Washington and Lee Journal of Civil Rights and Social Justice

Volume 11 | Issue 1 Article 8

Winter 1-1-2005

"CAN I SEE YOUR PAPERS?" LOCAL POLICE ENFORCEMENT OF FEDERAL IMMIGRATION LAW POST 9/11 AND ASIAN AMERICAN PERMANENT FOREIGNNESS

Mohar Ray

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> If I see someone come in and he's got a diaper on his head and a fan belt around that diaper on his head, that guy needs to be pulled over and checked.
>
> U.S. Congressional Representative John Cooksey of Louisiana, Radio Announcement after September 11, 2001[1]

I. INTRODUCTION

In the aftermath of the September 11, 2001 terrorist attacks perpetuated by nineteen foreign nationals residing in the United States,[2] the U.S. government and the general public have correlated immigration controls with national security.[3] As a response, the U.S. government merged the Immigration and Naturalization Service (INS) into the newly created Department of Homeland Security (DHS).[4] However, with a maximum of 5,500 federal immigration agents available to enforce immigration controls and an estimated eight million undocumented immigrants within the United States,[5] the federal government is in dire need of increased manpower if it chooses to prioritize undocumented immigration control and criminal immigration enforcement issues on the federal agenda.

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1 Timothy W. Maier, *Cracks in System Open to Terrorists*, INSIGHT ON THE NEWS, Mar. 24, 2004, at 26.

2 Robert S. Mueller, Address at the Commonwealth Club of California, (Apr. 19, 2002), *available at* http://www.fbi.gov/pressrel/speeches/speech041902.htm. (last visited Feb. 13, 2004). Mueller stated, "Each of the hijackers came from abroad: fifteen from Saudi Arabia, two from the United Arab Emirates, and one each from Lebanon and Egypt. All 19 entered our country legally, and only three had overstayed the legal limits of their visas on the day of the attacks." *Id.*

3 *See generally* Christopher Marquis, *Threats and Responses: Disruptions; Slowdown on the U.S. Visas Stalls Business, Science and Personal Travel Plans*, N.Y. TIMES, Oct. 13, 2002, at 16.

4 *See* DHS and INS reorganization overview, *available at* http://www.dhs.gov/dhspublic/ (last visited Dec. 21, 2003). *See also* Homeland Security Act of 2002, *at* http://www.whitehouse.gov/deptofhomeland/analysis/ (last visited Dec. 21, 2003).

5 Ricardo Alonso-Zaldivar, *Police May Join Hunt for Illegal Immigrants: Advocates See a Way to Boost Enforcement, but Officers and Civil Rights Groups Fear Abuses*, L.A. TIMES, Nov. 11, 2003, at A1, *available at* http://ist-socrates.berkley.edu (last visited Feb. 21, 2004).

To address this concern, Congressman Charles Norwood (R-GA) proposed the Congressional Clear Law Enforcement for Criminal Alien Removal Act of 2003 or CLEAR Act, aimed at enhancing federal, state and local enforcement of immigration laws by placing local police on the front-lines of immigration enforcement.[6] The CLEAR Act proposes to give local law enforcement officers the authority to arrest immigrants for both civil and criminal violations and provides an elaborate funding and training structure to implement a program aimed at detecting both potential terrorists[7] and undocumented immigrants who commit criminal acts. The implications of the CLEAR Act and its Senatorial counterpart, the Homeland Security Enhancement Act (HSEA), has sent shockwaves around the Asian American activist community and is likely to place undocumented Asian American immigrants in fear of contacting local authorities for assistance and/or emergency services, lest the encounter result in deportation.

This paper will explore the CLEAR Act, its legal precursors regarding federal domain over immigration controls, and the recent trend in federal lawmaking 'criminalizing' civil immigration violations, including the "criminalization" of local police officers' encounter with undocumented immigrants, wherein officers can interrogate, detain and arrest a person for civil immigration infractions. The recent trend in federal lawmaking places Asian Americans in a precarious situation because of the perception that Asian Americans are "permanent foreigners" in the United States.

The term "Asian American" includes a vast array of ethnicities. The term encompasses those whose ancestral origins can be traced back to China or Japan and also captures South Asians and South East Asians. Although each country of origin comprised within the expansive "Asian American" label possesses unique traditions and customs, East, South and South East Asian Americans also share a commonality that ties them together within the United States: all these Asian American groups share a similar history of legal discrimination through anti-immigration laws and other legal edicts.

The CLEAR Act stands as another link in the chain of anti-immigrant laws that will adversely impact Asian Americans. In particular, the CLEAR Act may lead to racial profiling, in which individual police officers may consciously or unconsciously apply stereotypes based on a physical composite of an undocumented immigrant, reinforcing the perception of Asian American's "permanent foreignness." This paper will explore the works of some Asian American scholars who conclude that due

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[6] Clear Law Enforcement for Criminal Alien Removal Act of 2003, H.R. 2671, 108th Cong. (2003).

[7] The assumption when using immigration law enforcement to capture potential terrorists is that the suspected terrorist is presumably an immigrant.

to an intersectionality of race and national origin, there is something 'different' about Asian Americans that places them outside the critical race theory's Black/White paradigm. Ultimately, it is this intersectionality in which national origin cannot be separated from an Asian American's identity that may spearhead some police officers into questioning Asian Americans.

II. THE CLEAR ACT – ANOTHER ANTI-IMMIGRATION LAW

> I believe the immigration reforms of 1996 are a step in the right direction, but we still have much work ahead of us. Current immigration laws allow one million people to come to this country annually. This tragedy [9/11] will no doubt cause Congress to pass much needed, stricter immigration control measures.
>
> United States Congressman Charles Norwood (R-Georgia)[8]
> *CLEAR Act Sponsor*

The United States Constitution permits the national legislature to establish a "uniform rule of naturalization."[9] Since the late 1880s, the Supreme Court has inferred that the federal government may also regulate other various aspects of immigration, such as admission and deportation, through the plenary power doctrine.[10] In the 1960s, the federal government had 'relaxed' immigration laws and stipulated service provisions for immigrant communities, but by the 1980s, increased unemployment, post-industrial economic decline, right-wing conservatism and a fear of increased immigration "contributed to a fundamental shift in policy toward legal and undocumented immigration."[11]

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[8] *Congressman Charles Norwood Issue: Terrorism*, Charles Norwood Congressional website, *available at* http://www.house.gov/norwood/issue-terrorism.shtml (last visited June 28, 2004).

[9] U.S. CONST. art. I, § 8, cl. 4.

[10] *See* Smith v. Turner, 48 U.S. 283 (1848); Henderson v. Mayor of City of N.Y., 92 U.S. 259 (1875); Chy Lung v. Freeman, 92 U.S. 275, 276 (1876) (in these cases, the Supreme Court validated the federal government's authority to regulate admission through its analysis of the Constitution's Commerce clause and struck down relevant state law that issued a head tax on arriving foreign passengers because the laws challenged the federal government's power under this Constitutional provision). *See also* Chae Chan Ping v. United States, 130 U.S. 581, 609-10 (1889) (the federal government has the authority to regulate admission matters under the plenary power doctrine); Fong Yue Ting v. United States, 149 S. Ct. 1016 (1893) (the federal government has the authority to regulate deportation matters under the plenary power doctrine), and Ekiu v. United States, 142 U.S. 651, 663 (1892) (the Supreme Court gave deference to a federal immigration agent's decision to exclude a Japanese national at the port).

[11] Teresa A. Miller, *Citizenship & Severity: Recent Immigration Reforms and the New Penology*, 17 GEO. IMMIGR. L.J. 611, 625 (2003). Miller posited:

> By the mid 1960's, the U.S. had experienced a long period of low immigration and low unemployment, and the economy was strong. By the mid-1970's, the U.S. had withdrawn troops from Vietnam, touching off a refugee crisis as the U.S. evacuated over 100,000 South Vietnamese government officials, soldiers and others who had supported the U.S. in the war against the Viet Cong. With long-standing precedent

Legal scholar Theresa A. Miller posited five major developments that attest to the federal government's increased immigration control of both documented and undocumented immigrants.[12] The developments are: (1) the judiciary and Congress no longer afford non-United States citizens limited procedural and substantive rights, rather "the rights of non citizens have been sharply curtailed;"[13] (2) legal and political tolerance of undocumented residents has given way to the "belief that criminal punishment and expedited removal of undocumented aliens through beefed up law enforcement is the best way to handle undocumented immigration;"[14] (3) there has been an expansion of immigration detention for those awaiting deportation;[15] (4) officials have strongly for advocated immigration-status information sharing between state and federal agents;[16] and (5) there is an increased perception that immigration control would improve national security.[17]

Other immigration law scholars have noted the increased incarceration of immigrants under the federal Immigration and Naturalization Act (INA) for what was historically construed to be civil violations.[18] The federal government also increased criminal penalties for

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> favoring the acceptance of refugees from Communist countries, the U.S. response was legislative authorization of generous resettlement assistance, language and vocational training, and medical care for the refugees. By the late 1970's refugee admission and assistance was significantly expanded, culminating in the Refugee Act of 1980 . . . Also passed in the same congressional session was legislation reauthorizing public assistance and educational services for refugees from Cuba, Haiti and Indochina. In the 1980's, a confluence of factors, including post-industrial economic decline, skyrocketing unemployment, the ascendancy of right-wing political conservatism, negative public attitudes toward the dramatic increase in legal immigration made possible by legislative changes in 1965 and 1980, and trepidation about rising illegal immigration, contributed to a fundamental shift in policy toward legal and illegal immigration.

Id. at 624-25.

[12] Miller, *supra* note 11, at 614.

[13] *Id.* For example, the Immigration and Naturalization Act of 1996 § 101(a)(43)(g) provides, in relevant part, that non-citizens that committed "aggravated felonies" would receive a notice of removal from DHS and could be deported. INA § 101 (a)(43)(g) (1996). Furthermore, in *Demore v. Kim*, the Supreme Court held that non-citizens that committed aggravated felonies could be subject to mandatory detention as they awaited their final removal hearing. Demore v. Kim, 538 U.S. 510 (2003).

[14] Miller, *supra* note 11, at 614.

[15] *See* Zadvydas v. Davis, 533 U.S. 678 (2001) (held that the (future) habeas court, in order to determine whether the detention exceeded the "reasonably necessary" threshold, should examine the statute's primary purpose of ensuring that the non-citizen would be present at the moment of removal).

[16] Miller, *supra* note 11, at 615.

[17] *Id.*

[18] *See* Helen Morris, *Zero Tolerance: The Increasing Criminalization of Immigration Law, in* 74 INTERPRETER RELEASES 1317, No. 33 (Aug. 29, 1997). Morris examined three caveats of the increase in prosecution of immigrants, inter alia: 1) a focus on the increased prosecution of immigration violations as federal crimes from 1987-97; 2) an examination of how immigration violations are defined as crimes, including how noncitizens are increasingly being prosecuted for civil infractions; and 3) immigration consequences of other criminal conduct.

immigration marriage fraud and fraudulent employment relationships under the Immigration Reform and Control Act of 1986 (IRCA) and the Immigration Marriage Fraud Act of 1986 (IMFA).[19] Additionally,

> [o]ther immigration reforms within the past two decades that have been cited as evidence of the increasing criminalization of immigration law include the new policy of detaining and criminally prosecuting asylum-seekers entering the United States with false documents . . . and stiff criminal penalties such as incarceration, heavy fines and forfeiture of property for the act of entry itself, and for fraud in a variety of contexts.[20]

In the aftermath of the September 11th attacks, the Executive Branch, through the Attorney General, further revised immigration laws and policies to respond to the perception that immigration control was essential to securing the country's borders:

> In one instance, the Bush administration unilaterally expanded its power to detain immigrants without charging them with either criminal or immigration violations. The Attorney General single-handedly rewrote federal immigration regulations to expand from 24 hours to 48 hours the length of time a non-citizen could be detained, and from 48 hours to an unspecified, indefinite length of time during a national emergency[21]

The federal government even changed its policy regarding local police enforcement of immigration law in the aftermath of the terrorist attacks. Historically, the Department of Justice (DOJ) opined that local police did not have the authority to make civil immigration arrests stating, "[s]tate police lack recognized legal authority to arrest or detain aliens solely for purposes of civil deportation proceedings, as opposed to criminal prosecutions."[22] It should be noted that a narrow exception existed that allowed local police officers to be involved in immigration law enforcement by receiving specialized training and accepting the federal Bureau of Immigration and Customs Enforcement supervision when enforcing

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[19] *See* Maria Isabel Medina, *The Criminalization of Immigration Law: Employer Sanctions and Marriage Fraud,* 5 GEO. MASON L. REV. 669 (1997) (examining the criminalization of immigration related activities of citizens or permanent legal residents).

[20] Miller, *supra* note 11, at 617.

[21] *Id.*

[22] Memorandum from Teresa Wynn Roseborough, Deputy Assistant Attorney General, Office of Legal Counsel, to the United States Attorney, Southern District of California, *Re: Assistance By State and Local Police In Apprehending Illegal Aliens* (Feb. 5, 1996), *at* http://www.usdoj.gov/olc/immstopo1a.htm (last visited Feb. 23, 2005).

immigration laws.[23] But, as a matter of practice, the vast majority of police precincts did not enter into this program and therefore did not enforce civil immigration law.

However, in 2002, during the aftermath of the September 11th terrorist attacks, Attorney General John Ashcroft declared that local police had the "inherent authority" to make immigration arrests, provided that the government classified the immigrant as a wanted criminal suspect and had entered his name in the National Crime Information Center Database (NCIC).[24] Thereafter, Congressman Norwood proposed the CLEAR Act, which codified a training and financial incentives program for local and state officers to enforce federal immigration law disregarding the requirement that the presumptive violator had to be classified as a criminal suspect with an NCIC record. The CLEAR Act establishes, in pertinent part the following: (1) the addition of immigration violations into the NCIC for local police to access;[25] (2) a voluntary training program partially paid for by interested precincts;[26] (3) a contractual program between the Federal government and local police to detain undocumented immigrants in local detention facilities;[27] and (4) individual and some agency immunity from lawsuits

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[23] Alonso-Zaldivar, *supra* note 5.

[24] *Id.* The Attorney General stated in June 2002 that "[w]hen federal, state and local law enforcement officers encounter an alien of national security concern who has been listed in the NCIC, this criminal information system, federal law permits them to arrest the individual and transfer the individual to the custody of the INS. The Justice Department's Office of Legal Counsel has concluded that this narrow, limited mission we are asking state and local police to undertake voluntarily . . . is within the inherent authority of the states." Nat'l Council of La Raza v. DOJ, 337 F.Supp.2d 524, 526 (S.D.N.Y. 2004). However, the DOJ never released a written opinion on this new authority for local police. *See CLEAR Act and HSEA: Local Law Enforcement of Civil Immigration Law,* American Immigration Lawyers Association, *available at* http://www.aila.org/fileViewer.aspx?docID=12346 (last viewed Mar. 1, 2004):

> In April 2002, the media reported that the DOJ was poised to issue a legal opinion that states and localities, as sovereign entities, have the 'inherent authority' to enforce federal immigration laws; including civil violations of immigration law. In the face of widespread criticism of such an opinion, the DOJ never issued the opinion and has refused repeated requests to provide a copy of it. The DOJ does acknowledge, however, that the opinion exists and that it accurately reflects the Administration's position.

Id. In April 2003, immigration advocacy organizations brought an action under the Freedom of Information Act to compel the DOJ to produce documentation pertaining to local police enforcement of immigration laws in *Nat'l Council of La Raza v. DOJ.* Although the court held that one document could be released to the immigration advocacy groups, the court did not compel the DOJ to produce the actual memo memorializing the Department's position. *See* Nat'l Council of La Raza v. DOJ, 337 F.Supp.2d 524 (S.D.N.Y. 2004).

[25] H.R. 2671 § 104(a), 108th Cong. (2003) (under this provision, DHS's Director of Border Transportation and Security would provide DOJ's NCIC with information on "any person who has violated *any immigration law*". *Id.* (emphasis added)). This would include both criminal and civil immigration violations.

[26] H.R. 2671§§ 109(b)(1) & (d), 108th Cong. (2003).

[27] H.R. 2671 § 111, 108th Cong. (2003).

pertaining to these immigration arrests.[28] Perhaps most importantly, under the CLEAR Act, civil immigration violations, such as violations for an overstayed visa, would be "criminalized."[29] Local police could arrest, detain and jail an undocumented immigrant for a civil immigration violation, creating a law that weaves a criminal component into federal civil infractions.[30]

Critics could argue that the CLEAR Act's implementation presents federalism problems under *Printz v. United States*.[31] In *Printz*, the Supreme Court held that the federal government could not commandeer states to implement a federal program.[32] However, the CLEAR Act may avoid the federalism problem by making local immigration law enforcement purely voluntary, both through police precinct and individual officer participation.[33] Although judicial precedent has usually held that the federal government has the sole authority to regulate immigration matters, there have also been instances where the judiciary has upheld state and local schemes applying to immigrants.[34] Specifically, the Supreme Court declared that "the Court has

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[28] H.R. 2671 §§ 110(a) & (b), 108th Cong. (2003).

[29] H.R. 2671 § 101, 108th Cong. (2003).

[30] *Id.*

[31] Printz v. United States, 521 U.S. 898 (1997) (holding that a federal gun control scheme's interim provisions were unconstitutional because they compelled states to administer a federal regulatory scheme).

[32] *Id.*

[33] *CLEAR Act Pointed to as Solution to Criminal Alien Crisis*, *available at* http://www.house.gov/apps/list/press/ga09_norwood/CLEARActPostHearing.htlm (last visited Feb. 21, 2004). Norwood states at a House of Representatives meeting:

> [T]he CLEAR Act is absolutely voluntary. So when it passes and is signed into law, those cities interested in giving their local and state law enforcement folks training, access to data, and the funding needed to enforce immigration laws can do so . . . those which have no interest in helping out and would rather create a refuge for criminal aliens, can try that instead.

Id.

[34] *See e.g.*, McCready v. Virginia, 94 U.S. 391 (1877) (upheld a Virginia statute barring non-citizens from planting oysters in state rivers because states had the right to determine who could use public property); Patsone v. Pennsylvania, 232 U.S. 138. 144 (1914) (upheld Pennsylvania statute barring foreign-born residents from owning shotguns because "a State may classify with reference to the evil to be prevented, and that if the class discriminated against is or reasonably might be considered to define those from whom the evil mainly is to be feared, it property may be picked out"); Ohio ex. Rel. Clarke v. Deckebach, 274 U.S. 392 397 (1927) (Court dismissed foreign-resident's case seeking review of a City of Cincinnati law that prevented him from receiving a billiard hall operating license based on his alienage, stating "[s]ome latitude must be allowed for the legislative appraisement of local conditions, and for the legislative choice of methods for controlling an apprehended evil"), Frick v. Webb, 263 U.S. 326 (1923) (Court upheld California Land Act that prohibited aliens from owning, leasing or using agricultural lands for 'beneficial purposes'); Terrace v. Thompson, 263 U.S. 197, 217 (1923) ("while Congress has exclusive jurisdiction over immigration, naturalization and the disposal of the public domain, each State, in the absence of any treaty provision to the contrary, has power to deny to aliens the right to own land within its borders"); Hauenstein v. Lynham, 100 U.S. 483, 484 (1879) (same); Mathews v. Diaz, 426 U.S. 67 (1976). *But see* Graham v. Richardson, 403 U.S. 365 (1971) (the Fourteenth Amendment's Equal

never held that every state enactment which in any way deals with aliens is a regulation of immigration and thus *per se* pre-empted by this constitutional power, whether latent or exercised."[35]

Because the CLEAR Act will not raise federalism issues under the Constitution and has garnered a great deal of Congressional support, the CLEAR Act will probably be implemented. Furthermore, public political perceptions, the aforementioned trends in the "scapegoating" of both documented and undocumented immigrants regarding national security, and ailing economic conditions could increase public support for anti-immigration measures such as the CLEAR Act. In particular, since the CLEAR Act is encoded in a rhetoric of lofty policy goals of reducing immigrant crime and increasing national security, the general public may support the CLEAR Act as a way to remove "unwanted" immigrants in the aftermath of the terrorist attacks without fully understanding the ramifications of the law.

III. POST 9/11 RACIAL PROFILING OF ASIAN AMERICANS

> I hope that no additional Americans die because of a failure to recognize that some people, that 100 percent of the people who were involved in this [9/11 hijacking], met a certain profile. If more people die because we were trying not to be politically correct, I think that would be a tragedy.
>
> United States Congressional Representative John Cooksey (R-Louisiana)[36]

In the aftermath of the September 11, 2001 terrorist attacks, both the United States government and its citizenry concentrated on establishing measures that would help find future terrorists in an effort to protect national security—security that happened to be shattered when three thousand people died on that horrific day. The September 11th attacks involved foreign nationals of Middle Eastern descent and this caused some members of the

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Protection Clause prevented Arizona and Pennsylvania from conditioning welfare benefits on possession of United States citizenship or, if an alien, upon a beneficiary residing in the U.S. for a certain number of years), Truax v. Raich, 239 U.S. 33 (1915) (Supreme Court affirmed a lower court's issuance of an injunction that restrained appellant from enforcing a state law that made it illegal for certain businesses to employ more than a specified percentage of noncitizens); Hines v. Davidowitz, 312 U.S. 52 (1941) (invalidating Pennsylvania's alien registration program); Plyler v. Doe, 457 U.S. 202 (1982) (holding that Texas statute that denied undocumented children from receiving public education violated the Fourteenth Amendment's Equal Protection Clause).

[35] De Canas v. Bica, 424 U.S. 351, 355 (1976) (emphasis in original).

[36] Joan McKinney, *Cooksey: Expect Racial Profiling*, THE ADVOCATE (Baton Rouge, Louisiana), Sept. 19, 2001, at 1-B, 2-B.

public and the government to focus their attention on areas with high concentrations of various immigrant groups, including New York City and Detroit.[37] Subsequent to September 11, 2001, Muslim; Asian, particularly South Asian;[38] and Arab immigrants experienced a surge of public violence.[39] Additionally, federal law enforcement officials heavily scrutinized these communities[40] in an attempt to detect potential terrorist plots. "In the first chaotic weeks after the September 11 suicide hijackings, investigators fanned across the country in a haphazard, almost desperate

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[37] According to the Lawyers Committee for Human Rights (now Human Rights First):

> Two years after September 11, a number of the most controversial initiatives that the executive branch directed toward certain categories of non-citizens in the aftermath of the attacks have ended, or at least subsided. The mass roundups of predominantly Arab and Muslim immigrants that occurred in the weeks and months following September 11 have ended, although immigration laws are still being enforced disproportionately against those communities. The Department of Justice and the Department of Homeland Security have indicated that they will take steps to ensure that the egregious mistakes made during these round-ups do not happen again. The Justice Department's Temporary "call-in" registration program—a source of fear and confusion for non-citizens from the 25 predominantly Arab and Muslim nations targeted by the program—official concluded in April 2003. The series of "voluntary" interviews initially conducted by the Justice Department of nationals from predominantly Arab and Muslim nations (and then "Iraqi-born" individuals this past spring) do not appear to be currently occurring.
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> Despite these important recent changes, the nationality-based information and detention sweeps of the past two years have taken a serious toll on immigrant communities in the United States. Arab and Muslim organizations describe the "chilling effect" that these programs have had on community relations, relating feelings of anxiety, isolation and ostracism—even among longtime lawful permanent residents in the United States.

Assessing the New Normal: Liberty and Security for the Post-September 11 United States, September 2003, at http://www.humanrightsfirst.org/pubs/descriptions/Assessing/Ch3.pdf (last visited April 20, 2004).

[38] The term "Asian," as previously mentioned, includes East Asians, South East Asians and South Asians; however, as discussed later in this paper, the post-September 11 targeting of Asians predominantly focused on South Asians.

[39] Anu Prakash, *Attacks Lead to Local Fear, Violence*, *available at* http://www.sikhcoalition.org/news.asp?mainaction=viewnews&newsid=166 (last viewed Feb. 13, 2004). Albor Ruiz, *"Don't Ask" Policy Will Hurt City of Immigrants*, N.Y. DAILY NEWS, June 5, 2003, at 4. "It is public knowledge that violence against Arab and Muslim immigrants increased sharply after 9/11." *Id.* *See* Muzaffer A. Chishti et al., *America's Challenge: Domestic Security, Civil Liberties, and National Unity after September 11*, Migration Policy Institute, *at* http://www.migrationpolicy.org/pubs/Americas_Challenges.pdf (last viewed Mar. 1, 2004). "Hate crimes against Muslims soared after September 11, rising more than 1,500 percent." *Id.*

[40] Author recognizes that "Arabs" and "Muslims" are not a monolithic groups and that there is a vast panoply of cultures, languages and traditions that compose these diverse groups; however, since this paper focuses on Asian American jurisprudence, the words "Arab" and "Muslim" may take on a more monolithic concept for the purposes of brevity and simplicity.

scramble to stop what many Americans feared was an impending second wave of terrorism."[41]

The "scramble" to find anyone with a connection to terrorist plots led to racial and ethnic profiling,[42] wherein government officials detained thousands of Asians, in particular South Asian immigrants without due process because of "perceived racial, ethnic, and religious similarities to the hijackers."[43] The perception of the threat by those perceived to be non-citizens also permeated into the private airline industry wherein the airline racially profiled and searched certain Asian passengers, in particular, South Asian passengers "in the name of passenger safety."[44] The airline screenings became a national security mechanism because the terrorists had used commercial aircraft to cause mass destruction.[45] The airline and passengers perceived that Asian, Arab and Muslim passengers posed a greater threat because they both believed Asian Americans to be disloyal and have interests juxtaposed to American national security, a belief based solely on racial features.[46] Racial profiling on the government side entered a similar realm after the terrorist attacks as racial profiling of Asian, Arab and Muslim immigrants became rampant.[47] Even the majority of Americans in the aftermath of the attacks believed that racial profiling of those whose racial profiles could be perceived to fit that of the hijackers would be an effective anti-terrorism measure, a dramatic rise from the pre-September 11 consensus in which a vast majority of Americans disapproved of the racial profiling of Blacks.[48]

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[41] Cam Simpson et al., *Immigration Crackdown Shatters Muslims' Lives*, CHIC. TRIB., Nov. 16, 2003, at 1, *available at* http://chicagotribune.com/news/nationworld/chi-031116037nov16. (last viewed Feb. 21, 2004). *See generally* Marquis, *supra* note 3.

[42] *See* Charu A. Chandrasekhar, *Flying While Brown: Federal Civil Rights Remedies to Post-9/11 Airline Racial Profiling of South Asians*, 10 ASIAN L.J. 215, 215-16 (2003). (describing a judicially created definition of racial profiling as "the improper use of race as a basis for taking law enforcement actions and as 'law enforcement-initiated action based on an individual's race, ethnicity, or national origin rather than on the individual's behavior or on information identifying the individual as having engaged in criminal activity'" (citing Chavez v. Ill. State Police, 251 F.3d 612, 620 (7th Cir. 2001); United States v. Coleman, 162 F. Supp. 2d 582 (N.D. Tex. 2001).

[43] Chandrasekhar, *supra* note 42, at 215-216 (2003).

[44] *Id.* at 217. The ACLU even filed five lawsuits against four major private airlines, challenging that the removals of several 'Middle-Eastern' looking men from commercial airliners under 42 U.S.C. § 1981 of the Civil Rights Act of 1866, and Title VI of the Civil Rights Act of 1964. *See generally Id.* at 218.

[45] *Id.* at 216-217.

[46] *Id.*

[47] *See generally* Sharon L. Davies, *Symposium: Reflections on the Criminal Justice System After September 11, 2001: Profiling Terror*, 1 OHIO ST. J. CRIM. L. 45 (2002).

[48] *Id.* (In a 1999 Gallop Poll, 81% of respondents disapproved of racial profiling practices (citing Gallup News Service, *Racial Profiling Seen as Widespread, Particularly Among Young Black Men*, Dec. 9, 1999)). Noting the increase in Americans supporting racial profiling post-9/11, the author stated:

The sense of urgency to find terrorists in both the private and public sphere created an emerging tension, which pitted the federal government against immigration advocates. The following question emerged: How does the federal government protect its general citizenry through law enforcement investigations of those who fit a particular profile likely to harm the United States, while protecting the civil liberties of all American residents, including Asians, Arabs, and Muslims? This debate led to Capital Hill and federal agents, community action groups, and municipal employees working with immigrant communities testified for days about the struggle to ensure that Asians, Arabs, and Muslims are afforded constitutional protections against the federal government's desire to ensure national security.[49] Although finding the right balance between these two possibly conflicting interests still remains unanswered, one thing is clear—many immigrant rights groups fear that the federal government's anti-terrorism measures will lead to racial profiling of various communities.

The public and government focus on Arab, Muslim and some Asian groups causes some immigrant advocates to caution that the CLEAR Act could lead to local police using racial profiling in these communities. If a police officer is required or has the legal authority to arrest undocumented immigrants, how will a police officer be able to differentiate who is an undocumented immigrant from a person who is "legally" residing in the United States prior to arrest? To complicate matters, immigration law is complex and requires specialized training, which is voluntary under the

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> A CNN/USA Today/Gallup poll taken a few days after the attack on the World Trade Center revealed that many Americans supported law enforcement measures that targeted people of Middle Eastern descent, including subjecting them to more intensive security checks compared with other travelers even if they were American citizens (58%), issuing them special identification cards (49%) and authorizing their "special surveillance" (32%) . . . . A Los Angeles Times poll conducted a few days after the attacks revealed that 68% of those polled approved of law enforcement "randomly stopping people who may fit the profile of suspected terrorists," and that a majority supported requiring people of Arab descent including U.S. citizens, to "undergo special, more intensive security checks before boarding airplanes in the U.S. . . . . " An opinion poll conducted more than a month after 9/11 showed that the public's heightened suspicion of Middle Easterners lingered. In a CNN-USA Today Gallup poll conducted between October 19 and 21, 49% of the respondents continued to think it appropriate to require Arabs present within the United States to carry special identification cards.
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> *Id.* at n. 6.

[49] See *infra*, note 53, on constitutional protections attaching to all residents of the United States. *See also* Fed. Document Congressional Clearing House Testimony, Feb. 23, 2003. (In February 2003, the Federal House Judiciary Subcommittee on Immigration, Border Security, and Claims held hearings and heard the testimony from Former Special Agent Michael W. Cutler, National Organization for Women Legal Defense and Education Fund Immigrant Women Program Director, Leslie E. Orloff, and City of New York Criminal Justice Coordinator, John Feinblatt).

CLEAR Act's relevant provisions.[50] Even if local officers did receive the CLEAR Act's offered training, being able to correctly identify who could be an undocumented immigrant could still be a source of confusion,[51] creating a system in which officers may question those with particular physical and racial characteristics—characteristics that the officer may consciously or unconsciously associate with undocumented immigrants, such as "ethnic features," particular dress, or a foreign accent.[52] Additionally, if officers would be more likely to question these groups, would members of immigrant communities be forced to carry immigration documents with them at all times to ensure that they would not be arrested or detained if approached by a local police officer?

Furthermore, despite the CLEAR Act's race neutral terminology, its application through potential racial profiling by police officers could create Constitutional dilemmas. Common law doctrine illustrates that the Supreme Court has evolved from excluding basic constitutional rights to certain groups to attaching a panoply of Constitutional protections to immigrants who reside in the United States, regardless of their immigration status as illustrated by *Yick Wo v. Hopkins* and its progeny.[53] It should follow that

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[50] *See* CLEAR Act of 2003 § 111, H.R. 2671, 108th Cong. (2003).

[51] *See CLEAR Act and HSEA: Local Law Enforcement of Civil Immigration Laws, supra* note 24.

> Federal immigration law is an extremely complicated body of law that requires extensive training and expertise to properly enforce. There are many different ways for people to be lawfully present in the United States, and the Department of Homeland Security [DHS] issues many different types of documents that entitle someone to be in the United States legally. Local law enforcement officials do not have the training and expertise that is required to determine who is allowed to be in the United States and who is not. Adequate training would need to be on-going and extensive to adequately protect against abuses . . . the CLEAR Act . . . would [not] mandate such training and any training provided would be at the state or locality's expense.

Id.

[52] *See ACLU Statement on H.R. 2671, at* http://www.aclu.org/immigrantsRights/ImmigrantsRights.cfm?ID=13881&c=22 (stating that "Reversing policies that separate immigration enforcement from local law enforcement will increase racial profiling and other unjustified stops . . . of undocumented workers . . . and United States citizens who 'look foreign'") (last visited Mar. 2, 2004); *CLEAR Act Obscures Justice: Vote No*, Amnesty International Issue Brief, *available at* http://www.amnestyusa.org/uspolicy/report.do (arguing that "Although the bill targets immigrants who are out of status or perhaps were never in status, it is likely that documented immigrants and US citizens who speak with an accent or appear to be from another country by their appearance or their attire will also feel the impact of the CLEAR Act") (last visited Mar. 2, 2004).

[53] *See* Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886) (stating "[t]he Fourteenth Amendment to the Constitution is not confined to the protection of citizens"); *see also* Zadvydas v. Davis, 533 U.S. 678, 693 (2001) (stating, "but once an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent"); *see also* Plyler v. Doe, 457 U.S. 202, 210 (1982) (stating "[w]hatever his status under the immigration laws, an alien is surely a 'person' in any ordinary sense of that term. Aliens, even aliens whose presence in this country is unlawful, have long been

immigrants, both documented and undocumented, be afforded constitutional protections regarding law enforcement practices, including the requirement that searches and seizures be reasonable under the Fourth Amendment.

CLEAR Act proponents may argue that training would properly counteract concerns about racial profiling, particularly those alleged in an ACLU lawsuit against private airlines in the aftermath of September 11 regarding the racial profiling of Asian, Arab and Muslim passengers.[54] However, training may have less an impact in circumstances where local law enforcement officers have been allowed to make immigration arrests by using racial profiling as an essential tool. For example, in 1997 in Chandler, Arizona, enforcement of immigration law by local police led to widespread civil rights abuses, including the unjustified arrests of documented residents of Mexican descent.[55] This led to strained relations between local police and the community and ultimately resulted in costly litigation.[56] Additionally,

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recognized as 'persons' guaranteed due process of law by the Fifth and Fourteenth Amendments"); *see also* Mathews v. Diaz, 426 U.S. 67, 77 (1976) (stating "[there] are literally millions of aliens within the jurisdiction of the United States. The Fifth Amendment, as well as the Fourteenth Amendment, protects every one of these persons from deprivation of life, liberty, or property without due process of law. Even one whose presence in this country is unlawful, involuntary, or transitory is entitled to that constitutional protection"); *see also* Kwong Hai Chew v. Colding, 344 U.S. 590, 596-98, (1953); *see also* Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206, 212 (1953) (stating, "[a]liens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law"); *see also* Farrington v. Tokushige, 273 U.S. 284 (1927) (affirming that the Constitution's Fifth Amendment protects inhabitants of territories from denial of due process); *see also* Oyama v. Cal., 332 U.S. 633, 640 (1948) (judgment for state reversed because the law afforded different treatment for minor citizens whose parents could not be naturalized and for minor citizens whose parents were either citizens or eligible aliens, and even for minors who were themselves aliens though eligible for naturalization, demonstrating an intent to discriminate); *but see* Gong Lum v. Rice, 275 U.S. 78 (1927) (holding that a state could mandate that a Chinese citizen minor could attend a "colored" school because the operation of a dual school system did not violate the Fourteenth Amendment's Equal Protection Clause); *see also* Terrace v. Thompson, 263 U.S. 197 (1923) (the statute disallowing aliens from owning land did not violate equal protection where it was based on the reasonable classification of citizenship, thus the state properly invoked its right to deny aliens the right to own land within its borders).

[54] *See* Chandrasekhar, *supra* note 42.

[55] *Local Cops and Visa Violators: Problems in Departizing Police . . .* , CHRISTIAN SCIENCE MONITOR, Apr. 30, 2002, at 10, *available at* 2002 WL 6425526.

[56] *Id.* (Chandler had to pay the plaintiffs $400,000). *See* Amy Bach, *Vigilante Justice*, THE NATION, June 3, 2002, at 18, *available at* 2002 WL 2210567 (stating that the police conducted a sweep of illegal immigrants as part of an effort to "beautify the rumpled agricultural town." A police report that leaked to the press indicated that Chandler police approached people on the street that had "strong body odor common to illegal aliens," or lacked "personal hygiene." The Chandler police, who did not have the extensive seventeen-week training required by federal law enforcement, which included how to discern fraudulent immigration paperwork, wrongly determined that documentation was fraudulent and made these faulty arrests. Many of the 432 people captured in the local police dragnet were United States born Hispanics, who ultimately sued the city for discrimination).

similar 'immigrant sweeps' occurred in Katy, Texas in 1994, and Richmond, Arkansas in 2000.[57]

Although White House Aide Alberto Gonzalez noted that "[o]nly high-risk aliens who fit a terrorist profile would be placed on NCIC,"[58] the CLEAR Act mandates DHS provide the DOJ with "such information as the [DHS] Commissioner may have on *any* person who has violated the immigration laws of the United States."[59] This could mean that the NCIC would contain relatively 'benign' information on foreign students initially admitted into universities for a full-time degree program but who later fell below the requisite number of credits or had excessive class absences.[60] The NCIC would ultimately list numerous immigration violations and a local officer may have to review panoply of immigration paperwork, without adequately understanding how to identify an immigration violation or how to identify which violations warrant arrest and deportation.

Although the cases in Chandler, Arizona; Katy, Texas; and Richmond, Arkansas pertain to racial profiling of Latino residents in the United States prior to September 11, the same type of racial profiling of Asian Americans may likely occur in the post September 11 political scheme. As illustrated by the ACLU suits, private airlines presumed that South Asians could threaten United States security interests and, it is possible that local police officers may presume that "foreign-looking" residents, such as those who are South Asian or members of other Asian groups, among others, could threaten national security or have values that are 'un-American.' Although some scholars may argue that the airline discrimination cases occurred closer to the immediate aftermath of September 11, when the United States was on high alert of other possible terrorist attacks, Asian American jurisprudence has usually illustrated that the federal government continuously perceives all subgroups of Asian Americans as having interests that are counter to the United States' national security concerns or interests that are 'un-American.'

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[57] *See* Edward Hegstrom, *HPD Shuns Taking Role in Tracking Immigrants: Officers Say They Need Foreigners' Trust,* HOUS. CHRON., May 15, 2002, at 1, *available at* http://www.immigrationforum.org/currentissues/articles/051702_houston.htm (last visited Mar. 2, 2004).

[58] *See ACLU Statement on H.R. 2671, supra* note 52.

[59] *See* CLEAR Act of 2003 § 104(a), H.R. 2671, 108th Cong. (2003).

[60] *Amnesty International Issue Brief, supra* note 52. "Under the CLEAR Act, a foreign student studying at an American university who drops a course and falls below the 12 credits required by the student visa can be picked up by state or local police and detained in any correctional facility that the state designates." *Id.*

IV. ASIAN AMERICANS, "PERMANENT FOREIGNNESS," AND RACIAL PROFILING

American Beats Out Kwan

MSNBC headline on American Figure Skater
Tara Lipinski's Victory over Asian American
Michelle Kwan in 1998[61]

From the early days of Asian American jurisprudence, the judiciary commented that there was something "different" about Asian Americans that placed them in a very dissimilar position than other "Americans," such as African-Americans or Whites. Perhaps Justice Field's infamous opinion in *Chae Chan Ping* began the legal tradition of categorizing Asian Americans as "foreign." Field described the increasing numbers of Chinese people entering the United States in the late 1800s as, "they [Chinese] remained strangers in the land, residing apart by themselves, and adhering to the customs and usages of their own country. It seemed impossible for them to assimilate with our people or to make any change in their habits or modes of living."[62] Similarly in 1923, the Supreme Court declared in *United States. v. Thind* that South Asian Americans, which the Court termed "Hindu," would never be able to assimilate into the American fabric, stating:

> The children of English, French, German, Italian, Scandinavian, and other Europe parentage, quickly merge into the mass of our population and lose the distinctive hallmarks of their European origin. On the other hand, it cannot be doubted that the children born in this country of Hindu parents would retain indefinitely the clear evidence of their ancestry. [The] racial difference . . . is of such character and extent that the great body of our people instinctively recognize it and reject the thought of assimilation[63]

Over one hundred years later, Asian American legal scholars still debate about whether there is something different about Asian Americans that separates them from other 'Americans' and therefore, precludes assimilation into the American racial landscape.

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[61] Rene M. Astudillo, *Michelle Kwan Headline Controversy Continues to Haunt Us*, Asian American Journalist Website, *available at* http://www.asiaweek.com/2002_03_01/opinion_voices.html (last visited Sept. 24, 2004).

[62] Chae Chan Ping v. United States, 130 U.S. 581, 595 (1889).

[63] United States v. Thind, 261 U.S. 204, 215 (1923).

Using the Black/White paradigm[64] as a primary tool to analyze Asian Americans' presence in the American racial landscape, prominent Asian American scholars such as Michael Omi, Howard Winant, Robert S. Chang, and William R. Tamayo claim this mainstream racial paradigm cannot adequately grapple with the Asian American experience. In particular, Omi and Winnant claim that the Black/White paradigm inadequately encompasses the shifting demographics in which an increasing number of non-Black or non-White groups are present, ignores nativism, and marginalizes "others" in racial discourse by discounting the issues or consequences of particular polices.[65] If the mainstream Black/White paradigm pushes Asian Americans to the margins by inadequately addressing their issues or experiences, as claimed by these scholars, then the consequences could be grave. As legal scholar Neil Gotanda summarized:

> One of the critical features of legal treatment of Other non Whites has been the inclusion of a notion of "foreignness" in considering their racial identity and legal status . . . the persistence of the view that even American-born non-Whites
> were somehow "foreign." This undeserved stigma became, and may remain, an unarticulated basis for the legal treatment of these groups, leading to unfair and often shocking consequences[66]

As these "Other non-Whites" become associated with notions of "foreignness," this also conjures ideologies of "Other non-Whites" as permanently "Un-American," immersed in a perception of immutable loyalties to their "home country" that cannot be changed through naturalization, assimilation or birth on American soil.[67] Because one cannot be construed as "foreign" and "American" at the same time due to the

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[64] A critical race theory paradigm in which relations between Black and Whites are analyzed to better understand the 'racialization' of America.

[65] Janine Young Kim, *Are Asians Black: The Asian-American Civil Rights Agenda and the Contemporary Significance of the Black/White Paradigm*, 108 YALE L.J. 2385, 2388 (1999). *See* MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES FROM THE 1960S TO THE 1990S 145 (Routledgerress 2d ed. 1994) (examining the historical development of race, racism, race-gender interrelationships and addressing the 1992 Presidential elections and the Los Angeles riots. Authors claim that increased multiculturalism in the United States calls into question the applicability of the black-white paradigm); *see also* Robert S. Chang, *Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, 1 ASIAN L.J. 1, 27 (1994) (stating "critical race scholarship tends to focus on the black-white racial paradigm, excluding Asian Americans and other racial minorities"); see also William R. Tamayo, *When the "Coloreds" are Neither Black nor Citizens: The United States Civil Rights Movement and Global Migration*, 2 ASIAN L.J. 1 (1995) (supporting new theory to replace the black-white paradigm).

[66] Neil Gotanda, *Other Non-Whites in American Legal History: A review of Justice at War*, 85 COLUM. L. REV. 1186, 1188 (1985) (book review).

[67] *See* Thomas W. Joo, *Presumed Disloyal: Executive Power, Judicial Deference, and the Construction of Race Before And After September 11*, 34 COLUM. HUM. RTS. L. REV. 1, 18 (2002).

immutability of these aforementioned characteristics,[68] these two labels becomes juxtaposed with preventative bars that thwart the presumed foreign Asian American from crossing over into a perceived "American" identity.

It is perhaps an intersectionality of race and a perceived foreignness that challenges the confines of the Black/White paradigm, pushing Asian Americans to its margins or even outside its discourse and crystallizing Asian Americans as "permanent foreigners" to this country. Although Asian Americans began entering the United States over one hundred years ago, the United States Supreme Court stated that Asian Americans could not assimilate into the American fabric.[69] Even modern day scholars acknowledge the difference in Asian Americans, noting that current mainstream scholarship cannot adequately capture the Asian American experience. Perhaps this difference, or perceived foreignness, could be the reason why some local police officers could view Asian Americans as foreign, despite many Asian Americans being born in America, having American citizenship or having documented immigration status. These antiquated stereotypes still embodied in our jurisprudence could cause certain officers to consciously or unconsciously rely on notions of permanent foreignness when deciding which residents to interrogate regarding immigration status under the proposed CLEAR Act.

To the contrary, some scholars, such as Janine Young Kim, warn that the Black/White paradigm should not be so easily dismissed. According to Kim, current discourse oversimplifies the Black/White paradigm and fails to articulate the cost of abandonment.[70] Kim does not discuss exactly where Asian Americans belong in the Black/White paradigm but states there are some political issues within the paradigm particular to the Asian American community, such as immigration.[71] Interestingly, it is the issue of immigration that is more particular to Asian Americans than Blacks or Whites along the Black/White paradigm. The issue reinforces notions of voyages from other lands and the struggle of assimilation from the "home country" into an "adopted" land. Notwithstanding these pedagogical differences between those scholars who discount the Black/White paradigm and those who maintain that it should not be readily dismissed, both groups probably agree that there is something different about Asians, such as differing political agendas that differentiate Asian Americans from Blacks and Whites.

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[68] *Id.*

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

[70] Kim, *supra* note 65, at 2386-87. Kim also argues that the Black/White paradigm is so powerful that it should not be readily dismissed and it still contains a contemporary significance despite the demographic changes in American society.

[71] *Id.* at 2409.

However, it is more than a different political agenda that highlights the Asian American experience. It is this perceived foreignness or perhaps a presumed disloyalty to American interests that perhaps plays the central role in Asian American jurisprudence:

> Between the time of the Chinese Exclusion Act of 1882 and the National Origins Act of 1924, immigration laws were modified to prevent nearly all Asian migration to the United States. The 1790 Naturalization Act limited citizenship to "free white persons" and Asians were held in a series of cases to be non-white. Thus, as Asians were incorporated into the United States racial hierarchy, "foreignness" became part of their racialized identity . . . State and local laws were enacted which levied special taxes on Asian Americans; others prevented those aliens "ineligible to citizenship" from obtaining employment, possessing various kinds of licenses, or owning land. [72]

On the immigration front, unduly strict restrictions on Asian immigration ensured a sense of permanent foreignness before the immigration laws were rewritten in 1965. According to Gabriel J. Chin:

> Asians were the only group whose immigration was restricted on the basis of race. A consistent feature of anti-Asian immigration laws was categorization by race and ancestry, rather than by place of birth. For example, a person of Asian racial descent born and raised in Brazil was treated as Asian, not Brazilian.[73]

Although Congress eventually granted naturalization status to Chinese, Filipino and South Asian American residents by the early 1950s,[74] a presumptive foreignness still remains regarding all subgroups of Asian Americans despite documented immigration status or citizenship.

With the passage of the CLEAR Act and the possibility that certain officers will utilize stereotypes of Asian American 'permanent foreignness' to decide which residents to question or detain pertaining to immigration status could lead American society back to the immigration law cases from the 1800s. In early immigration cases such as *Fong Yue Ting* (1893), the

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[72] Natsu Taylor Saito, *Symbolism Under Siege: Japanese American Redress and the "Racing" of Arab Americans as "Terrorists"*, 8 ASIAN L.J. 1, 8-9 (2001). *See* Jean Shin, *The Asian American Closet*, 11 ASIAN L.J. 1, 6 (2004) ("Perceptions of Asian Americans as prima facie foreigners persist outside the law and to the present day").

[73] Gabriel J. Chin, *The Civil Rights Revolution Comes to Immigration Law: A New Look at the Immigration and Nationality Act of 1965*, 75 N.C. L. REV. 273, 281 (1996); *see* Hitai v. I.N.S., 343 F.2d 466, 468 (2d Cir. 1965) (holding that a Brazilian of Japanese ancestry could not enter as a Brazilian, but only as a Japanese).

[74] *See id.*

Court upheld a federal law that, in practice, assumed that Chinese laborers were "illegal" unless they could provide documentation and a witness affidavit that proved otherwise.[75] The case affirmed a presumptive foreignness. Although some scholars may argue that the early immigration cases, such as *Chae Chan Ping* or *Fong Yue Ting* are outdated because they refer to immigration laws that are no longer in effect, more recent events illustrate the ongoing perception of a perceived foreignness or presumptive disloyalty. For example, in the Japanese internment of the 1940s the federal government and some members of the general public assumed a presumptive foreignness and disloyalty of Japanese Americans in the aftermath of the Pearle Harbor bombing.[76] During this time, the federal government treated all those of Japanese ancestry residing in the United States as presumptively disloyal to the United States, regardless of their citizenship status.[77] Immersed in rhetoric of Japanese disloyalty, un-American beliefs, and permanent foreignness to the United States, California Attorney General Earl Warren painted a poignant portrait of Asian American foreignness. He stated, "[w]hen we are with the Caucasian race, we have methods that will test the loyalty of them . . . But when we deal with the Japanese, we are in an entirely different field and we cannot form any opinion."[78] Despite Warren's claim of the inability to form an opinion on the Japanese, legal scholar Thomas M. Joo notes that General John L. DeWitt implemented the internment policy against the Japanese because although some Japanese were American citizens or had assimilated into American culture, their "racial strains are undiluted."[79]

This notion of a perceived foreignness that cannot be changed due to "undiluted" Asian American "racial strains" could affect local police officers enforcement of the CLEAR Act. Local police officers may resurrect antiquated stereotypes without regard to Asian American participation in American life because of a presumptive foreignness that is inextricably intertwined with their race. In particular, local officers with an agenda of capturing undocumented immigrants or those immigrants who violate other aspects of the INA are likely to question residents whom they perceive to be unable to assimilate, disloyal or marginalized in the American racial landscape. Even as recently as the 1990s, the cases concerning the espionage

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

[76] *See* Hirabayashi v. United States, 320 U.S. 81 (1943); *see also* Yasui v. United States, 320 U.S. 115 (1943); Korematsu v. United States, 323 U.S. 214 (1944).

[77] *See* Hirabayashi, *supra* note 76 (describing the military orders that established curfews and other restrictions on Japanese Americans under the guise of national security).

[78] Joo, *supra* note 67 at 20.

[79] *Id.* at 20-21.

investigation of naturalized United States scientist Wen Ho Lee[80] and the Asian American fundraising 'scandal'[81] both had an overtone of Asian American foreignness and disloyalty to the United States.

Joo recounted the infamous events, stating:

> The Lee case must be viewed in the context of contemporaneous and historical attitudes toward Asians in America. At the time of the Lee investigation, anti-Chinese sentiment was high, with negative consequences for Chinese and other Asian Americans. When Asian American fundraisers solicited questionable (and perhaps illegal) foreign campaign donations for Democrats in the 1996 elections, these practices should have prompted an examination of the corrupt nature of campaign financing. Instead, they led to an episode of racial scapegoating. Republican politicians accused the fundraisers of being spies for the People's Republic of China and conduits for Chinese influence over the Clinton Administration. The Democratic National Committee responded by auditing its own Asian American contributors and questioning them about their identities and citizenship status.[82]

As Joo's analysis of the recent events indicates, the allegations of misconduct of both Wen Ho Lee and the campaign financing activities could not be investigated on their merits alone; Asian American racialization and notions of permanent foreignness could not be separated from the identity of the alleged 'perpetrators' and played a central role in the investigations.

Similarly, a local police officer may presume foreignness based on the fact that the individual is Asian American and arbitrarily question, arrest and detain the individuals under the CLEAR Act. If an officer is charged with arresting those who are in this country in violation of the INA or non-citizens who have committed criminal acts, then approaching those whom the officer presumes to be an immigrant or who has questionable citizenship status would likely be the starting point of any investigation. Officers may have difficultly in separating the presumptive foreignness from an Asian

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[80] *See* Neil Gotanda, *Comparative Racialization: Racial Profiling and the Case of Wen Ho Lee*, 47 UCLA L. REV 1689 (2000). In 1995, scientists at Los Alamos National Laboratory found indications that China had duplicated an American warhead. Convinced that there was espionage, the government focused its investigations on Wen Ho Lee, a scientist born in Taiwan and a naturalized United States citizen. Although the government's investigation against Lee slowly crumbled while Lee was detained for almost 300 days, the racial dynamics of the government's suspicion against Lee conjure notions of Asian American presumptive foreignness and disloyalty. According to Gotanda, "The assignment to Wen Ho Lee of a presumption of disloyalty is a well-established marker of foreignness. And foreignness is a crucial dimension of the American racialization of persons of Asian Ancestry." *Id.* at 1690.

[81] *See* Phil Tajitsu Nash & Frank Wu, *Asian-Americans Under Glass: Where the Furor Over the President's Fundraising Has Gone Awry – and Racist*, THE NATION, Mar. 31, 1997, at 15.

[82] Joo, *supra* note 67, at 11.

American's identity and if combined with discriminatory government investigations spanning from early immigration law cases to post September 11, 2001, all Asian Americans could be targets of racial profiling under the CLEAR Act.

V. CONCLUSION

The Congressional CLEAR Act threatens to solidify a sense of permanent foreignness that has pervaded Asian American jurisprudence. The proposed legislation would codify intricate financial and operational mechanisms for local police officers to enforce civil immigration law through the 'criminalization' of an encounter with a presumed immigrant. Because the officer must determine which person to question, arrest and detain, officers may approach those they believe are undocumented or criminal immigrants based on conscious or unconscious stereotypes. Asian Americans are likely to be negatively impacted should this legislation garner Congressional approval. Subjected to a history of presumptive foreignness and disloyalty to the United States and despite generations of active participation in American life, Asian Americans still carry a notion of foreignness that is immutable through an intersectionality of race and foreignness. Ultimately, it is this perceived notion of foreignness that will make local officers likely to question Asian Americans once the CLEAR Act is passed. Ultimately, society may revert back to the days of *Fong Yue Ting*, wherein Asian Americans had to carry papers with them at all times because it was assumed that they were residing in the United States 'illegally,' unless they could prove otherwise.

To conclude in the words of Fred Korematsu, the litigant in the infamous Japanese interment case *Korematsu v. United States* in 1944, the federal government has frequently used other groups in the name of national security. He states:

> History teaches that, in time of war, we have often sacrificed fundamental freedoms unnecessarily. The Executive and Legislative Branches, reflecting public opinion formed in the heat of the moment, frequently have overestimated the need to restrict civil liberties and failed to consider alternative ways to protect the national security. Courts, which are not immune to the demands of public opinion, have too often deferred to exaggerated claims of military necessity and failed to insist that measures curtailing constitutional rights be carefully justified and narrowly tailored[83]

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[83] Brief of Amicus Curiae Fred Korematsu in Support of Petitioners at 3-4; Al Odah v. United States, 124 S. Ct. 2686 (U.S. 2004) (No. 03-343), *available at* 2003 WL 23170357.

Similarly, the CLEAR Act will place Asian Americans on the defense, crystallizing notions of a permanent foreignness in the name of national security, ultimately eroding the rights of many Asian Americans. Perhaps Ben Franklin's infamous words should be the platform for Asian American scholars to begin challenging the CLEAR Act and its mandates: "They that can give up essential liberty to obtain a little temporary safety deserve neither liberty nor safety."[84]

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[84] *The Quotable Franklin*, *at* http://www.ushistory.org/franklin/quotable/quote04.htm (last visited Mar. 2, 2004).