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Suspect First: How Terrorism Policy Is Reshaping Immigration Policy

Karen C. Tumlin

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Suspect First: How Terrorism Policy Is Reshaping Immigration Policy

Karen C. Tumlin†

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† J.D., School of Law, University of California, Berkeley (Boalt Hall), 2004; M.P.P., University of California, Berkeley, Goldman School of Public Policy, 2003; A.B., Brown University, 1996. I dedicate this Comment to the courageous attorneys working on behalf of immigrants' rights since 9/11. This Comment has been greatly improved by my good fortune to discuss ideas with and be inspired by Lilliana Garcés, Lee Gelernt, Robin Goldfaden, and Lucas Guttentag. I would like to thank the members of the Social Justice Writing Seminar and the editors of the *California Law Review* for their helpful comments on earlier drafts. My thanks also to Angela Harris, Sherene Razack, and participants at the 2003 Law and Society Annual Conference where I presented this paper in an earlier form. I am deeply indebted to Lucas Guttentag, Ian Haney López, Donna Maeda, and Norman Spaulding for their insights on earlier drafts and their encouragement in writing this piece. I would also like to thank Michelle Wilde Anderson for editing this piece with rigor and care and for enriching my law school experience with her intellect and deep sense of justice. As always, I thank my family for their unconditional encouragement. Most profoundly, I owe thanks to my husband, Justin Pritchard, for enduring countless conversations on and drafts of this piece and for his unwavering support.

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Suspect First: How Terrorism Policy Is Reshaping Immigration Policy

Karen C. Tumlin

This Comment evaluates how post-9/11 terrorism policy is radically reshaping immigration law and policy. I argue that since 9/11, immigration policy has become intertwined with and subordinated to terrorism policy. Existing immigration laws have been used as tools in the 9/11 investigations because they provide fewer procedural protections than related criminal laws. Since 9/11, few immigration policies have been created without terrorism policy in mind. Instead, immigration policy exists largely as a means of fighting terrorism. This merger of immigration and terrorism policy promotes the notion that immigrants are suspects first and welcome newcomers second, if at all.

A hallmark of terrorism policy's control over immigration policy since 9/11 is the institution of what I call an immigration-plus profiling regime, which targets immigrants of certain national origins and presumed Muslim religious identity for increased scrutiny.

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This Comment also analyzes the major federal lawsuits to date, that challenge the federal government's actions impacting immigration policy since 9/11. Thus far, the federal judiciary has been largely complicit in the rewriting of our nation's immigration policy by viewing these 9/11 cases almost exclusively in their terrorism policy context and ignoring the impact these policies are having on immigration policies and, indeed, on our nation's immigrants.

INTRODUCTION

"The Executive Branch seeks to uproot people's lives, outside the public eye, and behind a closed door. Democracies die behind closed doors."¹

"Indeed, it is interesting to note that our democracy was *created* behind closed doors"²

1. Detroit Free Press v. Ashcroft, 303 F.3d 681, 683 (6th Cir. 2002).

The exchange above represents part of the spirited debate, and utter lack of judicial consensus, about whether to curtail civil liberties in the post-9/11 United States. It also underscores how contentious this debate has become. How the judiciary resolves questions of civil liberties after 9/11 will not only define the scope of our civil rights, but may also fundamentally remake our nation's immigration policy. Discussions over how the government has curtailed civil liberties since 9/11 focus on what we as a nation are willing to sacrifice for potential increases in security. However, the sacrifice has not been distributed evenly across the U.S. population. Immigrants have disproportionately borne the burden of restricted civil liberties. This Comment looks at the impact of post-9/11 terrorism policy on immigrants and immigration policy.

Those who have written about the government's violations of civil liberties and immigrants' rights since 9/11 have faced twin challenges: government secrecy and the unpopularity of criticizing the government. In conducting its 9/11 investigation, the Bush administration has refused to release basic information about who has been detained, on what basis, and for how long.³ The administration has also held 9/11 detainees incommunicado for long periods, preventing the release of information about the conditions of their confinement.⁴ Against this backdrop of secrecy, the attempt to document—much less analyze—the erosion of immigrants' rights forces legal scholars into what I call the 9/11 trap. Legal professionals, scholars, and judges all place premium value on accuracy and logical argumentation grounded in facts. So what then is someone wishing to comment on the 9/11 investigation to do? There seem to be only two unsatisfactory choices. One choice is to take the safe route and merely describe the curtailment of civil liberties since 9/11 based only on the limited disclosure, thereby presenting a diminished picture to which some may respond that the reduction in civil liberties, even if they have been borne by a disfavored group in our society, has been so negligible as to be worth the price. The other option is to make logical assumptions to fill gaps in the available data, but risk being labeled hysterical or hyperbolic because of the limited "hard evidence" to support these assumptions. The result, of course, is polarized and watered-down public debate about the government's actions since 9/11. On one side, largely safe, academic discussions take place about the assumed trade-off between civil liberties and national security. On the other side, affinity groups—

2. *N. Jersey Media Group, Inc. v. Ashcroft*, 308 F.3d 198, 210 n.6 (3d Cir. 2002), *cert. denied*, 538 U.S. 1056 (2003).

3. See *infra* notes 78-94 and accompanying text.

4. See *infra* notes 114, 164, 203, & 220-25 and accompanying text discussing instances of 9/11 detainees being held without appropriate access to counsel.

liberal and conservative—engage in more vigorous conversations where speakers feel safe to take more risks with the few known facts. The gravity of this moment in American history, however, demands a more thoughtful and less intellectually fractured debate.

This Comment attempts both to document the known facts about the government's terrorism investigation and to make logical assumptions based on the information available to help assess the damage of this investigation to immigration and immigrant policy. Some argue that it is unpatriotic to engage in critical analysis of the government's actions in the 9/11 investigation and their impact on immigrant communities. I contend it is unpatriotic not to inquire how our nation is treating the least powerful members of our community in this time of national fear.

This Comment shows how U.S. terrorism policy is profoundly reshaping our national immigration and immigrant policy.⁵ Following 9/11, the Department of Homeland Security (DHS) has assumed responsibility for immigration and immigrant policy and has subordinated these concerns to separate and larger terrorism policy goals. As a result, the Bush administration terrorism policy, designed to prevent other terrorist attacks, has dramatically altered the way we treat people seeking to enter the United States, and those noncitizens who are already here. The new terrorism policy sends the message that immigrants of certain nationalities should be viewed as potential terror suspects first and as welcome newcomers second, if at all. To be sure, the 9/11 attacks justified a searching review of our nation's intelligence and terrorism policy. As we near the third anniversary of the attacks, however, we must assess the spillover effects that terrorism policy is having on our national immigrant and immigration policy as well as on immigrants—both those here and those waiting to come.

This is not to say that immigration and immigrant policy should operate entirely separate from terrorism policy. Even before 9/11, immigration and terrorism policy overlapped some as immigration law already provided for the exclusion and removal of members of terrorist organizations. At least in this way, immigration policy has a role to play in terrorism prevention. Since 9/11, however, this small overlap has become a near complete, and unwise, subordination of immigration and immigrant policy to terrorism policy. This policy convergence has diminished the procedural and substantive rights of immigrants. Federal antiterrorism efforts have used immigration laws as tools of investigation, prosecution, and prevention. The federal judiciary has been largely complicit in the erosion of immigrants' rights and civil liberties since 9/11 through its

5. By *immigration* policy I refer to the vast body of laws and regulations guiding the admittance of immigrants to this country. In contrast, *immigrant* policy refers to the far smaller set of laws and policies regulating immigrants' rights once they are already in the United States.

failure to notice how the decisions courts make in the name of national security are radically altering the nation's contract with immigrants.

The clearest example of the way immigration and immigrant policy has been conflated with and subordinated to terrorism policy goals is the abolition of the Immigration and Naturalization Service (INS), the federal administrative agency once responsible for immigration, and the transfer of most of its authority to the newly created DHS.⁶ For decades, scholars and policy makers questioned the wisdom of housing the conflicting tasks of immigration enforcement and the provision of immigration services, including naturalization and asylum, within a single agency.⁷ Whenever the INS blundered, some in Congress habitually demanded the splitting or dissolution of the agency. But it took 9/11 for INS reform to pass.

Today the INS no longer exists. Virtually all of its former responsibilities are now undertaken by the DHS. As its name suggests, providing homeland security is the new agency's "mission" and "primary objective."⁸ To achieve this objective the agency consolidated twenty-two separate agencies, including the INS, into a new super agency with the goal of "protect[ing] the American people and our way of life from terrorism."⁹ The services and enforcement functions of the INS have been separated under the DHS as follows:¹⁰ the Immigration and Customs Enforcement

6. Homeland Security Act of 2002, 6 U.S.C. § 291 (2003) (abolishing the INS); 6 U.S.C. § 251 (creating the DHS). This is by no means the only formal convergence of immigration and terrorism policies following 9/11. In some cases, terrorism policy has swallowed up immigration policy, as in the dissolution of the INS. In other instances, terrorism policy has led to a freeze in the formulation of new immigrant policies. For example, following 9/11 the Bush administration quickly dropped well-developed plans for an amnesty program for long-time Mexican foreign nationals, and potentially others, living and working in the United States. *See, e.g.,* August Gribbin, *Bush Mexican Amnesty Plan Resurfaces*, WASH. TIMES, Feb. 15, 2002, at A1. The most recent proposal by the Bush administration to create a temporary guest worker program, without a route to permanent residence, hardly substitutes for Bush's pre-9/11 amnesty proposal to legalize long-time workers. In fact, in describing the new proposal, Bush specifically stated, "[t]his is not an amnesty program. I don't think it makes sense to have amnesty right now in this country." Bill Sammon, *Bush Defends Proposal for Aliens*, WASH. TIMES, Mar. 27, 2004, at A2. One Senate bill, introduced by Senators Hagel and Daschle, however, would closely emulate the pre-9/11 amnesty proposals. Immigration Reform Act of 2004, S. 2010, §§ 201-18 (introduced Jan. 21, 2004); *see* Cindy Gonzalez, *Immigration Reform Plan Brings Hagel to Omaha*, OMAHA WORLD-HERALD, Feb. 18, 2004, at B1. The likelihood of its enactment is unclear as the proposal quickly drew criticism. *See, e.g.,* James R. Edwards, Jr., *Amnesty Plan Doesn't Pass Laugh Test*, 20 INSIGHT ON THE NEWS 52 (2004).

7. *See, e.g.,* Immigration Reform, Accountability, and Security Enhancement Act of 2002, S. 2444 §101-11, 107th Cong. (2002) (proposing to split INS enforcement and service functions but keeping these under the Department of Justice (DOJ)); U.S. COMM'N ON IMMIGRATION REFORM, REPORT TO CONGRESS, BECOMING AN AMERICAN: IMMIGRATION AND IMMIGRANT POLICY xlii-lvi (1997) (recommending such a division).

8. U.S. DEP'T OF HOMELAND SECURITY, SECURING OUR HOMELAND: U.S. DEP'T OF HOMELAND SECURITY STRATEGIC PLAN 1 (2004).

9. *Id.*

10. One piece of the old immigration system, the Executive Office of Immigration Review (EOIR), which includes the immigration courts and the appellate immigration court, the Bureau of Immigration Appeals, remains under the DOJ. *See* 6 U.S.C. § 291 (abolishing the INS); 6 U.S.C. §251

(ICE) oversees the enforcement of immigration laws, while the U.S. Citizenship and Immigration Services (USCIS) handles immigration services.¹¹ Despite this formal split, there is little doubt that under an agency charged with protecting domestic security, immigration enforcement will trump immigration services as a matter of routine and explicit prioritization.¹²

Aside from the resolution of the service-enforcement tension, the transfer of INS functions to the DHS has a profound symbolic impact. This transfer communicates a view that immigrants, including refugees and asylum seekers, are potential terror threats, constituting a fundamental shift in how the United States receives newcomers.¹³ Imagine being among the fraction of people who gain refugee status or win the visa diversity lottery to enter the United States as legal permanent residents, but having to meet with Homeland Security officials before entry.¹⁴ The first message that the government sends is now one of suspicion, not welcome.

(creating the Border and Transportation Security and transferring the INS' former immigration enforcement responsibilities to it). In addition, the Homeland Security Act places the responsibility for unaccompanied foreign-born children on the Director of the Office of Refugee Resettlement (ORR), which is part of the Department of Health and Human Services. 6 U.S.C. § 279. After the Act's transfer of power from the INS to the DHS, it seems the EOIR would logically be viewed as having only adjudicative authority over immigration law and that substantive rulemaking power would transfer to the DHS. The Attorney General, however, has attempted to maintain substantive immigration rulemaking powers within the DOJ. In the proposed rule that purported to transfer all former INS authority to the DHS, the Attorney General attempted to give the EOIR and the DHS concurrent rulemaking authority over substantive immigration law. Aliens and Nationality; Homeland Security; Reorganization of Regulations, 28 C.F.R. § 200.1 (2004); NATIONAL IMMIGRATION LAW CENTER, NEW REGULATIONS FOLD INS INTO DHS, ADDRESS DIVISION OF IMMIGRATION JURISDICTION BETWEEN DHS AND DOJ, *Immigrants' Rights Update*, Vol. 17, No. 2, (Apr. 8, 2003), available at <http://www.nilc.org/immlawpolicy/removpsds/removpsds120.htm> (noting that the concurrent rulemaking policy is likely to lead to conflicting policies, "disorganization within the government and confusion for everyone who has to deal with the new system").

11. The current names of these entities have changed since their original creation. ICE was originally the Bureau of Immigration and Customs Enforcement, and the U.S. Citizenship and Immigration Services was originally the Bureau of Citizenship and Immigration Services.

12. All of the responsibilities of the former INS Commissioner have been vested in the Secretary of the DHS. Authority of the Secretary of Homeland Security, 8 C.F.R. § 2.1 (2004). As a result, the federal official responsible for immigration and immigrant policy no longer has responsibilities for these issues alone, but instead is charged with promoting domestic security—a mission that covers a far larger population than our nation's immigrants.

13. Responsibility for the overseas refugee program and the refugee corps was transferred to the DHS under the Homeland Security Act. 6 U.S.C. § 451. Specifically, refugee admissions will be handled by the USCIS. *Id.* Although the transfer of all immigration authority to the DHS presumes that all immigrants are potential terror threats, federal policies since 9/11 have promoted this view largely for a subset of immigrants from countries with a large Muslim population. *See infra* Part II.

14. The visa diversity lottery admits 50,000 legal permanent residents annually. *See* 8 U.S.C. § 1151(e) (establishing visa lottery quota at 55,000 per year). *But see* Nicaraguan Adjustment and Central American Relief Act, Pub. L. 105-100 § 203(d), 111 Stat. 2193, 2199 (1997) amended by Pub. L. No. 105-139, 111 Stat. 2644 (1997) (reducing annual diversity visas to 50,000). The lottery program was created in 1990 in order to diversify the U.S. immigrant population, which had remained largely White and European as a result of national origin quotas in place from 1924-1965. *See* U.S. DEP'T OF STATE, MEDIA NOTE: DIVERSITY VISA LOTTERY 2004 (DV-2004) RESULTS (June 24, 2003), at

Due to the delayed release of information on the strategies employed in the 9/11 investigation, scholarship analyzing immigration and immigrant policy changes has been slow in coming.¹⁵ Legal challenges to the constitutional and statutory authority for the administration's aggressive actions in its terrorism investigation, however, were inevitable. This Comment evaluates the effect post-9/11 terrorism policy has on immigrants, including the government's creation of an explicit national origin profiling campaign and the erosion of civil liberties. It represents a first attempt to assess both the political and doctrinal changes since 9/11 in light of their impact on immigration and immigrant policy.

Part I of this Comment provides an overview of immigrants' constitutional rights, underscoring that the Constitution's individual liberty protections are enjoyed by all people, not only by citizens. Part II documents the government's development and use of a new form of post-9/11 profiling, "immigration-plus" profiling, which is based on immigration status, national origin and often presumed Muslim religion. Part III canvasses how the government has diminished civil liberties, particularly for immigrants, following 9/11. Part IV summarizes the major

<http://travel.state.gov/dv2004results.html> (noting that the lottery program was created to increase immigration from countries "with low rates of immigration to the United States). *But see also* Victor C. Romero, *Immigration Policy: Critical Race Theory in Three Acts: Racial Profiling, Affirmative Action, and the Diversity Visa Lottery*, 66 ALB. L. REV. 375, 382-86 (2003) (criticizing the diversity lottery program as creating an avenue for increased legal immigration for European immigrants who have traditionally enjoyed open access to U.S. immigration). As its name suggests, admissions are determined on a lottery basis with the odds somewhat stacked in favor of immigrants from countries traditionally underrepresented in the U.S. immigrant population. In fiscal year 2004, nearly half (45.4%) of the visas were allocated to individuals from African nations, while nearly one-third (32.3%) went to those from European countries, and under one-fifth (17.7%) were given to those from Asian nations. U.S. DEP'T OF STATE, MEDIA NOTE: DIVERSITY VISA LOTTERY 2004 (DV-2004) RESULTS (June 24, 2003), at <http://travel.state.gov/dv2004results.html>.

15. One notable exception is the small body of scholarship comparing the government's actions following 9/11 to other historical periods. *See, e.g.*, David Cole, *The New McCarthyism: Repeating History in the War on Terrorism*, 38 HARV. C.R.-C.L. L. REV. 1 (2003) (comparing the government's actions after 9/11 to McCarthyism); Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575, 1586-91 (2002) (comparing the government's use of racial profiling in the 9/11 investigation to Japanese internment). In addition, some scholars have written on the decline in privacy rights and civil liberties generally since 9/11, but have failed to look specifically at the disproportionate impact on immigrants. *See, e.g.*, Marin R. Scordato & Paula A. Monopoli, *Free Speech Rationales After September 11th: The First Amendment in Post-World Trade Center America*, 13 STAN. L. & POL'Y REV. 185 (2002). David Cole's ground-breaking work has extensively documented the disproportionate impact the post-9/11 policies are having on immigrants, but he has placed less emphasis on the impact of these actions on immigration and immigrant policy. *See* DAVID COLE, *ENEMY ALIENS: DOUBLE STANDARDS AND CONSTITUTIONAL FREEDOMS IN THE WAR ON TERRORISM* 4 (2003); David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953 (2002). Finally, while some scholars have looked specifically at the legality of discrete executive branch actions since 9/11, such as the use of military tribunals, few have comprehensively assessed the legality of the major administration and congressional actions and their impact on immigrant and immigration policy. *See, e.g.*, Jordan J. Paust, *Antiterrorism Military Commissions: Courting Illegality*, 23 MICH. J. INT'L L. 1 (2001) (questioning the legality of the creation of military tribunals following 9/11).

lawsuits challenging the government's actions in the 9/11 investigation.¹⁶ These challenges fall into three broad groupings: (1) those focusing on the secrecy surrounding 9/11 investigations, (2) those challenging the legality of 9/11 detentions, and (3) those questioning post-9/11 changes in rights for immigrants already in the United States. The Supreme Court heard three of these cases in April 2004.¹⁷ The Supreme Court's decisions in this litigation may mitigate some of these encroachments on civil liberties since 9/11 and, by extension, repair some of the damage to immigrant policy.¹⁸ Indeed, I argue that assessments of these Supreme Court decisions should consider the impact of these decisions on immigrants' rights and immigrant policy. Finally, Part V of this Comment examines the judiciary's role in allowing terrorism policy to erode immigrants' rights.

This Comment considers how the federal judiciary will ultimately be evaluated for its actions in the face of grave intrusions on civil liberties. Judicial complicity during earlier times of national panic has left an

16. Not every 9/11 lawsuit is covered in this section. Instead, this section focuses on the legal challenges with the greatest implications for immigration and immigrant policy. The cases covered challenge actions by government actors since 9/11. This Comment does not consider the set of cases alleging discrimination by private actors, especially the airlines, after 9/11. *See, e.g.*, Chowdhury v. Northwest Airlines, 238 F. Supp. 2d 1153 (N.D. Cal. 2002); Dasrath v. Cont'l Airlines, 228 F. Supp. 2d 531 (D.N.J. 2002); Bayaa v. United Airlines, 249 F. Supp. 2d 1198 (C.D. Cal. 2002). As Muneer Ahmad notes, however, discrimination undertaken by airlines since 9/11 may be improperly considered as purely private discrimination. Muneer I. Ahmad, *A Rage Shared By Law: Post-September 11 Racial Violence as Crimes of Passion*, 92 CALIF. L. REV. (forthcoming Oct. 2004) (manuscript on file with author). Ahmad writes: "Although many of these incidents involve profiling of Arabs, Muslims, and South Asians by airline personnel, they are properly considered within the realm of public violence because of the statutory authority under which such profiling has been undertaken. Specifically, 49 U.S.C. § 44902(c) (2004) grants air carriers the discretion to refuse to transport a passenger whom the carrier 'decides is, or might be, inimical to safety.'" *Id.* (emphasis omitted).

17. After denying the first petition for certiorari to reach its chambers from these major 9/11 cases—a challenge to the secrecy surrounding the government's 9/11 investigations, *N. Jersey Media Group, Inc. v. Ashcroft*, 308 F.3d 198 (3d Cir. 2002), *cert. denied*, 123 S. Ct. 2215 (2003)—the Supreme Court agreed to consolidate and hear two cases involving the detention of foreign nationals at Guantánamo Bay, Cuba. *Rasul v. Bush*, 215 F. Supp. 2d 55 (D.D.C. 2002), *aff'd sub nom.* *Al Odah v. United States*, 321 F.3d 1134 (D.C. Cir. 2003), *cert. granted*, 124 S. Ct. 534 (2003), *rev'd and remanded*, *Rasul v. Bush*, No. 03-334, slip op. (U.S. June 28, 2004). The Supreme Court also heard oral arguments in the cases of detained enemy combatants Yaser Hamdi and José Padilla. *Padilla ex rel. Newman v. Bush*, 233 F. Supp. 2d 564, 593-94 (S.D.N.Y. 2002), *aff'd on reh'g sub nom.*, *Padilla ex rel. Newman v. Rumsfeld*, 243 F. Supp. 2d 42 (S.D.N.Y. 2003), *rev'd in part sub nom.*, *Padilla v. Rumsfeld*, 352 F.3d 695 (2d Cir. 2003), *cert. granted*, 124 S. Ct. 1353 (2004), *rev'd and remanded*, *Rumsfeld v. Padilla*, No. 03-1027, slip op. (U.S. June 28, 2004); *Hamdi v. Bush*, 243 F. Supp. 2d 527 (E.D. Va. 2002), *rev'd*, 316 F.3d 450 (4th Cir. 2003), *cert. granted*, 124 S. Ct. 981 (2004), *vacated and remanded*, *Hamdi v. Rumsfeld*, No. 03-6696, slip op. (June 28, 2004). On January 12, 2004, the Supreme Court refused to hear another 9/11 case, *Ctr. for Nat'l Sec. Studies v. United States Dep't of Justice*, 215 F. Supp. 2d 94, 98 (D.D.C. 2002), *aff'd in part, rev'd in part*, 331 F.3d 918 (D.C. Cir. 2003), *cert. denied*, 124 S. Ct. 1041 (2004).

18. While this Comment was in final publication, the Supreme Court ruled on these cases. *Hamdi v. Rumsfeld*, No. 03-6696, slip op. (U.S. June 28, 2004); *Rasul v. Bush*, No. 03-334, slip op. (U.S. June 28, 2004); *Rumsfeld v. Padilla*, No. 03-1027, slip op. (U.S. June 28, 2004).

indelible mark of xenophobia on our nation's immigration and immigrant policy. Analysis of emerging case law suggests that our nation is poised to repeat these errors. We must begin a national dialogue that scrutinizes the spillover effects our new terrorism policy is having on immigration and immigrant policy, which together shape how our country views newcomers and how other nations view our country.

I

IMMIGRANTS ARE PEOPLE: THE TRADITIONAL CONSTITUTIONAL RIGHTS OF IMMIGRANTS

The individual rights established by the U.S. Constitution do not uniquely protect U.S. citizens. Instead, nearly all of the individual rights protected by our Constitution are rights of "persons," not "citizens."¹⁹ It follows that immigrants in the United States enjoy substantial constitutional protections.²⁰ The Supreme Court has consistently held that even those who are unlawfully present in the United States are "persons" under the Due Process Clause of the Fifth Amendment, dispelling the notion that these constitutional guarantees extend only to citizens and legal immigrants.²¹ Beyond the textual support for the constitutional rights of immigrants, the natural-law basis of the Bill of Rights, and its more modern human rights incarnation, support the idea that these individual liberties cannot be denied to any resident.²² Furthermore, the "discrete and insular"²³ nature of immigrants as a group warrants special judicial protection for them to ensure that they are not targets of illegitimate

19. Indeed, only those amendments dealing with voting rights speak of the rights of citizens. Compare U.S. CONST. amend. XV, § 1 (extending suffrage to all male citizens), U.S. CONST. amend. XXIV, § 1 (barring poll taxes), and U.S. CONST. XXVI § 1 (lowering the voting age to eighteen years), with U.S. CONST. amend. IV ("The right of the people to be secure . . . against unreasonable searches and seizures . . ."), and U.S. CONST. amend. V ("No person shall be . . . deprived of life, liberty, or property, without due process of law . . .").

20. See, e.g., *Zadvydas v. Davis*, 533 U.S. 678, 679 (2001) ("[T]he Due Process Clause applies to all persons within the United States, including aliens, whether their presence is lawful, unlawful, temporary, or permanent."); *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) (stating that the Equal Protection Clause is "universal in [its] application, to all persons within the territorial jurisdiction, without regard to any differences of . . . nationality . . ."); see also *Mathews v. Diaz*, 426 U.S. 67, 77 (1976) ("There are literally millions of aliens within the jurisdiction of the United States. The Fifth Amendment, as well as the Fourteenth Amendment, protects every one of these persons from deprivation of life, liberty, or property without due process of law.") (citations omitted). Finally, noncitizens facing criminal charges enjoy full Fourth Amendment Protection. See, e.g., *Almeida-Sanchez v. United States*, 413 U.S. 266, 273 (1973).

21. See, e.g., *Zadvydas*, 533 U.S. at 693-94; *Plyler v. Doe*, 457 U.S. 202, 210 (1982); *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596-98 n.5 (1953); *The Japanese Immigrant Case (Yamataya v. Fisher)*, 189 U.S. 86, 100-01 (1903); *Yick Wo*, 118 U.S. at 369.

22. *Cole*, *Enemy Aliens*, *supra* note 15, at 979-80.

23. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153, n.4 (1938).

government discrimination.²⁴ Following 9/11, however, immigrants have not been able to rely on the judiciary to guarantee that their rights are not sacrificed for a vaguely perceived increase in national security.

The Constitution precludes *states* from drawing virtually any distinction between citizens and noncitizens except when necessary to preserve political functions of the state.²⁵ Under the Equal Protection Clause of the Fourteenth Amendment, states can no more discriminate against noncitizens than they can against citizens.²⁶ The federal government, on the other hand, has the power to discriminate against noncitizens. According to the doctrine of congressional plenary power over immigration, when the plenary power applies, Congress may subject immigrants to substantive immigration laws that would otherwise violate constitutional principles.²⁷ This broad power lets Congress “regularly make[] rules that would be unacceptable if applied to citizens.”²⁸ Congress could, for example, enact a discriminatory removal law requiring the removal of all legal immigrants from Egypt, Saudi Arabia, and Iraq.

Still, even plenary power has its limits. Immigrants subject to such a discriminatory deportation law would retain procedural rights with respect to its implementation.²⁹ In addition, Supreme Court jurisprudence has afforded more procedural protections to certain immigrants based on their connection to the United States.³⁰ Immigrants with significant legal ties to the United States and immigrants actually within the borders of the United States, for instance, are entitled to greater protections.³¹ In the 9/11 cases, however, the courts have failed to maintain this extra protection for immigrants in those two categories. The cases of Yaser Hamdi and José Padilla, both U.S. citizens, show that after 9/11 the traditional triggers for constitutional protections have little effect.³² The only time courts have invoked the increased rights associated with presence in the United States

24. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 161-62 (1980).

25. *See, e.g.*, *Cabell v. Chavez-Salido*, 454 U.S. 432, 439 (1982).

26. *See, e.g.*, *Graham v. Richardson*, 403 U.S. 365, 372-75, 378 (1971).

27. *See, e.g.*, *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953).

28. *Mathews v. Diaz*, 426 U.S. 67, 80 (1976).

29. *Carlson v. Landon*, 342 U.S. 524, 537 (1952) (“This power [to expel aliens] is, of course, subject to judicial intervention under the ‘paramount law of the Constitution.’”); *see Zadvydas v. Davis*, 533 U.S. 678, 678 (2001) (holding that detention of deportable immigrants must comport with procedural due process).

30. *See Landon v. Plasencia*, 459 U.S. 21, 32-33 (1982).

31. *See id.* at 32.

32. *See Padilla ex rel. Newman v. Bush*, 233 F. Supp. 2d 564, 593-96 (S.D.N.Y. 2002), *aff’d on reh’g sub nom.*, *Padilla ex rel. Newman v. Rumsfeld*, 243 F. Supp. 2d 42 (S.D.N.Y. 2003), *rev’d in part sub nom. Padilla v. Rumsfeld*, 352 F.3d 695 (2d Cir. 2003), *cert. granted*, 124 S. Ct. 1353 (2004), *rev’d and remanded*, *Rumsfeld v. Padilla*, No. 03-1027, slip op. (U.S. June 28, 2004); *Hamdi v. Rumsfeld*, 316 F.3d 450, 475, 477 (4th Cir. 2003), *rev’g* 243 F. Supp. 2d 527 (E.D. Va. 2002), *cert. granted*, 124 S. Ct. 981 (2004), *vacated and remanded*, *Hamdi v. Rumsfeld*, No. 03-6696, slip op. (June 28, 2004); *see also infra* notes 188-231 and accompanying text for a discussion of the *Hamdi* and *Padilla* cases.

in the 9/11 context is in their denial of habeas petitions of Guantánamo detainees by focusing on their *lack* of presence in the United States.³³ This approach turns the traditional protection conferred by presence in the United States on its head: presence alone no longer triggers constitutional protection, while absence may be a bar to these protections.

II

THE GOVERNMENT'S CREATION OF A SUSPECT GROUP OF IMMIGRANTS

The re-emergence of racial profiling in federal law enforcement since 9/11 is the most obvious way in which terrorism policy is driving immigration and immigrant policy.³⁴ As this Part demonstrates, after 9/11, immigration status became a trigger for law enforcement scrutiny. Yet not all immigrants are considered equally suspect. Immigrants from nations with purported ties to al Qaeda receive increased attention through a form of profiling based on a combination of immigration status and nationality. I call this new form "immigration-plus" profiling. Immigration-plus profiling conflates nationality with religion and targets immigrants from nations with sizable Muslim populations for selective enforcement of immigration laws. In other words, immigration status combined with a presumed Muslim identity serves as a proxy for terrorism danger; immigration status alone, without these nationality or religion plus factors, does not trigger heightened scrutiny.

Before 9/11, growing public consensus and public officials had reached the same conclusion: racial profiling in law enforcement was both ineffective and discriminatory. Lawmakers and law enforcers alike had begun to view profiling as a self-fulfilling prophecy that found crime where it was sought.³⁵ In addition, before 9/11, 80% of Americans were opposed to racial profiling.³⁶ In a near flip flop, after 9/11, 70% of the population believed some type of profiling was essential to public

33. See *infra* note 43 and accompanying text for a discussion of the Guantánamo Bay detention case.

34. This reinstatement of racial profiling has been the subject of much discussion in the legal community. See, e.g., Muneer Ahmad, *Homeland Insecurities: Racial Violence the Day After September 11*, SOCIAL TEXT: 911—A PUBLIC EMERGENCY?, SPECIAL ISSUE, Fall 2002, at 101; Sameer M. Ashar, *Immigration Enforcement and Subordination: The Consequences of Racial Profiling After September 11*, 34 CONN. L. REV. 1185 (2002); Liam Braber, Comment, *Korematsu's Ghost: A Post-September 11th Analysis of Race and National Security*, 47 VILL. L. REV. 451 (2002). Of course, the sanctioning of racial profiling also shows how terrorism policy is impacting criminal law enforcement, and not just immigration policy, by reversing an earlier trend toward abandoning the use of profiling in law enforcement.

35. Before 9/11, both President Bush and Attorney General Ashcroft had condemned racial profiling. See *Attorney General Seeks End to Racial Profiling*, N.Y. TIMES, Mar. 2, 2001, at A20; Steve Miller, "Profile" Directive Rallies Two Sides: Bush Seeks Data on Police Stops, WASH. TIMES, Mar. 12, 2001, at A1.

36. See Nicole Davis, *The Slippery Slope of Racial Profiling*, COLORLINES, Dec. 2001, at 2, available at http://www.arc.org/C_Lines/CLArchive/story2001_12_05.html.

security.³⁷ Ominously, in one survey one-third of respondents supported internment of Arab Americans.³⁸

Several Department of Justice (DOJ) post-9/11 policies explicitly employ immigration-plus profiling to impose greater scrutiny and selective enforcement of immigration laws on certain groups of immigrants. Immigrants subject to this new profiling are described by the DOJ as coming from nations with putative ties to al Qaeda. Although the list primarily includes Middle Eastern nations, it also encompasses several countries in Africa and Asia with significant Muslim populations.³⁹ The government's insistence that it is only targeting immigrants from countries with alleged al Qaeda ties implies that these policies are only being applied to a discrete and clearly identified group of immigrants. The evidence relied upon to establish al Qaeda's operations in these countries is tenuous and has changed over the course of the 9/11 investigation, but the list of countries included in these new policies has not similarly contracted.⁴⁰ Instead, over time the list of countries has steadily expanded. Thus, the use of a seemingly precise al Qaeda label disguises an overinclusive, discriminatory policy.

Administration policies have employed immigration-plus profiling to track, detain, interrogate, and deport immigrants from al Qaeda nations.⁴¹ As the discussion below clarifies, unlike the paradigmatic profiling used in police stops, this immigration-plus profiling is being used as a proxy for future behavior, rather than as a procedure to locate suspects who have committed particular past acts using information on a suspect's race or ethnicity. This group-based attempt to identify future danger is the most

37. *Id.* In addition, following 9/11, reports of hate incidents against Muslim, Arab, and South Asian Americans increased dramatically. See also SOUTH ASIAN AMERICAN LEADERS OF TOMORROW, AMERICAN BACKLASH: TERRORISTS BRING WAR HOME IN MORE WAYS THAN ONE 5 (2001), available at <http://www.saalt.org/biasreport.pdf> (last visited June 15, 2004) (documenting 645 bias incidents during the first week following 9/11); *Hate Crime Reports Up in Wake of Terrorist Attacks*, CNN.com, at <http://www.cnn.com/2001/US/09/16/gen.hate.crimes/index.html> (Sept. 17, 2001) (noting over 300 reports of hate incidents against Muslim, Arab, and South Asian Americans, including murder, in the two weeks following 9/11).

38. See, Volpp, *supra* note 15, at 1591 n.68 (citing Jeffrey M. Jones, *The Impact of the Attacks on America: Americans Believe Country Already at War, Accept Increased Security Measures*, THE GALLUP ORGANIZATION (Sept. 25, 2001)).

39. The one country that falls outside this conceptual grouping is North Korea. To date, however, North Korean nationals have been included only in one of the post-9/11 policies that apply specifically to immigrants of certain nationalities. Registration of Certain Nonimmigrant Aliens from Designated Countries, 67 Fed. Reg. 70,525 (Nov. 22, 2002) (including North Korea in the special registration of nonimmigrants). For a discussion of special registration, see *infra* note 51 and accompanying text. Nonimmigrants are those aliens admitted to the United States for a specific time and purpose, such as those who enter on a tourist visa or as students. Section 214 of the Immigration and Nationality Act sets out the various classes of nonimmigrant visas. 8 U.S.C. § 1184 (2004).

40. See Table I *infra* p. 16 listing the countries of origin for immigrants subject to special registration.

41. See *infra* notes 42-73 and accompanying text.

invidious form of profiling because it employs a suspect class criterion to subject individuals to heightened government scrutiny.

Since 9/11, the administration has explicitly employed immigration-plus profiling in five new policies. First, a form of immigration-plus profiling appeared in the arrests made immediately following 9/11. Because the government refused to release information on the at least 1,200 individuals detained in the days and months after 9/11, the only initial evidence of immigration-plus profiling came from those witnessing INS sweeps of local mosques and businesses,⁴² from reports of counsel, advocates, and family members who managed to contact detainees, and from testimonials of released detainees.⁴³ The government has recently confirmed the pattern that emerged from these anecdotal reports: the vast majority of those detained are immigrants of Middle Eastern or South Asian descent.⁴⁴ Intense targeting of those of Arab or South Asian ancestry has created widespread fear in those communities.⁴⁵ Many report being afraid to attend their usual places of worship or to take any action critical of the government, including engaging in constitutionally protected speech.⁴⁶

Second, an early version of immigration-plus profiling surfaced in the DOJ's "voluntary interview[]" program.⁴⁷ Through this initiative the DOJ aimed to interview more than 5,000 men between the ages of eighteen and thirty-three who entered the country on nonimmigrant visas and were from

42. See, e.g., Volpp, *supra* note 15, at 1577-78 n.8.

43. Dan Eggen & Susan Schmidt, *Count of Released Detainees is Hard to Pin Down*, WASH. POST, Nov. 6, 2001, at A10.

44. The Office of the Inspector General Report issued in June 2003 confirms that virtually all of the 9/11 detainees are Middle Eastern and/or from "Muslim" countries. U.S. DEP'T OF JUSTICE, OFFICE OF THE INSPECTOR GEN., *THE SEPTEMBER 11 DETAINEES: A REVIEW OF THE TREATMENT OF ALIENS HELD ON IMMIGRATION CHARGES IN CONNECTION WITH THE INVESTIGATION OF THE SEPTEMBER 11 ATTACKS 21-22* (2003), available at <http://www.usdoj.gov/oig/special/0306/full.pdf> (last visited June 15, 2004) [hereinafter *OIG REPORT*]. If immigration status alone triggered increased scrutiny in the 9/11 investigation, a distinctly different set of immigrants would have been investigated and detained. If all undocumented immigrants were targeted, most detainees would be Mexican nationals, since the most recent estimates of the undocumented population in the United States indicate that the majority of undocumented immigrants are Mexican. Jeffrey Passel, *New Estimates of the Undocumented Population in the United States*, MIGRATION POLICY INSTITUTE (May 22, 2002) at <http://migrationinformation.org/USfocus/display.cfm?ID=19>. Undocumented immigrants from Latin America account for over three-quarters of the U.S. undocumented population. *Id.* In 2000, Mexicans alone comprised over 55%, or 4.7 million, of the estimated 8.5 million undocumented immigrants residing in the United States. *Id.* The rest of Latin America accounts for 22% or fewer than 2 million undocumented immigrants. *Id.*

45. See Anastasia Hendrix, *Fear Keeps Immigrants in Hiding: After 9/11, Many Live Underground Rather Than Register*, S.F. CHRON., Aug. 3, 2003, at A25.

46. *FBI: We Won't Spy on Mosques*, GRAND RAPIDS PRESS, June 6, 2002, at A3.

47. U.S. Attorney General John Ashcroft, Update on Justice Actions Against Terrorism, Press Conference at the U.S. Attorney's Office for the Eastern District of Virginia, Alexandria (Mar. 20, 2002).

countries with “al Qaeda presences.”⁴⁸ Later, the DOJ added another 3,000 men.⁴⁹ While the DOJ pledged that these interviews were informational only, many immigrants were placed in deportation proceedings as a result of technical immigration violations discovered in this process.⁵⁰ The deportation of voluntary interviewees belied the purported information-gathering aim of these interviews. These deportations also confirmed fears among immigrants and their advocates that the voluntary interview program was a veiled attempt to rid the nation of the members of certain groups that the administration considered likely terrorism suspects. Regardless of its true intent, the fact that the federal government asks a discrete group of legal immigrants to clear their names “voluntarily” indicates that the government presumes these group members to be suspect.

Third, in 2002 and 2003, the Attorney General used his statutory power under the Immigration and Nationality Act to create a series of “special registration” requirements for immigrants from “al Qaeda” nations who are not legal permanent residents.⁵¹ Special registration requires immigrants from certain nations to register as they arrive in the United States and that those already in the United States come forward for a “call-in” registration. Both groups are also subject to ongoing registration requirements.⁵² As of January 2003, 54,242 individuals had been registered through these new requirements.⁵³ Of this group, 30,828 were registered as they entered the United States, and 23,414 were called in to register at an

48. *Id.*

49. Haroon Siddiqui, *Ayatollah Ashcroft's Law*, TORONTO STAR, June 12, 2003, at A27.

50. *Id.*

51. Section 1303(a)(6) of the Immigration and Nationality Act of 1990 gives the Attorney General (and now the Secretary of the DHS) the power to prescribe special registration requirements for certain classes of temporary visitors or nonimmigrants. 8 U.S.C. § 1303(a)(6) (2004). This power has wartime origins. The first registration scheme was congressionally authorized in 1940 under the Alien Registration Act. Pub. L. No. 76-670, 54 Stat. 670 (1940) (incorporated into the INA in the 1952 Immigration and Nationality Act Pub. L. No. 82-414). The 1940 Act also included a version of the current INA § 1303, allowing the Attorney General to require special registration of certain nonimmigrants. 54 Stat. 670 (1940). The special registration authority has been employed with some regularity since 1940. It was used, for example, to require registration of Iraqi-born nonimmigrants in the United States during the first Gulf War. It was also used to register Iranian-born nonimmigrants during the 1980s. See ANDORRA BRUNO, DOMESTIC SOCIAL POLICY DIVISION, IMMIGRATION: ALIEN REGISTRATION 3 (2003).

52. Registration and Monitoring of Certain Nonimmigrants from Designated Countries, 67 Fed. Reg. 57,032 (Sept. 6, 2002); Registration of Certain Nonimmigrant Aliens from Designated Countries, 67 Fed. Reg. 67,766 (Nov. 6, 2002); Registration of Certain Nonimmigrant Aliens from Designated Countries, 67 Fed. Reg. 70,525 (Nov. 22, 2002); Registration of Certain Nonimmigrant Aliens from Designated Countries, 67 Fed. Reg. 77,641 (Dec. 18, 2002); Registration of Certain Nonimmigrant Aliens from Designated Countries, 68 Fed. Reg. 2363 (Jan. 16, 2003).

53. Patrick J. McDonnell, *More Than 24,000 Foreign Men Register in U.S.: More Than 10% Face Possible Deportation, Federal Officials Say About 1,170 Have Been Arrested*, L.A. TIMES, Jan. 19, 2003, at A22; Elaine Silvestrini, *Middle Easterns View the INS Visa Rule as Catch-22*, TAMPA TRIB., Feb. 5, 2003, available at 2003 WL 4582742.

INS (later a DHS) office after they had entered.⁵⁴ Most of those subject to registration were Middle Eastern and South Asian men.⁵⁵ Again, although the registration was proffered as a means of tracking the entry and timely exit of those temporarily present in the United States, one quarter (13,434) of those who registered face deportation as a result of technical immigration violations, such as failure to maintain an adequate number of college units on a student visa.⁵⁶

54. McDonnell, *supra* note 53; Silvestrini, *supra* note 53. The special registration should be thought of as two separate registrations: one occurs at the port of entry (POE) for new entrants to the United States; the other requires select nonimmigrants already inside the United States to register at INS (now DHS) offices. The precise group of nonimmigrants covered by the POE registration is unknown. The regulations for the call-in registration of nonimmigrants already in the United States more clearly define who is subject to this registration. 67 Fed. Reg. 67,765. See Table 1 *infra* p. 16 for details on both POE and call-in registration.

55. See Table 1 *infra* p. 16 (outlining the nonimmigrant groups subject to these registration requirements).

56. Hendrix, *supra* note 45. Ironically, immigrants subject to special registration who willfully fail to register cannot be removed on this basis alone. See Immigration and Nationality Act of 1990, 8 U.S.C. § 1306(a)-(d) (2004) (setting out the penalties for violations of the registration statutory scheme). Compare § 1306(a), and § 1306(d) (sanctioning willful failure to register and counterfeiting an alien registration receipt card with a fine and/or imprisonment, but not with removal), with § 1306(b), and § 1306(c) (sanctioning failure to provide address information and making fraudulent statements in connection with registration with a fine, imprisonment, and removal). This allows for the perverse result that one-quarter of the nonimmigrants who came forward to cooperate with registration and provide the information the government wanted on their whereabouts are facing removal, but those who provided no information cannot be removed.

PORT OF ENTRY REGISTRATION	CALL-IN REGISTRATION
<p>Officially, all nonimmigrants from the following countries must register:⁵⁷</p> <ul style="list-style-type: none"> • Iran • Iraq • Libya • Sudan • Syria <p>But also, all immigrants determined to merit “national security” or “law enforcement” monitoring must register.⁵⁸</p> <p>A leaked memo states that men 16-45 years old from the following countries must register:⁵⁹</p> <ul style="list-style-type: none"> • Pakistan • Saudi Arabia • Yemen <p>The memo also states that men with “unexplained trips” to the following countries must register:</p> <ul style="list-style-type: none"> • Iran • Iraq • Saudi Arabia • 9 undisclosed countries • Sudan • Syria 	<p>Men 16 years old and above from the following countries must register:⁶⁰</p> <ul style="list-style-type: none"> • Afghanistan • Algeria • Bahrain • Bangladesh • Egypt • Eritrea • Indonesia • Iran • Iraq • Jordan • Kuwait • Lebanon • Libya • Morocco • North Korea • Pakistan • Oman • Qatar • Saudi Arabia • Somalia • Sudan • Syria • Tunisia • United Arab Emirates • Yemen

TABLE 1: Nonimmigrants Subject to Special Registration

Fourth, on the eve of war in Iraq, the administration used immigration-plus profiling to target yet another group of

57. Registration and Monitoring of Certain Nonimmigrants from Designated Countries, 67 Fed. Reg. 57,032 (Sept. 6, 2002).

58. Registration and Monitoring of Certain Nonimmigrants from Designated Countries, 67 Fed. Reg. 52,584 (8 C.F.R. pt. 214 & 264) (Aug. 12, 2002). Reports of the imposition of this requirement show that it is being implemented primarily on racial/ethnic grounds. As a result, most Middle Eastern and South Asian men are being required to register at entry. Margaret D. Stock, *Two Years of Policy Revamping: In the Wake of Sept. 11, 2001, the Federal Government Reorganized the Work of the INS, with Mixed Results*, 26 NAT'L L.J. 19 (2003).

59. BRUNO, *supra* note 51, at 5-6.

60. Men from Iran, Iraq, Libya, Sudan, and Syria are subject to call-in registration only if they were last admitted to the United States on or before September 10, 2002. Registration of Certain Nonimmigrant Aliens from Designated Countries, 67 Fed. Reg. 67,765 (Nov. 6, 2002). Nonimmigrants from the following countries are subject to call-in registration if they were last admitted to the United States on or before September 30, 2002: Afghanistan, Algeria, Bahrain, Eritrea, Lebanon, Morocco, North Korea, Oman, Qatar, Somalia, Tunisia, United Arab Emirates, and Yemen. Registration of Certain Nonimmigrant Aliens from Designated Countries, 67 Fed. Reg. 70,525 (Nov. 22, 2002); Registration of Certain Nonimmigrant Aliens from Designated Countries, 67 Fed. Reg. 77,641 (Dec. 18, 2002); Registration of Certain Nonimmigrant Aliens from Designated Countries, 68 Fed. Reg. 2363 (Jan. 16, 2003). Male nonimmigrants age sixteen years or older from Pakistan and Saudi Arabia are subject to this registration only if they entered the country on or before September 30, 2002 and intend to stay beyond February 21, 2003. 67 Fed. Reg. 77,641. Similarly, men sixteen years or older from Bangladesh, Egypt, Indonesia, Jordan, and Kuwait must register only if they entered the United States on or before September 30, 2002, and intend to remain beyond March 28, 2003. 68 Fed. Reg. 2363.

noncitizens: asylum seekers.⁶¹ By focusing on asylum seekers, this policy markedly expanded immigration-plus profiling to encompass one of the most-protected groups under U.S. immigrant policy.⁶² The new policy, Operation Liberty Shield, mandates that asylum seekers fleeing persecution in one of thirty-four “al Qaeda” nations may be immediately detained while their claims are adjudicated.⁶³ Previously, even asylum seekers lacking legal immigration status were not routinely detained during the initial stages of application processing.⁶⁴ The policy immediately came under fire for, among other reasons, the irony that it would require even those fleeing the torture chambers of Iraq to be detained.⁶⁵ To justify the policy, the DHS called it a “reasonable and prudent temporary action” in the buildup to war.⁶⁶ DHS Secretary Tom Ridge also said:

We want to make absolutely certain during this period of time you are who you say you are [We will] be looking, obviously scrutinizing all asylum seekers at this time, but there are countries that we believe are supportive of Al Qaeda or countries where we know there is an Al Qaeda network or other terrorist organizations.⁶⁷

There is, of course, a distinction between scrutiny and detention, and that distinction is being made in a discriminatory fashion. Operation Liberty Shield makes clear that no immigrant group, even those traditionally protected by U.S. immigrant policy, is immune from suspicion if it is associated, even unfairly, with al Qaeda.

The final and most troubling application of immigration-plus profiling is its use to deport a select group of undocumented immigrants under the “Absconder Apprehension Initiative.”⁶⁸ The DOJ claims that it developed this initiative to address the problem of immigrants remaining in the

61. This new program, Operation Liberty Shield, was announced on March 18, 2003. See Jeanne Meserve, *Ridge to Outline Enhanced Security Plan*, CNN.COM, at <http://www.cnn.com/2003/US/03/18/terror.alert/> (June 15, 2004).

62. See Immigration and Nationality Act, 8 U.S.C. § 1158 (2004) (outlining asylum procedures); 8 C.F.R. § 208.5 (2004) (discussing “[s]pecial duties towards aliens in custody of the Service”).

63. See Press Kit, U.S. Dep’t of Homeland Security, Operation Liberty Shield (Mar. 17, 2003), available at <http://www.dhs.gov/dhspublic/display?content=520>.

64. Previously, asylum seekers were detained pending adjudication of their claim only if there was an individualized showing that the particular asylum seeker was a threat to national security or likely to be a flight risk. Marty Logan, *Rights—U.S.: Seeking Asylum Risky After 9/11—Report*, Inter Press Service, Jan 16, 2004, available at 2004 WL 59282282.

65. See, e.g., Philip Shenon, *Threats and Responses: Immigration; New Asylum Policy Comes Under Fire*, N.Y. TIMES, Mar. 18, 2003, at A22.

66. Meserve, *supra* note 61.

67. Shenon, *supra* note 65.

68. See Memorandum from the Deputy Attorney General, U.S. Dep’t of Justice, to Commissioner, Immigration and Naturalization Service, et al., on Guidance for Absconder Apprehension Initiative (Jan. 25, 2002), available at <http://news.findlaw.com/hdocs/docs/doj/abscondr012502mem.pdf> [hereinafter Absconder Guidance].

country after their final deportation orders have been issued.⁶⁹ A closer evaluation of the policy shows that immigration status alone does not trigger government attention. Instead, the government is selectively enforcing immigration law based on national origin and presumed religion. The DOJ admits that the overwhelming majority of the estimated 314,000 immigrants in the United States with final orders of deportation are “Latin American,”⁷⁰ while less than 2% (6,000 immigrants) are from “Muslim” nations.⁷¹ Yet immigrants from the “Muslim” nations are the focus of the initiative because, according to the DOJ, they hail from countries where there has been an al Qaeda presence.⁷² This prioritization contradicts the DOJ’s stated motive of addressing the problem of immigrants remaining in the country after receiving final orders of deportation, for such a policy, neutrally applied, would lead to mass deportations of a distinctly different set of immigrants. The DOJ’s declaration of the need for the Absconder Apprehension Initiative also clearly highlights both the presumptive suspicion facing immigrants from al Qaeda-designated nations and the ways U.S. terrorism policy is driving immigration policy. The DOJ proclaimed:

As we have previously stated, the Justice Department’s highest priority in the aftermath of September 11 is to prevent terrorists from killing more innocent Americans. As part of that mission, the Justice Department has begun a proactive initiative to locate and apprehend 314,000 absconders who have violated U.S. immigration laws, been ordered deported, and are criminal fugitives from deportation.⁷³

These two sentences make immigration violations proxies for terrorist activities—though they do not substantiate the link with any facts. Ignoring both the overinclusiveness (not all immigrants from al Qaeda nations are terrorists) and the underinclusiveness (some terrorists are not immigrants and others are not from al Qaeda nations) of this approach, the government justifies the use of immigration-plus profiling by pointing to its purported advancement of the 9/11 investigation.⁷⁴

69. *Id.* at 1.

70. *Id.*; Dan Eggen, *Deportee Sweep Will Start With Mideast Focus*, WASH. POST, Feb. 8, 2002, at A1.

71. See Susan Sachs, *A Nation Challenged: Deportations; U.S. Begins Crackdown on Muslims Who Defy Orders to Leave Country*, N.Y. TIMES, Apr. 2, 2002, at A13.

72. Absconder Guidance, *supra* note 68, at 1.

73. Press Release, Dep’t of Justice (Feb. 8, 2002), available at http://www.usdoj.gov/opa/pr/2002/February/02_ag_066.htm.

74. This is not to say that terrorists, including the 9/11 hijackers, have not relied on immigration visas to enter the United States and carry out their terrorist attacks. Indeed, all 19 of the 9/11 hijackers entered the United States on legal visas and four of them had overstayed their visas. Nicholas Kravec, *America’s Other Army: Inside the Foreign Service*, WASH. TIMES, Mar. 29, 2004, at A1.

These policies—profile-driven arrests, voluntary interviews, special registration, Operation Liberty Shield, and the Absconder Apprehension Initiative—illustrate the government's systematic use of immigration-plus profiling to single out certain immigrants for intensive scrutiny, detention, and deportation. Further, no immigrant who is targeted by immigration-plus profiling, regardless of immigration status, is immune from suspicion of being a terrorist. As a result, these policies legitimize a damaging presumptive suspicion against Middle Easterners, South Asians, and Muslims living in the United States. Even assuming *arguendo* that immigration-plus profiling serves as an acceptable proxy for terrorist danger, the fact that nationality and religion are often visually attributed to individuals—but that immigration status cannot be deciphered on sight alone—means that the actual proxy being used is a much cruder, racially based assessment.⁷⁵ Moreover, even if government officials had perfect information and applied these new directives only against immigrants from certain nations, the use of immigration status and national origin appears to be a proxy for a form of government ethnic and religious discrimination. Although the federal government may discriminate on the basis of ethnicity or religion under its plenary power over immigration, such action would likely be politically unpopular. Stripped of formality, the current government policies discriminate on these bases, they simply do so under the more acceptable-seeming basis of national origin specificity.

When questioned about the impact of the DOJ's 9/11 policies on immigrants, Attorney General John Ashcroft warned:

To those who pit Americans against immigrants and citizens against non-citizens, to those who scare peace-loving people with phantoms of lost liberty, my message is this: Your tactics only aid terrorists, for they erode our national unity and diminish our resolve. They give ammunition to America's enemies and pause to America's friends.⁷⁶

Such political language in combination with the post-9/11 policies' clear message of suspicion for Middle Eastern and South Asian immigrants will likely revive old stereotypes about the perpetual foreignness of Asian

75. The hate crimes against Sikh Americans following 9/11, for example, underscore the impossibility of attributing race, ethnicity, or religion to individuals based on visual observations. Muneer Ahmad, *A Rage Shared by Law: Post September 11 Racial Violence As Crimes of Passion*, 92 CALIF. L. REV. (forthcoming Oct. 2004).

76. *Dep't of Justice Oversight: Preserving Our Freedoms While Defending Against Terrorism: Hearings Before the Comm. on the Judiciary, U.S. Senate*, 107th Cong. 309, 313 (2001) (statement of John Ashcroft, Attorney General of the United States). Of course, immigrant advocates have pointed out that Ashcroft's divisive rhetoric and policy of suspicion for certain immigrants pits immigrants against citizens and undermines the terrorism investigation by making members of these immigrant groups, who might be able to help in the investigation, too fearful to come forward. See Cole, *Enemy Aliens* at 958, 1003.

immigrants, resulting in these immigrants' disenfranchisement from U.S. society.⁷⁷

III

THE EROSION OF CIVIL LIBERTIES AND IMMIGRANTS' RIGHTS SINCE 9/11

Immigration-plus profiling and other restrictions on the rights of immigrants undercut equal protection principles by selectively enforcing immigration laws based on national origin and religion. These tactics also erode the traditional requirement of individual culpability in our criminal laws and, instead, promote guilt by association. In this manner, these strategies violate the core due process protections. Civil liberties have been diminished in two other substantial ways. First, the government's use of secrecy in its post-9/11 activities has curtailed the press's and the public's statutory and constitutional rights to information. Second, the government's 9/11 detentions have violated individuals' (usually immigrants') substantive due process rights by depriving them of physical liberty without adequate process.

Before turning to the courts' acquiescence in these retreats from civil liberties and the resulting impact on immigration policy, this Part maps how the executive branch and Congress have violated general civil liberties and particularly cut back immigrant's rights. While the widespread erosion of civil liberties across many areas is deeply troublesome in itself, their erosion without a showing of necessity raises additional concerns. We must also question whether the government's targeting of a discrete class, immigrants primarily from Middle Eastern and South Asian nations, has insulated these rights violations from popular challenge.

A. Encroachment on the Public's Right to Information

Throughout its 9/11 investigation, the administration has employed several tactics to shield its strategies from public scrutiny. Some of these methods have greatly curtailed the public's traditional rights to information. Aside from reigning in the public's informational rights, the government's secrecy has other significant consequences, as this section will discuss. Just ten days after 9/11, Chief Immigration Judge Michael Creppy ordered deportation proceedings closed to the public and press in all "special interest" cases.⁷⁸ Creppy's directive even barred confirmation of whether a case against an immigrant was "on the docket or scheduled for a hearing," depriving relatives and reporters alike of almost all

77. See Volpp, *supra* note 15, 1586-91 (2002) (discussing the perception of Asian Americans and Asian immigrants as perpetually foreign).

78. See *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 683-84 (6th Cir. 2002) (citing the Creppy Directive closing the immigration courts to the public in "special interest" cases).

information about a case.⁷⁹ Though the directive gave no definition of “special interest,” the government later asserted that all those detained on immigration violations in the 9/11 investigation were considered “special interest.”⁸⁰ Nearly three years after 9/11, little information on the government’s investigation has been made public. This unprecedented closure of immigration courts denies the press and public any ability to scrutinize the legitimacy of these detentions and removals. The prevailing secrecy short circuits informed evaluations of governmental actions in the 9/11 investigations.

The virtual information blackout hinders legal challenges to the government’s tactics. The strongest case against the government’s 9/11 strategies would not simply question the means employed, but would forcefully argue that the means are not justified by the results achieved. After all, courts have often upheld intrusions on civil liberties in the name of national security.⁸¹ However, the government’s total refusal to release information on the 9/11 investigations makes it difficult to disprove announcements of progress in the “war on terrorism” and reduces all challenges to abstract questions based solely on the rights at stake, not on the government’s need to curtail them.

The government’s refusal to release information also reduces public awareness of and concern about the erosion of civil liberties. Given the government’s tight control over basic information, civil libertarians have a hard time even documenting the severity of the encroachment on specific rights. Those questioning the government’s actions lack basic facts: the numbers of individuals detained, the duration of the detentions, or the reasons for them. The public is, therefore, left without a way of evaluating whether the government is actually trading civil liberties for increased national security or simply reducing civil liberties. Although the refusal to release the names of the detainees, in particular, originally drew harsh criticism from the media and lawmakers,⁸² widespread acquiescence has replaced skepticism.

Finally, the government’s secrecy has produced an uncertain picture of the current scope of the 9/11 investigations—one made up only of what

79. *Id.* at 684 (quoting the Creppy Directive).

80. Brief for Appellees at 15 n.1, *N. Jersey Media Group, Inc.* (No. 02-2524), available at 2002 WL 32103549.

81. See generally WILLIAM H. REHNQUIST, *ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME* (1998) (providing a historical look at the way that courts have decided civil liberty questions during wartime).

82. See, e.g., 147 CONG. REC. S13923 (daily ed. Dec. 20, 2001) (statement of Senator Feingold) (referencing a letter to Attorney General John Ashcroft from Senators Patrick J. Leahy, Russell D. Feingold, Edward M. Kennedy and Representatives John Conyers, Jr., Jerrold Nadler, Sheila Jackson Lee, and Robert C. Scott with a request for “information about the detention of over 1,100 individuals in connection with the investigation of the September 11 attacks”); *Disappearing in America*, N.Y. TIMES, Nov. 10, 2001, at A22; *Why Not Disclose?* WASH. POST, Oct. 31, 2001, at A26.

the government has chosen to disclose. The government did admit to holding three categories of detainees in connection with the 9/11 investigation: (1) those lacking proper immigration documentation; (2) criminal suspects; and (3) material witnesses the government believes have information that could be useful in trials, even though they are not themselves suspects.⁸³ On November 5, 2001, DOJ officials provided some hard numbers: at least 1,182 individuals had been detained.⁸⁴ DOJ officials added that, as of that date, they would no longer provide a running count of detainees but rather only disclose a total of those charged with federal crimes or immigration violations.⁸⁵ Of course, this denies precisely the information that could be useful in proving illegitimate detentions—or those that fail to result in charges despite the governmental deprivation of physical liberty.

In response to the DOJ's refusal to provide any information on the identities of those held or the reasons for their detention, several groups filed Freedom of Information Act (FOIA) requests based on concerns that the secrecy of these detentions obscured rampant racial, ethnic, and religious profiling.⁸⁶ The government initially denied these requests, claiming national security and law enforcement exemptions to the FOIA's disclosure requirements.⁸⁷ More than two and a half years have passed since the government released a count of those detained in its 9/11 investigation. Even if the number of detainees has stayed the same, the government's refusal to release information has infringed upon the public's statutory and constitutional rights to information and frustrates the public's ability to ensure that those imprisoned are not subject to unlawful physical liberty deprivations.⁸⁸

Table 2 summarizes what we know about the detainees held in the first seven months of the 9/11 investigation. The U.S. government has

83. *See* *Ctr. for Nat'l Sec. Studies v. United States Dep't of Justice*, 215 F. Supp. 2d 94, 98 (D.D.C. 2002), *aff'd in part, rev'd in part*, 331 F.3d 918 (D.C. Cir. 2003), *cert. denied*, 124 S. Ct. 1041 (2004). The government has also admitted to holding approximately 600 individuals as "enemy combatants" in connection with its 9/11 investigation in Guantánamo Bay and three more on naval brigs in U.S. waters. COLE, *supra* note 15, at 39-46. The Bush administration has claimed that its authority to hold enemy combatants is derived from the President's war powers under Article II of the Constitution. *See, e.g.*, Padilla, 352 F.3d at 699, 710-11 (discussing government's claim to detain enemy combatants under the President's power as Commander-in-Chief); *see also* U.S. CONST. art. II, § 2, cl. 1.

84. Reports that the number of detainees had climbed above 1,000 came within almost one month of the 9/11 attacks. *See* Neil A. Lewis, *Detentions After Attacks Pass 1,000*, U.S. SAYS, N.Y. TIMES, Oct. 30, 2001, at B1.

85. *Ctr. for Nat'l Sec. Studies*, 215 F. Supp. 2d at 94, 98-99, 100.

86. Rebecca Carr, *Lawsuit Asks U.S. to Reveal Identities of 553 Detainees*, PALM BEACH POST, Dec. 6, 2001, at A1.

87. *Ctr. for Nat'l Sec. Studies*, 215 F. Supp. 2d at 100-01; *see also infra* notes 154-56 and accompanying text discussing these exemptions.

88. *See infra* notes 136-46 and accompanying text for a discussion of the First Amendment challenges to the closure of immigration courts to the public.

imprisoned at least 1,785 individuals in connection with the 9/11 attacks. When the government discusses the 9/11 detainees, they focus only on the 1,182 individuals they reportedly detained on immigration violations, criminal charges, or as material witnesses. To provide a more complete picture of those in indefinite government custody as a part of the 9/11 investigation, I have also counted the three enemy combatants the government acknowledges holding on naval brigs in U.S. waters and approximately 600 more enemy combatants held at the U.S. military base on Guantánamo Bay, Cuba.⁸⁹

Whether or not enemy combatants are counted in the total, the majority of the 9/11 detainees are immigrants. The government acknowledges imprisoning 751 noncitizens on immigration charges, accounting for 63% of the detainees if the enemy combatants are not counted and 42% if they are counted.⁹⁰ These figures underestimate the total numbers and percentages of immigrant detainees, as it is likely that many of those being held on criminal charges or as material witnesses are also noncitizens. In contrast, a maximum of 11% of those detained (129 individuals) are held under federal criminal statutes. Finally, it appears that over one-quarter (26%) of the detainees may have been held as material witnesses (302 individuals).⁹¹

The importance of these percentages should not be missed: the fewest 9/11 detainees were held under criminal laws, which would have afforded them the most protection. Most detainees were held under immigration laws, which are civil in nature and provide less protection, though immigration detainees are routinely held in local prisons.⁹² In addition, a large percentage of the detainees are enemy combatants who, at best, enjoy only the drastically reduced protections of military law.⁹³

89. Nancy San Martin, *U.S. Military Opens Doors, Sheds Light on Cuba Camp*, MIAMI HERALD, Apr. 12, 2004, at A1.

90. *Ctr. for Nat'l Sec. Studies*, 215 F. Supp. 2d at 98-99 & n.7. These figures are based on data provided by the government in the *Ctr. for Nat'l Sec. Studies* litigation.

91. To reach these figures, some assumptions are necessary, because the government has never released a count of the number of individuals being detained as material witnesses. This information can be easily deduced, since the government has stipulated that individuals are being held in connection with the 9/11 investigations in only three ways and has provided counts of individuals held under each category except those held as material witnesses. On May 31, 2002, the government reported that 751 individuals had been detained on immigration violations and 129 individuals on criminal charges in the course of the investigation. *Id.* at 98. This data accounts for only 880 detainees, yet five months earlier the government reported that 1,182 individuals were being held. *Id.* at 99 n.7. At least 302 detainees are unaccounted for. According to the government's own assertions, these detainees must be material witnesses. Alternatively, it is possible that some of these individuals are being held on state and local charges, but the government has not conceded that this is a manner in which detainees have been held.

92. See, e.g., THOMAS ALEXANDER ALEINIKOFF ET AL., IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 882 (4th ed. 1998).

93. See COLE, *supra* note 15, at 4.

REASON FOR DETENTION	NUMBER OF DETAINEES	% OF DETAINEES EXCLUDING THOSE IN CUBA	% OF DETAINEES INCLUDING THOSE IN CUBA
Immigration Violations	751	63%	42%
Criminal Charges	129	11%	7%
Material Witnesses	302	26%	17%
Enemy Combatants	3 (held on U.S. waters) 600 (held in Cuba)	<1%	34%
Total	1,185 (1,785 including those in Cuba)	100% (1,185)	100% (1,785)

Table 2: 9/11 Detainees by Reason for their Detention⁹⁴

B. PHYSICAL LIBERTY VIOLATIONS

Despite the government's refusal to disclose details on who it was detaining and why during the 9/11 investigation, evidence of large numbers of detainees—mainly Middle Eastern and South Asian men—came to light quickly as reports of immigration raids on local mosques and businesses owned by Arab Americans and Asian Americans poured in from across the nation.⁹⁵ In addition, Attorney General Ashcroft conceded that a key investigative strategy was to scrutinize immigrants from certain nations who lacked proper documentation. Ashcroft's own descriptions of the preventative incarceration of at least 1,182 people led to the use of the term "preventative detention" to describe these actions.⁹⁶ The term hints at one

94. For the sake of coming up with an overall picture, no matter how speculative, of the total detained population, I have assumed that no additional individuals were detained between November 5, 2001 (when the government last provided a count of detainees) and May 31, 2002 (when the government provided data on the numbers of individuals detained based on criminal and immigration charges). Even if these assumptions were accurate at the time, we still do not know how many more individuals have been detained since May 31, 2002, over two years ago.

95. See Volpp, *supra* note 15, at 1577-78 n.8.

96. The minimum total of 9/11 detainees in Table 2, above, is three persons higher (at 1,185) than the government's 1,182 figure because the total includes the three individuals held as enemy combatants on U.S. naval brigs. In announcing the detention of over 1,000 individuals in the 9/11 investigation, Attorney General Ashcroft stated that, "[t]aking suspected terrorists in violation of the law off the streets and keeping them locked up is our clear strategy to prevent terrorism within our borders." Attorney General John Ashcroft, Prepared Remarks for the U.S. Mayors Conference (Oct. 25, 2001), available at http://www.usdoj.gov/ag/speeches/2001/agcrisisremarks10_25.htm. In the same speech, the Attorney General promised that he would arrest and detain "terrorists" who stayed beyond their visas "even by one day." Ashcroft likened this strategy to the one employed by Attorney General

problem inherent in the government's 9/11 detention campaign: the exploitation of nonterrorism-related federal laws to imprison a group of individuals the government has deemed high-risk for terrorism on the basis of violations unrelated to terrorist activities. In addition, the government has violated civil liberties by imprisoning individuals beyond the statutory grounds for their detention and by failing to provide procedural safeguards for those imprisoned.

The rights of 9/11 detainees depend on the basis for their detention. Criminal detainees have the strongest protection against arbitrary detention. The Supreme Court has interpreted the Fourth Amendment as protecting criminal suspects from prolonged detention in the absence of a showing of probable cause that they have been involved in criminal activity.⁹⁷ Specifically, a judicial determination of probable cause must be made within forty-eight hours to justify continued detention of criminal suspects.⁹⁸ By contrast, those jailed for potential immigration violations can be held for up to seven days before criminal charges are filed or removal proceedings based on an immigration violation are initiated.⁹⁹ The incentive for federal investigators is clear: if they pick up an immigrant and hold her under immigration authority, they have seven days to gather evidence of an immigration violation and initiate removal proceedings. Once removal proceedings are initiated, the government can move to detain the immigrant pending a resolution. This provides ample time to build a terrorism case, if there is one. The more limited procedural protections provided to suspected immigration violators have helped the new terrorism policy inappropriately co-opt immigration law to pursue criminal investigations of Muslim men from certain nations. The routine use of detention for any immigration violation is also a marked departure from pre-9/11 policy, under which the vast majority of those suspected of violating immigration laws were released on bond pending adjudication.¹⁰⁰ Were it not for this new near-mandatory detention for any suspected immigration infraction, the numbers of immigrant detainees would be much smaller.

Based on the available evidence, the 9/11 immigration detentions look more like the indefinite holding of certain immigrants than the enforcement

Robert Kennedy in the fight against organized crime when Kennedy promised to arrest mobsters for "spitting on the sidewalk." *Id.*; see *supra* notes 83-94 and accompanying text for discussion of the numbers and categories of detainees in the 9/11 investigation.

97. See, e.g., *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991); *Gerstein v. Pugh*, 420 U.S. 103 (1975).

98. *McLaughlin*, 500 U.S. at 44, 56 (holding that the Fourth Amendment requires at a minimum a probable cause hearing within forty-eight hours of a suspect's detention).

99. 8 C.F.R. § 287.3(d) (2001); see also Shirley Huey et al., Administrative Comment, *Indefinite Detention Without Probable Cause: A Comment on INS Interim Rule 8 C.F.R. § 287.3*, 26 N.Y.U. REV. L. & SOC. CHANGE 397, 405 (2001).

100. See, e.g., ALEINIKOFF, *supra* note 92, at 880-87.

of immigration laws. Although Congress's primary legislative response to 9/11 has been criticized for enabling widespread preventive detention of immigrants, it also incorporated a few basic procedural safeguards. The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT Act), for example, maintains the requirement that noncitizens detained under the Act have immigration proceedings initiated against them or be criminally charged within seven days of their detention.¹⁰¹ If the government fails to meet these requirements, the Act mandates release of the detained immigrant.¹⁰² Despite this statutory protection, immigrants have routinely been held beyond the seven-day deadline.¹⁰³ As early as mid-October 2001, some immigrants had already been held for a month without the initiation of either criminal charges or immigration proceedings.¹⁰⁴ This manifestly illegal practice persisted at least until August 2002.¹⁰⁵

Moreover, even when immigration proceedings went forward and detained immigrants accepted voluntary departure from the United States instead of contesting their removal in further proceedings or when final orders of removal were issued, immigrants initially detained in the 9/11 investigation were systematically denied release on grounds that the Federal Bureau of Investigation (FBI) first had to affirmatively clear them.¹⁰⁶ Despite the lack of any legal basis or common-sense reason for holding them, these immigrants remained in federal custody. In June 2003, the DOJ's own internal investigator, the Office of the Inspector General (OIG), issued a report on the conditions faced by the 9/11 detainees and

101. USA PATRIOT Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (codified in scattered sections of 8 U.S.C.); see 8 U.S.C. § 1226a(a)(5) (2004) (establishing timelines for the initiation of immigration proceedings or the filing of criminal charges). Though the Act requires the filing of criminal charges or commencement of immigration proceedings within forty-eight hours, another regulation promulgated before the passage of the Act allows noncitizens to be detained for "any reasonable period of time" in an emergency. 66 Fed. Reg. 48,334 (Sept. 20, 2001) (amending 8 C.F.R. §287.3(d)). Clearly, the 9/11 investigation has been deemed such an "emergency." In addition, the USA PATRIOT Act gives the Attorney General an expanded authority to detain noncitizens because it allows him to detain any noncitizen whom he has "reasonable grounds to believe" falls under the antiterrorism provisions of the immigration law indefinitely. 8 U.S.C. § 1226a(a)(3). The USA PATRIOT Act simultaneously maintains a narrow definition of terrorism with regard to citizens while it expands the definition of terrorism for immigration purposes. Compare 18 U.S.C. § 2331(5) (setting out a definition for "domestic terrorism"), with 8 U.S.C. § 1182(a)(3)(B)(iii)(V)(b) (creating a more expansive definition for "terrorist activity" for immigration purposes). David Cole has noted that this expansion of the definition of terrorist activities with regard to immigrants encompasses both "nonviolent humanitarian assistance to disfavored groups and garden-variety crimes, such as brandishing a kitchen knife in a domestic dispute, or threatening another person with a bottle in a barroom brawl." COLE, *supra* note 15, at 66.

102. 8 U.S.C. § 1226a(a)(5).

103. OIG REPORT, *supra* note 44, at 29-30 (reporting that 41% of the 9/11 immigrant detainees studied by the OIG were not charged within the required time periods).

104. See Judy Peres, *War on Terror: The Detained*, CHI. TRIB., Oct. 16, 2001, at 8.

105. OIG REPORT, *supra* note 44, at 29-30.

106. *Id.* at 91-110.

questioned, among other practices, the continued detention of immigrants beyond resolution of their removal.¹⁰⁷

Of those 9/11 detainees held in non-military custody, material witnesses may face the most indeterminate and unfounded detentions. Under the Bail Reform Act of 1984, the government may detain a material witness pending the resolution of the underlying criminal trial only if the witness's testimony is necessary in a criminal proceeding *and* the government makes an individualized showing that the detained witness is a flight risk or a threat to the community.¹⁰⁸ The number of material witnesses in federal custody remains unknown because the government has refused to release this information beyond the fact that individuals have been detained as material witnesses in the 9/11 investigation.¹⁰⁹ As explained earlier, as many as 302 individuals may have been detained as material witnesses in connection with the 9/11 investigation. These detentions have come under intense scrutiny.¹¹⁰ Broadly, the criticism is twofold. First, some argue that the government has manipulated the material witness provisions, like the immigration statutes, to hold those it suspects of terrorist activities but for whom it does not have the probable cause necessary to support a criminal detention.¹¹¹ Second, despite the government's admitted detention of material witnesses, there is no evidence to suggest that any of these witnesses are being held in relation to the few criminal cases arising from the 9/11 investigation.¹¹² The initial

107. *Id.*

108. 18 U.S.C. §§ 3141-3150 (2004).

109. *Ctr. for Nat'l Sec. Studies v. United States Dep't of Justice*, 215 F. Supp. 2d 94, 97, 106 (D.D.C. 2002), *aff'd in part, rev'd in part*, 331 F.3d 918 (D.C. Cir. 2003), *cert. denied*, 124 S. Ct. 1041 (2004) (ordering disclosure of names of material witnesses and noting that the "[g]overnment's treatment of material witness information is deeply troubling . . . [because] [t]he public has no idea whether there are 40, 400, or possibly more people in detention on material witness warrants").

110. *See, e.g.*, Peres, *supra* note 104, at 8; *see also* Interview by Matt Lauer, NBC News, with Steve Pomerantz, former Assistant FBI Director, and Alan Dershowitz, Harvard Law Professor (Oct. 16, 2001) (claiming that the material witness statute has been misused to hold potential suspects) *available at* 2001 WL 26428272.

111. The government must meet a lower standard to detain material witnesses than to detain criminal suspects. While the government must show probable cause that an individual committed a crime to detain criminal suspects, it must only show that the detained individuals have significant information related to criminal investigations and are a flight risk to imprison material witnesses. *See* Mark Hamblett, *Witnesses Challenge Detention*, N.Y. L.J., Sept. 18, 2001, at 1; Bill Miller, *U.S. Has Wide Leeway to Detain Material Witnesses*, WASH. POST, Sept. 22, 2001, at A21.

112. David Cole observes that since 9/11, the government has charged seventeen U.S. citizens and nine noncitizens with terrorism crimes allegedly related to al Qaeda. COLE, *supra* note 15, at 24. I would reduce this number to seventeen U.S. citizens and only seven noncitizens, making it even clearer that the majority of those charged with terrorism since 9/11 are citizens, not immigrants. I disagree with Cole's inclusion of Zacarias Moussaoui because he was actually detained before 9/11. I also would not include the two Yemeni citizens who were charged with plotting the attack on the U.S.S. Cole because this attack preceded 9/11. According to my assumptions, the citizens charged with terrorism crimes since 9/11 are: John Walker Lindh, James Ujaama, Enaam M. Arnaout, Ilyas Ali, the so-called Lackawanna Seven (accused of attending an al Qaeda training camp), and six citizens from Portland, Oregon (accused of supporting al Qaeda). *Id.* at 239 n.7. The noncitizens charged with terrorism crimes

material witness detentions, thus, seem to lack any statutory authority.¹¹³ Moreover, because there is no maximum holding time for material witnesses, the material witness detentions appear to be indefinite. The statute contemplates holding individuals as long as necessary to secure their appearance at trial. The current problem is that one signature aspect of the 9/11 investigation is the detention and interrogation of large numbers of individuals, but little movement toward criminal trials. This kind of open-ended investigation clearly violates the legislative intent of the material witness statute.

The treatment of 9/11 detainees while in government custody has also violated their civil liberties. These violations run the gamut from allegations of physical violence by government officials to knowing denials of statutorily or constitutionally compelled access to counsel. After 9/11, reports of egregious detention and interrogations trickled out almost immediately. Immigrants reported being forced to undergo hours of questioning without access to counsel, intentional violations of religious and dietary needs, moves in the middle of the night to detention facilities far away from their homes and communities, and unnecessary strip searches.¹¹⁴

Criminal defendants are entitled to have attorneys appointed to represent them if they cannot afford to hire their own counsel.¹¹⁵ Likewise, the federal material witness statute requires that those held as material witnesses be given counsel at government expense if they cannot afford their own attorney.¹¹⁶ Those facing immigration charges alone, however, have no right to government-funded counsel. Instead, immigrants have only the right to counsel they can afford.¹¹⁷ Although immigration

include: Richard Reid (the so-called shoe bomber), one of the Portland defendants (described above), and two Yemeni citizens (charged with raising money for al Qaeda).

113. See *infra* notes 178-86 and accompanying text for discussion of the material witness detention cases.

114. See, e.g., Plaintiff's Opposition to Motion to Dismiss, *Omar v. Casterline*, 288 F. Supp. 2d 775 (W.D. La. 2003) (No. CVO2-1933A) (detailing these allegations in a civil suit against law enforcement officials); see also Peres, *supra* note 104, at 8 (reporting that detainees were held without access to counsel); Matthew Brzezinski, *Hady Hassan Omar's Detention*, N.Y. TIMES, Oct. 27, 2002, § 6 (Magazine), at 50-55 (detailing the conditions of confinement faced by Omar, who was moved during the middle of the night to a detention center far from his wife and child, denied a religious diet, and repeatedly strip-searched despite being held in solitary confinement).

115. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."); see, e.g., *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972).

116. 18 U.S.C. §§ 3142, 3144 (2000 & Supp. 2004); see also *In re Class Action Application for Habeas Corpus on Behalf of All Material Witnesses in the W. Dist. of Tex.*, 612 F. Supp. 940, 948 (W.D. Tex. 1985) (holding that due process guarantees those detained as material witnesses the right to appointment of counsel).

117. Immigration and Nationality Act, 8 U.S.C. § 1229a(b)(4)(A) (2003).

regulations give detainees the right to a list of pro bono attorneys,¹¹⁸ in the weeks following 9/11, immigrants detained in New Jersey were not even given this list. Instead, they were given only the number for the New York Legal Aid office near the World Trade Center, an office closed because of damage sustained in the 9/11 attacks.¹¹⁹ Even before 9/11, immigrants were chronically unrepresented in immigration proceedings, especially for immigrants detained in remote locations.¹²⁰ This problem is particularly heightened for the politically unpopular and hard-to-access 9/11 detainees: fully 80% of these detainees were unrepresented in their removal proceedings.¹²¹ Such a lack of representation logically stacks the odds against immigrants in these proceedings.

Of course, a showing of effectiveness in finding terrorists would help rebut arguments against the government's 9/11 detention campaign. At least one measure of this efficacy would be criminal terrorism convictions. Despite the high number of detentions, however, there have been few criminal or even immigration charges associated with the investigation. In early December 2001, the Attorney General stated that half of those originally detained had been released and that 603 remained imprisoned.¹²² Almost none of those released were charged with any crime, and many were never given the reason for their arrest.¹²³ Of the 751 immigrants initially imprisoned for immigration violations in the 9/11 investigations, all but 74 had been released by June 13, 2002.¹²⁴ Even the DOJ

118. See 8 C.F.R. § 287.3(c) (requiring the provision of a list of available free legal services to each immigrant arrested under the INA); 8 C.F.R. § 241.14(g)(3)(i) (requiring the provision of a list of available free legal services to immigrants detained pending the adjudication of removal proceedings).

119. See also OIG REPORT, *supra* note 44, at 130-38, 172-78 (detailing violations of 9/11 immigrant detainees' right to counsel, including failure to provide pro bono counsel lists or the provision of inadequate lists to these detainees).

120. See, e.g. ALEINIKOFF *supra* note 92, at 832-33

121. HUMAN RIGHTS WATCH, PRESUMPTION OF GUILT: HUMAN RIGHTS ABUSES OF POST-SEPTEMBER 11 DETAINEES 43 (2002).

122. Note that these figures indicate that closer to 1,206 individuals had been detained in the 9/11 investigation by December 2001, instead of the 1,182 figure reported by the government. If only 1,182 individuals had been detained and 603 remained in government custody, this would mean 579 individuals had been released. But 579 detainees account for only 48.9% of the 1,182 detainees, instead of a full 50%. Although this difference may seem minor, it represents an extra twenty-four detainees. As physical liberty deprivations are the most aggressive form of government control over individuals, I am reluctant to assume this difference away.

123. The Sixth Amendment does not require the government to produce information on the probable cause used in an individual's arrest until the United States commits to prosecuting the detainee. Production of this information is not constitutionally compelled at the time of arrest, either. See *Kladis v. Brezek*, 823 F.2d 1014, 1018 (7th Cir. 1987); see also U.S. Const. amend VI (In all criminal prosecutions the accused shall enjoy the right, . . . to be informed of the nature and cause of the accusation); *Wong Tai v. United States*, 273 U.S. 77 (1927); *Lebetter v. United States*, 170 U.S. 606 (1898).

124. A significant number of these detainees (131) were deported to Pakistan under an arrangement with the Pakistani government. Of those returned, 110 had been convicted of immigration violations and 22 had credit card fraud, narcotics, robbery, or assault convictions. None, however, were linked to the terrorist attacks of September 11. *Ctr. for Nat'l Sec. Studies v. United States Dep't of*

acknowledged that many of these immigrants were “cleared of any wrongdoing.”¹²⁵ Similarly, of the 129 people detained on federal criminal charges, as of June 11, 2002, only 73 remained in federal custody.¹²⁶ Only one of these criminal detainees has been charged in connection with the 9/11 attacks—Zacarias Moussaoui.¹²⁷ Notably, Moussaoui was detained *before* September 11;¹²⁸ this makes it hard to argue that the preventive detention strategy initiated after the 9/11 attacks has exposed potential terrorists before they strike. For all categories of 9/11 detainees, the pattern is the same: prolonged detentions with few resulting criminal or immigration convictions.

At the core of the violations of physical liberty since 9/11 is the government’s failure to make individualized assessments of risk or suspicion and its reliance, instead, on overtly prophylactic rules, which have consistently failed to pass constitutional muster when applied to criminal proceedings. The question remains whether the government has a right to use such rules following 9/11 to achieve law enforcement goals, including the prevention of another terrorist attack. I argue that where such rules are based on inherently suspect categories, such as national origin and citizenship status, they are inappropriate without a showing of a compelling link between the suspect traits and terrorist activity. As the results of the government’s terrorism investigation to date show, the government has failed to make such a case. In addition, the use of immigration law, which is civil in nature, to achieve criminal law objectives disrupts the traditional balance in our criminal system, in which the increased potential penalties a criminal defendant faces are offset by greater requirements of procedural protections and a higher standard of proof.

IV

JUDICIAL RESPONSES TO THE ENCROACHMENT ON CIVIL LIBERTIES AND IMMIGRANTS’ RIGHTS

This Part explores judicial responses to the initial wave of litigation relating to the post-9/11 terrorism investigation, emphasizing how the judiciary has largely acquiesced in cutbacks in civil liberties, particularly those of immigrants. I focus attention on instances in which the judiciary failed to notice the potential ramifications of its decisions on the nation’s immigration and immigrant policy.

Justice, 215 F. Supp. 2d 94, 98 n.4 (D.D.C. 2002), *aff’d in part, rev’d in part*, 331 F.3d 918 (D.C. Cir. 2003), *cert. denied*, 124 S. Ct. 1041 (2004).

125. *Id.*

126. *Id.* at 98.

127. *Id.* at 98 n.6; see *United States v. Moussaoui*, 282 F. Supp. 2d 480 (E.D. Vir. 2003).

128. *Moussaoui*, 282 F. Supp. 2d at 480.

Given how the administration's post-9/11 actions have encroached on settled principles of constitutional law, it is perhaps surprising that more of these actions have not been challenged in federal court. This section describes the nine major 9/11 cases that implicate the rights of immigrants and the course of our nation's immigrant and immigration policy.¹²⁹ The cases fall into three primary categories: (1) cases challenging the secrecy of the government's terrorism investigation addressed in Part IV.A;¹³⁰ (2) lawsuits questioning the detentions that were a part of the 9/11 investigation discussed in Part IV.B;¹³¹ and (3) legal challenges to changes in the rights of immigrants already in the United States described in Part IV.C.¹³²

Only one of these lawsuits challenges congressional action following 9/11; the rest focus on the constitutionality of actions by the executive branch.¹³³ Yet only a few of these lawsuits question the President's actions either.¹³⁴ Nearly all the lawsuits review the legality of controversial decisions made by appointed, not elected, officials, who arguably lack the popular mandate to decide whose and what civil liberties should be sacrificed during a period of heightened national fears.¹³⁵

129. This does not, however, represent an exhaustive list of all the cases that have challenged legislative or executive actions following 9/11. Cases questioning actions that do not squarely implicate immigrants' rights have been excluded. For example, cases pertaining to the expansion of surveillance procedures following 9/11 in the Foreign Intelligence Surveillance Court (FISC) are excluded. *See, e.g., In re All Matters Submitted to the Foreign Intelligence Surveillance Court*, 218 F. Supp. 2d 611 (2002).

130. Cases falling under this heading include: *Ctr. for Nat'l Sec. Studies v. United States Dep't of Justice*, 215 F. Supp. 2d 94, 98 n.4 (D.D.C. 2002), *aff'd in part, rev'd in part*, 331 F.3d 918 (D.C. Cir. 2003), *cert. denied*, 124 S. Ct. 1041 (2004); *N. Jersey Media Group, Inc. v. Ashcroft*, 205 F. Supp. 2d 288 (D.N.J. 2002), *rev'd*, 308 F.3d 198 (3d Cir. 2002), *cert. denied*, 123 S. Ct. 2215 (2003); *Detroit Free Press v. Ashcroft*, 195 F. Supp. 2d 937 (E.D. Mich. 2002), *aff'd*, 303 F.3d 681 (6th Cir. 2002).

131. Cases falling under this heading include: *Omar v. Casterline*, 288 F. Supp. 2d 775 (W.D. La. 2003); *Hamdi v. Rumsfeld*, 243 F. Supp. 2d 527 (E.D. Va. 2002), *rev'd*, 316 F.3d 450 (4th Cir. 2003), *cert. granted*, 124 S. Ct. 981 (2004), *vacated and remanded*, *Hamdi v. Rumsfeld*, No. 03-6696, slip op. (June 28, 2004); *Padilla ex rel. Newman v. Bush*, 233 F. Supp. 2d 564, (S.D.N.Y. 2002), *aff'd on reh'g sub nom.*, *Padilla ex rel. Newman v. Rumsfeld*, 243 F. Supp. 2d 42 (S.D.N.Y. 2003), *rev'd in part sub nom. Padilla v. Rumsfeld*, 352 F.3d 695 (2d Cir. 2003), *cert. granted*, 124 S. Ct. 1353 (2004), *rev'd and remanded*, *Rumsfeld v. Padilla*, No. 03-1027, slip op. (U.S. June 28, 2004); *Rasul v. Bush*, 215 F. Supp. 2d 55 (D.D.C. 2002), *aff'd sub nom. Al Odah v. United States*, 321 F.3d 1134 (D.C. Cir. 2003), *cert. granted*, 124 S. Ct. 534 (2003), *rev'd and remanded*, *Rasul v. Bush*, No. 03-334, slip op. (U.S. June 28, 2004); *United States v. Awadallah*, 202 F. Supp. 2d 55 (S.D.N.Y. 2002), *rev'd*, 349 F.3d 42 (2d Cir. 2003).

132. The sole case in this area, currently, is *Gebin v. Mineta*, 239 F. Supp. 2d 967 (C.D. Cal. 2002), *vacated*, 328 F.3d 1211 (9th Cir. 2003).

133. *Gebin* challenges the constitutionality of the congressionally created citizenship requirement for airport screeners. *Id.*

134. *Hamdi*, *Padilla*, and *Rasul* all challenge the decision by the President to label certain detainees "enemy combatants." *Hamdi v. Rumsfeld*, 316 F.3d 450, 459 (4th Cir. 2003), *cert. granted*, 124 S. Ct. 981 (2004), *vacated and remanded*, *Hamdi v. Rumsfeld*, No. 03-6696, slip op. (June 28, 2004); *Padilla*, 233 F. Supp. 2d at 564; *Rasul*, 215 F. Supp. 2d at 55. Yet even in these cases, actions by appointed executive branch officials are centrally implicated in the legal controversies.

135. The closure of deportation proceedings to the public, the imposition of special registration procedures, the creation of the Absconder Apprehension Initiative, and the decision to detain asylum

A. Challenges to Government Secrecy in the Terrorism Investigation

As it moves forward with its 9/11 investigation, the executive branch, particularly the FBI and the DOJ, has systematically deprived the public of information. Two principal challenges to this secrecy policy have been lodged in federal courts. First, challenges to the blanket closure of deportation proceedings in “special interest” cases have created a contentious circuit split, which the Supreme Court’s denial of certiorari left unresolved.¹³⁶ Second, the categorical denial of requests for basic information about detainees prompted the Center for National Security Studies to file a FOIA claim.¹³⁷

The heart of the challenges in the closed hearings cases was that the press and the public enjoy a constitutionally protected right of access to deportation hearings. These challenges drew on the First Amendment notion that a free and informed press protects the public’s right to know whether their government is acting fairly and lawfully, a significant concern in times of national crisis.¹³⁸ In addition, because Congress is endowed with plenary power over immigration law, a free press serves a vital oversight function. Though immigrants benefit from certain procedural constitutional protections in removal hearings, the courts have virtually no review over the power of Congress to remove immigrants on arbitrary—even racial—grounds.¹³⁹ Watchful media can ensure that Congress exercises this awesome power without overstepping its constitutional bounds or acting grossly out of line with constituents’ beliefs.

seekers from certain countries pending review of their applications were all implemented by appointed DOJ officials. It is worth considering how Bush’s failure to capture the popular vote in the 2000 election impacts his mandate to make decisions regarding curtailment of civil liberties, specifically his designation of so-called enemy combatants. See *infra* notes 188-206 and accompanying text for a discussion of the President’s designation of enemy combatants.

136. Compare *Detroit Free Press v. Ashcroft*, 303 F.3d 681 (6th Cir. 2002) (holding the closure of deportation proceedings unconstitutional on First Amendment grounds), with *N. Jersey Media Group, Inc. v. Ashcroft*, 308 F.3d 198 (3d Cir. 2002), *cert. denied*, 123 S. Ct. 2215 (2003) (using similar analysis, but finding the closure of deportation proceedings constitutional).

137. *Ctr. for Nat’l Sec. Studies v. United States Dep’t of Justice*, 215 F. Supp. 2d 94, 96 (D.D.C. 2002), *aff’d in part, rev’d in part*, 331 F.3d 918 (D.C. Cir. 2003), *cert. denied*, 124 S. Ct. 1041 (2004).

138. See, e.g., *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606 (1982); *Gannett Co. v. DePasquale*, 443 U.S. 368, 383 (1979).

139. See *Fiallo v. Bell*, 430 U.S. 787 (1977); *Kleindienst v. Mandel*, 408 U.S. 753 (1972); *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952); *Fong Yue Ting v. United States*, 149 U.S. 698 (1893); *Chae Chan Ping v. United States*, 130 U.S. 581 (1889). But see *Zadydas v. Davis*, 533 U.S. 678 (2001); *Landon v. Plasencia*, 459 U.S. 21 (1982); *The Japanese Immigrant Case (Yamataya v. Fisher)*, 189 U.S. 86 (1903). The President is endowed with nearly the same plenary power over immigration as the Congress; both the President and the Congress share the foreign relations and war powers, which form the basis for the immigration power. *Hampton v. Mow Sun Wong*, 426 U.S. 88 (1976). The extent to which other executive officials, especially those in agencies without some relation to immigration, have the same scope of the plenary power is less clear. *Id.* at 101.

In the closed hearings cases, plaintiffs contended that the right of access to deportation proceedings cannot be abridged without an individualized showing, at least in camera, of need to close a particular hearing.¹⁴⁰ Without such a showing made to a presiding judge, there is no guarantee that special interest cases involve a plausible terrorism connection and are not merely summary deportations of immigrants from those countries designated as suspect.

Two circuit courts split on the closed hearing question. In August 2002, the Sixth Circuit held in *Detroit Free Press v. Ashcroft* that all deportation proceedings must be open unless the government can make a showing in camera that openness in a particular case would threaten national security.¹⁴¹ In its opinion, the court forcefully condemned the government's systematic denial of information to the public and its attempt to place "its actions beyond public scrutiny."¹⁴² Less than two months later, the Third Circuit ruled the opposite way in *North Jersey Media Group v. Ashcroft*.¹⁴³ Though both circuits applied the same test to determine whether a public right of access to deportation hearings existed, the Third Circuit found no such right and concluded that the government, therefore, need not make individualized showings to justify closure.¹⁴⁴ Both circuits rejected motions for rehearing en banc.¹⁴⁵ The *North Jersey Media Group* plaintiffs filed a petition for certiorari with the Supreme Court, which was denied.¹⁴⁶

The issues raised in these closed hearings cases are conceptually tied to those raised in the FOIA case, *Center for National Security Studies v. United States Department of Justice*.¹⁴⁷ In that case, plaintiffs challenged the government's refusal to release information on the people detained in the 9/11 investigation, including their number, identities, locations, and access to counsel.¹⁴⁸ The government's stranglehold on this basic information strengthens the arguments for open deportation hearings. Unless the press and public are allowed to observe the government's actions during hearings of so-called "special interest" deportees, there is no way to know whether these cases have any connection to the events of 9/11

140. See Brief for Appellees at 48, *N. Jersey Media Group, Inc.* (No. 02-2524), available at 2002 WL 32103549.

141. 303 F.3d at 710.

142. *Id.* at 683.

143. 308 F.3d at 201.

144. *Id.* Both circuits applied the public access test developed in *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980).

145. The Third Circuit denied the plaintiffs' rehearing motion by a 6-5 vote, with the judge who dissented from the panel opinion abstaining from the vote. See *N. Jersey Media Group, Inc.*, 308 F.3d at 221. See also *Detroit Free Press*, 303 F.3d 681 (6th Cir. 2003).

146. *N. Jersey Media Group, Inc. v. Ashcroft*, 123 S. Ct. 2215 (2003).

147. 215 F. Supp. 2d 94 (D.D.C. 2002), *aff'd in part, rev'd in part*, 331 F.3d 918 (D.C. Cir. 2003), *cert. denied*, 124 S. Ct. 1041 (2004).

148. *Id.*

and whether our government is acting responsibly. To defend the closure of immigration proceedings, the government neither offered a definition of “special interest” nor any standards that the DOJ uses to designate these cases for closed proceedings.¹⁴⁹ Instead, the government relied on a “mosaic theory” based on the claim that terrorists could piece together seemingly innocuous pieces of information released in special interest cases to decipher the status and scope of U.S. terrorism investigations and to avoid detection of their planned terrorist acts.¹⁵⁰ Acceptance of this theory as a reason to close deportation proceedings, which have traditionally been open to the public, represents another way that terrorism policy has overtaken immigrant policy by limiting the procedural rights of immigrants.

The *Center for National Security Studies* case initially produced split results, albeit within the same lower court decision.¹⁵¹ On one hand, the district court required government disclosure of the names of those detained in the 9/11 investigation and their attorneys.¹⁵² Still, the court held that if the government showed that detainees were material witnesses whose identities were sealed by court orders or that certain detainees had requested confidentiality, their identities could remain secret.¹⁵³ The court also upheld the government’s claims that FOIA exemptions permit it to withhold the dates and places of arrest, detention, and release of individuals in the 9/11 investigation.¹⁵⁴ The court found this information barred from public release because its disclosure could “reasonably be expected to interfere with enforcement proceedings”¹⁵⁵ and because the release of information on detention facilities might “endanger the life or physical safety” of people at those facilities.¹⁵⁶ Nonetheless, release of the

149. See Petition for a Writ of Certiorari at 3-4, *N. Jersey Media Group, Inc.* (No. 02-1289), available at http://www.ccr-ny.org/v2/legal/september_11th/docs/NorthJerseyMediacertpetition.pdf (last visited June 15, 2004).

150. *N. Jersey Media Group, Inc.*, 308 F.3d at 205 (attaching affidavits of two senior FBI officials describing the mosaic theory).

151. *Ctr. for Nat’l Sec. Studies*, 215 F. Supp. 2d at 100-01, 111-13.

152. *Id.* at 109. The court also ruled that the government failed to meet the FOIA search requirements for policy directives or guidance issued to officials making public statements about the 9/11 detainees or about the closure of immigration proceedings. *Id.* at 109-11.

153. *Id.* at 107-08. Orders sealing material witnesses’ identities must be shown to presiding judges in camera. *Id.*

154. *Id.* at 108.

155. *Id.* at 100, 113 (quoting Freedom of Information Act (FOIA), 5 U.S.C. § 552(b)(7)(A) (2003)). It is unclear which enforcement proceedings the court was referring to here as most of the detentions have led only to the enforcement of immigration law, not to the filing of criminal terrorism charges.

156. *Id.* at 108 (quoting § 552(b)(7)(F)). The court reasoned that the “fundamental purpose of FOIA is to lift the veil of ‘secrecy in government’ [by] ‘open[ing] up the workings of government to public scrutiny’ through the disclosure of government records.” *Id.* at 100 (quoting *United States Dep’t of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 772 (1989)); *McGehee v. CIA*, 697 F.2d 1095, 1108 (D.C. Cir. 1983). Therefore, the act requires “full agency disclosure unless

names of 9/11 detainees and their attorneys alone would have significantly improved the public understanding of the government's investigations, not to mention family access to the detainees. A stay of the district court's order pending appeal and subsequent reversal by the District of Columbia Circuit Court, which the Supreme Court declined to review, have ensured continuing government secrecy.¹⁵⁷ In June 2003, the D.C. Circuit reversed the lower court's judgment requiring the release of the names of the 9/11 detainees and their attorneys. As this Part discusses, in so doing, the D.C. Circuit court not only misapplied the law but also referred to questionable facts in support of its refusal to affirm the release of this basic information.

It is well settled that FOIA compels disclosure of information on government actions unless the government can establish that one of the statute's specific exemptions justifies withholding the information.¹⁵⁸ In fact, the Supreme Court has instructed courts to "narrowly construe" the exemptions and to place the burden squarely on the government to justify a withholding of information under any exemption.¹⁵⁹ In *Center for National Security Studies*, the D.C. Circuit found an exemption allowing the government to withhold the names of the 9/11 detainees and their attorneys based solely on judicial deference to the executive branch's assessment that release of these names might allow terrorists to thwart the ongoing investigation by mapping its progress.¹⁶⁰ But as Judge Tatel, the lone dissenter in the Circuit *Center for National Security Studies* case, rightly noted, had Congress wanted to authorize total deference to the executive branch in deciding FOIA exemptions touching on national security, it could have done so.¹⁶¹ Lacking such a directive, the court should have applied the congressionally outlined standard, which would require that the government do more than claim the possibility that terrorists might piece together an investigatory pattern if the names of 9/11 detainees were released. Under the FOIA, the government was required to show that this

information is exempted under clearly delineated statutory language." *Ctr. for Nat'l Sec. Studies*, 215 F. Supp. 2d at 100 (emphasis added) (quoting *Reporters Comm.*, 489 U.S. at 773). The information withheld in this case, the court held, fell within two of the FOIA's enumerated exemptions: 7A and 7F. Exemption 7A can be claimed if the information sought "could reasonably be expected to interfere with enforcement proceedings," and exemption 7F can be claimed when release of such information "could reasonably be expected to endanger the life or physical safety of any individual." 5 U.S.C. § 552(b)(7)(A), (F).

157. *Ctr. for Nat'l Sec. Studies*, 215 F. Supp. 2d 94, order stayed by 217 F. Supp. 2d 58 (D.D.C. 2002), *aff'd in part, rev'd in part*, 331 F.3d 918 (D.C. Cir. 2003) *cert. denied*, 124 S. Ct. 1041 (2004).

158. See, e.g., *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152 (1989) ("[FOIA's] limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act.") (quoting *Dep't of Air Force v. Rose*, 425 U.S. 352, 361 (1976)); *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978).

159. *John Doe Agency*, 493 U.S. at 152.

160. *Ctr. for Nat'l Sec. Studies v. United States Dep't of Justice*, 331 F.3d 918, 923 (D.C. Cir. 2003), *cert. denied*, 124 S. Ct. 1041 (2004).

161. *Id.* at 951 (Tatel, J., dissenting).

damage to “law enforcement proceedings . . . could reasonably be expected to” result from the release of the names.¹⁶² The government failed to make such a showing. Although the court took care to avoid any encroachment on the authority of the executive branch in this case, it did so at the cost of trampling on the congressionally defined statutory standards for FOIA exemptions.

In addition, by removing the burden on the government to prove that an exemption applied to the release of the detainees’ names, the court avoided having to articulate the public interest at stake, which these exemptions are designed to protect. The interest involved in this case, of course, was not solely the statutory right to information, but also the public’s right to gain the knowledge necessary to scrutinize the government’s use of one of its most chilling powers: the authority to physically imprison U.S. residents.

The D.C. Circuit’s decision was also blind to the few known facts about the 9/11 detainees.¹⁶³ Two weeks before the D.C. Circuit ruled in *Center for National Security Studies*, the Inspector General released a report detailing the systematic government-created barriers to accessing counsel faced by the 9/11 detainees.¹⁶⁴ Despite this, the court began its opinion by stating that the “INS detainees have had access to counsel” and that they had been given lists of pro bono attorneys as statutorily required¹⁶⁵—both assertions that are refuted by the OIG report. The court cited no authority to support these claims, which were repeated throughout the opinion. In addition, the executive testimony to which the court deferred acknowledged that many of the detainees had “no information useful to the investigation.”¹⁶⁶ Yet the court exempted the release of even the names of these innocent, uninformed detainees to prevent terrorists from learning the contours of the investigation without explaining how terrorists might do so based on a list of names unknown to them.

Finally, these inaccurate representations undermined the court’s own deference argument. The D.C. Circuit had previously held (when reviewing

162. The full text of FOIA’s 7A exemption permits withholding information “compiled for law enforcement purposes” whenever disclosure “could reasonably be expected to interfere with enforcement proceedings.” 5 U.S.C. § 552(b)(7)(A) (2003).

163. Although the OIG report was released only two weeks before the court’s decision in this case, the court was clearly aware of the pending investigation. See *Ctr. for Nat’l Sec. Studies v. United States Dep’t of Justice*, 215 F. Supp 2d 94, 105 (D.C. Cir. 2003), cert. denied, 124 S. Ct. 1041 (2004) (Tatel, J., dissenting) (mentioning the OIG investigation into abuses during the 9/11 detentions). Moreover, the report received substantial press coverage upon its release. See, e.g., Richard B. Schmitt and Richard A. Serano, *U.S. Finds Abuses of 9/11 Detainees, Justice Dept. Inquiry Reveals Many Violations of Immigrants’ Rights*, L.A. TIMES, June 3, 2003, at A1; Scott Shane, *Finding Fault in Detentions Report: The Justice Department Inspector General Criticizes the Government’s Treatment of Immigrants After the Sept. 11 Attacks*, BALTIMORE SUN., June 6, 2003, at 2A.

164. OIG REPORT, *supra* note 44, at 197.

165. *Ctr. for Nat’l Sec. Studies*, 331 F.3d at 921.

166. *Id.* at 942.

FOIA exemptions for materials with national security implications) that judicial deference to the executive cannot overcome the government's failure to account for evidence in the record to the contrary.¹⁶⁷ If it could, the court warned, deference would become acquiescence.¹⁶⁸ Deference surely became acquiescence in this case.

The failure of the judiciary to invalidate the government's actions in the 9/11 investigation that have eroded the rights of the press and the public to information has negative implications beyond First Amendment and FOIA doctrine. By upholding these government actions, the courts have impeded the ability of plaintiffs to challenge government violations of physical liberty in the 9/11 investigation by keeping even the most basic information on these detentions secret. In the area of government secrecy, unlike the pending detention challenges, the Supreme Court has already chosen to do nothing by denying certiorari in both of the closed hearings cases and in the *Center for National Securities Studies* case, despite the existence of a live circuit split in the closed hearings cases.

B. Detention Challenges

Not surprisingly, most legal opposition to the 9/11 investigation has come in the form of challenges to the detention of the nearly 1,200 individuals held during the government's preventive detention campaign.¹⁶⁹ District Court Judge Kessler noted in *Center for National Security Studies* that while the "bloodless language of the law" refers to detention, those caught in the government's 9/11 net have actually been "arrested and jailed."¹⁷⁰ This rhetorical point underscores what is at stake in the 9/11 detentions: physical liberty. Specifically, plaintiffs raise claims under the Fifth Amendment's Due Process Clause, which contains a powerful presumption against government deprivations of physical liberty,¹⁷¹ as well as under the Fourth Amendment's prohibition on unreasonable seizures of

167. *Campbell v. United States Dep't of Justice*, 164 F.3d 20, 30 (D.C. Cir. 1998).

168. *Id.*

169. *See Omar v. Casterline*, 288 F. Supp. 2d 775 (W.D. La. 2003); *Padilla ex rel. Newman v. Bush*, 233 F. Supp. 2d 564, 593-94 (S.D.N.Y. 2002), *aff'd on reh'g sub nom.*, *Padilla ex rel. Newman v. Rumsfeld*, 243 F. Supp. 2d 42 (S.D.N.Y. 2003), *rev'd in part sub nom. Padilla v. Rumsfeld*, 352 F.3d 695 (2d Cir. 2003), *cert. granted*, 124 S. Ct. 1353 (2004), *rev'd and remanded*, *Rumsfeld v. Padilla*, No. 03-1027, slip op. (U.S. June 28, 2004); *Hamdi v. Bush*, 243 F. Supp. 2d 527 (E.D. Va. 2002), *rev'd*, 316 F.3d 450 (4th Cir. 2003), *cert. granted*, 124 S. Ct. 981 (2004), *vacated and remanded*, *Hamdi v. Rumsfeld*, No. 03-6696, slip op. (June 28, 2004); *Rasul v. Bush*, 215 F. Supp. 2d 55 (D.D.C. 2002), *aff'd sub nom. Al Odah v. United States*, 321 F.3d 1134 (D.C. Cir. 2003), *cert. granted*, 124 S. Ct. 534 (2003), *rev'd and remanded*, *Rasul v. Bush*, No. 03-334, slip op. (U.S. June 28, 2004).

170. *Ctr. for Nat'l Sec. Studies v. United States Dep't of Justice*, 215 F. Supp. 2d 94, 96 (D.D.C. 2002), *aff'd in part, rev'd in part*, 331 F.3d 918 (D.C. Cir. 2003), *cert. denied*, 124 S. Ct. 1041 (2004).

171. *Omar*, 288 F. Supp. 2d at 780-81; *Padilla*, 233 F. Supp. 2d at 600-01; *Hamdi*, 243 F. Supp. 2d at 532-36; *see also* U.S. CONST. amend. V ("[n]o person shall be . . . deprived of life, liberty, or property, without due process of law").

individuals.¹⁷² These challenges question the legality of the detention itself. In addition, some detainees have brought claims based on the conditions they endured while in detention.¹⁷³

The government has relied on a range of existing—and sometimes long-dormant—statutes and ease law to justify the 9/II detentions. Individuals have been detained under the authority of: (1) federal immigration laws, primarily those collected in the Immigration and Nationality Act;¹⁷⁴ (2) federal criminal statutes; (3) the Bail Reform Act of 1984, which permits the detention of certain material witnesses;¹⁷⁵ and (4) long-ignored case law allowing the President to detain unlawful combatants, whom the Bush administration has relabeled “enemy combatants.”¹⁷⁶

To date, none of the 9/II detainees have been released based on a judicial ruling of unlawful detention. Osama Awadallah, detained as a material witness for a grand jury investigation into the 9/II attacks, was initially ordered released on such a basis, but the Second Circuit subsequently reversed that order.¹⁷⁷ Though he was never charged with committing any crime, Awadallah was treated as a high-risk criminal for twenty days.¹⁷⁸ He was held in solitary confinement, shackled, forbidden to talk to a lawyer or to receive family visitors, and denied a proper religious diet.¹⁷⁹ Though he had contact only with his FBI interrogators, Awadallah was strip-searched every time he was removed from his cell for more

172. *Omar*, 288 F. Supp. 2d at 780; see also U.S. CONST. amend. IV (“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”).

173. The most well known of these cases is that of Hady Hassan Omar. Omar’s claims that his First Amendment free exercise rights were violated while he was detained are pending before a federal district court in Louisiana. See *Omar*, 288 F. Supp. 2d 775; *infra* notes 247-52 and accompanying text; see also Class Action Complaint, *Turkmen v. Ashcroft* (E.D.N.Y. 2002) (No. 02 CV 2307), available at <http://news.findlaw.com/hdocs/docs/terrorism/turkmenash41702cmp.pdf> (last visited Feb. 5, 2004) (alleging, on behalf of 9/11 immigration detainees, First, Fourth, and Fifth Amendment violations based on confinement conditions).

174. 8 U.S.C. §§ 1101-1537 (2004).

175. 18 U.S.C. §§ 3141-3150 (2004).

176. See, e.g., *Ex Parte Milligan*, 71 U.S. (4 Wall.) 2 (1866); *Ex Parte Quirin*, 317 U.S. 1 (1942).

177. *United States v. Awadallah*, 202 F. Supp. 2d 55, 59 (S.D.N.Y. 2002), *rev’d*, 349 F.3d 42 (2d Cir. 2003). Interestingly, in December 2003 the Second Circuit ordered the release of a much higher profile 9/11 detainee, José Padilla. This release, however, has been stayed since the Supreme Court granted certiorari in February 2004. *Rumsfeld v. Padilla*, 124 S. Ct. 1353 (2004), *rev’d and remanded*, *Rumsfeld v. Padilla*, No. 03-1027, slip op. (U.S. June 28, 2004). Padilla will remain in detention now that the Supreme Court has reversed the Second Circuit ruling for lack of jurisdiction over Padilla’s habeas petition. *Rumsfeld v. Padilla*, No. 03-1027, slip op. at 23, (U.S. June 28, 2004). The judgment was dismissed without prejudice and Padilla’s attorneys will likely refile the petition in the appropriate district court. *Id.*

178. *Awadallah*, 202 F. Supp. 2d at 58, 60.

179. *Id.*

questioning.¹⁸⁰ Awadallah also claims that he was physically abused while in custody, and the government acknowledged that after two weeks of detention, “Awadallah had ‘multiple [bruises] on [his] arms, right shoulder, [and] both ankles,’ a cut on his left hand, and an unspecified mark near his left eye.”¹⁸¹ When Awadallah finally testified before a grand jury—without immunity—he was handcuffed to a chair and dressed in prison clothes.¹⁸²

The heart of Awadallah’s case is not the inhumane treatment he suffered; rather, it is the question of the government’s authority to hold him in the first place. Awadallah was held as a material witness to the 9/11 investigation, though the government has never asserted that he aided any of the hijackers or had information about the planning of the attacks. Although Awadallah testified that he met two of the hijackers, one of them approximately forty times, at work and at a local mosque,¹⁸³ this work and religious affiliation alone cannot justify his detention. The federal material witness statute requires that, to detain Awadallah, the government had to show both that his testimony was needed for a criminal proceeding *and* that he was a flight risk.¹⁸⁴ Despite these clear statutory requirements, Awadallah was never brought before a judge in a criminal proceeding. He was brought before an investigative grand jury, but the material witness statute contemplates the detention of witnesses only for criminal proceedings.¹⁸⁵ Even if the text of the material witness statute could be read to consider a grand jury to be a “criminal proceeding” within the meaning of the statute, the government did not show that Awadallah had to be detained in order to ensure his testimony before the grand jury. The material witness statute provides that “[n]o witness may be detained because of inability to comply with any condition of release if the testimony can adequately be secured by deposition.”¹⁸⁶ Although deposition clearly would have been a less restrictive alternative to detention, Awadallah was not deposed.¹⁸⁷

180. *Id.* at 59.

181. *Id.* at 61. Although the government admits Awadallah had cuts and bruises, it does not concede Awadallah’s physical abuse allegations.

182. *Id.* at 58, 60.

183. *Id.*

184. Bail Reform Act of 1984, 18 U.S.C. § 3144 (2004); *see also supra* notes 108-09 and accompanying text.

185. 18 U.S.C. § 3144.

186. *Id.*

187. The government argued that the statute only intended depositions to be taken for material witnesses held as trial witnesses because rule fifteen of the Federal Rules of Criminal Procedure, which outlines procedures for taking depositions, only applies to depositions taken for trial. FED. R. CRIM. P. 15; *Awadallah*, 202 F. Supp. 2d at 65. If the government is correct in this regard, this only reinforces the District Court’s view that the material witness statute did not intend to cover grand jury proceedings in the first place. 18 U.S.C. § 3144; *see also* *Bacon v. United States*, 449 F. 2d 933 (9th Cir. 1971) (holding that grand juries were criminal proceedings under the previous material witness statutes, 18 U.S.C. § 3149 (1966)); *Awadallah*, 202 F. Supp. 2d at 62-65 (holding that grand jury proceedings are

The final set of detention cases involve the military detention of individuals the administration has labeled enemy combatants, including two U.S. citizens detained on naval brigs (Yaser Hamdi and José Padilla) and more than 600 foreign nationals imprisoned at the U.S. military base at Guantánamo Bay, Cuba.¹⁸⁸ It should be noted at the outset that no judicial proceeding, in either a federal Article III court or a military tribunal, has been initiated for any of these hundreds of enemy combatants. Moreover, none of these men have been charged with any crime or violation of federal or international law.¹⁸⁹

1. *The Citizen Cases*

None of the enemy combatants whose claims are now before the Supreme Court are immigrants. In two of the cases, the detainees are citizens (*Hamdi v. Bush* and *Padilla ex rel. Newman v. Bush*). The 600-plus detainees in the final case, *Rasul v. Bush*, are foreign nationals being

not criminal proceedings for the purposes of the material witness statute). *But see* Aguilar-Ayala v. Ruiz, 973 F. 2d 411 (5th Cir. 1992) (holding that material witnesses must be deposed and released under 18 U.S.C. § 3144 if a deposition would suffice as an adequate alternative to their live testimony).

188. Padilla *ex rel. Newman v. Bush*, 233 F. Supp. 2d 564, 593-94 (S.D.N.Y. 2002), *aff'd on reh'g sub nom.*, Padilla *ex rel. Newman v. Rumsfeld*, 243 F. Supp. 2d 42 (S.D.N.Y. 2003), *rev'd in part sub nom. Padilla v. Rumsfeld*, 352 F.3d 695 (2d Cir. 2003), *cert. granted*, 124 S. Ct. 1353 (2004), *rev'd and remanded*, Rumsfeld v. Padilla, No. 03-1027, slip op. (U.S. June 28, 2004); Hamdi v. Bush, 243 F. Supp. 2d 527 (E.D. Va. 2002), *rev'd*, 316 F.3d 450 (4th Cir. 2003), *cert. granted*, 124 S. Ct. 981 (2004), *vacated and remanded*, Hamdi v. Rumsfeld, No. 03-6696, slip op. (June 28, 2004); Rasul v. Bush, 215 F. Supp. 2d 55 (D.D.C. 2002), *aff'd sub nom. Al Odah v. United States*, 321 F.3d 1134 (D.C. Cir. 2003), *cert. granted*, 124 S. Ct. 534 (2003), *rev'd and remanded*, Rasul v. Bush, No. 03-334, slip op. (U.S. June 28, 2004); *see also* Letter to Congressional Leaders Reporting on United States' Efforts in the Global War on Terrorism, 39 WEEKLY COMP. PRES. DOC. 346 (Mar. 24, 2003).

On June 25, 2003, Bush designated the third enemy combatant, Ali Saleh Kahlah al-Marri—the first to be identified as a noncitizen. *See* Shannon McCaffrey, *Al-Qaeda Suspect from Qatar Becomes Military Prisoner*, PHILA. INQUIRER, June 24, 2003, at A3. Al-Marri has been held in federal custody since December 2001, first as a material witness and later on criminal charges. *Id.* This marks the first time an individual initially in the criminal justice system as part of the 9/11 investigation has been moved to military authorities. *Id.* Moreover, this move came less than one month before al-Marri's criminal jury trial was to begin. *Id.* DOJ officials claim that al-Marri was "positively identified" as part of a second wave of al Qaeda attacks by another detainee "in a position to know." *Id.* Justice officials also say al-Marri visited an al Qaeda training camp and was assigned to help settle al Qaeda operatives in the United States for follow-up attacks after September 11. *Id.* Yet the government admits there is no evidence that al-Marri knew about the 9/11 attacks before they occurred or assisted in their planning in any way. *Id.* The Central District of Illinois dismissed al-Marri's petition for writ of habeas corpus without prejudice. Al-Marri v. Bush, 274 F. Supp. 2d 1003, 1005 (C.D. Ill. 2003) (noting lack of venue in Illinois after al-Marri was transferred from Illinois to U.S. military control on a naval brig in South Carolina, but noting that al-Marri's ability to raise a habeas challenge in the appropriate venue is "essentially undisputed").

189. Since the Court accepted certiorari in *Hamdi*, *Padilla*, and *Rasul*, however, a handful of the Guantánamo Bay detainees have been released, and the administration has reported that it may try as many as six of the detainees in military tribunals. *See, e.g.,* Ray Moseley, *Guantánamo: Detainees "Guilty" Without Any Trial*, CHI. TRIB., Apr. 11, 2004, at A1. These actions may be an effort by the government to moot the most detrimental aspects of the *Rasul* case before it is decided by the Supreme Court.

held outside the United States by the U.S. military. Nonetheless, these cases are essential to an understanding of the ways that terrorism policy is remaking our nation's immigration and immigrant policy. First, the citizen cases underscore the racial and religious dynamics underlying the Bush administration's new profiling regime. The fact that Hamdi's and Padilla's citizenship has not afforded them more protection shows how the plus factors in immigration-plus profiling can overwhelm the more politically palatable justification used to defend these policies—an individual's immigration status. Although the U.S. citizenship of these men should trigger the fullest range of constitutional protections, it seems that their presumed religion and ethnicity has trumped their U.S. citizenship.

These two citizen cases also expose the severity of the erosion of civil liberties since 9/11: even citizens are not safe. Any Supreme Court action to end the indefinite military detention of these citizens could serve to justify the continued detention of noncitizens if the Court bases its decision on citizenship status. Even if the Supreme Court mandates the release of Hamdi and Padilla from military custody if they are not provided with some type of trial, the Court is not obliged to speak on the government's ability to hold noncitizens without such process. In this sense, the Court's acceptance of certiorari in the citizen cases in combination with the Guantánamo case highlights the cases the Court has refused to hear: those that squarely address the erosion of immigrants' rights since 9/11 and those that impact immigrants already present in the United States.¹⁹⁰

In addition to these reasons, understanding the government's claims in the enemy combatant cases exposes a dimension of terrorism policy that is not reliant on immigration law or policy. If nothing else, these cases remind the American public that the link between suspected terrorists and immigrants is not perfect. In its creation and use of the label "enemy combatants," the Bush administration has expanded its authority under both international law and Supreme Court case law to hold individuals indefinitely in military custody with little, if any, access to lawyers, and no apparent access to tribunals of any kind.¹⁹¹ The case law on which the government relies dates from World War II and does not use the term "enemy combatant." Instead, these cases define "unlawful combatants" as

190. Remember that the Court denied certiorari in *North Jersey Media Group, Inc.*, which challenged the government's closure of deportation hearings, despite the live circuit split and the constitutional questions raised in the case. *N. Jersey Media Group, Inc. v. Ashcroft*, 308 F.3d 198 (3d Cir. 002), *cert. denied*, 123 S. Ct. 2215 (2003). The Court also refused to hear the *Center for National Security Studies* FOIA case, challenging the government's refusal to release information including which immigrants had been detained in the 9/11 investigation. *Ctr. for Nat'l Sec. Studies v. United States Dep't of Justice*, 215 F. Supp. 2d 94 (D.D.C. 2002), *aff'd in part, rev'd in part*, 331 F.3d 918 (D.C. Cir. 2003), *cert. denied*, 124 S. Ct. 1041 (2004).

191. See Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 106, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention] (defining the rights of unlawful and lawful combatants); *Ex Parte Quirin*, 317 U.S. 1 (1942) (same).

those members of enemy armed forces who are charged with violations of the law of war, such as crossing enemy lines to commit sabotage in civilian dress.¹⁹² Such combatants, the Supreme Court has held, can be tried and punished in military tribunals for their war crimes.¹⁹³ Lawful combatants picked up on the battlefield during active hostilities, in contrast, may only be held according to the terms of the Geneva Convention (to which the United States is a signatory) until the end of hostilities in order to prevent them from rejoining their forces. Among other requirements, these lawful combatants are not to be tried in military courts.¹⁹⁴

The “enemy combatant” label should also not be confused with the statutorily defined category of “enemy aliens.” When the United States declares war on another country, the Enemy Alien Act considers all citizens of that country who are at least fourteen years old to be “enemy aliens.”¹⁹⁵ This Act allows the President to detain or expel enemy aliens *without* an individualized showing of suspicion.¹⁹⁶

In defining its new term, the administration claims that anyone who is “engaged in a mission against the United States on behalf of an enemy with whom the United States is at war” may be designated an enemy combatant and held until the war on terrorism concludes or, if they are noncitizens, brought before a military tribunal at the administration’s convenience.¹⁹⁷ In creating this category, the administration has tried to merge the elements of the three previously defined war-time detainee groups into one, resulting in an unprecedented expansive form of governmental custody. Under case law related to unlawful combatants, the government claims to possess the

192. See *Quirin*, 317 U.S. at 30-37.

193. *Id.* at 48.

194. *Id.* at 30-31.

195. Enemy Alien Act of 1798, 50 U.S.C. § 21 (2003). This act is also triggered in the absence of a declared war if the foreign country perpetrates, attempts, or threatens an invasion or predatory incursion against the territory of the United States. *Id.*

196. *Id.*

197. *Padilla ex rel. Newman v. Bush*, 233 F. Supp. 2d 564, 608 (S.D.N.Y. 2002), *aff'd on reh'g sub nom.*, *Padilla ex rel. Newman v. Rumsfeld*, 243 F. Supp. 2d 42 (S.D.N.Y. 2003), *rev'd in part sub nom. Padilla v. Rumsfeld*, 352 F.3d 695 (2d Cir. 2003), *cert. granted*, 124 S. Ct. 1353 (2004), *rev'd and remanded*, *Rumsfeld v. Padilla*, No. 03-1027, slip op. (U.S. June 28, 2004). Though the USA PATRIOT Act expanded the government’s ability to detain individuals in connection with the 9/11 investigation, these provisions have yet to be used in the 9/11 investigation. The USA PATRIOT Act contains a reporting provision that requires the Office of the Inspector General to investigate all complaints of civil liberties and civil rights violations in connection with the 9/11 investigation and to report the results of these investigations to Congress every six months. USA PATRIOT Act, Pub. L. No. 107-56, § 1001, 115 Stat. 272, 391 (2001); *see, e.g.*, U.S. Dep’t of Justice, Office of the Inspector Gen., REPORT TO CONGRESS ON IMPLEMENTATION OF SECTION 1001 OF THE USA PATRIOT ACT (2003).

Bush’s order allowing for the trial of enemy combatants by military tribunal, however, specifically bars the use of military tribunals for U.S. citizens. *See Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism*, 66 Fed. Reg. 57,833 (Nov. 16, 2001). In contrast, when the Bush administration announced its designation of al-Marri as an enemy combatant, officials said that he might face trial by a military tribunal. *See McCaffrey, supra* note 188 at A3.

ability to try enemy combatants in military tribunals, not Article III courts. Relying on international law that establishes the rights of lawful combatants, the government seeks the power to detain enemy combatants indefinitely. Finally, drawing on the Enemy Alien Act's provisions for enemy aliens, the administration would subject enemy combatants to indefinite detention or military justice without an individualized showing of danger. Although the administration has claimed that all of the enemy combatants are also unlawful combatants, the government's power to hold unlawful combatants indefinitely without trial has not been established—though the executive now seeks this right.¹⁹⁸

The chief World War II case that the government uses to justify the indefinite detention of enemy combatants, *Ex Parte Quirin*, is a poor fit because the defendants in that case were at least tried.¹⁹⁹ None of the current enemy combatants, including U.S. citizens Hamdi and Padilla, currently have prospects of trials, whether in military or Article III courts.²⁰⁰ Moreover, *Quirin* is questionable precedent, at best. Constitutional scholar Richard Fallon notes that *Quirin* is a decision motivated, at least in part, by the Court's desire to remain relevant.²⁰¹ Fallon reports that the Justices considered statements by the executive that they would execute the defendants in *Quirin* no matter what the Court decided.²⁰² Such decision making hardly makes for sound precedent.

Like its post-9/11 preventive detention campaign, the administration's enemy combatant category expands the reach of existing law. And, like the preventive detention campaign, the new category diminishes the physical liberty rights of a select group of individuals based primarily on their ethnicity and presumed religion.

The circuit courts have heard cases challenging the classification and indefinite detention of these enemy combatants. All but one of the federal courts considering enemy combatant cases failed to scrutinize the justifications for this new designation and instead deferred to the executive branch's judgment that these individuals must be detained indefinitely despite their severely impaired access to counsel.²⁰³ The sole exception is

198. See, e.g., *Padilla*, 233 F. Supp. 2d at 570.

199. *Quirin*, 317 U.S. 1 (upholding the President's ability to determine that plaintiffs charged with violating the "law of war" and considered unlawful combatants could be tried by military tribunal instead of a jury, and declining to consider the issues posed by the fact that one plaintiff claimed to be a U.S. citizen); see also Brief of Amici Curiae American Civil Liberties Union et al. at 5, *Padilla* (No. 02 Civ. 4445).

200. Note that another U.S. citizen held as an unlawful combatant, John Walker Lindh, received a trial in an Article III court. See *infra* notes 303-05 and accompanying text for a discussion of the John Walker Lindh case.

201. See Richard H. Fallon, Jr., *Marbury and the Constitutional Mind: A Bicentennial Essay on the Wages of Doctrinal Tension*, 91 CALIF. L. REV. 1, 30-31 (2003).

202. *Id.* at 31 n.150.

203. See *infra* notes 220-29 and accompanying text discussing the barriers Hamdi and Padilla faced in accessing counsel.

the Second Circuit's *Padilla* decision, which granted Padilla's habeas petition and ordered the military to release him within thirty days.²⁰⁴ In granting habeas corpus, the court noted that although Padilla could be transferred to and detained by criminal authorities, at least in the criminal system he would "be entitled to the constitutional protections extended to other citizens."²⁰⁵

Padilla is perhaps the most notorious of the 9/11 detainees. The government alleges that he planned to explode a "dirty" bomb in the United States,²⁰⁶ however, the evidence that has served as the basis for Padilla's continued detention has yet to be substantiated.²⁰⁷ Padilla has been held in federal custody since May 8, 2002.²⁰⁸ He has never been formally charged with any crime, and there has been no move to try him before any tribunal. In fact, when describing the government's interest in Padilla after his capture, Secretary of Defense Donald Rumsfeld said, "we are not interested in trying him at the moment; we are not interested in punishing him at the moment. We are interested in finding out what he knows."²⁰⁹ Padilla's detention, like that of the other enemy combatants, seems to be indefinite, a situation the Court recognized as a serious constitutional issue in *Zadvydas v. Davis*, even as applied to noncitizens.²¹⁰

204. *Padilla v. Rumsfeld*, 352 F.3d 695, 698-99 (2d Cir. 2003), *cert. granted*, 124 S. Ct. 1353 (2004), *rev'd and remanded*, *Rumsfeld v. Padilla*, No. 03-1027, slip op. (U.S. June 28, 2004). The Supreme Court, however, reversed this Second Circuit ruling. *Rumsfeld v. Padilla*, No. 03-1027, slip op., at 23 (U.S. June 28, 2004).

205. *Id.* at 724.

206. *Padilla ex rel. Newman v. Bush*, 233 F. Supp. 2d 564, 572-73 (S.D.N.Y. 2002), *aff'd on reh'g sub nom.*, *Padilla ex rel. Newman v. Rumsfeld*, 243 F. Supp. 2d 42 (S.D.N.Y. 2003), *rev'd in part sub nom. Padilla v. Rumsfeld*, 352 F.3d 695 (2d Cir. 2003), *cert. granted*, 124 S. Ct. 1353 (2004), *rev'd and remanded*, *Rumsfeld v. Padilla*, No. 03-1027, slip op. (U.S. June 28, 2004).

207. *Id.* On June 2, 2004, just a month before the Supreme Court is expected to rule in Padilla's case, the government released a declassified document providing more information on its justifications for detaining Padilla. The government now contends that Padilla's detention is justified based on information it obtained by interrogating Padilla once in U.S. custody. As a result of these interrogations, the government has learned that Padilla plotted to blow up apartment buildings in the United States using natural gas. The government has backed away from its earlier allegations that Padilla planned to detonate a dirty bomb in the United States. Commenting on this new information, Deputy Attorney General James B. Comey, Jr. said that if Padilla was detained and charged criminally, "he would very likely have followed his lawyer's advice and said nothing, which would have been his constitutional right. He would likely have ended up a free man." *See, e.g., Foster, Try Padilla or Set Him Free*, MILWAUKEE J. SENTINEL, June 5, 2004, at 12A; Dan Eggen, *Soldiers Facing Extended Tours in Iraq, Afghanistan*, WASH. POST, June 6, 2004, at A3 (describing the government's declassification of this information). Of course, this new information does not answer the question of whether Padilla's detention was justified initially.

208. *Id.* at 569.

209. News Briefing with Donald Rumsfeld, Secretary, United States Department of Defense (June 11, 2002), *available at* 2002 WL 22026773.

210. 533 U.S. 678, 682 (2001) (reading a reasonable time limit into the statutes governing the detention of immigrants with final orders of deportation for those immigrants whose actual deportation was clearly not reasonably foreseeable).

Nonetheless, in December 2002, the district court ruled that the President could designate American citizens, such as Padilla, enemy combatants, even when captured on U.S. soil, and detain them for the duration of the “armed conflict with al Qaeda,” which seems likely to continue for years, if not decades.²¹¹ The court left open the question of whether the evidence presented by the President was sufficient to justify the designation of Padilla as an enemy combatant, however, and gave Padilla time to meet with counsel and present facts to the court.²¹² Yet by establishing that the relevant standard of proof would be the incredibly deferential “some evidence” standard, the court seemed to indicate that *any* government evidence would support Padilla’s indefinite detention.²¹³ As noted earlier, the Second Circuit made this evidentiary question moot by declaring Padilla’s military detention unlawful and calling for his release or transfer to the criminal system.²¹⁴

In contrast to Padilla, Hamdi’s story, like that of the Guantánamo detainees, begins far from U.S. borders—he was allegedly captured by Northern Alliance troops as they overthrew the Taliban.²¹⁵ The Northern Alliance turned him over to American armed forces in the region, and he is currently detained on a naval brig in Virginia.²¹⁶ As with Padilla, the government has justified Hamdi’s detention on the basis of the President’s declaration that Hamdi is an enemy combatant, without providing any supporting evidence.²¹⁷ In January 2003, however, the Fourth Circuit overturned a district court ruling that would have required the government to present evidence substantiating this enemy combatant designation.²¹⁸ This result duplicates the willingness of the D.C. Circuit in *Center for National Security Studies* and of the lower *Padilla* court to defer to any executive branch assertion—no matter how speculative—of a potential national security risk.²¹⁹

211. *Padilla*, 233 F. Supp. 2d at 588.

212. The court noted that it would be very deferential to the judgment of the political branches about the sufficiency of the evidence to prove that Padilla is an enemy combatant under the “some evidence” test. *Id.* at 569-570, 608. Therefore, the court indicated that this would be an easy standard for the government to meet. *Id.* at 608. Still, the government had to produce this evidence—at least in camera.

213. *Id.* at 580.

214. *Padilla v. Rumsfeld*, 352 F.3d 695, 698-99 (2d Cir. 2003), *cert. granted*, 124 S. Ct. 1353 (2004), *rev’d and remanded*, *Rumsfeld v. Padilla*, No. 03-1027, slip op. (U.S. June 28, 2004).

215. *Hamdi v. Bush*, 316 F.3d 450, 460 (4th Cir. 2003), *cert. granted*, 124 S. Ct. 981 (2004), *vacated and remanded*, *Hamdi v. Rumsfeld*, No. 03-6696, slip op. (June 28, 2004).

216. *Id.*

217. *Id.* at 461. The court noted that the only support the government has provided is “an affidavit from the Special Advisor to the Under Secretary of Defense for Policy, Michael Mobbs, which confirms the material factual allegations in Hamdi’s petition.” *Id.*

218. *Id.* at 459.

219. *Id.*; see *supra* notes 160-67 and accompanying text for a discussion of the *Center for National Security Studies* case.

Also like the court in *Center for National Security Studies*, the courts hearing the enemy combatant cases have not been troubled by the inability of these U.S. citizens to gain access to counsel. Until recently, both Hamdi and Padilla had been held incommunicado.²²⁰ Padilla was detained without access to counsel for over a year and a half, despite a December 2002 ruling by a federal district court that he has a right to counsel.²²¹ This right, however, was not unencumbered.²²² Padilla was permitted to consult with counsel only to pursue his habeas corpus petition and to present facts countering the government's assertion that he is an enemy combatant.²²³ In contrast, the Fourth Circuit refused to allow Hamdi even this limited right to counsel. As a result, the Fourth Circuit's *Hamdi* decision threatens to undercut Padilla's limited right to counsel.²²⁴ Indeed, instead of complying with the court order that the government allow defense attorneys to meet with Padilla to gather evidence to rebut the government's asserted basis for his detention, the government stalled, hoping to get a more favorable decision in the *Hamdi* case.²²⁵

After the *Hamdi* decision, the government moved for the *Padilla* court to reconsider its ruling.²²⁶ In what has become a familiar move, the government filed a declaration from a high-ranking intelligence official (Director of the Defense Intelligence Agency, Vice Admiral Lowell E. Jacoby) to provide the court with an official executive assessment of the need to deny counsel, to which the court could defer.²²⁷ This declaration

220. Padilla *ex rel.* Newman v. Bush, 233 F. Supp. 2d 564, 599 (S.D.N.Y. 2002), *aff'd on reh'g sub nom.*, Padilla *ex rel.* Newman v. Rumsfeld, 243 F. Supp. 2d 42, *rev'd in part sub nom.* Padilla v. Rumsfeld, 352 F.3d 695 (2d Cir. 2003), *cert. granted*, 124 S. Ct. 1353 (2004), *rev'd and remanded*, Rumsfeld v. Padilla, No. 03-1027, slip op. (U.S. June 28, 2004); *see also* Nat Hentoff, *Censoring the Sixth Amendment*, TULSA WORLD, Mar. 19, 2004, at A19 (noting that the Defense Department did not allow Hamdi to meet his attorneys until December 2, 2003 and did not clear Padilla to meet his attorneys until February 11, 2004). Even when these meetings were finally allowed, they were closely monitored by military officials in the interview room and videotaped. *Id.*

221. Padilla, 233 F. Supp. 2d 564, 599-601; Hentoff, *supra* note 220 Padilla finally met with his lawyers on March 3, 2004, and he had not previously seen his lawyers since he was designated an enemy combatant by the President on June 9, 2002. Padilla, 233 F. Supp. 2d at 570; *Alleged Dirty Bomb Plotter Allowed to See his Lawyers*, ABERDEEN AM. NEWS, Mar. 4, 2004, at 3.

222. Padilla, 233 F. Supp. 2d at 610.

223. *Id.* The court required that such communications be conducted in a manner that "will minimize the likelihood that he can use his lawyers as unwilling intermediaries for the transmission of information to others." *Id.*

224. *Hamdi*, 316 F.3d at 470-72.

225. Padilla *ex rel.* Newman v. Rumsfeld, 243 F. Supp. 2d 42, 48 (S.D.N.Y. 2003) ("What seems to have happened here is that the government hoped the Fourth Circuit opinion in *Hamdi* would help its position in this case, and tried to slow the progress of this case until that opinion was issued."), *rev'd in part sub nom.* Padilla v. Rumsfeld, 352 F.3d 695 (2d Cir. 2003), *cert. granted*, 124 S. Ct. 1353 (2004), *rev'd and remanded*, Rumsfeld v. Padilla, No. 03-1027, slip op. (U.S. June 28, 2004).

226. *Id.* at 48-49. Although the government filed its reconsideration motion after the court had ordered the government to arrange for Padilla's attorney to consult with his client, the court still granted the motion to reconsider. *Id.*

227. *Id.* at 46.

argues that permitting Padilla to speak with his counsel would “set back by months the government’s efforts to bring psychological pressure to bear upon Padilla in an effort to interrogate him, and could compromise the government’s interrogation techniques.”²²⁸ The government’s professed need to hold Padilla incommunicado is hard to accept, especially since the Second Circuit has declared Padilla’s detention unlawful.²²⁹

These results show that individuals falling within the newly constructed “al Qaeda” group have diminished rights, regardless of their immigration or citizenship status. The courts have differed in their assessments of whether Hamdi’s and Padilla’s citizenship should matter to their habeas claims. In *Padilla*, the district court held that “[t]he President . . . has both constitutional and statutory authority to exercise the powers of Commander in Chief, including the power to detain unlawful combatants, and it matters not that Padilla is a United States citizen captured on U.S. soil.”²³⁰ The Fourth Circuit, however, found that citizenship may matter. Commenting on Hamdi, the court wrote, “[t]his dual status—that of American citizen and that of alleged enemy combatant—raises important questions about the role of the courts in times of war.”²³¹ If the Supreme Court decides Hamdi’s and Padilla’s cases without regard to their citizenship status, the holdings in these cases may have substantial implications for the 9/11 immigrant detainees.

2. *The Guantánamo Case*

The judiciary’s treatment of the challenges to the detention of those held in Cuba exposes just how far the courts have strayed from established

228. *Id.* Further, the government argued that the low “some evidence” standard set by the court to review Padilla’s designation as an enemy combatant rendered any communication with counsel on Padilla’s part “unnecessary.” *Id.* In response, the federal court reaffirmed its prior holding giving Padilla a limited right to counsel and noting that the “some evidence” standard did not allow evidence to be presented solely by the government. *Id.* at 54. Despite this reiteration of its earlier holding, the court showed the same willingness to uphold the legality of Padilla’s detention with little—if any—proof of the allegations against him. *Id.* at 56 (stating that if Padilla did not have access to counsel, “this court cannot do what the applicable statutes and the Due Process Clause require it to do: confirm what frankly appears likely . . . but cannot be certain if based only on the [government’s evidence]—that Padilla’s detention is not arbitrary . . .”).

229. *Id.* Any communication Padilla has with counsel, the government contends, will interrupt the creation of “an atmosphere of dependency and trust between the subject and the interrogator,” and therefore “directly threatens the value of interrogation as an intelligence-gathering tool.” *Id.* (quoting Jacoby Decl. at 4-5). The government declaration even states that the government needs to continue to bar Padilla from seeing counsel so that he gets the clear message that “help is not on the way.” *Id.* at 50 (quoting Jacoby Decl. at 8-9).

230. *Padilla ex rel. Newman v. Bush*, 233 F. Supp. 2d 564, 606 (S.D.N.Y. 2002), *aff’d on reh’g sub nom.*, *Padilla ex rel. Newman v. Rumsfeld*, 243 F. Supp. 2d 42, *rev’d in part sub nom. Padilla v. Rumsfeld*, 352 F.3d 695 (2d Cir. 2003), *cert. granted*, 124 S. Ct. 1353 (2004), *rev’d and remanded*, *Rumsfeld v. Padilla*, No. 03-1027, slip op. (U.S. Jun. 28, 2004).

231. *Hamdi v. Bush*, 316 F.3d 450, 462 (4th Cir. 2003), *cert. granted*, 124 S. Ct. 981 (2004), *vacated and remanded*, *Hamdi v. Rumsfeld*, No. 03-6696, slip op. (June 28, 2004).

doctrine in the *Hamdi* and *Padilla* cases. Those held in Cuba were seized by the U.S. armed forces in Afghanistan and were allegedly members or supporters of the Taliban army or al Qaeda.²³² Much debate surrounds the choice to imprison these captives outside U.S. territory and how this decision weakens the domestic and international law protections typically applied to such detainees.²³³ A group of the detainees challenged the legality of their detention in two separate cases, which the District Court for the District of Columbia consolidated and, in July 2002, dismissed for lack of jurisdiction.²³⁴

Mirroring the domestic 9/11 detention suits, the first challenge to the Guantánamo detentions was on habeas corpus grounds.²³⁵ The second challenge focused only on the detention conditions, not on the legality of the detentions themselves.²³⁶ Specifically, the detainees challenged their inability to meet with family; the government's failure to inform them of the charges against them; and their lack of access to counsel, the courts, or an impartial tribunal.²³⁷ The court refused to recognize these two claims separately and treated both as a request for relief from detention.²³⁸ According to the court, the detainees have no right of access to U.S. courts to pursue constitutional claims, because they are held outside the "sovereign territory of the United States"²³⁹ The D.C. Circuit affirmed this ruling on appeal.²⁴⁰ In its first decision to hear a 9/11 case, the Supreme Court granted certiorari on the two Guantánamo detention claims in November 2003.²⁴¹

In *Rasul v. Bush*, the lower courts emphasized only the plaintiffs' lack of presence in the United States when rejecting their habeas corpus petitions. The district court claimed that its decision turned on the

232. See *Rasul v. Bush*, 215 F. Supp. 2d 55 (D.D.C. 2002), *aff'd sub nom.* *Al Odah v. United States*, 321 F.3d 1134 (D.C. Cir. 2003), *cert. granted*, 124 S. Ct. 534 (2003), *rev'd and remanded*, *Rasul v. Bush*, No. 03-334, slip op. (U.S. June 28, 2004).

233. The administration has specifically refused to label the Guantánamo detainees prisoners of war, a classification that would guarantee them certain international law protections. Geneva Convention, *supra* note 191, at art. 4; Nicholas M. Horrock & Anwar Iqbal, *Waiting for Gitmo*, PITTSBURGH POST-GAZETTE, Mar. 28, 2004, at E1.

234. *Rasul*, 215 F. Supp. 2d 55, 56.

235. *Id.* at 57-58.

236. *Id.*

237. *Id.* at 63.

238. *Id.* at 64.

239. *Id.* at 65, 69, 73. Representatives of the detainees at Guantánamo Bay are currently pursuing legal claims before the United Nations Working Group on Arbitrary Detention. *United Nations Economic and Social Council, Report of the Working Group on Arbitrary Detention*, U.N. Commission on Human Rights, 59th Sess., Provisional Agenda Item 11(a), at 19-21, U.N. Doc. E/CN.4/2003/8 (2002), available at [http://www.unhchr.ch/Huridocda/Huridocda.nsf/0/c58095e9f8267e6cc1256cc60034de72/\\$FILE/G0216028.pdf](http://www.unhchr.ch/Huridocda/Huridocda.nsf/0/c58095e9f8267e6cc1256cc60034de72/$FILE/G0216028.pdf) (last visited June 15, 2004).

240. *Al Odah v. United States*, 321 F.3d 1134 (D.C. Cir. 2003), *cert. granted*, 124 S. Ct. 534 (2003).

241. *Al Odah v. United States*, 124 S. Ct. 534 (2003).

detainees' location outside U.S. sovereign territory, not on their status as "enemy aliens."²⁴² The court reaffirmed that the "privilege of litigation" applies to immigrants in the United States, but reasoned that "[n]o such basis can be invoked here, for these prisoners at no relevant time were within any territory over which the United States is sovereign."²⁴³

Following this logic, Hamdi and Padilla should enjoy constitutional protections simply because they are being held within U.S. territory, even if they were not U.S. citizens. But instead of focusing on the protections that have traditionally flowed from being held in U.S. territory, the *Hamdi* courts and the lower *Padilla* court have deferred to executive branch national security assessments to avoid investigating the circumstances and underlying legality of these detentions.

The Supreme Court's decision to hear the *Rasul* case may signal the Court's discomfort with the indefinite holding of more than 600 foreign nationals without any review process, either in military tribunals or the Article III courts. The Court's decision that U.S. courts have jurisdiction to hear challenges to the legality of the Guantánamo detention is striking as these detainees have much more attenuated ties to the United States than either citizens Hamdi or Padilla.²⁴⁴

3. Challenges to Conditions of Confinement

The latest wave of 9/11-detention litigation involves challenges to conditions of confinement, rather than challenges to the legality of the confinement itself.²⁴⁵ One such case, *Omar v. Casterline*, is currently proceeding in federal district court.²⁴⁶ In it, Hady Hassan Omar, a legal permanent resident who was detained on September 12, 2001, held for seventy-three days in a maximum-security prison solely on the basis of an immigration violation, and later released without charges, claims that he was subjected to confinement conditions violating the Constitution.²⁴⁷ Omar raised a Fourth Amendment challenge to the reasonableness of the

242. *Rasul*, 215 F. Supp. 2d at 67 (citing *Johnson v. Eisentrager*, 339 U.S. 763, 777-78 (1950)). Of course, this begs the question of why Cuba was selected as the detention location.

243. *Id.*

244. *Rasul v. Bush*, No. 03-334, slip op., at 4-17, (U.S. June 28, 2004).

245. *See, e.g., Turkmen v. Ashcroft*, No. 02 CV 2307 (E.D.N.Y. filed Apr. 17, 2002) (challenging the detention conditions faced by noncitizens held in New Jersey), available at <http://news.findlaw.com/hdocs/docs/terrorism/turkmenash41702cmp.pdf> (last visited Feb. 5, 2004).

246. 288 F. Supp. 2d 775 (W.D. La. 2003).

247. *Id.*; Plaintiff's Response Motion at 1, *Omar* (CV 02-1933 A) (on file with author). It is worth remembering, as David Cole observes, that those detained under our immigration laws face harsh conditions while in detention

only because the immigration process is administrative in nature. Were these individuals tried criminally, they would have had a right to a public trial, to be brought before an independent judge within forty-eight hours of their arrest, and not to be detained simply because the FBI had not completed its investigation.

Cole, *The New McCarthyism*, *supra* note 15, at 25.

body searches used against him during his captivity, a First Amendment claim that his free exercise of religion was stymied by prison officials, and a Fifth Amendment due process claim that he was denied adequate access to counsel.²⁴⁸

During his captivity, Omar was forced to undergo three body cavity searches within four days, even though he was held in isolation and denied visitors.²⁴⁹ All of the searches were videotaped. Omar also alleges that prison officials conducted two successive anal probes while a group of male and female guards laughed and mocked him.²⁵⁰ Though the government acknowledges that these searches were videotaped, it has failed to produce the tapes alleging that they were lost.²⁵¹ Yet on September 11, 2003, even though no discovery had been conducted, a federal district court judge dismissed Omar's Fourth Amendment claim on the government's motion for summary judgment.²⁵² The same judge did allow Omar's free exercise claims, that he was denied a proper religious diet and thwarted in his efforts to pray and to observe Ramadan, to proceed.²⁵³ Finally, the judge dismissed Omar's due process claim that his right to counsel had been abridged, as Omar did eventually get access to counsel in time to be represented at his immigration proceeding.²⁵⁴

Cases challenging detention conditions have been hard to bring because of the government's refusal to release the names of those detained, the names of their lawyers, and the dates of the detainees' releases. Even when former detainees are identified, many are reluctant to discuss the details of their detention and instead are anxious to resume their lives. As time passes, more of these confinement cases are likely to emerge. These cases highlight the harsh conditions faced by immigrants imprisoned by the government in its 9/11 investigation and serve as reminders that the immigration system, which is civil in nature, provides few protections for those in its custody.

248. *Omar*, 288 F. Supp. 2d at 779. There is no Sixth Amendment right to counsel in immigration proceedings, which are civil in nature. Yet it is well established that immigrants have the right to counsel if a lack of counsel would amount to a denial of due process under the Fifth Amendment. *See, e.g., Xu Yong Lu v. Ashcroft*, 259 F. 3d 127, 131 (3d Cir. 2001); *Gutierrez v. Ashcroft*, 289 F. Supp. 2d 555, 563 (D.N.J. 2003).

249. *Omar*, 288 F. Supp. 2d at 779-80.

250. *Id.* at 779. Today, these allegations are eerily reminiscent of the allegations made by Iraqi prisoners at Abu Ghraib.

251. *Id.* at 780.

252. *Id.*; *see also* Defendant's Motion for Summary Judgment and Dismissal, *Omar* (CV 02-1933A).

253. *Omar*, 288 F. Supp. 2d at 781.

254. *Id.* at 782.

C. Challenges to Changes in Immigrants' Rights After Entry

The final set of 9/11 cases with the potential to restore our nation's immigration and immigrant policy to its pre-9/11 independence from terrorism policy are those that challenge reductions in the rights of immigrants in the United States. As Part II of this Comment showed, new "immigration-plus" policies adopted by the administration have created a suspect class of immigrants based on ethnicity and presumed religion, thereby reducing the rights of immigrants lawfully in the United States. Given the breadth of the DOJ policies of selectively tracking, detaining, and deporting "al Qaeda" immigrants, more legal challenges to these policies, such as special registration, are likely to emerge.²⁵⁵ Though immigrant advocates are contemplating filing other cases, only one such challenge has been brought as of yet.²⁵⁶ In *Gebin v. Mineta*, a federal district court held that Congress could not bar noncitizens from working as airport screeners.²⁵⁷

The Congress passed the Aviation and Transportation Security Act (ATSA) on November 19, 2001.²⁵⁸ Key components of this security strategy included a citizenship requirement for airport screeners.²⁵⁹ The theory was that airports and air travel would be safer if all screeners were citizens. Assuming arguendo that this theory has merit, the district court questioned the underinclusiveness of the noncitizen bar. Though the Act disallowed noncitizen screeners, its citizenship requirement did not apply to all airport employees or even those with jobs proven to be most related to security.²⁶⁰ Oddly, while noncitizens were barred from holding airport screening positions, they could still work as airline staff to check in passengers, handle baggage, pilot planes, and even serve as armed National Guards providing security at U.S. airports.²⁶¹ The district court also

255. Success on a selective enforcement challenge to these policies is unlikely because the federal government's plenary power over immigration allows it to discriminate among immigrants. *See Narenji v. Civiletti*, 617 F.2d 745 (D.C. Cir. 1979) (holding that Iranian student registration did not violate the Equal Protection Clause).

256. *Gebin v. Mineta*, 239 F. Supp. 2d 967 (C.D. Cal. 2002), *vacated by* 328 F.3d 1211 (9th Cir. 2003). I have not included the cases challenging the closure of deportation hearings to the public in this category. *N. Jersey Media Group, Inc. v. Ashcroft*, 308 F.3d 198, 210 n.6 (3d Cir. 2002), *cert. denied*, 123 S. Ct. 2215 (2003); *Detroit Free Press v. Ashcroft*, 195 F. Supp. 2d 937 (E.D. Mich. 2002), *aff'd*, 303 F.3d 681 (6th Cir. 2002). Although the rights of immigrants in the United States are clearly diminished by those decisions, so too are the rights of the citizens who want information on these hearings. *See supra* notes 39, 51-61 and accompanying text.

257. *Gebin*, 239 F. Supp. 2d at 968.

258. Pub. L. No. 107-71, § 111, 115 Stat. 597, 616 (2001) (codified as amended in scattered sections of 49 U.S.C.).

259. *See Gebin*, 239 F. Supp. 2d at 969.

260. *See id.*

261. Of course, in response to this underinclusiveness, Congress could bar noncitizens from all of these positions, or the courts could hold that noncitizens do not have a right to work in any of these positions. Consider Justice O'Connor's infamous equality of misery query in *McCleskey v. Kemp*, 481

questioned the Act's overinclusiveness. As originally written, the law prohibited nationals—those born in American territories—as well as noncitizens from holding screening jobs.²⁶² For these reasons, the federal district court held the law unconstitutional on equal protection grounds, reasoning that the government had failed to show that this citizenship classification was narrowly tailored to achieve the compelling governmental interest of improving aviation safety.²⁶³ Following this decision, the Congress amended the ATSA to eliminate any distinctions between U.S. citizens and nationals.²⁶⁴ In light of the changes, the Ninth Circuit remanded the case to the district court.²⁶⁵

Though the end result of the lower court's ruling in *Gebin* is praiseworthy, Judge Takasugi missed the opportunity to take on the Act's presumption that *all* noncitizens should be considered threats to the national security of the United States.²⁶⁶ In finding the ATSA, as originally enacted, unconstitutional, the court focused mainly on the problematic extension of the law to nationals.²⁶⁷ While this emphasis made it easy to conclude that the Act failed the narrow tailoring requirement of strict scrutiny, it also missed the larger point—that the government had failed to establish a relationship between citizenship and security or even between airport screening and airport security.

By failing to challenge the assumption that noncitizens are inherently disloyal or dangerous, the court indulged a policy argument reminiscent of the rhetoric used to justify World War II internment of Japanese Americans.²⁶⁸ In defending the ATSA before the district court, the government argued that the citizenship requirement should be upheld because it “further[ed] the government's interest in restoring public trust in the nation's air transportation system.”²⁶⁹ The government basically contended that it should be able to discriminate against noncitizens because

U.S. 279 (1987), when she asked whether the disparity in sentencing faced by black murderers could be cured by “executing more people.” EDWARD LAZARUS, *CLOSED CHAMBERS* 203 (1998).

262. See *Gebin*, 239 F. Supp. 2d 967.

263. *Id.* at 969.

264. Homeland Security Act of 2002, Pub. L. No. 107-296, § 1603, 116 Stat. 2135, 2313 (primarily codified in 6 U.S.C. §§ 101-557).

265. *Gebin v. Mineta*, 328 F.3d 1211, 1212 (9th Cir. 2003).

266. See *Gebin v. Mineta*, 239 F. Supp. 2d at 969 (C.D. Cal. 2002), *vacated by* 328 F.3d 1211 (9th Cir. 2003).

267. *Id.*

268. See Thomas W. Joo, *Presumed Disloyal: Executive Power, Judicial Deference, and the Construction of Race Before and After September 11*, 34 COLUM. HUM. RTS. L. REV. 1 (2002) (discussing how the American public and policymakers have enforced a presumption of disloyalty against Asian Americans and Arab Americans); see also Cole, *supra* note 15.

269. Brief of Plaintiff-Appellees at 22 n.7, *Gebin* (No. 02-57033) (on file with author) (quoting the government's district court brief).

the public holds discriminatory views of them.²⁷⁰ The ATSA is also notable because it is the only congressional action that has been challenged in a post-9/11 lawsuit and because it is the sole example of a policy that discriminates against *all* noncitizens and not a subset of noncitizens based on national origin and presumed religion. In this way, the ATSA reflects an even more corrosive view of noncitizens in the United States than the view endorsed by the government's immigration-plus profiling campaign. Under the ATSA, the Congress made no attempt to identify a specific noncitizen group to subject to scrutiny. Instead, it considered all noncitizens equally suspect.

A clear pattern is starting to emerge from the courts' review of government actions restricting civil liberties and immigrants' rights since 9/11. Among the cases reviewed here are five decisions by district courts that question, if not invalidate, government actions that diminished civil liberties and immigrants' rights following 9/11.²⁷¹ All but one of these lower court decisions, *Padilla*, has been reversed on appeal. And in the one case in which an appellate court reversed a lower court decision in order to protect civil liberties, *Detroit Free Press*, the Supreme Court denied certiorari despite the existence of a live circuit split.²⁷²

There is, however, one nascent, and potentially potent, countertrend. In November 2003, the Supreme Court granted certiorari in *Rasul v. Bush*, a case that had resulted in a loss for plaintiffs at both the district and circuit court levels.²⁷³ In its grant of certiorari, the Supreme Court certified only one narrow question: whether any federal courts have jurisdiction to hear "challenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities" and held at the U.S. military base in

270. *But see* *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) ("The Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.").

271. *Padilla ex rel. Newman v. Bush*, 233 F. Supp. 2d 564, 599-601 (S.D.N.Y. 2002) (requiring the government to allow *Padilla* to speak to counsel in preparing his habeas claim), *aff'd on reh'g sub nom.*, *Padilla ex rel. Newman v. Rumsfeld*, 243 F. Supp. 2d 42 (S.D.N.Y. 2003), *rev'd in part sub nom. Padilla v. Rumsfeld*, 352 F.3d 695 (2d Cir. 2003), *cert. granted*, 124 S. Ct. 1353 (2004), *rev'd and remanded*, *Rumsfeld v. Padilla*, No. 03-1027, slip op. (U.S. Jun. 28, 2004); *Gebin*, 239 F. Supp. 2d 967 (invalidating a congressional statute prohibiting noncitizens and nationals from working as airport screeners as a violation of the Equal Protection Clause); *Ctr. for Nat'l Sec. Studies v. United States Dep't of Justice*, 215 F. Supp. 2d 94 (D.D.C. 2002) (requiring the release of the names of the 9/11 detainees and their attorneys), *aff'd in part, rev'd in part*, 331 F.3d 918 (D.C. Cir. 2003), *cert. denied*, 124 S. Ct. 1041 (2004); *N. Jersey Media Group, Inc. v. Ashcroft*, 205 F. Supp. 2d 288 (D.N.J. 2002) (holding that the public had a constitutional right to open deportation proceedings), *rev'd*, 308 F.3d 198 (3d Cir. 2002), *cert. denied*, 123 S. Ct. 2215 (2003); *United States v. Awadallah*, 202 F. Supp. 2d 55 (S.D.N.Y. 2002) (invalidating the detention of a material witness who was detained in order to ensure his testimony at a grand jury hearing without a showing that he was a flight risk), *rev'd*, 349 F.3d 42 (2d Cir. 2003).

272. *Compare* *Detroit Free Press v. Ashcroft*, 303 F.3d 681 (6th Cir. 2002) *with* *N. Jersey Media Group, Inc. v. Ashcroft*, 308 F.3d 198 (3d Cir. 2002), *cert. denied*, 123 S. Ct. 2215 (2003).

273. 215 F. Supp. 2d 55 (D.D.C. 2002), *aff'd*, 321 F.3d 1134 (D.C. Cir. 2003).

Cuba.²⁷⁴ Though the Court's motivation in hearing this case is unknown, a decision by the Supreme Court in favor of the plaintiffs would underscore the lack of a legal justification for the continued indefinite detention of those who should be in an even more protected position: those with ties to the United States through citizenship or immigration.²⁷⁵ The Court is clearly aware of this issue, as it granted certiorari in the *Padilla* and *Hamdi* cases shortly after agreeing to hear the *Rasul* case. The Supreme Court is thus poised to scrutinize many of the physical liberty deprivations resulting from the 9/11 investigation. Yet, the Court has consistently refused to accept a 9/11 case on informational rights or on the rights of immigrants. As a result, if the Court reigns in any of the government's actions in the 9/11 investigation, it will be in the area of terrorism policy that has little impact on immigration policy. It is useful to think of immigration policy and terrorism policy as overlapping circles. Before 9/11, these two circles overlapped slightly, as immigration policy already included provisions for excluding and removing immigrants charged with terrorist activities. After 9/11, as this Comment shows, immigration policy has become conflated with and subordinated to terrorism policy. As a result, the overlap between these two policy areas is far greater. Yet, there is still a small sliver of immigration policy that is distinct from terrorism policy and vice versa. Because *Hamdi* and *Padilla* are citizens and the detainees at Guantánamo are not immigrants, their cases most logically fall into the sliver of terrorism policy that is separate from immigration policy. Therefore, in deciding these cases the Court may do little, if anything, to separate the growing convergence between terrorism and immigration policy.

V

HOW TERRORISM POLICY IS RESHAPING IMMIGRATION AND IMMIGRANT POLICY

This Part explores where the executive and judicial action following 9/11 leaves U.S. immigration and immigrant policy. Specifically, this Part asks how the government's creation of a suspect class of immigrants based on national origin and presumed religion affects the way our nation treats newcomers and explores how the courts contributed to the drastic change in policy since 9/11.

274. *Rasul*, 124 S. Ct. 534 (2003).

275. Although on the same day it held that the Guantánamo detainees could raise habeas claims in federal courts, the Court dismissed (without prejudice) the habeas petition of citizen José Padilla. *Rasul v. Bush*, No. 03-334, slip op. (U.S. June 28, 2004); *Rumsfeld v. Padilla*, No. 03-1027, slip op. (U.S. June 28, 2004).

A. *Immigrants as Suspects First*

Several policy moves following 9/11 have sent the clear message that all immigrants will be viewed first as potential terror threats and only second, if at all, as welcome newcomers.²⁷⁶ The decision to give the new Department of Homeland Security authority over immigration and immigrant policy certainly sends this message.²⁷⁷ Terrorism policy is now driving immigration and immigrant policy in the United States.

Since 9/11, terrorism policy has misappropriated immigration laws to promote antiterrorism goals. As a result, immigration policy has lost its independent policy agenda. Virtually no new immigration or immigrant policies have been created separate from terrorism policy since 9/11. In fact, even well-developed plans for immigrant policy reform have been dropped since 9/11 as each reform was evaluated first for what it did for our national terrorism policy and potentially only second for its immigration goals. For example, notice how rapidly negotiations over a legalization program for long-term Mexican immigrants and potentially others—an immigration policy once championed by the Bush administration—were dropped after 9/11.²⁷⁸ Similarly, following 9/11, the admittance of refugees was frozen for several months, even for those approved before 9/11.²⁷⁹ As a result, refugee admissions for 2002 reached their lowest level since 1970.²⁸⁰ This outcome, in particular, shows that immigration policy is not able to maintain its own vitality for any immigrant group. Even refugees, a group usually favored under U.S. immigration law,²⁸¹ are received with suspicion. In this way, 9/11 has

276. For discussion of the voluntary interview, special registration, and Absconder Apprehension Initiative programs, as well as the mandatory detention for certain asylum seekers, *see supra* notes 39-75. Though U.S. immigration law has historically permitted exclusion based on racial grounds and political beliefs, since the repeal of race-based immigration quotas and of ideological bars to immigration in the 1950s and 1960s, most scholars of the U.S. immigration system view the last three decades as a sustained period of liberal immigration policy. *See, e.g.*, IMMIGRATION AND ETHNICITY: THE INTEGRATION OF AMERICA'S NEWEST ARRIVALS 7-10 (Barry Edmonston & Jeffrey S. Passel eds., 1994).

277. *See supra* notes 6-13 and accompanying text.

278. *See* Gribbin, *supra* note 6.

279. *See* Regina Germain, *Rushing to Judgment: The Unintended Consequences of the USA PATRIOT Act for Bona Fide Refugees*, 16 GEO. IMMIGR. L.J. 505, 507 (2002) (citing Somini Sengupta, *Refugees at America's Door Find It Closed After Attack*, N.Y. TIMES, Oct. 29, 2001, at A1).

280. *See* Donald Kerwin, *Counterterrorism and Immigrant Rights Two Years Later*, 80 INTERPRETER RELEASES 1402 (2003); Alyson Springer, *2002: Lowest Refugee Admissions in Two Decades?*, 23 REFUGEE REP. 1 (May 2002), available at http://www.refugees.org/world/articles/RR_May_2002_lead.cfm; *Don't Stop Refugee Resettlement*, WASH. POST, Oct. 18, 2001, at B7; *see also* Immigration and Nationality Act of 1990, § 207(c)(3), 8 U.S.C. § 1157(c)(3) (2003) (setting out the refugee admission criteria for the United States).

281. *See, e.g.*, Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (codified in scattered sections of 8 and 42 U.S.C.) (dramatically reducing noncitizens' access to federal public benefits, but retaining eligibility for refugees).

helped reinvigorate the closing borders movement that had already begun before the terrorist attacks.²⁸²

The selective immigration-plus policies of the Bush administration create a presumption of terrorist suspicion against immigrants.²⁸³ Clearly, the notion that all immigrants, or even a substantial portion of them, are potential terrorists is wildly overinclusive. Of course, not all noncitizens are terrorists regardless of their countries of origin.²⁸⁴ Moreover, experience teaches that citizens can be terrorists, too. We need only look as far back as 1995 for an example of a citizen terrorist, Timothy McVeigh.²⁸⁵ In addition, although he was commonly called the “American Taliban,” many consider John Walker Lindh a citizen terrorist.²⁸⁶

While executive policies promote the idea that certain immigrants are inherently threatening, our courts have done little to dispel this view.²⁸⁷ For example, even when the district court in *United States v. Awadallah* ruled that Awadallah’s detention was unlawful, the court failed to mention that he is an immigrant.²⁸⁸ By staying within the four corners of the material witness statute, the court refused to acknowledge the likely trigger for Awadallah’s unlawful detention: his immigration status and nationality. In remaining silent, the court ignores the larger social context within which the 9/11 detentions operate: a context invoking outdated, but still potent, prejudices against immigrants, which assume their perpetual foreignness and that their presence inherently threatens the United States.

B. *A Retreat from Immigrants’ Constitutional Rights*

In the 9/11 cases, the courts have muted the historical importance of immigrants’ ties to and presence in the United States. In some ways, it seems that the so-called “war on terrorism” has become an excuse for launching a war on immigrants. This result should trouble all Americans, not just immigrants and their advocates, since the treatment of immigrants

282. See, e.g., Hiroshi Motomura, *Immigration Policy, Immigration, and We the People After September 11*, 66 ALB. L. REV. 413, 416-17 (noting how preexisting agendas concerning immigration and border security have taken over since 9/11).

283. See *supra* notes 39-73 and accompanying text.

284. Consider David Cole’s argument that “the vast majority of persons who appear Arab and Muslim—probably well over 99.9 percent—have no involvement with terrorism. Arab and Muslim appearance, in other words, is a terribly inaccurate proxy.” Cole, *supra* note 15, at 976. Cole goes on to note that in the sex discrimination context, which invokes less stringent scrutiny than discrimination based on national origin or race if the state is discriminating, “the Court has held that statistics showing that 2 percent of young men [of certain ages] had been arrested for drunk driving did not justify denying men of that age the right to purchase an alcoholic beverage.” *Id.* (citing *Craig v. Boren*, 429 U.S. 190, 201-04 (1976)).

285. See *United States v. McVeigh*, 153 F.3d 1166 (10th Cir. 1998).

286. See *United States v. Lindh*, 227 F. Supp. 2d 565 (E.D. Va. 2002).

287. See *infra* Part III.

288. 202 F. Supp. 2d 55 (S.D.N.Y. 2002), *rev’d*, 349 F.3d 42 (2d Cir. 2003).

post-9/11 is a marked departure from our constitutional and statutory requirements and also threatens the value of citizenship.

Though the current attack on certain noncitizens' rights is a post-9/11 phenomenon, the trend towards deemphasizing the presence of immigrants within the United States as a basis for increased procedural protections is not entirely a reaction to the terrorist attacks.²⁸⁹ Nor is this retreat from the recognition of immigrants' constitutional and statutory rights entirely judicially driven. In many ways, the government's treatment of immigrants after 9/11 has simply exposed and exacerbated a trend that predated 9/11.²⁹⁰ What is new is the overtly discriminatory means these policies employ.

Prior to 9/11, for example, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA)²⁹¹ attempted to diminish the importance of immigrants' physical presence in the United States.²⁹² Before the IIRIRA, there was a clear demarcation between "excludable" and "deportable" immigrants.²⁹³ All immigrants within the borders of the United States, even those who entered surreptitiously, were subject to grounds of deportation, which were applied in deportation proceedings.²⁹⁴ Those immigrants seeking entry to the United States, however, were subject to much broader grounds of exclusion and to separate exclusion proceedings.²⁹⁵ Deportation and exclusion proceedings had different procedural rules, with immigrants in deportation proceedings enjoying greater protections.²⁹⁶ The IIRIRA attempted to change the line between deportable and excludable immigrants. Today, immigrants who enter the United States without documentation fall into the old excludable category, which the IIRIRA now calls "inadmissible" aliens.²⁹⁷

The IIRIRA also consolidated the two types of immigration proceedings into one, called "removal" proceedings.²⁹⁸ Generally, in the non-9/11 context, the federal courts have continued to enforce the differences between the procedural rules and burdens of proof for deportable and excludable immigrants.²⁹⁹ In the 9/11 cases, however, the situation is different. Now that the government's closure of removal hearings to the public has been judicially approved, at least in the Third

289. See, e.g., Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (codified as amended in scattered sections of 8 U.S.C.).

290. See Lucas Guttentag, *The 1996 Immigration Act: Federal Court Jurisdiction—Statutory Restrictions and Constitutional Rights*, 74 INTERPRETER RELEASES 245, 246 (1997).

291. Pub. L. No. 104-208, 110 Stat. 3009.

292. See Guttentag, *supra* note 290, at 260.

293. See ALIENIKOFF, *supra* note 92, at 792.

294. *Id.* at 792, 802.

295. *Id.*

296. *Id.*

297. See Immigration and Nationality Act of 1990 § 240, 8 U.S.C. § 1229a (2003).

298. *Id.*

299. See ALIENIKOFF, *supra* note 92, at 792, 826-27.

Circuit, the traditional strength of the rights of immigrants present in the United States has been muted. At least in the 9/11 context, immigrants living in the United States are now less able to depend on the protection of our laws.³⁰⁰ Closure of deportation hearings affects not only those immigrants who surreptitiously entered the United States, but also those immigrants who at one time had permission to enter.

C. The Impact that the Creeping Erosion of Immigrants' Rights Has on Citizens

The ultimate manner in which the courts treat Hamdi and Padilla will send a message about the continuing value of citizenship. As David Cole notes, the most basic difference between the rights of citizens and noncitizens is that while “immigrants can be expelled from the country, often for very minor infractions[, c]itizens . . . cannot be banished and cannot have their citizenship taken away.”³⁰¹ However, as national security concerns heighten, the rights enjoyed by citizens are not as safe as Cole presumes.

A leaked copy of the Domestic Security Enhancement Act of 2003 (the so-called “PATRIOT II Act”) would close this traditional distinction by making it easier to revoke U.S. citizenship based on political affiliation.³⁰² But the courts did not need a legislative retreat to diminish the value of citizenship. When citizens like Hamdi and Padilla are held incommunicado for over a year and a half without facing any formal charges, one must ask what continuing value of citizenship remains.

The enemy combatant cases also highlight the role that race has played in the 9/11 investigation. I argue that the government’s reaction to the 9/11 attacks has created a new group of immigrants who are presumed suspect based on their immigration status, national origin, and assumed religion. However, race has also played a role in the creation and implementation of this myth. The government’s post-9/11 actions do not establish a uniform weakening of the protections of citizenship, even for those accused of assisting al Qaeda. Compare the case of Yasser Hamdi with that of John Walker Lindh. Both were born in the United States.³⁰³ Both left the United States several years ago to study Islam in the Middle

300. See *supra* notes 177-86, 206-31 and accompanying text.

301. Cole, *supra* note 15, at 981.

302. See Draft of the Domestic Security Enhancement Act of 2003, Center for Public Integrity, at http://www.publicintegrity.org/dtaweb/downloads/Story_01_020703_Doc_I.pdf (last visited June 15, 2004). This copy was apparently a draft leaked from the DOJ and provided to the Center for Public Integrity.

303. See *Hamdi v. Bush*, 316 F.3d 450, 460 (4th Cir. 2003), *cert. granted*, 124 S. Ct. 981 (2004), *vacated and remanded*, *Hamdi v. Rumsfeld*, No. 03-6696, slip op. (June 28, 2004); see also *United States v. Lindh*, 227 F. Supp. 2d 565, 567 (E.D. Va. 2002).

East.³⁰⁴ Both subsequently moved to Afghanistan, where the Northern Alliance picked them up following clashes with the Taliban army.³⁰⁵ The government eventually transferred both men to military custody in the United States and accused them both of aiding the Taliban. This is where the similarities between their stories end. While John Walker Lindh was given a trial and eventually accepted a plea, Hamdi has received no such trial or plea offer.³⁰⁶ What explains the divergent result? Most likely, Hamdi's Arab ethnicity supplied the presumption of disloyalty necessary to overcome the fact that he was a U.S. citizen. For Lindh, however, his White race—not his citizenship—allowed the government to view him as an aberration, instead of another confirmation that members of his racial group should be viewed as potential suspects.³⁰⁷

The enemy combatant cases are not the only 9/11 litigation impacting citizens' rights. In both the closed hearings cases and the FOIA case, the primary plaintiffs are citizens.³⁰⁸ In *North Jersey Media Group, Inc.*, the court creatively avoided the importance of the plaintiffs' citizenship. In its opinion, the majority consistently refers to the plaintiffs as the "media" or the "newspapers," instead of simply plaintiffs or even citizens.³⁰⁹ This rhetoric masks the fact that citizens' First Amendment rights are at stake in this case. Similarly, the *Hamdi* court uses language that questions Hamdi's citizenship.³¹⁰ Though neither the *Hamdi* nor *Padilla* court purports to base its ruling on citizenship grounds, by questioning the plaintiffs' citizenship, the courts avoid considering the increased protections that should flow to citizen detainees.

The government-created suspect class of immigrants, defined by ethnicity and religion, is such a powerful category that even the ties of citizenship cannot protect those who fall under it. The traditional protections of citizenship seem only to extend to those individuals who do not fall within this government-created ethnic profile.

304. See *Hamdi*, 316 F.3d at 460.

305. See *id.*; see also *Lindh*, 227 F. Supp. 2d at 567.

306. See *Hamdi*, 316 F.3d at 450; *Lindh*, 227 F. Supp. 2d at 566.

307. See Joo, *supra* note 268 for a similar discussion of presumptions of disloyalty against Asian Americans at other points in our nation's history.

308. It is interesting to note that both closed hearings cases were originally brought by immigrant plaintiffs subject to closed hearings. As these cases moved forward, only the immigrant plaintiff in the Sixth Circuit case was deported. *Detroit Free Press v. Ashcroft*, 303 F.3d 681 (6th Cir. 2002). Deportation proceedings against the plaintiff in the Third Circuit case were dropped. *N. Jersey Media Group, Inc. v. Ashcroft*, 308 F.3d 198 (3d Cir. 2002), *cert. denied*, 123 S. Ct. 2215 (2003).

309. *N. Jersey Media Group, Inc.*, 308 F.3d at 203.

310. See, e.g., *Hamdi*, 316 F.3d at 460, 462 (noting that "Hamdi is apparently an American citizen" and that "Hamdi apparently was born in Louisiana but left for Saudi Arabia as a small child") (emphasis added).

*D. Political Accountability and the Expansion of
Executive Immigration Power*

Historically, the judiciary has given tremendous deference to congressional and presidential national security assessments during times of heightened security fears.³¹¹ Consequently the federal courts have, at several points in our nation's history, been parties to, rather than bulwarks against, national hysteria.³¹² The combination of judicial deference to national security decisions and to Congress's plenary power over substantive immigration law has been an insurmountable obstacle in many 9/11 cases.³¹³

The basis for Congress's plenary power over immigration is the constitutional powers to wage war and conduct foreign affairs.³¹⁴ Because these powers are also partially vested in the President, he has similar broad powers over substantive immigration law.³¹⁵ It is less clear to what extent federal agencies and other executive officials enjoy similar rights. *Hampton v. Mow Sun Wong* is the case most closely on point.³¹⁶ In *Hampton*, the Court invalidated the federal Civil Service Commission's citizenship requirement for employees, largely because the commission did not have immigration expertise.³¹⁷ The Court also relied on political accountability arguments to overrule this citizenship requirement.³¹⁸

In upholding congressional and presidential plenary immigration power, the Court often reasons that members of the public dissatisfied with the political branches' policy choices can communicate their concerns to elected officials, largely through votes.³¹⁹ Therefore, the logic goes, the

311. See generally JAMES X. DEMPSEY & DAVID COLE, *TERRORISM AND THE CONSTITUTION: SACRIFICING CIVIL LIBERTIES IN THE NAME OF NATIONAL SECURITY* (2d ed. 2002); REHNQUIST, *supra* note 81.

312. See, e.g., *Korematsu v. United States*, 323 U.S. 214 (1944); *c.f.* *Ex Parte Milligan*, 71 U.S. (4 Wall.) 2 (1866).

313. See *N. Jersey Media Group, Inc.*, 308 F.3d 198; *Detroit Free Press*, 303 F.3d 681. In the closed hearings cases, the government argued that the court must defer to the Creppy Directive under the plenary power doctrine. Both circuit courts refused to apply the plenary power doctrine, and therefore deferential review, to the Creppy Directive. They reasoned that the Creppy Directive was an exercise of a procedural, not substantive, immigration policy, and that the executive's plenary power over immigration extends only to substantive immigration decisions, not to the means used to implement these substantive policy choices. Still, the plaintiffs could not overcome the strong deference to the executive in matters of national security.

314. See, e.g., *Chae Chan Ping v. United States*, 130 U.S. 581 (1889).

315. See, e.g., *Mow Sun Wong v. Campbell*, 626 F.2d 739, 744-45 (9th Cir. 1980).

316. *Hampton v. Mow Sun Wong*, 426 U.S. 88 (1976).

317. See *id.* at 116 (stating that due process requires the restriction "be justified by reasons which are properly the concern of that agency").

318. See *id.* at 102.

319. This argument is also at work in *N. Jersey Media Group, Inc. v. Ashcroft*, 308 F.3d 198 (3d Cir. 2002), *cert. denied*, 123 S. Ct. 2215 (2003). Ironically, in this case, even citizens cannot access the deportation hearings to observe the process and oppose (or support) the closure through the political process.

court need not intervene. In *Hampton*, the Court worried that unelected officials could not similarly be held accountable for their actions targeting immigrants, a discrete and insular group.³²⁰ Since appointed officials have taken most of the post-9/11 actions under challenge, the courts should be particularly concerned about the lack of political accountability in this context. These public accountability concerns are, of course, heightened given the secrecy of the 9/11 investigation.³²¹ The total blackout of information regarding the 9/11 investigation means that political accountability arguments fail even for elected officials—an uninformed public cannot voice its concerns. Courts must intervene to protect the public or to make information available so the public may protect itself.

Finally, courts should be particularly skeptical of political accountability arguments in connection with immigrant policy. It is precisely those members of the population singled out by questionable immigrant policy that the political branches cannot protect, even when information on their discriminatory treatment is made public and when those singled-out individuals have the ability to vote. Again, as Cole warns,

When a democratic society strikes that balance [between liberty and security] in ways that impose the costs and benefits uniformly on all, one might be relatively confident that the political process will ultimately achieve a proper balance. But all too often we seek to avoid the difficult tradeoffs by striking an illegitimate balance, sacrificing the liberties of a minority group in order to further the majority's security interests.³²²

The government's post-9/11 targeting of certain immigrant groups permits scant confidence that the political process will properly balance the sometimes competing interests of liberty and security. The lessons from the internment of Japanese Americans during World War II are instructive here. It was precisely the failure of the political process to respond to minority interests and to operate accountably that allowed both the overstatement and the fabricated threat of Japanese Americans to persist.³²³ The internment cases are routinely viewed as a judicial catastrophe,³²⁴ we can only hope history will not view the 9/11 cases with the same distaste.

320. See *Hampton*, 426 U.S. at 102.

321. See *supra* Parts III.A and IV.A. for discussion of *Center for National Security Studies* and closed hearings cases.

322. Cole, *supra* note 15, at 956-57.

323. See *Korematsu v. United States*, 584 F. Supp. 1406 (N.D. Cal. 1984).

324. See Civil Liberties Act of 1988 § 2, Pub. L. No. 100-383, 102 Stat. 903 (acknowledging that Japanese internment was "motivated largely by racial prejudice, wartime hysteria, and a failure of political leadership").

E. Judicial Failure to Check the Expansion of Executive Powers

Courts have pronounced conflicting conclusions about their proper roles in safeguarding civil liberties—including those of immigrants—during a national security crisis. In *Center for National Security Studies*, the lower court wrote that the executive's role was to protect national security first, and that the judiciary had a distinct obligation to first protect the rule of law.³²⁵ Most courts, however, have taken an opposite view of their role. It seems the courts have taken the prescient dicta in *Zadvydas* to heart. There, the Supreme Court stated that “terrorism or other special circumstances” might require the judiciary to give “heightened deference to the judgments of the political branches with respect to matters of national security.”³²⁶ The *Rasul* court did just this when it refused to acknowledge any limit on the executive branch's decision to hold hundreds of detainees incommunicado at Guantánamo Bay.³²⁷ Though the court admitted that these detainees have basic rights, it asked the military and political branches to decide what international protections should apply, knowing that they will identify few, if any.³²⁸ A similar pattern emerges in the Third Circuit opinion in the closed hearing case, where judicial deference to executive assertions regarding the dangers of keeping deportation proceedings open to the public allowed hundreds to be deported in virtual secrecy.³²⁹ The D.C. Circuit decision in *Center for National Security Studies* is the most recent example of judicial deference to executive claims that constitutional rights must be sacrificed to protect the nation against a perceived threat.³³⁰ The end result: increased judicial

325. *Ctr. for Nat'l Sec. Studies v. United States Dep't of Justice*, 215 F. Supp. 2d 94 (D.D.C. 2002), *aff'd in part, rev'd in part*, 331 F.3d 918 (D.C. Cir. 2003), *cert. denied*, 124 S. Ct. 1041 (2004). Judge Kessler wrote:

The Court fully understands and appreciates the fact that the first priority of the executive branch in a time of crisis is to ensure the physical security of its citizens. By the same token, the first priority of the judicial branch must be to ensure that our Government always operates within the statutory and constitutional constraints which distinguish a democracy from a dictatorship.

Id. at 96.

326. *Zadvydas v. Davis*, 533 U.S. 678, 696 (2001). The Third Circuit cites this language in *N. Jersey Media Group, Inc. v. Ashcroft*, 308 F.3d 198, 202 (3d Cir. 2002), *cert. denied*, 123 S. Ct. 2215 (2003), and the D.C. Circuit also cited it in the *Center for National Security Studies* case. 331 F.3d at 927.

327. *Rasul v. Bush*, 215 F. Supp. 2d 55, 62 (D.D.C. 2002), *aff'd sub nom. Al Odah v. United States*, 321 F.3d 1134 (D.C. Cir. 2003), *cert. granted*, 124 S. Ct. 534 (2003), *rev'd and remanded*, *Rasul v. Bush*, No. 03-334, slip op. (U.S. June 28, 2004).

328. *Id.*

329. *See N. Jersey Media Group, Inc.*, 308 F.3d at 204.

330. *Ctr. for Nat'l Sec. Studies*, 331 F.3d 918.

deference to expanded executive powers is upending the rule of law and compromising rights of immigrants and citizens alike.³³¹

Judicial deference itself is not the problem. The executive branch has more expertise in matters of national security policy than the courts, and, therefore is best suited to make many national security decisions. The issue is the evidence courts have been willing to defer to in the 9/11 cases. These cases expose a troubling trend of blind judicial acceptance of incredibly speculative assertions regarding the national security risks posed by certain groups of immigrants.³³² Consider the uncritical scrutiny of the “mosaic theory,” which the government has used to justify withholding information about the 9/11 investigation. The theory relies on a better-safe-than-sorry argument to justify both the preventive detention of immigrants and total secrecy surrounding these detentions. Based on the statements of two senior FBI officials, the government claims it must withhold *all* information on the progress of its investigation, lest sleeper cells launch another attack by piecing together the government’s grand scheme.³³³ Even in the face of mounting evidence that the 9/11 detainees were arrested arbitrarily, without individualized showings of terrorism risk, the courts have been willing to defer to this speculative harm predicted by the executive branch. Perhaps the real reason that the government is withholding information on its 9/11 investigation is to give succor to the public myth that we are “winning the war on terrorism.”

The Third Circuit’s decision in *North Jersey Media Group* illustrates the problem with wholesale judicial acceptance of the mosaic theory. In determining whether a First Amendment right of public access to deportation proceedings exists, the court applies the two-part *Richmond Newspapers* test.³³⁴ The second part of this test asks “whether public access plays a significant positive role in the functioning of the particular process in question.”³³⁵ The court begins its analysis by reframing the scope of this test and holding that it must consider the negative, as well as positive, impacts of openness—creating a new balancing test within the existing one.³³⁶ Though the court admitted that the negative impacts of openness were speculative, it deferred to the executive assessment that the threat could be grave and outweighed the benefits of openness.

331. The recent Supreme Court decisions in the *Hamdi* and *Rasul* cases appear to be a powerful check on this trend. *Hamdi v. Rumsfeld*, No. 03-6696, slip op. (U.S. June 28, 2004); *Rasul v. Bush*, No. 03-334, slip op. (U.S. June 28, 2004).

332. See *supra* Parts III.A. and IV.A. for discussion of *Center for National Security Studies* and closed hearings cases.

333. *N. Jersey Media Group, Inc.*, 308 F.3d at 203.

334. *Id.* at 200 (citing *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980)).

335. *Id.* (quoting *Press-Enter. Co. v. Superior Court*, 478 U.S. 1 (1986)).

336. *Id.*

The problem is obvious—virtually no interest outweighs even the specter of a national security concern. Indeed, in *North Jersey Media Group*, the court recognized that all of the traditional values served by openness were present and that the closure of deportation hearings would amount to “a complete information blackout along both substantive and procedural dimensions.”³³⁷ Even this finding, however, was insufficient to overcome the speculative national security concerns.³³⁸

In summary, nearly all of the judicial decisions in the 9/11 cases to date show a judicial failure to scrutinize those post-9/11 executive actions that have grossly reduced civil liberties, especially for immigrants. In this way, the judiciary has abdicated its traditional role in protecting discrete and insular minorities. When we consider whether we are winning the war on terrorism, I argue that we must include as part of that determination a serious analysis of the costs imposed in the intended advancement of the goal of preventing terrorism. It is easy to protect the rights of all residents during times of peace and nationality stability. The true test of our nation, however, is how we treat those who are among the least powerful in our society during times of widespread fear.

CONCLUSION

Despite the widespread evidence, the public has largely stood quietly by as the government has curtailed civil liberties and immigrants' rights since 9/11. Many Americans see no problem with the sacrifice of rights immigrants have been asked to make in the interest of the supposed advancement of national security. In response to the American Civil Liberties Union's statement that the organization would assist immigrants going through the voluntary interview process, for instance, the following message was left on the ACLU hotline: “How can you guys tell us that people who are not American citizens have rights?” Another caller asked, “What makes you think these people have rights? Those are Arabs; they have no rights.”³³⁹ These messages might seem hopelessly ignorant—but in fact, they are merely cruder versions of the Attorney General's own statements to Congress criticizing those who question the disregard for immigrants' rights since 9/11, a disregard he considers “the phantoms of lost liberty.”³⁴⁰

337. *Id.* at 203.

338. *Id.* at 219 (calling the test “unavoidably speculative, for it is impossible to weigh objectively, for example, the community benefit of emotional catharsis against the security risk of disclosing the United States' methods of investigation and the extent of its knowledge.”).

339. Brian Dickerson, *ACLU Finds Intervention Not Welcome*, DETROIT FREE PRESS, Dec. 7, 2001, at 1B. It is notable that Michigan has the highest percentage of Arab Americans of all U.S. states. G. PATRICIA DE LA CRUZ & ANGELA BRITTINGHAM, U.S. CENSUS BUREAU, THE ARAB POPULATION: 2000 5 (2003).

340. *Dep't of Justice Oversight*, *supra* note 76.

There are several reasons why the gross restrictions placed on immigrants' rights should trouble all Americans. First, the contraction of immigrants' constitutional rights during a time of crisis virtually guarantees fewer rights for immigrants as national fears recede. As Justice Marshall wrote in *Skinner v. Railway Labor Executives' Association*, "[h]istory teaches that grave threats to liberty often come in times of urgency, when constitutional rights seem too extravagant to endure [But] when we allow fundamental freedoms to be sacrificed in the name of real or perceived exigency, we invariably come to regret it."³⁴¹ Before this predictable lament occurs, the erosion of civil liberties and basic constitutional protections for immigrants can change people's attitudes of immigrants and drastically reshape our nation's immigrant and immigration policies.

Second, restrictions on immigrants' rights today may lead to cutbacks in citizens' rights tomorrow. We have already seen that citizenship alone does not provide constitutional protections for suspected terrorists. This fact is evident in the still-unjustified indefinite detentions of Yasir Hamdi and José Padilla.

Third, even if we can rely on the political process to reassert those rights of citizens diminished since 9/11, the political process cannot protect the rights of noncitizens. Furthermore, reductions in noncitizens' rights will have large spillover impacts on citizens. Contrary to popular belief, neither the U.S. population as a whole nor individual households divide neatly into two categories—one comprised exclusively of citizens and the other consisting only of noncitizens. Instead, every one in ten U.S. citizen children has at least one noncitizen parent.³⁴² In California, one in four U.S. citizen children has at least one noncitizen parent.³⁴³ Inevitably, then, restrictions targeting noncitizens will affect citizens as well.

Fourth, and more fundamentally, allowing terrorism policy to become inextricably intertwined with immigration and immigrant policy threatens to undermine the ideals of equal justice and equal opportunity that represent the best of America. Though no showing has been made—either in the public sphere or in the courts—of a sufficient relationship between certain immigrants and terrorism, this relationship has been presumed. Allowing this assertion to go unchecked not only violates the principles of a legal system dedicated to equal treatment under the law, but it also makes a mockery of a criminal justice system predicated on assessments of individual culpability.

341. 489 U.S. 602, 635 (1989) (Marshall, J., dissenting).

342. Michael Fix & Wendy Zimmermann, *All Under One Roof: Mixed-Status of Families in an Era of Reform* (Oct. 6, 1999), available at <http://www.urban.org/url.cfm?ID=409100>.

343. *Id.*

Finally, time will continue and the tragic events of 9/11 so fresh in the minds of most Americans today, will fade somewhat. But our nation will remain marked by the way our government handled itself during this important time. The months following 9/11 may have been the time for aggressive terrorism policies and tactics that paused little to consider their impact on immigrant communities and on our nation's conception of members of targeted racial/ethnic and religious groups. Approaching three years after the attacks, that time has clearly ended. We can no longer afford to ignore the creation of a suspect group of immigrants and citizens within our nation: a suspect group created not based on evidence of individual terrorist actions, but on overbroad generalizations about nations of people and members of a leading world religion. As a nation that likes to boast of its immigrant roots, we have a national obligation to begin this conversation in earnest and to remember that the equality we prize in this country means little if we refuse to extend it to all newcomers of all nationalities and religions.

