

# MEMO

**To:** All Attorneys  
**From:** Ken Hashimoto, Fellow, NYSDA Immigrant Defense Project  
**Date:** October 31, 2001  
**Re:** Constitutional Limits on Federal Government's Power to Detain Immigrants Whom The Government Suspects To Be Terrorists

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## **I. Introduction and Question Presented**

Since the terror attacks on the United States on September 11, government officials have changed the laws regarding arrest and detention of immigrants present in the U.S., and have aggressively their authority to detain immigrants on suspicion of terrorism. Since September 11, the INS has promulgated new regulations that extend the permissible period of detention of aliens prior to a determination of probable cause; Congress has passed a new law that broadens the scope of INS authority to detain immigrants and immigrants suspected of terrorist activities; and federal law enforcement officials have arrested and detained nearly 1,000 individuals in furtherance of investigations into terrorist activities. For purposes of challenging new INS regulations, advancing efforts to inform public and political debate, and preparing for future litigation on behalf of immigrants detained pursuant to the new laws, this memo answers the question: What are the federal constitutional limits on the federal government's power to detain immigrants on suspicion of terrorism?

In answering this question, this memo attempts to project how past Constitutional doctrine might be applied to the recent amendments of immigration law. However, in light of fundamental changes in the culture and political context, alluded to herein, it is important to note that past doctrine may be of somewhat limited utility in predicting the analysis of future cases under the new amended laws.

## **II. Background**

### **A. Statutory and regulatory framework pertaining to detention of immigrants prior to September 11**

Prior to September 11, under the Immigration and Naturalization Act, the INS had two grounds of authority for arrest and detention of immigrants: "warrantless arrest" authority and "mandatory detention" authority.

## 1. Warrantless Arrest Provisions

Pursuant to 8 U.S.C. § 1357(a)(2), INS officials were authorized to make a warrantless arrest of any alien who attempted to enter the United States in violation of immigration laws, or if the official had “reason to believe that the alien so arrested is in the United States in violation of any such law or regulation and is likely to escape before a warrant can be obtained for his arrest, but the alien arrested shall be taken without unnecessary delay for examination before an officer of the Service having authority to examine aliens as to their right to enter or remain in the United States.” 8 U.S.C. § 1357(a)(2).

INS regulations promulgated pursuant to 8 U.S.C. § 1357 authorized the INS to detain immigrants for up to 24 hours after arrest before a qualified officer<sup>1</sup> was required to determine that there was prima facie evidence that the arrested alien was “entering, attempting to enter, or present in the United States in violation of the immigration laws.” 8 C.F.R. 287.3. This regulation was amended on October 18, 2001. See sub-section II(C), infra.

## 2. Mandatory Detention Provisions

Pursuant to 8 U.S.C. § 1226(a), the INS had authority to arrest an alien, and pending a decision on his or her removability, to detain the alien. 8 U.S.C. § 1226(a). This authority was mandatory, pursuant to § 1226(c); furthermore the Attorney General had no discretion to release such immigrants from custody.<sup>2</sup> 8 U.S.C. § 1226(c). The

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<sup>1</sup> A “qualified officer” was an INS officer who was not the arresting officer. 8 C.F.R. 287.3.

<sup>2</sup> 8 U.S.C. 1226 (c) provided in part:

### Detention of criminal aliens.

(1) Custody. The Attorney General shall take into custody any alien who--

(A) is inadmissible by reason of having committed any offense covered in section 212(a)(2), [8 USCS § 1182(a)(2)],

(B) is deportable by reason of having committed any offense covered in section 237(a)(2)(A)(ii), (A)(iii), (B), (C), or (D) [8 USCS § 1227(a)(2)(A)(ii), (A)(iii), (B), (C), or (D)],

(C) is deportable under section 237(a)(2)(A)(i) [8 USCS § 1227(a)(2)(A)(i)] on the basis of an offense for which the alien has been sentenced to a term of imprisonment of at least 1 year, or

(D) is inadmissible under section 212(a)(3)(B) [8 USCS § 1182(a)(3)(B)] or deportable under section 237(a)(4)(B) [8 USCS § 1227(a)(4)(B)],

when the alien is released, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense.

(2) Release. The Attorney General may release an alien described in paragraph (1) only if the Attorney General decides pursuant to section 3521 of title 18, United States Code, that release of

sweep of these “mandatory detention” provisions as related to persons suspected of terrorism was defined in 8 U.S.C. § 1182(3), which defined “security and related grounds” for exclusion from the United States, including committing espionage, committing sabotage, or engaging in terrorist activities.<sup>3</sup> Aliens who the Attorney General had “reason to believe” had “engaged in terrorist activities” or represented a terrorist organization were inadmissible. “Terrorist activities” was defined to include hijacking, kidnapping, assassination, and use of biological weapons or other weapons to harm the safety of other people.<sup>4</sup> “Engage in terrorist activity” was separately defined to

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the alien from custody is necessary to provide protection to a witness, a potential witness, a person cooperating with an investigation into major criminal activity, or an immediate family member or close associate of a witness, potential witness, or person cooperating with such an investigation, and the alien satisfies the Attorney General that the alien will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding. A decision relating to such release shall take place in accordance with a procedure that considers the severity of the offense committed by the alien.

<sup>3</sup> 8 U.S.C. § 1182(a)(3) provided in relevant part:

(A) Any alien who a consular officer or the Attorney General knows, or has reasonable ground to believe, seeks to enter the United States to engage solely, principally, or incidentally in--

- (i) any activity (I) to violate any law of the United States relating to espionage or sabotage or (II) to violate or evade any law prohibiting the export from the United States of goods, technology, or sensitive information,
- (ii) any other unlawful activity, or
- (iii) any activity a purpose of which is the opposition to, or the control or overthrow of, the Government of the United States by force, violence, or other unlawful means, is inadmissible.

(B) Terrorist activities.

- (i) In general. Any alien who--
  - (I) has engaged in a terrorist activity,
  - (II) a consular officer or the Attorney General knows, or has reasonable ground to believe, is engaged in or is likely to engage after entry in any terrorist activity (as defined in clause (iii)),
  - (III) has, under circumstances indicating an intention to cause death or serious bodily harm, incited terrorist activity,
  - (IV) is a representative (as defined in clause (iv)) of a foreign terrorist organization, as designated by the Secretary under section 219 [8 USCS § 1189], or
  - (V) is a member of a foreign terrorist organization, as designated by the Secretary under section 219 [8 USCS § 1189], which the alien knows or should have known is a terrorist organizationis inadmissible.

<sup>4</sup> 8 U.S.C. § 1182(a)(3)(B)(i) provided in relevant part:

Terrorist activity defined. As used in this Act, the term "terrorist activity" means any activity which is unlawful under the laws of the place where it is committed (or which, if committed in the United States, would be unlawful under the laws of the United States or any State) and which involves any of the following:

- (I) The highjacking or sabotage of any conveyance (including an aircraft, vessel, or vehicle).
- (II) The seizing or detaining, and threatening to kill, injure, or continue to detain, another individual in order to compel a third person (including a governmental organization) to do or abstain from doing any act as an explicit or implicit condition for the release of the individual seized or detained.

include acts of preparation or planning, gathering of information, providing of material support, or solicitation of funds, for terrorist activity, or solicitation of members for a terrorist organization.<sup>5</sup>

Pursuant to 8 U.S.C. 1231(a), the Attorney General was required to remove an alien within 90 days (the “removal period”) of a removal order, and had no authority to release the immigrant; however, if such removal did not occur, the immigrant was required to appear before an official for “supervision.”<sup>6</sup> 8 U.S.C. 1231(a)

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- (III) A violent attack upon an internationally protected person ... or upon the liberty of such a person.
  - (IV) An assassination.
  - (V) The use of any--
    - (a) biological agent, chemical agent, or nuclear weapon or device, or
    - (b) explosive or firearm (other than for mere personal monetary gain),with intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property.
  - (VI) A threat, attempt, or conspiracy to do any of the foregoing.

<sup>5</sup> 8 U.S.C. § 1182(a)(3)(iii) provided in relevant part:

Engage in terrorist activity defined. As used in this Act, the term "engage in terrorist activity" means to commit, in an individual capacity or as a member of an organization, an act of terrorist activity or an act which the actor knows, or reasonably should know, affords material support to any individual, organization, or government in conducting a terrorist activity at any time, including any of the following acts:

- (I) The preparation or planning of a terrorist activity.
- (II) The gathering of information on potential targets for terrorist activity.
- (III) The providing of any type of material support, including a safe house, transportation, communications, funds, false documentation or identification, weapons, explosives, or training, to any individual the actor knows or has reason to believe has committed or plans to commit a terrorist activity.
- (IV) The soliciting of funds or other things of value for terrorist activity or for any terrorist organization.
- (V) The solicitation of any individual for membership in a terrorist organization, terrorist government, or to engage in a terrorist activity.

<sup>6</sup> Section 8 U.S.C. § 1231 (a) provided in relevant part:

§ 1231 (a) Detention, release, and removal of aliens ordered removed.

(1) Removal period.

(A) In general. Except as otherwise provided in this section, when an alien is ordered removed, the Attorney General shall remove the alien from the United States within a period of 90 days (in this section referred to as the "removal period") . . . .

(C) Suspension of period. The removal period shall be extended beyond a period of 90 days and the alien may remain in detention during such extended period if the alien fails or refuses to make timely application in good faith for travel or other documents necessary to the alien's departure or conspires or acts to prevent the alien's removal subject to an order of removal.

(2) Detention. During the removal period, the Attorney General shall detain the alien. Under no circumstance during the removal period shall the Attorney General release an alien who has been found inadmissible . . .

(3) Supervision after 90-day period. If the alien does not leave or is not removed within the removal period, the alien, pending removal, shall be subject to supervision under regulations prescribed by the Attorney General. The regulations shall include provisions requiring the alien--

Pursuant to 8 U.S.C. 1226(e), the Attorney General’s judgment of deportability was not subject to judicial review, and “no court” was permitted to “set aside any action or decision by the Attorney General under this section regarding the detention or release of any alien or the grant, revocation, or denial of bond or parole.”

These laws were amended by the Patriot Act of 2001, which was signed into law by President Bush on October 26, 2001. See subsection II(D), infra.

## **B. Relevant Social and Political Context**

On September 11, terrorists commandeered three commercial airplanes and flew them into the Twin Towers of the World Trade Center in New York City and the Pentagon in Washington, D.C.. A fourth plane was hijacked, but was apparently prevented from striking an undetermined fourth location by passengers on board the plane. More than four thousand people were killed in the attacks. As of October 28, estimates are that 977 immigrants have been arrested and detained by INS officials pursuant to INS authority and the material witness statute.

On October 7, the U.S. launched air strikes against Afghanistan, in an attempt to dislodge the Taliban regime, which has allowed Osama Bin Laden, the suspected mastermind of the September 11 terrorist attacks, to remain within the country’s borders. The air strikes have continued since that time; in addition, the Pentagon reports that ground forces conducted a “raid” on locations in Afghanistan on October 18.

In the first week of October, envelopes filled with anthrax in a powdered medium were sent through the U.S. mail to news outlets and federal political leaders; since then, four people have died from exposure to anthrax. In the last week, up to 10,000 post office employees and other persons who may have been exposed have received antibiotic treatments for anthrax; on October 30, news outlets reported that a hospital worker in Manhattan who had no apparent connection to tainted mail had contracted pulmonary anthrax. Twice since the September 11 attacks, Attorney General Ashcroft has issued

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(A) to appear before an immigration officer periodically for identification;

(B) to submit, if necessary, to a medical and psychiatric examination at the expense of the United States Government;

(C) to give information under oath about the alien's nationality, circumstances, habits, associations, and activities, and other information the Attorney General considers appropriate; and

(D) to obey reasonable written restrictions on the alien's conduct or activities that the Attorney General prescribes for the alien.

public warnings of imminent terrorist attacks on the United States in the next week. However, the Attorney General has been unable to provide more specific information about potential attacks.

### **C. INS Proposed Interim Regulations on October 18**

On September 18, the INS promulgated regulations that extended the period of time after an alien's arrest within which the Service must make a determination of whether the alien will be continued in custody or released on bond or recognizance and whether to issue a notice to appear and warrant of arrest. The new rule provides that the Service must make such determinations within 48 hours of arrest, except in the event of emergency or other extraordinary circumstance in which case the Service must make such determinations within an additional reasonable period of time.<sup>7</sup>

The new rule was implemented immediately, “to ensure that the Service has sufficient time, personnel, and resources to process cases-including establishing true identities and communicating with other law enforcement agencies-that arise in connection with the emergency posed by the recent terrorist activities perpetrated on United States soil,” and “because the delays inherent in the regular notice and comment process would be ‘impracticable, unnecessary and contrary to the public interest.’” The public comment period on the rule is open until November 19, 2001.

The language of this amendment is virtually identical to language in County of Riverside v. McLaughlin, 500 U.S. 44 (1991), in which the Supreme Court held that for probable cause determinations in the absence of a demonstrated emergency or other extraordinary circumstances, a “prompt” determination of probable cause means “within 48 hours.”

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<sup>7</sup> The amended Custody Procedures read as follows:

*Custody procedures.* Unless voluntary departure has been granted pursuant to subpart C of 8 CFR part 240, a determination will be made within 48 hours of the arrest, except in the event of an emergency or other extraordinary circumstance in which case a determination will be made within an additional reasonable period of time, whether the alien will be continued in custody or released on bond or recognizance and whether a notice to appear and warrant of arrest as prescribed in 8 CFR parts 236 and 239 will be issued

#### **D. October 2001 Amendments to the INA**

On October 26, President Bush signed into law the “Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism” (USA PATRIOT) Act of 2001. As part of a broad array of substantial amendments to federal provisions, the Act expands the authority of the Attorney General to detain and deport immigrants.

In specific, the Act adds as persons ineligible for admissibility to the U.S. any alien who: (1) is a representative of a group whose endorsement of terrorist activity has been determined by the Secretary of State to undermine U.S. “efforts to reduce or eliminate terrorist activities”, (2) has used his/her position of prominence in any country to endorse, espouse, or persuade others to support terrorist activity or terrorist organization in a way that the Secretary of State determines has undermined the U.S. efforts to reduce terrorist activities, or (3) “is the spouse or child of an alien who is inadmissible under this section,” provided that the acts causing inadmissibility “occurred within the last 5 years.” The Act excepts from inadmissibility spouses and children who “did not know or should not reasonably have known” of the activity causing inadmissibility, and those whom the consular officer or Attorney General has reasonable grounds to believe have renounced such activities. H.R. 3162 Sec. 411(a)(1) – 411(a)(4).

The Act broadens the definition of “engage in terrorist activity” to include: (1) “to commit or to incite to commit, under circumstances indicating an intention to cause death or serious bodily injury, a terrorist activity;” (2) “to prepare or plan a terrorist activity; (3) to gather information on potential targets for terrorist activity; (4) to solicit funds or other things of value for a terrorist activity, terrorist organization, unless it can be shown that the alien “did not know, and should not reasonably have known, that the solicitation would further the organization’s terrorist activity”; (5) “to commit an act the actor knows or reasonably should know, affords material support, including a safe house, transportation, communications, funds, transfer of funds ... or training” for the commission of a terrorist activity, to any individual the actor knows or reasonably should know has committed or plans to commit a terrorist activity, to a terrorist organization. H.R. 3162 Sec. 411(a)(1)(F)(4).

The Act defines “terrorist organization” as an organization: (1) designated under the Act, or (2) by the Secretary of State in consultation with the Attorney General as a terrorist organization, or (3) that is a group of two or more individuals that engages in terrorist activities, as defined in the act. H.R. 3162 Sec. 411(a)(1)(G)(4).

The Act makes inadmissible “any alien” whom the Secretary of State in consultation with the Attorney General “determines has been associated with a terrorist organization and intends while in the United States to engage solely, principally, or incidentally in activities that could endanger the welfare, safety or security of the United States.” H.R. 3162 Sec. 411(a)(2)(G).

Finally, the Act restricts judicial review of “any action or decision” relating to mandatory detention provisions of the INA to the Supreme Court, the United States Court of Appeals for the District of Columbia Circuit, or “any district court otherwise having jurisdiction to entertain it.”<sup>8</sup> H.R. 3162 Sec. 412(b).

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<sup>8</sup> Section 412(b) of the Patriot Act provides in pertinent part:

(b) HABEAS CORPUS AND JUDICIAL REVIEW-

`(1) IN GENERAL- Judicial review of any action or decision relating to this section (including judicial review of the merits of a determination made under subsection (a)(3) or (a)(6)) is available exclusively in habeas corpus proceedings consistent with this subsection. Except as provided in the preceding sentence, no court shall have jurisdiction to review, by habeas corpus petition or otherwise, any such action or decision.

`(2) APPLICATION-

`(A) IN GENERAL- Notwithstanding any other provision of law, including section 2241(a) of title 28, United States Code, habeas corpus proceedings described in paragraph (1) may be initiated only by an application filed with-

`(i) the Supreme Court;

`(ii) any justice of the Supreme Court;

`(iii) any circuit judge of the United States Court of Appeals for the District of Columbia Circuit; or

`(iv) any district court otherwise having jurisdiction to entertain it.

`(B) APPLICATION TRANSFER- Section 2241(b) of title 28, United States Code, shall apply to an application for a writ of habeas corpus described in subparagraph (A).

`(3) APPEALS- Notwithstanding any other provision of law, including section 2253 of title 28, in habeas corpus proceedings described in paragraph (1) before a circuit or district judge, the final order shall be subject to review, on appeal, by the United States Court of Appeals for the District of Columbia Circuit. There shall be no right of appeal in such proceedings to any other circuit court of appeals.

`(4) RULE OF DECISION- The law applied by the Supreme Court and the United States Court of Appeals for the District of Columbia Circuit shall be regarded as the rule of decision in habeas corpus proceedings described in paragraph (1).

### **III. Congress' Limited Plenary Power Over Immigration**

#### **A. Congress' plenary power is subject to Constitutional limitations, and federal courts may review the constitutionality of Congressional enactments.**

Congress has plenary authority to establish the process due in immigration proceedings. See *U.S. ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950). However, the Supreme Court recently held this authority is subject to Constitutional limitations, and federal courts have authority to review immigration laws and actions for constitutionality. See *Zadvydas v. Davis*, 121 S.Ct. 2491, 2501 (2001), citing *INS v. Chadha*, 462 U.S. 919, 941-942 (1983); *The Chinese Exclusion Case*, 130 U.S. 581 (1889). *Zadvydas* has broad implications beyond its Due Process Clause holding – by limiting the plenary power of Congress, the Court has opened immigration laws and enforcement to other potential Constitutional claims.

### **IV. Fifth Amendment Due Process Clause**

*“No person shall be . . . deprived of life, liberty, or property without due process of law.”*

#### **A. Aliens are protected by the Fifth Amendment's Due Process Requirement**

Aliens are “persons” within the language of the Fifth Amendment, and once inside the country, are protected by the Due Process Clause. See *Zadvydas v. Davis*, 121 S.Ct. 2491, 2501 (2001); *Landon v. Plasencia*, 459 U.S. 21, 32-33 (1982); *Ngo v. INS*, 166 F.3d 390, 396 (3rd Cir. 1999); *Michael v. INS*, 119 F.Supp. 2d 485 (M.D. Pa. 2000). There are “well established” differences in the constitutional protections available to an “alien who has effected entry in the United States” and one who has not. *Zadvydas v. Davis*, 121 S.Ct. 2491, 2500 (2001).

An alien who has been deemed “excludable” or “not admitted” (present in the country illegally) are considered to have not “effected an entry” and, like persons outside the borders of the United States, are not protected by the Fifth Amendment. See *Zadvydas v. Davis*, 121 S.Ct. 2491, 2500; *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 216 (1953) (lawfully admitted alien who, after extended absence from U.S., was detained at Ellis Island, not considered to have effected entry, and subject to

indefinite detention); Duy Dac Ho v. Green, 204 F.3d 1045, 1059 (2000). Therefore, it is not likely that a court would extend to an illegal alien who was present within the United States or an alien at the border the substantive protections of the Fifth Amendment, and would only evaluate the detention of such aliens to determine if the process provided by statute was followed. Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206, 216 (1953).

But once an alien has lawfully entered the U.S. and begins to develop ties in the country, her constitutional status changes; it is likely that a court would afford such aliens Fifth Amendment protections. Landon v. Plasencia, 459 U.S. 21, 32; Shaughnessy v. United States ex rel. Mezei 345 U.S. 206, 212.

**B. Non-punitive detention by the government is valid only if it is ordered in “special and narrow non-punitive circumstances,” and survives constitutional due process analysis.**

The Supreme Court has held that government detention violates the Due Process requirements of the Fifth Amendment except in two circumstances. See Zadvydas v. Davis, 121 S.Ct. 2491, 2498-99. First, detention may not violate the Due Process Clause if it is ordered in a criminal proceeding with adequate procedural protections. See United States v. Salerno, 481 U.S. 739 (1987). Second, detention may be ordered in “special and narrow non-punitive circumstances.” See Foucha v. Louisiana, 504 U.S. 71 (1992). If detention is for the purpose of punishment, a detainee is protected by constitutional due process requirements. Wong Wing v. United States, 163 U.S. 228, 241 (1896). Detention by the INS in furtherance of deportation proceedings is civil, not criminal, and presumed non-punitive in purpose and effect, Zadvydas v. Davis, 121 S.Ct. 2491, 2499; thus, a challenge to the detention under immigration laws would proceed under a “civil, non-punitive” due process analysis.

**C. Detention of immigrants survives Substantive Due Process analysis only if it is narrowly tailored to serve a compelling governmental interest.**

Courts have construed the Fifth Amendment Due Process Clause to contain “substantive” protections, under which, certain fundamental liberty interests may not be infringed by the government, regardless of what process is provided, unless the infringement is narrowly tailored to serve a compelling governmental interest. See Reno

v. Flores, 507 U.S. 292, 301, Kay v. Reno, 94 F. Supp. 2d 546, 549 (M.D. Pa. 2000); Phan v. Reno, 56 F. Supp. 2d 1149, 1154 (W.D. Wash. 1999).

1. An immigrant’s fundamental right to freedom from custody is infringed upon when he or she is detained.

Evaluation of whether the “substantive” protections of the Due Process Clause have been violated begins with a determination of the right that is being asserted. Collins v. Harker Heights, 503 U.S. 115, 125 (1992). If the right asserted is a fundamental liberty interest, infringement upon that right must be narrowly tailored to serve a compelling state interest. Reno v. Flores, 507 U.S. 292, 301 (1993). If the asserted right is not fundamental, the detention need only rationally “advance some legitimate government interest.” Reno v. Flores, 507 U.S. at 305-06.

It is likely that a court would find that detention of an immigrant on suspicion of terrorism infringes upon a fundamental liberty interest, and would therefore require that the infringement be narrowly tailored to serve a compelling government interest. See Zadvydas v. Ashcroft, 121 S.Ct. 2491; Reno v. Flores, 507 U.S. 292, 301. Under the Fifth Amendment, a legal resident alien has a right to freedom from imprisonment. This freedom “from government custody, detention, or other forms of physical restraint – lies at the heart of the liberty [the Fifth Amendment Due Process] Clause protects.” Zadvydas v. Ashcroft, 121 S.Ct. 2491 (2001), citing Foucha v. Louisiana, 504 U.S. 71, 80 (1992); see also Barrera-Echavarria v. Rison, 44 F.3d 1441, 1450 (right to be free from detention). A long-term permanent resident who has not been subjected to a deportation order may assert rights that are even more broad, since these individuals likely have vested interests in property they have acquired. Matthews v. Diaz, 426 U.S. 67, 80 (1976); Bridges v. Wixon, 326 U.S. 135, 154 (1945); DiPasquale v. Karnuth, 158 F.2d 878, 879 (2<sup>nd</sup> Cir. 1947); Johnson v. Eisentrager, 339 U.S. 763, 770 (1950); Woodby v. INS, 385 U.S. 276, 286 (1966); Landon v. Plasencia, 459 U.S. 21, 32 (1982).

2. To survive substantive due process analysis, non-punitive detention that infringes upon an alien’s right to freedom from detention must be justified by purposes that outweigh the infringement on the detainee’s rights

For non-punitive detention to be constitutional, the “special” justification for detention must outweigh the burden on the protected right. Zadvydas v. Davis, 121 S.Ct.

at 2499. In general, the infringement upon an individual's fundamental liberty interest must be sufficiently narrowly tailored to a compelling governmental purpose that is regulatory, rather than punitive, and must not be excessive in relation to the purpose behind the statute. United States v. Salerno, 481 U.S. 739, 747 (1987) (administrative detention to prevent further criminal activity pursuant to the Bail Reform Act of 1984 that furthers an overwhelming governmental interest and is accompanied by "extensive" procedural safeguards does not impermissibly violate due process rights).

For example, the threat to the public and the detainee of a "harm-threatening mental illness" may outweigh the detainee's constitutionally protected interest in avoiding physical restraint. Zadvydas v. Davis, 121 S.Ct. at 2499, citing Kansas v. Hendricks, 521 U.S. 346 (confinement after criminal incarceration of pedophile not violative of *ex post facto* clause because a current mental abnormality or personality disorder was likely to endanger the public in the future). In Zadvydas, the court held that the government's justifications for indefinitely detaining deportable aliens whose home countries refused to accept them back did not outweigh the burden on the aliens' rights to freedom from detention, because the detention was not itself justified by the governmental purposes, and therefore the governmental interests could not outweigh the burden on the detainees' interests. See Zadvydas v. Davis, 121 S.Ct. at 2499.

However, advocates should note that prior case law on this fact-specific balancing of governmental interests against asserted rights is dependent on the context. See Salerno, 481 U.S. at 748. In the words of Justice Holmes, "[W]hat is due process of law depends on circumstances. It varies with the subject-matter and the necessities of the situation." Moyer v. Peabody, 212 U.S. 78, 81 (1909) (state governor's order to imprison a union president for over two months, made without sufficient reason but in good faith and within the authority granted by the state Constitution and laws, was not a deprivation of liberty without due process of law). It is likely that a court might find the uncertainty and "war-like" exigencies of the current context to weigh more heavily on the "governmental" side of the balance.

Furthermore, in considering Due Process cases in times of national crisis, courts have deferred to Congress and executive agencies. See, e.g., Ludecke v. Watkins, 335

U.S. 160, 173 (1948) (Habeas relief denied to German alien whose detention, by order of the Attorney General pursuant to the Alien Enemy Act of 1798, extended beyond the cessation of hostilities in Germany, because the “full responsibility for the just exercise of this great power may validly be left where the Congress has constitutionally placed it -- on the President of the United States.”) Given the dependence of factoral analyses on the context, pre-September 11 precedent may not be the most accurate predictor of a court’s likely analysis of Due Process claims under new anti-terrorism laws legislation and INS regulations.

a. To Outweigh an Immigrant’s Fundamental Interest in Liberty, Governmental Justifications for Detention Must Be Based in Permissible Regulatory Goals

To be constitutional, detention of legal immigrants upon suspicion of terrorism must not only serve a governmental interest weighty enough to overwhelm an immigrant’s fundamental liberty interests; detention must continue to bear a reasonable relation to the purpose for which the detainee was detained, and must be based on “permissible regulatory goals.” Zadvydas v. Davis, 121 S.Ct. at 2499.

Detention in service of non-punitive purposes may be found unconstitutional if the regulatory goals are impermissible or if the detention exceeds the regulatory goals. See Schall v. Martin, 467 U.S. 253, 269 (1984) (upholding statute authorizing pretrial detention of juveniles, because the statute served a legitimate state purpose and did not exceed that purpose). For example, in Zadvydas, the court found that indefinite post-removal detention of an alien whose country of origin refused to allow him back into the country was not justified by a fear that the alien would flee, since “where detention’s goal is no longer practically attainable, detention no longer “bears a reasonable relation to the purpose for which the individual was committed.” Zadvydas v. Davis, 121 S.Ct. at 2499, quoting Jackson v. Indiana, 406 U.S. 715, 738 (1972).

Applying this analysis to the newly amended immigration laws, advocates would need to argue that detention of immigrants does not advance legitimate governmental purposes, either because preventing terrorism and regulating immigration purposes are not permissible regulatory goals, or (if they are permissible purposes), because detention does not bear a reasonable relation to these purposes. The first argument seems difficult,

since regulation of immigration is the explicit mandate of the INS, and prevention of terrorism is a legitimate state interest.

Specific facts might alter the analysis somewhat; however, in broad terms it seems the second argument is potentially difficult as well. For immigrants who are detained on suspicion of terrorist activities, but who have not committed status offenses nor deportable predicate offenses, detention of immigrants might be reasonably related to the regulatory goal of preventing the flight of a suspected terrorist. For immigrants who are detained because of status offenses or deportable predicate offenses, about whom the government has only minimal suspicion of terrorist activity, detention would relate to the goal of regulating immigration.

- b. Preventive Detention may burden only a limited class of individuals, and must be accompanied by strong procedural protections

If non-punitive detention is preventive, it must be “limited to specially dangerous individuals and subject to strong procedural protections.” See Zadvydas v. Davis, 121 S.Ct. 2491 at 2499; Kansas v. Hendricks 521 U.S. 346, 368 (1997); Salerno, 481 U.S. at 747. Furthermore, in balancing the government’s interest in preventive detention against the infringement upon the fundamental liberty interest, the Supreme Court has also required the government to show “by clear and convincing evidence that an arrestee presents an identified and articulable threat to an individual or the community.” Salerno, 481 U.S. at 751, quoted in Chi Thong Ngo v. INS, 192 F.3d 390 (3d Cir. Pa. 1999).

The requirement of clearly limits might give rise to an argument that the new immigration laws are not sufficiently narrowly tailored to a particular class of individuals; however the Zadvydas court noted that “suspected terrorists” would be an example of a small segment of particularly dangerous individuals. Zadvydas v. Davis, 121 S.Ct. 2491, at 2499. Given this explicit reference, it could be presumed that detention under provisions of the Patriot Act that expanded the class of individuals to include individuals suspected of terrorism and association with terrorists organizations would be found sufficiently limited to “specially dangerous individuals.”

The Zadvydas court’s explicit mention of “terrorists” as a sufficiently narrow class might be countered with an argument that the newly amended immigration laws

include not just those aliens who are suspected terrorists, but also their spouses and children. H.R. 3162, Sec. 411(a)(1). In addition, although the Patriot Act requires the Attorney General to certify individuals and organizations as having engaged in “terrorist” activities, this certification process does not provide procedural guarantees normally associated with due process (such as notice, hearing, representation, and judicial review), and that the procedures provided are not “strong procedural protections.”

The Zadvydas court specifically noted that the immigration law’s procedural protections, like those in a scheme previously struck down in Foucha v. Louisiana, 504 U.S. 71 (1992), were available solely in administrative proceedings in which the detainee bore the burden of proving he was *not* dangerous, and observed that “the Constitution may well preclude granting ‘an administrative body the unreviewable authority to make determinations implicating fundamental rights.’” Zadvydas v. Davis, 121 S.Ct. 2491 at 2500 (quoting Superintendent, Mass. Correctional Institution at Walpole v. Hill, 472 U.S. 445, 450 (1985)).

The Patriot Act provides for Habeas Corpus review of detention – however, it might be argued that the Supreme Court itself held that the immigration provisions in Zadvydas were interpreted to allow habeas review (this is, after all, how the case reached the court), and yet were construed to require further protections. Furthermore, it might be argued that Habeas review is not a “strong procedural protection,” since the detention will continue while habeas is pending.

- c. Detention beyond a period reasonably necessary to bring about the government purpose is presumptively unconstitutional

In Zadvydas, the Supreme Court held that Fifth Amendment protections limited an alien’s “post-removal-period detention to a period reasonably necessary to bring about that alien’s removal from the United States,” Zadvydas, 121 S.Ct. at 2498, and therefore imposed a six month limit on the presumptive reasonableness of detention of removable aliens who are indefinitely non-deportable (i.e.-because their home countries refuse to receive them back). Zadvydas, 121 S.Ct. at 2505. After the six-month period, if the alien can provide good reason to believe there is no significant likelihood of removal, the government must rebut this showing with evidence of its own. Id. Detention beyond this

may be valid, until “it has been determined that there is no significant likelihood of removal in the reasonably foreseeable future.” Id.

Where preventive detention is of “potentially *indefinite* duration,” dangerousness must be accompanied by some special circumstance, “such as mental illness, that helps to create the danger.” Zadvydas v. Davis, 121 S.Ct. at 2499; Kansas v. Hendricks 521 U.S. 346 (1997), at 348. The Zadvydas court’s use of “indefinite” was directed at the lack of a foreseeable end to the detention, since the petitioners in the case were held pursuant to an order of removal, but their countries of origin refused to allow them back.

The Patriot Act requires a redetermination every six months by the Attorney General of the detention status of any detained alien. However, since detention under the Patriot Act is pursuant to the INS’ removal authority, it would seem that Zadvydas would require that this redetermination proceeding show that there is “a significant likelihood” that a given alien *will be removed* for a continued detention to be valid. A determination that the alien is merely a flight risk or a threat to the public might be insufficient to meet the Zadvydas requirements for potentially indefinite preventive detentions.

The INS proposed interim regulations allow for continued detention for a “reasonable period of time” in times of emergency or extraordinary circumstances. To the extent that detention under the newly-amended INS warrantless arrest provision exceeds six months, it would violate Zadvydas’ presumptive limit on reasonable detention – but it is likely that it would fail on Fourth Amendment grounds as well. See Fourth Amendment section, infra.

**D. Immigrants detained on suspicion of terrorism must be provided with adequate Procedural Due Process to withstand Constitutional scrutiny**

Whether or not a deprivation violates procedural due process is determined under the Mathews v. Eldridge framework, which weighs: (1) the private interest infringed upon; (2) the risk of an erroneous deprivation of the interest under the existing procedures and the probable value of additional or substitute procedural safeguards; (3) the Government’s interest, including additional burdens that the additional or substitute procedural requirement would entail.” See Mathews v. Eldridge, 424 U.S. 319, 335 (1976). The private interest and governmental interest analyses will not be repeated here;

it is sufficient to note that the private interest is a fundamental interest, and there is some question as to whether the government interest is sufficient to outweigh the private interest.

1. Risk of Erroneous Deprivation under Existing Procedures and Probable Value of Substitute Procedural Safeguards

In fundamental fairness determinations, procedural protections are adequate if they are "adequate to authorize the pretrial detention of at least some [persons] charged with crimes," whether or not they might be insufficient in some particular circumstances. See Salerno, 481 U.S. at 751, quoting Schall v. Martin, 467 U.S. 253, 264 (1984) (upholding statute authorizing pretrial detention of juveniles, because the statute served a legitimate state purpose and contained adequate procedural safeguards).

2. Extended detentions pursuant to an immigration law without a judicial determination of probable cause might be found unconstitutional in violation of the Fifth Amendment.

In addressing challenges to extended mandatory detentions during the pendency of appeal of a deportation order by deportable immigrants,<sup>9</sup> some federal courts have held that, failure by the government to hold individualized hearings about the risk of flight during the pendency of appeal is an erroneous deprivation of a fundamental interest, and therefore that the mandatory detention regulation fails procedural due process requirements. Zgombic v. Farquason, 89 F.Supp. 2d 220 (D.C Conn. 2000) (30-year lawful resident deprived of procedural due process rights, but not substantive due process, where no individualized determinations of bail during pendency of appeal); Koita v. Reno, 113 F.Supp. 2d 737 (M.D. Penn. 2000) (immigrants detained under 1226(c) had both a substantive and procedural due process right to a hearing on bond pending completion of the appeal proceedings); Koita v. Reno, 113 F.Supp. 2d 737 (M.D. Penn. 2000) (immigrants detained under 1226(c) had both a substantive and procedural

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<sup>9</sup> Section 8 U.S.C.S. § 1226(c), § 236(c) of the Immigration and Naturalization Act reads in part as follows:

(1) The Attorney General shall take into custody any alien who . . . (B) is deportable by reason of having committed any offense covered in section 1227(a)(2)(A)(ii) [multiple crimes of moral turpitude], (A)(iii) ["Aggravated felony"], (B) ["Controlled substances"], (C) ["Certain firearm offenses"], or (D) ["espionage-related crimes"] of this title, . . .  
(2) Release - The Attorney General may release an alien described in paragraph (1) only if the [alien has been admitted into the Witness Protection Program], . . . and the alien satisfies the Attorney General that the alien will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding.

due process right to a hearing on bond pending completion of the appeal proceedings); Zgombic v. Farquhason, 89 F.Supp.2d 220 (D.C Conn. 2000) (30-year lawful resident deprived of procedural due process rights, but not substantive due process, where no individualized determinations of bail during pendency of appeal); United States ex rel. Sadrija Radonic v. Zemski, 121 F. Supp. 2d 814 (E.D. Pa. 2000) (habeas relief granted to LPR confined under Section 1226, because due process requires an individualized determination of whether continued indefinite detention is necessary to prevent a risk of flight or a threat to the community, and continued detention without a bail hearing was unconstitutional); Van Eeton v. Beebe, 49 F. Supp. 2d 1186 (D.Or. 1999) (Habeas relief granted to LPR who did not admit to deportability but was detained pursuant to 1226(c) immediately after incarceration for drug offense, because his fundamental interest in liberty was being infringed, and the regulation did not contain procedures for individualized determination of whether or not LPR was a flight risk, making the risk of erroneous deprivation high.); Ekekor v. Aljets, 979 F.Supp. 640 (N.D. Ill. 1997) (Denial of bond, pursuant to 1226(e) violates due process).

Other courts have held that, in view of the legitimate government interest in curtailing crime, its broad authority in the field of immigration law, and its interest in removing deportable aliens and the limited private rights of aliens, additional procedural protections are not warranted and thus mandatory detention is not invalid on procedural due process grounds. See, e.g., Reyes v. Underdown, 73 F.Supp. 2d 653 (D.La.1999) (no procedural due process violation in extended detention of immigrant); Galvez v. Lewis, 56 F.Supp. 2d 637 (mandatory detention does not violate substantive or procedural due process because no deprivation of a liberty interest, since alien could end detention by leaving the United States); Avramenkov v. INS, 99 F.Supp. 2d 210 (D.C.Conn. 2000) (LPR denied habeas relief, because 1226(c) is not unconstitutional); Okeke v. Pasquarell, 80 F.Supp.2d 635 (W.D. Tex. 2000) (denying federal habeas relief for LPR because of the constitutionality of 1226(c), in light of the broad powers of Congress to legislate in the field of immigration); Diaz-Zaldierna v. Fasano, 43 F.Supp.2d 1114 (S.D.Ca. 1999) (Burden on LPR's Fifth Amendment rights does not render 1226(c) unconstitutional in view of Congress' mandate to detain a class of immigrants was valid in view of its legitimate regulatory goal of curtailing the drug trade.). Cf. Parra v. Perryman, 172 F.3d

954 (1999) (holding that, because the alien had admitted to committing a deportable offense, he had “forfeited any legal entitlement to remain in the United States and have little hope of clemency.” 172 F.3d at 957).

A third disposition of Fifth Amendment Due Process claims in the context of mandatory detention under 8 U.S.C.S. 1226(c) has been to grant a substantive due process claim and deny any separate procedural due process challenge, on grounds that the procedural claim is “at bottom” a substantive due process claim and not a procedural claim at all. See e.g., *Cardoso v. Reno* 127 F.Supp. 2d 106 (D.C. Conn. 2001) (continued detention of a LPR who had completed sentence for drug offenses was unconstitutional, because it violated substantive and procedural due process.)<sup>10</sup>

A federal court applying pre-September 11 doctrine might find that the mandatory detention provisions in the Patriot Act fail to adequately provide for procedural due process, in light of the fact that the *Zadvydas* court expressly held both that Congress’s plenary power over immigration matters does not preclude consideration of constitutional claims, and that an alien’s fundamental interest in liberty can outweigh the governmental interest in regulating immigration. Thus, the lack of individualized determinations of an alien’s fitness for relief from detention might be found to create an impermissibly high risk of erroneous deprivation of the alien’s fundamental interest. See *Zgombic v. Farquhason*, 89 F.Supp. 2d 220 (D.C Conn. 2000); *Koita v. Reno*, 113 F.Supp. 2d 737 (M.D. Penn. 2000); *Zgombic v. Farquhason*, 89 F.Supp.2d 220 (D.C Conn. 2000); *United States ex rel. Sadrija Radonic v. Zemski*, 121 F. Supp. 2d 814 (E.D. Pa. 2000); *Van Eeton v. Beebe*, 49 F. Supp. 2d 1186 (D.Or. 1999); *Ekechor v. Aljets*, 979 F.Supp. 640 (N.D. Ill. 1997).

However, it may be that the weighty anti-terrorist and national security concerns the government will now assert will tip the procedural due process balance against an immigrant.

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<sup>10</sup> “Given that a fundamental right is involved, § 236(c) sweeps too broadly, because denying individual bond hearings imputes a generalized intent to abscond or endanger society to all deportable aliens, regardless of their circumstances, the nature of their crime, or the potential that they may be allowed to remain in this country permanently. Petitioner’s detention under this generalized assumption is arbitrary, in that it is without regard to her circumstances, in light of the lack of any consideration of lawful permanent residents with a chance at discretionary relief, and whether they present similar flight or recidivism risks in the legislative history.” *Cardoso v. Reno* 127 F.Supp. 2d 106, 114.

3. Collateral Review of INS actions Would Likely be A Sufficient Procedural Safeguard to Satisfy Due Process Requirements

Congress may strip the federal courts of direct review of immigration decisions. See, e.g., Calcano-Martinez v. INS, 121 S.Ct. 2268 (2001). However, in Zadvydas, the Supreme Court noted “the Constitution may well preclude granting ‘an administrative body the unreviewable authority to make determinations implicating fundamental rights.’” Zadvydas v. Davis, 121 S.Ct. 2491 at 2500, quoting Superintendent, Mass. Correctional Institution at Walpole v. Hill, 472 U.S. 445, 450 (1985); Crowell at 87.

Habeas corpus review in a District Court has sustained a statute against Constitutional difficulties. See INS v. St. Cyr, 121 S.Ct. 2271, 2279 (2001) (construing IIRIRA and AEDPA to allow habeas jurisdiction, over a challenge to the constitutionality of the retroactivity of IIRIRA, in order to avoid constitutional difficulties). Thus, at a minimum, a law must provide for habeas jurisdiction to comply with due process requirements. Id.

Since the Patriot Act contains provisions for habeas review in district courts, the DC Circuit, and the Supreme Court, it is likely that this level of review would be found adequate for procedural due process requirements. Furthermore, it is likely that the new INS warrantless arrest and detention regulation would be construed to allow habeas review of agency detentions – thus, it is likely that the INS regulation would not fail procedural due process on this ground.

**V. 4<sup>th</sup> Amendment Search and Seizure**

*“The right of the people to be secure in their persons ... against unreasonable searches and seizures ... shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”*

**A. The Protections Of The Fourth Amendment Extend To All “People,” Including Lawful Permanent Resident Aliens, And Deportable Resident Aliens.**

The Fourth Amendment’s protection of the peoples’ freedom from unreasonable search and seizure represents “the very essence of constitutional liberty,” a guarantee that is “equal to the guaranties of other fundamental rights of the individual citizen.” See Ker

v. State of Cal., 374 U.S. 23, 32 (1963), quoting in part Gouled v. United States, 255 U.S. 298 (1921). Furthermore, the Fourth Amendment has been held to limit the power of search and seizure by INS officials. See Bond v. United States, 529 U.S. 334 (2000); United States v. Brignoni-Ponce, 422 U.S. 873 (1975).

The Supreme Court's has generally afforded greater Constitutional protections to lawful resident aliens while withholding them from excludable aliens. See, e.g., Zadvydas v. Davis, 121 S.Ct. 2491, 2500 (2001); Landon v. Plasencia, 459 U.S. 21, 32 (1982); Price v. INS, 962 F.2d 836 (1982). Whether or not the protections of the Fourth Amendment are extended to illegal and excludable immigrants is not a settled question.

Although the Supreme Court has not explicitly held that Fourth Amendment protections extend to illegal aliens, it has extended such protections without announcing the rule. See I.N.S. v. Lopez-Mendoza, 468 U.S. 1032 (1984). But in a later case, Chief Justice Rhenquist cautioned that "our statements in Lopez-Mendoza are ... not dispositive of how the Court would rule on a Fourth Amendment claim by illegal aliens in the United States if such a claim were squarely before us." Verdugo-Urquidez, 494 U.S. 259, 261 (1990) (Fourth Amendment did *not* apply to a search by U.S. law enforcement officials of Mexican property owned by a non-resident alien who was in custody in the United States).

This question has yet to be resolved conclusively, and a minority of federal district courts have found the ambiguity to support Fourth Amendment protections for illegal and excludable aliens. See, e.g., U.S. v. Guiterrez, 983 F.Supp. 905, 914 (1998), *rev'd on other grounds*, United States v. Guiterrez, 203 F.3d 833 (1999).

**B. An Immigration Officer's "Reason to Believe" Is Sufficient To Establish "Probable Cause" For Fourth Amendment Purposes**

Immigration statutes generally authorize detention or arrest of an alien where the INS has "reason to believe" there is grounds for such action. 8 U.S.C. § 1357(A)(2); 8 C.F.R. 287.5(c)(1)(i) (Immigration officer has statutory power to arrest an alien if there is "reason to believe" the alien is illegally in the U.S. and is likely to escape before a warrant can be obtained). Courts have interpreted "reason to believe" to mean "probable cause;" and therefore, immigration officers may Constitutionally detain or arrest aliens if

they act within their statutory authority. See, e.g., Westover v. Reno, 202 F.3d 475, 479 (1<sup>st</sup> Cir. 2000). Note, however, that courts have also upheld detentions that are beyond the scope of an immigration officer’s statutory authority. See, id. (detention in violation of § 1357 need not result in dismissal of removal proceedings).

Even if enforced only against persons of Middle Eastern descent, it is not likely that the INS warrantless arrest and detention provisions would be found in violation of the Fourth Amendment for unreasonableness, since, although apparently not willing to hold that race and nationality alone are sufficient to support probable cause, the Supreme Court has upheld findings of probable cause in which nationality was supported by other factors. See United States v. Brignoni-Ponce, 422 U.S. 873, 884-887 (1975) (“Mexican appearance” was a valid factor, even if not valid as the sole basis for probable cause.)

**C. Prior to A “Probable Cause Determination,” The INS May Detain Immigrants Suspected of Terrorism For A “Reasonable” Period**

In the criminal context, the Fourth Amendment requires that a suspect who has been arrested without a warrant on suspicion of criminal wrongdoing must be brought before a magistrate “promptly” after arrest, for a determination of probable cause. Gerstein v. Pugh. In County of Riverside v. McLaughlin, 500 U.S. 44 (1991) the Supreme Court held that, for probable cause determinations in the absence of a demonstrated emergency or other extraordinary circumstances, “prompt” means within 48 hours.

1. **Reasonable Period of Detention in Prior to Judicial Determination in the Immigration Context**

Courts have held that detention by immigration officials need only be “reasonable,” and is not strictly limited by the County of Riverside 48-hour rule; thus, so long as an alien’s detention is not extended beyond 48 hours unreasonably (i.e. – for merely dilatory or pretextual reasons), it might be held valid. See, e.g., United States v. Encarnacion, 239 F.3d 395 (1st Cir. 2001) (7-day detention of alien while files were being retrieved was not unreasonable where no evidence that the reasons for delay were pretextual or the result of dilatory tactics); Rhoden v. United States, 55 F.3d 428, 432 (9<sup>th</sup> Cir. 1995) (holding that *McLaughlin* did not compel the conclusion that a 6-day detention violated the Fourth Amendment, since “border detentions involve a distinct set of

considerations and require different administrative procedures.”); Ramirez v. United States, 81 F.Supp. 2d 532 (D.N.J. 2000) (upholding as “reasonable” detention of returning resident alien).

However, the Fourth Amendment’s limitation of the length of detention of immigrants to a “reasonable” period is not without boundaries; for example, courts have found limits on detention prior to judicial authorization in alimentary canal smuggling cases. See United States v. Adekunle, 2 F.3d 559 (5<sup>th</sup> Cir. Tex. 1992) (holding that, in the absence of a *bona fide* emergency or extraordinary emergency, the government, after detaining a suspected alimentary canal drug smuggler on reasonable suspicion of drug smuggling, must seek a judicial determination within 48 hours that reasonable suspicion exists to support the detention.<sup>11</sup>); United States v. Onyema, 766 F.Supp. 76, 84 (E.D.N.Y. 1991) (78-hour incommunicado detention of alimentary canal smuggler, without any judicial authorization, on suspicion of alimentary canal smuggling, impermissibly burdened alien’s Fifth Amendment Due Process Rights).

Since the INS regulation expressly limits detention prior to a probable cause determination after a warrantless arrest to a “reasonable period,” so long as the INS determination of probable cause takes place within 7 days, it is likely that the detention would be upheld. Detention beyond this time might be successfully challenged; however, note that once the probable cause determination (in the immigration context, an issuance of notice and appearance) takes place, detention could continue under the 8 U.S.C. 1226(a) detention authority.

## 2. Extraordinary Circumstances

County of Riverside v. McLaughlin expressly held that when an arrested individual does not receive a probable cause determination in 48 hours, “the burden shifts to the government to demonstrate the existence of a bona fide emergency or other extraordinary circumstance.” 500 U.S. at 57. Case law defining such an emergency is notably thin; however circumstances that have made burdensome the processing of

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<sup>11</sup> “We cannot, however, countenance the absurdity that one may have his liberty restrained for a longer period based on a mere suspicion than he lawfully could be detained based on probable cause. The same evils which the fourth amendment protects against by requiring a probable cause hearing within 48 hours of a warrantless arrest exist for a suspect in investigative detention for an extended period.” Adekunle, 2 F.3d at 561

arrested individuals have been held to justify detention beyond 48 hours. See United States v. Salivas-Gonzalez, 147 F.Supp. 2d 58, 61 (D.P.R. 2001) (72-hour detention prior to judicial determination of probable cause justified by practical difficulties experienced by law enforcement personnel<sup>12</sup> due to heavy caseload arising from civil disobedience). Thus, it is possible the government might attempt to rationalize pre-determination detention of immigrants beyond a “reasonable” period, by characterizing the high number of detainees during a heightened threat of terrorism as “extraordinary circumstances” that made processing of probable cause determinations prohibitively burdensome.

### 3. Purpose of Detention

Although in County of Riverside, the Supreme Court gave as examples of “unreasonable delay” a delay “for the purpose of gathering additional evidence to justify the arrest, a delay motivated by ill will against the arrested individual, or delay for delay's sake,” 500 U.S. at 57, detention prior to a judicial determination is not invalid where further investigation is conducted during the detention, so long as there is probable cause to support the initial detention. See United States v. Sholola, 124 F.3d 803 (7<sup>th</sup> Cir. Ill. 1997) (The “police may conduct further investigation of a crime to “bolster” the case against a defendant while the defendant remains in custody, and they may likewise hold an individual while investigating other crimes that he may have committed, *so long as they have sufficient evidence to justify holding the individual in custody in the first place*”, quoting U.S. v. Daniels 64 F.3d 311 (7<sup>th</sup> Cir. 1995) (emphasis in original)). Given the relaxed standards for probable cause (reasonable suspicion) in the immigration context, it is likely that a court would not find a violation of the Fourth Amendment if the

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<sup>12</sup> In Salivas-Gonzalez, the court held that extraordinary circumstances justifying delay in judicial determinations of probable cause existed because of:

- (a) the limited transportation means between Vieques and Puerto Rico;
- (b) the burdensome conditions being faced by the U.S. Marshals (limited available personnel to arrest, process, and transport over one-hundred arrestees, while still meeting security requirements);
- (c) the large number of violent incidents being reported (which excluded the possibility of assigning a judicial officer to conduct initial proceedings to any other place than secure/court premises);
- (d) the fact that no charging document was presented against the arrestees until Monday, April 30, 2001;
- (e) the fact that all arrestees (except those named under footnote No. 1) were presented before a judicial officer within forty-eight hours of being arrested by U.S. Navy personnel or having custody transferred to the U.S. Marshals and brought to Puerto Rico.

INS were to conduct, time prior to a probable cause determination, an investigation and interrogation of an immigrant who was detained without a warrant.

## VI. 5<sup>th</sup> Amendment Equal Protection

### A. To Challenge A Facially Neutral Law With A Discriminatory Impact, An Immigrant Would Need to Show Discriminatory Intent On The Part Of the Government

In Reno v. American-Arab Anti-Discrimination Committee, 525 U.S. 471, plaintiff immigrants challenged deportation proceedings instituted against them on a theory of selective enforcement in violation of the First and Fifth Amendments, on grounds that they were members of international terrorist and communist organizations. The Supreme Court flatly held that “an alien unlawfully in this country has no constitutional right to assert selective enforcement as a defense against his deportation.” 525 U.S. at 488. Thus, it is unlikely that an illegal or excludable alien could assert a selective enforcement claim under the Fifth Amendment. Note, however, that the Supreme Court has distinguished sharply between illegal and legal aliens, and has generally afforded greater Constitutional protections to lawful resident aliens while withholding them from excludable aliens. See, e.g., Zadvydas v. Davis, 121 S.Ct. 2491, 2500 (2001); Landon v. Plasencia, 459 U.S. 21, 32 (1982).

However, a further obstacle is that, to successfully challenge a facially neutral law on grounds that a “protected” class of immigrants (one defined by race, gender, ethnicity, religion, or alienage/national origin) is being disproportionately affected by the law, a plaintiff must show proof of discriminatory intent on the part of the government. See Washington v. Davis, 426 U.S. 229, 238-239 (1976) (announcing requirement that to prevail on an Equal Protection claim of discriminatory impact, a plaintiff must establish that a State actor had a “discriminatory purpose”). Proving such intent is difficult; statistical evidence of the fact of disparate impact will not necessarily demonstrate an intent to discriminate. See, e.g., United States v. Armstrong, 517 U.S. 456, 465-71 (1996) (requiring evidence that similarly situated individuals of a different race were *not* prosecuted). In the immigration context, given courts’ broad deference to executive actions, this hurdle is even higher. See, e.g., Bertrand v. Sava, 684 F.2d 204, 212-13 (2d Cir. ) (“[T]he Attorney General’s exercise of his broad discretionary power must be

viewed at the outset as presumptively legitimate and bona fide in the absence of strong proof to the contrary .... The wide latitude historically afforded to the political branches of our national government in immigration matters permits them to adopt even wholly irrational policies in this area”).

Thus, a detained immigrant will have a very difficult argument in bringing a selective enforcement claim against the INS.

**B. Facially Discriminatory Classifications on the basis of Alienage and Nationality Are Constitutionally Valid In The Immigration Context**

Because immigration and foreign policy concerns are implicated in the relationship between the federal government and aliens, federal immigration laws that discriminate on the basis of alienage are subject only to rational basis review. Mathews v. Diaz, 426 U.S. 67, 84-85 (1976); United States v. Song, 1995 U.S. Dist. LEXIS 18399 (S.D.N.Y. 1995); Narenji v. Civiletti, 617 F.2d 745 (D.C. Cir. 1979) (deferring to executive branch, and upholding Presidential Order for all Iranian Students in U.S. to report to INS and demonstrate lawful presence in country).

Rational Basis review under the Equal Protection Clause requires only that the alienage- or nationality-based classification rationally further a legitimate state interest. See Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 439-41 (1985). Prevention of terrorism would likely be found a sufficiently legitimate governmental purpose. See United States v. Duggan, 743 F.2d 59 (2d Cir. 1984) (terrorism is a valid state purpose for discrimination on the basis of alienage). Since it is likely that a court would find the Patriot Act and the INS warrantless arrest and detention regulations rationally related to this purpose, neither would likely fail rational basis review. See id.

**VII. First Amendment Freedom of Association**

*Congress shall make no law ... abridging ... the right of the people peaceably to assemble and to petition the Government for redress of grievances.*

**A. The protections of the First Amendment extend to lawful permanent resident aliens.**

Resident aliens are protected by the First Amendment. See Bridges v. Wixon, 326 U.S. 135, 148 (1945). However, excludable and illegal aliens are not entitled to

assert First Amendment Rights. See United States ex rel. Turner v. Williams, 194 U.S. 279, 292 (1904).

**B. Detention of lawful resident aliens pursuant to a law that targets advocacy, or association with those who advocate lawless action, might be unconstitutional if it is overbroad in sweep**

In Brandenburg v. Ohio the Supreme Court struck down an Ohio statute<sup>13</sup> that “by its own words and as applied, purport[ed] to punish mere advocacy and to forbid, on pain of criminal punishment, assembly with others merely to advocate the described type of action.” 395 U.S. 444, 449 (1969). The Court enunciated the principle that “the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action,” Brandenburg, 395 U.S. at 447, and held that a statute that fails to distinguish between “mere abstract teaching” and preparing a group for violent lawless action impermissibly intrudes on First Amendment freedoms.

Thus, to succeed in challenging the Patriot Act under Brandenburg, an immigrant would need to show that the Patriot Act was applied to punish her “mere advocacy” and “assembly with others to advocate,” and that the Patriot Act did not distinguish between “mere abstract teaching” and preparation for violent lawless action. While “engage in terrorist activity” under the Patriot Act includes “to commit or to incite to commit, under circumstances indicating an intention to cause death or serious bodily injury, a terrorist activity,” H.R. 3162 Sec. 411(a)(1)(F)(4), there are a number of other provisions in the Patriot Act that sweep in expressive conduct without excepting from their reach an immigrant’s “mere abstract teaching.”

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<sup>13</sup> The Ohio Criminal Syndicalism Statute expressly punished persons who “advocate or teach the duty, necessity, or propriety” of violence “as a means of accomplishing industrial or political reform”; or who publish or circulate or display any book or paper containing such advocacy; or who “justify” the commission of violent acts “with intent to exemplify, spread or advocate the propriety of the doctrines of criminal syndicalism”; or who “voluntarily assemble” with a group formed “to teach or advocate the doctrines of criminal syndicalism” was held unconstitutional as impermissibly. 395 U.S. at 449.

Pertinent examples will likely develop as the Act is applied; however, it is not difficult to imagine hypothetical situations that would make the Act susceptible to challenge under the Brandenburg doctrine.<sup>14</sup>

**C. Detention of lawful resident aliens for “guilt by association” is constitutionally invalid, where not narrowly drawn to protect against a burden on associational rights under the first amendment.**

Detention laws or enforcement actions are likely to run into constitutional difficulty if they punish individuals by reason of association alone, in a manner that burdens expression protected by the First Amendment. The Supreme Court has held unconstitutional laws and state actions that have impinged on individuals’ freedom of association when the laws or actions are not narrowly “narrowly drawn to define and punish specific conduct as constituting a clear and present danger to a substantial interest of the State.” See Cantwell v. Connecticut, 310 U.S. 296, 311 (1940); Elfbrandt v. Russell, 384 U.S. 11 (1966);<sup>15</sup> NAACP v. Claiborne Hardware Co., 458 U.S. 886;<sup>16</sup> Healy v. James, 408 U.S. 169;<sup>17</sup> Noto v. United States, 367 U.S. 290 (1961);<sup>18</sup> Aptheker v. Secretary of State, 378 U.S. 500, 510;<sup>19</sup> United States v. Robel, 389 U.S. 258 (1967).<sup>20</sup>

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<sup>14</sup> **Hypothetical:** A is a 52-year-old LPR who has lived in the United States for 3 years. As a citizen of country K, A was an outspoken advocate of rights for her minority group between 1997-8, and became a spokesperson for the Liberation Army in country K, a left-wing group that advocated for minority rights in country K. In 1998, just before A moved to the United States, the Liberation Army became far more militant and resorted to terror tactics. After moving to the United States, A married and bought a house. In December 2001 A was detained under [hypothetical] regulations promulgated pursuant to the Patriot Act. The Act makes inadmissible any individual who “(1) is a representative of a group whose endorsement of terrorist activity has been determined by the Secretary of State to undermine U.S. “efforts to reduce or eliminate terrorist activities”, (2) has used his/her position of prominence in any country to endorse, espouse, or persuade others to support terrorist activity or terrorist organization in a way that the Secretary of State determines has undermined the U.S. efforts to reduce terrorist activities, or (3) “is the spouse or child of an alien who is inadmissible under this section,” provided that the acts causing inadmissibility “occurred within the last 5 years.” H.R. 3162 Sec. 411(a)(1) – 411(a)(4). Here, whether or not A prepared persons in country K for lawless action is not clear; in addition, the statute makes no facial attempt to exempt such persons from its broad sweep.

<sup>15</sup> In Elfbrandt, an Arizona statute, providing for the discharge of any public employee who knowingly became a member of the Communist Party or of any party whose purposes included overthrow of the state government, if the employee had knowledge of the unlawful purpose, was held invalid because the statute did not require that the employee have the specific intent to further the organization’s illegal aims.

<sup>16</sup> In Claiborne, the court held unconstitutional the imposition of civil liability on all members of an association that boycotted in a non-violent manner, but caused unrest among other members of the public.

<sup>17</sup> In Healy, the same principle was applied in non-criminal context to strike down the withholding of recognition to SDS

<sup>18</sup> In Noto, the Court held there “must be some substantial direct or circumstantial evidence of a call to violence now or in the future which is both sufficiently strong and sufficiently pervasive to lend color to the otherwise ambiguous theoretical material regarding Communist Party teaching, and to justify the inference that such a call to violence may fairly be imputed to the Party as a whole, and not merely to some narrow segment of it.” Id. At 298.

<sup>19</sup> In Aptheker, Section 6 of the Subversive Activities Control Act, 50 U.S.C.S. § 785, which revoked Communist Party members’ passports, was held facially unconstitutional because it was vague, overbroad, and not narrowly drawn to prevent the supposed evil.

Thus, it is possible that provisions of the Patriot Act might be challenged for burdening immigrants' freedom of association rights. Although the detention provisions of the Act might be styled to address a threat of terrorism, which might be found to constitute "a clear and present danger to a substantial interest of the State," significant pressure could be brought to bear on the question of whether the provisions that burden expressive conduct are "narrowly drawn to define and punish specific conduct." An argument under a Cantwell approach would present the overbreadth of the Patriot Act as punishing an immigrant solely for his or her association with others who engage in expressive conduct.

**D. Detention of lawful resident aliens pursuant to a law that targets conduct, such as provision of material support to terrorist organizations, that is unrelated to the content of the aliens' (or association's) expression is only invalid if the law fails "intermediate scrutiny"**

In Buckley v. Valeo and In re Asbestos Sch. Litig., 46 F.3d 1284 (3d Cir. 1984), material support for organizations engaged in political expression was held to be political expression in its own right. However, In Humanitarian Law Project v. Reno, the Ninth Circuit distinguished the material support in these cases from support for terrorist organizations. First, the provision of material support protected in Buckley was to organizations whose overwhelming function was advocacy, and whose non-speech related activities were lawful. Furthermore, expressive conduct is afforded lesser protections than speech; the court noted that in Buckley, the Supreme Court permitted regulation of donations to organizations that engaged in non-speech related expression.

If detention laws or enforcement actions "serve a purpose unrelated" to the content of the protected expression, a court would likely only apply intermediate scrutiny, to determine whether the law was valid. See Humanitarian Law Project v. Reno, 205 F.3d

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<sup>20</sup> In Robel, an employee of the Department of Defense was indicted for violating the Subversive Activities Control Act 50 U.S. C. § 784, which had been passed pursuant to Congress' war powers, prohibited members of the Communist party from working at defense facilities. The Supreme Court affirmed dismissal of the indictment, holding that the Subversive Activities Control Act was unconstitutional because it forced the employee to choose between surrendering his membership in the Communist Party and losing his job. In Robel, the statute swept "indiscriminately across all types of association with Communist-action groups," and established "guilt by association alone." 389 U.S. at 262-65. The Court also rejected the notion that legislation pursuant to Congress' war powers superseded the private interests. Robel, 389 U.S. 265. ("Implicit in the term "national defense" is the notion of defending those values and ideals which set this Nation apart. For almost two centuries, our country has taken singular pride in the democratic ideals enshrined in its Constitution, and the most cherished of those ideals have found expression in the First Amendment. It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties -- the freedom of association -- which makes the defense of the Nation worthwhile." Id.)

1130 (9<sup>th</sup> Cir. 2000) (holding that prosecution of immigrants under the Antiterrorism and Effective Death Penalty Act was not punishment “by reason of association alone,” and therefore did not fall within the Clairborne doctrine). Since the AEDPA prohibited material support to terrorist organizations, the court held it did not directly limit expression. 205 F.3d at 1133. Instead of applying strict scrutiny, the court noted that “intermediate scrutiny applies where, as here ‘a regulation ... serves purposes unrelated to the content of expression’”, and analyzed and upheld the AEDPA using intermediate scrutiny. 205 F.3d at 1135, quoting Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989). In applying intermediate scrutiny, the court posed the following four questions: (1) Is the regulation within the power of government? (2) Does it promote an important or substantial government interest? (3) Is that interest unrelated to suppressing free expression? (4) Is the incidental restriction on First Amendment freedoms no greater than necessary? Humanitarian Law Project v. Reno, 205 F.3d at 1135, citing Ward.

Given the limitation imposed by Humanitarian Law Project, any argument that a law or enforcement action impermissibly infringes upon an alien’s First Amendment freedom of association would require a showing that the law or enforcement action serves a purpose related to the content of expression. Such a showing would take the form that the law or enforcement action is intended to curb constitutionally-protected association or expression (as opposed, for example, to material support for an organization). Humanitarian Law Project, 205 F.3d at 1135. If such a showing cannot be made, then a challenge must successfully prove that the law or enforcement action fails intermediate scrutiny. Id. This would most likely be done by arguing that, although the regulation may be within the power of government and promotes an important government interest, the regulation is related to suppressing free expression, and is not narrowly tailored in its restriction of First Amendment freedoms. For example, it could be argued that the overly-broad and inclusive sweep of new detention laws is not sufficiently narrow, and therefore the restriction First Amendment freedoms is not “no greater than necessary.” Id.