

## **Refining Immigration Law's Role in Counterterrorism**

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## Introduction

The federal government relied heavily on immigration laws in its immediate response to the September 11 terrorist attacks, which were carried out by aliens who were present in the United States on short-term visas. Hundreds of foreigners, swiftly deemed of “special interest,” were taken into custody on immigration charges, often of the most routine variety. Their removal proceedings were closed to the public under a blanket order issued by the Attorney General. Many noncitizens were subjected to exceedingly strict application of the inadmissibility and deportability grounds of the immigration statute, as well as a hardening of the criteria for release pending their hearings. Even those who conceded deportability and could have been sent readily to their countries of nationality often found themselves lingering in a kind of preventive detention, because they were forced to remain incarcerated on the basis of the removal order, frequently for months, pending FBI release clearance. Months later, thousands of other persons already in the United States were called in for special immigration status review, close questioning, and fingerprinting if they came from a specified list of predominantly Arab or Muslim countries, under a system called the National Security Entry-Exit Registration System (NSEERS). A significant percentage of them were detained and processed for removal. Admission procedures for all future travelers were tightened, including expanded requirements for consular interviews and for often time-consuming checks against disparate databases.

The immigration laws were pressed into service because they were available and flexible, affording discretion that could be directed toward targets deemed immediate and urgent. These advantages quickly commended themselves to the key executive branch decision-makers. The disadvantages of this approach, however, became widely apparent only over time. Many of these steps, both in isolation and particularly in cumulative effect, hampered useful trade and travel, impaired scientific and scholarly exchange, imposed competitive disadvantages on many American businesses, and clouded a traditional American stance of openness and welcome that has been valuable to diplomacy, business and the successful integration of immigrant populations.

The immigration laws remain available and flexible and still afford discretion that will likely attract the eye of any administration responding to a future terrorist crisis. It is, therefore, worth thinking now about the optimal arrangement of the immigration laws for the purposes of balancing counterterrorism against other interests the law of America’s borders must serve. In the years that followed September 11, the Departments of State and Homeland Security have worked to repair some of the damage caused by the initial deployment of immigration authorities, but American law needs more work to optimize a vital balance—one that gives adequate space to American values and economic interests while still holding fast to important security gains.

Some improvements can come simply through wiser use of the discretion bestowed by the immigration laws. But much improvement could be won through an improved legal architecture, some of it worked by statute, with other pieces probably better accomplished by administrative

regulations.

In this paper, I suggest the following specific legal changes:

First, though the general effort to “push out the borders” by accomplishing more screening overseas before travelers arrive in the United States has been valuable, Congress should change the laws to authorize flexibility and a more selective, risk-based approach to extensive screening. In particular, it should rescind the requirement that no visa can be issued without a face-to-face consular interview.

Second, capturing biometric information on arriving and departing foreigners is highly valuable, but Congress should rescind the unrealistically costly mandate for fingerprinting *all* departing noncitizens at land borders. It should, however, look for ways to strengthen the statutory authority for including all relevant criminal information, including that held by the FBI, in the Automated Biometric Identification System (IDENT) database that is the key to biometric checks in the immigration arena.

Third, the alien registration law provides a powerful tool that can be quickly deployed in a crisis, and to this end Congress probably needs to retain a flexible statutory authority. The negative lessons of the alien registration program initiated after September 11, however, should greatly constrain future imposition of such a requirement on resident populations.

Fourth, the terrorism grounds of inadmissibility and deportability are written with remarkable breadth. Congress should either narrow them, particularly as applied to refugees, asylum seekers, and deportation cases, or it should strengthen and streamline waiver procedures and make available adequate resources for prompt waiver decisions.

Fifth, immigration detention should be used only for its classic functions, to guard against flight risk and to restrain dangerous individuals pending their removal hearings, and then only as needed to secure removal. Decisions to detain should be subject to safeguards assuring reasonable and timely review. Both before and after the issuance of a removal order, immigration authority should not be used as a *de facto* preventive detention power.

Finally, Congress should improve the mechanisms for use of classified evidence in immigration proceedings, ensuring that they can be relied on in a limited class of appropriate cases. But Congress should also strengthen the safeguards available to some classes of individuals subjected to such procedures.

## **Clarifying Our Objectives**

In a speech he gave to a conference of mayors six weeks after the September 11 attacks, Attorney General John Ashcroft offered insight into why immigration laws received such heavy early reliance:

Robert Kennedy's Justice Department, it is said, would arrest mobsters for "spitting on the sidewalk" if it would help in the battle against organized crime. It has been and will be the policy of this Department of Justice to use the same aggressive arrest and detention tactics in the war on terror.

Let the terrorists among us be warned: If you overstay your visa—even by one day—we will arrest you. If you violate a local law, you will be put in jail and kept in custody as long as possible. We will use every available statute . . . Our single objective is to prevent terrorist attacks by taking suspected terrorists off the street.<sup>1</sup>

If this were really our single objective, the immigration laws would afford a nearly foolproof method for negating the actions of foreign terrorists. We could use those laws to forbid entry at our borders to *anyone* not holding U.S. nationality. Moreover, nothing in the Constitution as it has been consistently interpreted since the 1890s<sup>2</sup> would prevent Congress from amending current law to require the departure of all foreign nationals now present, even if they hold green cards and have lived here since infancy. The constitutional dimensions of legislative and executive discretion are remarkably sweeping.

But of course such a closure policy would come at colossal cost—certainly to the resident aliens cruelly uprooted and to America's core identity as a nation of immigrants, but also profoundly to our economy, which is inextricably reliant on foreign commerce and the associated personal travel. In the 21st century, no nation can prosper, or even achieve modest economic success, without ready contact with the rest of the world. Moreover, as is increasingly recognized, the global battle against terrorism has to be won not just by detaining, killing, or repelling terrorists, but more importantly by prevailing in a battle of ideas, in a contest for the support and even the affection of the world's population. America's immigration heritage has served us well over the decades in that effort—as has our now tarnished reputation for protecting human rights. This advantage has come in part through the ready availability of student and exchange visitor programs for foreign citizens who are likely to become leaders in their own countries, for example, but also through the long-term residence of significant diaspora populations who maintain links with family and friends in their countries of origin. Further, America's historic strength in integrating immigrants and encouraging newcomers to identify with the national project has made it harder for foreign-based terrorism to take root in U.S. ethnic communities. Immigrants who identify with the host society are far more likely not only to paint a favorable picture of America for friends back on their native soil, but also to alert law enforcement to indications of terrorist planning within their communities and to cooperate further with efforts to disrupt or prosecute.<sup>3</sup>

Hence, the design of the best immigration laws for the struggle against terrorism cannot pretend to serve any single objective. Certainly the immigration machinery's potential to keep dangerous persons from U.S. territory must be used systematically and professionally. That remains a highly significant policy goal. But measures to achieve this important end must be balanced against—or often simply shaped in a way that minimizes harm to—other vital objectives. These

include:

- Sustaining the wide range of contacts with other cultures and populations (through both temporary and permanent migration) that enrich America’s cultural and social life, nurture friendly ties with other countries, and are vital to the economy;
- Sustaining and bolstering the integration of America’s permanent immigrant population; and
- Avoiding procedures that themselves alienate applicants for benefits or discourage legal migration because they are overly complex or intrusive, take inexplicably long times to reach a decision, or regularly produce outcomes seen as unfair, arbitrary, or discriminatory.

Since at least 2004, the fact of competing and offsetting goals has gained increasing recognition. Facilitation of lawful immigration is now frequently mentioned in the same breath as the prevention of the migration of dangerous persons—captured in the oft-repeated mantra of “secure borders, open doors.”<sup>4</sup> Many of the steps taken under the immigration laws immediately after September 11, 2001, outlined above, have been abandoned or eased. The intrusive NSEERS call-in registration, which was criticized as a kind of ethnic profiling that damaged relations with immigrant communities, ended about a year after it was launched.<sup>5</sup> The presumption that immigration court hearings shall be open to the public has been restored, subject to case-by-case closure. Artificially delayed deportations that resulted in *de facto* preventive detention have been ended, following a strongly critical report on the practice by the Inspector General of the Department of Justice.<sup>6</sup> Long delays in processing have ameliorated as funding has increased, databases have been better integrated, and the intelligence agencies became better staffed and organized for the role.

Though progress has been uneven and problems linger in each of these areas, government policy has definitely moved toward a more nuanced understanding of the ways in which immigration enforcement must be balanced with facilitation in order to maximize successes in the struggle against terrorism. Nonetheless, further refinement in both practice and legal framework would be valuable. With the complex objectives listed above in mind, I now turn to examine several key legal and policy areas.

## Whom to Exclude or Deport?

Preventing the entry into the United States or the sustained presence of dangerous persons within it requires two separate judgments by immigration agencies: First, how can they marshal the facts that enable them to identify those who are involved in terrorism? And second, what type of terrorist involvement or connection should lead to negative immigration decisions?

### *Developing the Facts*

The U.S. admissions system has historically deployed a double-layer of screening: scrutiny by a consular officer overseas of the person's eligibility for admission before a visa issues, and a second and potentially equally demanding review by an immigration inspector at the port of entry, even if the person holds a duly-issued visa. One of the major responses to September 11 has been to "push out the borders"—that is, to try to maximize successful and rigorous screening well before the person embarks on his trip or shows up at the port of entry. This means designing systems to support more effective consular work or, for persons allowed to travel without a visa, to maximize the data available to U.S. officials well before the individual arrives on U.S. soil, and ideally, before she even boards the plane.

### Face-to-Face Interviews

Some of the September 11 hijackers had obtained temporary visas, known as nonimmigrant visas, for travel to the United States without undergoing a face-to-face interview before a U.S. consular officer. In response, in May 2003, the State Department issued a new policy requiring a personal interview for nearly all categories of applicants for nonimmigrant or immigrant visas. Congress tightened that requirement and wrote it into the statute in the 2004 Intelligence Reform Act.<sup>7</sup> Support for this change derived in part from the belief that interviews conducted by skilled officers would be more likely than paper reviews to identify terrorists or at least detect danger signs. The State Department has enhanced consular training in analytic interview techniques and has cooperated with the intelligence community to develop non-obvious lines of questioning that might help flag potentially dangerous individuals.

While a presumption in favor of personal interviews makes sense, the rigid statutory mandate to conduct them in every case does not. The chances of detecting a resolute terrorist simply through a sequence of consular questions remain slim despite the enhanced training, particularly because the officer may devote only between four and six minutes to a typical case. This timing benchmark, which includes the time spent checking databases, is a consequence of the sheer volume of nonimmigrant applications. The "white-noise effect" that results from having to interview everyone reduces the odds of detecting high-risk travelers.<sup>8</sup> Congress should, therefore, ease the statutory interview requirement to permit the State Department to apply more selective standards in requiring consular interviews, standards to be set administratively based on systematic risk analysis. Devoting more time to those cases that present significant risk factors

should improve security. At the same time, eliminating a rigid requirement for consular interviews each time a foreigner needs a visa—a requirement that often requires a costly trip within the traveler’s own country to reach the consulate—would ease a burden that serves to discourage travel and encourages businesses to locate elsewhere.

## **Improved Access to Databases and Intelligence Information**

More important to successful screening than face-to-face interviews is enhancing the timely availability to consular officers and immigration inspectors at the border of the best intelligence information possible. That is, one should not expect consular officers and immigration inspectors to play more than an occasional and adventitious role through their questioning of applicants in actually detecting or unearthing terrorist plots. What policymakers should expect, however, is that these officers can apply to their admission decisions the best possible intelligence and law enforcement information about the people before them. The significance of immigration control measures as a counterterrorism tool lie overwhelmingly in their offering an opportunity for *using* intelligence to minimize the risk of violent acts on U.S. soil, rather than an opportunity for obtaining such intelligence. The intelligence and law enforcement communities will be the primary actors in gathering that information.

Linking databases and providing user-friendly and comprehensive systems to front-line decision-makers has been a significant focus of both statutory changes and administrative adjustments since September 11. This was a daunting task because the databases had grown up in a haphazard and disconnected fashion. Disparate agencies used different and inconsistent systems and, before September 2001, jealously guarded their own information, only grudgingly yielding up morsels to immigration officials. Reforms have made considerable headway over the last six years in improving this situation, driven in part by congressional mandates for consolidation and interoperability but also by administrative innovation in centralizing key processes and efficiently allocating the time of skilled analysts through an automated targeting system.<sup>9</sup>

One of the main remaining challenges is to improve the timeliness of final resolution whenever the initial database query produces a “hit,” indicating, at least preliminarily, that negative information exists in one of the relevant databases about someone attempting to come to or remain in the United States. When this occurs, all further processing of the requested immigration benefit (typically visa issuance, extension of a period of admission or adjustment of status to permanent residence for someone already present in the United States) ordinarily ceases. The matter is then referred to the appropriate intelligence or law enforcement agency to determine whether the negative information actually relates to this particular individual and whether it is sufficiently clear and serious to warrant denial of the benefit. The identity confirmation step can be speedy if the information is coded to biometrics rather than biographical information, but Congress has mandated as well the checking of FBI records that are kept by name and date of birth in connection with most benefit decisions. The first step in those cases is to decide whether the negative information relates to the particular applicant, rather than another person with a similar name and date of birth. Many cases present difficult judgment calls, requiring labor-intensive review by human analysts. That kind of delay, which

has sometimes extended as long as four years, frustrates and alienates the applicant and often a host of U.S. citizens and residents expecting or relying on the person's approval—such as would-be employers, family members, or prospective academic or scientific colleagues. Since 2004, processing delays, overwhelmingly the product of delays in security screening, have triggered thousands of lawsuits in federal court filings seeking orders commanding DHS's Bureau of Citizenship and Immigration Services (USCIS) to proceed promptly to a final decision. The litigation itself is a costly waste of resources, and the delays threaten to discourage legal and desirable migration while conveying a negative image of a fearful, uncertain, indecisive America.

Here too, the legal framework could be eased to permit some benefits to be issued even before the completion of the inherently imprecise name-check process, although some improvements have already taken place without statutory change. In April 2008, DHS and the FBI reached an agreement on process changes that have made remarkable headway against the name-check backlog in just the first six months of its operation, and may serve virtually to remove this corrosive delay problem from applicants' list of grievances.<sup>10</sup> One crucial step was the provision of substantial new staffing for the FBI's analyst ranks, but USCIS also importantly determined that it could issue some benefits even before receiving the final name-check results from the FBI. This advance approval would apply only to certain categories of persons who were already present in the United States (and therefore equally capable of committing dangerous acts whether or not the benefit was delayed), who had passed all biometrically based screening without any indication of threat, whose FBI name check had been pending for 180 days, and for whom the benefit could easily be withdrawn if negative information came to light.<sup>11</sup> This latter criterion precludes the application of this streamlining measure to naturalization.

## **Detecting Fraud and Collecting Biometric Identifying Information**

If a terrorist can successfully use another person's identity, then he can obviously defeat even the best systems for prompt checking of available intelligence and law enforcement information. Skilled questioning by an inspector or consular officer, as discussed above, can help spot inconsistencies or oddities that will trigger closer scrutiny of identity fraud. Beyond this, the increasing use of biometric identifiers, as required in many pieces of immigration-related legislation since September 11, helps guard against such fraud, as does increasing international standardization of identity documents with counterfeit-resistant features and embedded machine-readable biometric data.

One element of the United States Visitor and Immigrant Status Indicator Technology (US-VISIT) screening system—planned eventually as a comprehensive DHS system monitoring entries and exits—has provided an important protection against a specific kind of fraud. Under the earliest system component widely deployed (beginning in 2004), aliens arriving at a port of entry have had to submit to facial photographing and the electronic capture of two fingerprints (of the right and left index fingers), conducted right at the primary inspection booth—a procedure that added about 15 seconds to each inspection. At about this time, consular officers began to capture the same two fingerprints (photos having long been required) at the time of visa



issuance. The system has thus permitted prompt comparison of the respective prints, to assure that the person applying for admission is the same person who had been cleared to receive a visa.<sup>12</sup>

The database that provides the foundation for US-VISIT, known as IDENT, also affords swift access to key watchlist information on possible terrorists, and increasingly to the FBI's comprehensive fingerprint system, known as the Integrated Automated Fingerprint Identification System (IAFIS). Continued improvement in the interoperability of the various systems, as mandated in various statutes, is critical to maximizing the efficient use of both immigration and law enforcement resources toward finding and either prosecuting or removing dangerous individuals, and arrangements need to be concluded for more efficient sharing of some FBI data with IDENT. Former DHS Secretary Chertoff's decision in 2005 to alter US-VISIT so that the fingerprint readers will capture all 10 prints, rather than just the index fingers, also represents a significant security gain. This will provide added chances for detecting terrorists by comparing the full fingerprint set against latent prints lifted from terrorist sites—including prints collected by the Department of Defense. Though challenges remain, US-VISIT has generally proven itself to be a gratifyingly successful technological venture.<sup>13</sup>

## **The Visa Waiver Program**

Some critics have urged an end to the statutorily authorized visa waiver program, which allows short-term visa-free travel (lasting no more than 90 days) to citizens of selected countries, seeing it as a particularly vulnerable entry point for dangerous individuals. As of mid-2008, there were 27 countries on the visa waiver list, most of them European democracies, which accord a reciprocal privilege to U.S. citizens. The list is due to expand to 34 countries under new determinations issued by the Bush administration in November 2008. But critics point out that some noted terrorists, including Richard Reid (the "shoe bomber") and Zacarias Moussaoui (the "20th hijacker"), were nationals of visa-waiver countries. They allege that a border inspector's quick query of the databases in the primary inspection line at an airport affords an insufficient opportunity to detect dangerous travelers. Pressure for a speedy decision is even higher at the border or at ports of entry than at consulates, and even if a given person is directed out of the line and referred to secondary inspection, he or she is already on U.S. soil and therefore must be either detained or released on bond here if any inquiry is protracted.

Though these concerns hold some merit, Congress should definitely continue the visa waiver program. It epitomizes the trade-offs needed to serve the multiple objectives entailed in the use of an immigration system as a counterterrorism tool. Requiring all nationals from these high-volume countries to obtain visas, even for short trips, would deter some travel, sow ill will, probably reduce American travel opportunities, and add a monumental additional workload on an already taxed consular corps. Nonetheless, Congress needs to take advantage of innovations that can reduce the vulnerabilities inherent in the visa waiver system. Statutory changes have already taken us some distance in this direction. Visa-waiver travelers must now have machine-readable passports, thus facilitating accurate and speedy database checks by airport inspectors.<sup>14</sup> Under a separate initiative, airlines are now required to send data on all passengers to U.S.

border authorities well before a plane arrives from an overseas location. This Advance Passenger Information System (APIS) has afforded Customs and Border Protection (CBP) officers additional time before landing for checking such name information against databases, in order to identify those whom CBP should either reject or at least subject to more intensive review at the border.<sup>15</sup> Furthermore, in order to join the Visa Waiver Program, countries must agree to full cooperation in sharing terrorist-related intelligence and also in following other security-enhancing practices.

A new law passed in 2007 adopts a practice like one pioneered by Australia, which is designed to provide still more extensive advance information on visa waiver passengers. It makes use of an automated electronic system for travel authorization (hence its shorthand moniker, ESTA). Under this framework, a prospective traveler from a visa waiver country must apply, ordinarily through the Internet many days or weeks before the flight, for travel authorization, providing at that time specified biographical information that allows DHS to check for “law enforcement or security risk.” If none is found, the person will receive a code indicating eligibility for travel to the United States without a visa. Eventually, airlines will be able, and required, to check that code through an automated system before permitting the individual to board the aircraft for the United States. All such persons will still be subject to inspection and a new database check at the port of entry.<sup>16</sup>

### ***Specifying Disqualifying Links to Terrorism: The “Material Support” Controversy***

Exactly how to deploy the immigration laws with respect to applicants for admission believed to be linked to terrorism depends on exactly what sort of link authorities can demonstrate, and with what degree of certainty. If they have enough evidence for a criminal conviction of the person for terrorist activity and he is applying, let us say, under a false identity he believes has not been discovered, then the authorities are probably best advised to use his application as a kind of sting. They can treat his travel as a lucky opportunity to take him into criminal custody upon arrival for trial and punishment. A similar approach makes sense with dangerous persons for whom the evidence is insufficient for criminal trial, but would meet the presumably less demanding standards for preventive detention of active terrorists, provided of course that Congress chooses to adopt such a detention regime—a subject addressed in prior papers in this series.<sup>17</sup> Excluding such individuals from admission denies the United States the benefit of their capture. It might keep them distant from their targets on U.S. soil, but it would of course leave them at large in some other country, where they could continue to plan or help carry out terrorist activity directed at U.S. interests domestically or abroad, or at allied nations and their populations.

But these cases in all likelihood will present themselves only rarely. Immigration law will come into play as a counter-terrorism tool most importantly with regard to individuals for whom some evidence indicates dangerousness but not in sufficient quantity or quality to assure this kind of incapacitation. The best we can do, given lesser-quality information on a given suspect, may be

to keep him or her off the streets of the United States by means of exclusion or—if the person is already present here—by means of removal. But this objective then presents a thorny set of questions of its own: What exact links merit this treatment? And what sorts of evidence, reflecting what degree of certainty, ought exclusion or deportation require?

The answer, for reasons developed below, should properly vary with the individual's stake in the process. Lesser indications of terrorist involvement should be enough to justify denial of an ordinary visa. By contrast, deporting a legally admitted alien should require stronger indications of knowing or intentional connection to terrorist groups—particularly if that person holds lawful permanent resident status. And the law should also require stronger showings in connection with the denial of an application for political asylum or refugee status.

### ***Statutory Evolution***

Congress has greatly expanded the sweep of the immigration law provisions that address links to terrorism since first enacting the comprehensive redesign of inadmissibility and deportability grounds in 1990. One important theme of that year's legal revision, as the Cold War was ending, was to forswear an era of "ideological exclusion" or "guilt by association" believed to mark the former anti-Communist exclusion and deportation provisions. These laws, which prohibited entry not only to members of communist organizations, but also to those who wrote about or taught "the economic, international and governmental doctrines of world communism" had provoked ongoing controversy and a string of judicial challenges.<sup>18</sup>

The only roughly comparable new grounds addressed terrorism, rather than Communist membership or writings, and focused on involvement in dangerous activities, not allegedly dangerous thinking.<sup>19</sup> The basic provision enacted in 1990 rendered excludable any alien who "has engaged in a terrorist activity" or who "a consular officer or [immigration officer] knows, or has reasonable ground to believe, is likely to engage after entry in any terrorist activity."<sup>20</sup> Later clauses in this section spelled out what Congress meant by "terrorist activity" and "engage in terrorist activity." They included the provision of material support to *individuals* involved in terrorism, but only if the provider of that support knows or reasonably should know that the aid would assist another "in conducting a terrorist activity"—that is, in carrying out the acts of violence the statute identified as terrorism.<sup>21</sup>

In 1996, Congress added as a ground of exclusion the provision of material support to terrorist *organizations*, but it provided a detailed procedure, under a section of the Immigration and Naturalization Act (INA), calling for the Secretary of State formally to designate organizations as such and publish the list before support for them could become grounds for exclusion.<sup>22</sup> The Secretary had to compile a record that would permit judicial review of a group's listing, albeit under deferential standards of review. At least in principle, this process helped clarify the situation for persons contemplating gifts to organizations operating in areas beset by armed conflict or terrorist resistance. It put potential donors more effectively on notice of which contributions would jeopardize their immigration status—or indeed render them liable to fines or imprisonment under a new provision of the criminal code, which criminalized the provision of support to the formally listed organizations, even when given by U.S. citizens.<sup>23</sup> But the list of

designated foreign terrorist organizations never included more than 30 groups before September 11, 2001. Experience in implementing these provisions apparently led some in the Justice Department to worry about loopholes, permitting guilty parties to escape sanctions when their support went to an unlisted organization, because the statute made it much too easy for them to cast doubt on whether they knew or reasonably should have known about the use of the gift or the organization's activities.

In the USA PATRIOT Act, enacted in 2001 one month after the September 11 attacks, Congress greatly expanded the terrorism exclusion and deportation grounds and cast an extremely wide net ensnaring all sorts of connections to terrorism. The statute added a second and far more streamlined process for the Secretary of State to designate additional organizations as terrorist organizations. These became known as tier II organizations, while the old procedure survived as tier I. (As of January 2009, there are 44 tier I organizations and 59 in tier II<sup>24</sup>) And then the Act added a tier III of striking breadth. That provision defines "terrorist organization" to include any "group of two or more individuals, whether organized or not, which engages in the activities described in subclause (I), (II), or (III) of clause (iv)."<sup>25</sup> Those three subclauses cover committing a terrorist activity or (with certain limitations) inciting it, preparing or planning a terrorist activity, and gathering information on potential targets. Tiers II and III have primary application to aliens, because material support to such organizations renders an alien inadmissible or, if already admitted, deportable, whereas the law applying criminal punishment to donations still does not automatically cover support to organizations unless they are listed through the tier I process. Congress did permit aliens an escape clause for unwitting tier III support, but, evidently to minimize manipulative use of such a claim, it shifted the burden of proof regarding knowledge from the government to the individual. The escape clause applied only when "the actor can demonstrate that he did not know, and should not reasonably have known, that the act would further the organization's terrorist activity." By 2005, Congress thought even this provision too lax and so made the individual's burden of proof still more demanding. Under current law, the donor to an organization that is proven long after the donation to be a tier III organization must make the showing of insufficient knowledge or notice "by clear and convincing evidence" in order to escape negative immigration consequences.<sup>26</sup>

Congress in 2005 also expanded the application of the now-sprawling terrorism ground along another dimension. Theretofore, only a subset of the more serious links to actual terrorist activities that might justify denial of a visa or refusal of admission at the border were designated as grounds for deportation of someone who had initially been lawfully admitted—essentially only past or ongoing engagement in terrorist activity.<sup>27</sup> The 2005 amendments removed that constraint, essentially making the entire list of links to terrorism, including mere membership, or negligent donation to a tier III organization, grounds for deportation. As now written, that deportability ground allows deportation when an immigration officer has "reason to believe" that the person is likely to engage in terrorist activity in the future—a standard that probably equates to probable cause.

## **Overall Evaluation**

The message from Congress's successive amendments from 1996 through 2005 seemed to be to cast as wide a net as possible in order to make sure that no real terrorist could use soft language or clever legal arguments to escape the application of exclusion or deportation grounds. The drafters either did not worry that the broad language might snare many innocents for whom some unwitting tie to terrorism could be shown many months or years later, or saw this problem as one to be dealt with through sound use of prosecutorial discretion. One difficulty with the latter expectation, however, has always been the highly diffuse nature of charging decisions within INS and DHS—perhaps even more so now that charging authority has been distributed among the three bureaus and numerous field offices of DHS. Another problem resides in the internal incentives that affect many officers after September 11—not wanting to be pilloried in case any individual to whom they granted a benefit, or as to whom they withheld enforcement, turned out to be a terrorist. The safest course for the individual officer is always to file a charge if it seems to fit at all. Thus, the disproportion written into the statute resists administrative amelioration.

Perhaps one could still defend such remarkable statutory breadth as reflecting an implicit cost-benefit analysis. Congress put its thumb heavily on the side of the scales favoring U.S. safety and security. Under this view, any hint of connection to terrorism should result in the nation's declining to run the risk of the person's admission onto or continued presence on American soil. But that kind of crude, across-the-board weighing makes for bad policy. It takes no account of the highly disparate individual stakes that are presented in different sorts of immigration adjudications, particularly the distinctions between those applying overseas for a first-time admission versus a long-term lawful permanent resident facing deportation for sending a donation incautiously to an ostensibly charitable group that proves to have links to a terrorist organization.

This lack of perspective or proportion finally drew sustained attention over the past few years in the context of the application of the "material support" grounds to the refugee resettlement program and also in the context of asylum adjudications. The Justice Department and DHS took the inflexible position that the terrorist exclusion or removal provisions admit of no exceptions for persons who provided material support at gunpoint or under other forms of duress, nor in circumstances where broader U.S. policy actually *favours* the supported organization that is engaged in armed resistance against an abusive government.

This interpretation brought an abrupt halt to some refugee resettlement initiatives that the administration otherwise saw as highly desirable at the very time the State Department was working hard to revive a resettlement program that had been particularly hard hit by the security retrenchments following the September 11 attacks.<sup>28</sup> (Refugee admissions fell below 29,000 annually for two years, from an average level of over 75,000 per year in the preceding five years<sup>29</sup>) Specific groups of Burmese refugees in Thailand were far into the consideration process when it was pointed out that their association with armed rebel groups, fighting the pariah Burmese military regime that the United States government has denounced and placed under sanctions, made the material support exclusion applicable. Later it became apparent that even Cambodian Hmong and Vietnamese Montagnard refugees who had aided the United States and its allies during the Vietnam War also were barred from admission under these interpretations.

In the asylum context, tales emerged of persons clearly in grave danger of persecution from paramilitary groups in Colombia who were disqualified from asylum because they had yielded to violent extortion by the very groups whose persecution had prompted their flight. That is, they provided “material support” to terrorist organizations simply by ransoming a kidnapped child. The obvious fact that such persons clearly would not repeat such support if given refuge in the United States made no difference. Likewise the fact that this exclusion from asylum protection probably violated U.S. obligations under the refugee treaties did not cause a rethinking of the interpretation.

The administration finally began addressing these particular policy embarrassments through the use of a waiver provision that permits the relevant Cabinet secretaries to exempt certain groups or individuals from the exclusion based on material support. But it took several years to reach internal agreement within the government concerning how to activate that waiver mechanism, and its actual usage is still proceeding very slowly.<sup>30</sup>

America needs a better way to calibrate the application of the terrorism exclusion or deportation grounds to take account of interests on the opposite side of the scales. That is, we cannot adopt for the long run a stance that across the board relentlessly favors security in immigration decisions. We need to set the types of links to terrorism that would disqualify a migrant, refugee, or asylum seeker with attention to the stakes involved for the individual. Otherwise, the process unnecessarily undercuts several of the countervailing objectives listed earlier in this paper—particularly in reaching outcomes that are seen as deeply unfair or arbitrary, or that detract from America’s historic role as a refuge from persecution.

From this broad observation flow several specific suggestions about how to differentiate among cases.

### ***Distinguish Between Exclusion and Deportation***

Congress erred badly in 2005 by applying the same sweeping terrorism-link standards to decisions about deportation as apply to decisions on admission or exclusion. A person applying for the first time for a non-immigrant visa or for admission to the United States has only limited stakes at issue in the adjudication of his case. To place a heavy benefit of the doubt on the side of exclusion if there are any significant signs of links to terrorism may be wholly justifiable. Critics may still charge that this amounts to “guilt by association,”<sup>31</sup> but the practice does not deserve the opprobrium associated with that epithet. What is being decided is not guilt (followed by criminal punishment) but merely a prudential judgment that leads to a disappointed expectation, not a deprivation of benefits already being enjoyed. Moreover, because terrorist networks are by their very nature clandestine, officials ordinarily have little to rely on in judging whether an applicant presents a terrorist risk other than evidence of past associations, activities, and statements. To be sure, the chance—indeed, the likelihood—remains of barring innocent persons in this process. But the relative consequences of false positives versus false negatives justifies such an approach in most visa and initial admission decisions.

This is not to say, however, that we need the full prolixity of the current terrorism inadmissibility

ground to provide this cushion of safety—not by any means. Congress could achieve the same result with a leaner provision mandating the denial of a visa or admission to the country when there is “reason to believe” that the person has committed or is likely to commit terrorist acts—that is, using only the core portions of the relatively spare 1990 version of the exclusion ground. Congress should revisit the current statute and search for ways to render the terrorist exclusion standards more precise and intelligible.

But even in the setting that involves relatively low-stakes nonimmigrant visas, we need greater care and rigor, policed by a reasonable supervisory review structure. Perceptible stakes still exist for the individual—as well as for a host of American citizen friends, family members, or business associates. The clumsily handled case of Tariq Ramadan, a Muslim scholar who was blocked from taking a faculty position at the University of Notre Dame but whose visa denials the government explained based on shifting rationales, stoked legitimate disaffection in academic and other circles.<sup>32</sup>

In the deportation setting, by contrast, the stakes can be enormously high, particularly when the government seeks to deport a lawful permanent resident. Congress should repeal the 2005 amendment and restore a system that makes only the subset of more dangerous links to terrorism—actual engagement in terrorist activity—grounds for deportation of a person who had been lawfully admitted. Indeed, it would be better not simply to go back to the pre-2005 deportability ground but instead to take a fresh look in order to specify with more focus the kinds of links that should result in loss of lawful admission. In particular, the law should demand more of the government in the deportation setting to prove the individual’s knowledge and intent in connection with any assistance or support later shown to have gone to terrorist activity or organizations.

The truth is that notwithstanding the 2005 changes, terrorism-based deportations—in apparent contrast to visa refusals—remain quite rare. While the government has doubtless prioritized persons with terrorist affiliations for removal, if these people were initially admitted as non-immigrants, it is usually possible to secure their removal while charging only more conventional grounds, such as overstay or violation of status. Such conventional charges present to government attorneys far fewer problems of proof and case management than charges rooted in terrorist activity. And I am unaware of the initiation in recent years of any terrorism-based removal charges lodged against lawful permanent residents. Hence a sweeping *deportability* ground based on terrorist affiliation is clearly not indispensable to affect the removal of apparently dangerous non-immigrants. Sweeping deportability provisions have significant bite only with regard to green-card holders—that is, in exactly the situation when a more focused and precise approach is called for, given the demands of justice for those who initially made their homes here with the full approval of the U.S. government.

### ***The “Good Guys” Claim, Duress, and De Minimis Support***

The application of the “material support” provision in the refugee and asylum settings, including some litigation over the latter, has revealed further issues regarding the legal specification of disqualifying links to terrorism.

In *Matter of S-K*,<sup>33</sup> the government argued that a Burmese asylum seeker was excluded from protection, no matter what her risk of persecution, because she had given money to the Chin National Front, a Burmese resistance organization engaged in armed conflict with the Burmese government. Her action apparently fit within the sweep of the material support provision, though she countered with numerous indications that the U.S. government considered the Burmese regime a “group of thugs” that had thwarted the assumption of office by Aung San Suu Kyi and her party, the National League of Democracy, which won parliamentary elections in Burma in 1990. In essence, she argued that the immigration judge or the Board of Immigration Appeals (BIA) should adjudge the regime illegitimate, such that armed resistance would be considered a just cause. They could then deem the Chin National Front to be the good guys, and hence not terrorist in nature.

The overall system for applying the terrorist removal grounds needs the capacity to judge the illegitimacy of regimes and the justice of the cause of some armed groups that fall within the sweeping language of the tier III definition or whose actions fit the broad statutory definition of terrorism. Nelson Mandela would probably have run afoul of this provision, as might those who rose up against the Hungarian Communist regime in 1956. The statute itself, however, leaves no room for this kind of “just war” determination—and so is significantly out of keeping with the way in which most people respond to the efforts of various resistance movements.

Nonetheless, the Board of Immigration Appeals was correct to refuse to permit immigration judges to make these kinds of judgments of legitimacy, regarding both governments and resistance movements. There is simply too much room for widely disparate views among adjudicators about the merits of regimes and their opponents—a phenomenon that became glaringly apparent in the 1980s and 1990s, in cases involving both the extradition and deportation of members of the Irish Republican Army.<sup>34</sup>

Where then should such decisions be made? Though any decision-making system on these sensitive issues holds real disadvantages, the right place for such “just war” judgments is probably the State Department, in consultation with the Department of Homeland Security. The current provision that allows unreviewable waivers for certain groups and organizations, in the discretion of these Cabinet members, provides a reasonable mechanism for implementing this needed accommodation.<sup>35</sup> Since 2006, the Secretaries have designated approximately a dozen groups for exemption. Congress also appropriately reinforced this mechanism in December 2007, by enshrining some exemptions in statute and expanding the reach of the discretionary waiver provision.<sup>36</sup> Ultimately the asylum seeker in *S-K* received asylum after a group waiver for the Chin National Front permitted the immigration judge to reach the merits of her persecution claim.<sup>37</sup>

The Departments of Justice and Homeland Security have also chosen to use this unreviewable waiver process as a way of dealing with claims that an individual provided support to a terrorist group under duress, and so should not be held responsible for the act.<sup>38</sup> This is a far more questionable approach—though of course it is better than simply ignoring claims that support was provided only as a result of coercion. The waiver process, reasonably adapted to the group-



wide decisions needed when confronting a “good guys” claim, does not fit as well with the inherently individualized issues presented by a duress claim. Though the duress waiver process currently in place does contemplate individualized review by DHS adjudicating officers, at present this is often simply a paper review based on a record compiled elsewhere, ordinarily in immigration court. Congress should consider whether immigration judges could handle this highly case-specific issue in the course of adjudicating asylum claims. The evidence presented in court in the process of proving a risk of persecution will necessarily overlap with the evidence relevant to deciding whether the individual acted under duress in giving support to the terrorist organization—ransom to free a kidnapped relative, “revolutionary taxes,” or food demanded at gunpoint. This assignment of decisional authority would also give the responsibility to an official who can readily cross-examine the witnesses on the duress question, instead of relying on adjudication by officers who, months later, see only a cold record. Immigration judge decisions that apply an overly generous conception of duress, or that ignore other evidence of genuine ongoing danger from the individual—which would disqualify him or her even under the refugee treaty<sup>39</sup>—would remain subject to government appeal to the BIA and, if necessary, to a final ruling by the Attorney General personally, under long-established provisions for administrative review.

Finally, the government has held to a reading of the material support provision that admits of no exceptions for trivial assistance, apparently once arguing that even the provision of a glass of water to a terrorist would constitute material support.<sup>40</sup> It is hardly obvious that this is a correct reading of current law; the adjective “material” in “material support” strongly suggests some threshold of substantiality, though it leaves much vagueness about how to determine that threshold. In any case, in order to avoid manifestly arbitrary results, the system, either by interpretive change or through statutory amendment, should allow adjudicators to find a person admissible despite *de minimis* amounts of assistance—depending of course on what other evidence might exist regarding the person’s terrorist connections or the person’s knowledge or intent at the time of the contribution. I do not argue that adjudicators (in refugee cases as well as ordinary visa cases) must ignore minor amounts of assistance. I argue only that such an act should not be automatically disqualifying.

## Detention

The government looked to immigration law in the immediate aftermath of the September 11 attacks in large part because it could justify detention of certain foreign nationals even in the absence of proof sufficient to support criminal charges against them. Hence it helped take persons officials viewed as possible terrorists “off the street,” which Attorney General Ashcroft regarded as the Justice Department’s single most important objective in October 2001. Many aliens deemed suspicious had violated their admission status and were thus amenable to immediate removal charges and detention pursuant to those charges. For others, the government could muster plausible charges based on bitingly close scrutiny of all their past immigration filings, which unearthed misstatements, falsehoods, or highly technical deficiencies that are ordinarily ignored.

As an emergency improvisation in the face of a grave crisis, this was perhaps understandable. But as long-term legal architecture, it is inadvisable. And it led to other pathologies in application. As the Justice Department inspector general determined, following a lengthy inquiry into the matter that focused on detainees in the New York area, immigration law was misused when the Justice Department ordered blanket detention without bond for more than 700 “special interest” detainees whom it had picked up in connection with the September 11 investigations. That report also found misuse when detention of many individuals continued, for as long as a year, awaiting FBI clearance of their deportation, even after entry of a final, executable removal order (perhaps one eagerly sought by the individual, who knew he was present illegally and preferred prompt deportation to lengthy detention). A later phase of the inspector general’s investigation also uncovered serious episodes of physical mistreatment of the immigration detainees during this period.<sup>41</sup>

### ***Detention Following a Removal Order***

Post-order detention should adhere to the rules derived from *Zadvydas v. Davis*, a Supreme Court decision that came down shortly before September 11 and put limits on the length of immigration detention. The Court held squarely that indefinite post-removal-order detention is invalid under the current immigration statutes, while signaling along the way that such a practice would also raise serious constitutional problems, at least as applied to previously admitted aliens.<sup>42</sup> After a removal order is final, the government should move as quickly as possible to deport the individual. If it cannot effectuate a removal order for reasons other than the individual’s noncooperation—for example, because of the home country’s refusal to provide travel documents or because the individual is stateless and no country will take him—then the detainee is entitled to supervised release within a guideline period, which *Zadvydas* sets at six months.

If prompt removal appears seriously to threaten some other government interest—for example, if the government believes the suspect to be an active terrorist—the answer is not to create a longer-term detention authority out of existing powers never meant to serve that purpose. Any longer-term detention should take place only on criminal charges or else under whatever separate mechanism Congress adopts for that purpose. Preventive detention, based on the rough analogy to the incarceration of prisoners of war to prevent their return to hostilities, should take place only under a regime specifically created by Congress for that purpose, with democratically debated limits and safeguards, rather than through stretches and distortions of immigration law.

The difficult and freighted topic of preventive detention has received close scrutiny elsewhere in this series.<sup>43</sup> For the present it is sufficient to note that the *Zadvydas* decision does not close the door to a properly designed regime of this sort. Writing just 11 weeks before the September 11 attacks, the Court presciently stated that it was not addressing “terrorism or other special circumstances where special arguments might be made for forms of preventive detention.”<sup>44</sup> Whatever the Court might do to apply that notion in a case squarely presenting the terrorism issue—as *Zadvydas* itself did not—the justices hardly meant this dictum as a recommendation of

preventive detention on the basis of immigration charges and delayed removal. Congress would do better to use this potential case-law opening to address preventive detention under its own separate legal architecture.

### ***Detention Pending Immigration Hearings***

In the pre-hearing setting, use of immigration detention should return to the purposes it has classically served. The traditional grounds for detention, rather than release, pending the hearing have been flight risk and dangerousness, judged case by case—not because an individual appears on a broader “special interest” list compiled elsewhere.<sup>45</sup> Evidence of terrorist affiliation or activity is of course relevant to both factors, and the system should permit reliance on such evidence in deciding to deny bond. The system should also permit the government, subject to safeguards discussed below, to use classified information in making the initial detention decision and in defending its no-bond or high-bond determinations before immigration judges or federal *habeas* courts. The government has long argued that current statutes permit such use, but the statutory foundation is at best unclear.<sup>46</sup> Congress should amend the provisions to extinguish all doubt about the propriety of considering classified information in connection with pre-hearing detention decisions.

One other technical but important pre-hearing detention issue deserves attention, perhaps to be followed by statutory or at least regulatory fixes. Before September 11, regulations required that an alien arrested without warrant be taken before an examining officer within 24 hours for a decision on whether to file formal charges and whether to release him pending further proceedings. In emergency rulemaking completed on September 17, 2001, the Justice Department amended this provision to allow 48 hours for these determinations, with an exception allowing an unspecified additional “reasonable period of time,” in the event of “an emergency or other extraordinary circumstance.”<sup>47</sup> The highly critical report written by the DOJ inspector general on September 11 detainees, discussed above, found that this escape clause had fostered sloppy practices that contributed to lengthy detentions without the filing of charges.<sup>48</sup> The liberty interests at stake in these judgments are substantial, and prompt presentation to an examining officer is a modest but crucial step to help avoid the dangers associated with warrantless arrests followed by incommunicado detention. Congress should amend the statute to provide a firm deadline in these cases.

It is also noteworthy that the September 2001 regulatory change softening the deadline for confirmation of charges against detainees contributed to a rather striking reaction by Congress later that month when it considered early drafts of the USA PATRIOT Act. The executive branch initially proposed a provision that would have given the Attorney General broad and largely unreviewable authority to certify specific aliens as likely terrorists, who would then be subject to a strict regime of mandatory detention. Made wary of indefinite detention by the earlier regulation, congressional leaders insisted on adding safeguards to what became a new section of the Immigration and Nationality Act.<sup>49</sup> They inserted a requirement that such certifications be done personally by the Attorney General or the Deputy Attorney General and could not be further delegated. Even with the power thus confined—and still acting while the

rubble of the twin towers smoldered—Congress also mandated that any detainee under this provision had to be released unless charged within seven days under the immigration laws or the criminal code. If, at the end of the immigration court proceedings, removal of the person could not be secured, Congress allowed for ongoing detention (in an apparent effort to override the statutory holding of *Zadvydas* for this limited category), but here too it imposed restrictions. It required the Attorney General to review the case every six months, and it made such prolonged detention explicitly subject to *habeas corpus* review in the federal courts. The care Congress applied to cabining this detention power, even in the alarmed atmosphere that prevailed in October 2001, reinforces the need for well-designed legal limits.<sup>50</sup>

## **Procedures**

### ***Closed hearings***

The Chief Immigration Judge, acting on September 21, 2001 on orders from the Justice Department, directed that the immigration court hearings of some 700 “special interest” detainees be closed to the public. This directive was at least in tension with pre-existing regulations that established a baseline expectation of open hearings, while permitting closure only based on criteria that seemed to demand case-by-case application.<sup>51</sup> The department defended this new policy, arguing that it would prevent terrorist organizations from knowing the pattern of arrests and the kinds of information that the government had uncovered. Nonetheless, the blanket closure drew sharp condemnation, as well as notable court challenges, filed by individual alien respondents and by media organizations and members of Congress. The Sixth Circuit found the practice invalid, in an opinion filled with somber warnings, including this: “Democracies die behind closed doors.”<sup>52</sup> The Third Circuit, however, upheld the closure order, as a permissible response to the emergency situation created by the 9/11 attacks.<sup>53</sup> Before the Supreme Court took up a certiorari petition in the latter case, the Justice Department signaled that the affected hearings had virtually all been completed, and that it did not contemplate adding other cases to the “special interest” list. Against this backdrop, the Court declined review.

It is hard to see, based on the public record, what was concretely gained by the blanket closure, while its disadvantages were fairly evident. It compounded suspicions about the fairness of the removal proceedings themselves, and it fueled charges that the government was improperly targeting defendants based on ethnicity or religion. The department’s apparent disinclination to replicate such a practice in the future is thus highly justified. Limited case-by-case closure, coupled as necessary with appropriate protective orders forbidding participants to reveal information, should be both sufficient to meet legitimate government needs and far less likely to sow doubts about the justice of the procedures.

### ***Secret evidence***

The government's information about the risk of terrorist acts from persons applying for admission to, or already present in, the United States will often come from intelligence sources. But use of such confidential information against an individual can raise exceedingly difficult issues. From the point of view of a high-level government manager, the chance to shield crucial operational information from close scrutiny by targets or courts has sometimes made room for hard-to-monitor abuses or shoddy practices on the part of certain agents, who have relied too much on rumor or accusation planted by personal enemies or estranged spouses. From the targeted individual's point of view, contending with such shadowy information can appear Kafkaesque. Notified in summary fashion, if notified at all, that he is being denied a benefit or subjected to deportation because of information indicating terrorist connections, he is left almost wholly at sea in trying to develop an explanation or a defense. If he is innocent, he will probably have no idea what past conduct or association triggered the alleged problem, and so will not know where to begin to prepare a response. More detail in the notification would help him to figure out what he needs to counter, but it is precisely such detail that would endanger intelligence sources or methods—if it turns out that the target subject really is a dangerous person who can then relate that detail to confederates. That is, the government sometimes cannot reveal accurate information with a legitimate or critical bearing on the case lest it endanger a valued source who has forwarded the information at great peril or who can continue to supply significant information only if not compromised. Very weighty interests can be found on both sides of the debate over the use of secret information.

## ***The Spectrum***

Our current system allows the use of confidential information at various stages of the immigration and removal process, but through different mechanisms and with different levels of protection for the alien subjected to its use. Judicial and political controversies over the years have led to modest improvements in practice, but closer scrutiny of the legal framework with an eye toward aligning the safeguards more closely with the individual stakes at issue would be worthwhile. I begin with a summary of the spectrum of procedures for the use of such information under current law.

First, consular officers consistently have had the power to use classified information in making a determination concerning visa applications. Visa records, by law, are confidential, and visa refusals are shielded from nearly all forms of administrative and judicial review.<sup>54</sup> The more compelling issue of the last two decades has been to make sure that intelligence information is readily accessible to the deciding officer—and equally to the immigration inspectors at U.S. ports of entry. Improved watchlists and better database integration and access have made significant headway toward that objective.<sup>55</sup>

Second, in the early 1950s, the Supreme Court found no due process problems with *ex parte* decisions by the Attorney General's delegates, using confidential information as the basis for excluding individuals applying for admission—even in circumstances where the excluded alien was the war bride of a U.S. soldier or a 25-year lawful resident returning after an unexpectedly lengthy stay abroad.<sup>56</sup> The Court, in fact, approved the procedure without even insisting on

judicial examination, *in camera*, of the negative information. Political efforts, however, eventually secured additional procedures for the war bride, which led to the discrediting of the government's case and her eventual admission, and also to an eventual release on parole of the 25-year resident, without any evident harm to the republic.<sup>57</sup>

Nonetheless, the secret procedure endured, having been codified by Congress in the Immigration and Nationality Act, and it has found sporadic use in succeeding decades.<sup>58</sup> Beginning in the 1980s, however, reviewing courts began to insist more regularly on receiving an unclassified summary of the negative information, coupled with *in camera* review by the judge of the derogatory information. Changing course from earlier practices, the Justice Department acceded to this information-sharing—usually thereby gaining judicial approval of the exclusion order.<sup>59</sup>

Third, a generally similar process applies to consideration of applications for what is called “relief from removal” filed by persons who are in deportation proceedings. Such applications come from persons who concede formal deportability—based, for example, on overstaying admission on a student or tourist visa—but seek the right to remain anyway by invoking provisions in the laws that trump those that authorize their removal. The primary relief provisions of this sort are those providing for political asylum, permanent admission based on marriage to a U.S. citizen (adjustment of status for an “immediate relative”), or discretionary forgiveness (called cancellation of removal) for aliens present more than 10 years whose removal would cause exceptional hardship. U.S. law explicitly allows the immigration judge to rely on classified information, unshared with the individual, in deciding on such applications, and dictum in an early Supreme Court case indicated that there would be no due process problems with the practice.<sup>60</sup> The government's ability to shield information relevant to relief, even if it could not shield information used to establish baseline deportability itself, is more significant than might initially appear, because the vast majority of removal proceedings involve no contest over deportability, but instead focus on relief claims. Today, immigration judges and reviewing courts ordinarily require *in camera* submission of the classified information, to permit the court's informed review, but the individual will usually see no more than a scrubbed unclassified summary.

A series of such relief cases in the 1990s triggered wide public controversy.<sup>61</sup> Several skeptical judges found deficiencies in the use of secret evidence to deny relief, and in a few cases the Justice Department ultimately decided not to contest the reversal, apparently following a more intensive internal review of the secret evidence (which had ordinarily been supplied by the FBI) in light of the judicial resistance. The resulting embarrassment led to the development of new internal procedures, overseen by the Deputy Attorney General, for more rigorous scrutiny of such information before INS invoked the confidential procedures.<sup>62</sup>

Fourth, using classified information to decide applications for relief, on which the alien bears the burden of proof, has traditionally been distinguished from the government's use of classified information in proving baseline deportability, especially against aliens whom the government lawfully admitted—an issue on which the government bears the burden. In the latter setting, as distinguished from exclusion at a port of entry, the constitutional protection of due process clearly applies, and with sufficient strength to cast significant doubt on the use of secret evidence

to the individual's disadvantage<sup>63</sup> Moreover, as a practical matter, classified information is likely to be relevant to baseline deportability only in the case of a green-card holder, who by definition was lawfully admitted for permanent residence of indefinite duration.

In 1996, aware of the heightened due process protection in this setting, Congress created a special tribunal known as the Alien Terrorist Removal Court (ATRC), for this sort of case.<sup>64</sup> The procedures allow for the government to use secret evidence to establish deportability, even against lawful permanent residents, but they create an extensive array of alternative safeguards. The members of the ATRC are appointed by the chief justice for 5-year terms from among sitting federal judges with life tenure. Hence even the initial decision on the merits, as well as all rulings on motions or procedures along the way, are to be made by independent federal judges, not administrative officials. The judge oversees the preparation of an unclassified summary of the confidential information. The statute also provides for appointed counsel at government expense for ATRC proceedings, something not required in any other sort of immigration case. In most cases, it also assures that counsel will be drawn from the ranks of specialists with high-level security clearances. These lawyers can then see all the classified information and offer arguments or engage in cross-examination of government witnesses in closed proceedings, though they of course cannot share that information with their client. The ATRC has never been used, testifying to the rarity of circumstances in which the government needs to use classified information in establishing baseline deportability. But the court's basic procedural design, with specially designated Article III judges and the use of specially cleared counsel as defense lawyers, has served as the sometimes unacknowledged model for a host of post-September 11 proposals to establish specialized procedures to address terrorism-related litigation.<sup>65</sup>

## ***Evaluation***

The current legal framework obviously permits the use of classified information in immigration procedures administered by different governmental players and with a varied array of safeguards. Since the 1950s, two significant checks and balances have expanded, albeit unevenly. Congress should make both more systematic and place them on more explicit legal footing.

First has been the increased use of internal administrative review before the government relies upon secret information—best exemplified by the special scrutiny implemented by the Deputy Attorney General's office after litigation setbacks in the late 1990s. It would be worthwhile to enshrine that procedure in binding legal requirements. Regulation is probably more appropriate than statute as the vehicle, to assure flexibility to adjust the process as the system gains experience or as the government continues to reorganize its intelligence processes.

The second change consists of an increasing role for federal courts, primarily through the courts' own insistence on greater sharing of confidential executive branch information *in camera* when the courts are reviewing administrative decisions. This method of course is not likely to be as effective in testing the accuracy of such information as would a full adversarial process driven by the respondent or his counsel, and judges' expertise in evaluating the bases for classifying the information will be limited. But even if less reliable than our standard courtroom processes, this

kind of judicial review remains a genuine check, administered in a forum wholly independent of the enforcement agencies and capable at least of detecting outliers representing gross error or abusive use of the process. Of real operational significance, even when judges ordinarily uphold the administrative decision (as one would expect), the simple fact that judicial review can occur, and that the judge may look in detail at the underlying information and its sources, helps to promote rigor and discipline in the internal agency monitoring processes.

This second evolutionary change—a greater reviewing role for the courts—may thus be most significant, in practice, for its impact in strengthening the first, the internal government review mechanisms employed before the government uses secret evidence in an actual case. Congress could amend the statutes to give explicit foundation for these elements of the procedures as they have evolved. The law should specify that courts reviewing these sorts of removal orders or benefit denials will have full access to the underlying information and, if necessary on exceptional occasions, to testimony from officers knowledgeable about its acquisition or analysis. The statute should also emphasize that courts should ultimately employ a standard of review that is highly deferential to the intelligence experts. The point is not to substitute a judge's judgment for that of an analyst, but instead to catch outliers and, in the process, create a healthy dynamic that will induce greater rigor on the part of the administrators in evaluating secret evidence before deploying it against an individual.<sup>66</sup>

### ***Possible Further Changes to this Legal Framework***

As is evident, the statutory scheme for use of secret evidence, though it developed disjointedly rather than through one insightful exercise of statutory design, generally provides an increasing array of procedural safeguards as the individual stakes increase. Visa applicants overseas have the fewest protections, whereas a hypothetical lawful permanent resident facing deportation based on secret evidence can claim all the protections afforded by the ATRC. In general such a spectrum is sensible and appropriate. The main question is whether Congress and the executive branch have placed the boundaries between the layers in the appropriate places—that is, whether some situations should invoke more safeguards than they do now or, indeed, whether some should draw fewer.

The ATRC goes about as far as one can in providing substitute safeguards meant to avoid injustice while still withholding the information from the individual. If secret evidence is to be used at all to secure deportation of a lawful permanent resident, these safeguards should be regarded as essential. It is still worth considering whether someone who was given full U.S. approval for permanent residence and hence came to rely on treating the United States as her home should be subject to deportation at all, unless the government is willing to place all its evidence on the public record and subject it to full adversarial testing.<sup>67</sup>

Whatever the decision on that question, Congress should amend the INA to require the use of ATRC procedures in a wider array of circumstances than its current narrow jurisdiction. Congress should use it for circumstances in which the *de facto* stakes for the individual are far higher than the current formal categories recognize. For example, an applicant for adjustment of



status who has married an American wife and has made a home with her – and assuming that no question exists about the genuineness of the marriage – may be formally a mere applicant for relief from removal. But in reality he has far more riding on the decision than someone who merely wishes to extend his stay as a tourist or student—and indeed more than someone whose adjustment claim is based only on a U.S. employment offer. Similarly, the stakes in an asylum claim can be far higher than in the ordinary removal case because an erroneous denial may subject the person to persecution or torture. Here too it might make sense to consider using some variant of ATRC-style procedures before asylum or related protections are denied based solely on classified information.

One objection to this proposal could arise from the potential expense and complexity of ATRC procedures as compared with the pared-down process that is the norm in immigration court. At present, however, secret evidence cases of any of these types are rare and would involve only modest incremental costs. Moreover, when secret evidence cases arise, they typically trigger major public controversies over the fairness and accuracy of the ultimate decisions. Adding a few cases to the ATRC's currently empty docket could be seen as an investment in improving the deportation system's reputation and protecting the legitimacy of its outcomes. Alternatively, Congress could deploy variations on the ATRC structure to reduce the cost. For example, it could empower immigration judges, rather than life-tenured federal judges, to conduct proceedings in certain subsets of secret evidence cases—but employing elements of the basic ATRC framework, including the use of counsel with high security clearances, at government expense if necessary.

Under our current system, the fewest safeguards apply to visa applicants still overseas; hence the chance of error to the disadvantage of a perfectly innocent applicant is increased. No doubt real injustices happen sometimes when the government uses untested secret evidence in such cases. Nonetheless, given the volume of visa cases and the relatively low stakes usually at issue, arguments for change here are not highly persuasive. There might be a case, however, for some sort of closer scrutiny, particularly via internal State Department review, for carefully defined classes of visa applicants for whom the stakes are generically higher, such as those seeking permanent immigration based on family ties.

## **Alien Registration**

In 2002 the Justice Department launched a program that provided for a specific form of detailed questioning of selected persons coming to or already in the United States, under what it labeled the National Security Entry-Exit Registration System (NSEERS).<sup>68</sup> As applied at the border, this system potentially covered persons from all nationalities, to be selected based on individualized criteria suggesting risk. But the system apparently also called for applying NSEERS to nearly all males ages 16-45 arriving from a wide range of countries in the Middle East. The Department required persons covered by NSEERS to report in again to the INS 30 days after the initial intensive interview and then annually thereafter. When they were ready to depart the country, they were required to exit through one of a handful of designated airports where they would be

subjected to detailed exit interviews.

Had the government confined NSEERS to the questioning of new entrants at ports of entry, it might have triggered only mild controversy. What made it highly contentious, however, was a second phase of NSEERS, which added a mandate for a special call-in registration for specified adult male aliens already present, though not those holding green cards. This phase resulted in additional and detailed INS questioning and fingerprinting of over 80,000 persons from 25 listed countries—all of them predominantly Arab or Muslim nations, save North Korea. The process also resulted in the arrest of about 13,000 who were discovered to lack valid status. Because this call-in procedure was explicitly based on nationality, age, and gender alone, it drew extensive criticism—denounced as, at a minimum, an overly intrusive law enforcement technique and at worst a form of racial or ethnic profiling.<sup>69</sup> Studies have concluded that the 2002 call-ins seriously angered foreign countries whose nationals were subjected to NSEERS and risked alienating resident populations whose cooperation remains crucial in the ongoing effort to detect and defeat terrorist operations in the United States.<sup>70</sup> There is no indication that it generated enough worthwhile information to justify this significant cost.<sup>71</sup>

The call-in was ordered under the alien registration provisions of the Immigration and Nationality Act (INA) which permit the Attorney General—and now the Secretary of Homeland Security—to prescribe special registration procedures for particular groups, over and above the normal and routine alien registration normally accomplished when an alien first enters the country.<sup>72</sup> Though the government discontinued the NSEERS call-in program in December 2003 and greatly simplified and later eliminated the annual reporting requirements for those already tagged by the system, some critics have called for repeal or modification of the law permitting this form of special registration demand.<sup>73</sup>

Repeal would be an overreaction. The government needs the authority, on exceptional occasions, to require extra inquiry of specified nonresident alien populations in response to international crises. It has used enhanced registration in earlier emergencies, including that which grew from the confrontation with the newly installed revolutionary regime in Iran after U.S. diplomats were taken hostage in 1979-80.<sup>74</sup> Nonetheless, the negative reaction to NSEERS, coupled with its apparently thin yield of useful information, should chasten any future use of this registration authority. Clearly, the government should use this power most sparingly and always tailor it to minimize any perceived message that entire ethnic communities have come under suspicion.

## Conclusion

We have come a long way since the clumsy and often gratuitously harsh deployment of immigration controls in the days shortly after the September 11 attacks. The government now has, at least in preliminary form, an important array of new tools that permit more accurate identification of persons applying for admission or actually arriving on U.S. soil, as well as the matching of those persons with any negative information available to the government. It is sharing intelligence more readily; its communications systems have made strides toward

interoperability; and front-line decision-makers have readier access to the information they need. Much remains to be done to refine these changes and to minimize their intrusion on legitimate privacy and civil liberties interests. Legal reform can help in this process. But the overarching need is to make sure that the system operates with a steady awareness that mere crackdown is deeply counterproductive. To foster success in the struggle against terrorism, we cannot just exclude and arrest people on the belief that they might be dangerous. We have to retain—or recapture—the openness and welcome to foreigners that traditionally characterized this country and contributed mightily to its economic success and its cultural richness. That sense of balance and perspective not only manifests fidelity to the best of America’s core identity, but also represents an indispensable element of any sound counter-terrorism strategy.

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## Notes

<sup>1</sup> John Ashcroft, “Prepared Remarks for the US Mayors Conference,” (speech, U.S. Mayors Conference, Washington, D.C., October 25, 2001), available at [http://www.usdoj.gov/archive/ag/speeches/2001/agcrisisremarks10\\_25.htm](http://www.usdoj.gov/archive/ag/speeches/2001/agcrisisremarks10_25.htm).

<sup>2</sup> See, e.g., *Fong Yue Ting v. United States*, 149 US 698 (1893); *Nishimura Ekiu v. United States*, 142 US 651 (1892).

<sup>3</sup> See Edward Alden, *The Closing of the American Border: Terrorism, Immigration, and Security Since 9/11* (New York: HarperCollins Publishers, 2008): 8-24; Robert Leiken, “Europe’s Immigration Problem, and Ours,” *Mediterranean Quarterly* 15 (2004): 203.

<sup>4</sup> See “Rice-Chertoff Joint Conference on Secure Borders and Open Doors,” *Interpreter Releases* 83 (2003): 161.

<sup>5</sup> Thomas Alexander Aleinikoff, David A. Martin, & Hiroshi Motomura, *Immigration and Citizenship: Process and Policy*, 5th ed. (Eagan, MN: Thomson West, 2003): 1247-49; “DHS Amends, But Does Not Abolish, Special Registration Requirements,” *Interpreter Releases* 80 (2003): 1633.

<sup>6</sup> Office of the Inspector General, *The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks* (Washington, D.C.: U.S. Department of Justice, 2003), <http://www.usdoj.gov/oig/special/0306/press.pdf>.

<sup>7</sup> Immigration and Nationality Act (INA) § 222(h), 8 U.S.C. § 1202(h), as added by the 2004 Intelligence Reform and Terrorism Prevention Act, § 5301, Public Law No. 108-458, 118 Stat. 3735. Exceptions are permitted for persons under fourteen or over 79, certain diplomats, and a limited range of applications for renewed visas in the same category after an earlier grant through face-to-face interview.

<sup>8</sup> Stephen Yale-Loehr, Demetrios G. Papademetriou, and Betsy Cooper, *Secure Borders, Open Doors: Visa Procedures in the Post-September 11 Era* (Washington, D.C.: Migration Policy Institute, 2005): 37, available at [http://www.migrationpolicy.org/pubs/visa\\_report.pdf](http://www.migrationpolicy.org/pubs/visa_report.pdf).

<sup>9</sup> See Thomas R. Eldridge et al., *9/11 and Terrorist Travel: Staff Report of the National Commission on Terrorist Attacks Upon the United States* (Washington, D.C.: National Commission on Terrorist Attacks Upon the United States, August 21, 2004): 68-69; Yale-Loehr, *supra*, at 90-9; Alden, *supra*, at 38, 240-52.

<sup>10</sup> See U.S. Citizenship and Immigration Services, “USCIS and FBI Release Joint Plan to Eliminate Backlog of FBI Name Checks,” News Release (Washington, D.C.: USCIS Communications Office, April 2, 2008).

<sup>11</sup> “USCIS Revises Field Guidance on Background Checks for Certain Applications,” *Interpreter Releases* 85 (2008), 417.

<sup>12</sup> See T. Alexander Aleinikoff, David A. Martin, Hiroshi Motomura, and Maryellen Fullerton, *Immigration and Citizenship: Process and Policy*, 6th ed. (Eagan, MN: Thomson West, 2008): 674-75, hereafter cited as AMMF.

<sup>13</sup> See Alden, *supra*, at 254; Rey Koslowski, *Real Challenges for Virtual Borders: The Implementation of US-VISIT* (Washington, D.C.: Migration Policy Institute, 2005), [http://www.migrationpolicy.org/pubs/Koslowski\\_Report.pdf](http://www.migrationpolicy.org/pubs/Koslowski_Report.pdf); Office of Inspector General, *US-VISIT System Security Management Needs Strengthening*, OIG-06-16

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(Washington, D.C.: Department of Homeland Security, December 2005): 3-8.

<sup>14</sup> INA § 217(a)(3), 8 U.S.C. § 1187(a)(3) (2007).

<sup>15</sup> See INA § 217(a)(10), 8 U.S.C. § 1187(a)(10) (2007); AMMF, *supra*, at 671.

<sup>16</sup> INA § 217(a)(11), (h)(3), ), 8 U.S.C. § 1187(a)(11), (h)(3).

<sup>17</sup> See Jack Goldsmith, “Long-Term Terrorist Detention and Our National Security Court,” working paper (Brookings Institution, 2009); Matthew Waxman, “Administrative Detention: The Integration of Strategy and Legal Process,” working paper (Brookings Institution, 2009),

[http://www.brookings.edu/~media/Files/rc/papers/2008/0724\\_detention\\_waxman/0724\\_detention\\_waxman.pdf](http://www.brookings.edu/~media/Files/rc/papers/2008/0724_detention_waxman/0724_detention_waxman.pdf).

<sup>18</sup> See Peter H. Schuck, “*Kleindienst v. Mandel*: Plenary Power v. The Professors,” in *Immigration Stories*, eds. David A. Martin and Peter H. Schuck (New York: Foundation Press, 2005): 169-96.

<sup>19</sup> See AMMF, *supra*, 565.

<sup>20</sup> 8 U.S.C. § 1182(a)(3)(B) (1998).

<sup>21</sup> *Ibid* at § 1182(a)(3)(B)(iii). The definition of terrorism appeared in § 1182(a)(3)(B)(ii) and was fairly broad, but less so than the current version. It included *inter alia*, hijacking, kidnapping, and assassination, plus the use of any “explosive or firearm (other than for mere personal monetary gain)” with intent to endanger individuals or cause substantial property damage.

<sup>22</sup> 8 U.S.C. § 1189 (2008).

<sup>23</sup> 18 U.S.C. §§ 2339A and 2339B (2008).

<sup>24</sup> See Department of State, Terrorist Designation Lists, available at <http://www.state.gov/s/ct/list/>.

<sup>25</sup> INA § 212(a)(3)(B)(vi), 8 U.S.C. § 1182(a)(3)(B)(vi).

<sup>26</sup> INA § 212(a)(3)(B)(iv)(VI)(dd), 8 U.S.C. § 1182(a)(3)(B)(iv)(VI)(dd).

<sup>27</sup> INA § 237(a)(4), 8 U.S.C. 1227(a)(4) (2004 version) listed as a ground of deportability only being party to ongoing acts defined as “engaging in terrorist activity,” thus leaving out such things as mere membership in a terrorist organization or the endorsement of a terrorist act. The post-2005 version decrees deportability for anyone who meets the description of any part of the terrorism inadmissibility ground, INA § 212(a)(3)(B), 8 U.S.C. § 1182(a)(3)(B) (2008).

<sup>28</sup> See AMMF, *supra*, 567-82; Rachel Swarns, “Provision of Antiterror Law Delays Entry of Refugees,” *New York Times*, March 8, 2006, at A20.

<sup>29</sup> David A. Martin, *The United States Refugee Admissions Program: Reforms for a New Era of Refugee Resettlement* (Washington, D.C.: Migration Policy Institute, 2005): 17.

<sup>30</sup> INA § 212(d)(3)(B), 8 U.S.C. § 1182(d)(3)(B). The waiver was activated through Federal Register notices (1) exempting specific groups from application of the material support provision, and (2) setting up a procedure for DHS to decide on individual waivers in cases where the individual claims to have acted under duress. See AMMF, *supra*, 580-82; 72 Federal Register 9954, 26138 (2007).

<sup>31</sup> See, e.g., David Cole, “Enemy Aliens,” *Stanford Law Review* 54 (2002): 953, 966-70; *American-Arab Anti-Discrimination Committee v. Reno*, 70 F.3d 1045, 1063 (9th Cir. 1995), vacated, 525 U.S. 471 (1999).

<sup>32</sup> See *American Academy of Religion v. Chertoff*, 463 F.Supp.2d 400 (S.D.N.Y. 2006); Tariq Ramadan, “Why I’m Banned in the USA,” *Washington Post*, October 1, 2006, at B1.

<sup>33</sup> 23 I&N Dec. 936 (BIA 2006).

<sup>34</sup> See *In the Matter of Pearson*, EOIR Case No. A: 72-472-870 (U.S.I.C. Mar. 27, 1997); *McMullen v. INS*, 788 F.2d 591 (9th Cir. 1986).

<sup>35</sup> INA § 212(d)(3)(B), 8 U.S.C. § 1182(d)(3)(B).

<sup>36</sup> Consolidated Appropriations Act, 2008, Public Law No.110-161, Div. J, § 691, 121 Stat 1844, 2364-66 (December 26, 2007).

<sup>37</sup> See *Matter of S-K-*, 24 I&N Dec. 289 (AG 2007); *Matter of S-K-*, 24 I&N Dec. 475 (BIA 2008). The Attorney General made it clear that the legal doctrine announced in the original BIA ruling in *S-K-* would remain controlling.

<sup>38</sup> 72 Federal Register 9954, 26138 (2007).

<sup>39</sup> The principal refugee treaty realistically excludes from *nonrefoulement* protection persons whom there are “reasonable grounds for regarding as a danger to the security” of the haven country. Convention relating to the Status of Refugees, Art. 33(2), done 28 July 1951, 189 U.N.T.S. 137. It is not reasonable to treat coerced donations to a terrorist organization as an indication of danger to the security of the United States once the person is given refuge here.

<sup>40</sup> See *Singh-Kaur v. Ashcroft*, 285 F.3d 293, 299 (3d Cir. 2004), and *ibid* at 304-05 (Fisher, J., dissenting).

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<sup>41</sup> See Office of the Inspector General, *supra*; Office of the Inspector General, *Supplemental Report on September 11 Detainees' Allegations of Abuse at the Metropolitan Detention in Brooklyn, NY* (Washington, D.C.: U.S. Department of Justice, 2003), <http://www.usdoj.gov/oig/special/0312/final.pdf> .

<sup>42</sup> 533 U.S. 678 (2001). Later the Court held that the same limits apply as a matter of statutory construction to all persons, whether or not they had previously been admitted, but in a decision that rested entirely on statutory construction without indications that such limits are constitutionally required. *Clark v. Martinez*, 543 U.S. 371 (2005).

<sup>43</sup> See Jack Goldsmith, *supra*; Matthew Waxman, *supra*. For a thoughtful and detailed discussion of the need for and recommended limits on such a system, see Benjamin Wittes, *Law and the Long War: The Future of Justice in the Age of Terror* (New York: Penguin Group, 2008): 151-82.

<sup>44</sup> 533 U.S. at 696.

<sup>45</sup> See *Matter of Drysdale*, 20 I&N Dec. 815 (BIA 1994); *Matter of Patel*, 15 I&N Dec. 666 (1976). For the future, the objectives apparently sought via the “special interest” list should be addressed, if at all, through a more tightly drawn statute for preventive detention of persons shown to present a specified level of threat of future terrorist activity.

<sup>46</sup> INA § 240(b)(4)(B), 8 U.S.C. 1229a(b)(4)(B), gives the alien the right to examine evidence used against him or her, with this exception: “but these rights shall not entitle the alien to examine such national security information as the Government may proffer in opposition to . . . an application by the alien for discretionary relief under this Act.” The Department of Justice has regularly argued that prehearing release on bond is a form of discretionary relief within the meaning of this provision. One court accepted this argument under an earlier version of the statute, but the issue cannot be regarded as settled. *United States ex rel. Barbour v. District Director*, 491 F.2d 573 (5th Cir. 1974), cert. denied, 419 U.S. 873 (1974).

<sup>47</sup> 8 C.F.R. § 287.3(d), as amended by 66 Fed.Reg. 48335 (2001).

<sup>48</sup> Department of Justice, *September 11 Detainees, supra*, 27-36.

<sup>49</sup> INA § 236A, 8 U.S.C. § 1226a, added by the USA PATRIOT Act, § 412(a), Public Law No. 107-56, 115 Stat. 350 (2001).

<sup>50</sup> See David A. Martin, “Preventive Detention: Immigration Law Lessons for the Enemy Combatant Debate,” *Georgetown Immigration Law Journal* 18 (2004): 305, 314-15, based on testimony given before the 9/11 Commission.

<sup>51</sup> 8 C.F.R. § 3.27 (2001).

<sup>52</sup> *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 683 (6th Cir. 2002).

<sup>53</sup> *North Jersey Media Group v. Ashcroft*, 308 F.3d 198 (3d Cir. 2002), cert. denied, 538 U.S. 1056 (2003).

<sup>54</sup> INA § 222(f), 8 U.S.C. § 1202(f) providing for confidentiality of visa records; AMMF, *supra*, 651-56, discussing the tight limits on administrative and judicial review.

<sup>55</sup> See Yale-Loehr, *supra*, at 90-97.

<sup>56</sup> *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950), the case of the war bride; *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953), the case of the 25-year resident.

<sup>57</sup> Charles Weisselberg, “The Exclusion and Detention of Aliens: Lessons from the Lives of Ellen Knauff and Ignatz Mezei,” *University of Pennsylvania Law Review* 143 (1995): 933.

<sup>58</sup> INA § 235(c), 8 U.S.C. § 1225(c).

<sup>59</sup> See, e.g., *Azzouka v. Sava*, 777 F.2d 68 (2d Cir. 1985), cert. denied, 479 U.S. 830 (1986); *El-Werfalli v. Smith*, 547 F.Supp. 152 (S.D.N.Y. 1982); *Avila v. Rivkind*, 724 F.Supp. 945 (S.D.Fla. 1989).

<sup>60</sup> INA §240(b)(4)(B), 8 U.S.C. § 1229a(b)(4)(B); *Jay v. Boyd*, 351 U.S. 345, 357 n. 21 (1956). Because this comment was dictum, other courts have found that more substantial procedural protections may be required, and the issue cannot be regarded as settled.

<sup>61</sup> See AMMF, *supra*, at 1050-59.

<sup>62</sup> These developments are summarized in David A. Martin, “Offshore Detainees and the Role of Courts after *Rasul v. Bush*: The Underappreciated Virtues of Deferential Review,” *Boston College Third World Law Journal* 25 (2005): 125, 157-59.

<sup>63</sup> See *Kwong Hai Chew v. Colding*, 344 U.S. 590 (1953); *Landon v. Plasencia*, 459 U.S. 21 (1982).

<sup>64</sup> INA §§ 501-507, 8 U.S.C. §§1531-1537, added by the Anti-terrorism and Effective Death Penalty Act of 1996, § 401(a), Public Law No. 104-132, 110 Stat. 1259.

<sup>65</sup> See, e.g., Peter H. Schuck, “Terrorism Cases Demand New Hybrid Courts,” *Los Angeles Times*, July 9, 2004, at

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<sup>66</sup> I have explored that dynamic in some detail in Martin, *Offshore Detainees*, *supra*, at 146-60.

<sup>67</sup> Treating this question at some length in an earlier essay, I concluded that LPRs should not be subject to deportation based on secret evidence. David A. Martin, "Graduated Application of Constitutional Protections for Aliens: the Real Meaning of *Zadvydas v. Davis*," *Supreme Court Review* 2001(2002), 47. This essay also explores the appropriate level of safeguards applicable to the use of secret evidence in cases affecting other categories of aliens.

<sup>68</sup> 8 CFR § 264.1(f), as amended by 67 Federal Register 52585 (August 12, 2002).

<sup>69</sup> See Alden, *supra*, at 106-16, 223.

<sup>70</sup> See Muzaffar A. Chishti et al., *America's Challenge: Domestic Security, Civil Liberties, and National Unity after September 11* (Washington, D.C.: Migration Policy Institute, 2003), 42-45, available at [http://www.migrationpolicy.org/pubs/Americas\\_Challenges.pdf](http://www.migrationpolicy.org/pubs/Americas_Challenges.pdf); 9/11 and Terrorist Travel, *supra*, at 159-60.

<sup>71</sup> See *ibid* at 159-61; Alden, *supra*, at 248, 294-95.

<sup>72</sup> INA § 263, 8 U.S.C. § 1303.

<sup>73</sup> E.g., "AILA Urges Repeal of Special Registration," AILA InfoNet Doc. No. 03010940 (posted January 9, 2003) available at <http://www.aila.org/content/default.aspx?bc=6714%7C6729%7C6752%7C8091>; Mary M. Sevandal, "Special Registration: Discrimination in the Name of National Security," *The Journal of Gender, Race & Justice* 8 (2005): 735.

<sup>74</sup> See *Narenji v. Civiletti*, 617 F.2d 745 (D.C.Cir. 1979), cert. denied, 446 U.S. 957 (1980).