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Tracey Topper Gonzalez

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Individual Rights Versus Collective Security: Assessing the Constitutionality of the USA Patriot Act

Tracey Topper Gonzalez*

I. Introduction

[T]he gravest danger terrorism poses is the risk that democratic societies will overestimate the magnitude of the threat and authorize measures violating fundamental norms of human rights and threatening the democratic principles we hold so dear.[1]

[W]hile the Constitution protects against invasions of individual rights, it is not a suicide pact.[2]

The most devastating terrorist attacks in United States history took place on September 11, 2001.[3] Less than two months later, Congress responded by passing a comprehensive anti-terrorism measure, awkwardly titled the "Uniting and Strengthening America by Providing

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* J.D., 2003, Benjamin N. Cardozo School of Law; B.A., 1993, Pennsylvania State University. The author has accepted a clerkship with the Honorable Richard K. Eaton at the United States Court of International Trade in New York for the 2003-2005 term.

[1] Michael A. Grimaldi, *Human Rights v. New Initiatives in the Control of Terrorism*, 79 AM. SOC'Y INT'L L. PROC. 288, 296 (1985) (remarks of John F. Murphy).

[2] Kennedy v. Mendoza-Martinez, 372 U.S. 144, 159-60 (1963) (discussing the draft as one of the obligations of U.S. citizenship).

[3] Nineteen men linked to Osama bin Laden's Al Qaeda terrorist network hijacked four airplanes, crashing two of the planes into the Twin Towers of the World Trade Center in New York, and one of the planes into the Pentagon outside of Washington, D.C. A fourth hijacked plane, believed to have been thrown off its intended target by the intervention of the passengers, crashed in a field in Pennsylvania. In the Twin Towers alone, over 3,000 people were killed. *See generally* Michael Grunwald, *Terrorists Hijack 4 Airliners; 2 Destroy World Trade Center, 1 Hits Pentagon, 4th Crashes; Hundreds Dead; Bush Promises Retribution; Military Put on Highest Alert*, WASH. POST, Sept. 12, 2001, at A1, 2001 WL 27731754 (reporting the events of September 11, 2001).

Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001," so as to form the acronym "U.S.A. P.A.T.R.I.O.T. Act."[4]

Characterized as the bill with the "long name, and longer reach,"[5] the Act quickly became a target for critics, who warned of its "relentless assault on civil liberties"[6] and Orwellian[7] tactics. Supporters of the bill, however—including, it seemed, a commanding majority of the American public[8]—hailed the measure as justified, "because terrorists 'are trying to kill Americans—as many as they possibly can.'"[9]

This article examines two of the most controversial provisions of the USA Patriot Act: first, the Attorney General's expanded powers to detain, deport, or deny admission to suspect aliens attempting to enter the United States; and second, the government's broadened authority to conduct confidential searches of suspected terrorists' homes[10] and to intercept and monitor suspects' telephone and Internet communications. Both provisions expand government authority under previously existing law.[11]

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[4] Pub. L. No. 107-56 (2001) (hereinafter "the USA Patriot Act" or "the Act"). The Act took effect on October 26, 2001.

[5] Matthew Purdy, *Bush's New Rules to Fight Terror Transform the Legal Landscape*, N.Y. TIMES, Nov. 25, 2001, at A1.

[6] George Lardner Jr., *On Left and Right, Concern Over Anti-Terrorism Moves: Administration Actions Threaten Civil Liberties, Critics Say*, WASH. POST, Nov. 16, 2001, at A40.

[7] *See* GEORGE ORWELL, 1984 (1948). In the book, Orwell describes a totalitarian society led by "Big Brother," which censors everyone's behavior. Today, the term "Orwellian" refers to intrusive governmental regulation of private behavior.

[8] A Gallup survey conducted in late 2001 showed that 82% of Americans favored increased government power to detain even *legal* immigrants. Adam Cohen, *Fighting Terror at Home*, TIME, Dec. 10, 2001, at 30, 2001 WL 29385648.

[9] *Id.* (quoting Sen. Orrin Hatch, R-Utah).

[10] This particular provision applies to both noncitizen aliens and citizens, which is one reason why it is controversial.

[11] The attorney general's expanded powers over immigration stem from the Anti-Terrorism and Effective Death Penalty Act, Pub. L. No. 104-132 (1996), and the Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208 (1996). The government's broadened surveillance powers under the USA Patriot Act originate in the Foreign Intelligence Surveillance Act, Pub. L. No. 95-511 (1978) (codified in scattered sections of 50 U.S.C.).

The discussion begins with an historical overview of national security in the United States, tracing the sources of executive and legislative power from the earliest days of the republic through the passage of the USA Patriot Act in October 2001. An overview of immigration in the United States follows, with particular emphasis on Congress's plenary power to regulate immigration and the judiciary's traditional deference to such power.

Next, this article explores the Attorney General's broadened authority over immigration pursuant to the USA Patriot Act, concluding that the Attorney General's newly delegated powers fall well within the legislative branch's plenary power over immigration, and therefore pass constitutional muster.

Finally, this article finds ample support for the constitutionality of the government's broadened search and surveillance powers under the USA Patriot Act. The legislative branch historically has taken the lead in authorizing investigation of national security matters, and the judiciary has granted Congress special deference in its efforts to balance national security concerns against any intrusion on constitutionally protected privacy interests.[12] The USA Patriot Act expands these powers only incrementally, and they remain within the constitutional bounds established by Congress and sanctioned by the courts.

II. Background

A. Historical Overview: National Security in the United States

"[F]rom the earliest days of the Republic," the United States government has recognized the need for national security.[13] In 1775, "the Continental Congress created the Committee for Secret Correspondence, thus authorizing the first official intelligence activity."[14] The first legislation "made it a capital offense for all persons, not

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[12] *See* Dalia v. United States, 441 U.S. 238, 263-4 (1979) ("It is appropriate to accord special deference to Congress whenever it has expressly balanced the need for a new investigatory technique against the undesirable consequences of any intrusion on constitutionally protected interests in privacy." (citing Marshall v. Barlow's, Inc., 436 U.S. 307, 334-39 (1978))).

[13] *See* William C. Banks & M.E. Bowman, *Executive Authority for National Security Surveillance*, 50 AM. U. L. REV. 1, 18 (2000).

[14] *See id.* at 10-11.

members of, nor owing allegiance to any of the United States of America . . . [to be] found lurking as spies."[15]

Most early presidents, following the model set by Washington, assumed the authority to engage agents for intelligence matters.[16] Congress typically was happy to oblige, and for the most part intelligence remained a purely executive matter, with each successive president doing what he felt necessary to gain information and keep the nation secure.[17]

Over the next century, "presidential exercise of executive authority continued to shape national security law."[18] The Espionage Act, enacted on June 15, 1917, authorized the government to wiretap, search and seize private property, censure writings, open mail, and restrict the right of assembly.[19] At the time, such measures were deemed necessary to thwart German hegemonic designs on the United States.[20]

Eventually, the executive began to delegate responsibility for homeland security, beginning with J. Edgar Hoover's appointment as Director of the FBI in 1924.[21] Authority was later vested in the Department of Defense and the Central Intelligence Agency as well.[22] Beginning in 1940, President Roosevelt authorized the Attorney General to approve electronic surveillance for "grave matters involving defense of the nation."[23] It was requested that the Attorney General keep such investigations to a minimum, and to limit them as much as possible to

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[15] *Id.* at 12 (citing 6 J. CONTINENTAL CONG. 1774 - 1789, at 345 (Worthington C. Ford et al. eds., 1905)).

[16] *See generally* Edward F. Sayle, *The Historical Underpinnings of the U.S. Intelligence Community*, 1 INT'L J. INTEL. & COUNTERINTEL. 1 (1986). "No president of the nineteenth century matched Washington's flair for intelligence," however. Banks & Bowman, *supra* note 13, at 15.

[17] *See* Sayle, *supra* note 16, at 15. The President's power over foreign affairs is found in Article II, section 2 of the Constitution.

[18] *See* Banks & Bowman, *supra* note 13, at 19.

[19] G.J.A. O'TOOLE, HONORABLE TREACHERY: A HISTORY OF U.S. INTELLIGENCE, ESPIONAGE, AND COVERT ACTION FROM THE AMERICAN REVOLUTION TO THE CIA 272-73 (1991).

[20] *Id.* at 202, 272-3. These plans included invasion of New York and Cape Cod. *Id.* at 204.

[21] *See* Banks & Bowman, *supra* note 13, at 26.

[22] *See* O'TOOLE, *supra* note 19, at 431.

[23] *See* S. REP. NO. 95-604, at 10 (1977). The "grave matters" that Roosevelt contemplated included the activities of "subversives," most likely Communists. *Id.*

aliens.[24] A decade later, at the height of the "red scare," the now-infamous House Un-American Affairs Committee and the Smith Act[25] emerged, and the nation once again demonstrated a willingness to accept extraordinary measures to ensure national security.[26]

After the decline of McCarthyism, Americans' reception to extraordinary national security measures was somewhat less hospitable. In the 1960s and 1970s, the nation became incensed at revelations that the CIA was meddling in domestic affairs,[27] and that the FBI was running programs such as "COINTELPRO."[28] The Civil Rights era had begun, and it would take the September 11 attacks—the worst ever perpetrated on U.S. soil—for the nation to regain its focus on national security.

B. The 1990s: The Anti-Terrorism and Effective Death Penalty Act[29] and the Illegal Immigration Reform and Immigrant Responsibility Act[30]

Historically, threats to America's national security have originated outside the nation's borders: the British and French in the early years of the republic; the Germans during the First and Second World Wars; Soviet communism from the 1950s through the 1980s; and predominantly fundamentalist Muslim terrorism (aimed primarily at U.S. interests overseas until very recently), from the 1990s to the present. Yet, in recent years, mass legal immigration[31] and lax enforcement of

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[24] *See* S. REP. NO. 95-604, at 10 (1977).

[25] 18 U.S.C. § 2385 (2003).

[26] *See* ERNEST VOLKMAN & BLAINE BAGGETT, SECRET INTELLIGENCE: THE INSIDE STORY OF AMERICA'S ESPIONAGE EMPIRE 90-92 (1989).

[27] *See, e.g.*, Harrington v. Bush, 553 F.2d 190, 196 (1977).

[28] *See, e.g.*, Frank Wilkinson, *Revisiting the "McCarthy Era": Looking at* Wilkinson v. United States *in Light of* Wilkinson v. F.B.I., 33 LOY. L.A. L. REV. 681, 683 (2000). Short for "counterintelligence programs," these covert FBI programs were directed against domestic groups such as the United States Communist Party, the Socialist Labor Party, and the Ku Klux Klan. *Id.* at 683 n.6.

[29] Pub. L. No. 104-132 (1996) (codified at 28 USC §§ 2244-2266 (1996)).

[30] Pub. L. No. 104-208 (1996) (codified at various sections of 8 U.S.C.).

[31] From 1900 through 1930, a period commonly referred to as the "Great Wave of Immigration," an average of 15.6 million immigrants were admitted per decade, for a total of 47 million over a period of 30 years. By contrast, in just ten years, from 1990 through 2000, 32.7 million immigrants were admitted—more than double the per-decade numbers of the Great Wave. *See* http://www.numbersusa.com/overpopulation/decadegraph.html. Although

illegal immigration[32] have left the United States increasingly vulnerable to attack by its enemies from within.[33] As Mary Jo White, former U.S. Attorney for the Southern District of New York,[34] has explained, "Immigration made this country what it is, and we never want to lose that. But we have to get greater control over [aliens]. It is a critical national security issue."[35]

Responding in part to Americans' fears stemming from the 1993 terrorist bombing of the World Trade Center,[36] Congress passed the Anti-

immigration rates have decreased slightly (incoming immigrants in 1930 equaled 12.7% of the total U.S. population in that year; incoming immigrants in 2000 equaled 11.6% of the population in that year), the effects of mass immigration today, with the U.S population at all-time high, are well documented. *See, e.g.*, Colorado Alliance for Immigration Reform, *at* www.cairco.org/edu/education.html (detailing negative effects on education, energy, and the economy as a result of mass immigration); *see also* Oregonians for Immigration Reform, *at* www.oregonir.org (advocating environmentally responsible levels of immigration).

[32] It has always been illegal to overstay a visa or sneak into the United States. But with over eight million illegal immigrants in the population, and more arriving every day, authorities have been hard-pressed to track down more than a small handful of violators. *See* Tamar Lewin, *As Authorities Keep Up Immigration Arrests, Detainees Ask Why They Are Targets*, N.Y. TIMES, Feb. 3, 2002, at A14.

[33] Internal threats to United States are not unique to the twenty-first century. During the Red Scare, for example, Congressmen called on their constituents to hunt down "internal enemies," considered at that time to be Communist subversives intent on toppling the American government. *See* Banks & Bowman, *supra* note 13, at 29.

[34] New York's Southern District includes Manhattan, the site of the World Trade Center attacks.

[35] John Caher, *White Reflects on Prosecuting Terror Crimes*, N.Y. L.J., Jan. 25, 2002, at 1.

[36] The bombing occurred on February 26, 1993. Six people were killed and many more injured. The mastermind of the plot, Ramzi Yousef, had entered the United States illegally and was not detained pending an asylum hearing. *See* Laurie Mylroie, *The World Trade Center Bomb: Who is Ramzi Yousef? And Why it Matters*, THE NAT'L INT. (Winter 1995/96), *available at* www.fas.org/irp/world/iraq/956-tni.htm. Yousef was arrested in Pakistan two years after the bombing and extradited to the United States. He was convicted by a jury in 1996 and sentenced to life in prison. United States v. Yousef, 1999 WL 714103 (S.D.N.Y. 1999).

Terrorism and Effective Death Penalty Act ("AEDPA") in 1996.[37] The legislature's fears were apparently well founded. A United States Department of State survey released in April 1996 (the same month the AEDPA was enacted) found that international terrorist acts increased by more than one-third in 1995.[38] One-fourth of the acts were aimed at the United States or its citizens.[39]

Intended to expel those aliens who pose a threat to America's national security, the AEDPA provides for retroactive and prospective deportation of terrorist aliens. Though widely criticized[40] for its significant restriction of the right of habeas corpus for certain deportable aliens, several circuit courts have found the AEDPA's removal of judicial review for deportation decisions to be constitutional,[41] and the Supreme Court has never granted certiorari on this issue. Ambiguities remain, however, regarding aliens' right to due process and other constitutional protections, and this article will explore those rights in a discussion of the Attorney General's expanded powers with regard to suspect aliens, *infra*.

Passed shortly after the AEDPA, the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA")[42] retroactively rendered permanent residents with criminal records deportable, and precluded courts of appeals[43] from exercising jurisdiction to review a final removal order [44] against any person deported under such circumstances. The

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[37] Pub. L. No. 104-132 (1996) (codified at 28 USC §§ 2244-2266 (1996)).

[38] Susan Dente Ross, *In the Shadow of Terror: The Illusive First Amendment Rights of Aliens*, 6 COMM. L. & POL'Y 75, 81 (2001).

[39] *Id.*

[40] *See, e.g.*, Lisa C. Solbakken, *The Anti-Terrorism and Effective Death Penalty Act: Anti-Immigration Legislation Veiled in an Anti-Terrorism Pretext*, 63 BROOK. L. REV. 1381 (1997).

[41] *See id.* at 1409 (1997) (citing, *e.g.*, Kolster v. INS, 101 F.3d 785 (1st Cir. 1996); Mendez-Rosas v. INS, 87 F.3d 672 (5th Cir. 1996)).

[42] Pub. L. No. 104-208 (1996) (codified at various sections of 8 U.S.C.).

[43] With respect to district courts, Congress has not spoken with sufficient clarity to strip them of their jurisdiction to hear habeas petitions regarding final removal orders. *See generally* INS v. St. Cyr, 531 U.S. 1107 (2001).

[44] Deportation is now referred to as "removal." *See generally* AEDPA, Pub. L. No. 104-132 (1996). Since older statutes cited in this article refer to the process as deportation, not removal, the terms are used interchangeably here.

IIRIRA also greatly expanded the class of crimes that constitute an aggravated felony, including terrorism.[45]

C. Post-September 11: The USA Patriot Act

The USA Patriot Act was passed in direct response to the terror attacks on September 11.[46] The measure passed by overwhelming majorities in both houses, by a vote of 356 to 1 in the House and 98 to 1 in the Senate.[47]

Outrage at the attacks was a major impetus behind passage of the Act. Described by some as a "sleeping giant," whose citizens "liv[e] in blithe ignorance of the world around them,"[48] the United States was shocked and horrified by the attacks, to be sure, but the primary emotion of most citizens, including members of Congress, was pure outrage.[49] Much of this anger stemmed from the discovery that several of the hijackers were in the country illegally, on false or expired visas, and most had been living in the U.S. undetected for years before carrying out the attacks.[50] Others, like former Senator Warren B. Rudman, felt manipulated: "We just have to recognize that we cannot bend over backwards in our innate American fairness to overlook that there are some people trying to hurt us."[51]

Despite the rapidity with which Congress passed the USA Patriot Act, and the circumstances surrounding it, the USA Patriot Act is

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[45] Aggravated felonies include drug trafficking, rape, sexual abuse of a minor, murder, or any other crime punishable by up to one year's imprisonment. 8 U.S.C. § 1101(a)(43) (2003).

[46] *See* Ronald L. Plesser et al., *USA Patriot Act for Internet and Communications Companies*, 19 COMPUTER & INTERNET LAW. 1, 1 (2002).

[47] Only Rep. John Conyers (D-Mich.) and Sen. Russell Feingold (D-Wis.) voted against the measure.

[48] *See* Kevin F. Ryan, *Evil, Patriotism, and the Rule of Law*, 27 VT. B. J. 7, 7 (2001).

[49] This sentiment was undoubtedly fueled by responses like that of now-deposed Iraqi leader Saddam Hussein, whose reaction to attacks has been described as "jubilant." *See Iran Urged [to] Join War on Terror*, Sept. 24, 2001, www.cnn.com/2001/WORLD/europe/09/23/gen.straw.iran/index.html.

[50] *See* Neil A. Lewis & David Johnston, *After the Attacks: The Investigation: Justice Dept. Identifies 19 Men as Suspected Hijackers*, N.Y. TIMES, Sept. 15, 2001, at A2. Several of the hijackers lived in Florida, New Jersey, California, Massachusetts, and Arizona. *Id.*

[51] Purdy, *supra* note 5. Sen. Rudman is currently chairman of the president's foreign intelligence advisory board.

nevertheless thoughtful and responsive to the twin tasks of fighting terrorism without eroding individual rights more than necessary. The Act has achieved this through incremental amendment of existing acts, which were passed under normal circumstances.[52] Moreover, the "war on terrorism" (and, thus, the provisions contained in the Act necessary to wage that war) commanded unprecedented public support.[53] Historical examples of restrictions on domestic freedom for national security purposes (e.g., suspension of the writ of habeas corpus during the Civil War) teach us that Americans will accept a reasonable level of restraint on liberty and will respond appropriately so long as two basic conditions exist: First, the civilian leadership must effectively articulate the necessity, and second, there must be a generally understood consensus for action.[54]

The public's recognition of the need for national security, along with the realization that America had been attacked from within, prompted one of the Act's main provisions, Title IV, which expands the Attorney General's powers under the AEDPA and the IIRIRA to detain, deport, or deny admission to suspect aliens attempting to enter the United States. Title II of the Act, which broadens the government's existing authority to conduct confidential searches of suspected terrorists' homes, and to intercept and monitor suspects' telephone and Internet communications, recognizes that investigations of terrorist plans "depend on stealth" to prevent them before they are carried out.[55]

Although critics of the Act have generally focused their ire on Titles II and IV, the Act also contains many less controversial provisions.

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[52] The USA Patriot Act, by contrast, was passed under highly unusual circumstances. "How unusual? Congressional negotiators finalized the language of the Patriot Act in a small room in the Capitol building while House and Senate offices were closed due to an anthrax attack." Plesser et al., *supra* note 44, at 1.

[53] In March 2002, the approval rating for President George W. Bush's "war on terrorism" was a high 82%. Paul Craig Roberts, *Where National Security is Slipping*, WASH. TIMES, Mar. 15, 2002, at Commentary. President Bush's overall approval ratings dropped to the mid-50s in various polls conducted from March 3, 2003 through March 16, 2003, just prior to Bush's declaration of war on Iraq. The Century Foundation's Public Opinion Watch, www.tcf.org/Opinions/Public_Opinion_Watch/March 101-6_2003.html.

[54] Col. Thomas W. McShane, *Life, Liberty and the Pursuit of Security: Balancing American Values in Difficult Times*, 23-Dec. Pa. Law. 46, 47 (2001).

[55] *See* Banks & Bowman, *supra* note 13, at 93.

These include Congressional condemnation of discrimination against Arab and Muslim Americans, grant programs to promote state and local anti-terrorism preparedness, expanded penalties for fraud in the solicitation of charitable contributions, and the federal Victims' Compensation Fund.[56]

III. Immigration Overview: Congressional Discretion and Judicial Deference

A. Judicial Deference: The Plenary Powers Doctrine

It is a widely accepted notion that sovereign nations have the power to regulate or even prohibit immigration.[57] The United States' ability to control its own borders is "essential to its safety, its independence, and its welfare."[58] To that end, United States immigration law may best be described as a "fabric of discretion and judicial deference."[59] This hands-off approach by the courts is rooted in the "plenary powers doctrine," pursuant to which courts exhibit extraordinary deference to Congress and the Executive in certain contexts,[60] and the separation of powers doctrine, which precludes the Court from reviewing certain decisions made by Congress or the President.[61] It is in fact Congress to which the constitution grants sole control over immigration matters,[62] and the Supreme Court has

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[56] *See* USA Patriot Act, §§ 102, 624, 1011, and 1014.

[57] *See, e.g.*, Wong Wing v. United States, 163 U.S. 228 (1896) (recognizing that sovereign nations have an inherent right to exclude or expel aliens).

[58] Fong Yue Ting v. United States, 149 U.S. 698, 711 (1893).

[59] *See* Daniel Kanstroom, *Surrounding the Hole in the Doughnut: Discretion and Deference in U.S. Immigration Law*, 71 TUL. L. REV. 703, 709 (1997).

[60] *See id.* at 707.

[61] "The reasons that preclude judicial review of political questions also dictate a narrow standard of review of decisions made by Congress or the President in the area of immigration and naturalization." Mathews v. Diaz, 426 U.S. 67, 81-82 (1976).

[62] U.S. CONST. art. I, § 8, cl. 4. This clause grants Congress specific power over "naturalization," which necessarily includes immigration. Congress has delegated extensive power to executive branch agencies, such as the Immigration and Naturalization Service and the Department of Justice, to carry out its immigration policies.

acknowledged that "over no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens.'[63]

Thus, Congress is responsible for establishing the criteria for determining aliens' initial admissibility, as well as the criteria for their continued presence in the United States.[64] Congress may also set the terms under which an alien may be detained pending a determination of admissibility. Whether these criteria are broad and permissive, as they were during the mass migrations to the U.S. in the early 1900s,[65] or narrow and restrictive, is determined in part by the public's perceptions of immigrants and the social, economic, or security threats believed to be posed by them.[66]

The Supreme Court has consistently upheld Congress's discretion under the plenary powers doctrine to regulate immigration.[67] Any policy toward aliens, particularly as it relates to national security, is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government. Such matters are so exclusively trusted to the political branches of government as to be largely immune from judicial inquiry or interference.[68]

The Court's deference to Congress's power over matters of immigration continues today. As recently as 1983, the Court reaffirmed

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[63] Fiallo v. Bell, 430 U.S. 787, 792 (1977) (quoting Oceanic Navigation Co. v. Stranahan, 214 U.S. 320, 329 (1909)).

[64] *See, e.g.*, Fong Yue Ting, 149 U.S. 698, 707 (1893) ("The right of a nation to expel or deport foreigners . . . rests upon the same grounds, and is as absolute and unqualified as the right to prohibit and prevent their entrance into the country.").

[65] From 1900 through 1930, a period referred to as the "Great Wave of Immigration," 47 million immigrants were admitted to the United States. *Comparisons of 20th Century U.S. Population Growth by Decade, at* www.numbersusa.com/overpopulation/decadegraph.html

[66] The AEDPA, for example, is thought by some to have "crested a wave of anti-immigrant sentiment." *See* Kanstroom, *supra* note 57, at 705.

[67] *See, e.g.*, Galvan v. Press, 347 U.S. 522, 528 (1954) (confirming broad congressional authority over admission of aliens); Mahler v. Eby, 264 U.S.32, 38 (1924) (affirming that power to regulate aliens is vested in the political branches of government); Fong Yue Ting v. United States, 149 U.S. 698, 731 (1893) ("the judicial department cannot properly express an opinion upon the wisdom, the policy or the justice of the measures enacted by Congress in the exercise of the powers confided to it by the Constitution over this subject.").

[68] Harisiades v. Shaughnessy, 342 U.S. 580, 588-89 (1952).

its belief that the plenary authority of Congress over aliens "is not open to question."[69]

B. Constitutional Protection of Noncitizens

Once an alien has been deemed admissible, his continued presence in the United States is a revocable privilege conferred by Congress, not a constitutional right.[70] The AEDPA, for example, expanded the kinds of felony convictions for which an alien may be deported,[71] even after long periods of legal residence in the United States, and the IIRIRA precludes judicial review of deportation decisions.[72]

The Supreme Court has long refused to hold that deportation constitutes punishment.[73] Because deportation hearings are regarded as civil, not criminal proceedings, not all of the due process protections of a criminal trial are made available to an alien in a deportation hearing.[74] It is for this reason that the *process* by which an alien may be deported is surrounded by great ambiguity.[75] Though the judiciary usually grants considerable deference to the legislative and executive branches as a result of their plenary power to regulate immigration, the Supreme Court

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[69] INS v. Chadha, 462 U.S. 919, 940-41 (1983).

[70] *See, e.g.*, United States *ex rel.* Knauff v. Shaughnessy, 70 S. Ct. 309, 312 (1950); Nishimura Ekiu v. United States, 142 U.S. 651, 659 (1892).

[71] Aggravated felonies include drug trafficking, rape, sexual abuse of a minor, murder, or any other crime punishable by up to one year's imprisonment. 8 U.S.C. § 1101(a)(43).

[72] The relevant language of IIRIRA is clear. Final deportation orders are addressed under the heading of "Matters Not Subject to Judicial Review," and the Act provides that "no court shall have jurisdiction to review any final order of removal." Pub. L. No. 104-208 § 242(a)(2).

[73] Lisa Mendel, *The Court's Failure to Recognize Deportation as Punishment: A Critical Analysis of Judicial Deference*, 5 SUFFOLK J. TRIAL & APP. ADVOC. 205, 205 (2000) (citing Burgess v. Salmon, 97 U.S. 381, 384 (1878)). *See also* Fong Yue Ting v. United States, 149 U.S. 698, 730 (1893) (holding that deportation is not punishment).

[74] *See* Clarence E. Zachery, Jr., *The Alien Terrorist Removal Procedures: Removing the Enemy Among Us or Becoming the Enemy From Within?*, 9 GEO. IMMIGR. L. J. 291, 299 (1995). Classification of deportation proceedings as civil also allows laws governing deportation to be applied retroactively, since the ex post facto clause applies only to criminal matters. *See* U.S. CONST. art. I, § 9, cl. 13, cl. 10 (stating prohibitions against ex post facto laws).

[75] *See* Solbakken, *supra* note 40, at 1401.

has extended the constitutional protections of the Fifth, Sixth, and Fourteenth Amendments to aliens.[76] However, these constitutional protections are not as complete as those afforded to American citizens.[77] The Court in *Mathews v. Diaz*[78] explained that:

> The fact that all persons, aliens and citizens alike, are protected by the Due Process Clause does not lead to the further conclusion that all aliens are entitled to enjoy all the advantages of citizenship or, indeed, to the conclusion that all aliens must be placed in a single, homogeneous legal classification. For a host of constitutional and statutory provisions rest on the premise that a legitimate distinction between citizens and aliens may justify attributes and benefits for one class not accorded to the other; and the class of aliens is itself a heterogeneous multitude of persons with a wide-ranging variety of ties to this country.[79]

Thus, how much constitutional protection an alien may claim depends on his citizenship status (or lack thereof),[80] which can be viewed as a point on a continuum. At one end are natural-born or naturalized American citizens, who are guaranteed every due process protection under the constitution, and may be stripped of their citizenship only in exceedingly rare cases. At the other end of the continuum are aliens, whose due process protections are limited and may be revoked altogether (for example, the AEDPA prohibits access to habeas corpus relief for certain removable aliens).[81] Along the continuum, additional

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[76] *See* Zachery, *supra* note 74, at 297-98 (citing Wong Wing v. United States, 163 U.S. 228 (1896) (Fifth and Sixth Amendments protect a deportable alien in a criminal trial)); *see also* Yick Wo v. Hopkins, 118 U.S. 356 (1886) (Equal Protection Clause of the Fourteenth Amendment bars discrimination against aliens)).

[77] *See id.* at 298.

[78] 426 U.S. 67, 78 (1976).

[79] *Id.* at 78.

[80] *See, e.g.*, United States v. Megahey, 553 F. Supp. 1180, 1181 (1982) (holding that the different treatment accorded nonresident aliens is rationally related to purposes of protecting the United States against various acts of foreign powers).

[81] Antiterrorism and Effective Death Penalty Act of 1996 § 440(a) (1996) [hereinafter AEDPA].

constitutional protections are obtained as the alien's ties to the United States become more significant.

The extent of an alien's constitutional protection also depends on the context in which he attempts to exercise that protection. When the context involves foreign affairs, such as deportation, exclusion, foreign policy, or national security, for example, the alien's rights often give way to an overriding governmental interest.[82] Thus, "the Bill of Rights cloaks an alien with its protective armor when the government attacks with purely domestic powers, but when the political branches' foreign affairs powers are unleashed, the armor pierces easily."[83] As a result, an alien has a weak due process claim in a deportation hearing if the governmental interest at stake is one of national security or foreign policy.[84]

IV. USA Patriot Act Title IV: Protecting the Border

A. Admissibility: Governmental Interest in National Security

> *[A]n alien who seeks admission to this country may not do so under any claim of right. Admission of aliens to the United States is a privilege granted by the sovereign United States Government. Such privilege is granted to an alien only upon such terms as the United States shall prescribe.*[85]

The United States Congress has always set standards for the admissibility of aliens into the country, and the Supreme Court has consistently upheld Congress's discretion to do so.[86] Over the years, Congress has denied admission to aliens for a variety of reasons, such as ethnicity, criminal intent or history (e.g., drug trafficking), terrorism, and even political ideology.

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[82] Michael Scaperlanda, *The Domestic Fourth Amendment Rights of Aliens: To What Extent Do They Survive* United States v. Verdugo-Urquidez?, 56 MO.L.REV. 213, 235, 239-40 (1991).

[83] *Id.* at 239-240.

[84] *Id.*

[85] United States *ex rel.* Knauff v. Shaughnessy, 70 S. Ct. 309, 312 (1950).

[86] *See* Trevor Morrison, *Removed from the Constitution? Deportable Aliens' Access to Habeas Corpus Under the New Immigration Legislation,* 35 COLUM. J. TRANSAT'L L. 697, 708-10 (1997).

1. Race

The Court first considered Congress's authority to exclude aliens in the Chinese Exclusion Case,[87] in which Congress responded to anti-Asian hostility by passing legislation that suspended immigration of Chinese laborers into the United States.[88] The Court held that the prerogative of the political branches to make immigration decisions according to their perception of the public interest outweighed the rights of the Chinese being excluded.[89] The Court recognized that controlling immigration—or, more precisely, controlling threats therefrom—was necessary for the United States "[to] give security against foreign aggression and encroachment."[90] Because "it matters not in what form" such aggression and encroachment come, the court has, in some instances, used it as the basis for racial discrimination.'[91] In fact, "[i]n an undeviating line of cases spanning almost one hundred years, the Court has declared itself powerless to review even those immigration regulations that explicitly classify on such disfavored bases as race.'[92]

In most cases, the threat posed by racially excluded aliens was largely an economic one.[93] Yet, the government is charged "with protecting this Nation from entrants who may bring anything harmful into this country, whether that be communicable diseases, narcotics, or

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[87] *See* Chae Chan Ping v. United States, 130 U.S. 581 (1889).

[88] *See* Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 6 SUP. CT. REV. 255, 288, n.173 (1984). Later, anti-Japanese sentiment resulted in legislation prohibiting the entry of all Japanese immigrants. *See id.*

[89] *Chae Chan Ping*, 130 U.S. at 606.

[90] *Id.*

[91] For example, the Court in *Chae Chan Ping* derogatorily referred to "vast hordes of [a foreign nation's] people crowing in upon us" as one form of foreign aggression and encroachment, in response to the influx of Chinese laborers to the U.S. in the early 1800s. *Id.*

[92] Legomsky, *supra* note 88, at 255.

[93] Today, immigration continues to impact the economy in different ways. For example, the abundance of nonunion immigrants in Los Angeles permitted unscrupulous firms to wipe out unionized janitors—half of whom were black—by the 1990s. On the opposite end of the spectrum, Harvard economist George Borjas has calculated that immigration in the 1980s redistributed more than $100 billion a year away from working Americans and to the economic elite. *See* Michael Lind, *Hiring From Within*, MOTHER JONES, July/Aug. 1998, *available at* www.motherjones.com/mother_jones/JA98/lind.html.

explosives."[94] If aliens bring with them the threat of displacing American workers or otherwise imperiling the nation's economy, Congress is justified in excluding them.[95] In all of these cases the Court has viewed aliens as "guests who may remain in the country subject to the host's desire to extend hospitality."[96]

2. Political Ideology

As early as 1904, the Supreme Court upheld provisions of the 1903 Immigration Act, which permitted exclusion of aliens who "believe in or advocate overthrow" of any government.[97] In 1918 Congress passed a law providing for the exclusion of aliens who "advise, advocate, or teach, or . . . are members of or affiliated with any organization, association, society, or group, that advises, advocates, or teaches, opposition to all organized government."[98] In the 1920s membership in a communist or totalitarian party was grounds for exclusion;[99] later grounds included participation in Nazi-era genocide or genocide-related activities.[100]

The end of the Cold War led to a revision of U.S. law with respect to exclusion based on one's beliefs.[101] However, a number of ideological exclusion grounds remain, including membership in the Communist Party "or any other totalitarian party" within recent years or engaging in activities aimed at the overthrow of the United States government.[102]

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[94] Montoya de Hernandez v. United States, 473 U.S. 531, 544 (1985).

[95] For example, immigrants coming to the U.S. for employment must obtain a labor certification, which is designed to ensure that the immigrant's employment will not displace or otherwise disadvantage American workers. INA § 212(a)(5)(A).

[96] Mendel, *supra* note 73, at 215 (*citing* Legomsky, *supra* note 88, at 269-70).

[97] Turner v. Williams, 194 U.S. 279, 293 (1904).

[98] Act of Oct. 16, 1918, 40 Stat. 1012, *amended by* Act of June 5, 1920, 41 Stat. 1008.

[99] *See* 8 U.S.C. § 1182(a)(3)(D)(i) (2003).

[100] INA § 212 (a)(3)(E) (1994).

[101] Maryam Kamali Miyamoto, *The First Amendment After* Reno v. American-Arab Anti-Discrimination Committee*: A Different Bill of Rights for Aliens?* 35 HARV. C.R.-C.L. L. REV. 183, 212 (2000).

[102] *See, e.g.,* the Alien Registration Act. 54 Stat. 670 (1940). Under that Act, it was necessary to prove in each case, where membership in the Communist Party was the basis for deportation, that the party did, in fact, advocate overthrow of the U.S. government. The Internal Security Act of 1950 dispensed with the need

3. Criminal Intent or History

Since President Reagan declared a "war on drugs" in the 1980s, Congress has employed various methods for stemming the flow of drugs into the United States, most importantly by denying admission to those who attempt to smuggle drugs into the country. At the border, where drug smugglers are often caught with their contraband, the scales tip appreciably in favor of the government, especially since "due process does not invest any alien with a right to enter the United States."[103]

The case of *Montoya de Hernandez v. United States*[104] provides a particularly pointed example of the government's power to regulate our borders. De Hernandez was detained by customs officials upon her arrival in the U.S. from Bogota, Colombia. The officials had reasonable cause to suspect that she was attempting to smuggle narcotics hidden in balloons in her digestive tract. De Hernandez was ultimately detained for approximately sixteen hours as a result of her refusal to undergo an x-ray, and her "heroic efforts to avoid the usual calls of nature."[105] Officials eventually obtained a court order authorizing an x-ray and a rectal examination. Subsequent to the examination, de Hernandez excreted eighty-eight balloons over four days, containing a total of 528 grams of 80% pure cocaine.

In affirming de Hernandez's detention, the Court reaffirmed Congress's power to protect the nation by stopping and examining persons entering the country, and held that the balance between the interests of the Government and those of the individual is "struck more favorably to the Government at the border."[106] Despite de Hernandez's

for such proof. Galvan v. Press, 75 S. Ct. 737, 742 (1954). Today, if the alien can show that he is not otherwise a threat to the security of the United States, termination of membership in the party two years before applying for a visa will suffice. *See* 8 U.S.C. § 1182(a)(3)(D)(ii) (2003).

[103] Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 222-23 (1953) (Jackson, J., dissenting). No member of the Court contradicted Justice Jackson's statement.

[104] *See* U.S. v. Montoya de Hernandez, 473 U.S. 531 (1985).

[105] *Id.* at 535.

[106] *Id.* at 540. Even race may be considered at the border. *See* United States v. Brignoni-Ponce, 422 U.S. 873, 881 (1975) (likelihood that an individual of Mexican ancestry on the Southwest border was an alien was sufficiently high to make the ancestry a legitimate factor in Border Patrol's decision to stop and interrogate); *see also* United States v. Martinez-Fuerte, 428 U.S. 543, 563 (1976) (finding no constitutional violation in referring motorists to a detailed secondary

"long, uncomfortable, indeed, humiliating" detention—which, under other circumstances, might constitute a violation of due process and other constitutional protections—the government is charged "with protecting this Nation from entrants who may bring anything harmful into this country, whether that be communicable diseases, narcotics, or explosives."[107]

De Hernandez involved an alien's intent to smuggle drugs in the United States. The AEDPA and the IIRIRA deal not with an alien's *intent* to commit a crime, but with his past history of having done so. Intended to expel those aliens who pose a threat to America's national security, the AEDPA provides for retroactive and prospective deportation of aliens convicted of certain listed "aggravated felonies," including drug trafficking and firearms trafficking.[108] Passed shortly after the AEDPA, the IIRIRA retroactively rendered permanent residents with criminal records deportable, and precluded courts of appeals[109] from exercising jurisdiction to review a final removal order against an alien removable by reason of a conviction for, *inter alia,* an aggravated felony.[110]

4. Terrorism

In 1996, the AEDPA added a new "terrorist activity" provision[111] aimed at excluding potential terrorists from the United States. "Terrorist" activities include hijacking of an aircraft, vessel, or vehicle; kidnapping and threatening to kill another individual; and the use of biological or chemical agents or nuclear devices.[112] In 1997, then-Secretary of State Madeleine Albright identified thirty "foreign terrorist organizations" under the AEDPA, mandating the denial of United States visas to all organization members, and imposing prison terms of ten years on Americans convicted of supporting any of the listed groups.[113]

inspection at U.S.-Mexico checkpoint even if based on apparent Mexican ancestry).

[107] *Montoya de Hernandez,* 473 U.S. at 544.

[108] AEDPA § 706 (1996).

[109] With respect to district courts, Congress has not spoken with sufficient clarity to strip them of their jurisdiction to hear habeas petitions regarding final removal orders. *See generally* INS v. St. Cyr, 531 U.S. 1107 (2001).

[110] *See* 8 U.S.C. § 1252(a)(2)(C). This provision was upheld by *Calcano-Martinez v. INS,* 121 S. Ct. 2268 (2001).

[111] AEDPA§ 302 (2003)).

[112] *Id.*

[113] Ross, *supra* note 38, at 91.

Fourteen of the groups are Arab or Muslim (including Al Qaeda); there are also two each of Israeli, Turkish, Japanese, Colombian, Peruvian, and Greek groups, plus one Spanish group and one Sri Lankan group.[114]

B. Admissibility Pursuant to the USA Patriot Act

Several sections of Title IV of the Patriot Act broaden the foundation laid by case law, the AEDPA, and the IIRIRA in order to protect the United States from those who threaten national security. Broadly speaking, the Act grants the Attorney General the power (in conjunction with the Secretary of State) to assess the threat that an alien may pose to national security and deny the alien admission if warranted.[115] To determine the nature of the threat, the Act broadens several statutory definitions relating to terrorism. First, the definition of a "terrorist" has been expanded to include a representative of a foreign terrorist organization; a member of a "political, social, or other similar group whose public endorsement of acts of terrorist activity . . . undermines United States efforts to reduce or eliminate terrorist activities;"[116] anyone who has used his "position of prominence within any country to endorse or espouse terrorist activity or a terrorist organization;"[117] and the spouse or child of an alien who is inadmissible for one of the foregoing reasons.[118]

The definition of "terrorist activity" has been similarly broadened to include committing or inciting to commit terrorist activity;[119] gathering information on potential targets for terrorist activity; recruiting others for membership in a terrorist organization; or soliciting funds for any sort of terrorist activity as defined in the Act that the contributor "reasonably should know" would further the

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[114] *See id.* n.104.

[115] "Any alien . . . [who] intends while in the United States to engage solely, principally, or incidentally in activities that could endanger the welfare, safety, or security of the United States is inadmissible." USA Patriot Act § 411 (2001).

[116] *Id.* § 411(a)(1)(A).

[117] *Id.*

[118] *Id.* Spouses and children of terrorists as defined herein are inadmissible only if the activity causing the alien to be defined a "terrorist" under this section occurred within the last five years. *Id.*

[119] Incitement is defined as speech intended to produce imminent lawless action, and from which a reasonable person would believe that lawless action is likely to result. Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

organization's terrorist activities.[120] This latter provision was deemed necessary to prevent those who fund terrorist groups from simply denying that they were aware of the group's activities in order to avoid deportation or inadmissibility.

Civil libertarians have attacked the expanded definition of "terrorist activity" as overly broad,[121] but the government's need to employ these classifications is sufficiently compelling to outweigh the burden on constitutional rights.[122] This is because terrorist attacks differ from most other crimes in three important respects: First, terrorist attacks are usually planned well in advance, sometimes for years,[123] by an elaborate network of participants located all over the world.[124] Second, unlike most crimes, terrorist networks require significant funding in order to carry out their attacks.[125] Third, terrorist groups are known to

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[120] USA Patriot Act § 411(a)(1)(F) (2001).

[121] One immigration lawyer noted that someone who "at the end of Ramadan does their charitable tithing to an orphanage in South Lebanon that was established by Hezbollah" could be labeled a terrorist under the new definition. Purdy, *supra* note 5.

[122] Ideologies that advocate immediate action, such as Islamic *fatwas* (religious rulings) ordering Muslims to kill Americans, are governed by the *Brandenburg* test, and therefore do not enjoy First Amendment protection. *See Brandenburg*, 395 U.S. 444, 447 (speech intended to produce imminent lawless action, and from which a reasonable person would believe that lawless action is likely to result, is exempted from First Amendment protection). With respect to deportation proceedings, however, aliens may be deported for "speech" for which they could not otherwise be punished, because deportation is a civil matter, not criminal punishment. *See* Burgess v. Salmon, 97 U.S. 381, 384 (1878); *see also* Miyamoto, *supra* note 101, at 194.

[123] Video tapes believed to be "scouting" tapes for the World Trade Center attacks were made as early as four years before the attacks were carried out. *See Video is Purportedly September 11 Scouting Tape,* Mar. 5, 2003, *at* www.cnn.com/2003/US/03/05/wtc.tape/index.html.

[124] Al Qaeda, for example, is believed to have operatives all of the world and to have forged alliances with other extremist groups. *See Tapes Give Evidence of al Qaeda's Global Reach*, Aug. 22, 2002, *at* www.cnn.com/2002/US/08/22/terror.tape.main/index.html.

[125] *See* Matthew Levitt, *Stemming the Flow of Terrorist Financing: Practical and Conceptual Challenges*, 27-SPG FLFWA 59, 61 (Winter/Spring 2003) ("Clearly, following the money trial represents a critical and effective tool both in reacting to terrorist attacks and in engaging in preemptive disruption efforts to prevent future attacks."). *See also* Eric Lichtblau & William Glaberson, *Millions Raised for Qaeda in Brooklyn, U.S. Says*, N.Y. TIMES, March 5, 2003,

form "sleeper cells," in which the members of the cell participate in activities such as training, fund-raising, and scouting of locations[126] in preparation for future terrorist attacks.[127] In short, because the execution of a large-scale terrorist attack requires training, communication, funding, and planning, it is imperative that law enforcement be able to approach the problem on several different fronts in order to prevent future attacks. Moreover, these provisions defining terrorist activity differ little from either those contained in the Immigration and Nationality Act ("INA") or over a dozen similar laws passed prior to 1997.[128]

Critics have also condemned the expanded definition of "terrorist" as the singling out of people based on nationality or ethnicity.[129] But terrorism takes many forms—from Japan's Aum Shinrikyo (a nihilist cult), to Greece's Revolutionary People's Struggle ("ELA") (an anti-capitalist, anti-imperialist group), to Peru's Shining Path (a Maoist organization). Terrorist groups are designated as such by their activities, not their nationalities, though many classifications are ethnically based out of necessity. This is because some terrorist groups—such as the Irish Republican Army or the Tamil Tigers in Sri Lanka—are fighting wars of national independence, albeit by extreme and unacceptable means. Still other groups are ideologically or

at A1; *Al Qaeda, Organized Crime, and Cash,* Aug. 30, 2002, *at* www.cnn.com/2002/US/08/30/boettcher/otsc/index.html (explaining that because many assets have been frozen, Al Qaeda is now turning to money from illegitimate sources, such as drugs and black-market diamonds).

[126] Among the locations appearing on alleged "scouting" tapes are the Statue of Liberty, the Brooklyn Bridge, the Golden Gate Bridge, and the Sears Tower in Chicago. *See Video is Purportedly September 11 Scouting Tape,* Mar. 5, 2003, *at* www.cnn.com/2003/US/03/05/wtc.tape/index.html.

[127] For example, in January 2003, Faysal Galab, an accused member of one such "sleeper" cell operating near Buffalo, New York, pled guilty to attending a training camp in April 2001 run by Al Qaeda in Afghanistan. He also pled guilty to contributing money, goods, and services to the terrorist group. *See* Robert F. Worth, *Accused Member of Terror Cell Near Buffalo Agrees to Guilty Plea,* N.Y. TIMES, Jan. 11, 2003, at A9.

[128] *See* Ross, *supra* note 38, at 77.

[129] *See, e.g.,* Purdy, *supra* note 5. As one FBI official has noted, "We have a problem with Islamic terrorism. . . . If we had a problem with Latvian terrorism, we'd focus on Latvians." John Mintz & Michael Grunwald, *FBI Terror Probe Focuses on U.S. Muslims; Expanded Investigations, New Tactics Stir Allegations of Persecution,* WASH. POST, Oct. 31, 1998, at A1.

religiously motivated (e.g., Shining Path's Maoist ideology or Al Qaeda's Islamic fundamentalism). Thus, the ethnic classifications of many terrorist groups are not invidious, just a necessary and concomitant consequence of the group's own self-identification.

Moreover, admission to the U.S. can be denied (or granted) upon *any* basis of Congress's choosing, even if it were invidious. Should Congress choose to admit only, say, Chinese citizens from now on—or, conversely, to *deny* admissibility only to Chinese—there is little that the President or Supreme Court could do.[130] Aliens trying to gain admission to the United States are not protected by the constitution *prior* to their admission, and it is properly within Congress's discretion to determine which aliens pose a threat to our national security at any given time.[131]

C. Detention

[Detention] is vital to preventing, disrupting, or delaying new attacks. It is difficult for a person in jail or under detention to murder innocent people or to aid and abet in terrorism.[132]

In 1996, the AEDPA and the IIRIRA extended mandatory detention to persons convicted of any of an additional[133] five major categories of crime, including noncitizens inadmissible or deportable on

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[130] There is also, presumably, little that the public could do, as immigration levels have consistently increased over the years, even as a majority of the American public favor limiting immigration. For example, an online reader's poll conducted by the Atlanta Journal-Constitution in March 2002 found that ninety-nine percent of those responding favored increased controls on immigration. *Reader Opinions: Most Call for Tighter Immigration*, ATLANTA J-CONST., Mar. 6, 2002, *available at* www.ajc.com.

[131] "Changes in world politics and in our internal economy bring legislative adjustments affecting the rights of various classes of aliens to admission and deportation." Carlson v. Landon, 342 U.S. 524, 534 (1952).

[132] Purdy, *supra* note 5 (quoting Attorney General John Ashcroft).

[133] Prior to 1996, the Anti-Drug Abuse Act of 1988 made conviction of an aggravated felony—including murder, drug trafficking, and firearms trafficking—a ground for deportation and mandated detention for any aggravated felon awaiting a deportation hearing. *See* Stephen H. Legomsky, *The Detention of Aliens: Theories, Rules, and Discretion*, 30 U. MIAMI INTER-AM. L. REV. 531, 533 (1999).

terrorist grounds.[134] Also, subject to some narrow exceptions, arriving passengers whom immigration inspectors find inadmissible must be detained pending a full removal hearing (the results of which, under the AEDPA, are not subject to judicial review).[135]

The USA Patriot Act amends the Immigration and Nationality Act,[136] picking up where the AEDPA and the IIRIRA left off with respect to detaining aliens on terrorist grounds. Under section 412 of the Act, the Attorney General may take into custody any alien that he has "reasonable ground[s]" to believe is engaged in or is likely to be engage in any terrorist activity after entry,[137] or is engaged in "any other activity" that endangers the national security of the United States.[138] However, the Attorney General's power in this respect is not limitless. He has only seven days after detention to either place the alien in removal proceedings or charge him with a criminal offense. Otherwise, the alien must be released.[139] Thus, although an alien may be detained *initially* on "reasonable grounds," it is only for a short period, and more is needed to hold him any longer.

Any alien not removed, and whose removal is unlikely in the reasonably foreseeable future, can be detained for an additional six months only if his release will threaten the national security of the U.S. or the safety of any community or person.[140] This provision allows the Attorney General additional time to conduct an investigation and charge the alien, when the seven-day window would provide insufficient time to do so.

Unlike the incarceration imposed as part of a criminal sentence, detention of noncitizens in connection with removal proceedings is not constitutionally considered "punishment."[141] As such, detention does not invoke the full range of constitutional safeguards provided in

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[134] AEDPA § 302 defines terrorist grounds as any foreign organization that engages in terrorist activity that threatens the security of United States nationals or the national security of the United States.
[135] *See* Legomsky, *supra* note 133, at 534.
[136] 8 U.S.C. § 1101 *et seq.* (1994).
[137] "Terrorist activity" is defined as, *inter alia*, committing or inciting to commit terrorist activity, gathering information on potential targets for terrorist activity, recruiting others for membership in a terrorist organization. 8 U.S.C.A. § 1182.
[138] USA Patriot Act § 236A(a) (2001).
[139] *Id.* § 236A(a)(5).
[140] *Id.* § 236A(a)(6).
[141] *See* Legomsky, *supra* note 133, at 536.

criminal proceedings, such as the Sixth Amendment rights to a speedy, public jury trial and to counsel.[142] Much like its use in the criminal context, however, detention of suspected terrorist aliens is useful in furthering national security goals. Professor Stephen Legomsky has identified three theories supporting detention of noncitizens pending removal: (1) preventing individuals from absconding; (2) isolating those who pose a danger to the community; and (3) deterring certain types of immigration violations in the first place.[143]

The most obvious justification for detention—to prevent individuals from disappearing—is the same rationale underlying pretrial detention in criminal cases.[144] With respect to immigration, the numbers speak for themselves: Before mandatory detention was imposed, about *ninety percent* of non-detained persons who were ordered removed failed to surrender themselves for removal.[145] Most probably believe they have nothing to lose: "If someone wishes to enter the United States, and the INS alleges that he or she is inadmissible . . . or deportable, the person might conclude there is little to lose by absconding."[146] Moreover, many noncitizens believe that absconding will buy them additional time in the U.S., and that, if caught, they will not be punished beyond the removal that otherwise awaited them.[147]

A person convicted of a qualifying crime (under the AEDPA) or suspected of terrorism may be even more likely to disappear rather than face removal.[148] Such persons are less likely to qualify for discretionary relief from removal,[149] and are considered more likely to fear removal if apprehended.[150]

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[142] *See id.*
[143] *See id.*
[144] *See id.*
[145] *Id.* at 537 (citing the Vera Institute for Justice, *The Appearance Assistance Program: Attaining Compliance with Immigration Laws through Community Supervision* (1998)).
[146] Legomsky, *supra* note 133, at 537.
[147] *See generally* Peter A. Schuck, *INS Detention and Removal: A "White Paper,"* 11 GEO. IMMIGR. L. J. 667 (1997). Schuck notes that immigration laws now authorize civil and criminal penalties, though they are unlikely to be imposed. *Id.* at 671-72.
[148] *See* Legomsky, *supra* note 337, at 538.
[149] *See id.*
[150] *See id.*

Moreover, "the terrorist category is the one to which the public safety rationale seems most applicable."[151] The already overwhelming probability that a non-detained removable alien will abscond absent mandatory detention, combined with the public safety threat that non-detained criminals and suspected terrorists may pose, provide ample justification for mandatory detention in the case of the suspected terrorists.

The third theory identified by Professor Legomsky, deterrence of immigration violations, may also play a role in protecting the United States from foreign terrorists. First, the unpleasantness of the detention itself might deter a potential terrorist from seeking entry into the United States.[152] Second, mandatory detention dashes the hopes of anyone expecting to remain at large pending a removal hearing, then going underground to complete his terrorist mission.[153]

The justifications for detention are compelling even where the removable alien is guilty of nothing more than being in the United States illegally.[154] In a case like that of the September 11th hijackers, for example, pre-removal detention is particularly compelling. First, such terrorists are well funded,[155] making it much easier for them to disappear than it might be for an immigrant of lesser means, such as a factory worker. Second, terrorists, including members of Al Qaeda, are known to possess various false documents and usually multiple passports,[156] making it easier to disappear if released. Third, detention facilitates extradition where a suspected terrorist is wanted in another country. By detaining the suspect, the United States may increase goodwill and anti-terrorism cooperation with foreign nations. Most importantly, detention allows time to build a criminal case against a suspected terrorist, especially on a conspiracy charge assuming that the government can persuade one of the suspect's peers to cooperate.

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[151] *Id.* at 539.

[152] *See id.* at 540.

[153] *See id.*

[154] Discussed *supra*, justifications include preventing the alien from absconding, and isolating those who pose a threat to the community.

[155] *See* Indira A.R. Lakshmanan, *Profit, not Ideology, Drives Group Sought by U.S., Manila*, BOSTON GLOBE, Jan. 26, 2002, at A8.

[156] *See, e.g.*, Richard Broudreaux, *Justice: Tunisian Immigrants are Given Sentences of Up to Five Years for Conspiracy*, L.A. TIMES, Feb. 23, 2002, at A10. Terrorists have procured fake passports, identity cards, driver's licenses, and other documents. *Id.*

The Attorney General's powers under the USA Patriot Act also contain sufficient protections for the detained alien. Checks on the Attorney General's power include some access to habeas corpus proceedings for detained aliens,[157] mandatory reports to the House and Senate Committees on the Judiciary,[158] and review of certification every six months as to the alien's status as a threat.[159]

Given the grave threat to national security, and the compelling justifications for detention, the Attorney General's expanded powers are not only warranted, but necessary. Detaining individuals in order to prevent them from simply disappearing into the interior—and, in the case of suspected terrorist aliens, perpetrating their attacks—is vital to national security.

D. Deportation

The right of a nation to expel or deport foreigners who have not been naturalized, or taken any steps towards becoming citizens of the country, rests upon the same grounds, and is as absolute and unqualified, as the right to prohibit and prevent their entrance.[160]

The Supreme Court first articulated the foregoing principle in the late 1800s and continues to do so today: "For reasons long recognized as valid, the responsibility for regulating the relationship between the United States and our alien visitors has been committed to the political branches of the Federal Government."[161] Thus, Congress may remove those aliens whom it believes should no longer be allowed to reside in the United States.[162] The INA[163] governs the terms by which an alien may be removed. Section 1251B of the INA provides that "any alien

[157] Proceedings may be initiated by application filed with the Supreme Court or a justice thereof, any circuit judge of the United States Court of Appeals for the District of Columbia, or any jurisdiction otherwise have jurisdiction to entertain the application. Patriot Act § 236A(b)(2)(A)(i)-(iv).
[158] *See id.* § 236A(c).
[159] *See id.* § 236A(a)(7). The alien may request reconsideration of the Attorney General's certification every six months, and may submit documents or other evidence in support of that request. *Id.*
[160] Fong Yue Ting v. United States, 149 U.S. 698, 707 (1893).
[161] Mathews v. Diaz, 426 U.S. 67, 81 (1976).
[162] Under AEDPA, such aliens include those who have committed felonies. *Id.*
[163] 8 U.S.C. § 1251 (1994).

who has engaged, is engaged, or at any time after entry engages in any terrorist activity is deportable."[164] The INA defines "terrorist activity" as involving any of the following:

> (I) The hijacking or sabotage of any conveyance (including an aircraft, vessel, or vehicle).
> (II) The seizing or detaining, and threatening to kill, injure, or continue to detain, another individual in order to compel a third person (including a governmental organization) to do or abstain from doing any act as an explicit or implicit condition for the release of the individual seized or detained.
> (III) A violent attack upon an internationally protected person (as defined in section 1116(b)(4) of Title 18) or upon the liberty of such a person.
> (IV) An assassination.
> (V) The use of any (a) biological agent, chemical agent, or nuclear weapon or device, or (b) explosive or firearm (other than for mere personal monetary gain), with intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property.
> (VI) A threat, attempt, or conspiracy to do any of the foregoing.[165]

Congress's power also extends to the removal process itself. With passage of the AEDPA, for example, Congress prohibited access to habeas corpus relief for certain removable aliens,[166] a provision that—if applied to citizens—would be unconstitutional.[167] Another Congressional statute, the IIRIRA, facilitated expedited removal proceedings for those

[164] *Id.* § 1251B.
[165] 8 U.S.C. § 1182(a)(3)(B)(ii) (1994).
[166] *See* AEDPA § 440(a) (1996).
[167] The constitution's Suspension Clause forbids suspension of the writ of habeas corpus except in cases of rebellion or invasion, and applies only to U.S. citizens. U.S. CONST. art. I, § 9, cl. 2. In the exercise of its broad power over immigration, Congress regularly makes rules that would be unacceptable if applied to citizens. Mathews v. Diaz, 426 U.S. 67, 79 (1976).

aliens convicted of certain felonies.[168] And because deportation is not considered punishment,[169] the constitution's prohibition of ex post facto laws[170] does not apply to the retroactivity provisions found in the AEDPA and IRRIRA.

The Supreme Court traditionally has upheld Congress's power over deportation and, more importantly, the legislature's ability to preclude judicial review of deportation orders. In *Carlson v. Landon*,[171] the Court held that expulsion of aliens was "essentially a power of the political branches of government," and that opportunities for judicial review would be granted "as Congress may see fit to authorize or permit."[172] In 1996, Congress saw fit to withdraw all access to judicial review: "Any final order of deportation against an alien who is deportable by reason of having committed a criminal offense covered in several enumerated sections of the INA shall not be subject to review by any court."[173] Several circuit courts have upheld the provision. In *Duldulao v. INS*,[174] for example, the Ninth Circuit relied heavily on Carlson, holding that "aliens have no constitutional right to judicial review of deportation orders."[175] The Fifth Circuit has agreed, explaining that the AEDPA section 440(a) "effectively eliminates all judicial review of certain criminal alien appeals," and, correspondingly, the court's jurisdiction to hear such appeals.[176] The Supreme Court, apparently satisfied with the position it articulated in Carlson, has declined to grant certiorari on the issue.

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[168] "Aggravated felonies" under the IIRIRA include drug trafficking, rape, sexual abuse of a minor, murder, or any other crime punishable by up to one year's imprisonment. 8 U.S.C. § 1101(a)(43).
[169] *See* Burgess v. Salmon, 97 U.S. 381, 384 (1878).
[170] *See* U.S. CONST. art. I, § 9, cl. 3, cl. 10 (stating prohibitions against ex post facto laws).
[171] 342 U.S. 524 (1952).
[172] *Id.* at 537.
[173] AEDPA § 440(a) (*codified at* 8 U.S.C. § 1105a(a)(10)).
[174] 90 F.3d 396 (9th Cir. 1996).
[175] *Id.* at 400.
[176] Mendez-Rosas v. INS, 87 F.3d 672, 675 (5th Cir. 1996).

V. USA Patriot Act Title II: Enhanced Surveillance Procedures

A. Overview

The tradition of liberty in the United States casts a shadow over all national security surveillance. . . . The core openness of our society permits all of us, including the potential terrorist, considerable freedom to move about, to associate with others, and to act in furtherance of political aims.[177]

Terrorists seldom forewarn of their attacks. Indeed, the point of terrorism is to surprise one's enemy, threatening his sense of security.[178] To achieve their ends, terrorists hatch their plots in secret, sometimes planning them for years,[179] before perpetrating their attacks on an unsuspecting public.

As is true for other types of crimes, prevention is the key to stopping terrorist attacks. Plots must be discovered and thwarted before they can be carried out. Prevention is especially important in the context of terror, however, since terror attacks tend to be of a larger scale and more random occurrence than other crimes,[180] and are specifically geared

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[177] Banks & Bowman, *supra* note 13, at 93 n.715 (citing RICHARD A. FALKENRATH ET AL., AMERICA'S ACHILLES HEEL: NUCLEAR, BIOLOGICAL, AND CHEMICAL TERRORISM AND COVERT ATTACK 8 (1998)).

[178] A 1995 House Report referred to the United States' vulnerability to "random, unpredictable acts of terrorism." H.R. REP. NO. 104-383 (1995). Indeed, the Central Intelligence Agency and Federal Bureau of Investigation have come under intense criticism for their failure to anticipate the attacks of September 11, with one White House aide calling the September 11 attacks "an abject intelligence failure." *See, e.g.,* Massimo Calabresi & Romesh Ratnesar, *Can We Stop the Next Attack?*, TIME, Mar. 11, 2002, at 24, 2002 WL 8385880.

[179] Al Qaeda, for example, is thought to have terrorist "sleeper cells" scattered all over the world, whose members wait for the cell to receive orders to carry out a terrorist act. *See* Elaine Shannon, *Al-Qaeda's Paper Trail*, TIME, Dec. 3, 2001, at 17, 2001 WL 2938563.

[180] Although crime can occur anywhere, terror attacks typically occur in everyday places where most people assume they are safe: at office buildings (such as the World Trade Center), malls, nightclubs, and even pizza parlors. *See, e.g.,* www.usatoday.com/news/world/2002/06/19/bombings-glance.html (chronology of Palestinian suicide bombings against Israelis occurring in taxis, buses, nightclubs, train stations, parks, and supermarkets, among other locations).

toward causing widespread panic and fear.[181] Moreover, routing out terrorists presents a special challenge for law enforcement, as many terrorists are "well-entrenched, sophisticated, and often shrouded in a veil of legitimacy (such as operating under the camouflage of purportedly charitable or humanitarian activity)."[182]

Law enforcement's power to prevent terrorist attacks is limited by the Constitution's protection of individual rights, particularly the Fourth Amendment's prohibition of unreasonable searches and seizures.[183] Striking a balance between individual rights and collective security is no easy task, as one senior FBI official has bluntly observed: "We know that whenever we do something, people are going to call us jackbooted thugs. But if we do nothing, people are going to yell at us when something blows up."[184]

The USA Patriot Act greatly expands law enforcement's power to detect and prevent future terrorist attacks. The two most significant—and controversial—provisions include confidential searches of suspected terrorists'[185] homes, and the power to intercept and monitor suspects' telephone and Internet communications.

B. Executive Authority and the Foreign Intelligence Surveillance Act[186]

Prior to 1978, federal courts had recognized the President's inherent power to authorize warrantless electronic surveillance in matters involving foreign intelligence and national security.[187] As early as 1775, the President had assumed the authority to engage agents in foreign

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[181] The psychological damage wrought by such attacks can linger long after the event is over. *See, e.g.*, Matt Crenson, *Psychological Fallout, Anxiety over Terrorism Linger a Year After Attacks*, www.suntimes.com/special_sections/sept11/nation/psychological.html.

[182] *See* Matthew Levitt, *Stemming the Flow of Terrorist Financing: Practical and Conceptual Challenges*, 27-SPG FLFWA 59, 60 (Winter/Spring 2003).

[183] *See* U.S. CONST. amend IV.

[184] Mintz & Grunwald, *supra* note 129, at A1.

[185] This particular provision applies to both noncitizen aliens and citizens, which is one reason why it is regarded as controversial.

[186] Pub. L. No. 95-511 (1978) (codified in scattered sections of 50 U.S.C.).

[187] *See, e.g.*, United States v. Brown, 484 F.2d 418 (5th Cir. 1973), *cert. denied*, 415 U.S. 960 (1974); United States v. Butenko, 494 F.2d 593 (3rd Cir. 1974) (en banc), *cert. denied*, 419 U.S. 881 (1974); *see* William Michael, *A Window on Terrorism: The Foreign Intelligence Surveillance Act*, 58 B. & BENCH MINN. 23, 23 (2001).

intelligence matters[188] through executive order. Similarly, Congress has broad legislative authority over electronic surveillance and "can change the rules with the stroke of a pen."[189]

The constitutionality of the executive and legislative branches' long-standing practice of warrantless surveillance was first called into question when the Supreme Court held in *Katz v. United States*[190] that the warrant requirement of the Fourth Amendment[191] applied to electronic surveillance.[192] Five years later, in *United States v. United States District Court*,[193] the Supreme Court first confronted the tensions between unmonitored executive surveillance and individual freedoms within the context of national security. The Court clarified that if the national security threat was a domestic one, *Katz* still controlled, but reserved judgment on a key issue—foreign security threats.[194]

Enacted in response to this troubling constitutional issue, the Foreign Intelligence Surveillance Act ("FISA") was intended to create a "secure framework by which the Executive Branch may conduct legitimate electronic surveillance for foreign intelligence purposes within the context of this Nation's commitment to privacy and individual rights."[195] On a practical level, FISA's purpose is to review Justice Department applications and issue secret warrants for electronic surveillance[196] and, since 1995, issue warrants for covert entries into premises in connection with national security investigations.[197] Congress and President Clinton added the most current chapter of FISA in late 1998, when FISA amendments gave the government authority to engage

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[188] *See* Banks & Bowman, *supra* note 13, at 19.
[189] McShane, *supra* note 54, at 49.
[190] 389 U.S. 347 (1967).
[191] "[N]o Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV.
[192] *Katz*, 389 U.S. at 353, 356-57. *Katz* carefully excluded national security surveillance from its holding. *Id.* at 358 n.23.
[193] 407 U.S. 297 (1972) (commonly known as the *Keith* case).
[194] *Id.* at 321-22.
[195] S.REP NO. 604, 95th Cong., 1st Sess. 15.
[196] *See* 50 U.S.C. § 1803 (1994 & Supp. III 1997). FISA allows wiretapping of both aliens and U.S. citizens when there is probable cause to believe that the target is a member of a foreign terrorist group or the agent of a foreign power.
[197] *See id.* § 1821-1829 (1994 & Supp. III 1997)) (addressing physical searches).

in roving wiretaps, install pen registers,[198] and place "trap and trace" devices[199] on communication lines.[200]

Responsibility for reviewing the government's applications and issuing warrants rests with the "FISA Court." Pursuant to the requirements of the Fourth Amendment,[201] the FISA Court will not approve the government's request for a physical search or surveillance unless it finds probable cause to believe the target is a foreign power or its agent;[202] and unless it finds that "foreign intelligence information" is being sought.[203] Such information is defined as that which relates to the ability of the United States to protect against, *inter alia*, sabotage or international terrorism by a foreign power or an agent of a foreign power.[204] When the surveillance involves a "United States person,"[205] the information sought must be necessary to "(A) the national defense or the security of the United States; or (B) the conduct of the foreign affairs of the United States."[206]

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[198] A pen register records the numbers dialed from a telephone. It does not overhear oral communications and does not indicate whether calls are actually completed. Smith v. Maryland, 442 U.S. 735, 736 (1979) (citing United States v. N.Y. Tel. Co., 434 U.S. 159, 161 (1977)).

[199] "Trap and trace" devices record the telephone numbers of the subject's incoming calls. U.S. Telecom Ass'n v. F.B.I., 276 F.3d 620, 623 (2002).

[200] *See* Pub. L. No. 105-272, 112 Stat. 2396 (codified at 50 U.S.C.A. §§ 4041, 1841-1846, 1861-1863 (West 2000)).

[201] The Fourth Amendment requires that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV. However, probable cause that the target has actually committed a crime is not necessary. *See* United States v. Rahman, 861 F.Supp. 247, 251 (S.D.N.Y. 1994).

[202] A "foreign power or its agent" includes entities controlled and directed by foreign governments, such as their intelligence services, as well as groups "engaged in international terrorism or activities in preparation therefore." 50 U.S.C. § 1801(a)(4).

[203] *Id.*

[204] 50 U.S.C. § 1801(e). Some critics, however, charge that the FISA Court simply "rubber stamps" all foreign intelligence surveillance requests. In fact, the FISA court has never denied an application for a search or surveillance, but this is probably due to the fact that the "probable cause" standard is a relatively easy one to meet. *See* Michael, *supra* note 180, at 24.

[205] A United States person is defined as a United States citizen or "an alien lawfully admitted for permanent residence." 50 U.S.C. § 1801(i).

[206] *Id.* § 1801(e).

Although FISA has been commonly associated with gathering classic intelligence information, (e.g., investigating Soviet intelligence agencies), it has also been an effective tool in the fight against terrorist organizations and their individual cells or members.[207] The USA Patriot Act expands the range of terrorism-fighting tools available pursuant to FISA, most notably its physical search and electronic surveillance provisions.

1. Physical (Home) Searches

It is better sometimes that crime should go unpunished than that the citizen should be liable to have his premises invaded, his desks broken open, his private books, letters, and papers exposed to prying curiosity . . . of ignorant and suspicious persons.[208]

Prior to 1994, physical searches for intelligence information were performed without review by the courts. Concerned that the 1993 warrantless physical search of the home of convicted spy Aldrich Ames might have been challenged had Ames not pled guilty, Congress amended FISA to permit physical searches.[209]

Physical searches under FISA are subject to the same Fourth Amendment probable cause requirement[210] that governs ordinary criminal investigations. First, the government must meet a two-prong inquiry, showing probable cause that: (1) the target of the physical search is a foreign power or an agent of a foreign power, except that no United States person may be considered an agent of a foreign power solely upon the basis of activities protected by the first amendment to the Constitution of the United States; and (2) the premises or property to be searched is owned, used, possessed by, or is in transit to or from an agent of a foreign power or a foreign power.[211]

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[207] Michael, *supra* note 187, at 24. FISA authorizes surveillance of groups or individuals engaged or preparing to engage in terrorist activities. *See* Zachery, *supra* note 74, at 296 n.31.
[208] THOMAS G. COOLEY, A TREATISE ON CONSTITUTIONAL LIMITATIONS 367, 375 (4th ed. 1878).
[209] Michael, *supra* note 187, at 23.
[210] "[N]o Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV.
[211] 50 U.S.C. § 1824(a)(3).

In determining whether or not probable cause exists for purposes of a warrant, the FISA Court judge may consider past activities of the target, as well as facts and circumstance relating to current or future activities of the target.[212]

The USA Patriot Act amends FISA's physical search provisions in several ways. First, the USA Patriot Act extends the duration for which an order approving a physical search is valid, from forty-five to ninety days.[213] Second, the Act allows a FISA warrant to be extended "for a period not to exceed one year."[214] Finally, the USA Patriot Act adds "agents" of a foreign power to the FISA provision that allows extensions of physical search orders against a "foreign power" for a period not to exceed one year, if the judge finds probable cause to believe that no property of any individual United States person will be acquired during the period.[215]

None of the foregoing amendments affects FISA's constitutionality, which, although challenged on several fronts, has consistently been upheld.[216] Unsuccessful challenges included the argument that there must be probable cause to believe that the target has committed a crime,[217] and the argument that FISA's provisions violate the Fourth Amendment's prohibition against warrantless searches.[218] Because FISA was amended only minimally by the USA Patriot Act, it is likely that the provisions of the Patriot Act in question pass constitutional muster.[219]

2. Electronic Surveillance

The USA Patriot Act reduces the procedural hurdles to government surveillance Authority.[220] For example, prior to passage of

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[212] *Id.* § 1824(b).
[213] 50 U.S.C. § 1824(d)(1), *amended by* USA Patriot Act § 207(a)(2).
[214] USA Patriot Act § 207(b)(1).
[215] 50 U.S.C. § 1824(d)(2), *amended by* USA Patriot Act § 207(b)(2).
[216] *See* Michael, *supra* note 187, at 24.
[217] Although the gathering of foreign intelligence information must be the primary purpose of a FISA warrant, the information gleaned can be used in a criminal proceeding. *Id.* at 25.
[218] FISA does in fact require the government to obtain warrants, although the FISA court has never denied an application for a search or surveillance. *Id.* at 24.
[219] *Id.*
[220] *See* Plesser et al., *supra* note 46, at 9.

the Act, FISA required the government to certify, for any electronic surveillance request, that "the purpose of the surveillance is to obtain foreign intelligence information."[221] Courts have interpreted this to mean that the "primary purpose" of the surveillance must be gathering of foreign intelligence.[222] Section 218 of the USA Patriot act amends FISA so that the gathering of foreign intelligence need only be "a significant purpose" of the surveillance.[223] This will stave off arguments that if the information is also used for a criminal investigation, all Fourth Amendment protections should apply. In *United States v. Pelton*,[224] in which the defendant argued that the need for foreign intelligence did not justify an exception to the warrant requirement, the court held that FISA has numerous safeguards that provide sufficient protection under the 4th Amendment. The court stated: "The governmental interests in gathering foreign intelligence are of paramount importance to national security, and may differ substantially from those presented in the normal criminal investigation."[225] In *United States v. Rahman*,[226] the defendant was convicted for his role as a supervisor of terrorist operations in the United States, based in part on the use of FISA surveillance.[227] He argued that because the FISA surveillance was expected to produce results for use in a criminal case, the warrant should not have been certified.[228] The court dismissed this argument, refusing to "second-guess" the government's certification.[229] The court noted that FISA specifically contemplated that targets of surveillance would violate criminal laws.[230] Accordingly, the government is not precluded from using FISA when doing so would also produce criminal evidence.[231] Section 204 of the USA Patriot Act

[221] 50 U.S.C. § 1804 (a)(7)(B).
[222] *See, e.g.*, United States v. Johnson, 952 F.2d 565, 572 (1st Cir. 1991), *cert. denied*, 506 U.S. 816 (1992); United States v. Badia, 827 F.2d 1458, 1464 (11th Cir. 1987).
[223] USA Patriot Act § 218 (2001). This language reflects a compromise between existing law and a lower standard requested by the Bush administration. *See* Plesser et al., *supra* note 46, at 5.
[224] 835 F.2d 1067, 1075 (4th Cir. 1987).
[225] *Id.*
[226] 861 F.Supp. 247, 251 (S.D.N.Y. 1994), *affirmed at* 189 F.3d 88 (2nd Cir. 1999), *cert. denied*, 528 U.S. 1094 (2000).
[227] *See id.* at 249.
[228] *See id.* at 251.
[229] *Id.*
[230] *See* 50 U.S.C. § 1801(c)(1) & (d).
[231] *Rahman*, 189 F.3d at 251.

codifies these holdings, specifically exempting foreign intelligence surveillance from criminal procedure protections.[232]

The USA Patriot Act also amends FISA to allow roving surveillance of particular individuals. The federal wiretap statute, but not FISA, was amended fifteen years ago to allow "roving taps."[233] Prior to amendment by the USA Patriot Act, FISA authorized electronic surveillance of only a specifically identified facility, such as a telephone or facsimile machine.[234] Section 206 of the USA Patriot Act expands FISA's reach to authorize roving surveillance of particular individuals, not just a particular telephone or computer.[235] This will enable investigators to intercept all of a suspect's wire or electronic communications, regardless of his location. The "quintessential situation" regarding a roving wiretap in the past has been when a suspect "goes from phone booth to phone booth numerous times in an effort to prevent his or her calls from being wiretapped."[236] Today, terrorists often employ similarly evasive tactics, moving among various public Internet cafés or public library computer terminals in an effort to avoid being tracked,[237] and utilizing "disposable" cell phones[238] to prevent interception of their calls.

The Act also expands the kinds of communications that may be intercepted. Because FISA was passed over twenty years ago, in 1978, it contemplated only wire or oral transmissions. The USA Patriot Act brings FISA into the twenty-first century by including "electronic" communications as well, allowing investigators to monitor and intercept

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[232] Plesser et al., *supra* note 46, at 2.

[233] *Id.*

[234] *See* 50 U.S.C. § 1805(c)(2)(B).

[235] USA Patriot Act § 206 (2001).

[236] Plesser et al., *supra* note 6, at 2.

[237] *See, e.g.*, Randall E. Stross, *A Web of Peace—or War?*, U.S. NEWS & WORLD REP., Nov. 26, 2001, at 47, 2001 WL 30365714. "Roving tap authority . . . could be used to intercept the Internet communications of a suspect who changes Internet accounts daily, or several times a day." Plesser et al., *supra* note 44, at 2.

[238] "[A] suspect buys one cell phone and a week later buys another cell phone with a different number and moves from cell phone to cell phone seeking to avoid interception." *Id.* at 2. *See also* Michael Goldsmith, *Eavesdropping Reform: The Legality of Roving Surveillance*, 1987 U. ILL. L. REV. 401, 410 (1988) ("The success of electronic surveillance prompted experienced targets to shift telephones continuously.").

suspected terrorists' Internet communications.[239] Also, the Act makes several changes to FISA's pen register[240] and "trap and trace"[241] authority, most notably a provision that adds the terms "routing" and "addressing" to the phrase "dialing and signaling information," clarifying that pen register and trap and trace authority are intended to apply to Internet communications as well as traditional oral and wire communications.[242]

The foregoing amendments to FISA by the USA Patriot Act seek to bring FISA up-to-date by addressing many of the modern techniques and technologies utilized by terrorists. None of the amendments—most of which simply contemplate Internet communications and related hardware (e.g., laptop computers) in addition to traditional oral and wire communications and related hardware (e.g., telephones)—do not appear to affect FISA's constitutionality in any way. FISA still contains numerous safeguards that provide sufficient protection under the Fourth Amendment,[243] and because it involves national security, "the governmental interests in gathering foreign intelligence are of paramount importance."[244] Thus, FISA's updated provisions, as amended by the USA Patriot Act, pass constitutional muster.

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[239] USA Patriot Act § 204. The Act also expands the scope of items that may be obtained to include "tangible things." *Id.* § 215. Thus, Internet communications, records, and, now, items such as a computer on which information is stored may all be obtained with a proper FISA warrant. *See* Plesser et al., *supra* note 44, at 4. Seizure of tangible things is particularly useful in terrorism investigations, where bomb plots, diagrams of potential targets, and other documents may be stored on a suspect's computer but not necessarily e-mailed to others. In one particularly important discovery, for example, the convicted terrorist who masterminded the World Trade Center bombing in 1993 had encrypted files on his laptop containing plans to blow up U.S. airplanes around the world. *See Hearing of the Senate Judiciary Committee: Digital Privacy and the FBI's Carnivore Internet Surveillance Program,* FED. NEWS SERV., Sept. 6, 2000.

[240] A pen register records the numbers dialed from a telephone. It does not overhear oral communications and does not indicate whether calls are actually completed. Smith v. Maryland., 442 U.S. 735, 736 (1979) (citing United States v. N.Y. Tel. Co., 434 U.S. 159, 161 (1977)).

[241] "Trap and trace" devices record the telephone numbers of the subject's incoming calls. U.S. Telecom Ass'n v. F.B.I., 276 F.3d 620, 623 (2002).

[242] Plesser et al., *supra* note 46, at 4.

[243] United States v. Pelton, 835 F.2d 1067, 1075 (4th Cir. 1987).

[244] *Id.*

VI. Conclusion

The principles enunciated in the Declaration of Independence, the Constitution, acts of Congress, and court decisions historically seek to maximize individual liberty and minimize abuse of individual rights by the state.[245] At the same time, Americans understand that our freedom comes at a price, and that there are times of national emergency when individual liberties must be subordinated to national security concerns.[246]

The USA Patriot was passed at such a time. National security commentators and experts had warned Americans for years that the world's geopolitical climate exposed them to the threat of a serious terrorist attack.[247] This prediction was tragically realized on September 11, 2001, when terrorists used hijacked airplanes as missiles to attack the United States, reminding the U.S. that it can no longer ignore the threat terrorism poses to national security.

Throughout U.S. history, the American people have demonstrated a willingness to accept extraordinary measures to ensure national security.[248] There are, of course, limits beyond which the U.S. government should not go in the pursuit of national security. Those limits remain unknown.[249]

The USA Patriot Act strikes a reasonable balance between national security and individual rights. It utilizes several means allowed within the constitutional framework to prevent terrorism, without unnecessarily encroaching on the liberties enjoyed by Americans. So long as the Act commands the support of the American people, the United States should utilize the tools contained therein to the fullest extent possible to ensure national security and prevent further terrorist attacks.

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[245] McShane, *supra* note 54, at 46.
[246] *Id.*
[247] McShane, *supra* note 54, at 46.
[248] *See* Volkman & Baggett, *supra* note 26, at 90-92.
[249] McShane, *supra* note 54, at 49.

Editorial Postscript

Two major developments have taken place since the writing of this article. First, the U.S. Supreme Court declined, without comment, to hear an appeal that the ACLU filed on behalf of people who are under government surveillance pursuant to FISA Court warrants granted under the USA Patriot Act. The Court's action does not constitute a ruling on the merits.[250] Second, the draft of follow-up legislation to the USA Patriot Act, entitled the "Domestic Security Enhancement Act of 2003," expands on several of the provisions of the Patriot Act, going so far in some instances as to strip U.S. citizens of their citizenship if such persons are involved in terrorist activity. Testifying before the Senate Judiciary Committee on the parameters of the new Act, Attorney General John Ashcroft noted, "It's in the country's interest that we think expansively."[251]

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[250] Gina Holland, *Court Rejects Challenge to U.S. Spy Tactics*, MIAMI HERALD, Mar. 25, 2003, *available at* http://www.miami.com/mld/miamiherald/2003/03/25/news/nation/5474293.htm.

[251] Shannon McCaffrey, *Diverse Groups Opposed to Broader Antiterror Powers*, MIAMI HERALD, Mar. 26, 2003, at A1.