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# DEFENDING THE LAND OF THE FREE AND THE HOME OF THE FEARFUL: THE USE OF CLASSIFIED INFORMATION TO DEPORT SUSPECTED TERRORISTS

Dave Martella\*

## INTRODUCTION

The dismantling of the Iron Curtain and the resignation of the Soviet Union as the wellspring of communism is forcing the United States to reevaluate its arsenal of democracy. One weapon in its inventory which is quickly falling into obsolescence is the ideological exclusion and deportation of alien persons.<sup>1</sup> Recently, Congress began chipping away at the fortifications of the Cold War by repealing part of a 1952 law which denied visas on the basis of the political beliefs or associations of aliens wishing to visit the United States.<sup>2</sup> The courts also now demand a greater showing by the government that an alien poses a threat to national security<sup>3</sup> before that alien can be excluded or deported.<sup>4</sup>

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1. See David Cole, *The 1952 McCarran-Walter Act: Is it Irrelevant in Today's World?*, NAT'L L.J., May 29, 1989, at 22 (hereinafter *The 1952 McCarran-Walter Act*) (discussing proposed amendments to the Immigration and Nationality Act of 1952). The term "alien" itself may be an anachronism. Professor Schuck finds that the term "alien" may reflect American society's hostile perception of foreign persons as strangers. Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 1 (1984). In continuing the fiction, the term "alien" is intended to mean foreign persons wishing to enter the country, or resident foreign persons who are not United States citizens.

2. Foreign Relations Authorization Act, Pub. L. No. 101-246, 104 Stat. 15 (1990). The Immigration and Nationality Act of 1952 still permits the ideological exclusion of aliens seeking permanent residency in the United States. Steven A. Holmes, *Legislation Eases Limits on Aliens*, N.Y. TIMES, Feb. 2, 1990, at A6. The Act also allows the government to exclude any alien suspected of engaging in terrorist activity or whose presence in the United States would adversely affect United States foreign policy. Pub. L. No. 101-649, § 601(a)(3)(B)-(C), 104 Stat. 4978, 5069-72 (amending 8 U.S.C. § 1182 (1988)).

3. SENATE COMM. ON THE JUDICIARY, THE CLASSIFIED INFORMATION PROCEDURES ACT, S. REP. NO. 823, 96th Cong., 2d Sess. 5 (1980). "National security" is defined as matters that relate to the national defense and foreign relations of the United States. *Id.*

4. See, e.g., *Rafeedie v. INS*, 880 F.2d 506 (D.C. Cir. 1989) (holding that provisions of the Immigration and Nationality Act of 1952 are unconstitutional because they exclude aliens on the basis of their political affiliations); *Abourezk v. Reagan*, 785 F.2d 1043 (D.C. Cir. 1986), *aff'd*, 484 U.S. 1 (1987) (per curiam) (holding that an alien may not be excluded for reasons merely arising from his or her affiliation with an organization).

Although traditional tools of ideological exclusion are fading with the dissolution of the communist threat, the United States is procuring updated methods of excluding political undesirables.<sup>5</sup> At the forefront of this campaign is the immigration restriction for terrorism.<sup>6</sup> Current laws and proposed legislation continue to grant the executive branch broad discretionary powers to prevent suspected terrorists from penetrating United States borders.<sup>7</sup> Critics warn that these laws, under the guise of preserving national security, are often used against those who merely dissent from United States foreign policy.<sup>8</sup>

The most recent fight against terrorism occurred in the summer of 1991 when the Bush Administration introduced legislation to provide deportation hearings for suspected terrorists in which neither the defendant-alien nor the public would be allowed to view the government's evidence.<sup>9</sup> The Administration argued that *in camera, ex parte* procedures are necessary to protect classified information used in ferreting out terrorists within the United States.<sup>10</sup> Although congressional leaders withdrew these removal provisions to ease passage of the Administration's crime package, the legislation represents the difficulty in combatting terrorism without encroaching upon individual freedoms.<sup>11</sup>

Part I of this Note examines domestic terrorist activities and the recent proposal to use *in camera, ex parte* hearings to deport resident

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5. See *infra* text accompanying notes 76-88 (examining the history of the United States legislation involving the exclusion of aliens based on ideological considerations).

6. See *The 1952 McCarran-Walter Act, supra* note 1, at 22 (arguing that use of "terrorist activity" and "foreign policy" as standards of immigration exclusion is subject to political manipulation by the administration in power). Cole warns, in his conclusion, that although Congress updates immigration law to confront modern-day concerns, definitions of terms such as "terrorism" must be sufficiently narrow to avoid a broad and arbitrary interpretation that serves as a means of ideological exclusion. *Id.*

7. See *infra* text accompanying notes 76-88 (discussing that, in the late 1970s, Congress enacted legislation to expand the exclusion and deportation of suspected terrorists).

8. David Cole, *Secret Tribunal*, THE NATION, May 6, 1991, at 581 (criticizing the recent Federal Bureau of Investigations (FBI) and Immigration and Naturalization Service (INS) investigations of Palestinian-born resident aliens accused of affiliating with terrorist organizations).

9. S. 635, 102d Cong., 1st Sess. Title VII, 137 CONG. REC. S3233 (daily ed. Mar. 13, 1991).

10. See *infra* note 46 (examining findings of the administration that many aliens, within the United States, are conducting terrorist operations).

11. See Helen Dewar, *Administration Drops Plan for Secret Trials of Aliens*, WASH. POST, June 21, 1991, at A4 (quoting Assistant Attorney General Lee Rawls who confirmed that the deportation provisions caused difficulties in the effort to pass other high priority crime provisions). Shortly after Republican leaders withdrew the deportation procedures, Senator Alan Simpson proposed amending the Democratic version of the Crime Bill with a version of the Terrorist Alien Removal Act similar to the original deportation measures. 137 CONG. REC. S9384 (daily ed. July 9, 1991) (proposed amendment to S. 1241). Senator Simpson, however, did not pursue the matter.

aliens suspected of engaging in terrorist activity.<sup>12</sup> Part II then argues that recent counterterrorism immigration policies are fast becoming the tools of ideological exclusion for the United States in the new world order.<sup>13</sup> Part III then examines whether the *in camera, ex parte* deportation procedures can be reconciled with the due process rights of resident aliens.<sup>14</sup> Finally, Part IV offers suggestions for future legislative efforts to protect America from politically motivated violence.<sup>15</sup>

## I. THE DOMESTIC CAMPAIGN AGAINST TERRORISM

### A. THE TERRORIST THREAT IN AMERICA

Most Americans' fear of terrorism stems from the violent and frequent attacks on those who venture beyond America's borders.<sup>16</sup> Almost one in four international terrorist incidents threatens American lives.<sup>17</sup> Several highly publicized attacks leave vivid images of the destructive ability of a few daring individuals including the 1983 destruction of the Marine barracks in Beirut which claimed 241 American lives,<sup>18</sup> the 1985 bombing of a West Berlin nightclub,<sup>19</sup> the 1985 hijacking of the Achille Lauro cruise ship resulting in the murder of a handicapped American tourist,<sup>20</sup> and the 1988 bombing of Pan Am

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12. See *infra* text accompanying notes 16-39 (assessing the magnitude of the terrorist threat within the United States).

13. See *infra* text accompanying notes 60-147 (reviewing the historical underpinnings of ideological exclusion policies).

14. See *infra* text accompanying notes 149-241 (examining the due process rights of resident aliens, and their rights to view classified information in a deportation hearing).

15. See *infra* text accompanying notes 242-65 (proposing ways to maintain an effective domestic counterterrorism program while limiting the occurrence of ideological deportations).

16. Cf. WAYMAN C. MULLINS, *TERRORIST ORGANIZATIONS IN THE UNITED STATES* 30-33 (1988) [hereinafter MULLINS] (examining terrorism's purpose of maximizing the use of fear to intimidate its intended audiences); WILLIAM R. FARRELL, *THE U.S. GOVERNMENT RESPONSE TO TERRORISM: IN SEARCH OF AN EFFECTIVE STRATEGY* ix (1982) [hereinafter FARRELL] (discussing how the public perceives and responds to terrorist attacks).

17. William S. Sessions, Director, Federal Bureau of Investigations, Address to the National Strategy Forum, Chicago, Illinois (Feb. 5, 1990), reprinted in *The FBI's Mission in Countering Terrorism*, 13 *TERRORISM* 1, 2 (1990) [hereinafter *The FBI's Mission*]. Of the 856 international terrorist incidents which occurred in 1988, 185 were directed at United States citizens. *Id.* In 1989, 165 of the 659 recorded terrorist attacks involved United States citizens. *Id.*

18. Philip Taubman, *Pentagon's Inquiry Blames Major Marine Commanders and Faulty Policy in Beirut*, N.Y. TIMES, Dec. 29, 1983, at A1.

19. *2 Killed, 155 Hurt in Bomb Explosion at Club in Berlin*, N.Y. TIMES, Apr. 6, 1986, at A1.

20. E.J. Dionne Jr., *Hostage's Death: 'A Shot to Forehead'*, N.Y. TIMES, Oct. 11, 1985, at A1.

flight 103 which killed 189 Americans returning from Europe for the winter holidays.<sup>21</sup>

The effect of terrorist attacks on their intended audience is considered more dangerous than the immediate physical loss.<sup>22</sup> The threat of terrorism greatly influences the willingness of Americans to travel abroad as business persons, diplomats, and tourists.<sup>23</sup> The public's perception of the government's ability to effectively respond to terrorism may even determine the political survivability of a particular administration.<sup>24</sup>

Not surprisingly, America took seriously Saddam Hussein's vow during the Persian Gulf War to unleash his terrorist forces against the United States.<sup>25</sup> From the United States Capitol to highly publicized sporting events, and at every major airport across the country, the United States was on full security alert.<sup>26</sup> More recently, the Middle East Peace Conference of 1991, hosted by the United States and the former Soviet Union, precipitated a new wave of terrorist violence by radical factions.<sup>27</sup> The United States, however, has yet to suffer a do-

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21. Jonathan C. Randal, *Service Mourns Flight 103 Victims*, WASH. POST, Jan. 5, 1989, at A20. A total of 270 people died in the explosion of a Pan Am jetliner. *Id.*

22. See MULLINS, *supra* note 16, at 33-36 (explaining that an element common to all definitions of terrorism is the motivation to affect the behavior of an audience larger than the terrorist's immediate victims).

23. See Agis Salpukas, *Air Travelers On Business Trickle Back*, N.Y. TIMES, Feb. 19, 1991, at D1 (discussing the fear of United States citizens to travel abroad during the Persian Gulf War); Cindy Skrzycki & Martha M. Hamilton, *Fear of Terrorism Causing Americas to Trim Travel*, WASH. POST, Jan. 24, 1991, at A1.

24. See Yonah Alexander, Remarks at the Symposium on the Legal Aspects of Terrorism, Washington, D.C., (Nov. 7, 1988), in *Legal Aspects of Terrorism*, 12 TERRORISM 297, 297 (1989) (alleging that President Carter's inability to resolve the Iran hostage crises through either diplomatic or military means substantially contributed to his defeat in the 1980 presidential election).

25. See Sharon LaFraniere & George Lardner, *U.S. Set to Photograph, Fingerprint All New Iraqi and Kuwaiti Visitors*, WASH. POST, Jan. 11, 1991, at A23; James Barron, *Confrontation in the Gulf: Security; U.S. Taking Steps to Curb Terrorism*, N.Y. TIMES, Jan. 16, 1991, at A15 (reporting on domestic efforts to guard against Iraqi led terrorist attacks). See also Brian Duffy & Louise Lief, *Saddam Hussein's Unholyest Allies*, U.S. NEWS & WORLD REP., Jan. 28, 1991, at 42, 42 (reporting on terrorists operating under Saddam Hussein's control, including Abul Abbas, who orchestrated the Achille Lauro hijacking, and Abu Nidal, who heads one of the most dangerous terrorist organizations in the world today).

26. See *Will America Be Held Hostage*, U.S. NEWS & WORLD REP., Jan. 28, 1991, at 10 (reporting on efforts to tighten security at important government, recreation, and infrastructure locations). See also Patricia A. Gilmartin & James T. McKenna, *U.S. Warns of Iraqi-led Terrorism As Carriers, Airports Tighten Security*, AVIATION WK. & SPACE TECH., Jan. 21, 1991, at 64 (describing airport security measures taken during the Persian Gulf War).

27. See Louise Lief, *Tehran Hosts a Predator's Ball*, U.S. NEWS & WORLD REP., Nov. 4, 1991, at 38 (reporting on a conference of Palestinian radicals and Islamic fundamentalists who met in Iran to discuss their opposition to the Middle East peace

mestic terrorist attack prompted by the Persian Gulf War or the Peace Conference.<sup>28</sup> In fact, although hundreds of terrorist incidents have occurred in the United States since the late 1970s, only a few have involved international groups.<sup>29</sup>

Domestic acts of terrorism emanate from two sources: domestic organizations and international groups operating within the United States.<sup>30</sup> Domestic terrorist groups function without any foreign guidance or motivation<sup>31</sup> and focus primarily on domestic issues such as race, religion, federal taxation, and the environment.<sup>32</sup> International groups within

talks). The International Conference in Support of the Islamic Revolution attracted a bevy of Middle East radicals and leaders of various terrorist organizations. *Id.* Convening under a banner which read "Israel Must be Destroyed," the Islamic Conference resolved that armed struggle remains the only means of liberating Palestine. *Id.* at 39.

One day prior to the start of the Middle East Peace Conference of 1991 (the "Peace Conference"), terrorists attacked a civilian bus in the Israeli occupied West Bank, killing a Jewish woman and the bus driver. Clyde Haberman, *At Israel Funeral, Mood is Defiant*, N.Y. TIMES, Oct. 30, 1991, at A12. The Popular Front for the Liberation of Palestine claimed responsibility for the attack. *Id.* The opening days of the Conference also brought several military exchanges in South Lebanon between Muslim fundamentalist guerillas and Israeli troops. *Id.*

Arab extremists also launched a rocket attack against the United States embassy in East Beirut and vowed to attack other American targets. *Rocket Hits Embassy in Lebanon*, N.Y. TIMES, Oct. 30, 1991, at A12. Middle East radicals also claimed responsibility for two explosions in Ankara, Turkey which killed an American serviceman and seriously wounded an Egyptian diplomat. William Touhy, *2 Jewish Settlers Killed in West Bank*, WASH. POST, Oct. 29, 1991, at A16, A18.

28. Cf. Agis Salpukas, *Air Travelers On Business Trickle Back*, N.Y. TIMES, Feb. 19, 1991, at D1. (discussing the reduced fears of American business travelers in the wake of the Persian Gulf War). The author found no reports of domestic terrorist attacks against the United States. *Id.*

29. See Robert Ricks, Deputy Assistant Director, FBI, Address at the conference on "Terrorism: An Evaluation of the Reagan Years and an Agenda for the Next Administration," Wash., D.C., reprinted in *Future Domestic and International Terrorism: The FBI Perspective*, 11 TERRORISM 538, 538-39 (1988) [hereinafter *Future Domestic and International Terrorism*] (stating that since 1983, the FBI has not recorded a single act of terrorism in the United States perpetrated by an international group). Terrorism in the United States has declined dramatically since the late 1970s. In 1978, the FBI recorded 112 terrorist incidents in the United States. *Id.* By 1989, that number decreased to four incidents. *The FBI's Mission*, *supra* note 17, at 1.

30. *Id.* at 3; see MULLINS, *supra* note 16, at 36-39 (defining the different types of terrorism). Mullins suggests four different categories of terrorism: transnational terrorism, international terrorism, domestic terrorism, and state terrorism. *Id.* Transnational terrorism is carried out by non-state supported actors. *Id.* at 36. International terrorism, or state-sponsored terrorism, involves groups whose control is absorbed by a sovereign state. *Id.* at 37-38. Domestic terrorists conduct virtually all of their operations within a country against a single government. *Id.* at 38. Finally, state terrorism involves acts conducted by a government against its own citizens. *Id.*

31. *Id.*

32. See *id.* (discussing the difference between domestic terrorist organizations and international terrorist groups operating within the United States). Domestic terrorist groups include the Aryan Nation and The Order, which advocate white supremacy, and the Sheriff's Posse Comitatus and the Arizona Patriots, which regard federal and

the United States receive foreign assistance and direction. This guidance comes from large terrorist networks outside the United States, including the Baader-Meinhoff Gang based in Germany, and the Italian-based Red Brigades.<sup>33</sup> According to the Federal Bureau of Investigations (FBI), nearly every major Middle East terrorist group operates a surrogate organization within the United States.<sup>34</sup> Several governments also support, control, and direct international terrorism.<sup>35</sup> Not since 1983, however, has an international group executed a successful terror-

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state laws as unconstitutional. *Id.* The May 19th Communist Organization is a domestic Marxist-Leninist organization which advocates the violent overthrow of the United States. *FBI Oversight and Authorization Request for Fiscal Year 1990: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 101st Cong., 1st Sess. 316, 322 (1989) (synopsis of terrorist incidents recorded by the FBI in 1988).

Other quasi-domestic groups include the Reunion Flotilla, which calls for free emigration to and from Cuba, and the Armed Forces of the National Liberation, which advocates the independence of Puerto Rico. *Id.* at 317, 320. Puerto Rican separatists are also the most active perpetrators of terrorism, along with radical environmentalists advocating sabotage of domestic energy production facilities. Edward V. Badolato, *Terrorism and the U.S. Energy Infrastructure*, 13 *TERRORISM* 159, 159-60 (1990).

33. *The FBI's Mission*, *supra* note 17, at 3.

34. *Future Domestic and International Terrorism*, *supra* note 29, at 539. The FBI alleges that the Abu Nidal terrorist group may have " sleeper " agents established in the Palestinian populations of Los Angeles, Detroit, and Chicago. Brian Duffy & Louise Lief, *Saddam Hussein's Unholiest Allies*, *U.S. NEWS & WORLD REP.*, Jan. 28, 1991, at 42, 42. Sleeper agents infiltrate a country and live peacefully for years within a community. *Id.* When called upon, however, they will execute terrorist acts against that same community. *Id.*

35. See Neil C. Livingston & Terrell E. Arnold, *The Rise of State Sponsored Terrorism*, in *FIGHTING BACK: WINNING THE WAR AGAINST TERRORISM* 11-24 (1984) [hereinafter Livingston & Arnold] (discussing the growth of state-sponsored terrorism by the agents of the former Soviet Union and several third-world nations). Livingston and Arnold assert that during the 1970s the former Soviet Union sponsored terrorism to disrupt Western nations. *Id.* at 13. In the 1980s, countries such as Iran, Libya, and Syria began managing their own agendas for terrorism. *Id.* at 14-20. The Iranian government, under the leadership of the Ayatollah Khomeini, for example, not only condoned the 1979 seizure of the American embassy in Tehran, but also fed the financial and military needs of the radical Islamic Jihad. *Id.* at 14-15. The Iranian government has also been linked to the 1983 bombings of the Marine barracks in Beirut and the United States Embassy in Kuwait. *Id.* at 15.

Syria has confined its devices of terrorism to interests exclusively in the Middle East. *Id.* at 20. Cultivating ties with Iranian sponsored terrorist groups, Damascus maintains terrorist training camps in the Syrian controlled parts of Lebanon. *Id.* at 19.

Libya utilizes foreign diplomatic missions and official emissaries to transport weapons and provide support for international terrorists. *Id.* at 18. Accordingly, Muammar Qaddafi may have planned to use Libyan diplomats to assassinate dissidents in Western Europe. *Id.* In 1984, FBI agents arrested two Libyan intelligence officers posing as students as they attempted to buy weapons in Philadelphia. *Future Domestic and International Terrorism*, *supra* note 29, at 539. Libya is also suspected of sponsoring the bombing of Pan Am flight 103 which killed 270 people, including 189 Americans. Gerald F. Seib, *Amid Peace Talks, Specter of Terrorism Will Return to Haunt President Bush*, *WALL ST. J.*, Oct. 7, 1991, at A11.

ist strike on United States territory.<sup>36</sup> The FBI has intercepted several terrorist attacks and assassination attempts that could have resulted in the deaths of hundreds of Americans.<sup>37</sup> Although new rounds of violence surrounding the Middle East Peace Conference of 1991 again put the United States on alert,<sup>38</sup> civil rights groups warn that domestic counterterrorism efforts threaten the rights of resident aliens.<sup>39</sup>

## B. THE ABORTED TERRORIST ALIEN REMOVAL ACT

Recent criticism has focused upon legislation introduced in the spring of 1991, which called for the *in camera*, *ex parte* use of classified evidence to deport resident aliens suspected of supporting terrorist

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36. *Future Domestic and International Terrorism*, *supra* note 29, at 539.

37. *Id.* In 1983, several Iranian students conspired to chain the doors of a Seattle theater and then ignite fire bombs inside. *Id.* The FBI and local police, however, successfully thwarted the plan. *Id.* That same year, a group protesting the United States invasion of Grenada and the presence of Marines in Beirut, Lebanon detonated a bomb inside the Capitol building. Robert Pear, *Bomb Explodes in Senate Wing of Capitol: No Injuries Reported*, N.Y. TIMES, Nov. 18, 1983, at A1, col. 3.

In 1986, the FBI and the Royal Canadian Mounted Police prevented Sikh terrorists from destroying a 747 airplane scheduled to depart from John F. Kennedy International Airport. *Future Domestic and International Terrorism*, *supra* note 29, at 539. In 1987, a Vermont federal district court convicted three members of the Syrian Social Nationalist Party for attempting to transport explosives across the Canadian border into the United States. *FBI Authorization Hearings*, *supra* note 32, at 325.

In 1988, a New Jersey highway patrolman arrested a member of the Japanese Red Army (JRA), a terrorist organization that trains in Lebanon and has conducted strikes against civilian targets in Western Europe and the Middle East. *United States v. Kikumura*, 918 F.2d 1084, 1090-97 (3d Cir. 1990). A search of the suspect's car produced explosives, bomb paraphernalia, and maps indicating he intended to blow up a Navy recruiting center in New York City. *Id.* at 1094-95. The prosecution introduced evidence at trial showing that the JRA's primary target was the United States, and that the group intended to strike within American borders. *Id.* at 1097.

Several political assassination attempts have also taken place on American soil. MULLINS, *supra* note 16, at 113. In January of 1982, the Justice Commandoes of Armenian Genocide (JCAG) assassinated the Turkish General Consul in Los Angeles. *Id.* Four months later, the same group killed the Honorary Turkish General Consul in Boston. *Id.* The FBI prevented a third JCAG bombing of the Turkish Consulate in Philadelphia, which experts said could have killed from 2,000 to 3,000 persons. *United States v. Sarkissian*, 841 F.2d 959, 961-63 (9th Cir. 1988). In 1985, the FBI thwarted Sikh terrorist plans to assassinate Indira Ghandi during her visit to the United States, and the Chief Minister of the Indian State of Haryana when he later visited New Orleans. MULLINS, *supra* note 16, at 113.

38. See Seib, *supra* note 35, at A11 (reporting on efforts by Middle East radicals to influence or disrupt the more recent Middle East peace process). Robert Kuperman, a terrorism analyst for the Center of Strategic and International Studies, told Seib that the world will likely see new waves of terrorism as a prelude to and as a consequence of the recent Middle East peace talks. *Id.* See also *supra* note 27 (discussing recent terrorist attacks in response to the recent Middle East peace talks).

39. See *infra* note 43 and accompanying text (discussing opposition to the proposed Terrorist Alien Removal Act).



activity. Introduced in March 1991 as part of the Bush administration's version of the Comprehensive Violent Crime Control Bill,<sup>40</sup> the Terrorist Alien Removal Act of 1991<sup>41</sup> proposed establishing *in camera* and *ex parte* review of classified information used in deporting suspected terrorists.<sup>42</sup> Proponents argue that these measures are necessary to deal with the terrorist threat.<sup>43</sup> Members of Congress and many civil rights organizations, however, attacked these proposals for attempting to establish star-chamber tribunals.<sup>44</sup>

The preamble of the proposed Terrorist Alien Removal Act states that present deportation procedures are unsatisfactory in light of Department of Justice findings that many aliens aid or receive instructions from various international terrorist organizations.<sup>45</sup> Under the Terrorist Alien Removal Act, the Justice Department could request a special re-

40. S. 635, 102d Cong., 1st Sess. §§ 721-26 (1991).

41. L. PAUL BREMER, DEP'T. ST. BULL., COUNTERING TERRORISM IN THE 1980S AND 1990s 61 (1989). President Reagan first introduced the Terrorist Alien Removal Act in 1988 but no legislative action on the proposal was ever taken. 134 CONG. REC. H3125 (daily ed. May 10, 1988) (executive communication from the Acting Assistant Attorney General to the House of Representatives); 134 CONG. REC. S7882 (daily ed. June 15, 1988) (executive communication from the Acting Secretary Attorney General to the Senate).

42. S. 635, 102d Cong., 1st Sess. §§ 721-26 (1991).

43. See Tom Watson, *Obscure Provisions in Bush's Crime Bill Stir Debate*, N.J.L.J., June 13, 1991, at 4 (statement of Steven Valentine, deputy assistant attorney general, Civil Division, Justice Department) (stating that present immigration law puts the government in the untenable position of either declassifying information and risking the life of an informant, or letting a known terrorist remain in the United States). See also 135 CONG. REC. E815 (daily ed. Mar. 15, 1989) (statement of Rep. Solomon) (arguing that in 1989, 30,000 Iranian students lived in the United States, one-third of whom were funded by the Ayatollah Khomeini and capable of carrying out terrorist strikes).

44. See 137 CONG. REC. E2285 (daily ed. June 19, 1991) (statement of Rep. Edwards) (characterizing the *in camera* and *ex parte* procedures as offensive to fundamental American values); 137 CONG. REC. S8133 (daily ed. June 19, 1991) (statement of Sen. Cranston) (opposing the proposal to prevent aliens from hearing the evidence against them). See also *Secret Trials*, WASH. POST, June 19, 1991, at A18 (criticizing the lack of procedural protections afforded an alien under the special removal procedures); Watson, *supra* note 43, at 4 (reporting on a May 1991 American Civil Liberties Union (ACLU) meeting of immigration and defense lawyers to analyze the deportation provisions); Cole, *Secret Tribunal*, *supra* note 8, at 581 (arguing that the administration's version of the crime bill results in secret deportation proceedings based on an alien's political affiliations).

45. S. 635, 102d Cong., 1st Sess. § 722 (1991). Specifically, the bill states: the Department of Justice has obtained considerable evidence of involvement in terrorism by aliens in the United States. Both legal aliens, such as lawful permanent residents and aliens here on student visas, and illegal aliens are known to have aided and to have received instructions regarding terrorist acts from various international terrorist groups. While many of these aliens would be subject to deportation proceedings under the Immigration and Nationality Act (INA), these proceedings are unsatisfactory in cases involving sensitive information.

*Id.*

removal hearing whenever it believes that public disclosure of certain evidence would adversely affect national security or foreign relations, or would reveal a confidential source or important investigative technique.<sup>46</sup> A specially appointed judge would then review the government evidence *ex parte* and *in camera*.<sup>47</sup> Upon a finding of probable cause that the alien has engaged in terrorist activity, and when part of the government's argument is composed of sensitive national security information, a special removal hearing would be ordered.<sup>48</sup>

Thereafter, the proposal required a public hearing in which the government bears the burden of showing by clear and convincing evidence that the alien engaged in terrorist activity.<sup>49</sup> Neither the alien nor the public would be able to view any confidential or sensitive evidence presented to the judge *in camera* and *ex parte*.<sup>50</sup> The alien would be entitled to a summary of the evidence, if the sensitive elements can be redacted.<sup>51</sup> A summary would not be issued, however, if a censored version of the evidence might result in the death or serious bodily injury of an informant.<sup>52</sup>

The administration's proposal also would have established a special court to hear the removal cases<sup>53</sup> comprised of Article III judges<sup>54</sup> appointed by the Chief Justice of the Supreme Court. Unlike typical exclusion and deportation hearings presided over by administrative judges, the special removal court would consist of five federal court

46. S. 635, 102d Cong., 1st Sess. § 502(a) (1991). Section 502(a) requires the Department of Justice to state in its application for a special removal hearing that normal deportation proceedings "would pose a risk to the national security of the United States, adversely affect foreign relations, reveal an investigative technique important to efficient law enforcement, or disclose a confidential source of information. *Id.*

47. S. 635, 102d Cong., 1st Sess. § 502(c) (1991).

48. S. 635, 102d Cong., 1st Sess. § 502(c)(1)-(2). At the time of the application for a special removal hearing, the Attorney General may take the suspected alien into custody without the possibility of judicial review. *Id.* § 502(b). If the judge denied the application, the government may appeal to the Court of Appeals within twenty days, during which the Attorney General may still retain custody of the alien. *Id.* § 502(d)(1). If the government makes no appeal, the government must release the alien unless such alien can be arrested for other immigration violations. *Id.* § 502(d)(2).

49. S. 635, 102d Cong., 1st Sess. § 502(h) (1991). Section 502(h) requires hearings be open to the public and aliens to have the right to be represented by counsel. *Id.* Section 502(m) states that the standard of proof used in all deportation proceedings, clear and convincing evidence, is the most appropriate standard for special removal hearings. *Id.* § 502(m).

50. S. 635, 102d Cong., 1st Sess. § 502(j).

51. S. 635, 102d Cong., 1st Sess. § 502(e)(1)(A).

52. S. 635, 102d Cong., 1st Sess. § 502(e)(1)(A)-(B).

53. S. 635, 102d Cong., 1st Sess. § 503(a). The judges would serve five year terms to which they may be reappointed. *Id.* § 503(c).

54. U.S. CONST., art. III, § 1.

judges.<sup>55</sup> Although at least one observer decried the proposal as a "terror court," the use of similar tribunals for handling classified information has been upheld as constitutional.<sup>56</sup> Commentators also note that avoiding the use of administrative judges, who work for and are paid by the Immigration and Naturalization Service (INS), mitigates the appearance of bias when adjudicating immigration cases.<sup>57</sup>

Criticism of the proposed Terrorist Alien Removal Act came from two fronts. First, the definition of "terrorist activity," as the standard for invoking the special removal hearings was so broad that critics feared it would have a chilling effect on the free speech and association rights of resident aliens.<sup>58</sup> Second, it was also argued that enactment of the proposed measures would violate the fundamental due process rights of resident aliens.<sup>59</sup>

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55. S. 635, 102d Cong., 1st Sess. § 503(a).

56. See *No Terror Court for the U.S.*, N.Y. TIMES, June 20, 1991, at A22 (comparing the special court established by the Terrorist Alien Removal Act to the so-called "kangaroo" courts employed by Kuwait, which resulted in summary sentences to persons who collaborated with Iraqi occupiers during the Persian Gulf War). The Foreign Intelligence Surveillance Act (FISA) created a court similar to that proposed by the Terrorist Alien Removal Act. 50 U.S.C. § 1803 (1988). Under FISA, the Supreme Court Chief Justice appoints seven district court judges to serve seven-year terms although these subjects are not subject to reappointment. 50 U.S.C. § 1803(a),(d) (1988).

In *United States v. Cavanaugh*, 807 F.2d 787, 791-92 (9th Cir. 1987), the defendant argued that the special FISA court was unconstitutional because the statute did not provide for life tenure of its judges. *Id.* at 791. The Ninth Circuit found that the temporary designation of FISA judges in no way undermined their judicial independence. *Id.* at 792. Unlike FISA, however, the Terrorist Alien Removal Act permits the reappointment of its judges. S. 635, 102d Cong., 1st Sess., § 503 (1991). Thus, future legislation should consider limiting the time judges may sit on the Terrorist Removal Court to one term. See also *United States v. Megehey*, 553 F. Supp. 1180, 1197 (E.D.N.Y. 1982), *aff'd*, 729 F.2d 1444 (2d Cir. 1983) (ruling that the finite terms of FISA judges ensure the judicial independence of the judges).

57. See *The Transformation of Immigration Law*, *supra* note 1, at 30-34 (examining the role of INS judges in immigration cases). Prior to 1952, immigration inspectors often adjudicated the same cases that they investigated. *Id.* at 32. The 1952 Immigration Act, however, prohibits an immigration inspector from presiding over a hearing in which that individual served as an investigator or prosecutor. *Id.* Nevertheless, Professor Schuck questions whether impartiality can be achieved so long as both the immigration judge and "prosecutor" are employed by the same agency. *Id.* at 30.

58. See *No Terror Court For the U.S.*, *supra* note 57, at 22 (stating that the government's definition of "terrorist activity" is broad enough to encompass fundraising for the African National Congress and the Palestinian Liberation Organization (PLO)); Cole, *Secret Tribunal*, *supra* note 8, at 581 (arguing that the administration's version of the crime bill would establish secret deportation proceedings for aliens the administration finds politically undesirable).

59. See *Watson*, *supra* note 43, at 4 (noting that current law allows the use of confidential evidence to exclude aliens, but such procedures threaten the rights of aliens already in the country).

## II. COUNTERTERRORISM AS IDEOLOGICAL EXCLUSION

The United States has a long history of relying upon xenophobic immigration policies to protect itself against spies, saboteurs, and subversives.<sup>60</sup> These laws have been used not only to expel those individuals who sought to destroy the government, but also those who merely disagree with its policies.<sup>61</sup> Recent anti-terrorism policies are quickly becoming the tools of ideological exclusion in the new world order in the same way that anti-communism policies were used during the Cold War.<sup>62</sup>

### A. NATIONAL SECURITY THROUGH IMMIGRATION POLICY

#### 1. *Immigration Legislation: A History of Ideological Exclusion*

The United States has long feared the arrival of immigrants who do not to seek the shelter of its freedoms, but instead work toward the destruction of its government.<sup>63</sup> Since the early twentieth century, Congress legislated these fears into immigration restrictions and blurred the lines between national security and ideological exclusion.<sup>64</sup> Although recent legislative action moves away from ideological immigration restrictions, the terrorist exception remains a broad loophole through which the government may exclude and deport political undesirables.<sup>65</sup>

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60. See Alexander Wohl, Comment, *Free Speech and the Right of Entry Into the United States: Legislation to Remedy the Ideological Exclusion Provisions of the Immigration and Naturalization Act*, 4 AM. U. J. INT'L L. & POL'Y 443, 447-59 (1989) (proffering that the harshest immigration restrictions are enacted during times of international turmoil and high volume immigration).

61. See *infra* text accompanying notes 63-75 (reviewing the evolution of immigration policies which seek to protect national security from subversive individuals and organizations).

62. See *infra* text accompanying notes 76-88 (examining legislation which replaces anti-communism deportation guidelines with anti-terrorism restrictions).

63. See Wohl, *supra* note 60, at 447-59 (discussing United States immigration law and its history of excluding communists, anarchists, and other alleged subversives based on evidence of their political beliefs).

64. *Id.* In 1990, Congress repealed sections of the McCarran-Walter Act which denied temporary visas to aliens because of their political beliefs and associations. Steven A. Holmes, *Legislation Eases Limits on Aliens*, N.Y. TIMES, Feb. 2, 1990, at 6. However, aliens seeking permanent resident status may still be barred on ideological grounds. *Id.* Additionally, the amended legislation leaves intact the Secretary of State's power to deny entry to anyone believed likely to engage in terrorist activity. *Id.*

65. See *infra* text accompanying notes 76-88 (examining recent anti-terrorism immigration laws). See also George E. Gruen, *The Anti-Terrorism Act of 1987—An Update on the Controversy Surrounding Efforts to Close Down PLO Offices in the U.S.*, 11 TERRORISM, 235, 238-39 (1988) (discussing the PLO exception to the Attorney General's authority to recommend a waiver to aliens excluded because of their affiliation with a proscribed organization).

In 1903, Congress enacted the first immigration restrictions directed toward the exclusion of any alien who advocated the use of force to overthrow the government or the rule of law.<sup>66</sup> The legislature expanded these provisions in 1918 to permit the deportation of any alien in the United States who belongs to a subversive organization at their time of entry or at any time thereafter.<sup>67</sup> By 1940, the Alien Registration Act prohibited the printing, publication, and distribution of any material that advocated or supported a group seeking to violently overthrow the federal government or any state government.<sup>68</sup> Title II of that Act made deportable any alien who knowingly violated these prohibitions.<sup>69</sup> The Internal Security Act of 1950<sup>70</sup> and the Immigration and Nationality Act of 1952,<sup>71</sup> however, authorized the government to deport an alien without actually proving that the alien knew the organization encouraged the violent overthrow of the United States government.<sup>72</sup>

Congress also diluted the deportation standard for aliens. The 1952 Immigration and Nationality Act, also known as the McCarran-Walter Act,<sup>73</sup> gave the Attorney General the power to exclude any alien entering the United States if that alien is believed to be plotting any act *prejudicial to the welfare of the nation*.<sup>74</sup> Between 1952 and 1984, the United States excluded over 8,000 aliens from ninety-eight countries

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66. Immigration Act of 1903, Pub. L. No. 162, ch. 1012, 32 Stat. 1213, 1221 (1903). Specifically, the Act prohibits the entry of any alien who: disbelieves in or who is opposed to all organized government, or who is a member of or affiliated with any organization entertaining and teaching such disbelief in or opposition to all organized government, or who advocates or teaches the duty, necessity, or propriety of the unlawful assaulting or killing of any officer or officers . . . of the Government of the United States or of any other organized government . . . .

*Id.*

67. Act of Oct. 16, 1918, ch. 186, Pub. L. No. 221, 40 Stat. 1012 (1918).

68. Alien Registration Act, ch. 439, Pub. L. No. 670, 54 Stat. 670 (1940).

69. *Id.*

70. Internal Security Act, ch. 1024, 64 Stat. 987 (1950).

71. Immigration and Nationality Act, ch. 477, 66 Stat. 163 (1952).

72. See *Galvin v. Press*, 347 U.S. 522, 528 (1954), *reh'g denied*, 348 U.S. 852 (1954) (holding that the Acts do not require that the government demonstrate the aliens knew the Communist Party advocated violence in order to deport, only that the aliens were aware and freely joined the Communist Party). See also *Sigurdson v. Landon*, 215 F.2d 791, 798 (9th Cir. 1954), *cert. denied*, 348 U.S. 916, *reh'g denied*, 348 U.S. 956 (1955) (holding that the alien's intent, or the possibility of deception with regard to the alien's membership, is irrelevant for deportation purposes); *United States ex rel. Avramovich v. Lehman*, 235 F.2d 260 (6th Cir. 1956), *cert. denied*, 355 U.S. 905 (1957), *reh'g denied*, 355 U.S. 925 (1958) (holding that an alien voluntarily joining the Communist Party constitutes grounds sufficient to impose deportation).

73. 8 U.S.C. § 1182 (1988).

74. 8 U.S.C. § 1182(a)(27). Subsection (a)(27) allows the Attorney General to exclude any alien seeking to enter the United States "to engage in activities which

under this broad standard because of their political beliefs or affiliations.<sup>75</sup>

## 2. *The Terrorist Exception to Immigration Reform*

In the late 1970s, Congress began curbing the expansive power of the executive branch to exclude or deport aliens because of their political beliefs. Each reform, however, contained a provision designed to prevent terrorist organizations and their supporters from entering the United States. In 1977, Congress enacted the McGovern amendment which allowed the Attorney General to waive the exclusion of any alien because of that person's affiliation with an organization proscribed by the Immigration and Nationality Act.<sup>76</sup> In 1979, however, Congress altered the McGovern Amendment to make the provision inapplicable to PLO members.<sup>77</sup>

Congress later implemented the Anti-Terrorism Act of 1987, which ordered the closing of a PLO information office in Washington and its observer mission to the United Nations.<sup>78</sup> Although sponsors praised the legislation for taking a tough stand against terrorism, critics complained that it violated the rights of free speech and association by limiting American citizens' access to Palestinian concerns and opinions.<sup>79</sup>

Later that year, Congress temporarily suspended the enforcement of the ideological exclusion provisions in the Immigration and Nationality Act.<sup>80</sup> For one year, the legislation prevented the exclusion or deportation of aliens because of their beliefs and associations.<sup>81</sup> Not only did

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would be prejudicial to the public interest, or endanger the welfare, safety, or security of the United States." *Id.*

75. See *The 1952 McCarran-Walter Act*, *supra* note 1, at 22 (relying on a 1984 internal report by the Immigration and Naturalization Service which estimates the number of aliens excluded under the McCarran-Walter provisions).

76. 22 U.S.C. § 2691 (1988).

77. See George E. Gruen, *The Anti-Terrorism Act of 1987—An Update on the Controversy Surrounding Efforts to Close Down PLO Offices in the U.S.*, 11 *TERRORISM* 235, 237-38 (1988) (discussing legislative efforts to pressure the PLO into renouncing the use of terrorism by removing their representatives from the United States).

78. *Id.* at 235.

79. *Id.* Senator Dole said such action was necessary "to strengthen the defenses of [the United States] against the real, physical threat that the PLO represents." *Id.* On the other hand, Morton Halperin, Washington, D.C. director of the ACLU, stated that the legislation violates the freedoms of speech and association by preventing Americans from seeking to advance the political ideology of an organization, including those based extritorially. *Id.* at 236.

80. Foreign Relations Authorization Act, Pub. L. No. 100-204, § 901, 101 Stat. 1399, 1399-1400 (1987).

81. *Id.* See *The 1952 McCarran-Walter Act*, *supra* note 1, at 22 (discussing the United States government policy of excluding Arab groups in the name of counterterrorism).

Congress make this suspension inapplicable to members of the PLO, but also extended this ineligibility to any alien directly or indirectly linked to a group that advocates terrorist activity.<sup>82</sup> Thus, like earlier efforts to exclude members of the Communist Party, the government could deport an alien without proving the alien knew the suspect group ever committed or advocated an act of terrorism.<sup>83</sup>

In 1990, Congress declared illegal the denial of temporary visas to aliens because of their political or ideological beliefs.<sup>84</sup> Again, the measure allowed the Secretary of State to deny visas to any alien believed to have engaged or is likely to engage in terrorist activity.<sup>85</sup> Later that year, the Immigration and Nationality Act expanded the definition of engaging in terrorist activity.<sup>86</sup> Under that definition, an alien may be deported if the alien negligently assists someone who has committed, is planning, or can be linked to a terrorist act or organization.<sup>87</sup> Such assistance includes unknowingly housing, transporting, or funding a suspected terrorist.<sup>88</sup>

Thus, as Congress moves to restrict the ideological exclusion provisions of the Cold War era, the scope of the executive branch's power to label an alien a terrorist expands. The Terrorist Alien Removal Act proposes to hide the government's rationale for affixing the label of "terrorist" to a resident alien from both the alien and the public.

#### B. COUNTERTERRORISM OR COUNTERACTIVISM?

Although the occurrence of domestic terrorist incidents has declined dramatically since the 1970s,<sup>89</sup> the government's counterterrorism program is increasingly under fire for harassing resident aliens who vocal-

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82. *Id.*

83. *Id.*

84. Foreign Relations Authorization Act, Pub. L. No. 101-246, 104 Stat. 15 (1990).

85. *Id.*

86. *See infra* text accompanying note 107 (examining the definition of "terrorist activity" under the Immigration and Nationality Act of 1990).

87. Immigration and Nationality Act of 1990, Pub. L. No. 101-649, § (a)(3)(B)(iii), 104 Stat. 4978, 5070 (1990).

88. *Id.* at § 601(a)(3)(B)(iii).

89. *See supra* note 29 (discussing the decline of domestic terrorist incidents).

ize their opposition to United States foreign policy.<sup>90</sup> In 1988, Representative Don Edwards, the chairman of the House Subcommittee on Civil and Constitutional Rights, requested a General Accounting Office (GAO) audit of the FBI's domestic counterterrorism program.<sup>91</sup> Representative Edwards asked the GAO to determine the extent to which the FBI opens investigations of United States citizens without any suspicion of criminal conduct.<sup>92</sup> The results reveal a practice of monitoring the political activities of United States citizens and resident aliens.

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90. See Eve Pell, *Kicking Out Palestinians*, THE NATION, Feb. 5, 1990, at 167 (arguing that FBI and INS raids on resident alien Palestinians in 1988 in Los Angeles were politically motivated as an attempt to quell domestic dissent over United States policies toward the Middle East). See also *FBI Investigations of First Amendment Activities: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 101st Cong., 1st Sess. 120-21 app. 2 (1991) [hereinafter *Hearings on FBI Domestic Terrorism Investigations*] (GAO report to the chairman of the House Subcommittee on Civil and Constitutional Rights) (reporting that in the mid-1980s the New York-based Center for Constitutional Rights accused the FBI of improperly investigating the legitimate political activities of members of the Committee in Solidarity with the People of El Salvador (CISPES)). A subsequent internal FBI inquiry denied that the agency lacked justification for looking into alleged terrorist activities by CISPES, but admitted mismanagement of the investigation. *Id.*

91. *Hearings on FBI Domestic Terrorism Investigations*, supra note 90, at 63 (statement of Arnold Jones, Director, Administration of Justice Issues, General Government Division, United States GAO). On December 1, 1981, President Reagan issued Executive Order 12333, which expands the FBI's authority to investigate any violent act attempting to overthrow or impair the federal government. *Id.* at 121 n.1 app. 2. Specifically, the purpose of the Counterterrorism Program is to:

detect, prevent, and react to unlawful violent activities of individuals or groups whose intent is to (1) overthrow the government; (2) interfere with the activities of a foreign government in the United States; (3) impair the functioning of the federal government, a state government, or interstate commerce; or (4) deprive Americans of their civil rights.

*Id.* One year later, the President assigned the FBI the principal responsibility of combatting terrorism in the United States. *The FBI's Mission*, supra note 17, at 2. In 1982, counterterrorism joined a select list of FBI national priorities which include counterintelligence, white-collar crime, organized crime, narcotics, and violent crime. *Id.* Since then, the GAO estimates that the FBI opened approximately 19,500 investigations against United States citizens, aliens, and resident aliens suspected of conducting, supporting, or contributing to terrorist activity. *Hearings on FBI Domestic Terrorism Investigations*, supra note 90, at 126 app. 2 (GAO report to the chairman of the House Subcommittee on Civil and Constitutional Rights).

92. *Hearings on FBI Domestic Terrorism Investigations*, supra note 90, at 59 (statement of Rep. Edwards). The Subcommittee on Civil and Constitutional Rights held a special hearing upon learning that the FBI did not provide the GAO auditors, who had top security clearances and worked in the FBI headquarters, with full access to counterterrorism investigative files. *Id.* The reason proffered by the FBI for the limited disclosure was the need to protect the security of confidential informants and investigative techniques. *Id.* at 64. The FBI eventually turned over nearly all of the files requested by the GAO. *Id.* at 61. The FBI, however, redacted so much information from some of the files that GAO auditors could not discern the motivations for particular investigations. *Id.* at 81-82.



In nearly half of the over 18,000 counterterrorism investigations opened between 1982 and 1988, the FBI found no evidence of criminal conduct.<sup>93</sup> The FBI opened such investigations because an informant or some other evidence alleged that the subject of the inquiry could be linked to a terrorist group.<sup>94</sup> The GAO also estimates that thirty-eight percent of the investigations focus on United States citizens or permanent resident aliens.<sup>95</sup> The FBI allegedly monitored the First Amendment activities of groups and individuals in 2,080 investigations, 951 of which involved United States citizens or resident aliens.<sup>96</sup>

As this data reveals, American citizens and resident aliens are monitored, and subject to possible prosecution or deportation merely because of their political expressions and associations.<sup>97</sup> This investigatory focus on political activities may result in a chilling effect on the First

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93. *Hearings on FBI Domestic Terrorism Investigations*, *supra* note 90, at 80 (response of John Anderson, Assistant Director, Administration of Justice Issues, General Government Division, GAO). The GAO estimates that forty-five percent of the investigations found no criminal activity. *Id.*

94. *Hearings on FBI Domestic Terrorism Investigations*, *supra* note 90, at 80 (question of James Dempsey, Assistant Counsel, House Subcommittee on Civil and Constitutional Rights).

95. *Hearings on FBI Domestic Terrorism Investigations*, *supra* note 90, at 115 app. 2 (GAO report to the chairman of the House Subcommittee on Civil and Constitutional Rights).

96. *Hearings on FBI Domestic Terrorism Investigations*, *supra* note 90, at 116 app. 2. First Amendment activities include public speeches, attending meetings, participating in demonstrations, and appearing on radio or television broadcasts. *Id.* at 132 app. 2. When citizens or resident aliens are the subject of a terrorism investigation, the Justice Department's Office of Intelligence Policy and Review (OIPR) must determine whether the investigation complies with the procedural guidelines of the Attorney General. *Id.* at 124 app. 2. If the OIPR believes that an investigation is unwarranted, it may halt the inquiry. *Id.* According to the GAO report on FBI counterterrorism investigations, conducted between 1982 and 1988, the OIPR never recommended the termination of an investigation. *Id.*

97. *Cf. United States v. Megahey*, 553 F. Supp. 1180, 1194-1200 (1982), *aff'd*, 729 F.2d 1444 (2d Cir. 1983) (examining the extent to which evidence of First Amendment activities may be used to obtain a warrant for domestic electronic surveillance under the Foreign Intelligence Surveillance Act (FISA)). In 1978, Congress enacted FISA, 50 U.S.C. §§ 1801-1811 (1988), in response to executive branch abuses, which had authorized the warrantless electronic surveillance of persons in the United States. *Megahey*, 553 F. Supp. at 1184. Section 1805 of FISA permits the issuance of an order approving an electronic surveillance if probable cause exists to believe the target of the surveillance is a foreign power or agent thereof. 50 U.S.C. § 1805. First Amendment activities may constitute the *sole* basis of a FISA request for surveillance, if the target is a United States citizen or resident alien. *Id.* This restriction does not apply if such a person acts for a group or government that engages in terrorism. *Id.* § 1801. Thus, Congress has implicitly recognized that, not only may the FBI monitor the First Amendment activities of United States residents, but it is also given greater latitude in instances in which persons affiliate with terrorist groups or governments.

Amendment freedoms of resident aliens and citizens.<sup>98</sup> The problem, according to critics, is that deciding who is a terrorist and, thus, subject to deportation is a highly political question.<sup>99</sup> This danger, however, is difficult to avoid when combatting a form of violence that escapes definition and is often politically motivated.<sup>100</sup>

Many terrorist groups commit acts of violence with a set political goal in mind.<sup>101</sup> Focusing on the political purposes of terrorism as a means to identify terrorists, however, creates several difficulties. First, a person may advocate the same political goals as terrorist groups without ever advocating the use of violence to achieve those goals.<sup>102</sup> Second, many terrorist groups operate with no political purpose except the

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98. See Watson, *supra* note 43, at 4 (quoting Jeanne Woods, legislative counsel of the ACLU, who notes that the use of a broad definition of "terrorist activity" in the 1991 Terrorist Alien Removal Act, discussed *infra*, would chill the political expressions of those fearing deportation).

99. See David Johnston, *Crime Bill Would Establish Alien Deportation Tribunal*, N.Y. TIMES, June 1, 1991, at A6 (quoting David Cole, attorney for the Center for Constitutional Rights, who predicts that an administration will define terrorists to include those it finds to be politically unacceptable).

100. See FARRELL, *supra* note 16, at 6-13 (discussing attempts to define terrorism). An acceptable definition of terrorism has been the subject of debate as early as the first half of this century. In 1937, the League of Nations formulated a definition of terrorism in the Convention for the Prevention and Punishment of Terrorism. *Id.* at 7. The convention defined terrorism as "acts directed against a State and intended or calculated to create a state of terror in the minds of particular persons or the general public." *Id.* Since then, hundreds of definitions have been offered, and each has been criticized as either being too broad or too narrow. MULLINS, *supra* note 16, at 35. After examining several definitions, Mullins has praised the description of terrorism offered by B. M. Jenkins. *Id.* Jenkins defines terrorism as:

the threat of violence, individual acts of violence, or a campaign of violence designed to instill fear. . . . Terrorism is violence for effect; not only, and sometimes not at all, for the effect on the actual victims of the terrorists. In fact, the victim may be totally unrelated to the terrorist's cause. Terrorism is violence aimed at the people watching. Fear is the intended effect, not the byproduct of terrorism.

*Id.*

Mullins adds that this definition unearths four important elements involved in terrorist acts. *Id.* at 36. First, a threat alone, without any executed acts of violence, may constitute terrorism. *Id.* Second, the fear of terrorism changes the behavior and policies of others. *Id.* Third, violence is only a tool, and not the purpose of terrorism. *Id.* Finally, violence is not used to affect the behavior of the terrorist's victims, but to influence its audience. *Id.*

101. See MULLINS, *supra* note 16, at 67 (noting that one characteristic common to many terrorists is their commitment to a political goal and the desire to make a particular government appear oppressive).

102. See Warren Strobel, *U.S., Israel Choose Not to Hear PLO's Voice*, WASH. TIMES, Sept. 2, 1992, at A7 (reporting that during Middle East Peace talks, Israeli leaders welcomed negotiations with Palestinian representatives so long as they had no ties to the Palestinian Liberation Organization).

destruction of the status quo.<sup>103</sup> Third, how well the political and social ends of militaristic groups parallel American interests often dictates who the United States decides to condemn as a terrorist or praise as a freedom fighter.<sup>104</sup>

Furthermore, the expression of certain political beliefs which do not compliment United States policy often makes resident aliens immediately suspect as terrorists.<sup>105</sup> For the most part, Americans do not condemn the political goals of terrorism as much as they fear the violent tactics employed to achieve those goals.<sup>106</sup> Thus, commentators stress that efforts to define terrorism must focus on the conduct of terrorism, rather than the motivations of terrorism.<sup>107</sup>

In conducting investigations, the FBI views terrorism as the unlawful use of violence to intimidate or coerce civilians or government policy.<sup>108</sup>

103. See DAVID C. MARTIN & JOHN WALCOTT, *BEST LAID PLANS* 53 (1988) (describing the Baader-Meinhoff organization of Germany and the Italian-based Red Brigades as nihilist groups with no identifiable political agenda).

104. See *The FBI's Mission*, *supra* note 17, at 1 (rejecting the argument that "one man's terrorist is another man's freedom fighter"). Sessions argues that, unlike terrorists, freedom fighters, liberators, and urban guerillas do not deliberately target non-combatants and innocent civilians. *Id.* Instead, such groups limit their attacks to military targets. *Id.* Stansfield Turner, former Director of Central Intelligence (1977-81), notes that George Schultz advanced the same argument as Secretary of State for the Reagan administration. STANSFIELD TURNER, *TERRORISM AND DEMOCRACY* 181 (1991). Turner points out, however, that the Nicaraguan contras, although often called "freedom fighters," investigated and purged their own forces for perpetrators of abuses against Nicaraguan civilians. *Id.* He candidly admits: "[T]he contras were freedom fighters because we shared their political aims, but the Shiite fundamentalists were terrorists because we did not." *Id.*

105. See *The 1952 McCarran-Walter Act*, *supra* note 1, at 22 (arguing that the State Department and the INS pursue the exclusion and deportation of aliens because of their associations with terrorist groups, regardless of whether the alien ever participated in an act of terrorism). See also *infra* note 117 and accompanying text (observing that not all nations that engage in terrorism are listed on the State Department's list of state sponsors of terrorism).

106. See MULLINS, *supra* note 16, at 30-31 (discussing terrorism's use of fear to influence the behavior of others). Mullins notes that the most important component of terrorism is terror. *Id.* Terrorists attempt to influence the behavior of others by creating the perception that violence will result unless their demands are met. *Id.*

107. See TURNER, *supra* note 104, at 181 (calling for the removal of political considerations from the definition of terrorism). Turner suggests using a definition of terrorism first proposed by the CIA in 1980. *Id.* According to that definition, terrorism is "[t]he threat of use of violence for political purposes by individuals or groups . . . when such actions are intended to shock, stun, or intimidate a target group wider than the immediate victims." *Id.* This definition, however, does not remove a consideration of the political purposes of terrorism. As Mullins points out, not every terrorist act is political. MULLINS, *supra* note 16, at 34. Terrorist acts may be executed against ethnic or religious groups without any consideration of a political objective. *Id.* For example, the Members of the Christian Identity Movement advocate the killing and deportation of racial and religious minorities to facilitate the second coming of Christ. *Id.* at 68.

108. *Hearings on FBI Domestic Terrorism Investigations*, *supra* note 90, at 122 app. 2 (GAO report to the chairman of the House Subcommittee on Civil and Consti-

The FBI's definition requires that one must commit a crime, such as murder or conspiracy, before being branded as a terrorist.<sup>109</sup> At least one federal district court has noted that the FBI's formulation makes arriving at a definition of the term terrorist more of an objective question of fact and less of a political decision.<sup>110</sup> Present immigration law does not require evidence of a crime before an alien can be excluded or deported for engaging in terrorist activity.<sup>111</sup> Terrorist activity may in-

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tutional Rights). The FBI uses the statutory definition of international terrorism. 18 U.S.C.A. § 2331 (West Supp. 1991). *Id.* Subsection one states:

the term "international terrorism" means activities that—

(A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State;

(B) appear to be intended—

(i) to intimidate or coerce a civilian population;

(ii) to influence the policy of a government by intimidation or coercion; or

(iii) to affect the conduct of a government by assassination or kidnapping; and

(C) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum.

*Id.*

109. 18 U.S.C.A. § 2331 (West Supp. 1991).

110. *See* United States v. Megahey, 553 F. Supp. 1180, 1196 (E.D.N.Y. 1982), *aff'd*, 729 F.2d 1444 (2d Cir. 1983) (finding that the statutory definition of international terrorism found in FISA is identical to the definition used by the FBI). In *Megahey*, defendants, charged with attempting to export weapons to the Irish Republican Army, challenged the statutory definition of international terrorism. *Id.* Asserting that "one man's terrorist is another man's freedom fighter," the defendants argued that the definition would embroil courts in difficult political questions. *Id.* The court held that the statutory definition of terrorism requires proof of certain facts (i.e., perpetration of a crime) which does not implicate foreign policy. *Id.*; *see also* United States v. Sarkissian, 841 F.2d 959 (9th Cir. 1988) (stating that international terrorism, by definition, involves activities which constitute crimes).

111. Immigration and Nationality Act of 1990, Pub. L. No. 101-649, § 601, 104 Stat. 4978, 5070 (1990). Section 601(a)(3)(B)(iii) declares that to engage in terrorist activity means:

to commit, in an individual capacity or as a member of an organization, an act of terrorist activity or an act which the actor knows, or reasonably should know, affords material support to any individual, organization, government in conducting a terrorist activity at any time, including any of the following acts:

(I) The preparation or planning of a terrorist activity.

(II) The gathering of information on potential targets for terrorist activity.

(III) The providing of any type of material support, including a safe house, transportation, communications, funds, false identification, weapons, explosives, or training, to any individual the actor knows or has reason to believe has committed or plans to commit an act of terrorist activity.

(IV) The soliciting of funds or other things of value for terrorist activity or for any terrorist organization.

(V) The solicitation of any individual for membership in a terrorist organization, terrorist government, or to engage in terrorist activity.

*Id.*

clude collecting information or recruiting members for a terrorist organization or government.<sup>112</sup> Further, an alien may be deported for negligently and unknowingly assisting or supporting a terrorist entity.<sup>113</sup>

Under this definition, those who publicly support the efforts of organizations, such as the Irish Republican Army or the PLO, may be subject to deportation. Due to the rise of state-sponsored terrorism, aliens from countries such as Syria, Iran, and Libya are easily encompassed by this broad definition.<sup>114</sup> At least one commentator recognizes that during the 1980s, Nicaragua, North Korea, Czechoslovakia, and the former Soviet Union did not appear on the State Department's list of government sponsors of terrorism despite the involvement of these countries in terrorist activity.<sup>115</sup> Thus, an alien's ability to remain in the United States may depend on national origin as well as the political decisions of the State Department. The following examination of the government's counterterrorism program of the 1980s reveals that aliens of particular nationalities were targeted for wholesale deportation.

### C. THE NATIONAL COUNTERTERRORISM PROGRAM

In January 1986, President Reagan issued a top-secret National Security Decision Directive which created the National Program for Combatting Terrorism.<sup>116</sup> This Directive also established the Alien Border Control Committee (ABCC or Committee) whose express purpose is to prevent suspected terrorists from entering or remaining in the United States.<sup>117</sup> Examination of the ABCC provisions reveals, how-

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112. *Id.*

113. Immigration Act of 1990, Pub. L. No. 101-649, § 601, 104 Stat. 5067, 5070 (1990). Present immigration law employs a negligence standard for determining when an alien may be deported. The Immigration Act of 1990 makes deportable any alien who commits an act which the "actor knows, or reasonably should know" assists terrorist activity. *Id.* Activities which aliens should know constitutes terrorist activity includes the gathering of information, fundraising, or recruiting for groups or governments the State Department lists as sponsors of terrorism. *Id.*

114. See *supra* note 35 (discussing the rise of state-sponsored terrorism).

115. Livingston & Arnold, *supra* note 35, at 20-21.

116. See Eve Pell, *Kicking Out Palestinians*, THE NATION, Feb. 5, 1990, at 167-68 (discussing INS efforts to deport seven Palestinians and one Kenyan because of their vocal opposition to United States foreign policy). Although President Reagan issued National Security Decision Directive (NSDD) 207 in 1986, it did not become public until the summer of 1989 by a Freedom of Information Act request by the ACLU. *Id.*

117. *Id.* The ABCC's birth was based on the perceived need to avoid those problems faced by the Carter administration in monitoring the activities of Iranian students in the United States during the Iran hostage crisis. Ronald L. Soble, *INS Labels Terrorist Emergency Proposal Just an "Option Paper"*, L.A. TIMES, Feb. 7, 1987, at 31.

ever, a plan to deport large numbers of Arab aliens, targeted exclusively because of their nationality.<sup>118</sup> Parts of this plan, which recommended the rigorous use of *in camera* procedures to protect classified information, resurfaced in the recent Terrorist Alien Removal Act. However, the low level of international terrorist activity in the United States questions the necessity for implementing such a broad-based proposal.<sup>119</sup>

According to an INS interagency report, the ABCC considered two scenarios for removing not only suspected terrorists, but any alien found to be "politically undesirable."<sup>120</sup> The first option invalidates the visas of all nonimmigrant aliens of a particular nationality.<sup>121</sup> These immigrants would then be required to register with the INS so that the INS can identify the number, location, and characteristics of a particular group of targeted immigrants.<sup>122</sup> The report, however, acknowledges that the INS should distinguish between those aliens who threaten na-

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118. See *infra* text accompanying notes 120-32 (discussing recommendations of the ABCC). The INS stated that the ABCC proposals would be used if the government found that national security required the rounding up of a large group of aliens. Miriam Davidson, *Militarizing the Mexican Border*, THE NATION, April 1, 1991 at 406. Soon after the issuance of these recommendations, however, the INS and FBI aggressively pursued the deportation of several Arab aliens and accused them of supporting terrorist organizations. See *infra* text accompanying notes 133-47 (discussing the FBI's and INS's efforts in deporting Arab aliens). Many of the same recommendations appeared in the recently proposed Terrorist Alien Removal Act. In 1987, an INS spokesperson, however, declined to outline which ABCC recommendations the government was pursuing. Ronald L. Soble, *INS Labels Terrorist Emergency Proposal Just an "Option Paper"*, L.A. TIMES, Feb. 7, 1987, at 31.

119. See *Legislation to Implement the Recommendations of the Comm'n on War-time Relocation and Internment of Civilians: Hearings on H.R. 442 Before the Subcomm. on Admin. Law and Gov't Relations of the House Comm. on the Judiciary*, 100th Cong., 1st Sess. 67 (1987) [hereinafter, *Internment Compensation Hearings*] (INS interagency report entitled, *Alien Terrorists and Undesirables: A Contingency Plan*). An INS interagency report acknowledged that international terrorism has been confined to Western Europe, North Africa, and the Middle East. *Id.* The report stated, however, that because of the increasing likelihood of terrorist activities on American soil, government agencies should make contingency plans to protect "the national security and public safety." *Id.*

120. *Internment Compensation Hearings*, *supra* note 119, at 62-63 (memorandum from Robert Walsh, Assistant Commissioner, Customs Office of Intelligence regarding organization of the ABCC). A special working group was created within the ABCC with the purpose of establishing procedures for the expulsion of alien activists whose activities do not conform to their immigration status, and deportation of aliens who support terrorism efforts. *Id.* The ABCC created another working group charged with establishing new visa restrictions "for aliens from certain countries or aliens of certain categories who are likely to be supportive of terrorist activity within the United States." *Id.* at 62.

121. *Internment Compensation Hearings*, *supra* note 119, at 72.

122. *Internment Compensation Hearings*, *supra* note 119, at 72-74. The INS report indicates that the suggested strategy would tax the administrative capabilities of federal immigration and law enforcement agencies. *Id.* More important, the report ac-

tional security from those who seek asylum from their country of origin.<sup>123</sup> Nationalities that the INS focuses upon include Libya, Syria, Iran, Jordan, Lebanon, Algeria, and Morocco.<sup>124</sup>

The second strategy calls for the collection of data from agencies such as the FBI and the Central Intelligence Agency (CIA) in order to compile a list of undesirable aliens and suspected terrorists.<sup>125</sup> This information may be used to initiate investigations of aliens in order to locate and apprehend the suspects.<sup>126</sup> The program, which anticipates apprehending up to 1,000 aliens in its opening stages, also called for the use of internment camps to house the detainees.<sup>127</sup>

Upon locating and apprehending undesirables and suspected terrorists, the ABCC recommends rapid deportation, while taking all necessary steps to protect classified information.<sup>128</sup> Any alien suspected of terrorism, or who officially represents a country that sponsors terrorism, would be routinely detained without bond and the government may oppose any appeal for the alien's conditional release.<sup>129</sup> The Committee also calls for vigorous use of federal regulations permitting the use of *in camera* proceedings to protect classified information.<sup>130</sup> Additionally, the ABCC proposal sought to amend regulations which restrict the use of *in camera* proceedings to classified information only; the amended regulations would allow *in camera* review of merely confidential infor-

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knowledgeed that the plan discriminates by categorizing people solely on the basis of national origin rather than upon their political opinion. *Id.*

123. *Internment Compensation Hearings, supra* note 119, at 70.

124. *Internment Compensation Hearings, supra* note 119, at 84.

125. *Internment Compensation Hearings, supra* note 119, at 74.

126. *Internment Compensation Hearings, supra* note 119, at 74.

127. *Internment Compensation Hearings, supra* note 119, at 91-93 (report entitled "Border Patrol Response to an En Bloc Registration or En Bloc Revocation of NIV Status of a Class of Aliens") (discussing plans for the detention of aliens apprehended through the proposed registration strategy). Alien Border Control Committee plans create three stages for the detention of aliens, contingent upon the number of aliens apprehended. The first stage anticipates the apprehension of 200 to 500 aliens. *Id.* Existing INS holding facilities would be employed with a moderate reallocation of resources. *Id.* If the INS apprehends between 500 and 1,000 aliens, a detention center in Oakdale, Louisiana would be employed. *Id.* Should over 1,000 aliens be detained, military facilities would house the aliens, and camps would be built using tents as temporary quarters. *Id.*

128. *Internment Compensation Hearings, supra* note 119, at 62-63 (memorandum from Robert Walsh, Assistant Commissioner, Customs Office of Intelligence regarding organization of the ABCC).

129. *Internment Compensation Hearings, supra* note 119, at 75 (INS interagency report entitled, *Alien Terrorists and Undesirables: A Contingency Plan*).

130. *Internment Compensation Hearings, supra* note 119, at 75.

mation.<sup>131</sup> The Committee also recommends that the government routinely request the exclusion of the public from deportation hearings.<sup>132</sup>

Less than one year after the creation of the ABCC,<sup>133</sup> FBI and INS agents raided the Los Angeles homes of six Palestinians and one Kenyan.<sup>134</sup> Days later, agents apprehended another Palestinian as he took a college exam.<sup>135</sup> The INS accused all eight of supporting the Popular Front for the Liberation of Palestine (PFLP), a suspected terrorist organization, and subjected each to deportation proceedings.<sup>136</sup>

The INS originally sought deportation under the McCarren-Walter Act, which permits the expulsion of any alien who circulates material espousing the doctrines of communism, or advocating the injury of persons or destruction of property.<sup>137</sup> At trial, a federal district court refused to hear evidence which the government argued must be kept secret.<sup>138</sup> The court then found that resident aliens are entitled to the same First Amendment protections enjoyed by citizens.<sup>139</sup> Because the

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131. *Internment Compensation Hearings*, *supra* note 119, at 75. Specifically, 8 C.F.R. § 242.17(a) (1991) provides that when an alien seeks discretionary relief from deportation, the court may review, *in camera*, government evidence which is classified under Executive Order No. 12,356. This executive order creates three levels of classified material: Top Secret, Secret, and Confidential. Exec. Order No. 12,356, 47 Fed. Reg. 14,874 (1982). Such information may be designated by the President, department heads, and specially designated officials. *Id.*

132. *Internment Compensation Hearings*, *supra* note 119, at 75.

133. *Id.* at 58 (memorandum from Walter Cadman, Senior Special Agent, Investigation Division, INS). The ABCC formed on June 27, 1986. *Id.*

134. Eve Pell, *Kicking Out Palestinians*, THE NATION, Feb. 5, 1990, at 167. One of the persons arrested, Khader Hamide, a resident alien and marketing consultant active in the Rainbow Coalition, has lived in the United States since 1971. *Id.* The government denied any connection between the ABCC and INS efforts to deport the Palestinians. *Id.* at 168.

135. *Id.* at 167.

136. *Id.* After the 1967 Six Day War between Israel and the combined forces of Egypt, Syria, and Jordan, the PFLP emerged as a radical faction of the PLO. MARTIN & WALCOTT, *supra* note 103, at 55. The PFLP led the spread of worldwide terrorism, vowing to strike not only at targets in Israel, but at any Jewish property throughout the world. *Id.*

137. *American-Arab Anti-Discrimination Comm. v. Meese*, 714 F. Supp. 1060, 1062 (C.D. Cal. 1989), *aff'd in part, rev'd in part*, 940 F.2d 445 (9th Cir. 1991).

138. Michael J. Ybarra, *Long Effort to Deport Terror Suspects Raises Difficult Rights Issues*, WALL ST. J., Nov. 11, 1991, at A1.

139. 714 F. Supp. at 1074-82. The court rejected the government's argument that because Congress has traditionally exercised plenary power over immigration, an alien's First Amendment rights are substantially limited in the deportation context. *Id.* at 1075. The court did not find persuasive the government's assertion that because First Amendment rights are limited with regard to prisoners, *Pell v. Procunier*, 417 U.S. 817, 822 (1974), military personnel, *Parker v. Levy*, 417 U.S. 733, 756 (1974), and students in a school setting, *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 506 (1969), then such rights are also limited for resident aliens. 714 F. Supp. at 1081. Such limitations, the court noted, apply only within the "limited settings" of prisons, schools, and military service. *Id.*



teaching of communism or mere advocacy does not incite immediate and imminent unlawful action, the court held that the McCarran-Walter Act prohibited protected forms of expression and was therefore unconstitutionally overbroad.<sup>140</sup> The government continued to pursue the deportations on charges of routine visa violations.<sup>141</sup>

In another case, the INS tried to deport Fouad Rafeedie, a Palestinian-born resident alien who has lived in the United States for fifteen years.<sup>142</sup> The government alleged that Rafeedie traveled to Syria in 1986 to attend a conference of the Palestine Youth Organization which is an alleged affiliate of the PFLP.<sup>143</sup> Upon his return, the government initiated summary exclusion proceedings, which are typically reserved for aliens entering the country for the first time.<sup>144</sup> The government argued that even if the length of Rafeedie's absence was not long enough to destroy his residency status, then the purpose of his trip was "sufficiently nefarious" to mandate a summary exclusion hearing.<sup>145</sup>

The court rejected both arguments, holding that Rafeedie's absence from the country was insufficient to remove his resident alien status, thereby entitling him to the due process protections enjoyed by United States citizens.<sup>146</sup> The court remanded the case to the district court in order to weigh Rafeedie's due process rights against the national security interests of the government.<sup>147</sup>

Although the government has not admitted that these cases are linked to ABCC, such INS efforts bear a striking resemblance to many

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The same persons incur no First Amendment limitations outside these settings. *Id.* The court concludes that the First Amendment rights of aliens may not be limited in a deportation context, without also curbing their expressive freedoms outside that setting. *Id.*

140. *Id.* at 1082-84. The court relied on *City of Houston v. Hill*, 482 U.S. 451 (1987), which stated that a law is overbroad and vague if "reaches a substantial amount of constitutionally protected conduct." *Id.* at 451 (quoting *Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 (1982)). The court then cited *Brandenburg v. Ohio*, 395 U.S. 444 (1969) for the proposition that to prohibit expressed advocacy of conduct, the purpose of the speech must incite or produce imminent lawlessness and the speech must be likely to produce such conduct. *Id.* at 447. The provisions of the McCarran-Walter Act could, according to the court, prohibit the wearing of a PFLP button or expression of a PFLP viewpoint. 714 F. Supp. at 1084. Therefore, the court held the provisions were unconstitutionally overbroad. *Id.*

141. Eve Pell, *Kicking Out Palestinians*, THE NATION, Feb. 5, 1990, at 167, 168.

142. David Cole, *Secret Tribunal*, THE NATION, May 6, 1991, at 581.

143. Rafeedie v. INS, 880 F.2d 506, 508-09 (D.C. Cir. 1989).

144. *Id.* at 507-08. By resorting to a summary exclusion hearing, the government could introduce classified information against Rafeedie without having to reveal, to either Rafeedie or the public, the substance of that information. *Id.*

145. *Id.* at 521-23.

146. *Id.* at 524.

147. *Id.*

of the committee's recommendations.<sup>148</sup> These actions also indicate the abuses that could have resulted from the enactment of the Terrorist Alien Removal Act.

### III. THE DUE PROCESS RIGHTS OF RESIDENT ALIENS

The Immigration Act of 1990 allows for the deportation of any alien within the United States who engages in terrorist activity.<sup>149</sup> The Terrorist Alien Removal Act would have permitted the government to deport an alien by using confidential information, without disclosing such evidence to the alien or the public.<sup>150</sup> Reconciling the Terrorist Alien Removal Act with the due process rights of resident aliens appears problematic since deportation hearings are, theoretically, civil proceedings despite their practical resemblance to criminal prosecutions.

#### A. THE LIMITED RIGHTS OF RESIDENCY

The government's power to regulate and prohibit immigration begins with the maxim of international law that every sovereign nation retains the power to forbid the entry of foreign persons.<sup>151</sup> As a corollary to this principle, the formulation and administration of immigration law is the exclusive province of the political branches of government.<sup>152</sup> As a

148. See *supra* text accompanying notes 117-36 (discussing ABCC recommendations). During the Persian Gulf War, the Bush administration ordered the tracking and apprehension of Iraqi students in the United States. Sharon LaFraniere & George Lardner, *U.S. Set to Photograph, Fingerprint All New Iraqi and Kuwaiti Visitors*, WASH. POST, Jan. 11, 1991, at A23; James Barron, *U.S. Taking Steps to Curb Terrorism*, N.Y. TIMES, Jan. 16, 1991, at A15 (reporting on domestic efforts to guard against Iraqi led terrorist attacks). These efforts seem to emulate the recommendations of the ABCC.

149. Pub. L. No. 101-649, § 601(a)(3), 104 Stat. 4978, 5069 (to be codified at 8 U.S.C. § 1182(a)(3)). The Immigration Act of 1990 added persons engaging in terrorist activity to the list of aliens who are deportable through a regular deportation hearing before an immigration judge as provided in 8 U.S.C. § 1251(a)(4)(B).

150. See *supra* text accompanying notes 45-56 (examining the provisions of the Terrorist Alien Removal Act). Section 501(e)(1) of TARA provides that an alien facing possible deportation is given a summary of the confidential information with the sensitive material redacted, except when even distributing a summary might cause the death or serious bodily injury of an informant. S. 635, 102d Cong., 1st Sess. § 501(e)(1) (1991).

151. See, e.g., *Wong Wing v. United States*, 163 U.S. 228 (1896) (acknowledging that the right to expel or exclude aliens is an inherent and inalienable right of every sovereign nation). Every sovereign nation has the power to forbid foreigners from entering the country, and only to admit foreigners under specific prescribed conditions. *Nishimura Ekiu v. United States*, 142 U.S. 651, 659 (1892).

152. See, e.g., *Kleindienst v. Mandel*, 408 U.S. 753, 765 (1972) (reiterating that in order for a country to maintain international relations and its own defense, a sovereign nation must have the power to exclude).

result, the Supreme Court gives great deference to the rules and regulations defined by Congress and the executive branch.<sup>153</sup>

Theoretically, aliens seeking initial entry into the United States ask for the privilege of entry and, therefore, may not claim any right to constitutional protections.<sup>154</sup> Only the procedures established by Congress constitute due process of law.<sup>155</sup> Thus, courts will not look beyond the provisions of a statute to define an alien's rights.<sup>156</sup> Upon entering the United States, however, an alien establishes ties to the community<sup>157</sup> which cannot be severed without the same constitutional protections of due process<sup>158</sup> afforded to American citizens.<sup>159</sup> Because deportation of a person already within the United States may result in

153. See H.R. REP. NO. 1365, 82d Cong., 2d Sess. 1654 (1952), reprinted in 1952 U.S.C.C.A.N. 1653, 1654 (stating that "[t]he power and authority of the United States, as an attribute of sovereignty, either to prohibit or regulate immigration of aliens are plenary and Congress may choose such agencies as it pleases to carry out whatever policy or rule of exclusion it may adopt and, so long as such agencies do not transcend limits of authority or abuse discretion reposed in them, their judgment is not open to challenge or review by courts.") The Supreme Court acknowledges Congress' plenary power over matters of immigration in *Chae Chan Ping v. United States*, 130 U.S. 581 (1889). There, the Court found that if Congress "considers the presence of foreigners of a different race in this country, who will not assimilate with us, to be dangerous to its peace and security, . . . its determination is conclusive upon the judiciary." *Id.* at 606.

Professor Schuck rejects suggestions that the tradition of judicial deference in immigration cases is linked to the fact that aliens lack the capacity to vote, or to the refusal by the courts to enter into questions of foreign policy. *The Transformation of Immigration Law*, *supra* note 1, at 14-18. Instead, Professor Schuck notes that the pattern of judicial restraint is subtly connected to the idea of national sovereignty. *Id.* at 17.

154. See, e.g., *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950) (stating that admission to the United States is a privilege the government grants to foreigners and, as such, is granted upon terms prescribed by the government).

155. See *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953) (quoting *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950)) (proclaiming that aliens who have entered the United States, even illegally, may only be expelled after proceedings which comply with the due process of law). An alien, however, who has not yet entered the United States is granted only those procedures authorized by Congress. *Id.*

156. *Id.*

157. *Landon v. Plasencia*, 459 U.S. 21, 34 (1982).

158. See *Hellenic Lines, Ltd. v. Rhoditis*, 398 U.S. 306, 309 n.5, *reh'g denied*, 400 U.S. 856 (1970) (quoting *Bridges v. Wixon*, 326 U.S. 135, 161 (1945) (Murphy, J., concurring)) ("Once an alien lawfully enters and resides in this country he becomes invested with the rights guaranteed by the Constitution to all people within our borders. Such rights include those protected by the First and the Fifth Amendments and by the due process clause of the Fourteenth Amendment").

159. See *Hellenic Lines v. Rhoditis*, 398 U.S. at 310 (stating that resident aliens are afforded the same constitutional due process protections as citizens); see also *Bridges v. Wixon*, 326 U.S. 135, 161 (1945) (Murphy, J., concurring) (asserting that the Bill of Rights recognizes no differences between citizens and resident aliens).

separation from family, friends, and occupation,<sup>160</sup> such a person must be given a fair opportunity to be heard and present evidence in his or her defense.<sup>161</sup> As a result, resident aliens enjoy more procedural protections in deportation hearings than do aliens seeking initial entry.<sup>162</sup>

Because a deportation hearing is a civil proceeding, an alien is not entitled to the due process protections which are found in criminal proceedings.<sup>163</sup> This interpretation is based on the view that deportation is not punishment, but instead a refusal to harbor persons the United States does not want within its borders.<sup>164</sup> Thus, resident aliens cannot claim many constitutional safeguards, such as the right to a jury.<sup>165</sup>

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160. See *Landon v. Plasencia*, 459 U.S. at 34 (relying on *Moore v. City of East Cleveland*, 431 U.S. 494, 499, 503-04 (1977)) (stating that the right of a resident alien to remain with his or her family ranks as one of the most important individual interests). See also *Harisiades v. Shaughnessy*, 342 U.S. 580, 600, *reh'g denied*, 343 U.S. 936 (1952) (Douglas, J., dissenting) (comparing deportation to banishment and stating that the liberty enjoyed by resident aliens is only illusory if the resident aliens are not free from arbitrary banishment).

161. *Plasencia*, 459 U.S. at 36. In *Plasencia*, the petitioner, a permanent resident alien, travelled to Mexico for two days for the purpose of smuggling illegal aliens into the United States. *Id.* at 23. Upon her return, the INS subjected her to an exclusion hearing to determine whether her return constituted an "entry" for purposes of deciding if her absence dissolved her resident alien status. *Id.* The Supreme Court held that although the alien's entry is to be evaluated in an exclusion hearing, her status as a resident alien entitles her to a fair hearing with procedures that afford her the opportunity to make an effective presentation of her case. *Id.* at 36-37.

162. See *id.* at 26-27 (comparing the procedural rights guaranteed in a deportation hearing with those allowed in an exclusion hearing). In an exclusion hearing, the alien: does not enjoy the right to prior notice; carries the burden of proving eligibility for entry; and may challenge exclusion only through a writ of habeas corpus. *Id.* In a deportation proceeding, however, the alien is: entitled to a seven-day notice of the action; the right of appeal to a federal circuit court; the right to seek suspension of a deportation order; the option of departing voluntarily, and the burden of proof is on the government, to prove an immigration violation with clear and convincing evidence. *Id.*

163. See, e.g., *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984) (stating that a deportation proceeding is a purely civil action which looks prospectively to determine the alien's right to remain in the country); see also *The Transformation of Immigration Law*, *supra* note 1, at 24-27 (questioning the deportation hearing's lack of procedural protections normally found in criminal actions when significant personal interests such as remaining with family, friends, and personal lifestyle are jeopardized).

164. See, e.g., *Bugajewitz v. Adams*, 228 U.S. 585, 591 (1913) (stating that deportation is not a punishment but instead the government's refusal to harbor unwanted persons). But see *Harisiades v. Shaughnessy*, 342 U.S. 580, 600, *reh'g denied*, 343 U.S. 936 (1952) (Douglas, J., dissenting) (arguing that despite judicial recognition that deportation is a civil matter, its effects on the resident alien make it nothing less than banishment).

165. See *Fong Yue Ting v. United States*, 149 U.S. 698, 730 (1893) (observing that because deportation is merely a means to return an alien to his own country, the right to a jury trial, the prohibitions against unreasonable searches and seizures, and cruel and unusual punishment are not binding in such hearings); see also *Galvan v. Press*, 347 U.S. 522, 530-32, *reh'g denied*, 348 U.S. 852 (1954) (holding that the prohibition against ex post facto laws does not apply to deportations); *Woodby v. INS*, 385

The availability of due process protections for deportation hearings are determined by the Supreme Court's test adopted in *Landon v. Plasencia*.<sup>166</sup> The test requires courts to balance (1) the alien's interest in remaining in the country; (2) the risk of erroneous deportation under current procedures; (3) the value of additional procedural safeguards in reducing that risk; and (4) the interest of the government in using current procedures versus any additional procedural safeguards.<sup>167</sup>

When considering terrorism, the interests of the alien and the government are both compelling. As the Supreme Court recognizes in *Plasencia*, an alien's family, social, and economic ties create a significant personal interest in avoiding deportation.<sup>168</sup> The Supreme Court also recognizes the "weighty" interest of the government in efficient enforcement of immigration laws.<sup>169</sup> The government's interest is even greater when it seeks to protect the public welfare<sup>170</sup> from violent acts by those who arbitrarily select their victims.<sup>171</sup> Thus, further examination should focus on the protections afforded to classified information versus the rights of aliens in immigration hearings.

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U.S. 276, 284-86 (1966) (requiring that clear and convincing evidence serve as the burden of proof in deportation cases).

Despite judicial recognition that deportation hearings are civil proceedings, Professor Schuck notes that lower court decisions have assimilated several criminal due process rights into these hearings. *The Transformation of Immigration Law*, *supra* note 1, at 66-68. He posits that this trend will probably continue as courts are more willing to view deportation as a removal from one's community, instead of a mere loss of the privilege to remain in the country. *Id.* at 66.

Nevertheless, Schuck questions whether imposing additional procedural requirements would result in substantially more fairness to aliens. *Id.* at 67-68. Extending greater procedural protections to the over one million deportations each year would require enormous reallocation of INS resources and would result in a large backlog of cases. *Id.* at 68. Schuck concludes that retaining the civil characterization of deportation hearings may be a necessary compromise in light of empirical realities. *Id.* at 68.

166. 459 U.S. 21, 35 (1982). This test, first espoused in *Matthews v. Eldridge*, 424 U.S. 319, 334-35 (1976), calls for courts to "consider the interest at stake for the individual, the risk of erroneous deprivation of the interest through procedures used as well as the probable value of additional or different procedural safeguards, and the interest of the government in using the current procedures rather than additional or different procedures." *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

170. *Cf. Jay v. Boyd*, 351 U.S. 345, 358 (1956) (stating that some circumstances may exist where the government is permitted to withhold classified information from an alien, especially when national security is threatened).

171. See Sen. John Danforth, Remarks at the Jerusalem Conference on International Terrorism (July 2-5, 1979), in *Terrorism Versus Democracy*, INTERNATIONAL TERRORISM: CHALLENGE AND RESPONSE 116-17 (B. Netanyahu ed., 1981) (observing that in selecting its victims, terrorism does not discriminate between combatants and noncombatants, young and old, or male and female, so long as the number of casualties and the magnitude of the violence are maximized).

## B. THE ROLE OF CLASSIFIED INFORMATION IN IMMIGRATION HEARINGS

An alien seeking initial entry to the United States may be excluded with no right to view the information the government uses to deny entry.<sup>172</sup> In *Shaughnessy v. United States ex rel. Mezei*, the government attempted to exclude Mezei, a twenty-five-year resident alien from New York, after his return from a two-year stay in Europe.<sup>173</sup> The government refused to provide Mezei with a hearing pursuant to regulations which allow the Attorney General to deny a hearing if the exclusion is based on confidential information.<sup>174</sup> After acknowledging that a resident alien cannot be denied constitutional due process,<sup>175</sup> the Court found that Mezei's two year absence, nineteen months of which were spent behind the Iron Curtain, dissolved his resident alien status.<sup>176</sup> Because entering aliens can claim no rights of due process, the Court found that the Attorney General could order the exclusion without a hearing in order to protect the confidentiality of information used against Mezei.<sup>177</sup>

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172. See *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953) (stating that in an exclusion case, an Attorney General cannot be forced into disclosing the foundation of his determinations).

173. *Id.* at 208. The alien, Mezei, proffered that he traveled to Rumania to visit his dying mother. *Id.* When Rumania denied him entry, he spent nineteen months in Hungary because of difficulties encountered in acquiring permission to leave. *Id.* After being denied entry to the United States, Mezei unsuccessfully sought to emigrate to other countries. *Id.* at 209. Because no other country would receive him, Mezei was detained on Ellis Island. *Id.* Thus, entry into the United States offered him the only means of release from detention.

174. *Id.* at 210-11. The government relied on 8 C.F.R. § 175.57 which provides that "[i]n any special case the alien may be denied a hearing before the board of special inquiry . . . if the Attorney General determines that he excludable . . . on the basis of information of a confidential nature, the disclosure of which would be prejudicial to the public interest."

175. *Id.* at 213 (relying on *Kwong Hai Chew v. Colding*, 344 U.S. 590, 601 (1953)).

176. *Id.* at 214.

177. *Id.* at 214-15. Justices Black and Douglas pointed out that not only had Mezei been excluded, but he had also faced an indefinite term of detention until another country agreed to receive him. *Id.* at 216-17 (Black, J. and Douglas, J., dissenting). They also argued that the Court's holding puts the alien's liberty at the unreviewable and arbitrary discretion of the government. *Id.*

Justices Jackson and Frankfurter, in a separate dissent, distinguished between the substantive due process rights afforded to aliens, and the rights of procedural due process. *Id.* at 218 (Jackson, J. and Frankfurter, J., dissenting). They agreed that the executive may detain even a resident alien, especially when found necessary to preserve the national security. *Id.* at 223. Procedural due process, however, demands that any alien that comes within the jurisdiction of the United States be granted a fair hearing. *Id.* at 228.

The Supreme Court reached a different result, however, in a case in which the person's absence from the United States did not destroy his resident alien status. In *Kwong Hai Chew v. Colding*,<sup>178</sup> the government relied on confidential information to exclude, without a hearing, a five-year resident alien.<sup>179</sup> Chew, who joined the United States Merchant Marines in New York, was detained by immigration officials when his ship docked in San Francisco.<sup>180</sup> The Supreme Court found that Chew's four month absence did not dissolve his resident alien status, and therefore, he could not be excluded without a fair hearing.<sup>181</sup> The Court stated that not even Congress may deny a fair hearing to a lawful permanent resident alien who has entered its jurisdiction and is part of its population.<sup>182</sup>

In *Jay v. Boyd*,<sup>183</sup> the Supreme Court upheld the use of undisclosed, confidential information to deny a waiver of a decision to deport a resident alien.<sup>184</sup> After the Court found the alien deportable because of his voluntary membership in the Communist Party, the alien filed an application for suspension of the deportation order.<sup>185</sup> The Court explained that while the alien has a right to request discretionary relief, the granting of such relief is a matter of grace.<sup>186</sup> The gratuitous nature of this relief, therefore, permits the use of confidential information without requiring disclosure to the alien.<sup>187</sup> According to the Court, the constitutional protections afforded to resident aliens are useful only to

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178. 344 U.S. 590 (1953).

179. *Id.* at 593-95.

180. *Id.*

181. *Id.* at 599. The Court ultimately found that the federal regulation permitting the denial of a hearing in which confidential information is used, does not apply to resident aliens. *Id.* The Court stated that "we find no language in the regulation that would have required its application to the petitioner had he remained continuously and physically within the United States." *Id.* Although the *Chew* decision is founded in regulatory interpretation, the Supreme Court has acknowledged that *Chew* establishes that resident aliens are entitled to a fair hearing as a matter of constitutional due process. *Landon v. Plasencia*, 459 U.S. 21, 32 (1982).

182. *Kwong Hai Chew v. Colding*, 344 U.S. 590, at 595.

183. 351 U.S. 345 (1956).

184. *Id.* at 347-50.

185. *Id.*, see 8 C.F.R. § 242.17 (1991) (noting that under federal regulations, which are still in place today, a resident alien who loses a deportation judgment may file for discretionary relief from the Board of Immigration Appeals). In deciding whether to suspend the deportation order, the immigration judge may consider confidential information not in the record and not available for review by the alien. *Id.*

186. 351 U.S. at 345-55.

187. *Id.* at 359. The regulation in question restricts the use of confidential information to those cases in which disclosure would endanger the public safety. *Id.* at 358. According to the Court, "[i]f the statute permits any withholding of information from the alien, manifestly this is a reasonable class of cases in which to exercise that power." *Id.*

interpret an ambiguous statute against the use of confidential information.<sup>188</sup>

*Plasencia, Mezei, and Chew* provide that a resident alien facing deportation retains the right to a fair hearing. Because a deportation hearing is a matter of right and not of grace, *Boyd* would appear to compel the disclosure of classified government evidence to the alien. The compelled disclosure of this evidence, however, is required only when a "fair hearing" requires full disclosure of classified government evidence. Recent legislation and court decisions, however, indicate that such disclosure may not be necessary.

### C. THE USE OF CLASSIFIED INFORMATION AGAINST UNITED STATES CITIZENS

The Supreme Court has held in no certain terms that resident aliens enjoy the same rights of due process as do citizens.<sup>189</sup> Therefore, an examination of the judicial treatment of the use classified information against citizens logically follows. Because a deportation hearing is a civil proceeding, and because courts recognize a resident alien's significant interest in avoiding expulsion from the United States, it is necessary to examine the treatment of classified information in both criminal and civil actions.

#### 1. *Classified Evidence in Criminal Actions*

Generally, when the government's case against a United States citizen is based upon classified information, the government must either disclose such information to the defendant or abandon its pursuit of a conviction.<sup>190</sup> In *Roviaro v. United States*, the Supreme Court held that the prosecution must disclose any information which may be relevant and helpful to the defense.<sup>191</sup> To refuse a defendant the opportunity to examine the incriminating evidence, is considered a denial of

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188. *Id.* at 359.

189. *See supra* text accompanying notes 154-64 (examining how the due process rights of resident aliens are established by their interest in remaining within the United States, but are limited by the characterization of a deportation hearing as a civil proceeding).

190. *See Note, Graymail: The Disclose or Dismiss Dilemma in Criminal Prosecutions*, 31 CASE W. RES. L. REV. 84, 86-95 (1980) (discussing the problems of using classified information to support a criminal prosecution).

191. 353 U.S. 53, 60-62 (1957). The Court in *Roviaro* warned that no fixed rule could be established. *Id.* at 62. Whether or not disclosure is required "must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defense, the possible significance of the informer's testimony, and other relevant factors." *Id.*



the Sixth Amendment right of confrontation and right to a public trial.<sup>192</sup>

In the 1970s, however, Congress investigated instances in which the reluctance of the government to disclose classified information forced the voluntary dismissal of criminal prosecutions.<sup>193</sup> As a result of these failed investigations, Congress enacted two laws which provide for the use of *in camera* and *ex parte* review of classified information: the Foreign Intelligence Surveillance Act (FISA),<sup>194</sup> and the Classified Information Procedures Act (CIPA).<sup>195</sup> Neither of these acts, however, proposes, as did the Terrorist Alien Removal Act, to prevent the disclosure of information material to the defense.<sup>196</sup>

Congress enacted FISA in 1978 to establish procedures for the authorization of electronic surveillance within the United States for foreign intelligence purposes.<sup>197</sup> The information obtained through the surveillance may be used in a criminal proceeding only upon written

192. U.S. CONST. amend. VI. The Sixth Amendment states: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him . . . ."

193. See SUBCOMM. ON SECRECY AND DISCLOSURE OF THE SENATE SELECT COMM. ON INTELLIGENCE, 95TH CONG., 2D SESS., NAT'L SECURITY SECRETS AND THE ADMIN. OF JUSTICE 7-10 (Comm. Print 1978) (examining situations in which the government's pursuit of a conviction requires the disclosure of information which may harm the national security). This "disclose or dismiss" dilemma can arise in a number of situations. *Id.* In espionage and "leak" cases, the very information which gave rise to the breach of security must often be revealed to the jury. *Id.* Such information does not lose its sensitivity merely because of its disclosure by the defendant. *Id.* Often, adversary intelligence organizations do not realize information is classified until the United States litigates the matter. *Id.*

In many cases, the defendant is usually a high-ranking official who threatens to expose classified information to the public as part of the defense. *Id.* Such a situation virtually immunizes the defendant from prosecution unless the government is willing to risk the disclosure of the sensitive material. *Id.* In one case, the Justice Department pursued drug trafficking charges against Pittaporn Khramkhruan, a CIA operative in Thailand. *Id.* at 13-14. The government abandoned its prosecution after Khramkhruan sought discovery of documents which would have revealed sources and methods of CIA operations in Southeast Asia. *Id.*

In *United States v. Ehrlichman*, 546 F.2d 910 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 1120 (1977), defense counsel warned the Watergate Special Prosecutor that it would seek to discover highly classified documents at trial. *Id.* at 930-32. Discovery was avoided, however, because the court found the information, which consisted of strategic nuclear targeting plans, irrelevant to the defense. *Id.* at 917-18.

194. 50 U.S.C. §§ 1801-1811 (1988).

195. 18 U.S.C. app. §§ 1-16 (1988).

196. See *infra* text accompanying notes 187-208 (examining applications of FISA and CIPA).

197. SENATE SELECT COMM. ON INTELLIGENCE, THE FOREIGN INTELLIGENCE SURVEILLANCE ACT OF 1978, S. REP. NO. 701, 95th Cong., 2d Sess. 7 (1978). Information which constitutes "foreign intelligence" includes information relating to the ability of the United States to protect against attack from a foreign power, sabotage, interna-

authorization from the Attorney General.<sup>198</sup> If a defendant makes a motion to suppress the evidence obtained through an electronic surveillance, the government is permitted to protect the underlying classified information by requesting a judge to review the FISA order *in camera* and *ex parte*.<sup>199</sup> Lower courts have upheld the constitutionality of these procedures, reasoning that the right to be present at all proceedings and the right to a public trial does not apply to pretrial suppression hearings.<sup>200</sup> When, however, an adversary hearing is necessary to determine the legality of a surveillance, the courts may compel disclosure to the defendant.<sup>201</sup>

Unlike FISA, the Classified Information Procedures Act provides for the use of *in camera*, *ex parte* review of classified information to be used at trial.<sup>202</sup> Congress enacted CIPA to allow the government to evaluate classified information in the defendant's possession in order to determine whether to dismiss the action, or risk the defendant's public disclosure of the sensitive information at trial.<sup>203</sup> Contrary to its in-

tional terrorism, clandestine intelligence activities, and any matter relating to the national defense or conduct of foreign affairs. 50 U.S.C. § 1801(e).

198. 50 U.S.C. § 1806(b). Courts require that although this information may be used in criminal proceedings, the primary purpose of electronic surveillance should be for foreign intelligence purposes. *See United States v. Duggan*, 743 F.2d 59, 77 (2d Cir. 1984) (stating that the language of the act and its requirements for authorizing electronic surveillances make plain that its primary purpose must be to gather foreign intelligence data). *But see United States v. Falvey*, 540 F. Supp. 1306, 1313-14 (E.D.N.Y. 1982) (permitting the use of information obtained despite the fact that the primary motivation of the surveillance was to amass evidence for a criminal conviction).

199. 50 U.S.C. § 1806(f). Before a court can make an *in camera*, *ex parte* review of a FISA application and order, the Attorney General must file an affidavit certifying that the disclosure of such material in an adversary setting is harmful to national security. *Id.*

200. *See, e.g., United States v. Falvey*, 540 F. Supp. at 1315-16 (holding that the Sixth Amendment right of confrontation and right to a public trial do not apply to a motion to suppress FISA information). The court in *Falvey* noted that *in camera*, *ex parte* hearings are used to determine the reliability of informants. *Id.* at 1315.

201. *See United States v. Megahey*, 553 F. Supp. 1180, 1193-94 (E.D.N.Y. 1982) (distinguishing *Alderman v. United States*, 394 U.S. 165, which held that disclosure to a defendant is required to determine whether seized evidence is tainted), *aff'd mem.*, 729 F.2d 1444 (2d Cir. 1983). Section 1806(f) provides that in determining the legality of a FISA order "the court *may* disclose to the aggrieved person, under appropriate security procedures and protective orders, portions of the application, order, or other materials relating to the surveillance only where such disclosure *is necessary to make an accurate determination of* legality of the surveillance."

50 U.S.C. § 1806(f) (emphasis added).

202. *See Richard P. Salgado*, Comment, *Government Secrets, Fair Trials, and the Classified Information Procedures Act*, 98 YALE L.J. 427, 427-31 (1988) (examining the history and purpose of CIPA).

203. SENATE COMM. ON THE JUDICIARY, THE CLASSIFIED INFORMATION PROCEDURES ACT, S. REP. NO. 823, 96th Cong., 2d Sess. 1-3 (1980) [hereinafter SENATE

tended purpose, however, CIPA has been employed to allow *in camera*, *ex parte* use of classified information against the defendant.<sup>204</sup>

Under CIPA, if a defendant seeks the discovery of classified documents, the Attorney General may request an *ex parte* and *in camera* hearing after certifying that disclosure of such information would damage national security.<sup>205</sup> Like the Terrorist Alien Removal Act, CIPA authorizes a court to substitute disclosure of the classified material with a summary of the information.<sup>206</sup> If the government ultimately refuses to disclose the information to the defendant, the court may order the prosecution to continue if the "interests of justice" would not be served by a dismissal.<sup>207</sup>

Use of CIPA is generally limited to preventing the disclosure of classified information immaterial to determining the defendant's guilt or innocence.<sup>208</sup> In *United States v. Porter*, the government used CIPA to

CIPA REPORT]. Congress intended for CIPA to require the defense to notify the court, prior to trial, of all motions it intended to make which requires the discovery of classified documents. *Id.* at 2. This practice allows the government to determine whether it should continue with the prosecution, as well as protecting sensitive information immaterial to the defense. *Id.* at 1. Nowhere in the legislative history does Congress imply that the government may successfully prosecute a case without disclosing material evidence to the defendant.

204. See *United States v. Sarkissian*, 841 F.2d 959, 965-66 (9th Cir. 1988) (upholding *ex parte*, *in camera* review of classified material by the district court).

205. 18 U.S.C. app. § 6(c)(2) (1988). Section 6(c)(2) provides:

The United States may . . . submit to the court an affidavit of the Attorney General certifying that disclosure of classified information would cause identifiable damage to the national security of the United States and explaining the basis for the classification of such information. If so requested by the United States, the court shall examine such affidavit *in camera* and *ex parte*.

18 U.S.C. app. § 6(c)(2) (1988).

206. 18 U.S.C. app. § 6(c)(1). Section 6(c)(1) provides in part:

[T]he United States may move that, in lieu of the disclosure of such specific classified information, the court order—

(A) the substitution for such classified information of a statement admitting relevant facts that the specific classified information would tend to prove; or

(B) the substitution for such classified information of a summary of the specific classified information.

18 U.S.C. app. § 6(c)(1).

207. 18 U.S.C. app. § 6(e)(2). 18 U.S.C. app. § 6(e)(2) provides:

[W]hen the court determines that the interests of justice would not be served by dismissal of the indictment, the court shall order such other action, in lieu of dismissing the indictment or information, as the court determines is appropriate. Such action may include, *but need not be limited to*—

(A) dismissing specified counts of the indictment or information;

(B) finding against the United States on any issue as to which the excluded classified information relates; or

(C) striking or precluding all or part of the testimony of a witness.

18 U.S.C. app. § 6(e)(2) (emphasis added).

208. See *United States v. Pringle*, 751 F.2d 419, 427-28 (1st Cir. 1984) (using CIPA to deny discovery of radio transmitters used to apprehend defendants); *United*

deny the defense team's inspection of aircraft surveillance equipment used to apprehend the defendants.<sup>209</sup> After examining the equipment *in camera* and *ex parte*, the Sixth Circuit held that although denying the inspection may have hampered the defense, the defense was not deprived of a fair trial.<sup>210</sup> The court also noted that in light of other available evidence, examination of the equipment offered little to the defense.<sup>211</sup>

In *United States v. Sarkissian*,<sup>212</sup> however, the Ninth Circuit used CIPA to deny defendants access to information submitted to the court *by request of the government*.<sup>213</sup> The FBI accused the defendants, members of the Justice Commandoes of the Armenian Genocide, of attempting to destroy the Honorary Turkish Consulate in Philadelphia.<sup>214</sup> At trial, the government submitted classified information which the court sealed from disclosure to the defendants.<sup>215</sup> Without attempting to characterize the nature of the information and without determining its relevance to the defense, the court of appeals interpreted CIPA to bar the defendants' access to the information.<sup>216</sup> The court, however, merely stressed the classified nature of the information and ignored the Congressional intent that CIPA is not to be used in any manner that would prejudice the defendant.<sup>217</sup>

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*States v. Panas*, 738 F.2d 278, 285-86 (8th Cir. 1984) (refusing discovery of radio transmitters when the capabilities of such radios are corroborated by expert testimony); *United States v. Porter*, 701 F.2d 1158, 1162-63 (6th Cir.), *cert. denied*, 464 U.S. 1007 (1983) (refusing inspection of radar equipment after determining that the inspection contributes little to the defense).

209. 701 F.2d at 1162. Customs officials employed radar systems which are used in military fighter aircraft to track the defendant's plane carrying contraband into the United States. *Id.* at 1160. The government denied requests to inspect the equipment under section 4 of CIPA which authorizes a court, *in camera* and *ex parte*, to delete specific immaterial facts from the classified information that is to be made available to the defendants. *Id.* at 1162.

210. *Id.* at 1162-63.

211. *Id.* at 1162. At trial, the government introduced expert testimony describing, in detail, the range and capabilities of the radar equipment. *Id.* A similar holding was reached in *United States v. Pringle*, 751 F.2d 419 (1st Cir. 1984). In this case, a Massachusetts district court refused to allow discovery of certain radio transmitters used by federal agents in a narcotics sting operation. *Id.* at 426. The Court of Appeals held the transmitters not discoverable under CIPA after an *in camera, ex parte* hearing. *Id.* at 427-28. The court ruled that the sought-for evidence had no bearing on the guilt or innocence of the defendants and would not have aided the defense. *Id.*

212. 841 F.2d 959 (9th Cir. 1988).

213. *Id.* at 965-66 (emphasis added).

214. *Id.* at 961-962.

215. *Id.* at 962.

216. *Id.* at 965.

217. *Id.* In denying the defendants access to the information, the court appears to have balanced the defendant's need for the information with the national security interests sought to be protected by refusing disclosure. *Id.* The defendants argued that

Thus, although FISA and CIPA regulate the use of *in camera* and *ex parte* review of classified information, they do so only to prevent disclosure of information immaterial to the defense. The Terrorist Alien Removal Act, however, would have permitted the *ex parte* use of secret evidence that forms the foundation of the government's case against a resident alien.<sup>218</sup> Unlike CIPA, if even a summary of the classified material would harm national security, the Terrorist Alien Removal Act would not have required disclosure of the information or dismissal of the deportation hearing.<sup>219</sup>

## 2. *Classified Evidence in Civil Actions*

Although each citizen's interest in a fair adjudication trumps the government's use of classified information in a criminal trial, the government's veil of secrecy resists penetration in civil actions. A civil plaintiff may be forced to surrender the pursuit of a remedy if resolution of the matter requires discovery of classified information.<sup>220</sup>

In *Totten v. United States*,<sup>221</sup> a decedent's administrator sought compensation for services the decedent performed as a spy for Union forces during the American Civil War.<sup>222</sup> Without discovery of the specific terms of the contract between the decedent and the President, the sufficiency of the government's offered compensation could not be verified by the administrator.<sup>223</sup> The Supreme Court refused to compel discov-

CIPA forbid such balancing, implying that CIPA must either exclude irrelevant information or demand disclosure of information material to the defense. *Id.* The Circuit Court ruled the argument meritless, citing a section of the Senate CIPA report which states that courts should consider the possible harm to national security in allowing discovery. *Id.*

The legislative history relied upon by the court, however, deals with that part of CIPA which allows the government to delete irrelevant items from classified documents while substituting "a statement *admitting the facts that classified information might prove.*" SENATE CIPA REPORT, *supra* note 202, at 6 (emphasis added). Three pages later, the same report states that when the government refuses to disclose classified information, "the court must then issue an order that is designed to ensure that the defendant's ability to prepare for his defense is not impaired . . ." *Id.* at 9. The report then declares: "It should be emphasized . . . that the court *should not balance the national security interests of the Government against the rights of the defendant to obtain the information.*" *Id.* (emphasis added).

218. S. 635. 102d Cong., 1st Sess. § 501(b) (1991).

219. *Id.* at § 501(e)(1).

220. See *infra* text accompanying notes 221-237 (examining the use of classified information in civil actions).

221. 91 U.S. 105 (1875).

222. *Id.* at 105-106. The decedent entered into a contract with President Lincoln, promising to infiltrate the South to determine the size and location of Confederate forces and fortifications. *Id.*

223. *Id.* at 106.

ery, noting that if the disclosure of secret documents could be forced through the bringing of a civil claim, then the security of the public would be sacrificed.<sup>224</sup> Therefore, public policy demands that the pursuit of a remedy must fail when such action may result in the revelation of state secrets.<sup>225</sup>

In *United States v. Reynolds*,<sup>226</sup> the Supreme Court denied the plaintiff's discovery request for the production of classified documents in a tort action.<sup>227</sup> The plaintiffs, widows of three technical experts killed while conducting a top-secret test of air-defense equipment, sought discovery of an Air Force accident investigation report.<sup>228</sup> In denying discovery, the Court held the classified report privileged under the Federal Rules of Civil Procedure.<sup>229</sup>

The Court likened the government's claim of privilege to the right against self incrimination.<sup>230</sup> The presiding judge must be satisfied by the context in which the claim of privilege is made that the asserted claim prevents the harmful effects that could result from disclosure.<sup>231</sup> The Supreme Court warned that a judge should not compromise the security of state secrets by insisting upon examination of the evidence, even if such an examination is *in camera*.<sup>232</sup>

224. *Id.* at 106-107.

225. *Id.* at 107.

226. 345 U.S. 1 (1953).

227. *Id.* at 11.

228. *Id.* at 3-4. Plaintiffs sought discovery of the Air Force accident report through Rule 34 of the Federal Rules of Civil Procedure, which Congress made applicable in suits against the United States government through the Torts Claims Act, 28 U.S.C. § 2674. *Id.* at 4. Rule 34 then provided that a court may:

order any party to produce and permit the inspection, copying or photographing, by or on behalf of the moving party, of any designated documents, papers, books, accounts, letters, photographs, objects, or tangible things, not privileged, which constitute or contain evidence relating to any of the matters permitted within the scope of the examination. . . .

*Id.* at 3 n.3.

229. *Id.* at 9-11.

230. *Id.* at 8-9.

231. *Id.* at 14-15. The court acknowledged that "[t]oo much judicial inquiry into a claim of privilege would force disclosure of the thing the privilege was meant to protect, while a complete abandonment of judicial control would lead to intolerable abuses." *Id.* Thus, the Court recognized that requiring disclosure in all circumstances would render useless the classification of government documents. However, honoring the claim of privilege on its mere assertion allows the government to frustrate virtually all civil actions in which the plaintiff seeks discovery of government documents. *Id.*

232. *Id.* at 10. The court rejected the plaintiffs' reliance on criminal cases which force the government to either disclose the classified data, or dismiss its prosecution of the accused. *Id.* at 12. Such cases, according to the Court, do not apply to civil actions since the government is not the moving party seeking the sole benefit of classified information. *Id.*

In *Halkins v. Helms*,<sup>233</sup> the Court of Appeals for the Circuit Court of the District of Columbia reviewed a discovery request in a suit by twenty-seven individuals alleging that the federal government illegally intercepted international wire, cable, and telephone communications.<sup>234</sup> The plaintiffs sought discovery of the names of individuals and organizations whose communications were intercepted by the National Security Agency.<sup>235</sup> The court of appeals rejected plaintiffs' request to be present during the lower court's *in camera* review of classified information.<sup>236</sup> The court held that state secrets are absolute and courts cannot risk the possibility that an individual litigant might divulge the information gleaned from an *in camera* hearing.<sup>237</sup> The court also stated that executive claims of privilege should be granted the "utmost deference" when made to protect military or diplomatic secrets.<sup>238</sup>

*Totten*, *Reynolds*, and *Halkins* aids interpretation of the Terrorist Alien Removal Act only if one views deportation as a civil proceeding by which the resident alien seeks the prospective "privilege" of remaining within the United States. Such reasoning, however, ignores the increasing willingness of courts to recognize deportation as a separation of the alien from significant personal interests which deserve constitutional protection.<sup>239</sup> Also, in a deportation hearing, the government is the party moving to introduce the secret evidence.<sup>240</sup> In *Totten*, *Reynolds*, and *Halkins*, the plaintiffs moved to discover classified information with the speculative hope that the material would assist their case.

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233. 598 F.2d 1 (D.C. Cir. 1978).

234. *Id.* at 3.

235. *Id.*

236. *Id.* at 7.

237. *Id.* Likewise, allowing a "suspected terrorist" to be present at an *in camera* review of classified information is illogical. The Classified Information Procedures Act provides that a court may permit a defendant to view classified information under an order that prohibits disclosure of such information. 18 U.S.C. app. § 3 (1988). These protective orders are futile when used against an alien who is to be deported outside the jurisdiction of the United States.

238. *Halkin v. Helms*, 598 F.2d 1, 9 (D.C. Cir. 1978) (relying on *United States v. Nixon*, 418 U.S. 683, 710 (1974)). The court stated:

[a] ranking of the various privileges recognized in our courts would be a delicate undertaking at best, but it is quite clear that the privilege to protect state secrets must head the list. The state secrets privilege is absolute. However helpful to the court the informed advocacy of the plaintiff's counsel may be, we must be especially careful not to order any dissemination of information asserted to be privileged state secrets.

*Id.* at 7.

239. See *supra* text accompanying notes 154-64 (discussing the Supreme Court's examination of a resident alien's interests that are at stake in a deportation hearing).

240. See *supra* text accompanying note 161 (noting that the burden is on the government to prove an immigration violation with clear and convincing evidence).

Thus, in both criminal and civil cases, the government may not benefit from information that it brings into court without disclosing that same information to the defendant. As Justice Vinson recognized in *United States v. Reynolds*,<sup>241</sup> allowing the moving party to seek prosecution with the aid of secret evidence, while depriving the responding party access to that same material is unconscionable.<sup>242</sup>

#### IV. RECOMMENDATIONS FOR FUTURE LEGISLATION

Although a continuing need for an effective counterterrorism program exists, experts agree that such strategies must respect the rights of individuals.<sup>243</sup> Terrorism not only attempts to disrupt the functions of government, but also seeks to win the sympathies of the people by provoking oppressive government responses.<sup>244</sup> Thus, the zealous application of security defenses against terrorism must also recognize that preserving the political freedoms of individuals is, inherently, a vital weapon in the war against terrorism.<sup>245</sup>

Likewise, any legislation to facilitate the deportation of resident aliens as suspected terrorists must not abandon the procedural protections previously afforded to resident aliens. The following suggestions are intended to produce a Terrorist Alien Removal Act that is both acceptable to Congress, and true to the fundamental notions of fairness that preserve democracy.

##### A. REQUIRE DISCLOSURE OF MATERIAL INFORMATION

The treatment of classified information in civil and criminal actions is difficult to reconcile with deportation hearings in a way that is both legally consistent and practically humane. Because a deportation hear-

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241. 345 U.S. 1 (1953).

242. *Id.* at 12.

243. Senator Danforth, Remarks at the Jerusalem Conference on Terrorism (July 2-5, 1979), in *INTERNATIONAL TERRORISM: CHALLENGE AND RESPONSE* 115-116 (B. Netanyahu ed., 1981). Senator Danforth argues that unlike totalitarian regimes, democratic governments do not operate with unchecked power to suppress threats to domestic order. *Id.* at 116. Instead, respect for the rights of individuals limits the tools available to respond to terrorist actions within a democracy. *Id.*

244. *See id.* at 120-21 (arguing that terrorist causes will not win support so long as governments preserve the people's right to participate in the political process). *See also* Yonah Alexander, Remarks at the Symposium on the Legal Aspects of Terrorism, Washington, D.C. (Nov. 7, 1988), in *Legal Aspects of Terrorism*, 12 *TERRORISM* 297, 298 (1989) (stating that "should governments overreact to terrorism and meet it with . . . repression, democracy itself will be substantially weakened. The terrorists will then achieve one of their primary goals: the destruction of democratic society").

245. *See supra* text accompanying notes 242-43 (discussing the need to avoid oppressive government reactions in combatting terrorism).



ing is a civil proceeding,<sup>246</sup> a resident alien cannot compel the disclosure of classified information. After all, the Supreme Court has held that the deportation hearing is not punishment, but merely serves to determine whether an alien is entitled to the privilege of remaining in the United States.<sup>247</sup>

In *Landon v. Plasencia*,<sup>248</sup> however, the Supreme Court found that the Fifth Amendment Due Process Clause requires that a resident alien facing deportation must be given an opportunity to make an effective presentation.<sup>249</sup> Concealing information from an alien which the government finds effective in arguing for deportation, deprives the alien of the ability to effectively defend against such action.

In *Shaughnessy v. United States ex rel. Mezei*, Justice Jackson recognized that both the alien and the government have an interest in restricting the use of secret proceedings.<sup>250</sup> Shutting the public out of deportation tribunals opens the door for corruption, and paves the way for popular discontent. An incident in England, in which six Irishmen were convicted of bombing a pub were released after spending sixteen years in prison provides a vivid example of this danger.<sup>251</sup> A British appellate court found that the police not only forced the defendants to sign confessions, but also tampered with evidence in order to obtain their convictions.<sup>252</sup>

Efforts to curb the use of *ex parte* deportation hearings, however, must begin with a refinement of the definition of terrorism. Much of the fear of the *in camera*, *ex parte* hearings could be reduced by narrowing the pool of resident aliens who could be subjected to such hearings. The definition of "terrorist activity" should be recalibrated to welcome the political expression of aliens, while at the same time defending against those who articulate their beliefs through violence.

The effort to limit the use of deportation hearings first requires prohibiting the deportation of any alien who merely negligently partici-

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246. *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984).

247. See *supra* notes 162-64 and accompanying text (finding that deportation hearings are civil proceedings and, therefore, aliens are not entitled to the same due process protections as afforded in criminal proceedings).

248. 459 U.S. 21 (1982).

249. *Id.* at 36.

250. See 345 U.S. at 224-25 (Jackson, J., dissenting) (stating: "[l]et it not be overlooked that due process of law is not for the sole benefit of the accused. It is the best insurance for the Government itself against those blunders which leave lasting stains on a system of justice but which are bound to occur on *ex parte* consideration").

251. See John McCoy, *The Wheels of Justice*, TIME, Mar. 25, 1991, at 45 (discussing the erroneous convictions of the "Birmingham Six").

252. *Id.*

pates in terrorist activity.<sup>253</sup> Legislating what resident aliens "should know" about a form of violence that experts cannot define, and which is subject to the political whims of the State Department, is unconscionable.<sup>254</sup> Furthermore, deporting aliens who harbor no intent to harm the United States or its people does not advance national security interests.

When an alien is accused of knowingly contributing to an act of terrorism, the Terrorist Alien Removal Act should require the disclosure of any classified information material to the alien's defense. Thus, procedures similar to CIPA should be employed.<sup>255</sup> Accordingly, the unnecessary disclosure of classified evidence would be prevented while allowing the alien to effectively challenge the truth of the government's accusations.

Forbidding the undisclosed use of classified information in all circumstances, however, gives aid to those who infiltrate the United States for the sole purpose of terrorizing the "domestic tranquility."<sup>256</sup> The use of secret evidence should be allowed when the alien's interests are not seriously impinged upon, and a national security threat is imminent.<sup>257</sup>

The Supreme Court recognized that an alien's interest in avoiding deportation are not necessarily fixed.<sup>258</sup> These interests develop as time strengthens the alien's ties to the community.<sup>259</sup> Thus, courts should employ the balancing test adopted in *Landon v. Plasencia* in measuring the adequacy of the government's disclosure.<sup>260</sup> Such a balancing test would allow the terrorist removal judge to weigh the interests of the alien in avoiding deportation against the government's need for secrecy.

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253. See Immigration Act of 1990, Pub. L. No. 101-649, § 601(a)(3)(B)(iii), 104 Stat. 4978, 5070 (1990) (authorizing the deportation of any alien who assists any individual or organization that has committed a terrorist act whom the alien knows, or reasonably should know); see also Bruce Fein, *Improving on a Terrorist Idea*, Tx. LAWYER, July 1, 1991, at 17 (recommending that negligence should not trigger the jurisdiction of the special deportation tribunal).

254. See *supra* text accompanying notes 101-15 (examining the problems of defining terrorism).

255. See *supra* text accompanying notes 201-16 (examining applications of the Classified Information Procedures Act).

256. U.S. CONST. pmb1.

257. See *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (holding that the First Amendment does not protect speech likely to incite imminent and likely unlawful action).

258. See *Landon v. Plasencia*, 459 U.S. 21, 32 (1982) (stating that "once an alien gains admission to [the United States] and begins to develop ties that go with permanent residence, his constitutional status changes accordingly").

259. *Id.*

260. *Id.* at 35-36.

Terrorists would also be prevented from claiming the protections of constitutional due process at the very instant they cross the border into the United States.

## B. REINFORCE JUDICIAL INDEPENDENCE

Any proposal to permit the *ex parte* use of classified evidence demands complete judicial independence from INS authority. Under the proposed Terrorist Alien Removal Act, Article III judges appointed by the Chief Justice of the Supreme Court would preside over all special removal hearings.<sup>261</sup> This represents a significant and welcome departure from traditional immigration procedures.<sup>262</sup>

Presently, INS administrative judges subject to the influence of the INS political leadership preside over deportation hearings.<sup>263</sup> Like the FISA court, judges appointed to the special terrorist deportation court should serve for no longer than one term.<sup>264</sup> The proposed Terrorist Alien Removal Act which called for the reappointment of judges creates a personal interest in handing down decisions favorable to the government.

Additionally, the term should be lengthened from the proposed five-year term, to ten years.<sup>265</sup> A ten-year term would foster expertise in handling classified information and prevent a multitude of judges from having access to state secrets.<sup>266</sup>

## CONCLUSION

It is to the credit of the FBI and the INS that no article need be written about the failure of the United States to defend against domestic terrorist strikes. Any analysis of counterterrorism strategy must be measured against the reality that international terrorist groups threaten, plan, and execute acts of violence against American civilians.

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261. S. 635, 102d Cong., 1st Sess. § 503(a) (1991).

262. See *The Transformation of Immigration Law*, *supra* note 1 at 30-34 (criticizing the fact that those who adjudicate immigration violations work for the same administrative employers as those who investigate the violations).

263. *Id.* at 31.

264. See *United States v. Cavanagh*, 807 F.2d 787, 791-92 (9th Cir. 1987) (holding that the limited term served by specially appointed FISA judges does not hamper their judicial independence); see also *United States v. Megahey*, 553 F. Supp. 1180, 1197 (E.D.N.Y. 1982), *aff'd*, 729 F.2d 1444 (1983) (ruling that the finite terms of FISA judges does not render their judicial independence constitutionally suspect because they are district court judges appointed for life by the President).

265. See Bruce Fein, *Improving on a Terrorist Idea*, *Tx. LAWYER*, July 1, 1991, at 17 (recommending a ten-year term for special removal judges in order to foster expertise in handling classified information).

266. *Id.*

United States democracy, however, has long believed that the ends do not justify every available means.<sup>267</sup>

In seeking to ensure the security of the American people, United States counterterrorism policy must not confuse terrorism with political activism. The United States must not demand that a foreign-born person should not be heard from upon entering the country. Thus, who the United States labels as a terrorist must reflect the source of our fears — physical violence. The ability of an agency or President to exploit this fear in order to silence and remove those who disagree with United States foreign policy cannot be tolerated.

The collection of classified information provides the government with a powerful weapon against those who carry out acts of violence. To forbid the use of classified information in deportation proceedings shackles the hands of those we look to for protection. In a courtroom, however, the use of secret evidence obstructs the search for truth. If terrorism is physical violence motivated by political concerns, classified information must be used only against terrorism's virulence, and not against those who merely voice their concerns.

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267. See *Korematsu v. United States*, 323 U.S. 214, 233-34 (1944), *reh'g denied*, 324 U.S. 885 (1945) (Murphy, J., dissenting) (stating, in his dissent, that, when matters relating to the prosecution and progress of war are involved, the United States must give great weight to the military authorities). Justice Murphy also suggests that the authorities must be given broad discretion to deal with such matters. *Id.* at 233-34. Justice Murphy emphasizes, however, that this military discretion must be limited to the extent that it impinges on the constitutional rights of the individuals involved. *Id.*