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Enemy Aliens

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I. INTRODUCTION

On January 24, 2002, the United States military transported John Walker Lindh, a young American raised in Marin County, California, and captured with the Taliban on the battlefields of Afghanistan, to Alexandria, Virginia, where he was to be tried in a civilian criminal court for conspiring to kill Americans. White House spokesman Ari Fleischer announced that “the great strength of America is he will now have his day in court.” At the same time,
the military was holding 158 foreign-born Taliban and Al Qaeda prisoners at a military base in Guantanamo Bay, Cuba, in 8-foot-by-8-foot chain-link cages.\(^3\)

A widely circulated press photo depicted the prisoners bound and shackled, with bags covering their heads and eyes, kneeling on the ground before U.S. soldiers.\(^4\)

President George W. Bush announced that he had categorically determined that the Guantanamo detainees were not entitled to the protections accorded prisoners of war under the Geneva Conventions, and Secretary of Defense Donald Rumsfeld dismissed concerns about their treatment with the assertion that it was better than the treatment the Taliban and Al Qaeda accorded their prisoners.\(^5\)

Two months earlier, the President had issued a military order providing that Al Qaeda members and other noncitizens could be tried by military tribunals, in which the military would act as prosecutor, judge, jury, and executioner, without any appeal to a civilian court.\(^6\)

The difference between the treatment afforded John Walker Lindh and his fellow Taliban and Al Qaeda prisoners held on Guantanamo rested on the fact that Lindh was, as the press nicknamed him, "the American Taliban." When the Attorney General announced the charges against Lindh, a reporter asked why Lindh was being tried in an ordinary criminal court rather than before a military tribunal. The Attorney General explained that because Lindh was a United States citizen, he was not subject to the military tribunals created by President Bush's order.\(^7\)

As a purely legal matter, the president could have made U.S. citizens subject to military commissions; citizens have been tried in military tribunals before, and the Supreme Court expressly upheld such treatment as recently as World War II.\(^8\) But the president chose to limit his order to noncitizens.

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\(^4\) Seelye & Erlanger, supra note 3.

\(^5\) John Mintz, *Debate Continues on Legal Status of Detainees*, Wash. Post, Jan. 28, 2002, at A15; Secretary of Defense Donald H. Rumsfeld Roundtable Briefing with Radio Media (As Released by the Pentagon), Fed. News Service, Jan. 15, 2002 (quoting Rumsfeld: "I do not feel even the slightest concern about their treatment. They are being treated vastly better than they treated anybody else over the last several years and vastly better than was their circumstance when they were found.").


\(^8\) In *Ex parte Quirin*, 317 U.S. 1 (1942), the Court upheld against a constitutional challenge the use of a military tribunal to try a group of "German saboteurs" who had secretly entered the United States posing as civilians with intent to attack U.S. installations. One of those charged claimed that, having been born in the United States, he was a U.S. citizen. The Court held that military tribunals can be used against citizens and aliens alike;
That choice is emblematic of how we have responded to the terrorist attacks of September 11, 2001. While there has been much talk about the need to sacrifice liberty for a greater sense of security, in practice we have selectively sacrificed noncitizens' liberties while retaining basic protections for citizens. It is often said that civil liberties are the first casualty of war. It would be more accurate to say that noncitizens' liberties are the first to go. The current war on terrorism is no exception.

In the wake of September 11, we plainly need to rethink the balance between liberty and security. The attacks, which killed more than 3,000 people and did immeasurable damage to the human spirit, succeeded beyond our worst nightmares and their perpetrators' wildest dreams in wreaking destruction and spreading fear throughout the nation. We all feel a profound and deeply unfamiliar sense of vulnerability in their wake and have a correspondingly urgent need for security and reassurance. The anthrax scare that followed underscored the gravity of the threats we face, vividly demonstrating that scientific and technological advances have made instruments of mass destruction far too widely accessible. And as Attorney General John Ashcroft's statement quoted as an epigraph to this article illustrates, many argue that the demands of waging war—here, a war without an articulable endpoint—require that civil liberties not stand in the way of victory.9

There is undoubtedly a balance to be struck between liberty and security, but there are also several reasons to be cautious about too readily sacrificing liberty in the name of security. First, as a historical matter, we have often overreacted in times of crisis. In World War I, we imprisoned people for years at a time merely for speaking out against the war effort.10 In World War II, we interned more than 110,000 persons solely because of their Japanese ancestry.11 And during the Cold War, thousands of innocent persons lost their jobs, were subjected to congressional investigations, or were incarcerated for their mere association with the Communist Party.12 In hindsight, these responses are generally viewed as shameful excesses; but in their day, they were considered reasonable and necessary.

Second, there is reason to think that as a general matter in times of crisis, we will overestimate our security needs and discount the value of liberty. Liberty is almost by definition abstract; it is measured by the absence of

9. See Senate Judiciary Committee Hearing on Anti-Terrorism Policy, supra note 1.
control or restraint. Fear, by contrast, is immediate and palpable; it takes physical form as stress, anxiety, depression, a pit in the stomach, a bad taste in the mouth. It is easy to take liberty for granted, and to presume that government powers to intrude on liberty are not likely to be directed at one's own liberty. Fear affects us all, especially after an attack like that of September 11.

Third, liberty and security are not necessarily mutually exclusive values in a zero-sum game. Liberty often plays a critical role in maintaining security. One of the justifications for guaranteeing political freedoms is that a free people are less likely to be driven to extreme violence. A political process that treats people with equal dignity and allows dissidents to voice their views and organize to change the rules through political means is likely to be more stable in the long run. Recent experience in England and Israel has shown that cracking down on civil liberties does not necessarily reduce violence, and may simply inspire more violence. As Justice Brandeis wrote, the Framers knew "that fear breeds repression; that repression breeds hate; [and] that hate menaces stable government." 14

Understanding both the importance of liberty and the temptation to restrict it that government authorities and democratic majorities would face in times of crisis, the Framers sought to protect our basic liberties from the momentary passions of the majority by inscribing them in the Constitution. But with few exceptions, constitutional rights are not absolute; a balance must be struck. As Justice Goldberg famously put it, "[the Constitution] is not a suicide pact." 15

Thus, while the tension between liberty and security should not be overstated, it cannot be denied. We love liberty and security, but recognize that sometimes we must limit one to enjoy the other. 16 When a democratic society strikes that balance in ways that impose the costs and benefits uniformly on all,

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16. As Chief Justice Rehnquist has written:

It is not simply "liberty" but civil liberty of which we speak. The word "civil," in turn is derived from the Latin word cīvis, which means "citizen." A citizen is a person owing allegiance to some organized government, and not a person in an idealized "state of nature" free from any governmental restraint.

one might be relatively confident that the political process will ultimately achieve a proper balance. But all too often we seek to avoid the difficult trade-offs by striking an illegitimate balance, sacrificing the liberties of a minority group in order to further the majority’s security interests. In the wake of September 11, citizens and their elected representatives have repeatedly chosen to sacrifice the liberties of noncitizens in furtherance of the citizenry’s purported security. Because noncitizens have no vote, and thus no direct voice in the democratic process, they are a particularly vulnerable minority. And in the heat of the nationalistic and nativist fervor engendered by war, noncitizens’ interests are even less likely to weigh in the balance.

In this essay, I will show how this double standard has operated, both in the wake of September 11 and at critical moments in our history. Since September 11, immigrants have been the targets of a massive preventive detention campaign conducted under unprecedented secrecy. Congress has enacted new laws that subject noncitizens to guilt by association, ideological exclusion, and unilateral executive detention. And federal and local officials have engaged in ethnic profiling, treating immigrants as suspect based on little more than their Arab ethnicity or national origin.

Some argue that a “double standard” for citizens and noncitizens is perfectly justified. The attacks of September 11 were perpetrated by 19 Arab noncitizens, and we have reason to believe that other Arab noncitizens are associated with the attackers and will seek to attack again. Citizens, it is said, are presumptively loyal; noncitizens are not. Thus, it is not irrational to focus on Arab noncitizens. Moreover, on a normative level, if citizens and noncitizens were treated identically, citizenship itself might be rendered meaningless. The very essence of war involves the drawing of lines in the sand between citizens of our nation and those against whom we are fighting. Surely in that setting it makes sense to treat noncitizens differently from citizens.

I will suggest that such reasoning should be resisted on three grounds: It is normatively and constitutionally wrong; it undermines our security interests; and it will pave the way for future inroads on citizens’ liberties. First, properly understood, the Constitution imposes substantial limits on sacrificing immigrants’ liberties for citizens’ purported security. The basic rights at stake—political freedom, due process, and equal protection of the laws—are not limited to citizens, but apply to all “persons” subject to our laws. These rights are best understood not as special privileges stemming from a specific social contract, but from what it means to be a person with free and equal dignity. They are human rights, not privileges of citizenship, and ought to apply whenever we seek to impose legal obligations on persons. The Constitution reserves relatively few rights to citizens, the principal one being the right to vote. And precisely because noncitizens do not enjoy the franchise, and therefore cannot rely on the political process for their protection, it is all the more critical that they be accorded basic human rights enforceable in court.
The fact that we are waging a “war on terrorism” does not alter these basic constitutional principles. This war is more akin to the metaphorical (and indefinite) “war on drugs” or “war on crime” than to a conventional war. As yet, it finds no nation on the other side. We are fighting an international criminal organization, Al Qaeda, and those who aid it, including, thus far, the Taliban. But we have declared war on no nation. Moreover, as the Japanese internment of World War II illustrated, it is perilous to predicate suspicion on ethnic identity even with respect to persons associated with a specific country on which we have declared war. It is another matter entirely to apply such treatment to citizens from a wide range of Arab countries, most of which are fighting on our side in the war on terrorism.

Second, as a security matter, employing a double standard with respect to the basic rights accorded citizens and noncitizens is likely to be counterproductive at home and abroad, because it undermines our legitimacy in both spheres. At home, law enforcement is more effective when it works with rather than against communities. If authorities have reason to believe that there might be potential terrorists lurking in the Arab immigrant community, they would do better to work with the millions of law-abiding members of that community to obtain their assistance in identifying potential threats, than to alienate the community by treating many of its members as suspect because of their ethnicity or national origin and pursuing others under conditions of secrecy that invite fear and paranoia.

Legitimacy is essential at the international level as well. As September 11 illustrated, terrorism is a transnational phenomenon, and it demands a transnational response. We must maintain a broad coalition if we are to succeed in our efforts, not only because we need the cooperation of many different nations’ intelligence and law enforcement apparatuses, but also because if we are seen as fighting for our own parochial interests and not for the interests of justice and peace more broadly, we are likely to inspire more people to take up the mantle of terrorism against us. As the critical responses of our allies to the military tribunals and the Guantanamo detentions illustrate, our credibility on matters of international law and human rights is already at a low ebb.17 This is in large part our own fault; as the world’s most powerful nation, we have too often acted as if we are free to ignore international norms whenever it serves our interests.18 But doing so will surely undermine the


multilateral coalition we desperately need to fight the war against terrorism effectively. Secretary of State Colin Powell's reported objections to the United States' stance on the Guantanamo prisoners reflects precisely that concern. 19

Finally, what we are willing to allow our government to do to immigrants creates precedents for how it treats citizens. In 1798, for example, Congress enacted the Enemy Alien Act, which remains on the books to this day and authorizes the President during wartime to detain, deport, or otherwise restrict the liberties of any citizen over 14 years of age of a country with which we are at war, without any individualized showing of disloyalty, criminal conduct, or even suspicion. In World War II, the government extended that logic to intern 110,000 persons of Japanese ancestry, about two-thirds of whom were U.S. citizens. Similarly, while we think of the McCarthy era as beginning in the 1940s, it was in fact preceded by several decades of targeting immigrants for their purportedly subversive political associations using immigration law. Joe McCarthy simply applied to citizens techniques developed in the 1910s under the leadership of a young J. Edgar Hoover, head of the Justice Department's "Alien Radical" division. Measures initially targeted at noncitizens may well come back to haunt us all.

In short, when we balance liberty and security, we should do so in ways that respect the equal dignity and basic human rights of all persons and not succumb to the temptation of purchasing security at the expense of noncitizens' basic rights. In the wake of September 11, we have failed to follow that mandate. But our long-term success in the campaign against terrorism prompted by the September 11 attacks will turn on our treating immigrants as we would want to be treated ourselves. In the end, the true test of justice in a democratic society is not how it treats those with a political voice, but how it treats those who have no voice in the democratic process.

II. SACRIFICING THEIR LIBERTY FOR OUR SECURITY: THE POST-9/11 RESPONSE

"[S]omebody who comes into the United States of America illegally, who conducts a terrorist operation killing thousands of innocent Americans—men, women, and children—is not a lawful combatant . . . . They don't deserve the same guarantees and safeguards that would be used for an American citizen

26, 2002, at A15 (maintaining that "the prisoner issue touches a profound resentment abroad at what many see as an American tendency to lecture others about international standards while refusing to comply with those it urges"); The Guantanamo Story, WASH. POST, Jan. 25, 2002, at A24 (arguing that Administration response to criticism of treatment of detainees at Guantanamo "suggested that the Bush administration would respect international law only so far as it chose to").

19. Rowan Scarborough, Powell Wants Detainees to be Declared POWs; Memo Shows Difference with White House, WASH. TIMES, Jan. 26, 2002, at A1 (reporting an internal White House memorandum in which White House Counsel Alberto Gonzales noted Powell's request that Taliban and Al Qaeda detainees be declared prisoners of war).
going through the normal judicial process."20 With these words Vice President Dick Cheney defended the president’s military order of November 13, 2001,21 which authorizes trial by military commission of any noncitizen whom the president accuses of engaging in international terrorism or belonging to Al Qaeda. The vice president’s view captures much of the administration’s response to the attacks of September 11. It has repeatedly targeted noncitizens, selectively denying them liberties that citizens take for granted. Each of its initiatives raises serious constitutional concerns, and each imposes burdens on noncitizens’ basic rights that citizens do not bear.

A. Secret Preventive Detention

Perhaps the most troubling feature of the government’s response to the attacks of September 11 has been its campaign of mass preventive detention. The actual number detained is a mystery, because in early November 2001, when the number was 1,147, the government responded to growing criticism of the number of persons it was detaining by halting its practice of issuing a running tally.22 If one assumes that the numbers of newly arrested persons decreased by half in the five months since the government stopped announcing a running tally, the number would be over 2,000 detained as of April 2002. Yet only a single person—Zaccarias Moussaoui—has been charged with any involvement in the crimes under investigation. And he was arrested before September 11. Government officials have claimed that 10 or 11 of the detainees, presumably including Moussaoui, may be members of Al Qaeda.23 But that simply raises the question of why the other 1,990 or so individuals were detained.

The detentions have been carried out under an unprecedented veil of secrecy. Initially, the government refused to release any details regarding the identity of the detainees. After substantial public pressure, a Freedom of Information Act (FOIA) lawsuit, and requests from members of Congress, the Justice Department released limited information in November regarding the approximately 600 persons then still in federal custody. The vast majority of the detainees were being held on immigration charges. About fifty were held on federal criminal charges, and an undisclosed but assertedly small number were held as material witnesses. The government refused to disclose how many were being held on state or local charges, and refused to reveal the


identities of any of the immigration or material witness detainees. In February 2002, the government announced that 327 persons remained in INS custody in connection with the September 11 investigation, but continued to refuse to provide the identities or charges for any of these persons. This secrecy makes it difficult to assess the extent to which the government is adhering to or violating the law in its detention policy.

The Justice Department has been especially secretive about the largest group of detainees, those held on immigration charges. As of December 2001, it had detained approximately 725 persons on immigration charges in connection with the September 11 investigation. All immigration detainees have been tried in proceedings closed to the public, the press, legal observers, and even family members. On orders from Attorney General Ashcroft, Chief Immigration Judge Michael Creppy has instructed immigration judges not to list the cases on the public docket, and to refuse to confirm or deny that they even exist. All hearings must be closed, no matter how routine, and whether or not any sensitive issues are discussed. Yet the INS has not used classified information in the proceedings, nor has it imposed protective orders on the aliens or their attorneys that would bar them from relaying to the public everything that they can recall happening in the hearing. Thus, the government cannot justify the closure order as a means of maintaining the confidentiality of classified information. Such an unprecedented and broad-based use of secret proceedings raises fundamental questions of fairness, because public scrutiny is critical to a fair process.


April 2002 that the closure order violates the First Amendment rights of the public and press to observe the trials. Yet over 700 aliens have been tried in secret.

Many of those detained on immigration charges were initially held for weeks or even months without any charges. On September 20, the Immigration and Naturalization Service (INS) amended a regulation governing detention without charges. The preexisting regulation had required the INS to file charges within 24 hours of detaining an alien. Under the new regulation, detention without charges is permissible in all cases for 48 hours, and for an unspecified "reasonable" period beyond that in times of emergency. Documents disclosed in the FOIA lawsuit show that 317 detainees were held for more than 48 hours before being charged, 36 detainees were held for more than four weeks without charges, and nine were held for more than 50 days without charges.

With the exception of Zaccarias Moussaoui and perhaps the material witnesses, all of the detainees are being held on "pretextual" charges. The real reason for their incarceration is not that they worked without authorization or took too few academic credits, for example. Rather, the government has used these excuses to detain them because it thinks they might have valuable forward with relevant testimony, [and] cause all trial participants to perform their duties more conscientiously . . . ."


32. 66 Fed. Reg. 48,334 (Sept. 20, 2001) (amending 8 C.F.R. 287.3(d)).

33. 8 C.F.R. 287.3(d) (2000).

34. 8 C.F.R. 287.3(d) (2002).

information, because it suspects them but lacks sufficient evidence to make a charge, or simply because the FBI is not yet convinced that they are innocent.

Consider, for example, Ali Maqtari. A Yemeni citizen, Maqtari was picked up on September 15 when he accompanied his U.S. citizen wife to Fort Campbell, Kentucky, where she was reporting for Army basic training. Agents interrogated him for more than 12 hours and accused him of being involved with terrorists. Maqtari took and passed a lie detector test, but was detained on the highly technical charge that he had been in the country illegally for ten days while changing his status from tourist to permanent resident. The government never offered any evidence linking him to terrorism or crime of any kind. It merely submitted a boilerplate affidavit from an FBI agent arguing that Maqtari should be detained because the investigation of terrorism is a “mosaic,” and therefore, seemingly innocent facts might at some future time turn out to indicate culpability. Two months later, Maqtari was released without charges.36

Another man, Osama Elfar, was detained on September 24, 2001, apparently because he was Egyptian, attended a Florida flight school, and worked as a mechanic for a small airline in St. Louis. He agreed to leave the country, but a month later, he was still detained.37 Hady Hassan Omar, also an Egyptian, spent two months in jail because he made plane reservations on a Kinko’s computer around the same time that one of the hijackers did so. He was released without charges on November 23, 2001.38

These and other cases suggest that the Justice Department policy has been to lock up first, ask questions later, and presume that an alien is dangerous until the FBI has a chance to assure itself that the individual is not. The government has justified its actions with a liberal combination of the “mosaic” argument noted above and the “sleeper” theory. Under the latter, the fact that a suspicious person has done nothing illegal only underscores his dangerousness; Al Qaeda is said to have “sleeper” cells around the world, groups of individuals living quiet and law-abiding lives, but ready and willing to commit terrorist attacks once they get the call.39 Taken together, the “mosaic” and “sleeper” theories suggest that the absence of evidence of illegal conduct is not a reason to release a “suspicious” person. In practice, they appear to have justified tremendously overbroad detention policies.


37. Jodi Wilgoren, A Nation Challenged: The Detainees; Swept Up in a Dragnet, Hundreds Sit in Custody and Ask, ‘Why?’, N.Y. TIMES, Nov. 25, 2001, at B5. Elfar later went on a hunger strike to protest his detention, consuming only water for seven days. At least fourteen detainees have done the same. Peter Slevin & George Lardner, Jr., Some Detainees Turn to Hunger Strikes, WASH. POST, Dec. 1, 2001, at A20.

38. Wilgoren, supra note 37.

Government documents disclosed in the FOIA lawsuit in December showed that of the 725 people held on immigration charges, over 350 had already been determined to be of no interest to the investigation.\(^{40}\) The number of such "cleared" individuals is no doubt much higher today, since, as noted above, only one person has been charged with involvement in the September 11 attacks. Yet until the FBI clears an individual, he is detained, even when the government has no legitimate legal basis for detention. Ibrahim Turkmen, a citizen of Turkey, was arrested and detained on October 13, 2001, and given voluntary departure on October 31. Two days later, a friend purchased a ticket for him and brought it to the INS office. Yet the INS kept Turkmen in custody for nearly four more months, until the FBI convinced itself that he was innocent.\(^{41}\) The *New York Times* reported that as of February 18, 2002, the Justice Department was blocking the departures of 87 foreign citizens who had either agreed to leave or had been ordered deported.\(^{42}\) The government was continuing to hold them simply because it had not yet satisfied itself that they were innocent, even though there was no longer any ostensible immigration purpose for their detention, they were charged with no crimes, and they had been afforded no probable cause hearings.

The INS has no legal authority to detain a person once it can remove him from the country. It may put him on an airplane at that point, but it cannot decline to remove and simply hold him in custody. The INS's authority to detain is only incident to its authority to deport. Where detention is necessary to effectuate deportation, the Supreme Court has permitted the INS to employ a form of preventive detention.\(^{43}\) But it cannot impose detention for punishment,\(^{44}\) nor does it have any freestanding authority to detain persons who might be thought to be dangerous.\(^{45}\) Yet the INS appears to be doing just that with respect to many of the immigration detainees, who are held on pretextual immigration charges and the faintest of suspicions and are being held in many instances even when the immigration charges have been finally resolved, and the aliens are willing to leave the country.\(^{46}\)

Some argue that because the detainees have at least allegedly violated immigration laws, they deserve to be detained. But while an allegation of an immigration violation, if proven, may justify deportation (if the alien does not


\(^{42}\) Drew & Miller, *supra* note 25.

\(^{43}\) Carlson *v.* Landon, 342 U.S. 524 (1952).

\(^{44}\) Wong Wing *v.* United States, 163 U.S. 228 (1896).

\(^{45}\) In *Zadvydas v.* Davis, 533 U.S. 678, 121 S. Ct. 2491 (2001), for example, the Supreme Court held that even aliens who had been finally ordered deported and who were found to be dangerous could not be detained indefinitely if they were not likely to be deported in the foreseeable future.

qualify for some form of relief permitting him to remain, such as political asylum), the allegation of a violation does not in itself justify detention. Detention is the exception, for immigration law has long held that aliens placed in removal proceedings and alleged to have violated the terms of their visas may not be detained while the administrative process determines their fate unless they pose a danger to the community or a flight risk. Under a new regulation issued October 29, 2001, however, even if an immigration judge rules after a custody hearing that the government has shown no basis for detention, an INS district director—in effect, the prosecutor—can keep the alien locked up simply by filing an appeal of the release order. Appeals of immigration custody decisions routinely take months and often more than a year to decide. And the INS need not make any showing that its appeal is likely to succeed.

None of these measures apply to citizens. Citizens are entitled to a public trial. They may be subjected to “preventive detention,” but only if brought before an independent judge within 48 hours of arrest for a hearing to determine whether there is probable cause that they have committed a crime, and only if they are shown to be a flight risk or danger to the community. The “speedy trial” requirement means that unless a citizen agrees to an extension, preventive detention is limited to a matter of weeks. Citizens cannot be held simply because the government entertains vague suspicions about them and has not yet convinced itself that they are innocent. And if a judge rules that a citizen should be released on bail pending trial, the prosecutor cannot keep him in jail simply by filing an appeal. In other words, we have imposed on foreign citizens widespread human rights deprivations that we would not likely tolerate if imposed on ourselves.

47. O’Rourke v. Warden, 539 F. Supp. 1131, 1135 (S.D.N.Y. 1982) (“The BIA... has construed [8 U.S.C. § 1252(a)] to provide that the determination to release an alien pending deportation proceedings is ‘not a discretionary form of relief’ but rather ‘an alien should be detained or required to post a bond, only if he is a threat to national security or is a poor bail risk.’”) (quoting In re O’Rourke, A22 607 396, Decision and Order of the BIA, August 13, 1980, at 3); see also In re Drysdale, 20 I. & N. Dec. 815, 817 (BIA 1994) (“Once it is determined that an alien does not present a danger to the community or any bail risk, then no bond should be required.”); In re De La Cruz, 20 I. & N. Dec. 346, 349 (BIA 1991) (same); Matter of Patel, 15 I. & N. Dec. 666 (BIA 1976) (same).


B. *The USA PATRIOT Act*

The targeting of noncitizens is further reflected in the USA PATRIOT Act, an omnibus antiterrorism bill enacted just six weeks after September 11. The Act makes many changes to criminal, immigration, banking, and intelligence law, but it reserves its most extreme measures for noncitizens. It makes noncitizens deportable for wholly innocent associational activity, excludable for pure speech, and detainable on the Attorney General's say-so, without a hearing and without a finding that they pose a danger or a flight risk.

1. *Guilt by association.*

Section 411 of the USA PATRIOT Act imposes guilt by association on aliens. This McCarthy-era philosophy, which the Supreme Court has since condemned as "alien to the traditions of a free society and the First Amendment itself," has made a strong comeback in recent years under the guise of cutting off funding for terrorism. Before September 11, however, aliens were deportable for engaging in or supporting terrorist activity, but not for mere association. Aliens could be deported for providing material support to an organization only if they knew or reasonably should have known that their activity would support the organization "in conducting a terrorist activity." In other words, the government had to demonstrate a nexus between the alien's conduct and terrorist activity. The USA PATRIOT Act eliminates that nexus requirement. It makes aliens deportable for wholly innocent associational activity with a "terrorist organization," whether or not there is any connection between the alien's associational conduct and any act of violence, much less terrorism. Because the new law defines "terrorist activity" to include virtually any use or threat to use a weapon, and defines "terrorist organization" as any group of two or more persons that has used or threatened to use a weapon, the Act's proscription on associational activity

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56. USA PATRIOT Act, supra note 51, at § 411. The Act defines as a deportable offense the solicitation of members or funds for, or the provision of material support to, any group designated as terrorist. There is no defense available, not even for those who can show that their support had no connection to furthering terrorism. The government is free to designate any organization that uses or threatens to use violence as terrorist. In addition, the law makes aliens who support even nondesignated groups deportable if the group has engaged in or threatened violence, unless the alien can prove that he neither knew nor reasonably should have known that his support would further the group's terrorist activities.
potentially encompasses every organization that has ever been involved in a
civil war or a crime of violence, from a pro-life group that once threatened
workers at an abortion clinic, to the African National Congress, the Irish
Republican Army, or the Northern Alliance in Afghanistan.

Under this law, an alien who sent a toy train set to a day-care center run by
a designated organization would be deportable as a terrorist, even if she could
show that the train set was used only by three-year olds. Indeed, the law
extends even to those who seek to support a group for the purpose of
countering terrorism. Thus, an alien who offered to train IRA representatives in
negotiating in the hope of furthering the peace process in Great Britain and
forestalling further violence could be deported as a terrorist if the Secretary of
State chose to designate the IRA as a proscribed group.

Had this law been on the books in the 1980s, the thousands of noncitizens
who supported the African National Congress's lawful, nonviolent anti-
apartheid activity would have been deportable as terrorists. The ANC used
military as well as nonviolent means in its struggle against apartheid, and the
State Department routinely designated it as a terrorist organization before it
came to power in the 1990s. 57

Some argue that the threat from terrorist organizations abroad and the
fungibility of money require adjustments to the constitutional prohibition on
guilt by association. But that prohibition was developed in the crucible of a
battle against an even more formidable foe—the Communist Party, an
organization that Congress found to be, and the Supreme Court accepted as, a
foreign-dominated organization that used sabotage and terrorism for the
purpose of overthrowing the United States by force and violence. 58 If
association with such an organization deserves protection, surely association
with much less powerful groups that have merely used or threatened to use a
weapon at some point deserves similar protection.

In addition, the fungibility argument rests on a faulty factual assumption.
It maintains that because money is fungible, even a donation of blankets to a
hospital will free up resources that will then be devoted to terrorism. But this
argument assumes that a group engaged in a political struggle that uses both
legal and illegal means will necessarily devote every marginal dollar to its
illegal means. On this assumption, every dollar donated to the ANC for its
nonviolent opposition to apartheid freed up a dollar that the ANC then spent on
violent, terrorist ends. While some groups (including Al Qaeda) may be so
committed to violence that all other activities are merely a front for terrorism,
that is not likely to be true for most political organizations that use violence.

57. See, e.g., U.S. Dep't of State, Patterns of Global Terrorism: 1988, at 82
(1989); U.S. Dep't of State, Patterns of Global Terrorism: 1987, at 65 (1988).

58. See, e.g., United States v. Robel, 389 U.S. 258, 262 (1967); Keyishian v. Board of
Regents of Univ. of State of N.Y., 385 U.S. 589, 606 (1967); Scales v. United States, 367
For most groups, violence is but one means to a political end. This is not to excuse the violence, but to insist that one can often meaningfully distinguish between a group’s lawful and unlawful activities.

Consider Hamas, for example, which the government has designated as a terrorist group, and which has itself proclaimed responsibility for numerous suicide bombings. In 1996, the Israeli government estimated that Hamas devoted 95 percent of its resources to legal social service activity and only 5 percent to violent or military activity. In 1994 the State Department opposed making membership in Hamas a ground for denying visas, arguing that because Hamas engaged in “widespread social welfare programs” as well as terrorism, one could not presume that a Hamas member was a “terrorist” without indulging in guilt by association. There is no evidence that the social welfare programs to which Hamas devotes 95 percent of its resources are merely a cover for its terrorist activities. Indeed, if Hamas sought to devote every marginal dollar to terror, one would expect to see its relative distribution of resources between illegal and legal activities reversed. Is it really plausible that every blanket provided to a Hamas-run hospital will lead to more money being spent on terrorist attacks? If it could be shown that a group’s “legitimate” activities were a cover for its illegal activities, action against its legitimate enterprises would be justified, just as federal law allows the government to seize legitimate businesses from organized crime groups where it can show that they are fronts for criminal activity. But short of such a showing, we can and should distinguish between lawful and unlawful activities. We could not criminalize everyone who buys a pizza at a Mafia-run restaurant or gives a gift at a Mafia don’s wedding; nor should we treat as terrorist the provision of humanitarian aid to disfavored “terrorist organizations.”

The fungibility argument also proves too much as a legal matter. The Supreme Court has repeatedly struck down or narrowly construed laws that penalized association with the Communist Party absent proof that the individual specifically intended to further the group’s illegal ends. It has also


60. Hearing Before the Subcomm. on Int’l Law, Immigration, and Refugees of the House Comm. on the Judiciary, 103d Cong. 7 (Feb. 23, 1994) (written testimony of Mary A. Ryan, Assistant Sec’y for Consular Affairs, U.S. Dep’t of State); see also id. at 9 (written testimony of Chris Sale, Deputy Commissioner of the Immigration and Naturalization Service).


62. See Robel, 389 U.S. at 262 (invalidating ban on Communist Party members working in defense facilities absent showing of “specific intent”); Keyishian, 385 U.S. at 606 (holding that “[m]ere knowing membership without a specific intent to further the unlawful aims of an organization is not a constitutionally adequate basis” for barring Communist Party members from employment in state university system); Elftbrandt v. Russell, 384 U.S. 11, 19 (1966) (invalidating oath requiring state employees not to join Communist Party
repeatedly recognized that the rights of speech and association would mean little without the right to raise and spend money to speak and associate, and accordingly, has protected fundraising and donations as acts of association and speech.\textsuperscript{63} An association cannot exist without the material support of its members. If the provision of material support to a group were somehow constitutionally different from membership, then all of the anti-Communist measures declared invalid by the Supreme Court could have simply been rewritten to make punishment contingent on the payment of dues, the volunteering of time, or any of the other material manifestations of political association. The right of association, in other words, would be left a meaningless formality.

2. **Ideological exclusion.**

The USA PATRIOT Act also resurrects ideological exclusion, the practice of denying entry to aliens for pure speech. It bars admission to aliens who "endorse or espouse terrorist activity," or who "persuade others to support terrorist activity or a terrorist organization," in ways determined by the Secretary of State to undermine U.S. efforts to combat terrorism.\textsuperscript{64} It also excludes aliens who are representatives of groups that "endorse acts of terrorist activity" in ways that similarly undermine U.S. efforts to combat terrorism. Because of the breadth of the definitions of "terrorist activity" and "terrorist organizations," this authority would empower the government to deny entry to

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\textsuperscript{63} See Meyer v. Grant, 486 U.S. 414 (1988) (holding that statutory prohibition against paid solicitors violates First Amendment); Roberts v. U.S. Jaycees, 468 U.S. 609, 626-27 (1984) (finding that the First Amendment protects nonprofit group's right to solicit funds); Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290, 295-96 (1981) (holding that monetary contributions to a group are a form of "collective expression" protected by the right of association); Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620, 632-38 (1980) (ruling that the First Amendment protects nonprofit group's right to solicit funds); Buckley v. Valeo, 424 U.S. 1, 16-17, 24-25 (1976) (holding that the First Amendment protects monetary contributions to political campaigns); Staub v. City of Baxley, 355 U.S. 313, 321-25 (1958) (striking down on First Amendment grounds law requiring permit to solicit citizens for membership in any organization that requires fees or dues); In re Asbestos School Litig., 46 F.3d 1284, 1290 (3d Cir. 1994) (finding that contributions to political organization are constitutionally protected absent specific intent to further the group's illegal ends); Serv. Employees Int'l Union v. Fair Political Practice Comm'n, 955 F.2d 1312, 1316 (9th Cir.1992) (holding that "contributing money is an act of political association that is protected by the First Amendment"), cert. denied, 505 U.S. 1230 (1992).

\textsuperscript{64} USA PATRIOT Act, supra note 51 at § 411.
any alien who advocated support for the ANC, for the Contras during the war against the Sandinistas, or for opposition forces in Iraq and Iran today. Because all of these groups have used force or violence, they would be terrorist organizations, and anyone who urged people to support them could be denied entry on the Secretary of State's say-so.

Citizens have a constitutional right to endorse terrorist organizations or terrorist activity, so long as their speech is not intended and likely to produce imminent lawless action. While the Supreme Court has long ruled that aliens outside our borders—in contrast to those living among us—have limited constitutional rights, such ideological exclusions nonetheless raise constitutional concerns. The First Amendment is designed to protect a robust public debate, and if our government can keep out persons who espouse disfavored ideas, our opportunity to hear and consider those ideas will be diminished. More broadly, excluding people for their ideas is contrary to the spirit of political freedom for which the United States stands. It was for that reason that Congress removed all such grounds from the Immigration and Nationality Act (INA) in 1990, after years of embarrassing visa denials for political reasons. We are a strong enough country, and our resolve against terrorism is strong enough, to make such censorship unnecessary. Yet we have now returned to the much-criticized ways of the McCarran-Walter Act, targeting aliens not for their acts but for their words, and for words that would be fully protected if uttered by United States citizens.

3. Unilateral executive detention.

The USA PATRIOT Act radically revises the rules governing detention of immigrants. Prior to its enactment, aliens in removal proceedings were subject to preventive detention under essentially the same standards that apply to defendants in criminal proceedings: They could be detained without bond if they posed a danger to the community or a risk of flight. Unless the

66. See, e.g., Kleindienst v. Mandel, 408 U.S. 753 (1972) (assuming without deciding that alien outside the United States does not have First Amendment right to object to his exclusion); United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537 (1950) (holding that aliens outside the United States do not have a right to enter protected by the Constitution).
68. See Immigration and Nationality Act of 1990, 8 U.S.C. § 1182(a)(3)(C) (repealing INA § 212(a)(27) and (28) (1952), which excluded anarchists; members of the Communist party; aliens who advocated Communism or violent overthrow of the U.S. government; and aliens who wrote or published, or even knowingly had in their possession, material advocating such activities).
69. See note 47 supra.
government could make such a showing in a hearing before an immigration judge, aliens were entitled to release on bond.

The USA PATRIOT Act gives the Attorney General unprecedented power to detain aliens without a hearing and without a showing that they pose a threat to national security or a flight risk. He need only certify that he has "reasonable grounds to believe" that the alien is "described in" various anti-terrorism provisions of the INA, and the alien is then subject to potentially indefinite "mandatory detention."70 The INA’s anti-terrorism provisions in turn include persons who are mere members of designated "terrorist organizations,"71 and persons who have supported the lawful activities of such organizations.72 Because the INA defines "engage in terrorist activity" so broadly as to include the use of, or threat to use, a weapon with intent to endanger person or property,73 it would encompass a permanent resident alien who brandished a kitchen knife in a domestic dispute with her abusive husband, or an alien who found himself in a barroom brawl, picked up a bottle, and threatened another person with it. Surely all such persons do not pose a danger or flight risk necessitating mandatory preventive detention, yet the USA PATRIOT Act empowers the Attorney General to detain such persons without any showing that they pose a danger or flight risk.

The mandatory detention provision applies both during removal proceedings, which frequently last years, and after removal proceedings have concluded, even where the proceeding determines that the alien may not be removed. The Supreme Court has held that "[i]n our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception."74 Preventive detention is constitutional only in very limited circumstances, where there is a demonstrated need for the detention—because of current dangerousness or risk of flight—and only where adequate procedural safeguards ensure a prompt and fair adjudication of whether detention is necessary.75 Where there is no showing that the alien poses a threat to the

70. USA PATRIOT Act, supra note 51 at § 412(a)(3) (amending 8 U.S.C. § 1226A(a) (2001)).
75. Zadvydas v. Davis, 533 U.S. 678, 121 S. Ct. 2491, 2498-99 (2001) (explaining constitutional limits on preventive detention, and interpreting immigration statute not to permit indefinite detention of deportable aliens); Foucha v. Louisiana, 504 U.S. 71, 80-81 (1992) (holding civil commitment to be constitutional only where individual is mentally ill and poses a danger to the community and adequate procedural protections are provided); Salerno, 481 U.S. at 751-55 (upholding preventive detention only where there is a showing of threat to others or risk of flight, the detention is limited in time, and adequate procedural safeguards are provided).
community or a risk of flight, there is no justification for detention, and any such detention would violate substantive due process.

In addition, the USA PATRIOT Act appears to permit detention of aliens indefinitely, even where they have prevailed in their removal proceedings. It provides that detention shall be maintained “irrespective of . . . any relief from removal granted the alien, until the Attorney General determines that the alien is no longer an alien who may be certified.” But an alien who has been granted relief from removal may not be removed. An alien granted asylum, for example, has a legal right to live in the United States. At that point, the INS has no legitimate basis for detaining the individual. As noted above, the INS’s authority to detain is only incidental to its removal authority. If the INS cannot remove an individual, it has no basis for detaining him.

The standard for certification raises additional constitutional concerns. The Act authorizes mandatory and potentially indefinite detention whenever the Attorney General has “reasonable grounds to believe” that an alien falls within one of the specified grounds of deportation or inadmissibility. If that is interpreted as requiring anything less than probable cause, the constitutional minimum required for an arrest, it would likely be unconstitutional. Moreover, even probable cause is not constitutionally sufficient to justify preventive pretrial detention absent a separate and additional finding that the individual poses either a risk of flight or a threat to the community.

4. Secret searches without probable cause.

The USA PATRIOT Act also made substantial changes to the rules that govern the collection and sharing of information by law enforcement and intelligence agencies. Many of these changes potentially affect citizens and immigrants alike, although their principal targets, at least initially, are likely to be Arab and Muslim immigrants. One of the most significant changes has the effect of authorizing warrants for secret searches (so-called “black bag jobs”) and wiretaps in criminal investigations without probable cause of criminal

77. See supra text accompanying notes 42-44.
78. Zadvydas, 121 S. Ct. at 2505 (holding that INS could not detain indefinitely even aliens finally determined to be deportable where there was no reasonable likelihood that they could be deported because no country would take them). The Court in Zadvydas reserved for another day the legality of indefinite detention of deportable aliens where applied “narrowly to ‘a small segment of particularly dangerous individuals,’ say suspected terrorists.” 121 S. Ct. at 2499 (citation omitted). But the USA PATRIOT Act’s definition of “terrorist activity” is not limited to a narrow, “small segment of particularly dangerous individuals,” as the Court in Zadvydas contemplated, but applies to garden-variety criminals, barroom brawlers, and those who have supported no violent activity whatsoever, but have merely provided humanitarian support to a disfavored group.
79. Salerno, 481 U.S. at 751-52.
conduct.\textsuperscript{80} The Fourth Amendment generally permits the government to conduct searches or wiretaps only where it has probable cause that an individual is engaged in criminal activity or that evidence of a crime would be found. But the USA PATRIOT Act allows the government to evade that requirement wherever it says that its investigation also has a significant foreign intelligence purpose.

It accomplishes this by amending the Foreign Intelligence Surveillance Act (FISA).	extsuperscript{81} FISA creates a limited exception to the criminal probable cause rule for foreign intelligence gathering. It authorizes the FBI to conduct electronic surveillance and secret physical searches without a criminal predicate, on the theory that foreign intelligence gathering is not designed to detect crimes but to gather information about foreign agents. Accordingly, it authorizes warrants not on a showing of probable criminal conduct, but on a showing that the target of the intrusion is an “agent of a foreign power.” “Agent” is defined broadly to include any officer or employee of a foreign based political organization, so that an employee of or volunteer for Amnesty International could be an “agent.”\textsuperscript{82} If the suspected agent of a foreign power is a U.S. citizen or permanent resident alien, the government is not allowed to base its warrant on activities protected by the First Amendment, but there is no requirement that the warrant be predicated on criminal activity.\textsuperscript{83}

Searches and wiretaps under FISA may be kept secret from the target, in many cases forever. Targets of criminal searches and wiretaps, by contrast, must be notified eventually of the search. Under FISA, a person is notified of surveillance only if he or she is later prosecuted using the evidence seized. Even then, defendants have little opportunity to challenge the validity of the search, for they are not provided the affidavit that served as the basis for the surveillance.\textsuperscript{84} Where individuals are not prosecuted, notice is never provided, and therefore the search cannot be challenged unless the target somehow independently discovers it.

The extraordinary authority provided by FISA was justified on the ground that foreign intelligence gathering is different from criminal law enforcement, and that the intelligence authority would not be used for the purpose of investigating crime. At the same time, Congress recognized that evidence of crimes might be obtained during legitimate foreign intelligence gathering—

\textsuperscript{80} USA PATRIOT Act, supra note 51, at § 218 (amending 50 U.S.C. §§ 1804(a)(7)(B) and 1823(a)(7)(B) (2001)).


\textsuperscript{84} 50 U.S.C.S. § 1825 (g) (Law. Co-op. 2002).
espionage, for example, is a crime—and therefore allowed the use of FISA evidence in criminal cases. But in order to obtain a FISA warrant, the "primary purpose" of the investigation had to be the collection of foreign intelligence, not criminal law enforcement. Otherwise, the statute would serve as an end-run around the probable cause requirements of the criminal wiretap statute.

In the USA PATRIOT Act, Congress eliminated the primary purpose test, amending FISA to allow wiretaps and physical searches without probable cause in criminal investigations so long as "a significant purpose" of the intrusion is to collect foreign intelligence, a showing that should be easy to make whenever the government's target is a politically active foreign citizen.\(^\text{85}\) The express justification for this amendment was to permit the government to initiate wiretaps under FISA's lower standard where the investigation's primary purpose was to collect criminal evidence. The potential scope of this loophole is enormous, for it permits searches in criminal investigations without probable cause of a crime.

C. Ethnic Profiling

One of the most dramatic responses to the attack of September 11 was a swift reversal in public attitudes about racial and ethnic profiling as a law enforcement tool. Before September 11, about 80 percent of the American public considered racial profiling wrong.\(^\text{86}\) State legislatures, local police departments, and the President had condemned the practice and ordered data collection on the racial patterns of stops and searches.\(^\text{87}\) The U.S. Customs Service, sued for racial profiling, had instituted measures to counter racial and ethnic profiling at the borders. A federal law on racial profiling seemed likely.

After September 11, however, polls reported that nearly 60 percent of the American public favored ethnic profiling, at least as long as it was directed at Arabs and Muslims.\(^\text{88}\) The fact that the perpetrators of the September 11 attack were all male Arab immigrants and that the attack was apparently orchestrated by Al Qaeda has led many to believe that it is only common sense to pay closer attention to Arab-looking men boarding airplanes and elsewhere. The high stakes make the case for engaging in profiling stronger here than in routine

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85. USA PATRIOT Act, supra note 51, at § 218 (amending 50 U.S.C. §§ 1804(a)(7)(B) and 1823(a)(7)(B) (2001)).
86. Gallup Poll, Do You Approve or Disapprove of the Use of 'Racial Profiling' by Police? (Dec. 9, 1999), available at WESTLAW, USGALLUP.120999 R6 009.
87. See generally DAVID HARRIS, PROFILES IN INJUSTICE: WHY RACIAL PROFILING CANNOT WORK (2002).
88. Sam Howe Verhovek, A Nation Challenged: Civil Liberties; Americans Give in to Race Profiling, N.Y. TIMES, Sept. 23, 2001, at A1. A Detroit News poll of Michigan residents found that while "70 percent generally opposed racial profiling, 70 percent also agreed that 'authorities should take extra precautions in screening people of Arab descent when flying.'" Gregg Krupa, Most in State Support Screening of Arabs, DETROIT NEWS, Feb. 28, 2002, at A1.
drug interdiction stops on highways. Thus, Stuart Taylor, a columnist for *Newsweek*, the *National Journal*, and *Legal Times*, who had previously been highly critical of racial profiling, wrote shortly after the attacks in favor of ethnic profiling of Arab men on airplanes.89 Press accounts made clear that, whether as a matter of official policy or not, law enforcement officials were paying closer attention to those who appear to be Arabs and Muslims.90

While the Bush Administration has been careful to speak out against ethnic and religious intolerance and hate crimes, it has sent mixed messages through its own enforcement policies. In November, the Justice Department announced its intention to interview 5,000 young immigrant men, based solely on their age, date of arrival, and the country from which they came.91 The countries singled out were said to be those where support for Al Qaeda was believed to exist, mostly Arab nations. In any event it appeared that virtually all of those interviewed were Arabs or Muslims. Several police departments around the country refused to participate in the interviews on the grounds that the practice appeared to constitute ethnic profiling.92

In January 2002, the *Washington Post* reported that the Justice Department had decided to prioritize the deportation of 6,000 aliens, selected from more than 300,000 foreign nationals who have remained in the country after being ordered deported.93 The basis for their selection? Once again, nothing more than that they are young men from countries where Al Qaeda support is thought to exist, i.e., Arab countries.

There is no question that the immediate aftermath of September 11 called for greater urgency than the ongoing war on drugs. But that does not


[R]acial profiling by police should be held to be unconstitutional... even where there is a statistically valid basis for believing that it will help catch more drug dealers or illegal immigrants... The negative impact of such profiling is far reaching... it subjects thousands of innocent people to the kind of inconvenience and humiliation most of us associate with police states; and it makes law enforcement more difficult by fomenting fear and distrust among potential witnesses and jurors. These costs far outweigh any law enforcement benefits.


demonstrate that ethnic profiling is a legal, much less an effective, response. The argument that we cannot afford to rely on something other than racial or ethnic proxies for suspicion, after all, is precisely the rationale used to intern 110,000 persons of Japanese ancestry during World War II. While subjecting an individual to closer inspection and a possible search is far less extreme than detention, the underlying rationale—that we must use ethnicity as a proxy for suspicion—is the same.

Precisely because of the history of racial discrimination in this country, the Equal Protection Clause of the Constitution presumptively forbids government authorities from relying on such racial or ethnic categories. Such actions trigger "strict scrutiny," requiring the government to show that its distinctions are "narrowly tailored" to further a "compelling government interest." 94 There is no question that protecting citizens from terrorism is a compelling government interest, but so too is drug interdiction—ina fact, all criminal law enforcement would likely be viewed as a compelling state interest. The real question from a constitutional perspective is whether the means adopted—reliance on ethnic appearance as a proxy for suspicion—is narrowly tailored to further that interest. It is highly unlikely that profiling could satisfy that scrutiny.

First, the vast majority of persons who appear Arab and Muslim—probably well over 99.9 percent—have no involvement with terrorism. Arab and Muslim appearance, in other words, is a terribly inaccurate proxy. In the sex discrimination context, where the Supreme Court applies less stringent scrutiny than it does to ethnic or racial discrimination, the Court has held that statistics showing that 2 percent of young men between the ages of 18 and 21 had been arrested for drunk driving did not justify denying men of that age the right to purchase an alcoholic beverage. 95 Surely the percentage of terrorists among men of Arab appearance is far smaller than the percentage of drunk drivers among college-age men.

Second, the use of ethnic stereotypes, far from being "necessary" for effective law enforcement, is likely to be ineffective. When one treats a whole group of people as presumptively suspicious, it means that agents are more likely to miss dangerous persons who do not fit the profile, such as Richard Reid, the British citizen who boarded a plane in Paris headed for Miami with a bomb in his shoe. 96 In addition, the fact that the vast majority of those targeted on the basis of their Arab or Muslim appearance will prove to be innocent will inevitably cause agents to let their guard down. 97 Overbroad ethnic

97. Cf. Malcolm Gladwell, Safety in the Skies; How Far Can Airline Security Go?, NEW YORKER, Oct. 1, 2001, at 50 (arguing that it is cognitively impossible to remain alert in reviewing metal detectors at airports because the fact that the vast majority of luggage will
generalizations, in other words, are not only not narrowly tailored to furthering effective law enforcement, but may actually undermine effectiveness.

D. Military Tribunals

The final example of the double standard at work in our response to September 11 is President Bush’s order creating military tribunals to try alleged terrorists and Al Qaeda members. As noted at the outset, the Constitution imposes no bar on using the tribunals to try any person who qualifies as an unlawful combatant, irrespective of citizenship. Yet the president opted to limit the application of the tribunals to noncitizens. As there is no legal reason for that justification, one has to wonder why the president chose to delimit the tribunals in this way, particularly as in all other respects the order recognized virtually no limits. It seems all too likely that this was a politically opportunistic decision, fully in keeping with the rest of the post-September 11 response that I have described above. If citizens were subject to the tribunals, citizens would have a much more immediate interest in overseeing and limiting the president’s assertion of power. The president’s military tribunals are extraordinary, as they do away with any independent judicial review, and make the determination of guilt a matter of military judgment. Moreover, they permit the use of classified evidence, presented ex parte and in camera, to convict suspects, and do not permit access to that evidence by anyone outside the military chain of command. Such measures may or may not be justified in wartime, but the important point for purposes of this article is that it was politics, not law, that limited exposure to the tribunals to noncitizens.

In all of these responses to the attacks of September 11, the government has targeted immigrants. Some measures will undoubtedly have spillover effects on citizens. Profiling on the basis of Arab appearance, for example, will affect Arab-looking citizens as well as noncitizens. But most are, at least on their face, limited to noncitizens. With few exceptions, we have not sought to impose similar burdens on citizens. Citizens are not subject to massive preventive detention under extreme secrecy, are not penalized for their speech, cannot be detained on the Attorney General’s say-so, have not been targeted for questioning or prioritized law enforcement initiatives because of their national origin, and, as John Walker Lindh illustrates, are not subject to military tribunals. In the following sections, I will show that this double standard is constitutionally and normatively wrong, counterproductive as a security matter, and may well pave the way for the extension of these measures to citizens.

pose no threat inevitably causes security personnel to let their guard down).


III. THE BILL OF RIGHTS AS HUMAN RIGHTS

The critique leveled above presumes that there is something wrong with treating immigrants differently from citizens. But is there? If aliens are differently situated from citizens, then treating them differently would not violate basic norms of equality and dignity, but would simply reflect that they are in fact different. There is nothing wrong with a double standard where relevant considerations warrant the application of separate rules.

Defenders of the administration maintain that we need not extend the same rights to foreigners that we extend to citizens. Aliens have taken no oath of loyalty to this country and presumably maintain their principal fidelity elsewhere. And surely it is not irrational to treat Arab and Muslim aliens differently now, in light of the fact that Al Qaeda, the organization apparently responsible for the September 11 attacks, is comprised almost exclusively of Arab and Muslim noncitizens and has threatened to carry out further terrorist acts against American civilians. Al Qaeda doesn’t issue identify cards or passports, so we can’t easily identity its members, but we do know that they are likely to consist of young Arab or Muslim men.

But the fact that it may not be irrational to focus more closely on Arab and Muslim immigrants than on other persons does not resolve whether it is fair to deny those immigrants basic constitutional rights. In particular, it does not justify denying them the basic guarantees of due process, political freedom, and equal protection. Were an Asian-American gang to launch a series of violent attacks on residents of New York City, it might justify paying more attention to those who might be members of the gang, but it would not warrant denying gang members, much less those who merely share their ethnic identity, basic constitutional rights.

Similarly, the issue of loyalty and oaths is a red herring. Most citizens do not take an oath of loyalty either; they become citizens by the accident of birth, not by passing any test of commitment. And while one might roughly presume that citizens will be loyal to the countries of which they are citizens, where we are at war with no nation, there is no basis for a presumption of conflicting loyalties based on national origin. Most fundamentally, there is simply nothing in the nature of the rights of due process, political freedom, and equal protection that would warrant imposing a threshold requirement of loyalty.

The Constitution does distinguish in some respects between the rights of citizens and noncitizens. But in fact, relatively little turns on citizenship status. The right to vote and the right to run for federal elective office are restricted to citizens, but all of the other rights are written without such limitation. Thus, the First and Fourth Amendments protect the rights of “the people,” while the Fifth and Fourteenth Amendment Due Process Clauses, as well as the Equal Protection Clause, extend their protections to all “persons.” The rights attaching to criminal trials apply to “the accused.” As the Court has noted, the fact that the Framers knew how to limit rights to citizens, and chose to so limit
only the right to vote and run for office, indicates that the other rights are not so limited. Specifically, the Court has stated that neither the First nor the Fifth Amendment “acknowledges any distinction between citizens and resident aliens.”

For more than a century, the Court has recognized that the Equal Protection Clause is “universal in [its] application to all persons within the territorial jurisdiction, without regard to differences of . . . nationality.” Similarly, the Court has repeatedly stated that “the Due Process Clause applies to all ‘persons’ within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent.” And when noncitizens, no matter what their status, are tried for crimes, they are entitled to all of the rights that attach to the criminal process.

There are good reasons for this. First, the rights articulated in the Bill of Rights were viewed by many at the time not as a set of optional contractual provisions enforceable because they were agreed upon by a group of states and extending only to the contracting parties, but as inalienable natural rights that find their provenance in God. While natural law theories no longer hold

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100. Kwong Hai Chew v. Colding, 344 U.S. 590, 596 n.5 (1953) (construing immigration regulation permitting exclusion of aliens on secret evidence not to apply to a returning permanent resident alien because of the substantial constitutional concerns that such an application would present).


103. Almeida-Sanchez v. United States, 413 U.S. 266 (1973). See also Bridges v. Wixon, 326 U.S. 135, 161 (1945) (Murphy, J., concurring) (arguing that aliens are protected by the First, Fifth, and Fourteenth Amendments); Wong Wing v. United States, 163 U.S. 228 (1896) (holding that aliens charged with crimes are protected by the Fifth, Sixth, and Fourteenth Amendments); Fong Yue Ting v. United States, 149 U.S. 698. 724 (1893) (observing that aliens are entitled to all “the safeguards of the Constitution, and to the protection of the laws, in regard to their rights of person of property, and to their civil and criminal responsibility”); Nishimura Ekiu v. United States, 142 U.S. 651, 660 (1892) (noting that aliens have a constitutional right to invoke habeas corpus). Chief Justice Rehnquist suggested some limitation on the rights of some aliens in the United States in his plurality opinion in United States v. Verdugo-Urquidez, 494 U.S. 259, 271 (1990), in which he suggested that an alien who had been involuntarily brought into this country for criminal prosecution was not part of “the people” eligible to invoke the Fourth Amendment. However, he was unable to garner a majority for that view, and Justice Kennedy, whose vote was necessary to the majority in that case, expressly rejected Rehnquist’s suggestion that the Fourth Amendment did not extend to all persons present in the United States. 494 U.S. at 276-77 (Kennedy, J., concurring). Kennedy rested instead on the fact that the search took place beyond our borders, a factor also relied upon by Rehnquist. Id. at 278.

104. See generally Suzanna Sherry, The Founders’ Unwritten Constitution, 54 U. Chi. L. Rev. 1127 (1987). The debate that accompanied the enactment and ultimate demise of the Alien and Sedition Acts suggests that there was in fact substantial disagreement about the status of aliens’ rights in the early years of the republic, at least in a time of crisis. In debating the Alien Act, critics, mostly Republicans, pointed to the broad language of the Bill of Rights and the legal obligations we imposed on all persons residing within our territory as support for the notion that aliens were entitled to the protection of the Bill of Rights. Others,
much influence, the human rights movement of the last 50 years reflects a similar understanding that there are certain basic rights to which all persons are entitled, simply by virtue of being persons. The rights of political freedom, due process, and equal protection, in other words, are part of the minimal set of rights that the world has come to demand of any free society. In the words of the Supreme Court, these rights are "implicit in the concept of ordered liberty." Second, as Alexander Bickel has argued, our experience with delimiting rights on the basis of citizenship should give us pause. The Supreme Court’s decision in Dred Scott v. Sandford sought to define away Dred Scott’s rights by concluding that “persons who are descendants of Africans who were imported into this country, and sold as slaves,” were not citizens and therefore could not invoke federal court jurisdiction. The Court reasoned that when the Constitution was adopted, blacks were not protected by its provisions, because they were “considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the Government might choose to grant them.” With the express intent of overruling that reasoning, Congress provided in the Civil Rights Act of 1866 that “all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States . . . .” The same Congress enacted the Fourteenth Amendment, which provided that all persons born or naturalized in the United States are citizens, and further guaranteed to all persons in the United States—whether citizen or not—due process of law and mostly Federalists, maintained that the Constitution was a more limited document that protected only “we the people.” See Gerald L. Neuman, Strangers to the Constitution: Immigrants, Borders, and Fundamental Law 52-63 (1996). But as with the Sedition Act, so with the Alien Act, those espousing the more inclusive, rights-protective views ultimately prevailed. Cf. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 273-76 (1964) (relying on history of repudiation of Sedition Act as evidence for importance of protecting political dissent under First Amendment).

108. 60 U.S. (19 How.) 393 (1856).
109. Id. at 403.
110. Id. at 404-405. The Court eerily echoed this statement almost 100 years later when it held that an alien seeking admission to the country, and in detention on Ellis Island, could assert no constitutional objection to the fact that she was being excluded on the basis of secret evidence that she had no opportunity to confront because “[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.” United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537, 544 (1950).
111. Civil Rights Act of 1866, Ch. 31, § 1, 14 Stat. 27.
equal protection. As Bickel argues, *Dred Scott* teaches that “[a] relationship between government and the governed that turns on citizenship can always be dissolved or denied [because] [c]itizenship is a legal construct, an abstraction, a theory.”112 It is far more difficult to deny that a human being is a “person.”

Third, the fact that the Constitution denies aliens the right to vote makes it that much more essential that the basic rights reflected in the Bill of Rights be extended to aliens in our midst. As a group that is subject to government regulation but denied a vote, aliens are without a meaningful voice in the political bargains struck by our representative system. Members of Congress have little reason to concern themselves with the rights and interests of those who cannot vote. Thus, as John Hart Ely has argued, aliens’ interests will almost by definition be undercounted in the political process; they are a “relatively easy case” of a “discrete and insular minority” deserving of heightened protection.113 When one adds to this the ignoble history of anti-immigrant sentiment among the voting citizenry, usually laced with racial animus, aliens are a group particularly warranting judicial protection.114

The extension of basic constitutional rights to noncitizens must be qualified in at least three significant respects, however. First, immigrants are subject to the immigration power, which the Court has historically treated with substantial deference as a “plenary power.” As a result, “Congress regularly makes rules that would be unacceptable if applied to citizens.”115 At the most basic level, immigrants can be expelled from the country, often for very minor infractions. Citizens, by contrast, cannot be banished and cannot have their citizenship taken away. The plenary power doctrine is often overstated, however, and has been subject to widespread criticism.116 Just last term the Supreme Court summarily rejected the government’s assertion of plenary power in a case involving indefinite detention of criminal aliens who had been ordered deported but whose deportation could not be effectuated, with the statement that the plenary power “is subject to important constitutional limitations.”117 Congress has broad leeway—one might say “plenary power”—to

112. BICKEL, supra note 107, at 53.

113. JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 161-62 (1980). Ely notes that “[a]liens cannot vote in any state, which means that any representation they receive will be exclusively “virtual,”’ that aliens have been the subject of substantial prejudice throughout our history, that recent immigrants in particular tend to live fairly discrete and unassimilated lives, and that “our legislatures are composed almost entirely of citizens who have always been such.” Id. at 161.

114. Interestingly, while citizenship is a constitutional prerequisite to running for president or Congress, the political branches, it is not a requirement for those who make up the federal judiciary responsible for enforcing constitutional rights.


117. Zadvydas v. Davis, 533 U.S. 678, 121 S. Ct. 2491, 2501 (2001); see also Carlson
make substantive policy judgments in many areas, including, for example, the regulation of commerce, but that does not authorize it to violate other provisions of the Constitution in doing so.\textsuperscript{118}

The existence of the federal immigration power means that while the Equal Protection Clause indisputably protects noncitizens living among us,\textsuperscript{119} not all distinctions based on alienage are necessarily suspect. The federal government may treat aliens differently from citizens in a variety of ways without thereby violating equal protection, so long as it has a rational basis for doing so.\textsuperscript{120} But distinctions between citizens and aliens do not generally justify differential application of First Amendment speech and association rights or Fifth Amendment due process protections.\textsuperscript{121}

Second, the extension of basic constitutional rights to aliens is complicated by territorial concerns. The Court has historically treated aliens within our jurisdiction very differently from those outside our border. As the Court noted last term, "it is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders. But once an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all 'persons' within the United States ...."\textsuperscript{122}

This distinction, too, has often been overstated. The case most often cited for the proposition, \textit{United States ex. rel Knauff v. Shaughnessy,}\textsuperscript{123} involved a challenge to the procedures used to decide a request for admission to the country by an initial entrant. The Court reasoned that aliens have no right to enter the country and therefore may not object on due process grounds to the procedures used. But that result does not compel the far broader conclusion that aliens outside our borders have no constitutional rights. Rather, it may simply reflect the proposition—equally applicable to citizens—that where a statute does not create an entitlement, no "liberty" or "property" interest is implicated, and therefore due process does not attach.\textsuperscript{124} Since Knauff had no
entitlement to enter, but was merely seeking a gratuitous benefit, she had neither a liberty nor a property interest sufficient to trigger due process protection, just as a convicted prisoner has no liberty or property interest in a pardon, and therefore may not challenge the procedures by which pardons are granted. On this view, aliens outside of our border might indeed have constitutional rights where we are not merely denying them a gratuitous benefit, but are affirmatively exercising sovereign authority over them and subjecting them to the obligations of our legal system. Thus, while a decision to deny entry to an alien might not trigger due process, a decision to detain an entering alien would trigger due process limitations, because to do so is to deprive the person of physical liberty, and "[f]reedom from imprisonment... lies at the heart of the liberty that [the Due Process] Clause protects." In any event, the vast majority of the anti-terrorism initiatives discussed here affect aliens residing among us, and those, such as military tribunals, that may apply to aliens abroad arise in settings where we are seeking to impose U.S. legal obligations.

Finally, the Court has always treated the rights of "enemy aliens" as categorically different from the rights of citizens, and indeed of all other aliens. The Court has upheld the constitutionality of the Enemy Alien Act, which authorizes the President in a declared war to detain, deport, or otherwise restrict the freedom of any citizen 14 years of age or older of the country with which we are at war. And in Johnson v. Eisentrager, the Court held that enemy

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125. See Neuman, supra note 104, at 108-17 (arguing that aliens should have constitutional rights abroad where the United States imposes its sovereign legal obligations on them).

126. Zadvydas, 121 S. Ct. at 2498; see also Foucha v. Louisiana, 504 U.S. 71, 80 (1992) ("[C]ommitment for any purpose constitutes a significant deprivation of liberty that requires due process protection" (internal citations omitted)); Meyer v. Nebraska, 262 U.S. 390, 399 (1923) ("Without doubt, [liberty] denotes... freedom from bodily restraint."). Admittedly, Knauff and Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206 (1953), suggest that detention of arriving aliens does not change the constitutional calculus, but in that respect they may be wrongly decided. Moreover, it may be that those entering aliens who can freely leave the country have the "keys to the cell," and therefore cannot complain of their detention while their admissability is determined.


aliens captured on the battlefield abroad had no right to seek habeas corpus in a United States court to challenge their subjection to military trial.\textsuperscript{129} The Court noted that at common law, an enemy alien had no rights during a time of war,\textsuperscript{130} and that the United States "regards him as part of the enemy resources."\textsuperscript{131} But these principles apply only in a time of declared war to citizens of the country with which we are at war. Thus, they should not be generalized to justify treatment of aliens when, as now, no war has been declared, and there is no identifiable enemy nation. The Supreme Court was careful to note in\textit{Eisentrager} that the power to treat enemy aliens is "an incident of war and not . . . an incident of alienage."\textsuperscript{132} It is critical to honor that distinction, the Court warned, because "'[m]uch of the obscurity which surrounds the rights of aliens has its origin in this confusion of diverse subjects.'"\textsuperscript{133}

Thus, while the rights of aliens are undoubtedly qualified in certain circumstances, these circumstances do not justify the imposition of a double standard across the board. Rather, they suggest that outside of a declared war against an identifiable nation, aliens living among us are entitled to those constitutional rights not expressly restricted to citizens, including most critically the rights of due process, political freedom, and equal protection.

The constitutional arguments made in this section should impel us to respect immigrants’ speech, associational, and due process rights as fully as our own even in those settings where infringing aliens’ rights might advance our security. Most constitutional rights, as restrictions on the exercise of sovereign authority, potentially impede government efforts to make the nation more secure. That is an inevitable cost of a limited government. At the same time, most constitutional rights have not been interpreted as absolutes, but as presumptive prohibitions rebuttable by compelling showings of need and narrow tailoring. Thus, for example, the First Amendment right of free speech reflects a presumption of protection that is overridden where speech is intended and likely to incite imminent lawless action.\textsuperscript{134} My claim is not that such categorical balancing is inappropriate, but that we must not cheat on the balance by drawing the line differently with respect to aliens and citizens. Aliens’ speech may be punished, but only if it meets the\textit{Brandenburg} standard. Aliens’ liberty may be deprived, but only pursuant to the same procedural safeguards we demand for citizens. Thus, while the definition of most constitutional rights contains an implicit consequentialist balance, the balance should be struck equally for all—even if it might be convenient or effective to strike it differently for some. As shown below, however, there is also good

\textsuperscript{129} Id. at 785.  
\textsuperscript{130} Id. at 774 n.6.  
\textsuperscript{131} Id. at 773.  
\textsuperscript{132} Id. at 772.  
\textsuperscript{133} Id. (quoting Techt v. Hughes, 229 N.Y. 222, 237 (1920) (Cardozo, J.)).  
reason to believe that reliance on double standards will in fact make us less, not more secure.

IV. SECURITY AND EQUAL TREATMENT

In addition to the constitutional and normative reasons for according aliens living here the same basic rights that we insist upon for ourselves, our interest in security argues in favor of doing so. When law enforcement fails to abide by the basic dictates of political freedom, due process, and equal protection, it almost inevitably surrenders legitimacy, and thereby triggers a reaction in the targeted community that will ultimately create further problems. In the "war on terrorism," this loss of legitimacy has implications both at home and abroad.

At home, let us suppose—as the Justice Department apparently does—that there may be terrorist threats living among us, and that given what we know about the makeup of Al Qaeda, they are likely to be Arab and Muslim immigrants. The question for law enforcement is how to identify individuals who have no visible markers. The possibility that Al Qaeda may have "sleeper" cells in the country—groups of committed terrorists who are living quiet, law-abiding lives while awaiting a sign to act—makes the problem of identification and prevention that much more daunting.

There are two ways to go about solving this problem. One is characterized by most of what the Justice Department has done in the wake of September 11. In the absence of good intelligence, it has cast an extremely wide net, treating people as potential suspects based on little more than the fact that they are Arab or Muslim immigrant males, and has sought to sweep up and detain hundreds of persons without any criminal charges. The questioning of 5,000 immigrants and the decision to prioritize the deportation of 6,000 others who have remained despite having final deportation orders, both based essentially on the fact that they are male noncitizens from Arab countries, reflects such a philosophy. So, too, do the detentions of approximately 2000 aliens, most on routine immigration charges, only one of whom has been charged with involvement in the events of September 11. Ethnic profiling by local and federal law enforcement officials and airport security personnel also fits this pattern.

These methods are unlikely to be effective for two reasons. First, when the government departs from individual culpability and adopts guilt by association or suspicion by ethnicity as guiding principles, it encourages sloppy policing and wasteful expenditure of resources on the innocent. The proxies of ethnicity and political or religious association are so inexact and overbroad that the vast majority of those questioned or detained are certain to be wholly innocent. The predominance of "false positives" will likely lead investigators to drop their guard and to be less attentive to those who really warrant attention.135

135. See Gladwell, supra note 97.
Moreover, the broader the suspicion, the more time and resources will be wasted pursuits innocent people. To cite one example, the federal government has now been attempting to deport a group of seven Palestinians and a Kenyan in Los Angeles for 15 years. (I have been defending the group for the same period of time). The group came to the FBI's attention in the early 1980s in connection with counterterrorism investigations relating to the 1984 Los Angeles Olympics. Most of the eight were college students at the time, and were vocally supportive of Palestinian self-determination. The FBI spent three years investigating them, including video and electronic surveillance, renting a home next door to two of the individuals for six months, and frequent spells of 24-hour round-the-clock surveillance. One of the things the students did was to organize annual dinners for the Palestinian community. The events were widely publicized and open to anyone. As many as 1,000 people attended, including many families and children. The events included Palestinian food, music, dancing, and speeches. In addition, at the close of the evening there was generally a charitable fundraising pitch. Suspecting that these events may be linked to terrorism, FBI agents attended one of the events, and wrote a report on the event as follows:

The Federal Agents observing the fund raiser did not speak or understand the Arabic language, however, from the posters of Palestinians with AK-47 assaults [sic] rifles and the general mood or tone of the speeches, the agents realized that the PFLP was not attempting to raise money for a humanitarian cause. The music and entire mood of the fund raiser from the entrance ceremony through the speeches sounded militaristic.136

The fact that the FBI would not even bother to have someone attend the event who could speak Arabic is an illustration of what happens when one proceeds under a principle of guilt by association. If all one needs to prove is association, one need not do the difficult work of determining whether in fact the individuals are engaged in any criminal or terrorist activity. In the end, the FBI concluded that it had no evidence that any of the individuals had committed any criminal or terrorist activity, but nonetheless urged the INS to deport them for their political associations.

Second, and more fundamentally, these methods send a message that law enforcement has targeted a whole community as "alien" or "suspect." That message cannot help but alienate members of the targeted community, rendering them far less likely to assist law enforcement in their efforts to identify true perpetrators. If the community comes to view law enforcement officials as unjustly suspecting them for their ethnic, political, or religious identity, an adversarial relationship is likely to arise making law enforcement more difficult. In this regard, one of the leading spokespersons for the Arab community, James Zogby, director the Arab-American Institute, recently found

himself in rare agreement with the former counterterrorism chief of the FBI, both of whom predicted that the Justice Department’s plan to interview 5,000 Arab immigrant men would likely backfire because of the division it would create between law enforcement and the Arab community.\(^{137}\)

In the criminal justice area, local police have learned this lesson the hard way. Crime-fighting tactics that emphasize mass arrests, stop-and-frisk strategies, and racial profiling, while they may catch more criminals, undermine the legitimacy of law enforcement in the communities targeted, and thereby impede effective law enforcement. Witnesses are less likely to come forward, to work with police and prosecutors, or to testify in court. Moreover, where the law enforcement system is seen as unfair and illegitimate, there is a higher likelihood that those in the affected community will be drawn to crime. Studies have consistently found that those who obey the law do so not because they fear being apprehended, but because they believe that the rules are fair, that the system has legitimacy. As everyone who has ever played a leadership role knows, if people believe in the leader’s legitimacy they are much more likely to do his or her bidding. Once legitimacy is lost, one must resort to the much less effective strong-arm responses of building more prisons and putting more police on the streets.\(^{138}\)

The contrast between Boston’s and New York’s responses to high crime rates in their respective inner cities illustrates the point. In Boston, police reacted to a wave of juvenile homicides in 1992 by reaching out to and working with religious leaders in the inner city. The religious leaders, who had a legitimacy in the community that the police lacked, served as a critical intermediary between the community and the police. Among other things, they helped identify the true bad actors, which allowed the police to refrain from broad sweeps that treated every young black male as a suspect.\(^{139}\)

New York City police undertook the opposite approach. They treated the problem almost as an occupying military force would, using aggressive enforcement of minor “quality of life” violations as pretexts to stop, search, and arrest large numbers of young minority men. While both cities experienced a

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137. Eric Slater & John Beckham, *Response to Terror; The Investigation; U.S. Moves to Question Mideast Men; Law: Local Officials Face Obstacles in Carrying Out an Order to Contact About 5,000 Recent Visitors*, L.A. TIMES, Nov. 28, 2001, at A1 (reporting that “a former counter-terrorism chief for the FBI said that, while he supports Ashcroft’s aggressive campaign against terrorism, questioning the thousands of men would be counterproductive because it could breed hostility in Muslim communities in the United States,” and also quoting James Zogby as saying, “It compromises what may be the most important aspect of the investigation: Arab-police bonds of trust.”).


drop in crime, New York did so at a tremendous cost, as arrests and complaints about police abuse both skyrocketed, whereas in Boston the crime rate dropped dramatically without any increase in either arrests or complaints. As the reaction to the killing of Amadou Diallo vividly demonstrated, the New York City police forfeited substantial legitimacy by using such tactics.

Boston’s approach is an example of the second way to solve the problem of identifying true threats within a broader community. From this perspective, the most effective response in the wake of September 11 might have been to use the overwhelming shock and revulsion at the attacks here to build a bridge to the Arab and Muslim communities, seeking their help in identifying the perpetrators and any further threats that might reside among them. That kind of outreach, coupled with incentives for assistance, might well have proven far more effective than the dragnet that thus far has netted only one person charged with involvement in the September 11 attacks and has generated substantial outrage and opposition in the targeted communities.

From an international perspective, legitimacy is also critical. As September 11 illustrated, terrorism is a transnational phenomenon, and requires a transnational response. It is in Osama bin Laden’s interest, not ours, to characterize the struggle as the West against Islam or the United States against Arabs. The more we act in ways that support that picture, the more likely bin Laden or others will be able to attract adherents to their terrorist cause against us. At the same time, the willingness of members of the international community to cooperate with us by providing intelligence and law enforcement support will turn on the extent to which we are seen as fighting for a broad principle of justice, rather than for our own parochial self-interest. When we decline to accord foreign citizens the same respect and basic rights that we insist upon for ourselves, we undermine the legitimacy of our cause in the world at large. The president’s symbolic outreach to the Muslim community in the days immediately following the attacks, with a reference here and there to mosques, and the inclusion of a Muslim cleric in the national memorial service for September 11, seemed to reflect his administration’s understanding that it must do what it can to undermine the perception that bin Laden seeks to foster—namely that this is a war of cultures. Yet the administration’s actions have been contrary to its words. While the president urged that Americans not treat Arabs and Muslims as suspect based on their ethnic or religious identity, his administration has adopted policies, like the mass detention, interview, and deportation programs, that seemed to do precisely what the president was urging the rest of us not to do.

V. TARGETING IMMIGRANTS, HITTING CITIZENS

One of the most common refrains about September 11 is that it “changed everything.” But while much about the attacks was unprecedented, our response has in fact been disturbingly familiar. As citizens, we have all too
often found it convenient to trade immigrants' rights for our own purported
security. From the nation’s earliest days, we have deemed immigrants
suspicious based on their racial and ethnic identity and political associations.
We have detained and deported aliens using summary procedures, failing to
treat them as individuals deserving of equal respect and dignity. At critical
moments, we have relied upon alienage as a basis for mass arrests and
detentions.

By selectively targeting immigrants, such measures implicitly or explicitly
assure citizens that their own liberties and rights will be left intact. But that
promise has often proved illusory. While security measures have often been
initially targeted at immigrants, they have just as often laid the groundwork for
future deprivations of citizens’ rights as well. What we do to immigrants
creates a precedent that then makes it more thinkable to do the same to citizens.
Thus, from the long view, all citizens have a stake in how we treat aliens in
times of crisis. Unfortunately, not many citizens take the long view.

A. Enemy Aliens and Enemy Races

Two historical examples illustrate how measures initially directed at
immigrants can pave the way for incursions on citizens’ rights. The first is the
link between the treatment of “enemy aliens” in wartime and the internment of
persons of Japanese descent—including 70,000 U.S. citizens—in World War II.
Treatment of foreigners as subversive dates back at least to 1798, when,
inspired by fears that the radicalism of the French Revolution might take root
in the United States, Congress enacted the infamous Alien and Sedition Acts.\textsuperscript{140}
The Alien Act gave the president the power to deport any noncitizen whom he
deemed a threat to the national security. Deported aliens had no recourse to the
courts nor any right to a writ of habeas corpus.\textsuperscript{141} The Sedition Act made it a
crime to criticize government officials.\textsuperscript{142} The Alien Act was not enforced, and
the Sedition Act was enforced exclusively against Republican critics of the
Federalist administration. Both laws sparked substantial protest, and expired
two years later. Thomas Jefferson pardoned all those convicted under the
Sedition Act. The Supreme Court has interpreted the short-lived history and
swift repudiation of the Sedition Act as important evidence supporting the First

\textsuperscript{140} JAMES M. SMITH, FREEDOM'S FETTERS 12-49 (1956).

\textsuperscript{141} JOHN C. MILLER, CRISIS IN FREEDOM: THE ALIEN AND SEDITION ACTS 52-53
(1951).

\textsuperscript{142} The Act prohibited “false, scandalous, and malicious writing or writings against
the government of the United States, or either house of the Congress ... or the President ...
with intent to defame [them], or to bring them ... into contempt or disrepute; or to excite
against them ... the hatred of the good people of the United States ... .” Act of July 14,
1798, ch. 74, § 2, 1 Stat. 596 (1798).
Amendment principle that political debate must be free from government control. 143

At the same time that Congress enacted the Alien and Sedition Acts, it also enacted the Enemy Alien Act. While the former were short-lived and are more important for their rejection than for their application, the Enemy Alien Act remains on the books to this day. 144 It authorizes the President during a declared war to detain, expel, or otherwise restrict the freedom of any citizen 14 years or older of the country with which we are at war. It requires no proceeding to determine whether the individual is in fact suspicious, disloyal, or dangerous; the act creates an irrebuttable presumption that an enemy alien is dangerous. In stark contrast to the ignominious and brief history of the Alien and Sedition Acts, the Enemy Alien Act has been enforced during declared wars, and was upheld by the Supreme Court in 1948, 145 even when applied to detain aliens after hostilities had ceased. The Roosevelt Administration used the Enemy Alien Act during World War II to round up, question, and detain thousands of German, Italian, and Japanese aliens. 146

The Enemy Alien Act is a precursor to the internment of 110,000 persons of Japanese ancestry during World War II. The justification for the Enemy Alien Act is that during a war government should have the power to confine and neutralize all persons with ties to the country we are fighting, because aliens are presumptively loyal to their own country, and therefore, presumptively our enemies. In World War II, we simply extended that philosophy to Japanese Americans. The Army argued that persons of Japanese descent, even if they were technically American citizens because they were born here, remained for all practical purposes “enemy aliens,” likely to be loyal to Japan. Lt. General John L. DeWitt, the driving force behind the internment orders, wrote in his report on the Japanese evacuation that “[t]he Japanese race is an enemy race and while many second and third generation Japanese born on United States soil, possessed of United States citizenship, have become ‘Americanized,’ the racial strains are undiluted.” 147 More colloquially, General DeWitt testified in 1943 before the House Naval Affairs Committee, that “[a] Jap’s a Jap. It makes no difference whether he is an American citizen or not.” 148 Secretary of War Henry Stimson concurred, reasoning that “[t]heir racial characteristics are such that we cannot understand or trust even the

citizen Japanese. 149 The Supreme Court accepted the rationale in several cases reviewing the Japanese curfews and internment. 150 Thus, in Hirabayashi v. United States, 151 the Court reasoned that "[t]he fact alone that the attack on our shores was threatened by Japan rather than another enemy power set these citizens apart from others who have no particular association with Japan."

As these quotations reveal, the "enemy alien" concept was extended not to all citizens, but to a distinct subset, through the prism of race. The Japanese alien could not be distinguished from the Japanese-American citizen because, as General DeWitt put it, "the racial strains are undiluted." Citizens of German and Italian ancestry were not interned en masse; only the Japanese were. The linkage between alienage and race has a long history in the United States. In the mid-nineteenth century, for example, anti-Chinese sentiment in California led to frequent lynchings, stonings, and beatings of Chinese immigrants, as well as to laws barring Chinese from testifying in cases involving whites. 152 California Governor John Bigler argued in 1852 "that the Chinese were a moral evil, that as coolies they were little more than slaves, that they degraded white labor and were inherently incapable of playing the role of citizens." 153 In 1876, the California state legislature published "An Address to the People of the United States on the Evils of Chinese Immigration," 154 and in 1882, Congress enacted the first Chinese exclusion laws, barring Chinese from entering the United States. 155 Shortly thereafter, Congress enacted a law requiring Chinese immigrants already living here to establish the legality of their presence by presenting the testimony of "one white witness." 156

In 1920, Congress adopted a literacy test for immigrants, designed to keep out those who could not speak English, and banned virtually all immigration from Asia. In 1924, Congress enacted national origins quotas on admissions, based on the proportion of aliens from each country in the United States as of 1890, apparently because using later figures would have admitted more aliens from Italy, Poland, Greece, and other undesirable countries. A year later, the Commissioner of Immigration boasted that virtually all immigrants now "looked" like Americans. 157


151. 320 U.S. 81, 101 (1943).


153. Id. at 18.

154. Id. at 17.


In the period immediately preceding World War II, both the federal and state governments adopted a wide range of anti-Japanese measures, denying people of Japanese ancestry the right to naturalize, to own property, and to work in several industries based solely on their ethnic identity. Like the Chinese before them, the Japanese were considered unassimilable, a breed apart, and an inferior race. In this atmosphere, measures targeted at the Japanese occasioned little popular objection. As one account describes the World War II period,

The position of American citizens of Japanese descent, theoretically more secure [than that of aliens], was almost equally precarious. Regarded generally as ‘descendants of the Japanese enemy,’ they found their status as citizens more and more in jeopardy. The confusion of alien ancestry with alien status was compounded in the public mind as newspapers referred indiscriminately to all Japanese—whether citizens or aliens, enemy forces or peaceful residents—as ‘Japs.’... [T]he cry of ‘once a Jap, always a Jap’ was heard on all sides.

The difference of the Japanese—a difference founded initially on alienage but ultimately on race—made it easier for the majority to accept measures targeted at them, because that difference simultaneously facilitated deeply rooted stereotypes, diminished empathy, and offered assurances that the same fate would not befall the majority. The close interrelationship between anti-Asian racism and anti-immigrant sentiment made the transition from “enemy alien” to “enemy race” a disturbingly smooth one.

The role that racial stereotypes played in the transition is underscored by the fact that there was no evidence to support the concern that the Japanese living among us posed a threat. In arguments that eerily foreshadow the “sleeper” theories advanced about Al Qaeda today, government officials argued that the fact that Japanese aliens and citizens living among us had taken no subversive action yet only underscored how dangerous they were. Earl Warren, then governor of California, argued, “It seems to me that it is quite significant that in this great state of ours we have had no fifth column activities and no sabotage reported. It looks very much to me as though it is a studied effort not to have any until the zero hour arrives.” General DeWitt argued similarly that the lack of any evidence of sabotage by the Japanese to date “is a disturbing and confirming indication that such action will be taken.”

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158. TENBROEK, BARNHART & MATSON, supra note 152, at 33-67.
159. See generally PETER IRONS, JUSTICE AT WAR (1983); TENBROEK, BARNHART & MATSON, supra note 152.
160. TENBROEK, BARNHART & MATSON, supra note 152, at 81.
161. Id. at 83-84.
162. Id. at 110. See also id. at 92 (“Local, state, and national officials voiced the conviction that the absence of sabotage in the present makes it all the more certain in the future.”).
In retrospect, however, history has vindicated dissenting Justice Frank Murphy’s view in Korematsu\(^1\) that the Japanese internment was “one of the most sweeping and complete deprivations of constitutional rights in the history of this nation in the absence of martial law.”\(^2\) Eight of the nine sitting Justices on today’s Supreme Court have stated that it was wrongly decided; Justice Scalia has placed Korematsu on a par with Dred Scott.\(^3\) Congress has paid reparations, and Fred Korematsu’s conviction has been overturned.\(^4\)

But the Enemy Alien Act remains on the books. And some, including Chief Justice Rehnquist, have argued that the error of the internment plan lay only in its extension to citizens; had it been limited to the 40,000 Japanese aliens, Rehnquist reasons, it would have been constitutionally justified.\(^5\) In the Chief Justice’s estimation, in other words, the error was not in making assumptions based on racial stereotypes, but in making assumptions about citizens based on racial stereotypes.

In my view, the error is much more fundamental. The Japanese internment during World War II was not an isolated mistake that happened to harm 70,000 citizens, but an action fully in keeping with prevailing anti-Japanese popular sentiment that predated but was obviously exacerbated by the war. The error was to treat people as dangerous and to intern them not based on their individual conduct, but on the basis of their group identity. It was as wrong to apply that reasoning to aliens as it was to apply it to citizens. But more significantly, the fact that the internment extended to citizens illustrates how

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164. Korematsu, 323 U.S. at 235 (Murphy, J., dissenting).
165. Stenberg v. Carhart, 530 U.S. 914, 953 (2000) (Scalia, J., dissenting). See also Adarand Constructors, Inc., v. Pena, 515 U.S. 200, 236 (1995) (O'Connor, J., joined by Rehnquist, C.J., and Kennedy, Scalia, and Thomas, J.) (“Korematsu demonstrates vividly that even ‘the most rigid scrutiny’ can sometimes fail to detect an illegitimate racial classification. . . . Any retreat from the most searching judicial inquiry can only increase the risk of another such error occurring in the future.”); id. at 244 n.2 (Stevens, J., dissenting, joined by Ginsburg, J.) (referring to the “shameful” burdens that the government imposed on Japanese Americans during World War II, some of which the Court upheld in Korematsu); id. at 275 (Ginsburg, J., dissenting, joined by Breyer, J.) (“[T]he enduring lesson one should draw from Korematsu” is that “scrutiny the Court described as ‘most rigid’ nonetheless yielded a pass for an odious, gravely injurious racial classification.”); Metro Broadcasting v. FCC, 497 U.S. 547, 633 (1990) (Kennedy, J., dissenting, joined by Scalia, J.) (“Even strict scrutiny may not have sufficed to invalidate early race-based laws of most doubtful validity, as we learned in Korematsu.”). Only Justice Souter has yet to weigh in. I am indebted to Professor Eric Muller for this point.
167. REHNQUIST, supra note 16, at 208-11 (1998). This argument sheds new light on Rehnquist’s suggestion that “civil liberties” are the liberties of “citizens.” See supra note 16.
anti-alien measures can pave the way for serious inroads on citizens’ liberties as well.

Some have argued that the fact that Arabs and Muslims have not been interned en masse in the wake of September 11 shows that we have learned from our past mistakes. But that seems far too optimistic a reading. The threat we face today, while terrifying, pales in comparison to that which we faced during World War II. And while the Japanese were a very small minority in the United States in the 1940s, there are many millions of Arabs and Muslims interspersed throughout American society, making anything like mass internment so impractical that it is not even contemplated. At the same time, however, we have targeted immigrants based on their Arab identity, and in doing so have fallen prey to the same kind of ethnic stereotyping that characterized the fundamental error of the Japanese internment. And particularly in the realm of ethnic profiling, we have once again extended anti-immigrant measures to United States citizens through the prism of race.

B. Alien Radicals and Radical Citizens

Measures directed at aliens can also extend to citizens through the prism of politics. Thus, a second example of anti-alien initiatives laying a foundation for incursions on citizens’ rights can be found in the connections between efforts to target “alien radicals” during the early part of the twentieth century and the more broad-based anti-Communist measures of the 1940s and early 1950s under Senator Joseph McCarthy and the House Un-American Activities Committee. Here, the common currency was political association, as efforts to suppress Communist aliens transformed into a war on Communists irrespective of citizenship.

The story begins, at least at the level of national legislation, with Leon Czolgosz’s assassination of President McKinley in 1902. Czolgosz was a United States citizen, but he had a foreign-sounding name, and that was enough to spur Congress to enact immigration laws barring entry to anarchists and other aliens who advocated “the overthrow by force or violence of the Government of the United States or of all government or of all forms of law.”\footnote{168. Immigration Act of 1903, ch. 1012, § 2, 32 Stat. 1213, 1214 (1903), repealed by Immigration Act of February 5, 1917, ch. 29, § 38, 39 Stat. 874, 897 (1917). See also WILLIAM PRESTON, JR., ALIENS AND DISSENTERS: FEDERAL SUPPRESSION OF RADICALS, 1903-1933, at 208-37 (1963).} Congress considered but rejected bills that would have imposed similar prohibitions on the political activities of U.S. citizens.\footnote{169. Preston, supra note 168, at 31-32.} Over the next thirty years, through and following World War I, the federal government consistently targeted alien radicals, deporting them with summary procedures for their speech or associations, making little effort to distinguish true threats from ideological dissidents.
Many of the early targets were members of the Industrial Workers of the World (IWW). Created in 1905, the IWW organized unskilled workers and was deeply critical of capitalism. After several prominent IWW strikes in 1916 and 1917, law enforcement turned to immigration law as a tactic for attacking the IWW. As William Preston describes, prosecutors saw “deportation as the most flexible and discretionary weapon available for their attack upon radical labor agitators.”\(^{170}\) This was because the immigration law supported theories of guilt by association, and “[p]roof of individual guilt was the greatest stumbling block in labor disturbances.”\(^{171}\) In Seattle, a focal point for many of the deportation cases, government officials “argued that an alien’s support of the [IWW] automatically helped to spread its doctrines. An individual could therefore ‘advocate’ [illegal doctrine] simply by paying his dues or contributing to a defense fund.”\(^{172}\)

This first “Red Scare” culminated in the Palmer Raids of 1919-1920. In April 1919, a large-scale bomb plot was discovered.\(^{173}\) All but one of the bombs were discovered in transit; the packages were addressed to immigration officials, Supreme Court Justice Oliver Wendell Holmes, the chairman of the Senate Bolshevik Investigation Committee, Attorney General A. Mitchell Palmer, and other leaders.\(^{174}\) No one was ever arrested for the bomb plot, but everyone agreed action had to be taken or, as the press said, “we may as well invite Lenin and Trotsky to come here and set up business at once.”\(^{175}\) On June 2, bombs exploded in eight different cities within the same hour; two people were killed, and the attorney general’s home in Washington, D.C. was bombed. The bomber of Palmer’s home was killed in the explosion, and fragments of his clothing and body indicated that he was an Italian alien from Philadelphia.\(^{176}\)

In response, the federal government began a series of dragnet raids directed at deporting radical aliens, under the guidance of the Justice Department’s “alien radical” division, headed by a young J. Edgar Hoover.\(^{177}\) The government relied heavily on confessions, extracted without lawyers present, to provide a factual basis for the deportations. When progressive union lawyers produced a pamphlet entitled “Our Constitutional Rights, Notice to Aliens,” advising aliens to remain silent and to consult a lawyer before answering questions, the government at Hoover’s urging changed the rules to provide that an alien’s right to be represented by counsel began not upon arrest, but only at

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170. *Id.* at 100.
171. *Id.; see also id.* at 164-65, 180.
172. *Id.* at 173; *see also id.* at 184 (observing that in July 1918, the INS adopted this argument as official policy).
174. *Id.* at 71.
175. *Id.* at 72.
176. *Id.* at 78-79.
the beginning of an immigration hearing, well after interrogation had been completed.\textsuperscript{178}

The first Palmer raid was conducted on November 7, 1919. Raids continued into January 1920. In all, federal and local officials arrested between 4,000 and 10,000 individuals. As one historian described them, the raids involved

[i]ndiscriminate arrests of the innocent with the guilty, unlawful searches and seizures by federal detectives, intimidating preliminary interrogations of aliens held incommunicado, high-handed levying of excessive bail, and denial of counsel.... The Department of Justice concerned itself with the preservation of its informers rather than with the protection of the rights of alien defendants. Sworn and extorted confession became the substitute for due process.\textsuperscript{179}

Hoover specifically urged immigration authorities to set bail sufficiently high to make release impossible, because if aliens were set free, the rule change designed to permit interrogations without counsel would be "virtually of no value."\textsuperscript{180} Prisoners were beaten, interrogated incommunicado, and detained for months.

The public response was not heartening. The \textit{Washington Post} proclaimed that "[t]here is no time to waste on hairsplitting over infringement of liberty."\textsuperscript{181} Meanwhile, Attorney General Palmer defended the raids by ruthless description of the targets: "[o]ut of the sly and crafty eyes of many of them leap cupidity, cruelty, insanity, and crime; from their lopsided faces, sloping brows, and misshapen features may be recognized the unmistakable criminal type."\textsuperscript{182}

Louis Post, Acting Secretary of Labor in March 1920, who was responsible for releasing or deporting the remaining detainees, later complained that the laws forced him "to order deportations of many aliens whom not even a lynching mob with the least remnant of righteous spirit would have deported from a frontier town."\textsuperscript{183}

The more familiar McCarthy era of the 1940s and 1950s essentially replicated the abuses of this first "red scare," but this time directed at citizens as well.\textsuperscript{184} There were 300 federal, state, and local laws enacted against Communist "subversives," and the House Committee on Un-American Activities compiled an index of one million suspects.\textsuperscript{185} Guilt by association was the watchword, as loyalty oaths, blacklists, registration requirements, and congressional inquiries sought to identify and penalize those who were

\begin{thebibliography}{99}
\bibitem{178} \textit{Id.} at 214-18; \textit{Murray, supra} note 173, at 211.
\bibitem{179} \textit{Preston, supra} note 168, at 221.
\bibitem{180} \textit{Id.} at 219.
\bibitem{181} \textit{Id.} at 217.
\bibitem{182} \textit{Id.} at 219.
\bibitem{183} Robert D. Warth, \textit{The Palmer Raids}, 48 S. \textit{Atlantic Q.} 1, 18 (1949).
\bibitem{184} \textit{Sabin, supra} note 12, at 27-28.
\bibitem{185} \textit{Preston, supra} note 168, at 291.
\end{thebibliography}
sympathetic to or associated with the Communist Party, irrespective of their involvement in any otherwise illegal activity. Communists were denied teaching positions at state universities, admission to the bar, passports for travel abroad, security clearances for work in defense facilities, and employment in Hollywood. They were imprisoned, deported, and subjected to public harassment.

As with the Japanese internment, in retrospect we recognize that the McCarthy era tactics were not merely a mistake, but unconstitutional. While the Supreme Court initially tacitly permitted guilt by association, it ultimately ruled, after McCarthy's censure, that both the First Amendment right of association and the Fifth Amendment's Due Process Clause preclude imposition of criminal or even civil liability for association absent specific intent to further a group's illegal ends. In our jurisprudence, the Court reasoned, "guilt is personal," and "[i]f there were a ... blanket prohibition of association with a group having both legal and illegal aims, there would indeed be a real danger that legitimate political expression or association would be impaired . . . ."

As with the Japanese internment, so in the McCarthy era, law enforcement measures initially targeted at aliens paved the way for measures later extended to citizens. In both instances, what made the extension possible was a proclivity to treat people as suspicious not based on individual conduct, but on group identity—be it ethnic or political. And as with the Japanese internment, the courts and the country initially went along with the extension. Only later, after many thousands of Americans had been harmed, did the Court and the country recognize the constitutional infirmities in treating people as guilty not for their individual conduct but for their group associations.

C. History Repeats Itself

More recent history, including the decade or so preceding September 11, tells a disturbingly similar story. Here, too, law enforcement authorities selectively targeted immigrants' rights, and then extended analogous treatment to citizens. One of my own first cases, as a young lawyer for the Center for Constitutional Rights in 1985, was the defense of Margaret Randall, a 50-year-old grandmother, poet, author, and photographer who was denied permanent resident status and ordered deported because she had advocated "the doctrines of world communism" in her written work. As I listened to government

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187. See supra note 62.
189. Id. at 229.
lawyers in an El Paso immigration courtroom cross-examine Randall about the fact that a poetry magazine she once edited had been described as a "revolutionary weapon." I felt as if I had been transported to another time. Such claims, I had thought, were a bygone relic of the McCarthy era and no longer a feature of our legal landscape.

That we were even on trial was dependent upon the United States' view that Randall was not a citizen. She had been born in the United States, but had taken Mexican citizenship in the 1960s while married to a Mexican poet, out of a desire to find employment to support their family. The State Department determined that she had forfeited her citizenship in so doing. Were Randall a United States citizen, of course, she would not have been in deportation proceedings, but more broadly, the government could not have taken any action against her based on her advocacy of communism, much less the fact that her poetry magazine had once been described as a "revolutionary weapon." Randall eventually prevailed on appeal, on the argument that she had never in fact lost her U.S. citizenship. In other words, she won her case precisely by insisting upon the line between citizen and alien.

In 1987, shortly after Randall prevailed, federal officials in Los Angeles arrested a group of foreign student activists (seven Palestinians and a Kenyan) and charged them as deportable on similar charges—they were alleged to be associated with a Palestinian group that advocated the "doctrines of world communism," the Popular Front for the Liberation of Palestine ("PFLP"). At the time of their arrest, FBI Director William Webster testified to Congress that a three-year FBI investigation had found no evidence of criminal or terrorist activity, but that the individuals "were arrested because they are alleged to be members of a world-wide Communist organization which under the McCarran Act makes them eligible for deportation," and that "if these individuals had been United States citizens, there would not have been a basis for their arrest." The INS District Director who authorized the deportation proceedings confirmed that explanation, admitting that the eight aliens "were singled out for deportation because of their alleged political affiliations with the [PFLP]." He explained that the INS sought their deportation "at the behest of the FBI, which concluded after investigating [the eight] that it had no basis for prosecuting [them] criminally, and urged the INS to seek their deportation."

Contemporaneous FBI memoranda prepared to urge the INS to deport the eight aliens confirm that they were targeted solely for lawful political

191. Reno v. American-Arab Anti-Discrimination Comm., 70 F.3d at 1053 (quoting Hearings before the Senate Select Committee on Intelligence on the Nomination of William H. Webster, to be Director of Central Intelligence, 100th Cong., 1st Sess. 94-95 (April 8, 9, 30, 1987; May 1, 1987)).
193. Id. at 94.
associations and advocacy that would be fully protected if engaged in by U.S. citizens. The memoranda consist entirely of accounts of lawful political activity and include detailed reports on political demonstrations, meetings, and dinners, and extensive quotations from political speeches and leaflets. Over 300 pages are devoted to tracking compulsively the distribution of PFLP newspapers, available in public libraries throughout the United States, as if they were illegal drugs. Agents intercepted boxes of magazines imported from abroad at the Los Angeles airport, weighed them to estimate how many magazines they contained, and then carefully tracked those who picked up and distributed the magazines.

The memos repeatedly criticize the aliens’ political views as “anti-US, anti-Israel, anti-Jordan,” and even “anti-REAGAN and anti-MABARAK [sic].” The principal FBI report on the group admitted that the FBI’s purpose was to disrupt political activity. It identified its purpose as “to identify key PFLP people in Southern California so that law enforcement agencies capable of disrupting the PFLP’s activities through legal action can do so,” even though the FBI had identified no illegal activities. The FBI specifically urged deportation of the alleged “leader” of the group, Khader Hamide, not because he engaged in any criminal acts, but because he was “intelligent, aggressive, dedicated, and shows great leadership ability.”

In 1990, Congress repealed the immigration law provisions that made aliens deportable for associating with groups advocating communism. But the INS continued its deportation efforts, pursuing some of the eight on routine visa violation charges, and charging the two who were permanent residents with having “engaged in terrorist activity” by providing material support to the PFLP. The aliens obtained an injunction against the deportation proceedings, successfully arguing that they had been singled out for deportation based on First Amendment-protected activities. In opposing the injunction, the government argued that aliens enjoyed only diminished First Amendment rights, and that therefore the INS should be permitted to single out aliens for deportation based on their association with and support of a terrorist group, without having to show that the conduct in any way furthered any terrorist

194. Id. at 150-51, 172-74, 181, 184, 190-91.
195. Id. at 165.
196. Id. at 142-43.
197. Id. at 152.
199. American-Arab Anti-Discrimination Comm. v. Reno, 70 F.3d 1045 (9th Cir. 1995)
The federal courts rejected this argument, holding that aliens in the United States are entitled to the same First Amendment rights as citizens.\(^{201}\)

In 1996, however, the INS persuaded Congress to repeal federal court jurisdiction to hear cases challenging selective enforcement of the immigration law, and the Supreme Court ruled that the case should be dismissed.\(^{202}\) To this day, fifteen years after the initial arrests, the government continues to seek the aliens’ deportation, notwithstanding its initial admission that they have engaged in no illegal or terrorist activity. From the government’s perspective, that admission is not material, because any support to a “terrorist group,” even to its wholly lawful activities, should be a legally sufficient basis for deportation.\(^{203}\)

In the Los Angeles deportation case, the government consistently argued that aliens were entitled to reduced First Amendment protection, at least in the deportation setting.\(^{204}\) But as in the World War II and McCarthy era periods, its arguments were soon extended to citizens. In the 1996 Anti-Terrorism and Effective Death Penalty Act, Congress enacted a new criminal statute making it a crime, punishable by ten years in prison and a substantial fine, to provide material support to a designated terrorist organization.\(^{205}\) Prior law had criminalized material support of terrorist activity, which required the government to show some connection between an individual’s support and the terrorist activity. Just as the USA PATRIOT Act later did with respect to immigration law, the 1996 statute dispensed with the requirement that the government prove a nexus to terrorist activity for criminal prosecutions, making it a crime to support even the legal activities of any organization designated as terrorist by the Secretary of State. Under this law, like the USA PATRIOT Act, a person who supports a designated organization is liable even if he can show that his support was designed to discourage the group from engaging in violence, and actually had that effect. Here again, then, a theory initially used against aliens, and defended on the ground that aliens deserve less constitutional protection than citizens, proved to be a precursor for a similar law directed at citizens.

One practice that one might think citizens need not worry about is the use of secret evidence to determine the outcome of legal proceedings concerning their liberty or property. The Confrontation Clause guarantees that anyone

\(^{200}\) Id. at 1064-66.

\(^{201}\) Id.


\(^{203}\) As described above, the USA PATRIOT Act makes material support to designated terrorist organizations a deportable offense. See supra text at notes 52-63.

\(^{204}\) See American-Arab Anti-Discrimination Comm. v. Reno, 70 F.3d at 1064-66 (describing government arguments for diminished First Amendment protection for aliens facing deportation).

tried in a criminal court has a right to confront the evidence used against him, and the elemental due process requirement that persons be afforded a meaningful opportunity to be heard would seem to require access to the dispositive evidence used to take one’s liberty or property. Yet the government has for many years used secret evidence, submitted in camera and ex parte, in immigration proceedings, and has argued that aliens are not constitutionally entitled to confront the evidence against them even when their physical liberty is at stake. Here, too, the government has maintained that aliens enjoy only diminished constitutional protections. But here, too, the government has recently sought to extend this practice to United States citizens.

The government’s use of secret evidence against noncitizens is illustrated by the case of Hany Kiareldeen, a Palestinian man in his 30s who came to the United States on a student visa in 1990 and now lives in Newark, New Jersey. In March 1998, the INS arrested Kiareldeen, charged him with failing to maintain his student visa status, and detained him without bond, claiming that he was a threat to national security.

Kiareldeen never saw the evidence that allegedly supported his detention as a security threat, because the INS submitted it to an immigration judge in camera and ex parte. The INS did give Kiareldeen an unclassified summary of the evidence, but the summary initially disclosed only that he was allegedly associated with terrorists and posed a threat to the Attorney General, charges so general that Kiareldeen could not possibly rebut them.

Subsequently, the INS expanded its disclosure, and ultimately revealed three allegations: (1) that Kiareldeen was associated with an unidentified “terrorist organization,” and with other members and suspected members of terrorist organizations, also unidentified; (2) that about a week before the World Trade Center (“WTC”) bombing, Kiareldeen hosted a meeting at his residence in Nutley, New Jersey, where some individuals discussed plans to bomb the World Trade Center; and (3) that “Kiareldeen expressed a desire to murder Attorney General Janet Reno.” The summary provided no further details. It did not, for example, identify the sources for any of these allegations, nor explain the context or time frame for the alleged relationships and statement.

Kiareldeen was nonetheless able to rebut the government’s case in open court. He proved, for example, that he did not even live in the apartment where

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he supposedly hosted a meeting with World Trade Center bombers until a year and a half after the alleged meeting took place.\textsuperscript{210} He showed that his phone records from the time revealed no phone calls to other conspirators in the World Trade Center case, while the conspirators’ phone records showed extensive calls among themselves.\textsuperscript{211} And he testified that one of the sources of secret evidence against him, his ex-wife, had made numerous false allegations against him in the course of a custody battle over their child.\textsuperscript{212} Kiareldeen sought to examine his ex-wife in open court, but the INS vigorously opposed his attempts to do so, and she refused to testify about her discussions with the FBI.\textsuperscript{213}

In the end, all seven immigration judges who examined the complete record in Kiareldeen’s case, including the government’s secret evidence presentation and Kiareldeen’s open court rebuttal, rejected the government’s contention that he posed a threat to national security, and he was eventually released—but not before he spent 19 months in jail on the basis of that secret evidence.\textsuperscript{214}

Kiareldeen is not alone. Since 1987, I have represented thirteen aliens against whom the government has sought to use secret evidence, either to detain or to deport them. In each case, the government claimed that the evidence showed the aliens to be threats to national security. Yet in each case, the aliens were eventually released by court order, either because federal courts concluded that reliance on classified evidence was unconstitutional, or because once the government disclosed some of the classified evidence, the alien was able to rebut the charges in immigration court. In each case in which the charges were disclosed, they consisted of little more than guilt by association.\textsuperscript{215}

In the wake of September 11, this tactic has now been extended to domestic law affecting citizens. The Treasury Department, relying on the USA PATRIOT Act, has seized all property and blocked all bank accounts of two U.S.-based charities, Global Relief Foundation, Inc., and Benevolence

\begin{itemize}
\item \textsuperscript{210} \textit{In re} Kiareldeen, No. A77-025-332, slip op. at 13-14 (U.S. Immigration Ct. Apr. 2, 1999).
\item \textsuperscript{211} \textit{Id.} at 14-15.
\item \textsuperscript{212} \textit{Id.} at 8-9.
\item \textsuperscript{215} \textit{See} Cole, \textit{supra} note 206.
\end{itemize}
International Foundation, Inc. Their assets have been frozen, not based on any showing that they have violated any law, but merely pursuant to an investigation under the International Emergency Economic Powers Act. Neither corporation has even been charged with violating any law. Both organizations, which have U.S. citizen board members, have sued, arguing that these property seizures violate their rights under the First, Fifth, Sixth, and Eighth Amendments, and the prohibition on bills of attainder and ex post facto laws. In March 2002, the government notified Global Relief Foundation that it will rely on a provision of the USA PATRIOT Act to justify its actions by presenting classified evidence in camera and ex parte to the district court in which the seizure has been challenged.

History reveals that the distinction between citizen and alien has frequently been resorted to as a justification for liberty-infringing measures in times of crisis. In the short term, the fact that measures are limited to noncitizens appears to make them easier for the majority to accept—citizens are not asked to sacrifice their own liberty. But the same history suggests that citizens should be wary about relying on this distinction, because it has often been breached before. What we are willing to do to noncitizens ultimately affects what we are willing to do to citizens. In the long run, all of our rights are at stake in the war against terrorism.

VI. CONCLUSION

Security is indisputably at a premium in the wake of the attacks of September 11. There may well be a justification for sacrificing some of our liberties if the sacrifice will make us more secure. But many of the measures we have undertaken after September 11 follow a disturbing historical pattern, in which we, the citizenry, sacrifice not our freedoms, but the freedoms of noncitizens, a minority group with no vote, in the interest of preserving citizens’ security. The post-September 11 response constitutes a reprise of some of the worst mistakes of our past. Once again, we are treating people as suspicious not for their conduct, but based on their racial, ethnic, or political identity. Once again, we are using the immigration power as a pretext for criminal law enforcement, and have undertaken a mass detention campaign directed at immigrants without probable cause that any of them are tied to the specific threats that we face. And once again, we have authorized the government to bypass procedures designed to distinguish the guilty from the innocent, holding secret hearings and authorizing executive detentions that challenge the most basic notions of fairness.


As politically tempting as the trade-off of immigrants' liberties for our security may appear, we should not make it. As a matter of principle, the rights that we have selectively denied to immigrants are not reserved for citizens. The rights of political freedom, due process, and equal protection belong to every person subject to United States legal obligations, irrespective of citizenship. As a pragmatic matter, reliance on double standards reduces the legitimacy of our struggle, and that legitimacy may be our most valuable asset, both at home and abroad. To paraphrase John Ashcroft himself: “To those who pit Americans against immigrants and citizens against non-citizens . . . my message is this: Your tactics only aid terrorism.”218 And as a matter of self-interest, what we do to aliens today may well pave the way for what will be done to citizens tomorrow. In the end, however, it is principle that should drive us: the justice of our response should be judged by how we treat those who have no voice in the political process. Thus far, we have performed predictably, but not well.

218. See Senate Judiciary Committee Hearing on Anti-Terrorism Policy, supra note 1.