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## Say “Cheese.” Uncle Sam Wants Your Photograph and Fingerprints or You Are Out of Here. Does America Have a Peace Time Constitution in Danger of Being Lost

Mark D. Friedman\*

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# SAY "CHEESE." UNCLE SAM WANTS YOUR PHOTOGRAPH AND FINGERPRINTS OR YOU ARE OUT OF HERE.

## Does America Have a Peace Time Constitution in Danger of Being Lost?

MARK D. FRIEDMAN\*

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## I. INTRODUCTION

War broke out in the Middle East. Domestic terrorism got out of control. The President tirelessly toured the country, urging patience and calm. . . . Martial law was declared, and the United States of America was turned, overnight, into a police state. Curfews were enforced. Identity papers were required for all. Penalties for unlawful behavior were harsh and certain. And it worked too, for a time. The riots stopped. Everyone had food, water, and power. Stability and peace were returned to the country. But it was peace without Freedom.<sup>1</sup>

The passage quoted above sounds like a modern-day headline, but it is not. These words, from the introduction to a recent television program,<sup>2</sup> echo those of one of our Founding Fathers. At its base is Benjamin Franklin's quote in 1759, in which he says, "[t]hose, who would give up essential liberty to purchase a little temporary safety, deserve neither liberty nor safety."<sup>3</sup> This article analyzes what happens when the United States gives up civil liberties for security. It further attempts to determine, based on historical precedent, if this country is heading down that dangerous road again. Are the words in the quotes above unfounded fears, or have they actually become reality in our country's short history? Is the United States now in a new cycle of civil liberty deprivation that will once again lead us down a path that was not intended by ostensibly well-intentioned policy makers?

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1. *Freedom* (United Paramount Network (UPN) television broadcast 2000) (transcript of Introduction available at [http://geocities.yahoo.com.br/foreword\\_freedom](http://geocities.yahoo.com.br/foreword_freedom)). This prophetic paragraph is known as "Decker's Intro" from the UPN television series *Freedom*, which aired in the 2000–2001 television season. *Id.* The quote appeared as a graphic with a voice-over at the beginning of each episode. *Id.* The final line of the quote, omitted above, states, "And that was a price some of us would not pay." *Id.* The action-drama featured four freedom fighters who were trying to restore the government to civilian authority because the military was not willing to step down from power now that peace was restored. *Id.*

2. *Freedom*, *supra* note 1.

3. THE HOME BOOK OF QUOTATIONS: CLASSICAL AND MODERN 1106 (Burton Stevenson ed., 10th ed. Greenwich House 1984). This quote is attributed to Benjamin Franklin in his *Historical Review of The Constitution and Government of Pennsylvania*. BENJAMIN FRANKLIN, HISTORICAL REVIEW OF THE CONSTITUTION AND GOVERNMENT OF PENNSYLVANIA (1759). However, this "sentence was much used in the Revolutionary period" and its earliest use was in November 1755, "in an Answer by the Assembly of Pennsylvania to the Governor." RICHARD FROTHINGHAM, THE RISE OF THE REPUBLIC OF THE UNITED STATES 413 n.1 (4th ed. 1886).

National crises and emergencies in the United States have, at times, meant that civil liberties were abandoned to preserve our national security.<sup>4</sup> However innocent the initial retrenching of these liberties may have been, the lessons of history demonstrate what happens when constitutional freedoms are lost.<sup>5</sup> In each century, a President has taken away our country's fundamental liberties.<sup>6</sup> Thus far, the United States has been able to survive these transgressions on its constitutional values. Nevertheless, are we destined to repeat the past as we move forward to the even greater challenges in this country's future?

Following a Democratic administration, a Republican President takes office. There is turmoil within the country's borders. The President, against the judgment of the Chief Justice of the United States Supreme Court,<sup>7</sup> suspends the writ of habeas corpus<sup>8</sup> throughout the land.<sup>9</sup> At first this was to protect the national safety interest,<sup>10</sup> but eventually it became a tool whereby people considered subversive or against national security were arrested<sup>11</sup> and brought before a military tribunal.<sup>12</sup> If this sounds startling, like the present day United States of America, it might surprise the reader to know that this

4. See WILLIAM H. REHNQUIST, *ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME* 218 (1998).

5. See *id.* at 218–24.

6. In the 1800s, President Lincoln suspended the writ of habeas corpus. See Proclamation No. 1, 12 Stat. 730 (1862); Proclamation No. 7, 12 Stat. 734 (1863); see also Act of Mar. 3, 1863, ch. 81, 12 Stat. 755 (explaining the President's powers in relation to suspending the writ of habeas corpus). In the 1900s, President Roosevelt relocated Japanese Americans to internment camps. See Exec. Order No. 9102, 7 Fed. Reg. 2165 (Mar. 20, 1942). In 2001, President George W. Bush began the process of removing civil liberties with the enactment of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001, requiring the fingerprinting of all non-residents in the United States. See USA PATRIOT Act of 2001, Pub. L. No. 107-56, § 405, 115 Stat. 272, 345.

7. See *ex parte Merryman*, 17 F. Cas. 144, 147 (C.C.D. Md. 1861) (No. 9487).

8. Habeas corpus is defined as “[a] writ employed to bring a person before a court, most frequently to ensure that the party’s imprisonment or detention is not illegal.” BLACK’S LAW DICTIONARY 715 (7th ed. 1999).

9. See REHNQUIST, *supra* note 4, at 24–25. The initial suspension was just for Maryland because it was a “strategic location [that had a] substantial degree of secessionist sympathy in Baltimore, ma[king] the city the Achilles’ heel of the early efforts to bring federal troops to defend Washington.” *Id.* at 18. The writ was eventually suspended throughout the United States in 1863. See Proclamation No. 7, 12 Stat. 734 (1863).

10. See Proclamation No. 7, 12 Stat. 734 (1863).

11. See REHNQUIST, *supra* note 4, at 63–64; see also Constitutional Rights Foundation, *America Responds to Terrorism: Lincoln and the “Writ of Liberty,”* <http://www.crf-usa.org/terror/Lincoln.htm> (last visited Mar. 5, 2006) [hereinafter *Writ of Liberty*].

12. *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 6 (1866); *Ex parte Vallandigham*, 68 U.S. (1 Wall.) 243, 244 (1863).

happened in the 1860s under President Abraham Lincoln.<sup>13</sup> The target was anyone opposing the war effort,<sup>14</sup> but what ended up happening was “13,000 arbitrary arrests.”<sup>15</sup> People were dragged from their beds in the middle of the night and interned in military confinement without judicial process.<sup>16</sup> When Lincoln’s administration was criticized, First Amendment rights were trampled upon.<sup>17</sup>

Fast forward to World War II: the year is 1941. President Franklin Roosevelt directs that the conduct of the Japanese within the United States is to be observed.<sup>18</sup> This led the United States down a slippery-slope that evolved into curfews<sup>19</sup> and eventually created the relocation camps, which, a year later, incarcerated loyal American citizens of Japanese descent.<sup>20</sup>

With a new century came a new challenge—September 11, 2001—another day that will live in infamy<sup>21</sup> in U.S. history. The Twin Towers of the World Trade Center were destroyed by terrorists using jetliners as weapons. The national security was again being threatened by those within our borders. In response, the United States Congress enacted the USA PATRIOT Act.<sup>22</sup> Subsequent to that Act, the Attorney General of the United States, John Ashcroft, announced the National Security Entry-Exit Registration System.<sup>23</sup> This new program would more closely monitor aliens within U.S. borders from certain unnamed countries.<sup>24</sup> The major newspapers reported that the people that were to be monitored would be primarily Muslims.<sup>25</sup> However, the Justice Department would not state that outright.<sup>26</sup>

13. See REHNQUIST, *supra* note 4, at 11–25.

14. General Order No. 38 stated, “[t]he habit of declaring sympathies for the enemy will no longer be tolerated in this department. Persons committing such offenses will be at once arrested.” *Writ of Liberty*, *supra* note 11.

15. Mark E. Neely, Jr., *Lincoln, Abraham*, in GROLIER MULTIMEDIA ENCYCLOPEDIA, <http://ap.grolier.com> (follow “Presidents” hyperlink; then follow “GME” hyperlink under “Abraham Lincoln”) (last visited Mar. 5, 2006).

16. See *ex parte Merryman*, 17 F. Cas. 144, 147 (C.C.D. Md. 1861) (No. 9487).

17. See REHNQUIST, *supra* note 4, at 221.

18. Proclamation No. 2525, 6 Fed. Reg. 6321, 6321 (Dec. 10, 1941).

19. See Exec. Order No. 9066, 7 Fed. Reg. 1407, 1407 (Feb. 25, 1942); Hirabayashi v. United States, 320 U.S. 81, 102–03 (1943).

20. Exec. Order No. 9102, 7 Fed. Reg. 2165, 2165 (Mar. 20, 1942).

21. “[A] date which will live in infamy” is the opening line of Franklin Roosevelt’s address to Congress on December 8, 1941, asking Congress to declare war on the Empire of Japan. President’s Address to a Joint Session of Congress, 87 CONG. REC. 9504 (1941).

22. USA PATRIOT Act of 2001, Pub. L. No. 107-56, 115 Stat. 272.

23. John Ashcroft, U.S. Att’y Gen., Press Conference with James Ziglar, INS Commissioner (June 5, 2002), in FDCH POL. TRANSCRIPTS.

24. *Id.*

25. Eric Schmitt, *U.S. Will Seek to Fingerprint Visas’ Holders: Justice Plan to Require Muslims to Register*, N.Y. TIMES, June 5, 2002, at A1.

Is history once again repeating itself? In each of the historical contexts there was an enemy that was well defined—the South in the Civil War and the Japanese in World War II. Each of these battles was won in a clear, concise manner, after which civil liberties were restored. In the current situation, there is not just one country we are fighting against. Will there ever be a clear victory? Our goal in the war on terrorism is aimed at “the disruption and . . . the defeat of the global terror network.”<sup>27</sup> What will that mean in the long term to civil liberties in the United States? Aspects of the current Entry-Exit Registration System will be examined in a historical context with these questions in mind.

Part II will explore the Lincoln administration’s battle with the United States Supreme Court, exploring whether the Court is really able to be the branch of government that comes to the rescue when civil liberties are trampled upon. Part III will explore what happens when national sentiment and political motivation get in the way of a government’s quest for national security. Finally, Part IV will bring together the historical elements and review the current national security situation in the United States and some of the actions being taken to see what dangers might lay in our path.

## II. CONSTITUTIONAL LIBERTIES IN TIMES OF NATIONAL CRISES, A HISTORICAL PERSPECTIVE

### A. “King Lincoln”<sup>28</sup> and “Conquering Peace”<sup>29</sup>

*“I must pronounce that the liberties of America cannot be unsafe, in the number of hands proposed by the federal Constitution. From what quarter can the danger proceed? . . . But where are the means to be found by the President . . . [but he] cannot possibly be [a] source[] of danger.”*<sup>30</sup>

—James Madison

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26. See Ashcroft, *supra* note 23.

27. George W. Bush, President, Address to a Joint Session of Congress and the American People (Sept. 20, 2001), <http://www.whitehouse.gov/news/releases/2001/09/print/20010920-8.html> [hereinafter Presidential Address].

28. REHNQUIST, *supra* note 4, at 66. The full quote from Clement Vallandigham was “a plea to citizens who valued their rights to exercise the franchise and hurl ‘King Lincoln’ from his throne.” *Id.* He was arrested shortly after making these remarks. *Id.*

29. *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 19 (1866). “[T]o conquer a peace” is a quote from this Supreme Court case. *Id.* The full quote is: “During the war [the President’s] powers must be without limit, because, if defending, the means of offence may be nearly illimitable; or, if acting offensively, his resources must be proportionate to the end in view,—to conquer a peace.” *Id.* at 18–19.

30. THE FEDERALIST NO. 55, at 308–09 (James Madison) (E.H. Scott ed., 2002) (emphasis added).

James Madison, in the Federalist Papers, speaks to how protected he felt the United States Constitution would be, such that he could not conceive of how the liberties could be stripped away, especially by the President.<sup>31</sup> However, he apparently never conceived of Lincoln and the Civil War. The Founding Fathers never anticipated that the sixteenth President would ignore civil liberties and do things his own way, even to the extent of ignoring the United States Supreme Court on these issues.<sup>32</sup>

“The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”<sup>33</sup> President Lincoln insisted that this clause in the Constitution, the only mention of habeas corpus,<sup>34</sup> meant that he, as President, had the power to suspend it.<sup>35</sup> He first suspended the writ of habeas corpus by Presidential Proclamation in 1862, even before Congress gave him the authority to do so, in the belief that it was within his power.<sup>36</sup> This was a limited suspension designed primarily for the State of Maryland due to its strategic importance to Washington D.C. in the war effort.<sup>37</sup>

He even went as far as to ignore United State Supreme Court Justice Taney’s admonition that “only Congress, and not the President, may suspend the privilege of the writ of *habeas corpus*,” and only a person who was enlisted in the military could be “subject to the Articles of War.”<sup>38</sup> In *Ex parte Merryman*, a Maryland case over which Justice Taney presided, “[t]he petitioner . . . while peaceably in his own house, with his family . . . at two o’clock [a.m.]” had an “armed force” enter his home “professing to act under

31. *See id.*

32. *See* REHNQUIST, *supra* note 4, at 38.

33. U.S. CONST. art. I, § 9, cl. 2.

34. *Writ of Liberty*, *supra* note 11.

35. REHNQUIST, *supra* note 4, at 38. Justice Rehnquist is speaking of President Lincoln’s Fourth of July message to a special session of Congress. *Id.*

36. Proclamation No. 1, 12 Stat. 730 (1862). Lincoln wrote, in a letter to the Commanding General of the Army of the United States, that if he found “resistance which renders it necessary to suspend the writ of *habeas corpus*” that he granted him the power to do so. REHNQUIST, *supra* note 4, at 25. The Presidential Proclamation of September 24, 1862 stated:

That the writ of habeas corpus is suspended in respect to all persons arrested, or who are now, or hereafter during the rebellion shall be, imprisoned in any fort, camp, arsenal, military prison, or other place of confinement by any military authority or by the sentence of any court-martial or military commission.

Proclamation No. 1, 12 Stat. 730, 730 (1862).

37. REHNQUIST, *supra* note 4, at 18.

38. *Id.* at 36 (speaking about Justice Taney’s remarks in his *Merryman* opinion).

military orders.”<sup>39</sup> He was arrested and imprisoned at Fort McHenry.<sup>40</sup> When the writ of habeas corpus was issued to:

examine into the legality of the imprisonment, the answer of the officer [was] that he is authorized by the president to suspend the writ of habeas corpus at his discretion, and in the exercise of that discretion, suspends it in this case, and on that ground refuses obedience to the writ.<sup>41</sup>

Lincoln, in a speech to Congress, also seemed to ignore Justice Taney and his holding in *Merryman* and proceeded with the implementation of his policy.<sup>42</sup>

Congress, supporting the President’s position during the war, passed the Habeas Corpus Act of 1863 in order to give merit to the administration’s actions.<sup>43</sup> The President then expanded the suspension of the writ in 1863 to cover the entire United States.<sup>44</sup> Now that he had the authority he used his

39. *Ex parte Merryman*, 17 F. Cas. 144, 147 (C.C.D. Md. 1861) (No. 9487).

40. *Id.*

41. *Id.* at 148.

42. See REHNQUIST, *supra* note 4, at 38; *Merryman*, 17 F. Cas. at 153. *Merryman* provided:

It is possible that the officer who has incurred this grave responsibility may have misunderstood his instructions, and exceeded the authority intended to be given him; I shall, therefore, order all the proceedings in this case, with my opinion, to be filed and recorded in the circuit court of the United States for the district of Maryland, and direct the clerk to transmit a copy, under seal, to the president of the United States. It will then remain for that high officer, in fulfillment of his constitutional obligation to “take care that the laws be faithfully executed,” to determine what measures he will take to cause the civil process of the United States to be respected and enforced.

*Merryman*, 17 F. Cas. at 153 (quoting U.S. CONST. art. II, § 3).

43. Act of March 3, 1863, ch. 81, § 1, 12 Stat. 755, 755. The statute reads:

That, during the present rebellion, the President of the United States, whenever, in his judgment, the public safety may require it, is authorized to suspend the privilege of the writ of habeas corpus in any case throughout the United States, or any part thereof. And whenever and wherever the said privilege shall be suspended, as aforesaid, no military or other officer shall be compelled, in answer to any writ of habeas corpus, to return the body of any person or persons detained by him by authority of the President; but upon the certificate, under oath, of the officer having charge of any one so detained that such person is detained by him as a prisoner under authority of the President, further proceedings under the writ of habeas corpus shall be suspended by the judge or court having issued the said writ, so long as said suspension by the President shall remain in force, and said rebellion continue.

*Id.*

44. Proclamation No. 7, 12 Stat. 734, 734–35 (1863). Presidential Proclamation No. 7 states:

Now, therefore, I, ABRAHAM LINCOLN, President of the United States, do hereby proclaim and make known to all whom it may concern, that the privilege of the writ of habeas corpus is suspended throughout the United States in the several cases before mentioned, and that this suspension will continue throughout the duration of the said rebellion, or until this proclama-



proclamation to put the courts and citizens of the United States on notice that no further challenges will be tolerated with the language, "I do hereby require all magistrates . . . to take distinct notice of this suspension, and to give it full effect, and all citizens . . . to conduct and govern themselves accordingly."<sup>45</sup>

### 1. A General and the Power to Decide Who Deserved the Writ

While President Lincoln may have felt justified in his action in the suspension of the civil liberties, his men were starting to take advantage of the power that it gave them, which would inevitably embarrass their commander-in-chief.<sup>46</sup> General Ambrose Burnside, in command of Ohio's military district, was one of those men.<sup>47</sup> He issued General Order No. 38, which did not allow for "sympathies for those in arms against the Government of the United States, declaring disloyal sentiments and opinions, with the object and purpose of weakening the power of the Government in its effort to suppress the unlawful rebellion."<sup>48</sup> Clement L. Vallandigham would be one of the first citizens to experience the restraint on his civil liberties.<sup>49</sup> "Vallandigham appeared at a Democratic rally" and Burnside sent observers to take notes.<sup>50</sup> Vallandigham called the General's Order No. 38 "a usurpation of arbitrary power,"<sup>51</sup> and finished his lengthy speech with a call to "hurl 'King Lincoln' from his throne."<sup>52</sup> Burnside was not pleased with these remarks and set in motion Vallandigham's silencing by having him arrested.<sup>53</sup> With sixty-seven men, they broke through the door of his home and sent him by specially commandeered train to a military prison near Cincinnati.<sup>54</sup> His charges indicated that he was "declaring disloyal sentiments and opinions,

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tion shall, by a subsequent one to be issued by the President of the United States, be modified or revoked. And I do hereby require all magistrates, attorneys, and other civil officers within the United States, and all officers and others in the military and naval services of the United States, to take distinct notice of this suspension, and to give it full effect, and all citizens of the United States to conduct and govern themselves accordingly, and in conformity with the constitution of the United States and the laws of congress in such case made and provided.

*Id.*

45. *Id.*

46. *See Writ of Liberty, supra* note 11.

47. *See id.*; REHNQUIST *supra* note 4, at 63.

48. REHNQUIST *supra* note 4, at 66 (citation omitted); *accord ex parte* Vallandigham, 68 U.S. (1 Wall.) 243, 244 (1863).

49. *See Vallandigham*, 68 U.S. (1 Wall.) at 244.

50. REHNQUIST, *supra* note 4, at 65.

51. *Id.*

52. *Id.* at 66.

53. *See id.*

54. *Id.*

with the object and purpose of weakening the power of the Government in its effort to suppress the unlawful rebellion."<sup>55</sup> The charges indicated that he had declared that "the present war is a wicked, cruel and unnecessary war, one not waged for the preservation of the Union."<sup>56</sup> The First Amendment to the Constitution was of little concern to the administration of this era<sup>57</sup> and "the government sought to suppress public criticism of the administration's war effort."<sup>58</sup> This was a time in U.S. history when newspapers and the very presses on which they were printed were seized if they spoke out against the government's policies.<sup>59</sup>

Vallandigham's petition for certiorari was denied by the Court.<sup>60</sup> However, Lincoln would not sign the order suspending Vallandigham's writ of habeas corpus,<sup>61</sup> as it seemed that the President knew little of what was going on in the case other than what he "read in the newspapers" and the "vague response" he received from his inquiries.<sup>62</sup> The President's cabinet discussed the case in a subsequent meeting and "[m]ost members seemed to agree with the assessment of [the] Secretary of the Navy . . . that Burnside's summary action had been a mistake. But now that it had taken place, there was no way to back down."<sup>63</sup> This matter was an embarrassment to the President<sup>64</sup> and he commuted the "sentence from imprisonment for the duration of the war to banishment 'beyond the Union lines.'"<sup>65</sup>

## 2. A Peace Time Constitution

The United States Supreme Court refused to grant certiorari in the Vallandigham matter stating that they "had no jurisdiction to review the decision of the military commission."<sup>66</sup> "While the bloody Civil War raged on, the Supreme Court decided it was not the time to challenge the power of General Burnside or his commander-in-chief, Abraham Lincoln."<sup>67</sup> There were over

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55. REHNQUIST, *supra* note 4, at 66 (citation omitted).

56. *Id.* (citation omitted).

57. *See id.* at 221.

58. *Id.*

59. *Id.*

60. *Ex parte Vallandigham*, 68 U.S. (1 Wall) 243, 254 (1863).

61. REHNQUIST, *supra* note 4, at 67.

62. *Id.*

63. *Id.*

64. *Writ of Liberty*, *supra* note 11.

65. REHNQUIST, *supra* note 4, at 67 (citation omitted).

66. *Id.* at 67–68 (citing *ex parte Vallandigham*, 68 U.S. (1 Wall.) 243, 251–52 (1863)).

67. *Writ of Liberty*, *supra* note 11.

“13,000 arbitrary arrests”<sup>68</sup> of “Northern citizens who opposed his policies”<sup>69</sup> during the time the writ of habeas corpus remained suspended.<sup>70</sup>

In 1864, under military orders, Lamdin P. Milligan, a U.S. Citizen, was arrested while at home and confined to a military prison.<sup>71</sup> He was charged with: “[c]onspiracy against the Government;” “[a]ffording aid and comfort to rebels;” “[i]nciting insurrection;” “[d]isloyal practices;” and “[v]iolation of the laws of war.”<sup>72</sup> He was found guilty and sentenced to have his life ended at the gallows.<sup>73</sup>

In this case, decided after the conclusion of the Civil War, the United States Supreme Court indicated that “[d]uring the war [the President’s] powers must be without limit, because, if defending, the means of offence may be nearly illimitable; or, if acting offensively, his resources must be proportionate to the end in view,—‘to conquer a peace.’”<sup>74</sup> The Court reasoned that the challenges of war are fast paced and the legislative process is slow to act, so the President needed some room to maneuver to meet these challenges.<sup>75</sup>

The amendments to the United States Constitution provide for “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation”<sup>76</sup> and “[n]o person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.”<sup>77</sup> The United States government, in its argument in the *Milligan* case, called these amendments “peace provisions,” which are silent during war time when the government’s only concern is for the safety of its citizens.<sup>78</sup> The government called this concept the “supreme law.”<sup>79</sup> They further stated that “the Constitution takes it for granted that [the writ of habeas corpus] will be suspended ‘. . . in time of war . . . when the public safety requires it.’”<sup>80</sup>

68. Neely, *supra* note 15.

69. Thomas J. DiLorenzo, *Fighting Facts with Slander*, LEWROCKWELL.COM, Apr. 3, 2002, <http://www.lewrockwell.com/dilorenzo/dilorenzo14.html>.

70. Neely, *supra* note 15.

71. *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 6 (1866).

72. *Id.* (internal quotations omitted).

73. *Id.* at 7.

74. *Id.* at 18–19.

75. *Id.* (citing THE FEDERALIST NO. 26 (Alexander Hamilton), NO. 41 (James Madison)).

76. U.S. CONST. amend. IV.

77. U.S. CONST. amend. V.

78. *Milligan*, 71 U.S. (4 Wall.) at 20.

79. *Id.*

80. *Id.* at 21.

Milligan's attorney<sup>81</sup> stated that, "[i]t is a question of the rights of the citizen in time of war."<sup>82</sup> The question he poses seems to reverberate two centuries later as the United States goes through its current terrorism crises.

Is it true, that the moment a declaration of war is made, the executive department of this government, without an act of Congress, becomes absolute master of our liberties and our lives? Are we, then, subject to martial rule, administered by the President upon his own sense of the exigency, with nobody to control him, and with every magistrate and every authority in the land subject to his will alone?<sup>83</sup>

As it is stated in the United States Constitution, "[t]he privilege of the writ of *habeas corpus* shall not be suspended, unless when, in cases of rebellion or invasion, the public safety may require it."<sup>84</sup> The argument was that Lincoln did not have the power to suspend *habeas corpus* because this privilege of suspension was contained in the first article of the Constitution—powers of the legislature—not in the section where the President derives his authority.<sup>85</sup> The words of the government's counsel<sup>86</sup> are also words that ring true in the United States after September 11, 2001:

the facts are unprecedented; because the war out of which they grew is unprecedented also; . . . because the necessity which called forth this exertion of the reserved powers of the government is unprecedented, as well as all the rest. . . . [W]e shall have set precedents how a nation may preserve itself from self-destruction.<sup>87</sup>

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81. Mr. David Dudley Field was one of the attorneys for the petitioner who presented the case to the United States Supreme Court. *Id.* at 22.

82. *Id.*

83. *Milligan*, 71 U.S. (4 Wall.) at 22; *see also* Proclamation No. 7, 12 Stat. 734, 734–35 (1863). In the Proclamation, Lincoln makes it clear that it is his authority that must be obeyed and that the courts should "take distinct notice" of his suspension of *habeas corpus* and "give it full effect." *Id.* at 734. This was proclaimed after Congress gave him full authority in such matters earlier in that year, 1863. *See* Act of Mar. 3, 1863, ch. 81, § 1, 12 Stat. 755, 755.

84. *Milligan*, 71 U.S. (4 Wall.) at 40 (quoting U.S. CONST. art. I, § 9, cl. 2). This is the only mention of *habeas corpus* in the United States Constitution. *Writ of Liberty*, *supra* note 11; *see generally* U.S. CONST.

85. *Milligan*, 71 U.S. (4 Wall.) at 41–42.

86. Mr. Butler gave the reply for the United States. *Id.* at 84.

87. *Id.* at 88.

“The [war] power is tremendous. It is strictly constitutional, *but it breaks down every barrier so anxiously erected for the protection of liberty, property, and life.*”<sup>88</sup>

After weighing the arguments presented, the Court issued its opinion.<sup>89</sup> The Supreme Court noted that the framers of our constitutional liberty foresaw that a time would arrive when our nation’s leaders, in times of trouble, might conclude that the ends justified the means in abating the unrest.<sup>90</sup> They realized that one day constitutional liberties might be put “in peril, unless established by irrepealable law.”<sup>91</sup> The Court held that “[t]he Constitution of the United States is a law for rulers and people, *equally in war and in peace*, and covers with the shield of its protection all classes of men, at all times, and under all circumstances.”<sup>92</sup> The Court ruled that Milligan, who was a private citizen, should not have been tried by a military tribunal even during the war because the courts in his state were open and able to handle such matters.<sup>93</sup> The Constitutional guarantees could have been preserved and the same result would have followed if he was arrested and tried before the courts in his home state.<sup>94</sup>

Martial law gave the commander of the armed forces “the power . . . to suspend all civil rights and their remedies, and subject citizens . . . to the rule of *his will*”<sup>95</sup> without due restraint, thus “substitut[ing] military force for and to the exclusion of the laws, and punish all persons, as he thinks right and proper, without fixed or certain rules.”<sup>96</sup> The Court was concerned that this would be the “end of liberty regulated by law,” “destroy[] every guarantee of the Constitution,” and “render[] the ‘military independent of and superior to the civil power’ . . . .”<sup>97</sup>

The Supreme Court was not totally without sympathy for the great task of keeping the peace that befell the federal government. They allowed for occasions in which martial law could be implemented.<sup>98</sup>

If, in foreign invasion or civil war, the courts are actually closed, and it is impossible to administer criminal justice according to law, *then*, . . .

88. *Id.* at 104 (internal quotations omitted).

89. *See id.* at 107–31.

90. *Milligan*, 71 U.S. (4 Wall.) at 120.

91. *Id.*

92. *Id.* at 120–21 (emphasis added).

93. *Id.* at 121–22.

94. *Id.* at 122.

95. *Milligan*, 71 U.S. (4 Wall.) at 124.

96. *Id.*

97. *Id.* (citation omitted).

98. *See id.* at 127.

there is a necessity to furnish a substitute for the civil authority . . . to preserve the safety of the army and society; and . . . it is allowed to govern by martial rule until the laws can have their free course.<sup>99</sup>

However, the Court was insistent that there must be an actual invasion, not a “*threatened* invasion” and “[m]artial rule can never exist where the courts are open, and . . . in the case of a foreign invasion, martial rule may become a necessity in one state, when, in another, it would be ‘mere lawless violence.’”<sup>100</sup> *Milligan* “clearly limited the powers of the President and Congress in time of war.”<sup>101</sup> However, Lincoln may have thought that the ends justified the means when he asked rhetorically, “[a]re all the laws, but one, to go unexecuted, and the government itself to go to pieces, lest that one be violated?”<sup>102</sup> This is a justification that any President could use to eliminate some aspect of our civil liberties. Isn’t this same justification being used today?<sup>103</sup>

#### B. *Roosevelt, the 1940s, and the Alien Enemies*<sup>104</sup>

*“The essence of Government is power; and power, lodged as it must be in human hands, will ever be liable to abuse.”*<sup>105</sup>

—James Madison

The current Entry-Exit program has the United States government keeping close tabs on all non-resident aliens within its borders.<sup>106</sup> That sounds innocent enough—a country wanting to protect itself from within. However, isn’t that how it began in 1941 with President Roosevelt’s orders to keep tabs on all Japanese over the age of fourteen?<sup>107</sup> As we have already seen, the

99. *Id.*

100. *Milligan*, 71 U.S. (4 Wall.) at 127.

101. Supreme Court Cases, *Ex Parte Milligan*, 1866, [http://www.phschool.com/atschool/supreme\\_court\\_cases/milligan.html](http://www.phschool.com/atschool/supreme_court_cases/milligan.html) (last visited Mar. 5, 2006).

102. REHNQUIST, *supra* note 4, at viii (citation omitted). This is the introduction to Justice Rehnquist’s book, which gets its title from that quote. *Id.* The quote was taken from President Lincoln, in a message addressing a special session of Congress on July 4, 1861. *Id.*

103. For the reader’s understanding, note that this Law Review article was written in 2002.

104. The term “alien enemies” comes from the title of President Roosevelt’s Proclamation. Proclamation No. 2525, 6 Fed. Reg. 6321, 6321 (Dec. 10, 1941).

105. THE MIND OF THE FOUNDER: SOURCES OF THE POLITICAL THOUGHT OF JAMES MADISON 403 (Marvin Meyers ed., Univ. Press of New England 1981) (1973) (emphasis added). President James Madison spoke to the Virginia Constitutional Convention on December 2, 1829. *Id.* at 401–02.

106. Ashcroft, *supra* note 23.

107. Proclamation No. 2525, 6 Fed. Reg. 6321, 6321 (Dec. 10, 1941).

Supreme Court, almost one hundred years prior to World War II, put stringent guidelines on when and how martial law could be imposed.<sup>108</sup> It has been said that “[i]t is devoutly to be hoped that the decision of the Court may never be subjected to the strain of actual war. If, however, it should be, we may safely predict that it will be necessarily disregarded.”<sup>109</sup>

It began innocently enough after the December 7, 1941 attack on Pearl Harbor by the Japanese Imperial Forces.<sup>110</sup> Franklin D. Roosevelt, issued a Presidential Proclamation entitled “Alien Enemies—Japanese.”<sup>111</sup> Under 50 U.S.C. §§ 21-24, which he relied on for his authority, the President

direct[ed] that the conduct to be observed on the part of the United States toward all natives, citizens, denizens or subjects of the Empire of Japan being of the age of fourteen years and upwards who shall be within the United States or within any territories in any way subject to the jurisdiction of the United States and not actually naturalized, who . . . are termed alien enemies . . . .<sup>112</sup>

The President wanted to keep track of possible enemy activity within our country’s borders.<sup>113</sup> How then did the United States go from a sincere effort to observe possible enemies to forcing Japanese-Americans from their homes into “concentration camp[s]?”<sup>114</sup>

### 1. Moods and Attitudes

It is difficult to understand why history unfolded in the manner which it did without having an understanding of American society at the time. The day after the attack on Pearl Harbor, the United States declared war on Japan.<sup>115</sup> By March 1942, Lieutenant General DeWitt was in command of the

108. See generally *ex parte* Milligan, 71 U.S. (4 Wall.) 2 (1866) (holding that if civil courts are still operating during wartime, military tribunals may not try civilians).

109. THE MILLIGAN CASE 3 (Samuel Klaus ed., Da Capo Press 1970) (1929) (quoting JOHN W. BURGESS, POLITICAL SCIENCE AND COMPARATIVE CONSTITUTIONAL LAW: SOVEREIGNTY AND LIBERTY 251 (William S. Hein & Co., Inc. 2000) (1893)).

110. President’s Address to a Joint Session of Congress, 87 CONG. REC. 9504 (1941). President Roosevelt addressed a joint meeting of the two Houses of Congress. *Id.*

111. Proclamation No. 2525, 6 Fed. Reg. 6321, 6321 (Dec. 10, 1941).

112. *Id.*

113. *Id.*

114. *Korematsu v. United States*, 323 U.S. 214, 223 (1944); see generally Public Proclamation No. 4, 7 Fed. Reg. 2601, 2601 (Apr. 4, 1942); Civilian Restrictive Order No. 1, 8 Fed. Reg. 982, 982 (Jan. 21, 1943). In *Korematsu*, there was disagreement among the Justices as to whether the term “concentration camp” should be used. *Korematsu*, 323 U.S. at 223.

115. S.J. Res. 116, 77th Cong., 55 Stat. 795 (1941).

states on the west coast of the United States in what had been designated the "Western Defense Command."<sup>116</sup> There were racist overtones to what was beginning to happen to the Japanese population.<sup>117</sup> This was also an era when federal laws prohibited naturalization of Japanese ex-patriots who wanted to become citizens.<sup>118</sup> Laws forbade land ownership,<sup>119</sup> intermarriage with Caucasians,<sup>120</sup> and the Japanese were often "unable to secure professional or skilled employment except in association with" their former countrymen.<sup>121</sup>

Special interest groups were involved in supporting the concept of mass evacuations.<sup>122</sup> The *Saturday Evening Post* published an article entitled, "The People Nobody Wants."<sup>123</sup> The article spoke about the special interest groups whose comments were less than subtle.<sup>124</sup>

"We're charged with wanting to get rid of the Japs for selfish reasons. . . . We do. . . . If all the Japs were removed tomorrow, we'd never miss them in two weeks, because the white farmers can take over and produce everything the Jap grows. And we don't want them back when the war ends, either."<sup>125</sup>

Popular media, such as movie serials, portrayed the Japanese as evil villains and portrayed those who defeated them as being good and heroic.<sup>126</sup>

116. *Korematsu*, 323 U.S. at 227; see Exec. Order No. 9066, 7 Fed. Reg. 1407, 1407 (Feb. 25, 1942) (creating the military areas); see also Public Proclamation No. 1, 7 Fed. Reg. 2320, 2320–21 (Mar. 26, 1942) (giving the military the power to create the Western Defense Command).

117. See generally *Korematsu*, 323 U.S. at 215–16, 223–24 (upholding the internment of Japanese Americans during World War II).

118. *Hirabayashi v. United States*, 320 U.S. 81, 96 n.4 (1943) (citations omitted); see *Ozawa v. United States*, 260 U.S. 178, 190, 194 (1922).

119. *Hirabayashi*, 320 U.S. at 96 n.4 (citation omitted).

120. *Id.* (citation omitted).

121. *Id.* (citation omitted).

122. *Korematsu*, 323 U.S. at 239 n.12 (Murphy, J., dissenting).

123. *Id.* (citing Frank J. Taylor, *The People Nobody Wants*, THE SATURDAY EVENING POST, May 9, 1942, at 24, 66).

124. See *id.*

125. *Id.* (quoting Taylor, *supra* note 123, at 66).

126. *E.g.*, BATMAN (Columbia Pictures Corp., Movie Serial 1943) (copy on file with author). In this movie, Batman and Robin battle the "evil Japanese, Dr. Daka." *Id.* The serial features background narration such as "since a wise government rounded up the shifty eyed Japs" and "Daka, the sinister Jap spy." *Id.* An interesting note is that Sony now owns the rights to this first Batman serial. Batman, <http://www.batmantoy.com/articles/article41.html> (last visited Mar. 5, 2006). As a Japanese company, they deleted these phrases during a re-release of the video series. *Id.* Additionally, one of this generation's cultural icons, George Takei, who portrayed Mr. Sulu in the television series *Star Trek* was forced, as a child, to



While this was the popular sentiment, in the eleven months that it took to remove all of the “subversive” Japanese, “not one person of Japanese ancestry was accused or convicted of espionage or sabotage after Pearl Harbor while they were still free.”<sup>127</sup>

[Yet the military] makes the amazing statement that as of February 14, 1942, “The very fact that no sabotage has taken place to date is a disturbing and confirming indication that such action will be taken.” Apparently, in the minds of the military leaders, there was no way that the Japanese Americans could escape the suspicion of sabotage.<sup>128</sup>

This quote comes from a report written by General DeWitt, the commander responsible for making the decisions about the way the Japanese were to be handled to protect the national security on the western-most coast of our country.<sup>129</sup>

But why internment camps? Why not just let the Japanese move from the military zones into the interior of the country? The residents of these coastal areas were afraid of the Japanese living in their midst.<sup>130</sup> It was not the recommendation of the head of the Western Military Command but of “three California officials—the state’s Governor and Attorney General, and the Mayor of Los Angeles—and the congressional delegations of the three west coast states.”<sup>131</sup> Chief Justice Rehnquist<sup>132</sup> surmises that had the military not gone along with this plan and it had proved in hindsight to have been necessary then “their names will very likely [have been] ‘Mudd’ [for rejecting] a widely popular security measure.”<sup>133</sup> That may answer the question of why the relocation program, but why internment?

Why take people from their homes and force entire families to live in a single room, black tar-papered barracks with nothing more than a potbellied

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leave Los Angeles with his family and relocate to the Rohwer Relocation Center. See GEORGE TAKEI, *TO THE STARS: THE AUTOBIOGRAPHY OF GEORGE TAKEI, STAR TREK’S MR. SULU* 19 (1994).

127. *Korematsu*, 323 U.S. at 241 (Murphy, J., dissenting).

128. *Id.* at 241 n.15 (quoting J.L. DEWITT, *FINAL REPORT: JAPANESE EVACUATION FROM THE WEST COAST 1942*, at 34 (1943) [hereinafter *FINAL REPORT*]).

129. See REHNQUIST, *supra* note 4, at 189.

130. *Id.* at 188.

131. *Id.* at 204.

132. Chief Justice of the United States Supreme Court from 1986 to 2005. MEMBERS OF THE SUPREME COURT OF THE UNITED STATES, <http://www.supremecourtus.gov/about/members.pdf> (last visited Mar. 5, 2006).

133. REHNQUIST, *supra* note 4, at 204.

stove for cooking?<sup>134</sup> After all, “an Assembly Center was a euphemism for a prison [as n]o person . . . was permitted to leave except by Military Order.”<sup>135</sup> Of the 112,000 Japanese forced to leave their homes for the internment camps, 70,000 were United States citizens,<sup>136</sup> also known by the Japanese word “Nisei” meaning second generation.<sup>137</sup> They were, in large part, “children and elderly men and women.”<sup>138</sup> The British government had investigated about 74,000 Germans and Austrians, and categorized them as either “real enemies” or a “friendly enemy.”<sup>139</sup> Our allies ended up holding only 10,000 “real enemies” of that entire number and accomplished this task in only six months.<sup>140</sup> What prevented the United States military from moving the Japanese to the interior states, where security would not be an issue, and doing the same kind of sorting? This “was due primarily to the fact that the interior states would not accept an uncontrolled Japanese migration.”<sup>141</sup> This prevented the military from a “planned and orderly relocation” because without such supervision “there might have been a dangerously disorderly migration of unwanted people to unprepared communities.”<sup>142</sup> It was the Governors of those states that would not allow for an open relocation of primarily United States citizens because of the prejudices of their local constituents.<sup>143</sup>

## 2. Military Authority

With the exception of Hawaii, the civilian government and courts maintained authority in the United States.<sup>144</sup> However, not unlike the dramatic introduction to his article, the government empowered the military to make decisions as to how to promulgate Executive Orders.<sup>145</sup> In this war, the three branches of government were working in unison in what amounted to the abridgment of civil liberties, conducted at the discretion of military com-

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134. TAKEI, *supra* note 126, at 21, 23.

135. *Korematsu v. United States*, 323 U.S. 214, 230 (1944) (Roberts, J., dissenting) (mentioning General Dewitt’s Report to the Secretary of War concerning the program).

136. *Id.* at 242.

137. See REHNQUIST, *supra* note 4, at 188.

138. *Korematsu*, 323 U.S. at 242 (Murphy, J., dissenting).

139. *Id.* at 242 n.16 (citing Robert M.W. Kempner, *The Enemy Alien Problem in the Present War*, 34 AM. J. INT’L L. 443, 445–46 (1940); H.R. REP. No. 2124, at 280–81 (1942)).

140. Kempner, *supra* note 139, at 446.

141. *Ex parte Endo*, 323 U.S. 283, 295–96 (1944) (citation omitted).

142. *Id.* at 296–97.

143. See *id.* at 295–97.

144. See REHNQUIST, *supra* note 4, at 212.

145. See, e.g., Exec. Order No. 9066, 7 Fed. Reg. 1407 (Feb. 25, 1942); REHNQUIST, *supra* note 4, at 191.

manders.<sup>146</sup> These decisions revolved around Presidential Executive Order 9066, issued for “the protection of our war resources against espionage and sabotage.”<sup>147</sup> The United States Supreme Court stated in *Hirabayashi v. United States* that the “[a]ppellant ha[d] been tried and convicted in the civil courts and ha[d] been subjected to penalties prescribed by Congress for the acts committed.”<sup>148</sup> This case is unlike *Milligan* in that there was “no question of martial law or trial by military tribunal.”<sup>149</sup> While Roosevelt wanted the military to be as reasonable as it could in the internment process, the people actually in charge of the operation thought that they had “*carte blanche*” from the President to conduct the operation.<sup>150</sup> Roosevelt’s Attorney General, Francis Biddle,<sup>151</sup> reflected that he did not feel ““that the Constitutional difficulty plagued [Roosevelt]. The Constitution has not greatly bothered any wartime President.””<sup>152</sup>

### 3. From *Hirabayashi* to *Endo*, the Court Comes Full Circle

“There was no physical brutality, but there were certainly severe hardships—physical removal from the place where one lived, often forced sale of houses and businesses, and harsh living conditions in the spartan quarters of the internment centers.”<sup>153</sup> This was the backdrop upon which the main cases of *Yasui v. United States*,<sup>154</sup> *Hirabayashi*, *Korematsu*, and *Endo*—all of which involved American citizens<sup>155</sup>—would take place.

146. *Hirabayashi v. United States*, 320 U.S. 81, 91–92 (1943).

147. *Id.* at 102.

I hereby authorize and direct the Secretary of War, and the Military Commanders whom he may from time to time designate, whenever he or any designated Commander deems such action necessary or desirable, to prescribe military areas in such places and of such extent as he or the appropriate Military Commander may determine, from which any or all persons may be excluded, and with respect to which, the right of any person to enter, remain in, or leave shall be subject to whatever restrictions the Secretary of War or the appropriate Military Commander may impose in his discretion.

Exec. Order No. 9066, 7 Fed. Reg. 1407, 1407 (Feb. 25, 1942).

148. *Hirabayashi*, 320 U.S. at 92–93.

149. *Id.* at 92.

150. REHNQUIST, *supra* note 4, at 191 (quoting FRANCIS BIDDLE, IN BRIEF AUTHORITY 218 (1962)).

151. *Id.* at 190.

152. *Id.* at 191 (quoting BIDDLE, *supra* note 150, at 219).

153. *Id.* at 192.

154. 320 U.S. 115 (1943).

155. See *Hirabayashi v. United States*, 320 U.S. 81, 84 (1943); *Yasui*, 320 U.S. at 116; *Korematsu v. United States*, 323 U.S. 214, 215 (1944); *Ex parte Endo*, 323 U.S. 283, 284 (1944).

Both Gordon Hirabayashi and Minoru Yasui were born in the United States to *Issei*<sup>156</sup> parents.<sup>157</sup> Hirabayashi was convicted of two charges, “disobey[ing] the curfew . . . [and] fail[ing] . . . to register for evacuation from the prescribed military area”<sup>158</sup> when he did not show up at a Civil Control Station as scheduled.<sup>159</sup> In *Hirabayashi*, the Court espoused the philosophy of “*Inter arma silent leges*: In time of war the laws are silent.”<sup>160</sup> There were two charges—internment and curfew, in that order—and the sentences were to run concurrently.<sup>161</sup> The Court found that the second charge of violating the curfew was “without constitutional infirmity,” thus totally sidestepping the more difficult question of whether reporting to a Civil Control Station meant that Hirabayashi would necessarily be confined in a relocation center.<sup>162</sup> *Yasui* was another case of curfew violation which the Court upheld based on the ruling in *Hirabayashi*.<sup>163</sup>

When the military decided that the curfew alone would not be an adequate measure, they began to exclude the Japanese from certain areas.<sup>164</sup> In *Korematsu*, “the Court was required to confront . . . the far more draconian relocation requirement.”<sup>165</sup> The Court upheld *Korematsu*’s exclusion and the conviction for violating Exclusion Order No. 34<sup>166</sup> by stating that he “was not excluded . . . because of hostility to him or his race.”<sup>167</sup> “He was excluded because we are at war with the Japanese Empire,” and because the military authority decided that “the situation demanded that all citizens of Japanese ancestry be segregated from the West Coast temporarily.”<sup>168</sup> The Court also noted that Congress gave the military the authority to do this.<sup>169</sup> It was not until the *Endo* case that the Supreme Court began to look at the internment of

156. “*Issei*” is a Japanese term referring to first generation Japanese born in Japan, as opposed to “*Nisei*,” which means second generation born in the United States. REHNQUIST, *supra* note 4, at 188.

157. *Id.* at 192.

158. *Id.*

159. *Hirabayashi*, 320 U.S. at 84.

160. See REHNQUIST, *supra* note 4, at 202.

161. *Hirabayashi*, 320 U.S. at 83–84, 105.

162. *Id.* at 105; see REHNQUIST, *supra* note 4, at 198.

163. *Yasui v. United States*, 320 U.S. 115, 117 (1943).

164. *Korematsu v. United States*, 323 U.S. 214, 216 (1944); see Public Proclamation No. 4, 7 Fed. Reg. 2601 (Apr. 4, 1942).

165. REHNQUIST, *supra* note 4, at 200.

166. *Korematsu*, 323 U.S. at 222–24; see Act of Mar. 21, 1942, ch. 191, 56 Stat. 173 (providing a penalty for violations regarding military zone restrictions).

167. *Korematsu*, 323 U.S. at 223.

168. *Id.*

169. *Id.*

loyal U.S. citizens,<sup>170</sup> however, still choosing not to address the constitutional issues.<sup>171</sup>

*Ex parte Endo* was a case which came before the Supreme Court based on a writ of habeas corpus.<sup>172</sup> Mitsuye Endo was an American of Japanese descent who had been detained by the War Relocation Authority.<sup>173</sup> The government had no question as to her loyalty to the United States.<sup>174</sup> However, the War Relocation Authority wanted her held for an additional period as “an essential step in the evacuation program.”<sup>175</sup> It was already 1944 and “the United States’ military position was much more favorable . . . than it had been in the spring of 1942.”<sup>176</sup> The Court no longer felt it needed to be silent.<sup>177</sup> Endo was given her freedom.<sup>178</sup> The Court held that Relocation Centers were not “part of the original program of evacuation but developed later to meet what seemed to the officials in charge to be mounting hostility to the evacuees on the part of the communities where they sought to go.”<sup>179</sup> The Court further held that the authority to hold a person under these circumstances should end once the individual is shown to be a loyal citizen.<sup>180</sup> Holding such a person because of public sentiment and hostility was not supported by the President’s Executive Order, which was created to protect our nation against disloyal saboteurs and fashioned to prevent espionage and sabotage.<sup>181</sup>

#### 4. The Disloyal Citizen

While the Court held that a loyal citizen could not be held by the military in the internment camps,<sup>182</sup> it was a different matter for those who were

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170. See *ex parte Endo*, 323 U.S. 283, 302 (1944); see also REHNQUIST, *supra* note 4, at 201–02.

171. *Endo*, 323 U.S. at 297.

172. *Id.* at 285.

173. *Id.* at 284–85.

174. *Id.* at 294. “It is conceded by the Department of Justice and by the War Relocation Authority that appellant is a loyal and law-abiding citizen. They make no claim that she is detained on any charge or that she is even suspected of disloyalty.” *Id.*

175. *Endo*, 323 U.S. at 295.

176. REHNQUIST, *supra* note 4, at 202.

177. See *id.*

178. *Endo*, 323 U.S. at 297.

179. *Id.* at 301.

180. *Id.* at 302.

181. *Id.* at 302–03 (citations omitted).

182. *Id.* at 302–04.

disloyal.<sup>183</sup> On the east coast of the United States, a group of German agents, one of whom professed American citizenship, came ashore, took off their German uniforms, changed into civilian clothes, and entered the country in a clandestine manner to sabotage the United States' war effort.<sup>184</sup> The Court made the distinction between "[l]awful combatants [who] are subject to capture and detention as prisoners of war by opposing military forces [and] [u]nlawful combatants . . . [who] are subject to trial and punishment . . . for acts which render their belligerency unlawful."<sup>185</sup> They found that:

an enemy combatant who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property, are familiar examples of belligerents who are generally deemed not to be entitled to the status of prisoners of war, but to be offenders against the law of war subject to trial and punishment by military tribunals.<sup>186</sup>

An enemy combatant, even one with United States citizenship, is not relieved of the consequences of his belligerency.<sup>187</sup> Those "[c]itizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction enter this country bent on hostile acts, are enemy belligerents within the meaning of the Hague Convention and the law of war."<sup>188</sup>

In this case, there was a claim by the petitioners that they had not actually committed any anti-American activity.<sup>189</sup> However, the Court held that "[t]he offense was complete when with that purpose they entered—or, having so entered, they remained upon—our territory in time of war without uniform or other appropriate means of identification."<sup>190</sup>

These will become important issues when reviewing the current situation in the United States. Are the Muslim and Arab-Americans being treated more like the Japanese in World War II, or more like the enemy combatants of the same era?

183. See generally *ex parte* Quirin, 317 U.S. 1, 48 (1942) (upholding detention of German belligerents despite U.S. citizenship).

184. *Id.* at 20–21.

185. *Id.* at 31 (footnote omitted).

186. *Id.*

187. *Id.* at 37.

188. *Quirin*, 317 U.S. at 37–38.

189. *Id.* at 38.

190. *Id.*

### III. BEING A PATRIOT IN THE NEW MILLENNIUM

“Those who refuse to comply and are already in the country, if we discover them, we’ll be taking steps for them to be deported.”<sup>191</sup>

—John Ashcroft, June 5, 2002.

The foregoing historical perspective provided to demonstrate how far the United States has already gone in the abridgment of civil liberties and how it has recovered. The section that follows will speak to where this country is now and where it may be heading.

President George W. Bush has called for a review of the Posse Comitatus Act which limits the role that the military can have in domestic affairs.<sup>192</sup> The head of the Northern Command, a Four Star General, favors giving “greater domestic powers to the military to protect the country against terrorist strikes.”<sup>193</sup> However it is uncertain what new role the military might play if the Act, which was put in force after the Civil War, is repealed.<sup>194</sup> “Congress enacted the law in reaction to excesses by . . . troops . . . .”<sup>195</sup> These perceived misuses were committed during “domestic law enforcement.”<sup>196</sup> Will modern era generals take the place of General Burnside<sup>197</sup> and General DeWitt in the abridgment of civil liberties in the fight for peace and freedom?<sup>198</sup>

#### A. *A War on Terror Versus a Declared War*

In each of the aforementioned historical times—the Civil War and World War II—the United States was in a state of declared war.<sup>199</sup> The former Chief Justice of the United States Supreme Court, William Rehnquist, noted that “[w]ithout question the government’s authority to engage in con-

191. Ashcroft, *supra* note 23.

192. See Eric Schmitt, *Wider Military Role in U.S. Is Urged*, N.Y. TIMES NAT’L, July 21, 2002, at 16.

193. *Id.*

194. *Id.*

195. Adam Liptak, *Posse Comitatus Act Limits Armed Services at Home*, N.Y. TIMES, July 21, 2002, at 16.

196. *Id.*

197. See *Writ of Liberty*, *supra* note 11.

198. See FINAL REPORT, *supra* note 128, at 34.

199. REHNQUIST, *supra* note 4, at 218. There was no actual declaration of war on the Southern Confederacy since it was not recognized by the Union as a separate nation. *Id.* However, the Court held that the “insurrection could be treated by the government as the equivalent of a declared war.” *Id.* (citing *In re Prize Cases*, 67 U.S. (2 Black) 635 (1862)).

duct that infringes [on] civil liberty is greatest in time of declared war."<sup>200</sup> Where does that leave the current war on terror? The United States is striking back against those who would cause terrorist acts within its borders.<sup>201</sup> President Bush<sup>202</sup> declared a national emergency and called up the ready reserve of the armed forces to active duty.<sup>203</sup> However, there was no country to target, only individuals that the President determined planned and executed the terrorist actions against our country.<sup>204</sup> Congress did not declare war, but only authorized the use of military force.<sup>205</sup> This is the first notable difference between this time of unrest and those previously discussed.<sup>206</sup> The United States then proceeded with its retaliation against Al Qaeda by bombing Afghanistan.<sup>207</sup> However, the United States needed to be protected from the inside, so the President, through an Executive Order, established the Office of Homeland Security.<sup>208</sup> The primary functions of this newly created office are to be "responsible for administering such polic[ies] with respect to terrorist threats and attacks within the United States."<sup>209</sup> This office will be responsible for "detecting, preparing for, preventing, protecting against, responding to, and recovering from terrorist threats or attacks within the United States."<sup>210</sup> Prevention, as would be expected, is one of the key components of this effort.<sup>211</sup> Since the terrorists who attacked the World Trade Center were from outside the United States—from Middle Eastern countries<sup>212</sup>—there will also be careful scrutiny of immigration and visas.<sup>213</sup> Will

200. *Id.*

201. Authorization for Use of Military Force, Pub. L. No. 107-40, § 2, 115 Stat. 224, 224 (2001).

202. George W. Bush, America's 43rd President.

203. Authorization for Use of Military Force § 2.

204. *See id.* The Act provides:

[T]he President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

*Id.*

205. *See id.*

206. *See supra* Part I.

207. *See, e.g.,* James Dao with Patrick E. Tyler, *A Nation Challenged: The Alliance; Military Called Just One Element in War on Terror*, N.Y. TIMES, Sept. 27, 2001, at A1.

208. Exec. Order No. 13,228, 66 Fed. Reg. 51,812, 51,812 (Oct. 10, 2001).

209. *Id.* at 51,816.

210. *Id.* at 51,812.

211. *Id.* at 51,813.

212. *See* James Risen & Don Van Natta, Jr., *Authorities Have Learned the Identities of 18 Hijackers, Attorney General Says*, N.Y. TIMES, Sept. 14, 2001, at A4.

213. Exec. Order No. 13,228, 66 Fed. Reg. 51,812, 51,813 (Oct. 10, 2001).



civil liberties stand in the way of these investigative activities? Not according to section 3(k) of the Executive Order which indicates that if the legal authority to act is inadequate they will periodically review the matter and seek Presidential and legislative action to change the laws to accommodate the functions of this office.<sup>214</sup>

#### B. *The USA PATRIOT Act and the Arab and Muslim in America*

The United States already has “relatively poor relations with the Muslim world,”<sup>215</sup> a kind of “Islamophobia.”<sup>216</sup> The USA PATRIOT Act goes to great lengths to reassure Arab and Muslim Americans that the United States does not see them as the enemy.<sup>217</sup> In response to incidents of hate crimes that have taken place since September 11, 2001,<sup>218</sup> the President has even gone so far as to visit a Mosque to show his support for Muslim and Arab-Americans.<sup>219</sup> He has stated in a political address that the people of the United States respect those of the Muslim faith.<sup>220</sup> However, not unlike World War II and the reaction to the Japanese living in our country, this is a time when non-Muslim Americans are retaliating, with hate, in their own communities, and the targets are innocent Arab and Arab-looking individuals.<sup>221</sup> The fear is that “life is going to be miserable,” for the Arab Ameri-

214. *Id.* at 51,815.

215. Adrienne Katherine Wing, *Reno v. American-Arab Anti-Discrimination Committee: A Critical Race Perspective*, 31 COLUM. HUM. RTS. L. REV. 561, 581 (2000).

216. *Id.* (citing Farhan Haq, *Religion-Rights: UN Report Shows Mixed Picture on U.S. Muslims*, INTER PRESS SERVICE, Mar. 18, 1999).

217. USA PATRIOT Act of 2001, Pub. L. No. 107-56, § 102(a)-(b), 115 Stat. 272, 276-77.

(b) SENSE OF CONGRESS.—It is the sense of Congress that —

(1) the civil rights and civil liberties of all Americans, including Arab Americans, Muslim Americans, and Americans from South Asia, must be protected, and that every effort must be taken to preserve their safety;

(2) any acts of violence or discrimination against any Americans be condemned; and

(3) the Nation is called upon to recognize the patriotism of fellow citizens from all ethnic, racial, and religious backgrounds.

*Id.* § 102(b), at 277.

218. See Laurie Goodstein & Gustav Niebuhr, *Attacks and Harassment of Arab-Americans Increase*, N.Y. TIMES, Sept. 14, 2001, at A14.

219. Blaine Harden, *Arab-Americans Are Finding New Tolerance Amid the Turmoil*, N.Y. TIMES, Sept. 22, 2001, at B1.

220. Presidential Address, *supra* note 27.

221. See Tamar Lewin & Gustav Niebuhr, *Attacks and Harassment Continue on Middle Eastern People and Mosques*, N.Y. TIMES, Sept. 18, 2001, at B5. The article lists a series of hate crimes in which a Sikh gas station owner was killed; a Lebanese clerk at another gas station was shot at; a Pakistani grocery store owner was gunned down; Mosques were being

can.<sup>222</sup> These criminal acts are admittedly the work of extremists and the United States government has worked hard to cast them in their proper light.<sup>223</sup> However, there is an attitude that has developed in the United States which has caused us to give a second look at the Arab-looking person.<sup>224</sup>

There is a fear that President Bush will follow the lead of Lincoln and Roosevelt in abrogating constitutional liberties.<sup>225</sup> "Americans [seem] deeply conflicted about the balance between security and civil liberties . . ." <sup>226</sup> The undercurrent seems to be about taking civil liberties from Middle Easterners.<sup>227</sup> "[M]any Muslims . . . have felt like targets in a larger society where 'Arab' and 'Muslim' are often equated with 'terrorist.'" <sup>228</sup> Yet others are worried that people in power who have their own personal agendas could use this situation to take too many of our liberties away.<sup>229</sup> To quote one Arab-American, "[o]fficials come and say there's a distinction between terrorists and Islam . . . Publicly they say we are friends. But secretly they say, 'No, go behind them, tape them and spy on them.'" <sup>230</sup>

It is little wonder that the Arab and Muslim American community is worried when Attorney General Ashcroft makes remarks like "Islam is a religion in which God requires you to send your son to die for him. Christianity is a faith in which God sends his son to die for you."<sup>231</sup> Having a person who has the power to certify that you are engaged in terrorist activities without showing evidence understandably makes the presumed targets of that scrutiny uneasy.<sup>232</sup>

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attacked—one mosque even had a car drive through the doors; and school children were being bullied. *Id.*

222. Harden, *supra* note 219.

223. *Id.*

224. *Id.*

225. Robin Toner, *Civil Liberty vs. Security: Finding a Wartime Balance*, N.Y. TIMES, Nov. 18, 2001, at A1.

226. *Id.*

227. *Id.*

228. *Id.*

229. *Id.*

230. Toner, *supra* note 225.

231. Dan Eggen, *Alleged Remarks on Islam Prompt an Ashcroft Reply; Critics Urge a More Emphatic Repudiation of Comments*, WASH. POST, Feb. 14, 2002, at A31. Remarks were allegedly made by Attorney General John Ashcroft to syndicated columnist Cal Thomas who quoted them on his radio broadcast. *Id.* The Justice Department said that Ashcroft's statement "refer[ed] to terrorists who distorted Islamic beliefs." *Id.* A spokesperson for the Department of Justice said that the "statement reflected views of terrorists and not mainstream Muslims." *Justice Officials Deny Ashcroft Insulted Islam*, L.A. TIMES, Feb. 16, 2002, at 21.

232. See USA PATRIOT Act of 2001, Pub. L. No. 107-56, § 412, 115 Stat. 272, 350–52.

### C. *National Security Entry-Exit Registration System*

The new Entry-Exit Registration System is becoming a reality.<sup>233</sup> The system will have three prongs.<sup>234</sup> The first is “fingerprinting and photographing at the border.”<sup>235</sup> Next is “periodic registration of aliens who stay in the United States thirty days or more.”<sup>236</sup> Finally, the implementation of “exit controls that will help the Immigration and Naturalization Service remove those aliens who overstay their visas.”<sup>237</sup> The worry seems to come from the second part of the process since it would affect those law abiding residents already here legally.<sup>238</sup> American Muslim groups do not like the plan because they feel that it will target Muslims and Arabs instead of terrorists, becoming a kind of modern day “witch-hunt.”<sup>239</sup> Ashcroft would not, even with repeated questioning, state from which countries visitors would be fingerprinted.<sup>240</sup> However, “[o]ther government officials said men 18 to 35 years of age from about 20 largely Muslim and Middle Eastern nations, including important allies like Saudi Arabia and Egypt, would make up the bulk of those who would be fingerprinted, photographed and required to fill out a long form.”<sup>241</sup>

Since this new system has been put in place without Congressional consultation, not everyone on Capitol Hill is pleased with the plan.<sup>242</sup> Senator Edward Kennedy of Massachusetts stated that he was “‘deeply disappointed’” by this new system and considered it a way of “target[ing] Muslim and Arab nationals.”<sup>243</sup> He felt it would do little to protect against terrorist attacks and would “‘further stigmatize innocent Arab and Muslim visitors, students, and workers who have committed no crimes and pose no danger to us.’”<sup>244</sup>

233. See Ashcroft, *supra* note 23.

234. *Id.*

235. *Id.*

236. *Id.*

237. *Id.*

238. See Jerry Seper, *New INS Policy Targets Middle Easterners*, WASH. TIMES, June 6, 2002, at A01.

239. Carolyn Lochhead, *Rights Groups Condemn Visa Plan: Ashcroft Says Crackdown is Essential for U.S. Security*, S.F. CHRON., June 6, 2002, at A1.

240. See Ashcroft, *supra* note 23.

241. Eric Schmitt, *Ashcroft Proposes Rules for Foreign Visitors*, N.Y. TIMES, June 6, 2002, at A28.

242. Seper, *supra* note 238.

243. *Id.*

244. *Id.*

## 1. The New Face of Racial Profiling

A concise definition of racial profiling is a “law enforcement-initiated action based on an individual’s race, ethnicity, or national origin rather than on the individual’s behavior or on information identifying the individual as having engaged in criminal activity.”<sup>245</sup> However, the United States Court of Appeals for the Sixth Circuit has held that “when determining whom to approach as a suspect of criminal wrongdoing, a police officer may legitimately consider race as a factor if descriptions of the perpetrator known to the officer include race.”<sup>246</sup>

When the United States government treats the entire Arab and Muslim communities as if they are terrorist suspects, they “don’t create trust or cooperation. [They] create fear.”<sup>247</sup> Many writers point out that targeting people by their country of origin will be ineffective because “Zacarias Moussaoui<sup>248</sup> held a French passport and suspected shoe-bomber Richard Reid [held] a British passport.”<sup>249</sup> The question then becomes, if the threat can just as easily come from U.S. citizens and national origin is an unreliable factor, what possible means can we use other than physical appearance?<sup>250</sup>

## 2. Power to Regulate Immigrants

The reason that there is no constitutional challenge to Ashcroft’s plan is because “[t]he Supreme Court has stated that the power to regulate immigration is firmly in the hands of the political branches of the Federal Government.”<sup>251</sup> The question really is whether the power falls to the Attorney Gen-

245. *United States v. Coleman*, 162 F. Supp. 2d 582, 589 (N.D. Tex. 2001) (quoting TEX. CODE CRIM. PROC. ANN. art. 3.05 (Vernon 2005)).

246. *United States v. Waldon*, 206 F.3d 597, 604 (6th Cir. 2000).

247. Editorial, *Treating Visitors Like Enemies*, ST. LOUIS POST-DISPATCH, June 14, 2002, at C18 (quoting David A. Harris, a visiting law professor at St. Louis University, and “an expert on racial-profiling”).

248. Zacarias Moussaoui, a self-admitted member of al Qaeda, is suspected by the United States government of being the “20th hijacker” on Sept. 11, 2001. See Raymond Bonner & Douglas Frantz, *French Suspect Moussaoui in Post-9/11 Plot*, N.Y. TIMES, July 28, 2002, at 22. He was kept off the plane when he was taken into custody for violating the terms of his visa. *Id.*

249. Lochhead, *supra* note 239; see also *America’s War Against Terrorism; New INS Mandate May Be More Divisive than Effective at Preventing Terrorism*, MORNING CALL (Allentown, Pa.), June 7, 2002, at A18.

250. See Lochhead, *supra* note 239.

251. *Zheng v. Reno*, 166 F. Supp. 2d 875, 879 (S.D.N.Y. 2001) (citing *Reno v. Flores*, 507 U.S. 292, 305 (1993); *Landon v. Plasencia*, 459 U.S. 21, 34 (1982)).

eral or the Congress? The answer is Congress.<sup>252</sup> Therefore, the courts will not be much help in this matter.<sup>253</sup>

But 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. Courts do enforce the requirements imposed by Congress upon officials in administering immigration laws, and the requirement of Due Process may entail certain procedural observances. . . . One merely recognizes that the place to resist unwise or cruel legislation touching aliens is the Congress, not this Court.<sup>254</sup>

The USA PATRIOT Act was created by Congress and signed into law by the President.<sup>255</sup> As of that date,<sup>256</sup> when the law became effective, the Attorney General was given the power to implement the Entry-Exit program, including fingerprint identification.<sup>257</sup> When decisions are made, however, there is a clause which states that no court shall have, absent special circumstances, jurisdiction to review, by habeas corpus petition or otherwise, any such action or decision.<sup>258</sup> As with all laws, “[a]nyone who [is] truly dangerous is not going to show up to be registered.”<sup>259</sup> “This is targeting a group of people, the overwhelming majority of whom are innocent, but whose lives will be turned upside down . . . .”<sup>260</sup>

### 3. McVeigh and Padilla—The United States Citizen Who Terrorizes

Terrorists are not just from outside of our borders; many are United States citizens.<sup>261</sup> Timothy McVeigh blew up the Alfred P. Murrah Federal

252. See *Harisiades v. Shaughnessy*, 342 U.S. 580, 597–98 (1952) (Frankfurter, J., concurring).

253. *Id.* at 589 (majority opinion).

254. *Id.* at 597–98 (Frankfurter, J., concurring) (citations omitted).

255. OFFICE OF HOMELAND SECURITY, NATIONAL STRATEGY FOR HOMELAND SECURITY 47 (2002), available at [http://www.whitehouse.gov/homeland/book/nat\\_strat\\_hls.pdf](http://www.whitehouse.gov/homeland/book/nat_strat_hls.pdf) (stating that the President signed the USA PATRIOT Act into law on October 26, 2001).

256. USA PATRIOT Act of 2001, Pub. L. No. 107-56, § 411(c)(1), 115 Stat. 272, 348.

257. USA PATRIOT Act § 405(a).

258. See USA PATRIOT Act § 412.

259. Schmitt, *supra* note 25 (quoting Jeanne Butterfield, Executive Director, American Immigration Lawyers Association).

260. *Id.* (quoting James J. Zogby, President, Arab American Institute).

261. See *Not All Terrorists Are from Mideast*, THE ADVOCATE (Baton Rouge, La.), May 10, 2002, at 8B.

Building in Oklahoma City, causing 168 deaths.<sup>262</sup> The bomb “destroyed 14 buildings, damaged 309 others and . . . injured more than 500 people.”<sup>263</sup> He was caught and subsequently executed for his crimes.<sup>264</sup> He was not the only one.<sup>265</sup> There was “the Unabomber” who sent explosive letters through the mail.<sup>266</sup> The mailbox bomber put pipe bombs in mailboxes throughout the Midwest.<sup>267</sup> Finally, there was Jose Padilla who was arrested for planning a dirty bomb attack.<sup>268</sup> Americans, one and all, yet not one of them would have had to pass through the new Entry-Exit system.<sup>269</sup> There was no government ultimatum that all Americans should be fingerprinted and photographed, although there was talk of a type of national identification card through United States driver licenses.<sup>270</sup> The plan would be a “back door” approach to do the same thing to the American citizenry as is being done to the foreigners entering our borders.<sup>271</sup>

#### IV. CONCLUSION

In times of peace, the government is in a precarious balance of power between the judiciary, administrative, and legislative branches. However, in times of war all of that begins to break down. Our Constitutional guarantees no longer become ones that are for every citizen, but become ones that are for those that fall within the popular and political beliefs of the nation at the time of crisis. The Supreme Court has shown itself to be powerless if there is a strong President or if the President and Congress work in unison to abridge civil liberties.

Unlike previous wars where the North had to defeat the South or the unconditional surrender of Japan ended the need for worrying about the interned Japanese citizens, the United States has no clear cut foreseeable vic-

262. See Erin Hallissy, *Oklahoma City Bombing; Timothy McVeigh Execution; Endurance in the Face of Tragedy; Six Years Later, Oklahoma City Moves Forward*, S.F. CHRON., June 10, 2001, at A17, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2001/06/10/MN39387.DTL&hw=oklahoma+city+bombing&sn=ooldsc=1000>.

263. *Id.*

264. See Rick Bragg, *The McVeigh Execution: The Overview: McVeigh Dies for Oklahoma City Blast*, N.Y. TIMES, June 12, 2001, at A1.

265. See *Not All Terrorists are from Mideast*, *supra* note 261.

266. *Id.*

267. See *id.*

268. See Stuart Taylor, Jr., *GC Pay Weathers the Storm: Congress Must Set Rules for How We Lock up Potential Terrorists*, LEGAL TIMES, July 22, 2002, at 44.

269. See Ashcroft, *supra* note 23.

270. See John Hall, *Might National ID Begin with Drivers' Licenses?*, TAMPA TRIB., July 24, 2002, at 11.

271. See *id.*

tory in the war on terror. The civil liberties that are disappearing will probably disappear forever. Those within our borders who are from other countries have no choice but to turn themselves in for fingerprinting and photographing, not unlike an arrested criminal. But who will really come forward? The terrorist who wants to check in or the law abiding citizen who wants to follow the rules and live in our country peaceably? This is another instance where the government is intruding into the lives of the innocent in order to find the few that might be guilty. It is no different than the internment camps of World War II, seeking a few saboteurs among an otherwise loyal populace, except that the barbed wire has been replaced with fear of arrest without habeas corpus rights and deportation. As seen by the news of recent days, the popular sentiment is still not strongly sided with the Muslim and Arab community. Perhaps it is a fear of the unknown, both about their religious beliefs and about when and where the next attack might be perpetrated. The United States must learn from the past so that it does not become a totalitarian regime in the future. It is a dangerous path this country is on when it seeks to take away a group's civil liberties to prevent future criminal events. That should be left to the stuff of fiction.<sup>272</sup>

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272. MINORITY REPORT (Twentieth Century Fox 2002). The film featured officers who would arrest people before a crime was committed or even thought of, in order to prevent it from ever taking place in the future. *Id.* This made for a peaceful society, free of violent crime. *Id.* Is this where we are heading?