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## DUE PROCESS OR “SUMMARY” JUSTICE?: THE ALIEN TERRORIST REMOVAL PROVISIONS UNDER THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996

"You have adopted the right course, my dearest Secundus, in investigating the charges against the Christians who were brought before you . . . Anonymous informations ought not to be received in any sort of prosecution. It is introducing a very dangerous precedent, and it is quite foreign to the spirit of our age."

—ROMAN EMPEROR TRAJAN, CIRCA 100 A.D.<sup>1</sup>

### I. INTRODUCTION

The recent explosion and crash of Flight 800 to Paris<sup>2</sup> only minutes after takeoff from John F. Kennedy International Airport in New York prompted immediate speculation of terrorist involvement.<sup>3</sup> Such fears—rampant before any conclusive evidence was gathered—seemed reasonable in light of the scheduled opening ceremonies of the 1996 Olympics in Atlanta the day following the disaster.<sup>4</sup> Regardless of what

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1. *Quoted in* Jay v. Boyd, 351 U.S. 345, 368 (1956) (Black, J., dissenting).

2. July 17, 1996.

3. See Jonathan Freedland, *Silence Whets Appetite for Conspiracy; TWA 800: Angry Relatives Blame Politics for Delay*, GUARDIAN, July 22, 1996, at 9; Bill Hutchinson, *Logan Dogs to Sniff Out Possible Sabotage*, BOSTON HERALD, July 24, 1996, at 6; David Hanners, *Conspiracy Buffs Take to the Net; TWA Explosion is Fertile Ground*, TIMES-PICAYUNE, July 28, 1996, at A13.

4. With a security force of 30,000, preparations for the Atlanta Olympics were unprecedented. In spite of this security presence, the games were disrupted by a pipe-bomb in Centennial park which killed two and injured 111 people. See Elizabeth Levitan Spaid, *Blast Quiets But Can't Silence Spirit Of Olympics*, CHRISTIAN SCIENCE MONITOR, July 29, 1996, at 1; William Drozdiak, *FBI Probes Bombing as Olympic Games Continue*, WASH. POST, July 28, 1996, at A1.

the investigation ultimately reveals about the cause of the crash, this event underscores the random, brutish and indiscriminate character of terrorist attacks. Terrorism strikes across national boundaries from unexpected sources, threatening all that civilized societies hold precious.

Flight 800 is only the latest reminder of the vulnerability of innocents by terrorist activities. In 1988, Pan Am Flight 103 fell victim to a terrorist bomb over Lockerbie, Scotland, killing all 259 people on board and 11 on the ground.<sup>5</sup> The World Trade Center bombing killed five and injured hundreds more.<sup>6</sup> The bombing in Dharan, Saudi Arabia,<sup>7</sup> was a stark reminder of an earlier lesson<sup>8</sup> that even peacekeeping soldiers whose mission is to protect others from violence are themselves not immune to the swift and sudden fury of a terrorist's bomb. The bombing of the Alfred P. Murrah Building in Oklahoma City on April 9, 1995 represented the worst act of domestic terrorism in American history. This ferocious deed, though apparently the result of a uniquely homegrown variety of extremism, galvanized public support for tougher methods of dealing with domestic and international terrorists.<sup>9</sup> Shortly after the bombing, the Comprehensive Terrorism Prevention Act of 1995 received renewed support in Congress.<sup>10</sup> This act eventually became the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA),<sup>11</sup> which was signed into law by President Clinton on April 24, 1996.

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5. See Robin Wright, *Bloodier Standard Set, Experts Fear; Pan Am Bombing May Escalate Terrorist Trend*, L.A. TIMES, Dec. 31, 1988, pt. 1, at 1.

6. See John J. Goldman, *Blast Rips World Trade Center in N.Y.; 5 Dead, Hundreds Hurt*, L.A. TIMES, Feb. 27, 1993, at A1.

7. This bombing, on June 25, 1996, took nineteen American lives and seriously injured more than eighty. See Bradley Graham, *Bomb Won't Deter U.S. in Gulf, Officials Say*, WASH. POST, June 27, 1996, at A1; See also *Bodies of American Soldiers Flown Home*, JERUSALEM POST, June 28, 1996, at 6.

8. See Robin Wright, *1983 Beirut Blast Killed 241; U.S. Traces Bomber, Gear in Marine Barracks Attack*, L.A. TIMES, Oct. 23, 1988, pt. 1, at 1.

9. It is interesting to note that shortly before the bombing of the Murrah Building, studies reassuringly reported that terrorism was on the decline. See, e.g., Robin Wright, *U.S. Claims Success in Fighting Terrorism*, RECORD, Feb. 12, 1995, at A30. After the bombing, the public's rage blossomed into widespread support for staunch anti-terrorism measures. See, e.g., Neil A. Lewis, *Anti-Terrorism Bill: Blast Turns a Snail Into a Race Horse*, N.Y. TIMES, Apr. 21, 1995, at A24; A.M. Rosenthal, *Ending Forgiveness*, N.Y. TIMES, Apr. 21, 1995, at A31.

10. Less than two months after the bombing the Senate enacted S. 735, 104th Cong., 1st Sess. (1995), otherwise known as the Comprehensive Terrorism Prevention Act of 1995. The Act passed upon a vote of 91 yeas to 8 nays. See 141 CONG. REC. S7857 (daily ed. June 7, 1995) [Rollcall vote No. 242 Leg.]. See also Melissa A. O'Loughlin, Note, *Terrorism: The Problem and the Solution—The Comprehensive Terrorism Prevention Act of 1995*, 22 J. LEGIS. 103 (1996).

11. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214.

The AEDPA is a particularly wide-ranging law, amending diverse sections of the U.S. Code.<sup>12</sup> The law contains extensive immigration reforms geared toward the removal of both illegal and legal aliens whom the government has reason to believe are a threat to the security of the United States.<sup>13</sup> The public sentiment necessary to pass laws which potentially infringe on constitutional liberties is naturally easier to garner after an incident like the Oklahoma City bombing, especially where those targeted are historically unprotected by the passions of election year politics.<sup>14</sup> However, the question is whether draconian legislation is truly necessary in light of the dangers of these times, or whether, as some would suggest, the Bill of Rights is merely another casualty of terrorism.<sup>15</sup>

This comment will focus on one portion of the AEDPA's response to international terrorism: Title IV, § 401 of the AEDPA, designated "Alien Terrorist Removal," which adds a new title to the Immigration and Nationality Act (INA).<sup>16</sup> These provisions set up a special court charged with hearing the cases of suspected alien terrorists.<sup>17</sup> Part II of this comment will discuss specific contents of the provisions: the establishment of the new removal court and the procedures under which it will operate, including the method by which secret evidence can be

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12. Among the better known provisions of the AEDPA, and from which it draws its short title, are those dealing with federal habeas corpus and death penalty reforms. The new provisions culminate a decade of effort to streamline the federal appeals process for death row inmates. *See id.* §§ 101-08, 110 Stat. at 1217-26.

13. While outside the scope of this comment, it bears mentioning that the INS has been given summary deportation powers over certain aliens whom it believes are in the United States illegally. Thus, in terms of the treatment of illegals, judicial oversight has been completely eliminated. *See id.* § 439, 110 Stat. at 1276. *See also* Charles Finnie, *Both Police Officer and Judge; The New INS Deportation Power*, TEXAS LAWYER, May 20, 1996, at 21.

14. Says Oscar Chacon of Centro Presente, an immigrant's rights group, "[w]e are in an electoral year and it is a proven premise that if you are mean to immigrants in time of economic decline, you will gain popularity." Tatiana M. With, *Immigrants Fear Federal Measures*, BOSTON GLOBE, May 12, 1996, (City Weekly), at 1. *See also* Mary Jacoby, *The Platform; Fight Looms Over Immigration Issue*, CHICAGO TRIBUNE, Aug. 12, 1996, at 15, reporting on the Republican National Convention. The party ratified a platform position calling for reversal of the constitutional guarantee of U.S. citizenship for all who are born on American soil.

15. *See, e.g.*, Loren Fleckenstein, *A Requiem for Arnold Heights*, PRESS-ENTERPRISE, May 13, 1996, at B1; James Ridgeway, *The Long Arm of the Law: Clinton's Anti-Terrorism Act Beefs up Big Brother*, VILLAGE VOICE, May 21, 1996, at 32; Benjamin Wittes, *Secret Deportation Panel Raises Due Process Issues; Critics Blast New Court Set Up by Anti-Terrorism Law*, RECORDER, Apr. 25, 1995, at 1.

16. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, sec. 401, §§ 501-507, 110 Stat. 1214, 1258-68 (to be codified at 8 U.S.C. §§ 1531-37). Within the text of this comment, these amended sections of the INA will hereinafter be referred to as the "removal court provisions."

17. *See id.* § 502, 110 Stat. at 1259.

used against the alien. Part III will briefly trace the history of aliens' rights under the Constitution for the purpose of illustrating the unique status of immigration law in American jurisprudence. Under the so-called "plenary power doctrine" the courts have traditionally deferred almost entirely to the legislative and executive branches in the area of immigration. While the doctrine has been displaced to some degree by a traditional due process model, its historical importance could add an unpredictable element to the Court's view of the new law.

Finally, in Part IV, the removal court provisions are analyzed under the due process test articulated in *Mathews v. Eldridge*.<sup>18</sup> This comment takes the position that the alien's stake in removal court proceedings involves a substantial liberty interest and that the proceedings are properly viewed as quasi-criminal in nature. The suspected alien terrorist may too easily be denied his confrontation rights by the government's use of secret evidence and then deported on a mere preponderance of the evidence. These features of the removal court provisions, in conjunction with a lack of other significant procedural protections, present an inordinate risk that the alien will be erroneously deprived of his liberty.

## II. ESTABLISHMENT OF THE REMOVAL COURT AND PROCEDURES FOR THE REMOVAL OF SUSPECTED ALIEN TERRORISTS

The removal court provisions state that the Chief Justice of the United States "shall publicly designate 5 district court judges from 5 of the United States judicial circuits who shall constitute a court that shall have jurisdiction to conduct all removal proceedings."<sup>19</sup> The removal court is modeled after the seven-member secret court set up under the Foreign Intelligence Surveillance Act of 1978 (FISA).<sup>20</sup> Indeed, the

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18. 424 U.S. 319, 335 (1976).

19. Sec. 401, § 502(a), 110 Stat. at 1259.

20. See 50 U.S.C. § 1803 (1994). The FISA is "intended to provide the exclusive means of authorizing various types of electronic surveillance activities for national security purposes," including:

- (1) deliberate interception of international radio or wire communications to or from a particular person in the United States;
- (2) deliberate interception of wholly domestic radio communications, and the installation or use of any monitoring device to acquire information about a person's activities;
- (3) interception in the United States of wire communications to or from any person in the United States without the consent of the party to the communication.

See Americo R. Cinquegrana, *The Walls (and Wires) Have Ears: The Background and First Ten Years of the Foreign Intelligence Surveillance Act of 1978*, 137 U. PA. L. REV. 793, 811 (1989).

Chief Justice has discretion to designate these judges for concurrent service on the removal court.<sup>21</sup>

The procedures for the removal court are outlined in § 503 of the new INA amendments. In any case in which the Attorney General of the United States has reason to believe, based upon classified information, that an alien is an alien terrorist,<sup>22</sup> the Attorney General may seek

The government presents applications for warrants to the Foreign Intelligence Surveillance Court (FISC) in “*in camera*, ex parte proceedings conducted under physical security measures designed to protect sensitive national security information.” *Id.* at 812; *see also* 50 U.S.C §§ 1804(a), 1805(a), and 1803(c). It is interesting to note that the FISC has never refused a government counterespionage request. *See* Wittes, *supra* note 15.

21. *See* sec. 401, § 502(a), 110 Stat. at 1259. It seems likely that judges serving on the new removal court will be culled from those with experience serving on the FISC, since it is that group of judges who now form part of the judge pool for the new court. *See* Ridgeway, *supra* note 15. But Nicholas Gess, director of the Justice Department’s Office of Intergovernmental Affairs, denies that the removal court is merely an extension of the FISC. While the judges and the facility—a secure room on the sixth floor of the Justice Building—may be the same, Gess maintains that the function of the two courts would be different. *See* Wittes, *supra* note 15.

22. The term “alien terrorist” means any alien described in § 241(a)(4)(B) of the INA:

(B) Terrorist activities

Any alien who has engaged, is engaged, or at any time after entry engages in any terrorist activity (as defined in section 212(a)(3)(B)(iii) of this title) is deportable.

Immigration and Nationality Act § 241(a)(4)(B), 8 U.S.C. § 1251(a)(4)(B) (West Supp. 1996).

The definition of “terrorist activity” and “engage in terrorist activity” are found in § 212(a)(3)(B)(ii & iii) of the INA:

(ii) Terrorist activity defined

As used in this Act, the term “terrorist activity” means any activity which is unlawful under the laws of the place where it is committed (or which, if committed in the United States, would be unlawful under the laws of the United States or any State) and which involves any of the following:

(I) The highjacking or sabotage of any conveyance (including an aircraft, vessel, or vehicle).

(II) The seizing or detaining, and threatening to kill, injure, or continue to detain, another individual in order to compel a third person (including a governmental organization) to do or abstain from doing any act as an explicit or implicit condition for the release of the individual seized or detained.

(III) A violent attack upon an internationally protected person (as defined in section 1116(b)(4) of title 18, United States Code) or upon the liberty of such a person.

(IV) An assassination.

(V) The use of any—

(a) biological agent, or nuclear weapon or device, or

(b) explosive or firearm (other than for mere personal monetary gain), with intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property.

(VI) A threat, attempt, or conspiracy to do any of the foregoing.

(iii) Engage in terrorist activity defined

removal of that individual by filing an application with the removal court. The main requirement for this application is a statement of the facts and circumstances relied on by the Department of Justice to establish probable cause that (1) the alien is an alien terrorist, (2) the alien is physically present in the United States, and (3) with respect to such alien, removal under title II<sup>23</sup> would pose a risk to the national security of the United States.<sup>24</sup>

An application for removal is submitted *ex parte* and *in camera* to the removal court, and filed under seal.<sup>25</sup> A single judge on the removal court may determine whether to grant the application. In making this determination he may also consider, *ex parte* and *in camera*, "other information, including classified information, presented under oath or affirmation," and "testimony received in any hearing on the application, of which a verbatim record shall be kept."<sup>26</sup> If the judge finds that the application is well-taken, it shall be granted, and "the rights of the alien regarding removal and expulsion shall be governed solely by this title."<sup>27</sup>

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

- (I) The preparation or planning of a terrorist activity.
- (II) The gathering of information on potential targets for terrorist activity.
- (III) The providing of any type of material support, including a safe house, transportation, communications, funds, false identification, weapons, explosives, or training, to any individual the actor knows or has reason to believe has committed or plans to commit a terrorist activity.
- (IV) The soliciting of funds or other things of value for terrorist activity or for any terrorist organization.
- (V) The solicitation of any individual for membership in a terrorist organization, terrorist government, or to engage in a terrorist activity.

Immigration and Nationality Act § 212(a)(3)(B)(ii & iii), 8 U.S.C. § 1182(a)(3)(B)(ii & iii) (West Supp. 1996).

23. Title II, Chapter 5 of the INA provides for general deportation of certain classes of aliens. *See* Immigration and Nationality Act §§ 241-50, 8 U.S.C. §§ 1251-60 (West Supp. 1996). For a version of the Immigration and Nationality Act current through January 1, 1993, *see* BENDER'S IMMIGRATION AND NATIONALITY ACT PAMPHLET (Publisher's Editorial Staff ed., 1993).

24. *See* sec. 401, § 503(a)(1)(D), 110 Stat. at 1260. "National security" is defined as "the national defense and foreign relations of the United States." Classified Information Procedures Act, 18 U.S.C. app. §§ 1-16 (1994).

25. *See* sec. 401, § 503(a)(2), 110 Stat. at 1260.

26. *Id.* § 503(c)(1)(A & B), 110 Stat. at 1260.

27. *Id.* § 503(d), 110 Stat. at 1260.

After an application is granted a removal hearing is expeditiously conducted for the purpose of determining whether the alien is deportable on the grounds that he is an alien terrorist.<sup>28</sup> This hearing is again before a single judge on the removal court. The character of the proceeding is quasi-criminal: a suspected alien terrorist financially unable to obtain counsel "shall be entitled to have counsel assigned" to represent him.<sup>29</sup> Introduction of evidence and examination of witnesses, however, are subject to the special rules of discovery laid out in § 504(e). These special rules and their accompanying treatment of classified information give rise to the most problematic aspects of the new removal court and the procedures which govern it.

The government may introduce evidence obtained under the FISA. This means the government may, under the auspices of national security, use electronic, mechanical or other surveillance techniques to acquire information which can then be used against the alien in the removal proceedings.<sup>30</sup> The new law also eliminates any notice requirement on the part of the government where it plans to introduce such evidence, if the Attorney General determines that "public disclosure would pose a risk to the national security . . . or otherwise threaten the integrity of a pending investigation."<sup>31</sup> Following the 1994 amendments to the FISA, which expand its provisions to cover physical surveillance as well, one civil libertarian has remarked that this "represents a huge increase in the use of secrecy in American jurisprudence."<sup>32</sup> Coupled with the explicit elimination of the exclusionary rule<sup>33</sup> and the inapplicability of the Federal Rules of Evidence,<sup>34</sup> the procedures ensure that proceedings before the removal court will provide a streamlined method of expelling any individual whom the government believes is a threat to public security.<sup>35</sup>

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28. *See id.* § 504(a)(1), 110 Stat. at 1260-61.

29. *Id.* § 504(c)(1), 110 Stat. at 1261.

30. *See* 50 U.S.C. § 1802(a)(1); *see generally supra* note 20. While the FISA does not comprehend the recording of conversations of a foreign national who is not an agent of a foreign power, *see* *United States v. Missick*, 875 F.2d 1294, 1299-1300 (7th Cir. 1989), a suspected alien terrorist easily fits the definition of "agent of a foreign power." *See* 50 U.S.C. § 1801(b)(1)(A).

31. *Sec.* 401, § 504(e)(1)(C), 110 Stat. at 1262. Such a notice requirement is expressly provided for under the FISA, *see* 50 U.S.C. § 1806(c), but was eliminated in the removal court provisions.

32. Wittes, *supra* note 15.

33. *Sec.* 401, § 504(e)(1)(B), 110 Stat. at 1262, states that "an alien subject to removal under this title shall not be entitled to suppress evidence that the alien alleges was unlawfully obtained."

34. *See id.* § 504(f), 110 Stat. at 1263.

35. The House Conference Report accompanying the new law makes clear that Congress viewed suspected alien terrorists as a separate category not just from citizens but from the class



In addition to the disposable notice requirement for evidence gathered under existing FISA law, the AEDPA's removal court procedures provide that much of this and other evidence may never be disclosed at all to the suspected alien terrorist. Under the discovery rules of the removal court provisions, the suspected alien terrorist is not entitled to any information gathered under FISA<sup>36</sup> or to any other classified information for which the Attorney General determines that "public disclosure would pose a risk to the national security of the United States or to the security of any individual because it would disclose classified information."<sup>37</sup> This evidence is instead examined by the judge *ex parte* and *in camera*, presumably for the sole purpose of giving the judge a full understanding of the nature of the evidence against the alien.<sup>38</sup> The government is then required to submit "an unclassified summary of the specific evidence" which is deemed not to pose the risks described.<sup>39</sup>

The judge has fifteen days in which to examine the unclassified summary, and shall approve the summary if he finds that it is "sufficient to enable the alien to prepare a defense."<sup>40</sup> In these cases the government is then required to deliver a copy of the classified summary to the alien so the removal hearing can go forward. At the hearing "it is the Government's burden to prove, by the preponderance of the evi-

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of deportable aliens in general:

The removal of alien terrorists from the United States, and the prevention of alien terrorists from entering the U.S. in the first place, present among the most intractable problems of immigration enforcement . . . Yet, alien terrorists, while deportable under section 241(a)(4)(D) of the INA, are able to exploit many of the substantive and procedural provisions available to all deportable aliens in order to delay their removal . . .

H.R. CONF. REP. NO. 104-518, at 115 (1996), *reprinted in* 1996 U.S.C.C.A.N. 944, 948.

36. *See* sec. 401, § 504(e)(1)(A), 110 Stat. at 1262 provides that information derived pursuant to FISA "shall not be authorized if disclosure would present a risk to the national security of the United States." Curiously, this provision, unlike the others which relate to national security, does not explicitly place the determination of risk in the hands of the Attorney General.

37. *Id.* § 504(e)(3)(A), 110 Stat. at 1262.

38. The judge has no authority to force disclosure by the government: "[n]othing in this subsection is intended to allow an alien to have access to classified information." *Id.* § 504(d)(5), 110 Stat. at 1262.

39. *Id.* § 504(e)(3)(B), 110 Stat. at 1262.

40. *Id.* § 504(e)(3)(C), 110 Stat. at 1262. This standard for determining whether the summary of evidence satisfies the alien's due process rights was reduced in the final version of the law. In the version which passed the Senate on June 7, 1995, the summary of evidence was required "to provide the alien with substantially the same ability to make his defense as would disclosure of the classified information." S. 735, § 503(e)(6)(B), 104th Cong., 1st Sess. (1995), *reprinted in* 141 CONG. REC. S7857, S7862 (daily ed. June 7, 1995). This lowered standard is identified as one of the shortcomings of the removal court procedures. *See* discussion *infra* Part IV.B.

dence, that the alien is subject to removal because the alien is an alien terrorist."<sup>41</sup> If, on the other hand, the judge deems the unclassified summary insufficient, the government has an additional fifteen days to correct the deficiencies identified by the court. If the revised summary is still deficient, the "removal hearing shall be terminated."<sup>42</sup>

### III. ALIENS' RIGHTS AND THE PLENARY POWER DOCTRINE

To gauge the constitutionality of the uncompromising set of procedures governing the new removal court, it is necessary to comprehend the extensive power over immigration law that has traditionally been placed in the political branches of government. More than a century ago, the Supreme Court granted full power over immigration law to the federal government,<sup>43</sup> instituting what has come to be known as the "plenary power doctrine." Though not explicitly granted by the Constitution, the doctrine was the key feature of American immigration jurisprudence for much of the twentieth century. While its contours have changed over the years, the doctrine essentially declares that "Congress and the executive branch have broad and often exclusive authority over immigration decisions. Accordingly, courts should only rarely, if ever, and in limited fashion, entertain constitutional challenges to decisions about which aliens should be admitted or expelled."<sup>44</sup>

Since a distinct feature of the AEDPA is the broad authority placed in the Secretary of State to "designate an organization as a foreign terrorist organization,"<sup>45</sup> the extent to which the plenary power doctrine is still operative in immigration law will help to determine whether it is constitutional to place such power in a single appointed official. The

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41. Sec. 401, § 504(g), 110 Stat. at 1263. Also diminished in the final version of the law is the standard of proof required to establish that the alien is an alien terrorist. In the Senate version of the bill the government was required to prove its case by "clear and convincing evidence." S. 735, § 503(f), 141 CONG. REC. at S7862. This lowered standard is also identified as a shortcoming of the removal court procedures, *see* discussion *infra* Part IV.B.

42. Sec. 401, § 504(e)(3)(D)(ii), 110 Stat. at 1262-63.

43. *Chae Chan Ping v. United States*, 130 U.S. 581 (1889) confirmed congressional authority to prevent aliens from entering the country (the *exclusion* power) and *Fong Yue Ting v. United States*, 149 U.S. 698 (1893) similarly established congressional authority to send resident aliens home (the *deportation* power). *See* T. Alexander Aleinikoff, *Federal Regulation of Aliens and the Constitution*, 83 AM. J. INT'L L. 862, 862 (1989).

44. Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L. J. 545, 547 (1990).

45. Sec. 302, § 219(a), 110 Stat. at 1248. This provision is not the focus of this comment. However, it is nevertheless significant to an understanding of the reach of the new court. Anyone belonging to an organization that has been designated a terrorist organization by the Secretary can subsequently be haled before the removal court by the Attorney General based on their membership alone. This raises serious First Amendment questions which will no doubt find their way to the Supreme Court.

continued vitality of the doctrine also affects the fundamental authority of Congress to set up a separate court with a disparate and arguably deficient set of procedural rules.

The history of judicial doctrine concerning aliens' rights in the deportation context can be divided into three phases.<sup>46</sup> Under the plenary power doctrine, courts recognized that aliens in deportation hearings were entitled to due process in some form, but they simultaneously allowed Congress to dictate how much process was due.<sup>47</sup> Legislators during this phase were "practically unlimited in their ability to restrict the rights of aliens."<sup>48</sup> During the McCarthy Era the fear of Communist infiltration of American society "reinvigorated"<sup>49</sup> the plenary power doctrine, facilitating one of the most shameful and paranoid episodes in American history. Thus, the plenary power doctrine "emerged in the oppressive shadow of a racist, nativist mood a hundred years ago . . . [and] was reaffirmed during our fearful, cold war McCarthy days."<sup>50</sup>

Since under the plenary power doctrine the Court will "defer almost entirely to the legislature's plenary power over immigration rather than intervene on behalf of the rights of aliens involved in immigration proceedings,"<sup>51</sup> its modern relevance has been questioned. In the early cases which established the plenary power doctrine, the Court relied overwhelmingly on international law principles respecting the sovereign rights of nations.<sup>52</sup> The Court "did not start with the text or structure of the Constitution and ask how a power to regulate immigration might be inferred. Rather, it approached the question of congressional power from the perspective of the conduct of foreign affairs."<sup>53</sup> Thus, in *Fong Yue Ting*, the Court quoted extensively from Vattel, Ortolan, Phillimore and Bar before announcing that the right to deport foreigners is an "inalienable right of every sovereign and independent nation, essential to its safety, its independence and its welfare."<sup>54</sup> This view of

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46. See Jim Rosenfeld, *Deportation Proceedings and Due Process of Law*, 26 COLUM. HUM. RTS. L. REV. 713, 733-39 (1995). Phase I, as Rosenfeld describes it, was marked by "a relatively broad respect for alien's rights in deportation proceedings." This respect was manifested in various ways, including the broad opposition to the Alien Act of 1798. Phase II represents the broad deference shown under the plenary power approach. Phase III, the current approach, has moved toward a balancing of the respective interests of the parties.

47. See *id.* at 734.

48. *Id.*

49. See Motomura, *supra* note 44, at 555.

50. Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny*, 100 HARV. L. REV. 853, 862 (1987).

51. Rosenfeld, *supra* note 46, at 733.

52. See Aleinikoff, *supra* note 43, at 863-65.

53. *Id.* at 863.

54. *Fong Yue Ting v. United States*, 149 U.S. 698, 711 (1892).

the "immigration power as an aspect of international relations suggested a very limited—or nonexistent—role for the courts."<sup>55</sup>

Of course, the foreign relations/international law model does not logically entail the power of Congress to do as it pleases in any matter touching on immigration. As Aleinikoff rightly suggests, "the Constitution may supply constraints on the foreign affairs power quite distinct from those recognized under international law."<sup>56</sup> Indeed, the steady decline of the plenary power doctrine signals an end to the traditional isolation of the entire body of immigration law from the constitutional norms and principles developed through the process of judicial review over the years.<sup>57</sup> Yet, despite the "liberalization" of the doctrine in recent years, the plenary power doctrine has not been completely eradicated.<sup>58</sup> While not likely to expressly dictate the constitutionality of the removal court provisions, the doctrine may well provide a historical backdrop which will color the analysis of the Court.<sup>59</sup> In light of the perceived threat of international terrorism, there is an inclination to revert to the foreign relations/international law model which places few limits on the legislative and executive branches to guard the nation's security.<sup>60</sup> As in all areas of immigration and nationality law, the ple-

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55. Aleinikoff, *supra* note 43, at 864. An example of this approach is found in § 241(a)(4)(C)(i) of the INA (codified at 8 U.S.C. § 1251(a)(4)(C)(i)), which provides for deportation of an alien if the Secretary of State has reasonable grounds to believe that his or her presence or activities would have potentially serious adverse foreign policy consequences. This provision "vests broad authority in the Secretary of State to interpret these undefined terms." AMERICAN IMMIGRATION LAWYERS ASSOCIATION, 1993-94 IMMIGRATION AND NATIONALITY LAW HANDBOOK 442 (1993). Aleinikoff suggests that had the immigration power been located elsewhere—for example, in the Congress' power to regulate commerce with foreign nations—the Court may have exercised stricter scrutiny of immigration laws through the years. See Aleinikoff, *supra* note 43, at 864.

56. Aleinikoff, *supra* note 43, at 863. Even the nineteenth century international law commentator Ortolan grudgingly admits this:

The government of each state has always the right to compel foreigners who are found within its territory to go away, by having them taken to the frontier. This right is based on the fact that, the foreigner not making part of the nation, his individual reception into the territory is matter of pure permission, of simple tolerance, and creates no obligation. The exercise of this right may be subjected, doubtless, to certain forms by the domestic laws of each country; but the right exists none the less, universally recognized and put in force.

*Fong Yue Ting*, 149 U.S. at 708.

57. See Motomura, *supra* note 44, at 547.

58. See Rosenfeld, *supra* note 46, at 737.

59. See, e.g., *Mathews v. Diaz*, 426 U.S. 67, 79-80 (1976) ("In the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens").

60. Of course, it strains modern sensibilities to equate the power to protect the nation against invading armies with the power to defend against "vast hordes of [a foreign] people crowding in upon us," see *Chae Chan Ping v. U.S.*, 130 U.S. 581, 606 (1889). However, the

nary power doctrine hangs over the constitutionality of the removal court provisions "like a chilling, choking fog."<sup>61</sup>

#### IV. CONSTITUTIONALITY OF THE REMOVAL COURT PROVISIONS

Due in part to the validating influence of the plenary power doctrine, Congress could be confident of the constitutionality of certain aspects of the removal court provisions. For example, the Court long ago determined that failure to abide by judicial rules of evidence does not render a deportation hearing unfair.<sup>62</sup> The exclusionary rule has likewise been deemed inapplicable to deportation proceedings.<sup>63</sup> Indeed, the entire avenue of attack afforded by equal protection has been blocked by the plenary power doctrine. Though the removal court provisions single out aliens for disparate treatment under the law, the concept of equal protection in regard to federal law based on citizenship classifications is well settled.<sup>64</sup>

Nevertheless, if the new provisions were challenged, the consolidated effect of the procedures governing the removal court would raise serious constitutional concerns. The first chink in the armor of the

power to protect against international terrorism is related to national defense and arguably the sole province of the political branches. Foreign relations with friendly nations are also at stake. As stated in the House Conference Report on the AEDPA, "[t]he U.S. relies heavily upon close and continued cooperation of friendly nations who provide information on the identity of such terrorists. Such information will only be forthcoming if its sources continue to be protected." H.R. CONF. REP. NO. 104-518 at 116 (1996), *reprinted in* 1996 U.S.C.C.A.N. 944, 948.

61. 1993-94 IMMIGRATION AND NATIONALITY LAW HANDBOOK, *supra* note 55, at 417.

62. See *Bilokumsky v. Tod*, 263 U.S. 149 (1923). Evidence during a deportation hearing is now covered by INS administrative guidelines. See 8 CFR § 242.14(c) (1996), allowing any oral or written statements into evidence as long as it is "material and relevant to any issue in the case." While the removal court provisions specifically eliminate the applicability of the Federal Rules of Evidence, they do not replace it with anything. Presumably the same standard of materiality and relevance applies to proceedings before the removal court.

63. See *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984).

64. Aliens are persons under the Equal Protection Clause. See *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). While the Equal Protection Clause does not apply to the federal government, the Fifth Amendment's Due Process Clause guarantees equal protection in the application of federal law. See *Bolling v. Sharpe*, 347 U.S. 497 (1954). However, the Supreme Court has traditionally afforded lenient treatment for federal laws which create classifications based upon United States citizenship. Such laws are typically upheld under the rational basis test. All that has been required in the past has been a showing by the federal government that the alienage classification is not an "arbitrary and invidious imposition of burdens upon a politically powerless group." The litany of cases adjudicated in this area demonstrate that the federal government's interests in foreign affairs, foreign relations, and immigration and naturalization will generally be deemed sufficient to justify a governmental classification based on alienage. See, e.g., *Mathews v. Diaz*, 426 U.S. 67 (1976); *Alvarez v. INS*, 539 F.2d 1220 (9th Cir.), *cert. denied*, 430 U.S. 918 (1976). The federal government's paramount interest in national security and the physical security of its citizens would undoubtedly rise to the same level. See generally JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* § 14.12 (5th ed. 1995).

plenary power doctrine was struck in *Yamataya v. Fisher*, in which the Court recognized that aliens were generally entitled to due process of law.<sup>65</sup> In spite of the Court's eloquent promise, however, constitutional protections have only been "nominally" applied to aliens in deportation proceedings.<sup>66</sup> The "courts have been willing to intervene solely on a case-by-case basis and have issued no general protections of due process rights in the deportation context."<sup>67</sup> The precise extent to which the Due Process Clause applies in administrative and quasi-criminal judicial proceedings such as those before the removal court is therefore unclear.<sup>68</sup> While the modern approach to procedural due process under *Goldberg v. Kelly*<sup>69</sup> and *Mathews v. Eldridge*<sup>70</sup> has expanded the types of interests protected under the Due Process Clause, the issue of whether a full package of rights applies to aliens in any particular setting is complicated by the alien's transitional citizenship status. As the Court has noted:

The alien, to whom the United States has been traditionally hospitable, has been accorded a generous and ascending scale of rights as he increases his identity with our society. Mere lawful presence in the country creates an implied assurance of safe conduct and gives him certain rights; they become more extensive and secure when he makes preliminary declaration of intention to become a citizen, and they expand to those of full citizenship upon naturalization.<sup>71</sup>

In light of this sliding scale of rights, the current approach of the law in the immigration context lies somewhere between the absolute deference of the plenary power doctrine and the modern due process balancing test established in *Mathews*.<sup>72</sup> The removal court provisions must therefore be analyzed under the *Mathews* model, with the caveat that its balance could be skewed by the judicial deference traditionally

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65. In *Yamataya v. Fisher*, 189 U.S. 86, 100 (1903), the Court stated:

But this Court has never held, nor must we now be understood as holding, that administrative officers, when executing the provisions of a statute involving the liberty of persons, may disregard the fundamental principles that inhere in "due process of law" as understood at the time of the adoption of the Constitution.

66. See Rosenfeld, *supra* note 46, at 733.

67. *Id.*

68. See *id.* at 739; O'Loughlin, *supra* note 10, at 113.

69. 397 U.S. 254 (1970).

70. 424 U.S. 319 (1976).

71. *Johnson v. Eisentrager*, 339 U.S. 763, 770 (1950).

72. See *Landon v. Plasencia*, 459 U.S. 21 (1982), in which the INS sought to exclude a permanent resident alien upon her return from Mexico. The Court applied the *Mathews* due process test. However, it further remarked that "control over matters of immigration is a sovereign prerogative, largely within the control of the Executive and the Legislature" and that "the role of the judiciary . . . does not extend to imposing procedures that merely displace congressional choices of policy." *Id.* at 34-35.

shown to federal immigration measures. The *Mathews* test was articulated as follows:

[The] identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.<sup>73</sup>

### A. *The Private Interest*

Since the interests at stake in civil proceedings are typically deemed less important than those in criminal settings, the private interest prong under *Mathews* is often outweighed by other concerns. Proceedings before the removal court, and deportation hearings in general, are categorized as civil in nature.<sup>74</sup> In a mechanical sense, therefore, the removal court provisions might easily be dubbed constitutional. If the suspected alien's stake in removal proceedings is depicted as a mere civil or administrative deprivation, it becomes easier to undervalue it.

However, the unique issues raised by the removal court provisions deserve more than the facile reply that deportation is a civil matter. A resident alien's deportation proceeding affects a *substantial* liberty interest, and thus should provide more protection than is generally afforded in civil settings. The Attorney General may take into custody any alien who is the subject of an application for removal,<sup>75</sup> and only if the alien is a permanent resident is he entitled to a "release hearing" at which bail can be set and the alien released if it appears to the removal court judge that he is not a danger to national security and will not flee.<sup>76</sup> The quasi-criminal nature of the removal proceedings is also implicitly recognized in the right of counsel granted to an alien in a removal hearing. As already mentioned, an alien financially unable to obtain counsel shall be entitled to have counsel assigned at government expense, and for purposes of compensation "the matter shall be treated as if a felony was charged."<sup>77</sup>

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73. *Mathews*, 424 U.S. at 335.

74. See, e.g., *Harisiades v. Shaughnessy*, 342 U.S. 580, 594 (1951) ("Deportation, however severe its consequences, has been consistently classified as a civil rather than a criminal procedure").

75. See Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, sec. 401, § 506(a)(1)(A), 110 Stat. 1214, 1265.

76. See *id.* § 506(a)(2)(A), 110 Stat. at 1265.

77. *Id.* § 504(c)(1), 110 Stat. at 1261. This is not a right afforded to aliens in general deportation hearings. See Aleinikoff, *supra* note 43, at 414-22. However, in rare cases counsel has been provided where necessary to assure "fundamental fairness," which is the "touchstone of due process." *Aguilera-Enriquez v. INS.*, 516 F.2d 565, 568 (6th Cir. 1975). Indeed, the right to

In general, the quasi-criminal nature of deportation is also demonstrated by the requirements placed on arresting officers after the decision to proceed with deportation is made by the INS. While no *Miranda* warning is required, officers are required to advise the alien of (1) the reason for the arrest, (2) the alien's right to counsel at no cost to the government, and (3) the alien's right to remain silent.<sup>78</sup> These are essentially the same requirements as defined by the Court in *Miranda*.<sup>79</sup>

The recognition that deportation represents a loss of liberty led to much of the uneasiness with the plenary power doctrine among past members of the Court. As long ago as 1893, Justice Brewer observed:

But it needs no citation of authorities to support the proposition that deportation is punishment. Every one knows that to be forcibly taken away from home and family and friends and business and property, and sent across the ocean to a distant land, is punishment, and that oftentimes most severe and cruel.<sup>80</sup>

Indeed, deportation may result "in loss of both property and life; or of all that makes life worth living."<sup>81</sup> Because of its drastic consequences, deportation has been described by the Court as "draconian" punishment, similar to "exile or banishment."<sup>82</sup>

Yet the Court, in a relatively recent opinion, has again endorsed the view of the majority in *Fong Yue Ting* that deportation is not punishment.<sup>83</sup> "A deportation proceeding," writes Justice O'Connor,

is a purely civil action to determine eligibility to remain in this country, not to punish an unlawful entry, though entering or remaining unlawfully in this country is itself a crime. The deportation hearing looks prospectively to the respondent's right to remain in this country in the future. Past conduct is relevant only insofar as it may shed light on the respondent's right to remain.<sup>84</sup>

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counsel was perhaps granted in removal hearings to "compensate" for other reductions in rights. See O'Loughlin, *supra* note 10, at 110 n.61.

78. See 8 CFR § 287.3 (1996).

79. See DAVID WEISSBRODT, IMMIGRATION LAW AND PROCEDURE IN A NUTSHELL § 7-3.1, at 138 (2d ed. 1989).

80. *Fong Yue Ting v. United States*, 149 U.S. 698, 740 (1893).

81. *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922).

82. *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948). See also *Wong Yang Sung v. McGrath*, 339 U.S. 33, 50 (1950) ("A deportation hearing involves issues basic to human liberty and happiness and, in the present upheavals in lands to which aliens may be returned, perhaps to life itself").

83. See *Fong Yue Ting*, 149 U.S. at 709. The Court has periodically reiterated this idea that deportation is non-punitive. See, e.g., *Wong Wing v. United States*, 163 U.S. 228, 236 (1896); *Bugajewitz v. Adams*, 228 U.S. 585, 591 (1913); *Mahler v. Eby*, 264 U.S. 32, 39 (1923); *Harisiades v. Shaughnessy*, 342 U.S. 580, 594 (1951).

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



This view may be persuasive where, as in *Lopez-Mendoza*, the entirety of the alien's offense is his illegal presence within the country. However, for a legal resident alien whom the government suspects of terrorist activity, a deportation proceeding is more than a non-punitive method which merely determines future eligibility to remain in the country. It is an investigation into alleged wrongful behavior. To apply Justice O'Connor's view to resident aliens suspected of bad acts is to redefine "punishment." One might as easily proclaim that a trial looks prospectively at the accused's right to stay out of jail.

To ignore the liberty interest that aliens have in deportation hearings is to rely to an unnatural degree on the dichotomy between civil and criminal affairs. In short, the private interest involved in deportation occupies a middle ground between these types of law, and will tend to be undervalued where the proceeding is perfunctorily classified as civil in nature. Surely, deportation from this country "qualifies as a great deprivation of liberty, and therefore would require extensive due process protection."<sup>85</sup>

#### B. *The Risk of Erroneous Deprivation*

"Deprivation of liberty . . . is the harshest action the state can take against the individual through the administrative process."<sup>86</sup> Deportation is a substantial deprivation of liberty, and the level of procedural protection needed to guard against the erroneous deprivation of that liberty has historically risen when such interests are implicated. This concern brings to the fore the most notorious features of the removal court provisions: the lowered standard for the summary of evidence given to the suspected alien terrorist,<sup>87</sup> and the lowered burden of proof by which the government is bound to establish its case against the alien.<sup>88</sup>

The standard for the unclassified summary of evidence can best be understood through a comparison with earlier versions of the law, particularly the bill which passed the Senate on June 7, 1995.<sup>89</sup> This version provided that the unclassified summary used against the alien was required "to inform the alien of the nature of the evidence that such person is an alien [terrorist], and to provide the alien with *substantially the same ability to make his defense as would the classified informa-*

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85. Rosenfeld, *supra* note 46, at 744.

86. Henry J. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1296 (1975).

87. See Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, sec. 401, § 504(e)(3)(C), 110 Stat. 1214, 1262.

88. See *id.* § 504(g), 110 Stat. at 1263.

89. S. 735, 104th Cong., 1st Sess. (1995), reprinted in 141 CONG. REC. S7857 (daily ed. June 7, 1995).

tion.”<sup>90</sup> This so-called “heightened standard summary”<sup>91</sup> could be lowered in the revised summary, but only after the court deemed that particular criteria were satisfied.<sup>92</sup>

Whatever the due process problems inherent in these criteria for accepting the “lower-standard summary,”<sup>93</sup> Congress has mooted the issue. Under the new law, the criteria for lowering the standard have been dispensed with completely. The lower-standard summary is no longer a substitute standard for exceptional cases; it has triumphed as the sole standard which the unclassified summary must satisfy. In order for the removal hearing to proceed under the new law, the summary of evidence must only be “sufficient to enable the alien to prepare a defense.”<sup>94</sup> Thus the level of secret and undiscoverable evidence which can be used against the alien is greatly expanded, raising serious constitutional concerns over the suspected alien’s confrontation rights.

90. *Id.* at S7862 (emphasis added).

91. The term “heightened-standard summary” is used herein to describe the summary which provides the alien with “substantially the same ability to make his defense as would disclosure of the classified information.” See O’Loughlin, *supra* note 10, at 108 n.50.

92. The Senate version provided that:

(E) If the revised unclassified summary is not approved by the court within 15 days of its submission . . . , the special removal hearing shall be terminated unless the court, within that time, after reviewing the classified information in camera and ex parte, issues written findings that—

(i) the alien’s continued presence in the United States would likely cause—

(I) serious and irreparable harm to the national security; or  
(II) death or serious bodily injury to any person; and

(ii) provision of either the classified information or an unclassified summary that meets the [heightened-standard] would likely cause—

(I) serious and irreparable harm to the national security; or  
(II) death or serious bodily injury to any person; and

(iii) the unclassified summary prepared by the Justice Department is adequate to allow the alien to prepare a defense.

S. 735 § 503(e)(6)(B), 141 CONG. REC. at S7862.

O’Loughlin, *supra* note 10, at 107-10, argues that these criteria provided no meaningful check on the government’s ability to dispense with the heightened standard summary. It is worth noting that the precursor to the AEDPA, the Comprehensive Terrorism Prevention Act, did not include any provisions for a required summary at all. The Specter-Simon-Kennedy Amendment created the scheme described above, and was introduced for the explicit purpose of restoring some semblance of an adversarial proceeding. See *generally id.*

93. The term “lower-standard summary” is used to describe the summary of evidence which must only be “adequate to allow the alien to prepare a defense.” See O’Loughlin, *supra* note 10, at 108 n.48.

94. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, sec. 401, § 504(e)(3)(c), 110 Stat. 1214, 1262. The significance of the change of wording in the lower-standard summary, from “adequate” to “sufficient,” is unclear. At any rate, they would seem to establish an equivalent level of protection.

The lower-standard summary of evidence provides no meaningful replacement for the important purposes which the Sixth Amendment right of confrontation has traditionally served.<sup>95</sup> Deportation hearings are technically civil proceedings and thus carry no *explicit* Sixth Amendment guarantee.<sup>96</sup> However, the right of persons to be confronted with the witnesses against them is an essential component of due process. The quasi-criminal nature of deportation proceedings and the substantial liberty interest at stake require that this right not be casually disposed of, lest the risk of erroneous deprivation become too great. Even if it is accepted that the singular purpose of confrontation is to promote accuracy in the truth-seeking process,<sup>97</sup> the frail guarantee that the alien will be given a version of events prepared by his opponent which is merely "sufficient to prepare a defense" does little to promote this process.<sup>98</sup> In light of the lack of other procedural and

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95. In *Mattox v. United States*, 156 U.S. 237, 242-43 (1895), the Supreme Court explained the two-fold purpose underlying the confrontation clause. First, it affords the accused an opportunity to cross-examine the witness in order to test the witness' memory and possibly elicit information that might aid in his defense. Second, it gives the fact-finder an opportunity to observe the witness' demeanor and determine his credibility. See Joel R. Brown, Comment, *The Confrontation Clause and The Hearsay Rule: A Problematic Relationship In Need of A Practical Analysis*, 14 FLA. ST. U. L. REV. 949, 950 (1987). Another rationale of the confrontation right, recognized centuries ago, is that people are less prone to lie in a public setting than they are in situations where there is little or no accountability. See, e.g., SIR MATTHEW HALE, THE HISTORY OF THE COMMON LAW OF ENGLAND 163 (1713) ("That it is openly; and not in private before a Commissioner or Two . . . where oftentimes Witnesses will deliver that which they will be ashamed to testify publicly."). See also Amy Gallicchio, Note, *The Sixth Amendment Right to Confrontation Where Reliability or Credibility of Witnesses is at Issue: The Extent and Scope of Cross-Examination*, 34 CATH. U. L. REV. 1267 (1985).

96. "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . .". U.S. CONST. amend. VI.

97. The approach of the Court in recent years has diluted the historical function of the Confrontation Clause even in criminal settings. In *Idaho v. Wright*, 497 U.S. 805, 814 (1990), the Court stated that the clause was a safeguard "generally designed to protect similar values" as the hearsay rule. Such pronouncements have led to the charge that the Court has transformed a Constitutional guarantee into an evidentiary doctrine, the only function of which "is the promotion of accuracy in fact-finding . . .". Margaret A. Berger, *The Deconstitutionalization of the Confrontation Clause: A Proposal for a Prosecutorial Restraint Model*, 76 MINN. L. REV. 557, 558 (1992); see also *White v. Illinois*, 502 U.S. 346, 356-57 (1992) ("the Confrontation Clause has as a basic purpose the promotion of the integrity of the factfinding process."). Some would argue that even this function has been diluted. See, e.g., Jacqueline Miller Beckett, Note, *The True Value of the Confrontation Clause: A Study of Child Sex Abuse Trials*, 82 GEO. L. J. 1605, 1607 (1994) (arguing that the Court's current approach has transformed the courtroom "from a place where facts are processed and law is carefully analyzed to a place where unsubstantiated lies may be heard as truths . . .").

98. In determining what evidence to provide to the accused alien terrorist, the government will not likely be guided by the original purpose of the law—which is to protect classified information—but will rather seek only to satisfy this low standard. Certain information, even if not a risk to national security if furnished to the accused, will tend to be withheld if the stan-

evidentiary protections provided in this law, due process demands the restoration of a heightened standard for the unclassified summary. Otherwise, those who stand before the removal court stand perilously close to non-adversarial proceedings.

In spite of this semi-adversarial setting, the removal court provisions also contain a reduced burden of proof by which the government must establish its case against the suspected alien terrorist.<sup>99</sup> The effect of this lowered burden is predictable. In conjunction with the alien's negligible confrontation rights and the lack of other meaningful procedural protections, it renders the chance of an acquittal remote. In requiring the case against the alien to be proved by a mere preponderance of the evidence, Congress has all but stamped the accused's passport.

In its political rush to rid the country of accused alien terrorists, however, Congress has brushed aside the Supreme Court's admonition that deportation of aliens should be governed in all cases by a standard of clear and convincing evidence. In *Woodby v. INS*<sup>100</sup> the deportation of a resident alien was ordered on the ground that she had engaged in prostitution after her entry into the United States. Neither the hearing officer nor the Board of Immigration Appeals (BIA) discussed what burden of proof the government was required to bear in establishing deportability; nor did they indicate the degree of certainty with which they reached their factual conclusions. The Sixth Circuit nevertheless upheld the deportation order without discussing the government's burden of persuasion at the administrative level, finding only that BIA's order was "supported by reasonable, substantial, and probative evidence on the record considered as a whole."<sup>101</sup> The Supreme Court granted certiorari to determine "what burden of proof the government is required to sustain in deportation proceedings."<sup>102</sup>

The *Woodby* Court remanded the case to the INS. It ruled that the disputed provisions applied only to judicial review, and that the less stringent statutory language of "reasonable, substantial, and probative" evidence was not a satisfactory standard for the deportation proceeding

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dard can otherwise be met.

99. Apparently, sufficiency of the evidence proved a difficult issue to resolve. The day before the Senate version of the bill passed, Senator Specter remarked on the floor that they were still "wrestling" with whether the evidence to establish deportability should be clear and convincing. See 141 Cong. Rec. S 7762 (daily ed. July 6, 1995) (statement of Sen. Specter). As already discussed, the bill passed the Senate with this intermediate burden intact, but was downgraded in the House to the lower burden of a "preponderance." See *supra* note 41.

100. 385 U.S. 276 (1966).

101. *Id.* at 281. The language used by the court of appeals was based on the disputed provisions in the INA which used the term "reasonable, substantial, and probative evidence" in connection with deportation orders. *Id.*

102. *Id.* at 277.

itself.<sup>103</sup> Emphasizing the “drastic deprivation”<sup>104</sup> that may follow when a resident alien is expelled, the Court concluded:

In denaturalization cases the Court has required the Government to establish its allegations by clear, unequivocal, and convincing evidence . . . .No less a burden is appropriate in deportation proceedings . . . .

We hold that no deportation order may be entered unless it is found by clear, unequivocal, and convincing evidence that the facts alleged as grounds for deportation are true.<sup>105</sup>

Two months after *Woodby* was decided, Congress acted through the INS to formally adopt the Court’s view that deportation proceedings merit an intermediate burden of proof.<sup>106</sup> This regulation has been in effect for nearly thirty years; not until the passage of the removal court provisions has Congress promulgated a lower burden of proof within the deportation context. This “get tough” policy choice, like the passage of the antiterrorism bill itself, was undoubtedly a product of the Oklahoma City bombing and the popularity of anti-immigrant election year politics.<sup>107</sup> Yet the competing constitutional policy embodied in the Fifth Amendment has unfortunately been neglected.<sup>108</sup>

Traditionally, Fifth Amendment liberty interests are implicated where there is an element of punishment. Based on the severity of this punishment, the burden of proof instructs the factfinder “concerning the degree of confidence our society thinks he should have in the correct-

103. The Court’s decision turned on the “elementary but crucial difference between burden of proof and scope of review.” *Id.* at 282. The burden of proof is imposed at the trial or original proceeding, and is often higher than the scope of judicial review used on appeal. For example, in a criminal trial the prosecution is required to establish the elements of the defense beyond a reasonable doubt. “But if the correct burden of proof was imposed at trial, judicial review is generally limited to ascertaining whether the evidence relied upon by the trier of fact was of sufficient quality and substantiality to support the rationality of the judgment.” *Id.*

104. *Id.* at 285.

105. *Id.* at 285-86. Despite the Court’s powerful language, its holding in *Woodby* did not establish an express constitutional mandate for a clear and convincing standard in deportation proceedings. The Court was interpreting specific statutory provisions of the INA. Once it concluded that Congress had “not addressed itself to the question of what degree of proof is required in deportation proceedings,” it was necessary to go no further than filling in the gap. *See id.* at 284.

106. *Woodby* was decided in December, 1966. In February, 1967 the INS amended the regulation governing the burden of proof in deportation proceedings. *See* 32 Fed. Reg. 2883 (1967). This amendment remains unchanged and is codified at 8 C.F.R. § 242.14(a) (1996):

§ 242.14 Evidence

(a) *Sufficiency.* A determination of deportability shall not be valid unless it is found by clear, unequivocal and convincing evidence that the facts alleged as grounds for deportation are true.

107. *See* With, *supra* note 14 and accompanying text.

108. U.S. CONST. amend. V. states that “[n]o person shall . . . be deprived of life, liberty, or property without due process of law . . . .”

ness of factual conclusions for a particular type of adjudication."<sup>109</sup> At one end of the spectrum lie criminal proceedings. Justice Brennan, speaking for the majority in *In Re Winship* observed that "it has long been assumed that proof of a criminal charge beyond a reasonable doubt is constitutionally required."<sup>110</sup> The requirement is "implicit in 'constitutions . . . [which] recognize the fundamental principles that are deemed essential for the protection of life and liberty.'"<sup>111</sup> Such protection is needed in the real world of accusations and trials because there is *always* a margin of error, representing mistakes in factfinding, which must be justly accounted for:

Where one party has at stake an interest of transcending value—as a criminal defendant his liberty—this margin of error is reduced as to him by the process of placing on the other party the burden of . . . persuading the factfinder at the conclusion of the trial of his guilt beyond a reasonable doubt. Due process commands that no man shall lose his liberty unless the Government has borne the burden of . . . convincing the factfinder of his guilt.<sup>112</sup>

Implicit in the Court's statements is the idea that the burden of proof rises as the accused's liberty stake increases. This principle cannot fairly be restricted by a rigid criminal/civil dichotomy, where one type of proceeding is served the highest standard and the other is thrown the judicial scraps. The intermediate standard of clear and convincing evidence plays an important role in civil proceedings, and has been used to give expression to a societal "preference for one of the parties or a desire to handicap the other."<sup>113</sup> The Court has declared such a heightened standard appropriate in libel suits,<sup>114</sup> in involuntary commitment proceedings,<sup>115</sup> and state parental termination proceedings.<sup>116</sup> As mentioned in *Woodby*, the Court has also consistently required clear and convincing evidence in expatriation<sup>117</sup> as well as denaturalization cases.<sup>118</sup>

Many of these types of proceedings, like those before the removal court, are quasi-criminal in nature because they punish wrongful behavior. *All* pose a significant threat to individual liberty. When the in-

109. *In Re Winship*, 397 U.S. 358, 370 (1970) (Harlan, J., concurring).

110. *Id.* at 362.

111. *Id.* (quoting *Davis v. United States*, 160 U.S. 469, 488 (1895)).

112. *Id.* at 364 (quoting *Speiser v. Randall*, 357 U.S. 513, 525-26 (1958)).

113. Lisa Pennekamp, *Recent Case*, 51 U. CIN. L. REV. 933, 935 (1982).

114. *See Rosenbloom v. Metromedia*, 403 U.S. 29 (1971).

115. *See Addington v. Texas*, 441 U.S. 418 (1979).

116. *See Santosky v. Kramer*, 455 U.S. 745 (1982).

117. *See Gonzalez v. Landon*, 350 U.S. 920 (1995); *Nishikawa v. Dulles, Secretary of State*, 356 U.S. 129 (1958). *See also Woodby v. INS*, 385 U.S. 276, 285 (1966).

118. *See Schneiderman v. United States*, 320 U.S. 118 (1943); *Baumgartner v. United States*, 322 U.S. 665 (1944); *Nowak v. United States*, 356 U.S. 660 (1958); *Chaunt v. United States*, 364 U.S. 350 (1960). *See also Woodby*, 385 U.S. at 285.

terests at stake are "more substantial than mere loss of money,"<sup>119</sup> a heightened burden of proof is required to minimize the risk of an erroneous judgment. The preponderance standard is constitutionally inadequate to satisfy due process in an alien's deportation proceeding before the new removal court. If allowed to stand, it creates an inordinate risk that the innocent and guilty alike will be punished.

### C. *The Government Interest.*

As observed forty years ago, "we have been none too ingenious in producing legal inventions for reconciling national security with procedural fairness."<sup>120</sup> Popular passions drown the faint echo of the caveat that scrutiny of the law becomes quite limited in fact, especially in times of crisis. National security is a unique concern, perhaps the most imperative of federal government functions. Information relating to national security must often be kept secret, however, and the public view of this function often transmutes into a vital yet amorphous stake against a faceless enemy. Guided only by a xenophobic national angst, this preoccupation threatens the very nation it seeks to protect. As Justice Douglas commented, "[i]n days of great tension when feelings run high, it is a temptation to take short-cuts by borrowing from the totalitarian techniques of our opponents. But when we do, we set in motion a subversive influence of our own design that destroys us from within."<sup>121</sup>

Government action against foreigners on our soil who pose a real or perceived threat to national security is not new. In 1798 the United States passed the Alien and Sedition Acts, both of which have since been recognized as paradigms of government paranoia.<sup>122</sup> During

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119. *Addington*, 441 U.S. at 424.

120. Kenneth Culp Davis, *The Requirement of a Trial-Type Hearing*, 70 HARV. L. REV. 193, 193 (1956).

121. *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123 (1950). Especially vulnerable are treasured First Amendment rights. Many observers believe the removal court is a response to government frustration with the so-called "Los Angeles Eight." In 1987, seven Palestinians and one Kenyan were arrested by the INS and charged with membership in the Popular Front for the Liberation of Palestine, a Marxist wing of the Palestinian Liberation Organization. The INS sought to deport them on charges of membership in an organization which supports terrorism. The original charges were thrown out of court, and the government has attempted other approaches over the years including subversion and visa violations. Some believe the eight are being persecuted solely for their political affiliations. See Eve Pell, *Secret INS Deportation Plan: Kicking Out Palestinians*, THE NATION, vol. 250, No. 5, at 167, February 5, 1990; Alexander Cockburn, *US-Hamas Links*, NEW STATESMEN AND SOCIETY, vol. 6, No. 242, at 10, March 5, 1993.

122. "The Alien Act empowered the President to order, without assigning cause, the summary arrest and deportation of any foreigner, even the citizen of a friendly nation, whom he judged to be 'dangerous' to the peace and safety of the nation or believed 'suspect' of 'secret

World War II, persons of Japanese descent were systematically rounded up and imprisoned in internment camps against their will.<sup>123</sup> In the 1950's, aliens with communist sympathies were persecuted and often deported. At the height of this second "red scare" the Supreme Court held due process was not violated by federal statutes which made an alien's present or former membership in the Communist Party, in and of itself, a ground for exclusion or deportation.<sup>124</sup> In light of these past excesses, a "healthy skepticism" is called for whenever the government interest in protecting national security is invoked by legislators.<sup>125</sup>

But from a history of past abuse it does not logically follow that the government is overstating the current threat posed by international terrorism.<sup>126</sup> The United States has many enemies who are increasingly well-financed, internationally established, and fanatically motivated.<sup>127</sup> To ensure that these enemies are continually monitored, the nation must be allowed to protect secret information, especially that which comes from international sources. This government interest in secrecy should weigh heavily in the balance. But it should not be permitted to squelch the civil liberties of those who have obeyed our immigration laws and who reside in this country legally. Where the gov-

machinations." L. LEVY, *JUDGMENTS: ESSAYS ON AMERICAN CONSTITUTIONAL HISTORY* 162 (1972).

123. See *Korematsu v. United States*, 323 U.S. 214 (1944).

124. See *Galvan v. Press*, 347 U.S. 522 (1954) (dealing with § 22 of the Internal Security Act of 1950); *Hyun v. Landon*, 350 U.S. 990 (1955) (dealing with § 241(a)(6) of the Immigration and Nationality Act of 1952). Under these cases it was not necessary to show that the deportee supported, or even had demonstrative knowledge of, the Communist Party's advocacy of violence. For a fuller account of the case law from this era, see Annotation, *Exclusion or Deportation of Alien as Subversive—Federal Cases*, 2 L. Ed. 2d 1617 (1958).

125. See Rosenfeld, *supra* note 46, at 747. See also 1993-94 IMMIGRATION AND NATIONALITY LAW HANDBOOK, *supra* note 55, at 442, remarking that the detailed definitions of terrorism and the elimination of Communists, anarchists and other subversives under modern deportation law reflect a political climate in which "[t]errorists' have replaced Communists as the new undesirables."

126. Since 1968 over 8500 terrorist acts worldwide have been claimed by over 700 different terrorist groups. More than half of these have been directed at the United States or its citizens. See STEPHAN BOWMAN, *WHEN THE EAGLE SCREAMS: AMERICA'S VULNERABILITY TO TERRORISM* 11 (1994).

127. See *id.* at 12-34, listing many of the well-known and active international terrorist groups. Predictably, many of these groups originate in the volatile Middle East. See Kevin Fedarko, *Who Wishes Us Ill?*, *TIME*, July 29, 1996, at 41.

The reality of a more advanced breed of terrorist was not lost on Congress. The House Conference Report states that "[t]errorist organizations have developed sophisticated international networks that allow their members great freedom of movement and opportunity to strike, including within the United States. They are attracting a more qualified cadre of adherents with increasing technical skills." H.R. CONF. REP. NO. 104-518, at 116 (1996), *reprinted in* 1996 U.S.C.C.A.N. 944, 948.



ernment interest in secrecy is overstated it nullifies other legitimate concerns, and vague accusations from untraceable sources become sufficient to arrest, try, convict and banish.

#### V. CONCLUSION: THE PROPER BALANCE

International terrorism is an evil which has only begun to haunt the West. Effective methods must be developed to prevent attacks and to guard against the unsettling presence of those who would kill and maim innocents to further their extremist agendas. However, when we allow fear and outrage to guide our response the terrorist wins. Laws to combat terrorism must be forceful and effective, but balanced against the civil liberties of *all* residents, not just citizens of the United States.

The removal court provisions of the AEDPA have struck the wrong balance. This portion of the new antiterrorism law likely passed because it targets aliens, a group whose rights have traditionally been dictated by the political branches of the government rather than the courts. However, due process for legal resident aliens should not be relegated to an empty promise. If the provisions are challenged, the courts must intervene under a modern approach which properly balances an alien's substantial liberty interests against other concerns. The government's countervailing interests are undeniably strong. In light of the increasing fanaticism of many terrorist groups and the growing sophistication of their methods, prevention of terrorist acts and protection of the classified information utilized to track suspected terrorists is an urgent and necessary function of the federal government.

However, the dearth of significant procedural and evidentiary safeguards in the removal court provisions creates an undue risk that legal resident aliens who have obeyed the immigration laws and are guilty of nothing more than unpalatable political affiliations will suffer erroneous deprivation of their liberty to remain in this country. Congress should remedy the imbalance of the new law by amending it in the following two ways. First, the heightened standard for the unclassified summary of evidence should be restored. While classified information must remain secret, the only meaningful substitute for the suspected alien's confrontation rights is a standard which provides substantially the same ability to prepare a defense as he would have if all information were presented. Second, the government should be required to prove its case against the suspected alien terrorist by clear and convincing evidence.

Passed in the wake of the horrific tragedy of the Oklahoma City bombing, the removal court provisions reflect the understandable desire of an outraged public for strict and uncompromising measures to prevent acts of terrorism. But even though the removal court was inspired by the government's most frustrating attempts to deport supposed foreign terrorists, there is no guarantee that its application will be restrict-

ed to egregious cases. Nicholas Gess, director of the Justice Department's Office of Intergovernmental Affairs, has remarked that "this law allows us to do what we could not do before."<sup>128</sup> This observation, made by an unabashed proponent of the new law, may be the most accurate and telling assessment of all.

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128. Wittes, *supra* note 15.

