Bridging the Gap: Why the Stevens-Leahy Amendment to the Western Hemisphere Travel Initiative May Reveal a Renewed Focus on Civil Liberties in National Security Legislation

STUART GILGANNON†

I. INTRODUCTION

In recent years, the response of the United States government to the threat of terrorist attacks courted significant controversy, with scholars accusing each branch of the United States government of disregarding the civil liberties of U.S. citizens under the guise of strengthening the nation's security.[1] This trend, along with its alarming constitutional implications, appeared set to continue when, in 2004, Congress announced the creation of the Western Hemisphere Travel Initiative ("WHTI"), which required U.S. citizens to present a passport when traveling to or from other Western Hemisphere nations, whether by land, sea or air.[2]

Although the WHTI provided for the creation of a "registered traveler program" to facilitate expeditious border-crossings for frequent travelers,[3] it appeared increasingly unlikely that this program would be in place ahead of the statutory deadline for the WHTI's land border-crossing phase.[4] The imposition of these travel documentation requirements threatened to impose a considerable burden on U.S. citizens residing in communities

---

† Stuart Gilgannon received his Juris Doctor from Duquesne University School of Law.

1 *See, e.g.*, Alison A. Bradley, *Extremism in the Defense of Liberty: The Foreign Intelligence Surveillance Act and the Significance of the* USA PATRIOT Act, 77 TUL. L. REV. 465, 493 (2002) (asserting that, through its passage of the USA Patriot Act of 2001, Congress has "sacrificed many of the liberties we most value"); Erwin Chemerinsky, *Civil Liberties and the War on Terrorism*, 45 WASHBURN L.J. 1, 2–3 (2005) (alleging that "[a]mong the most troubling actions by the Bush Administration and the Justice Department since September 11 has been the claim of authority to detain individuals without complying with the Constitution and without any semblance of due process"); Tania Cruz, *Judicial Scrutiny of National Security: Executive Restrictions of Civil Liberties When Fears and Prejudices Are Aroused*, 2 SEATTLE J. SOC. JUST. 129, 130 (2003) (arguing that excessive judicial deference to government actions during times of national security fears "has led to numerous civil liberties disasters").

2 The provisions of the WHTI were enacted as § 7209 of the Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108–458, 118 Stat. 3638 (2004) [hereinafter IRTPA].

3 *Id.* § 7209(b)(1).

4 *See infra* Part III.D.

along the northern border with Canada, for whom brief trips across the border were a frequent and necessary occurrence.[5]

However, following the adoption of a bipartisan amendment, ("the Stevens-Leahy Amendment") sponsored by concerned lawmakers representing northern border states implementation of the WHTI's land border-crossing phase was delayed by 17 months, from January 1, 2008 to June 1, 2009.[6] This delay was surprising in light of the urgency with which the WHTI was created following the release of the National Commission on Terrorist Attacks Upon the United States' (the "9/11 Commission") final report,[7] and the lack of regard for affected U.S. citizens' civil liberties, as demonstrated by similar national security legislation in recent years.[8]

At first glance, the Stevens-Leahy Amendment's primary focus is ensuring that any alternative forms of travel documentation possess the necessary technology to ensure the security of the nation's borders. However, an analysis of the Amendment's legislative history and the circumstances surrounding its adoption reveals a strong emphasis on preserving the right to international travel, particularly for U.S. citizens residing in northern border communities. Accordingly, this article suggests that Congress' passage of the Stevens-Leahy Amendment reveals a renewed focus among lawmakers on ensuring that legislation enacted in the name of national security does not unduly curtail or infringe upon the civil liberties of affected U.S. citizens.

Section II sets the stage for later discussion of the Stevens-Leahy Amendment by examining two of the most controversial pieces of national security legislation passed by Congress in recent years, and the perceived effects of that legislation on many of our most basic constitutional freedoms. Section III chronicles the gradual implementation of the WHTI, from Congress' initial adoption of the 9/11 Commission's recommendations regarding travel documentation in 2004,[9] to the promulgation of the final rule governing air travel by the Department of Homeland Security ("DHS") on November 24, 2006.[10] Section IV presents a brief synopsis of the Stevens-Leahy Amendment's provisions. Section V concludes with a broader discussion of the circumstances that led to the

---

[5] For more detailed discussion on the strong dependence on border crossing for many U.S. citizens, *see infra* Part V.D.

[6] Department of Homeland Security Appropriations Act, 2007, Pub. L. No. 109–295, § 546, 120 Stat. 1355 (2006).

[7] FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES (2004), http://www.9-11commission.gov/report/911Report.pdf [hereinafter 9/11 COMMISSION FINAL REPORT].

[8] *See infra* Part II.

[9] *See infra* Part III.A.

[10] *See infra* Part III.C.

Amendment's adoption, and its effects on the right to international travel, a liberty interest afforded to all U.S. citizens under the Fifth Amendment's due process clause.

II. EROSION OF CIVIL LIBERTIES IN THE NAME OF NATIONAL SECURITY

The delicate balancing of civil liberties and national security has been the subject of considerable scholarly treatment throughout the last century, in particular around the time of World War II.[11] This article discusses this balance in the context of the "Global War on Terror," and concentrates on the legislation passed by Congress before and after the September 11, 2001 terrorist attacks.[12] Section II.A presents a discussion of The Antiterrorism and Effective Death Penalty Act of 1996, while Section II.B focuses on The USA Patriot Act of 2001. Exhaustive analyses of the full constitutional implications of each act are beyond the scope of this paper, but a brief discussion of some of the more controversial provisions contained within each act – as well as scholars' reactions to these provisions –provide helpful points of comparison for the discussion of the Stevens-Leahy Amendment.

A. The Antiterrorism and Effective Death Penalty Act of 1996

Much of the recent publicity regarding the perceived erosion of U.S. citizens' civil liberties centered on Congress and the Bush Administration's response to the terrorist attacks of September 11, 2001. However, according to several civil liberties advocates, this alarming trend in the balancing of liberty interests and national security was already fully underway during the Clinton Administration, several years prior to the attacks on the World Trade Center and the Pentagon in 2001.

President Clinton signed The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") into law on April 24, 1996.[13] Clinton described AEDPA as "an important step forward in the Federal Government's continuing efforts to combat terrorism."[14] While similar national security legislation was in the pipeline since the Regan

---

[11] *See, e.g.*, Dorothy Jeanne Allen, *War and Civil Liberties*, 14 U. KAN. CITY L. REV. 26 (1945–1946); Robert E. Cushman, *National Defense and the Restriction of Civil Liberties*, 9 U. KAN. CITY L. REV. 63 (1941); Osmond K. Fraenkel, *War, Civil Liberties and the Supreme Court 1941 to 1946*, 55 YALE L.J. 715 (1946); Arthur Garfield Hays, *Civil Liberties in War Time*, 2 BILL RTS. REV. 170 (1942); Edward H. Miller, *The Case of Civil Liberties v. National Security*, 47 DICK. L. REV. 117 (1943).

[12] President Bush coined the phrase "Global War on Terror" shortly after the terrorist attacks of September 11, 2001 and it is frequently used to describe the focus of U.S. military operations in the Middle East since those deadly attacks.

[13] Pub. L. No. 104-132, 110 Stat. 1214 (1996).

[14] President's Statement on Anti-Terrorism Bill Signing, Office of the Press Secretary (April 24, 1996), 1996 WL 203049.

Administration in the 1980s,[15] some observers have agreed that the terrorist attacks on the World Trade Center in 1993 and the Oklahoma City bombing in 1995 served as catalysts for AEDPA's passage.[16]

Few would argue that these tragic events of the mid-1990s exposed the need for a thorough reexamination of the nation's intelligence-gathering and law enforcement capabilities. However, AEDPA's perceived effects on civil liberties attracted considerable criticism from the academic community. David Cole, professor of law at Georgetown, and James Dempsey, Policy Director at the Center for Democracy and Technology are among AEDPA's most vociferous critics. In their book, *Terrorism and the Constitution: Sacrificing Civil Liberties in the Name of National Security*, Cole and Dempsey assert that AEDPA's provisions included "some of the worst assaults on civil liberties in decades."[17] In particular, they make the following observations on the legislative process that took place prior to the act's passage in 1996:

> The voices of likely victims of the statute's ideologically-based approach were never heard from, while those who opposed the legislation on the grounds that it was unnecessary or dangerously unconstitutional were marginalized. Instead, two incidents – the 1993 bombing of the World Trade Center and Timothy McVeigh's attack on the federal building in Oklahoma City – overwhelmed all rational discussion, and the law was enacted as an effort to do something on response to these two crimes.[18]

Cole and Dempsey also point to the House Judiciary Committee's first hearing on the proposed legislation in April of 1995 as indicative of the one-sided nature of AEDPA's legislative history.[19] Of the eight witnesses that testified before the Committee, "[o]nly one witness, Greg Nojeim of the American Civil Liberties Union, gave a consistently critical, constitutionally based analysis of the legislation."[20]

Several of AEDPA's provisions have been identified as particularly troubling in terms of their effect on the liberty rights of both U.S. citizens

---

[15] DAVID COLE & JAMES X. DEMPSEY, TERRORISM AND THE CONSTITUTION: SACRIFICING CIVIL LIBERTIES IN THE NAME OF NATIONAL SECURITY 126–27 (3d. ed. 2006) [hereinafter COLE & DEMPSEY].

[16] *See, e.g.*, COLE & DEMPSEY, *supra* note 15, at 126; Jennifer A. Beall, Note, *Are We Only Burning Witches – The Antiterrorism and Effective Death Penalty Act of 1996's Answer to Terrorism*, 73 IND. L.J. 693, 694–95 (1998) (setting forth legislative history of AEDPA).

[17] COLE & DEMPSEY, *supra* note 15, at 135.

[18] *Id.* at 126.

[19] *See id.* at 128.

[20] *Id.*

and aliens. One such provision makes it unlawful for U.S. citizens to provide "material support or resources" to the otherwise lawful activities—including those of a purely political or humanitarian nature—of a foreign group designated as a terrorist organization by the Secretary of State.[21] These criminal sanctions provide for what commentators describe as "guilt by association" that is likely to have a chilling effect on U.S. citizens' exercise of their associational and expressive freedoms.[22] As Cole and Dempsey point out, "[p]ersons legitimately concerned about conditions in other countries, and seeking to support the political and humanitarian activities of ethnic or nationalist groups, will be hesitant to exercise their First Amendment rights to support them if they fear criminal prosecution."[23] Cole and Dempsey also liken the broad designation authority delegated to the Secretary of State as "a blank check to blacklist disfavored foreign groups," [24] and warn that granting such wide discretion "invites selective enforcement."[25]

AEDPA also provides for the denial of admission to the United States for foreign nationals who are members or representatives of any group that has been designated as a terrorist group by the Secretary of State, even if that foreign national's participation in the group was limited to lawful political or humanitarian activities.[26] Cole and Dempsey offer the following analysis in support of their argument that such a restrictive provision encompassing the theory of "guilt by association" serves to hinder the exercise of First Amendment freedoms by US citizens:

> The First Amendment grants Americans the right to receive information and ideas, especially ideas the government finds objectionable. This right includes the receipt of information from abroad. One highly effective way of transmitting information remains the personal encounter, through speeches, conferences and meetings. Since the immigration law sets the standard for both excluding foreign nationals from permanent admission and making them ineligible for visas for temporary visits, rendering a category of persons "excludable" on

---

[21] 18 U.S.C. § 2339B(a)(1) (2006). The statute does however provide an exemption for support provided in the form of medicine and religious materials. *Id.* § 2339A(b)(1).

[22] COLE & DEMPSEY, *supra* note 15, at 137; *see* Robert M. Chesney, *Civil Liberties and the Terrorism Prevention Paradigm: The Guilt by Association Critique*, 101 MICH. L. REV. 1408, 1434–38 (2003).

[23] COLE & DEMPSEY, *supra* note 15, at 141.

[24] *Id.* at 138.

[25] *Id.* at 139.

[26] 8 U.S.C. § 1182(a)(3)(B)(i)(IV) (2006).

> ideological grounds means that they cannot come here even temporarily to speak or engage in other activities implicating the First Amendment rights of U.S. citizens.[27]

Other notable provisions of AEDPA that raised significant constitutional concerns include sections that place restrictions on the ability of prisoners to challenge their convictions through the "great writ" of habeas corpus,[28] and those that abolish the judicial review of deportation orders for criminal aliens.[29]

B. The U.S.A. Patriot Act of 2001

The most controversial piece of national security legislation Congress passed in recent years was the U.S.A. PATRIOT ACT of 2001 ("Patriot Act").[30] The Patriot Act was enacted only six weeks after the terrorist attacks of September 11, 2001, with legislators acting under what Cole and Dempsey describe as "extraordinary pressure from Attorney General John Ashcroft, who essentially threatened Congress that the blood of the victims of future terrorist attacks would be on its hands if it did not swiftly adopt the Administration's proposals."[31]

The Patriot Act is extensive and comprehensive. Its provisions amount to well over 300 pages that amended at least fifteen sections of the United States Code. While many of the Patriot Act's provisions appear relatively harmless from a constitutional standpoint, several sections in particular

---

[27] COLE & DEMPSEY, *supra* note 15, at 142.

[28] *See, e.g.*, David Blumberg, *Habeas Leaps from the Pan and into the Fire:* Jacobs v. Scott *and* the Antiterrorism and Effective Death Penalty Act of 1996, 61 ALB. L. REV. 557 (1998); Randal S. Jeffrey, *Successive Habeas Corpus Petitions and Section 2255 Motions after* the Antiterrorism and Effective Death Penalty Act of 1996: *Emerging Procedural and Substantive Issues*, 84 MARQ. L. REV. 43 (2000); Andrea A. Kochan, The Antiterrorism and Effective Death Penalty Act of 1996: *Habeas Corpus Reform*, 52 WASH. U. J. URB & CONTEMP. L. 399 (1997); Thomas C. O'Bryant, *The Great Unobtainable Writ: Indigent Pro Se Litigation after* the Antiterrorism and Effective Death Penalty Act of 1996, 41 HARV. C.R.-C.L. L. REV. 299 (2006); Benjamin Robert Ogletree, Antiterrorism and Effective Death Penalty Act of 1996*, Chapter 154: The Key to the Courthouse Door or Slaughterhouse Justice*, 47 CATH. U. L. REV. 603 (1998); Deborah L. Stahlkopf, *Dark Day for Habeas Corpus: Successive Petitions under* the Antiterrorism and Effective Death Penalty Act of 1996, 40 ARIZ. L. REV. 1115 (1998).

[29] *See, e.g.*, Sara Candioto, The Antiterrorism and Effective Death penalty Act of 1996: *Implications Arising from the Abolition of Judicial Review of Deportation Orders*, 23 J. LEGIS. 159 (1997); Lawrence E. Harkenrider, *Due Process or Summary Justice: The Alien Terrorist Removal Provisions Under* the Antiterrorism and Effective Death Penalty Act of 1996, 4 TUL. J. INT'L & COMP. L. 143 (1996); Alison Holland, *Across the Border and over the Line: Congress' Attack on Criminal Aliens and the Judiciary Under* the Antiterrorism and Effective Death Penalty Act of 1996, 27 AM. J. CRIM. L. 385 (2000).

[30] USA PATRIOT Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001). The name USA PATRIOT is an acronym for its full title of "Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism."

[31] COLE & DEMPSEY, *supra* note 15, at 195.

have come under attack for their perceived effects on the civil liberties of both U.S. citizens and noncitizens. This article examines three of the Patriot Act's more controversial provisions, and some of the most commonly-asserted criticisms of these measures.

Among the most widely-criticized provisions is § 213, the so-called "sneak and peek" provision.[32] This section allows federal agents to execute a search warrant for an individual's home or apartment, without providing immediate notice to the targeted individual that such a search took place. It requires only that (1) immediate notice "may have an adverse result;" or (2) "the warrant provides for the giving of such notice within a reasonable period of its execution."[33]

As Cole and Dempsey point out, such delayed notice was previously allowed only "in extraordinary circumstances, such as where someone's life would be endangered or evidence would likely be destroyed if simultaneous notice of the search were given."[34] Furthermore, § 213 represents a significant departure from the "knock and announce rule."[35] This raised the following concerns over the ability of citizens to ensure that search warrants issued under § 213 are executed in compliance with the Fourth Amendment's protections against unreasonable searches and seizures:

> The purpose of this long-standing requirement [of providing immediate notice] has been to allow owners to ensure that the warrant is being executed at the proper address, to monitor the scope of the search to ensure that it does not extend beyond the terms of the warrant, and, in the case of a prolonged search, to seek judicial intervention to narrow the scope of the search. Under a "sneak and peek" warrant, FBI agents can secretly enter an apartment or home while the owner is asleep or away, take, alter, or copy things, and not

---

[32] USA PATRIOT Act of 2001 § 213.

[33] 18 U.S.C.A. § 3103a (b) (2006) (as amended by Section 213 of the PATRIOT Act of 2001).

[34] COLE & DEMPSEY, *supra* note 15, at 209.

[35] *Id.* The knock and announce rule was originally a judge-made doctrine designed to protect against unreasonable searches and seizures in violation of the Fourth Amendment. This rule is now codified in the United States Code, and provides that a police officer executing a search warrant:

> may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant.

See 18 U.S.C. § 3109. For detailed discussion on the rule's historical origins and recent treatment by the U.S. Supreme Court, *see* G. Robert Blakey, *The Rule of Announcement and Unlawful Entry:* Miller v. United States *and* Ker v. California, 112 U. PA. L. REV. 499 (1964); E. Martin Estrada, *A Toothless Tiger in the Constitutional Jungle: The "Knock and Announce Rule" and the Sacred Castle Door*, 16 U. FLA. J.L. & PUB. POL'Y 77 (2005).

> tell the owner that they were there for a "reasonable period thereafter."[36]

Another commentator questioned whether such powers are entirely necessary for the prevention of future terrorist attacks, noting that "it has never been demonstrated that following the usual procedures and rules required under the Fourth Amendment for law enforcement would not be sufficient."[37]

Another of the Patriot Act's most controversial provisions – § 215 – provides for the issuance of an ex parte judicial order requiring the release of books, records, documents and other tangible items upon a certification from a senior FBI official that such items are being sought for the purpose of foreign intelligence gathering or to protect against international terrorism.[38] In addition, this section imposes a gag order on those who are compelled to release the items in question, by preventing the custodian from disclosing that such a request has even taken place.[39] These provisions of the Patriot Act represent a significant change in the procedures federal law enforcement agents must follow in accessing otherwise confidential information on U.S. citizens. As Cole and Dempsey observed:

> Previously, the FBI could get the credit card records of anyone suspected or being an international terrorist or other foreign agent. Under the Patriot Act, the FBI can get the entire database of the credit card company. Under prior law, the FBI could get library borrowing records only by complying with state law and always had to ask for the records of a specific patron or concerning a specific book. Under the Patriot Act, the FBI can get an order for the records on everybody who ever used the library, or who used it on a certain day, or who checked out certain kinds of books. It can do the same at any bank, telephone company, hotel or motel, hospital, or university . . . .[40]

Scholars identified several alleged constitutional flaws contained within the provisions of § 215. First, this section requires no showing of individualized suspicion or probable cause that the person targeted has

---

[36] *Id.*

[37] Chemerinsky, *supra* note 1, at 18.

[38] 50 U.S.C.A. §§ 1861(a)(1), 1861(b)(2)(A), 1861(c)(1) (2006) (as amended by Section 215 of the PATRIOT Act of 2001).

[39] *Id.* § 1861(d)(1).

[40] COLE & DEMPSEY, *supra* note 15, at 215.

committed any wrongdoing related to terrorist activities, as would normally be required for the issuance of a search warrant pursuant to the Fourth Amendment. It is sufficient that the information sought falls within the broad definition of "foreign intelligence gathering" or is part of an investigation "to protect international terrorism."[41] Second, the gag order placed on the custodians of information sought pursuant to § 215 ensures that, even after the information has been reviewed, no notice is provided to the target that such a search was conducted.[42] It is asserted that this lack of notice violates the protections traditionally afforded by the Fourth Amendment in criminal investigations.[43] Third, critics raise First Amendment concerns over the "gathering of information about an individual's reading habits, Internet activities, or religious practices," due to the chilling effect this may have on the free exercise of such freedoms.[44] The most high-profile examples of such opposition centered on the reluctance of librarians to release information regarding the reading habits of customers.[45]

Finally, § 412 of the Patriot Act also garnered considerable criticism from constitutional scholars. This section provides for the detention of aliens for up to seven days without charges being filed, upon a certification that the Attorney General has "reasonable grounds to believe" that the alien concerned is engaged in terrorist activities or other activities that threaten the national security.[46] The only remedy available to an alien detained under this section is through filing a habeas petition in federal district court.[47]

Scholars point to several ways in which § 412 threatens the civil liberties of those detained pursuant to the Attorney General's certification. First, the standard of reasonable suspicion required to detain noncitizens

---

[41] Susan N. Herman, USA PATRIOT Act *and the Submajoritarian Fourth Amendment*, 41 HARV. C.R.-C.L. L. REV. 67, 77 (2006); Bob Barr, USA PATRIOT Act *and Progeny Threaten the Very Foundation of Freedom*, 2 GEO. J.L. & PUB. POL'Y 385, 390–91 (2004); Nancy Chang, The USA PATRIOT Act: *What's So Patriotic about Trampling on the Bill of Rights*, 58 GUILD PRAC. 142, 147 (2001) [hereinafter *Chang*].

[42] *See* 50 U.S.C.A. § 1861(d) (2006) (as amended by Section 215 of the PATRIOT Act of 2001) (requiring that "[n]o person shall disclose to any other person . . . that the Federal Bureau of Investigation has sought or obtained tangible things under this section").

[43] Herman, *supra* note 41, at 77.

[44] *Id.* at 77–78.

[45] *See, e.g.*, Anne Klinefelter, *Role of Librarians in Challenges* to the USA PATRIOT Act, 5 N.C. J.L. & TECH. 219 (2004); Kathryn Martin, The USA PATRIOT Act's *Application to Library Patron Records*, 29 J. LEGIS. 283 (2003); Susan Nevelow Mart, *Protecting the Lady from Toledo: Post-*USA PATRIOT Act *Electronic Surveillance at the Library*, 96 LAW LIBR. J. 449 (2004); Scott White, USA PATRIOT Act *and Libraries*, 3 JIJIS 99 (2003).

[46] USA PATRIOT ACT of 2001, Pub. L. No. 107-56, §412, 115 Stat. 272 (2001).

[47] *Id.* As one commentator points out, the fact that a habeas petition is civil in nature ensures that the government is under no obligation to provide free counsel, as is provided to criminal defendants under the Sixth Amendment. *See* Chang, *supra* note 41, at 152.

falls considerably short of the Fourth Amendment's long-established probable cause requirement.[48] Second, the Patriot Act's broad definition of "domestic terrorism" set forth in § 802 ensures that conduct posing little or no danger to national security can be the basis of detention by the Attorney General under § 412.[49] In support of such an argument, Cole and Dempsey offer the following illustration:

> [T]he legislation defines "terrorist activity" so expansively that it literally includes virtually every immigrant who is suspected of being involved in a barroom brawl or domestic dispute, as well as aliens who have never committed an act of violence and whose only "crime" is to have provided humanitarian aid to an organization disfavored by the government.[50]

Section 412 has also been criticized for failing to provide for a hearing at which the government must bear the burden of demonstrating that such preventive detention is justified.[51] Finally, critics contend that allowing the Attorney General to detain aliens for up to seven days without filing any charges for criminal or immigration violations contrasts sharply with the Supreme Court's jurisprudence within the criminal setting, which requires that charges be filed within forty-eight hours except in the most extraordinary circumstances.[52]

As the preceding discussion reveals, both AEDPA and the Patriot Act illustrate what many observers view as an alarming disregard for civil liberties on the part of Congress when enacting national security legislation over the past decade or so. The circumstances surrounding the passage of the Patriot Act in particular further suggest that in times of heightened

---

[48] *See, e.g.*, COLE & DEMPSEY, *supra* note 15, at 202 (contending that "[t]he evidentiary threshold for detention is too low" under the Fourth Amendment); Chang, *supra* note 41, at 151 (noting that "[t]his low level of suspicion falls far short of a finding of probable cause."); Chemerinsky, *supra* note 1, at 19 (arguing that detention based on reasonable suspicion alone "has no precedent under the Constitution."). The existing threshold under the warrants clause of the Fourth Amendment requires a determination by a neutral magistrate within forty-eight hours of arrest that there are reasonable grounds to believe a crime has been committed. *See* County of Riverside v. McLaughlin, 500 U.S. 44, 56 (1991). A narrow exception exists in the case of a "bona fide emergency or other extraordinary circumstance." *Id.* at 57.

[49] "Domestic terrorism" is defined to include "activities that . . . involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State" and "appear to be intended . . . to intimidate or coerce a civilian population." *See* 18 U.S.C.A. § 2331 (2006) (as amended by Section 802 of the PATRIOT Act of 2001).

[50] COLE & DEMPSEY, *supra* note 15, at 201.

[51] *Id.* at 203 (contending that "it is critical to the constitutionality of any detention provision that the government bear the burden of justifying any preventive detention promptly in a scrupulously fair proceeding").

[52] *Id.*

fears due to the threat of terrorist attacks, lawmakers have largely acquiesced to the wishes of executive branch officials by conferring unprecedented powers of surveillance and detention that present a significant risk of abuse by executive officers at the expense of individual civil liberties.

III. THE WESTERN HEMISPHERE TRAVEL INITIATIVE

A. Congressional Mandate

It is not surprising the origins of the WHTI can be traced to the aftermath of the terrorist attacks of September 11, 2001. In response to various recommendations made by the 9/11 Commission in its final report,[53] Congress passed The Intelligence Reform and Terrorism Prevention Act of 2004 ("IRTPA").[54] In doing so, lawmakers announced the following simplified legislative findings:

> (1) Existing procedures allow many individuals to enter the United States by showing minimal identification or without showing any identification.
> (2) The planning for the terrorist attacks of September 11, 2001, demonstrates that terrorists study and exploit United States vulnerabilities.
> (3) Additional safeguards are needed to ensure that terrorists cannot enter the United States.[55]

IRTPA mandated the expeditious creation and implementation of a plan by the Secretary of Homeland Security, in consultation with the Secretary of State, to require "a passport or other document, or combination of documents, deemed by the Secretary of Homeland Security to be sufficient to denote identity and citizenship, *for all travel into the United States by United States citizens* . . . ."[56] Such language, standing alone, did not represent a significant departure from the existing statutory scheme under § 215(b) of the Immigration and Nationality Act ("INA").[57] However, IRTPA further served to remove the Secretary of State's powers to grant discretionary waivers of such passport requirements for U.S.

---

[53] *See* 9/11 COMMISSION FINAL REPORT, *supra* note 7.

[54] IRTPA, *supra* note 2.

[55] *Id.* § 7209(a) (emphasis added).

[56] *Id.* § 7209(b)(1) (emphasis added).

[57] This section provides that "[e]xcept as otherwise provided by the President . . . it shall be unlawful for any citizen of the United States to depart from or enter, or attempt to depart from or enter, the United States unless he bears a valid passport." INA § 215(b), 8 U.S.C.A. § 1185(b) (West, Westlaw through P.L. 110-80 (2007)).

citizens traveling within the Western Hemisphere, as well as nonimmigrant aliens from other Western Hemisphere countries seeking temporary admission to the United States.[58]

The initial deadline for full implementation of the WHTI was January 1, 2008.[59] Significantly, the initial legislation also called for the facilitation of expeditious travel for frequent travelers, including those residing in border communities, by making "readily available a registered traveler program."[60] Such language suggests lawmakers were keenly aware at drafting that the new identification requirements would impose an increased burden on the affected class of citizens. However, the statutory wording failed to clarify whether the creation of such a program for frequent travelers was a prerequisite for the implementation of the WHTI's passport requirements for U.S. citizens. Because WHTI's initial phase for air travelers was implemented before such alternative forms of identification became available, it is possible, the availability of alternate identification for expeditious border crossing, while preferable, was not considered an absolute necessity for the WHTI's full implementation under IRTPA.

B. The Rulemaking Process

It did not take long for DHS to begin work on the creation of a plan that would attempt to address the concerns of Congress and the 9/11 Commission regarding travel documentation requirements for U.S. citizen travelers. On April 5, 2005 – just five months after President Bush signed IRTPA into law – DHS and the Department of State ("DOS") made an initial announcement regarding their intentions for WHTI's creation.[61] Although the departments disclosed that the plan would be implemented in several phases, no specific timeline was given.[62] When making this announcement, officials from both departments reiterated the key policy goal underpinning the creation of the WHTI: strengthening border security

---

[58] IRTPA §7209(c) (limiting the exercise of such discretion to cases of "unforeseen emergency" or those involving "humanitarian or national interest reasons"). Under regulations previously promulgated by the Secretary of State in 1966, INA § 215(b)'s general passport requirements were not applied to U.S. citizens traveling to and from destinations within the Western Hemisphere, with the exception of Cuba. *See* Foreign Relations, 31 Fed. Reg. 13,537, 13,546 (Oct. 20, 1966) (to be codified at 22 C.F.R. pt. 53.2). Upon inspection at a U.S. port-of-entry, such travelers were required only to present documentation sufficient to satisfy officials of their U.S. citizenship. *See* 8 C.F.R. § 235.1(b), *amended by* Documents Required for Travelers Departing From or Arriving in the United States at Air Ports-of-Entry From Within the Western Hemisphere, Final Rule, 71 Fed. Reg. 68,412 (Nov. 24, 2006).

[59] IRTPA § 7209(b)(1).

[60] *Id.*

[61] *See* U.S. DEP'T OF STATE, NEW PASSPORT INITIATIVE ANNOUNCED TO BETTER SECURE AMERICA'S BORDERS (2005), http://www.state.gov/r/pa/prs/ps/2005/44228.htm. (last visited Nov. 5, 2007).

[62] *Id.*

while facilitating expeditious travel into the United States by citizens and foreign visitors.[63]

Based upon the language provided in the relevant portion of IRTPA, DHS and DOS followed the informal rulemaking procedures set forth in the Administrative Procedures Act ("APA"), known as "notice and comment rulemaking."[64] An Advanced Notice of Proposed Rulemaking ("ANPRM") for the WHTI was formally published in the Federal Register on September 1, 2005.[65] This initial ANPRM provided a brief summary of the provisions contained within IRTPA relating to travel documentation requirements, and how these differ from the previous statutory scheme regarding such requirements.[66] More importantly however, this ANPRM also served to formally open the channels of communication between the agencies involved and the general public, as required by § 553 of the APA.[67] Interested parties were invited "to participate generally in this rulemaking process by submitting written data, views, or arguments on all aspects of this [ANPRM],"[68] with assurances that "[c]omments received by DHS and DOS on the ANPRM will be addressed in the future rulemaking actions that promulgate any regulations necessary to implement the requirements of IRTPA."[69]

The ANPRM also provided additional insight into the types of issues that DHS and DOS anticipated would be the most problematic during the rulemaking process. Department officials requested in the ANPRM that comments submitted by the public focus primarily on the economic impact

---

[63] In this initial press release, Randy Beardsworth, Homeland Security's Acting Under Secretary for Border and Transportation Security, proclaimed "[o]ur goal is to strengthen border security and expedite entry into the United States for U.S. citizens and legitimate foreign visitors." *Id.* Maura Harty, Assistant Secretary of State for Consular Affairs, is similarly quoted as stating "[t]he overarching need is to implement this legal requirement in a way that strengthens security while facilitating the movement of persons and goods." *Id.*

[64] The Administrative Procedure Act (APA) provides for both formal and informal rulemaking processes. Informal rulemaking procedures are provided in § 553. Administrative Procedure Act § 3, 5 U.S.C. § 553 (2006). They require the relevant agency to publish notice of a proposed rule, and provide the public with an opportunity to comment by way of written statements; only after consideration of such statements can the agency issue a final rule. The formal rulemaking procedures of APA §§ 556 and 557 are triggered when Congress provides that a rule "be made on the record after opportunity for an agency hearing." *Id.* §§ 556–57. Such procedures include an oral hearing at which any factual findings made by the relevant agency in support of a proposed rule must be supported by "substantial evidence." *See generally* ALFRED C. AMAN, JR. & WILLIAM T. MAYTON, ADMINISTRATIVE LAW AND PROCESS § 4.02 (2d. ed. 2006). In addition to the absence of such "magic words," the fact that IRPTA called for officials to "develop and deliver a plan as expeditiously as possible" further suggests that lawmakers intended the less time-consuming informal rulemaking measures of the APA be followed during implementation of WHTI. *See* IRTPA, *supra* note 2, and accompanying text.

[65] *See* Documents Required for Travel Within the Western Hemisphere, 70 Fed. Reg. 52,037 (Sept. 1, 2005).

[66] *Id.* at 52,037–39.

[67] 5 U.S.C. § 553.

[68] *Id.* at 52,039.

[69] *Id.*

of any rules promulgated and suggestions for alternative types of documentation that would be sufficient to demonstrate U.S. citizenship.[70]

DHS and DOS soon followed up with a more expansive Notice of Proposed Rulemaking ("NPRM") that was published in the Federal Register on August 11, 2006.[71] This NPRM provided the clearest indications to date of how DHS and DOS planned to implement the new documentation requirements imposed by IRTPA. It was proposed that "beginning January 8, 2007, United States citizens and nonimmigrant aliens from Canada, Bermuda and Mexico entering the United States at air-ports-of-entry and most sea ports-of-entry, with certain limited exceptions, will generally be required to present a valid passport."[72] The NPRM stressed, however, that this proposal did not in any way effect travel documentation requirements for U.S. citizens traveling into the United States by land, or by sea on ferries and pleasure vessels, and that such requirements would be addressed at a later date in a future rulemaking.[73] The decision of DHS and DOS to "phase-in" the implementation of the WHTI according to the mode of entry into the United States was explained as follows:

> [T]his phased approach is essential because a staggered implementation at air and sea ports-of-entry one year before the statutory deadline [of January 1, 2008] will enhance security requirements using existing infrastructure

---

[70] *Id.*

> Comments that will provide the most assistance to DHS in this rulemaking include, but are not limited to:
> a. The types of documents denoting identity and citizenship that should be acceptable as alternatives to a passport under section 2709 of IRTPA;
> b. The economic impact (both long-term and short-term, quantifiable and qualitative) of the implementation of section 7209 of IRTPA, including potential impacts on State, local, and tribal governments of the United States; potential impacts on cross-border trade along United States-Canada and United States-Mexico borders; potential impacts on travel, travelers and the travel industry; and potential impacts on small businesses;
> c. The monetary and other costs anticipated to be incurred by United States citizens and others as a result of the new document requirements such as the costs in time and money in that an individual may incur to obtain a passport or other document(s) determined to be sufficient. These costs may or may not be quantifiable and may include actual monetary outlays, traditional costs incurred to obtain alternative documents, and the costs that will be incurred in connection with delays at the border;
> d. The benefits of this rulemaking;
> e. Any alternative methods of complying with the legislation; and
> f. The proposed stages for implementation of the requirements of section 7209 of IRTPA.

Id.

[71] *See* Documents Required for Travelers Arriving in the United States at Air and Sea Ports-of-Entry From Within the Western Hemisphere, 71 Fed. Reg. 46,155 (Aug. 11, 2006) [hereinafter *Notice of Proposed Rulemaking*].

[72] *Id.*

[73] *Id.*

> while allowing the Departments time to acquire and develop resources to meet the increased demand for the largest sector, the land border crossings.[74]

The NPRM also included another significant component: the proposed designation of two types of documents, which, in addition to a valid passport, would be sufficient to ensure citizens entry into the United States.[75] The first proposed document was the Merchant Mariner Document ("MMD"), a card issued to U.S. citizen Merchant Mariners following an application process that includes an FBI background check, a National Driver Register check, and the submission to a drug test.[76] Under the existing regulatory scheme, an MMD was sufficient to ensure entry to the United States for citizen crewmembers in lieu of a passport.[77]

The second type of document that DHS and DOS proposed to designate under the WHTI was the NEXUS Air Program Membership Card ("NEXUS Card").[78] The NEXUS Air Program was jointly implemented by the U.S. Customs and Border Protection ("CBP") and Canada Border Services agencies, following the Shared Border Accord and Smart Border Declaration between the United States' and Canadian governments.[79] Enrollment in the program is limited to pre-screened citizens and permanent residents of each country.[80] In addition to providing proof of such status, applicants must undergo "[a]n extensive background check against law enforcement databases and terrorist indices, as well as a personal interview with a CBP officer."[81]

By proposing the designation of these documents under the WHTI, DHS and DOS demonstrated a clear willingness to embrace the discretion afforded to them under IRTPA, and to look beyond the passport as a means of entry to the United States for citizens. However, the lengthy and relatively burdensome process involved in obtaining either of these types of documentation would be unlikely to appease those seeking a more flexible and less costly alternative to purchasing a passport. In addition, the proposed documents would only serve to ease entry for two very small classes of the affected citizenry.

---

[74] *Id.* at 46,160.
[75] *Id.* at 46,161.
[76] *Id.*
[77] *See* 22 C.F.R. § 53.2(d) (2006).
[78] *See Notice of Proposed Rulemaking*, *supra* note 71, at 46,162.
[79] *Id.*
[80] *Id.*
[81] *Id.*

C. Passage of Final Rule

The WHTI's rulemaking process culminated with the issuance of the Final Rule on November 24, 2006.[82] The Final Rule announced that "beginning January 23, 2007, all United States citizens and nonimmigrant aliens from Canada, Bermuda, and Mexico departing from or entering the United States from within the Western Hemisphere at air ports-of-entry will be required to present a valid passport."[83] This Final Rule codified the first phase of the WHTI's implementation, but differed in two key respects from the proposals contained within the NPRM. First, the Rule's January 23, 2007 effective date reflected a minor delay from the originally-proposed effective date, January 8, 2007. Second, the Rule's provisions were to be applied only to travelers arriving in the United States by air, with the Stevens-Leahy Amendment having been passed the previous month.[84]

As proposed in the NPRM, DHS and DOS officials designated both MMDs and NEXUS Cards in the Final Rule as additional forms of identification that would be sufficient to denote identity and citizenship for entry at U.S. airports in lieu of a valid passport.[85] The Final Rule also provided one more exemption from the passport requirement, for "United States citizens who are members of the United States Armed Forces traveling on active duty."[86]

D. Announcement of PASS Card Proposal

Amid much fanfare, Secretary of State Condoleezza Rice and Secretary of Homeland Security Michael Chertoff announced their joint vision to "Secure Borders and Open Doors in the Information Age" on January 17, 2006.[87] This initiative included plans for the creation of "an inexpensive, secure, biometric passport card as an alternative to a traditional passport book for use by U.S. citizens in border communities who frequently cross our land borders."[88] Secretary Chertoff declared that the format of this new "PASS Card" would be "essentially like the kind of drivers [sic] license or other simple card identification that almost all of us

---

[82] Documents Required for Travelers Departing From or Arriving in the United States at Air Ports-of-Entry From Within the Western Hemisphere, Final Rule, 71 Fed. Reg. 68,412 (Nov. 24, 2006) (to be codified at 8 C.F.R. pts. 212 and 235, and 22 C.F.R. pts. 41 and 53) [hereinafter *Final Rule*].

[83] *Id.*

[84] *See infra* Part IV.

[85] *Final Rule*, *supra* note 82, at 68,414.

[86] *Id.*

[87] *See* U.S. DEP'T OF STATE, RICE-CHERTOFF JOINT VISION: SECURE BORDERS AND OPEN DOORS IN THE INFORMATION AGE, Jan. 17, 2006, *available at* http://www.state.gov/r/pa/prs/ps/2006/59242.htm.

[88] *Id.*

carry in our wallets day in and day out."[89] While the cost of obtaining a PASS Card was not discussed at the initial press conference, a DHS spokesman later estimated that PASS Cards would be made available for around $50, just over half of the cost of a U.S. passport.[90]

This announcement provided the first concrete indication that DHS and DOS officials were willing to create an alternative yet secure travel document for U.S. citizens to ensure compliance with the congressional mandate set forth in IRTPA. However, initial reaction to the PASS Card proposal was cautious; several commentators expressed concerns over the adequacy of the proposed PASS Card's security features, and the likelihood such a plan could be fully implemented in time for IRTPA's stated deadline of January 1, 2008. In a letter sent to Secretaries Rice and Chertoff on March 16, 2006, the Travel Business Roundtable and Travel Association of America voiced the following reservations regarding the PASS Card proposal:

> Our industry is becoming increasingly concerned about the limited progress that your Departments have made in the 15 months since IRTPA was enacted, including the last few months since PASS was unveiled officially. . . [W]e believe the Administration is perilously close to losing any chance at having PASS cards or other acceptable documents in the hands of the millions of travelers who still need them on January 1, 2008.[91]

Such concerns increased the pressure on Congress to ensure the availability of an alternative form of identification for U.S. citizens prior to the implementation of the WHTI's land border-crossing phase.

---

[89] *Id.*

[90] *See* Stewart M. Powell, U.S. Proposes ID for Border Crossings, SEATTLE POST-INTELLIGENCER, Jan. 18, 2006, at A1 (quoting DHS spokesman Jarrod Agen), *available at* http://seattlepi.nwsource.com/national/256067_homeland18.html.

[91] Letter from Jonathan M. Tisch, Chairman, Travel Business Roundtable, and Roger J. Dow, President and CEO, Travel Industry Association of America, to the Honorable Condeleezza Rice, Secretary of State, and the Honorable Michael Chertoff, the Secretary of Homeland Security (Mar. 16, 2006), *available at* http://tbr.org/lac/fedcorletters/rcwhti031606.pdf.; s*ee also* Sheldon Alberts, *U.S. to Require Travel Card*, NATIONAL POST, Jan. 18, 2006 (describing the reaction of Canadian tourism officials to the new proposal as "wary," based on concerns over the efficiency of frequent border crossings for tourism and commerce purposes), http://www.canada.com/nationalpost/story.html?id=8177558e-91c3-4ad6-8e6e-db63816581bd&k=76330; Card Technology, Proposed Border-Crossing Card Raises Privacy Concerns, http://www.cardtechnology.com/article.html?id=20060420U8PS9SJZ (last visited Sept. 21, 2007) (discussing potential flaws contained within the initial PASS Card proposal, such as the use of a radio-frequency chip that can be read from up to thirty feet away).

IV. THE STEVENS-LEAHY AMENDMENT

As provided in the November 24, 2006 Final Rule, the WHTI's air-travel phase took effect on January 23, 2007.[92] Early reports suggested the implementation of this first phase went relatively smoothly.[93] However, concerns over the availability of the PASS Card ahead of the January 1, 2008 deadline for land border crossings led to moves by legislators to further delay the implementation of the WHTI's remaining phases. On May, 17, 2006, the United States Senate approved a bipartisan amendment introduced by Republican Senator Ted Stevens of Alaska and Democratic Senator Patrick Leahy of Vermont ("Stevens-Leahy Amendment" or "the Amendment").[94] The Stevens-Leahy Amendment was adopted as § 546 of the Department of Homeland Security Appropriations Act of 2007, which was signed into law by President Bush on October 4, 2006.[95]

The Amendment sought to address concerns over the PASS Card Proposal's lack of security measures. In a statement, Senator Leahy described the existing proposals as "a train wreck on the horizon for the Northern Border."[96] In particular, Senator Leahy cited a lack of coordination between DHS and DOS officials over such issues as the technology to be used for the new border crossing cards.[97] He also criticized the Bush Administration for a lack of coordination with the Canadian Government over the requirements to be imposed on Canadian citizens who attempt to enter the United States.[98]

The Amendment pushed back the deadline by which DHS and DOS were required to fully implement the WHTI's provisions, to the earlier of

---

[92] *Final Rule*, *supra* note 82, at 68,412.

[93] *See, e.g.*, Press Release, Embassy of the United States, Nassau, Bahamas, Western Hemisphere Travel Initiative: Implementation on Target (Jan. 27, 2007), *available at* http://nassau.usembassy.gov/pr_ 27012007.html (reporting that, out of the nearly 7000 United States citizen travelers passing through the Pre-Clearance facility at Nassau's airport during the first three days of the WHTI's implementation, only 11 did not possess the necessary travel documentation); *New Passport Rules Cause Few Glitches*, USA TODAY, Jan. 24, 2007, *available at* http://www.usatoday.com/news/nation/2007-01-23-passport-rules_x.htm (reporting near-full compliance during initial implementation of WHTI at some of the nation's major airports). It was further reported that most U.S. citizen travelers who were not in possession of a valid passport *were* indeed allowed into the United States, but only "after receiving a warning and a passport application," as well as having their names entered into the Custom and Border Protection agency's computer, for scrutiny of future compliance. *Id*.

[94] Press Release, Office of Sen. Patrick Leahy, Senate Approves Stevens-Leahy Amendment to Delay Stiff New Border-Crossing Requirements (May 17, 2006), *available at* http://www.leahy.senate.gov/press/200605/051706b.html [hereinafter Leahy Press Release].

[95] Department of Homeland Security Appropriations Act, 2007, § 546, Pub. L. No. 109-295, 120 Stat. 1355 (Oct. 4, 2006).

[96] Leahy Press Release, *supra* note 94.

[97] *Id.*

[98] *Id.*

two dates: June 1, 2009,[99] or no later than three months after the Secretaries of Homeland Security and State make certain enumerated certifications.[100] The Amendment's certifications included: assurances over the security features of any approved frequent border crossing documents; communication with the governments of Canada and Mexico regarding any changes in technology required for implementing the PASS Card system; sufficient training for officers staffing U.S. border ports-of-entry; and agreement with the United States Postal Service over the fees required for obtaining a Passport Card.[101]

The executive branch's response to the Stevens-Leahy Amendment was almost immediate. On October 17, 2006, just thirteen days after President Bush signed the Stevens-Leahy Amendment into law, DHS and DOS announced further plans for the creation of a PASS Card that could be used by U.S. citizens traveling within the Western Hemisphere.[102] It was initially proposed that the PASS Card would cost $45 for adults and $35 for children, a significant saving on the cost of an international passport.[103] Furthermore, like traditional U.S. passports, the PASS Cards issued to those sixteen years of age or over would be valid for ten years, while those issued to citizens below sixteen years of age would be valid for five years.[104]

V. THE STEVENS-LEAHY AMENDMENT'S IMPLICATIONS ON THE CIVIL LIBERTIES OF U.S. CITIZENS

As the discussion of both AEDPA and the Patriot Act in Section II, *supra*, suggests, many commentators believe that Congress acquiesced to the wishes of the executive branch in recent years, by simply rubber-stamping the significant expansion of the executive's law enforcement and intelligence-gathering capabilities in the name of national security. It has been argued that many of the powers conferred by AEDPA and the Patriot Act came at the expense of some of the most fundamental civil liberties enjoyed by U.S. citizens and non-citizens alike. However, an analysis of the Stevens-Leahy Amendment's legislative history reveals a renewed

---

[99] Department of Homeland Security Appropriations Act, 2007, § 546, Pub. L. No. 109-295, 120 Stat. 1355 (Oct. 4, 2006).

[100] *Id.*

[101] *Id.*

[102] Card Format Passport; Changes to Passport Fee Schedule, 71 Fed. Reg. 60,928 (Oct. 17, 2006) [hereinafter *Passport Card Proposal*]. *See also* U.S. DEP'T OF STATE, DEPARTMENT OF STATE TO INTRODUCE PASSPORT CARD (2006), http://www.state.gov/r/pa/prs/ps/2006/74083.htm. (last visited Nov. 5, 2007).

[103] *See Passport Card Proposal*, *supra* note 102, at 60,931. These fees would include a $25 execution fee. *Id.*

[104] *Id.* at 60,929.

focus on civil liberties among lawmakers when balancing such interests against the need to prevent future terrorist attacks.

A. The Right to International Travel Under the U.S. Constitution

Although no express, textual commitment can be found in the U.S. Constitution, the right to international travel was first recognized by the U.S. Supreme Court as a liberty interest grounded in the Fifth Amendment's due process protections, in *Kent v. Dulles*.[105] The Court held that the Secretary of State had improperly denied a passport application due to the applicant's affiliation with the Communist Party, and Justice Douglas, writing for the majority, offered the following analysis:

> [The passport's] crucial function today is control over exit. And, as we have seen, the right of exit is a personal right included within the word 'liberty' as used in the Fifth Amendment. If that 'liberty' is to be regulated, it must be pursuant to the lawmaking functions of the Congress . . . . And if that power is delegated, the standards must be adequate to pass scrutiny by the accepted tests.[106]

The majority of the cases dealing with the right to international travel arose over the Secretary of State's powers under the Passport Act to issue, deny and revoke passports,[107] and the ability of the President to restrict travel by U.S. citizens to certain designated countries.[108] However, despite their relatively narrow focus, these cases have nevertheless served to firmly establish the following constitutional principles:

---

[105] 357 U.S. 116 (1958).

[106] *Id.* at 129. The Supreme Court has stressed, however, that such a right to *international* travel is to be carefully distinguished from the constitutional right to *interstate* travel. *See* Califano v. Aznavorian, 439 U.S. 170, 176–77 (1978) (rejecting an argument that the right to international travel is "basically equivalent" to the right to intrastate travel for purposes of constitutional analysis).

[107] *See* Haig v. Agee, 453 U.S. 280, 309 (1981) (upholding revocation of former CIA Agent's U.S. Passport by Secretary of State following determination that his actions overseas "are causing or likely to cause serious damage to the national security or the foreign policy of the United States"); Kent v. Dulles, 357 U.S. 116, 128 (1958); Schachtman v. Dulles, 225 F.2d 938, 940–41 (D.C. Cir. 1955) (rejecting argument from Secretary of State that powers to issue and deny passport applications fell within the executive branch's inherent powers over the nation's foreign affairs, and was therefore a purely political question over which the judiciary was not entitled to assert jurisdiction).

[108] *See* Regan v. Wald, 468 U.S. 222, 240–42 (1984) (rejecting argument that President's imposition of restrictions on ability of U.S. citizens to travel to Cuba violated the freedom of international travel); Zemel v. Rusk, 381 U.S. 1, 15 (1965) (upholding U.S. Passport Office's refusal to validate passport for travel to Cuba); Worthy v. Herter, 270 F.2d 905, 909 (D.C. Cir. 1959) (upholding Secretary of State's denial of newspaperman's passport renewal application following applicant's refusal to provide assurances that he would not use the passport to travel to certain areas under Communist control at the time).

> The right to travel, to go from place to place as the means of transportation permit, is a natural right subject to the rights of others and to reasonable regulation under law. A restraint imposed by the Government of the United States upon this liberty, therefore, must conform with the provision of the Fifth Amendment that 'No person shall be . . . deprived of . . . liberty . . . without due process of law.'[109]

Such a liberty interest is clearly enjoyed by all U.S. citizens. However, the imposition of passport requirements under the WHTI would have placed the greatest burden on U.S. citizens residing in communities along the northern U.S. border.

B. The U.S. – Canada Border: An "Artificial Divide"

In 2003, the American Bar Association ("ABA") commissioned a report entitled "The Canada-U.S. Border: Balancing Trade, Security and Migrant Rights in the Post-9/11 Era."[110] In examining the deeply-ingrained interdependence that exists in communities located along the U.S.-Canada border, the ABA found:

> Border families, communities, and businesses have traditionally conducted their affairs with little impediment from the "artificial divide" [of the U.S.-Canada border]. Residents of bi-national communities attend school, work, marry and socialize together . . . . The interdependence of some bi-national communities extends to emergency preparedness and medical care. After the terrorist attacks [of September 11, 2001 and the subsequent closing of the border], hundreds of nurses living in Windsor, Ontario could not reach their jobs in Michigan, threatening the operation of U.S. hospitals.[111]

The report further pointed to the example of The Haskell Opera House and Library as "exemplify[ing] the border's fluidity."[112] The Opera House's stage and front rows are located in Quebec, Canada, while the back rows and majority of the balcony seats are situated in Vermont.[113] A

---

[109] *Schachtman*, 225 F.2d at 941.

[110] 19 GEO. IMMIGR. L.J. 199 (2004-2005).

[111] *Id.* at 207–08.

[112] *Id.* at 208.

[113] *Id.*

piece of black tape signifies the location of the border inside the Opera House.[114]

Concerned lawmakers who represent communities that span both sides of the border offered many other similar examples. The New York State Assemblyman representing the prominent Buffalo Niagara border region provided the following insight into the effects that that WHTI's passport requirements would have on his district:

> As in other shared border communities, this is a quality of life issue for residents of Buffalo Niagara. Many of us in Western New York and Southern Ontario frequently make spontaneous day trips across the border to attend a sporting or cultural event, to shop or dine, to ski or golf, or simply to visit family or friends. And many of us know someone who must cross the bridges daily to go to work or college. This would impose a costly burden on individuals and families who now give little advance thought to crossing the border.[115]

Similarly, a statement issued by the Premiers of several Western Canadian Provinces noted that "many Canadian and U.S. families have forged strong and lasting social relationships through cross-border events, such as sporting tournaments and cross-border cultural exchanges and activities."[116]

C. The Impact of the WHTI on the Right to International Travel

The imposition of passport requirements on U.S. citizens entering Canada by land would not amount to an outright governmental restriction of the continued enjoyment of the right to international travel. This article does not assert that the Secretary of State would arbitrarily deny the passport applications of U.S. citizens residing in communities along the northern border with Canada, thereby restricting their ability to exercise their right to international travel by crossing the U.S.-Canada border. Nor does this article assert that the executive branch has placed, or is likely to place at any time in the future, restrictions on the ability of U.S. citizen passport-holders to freely enter and exit Canada.

---

[114] *Id.*

[115] Assemb. Robin Schimminger, Perspective From the Border: U.S. Passport Plan a Threat to Border Economies, and Beyond, Council of State Gov'ts (2005), *available at* http://www.csgeast.org/pdfs/ercissuebriefdec2005.pdf.

[116] News Release, 2006 Western Premiers' Conference**,** Western Hemisphere Travel Initiative (WHTI) (2006), *available at* http://www.scics.gc.ca/cinfo06/850106008_e.html.

Nevertheless, for many living in northern border communities, such requirements would serve the functional purpose of a *de facto* tax that is necessary for the continued ability to perform simple daily tasks and to enjoy a standard of living that has been nurtured by several centuries of liberal identification requirements along the world's longest unguarded border. In the absence of more affordable forms of identification denoting U.S. citizenship, the WHTI would present this affected class of citizens with two options: (1) to purchase, at considerable expense, a passport for oneself and any dependent family members wishing to cross the border on a frequent basis;[117] or (2) to begin using alternative, less conveniently-located essential services such as grocery stores, colleges, and, in many cases, employment, that are located within the United States. Proponents of the WHTI argue this is a small price to pay for securing the nation's borders. But, our lawmakers should fully explore all of the readily available alternatives that would achieve all of the intended policy goals, and ensure minimal infringement on U.S. citizens' Constitutional civil liberties.

A full mechanical due process analysis is beyond the scope of this article.[118] It is sufficient to acknowledge the right to international travel is a liberty interest protected by the Fifth Amendment, and to require the purchase of a passport for short, frequent land crossings of the U.S.-Canada border would impose a significant burden on the exercise of such freedoms by those residing in northern border communities.

D. Redressing the Balance Between Civil Liberties and National Security

At first glance, national security appears to be the primary rationale underlying the Stevens-Leahy Amendment. Of the seven conditions imposed on the Secretary of Homeland Security and the Secretary of State before the implementation of the WHTI's final phases, the first and most extensive condition requires a certification by the National Institute of Standards and Technology that DHS and DOS "have selected a card architecture that meets or exceeds International Organization for Standardization (ISO) security standards and meets or exceeds best

---

[117] At time of writing, the fees required to obtain a passport are $97 for applicants 16 and older, and $82 for applicants below the age of 16. Therefore, the cost of passports for a family composed of two adults and two young children would total $358. *See* U.S. DEP'T OF STATE, Passport Fees (2005), http://travel.state.gov/passport/get/fees/fees_837.html.

[118] Due to the fact that the burdens imposed on U.S. citizens by the WHTI's passport requirements would largely be of a social and economic nature, it is highly unlikely the WHTI's provisions would be struck down by a reviewing court, given the Supreme Court's highly deferential modern due process jurisprudence. *See* Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59, 83–84 (1978) (articulating the court's modern approach to due process analysis, whereby deference is shown to legislative judgments in respect to economic and social regulations unless they are "demonstrably arbitrary or irrational"). *See also* Cruz, *supra* note 1, at 130 (accusing the judicial branch of "excessive judicial deference" to government national security actions).

available practices for protection of personal identification documents."[119] However, a closer examination of the Amendment and its legislative history reveals lawmakers' strong desire to ensure the preservation of the right to international travel for U.S. citizens residing in northern border communities.

In the months following the joint announcement by DHS and DOS, concerns grew on Capitol Hill over the lack of progress made towards the implementation of the PASS Card ahead of the WHTI's final deadline of January 1, 2008. On May 25, 2006, the United States Government Accountability Office issued a report ("GAO Report") that fueled these concerns, warning "[a]chieving the intended security benefits of the Travel Initiative by the statutory milestone date, without simply requiring all travelers to carry a passport, appears in jeopardy, given the volume of work that remains."[120] Such a grim prognosis led to a series of hearings conducted by more than one subcommittee of the Senate Foreign Relations Committee.[121]

At these hearings, several witnesses urged Congress to take whatever steps were necessary to ensure that an affordable alternative form of identification was made available prior to the implementation of the WHTI's land border-crossing phase.[122] However, the most compelling testimony the subcommittee heard came from Slade Gorton, a former Washington Senator and member of the 9/11 Commission, the very entity whose recommendations led to the creation of the WHTI in 2004. Senator Gorton reminded the subcommittee of the 9/11 Commission's findings that "programs to speed known travelers should be a higher priority," and "the daily commuter should not be subject to the same measures as first-time travelers."[123] He then expressed the following concerns over the prospect

---

[119] Department of Homeland Security Appropriations Act, 2007, § 546, Pub. L. No. 109-295, 120 Stat. 1355 (Oct. 4, 2006).

[120] GOV'T ACCOUNTABILITY OFFICE, GAO-06-741R, OBSERVATIONS ON EFFORTS TO IMPLEMENT THE WESTERN HEMISPHERE TRAVEL INITIATIVE ON THE U.S. BORDER WITH CANADA 3 (2006), *available at* http://www.gao.gov/new.items/d06741r.pdf.

[121] *See infra* notes 123-24 and accompanying text.

[122] *See, e.g.*, *A North American Community Approach to Security*: *Hearings Before the Subcomm. on the Western Hemisphere of the S. Comm. of Foreign Relations*, 109th Cong. (2005) (statement of Dr. Robert A. Pastor), *available at* http://www.senate.gov/~foreign/testimony/2005/PastorTestimony050609.pdf; Press Release, Rep. Louise M. Slaughter, Slaughter Testifies Before Senate Foreign Relations Subcommittee on WHTI: Outlines Concerns of Border Communities and List of Proposals to Fix Program (Apr. 27, 2006), *available at* http://www.louise.house.gov/index.php?option=com_content&task=view&id=558 (insisting that DHS and DOS "must ensure that travelers have options that are secure, inexpensive and easy to obtain").

[123] *Western Hemisphere Travel Initiative: Hearings Before the Subcomm. On Int'l Operations and Terrorism of the S. Comm. on Foreign Relations*, 109th Cong. 3 (2006) (testimony of Slade Gorton), *available at* http://www.besttcoalition.com/files/Gorton_WHTI_Hearing_Testimony.pdf (quoting the 9/11 Commission's Final Report).

of requiring U.S. citizens to carry a valid passport in order to cross the northern border:

> In April 2005, when Department of Homeland Security and Department of State suggested that a passport might be the only option for getting back and forth across the border, there was a huge public outcry, and rightly so. The U.S. and Canada have enjoyed hundreds of years of harmonious border relations, longer than any other in the world. That border is the conduit for $1.2 billion in trade every day and supports 5.2 million jobs. Going from never having requested a formal border-crossing document to a passport-only option would be disastrous.[124]

Senator Gorton also criticized the PASS Card proposal for failing to accord sufficient weight to the preservation of such freedom of movement, noting that "[t]hough the proposed regulation lives up to the call for enhanced border security . . . it does not take into account the justified expectation of both Americans and Canadians that the historic policy of easy access to one another's countries is too dear to all of us to be abandoned."[125] Such authoritative testimony from a 9/11 commission member – and therefore someone who was acutely aware of the need to secure the nation's borders against the threat of terrorist attacks –likely had a significant influence on the passage of the Stevens-Leahy Amendment just over four months later.

As it became clearer that the proposed PASS Card was unlikely to be available prior to the implementation of the WHTI's land border-crossing phase, Congress was presented with two options. The first option was to simply persist with the original statutory deadline set forth in IRTPA, and require all U.S. citizens present a valid passport when crossing the U.S.-Canada border by land until an alternative form of documentation was made available. The second option was to delay the implementation of this phase of the WHTI to ensure that a less burdensome means of identification was made available for those crossing the U.S./Canada border frequently.

It should not be forgotten that a fully compliant form of travel documentation would have been available to all U.S. citizens by the initial deadline date of January 1, 2008, in the form of a valid passport. However, by selecting the latter of the two options and adopting the Stevens-Leahy Amendment, lawmakers sent a message that the burden a passport requirement would place on the civil liberties of northern border

---

[124] *Id.* at 2.

[125] *Id.*

community resident outweighed potential security risks that could arise as a result of the more relaxed identification requirements presently in place. This argument is further strengthened when one considers that the requirement of a passport for air travel between the U.S. and Canada continues to be enforced, despite the absence of a less burdensome form of documentation. Such a disparity in the enforcement of the WHTI's travel documentation requirements suggests lawmakers recognize the constitutional implications for a working-class family to whom daily shopping at the local grocery store involves entering into Canada are far greater than the executive whose work requires frequent business trips by air to Toronto.

VI. CONCLUSION

Congress attracted significant criticism in recent years for a lack of willingness to ensure the preservation of civil liberties against the threat of an over-zealous executive branch. Civil libertarians point to many provisions of AEDPA and the Patriot Act as prime examples of such congressional acquiescence. Such fears were re-ignited in 2004 when Congress enacted the WHTI, which provided all U.S. citizens must be in possession of a valid passport in order to cross the northern border with Canada by land, sea or air. However, through its adoption of the Stevens-Leahy Amendment in 2006, Congress assured such restrictive travel documentation requirements will not be imposed until an alternative affordable form of identification is available to all U.S. citizens.

The Stevens-Leahy Amendment appears to be primarily concerned with ensuring any approved forms of identification are fully equipped with the latest technology, to ensure compliance with internationally-accepted standards for security. However, further analysis of the Amendment's legislative history, and the circumstances surrounding its adoption, reveals an implicit recognition among lawmakers of the negative impact such passport requirements would have on the ability of U.S. citizens to exercise the right to international travel. Congress' adoption of the Stevens-Leahy Amendment may represent a renewed focus on the civil liberty interests of individual citizens in national security legislation.