IMMIGRANTS AND COUNTERTERRORISM POLICY:
A COMPARATIVE STUDY OF THE UNITED STATES AND BRITAIN

A dissertation presented

by

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to

The Department of Political Science

In partial fulfillment of the requirements for the degree of
Doctor of Philosophy in Political Science

Northeastern University
Boston, MA
April 2013
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ABSTRACT OF DISSERTATION

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in the Graduate School of Social Sciences and Humanities of
Northeastern University
April 2013
Abstract

This project examines the political mechanisms through which foreign nationals are perceived as security threats and, as a consequence, disproportionately targeted by counterterrorism policies. Evidence suggests that domestic security strategies that unduly discriminate against non-citizens or national minorities are counterproductive; such strategies lead to a loss of state legitimacy, they complicate the gathering of intelligence, and they serve as a potential source of radicalization. At the same time, discriminatory counterterrorism policies represent a significant break from liberal democratic ideals by legitimizing unfair treatment of targeted groups.

If discriminatory counterterrorism policies are counterproductive and undemocratic, why do policymakers support such strategies in the first place? By what means do these types of policies and related administrative measures gain traction in the political system? How do these measures operate in practice, and what accounts for variations in their implementation over time? To answer these questions, a policy process model is used that distinguishes between the problem definition and agenda setting, policy formulation and legitimation, and policy implementation phases of policymaking. The American government’s handling of the First Red Scare (1919-1920), the American response to 9/11, and the British response to 9/11 are examined to provide a comparative perspective on these issues.

Policy outputs across these three cases were remarkably similar. The rights of non-citizens were curtailed to a much greater extent than were the rights of citizens. These similarities are attributed to the ways in which notions of national identity influence problem definition and policy legitimation. In particular, concepts that were prevalent in nationalist
narratives about the *Other* were incorporated into dominant policy narratives about terrorism. The nationalist *Other* became indistinguishable from the terrorist *Other*, thereby contributing to the translation of group-neutral policies into a group-specific practice of counterterrorism.

The greatest variation, within and between cases, was observed in the implementation of counterterrorism policy. Each instance of implementation represented a unique trajectory, and both American cases displayed a much more vigorous and public set of counterterrorism activities than the British case. These differences are traced to variations in other institutional (domestic and international) and political variables that were found to be influential in each case.
Acknowledgements

I would like to express my sincere gratitude to the members of my dissertation committee. They have not only helped to improve the quality of this dissertation, they have been indispensable sources of inspiration and support.

I am incredibly thankful for the time Professor Amílcar Barreto has devoted as committee chair. I truly appreciate his guidance and support throughout this entire process, from the countless hours spent helping me develop a robust research proposal to the myriad discussions we have had on everything from nationalism to comparative politics, academia, travel, food and family. His breadth of knowledge has been invaluable for my own research and his enthusiasm has been inspiring for me as a young scholar.

I am indebted to Professor David Rochefort for the substantial time he has spent working with me on this project. This dissertation would have been of much less quality if it were not for his thoughtful feedback and direction. He has helped me to become a better writer and a better scholar, and he has been a terrific role model. For this I am grateful.

I would also like to thank Professor David Schmitt for his continued support throughout my graduate career, including his guidance as a member of my dissertation committee. He has challenged me to think critically about the policy implications of my work, and he has played an essential role in my development as a scholar.

I would be remiss if I did not express my gratitude for the mentorship and friendship of Professor Thomas Vicino. He is always willing to meet for a chat and his advice on research and academia has been invaluable. I wish him all the best.

Finally, this project would not have been possible without the everlasting love and support of my family. I am incredibly fortunate to have them in my life.
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Chapter 1

Immigrants and Counterterrorism

A deep sense of vulnerability permeated American society in the wake of Japan’s bombing of Pearl Harbor in 1941. This was one of the most destructive attacks ever to occur in the United States, amounting to 2,402 Americans killed and over 1,000 wounded. Japan’s success in other battles throughout the Pacific during this period was a sign that the United States faced a significant threat for some time to come. Perceptions of this external threat transformed into a public hysteria about a “fifth column” working to undermine national security from within. Prominent public officials, the press, and patriotic groups promoted the notion that Japanese-Americans were a threat to American national security. This hysteria culminated in the internment of 120,000 people of Japanese decent. A majority were American citizens. Their internment was based on suspicions of disloyalty simply because of their ethnic background. Not a single act of espionage or sabotage had been committed. Internees were not charged with any crime, their cases were not considered on an individual basis, nor were they given any legal recourse to challenge their detention.¹

The internment of Japanese-Americans exemplifies the vulnerable status of immigrants and national minorities during times of severe insecurity. However, the internment of individuals based on race, ethnicity, religion, or ideology has not been limited to the United States. Many countries around the world, including Britain,² have interned individuals during wartime based

¹ For an official and detailed look at the politics behind Japanese-American internment, including Executive Order 9066 authorizing internment in general, see Commission on Wartime Relocation and Internment of Civilians, 1982.
² Nearly 2,000 Nazi sympathizers, all British citizens, were interned during World War II (Simpson, 1992: 1). 176 Iraqis and other Arabs thought to be security threats were detained during the first Gulf War
on their suspected sympathies rather than any overt threatening behavior (Myers et al. 2011). The harsh treatment of suspect groups during times of war is well known. Yet similar actions have also been taken during other times of insecurity. The aftermath of a terrorist attack is a prominent example. Responses to terrorism often involve a disproportionate exercise of state power towards marginalized groups.

Ironically, counterterrorism strategies that target internal minorities may actually undermine efforts to enhance national security. The integration of immigrants and national minorities diminishes the likelihood of domestic terrorist attacks (Chebel d'Appollonia & Reich 2008a), yet policies that summarily treat such groups as threats often hinder this process. Therefore integration outcomes should be a vital consideration of any counterterrorism policy. While citizens and non-citizens alike can present a security danger, state responses must be particularly sensitive to their effects on immigrant populations because of an increased susceptibility to alienation. Efforts that do not consider the potential for alienation of immigrants will likely fall short of adequately addressing any threat there may be (Chebel d'Appollonia & Reich 2008b; O'Duffy 2008). Alienated individuals are more likely to become radicalized and participate in contentious political activities as a result of an ambivalent or even hostile identification with their state. For various reasons they may reject their minority status and culture; yet at the same time they do not fully accept or become embraced by the majority culture (Awan 2008).

This project will evaluate the political mechanisms through which non-citizens are perceived as security threats and, as a consequence, punitively targeted by counterterrorism policies. Several questions are addressed: Why do policymakers support these types of policies?

By what means do these discriminatory policies and related administrative measures gain traction in the political system? How do these measures operate in practice, and what accounts for variations in their implementation over time? Political rhetoric is given special attention in order to demonstrate how policymakers form an understanding of terrorism and how they evaluate policy proposals; particularly those provisions related to non-citizens and immigration. We will also examine how these policies are implemented, paying attention to the various activities targeting non-citizens and emphasizing the variation in intensity of these activities over time. Doing so will provide a clearer illustration of the political constraints and opportunities policymakers face when it comes to counterterrorism, thereby giving us a better understanding of why counterterrorism policies are adopted that disproportionately target non-citizens.

**Balancing Security and Civil Liberties**

The central challenge for policymakers in dealing with domestic terrorism is often depicted as one of balancing the need for security with the maintenance of civil liberties. While security measures are meant to protect the very freedoms that are central to liberal democracies, rights must be abrogated, to some degree, for security threats to be effectively addressed. Contemporary debate centers on the extent to which rights should be curtailed to achieve an adequate level of security. This balance is particularly acute, and more complex, when it comes to non-citizens and national minorities. The trade-off between security and liberty has historically been viewed differently with respect to foreign nationals and national minorities than for the majority population (Cole 2003). For example, policies that restrict the rights of non-citizens, in the name of national security, rarely receive widespread opposition. Conversely, restrictions of the rights of the majority population for purposes of national security are strongly resisted if they are not bolstered by a convincing rationale. So while it has become more
acceptable for states to restrict the rights of non-citizens for purposes of national security, this unequal burden is discriminatory in nature and therefore perpetuates a certain level of insecurity.

The security/rights balance regarding foreign nationals is also complicated because of the linkage that immigrant and immigration policies have with other policy considerations (Boswell 2009: 103; Hampshire 2009: 125; Huysmans 2006: 60). Since immigration can contribute to economic development by increasing the pool of labor, correcting demographic imbalances — particularly important for aging populations in welfare states — and through creating new markets at home and abroad, economic considerations compete with other policy rationales. A restrictive counterterrorism approach that is burdensome for non-citizens can decrease the attractiveness of a country for potential immigrants and therefore affect the economy. Immigration policies are also linked with a state’s foreign policy interests. States, as well as broader ethnic or religious communities, are concerned with how their members are treated abroad. Just as importantly, host governments have dealt with immigrants (including refugees) and national minorities in ways that further their foreign policy agenda (Mylonas 2012; Rosenblum 2009; Zolberg 2006: 18). Although foreign policy considerations do not always influence immigration policy, they tend to be amplified during times of war. We should therefore consider the influence of foreign policy goals on counterterrorism policy, as it pertains to non-citizens, particularly when policymaking in this domain is done within the context of international war.

**The Securitization of Immigration**

Many countries have strengthened the operational links between immigration and immigrant policies, on the one hand, and national security, on the other, since 2001 (Chebel d'Appollonia 2012; Chebel d'Appollonia & Reich 2008a). The problems of immigration have
increasingly been framed in terms of national security, and policymakers have fashioned
immigration policies as tools for achieving counterterrorism objectives. Examples include
enhanced visa requirements, increased border security, restricted rights of asylum-seekers, and
deeper scrutiny of visa applicants before visitors and immigrants arrive at ports of entry. At the
same time, counterterrorism legislation has increasingly targeted immigrants. In many countries
immigrants have been subjected to increased surveillance, broadened grounds for deportation,
longer periods of detention without charge, and restrictions on their financial and associational
activities. In many cases, this has been done on a retroactive basis.

Policymaking becomes securitized, to varying degrees, as a security rationale begins to
exert influence on policy design. As defined by Buzan et al. (1998: 5), securitization occurs
when policy domains are “staged as existential threats to a referent object by a securitizing
actor,” which then “generates endorsement of emergency measures beyond rules that would
otherwise bind.” In this view security has to do with much more than military affairs and
warfare. Existential threats can be seen as arising from a number of different “sectors,” such as
the economy, the environment, or social phenomena such as immigration.

The securitization of immigration began receiving more scholarly attention in the 1990s,
with the advancement of the European Union and the loss of state sovereignty that came with it
(Wæver et al. 1993). Yet this was not the first time in which immigration or immigrants were
perceived as security threats. At several points in U.S. history, for instance, immigrants have
been characterized in political discourse as threats to national security: after the assassination of
President McKinley in 1901 by a Hungarian anarchist; in the aftermath of World War I and the
hysteria about radicalism during the First Red Scare; or the internment of mostly Japanese
immigrants and their descendants during World War II (Cole 2003). However, the tone of
discourse on both sides of the Atlantic and the counterterrorism measures enacted in the wake of 9/11, both of which were particularly severe on the Muslim population, have led to an increase in scholarship on the confluence of security and immigration (Bleich 2009; Brown 2010; Chebel d'Appollonia & Reich 2008a; Givens et al. 2009; Hamadouche 2009; Ismaili 2010; Mandaville 2009; Rudolph 2006; Saggar 2006; 2009; Tirman 2004).

We can look to two different areas for indications of the securitization of immigration: the extent to which a security rationale influences immigration policy, and the extent to which immigrants are the target population of security policy. The three cases examined here represent both of these scenarios. In media reports, policy debates, and public policy itself the link between immigration and terrorism has been firmly established. It is easy to notice such policy linkages in the current climate where both immigration and terrorism are receiving much public attention, but it should be noted that this is not a novel phenomenon. Immigration and national security have been linked, in many instances, since before 2001 (Chacón 2008; Chebel d'Appollonia 2008; Cole 2003; Friman 2008; Jupp 2009; Rosenblum 2009; Schain 2008a). The 2001 attacks on the Twin Towers and the Pentagon merely accelerated the conjoining of immigration and security concerns, so that the links between these two policy domains have deepened and broadened (Chebel d'Appollonia & Reich 2008a; Givens et al. 2009).

**Contemporary Issues in Immigration and National Security**

Immigration and national security are two issues that are persistently salient among national publics and attracting the attention of central governments. Despite the recent global economic downturn, international migration flows remain high. Inflows to OECD countries in 2008 were 37% higher than they were at the beginning of the twenty-first century; in 2009 inflows were 18% higher (OECD 2011). Despite the drop between 2008 and 2009, the aging of
many western societies and the economic benefits immigration delivers mean that the flow of people between countries is unlikely to recede any time soon.

Immigration and immigrant integration are particularly contentious issues that many Western countries have grappled with in recent years. The United States has twice attempted and failed to achieve any meaningful reform of its immigration and citizenship policies within the last decade. An especially factious aspect of the American debate has been concerned with how to stem the flow of undocumented immigration and what to do about the millions of undocumented immigrants already in the country. No lasting solution has yet been agreed upon. Despite a substantial increase in resources deployed for purposes of border security, many believe the federal government has failed to fulfill its responsibility for controlling immigration. The issue of undocumented immigration also has significant economic repercussions. Businesses rely on the cheap labor and increased manpower that accompany illegal immigration. The economic benefits that accrue from unauthorized immigration have induced the government to adopt a stance of passive toleration instead of aggressive curtailment. As a result, several states and municipalities have passed their own legislation restricting the rights of undocumented immigrants, in addition to giving increased authority to local police and other officials to report and apprehend these individuals. These actions by local governments have challenged the federal government’s traditional authority over immigration matters and have ensured that immigration will remain an important political issue for some time to come.

Immigration politics has been equally contentious in Europe. European societies are concerned with immigration from newly admitted members of the European Union, and matters

3 The Comprehensive Immigration Reform Act of 2006 and the Comprehensive Immigration Reform Act of 2007 were Senate bills that sought to address a number of areas related to immigration, such as border security, visa allocation, and citizenship for unauthorized migrants. Congressional debates on both bills received substantial media attention but neither one received enough support from Congress to pass.
related to refugees have led to disputes between European states. However, the central challenge for many European countries is not so much the issue of undocumented immigrants. Rather, it has been the integration of immigrants into the host society. This primarily concerns the integration of Muslims, both immigrant and native-born. The controversies surrounding Salman Rushdie’s *The Satanic Verses*, the 2005 publication of twelve cartoons in a Danish newspaper seen as offensive to Muslims, and the 2011 French ban on wearing a face veil in public — which mostly affects Muslim women — all highlight the tenuous standing of Muslims within Western European societies. Social disturbances and riots between minority groups and the host populations in Britain, France, Germany and Italy are additional indications that these increasingly diverse societies have not adequately integrated their constituent groups. And the relative strength of extreme right-wing parties will ensure that these issues are kept in the public discourse for the foreseeable future.

National security issues, particularly concerns about terrorism, have also been highly salient in recent times. The attacks on New York City and Washington, D.C. in 2001 were the impetus for policymakers to renew their focus on terrorism. The culmination of government activity in the United States was the USA PATRIOT Act and a host of regulatory changes intended to increase the state’s capability to detect and thwart acts of terror. Many countries in Western Europe followed suit (Chebel d'Appollonia & Reich 2008a; Givens *et al.* 2009), initiating a wave of new or strengthened counterterrorism legislation. The train bombings in Madrid in 2004 and again in London in 2005, in addition to several incidents on both sides of the

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4 While *The Satanic Verses* won merit within the literary community of Britain, where it was published, many Muslims considered it blasphemous for its depiction of Islam. The book was banned in several Muslim majority countries, and Ayatollah Khomeini of Iran issued a fatwa calling for the author’s death. Iran also broke diplomatic ties with Britain because of the book’s publication.

5 The cartoons initiated a public debate about the balance between freedom of expression and showing respect for other religions, and touched off a series of protests in several cities in Europe and Muslim majority countries. Many of the cartoonists received death threats. (See Klausen, 2009.)
Atlantic in which terror plots had been discovered and effectively neutralized, have ensured that terrorism remains a concern with high standing on the political agenda.

**Research Design - Policy Analysis and National Identity**

This project is a study of the securitization of immigration, concentrating on the politics of counterterrorism where it has focused on non-citizens. Since securitization entails political and technocratic processes (Huysmans 2006: 153), both are captured in the following analysis, although more attention is paid to the political aspects of securitization. The role of experts and other officials with responsibilities of a more technical nature are considered to the extent that they show how outcomes from political processes do not always match those from technical assessments of a given public problem. Counterterrorism experts may have policy reasons for isolating the process of immigration to some degree in order to more comprehensively address security concerns. However, the imprecise and rather blunt targeting of foreign nationals for purposes of national security, in many instances, suggests that these strategies are not based solely on technical considerations. It appears that these suboptimal policies are the consequence of political processes that, for various reasons, amplify the extent of the danger from foreign nationals as well as the measures seen as necessary to thwart it.

The distinction between technical and political processes of policy relates to two broad rationales for implementing a particular solution to a given problem: the effectiveness and the political expediency such a solution entails. Re-election and the development of effective, appropriate and relevant public policy are the two primary goals of state officials (Stone 2002: 2). These goals can coincide so that a public policy is both effective in addressing a problem and is popular among the electorate. But these goals can also contradict one another, so that effective and appropriate policies are at the same time politically unpopular. Many counterterrorism
strategies seem to embody this tension between effective and popular policy, given that they often contain elements that perpetuate insecurity by stunting the integration of immigrants and national minorities. A focus on the political processes by which counterterrorism decisions are made can help to more fully capture the dynamics that determine the achievement of these two goals.

The model of counterterrorism policymaking used here builds on this distinction between policy effectiveness and policy popularity. Specifically, counterterrorism is understood as a domain in which state officials seek to achieve two goals: to neutralize any future threat of terrorism, and to manage public fear. The management of public fear is a corollary to the need for policies that effectively address terrorism because a sense of security is partially based on the perception that the nation is adequately protected. For instance, a bigger arsenal of nuclear weapons may make us feel more secure, but whether or not this merely serves to intensify the dangers we face continues to be a subject of scholarly debate. The goals specific to counterterrorism policy — effectively neutralizing terrorist activities and managing public fear — can be complimentary so that both are simultaneously achieved. But they can also pull policy in different directions. This is especially so when policy is created in the wake of a terrorist attack (Garland 2001: 134). Many of the activities that make substantive gains in security — such as the gathering of intelligence, developing international information-sharing networks, or addressing domestic or global structural inequalities — take time to bear fruit. It is unlikely these activities will do much to calm an anxious public looking for immediate psychological comfort.

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6 Managing public fear refers to the active involvement of the state to keep fear at a preferred level. This denotes actions to decrease fear from unacceptably high levels, and it also denotes actions to increase fear. The latter is variously explained as instrumental for the state to exert control and elicit mass acquiescence (Edelman, 1977: 5; Levin, 1971: 4) or as the by-product of political and institutional incentives to promote fear (Friedman, 2011: 77).
If we are to understand how policymakers strive to achieve these goals it is necessary to understand whom the audience, watching over (if not actively attempting to influence) policy developments, is. Among whom does the policy need to be popular? If the policy is to be effective, whose support will it need to attract? Max Abrahms identifies three key “constituents” of counterterrorism policy: the domestic public, the international community, and individuals holding moderate views of those ideologies that have been appropriated by extremists to justify terrorism (2007: 242-246). If counterterrorism is to be successful, the support of each of these constituents is required. In order to understand how policymakers attempt to develop counterterrorism policy that manages public fear and thwarts future attacks, then, we should pay attention to how they try to garner support from these three constituents.

David Garland (2001) expresses the distinction between effective and popular policy in his model of crime control when he discusses the differences between adaptive and expressive solutions to crime. Adaptive approaches are characterized as the product of rational assessments of crime that seek to effectively address underlying problems. Contrasted with this is an expressive approach to crime that is meant, above all else, to reassure the public that the state is in control (ibid., 133). That expressive solutions are often ineffective at curtailing crime is beside the point. The value lies in its ability to provide psychological relief from the anxieties associated with crime and personal safety. Within an expressive approach to crime, then, “policymaking becomes a form of acting out that downplays the complexities and long-term character of effective crime control in favour of the immediate gratifications of a more expressive alternative” (Garland 2001: 133, emphasis in the original). This model is therefore useful for understanding state responses to acts of terrorism, in which staving off future attacks is just as crucial as addressing the intense psychological stress experienced by the public.
These political dynamics of counterterrorism will be examined using a policy process model that distinguishes between the distinct phases of policymaking (Kraft & Furlong 2007: 71). Important features of the agenda setting, policy formulation and legitimation, and implementation phases will be analyzed. This approach provides a framework for precise exploration of the various forces present in counterterrorism politics at each phase of the policymaking process. Such a discrete analysis of policy development will illuminate the constraints and opportunities policymakers confront at each stage of the policymaking process. We can thereby develop a clearer understanding of how officials manage the balance between security and liberty, and how they reconcile their goals of developing effective policy and attaining popular support.

Since many counterterrorism strategies appear to be suboptimal, when considering their implications for immigrant integration, such strategies are likely adopted more for their anticipated political popularity. This popularity may be based on a multitude of sources, but national identity is an important factor since it plays a pivotal role in political debate on issues involving immigrants (Bauder & Semmelroggen 2009; Bowen 2007; Brubaker 1992; Citrin et al. 1990; Fitzgerald 1996; Kurthen 1995; Zolberg 2006). Our understanding of these issues — what exactly the problem is, who is at fault, how to address the issue — is contextually bound (Bosso 1994) by our “conceptions of nationhood” (Brubaker 1992: 17).

National identity is especially important in matters concerning terrorist threats. One way to reduce the uncertainty associated with such sporadic and seemingly random acts of violence is to objectify the threat (Huysmans 2006: 53). The identification of any group that could plausibly be portrayed as threatening is frequently undertaken to reduce a sense of uncertainty, thereby easing public fear. This process of objectification involves the identification of the Other, an
important element in the definition of any national identity (Barth 1998; Tajfel 1978a). Therefore the following analysis explicitly focuses on the nature of national identity in a given context and the way it is deployed in political discussions about terrorism.

The literature on immigration securitization has generally failed to acknowledge the role that national identities have played in spurring this process. In political terms, nationalism is considered a benchmark of legitimacy. Recent scholarship on immigration policy has focused on state legitimacy as the key explanatory variable for policy outcomes (Boswell 2007; 2009). This lens for understanding policy is adopted here. However, insight from the nationalism literature is used to develop a comprehensive view of what it means for a state and its behavior to be legitimate. Certain groups and political acts are welcomed and hence deemed legitimate when they coincide with the prevailing conception of national identity. A strong incentive then exists for public policies involving immigrants to align with dominant notions of national identity since legitimacy is the lynchpin of state authority. States could also strive to develop effective public policies to secure legitimacy. However, as argued above, counterterrorism strategies often fall short in this regard. The social dimension of nationalism defines members and non-members of a national community on the basis of various criteria, and it draws attention to the interaction between these groups in terms of inclusionary or exclusionary behavior. These concepts will be vital for making sense of counterterrorism policies as they pertain to immigrants.

The perceived quality of threats from immigrants and national minorities is an important qualifier. Such threats are not entirely identified in an objective manner. The definition of who or what is threatening is, instead, the product of political and social processes (Huysmans 2006: 2). While our understanding of threat is partly based on actual breaches of security or the threatening behavior of others, our perception often amplifies the magnitude or distorts the
nature of the threat involved. The perceived nature of security threats does not imply they are entirely fabricated threats, without any logical basis. Such threats are referred to as “perceived” to bring attention to the fact that the extent of any objective danger is distorted by our interpretations of the context and the people involved. So while it is true that all 19 hijackers involved in the 9/11 attacks in the United States were Muslim immigrants, the notion that immigrants — particularly Muslim ones — or that the process of immigration are primary sources of threat does not exist independent of our collective understanding of them as such. In the words of Jef Huysmans (2006: 7), “insecurity is not a fact of nature but always requires that it is written and talked into existence.” An understanding of national identity, and its construction, can shed light on how these perceptions are developed.

The role of national identity is a central focus of the study, yet the influence of other institutional forces and policy considerations are not overlooked. A focus on national identity and its influence on political debate and policy developments is the starting point of analysis because it serves as a clear reference point around which terrorist threats are understood and objectified. Objectification of a threat does more to placate the fears of the public than it does to reduce the severity of the actual threat. At the same time pressure builds for the state to soften its objectification tactic since it can easily become highly discriminatory and counterproductive. Liberal institutions can challenge the appropriateness of such an approach (Hollifield 1992; 2004), and the desire to make progress in reducing the severity of the threat will likely stunt a full-fledged objectification campaign from proceeding for too long. Considerations of the

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7 While clampdowns on undocumented immigration, and the screening and domestic surveillance of immigrants have increased in the United States as a result of 9/11, these same measures would most likely not have caught the hijackers since all had permission to be in the U.S., all had no suspicious history that would have alarmed authorities doing the screening, and none had conducted activities in the United States that would have appeared suspicious under closer surveillance. (See Chishti et al., 2003: 7.)
linkages that counterterrorism has with other policies are another factor that can influence the strategy adopted.

**Case Studies**

To more clearly understand the politics of counterterrorism as it relates to immigrants and national minorities, a historical qualitative analysis of policymaking and policy implementation will be conducted involving two cases from the United States and one case from Britain. The American government’s handling of the First Red Scare (1919-20) in the United States is examined, in addition to individual analyses of the American and British responses to 9/11. These are all instances in which immigrant or national minority populations became a central focus of security concerns and related public policies. Recent acts of terrorism in both countries, perpetrated by immigrants — in the case of the U.S. — or native-born national minorities — in the case of Britain — make them obvious cases to observe. But each country has also had a long history of targeting these groups for purposes of national security. The United States has taken drastic measures towards German-, Japanese-, and Italian-Americans during World War I and World War II. Britain has sought to defend itself against Irish Republican terrorism for nearly four decades, an experience that has informed their current approach to counterterrorism (Jupp 2009; Schain 2008a).

It may seem like these cases were chosen based on the dependent variable, in which case a selection bias would be present that attenuates the real effect of any causal variable (King *et al.* 1994: 130). However, choosing to observe the United States and the United Kingdom because

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8 Some scholars do not consider this type of selection bias to be methodologically inferior. Stephen Van Evera, for instance, argues that case selection on the dependent variable poses no issue if: it is possible to compare selected cases to a common example; there is large within-case variance that would allow for multiple points of comparison; or detailed process tracing of the selected cases is possible. Meaningful
of their history with securitizing immigration does not introduce such bias. This would be the case if the purpose were to understand the factors that lead to the securitization of immigration issues, since no cases would have been observed in which securitization did not occur. Rather, the purpose of the current study is to understand the political dynamics of and the variability in counterterrorism policy once immigration issues have become securitized. Structured in this way, the processes and policies under investigation are still open to variation.

While both countries have significant immigrant populations, immigration is a central component of the American national narrative. In Britain immigration has largely occurred in the context of the British Empire. As a result, immigrants in Britain largely originate from the former colonies, resulting in a more concentrated profile of immigrants in terms of race, religious background, and nationality when compared to the United States. British national identity is also much more ambiguous than is American national identity. The admixture of a multinational state — whereby a central state in London rules over the ‘home nations’ of England, Scotland, Wales and Northern Ireland — with the continuously undecided relationship it has with the European Union have made it difficult to articulate a definitive British national identity. The political institutions of these countries also differ in important ways. Notably, the presidential system of government in conjunction with relatively weaker party cohesion means that pressure groups have much better access to elected officials in the United States than in Britain. The principle of Parliamentary supremacy has rendered the British judiciary to be relatively weak when compared to its American counterpart. The British system, during the period under consideration here, lacked any tradition of judicial review and therefore posed less of a constraint on governmental action. However, the adoption of the European Convention on Human Rights has recently

conclusions can still be drawn, even if there is no variation of the dependent variable between cases, under any of these three conditions. (See Van Evera, 1997.)
bestowed the British courts with additional powers. While immigration has been securitized in Britain and the United States, these countries differ on several institutional, ideational, and demographic factors that are expected to have a bearing on the way in which immigrants and national minorities are targeted by counterterrorism policy. By comparing cases from these two systems, not only can we get a better idea of how national identity influences counterterrorism policy, we can also see more clearly how and where these different institutional and political variables outweigh considerations of national identity.

The following is a comparative study of the politics of counterterrorism as it pertains to foreign nationals. The next chapter discusses the theoretical and methodological foundations of the study. Insights from the nationalism literature are highlighted, before a review of the policy process model and the identification of different types of political forces that may act upon policymaking. The next two chapters will discuss counterterrorism in the United States. Chapter three focuses on the First Red Scare of 1919 and 1920, a time when the fear of radicalism and communism led to a relatively brief, but intense, attack on immigrant communists and anarcho-syndicalists. Chapter four analyzes the politics of counterterrorism in the wake of the terrorist attacks in New York City and Washington, D.C., in 2001. Britain is the focus of the next chapter. Chapter five looks at the development of the Anti-terrorism, Crime, and Security Emergency Act, which was developed soon after the 2001 attacks in the United States. The last substantive chapter will bring together insights from the three case studies to understand the influence of various political forces and considerations, and to highlight the similarities and differences in how immigrants are targeted by counterterrorism policy in the United States and Britain.
Chapter 2

National Identity and the Analysis of Counterterrorism Policy

Policymakers must consider the consequences of their counterterrorism activities on the integration prospects of immigrants since individuals from alienated groups are more likely to engage in contentious political activities, including terrorism (O'Duffy 2008). Yet many states have addressed terrorism in ways that tend to exclude segments of these immigrant and minority groups from the broader national community. So while integration is an effective element of counterterrorism, policies have been pursued that stunt integration and thereby perpetuate a certain level of insecurity. While many scholars have noted these exclusionary aspects in the counterterrorism approaches of several Western states (Bleich 2009; Chebel d'Appollonia & Reich 2008a; Epifanio 2011; Friedman 2011; Givens et al. 2009; Mandaville 2009; Saggar 2009), there is a need for a comprehensive explanation for why these exclusionary — and counterproductive — tactics are employed. This study attempts to provide such an explanation.

A close examination of the political dynamics involved in the fashioning of counterterrorism policy is necessary if we are to fully understand the nuances of a state’s approach in this domain. A policy process model will be used for this purpose. An analysis that distinguishes between the distinct steps of the policymaking process will help to uncover the various constraints and opportunities that state leaders are confronted with when addressing terrorism. Moreover, observing the political dynamics associated with each step of the policymaking process is fruitful for understanding policy differences across polities (Schain 2008b), as well as for understanding differences in outputs across issue areas (Rochefort & Cobb 1994a), including counterterrorism policy.
A focus on national identity serves as the foundation for understanding the political dynamics of security politics as it pertains to non-citizens. Dominant notions of national identity — or “conceptions of nationhood” in Rogers Brubaker’s (Brubaker 1992: 17) terminology — provide a frame of reference for making sense of security threats perceived to be posed by foreign nationals. As the problem definition literature suggests, the solutions selected to address public issues are heavily influenced by how we define and understand these problems (Kingdon 2003; Rochefort & Cobb 1994a; Stone 2002). Since state policies related to immigrants directly confront notions of national identity, we should give this concept special attention. The nature of national identity in each case, and how it is deployed in policymaking, will therefore be highlighted.

Considered a benchmark of political legitimacy (Gellner 1983), nationalism can also help us understand state actions if we assume the state to act in ways that maintain its legitimacy. Indeed, employing the concept of legitimacy in analyses of immigration policy has been proposed as an alternative to more established theories in the field (Boswell 2007). This study is different in that it uses national identity as an important referent for state legitimacy. In sum, a focus on national identity is very useful, in conjunction with a policy analysis framework, for making sense of how and why non-citizens and national minorities are targeted by counterterrorism policies.

Although it is suspected that notions of national identity will have a strong effect on the contours of counterterrorism policies as they relate to non-citizens, the influence of other political and institutional forces is considered. Within democratic societies where a multitude of interests compete, it is unlikely that one force will have exclusive influence over public policy. In the case of counterterrorism, other political and institutional forces will likely alter the policy
outcomes that would otherwise stem from initial impulses largely based on notions of national identity. Therefore the role of liberal institutions, the manner in which officials balance their desire for developing effective policy with their need for gaining public support, and the policy linkages counterterrorism has with other domains will be examined for the influence they may have on counterterrorism policy.

The next section will review important elements of the nationalism literature, as they relate to the current topic. The social and political dimensions of nationalism are highlighted, as well as the construction, maintenance and deployment of national identity. These concepts and processes are then related to counterterrorism policy and the implications it has for integration. A detailed account of the potential political constraints and opportunities within each phase of the policymaking process is then presented. This section will sketch the broad analytical framework that will then be used to examine the development of counterterrorism policy in subsequent chapters.

**Nationalism**

Nationalism, some argue, is a difficult concept to define because of its malleability and complexity (Connor 1994; Greenfeld 1992). Various definitions have been offered that emphasize the political or social dimension of nationalism. In one typical view, nationalism can be seen as a theory of political legitimacy (Gellner 1983: 1), asserting that the boundaries of the ethnic group must coincide with the boundaries of the state (Anderson 1991; Hechter 2000). Ethnic groups, based on the myth of common ancestry, are considered nations when associated with a particular state or when they strive to develop their own state (Eriksen 2002: 13, 102). Examples of nationalist movements ‘from below’ — such as the Basques in Spain or Kurds in the Middle East — and nation-building efforts ‘from above’ — most pronounced in former
colonial territories of Africa and the post-World War I Middle East — are in line with this view of nationalism.

Another element to the political definition of nationalism, in addition to asserting that only particular states are legitimate, is that only particular political participants, leaders and actions are legitimate. Just as the authority of the state must coincide with the boundaries of the nation, the leaders of this nation-state must be fellow nationals. Hence, Hugh Seton-Watson and Benedict Anderson (1991) talk of “official nationalism” whereby rulers once claiming a divine right to rule had to find new ways of legitimating their power. After the currents of nationalism had largely eroded the legitimacy once enjoyed by dynasties over large polyglot empires, state leaders began to embrace the nationalist idea; they set out to achieve cultural homogenization among their subjects to fit this new model of legitimacy. The goal was not only to militate against rival nationalisms from arising within a diverse empire, but also to enjoin ruler and ruled under the same nationality. “Russification,” “Anglicization,” and “Magyarization” are some of the more well-known instances of transforming a diverse society into a common nationality.

The substantial effort by some in the United States to challenge President Barack Obama’s religious affiliation, and implicitly his national identity as an American, attests to the continued relevance of this principle of legitimacy. The potential of a purported Muslim holding the American presidency became a salient issue with some segments of the electorate during the 2008 presidential election, as Islamic beliefs are not a typical American trait. Indeed it is likely that some who criticize Barack Obama for being a Muslim use this as a veil for their opposition to his presidency because he is black. Opposition to a candidate for United States President because he is Muslim is, in post-Civil Rights America, more legitimate than opposition openly attributed to his race. These religious concerns have roots in the nation’s past — a past that
subtracts legitimacy the more one deviates from the White Anglo-Saxon Protestant norm. President John F. Kennedy felt compelled by growing popular anxiety about his Catholic background to make a campaign speech avowing that his religious beliefs would not dictate his policy decisions as president. Kennedy, of course, was running for president as a Catholic at a time when only Protestants had ever held that office. Therefore he would be atypical — in the ethno-religious sense — as American president.

Elizabeth Theiss-Morse (2009: 72-77) points out that group prototypes are an important element in national identity, serving as the basis for marginalization of atypical members. Both presidential candidates, Obama and Kennedy, were portrayed in a way that made them atypical to a popular ethnic notion of American national identity, and therefore less American than other candidates. Within this ethno-religious and racial hierarchy of American-ness only those who fully meet the membership criteria can enjoy full legitimacy among those holding such ethno-religious standards. Such was the case of subjects in the old monarchies who were targets of official nationalism; they would become co-nationals by virtue of an acquired language and culture. Despite their assimilation, however, these new co-nationals would still be situated on the margins of the national community. For them there was virtually no opportunity for a leadership role at the apex of the empire-nation for the empire’s administrators were “instinctively resistant to ‘foreign’ rule” (Anderson 1991). While these minorities assimilated to the dominant language and culture, they were still perceived as ‘foreigners.’

For others nationalism is much more a sociological phenomenon. From this perspective nationalism is often defined as a collective sentiment or identity with the nation. Some scholars have focused on the nature of national identity and the manner in which this became preeminent over other sources of identity. For instance, Walker Connor (1994) argues that psychological and
emotional elements are essential to understanding national identity and nationalism. The belief of a shared ancestry, in Connor’s view, is the defining characteristic of nations; it is what gives the national community the quality of kinship, eliciting loyalty just as familial ties often do.

Benedict Anderson (1991), while paying special attention to the political aspects of nationalism, takes up the psychological dimension in describing nations as “imagined communities.” While commitment to the nation may be strong, the enormity of the national population makes it impossible for one to empirically verify its existence. Therefore such commitment can only be supported by the imagination, by the belief in the mind that a nation does exist and the bonds among co-nationals are sufficiently strong. At this point it should be noted that although the nation is collectively imagined, it is not imaginary in the sense that it has minimal influence in social, political and economic life. The social construction of the nation — a focal point for widespread psychological and emotional attachment in the modern era — makes it part of a social reality that nonetheless should be viewed as objective in its existence and its consequences for interaction (Tajfel 1978b: 63-65). How the image of the nation grew in clarity and strength to become a dominant social ‘fact’ is the primary objective of Anderson’s study. Eventually, social identity based on national, rather than religious, affiliation became the most meaningful in peoples’ lives.

The view of nationalism primarily as a collective identity also turns one’s attention to the extent of, and processes supporting or undermining, national cohesion. Anthony Marx’s (1998; 2003) work focuses on nationalism’s dual nature as an inclusive and exclusive phenomenon. In Faith in Nation Marx (2003) shows how the so-called liberal nationalisms of the West today began in the Middle Ages as intolerant and exclusionary communities based on religion. The exclusion of religious minorities, accordingly, helped to create a sense of solidarity among the
majority population. Marx’s (1998) other major work, *Making Race and Nation*, also shows how the use of exclusionary measures targeted at certain segments of the population helped the state create a unified *national* core from which it could derive support.

Where Marx shows how national cohesion can be attained through exclusionary practices, others find the use of inclusionary measures elsewhere to achieve the same goal. Rogers Brubaker (1992) demonstrates how the expansion of French citizenship policy in the late nineteenth-century was partially motivated by concerns about the “incipient development” of different nations among French society (105). Granting citizenship on a *jus soli* (i.e. birthplace) basis, together with the assimilatory powers of the state, were both seen as an effective means for countering the threat to the French nation posed by the existence of competing sub-national groups in France.

Turkey offers another example of cohesion achieved through inclusion rather than exclusion. In fashioning a Turkish national identity among the Anatolian remnants of the Ottoman Empire, Mustafa Kemal (Atatürk) emphasized secularism as a way to break with the Ottoman past. During the first five decades of the modern Turkish state Islam was accorded little status in the national narrative and actively kept to the margins by the staunch protector of Kemalist ideology, the Turkish military. Not until 1980, when the government was forcibly removed for the third time in two decades, were religion classes made compulsory in the national education curriculum and Islam given a central role in Turkish national identity. The significant shift in policy imposed by the junta presented the “Turkish people’s Islamic heritage as the major source of national unity” (Kaplan 2006: 78) and therefore would enhance the goal of “[preventing] at all costs the consolidation of distinct identities that threatened to fragment the nation into a polity riddled with divisions” (ibid.: 44).
Integration and national cohesion are key goals of the states under review in this study. The Britain emphasis on community cohesion began after a series of riots between mostly South Asian and English groups broke out in several cities during the summer of 2001. Soon after these events the Ministerial Group on Public Order and Community Cohesion (2001) was established to advise policymakers in how to “build stronger, more cohesive communities” within a context of social diversity. “Community cohesion” remains the leading paradigm for the British government’s approach to integration, combining respect for diversity with a particularly keen focus on fostering positive interaction among the various ethnic, racial and religious groups of Britain.

Refocusing its efforts on integration in 2006, the United States has also made cohesion an explicit goal. As the Task Force for New Americans states in its introduction:

All of us have a vested interest in reengaging and preserving the fundamental civic principles and values that bind immigrants and citizens alike. The result of such efforts builds universal attachment to America’s core civic values, strengthens social and political cohesion, and will help the United States continue to prosper as a nation of immigrants… (U.S. Department of Homeland Security 2008: viii, emphasis added)

The recent controversy over plans to build a mosque and cultural center near the World Trade Center site in New York revolves around the notion of cohesion. Supporters of the project emphasize the efforts of the organizing group in promoting interfaith understanding and strengthening the relationship between Muslims and non-Muslims. They highlight the fact that the center will not only hold a mosque but also a community center. Opponents of the “Ground Zero Mosque,” as they refer to it, come to the opposite conclusion. Newt Gingrich (2010b), a
prominent conservative figure in the debate on Muslims and Islamic culture in America, argues that the idea of a mosque in the vicinity of ground zero will only serve to “fan the flames of inter-religious strife.” Considered an act of Islamist “triumphalism” (Gingrich 2010a: 26) the building of a mosque and community center near ground zero is not seen as a means for promoting cohesion among the different religious groups of American society, but as a source of division between ‘Americans’ and Muslims; the implication being that the two categories are mutually exclusive.

The perception of a security threat emanating from immigrants disrupts social cohesion. States have an incentive to address these disruptions for the sake of stability. Democratic states have the added responsibility to mollify growing social tension to maintain a foundation for cooperation and compromise. Since security concerns related to immigrants are significant sources of disunity, the challenge faced by policymakers is to effectively regain a sense of security without alienating immigrants and national minorities.

The works of Connor, Anderson, and Marx are part of a larger body of scholarship that clearly shows the socially constructed nature of nations and national identities (Barreto 2001; Chatterjee 1993; Corcuera Atienza 2006; Danforth 1995; Hobsbawm & Ranger 1983; Kaplan 2006; Kaufmann 2004; Zerubavel 1995). This view contrasts popular assumptions — notions propelled by nationalist elites themselves — that nations are primordial structures, existing independent of social interaction.

The various political and social perspectives of nationalism provide a glimpse into its multidimensionality as an analytical concept. The current project does not take issue with the various definitions of nationalism but does recognize both the social and political dimensions encompassed by it. The political element of nationalism is important for two reasons. First, it
provides a benchmark of legitimacy for all aspects of political phenomena, not just for the legitimacy of state leaders and state actions but for political participants and rhetoric as well. Scholarship on ethnic politics corroborates this point, showing how the dominant notion of national identity has a significant effect on the frequency and form of political participation by minorities (Koopmans & Statham 2000; Koopmans et al. 2005). Second, the state has a substantial influence on the form and definition of national identity. Kurdish nationalism is instructive on this point. Denise Natali (2005) shows that rather than a unitary Kurdish national identity and concomitant nationalism among all Kurds, variation exists largely because Kurds are located across state boundaries. Responding to different political opportunity structures within Iran, Iraq and Turkey, Kurdish nationalism varies in form and character.

In a position of high visibility, with access to a large pool of resources and communication media, the state plays a central role in adjudicating between competing notions of national identity. Beyond rhetoric and the staging of various ceremonies, the symbolic value in many types of state policies promotes a particular notion of national identity. While immigration, integration and cultural policies are the most poignant in symbolizing national identity (Ager 1999; 2003; Barbour & Carmichael 2000; Brubaker 1992; Fitzgerald 1996; Zolberg 2006) other policy areas such as security, welfare, healthcare and labor also contribute to and are reflective of a certain definition of national membership. As Natali (2005) remarks, the position of national minorities is “shaped by the discourse and policies of the state elite … that create different notions of inclusion and exclusion” (xvii) and therefore impinge on the prevailing understanding of national identity.

Understanding nationalism in sociological terms as a collective identity — where identity is conceived of as something acquired through social interaction with others — is useful to the
extent it shows the socially constructed nature of national identity. From this perspective we can see how the definition of national membership may be a contested field. Debates about national identity occur between those included and between members and those who are excluded. Co-nationals may have differing understandings of what comprises their shared national identity, just as those excluded from a particular nation may challenge the prevailing understanding for one that is more inclusive of themselves. Indeed, the ambiguous and contested nature of national identity allows it to be employed in rhetorical strategies supporting countervailing policy positions in political debate (Lee 2007). The question ‘How is membership in nation X defined?’ becomes one of perpetual debate that can lead to changes in the dominant answer to it over time. This transformation in the dominant understanding of national identity is exemplified in the American case by Eric Kaufmann’s (2004) analysis of the liberalization of membership in the American national community.

More importantly for the purposes of this research, being mindful of the collective identity element of nationalism reminds us that national membership is constituted by both self-identification and recognition as a co-national from others (Barth 1998; Breakwell 1978; Gellner 1983: 7). To be recognized as a fellow national by others means to fulfill certain criteria of membership, derived from the dominant understanding of that particular national identity. These criteria for membership are broadly defined as ethnic or civic in nature, and will be discussed below. Nonetheless, recognition by others is just as important as self-identification, much like in the realm of international relations where the recognition of a reputed state’s sovereignty by other states is critical for participation in international politics. One may self-identify as British, for instance, but their participation in British politics and their integration into British society will not be seen as legitimate unless others view that person as British too.
The scholarly literature on nationalism most commonly identifies two types of nations based on their membership criteria. One is ethnically-based and the other is civic in nature (Anderson 1991; Kohn 1944; Smith 1991). The ethnic model of national membership and self-definition has typically rested on observable characteristics that most readily distinguish ethnic groups from one another — such as language, religion, race, or culture, combined with a belief in common ancestry. As a political ideology, nationalism is often based on a purported shared ethnicity so as to engender a sense of legitimacy on the political community. The ethnic group is commonly thought of as an extended family, where terms like ‘brotherhood’, ‘fatherland’, ‘mother tongue’ or ‘homeland’ symbolize familial ties among co-ethnics (Horowitz 1985: 57). Connor (1994) refers to this sense of family-like bond as consanguinity. The ethnic group or nation charged with a sense of consanguinity provides legitimacy to the political community, naturalizing the sense of national membership as something that one is born into — i.e. not chosen — giving it a primordial quality which thus exists beyond questioning.

The civic model of national membership is, comparatively, rare. As such, nations typically characterized as civic in nature — France, Britain, the United States and other British settler societies — are considered exceptional rather than the norm. Civic states, officially at least, minimize the importance of any ethnicity-based element that may be shared among members. Instead, the common bonds holding the nation together are certain civic principles. Shared loyalty to the state as well as certain shared political principles, such as liberalism and equality, are examples of civic ideals that manifest themselves in French nationalism, for instance (Geary 2002: 21). The nations of the Americas provide a different example of civic-based national communities; largely sharing the same ethnicity with those who they initially sought to exclude, these societies developed a national consciousness based on their shared
experiences that differed significantly from their ethnic kindred on the other side of the Atlantic (Anderson 1991: 47-65). In both cases, ethnicity has very little significance in holding the nation together, at least officially.

As nationalism plays out on a daily basis it is not unusual for nations that claim to be civic in nature to limit in-group membership on ethnic grounds. While France and the United States are prototypical of the civic model, this in no way precludes the use of various elements of ethnicity as national boundary markers in these societies. Indeed, national membership is often defined by varying degrees of both civic and ethnic criteria (Smith 1991: 13); what Horowitz (1985: 55) distinguishes as elements that imply either “voluntary membership” or “membership given at birth.”

In the Americas, many early leaders did not initially define the ‘national’ population in ethnic terms, for this would fail to serve the intended goal of excluding their imperialist co-ethnics in Europe. However, today we commonly observe Latin American national leaders refer to a sense of blood-relatedness (i.e. an ethnic conception) in the popular celebrations of Mestizaje — or the blending of different races — to symbolize the consanguinity of the modern-day members of these nations (Guss 2000). Kaufmann (2004) shows how the civic conception of American identity has gained dominance in popular understandings of American national identity only recently, in the decades following World War II. Before then the White Anglo-Saxon Protestant (WASP) was considered to be the ideal-type American to which others were expected to assimilate—primarily in terms of culture, religion, and language. Though no longer dominant in the public definition of American identity, the WASP understanding of American national membership still exists in more covert form today (Barreto 2001; Bonilla-Silva 2003; Theiss-Morse 2009).
In Anderson’s (1991: 6) definition, the nation is not only an imagined community but it is “both inherently limited and sovereign.” Imagined as inherently limited the nation encompasses only certain kinds of people, not all of humanity. This implies the nation is a community based on the inclusion of a people sharing some set of characteristics — either ethnic or civic in nature — as well as a community based on the exclusion of those people considered to be different in terms of these relevant traits.

The concepts of inclusion and exclusion can only be understood in terms of the boundaries that give meaning to them. In this sense the work of Fredrik Barth (1998) and his collaborators on ethnic groups can be applied to the analysis of nations and nationalism. Like Anderson and many other scholars of nations, Barth characterizes the ethnic group as a social construction, the boundaries of which are collectively determined. These boundaries refer to certain traits that are considered socially relevant and symbolize nationality, which are then represented through repetitive enforcement in the face of substantial population shifts and the changing objective character of the political community’s population. This is what gives the nation a sense of permanence. If any change to its demarcation does occur this will be an intergenerational process. Nonetheless, the long-term stability of national boundaries despite high levels of immigration and other social changes means these boundaries play a crucial role in the definition and perpetuation of a national community through time. We can gain a full understanding of how nationalism is deployed in everyday politics only if we pay attention to how these national boundaries are publicly articulated (ibid.: 15).

The act of exclusion is what Rogers Brubaker (1992: 29) refers to as “social closure” and takes one of two forms: groups are indirectly excluded because they lack certain characteristics necessary for membership, or groups are directly identified as outsiders because of some
unacceptable traits they possess. In the nationalism scholarship the latter form of exclusion is what takes place when an *Other*, oppositional group exists against which a nation defines itself. In this process a nation purposively identifies a particular group to be excluded, clearly justified in terms of the traits this group possesses, which are said to be in opposition to the primary elements of the nation’s identity. Paraphrasing Loring Danforth (1995), one must know who they are not before they can define who they are.

The role of the *Other* can be highly instrumental for nation-building and maintenance. For instance, British identity in the early period of nation-building has been shown to be constructed largely in opposition to the presumed character of the French, with whom Britain was constantly at war (Colley 1992). *Catholic* Spain and Ireland also played the oppositional role, helping to solidify the *Protestant* nature of British national identity (ibid.). Language differences with the United States — with which Puerto Rico shares an otherwise close relationship — are an important element in Puerto Rican nationalism. The reason language is so central to Puerto Rican nationalism is because it is such an important marker of American national identity (Barreto 2001). Basque nationalism was spawned as an ideological counterpoint to liberalism and socialism in nineteenth-century Spain (Corcuera Atienza 2006: 39-42). Even more pronounced is the case of Jordan. Created well before there had existed a Jordanian ‘people’ the state of Transjordan was inhabited largely by people with origins outside of the territory, had rulers who originated from other regions and whose military leaders were British for a long period after independence. Joseph Massad (2001) illustrates how the concept of the *Other* proved useful to state leaders in developing a sense of Jordanian identity in a situation where there was not much indigenous material to build upon. Although the target of this oppositional construction of identity shifted from the Syrians, to the British and eventually to the
Palestinians, Massad’s analysis highlights the importance of social interaction and the Other in defining the nation.

The image of the Other can be rather abstract because it is a set of ideas and beliefs that the nation places itself in opposition to. These abstract aspects of the Other appear in more concrete form through the presence of immigrants. The physical presence of immigrants, with their different cultures and values, can represent those ideas and beliefs antithetical to the nation’s identity. Portrayed as the Other, it is only a small step to perceive of immigrants as posing various types of threats which put the nation’s character and well-being in jeopardy. Immigration is a source of ethnic change in society, causing anxiety for those who view the nation in ethnic terms. Immigrants as a source of anxiety make them easily perceived as a threat. In addition, blaming immigrants for making the nation vulnerable is likely to occur since their status in the community is lower than the native-born. Finally, the geographical proximity of immigrants makes arguments labeling them as national threats more plausible at the same time that the state has jurisdiction to do something about it. Identifying communism or fundamentalist Islam on the other side of the world as the Other is one thing; finding groups on the home soil who seem to represent these oppositional ideas is quite another.

It is plausible, then, to view the targeting of non-citizens through counterterrorism policy as a means of nation-building. “Securitizing immigration and asylum constructs political trust, loyalty and identity,” argues Jef Huysmans (2006: 47). “Migration and asylum become a factor in a constitutive political dialectic in which securing unity and identity of a community depends on making this very community insecure” (ibid.). The identification of an ‘outside’ threat can foment unity among those feeling threatened. In nationalist language, the nation becomes more unified and more clearly defined when the Other is identified and denounced.
This is not to say that all immigrants at all times are considered national threats; ideologically, economically, socially and in other ways immigration is seen as beneficial for national strength. As Bonnie Honig (2001) argues, “Since the presumed test of both a good and a bad foreigner is the measure of her contribution to the restoration of the nation rather than, say, to the nation’s transformation or attenuation, nationalist xenophilia tends to feed and (re)produce nationalist xenophobia as its partner” (76). What needs to be identified is the set of circumstances that lead to particular groups at particular times being identified as posing a security threat to the nation. The genesis of collective threat perception is to a large extent a political process (Huysmans 2006: 7). We will turn to this in the next section discussing the politics of policymaking.

Policy Analysis

The analytical approach of this study is informed by the problem definition literature and utilizes the policy process model as described by Michael Kraft and Scott Furlong (2007: 71). The policy process model distinguishes between several distinct steps in the making of public policy, giving attention to the “broad relationships among policy actors within each stage” (ibid.: 71). By more closely examining each stage of the policy process we can gain a better understanding of how social problems are identified and characterized, and how various policy alternatives develop through the course of political debate. As E. E. Schattschneider (1975) notes, “[e]verything changes once a conflict gets into the political arena—who is involved, what the conflict is about, the resources available, etc” (36). We therefore need to pay attention to these aspects of the policy process to fully grasp its mechanics. The stages of the policy process that will be examined here are: problem definition and agenda setting, policy formulation and
policy legitimation (which will be referred to here collectively as “policymaking”), and policy implementation.

**Problem Definition and Agenda Setting**

If we are to understand the development of public policy we must first look at how different issues are defined by political actors. Problem definition, far from being a straightforward exercise, entails contestation between political actors over the characterization of a particular public issue. The meaning of the terrorist attacks in September 2001, for instance, was interpreted as an act of war, which then initiated a global “war on terror.” This framing also competed with other characterizations of 9/11, but the response — with a focus on seeking revenge — was largely dictated by a war mentality (Bigo 2008; Huysmans 2006: 7).

While differences of perspective on any given issue can stem from deep-rooted differences in values and ideology, they are also the product of more ephemeral influences, namely politics. Emphasizing its political nature, David Rochefort and Roger Cobb (1994b) argue that the “function of problem definition is at once to explain, to describe, to recommend, and, above all, to persuade” (15, emphasis added). Competing definitions ultimately lead to different policy solutions with their unique distribution of costs and benefits (Kingdon 2003: 382; Stone 2002). As key actors have an eye on the potential material and symbolic gains associated with how a particular issue is perceived by state officials and by the public, problem definition should be understood from a political perspective. Accordingly, any definition of a problem should be seen as a “strategic portrayal” through which competing political actors are “trying to get others to see a situation as one thing rather than another” (Stone 2002: 9, emphasis added). Deborah Stone elaborates on problem definition and the proper analytical technique for understanding it in this way,
… there is no universal, scientific, or objective method of problem definition. Problems are defined in politics, and political actors make use of several different methods, or languages, of problem definition … To become fluent in these [different ways of defining a problem] is to learn to see problems from multiple perspectives and to identify the assumptions about both facts and values that political definitions don’t usually make explicit. (Stone 2002: 134-135)

Defining a public problem is therefore a political process, and to understand this aspect is to grasp the underlying assumptions and political motivations of relevant political actors, and ultimately, their favored solutions.

The political process of problem definition influences a host of elements in, and therefore has significant implications for, the latter stages of the policy process. Most immediately, problem definitions contribute to the likelihood of an issue making it onto the institutional agenda. Initially, there is debate on whether a problem even exists. What some may see as a problem requiring state intervention, others may see as, using Kingdon’s (2003) terms, merely a “condition” to be tolerated. Beyond the debate about labeling a situation a “problem,” the type of problem it is seen to be, or the values said to be at risk of violation if the problem persists, can have more or less salience for the general public. Furthermore, different characterizations of a problem may vary in their level of contentiousness. Viewing immigration as a cultural problem is likely to lead to more conflict in debates on a policy response than addressing immigration as a security problem. Broadly speaking, if we expect both the salience and level of contentiousness of a problem to influence its likelihood of reaching the institutional agenda (Kraft & Furlong 2007: 78), then by extension we need to pay attention to how these issues are initially defined.
Problem definition also has implications for the configuration of actors involved in debate. For one, the *scope* of the problem can be defined narrowly or more broadly; as an issue with national implications or as a more localized problem (Schattschneider 1975: 10). Such debate about problem scope — in terms of both geography and jurisdiction — is prominent with regards to addressing the contemporary issue of undocumented immigration in the United States. In addition to scope, the *salience* of an issue for potential stakeholders is changed when defined in a different way. Salience for the wider public can be increased when the protection of certain societal values are said to be at stake. Security is perhaps the most universal value, but other values typically invoked in political argumentation are equity, efficiency, and liberty (Stone 2002: 37-130). Salience can also be increased for certain groups if a particular problem is associated with issues in other domains they see as important (Rochefort & Cobb 1994b: 13).

As E. E. Schattschneider argues, “the outcome of every conflict is determined by the *extent* to which the audience becomes involved in it” (1975: 2, emphasis in original). In sum, the scope and salience of an issue as laid out in any given problem definition influences the diversity and configuration of political actors involved. Different configurations of actors with a stake in the resolution of any given social problem contain different power relations, thereby influencing which views are most influential upon official decision making.

Lastly, problem definition places constraints on political rhetoric and on the set of potential policy solutions deemed acceptable. This last point is corroborated by Aaron Wildavsky’s (1987) argument that it is actually policy solutions which influence problem definitions. Frequently, a problem is characterized in a specific way because it is expected to lead to a preferred solution being enacted to address it. This is as true for security policy (Huysmans 2006: 8) as it is for other types of public policy. Rochefort and Cobb (1994b) share
this view. They see problem definition as “a look ahead and an implicit argument about what government should be doing next” (3), noting that “[s]olutions can also predispose the identification of causes, in the sense that political actors who favor particular policy strategies highlight those causal factors in social problems that can be targeted by their strategies” (25). By influencing the likelihood of an issue making it onto the institutional agenda, by helping shape the configuration of actors involved in political debate on that issue, and by imposing constraints and opportunities on the set of acceptable policy solutions, problem definition is a critical aspect of the policy process.

Public problems can be characterized in a number of different ways, all of which may focus on a different aspect of the issue or originate from a different perspective or personal bias. Most problem definitions make implicit, if not explicit, allusions to causality. Identifying the cause of a problem predisposes certain types of solutions because, as Rochefort and Cobb (1994b) attest, “causality can be the linchpin to a whole set of interdependent propositions that construct an edifice of understanding about a particular issue” (16). Apart from being statements of causality, problem definitions can emphasize various generic aspects of an issue such as its severity, novelty, frequency of occurrence, or the extent to which it affects one’s material and symbolic interests (ibid.). Terrorism issues are more often than not seen as urgent public problems that have a significant effect on the public’s material and psychological well-being. The dynamics of policy development within an emergency context such as this will differ from policymaking on issues that are less pressing, and these differences have a significant effect on the final policy outputs and outcomes.

Characterizations of the group(s) most closely associated with the problem may also be the focus of problem definition. Anne Schneider and Helen Ingram (1993) argue the importance
of the “social construction of target populations” and the implications for other phases of the policy process. They develop a typology that takes into account the characterization of a population (“positive” or “negative”) and its political power (“strong” or “weak”). Different types of policies are then mapped out according to this typology. For instance, the more positively portrayed and politically powerful a group is — such as the elderly and veterans — the more likely public policy will be beneficial towards these groups. Conversely, policy addressing politically weak and negatively characterized groups — such as criminals and drug addicts — is more likely to be burdensome towards these groups. Schneider and Ingram (1993) characterize these two situations as instances of “congruence” whereby public officials seek to balance their ambitions for re-election with their interests in developing effective and relevant public policy (337). This mirrors Deborah Stone’s (2002) bifurcation of politicians’ goals into those that are political and those that are policy-related (2). Providing “beneficial policy to powerful, positively viewed groups who are logically connected to an important public purpose” or providing “punishment policies to negatively constructed, powerless groups, who are linked logically to a broader public purpose” are the two strategies for achieving congruence (Schneider & Ingram 1993: 337).

Congruence occurs when a policy meets the expectations of the public — optimal for re-election — and at the same time is an effective way for addressing a salient problem. In this sense congruence is closely associated with the concept of legitimacy. The notion of congruence can be seen as referring to two dimensions of legitimacy: the public’s expectations of policy substance, and the public’s expectations of policy effectiveness. In the first, the legitimacy of a given policy is evaluated on how closely its substance meets the public’s expectations. As Schneider and Ingram argue, an important influence on expectations of substance — broadly
categorized as beneficial or burdensome — is the social construction of target populations. Policies related to immigration and immigrants are sites of contention between opposing views of national identity (Brubaker 1992; Fitzgerald 1996; Kaufmann 2004) that inherently characterize the problem population (i.e., immigrants) in opposing ways. We should therefore expect characterizations of immigrants to figure prominently in political debate surrounding this issue. Lina Newton’s (2008) analysis of changes in the prevailing portrayal of undocumented immigrants in American political debate, and the concomitant changes in policy, is a clear example of this.

The second dimension of legitimacy has to do with how well the policy ameliorates the problem it was meant to address. This constitutes a separate dimension because the type of policy the public expects is not always synonymous with the type of policy that will be effective for addressing a given problem; in Schneider and Ingram’s (1993) terms, developing effective policy may require the allocation of benefits to negatively constructed or politically weak groups, or the allocation of burdens to positively constructed or politically strong groups (338). By giving separate attention to each of these dimensions of legitimacy we are more equipped to understand the seemingly inconsistent and, at times, contradictory nature of public policy (Boswell 2007).

These ideas of legitimacy and congruence are relevant for the current study. In all of the cases reviewed, immigrants were viewed as problem populations posing the most significant terrorist threat. In such a situation, the public is more likely to expect policy responses to focus disproportionately and more harshly on these groups. Such a strategy would be popular with the segments of society who are more xenophobic and more tolerant of unfair treatment of immigrants. However there is countervailing pressure for the state to ease off of a strongly
discriminatory approach. One source of pressure may be from more liberal institutions and similar segments of society that are less tolerant of the abrogation of rights, and especially of the unequal burden placed on foreign nationals in the name of national security. Another aspect to consider is the effectiveness of avoiding alienation of minority groups in achieving security. These are instances of incongruence in which the policies expected by large segments of the population are not the most effective. Understanding how officials deal with incongruence can illuminate those goals that are most important to political communities, and it can make sense of the ways in which state officials seek to maintain legitimacy in the face of conflicting policy rationales. Counterterrorism policy is a relevant site to observe these dynamics.

The way in which problems are defined contributes to the likelihood of state officials giving the issue further consideration. Yet, making it onto the institutional agenda is not a foregone conclusion once a particular characterization of a problem prevails. Having an inordinate amount of issues that could be addressed, the state must decide which issues receive further consideration and which issues are pushed to the side. The way in which public problems are defined goes a long way in convincing state officials of the importance (however defined in political, social, or economic terms) an issue holds, and therefore in compelling them to give it further attention.

Yet even if an issue, as defined in a certain way, is salient to the wider public it still may not reach the institutional agenda. Generalizing John Kingdon’s (2003) argument regarding agenda setting, states tend to give priority to those issues that are deemed important and already have proposed solutions that are both technically and politically feasible. According to Kingdon’s framework for understanding which issues reach the institutional agenda and which ones do not, three elements, or “streams,” are critical.
The first stream to consider is the problem stream. Many aspects of this stream have been discussed in detail above. In sum, some characterizations of any given problem are more salient than others. For instance, when immigration is defined as an issue of national security it is more salient for policymakers and the wider public than if defined as a more bureaucratic issue of visa allocation. The former ‘problem’ will get more attention than the latter. The goal of problem definition is “fixing attention on one problem rather than another” as Kingdon (2003) concludes, which is ultimately a “central part of agenda setting” (115).

The second important component that influences agenda setting is the policy stream. This refers to the set of potential solutions to a given problem that have been developed within related policy networks. Elected officials are reluctant to take on issues, even highly salient ones, that do not already have at least one viable solution to address it (Kingdon 2003: 142-143). Kingdon offers a set of criteria any solution should meet to be considered viable: the solution should be technically feasible in that it is expected to be implemented with reasonable ease and that it addresses the core of the problem; the solution should accord with prevailing societal values; and the solution should be free of any expected constraints in the future, such as budgetary concerns or the support of key politicians and the public. The availability of a viable solution greatly increases the chances of an issue reaching the institutional agenda.

The last component to influence agenda setting is the political stream, which encompasses several aspects related to political opportunities. For one, overall public opinion is a significant consideration. As an indicator of issue salience and the balance of support for likely policy responses elected officials would do well to take account of the national mood. The influence of organized interests is another political element that can help push an issue onto the agenda and indicate the likely support received from these groups for various policy
solutions. Finally, political opportunities can open with a change in administration. New governments can have a different set of priorities that lift some issues — neglected by the previous administration — to the top of the agenda.

An opportunity arises for an issue to reach the institutional agenda when these three streams — problem, policy, and political — converge. This opportunity is what Kingdon (2003) refers to as a “policy window.” With the emergence of a policy window, policy solutions get attached to salient problems when the political environment is ripe for action. These policy windows open rather infrequently and are typically open only for short periods of time. However, when open they can and do establish the priority of issues that state officials focus on, therefore affecting the institutional agenda.

**Policymaking**

Once an issue makes its way onto the institutional agenda various, and often times competing, policy solutions are put forth by state officials and other interested parties. They seek to garner support for their proposals, advocating the value of their favored solution, in order to increase the likelihood of it becoming state policy. This is the policymaking phase that includes the formulation of policy to address the identified problem and the legitimation of such policies. In this stage we need to examine the constraints and opportunities present in crafting and garnering support for policy alternatives. State officials are not entirely free to enact the most effective policy solution for a given problem. They respond to political opportunities and work within a web of constraints to achieve their goals. In other words, the “ordinary situations of politics” get in the way (Stone 2002: 8). Policymaking is both a technical and political process (Kraft & Furlong 2007: 79). A better understanding of the various elements that pose constraints
or opportunities in the policymaking phase gives us a view of the terrain that state officials must navigate to achieve their political goals, their policy goals, or both.

Proposals with the highest likelihood of becoming enacted are those that are seen as effective in addressing the issue — at reasonable cost and ease of implementation — and that accord with prevailing societal values (Bosso 1994; Kingdon 2003: 131; Kraft & Furlong 2007: 78). As indicated earlier, problem definition affects each of these. Proposed solutions to social problems must logically flow from the implications of those problems as defined. The effectiveness of a solution is assessed against the problem as it is defined and commonly understood. It is apparent that solutions that are largely unrelated to the problem are not viable. Seen as an opportunity, some problem definitions allow for a policymaker’s favored solution to be seen as a viable option.

However, evaluating the effectiveness of policy alternatives is not a straightforward process. Two analysts can assess the same policy, in relation to the same objective, and come to different conclusions regarding its effectiveness. Differences in assumptions and evaluation criteria used are the most common factors in bringing about this discrepancy. Program cost is another evaluation area where assumptions and criteria are decisive. Once costs of a program are calculated a subjective decision must be made as to whether the problem warrants such an expense to remedy it. What some may see as a worthwhile expenditure for achieving a valued objective, others may see as too heavy a price to pay for a relatively smaller payoff.

Proposals must also be seen as harmonious with central values. Here it is important to distinguish between ends and means (Rochefort & Cobb 1994b: 23-24). Even if a consensus exists on a specific objective of public policy — such as achieving and maintaining social cohesion — disagreements can ensue over alternative means to accomplish this objective, each
embodying different sets of values. Liberal democracy, equality, freedom, and free-market capitalism are some central values in the American context. Societal values along with definitions of membership constitute national identity. Policies related to immigration are not only evaluated in terms of how well they embody certain values; these issues also have real consequences for community membership. We should therefore expect notions of national identity (regarding both values and membership) to be an important factor in the public’s assessment of policies related to immigrants.

Public opinion data at this point can be analytically useful. If large portions of the public identify a group as posing a security threat, and thereby view this group as an outsider, policymakers will be expected to not only target these groups but to do so in a punitive manner. The allocation of burdens that are meant to increase national security will fall disproportionately on these groups, as Schneider and Ingram (1993) would predict. The identification of a threatening group takes place within the problem definition phase of policy development, which tends to be dominated by political elites and organized groups rather than the public at large. Nevertheless, public opinion serves as a barometer for how well these problem definitions are received by the public. Wide acceptance of a given problem definition — that includes a statement as to who is causing the problem — lends greater influence to policies that logically follow. If foreign nationals are widely viewed as terrorist threats, then counterterrorism policy should be expected to target these groups.

In addition to these features of policy alternatives — the effectiveness, cost, and congruence with societal values that policies embody — we must also consider structural elements that impose constraints of a more political nature on the actions of state officials. For one, the configuration of actors with a keen interest in the problem being addressed is highly
influential. We already discussed the potential of problem definition to attract attention from a larger audience and therefore affect the distribution of power among interested parties. To be more specific, the audience affects two areas that ultimately influence policymaking. The first area relates to the value acceptability of a proposal. As noted above, notions of national identity are activated when policies related to immigrants are evaluated. Knowing whom the audience is matters because not all individuals hold the same understanding of their ‘shared’ national identity. Some might evaluate immigrant policies from a civic view of national identity while others assess the merits of these policies with an ethnic understanding of national identity. Each of these perspectives has very different implications for how a given policy will be evaluated. The second aspect of the audience that influences policymaking is the level of visibility of policy deliberations and state activities (Schattschneider 1975). If the wider public is involved in the political debate then electoral considerations will weigh more heavily on the decision making of elites. If a narrower set of actors is involved the state may have more freedom to determine policy, or at least be free from the need to balance as many diverse interests as would otherwise be the case.

The second structural feature to note are the institutional constraints that have a bearing on policy outputs, particularly in the form of liberal democratic values and other commitments that militate against openly discriminatory policies towards minorities. Barriers in the form of judiciaries, political culture and international norms militate against highly discriminatory policies towards immigrants and minorities. Such institutions create a “pervasive and equally powerful rights-dynamic in the liberal democracies” (Hollifield 2004: 897) which constitute a “liberal constraint” (Hollifield 1992) on policymaking.
Lastly, state officials may have interests in other policy domains that may be affected by outcomes in counterterrorism policy. In other words officials may see, for a variety of reasons, a need to balance their objectives in different but closely related arenas. Just as state officials have an interest in re-election alongside an interest in developing effective public policy, they may also need to reconcile their interests associated with multiple issue areas. Therefore we should be mindful of likely policy linkages, the interdependent interests among these arenas, and the effect they have on elite decision making.

Outputs of the policymaking phase (referred to as policy outputs) ultimately reflect not only the technical merits they possess in effectively addressing the issue, but also the political constraints and opportunities that decision makers confront. These variables constitute the environment in which state officials must balance their dual interests in remaining in office and developing effective public policy. Policy outputs should therefore be those alternatives that are best equipped to take advantage of political opportunities or avoid many of the constraints imposed on decision makers.

**Policy Implementation**

Lastly, policy outputs from the legislative process can be implemented in various ways that ultimately deliver different policy outcomes. The implementation of public policy entails a significant degree of discretion on the part of administrators charged with the development and ongoing management of government programs (Howlett et al. 2009: 163; Parsons 1995: 469). Discretion involves choice, which means public decisions are open to influence by various forces. Implementation is not purely a technical endeavor where government programs are introduced to achieve the goals of policy outputs. While technical considerations such as effectiveness and cost do influence executive decisions, policy implementation is foremost a
political process. It involves the “strategic interaction” of different stakeholders to influence how the state fulfills its policy mandates (Bardach 1977: 9).

Administrative discretion increases as policy goals become more ambiguous and as the complexity of a public issue increases. The bargaining involved in policymaking, in which various objectives and solutions are amalgamated to satisfy a plurality of interests, often results in ambiguous policy outputs (Howlett et al. 2009: 165). Ambiguity also arises during crises, in which the government is expected to quickly address a complex issue for which no solutions are readily available (Bardach 1977: 90). Ambiguous policy outputs require interpretation before programs can be devised to implement them. These interpretations are subject to contention and political influence — much like problem definitions are — and therefore disrupt any straightforward connection between policy outputs and strategies for their implementation (Parsons 1995: 469-470). Problems that are more complex and multifaceted typically have a greater range of potential solutions, even during less urgent times. Thus agencies charged with implementing public policy have considerable discretion over the strategies they employ to achieve policy goals (Howlett et al. 2009: 165).

As with any political activity, multiple actors and forces converge around a specified issue to influence key decision makers. In the politics of policy implementation a multiplicity of governmental and non-governmental stakeholders urge the executive arm of the state to adopt programs that further their own interests (Parsons 1995: 467). Favored programs may entail goals that are more or less ambitious than those initially expressed in policy outputs, or they may effectively prevent the achievement of such goals altogether (Bardach 1977: 85). Whatever the outcome, the process of implementation offers an opportunity for opponents of the initial legislation to shape the contours of program delivery and, ultimately, to alter the policy’s impact
on affected groups (Howlett et al. 2009: 161). Therefore Eugene Bardach’s (1977) depiction of policy implementation as a game is appropriate, since it directs our attention to the players involved, their strategies for attaining favored outcomes, and the resources they employ.

There are two aspects of policy implementation that are important to examine for the purposes of this study: consistency and alignment. The former refers to how consistent government programs are over time, in terms of the strategy employed and resources committed. The latter denotes how closely aligned government programs are with the initial goals inscribed in policy mandates. In other words, alignment in this sense refers to whether government programs are more or less ambitious than initially intended by legislators. It is difficult to measure alignment with precision, although it is not necessary to do so for the purposes of this study. Alignment between policy outputs and program ambitions serves merely as a crude indication that some influence, outside of the policymaking stage, may be present during policy implementation. One such influence, of course, is the need for vague policy outputs to be interpreted by implementers. Opponents of policy outputs are another likely source of de-alignment. For any one of the myriad reasons discussed above, opponents may have been constrained from getting their preferred policy through the legislative process. Since the machinations of politics do not end with the passage of legislation, opponents are given another opportunity — and in a less publicly visible way — to shape the contours of government programs and to affect the ultimate impact of these programs on target groups (Bardach 1977: 85; Howlett et al. 2009: 161).

Consistency of implementation, over time, is another indicator that political and institutional influences are present in the implementation stage. Policy evaluation is one cause for changes to government programs. Numerous public and private groups evaluate the
effectiveness, efficiency, and other aspects of government programs. Such evaluations can be administrative, judicial, or political in nature (Howlett et al. 2009: 185). Administrative evaluations are carried out by government agencies or other interested officials in the executive and legislative branches, and tend to be systematic and comprehensive reviews. Private interest groups, in contrast, conduct political evaluations. These evaluations are typically carried out in a biased manner, so that results support a particular pre-determined position to either continue with a government program or cancel it (ibid.: 189). The judiciary also evaluates government programs, under certain conditions, to review the legality of the processes and outcomes involved. The outcomes of judicial reviews are a strong institutional constraint on public policy, although judicial processes are slower than other forms of policy evaluation. Policy evaluations can result in the continuation or cancellation of government programs as implemented. However, it is more likely that programs will be revised to address any deficiencies identified. These could be incremental changes or they could be rather substantial modifications. Larger program revisions present greater opportunities for the politics of policymaking to begin anew.

Government programs may also vary over time because of changes in government. Differences in political philosophy and prioritization of resources can lead to modifications of existing programs once a new administration arrives. Finally, policy implementation can be affected by changes in the wider political, social, economic and technological context (Howlett et al. 2009: 167). Changes in any one of these conditions may result in a different understanding of the initial problem government programs were initially designed to address. Alternatively, these contextual changes may result in a different interpretation of a public problem’s significance. In either case contestation over problem definition may begin anew. Border patrol, for instance, took on much greater significance after September 11, 2001 in the United States.
British Prime Minister David Cameron has reconsidered the importance of government-provided healthcare and the social benefit of public libraries during the latest economic crisis, amidst a more urgent need for fiscal austerity. These events can lead to the reprioritization of government programs, with a subsequent change to their funding and to the way they are carried out.

While there has been a long-running debate about the role of public opinion in policymaking (Parsons 1995: 110-125), it cannot be wholly ignored as an influential variable on government actions. The government’s need for public support of its programs is crucial for maintaining legitimacy. This need is significantly higher when it comes to national security, and particularly domestic security, since the government’s strategy will likely entail at least minor curtailments of civil rights. The restriction of rights without support from broad segments of society is authoritarian in nature, and the more authoritarian a state is perceived to be the less legitimacy it will garner — at home and abroad. As programs designed to address terrorist threats are set in motion the public gains a clearer idea of what these entail. If policy implementation is met with public outcry, we should expect this to result in some kind of programmatic change.

In sum, public policy and the government programs used to implement them are shaped by many influences throughout the different stages of policy development. These various forces exert pressure on policy in different ways, and they tend to pull in multiple directions. A detailed account of the constraints and opportunities policymakers face is necessary if we are to have a robust understanding of public policy. Such an approach is helpful in the case of counterterrorism because it can help make sense of the seeming inconsistencies of government actions in this domain.
The following three chapters each deal with a particular case in which terrorism was a major public problem. Two cases are from the United States, and one case is from Britain. Chapter three examines the First Red Scare in the United States shortly after World War I, in which several bombings and the widespread fear of Communism led to a series of government crackdowns on radical immigrant groups. In the following chapter we take a look at the U.S. government’s response to the terrorist attacks on September 11, 2001. Foreign nationals were a substantial focus of this response, with the Muslim community receiving the most attention. In chapter five the development of the Anti-terrorism, Crime, and Security Act 2001 (the British response to the 9/11 attacks in the U.S.) is then examined.
Chapter 3

Foreign Radicals and Government Raids: The First Red Scare

The First Red Scare in the United States took place in the wake of World War I and the October Revolution in Russia. The revolution played a significant role in American politics at the time. Several American communist organizations openly supported the revolution and called for a similar change in the United States while the frequency and magnitude of milder forms of labor agitation within American industry were increasing. Desires to remodel the American political economy meshed well with existing anarchistic ideas prevalent in the United States. Adherents to the latter political ideology were responsible for two attempted bombing campaigns targeting highly public figures in government and industry, and thus added to the sense of perceived threat. Labor strikes at the time were seen in the same light as the communists’ call for an American revolution and the anarchists’ bombings. The ideological nature of the threat posed by Communism and radicalism was transformed into one that jeopardized the physical security of the United States and the very existence of American capitalism and democracy.

The First Red Scare warrants a closer examination because there is significant variation, over the approximately 18-month period of this episode, in the manner in which the American government responded. Immigration legislation had been passed at the end of World War I to allow the U.S. government to identify and deport suspected radicals. Yet this power was not used by Attorney General A. Mitchell Palmer until many months after several major labor strikes and the two attempted bombings took place. Indeed, members of Congress questioned Attorney General Palmer’s patriotism and requested that he explain his leniency to the upheaval taking place. The standoffish approach taken by Attorney General Palmer before the Congressional
inquiry was followed by a highly publicized and aggressive series of raids, arrests, and deportations of suspected radicals. Despite the initial public elation at the heavy-handedness with which the government began dealing with the “red menace” in the United States, challenges to both the raids and subsequent deportations by other government officials as well as overreach in other areas of public policy led to a substantial retrenchment of government activity in rooting out radicalism.

An analysis of the political dynamics of the First Red Scare will give us a better understanding of the political constraints and opportunities policymakers faced at a time when there was a heightened sense of insecurity. This case is like other episodes in American history in which a threat to national security, characterized as originating from external sources and overstepping existing controls, provides a unique set of political dynamics that typically lead to discriminatory treatment of foreign nationals. The fluctuations in the vigor with which the American government pursued radicals during the First Red Scare provide the ideal situation to analyze the influence of different variables on public policy and to understand why the civil liberties of immigrants are breached in the name of security more easily than the civil liberties of citizens.

The First Red Scare (1919-20)

The American public became fixated on the issue of radicalism in the years 1919 and 1920. Anti-radical sentiment among government officials and the wider public reached unprecedented levels amid widespread labor strikes, high-profile attempted bombings of prominent American leaders, and the prospect of a global communist revolution. Congress enacted legislation during World War I to outlaw acts of espionage and sedition — whether committed by citizens or immigrants — that could hinder the war effort. Legislation passed at
the same time also allowed the government to deport any immigrant found to be advocating or participating in anarchy. The espionage and sedition legislation expired with the cessation of hostilities. Therefore the only means of addressing radicalism in an official capacity was to target the immigrants of this movement under the authority granted in the Immigration Acts of 1917 and 1918. While the passage of these acts was not without controversy, particularly within the wider context of American immigration policy of the twentieth century, it was their implementation in 1919 and early 1920 which led Robert Murray (1964: 4) to conclude that this time period, “rather than being remembered for its great hopes and its promise, remains on the pages of American history as one of the most futile and tragic”.

John Higham (2008) identifies anti-radicalism as one of three variants of American nativism during the late nineteenth and early twentieth century, the extent of which spiked in the United States during major international revolutionary periods. Anti-radicalism indirectly defined American identity, much like the anti-Catholicism strand of American nativism; both forms were statements of what American identity is not, rather than a proclamation of its core characteristics. This form of social closure (Brubaker 1992: 29) — whereby outsiders are explicitly identified based on a certain trait they have — labeled anyone supporting extensive changes to the political, economic or social status quo as the Other against which the American nation must remain united in order to repel. Higham points out that American nativism first took on an anti-radical character towards the end of the French Revolution. Concern about the possible importation of violent political upheaval led Congress to pass the Alien and Sedition Acts in 1798. One of these acts limited free speech that excessively criticized members of the U.S. government or its policies, a measure seen by many as drastic. Similar actions were taken during both world wars.
The First Red Scare in the United States was very much a product of the conditions brought on by a nation involved in total war. A large majority of the population were in support of the war effort once President Wilson committed to it (Peterson & Fite 1957: 10), despite the sizable proportion who wanted the United States to remain neutral. These advocates for neutrality were ambivalent towards the war itself and America’s role in it. Sympathies among first- and second-generation immigrants were often at odds with the official position of the U.S. government. As Aristide Zolberg succinctly describes it:

Germans tended to side with the Fatherland; Jews who originated in Austria-Hungary offered prayers for their beloved Emperor Franz-Josef, who was an enemy, whereas those who came from pogrom-ridden Russia cursed the tsar, who was a friend; the Irish hardly cheered for the British side; and the Italians, reflecting their country of origin’s initial neutrality, were wary of entanglement altogether. (Zolberg 2006: 238)

Such divided loyalties, or perceived divided loyalties, instigated the anti-hyphenism movement in the United States. Theodore Roosevelt proclaimed that “every man of foreign birth or parentage must in good faith become an American and nothing else” ("Roosevelt Assails Divided Allegiance" 1917). He denounced the ambivalence of hyphenated Americans in supporting U.S. allies, and equated this “half-and-half attitude” with “moral treason” (Ibid.). This was merely the wartime extension of remarks made earlier by President Wilson in 1915 — a time when the United States was officially neutral — that ethnic identity was not consistent with being a “thorough American” (as quoted in Gordon 1964: 101). As perceptions can become more distorted when national security is most vulnerable, the looming distrust of so called ‘fifty-fifty’ Americans quickly extended to any foreigner on American soil (Murray 1964: 14).
conviction was an important component of patriotic wartime hysteria, and it led to an Americanization movement to teach immigrants English, inculcate them with a deep appreciation of American civic institutions, and to encourage their naturalization (Higham 2008: 247).

Germans living in the United States at the time were looked upon with an exceptional amount of suspicion, and they received harsh treatment from the American public. The Germans were thought to have established several secret organizations within the United States to disseminate propaganda and instigate sabotage of key American industries and resources. The loyal support of the German-American community was questioned, and the public at large viewed them as a potentially devastating fifth column endangering the American war effort (Higham 2008: 195-197).

The U.S. government took a similar view. Once the United States entered World War I German-born residents were required to register with local officials, and further restrictions were placed on their movement throughout the country. Ultimately 6,300 such persons were arrested and interrogated, with approximately 2,300 being interned by the U.S. government (Peterson & Fite 1957: 86). Local authorities and public organizations also suppressed many elements of American society that had a German connotation. Symbolic actions were taken, such as the renaming of towns and streets that were German-sounding for ones that were more American (Higham 2008: 208). Likewise, producers rebranded sauerkraut as “liberty cabbage” because of their concern about the marketability of such an authentically German product ("Sauerkraut May Be 'Liberty Cabbage’" 1918). Several cities throughout the country blocked the circulation of German-language publications while others banned the teaching of the German language in
public schools (Higham 2008: 208), though the U.S. Supreme Court would later rule this unconstitutional.⁹

At a time when loyalty to the American war effort was expected the most, any signs of disloyalty were stridently addressed. Germans, of course, were seen as disloyal either because they were widely perceived to sympathize with America’s enemy or because they tended to advocate for continued American neutrality. Foreigners more generally were under suspicion, and so were subjected to Americanization campaigns and expected to show their support beyond any doubt. The American public also considered socialists and others of the political left to be disloyal because of their characterization of the war as a nonsensical melee that would only further the capitalists’ cause (Murray 1964: 18-20; Peterson & Fite 1957: 43-45). Leaders of the Socialist party in the United States issued a resolution declaring their “unalterable opposition” the day after President Wilson declared war on Germany (Peterson & Fite 1957: 8). The Industrial Workers of the World, or the I.W.W. was most radical in its fight against capital prior to and during the war. It was also the group most ardently opposed by patriotic Americans. Even the American Federation of Labor was opposed to the principles of the I.W.W. The press and government officials identified Wobblies, as members of the I.W.W. were called, as the primary instigators behind many of the labor disturbances during the war. Their tactics often included violence, and they were only too willing to participate in the bitterest conflicts between labor and capital (Ibid., 49). The wider public considered the strikes during the war to be a detriment to the nation’s security and businesses branded the strikers as unpatriotic troublemakers. To further support this claim of disloyalty, opponents of the I.W.W. asserted that the organization’s activities were financed by Germany, and thus served as a subterfuge to achieve a German victory in the war (Murray 1964: 30).

⁹ Meyer v. Nebraska, 262 U.S. 390 (1923)
Opposition to all things German and to the more forceful philosophies of radicals in the labor movement was established fairly early on during the war. All of these elements of American anxiety would converge when the Bolsheviks gained control of the Russian government in November 1917. Antipathy towards the Bolsheviks was initially based on their revolutionary Marxist ideology, which included the stated goal of initiating the global overthrow of capitalism. It grew in ensuing months when they signed a peace treaty with Germany — triggering suspicions of collusion between the two — and escalated even further once the extent of the violence associated with the revolution and its aftermath became known.

This revolution fed into the established hysteria of ‘100% Americanism’ because American radicals applauded the situation in Russia. Although reactions among American radicals varied from mild celebration of the triumph of socialism to outright support for the violent revolutionary means for achieving it, both were vastly different than the vehement public condemnation of the Russian Bolsheviks (Powers 1995: 9). It was widely known that a substantial propaganda campaign was being carried out in the United States by the Russian Bolsheviks, urging their compatriots to overthrow the capitalist system (Murray 1964: 45). The shock of the October Russian Revolution and the budding relationship between its perpetrators and the radical American labor movement heightened fears among the American public when they were already feeling unusually vulnerable.

While World War I ended these fears persisted. The Bolsheviks remained in power, their desire for a world revolution had not waned, and American radicals were attacking the government and economic system with increasing ferocity. The United States, like other nations, was also in the midst of a social and economic transition to peacetime. The economy was in recession, the cost of living had been skyrocketing, and unemployment was rising (Murray 1964:
4-7). Millions of soldiers coming home from war had to be reintegrated into a society that experienced substantial social change — including the extensive migration of African Americans from the south into northern cities and the entrance of thousands of women into the wartime workforce — in a short period of time (Coben 1964: 61). The psychological impact of facing these issues was sizable and added to the growing fear of bolshevism in the United States (Ibid., 63). For these reasons, the American public in the aftermath of World War I still had a war mentality and were willing to accept a robust governmental response to the growing radical threat in the country (Ackerman 2007: 8; Coben 1964: 59; Hagedorn 2007: 154; Murray 1964: 14; Peterson & Fite 1957: 285).

Several pieces of legislation were passed during the final years of World War I that addressed the problem of radicalism in the United States. First was the Immigration Act of 1917 containing a clause that excluded entry to “anarchists” or those “who believe in or advocate the overthrow by force or violence of the Government of the United States” or “who advocate or teach the unlawful destruction of property” (United States Statutes at Large 1917b: 875-876, 889). Foreign nationals with similar characteristics already in the U.S. could be deported within five years of entering the country. The dominant issue of the Act, however, was the clause that would implement a literacy test that immigrants must pass in order to gain entry. Two different immigration bills had been offered in the previous years that included a literacy test, each having been vetoed by the president. A review of congressional debates shows that a significant amount of time was spent discussing the appropriateness and effectiveness of the literacy test.10 This was the primary element around which politicians based their support or opposition to the entire bill.

10 See the index of congressional debates concerning H.R. 10384 at Congressional Record, 1916b: 248; and Congressional Record, 1917b: 280.
President Wilson would soon veto the bill, citing his opposition to the literacy test as his primary justification.

While there were some concerns that the anarchist clause would limit freedom of thought or would unfairly exclude those who might take part in the destruction of property as part of a ‘legitimate’ revolution — the Boston Tea Party was cited as one example (*Congressional Record* 1917a: 273) — the issue of excluding anarchists was largely uncontroversial. The President prefaced his veto message by declaring his support for a majority of the bill’s provisions (Wilson 1917). Many in Congress who opposed the bill would do the same by highlighting their support for much of it, specifically for the exclusion of anarchists (*Congressional Record* 1916a: 4876). Senator William Alden Smith’s statement is representative of this position:

That we must have immigration laws there can be no question; that our land should be protected from the lawless, from the criminal, from the anarchistic, there can be no question. We all admit that; but to say in statute law that because a man has not had the education which rises to specified standards he should be prevented from coming into this country, seems to me is very unfair.

(*Congressional Record* 1917a: 2626)

Congress overturned President Wilson’s veto and so the Immigration Act, including the literacy test and anarchist clauses, became law in February 1917. Later in the same year the Bolsheviks would overthrow the interim Russian government, proclaiming their intentions of fostering a worldwide communist revolution. The American government became increasingly concerned when radical elements of various affiliations supported the events in Russia and openly agitated for a similar movement in the United States. While the Immigration Act of 1917 provided a means for addressing these radicals, it was thought to be too restrictive of
governmental action (Burnett 1918: 1). The Immigration Act of 1918 would remove these restrictions by clarifying the types of persons deemed excludable and deportable, and by removing any time limit subsequent to entry before which deportation must occur. The new Act dealt exclusively with the problem of foreign radicals and so official opinion regarding this issue was given more space to thrive. Most legislators supported the bill with strong commitments to standing up against the communist threat. “No action is too drastic, no measure too severe,” stated Rep. Melville Kelly (Congressional Record 1918a: 8118), “for the protection of the American government and American institutions against such destructive attacks [akin to the Russian Revolution] from within our own breastworks”. Although some concerns were voiced about overreacting due to what Representative Meyer London described as “the excited state of mind that exists in time of war” (Ibid., 8110) the bill became law in October 1918 after the House unanimously supported it and the Department of Labor urged the Senate to quickly follow suit (Ibid., 8562).

The Immigration Acts of 1917 and 1918 only dealt with radicals who were foreign nationals, not those who were American citizens. Shortly after the United States entered World War I legislation was passed to prohibit actions that were meant to interfere with the American war effort — such as promoting disloyalty or opposition to conscription — or that promoted the success of U.S. enemies (United States Statutes at Large 1917a: 219). In a similar trajectory to the Immigration Acts of 1917 and 1918, policymakers strengthened this legislation in May 1918 amid heightened concerns with domestic radicalism after the Bolshevik takeover of Russia. The new legislation outlawed much more basic freedoms, such as freedom of expression, which were nevertheless deemed too threatening for national security (United States Statutes at Large 1918: 554). Any statements made that criticized the American form of government or brought it into
disrepute were prohibited. The U.S. Postal Service was given authority to block any material proclaiming the same. Merely displaying the flag of a foreign enemy was cause for imprisonment. Collectively known as the Espionage and Sedition Acts, they were helpful in curtailing radical activity in the United States. However, much of this legislation would expire with the cessation of hostilities. Therefore foreign nationals were the only types of radicals the government had authority to incarcerate after 1918.

Widespread labor strikes and a series of bombings throughout 1919 were seen as an indication of the growing problem of radicalism in the United States. First, a general strike took place in Seattle in which 95,000 unionized workers of all professions walked off the job. The local economy came to a standstill and 1,500 federal troops were sent in to maintain order (Murray 1964: 57-66). The Seattle general strike kicked off a season of labor disturbances throughout the country, in which 110 strikes carried out in February multiplied to 364 in July (Congressional Record 1919: 6869). The sensation of the Boston police strike, in which 1,500 police officers abandoned their posts, gained national attention in September 1919 (Murray 1964: 122-134). Later that year more than 700,000 steel and coal workers initiated a nationwide strike for higher wages and better working conditions (Ibid., 135-163).

Amid the labor strikes throughout 1919 a series of sensational bomb attempts took place, reinforcing a sense of urgency in addressing the radical problem. First, bombs were sent through the mail to thirty-six people in April, including several prominent politicians and judges and two giants of American capitalism: John D. Rockefeller and J.P. Morgan. Only two had reached their destination and only one of these exploded, injuring two people at a former senator’s home. The remainder were set aside by various post offices for insufficient postage (Murray 1964: 69-73). Little more than one month later, on June 2, ten bombs exploded within the same hour in eight
different cities from Ohio, to Washington, D.C. and Boston. The most notorious of these was the bomb intended for Attorney General A. Mitchell Palmer’s home, where the bomb nearly reached its target. Among all the bombs only two people had been killed, including the bomb-thrower at the Attorney General’s house who likely tripped before achieving his goal (*Ibid.*, 78-81).

Despite a massive investigation none of the bombers were ever found. By the end of the summer in 1919 Congress was applying increasing pressure on the Wilson administration to take more vigorous steps to eradicate the radical threat. The most prominent response came in the form of two raids on suspected radical organizations. The raids were led by J. Edgar Hoover — then the head of the General Intelligence Division (GID) — and were carried out under authority of the Immigration Act of 1918. The GID’s responsibility was to gather intelligence on the radical movement in the United States and to prevent any massive breaches of law, including revolutionary actions, which may stem from it. The division, created shortly after the June bombings, was a part of the Bureau of Investigation within the Department of Justice. Although Hoover was responsible for carrying out the raids, Attorney General A. Mitchell Palmer had executive authority for the government’s policy on domestic radicalism. These incidents would therefore come to be popularly known as the “Palmer Raids.”

The first series of raids was conducted in fifteen cities across the country on November 7, 1919 (*Ackerman 2007: 113*). The target was the Union of Russian Workers (URW), an anarchist organization that publicly agitated for the overthrow of government and capitalism, and was affiliated with the IWW and composed almost entirely of Russian immigrants. The execution of the raids was blunt. Anyone found within the offices of the URW on the night of the raids was arrested without being identified, they were likely treated with indiscriminate force and taken in for questioning (*Ibid.*, 114). In the end approximately 300 people were arrested across eleven
cities (Palmer 1920a: 174). Nearly 200 were arrested in New York City alone, although only 39 remained in custody the next day (Murray 1964: 197). The rest were released because they were either found to be U.S. citizens — and therefore not subject to deportation — or were Russian immigrants who were members of the organization but knew nothing of its ideology and considered it nothing more than a gathering place to socialize with fellow Russians (Ackerman 2007: 118; Murray 1964: 197).

Nevertheless the public was elated with the government’s actions. On December 21, 1919 the U.S. deported 249 radicals to Russia on the USAT Buford. Of those on board, 199 were from the November raids and the rest were anarchists who were previously apprehended (Murray 1964: 207). The press enthusiastically reported the departure of the Buford — popularly nicknamed the ‘Soviet Ark’ — and encouraged a continued strong stance towards domestic radicalism.

The General Intelligence Division carried out their second major raid in two months on January 2, 1920. This time it was against two of the most influential communist organizations in the United States: the Communist Party of America and the Communist Labor Party. The raids were conducted in 33 major cities with many of the leaders of both parties being arrested (Murray 1964: 213). The execution of the raids was even more excessive than the first. The authorities ended up arresting at least 4,000 people that night, although deportation warrants were obtained for roughly 3,000 members of these organizations (Ibid., 211-213). Some estimates of those arrested reached as much as 5,000 (Ackerman 2007: 180). It took several days to determine who was to be let go — i.e. American citizens and those who were not bona fide members of either communist party. In Detroit, where the condition of the detention facility was exceptionally unfit, it took over three weeks (Ibid., 193). A federal judge described the detention
facilities on Deer Island in the Boston Harbor as “unfit and chaotic.” He was also irritated that the detainees were held incommunicado for several days. With the executive overreach of the first raids likely on his mind, the Seattle immigration commissioner was exasperated with the conduct of the second series of raids, exclaiming to the Commissioner General of Immigration: “We have never gone on the assumption that we had the authority to throw a blanket around an entire community and subject American citizens and all others to an arrest in order to secure one or two accused” (as quoted in Ackerman 2007: 204).

The wider American public supported the raids and many newspapers were calling for the immediate deportation of those captured, as was done after the first series of raids (Murray 1964: 217). However there was not to be another mass deportation as the one that occurred on the Buford just several weeks prior. The Assistant Secretary of Labor Louis F. Post, who became responsible for immigration matters at the beginning of 1920, would end up cancelling more than 1,200 deportation orders (U.S. House Committee on Rules 1920: 72). He concluded that many of the suspected radicals arrested in the raids were simply social members of the communist parties rather than true revolutionaries. Most of those arrested were “working men of good character,” Post would later state, “who are not anarchists or revolutionists, nor politically or otherwise dangerous in any sense. […] It is pitiful to consider the hardship to which they and their families have been subjected […] for nothing more dangerous than affiliating with friends of their own race, country and language” (Ibid., 76).

The First Red Scare would quickly die down beginning in the summer of 1920. The public had begun to oppose the excessive actions of the government more strenuously throughout the year. This can be seen in the strong negative reaction from the press and public officials to the New York State Assembly’s decision to expel five socialist members in April of

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11 Colyer et al. v. Skeffington, 265 F. 17, 45 (1920)
The federal government met with a similar response when it attempted, at the urging of Attorney General Palmer, to pass peacetime sedition legislation so that citizens could also be targeted for their radical leanings (Higham 2008: 232). The American psyche was also finally transitioning to a more peacetime mentality as the social and political upheavals caused by the war were beginning to subside (Coben 1964: 74; Murray 1964: 240).

A more detailed analysis of the constraints and opportunities upon public officials will help to provide a better understanding of why the government could take such vastly different actions toward domestic radicals within a relatively short span of time. From widespread hysteria and high-profile government raids to a sharp attenuation of public concern and strenuous opposition to similar actions towards radicals just a few months later, the First Red Scare offers an opportunity to assess the influence of various factors on public policy. The analysis that follows will be grounded in the enactment and implementation of the Immigration Acts of 1917 and 1918 since these were the primary pieces of legislation underlying the government’s response to domestic radicalism after the First World War.

Problem Definition and Agenda Setting

National security was the dominant lens through which domestic radicalism was understood by policymakers in 1917 and 1918. It is not surprising that the Congressional debates on the Immigration Acts of 1917 and 1918 show a deep concern for maintaining domestic cohesion during a time of war. Policymakers used the country’s engagement in the war and the revolutionary events unfolding in Russia shortly after as reference points to characterize the events unfolding at home. They blamed strikes and other labor disturbances in 1918 on German agents working to disrupt America’s war effort. Indeed, Rep. Edward Robbins from
Pennsylvania proclaimed, “These facts are so overwhelming in the conclusiveness of their purpose that it is time that this Congress would enact laws that would make it possible for the United States district courts to convict these German spies and German propagandists and impose the death penalty on them by promptly having them shot by a firing squad as guilty of treason” (Congressional Record 1918a: 8113). The strikes were characterized as much more than a struggle for fairer wages and better work conditions; they were an extension of war, according to the dominant frame, with the nation’s most hated enemy at the time. Political elites also considered those walking off the production line or otherwise showing support for organized labor’s cause to be, in effect, traitors (Congressional Record 1918a: 8108-8127; Peterson & Fite 1957: 286).

Government officials roundly placed much of the blame for the strikes on immigrants of German, Italian or Russian heritage. Attorney General Palmer (1920a) would later estimate that immigrants were responsible for 90% of the radical disturbances in the United States. While several states had laws against anarchy, anarcho-syndicalism and sedition, the federal government had no such legislation with which to apprehend radical citizens. The absence of any federal laws punishing citizens for engaging in radical activities contributed to the popular perception that immigrants were the ultimate source of radical agitation (Higham 2008: 226-227). The fact that the three most famous anarchists in the United States were immigrants — Emma Goldman, Alexander Berkman, and Luigi Galleani — also lent credence to the idea that most, if not all, radicals were immigrants. Several policymakers characterized the problem in Congressional debates as an indication that the melting pot was not working on certain elements of society (Congressional Record 1918a: 8118, 8124). This allusion to those immigrants who had arrived but had not adopted American values reinforced the notion that radicalism was
contrary to American identity and a problem that afflicted mostly immigrants. National identity was deployed in this way to brand any immigrant espousing radical ideals as un-American. Elites propagated this negative construction of radicals as a strategy to elicit support for policies singling them out for punishment in the form of deportation. “After all in a land where Communism is truly ‘alien,’” argues Louis Hartz (1955: 301), “what is more sensible than to get rid of it simply by throwing out the men who brought it over?” Congruence, in the terminology of Schneider and Ingram (1993), would then be achieved between the dominant view of this target population and the policies that would affect them.

Immigrants of radical persuasion were identified as the root cause of labor agitation and as the target population for the government’s response. If radical immigrants were the reason for disruptive labor strikes, then their removal would solve the problem; deportation was a logical response in light of this understanding. However the problem could have been defined in other ways, such as a protest against the exploitative relationship between capital and labor. By focusing on immigrants rather than the excesses of capitalism as the primary cause of the strikes, labor reform was not seen as a viable response. Given the political difficulty of instituting labor reform, against the relative strength of anti-immigrant sentiment at the time, it is likely that government officials — with the full support of large corporations worried about union activity — promoted the “radical immigrant” definition because it could be addressed by a preferred solution, deportation. In other words, considerations of preferred solutions likely influenced the way policymakers defined the problem in the first place (Rochefort & Cobb 1994b: 25).

Policymakers also depicted the problem of radicalism as severe enough to warrant immediate attention. A strong sense that domestic radicalism posed an acute threat to national security and domestic cohesion was prevalent among political leaders. The association made
between the labor strikes and Germany — an established and credible threat — was indicative of how severe many perceived the situation at home to be. Germans were also blamed for instigating the Russian Revolution (Congressional Record 1918a: 8118) making them even more culpable of initiating labor unrest in the United States. War references were another way to understand the extent of the radical threat. As one congressman put it, anarchists were “more dangerous in undermining our Government than many bullets on the battle fields of Flanders” (Ibid., 8125). The fact that the Immigration Act of 1918 was debated in the House for only one day and in the Senate for only three brief debates is further evidence that the problem was perceived to be serious and needed immediate action. The acting Secretary of Labor considered the matter to be of “great importance” and urged the Senate to quickly pass legislation (Ibid., 8562).

Policymakers viewed radicalism as a serious problem, and it was one that they characterized as increasing in severity. Congressional debates indicate a concern among the leadership with the progress of bolshevism in Italy and Central Europe. Its presence in Mexico and several Central American countries created an even greater sense of alarm (Congressional Record 1918a: 8116, 8125). The domestic situation in 1918 was likened to a prairie fire that starts from a relatively small or unrecognized action but soon “gathers force and spreads devastation among miles of country, doing damage to thousands of homes and spreading want throughout an entire section” (Ibid., 8124). Politicians saw the chaos after the Russian Revolution as something that would befall the United States if swift action were not taken to root out bolshevism, anarchism and more generally radicalism at home (Ibid., 8116, 8118, 8124). These, it was commonly understood, were the meager beginnings from which greater dangers to the country could emerge. Labor strikes and the show of support for bolshevism by domestic

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12 See the index of congressional debates concerning H.R. 12402 at Congressional Record, 1918b: 514.
radicals were therefore considered problems, and the Russian Revolution provided the imagery for what could happen if these were left unaddressed.

The Russian Revolution and the elation of domestic radicals did much to create a propitious political environment for the government to gain support for deporting immigrant radicals. The Revolution also cast domestic affairs in a different light. During the war the strikes were largely seen as a hindrance to the war effort and therefore unpatriotic. However, the Revolution exemplified another type of problem labor agitation could pose: domestic instability and the radical transformation of society. The strikes were then viewed not only as unpatriotic and un-American, but as threats to national security. Therefore powerful groups such as business organizations and patriotic societies supported vigorous measures to contain the radical threat in America, as did the wider public (Murray 1964: 9, 16). Many executive departments were also in support of legislation authorizing them to take effective action against radicals, notably the Departments of Justice and Labor (Congressional Record 1918a: 8109).

**Policymaking**

It was under these conditions that Congress began debating legislation to deport radical aliens. As noted earlier, the Immigration Act of 1918 merely clarified and revised the anarchist clause contained in the Immigration Act of 1917. However, debate on the earlier Act was largely concerned with the literacy test for gaining entrance to the country. The Act of 1918 pertained solely to radical aliens and was the basis for subsequent government actions. This is therefore where we should direct our attention.

The press took a particularly keen interest in the Russian Revolution and labor unrest in America and so devoted substantial attention to any domestic events that appeared to signal radical inclinations (Murray 1964: 34-36). This meant that the activities — and the failures — of
the government regarding domestic radicalism would also attract much press. Under such public scrutiny policymakers took particularly tough stances regarding their support for the anarchist deportation bill. “It seems to me the quicker you can get rid of cattle of this kind the better,” one congressman defiantly proclaimed (Congressional Record 1918a: 8109). Referring to radicals as the uncooperative element in the American melting pot, another representative suggested the government should “skim off the dross and throw it on the slag heap where it belongs” (Ibid., 8118). The suggestion was even made to strip a naturalized person of their citizenship if they were found to believe in or preach radical ideas (Ibid., 8123). Such bombastic rhetoric is typical at times of insecurity. The political costs of appearing too weak are higher than appearing too tough. Policymakers will at least have the support of some segments of society if they are too aggressive and this is later seen to be unwarranted. Yet policymakers who take a more measured approach will have very little support in the event that domestic security is breached. Rhetoric — and even policy — tend to outstrip the extent of the security threat they are meant to address (Friedman 2011: 92).

One reason policymakers took a strong stance against radicalism was because they were keen on keeping the country secure from an economic or social revolution. Another reason was that they saw it as their responsibility to protect American national identity. Violent radicalism was considered a problem because it posed a threat to the nation’s security, and it also represented a worldview that was antithetical to American values. To allow such ideas as bolshevism or anarchism to fester within American society would mean the diminution of core tenets of American identity such as democratic politics, individualism and capitalism (Congressional Record 1918a: 8116). “The persistent contrast between a generally hopeful psychology of mobility in America and the more desperate politics born in class-ridden Europe,”
argues John Higham (2008: 7), “has fostered the belief that violent and sweeping opposition to the status quo is characteristically European and profoundly un-American.” In their attempts to usher in drastic changes to the status quo, radicals became an out-group of American society. Radicals were more like those Europeans whose history is marked by reliance on political violence to effectuate change. They became the Other against which American national identity could be defined. Indeed, anti-communism has been a cornerstone of American identity throughout the twentieth century and continues to be today (Bosso 1994; Herman & Chomsky 2002: 29-31; Kaufmann 2004: 166; Powers 1995; Theiss-Morse 2009: 63).

This nationalist perspective is reflected in the way many leaders characterized the problem and justified deportation as a response. Policymakers saw the very survival of the nation being challenged; a united ‘American’ response was called for to protect it (Congressional Record 1918a: 8116). Radicals were variously characterized as “anti-Americans” who were “not fit to be citizens” because they had “no American spirit in their souls” (Ibid., 8112, 8118, 8123). Several references to the melting pot — that American myth of immigrant integration — were also made regarding its failure to assimilate the radical elements of American society (Ibid., 8118, 8124). Deportation was justified on the basis that it would help in the “cleaning up of [American] citizenship” (Ibid., 8111). For those who were weary of the Act’s appropriateness the aura of the American forefathers was invoked, claiming that they had gone “ten times further” and “were not afraid of being charged with arbitrary arrests when the entire fate of their Nation hung in the balance” (Ibid., 8118).

The majority of policymakers supported the bill while relatively little opposition was aired. Two representatives did voice their concern about the procedure for determining who committed deportable offenses but they largely supported the other elements of the legislation
Their concerns, however, were not reflected in any amendments to the initial legislation. The only other points of discussion that were not wholeheartedly in support had to do with logistical issues, such as what should be done with aliens who cannot be deported back to their home country or whether to allow the return of aliens previously deported who have shown a true reform of their beliefs (Ibid., 8122, 8124). Overall, Congressional debates do not indicate the presence of any overwhelming liberal ideological or institutional constraints on the positions of policymakers.

There is also no clear indication that policymakers altered their approach in consideration of objectives they may have had in other policy domains. In fact auxiliary objectives, rather than constraining legislators in their approach to domestic radicalism, did more to promote the need for strong legislation to deal with the problem. President Wilson’s response to the hanging of Robert Prager, a coal miner of German descent suspected of disloyalty and hanged by a mob in April 1918, was explicit about the consequences of citizens taking matters of disloyalty into their own hands. Shortly after the acquittal of those involved in the Prager hanging, President Wilson expressed his concern that “every mob contributes to German lies about the United States” (as quoted in "President Demands that Lynchings End" 1918). America’s participation in World War I was premised on the promotion of democracy and the existence of mob violence was a serious impediment to the pro-democracy image President Wilson needed to portray. Such vigilante justice was also a concern because of the lawlessness and instability it entailed. Officials referred to mob violence as further justification for the need of a strong response to domestic radicalism, which would take the form of deportation embodied in the Immigration Act of 1918 (Congressional Record 1918a) and sedition legislation considered by Congress (Peterson & Fite 1957: 211).
Policy Implementation

Congress passed the Immigration Act of 1918 in a climate of heightened anxiety among officials about the Russian Revolution, so-called “disloyalty” among some segments of the American public with German sympathies or who celebrated the Bolshevik victory, and the increased incidence of labor unrest throughout 1918. Sedition legislation, a traditional wartime policy meant to curtail overt criticism of the government that may hinder war efforts, was passed just several months prior. Labor unrest, the basis for these pieces of legislation, would only become more pronounced in the months that followed. The frequency of labor strikes quickly increased at the beginning of 1919. Large-scale strikes occurred throughout the year, including a general strike in January involving all unionized workers in Seattle, a nationwide steel strike in September and a nationwide coal strike in November. The Boston police strike in September — for the right to organize a union — and the public disorder that quickly ensued once officers abandoned their posts was sensationaly reported by the press, and captured the imaginations of policymakers (Levin 1971: 37-38; Murray 1964: 129-130).

Violence occurred in some of these strikes but the most salient issue in connection with them at the time was the more general concern with the propagation of radical ideas (Murray 1964: 165). Some of the most entrenched ideas of capitalism were being challenged when the nation was struggling through the postwar transition to a peacetime economy. Work stoppages and strikes disrupted economic activity at a time when the country needed it most. The strikes were characterized as revolutionary attempts, whose aims were not simply the improvement of labor’s position but, as Senator Miles Poindexter put it, the “overthrow of the government” and the “establishment of forcible communism” in America (Congressional Record 1919: 6868). This sentiment was widespread among policymakers who saw in the labor strikes the possibilities of a chaotic Bolshevik-style revolution similar to the one in Russia.
It was the two bomb attempts in the spring and early summer of 1919 that indicated a markedly violent turn in the radical movement in the United States. While the death toll from these bomb attempts was minimal — the forty-six bombs in total killed two people and injured another two — the audacity of the perpetrators and the high-profile businessmen and government officials who were the intended targets signaled the seriousness with which the more extreme radicals in the United States were in changing the status quo. Both episodes were widely proclaimed by the press and political leaders to be revolutionary attempts by the agents of the Russian Bolsheviks in the United States. The work of Lenin and Trotsky was seen in both bomb plots and the press urged the government to take aggressive action in response (Murray 1964: 72, 79). Although a massive investigation took place, none of the perpetrators of the April or June bombings were ever discovered. The radical situation in the United States had escalated in the first half of 1919 but the government’s efforts to clamp down on domestic radicalism had shown scant tangible progress.

The increased radical activity in the United States coaxed the government to take action. Congress authorized an appropriation of $500,000 for the creation of the General Intelligence Division shortly after the second series of bombings. Its sole purpose was to track radical activity in the United States and to counter any threat it posed to the political, economic, and social order. Congress increased its focus on radicalism in the fall of 1919 after the Boston police strike and the nationwide coal and steelworkers’ strikes. At this time particular emphasis was placed on the increasing severity of radicalism in the United States, and the imagery of a prairie fire once again provided the metaphor to promote quick action (Palmer 1920b: 2; U.S. House Committee on the Judiciary 1919: 54). Problem definition had started anew. While the situation was deemed serious enough to pass related legislation in 1918, changing conditions warranted a redefinition
of the radical problem. Radicalism was still characterized as a mortal threat to the American
nation, but it was now defined as a much more acute affliction. The frequency and ferocity of
radical activity had substantially increased and suspicions grew that more and more foreign
governments had been involved. As one senator put it, “we have now reached a point in the
development of this [Communist] movement at which it behooves the Government, if it is going
to be maintained in its full vigor, not only to take action but to take vigorous action to suppress
anarchy and revolution and to defend itself” (Congressional Record 1919: 6869).Congressmen
were concerned about the perceived involvement of other countries — particularly Russia, Germany, and Sweden — in funding or directing the unrest taking place in America
(Congressional Record 1919: 6871; Palmer 1919: 13; 1921: 130; U.S. House Committee on the
Judiciary 1919: 35, 45, 46) while the seemingly international scope of the Communist movement
contributed to an inflated sense of threat (Palmer 1920a: 178; U.S. House Committee on the
Judiciary 1919: 25).

Developing a sense of how grave the radical situation in the United States seemed at the
end of 1919 and the beginning of 1920, policymakers were adamant in addressing any executive
actions that did not fully reflect the extent of the danger. Two instances highlight this sentiment.
First in mid-October 1919 the Senate called for Attorney General Palmer to inform Congress of
the actions his department had taken to address radicals in the United States (Congressional
Record 1919: 7063). Attorney General Palmer was accused of failing to adequately enforce the
Immigration Act of 1918 regarding the deportation of alien radicals and so was called upon to
explain his rather lenient approach to this problem (Ibid., 6871). They looked at with dismay the
postponement of deportation for several notorious anarchists and the lack of action taken against
strike organizers who were deemed deportable for their advocacy of the destruction of property (Ibid., 6872).

Attorney General Palmer responded with an extensive review of the deportation cases being handled by his department and the general activities being undertaken to address the radical threat. He also urged Congress to pass peacetime sedition legislation — a move that would burnish his anti-radical credentials — to deal with the “extremely difficult and serious problem” facing the country (Palmer 1919: 13). Such legislation would help, it was argued, to stop the mailing of radical publications through the post. Concerning itself with the tracking and translation of 471 radical publications in 23 languages, the Department considered these the most important vehicle for spreading the bolshevist ideology (Ibid., 12).

The Justice Department would also take two unprecedented steps in confronting radicalism shortly after the Senate called for an explanation of its lenient approach, on October 17, and before Attorney General Palmer gave his response on November 17. First, Attorney General Palmer was able to obtain an injunction shortly before the nationwide coal strike that took place on November 1 against the strikers, under the wartime Food and Fuel Control Act. This Act gave the government authority to control the price and distribution of coal and other products deemed necessary for national security at a time of war. The administration of the Act was dissolved once World War I had ended, but Attorney General Palmer was able to persuade President Wilson to have the authority reinstated to prevent the coal strike from taking place. Although the authority and administration of the Act would be dissolved forever by the end of the year, it was an extraordinary action on the part of the executive to reinstate wartime authority to prevent a labor strike during peacetime. A cabinet member suggested later that President
Wilson would have disapproved of such action had he not been seriously ill at the time (as cited in Murray 1964: 157).

A raid of the Union of Russian Workers was the second unprecedented action, and more sensational, taken by Attorney Palmer before responding to Congress. The execution of the raids was drastic. Of the approximately 200 arrested in New York City alone, all but 39 were released by the following day. Little care was taken in apprehending suspects or respecting their property. One newspaper described the aftermath “as if a bomb had exploded in each room,” replete with demolished typewriters and blood stains throughout the raided offices (as cited in Ackerman 2007: 116). If Attorney General Palmer was perceived as being too soft on radicals by Congress in October 1919, he made sure to change that perception quickly. He would rest his presidential ambitions on this issue.

Louis F. Post, Assistant Secretary of Labor, would be the next executive-level official to fall under Congressional scrutiny. Mr. Post became responsible for adjudicating deportation cases at the beginning of 1920. Policymakers and the wider public were still highly concerned with radicalism at the time. Members of Congress viewed Mr. Post’s decision to cancel more than 1,200 warrants for deportation in early 1920 (U.S. House Committee on Rules 1920: 72), and other actions, as egregiously irresponsible. Convinced that there was a “widespread and carefully planned effort to Russianize this country,” (Ibid., 16) they viewed Post’s actions as inimical to national survival. Mr. Post was called disloyal and it was even intimated that he should be deported when he set bail for a suspected radical at a level that was attainable (Ibid., 24). Since the Department of Labor had been among the least caught up in the zeal of the First Red Scare, it was stated as early as December 1919 that the department was “so honeycombed with anarchism and Bolshevism that you have got to have a house cleaning there before you
relieve this country of the present menace” (Ibid., 51). The House passed a resolution, widely supported by the press (Murray 1964: 248), to investigate the actions of Mr. Post, possibly leading to his impeachment (U.S. House Committee on Rules 1920: 6).

Assistant Secretary Post appeared before Congress in April 1920 to explain his actions. He spent considerable time reviewing every grievance against his record, showing his even-handedness in dealing with the deportation decisions of suspected radicals. His defense was exceptionally effective because he was able to demonstrate how overzealous the actions of some government officials were — particularly in the Department of Justice and the Bureau of Immigration — compared to his equitable handling of the problem. For instance, the reason Mr. Post canceled so many warrants was because he defined “membership” in a designated radical organization in stricter terms than many in Congress thought it should be. As the Immigration Act of 1918 stated, members of organizations advocating or inciting anarchy or the destruction of property were deemed deportable. Mr. Post insisted that membership, for purposes of deportation, must entail knowledge of the organization’s philosophy and goals and a willful pledge to join and participate in that organization’s activities (U.S. House Committee on Rules 1920: 77). He rejected the notion that “automatic members,” such as those who were given a membership card for merely socializing with affiliates, should be considered deportable without further proof of their radical inclinations. Mr. Post poignantly remonstrated such thinking in defending his cancellation decisions:

…the hearings show the aliens arrested to be workingmen of good character who have never been arrested before, who are not anarchists or revolutionists, nor otherwise dangerous in any sense. Many of them […] have American-born children. It is pitiful to consider the hardships to which they and their families
have been subjected during the past three or four months by arbitrary arrest, long
detention in default of bail beyond the means of hard-working wage-earners to
give, for nothing more dangerous than affiliating with friends of their own race,
country, and language, and without the slightest indication of sinister motive, or
any unlawful act within their knowledge or intention. (Ibid., 76)

Many of these assertions were confirmed by testimony in a *habeas corpus* case taking place in
Boston at about the same time.\(^\text{13}\) So effective was Mr. Post in defending his actions that the
committee agreed to suspend any further consideration of the matter. Policymakers had also
come to see the situation in a different light: it was not that Assistant Secretary Post was too soft
in addressing radicalism, but that the Department of Justice was being too hard. The dominant
understanding of the radical problem had once again been modified. Two months later Attorney
General Palmer would be given the chance to justify his department’s actions and to demonstrate
the necessity of his strong approach. First prodded by Congress to be more aggressive in
addressing domestic radicalism, Attorney General Palmer was now called to defend his heavy-
handed tactics.

For a considerable time, however, the government enjoyed substantial support from the
business community and patriotic societies (Levin 1971: 54). Industrialists supported the
government’s intervention because it furthered their interests in the more general conflict with
labor. Not only did the federal government use its influence to disrupt labor strikes, but the
framing of these strikes as Bolshevik-led helped to win public support for business owners.
Patriotic societies were another group heavily supportive of a strong approach. Since some of
them had been co-opted by the Justice Department to help enforce the Espionage and Sedition

\(^\text{13}\) *Colyer et al. v. Skeffington*, 72-77
Acts, they saw an equally drastic approach by the government towards radicals as an opportunity to regain their wartime power and prestige (Hagedorn 2007: 186; Murray 1964: 84).

The press also gave significant attention to the radical threat in their news coverage. Daily and weekly publications across the nation urged the government on as it did when calling for another “Soviet Ark” to set sail immediately following the second series of raids in January 1920. Anti-Bolshevik themes were widely popular in American culture as well, most prominently in film and literature.

Policymakers were keenly aware of such public sentiment. During a committee hearing which entailed a comprehensive review of bills related to domestic radicalism in December 1919 several representatives noted the substantial pressure they were receiving from constituents to get tough in addressing the problem (U.S. House Committee on the Judiciary 1919: 35, 40, 50). In support of the peacetime sedition bill proposed by Attorney General Palmer, one representative proclaimed that “the American people are aroused to the point of almost bitterness over the red menace. That fact is evidenced in the most unmistakable form in the communications that have come to me, and this Congress can do nothing better for itself, to satisfy the judgment and demand of America, to establish the confidence of the people, than to pass a law to meet this present danger” (Ibid., 35).

The government was certainly aware of the public sentiment at the time, but this does not mean that the public was largely responsible for urging the government to do more. Indeed, it was the government who actually fomented negative public opinion towards radicalism in the first place. The Justice Department was “one of the major agents” in stimulating anti-radical sentiment by disseminating propaganda — in the form of cartoons and exaggerated stories of supposed radical activity — to news outlets for publication (Murray 1964: 194). Rather than
merely providing information about radical activities to news outlets, the Justice Department was actually supplying pre-written news stories for newspapers to reproduce and disseminate (Levin 1971: 53). A 1920 report on the *Illegal Practices by the United States Department of Justice* (National Popular Government League 1920: 5), produced by 12 prominent lawyers, described these anti-radical materials sent to newspapers by the department as “deliberately intended to prejudice [magazines and editors] in favor of [the department’s] actions” and were “prepared in the manner of an advertising campaign in favor of repression.” Many of these accounts implicitly connected any suspected radical activity and the more general ideology with Russia and immigrants (*Ibid.*, 55-60). Attorney General Palmer asserted that “fully 90 percent of the communist and anarchist agitation is traceable to aliens” (Palmer 1920a: 177). The radical was identified as the *Other* in order to rally the nation behind the government’s crackdown. This nationalist strategy was an effective way of gaining support for governmental suppression of radicals given the extent of American nativism at the time (Higham 2008: 194-233).

The federal government would respond to public hysteria through its management of the raids in November 1919 and January 1920. The raids were conducted somewhat like a public spectacle. Suspected radicals apprehended in New England were chained together and marched through the streets of Boston on their way to Deer Island. Detainees, looking disheveled and therefore culpable, were deliberately exposed to newspaper photographers. In the wake of the Seattle general strike almost a year earlier 54 suspected alien radicals were transported across the country by train to Ellis Island for deportation (Murray 1964: 194). Both this episode and the deportation of 249 alien radicals in December 1919 were very public events. They were publicized to such an extent that the vessels carrying the suspected radicals were popularly

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14 *Colyer et al. v. Skeffington*, 44
known by their nicknames: the “Red Special” was the transcontinental train used in January 1919, and the boat used in December of the same year was referred to as the “Soviet Ark.”

American nationalism was the theme of the day and government officials framed the eradication of the “Red Menace” as a nationalist endeavor. The effort of the Justice Department to gain public support on nationalist grounds indicates a consideration, on the part of Attorney General Palmer, for the Presidential elections to be held in the fall of 1920. Attorney General Palmer believed he could win the presidency by giving special attention to the general public’s concern about radicalism in the United States (Coben 1964: 73; Hagedorn 2007: 228; Murray 1964: 192). This was not overly optimistic since two political figures closely identified with combating domestic radicalism became incredibly popular: Mayor Ole Hanson, who was perceived to be the one to end the Seattle general strike of January 1919 (Murray 1964: 65); and Calvin Coolidge, whose central role in ending the Boston police strike in September 1919 made him a widely-known political figure, eventually becoming Vice President in 1920 (Ibid., 133).

A closer examination of how societal values influenced the decisions of policymakers reveals the extent to which notions of American identity colored their perspective. There was unanimous support for the goal of eradicating the domestic radical threat. The worthiness of this goal was hardly considered in any detail. Since it became widely understood that the radical represented the Other, the government’s struggle to rid the country of this impurity was naturally seen as a legitimate endeavor. The only time it was necessary to publicly declare the necessity of addressing domestic radicalism was in connection to the accusation that Attorney General Palmer was being too soft on radicals prior to November 1919. Policymakers saw his leniency in handling infamous anarchists and labor agitators as detrimental to the concept of private property
(Congressional Record 1919: 6869-6870) and the “right of the individual to life, liberty, and the pursuit of happiness” (Ibid., 6872).

Even Louis F. Post asserted during his defense before Congress the obvious value of deporting radical immigrants. However, he followed this by emphasizing the need for the government to achieve the desired goal in a way that also accords with American values. As Mr. Post (U.S. House Committee on Rules 1920: 76, emphasis added) put it, “To permit aliens to violate the hospitality of this country by conspiring against it is something which no American can contemplate with patience […] Equally impatient, however, must any patriotic American be with drastic proceedings on flimsy proof to deport aliens who are not conspiring against our laws and do not intend to.”

Though President Wilson urged the Justice Department to use proper restraint in carrying out its hunt for radicals (Murray 1964: 202) Assistant Secretary of Labor Post was the most prominent governmental official to look at the situation from the more comprehensive perspective of both means and ends. During Mr. Post’s appearance before Congress it was noted by one senator that the stricter criteria he used would make it more difficult to deport aliens. It was said in a manner that implied the only consideration should be the goal of deportation. In other words, anything impeding this goal was viewed as misguided. In one of the most notable exchanges during the proceedings, Mr. Post responded: “Every rule in the interest of personal liberty makes it more difficult to take personal liberty away from a man who is entitled to his liberty” (U.S. House Committee on Rules 1920: 248). The focus was put on the means employed to achieve the goal, something many policymakers had failed to seriously consider until then.

It appears that the public was also concerned with the means for addressing the radical threat, albeit in a different way. As John Higham (2008: 232) argues the American public did not
have much of a problem with the government’s illiberal means of confronting radicals, so long as they were immigrants. However, once American institutions and liberties enjoyed by the wider public were targeted the government faced widespread opposition. Two such incidents — the federal government’s serious consideration of peacetime sedition legislation limiting free speech and the expulsion of five Socialist representatives popularly elected to the New York State Assembly — contributed to the ultimate decline of public hysteria surrounding the radical threat (Murray 1964: 242-244). While considerations of American values did influence the public’s opposition to some governmental actions, this was not so when the Other was the target.

Institutional factors, however, would eventually constrain the government’s handling of suspected immigrant radicals. Though several cabinet members opposed Attorney General Palmer’s strategy, none was able to effectively influence a change (Murray 1964: 203). With President Wilson largely removed from decision making on domestic affairs and the press sensationalizing the red menace, the balance of power was in favor of those who supported raids and deportations. Curtailment of the government’s abuses would come from the justice system after both series of raids had taken place.

Writs of habeas corpus were filed in January 1920 on behalf of several suspected radicals who had been detained in the raids. The case was heard before Judge George W. Anderson of the U.S. District Court in Boston.15 This was a crucial test of the federal government’s implementation of anarchist deportation. The November and January raids were the tactical and very public cornerstones of the Justice Department’s attempts to rid the country of radicals, and it was the conduct of these raids that was being reviewed by the court. From the many witnesses and agents examined throughout the trial it was clear that the government had committed several illegal acts in carrying out the raids: setting excessive bail, making arrests without warrants,

15 Colyer et al. v. Skeffington,
unreasonable and unwarranted searches and seizures, and compelling persons to witness against themselves. These violations, among others, were also alleged in the *Report Upon Illegal Practices by the United States Department of Justice* (National Popular Government League 1920) published at the same time the trial was being held.

During the trial Judge Anderson condemned the federal government’s conduct in strong terms: “A more lawless proceeding it is hard for anybody to conceive. [...] We shall forget everything we ever learned about American Constitutional Liberty if we are to undertake to justify such a proceeding as this” (as quoted in National Popular Government League 1920: 34). In summarizing the case and giving his ruling, Judge Anderson once again described the government’s actions as criminal. “[A] mob is a mob,” he remarked, “whether made up of government officials acting under instructions from the Department of Justice, or of criminals, loafers, and the vicious classes.”

In the final ruling, writs of *habeas corpus* were granted to all thirteen plaintiffs. One group of plaintiffs — nine in total — was granted release because they did not receive due process when arrested and interrogated by law enforcement agents. Their right to counsel was not made known to them during much of the process and their statements of guilt were more of compellence than admission. The other four plaintiffs were released because it was determined that there was insufficient evidence to establish the Communist Party as an organization advocating anarchy, and therefore their membership was not grounds for deportation. This latter ruling would eventually be overturned on appeal, but the damage had been done nonetheless. A substantial part of the Justice Department’s policy had been discredited and its public image tarnished. The excesses of wholesale arrests and denials of a fair trial during deportation proceedings had been curbed. Similar raids would not occur again.

16 *Colyer et al. v. Skeffington*, 43
This ruling not only curbed official actions for addressing the problem of domestic radicals, it also stimulated a further decrease in public support for the government’s anti-radical activities. Public hysteria had already begun to wane when peacetime sedition legislation was being considered by Congress and when several popularly elected Socialist members of the New York State Assembly were expelled (Higham 2008: 232; Murray 1964: 242). In addition, the post-war social and economic disruptions were beginning to dissipate and so the general public had a more positive outlook (Coben 1964: 74). Rather than focusing so much on the problem of radicalism presidential candidates were talking more about a return to “normalcy”; indeed radicalism was not a major campaign issue of the Democratic or Republican parties for the presidential elections in November 1920 (Ackerman 2007: 322). The American public had grown weary of the government’s actions and eventually realized that the extent of the threat had been exaggerated. For many, addressing domestic radicalism was no longer salient (Murray 1964: 240).

**Conclusion**

The First Red Scare in the years 1919 and 1920 is largely a story of policy implementation. Formulation and legitimation of the Immigration Act of 1918 was a rather straightforward process. There was little disagreement with the notion of using deportation — for the first time in American history (Higham 2008: 220-221) — as a means for ridding the country of undesirable immigrants. Implementation of the Act, however, was much more nuanced and varied over time. The Justice Department sought to prove its anti-radical credentials through a series of high-profile raids, carried out with brute force, only after Congressional hearings were held to discuss Attorney General Palmer’s unwelcome lenient approach, at the time, to domestic radicalism.
The overwhelming response of Congressional leaders, the press and the wider public led to a second series of raids just two months later. These raids were amplified in their scope and disregard for protections of civil liberties. The emergence of details regarding the raids contributed to a swelling public backlash — led by prominent public figures in government and academia (Levin 1971: 81-85) — that would increase following other overreactions of government: the expulsion of popularly elected officials in New York and the consideration of peacetime sedition legislation limiting free speech. The perceived extent of the radical threat diminished once a larger number of those apprehended in the raids were ultimately released. It became apparent that the radical threat to America was greatly exaggerated. Policymakers and the wider public began to focus on the means of addressing domestic radicalism instead of solely on the goal of ridding the country of radicals. The means were out of step with American liberal ideals. Therefore the entire campaign was seen in a more negative light. The issue had lost salience and the Justice Department had lost public support for its aggressive, and illiberal, activities.

The labor strikes and other activities associated with radical ideas were the result of many factors, but the government emphasized the role of radicals as the primary issue. Defining the problem in this way downplayed the exploitative nature of the current economic system. The highly publicized bomb attempts and the specter of the Russian Revolution gave the “radical threat” storyline added plausibility. While native-born citizens were part of the unrest, immigrants bore the brunt of the government’s response because it was easier to implement punitive policies targeting only them (given their negative public image at the time). Policymakers did show concern for the influence of “parlor reds” (U.S. House Committee on the Judiciary 1919: 44) — mostly social or intellectual elites who supported bolshevism in various
ways (Murray 1964: 55) — but attempts to pass peacetime sedition legislation affecting citizens was met with strong opposition, particularly from the press (Levin 1971: 75).

A final note is necessary about the role of public opinion during this time period. It is evident, based on anecdotal accounts, that the public was largely supportive of the Palmer raids and had become increasingly concerned with the perceived growth of domestic radicalism (Ackerman 2007; Hagedorn 2007; Murray 1964; Peterson & Fite 1957). Nevertheless, the First Red Scare was more a product of various actors who all had a stake in promoting a fear of radicalism in the first place: corporations concerned about the growing power of labor unions; unethical newspapers who saw an attractive storyline that would perpetuate itself; and patriotic societies looking for an opportunity to regain the significance they had during the war (Levin 1971: 178). Federal officials would join the fervent anti-radical chorus once it became clear there was political capital to be gained in a nationalist hunt of immigrant radicals. So although it is not accurate to say that the public at large had called on the government to do something about the Red menace in American society, popular reaction to the first series of raids and their portrayal in the news was a catalyst for further government crackdowns on radicals.

This unequal treatment of immigrants during times of heightened concern about national security has been a consistent phenomenon throughout American history. In such circumstances illiberal policies targeting immigrants typically enjoy at least passive acceptance, while government attempts at extending similar legislation that apply to citizens is met with substantial opposition (Cole 2003). This would not be the last time the U.S. government would mete out differential treatment in response to a national security threat.
Chapter 4

Zeroing in on the Muslim Other: The U.S. Counterterrorism Response to 9/11

This chapter examines the United States government’s policy response to the terrorist attacks of September 11, 2001. These attacks were the most destructive ever carried out on U.S. soil and were firmly linked to foreign sources. Similar to the First Red Scare, the attacks occurred outside of any declared interstate war and the suspected perpetrators were non-state foreign actors. Accordingly, Congress had been deeply involved in the development of legislation closely related to the official responses, in addition to conducting oversight of executive actions, in both cases. The policy debates and committee hearings conducted by Congress in the immediate aftermath of the September 2001 attacks, as well as the activity of myriad executive agencies, provide an ideal opportunity to observe the perspectives and motivations of government officials responding to a breach of national security associated with a minority population.

The Japanese attack on Pearl Harbor in 1941 was another significant challenge to U.S. national security. However, the subsequent internment of Japanese-, Italian-, and German-Americans and the summary measures that were taken against these minority populations will not be examined. Although the World War II internments share some characteristics with the First Red Scare and the response to 9/11, they were part of a political and strategic calculus during a time of total war. The internments were authorized by an executive order based on legislation, passed nearly 150 years prior, on presidential war powers.¹⁷ The internments were

¹⁷ The Alien Enemies Act was part of the Alien and Sedition Acts passed in 1798. The power to apprehend, restrain, secure, and remove “all natives, citizens, denizens, or subjects” of a “hostile nation or
also a response to attacks by a foreign nation, rather than to terrorist attacks committed by non-
state actors. The extraordinary circumstances of the attacks on Pearl Harbor and World War II
are important elements differentiating the internments from the other cases addressed here, and
therefore place it beyond the scope of this project.

**The 9/11 Attacks and the U.S. Response**

The attacks in New York City and Washington, D.C. on the morning of September 11, 2001 were the most sophisticated and destructive acts of terrorism on U.S. soil in American history. Within one hour members of al Qaeda were able to hijack four in-flight passenger planes in an operation that took more than two years of preparation among dozens of conspirators and cost nearly half a million dollars (National Commission on Terrorist Attacks upon the United States *et al.* 2004). Three of the planes ultimately crashed into their intended targets. In the end nearly 3,000 victims had died. The death of 343 firefighters in New York City during the aftermath would be the single largest loss of life for any emergency response agency in American history (*Ibid.*, 311). The Port Authority Police Department and the New York Police Department would suffer the greatest and second greatest loss of life for any police force, respectively (*Ibid.*, 311). Millions around the world saw the immediate devastation and chaotic emergency response, and the unforgettable live footage of the Twin Towers collapsing shortly after was astonishing.

The extent of the devastation and the sensational imagery of airplanes flying into buildings were shocking, though these were not the first terrorist attacks to which the United States had fallen victim. U.S. embassies and military installments abroad have been frequent targets for attacks in the last decades of the twentieth century. The Iran hostage crisis was highly

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...— and who are above the age of 14 and not naturalized American citizens — is still proscribed by U.S. law today (50 U.S.C. §§ 21-24).
salient for the American public. As diplomatic tensions escalated between the United States and Iran, 52 Americans were taken hostage at the American embassy in Tehran and held captive for nearly fifteen months. The simultaneous bombings of the U.S. embassies in Tanzania and Kenya in 1998 gave caution to the American public. These were highly coordinated attacks, although only a small fraction of those killed by the blasts were American (12 of the 224 killed). The bombing of Pan-Am flight 103 over Lockerbie, Scotland in 1988 was the most sensational and destructive attack towards the United States prior to September 2001. The mid-air explosion and subsequent crash resulted in the death of 189 Americans among the 270 who had perished. This was cause for significant concern about terrorism among American officials and the wider public. Each one of these incidents also fed into an existing sense of Islamophobia in the United States. But compared to al Qaeda and the attacks of September 2001 the perpetrators in 1988 were closely linked with a well-established government entrenched in the international political system, and therefore more responsive to sanctions and public condemnation. In addition, the fact that the bombing occurred in foreign territory — just like the other events mentioned above — gave some respite to an otherwise anxious public.

The attacks of September 2001 also stand out when compared to past terrorist incidents taking place within the United States. Beginning in the mid-1970s the Puerto Rican independence group Fuerzas Armadas de Liberación Nacional (FALN) executed over 120 bomb attacks in Chicago and New York City. Though some were highly disruptive — as when two bombs exploded in New York City and 100,000 civilians were evacuated upon threats of more bombs ready to detonate — the FALN’s actions, comparatively speaking, were not highly destructive. Of the 120 bombings, six people had died as a result, four of which were from one incident. The bombing of the World Trade Center in 1993 failed to achieve the intended
objective, but it did alert the public to a much more foreign threat on U.S. soil than the FALN of Puerto Rico. The bombing of a federal building in Oklahoma City was the most destructive terrorist attack in the United States until 2001, when more than 150 people lost their lives. Images of the entire side of a high-rise building having been ripped apart, along with news that the explosion took place beneath a day care center in the building, were incredibly disconcerting. Public concern was pacified to an extent, however, by the near immediate apprehension of the main conspirator. His co-conspirators were arrested within the following days. Being part of no larger organization, the four implicated in the bombing were seen as rogue individuals rather than participants in a sustained and organized attack against the United States.

The 9/11 attacks were unique in several respects. First, the spectacle and the destruction that resulted were significantly greater than past terrorist incidents. The magnitude of civilian casualties greatly exceeded anything the United States had previously experienced. Live footage of the second plane crashing into the south tower of the World Trade Center and the subsequent collapse of both towers added solemnity to the affair. Targeting the World Trade Center, the symbol of capitalism and American prosperity, and the nation’s defense headquarters at the Pentagon, were exceptionally strong statements of aggression towards the United States; particularly so since they occurred outside of any declared war. Second, the sophistication of the attacks exemplified how well-organized the perpetrators had been. Far from being a few disgruntled individuals committing a devastating act of protest towards government policy, the 9/11 attacks were executed by a large organization with a long-term commitment to destroying the United States.

Third, the 9/11 attacks meant that terrorism was no longer just a problem for American interests overseas but now a vital concern that must be addressed at home as well. In recent
decades most of the fatal terrorist attacks against the United States had occurred in or were carried out by groups from the Middle East or Africa such as Iran, Lebanon, Kuwait, Libya, Yemen, Kenya and Tanzania. After September 2001 the threat of terrorism was much more proximate, and at the same time more grave, than anyone had perceived with past incidents. With the realization that terrorism was now a major domestic concern, the need for greater security measures was widely supported within the government and among the American public.

In these terms the 9/11 attacks are similar to the First Red Scare of 1919 and 1920. The bombing incidents of the First Red Scare, in which several prominent public figures were targeted, were just as sophisticated and sensational, for their time, as al Qaeda’s actions in 2001. The bombing campaigns of the First Red Scare were also suspected of being orchestrated by the highly-organized Communist Party of the Soviet Union, an organization that was rapidly increasing its power and its reach after World War I. Lastly, the First Red Scare was the beginning of high-profile socialist agitation in the United States. Until then, radicalism was largely seen as a remote threat festering in faraway places such as Europe and beyond.

Similarities can also be seen in the governmental responses to the First Red Scare and 9/11 attacks; aggressive policies and blunt implementation characterized the responses in 1919 and 2001. Immediately following the 9/11 attacks the FBI initiated its investigation, named PENTTBOM (the Pentagon/Twin Towers Bombings). During the course of the investigation 762 aliens, mostly from Middle Eastern countries, were detained largely on the basis of general leads given by the public (U.S. Department of Justice 2003b: 2, 16, 21). Many of these were detained because of routine visa violations unrelated to any known terrorist activity (Amnesty International 2002: 2). Similar to the Palmer Raids, a dragnet approach was used in which people were arrested for merely associating with those under warrant of arrest.
Within days of the attack the Bush administration drew up proposed legislation that would provide for additional powers and resources in combating terrorism in the United States. More specifically, the administration’s proposal sought five broad objectives: 1) strengthening and streamlining the intelligence-gathering process; 2) make fighting terrorism a national priority in the criminal justice system; 3) enhance the authority of the INS to detain and deport alien terrorists; 4) enhance the government’s ability to track and impede the financing of terrorism; and 5) provide emergency relief to the victims of terrorism and their families (U.S. Senate Committee on the Judiciary 2001b: 10-11). The administration’s proposal, submitted to Congress on September 19, served as the basis for Congressional debate on new counterterrorism legislation although policymakers limited some of the expanded powers initially called for. For instance, policymakers allowed domestic surveillance to be used for intelligence-gathering purposes, but they circumscribed the powers initially requested to do so. Likewise, Congress limited the amount of time a suspected alien terrorist could be detained without charges being brought to seven days. They also strengthened habeas corpus procedures for reviewing the legitimacy of detention. The language in the administration’s proposal would have allowed for the indefinite detention of such aliens and with only very limited opportunities for judicial review.18

The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001 was signed into law on October 26, 2001. It broadened executive powers to combat terrorism by increasing the administration’s authority for surveillance, tracking and obstructing the financing of terrorist activities, and the detention and deportation of suspected alien terrorists, among other measures. The USA PATRIOT Act is popularly viewed as the centerpiece of the government’s response to 9/11, but

18 See sections 202 and 203 of Anti-Terrorism Act of 2001 [Proposed].
it has not served as the primary basis for many of the counterterrorism activities undertaken by the government. As Martin Schain (2008a) points out, counterterrorism efforts in the United States, as they pertain to immigrants, have largely been under the purview of expanded executive powers through administrative procedures, rather than legislative fiat. The FBI investigation and post-9/11 roundup are two such measures.

The Bush administration carried out several other programs to address domestic terrorism in the months following September 2001. On December 5 the Immigration and Naturalization Service (INS) began working with law enforcement agencies to apprehend more than 300,000 foreigners who had failed to leave the country after receiving deportation orders (Sheridan 2001). In January 2002 the Department of Justice identified 6,000 men from Middle Eastern countries as the highest priority targets of this program because of the existence of terrorist organizations in this region (Eggen & Thompson 2002).

Foreign nationals of countries in the Middle East, particularly men, were the center of the administrations attention in two other initiatives as well. First, in November 2001 Attorney General John Ashcroft began to carry out interviews of 5,000 immigrants who had characteristics similar to the perpetrators of 9/11 in terms of age, how they were permitted to enter the United States, and country of origin (Wilgoren 2001). Four months later, the department identified another 3,000 men fitting the same criteria to be interviewed by law enforcement officials (Shenon 2002). Finally the National Security Entry/Exit Registration System was implemented in September 2002. The program required immigrants from designated countries — mostly from the Middle East and North Africa — to register with the federal government every year (67 Federal Register 155 2002). Registrants were also required to notify the government if they had a change of address. By September 2003 a total of 83,519 people had registered under the
domestic registrations component; of that total 13,799 were placed in removal proceedings for violation of immigration law (U.S. Department of Homeland Security 2003).

All of these actions were part of the larger proclaimed war on terrorism, which also included the invasions of Afghanistan and Iraq. How the problem was defined had a significant impact on how the government would respond. While many of the federal government’s actions stem from administrative actions, a closer examination of Congressional debates on the USA PATRIOT Act will provide an accurate depiction of the political dynamics surrounding counterterrorism initiatives in the wake of 9/11. In all phases of the policy process immigrants were a central focus. Although the link between terrorism and immigration was largely implied when defining the problem or discussing policy solutions, the implementation of government policy would make clear that immigrants, and more specifically Arab and Muslim immigrants, were to be most affected.

**Problem Definition and Agenda Setting**

The most dominant characterization of the terrorist attacks on September 11 was as an act of war; policymakers, President Bush, the press and the wider public were in broad agreement about this. Throughout the week that followed President Bush repeatedly referred to the attacks and the forthcoming American response within the context of war (Bush 2001c; 2001d). In a conference with his top advisors just a few hours after the attacks President Bush began by articulating the same interpretation (National Commission on Terrorist Attacks upon the United States *et al.* 2004: 326). President Bush (2001a) stated as much in a national address before Congress on September 20, 2001; his intentions were clear when he followed with: “I have a message for our military: Be ready.”
Immediately after the 9/11 attacks a CNN/USA/Gallup poll found that 86% of Americans viewed them as an act of war against the United States (Gallup 2011a). The following day numerous lawmakers were quoted in the press as having the same impression (Clymer 2001; Crowder 2001; Epstein 2001; Mitchell & Seelye 2001; Mufson 2001; Pope 2001; Thomas 2001; Willing & Drinkard 2001) and martial rhetoric was used throughout discussions on a joint resolution by Congress condemning the attacks (Congressional Record 2001a: 16865-16870). Many editorials and news analyses, foreign and domestic, published on September 12 depicted the attacks as acts of war as well ("America Attacked" 2001; "A day that changes America's view of terror" 2001; "LEADING ARTICLE: TERRIBLE ACTS OF BARBARISM AGAINST AMERICA" 2001; "MORNING VIEW: TERRORISM HAS SHOWN A NEW FACE" 2001; "Terror Tests America" 2001; "The War Against America; An Unfathomable Attack" 2001). Nevertheless some advocated a measured response by the U.S. government while others, notably the Washington Post (Krauthammer 2001) and the National Review (Kurtz 2001), advocated a much more aggressive reaction.

There was also broad agreement about the particular group of people who were the primary perpetrators of terrorism in the United States. Administrative actions and public statements by policymakers conveyed the sense that terrorists, as a whole, come broadly from the immigrant population. One of the goals the administration had in developing its proposal for new legislation shortly after September 11 was to enhance the authority of the former Immigration and Naturalization Service to detain and deport suspected terrorists. Attorney General Ashcroft justified this on the grounds that the “ability of terrorists to move freely across our borders and to operate within the United States is critical to their capacity to inflict damage on citizens and facilities in the United States” (Ibid., 10-11). Implicit in this argument is the association of
terrorism exclusively with immigrants and immigration. This view of the situation led to the subsequent formation of the Foreign Terrorist Tracking Task Force to “protect the United States from the threat of terrorist aliens” in addition to other measures introduced to “prevent terrorists and their supporters from entering the United States” (Ashcroft 2001). Concern with immigration as a potential source of threat to national security is understandable since all of the hijackers had been in the U.S. on various types of visas. However this became the dominant understanding of the domestic terrorism problem to the point that terrorists were almost exclusively thought to be immigrants, and more specifically, Arab and Muslim. As a result, legislation passed and administrative actions taken in the aftermath of 9/11 came down strongly on these groups.

The view that domestic terrorism was tied up with immigration issues was also dominant among members of Congress and other experts. In a hearing before a subcommittee on the judiciary several law experts gave testimony about the balance between security and constitutional freedoms as it applied to domestic terrorism and the administration’s proposed legislation (U.S. Senate Committee on the Judiciary 2001c). Proclaiming support for the administration’s proposal one law professor stated that it struck an appropriate balance between protecting the “civil liberties enjoyed by our citizens” and providing law enforcement the necessary authority to effectively address the terror activities of “those non-citizens who come to our shores” (Ibid., 38). Others during the hearing would also associate terrorism with immigrants (Ibid., 25, 78).

Naturally flowing from defining the attacks as acts of war, a sense of urgency was imputed on the situation. Attorney General Ashcroft was prominent in this regard. In a Congressional hearing before the Senate Committee on the Judiciary (U.S. Senate Committee on the Judiciary 2001b: 8) on September 25 he stated that “terrorism is a clear and present danger to
Americans today” and that any response must be swift. Congress acted accordingly. Consideration of the USA PATRIOT Act was expedited; the committee review process was largely bypassed except for an earlier version that had been marked up by the House Committee on the Judiciary. Representative Sensenbrenner (Congressional Record 2001a: 20450), who sponsored the bill that would become the USA PATRIOT Act, emphasized in the close of House debate the “very, very great” urgency with which Congress must act. Other members of congress expressed the same sentiment (Congressional Record 2001a: 19514, 19689, 19690, 20704; U.S. Senate Committee on the Judiciary 2001c: 76).

The 9/11 attacks were roundly considered acts of war necessitating a swift response. A consensus quickly developed among policymakers about the cause as well: the government lacked the necessary authority to do what was needed for preventing such attacks. There was overwhelming agreement that new legislation was needed to give the executive additional powers in tracking and preventing terrorist activity within the United States. During a hearing entitled Homeland Defense before the Senate Committee on the Judiciary (U.S. Senate Committee on the Judiciary 2001b), one of the first such hearings after September 11, Attorney General Ashcroft outlined the shortcomings of existing statutes in relation to advancing technologies and new methods of terrorism. Every committee member who made a statement during the hearing reiterated the same need for updated statutes to address modern terrorism. Even Senator Russell Feingold, the only senator to vote against passage of the USA PATRIOT Act and who was most vocal about protecting civil liberties, agreed that additional powers for law enforcement agencies were needed (Ibid., 28-29). Although there were various views on the type and extent of additional authority that should be given the executive, all concurred that the

government was not equipped, given existing statutes, to effectively prevent another catastrophic terrorist attack on U.S. soil.

The aftermath of the terrorist attacks was filled with a sense of urgency. Of course the emergency response and clean up of the crash sites were urgent matters. But the legislative response was carried out in a similar manner, with a paramount concern about the possibility of another terrorist attack lurking. High-ranking government officials and several members of Congress had argued that immigrants were the primary problem population. The likelihood of harsh policies being directed towards immigrants, in such a worrisome and demanding environment, would increase drastically.

Certainly the political climate was ripe for granting the executive additional powers to combat domestic terrorism. The entire country was stunned at the events that unfolded on the morning of September 11 and the aftermath. For the first time in American history all civilian aircraft in the country were immediately grounded for two days (National Commission on Terrorist Attacks upon the United States et al. 2004: 326). All bridges and tunnels into Manhattan were closed, with some not reopening to civilian traffic for several weeks. Federal buildings and major landmarks across the country were closed, while many skyscrapers in several cities were evacuated. American financial markets remained closed on September 11 and did not reopen until the following week. The attacks caused significant disruption throughout the country and instilled a sense of fear about possible future acts of terrorism on U.S. soil. The public looked to the government as the keeper of national security to respond accordingly.

Policymaking

The Bush administration and Congress concurrently began crafting a policy response amid the turmoil immediately following the 9/11 attacks. The discussions among policymakers
revolved around several themes. Foremost among these was the need to prevent future terrorist attacks. In late September Attorney General Ashcroft said in no uncertain terms that his first priority was to prevent future attacks (U.S. Senate Committee on the Judiciary 2001b: 8); bringing those responsible for 9/11 to justice came second. This “prevent first, prosecute second” mentality was evident among policymakers as well. As Representative Mike Oxley put it, “Nothing could be more important in our careers here in the Congress, no matter how long we stay, than to protect the American people and to make certain that the people who seek to terrorize us and to kill our citizens are brought to justice, and, indeed, even more importantly stop these individuals before they commit these heinous acts” (Congressional Record 2001a: 20448). Others echoed this sentiment, pointing out how it was “clearly within the public interest and the Federal government’s mandate” and a “fundamental obligation” for policymakers to protect the American people from future terrorist attacks (Ibid., 19683, 20736).

That the federal government needed additional surveillance powers and enhanced authority in other areas of law enforcement was widely agreed upon from the outset. The administration quickly drew up proposed legislation, which served as a starting point for Congressional debate. An examination of the administration’s proposal and the subsequent debates makes it clear that there was a concern for balancing the needs of increased security with the protection of civil liberties. In fact a majority of the national debate surrounding the USA PATRIOT Act was centered on whether its provisions adequately balanced these two ideals. Security was the goal, while the tools necessary to achieve it were expected to minimize the infringement of civil liberties.

Before Congressional debate on any specific bill got underway the Subcommittee on the Constitution, Federalism, and Property Rights of the Committee on the Judiciary sought the
opinion of legal experts on the balance struck in the administration’s proposal between liberty and security. The subcommittee was chaired by Senator Russell Feingold, the Senate’s most outspoken critic of the administration’s proposal and the revised versions that would be debated in Congress. Senator Feingold was the only senator to oppose passage of the USA PATRIOT Act. A primary justification regarded the vague and expansive deportation provisions for aliens suspected of terrorist activity (*Congressional Record* 2001a: 20703-20704). Entitled “Protecting Constitutional Freedoms in the Face of Terrorism” (U.S. Senate Committee on the Judiciary 2001c) the hearings included testimony from legal scholars and high-ranking officials from the Department of Justice. The balance of witnesses agreed that the administration’s proposal was appropriate, noting that the response was proportionate to the ‘war’ context that had developed.

Senator Patrick Leahy, then Chairman of the Committee on the Judiciary and a key figure in the development of the legislative response to 9/11, foresaw this concern with security and civil liberties as the main axis around which support for the bill would revolve. He asserted in his opening remarks on the first day of congressional debate on the matter: “In negotiations with the administration, I have done my best to strike a reasonable balance between the need to address the threat of terrorism, which we all keenly feel at the present time, and the need to protect our constitutional freedoms” (*Congressional Record* 2001a: 19493). This theme featured throughout the debate in the House and Senate. Policymakers either urged for a balance to be struck (*Congressional Record* 2001a: 19536, 19698, 20445, 20704; U.S. Senate Committee on the Judiciary 2001c: 8, 21, 43) or assured their colleagues that such was already the case in the present bill (*Congressional Record* 2001a: 19542, 19686, 20714, 20728; U.S. Senate Committee on the Judiciary 2001c: 4).
Many of the 66 representatives in the House who had opposed passage of the Act did so on the same grounds that it abrogated civil liberties. They were also opposed because of the expedited procedure used for deliberation (Ibid., 19684-19693, 19696-19698, 20443-20449). Others expressed some apprehension with possible violations of civil rights, but nonetheless supported the legislation because of the sunset provisions\(^{20}\) on many of the most worrying clauses. However, many more within Congress were satisfied that civil liberties would be properly protected at the same time that the country’s capacity to track and prevent terrorist activity would be enhanced.

In the end value compatibility of both the ends and the means regarding American counterterrorism efforts were given due consideration. Unlike the First Red Scare a larger proportion of lawmakers were concerned with the adherence to individual rights when it came to addressing the security threat after 2001. Nonetheless, greater importance was attached to achieving the objective of preventing future terrorist attacks than to developing a solution that would fully protect civil liberties. As one law scholar put it, “many of the objections that have been raised against this legislation are raised by people who have a much different conception of freedom than our Founders possessed [...] and also unfortunately a far less realistic assessment of the threat that is now presented to the United States” (U.S. Senate Committee on the Judiciary 2001c: 35).

Some of the most expansive provisions in the USA PATRIOT Act were subject to the sunset clause after 4 years. This would ensure that Congress would have the chance to reconsider the additional powers given to law enforcement agencies once it was known how, exactly, they would be used in practice. Notably exempt from the sunset provision were clauses related to the detention and deportation of suspected alien terrorists, despite the considerable extension of

\(^{20}\) See section 224 of *USA PATRIOT Act* (October 26, 2001).
authority to the Attorney General in the matter. This section was another major concern for those worried about the civil liberties implications of the government’s response to 9/11. Under section 412 of the USA PATRIOT Act ("USA PATRIOT Act" 2001) the Attorney General is given the authority to certify detained aliens if there are “reasonable grounds to believe” that the alien is involved in a broad range of terrorist activities. A certified alien can then be detained for up to seven days before the government must place them in removal proceedings or bring criminal charges against them. The previous limitation had been 24 hours (62 Federal Register 44 1997). In addition, such aliens who are deemed by a judge not to be deportable on terrorism grounds can still be detained if the Attorney General continues to suspect them of being a threat to national security, though such a designation requires a review every six months.

The detention and deportation of suspected alien terrorists provisions had been revised more than once from the original language found in the administration’s proposed legislation. Nevertheless the provisions as enacted in the USA PATRIOT Act were still a significant expansion of executive authority not subject to the sunset clause. Under these provisions the Attorney General has only to meet a fairly low standard of proof to certify an alien as a suspected terrorist according to criteria, also added in the Act, which greatly expanded the definition of “terrorist organization” and “terrorist activity.” Authority under this clause could also be retroactively applied to aliens engaging in such activity prior to its enactment.

Although the immigration clauses in the administration’s proposed legislation had been substantially checked by Congressional revision, the final bill was still quite harsh in this regard. Yet despite opposition to the immigration provisions of the bill, a large majority in Congress had voted for passage of the legislation. Three factors contributed to the relative unimportance of the immigration clauses. First, the sense of urgency surrounding the deliberations encouraged quick
policymakers were willing to accept provisions that they thought were suboptimal yet adequate for achieving increased security, as long as they maintained basic protections of civil liberties. The sunset clause eased some of their trepidation as well (Congressional Record 2001a: 20707, 20742). Second, congressional debate revolved largely around the equally expansive provisions for domestic surveillance. Concerns with the balance of liberty and security were first and foremost directed towards: the increased powers for surveillance of citizens under the Foreign Intelligence Surveillance Act; the authority to delay notice when a search warrant is executed; and the increased access to personal records by law enforcement agencies. These aspects of the bill attracted much more attention among policymakers and the wider public than the immigration provisions did.

The third factor contributing to the immigration-related clauses not being more vigorously attended to was an assumed association in the minds of many — including policymakers and the wider public — between terrorists and immigrants. This assumption is portrayed in statements such as “terrorists are taking advantage of our immigration system” (U.S. Senate Committee on the Judiciary 2001b: 31) and the hope that “individuals who pose a serious threat to this nation never see these shores and never set foot on our soil” (Congressional Record 2001a: 20735). Representative Carolyn Cheeks Kilpatrick noticed the bias against immigrants in the public rhetoric and urged her colleagues to focus on domestic terrorists as much as they do foreign ones. “Our outcry against the Osama bin Ladens of the world should be just as strong against the Timothy McVeighs” (Ibid., 19696). Nevertheless, it was intimated in later debates that the anthrax problems in late 2001 were perpetrated by immigrants (Ibid., 20712), when the prime suspect — who committed suicide before he could be tried in court — was an American scientist (Warrick 2010). It is clear that policymakers, while they were trying to make sense of
the greatest terrorist act on U.S. soil, largely associated terrorism with immigration. The widespread assumption that terrorism was a problem primarily among the immigrant population meant that the wider public expected the provisions dealing with terrorist aliens to be harsh. Vying for attention with the equally controversial domestic surveillance aspects of the Act, it would have taken an egregious breach of immigrants’ civil liberties for any substantial opposition to develop that could overwhelm support for the overall bill.

Despite the substantially stronger opposition on civil liberties grounds in 2001 than in 1919, the USA PATRIOT Act would pass with overwhelming support; the House vote was 357-66 (Congressional Record 2001a: 20466), while the Senate voted in favor 98-1 (Ibid., 20742). Although those who were opposed strongly criticized what they saw as an excessive curtailment of liberties the final legislation in the USA PATRIOT Act was the product of refinement on some of its most controversial aspects. The Bush administration’s attempt to expand its authority over immigrant exclusion and deportation was constrained, to an extent (see Ibid., 20440-20441, 20690-20692). Whereas the administration’s proposal gave no time limit for when charges needed to be brought against a detainee, the final legislation capped this at seven days. The broad definition of “terrorist activity” and the retroactive applicability of the new statutes were narrowed by the legislative process, while rights of habeas corpus for detainees were strengthened. Despite these actions the final legislation was still stricter than previous immigration statutes. The legislative check on the administration’s ambitions merely minimized the expansion of executive authority vis-à-vis immigrant rights. The new legislation increased the amount of time a detainee can be held without charge from one day to seven and the certification process of a suspected alien terrorist was subject to broad definitions of “terrorist activity” and “terrorist organization.” In certain circumstances immigrants could be detained
indefinitely, albeit with a mandatory review of the detainee’s status as a suspected terrorist every six months.

Consideration of the government’s need for legitimacy through politics and policy gives us a broader understanding of legislative and executive actions at the time. From a political standpoint state legitimacy rested upon the substance of the government’s response. Following 9/11 the government needed to convince the public that it was able to maintain national security while preserving at least basic civil rights. Stated more generally, the specific strategy to achieve this had to meet the public’s expectations for what the response should entail. In this regard it is not surprising that immigrants were singled out for particularly harsh treatment in the legislation. Given the dominant view that terrorism is a problem among immigrants and that the 9/11 attacks were the reference point for making sense of counterterrorism strategies, it follows that the public would expect the non-citizen population to be targeted by any response. “Terrorist aliens” broadly defined — without reference to race, ethnicity or religion — were the primary subjects of the USA PATRIOT Act. As we will see in the next section, governmental actions in the months following September 11 would, on the one hand, make a finer distinction by targeting primarily Muslims and Arabs, and on the other hand, a broader application of “terrorist alien” by including both immigrants and citizens from the Muslim and Arab communities.

However, political goals and expectations of policy substance are only one consideration. The other basis for state legitimacy is the appropriateness of policy goals and the development of effective public policy. Complete alienation of immigrants and, more specifically, members of the Arab and Muslim communities, would not serve this end. Fostering distrust towards the government within any given community is likely to, at best, hinder cooperation and information-sharing regarding security threats and at worst, serve to radicalize some inside and
outside of the community (Awan 2008; Marx 1998; O'Duffy 2008) and thus add to the size of the security threat being addressed. Alienation of certain communities would also hinder the American global effort of combating terrorism. ‘Winning the hearts and minds’ of the Islamic Ummah and strong diplomatic relations with other key states, vital to achieving success in the global war on terrorism, would be significantly hampered if the U.S. were to blatantly single out the groups within its society that were most closely related to these wider audiences.

Given its policy goals in the domestic and international arenas, the government needed a way to counteract the discriminatory image that was developing as a result of the more aggressive measures taken towards Arab and Muslim men in the wake of the attacks. While it may have been politically advantageous to target specific immigrant groups immediately following the attacks, this would have negative repercussions for counterterrorism policy goals at home and abroad. Addressing hate crime is one way to mitigate this obstacle. In public statements beginning immediately after September 11 President Bush, Attorney General Ashcroft and other top administration officials would repeatedly condemn hate-motivated crimes towards Arab- and Muslim-Americans (Human Rights Watch 2002: 23-26). Congress passed a resolution condemning such violence on September 15 (Congressional Record 2001b: 3699) while every major debate and hearing related to the USA PATRIOT Act contained similar proclamations (Congressional Record 2001a: 19544, 19689, 20675; U.S. Senate Committee on the Judiciary 2001b: 2; 2001c: 15).

The government was so concerned with rise in hate crimes in the wake of 9/11 that it included sections 102 and 1002 in the USA PATRIOT Act explicitly condemning discrimination or violence directed towards Muslims, Arabs, South Asians and Sikhs. Of course there are strong moral reasons to condemn hate crimes. They are reprehensible and only serve to undermine the
social fabric that is required for any properly functioning liberal democracy. However
condemnation also helps to harmonize the federal government’s multiple interests related to
counterterrorism. So while the USA PATRIOT Act was shaped in a way that achieved political
goals — in the form of singling out immigrants and making related provisions uniquely harsh —
countervailing actions and statements were necessary to partially neutralize those side effects
that could thwart the government’s domestic and international policy objectives in other arenas.

Policy Implementation

Despite the flurry of legislative activity that took place in the weeks after September 11
much of the government’s response to the attacks were carried out under expanded executive
powers through administrative procedures (Schain 2008a). During the month and a half it took
for the USA PATRIOT Act to be passed by Congress the Bush administration had initiated
investigations, modified relevant regulations, and initiated several counterterrorism programs
that would help it prevent future attacks. Indeed, the Senate Committee on the Judiciary held
hearings over three days in December 2001 to discuss Congressional oversight and constitutional
questions regarding President Bush’s administrative actions (see U.S. Senate Committee on the
Judiciary 2001a). The expansion of executive power was achieved in several ways, and it served
as the basis for many of the counterterrorism programs that followed 9/11.

The FBI initiated PENTTBOM in the immediate aftermath of the attacks. The
investigation was the largest the FBI had ever conducted (Federal Bureau of Investigation 2011).
More than half of all FBI agents nationwide followed up on more than 500,000 leads during the
peak of the investigation. When the Department of Justice stopped providing statistics on
November 8, 2001 it was reported that a total of 1,182 people, citizens and aliens, had been
questioned as a result of PENTTBOM since September 2001 (Goldstein & Eggen 2001; U.S.
Of this total the Office of the Inspector General of the Department of Justice (U.S. Department of Justice 2003b: 2) identified 762 who had been arrested, detained, and eventually charged with violations of federal immigration statutes, not with any crime related to terrorism. Most of those detained came from countries in the Middle East or North Africa, many being taken in based on leads given by the public that were general in nature and often unreliable (Ibid., 16, 21).

Later it was discovered by the Office of the Inspector General of the Department of Justice that a dragnet approach, similar to that used in the Palmer Raids, was used during the PENTTBOM investigation. In following up on specific leads agents did not discriminate between those who were subjects of the lead and any other person, in violation of immigration law, who happened to be with the subject at the time (Ibid., 16). All individuals who were out of immigration status, whether the subject of a lead or not, were arrested to ensure that any potential terrorist was not passed over. Mere association with terror suspects was enough for one to be arrested, on grounds unrelated to terrorism, in the weeks following September 11. While there is no legal issue with detaining individuals who have violated immigration laws, it does become problematic when doing so is used as a pretense for other purposes and when the burden falls disproportionately on certain groups. In this case immigration statutes were used to detain anyone under the slightest suspicion of being a terrorist and, given the circumstances, these more often than not were males of Middle Eastern background.

On September 17, 2001 federal regulations were modified in regards to the maximum time a suspected alien terrorist could be detained without charge. The previous limit of 24 hours was increased to 48 hours without charge. Although this was a modest increase, it would apply “except in the event of an emergency or other extraordinary circumstance in which case a
determination will be made within an additional reasonable period of time” (66 Federal Register 183 2001). The vagueness of this new stipulation substantially increased the detention powers of the INS. This power was utilized immediately. According to information released by the federal government in January 2002, 317 out of 718 detained individuals were held for longer than 48 hours without charge (Amnesty International 2002: 11). A further 36 had been held for longer than 28 days, while another 22 were held for longer than 40 days without being charged for a crime or deportable offense (Ibid., 11). The longest period of detention without charge was 119 days (Ibid., 11).

The detention measures were drastic and shrouded in secrecy. Despite several requests from civil rights groups and senior members of Congress the administration refused, on the basis of national security concerns, to release the names of those detained and other pertinent information. It was not until January 2002 that such information was disclosed (Migration Policy Institute 2003: 6). In addition, all immigration hearings involving detainees from the PENTTBOM investigation were to be closed to the public. Hearings held in camera were justified on grounds of national security, though most detainees were charged with immigration violations unrelated to any terrorist activity (U.S. Department of Justice 2003b: 27).

The PENTTBOM investigation was the beginning of a pattern whereby both U.S. citizens and aliens from the Middle East or those who appeared to be Muslim or Arab were the focus of the government’s counterterrorism efforts. In December 2001 the INS began a concerted effort to track down more than 300,000 foreigners who had ignored their deportation orders (Sheridan 2001), by sharing the names of these individuals with law enforcement agencies. Known as the “absconder initiative” INS Commissioner James Ziglar insisted that the new program was not a component of the administration’s domestic counterterrorism efforts (Ibid.). However
modifications made just one month later would prove otherwise. In January 2002 the Department of Justice announced that it was giving highest priority to tracking down nearly 6,000 men of Middle Eastern origin (Eggen & Thompson 2002), citing the links that some of the countries in this region had to al Qaeda. Only some of these men had criminal backgrounds, meaning a majority was given special attention for enforcing deportation orders simply because of their country of birth.

In November 2001 and again in March 2002 the Department of Justice drew up a list of individuals that were sought for voluntary interviews in order to obtain information on potential future terrorist attacks. In all nearly 8,000 men from Middle Eastern countries admitted to the U.S. on temporary visas were subjected to this initiative (Shenon 2002; Wilgoren 2001), further stigmatizing this group. Finally, beginning in September 2002 immigrants already in the U.S. from designated countries believed to be havens for terrorist organizations, nearly all of them in the Middle East or North Africa, were required to register with the federal government annually and notify authorities of any change of address (67 Federal Register 155 2002). By September 2003 a total of 83,519 individuals had registered under this program, while 13,799 of these were eventually placed in removal proceedings for immigration violations (U.S. Department of Homeland Security 2003). Once again an effort to combat terrorism resulted in the de facto selective enforcement of immigration law. Muslim and Arab men, who had no ties to terrorism or any terrorist organization, were more likely than individuals from any other group to suffer the consequences of the federal government’s counterterrorism efforts.

Governmental measures in the wake of 9/11 were taken amid substantially heightened concern for national and personal safety, and amid increased visibility of state effectiveness. In a survey of over 1,500 individuals between October 2001 and March 2002 Huddy et al. (2005:}
597) found that 86.3% of those polled were at least “somewhat concerned” about another terrorist attack in the United States. They also found that nearly half the sample, 49.8%, were “very concerned” about a potential future attack (Ibid., 597). A Gallup poll (2011b) tracking public attitudes for terrorism over several years found that 85% believed another terrorist attack on U.S. soil was at least “somewhat likely” in late October 2001. Of the several years that this poll tracked such attitudes, this was the high point of public expectations, although the figure would remain above 60% for much of the first twelve months after September 2001. As for personal safety, the same Gallup poll showed that fully 59% of those polled in October 2001 were very or somewhat worried that they or someone in their family would be a future victim of terrorism.

The government’s response to 9/11 and their efforts to prevent future attacks were widely publicized. Between September 12, 2001 and December 31, 2001 the New York Times ran a total of 584 stories on its front page on the topic of terrorism (LexisNexis Academic 2011). This amounted to an average of more than five front-page stories per day in a paper with an average daily circulation of more than 900,000 (Vega 2011). Beginning on September 18, 2001 until the end of the year the New York Times created a special section under the title “A Nation Challenged” containing articles that covered the attacks and all aspects of the aftermath, including profiles of many victims. The series would eventually become voted the best work of journalism in the first decade of the twenty-first century (NYU Arthur L. Carter Journalism Institute 2010).

As law enforcement agencies began the PENTTBOM investigation the Bush administration gave frequent updates on the number of people who had been questioned or detained as a result (U.S. Department of Justice 2003b: 1 n2). However the decision was made in
early November 2001 to stop making such statistics available to the public, citing logistical difficulties and confusion about the way the data had been presented (Goldstein & Eggen 2001). Notwithstanding any difficulties in accurately collecting the data, it is plausible that the government stopped providing a running tally of detainees because many of those detained were never charged with any crimes related to terrorism (Ibid., 2). Had the public been privy to the fact that only a very small proportion of those questioned or detained had any connection to terrorist activity the government would have appeared weaker in its fight against terrorism.

In addition to ending the frequent and public detention tallies, the government also kept secret additional information such as the names of those detained, the charges that were brought against them, as well as the related court hearings. These pieces of information would have also signaled to the public the dearth of bona fide terror suspects in custody. As David Cole (2003: 30) asserts regarding the secret hearings, “public disclosure not only might have increased objections to the government’s measures, but, given that the widely cast net came up empty, would almost certainly have impaired confidence in the job our government was doing to protect us.” Of course it is difficult to assess the credibility of the government’s claim that secret hearings were necessary because sensitive evidence was involved, since by its very nature the public is meant never to see it. However these secret hearings, in conjunction with the cessation of providing the public with at least a running tally of individuals detained, elicit substantial suspicion of the government’s motives.

The possibility that the government’s decision to stop providing statistics on the number of detainees was based on a concern for its public image, rather than any overwhelming technical difficulties, is bolstered by indications that the administration’s initial purpose for releasing the statistics were to demonstrate the effectiveness of the government’s response to 9/11. An FBI
Special Agent, who was highly critical of the agency’s handling of the PENTTBOM investigation, voiced her concern with the large number of detentions in a letter to FBI Director Robert Mueller.

The vast majority of the one thousand plus persons "detained" in the wake of 9-11 did not turn out to be terrorists. They were mostly illegal aliens. We have every right, of course, to deport those identified as illegal aliens during the course of any investigation. But after 9-11, Headquarters encouraged more and more detentions for what seem to be essentially PR purposes. Field offices were required to report daily the number of detentions in order to supply grist for statements on our progress in fighting terrorism. [...] But from what I have observed, particular vigilance may be required to head off undue pressure (including subtle encouragement) to detain or "round up" suspects particularly those of Arabic origin. (Rowley 2003)

If the government was concerned with maintaining a positive public image in the fight against terrorism then publicizing the number of arrests and subsequently withholding this information would have served this purpose well. The publicity gained from exhibiting a large number of detentions in the immediate aftermath of 9/11, and the awkwardness avoided later on by keeping secret the fact that many detainees were not found to have any links to terrorist activity contributed to an image of the government as a strong and effective force against terrorism.

The Bush administration soon faced significant opposition to its tactics from a host of civil rights groups and some policymakers. In late October 2001 nearly 20 organizations filed a request under the Freedom of Information Act (FOIA) pertaining to the individuals detained thus far in the government’s investigation (Migration Policy Institute 2003). Among those requesting
information were the American Civil Liberties Union, Amnesty International USA, the
American Muslim Council, the Federation of American Scientists, and Human Rights Watch
(American Civil Liberties Union 2001). Days later seven senior members of Congress requested
similar information from Attorney General Ashcroft (Migration Policy Institute 2003). The
Department of Justice released some information pertaining to PENTTBOM detainees in late
November, but it was considered “fragmentary and incomplete” (Center for National Security
Studies 2001a: 3). Soon after, the Center for National Security Studies and 18 other civil rights
organizations sued the Department of Justice for failure to comply with their FOIA request
(Center for National Security Studies 2001a). In January 2002 the Department of Justice
complied and released more information for each detainee such as date of arrest, date of charge,
date of release and attorney contact information. The list also included information on an
additional 170 detainees not in the Department’s initial release in November 2001 (Amnesty
International 2002: 8-9).

Growing concern for the administration’s actions was also apparent among members of
Congress. In late November and early December 2001 the Senate Committee on the Judiciary
held a series of hearings titled “Department of Justice Oversight: Preserving Our Freedoms
While Defending Against Terrorism” (U.S. Senate Committee on the Judiciary 2001a). The
biggest concern addressed during the hearings regarded the use of military tribunals for those
detainees suspected of having a material role in the attacks. These tribunals were authorized by
President Bush just weeks before the hearings. However the purpose of the hearings also
included review of other administrative actions taken by the Bush administration without
Congressional consultation or approval: the authorization to eavesdrop on attorney-client
communications without a court order, and the detention of individuals in connection to the

21 For related documents see Center for National Security Studies, 2001b.
PENTTBOM investigation “without public explanation” (U.S. Senate Committee on the Judiciary 2001a: 2). Related to this last objective the hearings did put additional pressure on the Department of Justice to release more information surrounding the detention of so many aliens. Several members of the committee and outside experts lamented or heavily criticized the secrecy of these detentions (U.S. Senate Committee on the Judiciary 2001a: 2, 88, 117, 200, 218, 265).

The hearings also consisted of several witnesses strongly criticizing the Bush administration’s post-9/11 counterterrorism strategy. Beyond the consternation felt by some committee members towards the administration’s actions, civil rights groups such as the Center for National Security Studies and the American Civil Liberties Union, and law groups such as the American Immigration Lawyers Association and the Association of Criminal Defense Lawyers also voiced their opposition. Several other such groups, including ones that serve the Muslim and Arab communities in the United States, would make submissions for the record as well. The criticisms focused on a number of the administration’s policies, including: detention of individuals on mere suspicion rather than substantial evidence; ethnic profiling of terror suspects; authorization to detain someone for up to 48 hours without charge, but for a longer period in extraordinary circumstances; secrecy of detention and related court hearings; and the voluntary interviews of Muslim and Arab men.

The Bush administration’s actions were also shown in a negative light by a demonstration of how they affected people’s lives. Testimony was given by Ali Al-Maqtari — detained for eight weeks on suspicion of terrorism — and his attorney about the conditions of his arrest and detention (Ibid., 212-225). Both explained the weak basis on which Mr. Al-Maqtari was detained, how he was transferred to several different detention facilities and the harsh treatment he received as a serious criminal when very little evidence justified it. His attorney elaborated on
the difficulties he had in providing Mr. Al-Maqtari with adequate legal counsel because of the secrecy about his arrest, his current location, or specific information on the time and place of court proceedings.

The Department of Justice eventually acquiesced to releasing pertinent information on the individuals detained in the PENTTBOM investigation as a result of Congressional pressure and the FOIA request by several civil rights organizations. The oversight hearings conducted by the Senate Committee on the Judiciary highlighted the problematic aspects of the administration’s actions in the wake of 9/11, but it is unclear if this had any direct effect on executive policy, other than the release of detainee information. Expansive federal regulations limiting detention of aliens without charge were still in effect, ethnic profiling continued to be used in counterterrorism efforts (Naughton 2003), court hearings of detainees continued to be closed to the public (Kim 2004: 529), and mass voluntary interviews of specific segments of the population were still a tool at the disposal of the federal government (American Civil Liberties Union 2004). Court cases brought against the government — regarding closed hearings and targeted registration requirements for immigrants — were ruled in favor of the government, presenting very little constraint on its future activities. As Martin Schain (2008a) concludes, there were very few checks on the expansion of executive power in the wake of 9/11.

Although institutional elements did little to constrain the Bush administration’s response to 9/11 in the initial weeks and months, its approach was tempered throughout 2002. There were no longer large numbers of individuals arrested on suspicion of terrorism to the extent seen in late 2001, and the last round of voluntary interviews targeted at Arab and Muslim men were carried out in March 2002. The preventive detention measures, whereby individuals would be detained on immigration charges as a pretext for their suspected terrorism links, were largely
confined to the months following September 11. Undoubtedly this is partially the result of simply becoming further removed from the occurrence of the attacks. The initial sense of insecurity and hysteria attenuated — there were no longer warnings from top officials of unspecified attacks in the immediate future (Rosenbaum & Johnston 2001) — and the government’s confidence in its knowledge about and ability to prevent future attacks had increased.

Conclusion

The legislative and executive responses to the 9/11 attacks were extraordinarily swift. Congress passed the USA PATRIOT Act in less than two months, considerably increasing the authority of law enforcement to track and prevent future acts of terrorism. Vast resources from the FBI and other law enforcement and intelligence agencies were mobilized immediately to carry out the largest investigation in American history. All of this was the product of the primary way that the attacks were understood: as acts of war. This understanding necessitated the use of exceptional powers to enhance national security during one of its most weakened moments. That the wider public was stunned by the sensational attacks, as well as highly concerned about possible future ones, was even more reason for the government’s response to be convincingly strong.

Another dominant theme of public debates about the issue was the understanding of terrorism as primarily a problem among the immigrant population; specifically Arab and Muslim immigrants. While policy debates centered on immigration and the general population of immigrants, the manner of implementation suggests that the terrorist threat had become substantially racialized. The focus of government efforts in the aftermath of 9/11 was on Arab or Muslim aliens and citizens. There was also a significant increase in hate crimes, towards Arabs
and Muslims but also towards other minorities who shared a generally similar appearance, such as Sikhs and Latinos (Volpp 2002; Waslin 2009). Instead of a ‘black’ threat related to crime, we can now speak of a widely perceived ‘brown’ threat related to terrorism (Alexander 2007: 146).

The popular association of security threats with immigrants had a strong influence on the response to 9/11, particularly since all of the perpetrators were quickly found to be in the United States on various types of visas. The security-related provisions in the Immigration Acts of 1917 and 1918 received less attention from policymakers than other parts of the bills. The same could be said for those aspects of the USA PATRIOT Act that dealt with immigrant detention and deportation. While there was more opposition voiced during Congressional debates towards the immigration clauses in the case of the USA PATRIOT Act than in the legislation during the First Red Scare, these were still overwhelmed by the broad sense of urgency and by support for the overall bill. Even some of those who disliked the immigration-related provisions in the USA PATRIOT Act were reluctant to oppose passage of the bill as a whole (see for example Congressional Record 2001a: 19504).

Both cases indicate that harsh legislative measures related to national security and immigrants receive relatively less opposition or consideration than other types of measures do. This stands in contrast to equally harsh provisions that deal with non-security issues related to non-citizens — such as literacy tests for entry — or security measures that significantly affect citizens — such as peacetime sedition legislation limiting free speech or expanded domestic surveillance powers — both of which receive far more partisan scrutiny. Both of these latter policies were given significant attention in public and Congressional debates during the First Red Scare and were far more contentious than any security provisions related to immigrants.
These differences in scrutiny have also been found during the Bush administration’s response to 9/11. Citing the proposed creation of a national identity card and measures to increase airport security as examples — both of which affect citizens and non-citizens alike — David Cole (2003: 72) asserts, “where citizen’s rights are directly affected, the political process has been much more sensitive to civil liberties concerns”. “As a political matter,” Cole (Ibid., 82) explains, “the government’s war on terrorism has been sustainable in significant part because it is targeted at noncitizens — at ‘them,’ not ‘us’”. This is equally true for the First Red Scare. Public support for the government’s response to domestic radicalism was high until popularly elected socialist officials in the New York Assembly were expelled and the government began to seriously consider peacetime sedition legislation.

Similarities are also seen between the First Red Scare and the aftermath of September 2001 regarding the implementation of government policies. Both responses to security threats were carried out in an aggressive and publicized manner. Suspects were treated summarily based on nationality or religion rather than on an individualized basis. The dragnet approach used to detain suspects displayed the government’s strong convictions, during both time periods, to maintain national security. We now move on to examine the response of the British government to 9/11 to get a better idea of how typical the undervaluing of immigrant rights in the name of national security is.
Chapter 5

Focusing on International Terrorists: The British Counterterrorism Response to 9/11

This chapter examines the development and implementation of the Anti-terrorism, Crime and Security Act 2001 (ATCSA) in Britain, the Blair administration’s primary counterterrorism response to 9/11. The differences and similarities in institutional, ideational and political context between Britain and the United States offer an informative comparison with the American response to 9/11 and the First Red Scare. This policy was just as punitive towards foreign nationals as the ones in either of the American cases. The British case stands out, however, for the heightened level of contentiousness regarding the immigration clauses of the ATCSA, as well as the relatively milder implementation of it compared to the Immigration Act of 1918 or the USA PATRIOT Act.

The British Response to 9/11

The collective shock, fear and anxiety that existed in the United States in the wake of 9/11 were also present in Britain. The sense of insecurity in Britain was pervasive, even though the attacks had occurred more than 3,000 miles away. In the first 24 hours following the attacks the British government’s emergency committee — composed of senior members of government, security services and the military — met three times to coordinate the immediate response (Jones 2001). Government buildings, British embassies and diplomatic offices overseas, and the airports around London were put under the tightest security. British police throughout the country were put on high alert, as were British defense installations around the world ("The Prime Minister
responds” 2001). Several high-rise buildings in London, including the London Stock Exchange, were evacuated. Aircraft were barred from flying over the city.

A general election was held several months earlier, with the Labour party easily, for the second election in a row, gaining a majority in Parliament. Labour won 413 seats to the Conservative Party’s 166 seats, an outcome that led the media to dub the election “the quiet landslide” (BBC 2010). Labour’s policy priorities focused on improving the National Health Service, broadening opportunities for education, and reforming the welfare system (Labour Party 2001). The Conservatives’ emphasized lower taxes, repatriating powers from the European Union, and a promise to reform the asylum system (Conservative Party 2001). The British relationship with the European Union was the dominant foreign policy concern of both parties. Whereas Labour wanted to strengthen ties with the EU and hold a referendum on adopting the Euro, the Conservative Party vowed to increase British independence and keep the British pound as its currency. Labour’s success was bolstered by the strong economy it had presided over during the previous term while the Conservatives’ poor showing was a reflection of how divided it had become — over issues such as the European Union — and how out of touch it was with voters’ priorities ("General Election" 2001).

Members of Parliament, on summer recess until October 15, were recalled on September 14 to discuss the attacks and the British response. This was the first time Parliament had been recalled since the 1998 Omagh bombing, the most devastating terrorist attack in Northern Ireland’s history. In fact, Parliament would be recalled two more times in 2001 before the summer recess ended to address the terrorist attacks in the United States. The British Parliament had never in its history been recalled so many times in such a short period to discuss a single topic, except at the outbreak of World War II (U.K. Parliament 2012).
The legislative response was swift. The Anti-terrorism, Crime and Security Act 2001 (ATCSA) received Royal Assent on December 14, 2001. ATCSA covered a wide range of activities related to terrorism in a manner similar to the USA PATRIOT Act. Some of the British government’s intentions for the new legislation were to: cut off terrorist funding; ensure that government departments and agencies can collect and share information required for countering the terrorist threat; streamline relevant immigration procedures; ensure the security of the nuclear and aviation industries; and extend police powers available to relevant forces (United Kingdom 2001).

The most controversial aspect of the government’s proposed bill related to certain provisions that dealt with foreign aliens. The government’s bill gave the Home Secretary authority to detain and deport any foreign alien suspected of engaging in terrorist activities. Members of Labour and the opposition parties largely supported the general principles behind these provisions. However there was a considerable difference of opinion among policymakers regarding the government’s proposed solution for suspected international terrorists who could not be deported. Such foreigners could not be deported either because it was reasonably expected they would be subjected to torture or inhuman treatment — therefore their deportation would contravene Britain’s obligations under Article 3 of the European Convention on Human Rights — or because of logistical difficulties. In the past such individuals would have to be released because they could only be detained, in line with Article 5(1)(f) of the European Convention on Human Rights, if “action is being taken with a view to deportation or extradition.”

See Part 4 of Commission on Wartime Relocation and Internment of Civilians. Under this part of the bill an individual could be certified as a “suspected international terrorist” if it the Home Secretary “reasonably believes” that they are a risk to national security or “reasonably suspects” them of being a terrorist.
The British government’s proposed solution for dealing with suspected international terrorists who could not be deported was to detain them, indefinitely if necessary, rather than let them go free. This approach required derogation from Article 5 of the European Convention on Human Rights, which sanctioned detention only as a temporary measure prior to deportation. Derogation from Article 5, however, is only allowed “in time of war or other public emergency threatening the life of the nation.”

The government therefore argued that the country was in a state of public emergency because the threat of terrorism in Britain, a close ally of the U.S., had significantly increased after September 2001. There were multiple points of contention in this proposal: that a public emergency truly existed in Britain; that the British government would have to derogate from an important international obligation related to human rights; and that individuals could be detained indefinitely without trial.

Parliament was successful in pushing through some amendments to the government’s proposal. The definition of a “suspected international terrorist” was modified and certification reviews were to be held every three months instead of every six. An independent review of the operation of these clauses after 14 months was included, and a sunset clause of five years pertaining to the authority to certify, detain and deport suspected international terrorists was also made part of the ATCSA. Despite the addition of these safeguards, the broad parameters of the initial proposal remained intact. The United Kingdom derogated from Article 5 of the European Convention on Human Rights and instituted indefinite detention for those suspected international terrorists who could not be deported. The appeal and review process was also kept intact. The Special Immigration Appeals Commission (SIAC), a judicial body established in 1997 to hear

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23 Per Article 15(1) of the European Convention on Human Rights.
24 Certification and subsequent detention or deportation is based solely on the judgment of the Home Secretary. A certification can be appealed by the individual and must be reviewed periodically, although defendants do not have the right to see all evidence against them if it would jeopardize national security.
security-related deportation cases, would hear any appeals and conduct periodic reviews of individual cases.

The other controversial aspect of the initial bill was Part 5, dealing with race and religion. Specifically, a vigorous debate took place in Parliament concerning a clause that extended existing legislation on incitement to *racial* hatred to also cover incitement to *religious* hatred.\(^\text{25}\) Incitement to racial hatred had been outlawed since 1976 but no such offence existed for acts that incite religious hatred. The government wanted to close this legislative gap because there was concern about a backlash towards British Muslims in the wake of September 2001. MPs were sympathetic with religious minorities who were victims of hate crimes but they were apprehensive about passing legislation on the matter on a compressed timetable, or as part of legislation primarily concerned with terrorism. Part 5 also included provisions to make religiously aggravated crimes a distinct class of offences. This was another extension of existing legislation that covered racially aggravated offences. The clauses related to religiously aggravated offences became part of the ATCSA, while the provisions related to the incitement to religious hatred were entirely removed by Parliament.

The Anti-terrorism, Crime and Security Act 2001 enhanced the British government’s ability to track and disrupt terrorist activity. The USA PATRIOT Act achieved the same broad objective, although the United States did not already have extensive counterterrorism powers on which to rely, even during the First Red Scare. Britain, in contrast, has had a significant history of enacting counterterrorism legislation. During some of the worst days of the Troubles in Northern Ireland the Prevention of Terrorism (Temporary Provisions) Act 1974 was passed as a short-term solution to the escalated violence taking place there. The Act gave the Home Secretary authority to proscribe organizations believed to be primarily engaged in terrorism, and

\(^{25}\) See Section 38 of Commission on Wartime Relocation and Internment of Civilians,
outlawed membership in, management of, displays of support or the solicitation of funds for these organizations. Additionally, suspected terrorists could be arrested, deported or prevented from entering the United Kingdom or certain jurisdictions within it if an exclusion order were issued against them. The legislation was designed to be temporary in nature and therefore required renewal by order of the Home Secretary every six months. The legislation, however, was renewed on a regular basis and was revised in 1976, 1984 and 1989. Continual renewal and revision had rendered this temporary legislation permanent in effect.

The Terrorism Act 2000 replaced these earlier Acts and consolidated them with other legislation related to public order and security in Northern Ireland. The definition of terrorism was broadened to include, among other things, actions that endanger a person’s life or damages property for the purpose of furthering a political, religious or ideological cause. The Act proscribed several new organizations — all related to terrorism in Northern Ireland — and continued the practice of holding trials for terrorism offences in Northern Ireland without a jury. It is interesting to note that the Terrorism Act 2000 did not provide any authority for the exclusion or deportation of suspected terrorists. The power to issue exclusion orders under the Prevention of Terrorism Act 1989 was not renewed beginning in 1998, since this power had not been used for several years. Exclusion orders were also omitted from the Terrorism Act 2000. However, the government could still deport suspected terrorists, or prevent them from entering the country, under the Immigration Act 1971. The absence of this power in the Terrorism Act 2000 was merely symbolic towards immigrants insofar as they were no longer singled out in terrorism legislation.

The Anti-terrorism, Crime and Security Act 2001 would soon eclipse this symbolism. Foreign nationals were singled out and powers of indefinite detention, for those suspected of
terrorism but who could not be deported, were introduced. So while the ATCSA as a whole is properly viewed as an incremental increase in British counterterrorism powers (Schain 2008a: 115) the provisions related to foreign nationals represent a more drastic limitation of rights previously enjoyed by immigrants.

Our analysis will proceed as the previous chapters have. The only difference will be that two major dimensions of the ATCSA, rather than one, will be examined at the policymaking phase. The first will be the provisions dealing with certification, detention and deportation of suspected international terrorists. These collectively serve as the counterpart to similar provisions in the Immigration Act of 1918 and USA PATRIOT ACT excluding radicals and terrorists, respectively, in the United States. The second dimension that will be analyzed is Part 5 of the ATCSA that deals with issues of race and religion. Provisions under this part also affected the rights of citizens and non-citizens alike. A closer look at the parliamentary debates related to this will elucidate what is deemed an acceptable balance between liberty and security, and how this balance is viewed differently when it applies to citizens rather than to non-citizens exclusively.

**Problem Definition and Agenda Setting**

Although the attacks took place in the United States, British policymakers immediately considered the United Kingdom to have been under attack. In opening the first parliamentary debates just days after 9/11 Prime Minister Tony Blair considered the killing of British citizens in the United States as no different than if they had been killed in Britain: “these attacks were not just attacks upon people and buildings; nor even merely upon the United States of America; these were attacks on the basic democratic values in which we all believe so passionately and on the civilised world” (United Kingdom. House of Commons 2001c: col. 604). “Murder of British
people in New York is no different in nature from their murder here in the heart of Britain itself” (ibid.).

The attacks were associated with the bombing of Pan-Am flight 103 over Lockerbie, Scotland and the terrorist attacks in Omagh, Northern Ireland in 1998, two of the greatest terrorist incidents in Britain at the time (United Kingdom. House of Commons 2001c: col. 605). Prime Minister Blair proclaimed that 9/11 was a “tragedy of epoch making proportions” for Britain, as he compared the estimated death toll of British citizens in New York and Washington, D.C. to those killed during the Falklands and Gulf wars (United Kingdom. House of Commons 2001c: col. 605). Foreign Secretary Jack Straw estimated that hundreds\(^{26}\) of Britons may have been victims of 9/11 (United Kingdom. House of Commons 2001c: col. 617) and weeks later described it as the worst terrorist attack, in terms of numbers killed, in Britain’s history (United Kingdom. House of Commons 2001c: col. 689). Opposition leaders and media outlets echoed these sentiments ("This is a world war" 2001; United Kingdom. House of Commons 2001c: cols. 608, 611, 621, 653).

The ramifications of 9/11 were also cast far beyond the United States. In one sense, British policymakers realized that the struggle to prevent future terrorist attacks would involve all “civilized” countries throughout the world ("The Prime Minister responds" 2001; Arthur Schlesinger 2001; United Kingdom. House of Commons 2001c: cols. 608, 613, 614, 628, 645, 646).\(^{27}\) The burden of counterterrorism was not only for the United States to bear. In another sense British officials interpreted the attacks as the first indication that the United Kingdom, in particular, faced an increased threat from terrorists. Whether it was because Britain and the

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26 This estimate was made in the immediate aftermath of the attacks. The actual death toll of British citizens was 67. (See Queen Elizabeth II Garden, 2012.)

27 A contrast was drawn, repeatedly, between the “barbaric” attacks and the “civilized” people and nations around the world whom must jointly address terrorism.
United States were close allies, or they were both Western superpowers, or because each had contentious relationships with states in the Middle East or Muslim populations, there was widespread concern that the United Kingdom was certainly a target for future terrorist attacks ("This is a world war" 2001; Guardian 2001a; 2001b; United Kingdom. House of Commons 2001c: cols. 679, 741, 925). The perceived imminence of future attacks on British soil necessitated a response from policymakers.

The novelty and magnitude of the attacks were other defining characteristics that policymakers focused on (Guardian 2001a; United Kingdom. House of Commons 2001c: col. 608; United Kingdom. House of Lords 2001b: col. 372). Policymakers were shocked by the extent of devastation and the utter disregard for innocent human life. The scale, sophistication and ruthlessness of the attacks were of a magnitude never experienced in the long history of terrorism in Britain. Officials saw the emergence of a new type of terrorism that involved novel goals, weapons, and methods of organization. As Michael Ancram, the MP for Devizes put it, the attacks “struck new levels of evil” and represented “a new dimension of terrorism — terrorism without limits” (United Kingdom. House of Commons 2001c: col. 622). Many other commentators, within Parliament and the media, saw September 11, 2001 as what The Times dubbed “[t]he day that changed the modern world” ("Terror for all" 2001).

The novelty, perceived imminence and scale of future terrorist attacks in Britain compelled policymakers to respond. Prime Minister Blair, his Foreign and Home Secretaries, as well as the opposition leader and members of the shadow cabinet all agreed that British counterterrorism legislation needed improvement. Despite its deep history of implementing counterterrorism measures, Home Secretary David Blunkett noted that existing legislation contained loopholes and inconsistencies which left the United Kingdom vulnerable (United
Kingdom. House of Commons 2001a: col. 22). Home Secretary Blunkett and others lacked confidence that existing legislation, devised for thwarting ‘traditional’ terrorist activities, was adequate to address the ‘new’ terrorist threat.

Other policymakers, however, were not so adamant that new counterterrorism measures were necessary. To some, the 9/11 attacks were not the result of flawed legislation, as the leadership had claimed. Many MPs and Peers considered existing counterterrorism laws to be sufficient, arguing that 9/11 was the result of intelligence failures or inadequate implementation of current legislation (United Kingdom. House of Commons 2001c: cols. 732, 934; 2001a: col. 75, 138; United Kingdom. House of Lords 2001a: cols. 239, 242). Others expressed concern that the desire for new legislation was more the product of public pressure than any strategic or tactical need. MPs worried that the ‘need to appear to be doing something’ in the tumultuous wake of the attacks would lead to ill-considered, counterproductive, or inappropriate policies (United Kingdom. House of Commons 2001a: cols. 75, 84; United Kingdom. House of Lords 2001a: cols. 187, 200, 243). The comments of Lord Jenkins of Hillhead, who as Home Secretary had pushed through the Prevention of Terrorism Act of 1974, were prominent in this regard: “At a time of threat, to be seen to be doing something rather than nothing is a natural human — and perhaps particularly ministerial — reaction. But something, anything, is by no means always better than nothing. You can do more harm than good” (United Kingdom. House of Lords 2001a: col. 200).

Despite these concerns from experienced policymakers there was significant inertia behind the creation of new counterterrorism measures. Many other MPs and Peers, including Home Secretary Blunkett (United Kingdom. House of Commons 2001a: col. 22), noted the pressure of public expectations and the duty of government to respond. MP Stephen McCabe
summed up the dominant feeling with Parliament: “I do not think we would ever be forgiven if there was a serious attack on this country and it was later shown to be preventable if we had taken the action necessary to plug gaps in our law” (United Kingdom. House of Commons 2001a: c. 104). The response was widely implied in parliamentary debates to entail new legislation rather than simply more vigorous enforcement of existing measures (United Kingdom. House of Commons 2001a: cols. 104, 108; United Kingdom. House of Lords 2001a: cols. 162, 196, 233). To do otherwise was characterized as irresponsible. Public opinion data supports this view.

A poll conducted by Ipsos MORI days after the attacks revealed that 83% of those interviewed were “fairly” or “very” worried about a similar attack in the U.K. (Ipsos MORI 2001a).\(^{28}\) By the end of September 2001, 48% of those polled considered “defense/foreign affairs/international terrorism” to be the most important issue (Ipsos MORI 2001e). The second most important issue was considered by 12% of respondents to be race relations and immigration (Ipsos MORI 2001e).\(^{29}\) Defense and terrorism therefore dominated the political agenda. This also represented a significant shift in the political priorities of the country. Prior to September 2001 healthcare was considered the paramount issue, according to an average of 24% of respondents over the summer months of 2001 (Ipsos MORI 2001b; 2001c; 2001d). In September, however, only 8% of respondents considered healthcare to still be the most important issue for Britain (Ipsos MORI 2001e).

There were extensive discussions, from the very first parliamentary gatherings soon after the attacks, about the particular sources and causes of the new terrorism threat in Britain. Foreign nationals in the United Kingdom were featured in many of these debates. The notion that the

\(^{28}\) Of those interviewed, 39% were “very worried” and 44% were “fairly worried” that a similar attack could happen in the U.K.

\(^{29}\) No other issue in the survey received more than 10%.
United Kingdom was an international ‘safe haven’ for terrorists had circulated for some time. Indeed, as far back as the 1980s “Londonistan” became a pejorative term for what foreign governments perceived as British leniency towards suspected terrorists in the U.K. ("Farewell, Londonistan?" 2002). As a consequence, Prime Minister Blair (Guardian 2001a; United Kingdom. House of Commons 2001c: col. 679) and other policymakers (United Kingdom. House of Commons 2001c: cols. 629, 644, 688, 743) identified Britain’s extradition laws, and its asylum system, as weaknesses in the British counterterrorism defense. The media immediately drew attention to this weakness as well (Ahmed & Bright 2001; Binyon & McGrory 2001; Ford 2001; Johnston 2001a). One commentator described British extradition laws in this way: “It is clearly easier to extradite a Milosevic to The Hague or house-arrest General Pinochet […] than it is to get hold of Osama bin Laden’s lieutenants once they make it to Britain” (Amiel 2001).

The British asylum system had been a contentious political topic for several years prior to 2001 (Gibney 2001). The traditional notion that poor migrants in search of better jobs were abusing this system had, in the wake of 9/11, transformed into the notion that terrorists looking for a liberal environment in which to recruit members, raise funds, and organize attacks were also abusing it. Strong associations were being constructed between ‘terrorist’ and ‘migrant’ to the point that Home Secretary Blunkett could feasibly assert, “I think that we all accept that there is a compelling need for more effective powers to exclude and remove suspected terrorists from our country” (United Kingdom. House of Commons 2001c: col. 924). This language clearly implies terrorist activity to be the work of migrants, an anti-immigrant bias which is ultimately reflected in the ATCSA.

British officials went to great lengths, however, to repudiate any association of the attacks with the Islamic faith. Prime Minister Blair set the tone from the very beginning. During
the first two parliamentary gatherings after the attacks, and at the Labour party conference in early October 2001, Blair repeatedly stressed that Muslims were not the enemy.30 “The true followers of Islam are our brothers and sisters in this struggle” he proclaimed. “Bin Laden is no more obedient to the proper teaching of the Koran than those Crusaders of the 12th century who pillaged and murdered, represented the teaching of the Gospel” (Guardian 2001b). The leader of the Conservatives, Iain Duncan Smith, and the Liberal Democrats leader Charles Kennedy were also quick to express these same sentiments (United Kingdom. House of Commons 2001c: cols. 608, 610). The vigorous stance against conflating the attacks with the teachings of Islam was reiterated by MPs (United Kingdom. House of Commons 2001c: cols. 620, 628, 636).

Statements by former Prime Minister Margaret Thatcher criticizing the Muslim community mobilized officials to be even more forthcoming in their support for the Muslim community. In an interview with The Times of London, Thatcher seemed dismayed that there was not “enough condemnation” from Muslim leaders (McCue et al. 2001).31 She seemed to think that Muslims had a responsibility, more or less, to repudiate the attacks since the hijackers practiced the same religion. Several MPs expressed sympathy with the Muslim community immediately after Thatcher’s comments were published (United Kingdom. House of Commons 2001c: cols. 680, 767, 771, 715, 739, 772), while some explicitly deplored her “ill-informed” (United Kingdom. House of Commons 2001c: c. 703), “offensive” (ibid., c. 727), “insulting” (ibid., c. 777) remarks. As one MP concluded: “A period of silence from Baroness Thatcher can only help the situation” (ibid., c. 783).

30 Nearly every time Blair rose to speak in the parliamentary debates he included some statement dissociating Islam from 9/11. (See Guardian, 2001a; Guardian, 2001b; United Kingdom. House of Commons, 2001c.)

31 A similar criticism was leveled against American Muslims after 9/11. (See Eteraz, 2007.)
The insistent public backing policymakers gave to the Muslim community was largely due to serious concerns about a backlash from the majority white population. Indeed, a backlash was growing in the weeks following the attacks. Muslims were victims of assault and harassment, including threatening language, which all increased drastically after 9/11. Mosques in Edinburgh and Bolton were firebombed, and the Regents Park Mosque in London was evacuated during Friday prayers after receiving a bomb threat. Other mosques throughout the United Kingdom received hate mail, had their windows smashed, were covered with graffiti or had pigs’ heads left on their property (European Monitoring Centre on Racism and Xenophobia 2001). The 9/11 attacks prompted policymakers not only to improve their counterterrorism measures, but also to address the growing tensions between increasingly antagonistic social groups.

During the adjournment debates in Parliament in the immediate aftermath of 9/11 legislators also identified more deep-rooted causes of the attacks, and terrorism more generally. These primarily focused on the conditions and politics, domestic and international, of the Middle East and the surrounding regions. Several MPs blamed the foreign policies of the United States and Western countries towards the Middle East as the primary instigation (United Kingdom. House of Commons 2001c: cols. 632, 700, 735, 779, 793). Others saw a pressing need to resolve long-standing conflicts in such hotspots as Israel-Palestine, the Balkans, Chechnya and Kashmir (United Kingdom. House of Commons 2001c: cols. 627, 643, 654, 659, 715, 720, 738, 744). Still others wanted to promote democracy and address the impoverishment in many Middle Eastern societies as a way to prevent future terrorist attacks (United Kingdom. House of Commons 2001c: cols. 715, 723, 748, 755). British participation in the Afghanistan and Iraq wars was intended to address these issues, although the main reason for allying with the United States was
probably more for eradicating terrorist groups in these regions than for ambitious goals of democratization and meaningful economic development. Nevertheless, all of these issues required incredibly intricate solutions whose goals would be realized, if at all, after many years of commitment. The post-9/11 political environment required policies that had a more direct and immediate impact — or at least the appearance of this — on curtailling terrorist activity. The ATCSA was meant to do exactly this.

Existing powers to combat terrorism were deemed inadequate. New counterterrorism legislation was needed if Britain was to effectively protect itself, and there was no time to waste. Just as in the United States, British policymakers keenly felt a sense of urgency to pass new legislation. “[W]ith every day that goes by, we are risking our safety” declared MP Flint (United Kingdom. House of Commons 2001a: col. 94). MP Khabra put the situation in starker terms: “If we do not act at this precise moment, there is no doubt that the terrorists will” (United Kingdom. House of Commons 2001a: col. 98). Home Secretary Blunkett argued that it would be useless to pass such “emergency” legislation unless it were done very quickly (United Kingdom. House of Commons 2001a: cols. 23, 801), and Prime Minister Blair pronounced in his first address to Parliament on September 14, 2001 that “now is the time to put into place the measures that will give us the best chance of stopping [terrorist groups]” (United Kingdom. House of Commons 2001c: col. 610). Implicit in the Prime Minister’s and Home Secretary’s statements was the immediate need for additional counterterrorism powers. The government met this need by enacting the broad, expansive, and controversial powers contained in the ATCSA just one month after they were introduced in Parliament.
Policymaking

Before the government’s bill was introduced in the House of Commons on November 12, 2001 policymakers had met on several occasions following 9/11 to discuss the situation. These debates focused on the domestic and international dimensions of terrorism, including the significance of the attacks for British national security and the United Kingdom’s role in the U.S.-led effort to depose the Taliban in Afghanistan. British participation in Afghanistan contributed to the environment of uncertainty during policy discussions, and likely led to a heightened sense of urgency and necessity for new counterterrorism legislation.

The comprehensive nature of the bill was alarming to some policymakers. There was a concern that some parts of the bill were unrelated to combating terrorism (United Kingdom. House of Commons 2001a: cols. 94, 103, 110; United Kingdom. House of Lords 2001a: cols.155, 245, 272). In particular, some MPs found several aspects of the government’s proposal to be superfluous to the current emergency, including: legislation against religious hatred; expanded police powers for search and seizure and other related activities; retention of communications data; legislation against bribery and corruption; and implementation of EU-level decisions on matters of law enforcement and adjudication (so-called ‘third pillar’ issues) by government regulation rather than parliamentary-approved primary legislation. When Lord McNally spoke of the “worrisome habit of Whitehall to do a little shelf-clearing at the time of emergency power Bills, slipping in measures that have failed before or that would fail if given thorough parliamentary scrutiny” (United Kingdom. House of Lords 2001a: c. 158) he was expressing the concerns of a larger swath of policymakers (United Kingdom. House of Commons 2001a: col. 84; United Kingdom. House of Lords 2001a: cols. 189, 237, 268).

Another troubling element was the accelerated process used to review the bill. The Blair administration considered this to be emergency legislation, and therefore wanted to have it
enacted before Parliament’s Christmas recess. Consideration of the ATCSA was held to only four days of debate in the House of Commons and eight days of debate in the House of Lords.\textsuperscript{32} The bill was passed just one month after the Home Secretary David Blunkett introduced it in Parliament. Given the length of the bill and the gravity of the issues to be decided on, this schedule was alarming to members from all major parties, including Labourites.

Among general complaints about the abbreviated time Parliament had to scrutinize the bill (United Kingdom. House of Commons 2001b: col. 923; 2001a: cols. 23, 61, 76, 395; United Kingdom. House of Commons. Select Committee on Home Affairs 2001: para. 11; United Kingdom. House of Lords 2001a: cols. 155, 193, 226; United Kingdom. Joint Committee on Human Rights 2001b: para. 2) the legislative schedule was characterized as “reckless” (United Kingdom. House of Commons 2001a: col. 73) and “offensive” (United Kingdom. House of Commons 2001a: col. 95). MPs warned that rushed consideration usually resulted in the passage of poor legislation and urged the government to allow for extended debate on the bill (United Kingdom. House of Commons 2001a: cols. 24, 40, 56, 75, 77, 713; United Kingdom. House of Lords 2001a: cols. 158, 238, 272). Lord Dixon-Smith described the consequences of this accelerated process in this way: “the Bill is in the position of a premature baby: dragged far too soon kicking and screaming into the world when it would have been better to have gone full term. Like such babies, I consider the Bill to be in need of some intensive care” (United Kingdom. House of Lords 2001a: c. 155).

Yet the overwhelming sense of uncertainty about the next terrorist attack precluded any protraction of the legislative process. Shadow Home Secretary Oliver Letwin acknowledged that

\textsuperscript{32} At the committee stage in the Commons the bill was reviewed by a Committee of the Whole House — in which all members could participate — rather than a smaller standing committee, which is the typical process. The only bills to be reviewed before a Committee of the Whole House are ones that deal with public expenditures, and those that are controversial or require very quick passage.
the bill would be imperfect if rushed through Parliament but he accepted the shortened timetable because he did not want Conservative’s to appear obstructionist if another attacked occurred before new counterterrorism legislation were passed (United Kingdom. House of Commons 2001a: col. 40). This exemplified the official opposition’s view: it was less of a political risk to pass suboptimal legislation than it was to insist on additional time and hope that no terrorist attacks occurred before new legislation were in force.

**Parliamentary Debates on Part 4 (Immigration and Asylum)**

The first subsection of Part 4 of the ATCSA, relating to suspected international terrorists, was the most controversial aspect of the entire Act. It outlined five provisions: the certification of suspected international terrorists by the Home Secretary, detention and deportation powers of suspected international terrorists, derogation from Article 5 of the European Convention on Human Rights (ECHR), the appeal and review process of certifications, and a sunset clause applicable to this part of the Act. Parliamentarians spent most of their time discussing those clauses that had the most substantial bearing on civil rights. These were the ones related to detention, derogation from the ECHR, and the appeal and review process. The second subsection of Part 4, which streamlined the asylum application review process for suspected international terrorists, was another controversial element of the ATCSA. However, our analysis will focus on the first subsection since the broader political dynamics concerning the intersection of immigrants and counterterrorism most clearly emerge here.

Policymakers had no insurmountable concerns with the certification of suspected international terrorists. Although some were reluctant to give the Home Secretary powers to certify someone as a suspected terrorist on mere “suspicion” or “belief,” this paled in comparison with the larger issues of indefinite detention and its judicial oversight. The debate over
certification was largely about semantics since the most significant alternative offered by the opposition was for the Home Secretary to have “substantial grounds to believe” that someone was involved in terrorist activities (United Kingdom. House of Commons 2001a: cols. 46, 111, 388). The government acquiesced, to an extent, by changing the wording of the clause so that Home Secretary needed to “reasonably” suspect or believe someone was a terrorist before they could be certified. Home Secretary Blunkett also tightened the definition of a suspected international terrorist as someone who materially supports or assists an international terrorist group, after concern was emphasized in a joint committee report (United Kingdom. Joint Committee on Human Rights 2001a: para. 36) and expressed by several MPs (United Kingdom. House of Commons 2001a: cols. 42, 76, 84, 378, 379). A suspected international terrorist was defined, in the government’s original proposal, as someone who merely had “links” with an international terrorist group.

The clause proscribing detention for suspected international terrorists and the derogation from Article 5 of the ECHR that this required, in addition to the government’s proposed method for judicial oversight, were the most disagreeable elements of the ATCSA. Clause 23 authorized the indefinite detention of those who could not be deported, either because they were expected to be tortured once returned home or because of logistical reasons. The U.K. sought derogation from Article 5 of the ECHR, which pertains to the right to liberty, because the continued detention of an individual who had little prospect of being deported would contravene this part of the convention.33

33 This scenario arose in the case of an Indian migrant, Karamjit Singh Chahal, whom the British government sought to deport. Mr. Chahal, a Sikh, would have likely faced torture in India and was therefore protected from deportation under Article 3 of the ECHR. The British government therefore continued to detain him. In Chahal v. The United Kingdom, 23 EHRR 413 (1996) the European Court of Human Rights ruled that Mr. Chahal’s continued detention contravened Article 5(1)(f) of the ECHR. This article states that detention is only permissible for persons “whom action is being taken with a view to
Finally, the government proposed that oversight of the certification and detention of suspected international terrorists be handled by the Special Immigration Appeals Commission (SIAC), a judicial body created in 1997 to hear deportation cases involving sensitive information that affected national security.\textsuperscript{34} Appeals and periodic reviews of the Home Secretary’s certification were to be conducted by SIAC, which is presided by three judges, one of whom must be a current or former high judge and one of whom has been an immigration judge. SIAC also uses a government-appointed “special representative” to act in the interest of the defendant. The special representative is not necessarily the defendant’s chosen attorney, however. The special representative is allowed to review the sensitive evidence that the defendant and attorney are not allowed to see, but strict limitations are placed on the interactions between the defendant and the special representative once the sensitive information has been disclosed. Although sensitive information can be disclosed to the special representative under this procedure, defendants are still not able to know the specific evidence against them so that they may have the opportunity to challenge it.

Much of the debate about the proper balance between ensuring security and maintaining individual liberties centered on these issues. Although concerns were voiced in a joint committee report about the discriminatory nature of the detention clause,\textsuperscript{35} this was a minor point in the overall debate (United Kingdom. Joint Committe on Human Rights 2001a: para. 35). Ironically, this is why the Law Lords, the highest court in Britain, would eventually strike down this part of deportation or extradition.” If the likelihood of deportation were remote, as in Mr. Chahal’s case, then the criteria under Article 5 would not be met.

\textsuperscript{34} SIAC was established in response to the ruling in Chahal v. The United Kingdom, where it was determined that the procedure used for deciding deportation cases was inadequate.

\textsuperscript{35} The possibility of indefinite detention outlined in clause 23 existed only for unnaturalized immigrants and not for British citizens.
the ATCSA. These legal challenges to the ATCSA will be discussed more fully in the policy implementation section below.

Much of the discussion about the detention clause revolved around the notion of internment. The British government has relied on internment during most of its major armed conflicts in the Twentieth century, including both world wars, the first Gulf War and during the Troubles in Northern Ireland. Internment, whereby individuals suspected of posing a danger to national security are detained without trial and prior to any criminal offence having been committed, is not a wholly unusual action taken by most government’s towards ‘enemy aliens’ during a time of war. It was pointed out in the last chapter how the U.S. interned more than 100,000 Japanese-Americans during World War II, for instance, under powers that still exist today. However, the use of internment by British authorities during the Troubles — which was more akin to a domestic conflict rather than an international one — and the greater sense of injustice this engendered has made the use of these powers a more sensitive political issue in Britain than in other countries.

Opponents of clause 23 largely referred to the measure as the “internment clause” because it, in their view, amounted to much more than the detention of individuals until they left the country (United Kingdom. House of Commons 2001a: cols. 46, 91, 95, 395; United Kingdom. House of Lords 2001a: col. 222). This label was more of a rhetorical device to elicit opposition, but it did have relevance.

Home Secretary Blunkett, Beverley Hughes (then the Minister for Prisons and Probation) and Lord Jeffrey Rooker (then the Minister of State for Asylum and Immigration) all countered by arguing that clause 23 was not internment because detainees could leave for another country at anytime, if they voluntarily chose to do so (United Kingdom. House of Commons 2001a: cols.
114, 380; United Kingdom. House of Lords 2001a: col. 480). While technically true this was a fairly hollow position. In different terms, the government argued that although it would not forcibly deport detainees to countries where they were likely to be tortured, the detainees were free to choose to do so themselves. It was also unlikely, as PM Diane Abbott (United Kingdom. House of Commons 2001a: col. 395) pointed out, that third countries would accept an individual who had been detained in Britain as a suspected terrorist. For opponents, the unlikelihood of deportation to a third country and the severely circumscribed ‘choice’ detainees had to leave for a country that would likely torture them resulted in a system that would, in effect, be more like internment than detention. Despite these negative attributes, clause 23 on detention was included, without amendment, in the ATCSA.

Debate also centered on the government’s proposed derogation from Article 5 of the ECHR which, per Article 15, could only be done in time of war or public emergency. The government argued that 9/11, in addition to British engagement in Afghanistan and its traditional alliance with the U.S., constituted such a public emergency in the U.K. ("The Human Rights Act 1998 (Designated Derogation) Order 2001" 2001; United Kingdom. House of Commons 2001a: col. 146). MPs from the Labour, Conservative and Liberal Democrat parties voiced doubt that such an emergency existed (United Kingdom. House of Commons 2001a: cols. 74, 76, 138; 2001b: col. 916, 924; United Kingdom. House of Lords 2001a: cols. 189, 240; United Kingdom. Joint Committe on Human Rights 2001a: para. 78). It was also noted that the U.K. would be the only signatory to derogate, even though others presumably faced the same international threat of terrorism. Although these were serious concerns regarding a major international obligation on human rights, the derogation was agreed to, 331-74 (United Kingdom. House of Commons 2001a: col. 440). To continue with the existing system at the time, which entailed the release of
suspected terrorists who could not be deported, was politically unfeasible given the uncertain atmosphere in the aftermath of 9/11. It was therefore never seriously considered. In fact, the Conservatives countered with a proposal that, \textit{prima facie}, seemed to be more extreme.

The only viable alternative to indefinite detention that Conservatives suggested was to seek a way out of the absolute obligation the U.K. had to refrain from deporting individuals to countries where they were likely to face torture. Conservatives proposed that the British government should renounce the ECHR and immediately re-enter with a reservation regarding Article 3. This was intended to augment the practice of indefinite detention and the related derogation from Article 5 of the ECHR. It would allow the Home Secretary, essentially, to weigh the extent of the threat to British national security against the risk of torture that a given individual would face (United Kingdom. House of Commons 2001a: col. 392).

Conservatives wanted the Home Secretary to have the option of deporting a suspected terrorist to a country that is blacklisted under Article 3 of the ECHR but that nevertheless had a well-developed justice system and was “not in a state of barbarism” (United Kingdom. House of Commons 2001a: col. 49).\footnote{The U.S. (blacklisted because of the death penalty in some states) and India (blacklisted because of its history of torture) were given as examples of such countries that suspected terrorists could be deported to. Deportation to these countries, it was argued, would achieve an optimal balance between maintaining national security and protecting human rights.} Conservatives were still committed to refraining from sending individuals back to countries where torture was rampant (United Kingdom. House of Commons 2001a: col. 392), but the party leadership wanted indefinite detention to be a course of last resort. Shadow Home Secretary Letwin justified his party’s position in this way: “each time we intern people — under whatever procedure — indefinitely and without a full trial, we create another precedent that, in the long run after an accumulation of precedents, may prove dangerous to our liberties” (United Kingdom. House of Commons 2001a: c. 49). In addition to these concerns
about civil liberties, he argued, indefinite detention would be a security risk by acting as a catalyst for reprisals from terrorists (ibid.).

The government regarded entering a reservation to Article 3, however, as a rather cynical maneuver. The prohibition of torture in the ECHR is meant to be so strong that countries are not allowed to derogate from it, either during a time of war, public emergency, or otherwise. Since derogation from Article 3 is explicitly forbidden, renouncing the ECHR and rejoining with a reservation would have been a direct affront to the spirit of this important agreement on human rights. Beverley Hughes argued that the government’s detention-and-derogation option was a more measured approach and, most importantly, that it preserves “unequivocally” British obligations under the ECHR (United Kingdom. House of Commons 2001a: col. 147). As we know, the Conservative strategy to make a reservation to Article 3 of the ECHR did not pass.

Labour and Conservative leaders agreed, however reluctantly, that additional powers were needed to deal with the suspected international terrorists who could not be deported (United Kingdom. House of Commons 2001a: col. 392). Although some backbenchers opposed the notion of indefinite detention — as did the media ("Is detention without trial simply unlawful?" 2001; Wadham 2001) — the central point of contention revolved around whether the U.K. should use indefinite detention exclusively or whether it should, in addition, re-enter the ECHR with a reservation to Article 3. That party leaders did not seriously consider sticking with the legislative status quo — the culmination of decades of successively finely-tuned counterterrorism legislation — shows the extent to which Parliament as a whole felt uneasy about the post-9/11 political and security environment.

37 Although Article 15 of the ECHR allows for the derogation of certain provisions in a time of emergency, it explicitly forbids derogation from Article 3 since the prohibition of subjection to torture is meant to be absolute, regardless of context or circumstance.
Judicial oversight was the last major issue regarding Part 4 that occupied much of the Parliamentary debate. Some MPs vociferously opposed the government’s proposal for the Special Immigration Appeals Commission (SIAC) to hear appeals and reviews of the Home Secretary’s certification of suspected international. SIAC is an independent judicial body to hear deportation cases of individuals deemed to present a threat to national security. It was established to replace the old procedure used for this purpose, an internal administrative review, after this was deemed inadequate in *Chahal v. The United Kingdom*.

Those opposed to SIAC reviewing the exercise of the Home Secretary’s new ATCSA powers argued that it was meant to review decisions about deportation, not to function as a court ruling on the legality of actions that could result in indefinite detention (United Kingdom. House of Commons 2001a: col. 139; United Kingdom. House of Lords 2001a: cols. 220, 239, 274, 1439). Opposing this expanded remit for SIAC, Lord Thomas of Gresford commented how it was “a new and untried [it had only heard three cases in the four years it had existed prior to 2001] part of our constitutional framework, and I believe that is a busted flush” (United Kingdom. House of Lords 2001a: c. 220). The stakes of SIAC decisions would dramatically increase from what they were when SIAC was established. Yet this opposition could not surmount the support there was, however reluctant, among a broad swath of MPs and expressed after both the Select Committee on Home Affairs (United Kingdom. House of Commons. Select Committee on Home Affairs 2001: para. 36) and the Joint Committee on Human Rights (United

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38 The procedure entailed review of the evidence by an internal Home Office committee (nicknamed the “Three Wise Men”). However, the defendant did not have legal representation in the review, could not see the evidence against them, and the Home Secretary was not obligated to follow the committee’s recommendation if its findings were contrary to the initial decision to deport. For these reasons, the European Court of Human Rights did not consider the “Three Wise Men” review to provide a sufficient safeguard.
Kingdom. Joint Committe on Human Rights 2001a: para. 47) gave further consideration to the bill.

Even though the government was able to push through these clauses without making many significant amendments, it did respond to the exceptional concern a minority of MPs had about the expanded powers given to the Home Secretary for dealing with suspected international terrorists. The government added a 5-year sunset clause for the sections pertaining to the certification, detention and deportation of suspected international terrorists. Part 4 was the only part of the ATCSA to be subject to a sunset clause.\textsuperscript{39} The government also agreed to conduct an annual review of the operation of these clauses. This was further recognition of the trepidation about Part 4 within Parliament. The entire Act was subject to an independent review, but it was required only once. Despite their concern about the infringement of the human rights of immigrants contained in the bill, these sunset clauses helped to win over some MPs (United Kingdom. House of Commons 2001a: cols. 137, 346, 389, 397; United Kingdom. House of Lords 2001a: cols. 188, 272, 1534).

The underlying theme during parliamentary debates on these issues had to do with achieving the proper balance between ensuring security and respecting human rights. At the outset, Prime Minister Blair, Home Secretary Blunkett (responsible for pushing the ATCSA through the House of Commons) and Lord Rooker (responsible for pushing the ATCSA through the House of Lords) all acknowledged the paramount importance of achieving this balance. They also asserted that the government’s proposal was successful in this regard (Guardian 2001a; United Kingdom. House of Commons 2001c: col. 925; United Kingdom. House of Lords 2001b: col. 368). When Home Secretary Blunkett announced his intention to introduce new

\textsuperscript{39} Within this sunset period the provisions of Part 4 had to be reviewed and renewed annually by the Home Secretary under a less stringent procedure, but after five years the provisions could only be renewed by primary legislation and a full parliamentary review.
counterterrorism legislation following 9/11 he emphasized this security/liberty balance: “The legislative measures which I have outlined today will protect and enhance our rights, not diminish them. Justice for individuals and minorities are reaffirmed, and justice for the majority and the security of the nation will be secured” (United Kingdom. House of Commons 2001c: c. 925).

The first several speakers of each parliamentary session in the days after the attacks, and in the initial stages of consideration of the ATCSA, also stressed the importance of achieving a balance (United Kingdom. House of Commons 2001c: cols. 783, 786; 2001a: cols. 29, 66, 80, 109; United Kingdom. House of Lords 2001b: cols. 364, 366; 2001a: col. 256). Balancing national security with the maintenance of civil liberties was also the guiding principle used by the Joint Committee on Human Rights for its review of the legislation (United Kingdom. Joint Committe on Human Rights 2001a: para. 2). It was clear that, next to the importance of strengthening British defenses against terrorism, striking a balance was a key priority for government officials.

Parliamentarians competed in staking out how the balance between security and human rights should be considered. One common refrain was the notion that the curtailment of civil liberties would mean, in the battle between democracies and the terrorists, that the latter have won (United Kingdom. House of Commons 2001c: col. 750; 2001a: col. 135; United Kingdom. House of Lords 2001a: cols. 208; United Kingdom. Joint Committe on Human Rights 2001a: para. 5). “Anything that decreases time-honoured freedoms and protections for the individual is in itself a victory for terrorism” was how Lord Hylton put it (United Kingdom. House of Lords 2001a: c. 242). Any compromise to civil liberties was regarded as exactly the sort of thing that terrorists sought to bring about. A great sense of responsibility was felt in Britain, as an
exemplary democracy, to show that this system could withstand a terrorist attack without deteriorating its core values. As Lord Corbett of Castle Vale put it, if the British polity turned against itself this would result in “the ridiculous and ludicrous position of the Mother of Parliaments being asked to put its name to achieving some of the aims of those who carried out the events of 11th September” (United Kingdom. House of Lords 2001a: col. 1005). The assumption behind this notion is that terrorists aim not to attack a certain society per se, but to dismantle democracy more generally. In this vein, Lord Corbett argued that the best way to protect democracy was to strengthen it, not to willfully erode its central features (ibid.).

Yet other parliamentarians disagreed with this argument. Notably, Home Secretary Blunkett and Lord Rooker argued that it was the tenets of democracy, its openness and extensive provision of liberties, which terrorists seek to exploit (United Kingdom. House of Commons 2001c: col. 923; United Kingdom. House of Lords 2001a: col. 143). In Lord Rooker’s view, “inevitably there are those who seek to abuse our liberal, tolerant democracy to undermine and exploit existing loopholes. We must make sure that we maintain our liberal and tolerant quality of life and not have it smashed by terrorist minorities” (United Kingdom. House of Lords 2001b: c. 368). In contrast to Lord Corbett’s view, Home Secretary Blunkett argued that “most in this country would agree to sacrifice some of their liberty if it meant greater security” (United Kingdom. House of Commons 2001c: col. 933). Others placed an equal emphasis on the importance of upholding rights, but they focused more on the positive rights of society as a whole rather than on the negative rights of terror suspects. MP James Paice, the Conservative spokesman for Home Affairs, asked the question, “Can any responsible politician say that, despite strong evidence, the liberty of an individual is more important than the security of the vast majority of the people?” (United Kingdom. House of Commons 2001a: col. 132). Labour
MP Vernon Coaker spoke of reinforcing the “right to feel safe” and restricting the “freedom to terrorise” (United Kingdom. House of Commons 2001a: col. 108), an echo of Prime Minister Blair’s argument that freedom from terror is the “most basic liberty of all” (Guardian 2001a). Similar views about the rights of the majority were also articulated by MP Gerald Howarth (United Kingdom. House of Commons 2001c: col. 722), a senior Conservative member of the Select Committee on Home Affairs, and MP Simon Hughes (United Kingdom. House of Commons 2001a: col. 30), the Liberal Democratic spokesman for Home Affairs.

Part 4 was considered the most significant element of the bill for balancing civil liberties and national security (United Kingdom. House of Commons. Select Committee on Home Affairs 2001: para. 5), and in this regard there was considerable disagreement about whether the provisions met this objective. MPs were keenly aware of the vulnerability to civil liberties during times of insecurity. Some openly worried that the British legislative response to 9/11 would prioritize national security above everything else (United Kingdom. House of Commons 2001a: cols. 84; 2001c: col. 366; United Kingdom. House of Lords 2001a: col. 200; United Kingdom. Joint Committe on Human Rights 2001a: para. 2). MP Gummer expressed the view that “at no time is freedom more vuln
erable then when good men set out to protect freedom against terrorists” (United Kingdom. House of Commons 2001a: c. 82); therefore it was absolutely necessary, he proclaimed, for Parliament to consider the bill carefully in order to “protect the liberties of the people against the over-mighty power of the Executive” (ibid.). Liberty-minded legislators were concerned most with the role of judicial oversight of the new certification and detention powers given to the Home Secretary. Opponents saw in the government’s proposal the erosion of “centuries of British liberty” (United Kingdom. House of Lords 2001a: col. 243) and
violations of principles established through “hundreds of years of common law” (United Kingdom. House of Commons 2001a: col. 394).

The use of SIAC to review certifications and to hear appeals was somewhat controversial, but the more troublesome aspect of the government’s proposal was a provision (clause 29 of the government’s bill) that explicitly excluded the courts, other than SIAC, from questioning certifications made by the Home Secretary.\footnote{The government’s position was not bolstered by the fact that the title of this clause was “Exclusion of legal proceedings.” Opponents could easily frame this as illiberal, at the very least, if not worse.} Although the government argued that SIAC, rather than the courts, would almost always be the judicial route taken in matters related to Part 4 — a point conceded by the opposition (United Kingdom. House of Lords 2001a: col. 561) — there was considerable unease among some MPs about the explicit exclusion of judicial review. The most heated debate occurred in the House of Lords, where peers labeled the government’s approach as disgraceful (United Kingdom. House of Lords 2001a: col. 1439) or even tyrannical (United Kingdom. House of Lords 2001a: col. 464). These were the extreme arguments put forth by opponents but they were part of a wider sense of discomfort, in both houses of Parliament, with the explicit exclusion of judicial review and the message this would send (United Kingdom. House of Commons 2001a: cols. 81, 89, 377; United Kingdom. House of Lords 2001a: cols. 217, 270, 997, 999, 1002). Lord Mayhew of Twysden was particularly worried about the trajectory of this action: “Jurisdiction is so vitally important that no precedent at all should be for excluding it – especially when there is no need. We can bet our boots that any such precedent would be relied upon to justify further attempts at excluding judicial review in future” (United Kingdom. House of Lords 2001a: c. 197). The exclusion of judicial review of powers that could lead to indefinite detention, on top of the government’s proposal to derogate from Article 5 of the ECHR, was too great an infringement on civil liberties for parliamentarians to accept.
Opponents of this clause asked, why set the dangerous precedent of formally excluding judicial review when in a great majority of cases it would not be used anyway? Since the government had no strong response, it acquiesced and the clause was removed. Yet the essence of judicial oversight regarding Part 4 was left intact. SIAC was the primary judicial body to review certifications by the Home Secretary, and defendants still had the right to appeal first to the Court of Appeal, and then to the House of Lords. The removal of this clause did little to alter the approach to judicial oversight but it was at the least a symbolic victory for those who thought the government’s proposal did not give enough consideration to the protection of civil liberties.

It seems likely that the government was using the post-9/11 environment as an opportunity to assert the primacy of executive decisions on matters of national security. The government did not seek to formally exclude other courts when SIAC was established in 1997 and it gave no sound justification for doing so in the wake of 9/11. While we cannot be sure that the government was acting opportunistically, the scorn with which Home Secretary Blunkett looked upon the legal profession lends some support to this argument (Kallenbach 2001; United Kingdom. House of Commons 2001a: col. 64).  

Those who recast the debate in terms of society’s right to security, as opposed to the individual’s right to liberty, were obviously supportive of the government’s proposal. Other MPs who supported an abrogation of Article 5 of the ECHR and the occasional indefinite detention of suspected international terrorists were more reluctant. Labour MP Graham Allen is illustrative of the ambivalence felt by a number of legislators. He supported the government’s proposal because he believed it was necessary to address the security threats facing Britain. Yet he still believed that it breached 700 year old principles enshrined in the Magna Carta (United Kingdom. House  

41 Blunkett has argued that activist judges undermine democracy and that the balance between the judiciary and Parliament needed to be recalibrated.
of Commons 2001a: col. 136) and constituted an “appalling precedent of suspending one of [Britain’s] key human rights” (United Kingdom. House of Commons 2001a: col. 137). In the end, MP Allen and others (United Kingdom. House of Commons 2001a: cols. 132, 712) supported the government’s proposal that would curtail civil liberties because they believed it would be outweighed by gains in national security.

While opponents were most concerned about the extent to which the government’s proposed legislation infringed on civil liberties, they also argued that the government’s counterterrorism strategy was ineffective. Considerations of effectiveness centered on the detention clause and the mode of judicial review. Several parliamentarians considered these to create additional risks rather than serving as effective counterterrorism tools. It was commonly argued that the indefinite detention of suspected international terrorists would provide an incentive for their compatriots to take hostages in the hopes of brokering a prisoner exchange (United Kingdom. House of Commons 2001a: cols. 49, 81, 91, 134, 138, 395; United Kingdom. House of Lords 2001a: cols. 156, 221). Moreover, the SIAC judicial procedure — which required a lower standard of proof and lacked the procedural safeguards afforded criminal suspects — would be in danger of falsely convicting suspects and be seen as a denial of justice for defendants (United Kingdom. House of Commons 2001a: cols. 81, 99; United Kingdom. House of Lords 2001a: cols. 249, 250, 274). This would do more to enrage terrorists than deter them, the argument went, and would therefore foster more terrorist attacks instead of repelling them.

These arguments were bolstered by references to past British experiences with terrorism and internment. Policymakers reminded their colleagues of the failed practice of internment and the use of Diplock courts during the Troubles (United Kingdom. House of Commons 2001a:
Citing the Second World War, Northern Ireland, and the Gulf War, the Earl of Onslow bluntly concluded that “it is not as though our efforts in interning the right people have been anything other than catastrophic” (United Kingdom. House of Lords 2001a: c. 243). These were potentially effective arguments. Internment had been discontinued in 1975 because it was entirely counterproductive. IRA activity increased drastically once internment was introduced, as did the number of people killed (Tonge 2002: 43-44, 48). Sharp increases in recruitment to paramilitary groups were also attributable to the use of interment by government forces (Tonge 2002: 86). Despite these failings, indefinite detention and the use of SIAC for judicial review were still incorporated into the ATCSA. No viable alternatives were offered, and the status quo would have meant letting suspected terrorists go free.

**Parliamentary Debates on Race and Religion**

The Parliamentary debates about Part 5 were another highly contentious aspect of the Anti-terrorism, Crime and Security Act. This part of the Act was meant to extend certain laws regarding matters of race so that they also applied to religious issues. The Public Order Act 1986 criminalized any behavior that was intended to incite hatred toward a racial group, while the Crime and Disorder Act 1998 made racially aggravated crimes a distinct class of offence. After 9/11 the government proposed to criminalize incitement to religious hatred and to make religiously aggravated crimes a distinct class.

Home Secretary Blunkett and other Cabinet members articulated several justifications for the provisions in Part 5. First, the government had genuine concerns about the sharp increase in

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42 A “Diplock court” refers to a type of trial in which there is no jury where one would otherwise sit (for instance, in a serious criminal trial). These were used to hear terrorism cases during the Troubles, after it was recognized that juror intimidation was a serious problem. (See Tonge, 2002: 87.) Such courts are still in use in Britain today for certain types of offences.
hate crimes towards Muslims, and those who appeared Muslim, in the wake of the terrorist attacks (United Kingdom. House of Commons 2001a: cols. 114, 682, 685; 2001b: col. 932; United Kingdom. House of Lords 2001a: cols. 257, 286, 425, 428, 1166). There was a worry that certain groups — the British National Party (BNP) was referenced on several occasions (United Kingdom. House of Commons 2001a: cols. 685, 692, 702, 706; United Kingdom. House of Lords 2001a: col. 193) — would exploit 9/11 to stir up hatred against Muslims. A report from the UN Human Rights Committee (International Covenant on Civil and Political Rights 2001) expressing concern for the rise in hate crimes, as well as calling for legislation to be extended to cover religious hatred, lent further support to the notion that something had to be done about the increased vulnerability of religious minorities in Britain (United Kingdom. House of Commons 2001a: col. 705; 2001b: cols. 935; United Kingdom. House of Lords 2001a: cols. 442, 1164; United Kingdom. Joint Committe on Human Rights 2001a: para. 58).

A second reason for outlawing incitement to religious hatred and religiously aggravated offences was to address a legal anomaly: it was a crime to act in a threatening and offensive way towards Sikhs or Jews,43 for instance, but not towards Muslims. Public officials thought that 9/11 offered the ideal opportunity to address this situation (United Kingdom. House of Commons 2001a: col. 689; United Kingdom. House of Lords 2001a: cols. 443, 1163). Third, officials recognized the symbolic value of including Part 5 in the ATCSA. The positive messages of inclusiveness and equal respect for all religions inherent in the provisions were noted (United Kingdom. House of Commons 2001a: col. 711; United Kingdom. House of Lords 2001a: cols. 204, 1167, 1192) while some MPs were concerned about the negative signal it would send if Parliament were to strike down sections of the bill that were clearly meant to protect religious

43 Jews and Sikhs are defined under British law as racial groups and therefore covered by laws on racial hatred and racially aggravated offenses. Muslims are regarded only as a religious group.
minorities (United Kingdom. House of Commons 2001a: cols. 693, 711; United Kingdom. House of Lords 2001a: col. 1192). “What message would the committee send to the Muslim community,” MP Bryant asked, “if it decided, at this particular moment, to keep the blasphemy laws and reject the current measures” (United Kingdom. House of Commons 2001a: c. 713). Home Secretary Blunkett also highlighted the symbolic importance of Part 5, not just domestically but also for Britain’s international reputation, as a major reason for introducing it (United Kingdom. House of Commons 2001a: col. 703).

Despite the seemingly reasonable justifications for including both elements in Part 5 the provision dealing with incitement to religious hatred received substantial opposition from Conservatives, Liberal Democrats and even some Labourites within both houses of Parliament. Although Oliver Letwin, the Shadow Home Secretary, and Simon Hughes, the Lib Dem spokesman for Home Affairs, acknowledged that religious hate was a very serious matter, these two were highly influential in advancing the idea that legislation related to it should not be part of the ATCSA (United Kingdom. House of Commons 2001a: cols. 695, 714). They, and others, were most concerned about rushing through legislation that could have unintended consequences for the right of free speech (United Kingdom. House of Commons 2001a: cols. 66, 78; 2001b: cols. 932-948; United Kingdom. House of Lords 2001a: col. 1180). Acknowledging the complexity of the matter, MP Chope argued that “if the Home Secretary, or any other worthy, gets up and says that it is not the intention of the Bill to result in the denial of free speech, all I can say is that he cannot guarantee that” (United Kingdom. House of Commons 2001a: c. 70). Whereas the government simply wanted to add the words “and religious” to the relevant laws pertaining to racial hatred, opponents wanted to consider the legislation in much more detail and have time to consult extensively with pertinent civic groups (United Kingdom. House of
Important questions regarding the implementation of this legislation were also raised, such as how the Home Secretary would distinguish between hateful language and legitimate critiques of religious beliefs (United Kingdom. House of Commons 2001a: cols. 45, 87; United Kingdom. House of Lords 2001a: cols. 211, 240, 265, 269, 275, 423, 429, 430, 1171, 1173, 1188, 1460). Oliver Letwin, Simon Hughes and others also opposed the religious hatred clause because they wanted to address the larger issue of religious discrimination as well. They argued that it was better to deal with religious hatred and discrimination comprehensively in a separate bill rather than hold multiple debates about similar issues and addressing them in a more piecemeal fashion (United Kingdom. House of Commons 2001a: cols. 45, 680; 2001b: cols. 943, 947; United Kingdom. House of Lords 2001a: cols. 210, 211, 1169, 1179). The final reason MPs opposed inclusion of the religious hatred clause in the ATCSA was that it would be counterproductive. Including such provisions would inadvertently associate religion — and more specifically, Islam — with terrorism and thereby instigate more attacks on such groups (United Kingdom. House of Commons 2001a: cols. 675, 696; United Kingdom. House of Lords 2001a: cols. 194, 228, 275, 423, 427, 1171). Many MPs shared Shadow Home Secretary Letwin’s view on the matter: “To confuse protection of any minority, but particularly Muslim minorities, with counter-terrorism is itself to make an elision that is dangerous in the current circumstance” (United Kingdom. House of Commons 2001a: c. 46). This was a particularly salient argument at the time since community cohesion was the top priority for social policy, the result of a series of riots that broke out between mostly South Asian and English groups in several cities during the summer of 2001 (Ministerial Group on Public Order and Community Cohesion 2001).
Although most who opposed the religious hatred clause in the government’s bill agreed that it touched upon an important issue that needed to be addressed, a vocal minority felt that the entire matter was superfluous from the start. Some thought the legal gap between religious and racial minorities was the wrong place to look if community cohesion were to be strengthened. Instead, it was argued, the blasphemy law should be abolished (United Kingdom. House of Commons 2001a: col. 693; United Kingdom. House of Lords 2001a: cols. 1169-1171, 1177-1178). This law originated in the 17th century and covered offences that violated the dignity of Christians and their faith. Blasphemy of other religions was not included, an asymmetry that was widely exposed during the Rushdie Affair in 1989.44 Others argued that outlawing incitement to religious hatred was unnecessary altogether, either because existing legislation on incitement to violence was adequate (United Kingdom. House of Commons 2001a: col. 680), or the problem of hate crime towards religious minorities after 9/11 was not as pressing a matter as proponents of the measure portrayed it to be (United Kingdom. House of Commons 2001a: col. 74; United Kingdom. House of Lords 2001a: cols. 157, 187, 189, 211, 421, 429, 1171, 1179).

Despite both sides of the debate adding legitimacy to their arguments by claiming widespread support from Muslim organizations in favor of (United Kingdom. House of Commons 2001a: col. 692; 2001b: cols. 935, 1113; United Kingdom. House of Lords 2001a: cols. 442, 1164) and against (United Kingdom. House of Commons 2001a: cols. 46, 705, 713; United Kingdom. House of Lords 2001a: cols. 1174-1175, 1179, 1453) legislation dealing with religious hatred, the House of Lords agreed, 240-141, to remove the clause from the ATCSA (United Kingdom. House of Lords 2001a: col. 1193). Under-Secretary of State Beverley Hughes, who reiterated the main reasons for including the clause in the ATCSA, led debate in the

44 As discussed in chapter 1, this was in connection with Salman Rushdie’s *The Satanic Verses*, a novel which portrayed the prophet Muhammad in a way that was deeply offensive to Muslims throughout the world.
Commons two days later. In response to the growing concerns about legitimate expressions of faith and beliefs about other religions being stifled, the government included an amendment that would require the Attorney-General to state more explicitly the types of actions that would not be prosecuted as incitement to religious hatred (United Kingdom. House of Commons 2001b: cols. 934, 938). This amounted to a proactive offer by the government to lay out the rules by which it would enforce the religious hatred clause. But it did little to quell opponents’ misgivings since the Attorney-General’s guidance would not be immediately available.

Although MPs still had serious concerns about how the right to freedom of expression might be unduly impeded (United Kingdom. House of Commons 2001b: cols. 937-948) the Commons voted to disagree with the upper chamber, 307-236, and reinserted the religious hatred clause (United Kingdom. House of Commons 2001b: col. 948). The House of Lords nevertheless voted the following day, 234-121, to overrule the Commons and remove the clause once again (United Kingdom. House of Lords 2001a: col. 1463). Despite having the chance to see the Attorney-General’s guidance on how the legislation would be enforced, peers were adamant that more consideration was needed and that the clause was inappropriate for a bill related to terrorism. Home Secretary Blunkett conceded, later that day, in front of the House of Commons to jeers and interruptions from MPs, including many Labour members (Hurst 2001; United Kingdom. House of Commons 2001b: col. 1112). While religiously aggravated offences were outlawed by the ATCSA, Parliament refused to include the clause on the incitement to religious hatred.

**Policy Implementation**

After both houses of Parliament worked throughout the day on December 13, 2001, trying to reach last-minute compromises on incitement to religious hatred and other points of
disagreement, the final version of the Anti-terrorism, Crime and Security Act received royal assent just after midnight (United Kingdom. House of Commons 2001b: col. 1124). The legislative achievements received little media attention but the government began exercising its new authority immediately. Of the sixteen suspected international terrorists certified and detained under the ATCSA before November 2003, eight of them were arrested just 5 days after passage of the bill. Five suspects had been apprehended in 2002 and three more in 2003 (United Kingdom. House of Commons 2003: 27WS). Two of the suspects detained in December 2001 exercised their right to voluntarily leave the country, departing for France and Morocco where they each had citizenship. Despite the apparent importance of these events for national security there was little publicity of them. The government offered very little information about the suspects and did not publicly tout its actions. News stories about the December 2001 detainees were brief accounts of the number of people detained in government raids and which cities they were apprehended in, along with short stories about civil liberties groups who vowed to challenge the government’s new powers (Bowcott 2001; Gibb 2001; Johnston 2001b; Rozenberg 2001; Tendler 2001; Vasagar 2001).

The British government only modestly publicized its enforcement activities and the media took little interest in them as well. British counterterrorism efforts towards immigrants were also limited to actions against individuals that were already considered highly dangerous by security officials. This is in contrast to the United States, where the response to 9/11 included highly publicized mass arrests of suspected terrorists and a number of different programs meant to search out entire communities for information about potential terrorist threats. However, the exercise of powers under Part 4 of the ATCSA was subject to several independent reviews and legal challenges that ultimately influenced policy implementation.
Lord Carlile of Berriew conducted the first review of the legislation’s implementation one year after it was enacted. His review focused only on the provisions of part 4 dealing with the certification, detention and deportation of suspected international terrorists. The review was mandated by clause 28, which the government included as a compromise for receiving broader support for Part 4 during the legislative phase.

Lord Carlile broadly supported the certification process. In every case to date, after reviewing the same evidence the Home Secretary had access to, he agreed with the Secretary’s certification decision (Carlile 2003: 13). Lord Carlile also concluded that the SIAC procedure, and the use of special advocates, for reviewing certifications were adequate. However he considered this in terms of weighing the severity of particular security concerns against the rights of suspects in judicial proceedings. If the threat level decreased, he advised, a fairer legal process should be implemented, such as giving suspects access to more of the evidence against them (Carlile 2003: 25). Finally, Lord Carlile expressed some concerns with the conditions of detention, noting that suspects were housed with and treated the same as serious criminals (such as the use of solitary confinement or restricted contact to family members) even though detainees under Part 4 had never been charged with a specific crime. It was recommended that detainees be kept separate from ordinary criminals and given more freedoms within prison (Carlile 2003: 34). Lord Carlile also suggested alternatives to detention such as house arrest and other measures that restricted a suspect’s movement outside of a detention facility (2003: 35). A noticeable omission from the review is any serious consideration of the fact that Part 4 pertained only to foreign nationals. The report briefly notes how some police officers consider the law to foster resentment among the Muslim community — therefore straining its relationship with law enforcement.
(Carlile 2003: 8) — but is otherwise silent on the legal, moral, or operational consequences of the narrowly constructed legislation.

Clause 122 of the ATCSA also mandates that a committee of Privy Council members — the advisory body to the British crown — review the entire Act. Unlike the review of Part 4, which is required annually, the Privy Council was to conduct a one-time review within the first two years of implementation. The committee’s conclusions, published in the so-called Newton Report\textsuperscript{45} in December 2003, were much more critical of Part 4 than Lord Carlile. Significant concern was expressed about the inability of suspects to see all the evidence against them and the low standard of proof (only a “reasonable belief and suspicion”) required for certifying a suspected international terrorist (Privy Counsellor Review Committee 2003: 52). The committee also lamented the fact that the U.K. was the only country to derogate from the ECHR and that indefinite detention was a likely outcome in many cases (Privy Counsellor Review Committee 2003: 53). The Newton Report heavily criticized the efficacy of Part 4 in that it only applied to foreign nationals, despite the existence of dangerous British nationals (Privy Counsellor Review Committee 2003: 53), and that it allowed for detainees to voluntarily leave the country, amounting to a relocation of a threat rather than its neutralization (Privy Counsellor Review Committee 2003: 54). The committee urged the government to reformulate the legislation in order to address these shortcomings (Privy Counsellor Review Committee 2003: 56).

The Newton Report acknowledged the discriminatory nature of Part 4 (Privy Counsellor Review Committee 2003: 54) and noted how the implementation of it fostered unease within the Muslim community (Privy Counsellor Review Committee 2003: 54). Yet the Committee considered these to be drawbacks because they inhibited the effectiveness of counterterrorism efforts. The legislation, according to this view, was suboptimal because it did not apply to British

\textsuperscript{45} The report was named after the Committee’s chairman, Lord Newton of Braintree.
nationals who posed a terrorist threat, and it sacrificed wide support by alienating a portion of the community. The implied message was that security goals were paramount. The legislation’s effect on civil rights was a subordinate consideration. The committee did suggest several alternatives that were more lenient than the current approach, yet the broader evaluation was guided primarily by concerns for security over the protection of civil rights.

The first nine suspects detained under the ATCSA challenged the legality of Part 4 before the Special Immigration Appeals Commission in July 2002. The appellants contended that the government’s derogation from Article 5 of the ECHR did not meet any of the three preconditions for derogation as set out in Article 15(1). In addition to the requirement that the nation must be in a state of public emergency, derogation is allowed only if the government’s response were “strictly required” by the nature of the emergency and if it did not violate any other obligations under international law. If SIAC determined that any one of these preconditions was not met, Part 4 of the ATCSA (and the detention of suspected international terrorists) would be unlawful.

After reviewing public and classified security information SIAC agreed that the U.K. had been in a state of public emergency and that the detention of suspected international suspects as outlined in Part 4 was a necessary response. However, SIAC ruled that Part 4 was discriminatory towards foreigners. Since it did not apply to British citizens Part 4 of the ATCSA violated the country’s obligations under Article 14 of the ECHR prohibiting discrimination. Therefore the indefinite detention of suspected international terrorists was deemed unlawful.47


47 For a summary of the SIAC ruling, see Special Immigration Appeals Commission, 2002.
The Home Secretary immediately appealed the SIAC ruling, which brought the case before the Court of Appeal. The Court overturned the SIAC decision in October 2002, judging that Part 4 was not discriminatory towards foreigners. This ruling was premised on two arguments. First, the justices asserted that a “longstanding feature” of international law had allowed states to treat nationals differently than non-nationals during times of war or other public emergency.\(^48\) Numerous instances of such differential treatment for “alien enemies” have occurred during both World Wars in the United States and United Kingdom, among other countries. More importantly, the Court did not view Part 4 as discriminatingly withholding rights from non-nationals since they did not have a right of abode in the country. Non-nationals only had a right not to be removed for reasons of personal safety.\(^49\) Deportation has only ever applied to foreign nationals, and indefinite detention was only to be used simply to uphold the right that protects them from torture or inhuman treatment.

The Court of Appeal also highlighted a legal complication that was not considered by SIAC. SIAC considered Part 4 discriminatory because nationals suspected of international terrorism were not subject to detention like non-nationals were. However, the Court pointed out that the focus of Part 4 on non-nationals was justified by the nature of the situation and required by law. Law required narrowing the scope of Part 4 to foreign nationals because the only way for the U.K. to derogate from Article 5 of the ECHR was to implement a program that was strictly required by the nature of the declared public emergency. The government argued that the public emergency was brought about by the terrorist attacks of 9/11, which had substantially increased the threat of terrorism from foreign sources. It would have been implausible for the government to derogate on the premise that 9/11 had changed the domestic security situation (namely the

\(^{48}\) A, X and Y, and OTHERS v. Secretary of State for the Home Department, EWCA Civ 1502, para. 112 (2002)

\(^{49}\) A, X and Y, and OTHERS v. Secretary of State for the Home Department, para. 46
threat from terrorist groups associated with the struggle for independence in Northern Ireland).\(^{50}\)

The justices on the Court of Appeal considered Part 4 to be justified by relying on the government’s assessment that the most serious terrorist threats derived from non-nationals.\(^{51}\) Of course, in deferring to the government’s determination that foreign nationals posed the largest threat to national security the Court did not consider whether the government’s view was biased in some way. Assuming that the government acted with integrity and professionalism, and unwilling to challenge their expertise in such matters, the court argued “there comes a time when judicial scrutiny can go no further.”\(^ {52}\)

The Court’s decision was challenged in front of the House of Lords, the highest court in Britain at the time. The Law Lords agreed, just as SIAC and the Court of Appeal did, that there had been a public emergency after 9/11. However, the Law Lords ruled that Part 4 of the ATCSA unjustly discriminated against foreign nationals and, contrary to SIAC and the Court of Appeal, viewed Part 4 as a disproportionate response that went beyond what was strictly required to address the public emergency. The Law Lords agreed that it was appropriate to differentiate citizens and non-citizens in an immigration context, but they did not see it as appropriate to make this distinction within a security context. “What cannot be justified here is the decision to detain one group of suspected international terrorists, defined by nationality or immigration status, and not another.”\(^ {53}\)

The Law Lords also agreed with the European Commissioner for Human Rights who, upon reviewing Part 4 at the request of the Joint Committee on Human Rights, thought it was

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\(^{50}\) For examples of such groups that were considered terrorist organizations, see Schedule 2 of the Terrorism Act 2000.

\(^{51}\) A, X and Y, and OTHERS v. Secretary of State for the Home Department, paras. 45, 102, 153

\(^{52}\) A, X and Y, and OTHERS v. Secretary of State for the Home Department, para. 87

\(^{53}\) A (FC) and others (FC) (Appellants) v. Secretary of State for the Home Department (Respondent); X (FC) and another (FC) (Appellants) v. Secretary of State for the Home Department (Respondent), UKHL 56, para. 68 (2004)
something that did more than what was absolutely necessary. The first issue was that the definition of a suspected international terrorist could be construed as to include those who had links to terrorist organizations that posed no threat to Britain. The Commissioner also pointed out that Part 4 allowed for (indeed it required) suspected international terrorists to be released to a safe country if one were available or if the suspects voluntarily left. This led the Commissioner to question why someone, if they were a threat to British security, would be allowed to go free in another country: “If the suspicion is well founded, and the terrorist organisation a genuine threat to UK security, such individuals will remain, subject to possible controls by the receiving state, at liberty to plan and pursue, albeit at some distance from the United Kingdom, activity potentially prejudicial to its public security” (United Kingdom. Joint Committee on Human Rights 2003: Ev 14). Since Part 4 allowed for the detention of suspects who posed no direct threat to the U.K. at the same time that it allowed for the release of suspects thought to be a danger, the Commissioner concluded that “[s]uch a paradoxical conclusion is hard to reconcile with the strict exigencies of the situation” (United Kingdom. Joint Committee on Human Rights 2003: Ev 14). The Law Lords overwhelmingly supported the Commissioner’s conclusion and cited it as the basis for their decision.

The Law Lords’ ruling in December 2004 stripped the government of its authority to indefinitely detain suspected international terrorists who could not be deported. By March 2005, however, legislation was passed that provided other tools to deal with suspected terrorists. The Prevention of Terrorism Act 2005 gave the government authority to issue “control orders” —

54 Of the nine Law Lords to hear the case, eight agreed that Part 4 of the ATCSA was discriminatory and that it went beyond what was strictly required by the public emergency. Only one Law Lord, Lord Walker of Gestingthorpe, dissented.
55 A (FC) and others (FC) (Appellants) v. Secretary of State for the Home Department (Respondent); X (FC) and another (FC) (Appellants) v. Secretary of State for the Home Department (Respondent), para. 34
essentially the imposition of house arrest — restricting the movement and communications of suspected terrorists, whether they were foreigners or British citizens.

**Conclusion**

The Anti-terrorism, Crime and Security Act 2001 introduced new counterterrorism measures that covered a broad swath of activities, despite the country’s lengthy history of legislation in this domain. The ATCSA was under parliamentary scrutiny for just one month before receiving royal assent in December 2001. This was extraordinarily swift, given that the ATCSA touched upon so many different facets of national security and the significant ramifications these had for civil liberties. Parliamentary activity at the time was taking place within the context of a national emergency that precipitated a rapid response to quell public anxiety and shore up national defenses. These same conditions resulted in a similarly comprehensive and rapid response in the United States.

The attacks went a long way in uniting all British political factions to thwart similar acts of destruction in the U.K. Yet consensus on specific policy prescriptions did not come easily. Parts 4 and 5 were the most contentious aspects of the ATCSA. The possibility of indefinite detention for suspected international terrorists and the abrogation from Article 5 of the European Convention on Human Rights, both proscribed by Part 4, drew significant opposition. Parliament successfully modified Part 4 by including a sunset clause and requiring annual reviews. However, these merely contained the contentious powers to detain indefinitely rather than curtail them in any meaningful way. Opponents were also successful in striking down clause 29 (“Exclusion of legal proceedings”) of the government’s bill. Yet there is no indication that this clause would, if it were included in the final Act, have been used since judicial oversight of Part
4 was already clearly laid out in other clauses. Therefore, omission of the government’s proposed clause 29 was largely a symbolic gesture.

A wide swath of parliamentarians, including rebellious Labourites, was against legislating on the incitement of religious hatred (contained in Part 5 of the government’s proposal) because of the consequences it would have for free speech. The biggest check on the government’s ambitions came from the House of Lords, who on two different occasions rejected this provision. Provisions for making religiously aggravated crimes a distinct class of offense were included in the ATCSA, while the government’s proposed revisions for outlawing incitement to religious hatred were left out. Since incitement of religious hatred was only a by-product of the 9/11 attacks and not an immediate cause of them, legislation on this issue would only pass if it did not entail reaching a new consensus on the extent of citizens’ rights.

The clauses that most affected civil liberties were ones designed to directly enhance national security. Immigration was immediately identified as a target domain to achieve this goal. The 9/11 attacks presented an opportunity for the British government to address flaws in their immigration system that led to its abuse. The government now had a chance to ensure that “Londonistan” would no longer be a safe zone for carrying out terrorist activities. The association of immigration with terrorism was so strong that the additional powers of detention and judicial scrutiny included in the ATCSA only applied to non-nationals. British citizens who were just as dangerous as some foreigners were not affected. In effect, Parliament passed legislation that allowed the government to indefinitely detain suspected international terrorists

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56 Ironically, the Conservatives made reforming the asylum system a major plank in their 2001 election platform, but it was not an important issue for most of the electorate at the time. 9/11 increased the salience of the security issues related to asylum, and Labour leveraged this opportunity to co-opt the Conservatives’ tough stance in this domain. ("General Election: What's Wrong with William Hague?," May 31, 2001.)
without providing the typical standard of justice available to citizens and other types of suspected criminals.

The stated objective of the government was to pass counterterrorism legislation that achieved an appropriate balance between preserving civil liberties and ensuring national security. Opposition leaders, crossbenchers, and backbenchers all accepted this goal, and much of the debate was really about whether each clause achieved a proper balance. Yet it is clear that this balance was viewed differently for citizens than it was for non-citizens. The additional authority the government gained in detaining foreigners clearly shows that, in the name of national security, the rights of non-citizens were valued less than the rights of citizens. MP Graham Allen supported the “appalling” provisions of Part 4 because the gains in national security were sufficiently large (United Kingdom. House of Commons 2001a: col. 137). It seems highly unlikely that MP Allen, or any other policymaker, would have been willing to pass any measure they considered appalling if it affected British nationals. The fact that the clause on incitement to religious hatred was left out of the ATCSA is another indication that legislators wanted to scrutinize more thoroughly any curtailment of citizens’ rights than they did for measures targeting non-nationals.

The domestic judiciary significantly influenced implementation of Part 4 of the ATCSA. Legal challenges and counter appeals had brought the case to the highest judicial body, the Law Lords, who found the provisions to contravene international law. They ruled that Part 4 was a discriminatory and disproportionate response to the public emergency brought on by 9/11. Since the government’s approach was deemed unlawful the use of control orders was instituted to target citizens and non-citizens alike. Yet it took three years before the government was legally barred from exercising its authority pursuant to Part 4 of the ATCSA. In the meantime, foreign
nationals faced discriminatory treatment and remained the central focus of British counterterrorism efforts. This strategy would prove to be unfortunate not only because it marginalized certain groups in British society, but also for the lack of attention it engendered among public officials towards threatening individuals who were British nationals. Sadly, terrorists detonated several bombs on London’s transport system in July 2005, killing 56 people and injuring 700 more. Most of the terrorists were British citizens.\(^{57}\)

\(^{57}\) Three of the four individuals who perpetrated the London bombings were British nationals. The fourth individual, who was 19 years old at the time, had resided in the U.K. since the age of one.
Chapter 6

Understanding the Counterterrorism/Immigration Nexus

We now turn to an analysis of our findings and a discussion of the variables that have influenced the counterterrorism policy outputs and outcomes in our three cases. Counterterrorism measures gain support only if they are seen as striking a proper balance between safeguarding the nation against identifiable threats and protecting civil liberties. Therefore, we will start with a discussion of how this balance plays a role in the political dynamics of counterterrorism policymaking and how it applies to each of the cases reviewed. Following this discussion is a comparative review of each policy stage across the cases. This review will highlight the similarities and differences among these cases, which will then be explained in detail in the subsequent section.

Balancing Security and Civil Liberties

Communities are often asked to make sacrifices for the good of national security. Military engagements are particularly trying affairs. Individuals and loved ones sacrifice their lives in combat operations. The families of those in the armed forces are separated for extended periods of time. Entire societies sacrifice economic security and fiscal health so that massive amounts of resources can be diverted to national defense, while other important economic and social priorities are neglected. Civil liberties are usually curtailed, in one way or another, for all.

Counterterrorism measures, which are a form of national defense, typically require the heaviest sacrifices to be made in the realm of civil liberties. Personal freedoms are central to counterterrorism decisions since terrorist threats originate with individuals. Defense measures used against other states, such as espionage and intelligence-gathering, would be useful for
countering terrorist threats, but the rights of individuals in democratic societies that protect them from the arbitrary exercise of state power significantly complicates matters.

These sacrifices must be justified if state leaders are to maintain popular support. Hence the opportunity costs of counterterrorism, and national security more generally, are discussed in terms of balance. Public discourse about counterterrorism measures revolve around whether curtailments to civil liberties are justified by — i.e., balanced with — expected decreases in the risk of a terrorist attack. Post-9/11 debates in the U.S. and Britain show that there were limits to this tradeoff. Proponents of civil liberties acknowledged that additional security measures were needed even if they did impinge, to some degree, on individual rights. Security advocates conceded that a totalitarian police state was unacceptable even if it virtually eliminated any chance of a future terror attack. The excesses of the Palmer Raids during the First Red Scare, for instance, were abruptly brought to check after it became apparent that the security situation did not require such a violation of rights, whether of citizens or non-citizens. In the end, most policymakers can agree that overweighting security concerns or rights provision is detrimental to society. Some sort of harmony between the values of security and liberty must be achieved.

Despite the conversation being bounded in this way, debates about whether a balance between civil liberties and national security has been achieved are contentious because they are largely subjective in nature. First, rights and national security cannot be measured with any precision. Conceptualization of these abstract terms may allow for rudimentary measurement, at best, but arguments about what these measurements mean can still ensue. Even if we can measure rights and national security reasonably well, there will still be arguments about where

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58 Some legislators have argued that talking in terms of a tradeoff between rights and security is a misrepresentation. Increased security measures, they argue, are necessary to protect individual freedoms. Despite any philosophical or rhetorical value this argument may have, the debates in the U.S. and Britain show that the rights-versus-security dimension was widely perceived as a zero-sum game.
the balance should be struck. Declarations about a proposal being balanced or not are reflective of the personal values and interests of those who make them, not an objective description of the proposal itself (Edelman 1977: 152).

Jeremy Waldron (2003) points out that an important dimension to consider, regarding this balance framework, is the distribution of sacrifices to be endured. It is often the case that only certain groups must bear the burden of combat, diminished rights, or decreases in government spending on social programs, for the sake of national security. This pits the interests of the few, who are affected by a re-balancing of the security/liberty scheme, against the interests of society as a whole, who benefit from the added security. This would not be inherently undesirable if it were not for the fact that those few who are consistently asked to sacrifice their interests are marginalized groups who possess the least power to challenge the situation (Edelman 1977: 34). We must also be concerned with any systemic “moral corruption” such as racism, xenophobia or other prejudice that influence which ‘few’ among us are asked to sacrifice for the greater good (Waldron 2003: 204).

The rights of foreign nationals are typically the most truncated by counterterrorism policies. The political advantage of this is the implication that the state’s counterterrorism efforts are minimally intrusive to those in the majority population (Cole 2003: 86). Non-citizens are disproportionately targeted because of the plausibility in perceiving terrorist threats as originating primarily from foreigners. The ambiguous and largely secretive ‘facts’ of terrorism make it rather easy for policymakers to justify a strident response. Murray Edelman (1977: 30) argues that rationalizations of complex policies, particularly during times of heightened anxiety, do not need to be thoroughly verifiable. It is more important that they are merely plausible.
Three characteristics of non-citizens make them plausible targets of counterterrorism policies. First, their group status within the national community is relatively low. Their behavior and presence will likely be met with greater suspicion (Edelman 1977: 33; Huysmans 2006: 107) especially when their distinguishing traits — e.g., language, folk customs, religion, phenotypical characteristics — are construed as culturally different from the majority population (Gerstle 2004: 105). Second, immigrants create anxiety among some in the majority population even in peaceful times. Perceptions of economic or cultural threat posed by immigrants can easily feed into a broader perception of immigrant threat during a crisis. These anxieties can then be exploited by the state to justify a more punitive policy towards these groups (Ismaili 2010: 85). Third, immigrants are geographically proximate. Their proximity increases the perceived immediacy of the danger. It also means that the state has the sovereignty, and therefore the greatest opportunity, to neutralize the threat. Objectifying foreign nationals as terrorist threats is a plausible way to reassure the public that the sources of the danger have been identified and it implies that the state can reasonably be expected to do something about it.

In all three cases reviewed here we see a disproportionate burden placed on foreigners. Foreign radicals were blamed for the labor unrest occurring throughout 1919. Immigrants only made up a small proportion of the workers on strike, but their participation was highlighted because it meant that deportation was a possible solution to the problem. Given the power of corporations relative to immigrants, deportation was a much easier solution to implement than labor reform. The two attempted bombings in 1919 fit into this foreign radical narrative during the First Red Scare. The government’s subsequent raids on immigrant associations that were pro-communist were hugely popular, even though they violated the basic rights of the thousands of individuals apprehended. Consideration of peacetime sedition legislation, limiting free speech for
citizens and non-citizens, and the expulsion of five socialist members of the New York State Assembly were part of the anti-radical politics at the time. Yet the strong opposition to these measures, inside and outside of government, made clear that it was unnecessary and unacceptable to violate democratic ideals or the rights of citizens in the fight against radicalism.

The American and British responses to 9/11 demonstrate a similar asymmetry when it comes to protecting rights. The possibility of indefinite detention without trial, outlined in the USA PATRIOT Act, only applied to foreign nationals. Non-citizens, as well as citizens, were the target of the PENTTBOM investigation and other government programs instituted in the wake of the attacks. When it came to citizens, only those who were Arab or Muslim were affected by these measures. Therefore a semblance remained that the rights of the majority population would be unscathed. Congressional debate largely focused on the provisions of the USA PATRIOT Act that affected citizens, such as increased powers of surveillance and access to personal records. This left relatively little time to consider the parts of the bill that dealt with immigration and the rights of foreign nationals. Even when this section was considered, several legislators were willing to compromise immigrant rights so long as basic protections were in place. When it came to national security, the rights of immigrants were less valuable than those of citizens.

Pursuant to Part 4 of the Anti-terrorism, Crime and Security Act immigrants to the United Kingdom were the only ones who could be detained, possibly indefinitely, on charges of terrorism without knowing the evidence against them. Unlike the immigration provisions of the USA PATRIOT Act, Part 4 of the ATCSA elicited the most contentious debate. But these provisions were the center of attention more for the fact that they required legal contortions in order to comply with British obligations under the European Convention of Human Rights, not for the disproportionate focus they put on foreign nationals. Policymakers expressed deep
misgivings about having to declare a national emergency, without having been attacked, so that Britain could derogate from Article 5 of the ECHR. There was also significant concern for the effectiveness, in terms of maintaining national security, of the government’s proposed policy. The effect of Part 4 on immigrant rights, relative to the perceived national security threat, was less troublesome to Parliamentarians than these other issues were. The lack of a viable and more balanced alternative offered by the opposition indicates even more strongly that protecting immigrant rights was a relatively low priority.

The low importance of immigrant rights relative to national security concerns can be contrasted with the fate of the clause in the ATCSA that would outlaw incitement to religious hatred. This provision would have limited free speech, for all, by making it an offence to use threatening or insulting language, meant to encourage hatred, towards a religious group. The House of Lords voted to overrule the Commons and strike the clause from the ATCSA. Even though the clause would simply extend existing legislation on racial hatred so that it applied to religious groups, policymakers were adamant that more time was needed to consider it. Perhaps this was the case, but we cannot overlook the fact that the rights of citizens were involved.59 The willingness of Parliament to pass Part 4 of the ATCSA — which cut much more deeply into civil liberties than the incitement to religious hatred clause would have — so quickly, while refusing to do so with the incitement clause, shows the lower value placed on immigrant rights.

59 It is also important to note that Parliament outlawed incitement to religious hatred in the Racial and Religious Hatred Act 2006 using nearly identical language to that used in the government’s bill in 2001. Even though this does not invalidate the claim that more time was needed in 2001 to consider the legislation, it does raise questions about the possible influence of other factors in excluding this provision from the ATCSA in 2001.
Comparative Review of Policy Development

Before we explain why non-citizens received harsher treatment than citizens it will be helpful to trace the development of these policies through the policy process. The following comparative review highlights the similarities and differences in the political dynamics of each stage of the policy process.

Problem Definition and Agenda Setting

In many of the typical elements of problem definition and in the way the problem of terrorism was framed, we see similarities across the cases reviewed here. The manner in which public problems are discussed goes a long way in establishing a common understanding of the issues, and it leads policymakers towards certain solutions and away from others. Therefore, it is not surprising to see a similar disproportionate focus on non-citizens in policy outputs and outcomes across these cases, since the problems were characterized in similar ways.

It should be noted that the following discussion draws from several related, but different, perspectives on discourse analysis.\(^{60}\) The problem definition perspective focuses on how key elements of a problem are characterized, and on the implications these have for agenda setting. Rochefort and Cobb (Rochefort & Cobb 1994b) provide a framework for this type of analysis that emphasizes the following elements of a public problem: causation, the nature of the problem, identification and characterization of the problem population, the ends-means orientation of problem definers, and the nature of the solution. The framing perspective focuses on which dimensions of a problem are emphasized in political debate and, just as importantly, which dimensions are overlooked or cast as irrelevant. Finally, the narrative perspective looks at how the various facts of a problem are compiled to form a narrative that incorporates metaphors,

\(^{60}\) For a helpful review of the problem definition, framing, and narrative perspectives on discourse analysis see Rochefort and Donnelly, 2013.
symbols, and other forms of representation. The review that follows makes use of the problem
definition and framing perspectives. The narrative perspective is employed further below when it
is shown how notions of national identity are incorporated into the dominant policy narratives
about terrorism in each case.

“War” was a common way for policymakers in the U.S., during the First Red Scare and
in the aftermath of the 9/11 attacks, to frame the problem. The labor strikes, general unrest, and
even the attempted bombings of prominent business and government leaders in 1919 and 1920
were defined as German-sponsored acts to perpetuate World War I, with the aim of causing
instability in the United States. There was broad agreement among policymakers and the wider
public that the 9/11 attacks represented an undeclared act of war. President Bush’s subsequent
War on Terror was the natural outgrowth of how the attacks were initially framed. The “war”
label was never prominent in the way the British characterized the 9/11 attacks, but the
continuous public assertions of concern about the imminence or uncertainty of a future attack on
British soil invoked a similar feeling of anxiety and crisis. These characterizations, in all three
cases, represented a very severe problem related to terrorism, as well as the urgency with which
the government must respond.

The problem of terrorism in all three cases was also construed as one that had very real
consequences for everyone’s daily life. The uncertainty of where the next attack would occur
insinuated that everyone’s material well-being was in danger. Reports about additional protection
of key landmarks and of infrastructure — potential targets that are ubiquitous — draws everyone
in as a potential victim of the next attack. In each of these cases we also saw how the acts that
precipitated an emergency were characterized as attacks on cherished values and symbols. The
perpetrators were said to be attacking freedom, democracy, capitalism, or ‘our’ way of life. At
stake, then, were the most important shared values that comprise a person’s identity. As a consequence, everyone was drawn in as an interested party.

Just as the rise of radicalism in the United States was characterized as a novel problem in 1918, American and British policymakers emphasized the novelty of the 9/11 attacks. They focused on the scale of the destruction and the method of attacks in doing so. There were various claims of causality for each event — from the inherent evil of the perpetrators, to the malevolent intentions of a wartime foe, to the social and political conditions in the Middle East, to American foreign policy — but the one that was most pertinent to policymaking in each case was the lack of preparedness. The American government argued that it could not effectively counter the rise of radicalism with the authority granted by the Immigration Act of 1917; therefore it sought to expand this authority with the Immigration Act of 1918. The British and American governments highlighted the inadequacy of their counterterrorism policies at the time as a major reason why the 9/11 attacks were successful. If the government were granted greater authority to deport or detain suspected terrorists, or given more freedom to gather intelligence, it was asserted, then the terrorist attacks would likely have been prevented. Defining the problem in this way leads to proposals for expanded counterterrorism powers. Other possible solutions — such as the encouragement of economic or political development, or a change in foreign policy—would not affect the root cause of the problem, so defined.

Finally, non-citizens were identified as the problem population in each case. Equating immigration with terrorism became an ordinary part of the way terrorism was discussed. This led to policies that disproportionately targeted non-citizens, in general. But the implementation of these policies always led to the targeting of foreign nationals of only certain minority groups, as well as those citizens who also belonged to the minority groups under suspicion. The implication
that immigrants, or immigrants of a certain ethnic or religious background, were responsible for causing a serious public problem pointed in the direction of harsher measures towards these groups as the most effective, and logical, solution.

The way that terrorism was characterized during the problem definition phase in each case had a significant effect on the trajectory of subsequent policy developments. It established the context within which policymaking would take place. It articulated the stakes involved. It provided a narrative about the nature of the problem, which pointed in the direction of certain logical solutions and away from others. Finally, the role of immigration and immigrants in perpetuating the problem was emphasized in each case. If future terrorist attacks were to be prevented, it followed that dealing with immigrants and immigration would be a major part of the strategy.

**Policymaking**

Since policymaking in all three cases took place in the wake of a catastrophic event there was a high degree of public visibility to government actions. British and American officials felt a great sense of responsibility to respond to the events taking place, and an overall strong determination to combat terrorism was expressed.

The emergency context within which these policies emerged had an effect on the legislative process as well as the substance of counterterrorism policy itself. The legislative process was accelerated in all three cases. Consideration of the Immigration Act of 1918 consisted of one day of debate in the House and three exceptionally brief debates in the Senate.61 The normal committee review process was suspended for the USA PATRIOT Act and the ATCSA. The USA PATRIOT Act bypassed committee review altogether, and the ATCSA was 

61 Transcriptions of each of the Senate debates amounted to less than three pages in the Congressional Record.
reviewed by a Committee of the Whole House during the committee stage. There was hardly any consultation with outside groups on either piece of legislation, and each was enacted within one month of their introduction. The shortened legislative process reflected the significant anxiety felt by policymakers at the time, and it meant that scrutiny of each of the clauses contained in these bills would have to be prioritized.

Another common element of the three cases reviewed here is the increased deference to executive authority. All three bills were introduced by the executive and, in the end, all three received overwhelming support from policymakers. Legislators were able to agree on making some amendments to each of these bills, but these amendments did not alter the original proposals of the executive in any significant way (notwithstanding the British Parliament’s striking of the incitement to religious hatred clause from the ATCSA). The extent of acquiescence to executive power stemmed from the inherent uncertainty associated with terrorism and to the political costs of caution, in the event of a future attack.

Finally, it was apparent that the balance between security and liberty was the primary metric against which policymakers and the public at large evaluated these policies in all three cases. This balance was the explicit framework used to scrutinize the USA PATRIOT Act and the ATCSA. Leaders in both countries sought to legitimize these policies by emphasizing the proper balance they struck between security and liberty, and legislative debates revolved around whether each clause achieved such a balance.

There were no explicit references of this balance during Congressional debates of the Immigration Act of 1918, but the context within which this legislation was passed suggested that it did properly balance these goals. Authority to deport anarchists had already been granted under the Immigration Act of 1917. The Immigration Act of 1918 merely widened the definition of
anarchism and did away with a statute of limitations clause exempting any immigrant in the United States for longer than five years. Therefore it did not represent a major break from existing statutes, and so could easily be justified in the immediate aftermath of a world war and a tremendously consequential revolution in Russia.

Balancing the protection of national security with the protection of civil liberties was featured much more prominently in the implementation of the Immigration Act of 1918. When Attorney General Palmer went to great lengths to rid the country of radicals during the First Red Scare, it was Assistant Secretary of Labor Louis F. Post who brought this to check, cancelling deportation orders on the premise that the threat posed by many caught in the Palmer raids was not serious enough to warrant such a drastic deprivation of liberty. The deportation orders he cancelled were for those individuals who were merely passive members, not activists, of communist parties in the U.S. Post’s defense of his actions before Congress went a long way in convincing lawmakers that Attorney General Palmer’s strategy for countering the threat of radicalism had unreasonably neglected civil liberties.

The policy outputs from these processes shared three important attributes. First, in each we see the significant expansion of executive powers. Authority for surveillance, the collection of personal information, and police powers were extended under the USA PATRIOT Act and the ATCSA. All three bills broadened the grounds for deportation that were subject to administrative decision making, instead of due process, and the USA PATRIOT Act and the ATCSA both allowed for the possibility of indefinite detention subject to executive discretion. Provisions for judicial oversight of these various powers were included, but they either relaxed this requirement from previous policies or established it in a diluted form (for instance, by requiring the executive
to prove there was merely a “reasonable belief or suspicion” that an individual was involved in terrorist or radical activity).

Second, the American and British responses to 9/11 were similarly broad. The USA PATRIOT Act touched upon surveillance, powers of search and seizure, access to personal information, the financing of terrorist activities, and immigration. The ATCSA addressed many of these issues, as well as race and religion, the asylum system, bribery and corruption, the handling of biological or nuclear weapons, and implementation of EU legislation related to law enforcement and adjudication. The increased complexity of terrorist organizations and related activities may be a reason why we see counterterrorism legislation include such a broad range of measures. This also might indicate the extent of political opportunity seeking in the wake of an extraordinary event like 9/11, where leaders try to capitalize on a favorable political environment. Lord Dholakia alluded to as much, when he suspected that the incitement to religious hatred clause was included in the ATCSA bill so that the government could “clear the Home Office cupboard while the going is good” (United Kingdom. House of Lords 2001a: c. 211).

Third, all three policies targeted non-citizens disproportionately. The Wilson administration dealt with the threat of radicalism during the First Red Scare almost entirely through immigration legislation. Although other temporary actions were taken to curb labor strikes, such as the imposition of the wartime Food and Fuel Control Act during peaceful times, the central component of the anti-radical strategy was the apprehension and deportation of radical foreign nationals. The USA PATRIOT Act and the ATCSA allowed for the detention, 62

Lord Dholakia referred to this as the “Jo Moore syndrome.” Jo Moore was an adviser to the Transport, Local Government and Regions Secretary who had sought to exploit the 9/11 attacks. Shortly after the attacks she sent a memo to colleagues stating “It is now a very good day to get out anything we want to bury. Councilors expenses?” (See Sparrow, "Sept 11," October 10, 2001.)
possibly indefinitely, and deportation of suspected non-citizen terrorists without the full set of legal protections afforded citizens.

One important difference to note is the relatively stiffer resistance within Parliament to the immigration-related clauses of the ATCSA compared to the easier time the Bush administration had in getting the USA PATRIOT Act through Congress. The Blair administration made a number of concessions after many parliamentarians expressed disapproval. First, the government included an annual review of the operation of Part 4 (the section related to immigration). This annual review was in addition to a required one-time review of the operation of the entire Act, within two years of enactment, that was already part of the government’s initial bill. Whereas the sunset clause of the USA PATRIOT Act was not applicable to the section related to immigration, the Blair government inserted a five-year sunset clause, as a response to the concerns of policymakers, which applied only to the immigration section of the ATCSA. Furthermore, Parliament struck down the entire clause that excluded the courts, other than SIAC, from reviewing administrative decisions about detainees as well as the entire clause that would have made incitement to religious hatred a distinct crime.

**Policy Implementation**

Although we see many similarities in the way that problems were defined in all three cases, as well as similarities in the major features of policy outputs, the implementation of these policies diverged in some important ways.

Despite the urgent need for greater authority to deport radicals, granted by the Immigration Act of 1918, the Wilson administration did not make immediate use of them, even though the problem of radicalism was widely thought to have been getting worse throughout the spring and summer of 1919. It was not until Congress questioned the supposed laxity of the
Justice Department that the apprehension and deportation of radical non-citizens fully got underway. Attorney General responded robustly in the form of two high-profile raids on suspected communist organizations. The Palmer Raids were exceptionally strong-handed tactics that broke a number of laws and violated the rights of thousands of foreign nationals and citizens. The Palmer raids, the last to occur in January 1920, were very public and highly popular affairs, yet broad support for hunting radicals had dissipated significantly by the middle of the year. The extraordinary levels of support died down just as quickly as Attorney General Palmer’s efforts to address the Red Menace had scaled up. By the end of the summer American politics was more concerned with the upcoming presidential election, which was won by Warren Harding. His campaign slogan that year was “a return to normalcy.”

Unlike the government’s response to the radical threat during the First Red Scare the Bush administration immediately sprang into action after the 9/11 attacks. A number of administrative actions took place, entailing an extraordinarily broad range of activities, even before passage of the USA PATRIOT Act. The PENTTBOM investigation was a massive effort that was carried out in a blunt manner, much like the Palmer raids were. Individuals — citizens and non-citizens — were detained or questioned as suspects merely for associating with those who were subjects of leads that were often unreliable. The Bush administration made a regulatory change that gave it the authority to detain suspected alien terrorists for an “additional reasonable period of time” over 24 hours, in case of emergency. As a result, 59 detainees were held for over 28 days without charge (Amnesty International 2002: 11); Muslim or Arab males comprised a large majority of the individuals affected by these counterterrorism activities. In addition, several other initiatives by the Bush administration — the NSEERS registration program, voluntary interviews of individuals from countries suspected of harboring terrorists,
and the Absconder initiative that directed resources to finding individuals who had ignored deportation orders — focused almost exclusively on Arabic or Muslim non-citizens.

These broad-based measures, targeting entire groups based on religious or ethnic background, were confined to the months immediately following the 9/11 attacks. The government tempered its approach throughout 2002 so that it became more fine-grained and less of a public spectacle.

Implementation of the ATCSA was a much less public affair than in either of the U.S. cases. There was very little publicity of the government’s activities stemming from the ATCSA. Neither the government nor the media made a big deal of the actions taken against suspected terrorists in Britain once the ATCSA was passed. The government’s counterterrorism activities were also limited to particular individuals rather than entire groups suspected of engaging in terrorist activities. By the end of 2003 only sixteen individuals had been detained under authority of Part 4 of the ATCSA. This pales in comparison to the hundreds and thousands of individuals who were caught up in the American responses to the First Red Scare and the 9/11 attacks.

Ultimately, British counterterrorism activities under Part 4 of the ATCSA were judged to be illegal by the Law Lords in December 2004. It was judged that these activities violated the European Convention on Human Rights. The British government altered its strategy for dealing with suspected terrorists as a consequence, instituting the use of control orders to restrict their movement and communications. These control orders applied to foreign nationals and British citizens.
The findings of these three cases are summarized below:

<table>
<thead>
<tr>
<th>Problem definition and agenda setting</th>
<th>First Red Scare</th>
<th>9/11 U.S.</th>
<th>9/11 U.K.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Framing: bombings and labor unrest seen as extension of war</td>
<td>Framing: attacks characterized as acts of war</td>
<td>Framing: great sense of urgency and uncertainty (akin to war or crisis situation)</td>
<td></td>
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<tr>
<td>Problem population: foreign nationals</td>
<td>Problem population: foreign nationals</td>
<td>Problem population: foreign nationals</td>
<td></td>
</tr>
<tr>
<td>Cause: insufficient authority/tools for counterterrorism</td>
<td>Cause: insufficient authority/tools for counterterrorism</td>
<td>Cause: insufficient authority/tools for counterterrorism</td>
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<thead>
<tr>
<th>Policymaking</th>
<th>Accelerated process: very little Congressional debate</th>
<th>Accelerated process: committee review bypassed</th>
<th>Accelerated process: Committee of the Whole House</th>
</tr>
</thead>
<tbody>
<tr>
<td>Deference to executive: no amendments made to Immigration Act of 1918</td>
<td>Deference to executive: USA PATRIOT Act passed with overwhelming support; minimal substantive amendments made</td>
<td>Deference to executive: less so than other two cases (incitement to religious hatred struck down; exclusion of the courts struck down)</td>
<td></td>
</tr>
<tr>
<td>Disproportionate focus on non-citizens: anti-radical provisions almost entirely within immigration policy</td>
<td>Disproportionate focus on non-citizens: possibility for indefinite detention only for non-citizens</td>
<td>Disproportionate focus on non-citizens: possibility for indefinite detention only for non-citizens</td>
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<tr>
<th>Implementation</th>
<th>Scope: thousands affected by Palmer Raids</th>
<th>Scope: thousands affected by variety of programs (PENTTBOM, NSEERS, increased authority for detaining suspects, voluntary interviews, Absconder Initiative)</th>
<th>Scope: 16 suspected international terrorists apprehended (Dec. 2001-Nov. 2003)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Focus: on communities</td>
<td>Focus: on communities</td>
<td>Focus: on individuals</td>
<td></td>
</tr>
<tr>
<td>Publicity of actions: highly publicized</td>
<td>Publicity of actions: highly publicized</td>
<td>Publicity of actions: very little</td>
<td></td>
</tr>
<tr>
<td>Waning of activity: within a few months</td>
<td>Waning of activity: within a few months</td>
<td>Waning of activity: within a few months</td>
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Analysis

We now turn to an analysis of these processes. The following discussion will explain why national identity is an important element to consider if we are to fully understand these outcomes. Yet, just as Bosso (1994: 192) argues that problem definitions are the product of
culture and structure, he could have just as likely been talking about policy outputs and outcomes. Therefore, the role of other institutional and political variables in shaping these policies is examined as well.

**National Identity**

Rogers Brubaker’s (1992) comparative study of German and French citizenship policy was among the first to link notions of national identity with policy outputs. Brubaker explains the variance between the German and French cases in terms of the dominant “conception of nationhood” within each country. He finds that the prevailing understanding of national identity places boundaries around political debate that demarcate the ideas and values that are appropriate from those that are not (Ibid., 185). Brubaker concedes that a cultural variable like national identity cannot account for the fine details of public policy (Ibid.), but he does show how it can influence the trajectory of policymaking (Ibid.: 17) by raising the political costs incurred by those who offer counter-idiomatic arguments (Ibid.: 162). Dominant understandings of national identity limit the “universe of debate” (Ibid.: 185) and therefore have a bearing on policy outputs. Therefore an examination of the cultural context that sets these limits is an appropriate place to start our analysis.

According to Brubaker’s argument, then, notions of national identity affect policy by influencing the way public problems are defined. Problem definition plays a key role in constraining rhetoric, or limiting the “universe of debate,” by emphasizing only certain causes of a problem. As Rochefort and Cobb assert, causality is the most prominent aspect of problem definition, and its prominence lies in the way that causal claims can preclude alternative views about a problem (Rochefort & Cobb 1994b: 15-16). “Counter-idiomatic” arguments, or ones that run contrary to the popular definition of a problem, are much less likely to be persuasive and
may even be politically costly to those who hold too firmly to them. Notions of national identity influence problem definition specifically by informing an understanding of who the problem population is. The public portrayal of these groups has a strong influence on how punitive related policies will be (Schneider & Ingram 1993). Problem definition and notions of national identity therefore have a direct relationship with the types of policy solutions offered, and ultimately adopted.

Since citizenship policy is the legal definition of who is and is not part of the national community it is clear that notions of national identity are important for assessing the symbolic value of policies in this domain. Yet it is reasonable to expect that national identity also has a prominent role to play in the making of counterterrorism policy. Although the material stakes of counterterrorism policy are significantly different than those of citizenship policy, the symbolic value of the former policy area, by reducing public fear, is just as significant as the symbolic value of the latter. National identity shapes perceptions of who is threatening to the community, which then feed into a broader policy narrative about the causes of, and stakes involved in addressing, terrorism. In what follows, we will first look at how notions of national identity affected the perceptions of policymakers and the wider public in each of the cases reviewed, before discussing the influence of these perceptions on the dominant policy narratives.

National Identity and the Perception of Threat

Perceptions of national threats are informed by popular notions of the Other in nationalist discourse. The content of this discourse provides a heuristic for understanding which group or groups pose an existential threat to the nation (Huysmans 2006: 2, 47). Certain groups are negatively stereotyped as the antithesis of a nation’s culture and values, and therefore cast as a threat. Through psychological and social processes these characterizations of the Other bolster
perceptions of material threat during times of heightened concern about national security (Christie 2004: 10; Friedman 2011: 87-89; Gowda 2003: 320-322; Ismaili 2010: 85; Ripberger et al. 2011). It is clear that the targeted populations in each case reviewed here were marginalized groups that had been framed as the Other in political and popular rhetoric before, during, and after the development of responses to the terrorist events under study.

During the First Red Scare ideologically-defined conceptualizations of American identity were the primary means of discussing both the worthiness of the U.S. government’s strategy and its goal of eliminating the radical threat. For instance, there was a very strong nationalist discourse in Congressional debates on the Immigration Act of 1918, the legislation that further empowered the government to exclude and deport radicals. “If this Nation is to continue to exist as a nation,” proclaimed Representative Jacob Meeker, “we have got to put down the Bolsheviki” (Congressional Record 1918a: 8116). Others concluded that the American melting pot was not able to assimilate radicals (Ibid.: 8118, 8124), which led logically to calls for stripping any communist of their citizenship since “At heart they are not American citizens at all. They have no American spirit in their souls” (Ibid.: 8121). Attorney General Palmer relied on a similar discourse to publicly defend his Department’s actions. He first emphasized the foreign character of communism in the U.S. by describing it merely as “an organization of thousands of aliens, who were direct allies of Trotzky” (Palmer 1920b). Because communists were said to have “infected our social ideas with the disease of their own minds and their unclean morals” the U.S. government had been compelled to rid the country of such “alien filth” (Ibid.). Representative Homer Hoch of Kansas, who led the impeachment proceedings of Assistant Secretary of Labor Louis F. Post, summed up the problem in this way: “The movement [to “Russianize” the U.S.] is not only against orderly government, but is against the institution of
marriage, the church, religion, and all the establishments of civilization” (U.S. House Committee on Rules 1920: 16). Radicals, as portrayed in these instances spanning the period of the First Red Scare, were entirely un-American and driven to uproot American society.

Many of the arguments put forth by Assistant Secretary of Labor Louis F. Post, in defense of his decision to rescind many of the deportation orders originating from the Palmer raids, were also couched in terms of American ideals. He justified a narrow interpretation of the clause making “membership” in a communist party a deportable offense as being in the interest of “American principles of personal liberty” (U.S. House Committee on Immigration and Naturalization 1920: 8). Post also argued that the immediate deportation of those arrested, without proper consideration of the facts and other constitutional protections, would be a “very drastic and very un-American” penalty (U.S. House Committee on Rules 1920: 81). Judge George W. Anderson would use the language of American identity to rail against the government’s harsh tactics as well: “Talk about Americanization! What we need is to Americanize people that are carrying out such proceedings as this” (as quoted in National Popular Government League 1920: 34). The tables had been turned. Calls to uphold American ideals were now used to attack the government’s overzealous hunt for radicals.

National identity had a significant impact on how domestic radicalism during the First Red Scare was understood, and it was an important point of reference for supporters and opponents of the Justice Department’s tactics. The contested nature of national identity makes it an amenable tool for opposing sides to employ in legitimating their claims (Lee 2007). However, in this case it was not so much that opponents of the Palmer raids had a drastically different notion of American national identity than supporters did. Assistant Secretary of Labor Post, who cancelled many of the deportation orders, noted the un-American nature of radicalism in his
testimony before Congress (U.S. House Committee on Rules 1920: 76). He agreed that radical immigrants, who were professional revolutionaries and who posed a serious threat to the American economic order, should be deported. The conflict over the Palmer raids had more to do with the appropriateness of the means employed to eradicate the threat. While supporters couched their arguments in terms of the worthiness, indeed the American-ness, of expelling radicals from the U.S., opponents emphasized the illiberal and un-American nature of the raids and associated abuses of power.

Patriotic societies that had been active in stamping out disloyalty during the war — such as the Daughters of the American Revolution and the American Protective League — fanned the flames of anti-radicalism and represented popular demands for eradicating the “Red Menace” (Higham 2008: 211, 228). This widespread anti-Communist sentiment had revived the dormant anti-radical variant of American nativism that developed during the French Revolution. Anti-Germanism was undoubtedly the centerpiece of American nativism during the war, but the crusade against radicals shortly thereafter was an outgrowth of the wartime anxieties and perceptions of the German enemy (Ibid.: 219, 223). Socialists were the most vocal domestic group opposing the war, and their open support for the October Russian Revolution only added to the notion of them as thoroughly disloyal and, most importantly, as un-American (Higham 2008: 218; Murray 1964: 18-20; Peterson & Fite 1957: 43-45).

Anti-Bolshevik themes were a central element of American popular culture during the time of the First Red Scare. Bolshevism on Trial — released in April 1919 as an adaptation of a book by Thomas Dixon, a well-known author at the time — was a very popular movie depicting the conversion of two Americans to Communism and their subsequent realization of its evil character. John Reed’s firsthand account of the Russian Revolution in Ten Days That Shook the
World was a huge success when it was published in 1919 (Hagedorn 2007: 179). In 1999 it was considered to be “probably the most consequential news story of the century” (Stephens 1999) and named by New York University as one of the top ten works of American journalism in the 20th Century ("Journalism's Greatest Hits: Two Lists of a Century's Top Stories" 1999). Several other films and books demonizing bolshevism would appear in ensuing months to be received by a public fixated on the “Red Menace.”

The First Red Scare established communism as the antithesis of American identity. This notion was so firmly entrenched that communists would remain the Other in American nationalist discourse for the next eight decades. The collapse of the Soviet Union meant the near instantaneous disappearance of the nation’s primary object against which it had defined itself for so long. In 1990 Congress passed a host of amendments to the Immigration and Nationality Act of 1952, the basis of contemporary immigration law. The revised title pertaining to exclusion and deportation is notable for the change in emphasis that was made: those who “advocate the economic, international, and governmental doctrines of world communism” (8 U.S.C. § 1182 1988: 1247) were no longer an excludable class or subject to deportation under the amended statute. At the same time, a host of terrorist activities for which immigrants could be deported or prevented from entering the country were articulated in the new statute. Prior to the amendments of 1990 there was only a minimalist clause barring those who took part in “indiscriminate acts of violence with extreme indifference to the risk of causing death or serious bodily harm to individuals not taking part in armed hostilities” (8 U.S.C. § 1182 1988: 1257).

Congressional debates in the wake of 9/11 clearly indicate that many lawmakers associated terrorism with foreign nationals, just as the 1990 amendments to the Immigration and Nationality Act of 1952 implied. Adding credence to the notion of terrorists as the Other was the
continuous assertion that the perpetrators of the 9/11 attacks, and terrorists more generally, were enemies of American values. This is a familiar way of characterizing the Other. During the First Red Scare it was the radicals’ opposition to capitalism and their use of contentious politics for effectuating change that were accentuated in American nationalist discourse. In the contemporary context the 9/11 attacks were framed as attacks on American freedoms. In President Bush’s address to Congress one week after the attacks the perpetrators were said to “hate our freedoms — our freedom of religion, our freedom of speech, our freedom to vote and assemble and disagree with each other” (Bush 2001a). This portrayal became a common theme in many public statements by President Bush in the months after September⁶³ along with a sense that the United States and “freedom-loving people everywhere” must fight against terrorism in order to protect the liberties enjoyed in a free society. Many policymakers would also join the refrain (Congressional Record 2001a: 16865, 19692; U.S. Senate Committee on the Judiciary 2001c: 16).

Just as legislative changes in the early 1990s replaced communism with terrorism as the biggest threat to American interests, a similar shift in the groups most negatively portrayed in American popular culture had also been underway. Whereas new legislation outlining the grounds for deportation identified terrorists, broadly defined, as the new menace in American society it was through other media that “terrorist” became synonymous with Arab or Muslim men. Films such as Executive Decision (Baird 1996), The Siege (Zwick 1998), and Rules of Engagement (Friedkin 2000) portrayed Arab and Muslim societies as inherently violent, and their citizens as steadfast in their desire to bring about the destruction of the United States (Sweet 2000). Political cartoons began promoting stereotypes of Muslims as deceitful, evil or ultra

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conservative (Gottschalk & Greenberg 2008) while the broadcast media started to depict them as hyper-religious and violent (McAlister 2005).

Edward Said (1978) demonstrates how stereotypes about and prejudices towards Muslims — and Eastern cultures and religions more generally — were first established in eighteenth- and nineteenth-century literature and scholarly, ‘scientific’ works. The ideas about Islam and the “Orient” espoused in these works are what he describes as a political project to promote the mentality of “us” versus “them” (Ibid.: 43-44). The Orient was depicted as the Other to Western civilization. These ideas were established during the height of British colonial power but they still influence Western perceptions today, as in Samuel Huntington’s prognostication that the fiercest international conflicts would occur between “the West and the rest;” the “rest” meaning predominantly Islamic and Asian societies (Huntington 1996: 183).

By 1990 Said’s (1966) assertion that terrorism had replaced communism as the American antipode, made nearly a quarter of a century earlier, had been statutorily and popularly vindicated. And the popular perception pinpointed the source of that terrorism, geographically, in the Middle East and demographically in the form of Arabs and Muslims whether or not they were U.S. citizens. Even official actions insinuated a strong association between terrorism, Muslims, and Arabs. It is striking how clearly this link is made in the Immigration Act of 1990. Members of the Palestine Liberation Organization are the only ones explicitly referred to in the clause of this act that specifies the excludability of anyone involved in terrorist activities. In this otherwise broad legislation the move is made, within two consecutive sentences, from general principles of terrorism as an excludable and deportable offense to the labeling of a single group as a terrorist organization (United States Statutes at Large 1990: 5069). In a law review piece written before the 9/11 attacks, Natsu Taylor Saito (2001) compared the framing of Asian-
Americans during World War II with that of Arabs and Muslims in this way: “Just as Asian Americans have been ‘raced’ as foreign, and from there presumptively disloyal, Arab Americans and Muslims have been ‘raced’ as ‘terrorists’: foreign, disloyal, and imminently threatening” (Ibid., 12).

The British publication in 1988 of Salman Rushdie’s *The Satanic Verses* outraged Muslim communities in Britain and around the world. This novel portrayed the prophet Muhammad in a way that was deeply offensive to Muslims, and it touched upon other sensitive Islamic themes. At first, British Muslim leaders tried to persuade the publisher to include a statement that the novel was purely fictional and in no way was meant to represent an accurate portrayal of Islamic history. Muslims also staged peaceful protests against publication of the novel. But the book’s publishers and government officials did not treat the concerns of ordinary Muslims, or the requests of Muslim leaders, with much seriousness (Parekh 1990).

Once it became clear that these peaceful expressions of opposition were ineffective, the Muslim community’s response became more contentious. In areas of Britain where large numbers of Muslims resided, bookstores were bombed and several public burnings of the novel were held. An extraterritorial dimension was added when several countries banned sales of the book. International furor culminated with Ayatollah Khomeini issuing a *fatwa* instructing Muslims to kill Salman Rushdie and the publishers of *The Satanic Verses*. Britain broke diplomatic relations with Iran soon after, a condition that was not fully rectified until a decade later.

The *Satanic Verses Affair* entrenched the notion within the British public that Muslims were fundamentally different. Muslim opposition to publication of *The Satanic Verses* was
interpreted as a direct affront to the liberal principle of free expression.64 The demonstrations, book burnings, and bombings were characterized as barbarian acts and cast as symbols of Muslim intolerance (Parekh 1990: 3). Muslims, as it were, needed to be civilized.

Some leaders focused on the legitimate bases of Muslim grievance — notwithstanding the violent expression that it ultimately took — and used the opportunity to highlight the anachronistic nature of the blasphemy laws, which only applied to speech offensive to Christianity. However, the dominant narrative had become that of Muslim difference and the threat it posed to British values. The totality of the Muslim response seemed like a fundamentalist opposition to a cherished right of liberal democracies, thereby establishing the popular belief that Islam is incompatible with democracy.65 The nature of the Muslim response also laid the foundation for perceiving Muslims as inherently violent people. A sharp rise in Islamophobia was the consequence (Alexander 2007: 146).

The portrayal of British Muslims as culturally different would be reinforced by public and political reactions to a series of riots that broke out in the summer of 2001. Several violent conflicts occurred between predominantly white young men and their counterparts of Pakistani or Bangladeshi heritage in the northern cities of Bradford, Burnley and Oldham. Each incident lasted only a few days, but total property damages were estimated to be as high as £12 million (Home Office 2001: 7). These riots were the worst case of ethnically based violence to occur in the country for two decades, and they became symbolic of the burgeoning ‘Asian problem’ within Britain (Robinson 2005: 1413).

64 Offensive depictions of the Prophet Muhammad in cartoons published by the Danish newspaper Jyllands-Posten in 2005, and the outrage expressed by Muslims around the world, sparked the most recent debate pitting the right of free expression against the value of respect for other religions.
65 For a review of and counterargument to this position, see Mazrui, 1997.
Official inquiries highlighted the role of economic deprivation and the activities of extremist groups in fomenting the riots. Yet the segregation of British society at the time was the most prominent cause to be emphasized. As the official government report on these events summarized,

…the team was particularly struck by the depth of polarisation of our towns and cities. The extent to which these physical divisions were compounded by so many other aspects of our daily lives, was very evident. Separate educational arrangements, community and voluntary bodies, employment, places of worship, language, social and cultural networks, means that many communities operate on the basis of a series of parallel lives. These lives often do not seem to touch at any point, let alone overlap and promote any meaningful interchanges. (Independent Review Team 2001: 9)

The existence of “parallel lives” as described here symbolizes physical as well as cultural separation, and it was this element, rather than other structural or socioeconomic variables, which became the underlying problem that needed to be fixed (Alexander 2007: 154). Instead of promoting the proper functioning of a diverse community the British form of multiculturalism, it was concluded, led to the development of autonomous communities. The connotation of parallel lives can imply mutual culpability for segregation, but the situation was interpreted as the deliberate self-segregation of Muslims (Alexander 2007: 148; Robinson 2005: 1413).

The 2001 riots also bolstered pre-existing popular depictions of Muslims as criminals. In particular, stereotypes of young Asian (i.e. Muslim) men as a deviant underclass, propagated in the media throughout the 1990s (Poole 2000), crystallized into a negative image of ‘the Asian gang’ (Alexander 2000) as a prominent social problem in Britain. The riots in the summer of
2001 appeared to the wider public to fit this model. Criminal behavior had been perceived as endemic within Muslim culture and was therefore another marker of Muslim difference.

The 9/11 attacks added an entirely new dimension of threat to this image of Asian criminality. “Bringing together the assumption of crime and conflict that underpins the racialized stereotype of ‘the Asian gang’ with the emergent spectre of religious ‘fundamentalism’ and the threat of terrorism,” Claire Alexander (2007: 144) concludes, “Muslim young men are now inseparable from the image of violence.” Depicted simultaneously as a culturally different, physically segregated, and inherently violent population, Muslims inevitably attracted substantial suspicion in the wake of 9/11.

Parliamentary debates drew from these themes of Muslim difference, and propagated notions of Muslim Other-ness, in subtle ways. The typical form this took was to characterize the perpetrators and their supporters as enemies of British values, much like what took place in the United States. Political leaders roundly characterized the attacks as an assault on freedom and democracy (United Kingdom. House of Commons 2001c: Cols. 608, 666), the very survival of which was at stake in the reinvigorated struggle against terrorism (Ibid.: Col. 607). Indeed, the entire framework of human rights was said to be under attack. The Shadow Secretary of State Michael Ancram explicitly stated as much: “Theirs was an attack on that set of values that believes in the sanctity of human life and in human liberty and human rights […] There is no morality and no conscience” (Ibid.: Col. 622), and it was implied in the argument, frequently made, that any significant curtailment of civil liberties would give the terrorists exactly what they sought to achieve (United Kingdom. House of Commons 2001a: Col. 135; 2001c: Col. 750; United Kingdom. House of Lords 2001a: Cols. 208, 242).
Just hours after the attacks Prime Minister Tony Blair cast the entire conflict in this way: “This is not a battle between the United States of America and terrorism but between the free and democratic world and terrorism” (“The Prime Minister responds” 2001). In explicitly rejecting the notion that the fight against terrorism involved two specific protagonists, and instead proclaiming it to be a struggle between two different “worlds,” in essence, Blair invoked a Huntingtonian paradigm of a “clash of civilizations” that pointed to differences in core values. Although the ‘terrorism’ side of the battle is not a civilization per se, it is not difficult to see how ‘terrorism’ could be interpreted as being synonymous with the ‘Islamic world,’ given the strength of this association in popular culture. Blair’s depiction also served to set apart the contemporary problems of terrorism from the terrorism that took place during the Troubles. Whereas the Troubles were a struggle for a more localized form of democracy, contemporary terrorism is depicted as the main threat to the idea of democracy itself. Despite the negative characterization of groups such as the IRA during the height of the Troubles, Blair’s narrative, in the contemporary context, casts Northern Irish terrorists more as freedom fighters and Islamic terrorists as fighters against freedom.

Prime Minister Blair further specified who the enemy was in his opening remarks of the first Parliamentary session after the attacks. “We are democratic. They are not. We have respect for human life. They do not. We hold essentially liberal values. They do not” (United Kingdom. House of Commons 2001c: Col. 606). Blair was talking about terrorist groups in this classic depiction of a battle between “us” versus “them.” But the list of identifiable traits that he referenced — illiberal, undemocratic, barbaric — had been prevalent in popular discourse to describe Muslims and Muslim-majority countries during the Satanic Verses Affair. These also were popular labels applied to Muslims throughout the 1990s in response to political conflicts...
involving Islamic states or figures, from the cynical motives of Muammar Qaddafi, Ayatollah Khomeini or Yasser Arafat to the violence of Chechen rebels and the evil already known to have existed in Osama Bin Laden (Turner 2007: 69). The “uncivilized” (United Kingdom. House of Commons 2001c: Cols. 604, 605, 607, 676, 678, 791) and “barbaric” ("The Prime Minister responds" 2001; United Kingdom. House of Commons 2001c: Cols. 615, 697, 730, 742, 774, 777, 792, 797) nature of the attacks also recalled anti-Islamic themes used during the Satanic Verses Affair, and the “fanatical” (United Kingdom. House of Commons 2001c: Cols. 628, 666, 712, 715, 725, 755, 784, 792) and “fundamentalist” (Ibid.: Cols. 628, 721, 739, 782) nature of the terrorists coincided with existing portrayals of Islam and its followers (Turner 2007: 63). The traits of the Muslim Other, already established in popular discourse, were now being used by political leaders to describe the enemy in the War on Terror.

Perceptions and Public Policy

Political discourse in all three cases reviewed here was intricately linked with notions of national identity that had been prevalent in popular discourse. Terrorism was clearly identified as the Other in American political discourse in the wake of 9/11, reinforcing the official nationalist paradigm in place since the collapse of the Soviet Union. In Britain, the language of Muslim Other-ness, developed throughout the previous decade, was invoked to describe the 9/11 attacks. In both cases terrorism was portrayed not just as a national problem, like poverty or hooliganism, but as a national enemy, that threatened the very existence of the nation. Although political leaders in both countries talked about terrorism irrespective of ethnicity, religion, ideology or race,66 the Muslim Other was indistinguishable from the terrorist Other.

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66 To do otherwise in the post-Civil Rights era would be unacceptable in a liberal democracy.
Policymakers similarly borrowed from the nationalist lexicon in vogue during previous years to make sense of the important issues during the First Red Scare. Communism was a relatively new enemy in 1919 but Germany, the hated American enemy of World War I, was initially identified as the instigator of the widespread labor unrest and attempted bombings of that year. It was widely thought that the Germans were still waging war with the United States, albeit through a communist conduit. The differences between anti-German nationalist discourse and the anti-radical fulminations of policymakers in 1919 and 1920 were imperceptible.

Political discourse in all three cases was congruent with the cultural idioms (Brubaker 1992), or ways of talking about national membership and characterizing national enemies, that had developed in previous years. These cultural idioms contributed to a broader policy narrative that identified the origins, significance, and prevalence of terrorism. In other words, exclusive notions of national identity played a substantial role in how the problem of terrorism was defined. The infusion of a nationalistic discourse into the prevailing policy narrative has two effects. First, it increases the likelihood of a policy response that focuses on the national Other, to the exclusion of other suitable target groups, since it logically follows from the premises of the policy narrative. Second, a nationalistic policy narrative garners support for punitive responses that accord with the negative social construction of the groups understood to be targeted (Schneider & Ingram 1993). Therefore, defining terrorism as a problem largely created by the national Other — by definition, a group that is negatively portrayed in nationalist discourse — increases the likelihood that punitive solutions will disproportionately target this group, as Schneider and Ingram (1993) would predict.

The dominant policy narrative during the First Red Scare was one of American institutions being threatened by un-American ideas imported from Russia. Despite the fact that
the labor strikes were acts of protest — largely by native-born workers — against low wages and inhumane working conditions, and despite the fact that much of the associated violence was instigated by local police or corporate agents (Levin 1971: 36-46) — not by the strikers as claimed by the government, the press or affected corporations — the problem had become defined in the most un-American terms possible: as violent attempts by radical immigrants to gradually whittle away the structures of American capitalism. This characterization of the issue made the problem one of national survival. Deportation of non-citizens, for merely espousing radical ideas, became synonymous with saving the nation.67

The identification of foreign nationals as a primary cause of terrorism was also a prominent feature of the counterterrorism policy narratives in the U.S. and Britain in the wake of 9/11. The immigration provisions of Britain’s Anti-terrorism, Crime and Security Act were much more contentious than those found in the USA PATRIOT Act, but opposition from British policymakers had more to do with the means by which non-citizens were targeted. The value of targeting non-citizens was uncontested. Terrorists were characterized, in both cases, as freedom-hating immigrants who stand for everything that is antithetical to national values.

The nativist nature of the response to the First Red Scare was much more apparent than the actions of the American or British governments in the wake of 9/11. Targeting a group because of their ideology was more acceptable in 1920 than in 2001. Yet national identity played an equally significant role in post-9/11 counterterrorism rhetoric and legislation, just in a more implicit manner. Associating terrorism with immigration, as was done repeatedly in the American and British cases, implied a certain degree of group difference. Furthermore, terrorists were said to be a subset of the immigrant population, and they were defined in language that

67 Deportation had traditionally been viewed simply as an administrative tool for enforcing immigration law. Beginning with World War I it was considered a useful instrument for “purifying American society.” (See Higham, 2008: 220-221.)
closely resembled pre-existing anti-Muslim popular rhetoric. In other words, “terrorist” was defined in a way that approximated the Other-ing of Arab and Muslim foreign nationals.

These official policy narratives reflected a consensus about the culpability of non-citizens of any race. Yet the implementation of these policies focused disproportionately on Muslim and Arab suspects. Despite the relatively more liberal frames invoked during the development of policies in the wake of 9/11, the outcomes have been as discriminatory as they were during the First Red Scare. This fits into a broader dynamic in which group-neutral anti-violence legislation has led to the implementation of Muslim-specific government programs (Bleich 2009). Since the group-neutral political discourse approximated the pre-existing anti-Muslim popular discourse, the worst stereotypes about Muslims had been, to a degree, vindicated. This, in turn, gave added plausibility to group-based suspicions among the public as to who is a potential terrorist, which then generates expectations about who the government should target in its counterterrorism efforts. The government can most directly ameliorate public fears, and therefore bolster its legitimacy, by demonstrating a tough response towards those groups suspected by the public to be most threatening.

This is not to deny that more liberal interpretations of American or British identity existed during this time. Indeed, official nationalist rhetoric in these countries has been relatively unhinged from ethnic markers of difference for quite some time. However, nativist variants of national identity still exist, even in these quintessentially liberal societies (Barreto 2001; Bonilla-Silva 2003; Theiss-Morse 2009). The existence of these ethnic conceptions of nationhood creates acute anxieties during times of heightened insecurity that governments are compelled to address. By focusing its counterterrorism efforts on groups who are easily recognizable as the Other, the government can most directly manage these public fears.
Identity politics played an important role in all three cases reviewed here. National identity was the most salient frame of reference for managing public fear during these times of deep insecurity. It provided the foundation upon which political leaders characterized the problem and, as a consequence, it set loose boundaries around the types of policy responses that would be considered legitimate. Punitive responses that discriminate against marginalized groups associated with the perpetrators of these violent acts are therefore much more likely to take hold.

**Institutions and Other Political Interests**

The illness of President Wilson during the First Red Scare and the presidential elections in November 1920 were two important factors that influenced the course of events during this time. President Wilson suffered a serious stroke in September 1919 and was largely absent from public life during the height of the First Red Scare. The handling of most domestic affairs was therefore delegated to pertinent cabinet members. The limited involvement of President Wilson meant, in effect, the neutralization of a potentially powerful bulwark against extreme policies (Murray 1964: 203). Presidential elections were to be held in November 1920 and it was well known that Attorney General Palmer had ambitions to run as the Democratic Party’s candidate. Palmer campaigned throughout the first half of 1920, but eventually lost out to James M. Cox, then the governor of Ohio, at the party’s convention in July.

The absence of President Wilson and the forthcoming presidential elections resulted in a state response to the threat of radicalism that was very populist in nature. Congress swayed with the changing direction of popular discourse. It first criticized Attorney General Palmer for being too weak and later praised him after the raids on communist organizations had taken place. Congressional leaders subsequently held impeachment hearings related to Assistant Secretary of Labor Post for his cancellation of deportation orders linked to the raids. Post’s rationalization of
his decision to cancel these deportation orders exposed the excessive nature of the government’s strategy for confronting radicalism in the country. As a result, Congress called on Attorney General Palmer to defend the very actions that it had praised just a few months earlier.

The actions of Attorney General Palmer also appear to be motivated by notions of what was fashionable at the time. Seemingly slow to adequately respond to the growing threat of radicalism in the summer of 1919, he carried out the first series of raids, and either reinstated or proposed harsh legislative measures designed to stifle the radical movement, soon after his determination to confront radicalism was called into question by Congressional leaders. For a presidential hopeful whose seriousness about national security had been openly questioned by Congress, we should not be surprised that Palmer would take some sort of drastic action. There were several cabinet members who were strongly opposed to Palmer’s approach, but the Congressional and popular support that Palmer and his allies had was enough to outweigh any objections (Murray 1964: 202-206).

The absence of President Wilson in conjunction with a looming presidential election proved to be a toxic mix of circumstances at a time when the country was dealing with a seemingly existential threat. As Robert K. Murray (1964: 11) put it, this “offered an excellent opportunity for smaller men, with less vision and little principle, to command the attention of a drifting public.” Xenophobia and nativism reached their zenith during World War I, but these attitudes continued to linger after the cessation of hostilities. The presidential elections of November 1920 provided the incentive to exploit these sensitivities of the American public. The absence of President Wilson offered an opportunity to carry it out.

Nationalist appeals were very effective in generating fear about a radical takeover of the United States and in eliciting support for extreme measures to counter this threat. This support,
however, began to wane in the spring of 1920 and continued throughout the rest of the year. Viewing the situation in terms of the security/liberty balance, it becomes apparent that the government’s strategy for addressing radicalism was increasingly unbalanced. For one, the public began to realize that the threat posed by radicalism had been exaggerated by the Department of Justice. The cancellation of over 1,200 deportation orders by Assistant Secretary of Labor Post — on grounds that most of the members of the targeted communist organizations did not advocate or hold radical beliefs — and the judgment of the U.S. District Court in Boston that the Communist Party was not an organization advocating anarchy — which meant that membership in this party was not a deportable offense — deflated the image of a massive group of radicals preparing to take over the country.

The government’s tactics were also cast in a harsher light. The testimony of Assistant Secretary of Labor Post before a Congressional committee and the *Habeas Corpus* trial held in the U.S. District Court of Boston did much to publicize the illegality of the government’s response. The government had not simply carried out raids of suspected organizations. It committed several illegal acts, including unwarranted arrests and compelling detainees to confess their guilt, and it attempted to deport individuals who were not bona fide radicals. These merely added to the sense of government intrusion that was already widely felt as a result of Attorney General Palmer’s proposal in November 1919 to enact peacetime sedition legislation, and the expulsion of five communist members of the New York State legislature in April 1920. At the same time that perceptions of the intensity of the radical threat were on the decline there was a growing realization of the extent to which civil liberties were being curtailed by the Justice Department’s activities. As the relationship between security and liberty became increasingly out
of balance, support for the government’s approach, within Congress and among the public, declined accordingly.

Unlike the First Red Scare and the British response to 9/11 there were limited institutional constraints imposed on the Bush administration’s proposal for the USA PATRIOT Act or the multitude of administrative programs it had implemented. The attacks, and their aftermath, made for highly sensational video footage that was immediately and publicly available around the world. U.S. leaders and political commentators broadly agreed in characterizing the attacks as an act of war. This constructed wartime context resulted in a martial politics that provided relatively little incentive for policymakers to strongly oppose the Bush administration’s proposed counterterrorism bill (Friedman 2011: 92). Some legislators did voice opposition to specific aspects of the bill, but this translated into only minor revisions. The USA PATRIOT Act, in the end, was still heavy-handed. Once weapons of mass destruction were linked with terrorism — beginning with President Bush’s (2002a) State of the Union address the following January — a new level of danger was attached to the problem that could justify enhanced intrusion, by the government, for the protection of the country.

As a consequence of the problem being defined in terms of war — including the possible involvement of nuclear weapons — there were only limited institutional constraints on the actions of the Bush administration. Congress, for one, passed the USA PATRIOT Act with only minor revisions to the Bush administration’s initial proposal, and the clauses related to immigration were given much less attention than other aspects of the bill. The bill went through Congress on an accelerated timetable that did not include any meaningful committee review, yet it was passed with overwhelming support. The Senate voted 98-1 (Congressional Record 2001a: 20742) in favor, while the House of Representatives voted 357-66 (Ibid.: 20466) in favor.
These figures mask the fact that there were some deep reservations, from a broad array of legislators, about the clauses related to immigration. Policymakers did amend some of these clauses as a result — such as capping the amount of time a suspect can be detainee without charge at seven days (still a significant increase over the previous limit of 24 hours), easing the logistics for a detainee to file a habeas corpus petition, and narrowing the definition of “terrorist activity” — but the basic elements of the initial bill were kept intact. The definitions of “terrorist activity” and “terrorist organization” were still quite broad, and although a cap was placed on the length of time a suspect could be detained before being charged with a crime it was still possible for a suspect to be indefinitely detained, albeit with a review of the detainee’s status every six months, if the Attorney General considered the individual to be a threat to national security.68

The judiciary also did not check the Bush administration’s counterterrorism activities in any meaningful way. In lawsuits against the government related to its post-9/11 response — in particular, the legality of using closed hearings for terror suspects69 and to the registration program that targeted only non-citizens from certain Middle Eastern countries70 — the courts ruled in favor of the Bush administration. In addition, jurisprudence related to the Bush administration’s War on Terror was in its infancy. Notions of what constituted an “unlawful enemy combatant” and the proper use of military tribunals for terror suspects were novel questions about the use of traditional military legal procedures. The first two major cases to appear before the Supreme Court were not heard until 2004 and 2006,71 partially the consequence of the unprecedented, complex and ambiguous nature of the legal issues involved.

68 See section 412(a)(6) of the USA PATRIOT Act.
70 See Chishti and Bergeron, 2011.
Despite the lack of institutional constraints the aggressive targeting of Arab and Muslim men by the Bush administration abated throughout 2002. Auxiliary political interests played a part in this. American counterterrorism efforts expanded in October 2001 with the initiation of a global war on terror. The first action was to remove the Taliban from power in Afghanistan. In addition to the support required from NATO members to achieve this, the United States needed the support of regional allies. President Bush’s recognition of the need for support from regional power brokers was apparent in his address to the United Nations General Assembly in September 2002, when he began laying the diplomatic groundwork for the March 2003 invasion of Iraq (Bush 2002b). The blanket targeting of these allies’ citizens would undermine any of these diplomatic relationships.

A complicating matter was the fact that America’s opponents were framing the U.S. invasions of Afghanistan and Iraq as part of an American war against Islam. The fatwa issued by Osama bin Laden and his associates in 1998, articulating the duty of every Muslim to kill Americans whenever possible, was premised on the meddling of the United States in Middle Eastern politics and the presence of the American military in the Arabian Peninsula. These actions were seen as a “clear declaration of war on Allah, his messenger, and Muslims” (World Islamic Front 1988). This view of international politics was the primary motivation behind the 9/11 attacks, and its popularity among radical Islamic groups grew shortly thereafter. For those who strongly believed in this worldview, the presence of a large American military force in Afghanistan and Iraq would only reinforce their convictions. These wars gave added plausibility to the radical Bin Laden worldview, regardless of the true intentions of the United States and its coalition partners. The more the U.S.-versus-Islam depiction became plausible, the more easily terrorist organizations could find recruits among the increasingly frustrated, humiliated and
angered Muslim public (Abrahms 2008: 99-100). Ending the indiscriminant handling of terror suspects, almost all being Muslim or Arab, was a way for the United States to neutralize this claim.

The increased difficulty the Blair government had in passing the ATCSA in comparison to the overwhelming support President Bush received for the USA PATRIOT Act is attributable to differences in international commitments and the immediate political context. For one, Britain was not the direct target of the 9/11 attacks. Even though British nationals were among the casualties, and even though British leaders largely considered the attacks to be directed at them, as well as the United States, the fact that these attacks occurred on U.S. soil still led some policymakers to consider the need for new counterterrorism legislation to be superfluous; and if not superfluous, then it at least did not need to be as far-reaching as the Blair administration proposed. This was an important difference in political context but it cannot account for all of the opposition to the ATCSA.

A second important element of the different political context in Britain at the time was the general election held in June 2001. Tony Blair and the Labour Party easily won the election over its main rival, the Conservative Party, garnering 40.7% of the popular vote versus 31.7% for the Conservatives. This translated to 413 seats in the House of Commons for Labour and 166 seats for the Conservatives, an outcome that led the media to dub the election “the quiet landslide” (BBC 2010). This was particularly difficult for the Conservatives since they had lost to Labour in the previous general election of 1997 by a similarly large margin.\(^\text{72}\) The results of the 2001 election left the Conservative party more divided than ever and William Hague, the party leader, resigned shortly thereafter. When Parliament was recalled from recess on

\(^{72}\) The 1997 general election was especially bruising for the Conservatives, since they lost by such a wide margin and because it ended the 18-year spell of Labour being in the opposition.
September 14, 2001 the Conservatives had a new party leader and a new shadow cabinet of ministers. After suffering a second consecutive electoral thrashing, the Conservatives needed to mount an effective opposition and assert an identifiable alternative to Labour. Although it required delicate handling, the ATCSA was the first high-profile issue upon which the Conservatives could make their political comeback.

The third factor that explains the lower support for the ATCSA than for the USA PATRIOT Act among policymakers is the obligations the British had under the European Convention of Human Rights. Once the status quo — in which suspected international terrorists who could not be deported and who could not be prosecuted in British courts had to be released — was deemed unacceptable the Blair government proposed to derogate from the ECHR in order to hold such detainees indefinitely if necessary. No opposition party can take lightly a proposal to retreat from an international commitment to human rights. That the Labour Party was proposing this retreat gave the Conservatives an opportunity to improve its declining image by appearing more liberal than Labour on this issue. Although the opposition’s alternative policy also involved retreat, albeit in a different way, they could appear as defenders of human rights by denouncing the government’s proposal to derogate from the ECHR. The policy chosen by Labour was actually more considerate of human rights than the policy sponsored by the Conservatives, but the Labour approach required that a public emergency be declared. The unusual situation of declaring a public emergency, in response to a terrorist attack that occurred in a country on the opposite side of the Atlantic, was fodder for the opposition to criticize.

Parliament struck down the clauses in Part 5 that had to do with the incitement to religious hatred. More specifically, it was the House of Lords who twice voted to strike these
clauses from the bill. We can consider the influence of electoral politics to be minimal since the House of Lords is an unelected body of Peers who are either appointed or have inherited their seats. The extensive debates about the clauses related to the incitement to religious hatred, which sought to outlaw abusive language or behavior aimed at stirring up hatred toward a religious group, indicate that policymakers had strong considerations of auxiliary policy goals when understanding the merits of legislating in this area.

Community cohesion was the primary strategy for managing the ethnic diversity of Britain at the time. Community cohesion sought to promote positive intergroup relations by replacing the previous strategy of multiculturalism, an approach that resulted in the establishment of “parallel lives” among Britain’s various social (particularly ethno-religious) groups (Ministerial Group on Public Order and Community Cohesion 2001). Although some policymakers referenced community cohesion as a basis for supporting the incitement to religious hatred clauses, many more who opposed the inclusion of these clauses were concerned about the negative effects it would have on community cohesion (United Kingdom. House of Commons 2001a: Cols. 36, 59; 2001b: Col. 942; United Kingdom. House of Lords 2001a: Cols. 223, 246, 257, 427, 1185).

Concern for the effects of the incitement clauses on community cohesion were an important cause of their demise, but the broader issue had to do with evaluating the worthiness of these clauses in terms of the security/liberty balance. Looking at the liberty dimension, these clauses impinged on the cherished right of free expression. An even more concerning element was the fact that these clauses affected the right of free expression for citizens, not just foreign nationals. In other words, the curtailment of liberties inherent in the incitement clauses was

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73 The House of Lords first voted, 240-141, to strike these clauses from the bill. The House of Commons then decided, 307-236, to disagree with the Lords and reinstated these clauses. The House of Lords then voted the following day to overrule the Commons, 234-121.
rather drastic, despite the fact that the exact same legislation had already existed regarding the incitement to \textit{racial} hatred. The question then became: would the gains in security that could reasonably be expected to result from such legislation justify such a substantial restriction of rights? A majority of Peers did not think so. They considered incitement to religious hatred to be related only indirectly, at best, to national security and therefore they did not perceive it as a balanced approach. By comparison, the clause that made religiously aggravated offences a separate class of crime did pass both Houses of Parliament. Notably, this clause did not affect civil liberties to any significant degree.

The final points of difference between the British and American responses to 9/11 had to do with the implementation of counterterrorism legislation. In Britain, unlike in the United States, the apprehension of suspected terrorists and other enforcement activities in the wake of 9/11 were not widely publicized. The government did not provide a running tally of individuals who had been questioned about or detained for terror-related offences, as the Bush administration did in the first two months after the attacks. The British response also did not consist of a wide range of counterterrorism activities that targeted entire communities. The American response, by contrast, included the PENTTBOM investigation, a new registration requirement for foreign nationals, mass “voluntary” interviews, and the absconder initiative to track down immigrants who had ignored their deportation orders. All of these programs ended up focusing almost entirely on the Muslim and Arab \textit{communities}. British authorities, however, limited their activities to targeting only certain \textit{individuals} who had been considered highly suspicious and dangerous since before 9/11.

The commitments that Britain had as a signatory to the European Convention on Human Rights helps to explain these differences. These commitments tempered the British
counterterrorism response, and they ultimately neutered the British government’s primary method for dealing with suspected international terrorists who could not be deported. Although the Blair administration sought via the ATCSA to free itself of the ECHR-derived obligation to release suspected international terrorists who could not be deported, the legal maneuvers it took to achieve this demonstrate a strong effort to stay within the bounds of the ECHR as much as possible. The British government was mindful of the extraordinary nature of its derogation from the ECHR, and so it sought to limit any actions that would contravene the articles of this convention. It should therefore be expected that the government would not push the boundaries too far by violating the rights of entire ethnic, racial, or religious communities.

Policymakers expressed support for many of the liberties that the ECHR was meant to protect, but many were critical of the specific framework it employed. The ECHR was seen more as an obstruction to effective counterterrorism practice — that needed to be maneuvered around — and less as a guarantee of rights. For example, several MPs, including Shadow Home Secretary Oliver Letwin (United Kingdom. House of Commons 2001a: col. 51), expressed frustration with the so-called ‘Bin Laden anomaly’ created by the ECHR (United Kingdom. House of Commons 2001a: cols. 97, 108, 133; United Kingdom. House of Lords 2001a: cols. 190, 1460). Under this scenario Osama Bin Laden could be killed if found in Afghanistan, but Article 3 of the ECHR would prevent him from being extradited to the United States (where capital punishment were possible) if he had been captured in Britain or applied for asylum there (or in any other European country). Pursuant to the British government’s ECHR commitments before the enactment of the ATCSA Bin Laden would have to be released from detention, despite being a very dangerous international terrorist. His extradition to the United States or
another interested country (such as Saudi Arabia) would likely result in torture or inhuman treatment, as defined by the ECHR, and would therefore contravene it.

Even though the ECHR was considered to be more of an obstacle than a constraint, and despite the great lengths the British government went to break free, only as far as was necessary, from its commitments, the ECHR legal framework ultimately had a significant effect on the implementation of the ATCSA clauses related to immigration. The legal battles mounted against the ATCSA challenged the legality of these clauses according to the ECHR. The Law Lords ultimately ruled that the immigration clauses of the ATCSA violated other articles of the ECHR that Britain was still subject to, and therefore stripped the government of its authority to indefinitely detain suspected international terrorists who could not be deported.

**Conclusion**

As we have seen, the most fundamental consideration in fashioning counterterrorism policy is the balance between maintaining national security and upholding civil liberties. All three cases demonstrate the centrality of this consideration for influencing policy outputs and the trajectory of policy implementation. All three cases also demonstrate that the balance struck between these two values is different for non-citizens than it is for citizens. In other words, the civil rights of foreign nationals are respected to a lesser extent, when it comes to national security, than are those of citizens. The political mechanisms that have led to these asymmetries are what this chapter has attempted to uncover.

Notions of national identity have been shown to exert a significant influence on counterterrorism policy and practice. Nationalist discourse of the *Other* informs perceptions of who and what is threatening to society. These perceptions may lay dormant for long periods of time, but they are activated when an event occurs that appears to validate the danger of the *Other*
as depicted in popular discourse. Once activated, these perceptions inform the dominant policy narratives that are constructed about the problem of terrorism. Infused with a nationalist worldview, these policy narratives often lead to policies that focus on the *Other* at the same time that they elicit support for punitive actions towards these groups, in accordance with their negative social construction (Schneider & Ingram 1993).

In all three cases reviewed here, political discourse about terrorism mirrored the popular nationalist discourse that had developed in prior years. Narrow conceptions of national identity — based on ethnicity, race, or religion — become salient frames of reference during times of heightened threat, and we see in all three cases that these narrower notions of national identity were incorporated into the political discourse about terrorism. The policy outputs have, accordingly, been much more punitive towards groups who had been characterized as the *Other*.

However, a full understanding of the similarities and differences in the way terrorism was addressed in each case cannot be reached by looking only at the role of national identity. Counterterrorism responses in all three cases were similarly aggressive towards foreign nationals, yet differences were seen in the details of the policies, and in their implementation. While notions of national identity push counterterrorism policy in certain directions by influencing the way in which the problem of terrorism is defined, institutional influences and other political interests shape the finer contours of policy outputs and outcomes. The variability across these three cases is the result of differences in institutional context and the existence of different political interests competing with counterterrorism objectives for attention.
Chapter 7

Conclusion

All of the cases reviewed here involve discriminatory policies towards non-citizens that were meant to enhance the country’s defenses against terrorist attacks. In essence, the rights of non-citizens were valued to a lesser extent than those of citizens when it came to matters of national security. This project has attempted to answer several questions in this regard: why do officials support counterterrorism policies, developed during times of crisis, which are more punitive towards non-citizens than citizens? By what means do these policies and related administrative measures gain political traction? How do these counterterrorism measures operate once implemented, and what accounts for variations in the manner and consistency of implementation over time?

Notions of national identity — in particular, narratives about the national Other — were hypothesized to have an important influence on the development of counterterrorism policy. Characterizations of the Other are pre-existing narratives of threat that can inform an understanding of national vulnerability, particularly in the aftermath of an event that appears to confirm the validity of this narrative. When these nationalist narratives are used to define the problem of terrorism, the adoption of policies that focus disproportionately on non-citizens becomes more likely (and in doing so reinforces the dynamic of ‘us’ versus ‘them’ that accompanies nationalist politics). This occurs because problem definitions provide a framework

74 Although it is argued that the national Other comes to be seen as the group responsible for terrorism, we should expect policies to focus on non-citizens more broadly, rather than on the Other specifically. This is for two reasons. First, the Other almost always refers to groups who are not natural-born citizens. Second, legal distinctions between citizens and non-citizens are more acceptable, particularly in modern democratic societies, than finer distinctions based on race, ethnicity, or religion.
of understanding that limits the boundaries of debate and establishes certain notions as fact (e.g., terrorist attacks are perpetrated by the Other), thereby making some policy solutions appear more logical than others.

However, it would be unwise not to consider the influence of other political and institutional variables on the development of counterterrorism policy. Officials must satisfy a number of different constituents as they simultaneously try to achieve interlinked policy goals within and across domains. This is based on the assumption that political leaders have two primary goals: to develop effective public policy, and to win re-election (Stone 2002: 2). The model of counterterrorism policy used for this project incorporates these goals by conceptualizing counterterrorism as a set of activities that has two aims: to prevent future terrorist attacks and manage public fear. The web of political and institutional constraints and opportunities within which counterterrorism policy is developed therefore needs to be examined if we are to fully understand how public officials manage these potentially antagonistic goals.

The primary contribution of this project, then, is to provide an explanation for why non-citizens become the primary targets of counterterrorism policies following a terrorist attack, taking into account the ways in which these attacks (and terrorism more broadly) are initially problematized as well as the influence of various political and institutional factors on the development of solutions to these problems.

Findings

All policies under investigation here were developed during a time of crisis. The Immigration Acts of 1917 and 1918 were introduced during World War I and in the wake of the Russian Revolution. The USA PATRIOT Act and the Anti-terrorism, Crime and Security Act (ATCSA) were enacted in the aftermath of the most horrific terrorist attacks to occur in the
United States. In other words, each of these pieces of legislation was a reaction to unfolding events that signaled weakness in national security. The emergency context within which these policies were developed had a significant influence on the political dynamics within each stage of the policy process.

The problems in each case were defined as representing a national crisis. Whether the situation was characterized in terms of war, associated with an ongoing war, or discussed in terms of the imminence and uncertainty of a future attack, there was a deep sense that the country was in a state of emergency. The population as a whole felt this sense of crisis, and it precipitated the need for urgent action by the government. There was broad agreement that the solution should be in the form of more robust tools and enhanced governmental authority to counter the terrorist threat. Non-citizens featured prominently in the dominant problem definition of each case. This group was associated with terrorism to an extent that it became assumed that terrorist attacks were the work, almost exclusively, of foreign nationals. The sense of urgency to address a pressing problem of national security, brought about by foreign nations, foretold a policy solution that would come down hard on this problem population.

Given the emergency context within which policymaking took place in all three cases, each bill received considerably less scrutiny than they would have under more peaceful circumstances. The Immigration Act of 1918 received very little attention from Congress before it was passed, and the normal involvement of legislative committees was suspended in the passing of the USA PATRIOT Act and the ATCSA. The committee review process was entirely bypassed in the case of the former, and a Committee of the Whole House (rather than a more specialized Public Bill Committee) was used during the committee stage for the latter. Another common feature of the policymaking process was the exceptional willingness of policymakers to
defer to the executive and its proposed legislation. All three bills originated in the executive and all were passed — containing very little substantive amendments — with overwhelming support.

The policy outputs from this process were also similar across the cases reviewed here. Each of the Acts greatly expanded executive authority in counterterrorism matters, and the American and British post-9/11 Acts were omnibus packages that touched upon a wide range of issues related to terrorism. All three Acts targeted non-citizens with measures that were much more punitive — and restrictive of their right — than the measures that applied to citizens. The problem of radicalism during the First Red Scare was dealt with almost exclusively through immigration legislation, by authorizing the deportation of individuals who held anarchist beliefs or belonged to organizations that advocated anarchy. No comparable penalties applied to citizens with similar beliefs or membership. The USA PATRIOT Act and the ATCSA allowed for the detention, possibly indefinitely, and deportation of suspected non-citizen terrorists without providing them the same set of legal protections that citizens were given.

Although we saw a number of similarities in problem definition and policymaking across the three cases, there was divergence in the manner of policy implementation. The greatest differences were found with the British response to 9/11. Whereas the enforcement activities of the U.S. government during the First Red Scare and in the wake of 9/11 were clearly visible to the public, the British implementation of the ATCSA was a much more subdued affair. The Blair administration did not publish daily statistics on the number of suspected terrorists apprehended or questioned, nor did it adopt a host of administrative measures targeting entire communities. The British response was much more measured and targeted at individuals instead of groups. Both of the American responses, in contrast, were much more blunt in this regard. The only
significant element of similarity, regarding implementation, among these three cases was the waning of activity after just a few months.

**Explanation of Findings**

It was shown how national identity had an important influence on the ways in which the problem of terrorism was defined. This was evident in all three cases. Pre-existing narratives about the *Other* informed an understanding of the origins of national threat during these times of heightened insecurity. The political discourse surrounding these precipitating events adopted much of the language used in popular discourse to describe the *Other* during preceding years. Political discourse about terrorism was devoid of any specific ethnic or religious references, but any differences between the terrorist *Other* and the nationalist *Other* were imperceptible. The rhetoric of anti-Germanism melded with the political discourse of anti-radicalism during the First Red Scare. Themes used in the *Other*-ing of Muslims in the U.S. and Britain after the collapse of communism were incorporated into the characterizations of those deemed responsible for 9/11, and terrorism more generally. Notions of national identity, therefore, made their mark on how the problem population was defined, which then fed into a broader narrative about the causes, significance, and prevalence of terrorism.

The trajectory of this narrative led to the development of policies that directly confronted the causes and problem populations that were identified. Policymaking, in terms of the process and outputs, was very similar across all three cases. A notable difference was the relatively more contentious debate in the British Parliament regarding the clauses of the ATCSA related to

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75 Although Parliamentary debate was more contentious than the one in Congress, there was still overwhelming support for the Blair administration’s proposal. For instance, the Commons voted 347-70 in support of the clauses allowing for possible indefinite detention and it voted 331-74 in support of the government’s proposal to derogate from the ECHR by declaring a public emergency. (See United Kingdom. House of Commons, 2001a: c. 407, 440.)
non-citizens. The political climate during this time was a major factor. The wide margin of victory by Labour in the June 2001 election — a repeat outcome of the 1997 general election — was a significant setback for the Conservative Party. For a party that was highly divided and seen as out of touch with voters’ priorities, the British response to 9/11 gave the Conservatives an opportunity to mount an identifiable alternative to Labour on an issue of national importance. Conservatives therefore contested Part 4 of the ATCSA. But their opposition was directed at the way in which Part 4 proposed to overcome the limits imposed by the European Convention on Human Rights (ECHR), not with the extent of punishment it spelled out for suspected international terrorists. So although the clauses of the ATCSA related to non-citizens were more contentious than similar clauses in the USA PATRIOT Act, the rights of non-citizens was not an issue.

Part 5 of the ATCSA included a provision to outlaw the incitement to religious hatred, which Parliament ultimately struck down. The striking of this clause was the most substantial revision Parliament made to the Blair administration’s proposal, and it demonstrated a marked difference in the value placed on the rights of citizens versus non-citizens. Policymakers indicated a concern for the effects of this clause on community cohesion, an important priority in social policy. It is likely that auxiliary policy goals influenced the striking down of the incitement clause, but it cannot be overlooked that the clause would have curtailed the rights of citizens by limiting free expression. The deep concern policymakers had about legislating on this topic in such a short timeframe, compared to the relative ease they had about the significant curtailment of immigrant rights embodied in Part 4, indicates an important difference in the way the security/liberty balance is applied to citizens versus non-citizens.
The most variation we saw across the three cases had to do with the implementation of policy; in particular, the consistency and manner in which counterterrorism measures were implemented, and the reasons for the waning of activity. Implementation in the U.S. of the Immigration Act of 1918 fluctuated the most. The Justice Department at first did not pursue or deport foreign radicals with much intensity, but then took incredibly aggressive steps to raid suspected communist organizations once Congress had questioned the leniency of Attorney General Palmer. However, the intensity dampened just as quickly as it had swelled. The presidential elections at the end of 1920 in conjunction with the absence of President Wilson provided an incentive and opportunity for the handling of the radical threat in a populist manner. The testimony of Assistant Secretary of Labor Post before Congress cast a harsh light on Attorney General Palmer’s illiberal tactics used to address a threat that was beginning to be seen as exaggerated. The growing realization of the imbalance between security and liberty in the pursuit of radicals led to a decrease in Congressional and public support, and ultimately to a substantial scaling back of anti-radical activity by the government.

The Blair administration implemented the ATCSA without much fanfare, especially when compared to the measures implemented by the Bush administration in the wake of 9/11. The level of threat in Britain, although perceived to be great, was not as severe as in the United States. The feeling of insecurity was much more palpable in the U.S. and therefore the need to manage public fear, through a show of decisive action on the part of the government, was much more necessary than it was in Britain. However, proximity cannot entirely account for these differences since the uncertainty of a future attack was just as sizable in both countries. British legal obligations under the ECHR were the decisive factor. The British government had already took the extraordinary step of being the only European country to declare a public emergency in
response to the 9/11 attacks — which took place more than 3,000 miles away — so that it could derogate from the ECHR. It could not afford the approbation it would have received from the European Union, its members, or the wider international community if it were to go even further by targeting entire communities suspected of terrorism, since it was already pushing the boundaries of legitimacy by declaring a public emergency. That the British government went to great lengths to respect the protections embodied in the ECHR as much as possible, at the same time that it sought to change the legislative status quo (having to release suspected international terrorists who could not be deported) that had become politically unacceptable in the wake of 9/11, illustrates the antagonistic forces at play. In the end, the ECHR was effective in constraining British counterterrorism activities.

Regardless of the different ways that each policy was implemented, the level of counterterrorism activity dropped off significant after just a few months. The rapid dissipation of anti-radical hysteria during the First Red Scare was the result of the growing realization of the excessive pursuit of national security at too great an expense to the protection of civil liberties. The flurry of investigations, detentions, interviews, and registration programs targeting Arab and Muslim immigrants and citizens in the wake of 9/11 subsided after a few months. The invasion of Afghanistan, and the expected invasion of Iraq in the near future, necessitated the cooperation of regional allies, which would have been undermined by the ongoing blatant discrimination of foreign nationals from these countries. The different political context in Britain, in addition to the constraints imposed by the ECHR — which ultimately negated the British counterterrorism strategy laid out in Part 4 of the ATCSA—were the primary forces holding back any excessively aggressive, or sustained, counterterrorism program.
Notions of national identity — narratives of the Other, in particular — established a trajectory of policymaking towards solutions that would disproportionately target non-citizens by influencing how the initial problem of terrorism was defined. Negative depictions of the Other developed in previous years, adopted by policymakers to describe the current problems with terrorism, increased the likelihood that this population would be more punitively targeted than other groups. Such a policy would be congruent with public expectations (Schneider & Ingram 1993). But other factors had an influence on policy outputs and outcomes in later stages of the process. Specifically, it was the influence of international legal commitments, interlinked policy goals, local political circumstances (elections and whether or not the terrorist attack directly targeted the country), and the institutionalized recalibration of policy when an imbalance between security and liberty was realized, that ultimately shaped the finer contours of these policy outputs and their outcomes. While notions of national identity have provided a foundation upon which these terrorism problems were understood, and therefore played a key role in the formulation and legitimization of policy responses to these problems, other political and institutional variables had more influence over the application of these policy responses to local circumstances.

**Profiling and Policy Implications**

It is important to address this tendency for counterterrorism policies to disproportionately target non-citizens. Not only is this a counterproductive strategy for neutralizing terrorist threats, it is also problematic from the standpoint of democratic ideals.

A counterterrorism strategy that disproportionately focuses on non-citizens — and which tends to discriminate against specific racial, ethnic, or religious groups — is part of the broader phenomenon of profiling in law enforcement. Profiling suspects using race, ethnicity or religion
as a marker of criminality has been shown to engender disrespect for the criminal justice system as a whole (Hawkins et al. 2003: 243, 302-303; Hudson 2011: 51). As a consequence, law enforcement officers and the state lose legitimacy, thereby diminishing its ability to maintain order. Racial, ethnic and religious profiling also fosters distrust of law enforcement officers among affected groups (Hawkins et al. 2003: 264; Hudson 2011: 36-37). These communities become less willing to provide authorities with potentially useful information about criminal activity. The less cooperation there is between law enforcement and the communities it serves the more difficult it becomes to reduce crime and disrupt terrorist activities.

Counterterrorism policies that disproportionately target non-citizens are also counterproductive because they stigmatize targeted groups and serve as a source of group alienation and grievance. Studies have shown that the individuals most susceptible to recruitment to terrorist organizations are those who are alienated from their host society or aggrieved by the treatment they or their community have received by outside forces (Abrahms 2008: 99-100; Awan 2008; Marx 1998; O'Duffy 2008). Grievance, for instance, is the basis of Al-Qaeda’s ideology and plays a central role in the narrative of extremist Islamic groups more broadly (Saggar 2009).

At the same, a strategy that focuses too heavily on non-citizens as sources of security threat inefficiently allocates government resources by neglecting domestic sources of threat. The London transit bombings in 2005 and the Oklahoma City bombings in 1995 are the most prominent examples of successful ‘homegrown’ attacks. Of course this does not establish that domestic groups are certain to succeed in carrying out terrorist attacks, but the likelihood does increase, which is the opposite of what counterterrorism is meant to achieve.
A discriminatory counterterrorism policy also poses broader challenges to the operation of liberal democracies. For one, it serves to legitimize this practice for the wider community (Cole 2003: 52). Ordinary individuals feel more at liberty to discriminate against immigrants and minorities, even in a violent fashion (Hudson 2011: 53). The rise in hate crimes in the wake of each of these incidents is not surprising, given that the thrust of political rhetoric identified foreign nationals (and by implication, minorities who look like the accused immigrants) as security threats, despite the official denunciation or outlawing of such behavior. Agencies at different levels of government are also prone to discriminate. Discrimination in policy and in practice at the highest level of government sends a signal to the entire system that criminals are of a particular racial, ethnic, or religious group (Hawkins et al. 2003: 264). The state-level anti-radicalism investigations and raids carried out by the Lusk Committee in New York, the illegal surveillance of Muslims in New York and New Jersey by the NYPD, and the illegal surveillance of Muslims in Birmingham by the British police are only some examples of the discriminatory actions conducted at different levels of government.

Another troublesome element of a discriminatory approach to counterterrorism is the tendency, over time, for the rights of citizens to be truncated. In the short-term, minorities who are nevertheless citizens tend to face a de facto restriction of rights, often in an illegal manner once policies limiting immigrant rights are implemented. The illegal surveillance of Muslims — of any nationality — by the NYPD and British police, and the mass arrests of suspected anarchists, including citizens, during the First Red Scare demonstrate the vulnerability of minority citizens during these times of heightened insecurity. The fact that the U.S. House

77 See Murray, 1964: 98-103.
78 See Associated Press, 2011.
Committee on Homeland Security held a series of hearings on “The Extent of Radicalization in the American Muslim Community and that Community’s Response” (U.S. House Committee on Homeland Security 2011) in 2011 demonstrates the longevity of this vulnerability when official suspicions of entire communities linger for so long.

There is also the tendency of policymakers to extend, or attempt to extend, legislation that initially limits the rights of foreign nationals to apply to ordinary citizens as well. During the First Red Scare lawmakers seriously considered peacetime sedition legislation that would limit criticism of the government. Five democratically-elected members of the New York State legislature were expelled in 1920 for being members of the Socialist Party. Operation TIPS was a Bush administration program — eventually cancelled as a result of public outrage — that would have provided for ordinary individuals (such as cable company employees or telephone service workers) with access to peoples’ homes to report any suspicious activity. The Bush administration also authorized the National Security Agency (a body that focuses primarily on foreign intelligence gathering) to conduct warrantless surveillance of foreign communications even if a U.S. citizen were involved. This was exceptionally controversial since it blurred the distinction between foreign and domestic intelligence gathering, a distinction that was established in the Foreign Intelligence Surveillance Act of 1978 (FISA).

The imposition of house arrest (“control orders” in the British vernacular) for all suspected terrorists in Britain, without access to a proper trial where evidence can be refuted, is another example of the extension of rights curtailment to citizens. As David Cole (2003) argues, “what we do to foreign nationals today often paves the way for what will be done to American citizens tomorrow”

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80 FISA initially required the government to first obtain a warrant from a special court before it can collect any intelligence involving a domestic actor. Congress, however, amended FISA in 2008 to explicitly legalize much of what President Bush had authorized regarding domestic intelligence. Renewal of the amended Act received overwhelming support in Congress in 2012 (the House voted 301-118 and the Senate voted 73-23 for renewal), an extraordinary outcome given the level of bipartisanship at the time.
In various ways democratic freedoms are eventually eroded, for all, as a result of counterterrorism policies that, initially, selectively limit the rights of foreign nationals.

There are a number of drawbacks with racial, ethnic, or religious profiling for counterterrorism purposes. The limited scope of rights curtailment embodied in this approach often serves as the first step in the limitations of rights, in the name of national security, for all. There are also more practical issues involved. A discriminatory approach makes counterterrorism more difficult to carry out, and it increases the threat of terrorism by unnecessarily agitating affected groups. These additional challenges can be overcome so that national security is still maintained, but it will only be possible to do so by a wider and deeper restriction of rights.

This is not to say that profiling for law enforcement purposes is entirely useless or illegitimate. Criminal profiling — wherein experts rely on a number of psychological and behavioral attributes that are associated with certain types of crimes — can be an effective way to fight crime by optimizing the allocation of limited resources. It would be unwise to ignore those psychological and behavioral indicators that have been shown to accompany different types of criminal activity. The danger of profiling lies in the use of racial, ethnic, or religious markers as substitutes for these more specific attributes. The number of innocent people brought under suspicion when race, ethnicity, or religion is used for profiling is much higher than if psychological and behavioral indicators are used. The Justice Department’s 2003 guidance on racial profiling is reassuring in that it reaffirms the constitutional prohibition on the use of race or ethnicity in “all but the most exceptional instances” (U.S. Department of Justice 2003a: 9), even if the standard used for national security and border security personnel is less stringent than for ordinary law enforcement.  

Ordinary law enforcement officers can only use race or ethnicity if it is relevant to criminal activity at a specific time and place. In matters of national security or border protection, however, race and ethnicity
Public expectations about policy outputs and outcomes are set by the way public problems are initially defined. These expectations then provide an incentive for government officials to act accordingly. When it comes to problems of terrorism, it was shown how the problem population is typically defined in terms of the national Other. One way to prevent the development of discriminatory counterterrorism policies, then, is to expose people to the simplistic and mythological nature of the Other as portrayed in nationalist discourse. The optimal time to do this is before an event occurs that appears to reinforce the validity of this narrative. Programs that actively promote interaction between different social groups can develop trust and understanding among people from other backgrounds (Allport 1954; Savelkoul et al. 2011). As familiarity increases, the less influential will negative stereotypes be on a person’s attitude about others.

Even if a terrorist attack occurs that seems to fit the narrative about the Other, government officials should constantly and consistently counteract this narrative through rhetoric and action. The American and British governments made many statements disassociating Islam with terrorism and the attacks of 9/11. These were positive steps. But both governments contradicted this rhetoric with actions that portrayed the entire Muslim community as terror suspects. Officials must avoid taking such steps, and be mindful of any activities it undertakes that could be construed as discriminatory towards entire communities. It is essential that officials be aware of how the public will perceive their actions and that they proactively explain the practical rationale of counterterrorism activities. Otherwise, measures targeting negatively stereotyped groups, that are nonetheless for practical purposes (and not the result of bias), will be viewed as official affirmation of the underlying stereotype.

can be considered in connection with a bona fide threat even if it is not tied to a particular location or scheme. (See U.S. Department of Justice, 2003a: 7, 10.)
In a broad sense the development of discriminatory counterterrorism policies can be avoided if the political environment, in which a nationalist discourse provides incentives to target the *Other*, is modified. In addition to the government actions outlined above the news media is another avenue for countering a narrow view engendered by nationalist discourse. Promoting a broader view of terrorism and those responsible helps to dissipate any political incentive for discriminatory responses to terrorist attacks. When the news media uses negative stereotypical themes as its basis for reporting — as when it focuses on the most extreme elements of the Muslim population, for instance (Morey & Yaqin 2011) — it reinforces these negative stereotypes. The perception of threat is therefore perpetuated and possibly amplified. More balanced reporting would challenge these stereotypes and provide an alternative, more nuanced, narrative.

**Generalizability**

Before concluding, a brief discussion about the generalizability of this analysis is necessary. All three cases reviewed here illustrate the strong influence that notions of national identity have in the development of counterterrorism policy. This is an important finding, but the three cases under review here have all included acts of terrorism perpetrated by individuals from groups who were already depicted as the *Other* in nationalist discourse. What has not been established is the influence of national identity on policy responses to attacks carried out by groups not previously identified as a nationalist foe. ‘Homegrown’ terrorists are a clear example of this. What role notions of national identity have had in state responses to these types of attacks is a question that has yet to be answered.

Another element of this study that urges caution before generalizing these findings is that all three cases involved the development of new counterterrorism legislation, all of which were
disproportionately more punitive towards foreign nationals. Whereas the first limitation of this study, discussed above, regarded the fact that policy development in all three cases took place within the same context (as responses to terrorist attacks perpetrated by the Other), this second limitation is due to similarities in the dependent variable. In those situations when no new legislation is developed, or when new legislation that is developed is equally punitive towards citizens and non-citizens, it is not yet clear if notions of national identity enter the picture. Perhaps it has a minimal role to play in these instances. Alternatively, previously developed policies already in place may have removed the need for disproportionately punitive measures towards foreign nationals. Further research of cases with outcomes that differ from those reviewed here is needed.

This study has shown how terrorist attacks have precipitated the development of policies that have disproportionately targeted foreign nationals. This intense focus on non-citizens erodes democratic principles and is counterproductive to achieving security goals. National narratives of the Other have played an important role in propelling this process forward, although other political and institutional variables tempered the intensity with which these discriminatory measures were implemented over time. The judiciary effectively halted Attorney General Palmer’s zealous hunt for radicals during the First Red Scare, just as the Law Lords struck down the British government’s program to detain, possibly indefinitely, and deport suspected international terrorists. The courts did not constrain the Bush administration’s response to 9/11 but other political interests in the wider War on Terror ultimately reigned in its handling of foreign nationals suspected of terrorism. Yet in the months and years before the courts could respond, and before ephemeral political interests in other areas pulled policy in a different
direction, thousands of innocent people experienced harassment, illegal surveillance, detention, deportation, and other demeaning kinds of treatment from government officials and neighbors. For the sake of upholding democratic ideals, more effectively maintaining national security without having to erode rights for all even further, and the personal dignity of every member of the community, we should look for ways to avoid these policies from developing in the first place.
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