

India's "Patriot Act": POTA and the Impact on Civil Liberties in the World's Largest Democracy

Jayanth K. Krishnan*

Introduction

Following the September 11th attacks in the United States, President Bush signed into law what has become known as the USA PATRIOT Act.¹ Viewed as an important weapon in the fight against terrorism, the PATRIOT Act, according to some, has sought to curb and prevent future terrorist acts by expanding the federal government's powers.² Three months after the New York, Washington, D.C., and Pennsylvania attacks, India—the world's

* Assistant Professor of Law, William Mitchell College of Law, St. Paul, Minnesota. J.D., Ohio State University; Ph.D., University of Wisconsin-Madison. The author thanks Julia Eckert, Marc Galanter, Clark Cunningham, and Gary Jacobsohn for their insightful comments. Note the title of this piece, *India's "Patriot Act"*, is a term that has been occasionally used by some in the media describing the similarities between India's newest anti-terrorist law and its counterpart just passed in the United States. For a recent newspaper article employing this term, see Dan Morrison, *India's 'Patriot Act' Comes Under Scrutiny*, CHRISTIAN SCI. MONITOR, Oct. 30, 2003, at 7.

1. Uniting and Strengthening of America by Providing Appropriate Tools to Intercept and Obstruct Terrorism (USA PATRIOT) Act, Pub. L. No. 107-56, 115 Stat. 272 (2001) [hereinafter PATRIOT Act].

2. *Id.* See also David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953, 957 (2002); *infra* Part III (discussing how the federal governmental power has been enhanced as a result of this act). But there are those who argue that it is an overstatement to claim that the PATRIOT Act has expanded governmental power. See, e.g., Orrin S. Kerr, *Internet Surveillance Law After the USA PATRIOT Act*, 97 NW. U. L. REV. 607 (2003) (arguing that the PATRIOT Act actually places new regulations on the use of governmental surveillance over the internet). And Kim Lane Scheppelle, a professor at the University of Pennsylvania Law School and someone who has intensely studied the PATRIOT Act, in an open letter to the scholarly "Law and Courts List-Serve," also recently wrote that "much of what the DOJ [Department of Justice] is doing in the war on terrorism is not done under the authority of the PATRIOT Act." Posting of Kim Lane Scheppelle, kimlane@law.upenn.edu to lawcourts-l@usc.edu (Apr. 10, 2004) (on file with author). Scheppelle argues that critics wrongly have summarily labeled much of the government's actions in the post 9-11 era as being done under the PATRIOT Act, when in fact it has been private organizations, with informal governmental assistance, that have been the "more worrisome sources of potential rights violation[s]." *Id.* Since this Article does not deal with the debate over the uses of the USA PATRIOT Act, I shall not delve further on this point.

largest democracy and a U.S. proclaimed ally in the war on terrorism—experienced one of its most significant terrorist attacks to date.³ On December 13, 2001, five Muslim extremists attacked the Indian National Parliament, killing seven people and placing the country into a heightened state of alert.⁴ Like its American counterpart, the Indian central government in March 2002, passed the Prevention of Terrorism Act (POTA), to enhance India's ability to crack down on possible terrorist threats.⁵ While the academic literature on the PATRIOT Act is growing, little is known about the extent to which POTA might be affecting civil liberties and civil rights in India.

This Article seeks to offer an analysis of POTA. Part I⁶ discusses the key legislative antecedent to POTA, the Terrorist and Disruptive (Prevention) Activities Act of 1987.⁷ Although this particular statute eventually lapsed, it nevertheless had enormous influence on the drafters of POTA. Part II⁸ offers an account of what led to the emergence of POTA. It outlines the arguments made on behalf of the legislation, and presents the critics' views of POTA. Part III⁹ explains how many of POTA's provisions seriously infringe on the civil liberties of Indians, especially in minority communities. Finally, Part IV¹⁰ concentrates on how the Indian government has used POTA to prosecute terrorist-classified cases, and how the courts have adjudicated these matters largely in support of POTA. The Article concludes, as do many dismayed rights activists, that few checks have been placed on how the government has exercised its powers under this so-called security-focused, terrorist-prevention statute.

3. News reports on the attack were extensive. See, e.g., Rediff News Serv., *The Attack on Parliament* (2001), at <http://www.rediff.com/news/pat2001.htm> (last visited Feb. 24, 2004); Rahul Bedi, *12 Die on Raid on Indian Parliament*, TELEGRAPH (U.K.), Dec. 14, 2001, available at <http://www.telegraph.co.uk/news/main.jhtml?xml=/news/2001/12/14/wind14.xml>; The Indian national newspaper, *The Hindu*, dedicated its December 14, 2001, edition to the attacks. HINDU, Dec. 14, 2001, available at <http://www.hinduonnet.com/thehindu/2001/12/14>.

4. See *supra* note 3.

5. Prevention of Terrorism Act, 89 A.I.R. 2002 ACTS [hereinafter POTA].

6. See *infra* notes 12-24.

7. Terrorist and Disruptive Activities (Prevention) Act, 74 A.I.R. 1987 ACTS [hereinafter TADA].

8. See *infra* notes 25-55.

9. See *infra* notes 56-155.

10. See *infra* notes 156-239.

I. An Important Predecessor to POTA—TADA¹¹

POTA did not emerge onto the Indian political landscape in a statutory vacuum. Some fifteen years prior to its enactment, the Indian Parliament passed the Terrorist and Disruptive Activities (Prevention) Act, or TADA.¹² TADA came into law partly as a response to the death of Prime Minister Indira Gandhi, who was assassinated by militant Sikh extremists in 1984.¹³ Indira's son, Rajiv Gandhi, who succeeded his mother as prime minister, also supported the new anti-terrorist legislation because various militant groups in the east, north, and south of India were engaging in on-going guerrilla-style attacks against the Indian state.¹⁴

TADA's provisions expanded the central government's powers to deal with individuals that the statute classified as terrorists.¹⁵ For example, at a judge's discretion, trials of accused terrorists could be held *in camera*.¹⁶ Furthermore, section 21 of the Act presumed that suspected terrorists were guilty and needed to

11. TADA, 74 A.I.R. 1987 ACTS.

12. *Id.* Anti-terrorist legislation, though, dates back to the days of the British Raj. In 1919 Britain enacted the Rowlatt Act, which permitted the Raj to summarily jail those who were deemed as dissenters, antagonists, or agitators within India. See Mahatma Gandhi and the Story of Indian Independence, at <http://library.thinkquest.org/26523/mainfiles/lifehistory10.htm?tskipl=1> (last visited Mar. 6, 2004). That same year, Mohandas Gandhi led a mass wave of protests to denounce this law as being in violation of due process and fundamental human rights. *Id.* In post-independence times, the Indian government has enacted other anti-terrorist laws. Consider, for example, the Armed Forces (Jammu and Kashmir) Special Powers Act, 77 A.I.R. 1990 ACTS; the National Security (Second Amendment) Act, 72 A.I.R. 1984 ACTS; the National Security Act, 68 A.I.R. 1980 ACTS; the Unlawful Activities (Prevention) Act, 54 A.I.R. 1967 ACTS; and the Armed Forces (Assam and Manipur) Special Powers Act, 45 A.I.R. 1958 ACTS.

13. See R. Shunmugasundaram, *Can POTA Achieve what TADA could not?* HINDU, Jan. 2, 2002, available at <http://www.hindu.com/thehindu/op/2002/01/01/stories/2002010100150100.htm> (discussing the original reasons behind the development of TADA including the assassination of Indira Gandhi).

14. See K. Balagopal, *Law Commission's View of Terrorism*, ECON. & POL. WKLY., June 17, 2000, at 2114; TADA: *Hard Law for Soft State*, ECON. & POL. WKLY., Mar. 25, 2000, at 1066 (containing an edited version of People's Union of Democratic Rights Report) [hereinafter *Hard Law*]. See generally SANJIB BARUAH, INDIA AGAINST ITSELF: ASSAM AND THE POLITICS OF NATIONALITY (1999) (discussing the historical origins of TADA and how it was designed to defend against the mafias and gangs that filled the country).

15. See TADA, 74 A.I.R. 1987 ACTS, Part II, § 3 (providing for the punishment of terrorist acts). This statute's definition is similar to that used by the POTA statute, which will be discussed below. See *infra* notes 60-74 and accompanying text.

16. TADA, 74 A.I.R. 1987 ACTS, Part III, §§ 16(1)-(3); see also *id.* at Part III, §§ 19(1)-(3) (discussing the appeals process for suspected terrorists).

establish their innocence.¹⁷ Also, the state could arrest anyone on the mere suspicion that the person was engaging in terrorist activities, and keep the accused behind bars for up to a year without bail.¹⁸ Once on trial, a defendant did not have an automatic right to face his accusers in court.¹⁹

For many, TADA's enhancement of the state's power to deal with those it believed threatened India's national security stirred up memories of the Emergency Rule era. During this nearly two-year period from 1975 to 1977, Indira Gandhi suspended the democratic constitution, jailed thousands of her opponents, and ruled by decree, arguing that the state faced a national security threat from opposition forces both inside and outside of the country.²⁰ Civil liberties advocates who opposed TADA warned that if the government's powers were not kept in check, democracy in India could once again be in jeopardy.²¹ By 1994, over 76,000 people had been arrested under TADA, with only about one percent of these detainees ever being convicted of any crime.²²

TADA, however, died in 1995, when public pressure forced Parliament not to reenact it at its two year required renewal date.²³ However, the shadow of TADA continues to loom for two reasons. First, even though TADA is no longer in effect, the state retains the power to charge suspected persons retroactively for

17. *Id.* at Part IV, § 21.

18. *Id.* at Part IV, § 20(4).

19. *Id.*

20. Grassroots activists remained skeptical; they cited several self-interested factors that caused her to suspend the Constitution. The economy was weak, the public disapproved her policies, leading to opposition leaders calling on military to oust her from power. She was eventually convicted of corruption charges in a state court in Gujarat. See Jayanth K. Krishnan, *Social Policy Advocacy and the Role of the Courts in India*, 21 AM. ASIAN REV. 91, 93 (2003); see also PAUL BRASS, *THE POLITICS OF INDIA SINCE INDEPENDENCE* 96-99 (1994) (discussing the Emergency Rule era that was developed by Indira Gandhi).

21. See Balagopal, *supra* note 14, at 2117-22 (discussing TADA's threats to India's national security and civil liberties); see also Susan D. Susman, *Distant Voices in the Courts of India: Transformation of Standing in Public Interest Litigation*, 13 WIS. INT'L L.J. 57, 100 n.226 (1994) (discussing Balagopal's article and the fact that there was indeed worry on the part of civil liberties activists).

22. See *Hard Law*, *supra* note 14, at 1. The data from this report state that one percent of those arrested were convicted, yet data from the Sikh Human Rights Group note that 1.8% were convicted. See SIKH HUM. RTS. GROUP, *TERRORIST AND DISRUPTIVE ACTIVITIES (PREVENTION) ACT* 1987, at <http://www.shrg.org/information/tada/tada.htm#> (last visited Feb. 24, 2004); compare S.U. Rahman, *TADA: A Ghost Best Forgotten*, MILLI GAZETTE, Nov. 6, 2003, available at <http://www.milligazette.com/Archives/15112001/17.htm> (noting that under TADA 77,000 were arrested, 8,000 were tried, 725 were convicted, and 3,000 remain jailed to this day).

23. See Balagopal, *supra* note 14, at 2114.

crimes committed during its enactment. Second, the Indian Supreme Court, in 1994, legitimized the statute by holding constitutional one of its central provisions, which allowed courts to admit into evidence uncorroborated witness statements gathered by the police.²⁴ Because of the longstanding tradition, arising from a historic and widespread public distrust of the police, prohibiting the admissibility of this type of evidence, the Court's ruling came as a surprise. Many observers began to wonder (and worry) if the Executive Branch would push for legislation further enhancing the powers of the police. In the years that followed, these concerns would turn out to be well justified.

II. The Post-TADA Era: The Emergence of POTO—then POTA

Despite the suspension of TADA, government officials continued to seek ways to increase the state's anti-terrorism powers. The same year that TADA was suspended, the central government's Law Commission proposed the Criminal Law Amendment Bill (CLAB), an initiative that contained many provisions identical to those found in TADA.²⁵ While CLAB never became law, it came before Parliament on repeated occasions.²⁶

In 2000, the government replaced this bill with the Prevention of Terrorism Ordinance (POTO), a proposal more sweeping in many ways than either CLAB or TADA.²⁷ Government officials who sponsored POTO offered a detailed set of explanations justifying its necessity.²⁸ Members of the Muslim underworld had set off deadly bomb blasts in Bombay in 1993, which made national headlines.²⁹ A few years later the Muslim

24. *Kartar Singh v. State of Punjab*, (1994) 3 S.C.C. 569.

25. Guatam Navlakha, *POTO: Taking the Lawless Road*, *ECON. & POL. WKLY.*, Dec. 8, 2001, at 4520.

26. *Id.*

27. See POTA, 89 A.I.R. 2002 ACTS. POTA is the act that resulted from the POTO proposal.

28. See generally Joint Sitting of the Houses of Parliament, Synopsis of Debates, Mar. 26, 2002, at <http://164.100.24.208/ls/lsdeb/ls13/ses9/260302.html> (last visited Mar. 6, 2004) [hereinafter Debates].

29. According to Dr. Julia Eckert, a scholar of South Asian studies at the Max Planck Institute in Germany and an expert in Bombay politics, the bomb blasts actually were revenge attacks. Letter from Dr. Julia Eckert to Jayanth K. Krishnan (Dec. 9, 2003) (on file with the author). On December 6, 1992, the famous Babri Mosque in Ayodhya was destroyed by Hindu nationalists. *Id.* The following day riots resulted throughout the country, particularly in Bombay, and lasted nearly three weeks; approximately 2000 Muslims were killed. *Id.* Subsequently, on January 9, 1993, Hindu-nationalists, led by the Shiv Sena organization, engaged in a pogrom in Bombay; Shiv Sena leaders argued that they were protesting the

extremist organization al-Umma killed a group of people (mainly Hindus) in the southern city of Coimbatore.³⁰ In addition, the Indian government accused Muslim terrorists of participating in atrocities in places such as Kashmir, Bihar, and the Telengana region.³¹ In the eastern part of the country—Tripura, Bodoland, and Assam—separatist militants seeking independence from India were suspected of receiving military and financial support from Muslim contingents.³²

Tension between India and Pakistan had also reached new heights by 1998, with both countries displaying to the world their nuclear capabilities.³³ By 2000, government officials were well equipped with enough examples to argue that an aggressive new law was needed to deal with this rising Muslim militancy. India's democratic political system, government officials warned, was being challenged and the state required enhanced authority to meet this threat.

The leading advocates in favor of POTO included Prime Minister Atal Behari Vajpayee and Home Minister L.K. Advani, both of the Bhartiya Janata Party (BJP).³⁴ Yet political opponents initially were able to block POTO's passage into law, having successfully argued that the bill would crack down on Muslims while leaving Hindu extremists to engage in violent acts free from the ordinance's liability.³⁵ Muslim interest groups and political parties, in particular, argued that the government had ignored the Hindu-committed atrocities that had occurred in cities such as Ayodhya, New Delhi, Bombay, as well as in other regions of the

killing of a Hindu-family by Muslim extremists. *Id.* Then came the above-mentioned March 13, 1993 Bombay bomb blasts. *Id.* See also JULIA ECKERT, *THE CHARISMA OF DIRECT ACTION: POWER, POLITICS AND THE SHIV SENA* 113 (2003).

30. Letter from Dr. Julia Eckert to Jayanth K. Krishnan (Dec. 9, 2003) (on file with the author); see also, T.S. Subramanian, *Death Sentence for Al Umma Cadre*, *FRONTLINE*, Jan. 18-31 2003, <http://www.frontlineonnet.com/fl2001/stories/20030117007113000.htm>.

31. Balagopal, *supra* note 14, at 2115-16.

32. *Id.*

33. See generally DINSHAW MISTRY, *CONTAINING MISSILE PROLIFERATION* 109-127 (2003); GEORGE PETROVICH, *INDIA'S NUCLEAR BOMB: THE IMPACT ON GLOBAL PROLIFERATION* (1999); SUMANTRA ROSE, *KASHMIR: ROOTS OF CONFLICT, PATHS TO PEACE* (2003) (discussing the nuclear proliferation of India and Pakistan).

34. See Debates *supra* note 28 (statements of Shri L.K. Advani, Minister of Home Affairs, and Shri Atal Bihari Vajpayee, Prime Minister).

35. See Smita Narula, *Overlooked Danger: The Security and Rights Implications of Hindu Nationalism in India*, 16 HARV. HUM. RTS. J. 41, 57, 58 n.63 (2003) (describing POTA as "long debated" and noting that "such laws have been used to subject minorities and political opponents to arbitrary arrest, preventive detention, torture, and death in custody").

country.³⁶ Furthermore, opponents feared that if POTO passed, mass arrests of Muslims would ensue, as was the case under TADA. Between 1987 and 1995, when TADA was in effect, eighty percent of people detained in such states as Rajasthan, Maharashtra, and Gujarat were Muslim.³⁷

Although the BJP was unable to gather the requisite political support to pass POTO, the December 2001 attack on Parliament by Muslim extremists gave the party the fuel it needed to restart the debate. The government argued that existing anti-terrorism laws had failed to deter militants from threatening "the epitome of Indian democracy."³⁸ According to the government, the number of Indians killed by Pakistani-backed terrorists since 1989 had reached 61,000.³⁹ A real threat was present, and substantive measures were needed in order to crush these anti-democratic forces.⁴⁰ In his floor speech supporting the passage of POTO, Home Minister Advani conceded that TADA had been an ineffective statute that had been misused by government officials. But he promised: "POTO is different than TADA."⁴¹

Although the Supreme Court had provided legitimacy for TADA, Advani was quick to point out that the Court had also recommended how the police ought to conduct their investigations—and, according to Advani, these recommendations were incorporated into the new bill.⁴² For example, under POTO, defendants could invoke the right to silence, and police had to provide warnings that anything defendants said in the course of the interrogation could be used in court against them.⁴³ Moreover, POTO explicitly barred the police from using coercion in order to obtain a statement from an individual.⁴⁴ The state could punish any police official found abusing this authority with a fine and up

36. Balagopal, *supra* note 14, at 2119 (providing statistics of Muslim arrests).

37. See Rahman, *supra* note 22; but see Letter from Dr. Julia Eckert to Jayanth K. Krishnan, *supra* note 29. Dr. Eckert disputes Rahman's statistics, particularly with regard to union and labor leaders, noting how many Hindus were indeed arrested under TADA. *Id.*

38. Debates, *supra* note 28 (statement of the Deputy-Speaker) (mourning the lives lost on December 13, 2001 during the attack by Muslim extremists).

39. *Id.* (statement of Home Minister L.K. Advani).

40. *Id.*

41. *Id.*

42. *Id.*

43. See POTA, 89 A.I.R. 2002 ACTS § 32(2). The "A" in POTA, refers to the word "Act." The final "O" in POTO refers to the word "Ordinance" or proposed bill that had yet to be enacted. The sections cited here will be the sections of the Act.

44. *Id.* § 32(3).

to two years in prison.⁴⁵ POTO also assured defendants a statutory right to appeal a criminal conviction to a state High Court.⁴⁶ For these reasons, both Advani and Prime Minister Vajpayee promised that POTO could effectively combat terrorism while protecting defendants' rights to due process and a fair trial.

On March 28, 2002, POTO, the proposed ordinance, became POTA the statutory act. Opponents to the legislation decried the manner in which POTA had been enacted. Normally, for a bill to become law in India, it must receive a simple majority vote in each house of Parliament.⁴⁷ Although POTO gained the required support in the lower house, the Lok Sabha, it did not garner the necessary votes in the upper house, the Rajya Sabha. However, a technical procedure allows the ruling government to call on both houses to meet together and vote on a bill in a joint session; in this situation only a simple majority of the entire Parliament is needed to pass the bill.⁴⁸ Such a maneuver is rarely used and is viewed by many as subverting the independence afforded to each house under the Constitution.⁴⁹ In fact, Sonia Gandhi,⁵⁰ the current leader of the Congress Party, the main opposition party in Parliament, noted in her floor speech before the ordinance became law:

This is a historic occasion. It is only the third time in more than a half a century of parliamentary life that both the Houses have been convened together in this manner This is an attempt to intimidate the Houses with arithmetic superiority and to reduce them both to rubber stamps.

Joint-session is an extraordinary provision. For an issue such as POTO, a Joint Session can never be a satisfactory solution. It is, even more unacceptable when it is used to pass a draconian law in the backdrop of [religious] communal tension.⁵¹

45. *Id.* § 58.

46. *Id.* § 34.

47. See Atul Kohli, *India, in* INTRODUCTION TO COMPARATIVE POLITICS 214-87 (Mark Kesselman et al. eds., 2000).

48. *Id.* See also Jayanth K. Krishnan, *New Politics, Public Interest Groups, and Legal Strategies in the United States and Beyond* (2001) (unpublished Ph.D. dissertation, University of Wisconsin-Madison) (on file with author).

49. See, e.g., Debates, *supra* note 28 (statement of Sonia Gandhi) (noting that many of her supporters denounced this BJP-led tactic).

50. For those who may be unfamiliar with the Indian political landscape, Sonia Gandhi is no relation to Mahatma Gandhi. Sonia, an Italian-born naturalized Indian citizen, is the widow of former Prime Minister Rajiv Gandhi. Rajiv was the son of former Prime Minister Indira Gandhi, who herself was the daughter of India's first Prime Minister, Jawaharlal Nehru.

51. Debates, *supra* note 28 (statement of Sonia Gandhi).

Others joined Sonia Gandhi's outrage during the debate on POTO. Some charged that the BJP was using POTO as a means of pandering to its Hindu fundamentalist constituency.⁵² Others suggested that POTO was not so much an anti-terrorism measure but rather a "terrorist law [that would be] . . . used to terrorise minorities."⁵³ Still others worried that the BJP would employ POTO as a tool to harass or threaten political enemies who disagreed with government policy.⁵⁴ These dissenting voices nevertheless failed to carry the day. In the next Part of this Article, I examine the new legislation and show how the government's promise that POTA would "not be misused"⁵⁵ is in serious jeopardy of going unfulfilled.

III. The Provisions of POTA

A. *Initial Problems with the Statute—Denial of Individual Freedoms and Rights*

POTA's provisions share some ties to the USA PATRIOT Act. Under the PATRIOT Act, non-citizens legally residing in the United States who are believed to have even the most tangential association with suspicious organizations may now be subject to deportation, indefinite confinement, or permanent imprisonment.⁵⁶ The PATRIOT Act permits ideology-based exclusions to those seeking admission into the United States as well.⁵⁷ The PATRIOT

52. See, e.g., *id.* (statement of H.D. Deve Gowda).

53. See, e.g., *id.* (statement of Mulayam Singh Yadav).

54. See, e.g., *id.* (statement of Kapil Sibal).

55. See, e.g., *id.* (statement of Home Minister L.K. Advani).

56. PATRIOT Act, *supra* note 1, at §§ 411-12. See also Cole, *supra* note 2, at 966-69. There is currently an initiative being proposed by Attorney General John Ashcroft that would expand even further the provisions of the present legislation. Reports indicate that among "the most troubling section[s] would [be to] strip U.S. citizenship from anyone who gives 'material support' to any group that the attorney general designates as a terrorist organization." Jack M. Balkin, *A Dreadful Act II*, L.A. TIMES, Feb. 13, 2003, at B23. Because little is known about this initiative, I shall, for now, only consider the USA PATRIOT Act itself. For an investigative journalistic piece that has uncovered what else the PATRIOT II initiative contains, see Charles Lewis & Adam Mayle, *Justice Dept. Drafts Sweeping Expansion of Anti-Terrorism Act: Center Publishes Secret Draft of 'Patriot II' Legislation*, Feb. 7, 2003, [at](http://www.publicintegrity.org/dtaweb/report.asp?ReportID=502&L1=10&L2=10&L3=0&L4=0&L5=0) <http://www.publicintegrity.org/dtaweb/report.asp?ReportID=502&L1=10&L2=10&L3=0&L4=0&L5=0>. For important Supreme Court cases that have discussed denationalization, see *Vance v. Terrazas*, 44 U.S. 252 (1980); *Afroyim v. Rusk*, 387 U.S. 253 (1967); *Trop v. Dulles*, 356 U.S. 86 (1958).

57. PATRIOT Act, *supra* note 1, at §§ 411-12. As Cole notes, although the Supreme Court has stated that aliens living outside of the United States have fewer constitutional protections than those residing within, normatively he believes

Act also gives law enforcement greater latitude to conduct secret searches without probable cause, including the allowance of more intrusive wiretapping.⁵⁸ And special secret military tribunals have been established for the purposes of trying suspected terrorists, exemplifying the point, to some, that individual rights have been curtailed in this era of heightened security.⁵⁹

POTA contains similarly troubling features. Provisions exist, for instance, that chill an individual's freedom to associate with others.⁶⁰ Consider section 3 of POTA, which describes the "punishment for, and measures for dealing with, terrorist activities"⁶¹ and criminalizes an individual "who is a member of a terrorist gang or terrorist organization."⁶² The statute, however, is silent as to how the state must prove that a person indeed is part of such a terrorist organization.⁶³ In fact, section 20 of POTA presumes that an individual charged with being a member of a terrorist organization is a terrorist unless that person can show that he or she has not participated in terrorist activities *and* that the organization itself was not declared illegal by the state at the time when the person joined.⁶⁴ By placing this type of onus on the individual, the state inevitably inhibits those peaceful persons who might wish to join a non-mainstream association but fear that doing so could subject them to potential arrest, or at the very least

that the power of the First Amendment is reduced by resorting to such practices. Cole, *supra* note 2, at 970. For a related discussion, see Kevin R. Johnson, "Aliens" and the U.S. Immigration Laws: The Social and Legal Construction of Nonpersons, 28 U. MIAMI INTER-AM. L. REV. 263 (1996-97).

58. PATRIOT Act, *supra* note 1, at § 218. See also Cole, *supra* note 2, at 972-74. According to Cole such surveillance techniques have resulted in greater ethnic profiling of certain groups such as Arabs and South Asians. *Id.* See also Thomas Joo, *Presumed Disloyal: Executive Power, Judicial Deference, and the Construction of Race Before and After September 11*, 34 COLUM. HUM. RTS. REV. 1, 37-38 (2002).

59. Cole, *supra* note 2, at 974-78.

60. AMNESTY INT'L., BRIEFING ON THE PREVENTION OF TERRORISM ORDINANCE 14 (2001) [hereinafter BRIEFING], available at <http://web.amnesty.org/library/Index/engASA200492001?Open?Open> (last visited Feb. 24, 2004). In fact, much of the ensuing discussion on POTA's drawbacks is discussed in this Amnesty report and will be cited accordingly. But as I shall explain, the Amnesty report, as does a report by Human Rights Watch, gives great deference to the government's National Human Rights Commission (NHRC) because of its supposedly critical views on POTA. However, as I will show, the NHRC has hardly been hawkish in its assessment of POTA.

61. POTA, 89 A.I.R. 2002 ACTS § 3.

62. *Id.*, § 3(5).

63. See BRIEFING, *supra* note 60, at 14. The list of banned groups is provided in what is called the Act's "schedule," or appendix. There are to date twenty-five such organizations listed. *Id.*

64. POTA, 89 A.I.R. 2002 ACTS § 20(1).

to the hassle of having to prove their innocence.⁶⁵

The heart of the problem is how the statute defines the words "terrorist," "terrorist acts," and "terrorist activities." Under section 3, a terrorist act is an act done "with intent to threaten the unity, integrity, security or sovereignty of India or to strike terror in the people or any section of the people . . ."⁶⁶ This section is supposed to apply to all persons within India, but as various non-governmental organizations have charged, for years the military has itself engaged in these exact acts in places such as Kashmir.⁶⁷ Hindu nationalist groups politically aligned to the BJP-led government, such as the Vishwa Hindu Parishad (VHP), the Bajrang Dal, and the Rashtriya Swayamsevak Sangh (RSS) have also committed terrorist-like atrocities against minorities.⁶⁸ And non-governmental organizations continue to suspect the Indian police force of participating in a wide range of terrorist-type activities.⁶⁹

The vague definition allows for discriminatory application. Despite POTA's language that anyone found guilty of a crime under the law will be punished,⁷⁰ no military officials, Hindu nationalists, or police officers to date have been charged under POTA.⁷¹ Section 57 of the Act gives governmental authorities immunity from prosecution under POTA, as long as the actions taken to combat terrorism are done in good faith.⁷² Terrorism in

65. For a discussion of this point, see BRIEFING, *supra* note 60, at 10-11.

66. POTA, 89 A.I.R. 2002 ACTS § 3(1)(a).

67. See, e.g., Press Release, Human Rights Watch, India/Pakistan Summit: Call to Address Human Rights in Kashmir (July 14, 2001), <http://www.hrw.org/press/2001/07/pakistan0713.htm>. See also Press Release, Amnesty International (Nov. 25, 2002), available at <http://web.amnesty.org/library/Index/ENGASA200222002?open&of=ENG-IND>.

68. Human Rights Watch has published a detailed report illustrating how the Hindu-right have antagonized minority interests in India. See HUM. RTS. WATCH, COMPOUNDING INJUSTICE: THE GOVERNMENT'S FAILURE TO REDRESS MASSACRES IN GUJARAT 4 (2003) [hereinafter COMPOUNDING INJUSTICE]. The Indian non-governmental organization (NGO), People's Union for Civil Liberties, also has written on this topic and has numerous reports available at www.pucl.org (last visited Feb. 24, 2004).

69. See COMPOUNDING INJUSTICE, *supra* note 68, at 27-29. See also S.P. SATHE, JUDICIAL ACTIVISM IN INDIA: TRANSGRESSING AND ENFORCING LIMITS 209-48 (2002).

70. POTA, 89 A.I.R. 2002 ACTS § 1(2).

71. See BRIEFING, *supra* note 60, at 14; see also Sridhar Krishnaswami, *Gujarat Legal System Biased*, HINDU, Feb. 27, 2003, available at <http://www.thehindu.com/thehindu/2003/02/28/stories/2003022802521100.htm>; Special Correspondent, *NHRC Fiat to Gujarat on Best Bakery Verdict*, HINDU, July 1, 2003, available at <http://www.hinduonnet.com/thehindu/2003/07/01/stories/2003070105021100.htm>.

72. POTA, 89 A.I.R. 2002 ACTS § 57; see also BRIEFING, *supra* note 60, at 14.

the Indian context thus primarily means one thing: Muslim terrorism.⁷³ Even the preamble of the statute intimates the anti-Muslim focus by referencing both the devastation of “cross-border terrorist activities” supported by Pakistan and also by discussing how the impetus for passing POTA was the December 2001 Muslim attack on Parliament.⁷⁴

POTA’s potentially disparate impact on minority communities could also violate the equal protection principles of the Indian Constitution. Article 14 of the Constitution reads, “[t]he State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.”⁷⁵ Article 15 reiterates this tenet more specifically by prohibiting the state from discriminating against any citizen on the basis of “religion, race, caste, sex, place of birth or any of them.”⁷⁶ Although much of the litigation involving these two Articles has dealt with promoting affirmative action-type policies on behalf of lower castes and women,⁷⁷ the preeminent Indian constitutional law scholar, S.P. Sathe, has noted that the Indian Supreme Court has explicitly held that the right to equal protection extends to all state policies.⁷⁸ If the Muslim community therefore finds itself singled out under POTA—as was the case during the TADA era—the Court may be obliged to consider whether this group’s equal protection rights are being protected.⁷⁹

73. See, e.g., Debates, *supra* note 28 (statements of Somnath Chatterjee and Mulayam Singh Yadav). See also *POTA: Well-Founded Fears*, ECON. & POL. WKLY., Apr. 5, 2003, at 1337. Unfortunately, neither the statute nor POTA’s supporters have specifically defined what constitutes good faith.

74. POTA, Statement of Objects and Reasons, ¶¶ 1, 2, http://www.naavi.org/importantlaws/pota/pota_sch.htm (last visited Mar. 6, 2004).

75. INDIA CONST. art. 14.

76. *Id.* art. 15(1).

77. Article 15(4) specifically gives the state the power to promote policies to advance societal and educational status of “backward classes of citizens or . . . Scheduled Castes and the Scheduled Tribes.” *Id.* at art. 15(4). See SATHE, *supra* note 69, at 132-39. For a classic treatment of articles 14 and 15, see generally MARC GALANTER, *COMPETING EQUALITIES* (1984).

78. See SATHE, *supra* note 69, at 132-33. For the case law highlighting this principle, see *Ajay Hasia v. Khalid Mujib*, A.I.R. 1981 S.C. 487; *E.P. Royappa v. State of Tamil Nadu*, A.I.R. 1974 S.C. 555; *State of Madras v. V.G. Row*, A.I.R. 1952 S.C. 196.

79. Interestingly, though, my research of Supreme Court case law on TADA reveals that the main Article 14 equal protection challenges were not ones in which Muslims argued that they were singled out. See, e.g., *Santhan et al v. State*, A.I.R. 1999 S.C. 2640 (ruling that Section 15 of TADA, which allowed police to take confessions through audio recordings, does not violate Article 14 of the Constitution); *Abdul Aziz v. West Bengal*, A.I.R. 1996 S.C. 3305, 3305-06 (ruling that classifying certain prisoners as terrorists while classifying others as “ordinary criminals” is not a violation of Article 14 of the Constitution).

B. Additional Statutory Complications

1. POTA's Detention Provisions

POTA's detention provisions are equally troubling. Within India's criminal justice system is a huge number of "under-tried" detainees whose cases languish for years in the tremendously clogged courts.⁸⁰ Economist Bibek Debroy, has noted:

Half a million cases in the High Courts have been on hold for 10 years or more, and almost 1 million in the lower courts. While the overly long time taken for civil cases to be resolved can be frustrating to litigants, of much greater concern are cases that involve incarceration. Two-thirds of the case backlog involves criminal trials. Today, there are 275,000 people in India's jails; 200,000 of them are waiting for their day in court. Even more distressing, 72% of the jail population consists of people accused only of petty crimes. Many have been locked up awaiting trial for longer than the maximum sentence for their alleged crime.⁸¹

POTA's detention provisions exacerbate this pathology. Under section 49, subdivision 2, for example, the police may place a suspected terrorist in jail for up to ninety days without any court proceedings. This period may be extended another three months if the prosecution submits a report to the court explaining the state's need for additional time.⁸² When an individual is charged under POTA, section 49, subdivision 7 permits a denial of bail to the accused for up to one year, as long as the prosecution's opposition to the bail request satisfies the court.⁸³ The statute does not require the prosecution to meet any evidentiary threshold when making its motion, such as showing whether the accused had the means, motive, or opportunity to commit the alleged crime.⁸⁴

Furthermore, while the arrestee is guaranteed the right to *consult* a lawyer and to have a family member informed of his or her arrest,⁸⁵ section 52, subdivision 4 curiously states that the accused is not entitled to have a lawyer "present throughout the

80. See Krishnan, *Social Policy Advocacy*, *supra* note 20, at 92-93.

81. Bibek Debroy, *Losing a World Record*, FAR E. ECON., Feb. 14, 2002, at 23.

82. POTA, 89 A.I.R. 2002 ACTS § 49(2). The statute does not provide any factors for determining when an extension will be granted. See also BRIEFING, *supra* note 60, at 7-10.

83. POTA, 89 A.I.R. 2002 ACTS § 49(7).

84. Amnesty International has also criticized section 48(9), which *per se* denies bail to a non-Indian citizen charged under POTA, as being a direct violation of Article 14 of the International Covenant on Civil and Political Rights. See BRIEFING, *supra* note 60, at 10.

85. POTA, 89 A.I.R. 2002 ACTS §§ 52(2)-(3).

period of [the police] interrogation.”⁸⁶ Section 14 additionally states that “any individual” (not excluding defense lawyers) is obligated to provide to the state information of anyone who may be in violation of POTA.⁸⁷ These limitations contravene the spirit of the United Nations Basic Principles on the Role of Lawyers⁸⁸ (BPRL) in two major ways. First, Article 1 of the BPRL mandates that clients have access to their lawyers during an entire police interrogation.⁸⁹ Second, Article 22 of the BPRL emphasizes that the confidentiality between a lawyer and a client must be respected by the state; efforts to undermine this relationship are incompatible with international norms on the rights of the detained.⁹⁰

Supporters of POTA may contend that section 52, subdivisions 4 and 14 are in line with Article 22, sections 4 through 7 of the Indian Constitution, which exempts the state from providing legal counsel to a person held for “preventive detention” and implicitly places some limitations on the confidential relationship between a lawyer and client.⁹¹ With respect to the latter point, the Indian Supreme Court recently noted that lawyers do not have an absolute, “sacrosanct right” to keep privileged all communications from clients—particularly those involving POTA-related crimes.⁹² But as already stated, police mistreatment of those under arrest is widespread and well-known.⁹³ The Court has acknowledged this reality and has

86. *Id.* § 52(4). See also BRIEFING, *supra* note 60, at 9.

87. POTA, 89 A.I.R. 2002 ACTS § 14.

88. See generally U.N. OFF. OF THE HIGH COMM’R FOR HUM. RTS., BASIC PRINCIPLES ON THE ROLE OF LAWYERS (1990). For a discussion of this document, see BRIEFING, *supra* note 60, at 9.

89. See UNITED NATIONS, *supra* note 88, art. 1.

90. *Id.* art. 22. As part of its argument, Amnesty International has argued that in the POTA chapter dealing with the police’s right to tap and intercept suspicious communications, sections 37 and 42 (addressing the issue of “Appointment of Competent Authority” conducting wiretaps) and section 44 (addressing the issue of protecting the information once it is collected) should also have explicit safeguards ensuring that lawyer-client communications must always be protected. BRIEFING, *supra* note 60, at 12.

91. INDIA CONST. art. 22(3)-(7).

92. PUCL v. Union of India, Writ Petition (C) No. 389 of 2002 with W.P. (Crl.) 89 and 129/2002 and 28 and 48/2003. But see, Rakesh Bhatnagar, *SC Upholds Pota, Respite for Vaiko*, TIMES OF INDIA, Dec. 17, 2003, at <http://timesofindia.indiatimes.com/articleshow/363248.cms>.

93. See *supra* notes 80-90 and accompanying text. The Supreme Court of India has been involved in several high-profile police brutality cases. See *Tukaram v. State of Maharashtra*, (1979) 2 S.C.C. 143, 148-50 (shockingly acquitting police officers who raped an adolescent girl because the prosecution had failed to show that the girl had tangibly resisted). See also *D.K. Basu v. State of West Bengal* (1997) 1 S.C.C. 416, 424 (stating that “[t]he protection of an individual from torture

established detailed guidelines to ensure the humane treatment of people under arrest,⁹⁴ including the right of detainees to have access to legal representation.⁹⁵ As several observers have noted, however, the police have disregarded the Court's admonitions on repeated occasions⁹⁶ and, in particular, continue to deny many under arrest access to a lawyer.⁹⁷ Moreover, because section 32 of POTA adopts TADA's language in section 15 allowing uncounseled statements made to police to be used at trial,⁹⁸ unrepresented detainees may be coerced into confessing to terrorist acts that they have not committed.⁹⁹ Also, because the police can take blood, DNA, or other bodily samples without consent from the accused,¹⁰⁰ the likelihood increases that POTA may be used to continue ignoring individual civil liberties.¹⁰¹

and abuse by the police and other law-enforcing agencies is a matter of deep concern" and infringes the fundamental rights guaranteed by Articles 21 and 22 of the Indian Constitution); Gudalure M.J. Cherian v. India (1992) 1 S.C.C. 397 (ordering the Uttar Pradesh state government to pay money damages to a group of nuns who were raped after the police and the CBI mishandled the investigation); Vishal Jeet v. India, A.I.R. 1990 S.C. 1412, 1416 (ordering state governments to direct law enforcement to eradicate child prostitution without allowing "complaint of remissness or culpable indifference"). For a discussion of inmates' Article 21 liberty rights, see Upendra Baxi v. State of Uttar Pradesh, (1983) 2 S.C.C. 308, 308; Sunil Batra v. Delhi Administration A.I.R. 1978 S.C. 1675, 1732.

94. D.K. Basu v. State of West Bengal (1997) 1 S.C.C. 416, 435-36.

95. See *id.* at 436 (ruling that a detainee may be permitted to meet his lawyer during interrogation). See also Suk Das v. Union Territory of Arunachal Pradesh, A.I.R. 1986 S.C. 991, 993; M.H. Hoskot v. Maharashtra, A.I.R. 1978 S.C. 1548, 1554.

96. See S.R. Sankaran, *Criminal Justice System: A Framework for Reforms*, ECON. & POL. WKLY, May 29, 1999, at 1316, 1319 (stating that "[t]he police as an institution cares little for the orders of the court and any aggrieved party has to again go to the courts to seek remedy or enforcement of the orders of the courts"); *Stinking Criminal Justice System*, ECON. & POL. WKLY., Mar. 20, 1999, at 647. These two articles have generated a good deal of controversy in India. See also SATHE, *supra* note 69, at 306.

97. See BRIEFING, *supra* note 60, at 6-9 (expressing concern that the Prevention of Terrorism Ordinance places restrictions on a detainee's access to a lawyer, especially during interrogation).

98. See POTA, 89 A.I.R. 2002 ACTS § 32; TADA, 74 A.I.R. 1987 ACTS § 15. POTA adopts this provision verbatim from TADA.

99. Defenders of section 32 of POTA will point to subsections 2-5 as safeguards against police abuse. Subsection 2 provides that the detainee has the right to remain silent. POTA 89 A.I.R. 2002 ACTS § 32(2). Subsection 3 provides that no confession may be made under duress. *Id.* § 32(3). Subsections 4 and 5 provide that once a detainee makes a confession, he must be brought within forty-eight hours in front of a magistrate who is supposed to verify that the statement was not coerced. *Id.* §§ 32(4)-(5).

100. *Id.* § 27.

101. Consider *id.*, subsection 2, which states that if the accused refuses to give a requested sample, "the Court shall draw adverse inference against the accused." *Id.* § 27(2). See also BRIEFING, *supra* note 60, at 10-13.

2. The Special Courts—Secret and Constitutionally Problematic

After the September 11, 2001, terrorist attacks on the United States, the U.S. government ordered the use of secret military tribunals for certain suspected terrorists considered to be high-risk threats, in order to protect the nation's security.¹⁰² The military order states that due to endangered U.S. safety and the nature of terrorism, principles of law and rules of evidence applicable to U.S. district courts will not be applicable to these military tribunals.¹⁰³ Little has been disclosed as to how these tribunals might operate, but administration officials have admitted that such trials: would be closed to public scrutiny; would have confidential times, dates, and locations; would have no juries; would not allow defendants an automatic right to legal representation before their trial; would be presided over by a panel of military officials; and would provide defendants with few if any rights to appeal.¹⁰⁴

Since the December 2001 Indian Parliament attack, the Indian government has similarly established Special Courts to handle cases brought under POTA,¹⁰⁵ based on many of the same reasons that United States officials have given in support of secret U.S. military tribunals. However, the sheer presence of these Special Courts highlights a main structural problem that has plagued the Indian legal system for decades. The "regular" Indian courts—the lower criminal and civil courts, the state High Courts, and the Supreme Court—all face incredible case backlogs that are arguably the worst in the world.¹⁰⁶ Relevant for our purposes here

102. See Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, § 4, 66 Fed. Reg. 57, 833 (Nov. 13, 2001) [hereinafter *Military Order*]. For a discussion of these recent military tribunals, see generally Neal L. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L.J. 1259 (2002); John Mintz, *List Created of Captives to Be Tried by Military Tribunals*, WASH. POST, May 3, 2003, at A17.

103. *Military Order*, *supra* note 102, at § 1(f).

104. See Katyal & Tribe, *supra* note 102, at 1261-62, 1265-66; Laura Dickinson, *Using Legal Process to Fight Terrorism: Detentions, Military Commissions, International Tribunals, and the Rule of Law*, 75 S. CAL. L. REV. 1407, 1415-16 (2002); Carl Tobias, *Detentions, Military Commissions, Terrorism, and Domestic Case Precedent*, 76 S. CAL. L. REV. 1371, 1377-79 (2003).

105. See POTA, 89 A.I.R. 2002 ACTS Ch. IV.

106. See Dibroy, *supra* note 81, at 23; Krishnan, *Social Policy Advocacy, supra* note 20, at 92-93; Marc Galanter & Jayanth K. Krishnan, "Bread for the Poor": *Access to Justice and the Rights of the Needy in India*, HASTINGS L.J. (forthcoming 2004). See also Jayanth K. Krishnan, *The Rights of the New Untouchables: A Constitutional Analysis of HIV Jurisprudence in India*, 25 HUM. RTS. Q. 791 (2003) (critically evaluating the Indian legal system and discussing the factors contributing to these case backlogs).

is that rather than tackling the fundamental flaws inherent in the legal system, Indian officials for years have opted to establish alternative judicial institutions that seek to bypass the regular courts.¹⁰⁷ Such alternatives—like POTA's Special Courts—are supposed to function in a superior, or at least more efficient, manner than the regular courts.¹⁰⁸ Yet the few empirical studies examining the performance of alternative forums reveal that they suffer from the same types of difficulties that plague the regular courts—overcrowded dockets, delays, unaccountable judges, inadequate remedies, and ultimately frustrated, dissatisfied parties.¹⁰⁹ It is too early to know whether the POTA Special Courts will experience the same problems as these alternative forums. What is noteworthy is that because of the prevalent belief that fixing the regular courts would amount to a Sisyphean-like endeavor,¹¹⁰ politicians have opted to promote alternatives, like POTA's Special Courts, to deal with legal issues thought to need immediate attention.¹¹¹

These Special Courts also raise constitutional problems. According to section 23 of POTA, the Central Government, not the Judiciary, has the final say in determining over which cases the Special Courts shall have jurisdiction.¹¹² Amnesty International, however, has pointed out that the Basic Principles on the

107. Galanter & Krishnan, *supra* note 106.

108. *Id.*

109. *Id.* See Catherine S. Meschievitz & Marc Galanter, *In Search of Nyaya Panchayats: The Politics of a Moribund Institution*, in *THE POLITICS OF INFORMAL JUSTICE: COMPARATIVE STUDIES* 47-77 (Richard Abel ed., 1982); ROBERT S. MOOG, *WHOSE INTERESTS ARE SUPREME? ORGANIZATIONAL POLITICS IN THE CIVIL COURTS IN INDIA* 135-46 (1997); Robert S. Moog, *Conflict and Compromise: The Politics of Lok Adalats in Varanasi District*, 25 L. & SOC'Y REV. 545, 545-65 (1991); Sarah Leah Whitson, "Neither Fish, Nor Flesh, Nor Good Red Herring" Lok Adalats: *An Experiment in Informal Dispute Resolution in India*, 15 HASTINGS INT'L & COMP. L. REV. 391, 400, 416-45 (1992); Gene Kassebaum, *ADR in India: The Lok Adalat as an Alternative to Court Litigation of Personal Injury and Criminal Cases in South India* 5 (1989) (unpublished manuscript, on file with author).

110. See Galanter & Krishnan, *supra* note 106. One reason that reform of the regular courts is difficult is because the Indian Civil and Criminal Procedure Codes allow for endless appeals, resulting in cases being continued for decades or simply never heard. In addition, the Indian bar has been resistant to any substantive change in the judicial process. Indian lawyers tend to receive their fees on the basis of court appearance. So there seems little incentive to change the way the game is currently played. See Krishnan, *Social Policy Advocacy*, *supra* note 20, at 100-02. A recent proposal to overhaul the Civil Procedure Code met with fierce resistance from lawyers who demonstrated and went on strike; eventually a watered-down version of the proposal was passed, but most observers are skeptical that real change is on its way. See Galanter & Krishnan, *supra* note 106.

111. Galanter & Krishnan, *supra* note 106.

112. POTA, 89 A.I.R. 2002 ACTS § 23(3).

Independence of the Judiciary, an international agreement endorsed by the Indian Supreme Court, states that the judiciary "shall have exclusive authority to decide whether an issue . . . is within its competence."¹¹³ Moreover, the Supreme Court in *L. Chandra Kumar v. Union of India*¹¹⁴ settled the issue of the extent to which parliament could remove the judiciary's right to determine for itself the cases it could hear. The Court in *Chandra Kumar* held that "the power of judicial review over legislative action . . . is an integral and essential feature of the Constitution" and ordinarily "can never be ousted or excluded."¹¹⁵ In *Chandra Kumar*, Parliament had stripped the jurisdiction of state High Courts to hear cases on appeal from an administrative tribunal—another alternative forum established to deal more speedily with complaints from civil servants against their particular governmental employer.¹¹⁶ Even though Parliament's statute seemed to reiterate what an existing constitutional article allowed,¹¹⁷ the Court said that such jurisdictional stripping violated the "basic structure" of the Constitution, the spirit of which was to provide claimants with an opportunity to appeal lower court (including tribunal) decisions to the upper judiciary.¹¹⁸ Although POTA does not strip a convicted defendant's right to appeal to a state High Court,¹¹⁹ the key point is that it does not allow the Special Court to determine for itself which cases it may hear.¹²⁰

Another troubling aspect is how the Special Court functions

113. See BRIEFING, *supra* note 60, at 10-13. See also Basic Principles on the Independence of the Judiciary, 7th Cong. on the Prevention of Crime and the Treatment of Offenders, Milan, 26 Aug. to 6 Sept. 1985, U.N. Doc. A/CONF. 121/22/Rev.1 at 60 (1986).

114. (1997) 3 S.C.C. 261.

115. *Id.* at 301. The Court specifically cites Articles 226 and 32 as vesting this power in the High Courts and the Supreme Court respectively. *Id.*

116. *Id.* at 307.

117. See INDIA CONST. art. 323A; Administrative Tribunals Act, 1985.

118. (1997) 3 SCC 261, 311. The Court cited Article 226 of the Constitution, which the Court has interpreted as allowing any claimant the opportunity to file suit on behalf of the public in a state supreme, or High Court, when there was a state violation of a fundamental right or a right guaranteed by statute. See *id.* at 302. See *Kesavandana Bharti v. Kerala*, (1973) 4 SCC 225, 292, for a discussion of the basic structure doctrine. Yet in 2002 the Court upheld a recent amendment to the Legal Services Authority Act, which states that any settlement reached in an alternative dispute forum is binding and non-appealable. See *S.N. Pandey v. Union of India*, Writ Petition Order 543/2002. The *Pandey* court, however, said nothing about the basic structure doctrine, nor did it overturn any past precedent. See *id.*

119. See POTA, 89 A.I.R. 2002 ACTS § 34.

120. See *id.* § 32(3).

under POTA.¹²¹ Each Special Court is run by one judge, an appointee of the central government, who is allowed broad powers in drawing adverse inferences against the defendant.¹²² As mentioned above, POTA does not require the police to obtain a written informed consent waiver from the detainee before taking a blood, DNA, or other type of bodily sample.¹²³ As long as the police testify that the detainee voluntarily provided such a sample, the evidence will be admissible in court. The potential here for abusing a detainee's right against bodily invasion is obvious. Even if the accused refuses to comply to a non-coercive police request, the statute allows the court to draw an "adverse inference" against the defendant.¹²⁴ Section 53 also allows a Special Court judge to draw an "adverse inference" against a defendant who possesses arms believed to have been used in a terrorist act;¹²⁵ whose fingerprints were found at the site of such an act or on anything used in connection with its commission;¹²⁶ or who rendered financial assistance to a person the defendant knew was suspected of a terrorist act.¹²⁷

Allowing such inferences against the accused has serious ramifications for individual civil liberties. Imagine, for example, a situation in which a person is suspected of owning a firearm that the government thinks was used in a terrorist crime. Suppose that the firearm has traces of blood on it, but that it was planted in the person's home by the real terrorist. Now assume because the accused—like many Indians—believes that the police engage in doctoring evidence, he refuses to give a blood sample. The court will be permitted to look askance at the accused not only for "possessing" the firearm, but also for not submitting to the blood test.¹²⁸ The judge may therefore view the defendant in a negative light even before the trial begins or the defense has an opportunity to present its case. This is an additional advantage for the prosecution, which already benefits from the facts that POTA is silent on the evidence required before the police can make an arrest, and on who bears the burden of proof if the case goes to

121. *See id.* Ch. IV.

122. *See id.* § 23(4). In some cases, where the central government so approves, a state government may appoint a Special Court judge. *Id.*

123. *See id.* § 227(1); *supra* note 100 and accompanying text.

124. *See* POTA, 89 A.I.R. 2002 ACTS § 27(2).

125. *Id.* § 53(1)(a).

126. *Id.* § 53(1)(b).

127. *Id.* § 53(2).

128. *Id.* §§ 53(1)(a), 27(2).

trial.¹²⁹

The erosion of defendants' rights is made more perilous when these provisions are combined with section 4 of POTA, which makes "unauthorized possession of . . . bombs, dynamite or hazardous explosive substances or other lethal weapons capable of mass destruction"¹³⁰ a terrorist act itself, punishable up to life in prison.¹³¹ If the government claims that an individual has violated section 4, that individual faces a seemingly irrebuttable presumption of guilt,¹³² in effect stripping any adjudicatory power from the Special Court. Moreover, the phrase "lethal weapons capable of mass destruction"¹³³ is undefined by the statute and therefore left open-ended. What constitutes a "lethal weapon"? Does possession of an ordinary ingredient that potentially could be used to make a lethal weapon qualify as an offense under section 4?

Section 4 thus violates due process, one of the Constitution's fundamental rights guaranteed under Article 21 to every Indian.¹³⁴ Article 21 states that "[n]o person shall be deprived of his [or her] life or personal liberty except according to the procedure established by law."¹³⁵ Defenders of POTA will be quick to point out that Article 21 contains no precise due process language and that, in fact, the framers of the Indian Constitution are believed to have deliberately omitted due process language from this provision.¹³⁶ But a review of the Indian Supreme Court's

129. See POTA, 89 A.I.R. 2002 ACTS §§ 52 (addressing arrest), 29 (addressing the procedure and power of Special Courts). See also BRIEFING, *supra* note 60, at 10-13.

130. POTA, 89 A.I.R. 2002 ACTS § 4.

131. *Id.*

132. For commentary on this point and on how this section draws directly from TADA, see BRIEFING, *supra* note 60, at 10-13.

133. See POTA, 89 A.I.R. 2002 ACTS § 4.

134. See INDIA CONST. art. 21. The Indian Constitution has twenty-two parts, twenty-plus chapters, nearly four hundred separate articles, a detailed appendix (known as the section of schedules), and a set of directive, non-justiciable public policy principles. See generally INDIA CONST. Embedded as well in part three of the Constitution are fundamental rights guaranteed to every Indian. *Id.* Part III. The broad categories that these fundamental rights cover include: the right to equality, the right to freedom, the right against exploitation, the right to freedom of religion, cultural and economic rights (including the right to private property), and the right to constitutional remedies. *Id.* See also Gary Jeffrey Jacobsohn, *Three Models of Secular Constitutional Development: India, Israel, and the United States*, 10 STUDIES IN AMERICAN POLITICAL DEVELOPMENT 1-68 (1996); GARY JEFFREY JACOBSON, *THE WHEEL OF LAW: INDIA'S SECULARISM IN COMPARATIVE CONSTITUTIONAL CONTEXT* 33-36 (2003).

135. INDIA CONST. art. 21.

136. See SATHE, *supra* note 69, at ch. 2. See also CHARLES EPP, *THE RIGHTS*

jurisprudence on this issue confirms that Article 21 indeed includes a due process element. Consider the matter of *A.K. Gopalan v. State of Madras*,¹³⁷ in which the Court ruled that even though great deference normally would be paid to the legislature's establishment of procedures in matters of preventive detention, the state would not be permitted to arrest and imprison individuals in an arbitrary fashion.¹³⁸ The Court in this case also reaffirmed its commitment to Article 13 of the Constitution, a separate provision which voids any law that deprives, rescinds, or abridges an individual of his or her fundamental rights.¹³⁹

Some years later, in *Maneka Gandhi v. Union of India*,¹⁴⁰ the Supreme Court broadened its view, noting that that Article 21 contained an important procedural due process component, even if the precise words were absent from the provision.¹⁴¹ According to the Court, not only did Article 21 guarantee due process, but so did Article 19, a provision that protects every citizen from state infringement upon one's personal liberty.¹⁴² Reading Articles 19 and 21 together, the *Maneka Gandhi* court ruled: that any person detained or arrested has the right to offer a defense as well as a right to be heard; that an impartial court must adjudicate the case against the defendant in a fair, deliberate manner; and that the tenets of natural justice—not the tenets of Parliament—serve as the standard for which procedures used against the accused will be judged.¹⁴³

REVOLUTION 82 (1998).

137. A.I.R. 1950 S.C. 27.

138. *Id.* at 42, 80-84, 92-93, 106. In this case, Mr. Gopalan was arrested under a preventive detention statute. *Id.* at 32-33. He argued that the manner in which he was arrested and detained violated the principles of natural justice inherent within not just Article 21 but also Article 19. *Id.* at 33. Article 19 articulates a fundamental right protecting freedom of speech, association, movement and the like. INDIA CONST. art. 19. Although the Court ruled that any arbitrary behavior by the state contravening a fundamental right violated the Constitution, the Court refused to bring a natural justice analysis into its consideration of these articles. A.I.R. 1950 S.C. 27, 101-03. It further held that so long as the statute set forth a procedure of how people like Gopalan should be treated, then the Court would defer to the legislature. *Id.* at 103.

139. A.I.R. 1950 S.C. 27, 34. INDIA CONST. art. 31(1).

140. A.I.R. 1978 S.C. 597.

141. *Id.* at 604-05.

142. *Id.* at 604. See INDIA CONST., art. 19. Section 1 of Article 19 states: "All citizens shall have the right (a) to freedom of speech and expression; (b) to assemble peaceably and without arms; (c) to form associations or unions; (d) to move freely throughout the territory of India; (e) to reside and settle in any part of the territory of India . . . [and] (g) to practise any profession, or to carry on any occupation, trade or business." *Id.* § 1. Sections 2 to 6 provide qualifications and caveats to this article. See *id.* §§ 2-6.

143. *Maneka Gandhi v. Union of India*, A.I.R. 1978 S.C. 597.

Section 4 of POTA does not come close to satisfying the *Maneka Gandhi* requirements. Under section 4 there is no right to be heard, no opportunity for the accused to make his or her case, nor any requirement for a deliberate judicial proceeding. Once the state has charged a person under section 4, guilt attaches.¹⁴⁴ Unfortunately section 4 is not the only portion of POTA where there are due process concerns.

Section 30, subsection 1 gives the Special Court discretion to hold proceedings against the accused *in camera*.¹⁴⁵ The next two subsections of section 30 discuss how the identity of the government's witnesses may be kept from the accused, if the prosecution, in its motion to the Special Court, indicates that those testifying fear for their personal security.¹⁴⁶ As Amnesty International has argued, nowhere is there a "procedure to hear the accused on this issue. [Effectively] this denies the accused the rights adequately to prepare his or her defense, to obtain the necessary information to challenge the witness's reliability and to examine witnesses on the same terms as the prosecution . . ." ¹⁴⁷

The Supreme Court on several occasions has made it clear that a fundamental aspect of a fair trial includes the ability of the defendant to mount a vigorous defense that includes the right to challenge those making the accusations.¹⁴⁸ As Professor S.P. Sathe has argued, the right of a defendant to know the basis of his or her accuser's claims is inherent within the liberty and procedural guarantees of Article 21.¹⁴⁹ Denying the accused an opportunity to raise objections to the *in camera* or witness secrecy provisions also contravenes principles found in international protocols such as the International Covenant on Civil and Political Rights,¹⁵⁰ the Universal Declaration of Human Rights,¹⁵¹ the Body

144. POTA, 89 A.I.R. 2002 ACTS § 4.

145. POTA, 89 A.I.R. 2002 ACTS § 30(1). See also BRIEFING, *supra* note 60, at 12.

146. POTA, 89 A.I.R. 2002 ACTS §§ 30(2), (3). See also BRIEFING, *supra* note 60, at 13.

147. BRIEFING, *supra* note 60, at 13.

148. For a series of cases that highlight the importance that the Court has placed on the defendant's right to prepare a zealous legal defense, see: *Suk Das v. Union Territory of Arunachal Pradesh*, A.I.R. 1986 S.C. 991; *Khatri v. State of Bihar*, A.I.R. 1981 S.C. 928; *Hussainara Khatoon v. State of Bihar*, A.I.R. 1979 S.C. 1369, 1377; *Ranchod Mathur Wasawa v. State of Gujarat*, A.I.R. 1974 S.C. 1143.

149. See generally S.P. SATHE, *THE RIGHT TO KNOW* (1991).

150. See INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, art. 14 (1966), available at http://www.unhchr.ch/html/menu3/b/a_ccpr.htm (last visited Jan. 28, 2004). See also BRIEFING, *supra* note 60, at 13.

151. UNIVERSAL DECLARATION OF HUMAN RIGHTS, art. 9-11 (1948) available at <http://www.un.org/Overview/rights.html>. See also BRIEFING, *supra* note 60, at 13.

of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment,¹⁵² and the U.N.'s Declaration of Basic Principles of Justice for Victims of Crime Abuse and Power.¹⁵³

POTA's opponents fear that its Special Courts will serve as a rubberstamp for the executive branch, as the TADA Special Courts were accused of doing during the 1980s and 1990s.¹⁵⁴ There is also another problem with having such non-independent courts operate within this environment. Earlier I noted that police brutality is frequent in India. Physical beatings, sexual assault, and deprivation of basic human needs are documented atrocities that the police are commonly known to inflict on inmates.¹⁵⁵ If the authorities indeed are arresting potential terrorist suspects and the Special Courts are imprisoning these people based on pure allegation, then there is a good possibility that at least some of those in custody are being abused by the police. Gaining information on the status of these detainees and the government's overall implementation of the anti-terrorist legislation has not been easy. However, some data have come to light. The next section will explore how the government has used POTA in its war on terrorism, and how the courts have adjudicated various POTA-based prosecutions over the past two years.

IV. Government Use and Court Adjudication of POTA

A. *Review Committees and POTA's Judicial Statistics*

In the United States, there has been a recent debate concerning the best way to enforce the PATRIOT Act. Some have argued that because the problems that the PATRIOT Act attempts to address are so pervasive, law enforcement authorities at all levels of government should be working to accomplish the statute's goals.¹⁵⁶ This position inevitably raises Tenth Amendment and

152. See generally BODY OF PRINCIPLES FOR THE PROTECTION OF ALL PERSONS UNDER ANY FORM OF DETENTION OR IMPRISONMENT (1988), available at <http://www.nchre.org/readingroom/undocuments/bpi1.shtml>. See also BRIEFING, *supra* note 60, at 13.

153. See generally DECLARATION OF BASIC PRINCIPLES OF JUSTICE FOR VICTIMS OF CRIME ABUSE AND POWER (1985), available at <http://www1.umn.edu/humanrts/instree/i9dbpjv.htm>; BRIEFING, *supra* note 60.

154. See Gautam Navlakha, *POTA: Freedom to Terrorise*, ECON. & POL. WKLY., July 19, 2002, at 3039. See also *Hard Law*, *supra* note 14, at 1066.

155. See *supra* notes 86, 93 and accompanying text.

156. See Marc Rotenberg, *Privacy and Secrecy after September 11*, 86 MINN. L. REV. 1115, 1118-19 (2002) (citing Federal-Local Information Sharing Partnership Act of 2001, S. 1615, 107th Cong. (2001)). See also Sameer M. Ashar, *Immigration Enforcement and Subordination: The Consequences of Racial Profiling after*

federalism concerns. Since immigration policy and immigration enforcement in the United States have fallen traditionally within the scope of the federal government, opponents contend that federal authorities should be exclusively responsible for administering the PATRIOT Act.¹⁵⁷ Any attempt by the federal government to deputize state and local police in order to enforce this new law infringes upon state sovereignty, and drains state resources that could be used for other purposes.¹⁵⁸

India, too, is a federalist system, but because of the historic strength of its central government, there is a presumption that police within the various states will enforce POTA.¹⁵⁹ State police routinely carry out other types of laws passed by the central government, particularly in the criminal law area, where there has long been a national penal code that governs the entire country.¹⁶⁰ Indian states are also expected to contribute to law enforcement efforts because resources are scarce.¹⁶¹ The problem, however, is the persistent distrust of state police officers. With local law enforcement continuing to play a key role in executing POTA, there is a question as to how legitimately the statute will be perceived, especially by minority groups.¹⁶²

In terms of administering POTA, defendants' rights are supposed to be protected by a national review committee in charge

September 11, 34 CONN. L. REV. 1185, 1199 n.66 (2002).

157. Ashar, *supra* note 156, at 1197. For an insightful study examining this issue, see Huyen Pham, *The Inherent Flaws in the Inherent Authority Position: Why Inviting Local Enforcement of Immigration Laws Violates the Constitution* (forthcoming FLA. ST. L. REV.); see generally THOMAS ALEXANDER ALEINIKOFF ET AL., IMMIGRATION AND CITIZENSHIP: POLICY AND PROCESS (5th ed., 2003).

158. See ALEINIKOFF ET AL., *supra* note 157, at 177-89.

159. See generally K.L. BHATIA, FEDERALISM AND FRICTIONS IN CENTRE-STATE RELATIONS: A COMPARATIVE REVIEW OF INDIAN AND GERMAN CONSTITUTIONS (2001); K.D. GAUR, CRIMINAL LAW AND CRIMINOLOGY (2002); O.P. TIWARI, FEDERALISM AND CENTRE-STATE RELATIONS IN INDIA: TOWARDS A NEW ERA OF MUTUAL COOPERATION (1996).

160. See sources cited *supra* note 159.

161. See sources cited *supra* note 159. As in the United States, state legislatures in India can tighten the standards set forth by the central government, as long as no conflict arises between the state's statute and the central government's statute. See, e.g., P.D. SHARMA, CRIMINAL JUSTICE ADMINISTRATION: THE RELAY RACE FOR CRIMINAL JUSTICE 56-57 (1998) (noting, however, that state legislation generally doesn't depart much from the parameters set by the central government).

162. See J. Venkatesan, *POTA Ordinance Empowers Review Committees*, HINDU, Oct. 28, 2003, available at <http://www.thehindu.com/2003/10/29/stories/2003102908090100.htm> (quoting renowned civil rights lawyer Fali Nariman, who states that "[t]he problem lies with the States. Therefore don't give them the power of arrest under POTA. . . . [T]errorism is a Central [government] subject and not a mere law and order problem").

of overseeing enforcement and adjudication of POTA cases.¹⁶³ Each state also maintains its own review committee, which does the bulk of the day-to-day oversight work; each of these state committees answers to the national committee.¹⁶⁴ On October 28, 2003, amendments were added to POTA in order to give the national and state committees greater teeth¹⁶⁵ in performing their mission. State committees now have the power to decide whether the police have a *prima facie* case against a detainee before the matter can even go before a Special Court.¹⁶⁶ The amendments give the national review committee the additional power of reviewing and reversing state committee decisions.¹⁶⁷

Yet there is a question as to what type of *real* access accused individuals have to this review committee process. The amendments state that any action by the review committee, whether at the state or national level, will only be triggered upon "an application by any aggrieved person."¹⁶⁸ This presumes that someone arrested under POTA knows about this requirement. Because detainees have limited access to legal representation,¹⁶⁹ many will never learn of the review process option during the police interrogation phase of the investigation.

The data compiled by the central government's review committee reveals that since March 2002, 1,600 arrest warrants have been issued for people under POTA.¹⁷⁰ Of the 1,600, 514 people are currently detained in jail while 885 remain at large.¹⁷¹ (It is unclear as to the status of the remaining 261 persons.¹⁷²) To date, the government reports that only 39 people have pursued complaints¹⁷³ through the review committee process.¹⁷⁴ Because "complaint" is not defined, it is impossible to tell from this information if pursuing a complaint means that the accused is

163. POTA, 89 A.I.R. 2002 ACTS § 60.

164. *Id.*

165. See Venkatesan, *supra* note 162.

166. POTA, 89 A.I.R. 2002 ACTS § 60(4).

167. POTA, 89 A.I.R. 2002 ACTS, §§ 60(5), (6).

168. POTA, 89 A.I.R. 2002 ACTS, § 60 (4).

169. See *supra* note 86 and accompanying text.

170. See J. Venkatesan, *No POTA Application in 15 States, 6 UTs*, HINDU, Oct. 1, 2003, <http://www.thehindu.com/2003/10/02/stories/2003100204331100.htm> [hereinafter *No POTA*].

171. *Id.*

172. *Id.* (providing no explanation for this missing data).

173. *Id.*

174. *Id.* (noting that "the maximum number of complaints to the Central Review Committee is from Tamil Nadu (23); Delhi (5); Maharashtra (6); Uttar Pradesh (3); and Jharkhand (2)").

inquiring whether the government has made its *prima facie* case, or whether it means that the accused has filed an independent complaint against the government for some other reason. Assuming it is the former, the fact that only 39 out of 514 detainees (7%) are making use of the 2003 amendments, seems to undercut the government's repeated claim that POTA contains safeguards to ensure that a defendant's rights are protected.

POTA arrests have also been spread unevenly through India. The 1,600 arrest warrants have been filed in only ten of India's twenty-nine states and six union territories.¹⁷⁵ Why the police have not pursued POTA charges in the majority of the states is an open question. Perhaps there have been no suspected terrorists in these states. Or, the police may have insufficient evidence for an arrest. Alternatively, it may be that in other states the leadership and/or the police have strategically avoided making POTA an issue for political reasons. These speculations require empirical verification. But the next section will demonstrate that, with respect to the last point, when the government has opted to bring POTA charges against an individual, many people inevitably assume that politics has played a major role in this decision.

B. Prosecuting POTA Cases—Questionable Political Motivations

At the time of this writing, the Indian government reports that 301 POTA cases are currently being pursued in the various Special Courts throughout the country.¹⁷⁶ But given the secret manner under which most people are arrested, questioned, detained, and tried, it has been difficult to collect information on the exact nature of the cases being brought by the government. However, through some matters involving prominent defendants, we have learned that the government's actions leave much to be desired. For instance, in the southern state of Tamil Nadu, a political enemy of the Chief Minister¹⁷⁷ and head of a major opposition party known as the MDMK,¹⁷⁸ is currently being prosecuted under POTA. The accused, Mr. Vaiko, is charged with violating section 21, which prohibits the promotion of any terrorist

175. *See id.* (noting that the states in which arrest warrants have been filed are Andra Pradesh, Delhi, Gujarat, Himachal Pradesh, Jammu and Kashmir, Jharkhand, Maharashtra, Sikkim, Tamil Nadu, and Uttar Pradesh). *See* CENSUS OF INDIA, at <http://www.censusindia.net> (last visited Jan. 30, 2004).

176. *See No POTA*, *supra* note 170.

177. The current Chief Minister of Tamil Nadu is Mrs. Selvi J. Jayalalitha, who is the head of the AIADMK (All India Anna Dravida Munnetra Kazhagam).

178. MDMK stands for Marumalarchi Dravida Munnetra Kazhagam.

group explicitly banned by the statute.¹⁷⁹ According to the state government, on June 29, 2002, Vaiko gave a speech in which he allegedly stated, "I was, I am, and I will continue to be a supporter of the LTTE [Liberation Tigers of Tamil Eelam]."¹⁸⁰ Vaiko is also believed to have associated with individuals alleged to be LTTE sympathizers.¹⁸¹ The Indian government has categorized the LTTE as a terrorist group because this organization was behind the 1991 assassination of Prime Minister Rajiv Gandhi.¹⁸² In addition, the LTTE has engaged in a twenty-plus year civil war against the Sinhalese-Buddhist government of Sri Lanka, a government that from time to time has received financial and military support from the Indians.¹⁸³

For over a year, Vaiko languished in prison waiting for his case to move forward.¹⁸⁴ Eventually, in February 2004, he was released on bail, but his case is still pending.¹⁸⁵ There is the possibility that Vaiko indeed conspired with this outlawed organization for terrorist purposes, but it is difficult to believe that politics have played no role in the arrest. As already stated, the rivalry between Vaiko's party and the Tamil Nadu government has a bitter history.¹⁸⁶ Furthermore, until he was formally charged, Vaiko sat as a member of the lower house of the national Parliament (the Lok Sabha). Although he and his party initially supported the BJP's position regarding POTA,¹⁸⁷ Vaiko began speaking out against POTA after it became law.¹⁸⁸ Since his

179. *Vaiko Episode Shows POTA is a Political Weapon*, MILLI GAZETTE, July 15, 2002, <http://www.milligazette.com/Archives/15072002/1507200235.htm> [hereinafter *Vaiko Episode*].

180. *Id.*

181. See V. Venkatesan, *POTA and Some Dilemmas*, FRONTLINE, Aug. 3-16, 2002, at 28.

182. Under POTA the LTTE is listed as the twenty-first banned group in the section entitled "Schedule." For a discussion of Rajiv Gandhi and his assassination, see generally SUNIL KHILNANI, *THE IDEA OF INDIA* (1997); VED MEHTA, *RAJIV GANDHI AND RAMA'S KINGDOM* (1994); SHASHI AHLUWALIA & MEENAKSHI AHLUWALIA, *ASSASSINATION OF RAJIV GANDHI* (1991).

183. For a discussion Sri Lankan civil war, see generally ROBERT ROTBERG, *CREATING PEACE IN SRI LANKA: CIVIL WAR AND RECONCILIATION* (1999).

184. See Jayaraj Sivan, *After 16 Months in Prison, Vaiko Rues the Day He Supported POTA*, INDIAN EXPRESS, Nov. 5, 2003, http://www.indianexpress.com/full_story.php?content_id=34729.

185. Rediff News Serv., *TN Govt Challenges Vaiko's Bail*, Feb. 9, 2004, at <http://www.rediff.com/news/2004/feb/09vaiko.htm>.

186. For an insightful discussion of Tamil Nadu politics, see NARENDRA SUBRAMANIAN, *ETHNICITY & POPULIST MOBILIZATION: POLITICAL PARTIES, CITIZENS, & DEMOCRACY IN SOUTH INDIA* 82-129 (1999).

187. See *supra* notes 34-46 and accompanying text.

188. See *supra* notes 34-46 and accompanying text. See also Venkatesan, *supra*

arrest, the BJP has maintained a conspicuous distance from Vaiko's case, contending that it is an internal state matter for the Tamil Nadu police to handle.¹⁸⁹ Neither the prosecution nor the state police has disclosed any link between Vaiko's supposed comments and his ties to the terrorist underworld. Authorities have also repeatedly failed to answer why Vaiko's actions are not protected under the Constitution's guarantees of freedom of speech and freedom of association.¹⁹⁰ In April 2003, Vaiko petitioned the Supreme Court to declare section 21 of POTA as unconstitutional on these grounds. In December 2003, a two-judge panel of the Court refused to grant his release and upheld the validity of section 21, but it did rule that Special Courts could not find an individual guilty of violating this section for expressing "moral support" alone for a terrorist group.¹⁹¹

Thus, the strategy of seeking relief from a higher court may have some limited merit. In another recent high profile POTA case, four alleged Muslim extremists were accused of plotting the December 2001 attack on Parliament. In a startling decision, the Delhi High Court reversed the Special Court convictions of two of

note 181, at 28.

189. See *Vaiko Episode*, *supra* note 179.

190. See INDIA CONST. art. 19.

191. Although the court did hold that if the prosecution could prove that there was "intent" to support the LTTE, then Vaiko could be found guilty. *PUCI v. Union of India*, Writ Petition (C) No. 389 of 2002 with W.P. (Crl.) 89 and 129/2002 and 28 and 48/2003. See also *POTA is Constitutional Rules SC*, Dec. 16, 2003, at <http://www.indlawnews.com/News/Archive/ViewNewsDetail.asp?result=d724f9708804a62eedc9c2786d15b4e4.xml>. See also Bhatnagar, *supra* note 92. For nearly three decades the Indian Supreme Court has allowed claimants directly to petition it in matters where the central government is accused of infringing upon the fundamental rights of the Constitution. The Court has allowed such petitions under Article 32 of the Constitution. For relevant case law, see *S.P. Gupta v. Union of India*, A.I.R. 1982 S.C. 149; *D.C. Wadhwa v. State of Bihar*, A.I.R. 1987 S.C. 579; *Ratlam Municipal Council v. Vardhichand*, A.I.R. 1980 S.C. 1622; *Fertilizer Corporation v. Union of India*, A.I.R. 1981 S.C. 344; *People's Union for Democratic Rights v. Union of India* A.I.R. 1982 S.C. 1473. The Court also has held that Articles 226/227 and 32 of the Constitution prevent legislative attempts to limit the jurisdiction of the High Courts and the Supreme Court. *L. Chandra Kumar v. Union of India*, (1997) 3 SCC 261, 311. The Court also held that Article 226 of the Constitution gives any claimant the opportunity to file suit on behalf of the public in a state supreme, or High Court, when there is a state violation of a fundamental right or a right guaranteed by statute. See *id.* at 302. See *T.C. Basappa v. T. Nagappa* A.I.R. 1954 S.C. 440, 443, 447 (describing in dicta the general parameters of the High Courts' and Supreme Court's authority to issue writs of certiorari, but ultimately holding that the writ in the case at bar had been improperly issued by the High Court). See *PUCI Urges Supreme Court to Quash POTA*, TIMES OF INDIA, Apr. 03, 2003, <http://www.pucil.org/Topics/Law/2003/poto-sc-pucil.htm>. See also *POTA Court Denies Bail to 8 MDMK Partymen*, TAJA NEWS, Sept. 11, 2003, <http://www.tajanews.com/noqnews/nnqview.php?ArtID=2214>.

the main accused perpetrators.¹⁹² Shortly after the Parliament attack, the police arrested Shaukat Hussain Guru and Mohammad Afzal, two men accused of belonging to the banned terrorist group Jaish-e-Mohammed.¹⁹³ According to police, both men implicated two other individuals as being integral conspirators in the Parliament attack—S.A.R. Geelani, a lecturer at Delhi University, and Afsan Guru, the wife of Shaukat Hussain Guru.¹⁹⁴ A Special Court in Delhi hearing the case found the three men guilty of violating section 3, subdivision 2 of POTA as well as the Indian Penal Code's murder statute, section 302, and sentenced them to death.¹⁹⁵ The court also ruled that Afsan Guru was guilty of concealing knowledge of the conspiracy and sentenced her to five years in prison and a fine of 10,000 rupees.¹⁹⁶

All four defendants appealed their cases to the Delhi High Court. The Delhi Court sustained the verdicts against Shaukat Hussain Guru and Mohammad Afzal, although in January 2004, the Supreme Court issued a temporary stay of the execution orders until it could more fully review the matter.¹⁹⁷ The convictions of Professor Geelani and Afsan Guru, however, were thrown out by the Delhi Court.¹⁹⁸ The Delhi Police have since petitioned the Supreme Court, challenging the acquittals,¹⁹⁹ and the Supreme Court will be reviewing the Delhi Court's dismissal of these two cases in 2004.²⁰⁰ In its reversal, the Delhi Court ruled that the statements of the two co-defendants to the police implicating Geelani and Afsan Guru should not have been used as

192. Siddharth Narrain, *Reversing a Verdict*, FRONTLINE, Nov. 8-21, 2003, available at <http://www.flonnet.com/fl2023/stories/20031121005002000.htm>.

193. *Id.* See also *Geelani Made a Scapegoat: Amnesty International*, MILLI GAZETTE, Sept. 12, 2002, at <http://www.milligazette.com/Archives/15092002/1509200261.htm>.

194. Narrain, *supra* note 192.

195. POTA, 89 A.I.R. 2002 ACTS § 3(2) (describing the punishment for committing a terrorist act); INDIAN PEN. CODE § 302. Because the special courts are held *in camera*, no evidence is available as to how the defendants were deemed to have violated section 3, subd. 2 of POTA.

196. *State v. Mohd. Afzal and Others*, Murder Reference No. 1/2003; Crl. A. No. 43/2003; Along with Crl. A. Nos. 59 and 80/2003; Along with Crl. A. Nos. 12, 19 and 36/2003. See also Narrain, *supra* note 192; *Geelani Made a Scapegoat*, *supra* note 193.

197. See *SC Stays Death Penalty on Shaukat, Afzal*, TIMES OF INDIA, Jan. 19, 2004, at <http://timesofindia.indiatimes.com/articleshow/432433.cms> [hereinafter *SC Stays Death Penalty*].

198. *State v. Mohd. Afzal and Others*, Murder Reference No. 1/2003.

199. *Geelani, Guru's Acquittal Challenged in SC*, TIMES OF INDIA, Dec. 14, 2003, at <http://timesofindia.indiatimes.com/articleshow/357229.cms>.

200. *SC Stays Death Penalty*, *supra* note 197.

evidence at trial.²⁰¹ Even though section 32 of POTA allows the government to present at trial the confessions made by an accused to the police,²⁰² the High Court followed the long-standing principle of Indian evidence law that precludes the prosecution from using uncorroborated statements.²⁰³ For the court, the incriminating statements against Geelani and Afsan Guru were self-serving and did not provide "cogent" proof that Geelani and Afsan participated in the conspiracy.²⁰⁴ The Delhi High Court also opted to scrutinize other evidence presented at trial, in particular the police recording of a phone conversation between Geelani and his half-brother that supposedly included Geelani praising the Muslim assault on Parliament.²⁰⁵ The court found no proof for this and went on to conclude that neither Geelani nor Afsan Guru showed any indication of having involvement in the December 2001 plot.²⁰⁶

The Delhi High Court's decision highlights that in at least one type of case the judiciary will not grant *per se* deference to the government in POTA cases. But the state has vowed to appeal the decision to the Supreme Court. If precedent is any indication, this may be a very wise move, for the reason that the Supreme Court has tended to show great deference to the procedures contained within POTA in the few cases that have come before it. In addition to its December 2003 Vaiko ruling, the Court held in September 2003 that before a defendant charged under POTA could ask for bail from the upper courts, his motion needed to be adjudicated in a POTA Special Court.²⁰⁷ In this case, four Muslims had been arrested under POTA for starting the 2002 Hindu-Muslim riots in the state of Gujarat that left thousands of people (the vast majority of whom were Muslims) displaced, brutalized, or dead.²⁰⁸ Before a Special Court could be convened,

201. *State v. Mohd. Afzal and Others*, Murder Reference No. 1/2003.

202. *Id.*

203. *Id.* See also BRIEFING, *supra* note 60, at 12.

204. *State v. Mohd. Afzal and Others*, Murder Reference No. 1/2003.

205. *Id.*

206. *Id.* The issue regarding the tapping of the phone conversation made its way up to the Supreme Court as a separate interlocutory appeal. The Court ruled that indeed the phone conversation could be considered as evidence, evaluated by the Special Court. The Court then remanded the matter, and while the Special Court considered it as adverse evidence against the defendants, the Delhi High Court reversed. See *State v. Navjot Sandhu, Afsan Guru and Others*, 2003 2 L.R.I. 690, ¶ 33.

207. *State of Gujarat v. Salimbhai Abdulgaffar Shaikh and Others*, 2003 Indlaw SC 708, ¶ 15.

208. There have been hundreds of news stories published on the riots. For a selected sample, see HUM. RTS. WATCH, COMPOUNDING INJUSTICE: THE

the defendants moved to be released on bail, but a regular criminal court denied their request.²⁰⁹ On appeal, the state High Court ruled that a bail motion could be entertained by the regular courts.²¹⁰ However, the Supreme Court rejected this argument, deferring to POTA's language that in these types of cases bail first must be considered by a Special Court.²¹¹

In another similar judgment, the Supreme Court reversed the Tamil Nadu High Court's ruling that bail should be granted to journalist R.R. Gopal, who was arrested in April 2003, for possessing terrorist weapons and other materials prohibited by POTA.²¹² As in the case of Mr. Vaiko,²¹³ Gopal contended that his arrest and prosecution were motivated by politics.²¹⁴ Gopal argued that because he published stories critical of and embarrassing to members of the Tamil Nadu government, the state retaliated against him.²¹⁵ In overturning the state High Court's ruling, the Supreme Court again deferred to POTA's provisions on bail: that when the prosecution opposes a bail request, a court may grant bail only when there has been an abuse of discretion on the part of the government.²¹⁶ In Gopal's case, the Supreme Court ruled that a *prima facie* case indeed existed, and that the state High Court should not have allowed its sympathy for the defendant's argument to cloud what was an obviously easy call to deny bail.²¹⁷ Deriding the state court justices for their lack of logic, the

GOVERNMENT'S FAILURE TO REDRESS MASSACRES IN GUJARAT, July 2003, <http://www.hrw.org/asia/india.php> (last visited Feb. 24, 2004); Rediff News Serv., The Gujarat Riots Homepage, at <http://www.rediff.com/news/godhra.htm> (last visited Feb. 24, 2004).

209. For a procedural history of this case see, Rediff News Serv., *Godhra: SC Reserves Verdict on Gujarat Appeal*, Sept. 1, 2003, at <http://www.rediff.com/news/2003/sep/01godhra.htm>; Legal Correspondent, *Bail Blow to Godhra Accused*, TELEGRAPH, Sept. 9, 2003, at http://www.telegraphindia.com/1030909/asp/nation/story_2347560.asp.

210. *Bail Blow to Godhra Accused*, TELEGRAPH, Sept. 9, 2003, at http://www.telegraphindia.com/1030909/asp/nation/story_2347560.asp.

211. See *State of Gujarat v. Salimbhai Abdulgaffar Shaikh and Others*, 2003 Indlaw SC 708, ¶ 15. The Court refers to POTA section 3, subdivisions 2 and 3, and section 34, subdivision 1 in its ruling. *Id.* at ¶ 4.

212. *State of Tamil Nadu v. R.R. Gopal Nakkeeran Gopal*, 2003 Indlaw SC 800, ¶¶ 7, 16-17.

213. See *supra* notes 184-189 and accompanying text.

214. For background on this case, see *Nakkeeran Editor Gopal's Bail Cancelled*, INDO-ASIAN NEWS SERV., Sept. 26, 2003, at <http://in.news.yahoo.com/030926/43/281qd.html>.

215. *Id.*

216. See *State of Tamil Nadu v. R.R. Gopal Nakkeeran Gopal*, 2003 Indlaw SC 800, ¶ 4. The Court cites section 4; section 49, subdivision 6; and section 49, subdivision 7 of POTA in its ruling. *Id.* at ¶¶ 4, 14.

217. *Id.* at ¶¶ 14-17.

Supreme Court concluded that the state "High Court does not seem to have applied its mind to this aspect at all."²¹⁸

Beyond the courts, another institution is also charged with monitoring the government's use of POTA. The National Human Rights Commission (NHRC) is a proclaimed independent governmental body established in 1993.²¹⁹ It is statutorily charged with ensuring that every individual's constitutional rights are protected by the Indian state.²²⁰ The NHRC is empowered to depose witnesses, conduct discovery, evaluate evidence, issue reports and recommendations, and ask the central government and the judiciary to enforce its opinions.²²¹ There are currently eight positions on the NHRC: four Members, three Ex-officio Members, and a Chairperson.²²² The NHRC is chaired by former Chief Justice of the Indian Supreme Court, A.S. Anand.²²³

The NHRC has, at times, criticized the central government and various state governments for not doing more to protect human rights.²²⁴ Perhaps the most well-known report from the NHRC involves the above-mentioned 2002 Gujarat riots.²²⁵ In the months after the riots, the state and central governments launched investigations; the NHRC conducted its own investigation, as did numerous domestic and international non-governmental associations.²²⁶ In its report, the NHRC noted that the police had not adequately protected Muslim communities that came under attack.²²⁷ It also noted that political leaders and the media contributed to the problems by politicizing the riots and fanning religious tensions.²²⁸ And when several Hindus accused of

218. *Id.* at ¶ 16.

219. The NHRC was established by Parliament through the Protection of Human Rights Act (PHRA) of 1993, 81 A.I.R. 1994 ACTS.

220. *Id.*

221. *Id.* at ch. 3.

222. *Id.* at ch. 2.

223. See NHRC's official website, at <http://www.nhrc.nic.in> (last visited Feb. 24, 2004).

224. *Id.*

225. NAT'L HUM. RTS. COMM'N, REPORT ON THE VISIT OF NHRC TEAM HEADED BY CHAIRPERSON, NHRC TO AHMEDABAD, VADODRA AND GODHRA FROM 19-22 MARCH 2002, Mar. 31, 2002, http://nhrc.nic.in/guj_annex_1.htm [hereinafter NHRC REPORT].

226. See, e.g., *id.* Some of the NGO's that have done in-depth investigations on the riots include, Amnesty International, Human Rights Watch, the People's Union for Civil Liberties, to name a few.

227. See NHRC REPORT, *supra* note 225. See also J. Venkatesan, *NHRC Chief Deplores Tardy Relief to Gujarat Riot Victims*, HINDU, Jan. 10, 2003, <http://www.hinduonnet.com/thehindu/2003/01/10/stories/2003011004671100.htm>.

228. See NHRC REPORT, *supra* note 225. See also HUM. RTS. WATCH, *supra* note

murdering a group of Muslims at the Best Bakery Shop were acquitted after key eyewitnesses during the trial recanted what they originally said they saw;²²⁹ the NHRC intervened and asked the Supreme Court to investigate whether the defendants should be re-tried outside of Gujarat and whether those charged had intimidated the witnesses.²³⁰ The investigation is still pending.²³¹

Even though the NHRC claims to be an autonomous institution, it is still a governmental body that operates with a ruling Hindu-nationalist party in the background. After the riots, Gujarat police arrested hundreds of Muslims and charged them with violating POTA.²³² Most of these individuals remain in custody, while according to Human Rights Watch, not one Hindu has been charged under POTA.²³³ Interestingly, the current NHRC Chairman has commented that while POTA has some defects, it still is a much better statute than its predecessor (TADA). He claims that it has not been misused for political purposes, at least during his tenure.²³⁴ In July 2003, I interviewed an official from the NHRC hoping to learn more about what the Commission was doing to protect the rights of Muslims in Gujarat.²³⁵ I specifically wondered why neither the state nor the central government had used POTA to charge the thousands of Hindus believed to have participated in the 2002 massacres. Also, why had the NHRC not taken note of this disparity? Was this not

208.

229. See Rediff News Serv., *Gujarat Riots: All 21 Accused in Vadodara's Best Bakery Carnage Acquitted*, June 27, 2003, at <http://www.rediff.com/news/2003/jun/27guj.htm>.

230. See Rediff News Serv., *NHRC Pans Best Bakery Acquittals*, July 2, 2003, at <http://www.rediff.com/news/2003/jul/02guj.htm>.

231. Indlaw News Serv., *Trial Court Proceedings In Gujarat Riot Cases Stayed*, Nov. 21, 2003, at www.scjudgments.com. Although note, in April 2004 the Supreme Court ruled that the accused be re-tried outside of Gujarat in the state of Maharashtra. See *Gov't to abide by SC Order in Best Bakery Case*, TIMES OF INDIA, Apr. 14, 2004, <http://www1.timesofindia.indiatimes.com/articleshow/616706.cms>. Whether this change of venue will make a substantive difference in how justice is administered remains to be seen.

232. See HUM. RTS. WATCH, *supra* note 208.

233. *Id.* See also Special Correspondent, *Illegal Detention of Muslims in Gujarat: Amnesty, HINDU*, Nov. 7, 2003, <http://www.hindu.com/thehindu/2003/11/07/stories/2003110702351200.htm>.

234. See Rediff News Serv., *More Safeguards Needed in Anti-Terror Law*, Feb. 22, 2003, at <http://www.rediff.com/news/2003/feb/22nhrc.htm> (noting that during a news conference Anand "denied that the act was being misused for political reasons").

235. Interview with NHRC official who asked to remain anonymous, July 29, 2003 (on file with the author) (interview done as part of a mission for Minnesota Advocates for Human Rights, an NGO investigating the Gujarat riots) [Hereinafter Interview with NHRC official].

disparate treatment of a minority community by both the Gujarat and central government and thus a direct violation of the Constitution's Equal Protection Clause?²³⁶ The official stated that it would not be possible to comment on my questions at this time and recommended that I review the NHRC's website and publications if I wished to pursue this matter.²³⁷

This NHRC official may have had valid reasons for refusing to provide answers to these queries. But for those who look to the NHRC to protect the rights of minorities and the disadvantaged, this silence is worrisome. Even the moderately conservative national newspaper, *The Hindu*, has suggested that the NHRC's lack of condemnation for how POTA has been discriminately used in Gujarat places this body's legitimacy into question.²³⁸ As a recent editorial notes, although the NHRC opposed POTO when it was a bill in Parliament, the NHRC has done little to prevent the politicization of POTA since it has become law. Instead it has passed the responsibility over to the Supreme Court to decide on the legality of governmental action under the statute.²³⁹

Both the NHRC and the Supreme Court will soon be dealing with more POTA cases. It is difficult to predict how either institution will respond to future charges that a state or the central government is abusing its powers under this law. If the actions exhibited thus far by the NHRC and the Court provide even the slightest clue, then POTA will remain an important governmental weapon in the fight against terrorism for many years to come.

Concluding Remarks

India passed the Prevention of Terrorism Act in the months following the December 2001 attack on the Indian Parliament, but the influence of its legislative precedent can be seen in various provisions of the current law. POTA's comprehensive measures enhance both the states' and central government's police powers to deal with real and perceived threats of terrorism. The question posed in this piece is to what extent have civil liberties been compromised as a result of the central government's desire to

236. INDIA CONST. art. 14.

237. Interview with NHRC official, *supra* note 235.

238. Editorial, *On the Ground in Gujarat*, HINDU, Oct. 26, 2003, available at <http://www.hindu.com/2003/10/26/stories/2003102600081400.htm>.

239. *Id.* For a discussion on the NHRC's stance on POTA, see Rajeev Dhavan, *Sugarcoating POTA*, HINDU, Oct. 31, 2003, available at <http://www.hindu.com/2003/10/31/stories/2003103100841000.htm>.

protect the nation from terrorist attacks.

In evaluating the different aspects of POTA, I have explained how various individual rights have been curtailed since the passage of this law. Because of the broad manner in which it is written, POTA has been (and no doubt will continue to be) challenged on a number of constitutional grounds. For instance, the statute infringes upon the individual's constitutional rights to freedom of expression and freedom of association.²⁴⁰ POTA also obstructs detainees from proper legal representation, the right to confront accusers, the right to a fair bail hearing, and the right to have an open, publicly scrutinized trial.²⁴¹ Furthermore, POTA's creation of Special Courts to adjudicate terrorist prosecutions,²⁴² and the law's irrebuttable presumptions of guilt for certain statutory violations,²⁴³ place into real question the government's claim that it is concerned for individual rights.

Even in the present politically tense environment, there is some hope that other institutions will serve as checks on how a state or the central government administers POTA. However, the two bodies that carry legitimacy among the public, the NHRC and the Supreme Court, have not yet directly challenged how POTA has been used. In addition, in April 2003, a separate and supposedly independent (albeit government-established) commission studying the criminal justice system released a two-volume report that endorsed the current ruling party's anti-terrorism policies.²⁴⁴ This report not only criticized the numerous advantages historically possessed by defendants in criminal trials, but it also recommended that Parliament incorporate into the Indian Penal Code the above-discussed provisions of POTA.²⁴⁵

240. See *supra* notes 56-79 and accompanying text.

241. See *supra* notes 145-153 and accompanying text.

242. See *supra* notes 105-144 and accompanying text.

243. See *supra* note 132 and accompanying text.

244. Justice V.S. Malimath, a former chief justice of the Karnataka and Kerala state High Courts, authored the report and chaired what has become known as the Malimath Commission. The Commission was made up of six members. See AMNESTY INT'L, INDIA: REPORT OF THE MALIMATH COMMITTEE ON REFORMS OF THE CRIMINAL JUSTICE SYSTEM: SOME OBSERVATIONS (2003), available at <http://web.amnesty.org/library/Index/ENGASA200252003?open&of=ENG-IND> (last visited Feb. 24, 2004).

245. *Id.* at Part I. POTA is currently set to expire in October 2004. *Id.* For this reason, the Commission has stated that rather than having to re-enact the legislation every so many years, it would be best if Parliament simply incorporated POTA into the ordinary criminal law. *Id.* Among some of the 158 recommendations made by the Malimath Commission are: that the police be given wider latitude in interrogating witnesses; that establishing proof beyond a reasonable doubt be lowered to a less "unreasonable" standard; and that a

Opposition political parties, most notably the Congress Party, have been very critical of POTA, accusing the BJP government of using this law to crush dissenting opinion. Yet one wonders whether the Congress Party would have acted any differently if it had been in power during the December 2001 attacks on Parliament. After all, it was the Congress Party that pushed for passage of the draconian TADA following the assassination of Congress Prime Minister Indira Gandhi in 1984.²⁴⁶ Perhaps the only hope is for grassroots non-governmental organizations to continue pressing for respect for individual rights. Until those in power who are using POTA offer a stronger defense for their anti-terrorist actions, bottom-up pressure may be the best chance for promoting and ensuring governmental accountability in the world's largest democracy.

defendant's right against self-incrimination be viewed adversely by the court. *Id.* The introduction of the report, written by Professor Upendra Baxi is very critical of the Malimath Commission's final recommendations. *Id.* at Foreword. Also critical have been various lawyers, non-governmental associations, and opposition political parties.

246. See Shunmugasundaram, *supra* note 13. After Mrs. Gandhi's assassination, thousands of Sikhs were murdered in the streets of Delhi, while the Congress Party in power did little to quell the rampage. Some members of Congress were even active participants in leading the riots. To this day, not one Congress party official has been held accountable for even one Sikh death. Many writers have documented this tragedy. See, e.g., Naunidhi Kaur, *Acquittal of a Politician*, FRONTLINE, Jan. 18-31, 2003, available at <http://www.frontlineonnet.com/fl2001/stories/20030117004312000.htm>; Naunidhi Kaur, *Waiting for Justice*, FRONTLINE, Sept. 1-14, 2001, available at <http://www.frontlineonnet.com/fl1818/18180340.htm>. See also, CHRISTOPHER SHACKLE ET AL., SIKH RELIGION, CULTURE AND ETHNICITY 188-98 (1998).