

The Civil Rights of "Others": Antiterrorism, The Patriot Act, and Arab and South Asian American Rights in Post-9/11 American Society

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I. Introduction

I woke up early on the morning of September 11, 2001, 5:45 AM PST, to get some studying in before class, and as I logged onto the Internet, I felt the terror that had already consumed the Eastern part of the United States. I turned on my television set just in time to witness the second plane crash into the World Trade Center (6:03 AM PST). The shock and dismay I felt as I watched the two buildings collapse and then stumbled through my classes need not be elaborated upon here, for it was the same feeling that engulfed the entire nation.

The object of this paper concerns what happened after this tragedy, and what the aftermath means for the hundreds of thousands of Arab and South Asian American citizens residing in the United States. Over the next several days, my feelings of remorse turned to apprehension as I heard the word "terrorist" uttered repeatedly in television newscasts and pictures of Osama bin Laden began popping up everywhere. I had been sheltered from excessively overt racial prejudice while living in the East Bay Area of California, yet I knew that these media associations could have terrible repercussions for people of Arab and South Asian ancestry in the United States during such an apprehensive period. My fears increased on September 15th when I heard that Balbir Singh Sodhi had been murdered at his gas station in Mesa, Arizona.¹

Sodhi's murder was one of eleven that followed the September 11th attacks. More than seventeen hundred other acts of hate violence were perpetrated against those who appeared to be of Arab and South Asian descent.² Each additional hate crime I heard about increased my

¹ Balbir Singh Sodhi, a resident of Mesa, Arizona, had frequented the Sikh Temple (Gurduwara) in El Sobrante, California (about 10 miles from Berkeley) in earlier years as a resident of the Bay Area. Machinist Frank Roque killed Sodhi on September 15, 2002, apparently because his Sikh turban recalled for Roque the appearance of Osama bin Laden and members of al-Qaida. Roque is currently being prosecuted for the crime, and the death penalty is reportedly being sought.

² See Council on American-Islamic Relations (CAIR) Website, *available at* <http://www.cair-net/> (Feb. 1, 2002). (Relating acts including not only the deaths and

fear that the very society that I had months earlier felt was the most tolerant and pluralist in the world would take out its anger on its own citizens (specifically, those of Arab and South Asian descent) who, like other Americans, had worked hard to help make this country the economic superpower that it is today. Although my extreme fears of Arab and South Asian American internment largely did not become a reality, something frighteningly close did: the USA Patriot Act of 2001. At this point, it should be mentioned that the amendments of the Patriot Act (with the notable exception of sections 203(a), 203(c), 205, 208, 210, 211, 213, 216, 219, 221, and 222) are subject to the Sunset Clause encapsulated in Section 224 of the Act, which renders all stipulations of the Act ineffective on December 31, 2005.³

The Patriot Act flew through both branches of Congress after being submitted by the President on September 24, 2001.⁴ Signed into law on October 26, 2001, The Patriot Act (officially termed the "Uniting and Strengthening America By Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001") was sought by the Bush Administration, the CIA, and the FBI to capitalize on the post-September 11th fervor that engulfed the nation. Specifically, the Bush Administration wanted to facilitate the evidence-gathering procedures of the CIA and FBI and expedite the prosecution of suspected terrorists in this national security crisis.

These were the explicit short-term goals of the Patriot Act. However, this paper is about the long-term legal and social ramifications of the Act. I contend that the Patriot Act has undermined many of the fundamental constitutional rights of Arab and South Asian Americans, and should serve as a reminder to American minorities of the tenuousness of their civil liberties in the United States. My argument will proceed in three parts.

First, I will briefly outline and analyze the provisions of the Patriot Act that jeopardize American First, Fourth, Fifth, and Sixth Amendment civil liberties, specifying how those sections are either directly or indirectly targeted at Arab and South Asian American citizens. Second, drawing from research conducted by social science race theory and Critical Race Studies, I shall demonstrate how specific American minority groups have been isolated from their African

death threats previously mentioned, but also numerous acts of beatings, vandalism, threatening encroachments, and other forms of harassment.)

³ Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA Patriot Act) of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001).

⁴ The Senate voted almost unanimously for the USA Patriot Act of 2001, with a vote of 98-1 in favor. Senator Russ Feingold, a Democrat from the state of Wisconsin, was the lone voice of dissent against the Act in the upper branch of Congress. The House vote was less one-sided, with a vote of 356-66 in favor. See American Library Association Website, available at <http://www.ala.org/> (May 8, 2003).

American counterparts and categorized as "aliens" or "others." Consequently, their civil liberties have historically been, and currently are, of an indefinite nature, subject to withdrawal in particular times of crisis. Finally, I will conclude by amalgamating the two previous points into a warning to civil liberty and minority groups. Specifically, I aim to show such groups that the passage of the Patriot Act demonstrates that American society has not socially evolved to the point where the civil liberties of all of its citizens are indefinitely secured.

II. The USA Patriot Act Deconstructed

A. Arab and South Asian American Targets

There can be no mistake as to which American communities were targeted with the passage of the USA Patriot Act of 2001. The disclaimer offered by both branches of Congress and the President in section 102 clearly directs the stipulations of the Act at the Arab and South Asian American communities:

Arab Americans, Muslim Americans, and Americans from South Asia play a vital role in our Nation and are entitled to nothing less than the full rights of every American...When American citizens commit acts of violence against those who are, or perceived to be, of Arab or Muslim descent, they should be punished to the full extent of the law...the civil rights and civil liberties of all Americans, including Arab Americans, Muslim Americans, and Americans from South Asia, must be protected.⁵

By explicitly condemning all subversions of Arab and South Asian American civil liberties in the United States after the September 11th attacks, the Patriot Act implicitly defines and anticipates the victims of its mandates.

This direction of the Patriot Act becomes clearer when one realizes that the main goal of the Act is to "intercept and obstruct terrorism." As can be discerned from empirical observation and the immense documentation by social scientists, citizens of the United States have come to associate the word "terrorist" with people of Arab and South Asian descent.⁶ Thus, in addition to the aforementioned

⁵ USA Patriot Act § 102.

⁶ The immediate American media and layperson reactions to the bombing of the Murrah Federal Building in Oklahoma City, Oklahoma on April 19, 1995, offer more insight into the depth and ubiquity of the association of the words "terrorist" and "terrorism" with Arab and South Asian Americans. For weeks before the culprit (Timothy McVeigh, a white American and far-right extremist) was brought into custody, it was widely held that the culprits had to be of either Arab or South Asian descent. See Penny Bender, *Jumping*

disclaimer, the use of the term "terrorism" also serves to direct the stipulations of the Patriot Act at members of the Arab and South Asian American communities. It is from this perspective that the Patriot Act should be viewed if one is to accurately assess the legal and social ramifications of the Act on these ethnic communities.

With this disclaimer in mind, I will now proceed to analyze the provisions of the Patriot Act that affect the civil liberties of Arab and South Asian Americans. Specifically, I will focus on the Patriot Act's circumventions of the First, Fourth, Fifth, and Sixth Amendments to the United States Constitution.

B. Free Speech Deferred

The first constitutional rights of Arab and South Asian Americans assailed by the passage of the Patriot Act were those of free speech and association, protected by the First Amendment of the U.S. Constitution.⁷ These fundamental rights, also encoded in the United Nations Universal Declaration of Human Rights (UDHR),⁸ are only to be

to Conclusions in Oklahoma City?, AM. JOURNALISM REV., 11, 1995, at 145, and Charles M. Sennott, *After Bombings, America Faces Up to Prejudice*, BOSTON GLOBE, June 21, 1995, at A1. For a personalized account of the American association of the word "terrorism" with people of Arab and South Asian descent in the United States, see RAY HANANIA, *I'M GLAD I LOOK LIKE A TERRORIST: GROWING UP ARAB IN AMERICA* (2001). For a description of how racial profiling is being used against Arab and South Asian Americans in the War on Terrorism, see STEVEN EMERSON, *AMERICAN JIHAD: THE TERRORISTS LIVING AMONG US* (2002), and Michael Higgins, *Looking the Part: With Criminal Profiles Being Used More Widely to Spot Possible Terrorists and Drug Couriers, Claims of Bias Are Also on the Rise*, 83 A.B.A. J. 48 (1997), and James Rosen, *Reality Meets Rhetoric Over Race Profiling*, SACRAMENTO BEE, Dec. 30, 2001, at A9.

⁷ U.S. CONST. amend I. The First Amendment reads as follows: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances" (emphases added). At this point it should be noted that, in their article "Civil Liberties After September 11th: Free Speech Rationales After September 11th," authors Marin R. Scordato and Paula A. Monopoli (both professors at Southwestern University School of Law) fail to address the concerns of the First Amendment rights of Arab and South Asian Americans following the passage of the Patriot Act. Instead, Scordato and Monopoli focus on the limitation of media criticisms of government activity, particularly the firing of *Politically Incorrect* host Bill Maher, by pointing out that "a number of journalists and commentators have been condemned or sanctioned in some respect for being critical of the government after September 11th." See Marin R. Scordato & Paula A. Monopoli, *Civil Liberties After September 11th: Free Speech Rationales After September 11th*, 13 STAN L. & POL'Y REV. 185, 199 (2002). It is the view of this author that the potential marginalization of Arab and South Asian American protections as outlined above appears in far more serious need of academic focus and discussion than the rights of national talk show hosts.

⁸ United Nations Universal Declaration of Human Rights, Art. 19-20 (1948), available at <http://www.un.org/Overview/rights.html>.

limited in American law by "narrowly tailored" efforts that serve a compelling state interest.⁹

Capitalizing on the fear that engulfed the nation, the Bush Administration succeeded in undermining these hard-fought freedoms by inserting sections 411 and 215 into the Patriot Act. Section 411 of the Patriot Act amends the Immigration and Nationality Act to prohibit the entry into the United States of any non-citizen who represents or is a member of "a political, social, or other similar group whose public endorsement of acts undermines United States efforts to reduce or eliminate terrorist activity."¹⁰ The section includes organizations that not only provide "material support," but also "encouragement," including public endorsement under the above description.¹¹ Freedom of speech and association is limited by section 411 because, as stipulated, members of "suspect" organizations will not be allowed admission into the country. De facto political association boundaries are therefore created which are frighteningly similar to those generated by the House Un-American Activities Committee (HUAC) created by Senator McCarthy in the 1950s.¹²

Not surprisingly, Arab and South Asian American "suspect" organizations are conceived to be the main targets of this section due to the aforementioned disclaimer, as well as the goal of section 411 to "reduce or eliminate terrorist activity." On December 14, 2001, the FBI arrested Rabih Haddad, co-founder and board member of the Global Relief Foundation (GRF), and the assets of the GRF were immediately frozen on suspicions that the foundation had been used as a mode of funneling money to terrorist organizations.¹³ How many other Arab and

⁹ See *Boos v. Barry*, 485 U.S. 312 (1988) (requiring that content-based restrictions on political speech must be shown to be necessary to serve a compelling state interest and must be narrowly tailored to achieve that end).

¹⁰ 8 U.S.C. § 1182(a)(3) (2000); USA Patriot Act § 411.

¹¹ *Id.*

¹² HUAC was initiated by Senator McCarthy to subvert what he perceived as the grave threat posed by Communist organizations in the United States. McCarthy went on to publicly interrogate numerous suspected communists (many of whom were famous actors) under the auspices of HUAC. See ALBERT FRIED, *MCCARTHYISM: THE GREAT AMERICAN RED SCARE* 205-207 (Oxford University Press 2000); (Need cite) *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123 (1951), (holding that the Attorney General's arbitrary blacklisting of defendant groups was unconstitutional and beyond the Attorney General's authority).

¹³ See Melissa K. Mathews, *Current Public Law and Policy Issues: Restoring the Imperial Presidency*, 23 *HAMLIN J. PUB. L. & POLICY* 11 (2001). Officially, Haddad was arrested for overstaying his immigration visa, but the assets of his U.S.-based organization (GRF) were immediately frozen due to "suspected" ties of financial transactions with terrorist organizations. GRF is an American-based organization dedicated to financially assisting impoverished people in the Middle East. Notably, security personnel forbade all members of the public and press from attending Haddad's hearing on January 2, 2002. The secrecy of this case and the suppression of evidence spurred the American Civil Liberties Union to file a lawsuit against Attorney General

South Asian American so-called suspect organizations have been targeted under this statute is not yet documented (due to the lack of information provided by the Office of the Attorney General). It is clear, however, that organizations of these two communities are immediately and on-face deemed suspect by federal authorities.¹⁴

The subversion of the First Amendment rights of Arab and South Asian Americans continued with the passage of section 215 of the Patriot Act. Specifically, section 215 permits seizures of tangible items from businesses under the Foreign Intelligence Surveillance Act (to be discussed below) by the FBI upon the Attorney General's certification that the seizure is in furtherance of "an investigation to protect against international terrorism or clandestine intelligence activities."¹⁵ More importantly from the standpoint of the First Amendment, section 215 mandates that "no person (under such a seizure) shall disclose to any other person that the Federal Bureau of Investigations has sought or obtained tangible things under this section."¹⁶ Free speech rights of Arab and South Asian Americans (and, in fact, of all Americans) are undoubtedly curtailed due to the fact that subjects of these types of investigations are legally prevented from publicly voicing their grievances of indiscriminate federal action under the auspices of section 215 of the Patriot Act.¹⁷

It is readily observable from the stipulations of sections 411 and 215 that the Patriot Act attempts to undermine the First Amendment protections taken for granted by American citizens. It is also clear that

John Ashcroft and several of the judges involved in the proceedings. The decision was appealed to the Sixth District Court of Appeals, which ruled on August 26, 2002, *Detroit Free Press v. Ashcroft*, 195 Fed App. 291 (6th Cir. 2002) in favor of the ACLU that the "creepy directive" of the criminal proceedings was unconstitutional. However, a similar case yielded the opposite decision in the Third Circuit Court of Appeals less than two months later, *North Jersey Media Group, Inc. v. Ashcroft*, 308 F.3d 198 (3rd Cir. 2002)(Need a cite) when it was held that the secrecy of the proceedings in question was in fact constitutional due to the nature of the terrorist threat to the United States.. For an analysis of the two divergent conclusions of the Sixth and Third Courts of Appeal, go to <http://law.about.com/library/weekly/aa102102a.htm>.

¹⁴ Even though the American public has not been granted access to federal documents that record the specific ethnic affiliations of targeted groups and organizations, it can be inferred (both from the direction of the War on Terrorism and the disclaimer presented in section 102 of the Patriot Act) that the overwhelming majority of these associations are led by Arabs or South Asians.

¹⁵ USA Patriot Act § 215.

¹⁶ *Id.*

¹⁷ Again, no public documents are available regarding organizations that have been prevented from publicly opposing the search of their organization. Also, groups that have been subjected to unreasonable searches have not been allowed to publicly voice their concerns, therefore impeding academic documentation of First Amendment violations. Nevertheless, as mentioned earlier, we can justifiably assume that the overwhelming majority of targeted associations are affiliated with Arabs and South Asians. (*Same here*)

since The Patriot Act is implicitly aimed at Arab and South Asian Americans, these sections too are directed at those two communities. Additionally, the Fourth, Fifth, and Sixth Amendment rights of Arab and South Asian Americans were also not spared from the Patriot Act.

C. The Foreign Intelligence Surveillance Act of 1978

In passing the Patriot Act, both Bush and the CIA hoped to ease restrictions that prevented the tracking down of suspected terrorists abroad by amending sections of the Foreign Intelligence Surveillance Act of 1978 (FISA).¹⁸ Thus, before moving on to the specific provisions of The Patriot Act that affect the Fourth Amendment protections of Arab and South Asian Americans, it will prove helpful to briefly delineate the stipulations mandated by the FISA in order to more fully understand the changes made by The Patriot Act.

The FISA was initially passed by Congress and signed into law by President Carter in 1978 in hopes of regulating the methods used by the CIA and FBI in gathering intelligence and monitoring suspected terrorists.¹⁹ Specifically, the FISA allowed wiretapping of citizens as well as resident aliens in the United States in "foreign intelligence" investigations upon the showing of probable cause that the target was a "foreign power" or an "agent of a foreign power."²⁰ The federal government passed this Act primarily to prevent gross violations of the Fourth Amendment rights of American citizens. The Fourth Amendment guarantees "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search and seizures" by the CIA and FBI.²¹

The FISA required that all requests for the surveillance of American citizens pass through a special eleven judge panel appointed

¹⁸ See President George W. Bush, Remarks at the White House Signing of the USA Patriot Act (Oct. 26, 2001), *available at* http://www.pbs.org/newshour/bb/terrorism/bush_terrorismbill.html. To promote the signing of the Act, President Bush gave a speech condemning the FISA as being written "in the era of rotary telephones." The USA Patriot Act, according to Bush, "will allow surveillance of all communications used by terrorists, including e-mails, the Internet, and cell phones." Thus, capitalizing on the fury that permeated the United States after the September 11th attacks, Bush sought to expand the means which he, the CIA, and the FBI, could use to search for and prosecute terrorists. These means, however, often conflict with the basic civil liberties that are guaranteed by the U.S. Constitution.

¹⁹ Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95- 511, 92 Stat. 1783 (codified as amended at 50 U.S.C. §§ 1801-1811, 1821-1829, 1841-1846, 1861-62).

²⁰ Foreign Intelligence Surveillance Act of 1978 §§ 1801-1829. The United States federal courts interpreted the FISA to include citizens who are a "foreign power" or "agents of a foreign power" in *United States v. Duggan*, 743 F.2d 59 (2nd Cir. 1984), and *United States v. Hung*, 667 F.2d 1105 (4th Cir. 1981).

²¹ U.S. CONST. amend IV.

by the Chief Justice of the United States Supreme Court.²² This panel, it was hoped, would help to assure that any and all warrants that were of a constitutionally "questionable" nature would get a thorough review by federal judges before they were granted to the CIA and/or FBI. However, as will be shown below, The Patriot Act succeeded in eroding many of the Fourth Amendment legal protections that all American citizens (not just Arab and South Arab Americans) thought had been fortified with the passage of the FISA in 1978.

D. The Attack on the Fourth Amendment²³

The Bush Administration and most of the members of the Senate thought that the provisions of the FISA were not adequate to support the "new" terrorist threat that the United States faced following the September 11th attacks. Senator Orrin Hatch's (R-UT) Senate address on September 24, 2002 to the Senate Judicial Committee summarizes the opinion that has pervaded the federal government concerning the utility of the FISA in combating terrorism:

(The FISA) did not work well with respect to terrorists, who did not work for the foreign government, who often financed their operations with criminal activities, and who began to target American interests. It was more difficult to determine if such terrorists were "agents of a foreign power," and it was difficult for the government to keep appropriate types of investigators involved in the operation.²⁴

In short, the federal government thought that the stipulations of the FISA requiring that citizens be "agents of a foreign power" in order for a warrant to be approved were not stringent enough to deal with the existing terrorist threat that faced the nation, due to the fact that agents of al-Qaida were not legally considered "of a foreign power" (power being construed as sovereign nation).

The Patriot Act was passed to help the CIA and FBI address this concern by conducting an overhaul of the FISA. Section 218 of the Patriot Act softened the FISA requirement that "foreign intelligence" be

²² Foreign Intelligence Surveillance Act of 1978 § 1803.

²³ The Fourth Amendment reads as follows: "The right of the people to be secure on their persons, houses, papers, and effects, against *unreasonable* searches and seizures, shall not be violated, and no warrants shall issue, but upon *probable cause*, supported by Oath or affirmation, and *particularly describing* the place to be searched, and the persons or things to be seized." (emphases added). U.S. CONST. amend IV.

²⁴ Sen. Orrin Hatch, Address to the Senate Judicial Committee on the USA Patriot Act (Sept. 24 2002), available at http://www.fas.org/irp/congress/2002_cr/hatch-fisa.html.

"the purpose" of the investigation, requiring only that it be a "significant purpose."²⁵ This seemingly minor change to the FISA by the Patriot Act legally gave the federal authorities (specifically, the CIA and FBI) the power to pursue "suspect" American citizens and non-citizens alike indicted on warrants that only tangentially touched on national security. Undoubtedly, most of these "suspect" citizens were of Arab and South Asian American descent.

The Patriot Act's attacks on the FISA and Fourth Amendment did not end with the expansion of the granting of warrants. Capitalizing on the post-September 11th hysteria, the CIA and FBI were also able to persuade President Bush and Congress that an augmentation of search and seizure authority was in order as well. Under sections 206 and 207 of the Patriot Act, previously illegal "roving wiretaps" and physical searches are now legal.²⁶ Unlike the protections of the FISA, which mandated that wiretaps be directed against "specific communications providers,"²⁷ the Patriot Act broadened such wiretaps to include "unspecified persons."²⁸ Physical searches had also been protected under the same sections of the FISA and limited to forty days after the issuance of a warrant in order to protect American Fourth Amendment civil liberties, but are now sanctioned for up to one year under the Patriot Act, with warrants (as described above) easier to attain.

These changes to the FISA by the Patriot Act amount to what John W. Whitehead and Steven H. Aden term as "blank warrants," giving federal authorities expanded authority to pursue actions not specifically delineated in a given warrant.²⁹ Specifically, the "roving surveillance" authority granted by the Patriot Act allows federal authorities to monitor individuals who are not directly covered by a given warrant. In short, under sections 206 and 207 of the Patriot Act, the CIA and FBI are now

²⁵ USA Patriot Act § 218. See John A. 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, 1103-05 (2002) (containing a thorough discussion of this change in language and requirement).

²⁶ USA Patriot Act §§ 206-207. The legality of "roving wiretaps" was reaffirmed on November 18, 2002, by the Foreign Intelligence Surveillance Court (FISC), which was given authority with respect to the previous ruling of the District of Columbia Court of Appeals. The FISC, created under the FISA to adjudicate appeals of the constitutionality of federal investigations is comprised of a three-judge panel (all of whom, it should be noted, were appointed under President Ronald Reagan and are considered "semiretired"). There is no decision as of yet whether or not the case will be appealed to the U.S. Supreme Court. The government has the sole right to appeal FISC decisions of this sort. For a complete description of the ruling, see <http://www.cnn.com/2002/LAW/11/18/spy.court.ruling/index.html>.

²⁷ Foreign Intelligence Surveillance Act §1805.

²⁸ *Id.*

²⁹ See Whitehead, *supra* note 25, at 8 (equating the provision allowing for "roving surveillance" as being parallel to what was described above as a "blank warrant").

allowed to conduct wiretaps in a wide range of jurisdictions and to carry out expanded physical searches against persons not specifically covered by a warrant.

These were not the only stipulations of the Patriot Act that subverted the Fourth Amendment protections of the FISA. Sections 209 and 210 of the Patriot Act circumvent the Wiretap Act of 1968³⁰ to allow wiretaps of voice mail communications (including messages) and, most significantly, Internet communications with the facilitated attainment of a warrant. Like the FISA, the provisions of the Wiretap Act were intended to expand the protections explicitly outlined in the Fourth Amendment by stating that American citizens have "a reasonable expectation of privacy" from the state. The privacy of "oral communications" is included under this "reasonable expectation" in the Wiretap Act.³¹ However, section 209 of the Patriot Act effectively sidesteps this protection of telephone communications by allowing the tapping of voice mail messages, and section 210 goes even further to allow the surreptitious surveillance of "electronic communications," or conversations conducted via the Internet.³² In addition, by treating voice mail as an "electronic communication," section 209 effectively lowers the requirements for warrant approval by federal courts, requiring only that federal agents show that the information to be gathered is "relevant to an ongoing criminal investigation."³³ By treating voice mail like email, federal agents no longer have to abide by the strict requirements for warrant approval as stated in Title III of the Wiretap Act and reiterated in *United States v. Smith*.³⁴ Specifically, Title III of the Wiretap Act gives federal judges the power to grant a warrant if and only if "there is probable cause (to believe) that an individual is committing, has committed, or is about to commit a particular offense . . . (and that) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous."³⁵

The most invasive of the Patriot Act's subversions of the Fourth Amendment occurs in section 213, which allows what has come to be known as "sneak and peak" warrants. The notice of the execution of a

³⁰ The Wiretap Act of 1968, Pub. L. No. 90-351, 801 (a), (d), 82 § 211-212 (1969).

³¹ Whitehead and Aden, *supra* note 25. The Wiretap Act of 1968, it should be noted, was passed in response to the Supreme Court's seminal Fourth Amendment right of privacy case, *Katz v. United States*, 389 U.S. 347 (1967). (ruling in favor of the defendant that his Fourth Amendment rights were in fact violated when the FBI tapped his phone without his permission in order to implicate him on gambling charges.) The United States legislature, cognizant of the importance of this Fourth Amendment right to privacy, sought to codify it with the passage of the Wiretap Act of 1968.

³² USA Patriot Act § 209-210.

³³ USA Patriot Act § 209.

³⁴ *United States v. Smith*, 155 F.3d 1050, 1055-56 (9th Circuit 1998).

³⁵ The Wiretap Act, *supra* note 30, at Title III.

warrant (commonly referred to as the "knock and announce" policy) has long been held to be an important component of the reasonableness of a search.³⁶ The Supreme Court has ruled that evidence obtained in illegal searches and seizures can be rendered constitutionally defective if police officers enter without prior announcement.³⁷ However, the Patriot Act directly attacks this constitutional protection by allowing the CIA or FBI to delay the notification of a warrant to the subject, even until after it has been executed, if notification "may have an adverse result."³⁸ The exceedingly broad nature of this clause in section 213 leaves a frightening amount of discretion to federal authorities under which they can conceivably test the boundaries of the Patriot Act at the expense of suspected terrorists, most of whom are undoubtedly Arab and South Asian American.

In short, many of the legal boundaries of the Fourth Amendment protections that have evolved over the past several decades are now put into question with the passage of the Patriot Act. The FISA and the Wiretap Act have been amended to broaden the scope of warrants and allow for expanded intelligence techniques by the CIA and FBI, while section 213 directly curtails the privacy rights of Americans by calling into question the traditional "knock and announce" search and seizure policy.

The aforementioned discussion lends credence to the argument that the Fourth Amendment civil liberties of Arab and South Asian Americans were indeed attacked with the passage of the Patriot Act. However, as will be outlined below, the Fifth and Sixth Amendment rights of Arab and South Asian Americans were also subject to assault by the Patriot Act.

E. Stemming Due Process

The Fifth Amendment of the United States guarantees that "no person shall be...deprived of life, liberty, or property, without due process of law."³⁹ The legalist nature of the United States and other

³⁶ See *Wilson v. Arkansas*, 514 U.S. 927, 932 (1995) (cementing the "knock and announce" policy into the protections mandated by the Fourth Amendment and its reasonableness inquiry).

³⁷ *Wilson*, 514 U.S. at 937.

³⁸ USA Patriot Act § 213. Section 213 of the Patriot Act allows "delayed notification" in the following three circumstances: 1) the court finds reasonable cause to believe that providing immediate notification of the warrant may have an adverse result; 2) the warrant prohibits the seizure of any tangible property, any wire or electronic communication...or any stored wire or electronic information, except where the court finds reasonable necessity for the seizure; and 3) if the warrant provides for the giving of such notice within a reasonable period of its execution, which period may thereafter be extended by the court for good cause shown.

³⁹ U.S. CONST. amend V. The Fifth Amendment reads in its entirety as follows: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval

liberal democracies holds this right to due process of the law sacred to the civil liberties of citizens. Nevertheless, in the name of national security, the Patriot Act proceeded to threaten many of the protections of Arab and South Asian Americans secured by the Fifth Amendment through the enactment of sections 412 and 106.

Although not explicitly aimed at Arab and South Asian American citizens, sections 412 and 106 of the Patriot Act should strike fear into the two aforementioned communities. Section 412 allows the Attorney General of the United States to take into custody any foreign national whom he has "reasonable grounds to believe" is "engaged in any activity that endangers the national security of the United States," blatantly subverting the Fifth Amendment protections of such individuals (since resident aliens are legally granted Fifth Amendment protections).⁴⁰ The Patriot Act allows the Attorney General to hold an alien for seven days, at which point he must either charge him criminally or initiate the process of deportation.⁴¹ Section 412 also permits suspects held under immigration violations to be held without a court order for up to six months, after which a process of deportation must commence.⁴²

Section 106 of the Patriot Act goes on to attack the protection of property rights of foreign nationals (presumably Arab and South Asian Americans). Specifically, section 106 amends the International Emergency Economic Powers Act of 1977⁴³ to allow the President of the United States to "confiscate any property...of any foreign person, foreign organization, or foreign country that he determines has planned, authorized, aided, or engaged in such hostilities or attacks against the United States."⁴⁴ Thus, the Fifth Amendment property rights of resident

forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; *nor to be deprived of life, liberty, or property, without due process of law*; nor shall private property be taken for public use, without just compensation" (emphasis added).

⁴⁰ See also Whitehead and Aden, *supra* note 25, 17. By law, resident aliens of legal status are awarded the Fifth Amendment protection of due process. See Patel v. Zemski, 275 F.3d 299, 70 U.S.L.W. 1396 (3d Cir. 2001), and Kim v. Ziglar, 276 F.3d 523, 70 U.S.L.W. 1439 (9th Cir. 2002). These rulings were reaffirmed on March 5, 2002 in *Hoang v. Comfort*, 282 F.3d 1247 (10th Cir. 2002), *petition for cert. filed*, 70 USLW 3698 (U.S. May 3, 2002) (No. 01-1616). Thus, section 412 of the Patriot Act contravenes established American Constitutional law by attempting to undermine the civil liberties of resident aliens.

⁴¹ USA Patriot Act § 412.

⁴² *Id.*

⁴³ The International Emergency Economic Powers Act, 50 U.S.C. § 1702 (1977).

⁴⁴ USA Patriot Act § 106. The International Emergency Economic Powers Act (IEEPA) permitted the President of the United States to "investigate, regulate, or prohibit" any and all money and money transfers in the United States in an attempt to ensure the security of the United States in case of a national emergency. The Patriot Act goes further and allows such property to be "held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States." The IEEPA also did *not*

aliens in the United States were also attacked by the Patriot Act under section 106.

Granted, the aforementioned two sections of the Patriot Act do not explicitly target Arab and South Asian American citizens. Nevertheless, many of the fifteen hundred persons currently detained under these sections (as well as the aforementioned sections) of the Patriot Act were American citizens of Arab and South Asian descent, who were later released once their American nationality was identified.⁴⁵

More importantly, the actions and public opinions of the Bush Administration during and following their assassination of Qaed Salim Sinan Harethi on November 3, 2002 in Yemen shows the relevancy of due process subversions of Arab and South Asian American citizens as a result of the Patriot Act.⁴⁶ A United States citizen by the name of Kamal Derwish was among the five other al-Qaida suspects targeted and killed in the assassination of Harethi. As stipulated in *Reid v. Covert*, American citizens are granted the same protections as citizens on American soil, regardless of their physical locality.⁴⁷ In spite of this widely referenced Supreme Court decision, National Security advisor Condeleeza Rice (commenting on the Derwish assassination) commented, "I can assure you that no constitutional questions are raised here. There are authorities that the president can give to officials."⁴⁸

Clearly, Derwish's Fifth Amendment right to due process of law as a citizen of the United States was subverted. The only plausible explanation is that Derwish was considered by the Bush Administration

grant the President the authority "to regulate or prohibit, directly or indirectly, any postal, telegraphic, telephonic, or other personal communication." Sections 209 and 210 of the Patriot Act, by contrast, give the FBI and CIA the rights to undermine this Fourth Amendment protection.

⁴⁵ See David Cole, Presentation at the Third Annual Peter M. Cicchino Symposium, American University, Washington College of Law (April 2002), in AM. U. J. GENDER SOC. POL'Y & L. AT 35-37. Exact figures on the number of detainees are unavailable from the government, but it has been reported that hundreds of suspects have been released because they were American citizens.

⁴⁶ On November 3, 2002, Harethi and five other al-Qaida suspects were killed in Yemen by a CIA operated Predator drone, an aeronautic unmanned device capable of releasing bombs on specific targets. For a detailed description of the assassination, see http://abcnews.go.com/sections/wnt/DailyNews/yemen_021105.html.

⁴⁷ *Reid v. Covert*, 354 U.S. 1 (1957) (ordering the release of two American women who brutally murdered their husbands on American military bases abroad on the grounds that their Fifth Amendment rights to due process had been violated. Justice Clark goes so far as to say that "it is clear that trial before an American court-martial in which the fundamentals of due process are observed is preferable to leaving American servicemen and their dependents to the widely varying standards of justice in foreign courts throughout the world." Derwish, as egregious as his crimes might have been if he indeed was a participating member of al-Qaida, was clearly not granted the same protections as were these American women.)

⁴⁸ John J. Lumpkin, *Bush approves killing U.S. citizens working with Al Qaeda*, CONTRA COSTA TIMES, Dec. 4, 2002, at A15.

to be a foreign national under The Patriot Act; although Derwish was a citizen of the United States, he was legally treated as a foreigner. Derwish's fate should serve as a warning to Arab and South Asian American citizens that their legal status as Americans does not necessarily prevent them from being treated as resident aliens, nor does it necessarily guarantee them the constitutional protections of other legally codified citizens. This egregious violation of Derwish's civil liberties also touches upon the Sixth Amendment protections that were assailed with the passage of the Patriot Act. It is to this issue that we now turn.

F. Attorney-Client Privilege and National Security

Two of the most basic civil rights provided by the Sixth Amendment to the United States Constitution are the rights to legal counsel and the confidentiality of any and all communications between legal representatives and their clients.⁴⁹ The actions taken by the Bush Administration (specifically by Attorney General John Ashcroft) after the passage of the Patriot Act have served to undermine these civil liberties, and these actions have been focused on members of the Arab and South Asian American communities.

Five days after the passage of the Patriot Act, on October 31, 2001, the Federal Register published the Bureau of Prisons (BOP) rule as an extension to the Patriot Act.⁵⁰ The BOP rule, as summarized by Avidan Y. Cover, "authorizes the Attorney General (of the United States) to order the Bureau of Prisons Director to monitor or review communications between inmates and lawyers for the purpose of deterring future acts that could result in death or serious bodily injury to persons or property."⁵¹ Under the BOP rule, no judicial approval is required to review such communications.⁵² Although such monitoring

⁴⁹ U.S. CONST. amend VI. The Sixth Amendment reads as follows: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witness against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance to counsel for his defense." (emphasis added) The right to legal counsel for the accused is explicitly protected by the Sixth Amendment. The right to attorney-client privilege (the sanctity of any and all communications between an accused party and his/her legal counsel) has been held to be a civil liberty since the Elizabethan Era of colonial England. See Robert Hirshon (2002), *Remarks to National League of Cities*, 24 MAINE BAR LAW JOURNAL 4. The United States Supreme Court most recently upheld this basic right in *Swidler & Berlin v. United States*, 524 U.S. 399 (1988).

⁵⁰ Prevention of Acts of Violence and Terrorism, 66 Fed. Reg. 55,062 (final action 67 Fed. Reg. 53,689) (Oct. 31, 2001).

⁵¹ Avidan Y. Cover, *A Rule Unfit for All Seasons: Monitoring Attorney-Client Communications Violates Privilege and the Sixth Amendment*, 87 CORNELL L. REV. 1233, 1235 (2002). See also 66 Fed. Reg. 55,066 (Oct. 31, 2001).

⁵² *Id.*

must be done by a "privilege team" (which is separate from the prosecution and investigation, and may not disclose any intercepted information without court approval unless violent acts are imminent), the clandestine nature of the team's operations may continue for up to one year without court notification.⁵³

As of December 6, 2001, at least sixteen inmates' conversations with their attorneys were being monitored under this rule (more current information on the extent of these civil rights violations could not be found, due to the withholding of such data by the Attorney General's Office).⁵⁴ One can reasonably suspect that many (if not all) of these sixteen inmates subject to attorney-client monitoring were Arab and South Asian Americans, due to the direction of the War on Terrorism. Nevertheless, it is clear that the stipulations outlined in the BOP rule both defy the Sixth Amendment right to attorney-client privilege (which was recently upheld in *Swidler & Berlin v. United States*) and were directed at Arab and South Asian Americans due to the fact that the BOP rule was passed in response to the September 11th attacks and as an addendum to the Patriot Act.⁵⁵

In addition, Arab and South Asian Americans' Sixth Amendment right to legal counsel have continued to come under attack following the passage of the Patriot Act. A plethora of news media sources have documented that more than one thousand suspected terrorists (detained under the auspices of the Patriot Act) have been detained by the Immigration and Naturalization Service (INS) and other federal authorities, and that these suspects have had enormous difficulty exercising their constitutional right to legal representation.⁵⁶ For example, San Antonio physician Albador Al-Hazmi, an American citizen, was held incommunicado for days as a material witness, despite his lawyer's efforts to gain access to him.⁵⁷

"Dirty bomber" suspect Abdullah Al-Mujahir (a United States citizen formerly named Jose Padilla) was held on lockdown inside of a military brig at a naval base in South Carolina without access to an

⁵³ *Id.* at 55,065.

⁵⁴ See *Excerpts From Attorney General's Testimony Before Senate Judiciary Committee*, N.Y. TIMES, Dec. 7, 2001, at B6.

⁵⁵ *Swidler & Berlin v. United States*, 524 U.S.399 (1998).

⁵⁶ See Kate Martin, Civil Liberties Since September 11th, 2001, before the Committee of the Judiciary, United States House of Representatives, available at <http://cnss.gwu.edu/cnss/arrests/kmtestimony012402.doc> (noting that 1147 persons had been detained by the Department of Justice as of November 5, 2001. Once the figure had reached this high, Martin claims that the Department of Justice stopped releasing figures on the number of detainees. Finally, Martin also states that the vast majority of the detainees are of Arab or South Asian descent, and have often been denied access to legal counsel.)

⁵⁷ Peter Slevin and Mary Beth Sheridan, *Justice Department Uses Arrest Powers Fully: Scope of Jailing Stirs Questions on Detainees' Rights to Representation and Bail*, WASHINGTON POST, Sept. 26, 2001, at A10.

attorney.⁵⁸ It was only after seven months of detention, on December 5, 2002, that Al-Mujahir was granted an attorney by United States District Court Judge Michael Mukasey.⁵⁹ Nevertheless, the judge ruled that Al-Mujahir was an enemy combatant, and thus could be detained indefinitely by the United States military, despite the fact that he is an American citizen.⁶⁰ In short, by being deemed an enemy combatant, Al-Mujahir was not afforded the traditional constitutional protections of other American citizens (i.e. the right to an attorney and due process of law). In doing this, Judge Mukasey set a precedent for the hundreds of other terrorist suspects still held in custody, compromising their legal rights to an attorney and due process of law.

The cases of Al-Hazmi and Al-Muhajir demonstrate the subversion of Arab American and South Asian American Sixth Amendment rights to legal counsel following the passage of the Patriot Act. With the additional monitoring of attorney-client communications legalized by the Bureau of Prisons rule of 2001,⁶¹ it is clear that the Sixth Amendment civil liberties of Arab and South Asian Americans were indeed curtailed by the passage of the Patriot Act.

G. Summary and Key Points

At this point it is helpful to briefly summarize the Arab and South Asian American constitutional and civil liberties that have been threatened as a result of the passage and implementation of the Patriot Act.(Revise intro language)

Under sections 411 and 215 of the Patriot Act, Arab and South Asian Americans' First Amendment rights to free speech and association were curtailed due to the restriction by federal authorities of members of certain Arab and South Asian American organizations from entry into the country, as well as the prohibition on certain groups from publicly revealing that they had been subject to a FISA search.

Sections 206-210, 213, 215, and 504 of the Patriot Act attacked the Fourth Amendment rights to search and seizure by expanding the mandates of the FISA, allowing wiretaps and surveillance of wireless communications, subverting the common "knock and pronounce" rule, and, in some cases, not requiring a warrant for certain searches and seizures.

⁵⁸ Richard A. Serrano and John J. Goldman, *Judge says Padilla is Enemy Combatant, Merits Attorney*, L.A. TIMES, Dec. 5, 2002, at A1.

⁵⁹ *Id.*

⁶⁰ *Id. Ex Parte Quirin*, 317 U.S. 1 (1942), (mandating that military commissions are constitutional when the suspects are deemed to be enemy combatants. Thus, by deeming al-Mujahir an enemy combatant, the Bush Administration sought and currently seeks to undercut the constitutional privileges granted to al-Mujahir as a consequence of his American citizenship.)

⁶¹ See Fed. Reg. 55,062, *supra* note 48.

Arab and South Asian Americans' Fifth Amendment right to due process of the law was assailed via sections 402 and 106 that allow the Attorney General to detain any and all foreign nationals who are suspected of terrorist activity, and permitting the President to confiscate property held by resident aliens without court approval in the name of national security.

Finally, the BOP rule authorized by the Federal Register five days after the passage of the Patriot Act undermines the Sixth Amendment rights of Arab and South Asian Americans to legal counsel and attorney-client privilege. The cases of Al-Hazmi and Al-Muhajir attest to this fact.

Three key points are important to this discussion. First, there has been relatively significant moral restraint by the federal government in its attempt to ensure the national security of the United States. As of yet, there has been no attempt to intern all Arab and South Asian Americans, as was the case with the Japanese during World War II.⁶² Further, information available to the public has revealed no evidence of extensive torture or killing of suspects, except in the case of Derwish in Yemen.

Second, the voices of civil liberty groups like the American Civil Liberties Union (ACLU) have been heard to the extent that American courts (have often overturned the most draconian civil rights violations committed by the CIA, FBI, and INS in their attempts to track and detain suspected terrorists (as in the case of Al-Muhajir).

Third, and most importantly, it is not relevant to this paper whether the United States government is justified in targeting Arab and South Asian Americans in the War on Terrorism. Some argue that the exigencies of war warrant such racial classifications, while others condemn such stereotyping by public authorities.⁶³ Nevertheless, the

⁶² During World War II over 100,000 Japanese Americans were told to sell their homes and relocate to internment camps in Arkansas, Arizona, California, Colorado, Idaho, Utah, and Wyoming as "a protection against espionage and sabotage" from potential Japanese agents in the United States. Exec. Order No. 9066, 7 Fed. Reg. 1407 (Feb. 19, 1942). This internment was deemed constitutional by the United States Supreme Court in *Korematsu v. United States*, 323 U.S. 214 (1944).

⁶³ Many individuals and organizations have adopted these two positions on the morality of racial stereotyping in the war on terrorism. Examples of organizations condemning such stereotyping are the National Jewish Democratic Council (see *NJDC Calls on Americans to Resist Stereotyping of Arab and Muslim Americans Following Tragic Attacks* (Sept. 14, 2001), available at <http://www.njdc.org/readNews.php?show=160&subcat=3>) and the ACLU (see <http://www.aclu.org/RacialEquality/RacialEqualitylist.cfm?c=133> (providing links to press releases on racial profiling opposition)). Examples of groups and people that support limited racial profiling include the National Center for Policy Analysis (see Jason L. Riely, 'Racial Profiling' and Terrorism, WALL STREET JOURNAL, Oct. 24, 2001, cited in *An Acceptable Face to "Racial Profiling,"* DAILY POLICY DIGEST, Terrorism Issues, Oct. 29, 2001, available at <http://www.ncpa.org/g/iss/ter/2001/pd102901g.html>) and Stuart Taylor, Jr., *The Case For Using Racial Profiling at Airports*, THE ATLANTIC ONLINE, Sept. 25, 2001, available at <http://www.theatlantic.com/politics/nj/taylor2001-09->

imperative points are that Arab and South Asian Americans have been targeted by the Patriot Act, and that many of their constitutional rights have been subverted in post-September 11th America as a result.

Following this analysis of the legal ramifications of the Patriot Act, one may ask the following question: Why is it that Arab and South Asian American civil liberties were allowed to be undermined by the United States government (and, indirectly, the American people)? The answer to this question lies buried in social science race theory and critical race studies, and is discussed in the next section.

III. Arab and South Asian Americans as "Others"

A. The Social Construction of Race

The key to understanding why American society permitted Arab and South Asian Americans' rights to be subverted by the Patriot Act is to view race as a social construction, an idea that has recently begun to permeate social science race theory and Critical Race Studies. The first scholars to promulgate social construction theory in the social sciences were Michael Omi and Howard Winant. It was Ian F. Haney Lopez who first introduced the theory to Critical Race Studies.

In Racial Formation in the United States: From the 1960s to the 1980s, Omi and Winant pose what has come to be known as social construction theory.⁶⁴ Specifically, from their analysis of the perception of race in the United States from the 1960s to the 1980s, Omi and Winant conclude that "there is no biological basis for distinguishing among human groups along the lines of race ... (instead) the effort must be made to understand race as an unstable and 'decentered' complex of social meanings (that are) constantly being transformed."⁶⁵ In other words, Omi and Winant contend that a more effective way for social scientists to perceive race is through the dynamic lens of social interaction, rather than the static picture presented by biological models. Race, in the view of the authors, is more accurately viewed as a fabrication by human beings who stereotype individuals based upon their phenotypical characteristics drawn from historical and contemporary political, economic, and social norms and views.⁶⁶

Drawing upon the work of these two authors, Ian F. Haney Lopez expanded upon the idea of social construction while introducing

25.htm. In fact, a Detroit Free Press poll found that 61% of Arab and South Asian Americans prefer some form of racial profiling by the federal government in the War on Terrorism (see *Poll Arab-Americans Support Racial Profiling*, available at <http://www.newsmax.com/showinsidecover.shtml?a=2001/10/3/163458>).

⁶⁴ MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1980S* (Routledge 1986).

⁶⁵ *Id.* at 54.

⁶⁶ *Id.*

the theory to critical race studies in his piece, *The Social Construction of Race*.⁶⁷ Lopez highlights the construction of racial groups in a society, pointing out that "racial formation includes both the rise of racial groups and their constant reification in social thought."⁶⁸ Thus, social construction theory posits that races are formed in a society once they have been firmly distinguished and reified as different from the dominant race. Indeed, Lopez goes on to argue that "races are constructed relationally, against one another, rather than in isolation."⁶⁹ In short, Lopez contends that the formation of racial groups inherently brings about relational comparisons between the fabricated racial group and the dominant race in a given society.⁷⁰

Social construction theory (as outlined by Omi, Winant, and Lopez) can thus be summarized as follows: Race is most effectively viewed by social scientists when seen as a human fabrication in a society, as opposed to a biological form of difference, and is necessarily dynamic in nature due to the changing perceptions of human beings in and across generations in a society. In addition, race can and should be viewed as relational against the dominant race in a society, as the formation of race inherently necessitates a comparison with the dominant race. Now, armed with the tools provided by social construction theory and Critical Race Studies, we can proceed to examine how Arab and South Asian Americans were codified as "others" in American society. This will help explain how the civil liberties of these two groups were undermined with the passage of the Patriot Act, and why the Act should serve as a warning of the potential for more severe measures in the future.

B. The Peculiarity of "Others"

The theoretical race models outlined by Omi, Winant, and Lopez highlight the fact that races are constructed in a society in relation to the dominant group. The United States is no exception to the social forces outlined by the three authors. Ever since the American Revolution (and even before), American minority groups have been stereotyped against and compared with the white majority. However, immigrant minority groups (e.g. Hispanic, Asian, Arab, and South Asian Americans) were socialized in an entirely different manner than their African American counterparts. This fact will prove to be significant in understanding the peculiar nature of the civil liberty status of Arab and South Asian

⁶⁷ Ian F. Haney Lopez, *The Social Construction of Race*, 29 HARV. C.R.-C.L. L. REV. 1 (1994).

⁶⁸ *Id.* at 5.

⁶⁹ *Id.*

⁷⁰ See also EDWARD SAID, BEGINNINGS: INTENTION AND METHOD xvii (Columbia University Press 1985).

Americans and why their constitutional rights are of an indefinite nature in the United States.

The history of racial prejudice against and negative stereotyping of African Americans since the American Revolution is well documented in academic literature.⁷¹ Throughout American history, society has both overtly and implicitly characterized the African American race as inferior to the white race. Indeed, the original version of the United States Constitution held that each African American constituted only three-fifths of a person in census documentation for purposes of taxation and representation.⁷² The subhuman treatment of African Americans during slavery, the "separate but unequal" nature of the Jim Crow laws after the Civil War, and the anti-black racism embedded in American society (perceptions of blacks as lazy, intellectually disadvantaged, and prone to criminal activity) is widely known and need not be expanded upon here.⁷³

More important in terms of the argument of this paper is the fact that, following the social construction model outlined above, African Americans were socialized as inferior to whites in American society. However, it is imperative to note that African Americans were identified as Americans (as is evident from their inclusion in the Constitution at all), even if they were socialized as inferior. Although the American Colonization Society sought to export African Americans to Liberia in the mid-1800s, since then, there has never been a serious question as to whether or not African Americans are Americans (indeed, the racial category African *American* highlights this point).⁷⁴ Negative stereotypes of African Americans in the United States have largely taken place in the context of their right to residence in this country (albeit as inferior

⁷¹ See e.g., HANES WALTON, JR. & ROBERT C. SMITH, *AMERICAN POLITICS AND THE AFRICAN AMERICAN QUEST FOR UNIVERSAL FREEDOM* Chap. 1 (Addison Wesley Longman Press 2000), and WINTHROP JORDAN, *WHITE OVER BLACK: AMERICAN ATTITUDES TOWARDS THE NEGRO* Chap. 12 (Penguin Books 1969).

⁷² U.S. CONST. art. 1, § 2, cl. 3. See also JAMES MADISON, *THE FEDERALIST* No. 54 337 (Clinton Rossiter ed., New American Library 1961) (1788). In addition, Thomas Jefferson demonstrated the sentiment of American society toward African Americans in his *Notes to Virginia*. Jefferson repeatedly stated that blacks were human beings like whites, but lacked the intellectual sophistication of their counterparts. Jefferson even goes so far as to question the evolutionary development of the "Negro race," citing that (according to his research) African American women preferred sexual intercourse with orangutans rather than with members of their own race! See WINTHROP JORDAN, *THE WHITE MAN'S BURDEN: HISTORICAL ORIGINS OF RACISM IN THE UNITED STATES* 165-204 (Oxford University Press 1974).

⁷³ It can be rightly contested that these egregious stereotypes are not nearly as extreme today as they were only several decades ago. However, one must concede that a degree of such racism exists in contemporary society, and is a continuation of racist sentiment that has existed in American society since before the American Revolution.

⁷⁴ See ROBERT ALLEN, *RELUCTANT REFORMERS: RACISM AND SOCIAL REFORM MOVEMENTS IN THE UNITED STATES* 13-14 (Howard University Press 1983) (explaining the actions and goals of the American Colonization Society).

people). This has not been the case with other minority groups, as will be evident when they are compared with the categorization of Hispanic, Asian, Arab, and South Asian Americans as "others" in American society.

In *Racial Fault Lines*, Tomás Almaguer outlines the origins and development of white supremacy in the nascent years of the state of California.⁷⁵ In his in-depth analysis, Almaguer finds that Hispanic and Asian American immigrants were socialized with respect to whites in much the same manner as African Americans. Specifically, Almaguer found that:

The Mexican population ...was ambiguously deemed "half-civilized" and ambivalently integrated into an intermediate status within the "new society"... the Chinese were (also) subjected to widespread hostility from the European-American population. They too were categorically deemed nonwhite and therefore ineligible for the same rights held by white citizens.⁷⁶

Like African Americans, Hispanic and Asian Americans were initially socialized as inferior to whites and consequently given inferior treatment in the early years of California history. However, it is crucial to note that, with the passage of the Thirteenth and Fourteenth Amendments to the U.S. Constitution, African Americans were (at least legally) granted citizenship as free persons in the United States and recognized as members (albeit inferior ones) of American society in a way that Hispanic and Asian Americans were not.⁷⁷

⁷⁵ TOMÁS ALMAGUER, *RACIAL FAULT LINES: THE HISTORICAL ORIGINS OF WHITE SUPREMACY IN CALIFORNIA* (University of California Press 1994).

⁷⁶ *Id.* at 4-6.

⁷⁷ U.S. CONST. amend. XIII, XIV. The Thirteenth Amendment reads as follows: "Section 1: Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction. Section 2: Congress shall have power to enforce this article by appropriate legislation." Passed in 1865 after the Civil War, the Thirteenth Amendment was explicitly directed at freeing those African Americans who were still enslaved in the free and neutral states during the Civil War as a result of the narrow tailoring of the Emancipation Proclamation (which only freed slaves in rebellious states). The first section of the Fourteenth Amendment reads as follows: "Section 1: *All persons born or naturalized in the United States*, and subject to the jurisdiction thereof, *are citizens of the United States* and of the States wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of *citizens of the United States*; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws" (emphases added). The Fourteenth Amendment, passed in 1868, was again aimed at giving African Americans the same rights (at least legally) as their white counterparts. Care was taken in crafting the amendment as to apply to citizens of the United States, so

Unlike African Americans, Hispanic and Asian Americans were socialized as "others" (or non-Americans) in addition to being deemed inferior, and consequently not deserving of many of the constitutional protections of their African American counterparts.⁷⁸ Numerous laws and court decisions lend support to this contention. In 1850 the California legislature passed the Foreign Miners' Tax to keep Hispanic and Asian Americans out of the burgeoning mining economy.⁷⁹ The 1855 Greaser Act was later passed by the California legislature. It consisted of anti-vagrancy laws aimed at the Hispanic population.⁸⁰ African Americans, as a result of their citizenship and socialization in American society as "native," were exempt from both the Foreign Miners' Tax and The Greaser Act. Although African Americans were subject to a multitude of egregious laws in their own right, the Foreign Miner's Tax and the Greaser Act show how Hispanic and Asian Americans were socialized and treated differently than African Americans by being defined as foreigners.

This distinction between "native" and "foreigner" was crucial in the refusal of citizenship to Hispanic and Asian Americans, which is another central difference between the racism experienced by these groups and African Americans. Although the 1848 Treaty of Guadalupe Hidalgo offered citizenship to Mexican Americans residing in California, it was still exceedingly difficult for Mexican immigrants to become American citizens. Subsequently, the 1924 Immigration Act made the attainment of citizenship impossible for Mexican immigrants.⁸¹ The 1854 California Supreme Court decision of *People v. Hall* held that Chinese Americans were generically "nonwhite" and consequently

as not to include Hispanic and Asian immigrants who were still deemed as "others," and consequently not worthy of equal protection under the laws.

⁷⁸ For a nuanced analysis of the difference between the racism experienced by African Americans and their Asian and Hispanic counterparts, see Berta Esperanza Hernandez-Truyol, *Natives, Newcomers, and Nativism: A Human Rights Model for the Twenty-First Century*, 23 *FORDHAM URB. L. J.* 1075 (1996), and Natsu Taylor Saito, *Alien and Non-Alien Alike: Citizenship, 'Foreignness,' and Racial Hierarchy in American Law*, 76 *OR. L. REV.* 261 (1997).

⁷⁹ LEONARD PITT, *THE DECLINE OF THE CALIFORNIOS: A SOCIAL HISTORY OF SPANISH-SPEAKING CALIFORNIANS, 1846-1890* 56-57 (University of California Press 1970). The Foreign Miners' Tax required that all Hispanic and Asian miners pay a \$20 tax in order to mine in California's goldfields. This tax, remarkably steep for the time period, put Hispanic and Asian miners at a significant disadvantage in the mining economy, driving most of them out of the business.

⁸⁰ ROBERT F. HEIZER & ALAN F. ALMQUIST, *THE OTHER CALIFORNIANS: PREJUDICE AND DISCRIMINATION UNDER SPAIN, MEXICO, AND THE UNITED STATES* 151 (University of California Press 1971), and DAVID J. WEBER, *FOREIGNERS IN THEIR NATIVE LAND: HISTORICAL ROOTS OF MEXICAN AMERICANS* 149 (University of New Mexico Press 1982). Also known as the Vagrancy Act, the 1855 Greaser Act targeted "idle" Mexicans in the state of California, which sanctioned the arrest and imprisonment of individuals guilty of vagrancy or levied fines against them.

⁸¹ See DERRICK BELL, *RACE, RACISM, AND AMERICAN LAW* (Aspen Publishers 2000).

ineligible for citizenship.⁸² In 1894, a Massachusetts Circuit Court ruled similarly against Japanese Americans in *In re Saito*.⁸³ These acts and court decisions clearly demonstrate how the Hispanic and Asian immigrant populations were treated as "foreign" or "alien," as well as inferior to whites upon their arrival to the United States. Because they were denied access to American citizenship, they were denied many of the constitutional protections enjoyed by white Americans, and to a lesser extent, African Americans.

C. Constructing Arab and South Asians as "Others"

The same type of socialization occurred with the immigration of Arab and South Asian immigrants to the United States.⁸⁴ In the 1800s and early 1900s, American society held the perception that, like other minority groups, Arab and South Asian immigrants were intellectually

⁸⁰ *People v. Hall*, 4 Cal. 399 (1854); *In re Saito*, 62 F. 126 (CCD Mass. 1894). In *People v. Hall*, the California Supreme Court overturned the murder conviction of a white man (George W. Hall) accused of killing a Chinese man (Ling Sing) on the grounds that the testimony of three Chinese men was not legally valid. Specifically, the court ruled that Chinese individuals were covered under the California law that "no black or mulatto person, or Indian, shall be permitted to give evidence in favor of, or against, any white person." In his concurring opinion, Justice Murray went on to state that "the same rule that would admit them (the three Chinese witnesses) to testify, would admit them to all the legal rights of citizenship, and we might soon see them at the polls, in the jury box, upon the bench and in our legislative halls." This decision implied that Chinese immigrants in California were not eligible for citizenship in the same way as their white counterparts, clearly classifying them as "others." The Massachusetts Circuit Court in *In re Saito* came to a similar conclusion regarding Japanese immigrants. The court concluded that Japanese immigrants to the United States were not eligible for citizenship due to the fact that they were "Mongolian," neither black nor white. Another notable example of how Asian immigrants were socialized as "others" occurred with the adoption of the Burlingame Treaty in 1868. According to the stipulations of the Treaty, Chinese laborers were allowed unrestricted access to jobs in the United States. However, as can be deduced from the *Hall* and *Saito* cases above, they would not be granted full rights of citizenship in the United States. See CHARLES J. MCCLAIN, *IN SEARCH OF EQUALITY: THE CHINESE STRUGGLE AGAINST DISCRIMINATION IN NINETEENTH-CENTURY AMERICA* (University of California Press 1994), and SHIH-SHAN HENRY TSAI, *THE CHINESE EXPERIENCE IN AMERICA* (Indiana University Press 1986).

⁸⁴ Edward Said makes this argument at length in his widely acclaimed book, *Orientalism*. See EDWARD SAID, *ORIENTALISM* 27 (Vintage Books 1994). See also VIJAY PRASHAD, *THE KARMA OF BROWN FOLK* (The University of Minnesota Press 2000). In their books, Said and Prashad also elaborate upon how Arab and South Asians have been exoticized in American culture as "different" or "deviant." Examples of the fascination with Arab and South Asian spirituality permeates American society, ranging from the immense popularity of Deepak Chopra to The Beatles and Alanis Morissette's "spiritually cleansing" trips to India. This exoticization of Arab and South Asian culture is further evidence of how these two groups have become identified as "others" in American society. For a complete and thorough outline of how Arab and South Asian immigrants have been socialized into American society since the 1800s, see Karen McBeth Chopra, *A Forgotten Minority, An American Perspective: Historical and Current Discrimination Against Asians From the Indian Subcontinent*, 4 DET. C. L. REV. 1269 (1995).

inferior to whites. During British colonial rule, the United States government concurred with the English government in prohibiting the mechanization of Indian agriculture on the grounds that "the Indian peasants could not decipher the devices."⁸⁵ This racist perception of Arab and South Asians carried on into the United States, as white farmers in California categorically deemed Indian farm laborers to be worthless when compared with their white counterparts.⁸⁶

In 1905, the Asiatic Exclusion League (AEL) was founded in San Francisco. The AEL was focused upon saving the "superior white race" from "inferior" Asian immigrants, and encapsulated the predominant sentiment of American society towards Arab and South Asian immigrants.⁸⁷ The AEL went on to terrorize and beat many Arab and South Asian immigrants who worked as farm laborers in an effort to rid the country of "cheap and inferior labor." The most notable of their attacks occurred on September 4, 1907, in the California town of Bellingham, where 400 to 500 white men terrorized Hindu farm colonies.⁸⁸ Hundreds of Hindus were maimed and tortured, and an undocumented number were killed.

More importantly, like Hispanic and Asian immigrants to the United States, Arabs and South Asians were socially constructed as "others" in addition to being deemed inferior to whites. The Alien Land Laws of 1913 (also known as the Webb-Haney Bill) and 1920 were passed in California with the explicit intent of prohibiting the ownership and lease of farmland by "aliens ineligible for citizenship," which included Arab, South Asian, Mexican, and Asian immigrants.⁸⁹ More demonstrative of the codification of Arab and South Asians as "others" in American society was the 1923 case of *United States v. Bhagat Singh Thind*, in which the United States Supreme Court ruled that Asian Indians could legally be denied the right to naturalized citizenship because they were neither "white" according to the "understanding of the common man," nor "of northern or western European stock."⁹⁰ These racist socializations culminated with the passage of the notorious 1924 Immigration Act in the United States Congress, which effectively

⁸⁵ Prashad, *supra* note 82, at 41. See also Bernard Saul Stern, *American Views of India and Indians, 1857-1900* 44 (1956) (unpublished Ph.D. dissertation, University of Pennsylvania) (on file with University of Pennsylvania Main Library).

⁸⁶ RONALD TAKAKI, *A DIFFERENT MIRROR: A MULTICULTURAL HISTORY OF AMERICA* 332 (Little, Brown, and Company 1993).

⁸⁷ See SUCHENG CHAN, *ASIAN AMERICANS, AN INTERPRETIVE HISTORY* 131 (Twayne Publishers 1991).

⁸⁸ See University of California Library, *Echoes of Freedom: South Asian Pioneers in California, 1899-1965*, Chap. 4, available at <http://www.lib.berkeley.edu/SSEAL/echoes/chapter4/chapter4.html>.

⁸⁹ James Okutsu, "Asian Land Laws," *ASIAN AMERICAN ENCYCLOPEDIA* 16, Vol. 1 (Franklin Ng & John D. Wilson eds., Marshall Cavendish 1995).

⁹⁰ *United States v. Bhagat Singh Thind*, 261 U.S. 204 (1923).

eliminated immigration for "people ineligible for citizenship," or nonwhites (which included Arabs and South Asians, as well as Mexicans and Asians).⁹¹

Finally, Arab and South Asian Americans have recently been socialized in American society as potential terrorists. A multitude of publicized events has contributed to this disturbing stereotype. Among the wealth of examples are Sirhan Sirhan's assassination of Robert F. Kennedy in 1968,⁹² Abdelbaset Ali Muhammad Al-Megrahi and Al Amin Khalifa Fhimah's 1988 attack on Pan Am Flight 103,⁹³ Ramzi Yousef's 1993 bombing of the World Trade Center in New York City,⁹⁴ and the al-Qaida attacks on American embassies in Kenya and Tanzania in 1998⁹⁵ and the USS Cole in 2000.⁹⁶ These terrorist attacks by Arabs and South Asians in recent history contributed to the stereotyping by Americans of these ethnic groups as potential terrorists even before the

⁹¹ Immigration Act of May 26, 1924, 43 U.S.C. 204 (1924).

⁹² On April 4, 1968, Sirhan Sirhan assassinated United States presidential candidate Robert F. Kennedy at a Los Angeles political rally because Sirhan (a Palestinian activist) felt that Kennedy, if elected, would continue the pro-Israeli United States foreign policy that had dominated the White House in previous years. However, there still exists controversy as to whether he was framed for the murder, and to this day, Sirhan denies any responsibility for the crime. For a complete description of the assassination and legal controversy, see Ian F. Haney Lopez, *Institutional Racism: Judicial Conduct and a New Theory of Racism*, 109 YALE L. J. 1717 (2000).

⁹³ On December 21, 1988, Abdelbaset Ali Muhammad Al-Megrahi and Al Amin Khalifa Fhimah (both had ties to the Libyan government) apparently set a bomb on Pan Am Flight 103, which exploded over Lockerbie, Scotland. After over a decade of negotiations, the Libyan government agreed to pay the families of the victims for the tragedy, while continuing to deny any involvement in the attack. Al-Megrahi and Fhimah are currently serving jail terms. For a complete description of the attacks and the subsequent legal proceedings, see Laurie M. McQuade, *Tragedy as a Catalyst For Reform: The American Way?*, 11 CONN. J. INT'L. L. 325 (1996).

⁹⁴ On February 26, 1993, it is speculated that Ramzi Yousef organized the bombing of the World Trade Center in New York with a dozen or so associates. The motive remains unclear to this day, but investigators speculate that the reason for the bombing was either a retaliation for the United States' support for Israel or a retaliation by Iraqi leader Sadaam Hussein for the Persian Gulf War. For a delineation of the bombing and an outline of these theories, see Fawaz A. Gerges, *Islam and Muslims in the Mind of America: Influences on the Making of U.S. Policy*, JOURNAL OF PALESTINE STUDIES, Vol. 2, No. 1, 72 (1996), and Laurie Mylroie, *The World Trade Center Bomb: Who is Ramzi Yousef?*, THE NATIONAL INTEREST, Winter Ed. 1996, available at <http://www.fas.org/irp/world/iraq/956-tni.htm>.

⁹⁵ On August 7, 1998, the United States embassies in Kenya and Tanzania were almost simultaneously bombed, killing 224 people. Twenty-two suspects were later arrested in relation to the bombings, all with ties to al-Qaida (the terrorist group led by Osama Bin Laden). For a complete description of the bombings and the subsequent trials, see <http://www.cnn.com/LAW/trials.and.cases/case.files/0012/embassy.bombing/>.

⁹⁶ On October 12, 2000, the USS Cole (a United States naval ship) was bombed and destroyed in the port of Aden, Yemen allegedly funded and planned by al-Qaida. For a description of the attack on the USS Cole, see <http://www.defenselink.mil/pubs/cole20010109.html>.

September 11th attacks in 2001, which undoubtedly permeated and solidified these prejudices.

In short, by utilizing social construction theory we can see how African Americans, Asian and Hispanic Americans, and Arab and South Asian Americans have been peculiarly socialized in American society. Asian, Hispanic, Arab, and South Asian Americans have been socialized as inferior to whites, much like their African American counterparts. However, Asian, Hispanic, Arab, and South Asian Americans have been socialized as "others" to a much greater extent than African Americans. Arab and South Asians have had the additional misfortune of being labeled as potential terrorists following recent terrorist attacks in America. Natsu Taylor Saito summarizes these points best in the following excerpt:

Within the United States, if a person is racially identified as African American or white, that person is considered to be legally a U.S. citizen and socially an American...but these presumptions are not present for Asian Americans, Latinos, Arab Americans, and other non-black racial minorities. Rather, there is the opposite presumption that these people are foreigners; or, if they are U.S. citizens, their racial identity includes a foreign component.⁹⁷

It is true that the stereotypes outlined above have been mitigated to a large extent in contemporary American society. The Civil Rights Movement of the 1960s and the increasing awareness among American students of the egregiousness of such prejudices have ameliorated much of the racism that characterized earlier American society. However, the aforementioned perceptions still exist in American society, albeit to a lesser extent. These deep psychological prejudices, perpetuated by social forces like the media and everyday social interaction, can become resurrected and amplified in times of perceived crisis like the post-September 11th era. This phenomenon of social prejudices and crises was the central factor in the undermining of Arab and South Asian American civil liberties by American society.

D. The "Other" During Crises

It has been evident time and time again in American history that the civil liberties of minority groups socialized as "others" are of a provisional nature, subject to withdrawal in times of perceived crisis. This section seeks to place the Patriot Act in historical perspective, briefly highlighting similar attacks on the civil rights of "alien" minority

⁹⁷ *In re Saito*, 62 F. at 262-63.

groups throughout American history. From the following discussion, it will be shown how it has been socially acceptable to deny the civil liberties of individuals considered to be foreigners who are, consequently, not considered to be deserving of the protections afforded by the United States Constitution.

One of the earliest subversions of the civil rights of "others" in American history occurred in 1882 with the passage of the Chinese Exclusion Act.⁹⁸ At a time when approximately 375,000 Chinese laborers had already immigrated to the United States, the United States Congress drastically curtailed the number of Chinese immigrants allowed into the country, thus negating the 1868 Burlingame Treaty, which allowed for a free flow of immigration between the United States and China. Specifically, the Act was aimed at preventing the immigration of "both skilled and unskilled (Chinese) laborers and Chinese employed in mining."⁹⁹ Although not explicitly mentioned in the Act, the central reason behind the restriction of Chinese laborers was to ameliorate the effects of the economic recession, particularly in the Western states, in the agriculture and mining sectors, on white laborers.¹⁰⁰ Thus, in a time of perceived crisis, the first people to be targeted were the Chinese "others" and their right to residence under the 1868 Burlingame Treaty.

A more recent and direct attack on the civil liberties of "others" in American history occurred in 1942 with the internment of over 100,000 Japanese Americans.¹⁰¹ Under President Roosevelt's Executive Order 9066, Japanese Americans were told to sell their homes and relocate to internment camps in Arkansas, Arizona, California, Colorado, Idaho, Utah, and Wyoming.¹⁰² The reason for this internment was as "a protection against espionage and sabotage" from potential Japanese agents in the United States during World War II.¹⁰³ In this time of national crisis, the civil rights of "others" were again targeted in a similar (albeit much more extreme) manner as the rights of Arab and South Asian Americans with the passage of the Patriot Act in 2001, and were both measures deemed necessary for the sake of "national security."¹⁰⁴

⁹⁸ Chinese Exclusion Act, 22 Stat. L. 58 (1882).

⁹⁹ ENCYCLOPEDIA BRITANNICA, *The Annals of America*, Vol. 10, 536 (Encyclopedia Britannica Press 1976). Under the mandates of the 1868 Burlingame Treaty, free flow of immigration was allowed by Chinese laborers from China to the western United States. However, full rights of citizenship were not granted.

¹⁰⁰ Takaki, *supra* note 84, at 200.

¹⁰¹ Exec. Order No. 9066, 7 Fed. Reg. 1407 (Feb. 19, 1942). See also Alec Dubro, *The Japanese-American Internment*, 3 CAL. L. REV. 24 (1983).

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ The marked similarities between Executive Order 9066 and the Patriot Act of 2001 are explored further in Liam Barber, *Korematsu's Ghost: A Post-September 11th Analysis of Race and National Security*, 47 VILL. L. REV. 451 (2002).

The passage of Proposition 187 in the state of California in 1994 also demonstrates the contraction of the civil rights of "others" in a time of perceived crisis. As a political move to garner votes during California's economic slump in the early 1990s, Governor Pete Wilson sponsored Proposition 187 during the 1994 state election, a measure which sought to take away public benefits (including public education and public health services) from unauthorized aliens residing in the state. The initiative, implicitly aimed at the state's Hispanic population, passed with a slim majority.¹⁰⁵ Although Proposition 187 was directed at non-citizens and was eventually negated by court rulings, the substance and circumstances of the discourse surrounding the initiative mirror the Chinese Exclusion Act, Executive Order 9066, and the Patriot Act. In a time of perceived crisis, the first individuals whose civil liberties were targeted were those considered to be others, in this case Hispanic immigrants in the state of California.¹⁰⁶

Finally, the extreme nature of the detention and prosecution of Los Alamos National Laboratory scientist Dr. Wen Ho Lee again demonstrates how the civil rights of minorities socialized as others are of a provisional nature in times of perceived crisis. In March 1999, the Los Alamos National Laboratory found that important nuclear weapons secrets had possibly been leaked from their facility to the Chinese government.¹⁰⁷ Dr. Lee was promptly terminated from his position at the Laboratory, and in December of that year, he was indicted on fifty-nine counts of mishandling classified information.¹⁰⁸ In September of 2000, all of the allegations against Lee were found to be false and without sufficient evidence, and Lee was released from nine months of solitary confinement.¹⁰⁹ Judge James A. Parker of the United States District Court for the District of New Mexico issued a rare public apology to Lee: "I sincerely apologize to you, Dr. Lee, for the unfair manner (in which) you were held by the Executive Branch."¹¹⁰ Judge Parker went on to question the motives of the Executive Branch, openly asking "[w]hat was the government's motives in insisting on your being jailed

¹⁰⁵ See Philip Martin, *Proposition 187 in California*, INTERNATIONAL MIGRATION REVIEW, Vol. 29, No. 1, 255-259 (1995). For a description of how Proposition 187 and anti-immigrant rhetoric helped Wilson in his re-election campaign in 1994, see Daniel Weintraub, *Crime, Immigration Help Wilson, Poll Finds*, L.A. TIMES, Nov. 9, 1994, at A1.

¹⁰⁶ For a discussion of how Proposition 187 mirrored the characteristics of the Chinese Exclusion Act and Japanese Internment, see John SW Park, *Race Discourse and Proposition 187*, 2 MICH. J. RACE & L. 175 (1996).

¹⁰⁷ See Jeff Gerth, *Breach at Los Alamos: A Special Report - China Stole Nuclear Secrets for Bombs*, U.S. AIDES SAY, N.Y. TIMES, Mar. 6, 1999, at A1.

¹⁰⁸ *Spy Hunters Hit Peaks and Valleys Searching for Leak of U.S. Secrets*, MERCURY NEWS, December 18, 2000, at A1.

¹⁰⁹ *United States v. Lee*, 90 F.Supp.2d 1324 (D.N.M. 2000).

¹¹⁰ *Id.*

pretrial under extraordinarily onerous conditions of confinement ... this makes no sense to me."¹¹¹

Judge Parker's statements depict the gratuitously harsh manner in which Dr. Wen Ho Lee was held for crimes in which no evidence existed to point to his culpability. On a microcosmic level, Lee's experience shows how the civil liberties of minorities socialized as "others" are subject to withdrawal during times of perceived crisis. Lee, a Taiwanese-born American citizen, was undoubtedly singled out in the federal investigation due to his racial status. In the crisis-like search for sources of the top-secret nuclear weapons information leaks, Lee's civil rights were undermined due to the fact that he was identified as foreign, which consequently meant that he did not enjoy the same constitutional rights of due process and humane prison treatment as American citizens.¹¹²

Seen in this historical context, the nature, content, and direction of the Patriot Act should come as no surprise. The civil liberties of Arab and South Asian Americans have been subject to withdrawal because these groups have been portrayed as "others" (and now as potential terrorists as well) in American society and are consequently thought to be undeserving of the fundamental constitutional protections afforded to socially "native" Americans.¹¹³ The attacks of September 11th created the perceived "crisis" in the United States (like the economic slumps of 1882 and the early 1990s, World War II, and the leaking of information to the Chinese government in 1999) to facilitate the passage of the Patriot Act, which succeeded in eroding the First, Fourth, Fifth, and Sixth

¹¹¹ *Id.*

¹¹² For other analyses of how Lee's race affected the manner in which he was treated during the investigation, see Miriam Kim, *Discrimination in the Wen Ho Lee Case: Reinterpreting the Intent Requirement in Constitutional and Statutory Discrimination Cases*, 9 ASIAN L. J. 117 (2000), and Spencer K. Turnbull, *Wen Ho Lee and the Consequences of Enduring Stereotypes*, 7 ASIAN PAC. AM. L. J. 72 (2001), and Neil Gotanda, *Comparative Racialization: Racial Profiling and the Case of Wen Ho Lee*, 47 UCLA L. L. REV. 1689 (2000). For a personal account of Lee's experience, see WEN HO LEE & HELEN ZIA, *MY COUNTRY VERSUS ME: THE FIRST-HAND ACCOUNT BY THE LOS ALAMOS SCIENTIST WHO WAS FALSELY ACCUSED* (Hyperion Press 2002).

¹¹³ A helpful distinction between the divergent constitutional protections of "native" and "non-native" Americans can be seen through the treatment of African Americans in historical and contemporary American society. Although African Americans are widely perceived by the American public to be predisposed to criminal activity and pose a significant threat to their white counterparts, there has been no parallel subversion of the civil rights of blacks (or even discussion of internment). One may justifiably argue that racial profiling and prejudged guilt indeed affects the African American community; however, it must be granted that these civil liberty circumventions do not parallel those inflicted on "other" Americans during Japanese Internment, the Wen Ho Lee case, and now the Patriot Act. In short, although the civil rights of African Americans are compromised in American society as a result of their racial status, their "native" socialization grants them constitutional protections not necessarily shared by their counterpart minorities socialized as "others" in times of crisis.

Amendment civil rights of Arab and South Asian Americans. Instead of taking an individualist and legalist approach to apprehending terrorist threats to the United States, the American government responded with an approach used all too often in American history: they ostracized and prosecuted those considered to be "others" in society, violating the civil rights of thousands of innocent Arab and South Asian Americans in the name of national security.¹¹⁴

The short answer, then, to the question of why it is that Arab and South Asian American civil liberties were allowed to be undermined by the United States government is that Arab and South Asian Americans were and are not perceived in the United States to be truly "American."

IV. Conclusion

This paper has sought to document the subversions of the First, Fourth, Fifth, and Sixth Amendment civil liberties of Arab and South Asian Americans that resulted from the passage of the Patriot Act on October 26, 2001. It has aimed to explain how and why such a significant restriction of constitutional protections was allowed by American society and the American government. The answer to the latter questions lies in social construction theory, an idea that has only recently permeated social science and legal studies. Due to the fact that Arab and South Asian Americans (like their Asian and Hispanic counterparts) have been socialized as "others" in American society, they are not seen to be wholly protected by the United States Constitution. Consequently, the civil liberties of "others" are of a provisional nature, subject to withdrawal during times of perceived crisis. The September 11th attacks exemplifies such a "crisis," and led to the passage of the Patriot Act, arguably the single most severe mass restriction of American constitutional rights in almost six decades.

Again, it should be noted that to accept the conclusions of this paper does not demand subjective judgment as to whether or not the Patriot Act was necessary or unwarranted, or gratuitous or not restrictive enough. The only things that need to be granted for the contentions in this paper to hold are that the Patriot Act was directed at Arab and South Asian Americans, that the First, Fourth, Fifth, and Sixth Amendment civil rights of those targeted by the Act were curtailed, and that race can be best understood as a social construction in a given society.

The disclaimer offered in section 102 and the circumstances (both historical and current) surrounding the Patriot Act present a strong case that the Act was directed at the Arab and South Asian American

¹¹⁴ For a discussion of how the Patriot Act has conformed to this convoluted racialization process, see Huong Vu, *Us Against Them: The Path to National Security is Paved By Racism*, 50 *DRAKE L. REV.* 639 (2002).

communities. A clear, objective examination of the Patriot Act reveals a marked restriction of First, Fourth, Fifth, and Sixth Amendment protections of those targeted by the Act.¹¹⁵ Finally, a conscientious analysis of historical and contemporary society reveals that race is best understood as a social construction, fabricated through the multitude of social interactions, cultural retentions, and media images that define human social relations. Once these basic premises are understood, one cannot help but conclude that Arab and South Asian Americans (as well as Asian and Hispanic Americans) have been socialized differently than African and Caucasian Americans, and that this demarcation is one of the central reasons why the Patriot Act was allowed to circumvent the constitutional rights of members of these minority groups in a time of perceived crisis.

In short, I hope that this paper will serve to highlight the fragility upon which the civil liberties of many American minority groups rest, and how the Patriot Act should serve as a premonition of the potential for detrimental social and legal action against such groups in the future. The alarming comments made by Philip B. Heymann in the *Harvard Journal for Law & Public Policy* substantiate the possibilities that still exist for minorities socialized as "others":

It makes sense in terms of prevention to concentrate only on limited ethnic categories even if you know that the number of false positives—the number of innocent members subjected to investigation or denial of access—will vastly exceed the number of legitimate suspects.¹¹⁶

This opinion, held by many Americans after the September 11th attacks, points to the potential of civil rights violations of "others" in the United States following future terrorist attacks or in other times of perceived crisis. One can well imagine what repercussions would lie in store for Arab and South Asian Americans if a nuclear terrorist attack were to occur in the United States. Internment of Arab and South Asian Americans (or Islamic individuals of Arab and South Asian descent), parallel to Executive Order 9066, would likely not be ruled out of the realm of possibility.

At the very least, after an analysis of the Patriot Act and its effects on members of the Arab and South Asian American community, it should be granted that Dinesh D'Souza's conclusion (in his

¹¹⁵ For another section-by-section analysis of the Patriot Act and the civil liberties it threatens, see Charles Doyle, *Terrorism: Section By Section Analysis of the USA Patriot Act*, CONG. RESEARCH SERVICE, Order Code RL31200 (Dec 10, 2001), available at <http://ipc.state.gov/documents/organization/7952.pdf>.

¹¹⁶ Philip B. Heymann, *Civil Liberties and Human Rights in the Aftermath of September 11th*, 25 HARV. J. L. & PUB. POL'Y 441, 446 (2002).

controversial book *The End of Racism*) that no serious racist threat exists in the contemporary United States is dubious at best.¹¹⁷

¹¹⁷ DINESH D'SOUZA, *THE END OF RACISM*, 412 (The Free Press 1995).