

A Twenty-Year Lesson: The Role of Civil Rights in Securing Our Nation

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“We weaken our greatness when we confuse our patriotism with tribal rivalries that have sown resentment and hatred and violence in all the corners of the globe. We weaken it when we hide behind walls, rather than tear them down, when we doubt the power of our ideals, rather than trust them to be the great force for change they have always been.”¹

- the late U.S. Senator John McCain, August 27, 2018

INTRODUCTION: THE FAILURE OF TRUST AND IMPACT ON COMMUNITIES

“Communities are not the problem. Communities are an essential part of the solution.” This is a mantra I repeated over the past twenty years. I mistakenly believed this approach was a constructive and effective formula for protecting

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1. Katie Reilly, 'Do Not Despair of Our Present Difficulties.' Read John McCain's Powerful Farewell Letter, TIME (Aug. 27, 2018 4:17 PM), <https://perma.cc/PB3E-2E2L>.

our homeland. This approach focused on working with communities that were viewed as being “targeted” by foreign terrorist organizations (FTOs) to help raise awareness of the threat and support the building of “resiliency” against those threats within those communities. Agencies leveraged various approaches to establish outreach efforts within the American Arab, Muslim, and South Asian communities for this purpose. Some agencies used their investigative tools in tandem with this approach to also scrutinize these same communities. This latter approach was shortsighted, ill-informed, and counter to the values we aspired to defend from the threat of international terrorism. It is unlikely to be effective against the prevailing threat of domestic violent extremism. The “communities” mantra describes an approach that was understood to respect the values promoting civil rights and civil liberties, and more broadly human rights, values we aspired to achieve in various contexts throughout our history, but often failed to attain. However, as a practitioner of this approach for the past two decades, I believe it has proven to be an overall failure. It fails because of its poor results, including the disparate impact it has on individual rights and liberties, and the indelible stigma it leaves in its wake on entire communities. It also has a markedly checkered history of any real national security success. To be clear, I believe it makes us less secure.

Over the past twenty years, I have had instructive experiences demonstrating that law enforcement and intelligence agencies at all levels, but especially at the federal level, will fail when they attempt to “develop trust” with communities for national or homeland security purposes, whether those purposes are expressed directly or indirectly as part of the engagement process. My roles in the civil rights advocacy sector — and separately in the US Government civil rights oversight and violence prevention fields — have taught me that while law enforcement agencies have successfully leveraged this approach (as evidenced by the numerous arrests, charges, and convictions obtained by the FBI and US Attorneys’ Offices), the broader effort to secure society from threats of violence will ultimately suffer when this approach is applied society-wide. I offer four specific lessons in this regard:

A. Lesson One: Do Not Conflate Immigration Enforcement with Violence Prevention

Focusing on communities based on broad stereotypes fails to recognize the complexity of human nature and the role of individuals beyond their community. This approach is born out of flawed policy formulations in a system that has historically proven to disparately impact minority communities whose interests are underrepresented in policy formulation processes. One example of targeted immigration enforcement implemented shortly after the September 11th attacks was the “National Security Entry-Exit Registration System” (NSEERS), commonly referred to at the time as the “Special Registration Program.” This effort was inherently discriminatory as it focused much of its multipronged immigration enforcement efforts on individuals from specific countries (all but one were Muslim-majority countries). As a result, American communities associated with

these populations bore the brunt of the impact. It also countered our international diplomacy efforts which at the time were centered on building bridges with those same societies. While NSEERS was initially viewed as a knee-jerk policy reaction to the September 11th attacks, its reverberating effects are still felt today within these impacted communities which still struggle as a result of more recent versions of this approach; namely the Trump Administration's so-called "Muslim Ban." To be clear, NSEERS paved the way in both public discourse and in the Washington establishment to the more draconian "Muslim Ban." While both were heavily litigated, versions of both were ultimately found to be lawful despite their negative ramifications for our collective security efforts. Both programs alienated segments of our society and enhanced the divisions within our own nation; divisions that are often capitalized upon by those who mean our democracy harm, both outside of our borders and within them.

Leveraging our immigration laws based on the perception they will keep us safe from terrorist attacks is ultimately a cosmetic political effort that has repeatedly failed to show results. More importantly, these efforts over the past twenty years — starting with NSEERS and continuing through the Trump Administration's "Muslim Ban" — only served to add to the friction within our society. While we Americans often speak of inclusion and diversity as national assets in our arsenal against hate and violence, our actions often undermine these narratives. This is especially true when those impacted communities, often minorities, are viewed as the "other" both within the national and homeland security establishment and in broader society.

Thus, while our system provides bureaucratic processes and legal protections that may mitigate negative impacts on broader segments of society, the two decades since 9/11 have demonstrated that minority communities whose interests are under-represented in those processes are particularly vulnerable and suffer disproportionately from these otherwise "legal" programs. This was especially true following the September 11, 2001 terrorist attacks when the American Arab, Muslim, Sikh, and other South Asian communities bore the brunt of such policies.²

I. DIVERSITY, EQUITY, AND INCLUSION PROVIDE COLLECTIVE SECURITY

Our nation, as a constitutional democracy cognizant of the need to protect those who face unlawful discrimination, is unique in the values it has aspired to achieve even though the ideals that form the core of those beliefs have had an admittedly checkered history. While we have learned some lessons from the past,

2. See *NSEERS: The Consequences of America's Efforts to Secure its Borders*, CTR. FOR IMMIGRANTS' RIGHTS CLINIC PUB. 1 (2009), <https://perma.cc/ZMN9-C4LL>; Kareem Shora, *Activism against Racial Injustice in Times of War*, 8 ASIAN AMERICAN POL. R. 1, 3-7 (2004); Kareem Shora, *National Security Entry Exit Registration System (NSEERS)*, 2 CARDOZO PUB. L. POL'Y & ETHICS J. 73, pin (2003); Kareem Shora, "Protecting the Vulnerable; After 9/11, an Assault on Civil Liberties" 39 TRIAL, Oct. 2003, at 56-61; LEADERSHIP CONF. ON CIVIL AND HUM. RTS., WRONG THEN, WRONG NOW; RACIAL PROFILING BEFORE & AFTER SEPTEMBER 11, 2001 21-32 (2002).

we have often repeated many of the same mistakes. The notion of collective security will ultimately clash with the notion of inclusion and diversity if this latter notion is not incorporated in the policy formulation and application processes as an equal part of our national security priorities. Leaders at all levels must understand this and ensure that these elements are incorporated into every step of both the policymaking and operating levels if we are to cease repeating those same mistakes, mistakes that have hindered our efforts to secure our nation from violence while promoting our values. Thus, my second lesson addresses the use of ideological litmus tests as another failed approach to securing our nation.

A. Lesson Two: Avoid the ideological litmus test

Beyond the immediate post-trauma response in the days and weeks following the terrorist attacks of September 11, 2001, we have been hampered in our attempts at unity. Since that time, our responses have enhanced societal tensions when it comes to racial and social justice, and failed to protect the most vulnerable among us, resulting in even greater civil society demands for justice, equity, and inclusion in the context of our criminal justice system specifically, and our homeland security processes more broadly.

I was part of similar efforts within a smaller subset of civil society in the aftermath of September 11, 2001, when the American Arab, Muslim, Sikh, and South Asian communities bore the brunt of Government-sponsored ideological litmus tests. These tests divided our society and ultimately failed to garner the unity that was among their stated goals.³ These same divisions and societal tensions were a national security concern in the aftermath of September 11, 2001, and remain a homeland security concern today in the context of tackling the threat of domestic violent extremism and especially Racially and Ethnically Motivated Violent Extremism (REMVE) as exhibited most prominently by white supremacist violence.

To varying degrees, our national leaders find it easy to approach the issue of violence prevention through an overly simplistic “with us or against us” mentality. We witnessed this approach at all levels of government in the aftermath of the September 11th terrorist attacks when criminal investigative and prosecutorial steps were taken while incorporating inaccurate information about the ideological beliefs of individuals and factors such as their religious or ethnic affinity. For example, civil rights and civil liberties organizations (and more than a few lawsuits) documented this approach where homeland security officials, law enforcement investigators, and some criminal prosecutors would use an individual’s affinity to a certain mosque, their immigration status from a specific region or nation, or their political viewpoints on controversial issues as factors in the investigative or prosecutorial process. Many otherwise innocent Americans and immigrants were caught in this web of ideological litmus testing. While this approach may have been born out of the urgency of preventing further violence or attacks, it was only possible because our government institutions fail to reflect the ethnic

3. See Kareem W. Shora, CSPAN (July 19, 2021, 9:11 PM), <https://perma.cc/5MVN-P6RL>.

diversity of the nation they serve. The impact of such a dearth of leaders and experts from those minority communities whose interests are often at stake is profound.

I make three primary recommendations to correct this approach: (1) focus on achieving diversity, equity, and inclusion at all levels of government, specifically within the national and homeland security establishment — disabling ideological bias against the “other”; (2) establish a comprehensive, institutional, society-wide, locally-driven focus leveraging a multidisciplinary public health approach to security — avoid, viewing it as an all-or-none law enforcement-driven mechanism designed to investigate, collect evidence, and prosecute; and (3) instill value-focused humanitarian priorities within our national security goals; a lesson that has failed us repeatedly throughout our history, and for which we are often criticized by allies in the international human rights context.

B. Lesson Three: Civil Rights and Civil Liberties Should Not Be Limited to Oversight; They Are Core Foundations of the Policy Development Process and the Operational Implementation Process

When dispensing advice, it is easy to criticize, but it is more effective to offer proactive steps that leaders and decision-makers can take to avoid repeating errors. Following the September 11th attacks, there were many who called for enhanced civil rights and civil liberties oversight mechanisms; calls that often went unheeded until it was too late, and which when implemented, failed to provide the necessary statutory authorities for those mechanisms to achieve the desired results. The internal civil rights oversight office within the US Department of Homeland Security (DHS), for example, unlike similar offices such as the one at the US Department of the Interior, was not provided with the subpoena authorities needed to effectively conduct its oversight investigations. This has sometimes left the effectiveness of the office’s oversight investigations to the whims of the component agencies being investigated.

Added to the weak statutory posture of such civil rights oversight mechanisms is the fact that, so-far, we have failed to effectively incorporate them into policy formulation and design efforts. Civil rights and civil liberties experts need to be part of every US Government effort in drafting violence prevention policies.

C. Lesson Four: Avoid Comparing and Contrasting with Other Nations

Over the past twenty-years, I have experienced firsthand bilateral and multilateral coordination efforts with similarly-placed democracies and allies around the world. These efforts are necessary as we collectively work to counter terrorism and ideological violence across the spectrum. However, a significant shortcoming has been our continued inclination to model our efforts after those designed and implemented in countries such as the United Kingdom, Australia, Germany, France, and Canada, among others. Our system of government, our laws, and our history are the best guides for establishing a uniquely-American model, and while coordination with friends is important, we have repeatedly fallen into the trap of

attempting to duplicate initiatives that have proven successful (and sometimes not so successful) in other countries, but which were a poor fit for the U.S. For example, Washington has repeatedly sought to import elements of programs such as London's "Prevent" strategy, an initiative with a controversial and checkered success rate. Prevent could never pass constitutional muster in the United States, yet our leaders continue to work at incorporating aspects of it into our own initiatives. While learning about the challenges and potential solutions that others are considering or are implementing is important, we have often fallen too far and spent entirely too many resources attempting to import programs that fall far short of our national ideals and values.

II. PROMOTING IDEALS: A PATH FORWARD

In conclusion, those who attacked us on September 11, 2001 had both operational and strategic goals. Their operational goals were fortunately never repeated thanks to the success of our military, law enforcement, and intelligence agencies. Unfortunately, we were less effective in appreciating and mitigating the strategic goals of the 9/11 terrorists — the degradation of the values and ideals that serve as our nation's anchors — and a goal shared by those behind our current threat of domestic violent extremism, particularly REMVE as exhibited most prominently by white supremacist violence.

Whether we are the great grandchildren of immigrants who sought to escape persecution, the descendants of slaves transported here against their will, the progeny of indigenous people who rightly call our modern state their native home, or are ourselves immigrants who came to this nation believing in its promise and aspiring to achieve an American dream, let us not repeat the errors committed in the aftermath of September 11th as we continue our national journey to perfect this imperfect union we all call home. May our national motto always drive our decisions and serve to unite us against all threats, both foreign and domestic: E Pluribus Unum!