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# **DISCRIMINATION IN THE NEW MILLENIUM: TERRORIZING MIDDLE-EASTERNERS, RETRACTION OF CIVIL LIBERTIES, AND THE USA PATRIOT ACT**

Jennifer Y. Brazeal\*

## **I. INTRODUCTION**

When terrorists struck the United States on September 11, 2001, killing thousands of individuals, many Americans turned the spotlight on the government demanding for it to calm their fears of the imminent threats of international terrorism. While some Americans turned to the government with the expectation that it would solve the problem of international terrorism, some Americans turned their backs on Middle Eastern-Americans and immigrants because of their race and ethnicity. Although Americans showcased their great resolve during the weeks and months following September 11, 2001, the ugly head of American racism revealed itself, striking out against Arabs, Muslims, and South East Asians.

Congress responded to the American call for action against international terrorism by passing The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT ACT).<sup>1</sup> This act gave the government unprecedented powers with regards to detaining, denying entry, and searching immigrants. However, many civil libertarians urged the legislature to retract these broad grants of power because of the possibility that the government would use these provisions to infringe upon fundamental civil rights and discriminate against Middle-Easterners.

The purpose of this paper is to examine the roots of racism against Middle - Eastern immigrants, how this racism has manifested itself in discriminatory acts, and finally to examine the USA PATRIOT Act and its implications.

## **II. CONSTITUTIONAL BACKDROP**

In assessing discrimination against Middle-Eastern immigrants, it is important to evaluate the rights the Constitution gives to immigrants. Immigrants' constitutional rights depend on whether the immigrants are citizens. Obviously, immigrants who are also citizens enjoy all of the rights granted by the Constitution. However, non-citizen immigrants have limited constitutional rights. For example, the right to vote and the right to run for political office are expressly restricted to citizens. The fact that the Framers did not expressly limit other Constitutional rights indicates that the other rights are not limited to citizens.<sup>2</sup>

Courts have long held that other constitutional rights such as due process and equal protection rights extend to all persons, including legal and illegal aliens, as long as they live in the United States.<sup>3</sup> In the leading case, *Yick Wo v. Hopkins*, the Supreme Court held that a statute that unduly and arbitrarily burdened aliens of Chinese descent would violate the due process clause of the Fourteenth Amendment.<sup>4</sup> In *Yick Wo*, the plaintiff was an alien of Chinese descent that owned a laundry in the San Francisco. The plaintiff was jailed because he purportedly violated a San Francisco ordinance that mandated that all laundry owners obtain consent from city officials in order to operate their businesses unless their laundries were constructed in brick. Chinese immigrants owned the overwhelming majority of all laundries in San Francisco, and most of

their facilities were constructed out of wood.<sup>5</sup> In granting habeas corpus, the court found that if city officials used this statute arbitrarily to jail Chinese immigrants while driving out Chinese-owned laundries, the statute would clearly violate the due process rights of even non-citizen Chinese immigrants.<sup>6</sup> Since *Yick Wo*, the principal of due process rights extending to all persons living within the United States has remained a long-held constitutional principle.

However, the courts have not interpreted the Constitution to guarantee due process rights to aliens living outside of the United States borders who happen to find themselves using the United States judicial system.<sup>7</sup> For example, in *Shaughnessy v. United States ex rel. Mezei*<sup>8</sup>, an alien who lived in the United States for twenty-five years, left the country to visit his mother in Romania. He was denied admission into that country. Upon seeking to return to the United States, U.S immigration officials would not allow him to return, nor would any other country allow him to enter into their country. In light of these facts, U.S. immigration officials detained him indefinitely at Ellis Island in New York.<sup>9</sup> The plaintiff-alien sought habeas corpus alleging, among other things, that his due process rights were violated because of the detention. He also alleged that his due process rights were violated because he was denied a hearing to discuss whether he could be admitted into the country. The U.S. Supreme Court held that the detention without a hearing did not deprive the plaintiff of any constitutional rights.<sup>10</sup> Specifically, the court stated that “It is true that aliens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due

process of law... But an alien on the threshold of initial entry stands on different footing: 'Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.'"<sup>11</sup> Thus "traditional notions of fairness" tacitly read into the due process clause, do not apply to non-citizens seeking entry into the United States if Congress does not include these notions when drafting provisions regarding non-citizens that live outside U.S. borders.

### **III. RACIAL CONSTRUCTION OF MIDDLE-EASTERNERS AS "NON-AMERICANS" AND DISCRIMINATORY ACTS AGAINST MIDDLE- EASTERNERS SINCE SEPTEMBER 11, 2001**

One scholar has written that what has happened to Arabs in the United States since September 11, 2001 may be a process of ostracism from the American community involving two aspects.<sup>12</sup> The first aspect involved actions by private individuals whereby they classified all Middle-Easterners or Arabs as foreigners. At times, these individuals mistakenly identified Arabs as non-citizens. But at other times, individuals intentionally treated Arabs as non-citizens, knowing that they were indeed citizens. The second aspect of ostracism involved official governmental sanctions against Middle-Easterners because the U.S. government felt as if they were threats to national security.<sup>13</sup> This aspect stemmed from a "twisted form of xenophobia that [was] not simply a hatred of foreigners, but also a hatred of those who in fact may not [have been] foreigners, but whom [certain Americans] would prefer being removed from the country."<sup>14</sup>

Underlying the current animus against Arabs, is the idea that all Arabs are terrorists, whose mission is to harm American citizens. In fact, Arabs living in the United States have been characterized as foreign, disloyal, and imminently threatening.<sup>15</sup> Although the term "Arab" is inclusive of many cultures in the Middle

East and Southeast Asia, the distinctions between these cultures are deemed insignificant, and negative stereotypes are attributed to all people from the those regions of the world. As Ibrahim Hooper of the Council on American – Islamic Relations stated, the common stereotypes of Arabs are that “[they’re] all violent and [they’re] all conducting a holy war.”<sup>16</sup>

Unfortunately, examples of hatred and intimidation towards Arab-Americans in the wake of September 11, 2001 have been plentiful. For example in September of 2001, while advocating for the increased implementation of racial profiling, Republican Congressman John Cooksey, stated: “If I see someone come in and he’s got a diaper on his head and a fan belt around his head, that guy needs to be pulled over and checked.”<sup>17</sup> Although the Congressman later apologized, he commented that the war on terrorism could not be won if Americans must “stop every five minutes to make sure that [they] are being politically correct.”<sup>18</sup> In December of 2001, a San Francisco man shouted a racial slur at Ahmad Namrouti, an Arab grocer, during business hours. That same night, as Mr. Namrouti slept in a back room of the store, a brick came flying through the front window of the store. Mr. Namrouti believed that the vandalism was an act of racially-motivated harassment.<sup>19</sup> In October of 2001, a San Diego Sikh woman was attacked by a knife-wielding man shouting, “This is what you get for what you’ve done to us.”<sup>20</sup> On September 11, In a Chicago suburb, three hundred protesters, waving U.S. flags marched on a mosque while chanting repeatedly, “U.S.A.!”<sup>21</sup> Although this act did not involve any personal discrimination, this act can be seen as a sign of cultural imperialism for the

mosque was chosen as a protest site as opposed to a Christian church, the symbol of American religion. Another example where Americans discriminated against an Arab man was in the case of Ahmed Esa. Mr. Esa worked at a small welding factory in suburban Detroit for 15 years until he was fired the day after September 11, 2001. Reportedly, the manager of the company called Mr. Esa's religion, Islam, the "scum of the earth", and told him that he no longer wanted Mr. Esa to work for him.<sup>22</sup>

This process of ostracism from the American community coupled with specific acts of hatred against Arabs is an unfortunate consequence of the terror attacks of September 11. However, some believe that Congress' adoption of the USA PATRIOT ACT, discussed below, is even more unfortunate with respect to the fate of Arab immigrants.

#### **IV. USA PATRIOT ACT AND ITS EFFECT ON ARAB IMMIGRANTS**

Six weeks after September 11, 2001, Congress passed the USA PATRIOT Act, which made sweeping changes in immigration law and left civil rights advocates worried. Broadly, the USA PATRIOT ACT makes it easier for the government to detain and deport immigrants as well as infringe upon constitutionally protected civil liberties.

##### **A. Immigrant-friendly provisions of the USA PATRIOT ACT.**

Although the USA PATRIOT ACT is known for its provisions that may infringe upon the civil liberties of Arab-American immigrants (as well as citizens), it does expressly mention that many of the people who died in the terrorist attacks were immigrants and/or non-citizens. Accordingly, Congress drafted

provisions that preserved immigration benefits for non-citizens that would have ordinarily been extinguished by death or loss of employment. For example, if an U.S. citizen filed a relative-visa petition or fiancé petition on behalf of a spouse, child, or fiancé before September 11, 2001, the petition would have been nullified by the death of the petitioner. However, the USA PATRIOT ACT preserves the ability of a surviving spouse, child, or fiancé of a U.S. citizen killed in the September 11, 2001 attacks to file his or her own petition for special immigrant status.<sup>23</sup> Furthermore, if the U.S citizen that was killed in the September 11, 2001 attacks had not filed a visa petition for a spouse or child, the spouse or child may file a visa petition on their own behalf within two years of the death of their spouse or parent.<sup>24</sup>

## **B. USA PATRIOT ACT Provisions that Infringe on Civil Liberties.**

### **1. Guilt by Association**

Throughout the history of the United States, the government has maintained the authority to deport, detain, and deny asylum rights of aliens that have participated in and espoused terrorist activity or involved in terrorist groups. The Secretary of State along with the Attorney General determines which groups they consider as “terrorist” organizations. Usually, members of these certified terrorist groups that are found to have terrorist motives are susceptible to deportation or exclusion from the United States.<sup>25</sup> Before September 11, 2001, the definitions of “terrorist activities” and the concept of “engaging in terrorist activities” were interpreted much narrower than post September 11, 2001. The expansion of these definitions, discussed below, worry civil libertarians because of the

possibility of perceived guilt of an alien without the showing of a nexus between their conduct and the effectuation of a terrorist activity.<sup>26</sup>

The previous definition of “terrorist activity” would have included many of the activities that would have commonly been considered as terrorism and included many of the acts that the September 11 hijackers took part.<sup>27</sup> Specifically, the pre-September 11 definition of terrorist activity involved:

The hijacking or sabotage of any conveyance..., the seizing or detaining, and threatening to kill, injure, or continu[ing] to detain, another individual in order to compel a third person (including a government organization) to do or abstain from doing any act as an explicit or implied condition for the release of the individual seized or detained, a violent attack upon an internationally protected person... an assassination, the use or any biological agent, chemical agent, or nuclear weapon or device, or explosive firearm... with the intent to endanger, directly or indirectly, the safety of one or more individuals, or to cause substantial damage to property. [Also] a threat, attempt, or conspiracy to do any of the foregoing [is considered a terrorist activity].

28

The previous definition of “engaging in terrorist activities”, referred to the process of committing the following in an individual capacity, or as a member of an organization:

an act of terrorist activity or an act which the actor knows, or reasonably should know, affords material support to an any individual, organization, or government in conducting a terrorist activity at any time including the following acts: the preparation or planning of a terrorist activity..., the gathering of information on potential targets for a terrorist activity, the providing of any type of material support ...to any individual the actor *knows or has reason to believe* has committed or plans to commit a terrorist activity, the solicitation of funds or other things of value for terrorist activity or for any terrorist organization, [or] the solicitation of any individual for membership in a terrorist

organization, terrorist government, or to engage in a terrorist activity. (*emphasis added*)

29

An example when the government used its power to detain an alien because of the alien's alleged participation in terrorist activities as defined pre-USA PATRIOT ACT can be found in the case of *Kiardeldeen v. Ashcroft*.<sup>30</sup> In that case, the government detained Kiardeldeen, an alien, because of his alleged association with a foreign terrorist organization, participation in the attempt to bomb the World Trade Center in 1993, and his alleged threat to kill the past Attorney General, Janet Reno. Being that individuals engaged in terrorist activities were already subject to anti-terrorism laws, it is questionable as to whether Congress needed to expand the definition of "engaging in terrorist activities."

Under the USA PATRIOT ACT, Congress expanded the definition of terrorist activities to include the use of any weapon or dangerous device, not just those previously listed. The only limitation is that the use of weapon must not be for mere personal monetary gain and that the individual conducting these activities must have the intent to danger people or property.<sup>31</sup> Under this definition, any thing, even if it is small and ineffective at causing great harm, can be considered a weapon. For example, a protestor who throws stones at a demonstration could be considered to have engaged in terrorist activities.<sup>32</sup> Stones could be considered weapons or dangerous devices. When these stones are thrown at others, the protestors could be found to have the intent to endanger. In addition, since the stones would be thrown at a demonstration, the protestor would

probably not be found to have thrown the stones for personal monetary gain.<sup>33</sup> Finally, as one scholar noted; “With this [new definition] in place, it will be even easier to argue that any type of violent political acts, however minimal, falls within this definition.”<sup>34</sup>

Significantly, the USA PATRIOT ACT eliminates the need for the government to show that the actor knew or should have known that he was offering material support to a terrorist organization. This provision worries civil libertarians the most because of its “guilt by association” implications. Currently, an alien can be deported or revoked asylum rights regardless if he knew that he gave, usually in the form of money, support to terrorist organizations.<sup>35</sup> There are two exceptions to this general rule. The first exception describes a situation where the provider donates to a group that has not been designated by the government as a terrorist group. The second exception describes a situation where the Secretary of State, in its un-reviewable discretion, determines that the clause should not apply.<sup>36</sup> An example when the Secretary of State may find that this section should not apply is when there is an interest in preserving family unity.<sup>37</sup> The implications of this rule are severe. For instance, Muslims may be deterred from giving to charitable groups in their native countries that only tangentially offer support to groups engaging in terror. In fact, many Muslims have declined to give to charities, even during the season of Ramadan, a traditional time for charitable giving.<sup>38</sup>

The expanded definition of “terrorist acts” coupled with the expanded definition of “engaging in terrorist activities” gives the government enormous power to deport or revoke asylum rights of anyone who they view as being

suspect or anyone who uses any type of mechanism (no matter how threatening) as a “weapon”. Because courts have not interpreted the revised definitions of “terrorist activities” and “engaging in terrorist activities”, the specific implications of the implementation of the new definitions are yet to be seen. However, since Arab immigrants activity has the potential to be highly scrutinized in this current climate of racial hostility, they are subject an increased likelihood of deportability.

## **2. Exclusion based on Ideas, Speech or Political Associations**

Not only is the idea of guilt by association imbedded in the USA PATRIOT ACT, but so is the idea of ideological exclusion. Ideological exclusion is the practice of denying entry or removing aliens for pure speech. Specifically, the USA PATRIOT ACT, bars admission or revokes asylum rights of aliens who endorse or espouse terrorist activity in ways determined by the Secretary of State to undermine U.S efforts to combat terrorism.<sup>39</sup> The Act also excludes aliens who are representatives of groups that endorse terrorism.<sup>40</sup>

The Supreme Court, in *Brandenburg v. Ohio*, pronounced the principle that U.S. citizens have the right to endorse terrorist organizations or terrorist activities as long as their speech is not intended to produce imminent lawless conduct.<sup>41</sup> In *Brandenburg*, the plaintiff, a Ku Klux Klan member, was convicted of violation of a statute that punished individuals who advocated or taught the necessity of violence as a means of accomplishing industrial or political reform and who advocated the doctrines of criminal syndicalism.<sup>42</sup> The court invalidated the statute stating that “constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy unless it is directed to inciting

or producing imminent lawless action and is likely to produce such action.”<sup>43</sup> Modern notions of espousing terrorist beliefs are similar to the conduct that the Ohio statute sought to prevent in *Brandenburg*.<sup>44</sup> Thus, the endorsement of terrorist activity in certain circumstances is protected by the First Amendment.

However, the USA PATRIOT ACT seems to provide that aliens do not have First Amendment guarantees of free speech, especially if they live outside of the United States borders.<sup>45</sup> Although aliens living outside of our borders have limited Constitutional rights as opposed to those living within the borders, First Amendment constitutional issues still arise in this context.<sup>46</sup> In *Kliendienst v. Mandel*, the Supreme Court assumed that aliens did not have First Amendment rights and further held that the government’s exclusion of an alien scholar because of his communist beliefs did not violate the First Amendment rights of American scholars and students who wished to converse with him.<sup>47</sup> However, Justice Marshall, in his dissenting opinion, pointed out that “[t]he First Amendment is designed to protect a robust public debate, and if our government can keep out [or remove] person who espouse disfavored ideas, or opportunity to hear and consider those ideas will be diminished.”<sup>48</sup>

### **3. Expansion of Terrorism Law Include “Domestic Terrorism”**

The USA PATRIOT ACT also expands the definition of terrorism to include the notion of “domestic terrorism.”<sup>49</sup> As defined in Section §802(a)(5) of the Act, domestic terrorism means activities that:

- “(A) involve acts dangerous to human life that are a violation of the criminal laws of the United States of any state;
- (B) appear to be intended—

- (i) to intimidate or coerce a civilian population;
  - (ii) to influence the policy of a government by intimidation or coercion; or
  - (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping; and
- (C) occur primarily within the territorial jurisdiction of the United States”

With the expansion of definition of terrorism to include the idea of domestic terrorism, political organizations that dissent against governmental policy may be subject to harassment, searches, and criminal liability.<sup>50</sup> For instance, if this definition of domestic terrorism is construed broadly, groups of individuals that merely *appear* to be involved in activities aimed at coercing the population against an established governmental policy will be targeted as potential terrorists. Obviously a broad interpretation of this policy will implicate fundamental First Amendment Rights of freedom of speech and association, even for United States citizens. Moreover, the courts have consistently held that underlying First Amendment jurisprudence is the idea to promote a robust public debate.<sup>51</sup> For instance the U.S. Supreme court has stated “speech concerning public affairs is more than self-expression; it is the essence of self-government.”<sup>52</sup> Additionally, the Court has stated that: “The First and Fourteenth Amendments embody our 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.’”<sup>53</sup> There can be no doubt that §802 of the USA PATRIOT ACT flies in the face of long-held constitutional principles safeguarding political speech.

#### **4. Executive Detention**

The USA PATRIOT ACT dramatically changes the rules pertaining to the detention of immigrants in removal proceedings. Currently, the government has more freedom to detain immigrants than in any time during modern history.

Before Congress enacted the USA PATRIOT ACT, the government could detain aliens without bond if they posed a danger to the community or if they were significant flight risk.<sup>54</sup> Unless the government could make such a showing in an immigration hearing, the detained immigrants were entitled bond.<sup>55</sup> Furthermore, the government could only detain aliens for a reasonable amount of time.<sup>56</sup> The Supreme Court interpreted these principles in *Zadvydas v. Davis*.<sup>57</sup> In that case, resident aliens who had been removed from the United States and indefinitely held in custody brought habeas corpus petitions. After the aliens had been removed from the United States, they were held in United States custody because no other country would allow them entry into their country. The court held that unless the aliens posed a danger to the community or imposed a flight risk they could not be held without bond.<sup>58</sup> Furthermore, the aliens could only be detained for a reasonable amount of time after their removal proceedings.<sup>59</sup>

The USA PATRIOT ACT changes this rule by granting the Attorney General power to detain aliens without a showing that they pose a threat to national security or a flight risk. The only requirement imposed on the Attorney General before he detains an alien is that he must certify that he has reasonable grounds to believe that the alien is susceptible to deportation pursuant to the anti-

terrorism provisions of the Act.<sup>60</sup> The USA PATRIOT ACT also requires the Attorney General to detain any non-citizen who is certified as a suspected terrorist if he has reason to believe that he is subject to deportation because he is a threat to national security.<sup>61</sup>

Additionally, the Act seems to allow for detention of aliens indefinitely, even after they prevailed in removal proceedings. The Act provides that detention should be maintained regardless of any relief from removal granted the alien, until the Attorney General determines that that alien is no longer the type that should be certified as a terrorist.<sup>62</sup> Non-citizens who would not normally be barred from asylum or deportable under other sections of the USA PATRIOT ACT may be detained, possibly indefinitely, under this section of the Act. This section of the Act gives the Attorney General to certify and detain aliens merely because they are a part of a terrorist group, irrespective of whether that group was certified by the Attorney General as a terrorist group. Furthermore, this provision allows the Attorney General to detain and certify individuals if they are a spouse or child of an individual who has been certified as a terrorist.<sup>63</sup> This means that there is a possibility that individuals with less culpability than others singled out in the USA PATRIOT ACT as a threat to national security could be detained indefinitely.<sup>64</sup>

As of date, there have been no detentions subject to the authority permitted by the USA PATRIOT ACT. Therefore, the implications of the changes with regards to detentions are yet to be seen. However, since Arabs have been singled out as subjects of other types of wrongful discrimination since September

11, 2001, it is likely that this provision of the USA PATRIOT ACT will also be a means method to wrongful discrimination against Arabs.

### **5. Secret Searches**

The USA PATRIOT ACT also makes changes to the rules governing collection and sharing of information by law enforcement or intelligence agencies. Although this rule affects aliens, it can also affect citizens. The Fourth Amendment permits the government to seize individuals or conduct searches only when the government has probable cause that an individual is engaged in criminal activity or in cases where the government believes that evidence of a crime is likely to be found.<sup>65</sup> Furthermore, this search or seizure must be reasonable.<sup>66</sup> The change in the USA PATRIOT ACT allows the government to get around this requirement whenever the government says that the investigation has a significant foreign intelligence purpose.

The USA PATRIOT ACT amends the Foreign Intelligence Surveillance Act of 2001 (FISA)<sup>67</sup> in order to accomplish this goal. FISA creates an exception to the criminal probable cause rule. The criminal probable cause rule states that an agency should not search individuals unless the government can show that the individuals probably committed some type of crime. FISA authorizes the FBI to conduct electronic surveillance and secret physical searches without such or criminal probable cause. The underlying theory is that the foreign intelligence gathering is not designed to catch criminals, but to gather information about foreign agents. Accordingly, FISA authorizes warrants, without a showing of probable criminal conduct, but on the showing that the target of intrusion is an

agent of a foreign power.<sup>68</sup> Agents are defined as any officer or employee of a foreign-based political organization or any group engaged in international terrorism.<sup>69</sup>

Although Congress justifies the validity of FISA searches by stating that a FISA search is for the purpose of foreign intelligence gathering, Congress realized that evidence of crimes may be obtained during a FISA search. Therefore, Congress allowed the use of evidence obtained by a FISA warrant in criminal cases. However, in order to obtain a FISA warrant, the government had to show that the purpose of the search had to be for the collection of foreign intelligence information as opposed to law enforcement. If not, FISA would have served as a means to get around the probable cause requirements in a criminal search or wiretap case.<sup>70</sup>

Before the USA PATRIOT ACT, the circuit courts dealt with the issue of when the government was authorized to use information gathered in FISA searches in criminal proceedings by closely examining the intent of the intrusion. In the principal case, *United States v. Truong Dinh Hung*<sup>71</sup>, the Fourth Circuit court excluded evidence obtained in a warrantless surveillance subsequent to the point in time when the government's objective switched from being primarily motivated by gathering foreign intelligence information to being primarily motivated by law enforcement objectives.<sup>72</sup> The court also held that the Executive branch should be excused from securing a warrant only when the object of the search or surveillance is conducted primarily for foreign intelligence reasons.<sup>73</sup> Moreover, the court held that targets must receive the protection of

the warrant requirement if the government is “primarily attempting to put together a criminal prosecution”.<sup>74</sup> *Truong* involved an electronic surveillance conducted before the passage of FISA predicated on the President’s executive power, but courts interpreted the holding in *Truong* to apply to subsequent FISA cases.

From the language in *Truong*, the “primary purpose” test arose. However, the plain language of FISA never explicitly required that the government’s purpose must primarily involve the gathering of foreign intelligence information rather than gathering information regarding crimes in order for it to receive a FISA warrant.<sup>75</sup> For example, in *United States v. Megahey*, the court held that surveillance under FISA would be “appropriate only if foreign intelligence surveillance is the Government’s primary purpose.”<sup>76</sup>

The USA PATRIOT ACT sought to eliminate the primary purpose test judicially read into FISA by amending the law to allow searches and wiretaps without probable cause as long as a “significant purpose” of the search or wiretap is to collect foreign intelligence information.<sup>77</sup> The justification for this amendment was to relax the primary purpose standard set forth in *Truong* and all of the cases following that philosophy.

Recently in *United States Foreign Intelligence Surveillance Court of Review, In re Sealed Case*, the constitutionality of the USA PATRIOT ACT’s amendment to FISA was challenged.<sup>78</sup> The court held that FISA did not require the government to demonstrate that its primary purpose in conducting electronic surveillance was not criminal prosecution because the primary purpose standard was never implied by Congress to be read into FISA.<sup>79</sup> Also, the court held that

the USA PATRIOT ACT's amendment to FISA permitting the government to conduct surveillance of agents of foreign powers if the foreign intelligence is a significant purpose of the surveillance does not violate the Fourth Amendment guarantees against unreasonable searches and seizures.<sup>80</sup>

This amendment created an enormous loophole in the criminal law because it permits searches in criminal investigations without a probable cause of a crime.<sup>81</sup> However, the specific ramifications of this change have yet to be seen in the judicial arena.

#### **V. US DEPARTMENT OF JUSTICE'S ATTEMPTS TO DISPEL MYTHS ABOUT THE USA PATRIOT ACT**

Although several civil liberties groups have strongly criticized the USA PATRIOT ACT, the U.S. Department of Justice, headed by the Attorney General, John Ashcroft, have begun a concerted effort to defend the legitimacy and necessity of the Act.<sup>82</sup> On the U.S. Department of Justice's official website, the agency has dedicated a significant amount of space informing viewers its rationale of why Congress acted appropriately in passing the USA PATRIOT ACT and why such an act is needed in order for the country to effectively combat terrorism.<sup>83</sup> Additionally, the Department of Justice goes to great lengths in order to dispel what it claims to be common misconceptions about the USA PATRIOT ACT.<sup>84</sup>

The Department of Justice denies that the USA PATRIOT ACT will prohibit groups from engaging in political advocacy that differs from established governmental policy. One major critique of the Act is that the expansion of the

definition of terrorism to include “domestic terrorism” will inhibit individuals from advocating their political ideas. In response to this critique, the Department of Justice states that the USA PATRIOT ACT limits domestic terrorism to conduct that breaks criminal laws and endangers human life.<sup>85</sup> Additionally, the Department of Justice states that peaceful groups that dissent from governmental policy, without breaking laws will not be targeted.<sup>86</sup>

The Department of Justice also defends provisions of the USA PATRIOT ACT that expand the government’s authority to conduct surveillance and searches without search warrants. Noting that the terrorism investigators have no interest in conducting surveillance with regard to the ordinary habits of Americans, the Department of Justice insists that such provisions provide the necessary tools to prevent the planning of future terrorist attacks.<sup>87</sup> The Department of Justice also asserts that, in some situations, searching without first securing a warrant is a necessary and constitutional way to prevent terrorists evading arrest or destroying evidence that would expose terrorist plots.<sup>88</sup>

Clearly, the Department of Justice has taken the initiative to uphold the integrity of the USA PATRIOT ACT. Indeed, the government has a strong interest in preventing future attacks such as the tragic events of September 11, 2001. However, the Department of Justice must balance the governmental interest in safeguarding our national security and safeguarding our civil liberties.

## **VII. SUGGESTIONS TO BALANCE THE INTERESTS BETWEEN NATIONAL SECURITY AND CIVIL LIBERTIES**

After the September 11, 2001 attacks, many Americans felt the need for increased measures of national security. Measures such as the USA PATRIOT ACT may make the United States a more secure nation with regards to the threats imposed by immigrants at the expense of civil liberties. The next section of this paper discusses ways in which the United States can balance the interests of national security and safeguard civil liberties.

**A. Perimeter Security Strategy.**

In its efforts to promote national security, the United States has tried to tighten border security<sup>89</sup>, but a perimeter strategy may be more effective.<sup>90</sup> A perimeter strategy involves the establishment of a security zone around the entire North American Continent. This approach would shift the responsibility for security from the points of entry around the United States borders to foreign service officers in the U.S. embassies around the world.<sup>91</sup> Under this approach, the visa and passport offices in countries around the world would share the burden prohibiting suspect individuals from entering into North America. There must be a concerted effort and agreement among all nations in order for this approach to be effective. Additionally, this approach could still be used to discriminate against “suspect” nationalities such as those from Arab countries if other nations disproportionately scrutinize these individuals as they seek entry into the United States.

**B. National Identity Card**

Another suggestion proposed was the idea of all residents of North America carrying a national identity card.<sup>92</sup> This approach would be an attempt to

monitor the internal movement of people and products within North America. It has been proposed that these cards contain biometric data. In addition to biometric data that could eliminate the need for racial profiling, the computer chip in the card could be updated with information on personal consumer behavior. The information could be used to identify suspected terrorists, but it could also be used to facilitate commercial transactions and facilitate the process of travel domestically and internationally by providing the customs and airport officials with the information they need to ensure security.<sup>93</sup> However, the implementation of this suggestion would implicate serious privacy concerns, as information about individuals could be used unethically, and their biometric data could be released. For example, if agencies and other groups could have access to probe into the personal and private aspects of individuals' lives although they might not pose a national security risk.

### **C. Inclusive Capitalism**

In order to guard against future terrorist attacks, the United States should take a leadership role in eliminating the gap between the standard of living between the developed and the developing countries.<sup>94</sup> The gap between these two groups of nations lies at the root of the anti-American sentiment that spurs terrorism. In the broadest sense, rich Western nations overpower and exploit the resources of poor developing nations. This leads to increased opportunities and a higher standard of living for those that live in the rich countries and depressed standards of living and opportunities to generate income in poor countries. Business oriented models that are mutually beneficial between Western multi-

national corporations and the developing cultures can be developed. These models focus on building alliances between multi-national corporations in an effort to foster technological advancement in poorer countries and provide real chances for generation of income for the citizens of poor countries.<sup>95</sup>

#### **D. Burden Sharing in Asylum Adjudication**

This approach deals specifically with asylum and withholding of removal cases. This approach suggests that the burden of proof, the showing that the applicant should be able to get into or stay in the country as a refugee, should be split between the applicant and the governmental agency. Usually, the burden of proof in asylum and withholding of removal cases is on the applicant. However, recently the Board of Immigration found that when applying mandatory bars to asylum and withholding, the INS is required to produce evidence which indicates that the applicant has engaged in the prohibited conduct.<sup>96</sup> After the INS provides this evidence, the burden shifts to the applicant to establish by a preponderance of the evidence that he did not engage in the conduct. The regulation that the Board relied on specifically applied to applications filed before April 1, 1997.<sup>97</sup> However, this approach can easily be extended to post September 11, 2001 cases in which the INS asserts that a security-related bar to asylum and withholding applies. This approach will make sure that an asylum-seeker has sufficient notice of the INS' rationale for asserting that she is ineligible for relief. Additionally, it could "alleviate the almost insurmountable burden of proving a negative, i.e. that she has never engaged in culpable conduct."<sup>98</sup> Also, it may obligate the INS to only make allegations that an applicant for asylum or

withholdings is a threat to national security when they have sufficient proof to substantiate their claims.<sup>99</sup>

#### **E. Quality Assurance**

In wake of September 11, 2001, many adjudicators may be compelled to exclude an asylum seeker or deport an alien even if there is a minute possibility that the asylum seeker or the alien is connected to terrorist activity. In order to safeguard the aliens' rights in this country and to be fair to asylum seekers, decisions by the adjudicating bodies should be reviewed by a supervisory panel.<sup>100</sup> Prior to an Immigration Judge's ruling to deport an alien on terrorism grounds, the judge should have her decision reviewed by the Office of the Chief Immigration Judge. Additionally, prior to asserting that an individual is barred from asylum on terrorism grounds, an INS trial attorney would have to submit their case for review by the INS Office of General Council.<sup>101</sup>

#### **V. CONCLUSION**

The events of September 11, 2001 have dramatically changed the focus of the United States government. Currently, the threat of international and domestic terrorism is imminent, and the United States does need to respond to ensure the safety of its citizens. However, the government should be cautious not to circumvent all of the civil liberties granted to citizens and residents of this nation by the Constitution. The root of the United State's predicament is the gap between its citizens' privilege the severe disadvantages experienced by most people in the world. Decreasing the gap between the have and the have nots and creating a more inclusive capitalistic society should be the top priority if this

country is interested in national security. However, the United States should expect that they will always have enemies. Thus a combination of the above stated solutions could be ways to ensure safety within our borders.

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<sup>1</sup> The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001) [hereinafter USA PATRIOT ACT].

<sup>2</sup> See David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953, 978 (2002).

<sup>3</sup> See *Yick Wo v. Hopkins*, 118 U.S. 356, 362 (1886);

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Zadvydas v. Davis*, 533 U.S. 678, 693-4 (2001)

<sup>8</sup> *Shaughnessy v. United States ex. rel Mezei*, 345 U.S. 206 (1953).

<sup>9</sup> *Id.* at 208-09.

<sup>10</sup> *Id.* at 215.

<sup>11</sup> *Id.* at 212 (citations omitted).

<sup>12</sup> Bill Ong Hing, *Vigilante Racism: The De-Americanization of Immigrant America*, 7 MICH. J. RACE & L. 441, 444 (2002).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> See Natsu Taylor Saito, *Symbolism Under Siege: Japanese American Redress and the “Racing” of Arab Americans as “Terrorists”*, 8 ASIAN L.J. 1(2001) (quoting Twila Decker, *Muslims Fight Unfairness, the American Way*, ST. PETERSBURG TIMES, October 17, 1999, available at WL 27322848).

<sup>16</sup> *Id.*

<sup>17</sup> *Louisiana: Apology from Congressman*, N.Y. TIMES, Sept. 21, 2001 at A 16 (quoting U.S Representative John Cooksey from Louisiana)

<sup>18</sup> *Id.*

<sup>19</sup> Marsha Ginsburg, *Shattered Dream, Brick Hurlled at Muslim-Owned Store Drives out S.F. Man*, S.F. CHRON., Dec. 29, 2001 at A21.

<sup>20</sup> Jennifer Hahrahan, *Sikh Woman Stabbed in Suspected Hate Crime Linked to Terror Attacks; Incident Latest of 36 in Area Involving Violence, Threats, or Harassment*, S.D. UNION-TRIB., Oct. 5, 2001 at B2.

<sup>21</sup> *Muslims living in America come under fire; Terror War on U.S.: Backlash Terrorism USA*, EVENING STANDARD (London), Sept. 13, 2001 at 10.

<sup>22</sup> See Patricia Anstett, *Fallout on Arab Americans: ‘I’m Scared’, Metro Muslim Says*, DETROIT FREE PRESS, Sept. 22, 2001

<sup>23</sup> USA PATRIOT ACT, *supra* note 1 at § 421.

<sup>24</sup> *Id.* § 423.

<sup>25</sup> See Immigration and Nationality Act, 8 U.S.C. §§ 1182, 1227 (a)(4)(B)(2000) [hereinafter Immigration and Nationality Act 2000]

<sup>26</sup> Cole, *supra* note 2 at 966-69.

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<sup>27</sup> Regina Germain, *Rushing to Judgment: The Unintended Consequences of the USA PATRIOT Act for Bona Fide Refugees*, 16 GEO IMMIGR. L.J. 505, 511 (2002)

<sup>28</sup> Immigration and Nationality Act 2000 §1182(a)(3)(B)(ii).

<sup>29</sup> Immigration and Nationality Act 2000 § 1182 (a)(3)(B)(iii).

<sup>30</sup> *Kiareldeen v. Ashcroft*, 273 F.3d 542 (2001).

<sup>31</sup> USA PATRIOT Act § 411

<sup>32</sup> Germain, *supra* note 27, at 518.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> USA PATRIOT ACT § 412.

<sup>36</sup> Germain, *supra* note 27, at 519; *See* USA PATRIOT ACT § 412.

<sup>37</sup> Germain, *supra* note 27, at 519; *See* USA PATRIOT ACT § 412

<sup>38</sup> Germain, *supra* note 27 at 520 (citations omitted).

<sup>39</sup> Cole, *supra* note 2 at 969-70 (citing USA PATRIOT ACT § 411.).

<sup>40</sup> USA PATRIOT Act § 411.

<sup>41</sup> *See* *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

<sup>42</sup> *Id.* at 444-45.

<sup>43</sup> *Id.* at 447.

<sup>44</sup> *See* Cole, *supra* note 2, at 970.

<sup>45</sup> *Id.* at 1004 n. 66.

<sup>46</sup> Cole, *supra* note 2, at 970.

<sup>47</sup> *Kliendierst v. Mandel*, 408 U.S. 753, 770 (1972)

<sup>48</sup> Cole, *supra* note 2, at 970 (citing *Kleindierst*, 408 U.S. 753, 777, (Marshall, J. dissenting recognized that excluding aliens for political associations and ideas infringes on the rights of U.S. citizens to converse with him)).

<sup>49</sup> *See* USA PATRIOT Act §802

<sup>50</sup> *See* Lisa Finnegan Abdolian, Harold Takooshian, *The USA PATRIOT ACT: Civil Liberties, the Media, and Public Opinion*, 30 FORDHAM URB L.J. 1429, 1430 (2003).

<sup>51</sup> *See* *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964)

<sup>52</sup> *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964).

<sup>53</sup> *Id.* at 75, citing *New York Times Co. v. Sullivan*, 376 U.S. 254, at 270 (1964).

<sup>54</sup> *O'Rourke v. Warden*, 539 F. Supp. 1131, 1135 (S.D.N.Y. 1982).

<sup>55</sup> Cole, *supra* note 2, at 970-71.

<sup>56</sup> *See* *Zadvyas*, 533 U.S. at 701.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 701-02.

<sup>59</sup> *Id.*

<sup>60</sup> USA PATRIOT ACT § 412.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> USA PATRIOT Act § 411; Germain, *supra* note 27, at 524.

<sup>65</sup> U.S. CONST. amend IV; *See* Cole, *supra* note 2, at 473.

<sup>66</sup> *See* *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975).

<sup>67</sup> 50 U.S.C. §1801-63 (2001).

<sup>68</sup> *Id.*; *See* Cole, *supra* note 2, at 973.

<sup>69</sup> 50 U.S.C. § 1801(b)(2002)

<sup>70</sup> Cole, *supra* note 2, at 974 (summarizing the intent of the Foreign Intelligence Surveillance Act).

<sup>71</sup> *United States v. Truong Dinh Hung*, 629 F.2d 908 (4th Cir. 1980).

<sup>72</sup> *Id.* at 915.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 916.

<sup>75</sup> *See* *United States Foreign Intelligence Surveillance Court of Review, In re Sealed Case*, 310 F.3d 717, 726-728 (2002).

<sup>76</sup> *United States v. Megahey*, 533 F. Supp. 1180, 1189-90 (E.D.N.Y. 1982).

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<sup>77</sup> USA PATRIOT Act § 218 (Amending 50 U.S.C. §§ 1804(a)(7)(B) and 1823(a) (7)(B) (2001)).

<sup>78</sup> See *In re Sealed Case*, *supra* note 69.

<sup>79</sup> *Id.* at 727.

<sup>80</sup> *Id.* at 743-744.

<sup>81</sup> Cole, *supra* note 2, at 474.

<sup>82</sup> During 2003, General Ashcroft has made several speeches promoting the USA PATRIOT ACT. See [http://www.lifeandliberty.gov/subs\\_speeches.htm](http://www.lifeandliberty.gov/subs_speeches.htm). (last visited February 8, 2004)

<sup>83</sup> See <http://www.lifeandliberty.gov/index.html/> (last visited February 8, 2004)

<sup>84</sup> See [http://www.lifeandliberty.gov/subs/w\\_myths.htm](http://www.lifeandliberty.gov/subs/w_myths.htm) (last visited February 8, 2004)

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> James H. Johnson, U.S. *Immigration Reform, Homeland Security, and Global Economic Competitiveness in the Aftermath of the September 11, 2001 Terrorist Attacks*, 27 N.C.J. Int'l L & Com. Reg. 419, 458 (2002) (citing Tom Ridge, Director of Homeland Security, proposed a the creation of a federal border administration, which would “take control over the Coast Guard, the Customs Service, the border enforcement functions of the Immigration and Naturalization Service, and the Department of Agriculture’s agricultural quarantine inspection program.” Allison Mitchell, *Official Urges Combining Several Agencies to Create One that Protects Borders*, N.Y. TIMES, Jan 12, 2002, at A8).

<sup>90</sup> *Id.* at 458.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 460-61.

<sup>93</sup> Johnson, *supra* note 89, at 461.

<sup>94</sup> *Id.* at 461-62.

<sup>95</sup> *Id.* at 462

<sup>96</sup> Germain, *supra* note 27, at 537(citing *Matter of Haddam*, 54 F. Supp. 2d 588 (E.D. VA 1999)).

<sup>85</sup> *Id.*

<sup>98</sup> *Id.* at 527.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 528.

<sup>101</sup> *Id.*