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## Immigration Legislation Pursuant to Threats to US National Security

### Keywords

Immigration Law, Legislation, National Security, Aliens, Deportation

# IMMIGRATION LEGISLATION PURSUANT TO THREATS TO US NATIONAL SECURITY

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This article will examine the United States' immigration legislation in the face of threats to national security. Throughout history foreign enemies have threatened the American way of life, from the Germans in World War I, to the spread of Communism, to the current threat of terrorism. As history has demonstrated, the U.S. has taken drastic measures to protect its citizens. This paper will consider those actions and evaluate the PATRIOT Act's adequacy in resolving the present threat to national security. Further, this paper will propose reforms to certain immigration provisions of the PATRIOT Act.

## BACKGROUND

The United States Constitution grants Congress the power to "establish a uniform Rule of Naturalization"<sup>1</sup> and grants the Executive Branch the inherent sovereign authority to regulate immigration.<sup>2</sup> Aliens seeking entrance into the United States have no claim of right;<sup>3</sup> rather admission is a privilege granted by the sovereign nation upon such terms as it prescribes.<sup>4</sup>

The United States relies upon immigration policies to protect itself against subversives.<sup>5</sup> U.S. history includes spies, saboteurs, anarchists, and terrorists as parts of this subversive class. It has feared immigrants who seek to destroy the government rather than strive for the shelter of its freedoms.<sup>6</sup>

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1. U.S. Const. art. I, § 8, cl. 4.

2. Excludable Aliens, 8 U.S.C. § 1182(a)(27)(2001) (Grants the Attorney General the power to exclude any alien seeking admission into the United States "to engage in activities which would be prejudicial to the public interest or endanger the welfare, safety, or security of the United States.")

3. U.S. *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 542 (1950); *Accord* Landon v. Plasencia, 459 U.S. 21, 32 (1982).

4. *Id.*

5. See generally Alexander Wohl, Comment, *Free Speech and the Right of Entry Into the United States: Legislation to Remedy the Ideological Exclusion Provisions of the Immigration and Naturalization Act*, 4 AM. U. J. INT'L. L. & POL'Y. 443, 447-459 (1989) (Increasing numbers of immigrants coupled with international unrest during the World War I, World War II, and Cold War Eras, led the United States government to enact stringent immigration policies in an attempt to ward off perceived threats to national security).

6. See generally JOHN HIGHAM, STRANGERS IN THE LAND: PATTERNS OF AMERICAN

The protective immigration policies that the United States has legislated and implemented have been in response to fear, whether it is in response to a physical attack on the country, or an attack on its culture, political beliefs, or freedoms.<sup>7</sup> When immigrants threaten the American way of life, Americans respond by uniting and displaying a strong sense of nativism.<sup>8</sup> Nativism is a concept deeply rooted in American history, dating as far back as the late 1830's.<sup>9</sup> Nativism is defined as an intense opposition to a specific minority on the ground of its foreign ("un-American") connections.<sup>10</sup> Nativism was the energizing force behind the modern day theory of nationalism.<sup>11</sup> Nativistic activities were evidenced throughout U.S. history resulting in immigration reform during World War I, World War II, and against the fear of Communism.<sup>12</sup>

## HISTORICAL LEGISLATIVE RESPONSE

### *World War I*

During World War I, there was an increased concern over subversives and radical aliens, and legislation against those persons was strengthened.<sup>13</sup> Dissident immigrants were imprisoned for their anti-war campaigns.<sup>14</sup> Under wartime conditions, Congress passed the so-called Anarchists Act of October 16, 1918, which ordered the deportation of alien anarchists residing within the United States and made it a felony punishable by imprisonment for those deported to reenter or attempt to reenter the country.<sup>15</sup> This Act was amended by the June 5, 1920 Act which included in the anarchist class aliens who advocate "the unlawful damage, injury or destruction of property, or sabotage."<sup>16</sup> As an effect of the war and the wartime legislation, there was anti-German sentiment pervading throughout the United States.<sup>17</sup> The Justice Department gathered German aliens into internment camps under the President's summary powers.<sup>18</sup> The total number of arrested aliens rose from 1200 to 6300 by the end of 1918.<sup>19</sup> Further, the regulations governing the remaining Germans were tightened, requiring them to register and

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NATIVISM 1860-1925, (Atheneum 1963).

7. See David Cole, *Terrorizing Immigrants in the Name of Fighting Terrorism*, 29 HUM. RTS. 11 (Winter 2002).

8. See Wohl, *supra* note 5.

9. JOHN HIGHAM, *STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM 1860-1925* (1963).

10. *Id.* at 4.

11. *Id.*

12. See Cole, *supra* note 7, at 11.

13. See Wohl, *supra* note 5, at 449.

14. Cole, *supra* note 7, at 11.

15. E.P. HUTCHINSON, *LEGISLATIVE HISTORY OF AMERICAN IMMIGRATION POLICY 424, 1798-1965* (U. Penn. Press 1981).

16. *Id.* at 424 (quoting Act of June 5, 1920, 41 Stat. 1008).

17. HIGHAM, *supra* note 9, at 196-98.

18. *Id.* at 210.

19. *Id.*

“forbidding them to move without official permission.”<sup>20</sup>

The climate of repression established during World War I continued against Communists even after the conclusion of the war.<sup>21</sup> In 1919 the U.S. government responded to a politically motivated bombing of Attorney General Palmer’s home by rounding up alien members of the two communist parties.<sup>22</sup> Approximately three thousand aliens were held for deportation in response to this threat on the U.S.<sup>23</sup>

### *World War II*

Another example of the U.S. government taking action against potentially threatening immigrants occurred during World War II.<sup>24</sup> The approach of the war gave a strong impetus to establish a system for alien registration.<sup>25</sup> The Alien Registration Act of 1940 dealt with subversion and deportation for numerous offenses as well as registration requirements, including fingerprinting of an alien in advance of issuance of a U.S. visa.<sup>26</sup>

In addition to the Alien Registration Act of 1940, the federal government interned over 110,000 persons, mostly Japanese immigrants.<sup>27</sup> In an executive order delivered on February 19 1942, President Roosevelt authorized the internment of persons who may have posed a threat to national security or the war effort.<sup>28</sup> This order came as part of a response following an attack on the U.S. by Japanese forces.<sup>29</sup>

### *Communism*

Following World War II, the continued fight against Communism reached its peak in the McCarthy Era.<sup>30</sup> This anti-communist sentiment led to the passage of the McCarran-Walter Act of 1952, which introduced an ideological criterion for admission: immigrants and visitors to the U.S. could be denied entry on the basis of their political ideology (e.g., if they were communists).<sup>31</sup> This Act expanded the definition of the subversive classes that were subject to exclusion and

20. *Id.*

21. See Wohl, *supra* note 5, at 450.

22. *Id.* at 230; See also Cole, *supra* note 7.

23. HIGHAM, *supra* note 9, at 231.

24. See Cole, *supra* note 7; See Wohl, *supra*, note 5, at 451.

25. HUTCHINSON, *supra* note 165, at 541.

26. *Id.*, See also Alien Registration Act, 1940, ch. 439, 54 Stat. 670, tit. III repealed by Pub. L. No. 414, § 403, 66 Stat. 279, 280.

27. Cole, *supra* note 7

28. Exec. Order No. 9066, 7 Fed. Reg. 1407 (Feb. 19, 1942) [hereinafter Executive Order].

29. The order came following the Japanese surprise attack on Pearl Harbor, which resulted in the death of over 1,000 U.S. soldiers.

30. See Wohl, *supra* note 5, at 451.

31. See Immigration and Nationality (McCarran-Walter) Act, ch. 477, 66 Stat. 163, 184-186 (1952) [hereinafter McCarran-Walter Act] (regulating the exclusion and deportation of non-citizens who advocated communism or other proscribed beliefs).

deportation.<sup>32</sup> In essence, it became against national policy to be a member of the Communist Party and to advocate proscribed beliefs.<sup>33</sup>

### *Present Day Threat: Terrorism*

Such examples demonstrate that U.S. historical immigration actions were often in response to a perceived or actual threat by immigrants.<sup>34</sup> Present day immigration legislation stems not from war, or fear of Communism, but from terrorism, one of the threats included in the class of subversives.<sup>35</sup> Terrorism is defined as “the unlawful use of force or violence against persons or property to intimidate or coerce a government, the civilian population, or any segment thereof, in furtherance of political or social objectives. On September 11, 2001, terrorists attacked the United States and killed over 6000 people. Nineteen terrorists hijacked four commercial airlines in the U.S., and used them as bombs by flying two planes into the World Trade Centers, one into the Pentagon, and the fourth crashing into Pennsylvania.<sup>36</sup> All nineteen hijackers were foreigners, and at least sixteen entered the U.S. through ports of entry, with a tourist or student visa; some of those visas having expired before September 11, 2001.<sup>37</sup>

September 11, 2001 highlighted the frightening reality of terrorist threats and the gross inadequacy of the then current immigration system.<sup>38</sup> Though September 11<sup>th</sup> was the most devastating attack on US soil by a terrorist attack, it was not the first.<sup>39</sup> The U.S. government had prior knowledge and exposure to terrorist attacks as evidenced during the 1995 Oklahoma City bombing, and the nerve gas attack on the Tokyo subway system.<sup>40</sup> These events raised concern and placed increased pressure for government action. Congress responded by legislating the 1996 Antiterrorism and Effective Death Penalty Act, which provided for new definitions and enhanced penalties for terrorist crimes.<sup>41</sup> Congress further enacted the Defense Against Weapons of Mass Destruction Act of 1996 to address threats of biological, chemical, and nuclear weapons.<sup>42</sup> After these base programs were established, the focus was on “refining terrorism preparedness.”<sup>43</sup> Reports

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32. HUTCHINSON, *supra* note 15, at 311.

33. See McCarran-Walter Act, *supra* note 31.

34. See Wohl, *supra* note 5, at 451.

35. Cole, *supra* note 7

36. Philip Martin & Susan Martin, *Immigration and Terrorism: Policy Reform Challenges*, 8 Migration News 10 ¶ 1 (2001), at [http://www.migration.ucdavis.edu/mn/more.php?id=2462\\_0\\_2\\_0](http://www.migration.ucdavis.edu/mn/more.php?id=2462_0_2_0).

37. *Id.* at ¶ 2.

38. *Id.* at ¶ 6.

39. See PHILIP B. HEYMAN, *TERRORISM AND AMERICA: A COMMON SENSE STRATEGY FOR A DEMOCRATIC SOCIETY* 1-2 (MIT Press 2000).

40. *Id.*

41. See Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996); see generally H.R. CONF. REP. NO. 104-518 (1996).

42. See Pub. L. No. 104-201, § 1401, 110 Stat. 2422, 2714 (1996); see generally H.R. CONF. REP. NO. 104-724 at 824-29 (1996).

43. Michael T. McCarthy, *Recent Development: USA Patriot Act*, 39 HARV. J. ON LEGIS. 435, 437 (Summer 2002).

indicated that the federal agencies' approach to combating terrorism was fragmented with very little coordination and cooperation.<sup>44</sup> Further exacerbating the problem was the fact that the intelligence community and law enforcement had inadequate resources to gather intelligence, infiltrate terrorist groups, and prevent attacks.<sup>45</sup> These reports led Congress to hold hearings on how to rectify the situation, but increased concerns over civil liberties issues resulted in little action.<sup>46</sup> Therefore, prior to September 11<sup>th</sup> the problems with the immigration system concerning terrorism were realized but there was no implementation to directly address them.<sup>47</sup>

The September 11<sup>th</sup> attacks became the catalyst in turning those abstract flaws in "terrorism preparedness" into stringent regulations. The attacks highlighted a major problem in the system of intelligence sharing between the intelligence agencies and law enforcement. These problems ultimately led to the inability of the Intelligence Community to prevent the September 11<sup>th</sup> attacks.<sup>48</sup> Two of the September 11<sup>th</sup> terrorists were affiliated with Al-Qaeda, and were under surveillance prior to 9/11 by the CIA.<sup>49</sup> The NSA also independently had knowledge of the terrorists' connections to Al-Qaeda.<sup>50</sup> Despite this critical information, the CIA did not report these findings to watch list databases, such as TIPOFF<sup>51</sup> nor did it directly notify the FBI or the INS in time to prevent their entry into the United States.<sup>52</sup> Coupled with this was the FBI's inability to obtain a search warrant for the computer of accused terrorist Habib Zacarius Massaoui<sup>53</sup> who was known to be a member of al-Qaeda.<sup>54</sup>

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44. *Id.*

45. See generally ADVISORY PANEL TO ASSESS DOMESTIC RESPONSE CAPABILITIES FOR TERRORISM INVOLVING WEAPONS OF MASS DESTRUCTION, First Annual Report to the President and the Congress (Dec. 15, 1999) and Second Annual Report to the President and Congress (Dec. 14, 2000), available at <http://www.rand.org/nsrd/terrpanel/>; see also National Commission on Terrorism, *Countering the Changing Threat of International Terrorism*, available at <http://www.access.gpo.gov/nct/index.html>.

46. Jake Tapper, *Don't Blame It On Reno*, Jan. 2, 2002, at ¶ 2-3, at [http://archive.salon.com/politics/feature/2002/01/02/reno/index\\_np.html](http://archive.salon.com/politics/feature/2002/01/02/reno/index_np.html).

47. *Id.*

48. *Id.*

49. *September 11th and the Imperative of Reform in the U.S. Intelligence Community*, (Dec. 10, 2002) (additional views of Senator Richard C. Shelby, Vice Chairman, Senate Select Committee on Intelligence), available at <http://intelligence.senate.gov/shelby.pdf> [hereinafter Shelby].

50. *Id.* at 26.

51. *Id.* at 25. (The TIPOFF program was instituted for the purpose of using biographic information drawn from intelligence products for watch-listing purposes. In August 2002, the entire TIPOFF database was made available to authorized users from the Intelligence Community and law enforcement agencies. TIPOFF contains names of suspected terrorists who are either members of foreign terrorist organizations, known hijackers, car-bombers, assassins, or hostage-takers. Currently, efforts are under way to transform the TIPOFF watch-list into National Watch-list Center).

52. McCarthy, *supra* note 43, at 438.

53. James V. Grimaldi, *With Perfect Hindsight, Some Question Decision Not to Seek Surveillance of Curious Flight Student*, WASH. POST, Oct. 8, 2001, at E13. [Moussaoui was detained by the FBI in Aug. of 2001 after his enrollment in flight school and asking for lessons on a 747 simulator on how to only fly horizontally, with no interest in takeoffs or landings].

54. *World News Tonight: FBI missed significance of Habib Moussaoui asking for flying lessons in*

The connection between these events is that both could have been prevented if the various intelligence agencies coordinated their actions and shared their respective information.

## USA PATRIOT ACT

### *Intelligence*

#### Current Problem of Information Sharing

The General Accounting Office (GAO) of the federal government recently assessed the "information sharing within and between federal, state and local agencies, and concluded that there existed tremendous communication problems.<sup>55</sup> The GAO reported that each agency (FBI, CIA, NSA, and the other intelligence agencies) had a distinct organizational culture, and there have historically been walls separating their co-existence.<sup>56</sup> Further, the GAO identified three principal problems that the agencies must resolve if they are to succeed in their war against terrorism: fragmentation, technological impediments, and ineffective collaboration.<sup>57</sup> All three of these are illustrated in one specific example: the Federal Aviation Administration (FAA) had information on a reputed terrorist, but due to the technological impediments and the inability to collaborate, this information was not directly shared with the Intelligence Community<sup>58</sup>

The U.S.'s primary response to the 9/11 terrorist attacks has been the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT ACT).<sup>59</sup> The Act was signed into law on October 26, 2001, and substantive provisions of the Act focus on intelligence gathering, intelligence sharing, and strengthening immigration enforcement against suspected terrorists.<sup>60</sup>

### *Surveillance*

As a result of this lack of investigative information collaboration, the USA

747 *flight simulator* (ABC News broadcast, Sept. 15, 2001).

55. *Counter Terrorism Information Sharing With Other Federal Agencies and With State and Local Governments and the Private Sector* 20 (Oct. 1, 2002) (reported by Eleanor Hill, Staff Director, Joint Inquiry Staff), available at [http://www.fas.org/irp/congress/202\\_hr/10102hill.html](http://www.fas.org/irp/congress/202_hr/10102hill.html) [hereinafter Hill].

56. *Id.* (specifically identifies legal walls, classification walls, and bureaucratic walls existing between the agencies).

57. *Id.* (Success is defined as national, state, and local governments working collaboratively with each other and with the federal intelligence agencies).

58. *Id.* (Terrorist bomber Ahmed Ressam had been arrested while trying to enter the U.S. from Canada with intentions of bombing Los Angeles International Airport).

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

60. *Id.* at 1005.



PATRIOT Act included provisions to revise the law enforcement/Intelligence Community coordination.<sup>61</sup> The first step was to expand the government's ability to conduct surveillance<sup>62</sup> by authorizing wiretaps for surveillance.<sup>63</sup> It also granted authority for the expansion of roving wiretaps<sup>64</sup> under the Foreign Intelligence Surveillance Act of 1978 (FISA).<sup>65</sup> The PATRIOT Act made amendments to the FSIA making it more effective in terrorist investigations by granting authority for pen registers, trap and trace devices.<sup>66</sup> This permitted the government to employ surveillance technology that could monitor email, and other types of Internet communications.<sup>67</sup> Additionally, the PATRIOT Act amended the FSIA by replacing "purpose" with "significant purpose" thereby allowing law enforcement officers to obtain FISA warrants for gathering intelligence with the intent of using it for criminal matters.<sup>68</sup>

### *Information Sharing*

The second part of the intelligence provisions deal with the sharing of this gathered information within the Intelligence Committee and with the Immigration Enforcement Agencies.<sup>69</sup> Sections 203 and 905 will aid the Intelligence Community and law enforcement in their cooperative efforts to combat terrorism.<sup>70</sup> Prior to the PATRIOT Act, a prosecutor was precluded from disclosing to law enforcement, intelligence officers, or any other official any information from federal grand jury proceedings, electronic, wire and oral communications that were intercepted.<sup>71</sup> The PATRIOT Act established guidelines permitting and even at times requiring the sharing of this information with the Intelligence Community<sup>72</sup>

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61. Shelby, *supra* note 49, at 53.

62. See USA Patriot Act, *supra* note 59.

63. *Id.* at § 201. (Congress limited these wiretaps under Title III to only antiterrorist activity).

64. *Id.* at § 206. (A roving wiretap enables government officers to monitor suspected terrorist's communications regardless of his location at time of communication).

65. *Id.* (FSIA was implemented in response to increasing national security threats from abroad, it broadened the executive branch's Title III search and seizure powers to foreign enemies); see also Mike Dowley, Note, *Government Surveillance Powers Under the USA PATRIOT Act: Is It Possible to Protect National Security and Privacy at the Same Time? A Constitutional Tug-of-War* 36 SUFFOLK U. L. REV. 165, 173 (2002).

66. USA Patriot Act, *supra* note 59, at § 214; McCarthy, *supra* note 43, at 445. (Pen registers and trap and trace devices can record the time, date, and telephone numbers of outgoing and incoming calls).

67. USA Patriot Act, *supra* note 59, at § 214; Dowley, *supra* note 65, at 178.

68. USA Patriot Act, *supra* note 59, at § 218; McCarthy, *supra* note 43, at 444.

69. See USA Patriot Act, *supra* note 59

70. *Id.* at §§ 203, 905.

71. Press Release, Department of Justice, *Attorney General Announces New Guidelines to Share Information Between Federal Law Enforcement and the U.S. Intelligence Community* (Sept. 23, 2002), available at [www.usdoj.gov/opa/pr/2002/September/02\\_ag\\_541.htm](http://www.usdoj.gov/opa/pr/2002/September/02_ag_541.htm) (Prosecutors were not permitted to disclose this information even if it indicated plan for future terrorist attack).

72. USA Patriot Act, *supra* note 59, at § 203(b)(d) (modifies grand jury secrecy roles of the Fed. R. Crim. P. 6(e)(3)(c)). (These provisions enable the FBI, CIA, and other intelligence agencies to share information related to terrorism freely, and without regard to where and how the information was gathered); see also McCarthy, *supra* note 43, at 442. The required sharing of information is predicated

This legislation has taken a leap towards dismantling the “walls” between the intelligence agencies. Through communication and cooperation, information sharing will lead to higher success rates of infiltrating terrorist organizations, apprehending suspected terrorists, and preventing future attacks.

### *Civil Liberties Concerns*

The Constitution provides the government with the necessary powers to protect the country from significant threats to national security<sup>73</sup> In this quest, legislation and executive orders have been passed which oppress civil liberties without regard for Constitutional consequences.<sup>74</sup> In the present fight against terrorism, the government should compare the PATRIOT Act against historical immigration legislation to ensure America’s freedoms.<sup>75</sup>

During World War I, the government curtailed anti-war speech.<sup>76</sup> While entering into World War II, it suspended the Japanese citizens’ liberties in the name of national security<sup>77</sup> In *Hirabayashi v. U.S.*,<sup>78</sup> the Supreme Court “upheld the constitutionality of a curfew imposed only upon Japanese-Americans” living in or near military areas.<sup>79</sup> A year later, in *Korematsu v. U.S.*, the Court further undermined the Japanese citizens’ civil liberties by upholding the forced relocation of some Japanese-Americans to internment camps.<sup>80</sup> The Court’s justification rested once again on national security and deference to certain military orders as a *wartime necessary evil*.<sup>81</sup>

Following World War II, America concentrated on its new enemy the Communists.<sup>82</sup> Citizens who were organizing, teaching, or advocating the overthrow of the United States government were convicted.<sup>83</sup> The Supreme Court upheld these convictions on the ground that free speech is not “unlimited and unqualified” when it presents a sufficient threat to America.<sup>84</sup>

The present day threat to national security is terrorism, and the government has passed the USA PATRIOT Act of 2001 to combat this danger.<sup>85</sup> Some critics have argued that this Act contains provisions that infringe on citizens’ civil

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in Title IX § 905 of the Act which includes such provision subject to the Attorney General’s establishment of standards and procedures for such sharing; see Shelby, *supra* note 49, at 59.

73. U.S. CONST., *supra* note 1.

74. See Dowley, *supra* note 65, at 174; see also Deborah Kristensen, *Finding the Right Balance: American Civil Liberties in Time of War* ADVOC., Dec. 2001 at 20-21.

75. See Dowley, *supra* note 65, at 174.

76. HUTCHINSON, *supra* note 15, at 424-425.

77. Executive Order, *supra* note 28.

78. *Hirabayashi v. U.S.*, 320 U.S. 81 (1943).

79. Dowley, *supra* note 65, at 175.

80. *Korematsu v. U.S.*, 323 U.S. 214, 218-219 (1944).

81. *Id.* at 220.

82. McCarran-Walter Act, *supra* note 31, at 184-185.

83. See *Dennis v. U.S.*, 341 U.S. 494 (1951).

84. *Id.* at 503; see also Dowley, *supra* note 65, at 176.

85. See USA Patriot Act, *supra* note 59.

liberties.<sup>86</sup> While the majority of the immigration legislation, from increased border patrol, to broadening the definition of engaging terrorist activity to expanding grounds for deportation and admissibility have been relatively unscathed by controversy, the Act's surveillance provisions have been hotly criticized.<sup>87</sup> Detractors of the PATRIOT Act argue a violation of the Fourth Amendment regarding its search and seizure provisions.<sup>88</sup> However, the Supreme Court ruled in *Warden v. Hayden* that there are exceptions to the probable cause and warrant requirements.<sup>89</sup> These exceptions include times of "exigent circumstances" where following such procedures is impractical and inapposite to policy<sup>90</sup>

Another highly attacked provision of the Act is § 213 which authorizes "sneak and peek" warrants.<sup>91</sup> This provision allows officials to conduct a search without informing the suspect until after completion.<sup>92</sup> This section further authorizes the delayed notification of electronic or physical searches if the government can prove that such notification may jeopardize the investigation.<sup>93</sup>

Though certain civil liberties may be compromised for the sake of national security, steps can be taken to ensure that the government's expansive and intrusive tools are not abused.<sup>94</sup> The foremost solution is to direct courts to narrowly construe the provisions of the PATRIOT Act, while keeping in mind the legislative intent and national security concerns.<sup>95</sup>

### *Immigration Enforcement Provisions*

Title IV of the USA PATRIOT Act is targeted towards protecting the border. Specifically subtitle A of § 402 "authorizes a tripling of the number of Border Patrol personnel, Customs personnel, and immigration inspectors" along the Northern (Canadian) border.<sup>96</sup> It also calls for increased funding for new technology<sup>97</sup> These technological innovations include granting the Immigration and Naturalization Service (INS) and the State Department access to the FBI's

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86. Emanuel Gross, *The Influence of Terrorist Attacks on Human Rights in the United States: The Aftermath of September 11, 2001*, 28 N.C.J. INT'L L. & COM. REG. 1-2 (2002).

87. *Id.* (The American Civil Liberties Union (ACLU) argues that this legislation unnecessarily sacrifices civil liberties by denying due process).

88. *Id.* at 8.

89. *Warden v. Hayden*, 387 U.S. 294, 298-99 (1967).

90. *Id.*

91. See USA Patriot Act, *supra* note 59, at § 213; Dowley, *supra* note 65, at 181.

92. Dowley, *supra* note 65, at 181.

93. *Id.*, USA Patriot Act, *supra* note 59, at § 213.

94. Dowley, *supra* note 65, at 183.

95. *Id.* at 182; see also Edward P. Ryan, Jr., *Anti-Terror Bill Threatens Liberties*, MASS. LAW WKLY. (Nov. 13, 2001) at ¶ 25, available at <http://www.masslaw.com/ryanview.htm>.

96. Rosemary Jenks, *The USA PATRIOT Act of 2001: A Summary of the Anti-Terrorism Law's Immigration-Related Provisions*, Center for Immigration Studies, 2 (Dec. 2001), at <http://www.cis.org/articles/2001/back1501.html>.

97. *Id.*

NCIC files for checking the criminal history of visa applicants.<sup>98</sup>

Additionally, the USA PATRIOT Act broadened the definition of “engage in terrorist activity” and expanded the categories of non-citizens barred from entry and increased their susceptibility to deportation for terrorist activities.<sup>99</sup> The PATRIOT Act defines a terrorist organization as two or more persons engaged in a terrorist activity<sup>100</sup> It further defines “engage in terrorist activity” to include involvement in inciting to commit a terrorist activity, “to prepare or plan” any such activity “to gather information on potential targets, to ask for financial support for terrorist activities, to commit an act that is materially related to support terrorists,<sup>101</sup> or to use or threaten to use weapons for violence against persons or property<sup>102</sup> Once a person or group is designated as being involved with terrorist activities, they are deportable for soliciting people to join it, fundraising for it, or providing support for it.<sup>103</sup>

Prior to the PATRIOT Act, only non-citizens engaging in or supporting terrorist activities were deportable.<sup>104</sup> The PATRIOT Act amends that definition to make them deportable for any connection to a terrorist organization.<sup>105</sup>

Section 411 deals with detaining suspected terrorists.<sup>106</sup> The PATRIOT Act grants the Attorney General the authority to certify aliens as terrorists and detain them if he has “reasonable grounds to believe” that they are involved in unlawful terrorist activities.<sup>107</sup> Detainment periods can now run up to six months if their removal is unlikely in the near future and their release may threaten national security or public safety<sup>108</sup> Prior to September 11, aliens who were perceived to be a threat to national security were placed in removal proceedings and detained as long as the proceedings lasted.<sup>109</sup> However, the alien was allowed to present evidence to the contrary to an immigration judge and seek his release.<sup>110</sup> Under the new, more stringent provisions, INS prosecutors can file an appeal to a release order and keep the alien detained.<sup>111</sup> In addition, the INS amended a regulation

98. USA Patriot Act tit. IV § 401-405, *supra* note 59; *see also* Memorandum from the Commissioner of the Immigration and Naturalization Service to the Regional Directors and Regional Counsel 2 (Oct. 31, 2001) (on file with the United States Dept. of Justice, Immigration and Naturalization Service) [hereinafter Memo], *available at* <http://www.bcis.gov/graphics>.

99. Arthur C. Helton & Dessie Zagorcheva, *Globalization, Terror, & the Movements of People*, 36 INT'L LAW 91, 96 (Spring 2002); *see also* Memo, *supra* note 98, at 2-3; USA Patriot Act, *supra* note 59, at § 411

100. Cole, *supra* note 7, at 12.

101. Helton & Zagorcheva, *supra* note 99, at 96.

102. Cole, *supra* note 7, at 11-12.

103. Helton & Zagorcheva, *supra* note 99 at 96.

104. Cole, *supra* note 7, at 11; *see also* USA Patriot Act, *supra* note 59, at § 411.

105. Cole, *supra* note 7, at 11; *see also* USA Patriot Act, *supra* note 59, at § 411(a)(1)(G).

106. USA Patriot Act, *supra* note 59, at § 411.

107. Helton & Zagorcheva, *supra* note 99, at 96.

108. Jenks, *supra* note 96, at 3.

109. Cole, *supra* note 7, at 12.

110. *Id.* at 12-13.

111. *Id.* at 13.

governing the detention of aliens without formal charges.<sup>112</sup> While the prior regulation required the INS to file charges within twenty-four hours of detainment, the new regulation extends this detainment period to forty-eight hours, and for an unspecified “reasonable” period beyond forty-eight hours in times of emergency.<sup>113</sup> This new legislation was passed to protect the country from those who plan activities that could “endanger the welfare, safety, or security” of the US.<sup>114</sup>

*Summary Effects of Amendments on Inadmissibility and Removal Compared to Prior Legislation*

The PATRIOT ACT enhances the government’s authority to deport or deny admission to alien terrorists.<sup>115</sup> Under the prior law, members of terrorist organizations were denied entry into the United States only if their organization was designated as one of the twenty-eight terrorist organizations under § 219 of the INA.<sup>116</sup> Under the new provisions, any persons or organizations may be inadmissible if the Secretary of State has determined them to be a political or social group who publicly endorses terrorist acts which undermines the U.S.’s efforts to thwart or eliminate terrorism.<sup>117</sup> Further, previous legislation held inadmissible only those aliens designated as members of § 219 who “knew or should have known the organization was a terrorist organization.”<sup>118</sup> The new laws expand inadmissibility to members of both § 219 designated organizations and to “any terrorist organization that the alien knows or should know is a terrorist organization.”<sup>119</sup>

Under prior law aliens who engaged in terrorist activities were deportable and inadmissible, and legislation limited the term “engaged in terrorist activity” to soliciting funds or members for a terrorist organization.<sup>120</sup> However, it did not include a working definition of a terrorist organization.<sup>121</sup> It did not clarify whether an alien’s solicitation of funds or members for a terrorist organization constituted “engaging in a terrorist activity” if the alien lacked the intent to further a terrorist activity and/or did not have knowledge he was involved in a terrorist organization.<sup>122</sup>

The new law amends these deficiencies. First, it defines that a terrorist organization can be established by: (1) designation by the Secretary of State under

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112. *Id.* at 12.

113. *Id.*

114. USA Patriot Act, *supra* note 59, at § 411(a)(1)(G).

115. *Id.* at § 411(b)(2).

116. Memo, *supra* note 98, at 4. (The Immigration and Naturalization Act § 219 designates certain organizations that are affiliated with terrorist activities).

117. *Id.*

118. *Id.* at 4-5.

119. *Id.* at 5.

120. *Id.*

121. *Id.*

122. *Id.*

§ 219: (2) after a finding that the organization (a) commits or threatens to commit a terrorist activity (b) plans or prepares for terrorist activity, (c) gathers information on potential targets for terrorist activity, or (d) gathers material support to further terrorist activities; or (3) by being a group of two or more people that (a) commits or threatens to commit a terrorist activity (b) plans or prepares for terrorist activity, (c) gathers information on potential targets for terrorist activity, or (d) gathers material support to further a terrorist activity<sup>123</sup>

Next, the law is broadened to include an alien's solicitation of funds or members for a terrorist organization, even if not intending to further terrorist activity and/or not having knowledge of the terrorist organization as constituting "engaging in a terrorist activity"<sup>124</sup>

Third, the law expands the grounds for deportation and inadmissibility. Now the government is not required to prove that an alien had a specific intent to support a terrorist activity in order to deport him or to declare him inadmissible.<sup>125</sup> Regardless of intent, if an alien is found to have supported a designated or identified terrorist organization, he is inadmissible and/or deportable.<sup>126</sup>

Finally the new laws expand the definition of "engaged in terrorist activity" and "terrorist organization."<sup>127</sup> This change results in an increase of the classes of aliens who become ineligible for other forms of relief or protection under the immigration laws.<sup>128</sup> The effected parties are those seeking an adjustment of status, a release pending deportation, and withholding of removal.<sup>129</sup>

#### ADEQUACY OF THE USA PATRIOT ACT

Though the USA PATRIOT Act implements legislation towards protecting the United States from terrorism, the question remains whether it is adequate to actually reduce or eliminate the threat. Comparing previous U.S. legislation following a threat to the culture, freedoms, and political ideologies of this country, the PATRIOT Act is not sweeping legislation. More aggressive reforms that the PATRIOT Act did not address should have been considered.

The question raised must be whether this new legislation (the USA PATRIOT Act) meets the immigration problems of today and adequately represents the immigration policy that is now necessary

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123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.* at 6.

128. *Id.*

129. *Id.*

## IMMIGRATION REFORM

*Beyond the USA PATRIOT Act*

A recent study conducted by the Center for Immigration Studies reported how foreign terrorists entered the United States.<sup>130</sup> The research revealed that foreign terrorists have employed nearly every possible means for admission. For example, some have come as tourists, students, and business travelers. Others have entered as legal permanent residents and become naturalized United States citizens, while others have simply crossed the border illegally or used false documentation.<sup>131</sup>

Further immigration enforcement problems were revealed by the fact that terrorists have illegally crossed the border, used false documentation to enter the U.S., and those who have entered legally have overstayed without any consequences by the INS.<sup>132</sup> The INS's failure in fulfilling its duties was clearly highlighted when they approved visa extensions for two of the September 11<sup>th</sup> hijackers six months following their deaths.<sup>133</sup> The attacks also revealed other deficiencies in the INS system and together these brought about further support for drastic changes.

The 2000 Census Bureau reported 114,818 illegal Middle Eastern men and women in the US.<sup>134</sup> The Census also reported that there are approximately 8.7 million illegal immigrants, twice that of 1990.<sup>135</sup> Immigration officials, such as Steven Camorata, are concerned not only with the high number of people who are residing illegally but "also with the potential terrorist attack that could result from a lax immigration policy."<sup>136</sup> The immigrant population now makes up 11.1% of the nation's population, an increase of 57% since 1990.<sup>137</sup> The INS now conducts more enforcement operations that result in greater arrests than any other law enforcement agency in the world; this is done despite an undermanned staff and an aging computer system.<sup>138</sup> September 11<sup>th</sup> brought all of these problems to the

130. Panel Discussion Transcript, *How Have Terrorists Entered the U.S.?* Center for Immigration Studies 1 (2002), available at <http://www.cis.org/articles/2002/terrorpr.html> [hereinafter Panel] (Port of entry is a technical term where legal admission occurs through inspection).

131. *Id.*

132. *Id.*

133. See Alex Johnson, *INS Extends Visas for Sept. 11 Terrorist Pilots*, MSNBC, Mar. 12, 2002, available at <http://www.usbc.org/info/everything2002/0302terrorextension.htm>.

134. Christopher Marquis, *Census Bureau Estimates 115,000 Middle Eastern Immigrants Are in U.S. Illegally*, N.Y. TIMES, Jan. 23, 2002, at A10.

135. See *id.*

136. Catherine E. Otto, Comment, *Tracking Immigrants in the United States: Proposed and Perceived Needs to Protect the Borders of the United States*, 28 N.C. J. INT'L L. & COM. REG. 477 479 (Winter 2002); see also Chitra Ragavan, *Coming to America: An Already Burdened Immigration System Faces the New Demands of Post 9/11 World*, US NEWS & WORLD REP. Feb. 18, 2002, at 16; see also Bill Gertz, *5,000 in US Suspected of Ties to al Qaeda*, WASH. TIMES, July 11, 2002, at A1.

137. Stephen Dinan, *Immigration Growth of 1990's at Highest Rate in 150 Years*, WASH. TIMES, June 5, 2002, at A3.

138. Ragavan, *supra* note 136, at 16 (Yearly estimates are 50,000 criminal investigations, greater

surface and the federal government acknowledged that in its current state, the INS could not meet its demands.<sup>139</sup>

Subsequently, the PATRIOT Act concentrated some of its most important immigration provisions on intelligence sharing which will ultimately enhance the resources available to the Border Patrol and the Consulate officers to effectively address these problems.

### *Border Patrol*

One of the major areas identified as a port of entry for foreign terrorists is the United States' border.<sup>140</sup> Controlling the border is an integral step in countering terrorism; if terrorists cannot enter the country, they cannot commit an attack. The Immigration Border Patrol is "the guardian of the frontier[.]" as it provides the first line of defense against entry.<sup>141</sup> The Border Patrol's primary responsibility is to prevent the surreptitious entry of aliens through land or the coastal boundaries.<sup>142</sup> The Border Patrol is also responsible for preventing the smuggling of aliens into the United States, and to apprehend those who have immigrated illegally.<sup>143</sup>

In 2000, the Border Patrol apprehended 1.6 million persons for unauthorized entry, but a large, undetermined number of aliens eluded the Border Patrol and entered the country.<sup>144</sup> These enormous numbers detail the magnitude of the problem. One possible solution is to increase the manpower and infrastructure at the borders.<sup>145</sup> A 2000 report indicated a total of 9,000 agents, and only 1,700 agents on duty on any given shift at the southern border, which is an average of less than one agent per one mile.<sup>146</sup>

Another striking example of the U.S.'s lax immigration enforcement concerned the U.S.-Canadian border. Many terrorist cells operating in the U.S. have bases in Canada.<sup>147</sup> Prior to September 11<sup>th</sup> Millennium bomber Ahmed Ressam was arrested as he tried to cross the U.S.-Canadian border with ingredients for a homemade bomb to attack Los Angeles International Airport.<sup>148</sup> This arrest sparked discussion about possible solutions to the unguarded border, but no

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than 1,000 arrests, 300,000 court cases, and 175, 000 deportation hearings resulting in 1,200 deportations weekly).

139. Otto, *supra* note 136, at 485.

140. Panel, *supra* note 130.

141. Maro T Noto, *Travel & Domestic Control*, 367 ANNALS OF THE AMERICAN ACADEMY OF POLITICAL & SOCIAL SCIENCES (Sept. 1996).

142. *Id.*

143. *Id.*

144. Martin & Martin, *supra* note 36, at 4.

145. Mark Krikorian & Steven A. Camarota, *Immigration and Terrorism: What Is To Be Done?* Center for Immigration Studies, 7 (Nov. 2001), at <http://www.cis.org/articles/2001/back1601.html>.

146. Steven A. Camarota, *Immigration and Terrorism: Testimony Prepared for U.S. Senate Committee on the Judiciary*, 9 (Oct. 2001), at <http://www/cis.org/articles/2001/sactestimony1001.html>.

147. See Scripps Howard News Service, *Porous Border a Terror Concern*, CINCINNATI POST, Sept. 29, 2001, available at: <http://www.cincypost.com/2001/sep/29/border092901.html>.

148. Jonathan Dube, et.al., *Massive Manhunt Under Way*, ABC NEWS, available at: <http://www.abcnews.go.com/sections/us/DailyNews/canada991220.html>.



decisive action was implemented.<sup>149</sup> After September 11<sup>th</sup> investigators reported that as many as five of the nineteen terrorists slipped across the Canadian border, including the cell's ringleader, Mohammad Atta.<sup>150</sup> September 11<sup>th</sup> sparked further inquiry into the border problems, revealing staggering statistics. There are an estimated 3 million foreigners who overstayed their visas, but there is a lack of personnel to adequately patrol the border and track down these persons.<sup>151</sup> This prompted Congress and the President to take a closer look at how to secure the border, which is addressed by the PATRIOT Act.

A straightforward solution to this problem would be to increase the number of patrolling agents and inspection points.<sup>152</sup> The PATRIOT Act addresses this concern by authorizing the tripling of Border Patrol Agents.<sup>153</sup> However, this increase in the number of agents is only the first step. The Act should have gone into further detail outlining improved training guidelines and timelines for implementation.

In attempting to implement the increase in Border Personnel, the PATRIOT Act led to the enactment of the Border Security Act of 2002,<sup>154</sup> effectively giving "teeth" to the PATRIOT Act's provisions. Primary benefits of the Act are on the Border Patrol, visa issuance, and foreign student and exchange programs.

First, there is an appropriation of \$150 million to the INS and Customs Service towards implementing an interagency electronic database, machine-readable visas with biometric identifiers, and a computer system for monitoring foreign students.<sup>155</sup> Currently there are three technological endeavors: (1) the Enterprise Architecture, (2) the Student Exchange Architecture Information System (SEVIS), and (3) the Data Management Improvement of 2000.<sup>156</sup> The integration of these databases will provide federal law enforcement and intelligence agencies with relevant information to deportation proceedings and visa issues.<sup>157</sup> This will directly aid the increased Border Patrol agents and all other law enforcement and intelligence personnel to identify and investigate suspected

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149. Dean Patton, *Along U.S. Border, Problems Rise*, CHRISTIAN SCIENCE MONITOR, Sept. 22, 2000, available at: <http://www.search.csmonitor.com/durable/2000/09/22/p3s1.htm>.

150. See Scripps Howard News Service, *supra* note 147.

151. Cheryl N. Thompson, *Reorganization, Anti-Terrorism Effort Keeping INS Chief Busy*, WASH. POST, Jan. 21, 2002, at A15.

152. Krikorian & Camarota, *supra* note 145, at 7.

153. See USA Patriot Act, *supra* note 59 at § 402.

154. See Border Security Act of 2002, Pub. L. No. 107-173, 102, 116 Stat. 543, 546 (2002) (codified as amended at 8 U.S.C.A. 1712).

155. *Id.*

156. See Bureau of Citizenship and Immigration Services (formerly US Dept. of Justice Immig. & Nat. Service), Oct. 2002, at 8, available at <http://www.bcis.gov>. (The Enterprise Architecture was mandated in 2000 and it is "the long-term, strategically oriented approach to accomplishing the information driven aspects of the INS mission. The SEVIS provides information on student visas. The Data Management Improvement Act was enacted to develop an integrated, automated entry-exit data collection system. Further, the immigration inspectors' now have access to the National Crime Information Center (NCIC) to identify criminal aliens prior to their arrival).

157. Otto, *supra* note 136, at 499.

terrorists.<sup>158</sup>

### *US Consulate and Visa Issues*

#### Consular Affairs

All of the September 11<sup>th</sup> 2001 hijackers presented apparently valid travel documentation at U.S. ports of entry<sup>159</sup> Therefore, it is imperative to have closer scrutiny of who is granted access to enter the country (in terms of visa issuance to foreigners abroad, and inspection of foreign nationals at U.S. ports of entry).<sup>160</sup> Inspection controls function to protect the national interest.<sup>161</sup> It involves the examination of persons seeking entrance into the United States from foreign territories through ports of entry<sup>162</sup> The United State's inspection policies are to screen out undesirable aliens who may be involved in criminal or subversive activities or other objectionable conduct.<sup>163</sup>

Entry into the United States is a privilege and not a right, and is granted at the discretion of the members of the Consular Affairs.<sup>164</sup> Currently the Consular Affairs lack the manpower and tools to meet the tremendous load of applications. In 2000, almost 10 million foreigners applied for visas, for which there were only some 1100 consular officers, many young professionals just beginning their foreign services careers.<sup>165</sup> This results in consulate officers having very limited time to review each application.<sup>166</sup> In a recent panel discussion on immigration and terrorism, a former foreign services agent stated that approximately only one-fifth of all non-immigrant visa applicants are interviewed. To further exacerbate the problem, the State Department is moving towards "drop boxes, group applications via travel agencies and other ways to avoid having to actually look at people who are asking for permission to enter."<sup>167</sup> Adding to this challenge is the defective evaluation system whereby visa officers are assessed by the number of interviews they conduct daily<sup>168</sup>

One solution is to implement a biometric identification system. The initial need to include biometric identifiers in border security enforcement was realized as a result of the September 11<sup>th</sup> attacks, and a further push was spurred by the confusion in identifying Richard Reid, a Briton attempting to smuggle a shoe-

158. Mark Bixler, *War on Terrorism: Tracking Foreign Students Gains Renewed Interest Once Stalled Project in Atlanta Being Developed by INS*, ATLANTA J. & CONST., Jan. 7, 2002, at A5.

159. Martin & Martin, *supra* note 36, at 1.

160. *Id.* at 3.

161. Noto, *supra* note 141, at 78.

162. *Id.*

163. *Id.*

164. Martin & Martin, *supra* note 36, at 2.

165. *Id.*

166. *Id.* at 2-3.

167. Panel, *supra* note 130, at 4.

168. Camarota, *supra* note 146.

bomb onto an airplane destined for Miami.<sup>169</sup>

The first biometric identification system, named “IDENT” was piloted in 1995 in California.<sup>170</sup> It contained a database with thousands of criminal records.<sup>171</sup> By 1996, IDENT was implemented at thirty-four sites along the U.S. Mexican border.<sup>172</sup> The results were astounding; within the first few months over 3,000 criminal aliens who were attempting entry into the U.S. were identified.<sup>173</sup> Implementing a system similar to IDENT (one which compares the individual features of a visa applicant to those who actually appear at ports of entry by using unique technologies such as fingerprinting, retinal scans, or hand geometry<sup>174</sup>) could have a significant effect on stopping terrorists at U.S. borders. The Border Security Act of 2002 requires biometric identifiers on all visas and passports that American consulates issue to foreign travelers.<sup>175</sup>

Such a system would create an electronic file on each issued visa applicant that would be available to inspectors at the U.S. ports of entry prior to an alien’s arrival. This information and technology can then be employed by the INS to develop and implement an entry/exit system to track aliens as they enter and exit the country

#### Entry/Exit System

However, even with increased officers, the right tools are needed to keep the terrorists out. The Consular Lookout and Support System (CLASS) currently is the primary tool in flagging terrorists.<sup>176</sup> CLASS is a “watch list” of suspicious people who should be inadmissible.<sup>177</sup> However, this system is flawed since it is based solely on names and not on a “biometric identifier” such as a fingerprint, resulting in terrorists sneaking into the country<sup>178</sup>

The PARTIOT Act addresses this issue by requiring the Department of Justice and FBI to provide the INS and the State Department information from its National Crime Information Center (NCIC). The Act also included a provision to assess the possibility of enhancing the FBI’s Integrated Automated Fingerprint

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169. See Jonathan Peterson, *Digital Images Will Verify Identity of Visitors to US*, L.A. TIMES, Jan. 2, 2002. (Reid attempted to smuggle a bomb onto a Miami-bound airplane).

170. See BUREAU OF CITIZENSHIP & IMMIGRATION SERVICES, *Inspector General Report on Resendez-Ramirez/INDENT* Mar. 20, 2000, available at: <http://www.immigration.gov/graphics/publicaffairs/statements/igstate.htm>.

171. *Id.*

172. Bryan Paul Christian, *Visa Policy, Inspection and Exit Controls: Transatlantic Perspectives on Migration Management*, 14 GEO. IMMIGR. L. J. 215, 220 (1999).

173. *Id.*

174. *Id.*

175. See Enhanced Border Security and Visa Entry Reform Act of 2002, Pub. L. No. 107-173, § 303(b)(1), 116 Stat. 543, 553 (codified as amended at 8 U.S.C.S. 1732); see also Otto, *supra* note 136, at 501-02.

176. Krikorian & Camarota, *supra* note 145, at 3.

177. *Id.*

178. *Id.*

Identification System.<sup>179</sup> This is a promising start, but to be effective, the process should begin with the visa applicant's fingerprints being digitally scanned into an integrated system which all other agencies have access.<sup>180</sup> There should be a single file for each applicant that is checked against all "watch lists, and that file should stay with them until they leave, when their fingerprints should be once again scanned.<sup>181</sup> This would create an entry/exit system which would provide adequate checks on when a person entered the country, exited the country, and when they were supposed to leave. It would also serve other purposes: such as providing an effective way of excluding aliens on the "watch list" it would solidify the identification system, ensuring that the person who entered the country was the same one issued the visa; it would further prevent fraud by making it nearly impossible for a person to go from consulate to consulate using different identities; and it would deter would be terrorists who would be reluctant to give their fingerprints.<sup>182</sup>

This entry/exit system could also be implemented for tracking foreigners in the United States on student visas. In 2000, about 284,000 foreigners received student visas.<sup>183</sup> The major concerns for consulate officers in determining whether to issue a visa is the foreigner's financial status (whether the foreigner has sufficient funds to live and study in the U.S.) and their likelihood of returning to their native country.<sup>184</sup> Prior to September 11<sup>th</sup> 2001, legislation had been passed but not enforced regarding the tracking of foreign students.<sup>185</sup> Universities were supposed to cooperate with the State Department and the INS with details of a foreign student's activities (such as registration of classes, attendance, grades, etc.); however few schools complied and most blocked its implementation.<sup>186</sup>

#### Foreign Student and Exchange Visitors

The need for improvement in the INS's tracking ability of foreign students became apparent post September 11<sup>th</sup> when evidence revealed that two of the hijackers were living in the U.S. on student visas. One of the terrorists, Hani Hamjour, had apparently entered the U.S. on an F-1 student visa in December 2000.<sup>187</sup> He however never attended school, nor did the school notify the INS of his absence.<sup>188</sup> The other hijacker, Mommad Atta, who was believed to be the leader, was granted permission to switch his visa status to that of a student because he was taking flying lessons.<sup>189</sup> These examples illustrate the necessity for

179. USA Patriot Act, Pub. *supra* note 59, at §§ 403, 405, 15 Stat. 272, 343 (2001).

180. Krikorian & Camarota, *supra* note 145, at 12.

181. *Id.*

182. *Id.* at 4.

183. Martin & Martin, *supra* note 36 at 5.

184. *Id.*

185. *Id.*

186. *Id.*

187. Federation for American Immigration Reform, Issue Brief: World Trade Center and Pentagon Terrorists' Identity and Immigration Status, available at: <http://www.fairus.org/html/04178101.htm>.

188. See Ragavan, *supra* note 136.

189. See *id.*

tracking foreigners on student visas. Another problem was the lack of cooperation from schools to provide and report information of these students to the appropriate authorities.<sup>190</sup> Post September 11<sup>th</sup> has shown a strong willingness from these institutions to comply with the reporting requirements. However, even with school reports of a student's absence, the INS previously did not have a system in place to effectively track these missing students.<sup>191</sup>

Following September 11<sup>th</sup> (since it was found that some of the terrorists entered the U.S. on student visas), the Student and Exchange Visitor Program tracking system is expected to be fully functional with the cooperation of all universities.<sup>192</sup> A further, but more extreme approach could be to revive the 1940 Alien Registration Act, requiring all non-citizens living in the U.S. to annually register their residential address with the State Department and INS.<sup>193</sup> Such a policy could be easily implemented if the foreigner's fingerprints and other relevant information are already in an automated, integrated file, where they could be tracked. These methods of an entry/exit system, fingerprinting, and the registration requirements could serve as a deterrence for future terrorists from another route of entry into U.S., and would help in the identification and monitoring of current foreigners who may be suspected of terrorist activities.

Since the enactment of the PATRIOT Act, the INS has recently admitted that it still does not know the number of foreign students who have overstayed their visas, nor have they been successful in tracking these over-stayers.<sup>194</sup> Additionally, of the 547,000 student visas in the U.S., officials report that they do not know if these people are actually attending school.<sup>195</sup>

These alarming statistics provide further support for the need to implement the biometric identifiers with alacrity. One criticism of the biometric identification system is the fear that it will lead to a national identification (ID) cards that may impinge on privacy rights.<sup>196</sup> There have been scattered reactions on this issue, and further research must be conducted through detailed surveys with legal experts to determine its legality and its potential effects on U.S. citizens. Until then, the government stands by its position that the "U.S. must make every effort to reduce the possibility of terrorist attacks in the future[.]"<sup>197</sup> and implementing a biometric identification system is a critical step in revamping the immigration system to achieve this result.

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190. Martin & Martin, *supra* note 36 at 5.

191. *Id.*

192. *Id.*

193. Krikorian & Camarota, *supra* note 145, at 9.

194. See Ragavan, *supra* note 136.

195. Kate Zernicke and Christopher Drew, *Efforts to Track Foreign Students Are Said to Lag*, N.Y. TIMES, Jan. 28, 2002, at A1.

196. Robert O'Harrow, Jr. and Jonathan Krim, *National ID Card Gaining Support*, WASH. POST, Dec. 17 2001 at A1.

197. See Otto, *supra* note 136, at 517 (quoting Commissioner Ziglar).

### *Targeting Specific Countries*

A review of U.S. immigration policy demonstrates evidence of racial discrimination in certain times of U.S. history. Clearly Immigration and Naturalization has been unfairly denied to members of certain ethnic groups.<sup>198</sup>

The Chinese Exclusion Act barred Chinese peoples from 1882 until the Act was repealed in 1943.<sup>199</sup> Similarly, the Asiatic Barred Zone clause of the 1917 Act excluded southeastern Asians except the Japanese.<sup>200</sup> The Japanese suffered from a limited immigration policy since the 1907 Gentleman's Agreement.<sup>201</sup> These were explicit legislative acts, but legislative history also shows exclusion of certain immigrant groups without formal legislation, as was evidenced during World War I and World War II against the Germans, Communists, and the Japanese.<sup>202</sup>

If one were to apply precedent to the current problem of terrorism, there is a strong argument for more thorough screening for applicants from certain countries, and an extreme argument to exclude all enemies of the United States. The USA PATRIOT ACT now grants the INS the authority to "prohibit[] the admission of an alien from a country designated to be a state sponsor of international terrorism (as defined by [the PATRIOT] Act) unless the Secretary of State has determined that such individual does not pose a risk or security threat to the U.S."<sup>203</sup> However, it does not extend this restriction to those countries that are not designated as state sponsors of terrorism; it only provides legislation to deny entry to individuals from any state that may be associated with terrorism.<sup>204</sup> Further steps should be taken to safeguard against the entry of terrorists on U.S. soil.

### *Increased Screening*

The PATRIOT Act is not the first attempt to combat terrorism. In 1996, the Anti-Terrorism and Effective Death Penalty Act (AEDPA) was passed.<sup>205</sup> The AEDPA resulted in the increased screening of certain groups suspected of terrorism.<sup>206</sup> The Immigration and Nationality Act (INA) granted officers broad power to interrogate suspected aliens as to their right to remain in the U.S.<sup>207</sup> The

198. See Chinese Exclusion Act, ch. 126, 22 Stat. 214 (1882), 47th Cong.; Immigration Act of Feb. 5, 1917, ch. 29, Pub. L. No. 301, 39 Stat. 874; Alan M. Kraut, *Records of the Immigration and Naturalization Service*, Nov. 1995, available at: <http://www.lexisnexis.com/academic/guides/immigration/ins/insa1.asp>.

199. See Chinese Exclusion Act, *supra* note 198.

200. See Immigration Act, *supra* note 198.

201. See Kraut, *supra* note 198.

202. Regarding the Palmer Raids, Japanese internment camps, and the stifling of speech of any anti-American sentiment.

203. Enhanced Border Security and Visa Entry Reform Act of 2002, Pub. L. No. 107-73, § 306, 116 Stat. 543 (2002) (codified as amended at 8 U.S.C.A. 1735).

204. See Memo, *supra* note 98, at 4-5.

205. Adrienne R. Bellino, *Changing Immigration for Arabs With Anti-Terrorism Legislation: September 11th Was Not the Catalyst*, 16 TEMP INT'L & COMP L. J. 123-24 (Spring 2002).

206. *Id.*

207. *Id.* at 129.

USA PATRIOT Act perpetuates this by granting visa officers, the Attorney General, and other INS agents broad power to check suspected alien terrorist.

However, visa officers should be granted more responsibility and power as they are the first step in keeping alien terrorists out of the U.S. They should be empowered to deny admission to people who are enemies of America, but have not yet engaged in terrorist activities.<sup>208</sup> There are citizens from countries whose government do not sponsor terrorism, yet who have come here and engaged in terrorist activities.<sup>209</sup> Applicants from such countries should be subject to much stricter screening, including an exhaustive security clearance.<sup>210</sup> In addition, visa issuance should be restricted to U.S. consulates in their home country not consulates outside of their home state.<sup>211</sup> There is nothing unprecedented about these actions of country specific temporary visa policies.<sup>212</sup> Despite some objections to this proposal, it is important to remember that immigration into the United States is a privilege and not a right, subject to the provisions prescribed by the country

#### CONCLUSION

The surveillance and information sharing provisions of the PATRIOT Act provide a strong base to rectify the current problems of the system. However, the immigration enforcement legislation lacks sufficient mandates to adequately combat the threat of terrorism. To effectively reform immigration policy, changes have to be flexible and broadly based with regards to a wide range of considerations on both the national and international fronts, and in harmony with other elements of national policy. The current national threat of terrorism must be dealt with immigration reform that significantly enhances national security. Though the reforms implemented during World War I, World War II, and against the Communists (from internment, to registration, to stifling free speech) are outdated, extreme, and egregious more aggressive measures (through increased information gathering and sharing and implementing a biometric identification system) may need to be considered to effectively combat terrorism.

One concern about the implementation of these modifications is their potential effect on intelligence gathering. While legislative acts that expand the government's ability to conduct surveillance from roving wiretaps to internet communications, to expanding the immigration enforcement capabilities through increased screening and biometric identification, may lead to short-term success in capturing terrorists, they may have negative effects in the long-term. Some experts believe that intelligence gathering is based on the "penetration of trust" between

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208. Krikorian & Camarota, *supra* note 145, at 4.

209. *Id.*

210. *Id.*

211. *Id.* (This is because an American visa officer stationed in a particular country is more familiar to identify and deal with problems concerning an applicant from that area than are other officers stationed elsewhere).

212. Camarota, *supra* note 146.

parties, and these provisions may lead to distrust, ultimately making penetration of future attacks extremely difficult.<sup>213</sup> The standard seems to be based on a reasonable person argument, where it is logical that those who we need information from will not be willing to cooperate if they are the same people we are targeting. This raises the issue of proportionality and the government must determine how stringently these provisions should be administered. There must be a balance achieved between alleviating the current fear and threat of terrorism and sustaining covert relations to prevent future attacks.

While it may be too soon to reach definitive conclusions as to the effectiveness of the PATRIOT Act, preliminary results show improvement in the immigration system as a whole. The intelligence gathering and sharing provisions have led to the capture of Khalid Shaikh Mohammed, believed to be one of the top five leaders of al-Qaeda. Mohammed was captured in Pakistan, and has been identified as the "mastermind" behind the September 11<sup>th</sup> attacks.<sup>214</sup> He has also been linked to terrorist plots in Europe and Asia. In addition, over 400 al-Qaeda members have been detained worldwide, including an al-Qaeda field operations commander and the head of a hijacker's cell in Germany.<sup>215</sup>

It is hopeful that similar results will be seen with the implementation of the enhanced law enforcement provisions (the increase in Border Patrol personnel, the implementation of the biometric identification system, and the entry/exit system), but not at the expense of future intelligence gathering. With the changes in the INS's function and its move into the Department of Homeland Security, quantifiable results may not be seen for a few years, but the changes in place seem to be a step in the right direction. As long as the fight against terrorism remains a top priority, Congress is likely to legislate and implement the necessary resources to achieve its goal of eliminating terrorism and protecting the American people.

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213. Interview with Prof. Keely (quoting Vince Canistraro at the 26th Am. Legal Conf. at the Center for Migration Studies in New York), 2003.

214. Bill Gertz, *Bin Laden Aide Mastermind of Terror Plots*, WASH. TIMES, Mar. 2, 2003, at A1.

215. See Muazzam Gill, *Weighing Big Catch in War on Terrorism*, WASH. TIMES, Mar. 23, 2003, at B4.