PRESSING PUBLIC NECESSITY: THE UNCONSTITUTIONALITY OF THE ABSCONDER APPREHENSION INITIATIVE

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At approximately 5:30 a.m. on August 22, 2002, Mr. M. heard loud knocking on the front door of his family's apartment in Brooklyn, New York.[1] Mr. M., a Pakistani immigrant who lived with his U.S. citizen wife and two U.S. citizen children, went to the door to see who would disturb his home at such an early hour. When he answered the door, he was greeted by armed agents of the Federal Bureau of Investigation ("FBI"), agents of the Immigration and Naturalization Service ("INS"), and several New York City police officers. With guns raised, the law enforcement officers demanded that Mr. M. produce identification. While his entire family watched, Mr. M. was arrested and quickly taken away to a detention center in Manhattan, where he was fingerprinted and briefly interrogated regarding his knowledge of terrorists and terrorism. He was then transferred to a New Jersey county jail, and deportation proceedings began immediately.

In a similar incident, on April 24, 2002, in High Point, North Carolina, Mohammed Israr Khan was arrested at his workplace for failing to leave the country after an immigration judge had previously denied his asylum application and ordered his deportation.[2] Despite the fact that the INS recognized his subsequent marriage to a U.S. citizen as valid, the government refused to reopen his immigration case. Six weeks later, he was placed on a plane and deported to Pakistan.

I. INTRODUCTION

The above stories share two important things in common: first, the individuals were present in the United States at the time of their arrest, despite an outstanding final order of deportation against them; and second, the individuals

1. Mr. M., whose name has been withheld out of respect for his privacy, granted the author permission to use details of his post-September 11 experience in this article.

2. *See* MUZAFFER A. CHISHTI, ET AL., MIGRATION POLICY INSTITUTE, AMERICA'S CHALLENGE: DOMESTIC SECURITY, CIVIL LIBERTIES, AND NATIONAL UNITY AFTER SEPTEMBER 11, app. B, at 154–55 (2003) [hereinafter MPI REPORT]; Stan Swofford, *Family Torn as Father Is Deported: A High Point Man Is Sent Back to Pakistan*, GREENSBORO NEWS & RECORD (N.C.), June 20, 2002, at A1. The MPI Report, published in June 2003, is a comprehensive study of the aftermath of September 11. It includes profiles of over four hundred individuals who were detained by the government after September 11.

were targeted by the INS[3] for armed raids, interrogation, and deportation because, among the hundreds of thousands of similarly situated immigrants, they were Arab and Muslim men. They were targets of the Absconder Apprehension Initiative ("AAI"), a program announced by Deputy Attorney General Larry Thompson in January 2002 and designed to locate, apprehend, interview, and deport approximately 314,000 people described as "absconders" or "alien fugitives."[4] Absconders are individuals who have been ordered deported by an immigration judge but who, for a variety of reasons ranging from having strong family ties in the United States, to fearing persecution in their nation of origin, to being honestly ignorant that they had been ordered deported, have failed to comply with the judge's final order by remaining in the United States.[5]

The government did not intend, however, to pursue all 314,000 absconders equally. Rather, the government declared that it would initially target thousands of "priority absconders"[6] who "come from countries in which there has been Al Qaeda terrorist presence or activity."[7] The result was an egregious, government-

3. The Homeland Security Act of 2002 transferred functions of the INS to the new Department of Homeland Security, and on March 1, 2003, the INS was officially abolished. Now, immigration enforcement functions are either directly under the domain of the Directorate of Border and Transportation Security ("BTS") or under Customs and Border Protection ("CBP") (which includes the Border Patrol and INS Inspections) or Immigration and Customs Enforcement ("ICE") (which includes the enforcement and investigation components of the INS). *See* Homeland Security Act of 2002, Pub. L. No. 107-296, §§ 401–478, 116 Stat. 2135, 2176–2212 (codified as amended in scattered sections of 6 U.S.C.). I continue to refer to the INS because the intact agency oversaw the implementation of the alien absconder programs discussed in this article.

4. Memorandum from Larry Thompson, Deputy Attorney General, to the INS Commissioner, the FBI Director, the U.S. Marshalls Service Director, and U.S. Attorneys, § A, at 1 (January 25, 2002), *at* http://news.findlaw.com/hdocs/docs/doj/abscndr012502mem.pdf [hereinafter AAI Memo]. *See also* The Regulatory Plan, 67 Fed. Reg. 74,158 (Dec. 9, 2002) (noting launch of the AAI); Neil A. Lewis, *A National Challenged: Immigration Control—I.N.S. to Focus on Muslims Who Evade Deportation*, N.Y. TIMES, Jan. 9, 2002, at A12. The 314,000 figure cited is an estimate by the government contained in the AAI Memo. The number of absconders continues to grow: current estimates put the figure at over four hundred thousand. *Law Enforcement Efforts within the Department of Homeland Security: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Sec. of the House Comm. on the Judiciary*, 108th Cong. 17 (2004) (statement of Michael Garcia, Assistant Secretary, Bureau of Immigration and Customs Enforcement, Department of Homeland Security).

5. When an immigration judge orders the deportation of an individual and that individual is not being detained by the ICE, she is typically given ninety days to comply with that order and leave the country. *See* Immigration and Nationality Act (INA) § 241(a)(1)(A), 8 U.S.C. § 1231(a)(1)(A) (2000). Although the statute calls for detention, many aliens are not detained and are given the option of self-removal under 8 C.F.R. § 241.7, either by INS discretion or by their grant of voluntary departure. *See* INA § 240B, 8 U.S.C. § 1229c (2000). As mentioned, many decide to stay despite the deportation order. For decades before September 11, the odds of staying in the country without detection by the INS were heavily in the individual's favor. However, focused programs such as the AAI and strategies such as entering civil immigration violations into national criminal databases have increased the likelihood that absconders will be found.

6. *See infra* Section III for a discussion of the meaning of this phrase.

7. The AAI Memo notes that among the thousands of absconders "is a group of fewer than a thousand, many of whom appear to be convicted felons, who will constitute the first list of absconders we will . . . investigate." AAI Memo § A, *supra* note 4, at 1.

directed roundup consisting overwhelmingly of Muslim and Arab individuals. By May 2003, over eleven hundred alleged absconders had been arrested, and over two-thirds of them deported.[8] In that same month, the government changed the priorities of the AAI with the announcement of the National Fugitive Operations Initiative.[9] Now, those absconders who had been convicted of committing serious crimes in the country moved to the top of the list.[10] This article will focus on Phase I of the AAI—the period between January 2002 and May 2003—when the announced target was Arab and Muslim individuals.

In this article, my objection to the AAI does not arise from a belief that the profiling of Arab and Muslim individuals as terrorists, potential terrorists, or friends of terrorists is an ineffective tool of law enforcement. Other commentators have persuasively made this case.[11] Rather, I argue that prioritizing the arrest, detention, interrogation and deportation of a few thousand Arab and Muslim men from a group of over three hundred thousand similarly-situated individuals was unconstitutional. This conclusion stems from two principles. First, Supreme Court jurisprudence establishes that classifications based on race, ethnicity, and national origin receive strict scrutiny, and that selective enforcement driven by discriminatory purpose or resulting in discriminatory effect is impermissible.[12] Indeed, only the discredited rationalizations of the Supreme Court's infamous decision in *Korematsu v. United States* squarely support the govern-

8. *War on Terrorism: Immigration Enforcement Since September 11, 2001: Hearing before the Subcomm. on Immigration, Border Sec., and Claims of the House Comm. on the Judiciary*, 108th Cong. 14 (2003) (statement of Michael Dougherty, Staff Director of Operations, Bureau of Immigration and Customs Enforcement, Department of Homeland Security) (reporting that over two-thirds of 1139 individuals arrested pursuant to the Absconder Apprehension Initiative have already been deported).

9. Press Release, U.S. Citizenship and Immigration Services, ICE Unveils "Most Wanted" Criminal Aliens List (May 14, 2003), *at* http://www.uscis.gov/graphics/publicaffairs/newsrels/mostwanted.htm.

10. If the INS had prioritized the apprehension of absconders on this basis from the beginning, there would probably be nothing unconstitutional about its tactics. However, as will be argued later, by choosing to proceed first on the basis of race and national origin, the government acted unconstitutionally.

11. DAVID COLE, ENEMY ALIENS: DOUBLE STANDARDS AND CONSTITUTIONAL FREEDOMS IN THE WAR ON TERRORISM 183–97 (2003); Christopher Edley, Jr., *The New American Dilemma: Racial Profiling Post-9/11*, *in* THE WAR ON OUR FREEDOMS: CIVIL LIBERTIES IN AN AGE OF TERRORISM 170 (Richard C. Leone & Greg Anrig, Jr. eds., 2003); Tanya E. Coke, *Racial Profiling Post-9/11: Old Story, New Debate*, *in* LOST LIBERTIES: ASHCROFT AND THE ASSAULT ON PERSONAL FREEDOM 91 (Cynthia Brown ed., 2003). Together, these analyses demonstrate that profiling is (1) based on a tenuous factual premise that race, religion, ethnicity and/or national origin correlate with terrorism, (2) ineffective as compared to other strategies, such as carefully watching behavior at increasing hit rates, (3) counterproductive in that it alienates members of the overbroadly targeted community of people, and (4) an institutionalization of prejudice. *But see* William J. Stuntz, *Local Policing After the Terror*, 111 YALE L.J. 2137, 2142 (2002) ("[T]here is nothing new about, and nothing wrong with, the claim that after September 11 law enforcement authority should increase.").

12. *See, e.g.*, United States v. Armstrong, 517 U.S. 456, 465 (1996). *See also infra* Section III.B.3. Classifications based on religion also receive strict scrutiny, but this paper does not explore the religious component of the AAI.

ment's priority targeting of Arab and Muslim men for deportation following the September 11 attacks.[13] Second, strict scrutiny applies because the AAI was, in design and implementation, fundamentally a tool of domestic criminal law enforcement. Effectuating domestic law enforcement under the guise of immigration law enforcement should not and does not cure unconstitutionality. Finally, I argue that even if the AAI is considered immigration law enforcement, prioritizing enforcement based on race and national origin remains unconstitutional.

II.
THE ABSCONDER APPREHENSION INITIATIVE AND OTHER POST–SEPTEMBER 11 PROGRAMS

> We must not descend to the level of those who perpetrated [September 11's] violence by targeting individuals based on race, religion or national origin.
>
> —Attorney General John Ashcroft[14]

I watched from my Greenwich Village bedroom window as a commercial airliner exploded into the South Tower of the World Trade Center on the morning of September 11, 2001, and stood dumbstruck as the two colossal buildings crumbled in turn. The "War on Terrorism" quickly followed as the United States sought retribution for that day's terrible acts of violence and moved on dozens of fronts, domestic and abroad, to capture the perpetrators and to prevent future similar attacks.

Immediately after September 11, the Bush Administration cautioned against racist acts directed at Arabs and Muslims living in the United States. On September 13, President Bush counseled, "We must be mindful that, as we seek to win the war, we treat Arab-Americans with the respect they deserve."[15] That same day, Attorney General John Ashcroft declared in a press conference that "[w]e must not descend to the level of those who perpetrated Tuesday's violence

13. In *Korematsu v. United States*, 323 U.S. 214 (1944), the Supreme Court declared constitutional an internment program during World War II that sent over 110,000 Japanese-Americans, including some seventy thousand United States citizens of Japanese descent, to isolated desert camps. While the Court said that classifications on the basis of race and national origin generally receive the most stringent judicial scrutiny, it deferred to the government's national security rationale and upheld the internment. *Id.* at 223. For a historian's account of the internment, *see* ROGER DANIELS, PRISONERS WITHOUT TRIAL: JAPANESE AMERICANS IN WORLD WAR II (1993). For a first-hand account written by an internee, *see* JEANNE WAKATSUKI HOUSTON & JAMES D. HOUSTON, FAREWELL TO MANZANAR: A TRUE STORY OF JAPANESE AMERICAN EXPERIENCE DURING AND AFTER THE WORLD WAR II INTERNMENT (1973).

14. Federal News Service, *Press Conference with Attorney General John Ashcroft and FBI Director Robert Mueller, Statement of John Ashcroft* (Sept. 13, 2001) [hereinafter *Ashcroft Press Conference*].

15. *Bush Warns Against Arab American Backlash*, BBC NEWS, Sept. 13, 2001, *at* http://news.bbc.co.uk/1/hi/world/americas/1540371.stm.

by targeting individuals based on race, religion or national origin."[16] Michael Chertoff, Assistant Attorney General in the Criminal Division of the Department of Justice, later testified to Congress that, in its investigation of the September 11 attacks, the administration had "emphatically rejected ethnic profiling."[17]

The administration's actions, however, did not follow in step with its words. With persistence, breadth, and consistency, the federal government implemented a host of programs that targeted Arabs and Muslims. This section briefly describes some of those programs.

A. Roundups and Detention

The government's first response to the September 11 attacks was a program of mass preventive and secret detention. As unequivocally explained by Attorney General Ashcroft, prosecutors were to "neutralize potential terrorist threats by getting violators off the street by any lawful means possible, as quickly as possible."[18] Indeed, Ashcroft insisted that "[t]aking suspected terrorists in violation of the law off the streets and keeping them locked up is our clear strategy to prevent terrorism within our borders."[19] Analyzing a June 2003 Department of Justice report, leading civil liberties and immigration scholar David Cole points out, "[T]hey were arrested and linked to the September 11 investigation for the flimsiest of reasons—because of an anonymous tip that 'too many' Muslims worked at a convenience store, or that a Muslim neighbor kept odd hours, or simply because investigators happened upon an Arab or Muslim immigrant in a place the investigators visited."[20] In short, a shocked and scrambling Executive department reacted fiercely to the fact that all nineteen of the September 11 hijackers were Arab and Muslim men. Operating on the principle of guilt by association, the administration's first reactions were to hastily round up Arab or Muslim men on the slightest suspicion.

The government has refused to provide basic data regarding those detained in the weeks following September 11, keeping secret not only their identities but also even the number of people detained. When the government stopped issuing figures in November 2001, supposedly because it was too difficult to keep an ac-

16. *Ashcroft Press Conference*, *supra* note 14.

17. *Department of Justice Oversight: Preserving Our Freedoms While Defending Against Terrorism: Hearings Before the Committee on the Judiciary of the U.S. Senate*, 107th Cong. 23 (2001). Immediately following this explicit condemnation of ethnic profiling, however, Chertoff conceded that "[w]hat we have looked to are characteristics like country of issuance of passport." *Id.*

18. Attorney General John Ashcroft, Prepared Remarks for the U.S. Attorneys Conference in New York City (Oct. 1, 2001) (transcript available at http://www.usdoj.gov/ag/speeches/2002/100102agremarkstousattorneysconference.htm).

19. Attorney General John Ashcroft, Prepared Remarks for the U.S. Mayors Conference (Oct. 25, 2001) (transcript available at http://www.usdoj.gov/ag/speeches/2001/agcrisisremarks10_25.htm).

20. COLE, *supra* note 11, at 30.

curate count,[21] the total number detained had reached 1182.[22] While detailed information remains elusive, the Office of the Inspector General ("OIG") of the Department of Justice issued a report on the post-September 11 immigration detainees that revealed the discriminatory nature of the detention sweep. According to the report, of the 738 foreign nationals detained on immigration charges through August 2002, over one-third came from Pakistan and another fifteen percent came from Egypt.[23] In fact, twelve of the top thirteen countries represented among the detainees were predominantly Arab or Muslim.[24] Not one of the 738 individuals was charged with terrorism, and nearly all were cleared of any connection to terrorism.[25]

The Migration Policy Institute also performed a comprehensive study of post-September 11 detainees, ultimately publishing a report entitled "America's Challenge: Domestic Security, Civil Liberties, and National Unity After September 11" ("MPI Report") in June 2003.[26] The MPI Report profiles 406 detainees, and its findings reflect those of the OIG insofar as they indicate that the government's primary targets were Arab and Muslim men. Individuals from Pakistan and Egypt alone accounted for over one-third of all of the profiled detainees.[27] Together, 215 of the 402 profiled detainees consisted of individuals from Pakistan, Egypt, Israel, Saudi Arabia, and Jordan.[28] Meanwhile, the detainees included only one individual each from the United Kingdom and France, and none originated from either Germany or Spain.

B. "Voluntary" Interviews

Following closely on the heels of mass arrests and detentions in Arab and Muslim communities across America, the Department of Justice invited Arab and Muslim men not yet detained to visit their local FBI office or police station for an interview with the authorities. Specifically, in November 2001, Attorney

21. Amy Goldstein and Dan Eggen, *U.S. to Stop Issuing Detention Tallies*, WASH. POST, Nov. 9, 2001, at A16.

22. *Id.* (noting latest count of those detained as 1182). Although a federal district court ruled in August 2002 that the government was legally obligated to disclose the names of the detainees, that decision was later reversed. Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice, 215 F. Supp. 2d 94 (D.D.C. 2002), *rev'd*, 331 F.3d 918 (D.C. Cir. 2003), *cert. denied*, 124 S. Ct. 1041 (2004). Over a year later, six of the immigration detainees from the initial sweep had yet to be released or deported. Dan Eggen, *U.S. Holds 6 of 765 Detained in 9/11 Sweep*, WASH. POST, Dec. 12, 2002, at A20.

23. OFFICE OF INSPECTOR GEN., U.S. DEP'T OF JUSTICE, THE SEPTEMBER 11 DETAINEES: A REVIEW OF THE TREATMENT OF ALIENS HELD ON IMMIGRATION CHARGES IN CONNECTION WITH THE INVESTIGATION OF THE SEPTEMBER 11 ATTACKS 21 (Apr. 2003).

24. *Id.* The countries were, in descending order according to the number of detainees from each, Pakistan, Egypt, Turkey, Jordan, Yemen, India, Saudi Arabia, Morocco, Tunisia, Syria, Lebanon, Israel, and Iran.

25. *Id.*

26. *See* MPI REPORT, *supra* note 2.

27. *Id.*, app. E, at 1.

28. *Id.*

General Ashcroft directed the "voluntary" interviews of some five thousand men between the ages of eighteen and thirty-three from countries with Al Qaeda presence or activity, who had either entered the United States after January 2000 or who were currently college student visa holders.[29] The government claimed that the selected individuals "fit criteria designed to identify persons who might have knowledge of foreign-based terrorists."[30] The Justice Department generated the list of names and distributed it to federal prosecutors around the country, who were ordered to work with state and local police to locate and interview the men. The police and prosecutors interviewed the men about their activities, their family, their friends, and their involvement in, knowledge of, financing of, training of, and sympathy for terrorists.[31] According to a February 2002 Department of Justice report, a total of 2261 individuals were interviewed.[32] Of the fewer than twenty individuals who were taken into custody, most were charged with minor immigration violations, and only three were arrested on criminal charges.[33] In the end, the authorities failed to discover any interviewees with connections to terrorism and did not charge anyone with any terrorism-related crime.

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29. GEN. ACCOUNTING OFFICE, HOMELAND SECURITY: JUSTICE DEPARTMENT'S PROJECT TO INTERVIEW ALIENS AFTER SEPTEMBER 11, 2001, Report GAO-03-459 7 (Apr. 2003) [hereinafter GAO REPORT]; *see also* Attorney General John Ashcroft, Attorney General John Ashcroft Announces Responsible Cooperators Program (Nov. 29, 2001) (transcript available at http://www.usdoj.gov/ag/speeches/2001/agcrisisremarks11_29.htm). The GAO Report indicated that the list of interviewees for the first round included males born between January 1968 and December 1983 who entered the United States after January 1, 2000 and who "claimed citizenship from any of 15 countries in which intelligence indicated that there was an [Al Qaeda] terrorist presence or activity." *Id.* at 7. By March 2002, when the second round of interviews was announced, the number of countries in which intelligence indicated that there was an Al Qaeda terrorist presence or activity had grown to twenty-six. *Id.* at 26. The report did not identify the countries.

Several commentators and leading Arab-American groups have alleged that these interviews were the result of ethnic profiling. *See, e.g.*, Tracey Maclin, *'Voluntary' Interviews and Airport Searches of Middle Eastern Men*, 73 MISS. L.J. 471 (2003); Henry Silverman, *Effects of the American Response to the 9-11 Terrorist Attacks*, 10 MICH. ST. U. DETROIT C.L. J. INT'L L. 563, 568 (Fall 2001) ("To deny that this is racial profiling is to deny what racial profiling means.").

30. Memorandum from Attorney General John Ashcroft to All U.S. Attorneys, All Members of the Anti-Terrorism Task Forces, Interviews Regarding International Terrorism (Nov. 9, 2001), *available at* http://www.usdoj.gov/ag/readingroom/terrorism1.htm.

31. Memorandum from Attorney General John Ashcroft to All United States Attorneys, All Members of the Anti-Terrorism Task Forces, Guidelines for the Interviews Regarding International Terrorism (Nov. 9, 2001), *available at* http://www.usdoj.gov/04foia/readingrooms/terrorism2.htm. Interviewees were to be asked about, among other things, their knowledge and feelings about the events of September 11; their involvement in terrorism; whether they know anybody involved in advocating, planning, supporting, or committing terrorist activities; whether they or anybody they know has access to guns, explosives, or harmful chemical compounds; and whether they have any training in the development or use of such weapons. They were also to be asked if they know of anyone who is capable of developing any biological or chemical weapons, such as anthrax. *Id.*

32. Jeanne A. Butterfield, American Immigration Lawyers Association, *Executive Branch Actions* (citing Memorandum from Kenneth L. Wainstein, to Attorney General, Final Report on Interview Project (Feb. 26, 2002)) *at* http://www.ailf.org/lac/lac_otherresources_execbranchactions.asp.

33. *Id.*

Undeterred, Attorney General Ashcroft announced a second round of "voluntary" interviews in March 2002.[34] This second attempt echoed the curious logic of the American government during World War II, when it justified holding Japanese immigrants and Japanese-American citizens in internment camps in part on the fact that no Japanese sabotage or spying had been discovered.[35] The second round of voluntary interviews targeted another three thousand men between the ages of seventeen and forty-seven who had entered the United States since January 1, 2002 and who claimed citizenship from countries with a significant Al Qaeda presence.[36] By March 2003, the project had yielded 3216 interviews.[37] According to a report by the General Accounting Office, the results of the interviews were mixed. Although the Department of Justice claimed that the project netted intelligence information, had a disruptive effect on terrorists, and strengthened relationships between law enforcement and Arab communities, other law enforcement officials and representatives for immigrants felt differently.[38] Unfortunately, the true value of any information gained from the interviews is difficult to fully assess because the Department of Justice "considers the information too sensitive to divulge."[39]

C. *Special Registration*

Following the September 11 attacks, much was made of the INS's inability to quickly and accurately determine the immigration status of the hijackers.[40] The public demanded that the INS develop a better method to manage the significant flow of immigrants in and out of the country. To that end, Attorney General Ashcroft announced the National Security Entry-Exit Registration System ("NSEERS") on June 6, 2002.[41] Along the same lines as the Geary Act of

34. Attorney General John Ashcroft, Address at the United States Attorney's Office for the Eastern District of Virginia (Mar. 20, 2002) (transcript available at http://www.usdoj.gov/ag/speeches/2002/032002agnewsconferenceedvainterviewprojectresultsannouncement.htm).

35. Lieutenant General John L. DeWitt, Commanding General of the Western Theater of Operations, *Final Report:* Japanese Evacuation from the West Coast 1942 (Feb. 1942), *available at* http://www.wwiihistoryclass.com/civil-rights/text/government_internment_docs/1942_pro-evacuation.pdf (last visited Nov. 17, 2004).

36. Butterfield, *supra* note 32 (quoting Wainstein, *supra* note 34).

37. GAO REPORT, *supra* note 29, at 31.

38. *Id.* at 15–16. The report indicates, for example, that immigration rights advocates and attorneys felt that the program had a "chilling effect on the relations between the Arab community and law enforcement" and that interviewed aliens reported feeling "singled out and investigated because of their ethnicity or religious beliefs." *Id.* at 16.

39. *Id.* at 17.

40. It turned out that sixteen of the nineteen hijackers were legally in the United States on valid temporary visas. *See* Steven A. Camarota, *The Open Door: How Militant Islamic Terrorists Entered and Remained in the United States, 1993–2001*, tbl. 8, "Attacks of September 2001," *at* http://www.cis.org/articles/2002/imagesP21/tab8c.jpg (full article available at http://www.cis.org/articles/2002/theopendoor.pdf).

41. Attorney General John Ashcroft, Attorney General Prepared Remarks on the National Security Entry-Exit Registration System, (June 6, 2002) (transcript available at http://www.usdoj.gov/ag/speeches/2002/060502agpreparedremarks.htm).

1892, which required Chinese laborers to register with internal revenue authorities,[42] and the Iranian student registration during the 1979 hostage crisis,[43] NSEERS required (1) digital fingerprinting and photographing of immigrants as they entered the United States at borders or ports of entry and the cataloguing of that information; (2) regular registration for those staying in the country for longer than thirty days, with registration required at the thirty-day point and every twelve months after the date of entry; and (3) exit procedures to record who leaves the country.[44] Of these three components, the registration requirement, also known as "Special Registration," also applied to those already in the United States "who fall into categories of elevated national security concern."[45] Willful failure to comply with the registration requirements of NSEERS became a federal crime.[46]

Attorney General Ashcroft announced NSEERS as a program applicable to all immigrants.[47] Yet, as the following evidence will demonstrate, the program's implementation revealed the administration's discriminatory intent. In no uncertain terms, Special Registration was designed to compile information about Arab and Muslim individuals present in the country. Of the twenty-five countries designated for Special Registration, presumably because individuals traveling from them presented an elevated national security concern, twenty-four were predominantly Arab and Muslim.[48] The logical implication is that if an individual is traveling from an Arab or Muslim country, she is considered to present an elevated national security concern. Apparently, once the administration had gathered as much possible information on individuals from these Arab and Muslim countries, the need for the cumbersome and costly program ceased. In December 2003, the Department of Homeland Security suspended Special Registration.[49]

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42. The Geary Act of 1892, ch. 60, 27 Stat. 25 (1892). The Geary Act extended the exclusion of new Chinese immigrants for ten years, required that all Chinese immigrants currently in the United States obtain a certificate establishing their residence, and pronounced that any Chinese laborer caught illegally in the United States be deported after one year of hard labor.

43. See discussion *infra* Section III.B.3 concerning the significance of *Narenji v. Civiletti*, 617 F.2d 745 (D.C. Cir. 1979).

44. Ashcroft, *supra* note 41.

45. *Id. See* U.S. Bureau of Immigrations and Customs Enforcement, *Special Registration, at* http://www.ice.gov/graphics/specialregistration/index.htm (referring to the NSEERS as "Special Registration") (last visited Nov. 24, 2004).

46. *See* 8 C.F.R. § 214.1(f) (2004). Violators would have their photographs, fingerprints, and information entered into the National Crime Information Center database (NCIC).

47. *See id.*

48. U.S. Bureau of Immigrations and Customs Enforcement, *Special Registration Groups and Procedures, at* http://www.ice.gov/graphics/specialregistration/archive.htm (last visited Nov. 24, 2004). The following countries were subject to Special Registration: group 1 included Iran, Iraq, Libya, Sudan and Syria; group 2 included Afghanistan, Algeria, Bahrain, Eritrea, Lebanon, Morocco, North Korea, Oman, Qatar, Somalia, Tunisia, UAE, and Yemen; group 3 included Pakistan and Saudi Arabia; group 4 included Bangladesh, Egypt, Indonesia, Jordan, and Kuwait. Of these, only North Korea is not predominantly Arab or Muslim.

49. Press Release, U.S. Dep't of Homeland Security, NSEERS 30-Day and Annual Interview

D. *Absconder Apprehension Initiative*

In the middle of the voluntary interview process, the Department of Justice turned to immigration law as a tool to further its roundup of Arab and Muslim men. With the announcement of the AAI in January 2002, the administration did not seek simply to continue detaining and interrogating Arab and Muslim men—now, the administration was making it a priority to quickly deport Arab and Muslim men.

The implementation of the AAI involved numerous steps. First, the names of all absconders were slotted for entry into the National Crime Information Center Database ("NCIC").[50] The NCIC is an FBI-operated, federal criminal database that state and local law enforcement agents access to check an individual's criminal history. In contrast to the long-standing policy of keeping immigration law enforcement separate from criminal law enforcement, and solely the province of INS agents, Attorney General Ashcroft announced in April 2002 the Department of Justice's Office of Legal Counsel's conclusion that state and local police have the "inherent authority" to arrest any alleged immigration violator listed in the NCIC.[51] Therefore, the presence of absconders in the NCIC meant that local police would now be arresting absconders encountered during the normal course of their duties.[52]

Absconders were then divided by judicial district, based on the most current address information that the INS possessed, and the relevant portion of each absconder's INS file was transmitted to the appropriate INS Field Office.[53] Next, absconder fugitive investigations were assigned to apprehension teams consisting of agents of the INS, FBI, and other federal agencies and, where deemed appropriate, members of the Anti-Terrorism Task Forces ("ATTFs").[54]

Requirements to be Suspended (Dec. 1, 2003), *available at* http://www.dhs.gov/dhspublic/display?content=; Suspending the 30-Day and Annual Interview Requirements From the Special Registration Process for Certain Nonimmigrants, 68 Fed. Reg. 67,578 (Dec. 2, 2003) (to be codified at 8 C.F.R. pt. 264) (interim rule).

50. AAI Memo § A, *supra* note 4, at 1.

51. *See* Eric Schmitt, *Administration Split on Local Role in Terror Fight*, N.Y. TIMES, Apr. 29, 2002, at A1. Because the DOJ will not make the Office of Legal Counsel's ("OLC's") opinion available, it is impossible to know the legal authority that supports the change in position. Indeed, there is currently pending FOIA litigation in the Second Circuit seeking the release of the OLC's opinion.

52. Nina Bernstein, *Crime Database Misused for Civil Issues, Suit Says*, N.Y. TIMES (Dec. 17, 2003), at A34 ("The National Council of La Raza, the New York Immigration Coalition, the American-Arab Anti-Discrimination Committee, the Latin American Workers Project, and UNITE filed suit in federal district court in Brooklyn, NY in December 2003, challenging the entry of civil immigration information into the NCIC database. The plaintiffs argue that Congress has neither authorized nor required local police agencies to routinely arrest people for immigration violations.").

53. AAI Memo § A, *supra* note 4, 1–2.

54. *Id.* The INS has generally refused to reveal the number of officers assigned to the investigative teams. *See, e.g.*, Marisa Taylor, *Fugitives Remain a Step Ahead of the INS; Immigrants to Be Deported May Number 6,000 in County*, SAN DIEGO UNION-TRIBUNE (Jan. 9, 2003), at A1.

Next, absconders were tracked down and apprehended. As the stories that open this article illustrate, the apprehension of an absconder is often a frightening affair. Many of those arrested have been handcuffed, shackled, and interrogated at length before being locked up in detention.[55]

The information gathered from the interviews with absconders was entered into a criminal database.[56] After the absconder was detained and interrogated, the memo contemplated expeditious removal of absconders: "[T]he INS will make every effort to remove the absconder from the country as quickly as possible."[57]

As previously mentioned, the AAI memo announced that initial efforts would target individuals who "come from countries in which there has been Al Qaeda terrorist presence or activity."[58] The memo does not explicitly define the terms "come from" or "Al Qaeda presence or activity." I presume "come from" means nation of origin. There is no official list for the specific purpose of the AAI of "countries in which there has been Al Qaeda terrorist presence or activity." A Department of State list of "Countries Where Al Qaeda Has Operated" posted on the internet following September 11 included 45 countries from across the globe,[59] but nothing on the State Department website suggested that the list was tied to the AAI in any way. Assuming this list is accurate for the purpose of the AAI, the anecdotal evidence described below demonstrates that enforcement efforts under the AAI targeted only *some* of the 45 countries where Al Qaeda has operated.[60]

The government has not been forthcoming with statistics and data regarding individuals apprehended during Phase I of the AAI. As a result, various media accounts, reports from advocates, and informed speculation provide much of the evidence on the program's operation. The available evidence indicates that indi-

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55. *See, e.g.*, Nina Bernstein, *Old Deportation Orders Leading to Many Injustices, Critics Say*, N.Y. TIMES (Feb. 19, 2004), at B1.

56. It is not clear what specific database the AAI Memo refers to when it directs entry of interview results be entered into the database, much less the NCIC database. Later in the memo there is a reference to entry into the "Computerized Reporting System."

57. AAI Memo § B.11, *supra* note 4, at 6. *See also* AAI Memo § B.8, *supra* note 4, at 5 ("In the ordinary case, the absconder will be held until the INS can complete the processing of travel documents, at which point he will be sent out of the country.").

58. AAI Memo § A, *supra* note 4, at 1.

59. U.S. Dep't of State, *Countries Where Al Qaeda Has Operated* (Nov. 10, 2001), *available at* http://usinfo.state.gov/products/pubs/terrornet/12.htm (last visited June 20, 2004). The countries on the list are Albania, Algeria, Afghanistan, Azerbaijan, Australia, Austria, Bahrain, Bangladesh, Belgium, Bosnia, Egypt, Eritrea, France, Germany, India, Iran, Ireland, Italy, Jordan, Kenya, Kosovo, Lebanon, Libya, Malaysia, Mauritania, Netherlands, Pakistan, Philippines, Qatar, Russia, Saudi Arabia, Somalia, South Africa, Sudan, Switzerland, Tajikistan, Tanzania, Tunisia, Turkey, Uganda, United Arab Emirates, United Kingdom, United States, Uzbekistan, and Yemen. *See also supra* note 30 (indicating those selected for "voluntary" interviews claimed citizenship from twenty-six different countries where U.S. intelligence indicated that there was an Al Qaeda terrorist presence or activity).

60. See *infra* note 61.

viduals arrested pursuant to the AAI during Phase I "come from" at least the following fourteen countries (in alphabetical order): Afghanistan, Algeria, Egypt, Iran, Jordan, Lebanon, Morocco, Pakistan, Philippines, Palestinian individuals, Saudi Arabia, Somalia, Sudan, and Syria.[61] Despite the widely known presence of Al Qaeda in non-Arab or non-Muslim countries such as Great Britain, France, Germany, and Spain, to my knowledge, no absconders from these countries have been arrested.[62] According to INS Spokesman William Strassberger, the INS never intended to send officers out to find those absconders who did not come from nations with an Al Qaeda presence.[63]

A telling pattern emerges that links the fourteen countries on the list. Thirteen of the fourteen are predominantly Arab or Muslim—at least seventy percent Arab and/or Muslim.[64] The Philippines stands as the lone exception, as it is ap-

61. For Afghanistan and Morocco, *see* Susan Sachs, *Cost of Vigilance: This Broken Home*, N.Y. TIMES (June 4, 2002), at A15; for Iran, *see* Rosanna Ruiz, *'Absconders' Questioned by Justice Officials: Detainees Offered Deals to Talk*, HOUS. CHRON. (Mar. 9, 2002), at A35; for Jordan, *see* Michelle Goldberg, *Banished from the American Dream*, SALON (Apr. 26, 2004), *at* http://www.salon.com/news/feature/2004/04/26/deportee; for Egypt and Lebanon, *see* Marie Szaniszlo, *INS Crackdown Hits Bay State: U.S. Illegal Immigrants Rounded Up*, BOSTON HERALD (June 16, 2002), at 3; for Pakistan, *see* David Rohde, *Threats and Responses: Crackdown; U.S.-Deported Pakistanis: Outcasts in 2 Lands*, N.Y. TIMES (Jan. 20, 2003), at A1; for Palestine, *see* Edward Hegstrom, *Caught in the Net: 'Palestinian Cleavers' Become Entangled in INS Crackdown*, HOUS. CHRON. (May 6, 2002), at A1; for Philippines, *see* Jennifer A. Ng, *New Wave of RP Detainees from US Expected*, BUS. WORLD (Philippines) (Nov. 25, 2002); for Saudi Arabia and Somalia, *see* Cindy Rodriguez, *INS Revives Sweeps: Initial Targets are From Nations With Links to Al Qaeda*, BOSTON GLOBE (Apr. 18, 2002), at B1; for Sudan, *see* John Railey, *Few Turn Out for Downtown Rally in Support of Rights of Immigrants*, WINSTON-SALEM J. (N.C.) (Feb. 21, 2003), at B2; for Syria, *see* Lise Olsen, *INS Director Is Abruptly Replaced*, SEATTLE POST-INTELLIGENCER (Dec. 20, 2002), at B1.

62. While there have been media articles describing occasional arrests of absconders from non-Arab countries, not a single article has mentioned an arrest of any individual from Great Britain, France, Germany, or Spain. This, despite the fact that some of the highest profile Al Qaeda arrests have involved these Western European countries. Richard Reid, who tried to light explosives in his shoes aboard an intercontinental flight, was living in Great Britain. Zacarias Massaoui, the only person arrested in connection with the September 11 hijackings, had emigrated from France. In Spain, several high profile arrests took place in 2002, and, in 2004, Al Qaeda apparently struck again when it bombed commuter trains in Madrid.

63. Taylor, *supra* note 54.

64.

Country	Race/Ethnicity	Religion
Afghanistan	42% Pashtun, 27% Tajik, 9% Persian, 9% Uzbek	99% Muslim
Algeria	99% Arab-Berber	99% Muslim
Egypt	99% Eastern Hamitic	9% Muslim
Iran	51% Persian	98% Muslim
Jordan	98% Arab	92% Muslim
Lebanon	95% Arab	59.7% Muslim
Morocco	99.1% Arab-Berber	98.7% Muslim
Pakistan	Many ethnicities	97% Muslim
Philippines	4% Muslim Malay	5% Muslim
Saudi Arabia	90% Arab	100% Muslim

proximately four percent Arab and five percent Muslim.[65]

Anecdotal evidence of deportations since September 11, 2001, underscores the INS's targeting of Arabs and Muslims. A *Chicago Tribune* article shows that while only two percent of unauthorized immigrants in the United States are originally from twenty-four predominantly Muslim nations, there has been a 31.4 percent rise in deportation orders for those individuals since September 11.[66] This is compared to only a 3.4 percent rise in deportation orders for the other ninety-eight percent of unauthorized immigrants.[67] The statistics indicate a marked increase in the number of deportation orders issued since September 11, compared to the two years prior, for countries such as Pakistan (46%), Egypt (119%), Jordan (80%), Morocco (137%), Saudi Arabia (229%), and Sudan (53%), all countries from which absconders have been targeted.[68]

E. Summary

The government instituted a series of programs in response to the September 11 terrorist attacks. From secret detentions to "voluntary" interviews to programs like the AAI and Special Registration, the administration's consistent focus on Arab and Muslim individuals reveals its discriminatory intent. I focus on the AAI because the administration explicitly stated its intention to first target Arab and Muslims, and to use immigration law to achieve criminal law enforcement ends. The following section will outline the law that serves as the analytical framework for demonstrating the AAI's unconstitutionality.

Somalia	Less than 1% Arab	100% Muslim
Sudan	39% Arab, 52% Black	70% Muslim
Syria	90.3% Arab	90% Muslim
Palestine (Gaza and West Bank)	90% Arab	83% Muslim

Data compiled from U.S. Central Intelligence Agency, World Factbook, *available at* http://www.cia.gov/cia/publications/factbook/ (last visited Jan. 25, 2005) *passim*.

65. The Philippines is on the list of "countries in which there has been Al Qaeda terrorist presence or activity" because of the link between Al Qaeda and the Islamic separatist group known as Abu Sayef, which has been responsible for several acts of terrorism. As I argue later, the fact that absconders from the Philippines have been apprehended does not destroy an equal protection claim against the government. Proving selective enforcement does not require that the laws be enforced exclusively against a minority. The fact that some similarly situated individuals who are not from the minority group are also being targeted does not negate the discriminatory intent or the discriminatory impact of the government's actions. Nor does the facial neutrality of a law or program save it from strict scrutiny if, in purpose and effect, it is targeting a protected group. *See* Yick Wo v. Hopkins, 118 U.S. 356 (1886); Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993).

66. Cam Simpson, Flynn McRoberts & Liz Sly, *Profiling Illegal Immigrants in the U.S.*, CHI. TRIB. (Nov. 16, 2003), at C1.

67. *Id.*

68. *Id.* The data did not relate specifically to the AAI, but instead covered deportation generally since September 11.

III.
CURRENT DOCTRINE ON EQUAL PROTECTION, IMPERMISSIBLE DISCRIMINATION, AND IMMIGRATION LAW

> No person shall . . . be deprived of life, liberty, or property, without due process of law.
>
> —Fifth Amendment
>
> No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.
>
> —Fourteenth Amendment

This section introduces the doctrine and principles courts would apply in a challenge to the constitutionality of the AAI. Although the government considers the AAI an immigration enforcement program, this section outlines the law of equal protection and selective prosecution in the context of *both* domestic law enforcement and immigration law because I argue in Section IV that the AAI is properly understood as domestic criminal law enforcement.

A. Equal Protection and Domestic Law Enforcement

Though the Fourteenth Amendment on its face applies only to the States, the Supreme Court interprets the guarantee of equal protection to also apply to the federal government and its many agencies via the Fifth Amendment's promise of due process of law.[69] Today, the Fourteenth Amendment stands for the principle that equality is denied when the government, state or federal, accords disparate treatment to similarly situated individuals.

Noncitizens, including undocumented immigrants, are considered "persons" under the Fourteenth Amendment and are therefore entitled to equal protection.[70] As the Supreme Court declared in *Yick Wo v. Hopkins*: "[t]he Fourteenth Amendment to the Constitution is not confined to the protection of citizens. . . .

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69. *See* Buckley v. Valeo, 424 U.S. 1, 93 (1976) ("Equal protection analysis under the Fifth Amendment is considered the same as that under the Fourteenth Amendment."); Bolling v. Sharpe, 347 U.S. 497, 499 (1954) ("[T]he concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. . . . [D]iscrimination may be so unjustifiable as to be violative of due process.").

70. Plyler v. Doe, 457 U.S. 202, 210 (1982). Absconders have no lawful status in the country and are considered undocumented immigrants. I use "undocumented immigrants" rather than "illegal aliens" because the term "illegal" brands these individuals as criminals and the term "aliens" suggests that, if not from another planet, they are complete outsiders. While *Plyler* held that undocumented immigrants are not a suspect class, the AAI does not involve impermissible discrimination against undocumented immigrants as a class. Rather, the improper classification used by the AAI is the prioritization of the enforcement of immigration and criminal law against similarly situated individuals based on the suspect classifications of race and national origin. *See infra* Section IV.

[Its] provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws."[71] Equal protection also extends to undocumented immigrants because they are "persons" for purposes of the due process clause of the Fifth Amendment.[72]

Individuals bring an equal protection challenge when they believe that the government has improperly afforded different treatment to persons similarly situated based on a particular classification, such as race, national origin, or gender. Courts determine the applicable level of scrutiny depending on the nature of the classification. Classifications based on race and national origin receive strict scrutiny, the most probing level of review.[73] The purpose of heightened scrutiny for immutable characteristics like race and national origin stems from the notion that it is unfair to penalize someone for a characteristic that the person did not choose and that the person cannot change.[74] According to Professor Laurence Tribe, the principle of strict scrutiny holds that political choices burdening fundamental rights or suggesting prejudice against minorities "must be subjected to close analysis in order to preserve substantive values of equality and liberty."[75] To withstand strict scrutiny, the government classification must be narrowly tailored and necessary to achieve a compelling government purpose.[76] In practice, strict scrutiny has proven so difficult to survive that it has famously been called "'strict' in theory and fatal in fact."[77]

1. Facially Discriminatory Laws or Policies

Laws or policies that facially discriminated based on race were the first to be struck down under equal protection analysis,[78] and few have survived Su-

71. 118 U.S. 356, 369 (1886).

72. Mathews v. Diaz, 426 U.S. 67, 77–78 (1976).

73. *See* Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 227 (1995) (holding that all racial classifications are subject to strict scrutiny to ensure there has been no infringement of the right to equal protection); Fullilove v. Klutznick, 448 U.S. 448, 525 (1980) ("The color of a person's skin and the country of his origin are immutable facts that bear no relation to ability, disadvantage, moral culpability, or any other characteristics of constitutionally permissible interest to government.").

74. *Adarand*, 515 U.S. at 227.

75. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1451 (2d ed. 1988).

76. *Adarand.*, 515 U.S. at 227.

77. Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

78. For example, the Court struck down a West Virginia law that limited jury service to white male citizens over the age of twenty-one because it violated the equal protection rights of African-Americans. Strauder v. West Virginia, 100 U.S. 303, 310 (1879). More recently, the Court struck down as unconstitutional a state's denial of custody to a mother because she had married a person of a different race, noting that government-imposed race classifications are subject to strict scrutiny because such classifications are "more likely to reflect racial prejudice than legitimate public concerns." Palmore v. Sidoti, 466 U.S. 429, 432 (1984).

preme Court review.[79] One notable exception to the Court's consistent rejection of laws that discriminate facially on the basis of race or national origin is the Court's rejection of challenges to the treatment of Japanese immigrants and Japanese-Americans during World War II. In *Korematsu v. United States*[80] and *Hirabayashi v. United States*,[81] the Court upheld explicit racial and national origin discrimination.[82] Despite declaring that "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect," the *Korematsu* Court stated that not "all such restrictions are unconstitutional. . . . Pressing public necessity may sometimes justify the existence of such restrictions."[83]

While the *Korematsu* decision may reflect a wartime exception for otherwise impermissible laws and policies that involve national security,[84] *Korematsu* has been almost universally decried since it was decided.[85] Moreover, nothing in the Constitution indicates that its protections vanish when "pressing public necessity" or assuagement of our fears supposedly requires targeting a group of people based on their race, religion, or national origin.

In the process of striking down classifications based on national origin, the Supreme Court has linked discrimination based on national origin to racial discrimination.[86] As stated by Justice Brennan in *Saint Francis College v. Al-Khazraji*,[87] "[P]ernicious distinctions among individuals based solely on their ancestry are antithetical to the doctrine of equality upon which this Nation is founded."[88] There, the Supreme Court expanded the concept of national origin to include ethnic origin, holding that persons of Arab ancestry may be protected

79. Cases dealing with affirmative action programs designed to remedy past discrimination against racial minorities should be distinguished from cases in which explicit racial classifications burden racial minorities. *See* Grutter v. Bollinger, 539 U.S. 306, 325 (2003) (endorsing student body diversity, of which race may be a factor, as a compelling government interest for university admissions).

80. 323 U.S. 214 (1944).

81. 320 U.S. 81 (1943).

82. Ironically, *Korematsu* was one of the cases that introduced the "suspect class" distinction into equal protection analysis and established heightened review for classifications based on race and national origin. *See* Mary McGown, Note, Narenji v. Civiletti*: Equal Protection and the Iranian Crisis*, 31 CATH. U. L. REV. 101, 109 (Fall 1981).

83. *Korematsu*, 323 U.S. at 216. The Court added that "racial antagonism" can never justify restrictions based on race.

84. *See id.* at 217–20, 223–24. *See Hirabayashi*, 320 U.S. at 100–01 (stating that while race-based distinctions are prohibited in most circumstances, they may be justified "in time of war and threatened invasion" to protect public safety).

85. *See* TRIBE, *supra* note 75, at 1452 (*Korematsu* "represents the nefarious impact that war and racism can have on institutional integrity and cultural health."); COLE, *supra* note 11, at 99 (citing statements from eight of the nine current Supreme Court Justices declaring that *Korematsu* was wrongly decided).

86. *See* Hernandez v. Texas, 347 U.S. 475 (1954) (overturning criminal conviction because of state's alleged systematic exclusion of Mexican-Americans from jury service). *Accord* Castaneda v. Partida, 430 U.S. 482 (1977). Because of the frequent correlation between race and national origin, they are treated as synonymous for purposes of equal protection analysis.

87. 481 U.S. 604 (1987).

88. *Id.* at 614 (Brennan, J., concurring).

from racial discrimination.[89] In sum, government laws and policies that facially or intentionally discriminate based on race or national origin will not likely survive judicial scrutiny.

2. Facially Neutral Laws and Policies with Discriminatory Impact

Individuals may also challenge the constitutionality of laws and policies that, while facially neutral, have a discriminatory impact that violates equal protection. However, such challenges are difficult to sustain because of the demanding standard applied to such situations.

In *Washington v. Davis*,[90] the Supreme Court held that discriminatory impact is insufficient, by itself, to trigger strict scrutiny and render a law or policy unconstitutional.[91] The case established "the basic equal protection principle that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose."[92] Upon a prima facie showing of discriminatory purpose, the burden falls on the government to prove that its policies are neutral.[93] Absent a showing of discriminatory intent, the government need only establish a rational basis for the rule or policy that produces a disparate impact on a suspect class.[94]

In the criminal law context, a defendant may use equal protection principles to argue that she was singled out for prosecution based on an impermissible classification such as race. To prove selective enforcement, a criminal defendant must make a prima facie showing that (1) the law the defendant has allegedly violated has not been enforced against individuals similarly situated to the defendant, and (2) the decision to enforce the law against the defendant was based on an impermissible consideration, such as race.[95] Courts have applied the dis-

89. *See id.* The professor, an Iraqi-born United States citizen, alleged that he was denied tenure because of his Arab origin in violation of 42 U.S.C. § 1981, which provides that "[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory . . . to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens." *Id.* at 609. The Court held that Congress intended § 1981 to protect identifiable classes of persons subjected to intentional discrimination based solely on their ancestry or ethnic characteristics. *Id.* at 613. The Court declared that "[s]uch discrimination is racial discrimination," which the statute intended to forbid. *Id.* at 613.

90. 426 U.S. 229 (1976).

91. *Id.* The case involved a challenge to Test 21, a test taken by all applicants to the D.C. police force. Plaintiffs submitted statistics that showed that blacks failed the examination four times as often as whites.

92. *Id.* at 240. *See also* McKleskey v. Kemp, 481 U.S. 279, 292 (1987) (holding that proof of discriminatory racial impact in the administration of the death penalty was insufficient to make out an equal protection violation and that defendant "must prove that the decisionmakers in his case acted with discriminatory purpose").

93. *See Washington*, 426 U.S. 241.

94. *See also* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 269 (1977) (holding that plaintiffs failed to prove racially discriminatory intent behind zoning decision that prevented the building of racially integrated housing).

95. *See* United States v. Fares, 978 F.2d 52, 59 (2d Cir. 1992); United States v. Berrios, 501

criminatory impact and discriminatory intent requirements of *Washington* to selective enforcement challenges.[96] Once discriminatory purpose is established, the burden shifts to the government to prove that it would have taken the same action without the discriminatory violation.[97]

It is often much easier to demonstrate discriminatory impact than it is to prove discriminatory intent. Indeed, most selective prosecution challenges fail on the intent prong of the test.[98] As a result, the definition of discriminatory intent takes on great importance. According to the Supreme Court, it "implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group."[99] For example, in *Hunter v. Underwood*,[100] the Court invalidated a facially neutral Alabama constitutional provision disenfranchising certain convicted criminals because the provision had a racially discriminatory impact and was clearly motivated by racial animus.[101] The racist motive was unusually clear in *Hunter*, as the enacting all-white convention of the Alabama legislature had declared that its intention was to "establish white supremacy."[102]

Where discriminatory intent is not announced, it can be proven using two methods. The first involves discrimination which is "unexplainable on grounds other than race."[103] The classic example is *Yick Wo v. Hopkins*,[104] where the Court held that equal protection is violated when "the conclusion cannot be resisted, that no reason for [the discriminatory results] exists except hostility to the race and nationality to which the petitioners belong, and which in the eye of the law is not justified."[105] In *Yick Wo*, the plaintiff challenged the allegedly discriminatory enforcement of a city ordinance requiring laundries to be located in brick or stone buildings absent a waiver from the board of supervisors. According to the plaintiff, the city of San Francisco denied over two hundred waiver petitions by individuals of Chinese ancestry, while all of the petitions filed by non-

F.2d 1207, 1211 (2d Cir. 1974).

96. *See* United States v. Armstrong, 517 U.S. 456, 465 (1996); Wayte v. United States, 470 U.S. 598, 608 (1985); Oyler v. Boles, 368 U.S. 448, 456 (1962); United States v. Al Jibori, 90 F.3d 22, 25 (2d Cir. 1996); *Fares*, 978 F.2d 52, 59 (2d Cir. 1992). For an excellent critique of the use of the *Washington v. Davis* standard in cases where individuals allege selective prosecution based on race, see Yoav Sapir, *Neither Intent Nor Impact: A Critique of the Racially Based Selective Prosecution Jurisprudence and a Reform Proposal*, 19 HARV. BLACKLETTER L.J. 127 (2003).

97. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 689 (2d ed. 2002); *Arlington Heights*, 429 U.S. at 270–71 n.21. *See also* United States v. Armstrong, 517 U.S. 456 (1996) (denying discovery request because not prosecuting similarly-situated whites did not establish government intent to discriminate against African Americans).

98. *See* Sapir, *supra* note 96, at 128–29.

99. Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979).

100. 471 U.S. 222 (1985).

101. *Id.*

102. *Id.* at 229.

103. Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266 (1977).

104. 118 U.S. 356 (1886).

105. *Id.* at 374.

Chinese individuals save one were granted.[106] Another such case was *Gomillion v. Lightfoot*,[107] where the Court invalidated the creative redrawing of a city's boundaries such that almost every one of the four hundred black residents was excluded from participating in city elections, without affecting a single white resident.[108] The Supreme Court warned, however, that "[a]bsent a pattern as stark as that in *Gomillion* or *Yick Wo*," cases of discrimination which are unexplainable on grounds other than race are rare.[109]

The second method to prove discriminatory purpose is to examine the historical background of the government action. As the Supreme Court declared in *Arlington Heights v. Metropolitan Housing Development Corporation*, "[t]he historical background of the decision is one evidentiary source, particularly if it reveals a series of official actions taken for invidious purposes. The specific sequence of events leading up to the challenged decision also may shed some light on the decisionmaker's purposes."[110] For example, in *Guinn v. United States*,[111] the Court struck down a literacy test provision that included an exemption for all who were eligible to vote in 1866 and their descendants, the obvious purpose of which was to disenfranchise blacks who had gained the right to vote in 1870.[112]

In sum, to survive an equal protection claim involving facial discrimination on the basis of race or national origin, the government's classification must be (1) narrowly tailored and (2) necessary to achieve a compelling government purpose. For facially neutral laws or policies that allegedly discriminate based on race or national origin, the challenger must prove both discriminatory impact and intent to discriminate based on the individual's race or national origin. Even with this demanding standard, the equal protection doctrine has frequently shielded unpopular minorities from reactionary majorities in times of crisis.

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106. *Id.* at 357, 359.

107. 364 U.S. 339 (1960).

108. *Id.* at 341. The Court held that the conclusion that the "legislation is solely concerned with segregating white and colored voters by fencing Negro citizens out of town so as to deprive them of their pre-existing municipal vote" was irresistible. *Id.*

109. Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266 (1977). In other contexts, if a facially neutral policy has a disparate impact, courts may infer that the adverse effects were desired, thereby violating federal laws. *See, e.g.*, Johnson v. De Grandy, 512 U.S. 997 (1994) (holding that proof of discriminatory impact under Voting Rights Act of 1965 can establish a violation of the law); Griggs v. Duke Power Co., 401 U.S. 424 (1971) (holding that employment discrimination under Title VII of the 1964 Civil Rights Act can be established by proof of discriminatory impact if the employment practice cannot be shown to be related to job performance).

110. *Arlington Heights*, 429 U.S. at 267 (citation omitted).

111. 238 U.S. 347 (1915).

112. *Id. See also* Rogers v. Lodge, 458 U.S. 613, 622 (1982) (finding that an at-large electoral scheme violated equal protection because it was "maintained for the invidious purpose of diluting the voting strength of the black population"); Griffin v. Sch. Bd., 377 U.S. 218 (1964) (holding that history surrounding county's decision to close public schools and pay for children to attend segregated private schools made discriminatory intent clear).

B. Equal Protection Principles, Immigrants and Immigration and Law

Equal protection principles extend to immigration laws and policies. However, leading civil liberties and immigration scholar David Cole notes that "[b]ecause the lion's share of Ashcroft's pretextual law enforcement campaign has been pursued in the deportation setting, it is not clear that selective enforcement is even an available defense."[113] In this section, I trace the case law regarding profiling and selective enforcement in the immigration law context, and conclude that selective enforcement is indeed an available defense that can and should be used to challenge the conduct carried out against Arab and Muslim individuals.

Cole's uncertainty about the availability of a selective enforcement defense in the immigration context likely derives in part from the fact that, for over a century, the judiciary has applied deferential review of the substantive provisions of immigration law under the plenary power doctrine.[114] Congress has plenary authority over immigration policies under Article I, Section 8, Clause 4.[115] "In the exercise of its broad power over naturalization and immigration," the Supreme Court declared, "Congress regularly makes rules that would be unacceptable if applied to citizens."[116] Using this deference in the immigration law arena—which extends to actions taken by the Executive—courts have validated a total ban against immigration from China,[117] the nationwide roundup of Eastern European immigrant radicals known as the Palmer raids,[118] national origin quotas that significantly limited immigration from non-white countries,[119] and

113. COLE, *supra* note 11, at 204.

114. The Court's decision in *Reno v. American-Arab Anti-Discrimination Committee*, *see* discussion *infra* Section III.B.3, which Cole litigated, no doubt contributed to his uncertainty. However, the Court did not foreclose selective prosecution as a defense in the immigration context.

115. *See* I.N.S. v. Chadha, 462 U.S. 919, 940–41 (1983); Buckley v. Valeo, 424 U.S. 1, 132 (1976) ("Congress has plenary authority in all cases in which it has substantive legislative jurisdiction, M'Culloch v. Maryland, 4 Wheat. 316 (1819), so long as the exercise of that authority does not offend some other constitutional restriction.").

116. Mathews v. Diaz, 426 U.S. 67, 79–80 (1976). *See also* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 967–77 (3d ed. 1999).

117. Chae Chan Ping v. United States, 130 U.S. 581 (1889) (upholding the Chinese Exclusion Act of October 1, 1888, which prohibited Chinese laborers who had departed the United States before its passage from entering the United States, even though they had a certificate issued under the Act of 1882 granting them permission to return). The Court in *Chae Chan Ping* first announced the plenary power doctrine, which effectively shielded from judicial review much of immigration law regarding the admission of immigrants into the United States.

118. *See, e.g.*, Skeffington v. Katzeff, 277 F. 129 (1st Cir. 1922) (upholding deportation order based on membership in Communist Party because "an alien resident in the United States may be deported for any reason which Congress has determined will make his residence here inimical to the best interests of the government"). *See* COLE, *supra* note 11, at 116–28, for a brief overview of the Palmer raids.

119. *See* Johnson-Reed (Permanent National Origins Quota) Act of 1924, ch. 190, § 11(a), 43 Stat. 153, 159 (1924) (repealed 1965). *See* Gabriel J. Chin, *The Civil Rights Revolution Comes to Immigration Law: A New Look at the Immigration and Nationality Act of 1965*, 75 N.C. L. REV. 273, 281 (1996). There are still ceilings on the number of immigrants eligible for admission for

the internment of over 110,000 Japanese, including over seventy thousand American citizens of Japanese ancestry, during World War II.[120] In the hands-washing words of Justice Frankfurter, "whether immigration laws have been crude and cruel, whether they may have reflected xenophobia in general or anti-Semitism or anti-Catholicism, the responsibility belongs to Congress."[121]

While Congress and the Executive have broad latitude in immigration policy to make distinctions that would be impermissible if made between United States citizens or legal permanent residents, the exercise of plenary power is subject to the limits of the Constitution.[122] Moreover, in the enforcement of the law by the Executive, deference is constrained by the Constitution.[123] In *Zadvydas v. Davis*,[124] the Court held that the Attorney General's decision to indefinitely detain an individual with a removal order was subject to judicial review because the Constitution may preclude granting "'an administrative body the unreviewable authority to make determinations implicating fundamental rights.'"[125] The Court stated that the plenary power exercised by Congress and the Executive in immigration law "is subject to important constitutional limitations."[126] Prior to September 11, the plenary power doctrine as a justification for disparate treatment of immigrants and citizens was in obvious retreat.[127] The blind deference seemed anomalous with the rights revolution of the twentieth century and the great expansion of the equality principle.[128]

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each country each year. *See* Immigration and Naturalization Act § 202(a), 66 Stat. 163 (1952) (current version at 8 U.S.C. § 1152).

120. *See* Korematsu v. United States, 323 U.S. 214 (1944).

121. Harisiades v. Shaugnessy, 342 U.S. 580, 597 (1952) (Frankfurter, J., concurring) (refusing to disturb deportation on grounds of political ideology of lawful permanent residents).

122. *See* Zadvydas v. Davis, 533 U.S. 678, 695 (2001); Hoang v. Comfort, 282 F.3d 1247, 1257 (10th Cir. 2002) (holding that the INA's mandatory detention of criminal aliens with pending administrative removal proceedings violated due process); Patel v. Zemski, 275 F.3d 299, 307–08 (3d Cir. 2001) (holding that mandatory detention pursuant to INA without opportunity for individualized determination of flight risk and danger to community violated due process). *But see* Demore v. Kim, 538 U.S. 510 (2003) (holding that detention of alien, pursuant to no-bail provision of INA, did not violate his due process rights under the Fifth Amendment).

123. *See Zadvydas*, 533 U.S. 678; Jean v. Nelson, 472 U.S. 846, 881 (1985). *See also* discussion *infra* Section III.B.2.

124. 533 U.S. 678.

125. *Id.* at 692 (quoting Superintendent, Mass. Corr. Inst. at Walpole v. Gill, 472 U.S. 445, 450 (1985)).

126. *Zadvydas*, 533 U.S. at 695.

127. *See* INS v. St. Cyr, 533 U.S. 289 (2001) (holding that the provisions of the Anti-Terrorism and Effective Death Penalty Act and the Illegal Immigration Reform and Responsibility Act, repealing discretionary relief from deportation, did not apply retroactively); *Zadvydas*, 533 U.S. at 679.

128. *See* Bond v. United States, 529 U.S. 334 (2000) (holding that Border Patrol officer violated the Fourth Amendment when he physically manipulated carry-on baggage); Kevin R. Johnson, *The Case Against Race Profiling in Immigration Enforcement*, 78 WASH. U. L.Q. 675, 690 (2000); Nancy Morawetz, *Rethinking Retroactive Deportation Laws and the Due Process Clause*, 73 N.Y.U. L. REV. 97, 122–31 (1998). The stark realities of global terrorism and the need to maintain national security have certainly changed the legal landscape, and may lead courts to accord

With these constitutional limits on the exercise of plenary power in immigration in mind, I will now review the judicial treatment of the use of race and national origin in immigration law and enforcement.

1. Race and Immigration Law Enforcement

The Fourth Amendment circumscribes the power given by the Immigration and Nationality Act ("INA") to INS officers "to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States."[129] Nevertheless, courts have endorsed the use of race in immigration stops to a degree that would be unacceptable in criminal law.

The paradigmatic case endorsing the use of race in immigration law enforcement is *United States v. Brignoni-Ponce*,[130] where the Supreme Court held that roving Border Patrol agents could use "Mexican appearance" as one factor in making the decision to stop a vehicle near the border without violating the Fourth Amendment.[131] Ruling that agents needed only a reasonable suspicion to justify the stops, the Court determined that "Mexican appearance" alone did not provide reasonable suspicion of alienage.[132] However, the Court justified the use of race here as a relevant factor, referring to data offered by the INS linking "Mexican appearance" with undocumented immigration status.[133] The Court concluded that, because the "likelihood that any given person of Mexican ances-

more deference to government action, no matter how suspect.

129. Immigration and Nationality Act (INA) § 287(a)(1), 8 U.S.C. § 1357(a)(1) (2000). *See* Michael Scaperlanda, *The Domestic Fourth Amendment Rights of Aliens: To What Extent Do They Survive* United States v. Verdugo-Urquidez*?*, 56 MO. L. REV. 213 (1991).

130. 422 U.S. 873 (1975).

131. *Id.* The Court did not explain what exactly is meant by the impossibly vague "Mexican appearance." *Id.* at 887.

132. The Court offered some other criteria that Border Patrol agents could rely on, including (1) the "characteristics of the area," including its "proximity to the border, the usual patterns of traffic on the particular road, and previous experience with alien traffic," (2) "information about recent illegal border crossings in the area," (3) the "driver's behavior," such as "erratic driving or obvious attempts to evade officers," (4) the vehicle type, e.g., a station wagon with large compartments, which "are frequently used for transporting concealed aliens," (5) the vehicle's seemingly heavy load or "extraordinary number of passengers," (6) that persons are observed "trying to hide," (7) "the characteristic appearance of persons who live in Mexico, relying on such factors as the mode of dress and haircut," and (8) such other facts as are meaningful to the officer "in light of his experience detecting illegal entry and smuggling." *Id.* at 884–85.

133. The INS suggested that eighty-five percent of the possible ten to twelve million undocumented immigrants in the country in 1975 were from Mexico. *Id.* at 878–79. These numbers are unusually high; 2000 Census estimates put the total undocumented population at eight and a half million. *See* Jeffrey Passel, *New Estimates of the Undocumented Population in the United States*, MIGRATION INFO. SOURCE, May 22, 2002, *available at* http://www.migrationinformation.org/USfocus/display.cfm?ID=19. In a footnote, the *Brignoni-Ponce* Court wrote that the eighty-five percent estimate "tends to be confirmed by the consistently high proportion of Mexican nationals in the number of deportable aliens arrested each year." 422 U.S. at 879 n.5. This is, of course, circular reasoning. Because the INS focused its efforts on the southern U.S. border and against those of "Mexican appearance," the proportion of Mexican nationals deported each year was naturally proportionately high.

try is an alien is high enough to make Mexican appearance a relevant factor," Mexican appearance could be relied on together with specific articulable facts and rational inferences to establish reasonable suspicion for an INS stop.[134]

While *Brignoni-Ponce* and its progeny have endorsed race-based immigration law enforcement, courts have not felt compelled to permit the use of race in all circumstances. Determining when courts will refuse to countenance the use of race, however, is not easy. According to Jonathan Hafetz, no discernable pattern exists as to when a court will reject or uphold race-based law enforcement; instead, "the legitimacy of a stop seems to turn on a determination of how extreme—or how 'egregious'—the reliance on race was."[135] In addition, location seems to matter, as the use of race has been frequently allowed at or near the border.[136] In contrast, courts have restricted the use of race when the INS profiling occurred in the interior of the country, far from the United States–Mexico border.[137]

Race-based enforcement by the INS can trigger the Fourth Amendment's exclusionary rule. In *INS v. Lopez-Mendoza*,[138] the Supreme Court held that the exclusionary rule of criminal procedure, which prohibits the introduction of evi-

134. *Id.* at 884, 886–87. *See also* United States v. Cruz-Hernandez, 62 F.3d 1353, 1355–56 (11th Cir. 1995) (holding that a Border Patrol agent's stop of defendant's vehicle based on reasonable suspicion was constitutionally permissible); United States v. Urias, 648 F.2d 621 (9th Cir. 1981) (finding that a Border Patrol agent was entitled to rely on his experience and knowledge when stopping the defendant's car); United States v. Hernandez-Lopez, 538 F.2d 284, 285–86 (9th Cir. 1976). In *United States v. Martinez-Fuerte*, the Supreme Court held that stops at fixed immigration checkpoints "made largely on the basis of apparent Mexican ancestry" were constitutional even without reasonable suspicion. 428 U.S. 543 (1976).

135. Jonathan L. Hafetz, Note, *The Rule of Egregiousness:* INS v. Lopez-Mendoza *Reconsidered*, 19 WHITTIER L. REV. 843, 850 (1997–1998). For example, the Ninth Circuit *en banc* recently reversed a holding by a Ninth Circuit panel and disregarded *Brignoni-Ponce*, holding that the Border Patrol cannot lawfully rely on "Hispanic appearance" when deciding to make an immigration stop. United States v. Montero-Camargo, 208 F.3d 1122, 1135 (9th Cir. 2000) (en banc). Several other cases hold that Hispanic appearance, along with other factors, can be insufficient to establish reasonable suspicion. United States v. Garcia-Camacho, 53 F.3d 244, 247–48 (9th Cir. 1995); United States v. Rodriguez, 976 F.2d 592, 595–96 (9th Cir. 1992); Nicacio v. INS, 768 F.2d 1133, 1137 (9th Cir. 1985); United States v. Mallides, 473 F.2d 859, 861 (9th Cir. 1973).

136. The first of the nine factors from *Brignoni-Ponce* is "proximity to the border." *Brignoni-Ponce*, 422 U.S. at 884.

137. *See* United States v. Ortega-Serrano, 788 F.2d 299 (5th Cir. 1986) (holding that uneven paint job on early-model car and Hispanic appearance were insufficient to provide reasonable suspicion to stop car three to four hundred miles north of border to question occupants as to their citizenship); United States v. Pena-Contu, 639 F.2d 1228 (5th Cir. 1981) (holding that adult males of Hispanic appearance traveling during working hours without the accoutrements of tourists not sufficient to provide reasonable suspicion for stop and detention two hundred fifty miles away from nearest border crossing); Ill. Migrant Council v. Pilliod, 540 F.2d 1062 (7th Cir. 1976) (Mexican appearance and Spanish surname were insufficient to justify random stops and warrantless searches by INS in Illinois); Ramirez v. Webb, 599 F. Supp. 1278, 1283 (W.D. Mich. 1984) (granting a preliminary injunction restraining immigration officials from conducting warrantless stops of cars containing Hispanic-appearing individuals in Michigan, "very distant from the Mexican border").

138. 468 U.S. 1032 (1984).

dence gathered as a result of a violation of the Fourth Amendment, does not generally apply in civil immigration proceedings.[139] However, the Court declared that the exclusionary rule may apply in cases involving "egregious violations" of the Fourth Amendment or other fundamental rights.[140]

The Ninth Circuit has interpreted the *Lopez-Mendoza* "egregious violations" exception to mean that the exclusionary rule *does* apply in immigration proceedings where the INS has engaged in race-based enforcement. In *Gonzalez-Rivera v. INS*,[141] for example, the court required the exclusion of evidence from deportation proceedings because the Border Patrol's arrest of respondent was impermissibly based on his Hispanic appearance.[142] Therefore, *Lopez-Mendoza* and its line of cases clarify that there are constitutional limits to INS enforcement practices.[143] When the INS relies on race to guide its enforcement of the immigration laws, the victims of race-based enforcement may invoke the Constitution in their defense.

2. Equal Protection and Immigration Law Enforcement

While courts have limited the INS's reliance on race when making immigration stops, equal protection challenges to INS enforcement practices have been few and generally unsuccessful.

In *Bertrand v. Sava*,[144] fifty-three Haitians alleged, among other things, that the INS District Director had abused his discretion by invidiously discriminating against them because of their race or national origin.[145] The Haitians were detained following their arrival in Florida in makeshift boats and denied parole into the country pending determination of their admissibility.[146] The Second Circuit, emphasizing the broad deference accorded to the Attorney General's discretionary decisions, did not find invidious discrimination based on race or national origin and held that the District Director did not abuse his discretion in denying parole.[147]

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139. *Id.* (upholding the search and subsequent arrest of an individual by INS officials conducting the search and arrest on the basis of a tip and without a warrant).

140. *Id.* at 1050–51.

141. 22 F.3d 1441 (9th Cir. 1994).

142. *Id.*

143. *See also* Orhorhaghe v. INS, 38 F.3d 488 (9th Cir. 1994) (applying *Lopez-Mendoza* "egregious violations" rule and excluding evidence obtained by INS in arrest based on respondent's Nigerian-sounding name); Quintana v. INS, 1994 WL 669483, at *1 (9th Cir. 1994) (applying *Lopez-Mendoza* rule in holding INS arrest based on Filipino appearance illegal); Arguelles-Vasquez v. INS, 786 F.2d 1433 (9th Cir. 1986) (applying *Lopez-Mendoza* rule in remanding the case to determine whether stop was based on Hispanic appearance, in which case the evidence would be excludable).

144. 684 F.2d 204 (2d Cir. 1982).

145. *Id.* at 207.

146. *Id.* at 205–06.

147. *Id.* at 211–13, 214–18. There are few limits to the legislative power over the admission of aliens, "for an alien has no constitutional right to enter or remain in this country . . . [and] he

Three years later the Supreme Court reviewed a similar situation in *Jean v. Nelson*.[148] As in *Bertrand*, petitioners in *Jean* alleged denial of parole on the basis of race and national origin.[149] Because the Court relied on the premise that INS regulations already prohibited discrimination in parole decisions, the Court found no need to reach the constitutional question of equal protection.[150] Justice Marshall wrote a lengthy dissent to *Jean*, asserting that there was no principled way to avoid reaching the constitutional issue, and that the majority had mistakenly relied on the parties' assertion that the INS regulations prohibited discrimination. Instead, Marshall argued that the majority should have analyzed the language of the regulations and their statutory and administrative background.[151] He would have held that the petitioners had a right under the Fifth Amendment to parole decisions free from invidious discrimination based on race or national origin.[152]

By according broad deference to the Executive Branch and administrative agencies, *Bertrand* and *Jean* sidestepped more probing constitutional analysis. Both cases confirm that courts are reluctant to seriously evaluate the constitutionality of certain government actions, and that Congress can use race or national origin when deciding who to exclude from the country.

3. Selective Enforcement and Immigration Enforcement

While Due Process constrains the enforcement of immigration law, courts have not yet embraced selective enforcement claims brought by immigrants challenging the actions and policies of the INS.

Narenji v. Civiletti[153] was an equal protection challenge to an INS regulation issued in response to the seizure of American hostages in Tehran, Iran in November 1979.[154] The regulation directed all nonimmigrant students[155] in the United States who were natives or citizens of Iran to report to an INS office and

may be denied entrance on grounds that would be constitutionally suspect or impermissible in the context of domestic policy, namely, race, physical condition, political beliefs, sexual proclivities, age, and national origin." *Id.* at 211 (alterations in original) (quoting Fiallo v. Levi, 406 F. Supp. 162, 165 (E.D.N.Y. 1975)). It should be made clear that this legislative power applies only to decisions to deny entrance or exclude individuals from the country. Once an individual is admitted, she is protected from irrational discrimination by the Fifth and Fourteenth Amendments.

148. 472 U.S. 846 (1985).

149. *Id.* at 848.

150. *Id.* at 854–55. The INS conceded that the INA and the accompanying regulations do not authorize discrimination on the basis of race or national origin. *Id.* at 855.

151. *Id.* at 858, 864–68.

152. *Id.* at 872–77.

153. 617 F.2d 745 (D.C. Cir. 1979).

154. *See* Mary McGown, Note, Narenji v. Civiletti: *Equal Protection and the Iranian Crisis*, 31 CATH. U. L. REV. 101 (1981), for an excellent examination of the D.C. Circuit Court's problematic equal protection analysis in *Narenji*.

155. Nonimmigrant students are those who enter the United States from abroad solely to study temporarily in the United States. *See* INA § 101(a)(15)(F), 8 U.S.C. § 1101(a)(15)(F)(1) (2000).

verify their continued compliance with the terms of their immigration status.[156] Failure to comply could result in deportation.[157] Despite the regulation being facially discriminatory based on national origin, the court applied mere rationality review and upheld the regulation.[158] It concluded that the actions of the Attorney General were taken pursuant to his broad authority to administer the immigration laws, and that distinctions based on national origin were permissible when made by Congress or the Executive, provided they were not "wholly irrational."[159]

Rehearing *en banc* was denied in *Narenji* over a strong dissent by Chief Judge Skelley Wright.[160] Judge Skelley Wright acknowledged the broad authority to limit immigration on a variety of bases, including nationality, but made the important distinction that an individual is entitled to substantial constitutional protections once she has taken residence in the United States.[161] He explained that the Executive decision to selectively enforce an immigration statute against certain individuals because of the conduct of their country of origin presents a serious equal protection question since the individuals were selected to verify their statuses solely on the basis of their nationality.[162] Whether the Executive or Congress could selectively enforce immigration laws based on national origin was a question that Judge Skelley Wright thought required "close scrutiny," in order "to make certain that the United States does not retaliate in kind" to the actions taken against its nationals overseas.[163]

The Supreme Court considered the applicability of selective enforcement in the context of civil immigration proceedings in *Reno v. American-Arab Anti-Discrimination Committee* ("*AADC*").[164] The INS had arrested eight noncitizens in Los Angeles and sought their deportation based on their associations with the Popular Front for the Liberation of Palestine ("PFLP").[165] According to the INS, the PFLP advocated communist doctrines, and membership in such an organization made the eight deportable under the McCarran Act.[166] The government conceded that the eight had been targeted for their membership in the PFLP

156. *Narenji*, 617 F.2d at 746.
157. *Id.* at 747.
158. *Id.* at 748.
159. *Id.* at 747–48.
160. *Id.* at 753–55.
161. *Id.* at 754.
162. *Id.* at 753–54.
163. *Id.* at 755.
164. 525 U.S. 471 (1999).
165. *See id.* at 473.
166. *Id.* When the deportation proceedings against the eight individuals began, the McCarran Act provided for the deportation of aliens who "advocate . . . world communism." *See* McCarran-Walter Act, ch. 5, 66 Stat. 241 (1952) (codified as amended at 8 U.S.C. § 1277 (2000)). The INS also charged six of the individuals with technical visa violation charges. *See AADC*, 525 U.S. at 473.

and their activities relating to the organization.[167] The eight challenged their deportation proceedings on the ground that the INS impermissibly targeted them for deportation because of their affiliation with a politically unpopular group.[168]

Writing for the majority, Justice Scalia held that "[a]s a general matter—and assuredly in the context of claims such as those put forward in the present case—an alien unlawfully in this country has no constitutional right to assert selective enforcement as a defense against deportation."[169] The Court offered several reasons for restricting the availability of selective enforcement as a defense to deportation. Even in the criminal law field, selective enforcement claims are rarely subject to a particularly demanding standard because "such claims invade a special province of the Executive."[170] The Court found these concerns "greatly magnified in the deportation context" because of the potential for delay produced by litigation over selective enforcement claims and the potential disclosure of foreign-policy objectives and foreign intelligence as a result of discovery.[171]

AADC did not, however, completely foreclose the availability of selective enforcement as a defense to deportation. The majority made an important reservation to its broad holding—it held out the possibility of selective enforcement claims for cases "in which the alleged basis of discrimination is so outrageous that the foregoing considerations can be overcome."[172] In those situations, the policy of judicial deference towards prosecutorial decisions must give way to the individual's fundamental constitutional rights.[173]

The case law reviewed above imposes high standards on those who accuse the government of selectively prosecuting individuals on the basis of race, national origin, or other affiliation. What emerges from the decisions, however, is a critical distinction between INS action related to entry into the United States,

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167. David Cole, *Damage Control? A Comment on Professor Neuman's Reading of* Reno v. AADC, 14 GEO. IMMIGR. L.J. 347, 351 (2000). The INS District Director admitted that the eight were "singled out for deportation because of their alleged political affiliations with the [PFLP]." *Id.*

168. *AADC*, 525 U.S. at 472.

169. *Id.* at 488.

170. *Id.* at 489.

171. *Id.* at 490–91.

172. *Id.* at 491. This "outrageous" discrimination exception supports Justice Marshall's point in dissent in *Jean v. Nelson*, 472 U.S. at 881. Justice Marshall asserted that an INS detention policy based on a belief that all Haitians or African-Americans were more likely than others to commit crimes would certainly be unconstitutional.

173. *See AADC*, 526 U.S. at 491. The "outrageous" standard might arguably heighten the *Armstrong* standard for selective enforcement claims in the immigration context, making it harder to prove such a claim. The criminal law analogy to *AADC*'s exception can be seen in *Younger v. Harris*, 401 U.S. 37 (1971). *See* COLE, *supra* note 167, at 360–61. *Younger* holds that federal courts should not enjoin ongoing state criminal proceedings unless the defendant can demonstrate bad faith, harassment, or any other unusual circumstance in the prosecution that would call for equitable relief. *Younger*, 401 U.S. at 53–54. *See also* Fitzgerald v. Peek, 636 F.2d 943 (5th Cir. 1981) (enjoining prosecution brought for harassment and retaliation); Tolbert v. Memphis, 568 F. Supp. 1285 (W.D. Tenn. 1983) (enjoining unconstitutional ordinance partly because of threats of continued enforcement).

usually at or near the border, and actions taken in the interior to enforce immigration laws. At the border, courts are more likely to find the use of race permissible.[174] With respect to enforcing immigration laws against individuals who have already entered the country, however, the use of classifications such as race and national origin is more constrained.[175] Additionally, egregious violations of constitutional principles, wherever they occur, will trigger constitutional protections.[176] An open question remains whether a national policy discriminating based on race and national origin against individuals already present in the country, a policy such as the AAI, would be constitutional. In the next section, I will show how current doctrine, bleak as it is for noncitizens bringing constitutional challenges to immigration laws and policies, nevertheless does not allow the government to selectively enforce immigration laws against individuals based on their race, religion, ethnicity or national origin.

IV.
UNCONSTITUTIONALITY OF THE AAI ON SELECTIVE ENFORCEMENT GROUNDS

> Racial profiling, a focus on conduct based on race or ethnic background, is just plain wrong.
>
> —Attorney General Janet Reno[177]

History reveals that, in times of crisis, the U.S. government has often turned to race, ethnicity, and national origin as proxies for suspicious activity when targeting immigrants.[178] Such methods are not only ineffective as tools of law enforcement, but they also betray the principle of equal protection of the laws. It was wrong to target Japanese individuals during World War II. It is just as wrong to target Arab and Muslim immigrants and citizens following September 11 simply because the current threat appears to come from Arabs and Muslims. Constitutional principles must trump fear.

The government's alleged justification for the selection of several thousand "priority absconders" out of more than three hundred thousand for Phase I of the AAI was that they "come from countries in which there has been Al Qaeda terrorist presence or activity."[179] At the surface, national origin might be reasonably related to the purpose of fighting the "War on Terrorism," and discriminating

174. *See* discussion *supra* Section III.B.1.

175. *Id.*

176. *See AADC*, 526 U.S. at 491; INS v. Lopez-Mendoza, 468 U.S. 1032, 1050 (1984).

177. *Dep't of Justice Oversight, Hearing Before the S. Comm. on the Judiciary*, 106th Cong. 37 (1999) (statement of Attorney General Janet Reno).

178. *See* COLE, *supra* note 11, at 85–179 (tracing the pattern of sacrificing noncitizens' rights, from the internment of Japanese-Americans and Japanese nationals during World War II to the targeting of foreign nationals during the McCarthy Era to the current focus on foreign nationals assumed to have ties to terrorism).

179. AAI Memo § A, *supra* note 4, at 1.

on this basis would probably withstand constitutional challenges in the context of immigration law if supported by evidence. However, I argue that the AAI should properly be considered as a program of domestic criminal law enforcement. As such, its classifications based on race and national origin should receive strict scrutiny. Furthermore, even if the AAI is considered immigration enforcement, it still cannot pass constitutional muster. While national origin may be an acceptable classification in immigration law, facial neutrality does not necessarily clothe government action in constitutionality. The actual implementation of the AAI demonstrates its disparate impact on Arabs and Muslims and strongly suggests that the program is being driven by something more invidious than a rational relation between country of passport and combating terrorism.

This section outlines three separate theories under which Phase I of the AAI was unconstitutional.

A. The AAI Is Substantially a Program of Criminal Law Enforcement, Where Intentional, Discriminatory Enforcement of the Law on the Basis of Race and National Origin Is Unconstitutional

Despite its apparent and ultimate focus on deporting individuals who are illegally present in the country, the AAI was not conceived as a program exclusively implementing immigration law. The Department of Justice made clear that the AAI was of a different order from preceding projects such as the voluntary interviews. Indeed, while in name the AAI was strictly immigration enforcement, the AAI is properly considered a program of domestic criminal law enforcement.

1. The AAI Is Substantially a Program of Criminal Law Enforcement

Several aspects of the AAI illustrate its criminal law enforcement nature. Historically, state and local police have lacked the authority to make civil immigration arrests.[180] But the administration did not consider absconders mere immigration violators—absconders were presumed to be criminals who had committed the federal felony of Failure to Depart under 8 U.S.C. § 1253.[181] As

180. *See* Assistance by State and Local Police in Apprehending Illegal Aliens, 1996 WL 33101164 (Off. Legal Counsel, U.S. Dep't of Justice, Feb. 5, 1996) (finding no inherent state or local authority to make civil immigration arrests) *with* Letter from Alberto R. Gonzales, Counsel to the President, to Demetrios G. Papademetriou (June 24, 2002) (reprinted in 7 IMMIGR. BULL. 964 (Aug. 1, 2002)) ("[T]he Justice Department's Office of Legal Counsel has concluded that state and local police have inherent authority to arrest and detain persons who are in violation of immigration laws and whose names have been placed in the National Crime Information Center . . . .").

181. AAI Memo § B.6, *supra* note 4, at 4. Pursuant to 8 U.S.C. § 1253(a)(1), any individual with an outstanding final order of removal who willfully fails to depart the United States within ninety days from the date of the final order of removal is punishable by fine or no more than four years imprisonment. According to the AAI Memo, the probable cause that an absconder committed the offense would be based on "the existence of a final deportation order and the absconder's presence on American soil." AAI Memo § B.6, *supra* note 4, at 4.

such, the AAI Memo contemplates criminal arrests of absconders by the FBI and state and local police, without the presence of any INS agents.

Second, the AAI Memo makes clear that absconders will be treated as "criminal suspects" who are to be read their Miranda rights and afforded "*all* standard procedural rights and constitutional protections."[182] This is a marked difference from the typical treatment of individuals detained for immigration violations, where *Miranda* warnings are not required.[183] By requiring that absconders be treated not as civil immigration violators but as criminal suspects, and affording them all constitutional protections, the government has distinguished the AAI from routine immigration enforcement.

Third, the absconders' names are entered into the NCIC database, a federal *criminal* database operated by the FBI that state and local law enforcement access to check the criminal history of those they encounter.[184] Before September 11, the FBI did not enter civil information such as immigration data into the NCIC, except where specifically authorized by Congress.[185] Now, the government is treating absconders as criminals by including them in a criminal database and tracking them down as they do other criminals.

Finally, a significant aim of the AAI was the gathering of information for criminal investigations into terrorism. The AAI Memo directs arresting officers to interview individuals about their knowledge of terrorist activity.[186] According to the memo, the INS may deport an absconder only "[a]bsent an affirmative notification from the Anti-Terrorism Coordinator or the FBI Coordinator of the desire to undertake further investigative or prosecutive [sic] action against the absconder."[187] That is, until the FBI has cleared the individual, the INS could not deport him. This suggests that a major goal of the program was to find and prosecute individuals for crimes and deport them only if and when no criminal prosecution was warranted.

In sum, the AAI is a joint operation of the INS and federal, state, and local law enforcement, involving criminal arrests and the attendant criminal rights, and interrogations about terrorism that have nothing to do with the enforcement of immigration laws or expedited deportation. The AAI is therefore properly characterized as domestic law enforcement, and the law applicable to domestic

182. AAI Memo §§ A, B.7, *supra* note 4, at 2, 4 (emphasis added).

183. In *INS v. Lopez-Mendoza*, the Supreme Court noted that a deportation proceeding is merely a civil action to determine a person's eligibility to remain in this country, not to punish, so "various protections that apply in the context of a criminal trial do not apply in a deportation hearing." 468 U.S. 1032, 1038 (1984). Therefore, Miranda warnings are not required in deportation cases, even though the INS does require a minimal warning by regulation for certain arrests. 8 C.F.R. § 287.3(c) (2004) ("[A]lien arrested without warrant and placed in formal proceedings under section 238 or 240 of the Act will be advised of the reasons for his or her arrest and the right to be represented at no expense to the Government.").

184. AAI Memo § B.2, *supra* note 4, at 2.

185. Bernstein, *supra* note 52.

186. AAI Memo § B.7, *supra* note 4, at 4.

187. *Id.* § B.11, at 6.

law enforcement should apply to the AAI.

2. As a Program of Criminal Law Enforcement, the AAI Is Subject to Heightened Constitutional Standards

While the government generally enjoys broad discretion in law enforcement, it may not exercise this power in ways forbidden by the Constitution.[188] In the criminal law context, a prosecutor's discretion is "subject to constitutional constraints," including the constraint imposed by the Fifth Amendment's due process guarantee.[189] The Due Process Clause forbids the use of race, religion, or other arbitrary classification as a basis for the decision to prosecute.[190] While judicial deference to the other branches of government has allowed nationality distinctions in immigration law, the permissive review fades when the AAI is properly viewed as a tool of domestic law enforcement. Consequently, the use of classifications such as national origin and race as bases for selective enforcement merits strict scrutiny.

On its face, the AAI discriminates based on national origin. The implementing memorandum announced that, of the over three hundred thousand absconders, the government was prioritizing the apprehension of several thousand because they "came from" countries where there had been Al Qaeda presence or activity.[191] It is a settled constitutional principle that classifications based on national origin receive strict scrutiny, and survive only if narrowly tailored and necessary to achieve a compelling government purpose.[192]

The government will likely assert that national security is a compelling government purpose that justifies this particular classification. However, the government should not be able to recite the talisman of national security and operate free from scrutiny as it did in *Korematsu*.[193] Prioritizing the deportation of individuals simply because they come from countries where Al Qaeda has a presence

188. *See, e.g.*, United States v. Armstrong, 517 U.S. 456, 464 (1996).

189. *Id.*

190. *See* Wayte v. United States, 470 U.S. 598, 608 (1985) (citing Oyler v. Boles, 368 U.S. 448, 456 (1962), and noting that analyzing selective prosecution claims under the Fourteenth Amendment would be the same as analyzing equal protection under the Fifth Amendment); Jean v. Nelson, 472 U.S. 846, 855–57 (1985) (holding that parole decisions based on race or national origin would be a violation of facially neutral INS statute); Bertrand v. Sava, 684 F.2d 204, 212 (2d Cir. 1982) (explaining that while the Attorney General has broad discretion in parole decisions, discretion may not be exercised to discriminate invidiously against a particular race or group without rational explanation).

191. AAI Memo § A, *supra* note 4, at 1. Even before the AAI, the Department of Justice had acknowledged using national origin in other September 11–related programs. *Department of Justice Oversight: Preserving Our Freedoms While Defending Against Terrorism: Hearings Before the S. Comm. on the Judiciary*, 107th Cong. 10, 23 (2001) (statement of Michael Chertoff, Assistant Attorney General, Criminal Division, Department of Justice) (discussing the use of country of passport issuance, among other factors, to identify over five thousand individuals for "voluntary interviews").

192. *See, e.g.*, Hernandez v. Texas, 347 U.S. 475 (1954).

193. 323 U.S. 214 (1944).

or activity, absent any specific link between those individuals and terrorist activity, hardly seems a compelling justification for the prioritization. Nor is the AAI narrowly tailored. Nation of origin simply does not correlate with likelihood of terrorist activity. As David Cole points out, there are 6.5 million Muslims and 1.2 million persons of Arab ancestry in the United States, and somewhere between two hundred and two thousand Al Qaeda members worldwide.[194] Therefore, the categories of Arab and Muslim are "grossly inaccurate proxies" for terrorist activity.[195]

Furthermore, any individual already subject to an active terrorism investigation was required to be removed from the absconder list.[196] Since those suspected of having ties to terrorism were already removed from the list, the government's use of the classification of country of origin is even more questionable, underscoring that its use was indeed overbroad and hardly tailored to promoting national security.

Even if the national origin classification ostensibly appears narrowly tailored to a compelling government purpose, courts should look behind the classification to determine if a more invidious purpose exists.[197] The national origin classification is nothing but a proxy for discrimination based on the target's race and ethnicity. Because "[r]acial classifications are simply too pernicious to permit any but the most exact connection between justification and classification, . . . review of whether such requirements have been met must entail a most searching examination."[198] To prove that the government selectively enforced the AAI on race or other impermissible grounds, a challenger would have to demonstrate that the government conduct "had a discriminatory effect and that it was motivated by a discriminatory purpose."[199] The discriminatory impact of the AAI against Arabs and Muslims is evident. The evidence with respect to discriminatory intent is circumstantial but strong.

For classifications based on race, discriminatory intent can be proven by showing either that the discriminatory effects are "unexplainable on grounds other than race," or that the historical background and the sequence of events leading up to the challenged decision reveals the invidious purpose.[200] As was shown in Section II.D, individuals targeted and arrested during Phase I of the AAI came from approximately fourteen countries, thirteen of which are pre-

194. COLE, *supra* note 11, at 55. *See also* OFFICE OF THE COORDINATOR FOR COUNTERTERRORISM, PATTERNS OF GLOBAL TERRORISM, app. B at 132 (2004) (noting that Al Qaeda "probably has several thousand members and associates").

195. COLE, *supra* note 11, at 55.

196. AAI Memo § B.2, *supra* note 4, at 3.

197. *See, e.g.*, Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971); Hunter v. Underwood, 471 U.S. 222 (1985).

198. Gratz v. Bollinger, 539 U.S. 244, 270 (2003) (citation and internal quotes omitted) (alteration in original).

199. United States v. Armstrong, 517 U.S. 456, 465 (1996) (quoting Wayte v. United States, 470 U.S. 598, 608 (1985)).

200. Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266–67 (1977).

dominantly Arab or Muslim. Deportations for individuals from these countries have risen as much as 200 percent since September 11.[201] In addition, despite Al Qaeda presence in countries like Germany, Great Britain, Spain and France, no one arrested during Phase I of the AAI came from these non-Arab, non-Muslim western European countries.

The prioritization of enforcement against individuals from countries where Al Qaeda has operated, especially given the evidence of selective enforcement within that classification against individuals from predominantly Arab and Muslim countries, arguably demonstrates that the prioritization is unexplainable on grounds other than the government's intent to detain, interrogate, and deport Arabs and Muslims. The results simply cannot be a coincidence. The classification's slight overinclusiveness—that is, the inclusion within Phase I of the AAI of a small minority of non-Arab and non-Muslim individuals apprehended pursuant to the AAI, such as non-Arab and non-Muslim Filipinos[202]—should not distract attention away from the apparent intentions of the program. Nor should it save the AAI from constitutional challenge.

Courts can also turn to the historical background of the AAI for an unmistakable demonstration of the invidious intent behind the AAI.[203] As was shown in Section II, the AAI was just one in a series of government programs following September 11 that targeted Arab and Muslim individuals. The government engaged in mass detentions of Arab and Muslim men in the weeks immediately after September 11, often on flimsy evidence of wrongdoing, and rarely with any success in finding terrorists. The government extended invitations for "voluntary" interviews only to Arab and Muslim men. The government specially registered thousands of immigrants from twenty-five countries, twenty-four of which were predominantly Arab or Muslim. As a whole, the post–September 11 programs constitute a "series of official actions taken for invidious purposes."[204] Everything about the sequence of events and programs leading up to and surrounding the implementation of the AAI invites serious suspicion, and demonstrates discriminatory intent.

The AAI Memo and the implementation of Phase I revealed that the AAI is properly seen as a program of domestic criminal law enforcement rather than as one of immigration enforcement. As such, courts should apply a strict review of classifications like national origin and race. Because the evidence demonstrates

201. *See* Simpson, McRoberts & Sly, *supra* note 68.

202. *See* Cindy Rodriguez, *INS Revives Sweeps: Initial Targets Are from Nations with Links to Al Qaeda*, BOSTON GLOBE, Apr. 18, 2002, at B1 (describing Lebanese-Christian family arrested as absconders).

203. Guinn v. United States, 238 U.S. 347 (1915) (striking down literacy requirement that had obvious intent to disenfranchise black voters); Griffin v. Sch. Bd., 377 U.S. 950 (1964) (holding that history surrounding county's decision to close public schools and pay for white children to attend segregated schools in response to desegregation orders clearly evidenced discriminatory intent).

204. *See Arlington Heights*, 429 U.S. at 267.

the discriminatory impact and intent of Phase I of the AAI, the program was unconstitutional.

B. Even if the AAI Is Considered to Be Exclusively Immigration Law Enforcement, It Is Unconstitutional

Even if the AAI is characterized as immigration law enforcement, the targeting of Arabs and Muslims from a group of over three hundred thousand similarly situated individuals cannot withstand scrutiny. As discussed above, in the context of immigration enforcement, limits still exist on the government's ability to discriminate on the basis of race or national origin.[205] I will now show that the AAI's classifications of national origin and race to selectively enforce immigration laws were unconstitutional.

1. The Government Cannot Use a National Origin Distinction that Is Wholly Irrational; Prioritizing Enforcement Based on "Countries Where Al Qaeda Has a Terrorist Presence or Activity" Is Wholly Irrational

In *Narenji v. Civiletti*, the Court of Appeals for the District of Columbia held that distinctions based on national origin in the enforcement of immigration laws and policies were permissible when made by Congress or the Executive, provided they were not "wholly irrational."[206] If the AAI was challenged, the government would likely argue that *Narenji* specifically bars a selective immigration enforcement claim against the AAI based on its use of nation of origin.[207] However, *Narenji* does not control the outcome because its facts are significantly distinguishable from the AAI.

First, the regulation in *Narenji* involved only the registration of Iranian immigrants with the INS. It was essentially an administrative initiative, involving compliance with reporting requirements.[208] This is in sharp contrast to the more invasive scope of the sub-regulatory AAI, which involved a significantly larger intrusion on individual liberty via domestic law enforcement activity in the form of SWAT-team-like arrests, detentions, interrogations regarding terrorism, and swift deportation.

Second, the registration program at issue in *Narenji* was strictly related to immigration enforcement and was more clearly at the heart of the Executive Branch's plenary power to handle foreign relations and immigration affairs. In contrast, the AAI was a joint operation between the INS and local and federal

205. *See supra* Section III.B.2; Jean v. Nelson, 472 U.S. 846 (1985); Bertrand v. Sava, 684 F.2d 204 (2d Cir. 1982).

206. 617 F.2d 745, 747–48.

207. I would prefer to argue that *Narenji* was wrongly decided, and parallels the now-accepted mistake in *Korematsu* that endorsed classification based on national origin by an inflamed government during a time of crisis. But *Narenji*, like *Korematsu*, has not been overruled.

208. The Iranian student registration was more similar to the NSEERS ("Special Registration") program that was launched following the September 11 attacks than it was to the AAI.

law enforcement officials. It involved interrogations about terrorism that had nothing to do with the individuals' immigration proceedings (by definition, absconders have a final order of deportation, and nothing remains to be decided in their immigration cases). The AAI was far from a narrow immigration enforcement measure and, as such, deviates significantly from a simple exercise of plenary power.

Finally, the United States was in direct conflict with the country of Iran at the time the regulation at issue in *Narenji* was promulgated. This "state v. state" conflict, and the assumptions of the court that such a conflict lays at the heart of immigration policy, is not relevant to the AAI and the current "War on Terrorism."[209] The United States is not involved in a war against any particular state with respect to its global battle against Al Qaeda and terrorism. The fact that Al Qaeda has operatives in a particular country, most likely without that country's consent or endorsement, significantly distinguishes the importance and relevance of nation of origin in the current context.

Even if *Narenji* were deemed on point, it would not frustrate a challenge to the AAI. The use of national origin as a priority classification during Phase I of the AAI was wholly irrational for at least two reasons. First, it follows from an erroneous and racist belief in guilt by association—that Arabs and Muslims are likely to be terrorists.[210] The fact that the AAI and the other post–September 11 programs instituted by the government are failing to find any terrorists attests to the irrationality of the assumption. Second, the AAI targets individuals from several countries that are allies of the United States in the "War on Terrorism," such as Saudi Arabia and Pakistan. Therefore, the explanation of singling out nationals of enemy countries, used in respect to Iranians in 1979 and Japanese in 1942, is not plausible in the context of the current war on terror.[211]

The fact that the government discriminated based on national origin under the auspices of immigration enforcement does not necessarily protect it from strict constitutional review. Other cases support the theory that the AAI's particular implementation of national origin distinction is not permissible. For example, while *Bertrand* emphasized the broad deference given to the Attorney General in parole decisions, the court noted that the Attorney General's discretion is limited.[212] As long as the Attorney General respects due process and "ex-

209. The Attorney General filed an affidavit in *Narenji* stating that the regulation was issued "'as an element of the language of diplomacy by which international courtesies are granted or withdrawn in response to *actions by foreign countries*,'" and thereby was a fundamental effort of the Executive. *Narenji*, 617 F.2d at 747 (emphasis added). The court deferred in large part because "decisions in these matters may implicate our relations with foreign powers" and such decisions were in the province of the Executive. *Id.* at 748.

210. *See* COLE, *supra* note 11, at 55; *see also* discussion *supra* Section IV.A.2.

211. I do not mean to offer "state v. state" war as a justification for discriminatory treatment, especially considering the history of World War II, where the American government chose to roundup and intern people of color from Japan, but felt no similar threat from European immigrants and citizens who came from the Axis countries of Germany or Italy.

212. 684 F.2d at 211.

"exercise[s] that discretionary power on the basis of a facially legitimate and bona fide reason," courts will not look behind the exercise of discretion in parole decisions.[213] However, the court made it clear that absent a "rational explanation from established policies," discretion may not be exercised to discriminate invidiously against a particular race or group.[214] Indeed, the court explicitly stated that race or national origin discrimination, if found, would be an abuse of discretion in violation of the Fifth Amendment.[215] Since "countries where Al Qaeda has a terrorist presence or activity" is not a rational classification, and in practice effects invidious discrimination against Arabs and Muslims, the AAI's prioritization is unconstitutional.

Furthermore, the majority in *Bertrand* stated that its decision denying an equal protection challenge did not involve a situation where there existed a national policy to deny parole to individuals from a particular country.[216] In contrast to the situation in *Bertrand*, however, the AAI is a national policy to selectively enforce the immigration laws against individuals from particular countries and therefore meets *Bertrand*'s exception for an equal protection challenge.

Jean v. Nelson held that discrimination on the basis of race or national origin would be a violation of a facially neutral INS statute.[217] In his dissent, Justice Thurgood Marshall confronted the separate question of the constitutionality of immigration decisions made on the basis of race or national origin without any justification.[218] He cited *Yick Wo*, among other cases, and declared that the Attorney General's broad discretion "is not a license to engage in invidious discrimination. . . . In general, national-origin classifications have a stronger claim to constitutionality when they are employed in connection with decisions that lie at the heart of immigration policy."[219] Marshall did not define what he meant by "heart of immigration," though he seemed to be referring to decisions and policies regarding entry into the United States.[220] This distinction between accept-

213. *Id.* at 212 (quoting Kleindienst v. Mandel, 408 U.S. 753, 769–70 (1972)). *See also* Wong Wing Hang v. INS, 360 F.2d 715, 719 (2d Cir. 1966) (finding that denial of suspension of deportation to an eligible alien would be abuse of discretion if based on impermissible basis such as invidious discrimination against a particular race or group). The Second Circuit in *Bertrand* quoted Justice Frankfurter from *Galvan v. Press*, 347 U.S. 522 (1954), with respect to the procedural due process limits on the power over immigration. *Bertrand*, 684 F.2d at 211.

214. *Bertrand*, 684 F.2d at 212 (citing *Wong Wing Hang*, 360 F.2d at 719). "Policies pertaining to the entry of aliens and their right to remain here are peculiarly concerned with the political conduct of government. In the enforcement of these policies, the Executive Branch of the Government must respect the procedural safeguards of due process." *Id.* at 211 (quoting *Galvan*, 347 U.S. at 531 (1954)).

215. "[T]o the extent that the Fifth Amendment arguably forbids the INS from discriminating against the petitioners on the basis of race or national origin, such discrimination would constitute an abuse of discretion." *Bertrand*, 684 F.2d at 207 n.6.

216. *Id.* at 210 n.8.

217. 472 U.S. 846, 857 (1985).

218. *See id.* at 874–75.

219. *Id.* at 880.

220. *Id.* at 881 (distinguishing the decision to set entry quotas, where national origin is a

able immigration practices respecting entry at the border, and those that involve enforcement against individuals already present in the country's interior, was highlighted earlier in Section III. Because the AAI concerns enforcement of immigration laws against those already present in the country, and not those entering the country, the national origin classification cannot be strongly supported.

"When central immigration concerns are not at stake," Marshall continued, "the Executive must recognize the individuality of the alien, just as it must recognize the individuality of all other persons within our borders."[221] Marshall emphasized his point by noting that if the government acted on a belief that Haitians or blacks were more likely than others to commit crimes or be disruptive to the community into which they are paroled, "its detention policy certainly would not pass constitutional muster."[222] The AAI represents a national policy that discriminates based on national origin and race. It relies on the belief that Arabs and Muslims are more likely to be terrorists.[223] This is the very situation that was not confronted in *Bertrand* or *Jean*—those cases did not involve an invidious assumption based on national origin—but rather is the situation that each warned would be unconstitutional. Therefore, even as immigration law enforcement, Phase I of the AAI's prioritization of the enforcement of the law based on national origin or race was unconstitutional.

2. Even if the Government May Selectively Enforce Immigration Laws against a Subset of Similarly Situated Individuals Based on Their Nationality, the Basis for Choosing Such Countries Cannot Be Race or Ethnicity

In *AADC*, the Supreme Court held that an undocumented immigrant generally "has no constitutional right to assert selective enforcement as a defense against his deportation."[224] However, the Court held out the possibility of the selective enforcement defense in the context of immigration proceedings for the "rare case in which the alleged basis of discrimination is so outrageous that the foregoing considerations can be overcome."[225]

While not defined, the contours of "outrageous discrimination" can be gleaned from other cases. First, the Court has repeatedly condemned both selective law enforcement against similarly situated individuals on the facial basis of national origin, and intentional discrimination based on race and national origin as invidious and contrary to the principles of equal protection.[226]

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permissible consideration, from the decision to treat individuals admitted to the country differently based on their national origin, which would be unconstitutional).

221. *Id.* at 881.

222. *Id.* at 881.

223. *See* David Cole, *The New McCarthyism: Repeating History in the War on Terrorism*, 38 HARV. C.R.-C.L. L. REV. 1, 2 (2003).

224. Reno v. American-Arab Anti-Discrimination Committee, 525 U.S. 471, 488 (1999).

225. *See id.* at 490–91.

226. *See supra* Section III.A.2.

Second, in its Fourth Amendment jurisprudence, the Court has carved out an "egregious violations" exception to the proscription of the exclusionary rule in immigration proceedings.[227] As discussed in Section III.B.1, the Ninth Circuit has interpreted the *Lopez-Mendoza* "egregious violations" exception to mean that the exclusionary rule *does* apply in immigration proceedings where the INS has engaged in race-based enforcement. Therefore, the race-based immigration enforcement of the AAI likely would constitute "outrageous discrimination" and fall under the *AADC* exception.[228]

Even if the discrimination which motivated Phase I of the AAI was not found to meet *AADC*'s "outrageous" exception, the general difficulty of sustaining selective enforcement claims in the immigration context would not preclude a different holding with respect to the AAI than in *AADC* because of several key distinctions.

First, as outlined above, the AAI is a program of domestic criminal law enforcement, not immigration law enforcement.[229] The AAI was not a program to deport over three hundred thousand absconders; it was a joint effort of local, state and federal law enforcement to detain, interrogate, and deport a small group of absconders based on their national origin, race, and ethnicity and to further criminal investigations into terrorist activities. As a result, *AADC*'s language about the plenary power of the government over immigration matters should not apply.

Second, absconders are very different from the respondents in *AADC*, who were members of a group the government characterized as a communist organization and were being prosecuted for their specific First Amendment activities. Absconders are not known-terrorists or members of terrorist organizations. Indeed, the AAI Memo states that if an individual is subject to a terrorist investigation, his name will be removed from the absconder list.[230] Practically by definition, absconders have no known ties to terrorism at all, outside of being from a country where Al Qaeda has a presence.

Moreover, the three concerns expressed by the *AADC* majority about selective enforcement claims, which the Court declared are "greatly magnified in the deportation context," are not magnified in the absconder context.[231] The first concern, the risk of disclosing foreign-policy objectives by litigating the reasons for prioritization, is moot. The objectives of the AAI are plainly explained in the memo: to arrest and interview individuals from countries with Al Qaeda activity

227. *See* Lopez-Mendoza v. INS, 468 U.S. 1032, 1050 (1984).

228. Upholding a selective enforcement claim against the AAI would not prevent the INS from bringing deportation proceedings against individuals. It would merely prohibit the government from prioritizing the enforcement of the laws against individuals on the basis of their race or national origin.

229. *See supra* Section III.

230. AAI Memo § B.1, *supra* note 4, at 2–3.

231. *See supra* notes 170–176 and accompanying text.

in order to gather intelligence information.[232] The second concern, the potential for delay in litigation, is no greater in the deportation context than it is in any other context. Allowing absconders to assert constitutional protections evokes the very function that courts are to serve. The idea behind this "concern"—that quick injustice is better than slow justice—hardly squares with constitutional principles. The third concern, that injunctive relief against deporting absconders pending a ruling on the constitutionality of their arrests would permit and prolong a continuing violation of United States law, is an unsupported presumption. Many absconders received their orders of deportation in absentia and have valid claims to relief from deportation. A careful review of their cases will ensure that a consequence as severe as deportation is imposed only where appropriate. Additionally, an injunction as part of a constitutional challenge to the AAI would not prohibit the government from prosecuting absconders—the injunction would simply prohibit the government from specifically targeting Arabs and Muslims.

In summary, current doctrine supports a challenge to the constitutionality of Phase I of the AAI. As a program of domestic criminal law enforcement, it violates the proscription against using race and nation of origin as classifications in determining whom to prosecute. As a program of immigration law enforcement, it likewise constitutes the irrational and egregious use of race or nation of origin to identify targets of prosecution.

V.
CONCLUSION

In *Korematsu*, the Supreme Court affirmed the constitutionality of the internment of Japanese individuals, citing the "pressing public necessity" of such action.[233] Over fifty years later, the United States government responded to the devastating attacks of September 11, 2001, by instituting a series of programs aimed at Arab and Muslim individuals. With the AAI, which initially targeted for prosecution several thousand predominantly Arab and Muslim individuals from over three hundred thousand similarly situated individuals of all races, ethnicities, religions, and nationalities, the government pressed the bounds of public necessity too far. By conducting domestic law enforcement under the guise of immigration enforcement, and thereby violating well-established principles of equal protection, the rights of the few were sacrificed to assuage the fears of the many.

In his dissent in *Korematsu*, Justice Jackson warned that, when sanctioned by the courts, government classifications based on race "lie about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need."[234] The holdings in *Korematsu*, *Narenji*, and *AADC*—

232. AAI Memo § A, *supra* note 4, at 1.

233. Korematsu v. United States, 323 U.S. 215, 216 (1944).

234. *Id.* at 246 (Jackson, J., dissenting).

all decisions which sanctioned the targeting of unpopular minorities and immigrants—are just such loaded weapons for the current administration's actions targeting Arab and Muslim men following September 11. But courts need not follow those decisions nor make the same mistakes today. Especially in times of war and fear, the Constitution must not be cast aside.