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THE EXECUTIVE’S SCAPEGOAT,
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Hollis V. Pfitsch*

An Arab American cab driver had a sobering question for NAPALC’s Executive Director, Karen K. Narasaki, as she made her way to a press conference at the Japanese American memorial a week after September 11th. "How were the Japanese Americans treated in the internment camps during WWII?" he asked. When Narasaki asked why he posed the question, he replied, "I just want to be prepared for what may happen in the future."


Introduction

Immediately after the terrorist attacks on the World Trade Center on September 11, 2001, the U.S. government arrested hundreds of Arab, Muslim, and South Asian immigrant men suspected of terrorism connections.1 The government later deported these men, many in secret.2 But, the government did not charge them with September 11-related crimes.3 Before arresting the "September 11 detainees," the government did not attempt to establish that the men had any political affiliations that would make them deportable.4 Instead, the scarce information available indicates

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3 COLE, supra note 1, at 25-26.

4 See generally OFFICE OF INSPECTOR GENERAL, U.S. DEPARTMENT OF JUSTICE, THE SEPTEMBER 11 DETAINES: A REVIEW OF THE TREATMENT OF ALIENS HELD ON IMMIGRATION CHARGES IN CONNECTION WITH THE INVESTIGATION OF THE SEPTEMBER 11 ATTACKS (June 2003), available at http://www.usdoj.gov/oig/gspecr1.htm. This is in marked contrast to the government’s anti-terrorism efforts against immigrants before September 11, in which certain individuals were targeted based on their
the government arrested the men based on the assumption that those
connections existed because of their perceived race, ethnicity, religion, or
nationality. The government then relied on routine immigration violations
to detain the men for investigation and deport them. The administrative
immigration context hindered the detainees from challenging this selective
enforcement of immigration regulations.

Immigrants are easy scapegoats in times of national insecurity. From the Palmer Raids in 1920, to Japanese internment in World War II, to registration for Iranian students during the Iran Hostage Crisis, national security-related law enforcement measures often employ racial, religious, or ethnic profiling to target foreign nationals. Despite numerous historical lessons, the government’s post-September 11 anti-terrorism initiatives are designed to register, detain, and deport Arab, Muslim, and South Asian immigrants.

These programs raise numerous civil rights concerns. Racial and ethnic classifications violate the Fifth and Fourteenth Amendments’ equal protection and due process guarantees in most legal contexts. Selective enforcement of the law based on political and religious affiliation is traditionally viewed as a violation of the First Amendment. In the criminal context, even undocumented immigrants are afforded full constitutional protections, including the ability to raise constitutional challenges to selective prosecution. But, the Supreme Court has issued such confusing and contradictory statements about immigrants’ rights that the government has been able to operate anti-terrorism law enforcement as if the Bill of Rights does not apply to immigrants when the Executive invokes national security concerns.

activism with particular political groups. See discussion infra Part IV of the "LA 8" immigrant students who were arrested and placed in deportation proceedings because of their connections with the Popular Front for the Liberation of Palestine.  


6 COLE, supra note 1, at 24-25.  


8 I use the term "immigrants" in place of the more derogatory legal term "alien." Additionally, "immigrants" encompasses all those immigration law designates "non-immigrants" (foreign nationals on temporary visas like student, tourist, or business visas), "legal permanent residents," and "undocumented" immigrants. All three categories of immigrants have been affected by post-September 11 anti-terrorism initiatives, although sometimes in distinct ways which I will explain.  

9 COLE, supra note 1, at 204.  

10 COLE, supra note 1, at 213 n.12 (listing cases holding that immigrants are entitled to full constitutional protections in the criminal context).  

By using the immigration context to combat terrorism, the government has been able to evade important constitutional protections both for the targets of anti-terrorism law enforcement initiatives and for the press and public who have been denied access to information about the government's tactics. Besides the devastating impact on the lives of those immigrants affected, anti-terrorism law enforcement initiatives could signal a drastic erosion of the basic rights of all immigrants.

Part I of this paper outlines the political context of anti-immigrant sentiment and immigration reform that preceded the September 11 terrorist attacks. Part II describes how the Executive Branch used immigrants as a scapegoat for the domestic fight against terrorism after September 11. Parts III and IV constitute an analysis of whether the government's anti-terrorism law enforcement initiatives affecting immigrants are above constitutional challenge. This analysis first demonstrates how the present programs follow directly in the footsteps of previous administrations during times of war and terrorist threats and how the legal doctrines emerging from constitutional challenges to those past attacks on immigrants could undermine today's legal challenges. The second part of this analysis reviews the Supreme Court's rulings on immigrants' Bill of Rights protections, focusing particularly on equal protection and freedom of association, to determine whether there is precedent sufficient to challenge current initiatives. Part V describes how the post-September 11 anti-terrorism efforts could have a lasting effect on immigration proceedings because the Executive Branch has obtained judicial deference to its interpretation of "national security concerns," both in the context of routine immigration proceedings and secret immigration hearings for "special interest" detainees. Finally, the conclusion addresses the bearing of the Supreme Court's June 28, 2004, decisions in Rasul v. Bush, Hamdi v. Rumsfeld, and Rumsfeld v. Padilla on the constitutionality of domestic anti-terrorism tactics targeting immigrants.

Despite being termed a "nation of immigrants," the United States has a love-hate relationship with immigration. The United States designed its original immigration laws to keep out workers deemed a threat to the U.S. labor force. The Chinese Exclusion cases, while highly criticized as motivated by racism, were also rooted in U.S. concern that Chinese immigrant workers were displacing U.S. workers. Since then, U.S. immigration law has alternately admitted and excluded immigrants according to the need in the labor force. For example, during times of immigration restriction, such as the National Origins Quota of 1924, instated in response to anti-communist and socialist fervor after World War I, the United States allowed in Mexican agricultural workers. Perhaps the most notorious example of the alternate importation and deportation of immigrant workers is the Bracero Program of the 1940's and 50's, which operated parallel to a massive immigration law enforcement initiative, Operation Wetback. These two government projects operated to keep both legal guest workers—the "braceros"—and undocumented workers—the "wetbacks"—captive labor for U.S. agriculture, because either could be deported at any time.

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18 Ping v. United States, 130 U.S. 581, 595-596 (1889). Justice Fields wrote: "In December 1878, the convention which framed the present constitution of California . . . [set] forth . . . that the presence of Chinese laborers had a baneful effect upon the material interests of the state, and upon public morals; that their immigration was in numbers approaching the character of an Oriental invasion, and was a menace to our civilization; that the discontent from this cause was not confined to any political party, or to any class or nationality, but was well nigh universal; that they retained the habits and customs of their own country, and in fact constituted a Chinese settlement within the state, without any interest in our country or its institutions; and praying congress to take measures to prevent their further immigration." See Henkin, supra note 17, at 863.
21 Cameron, supra note 20, at 31.
A. Recent Immigration Reform

Anti-immigrant sentiment arose with the economic ups and downs of the 1980s and 1990s. Congress responded with immigration reform such as the terrorist-immigrant profile that motivated anti-terrorism law enforcement after September 11. To justify changes in the immigration laws, legislators relied on various myths about the threat immigration poses to the U.S. economy. The classic story invoked by politicians stated that a flood of undocumented immigrants would take jobs away from U.S. workers. This "competition myth," alive today, is rooted in racism and nationalism. U.S. whites fear a non-English speaking, non-white majority because of its effect on the U.S. economy.

In response, Congress created sanctions for employers who hired undocumented immigrants under the Immigration Reform and Control Act of 1986 (IRCA). While placing the ultimate burden on employers to verify work authorization documents, this provision essentially criminalized the work of undocumented immigrants. The legislative intent of the IRCA encompassed the language of the competition myth—to protect American jobs by reducing illegal immigration. Although this experiment failed to reduce levels of immigration, the impact on the immigrant community is clear: after IRCA, discrimination against Asian Americans and Latinos has increased.

23 Johnson, supra note 22, at 174.
24 Id. at 178-79.
25 Id.
26 Immigration Control and Reform Act, 8 U.S.C. § 1324a (1986). The Congressional debate about IRCA is revealing: "The magnetism of our country is like that of a magnet picking up iron filings as they rush to come here. I look at a situation where in Matamoros a woman goes into labor and they put her in a car and rush her across the border to have her child born in the United States. I understand that. If I were a Mexican citizen and my wife was in labor, I would want her child born in this country too." 132 CONG. REC. S16879-01 (daily ed. Oct. 17, 1986) (statement of Senator Bentsen).
28 "The most conservative estimate I have seen is that 65 percent of those who come into our country illegally take the jobs of Americans. They take the jobs of low-skilled Americans, generally. In the city of Chicago, for example, it is estimated-and I do not know how accurate any of these estimates is-that there are 135,000 people who are there illegally. Sixty-five percent means 81,000 jobs for the city of Chicago. That is a lot of jobs. Nationally, it is a major problem." 132 CONG. REC. S16879-01 (daily ed. October 17, 1986) (statement of Senator Simon). See Lori A. Nessel, Undocumented Immigrants in the Workplace: The Fallacy of Labor Protection and the Need for Reform, 36 HARV. C.R.-C.L. L. REV. 345, 357 (2001).
29 ANGELO N. ANCHETA, RACE, RIGHTS, AND THE ASIAN AMERICAN EXPERIENCE 77 (1998) (reporting that after IRCA, a GAO study found that almost 20% of all employers committed unlawful discrimination based on national origin or citizenship, and that in another survey of over 400 employers,
Like Congress, Proponents of Proposition 187 in California capitalized on the same competition myth narratives as they sought to deny undocumented immigrant children the right to attend public school and receive emergency medical care in 1994. Similar motivations resulted in the immigrant provisions of the Personal Responsibility and Work Opportunities Reconciliation Act (PRWORA) of 1996, which changed the basic eligibility requirements for welfare benefits, eliminating even legal immigrants from most programs.

Finally, concern about economic competition with foreign countries has also driven anti-immigrant policy. Anti-Japanese rhetoric emerged in connection with "Buy American" campaigns and debate about "trade wars" with Japan. The 1982 killing of Vincent Chin is a tragic reminder of the potential connection between U.S. foreign policy and local anti-immigrant violence.

B. Immigrants' Impact on the Economy

While immigrants routinely take the blame for economic problems, in reality, they form a cornerstone of the U.S. economy. A number of low wage, high risk job sectors depend largely on undocumented immigrant labor: manufacturing employs 1.2 million undocumented workers, services employs 1.3 million, agriculture employs from 1 to 1.4 million, construction employs 600,000, and restaurants employ 700,000 undocumented workers. These same industries are notorious for violating health, safety, labor, and wage and hour laws. The resulting poverty wages and unsafe working conditions are often cited as reasons why businesses and citizens oppose immigration reform.
conditions are economic incentives for employers to hire undocumented immigrants.\textsuperscript{37}

The fear behind the competition myth is an erroneous simplification of the complicated effect of immigration on the U.S. labor market. As an Urban Institute report found in 1994, immigrants have minimal overall negative effect on the availability of U.S. jobs (less than one percent).\textsuperscript{38} In small local economies with high immigration during times of economic recession, some studies have found that new immigrants can affect the wages of low-skilled black workers (a two to nineteen percent decrease in weekly earnings depending on study and location), and of other immigrant groups (a nine to ten percent decrease in wages).\textsuperscript{39} More specifically, however, studies showing the largest effects demonstrate that it is a combination of immigration and trade that most depress the wages of low-skilled U.S. workers in these areas.\textsuperscript{40} Studies also show that immigrants create more jobs than they fill by starting new businesses and spending money in the United States.\textsuperscript{41} Studies that separate immigrants according to legal status find either that undocumented immigrants have no negative impact on the job market for U.S. workers or that they actually increase labor market opportunities.\textsuperscript{42}

\textbf{C. U.S. Policy Drives Immigration}

Recent immigration reform based on the competition myth ignores the push-pull factors driving immigration. Instead of acknowledging the poverty, war, or environmental disaster forcing immigrants to flee their home countries, the law emphasizes the "criminal" act of the undocumented worker – crossing the border and using false papers to obtain a U.S. job. This focus on the individual conveniently ignores the role of U.S. policy in creating many of the "push" factors, primarily economic recession and poverty, in immigrant-sending countries.

The connection between trade policy and immigration from Mexico is a telling example. The North American Free Trade Agreement (NAFTA), once touted as a way to improve the economies of all countries involved, was implemented in 1994 and has not only failed to improve difficult economic conditions in Mexico, but it has also contributed to loss of earning power for

\textsuperscript{37} Id.
\textsuperscript{39} Id. at 80.
\textsuperscript{40} Id. at 49.
\textsuperscript{41} Id. at 47.
\textsuperscript{42} Id. at 81.
Mexican workers. In fact, between 1991 and 1998, wages in Mexico have decreased by 29% and overall hourly income has decreased by 40%. In addition, fewer Mexican workers are salaried and more have resorted to self-employment. Consequently, immigration north from Mexico has increased throughout the 1990’s, a clear indicator of decreased employment opportunities.

NAFTA is also behind job losses for U.S. workers. Every state in the U.S. has lost jobs due to NAFTA, ranging from 395 in Alaska to 82,354 in California, for a total of 766,030 actual and potential jobs. NAFTA has contributed to wage depression for "unskilled" U.S. workers who constitute 72.7% of the U.S. labor force. Despite these clear statistics, U.S. policy makers have blamed foreign workers for these losses instead of U.S. trade policy.

D. Increase in Immigration Law Enforcement

Immigration law enforcement strategies are driven by the same nativist fears and misguided policy considerations. Operation Gatekeeper, instituted in 1994 (at the same time as the implementation of NAFTA), has involved a massive build-up of immigration law enforcement on the southern border. Between 1993 and 1997, the INS budget for enforcement at the southwest border doubled from $400 million to $800 million. However, six out of ten undocumented immigrants have overstayed a visa and have not crossed the border illegally. Gatekeeper has not only failed to deter illegal immigration, but has caused a steep increase in the number of migrants who die each year attempting to cross the border in more isolated, un-patrolled areas.

44 Id. at 16.
45 Id.
46 Id. at 14.
47 Id. at 6-7.
48 Id. at 7.
50 Id. at 129 (citing INS FACT SHEET, OPERATION GATEKEEPER: NEW RESOURCES, ENHANCED RESULTS (July 14, 1998)).
52 Belinda I. Reyes, et al., HOLDING THE LINE? THE EFFECT OF RECENT BORDER BUILD-UP ON UNAUTHORIZED IMMIGRATION 65 (July 2002) (finding no evidence that border enforcement build-up has substantially reduced unauthorized border crossings and that migrant border deaths increased rapidly after
After the Oklahoma City bombing in 1996, the image of the Arab, Muslim, or South Asian terrorist-immigrant emerged as an additional component of the campaign for immigration reform. As a result, there were significant changes to the immigration laws via the Anti-Terrorism and Effective Death Penalty Act (AEDPA) and the Immigrant Responsibility and Immigration Reform Act (IRAIRA). Together, the two statutes removed significant deportation relief for immigrants with criminal convictions, regardless of their ties to the United States, and expanded the categories of crimes that could make legal permanent residents deportable and subject to mandatory detention.

With this shift in focus to immigration law enforcement the average daily immigration detention population tripled, rising from 5,532 in 1994 to 19,533 in 2001 and 22,716 in 2003. Not all of these detainees are held in the processing centers of immigration agencies; for example, in 2003 over sixty percent of immigration detainees were held in local prisons, jails, and private contract facilities. The harsh impact of these laws has been widely reported. Initially, the laws were applied retroactively and immigrants with decade-old convictions and subsequent clean records were deported. Even employees of the Immigration and Naturalization Service (now the Bureau of Immigration and Customs Enforcement) realized the unjust results.

Immigrants from countries with poor diplomatic relations with the United States presented a particularly difficult problem after the 1996 laws created mandatory detention for "criminal aliens." Immigrants with criminal convictions making them deportable, whose countries would not accept them back (for example, immigrants from Cuba, Iraq, Libya, Laos, the implementation of Operation Gatekeeper, reaching the highest number of deaths in 15 years in FY 2000).

Cambodia, and Vietnam), were held indefinitely until the Supreme Court held the practice unconstitutional in 2001.\textsuperscript{64} Since then, the government has stepped-up efforts to obtain repatriation agreements from some of these countries and has begun deporting Cambodians, many of whom spent more time in immigration detention than in serving their criminal sentences.\textsuperscript{65}

Nativist myths about immigrants have been the driving force behind U.S. immigration policy, with harsh results for the immigrant community. Given the political context of at least two decades of anti-immigrant sentiment and significant immigration law reform, the government's immediate reaction to the terrorist attacks of September 11 was not surprising.

II. POST-SEPTEMBER 11 ANTI-TERRORISM LAW ENFORCEMENT INITIATIVES TARGETING IMMIGRANTS

Immediately after the September 11 terrorist attacks, the Administration quickly instituted a number of law enforcement initiatives designed to root out any potential collaborators poised to carry out additional attacks.\textsuperscript{66} The tactics relied heavily on a profile of the terrorist, namely, Arab, Muslim, and South Asian immigrant men. The various programs included: preventative detention, Special Registration, voluntary interviews, and the Absconder Apprehension Initiative.

A. Preventative Detention

The first government action dispatched federal agents to work in collaboration with local police and resulted in the arrest of hundreds of Arab, Muslim, and South Asian men held not on terrorism charges, but on minor immigration violations.\textsuperscript{67} This "preventative detention" used immigration law as a pretext for detaining immigrants who fit the government's terrorist profile because of their perceived race, ethnicity, religion, political association, or national origin.\textsuperscript{68} As one commentator has indicated, "there were no World War II-style roundups and relocations of American citizens

\textsuperscript{64} Zadvydas v. Davis, 533 U.S. 678 (2001). See DOW, supra note 57, at 263-84.
\textsuperscript{65} DOW, supra note 57, at 263-77.
\textsuperscript{67} COLE, supra note 1, at 25.
\textsuperscript{68} Id. The Migration Policy Institute argued, "The government has essentially used national origin as a proxy for evidence of dangerousness." MUZAFFAR A. CHISHTI ET AL., MIGRATION POLICY INSTITUTE, AMERICA'S CHALLENGE: DOMESTIC SECURITY, CIVIL LIBERTIES, AND NATIONAL UNITY AFTER SEPTEMBER 11 6 (2003).
whose ancestry was suspect. But the extensive infrastructure for detention was in place: \[69\] the immigration law enforcement system.

The Department of Justice initially published rising numbers of those detained under this program, but stopped in November 2001, when the Department encountered criticism because none of the detainees had been charged with terrorism. \[70\] The last number released by the Department stated that the government had 1,182 detainees. \[71\] An example of how immigration law can be used as a pretext for detention for criminal anti-terror law enforcement purposes is the case of one Palestinian legal permanent resident. Law enforcement stopped the Palestinian for driving four miles per hour over the speed limit, took him into custody, and charged him with criminal sanctions for failing to file a change of address form with the INS. Ultimately, law enforcement detained him for four months and presumably investigated the Palestinian for terrorist connections. \[72\]

Of the individuals preventatively detained after the September 11 attacks, 762 of them are now known as the "September 11 detainees." The government designated these men "of interest" in the terrorism investigation and although charged with minor immigration violations, held them in maximum security for many months even after the resolution of their immigration cases. \[73\] Using immigration as a pretext allowed the government to afford the detainees much less protection than they would have in the criminal context. \[74\] The right to counsel, a hearing on probable cause for detention within 48 hours, a public trial, and other important constitutional safeguards do not apply in the immigration context. \[75\] Notably, the USA PATRIOT Act \[76\], passed just weeks after September 11, 2001, includes a provision for mandatory detention of "suspected alien terrorists." \[77\] The government has yet to use this provision; none of the September 11 detainees were officially designated as such, \[78\] perhaps because immigration law allowed the government to detain them without having to respect the constitutional rights usually afforded to criminal suspects.

Before the September 11 terrorism attacks, anti-terrorism law enforcement initiatives often focused on individual immigrants with some

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\[69\] Dow, supra note 57, at 27.
\[70\] Cole, supra note 1, at 221.
\[71\] Id.
\[72\] Id. at 31. For other stories about how preventative detention affected individual detainees and their families, see Dow, supra note 57, at 40-47.
\[73\] Cole, supra note 1, at 34.
\[74\] Id.
\[75\] Id. at 34-35.
\[77\] Nancy Chang, Silencing Political Dissent 71 (2002) (citing USA PATRIOT Act § 412(a)).
\[78\] Id. at 71-72.
demonstrated connection to organizations the U.S. government viewed as threats to national security. After September 11, the government continued in this vein, but the more recent law enforcement acts targeted people assumed to have such connections because of their perceived race, ethnicity, religion, or nationality (the term used for this approach is selective law enforcement). Preventative detention affected immigrants who had no particular political affiliation to terrorist groups; law enforcement justified the arrests on possible associations.

The scarce information available concerning selective law enforcement techniques employed by the government in order to select the "September 11 detainees" for arrest raises First Amendment and equal protection concerns. After researching the post-September 11 anti-terrorism law enforcement initiatives, a Human Rights Watch report stated, "Our research, press accounts, and research by other organizations suggest . . . that the 'indications' that triggered questioning and subsequent arrest in many cases may have been little more than a form of profiling on the basis of nationality, religion, and gender." As an example, the report detailed that police investigated two men because a bystander reported they stopped to kneel and pray in a parking lot in Texas City, Texas. The men were then arrested for having a knife and driver's licenses that the police suspected were to be altered.

Even elements within the government became concerned about the law enforcement response to September 11. FBI agent Coleen Rowley publicly criticized the FBI's intelligence failures, but she also denounced preventative detention:

The vast majority of the one thousand plus persons "detained" in the wake of 9-11 did not turn out to be terrorists. They were mostly illegal aliens . . . [A]fter 9-11, Headquarters encouraged more and more detentions for what seemed to be essentially PR purposes. Field officers were required to report daily the number of detentions in order to supply grist for statements on our progress in fighting terrorism . . . [P]articular vigilance may be required to

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79 See COLE, supra note 1, at 159-79.
80 HUMAN RIGHTS WATCH, supra note 5, at 12.
81 Id. at 14.
82 "In theory, 'selective prosecution' doctrine holds that a prosecution motivated by race, gender, ethnicity, religion, speech, or association is unconstitutional." COLE, supra note 1, at 204.
83 HUMAN RIGHTS WATCH, supra note 5, at 12.
84 Id. at 14.
85 Id.
head off undue pressure (including subtle encouragement) to detain or "round up" suspects, particularly those of Arabic origin.\textsuperscript{86}

The U.S. government itself has provided even more information showing the use of selective enforcement within the post-September 11 law enforcement initiatives. The Office of Inspector General of the U.S. Department of Justice issued the government’s own report evaluating the detention conditions of the September 11 detainees.\textsuperscript{87} The report stated that law enforcement made arrests based on "anonymous tips called in by members of the public suspicious of Arab and Muslim neighbors who kept odd schedules."\textsuperscript{88} The government designated the arrestees "of interest", "whether or not the alien turned out to have a connection to the September 11 attacks or any other terrorist activity."\textsuperscript{89} General political statements sometimes served as a basis to not only investigate an immigrant, but also to arrest and indefinitely detain him: "A Muslim man in his 40’s . . . was arrested after an acquaintance wrote a letter to law enforcement officers stating that the man had made anti-American statements. The statements, as reported in the letter, were very general and did not involve threats of violence or suggest any direct connection to terrorism."\textsuperscript{90} The government arrested him for overstaying his visa and placed him in the "special interest" category.\textsuperscript{91}

The preventative detention initiative has proved ineffective in finding terrorists. As a result of all the government’s various anti-terrorism measures, an estimated 5000 people have been detained.\textsuperscript{92} Of those detained, the government has failed to charge them with any crimes related to September 11; in fact, the government charged only three non-citizens and two citizens (held on material witness warrants) with terrorist-related crimes.\textsuperscript{93} Of those five charged, two were acquitted, one was convicted of conspiracy to support terrorism, one in exchange with the government dismissing terrorism charges pleaded to a minor violation, and one awaits trial.\textsuperscript{94} Effectiveness aside, such broad law enforcement sweeps targeting immigrants based on perceived political or religious affiliation can only be constitutional if immigrants have no First Amendment rights and if selective

\begin{footnotes}
\item[87] OFFICE OF INSPECTOR GENERAL, supra note 4.
\item[88] Id. at 16.
\item[89] Id. at 41.
\item[90] Id. at 64.
\item[91] Id.
\item[92] Cole, supra note 1, at 25.
\item[93] Id. at 26.
\item[94] Id.
\end{footnotes}
enforcement based on racial and ethnic identity is legal in the immigration context.95

B. Special Registration

Implemented by the Department of Justice, Special Registration comes in two forms. The National Security Entry-Exit Registration System (NSEERS) requires new non-immigrants from certain countries to be fingerprinted, photographed, and interviewed upon entry. They must be interviewed each year and notify the Bureau of Citizenship and Immigration Service (BCIS, formerly INS) when they leave the country.96

Special Call-In Registration affected non-immigrants already in the country.97 Beginning in 2002, BCIS called into its office four groups of men aged sixteen and older from twenty-five countries (mostly Arab and Muslim).98 The men were interviewed about their religious beliefs, marital status, reasons for being in the United States, family members in the United States and elsewhere, entry to the United States, and school or employer.99 BCIS fingerprinted and performed a criminal background check on each man. If there were no problems with the individual’s visa, and he had no criminal convictions, BCIS released him.100 Otherwise, officials took the individual to another room, interrogated him further, and sometimes detained him overnight.101 If they had an outstanding warrant or deportation order, BCIS detained and deported the non-immigrant.102 If they had some other more minor visa violation, BCIS released the individual and he later received a Notice to Appear for deportation proceedings.103

Around 82,000 men complied with the "call-in" registration;104 BCIS detained 2,747 men and about one-sixth of them have received deportation

96 COLE, supra note 1, at 15.
99 Id.
100 Id.
101 Id.
102 Id.
103 Id.
orders. Most of those deported were of Pakistani origin. The Brooklyn, New York, Pakistani community has reportedly been reduced by forty percent, because the members were either detained or deported or left the country voluntarily as a result of this program. The registration arguably involved various due process and equal protection violations in its implementation. The government published the notice only in the Federal Register and the BCIS website, and the government erroneously translated the information in some languages. Registrants did not have interpreters and were not allowed access to counsel. The conditions the registrants withstood involved intimidation and yelling, day-long lines, overcrowding, detention with no access to food or water, and no chance to observe religious practices.

Through the Special Registration Program, the government did not apprehend anyone connected with the September 11 terrorist attacks. In March 2003, the Department of Homeland Security reported that they had identified eight suspected terrorists, but as of yet, no one has been charged. The Department eventually announced that the government had ended parts of the Special Registration program and would no longer require a second registration or check-in from new entrants or those who registered through the "call-in" program.

C. Voluntary Interviews

In November 2001, the Department of Justice began interviewing a list of five thousand immigrant men from Arab and Muslim countries. The Department justified the list of countries as those with demonstrated support for Al Queda, but did not include Great Britain, Germany or Spain,

106 CHISHTI ET AL., supra note 68, at 45.
107 Volpp, supra note 105; Uri Ofer, New York Civil Liberties Union, Presentation at CUNY Law School (Nov. 4, 2003) (reporting that an estimated 10-20,000 Pakistanis have disappeared from Brooklyn, New York).
108 Anderson, supra note 98.
109 Id.
110 Id.
111 Id.
112 COLE, supra note 1, at 25-26.
113 Id. at 26.
115 COLE, supra note 1, at 49.
although Al Qaeda suspects have been captured in those countries.\textsuperscript{116} In March 2002, the Department started on another list of three thousand men, again basing the selection on age, date of entry to the U.S., and Arab or Muslim country of origin.\textsuperscript{117} The United States also instituted a twenty-day waiting period on visas for men between ages sixteen and forty-five from the same Arab and Muslim countries.\textsuperscript{118} The Department arrested fewer than 20 of the interviewees on immigration charges and none on terrorism charges.\textsuperscript{119}

\section*{D. Absconder Apprehension Initiative}

According to the Department of Justice, there are currently 314,000 "absconders" living in the United States—people who have final orders of removal or deportation but who have not left the country.\textsuperscript{120} Out of this group, the U.S. Deputy Attorney General has prioritized six thousand Arabs and Muslims to be apprehended and deported.\textsuperscript{121} By May 2003, the government had detained 1,100 people,\textsuperscript{122} using the immigration system to practice selective enforcement based on race and ethnicity.\textsuperscript{123}

\section*{III. ABOVE CONSTITUTIONAL CHALLENGE?}

The government initiatives outlined above are strikingly similar—perhaps modeled after—law enforcement programs instituted in response to international conflict in the past. A review of this checkered history reveals how immigrants’ rights are routinely ignored in the face of national insecurity, and how, when courts are asked to intervene, fundamental aspects of the U.S. legal system support judges’ decisions to step aside.

\subsection*{A. World War I}

The Alien Act of 1798 gave the U.S. President the power to deport any non-citizen he determined to be dangerous, without judicial review.\textsuperscript{124} At the time of its passage, the government used the Act against Irish Catholics.\textsuperscript{125} During World War I, the government used the Act to arrest

\begin{thebibliography}{12}
\bibitem{116} \textit{Id.}
\bibitem{117} \textit{Id. See CHISHTI ET AL., supra note 68, at 17-18.}
\bibitem{118} COLE, supra note 1, at 50.
\bibitem{119} LAWYER'S COMMITTEE FOR HUMAN RIGHTS, supra note 104, at 40.
\bibitem{120} CHISHTI ET AL., supra note 68, at 40.
\bibitem{121} COLE, supra note 1, at 25.
\bibitem{122} \textit{Id.}
\bibitem{123} CHISHTI ET AL., supra note 68, at 40.
\bibitem{124} COLE, supra note 1, at 91.
\bibitem{125} CHISHTI ET AL., supra note 68, at 112 (2003).
\end{thebibliography}
6,300 German-Americans labeled "enemy aliens." The government incarcerated 2,048 German nationals in enemy camps without any criminal charges. German men over fourteen could not own guns, radios, or explosives and had to register at U.S. post offices.

Soon after the war, in the midst of massive efforts to organize workers and the general strikes of 1919, terrorists mailed thirty-six small bombs to prominent U.S. citizens around the country. One of the bombs exploded on the doorstep of the house of the U.S. Attorney General, A. Mitchell Palmer, while still in the hands of the bomb-thrower, an anarchist Italian immigrant. The government blamed the terrorist incident on anarchist, communist, and socialist groups, which triggered an attack on leftists; this attack became known as the Red Scare. Despite the fact that the majority of members of the anarchist, communist, and socialist left could be classified as non-violent, the Attorney General launched a law enforcement initiative primarily targeting Jewish and Italian immigrants with suspicious political affiliations. To justify the raids, Palmer used the Alien Control Act of 1918, which provided that "aliens" advocating overthrow of the U.S. government should be excluded from the country. The government interrogated, arrested, and detained over 10,000 immigrants. To force confessions, government officials beat many of the immigrants. This resulted in the deportation of over five hundred individuals. The government uncovered no explosives or plots to overthrow the government and found no one to be a threat to the United States.

Eventually, federal judges began to throw out evidence gathered during the Palmer Raids because of civil liberties violations so the detainees could not be prosecuted criminally. The Secretary of Labor, in charge of immigration at the time, also began to throw out warrants and release the detainees. However, the Raids had a lasting impact on the country's perception of the immigrant communities, which soon expressed itself in

126 Id. at 114. See COLE, supra note 1, at 92.
127 CHISHTI ET AL., supra note 68, at 114. See COLE, supra note 1, at 92.
128 Id.
130 Gerstle, supra note 129, at 17.
131 Id. at 16.
132 Id. at 18.
133 CHISHTI ET AL., supra note 68, at 116.
134 CHANG, supra note 76, at 39.
135 Id.
136 Id.
137 Id. at 39. Gerstle, supra note 128, at 18-19.
138 Gerstle, supra note 128, at 19.
139 Id.
immigration law. In 1924, Congress passed quotas, limiting immigration to two percent of a country’s U.S. population in 1890.\textsuperscript{140} This had a disparate effect on newer immigrants, which was the same communities targeted in the Raids for their political leanings. As a consequence, immigration from eastern and southern Europe decreased by ninety-seven percent.\textsuperscript{141}

\textbf{B. World War II}

Japanese internment during World War II is perhaps the most infamous example of racial and ethnic profiling for national security. In 1942, President Roosevelt issued an Executive Order directing the army to evacuate, relocate, and intern 110,000 people of Japanese ancestry; two-thirds of those interned held the status of U.S. citizen.\textsuperscript{142} In addition to internment, Congress passed the Alien Registration Act, known as the Smith Act, requiring all "resident aliens" over the age of fourteen to register and be fingerprinted.\textsuperscript{143} President Roosevelt also used the Enemy Alien Act, passed at the same time as the Alien Act of 1798, to declare that the government could detain "enemy aliens" and confiscate their property.\textsuperscript{144}

In three well-known cases, the Supreme Court upheld Japanese internment.\textsuperscript{145} The Court agreed that classifications based on race and ethnicity merit strict scrutiny, but deferred to the government’s decision that internment was necessary for national security.\textsuperscript{146} Despite the fact that these cases have been widely criticized, even by the Court itself, the cases’ main holdings have never been explicitly overturned.

\textbf{C. The Iran Hostage Crisis}

The day after the Iran Hostage Crisis began, President Carter and the U.S. Attorney General instated a program that required all non-immigrant post-secondary students of Iranian nationality to register with local Immigration and Naturalization Service (INS) offices.\textsuperscript{147} Some students sued, claiming violation of equal protection as guaranteed by the Fourteenth

\begin{itemize}
\item \textsuperscript{140} \textit{Id.} at 20-21. See CHISHTI ET AL., supra note 68, at 121.
\item \textsuperscript{141} \textit{Id.}
\item \textsuperscript{142} Exec. Order No. 9,066, 7 Fed. Reg. 1,402 (Feb. 19, 1942). See CHANG, supra note 77, at 39; Gerstle, supra note 129, at 21-25.
\item \textsuperscript{143} 8 U.S.C. § 1302(a). See CHISHTI ET AL., supra note 68, at 122; COLE, supra note 1, at 93.
\item \textsuperscript{144} 50 U.S.C. §§21-24 (2002). See CHISHTI ET AL., supra note 68, at 122; COLE, supra note 1, at 93.
\item \textsuperscript{146} COLE, supra note 1, at 98.
\item \textsuperscript{147} 8 C.F.R. § 214.5 (1979). See CHISHTI ET AL., supra note 68, at 139.
\end{itemize}
Amendment. The D.C. Circuit upheld the program. The court applied rational basis scrutiny because the federal government has broad immigration powers. The government has the ability to make distinctions based on national origin as long as the reason is not irrational. The court also deferred to the Executive, stating that the court could not cast judgment on decisions made within the President’s foreign affairs power, in this case, his efforts to engage in diplomatic efforts to end the Hostage Crisis.

D. Fundamental Doctrines

Two doctrines fundamental to our legal system have been repeatedly invoked as courts refuse to intervene in government attacks on immigrants in times of national insecurity: the plenary nature of Congress’ Immigration Power and judicial deference to the Executive power.

In 1889, the Supreme Court upheld the Chinese Exclusion laws, declaring that the federal government’s power to control immigration "flow[ed] from no other legitimate source" than that of its independence. Implicit in the statement is that power inherent in the nation’s sovereignty can not be subject to other constitutional limitations such as the Bill of Rights. This "plenary" immigration power has been used to support statutes targeting immigrants during times of national insecurity. For example, in 1952, the Supreme Court upheld the Alien Registration Act against constitutional challenge, stating, War, of course, is the most usual occasion for extensive resort to the [Government’s power to terminate its hospitality]. Though the resident alien may be personally loyal to the United States, if his nation becomes our enemy, his allegiance prevails over his personal preference and makes him also our enemy, liable to expulsion or internment, and his property becomes subject to seizure and perhaps confiscation. But it does not require war to bring the power of deportation into existence or to authorize its exercise. Congressional apprehension of foreign or internal dangers short of war may lead to its use.

\[148\] Id.
\[149\] Id.
\[150\] Id.
\[151\] Narenji v. Civiletti, 617 F.2d 745, 747 (D.C. Cir. 1979).
\[152\] Id. at 748.
\[154\] HENKIN, supra note 153, at 303.
\[156\] Id. at 587 (emphasis added).
Another clear historical pattern in times of war is that of the Judiciary deferring to the Executive. This is most clear in the "war cases," in which military service men and women and members of Congress have asked the courts to intervene when they believe the President has overstepped his bounds in committing U.S. troops. Overwhelmingly, the courts have refused to hear the cases, arguing the political question doctrine makes the cases nonjusticiable. Obviously, asking a court to decide how government anti-terrorism initiatives may have affected civil liberties here in the United States is vastly different from asking a court to decide the difference between "war" and "use of force" in a foreign country. However, the political question doctrine, so quickly applied in the war cases, also rears its head in the immigration cases. In Narenji, the D.C. Circuit stated, "The reasons that preclude judicial review of political questions also dictate a narrow standard of review of decisions made by the Congress or the President in the area of immigration and naturalization." And in upholding the Alien Registration Act, the Supreme Court wrote,

It is pertinent to observe that any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.

As the Court indicates here, the war power and the plenary immigration power could insulate national security initiatives targeting immigrants from judicial review. The legal results of the history of government action

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157 Ofer, supra note 106.
159 Id.
162 David Cole argues that the plenary power has been both discredited and limited in recent years. In a 2001 Supreme Court case, Zadvydas v. Davis, the Court rejected the government’s argument that plenary power afforded the right to indefinitely detain immigrants with criminal convictions who had been found deportable but could not be returned to their countries of origin. COLE, supra note 1, at 223 (referring to Zadvydas v. Davis, 533 U.S. 678 (2001)). See CHISHTI ET AL., supra note 68, at 48. The Court stated that plenary power was "subject to important constitutional limitations," which applied in this case. Zadvydas, 533 U.S. at 695. However, the opinion left open the possibility that these limitations could be suspended in times of national insecurity by mentioning that it would not "consider terrorism or
targeting immigrants in wartime casts doubt on whether post-September 11 programs would be found unconstitutional.

IV. IMMIGRANTS’ BILL OF RIGHTS PROTECTIONS

In their similarity to government action in past wars, and in the face of courts’ reluctance to intervene, the post-September 11 anti-terror initiatives targeting immigrants appear beyond constitutional challenge. However, after the civil rights movement, the Bill of Rights has sharper teeth than ever before, especially where racial and ethnic classifications are concerned. An analysis of immigrants’ status under the Bill of Rights reveals precedent to argue the government has violated immigrants’ rights after September 11. The courts, however, have left open many questions as to whether the government can proceed as though immigrants have no rights.

Immigrants’ rights are constantly in tension with the "plenary" nature of the immigration power. But in the same era as the Chinese Exclusion cases, the Supreme Court also ruled that the Bill of Rights does apply to immigrants. In 1886, the Court decided the equal protection clause of the Fourteenth Amendment covers non-citizens.163 Ten years later, the Court struck down a statute that sentenced deportable immigrants to one year of hard labor and held that immigrants with a final order of deportation are entitled to criminal due process protections.164 At times the Court has explicitly stated that legal permanent residents are entitled to Bill of Rights protections.165 And all immigrants, regardless of status, are granted full due process rights in the criminal justice system.166

In the past fifteen years, the Supreme Court has issued a confusing range of statements on immigrants’ Bill of Rights protections, failing to garner a majority on any clear rule. In 1990, in United States v. Verdugo-Urquidez, the Court held that the Fourth Amendment did not apply to immigrants and therefore, did not require the suppression of evidence from a

other special circumstances where special arguments might be made for forms of preventive detention and for heightened deference to the judgments of the political branches with respect to matters of national security.” Id. at 696. Furthermore, since the September 11 terrorist attacks, the Court has retreated from Zadvydas in Demore v. Hyung Joon Kim by upholding a 1996 statute mandating detention without bond of immigrants with criminal convictions during immigration proceedings, again limiting immigrants’ due process rights. Demore v. Hyung Joon Kim, 538 U.S. 510 (2003). See Michael Patrick, Detention Without Bond, 229 New York Law Journal 3 (May 28, 2003). See discussion in Part IV.


164 Wong Wing v. United States, 163 U.S. 228, 238 (1896).

165 Kwong Hai Chew v. Colding, 344 U.S. 590, 596, 598 n.5 (1953) (holding that a lawful permanent resident is a person within the meaning of the First and Fifth Amendment); Bridges v. Wixon, 326 U.S. 135, 161 (1945) (concurring opinion by Justice Murphy stating that legal immigrants are protected by the First and Fifth Amendments, and the due process clause of the Fourteenth Amendment).

166 COLE, supra note 1, at 213 (listing cases).
warrantless search by U.S. agents of a Mexican national's property in Mexico.\(^{167}\) Chief Justice Rehnquist, in a plurality opinion, said the use of the term "the people" in the Fourth Amendment limited its protection to "a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be part of that community."\(^{168}\) The Chief Justice did state, however, that the Fifth and Sixth Amendment criminal protections were more broadly applicable because those amendments contain the words "person" and "accused."\(^{169}\)

Recently, the Court has considered the due process rights of immigrants in deportation proceedings. In 2001, in *Zadvydas v. Davis*, the Court rejected the government’s argument that plenary power afforded the right to indefinitely detain immigrants with criminal convictions who had been found deportable but could not be returned to their countries of origin.\(^{170}\) The Court stated that plenary power is "subject to important constitutional limitations."\(^{171}\) The government argued that immigrants lack a substantial liberty interest. Because the immigrants had been found deportable, their liberty interest had been "greatly diminished by their lack of a legal right to live at large in this country."\(^{172}\) The Court rejected the notion that lack of immigration status allows the government to completely


\(^{168}\) Id. at 265. In support, Chief Justice Rehnquist cited *Turner v. ex rel. Williams*, 194 U.S. 279 (1904), a case involving a First Amendment challenge by an immigrant in deportation proceedings, implying that the language of the First Amendment would similarly limit its protection. He distinguished cases holding that immigrants are entitled to the Bill of Rights by stating those cases "establish only that aliens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country," and emphasized that whether undocumented immigrants were protected by the Fourth Amendment was an unsettled question. *Id.* at 272-73. The Chief Justice minimized *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984), in which "a majority of Justices assumed that the Fourth Amendment applied to illegal aliens in the United States," stating that the case should be limited to its facts and that the decision was "not dispositive of how the Court would rule on a Fourth Amendment claim by illegal aliens in the United States if such a claim were squarely before us." *Id.* Some commentators have interpreted *Verdugo-Urquidez* to say that undocumented immigrants do not have First and Fourth Amendment rights. Michael J. Wishnie, *Immigrants and the Right to Petition*, 78 N.Y.U. L. REV. 667, 680 (2003). Justice Brennan’s dissent in the case also interpreted the majority’s decision this way: "In this discussion the Court implicitly suggests that the Fourth Amendment may not protect illegal aliens in the United States. Numerous lower courts, however, have held that illegal aliens in the United States are protected by the Fourth Amendment, and not a single lower court has held to the contrary" (citations omitted). *Verdugo-Urquidez*, 494 U.S. at 783 n.6 (Brennan, J., dissenting). Other commentators have emphasized that the fifth vote for the final holding, Justice Kennedy, concurred but specifically rejected this notion. *Cole, supra* note 1, at 213 (citing *Verdugo-Urquidez*, 494 U.S. at 276-77 (Kennedy, J., concurring)). And still others point out that Rehnquist’s language appears to condition protection of the Fourth Amendment on ties to the "national community" rather than immigration status. Maryam Kamali Miyamoto, *The First Amendment After Reno v. American-Arab Anti-Discrimination Committee: A Different Bill of Rights for Aliens?*, 35 HARV. C.R.-C.L. L. REV. 183, 186 n.13 (2000).


\(^{171}\) Zadvydas, 533 U.S. at 695 (2001).

\(^{172}\) *Id.* at 696.
disrespect the right to liberty: "[W]e believe that an alien's liberty interest is, at the least, strong enough to raise a serious question as to whether, irrespective of the procedures used, the Constitution permits detention that is indefinite and potentially permanent."\(^{173}\)

The Court has since retreated from this decision. In 2003, in *Demore v. Hyung Joon Kim*, the Court upheld a 1996 statute mandating preventative detention without bond of immigrants with criminal convictions during immigration proceedings.\(^{174}\) David Cole writes that this decision "marks the first time outside of a war setting that the Court has upheld preventative detention of *anyone* without an individualized assessment of the necessity of such detention."\(^{175}\) The Court justified the ruling by stating that the immigration power allowed Congress to make "rules that would be unacceptable if applied to citizens."\(^{176}\) This decision indicates the Court's willingness to allow certain governmental interests to outweigh Bill of Rights protections afforded to immigrants. The Constitution's equal protection clause and guarantee of freedom of association hold the most promise for a challenge to the government's post September 11 law enforcement techniques targeting immigrants.

### A. Equal Protection

Classifications based on race and ethnicity merits the highest judicial scrutiny, requiring justification with a compelling state interest.\(^{177}\) However, the Supreme Court's Fourteenth Amendment equal protection doctrine, as applied to the federal government through the Fifth Amendment, requires only a rational or reasonable justification for classifications based on immigration status and national origin.\(^{178}\) This doctrine upheld the Iranian student registration program in 1979 in *Narenji v. Civiletti*.\(^{179}\) The Migration Policy Institute argues that *Narenji* is distinguishable from other national security-related government initiatives targeting immigrants, like post September 11 Special Registration, because the program had a clear national origin focus, while current initiatives purport to use national origin, but in actuality rely more on race or ethnicity.\(^{180}\)
Challenging the selective law enforcement practiced after September 11 on this distinction would require extensive documentation of the role of the racial and ethnic profile used by law enforcement agents. One must attempt to show that national origin and immigration are the primary factors employed to arrest and detain individuals. Deliberately, such information has been kept from the public eye. The government's use of the immigration system is a brilliant tactical decision which could put preventative detention, Special Registration, voluntary interviews, and the Absconder Apprehension Initiative beyond equal protection challenge.

Despite the civil rights movement's great strides in strengthening the Constitution's protections for racial and ethnic minorities, immigrants' rights still come into conflict with the federal government's ultimate ability to define the national community. Furthermore, if it is established that the government's "terrorist" profile is based on race and ethnicity instead of immigration status or national origin, Korematsu and Hirabayashi demonstrate that even when race or ethnic classifications are subjected to strict scrutiny, national security is the ultimate "compelling interest."

B. First Amendment Rights

Congress has routinely used the immigration power to target foreign nationals based on their political associations in times of national insecurity, with the Alien and Sedition Acts (1798), the Alien Registration Act (1940) (also known as the Smith Act), the McCarran-Walter Act (1952), the

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183 The Alien Act of 1798 gave the President the power to deport non-citizens without judicial review. It was never enforced. The Sedition Act criminalized criticism of the government. COLE, supra note 1, at 91.
Anti-Terrorism and Effective Death Penalty Act (1996), and the USA PATRIOT Act (2001). Immigrants who came under the purview of these statutes have repeatedly brought First Amendment challenges to their deportation, denaturalization, or exclusion. The Supreme Court’s decisions on these challenges are reactionary—consistently responding to the political context rather than dictating clear rules to balance immigrants’ First Amendment rights with Congress’ immigration power. The result is a doctrinal confusion that allows the current government to act as if immigrants have no First Amendment rights. It also raises the question of whether the courts will intervene in anti-terrorism law enforcement initiatives targeting immigrants based on perceived religious and political associations.

C. A Hierarchy of Rights?

The first challenge to an immigration law targeting foreign nationals based on political association did not fare well. The 1903 Immigration Act excluded “anarchists, or persons who believe in or advocate the overthrow of the United States or of all government or of all forms of law.” The law survived a First Amendment challenge in Turner v. Williams, in which the Supreme Court upheld the deportation of a British national who had given speeches advocating a general strike and declaring himself an anarchist. The Court rejected the argument that to exclude all anarchist immigrants is unconstitutional because not all anarchists advocate violence. Instead the Court deferred to Congress’ decision that “the general exploitation of such views is so dangerous to the public weal that aliens who hold and advocate them would be undesirable additions to our population.” The Court also explained that an undocumented immigrant “does not become one of the people to whom [the First Amendment is] secured by our Constitution.”

In the 1940s, however, the Court explicitly recognized that immigrants have First Amendment rights to political association. First, the Court ensured that naturalized citizens have the same First Amendment rights as the native-born, striking "a real, decisive, and public blow in favor

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188 Turner v. Williams, 194 U.S. 279, 284 (1904).
189 Id. at 283, 292.
190 Id.
191 Id. at 294.
192 Id. at 292. See Ross, supra note 184, at 116.
of immigrants' rights."^{193} In *Schneiderman v. United States*, the Court struck down the government's attempt to denaturalize a U.S. citizen because he classified himself as Communist, years after being granted citizenship.^{194} The Court rejected the government's argument that Schneiderman, as a Communist, illegally procured his citizenship because he had not "attached to the principles of the Constitution" at his naturalization.^{195} The Court set a high standard for the government to meet in order to denaturalize an immigrant who has obtained U.S. citizenship: the burden is to prove "by clear, unequivocal, and convincing evidence . . . that petitioner obtained his citizenship illegally."^{196} In this case, the Court had doubt about whether Schneiderman's beliefs represented "agitation and exhortation calling for present violent action which creates a clear and present danger of public disorder," which would allow denaturalization, or "mere doctrinal justification or prediction of the use of force under hypothetical conditions at some indefinite future time," which would not.^{197} Because of this doubt, the Court determined the government had not met its burden.^{198}

Soon after *Schneiderman*, the Court issued a similarly strong statement about the First Amendment rights of legal permanent residents. The Court decided *Bridges v. Wixon*, reversing a lower court decision to deport Bridges for Communist party membership under the 1940 Alien Registration Act.^{199} "Freedom of speech and of press is accorded aliens residing in this country," the Court declared.^{200} It decided that Congress had not meant "affiliation" with Communism to "cast so wide a net as to reach those whose ideas and program, though coinciding with the legitimate aims of such groups, nevertheless fall short of overthrowing the government by force and violence."^{201} In balancing Bridges' First Amendment rights against the government's national security concerns, the Court decided the right to free speech sufficiently strong to outweigh the government's attempt to deport him.^{202}

The Court did not consistently interpret immigrants' First Amendment rights expansively. In the midst of the McCarthy Era, ten years

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195 *Schneiderman*, 320 U.S. at 136; Fontana, *supra* note 193, at 43.

196 *Schneiderman*, 320 U.S. at 157-58 (internal citations omitted); Fontana, *supra* note 193, at 48.

197 *Id.*

198 *Id.*


200 *Id.*

201 *Bridges*, 326 U.S. at 147-48; Miyamoto, *supra* note 168, at 198.

later, the Court upheld the deportation of legal permanent residents for past Communist Party membership under the Alien Registration Act, even allowing the law to be applied retroactively to deport immigrants who had been members of the party when it was legal to join.\textsuperscript{203} The Court relied on \textit{Dennis v. United States}, in which it upheld the criminalization of certain political associations advocating the overthrow of government by force or violence.\textsuperscript{204} While some commentators suggest these cases represent the Court's final statement on the First Amendment rights of immigrants, others point out that the Court applied the same "clear and present danger" test to the statutory provisions that applied in deportation as those that applied in the criminal context, indicating that the rights are the same.\textsuperscript{205} At least, as Susan Dente Ross has written, "These cases suggest that the Court has not fixed a point on the scale of constitutional rights for aliens."\textsuperscript{206}

It is important to note that all of the cases discussed above, with the exception of \textit{Turner v. Williams} and \textit{United States v. Verdugo-Urquidez},\textsuperscript{207} involved immigrants who had lawfully entered the country and received legal resident status. Immigrants never officially granted status, such as those who cross the border illegally, might be more analogous to those facing exclusion from the country. But, exclusion based on political affiliation has been challenged under the First Amendment, to no avail. In 1972, the Court upheld the U.S. government's refusal to grant a visa to Ernst Mandel, a Marxist Belgian national.\textsuperscript{208} Professors of U.S. citizenship brought suit, asserting their own First Amendment rights to associate with Mandel had been violated by the McCarran-Walter Act, which allowed the Attorney General to exercise discretion to exclude immigrants based on their political beliefs.\textsuperscript{209} The Court held the plaintiffs' First Amendment rights did not extend so far as to require granting the visa.\textsuperscript{210} The Court also made clear that "Mandel, personally, as an unadmitted and nonresident alien, had no constitutional right of entry to this country as a nonimmigrant or otherwise."\textsuperscript{211} While the decision could be used to represent the notion that

\begin{footnotesize}
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\item \textsuperscript{203} Harisiades v. Shaughnessy, 342 U.S. 580 (1952); Galvan v. Press, 347 U.S. 522 (1954); COLE, \textit{supra} note 1, at 136; Ross, \textit{supra} note 184, at 117.
\item \textsuperscript{204} Harisiades, 342 U.S. at 592 (citing \textit{Dennis v. United States}, 341 U.S. 494 (1951)); Miyamoto, \textit{supra} note 168, at 201.
\item \textsuperscript{205} Miyamoto, \textit{supra} note 168, at 201 (citing T. Alexander Aleinikoff, \textit{Federal Regulation of Aliens and the Constitution}, 83 \textit{Am. J. Int'l L.} 862, 869 (1989)).
\item \textsuperscript{206} Ross, \textit{supra} note 184, at 118.
\item \textsuperscript{207} \textit{Cf. United States v. Verdugo-Urquidez}, 494 U.S. 254, 279 (1990) (Stevens J, concurring and arguing that Respondent was lawfully present in the United States "even though he was brought and held here against his will" and therefore is "among those 'people' who are entitled to the protection of the Bill of Rights, including the Fourth Amendment").
\item \textsuperscript{208} Kleindienst v. Mandel, 408 U.S. 753 (1972).
\item \textsuperscript{209} Id. at 755, 760; Miyamoto, \textit{supra} note 168, at 196-97.
\item \textsuperscript{210} Kleindienst, 408 U.S. at 769-70.
\item \textsuperscript{211} Id. at 762.
\end{itemize}
\end{footnotesize}
an undocumented immigrant would be in the same position as Mandel, having never been lawfully admitted, the Court's language, with an emphasis on residence, does not completely foreclose constitutional protection to undocumented immigrants.

One possible interpretation of the Court's doctrinal confusion as to the First Amendment rights of immigrants is that there is a hierarchy of rights depending on one's immigration status.\textsuperscript{212} Naturalized citizens have similar rights to those of native-born citizens. Legal permanent residents are less protected when associating with groups the United States sees as a threat. Undocumented immigrants may have no protections, possibly depending on the extent of their connection to the country.

The 1996 re-definition of entry to the United States in the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA)\textsuperscript{213} could expand this latter category of those without protection. Before IIRIRA, immigrants who entered the country, regardless of the legality of their entry, became subject to deportation proceedings (and therefore, more rights) instead of exclusion proceedings, which had been limited to those who had not yet entered.\textsuperscript{214} After IIRIRA, those lawfully admitted are subject to what is now called removal proceedings, and all others, illegal entrants and those seeking entry, are subject to exclusion proceedings.\textsuperscript{215} This means two undocumented immigrants, one who crossed the border illegally, and one, who overstayed a visa, might be subject to different procedures, and therefore, have different rights.

While immigrants have repeatedly been subject to statutes providing for deportation based on association, as in the cases outlined above, more recently the government has changed tactics. The new strategy still involves targeting immigrants based on political affiliations, but the government uses routine immigration violations as the basis for deportation. Selective prosecution is unconstitutional in the criminal context, but may be allowed in immigration proceedings.

\textbf{D. Selective Enforcement of Immigration Laws Based on Political Affiliation}

A fairly recent Supreme Court decision could preclude immigrants from bringing claims of selective enforcement of the immigration laws based

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\item \textsuperscript{212} Miyamoto, supra note 168, at 185.
\item \textsuperscript{214} AUSTIN T. FRAGOMEN, JR. & STEVEN C. BELL, PRACTICING LAW INSTITUTE TREATISE, IMMIGRATION FUNDAMENTALS: A GUIDE TO LAW AND PRACTICE 297 (2002).
\item \textsuperscript{215} 8 U.S.C. § 1101(a)(13)(A) (2004) (defining "admission" as lawful entry); FRAGOMEN & BELL, IMMIGRATION FUNDAMENTALS, supra note 213.
\end{itemize}
on affiliations traditionally protected by the First Amendment. In 1999, the Court decided its first case addressing the conflict between the First Amendment and the plenary immigration power in the terrorism context.216 *Reno v. American-Arab Anti-Discrimination Committee* spanned three different Congressional attempts to provide for deportation of immigrants based on affiliations traditionally protected by the First Amendment: the McCarran-Walter Act, the Immigration Act of 1990, and the IIRIRA of 1996. Known as the "LA 8," the plaintiffs were politically active Palestinian students: two legal permanent residents, and six non-immigrants on temporary visas.217 The government claimed the students qualified as national security risks because they associated with the Popular Front for the Liberation of Palestine.218 The government arrested the students, placed them in deportation proceedings, and charged them under the McCarran-Walter Act provision that allowed for the deportation of members of a Communist organization.219 When they challenged the selective enforcement based on the right to political association guaranteed by the First Amendment, the government changed its tactics, charging the non-immigrants with minor visa violations and the legal permanent residents under another section of the Act making an immigrant deportable for associating with a group advocating destruction of property and attacks on government officials.220

When the Court designated the McCarran-Walter Act unconstitutional based on the LA 8's initial challenge,221 Congress repealed it and passed the Immigration Act of 1990, making immigrants deportable for having "engaged in terrorist activity."222 Capitalizing on the new legislation, the government again changed the charges against the legal permanent resident members of the LA 8, charging them with providing financial support to a terrorist organization.223 The group members continued to challenge their deportation, claiming their arrests amounted to selective enforcement, unconstitutionally based on activities protected by the First Amendment.224 The Ninth Circuit agreed, declaring that non-citizens living in the United States have the same First Amendment rights as citizens,

217 *Id.*, at 62-63; *CHISHITI ET AL.*, supra note 68, at 140-41.
218 *Id.*, at 62-63; *CHISHITI ET AL.*, supra note 68, at 141.
219 *Id.*
220 *Id.*, at 164; *CHISHITI ET AL.*, supra note 68, at 141; *American-Arab Anti-Discrimination Comm. v. Reno*, 70 F.3d 1045, 1053 (9th Cir. 1995).
223 *Id.*, at 166; *CHISHITI ET AL.*, supra note 68, at 142.
and held that selective prosecution of the immigration laws is unconstitutional.\textsuperscript{225}

The Supreme Court accepted certiorari on the case, limited to a jurisdictional issue created by the IIRIRA which significantly limited judicial review over pending deportation cases: the Attorney General argued IIRIRA eliminated federal court jurisdiction over the LA 8's selective enforcement claims.\textsuperscript{226} The Court held that the IIRIRA did bar the federal courts from reviewing such claims.\textsuperscript{227} However, despite holding the Court had no jurisdiction to hear the claim, Justice Scalia's opinion reached the merits of the immigrants' selective enforcement claim. He stated that "When an alien's continuing presence in this country is in violation of the immigration laws, the Government does not offend the Constitution by deporting him for the additional reason that it believes him to be a member of an organization that supports terrorist activity."\textsuperscript{228} Justice Scalia implied that undocumented immigrants have no First Amendment rights.\textsuperscript{229} The decision is to some degree predicated on the idea that the constitutional challenges to deportation proceedings would simply be postponed until an immigrant has a final order of removal—but appellate review of administrative proceedings are limited to the record, which then would not include facts about the constitutional challenge.\textsuperscript{230} Scalia did not seem bothered by this "catch-22,"\textsuperscript{231} instead clearly stating: "As a general matter—and assuredly in the context of claims such as those put forward in the present case—an alien unlawfully in this country has no constitutional right to assert selective enforcement as a defense against his deportation."\textsuperscript{232}

Justice Scalia's decision could have broad consequences for immigrants' First Amendment rights.\textsuperscript{233} The potential impact of his

\textsuperscript{226} Reno, 525 U.S. at 475-76; COLE, supra note 1, at 167; CHISHTI ET AL., supra note 68, at 142; Miyamoto, supra note 168, at 203-06.
\textsuperscript{227} Reno, 525 U.S. at 486-87; COLE, supra note 1, at 167; CHISHTI ET AL., supra note 68, at 142; Miyamoto, supra note 168, at 203-06.
\textsuperscript{228} Reno, 525 U.S. at 491-92.
\textsuperscript{229} CHISHTI ET AL., supra note 68, at 142; Miyamoto, supra note 68, at 204-05.
\textsuperscript{230} Miyamoto, supra note 168, at 206 (citing 8 U.S.C. § 1252(b)(4)(A); "[T]he court of appeals shall decide the petition only on the administrative record on which the order of removal is based.")
\textsuperscript{231} Id. (citing Margaret M. Russell, If Legal Immigrants Can Be Deemed "Illegal" Just for Exercising Their Rights, Who Among Us Is Safe, L.A. TIMES, Mar. 12, 1999, at B7).
\textsuperscript{232} Reno, 525 U.S. at 488.
\textsuperscript{233} Justice Ginsburg's concurring opinion attempted to limit the reach of the decision. She emphasized that immigrants do have First Amendment rights and implied the same standards applied to a selective prosecution claim in a criminal proceeding might also be applied to a deportation proceeding. Reno, 525 U.S. at 497-98 (Ginsburg, J. concurring). She also expressed discomfort with the majority opinion reaching the merits of the First Amendment claim when the Court was not briefed on the issue. Id.
statements is unclear, however, even for the LA 8, since two were legal permanent residents targeted for their political associations: not an "additional reason," but the sole reason for their deportation. Like the Court's previous immigrant First Amendment cases, *Reno v. American-Arab Anti-Discrimination Comm.* implies that immigrants, regardless of status, may not be protected by the Constitution to the same extent as citizens, but does not decide the issue. This allows the government, in current anti-terrorism law enforcement initiatives, to proceed as if immigrants have no rights and practice selective enforcement of the immigration laws with impunity.

After repeal of the McCarran-Walter Act, Congress has continued to provide for the deportation of immigrants based on associations traditionally protected by the First Amendment. Affiliations with anarchism and Communism have been changed to connections with "terrorist" groups, and immigrants are singled out based on their political activities. The USA PATRIOT Act, for example, defines terrorism in different ways for citizens and non-citizens. Domestic terrorism has a somewhat limited definition, while terrorist activity that makes non-citizens deportable includes support for even the lawful or nonviolent activities of any group that has also practiced violence and any use or threat to use a weapon "other than for mere personal monetary gain." The definition of "support" has also been broadened to include classic political activities like membership and fundraising drives, even if those activities support nonviolent programs. However, rather than make use of these provisions, which might be subject

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234 Miyamoto, supra note 168, at 205.
236 As applied to immigrants, a "terrorist" group is no longer limited to those designated by the Secretary of State under 8 USC § 1182(a)(3)(B)(iii), but now includes an undesignated group if it is composed of at least two people who engage in certain terrorist activities specified in 8 USC § 1182(a)(3)(B)(ii)(I)-(III). CHANG, supra note 77, at 62-63.
237 COLE, supra note 1, at 57-58.
238 Id. at 58 (citing USA PATRIOT Act § 802, amending 18 U.S.C. § 2331(g): "acts dangerous to human life that are a violation of the criminal laws . . . [and] appear to be intended . . . to influence the policy of a government by intimidation or coercion.").
239 Id. (citing USA PATRIOT Act § 411). The definition of "terrorist activity," as amended by this USA PATRIOT Act provision includes: "The hijacking or sabotage of any conveyance; . . . seizing or detaining, and threatening to kill, injure, or continue to detain, another individual in order to compel a third person . . . to do or abstain from doing any act as an explicit or implicit condition for the release of the individual seized or detained; . . . the use of any biological agent, chemical agent, or nuclear weapon or device, or explosive, firearm, or other weapon or dangerous device (other than for mere personal monetary gain), with intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property; a threat, attempt, or conspiracy to do any of the foregoing." 8 U.S.C. § 1182(a)(3)(B)(ii)(I)-(VI).
to First Amendment challenge, the government’s current strategy relies on routine immigration violations for the deportation of immigrants based on actual or perceived suspect political affiliations.

The Supreme Court has left substantial confusion as to the rights of immigrants. Consequently, Congress (in passing the USA PATRIOT Act) and the Department of Justice (by using selective enforcement within anti-terrorism law enforcement initiatives) both operate under the assumption that immigrants have no right to equal protection or freedom of association. Cole has predicted that if immigrants have no First Amendment rights within immigration proceedings, they have no First Amendment rights anywhere. The same could be said of equal protection guarantees.

Immigrants are clearly the kind of minority group the Framers intended to cover under the Bill of Rights. At the same time that immigrants have become an increasingly large part of the United States, they have also been the scapegoats of U.S. economic policy, from welfare reform to immigration restrictions. Since September 11, this scapegoating has reached a new level within the fight against terrorism. Hate crimes against immigrants have also increased, particularly against those groups targeted by government law enforcement initiatives. While the government argues that national security concerns call for a limitation on civil liberties, it is precisely because of this context that immigrants should be afforded full Fifth, Fourteenth, and First Amendment rights. Because immigration proceedings are now the forum for law enforcement initiatives more

241 The Anti-Terrorism and Effective Death Penalty Act (AEDPA), modified by the USA PATRIOT Act, criminalizes various levels of support for groups the Secretary of State has designated to be "terrorist." 18 U.S.C. § 2339(A) and (B). A California District Court recently held the inclusion of the language "expert advice and assistance" in this provision unconstitutionally vague, Humanitarian Law Project v. Ashcroft, 309 F.Supp.2d 1185 (C.D. Cal. 2004), following an earlier case that had found the inclusion of the language "training" unconstitutional for the same reason. Humanitarian Law Project v. Reno, 9 F. Supp. 2d 1176 (C.D. Cal. 1998), aff’d, 205 F.3d 1130 (9th Cir. 2000); and Humanitarian Law Project v. Reno, No. CV 98-1971 ABC (BQRx), 2001 U.S. Dist. Lexis 16729, at *1 (C.D. Cal. 2001), aff’d in part and rev’d in part, 352 F.3d 382 (9th Cir. 2003).


traditionally pursued within the criminal justice system, the civil rights of those affected must be respected. By allowing the current government position regarding immigrants' rights to continue without intervention, immigrants will always be considered second-class members of U.S. society.

E. Current legal challenges

One post-September 11 legal challenge may demarcate the limits of the government's ability to infringe on immigrants' civil liberties in times of national insecurity. *Turkmen v. Ashcroft* is the only legal challenge to the experiences of the 762 September 11 detainees. The case names seven of the detainees as plaintiffs, requests class certification to include all those arrested and held "of interest" after the terrorist attacks, and claims violations of the Bill of Rights, customary international law, and international treaties.\(^{246}\)

*Turkmen* does not challenge the selective law enforcement techniques leading to the arrest of the September 11 detainees, but instead focuses on their detention conditions. The government held detainees under conditions more appropriate for convicted felons, including maximum security detention, twenty-three hour lockdown, and restrictive escorts.\(^{247}\) The government also subjected the detainees to mental and physical abuse, total communication blackout, limited access to counsel, and detention for weeks without charge, conditions which are usually perceived as violations of the Bill of Rights.\(^{248}\) Specifically to accommodate detention of these immigrants, on September 17, 2001, Attorney General Ashcroft announced a new interim rule allowing the INS to detain immigrants without charge for forty-eight hours or in an "emergency or other extraordinary circumstance" for a "reasonable period of time."\(^{249}\) The INS took advantage of this regulation, and a "reasonable period of time" became days, weeks, and months. One hundred and ninety-two detainees waited longer than seventy-two hours to be charged, twenty-four waited twenty-five to thirty-one days, twenty-four waited more than thirty-one days, and five waited an average of 168 days before being served with charges.\(^{250}\)

In addition, the government instituted a "hold until cleared" policy for these detainees. Even after they had finally completed deportation proceedings, officials detained men until the FBI cleared them of connection

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246 CHANG, supra note 77, at 75.
247 Id.
248 CHANG, supra note 77, at 85. COLE, supra note 1, at 34-35. LAWYER'S COMMITTEE FOR HUMAN RIGHTS, supra note 104, at 38. See generally HUMAN RIGHTS WATCH, supra note 5.
249 COLE, supra note 1, at 32-33 (citing 66 Fed. Reg. 48,224 (Sept. 20, 2001) (amending 8 C.F.R. §287.3(d)).
250 LAWYER'S COMMITTEE FOR HUMAN RIGHTS, supra note 103, at 34. See OFFICE OF INSPECTOR GENERAL, U.S. DEPARTMENT OF JUSTICE, supra note 4.
to any crime or terrorist conduct. Requiring this FBI clearance demonstrates that the real interest behind the detention was criminal anti-terror investigations, not immigration concerns. It took an average of eighty days and as long as 244 days to clear detainees for deportation.

The Turkmen complaint involves a number of violations of the Bill of Rights. The majority of the claims are based on the Fifth Amendment’s due process clause. The claims list the conditions of detention, coercive interrogation, arbitrary detention (being held without charges and delays in serving charging documents), confiscation of personal property, communication blackout, interference with counsel, "high-interest" designation with no criteria, and blanket no-bond policy. The blanket no-bond policy also figures into a Fifth Amendment equal protection claim, along with the basic fact that the detainees did not receive the same treatment as similarly-situated non-citizens and instead received harsher treatment based on their race, religion, ethnicity and national origin.

Turkmen’s complaint includes Fourth Amendment claims of illegal seizure based on the length of detention without charges or a hearing to determine probable cause. The lengthy pre-trial incarceration is also listed as a violation of the Sixth Amendment right to a speedy trial. The final Bill of Rights claim is under the First Amendment’s guarantees of right to association and free exercise of religion. Government officials held the detainees under a communications blackout with little access to legal counsel, failed to provide hallal meat or a chance to engage in daily prayer, and subjected detainees to religion-based insults and verbal abuse.

The complaint also involves violations of customary international law and uses the Alien Tort Claims Act to give U.S. courts jurisdiction over claims of arbitrary detention and cruel, inhuman, or degrading treatment.
The final claim is a violation of the Vienna Convention on Consular Relations because the government did not allow the detainees to contact their consulates.267

Remarkably, the government itself has verified reports of the abuses committed against the September 11 detainees in an April 2003 Office of Inspector General report.268 Given the range of abuses at issue, the Court could uphold the government's preventative detention program and approve of the initial detention of the plaintiffs but draw the line at the physical and mental abuse they suffered, the overly restrictive detention conditions, and the arbitrary length of time the government detained the men. Because of the egregiousness of the abuses, it is possible that this case could, at the very least, establish a threshold that the government cannot cross, despite the limited constitutional rights afforded to immigrants in immigration proceedings and the various legal doctrines supporting the federal government's ability to discriminate based on immigration status and national origin in times of national insecurity.

V. JUDICIAL DEFERENCE TO THE EXECUTIVE BRANCH—
A LASTING CONCERN IN IMMIGRATION PROCEEDINGS

Aside from the impact on affected immigrants, the legal and tactical decisions behind the government's law enforcement initiatives targeting immigrants after September 11 are now expanding into immigration proceedings. In particular, the Department of Justice has asked Administrative Law Judges and the courts to defer to the Executive Branch in determinations of national security concerns and the designation of particular immigrants as possible threats, effectively removing an important check on Executive power.

A. Impact on All Immigration Proceedings: In re D-J-

A recent opinion issued by Attorney General John Ashcroft, In re D-J-,269 illustrates how the government's use of immigration status as a pretext for anti-terrorism law enforcement is expanding beyond post-September 11 investigations into routine immigration proceedings. D.J. is an undocumented migrant from Haiti, intercepted at sea by the Coast Guard in October 2002, along with 216 others from Haiti and the Dominican Republic.270 D.J. passed the "expression of credible fear determination"
required for an immigrant facing exclusion from the country and filed a petition for asylum. Both the Immigration Judge and the Bureau of Immigration Appeals said he should be released on bond pending his asylum case. D.J. had no criminal convictions, and his uncle in Brooklyn decided to pay his bond and give him a place to stay. All of these factors usually weigh heavily in favor of releasing the detainee on bond. However, Attorney General Ashcroft vacated the decision for D.J.'s release—on national security grounds.

The Attorney General had two primary national security arguments. The first argument stated that allowing D.J. to go free would encourage "future surges in . . . unlawful mass migrations . . . by sea . . . diverting valuable Coast Guard and Department of Defense resources from counterterrorism and homeland security responsibilities." The second argument relied on a State Department assertion that Haiti has become a "staging point" for migration from "third country nations (Pakistanis, Palestinians, etc.)" creating a "substantial risk that granting release on bond to such large groups of undocumented aliens may include persons who present a threat to national security, as well as a substantial risk of disappearance into the alien community within the United States."

It is important to remember that this case is a bond determination that traditionally requires an individualized analysis. Attorney General Ashcroft went on to say that this case constitutes binding precedent for future decisions involving "similarly situated aliens," essentially making national security interests now part of every future bond determination for a detained immigrant. The Attorney General stated, "Further, in all future bond proceedings involving aliens seeking to enter the United States illegally, where the Government offers evidence from sources in the Executive Branch with relevant expertise establishing that significant national security interests are implicated, Immigration Judges and the BIA shall consider such interests." In re D-J- would thus require deference to the Executive in all immigration proceedings whenever the Department of Homeland Security inserts national security interests.

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271 Patrick, supra note 162 at 6.
272 Volpp, supra note 105.
273 Id.
274 Id.
275 In re D-J-, 23 I&N Dec. at 579.
276 Id. at 579-81.
277 Id. at 581.
278 Id.
279 Volpp, supra note 105. LAWYER'S COMMITTEE FOR HUMAN RIGHTS, supra note 104, at 45-46. The government's attempt to ensure this kind of deference from the courts is also reflected in a May 28, 2002 Department of Justice interim rule allowing INS to close immigration hearings to the press and public if "sensitive law enforcement or national security information will be disclosed." The directive
This case further erodes due process rights for immigrants by foregoing the usual individual analysis for bond determination and attempting to ensure wide discretion for the Executive Branch when detaining immigrants with a national security justification.\textsuperscript{280} Attorney General Ashcroft held that it is not a violation of due process to consider national security in this setting.\textsuperscript{281} He distinguished \textit{Zadvydas v. Davis}, which afforded limited due process protection to immigrants already "admitted," by emphasizing that D.J. had not yet been given the right to stay in the United States.\textsuperscript{282}

Attorney General Ashcroft also rejected the argument that "an INS policy of detaining Haitian migrants in order to deter other Haitians from migrating to the United States seeking asylum violates international law."\textsuperscript{283} The Universal Declaration of Human Rights (UDHR) and an advisory opinion of the United Nations High Commission for Refugees state that asylum seekers should not be detained for purposes of deterrence.\textsuperscript{284} The Attorney General stated that the UDHR is a non-binding "expression of aspirations and principles, rather than a legally binding treaty," and that the government’s exercise of the plenary immigration power does not violate UDHR or any other international law.\textsuperscript{285}

In addition to \textit{In re D.-J.-}, there are other signs that routine immigration proceedings have been affected by the government’s attempts to roll back due process rights for immigrants in the interest of national security. On October 31, 2001, the INS issued a new rule allowing the government to detain immigrants charged with any immigration violation, even if an Immigration Judge orders their release, as long as the initial bond is $10,000 or more.\textsuperscript{286} Accordingly, since September 11, immigration bonds have increased by five times or more, bringing more immigrants under the purview of this new rule.\textsuperscript{287}

\textbf{B. Constitutionality of Secret Deportation Proceedings}

\begin{itemize}
  \item requires immigration judges to defer to law enforcement agents in determining what is "sensitive.
  \item The same deference was recently used in \textit{Ctr. for Nat’l Security Studies v. United States Dep’t of Justice}, 331 F.3d 918 (D.C. Cir. 2003), to deny a FOIA request for a list of the names, attorneys, dates of arrest and release, locations of arrest and detention and reasons for detention of those arrested after September 11.
  \item Patrick, supra note 161, at 6.
  \item \textit{In re D.-J.-}, 23 I&N Dec. at 582.
  \item Id. at 583.
  \item Id. at 584.
  \item Id.
  \item \textit{Id.} (citing \textit{Haitian Refugee Center v. Gracey}, 809 F.2d 794, 816 n.17 (D.C. Cir. 1987)).
  \item 8 C.F.R. Part 3, INS No. 272-01; and AG Order No. 2518-2001. \textit{See CHISHTI ET AL., supra note 68, at 55.}
  \item \textit{CHISHTI ET AL., supra note 68, at 55.}
\end{itemize}
Secret deportation hearings implicate the First Amendment rights of immigrants, the press, and the public. Soon after September 11, Chief Immigration Judge Michael Creppy issued a directive closing all "special interest" immigration hearings.\(^{288}\) The "Creppy Directive," as it is called, requires Immigration Judges to defer to the Executive Branch's definition of "special interest" detainee and provides "no definable standards" for the classification.\(^{289}\)

Two groups brought lawsuits challenging the Creppy Directive in *Detroit Free Press v. Ashcroft*\(^ {290}\) and *North Jersey Media Group v. Ashcroft*.\(^ {291}\) In *Detroit Free Press*, the Sixth Circuit found the directive unconstitutional under the First Amendment.\(^ {292}\) With respect to immigrants' rights, the government argued that the court should defer in matters of immigration, based on the notion that rights granted under the Constitution cannot limit non-substantive immigration laws.\(^ {293}\) The court rejected this argument and held instead that the Constitution does not require special deference to the government in immigration matters and can meaningfully limit non-substantive immigration laws.\(^ {294}\) The court reviewed the Supreme Court's immigration and First Amendment cases, from plenary power in the Chinese Exclusion Cases to *Zadvydas v. Davis* in 2001, and determined "there is ample foundation to conclude that the Supreme Court would . . . recognize that non-citizens enjoy unrestrained First Amendment Rights in deportation proceedings."\(^ {295}\) The "ordinary process of determining whether closure is warranted on a case-by-case basis" strikes the correct balance, the court said, between these rights and the security concerns of the government.\(^ {296}\)

Unlike the Sixth Circuit, the Third Circuit upheld the Creppy Directive.\(^ {297}\) In *North Jersey Media Group*, the Third Circuit did not address the issue of immigrants' First Amendment rights in deportation proceedings. Instead, the court emphasized the "national security" context and a tradition of deference to the government in such cases: "To the extent that the Attorney General's national security concerns seem credible, we will not

\(^{288}\) Memorandum from Chief Immigration Judge Michael Creppy, *supra* note 2.
\(^{289}\) *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 692 (6th Cir. 2002).
\(^{290}\) *Detroit Free Press v. Ashcroft*, 303 F.3d 681 (6th Cir. 2002).
\(^{292}\) *Detroit Free Press*, 303 F.3d at 692.
\(^{293}\) *Id.* at 685.
\(^{294}\) *Id.*
\(^{295}\) *Id.* at 690.
\(^{296}\) *Id.* at 692.
lightly second-guess them.\textsuperscript{298} In a footnote, the court clarified that "we do not here defer to the Executive on the basis of its plenary power over immigration . . . The issue at stake in the Newspapers' suit is not the Attorney General's power to expel aliens, but rather his power to exclude reporters from those proceedings . . . We defer only to the executive insofar as it is expert in matters of national security, not constitutional liberties."\textsuperscript{299}

With the issue of the immigrants' First Amendment rights aside, both courts proceeded to discuss the traditional First Amendment analysis of the right of the press and public to access government proceedings. In both cases, the government argued that the deferential standard of access articulated in \textit{Houchins v. KQED} should apply.\textsuperscript{300} Instead, both circuits applied the \textit{Richmond Newspapers} "logic and experience" test for the general right of access to proceedings.\textsuperscript{301} The Sixth Circuit emphasized the similarities between deportation proceedings and judicial trials, even as compared to other administrative proceedings, making the \textit{Richmond Newspapers} test more appropriate;\textsuperscript{302} the Third Circuit agreed.\textsuperscript{303}

The \textit{Richmond Newspapers} test has two prongs. The "experience prong" directs the court to "consider whether the place and process have historically been open to the press and general public."\textsuperscript{304} The "logic prong" analyzes "whether public access plays a significant positive role in the functioning of the particular process in question."\textsuperscript{305}

The Third Circuit decided application of this test resulted in the decision that there is no First Amendment right of access to deportation proceedings.\textsuperscript{306} Applying the "experience" prong, the court would not recognize a general right of public access to governmental proceedings or information and noted a tradition of closing sensitive hearings.\textsuperscript{307} While deportation proceedings are usually open and Department of Justice regulations create a presumption of openness, that history is "too recent and inconsistent to support a First Amendment right of access," the court said.\textsuperscript{308} The fact that some deportation proceedings are presumptively closed, as in

\begin{itemize}
  \item \textsuperscript{298} \textit{Id.} at 219.
  \item \textsuperscript{299} \textit{Id.} at 219 n.15.
  \item \textsuperscript{300} \textit{Detroit Free Press}, 303 F.3d at 694 (citing \textit{Houchins v. KQED}, 438 U.S. 1, 3 (1978) (emphasis omitted)).
  \item \textsuperscript{301} \textit{Richmond Newspapers}, Inc. v. Virginia, 448 U.S. 555 (1980).
  \item \textsuperscript{302} \textit{Detroit Free Press} v. \textit{Ashcroft}, 303 F.3d 681, 697-99 (6th Cir. 2002).
  \item \textsuperscript{303} \textit{North Jersey Media Group}, 308 F.3d at 208-09.
  \item \textsuperscript{304} \textit{Id.} at 209 (citing \textit{Press Enterprise Co. v. Super. Ct. (Press Enterprise II)}, 478 U.S. 1, 8 (1986) (internal quotations omitted)).
  \item \textsuperscript{305} \textit{Id.} at 209, 216 (citing \textit{Press Enterprise Co. v. Super. Ct. (Press Enterprise II)}, 478 U.S. 1, 8 (1986)).
  \item \textsuperscript{306} \textit{Id.} at 204-05.
  \item \textsuperscript{307} \textit{Id.} at 209-10.
  \item \textsuperscript{308} \textit{Id.} at 211, 213.
\end{itemize}
the case of abused immigrant children, and that deportation proceedings have historically taken place in many locations, not always open to the public, also influenced the court's decision.\(^{309}\)

In applying the "logic" prong, the court applied a revised version of the usual test. As commonly articulated, this prong requires the court to consider the positive value of open access to proceedings.\(^{310}\) Case law applying the test identifies various values served by openness: promoting informed public discussion and perception of fairness, providing a community outlet for concern, hostility, and emotion, exposing judicial process to public scrutiny, and discouraging perjury.\(^{311}\) However, the court decided that it is also important to "take account of the flip side—the extent to which openness impairs the public good."\(^{312}\) With this addition, the Government's national security concerns outweighed the values supported by First Amendment access, and the court upheld the blanket closure of special interest deportation proceedings.\(^{313}\)

The Sixth Circuit, on the other hand, found a First Amendment right of access to deportation proceedings applying the *Richmond Newspapers* test. Under the "experience" prong, the court found the tradition of open deportation proceedings convincing, especially because Congress expressly provided for closed exclusion proceedings, saying nothing about deportation.\(^{314}\) The court also noted that administrative proceedings are "briskly evolving to embrace open hearings."\(^{315}\) Under the "logic" prong, the court considered the values mentioned above and found that all were served by open deportation proceedings.\(^{316}\)

Having found a First Amendment right of access to deportation proceedings, the court then applied strict scrutiny to determine whether the government had a compelling justification and whether the blanket closure was narrowly tailored to the governmental interest.\(^{317}\) The court found national security concerns advanced by the Government to be compelling; the court willingly deferred to the government agents who submitted declarations about how terrorist groups might be able to glean sufficient information from deportation proceedings to threaten the government's

\(^{309}\) *Id.* at 212.

\(^{310}\) *Id.* at 216 (citing *Press Enterprise Co. v. Super. Ct.* (*Press Enterprise II*), 478 U.S. 1, 8 (1986)).

\(^{311}\) *Id.* at 217.

\(^{312}\) *Id.*

\(^{313}\) *Id.* at 218-220.

\(^{314}\) *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 701-02 (6th Cir. 2002).

\(^{315}\) *Id.* at 703 (citing 3 Kenneth Culp Davis, *Administrative Law Treatise* § 14:13 (2d ed. 1980): "The prevailing tendency . . . [is] to open all hearings of a somewhat formal character, overriding interest in privacy and in confidentiality.").

\(^{316}\) *Id.* at 704-05.

\(^{317}\) *Id.* at 705.
investigation of the September 11 terrorist attacks. However, the court found the Creppy Directive not to be narrowly tailored, since the same interests could be served if the government closed the hearings on a case-by-case basis.

Before the Third Circuit made its final decision, the Supreme Court allowed the closed immigration proceedings to continue. Therefore, many commentators expected the Court to grant certiorari and overturn the Sixth Circuit decision. However, the Department of Justice opposed Supreme Court review of the Sixth Circuit decision because the Creppy Directive was under evaluation and all of the September 11 detainees had already been deported. This may have prompted the Court to refuse to hear the case. The Department of Justice has interpreted the Court’s decision not to hear the Sixth Circuit case as an affirmation of the Third Circuit decision and the constitutionality of the Creppy Directive. Some commentators have suggested that the Court’s refusal to hear the case also represents an example of Chief Justice Rehnquist’s opinion that the Court should refrain from deciding wartime cases that involve the clash between national security and civil liberties. This case indicates that the Court may continue to condone government anti-terrorism law enforcement initiatives that proceed on the assumption that immigrants have no First Amendment rights, damaging the rights of the press and public in the process.

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318 Id. at 706-07.
319 Id. at 707-710.
323 Rivadeneira, supra note 321, at 863.
326 In another case about public access to information about the immigrants affected by post-September 11 law enforcement initiatives, the D.C. Circuit considered a First Amendment challenge to the denial of a FOIA request for the disclosure of the names of immigrant detainees and their attorneys. Ctr. for Nat’l Security Studies v. United States Dep’t of Justice, 331 F.3d 918 (2003), cert denied, 540 U.S. 1104 (2004). The court upheld the denial, stating, “We will not convert the First Amendment right of access to criminal judicial proceedings into a requirement that the government disclose information compiled during the exercise of a quintessential executive power—the investigation and prevention of terrorism.” Id. at 935. The Supreme Court denied certiorari. Id.
In reviewing the Third and Sixth Circuit’s rulings on the Creppy Directive, Harlan Grant Cohen has suggested that the Richmond Newspapers "experience" prong to determine the right of public access to government proceedings should not be limited to the question of whether a certain kind of hearing has traditionally been closed or open, but should also consider the lessons of history based on that tradition. 327 For example, the Palmer Raids and Japanese internment are widely acknowledged as government mistakes, the product of nativism and wartime hysteria. 328 This history of violating immigrants’ rights during wartime supports the decision that even national security-related immigration proceedings should not be closed with a blanket directive, but presumed open, and any closure should be narrowly tailored to support a compelling interest. 329

In fact, the Richmond Newspapers test gives the public an extra obstacle to information about government anti-terrorism law enforcement initiatives by creating an additional hurdle before a prior restraint barring access to a government hearing can be analyzed under the strict scrutiny test. Richmond Newspapers' "logic" and "experience" test emerged as a way to balance the rights afforded to the accused within a criminal proceeding, like the potential conflict between a fair and public trial, and the rights of the press and the public to speak and publish about government proceedings. 330 Many of these same issues exist in the case of immigration proceedings, but the use of immigration law to address national security concerns heightens the risk of government abuse of power, as history has proven. The arrest, detention, and deportation of hundreds of innocent Arab, Muslim, and South Asian immigrant men in the name of anti-terrorism is exactly the kind of government program the public needs information about, and the First Amendment, in theory, guarantees that access. Only on a showing of a compelling interest should the government be able to deny the public information about anti-terrorism law enforcement initiatives—and any denial should be narrowly tailored to a specific case.

VI. CONCLUSION

In June 2004, the Supreme Court handed down a series of historic decisions about government anti-terrorism initiatives after September 11. 331

[328] Id. at 1472-73.
[329] Id.
While the holdings do not have a direct bearing on the constitutionality of domestic anti-terror initiatives targeting immigrants, the cases indicate the Court’s willingness to serve as a check for the Executive branch even in times of national insecurity, and show that those the government has deemed a threat should still have access to the judiciary in order to challenge that designation.332

Two of the cases involved U.S. citizens.333 In one of these cases, Yaser Esam Hamdi had been initially detained in Afghanistan and then transferred to a naval brig in South Carolina.334 When deciding that the government did have Congressional authority to detain ‘enemy combatants’ as Hamdi had been designated, the Court ruled that Hamdi’s detention, without charges and without an opportunity to challenge that designation, violated due process.335 In a plurality opinion, Justice O’Connor implicitly invoked the history of civil rights abuses in wartime, insisting that national security concerns cannot automatically trump civil liberties: "[A]s critical as the Government's interest may be in detaining those who actually pose an immediate threat to the national security of the United States during ongoing international conflict, history and common sense teach us that an unchecked system of detention carries the potential to become a means for oppression and abuse of others who do not present that sort of threat."336 In fact, she continued, war-time is the most critical time to respect constitutional rights: "It is during our most challenging and uncertain moments that our Nation's commitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad."337 O'Connor rejected the Administration’s argument that, in the face of international conflict, the courts should forego individual analysis of each particular case; the separation of powers inherent in our legal system, she said, cannot allow that outcome: "We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens."338

The third case involved non-citizens, foreign nationals arrested in Afghanistan and held at the U.S. naval base at Guantánamo Bay.339 The

332 Id. (stating "Although divided in its rationale, the court was decisive in rejecting the administration’s core legal argument that the executive branch has the last word in imposing open-ended detention on citizens and non-citizens alike.").
333 Hamdi v. Rumsfeld, 124 S. Ct. 2633 (2004); Rumsfeld v. Padilla, 124 S. Ct. 2711 (2004). Jose Padilla was arrested at O’Hare International Airport. Padilla, 124 S.Ct. at 2715 (court stating he had filed his case in the wrong court).
334 Id. at 2636.
335 Id. at 2634 and 2648.
336 Id. at 2647.
337 Id. at 2648.
338 Id. at 2650 (citing Youngstown Sheet & Tube v. Sawyer, 343 U. S. 579, 587 (1952)).
Administration argued these individuals had no right to challenge their detention in U.S. courts. But, the Court decided that because the U.S. controlled Guantánamo, the federal courts had jurisdiction to hear the detainees’ arguments that they never declared war with the U.S. and had never committed terrorist acts.

These decisions show that the Court will not allow the Executive Branch to define a person as a national security threat so as to deny that person the possibility of challenging that status. This and other broad statements in the Court’s holdings could undeniably apply to the case of immigrants detained in the U.S. and held in immigration detention post-September 11. The Court’s emphasis on the need to preserve civil liberties and access to justice in war-time, and the Court’s unwillingness to defer to the Executive Branch’s definition of threats to national security could be helpful in challenging immigrants’ detention due to anti-terrorism law enforcement initiatives.

However, while the government’s detention of the September 11 detainees had the same motivations as that of Hamdi, Padilla, and the Guantánamo detainees, the "win" in the recent Court cases bears little on the constitutionality of selective enforcement of the immigration laws based on protected categories. The plaintiffs in the recent Court cases are distinctly situated from the September 11 detainees and other immigrants swept up in post-9-11 law enforcement programs. Hamdi, Padilla and the Guantánamo detainees sued to gain access to the courts in the first instance. Even as "aliens," the federal courts would have jurisdiction over the September 11 detainees; the more difficult question is whether the law enforcement tactics resulting in their detention could be considered legal, not whether they would be able to challenge that detention at all.

The government’s post-September 11 domestic anti-terrorism law enforcement initiatives have mired the civil rights of the September 11 detainees in an administrative quagmire. Instead of identifying true terrorist threats and filing criminal charges, the government relied on minor immigration violations to arrest, detain, and deport thousands of innocent people. This government action based on the protected categories of race, ethnicity, religion, and association could be constitutional because of the legal doctrines that allow the federal government to classify immigrants based on legal status and national origin. Ironically, if the September 11 detainees had been officially charged with terrorist acts, they would have had far more due process rights.

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340 Id. at 2693. See Johnson v. Eisentrager, 339 U.S. 763 (1950).
341 Id. at 2693, 2699.
Instead of truly addressing domestic terrorism, the government set up a "straw man" of the Arab, South Asian, or Muslim immigrant and used the immigration system to appear to make the American people safe. Immigrants are easy scapegoats, as the Court has failed to clarify their uncertain standing under the Bill of Rights. Consequently, after the September 11 terrorist attacks, all immigrants face diminishing constitutional protections. As the *Hamdi* and *Padilla* cases illustrate, the government will not stop at immigrants, and U.S. citizens could easily face the same erosion of civil liberties. The Supreme Court has now given the Bush Administration a warning. But the Supreme Court’s challenge will be to extend the same strong language and guarantee of protection to immigrant detainees.