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The Constitutionality of Detainment in the Wake of September 11th

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NOTES

The Constitutionality of Detainment in the Wake of September 11th

BY WHITNEY D. FRAZIER*

TABLE OF CONTENTS

INTRODUCTION ........................................... 1090
I. BACKGROUND OF CONSTITUTIONAL LAW REGARDING SEIZURE AND PROBABLE CAUSE ........................................ 1093
II. THE BAIL REFORM ACT AND MATERIAL WITNESSES .......... 1096
   A. The Bail Reform Act Generally .......................... 1097
   B. Due Process Analysis under the Bail Reform Act ........ 1103
III. SUSPICIONS AND SUSPECTS ................................ 1105
   A. Detainment of Suspects Must Be Warranted by Probable Cause ........................................ 1107
   B. Detainment of Suspects Must Be Reasonable ............ 1107
IV. MINOR OFFENSES UNRELATED TO TERROR .................. 1108
V. IMMIGRATION LAW AND THE USA PATRIOT ACT ............ 1109
   A. The USA PATRIOT Act Generally ......................... 1110
   B. Redefining Probable Cause and Reasonableness Standards 1114
VI. A RATIONALE TO JUSTIFY DETENTIONS—BALANCING HISTORICAL PRECEDENT, CIRCUMSTANCES, NATIONAL SECURITY, CIVIL LIBERTIES, AND SAFETY ........................................ 1115
   A. History of Encroachment on Civil Liberties During Times of War ........................................ 1115
   B. Circumstances as Justification for Detainment .......... 1118
   C. National Security—Secrecy, FISA, Exceptions to the Attorney-Client Privilege, and Military Tribunals ........ 1120

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INTRODUCTION

After September 11th, our nation was confronted with the vulnerability of its borders. The United States has responded to the attacks on the World Trade Center and Pentagon with a "war" on terrorism.¹ This "war" defies the traditional notions of combat. It is a battle that requires new tools,² new legislation,³ and a greater cohesiveness in granting and sharing access to information among intelligence agencies and our allies.⁴

Terrorists have threatened the public health of our nation. We are engaged in a "war" that tangibly affects the entire population of the United States. Terrorism instills a common fear into a nation, fear of the ability of terrorists to effectuate high casualty counts on innocent civilians, and fear of the terrorists' ability to encumber a nation with grief. A further concern of the population is the extent to which civil liberties will need to be encroached upon in order to restore a sense of security to the nation. The attacks of September 11th, coupled with other terroristic threats,⁵ make it clear that a major public health crisis⁶ is potentially looming.

¹ The United States has not declared war on terrorism or Afghanistan. See infra notes 190-95 and accompanying text.
² Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 [hereinafter USA PATRIOT Act] (codified as amended in scattered sections of 8 U.S.C.) (providing for broad surveillance powers). This Act was the result of Senate Bill 1510, the Uniting and Strengthening America ("USA") Act, and House Bill 2975, the Providing Appropriate Tools Required to Intercept and Obstruct Terrorism ("PATRIOT") Act. The final legislation is less invasive than the proposals originally submitted by President George W. Bush and Attorney General John Ashcroft.
⁴ See infra Part VI.C.
⁵ These threats encompass bioterrorism, illustrated by the anthrax scare.
⁶ A public health crisis could be determined to exist because of a high casualty count or an increase in the spread of disease.
The way to successfully win this "war" and prevent a public health crisis is to achieve safety, while maintaining the civil liberties that our nation cherishes. Many questions have been raised concerning how legislation and actions in response to terrorism encroach upon civil rights. The basic question is to what extent are we comfortable giving up our liberties to defeat terrorism?

Some commentators argue that many basic rights are being overstepped through the course of the investigation into the acts on September 11th. This is the largest criminal investigation in the government's history, with over twelve hundred people detained, and six hundred currently in custody. Reliable statistics on how many people are being held in relation to terrorist groups are not available.

See infra notes 8 & 180 and accompanying text.

See Linda Wertheimer, All Things Considered (NPR radio broadcast, Oct. 15, 2001). But see Evan Thomas & Michael Isikoff, Justice Kept in the Dark, NEWSWEEK, Dec. 10, 2001, at 36, 38 ("[I]t is far too soon to declare that the attorney general is undermining basic freedoms or tearing holes in the Constitution.").

The goal of the investigation is to "prosecute people suspected of association with terrorist groups on whatever charges they could find in order to get them out of the country or in jail." Neil A. Lewis, Detentions After Attacks Pass 1,000, U.S. Says, N.Y. TIMES, Oct. 30, 2001, at B1. Contra Preserving Our Freedoms While Defending Against Terrorism: Hearing: Before the Judiciary Committee of the United States Senate on DOJ Oversight, 107th Cong. (2001) (statement of Kate Martin, Director, Center for National Security Studies) ("Many of the recent actions appear to be aimed not so much at gathering information about Al Qaeda and its members, but at simply intimidating those who have come to visit, do business, or work and become Americans.").

Thomas & Isikoff, supra note 8, at 42 (six hundred detained). I have chosen to use the number six hundred (600) to identify the detainees currently in custody, because it is the last number reported. However, any inaccuracies of the numbers should be attributed to the refusal of the government to disclose their tally, the possibility that individuals were being counted twice for both illegal-immigration status and for committing a state or local crime, and because the task of compiling the lists of detainees was too labor intensive. Michele Orecklin, Why Hide the Numbers?, TIME, Dec. 3, 2001, at 61. See also Matthew Purdy, Bush's New Rules to Fight Terror Transform the Legal Landscape, N.Y. TIMES, Nov. 25, 2001, at A1 (reporting that the Department of Justice has not provided the number of people detained); David G. Savage & Eric Lichtblau, Response to Terror: Ashcroft Deals with Daunting Responsibilities, L.A. TIMES, Oct. 28, 2001, at A10 (reporting one thousand are detained); Time to Rethink Anti-Terror Moves, CHI. SUN-TIMES, Jan. 7, 2002, at 23 (reporting twelve hundred are detained). See Bob Edwards, Profile: Attorney General John Ashcroft Criticized For His Aggressive Approach to the Terrorist Investigation, Morning Edition (NPR radio broadcast, Nov. 28, 2001)
to this investigation are not available. After early November, the Department of Justice refused to announce the number of people detained in the course of the investigation.\(^{11}\)

Detentions have been justified based on people serving as material witnesses, being suspected of having information relevant to the terrorist attacks, overstaying visas, and committing minor crimes.\(^{12}\) Initially, it was estimated that only 165 people were detained under the Immigration and Naturalization Act ("INA").\(^{13}\) It has been established that most of the detainees are Muslims or of Middle Eastern descent.\(^{14}\) However, few details about the reasons for those detentions have been released; all matters have been sealed by a federal judge.\(^{15}\)

This Note examines the constitutionality of detentions in the wake of September 11th. Part I presents the background on the detainees associated with the investigation of the September 11th attacks and provides a general framework for constitutional seizures and the legality of detainment.\(^{16}\) Part II addresses the Bail Reform Act,\(^{17}\) which gives prosecutors the ability to

\(^{11}\) Purdy, supra note 10.

\(^{12}\) Savage & Lichtblau, supra note 10. Horror stories are already beginning to surface regarding treatment of these detainees. Stories of deprivation of showers and toothbrushes, limited access to attorneys, deprivation of a mattress, a cup, a clock to indicate when to say Muslim prayers, denial of contact with family, blindfolding and shackling, isolation cells, verbal attacks, beatings by other inmates, and physical humiliation and degradation are being shared with the public. Civil liberties are subsequently being questioned. Cf. Wertheimer, supra note 8 (discussing the story of Yazeed Al-Salmi, a student in San Diego held as a material witness for nineteen days because he was the roommate of one of the hijackers for six weeks.); William Carlsen, Rights Violations, Abuses Alleged by Detainees; Beatings, Lack of Legal Representation Cited, S.F. CHRON., Oct. 19, 2001, at A12; Richard A. Serrano, Ashcroft Denies Wide Detainee Abuse, L.A. TIMES, Oct. 17, 2001.

\(^{13}\) Judy Peres, War on Terror the Detained, CHI. TRIB., Oct. 16, 2001, at 8.

\(^{14}\) Id.


\(^{16}\) See infra Part I.

detain material witnesses; the constitutionality of this portion of the Act has never been litigated. Part III examines the constitutionality of detaining those immigrants who are only suspected to have information relevant to the investigations of the September 11th tragedy. This loosely defined category of "suspects" begs a closer look at the need for probable cause and whether that standard has been met. Part IV probes detention based on minor offenses unrelated to terrorism. Part V explores the provisions of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act ("USA PATRIOT Act") passed on October 26, 2001, addressing the detention period for foreign nationals. Part VI asks whether the threat terrorism poses to our country is sufficient to justify encroachments upon our civil liberties by reviewing historical precedent for infringing upon civil liberties during times of war and considering issues of national security. This Note concludes that the reasonableness of a seizure should be considered in light of national instability and that the current detentions are acceptable based on a shifting perception and understanding of what is reasonable.

I. BACKGROUND OF CONSTITUTIONAL LAW REGARDING SEIZURE AND PROBABLE CAUSE

The Fourth Amendment guarantees that citizens and non-citizens cannot be arrested without the establishment of probable cause. It states, in part, that "[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 ...." To arrest on mere suspicion is a violation of a basic civil liberty. The traditional definition of an arrest is to deprive a person of his liberty by legal authority. In Terry v. Ohio, the Supreme Court clarified this

18 See infra notes 71, 77, 85-86 and accompanying text.
19 See infra Part III.
20 See infra Part IV.
22 See infra Part VI.
23 See Conclusion infra pp. 1124.
25 U.S. CONST. amend. IV.
description by holding that a seizure limited in its intrusiveness may be reasonable under the Fourth Amendment.\textsuperscript{28} To determine what constitutes a reasonable seizure, the only necessary test is to "balance the need to search [or seize] against the invasion which the search [or seizure] entails."\textsuperscript{29} Reasonableness is tested under an objective standard: whether the facts available to the officer at the moment of the seizure or the search justify a reasonably cautious man to believe that the action taken was appropriate.\textsuperscript{30} "What is reasonable depends upon all of the circumstances surrounding the search or seizure ... itself."\textsuperscript{31} Reasonableness "represents a necessary accommodation between the individual's right to liberty and the State's duty to control crime."\textsuperscript{32}

A "stop" is distinguished from an arrest in \textit{Terry v. Ohio}\textsuperscript{33} because of its minimal intrusion, and the requirement of less evidence than is needed for an arrest. While a "stop" is a type of seizure,\textsuperscript{34} the standard of proof necessary for a stop is reasonable suspicion, rather than probable cause.\textsuperscript{35} In \textit{Terry}, the officer acted for crime prevention subsequent to his on-the-spot observations; however, stops may also be used for crime detection.\textsuperscript{36} For instance, after a crime occurs, police may not have more than a vague description of the possible perpetrator, thus an officer must be able to "stop" a suspect and make an inquiry before taking further action.\textsuperscript{37} In \textit{United States v. Hensley},\textsuperscript{38} the Court concluded that a \textit{Terry} stop was sometimes permissible to further the investigation of a criminal activity. This occasion of permissibility occurs when the stop is of "a person suspected of involvement in a past crime," only as to "felonies or crimes involving a threat to public safety [where] it is in the public interest that the crime be solved and the suspect detained as promptly as possible."\textsuperscript{39}

\begin{itemize}
\item \textsuperscript{28} \textit{Terry v. Ohio}, 392 U.S. 1, 16 (1968); LAFAVE ET AL., \textit{supra} note 27, at 178.
\item \textsuperscript{29} \textit{Camara v. Mun. Court of San Francisco}, 387 U.S. 523, 536-37 (1967).
\item \textsuperscript{32} \textit{Gerstein}, 420 U.S. at 112.
\item \textsuperscript{33} \textit{Terry}, 392 U.S. at 1.
\item \textsuperscript{34} \textit{Id.} at 16. The Fourth Amendment governs all seizures, even those "seizures that involve only a brief detention short of traditional arrest." \textit{Mendenhall}, 446 U.S. at 551; \textit{see also Terry}, 392 U.S. at 16-19.
\item \textsuperscript{35} \textit{See Terry}, 392 U.S. at 20.
\item \textsuperscript{36} \textit{Id.}; LAFAVE ET AL., \textit{supra} note 27, at 216.
\item \textsuperscript{37} LAFAVE ET AL., \textit{supra} note 27, at 216.
\item \textsuperscript{38} \textit{United States v. Hensley}, 469 U.S. 221 (1985).
\item \textsuperscript{39} \textit{Id.} at 229.
\end{itemize}
It could be argued that the current detainees are being “stopped” for crime detection; however, this argument is not plausible because the length of detainment is outside the scope of a stop. Since these detentions qualify as arrests, probable cause must be established by finding that a crime was committed and that it is probable that the detainee committed it. Probable cause requires only a probability or substantial chance of criminal activity, not an actual showing of such activity. The Supreme Court, in *Illinois v. Gates*, cited their previous decision in *Jaben v. United States*, stating that probable cause “requires that enough information be presented to the Commissioner to enable him to make the judgment that the charges are not capricious and are sufficiently supported to justify bringing into play the further steps of the criminal process.” In *Gerstein v. Pugh*, the Court ruled that the Fourth Amendment requires a prompt judicial determination of probable cause as a prerequisite to restraining liberty for an extended period. With regard to a time limit under which probable cause may be determined, a “jurisdiction that provides judicial determinations of probable cause within 48 hours of arrest will, as a general matter, comply with ... *Gerstein*,” provided that the hearing is not unreasonably delayed.

The necessity of probable cause and reasonable detainment is the same whether applied to detainees or citizens in other criminal cases. Detainees are entitled to “due process, the right to be free from unreasonable searches and seizures, and the right to a speedy trial, among other rights.”

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40 See supra notes 33-39 and accompanying text.
44 *Gates*, 462 U.S. at 231 n.6.
46 *Id.* at 126.
48 Examples of unreasonable delay are delays 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. In evaluating whether the delay in a particular case is unreasonable, however, courts must allow a substantial degree of flexibility... .
49 See U.S. CONST. amend. XIV (No state shall “deny to any person within its jurisdiction the equal protection of the laws.”).
Supreme Court ruled a century ago that where there is a possibility of a prison sentence, illegal aliens must be given the same rights as U.S. citizens.  

The constitutionality of a certain law enforcement practice is decided by "balancing its intrusion on the individual’s Fourth Amendment interests against its promotion of legitimate governmental interests." In this Note, possible legitimate governmental interests in detentions will be examined against the background of Fourth Amendment law.

II. THE BAIL REFORM ACT AND MATERIAL WITNESSES

The Bail Reform Act allows material witnesses, those whose testimony is material in a criminal proceeding, to be detained if the government foresees flight or a possible threat to the community if the individual is released. Reportedly, just a handful of those detained since September 11th are material witnesses. A material witness is entitled to a hearing but can be held without bail if considered a flight risk or a danger to society. The alien status of some of the detainees arguably qualifies them as flight risks. However,

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51 Chebium, supra note 50.

52 United States v. Montoya de Hernandez, 473 U.S. 531, 537 (1985) (quoting United States v. Villamonte-Marquez, 462 U.S. 579, 588 (1983)); accord Delaware v. Prouse, 440 U.S. 648, 654 (1979); Camara v. Mun. Court of San Francisco, 387 U.S. 523, 534-35 (1967). Contra Carroll v. United States, 267 U.S. 132, 149 (1925) ("The Fourth Amendment is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted, and in a manner which will conserve public interests as well as the interests and rights of individual citizens."). See supra note 29 and accompanying text. As recent cases illustrate, the need to construe reasonableness in light of the circumstances surrounding a situation, rather than the meaning of reasonable at adoption of the Fourth Amendment is imperative.


54 Peres, supra note 13.

55 Id.; 18 U.S.C. § 3144; e.g., United States v. Seif, No. CR 01-0977-PHX-PGR, 2001 WL 1415034, at *1 (D. Ariz. Nov. 8, 2001) (Defendant was detained as a material witness because he was a flight risk.).

questions of abuse of the material witness provision are bountiful with respect to the current investigation.\(^{57}\)

A. The Bail Reform Act Generally

The provision in the Bail Reform Act\(^{58}\) addressing material witnesses, states in relevant part:

If it appears from an affidavit filed by a party that the testimony of a person is material in a criminal proceeding, and if it is shown that it may become impracticable to secure the presence of the person by subpoena, a judicial officer may order the arrest of the person . . . \(^{59}\)

The arrest procedure for material witnesses is not used frequently because of the inherent intrusiveness an arrest and detainment causes in the life of someone who is not even charged with a crime.\(^{60}\) This Act "permits prosecutors to bring in some potential suspects and other people of interest without probable cause that they committed a crime;"\(^{61}\) constituting a stark contrast to the legal threshold needed to detain those people suspected of criminal activities. The only necessary showing to detain a material witness is that the witness has "significant information and is at risk to flee."\(^{62}\) It is also easier to hold someone as a material witness than under the immigration violations outlined in USA PATRIOT Act § 411.\(^{63}\)

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\(^{57}\) Many have warned that this statute is "easily misused against people who you think really did it, but you don’t have enough evidence to arrest them, so you hold them as a material witness." Id.

\(^{58}\) 18 U.S.C. § 3144 (release or detention of a material witness).

\(^{59}\) Id. The statute further states:

and treat the person in accordance with the provisions of section 3142 of this title. No material witness may be detained because of inability to comply with any condition of release if the testimony of such witness can adequately be secured by deposition, and if further detention is not necessary to prevent a failure of justice. Release of a material witness may be delayed for a reasonable period of time until the deposition of the witness can be taken pursuant to the Federal Rules of Criminal Procedure. Miller, supra note 15 (Managing Assistant U.S. Attorney Thomas W. Turner commenting on the use of material witness arrest warrants).

\(^{60}\) Id. (emphasis added).


In *United States v. Oliver*, the Seventh Circuit Court of Appeals addressed the issue of whether the government has power under the Bail Reform Act to issue an arrest warrant for a material witness. The defendant conceded that the court has the power to issue a material witness arrest warrant, but he argued that in order to satisfy the materiality requirement, courts should require that a factual basis be set forth rather than relying on the rules delineated in *Bacon v. United States*. *Bacon* held that two requirements must be met: "(1) that the testimony of a person is material and (2) that it may become impracticable to secure his presence by subpoena." The court held that a statement by a responsible official satisfies the first criterion because of the importance of secrecy in all aspects of the grand jury's investigation. The *Oliver* court found that "requiring a materiality representation by a responsible official of the United States Attorney's Office strikes a proper and adequate balance between protecting the secrecy of the grand jury's investigation and subjecting an individual to an unjustified arrest." However, *Oliver* expressed "no view on the propriety of extending this rule to witnesses material to a trial" because of the possibility that the special concerns of the grand jury are not present. Although the court addressed the applicability of the Act in these cases, it did not reach the merits of the constitutionality of the provision and its usage. It did, however, call into

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64 United States v. Oliver, 683 F.2d 224 (7th Cir. 1982).
65 Id. at 230-31 (discussing the propriety of the requirements for establishing the materiality of a witness).
66 Bacon v. United States, 449 F.2d 933 (9th Cir. 1971) (holding that a material witnesses arrest and detention (before the Bail Reform Act) must be based on probable cause).
67 Id. at 943.
68 Id.; see also Oliver, 683 F.2d at 231.
69 Oliver, 683 F.2d at 231.
70 Id. This representation seems to replace what the *Bacon* court described as the need for probable cause for a material witness arrest warrant. See *supra* notes 66-67 and accompanying text; see generally United States v. Hazelett, 32 F.3d 1313, 1317 (8th Cir. 1994) (The government could have detained a material witness pursuant to the Bail Reform Act in a trial where the defendant was convicted for possession of more than five hundred grams of cocaine with intent to distribute. The court did not reach the issue of the constitutionality of the Bail Reform Act.).
71 Oliver, 683 F.2d at 231. The constitutionality of § 3144 of the Bail Reform Act, the material witness provision, has never been litigated. It is notable that the constitutionality of the power to arrest a material witness was addressed in *Bacon* before the Bail Reform Act, where the Ninth Circuit Court of Appeals held that the authority was based in Fed. R. Crim. P. 46(b) and 18 U.S.C. § 3149. *Bacon*, 449
question whether the presence of some material witnesses could be secured by subpoena, especially if a non-deportable citizen is being held as a material witness.

The potential for the extended detention of a material witness seems to be greatest with relation to a grand jury proceeding because in cases where a material witness is held pending trial, the deposition of the witness can be taken upon written motion of the witness and notice to the parties, pursuant to Rule 15(a) of the Federal Rules of Criminal Procedure, as long as “further detention is not necessary to prevent a failure of justice.”

In United States v. Salerno, the Supreme Court determined that Section 3142(e) of the Bail Reform Act, which addresses the hearing held to determine whether or not the witness should be detained in order to assure his or her appearance and the safety of the community, is not facially unconstitutional as a violation of the Excessive Bail Clause of the Eighth Amendment. However, this case is easily distinguished from the instant situation involving the current detainees of the terror investigation and Section 3144 of the Bail Reform Act, which specifically addresses material witnesses and only references Section 3142. In Salerno, the Court did not address the constitu-

F.2d at 937.


If a witness is detained pursuant to section 3144 of title 18, United States Code, [Release or detention of a material witness] the court on written motion of the witness and upon notice to the parties may direct that the witness' deposition be taken. After the deposition has been subscribed the court may discharge the witness.

FED. R. CRIM. P. 15(a). This deposition “may be used as substantive evidence if the witness is unavailable, as unavailability is defined in Rule 804(a) of the Federal Rules of Evidence...” Id. at 15(e). However, according to § 3144, a deposition is only acceptable if “further detention is not necessary to prevent a failure of justice.” 18 U.S.C. § 3144. A failure of justice is not defined in this section of the Act, but it is presumed to mean a flight risk or danger to society.


18 U.S.C. § 3142(e) states:

If , after a hearing pursuant to the provisions of subsection (f) [a hearing will be held to determine whether conditions of section (c) can be filled to assure the appearance of this person] of this section, the judicial officer finds that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community, such judicial officer shall order the detention of the person before trial.

Salerno, 481 U.S. at 748.

See supra note 59 and accompanying text.
tionality of extended detainment of material witnesses under the Act or the constitutionality of detainment under the Fourth Amendment. The Court specifically established, "[w]e intimate no view on the validity of any aspects of the Act that are not relevant to the respondents' case."  

A court must first look to legislative intent to determine whether a "restriction on liberty constitutes impermissible punishment or permissible regulation."  

The Salerno Court reasoned that the legislative intent of the Bail Reform Act was to use the detention provisions "not as punishment for dangerous individuals, but as a potential solution to the pressing societal problem of crimes committed by persons on release."  

The Court further specified that "the incidents of detention under the Act are not excessive in relation to that goal, since the Act carefully limits the circumstances under which detention may be sought to the most serious of crimes" and the safeguards built in for the arrestee assure entitlement to a prompt hearing, a maximum length of detention limited by the Speedy Trial Act, and housing apart from convicts. The narrow list of crimes mentioned in the Bail Reform Act that require detention hearings include: cases involving crimes of violence, offenses for which the sentence is life imprisonment or death, serious drug offenses, or offenses committed by certain repeat offenders. However, with the secrecy involved in the investigation and the sealing of documents, there is no proof that these safeguards are being met. It is imperative to understand that the Salerno majority does not address those detained as only material witnesses and not also as prior felons. The constitutionality of the material witness provision, Section 3144, has never

77 Salerno, 481 U.S. at 745 n.3.
78 Id. at 747.
79 Id.
80 Id.
81 18 U.S.C. § 3161(c)(2) (1994) states that "[u]nless the defendant consents in writing to the contrary, the trial shall not commence less than thirty days from the date on which the defendant first appears through counsel or expressly waives counsel and elects to proceed pro se." There are other rules for trial dates depending on the specific charge as was referred to in Salerno. See Salerno, 481 U.S. at 747.
84 See supra Part VI.C.
85 Salerno, 481 U.S. at 750 ("Nor is the Act by any means a scattershot attempt to incapacitate those who are merely suspected of these serious crimes.") (emphasis added).
been addressed by the courts, probably because of its use in such limited circumstances.

Under the Bail Reform Act, various lengths of detainment do not violate due process. The Salerno decision overturned the court of appeals' ruling that the Due Process Clause prohibits pretrial detention that is imposed as a regulatory measure. However, in the cases where detentions did not violate due process, a trial date was set and the length of detainment was justified by the threat to society because of the propensity for violent acts.

Many detainees are probably being held because the government feels that they are flight risks due to their illegal immigrant status. Recently, the Third Circuit decided Patel v. Zemski, holding that mandatory detention of aliens "violates their due process rights unless they have been afforded the opportunity for an individualized hearing at which they can show that they do not pose a flight risk or danger to the community." This case must be distinguished from the instant situation by clarifying that the material witnesses in the current terror investigation may or may not have been charged with a felony, meaning processed under the Bail Reform Act and detained because they are flight risks. If a material witness has not been charged with a felony then it is possible that the individual has not been afforded a hearing to testify to whether he or she is a flight risk. The Third Circuit's decision illustrates the necessity for determining flight risk through

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86 See U.S. CONST. amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law. . . ."); Abrams, supra note 82, at 1333 n.982 (up to eighteen months was acceptable on the ground of dangerousness).
87 Salerno, 481 U.S. at 748. See also Abrams, supra note 82, at 1333 n.982 (commenting on United States v. Tortora, 922 F.2d 880, 889 (1st Cir. 1990) and United States v. Theron, 782 F.2d 1510 (10th Cir. 1986)).
88 See generally Abrams, supra note 82, at 1333 n.982 (providing examples of cases where detainment did not violate due process).
89 United States v. Seif, No. CR 01-0977-PHX-PGR, 2001 WL 1415034, at *1 n.1 (D. Ariz. Nov. 8, 2001) (Although Seif was not a part of this investigation, this case is illustrative of the way in which a flight risk is determined.).
91 Shannon P. Duffy, 3rd Circuit Rejects Detention of Alien Without Assessment of Flight Risk: Court Doesn't Follow 7th Circuit Decision, THE LEGAL INTELLIGENCER, Dec. 21, 2001, at 3. Contra Parra v. Perryman, 172 F.3d 954 (7th Cir. 1999) (finding that Congress has "plenary power" over the treatment of aliens, and since those who face deportation as a result of an aggravated felon will ultimately be deported, they have no liberty to be free from detention until then).
92 18 U.S.C. § 3142(a) (1994 & Supp. V. 1999) (This section only addresses a person charged with an offense.).
a hearing rather than solely inferring a risk based on immigration status. Furthermore, some of those held as material witnesses are not aliens, thus the court’s assertion in Patel that a hearing determining flight risk prevents a violation of due process is not applicable to this category of material witnesses.

Civil liberties advocates argue that the material witness statute was not designed to be used as preventative detention, allowing people believed to have a connection to a criminal activity to be detained when there are not sufficient grounds on which to base probable cause to charge them. A common fear is of the exploitation of this statute. It is possible that many detainees have been imprisoned for over four months without the prospect of a trial in the near future. Four of the jailed material witnesses are suspected associates of Osama bin Laden’s al Qaeda network. These four detainees have frustrated FBI and Justice Department investigators with their silence, to the extent that some believe that “traditional civil liberties may have to be cast aside if they are to extract information about the September 11 attacks and terrorist plans.” The FBI believes that the four suspects are withholding valuable information. Offers of lighter sentences, financial incentives, jobs, new identities, and a life in the United States for the suspects and their family members have not been persuasive. These men will be imprisoned until opting to cooperate with the government by taking one of the aforementioned incentives and providing information through depositions or grand jury testimony, at trial, or until other interrogation strategies are employed.

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93 Duffy, supra note 91. A hearing to evaluate flight risk is a fairly small restrictive means to evaluate flight risk on merits rather than on legal status.

94 Wertheimer, supra note 8 (summarizing comments of Steven Shapiro, national legal director of the ACLU).


96 These four key suspects are in New York’s Metropolitan Correctional Center being held for 1) seeking lessons to fly commercial jetliners but not how to take off or land them; 2) traveling with false passports and box cutters, hair dye, and $5000 in currency on the day of the attacks; and 3) alleged links to al Qaeda. Id.

97 Id.

98 Id.

99 Id. The “S” Visa is a possible incentive for alien informants who have reliable and critical information on terrorist operations. This is a S-6 visa. See INA § 101(a)(15)(S) (2000); DOJ Orders Incentives, ‘Voluntary’ Interviews of Aliens to Obtain Info on Terrorists, 78 INTERPRETER RELEASES 1816 (Dec. 3, 2001).

100 Prospects of applying pressure on these suspects include strategies of using “drugs or pressure tactics, such as those employed occasionally by Israeli interrogators, to extract information” or “extraditing the suspects to allied countries
In his dissent in *Salerno*, Justice Marshall compared the Bail Reform Act to statutes “consistent with the usages of tyranny and the excesses of what bitter experience teaches us to call the police state, hav[ing] long been thought incompatible with the fundamental human rights protected by our Constitution.” While the detention provisions of the Bail Reform Act can be justified for a convict or an enemy ally, the seizure of an innocent material witness, who has not committed a specifically describable crime to which probable cause can be attached, seems facially unconstitutional with respect to the Fourth Amendment.

**B. Due Process Analysis under the Bail Reform Act**

The due process clauses of the Fifth and Fourteenth Amendments state that no person shall be “deprived of life, liberty, or property, without due process of law.” The material witness provision of the Bail Reform Act should be questioned for its conformity with these clauses because of the undefined durations for which innocent witnesses can be held.

Courts have stated in dicta that the narrowness of the material witness provision, coupled with the government’s interest in protecting the community, make the Act’s pretrial detention provision consistent with the due process clause. However, although the threat to society seems to be substantial, the indefinite holding time, with unpredictable trial dates, calls into question whether the material witness provision meets due process in the instant case. With regard to the current detainees, detention arguably violates due process because it does not meet the Bail Reform Act’s goal, as

where security services sometimes employ threats to family members or resort to torture.” The drawbacks to these tactics are that the information obtained by inhumane treatment or torture cannot be used in a trial, and interrogators who implement these tactics are subject to charges of battery. See Pincus, *supra* note 95, at A6.

Although it is unlikely that our nation would ever allow torture or beatings, there is speculation as to whether our nation might reach the point where drugs are a viable interrogation tool. A former FBI official with a background in counterterrorism recently commented on the effectiveness of a “‘truth serum,’ such as sodium pentothal, ‘to try to get critical information when facing disaster, and beating a guy till he is senseless.’” He further commented, “[d]rugs might taint a prosecution, but it might be worth it.” However, there is no guarantee that a “truth serum” would be effective—it simply disinhibits an individual, but it does not guaranty truth. Pincus, *supra* note 95.

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102 U.S. CONST. amend. V; *id.*, amend. XIV.
103 See Abrams, *supra* note 82, at 1324-29.
delineated in *Salerno*, to offer a “potential solution to the pressing societal problem of crimes committed by persons on release.”104 Many of those being held have not committed crimes, and some of the crimes justifying detention are minor charges not typically associated with this form of seizure and not of the type likely to be repeated on release.105 The Bail Reform Act does not permit the government to seek detention based on the defendant being a danger to the community unless the crime for which he or she is charged is a “crime of violence.”106

The *Salerno* Court specifically qualified its decision in dicta, urging that no view is maintained “as to the point at which detention in a particular case might become excessively prolonged, and therefore punitive, in relation to Congress’ regulatory goal.”107 It seems as though the Court did not anticipate the prolonged detention of non-criminal or non-violent witnesses that will most likely be required in the terror investigation. Thus, without meeting the legislative intent, this restriction on liberty seems to equate to impermissible punishment.108 Further, the indefinite holding time makes the Act too broad to fit within the so-called “narrow” provision of *Salerno*. Perhaps if the statute had an applicable time limit, it would not violate due process. The lack of a statutory time limit has not been problematic until the investigation into the events of September 11th.109 Since the detainment period has no conclusive end, and because there is not a feasible way to estimate the end to the investigation of September 11th events and when a witness’ testimony can be adequately secured by deposition, it is arguable that the material witness provision of the Bail Reform Act is unconstitutional.110

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104 *Salerno*, 481 U.S. at 739.
105 See infra Part IV.
107 *Salerno*, 481 U.S. at 747 n.4.
108 See supra notes 77-82 and accompanying text. For a true showing of the unconstitutionality of the statute under the *Salerno* decision, a challenger must establish that “no set of circumstances exists under which the Act would be valid.” *Salerno*, 481 U.S. at 745. To use this test as part of the analysis is beyond the available facts concerning the investigation and all the circumstances currently warranting detention of material witnesses.
109 This investigation is ongoing and it is impracticable to estimate when detainees’ information will no longer be needed.
110 See supra notes 86-88 and accompanying text. All other detainment periods on record are regarded as proper.
The secrecy of this investigation has yielded little information about a legitimization of detainees, the number of detainees that are being held, and whether or not access is being granted to family and counsel. In the cases of the material witnesses who are reportedly linked to the Osama bin Laden investigation, no reports of material statements have been released, and all proceedings have been sealed by the federal courts. While the Justice Department has not commented on specific cases, it claims that every material witness has legal representation as required by the Act. However, we have no systematic check to determine whether the Act’s requirements are being met.

III. SUSPICIONS AND SUSPECTS

Detainees are being held on suspicion of a variety of offenses, such as possessing false documents and being suspected terrorists, known as “suspects of special interest.” This category of detainees also includes those who were never informed of why they were held as suspects. Under the Gerstein v. Pugh analysis, the Supreme Court stated that the Fourth Amendment necessitates a prompt judicial determination of probable cause before restraining liberty for an extended period. Whether probable cause exists is to be decided within forty-eight hours of the arrest, as determined to be a reasonable amount of time by the Court in County of Riverside v.

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111 See Thomas & Isikoff, supra note 8, at 37 (approximately a dozen are being held as “material witnesses”).
112 Wertheimer, supra note 8; see infra note 172 and accompanying text.
113 See Peres, supra note 13; Kelly Thornton, Three Local Men to be Kept in Jail Indefinitely: Material Witnesses Lose Case in Court, Are Headed to N.Y., THE SAN DIEGO UNION-TRIB., Sept. 26, 2001, at A1 (These men will remain in jail indefinitely and will remain uncharged of a crime because of suspected ties to hijackers. Proceedings involving these men have been sealed, including the imposition of a gag order on attorneys.).
114 Wertheimer, supra note 8; see 18 U.S.C. §§ 3142, 3144 (1994 & Supp. V 1999); see also In re Class Action Application for Habeas Corpus on Behalf of All Material Witnesses in the W. Dist. of Tex., 612 F. Supp. 940, 948 (W.D. Tex. 1985) (holding that individuals incarcerated as material witnesses had due process right to appointment of counsel).
115 Peres, supra note 13; Thomas & Isikoff, supra note 8, at 39; Wertheimer, supra note 8.
116 Wertheimer, supra note 8.
118 See supra notes 45-48 and accompanying text.
However, it is possible that before the end of this forty-eight hour period some detainees were turned over to the Immigration and Naturalization Service ("INS") and have never been afforded an initial hearing.

Foregoing an initial hearing to determine probable cause before a magistrate clearly violates the Supreme Court's forty-eight hour requirement. The time in which the INS can charge a suspected terrorist of a criminal offense or commence removal proceedings is seven days, a standard significantly longer than the criminal law's forty-eight hour requirement. Even if a proceeding ensues, the INS procedures for post-arrest establishment of probable cause and other protections differ significantly from criminal procedures, and thus cannot be substituted to establish probable cause. With fewer protections under the INS law, it is easier to find cause for detention, thus defeating the protections against arrest offered by the stringent establishment of probable cause.

Numerous individuals against whom there is no evidence of criminal activity have been imprisoned. United States citizens were arrested for having "suspicious passports" and Arabic-sounding names. In early December, Attorney General John Ashcroft asserted that the number of people being detained amounted to 603 rather than 1200. Of the six hundred no longer detained, many were released without ever being

119 See generally County of Riverside v. McLaughlin, 500 U.S. 44, 56 (1991); Gerstein, 420 U.S. at 126.
120 Peres, supra note 13; see Lara Jakes, Secrecy Shrouds Arrests, TIMES UNION (Albany, N.Y.), Oct. 14, 2001, at A1 (Abdallah Yassine was shackled and charged with violating his immigration visa, and he was not given a hearing before a judge to establish probable cause.).
121 See infra notes 155-58 and accompanying text.
122 Immigrant Rights Clinic, NYU School of Law, Administrative Comment, Indefinite Detention Without Probable Cause: A Comment on INS Interim Rule 8, 26 N.Y.U. REV. L. &SOC. CHANGE 397, 405 (2001) (Fourth Amendment rights are safeguarded by requiring the INS to establish probable cause post-arrest if the seizure was by a warrantless arrest.).
123 See Victoria Cook Capitaine, Note, Life in Prison Without A Trial: The Indefinite Detention of Immigrants in the United States, 79 TEX. L. REV. 769, 777 (2001) (differences in proceedings include that an alien has no right to counsel, there is no requirement of Miranda warnings, hearsay testimony is allowed, a hearing may proceed in the absence of an alien, and judicial review is limited).
124 Statement of Kate Martin, supra note 9. Father and son were arrested after returning from a business trip in Mexico. The son was detained for two months before a federal judge determined that the plastic covering on his passport had split.
charged with a crime. In other cases, those being detained were never even given knowledge of the probable cause for their arrest. While it is typical to provide an explanation of probable cause on which an arrest is based, it is not always required. However, failure to articulate grounds for probable cause to many detainees is suspicious.

A. Detainment of Suspects Must Be Warranted by Probable Cause

Although mere suspicion of a crime may authorize a “stop,” the detainment of an individual for any substantial amount of time is a violation of the Fourth Amendment if based solely on suspicion.

Recent evidence suggests that the FBI is failing to comply with the requirement of finding probable cause before engaging in an arrest. “The FBI is providing a form affidavit, which relies primarily on a recitation of the terrible facts of September 11, instead of containing any facts about the particular individual evidencing some connection to terrorism... The affidavit simply recites that the FBI wishes to make further inquiries.” This “form affidavit” is not a sufficient basis for probable cause and should not serve as a substitute for establishing the specific grounds of cause in each circumstance.

B. Detainment of Suspects Must Be Reasonable

Assuming that in most cases probable cause has been established, the question then becomes, what is a reasonable length of detainment? Reasonableness has been described as “a fluid concept that ebbs and flows according to the circumstances. In other words, the more dangerous the

125 See Thomas & Isikoff, supra note 8, at 37 (young Israelis were held and subsequently released without ever being charged of a crime).

126 See United States v. Ponce Munoz, 150 F. Supp. 2d 1125, 1136 (D. Kan. 2001) (stating that officers “accurately explained to the defendant their good faith basis for finding probable cause to arrest defendant’s wife”).

127 See Kladis v. Brezek, 823 F.2d 1014, 1018 (7th Cir. 1987) (holding that the Sixth Amendment right to be informed of cause for arrest is not relevant until the United States commits to prosecution; under the Fourth Amendment, police are not required to tell arrestees of the probable cause warranting their arrest). There might also be other exceptions to disclosure of probable cause contained in FISA, but that is beyond the scope of this Note.

128 See supra notes 26-40 and accompanying text.

129 Statement of Kate Martin, supra note 9.
situation, the more likely a court is to side with the government.”

The President has great power to order extensive searches and seizures in the name of national security. In the wake of the September 11th terrorist attacks, the public health danger that terrorists pose to our nation and to innocent civilians calls for a more flowing and open definition of what is reasonable. Under past definitions of reasonable seizure, the length of detention and little showing of cause would not pass muster under the Fourth Amendment. However, these detentions are arguably reasonable based on the public health threat posed to the entire population of our nation and the unprecedented war that was waged against the United States by the September 11th attacks.

IV. MINOR OFFENSES UNRELATED TO TERROR

Probable cause for detainment in cases unrelated to suspicion of terrorist activity or to arrests based on immigration violations has been established by minor crimes: credit card fraud, theft, and forging a landlord’s signature to cash rent-subsidy checks.

According to the Supreme Court’s holding in Whren v. United States, the establishment of a Fourth Amendment case turns upon a definition of “reasonableness,” requiring a balancing of all relevant factors. Historically, the only cases where the balancing test is applied include those “searches or seizures conducted in an extraordinary manner, unusually harmful to an individual’s privacy or even physical interests.” Here, the question is whether established cause is outweighed by the invasiveness of the seizure. It seems that relatively minor violations do not warrant the prolonged detention that is occurring as a result of the investigation into the September 11th attacks. Under traditional circumstances, these seizures

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131 Id.
132 See supra notes 29-32 and accompanying text.
135 Id. at 817-18.
136 Id. at 818.
137 Cf. Atwater v. City of Lago Vista, 532 U.S. 318 (2001). In Atwater, the plaintiff sued the city under § 1983 when she was arrested and taken to jail for failing to wear her seat belt, failing to fasten her children in seat belts, driving
seem unreasonable because the "physical interests" of an individual are typically afforded careful treatment. However, after factoring in the necessity of this investigation and the public health threat to our nation, extended detention for a minor violation seems reasonable if a showing of cause for a minor crime can be used to detain those whom the FBI suspects might have information related to the events.

V. IMMIGRATION LAW AND THE USA PATRIOT ACT

There are approximately twenty-six million foreign born residents in the United States, equating to approximately ten percent of our population. The term "immigrants" includes those who are naturalized citizens, legal permanent residents, undocumented aliens, or refugees/asylees. Many undocumented aliens enter this country as legal aliens and become illegal because they stay after their visas expire. In 2002, there are an estimated seven to eight million illegal, undocumented aliens in the United States.

without license, and failing to provide proof of insurance. Justice Souter, writing for the Court, held that: (1) officer's authority to make warrantless arrest for misdemeanors was not restricted at common law to cases of "breach of the peace," and (2) arrest did not violate plaintiff's Fourth Amendment rights.

See supra notes 29-32 (defining reasonable seizure).


A naturalized citizen is an alien who has gone through the process of naturalization to become a U.S. Citizen. This process requires the alien to be in good moral standing and a permanent resident of the United States for five years, as well as meet other requirements. Id. at 10.

A legal permanent resident is an immigrant who has obtained a green card and is entitled to remain indefinitely. Id.

An undocumented alien is an immigrant who has either entered the United States or has remained here without the proper documentation and legal immigrant status. Id.

A refugee/asylee is an immigrant who flees his or her home country in fear of persecution because of race, religion, nationality, political opinion, or membership in a social organization. Refugee status is obtained while abroad and asylees are already present in the United States during their application for status. Id.

Id. at 6 (four in ten immigrants enter as legal aliens and become illegal).

Dan Eggen & Cheryl W. Thompson, U.S. Seeks Thousands of Fugitive Deportees; Middle Eastern Men Are Focus of Search, WASH. POST, Jan. 8, 2001, at A1; see Immigrants' Health Care: Coverage and Access, supra note 140, at 10 (Illegal, undocumented aliens comprised approximately twenty-two percent of the nation's immigrants in 1998.).
The USA PATRIOT Act has significant ramifications for those illegal aliens.\textsuperscript{146}

A. The USA PATRIOT Act Generally

Apart from offering substantial new powers to enhance domestic security, use electronic surveillance, initiate counter money-laundering measures, strengthen criminal laws against terrorism, and remove obstacles to terrorism investigations generally, the USA PATRIOT Act that Congress passed on October 26, 2001, specifically affects immigrants with its redefinition of the length and reasons for which suspected terrorists can be detained under the INA.\textsuperscript{147}

Section 411 of the USA PATRIOT Act adds new grounds of inadmissibility to INA § 212(a)(3), making it less likely for representatives and supporters of terrorist organizations to be admitted into the United States.\textsuperscript{148} Various categories of activity considered to undermine the United States' initiatives against terrorism are defined.\textsuperscript{149} The previous definition of when an alien was "inadmissible and deportable for engaging in terrorist activity [included] only when he or she had used explosives or firearms."\textsuperscript{150} The USA PATRIOT Act broadly expands this definition to include the use of any "other weapon or dangerous device" with the intent to endanger the safety of individuals.\textsuperscript{151} Section 411 also redefines "engaging in a terrorist activity" to mean engagement as an individual, or as a member of an


\textsuperscript{147} See id. §§ 411, 412; Senate, House Pass Antiterrorism Legislation; Senate Subcommittee Discuss Improved Technology, 78 INTERPRETER RELEASES 1609, 1610-11 (Oct. 15, 2001) [hereinafter Senate, House Pass Antiterrorism Legislation].

\textsuperscript{148} USA PATRIOT Act §§ 411, 412.

\textsuperscript{149} See Senate, House Pass Antiterrorism Legislation, supra note 147, at 1610. Grounds of inadmissibility include being "a representative of a foreign terrorist organization, as designated by the Secretary of State under section 219, or a political, social or other similar group" whose actions are determined by the Secretary of State to undermine the "United States efforts to reduce or eliminate terrorist activities," and have used any "position of prominence" to undermine the United States anti-terrorist initiatives. USA PATRIOT Act § 411(a).

\textsuperscript{150} Antiterrorism Legislation Gains Momentum in Both Chambers; Lawmakers Offer Assorted Stand-Alone Bills, 78 INTERPRETER RELEASES, 1591, 1592 (Oct. 8, 2001) [hereinafter Antiterrorism Legislation Gains Momentum].

\textsuperscript{151} USA PATRIOT Act § 411(a)(1)(E)(ii).
organization who commits or intends to commit a terrorist activity that causes substantial bodily injury or death, prepares or plans a terrorist activity, gathers information on potential targets for terrorist activities, solicits funds or people for the activity or organization, or maintains membership in a terrorist organization. Further, a "terrorist organization" is redefined as a group designated under the INA or by the Secretary of State, or a group of two or more who engage in a terrorist activity. Association with a terrorist organization makes one inadmissible to the United States if the individual has "engage[d] solely, principally, or incidentally in activities that could endanger the welfare, safety, or security of the United States." Initially, the INS required that an immigrant be charged "within 24 hours." This requirement was changed by an interim rule initiated by Attorney General Ashcroft on September 17, 2001, to forty-eight hours except in emergencies or extraordinary circumstances, where an alien can be detained for any reasonable period of time. The passage of Section 412 of the USA PATRIOT Act attempts to define reasonable by altering the detention period from forty-eight hours to seven days so that the INS can decide whether to bring immigration or criminal charges against the detainee. If the removal proceeding is not commenced or charges are not made, then the Attorney General must release the alien. Section 412 also

152 Id. § 411(a)(1)(F); see generally Scales v. United States, 367 U.S. 203 (1961) (holding that knowing membership and active purposive membership in organizations criminal activities constitutes a crime, but membership alone is not a per se violation and enough to warrant a criminal charge). However, the USA PATRIOT Act appears to be contrary to Supreme Court precedent, saying that membership is enough for deportation. Unfortunately, further exploration of this topic is beyond the scope of this Note.


154 Id. § 411(G)(2).

155 Peres, supra note 13.

156 Id.

157 See generally Administrative Comment, supra note 122, at 399-400. This section provides that the INS bring the arrestee in front of an examining officer within forty-eight hours and states that in the event of "an emergency or other extraordinary circumstance," the INS has "an additional reasonable period of time" to examine the arrestee. 8 C.F.R. § 287.3(d) (2001); see also Peres, supra note 13.

158 John Lancaster, House Passes Sweeping Anti-Terrorism Bill, WASH. POST, Oct. 24, 2001, at A1; Senate, House Pass Antiterrorism Legislation, supra note 147, at 1610. Senator Russell D. Feingold (D-Wis.) was the only Senate member to vote against the USA PATRIOT Act. Id. at 1609.

159 See USA PATRIOT Act § 412(a)(5).
provides for mandatory detention, allowing enforcement agencies to hold people on immigration charges for more than a seven-day period once a deportation proceeding has been initiated.\textsuperscript{160}

If an alien's removal is "unlikely in the reasonably foreseeable future, [he or she] may be detained for additional periods of up to six months only if the release of the alien will threaten the national security of the United States or the safety of the community or any person."\textsuperscript{161} While the Act appears to state that the longest possible detention is six months, the express language only requires the Attorney General to review the certification every six months. The Act also grants the alien the ability to "request each 6 months in writing that the Attorney General reconsider the certification and . . . submit documents or other evidence in support of that request."\textsuperscript{162} These provisions clearly suggest that aliens may be detained for multiple six month periods if removal to another country cannot be facilitated in the "reasonably foreseeable future" and release after six months jeopardizes the national security or the safety of a community.\textsuperscript{163} While this seems to be consistent with the Supreme Court's decision in \textit{Zadvydas v. Davis},\textsuperscript{164} both the Court's decision and the statute are still ambiguous as to how long is reasonable to hold aliens in connection with terrorism or other matters of national security.\textsuperscript{165}

The fundamental question is when does the detention exceed the standard of reasonableness? The Act does not provide any definitions of reasonableness, nor does it place any clear boundaries on what time limit defines "the reasonably foreseeable future" with regard to removal or on the length of detention, provided the Attorney General "certify" an alien for detention if he is believed to be a risk to the community or is engaged in any other activity that endangers the national security of the United States.\textsuperscript{166} Although there is a cap of seven days on the initial detainment period, once detained for a removal proceeding or criminal charges, this

\begin{itemize}

\item \textsuperscript{160} See id. § 412.

\item \textsuperscript{161} Id. § 412(a)(6) (emphasis added).

\item \textsuperscript{162} Id. § 412(a)(7) (emphasis added).

\item \textsuperscript{163} See generally id. § 412; Antiterrorism Legislation Gains Momentum, supra note 150.

\item \textsuperscript{164} See \textit{Zadvydas v. Davis}, 121 S. Ct. 2491 (2001); see also infra note 201 and accompanying text.

\item \textsuperscript{165} See infra notes 201-02 and accompanying text (suggesting special arguments might be made for preventive detention with respect to matters of national security involving terrorism or other special circumstances).

\item \textsuperscript{166} See \textit{Senate, House Pass Antiterrorism Legislation}, supra note 147, at 1610; see also USA PATRIOT Act § 412.

\end{itemize}
period is ultimately undefined to the extent that the alien cannot be deported and continues to be "certified" based on reasonable grounds to believe that the alien endangers national security.\footnote{See USA PATRIOT Act § 412. This undefined period is much less severe and more reasonable than the "contentious indefinite detention provisions of the administration's proposal" that were ultimately compromised out of the bill on October 3, 2001. Antiterrorism Legislation Gains Momentum, supra note 150, at 1591. \"[T]he PATRIOT Act, approved since the terrorist attacks, allows Attorney General John Ashcroft to detain indefinitely foreigners who are certified as endangering national security. Some detainees may be held even when the Zadvydas ruling would otherwise have limited their confinement.\" Tamar Lewin, Deported Immigrants With Nowhere to Go Wait in Jail, N.Y. TIMES, Dec. 10, 2001, at 5 (emphasis added).
}

These mandatory detainment provisions are only intended to apply to persons subject to "deportation" on other grounds\footnote{Capitol Hill Hearings Highlight Concerns Over Administration's Anti-terrorism Proposal, 78 INTERPRETER RELEASES 1525, 1526 (2001) [hereinafter Capitol Hill Hearings]. Ashcroft's statement was made in response to Sen. Edward M. Kennedy (D-Mass) who noted that the administration's proposal would "appear to allow detention of aliens 'on mere suspicion' that they may be engaging in terrorist activity."} and those who the Attorney General believes are a threat to national security.\footnote{Id. at 1527 (Assistant Attorney General Viet Dinh's comments on mandatory detention). The final Act disregarded the House proposal to require the release of any alien after six months whose removal to another country could not occur in the "reasonably foreseeable future" if this release would not jeopardize the safety and security of the community and nation. This provision was added by Reps. Jackson Lee and Jerrold Nadler (D-N.Y.). Senate, House Pass Antiterrorism Legislation, supra note 147, at 1611. Further, the requirement of mandatory detention of suspected terrorists and aliens essentially gives the Attorney General "'carte blanche to keep someone in prison forever.'" Capitol Hill Hearings, supra note 168, at 1527 (quoting Rep. Jerold Nadler (D-N.Y.)).
}

However, minor visa violations that are usually cured by paperwork are now being prosecuted while aliens are detained.\footnote{The specification of those subject to deportation on other grounds is a justification against arguing that the Act allows mere suspicion to justify detainment rather than probable cause. See Jodi Wilgoren, Swept Up in a Dragnet, Hundreds Sit in Custody and Ask, 'Why?,' N.Y. TIMES, Nov. 25, 2001, at B7.
}

There are numerous concerns that
those with minor visa violations should not be treated as criminals and
detained with those suspected or wanted for more serious felonies.  

Apart from concerns about the length a person may be detained based
on criminal charges or to effectuate a removal, there are people who have
been held a month without being charged, and in some cases, they have
been held without access to a lawyer.  

According to the law, defendants charged with a crime are entitled to an appointed attorney if they cannot
afford to hire their own.  

The immigration court system does not provide an appointed attorney; instead, detainees are told that they may hire a
lawyer, but that one is not automatically assigned.  

The injustice of the events of September 11th has seemingly given
legislatures the perception that probable cause should be expanded and that immigration law can substitute for criminal procedure.

B. Redefining Probable Cause and Reasonableness Standards

Section 411 of the USA PATRIOT Act appears to redefine the elements of probable cause.  

As is evident in the description of the Act in Sections 411 and 412, any remote link to a terrorist organization serves as reasonable grounds for probable cause to justify detention.  

This means that a remote link to a terrorist organization, such as giving money to an organization that unknowingly associates with a terrorist group, constitutes probable cause.  

These attenuated links enlarge the definition of probable cause in relation to terrorist activities. While these measures may be justified by the nation’s desire for the safety of the entire population, they seem to be beyond the traditional scope of probable cause and beyond the legislators’ abilities to create law. Probable cause cannot be statutorily redefined.

171 See Carlsen, supra note 12.
172 Peres, supra note 13.
173 See supra note 114 and accompanying text.
175 Rep. Howard L. Berman (D-Cal.), commented that the “expansive definition of terrorist crimes was so broad that every act of violence not undertaken for monetary gain would fall within its ambit.” Capitol Hill Hearings, supra note 168, at 1527.
178 U.S. CONST. art. VI, cl. 2 (Supremacy Clause).
VI. A RATIONALE TO JUSTIFY DETENTIONS—
BALANCING HISTORICAL PRECEDENT, CIRCUMSTANCES, NATIONAL SECURITY, CIVIL LIBERTIES, AND SAFETY

The government has fielded many questions about the reasoning behind its actions. The ultimate rationale for the detentions of a group of people that once totaled approximately 1200\textsuperscript{179} seems to stem from evaluating historical uses of power to infringe upon civil liberties and the extreme measures that are required to assure safety in the wake of September 11th against the purview of Fourth Amendment law. Justification for the detentions also requires explanation of the secrecy of the investigation and the necessity to find that protecting the safety of the American population outweighs encroachments into civil liberties.

A. History of Encroachment on Civil Liberties During Times of War

Do cutbacks on civil liberties during times of war in our nation's history justify the limitations on civil liberties in the current "war" on terrorism?\textsuperscript{180} Approximately nineteen organizations, including the ACLU, the Electronic Privacy Information Center, the American Immigration Lawyers Association, and the First Amendment Foundation do not believe so. A suit based on the Freedom of Information Act\textsuperscript{181} has been filed against the Department of Justice in federal court in Washington, D.C. to follow up on the request made to the government to release the names and charges against all those held in connection with the September 11th investigation.\textsuperscript{182}

The Supreme Court has consistently upheld the President's extraordinary powers to protect national security, and the current "war" should not

\textsuperscript{179} See supra note 10 and accompanying text.

\textsuperscript{180} See generally Thomas & Isikoff, supra note 8, at 38 (discussing Presidents who have limited civil liberties during times of war).

\textsuperscript{181} Id.

\textsuperscript{182} See Marcia Coyle, A 'Less Polarized' Voice in the Civil Rights Debate, NAT'L L.J., Dec. 17, 2001, at A8; All Things Considered: Civil Liberties Groups Launching Efforts in Reaction to Bush Administration Actions Taken Since September 11th (NPR radio broadcast Jan. 3, 2002). Many individualized suits are likely to follow. See Ctr. for Nat'l Sec. Studies v. Dep't of Justice, No. 01 CV 02500 (D.D.C. filed Dec. 5, 2001); see also Rights Groups Sue DOJ, INS for Information on Those Detained or Arrested Following September 11, 79 INTERPRETER RELEASES 5 (2002).
be an exception.\textsuperscript{183} In the American Revolution, Washington established military tribunals to try enemy spies; many were sentenced to death.\textsuperscript{184} Abraham Lincoln, during the Civil War, established military courts to try those sympathizing with the Confederacy and suspended habeas corpus.\textsuperscript{185} During World War II, the U.S. government sent thousands of Japanese-Americans to internment camps after Pearl Harbor.\textsuperscript{186}

The expulsion of the entire Japanese-American population from the West Coast after the attack on Pearl Harbor into "relocation centers" has been condemned as one of the most tragic events in our nation's history.\textsuperscript{187} Two prominent cases stemming from this expulsion are \textit{Korematsu v. United States}\textsuperscript{188} and \textit{Hirabayashi v. United States}.\textsuperscript{189} This historic event is not thoroughly discussed in this Note because it is beyond the scope of the argument. Rather than focusing on racial profiling and the injustice to an ethnic population, this Note analyses the reasonableness of seizure instead of the criteria to determine who should be seized because of one's race. While the internment was an extraordinary use of governmental powers to facilitate national security, it is exemplary only of the reach of those powers rather than powers to be imitated.

\textsuperscript{183} See generally Thomas & Isikoff, supra note 8, at 38, 42-43. \textit{Contra} Nicholas von Hoffman, \textit{Defending Freedom By Suspending Liberty}, N.Y. OBSERVER, Jan. 7, 2002 (asserting that the bombing of the World Trade Center is not a valid reason to call for the same measures used during the Civil War and in the Japanese extraction).

\textsuperscript{184} Thomas & Isikoff, supra note 8, at 42.

\textsuperscript{185} U.S. CONST. art. 1, § 9, cl. 2 ("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."); Peter Grier, \textit{Fragile Freedoms}, CHRISTIAN SCI. MONITOR, Dec. 13, 2001, at 1 (Lincoln closed down the newspapers he considered "the founts of sedition.").

\textsuperscript{186} See Thomas & Isikoff, supra note 8, at 42-43.

\textsuperscript{187} \textit{JUSTICE DELAYED: THE RECORD OF THE JAPANESE INTERNMENT CASES} xi (Peter Irons ed., 1989) [hereinafter \textit{JUSTICE DELAYED}]. The number in relocation centers was estimated to be approximately 120,000 people, making these detentions substantially different than the ones in relation to the September 11th investigation. \textit{Id}.

\textsuperscript{188} \textit{Korematsu v. United States}, 323 U.S 214 (1944) (upholding the constitutionality of the evacuation of Japanese Americans justified by the need for national security).

\textsuperscript{189} \textit{Hirabayashi v. United States}, 320 U.S. 81 (1943) (holding that a curfew applicable to only Japanese Americans was constitutional); see \textit{JUSTICE DELAYED}, supra note 187 (reviewing the history and holdings of both of these landmark cases).
The question in the instant case is whether the present situation warrants the detention of hundreds of citizens and aliens, the establishment of military tribunals, and the expansion of surveillance measures through the exercise of extraordinary powers, not whether we are engaged in the prototypical war. The administration has continuously stated that the nation is "at war." The declaration of "war" came on September 11th. According to the "law of war," the attacks on September 11th were acts of war because they "were carried out against defenseless civilians by terrorists posing as non-combatants using concealed weapons." However, this "war" has not been officially declared by the United States. In fact, two House resolutions to declare that a state of war exists between the United States and "any entity determined by the President to have planned, carried out, or otherwise supported the attacks against the United States on September 11, 2001" or between the United States and "international terrorists and their sponsors" have been proposed. Perhaps the reason war was not declared is because there is not a clear definition of the parties against whom we are declaring war. Both bills were referred to the House Internal Relations Committee, and an "Authorization for Use of Military Force" was subsequently signed into law on September 18, 2001. Congress has not officially declared war since World War II, although administrations still refer to police actions as "wars."

Use of extraordinary power during police actions is consistent with precedent and is necessary for the well-being of the nation. Whether the United States is in a declared war does not reduce the severity of the events of September 11th, nor does it reduce the potential for further terrorist attacks. The nation should not be concerned with whether a technical war has been declared, but rather it should focus on the need to fight a "war" on both foreign and home soil with new legislation and investigation techniques.

192 See infra and supra notes 190-95 and accompanying text.
193 H.R.J. Res. 62, 107th Cong. (2001) (declaring a state of war between the United States and international terrorists and their sponsors); H.R.J. Res. 63, 107th Cong. (2001) (declaring a state of war on "any entity determined by the President to have planned, carried out, or otherwise supported the attacks against the United States on September 11, 2001").
In times of war, it is expected that the government's regulatory interest in community safety can outweigh individuals' liberties, if appropriate under the circumstances. The Salerno Court described times of war as periods when an interest in the well-being of society as a whole is prominent.\textsuperscript{196} The Court cited \textit{Moyer v. Peabody},\textsuperscript{197} in which due process claims were rejected when an individual was jailed without probable cause for over two and a half months in a time of insurrection.\textsuperscript{198} Justice Holmes delivered the opinion, stating that "[s]uch arrests are not necessarily for punishment, but are by way of precaution to prevent the exercise of hostile power. So long as such arrests are made in good faith and in the honest belief that they are needed in order to head the insurrection off . . ."\textsuperscript{199} Detainment seems justified when executed for the legitimate pursuit of the safety of the nation.

\textbf{B. \textit{Circumstances as Justification for Detainment}}

Terrorism creates a type of public fear that is not present with other national threats of security. The Supreme Court distinguished terrorism cases from cases involving lesser threats in \textit{Zadvydas v. Davis}.\textsuperscript{200} All of the justices acknowledged, in dictum, the genuine danger represented by terrorism or other exceptional circumstances "where special arguments might be made for forms of preventive detention and for heightened deference to the judgments of the political branches with respect to matters of national security."\textsuperscript{201} This statement seems to eerily foreshadow the

\textsuperscript{196} United States v. Salerno, 481 U.S. 739, 748-49 (1987).
\textsuperscript{197} Moyer v. Peabody, 212 U.S. 78, 84-85 (1909) (The governor of Colorado jailed Moyer, the president of the Western Federation of Miners, an organization that helped to instigate the governor's order for the National Guard to suppress the insurrection.).
\textsuperscript{198} See generally \textit{Salerno}, 481 U.S. at 748. The court also cited \textit{Ludecke v. Watkins}, 335 U.S. 160 (1948). That precedent, however, depends on a time of declared war, and thus, is not relevant to this Note.
\textsuperscript{199} \textit{Moyer}, 212 U.S. at 84-85.
\textsuperscript{200} \textit{See Zadvydas v. Davis}, 121 S. Ct. 2491 (2001) (holding the post-removal detention statute limits the detention period of an alien to a period reasonably necessary to facilitate the alien's removal from the United States and forbids indefinite detention); \textit{see also} Pincus, \textit{supra} note 95 (reporting on recent writing of Kenneth W. Starr, independent counsel during the Clinton administration).
\textsuperscript{201} \textit{Zadvydas}, 121 S. Ct. at 2502; \textit{see generally Supreme Court Finds Presumptive Six-Month Limit to Post-Removal-Period Detention}, 78 \textit{INTERPRETER RELEASES} 1125 (2001).
struggle our nation is now facing after the events of September 11th, while also indicating permission from the Supreme Court to utilize detention, surveillance, and military tribunals in the current "war" on terror, due to the suggested "heightened deference" to political branches for national security matters.202

Former Attorney General Richard L. Thornburgh has said, "[w]e put emphasis on due process and sometimes it strangles us."203 He has suggested further that the country might have to compare the current search for information "to brutal tactics in wartime used to gather intelligence overseas and even by U.S. troops from prisoners during military actions."204 The time we are living in calls for a heightened alertness to looming threats on our nation.205 The detention of hundreds of individuals based on the terror investigation may be justified, in light of the traditional reasonableness requirement of the Fourth Amendment, by the genuine danger to our nation posed by terrorism, as the Zadvydas Court suggested.206

The only existing exceptions to the Fourth Amendment requirement that searches and seizures be based on particularized suspicions involve "special needs" or administrative purposes.207 Without such exceptions, a search or seizure is unreasonable in the absence of individualized suspicion of wrongdoing.208 In special needs cases, "reasonableness is determined by 'a careful balancing of governmental and private interests,'... a test [that] should only be applied 'in those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable cause requirement impracticable....'"209 Special needs have been deemed to include random drug testing, drug testing relating to employment,210 and administrative searches, such as those of a "closely regulated"

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202 See Zadvydas, 121 S. Ct. at 2502.
203 Pincus, supra note 95.
204 Id.
205 See Wertheimer, supra note 8.
206 See supra notes 200-01 and accompanying text.
business\textsuperscript{211} and an administrative inspection to ensure compliance with a city housing code.\textsuperscript{212} These inspections must involve a relatively limited invasion of the citizen's privacy.

Although probable cause is required for arrest, perhaps the severity of the threat terrorism poses to the United States might also be defined as a special need after balancing governmental and private interests against each other. While this proposes a broad expansion of the "special needs" doctrine, it might be a proper category for the current detentions in order to prevent a potential public health crisis.

C. National Security—Secrecy, FISA, Exceptions to the Attorney-Client Privilege, and Military Tribunals

Attorney General John Ashcroft commented that the government's current actions are "consistent with the framework of the law that we operate under."\textsuperscript{213} However, civil rights advocates contend that the lack of information begs abuse because "[i]ncommunicado holding of persons in the U.S. is not a standard way of doing business."\textsuperscript{214} Ashcroft's strict orders for secrecy of the names of those detained, as well as closed hearings, were rationalized first by focusing on the protection of the detainees, and secondly by proffering that it would be irresponsible "to advertise to the other side that we have Al Qaeda membership in custody."\textsuperscript{215} While many are frustrated by the secrecy of the investigation and identification of the detainees, this is not the first time that our nation has withheld information to protect national security. When reviewing the satisfaction of the materiality requirement in the Bail Reform Act, the Seventh Circuit responded that "[r]equiring an articulation of the factual basis for materiality could jeopardize the secrecy of the grand jury's activities and precipitate responsive action by individuals who may be connected in some respect with the matter under investigation."\textsuperscript{216} Further, in \textit{Kiareldeen v.}

\textsuperscript{213} Peres, \textit{supra} note 13.
\textsuperscript{214} \textit{Id}. (opinion of Ronald Allen, a Northwestern University law professor).
\textsuperscript{215} Thomas & Isikoff, \textit{supra} note 8, at 42 (The Justice Department, however, has been reported to have privately acknowledged that the government does not have any evidence that the immigration detainees are members of al Qaeda.); \textit{see also} Shannon McCaffrey, \textit{Foreign Diplomats Complain of Secrecy}, CHI. TRIB., Jan. 1, 2002, at 10 (Diplomats have received little information about immigrants being detained from Pakistan, notably.).
\textsuperscript{216} United States v. Oliver, 683 F.2d 224, 231 (7th Cir. 1982); \textit{see also supra} notes 68-70 and accompanying text.
Ashcroft, a Palestinian man was held for nineteen months without bail on the basis of secret evidence. The Third Circuit Court of Appeals held that the government can pursue a prosecution based on 8 U.S.C. § 1229a(b)(4)(B), which says, "these rights shall not entitle the alien to examine such national security information as the government may proffer." The government has the right to withhold information protected by national security from the alien in a deportation proceeding, and it should have that same right with regard to the public in criminal cases where national security is an issue.

Many questions have also been raised concerning the expansion of the Foreign Intelligence Surveillance Act of 1978 ("FISA"), the rule from the Department of Justice that authorizes the monitoring of federal detainee attorney-client communications and the use of military tribunals and secret evidence. In short, FISA was amended to grant roving surveillance authority and increases the duration of FISA surveillance. The interim rule allows the Bureau of Prisons to monitor attorney-client mail and communications of detainees and inmates certified by the Attorney General as being in a category where reasonable suspicion exists to believe that the individual may use these communications to facilitate acts of violence or terrorism. Lastly, the controversial use of military tribunals to try suspected terrorists may or may not be used to try current detainees.

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221 The interim rule challenging the attorney-client privilege is outside the scope of this Note. For more information, see Controversial DOJ Rule Authorizes Monitoring of Federal Detainee Attorney-Client Communications, 78 INTERPRETER RELEASES 1741 (2001).
222 See e.g., Ex parte Quirin, 317 U.S. 1 (1942) (holding that tribunals are valid venues for non-citizens and citizens if they are suspected of being "unlawful combatants"); Douglas W. Kmiec, Opinion, Tribunals Don’t Coddle Terrorists In Court, L.A. TIMES, Jan. 6, 2002, at M3 (discussing proposed rules for military tribunals); When to Turn to Tribunals, WASH. POST, Jan. 5, 2002, at A20 (discussing proposal of H.R. 3468 to authorize the use of military tribunals for
Although these topics are outside the purview of this Note, they are all significant uses of power and are meaningful in a full evaluation of the encroachments on civil liberties made by the detentions in the wake of September 11th.

D. Civil Liberties v. Safety

The state of the current "war" on terrorism calls for the nation to accept secrecy and question the definition of reasonableness as it relates to seizures of a group that at one time was estimated to be 1200 people. As a nation, Americans must balance whether there is an exception for preventative detainment by questioning whether the nation will be better served by these encroachments rather than risking further attacks. The detention of these individuals is substantially more invasive than the "special needs" and administrative exceptions previously allowed; however, the magnitude of the potential public health threat is substantial enough to warrant an exception. These detentions act as a device to protect the population by detaining those thought to be involved in terrorist activities or individuals who might have knowledge relevant to the investigation. Although many detainees have been released, the expansion of the definition of reasonableness to justify the current detentions has restored a sense of safety and control to a nation stricken by terror.

It has been said that every democracy confronted with terrorism has engaged in some sort of administrative detention—Canada, Israel, and Britain are examples. There is much fear of the civil liberty encroachments embedded in the USA PATRIOT Act and other executive decisions being made in light of the "war" on terrorism. With specific regard to the detention of 600 to 1200 people, it is imperative that the administration continuously assure that both justification and a termination point exist for these detentions. Many believe that the balance is now weighing toward a breach of civil liberties and that the lack of justifications for the detention of over six hundred is not able to be apprised by the rule of law. Others, however, argue that this is not administrative detention; instead, many of crimes related to the terrorist attacks and also to limit jurisdiction to foreign nationals captured on foreign soil).


NBC News: Today, supra note 56.

Id.
those being held have been arrested under legitimate violations. The proposed justifications for those arrests include the Bail Reform Act's material witness provision, suspicious conduct, the new powers under the USA PATRIOT Act, and minor offenses unrelated to terrorism.

Further, the USA PATRIOT Act's expansion of probable cause in the terrorist investigation may even be supported by Supreme Court dicta. In Illinois v. Gates, the Court commented that "probable cause is a fluid concept—turning on the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules." The circumstances of the "war" on terror on both American and foreign soil justify the extension of this safeguard to allow such a thorough and widespread investigation.

Many have compared the actions of the United States law enforcement officers to those of military troops and officers fighting a battle on foreign soil. Attorneys working on the terror cases have been referred to as "field commanders in the war on terror" and "lawyer-warriors" who are asked to follow the paths of their predecessors who fought the "fascists and communists." The "war" on terror is distinguished from all previous battles because our nation offers protections to "enemies" or "informants" to whom this deference would not be given in a military battle. The need to redefine "reasonable" in the wake of September 11th urges a reevaluation based on the risks facing the country. Those being detained are being "reasonably" held in hopes of thwarting a continuing threat.

United States citizens seem to accept these intrusive laws, unconstitutional on their face, as long as there is a relatively smooth period of charge and release. In a Newsweek poll taken just weeks after September 11th, eighty-six percent responded that they did not believe that the current
administration has gone too far in restricting civil liberties in response to terrorism.\(^{232}\)

**CONCLUSION**

Although reasons for detainment raise constitutional questions, these detainments must be upheld and supported by our nation as an effort to defeat terrorism and prevent a major public health crisis, despite the perceived lack of constitutionality of the laws and acts under our current definitions of reasonableness. The boundaries of probable cause and reasonableness must not be rigidly set. Instead, they must be adapted to circumstances facing our nation. While civil libertarians question the validity of the detainments and question the need for such emphatic secrecy, the nation must stand behind our law enforcement agencies and trust that their actions will maintain the best interests of the nation.

The detainments resulting from the investigation into the events of September 11th should not be perceived by the public as unreasonable or unconstitutional seizures.\(^{233}\) The tragedy of that day has forced citizens of the United States to redefine our patriotism, to question the vulnerability of our nation’s borders, and to be willing to allow a slight encroachment into individual civil liberties so that America may be free from terror. The security of the United States has been penetrated by terrorists and the government must have power under the Constitution to take all measures to restore a sense of security to the population of the United States. Our current definition of reasonableness does not include the length and types of detentions resulting from the investigation into the attacks of September 11th; it is the current lawmakers’ and judiciary’s responsibility to redefine what is reasonable. Although these seizures are unconstitutional under traditional notions of reasonableness, such detainments are imperative in the wake of the vulnerable and shifting state of the nation.

\(^{232}\) Thomas & Isikoff, *supra* note 8, at 38. *See also* Richard L. Berke & Janet Elder, *Poll Finds Support for War and Fear on Economy*, N.Y. TIMES, Sept. 25, 2001, at A1 (On September 25, eight in ten Americans said they “will have to forfeit some of their personal freedoms to make the country safer.”).

\(^{233}\) U.S. CONST. amend. IV.