2003

Proxies for Loyalty in Constitutional Immigration Law: Citizenship and Race after September 11

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INTRODUCTION

I want to share with you some thoughts about using citizenship and race as proxies for loyalty in constitutional immigration discourse within two contexts: one historical and one current. The current context is the profiling of Muslim and Arab immigrants post-September 11, and the historical context is the distinction the Constitution draws between birthright and naturalized citizens in the Presidential Eligibility Clause.

II. PROXIES FOR DISLOYALTY: MUSLIM AND ARAB NONCITIZENS POST-SEPTEMBER 11

The *American Heritage Dictionary* defines “loyal” as “steadfast in allegiance to one’s homeland, government, or sovereign.” As with any vague and ambiguous term, “loyal” might be best understood by way of example: The President of a nation is expected to be “loyal” to that nation; a terrorist, in contrast, is not. Post-September 11, we have been duly concerned with the second, negative example with those who might be dangerously disloyal, those willing to give up their own lives in order to harm the United States and things “American.”

This search for the next terrorist has affected many of us most profoundly in the context of airport security. In an ideal world, perhaps, there would be a “terrorist screening device” through which all airport passengers would have to pass; it would search not only the person’s

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belongings for potentially dangerous weapons, but would also unerringly read the passenger's mind to determine whether he or she plans to hijack the next flight—a souped-up "lie-detector test," if you will.

Despite our twenty-first century advances, we have no such gadget (nor is any looming on the technological horizon)\(^2\) and we often settle for second-best solutions such as using race and citizenship as proxies for (dis)loyalty. When we use race and citizenship this way, we ask whether there is a particular kind of person who is disloyal, or a "disloyal type." In considering the utility of these factors, it might be helpful to look at analogous efforts by criminologists and sociologists to determine whether there is a classifiable "criminal type."

According to sociologist Jessica Mitford, prior to the end of the nineteenth century, people believed that the Devil was the cause of

\(^2\) Among the different technologies currently being developed are advanced explosive and trace metal detection machines, facial recognition systems, and fingerprint identification devices. See Karen Kaplan, Fighting Terrorism, L.A. TIMES, Sept. 20, 2001, at T1, available at 2001 WL 2519398; Guy Gugliotta, Tech Companies See Market for Detection, WASH. POST, Sept. 28, 2001, at A8, available at 2001 WL 28360472 ("For several years, cutting-edge identification and detection technologies have helped specialists in the battle against terrorism, but the Sept. 11 attacks on the Pentagon and the World Trade Center could transform these once exotic gadgets into everyday tools of airport safety."). Despite these developments, and recent non-technological advances aimed at fortifying airport security such as random screenings and covert military presence, flying is still not as safe as it could be. See, e.g., Romesh Ratnesar, How Safe Now?, TIME, May 27, 2002, at 34-35:

The congressional mandate to install 2,200 explosive-detection devices in all 429 airports by the end of the year has been scaled down; the new Transportation Security Administration does plan to buy almost 5,000 trace-detection devices. The TSA is having trouble recruiting more than 400,000 new screeners. So far, government-trained screeners have taken up positions in exactly one airport.

Id.

See also Richard Zoglin & Sally B. Donnelly, Welcome to America's Best-Run Airport (And Why It's Still Not Good Enough), TIME, July 15, 2002, at 22, 26-27 (noting that despite Denver International Airport's heightened security post-9/11, imperfections still exist in policies involving the profiling of passengers, bag matching, technology, luggage screeners, forgotten cargo, perimeter security, and crowd control). Perhaps a more important flaw is the government's inability to act quickly and decisively on intelligence. See, e.g., Michael Elliott, How the U.S. Missed the Clues, TIME, May 27, 2002, at 25 ("Everyone—inside the Bush administration as well as outside it—knew there had been massive failures of intelligence in the period before the [September 11] attacks.").

Of course, the terrorist threat extends well beyond securing the nation's airports. Political scientist Jessica Stern predicts that the most serious post-Cold War terrorist threat will come from the use of weapons of mass destruction—nuclear, chemical, and biological. See JESSICA STERN, THE ULTIMATE TERRORISTS 10 (1999):

While the probability of [weapons of mass destruction] terrorism is low, its expected cost—in lives lost and in threats to civil liberties—is potentially devastating. Government officials will be remiss—and will be blamed—if they do not take measures to reduce the likelihood and severity of the threat.

Id.
crime.\(^3\) She explains, however, that in the late 1800s, Cesare Lombroso, an Italian criminologist, insisted that criminals were born and could be identified by distinct physical and mental characteristics.\(^4\) Lombroso contended that "criminals have long, large, protruding ears, abundant hair, thin beard, prominent frontal sinuses, protruding chin, [and] large cheekbones."\(^5\) Mitford asserts that during the twentieth century, efforts to identify the criminal type persisted, but with bewildering results.\(^6\)

Mitford argues that obtaining a more realistic view of the criminal type requires examining the composition of the prison population.\(^7\) She explains that "[t]oday the prisons are filled with the young, the poor white, the black, the Chicano, [and] the Puerto Rican."\(^8\) Mitford opines that the reason certain groups are disproportionately repre-
sented in prisons and jails is that the only crimes available to the poor are those that are easily detected such as theft, robbery, and purse snatching. She also points to Professor Theodore Sarbin’s suggestion that the police are conditioned to treat certain classes of people—currently people of color, but formerly immigrants—as potentially more dangerous than others. She contends that in the American criminal justice system, a white person is more likely to be dismissed with a warning, but an African American is more likely to be arrested and imprisoned. Mitford concludes, “Thus it seems safe to assert that there is indeed a criminal type—but he is not a biological, anatomical, phrenological, or anthropological type; rather, he is a social creation, etched by the dominant class and ethnic prejudices of a given society.”

Mitford’s analysis rings true when we examine the less-than-careful finger pointing that ensued during the recently launched war on terrorism. In the days and weeks following 9-11, both the public and pundits alike approved of profiling airport passengers based on immutable characteristics such as race and national origin. A TIME/CNN reprinted in The Dilemmas of Corrections 24 (Kenneth C. Haas & Geoffrey P. Alpert eds., 3d ed. 1995).


10. Id. at 53, reprinted in The Dilemmas of Corrections 26 (Kenneth C. Haas & Geoffrey P. Alpert eds., 3d ed. 1995). Mitford examines a 1970 study by a sociology class at the University of California at Los Angeles. A dozen students with perfect driving records were selected for the experiment. The students were told to drive as they normally did, but with phosphorescent bumper stickers reading “Black Panther Party” attached to their cars. Mitford explains that in the first seventeen days of the study, the students accumulated thirty driving citations such as failure to signal and improper lane changes. The author goes on to write that “[t]wo students had to withdraw from the experiment after two days because their licenses were suspended; and the project soon had to be abandoned because the $1,000 appropriation for the experiment had been used up in paying bails and fines of the participants.” Id.


12. Id.

poll from the fall of 2001 revealed that fifty-seven percent of all Americans were willing to allow the government to discriminate on the basis of race, gender, and age during airport searches. And the government has breathed life into this sentiment. As Professors Susan Akram and Kevin Johnson carefully detail in their recent article, thousands of Muslim and Arab immigrants have been detained and questioned by federal authorities, all without producing any direct evidence of their terrorist affiliation. Even those skeptical that race and citizenship profiling might work have argued that, on balance, it should be used discreetly. As Michael Kinsley, editor of the cyberzine Slate, contends: “But assuming [racial profiling works], it’s hard to argue that helping to avoid another September 11 is not worth the imposition, which is pretty small: inconvenience and embarrassment, as opposed to losing a job or getting lynched.”

Kevin Johnson predicts that with continuing immigration from Latin America and Asia, more domestic civil rights controversies at the intersection of race and immigration will likely emerge. See Kevin R. Johnson, The End of “Civil Rights” As We Know It?: Immigration and Civil Rights in the New Millennium, 49 UCLA L. REV. 1481, 1482 (“With a growing foreign-born population, comprised predominantly of people of color, joining established minority communities in this country, new and different civil rights issues have emerged and will continue to do so for the foreseeable future.”). Indeed, the Justice Department’s recent legal ruling to allow the INS to supplement its forces with state police might lead to more clashes between immigrants and law enforcement. See, e.g., Eric Schmitt, Ruling Clears Way to Use State Police in Immigration Duty, N.Y. TIMES, Apr. 4, 2002, at A19, available at http://www.nytimes.com (last visited Feb. 12, 2002) (“This would leverage a small number of federal law enforcement officers with much, much larger numbers of state and local police officers,” said Mark Krikorian, executive director of the Center for Immigration Studies, which advocates stricter limits on immigration.”); Noteworthy, 79 INTERPRETER RELEASES 388 (2002) (“Florida police and the INS are working on a memorandum of understanding (MOU) that would allow 35 police officers to become deputized immigration officers under an obscure provision of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA). The MOU will need approval from the Attorney General.”).

Daniel Eisenberg, How Safe Can We Get?, TIME, Sept. 24, 2001, at 88 (describing TIME/CNN poll in which 57% deemed “acceptable” the use of “profiling by age, race and gender to identify potentially suspicious passengers”).

Akram & Johnson, supra note 13, at 331-41. See also Somini Sengupta, Ill-Fated Path to America, Jail and Death, N.Y. TIMES, Nov. 5, 2001, at A1, available at http://www.nytimes.com (last visited Feb. 12, 2002) (noting that since September 11, over 1100 people have been picked up by law enforcement authorities and that approximately two hundred of those people have been held by the INS solely for violations of United States immigration laws).

Stuart Taylor adds that while he generally believes racial profiling to be deplorable,

I think people getting on airliners [is] a very special case. Unless you can thoroughly search everyone, which would be great, but it would take hours and hours and hours, it makes sense to search with special care those people who look like all of the mass murder suicide hijackers who did the deeds on September 11.17

Supporters of this view believe this to be an objective cost-benefit analysis. There is great benefit to preventing another terrorist attack and the cost to the innocent individual is minuscule, and certainly, not the same as losing a job or getting lynched.

A. Comparing 9/11 and 12/7

Or being interned in a wartime camp. In United States v. Korematsu, a majority of the Supreme Court upheld the internment of mostly U.S. citizens of Japanese descent, partly for the reasons that Taylor articulates. The Court was unwilling to substitute its judgment

Cf. Stanley Crouch, Drawing the Line on Racial Profiling, N.Y. DAILY NEWS, Oct. 4, 2001, at 41 (asserting that the current profiling of Arab Americans is different from profiling African Americans); Dorothy Rabinowitz, Hijacking History, WALL ST. J., Dec. 7, 2001, at A18 (contending that profiling Arab Americans is not the same as the forms of racial profiling that were used in the past). See also Ronald J. Sievert, Meeting the Twenty-First Century Terrorist Threat Within the Scope of Twentieth Century Constitutional Law, 37 Hous. L. Rev. 1421, 1454 (2000):

If, for example, England, Iran, or Latvia were either to enter into a shooting war with the United States or to initiate a campaign of terrorism against our nation, no one would seriously content that all individuals of English, Iranian, or Latvian ancestry were terrorists... This does not mean, however, that law enforcement officers would be engaging in illegal profiling or racism if they considered an individual's English, Iranian, or Latvian ancestry as one factor, among others, in deciding who to interview, stop, or search. In fact, it could be argued that officers were acting irresponsibly if they did not note a suspect's ancestry while attempting to protect a nation in the midst of such a violent conflict between the different societies.

Id. As one airport screener admitted to TIME magazine reporters:

For me, profiling is the only way to be conscientious in doing the job. I make decisions based on who I wouldn't like to be seated next to on an airplane. If someone is unkempt and nervous or if they look like they belong on a bus instead of a plane, if they wear a baseball cap backwards and, without question, if they look to be foreign or of Middle Eastern descent.

Zoglin & Donnelly, supra note 2, at 22. When asked about whether he would be suspicious of African Americans, the screener replied that that would be discrimination. Id. Recently, a plane carrying an Indian actress and her family suspected of being terrorists was escorted to LaGuardia airport by military fighter jets. The family's suspicious conduct? Upon seeing the famous New York skyline for the first time, family members chatted excitedly about the sights, changing seats so each could have a peek through the window. A nervous passenger reported this conduct that was then relayed to airport authorities, leading to the jet fighter escorts. See Lydia Polgreen, Bollywood Farce: Indian Actress and Family Are Detained, N.Y. TIMES, July 18, 2002, at B1, available at http://www.nytimes.com (last visited Feb. 12, 2003).

for the military's about the possibility of a West Coast invasion by Japan. But as Justice John L. Murphy pointed out in dissent, the underlying rhetoric employed by the internment camps' chief enforcer, General Frank DeWitt, sounded more in stereotypical conceptions of who might be disloyal than in statistical fact:

Further evidence of the Commanding General's attitude toward individuals of Japanese ancestry is revealed in his voluntary testimony on April 13, 1943, in San Francisco before the House Naval Affairs Subcommittee to Investigate Congested Areas: . . . “I don't want any of them (persons of Japanese ancestry) here. They are a dangerous element. There is no way to determine their loyalty. The west coast contains too many vital installations essential to the defense of the country to allow any Japanese on this coast . . . . The danger of the Japanese was, and is now—if they are permitted to come back—espionage and sabotage. It makes no difference whether he is an American citizen, he is still a Japanese. American citizenship does not necessarily determine loyalty . . . . But we must worry about the Japanese all the time until he is wiped off the map. Sabotage and espionage will make problems as long as he is allowed in this area . . . .”

While admittedly, interning Japanese Americans is not the same as asking Arab noncitizens more questions at the airport, the underlying rhetoric is surprisingly similar. During World War II, as now, the public and government were willing to use proxies for disloyalty as a means to safeguard national security, despite the cost to innocent persons swept into the dragnet.

And, as Professors Akram and Johnson contend, the government has gone beyond airport profiling to arrest and detain many Muslims

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18. United States v. Korematsu, 323 U.S. 214 (1944). Justice Black, writing for the Court, noted that Korematsu had been convicted of remaining in a “Military Area” in violation of Civilian Exclusion Order No. 34, which provided that all persons of Japanese ancestry must be excluded from that area. Id. at 215-16. He stressed that laws curtailing the civil rights of a single social group were immediately suspect and would be subjected to the most rigid scrutiny. Id. at 216. He asserted, however, that public necessity could sometimes justify such laws. Id. Justice Black claimed that the defendant was excluded from the Military Area, not because of his race, but because the United States was at war with Japan, and because military authorities, fearing an invasion of the West Coast, felt compelled to take proper security measures. Id. at 223. He further stated that Korematsu was excluded because the military determined that the urgency of the situation required that all people of Japanese descent be segregated temporarily from the West Coast, “and finally, because Congress, reposing its confidence in this time of war in our military leaders — as inevitably it must — determined that they should have the power to do just this.” Id.

19. I thank Professor Frank Wu for his many thoughtful contributions to the YLOPEARL listserv that led to my comparing General DeWitt's rhetoric with both the post-September 11 debate on racial profiling and Justice Story's commentary on the Presidential Eligibility Clause.

20. Korematsu, 323 U.S. at 236 n.2 (Murphy, J., dissenting).
in a sweep reminiscent of the Japanese internment.\textsuperscript{21} Akram and Johnson report that in the weeks following the attack on the World Trade Center, the U.S. government arrested and detained roughly one thousand noncitizens, with Pakistanis and Egyptians most greatly represented.\textsuperscript{22} This dragnet, however, apparently did not reveal any direct links to the terrorist acts.\textsuperscript{23} Undeterred, the Justice Department sought interviews with an additional five thousand men, most of whom were Arab or Muslim between the ages of eighteen and thirty-three, who had come to the United States on non-immigrant visas since January 1, 2000.\textsuperscript{24} Akram and Johnson maintain that no evidence existed that any of those men were involved in terrorist activities.\textsuperscript{25} They conclude, therefore, that “the legal measures taken by the federal government reinforce deeply-held negative stereotypes—foreignness and possibly disloyalty—about Arabs and Muslims.”\textsuperscript{26}

The psychological costs of race and citizenship-based suspicion should not be underestimated. Social psychologists and critical-race theorists have long documented the damage done by prejudice admin-
istered in small doses—microaggressions, as they are called. Just as the exclusion of those of Japanese ancestry signaled their outsider status in a physical way, the targeting of Muslim and Arab immigrants post-September 11 sends the same message, albeit in psychological form. As lawyers and law students, we know from our first-year torts course that emotional distress may be just as harmful as physical injury. Indeed, as many critical scholars have demonstrated, stereo-

27. These are subtle, stunning, often automatic, and non-verbal exchanges which are “put downs” of blacks by offenders. Psychiatrists who have studied black populations view them as “incessant and cumulative” assaults on black self-esteem. Microaggressions simultaneously sustain defensive-deferential thinking and erode self confidence in Blacks . . . . [By monopolizing . . . perception and action through regularly irregular disruptions, they contribute] to relative paralysis of action, planning and self-esteem. They seem to be the principal foundation for the verification of Black inferiority for both whites and Blacks. The management of these assaults is a preoccupying activity, simultaneously necessary to and disruptive of black adaptation. [The black person’s] self-esteem suffers . . . because he is constantly receiving an unpleasant image of himself from the behavior of others to him. This is the subjective impact of social discrimination . . . . It seems to be an ever-present and unrelied irritant. Its influence is not alone due to the fact that it is painful in its intensity, but also because the individual, in order to maintain internal balance and to protect himself from being overwhelmed by it, must initiate restitutive maneuvers . . . —all quite automatic and unconscious. In addition to maintaining an internal balance, the individual must continue to maintain a social facade and some kind of adaptation to the offending stimuli so that he can preserve some social effectiveness. All of this requires a constant preoccupation, notwithstanding . . . that these adaptational processes . . . take place on a low order of awareness. Vigilance and psychic energy are required not only to marshall adaptational techniques, but also to distinguish microaggressions from differently motivated actions and to determine “which of many daily microaggressions one must undercut.”


28. DAN B. DODDS, THE LAW OF TORTS 821 (2000) (“Courts have long recognized that tortfeasors should be responsible for causing distress, emotional harm, anxiety, diminished enjoyment, losses of autonomy, and similar intangible harms . . . . All such [distress or emotional] harms are real. They represent the antithesis of happiness or enjoyment of life which everyone pursues.”).


The evacuated Japanese Americans, including U.S. citizens, were presumed to be sufficiently foreign for an inference by the military that such racial-foreigners might be disloyal. Japanese Americans were therefore characterized as different from the African American racial minority. With the presence of racial foreignness, a presumption of disloyalty was reasonable and natural.

types of foreignness seem to follow racial patterns: Latinas and Asians are perpetually foreign; European and African Americans are not. These narratives help explain General Dewitt's otherwise seemingly anachronistic assessment: "The danger of the Japanese was, and is now... espionage and sabotage. It makes no difference whether he is an American citizen, he is still a Japanese. American citizenship does not necessarily determine loyalty."

B. Why Racial and Citizenship Proxies Are Irrational

But what of the claim that there is a rationality to racial and citizenship profiling? That is, doesn’t it make sense to stop all Muslim and Arab immigrants because after all, all the September 11 terrorists were Muslim and Arab? There are at least four responses to this point: First, as Professor David Harris documents in great detail in his recent book, Profiles in Injustice, federal and state officials who have studied racial profiling conclude that it does not lead to better law enforcement. For example, a General Accounting Office report of U.S. Customs Service procedures in 1997 and 1998 revealed that customs officers were less effective when they relied on race and gender profiles in conducting searches for contraband than when they did not, prompting Customs to require better oversight of officer actions.

Second, even assuming that racial profiling is marginally effective, shouldn’t we expand our profiles to target non-Arab terrorist types as

‘wetback,’ is a Mexican who has sneaked into the United States in the dark of night. The image in the minds of many is that of a poor, brown, unskilled young male. . . .”).

30. Korematsu, 323 U.S. at 236 n.2 (Murphy, J., dissenting).

31. John Derbyshire, A (Potentially) Useful Tool, 12 The Responsive Community, Winter 2001-02, at 67, 69-70 (arguing that racial profiling should be used along with other criteria within context of airport security); Dinesh D'Souza, The End of Racism 259 (1995) (describing racial profiling as “rational racism”); Stephen J. Singer, Racial Profiling Also Has a Good Side, Newsday, Sept. 25, 2001, at A38 (arguing that race, along with other factors, can indicate that further investigation is needed); Editorial, Profiling Debate Resumes, Denver Post, Oct. 3, 2001, at B6 (asserting that race should be considered in finding law enforcement targets).


well? We know, for instance, that the Abu Sayyaf group in the southern Philippines has links to Al-Qaeda, hence America’s military involvement in that country’s affairs. Should we begin profiling Filipino and Filipino-looking individuals at airports—which would include yours truly? After all, our terrorist profiles should be inclusive, not exclusive. (Ironically, focusing excessively on a “foreign terrorist” profile might be exactly what Al-Qaeda wants: Osama bin Laden aide Abu Zubaydah has apparently instructed terror recruits to “shave their beards, adopt Western clothing and ‘do whatever it takes to avoid detection and see their missions through.’” Indeed, one of the few proven terrorists to date is John Walker Lindh, a European American—not an Arab, and not a noncitizen."

Third, given the importance of profiling in the war against terrorism, shouldn’t we advocate profiles in other law enforcement contexts, which would require us to strictly scrutinize white, rural school children in the school shooting (a.k.a. “Columbine”) context; rich, white males for white-collar crimes such as embezzling and corporate fraud (think: “Enron”); and disenfranchised white male spies like Aldrich


35. Massimo Calabresi & Romesh Ratnesar, Can We Stop the Next Attack?, Time, Mar. 11, 2002, at 27.

Ames in the counterespionage game? To the extent that disloyalty encompasses a general disrespect for our criminal laws, racial profiling of whites should occur if the statistics suggest links between ethnicity and specific crimes.

Fourth and finally, the next successful terrorist will likely thwart any profile we create. While I have no problem using specific, accurate information—including race and citizenship—to find a suspect accused of a crime such as was done to eventually apprehend the Unabomber, as a practical matter, profiles will not capture the next successful terrorist because he or she will thwart the profile. Indeed,


But, if prejudging—good old fashioned prejudice—hasn’t stopped for black Americans and Latinos, why should it stop for Arabs? It has stopped for Jews and never started for Christians. When Ivan Boesky and Michael Milken did their dirty financial deeds, the Jewish community didn’t get nasty looks or rocks through their windows from the rest of us. When Christian minister Paul Hill fatally shot abortion doctor John Britton in Pensacola, we didn’t burn Islamic crescents or Stars of David on the lawns of Christians. While a lot of minority groups still suffer from bigotry, the only group that some political observers still dare defame in public are the Arabs.

38. Even within this context, using race as a factor should not lead to an overreliance on that one trait. In Brown v. City of Oneonta, the Second Circuit upheld the questioning of over two hundred persons of color based on victim testimony that the fugitive was African-American. See Brown v. City of Oneonta, 221 F.3d 329 (2d Cir. 1999), cert. denied, 122 S. Ct. 44 (2001). Contrary to the Brown case, I believe courts should more strictly scrutinize police tactics to discern whether too much emphasis was placed on race or any other single characteristic. Accord Kevin R. Johnson, U.S. Border Enforcement: Drugs, Migrants, and the Rule of Law, VILL. L. REV. 897, 903 (2002) ("[E]ven though race may be a logical factor to consider under [certain] circumstances, police may rely excessively on race in criminal investigation and emphasize it over all else.") (emphasis in original).

39. As Professor Harris notes, despite current law enforcement’s best efforts to eliminate racial and ethnic profiling from its training, the average police officer still receives much information on criminal types, including drug couriers, which have an ethnic or racial component: "In 1999, a DEA intelligence report identified those it suspected of involvement in the heroin trade. 'Predominant wholesale traffickers are Colombian, followed by Dominicans, Chinese, West African/Nigerian, Pakistani, Hispanic, and Indian.'" HARRIS, supra note 32, at 49.

The Supreme Court has upheld the use of race as a factor in the border patrol stops against a Fourth Amendment challenge. See United States v. Brignoni-Ponce, 422 U.S. 873 (1975). The Court has not addressed, however, whether racially-motivated police enforcement violates the Fourteenth Amendment’s Equal Protection Clause. See Whren v. United States, 517 U.S. 806, 813 (1986):

We of course agree with petitioners that the Constitution prohibits selective enforcement of the law based on considerations such as race. But the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection
the next terrorist might not even know she is one. In 1986, Israeli
officials found a bomb hidden in the luggage of an Irish woman who
reported that her significant other was Jordanian.40

III. PROXIES FOR LOYALTY: THE PRESIDENTIAL ELIGIBILITY
CLAUSE AND THE IMMIGRANT FOUNDER EXCEPTION

Now that we have explored one extreme on the "(dis)loyalty" spec-
trum, let's examine the other: what it means to be "loyal." The issue
here is the opposite of the terrorism question. If we believe that the
paradigm example of loyalty should be the President, the question be-
comes, "What qualities must a President possess to demonstrate loy-
alty to her nation?" The Founders contemplated this exact question
by passing the following resolution on July 26, 1787:

Resolved That it be an instruction to the Committee to whom were
referred the proceedings of the Convention for the establishment of
a national government, to receive a clause or clauses, requiring cer-

Clause, not the Fourth Amendment. Subjective intentions play no role in ordinary,
probable-cause Fourth Amendment analysis.

Id. Outside the Fourth Amendment context, the Court has distinguished between illegitimate
status-based laws and law enforcement techniques—of which racial and citizenship profiling are
a type—and legal conduct-based measures. Compare Robinson v. California, 370 U.S. 660, 666
(1962) ("[W]e deal with a statute which makes the 'status' of narcotic addiction a criminal of-

fense . . . ."). with Powell v. Texas, 392 U.S. 514 (1968) (holding case outside scope of Robinson
because defendant was convicted not for being a chronic alcoholic, but for being in public while
intoxicated); Bowers v. Hardwick, 478 U.S. 186, 192 (1986) (noting that "proscriptions against
("[Amendment 2] is a status-based enactment [based on sexual orientation] divorced from any
factual context from which we could discern a relationship to legitimate state interests.").

40. See Associated Press, Prosecutor Ties Syria to El Al Bomb Attempt, L.A. TIMES, Oct. 6,
1986, at 2, available at 1986 WL 2151283:

Prosecutor Roy Amlot said Nezar Hindawi, a Jordanian accused of planting a bomb in
the suitcase of his pregnant Irish girlfriend, told police he had met the head of Syrian
military intelligence in Damascus and had agreed to carry out attacks on Israeli targets
for money and preferential treatment at Syrian universities.

Id. See also Lisa Beyer, Israel’s El Al Airline: Is This What We Really Want?, TIME, Sept. 24,
2001, at 91 (noting that the bomb was discovered as a result of El Al Airline’s practice of em-
ploying teams of agents to interrogate passengers for anywhere from twenty minutes to two
hours in order to discover any inconsistencies in terrorists’ made-up stories or to discover people
who may be unwitting accomplices). At a June 5, 2002 press conference, Attorney General
Ashcroft announced heightened immigration requirements for nationals of certain countries.
Fingerprinting, photographing, and registration requirements have been imposed on all visitors
from Iran, Iraq, Libya, Sudan, and Syria among others. See Attorney Gen. Announces Reg. Re-
quiring Registration, Monitoring of Certain Nonimmigrants, 79 INTERPRETER RELEASES 899
(2002). As the Israeli experience with the unsuspecting girlfriend “terrorist” suggests, perhaps
this requirement should be imposed upon all nonimmigrants, if not all persons within the United
States, as the case of John Walker Lindh bears out. See supra note 36 and accompanying text.
Of course, such a requirement would be extremely costly to implement, but such an inconve-
nience might be worthwhile if it leads to enhanced intelligence without compromising civil
liberties.
tain qualifications of landed property and citizenship in the United States for the Executive, the Judiciary, and the Members of both branches of the Legislature of the United States.[41]

Just as we have no technology for divining the next terrorist, nor do we have a device for helping us select the most loyal person for President. As in our terrorism calculus, we rely on proxies for loyalty. In the context of the Presidency, Article 2, Section 1, Clause 5 of our Constitution requires that the President be a natural born citizen or a citizen of the United States at the time of the adoption of the Constitution. So, while naturalized citizens were originally eligible for this highest executive office, this provision was intended to specifically reward those Founders who were immigrants. Indeed, in its initial draft, the conventioneers drew no distinction between “natural born” and “naturalized,” using the single term “citizen.” That they changed the text to differentiate between the two suggests that natural born citizens were more presumptively loyal than naturalized ones.

This interpretation is supported by Joseph Story in his famous commentaries on the Constitution. Story noted in 1833 that this “immigrant Founder” exception was:

doubtless introduced (for it has now become by lapse of time merely nominal, and will soon become wholly extinct) out of respect to those distinguished revolutionary patriots, who were born in a foreign land, and yet had entitled themselves to high honours in their adopted country. A positive exclusion would have been unjust to their merits, and painful to their sensibilities. But the general propriety of the exclusion of foreigners, in common cases, will scarcely be doubted by any statesman. It cuts off all chances for ambitious foreigners, who might otherwise be intriguing for office; and interposes a barrier against those corrupt interferences of for-

42. The Clause provides:

   No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President: neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.

   U.S. Const. art. II, § 1, cl. 5.

43. The misplaced commas in the clause have led some to argue (perhaps cynically) that the qualified “at the time of the adoption of this constitution” applies to both natural born and naturalized citizens, leading to the conclusion that Zachary Taylor was the last legitimate president of the United States. See Jordan Steiker et al., Taking Text and Structure Really Seriously: Constitutional Interpretation and the Crisis of Presidential Eligibility, 74 Tex. L. Rev. 237 (1995).
44. Farrand, supra note 41, at 563. The conventioneers’ initial draft provided that “he shall be of the age of thirty five years, and a Citizen of the United States, and shall have been an Inhabitant thereof for Twenty one years.” Id.
eign governments in executive elections, which have inflicted the most serious evils upon the elective monarchies of Europe.\footnote{Joseph Story, 3 Commentaries on the Constitution § 1473 (1833). Story also observed that the exception created for the immigrant Founders was a departure from the policy exercised by all governments of excluding foreign influence from executive councils and duties. Id.}

Specifically, Story referred to the nations of Germany and Poland as examples of executive governments unduly influenced by foreign forces.

Story's rhetoric shares a striking similarity to General DeWitt's: Both describe the need to distinguish the loyal from the disloyal—DeWitt suggested that the Japanese be "wiped off the map;"\footnote{Korematsu, 323 U.S. at 236 n.2 (Murphy, J., dissenting).} Story advocated the establishment of a "barrier" against foreign influence.\footnote{Story, supra note 45, § 1473.} Both acknowledged the permanency of foreignness—DeWitt argued that a Japanese person was always disloyal even if a naturalized citizen;\footnote{Korematsu, 323 U.S. at 236 n.2 (Murphy, J., dissenting).} Story draws no clear distinction between naturalized citizen and foreigner, stating only that he believes that the immigrant Founders had earned the designation "loyal," rendering them fit to be President, in what Story believed to be a narrow exception to the general rule.\footnote{Story, supra note 45, § 1473.}

But perhaps the most telling feature of Story's commentary is his remark that to not exempt the immigrant Founders would have been "unjust to their merits, and painful to their sensibilities."\footnote{Id.} Put another way, the immigrant Founders had demonstrated that, even though they were presumptively disloyal and foreign, they were actually good Americans worthy of being President. Contrast this observation with Kinsley's earlier evaluation that the harm visited upon innocent victims of post-September 11 airport racial profiling was "pretty small: inconvenience and embarrassment, as opposed to losing a job or getting lynched."\footnote{Kinsley, supra note 16, at 66.} It seems to me that one could easily imagine switching Story's and Kinsley's rationales to argue for not exempting naturalized citizens at the time of the Founding, on the one hand, and to argue against racial profiling, on the other. Paraphrasing Story, post-September 11 racial profiling is "unjust to [the] merits" of Muslim and Arab peoples and "painful to their sensibilities."\footnote{Story, supra note 45, § 1473.} Citing Kinsley, excluding the immigrant Founders from the Presidency visits
a harm that is “pretty small: inconvenience and embarrassment, as opposed to losing a job or getting lynched.”

Yet most people’s reactions are similar to Story’s and Kinsley’s, rather than the other way around. Even though most agree that race and citizenship are, at best, imperfect proxies for loyalty, many are willing to tolerate post-September 11 terrorist profiling on the basis of race, while not too many get excited about amending the Constitution to rid it of the birthright/naturalized citizen distinction in the Presidential Eligibility Clause. Whenever I have discussed the natural born citizenship requirement, whether in Constitutional Law, Immigration Law, or Racism and Law courses, there is universal agreement that the clause makes no sense in this modern age. In a well-known law review symposium on the stupidest provisions of the Constitution, two leading scholars—Randall Kennedy and Robert Post—indipendently selected the natural born citizenship clause as the worst. Aside from the clause’s inability to accurately measure loyalty, it disproportionately precludes persons of color from the Presidency, since most naturalized citizens today are from Asia and Latin America. Indeed, the

54. See Randall Kennedy, A Natural Aristocracy?, 12 CONST. COMMENT. 175, 176 (1995) (“This idolatry of mere place of birth seems to me an instance of rank superstition. Place of birth indicates nothing about a person’s willed attachment to a country, a polity, a way of life.”); Robert Post, What is the Constitution’s Worst Provision?, 12 CONST. COMMENT. 191, 193 (1995) (“Because allegiance is a matter of voluntary commitment rather than birth, it should not systematically differ as between naturalized and natural born citizens.”).

Post-September 11, the United States is not alone in its distrust of foreigners. Amnesty International reports that the following countries and groups of nations have engaged in a “clampdown on foreigners: denial of right to asylum, harsher treatment of asylum seekers, or mass deportations:” the European Union, the Arab League, Canada, Germany, Denmark, United Kingdom, Kazakhstan, Kyrgyzstan, Hungary, Greece, Yemen, Mauritius, South Korea, and Australia. See Amnesty International USA, Responses to Terrorism, AMNESTY NOW, Summer 2002, at 16-17 (map depicting various nations’ responses to terrorism).

55. Thanks to Kevin Johnson for this idea. E-mail from Kevin R. Johnson, Professor of Law and Associate Dean for Academic Affairs, U.C. Davis School of Law, to Victor C. Romero, Professor of Law, The Pennsylvania State University (Mar. 11, 2002) (on file with author) [hereinafter Johnson E-mail].

Large Asian and Latin American migration has not always been the norm. The late 1840s saw the first major immigration to the United States since independence. It drew a little more than five million people, mostly Europeans, from the United Kingdom, Ireland, Germany, and Scandinavia before it peaked in the 1880s. The next wave peaked in the first decade of the 1900s. More than nine million Italians, Poles, and eastern European Jews immigrated to the United States. The Great Depression and World War II virtually cut off immigration to this country. However, after the end of World War II, immigration to the United States began again and has since steadily increased. See Jeffrey S. Passel & Michael Fix, U.S. Immigration in a Global Context: Past, Present and Future, 2 IND. J. GLOBAL LEGAL STUD. 5 (1994). Passel and Fix assert that “[i]mmigration has profoundly affected the character of the United States at several key points in the nation’s history, notably the colonial period, mid-nineteenth century, early twentieth century, and the last twenty-five years.” Id. at 7.
clause's effect on naturalized citizens of color is not unlike how the disenfranchisement of felons disparately impacts the African-American community. Yet, when I ask my students whether they think a constitutional amendment to get rid of the birthright/naturalized citizenship distinction would pass, they uniformly express pessimism about such a project.

I am troubled by what such indifference suggests about America's priorities when we are quick to racially profile post-September 11 despite its inaccuracy, and yet are unwilling to eliminate the birthright citizenship distinction in the Presidential Eligibility Clause despite its inanity. In a sense, I am speaking out of self-interest as one of many naturalized citizens of color who would theoretically fit the negative stereotypes in both the terrorism and Presidential eligibility contexts: Being Filipino by national origin, I fit the Abu Sayyaf terrorist racial profile, and being a naturalized citizen (but not an immigrant Founder) I am presumptively disloyal and therefore ineligible for the Presidency. But I do not think of myself as anything but a loyal American. While my parents and siblings still live in the Philippines, I thought long and hard about where my loyalties lay when I took my U.S. citizenship oath in 1995. I took seriously the charge that I disavow allegiance to any foreign potentate. In the unlikely event that the Abu Sayyaf take over the Philippines and the United States declares war, I am ready to serve in the U.S. Armed Forces, if conscripted

Most of the immigrants that make up this current wave are from Latin American and Asia. According to the 1999 Statistical Yearbook of the Immigration and Naturalization Service, Mexico was the leading country of origin for legal immigrants in 1999, with 147,573. The other chief countries of origin for legal immigrants included the People's Republic of China (32,204), the Philippines (31,026), India (30,237), and Vietnam (20,393). The leading country of birth of people naturalizing in 1999 was Mexico, at 207,750. The other major countries of birth for persons naturalizing included Vietnam (53,316), the Philippines (38,944), the People's Republic of China (38,409), India (30,710), Jamaica (28,604), Cuba (25,467), the Dominican Republic (23,089), El Salvador (22,991), and Haiti (19,550). 1999 STATISTICAL YEARBOOK OF IMMIGRATION AND NATURALIZATION SERVICE (1999), available at http://www.ins.usdoj.gov/graphics/aboutins/statistics/FY99Yearbook.pdf (last visited Feb. 12, 2003).

56. Thanks again to Kevin Johnson for this idea. See Johnson E-mail, supra note 55. Professor John Calmore notes that there are 1.5 million disenfranchised African Americans; Maine, Massachusetts, and Vermont are the only states that do not disenfranchise offenders while they are in prison. Thirty-two states deny parolees the right to vote, and twenty-nine states disenfranchise probationers. In nine states, felons are precluded from voting for the rest of their lives. See John O. Calmore, Race-Conscious Voting Rights and the New Demography in a Multiracing America, 79 N.C. L. Rev. 1253, 1274 (2001). Calmore argues that the disproportionate impact felon disenfranchisement has on African Americans is a consequence of the United States's mass incarceration. He asserts that, in addition to denying felons the right to vote, disenfranchisement "constitutes vote dilution to the black community." Id. at 1256.

57. As a practical matter, the only limitation to this would be the "dual citizen," because if the United States should be at war with the country with whom the President also enjoys citizenship status, there would obviously be a conflict of interest.
(which, by the way, naturalized citizens and immigrants are subject to under federal law). Yet, somehow, these reassurances do not rebut the presumption of my disloyalty to qualify me for the Presidency.

Although, fortunately for my wife and kids, I do not aspire to be either a terrorist or U.S. President, the question remains: Why are most Americans willing to tolerate race and citizenship profiling in the contexts of battling terrorism and determining Presidential eligibility, despite an acknowledgment by most that both are far from perfect proxies for loyalty?

Not surprisingly, critical-race theorists and social psychologists teach us that we tend to think of those who are different—that is, racial and noncitizen outsiders—as disloyal. Hence, those who are nonwhite and noncitizens are presumptively suspect. Conversely, we believe that those who are similar to us are more loyal and hence, less suspect. As psychologist Gordon Allport explained in his path-breaking work, *The Nature of Prejudice*, every individual draws distinctions between in-groups and out-groups for survival:

[In-group] memberships constitute a web of habits. When we encounter an outsider who follows different customs we unconsciously say, “He breaks my habits.” Habit-breaking is unpleasant. We prefer the familiar. We cannot help but feel a bit on guard when other people seem to threaten or even question habits. Allport contends, however, that in-groups can be cohesive without being antagonistic toward out-groups: “Narrow circles can, without conflict, be supplemented by larger circles of loyalty.” Hence, the Presidency of the United States should be open to both birthright and naturalized citizens (a larger circle of citizenship), even though immi-

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58. See 50 U.S.C. § 453 (1994). One of my symposium co-participants, Esther Lopez of the AFL-CIO, pointed out the irony of post-September 11 security policy: While new government regulations require that airport baggage screeners must be U.S. citizens, the soldiers assigned to safeguard the airports—and assigned firearms to accomplish the task—need not be. Esther Lopez, AFL-CIO, Comments During the Symposium at the DePaul Law Review (Mar. 9, 2002). Interestingly, while the Constitution requires that the President be a natural born citizen, the Supreme Court has found the denationalization of a wartime deserter to be an unconstitutional sanction under the Eighth Amendment. See Trop v. Dulles, 356 U.S. 86 (1958). The defendant in *Trop* was a soldier whose citizenship was taken away after he was convicted by court martial of wartime desertion. *Id.* at 87. When Trop was unable to obtain a passport because he was not a citizen of the United States, he sued seeking a judgment restoring his citizenship. *Id.* at 88. Chief Justice Warren, joined by Justices Black, Douglas, and Whittaker, declared that denationalization violated the cruel and unusual punishment clause of the Eighth Amendment. *Id.* at 101. Chief Justice Warren did not argue that taking away a person’s citizenship was excessive in relation to the crime of wartime desertion because wartime desertion was also punishable by death. *Id.* at 99. Rather, he asserted that denationalization subjected a person to a fate that the Eighth Amendment did not permit. *Id.*


60. *Id.*
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migration and nationality law distinguishes between U.S. citizens and noncitizens (a narrower circle). Similarly, airport security burdens should be visited upon all airline passengers (a larger circle of travelers) rather than only upon Muslims and Arabs (a smaller racial and religious circle).

But how do we convince the fifty-seven percent of Americans\(^6\) who were in favor of profiling in the fall of 2001 and the many more who are disinclined to eliminate the Presidential Eligibility Clause’s birthright/naturalized citizen distinction that drawing large circles of loyalty makes sense? The answer is that these citizenship and race distinctions are irrational proxies for loyalty. I contend that, even within the contexts of the “disloyal terrorist” and the “loyal President,” relying on race and citizenship as proxies for loyalty are so inaccurate that they are unnecessarily antagonistic to those in the racial and citizenship out-group. My suspicion is that those who fancy themselves loyal believe that there is a group of readily identifiable “disloyalists” whose racial and citizenship characteristics are different from theirs. Hence, the Arab or Muslim naturalized citizen is more likely a terrorist and least likely qualified to be President of the United States than the average white, Anglo-Saxon birthright citizen. The reality, of course, is that terrorists and Presidents come in all citizenships and colors (remember President Alberto Fujimori, a Peruvian of Japanese descent?) and, indeed the danger of assuming that the terrorist is someone who belongs to one group overlooks the possibility that the terrorist could come from the so-called non-terrorist group. Two examples are worth noting. After the Oklahoma City bombing, many terrorist experts immediately suspected Arab terrorists to be at fault, only to discover that the crime was perpetrated by two white men with links to racist hate groups.\(^6\)

Following September 11, deaths by anthrax led many to wonder whether al-Qaeda...
had struck again; some believe that the killers are probably domestic, right wing extremists. The lesson here is that the enemy—especially the terrorist enemy—can very easily be a member of the in-group capitalizing on public scrutiny of out-group behavior.

IV. CONCLUSION: SOME LESSONS FROM LITERATURE

Although admittedly nonscientific, I find Robert Louis Stevenson’s novel, Dr. Jekyll and Mr. Hyde, instructive on this point. In the book, the revered Dr. Jekyll recognized that each person has within him two personalities, one good and one evil. In the end, the evil persona, Mr. Hyde, triumphs because Dr. Jekyll underestimates his alter ego’s power, believing he can control Hyde by only unmasking him when it suited Jekyll’s purposes. Ironically, Jekyll’s belated realization that he had no control over his evil self occurred at a time when he was contemplating his own goodness:

After all, I reflected, I was like my neighbours; and then I smiled, comparing myself with other men, comparing my active goodwill with the lazy cruelty of their neglect. And at the very moment of that vainglorious thought, a qualm came over me, a horrid nausea and the most deadly shuddering. These passed away, and left me faint; and then as in its turn the faintness subsided, I began to be cans and Muslims said they feared they were becoming convenient scapegoats for outrage about international terrorism.”).

After September 11, the backlash against the Arab and Muslim community was staggering. See, e.g., David Van Biema, As American As . . . . TIME, Oct. 1, 2001, at 72-73 (“All told, the Council on American-Islamic Relations counts more than 600 ‘incidents’ since Sept. 11 victimizing people thought to be Arab or Muslim, including four murders, 45 people assaulted and 60 mosques attacked.”). In response, the Justice Department stated that it has investigated some 350 reported crimes against people of Middle Eastern or South Asian origin since the terrorist attacks last fall. See Associated Press, On Lookout for Retaliation, NEWSDAY, June 26, 2002, at A17, available at 2002 WL 2750758.

In an interesting twist post-Oklahoma City, the Southern Poverty Law Center has recently discovered links between Muslim terrorists and domestic neo-Nazi extremists based on their similar distaste for the U.S. government. For example, the Philadelphia-based American Front lauds Osama bin Laden as “one of ZOG [Zionist Occupation Government, the name many extremists give to the federal government, which they believe is run by Jews] and the New World Order’s biggest enemies.” Martin A. Lee, Southern Poverty Law Center, The Swastika and the Crescent, INTELLIGENCE REP., Spring 2002, at 18, 24.

63. See, e.g., Michael D. Lemonick, Lessons Learned, TIME, Dec. 31, 2001-Jan. 7, 2002, at 126, 128; see also Editorial, No Anthrax Answers This Year, WASH. POST, Dec. 31, 2001, at A16 (asserting that the anthrax appears to be of domestic origin); Marsha Kranes, Anthrax Probe Shifts to Homegrown Hate Groups, N.Y. POST, Oct. 25, 2001, at 4, available at 2001 WL 28045672 (“The FBI has feared an anthrax attack by domestic terrorists for years, with its concerns regularly fueled by hoaxes and false alarms.”). But see Peter Slevin, In Anthrax Probe, Questions of Skill, Motive, WASH. POST, Nov. 5, 2001, at A5, available at 2001 WL 29760105 (“Analysts who monitor militias and political movements on America’s far right doubt that any known domestic group was capable of launching the deadly anthrax that left four people dead and at least 12 others sickened.”).
aware of a change in the temper of my thoughts, a greater boldness, a contempt of danger, a solution of the bonds of obligation. I looked down; my clothes hung formlessly on my shrunken limbs; the hand that lay on my knee was cored and hairy. I was once more Edward Hyde. A moment before I had been safe of all men’s respect, wealthy, beloved . . . ; and now I was the common quarry of mankind, hunted, houseless, a known murderer, thrall to the gallows.  

Within Stevenson’s novel lies a cautionary tale for us all: the sooner we realize that each individual, regardless of race and citizenship, has the capacity for loyalty and disloyalty, the more quickly we will eschew both ancient and modern proxies for the same. For this reason, I join the many post-September 11 voices calling for an end to racial profiling in the context of terrorism deterrence. Additionally, I leave you with the following proposal: that Article I, Section 5, Clause 2 of the Constitution be amended to eliminate the distinction between natural born and naturalized citizens, requiring only that the President be a “Citizen of the United States.”

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64. Robert Louis Stevenson, Dr. Jekyll and Mr. Hyde 82-83 (1994). I thank the Rev. Dr. Timothy Keller, Redeemer Presbyterian Church, for reintroducing me to this novel and its social justice implications.  

65. As mentioned earlier, the only practical limitation to this that I foresee would be ensuring that some dual citizenship exception be created. See supra note 57 and accompanying text.