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Freedom from Fear: Ethnic Profiling, the USA Patriot Act, and the "Right to Travel"

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"We will not allow this enemy to win the war by changing our way of life or restricting our freedoms."—President George W. Bush, September 12, 2001.

I. Introduction

"We must choose between freedom and fear—we cannot have both."[1]—Justice William O. Douglas.

Passengers identified by the Computer Assisted Passenger Prescreening System (CAPPS) as selectees, including those selected by a computer at random, will be subjected to additional screening at the boarding gate in addition to having their baggage being subject to additional security requirements. The CAPPS selection criteria have been reviewed by the Department of Justice to ensure that the methods of passenger selection are non-discriminatory and do not constitute impermissible profiling of passengers on the basis of their race, color, religion, ethnicity, or national origin.

> Individuals who may appear to be of Arab, Middle Eastern or South Asian descent and/or Muslim or Sikh have the right to be treated with the same respect as persons of other ethnicities and religions, and all persons should be treated in a polite, respectful and friendly manner.
>
> Persons or their property may not be subjected to inspection, search and/or detention solely because the persons appear to be Arab, Middle Eastern, Asian, and/or Muslim or Sikh, or solely because they speak Arabic, Farsi, or another foreign language, or solely because they speak with an accent that may lead another person to believe that they are Arab, Middle Eastern, Asian, and/or Muslim or Sikh.[2]

In the aftermath of the September 11, 2001 attacks on the United States and its citizens, which for the first time utilized commercial aircraft as instruments of terror on a large scale, Congress reacted to a perceived public outcry for the federal government to take measures that would prevent a reoccurrence. Forty years after Justice Douglas' pronouncement, and on the eve of the five-year "sunset" of the Patriot Act, the choice between freedom and fear is once again before lawmakers and their constituents.

America's willingness to sacrifice or suspend constitutionally protected liberties in exchange for security in their persons, homes, workplaces and travel has resulted in Congressional action in both World War I and World War II, and it acted similarly in the days and weeks after September 11th. Article I, §8 of the Constitution gives Congress the power to "declare War," "raise and support Armies" as well as other enumerated "war powers," and the Supreme Court has consistently held that these powers, enabled by the "Necessary and Proper Clause," grant Congress the authority to take many actions in a time of war that would be unconstitutional in peacetime.[3] As will be discussed below, during World War II Congress authorized the detention and relocation of citizens and residents of the western United States who were of Japanese ancestry. While clearly unconstitutional during peacetime, the statute was left untouched by the Supreme Court on the theory that: "when under conditions of modern warfare our shores are threatened by hostile forces, the power to protect must be commensurate with the threatened danger."[4]

Air crimes, or criminal activity taking place aboard private and commercial aircraft, have been a part of air travel since the dawn of commercial aviation. Between 1930 and 1973 there were 387 documented air piracy attempts; of those, about two dozen were for

extortion purposes. The decade of the 1970's brought a substantial increase in the incidences of air crimes, and the federal courts were compelled to develop legal standards dealing with a modern crime that differed little from late 19th century stagecoach and train robberies other than the mode of transportation involved.

> Although the problem of aerial hijacking is well known to the public, we think it appropriate, nevertheless, to single out our reasons for treating airport security searches as an exceptional and exigent situation under the Fourth Amendment. At the core of this problem is the hijacker himself. In some cases he is a deeply disturbed and highly unpredictable individual—a paranoid, suicidal schizophrenic with extreme tendencies towards violence. Although the crime of air piracy exceeds all others in terms of the potential for great and immediate harm to others, its undesirable consequences are not limited to that fact. Among other things, it has been used as an avenue of escape for criminals, a means of extorting huge sums of money and as a device for carrying out numerous acts of political violence and terrorism. Perhaps most disturbing of all is the fact that aerial hijacking appears to be escalating in frequency. We do not think that it is unrealistic to say that the current situation has approached the crisis stage for law enforcement officials in this country.[5]

In the ensuing three decades, both local and federal law enforcement authorities attempted to manage the rising tide of air piracy, drug smuggling, and money laundering cases by relying upon a patchwork of federal laws, regulations, and search-and-seizure case precedent unrelated to aviation to carve out a set of rules governing the detection and prosecution of crimes in and around airports and airplanes.

In what in retrospect seems a predictable political response to the events of September 11, Congress enacted legislation that created the largest federal bureaucracy in history and established unrealistic [according to the airlines and airports] standards and deadlines intended to make air travel safer amid cries of invasion of privacy and diminution of individual rights. The Attorney General of the United States called for, and received, unprecedented powers to identify and detain indefinitely, without bail, individuals who the Justice Department perceives to be threats to the safety and security of the United States, while implementing a:

> . . . Foreign Terrorist Tracking Task Force that . . . will ensure that federal agencies coordinate their efforts to bar from the United States all aliens who meet any of the following criteria: aliens who are representatives, members or supporters of terrorist organizations; aliens who are suspected of engaging in terrorist activity; or aliens who provide material support to terrorist activity.[6]

The Bush administration's position on the issue of identification and detention of terrorists and the applicability of the USA Patriot Act was summarized in the Attorney General's testimony before Congress in support of the new legislation designed to provide federal and state law enforcement agencies with new tools to combat terrorism:

> In addition, the USA Patriot Act requires the detention of aliens whom the attorney general certifies to be a threat to national security, or who are determined to have engaged—to have been engaged—let me start that over again. One, the attorney general, if he certifies that they are a threat to national security, they must be detained by a requirement of the USA Patriot Act; or two, if they are determined to have been engaged in terrorist activities. Once arrested, aliens must be charged with a criminal or immigration offense within seven days, under the act. If the charges are dismissed, the aliens will be released. Otherwise, charged aliens must be detained until they are removed from the United States, according to the act, or until they are determined no longer to pose a threat to national security. This measure, which is the equivalent of denying bail to violent offenders, will prevent dangerous aliens from being released to mingle among the American citizens that they would harm.[7]

> A nationwide program giving millions of American truckers, letter carriers, train conductors, ship captains, utility employees, and others a formal way to report suspicious terrorist activity. Operation TIPS, a project of the U.S. Department of Justice, will begin as a pilot program in 10 cities that will be selected. . . . Everywhere in America, a concerned worker can call a toll-free number and be connected directly to a hotline routing calls to the proper

> law enforcement agency or other responder organizations.[8]

> 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. They encourage people of good will to remain silent in the face of evil.[9]

This declaration of "if you aren't with us, you are against us" raised fears in some quarters that those objecting to the new statute and its implementation on the grounds of equal protection and constitutionality would be branded as traitors. Concerns that the broad reaches of new anti-terrorism legislation would give the government unfettered power to search, detain and arrest individuals on even the vaguest suspicion of criminal activity, in potential violation of the Fourth Amendment, have been raised in the press and by litigants in numerous judicial proceedings challenging the constitutionality of these laws.[10]

As history has shown, legislation enacted during a time of national outrage and collective passion, which understandably flows from a terrorist attack, increases the risk that laws may be based upon false assumptions and incomplete understandings. Furthermore, the hasty consideration and shortened debate attending such legislation heightens concerns that these laws will have unforeseen and unwanted effects.

This article examines the traditional means by which crimes involving commercial aviation have been detected, prosecuted, and occasionally prevented, discusses the constitutional barriers that must be surmounted by the Congress in its efforts to combat hostile actions by foreign and domestic terrorists, or otherwise to secure America's borders, and analyzes the so-called USA PATRIOT ACT, enacted in response to the September 11, 2001 terrorist attacks, in reference to the Constitution, taking into due consideration the protection of travelers, airline employees and the general public. The article does not focus on "air rage" incidents (those involving passengers misbehaving aboard aircraft and in airport terminals, a topic that has filled several volumes of analysis and comment elsewhere), but instead is specifically directed towards issues arising

out of politically motivated aircraft hijacking and acts of terrorism involving commercial aircraft.

II. The Constitutional Right to Travel

In the spring of 1869 the tracks of the Union Pacific Railroad extended west from Omaha, Nebraska to meet the eastward thrust of the Central Pacific Railroad's tracklayers in a race into Utah that ended at an unremarkable spot called Promontory Summit. When the Golden Spike went into the last tie joining the rails, and the telegrapher sent the one-word message to the world: "Done!" on May 10th, the lines from east and west were joined, thereby completing the transcontinental railroad, arguably one of the engineering marvels of the age. Two years before this watershed event, in response to the spreading network of rails and railroads, and, undoubtedly in anticipation of the substantial revenue that could be extracted from passengers using those rails, (as well as other forms of transportation—though mankind's dreams of powered flight would not be fulfilled for another 35 years), the state of Nevada imposed a $1.00 tax on any passenger (rail or stagecoach) who passed through the state. The validity of such a tax soon came before the Supreme Court in *Crandall v. Nevada*, and the Court had little trouble declaring the tax invalid, relying upon an inferred constitutional right to travel to find such a revenue tariff to be unconstitutional on its face.[11]

The right to travel was not a uniquely American invention, but may have first been recognized in the English common law. The Magna Carta of 1215, Chapter 42, permitted every man (it said nothing about women, who were still chattels in the eyes of the law) to leave England except during a time of war: "It shall be lawful to any person, for the future, to go out of our kingdom, and to return, safely and securely, by land or by water, saving his allegiance to us, unless it be in time of war, for some short space, for the common good of the kingdom: excepting prisoners and outlaws, according to the laws of the land, and of the people of the nation at war against us, and Merchants who shall be treated as it is said above."

In the newly formed United States, Article IV of the Articles of Confederation provided that the people of each state shall have free ingress and egress to and from any other state. However, when the Constitution was drafted, any reference to a right to travel was omitted from the final document. Since there is no evidence that the right was discussed during the constitutional convention, it is likely that travel was assumed to be so fundamental that it was implicit in the Constitution, rather than rejected.[12]

References to a right to travel in Supreme Court decisions have appeared sporadically.[13] Although there has been no dispute in the Supreme Court concerning the existence of a right to travel, there has been continuing controversy over its constitutional roots. Suggested sources have been the privileges and immunities section of either Article IV or the Fourteenth Amendment, the due process clauses of the Fifth and Fourteenth Amendments, the commerce clause, the Ninth Amendment and a general inferred premise in the Constitution.[14]

> The textual source of the constitutional right to travel, or, more precisely, the right of free interstate migration, though, has proved elusive. It has been variously assigned to the Privileges and Immunities Clause of Art. IV, [citations], to the Commerce Clause, [citations], and to the Privileges and Immunities Clause of the Fourteenth Amendment, [citations]. The right has also been inferred from the federal structure of government adopted by our Constitution. [citations]. However, in light of the unquestioned historic acceptance of the principle of free interstate migration, and of the important role that principle has played in transforming many States into a single Nation, we have not felt impelled to locate this right definitively in any particular constitutional provision. [citations]. Whatever its origin, the right to migrate is firmly established and has been repeatedly recognized by our cases. [citations][15]

The Supreme Court long ago recognized that the nature of our federal union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement.[16]

The high court defined the limits of the modern travel doctrine in a series of cases beginning in 1941 with *Edwards v. California*.[17] In *Edwards*, a narrow majority held a California law prohibiting public assistance for non-resident indigents entering the state to be an unconstitutional burden on interstate commerce. The significance of *Edwards* is that the Court affirmed in very positive terms the existence of a constitutional right to travel. *Edwards*, however, is usually interpreted as guaranteeing this right for interstate, but not for intrastate travel, because of the Court's reliance on the interstate commerce clause for constitutional support.[18]

The right to travel took on additional dimensions twenty years later in the "passport cases."[19] These cases were concerned with the freedom to leave the United States for foreign travel and the authority of the Secretary of State to withhold passports from applicants associated with communist organizations.

In *Kent v. Dulles*, the Court based its decision on other grounds than the right to travel, holding that the Secretary of State had exceeded his authority under a statute regulating the issuance of passports by attempting to withhold them. In a strongly worded *dictum* Justice Douglas, writing for the majority, recognized a right to travel derived from the due process clause of the Fifth Amendment:

> The right to travel is a part of the "liberty" of which the citizen cannot be deprived without due process of law under the Fifth Amendment. . . . Freedom of movement across frontiers in either direction, and inside frontiers as well, was a part of our heritage.[20]

Justice Goldberg, writing for a 6-3 majority in *Aptheker v. Secretary of State*, relied in part on *Kent*, (noting that the subject statute had yet to become effective when *Kent* was decided), to find that §6 of the Subversive Activities Control Act, which authorized the Secretary of State to revoke or deny passports to "registered members" of the Communist Party, ". . . too broadly and indiscriminately restricts the right to travel and thereby abridges the liberty guaranteed by the Fifth Amendment."[21] *Aptheker* could be interpreted narrowly to limit its application to cases where travel was impeded because of a person's political or religious affiliation or broadly to hold that travel itself was comparable to a First Amendment right and therefore entitled to a higher degree of protection independent of any relationship to a particular First Amendment freedom.[22] The broader construction would necessarily result in finding that restrictions placed on travel should only be narrowly construed when they infringe on a First Amendment right. In all other cases, (those not infringing on a First Amendment right), restrictions on the right to travel would be allowed if reasonable. Perhaps instructive of the court's thinking is its reliance upon *Shelton v. Tucker's* principle that:

> Even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when

> the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose.[23]

Aptheker carefully distinguishes the *freedom* to travel outside the United States from the *right* to travel within the United States.[24] The constitutional right of interstate travel is virtually unqualified.[25] However, ". . . [t]hat Congress under the Constitution has power to safeguard our Nation's security is obvious and unarguable. [Citations omitted]. As we said in Mendoza-Martinez, 'while the Constitution protects against invasions of individual rights, it is not a suicide pact' [Citations omitted]. At the same time the Constitution requires that the powers of government 'must be so exercised as not, in attaining a permissible end, unduly to infringe' a constitutionally protected freedom [Citations omitted]."[26]

The *Aptheker* court further observed that "[I]t is relevant to note that less than a month after the decision in *Kent v. Dulles* . . . President Eisenhower sent a message to Congress stating that: 'Any limitations on the right to travel can only be tolerated in terms of overriding requirements of our national security, and must be subject to substantive and procedural guaranties.' " [citing Message from the President—Issuance of Passports, H. Doc. No. 417, 85th Cong., 2d Sess.; 104 Cong. Rec. 13046][27]

A direct consequence of providing travel with the same level of protection as a First Amendment right is that a restriction on travel may be challenged on its face as unconstitutional. Generally, to have standing to challenge the constitutionality of a statute, one must show personal injury from the statute as applied. When First Amendment rights are involved, however, the statute may be challenged on its face without alleging an unlawful application. This prevents statutes from having a chilling or deterrent effect on the exercise of First Amendment rights.[28]

The *Aptheker* court's approach to the potential implication of a fundamental constitutional right is best stated in the following passage:

> Since this case involves a personal liberty protected by the Bill of Rights, we believe that the proper approach to legislation curtailing that liberty must be that adopted by this Court in *NAACP v. Button*, 371 U.S. 415, and *Thornhill v. Alabama*, 310 U.S. 88. In *NAACP v. Button* the Court stated that:

> "In appraising a statute's inhibitory effect upon such rights, this Court has not hesitated to take into account possible applications of the statute in other factual contexts besides that at bar. *Thornhill v. Alabama,* 310 U.S. 88, 97-98; *Winters v. New York,* [333 U.S. 507], 518-520. *Cf. Staub v. City of Baxley,* 355 U.S. 313. . . . The objectionable quality of vagueness and overbreadth does not depend upon absence of fair notice to a criminally accused or upon unchanneled delegation of legislative powers, but upon the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application. *Cf. Marcus v. Search Warrant,* 367 U.S. 717, 733. These freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions." 371 U.S., at 432-433.[29]

The right to travel in the context of racial issues was addressed in *U.S. v. Guest,*[30] which was concerned with the application of a federal criminal conspiracy statute to the murder of African-American citizens traveling through Georgia: "Although the Articles of Confederation provided that . . . the people of each State shall have free ingress and egress to and from any other State, that right finds no explicit mention in the Constitution. The reason, it has been suggested, is that a right so elementary was conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created. In any event, freedom to travel throughout the United States has long been recognized as a basic right under the Constitution."[31] The prior right-to-travel cases had proscribed state and federal interference with the right to travel, and *Guest* extended this to interference by private individuals. As Justice Stewart said for the Court:

> The constitutional right to travel from one State to another . . . occupies a position fundamental to the concept of our Federal Union. It is a right that has been firmly established and repeatedly recognized.[32]

Although the Court has consistently held that the right to travel is implicit in the Constitution itself and that any deterrence of or impediment on travel "implicates" a fundamental Constitutional right,[33] not all restrictions are unconstitutional. There is no constitutional guarantee of the most convenient form of travel, for

example.[34] The courts have, furthermore, consistently enforced congressional legislation intended to protect travel, so it is not illogical to suggest that Congress has authority, based on this constitutional right, to enact legislation regulating governmental and private action relating to travel, so long as the regulation does not unreasonably impede the right to travel, and there is a compelling governmental interest involved.[35]

In recent years, the Supreme Court has employed a stricter test where the classification is based on "suspect criteria" or where the classification restricts some fundamental right. In this case, the classification must not only meet the standards of the traditional test of reasonableness, but there must be a *compelling state interest* served by the classification.[36] The Court began its analysis in *Shapiro* by affirming its holding in *Guest, supra,* that the right to travel was based on the Constitution in general. Then, in language similar to *Aptheker, supra,* the Court said that a statute deterring the migration of indigents (between the states) was constitutionally impermissible because of the chilling effect on travel. The Court then invoked the *compelling state interest* doctrine to protect interstate travel. In moving from state to state travelers are exercising a constitutional right and any classification which serves to penalize the exercise of that right, *unless shown to be necessary to promote a compelling governmental interest,* is unconstitutional.[37]

. . . the compelling state interest test formulated in* Shapiro *does not automatically preclude most regulations of travel. Rather, it raises two questions: First, whether a regulation of travel places a penalty on the right to travel; and if so, second, whether the regulation promotes a compelling governmental interest.

—Douglas M. Marshall

The main controversy concerning the interpretation of *Shapiro* has been over the application of the "compelling state interest" test to travel. This rigorous standard requires the government to prove that certain classifications it has imposed are vital to the promotion of a compelling governmental interest.[38] Classifications subject to strict scrutiny by the courts are those involving "suspect" areas and fundamental rights. Suspect areas are race, religion and color; fundamental rights include marriage and procreation, voting and certain aspects of criminal procedures, First Amendment rights

and, as the result of *Shapiro*, travel. Even if there is a substantial and, on its face, legitimate governmental purpose (such as protecting the general public from acts of terrorism), "that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved."[39]

However, the compelling state interest test formulated in *Shapiro* does not automatically preclude most regulations of travel. Rather, it raises two questions: First, whether a regulation of travel places a penalty on the right to travel; and if so, second, whether the regulation promotes a compelling governmental interest.[40]

Additional interpretation of the travel doctrine as formulated in *Shapiro* was provided by the Supreme Court in *Dandridge v. Williams*,[41] although the facts of the case did not involve travel. The Court stated that restrictions on travel invoked the compelling state interest test since it was protected by the Constitution, and that the reason for its decision in *Shapiro* was because the right to travel was violated, not because welfare legislation was involved.

Can the government prevent an American citizen from traveling domestically or leaving the country for reasons other than association with a terrorist organization or hostile government? In *Eunique v. Powell*,[42] the applicant, a U.S. citizen with relatives in her native Mexico, was denied a passport under 42 U.S.C.S. § 652(k)(2) because she was severely in arrears on her child support payments. Eunique (a lawyer presenting her own case *pro se*) argued that there was an insufficient connection between her breach of the duty to pay for the support of her children, and the government's interference with her right to international travel. The Ninth Circuit held that Congress and the State Department could refuse to let the applicant have her passport as long as she remained in substantial arrears on her child support obligations. "Rational basis" review standards are to be applied to restrictions on international travel, and the relevant statute survives rational basis review. The court acknowledged that the failure of parents to support their children was recognized as an economic problem and a serious offense against morals and welfare, and that the statute assured that parents who fail to pay their child support obligations remain within the country. (Ironically, Eunique went to Mexico anyway to visit her sister, since a passport is usually not required to cross from the U.S. into Mexico).[43]

In summary, the Supreme Court has clearly indicated that the right to travel is a fundamental personal right enjoyed by citizens and those lawfully within the country's borders that can be impinged only if to do so is necessary to promote a compelling governmental interest. The cases distinguish between travel out of

the United States (passport cases) and interstate travel [cases arising out of state-imposed restrictions or requirements relating to public assistance and similar local programs]. The compelling governmental interest test is triggered by any classification which serves to *penalize or impede* the exercise of that right to travel. If the traveler is entering the U.S. via any legal port of entry, such as an airport, then a different set of rules would seem to apply, in the interest of national security and protection of the borders and citizens and residents therein. Once an "immigrant" has gained entry, legal or not, then fundamental constitutional rights come into play, and even the illegal immigrant enjoys the same constitutional rights as a citizen. The uninvited "guest" even has a constitutional right to due process, to protection from self incrimination, to equal protection, and so on, all "earned" the moment he/she sets foot on U.S. soil.[44]

Since a fundamental constitutional right to interstate and even intrastate travel has been well established, the next level of inquiry invites a comparison between interstate travel and immigration and/or entry into U.S., legally or otherwise, which is dealt with in Section IV *infra*.

III. The Changing Face of Air Transportation

As suggested by the passage quoted above from *United States v. Moreno*,[45] the greatest challenges facing air carriers, airports, governments and travelers have always involved safety and security. And, because airline and commercial air service has typically been the most convenient and fastest mode of travel, (airport and airway congestion notwithstanding), they have attracted more than their share of the criminal element.

Aviation security is essential to the survival of not only America's, but also the world's transportation infrastructure, certainly equal to and now irreversibly intertwined with safety. On November 19, 2001, President Bush signed into law the Aviation and Transportation Security Act (ATSA), which among other things, established a new Transportation Security Administration ("TSA") within the Department of Transportation.[46] TSA is accountable for security, not only in aviation, but in all other transportation modes. It had become the largest federal law enforcement agency by the end of 2003. The precise makeup and structure of the TSA is still undergoing examination, debate and reorganization, and will not be dissected here, except insofar as is necessary to put the discussion of a constitutional right to travel into context.

The September 11 attacks altered, perhaps indelibly, Americans' perspective on what is tolerable within (and perhaps outside

of) the borders of the United States, and what sacrifices must be made in the name of protection from foreign (and domestic) terrorism. Calls for major overhauls of the air transportation security program in the weeks after September 11th ran the gamut from federalizing all airport/airline security personnel, creation of a new federal multi-agency law enforcement bureaucracy, enriched appropriations for domestic and foreign surveillance assets, to subsidization of airlines and airports to beef up security, strategic placement of undercover and armed air marshals aboard every flight, installation of reinforced cockpit doors (already underway at carriers such as JetBlue) at an industry cost estimated at $250 million,[47] arming of pilots, a nationwide positive identification program for "favored travelers" involving biometric technology utilizing retinal scan or DNA-matching devices, and more radical suggestions including closing of the borders and the rounding up and deportation of anyone not in possession valid proof of citizenship. Most of these proposals became law with the signing of ATSA. TSA hired more than 45,000 federal security screeners and recruited, hired, and trained over 22,000 baggage screeners to operate explosives detection equipment before December 31, 2002, thereby meeting the ATSA's mandates.[48] The total number of airport TSA employees has subsequently been reduced to about 45,000, and the agency fired 1,200 screeners after background checks revealed they had either lied on their applications or had criminal records.[49] Consumer websites have been created by TSA specifically to address safety and security issues.[50]

Contrary to the rosiest predictions about the heightened sense of security that would follow implementation of the ATSA, the TSA has, according to a recent report from the Government Accountability Office, after three and one-half years, failed to complete nine of ten Congressional directives concerning the passenger pre-screening program, has missed numerous milestones for the program, and will have to struggle to complete work on its "Secure Flight" technology to meet its planned launch date of August, 2005. Secure Flight still exhibits "many of the same problems that doomed" its predecessor, the Computer Assisted Passenger Prescreening System II (CAPPS II), according to Timothy Sparapani, ACLU legislative counsel.[51]

The import of this new legislation, which effectively federalized all airport [and by extension airline] security personnel and their functions, is that there is no longer an issue of "state action" or whether an airline's singling out of a passenger for closer scrutiny or even exclusion is "under color of state law."[52] No longer does a prospective passenger, or potential or suspected terrorist need to establish that the airline was acting *pro socio* the government to

implicate constitutional protection, unless the individual commits the overtly criminal act while the aircraft is in flight, in which case the airline has an affirmative duty to its passengers and other foreseeable victims of a crime to thwart the act by any means available. Indeed, federal law allows airlines to refuse to transport a passenger it perceives to be a threat to the safety of the flight,[53] but the airlines have not been immune from civil damages claims from aggrieved passengers who have been ejected from flights for obnoxious behavior.[54] The finer line of distinction has been drawn at the point where the airline arranges for the detention and arrest of a passenger for conduct aboard the aircraft, whether in flight or not, and the passenger challenges the arrest as a constitutional violation,[55] or sues for civil damages after being ejected from a flight or denied passage.[56] The general distaste for and fear of passenger misbehavior while an aircraft is in flight, although the incidents do continue,[57] may deter civil litigation due to unsympathetic jury panels and courts.

In short, America is once again "at war," this time against an amorphous but dangerous and fanatically committed enemy that has undertaken a campaign of terror that shows no signs of abatement, and the airline industry, the airports, the transportation infrastructure and the federal government are all working, though often not in concert, to meet the challenge, both logistically and financially. Professor Lawrence Tribe observes that ". . . [i]t is also an argument for a strict requirement that there be a 'war' such that Congress can legitimately invoke its war powers. . . ," noting that several Justices have suggested that the Court's tolerance of occasional intrusions on individual rights, particularly the Fourth Amendment, was unduly influenced by the suggestion that there was a "war on drugs."[58] One of the most controversial tools available to aviation security and law enforcement personnel in the "war on terrorism" is racial or ethnic profiling.

IV. Racial Profiling and the Constitution

The seminal profiling case is *Korematsu v. United States*.[59] Mr. Korematsu, an American citizen of Japanese descent, was convicted in a federal district court for remaining in San Leandro, California, a "Military Area," contrary to Civilian Exclusion Order No. 34 of the Commanding General of the Western Command, U.S. Army, which directed that after May 9, 1942, all persons of Japanese ancestry should be excluded from that area. No question was raised as to Korematsu's loyalty to the United States. The Supreme Court held that the perceived threat from Japanese Americans in a time of war with the Empire of Japan was justification for removing

them from their homes, stripping them of their property and indefinitely interning them in concentration camps. Relying upon the "compelling interest" test to exercise the requisite "close scrutiny" of any law implicating a fundamental constitutional right, such as one fixing the imprimatur of racial discrimination on a national security statute, the Court allowed wide discretion for the government during a time of war. The Court allowed that the compulsory exclusion of large groups of citizens from their homes, except under circumstances of direst emergency and peril, was inconsistent with the basic governmental institutions. However, the Court held that the exclusion order was justified by the war and the threat to national security, and that the Equal Protection Clause is trumped by the exigencies of a national emergency or war.[60]

Although given many opportunities to overrule *Korematsu*, and in spite of the occasional vigorous attack in the lower courts,[61] the Supreme Court has never taken up the challenge to revisit the issue.[62] The *Aderand* court noted that Justices Roberts, Murphy, and Jackson filed vigorous dissents in *Korematsu*; Justice Murphy arguing that the challenged order "falls into the ugly abyss of racism" [*citing Korematsu*, 323 U.S. at 233]. They further noted that "Congress has recently agreed with the dissenters' position, and has attempted to make amends." *See* Pub. L. 100-383, § 2(a), 102 Stat. 903 ("The Congress recognizes that . . . a grave injustice was done to both citizens and permanent resident aliens of Japanese ancestry by the evacuation, relocation, and internment of civilians during World War II").[63] Justice Jackson warned in his dissent that the *Korematsu* majority decision lies like a "loaded weapon" ready to be used in times of national stress.[64] Nevertheless, *Korematsu* remains the law of the land until a more courageous court, perhaps, finds an Equal Protection interest in racial discrimination issues during a time of national emergency.

In a recent decision, *Hamdi v. Rumsfeld*,[65] the traditionally conservative Fourth Circuit denied an attempted inquiry into the facts supporting the United States government's allegations that would justify an "enemy combatant" classification of an American citizen, thereby stripping him of all constitutional protections. That decision gave rise to fears that the "loaded weapon" has been "picked up, fired, and reloaded."[66] However, the Supreme Court, in a split decision by Justice O'Connor, Justices Scalia, Stevens and Thomas dissenting, concluded that although Congress authorized the detention of combatants in the narrow circumstances alleged in the case (pursuant to the Authorization for Use of Military Force ('the AUMF')),[67] due process demands that a citizen held in the United States as an enemy combatant be given a meaningful

opportunity to contest the factual basis for that detention before a neutral decision maker.[68]

Racial profiling in contexts other than airlines and airports has repeatedly come before all levels of the federal court system, as well as most state high courts at one time or another. The issue usually revolves around a philosophical or constitutional conflict between Fourth Amendment protection from unreasonable searches and seizures and the Fourteenth Amendment's guarantees of Equal Protection from stops, searches and other forms of detention or seizure on the basis of race alone ("Driving While Black" in many U.S. cities, for example.[69] More relevant to the current discussion might be "Traveling While Arab" (the "New TWA"), and so on.

In *Whren v. United States*[70] the court grappled with the "DWB" situation in the context of a traffic violation detention that quickly evolved into a Fourth Amendment search performed under the broad heading of "probable cause." Here, the court held that the test of a reasonable Fourth Amendment stop was whether probable cause existed for *any* violation of law, not the subjective, or even actual, motivation of arresting officers.[71] But, as the Court seemed to suggest in earlier cases, cited and quoted with approval in *Whren*, a successful attack on such a stop will not rest on Fourth Amendment strictures, but rather on a broader Equal Protection argument if the claim is that the stop was occasioned entirely by a racial motive.[72]

Traditionally, any classification based on race has been actionable with reference to the Equal Protection Clause. As we have seen, however, wartime and national security interests have often overshadowed constitutional protection, even though Equal Protection doctrine imposes strong proscriptions against racial discrimination or disparate treatment. With the United States confronting credible threats from Arab and Muslim terrorists, the ongoing conflicts in the Middle and Far East and the political and industry pressure for viable security measures, the temptation, indeed the apparent demand, to use race as a criteria for suspicion of criminal activity has never been greater. The danger, of course, is the incipient loss of liberty envisioned by Sinclair Lewis in his 1935 novel *It Can't Happen Here.*

Aside from, or in addition to, the racial discrimination piece of the puzzle is the constitutional conflict inherent in balancing interstate travel and First Amendment free speech rights with the government's need to defend the integrity of its national security interests. Here, the Supreme Court has stated, without equivocation, that national security concerns would permit a large range of regulation:

> It is obvious and unarguable that no governmental interest is more compelling than the security of the Nation. Protection of the foreign policy of the United States is a governmental interest of great importance, since foreign policy and national security considerations cannot neatly be compartmentalized.[73]

Do the various constitutional protections described herein apply equally to non-citizens outside the borders of the United States, even if those aliens are subjected to search, arrest, detention and possible incarceration by American law enforcement personnel? The answer is a resounding "No."

In *United States v. Verdugo-Urquidez*[74] the Supreme Court was presented with the question of whether the Fourth Amendment applies to the search and seizure by United States agents of property that is owned by a nonresident alien and located in a foreign country. The court held that it does not.[75] Verdugo-Urquidez was a Mexican citizen who was accused of committing various drug related crimes in the U.S. (drug smuggling), and murdering a DEA agent in Mexico. Although not clear from the appellate record, it may be inferred that Verdugo-Urquidez was not accused of committing the crimes on U.S. soil, except to the extent that the illegal drugs were intended for importation across the border, and, of course, the EA officer was a U.S. government employee. Working with local law enforcement officials in Mexico, DEA agents obtained an arrest warrant, which was properly executed, and Verdugo-Urquidez was transported across the border to a U.S. correctional facility to stand trial. Search warrants were also obtained and served on his property in Mexico.

In addressing Verdugo-Urquidez's constitutional challenge to his arrest and the evidence seized pursuant to the warrant, the court found that: ". . . [t]he available historical data show, therefore, that the purpose of the Fourth Amendment was to protect the people of the United States against arbitrary action by their own Government; it was never suggested that the provision was intended to restrain the actions of the Federal Government against aliens outside of the United States territory."[76] Justice Rehnquist, writing for the majority, went on to observe that: ". . . [t]here is likewise no indication that the Fourth Amendment was understood by contemporaries of the Framers to apply to activities of the United States directed against aliens in foreign territory or in international waters."[77]

The Court acknowledged that aliens do enjoy the protection of certain provisions of the Constitution.[78] These cases, however, established only that aliens receive constitutional protections when they have come within the territory of the United States and have developed substantial connections with the country.[79] By logical inference, then, an alien seeking to enter the United States illegally probably has few, if any constitutional rights. However, once arriving within the territorial jurisdiction of the United States, whether voluntarily by illegal means, or involuntarily "kicking and screaming" assisted by government agents, even the illegal alien acquires some rights by sheer physical presence on American soil.

Moreover, we should be mindful of the public policy statements reflected by Congress in the 1996 amendment to the Immigration and Naturalization Act ("INA"). Section 240 of the INA states that an alien is not entitled "to examine such national security information as the Government may proffer in opposition to the alien's admission to the United States or to an application by the alien for discretionary relief under [the Act]."[80] Additionally, on October 26, 2001, President Bush signed the USA Patriot Act of 2001,[81] which was approved by Congress just days before. This Act ("Uniting and Strengthening America By Providing Appropriate Tools Required To Intercept and Obstruct Terrorism") dramatically expanded the investigative powers of our law enforcement agencies. The Act states that it is designed "to deter and punish terroristic acts in the United States and around the world, to enhance law enforcement investigatory tools, and other purposes."[82] There was little meaningful opposition in either house of Congress to the bills proposing this sweeping legislation.[83] The Act is clearly directed towards alien terrorists and those who may become terrorists, and is designed to identify and exclude them from entry into the United States.

V. Federal Immigration and Terrorism Policy

To gain a sense of how the federal agency that has the most direct and "hands on" contact with airline passengers and potential terrorists views its role, one need look no further than the U.S. Department of Transportation's "Fact Sheet" dealing with the profiling issue:[84]

> *Answers to Frequently Asked Questions Concerning the Air Travel of People Who Are Or May Appear to Be of Arab, Middle Eastern or South Asian Descent and/or Muslim or Sikh*

> . . . Various Federal statutes prohibit unlawful discrimination against air travelers because of their race, color, religion, ethnicity, or national origin.[85]

The Federal Aviation Administration's Fact Sheet contains similar language:

> Protecting the constitutional and civil rights of the American public remains one of our highest priorities. None of the new security measures decrease the responsibility of airports and airlines to enforce 1) Title VI of the Civil Rights Act of 1964 and the implementing regulations, 49 CFR Part 21 and 14 CFR 271.9 and 2) 49 U.S.C. 40127, 41310, and 41702, regarding discrimination, Federal civil rights laws prohibit discrimination on the basis of a person's race, color, national origin, religion, and sex.[86]

While the second and more recent attack on the World Trade Center on September 11, 2001, provided the impetus for the current spate of legislation and regulation intended to combat terrorism, on July 25, 1996 President Clinton announced the formation of a White House Commission on Aviation and Security in response to the tragedy of Trans World Airlines Flight 800. The Boeing 747 jetliner was bound for Paris with 229 people on board when it exploded in midair just after taking off from New York's Kennedy Airport and plunged into the Atlantic Ocean south of Moriches Inlet on July 18, 1996. Initial fears were that the aircraft had been the target of a terrorist bombing, and the creation of what later became the "Gore Commission" was a direct result.[87]

One of the directives to the Gore Commission was "to look at the changing security threat" in the aviation industry.[88] The final report recommended, among other things, increased funding for "state-of-the-art" bomb-detection systems for airports nationwide, complemented by automated passenger profiling systems; implementation of full bag-passenger match, and improving passenger manifests.[89] At the time, the commission's recommendations came under a good deal of pointed criticism as a usurpation of many basic constitutional rights.[90]

However, the Gore Commission's recommendations took on new meaning after September 11, and Attorney General Ashcroft's request to Congress for legislation giving his agency the broad powers outlined above,[91] essentially met with no opposition. But the new legislation is superimposed upon pre-existing statutes that were likewise directed towards the "war on terrorism."

A. The Antiterrorism and Effective Death Penalty Act (AEDPA)

The AEDPA[92] was passed as a result of the first World Trade Center attack and the Oklahoma City bombings. The Act has as its stated purpose: "to deter terrorism," "to prevent persons within the United States . . . from providing material support or resources to foreign organizations that engage in terrorist activities," and to amend numerous statutes to punish and prevent acts of terrorism.[93] Among other things, AEDPA amended 28 U.S.C. § 2253 and FED. R. APP. P. 22, concerning appeals from final orders in *habeas corpus* proceedings challenging state detention and § 2255 proceedings [proceedings to amend, vacate or set aside a criminal sentence]. One amendment to § 2253 is that, "unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from" such final orders.[94]

There have been numerous challenges to the constitutionality of the retroactivity provisions of AEDPA and to the application of the time limitations for the filing of the habeas corpus petition, none of them successful. Research reveals that the vast majority of reported cases discussing the statute deal with its application to late petitions for writ of habeas corpus from state and federal prisoners seeking sentence modification or illegal aliens attempting to set aside or defer deportation orders. Inserting "AEDPA" into the LexisNexis search engine just for the one year period between March 31, 2004 and March 31, 2005 produced 1558 "hits," and a random review of a dozen of those cases confirms the previous sentence.

The provision of the AEDPA that has drawn a more fundamental constitutional challenge authorizes the Secretary of State to "designate an organization as a foreign terrorist organization . . . if the Secretary finds that (A) the organization is a foreign organization; (B) the organization engages in terrorist activity . . . ; and (C) the terrorist activity of the organization threatens the security of United States nationals or the national security of the United States."[95] In *Humanitarian Law Project v. Reno*,[96] the Court, in considering whether Congress may, consistent with the First and Fifth Amendments, prohibit contributions of material support to certain designated foreign terrorist organizations, stated: "This provision has teeth. AEDPA decrees punishment by fine, imprisonment for up to 10 years or both on 'whoever, within the United States or subject to the jurisdiction of the United States, knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so. . .' "[97] Pursuant to guidelines set forth in the statute, the Secretary had, as of October 1997,

designated 30 organizations as foreign terrorist organizations.[98] Two such entities were the Kurdistan Workers' Party ("PKK") and the Liberation Tigers of Tamil Eelam ("LTTE"). The appellants, six organizations and two United States citizens, wished to provide what they feared would be considered by law enforcement agents material support to the PKK and LTTE. The court summarized the issues thusly:

> Plaintiffs claim that such support would be directed to aid only the nonviolent humanitarian and political activities of the designated organizations. Being prohibited from giving this support, they argue, infringes their associational rights under the First Amendment. Because the statute criminalizes the giving of material support to an organization regardless of whether the donor intends to further the organization's unlawful ends, plaintiffs claim it runs afoul of the rule set forth in cases such as *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 73 L. Ed. 2d 1215, 102 S. Ct. 3409 (1982). That rule, as succinctly stated in Claiborne Hardware, is "for liability to be imposed by reason of association alone, it is necessary to establish that the group itself possessed unlawful goals and that the individual held a specific intent to further those illegal aims." *Id.* at 920. Plaintiffs further complain that AEDPA grants the Secretary unfettered and unreviewable authority to designate which groups are listed as foreign terrorist organizations, a violation of the First and Fifth Amendments. Lastly, plaintiffs maintain that AEDPA is unconstitutionally vague.[99]

The court distinguished *NAACP v. Claiborne* and disposed of appellants' arguments by holding that the statute does not prohibit them from being a member of one of the designated groups or vigorously promoting and supporting the political goals of the group, and they are even free to praise the groups for using terrorism as a means of achieving their ends. The court wrestled with the argument that the appellants were being punished for mere membership in an organization or outspoken advocacy of the organization's goals, which would clearly impinge upon their constitutional rights, and emphasized that: ". . . [w]hat AEDPA prohibits is the act of giving material support, and there is no constitutional right to facilitate terrorism by giving terrorists the weapons and explosives with which to carry out their grisly missions. Nor, of course, is there a right to provide resources with which terrorists can buy weapons and explosives."[100] The court went even farther in

addressing the freedom of association issue, stating that: ". . . advocacy is far different from making donations of material support. Advocacy is always protected under the First Amendment whereas making donations is protected only in certain contexts."[101]

Lastly, the court discussed four questions that must be answered when the courts review under the "intermediate scrutiny" standard: Is the regulation within the power of the government? Does it promote an important or substantial government interest? Is that interest unrelated to suppressing free expression? And, finally, is the incidental restriction on First Amendment freedoms no greater than necessary?[102] In determining the constitutionality of the AEDPA, the court answered all four questions in the affirmative.

B. The Hostage Taking Act

The Hostage Taking Act[103] provides:

> § 1203. Hostage Taking
>
> (a) Except as provided in subsection (b) of this section, whoever, whether inside or outside the United States, seizes or detains and threatens to kill, to injure, or to continue to detain another person in order to compel a third person or a governmental organization to do or abstain from doing any act as an explicit or implicit condition for the release of the person detained, or attempts or conspires to do so, shall be punished by imprisonment for any term of years or for life and, if the death of any person results, shall be punished by death or life imprisonment.
>
> (b)(1) It is not an offense under this section if the conduct required for the offense occurred outside the United States unless—
>
> (A) the offender or the person seized or detained is a national of the United States;
>
> (B) the offender is found in the United States; or
>
> (C) the governmental organization sought to be compelled is the Government of the United States.
>
> (2) It is not an offense under this section if the conduct required for the offense occurred inside the United States, each alleged offender and each person seized or detained are nationals of the United States, and

> each alleged offender is found in the United States, unless the governmental organization sought to be compelled is the Government of the United States.
>
> (c) As used in this section, the term "national of the United States" has the meaning given such term in section 101(a)(22) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(22)).

The constitutionality of the statute has, like all others in this article, been challenged on a variety of substantive grounds.

It has been held that the section does not the violate Equal Protection Clause of the Fourteenth Amendment, since it is a rational exercise of Congress' plenary powers over aliens and foreign relations and is not unconstitutionally vague.[104]

The Hostage Taking Act does not violate the Treaty Power, the Necessary and Proper Clause, the Tenth Amendment, or Equal Protection as embodied in the Fifth Amendment.[105] Nor does the act violate a defendant's Equal Protection rights by discriminating on basis of alienage, since Congress rationally concluded that hostage taking involving non-citizens was sufficiently likely to involve matters implicating foreign policy or immigration concerns.[106] Likewise, the Act does not improperly discriminate against alien defendants by criminalizing actions by them which would not be illegal if everyone involved were American citizens, since § 1203 was rationally related to legitimate government interest.[107] Moreover, the Hostage Taking Act does not violate defendants' Fifth Amendment right to equal protection by discriminating impermissibly on basis of alienage, since Congressional classifications based on alienage are subject to rational basis review, and the Act is rationally related to achievement of legitimate government purpose, [to implement International Convention Against the Taking of Hostages] under the Necessary and Proper Clause.[108]

The Act did receive favorable constitutional treatment from an incensed South Dakota U.S. District Court judge in *United States v. Bad Horse*.[109] Bad Horse, a Native American, was arrested on an Indian reservation after a domestic dispute. Officers failed to search their man prior to placing him in a holding cell with two other arrestees. Bad Horse was "highly intoxicated," and had a knife, so he proceeded to take his cellmates hostage. He was charged with and convicted of hostage taking under the Act, kidnapping, and assault with a dangerous weapon. In reversing the hostage taking conviction the judge found that:

> The Hostage Taking Act, 18 U.S.C. § 1203, was "adopted specifically 'to extend jurisdiction over extraterritorial crimes and satisfy the country's obligations as a party to various international conventions.' " [Citations]. The Yunis court states that "the very purpose behind the Hostage Taking Statute was to 'demonstrate to other governments and international forums that the United States is serious about its efforts to deal with international terrorism.' " [Citations]. This statute is another example of Congress enacting laws which may result in discriminatory treatment of Native Americans without Congress ever considering or intending such a result. The Congressional intent of the hostage taking statute could not reasonably have been to subject, in general, only citizens in Indian Country to prosecutions and convictions for kidnapping as well as hostage taking (to say nothing of assault with a dangerous weapon) under the facts of this case. There is nothing in the legislative history to indicate that Congress intended, in effect, to single out Native Americans for such multiple prosecutions. We know, for example, that a person confined in a county jail in Aberdeen, SD, who acted in a manner similar to defendant could not be prosecuted for hostage taking. In general, only in Indian Country may a Native American be convicted of the federal crime of kidnapping without transporting a victim across a state line.[110]

This statute, clearly intended to extend the long arm of American law to kidnapping and other acts of terrorism occurring off U.S. soil or directed at U.S. citizens or interests, has only been challenged but a few times since it was enacted, and the courts have found little difficulty in sustaining its constitutionality from a variety of perspectives, relying in essence on the government's power, and duty, to enact reasonable measures to protect its citizens.

C. The USA Patriot Act

The USA Patriot Act[111] contains over 156 subparts grouped under ten major headings, a formidable effort considering that it was put together, considered by both houses of Congress, referred to committees, reconsidered, voted upon and signed by the President, all in the space of about 46 days after the events of September 11. Section 224, the "sunset" provision, states:

In General.—Except as provided in subsection (b), this title and the amendments made by this title (other than sections 203(a), 203(c), 205, 208, 210, 211, 213, 216, 219, 221, and 222, and the amendments made by those sections) shall cease to have effect on December 31, 2005.

(b) Exception.—With respect to any particular foreign intelligence investigation that began before the date on which the provisions referred to in subsection (a) cease to have effect, or with respect to any particular offense or potential offense that began or occurred before the date on which such provisions cease to have effect, such provisions shall continue in effect.

Of the titles and subtitles listed below, the only section pertaining directly to the issue of ethnic profiling is Section 102.

1. TITLE I—ENHANCING DOMESTIC SECURITY AGAINST TERRORISM.

Subsection 102 lists a series of findings intended to allay the fears of certain ethnic groups and civil libertarians:

Findings.—Congress makes the following findings:

(1) Arab Americans, Muslim Americans, and Americans from South Asia play a vital role in our Nation and are entitled to nothing less than the full rights of every American.

(2) The acts of violence that have been taken against Arab and Muslim Americans since the September 11, 2001, attacks against the United States should be and are condemned by all Americans who value freedom.

(3) The concept of individual responsibility for wrongdoing is sacrosanct in American society, and applies equally to all religious, racial, and ethnic groups.

(4) When American citizens commit acts of violence against those who are, or are perceived to be, of Arab or Muslim descent, they should be punished to the full extent of the law.

(5) Muslim Americans have become so fearful of harassment that many Muslim women are changing the way they dress to avoid becoming targets.

(6) Many Arab Americans and Muslim Americans have acted heroically during the attacks on the United States, including Mohammed Salman Hamdani, a 23-year-old New Yorker of Pakistani descent, who is believed to have gone to the World Trade Center to offer rescue assistance and is now missing.

(b) Sense of Congress.—It is the sense of Congress that—

(1) the civil rights and civil liberties of all Americans, including Arab Americans, Muslim Americans, and Americans from South Asia, must be protected, and that every effort must be taken to preserve their safety;

(2) any acts of violence or discrimination against any Americans be condemned; and

(3) the Nation is called upon to recognize the patriotism of fellow citizens from all ethnic, racial, and religious backgrounds.

2. TITLE II—ENHANCED SURVEILLANCE PROCEDURES

3. TITLE III—INTERNATIONAL MONEY LAUNDERING ABATEMENT AND ANTI-TERRORIST FINANCING

4. TITLE IV—PROTECTING THE BORDER

5. TITLE V—REMOVING OBSTACLES TO INVESTIGATING TERRORISM

6. TITLE V—REMOVING OBSTACLES TO INVESTIGATING TERRORISM Subtitle A—Aid to Families of Public Safety Officers

7. TITLE VII—INCREASED INFORMATION SHARING FOR CRITICAL INFRASTRUCTURE PROTECTION

8. TITLE VIII—STRENGTHENING THE CRIMINAL LAWS AGAINST TERRORISM

9. TITLE IX—IMPROVED INTELLIGENCE

10. TITLE X—MISCELLANEOUS

The USA Patriot Act is a broad-based, comprehensive law enforcement statute that incorporates references, in one fashion or the other, to every law enforcement and military agency or branch in the federal government, and gives the Secretary of State wide latitude in identifying and defining terrorists and those who support terrorists, either financially or through other actions such as publicly endorsing terrorist activities, as a means of excluding such individuals from entry into the United States.[112] For the reasons set forth above,[113] a constitutional challenge to the sections of the statute that purport to profile and discriminate against non-citizens and non-resident aliens, even if they should somehow gain entry through illegal or even legal means, would probably be unsuccessful. However, recent opinions suggest that the Supreme Court and at least one lower federal court are not so willing to endorse the broad suspensions of fundamental constitutional rights that some proponents of the USA PATRIOT ACT would endorse.[114]

D. Other Statutes Implicating Constitutional Equal Protection and First Amendment Rights

There have been attacks on other federal statutes that were written to single out or identify a particular ethnic, national origin, or lifestyle group as potential threats to national security, again largely unsuccessful, although there was one notable exception.

In *Huynh v. Carlucci*[115] two naturalized United States citizens of Vietnamese national origin employed by the Department of Defense ("DoD"), filed an action challenging the constitutionality of a provision of the then-new comprehensive DoD Personnel Security Program that denied security clearance to recently-naturalized citizens from 29 countries.[116] The District Court judge granted their motion for a preliminary injunction against enforcement of the Regulation against the two named plaintiffs. Under the regulation, certain naturalized United States citizens are denied security clearance even if they satisfy "Top Secret" "personal security standards." The regulation denies security clearance to naturalized citizens whose "country of origin has been determined to have interests adverse to the United States . . . or who have resided in such countries [sic] for a significant period of their life." In granting the injunction, the court emphasized that: ". . . [t]he Regulation, moreover, stigmatizes plaintiffs and other recently-naturalized citizens with a badge of disloyalty."[117]

In another preliminary injunction case, a homosexual U.S. Navy enlisted man successfully deferred his involuntary discharge from military service, initiated by the Department of Defense

under its "Don't Ask, Don't Tell, Don't Pursue" policy, codified at 10 U.S.C. § 654.[118] The court found:

> . . . that the Navy has gone too far. The "Don't Ask, Don't Tell, Don't Pursue" policy was clearly aimed at accommodating gay men and women in the military. In effect, it was intended to bring our nation's armed forces in line with the rest of society, which finds discrimination of virtually every form intolerable. It is self-evident that a person's sexual orientation does not affect that individual's performance in the workplace. At this point in history, our society should not be deprived of the many accomplishments provided by people who happen to be gay. The "Don't Ask, Don't Tell, Don't Pursue" policy was a bow to society's growing recognition of this fact. For the policy to be effective, it has to be implemented in a sensitive, balanced manner. Under the policy as it stands today, gay service members must be permitted to serve their country honorably, so long as they are discrete in pursuing their personal lives.[119]

As in *Hunhn*, the District Court was not impressed with national security arguments, because the government had not articulated a compelling reason why the discriminatory classification bore any relationship to legitimate national security interests.

E. The Homeland Security Act of 2002

This legislation was signed into law by President Bush on November 25, 2002.[120] The law transferred the former Immigration and Naturalization Service functions to the Department of Homeland Security. Immigration enforcement functions are placed within the Directorate of Border and Transportation Security, and the immigration service functions are placed into a separate U.S. Citizenship and Immigration Services. Some former INS functions report to the Under Secretary for Management. The INS ceased to exist as a separate agency.

On January 30, 2003, then DHS Secretary Tom Ridge announced the creation of two new Bureaus within the Border and Transportation Security Directorate. U.S. Customs and Border Protection includes the Border Patrol, as well as former INS, Customs, and Agricultural Quarantine Inspectors. U.S. Immigration and Customs Enforcement includes the enforcement and investigation components of the former INS, Customs, and the Federal Protective Services.

The Act called for the creation of a Homeland Security Department that would be headed by a Secretary of Homeland Security and would combine the resources of a dozen or so existing federal law enforcement, investigative and defense agencies into a "Super Agency" charged with protecting the nation from internal and external terrorist acts.[121] Among other powers conferred on the new Secretary by this Act are broad oversight over immigration and the visa process, which necessarily impacts those seeking admission to the United States via legal means, but the Act contains no specific reference to racial profiling or travel among the states or into and out of the United States.

VI. Conclusion

The freedom from fear is one of the critical elements of life and culture in the United States, such that our society and system of laws and government has become the model for the rest of the civilized world. Unfortunately, the same qualities that make our lives relatively free of stress and anxiety seem to breed intense hatred in individuals and cultures that are deprived of the benefits of living in an open and free society. Rather than emulate or learn, the response of these elements has been to destroy what they cannot or choose not to have. The ongoing armed conflict in Iraq has met with mixed results and support, both within the United States and elsewhere, has heightened the threat to our security, and has invited greater restrictions on freedoms guaranteed to all Americans by the first ten Amendments of the Constitution.

As America has abruptly been awakened from its slumber of complacency and comfort to confront the reality of a world that is unpredictable, irrational and lethal, the political response, as history repeats itself, has been to "circle the wagons" and throw up as many barriers to external threat as perceived possible, limited only by the imaginations of any number of stakeholders in the private sector, government and law enforcement, and tempered by the often unpopular but outspoken advocates for individual liberty and freedom. Justice O'Connor, writing for the majority in *Hamdi v. Rumsfeld*, recalled that "Congress was particularly concerned about the possibility that the Act [referring to 18 U.S.C. § 4001(a), a bill to repeal the Emergency Detention act of 1950, (50 U.S.C. § 811 *et seq*)], could be used to reprise the Japanese internment camps of World War II, quoting one of the authors of the bill as stating that "the concentration camp implications render it abhorrent."[122]

In times of crisis, or "war," if you will, there is a tendency [called "groupthink" by organizational behavior theorists] to find a

conspirator or traitor under every rock, to instinctively assume the "us or them" posture of paranoia and fear, to the exclusion of rational and considered analysis. The result, as this article has shown, has often been ill-considered laws, regulations and government policy, especially when dealing with perceived internal threats. On the other hand, America must respond to the very real and immediate dangers that threaten lives and our way of life. The task for our lawmakers, and those who enforce and interpret the laws, is to balance the national security demands of our targeted population while preserving the open society we have come to expect and enjoy, and, more importantly, to preserve our individual freedoms and liberties, those enumerated in the Declaration of Independence and sanctified in our Constitution.

. . . the same qualities that make our lives relatively free of stress and anxiety seem to breed intense hatred in individuals and cultures that are deprived of the benefits of living in an open and free society. Rather than emulate or learn, the response of these elements has been to destroy what they cannot or choose not to have.

—Douglas M. Marshall

According the President, we are a nation at war, against a loosely defined "Evil Axis" that at times defies easy description or distinct labels. Such an amorphous and vaguely delineated identification of the so-called enemy invites ambiguity, blurred distinctions, and at times overt discrimination against individuals who may innocently fit the "profile" of a terrorist. If we allow our fear to outweigh our historical and innate sense of fairness and equality, we will be inevitably led to Pogo's conclusion that "We have identified the enemy and it is us." This nation is at a turning point, and it is the duty of our leadership to maintain the standards of liberty that have provoked both enmity and envy worldwide, and to avoid the "slippery slope" of irrational racial distinctions that led to the regrettable decision in *Korematsu v. United States.*

Implementation of latest generation airport security devices must be adequately funded and supported by all users of the global transportation system. This technology must in turn be administered even-handedly and in compliance with fundamental constitutional guarantees so that racial minorities are not unfairly selected for closer scrutiny and do not have their right to travel impeded.

The legitimate governmental interests of protecting the borders, preventing acts or terrorism, excluding those with ties to terrorist organizations, and securing the right of everyone to travel within the territories of the United States can be advanced without violating the Fourth Amendment or unnecessarily invading the privacy of anyone electing to exercise their right to travel.

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Endnotes

[1] *Scales v. U.S.*, 367 U.S. 203, 270 (1961).
[2] Issued on 11/19/01 by the Office of the Assistant General Counsel for the Aviation Enforcement and Proceedings and its Aviation Consumer Protection Division.
[3] LAWRENCE TRIBE, AMERICAN CONSTITUTIONAL LAW, Third Ed., Vol. 1, 965 (2000).
[4] *Korematsu v. U.S.*, 323 U.S. 214, 220 (1944).
[5] *U.S. v. Moreno*, 475 F.2d 44, 48 (5th Cir. 1973).
[6] "Attorney General Ashcroft Outlines Foreign Terrorist Tracking Task Force, October 31, 2001," Official Government Document, Office of The Attorney General.
[7] *See id.*
[8] U.S. Government Web site (*http://www.citizencorps.gov/tips.html*).
[9] Ashcroft speech 12/06/01.
[10] "American Civil Liberties Union: How the Anti-Terrorism Bill Expands Law Enforcement 'Sneak and Peek' Warrants," October 23, 2001 Press Release.
[11] 73 U.S. 35 (1867).
[12] *Kreitzer v. Puerto Rico Cars, Inc.*, 417 F. Supp. 498 (U.S. District Court for the District of Puerto Rico, 1975).
[13] *U.S. v. Wheeler*, 254 U.S. 281 (1920); *Twining v. New Jersey*, 211 U.S.78 (1908); *Williams v. Fears*, 179 U.S. 270 (1900); *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35 (1867); *Passenger Cases*, 48 U.S. (7 How.) 283 (1849).
[14] *Kreizer v. Puerto Rico, id.* at 504.
[15] *Attorney General of New York v. Soto-Lopez*, 476 U.S. 898 (1986).
[16] *Shapiro v. Thompson*, 394 U.S. 618, 630 (1969).
[17] 314 U.S. 160 (1941).
[18] *Kreitzer v. Puerto Rico Cars, id.* at 504.
[19] *Kent v. Dulles*, 357 U.S. 116 (1958) and *Aptheker v. Secretary of State*, 378 U.S. 500 (1964).
[20] *Kent v. Dulles, id.* at 126.
[21] *Aptheker v. Secretary of State*, 378 U.S. 500, 505.
[22] *Kreitzer, id.*
[23] *Shelton v. Tucker*, 364 U.S. 479, 488.
[24] *Haig v. Agee*, 453 U.S. 280, 306 (1981) (*citing Califano v. Aznavorian*, 439 U.S. 170, 176 (1978)).
[25] *Id.* at 307.
[26] *Shelton v. Tucker, id.* at 509.
[27] *Id.* at 514.
[28] *Kreitzer, id.*
[29] *Id.* at 516.
[30] 383 U.S. 745 (1965).
[31] *See id.* at 758.

[32] *See id.* at 757-758.

[33] *See Attorney General of New York v. Soto-Lopez*, at 903.

[34] *City of Houston v. Federal Aviation Administration*, 679 F.2d 1184 (1982) (Involving the constitutionality of a "perimeter rule" established by the FAA to control flights out of Washington D.C.'s National Airport); *Miller v. Reed*, 176 F.3d 1202 (1999) (Denial of a California driver's license to someone who refused to supply his Social Security number).

[35] *Saenz v. Roe*, 526 U.S. 489, 499 (1999).

[36] *Shapiro v. Thompson, id.*

[37] *See id.*

[38] *See Kreitzer, id.* at 505.

[39] *Shelton v. Tucker*, 364 U.S. 479, 488 (1960).

[40] *Shapiro v. Thompson, id.*

[41] 397 U.S. 471, (1970).

[42] 302 F.3d 971 (2002).

[43] *See id.* at 972.

[44] *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886); *Wong Wing v. U.S.*, 163 U.S. 228, 238 (1896).

[45] *See* note 5 *supra.*

[46] Public Law 107-71.

[47] Marilyn Adams, *Bulletproof Cockpit Doors Could Cost $50,000 Per Plane*, USA TODAY, April 8, 2002.

[48] Official website of the Transportation Security Administration, *http://www.tsa.gov.*

[49] "TSA Takes Heat for Background Check Miscues," February 11, 2004, *http://mediaplanner.advertisers.securitysolutions.com/ar/security_tsa_takes_heat.*

[50] *http://www.airsafe.com.*

[51] Angela Kim and Denise Marois, *Secure Flight Expected to Fall Short in GAO Report*, AVIATION DAILY, March 25, 2005, *http://www.aviationnow.com/avnow/search/autosuggest.jsp?docid=380684&url=http%3A%2F%2Faviationnow.ecnext.com%2Ffree-scripts%2Fcomsite2.pl%3Fpage%3Daw_document%26article%3DSECF03255.*

[52] *U.S. v. Guest, id.* note 28. In *Guest* the court held that to constitute state action, "the involvement of the State need [not] be either exclusive or direct. In a variety of situations the Court has found state action of a nature sufficient to create rights under the [Constitution] even though the participation of the State was peripheral, or its action was only one of several co-operative forces leading to the constitutional violation." *Id.* at 755-56.

[53] 49 U.S.C. § 44902(b).

[54] *See Schaeffer v. Cavallero*, 29 F. Supp.2d 184 (1998); *Cordero v. CIA Mexicana De Aviacion, S.A.*, 681 F.2d 669 (1982).

[55] *See U.S. v. Hicks*, 980 F.2d 963 (5th Cir. 1992).

[56] *See Sedigh v. Delta Airlines, Inc.*, 850 F.Supp. 197 (E.D.N.Y. 1994).

[57] Andrew R. Thomas, *Feds Haven't Delivered On Security Promises*, THE PLAIN DEALER, September 30, 2002; John Harney, *Inquiry Into Airplane Passenger's Death*, THE NEW YORK TIMES, March 21, 2005.

[58] LAWRENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW, Third Edition, Vol. 1, 967, footnote 11.

[59] 323 U.S. 214 (1944).

[60] *Id.*

[61] Dissent in *U.S. v. Zapata-Ibarra*, 223 F.3d 281 (5th Cir. 2000).

[62] *Aderand Constructors, Inc. v. Pena*, 515 U.S. 200.

[63] *Id.*

[64] *Korematsu*, 323 U.S. at 246 (Jackson dissenting).

[65] 316 F.3d 450, 475 (4th Cir. 2003).

[66] Chris Iijima, *Shooting Justice Jackson's "Loaded Weapon" at Ysar Hamdi: Judicial Abdication at the Convergence of Korematsu and Mccarthy*, 54 SYRACUSE LAW REV. 109, 113.

[67] 115 Stat 224 (which authorizes the President to use "all necessary and appropriate force" against "nations, organizations, or persons" associated with the September 11, 2001, terrorist attacks).

[68] *Hamdi v. Rumsfeld*, 124 S. Ct. 2633; 159 L. Ed. 2d 578 (2004).

[69] *See U.S. v. Montero-Camargo*, 208 F.3d 1122 (9th Cir. 2000) note 14: "According to recent newspaper articles, some persons tired of being stopped on account of their Hispanic appearance refer to the reason for the stops as 'Driving while Mexican.' " *See* Jim Yardley, *Some Texans Tiring of a Busy Border Patrol*, N.Y. TIMES, January 26, 2000 (noting that one state judge in Texas said that "it feels like occupied territory. . ."); Ken Ellingwood, *U.S. Residents, Border Staff Clash*, LOS ANGELES TIMES, January 21, 2000, at A3. Similar experiences on the part of African-Americans have given rise to the better known term, "Driving while Black." *See Washington v. Lambert*, 98 F.3d 1181, 1188 (9th Cir. 1996).

[70] 517 U.S. 806 (1996).

[71] *See Whren* at 813: "We think these cases foreclose any argument that the constitutional reasonableness of traffic stops depends on the actual motivations of the individual officers involved. We of course agree with petitioners that the Constitution prohibits selective enforcement of the law based on considerations such as race. But the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment. Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis." Subjective intentions play no role in ordinary, probable cause Fourth Amendment analysis. (*Citing, e.g., U.S. v. Robinson*, 414 U.S. 218, and others).

[72] *See U.S. v. Martinez-Fuentes*, 428 U.S. 543 (1976), which found no constitutional violation in Border Patrol officers carrying out detailed inspections of vehicles stopped at the San Clemente border check over 100 miles from the California-Mexican border; and *U.S. v. Brignoni-Ponce*, 422 U.S. 882, which, in contrast, disallowed so-called "roving patrol" stops.

[73] *Haig v. Agee*, 453 U.S. 280, 307 (1981).
[74] 494 U.S. 259 (1990).
[75] *See id.* at 261.
[76] *See id.* at 266.
[77] *See id.* at 267.
[78] *Citing Plyler v. Doe*, 457 U.S. 202, 211-212 (1982) (illegal aliens protected by Equal Protection Clause); *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596 (1953) (resident alien is a "person" within the meaning of the Fifth Amendment); *Bridges v. Wixon*, 326 U.S. 135, 148 (1945) (resident aliens have First Amendment rights); *Russian Volunteer Fleet v. U.S.*, 282 U.S. 481 (1931) (Just Compensation Clause of Fifth Amendment); *Wong Wing v. U.S.*, 163 U.S. 228, 238 (1896) (resident aliens entitled to Fifth and Sixth Amendment rights); *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) (Fourteenth Amendment protects resident aliens).
[79] *See id.* at 271.
[80] 8 U.S.C. § 1229a(b)(4)(B).
[81] P.L. 107-56, Passed October 26, 2001.
[82] *Kiareldeen v. Ashcroft*, 273 F.3d 542, 555 (2001) (Appellant had the unfortunate timing of arguing a terrorist alien case on September 10, 2001).
[83] House vote 357-66, Role Number 398; Senate vote 98-1, Vote Number 313.
[84] *See* Note 2 *supra*.
[85] Citing 49 U.S.C. § 41702, 41310, and 40127 and 42 U.S.C. § 2000d *et seq.*
[86] Fact Sheet Posted November 28, 2001, Official FAA website at *http://www.nw.faa.gov/civilrights/Factnon.htm.*
[87] White House Commission on Aviation Safety and Security Final Report to President Clinton, February 12, 1997; *http://www.avweb.com/other/gorerprt.html.*
[88] Final Report of Gore Commission *supra.*
[89] *Id.*
[90] Nadine Strossen, *Check Your Luggage and Liberties at the Gate*, INTELLECTUAL CAPITAL (August 7, 1997) found at *http://www.intellectualcapital.com/issues/97/0807/icopinions1.asp.*
[91] *See supra* notes 4, 6 & 7.
[92] Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended and found in various sections throughout 8 U.S.C., 18 U.S.C., and 22 U.S.C.).
[93] *See id.*
[94] Pub. L. No. 104-132, § 102, 110 Stat. 1214, 1218, *codified at* 28 U.S.C. § 2253(c)(1).
[95] AEDPA § 302(a), 110 Stat. at 1248 (*codified at* 8 U.S.C. § 1189(a)).
[96] 205 F.3d 1130 (9th Cir. 2000).
[97] *See id.* at 1132.
[98] *See Designation of Foreign Terrorist Organizations*, 62 Fed. Reg. 52,650, 52,650-51 (1997).

[99] *See id.*
[100] *See id.*
[101] *See id.*
[102] *See id.*
[103] 18 U.S.C. § 1203 (2002).
[104] *U.S. v. Lopez-Flores*, 63 F.3d 1468 (9th Cir. 1995).
[105] *U.S. v. Wang Kun Lui*, 134 F.3d 79 (2nd Cir. 1997).
[106] *U.S. v. Santos-Riviera*, 183 F3d 367 (5th Cir. 1999).
[107] *U.S. v. Montenegro*, 231 F3d 389 (7th Cir. 2000).
[108] *U.S. v. Ferreira*, 275 F3d 1020 (11th Cir. 2001).
[109] 21 F. Supp. 2d 1063 (1997).
[110] *See id.* at 1064.
[111] *See id.* note 72 *supra.*
[112] *See id.* Title IV, Subsection 411.
[113] *See id.* Note 70 *supra.*
[114] *Hamdi v. Rumsfeld, id.* footnote 68; *Doe v. Ashcroft*, 334 F. Supp. 2d 471 (SD NY 2004); *Humanitarian Law Project v. Reno, id.* footnote 96.
[115] 679 F. Supp. 61 (D.C. Cir. 1988).
[116] 52 Fed. Reg. 11,227 (later codified at 32 C.F.R. § 154, *et seq.*).
[117] *Id.* at 67.
[118] *Timothy McVeigh v. Cohen*, 983 F. Supp. 215 (D.C. Cir. 1998) (No relation to the late Oklahoma City bomber Timothy McVeigh).
[119] *Id.* at 220.
[120] Public Law 107-296.
[121] White House website *http://www.whitehouse.gov/deptofhomeland/analysis/index.html.*
[122] *Id.* at 2639.

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