

## Dallas Would-Be Bomber Hosam Smadi The Case for 287(g) and Exit Tracking

By Janice Kephart

The case of 19-year-old Jordanian would-be terrorist Hosam Smadi points to the value of a viable, robust exit-tracking program that would verify that a foreign national has departed the United States. This was the message of a front-page *New York Times* story entitled, accurately enough, “U.S. Can’t Trace Foreign Visitors on Expired Visas.”<sup>1</sup>

However, the Smadi case also dramatically highlights why empowering local law enforcement with immigration data and enforcement powers through the Delegation of Immigration Authority under 287(g) can stop a terrorist when the system has no other derogatory information.

If Smadi had not been unknowingly “working with” FBI undercover agents toward a plot to blow up the 1.2 million square foot, 60-story Dallas office tower Fountain Place on September 24, 2009, his illegal immigration status could have been the key to assuring that Smadi never got to the point of trying to bring down a building. How?

One way is that Immigration and Customs Enforcement (ICE) had (1) the intelligence to be able to verify that Smadi had not departed the United States through an exit-tracking program; (2) the authority to net Smadi (he was a minor up until he became a visa overstayer, losing his legal status around his 18th birthday); and (3) the means and location information to do so. The more promising scenario, however, and the more efficient one, would be local cops using 287(g) powers alongside Smadi’s traffic violation on September 10, 2009, to arrest him. He could then be referred to ICE and deported, never having a chance to attempt his horrifying plans.

### Smadi Facts

Hosam Smadi was pulled over by Ellis County, Texas, Deputy Sheriff Shane Thompson for a broken tail light at about 11:23 p.m. on September 10, 2009. Fourteen days later this same illegal overstayer thought he had followed the leadership of his “beloved Sheik Usama”<sup>2</sup> and detonated a car bomb in downtown Dallas, intending to have an impact similar to 9/11.

On the night of September 10, Deputy Sheriff Thompson’s squad car had a video camera rolling.<sup>3</sup> Smadi is seen as a small, demure figure standing in front of his headlights as Thompson asks him if he has insurance. Smadi says no. Nor does Smadi have a driver’s license. We do not know if he was asked for any other form of identification, which in this case would have yielded either a California ID card or a Jordanian passport with an expired length of stay, assuming he had those IDs with him. It certainly would have been protocol for Thompson to ask Smadi for some other form of identification.

The video next shows Thompson emerging from the squad car as the dispatcher tells him that a man by the name of Hosam Smadi is under investigation by the FBI for terrorism. Thompson looks in the open areas of the car for bomb materials and does not see anything, but prudently tells the dispatcher, “we’ll proceed with the arrest as planned, then.” As Smadi is handcuffed without incident and placed in the back of the police car, he politely asks, “Do you think I’ll be able to get out of jail tomorrow?” Thompson tells him, “Yes, probably.” Thompson did not know that the young man was an illegal overstayer, or that he owned a handgun and ammunition.

When Thompson returned to the station and completed Smadi’s arrest, a phone call with the FBI revealed that there were no outstanding arrest warrants for Smadi, and he was released the next morning. The head of the local FBI promptly visited the Ellis County Sheriff and filled him in on their investigation. The sheriff stood down, and the FBI investigation continued.

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We know now that two months earlier Smadi had carefully chosen his target for tactical, strategic, and political reasons. By July 16, 2009, Hosam Smadi decided on a “big fish” to target with the goal that the “strike will be certain and strong” and “millions of people will incur losses ... along with the psychological impacts for the loss of this beautiful building.” Smadi was hoping for 9/11-style destruction. On August 26, 2009, according to the FBI’s September 24, 2009, arrest warrant, Smadi discussed with an FBI undercover agent the significance, logistics and timing of the bombing:

SMADI stated that he would have preferred to do the attack on “11 September,” but decided to wait until after the month of Ramadan. SMADI confirmed with UCE3 [the FBI agent] that Ramadan ended on September 20, 2009, and he would “go ahead” with the attack after Eid [the post-Ramadan celebration]. SMADI showed UCE3 what he described as building plans and stated, “What I discovered is that this building, my dear sir, is the same building as September 11 in New York .... That it is a trade building.” SMADI further informed UCE3 that the building was approximately 60 stories and contained about five banks. SMADI and UCE3 discussed the bomb to be utilized and SMADI’s expectations of the explosion. When the subject of using a vehicle to deliver the bomb was discussed SMADI stated “... a wonderful thing ... like you say, I thought of it ... I want to enter to plant the bomb ... I will plant it in the ... foundations ... exactly under the building ... when it explodes, it will shake the foundations so that the building, if it is heavy in weight, tons, all that will come down.” SMADI further confirmed his intentions by stating “I want to bring down the building, God willing. I mean, like you say, we are strivers and mujahidin.”<sup>4</sup>

Smadi’s September 10 encounter with law enforcement did not sway him from his objective. Indicating his clear intentions to follow through with his plans to bring the all-glass Fountain Place complex to the ground, he told UCE3 on September 20, 2009, “Let the drums of victory be struck in our holiday. We know Allah is with us. We ask Him to bless our gift with His angels protecting and assisting us. On this day, I tell you that I am ready to receive the gift. I thank you.”

Four days later, after parking the vehicle filled with what he thought were explosives, Smadi tried to detonate the car bomb under Fountain Place with a cell

phone call. Instead, he called the FBI and was promptly arrested.

## 287(g) and Smadi’s Traffic Stop

The 287(g) program is designed for exactly the situation that Deputy Sheriff Shane Thompson found himself in a few minutes shy of September 11, 2009: catching a would-be terrorist. By the time local Texas law enforcement encountered Hosam Smadi, he was well on his way to carrying out what he hoped would be a spectacular second 9/11 by detonating a bomb remotely from the parking garage under Fountain Place. Catapulting himself into unpleasant notoriety, young Smadi quickly became a *New York Times* story about why we need an entry-exit program to deport overstays before they cause trouble. The story was right, and so was Lamar Smith (R-Texas), who touted the need for a viable entry-exit program after learning that Smadi had illegally stayed in the United States for over a year before his arrest by the FBI on September 24, 2009.

However, by the time Smadi got a year into overstay and a year closer to formulating and executing his terrorist desires, what mattered more was not whether ICE had been forwarded information that Smadi’s length of stay had expired and he had never left; such information might simply have been submerged in an ever mounting “to do” file. Rather, ICE likely — without other derogatory information (which they did have, as ICE agents are detailed to FBI Joint Terrorism Task Forces) — would not have followed up due to a lack of resources. Former DHS Assistant Secretary for Policy Stewart Baker elaborated on the issue of ICE resources in an October 12, 2009, blog posting,<sup>5</sup> so those points need not be discussed further here. What matters is that when Smadi was standing in his own headlights outside of his car on September 10, 2009, the deputy sheriff who stopped him should have been able to access immigration data showing that Smadi’s length of stay had expired and have been empowered — considering Smadi’s other traffic violations — to arrest him and turn him over to ICE.

287(g) could have stopped Smadi; literally, a terrorist caught in his own headlights. Luckily for Smadi, Ellis County, Texas, has not signed a Memorandum of Agreement with DHS to use 287(g) in their jurisdiction. And luckily for the American people, the FBI’s involvement in this particular case makes the issue of whether a local cop could have prevented another 9/11 — the exact same “might have been” argument used in regard to traffic stops of 9/11 hijacker Nawaf al Hazmi — moot.

However, if the FBI had not taken the initiative to brief the sheriff and provide the basis for releasing Smadi — for the purpose of continuing the terrorism investigation, no doubt — the sheriff likely would have released him anyway, since there is no indication Smadi's immigration violation was investigated independently by the Ellis County Sheriff's office. If the FBI had not been on to Smadi, we do not know whether Smadi could have brought Fountain Place down himself, but we do know he was trying.

To reiterate: Without the FBI's investigation and information-sharing, Smadi's illegal status may have been the only way to stop him and the Ellis County sheriff's office's lack of 287(g) authority would have been a serious lost opportunity. Fortunately, the FBI took the decision-making away from the sheriff's office. But we cannot count on just the FBI able to stop every terrorist, every time. While DHS Secretary Napolitano does not see the incident this way, we know in other criminal contexts Americans have died because violations like broken tail lights were not considered important enough to check immigration status.

The Smadi case is thus a glaring illustration of what is wrong with the Obama Administration's decision to try to limit localities to using 287(g) authority only in the case of "serious criminals," reducing opportunities to deport illegal aliens whose intentions may not otherwise be determined until after they do us damage.

The 287(g) program is designed to provide immigration data to trained state and local law enforcement officials so that they can act in concert with ICE.<sup>6</sup> As of the first two months of FY 2009, the program has resulted in more than 80,000 arrests of illegal aliens for removal at the state and local level. With 75 participating jurisdictions, its success was honored by the Obama Administration with a revised Memorandum of Agreement requirement placed on all jurisdictions constraining use of the program to detaining only "serious criminals" with immigration violations.<sup>7</sup>

In short, while the old MOAs are designed to nab illegal aliens in conjunction with local offenses, such as those of 9/11 hijacker al Hazmi or Smadi, the new MOA seeks to make that less likely. Both Smadi and al Hazmi would continue to go free under the new arrangement.

It seems a bit disingenuous for the Obama Administration to claim compliance with 9/11 recommendations when their underlying purpose, as Secretary Napolitano has made clear, is to use "better border enforcement [to] help make the case for immigration legislation" (i.e., amnesty).<sup>8</sup> While the 9/11 Commission did not take a stand on immigration

legislation, it did take a clear stand on issues such as information-sharing; state and local participation and support of national security matters; and robust enforcement of immigration law by assuring that people are who they say they are and are authorized to have the privileges they seek, or enter the places they want to go. The Commission even mentioned the value of 287(g):

In 1996, a new law [287(g)] enabled the INS to enter into agreements with state and local law enforcement agencies through which the INS provided training and the local agencies exercised immigration enforcement authority. Terrorist watchlists were not available to them. Mayors in cities with large immigrant populations sometimes imposed limits on city employee cooperation with federal immigration agents. A large population lives outside the legal framework. Fraudulent documents could be easily obtained. Congress kept the number of INS agents static in the face of the overwhelming problem.<sup>9</sup>

Repeating our pre-9/11 mistakes by once more bifurcating immigration enforcement to segmented areas is not helpful. Perhaps at some point, Secretary Napolitano will get the message that the 9/11 Commission recommendations only make sense if implemented in a consistent manner with an overall strategy truly committed to enforcement, not just its appearance.

### The Status of Exit-Tracking

Since 1996, Congress has been calling on the Immigration and Naturalization Service, and now the Department of Homeland Security's Bureau of Customs and Border Protection (CBP), to put in place a viable entry-exit program.<sup>10</sup> Since its implementation in January 2004, US VISIT has become a robust, highly useful tool to establish biometric-based entry records for those entering at air, sea, and, for a more limited set of travelers, at land ports of entry.<sup>11</sup> Ten fingerprints are now taken of most travelers at all air and sea ports of entry and a very small number of crossers at land borders and checked against criminal databases. Digital photographs are compared against visa applications or prior visits. Biographic data is checked against law enforcement and immigration data, some of which is obtained from countries participating in the visa waiver program. Passports are checked against data on lost and stolen documents obtained from Interpol and from most visa-waiver countries as part of the Bush Administration's "Security Enhancement"

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requirements built into visa-waiver agreements. These agreements provide for additional criminal data to vet applicants traveling to the United States.

However, exit tracking for years has remained mired in airline and border/trade opposition, as well as an inability to formulate a practical solution to acquiring adequate data reliably from all persons exiting. Doing so at the land borders seemed — and some argue still is — a near impossibility. But the air and sea ports are confined areas with limited pedestrian access and without some of the infrastructure concerns presented by narrow bridges, tunnels, and large vehicular volume at land ports of entry.

After 9/11, discussions revolved around a variety of possible solutions, with an initial look at airports. One idea included doing an exit add-on at check-in for international flights, but that was deemed inadequate because airlines would be wholly responsible for the processing and just because someone checks in does not mean that he or she actually will board a plane. Since 2004, exit pilot programs included self-check kiosks in international terminals at a dozen-plus airports. The technology worked, but travelers often did not comply. Then on April 28, 2008, the Bush Administration released a proposed rulemaking that placed an unfunded mandate on airlines, requiring “commercial air and vessel carriers ... to collect and transmit the [alien] biometric information to DHS” prior to departure.

This new rule was a significant change from the airlines’ usual (if antiquated) course of business. Swapping out the traditional procedures — a visual passport check and in-flight paper I-94 form — with a jetway-based, biometric exit requirement for which airlines would be responsible was a hard sell, even for those in favor of exit programs and airline involvement. Granted, the airlines are under a legal duty to check passports prior to departure and collect I-94 departure forms during flight, and can (and should be) fined for failures to abide by their obligations, but tasking them with a biometric requirement was beyond their budgets and capability. The airlines refused to even try to comply.

Congress, fed up, refused more appropriations to US VISIT until they found a pilot that worked. So from May 28 to July 2, 2009, Detroit and Atlanta International Airports became the latest guinea pigs. Detroit had CBP track exits during boarding, while Atlanta tested compliance procedures at the TSA security checkpoints. A notice was put out in the Federal Register that illuminated the task for the CBP pilot as follows:

CBP officers are conducting a pilot at the departure gate. The purpose of this pilot is to

evaluate the impact of collecting biometric information at or near the departure gate from aliens who are subject to US-VISIT biometric requirements departing the United States for foreign destinations. The biometric information consists of one or more electronic fingerprints captured using a mobile or portable device. The biographic information includes travel document information, such as name, date of birth, document issuance type, country, and number — all of which are contained in the document’s machine-readable zone (MRZ) of a machine-readable travel document (MRTD). CBP is following defined processes that minimize interference with the air carrier boarding process. This pilot will capture the cycle time necessary for the additional verification and collection of this biometric data from international travelers.<sup>12</sup>

“Additional objectives” for the evaluation were listed as follows:

- Evaluate identity verification and exit-recording solutions with existing port operations and infrastructure.
- Record the exit from the United States of each alien encountered during the exit pilots who is subject to US-VISIT biometric requirements at the designated airports.
- Update the individual records of each alien encountered during the exit pilots who is subject to US-VISIT biometric requirements in the Automated Biometric Identification System (IDENT) and the Arrival and Departure Information System (ADIS) with departure encounter information.

Until a final exit rule is in place, US-VISIT will continue using its entry data to match the paper exit data on file to help determine overstays and provide leads to ICE. According to US-VISIT, “FY 2008 had a match rate of 92.5 percent of biographic exit records to the individual’s previous entry record. So far in FY 2009, the number of overstays who were denied re-entry to the United States or denied a visa has increased 500 percent since FY 2007 because of the biographic exit analysis services provided by US-VISIT.”<sup>13</sup>

From source information gathered to date, the evaluation of the two exit-tracking pilot programs will likely conclude that while both the TSA and CBP models

were successful, the CBP pilot assured better compliance. If the CBP exit pilot was able to verify identity, record exit, and update alien biometric and departure records, this could be considered the long-awaited next step toward fulfillment of a 9/11 Commission recommendation and congressional intent. A good guess would be that known, reliable technology was used; data was secure and reliable; and compliance was extremely high.

One potential problem — considering the limited number of CBP inspection personnel — could be that CBP had a difficult time diverting US VISIT crews to departing jetways. However technology may help augment CBP manpower in the future. If the airlines support the solution, they would no longer be responsible for the technology or the departure other than to adjudicate the processing, producing a win-win from the airline and passenger perspective, and no further reason to resist compliance.

The goal should be that the White House approves the US VISIT evaluation in the coming weeks. That could mean a final rule — at least for air and sea ports — by spring 2010. That, of course, requires the White House to release the evaluation to Congress and Congress to approve full implementation and funding for the exit program. However, that remains in question, as DHS Secretary Napolitano has made clear her disinterest in the exit program.

Yet, the secretary will not likely be able to resist political pressure on this long-standing congressional priority. If there is desire from Secretary Napolitano to at least appear like she's proceeding with border security as a quid pro quo for President Obama's promises of amnesty, this should, this time, jibe with long-time Republican support for pursuing border security, and an exit program should find its way toward implementation and appropriation.

## Exit-Tracking and Smadi

Those miffed that another would-be terrorist turned out to be an illegal overstay — this time Smadi, whose tourist visa expired in August 2008 — have pointed out that a viable exit program would have alerted ICE to his status in August 2008, when his length of stay expired. One result could have been that ICE could have sent out a search team in August 2008 and deported Smadi before he began chatting about his desire to bring down tall glass buildings in Dallas with undercover FBI agents on an extremist Internet site. An exit program was included in 9/11 Commission recommendations as a step toward a more secure border.

Knowing an exit system is in place is in itself deterrence against overstays and provides proof that a person has left the country and thus, by deduction, who has not. A reliable program that cannot be easily jettisoned suggests there may finally be a solution to encourage the departure of those who may otherwise want to stay illegally. Of course, critics say, this does not solve the problem of the land ports of entry, where the increased physical infrastructure to accommodate an exit program may not be feasible. In addition, cost factors remain unknown. But for individuals who otherwise would not have the means or desire to leave the country by land, at least beginning exit tracking at the airports, like US VISIT was, would be a good start. And pedestrian traffic — which is heavy at southern land ports of entry — could easily be monitored using the air/sea exit model.

## Catching Terrorists

Over and over again, terrorists get stopped for traffic violations:

- Timothy McVeigh was caught after the Oklahoma City bombing after being stopped for driving without a license plate on his vehicle.
- 9/11 hijacker Nawaf al Hazmi was stopped for speeding in Oklahoma on April 1, 2001. The pilot of the Pentagon plane, Hani Hanjour, was likely in the car with Hazmi. There was no arrest warrant in the National Crime Information Center even though the CIA had been looking for him since 2000, because no other agency had been informed. Police did not check his immigration status, which, prior to 9/11, would have required a call to the Law Enforcement Support Center hotline in Vermont. Had such a call been made, it would have revealed he had been in the United States illegally since January 2001. Instead, he was given a ticket and sent on his way.
- Operational leader and World Trade Center pilot Mohamed Atta had a Florida warrant issued for his arrest on June 4, 2001, as he was a “no show” for a court appearance following a prior traffic offense.
- Pennsylvania pilot Ziad Jarrah was stopped for speeding on September 9, 2001, issued a \$270 ticket, and permitted to continue on to his destination. His length of stay had expired in July 2001.

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Most recently, it was Smadi. Whether an American, or a legal or illegal alien, the fact is terrorists drive cars and commit traffic violations. So does every other variety of criminal. Security experts and politicians like Rep. Smith have been saying for a long time that traffic stops are a missed opportunity to go beyond ticket-dispensing and actually catch terrorists.

To catch a terrorist, Secretary Napolitano is correct that intelligence really matters. But what intelligence is the secretary referring to and with whom does she believe it should be shared? The secretary could not be referring to access to immigration data by local law enforcement for those jurisdictions participating in the 287(g) program; she has moved to restrict that type of information flow. She further states that she does not believe an exit system is important in the fight against terrorism. Yet Napolitano believes that immigration legislation is politically more likely if amnesty supporters can point to improved border enforcement.

But how does this nation achieve better border enforcement without leveraging a very under-resourced ICE (7,200 officers for the whole country) with local law

enforcement officers trained in reading and understanding immigration data? And how do you achieve credibility on enforcement to enhance the chances for immigration legislation (amnesty) when that border enforcement is being rolled back in key areas like 287(g)? And how do you get support for exit tracking when the secretary herself fails to make it a priority, or sees its nexus to her own mission, homeland security?

Having exit-tracking in place may not stop a determined terrorist like Smadi, but it would at least narrow the pool of overstays for which ICE is responsible and give them a better chance at catching individuals with bad intentions. Having a robust 287(g) program that empowers local law enforcement within the umbrella of immigration law could stop a terrorist like Smadi. Taken together, these are the types of programs that edge this nation toward more secure borders. Yet with neither exit programs or 287(g) receiving much forward momentum from the Obama administration, secure borders seem further out of reach than Americans should expect so many years after 9/11, especially with people like Smadi still intent on abusing immigration loopholes in order to further their terrorist plans.

## End Notes

- <sup>1</sup> “U.S. Can’t Trace Foreign Visitors on Expired Visas,” James C. McKinley Jr. and Julia Preston, *The New York Times*, October 12, 2009, <http://www.nytimes.com/2009/10/12/us/12visa.html?pagewanted=all>.
- <sup>2</sup> Criminal Complaint, *U.S. v. Hosam Maher Husein Smadi*, D.Ct.N.Texas, (Sept. 24, 2009). Filed by Thomas Petrowski, Supervisory Special Agent, FBI, [http://graphics8.nytimes.com/packages/pdf/us/Smadi\\_complaint.pdf](http://graphics8.nytimes.com/packages/pdf/us/Smadi_complaint.pdf).
- <sup>3</sup> See the “Dallas Terror Bomb Suspect Was Jailed on September 11” video at: <http://www.youtube.com/watch?v=crZcQBN525k>.
- <sup>4</sup> <http://74.125.93.132/search?q=cache:nJTEujXPRvwJ:blogs.findlaw.com/courtside/2009/10/dallas-terrorism-bomb-plot-suspect-smadi-indicted-on-wmd-charges.html+immigration+smadi&cd=4&hl=en&ct=clnk&gl=us&client=firefox-a> (indictment).
- <sup>5</sup> “Tracking overstays,” <http://www.skatingonstilts.com/skating-on-stilts/2009/10/tracking-overstays.html>.
- <sup>6</sup> For a detailed history and analysis of the program, see “The 287(g) Program: Protecting Home Towns and Homeland” by Jessica Vaughan and James R. Edwards, Jr., Center for Immigration Studies, October 2009, <http://cis.org/287report>.
- <sup>7</sup> See “The Obama Administration’s 287(g): An Analysis of the New MOA,” by Jon Feere, Center for Immigration Studies, October 2009, <http://cis.org/ObamasNew287g>.
- <sup>8</sup> “Napolitano Says Al-Qaeda-Style Terrorists Are in U.S.,” Bloomberg News, October 12, 2009, <http://www.bloomberg.com/apps/news?pid=20601087&sid=a187YRCSOi3A>.
- <sup>9</sup> *The 9/11 Commission Report*, Chapter 3, “Counterterrorism Evolves,” [http://www.9-11commission.gov/report/911Report\\_Ch3.htm](http://www.9-11commission.gov/report/911Report_Ch3.htm).
- <sup>10</sup> The 1996 Illegal Immigration Reform and Immigrant Responsibility Act, or IIRAIRA.
- <sup>11</sup> For more information, see “Modernizing America’s Welcome Mat: The Implementation of US-VISIT” by Jessica Vaughan, Center for Immigration Studies, July 2005, <http://cis.org/USVisit-Modernization>.
- <sup>12</sup> “Department of Homeland Security, Notice to Aliens Included in the United States Visitor and Immigrant Status Indicator Technology (US-VISIT) Program; Collection of Alien Biometric Data upon Exit from the United States at Air Ports of Departure,” Federal Register Notice, 74 FR 26721 (June 3, 2009).
- <sup>13</sup> E-mail exchange between author and the US-VISIT office on October 21, 2009.