and private sector as part of the US’s counterterrorism strategy after 9/11. Racial profiling has become normalized in this country. Interestingly, before 9/11, about eighty percent of Americans considered racial profiling wrong.¹²⁸ And on the federal, state and local level, there were efforts to collect data in order to understand the extent to which stops and searches were based on race. Today, the legal landscape looks different than it did before 9/11. The current discourse on immigration reform proposes a band-aid solution. The underlying issues with our current immigration legal framework affect all immigrants regardless of their country of origin. And thus, an effective immigration reform bill must take into account the structural bias that all immigrants face by virtue of being treated as an outsider.

¹²⁸ DAVID COLE & JAMES X. DEMPSEY, *TERRORISM AND THE CONSTITUTION* 168 (2001). See also Shaun L. Gabbidon, George E. Higgins & Matthew Nelson, *Public Support for Racial Profiling in Airports: Result From a Statewide Poll*, 23 *CRIM. JUST. POL’Y REV.* 254, 257 (2011).