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# FOR "OUR" SECURITY: Who is an "American" and What is Protected by Enhanced Law Enforcement and Intelligence Powers?

Natsu Taylor Saito[1]

In January 2003, the United States Justice Department's latest wish list was leaked to the press. Entitled the "Domestic Security Enhancement Act of 2003,"[2] but more commonly known as "PATRIOT II," it would expand the already impressive list of powers given law enforcement and intelligence agencies by the USA PATRIOT Act,[3] which Congress hurriedly enacted in the weeks following the September 11, 2001 attacks on the Pentagon and the World Trade Center. Patriot II, if passed, would go even further than the PATRIOT Act in dramatically curtailing the civil liberties of U.S. citizens as well as immigrants and legitimizing measures long sought—and in the meantime illegally used—by law enforcement agencies to suppress political dissent.[4]

A particularly striking provision of PATRIOT II would allow the government to "expatriate" U.S. citizens, i.e., strip us of our citizenship, for becoming members of, or providing material support to, a group that is deemed a "terrorist organization . . . engaged in hostilities against the United States."[5] The terms "material support" and "terrorist organization" are defined very broadly, and "hostilities" is left undefined.[6] In light of the United States' long history of race-based exclusion from citizenship, its denial of constitutional protections to large groups of people identified as "Other," and its repression of movements for social change and racial justice in the name of "national security," this proposal should be especially alarming to everyone concerned with civil and constitutional rights.

Since September 11, the Bush administration has convinced Congress to pass hundreds of new laws giving the executive branch dramatically expanded powers.[7] The administration has unilaterally assumed the power to detain thousands of people, hold them indefinitely and incommunicado, deny them access to the courts, and interrogate them.[8] We are told that all of these measures are necessary to protect us, the American people, and the most basic "American values" of freedom and democracy.[9]

But who is an "American" for purposes of governmental protection and constitutional rights? To understand just who and what are being protected by the "war on terror" today, we need to look at these measures in the context of the United States' long history of conflating race, "foreignness," and disfavored ideologies;[10] its consistent use of law enforcement and intelligence powers to suppress movements perceived as political threats;[11] and its more general use of the criminal justice system to preserve the status quo.[12] This is a large subject, of course, and this essay provides only a brief sketch of some of the issues that must be considered in developing such an analysis.

### A. THIS "NATION OF IMMIGRANTS"

Who is an American? The federal government has justified most of the post-September 11 measures taken in the name of "national security" as necessary to protect the American people. Yet many Americans are significantly less secure as a result of the constriction of otherwise applicable constitutional rights. In order to understand who is actually being protected by these measures, it is necessary to look at how "American" has been defined historically. This section begins with the frequently invoked image that this is a nation of immigrants, then contrasts that description with the actual treatment of immigrants and the historic role that race and national origin have played in defining who is an American, both literally in terms of citizenship, and more generally in terms of who is actually protected by the law.

The United States is commonly described as a "nation of immigrants,"[13] a phrase that evokes images of the Statue of Liberty holding out her beacon of light as a symbol of freedom and opportunity to the "huddled masses" oppressed elsewhere in the world.[14] In the aftermath of September 11, President George W. Bush invoked this image, attempting to explain away the attacks on the ground that "they" hate "us" because of our freedom and prosperity.[15] Prosperity in this construction is conceived of as a natural outgrowth of a "free market" economy which, in turn, has been given the status of an essential human right.[16] This beacon of light image is also used to explain increasingly restrictive immigration policies; according to this portrayal, everyone wants to come and partake of our freedoms, and we clearly cannot accommodate them all.

In reality, however, the United States has been anything but hospitable to immigrants since September 11. Noncitizens, both temporary visitors and permanent residents, have been subjected to a variety of harsh measures, including the expedition of thousands of deportations;[17] the "disappearance" and detention of at least 1,200 people;[18] interrogations in the form of "voluntary interviews" with officials from the Federal Bureau of Investigation (FBI) and Immigration and Naturalization Service (INS),[19] now under the Department of Homeland Security;[20] and the requirements of a cumbersome new National Security Entry Exit Registration System.[21]

Most of these measures have targeted men from Middle Eastern or predominantly Muslim countries and appear to violate fundamental constitutional protections such as the right to due process and equal protection[22] which, at least in theory, apply to all persons in the United States, not just citizens.[23] However, the government's actions are largely immune from constitutional challenge thanks to a long history of Supreme Court cases stating that the "political branches" of government, i.e., the executive and the legislature, have essentially unfettered power with respect to immigration. Called the "plenary power doctrine," this refusal to enforce otherwise applicable provisions of the Constitution in immigration matters

dates back to the Chinese Exclusion Cases[24] of the 1880s and 1890s, and has been invoked since then to allow, among other things, exclusions without hearings, deportations on the basis of secret evidence, and indefinite imprisonment when those deemed deportable have no country to accept them.[25] The measures targeting immigrants since September 11 have been particularly severe, but they are nonetheless quite consistent with the government's exercise of its plenary power over immigrants since the first federal immigration laws were enacted in 1875.[26]

What does it mean, therefore, to call the United States a "nation of immigrants"? It is certainly not a call to the huddled masses, who have been effectively excluded by policies including national origin quotas and country caps, requirements of immediate family ties or employment, and evidence of economic support.[27] It is accurate, however, insofar as it refers to the fact that most who call themselves Americans today descended from peoples who are not indigenous to this land. In other words, this is a settler-colonial state,[28] and the "nation of immigrants" characterization is perhaps most accurately understood as a call for unity among the settler population, an opportunity to identify with the privileged "we" who claim a share of the disproportionate wealth controlled by the United States and to distance ourselves from the "they" who envy our well-being.[29]

Calling the United States a nation of immigrants sanitizes its history by focusing on those who immigrated voluntarily, initially from northern and western Europe and later from other parts of the world.[30] This characterization completely excludes American Indians as members of the polity and conveniently reinforces the notion that they are "extinct."[31] Further, it renders invisible the genocidal practices which have accompanied the colonization of the continent since 1492,[32] and justifies an occupation that even U.S. government lawyers have conceded is not, for the most part, based on anything resembling valid title to the land.[33] Likewise, this characterization disregards or, more accurately, attempts to eradicate the history of African chattel slavery in this country,[34] the forced annexation

of the northern half of Mexico,[35] and the illegal overthrow and occupation of the Kingdom of Hawai'i,[36] leaving us with the myth that this was an essentially uninhabited land made prosperous by the hard work of freedom-seeking European settlers.

The determinants of citizenship have both reflected and reinforced this myth. Most American Indians only became U.S. citizens in 1924 when Congress, in an attempt to undermine native sovereignty, unilaterally imposed citizenship on them;[37] the government continues to treat them as members of "domestic dependent" nations,[38] sovereign only to the extent it is convenient to "larger" interests of the United States.[39] African Americans were not U.S. citizens until the Fourteenth Amendment was ratified in 1868.[40] As Supreme Court Chief Justice Taney stated forthrightly in the *Dred Scott* case, until the passage of the Fourteenth Amendment, persons of African descent, whether "free" or enslaved, were neither citizens nor even "persons" under the Constitution.[41]

The Constitution as originally drafted did not specify who was to be considered a citizen, but it did direct Congress to "establish an uniform Rule of Naturalization."[42] The first Congress, meeting in 1790, complied by passing an act that limited naturalized citizenship to "free white persons."[43] Although modified after the Civil War to include persons of African descent,[44] the racial restriction on citizenship was not completely eliminated until 1952.[45] Interpreting the law in 1923 to find a "high-caste Hindu" ineligible for naturalization, the Supreme Court summarized the initial understanding of who was to be an American:

> The words of familiar speech, which were used by the original framers of the law, were intended to include only the type of man whom they knew as white. The immigration of the day was almost exclusively from the British Isles and Northwestern Europe, whence they and their forebears had come. When they extended the privilege of American citizenship to "any alien being a free white person" it was these immigrants—bone of their bone and

> flesh of their flesh—and their kind whom they must have had affirmatively in mind.[46]

As a result of this initial construction of who was legally an "American" and the related racially restrictive immigration and naturalization policies, "foreignness" has become part of the racialized identity of Asian Americans, Latinos/as, and those of Middle Eastern descent.[47] One of the more obvious results of this imputed foreignness was the World War II internment of approximately 120,000 Japanese Americans, two-thirds of whom were U.S. citizens.[48] The U.S. military's justification for indefinitely incarcerating all persons of Japanese ancestry on the west coast, regardless of U.S. citizenship, gender, or age, was that it could not distinguish the "loyal" from the "disloyal."[49] This rationale, upheld by the Supreme Court on the basis of "military necessity,"[50] presumes that: (a) disloyalty is a crime for which one can be imprisoned with no semblance of due process; (b) certain groups can be presumed disloyal on the basis of race or national origin (i.e., persons of Japanese but not German or Italian descent); and (c) at least for those groups, "blood is thicker than water," making citizenship irrelevant.[51]

The perception that only Euro-derivative settlers are "real" Americans persists in many ways despite the elimination of racial restrictions on the acquisition of citizenship by birth or naturalization. Asian Americans and Latinos/as are still commonly treated as "foreigners," regardless of how long their families have lived in the United States.[52] Arab Americans and South Asians have been subjected to a dramatic increase in hate crimes since September 11[53] as they have been "raced"[54] in popular consciousness as not only foreign but as having terrorist sympathies as well.[55] Ironically, even those truly native to this land are perceived as foreign, as attested to by the tragic death of Kimberly Lowe, a twenty-one-year-old Creek woman killed in Oklahoma on September 18, 2001, by young white men in a pickup truck who yelled, "Go back to your own country!"[56]

While the examples are endless, the significance that race, ethnicity, and national origin still have today in the social and legal determination of who is a "real American" is illustrated by briefly comparing the cases of four people the government considers "terrorists" and, therefore, presumably affiliated with "them" rather than "us": John Walker Lindh, Yaser Esam Hamdi, Abdullah al-Muhajir (also known as Jose Padilla), and Timothy McVeigh.

Soon after September 11, the United States was engaged in an undeclared, if very real, war in Afghanistan, claiming that its ruling Taliban government was harboring Osama bin Laden and the al Qaeda network believed to be responsible for the attacks on the Pentagon and World Trade Center.[57] After a massive bombing campaign, the United States succeeded in replacing the Taliban with a more U.S.-friendly government.[58] In the process, the U.S. military captured over 600 men and boys of several dozen nationalities and transported them to the U.S. naval base at Guantanamo Bay, Cuba, where most continue to be detained and interrogated.[59]

Two of those captured turned out to be U.S. citizens, John Walker Lindh and Yaser Esam Hamdi. Lindh was immediately taken to Alexandria, Virginia, and charged with conspiring to kill Americans.[60] As White House spokesman Ari Fleischer said, "the great strength of America is he will now have his day in court."[61] And, in fact, he appeared in a civilian criminal court where, represented by counsel and supported by his family, he pleaded to reduced charges of supplying services to the Taliban and carrying an explosive during the commission of a felony; he subsequently received a twenty-year prison sentence.[62]

Hamdi, on the other hand, was first taken to Guantanamo Bay where it was discovered that he was a U.S. citizen born in Louisiana.[63] Rather than being transferred to a U.S. civilian court, he was sent to a naval brig in Norfolk, Virginia, where he has been held incommunicado for well over a year, labeled an "enemy combatant"[64] by the government, and denied access to counsel and the courts.[65]

What distinguishes Hamdi from Lindh? The only apparent difference in their cases is that Lindh is a Euroamerican while Hamdi is of Middle Eastern descent. Tellingly, the media immediately began referring to Lindh as "the *American* Taliban,"[66] a moniker that has never been applied to Hamdi.

The contrast between the treatment of Timothy McVeigh and Abdullah al-Muhajir reflects a similar disparity. McVeigh was convicted for the 1995 bombing of the Murrah Federal Building in Oklahoma City;[67] a bombing that resulted in the deaths of at least 168 men, women, and children,[68] and at the time was characterized as the most devastating terrorist act to have taken place on American soil.[69] Although convicted and sentenced to death, there was never any question that McVeigh would be given a full trial in a civilian criminal court, complete with the protections of constitutional due process,[70] and no one questioned whether McVeigh and his co-conspirator Terry Nichols,[71] both white, were really Americans.

Abdullah al-Muhajir, on the other hand, will never receive his vaunted "day in court" if the administration has its way. Al-Muhajir, known as Jose Padilla prior to his conversion to Islam, is a U.S. citizen of Puerto Rican descent, born in Brooklyn. He was arrested at Chicago's O'Hare Airport, apparently because the government suspected him of involvement in, or at least knowledge of, a plan to bring a small radioactive device, a so-called "dirty bomb," into the country.[72] Shortly before his preliminary hearing on the charges, he was instead transferred to a military prison in South Carolina.[73] Like Hamdi, al-Muhajir has been designated an "enemy combatant," held incommunicado, and interrogated for well over a year.[74] In December 2002 the Federal District Court for the Southern District of New York held that while the government has the power to hold unlawful enemy combatants who are U.S. citizens, al-Muhajir is entitled to confer with his lawyer concerning his petition for habeas corpus.[75] The government, however, is appealing and has yet to allow al-Muhajir to meet with his lawyer.[76] Only discrimination on the basis of race, ethnicity, or

religion accounts for the discrepancy between the treatments of McVeigh, who succeeded in killing hundreds of Americans, and al-Muhajir, against whom the government has made only unsubstantiated allegations of participation in an attempt to kill Americans.

### B. "OUTSIDE AGITATORS": DISSENT AS UN-AMERICAN

Perceived racial and ethnic distinctions are clearly a significant factor in who is considered an American for purposes of social inclusion and legal protection. As briefly outlined above, race was literally a prerequisite to citizenship in varying ways from the founding of the country until 1952,[77] and it still accounts for much of the disparity in the rights actually accorded those who now hold U.S. citizenship.[78] But the measures taken in the name of "our security" are much more than reflections of or attempts to maintain racial hierarchy in America. If the problem were simply that racial disparities exist in the enforcement of the law, it could be resolved by effective enforcement of the Constitution's guarantees of equal protection.[79] If, as argued below, the state's law enforcement and intelligence powers are being used to protect the status quo—which includes but is not limited to its racial hierarchy—rather than the people as a whole, then we must address much broader structural questions regarding whom the government represents and protects.

This section will consider examples of the U.S. government's long and consistent history of suppressing movements for social change. Laying the groundwork for many of the measures currently used or sought in the "war on terror," this history also focuses on how those who challenge economic, social or political structures are conflated with immigrants, labeled "un-American," and accused of being "seditious." As a result, the employment of surveillance, infiltration, and "counterintelligence" tactics—designed to combat subversion by foreign governments—now appears justified when used against U.S. citizens and residents exercising their constitutionally guaranteed rights.

The U.S. government's attempts to portray the threat embodied by the Other as pervading American society has been facilitated by fact that the United States, as a settler-colonial state, has acquired its territory and amassed much of its wealth by exploiting those deemed Other within its claimed borders. In addition, the effective portrayal of the United States as a nation of immigrants has made it easy to use perceived racial and ethnic distinctions to create an internal "us vs. them" mentality. Taking advantage of this construction, one of the first lines of attack on those perceived as threats to the status quo has been to label them as "foreign," either literally because they are immigrants or because they are characterized as representing foreign powers or ideologies.

As early as 1798, the first Alien and Sedition Acts[80] were passed on the Federalists' claim that the Jeffersonians were agents of France attempting to bring the French Revolution's "Reign of Terror" to the United States.[81] Only Republicans were prosecuted under the Acts and for clearly political reasons. Thus, for example, Congressman Matthew Lyon was sentenced to four months in prison for describing President John Adams as "swallowed up in a continual grasp for power, in an unbounded thirst for ridiculous pomp, foolish adulation, and selfish avarice."[82]

The institution of slavery was, of course, an essential aspect of the initial American status quo, well protected by the Constitution,[83] and those who spoke out against its cruelties and advocated abolition were frequently charged with sedition. Using that rationale, in certain periods the Postmaster General refused to allow abolitionist literature to be sent through the U.S. mail, and despite the First Amendment's explicit guarantee of the right of the people to petition the government for redress of grievances, the House of Representatives enacted a "gag rule" forbidding the discussion of slavery.[84]

Union organizers in the late nineteenth and early twentieth century were labeled "communists" and "anarchists" and working class unrest was blamed on immigrants. Thus, for example, the labor disputes which

accompanied the depression of 1873-1877, particularly the fiercely contested strikes of railroad workers and miners, were consistently depicted as the work of outside agitators. William Preston, Jr., says,

> A narrow focus on the Irish in the Molly Maguires [who organized dramatic actions in the Pennsylvania coal mines], on the few union leaders of alien birth, and on the scattered radicals among foreign-born strikers encouraged the idea broadcast by the New York *Herald* that "the railroad riots were instigated by men incapable of understanding our ideas and principles."[85]

During the 1880s and 1890s immigrants were frequently conflated with anarchists and "variously referred to as 'the very scum and offal of Europe,' 'venomous reptiles,' . . . and 'that class of heartless and revolutionary agitators' who had come 'to terrorize the community and to exalt the red flag of the commune above the stars and stripes.'"[86]

Congress began regulating immigration in 1875, and in the 1880s and 1890s passed a series of acts excluding Chinese workers.[87] In 1903, legislation was enacted which excluded "alien anarchists," individuals who believed in or advocated the overthrow of government by force, and anyone "who disbelieved in" organized government or was "affiliated with any organization entertaining and teaching such disbelief."[88] This was the first federal legislation to ban immigrants on the basis of their beliefs or associations. Congress portrayed this legislation as a response to the 1901 assassination of President McKinley by Leon Czolgosz, but Czolgosz was a U.S.-born citizen with only vague anarchist connections.[89] As Robert Justin Goldstein notes,

> The anarchist laws were the first sedition laws in American history since 1798, and the first laws in American history to provide penalties for simply belonging to a group (what later became known as "guilt by association"). They became the models for later legislation directed at other targets—for example, the criminal syndicalism laws passed by many states in 1917-20 to outlaw the Industrial Workers of the World [IWW] and again in 1947-54 to

> outlaw the Communist Party [CP]; the 1917-18 Federal wartime Espionage and Sedition Acts, which virtually outlawed all criticism of the government and were used to harass the Socialist Party; the 1917, 1918, 1920, 1940, 1950, and 1952 immigration laws used to exclude and deport members of the IWW and CP; and the 1940 Smith Act, outlawing advocating or belonging to groups advocating overthrow of the government, for all citizens, even in peacetime.[90]

In periods of war, people identified as Other by virtue of race, national origin, or political views have been deemed "un-American," a term that in a variety of ways implies more about one's "loyalty" than one's nationality. During the brutal four-year campaign to "pacify" the Philippines after it was ceded to the United States by Spain in 1898, those who opposed the war were dismissed as "liars and traitors." General Arthur MacArthur had a lawyer on the Philippine Commission draft "Treason Laws," which defined treason as "joining any secret political organization or even as 'the advocacy of independence or separation of the islands from the United States by forcible or peaceful means.'"[91]

During World War I, the Justice Department tried to convince President Woodrow Wilson to try civilians accused of interfering with the war effort before military courts martial.[92] That effort failed, but Wilson did sign the Espionage Act, which made it a crime to "willfully utter, print, write, or publish any disloyal, profane, scurrilous, or abusive language" about the United States, and allowed the Post Office to exclude from the mails any material advocating "treason, insurrection or resistance to any law of the U.S."[93] The following year Congress passed the Sedition Act,[94] prohibiting essentially all criticism of the war or the government. As Goldstein reports,

> Altogether, over twenty-one hundred [persons] were indicted under the Espionage and Sedition laws, invariably for statements of opposition to the war rather than for any overt acts, and over one thousand persons were convicted. Over one hundred persons were sentenced to jail terms of ten years or more. Not a single person was ever convicted for actual spy activities.[95]

African Americans were particularly targeted in the hunt for subversives and draft evaders, due, apparently, to "the widespread suspicion among whites that . . . enemy agents were actively subverting the loyalties of African Americans, who were believed to be uniquely susceptible to those who would manipulate them for sinister purposes."[96]

During World War II, Japanese Americans were categorically labeled "potentially disloyal" despite the fact that both the FBI and military intelligence denied that the community posed a threat to national security and, in fact, found no instances of sabotage or espionage by Japanese Americans.[97] The wholesale incarceration of those of Japanese descent—both "alien and non-alien"[98]—was driven primarily by pressure from nativist groups like the Sons of the Golden West, who had long advocated the exclusion of Japanese Americans.[99] The government was able to successfully invoke the wholly unsubstantiated claim of "military necessity" because the groundwork for viewing Asians as the "yellow peril" had been laid by decades of racist stereotyping and exclusionary laws.[100]

The "Cold War" which followed World War II illustrated that the pursuit of those considered "disloyal" was not to be limited to periods of actual warfare, but extended indefinitely. In 1947, President Truman issued Executive Order 9835, which authorized the Justice Department to seek out "infiltration of disloyal persons" within the U.S. government and to create a list of organizations that were "totalitarian, fascist, communist or subversive . . . or seeking to alter the government of the United States by unconstitutional means."[101] By 1954, the Justice Department had listed hundreds of organizations—including groups such as the Chopin Cultural Center, the Committee for Negro Arts, the Committee for the Protection of the Bill of Rights, and the Nature Friends of America—and either actual membership in or "sympathetic association" with such organizations was considered evidence of disloyalty.[102]

The Internal Security Act of 1950, also known as the McCarran Act, required all members of "Communist-front" organizations to register with

the federal government and adopted a proposal, not rescinded until 1968, to establish special "detention centers" for incarcerating those so registered, without trial, at any time the President chose to declare an "internal security emergency."[103] Between 1945 and 1957, the House Un-American Activities Committee (HUAC) subpoenaed thousands of Americans to hundreds of congressional hearings, requiring them to testify about their political associations and their knowledge of the activities of their friends, neighbors and co-workers.[104] Those who refused were jailed for contempt. "Communism," like anarchism, became a catch-all term to label a vague "enemy" against whom an undeclared "war" could be fought and increasingly restrictive measures imposed on the U.S. population.[105]

Between 1947 and 1952, the FBI placed hundreds of informants within social and labor organizations and conducted "security investigations" of approximately 6.6 million Americans.[106] These procedures set the stage for a massive program aimed squarely at suppressing all movements for social change in the United States. Between 1956 and 1971, the FBI conducted over 2,000 domestic "counterintelligence" operations, called COINTELPROs (a cryptonym deriving from COunter INTELligence PROgram), in what a Senate investigatory committee called "a secret war against those citizens it considers threats to the established order."[107] The Senate Select Committee to Study Government Operations with Respect to Intelligence Activities, generally known as the "Church Committee" after its chair, Senator Frank Church, produced a massive four-volume Final Report in 1976.[108] The Church Committee Report documented thousands of illegal and unconstitutional operations conducted by the FBI, the Central Intelligence Agency, the National Security Agency, the Defense Intelligence Agency, Army Intelligence, and numerous other federal agencies over several decades, operations explicitly designed to destroy political movements these agencies viewed as threats to the status quo.[109] In the Committee's words, these were part of "a sophisticated vigilante operation aimed squarely at preventing the exercise of First Amendment

rights of speech and association, on the theory that preventing the growth of dangerous groups and the propagation of dangerous ideas would protect the national security and deter violence."[110]

Because the Church Committee's investigation was both constricted in scope and abruptly terminated in mid-stream,[111] there is much we do not know about COINTELPRO-type operations. Nonetheless, between the Committee's official report and thousands of documents obtained under the Freedom of Information Act, we know that virtually every organization in the country perceived by intelligence or law enforcement agencies as advocating social change in any manner was targeted. These organizations included all communist or socialist groups; the "New Left" in general, which included anti-war activists, student organizations, environmentalists, feminists and gay rights advocates; *all* organizations composed primarily of people of color, from African American civil rights and church groups to the Black Panther Party, the American Indian Movement, the Chicano Brown Berets, and advocates of Puerto Rican independence; and "white hate" groups such as the Ku Klux Klan.[112]

While numerous federal agencies engaged in similar programs, the FBI's COINTELPRO operations are the most thoroughly documented, and thus are used here to illustrate the methods employed.[113] The best-known—and least egregious—category of their operations involved the acquisition of information through illegal means, including mail interception, wiretaps, bugs, live "tails," break-ins and burglaries, and the use of informants.[114] These means were employed not simply to obtain information, but were explicitly intended to induce "paranoia" in movements for social change. As then FBI Director J. Edgar Hoover stated, he wanted his targets to believe there was "an FBI agent behind every mailbox."[115] In other words, such tactics were used precisely because of the chilling effect they would have on speech and associational activities, not because they were yielding evidence of criminal activity.

To give just one example, after fifteen years of litigation the Socialist Workers Party (SWP) and its youth organization, the Young Socialist Alliance (YSA), won a lawsuit against the FBI for surveillance that began in 1936 and entailed 20,000 days of wiretaps, 12,000 days of listening "bugs," 208 burglaries of offices and homes, and the employment of thousands of informants.[116] According to the opinion of the District Court for the Southern District of New York,

> Presumably the principal purpose of an FBI informant in a domestic security investigation would be to gather information about planned or actual espionage, violence, terrorism or other illegal activities designed to subvert the governmental structure of the United States. In the case of the SWP, however, there is no evidence that *any* FBI informant *ever* reported an instance of planned or actual espionage, violence, terrorism or efforts to subvert the governmental structure of the United States.[117]

The government was not simply "spying" on these organizations. The stated objective of FBI COINTELPROs was to "neutralize," i.e., disrupt and destroy, the targeted group, and, to quote the Committee's Final Report, "[t]he techniques were adopted wholesale from wartime counterintelligence, and ranged from the trivial . . . to the degrading . . . and the dangerous."[118] Building on the programs of illegal surveillance, a second level of tactics employed was the dissemination of information known to be false. One version, sometimes called "gray propaganda," involved the use of "confidential sources" and "friendly" media outlets to leak derogatory information about individuals and publish unfavorable articles and fabricated "documentaries" about targeted groups.[119] Another form, known as "black propaganda," involved the fabrication of communications purporting to come from the targeted individuals or organizations.[120]

A third level involved attempts to destroy organizations by creating internal dissension and by setting up groups to attack each other—either by using groups already in existence, or by creating new groups solely for this purpose. As reported by the Church Committee, "approximately 28

[percent] of the Bureau's COINTELPRO efforts were designed to weaken groups by setting members against each other, or to separate groups which might otherwise be allies, and convert them into mutual enemies."[121]

A fourth level of COINTELPRO operations involved the deliberate misuse of the criminal justice system. Working with local police departments, the FBI had activists repeatedly arrested, not necessarily to obtain convictions, but "to simply harass, increase paranoia, tie up activists in a series of pre-arraignment incarcerations and preliminary courtroom procedures, and deplete their resources through the postings of numerous bail bonds (as well as the retention of attorneys)."[122] As most of its surveillance and infiltration revealed that the targeted groups were engaging in entirely lawful activity, the FBI resorted to placing agents provocateurs in organizations to advocate violence or illegal activities. When that failed, government agents used fabricated evidence or perjured testimony to frame activists for crimes they had not committed.[123] Finally, when all other avenues of "neutralization" had failed, "law enforcement" agents resorted to participation in direct physical assaults and assassinations, most notoriously the 1969 murders of Chicago Black Panthers Fred Hampton and Mark Clark.[124]

In light of recent developments, it is particularly significant to note that by declaring groups advocating social change to be threats to the national security, the FBI and other governmental agencies were able to more readily use techniques developed for "enemy agents"—presumably not protected by the Constitution—against U.S. citizens and residents. The result was "law enforcement" practices which violated U.S. law, constitutional mandates, and the fundamental human rights of persons under U.S. jurisdiction, *not* to quash criminal activity or terrorist threats, but to suppress those who challenged the status quo. As the Senate Select Committee on Intelligence Activities concluded,

> Many of the techniques used would be intolerable in a democratic society even if all of the targets had been involved in violent

> activity, but COINTELPRO went far beyond that. The unexpressed major premise of the programs was that a law enforcement agency has the duty to do whatever is necessary to combat perceived threats to the existing social and political order.[125]

While the FBI stopped calling such operations "COINTELPROs" when the program was exposed in the early 1970s, there is ample evidence both that such operations have continued[126] and that each successive administration has asked Congress for legislation which would "legalize" many of the methods described above.[127]

### C. MAINTAINING SOCIAL CONTROL THROUGH "WAR ON CRIME"

Part A briefly outlined the role race has played in the definition of who is an "American," and Part B focused on how criticism of U.S. policies or association with disfavored organizations have been conflated with treason and sedition, turning those accused of such activities into the "enemy"—disloyal, subversive, and un-American. Both sections traced how law and law enforcement powers have been used to preserve the particular racial, economic, and political status quo that has been defined as American, setting the stage for much of what is happening today in the "war on terror." To understand the weapons that are available to, or being sought by, the government in its current "war," however, we need to consider not only the United States' history of racial subordination and ideological repression, but also the powers that have been given to law enforcement and intelligence agencies in their sweeping "war on crime" and, in particular, in the "war on drugs."

During the 1960s, the United States faced massive challenges to the status quo, not only from organized social and political forces—such as the civil rights movement, the women's movement, massive anti-war mobilizations, and the resurgence of organized labor[128]—but also from the hundreds of urban rebellions that rocked every major U.S. city.[129] These

rebellions were particularly frightening to those in power because they were spontaneous and widespread and, as a result, were not susceptible to the "neutralization" tactics of COINTELPRO-type operations.[130]

In 1967, following "riots" in Newark, Detroit, Cleveland, and nearly 150 other cities,[131] President Lyndon Johnson convened a National Advisory Commission on Civil Disorders, commonly referred to as the Kerner Commission after its chair, Illinois Governor Otto Kerner. The Kerner Commission was given the task of determining what had happened, why it happened, and what could be done to prevent it from happening again.[132] The Commission concluded that the primary cause of the rebellions was "pervasive discrimination and segregation in employment, education and housing" and the resulting "frustrations of powerlessness" which permeated the "ghettos."[133] The Commission made extensive recommendations for federal programs to improve employment, education, the welfare system, and housing in poor communities.[134] The Commission viewed these improvements as the only viable long-term response to its most basic conclusion that "[o]ur nation is moving toward two societies, one black, one white—separate and unequal."[135] While noting that "[a]lmost invariably the incident that ignites disorder arises from police action,"[136] the Commission did not conclude that more police or harsher laws were needed; rather, it recommended improved police-community relations.[137]

Nonetheless, despite its stated awareness of the underlying causes of and solutions for "social disorder," the government's primary response since the late 1960s has been to wage an ever intensifying "war on crime."[138] As Richard Nixon said in campaigning for president, "doubling the conviction rate in this country would do more to cure crime in America than quadrupling the funds for Humphrey's war on poverty."[139] In the war on crime, the people—at least those residing in poor communities of color—quickly became the enemy, as illustrated by some San Francisco police officers' reference to their community relations work in black neighborhoods as "Commie relations."[140] In Christian Parenti's words,

"Crime meant urban, urban meant Black, and the war on crime meant a bulwark built against the increasingly political and vocal racial 'other' by the predominately white state."[141] Or, as H. R. Haldeman bluntly reported, "[President Nixon] emphasized that you have to face the fact that the whole problem is really the blacks. The key is to devise a system that recognizes this while not appearing to."[142] A national survey taken in the summer of 1968 found that over 80 percent of those polled believed that law and order had broken down and placed the blame on "communists" and "Negroes who start riots."[143]

Nixon had assumed office on a "law and order" platform and, perhaps because he soon discovered that there was little federal jurisdiction over most criminal activity, rapidly declared war on drugs. Claiming a "tenfold increase" in the number of addict-users from 68,000 in 1969 to 559,000 in 1971—an increase which "came not from any flood of new addicts reported to federal authorities in 1970 or 1971 but from a statistical reworking of the 1969 data"[144]—Nixon announced to Congress in June 1971 that "[t]he problem has assumed the dimensions of a national emergency."[145]

In the meantime, the 1968 Omnibus Crime Control and Safe Streets Act had weakened *Miranda* protections,[146] authorized more telephone taps and bugs, and allowed police 48 hours of unwarranted wiretapping in "emergencies."[147] Further, the Comprehensive Drug Abuse Prevention and Control Act of 1970 had dramatically expanded the budgets of drug and law enforcement agencies.[148] The 1970 Organized Crime Control Act, which contained the Racketeer Influenced and Corrupt Organizations (RICO)[149] Act, loosened the rules on admissible evidence, allowed seizures of the assets of any organization deemed a criminal conspiracy, created twenty-five year sentences for "dangerous adult offenders," and empowered secret "special grand juries" with broad subpoena authority.

Nixon created a special Office of Drug Abuse Law Enforcement (ODALE), directly accountable to the White House, with the power to create "strike forces" using federal agents from the Bureau of Narcotics and

Dangerous Drugs, the Bureau of Customs, the Internal Revenue Service, and the Bureau of Alcohol, Tobacco and Firearms.[150] As ODALE engaged in a series of dramatic no-knock entrances into the houses of what turned out to be entirely innocent citizens, its director "explained that extraordinary procedures, to the limit of the law, were necessary because the nation was engaged in an all-out war against drugs and the very survival of the American people was at stake."[151] With massive federal subsidies available for weapons, training, prison construction, and automated information systems, many states followed the federal lead.[152] The most striking example was in New York, where Governor Nelson Rockefeller implemented draconian drug laws with mandatory life sentences, even for sixteen year-olds, and requested that President Nixon and New York City Mayor John Lindsay set up "emergency camps" for detaining drug addicts.[153]

Under the Reagan administration, the drug war's focus on "foreign" enemies was intensified, with large-scale operations targeting Mexico and Colombia[154] and an increased focus on immigrants as drug traffickers.[155] These operations set the stage for heightened military involvement, facilitated by amending the Posse Comitatus Act[156] and welcomed as a way of maintaining military budgets in a time of apparent peace.[157] Federal police powers continued to be strengthened, as the 1984 Comprehensive Crime Control Act[158] allowed federal preventive detention, established mandatory minimum sentences, eliminated federal parole, scaled back the insanity defense, increased penalties for acts of terrorism, and greatly expanded asset forfeiture provisions. The Bail Reform Act,[159] also passed in 1984, expanded the use of preventive detention. Despite Justice Marshall's argument that "[s]uch statutes, consistent with the usages of tyranny and what bitter experience teaches us to call the police state, have long been thought incompatible with the fundamental human rights protected by the Constitution," the Supreme Court upheld the practice in *Salerno* on the grounds that preventive detention is regulatory, not

punitive.[160] While purportedly designed to keep "drug kingpins, violent offenders and other obvious threats to the community" incarcerated while awaiting trial, this act was immediately used to keep political resisters incarcerated, "provid[ing] the FBI with a weapon far superior to the strategy of pretext arrests" in detaining, among others, the Puerto Rican *independentistas*, Resistance Conspiracy defendants, and Irish Republican Army asylum seekers.[161]

The 1986 Anti-Drug Abuse Act provided new mandatory minimum sentences without possibility of parole, including the requirement of a five-year minimum for possession of either 500 grams of powdered cocaine or only 5 grams of crack cocaine; a particularly egregious disparity in light of the fact that powdered cocaine is used much more frequently by white Americans, while crack cocaine is used more by African Americans.[162] Furthermore, the 1988 Anti-Drug Abuse Act[163] expanded the use of the federal death penalty and created a "drug czar" to coordinate between law enforcement, military, and intelligence agencies. The Act also allocated funds to the Department of Defense to train law enforcement officers, again expanded forfeiture laws, increased the severity of mandatory minimum sentences, and enacted "user accountability" provisions which provide for automatic eviction from public housing for tenants engaging in criminal activity on or near housing projects.[164]

As these laws were being passed, huge sums of money allocated for police and prisons, and an increasing proportion of the population incarcerated, President Reagan was also dismantling the social programs which the Kerner Commission had identified as the only feasible alternative to urban rebellions. According to Christian Parenti, "In 1982 alone Reagan cut the real value of welfare by 24 percent, slashed the budget for child nutrition by 34 percent, reduced funding for school milk programs by 78 percent, urban development action grants by 35 percent, and educational block grants by 38 percent."[165] The 1988 Commission on the Cities

reported that poverty and racial disparities had, in fact, increased since the Kerner Commission's report had been issued, concluding

> "Quiet riots" are taking place in America's major cities: unemployment, poverty, social disorganization, segregation, family disintegration, housing and school deterioration, and crime. These "quiet riots" may not be as alarming or as noticeable to outsiders . . . but they are even more destructive of human life than the violent riots of twenty years ago.[166]

Notwithstanding the emphasis given the war on drugs during the 1980s, national surveys indicated that, as of July 1989, only 20 percent of the American people considered drugs the most pressing national problem.[167] Nonetheless in September 1989 in his first televised speech as president, George Bush "declared a national consensus on the primacy of this issue—'All of us agree that the gravest domestic threat facing our nation today is drugs'—and then declared war, calling for 'an assault on every front.' Urging Americans to 'face this evil as a nation united,' Bush proclaimed that 'victory over drugs is our cause, a just cause.'"[168] Shortly after this speech, 64 percent of those polled had decided that it was, after all, the nation's most pressing problem, and 62 percent were willing to sacrifice "a few of the freedoms we have in this country" to fight the war on drugs.[169]

Who was the enemy in this war? According to President Bush, it was "[e]veryone who uses drugs. Everyone who sells drugs. And everyone who looks the other way."[170] There is no evidence that these "wars" have reduced drug use or crime rates.[171] Despite the public perception of increasing crime, the overall crime rate has remained stable since the early 1970s.[172] Nonetheless, in 1972 there were just under 200,000 people incarcerated in U.S. prisons; by 1985 there were 500,000; and by 1997 the number reached 1.2 million, plus another 500,000 in local jails.[173] The United States now has one of the world's highest per capita incarceration rates.[174]

Poor people and people of color have been disproportionately targeted in this war. Although studies report virtually equal rates of drug usage among black and white Americans,[175] in 1980 23 percent of all drug arrests were of African Americans, who comprise about 12 percent of the population, and by 1990 African Americans accounted for 40 percent of all drug arrests and over 60 percent of drug convictions.[176] The incarceration rate of African Americans is now six times that of white Americans. In addition, 80 percent of all persons facing felony charges are indigent.[177] According to Noam Chomsky,

> The so-called drug war . . . was aimed directly at the black population. None of this has anything to do with drugs. It has to do with controlling and criminalizing dangerous populations. It's kind of like a U.S. counterpart to "social cleansing." . . . The more you can increase the fear of drugs and crime and welfare mothers and immigrants and aliens and poverty and all sorts of things, the more you control people.[178]

The use of the criminal justice system to control the poor and people of color is not new, but it appears to be intensifying.[179] While many factors contribute to the spiraling incarceration rate, such as the soaring profitability of the prison-industrial complex and the political capital gained by appearing "tough on crime," it is also a very effective mechanism for maintaining the economic and racial status quo. This strategy is made more socially palatable by the portrayal of its primary targets as Other by virtue of race, and as the "enemy" by the declaration of war on crime and drugs. All of these deeply rooted trends—the portrayal of persons of color as not fully "American," the labeling of social protest as seditious, and the dramatic expansion of the criminal justice system—have set the stage for the measures currently being taken in the "war on terror."

## D. THE WAR ON TERROR: CONSOLIDATING EXECUTIVE POWER

The recently enacted USA PATRIOT Act significantly expands the options available to government agencies concerned with maintaining social control, especially when used in conjunction with the police powers provided by the legal developments discussed in the previous section. With all of the powers obtained in the war on drugs firmly entrenched, the 1990s saw a gradual shift in emphasis from combating drugs to the "war on terrorism." In the process, Congress has consistently expanded the power of law enforcement an intelligence agencies to control the lives of those who are perceived as potential threats to the racial, economic, or political status quo.

While the PATRIOT Act and the proposed PATRIOT II have generated the most public scrutiny, these laws are simply the latest developments in "anti-terrorism" legislation which has been enacted over the past decade. The impetus for much of the legislation related to this new focus came from the bombings of the World Trade Center in 1993 and the Oklahoma City federal building in 1995.[180] In 1994, Congress passed the Violent Crime Control and Law Enforcement Act,[181] which fulfilled President Clinton's election year promise to put an additional 100,000 police officers on the street. It also provided more funds for state prisons, added a "three strikes" mandatory life sentence provision, enhanced sentences for "gang members," directed the sentencing commission to increase penalties for offenses committed in newly designated "drug free zones," made those convicted of such offenses ineligible for parole, and authorized the death penalty for numerous new categories of "terrorist activity."[182] The Act allocated an additional $25 million per year for the FBI's "counterterrorism" budget and $25 million per year for training state and local SWAT teams.[183]

Even though the FBI had reported only two incidents of international terrorism in the United States between 1985 and 1996, Congress passed the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) whose "sweeping provisions served to license almost the full range of repressive

techniques which had been quietly continued after COINTELPRO was supposedly terminated."[184] AEDPA defines "national security" as encompassing the "national defense, foreign relations, or economic interests of the United States" and gives the Secretary of State broad authority to designate groups as "engaging in terrorist activity" if they threaten "the security of United States nationals or the national security of the United States,"[185] a provision similar to that authorized by President Truman's 1947 Executive Order.[186] Under this Act, it is a felony to provide any form of material support to designated organizations, even if the support goes directly to an entirely lawful activity of the group,[187] and noncitizens can be deported on the basis of secret evidence for belonging to organizations deemed "terrorist" without any showing of personal involvement in terrorist or criminal activity; in other words, for engaging in what would otherwise be associations protected by the First Amendment.[188] As summarized by David Cole and James Dempsey, AEDPA

> resurrected guilt by association as a principle of criminal and immigration law. It created a special court to use secret evidence to deport foreigners labeled as "terrorists." It made support for the peaceful humanitarian and political activities of selected foreign groups a crime. And it repealed a short-lived law forbidding the FBI from investigating First Amendment activities, opening the door once again to politically focused FBI investigations.[189]

At the same time AEDPA was passed, Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), which not only made it easier to deport immigrants for their political associations but also for minor criminal convictions.[190] Noncitizens, who were already excludable or deportable for serious criminal offenses and for virtually any drug offense, no matter how minor,[191] became retroactively deportable for a wide range of minor crimes that were redefined as "aggravated felonies."[192] As a result, numerous long-time permanent residents have been deported for misdemeanor pleas or convictions several

decades old.[193] Invoking the specter of terrorism, the Clinton administration was able to implement many laws that had long been on the executive branch's "wish list." Thus, for instance, George Bush had twice proposed to allow secret evidence in deportation hearings,[194] and both the Bush and Reagan administrations had tried unsuccessfully to criminalize "support" for terrorism.[195]

With the September 11 attacks on the Pentagon and the World Trade Center, the stage was set for swift passage of the next level of police and intelligence powers on the executive branch's wish list,[196] as Americans were informed once again that they would have to "sacrifice some liberties for their security."[197] With Attorney General John Ashcroft's dire warning that the "blood of the victims" of the next terrorist attack would be on Congress' hands if they didn't act quickly,[198] the USA PATRIOT Act[199] was rushed through the legislature and hurriedly signed into law.[200]

The PATRIOT Act, a lengthy and complicated piece of legislation containing 158 separate provisions, dramatically expands the government's law enforcement and intelligence gathering powers.[201] Generally, the Act provides the government with enhanced surveillance powers, blurs the line between criminal and intelligence investigations, criminalizes political protest, and further curtails immigrants' rights.[202] While an in-depth analysis is not possible here, it is important to briefly highlight a few of its provisions that, in the name of protecting "our" security, significantly narrow the class of those protected by law.

According to Nancy Chang of the Center for Constitutional Rights, in passing the PATRIOT Act, Congress "granted the [George W.] Bush administration its longstanding wish list of enhanced surveillance tools, coupled with the right to use these tools with only minimal judicial and congressional oversight."[203] The PATRIOT Act has also expanded the scope and duration of authorized surveillance and physical searches,[204] including authorization for "sneak-and-peak searches," known in COINTELPRO days as "black bag jobs", i.e. searches conducted without

notice of warrant until after the search has been completed.[205] It is now easier for the government to obtain warrants for records from third parties such as telephone and utility companies, internet service providers, banks, credit card companies, and even public libraries.[206] In addition to this expanded legal authorization for warrants, many companies report being pressured to "turn over customer records voluntarily, in the absence of either a court order or a subpoena, 'with the idea that it is unpatriotic if the companies insist too much on legal subpoenas first.'"[207]

As noted above, in COINTELPRO-type operations law enforcement agencies employed methods which were initially developed for use against foreign agents against U.S. citizens and organizations. The PATRIOT Act attempts to legitimize this approach in a number of ways. For example, Title II of the PATRIOT Act, "Enhanced Surveillance Procedures," defines "foreign intelligence information" very broadly to include not only information relating to attacks or sabotage by foreign powers or their agents, but also "information, whether or not concerning a United States person [i.e., a U.S. citizen or permanent resident], with respect to a foreign power or foreign territory that relates to (i) the national defense or the security of the United States; or (ii) the conduct of the foreign affairs of the United States."[208] Under this definition, it appears that any person's opinion on any aspect of U.S. foreign policy, no matter how theoretical or even inane, is "foreign intelligence information" and can now be disclosed "to any Federal law enforcement, intelligence, protective, immigration, national defense or national security official" to assist in the performance of his or her duties.[209]

It has generally been presumed that the relaxed standards for warrants available under the Foreign Intelligence Surveillance Act (FISA)[210] were consitutionally acceptable because the purpose of the authorized surveillance was to obtain foreign intelligence information, not information intended for use in criminal prosecutions.[211] Now, however, U.S. persons can be targeted on the basis—although not *solely* on the basis—of First

Amendment protected activities and subjected to extensive, and perhaps secret, surveillance and searches because they are involved in activities that, under the broader definition of "foreign intelligence information," relate to U.S. foreign policy or national security.[212] Court orders may now be obtained requiring the production of "any tangible things" upon certification that they are wanted for an investigation "to protect against international terrorism or clandestine intelligence activities,"[213] without the earlier requirement of "specific and articulable facts" for believing that the material sought pertains to a "foreign power or an agent of a foreign power."[214] Similarly, a provision of FISA that authorized warrants for wiretaps and physical searches without a showing of probable cause has been expanded to allow such searches where "foreign intelligence information" is "a significant purpose," rather than "the purpose," of an investigation.[215]

As previously discussed, the United States' history of penalizing organizations that appear "disloyal" is exemplified by the Justice Department's creation, in the late 1940s, of a list of "subversive" organizations, and its practice of considering not only membership but "sympathetic association" with such groups as evidence of disloyalty.[216] Similarly, in 1996, under the authority of the AEDPA, the Secretary of State created a list of "foreign terrorist organizations" and made it a felony to provide material aid to these entities.[217] Expanding on this precedent, the PATRIOT Act now authorizes the creation of a separate "terrorist exclusion list,"[218] with increased penalties for providing material support to designated organizations.[219]

Immigrants are now more vulnerable than ever, for the Act both broadens the definition of who is deportable and gives the government expanded power to indefinitely detain noncitizens.[220] "Terrorist activity" is now a deportable offense,[221] and recent amendments to the Immigration and Nationality Act have expanded the definition of "terrorism" to include any crime involving a weapon or other dangerous device "other than for mere personal monetary gain."[222] In contrast, the State Department defines

terrorism as "premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents, usually intended to influence an audience."[223] The PATRIOT Act defines "engaging in terrorist activity" as encompassing solicitation of members or funds and providing material support or "encouragement" to a "terrorist" organization, even if the activity is undertaken solely to support the lawful, humanitarian activities of the organization, and even if the associational activities would otherwise be protected by the First Amendment.[224] These organizations need not be on any official list, but can simply be groups comprised of "two or more individuals, whether organized or not" engaging in certain activities, including the use or threat of violence.[225]

If the attorney general certifies that he or she has "reasonable grounds to believe" that an immigrant is engaged in terrorist activities, as broadly defined above, or in other activities threatening to the national security, the PATRIOT Act provides expanded powers to indefinitely detain the noncitizen until deportation. There is no requirement that the immigrant be given a hearing or shown the evidence on which the certification is based.[226] As Cole and Dempsey point out, the INS already had the authority to detain someone in deportation proceedings who presented a risk of flight or a threat to national security. "Thus, what the new legislation adds is the authority to detain aliens who do *not* pose a current danger or flight risk, and who are *not* removable because they are entitled to asylum or some other form of relief."[227]

The provision of the PATRIOT Act with the greatest potential for chilling the exercise of First Amendment rights and suppressing political dissent may be that which creates the new crime of "domestic terrorism." Under the Act, "domestic terrorism" is broadly defined to encompass activities which are "dangerous to human life," violate "the criminal laws of the United States or of any State," and appear intended to "intimidate or coerce a civilian population," "influence the policy of a government by intimidation or coercion," *or* "affect the conduct of a government by mass

destruction, assassination, or kidnapping." They must also "occur primarily within the territorial jurisdiction of the United States."[228] Any serious social protest, such as a demonstration against the World Trade Organization, the war in Iraq, or police brutality, is by definition intended to influence government policy and could easily be interpreted as involving "coercion."[229] Apparently, such protests now qualify as domestic terrorism if a law is broken and life is endangered, even by demonstrators who fail to obey a police officer's order, block an intersection, or break a window. Not only the protesters but also those who provide them with "material support" must now consider the fact that they could face felony charges and long prison terms. According to Chang, because the crime of domestic terrorism "is couched in such vague and expansive terms, it is likely to be read by federal law enforcement agencies as licensing the investigation and surveillance of political activist[s] and organizations that protest government policies, and by prosecutors as licensing the criminalization of legitimate political dissent."[230]

As noted in the Introduction, in January 2003 a draft of the Justice Department's "Domestic Security Enhancement Act of 2003" was leaked to the press. Commonly known as "PATRIOT II," this proposed legislation would significantly enhance the government's already extensive powers under the PATRIOT Act. A number of its provisions illustrate the Justice Department's intensifying effort to characterize larger and larger sectors of the U.S. population as "the enemy" and to give itself virtually unlimited power to wage war on dissent.

FISA allows many of the Fourth Amendment's protections against unreasonable searches and seizures to be circumvented under the theory that the methods authorized are to be used against "foreign powers" who pose threats to the national security.[231] The first section of PATRIOT II proposes amending FISA to extend the definition of "foreign powers" to a much broader swath of the American public. "Agents of a foreign power" are currently defined as those who knowingly engage in intelligence gathering

activities on behalf of a foreign power if those activities "involve or may involve a violation" of federal criminal law.[232] Section 101 of PATRIOT II would expand the definition of "foreign power" to include *all* persons who engage in "international terrorism" without any requirement of affiliation with an international organization.[233] Section 102 would remove the requirement of a possible violation of criminal law.[234] Under Section 103, the "wartime" authorization currently given the attorney general to engage in electronic surveillance or physical searches without prior FISA Court approval when Congress has declared war would extend to the periods immediately following a congressional authorization of the use of military force or an attack on the United States deemed to be a national emergency.[235]

The crime of "domestic terrorism" created by the PATRIOT Act would be incorporated by Section 121 into the definition of "terrorist activities," and would include related "preparatory, material support, and criminal activities."[236] The definition of "material support" for both "international terrorism" and "domestic terrorism" would also be expanded to cover "training," which includes "instruction or teaching designed to impart a specific skill" and "providing personnel," which includes providing an organization with "one or more individuals (including himself) to work in concert with it or under its direction or control."[237] In Section 121, the Justice Department proposes that all surveillance activities[238] authorized in criminal investigations would be available in investigations of terrorist activities and in Section 123 explicitly removes domestic security investigations from the limitations on criminal investigations provided by the Fourth Amendment.[239]

Private entities have traditionally been given greater latitude than the government to gather information about individuals on the theory that the Fourth Amendment applies to state action and the information is not obtained for the purpose of criminal prosecution. Referring to this distinction as "perverse,"[240] the Justice Department proposes in Section 126

to give the government "equal access" to consumer credit reports[241] and in Section 129 to expand the financial and communications information it can obtain from private agencies using administrative subpoenas known as "national security letters."[242] Businesses and their personnel who "voluntarily" provide information to law enforcement agencies would be protected against civil liability by Section 313.[243] At the same time that the government would be given more access to information about citizens, the proposed legislation would amend the Freedom of Information Act[244] to allow the government to refuse to disclose information regarding detainees until it chooses to initiate criminal proceedings against them.[245]

Despite the Church Committee's exposure in 1976 of widespread illegal and unconstitutional conduct by federal law enforcement and intelligence agencies working closely with state and local police, no legislation was passed to limit such conduct, nor was any official punished for engaging in such practices.[246] As a result, virtually the only constraint on such activity has come from court orders restraining police departments from investigating citizens without reasonable suspicion or probable cause to believe they have engaged in criminal conduct or may do so.[247] Such court orders most often take the form of consent decrees, agreed to by the parties in settling civil suits challenging unconstitutional police practices. Drawing explicitly on the Prison Litigation Reform Act, which terminated many consent decrees resulting from lawsuits brought over prison conditions,[248] Section 312 of PATRIOT II would prohibit, prospectively and retroactively, most consent decrees in police surveillance cases.[249]

Furthermore, drawing explicitly on measures instituted in the "war on drugs," Section 405 proposes to extend presumptive pretrial detention to persons accused of "offenses that are likely to be committed by terrorists"[250] and Section 408 would extend the government's ability, already provided in the PATRIOT Act,[251] to subject those convicted of terrorism-related offenses to "up to lifetime post-release supervision."[252] According to the Justice Department analysis, this extension of governmental power is

justified because "involvement by offenders in terrorism may be the result of persistent (or lifelong) ideological commitments that will not simply disappear within a few years of release."[253]

Also expanding on measures implemented in the "war on drugs," PATRIOT II proposes eliminating the statute of limitations with respect to terrorism-related offenses,[254] expanding the list of crimes subject to the death penalty,[255] and denying federal benefits such as grants, contracts, loans, and professional or commercial licenses to those convicted of terrorism offenses.[256]

Not surprisingly the proposed legislation would make it even easier to exclude, imprison, and deport noncitizens. The 1996 IIRIRA redefined "aggravated felony" to include numerous misdemeanors and made immigrants retroactively deportable on the basis of prior pleas or convictions.[257] Noting that this provision "perversely" makes immigrants subject to expedited deportation for offenses much less serious than crimes such as espionage, sabotage, draft evasion, violations of the Trading with the Enemy Act, or alien smuggling, Section 504 proposes to expand the list of offenses triggering the expedited removal provisions and to expand its applicability to all aliens, including permanent residents.[258] Enhanced criminal penalties would be provided for violations of immigration laws,[259] and those persons who cannot currently be deported because of the conditions in their home countries may, at the attorney general's discretion, "be removed to any country or region regardless of whether the country or region has a government, recognized by the United States or otherwise."[260]

The existing provisions of the PATRIOT Act coupled with the proposed "enhancements" of PATRIOT II dramatically expand the definition of "terrorism-related crimes," making it much easier to prosecute people for political dissent, and impose extremely harsh penalties, including pretrial detention and up to lifetime post-release "supervision."[261] The effect is to eliminate a large and as-yet-undefined sector of "U.S. persons," citizens and

permanent residents, from the "we" being protected by the measures allegedly being taken "for our security."

PATRIOT II goes even further, proposing to allow the government to literally make U.S. citizens into the Other by stripping them of their citizenship. Under Section 501, the Immigration and Nationality Act would be amended to allow the expatriation of a citizen who joins, serves in, or provides material support to a terrorist organization "engaged in hostilities against the United States, its people, or its national security interests." Given the broadly expanded definitions of "material support," "terrorist organization," and "national security interests" and the lack of definition of "hostilities," this provision has virtually unlimited potential for rendering U.S. citizens stateless.[262] Furthermore, in light of the United States' history of disregarding international law[263]—as illustrated by the treatment of those held at Guantanamo Bay[264]—such persons could easily find themselves protected by no law at all.

The "enemy" is again amorphous, the "war" pervasive, and the reach of constitutional protections even more circumscribed.[265] More and more U.S. citizens and permanent residents have been, and can be, imprisoned for longer periods of time and for a wider range of "crimes" that increasingly include protected First Amendment rights to political beliefs or associational activity, on the basis of evidence obtained with virtually no Fourth Amendment restrictions. U.S. citizens are now openly subjected to measures historically limited to "agents of foreign powers" and may soon literally be rendered "foreign."

### E. WHO—OR WHAT—IS PROTECTED BY EXPANDED LAW ENFORCEMENT AND INTELLIGENCE POWERS?

Spurred by the Justice Department's recent proposal to strip Americans of their citizenship on the basis of their political affiliations, as well as by the disparate treatment currently accorded both U.S. citizens and permanent residents in the name of combating terrorism, this essay has focused on the

question of just who is an "American" for purposes of examining and critiquing the measures being taken in the name of "our" security.

Part A provided a brief overview of the role that race and national origin have played in determining citizenship because this history helps us identify the structural origins of the racial hierarchy which pervades our society and continues to influence the public perception of who is considered an American. Part B presented some of the ways in which political ideology, not just ethnic identity, has been a determinant of who, or what, is protected by law, illustrating how those with "un-American" beliefs have been portrayed either as foreign or as agents of foreign powers and how the powers of the state have been used, legally or illegally, to suppress organizations and activities seen as threatening to the status quo. Part C described how, by declaring crimes and drugs to be threats to national security, law enforcement agencies have been given dramatically expanded power, with the result that a huge portion of the population most likely to be dissatisfied with the status quo—the poor and people of color—has been, or is under the immediate threat of being, incarcerated. Part D considered in summary fashion how these developments have come together in the current war on terrorism, which has targeted immigrants, people of color and those who dissent politically, focusing particularly on measures which will further reduce the legal and constitutional protections available to U.S. citizens, rendering them indistinguishable from "agents of foreign powers" in the eyes of the government.

The Church Committee's 1976 conclusion about COINTELPRO and related governmental operations is equally applicable to the more recent "wars" on crime, drugs and terrorism. The Committee stated, "The unexpressed major premise . . . [is] that a law enforcement agency has the duty to do whatever is necessary to combat perceived threats to the existing social and political order."[266] As briefly outlined above, historically the United States' criminal justice system and its intelligence agencies have been used to shore up the institution of slavery, crush labor movements,

protect explicitly colonial and imperialist ventures overseas, and undermine movements for social change, all in the name of protecting national security or American interests. By creating widespread fear about the dangers inherent in anarchy, communism, drugs, crime, uncontrolled immigration, or terrorism, the government has convinced much of the U.S. population to cede more and more of our constitutionally guaranteed rights and to "sacrifice some freedoms for the sake of security." In the name of "law and order," the state's police power has been expanded to encompass nearly every aspect of everyday life,[267] and the United States now incarcerates more of its people than almost any other country in the world. In the name of preserving the "American values" of freedom and democracy, the U.S. government has condoned policies and practices that the Church Committee declared "abhorrent in a free society."[268]

In light of our history, I return to the question originally posed: who is being protected by these dramatically expanded law enforcement and intelligence powers? It is not the poor, who comprise the bulk of those incarcerated.[269] It is not communities of color, in which at least one-third of all young men are, or will be, imprisoned, on probation, or on parole.[270] It is not immigrants, who have been interrogated, disappeared, detained, and deported by the thousands; or the victims of hate crimes perpetrated against those who appear to be "foreign." It is not those individuals who wish to struggle for civil rights, civil liberties, racial justice, or the sovereignty of indigenous peoples. It is not union organizers, environmental activists, advocates for gay and lesbian rights, or those who oppose U.S. military inverventions overseas or global economic institutions, who are made safer by such expanded law enforcement and intelligence powers.

In this essay I have argued that the current expansion of governmental powers, like those described by the Church Committee, serves to protect the status quo, not the American people as a whole. The presumption implicit in the call to support the measures being taken "for our security" is that the "average" (read "white") middle-class American benefits from the

maintenance of the status quo. But this assumption must be examined as well. Americans have not been made vulnerable to terrorist attacks because of a lack of police power, but because American foreign policy continues to breed repression and resistance. Despite the current Bush administration's claim that terrorists attack symbols of American political, military, and economic power because "they hate our freedom," there is widespread support throughout the world for the values of freedom, democracy and the rule of law that the United States is supposed to exemplify.[271] United States' foreign policy, which is all too often manifest in blatant disregard for international law and institutions, unilateral intervention, imposition of harsh economic policies, and support for repressive regimes, has generated much of the anger and frustration that results in terrorist actions.[272] As long as such policies continue, the "average" American is not safe from attack, regardless of how many internal security measures are implemented.

While Americans' fears regarding their physical insecurity, dramatically heightened by the media coverage of the September 11 attacks on the Pentagon and World Trade Center, have been explicitly evoked to justify the "security" measures taken by the executive branch, a more subtle call for their support comes in the subtext—the call to protect "our way of life." The government's definition of national security now explicitly incorporates American economic interests, and most Americans are at least vaguely aware that the United States controls a hugely disproportionate share of the world's wealth and resources. In essence, the U.S. government is asking for unlimited power to bring the rest of the world "into line" with perceived U.S. interests and to suppress dissent at home in order to retain the economic benefits of its sole superpower status abroad and its settler colonial regime at home.

Despite the mounting evidence that the "free market" policies being implemented throughout the world are not, in fact, raising the standard of living of the majority of peoples at home or abroad,[273] and the fact that almost 40 percent of American wealth is controlled by the top 1 percent of

the population,[274] it appears that the "average" American is comfortable with the belief, however ill-founded, that he or she is in a position of relative privilege and that it is somehow deserved.[275] However, the real costs of sacrificing "some liberties"—both ours and others'—to maintain the apparent material benefits of the status quo must be considered.

One of those costs is that the global policies being supported by the United States will continue to generate resistance both among less powerful countries and among groups who do not have the power of states and armies and, therefore, will see "terrorist" attacks as their only recourse.

More fundamental, perhaps, is the cost to all Americans of allowing a further erosion of the Constitution, the compact which creates the very legitimacy of this country and its government. The history of the U.S. government's use of repressive tactics and the attendant restriction of constitutional rights illustrates that such measures are not aberrational, used only in times of emergency with rights restored afterwards, but part of a steady ceding of power to the executive branch. This power, in turn, has been used consistently to undermine not only the Constitution, but the rule of law more generally. Regardless of how satisfied most Americans are with what they perceive to be the status quo, few would consciously trade away democracy to maintain it. Yet this is what is happening.

Democracy, at a minimum, requires a legitimate and representative government that complies with the rule of law. Essential aspects of the rule of law—transparency, consistency, and due process—are being undermined by current domestic and international U.S. practices that are shrouded in secrecy, apply double standards, and circumvent due process.[276] By failing to uphold the Constitution or to comply with international law,[277] the United States government is actively undermining the rule of law, both at home and abroad. Perhaps that 1 percent of the American people who control 40 percent of the wealth, and those who benefit from the billions of taxpayer dollars being given to private prison corporations, or companies like

Halliburton to "reconstruct" Iraq, benefit from this status quo, but the rest of us do not.

As the chief U.S. prosecutor for the Nuremberg Tribunal, Supreme Court Justice Robert H. Jackson stated, "We are able to do away with domestic tyranny and violence and aggression by those in power against the rights of their own people only when we make all men answerable to the law."[278] Furthermore, the Nuremberg principles established that it is not only the right but the *obligation* of a people to ensure that their government complies with the rule of law.[279] The rule of law is at stake now, as we watch long established principles of justice erode in the face of the "war on terror." The government argues that the war on terror is being fought to preserve freedom and democracy, but the measures being taken are undermining those values much more effectively than any terrorist attack could.[280]

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[1] Natsu Taylor Saito, Professor of Law, Georgia State University College of Law. My thanks go to the editors of the *Seattle Journal for Social Justice*, Maggie Chon, and the Georgia State University College of Law for its research support. I am particularly grateful to Ward Churchill for laying the groundwork for much of this analysis; to Steve Bright, the Southern Center for Human Rights, and the Metro Atlanta Task Force for the Homeless for their unflagging efforts to protect those most immediately affected; and to the lawyers on the frontline who have been challenging the governmental practices described in this essay.

[2] Domestic Security Enhancement Act of 2003, *at* http://www.publicintegrity.org/dtaweb/downloads/Story_01_020703_Doc_1.pdf (draft of Jan. 9, 2003). The draft includes the proposed text of the legislation as well as a section-by-section analysis.

Apparently as a result of public resistance to a further restriction of civil liberties, Attorney General John Ashcroft has recently embarked on a national tour to promote the USA PATRIOT Act, and it appears that the administration may be trying to implement PATRIOT II in a piecemeal fashion rather than as one comprehensive act. *See generally* David E. Sanger, *Two Years Later: The President; President Urging Wider U.S. Powers in Terrorism Law*, N.Y. TIMES, Sept. 11, 2003, at A1 (reporting a speech in which George W. Bush argued that the PATRIOT Act did not go far enough and proposed further expansion of powers, including "administrative subpoenas" and expansion of pretrial detention and the death penalty in terrorism-related cases).

[3] Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001). The Act was signed into law on October 26, 2001, just three days after it was introduced in the House of Representatives. The history of the bill is at

http://thomas.loc.gov/cgi-bin/bdquery/z?d107:HR03162:@@@L&summ2=m&.

[4] *See* Natsu Taylor Saito*, Whose Liberty? Whose Security? The USA PATRIOT Act in the Context of COINTELPRO and the Unlawful Repression of Political Dissent*, 81 OR. L. REV. 1051 (2002) (analyzing the USA PATRIOT Act in the context of this history).

[5] Domestic Security Enhancement Act of 2003, *supra* note 2, § 501. *See* text accompanying note 260 *infra*.

[6] *See* text accompanying notes 236-37 *infra*.

[7] *See Legislation Related to the Attack of September 11, 2001, at* http://thomas.loc.gov/home/terrorleg.htm (last updated Oct. 30, 2002).

[8] Natsu Taylor Saito, *Will Force Trump Legality After September 11? American Jurisprudence Confronts the Rule of Law*, 17 GEO. IMMIGR. L.J. 1 (2002) (addressing these detentions in detail). *See generally* David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953 (2002); NANCY CHANG, SILENCING POLITICAL DISSENT: HOW POST-SEPTEMBER 11 ANTI-TERRORISM MEASURES THREATEN OUR CIVIL LIBERTIES (2002); Jordan J. Paust, *Judicial Power to Determine the Status and Rights of Persons Detained Without Trial*, 44 HARV. INT'L L.J. 503 (2003); AMNESTY INT'L, AMNESTY INTERNATIONAL'S CONCERNS REGARDING POST SEPTEMBER 11 DETENTIONS IN THE USA, *at* http://web.amnesty.org/ai.nsf/Index/AMR510442002?OpenDocuments&of=COUNTRIES\USA (last visited Dec. 3, 2003).

[9] *See, e.g.,* THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA, § 3 (Sept. 2002), *at* http://usinfo.state.gov/topical/pol/terror/secstrat.htm (a policy report released to Congress on September 19, 2002 which states, "In the war against global terrorism, we will never forget that we are ultimately fighting for our democratic values and way of life. Freedom and fear are at war….").

[10] *See* Section A *infra*.

[11] *See* Section B *infra.*

[12] *See* Section C *infra.*

[13] This phrase has been used in many contexts, to further a variety of purposes. *E.g.*, Foley v. Connelie, 435 U.S. 291, 294 (1978) (noting that "[a]s a Nation we exhibit extraordinary hospitality to those who come to our country, which is not surprising for we have often been described as 'a nation of immigrants'" while upholding a New York statute requiring police officers to be U.S. citizens); 143 CONG. REC. H3890-06 (daily ed. June 18, 1997) (statement of Rep. Hall) ("We are a nation of immigrants. Those who came as free men went in one direction. Those who came from slave ships, another. If we are to travel towards a common future, we owe it to our children to clearly mark that the early fork in the road was the wrong way."); Editorial, *A Constitutional Anachronism*, N.Y. TIMES*,* Sept. 6, 2003, at A22 (stating that "America is a nation of immigrants" and proceeding with examples such as secretaries of state Henry Kissinger and Madeleine Albright, to argue that the Constitution's requirement that the President be a "natural born citizen" should be changed); Adam Chavarria, Presentation at the *Alianza Conference: Toward a National Latino Agenda April 6, 2002*, 6 HARV. LATINO L. REV. 91, Panel 1 (2003) (noting that President George W. Bush "stated that this nation of immigrants believes in all children, not just those whose parents may speak English" when signing Exec. Order No. 13,230, 66 Fed. Reg. 52,841 (Oct. 12, 2001) (creating the Advisory Commission on Educational Excellence for Hispanic Americans to implement the No

Child Left Behind Act of 2001, Pub. L. No. 107-110, § 502, 115 Stat. 1425 (2002)). Notably, the denominator "nation of immigrants" is often invoked in discussions about immigration policy. *E.g.*, Tamar Jacoby, *A Nation of Immigrants*, WALL ST. J., April 29, 2002, (noting post-September 11 debate over who should be allowed to enter the country); Laurent Belsie, *Now, A Nation of More Immigrants than Ever*, CHRISTIAN SCI. MONITOR, Feb. 7, 2002, *at* http://www.csmonitor.com/2002/0207/p01s01-ussc.html (noting renewed debate over immigration policies after a Census Bureau Report finding that the U.S. has more foreign-born and first-generation residents than ever before).

[14] *See,* LYNNE CHENEY, AMERICA: A PATRIOTIC PRIMER (2002) (children's book depicting the Statue of Liberty on the page for the letter "A." In the notes, Cheney quotes a portion of Emma Lazarus' 1883 poem "The New Colossus" inscribed on the statue: "Give me your tired, your poor, Your huddled masses yearning to breathe free, The wretched refuse of your teeming shore. Send these, the homeless, tempest-tossed to me: I lift my lamp beside the golden door!").

[15] In his first televised address on September 11, 2001, President Bush said, "America was targeted for attack because we're the brightest beacon for freedom and opportunity in the world." On September 20, he said to Congress, "Americans are asking, why do they hate us?" and continuing, "They hate our freedoms…." ZIAUDDIN SARDAR & MERRYL WYN DAVIES, WHY DO PEOPLE HATE AMERICA? 137 (2002).

[16] *See* NATIONAL SECURITY STRATEGY, *supra* note 9, intro. (consistently linking "democracy, development, free markets, and free trade").

[17] *See, e.g.,* Dan Eggen & Cheryl W. Thompson, *U.S. Seeks Thousands of Fugitive Deportees; Middle Eastern Men Are Focus of Search*, WASH. POST, Jan. 8, 2002, at A1 (reporting that the Justice Department was prioritizing the deportation of 6,000 men of Middle Eastern descent, selected by gender, age and country of origin from the more than 300,000 deportable noncitizens in the country); Cole, *supra* note 8, at 975.

[18] David Firestone & Christopher Drew, *A Nation Challenged: The Cases; Al Qaeda Link Seen In Only A Handful of 1,200 Detainees*, N.Y. TIMES, Nov. 29, 2001, at A1. *See* CHANG, *supra* note 8, at 69–87.

[19] *See* Cole, *supra* note 8, at 975 (noting the Justice Department's November 2001 announcement that it would interview 5,000 young men, selected on the basis of their age, date of arrival, and country of origin).

[20] Homeland Security Act of 2002, Pub. L. No. 107–296, 116 Stat. 2135 (2002) (abolishing the INS as an agency and distributing its functions to the Bureaus of Citizenship and Immigration Services (BCIS), Customs and Border Protection (BCBP), and Immigration and Customs Enforcement (BICE) within the newly created Department of Homeland Security).

[21] Registration and Monitoring of Certain Nonimmigrants, 67 Fed. Reg. 52584 (Aug. 12, 2002) (codified at 8 C.F.R. pts. 214 and 264). *See generally* Robert S. White, *New Post-9/11 Registration Procedure for Foreign Workers, Students, and Visitors*, 91 ILL. BAR J. 253 (2003).

[22] *See* Cole, *supra* note 8, at 974–77.

[23] Although noncitizens in the United States have limited constitutional rights with respect to immigration matters, federal courts have consistently held that they are "persons" protected by the Constitution. Plyler v. Doe, 457 U.S. 202, 210 (1982) (even

those unlawfully present are 'persons' guaranteed Fifth and Fourteenth Amendment due process); Mathews v. Diaz, 426 U.S. 67, 77 (1976) ("Even one whose presence in this country is unlawful, involuntary, or transitory is entitled to . . . constitutional protection."); Wong Wing v. United States, 163 U.S. 228, 238 (1896) (noncitizens cannot be punished without a criminal trial because they are protected by Fifth and Sixth Amendments); Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886) (noncitizens in U.S. protected by Fourteenth Amendment). *See generally* David A. Martin, *Graduated Application of Constitutional Protections for Aliens: The Real Meaning of Zadvydas v. Davis*, 2001 SUP. CT. REV. 47 (2001); GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW 1–15 (1996).

[24] *See* Chae Chan Ping v. United States, 130 U.S. 581 (1889) (upholding the exclusion of all Chinese workers despite apparent conflicts with the 1868 Burlingame Treaty and the Due Process clause of the Fifth Amendment); Fong Yue Ting v. United States, 149 U.S. 698 (1893) (allowing the deportation of three permanent residents on the ground that they had no white witnesses to attest to their residency).

[25] *See generally* Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545 (1990); Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255; Natsu Taylor Saito, *Asserting Plenary Power Over the "Other": Indians, Immigrants, Colonial Subjects, and Why U.S. Jurisprudence Needs to Incorporate International Law*, 20 YALE L. & POL'Y REV. 427; T. ALEXANDER ALEINIKOFF, SEMBLANCES OF SOVEREIGNTY: THE CONSTITUTION, THE STATE, AND AMERICAN CITIZENSHIP (2002).

[26] Act of March 3, 1875, ch. 141, 18 Stat. 477 (regulating immigration as a federal prerogative) .

[27] *See generally* THOMAS ALEXANDER ALEINIKOFF ET. AL., IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 151–75 (4th ed. 1998) (giving a brief overview of these policies and their evolution).

[28] *See generally* WARD CHURCHILL, *A Breach of Trust: The Radioactive Colonization of Native North America, in* ACTS OF REBELLION: THE WARD CHURCHILL READER, 111, 114–16 (2003) (summarizing internal colonialism as manifested in the United States); *see also* HOWARD ADAMS, A TORTURED PEOPLE: THE POLITICS OF COLONIZATION (1995) (applying a similar analysis to indigenous nations in Canada); MICHAEL HECTOR, INTERNAL COLONIALISM: THE CELTIC FRINGE IN BRITISH NATIONAL DEVELOPMENT, 1536–1966 (1975) (explicating the concept of internal colonialism).

[29] The United States, which has only 5 percent of the world's population, consumes 25 to 30 percent of its resources and has "40 percent of industrialized-world GDP [gross domestic product], 50 percent of total world defense spending, 60 percent of the total world growth rate, 70 percent of tradable world financial wealth, and 80 percent of world military R&D [research and development]." Criton Zoakos, *Why the world hates America: the Economic Explanation*, INT'L ECON., Mar. 22, 2003, at 10. *See also* Arlie Russell Hochschild, *A Generation Without Public Passion*, ATL. MONTHLY, Feb. 2001, at 62-63 (citing a 30% consumption rate); 2000 Statistical Abstract of the United States, *Energy Consumption and Production by Country: 1990 and 1998, tbl. 1390, at* http://www.census.gov/prod/2001pubs/statab/sec30.pdf (last visited Nov. 11, 2003)

(noting that in 1998 the United States accounted for approximately 25 percent of the world's total energy consumption)

[30] *See* ALEINIKOFF ET AL., *supra* note 27, at 176–77 (Fig. 2.1, The Origins of U.S. Immigration, by Region, 1821–1979). *See generally* ROGER DANIELS, COMING TO AMERICA: A HISTORY OF IMMIGRATION AND ETHNICITY IN AMERICAN LIFE (2d ed. 2002).

[31] Jimmie Durham summarizes the standard history as follows: "When the Europeans first came to North America they found an untamed wilderness inhabited only by a few primitive but noble savages. Those savages, called Indians, lived in nature almost like animals. They melted away when confronted by civilization, technology, and progress." JIMMIE DURHAM, A CERTAIN LACK OF COHERENCE: WRITINGS ON ART AND CULTURAL POLITICS 23 (1993). The alternative is to say that American Indians were simply earlier immigrants, as Lynne Cheney does in her children's primer: "N is for Native Americans, who came here first." CHENEY, *supra* note 14. Quoting Durham again, "Nothing could be more central to American reality than the relationships between Americans and American Indians, yet those relationships are of course the most invisible and the most lied about." *Id*. at 138.

[32] *See generally* WARD CHURCHILL, A LITTLE MATTER OF GENOCIDE: HOLOCAUST AND DENIAL IN THE AMERICAS 1492 TO THE PRESENT (1997).

[33] *See* WARD CHURCHILL, *Charades, Anyone? The Indian Claims Commission in Context*, *in* PERVERSIONS OF JUSTICE: INDIGENOUS PEOPLES AND ANGLO-AMERICAN LAW 125, 140 (2003) (noting that in 1956 "the Justice Department warned Congress that the country's legal ownership of about half the area of the lower 48 states was subject to serious challenge," and that the Interior Department concluded in 1970 that about "one third of the nation's land" still legally belongs to native people).

[34] *See generally* LERONE BENNETT, JR., BEFORE THE MAYFLOWER: A HISTORY OF BLACK AMERICA (6th ed., Penguin Books 1993); IRA BERLIN, MANY THOUSANDS GONE: THE FIRST TWO CENTURIES OF SLAVERY IN NORTH AMERICA (1998).

[35] *See generally* RODOLFO ACUNA, OCCUPIED AMERICA: A HISTORY OF CHICANOS (3d ed. 1988).

[36] *See generally* WARD CHURCHILL AND SHARON H. VENNE, EDS., ISLANDS IN CAPTIVITY: THE RECORD OF THE INTERNATIONAL TRIBUNAL ON THE RIGHTS OF INDIGENOUS HAWAIIANS (forthcoming 2004); HAUNANI-KAY TRASK, FROM A NATIVE DAUGHTER: COLONIALISM AND SOVEREIGNTY IN HAWAII (Revised ed., University of Hawai'i Press 1999).

[37] The Indian Citizenship Act of 1924, ch. 233, 43 Stat. 253.

[38] In *Cherokee Nation v. Georgia*, Supreme Court Justice John Marshall asserted that American Indian nations were neither independent foreign countries nor states of the union, but "domestic dependent nations" whose "relation to the United States resembles that of a ward to his guardian." 30 U.S. (5 Pet.) 1, 17 (1831).

[39] As the Supreme Court summarized:

> The sovereignty that Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance. But until Congress acts, the tribes retain their existing sovereign powers. In sum, Indian tribes still possess those aspects of sovereignty not withdrawn by

> treaty or statute, or by implication as a necessary result of their dependent status.

United States v. Wheeler, 435 U.S. 313, 323 (1978).

[40] U.S. CONST. amend. XIV. *See generally* MARY FRANCES BERRY, MILITARY NECESSITY AND CIVIL RIGHTS POLICY: BLACK CITIZENSHIP AND THE CONSTITUTION, 1861–1868 (1977) (arguing that the Union's needs during the Civil War led to citizenship for African Americans).

[41] Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 407 (1856). Justice Taney added that those of African descent had been regarded by the country's founders as "beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect."

[42] U.S. CONST. art. I, § 8, cl. 4.

[43] Naturalization Act of 1790, ch. 3, § 1, 1 Stat. 103, *repealed by* Act of Jan. 29, 1795, ch. 20, § 1, 1 Stat. 414 (re-enacting most of its provisions, including its racial restrictions). *See generally* IAN F. HANEY LOPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE (1996).

[44] *See* Act of July 14, 1870, ch. 254, § 7, 16 Stat. 254, 256.

[45] *See generally* Immigration and Nationality Act, ch. 477, 66 Stat. 163 (1952).

[46] United States v. Bhagat Singh Thind, 261 U.S. 204, 213 (1923) (holding a "high-caste Hindu" ineligible for naturalization).

[47] *See generally* Natsu Taylor Saito, *Alien and Non-Alien Alike: Citizenship, "Foreignness," and Racial Hierarchy in American Law*, 76 OR. L. REV. 261 (1997); Keith Aoki, *"Foreign-ness" & Asian American Identities: Yellowface, World War II Propaganda, and Bifurcated Racial Stereotypes*, 4 ASIAN PAC. AM. L.J. 1 (1996); Juan F. Perea, *Los Olvidados: On the Making of Invisible People*, 70 N.Y.U. L. REV. 965 (1995); Kevin R. Johnson, *Civil Rights and Immigration: Challenges for the Latino Community in the Twenty-First Century*, 8 LA RAZA L.J. 42 (1995); DAVID J. WEBER, FOREIGNERS IN THEIR NATIVE LAND: HISTORICAL ROOTS OF THE MEXICAN AMERICANS (1973); Natsu Taylor Saito, *Symbolism Under Siege: Japanese American Redress and the "Racing" of Arab Americans as "Terrorists,"* 8 ASIAN L.J. 1 (2001).

[48] *See generally* MICHI WEGLYN, YEARS OF INFAMY: THE UNTOLD STORY OF AMERICA'S CONCENTRATION CAMPS (1996); ROGER DANIELS, PRISONERS WITHOUT TRIAL: JAPANESE AMERICANS IN WORLD WAR II (1993).

[49] *See* ROGER DANIELS, THE DECISION TO RELOCATE THE JAPANESE AMERICANS 33–45 (Harold M. Hyman ed., 1975).

[50] *See* Hirabayashi v. United States, 320 U.S. 81 (1943); Yasui v. United States, 320 U.S. 115 (1943); and Korematsu v. United States, 323 U.S. 214 (1945).

[51] *See* Eugene V. Rostow, *The Japanese American Cases—A Disaster*, 54 YALE L.J. 489 (1945), *reprinted in* THE SOVEREIGN PREROGATIVE: THE SUPREME COURT AND THE QUEST FOR LAW 193–266 (1962).

[52] *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) (analyzing the identification of Arab, South Asian, and Muslim Americans as "foreign" since September 11); *see also supra* note 47.

[53] *See generally* American-Arab Anti-Discrimination Comm., Report on Hate Crimes and Discrimination Against Arab Americans: The Post-September 11 Backlash September 11, 2001–October 11, 2002 (Hussein Ibish ed., 2003), *at* http://www.adc.org/ hatecrimes/pdf/2003_report_web.pdf (last visited Dec. 3, 2003); Human Rights Watch, *United States: "We Are Not the Enemy:" Hate Crimes Against Arabs, Muslims, and Those Perceived to Be Arab or Muslim After September 11*, Vol. 14, No. 6 (G), Nov. 2002, *at* http://www.hrw.org/ reports/2002/usahate/ (last visited Dec. 3, 2003).

[54] *See generally* John A. Powell, *The "Racing" of American Society: Race Functioning as a Verb Before Signifying as a Noun*, 15 LAW & INEQ. 99 (1997).

[55] *See generally* Saito, *Symbolism Under Siege*, *supra* note 47.

[56] Fight Hate and Promote Tolerance, *Hate in the News: Violence Against Arab and Muslim Americans, at* http://www.tolerance.org/news/article_hate.jsp?id=412 (listed with Oklahoma hate crimes) (last visited Dec. 3, 2003).

[57] *See* John Quigley, *The Afghanistan War and Self-Defense,* 37 VAL. U. L. REV. 541 (2003); Jordan J. Paust, *Use of Armed Force Against Terrorists in Afghanistan, Iraq, and Beyond*, 35 CORNELL INT'L L.J. 533 (2002) (both criticizing the United States' self-defense rationale).

[58] *See* Matthew Lippman, *Aerial Attacks on Civilians and the Humanitarian Law of War: Technology and Terror from World War I to Afghanistan,* 33 CAL. W. INT'L L.J. 1, 56–65 (2002); Michael P. Scharf & Paul R. Williams, *Report of the Committee of Experts on Nation Building in Afghanistan,* 36 NEW ENG. L. REV. 709 (2002); Laura A. Dickinson, *Reluctant Nation Building: Promoting the Rule of Law in Post-Taliban Afghanistan,* 17 CONN. J. INT'L L. 429 (2002).

[59] *See generally* Amnesty Int'l, *Memorandum from to U.S. Government on the Rights of People in U.S. Custody in Afghanistan and Guantanamo Bay*, Apr. 15, 2003, *at* http://web.amnesty.org/library/Index/engAMR510532002 (last visited Dec. 3, 2003); Human Rights Watch, *U.S.: Growing Problem of Guantanamo Detainees*, May 30, 2002, *at* http://www.hrw.org/press/2002/05/guantanamo.htm (last visited Dec. 3, 2003); Richard J. Wilson, *United States Detainees at Guantanamo Bay: The Inter-American Commission on Human Rights Responds to a "Legal Black Hole,"* 10 HUM. RTS. BR. 2 (Spring 2003); Erin Chlopak, *Dealing With the Detainees at Guantanamo Bay: Humanitarian and Human Rights Obligations Under the Geneva Conventions,* 9 HUM. RTS. BR. 6 (Spring 2002).

[60] *See* United States v. Lindh, 227 F. Supp. 2d 565 (E.D. Va. 2002); Melysa H. Sperber, *John Walker Lindh and Yaser Esam Hamdi: Closing the Loophole in International Humanitarian Law for American Nationals Captured Abroad While Fighting with Enemy Forces,* 40 AM. CRIM. L. REV. 159, 160–61 (2003).

[61] Katharine Q. Seelye, *Walker is Returned to U.S. and Will Be in Court Today*, N.Y. TIMES, Jan. 24, 2002 at A15. *See also* COLE, *supra* note 8, at 953.

[62] *See* Sperber, *supra* note 60.

[63] *See* Hamdi v. Rumsfeld, 296 F.3d 278, 280 (4th Cir. 2002); Alejandra Rodriguez, *Is the War on Terrorism Compromising Civil Liberties? A Discussion of Hamdi and Padilla*, 39 CAL. W. L. REV. 379, 381 (2003); Sperber, *supra* note 60, at 162.

[64] U.S. officials used this undefined term to take advantage of the fact that the Geneva Conventions provide for a distinction between the treatment of enemy soldiers (who

cannot be punished simply for participating in combat) and "unlawful" combatants, while failing to comply with the Conventions' requirements of minimal protection for all detainees under the presumption that those held are prisoners of war until a hearing has been held to determine otherwise. *See* DAVID COLE, ENEMY ALIENS: DOUBLE STANDARDS AND CONSTITUTIONAL FREEDOMS IN THE WAR ON TERRORISM 39–46 (2003).

[65] Although the district court ordered that Hamdi should have access to his public defender, this was overruled by the 4th Circuit in *Hamdi*, 296 F.3d at 284. However, the Department of Defense (DOD) announced on December 2, 2003, that Hamdi will be "allowed access to a lawyer subject to appropriate security restrictions." DOD Announces Detainee Allowed Access to Lawyer, DOD News Release No. 908-03 (Dec. 2, 2003), *at* http://www.dod.gov/releases/ 2003/nr20031202-0717.html.

In its News Release, the DOD stated, "such access is not required by domestic or international law and should not be treated as a precedent." *Id*. The DOD's stated policy is that it will permit access to counsel by an enemy combatant who is a U. S. citizen and who is detained by the DOD in the United States after the DOD has determined that such access will not compromise the national security of the United States and after it has completed intelligence collection from that enemy combatant or after it has determined that such access will not interfere with intelligence collection from that enemy combatant. Despite this concession, the DOD has not removed the label of enemy combatant from Hamdi. The public defender seeking to represent Hamdi said he intends to press forward with the Supreme Court petition that calls for Hamdi to be allowed to contest his combatant designation. Jerry Markon and Dan Eggen, *U.S. Allows Lawyer For Citizen Held as "Enemy Combatant": Reversal Comes on Eve of Court Filing*, WASH. POST, Dec. 3, 2003, at A1. *See also* Thomas J. Lepri, *Safeguarding the Enemy Within: The Need for Procedural Protections for U.S. Citizens Detained as Enemy Combatants Under Ex Parte Quirin*, 71 FORDHAM L. REV. 2565, 2579–83 (2003).

[66] COLE, *supra* note 8, at 954.

[67] *See generally* United States v. McVeigh, 153 F.3d 1166 (10th Cir. 1998) (upholding conviction); Stephen Jones & Jennifer Gideon, *United States v. McVeigh: Defending the "Most Hated Man in America,"* 51 OKLA. L. REV. 617 (1998).

[68] *See* Jones & Gideon, *supra* note 67, at 617.

[69] Andrew E. Taslitz, *Terrorism and the Citizenry's Safety*, 17 SUM CRIM. JUST. 4 (2002).

[70] *See generally* United States v. McVeigh, 153 F. 3d 1166 (10th Cir. 1998). *See also* Jones & Gideon, *supra* note 67, at 623 (noting that the government paid between $10 and $15 million for McVeigh's defense, and expended approximately $82.6 million for the investigation, arrest, and prosecution of McVeigh and his co-defendant Terry Nichols).

[71] McVeigh and Nichols were prosecuted together until the court ordered separate trials. *See generally* United States v. Nichols, 169 F.3d 1255 (10th Cir. 1999) (*aff'g* conviction).

[72] *See generally* Padilla v. Bush, 233 F. Supp. 2d 564 (S.D.N.Y. 2002); Samantha A. Pitts-Kiefer, *Jose Padilla: Enemy Combatant or Common Criminal?,* 48 VILL. L. REV. 875 (2003); Rodriguez, *supra* note 63 at 383-84.

[73] *See* Lepri, *supra* note 65, at 2567; Rodriguez, *supra* note 63, at 383.

[74] *See* Lepri, *supra* note 65, at 2567, 2579.

[75] *See Padilla*, 233 F. Supp. 2d at 604.

[76] *See* David G. Savage, *Administration is Making Special Case out of Padilla; Diverse Experts Call the Detention of the American Citizen Suspected of Plotting a "Dirty Bomb" Attack an Abuse of Power*, L.A. TIMES, Sept. 7, 2003, at A18.

[77] *See* text accompanying notes 37, 40, 42-46 *supra*; Immigration and Nationality (McCarran-Walter) Act, ch. 477, 66 Stat. 163 (1952) (removing all references to racial prerequisites for citizenship). Current requirements for naturalization are found at 8 U.S.C. §§ 1101-1503 (1994).

[78] *See generally* ANDREW HACKER, TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL (1995). For examples of continuing disparities in a variety of settings, *see, e.g.,* David A. Harris, *The Reality of Racial Disparity in Criminal Justice: The Significance of Data Collection*, 66 LAW & CONTEMP. PROBS. 71 (2003); Spencer Overton, *Racial Disparities and the Political Function of Property*, 49 UCLA L. REV. 1553 (2002); John C. McAdams, *Racial Disparity and the Death Penalty*, 61 LAW & CONTEMP. PROBS. 153 (1998); Barbara A. Noah, *Racial Disparities in the Delivery of Health Care*, 35 SAN DIEGO L. REV. 135 (1998); Paul Burstein and Mark Evan Edwards, *The Impact of Employment Discrimination Litigation on Racial Disparity in Earnings: Evidence and Unresolved Issues*, 28 LAW & SOC'Y REV. 79 (1994).

[79] The Fourteenth Amendment, enacted in 1868, provides, among other things, that "[n]o state shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. The federal government is prohibited from engaging in racial discrimination under the due process clause of the Fifth Amendment, U.S. CONST. amend. V. *See generally* Strauder v. West Virginia, 100 U.S. 303 (1879) (holding the exclusion of African Americans from juries unconstitutional); Korematsu v. United States, 323 U.S. 214 (1944) (articulating the "strict scrutiny" standard for governmental classifications based on race).

[80] Alien Act, ch. 58, 1 Stat. 570 (1798) *amended at* 41 Stat. 1008 (1920); Sedition Act, ch. 74, 1 Stat. 596 (1798) (expired 1801).

[81] RICHARD O. CURRY, *Introduction, in* FREEDOM AT RISK: SECRECY, CENSORSHIP, AND REPRESSION IN THE 1980S 3, 5 (Richard O. Curry, ed., 1988); WILLIAM PRESTON, JR., ALIENS & DISSENTERS: FEDERAL SUPPRESSION OF RADICALS 1903-1933, at 21–22 (2d ed. 1994).

[82] CHANG, *supra* note 8, at 22.

[83] *See* U.S. CONST. art. II, §8, cl. 15; art. II, §9, cl. 1; art. IV, §2, cl. 3; *see also* PAUL FINKELMAN, SLAVERY AND THE FOUNDERS: RACE AND LIBERTY IN THE AGE OF JEFFERSON 1–33 (1996); Stughton Lynd, *Slavery and the Founding Fathers, in* BLACK HISTORY: A REAPPRAISAL 115 (Melvin Drimmer ed., Doubleday 1968).

[84] Michael Kent Curtis, *The Crisis Over the Impending Crisis: Free Speech, Slavery, and the Fourteenth Amendment, in* SLAVERY AND THE LAW 161–205 (Paul Finkelman, ed. 1987). *See also* WINTHROP D. JORDAN, WHITE OVER BLACK: AMERICAN ATTITUDES TOWARD THE NEGRO 1550–1812, 329–30 (Penguin Books Ltd. 1968).

[85] PRESTON, *supra* note 81, at 24–25. *See also* ROBERT JUSTIN GOLDSTEIN, POLITICAL REPRESSION IN MODERN AMERICA: FROM 1870 TO 1976 at 3–101 (2001).

[86] GOLDSTEIN, *supra* note 85, at 41.

[87] *See* Act of May 6, 1882, ch. 126, 22 Stat. 58 (suspending the immigration of all Chinese laborers for ten years); additional Chinese exclusion laws were passed in 1884,

1888 and 1892. *See generally* ENTRY DENIED: EXCLUSION AND THE CHINESE COMMUNITY IN AMERICA 1882–1943 (Sucheng Chan ed. 1991); LUCY E. SALYER, LAWS HARSH AS TIGERS: CHINESE IMMIGRANTS AND THE SHAPING OF MODERN IMMIGRATION LAW (1995).

[88] Act of March 3, 1903, ch. 1012, § 2, 32 Stat. 1219. *See* Turner v. Williams, 194 U.S. 279 (1904) (holding that the Act did not violate the First Amendment).

[89] *See* PRESTON, *supra* note 81, at 27–33; ALEINIKOFF, ET AL., *supra* note 27, at 695–96.

[90] GOLDSTEIN, *supra* note 85, at 69.

[91] STUART CREIGHTON MILLER, "BENEVOLENT ASSIMILATION": THE AMERICAN CONQUEST OF THE PHILIPPINES, 1899-1903 at 156–66 (Yale Univ. Press 1982).

[92] SANFORD J. UNGAR, FBI 41–42 (1976).

[93] Espionage Act of 1917, ch. 30, 40 Stat. 217 (1918).

[94] Sedition Act, ch. 75, 40 Stat. 553 (1918).

[95] GOLDSTEIN, *supra* note 85, at 113; *see also* MICHAEL LINFIELD, FREEDOM UNDER FIRE: U.S. CIVIL LIBERTIES IN TIMES OF WAR 33–67 (1990).

[96] THEODORE KORNWEIBEL, JR., "INVESTIGATE EVERYTHING": FEDERAL EFFORTS TO COMPEL BLACK LOYALTY DURING WORLD WAR I at 3 (2002).

[97] *See* DANIELS, THE DECISION TO RELOCATE, *supra* note 49, at 6; WEGLYN, *supra* note 48, at 45 (noting State Department Representative Curtis Munson's 1941 report, which stated not only that "[t]here is no Japanese 'problem' on the Coast," but that the *nisei*, the second generation, "show a pathetic eagerness to be Americans.")

[98] Lt. Gen. DeWitt's evacuation orders were directed at "all persons of Japanese ancestry, both alien and non-alien." Civilian Exclusion Order No. 57 of May 10, 1942. This order was presumably worded in this manner in an attempt to make mass internment more palatable to the general population by labeling the targeted American citizens as "non-aliens," with its attendant implications of imputed foreignness.

[99] On the nativist movement in California and Earl Warren's prominent role in it, see Sumi K. Cho, *Redeeming Whiteness in the Shadow of Internment: Earl Warren,* Brown*, and a Theory of Racial Redemption,* 40 B.C. L. Rev. 73, 86–119, 19 B.C. Third World L.J. 37, 86–119 (1998) (joint issue).

[100] *See generally* Keith Aoki, *No Right to Own?: The Early Twentiety-Century "Alien Land Law" As a Prelude to Internment,* 40 B.C. L. REV. 37, 19 B.C. THIRD WORLD L.J. 37 (1998) (joint issue); SUCHENG CHAN, ASIAN AMERICANS: AN INTERPRETIVE HISTORY (1991); RONALD TAKAKI, STRANGERS FROM A DIFFERENT SHORE: A HISTORY OF ASIAN AMERICANS (Penguin Books 1989).

[101] WARD CHURCHILL AND JIM VANDER WALL, AGENTS OF REPRESSION: THE FBI'S SECRET WARS AGAINST THE BLACK PANTHER PARTY AND THE AMERICAN INDIAN MOVEMENT 32 (2d ed. 2002).

[102] *Id*. at 32–36.

[103] *Id.* at 33; HOWARD ZINN, A PEOPLE'S HISTORY OF THE UNITED STATES 1492-PRESENT 423–24 (Harperperennial Library 1995). *See generally* Mari Matsuda, *McCarthyism, The Internment and the Contradictions of Power*, 40 B.C. L. REV. 9, 19 B.C. THIRD WORLD L.J. 9 (1998) (joint issue).

[104] *See* Alan Bigel, The First Amendment and National Security: *The Court Responds to Governmental Harassment of Alleged Communist Sympathizers*, 19 OHIO N.U. L. REV.

885, 890 (1993). *See generally* CORLISS LAMONT, FREEDOM IS AS FREEDOM DOES (Prometheus Books, 4th ed. 1990); Frank Wilkinson*, Revisiting the "McCarthy Era": Looking at* Wilkinson v. United States *in light of* Wilkinson v. Federal Bureau of Investigation, 33 LOY. L.A. L. REV. 681 (2000) (discussing his conviction for refusing to testify to HUAC in light of documents the FBI was later forced to produce).

[105] *See generally* ELLEN SCHRECKER, MANY ARE THE CRIMES: MCCARTHYISM IN AMERICA (Little Brown & Company 1998). Her title is taken from Supreme Court Justice (and Nuremberg Prosecutor) Robert Jackson's statement, "Security is like liberty in that many are the crimes committed in its name." United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 550 (1950) (Jackson, J. dissenting). For an analysis of parallels between the Cold War and the war on terrorism, *see generally* David Cole, *The New McCarthyism: Repeating History in the War on Terrorism*, 38 HARV. C.R.-C.L. L. REV. 1 (2003).

[106] CHURCHILL & VANDER WALL, AGENTS OF REPRESSION, *supra* note 101, at 36.

[107] SENATE SELECT COMMITTEE TO STUDY GOVERNMENT OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, FINAL REPORT: INTELLIGENCE ACTIVITIES AND THE RIGHTS OF AMERICANS, S. Rep. No. 755, Bk. III, 94th Cong. (2d Sess. 1976) at 77. *See generally* WARD CHURCHILL & JIM VANDER WALL, THE COINTELPRO PAPERS: DOCUMENTS FROM THE FBI'S SECRET WARS AGAINST DISSENT IN THE UNITED STATES (2d ed. 2002); CHURCHILL & VANDER WALL, AGENTS OF REPRESSION, *supra* note 101; Saito, *Whose Liberty?*, *supra* note 4; BRIAN GLICK, WAR AT HOME: COVERT ACTION AGAINST U.S. ACTIVISTS AND WHAT WE CAN DO ABOUT IT (1989); COINTELPRO: THE FBI'S SECRET WAR ON POLITICAL FREEDOM (Cathy Perkus ed., Monad 1975).

[108] SENATE SELECT COMMITTEE, FINAL REPORT, *supra* note 107.

[109] *Id.*

[110] *Id.* at 3.

[111] *See* PETER MATHIESSEN, IN THE SPIRIT OF CRAZY HORSE 125–26 (Viking Penguin 1991).

[112] *See generally* SENATE SELECT COMMITTEE, FINAL REPORT, *supra* note 107; CHURCHILL AND VANDER WALL, AGENTS OF REPRESSION, *supra* note 101; CHURCHILL & VANDER WALL, COINTELPRO PAPERS, *supra* note 107; GLICK *supra* note 107; Perkus, *supra* note 107.

[113] The categorization of COINTELPRO methods used here is based on the cogent summary of illegal practices found in CHURCHILL & VANDER WALL, AGENTS OF REPRESSION*, supra* note 101, at 39–53, and in Ward Churchill, *"To Disrupt, Discredit and Destroy": The FBI's Secret War Against the Black Panther Party, in* LIBERATION, IMAGINATION AND THE BLACK PANTHER PARTY 78–117 (Kathleen Cleaver & George Katsiaficas eds., 2001).

[114] CHURCHILL & VANDER WALL, AGENTS OF REPRESSION, *supra* note 101, at 39. *See generally* Clifford S. Zimmerman, *Toward a New Vision of Informants: A History of Abuses and Suggestions for Reform*, 22 HASTINGS CONST. L.Q. 81 (1994).

[115] CHURCHILL & VANDER WALL, AGENTS OF REPRESSION, *supra* note 101, at 39–40.

[116] Socialist Workers Party v. United States, 642 F. Supp. 1357, 1379–80 (S.D.N.Y. 1986) (emphasis added); *see* FBI ON TRIAL: THE VICTORY IN THE SOCIALIST WORKERS PARTY SUIT AGAINST GOVERNMENT SPYING (Margaret Jayko, ed. 1988).

[117] *Socialist Workers Party,* 624 F. Supp. at 1380.
[118] SENATE SELECT COMMITTEE, FINAL REPORT, *supra* note 107, at 3.
[119] *Id.*
[120] CHURCHILL & VANDER WALL, AGENTS OF REPRESSION, *supra* note 101, at 43–44; SENATE SELECT COMMITTEE, FINAL REPORT, *supra* note 107 at 35–36.
[121] SENATE SELECT COMMITTEE, FINAL REPORT, *supra* note 107, at 40.
[122] CHURCHILL & VANDER WALL, AGENTS OF REPRESSION, *supra* note 101, at 44.
[123] For example, after spending twenty-seven and nineteen years, respectively, in prison for murders they did not commit, the convictions of former Black Panthers Geronimo ji Jaga (Pratt) and Dhoruba bin Wahad (Richard Moore) were overturned because of overwhelming evidence that the FBI had framed them using perjured testimony and falsified evidence. *See* Wahad v. City of New York, 1999 WL 608772 (S.D.N.Y. 1999) (suit for damages); DHORUBA BIN WAHAD, MUMIA ABU-JAMAL & ASSATA SHAKUR, STILL BLACK, STILL STRONG; SURVIVORS OF THE U.S. WAR AGAINST BLACK REVOLUTIONARIES (1993); JACK OLSEN, LAST MAN STANDING: THE TRAGEDY AND TRIUMPH OF GERONIMO PRATT (2001); CHURCHILL AND VANDER WALL, AGENTS OF REPRESSION, *supra* note 101, at 77–94.
[124] *See* Hampton v. Hanrahan, 600 F. 2d 600 (7th Cir. 1979); *rev'd in part*, 446 U.S. 754 (1980), *remanded* 499 F. Supp. 640 (1980) (holding that gross negligence in the raids resulting in the deaths of Hampton and Clark was actionable); ROY WILKINS & RAMSEY CLARK, SEARCH AND DESTROY: A REPORT BY THE COMMISSION OF INQUIRY INTO THE BLACK PANTHERS AND THE POLICE (1973); Nikhil Pal Singh, *The Black Panthers and the "Undeveloped Country" of the Left*, *in* THE BLACK PANTHER PARTY RECONSIDERED (Charles E. Jones ed. 1998) 57, 79–80; CHURCHILL & VANDER WALL, AGENTS OF REPRESSION, *supra* note 101, at 64–77; GOLDSTEIN, *supra* note 85, at xvi.
[125] SENATE SELECT COMMITTEE, FINAL REPORT, *supra* note 107, at 3.
[126] *See, eg., id.* at 13–14 (noting operations which continued after Hoover's official "termination" of COINTELPROs); *see also* CHURCHILL & VANDER WALL, AGENTS OF REPRESSION, *supra* note 101, at 370–76 (noting operations in the 1980s against groups opposed to U.S. policy in Latin America and anti-war and anti-nuclear activists); Brian Glick, *Preface: The Face of COINTELPRO in* CHURCHILL & VANDER WALL, COINTELPRO PAPERS, *supra* note 107, at xiv-xv (noting FBI operations directed at environmental activists and advocates of Puerto Rican independence); Bernard P. Haggerty, *"Fruhmenschen": German for COINTELPRO*, 1 HOW. SCROLL, 36, 38 (1993) (detailing recent campaigns of harassment of black elected officials).
[127] Many of the attempts have been made in the name of fighting drugs, terrorism, or illegal immigration and are described in the following Parts C and D.
[128] *See* ZINN, *supra* note 103, at 435–528; GOLDSTEIN, *supra* note 85, at 429–545; CHRISTIAN PARENTI, LOCKDOWN AMERICA: POLICE AND PRISONS IN THE AGE OF CRISIS 3–4, 33–35 (1999).
[129] *See generally* Report of the Nat'l Advisory Commission on Civil Disorders (1968) ("Kerner Report").
[130] *See* text accompanying notes 114-24 *supra.*
[131] *See* Kerner Report, *supra* note 129 at 32.

[132] *Id.* at 1. The Commission was established pursuant to Exec. Order 11365, issued July 29, 1967. *Id.* at xvi.
[133] *Id.* at 10–11.
[134] For a summary, *see id.* at 23–29.
[135] *Id.* at 1.
[136] *Id.* at 206.
[137] *See id.* at 299–322.
[138] Lyndon Johnson announced to Congress in March 1965, "We must arrest and reverse the trend toward lawlessness. . .," despite the fact that his Crime Commission reported shortly thereafter that there was no significant increase in crime and that "[v]irtually every generation since the founding of the Nation . . . has felt itself threatened by the specter of rising crime and violence." ROBERT M. CIPES, THE CRIME WAR 3, 8 (1968).

A significant question we should be asking, but which is beyond the scope of this essay, is "a war on *which* crime?" Leaving aside the even bigger question of which conduct is defined as criminal, we must note that in 1996 the National Institute of Justice estimated that the cost to society of "violent" crime was about one tenth that of corporate crime, but we have seen no comparable war on white collar crime. George Winslow, *Capital Crimes: The Corporate Economy of Violence, in* PRISON NATION: THE WAREHOUSING OF AMERICA'S POOR (Tara Herivel & Paul Wright, eds. 2003).
[139] *See* PARENTI, *supra* note 128 at 8.
[140] *Id.* at 26 (referencing "pow-wowing" with "hostiles").
[141] *Id.* at 7.
[142] *Id.* at 12 (citing H. R. HALDEMAN, THE HALDEMAN DIARIES: INSIDE THE NIXON WHITE HOUSE 53 (1994)). Nixon had already directly linked the "crime problem" to the civil disobedience tactics of the civil rights movement, saying, "the deterioration [of respect for law and order] can be traced directly to the spread of the corrosive doctrine that every citizen possesses an inherent right to decide for himself which laws to obey and when to disobey them." *Id*. at 6 (citing Richard Nixon, *If Mob Rule Takes Hold in the U.S.: A Warning From Richard Nixon,* U.S. NEWS & WORLD REPORT, Aug. 15, 1966).
[143] *Id.* at 7 (citing THE U.S. VERSUS CRIME IN THE STREETS (Thomas Cronin, et al. eds., (1981)).
[144] EDWARD JAY EPSTEIN, AGENCY OF FEAR 174 (2d ed. Verso 1999). As the 1972 election approached, this was arbitrarily reduced to 150,000 addicts as evidence of success in the drug war. *Id.* at 177. Based on calculations of what addicts, presumed to be unemployed, would have to steal to support their habits, the Nixon administration also attributed $18 billion per year worth of crime to them, but in fact this was more than 25 times the total unrecovered stolen property in the US in 1971. *Id.* at 178–79.
[145] *Id.* at 173.
[146] *See* Miranda v. Arizona, 384 U.S. 436 (1966) (holding that the Fifth Amendment requires that persons be informed of the right to remain silent and the right to an attorney in custodial interrogations).
[147] Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197 (1968).
[148] Organized Crime Control Act of 1970, tit. IX, 84 Stat. 922, 941–47 (1970).

[149] The Racketeer Influenced and Corrupt Organizations Act (RICO) was a chapter of the Federal Criminal Code created by Title IX of the Organized Crime Control Act of 1970 (OCCA), Pub. L. No. 91-452, 84 Stat. 922 (1970) (codified as amended predominantly in scattered sections of 7, 15, 18, 49 U.S.C.). While purportedly aimed at organized crime, these tools were immediately used against leftist organizations such as the Black Panther Party and the Puerto Rican independence activists.

> Congress enacted RICO over dissenters who objected to its scope extending beyond profit-motivated, organized crime. During the enactment process, Congress made clear that RICO would extend to the politically, rather than economically, driven Black Panther Party, the KKK, and the Communist Party. Moreover, Congress has rejected subsequent attempts to exclude political demonstrators from RICO's purview.

R. Stephen Stigall, *Preventing Absurd Application of RICO: A Proposed Amendment to Congress' Definition of "Racketeering Activity" in the Wake of National Organization for Women, Inc. v. Scheidler*, 68 TEMP. L. REV. 223, 243 (1995).

[150] *See* EVA BERTRAM ET AL., DRUG WAR POLITICS: THE PRICE OF DENIAL 107 (1996); *see also* Aryeh Y. Brown, *In Memoriam: Ralph Seeley Obscured by Smoke: Medicinal Marijuana and the Need for Representation Reinforcement Review,* 22 SEATTLE U. L. REV. 175, 220–21 (1998); Steven Wisotsky, *Exposing the War on Cocaine: The Futility and Destructiveness of Prohibition*, 1983 WIS. L. REV. 1305, 1415–16 (1983).

[151] *See* EPSTEIN, *supra* note 144, at 19. According to Epstein, Nixon had hoped to use ODALE as a White House-controlled "counterintelligence" agency, but in the wake of Watergate, it and the BNDD were collapsed into a new agency, the DEA. *Id.* at 252.

[152] These funds were distributed through the Law Enforcement Assistance Administration (LEAA), created by the Omnibus Crime Control and Safe Streets Act. *See* Comment, *Federal Interference with Checks and Balances in State Government: A Constitutional Limit on the Spending Power,* 128 U. PA. L. REV. 402 (1979) (noting that by 1976, 20 percent of most state budgets came from such federal funding).

[153] EPSTEIN, *supra* note 144, at 43.

[154] *See* John Barry, *From Drug War to Dirty War: Plan Columbia and the U.S. Role in Human Rights Violations in Columbia,* 12 TRANSNAT'L L. & CONTEMP. PROBS. 161, 172 (2002); John A. Powell & Eileen B. Hershenov, *Hostage to the Drug War; The National Purse, The Constitution and the Black Community*, 24 U.C. DAVIS L. REV. 557, 574 (1991); Joseph P. Shereda, *The Internationalization of the War on Drugs and Its Potential for Successfully Addressing Drug Trafficking and Related Crimes in South Africa*, 31 GEO. WASH. J. INT'L L. & ECON. 297, 304 (1997-98).

[155] *See* Victor C. Romero, *Whatever Happened to the Fourth Amendment?: Undocumented Immigrants' Rights After* INS v. Lopez-Mendoza *and* United States v. Verdugo-Urquidez, 65 S.CAL. L. REV. 999, 1028 (1992).

[156] According to Kevin Fisher, prior to 1981, the Posse Comitatus Act of 1878 made it a felony for any member of the Army or Air Force to assist in the enforcement of civilian criminal laws. Partial repeal of the Posse Comitatus Act, insofar as it applied to civilian drug enforcement activities, was an early priority of the Reagan administration. In response to administration proposals in this area, Congress amended the Posse Comitatus Act in 1981 to permit the use of military equipment and the extraterritorial use of military

personnel in civilian law enforcement. Kevin Fisher, *Trends in Extraterritorial Narcotics Control: Slamming the Stable Door After the Horse Has Bolted*, 16 NYU J. INT'L L. & POL. 353, 391 (1984). *See also* BERTRAM ET. AL., *supra* note 150, at 112.

[157] For an update on the heightened role of the military in the domestic "war on terror," *see generally* Ann Scales & Laura Spitz, *The Jurisprudence of the Military-Industrial Complex*, 1 SEATTLE J. SOC. JUST. 541 (2003).

[158] Comprehensive Crime Control Act of 1984, Pub. L. 98-473, 98 Stat. 1989 (1984); s*ee also* PARENTI, *supra* note 128, at 50–51. Nationally, gross receipts from seizures went from approximately $100 million in 1981 to over $1 billion in 1987. *Id.* at 51.

[159] Bail Reform Act of 1984, 18 U.S.C. §§ 3141–50, 3156 (1984).

[160] *See generally* United States v. Salerno, 481 U.S. 739 (1987).

[161] COINTELPRO PAPERS, *supra* note 107 at il. *See also* Laura Whitehorn, *Preventive Detention*, in CAGES OF STEEL 365–77 (Ward Churchill and J.J. Vander Wall, eds. 1992). The "Resistance Conspiracy" cases involved charges of seditious conspiracy against seven white activists protesting U.S. war crimes. *See id*.

[162] Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (1986). *See generally* Jason A. Gillmer, *United States v. Clary: Equal Protection and the Crack Statute*, 45 AM. U. L. REV. 497 (1995); William Spade, Jr., *Beyond the 100:1 Ratio: Towards a Rational Cocaine Sentencing Policy*, 38 ARIZ. L. REV. 1233 (1996).

[163] Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (1988).

[164] *See generally* Christopher D. Sullivan, *User-Accountability Provisions in the Anti-Drug Abuse Act of 1988: Assaulting Civil Liberties in the War on Drugs*, 40 HASTINGS L.J. 1223 (1989); Jim Moye, *Can't Stop the Hustle: The Department of Housing and Urban Development's "One Strike" Eviction Policy Fails To Get Drugs Out of America's Projects*, 23 B.C. THIRD WORLD L.J. 275 (2003).

[165] PARENTI, *supra* note 128, at 40–41.

[166] QUIET RIOTS: RACE AND POVERTY IN THE UNITED STATES 181–82 (Fred R. Harris & Roger W. Wilkins, eds., 1988); *see also* James H. Johnson, Jr. & Walter C. Farrel, Jr., *The Fire This Time: The Genesis of the Los Angeles Rebellion of 1992*, 71 N.C. L. REV. 1403 (1993).

[167] BERTRAM ET. AL., *supra* note 150, at 115.

[168] *Id.* at 114.

[169] *Id.* at 116.

[170] *Id.* at 114.

[171] PARENTI, *supra* note 128, at 59.

[172] According to the FBI's Uniform Crime Rate (based on reported crimes), the rate per 100,000 population was at about 6,000 in 1980, dropped somewhat in the mid-80s, and was again at about 6,000 in 1991. The National Crime Survey (based on surveys to assess victimization, and generally assumed to be more accurate) reported a drop from nearly 12,000 in the early 1980s to about 9,000 in 1991. *See* JEROME G. MILLER, SEARCH AND DESTROY: AFRICAN-AMERICAN MALES IN THE CRIMINAL JUSTICE SYSTEM 26–30 (1996).

[173] MARC MAUER, RACE TO INCARCERATE 9 (1999). *See also* JOEL DYER, THE PERPETUAL PRISONER MACHINE: HOW AMERICA PROFITS FROM CRIME 1-2 (2000). According to a December 1999 report of the General Accounting Office, the number of

women in prison increased fivefold from 13,400 in 1980 to 84,400 in 1998, with 72 percent of all women in federal prison serving time for drug offenses. Nell Bernstein, *Swept Away*, *in* PRISON NATION, *supra* note 138, at 66, 67

[174] As of 1997, the U.S. was incarcerating one of every 155 Americans, second only to Russia among the 59 nations in Europe, Asia, and North America for which data are available. MAUER, *supra* note 173, at 19–23.

[175] *See* David D. Cole, *Formalism, Realism, and the War on Drugs*, 35 SUFFOLK U. L. REV. 241, 247–48 (2001); Kenneth B. Nunn, *Race, Crime and the Pool of Surplus Criminality: Or Why the "War on Drugs" Was a "War on Blacks,"* 6 J. GENDER, RACE & JUST. 381, 395 (2002).

[176] PARENTI, *supra* note 128, at 57. *See generally* Nunn, *supra* note 175.

[177] Stephen B. Bright, *The Accused Get What the System Doesn't Pay For*, *in* PRISON NATION, *supra* note 138, at 6.

[178] *See* Noam Chomsky, *Drug Policy as Social Control*, *in* PRISON NATION, *supra* note 138, at 57, 58. *See generally* Graham Boyd, *Collateral Damage in the War on Drugs*, 47 VILL. L. REV. 839 (2002).

[179] *See generally* JOHN K. ALEXANDER, RENDER THEM SUBMISSIVE: RESPONSES TO POVERTY IN PHILADELPHIA 1760-1800 (1980); CHARSHEE C.L. MCINTYRE, CRIMINALIZING A RACE: FREE BLACKS DURING SLAVERY (1993); NEIL WEBSDALE, POLICING THE POOR: FROM SLAVE PLANTATION TO PUBLIC HOUSING (2001); SCOTT CHRISTIANSON, WITH LIBERTY FOR SOME: 500 YEARS OF IMPRISONMENT IN AMERICA (1998).

[180] *See* Jennifer A. Beall, *Are We Burning Only Witches? The Antiterrorism and Effective Death Penalty Act of 1996's Answer to Terrorism,* 73 IND. L.J. 693–95 (1998).

[181] Violent Crime Control and Law Enforcement Act of 1994, Pub. L. 103-322, 108 Stat. 1796 (1994) (amending the Omnibus Crime Control and Safe Streets Act of 1968, and also referred to as the 1994 Omnibus Crime Control Act).

[182] Parenti*, supra* note 128, at 63.

[183] CHURCHILL & VANDER WALL, COINTELPRO PAPERS, *supra* note 107, at 1 (citing 18 U.S.C. § 2339B (1994)).

[184] *Id.* at li. *See also*, David B. Kopel & Joseph Olson, *Preventing a Reign of Terror: Civil Liberties Implications of Terrorism Legislation*, 21 OKLA. CITY U. L. REV. 247 (1996) (noting the dangers of the anti-terrorism bills subsequently enacted as AEDPA); Michael J. Whidden, Note, *Unequal Justice: Arabs in America and United States Antiterrorism Legislation*, 69 FORDHAM L. REV. 2825 (2001) (noting the discriminatory application of AEDPA).

[185] DAVID COLE & JAMES X. DEMPSEY, TERRORISM AND THE CONSTITUTION: SACRIFICING CIVIL LIBERTIES IN THE NAME OF NATIONAL SECURITY 119 (2d ed. 2002).

[186] *See* text accompanying note 101 *supra*.

[187] Cole & Dempsey, *supra* note 185, at 121–23.

[188] *See* William C. Banks & M.E. Bowman, *Executive Authority for National Security Surveillance*, 50 AM. U. L. REV. 1 (2000).

[189] COLE & DEMPSEY, *supra* note 185, at 2–3.

[190] Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (1996).

[191] *See* Immigration Act of 1990, Pub. L. 101-649, 104 Stat. 4978 (rewriting exclusion and deportation grounds and adopting provisions to ensure removal of criminal aliens). *See also* ALEINIKOFF ET. AL., *supra* note 27, at 173, 425–30.

[192] *See generally* Dawn Marie Johnson, *The AEDPA and the IIRIRA: Treating Misdemeanors as Felonies for Immigration Purposes*, 27 J. LEGISL. 477 (2001).

[193] *See* COLE & DEMPSEY, *supra* note 185, at 117–26. *See generally* David Cole, *Hanging With the Wrong Crowd: Of Gangs, Terrorists, and the Right of Association*, 1999 SUP. CT. REV. 203 (1999); Kevin R. Johnson, *The Antiterrorism Act, the Immigration Reform Act, and Ideological Regulation in the Immigration Laws: Important Lessons for Citizens and Noncitizens*, 28 ST. MARY'S L.J. 833 (1997).

[194] COLE & DEMPSEY, *supra* note 185, at 109. Despite the lack of Congressional authorization and several federal court decisions rejecting the practice, the INS had nonetheless been deporting people on the basis of secret evidence during this period. *See On the Use of Secret Evidence in Immigration Proceedings and H.R. 2121 Before the House Judiciary Committee, Subcommittee on Immigration and Claims*, 106th Cong., *at* http://www.house.gov/judiciary/cole0210.htm (2002) (statement of Professor David Cole, Georgetown University Law Center) (last visited Dec. 3, 2003). *See generally* Susan M. Akram, *Scheherezade Meets Kafka: Two Dozen Sordid Tales of Ideological Exclusion,* 14 GEO. IMMIGR. L.J. 51 (1999).

[195] COLE & DEMPSEY, *supra* note 185, at 108–09.

[196] *See* CHANG, *supra* note 8, at 48; *see also* Sharon H. Rackow, Comment, *How the USA PATRIOT Act Will Permit Governmental Infringement Upon the Privacy of Americans in the Name of "Intelligence" Investigations*, 150 U. PA. L. REV. 1651 (2002) (noting that the new powers are unnecessary, violate civil liberties, and go beyond the stated goal of fighting terrorism).

[197] As in the war on drugs, apparently the public has once again agreed, with a 2002 survey indicating that "49 percent of the public now thinks that the First Amendment 'goes too far,' up from . . . 22 percent in 2000." Diane P. Wood, *The Rule of Law in Times of Stress*, 70 U. CHI. L. REV. 455, n.1 (2003) (citing Richard Morin and Claudia Deane, *The Ideas Industry*, WASH. POST. Sept. 3, 2002, at A15).

[198] COLE & DEMPSEY, *supra* note 185, at 151. Within weeks of the September 11 attacks, Attorney General Ashcroft had testified to Congress that the Justice Department's mission had been redefined from focusing on criminal activity to detecting and halting terrorism, both in the United States and in other countries, and that its emphasis would forthwith be on prevention rather than prosecution. John W. Whitehead & Steven H. Aden, *Forfeiting "Enduring Freedom" for "Homeland Security": A Constitutional Analysis of the USA Patriot Act and the Justice Department's Anti-Terrorism Initiatives*, 51 AM. U. L. REV. 1081, 1086–87 (2002).

[199] USA PATRIOT Act.

[200] The history of the bill is available at http://thomas.loc.gov/cgibin/bdquery/z?d107:HR03162:@@@L&summ2=m& (last visited Dec. 3, 2003).

[201] *See generally* CHANG, *supra* note 8; Whitehead & Aden, *supra* note 198; Jennifer C. Evans, Comment, *Hijacking Civil Liberties: The USA PATRIOT Act of 2001*, 33 LOY. U. CHI. L.J. 933 (2002); Michael T. McCarthy, *USA PATRIOT Act*, 39 HARV. J. on LEGIS. 435 (2002).

[202] For a comprehensive consideration of the constitutional impact of the Act, *see* Whitehead & Aden, *supra* note 198.
[203] CHANG, *supra* note 8, at 48. *See generally* Evans, *supra* note 201; Rackow, *supra* note 196.
[204] *See, e.g.*, USA PATRIOT Act §§ 207, 216 (authorizing installation of pen registers and trap-and-trace devices when information sought is "relevant" to any criminal investigation); CHANG, *supra* note 8, at 49.
[205] USA PATRIOT Act § 213. *See also* CHANG, *supra* note 8, at 51–52; Whitehead & Aden, *supra* note 198, at 1110–13. After-the-fact notification may be delayed where it "may have an adverse result," and in the cases of seizures if "reasonably necessary," with the result that a person or organization subjected to a covert search or seizure may never be informed, or may learn about it only when the evidence obtained is used against them in court.
[206] *See also* Whitehead & Aden, *supra* note 198, at 1131–32; Mark Sommer, *Big Brother at the Library: FBI's Right to Data Raises Privacy Issue,* BUFF. NEWS, Nov. 11, 2002, at A1. *See generally* USA PATRIOT Act, tits. II–III.
[207] CHANG, *supra* note 8, at 49–50 (quoting Ohio State University law professor Peter Swire).
[208] USA PATRIOT Act § 203(a).
[209] *Id.* at § 203(a)(1).
[210] Foreign Intelligence Surveillance Act, Pub. L. No. 95-115 (codified at 50 U.S.C. §§ 1801-62).
[211] Banks & Bowman, *supra* note 188, at 5–10, 90–92.
[212] On the USA PATRIOT Act's expansion of FISA searches and seizures, *see* Whitehead & Aden, *supra* note 198, at 1103–07.
[213] USA PATRIOT Act § 215.
[214] 50 U.S.C. § 1862(b)(2)(B) (prior to amendment).
[215] USA PATRIOT Act § 218. On the dangers inherent in the removal of the "primary purpose" requirement, see Michael P. O'Connor & Celia Rumann, *Going, Going, Gone: Sealing the Fate of the Fourth Amendment* 26 FORDHAM INT'L L.J. 1234 (2003) (analyzing *In re Sealed Case*, 310 F.3d 717 (FOREIGN INT. SURV. CT. REV. (2002)), the only decision ever issued by the Foreign Intelligence Surveillance Court of Review, confirming that the government can use FISA warrants to conduct surveillance for evidence it intends to use in criminal cases).
[216] *See* text accompanying notes 101-102 *supra*.
[217] The criteria for such designation are found at 8 U.S.C. § 1189(a)(1)(A)-(C) (2003), and the list is published periodically in the *Federal Register*. *See, e.g.,* Designation of Foreign Terrorist Organizations, 67 Fed. Reg. 14761 (Mar. 27, 2002).
[218] USA PATRIOT Act § 805. *See* Designation of 39 "Terrorist Organizations" Under the "USA PATRIOT ACT," 66 Fed. Reg. 63620 (Dec. 7, 2001). The criteria for this list are much broader than for the list created under AEDPA. *See* 8 U.S.C. § 1189(a)(3)(B)(iv)(I)-(III) (2003).
[219] USA PATRIOT Act § 810(d).

[220] *See generally* Kevin R. Johnson, *September 11 and Mexican Immigrants: Collateral Damage Comes Home*, 52 DEPAUL L. REV. 849 (2003) (noting the additional hardships imposed on Mexican immigrants by recent "anti-terrorism" legislation).
[221] USA PATRIOT Act § 411.
[222] Immigration and Nationality Act, 8 U.S.C. § 1182(a)(3)(B)(iii)(V)(b) (2003).
[223] U.S. STATE DEPARTMENT, PATTERNS OF GLOBAL TERRORISM 2001, May 21, 2002, *at* http://www.state.gov/s/ct/rls/pgtrpt/2001/html/10220.htm (last visited Dec. 3, 2003), *quoting* 22 USC § 2656f(d).
[224] USA PATRIOT Act § 411(a). *See also* Whitehead & Aden, *supra* note 198, at 1098–99.
[225] USA PATRIOT Act § 411(a). The activities are listed at 8 U.S.C. § 1182(a)(3)(B)(vi)(III) (2003).
[226] USA PATRIOT Act § 412 .
[227] COLE & DEMPSEY, *supra* note 185, at 156. *See also* Regina Germain, *Rushing to Judgment: The Unintended Consequences of the USA PATRIOT Act for Bona Fide Refugees*, 16 GEO. IMMIGR. L.J. 505 (2002) (noting the likely effect of the 2001 Act on political asylum adjudications).
[228] USA PATRIOT Act § 802(a).
[229] *See* Whitehead & Aden, *supra* note 198, at 1093 ("Conceivably, these extensions of the definition of 'terrorist' could bring within their sweep diverse domestic political groups, which have been accused of acts of intimidation or property damage such as Act Up, People for the Ethical Treatment of Animals (PETA), Operation Rescue, and the Vieques demonstrators.").
[230] *See* CHANG, *supra* note 8, at 44. She goes on to note:

> Experience has taught us that when prosecutors are entrusted with the discretion to file trumped-up charges for minor crimes, politically motivated prosecutions and the exertion of undue pressure on activists who have been arrested to turn state's witness against their associates, or to serve as confidential informants for the government, are not far behind.

*Id.* at 113.
[231] *See* Foreign Intelligence Surveillance Act, *supra* note 210.
[232] 50 U.S.C. § 1801(b)(2)(A).
[233] Domestic Security Enhancement Act of 2003, *supra* note 2, § 101; analysis at 23. Section 107 also removes the distinction between U.S. persons and foreign persons with respect to the use of pen registers.
[234] Domestic Security Enhancement Act of 2003, *supra* note 2 §102; analysis at 23.
[235] *Id*. § 103; analysis at 23-24.
[236] *Id*. § 121.
[237] *Id*. § 402; analysis at 43.
[238] *Id*. § 121; analysis at 27.
[239] *Id.* §123; analysis at 28-30 (noting an explicit exception under *"Katz* and progeny" for activities directed at foreign powers, and that the Supreme Court stated in *United States v. United States District Court* ("*Keith*"), 407 U.S. 297 (1972), that "domestic security surveillance may involve different policy and practical considerations from the surveillance of 'ordinary crime.'").

[240] *Id.* § 126; analysis at 31.
[241] *Id*.
[242] *Id*. § 129; analysis at 33-35.
[243] *Id*. § 13; analysis at 41.
[244] Privacy Act of 1974, Pub. L. No. 93-579, 88 Stat. 1896 (1974) (codified as amended at 5 U.S.C. § 552a (1994))(commonly referred to as Freedom of Information Act (FOIA)). *See* Wendy Goldberg, Recent Decisions, *Freedom of Information Act*, 68 GEO. WASH. L. REV. 748 (2000) (describing developments relating to FOIA).
[245] Domestic Security Enhancement Act of 2003, *supra* note 2, § 201; analysis at 36 (noting the detainee exemption would be specifically added to FOIA's Exemption 3). *See also* North Jersey Media Group, Inc. v. Ashcroft, 308 F.3d 198, 217–19 (3d Cir. 2002); Ctr. for Nat'l Sec. Studies v. United States Dep't of Justice, 215 F. Supp. 2d 94 (D.D.C. 2002) (demonstrating direct attempts to prevent courts from mandating the release of information about detainees). On the latter case, *see generally* Rachel V. Stevens, Center for National Security Studies v. United States Department of Justice: *Keeping the USA PATRIOT Act in Check One Material Witness at a Time,* 81 N.C. L. REV. 2157 (2003).
[246] *See* CHURCHILL & VANDER WALL, COINTELPRO PAPERS, *supra* note 107 (noting that W. Mark Felt and Edward S. Miller, the only FBI officials ever convicted of COINTELPRO-related wrongdoing, were both pardoned by President Reagan before either had exhausted his appeals or spent a day in jail).
[247] *See, eg.,* Handschu v. Special Servs. Div., 605 F. Supp. 1384 (S.D.N.Y. 1985), *aff'd* 787 F.2d 828 (2d. Cir. 1986) (consent decree limiting New York City Police Department). For a current case, *see* Am. Friends Serv. Comm. v. City and County of Denver, No. 02CV2993, *at* www.aclu-co.org/spyfiles/Documents/ClassAction Complaint.pdf (last visited Nov. 11, 2003) (suit filed based on revelations that Denver police had "spy files" on over 3400 individuals and organizations). The *Handschu* decree would be immediately terminated and a decree in the Denver case preempted by PATRIOT II. *See* Domestic Security Enhancement Act of 2003, *supra* note 2, § 312; analysis at 40. *See also* Geoffrey R. Stone, *The Reagan Administration, the First Amendment, and FBI Domestic Security Investigations, in* Curry, *supra* note 81, at 272–88; Banks & Bowman, *supra* note 188, at 107–108. *See generally* Jerrold L. Steigman, *Reversing Reform: the Handschu Settlement in Post-September 11 New York City*, 11 J.L. & POL'Y 745 (2003) (addressing these constraints and restrictions in detail). The only other curb on such activities has come from "guidelines" issued by the Attorney General's Office, which have been eviscerated by each successive administration.
[248] Prison Litigation Reform Act, 18 U.S.C. § 3626. *See* Domestic Security Enhancement Act of 2003, *supra* note 2, § 312; analysis at 40-41. On the steady increase in restrictions on prison reform litigation, *see generally* David M. Adlerstein, *In Need of Correction: The "Iron Triangle" of the Prison Litigation Reform Act*, 101 COLUM. L. REV. 1681 (2001); *Developments in the Law II. The Prison Litigation Reform Act and the Antiterrorism and Effective Death Penalty Act: Implications for Federal Judges,*115 HARV. L REV. 1846 (2002); John Midgley, *Prison Litigation 1950-2000, in* PRISON NATION, *supra* note 138, at 281–300; Matthew T. Clarke, *Barring the Federal Courthouses to Prisoners, in id.* at 301–14. *See generally*, Anne K. Heidel, *Due Process*

*Rights and the Termination of Consent Decrees Under the Prison Litigation Reform Act,* 4 U. PA. J. CONST. L. 561 (2002) (describing the invalidation of consent decrees).

[249] Domestic Security Enhancement Act of 2003, *supra* note 2, § 312; analysis at 40-41 (noting only decrees prohibiting racial discrimination and those "necessary to correct a current and ongoing violation of a Federal right," extending "no further than necessary to correct the violation of the Federal right," and those "narrowly drawn and the least intrusive means to correct the violation" would be allowed to stand).

[250] *Id*. § 405 (proposing to amend 18 U.S.C. § 3142(e) to include crimes listed in 18 U.S.C. § 2332b(g)(5)(B)); analysis at 45.

[251] USA PATRIOT Act § 812, adding 18 U.S.C. § 3583(f).

[252] Domestic Security Enhancement Act of 2003, *supra* note 2, § 408; analysis pp. 46-48.

[253] *Id.,* analysis at 46.

[254] *Id*. § 410, analysis at 48.

[255] *Id*. § 411, analysis at 48-49.

[256] *Id*. § 424, analysis at 51.

[257] *See* text accompanying notes 190-193 *supra*.

[258] Domestic Security Enhancement Act of 2003, *supra* note 2, § 504; analysis at 54.

[259] *Id.* §§ 502, 505, analysis at 53-55.

[260] *Id*. § 506, analysis at 55.

[261] *Id.* §501; analysis at 52-53.

[262] *Id*. Recognizing that in previous cases where the government has attempted expatriation, the Supreme Court has required a showing of intent to relinquish citizenship, the draft attempts to skirt this requirement by stating: "[t]he voluntary commission or performance of [a qualifying act] shall be prima facie evidence that the act was done with the intention of relinquishing United States nationality."

[263] *See generally* Harold Hongju Koh, *On American Exceptionalism*, 55 STAN. L. REV. 1479 (2003); Natacha Fain, *Human Rights Within the United States: The Erosion of Confidence*, 21 BERKELEY J. INT'L L. 607 (2003); Mary Ellen O'Connell, *American Exceptionalism and the International Law of Self-Defense*, 31 DENV. J. INT'L L. & POL'Y 43 (2002); Johan D. van der Vyver, *American Exceptionalism: Human Rights, International Criminal Justice, and National Self-Righteousness,* 50 EMORY L.J. 775 (2001).

[264] *See* text accompanying note 59 *supra*. *See also* Saito, *Will Force Trump Legality?*, *supra* note 8, at 20–31. (summarizing international law violations arising from the United States' post-September 11 detentions).

[265] These expanded powers have already been extended to criminal cases that do not involve terrorism. *See* Eric Lichtblau, *U.S. Uses Terror Law to Pursue Crimes From Drugs to Swindling,* N.Y. TIMES, Sept. 28, 2003, at A1. *See generally* POLICE STATE AMERICA: U.S. MILITARY "CIVIL DISTURBANCE" PLANNING (Tom Burghardt ed., 2002) (describing the convergence of the "war on terror" with general police powers to quell "civil disturbances").

[266] SENATE SELECT COMMITTEE, FINAL REPORT, *supra* note 107, at 3.

[267] In addition to the complete erosion of privacy in everyday life, *see* text accompanying notes 203-07 *supra,* we have seen a dramatic increase in the regulation and criminalization of everyday activity in the name of public health, safety or "quality of

life," as illustrated by ordinances prohibiting smoking, joking in airports, sleeping in public places, panhandling, and jaywalking. Thus, a study of custodial arrests by the Atlanta police reports that of the 2803 arrests made in July 2003, 1039 were for "quality of life" violations. Metro Atlanta Task Force for the Homeless, *Summary of Atlanta Detention Center Admissions Records for July, 2003* (on file with *Seattle Journal for Social Justice*). *See generally* John J. Ammann, *Addressing Quality of Life Crimes in Our Cities: Criminalization, Community Courts and Community Compassion*, 44 ST. LOUIS U. L.J. 811 (2000); Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing,* 97 COLUM. L. REV. 551 (1997); Christine L. Bella & David L. Lopez, *Quality of Life—At What Price?: Constitutional Challenges to Laws Adversely Impacting the Homeless,* 10 ST. JOHN'S J. LEGAL COMMENT. 89 (1994); ZERO TOLERANCE: QUALITY OF LIFE AND THE NEW POLICE BRUTALITY IN NEW YORK CITY (Andrea McArdle & Tanya Erzen, eds. 2001); PARENTI, *supra* note 128, at 69–110.

[268] SENATE SELECT COMMITTEE, FINAL REPORT, *supra* note 107, at 8.

[269] *See* JEFFREY REIMAN, THE RICH GET RICHER AND THE POOR GET PRISON: IDEOLOGY, CLASS, AND CRIMINAL JUSTICE 142–44 (6th ed. 2001) (noting that in 1994 about half of prisoners had annual incomes one-third or less that of the U.S. median for males and, prior to their incarceration, prisoners were unemployed at three times the national average).

[270] *See* Nunn, *supra* note 175, at 391–94.

[271] A report released on October 1, 2003 by the Advisory Group on Public Diplomacy for the Arab and Muslim World, requested by the House Subcommittee on Appropriations and commissioned by Secretary of State Colin Powell, concluded that hostility toward the United States has reached "shocking levels," a finding which was "all the more stunning because American values are so widely shared. As one of our Iranian interlocutors put it, 'Who has anything against life, liberty and the pursuit of happiness?'" *Report says U.S. has "failed to listen and failed to persuade,"* Press Release, State Dept., Oct. 2, 2003, *available at* 2003 WL 64737967. *See also* Steven R. Weisman, *U.S. faulted on hostile image in Arab world; A "radical" change, not more "spin," is urged by panel,* INT'L HERALD TRIB., Oct. 2, 2003, at 1.

[272] *See generally* EQBAL AHMAD, TERRORISM: THEIRS AND OURS (2001); WILLIAM BLUM, ROGUE STATE: A GUIDE TO THE WORLD'S ONLY SUPERPOWER (1st ed. 2000); NOAM CHOMSKY, THE CULTURE OF TERRORISM (1988); CHALMERS JOHNSON, BLOWBACK: THE COSTS AND CONSEQUENCES OF AMERICAN EMPIRE (2000); ZIAUDDIN SARDAR & MERRYL WYN DAVIES, WHY DO PEOPLE HATE AMERICA? (2002).

[273] *See* Larry Elliott, *The Lost Decade*, THE GUARDIAN, July 9, 2003 (citing the United Nations annual human development report which says "[t]he richest 1% of the world's population . . . now receives as much income as the poorest 57%"). According to the same United Nations report, fifty-four countries are now poorer than they were a decade ago and overall human development, as measured by an amalgam of income, life expectancy and literacy, fell in twenty-one countries during the 1990s. *Id.*

[274] EDWARD WOLFF, TOP HEAVY: THE INCREASING INEQUALITY OF WEALTH IN AMERICA AND WHAT CAN BE DONE ABOUT IT 8 (noting that not only is 38 percent of American wealth controlled by 1 percent of the population, but today wealth inequality in

the United States is nearly double what it was in the mid-1970s); *The Wealth Divide: the Growing Gap in the United States Between the Rich and the Rest,* MULTINAT'L MONITOR, May 1, 2003, at 11.

[275] NATIONAL SECURITY STRATEGY *supra* note 9, § 9. This justification is explicitly articulated in the Bush administration's National Strategy, which says, "Terrorists attacked a symbol of American prosperity. They did not touch its source. America is successful because of the hard work, creativity, and enterprise of our people."

[276] David Cole, Their Liberties, Our Security: Democracy and Double Standards Presentation at Suffolk Law School (Sept. 19, 2003). *See generally* COLE, *supra* note 64.

[277] While the Constitution establishes the legitimacy of the internal governing structures of the American state, its legitimacy as a state is determined by its compliance with international law. This is acknowledged in the Bush administration's definition of "rogue states" as those that, among other things, "[d]isplay no regard for international law . . . and callously violate international treaties to which they are a party." NATIONAL SECURITY STRATEGY, *supra* note 9, § 5. The importance of international law is reflected in the Restatement (Third) of the Foreign Relations Law of the United States, the closest we have to the United States' "official" position on international law:

> International law is law like other law, promoting order, guiding, restraining, regulating behavior. States, the principal addressees of international law, treat it as law, consider themselves bound by it, attend to it with a sense of legal obligation and with concern for the consequences of violation. . . . It is part of the law of the United States, respected by Presidents and Congresses, and by the States, and given effect by the courts.

Restatement (Third) of the Foreign Relations Law of the United States, Part I, Ch. 1. (1986).

[278] Justice Robert H. Jackson, Opening Statement to the International Military Tribunal, (Nov. 21, 1945), *quoted in* FROM NUREMBERG TO MY LAI 28 (Jay W. Baird ed., 1972).

[279] On the Nuremberg Tribunal and its foundational principles, *see generally* EUGENE DAVIDSON, THE TRIAL OF THE GERMANS: NUREMBERG, 1945-1946 (1966); TELFORD TAYLOR, NUREMBERG AND VIETNAM: AN AMERICAN TRAGEDY (1970).

[280] On the erosion of democracy in America in recent times, *see generally* DONALD L. BARLETT AND JAMES B. STEELE, AMERICA: WHO STOLE THE DREAM? (1996); JAMES BOVARD, TERRORISM AND TYRANNY: TRAMPLING FREEDOM, JUSTICE, AND PEACE TO RID THE WORLD OF EVIL (2003); WILLIAM GREIDER, WHO WILL TELL THE PEOPLE? THE BETRAYAL OF AMERICAN DEMOCRACY (1992); MICHAEL PARENTI, AMERICA BESIEGED (1998).