

**The Ever-Changing Bogeyman: How Fear Has  
Driven Immigration Law and Policy**

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INTRODUCTION

The campaign for the Republican nomination for the American presidency in 2015 and 2016 has been marked by hyperbole and fear-mongering.<sup>1</sup> No candidate has made such a pronounced impact in the

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category of shocking or politically incorrect verbiage as Donald Trump.<sup>2</sup> One of the predominant talking points across Republican candidates' campaigns has been illegal immigration and border security.<sup>3</sup> Trump's framing of the issue put it into terms that have long been used to justify a restricted immigration policy:<sup>4</sup>

Either we have a border or we don't have a country. You can't have a country without borders. People are coming in and some of those people—I read it even yesterday, there was a huge article

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1. See, e.g., Rex W. Huppke, *GOP Candidates Want You to be Terrified*, CHI. TRIB. (May 20, 2015, 9:51 AM), <http://www.chicagotribune.com/news/opinion/huppke/ct-huppke-gop-fear-mongering-20150520-story.html> [https://perma.cc/VF25-LND9] (analyzing quotes from Republican presidential contenders, concluding that “[t]here’s something Republican presidential contenders want you to know: You should be TERRIFIED”).

2. See, e.g., Karen Tumulty & Jenna Johnson, *Why Trump May be Winning the War on “Political Correctness,”* WASH. POST: POLITICS (Jan. 4, 2016), [https://www.washingtonpost.com/politics/why-trump-may-be-winning-the-war-on-political-correctness/2016/01/04/098cf832-afda-11e5-b711-1998289ffcea\\_story.html](https://www.washingtonpost.com/politics/why-trump-may-be-winning-the-war-on-political-correctness/2016/01/04/098cf832-afda-11e5-b711-1998289ffcea_story.html) [https://perma.cc/UV97-EGLG].

3. See, e.g., Ed Kilgore, *When Did the GOP Get So Extreme on Immigration?*, N.Y. MAG.: DAILY INTELLIGENCER (Dec. 18, 2015, 8:00 AM), <http://nymag.com/daily/intelligencer/2015/12/when-did-the-gop-get-so-crazy-on-immigration.html> [https://perma.cc/U2DV-BPL4].

4. See Graham C. Ousey & Charis E. Kubrin, *Exploring the Connection Between Immigration and Violent Crime Rates in U.S. Cities, 1980-2000*, 56 SOC. PROBS. 447, 447 (2009).

Nearly 80 years ago, criminologist Edwin Sutherland . . . highlighted immigration and crime as an area of popular misconception and policy distortion. Today, not much has changed as both public opinion about immigration and immigration policy appear to be driven more by stereotype than by empirical fact . . . . The misperception that the foreign born, especially illegal immigrants, are responsible for higher crime rates is deeply rooted in American public opinion and is sustained by media anecdote and popular myth.

*Id.* (internal citations and quotation marks omitted).

about the tremendous crime that's taking place. It's like a crime wave. One of the most dangerous places on earth.<sup>5</sup>

Although many commentators dismissed Trump as “a flawed candidate who may be too inconsistent and nasty to appeal to most Americans,”<sup>6</sup> his consistently high polling “illustrate[s] deep anxiety and anger in the country.”<sup>7</sup> Statements such as this one evoke a sense of patriotism and stir up “fears about the boom of immigrants without legal status,”<sup>8</sup> while echoing a fear of immigration that, whether intentional or not, drives America's immigration policy. Although Trump's comments are harsh and controversial, the base sentiment behind them—fear—is perfectly understandable. Fear is instinctual; fear keeps us alive; fear motivates us to question things around us and instigate change.

The United States's response to the events of September 11, 2001 was rooted in that survivalist instinct driven by fear. Because of the particular impetus for the U.S. response, shortly after September 11, 2001, the field of immigration law quickly became a focal point in the Global War on Terror.<sup>9</sup> Not only did the federal government enact new immigration laws

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5. Pam Key, *Trump on Mexico Comments: 'I Can't Apologize for the Truth,'* BREITBART (July 5, 2015), <http://www.breitbart.com/video/2015/07/05/trump-on-mexico-comments-i-cant-apologize-for-the-truth/> [<https://perma.cc/CKH7-U7KT>].

6. Kenneth T. Walsh, *Anxiety and Anger in America*, U.S. NEWS: THE REP. (Sept. 11, 2015, 6:00 AM), <http://www.usnews.com/news/the-report/articles/2015/09/11/trumps-rise-illustrates-anger-and-anxiety-in-america> [<https://perma.cc/EWP2-ZK29>].

7. *Id.*; see also Tumulty & Johnson, *supra* note 2 (“The Republican front-runner is saying what a lot of Americans are thinking but are afraid to say because they don't think that it's politically correct . . .”).

8. Mortimer B. Zuckerman, *A Losing Trump Card*, U.S. NEWS: THE REP. (Sept. 18, 2015, 4:45 PM), <http://www.usnews.com/news/the-report/articles/2015/09/18/donald-trumps-immigration-polices-are-a-loser-for-the-gop> [<https://perma.cc/GR66-C9G2>].

9. See Farrah G. de Leon, Note, *Girding the Nation's Armor: The Appropriate Use of Immigration Law to Combat Terrorism*, 3 REGENT J. INT'L L. 115, 115–16 (2005).

Three years after the tragic September 11, 2001, attacks, it is tempting to believe that America has returned to a time of normalcy. Yet, few would dispute that the nation is engaged in an ongoing War on Terror. September 11 has forever changed America, triggering a war that is affecting the everyday lives of Americans. This nation now realizes that, despite its strength, it is vulnerable. Vigilance is necessary to prevent future terrorist attacks. The United States government has vigilantly exercised its duty to protect the nation--and so far it has been successful in preventing subsequent terrorist attacks on American soil. . . .

to better defend the nation as a direct response to the attacks, but the government also began using the immigration laws already on the books in a different way—as a tool of national security.<sup>10</sup> Immigration law is unique in its national security application. The uniqueness of its application stems from its dual usage as the apparatus for entry into the United States, as well as the mechanism by which we keep out those who pose a threat. Viewing “national security” in its broadest meaning, there is a clear security interest in maintaining the integrity of the borders. However, there is also an interest—an interest that can compete with the national security interest—in continuing our role as a beacon of light and of hope to the world community, our role as a nation where the “tired . . . poor, [and] huddled masses”<sup>11</sup> have refuge. This latter interest is critical because America is a place where public diplomacy is advanced through the citizenry’s diversity, which defines us as a people. Not only does a rational immigration policy bring the best and brightest to the United States—Albert Einstein as just one famous example<sup>12</sup>—but it also brings a diversity of culture that has proven to be our greatest diplomatic instrument.

This Article explores the relationship between national security and immigration law—and, specifically, how immigration as the proverbial “bogeyman”<sup>13</sup> has steered immigration law. Part I discusses the definition of national security, as defining it is a prerequisite to discussing its implications on immigration law. Part II provides a historical backdrop of national security and shows how events throughout history have sparked

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Immigration policy and its enforcement are inextricably linked to the War on Terror. The terrorist hijackers who perpetrated the September 11 attacks entered the United States through authorized visas.

*Id.*

10. See *infra* Part III.

11. EMMA LAZARUS, *THE NEW COLOSSUS* (1883). The poem is inscribed on a plaque on an inner wall of the pedestal of the Statue of Liberty. *Emma Lazarus, Statue of Liberty National Monument*, NAT’L PARK SERV., <https://www.nps.gov/stli/learn/historyculture/emma-lazarus.htm> [https://perma.cc/K4XM-9UEC] (last visited Sept. 28, 2016).

12. Not to mention that in 2016 all six of the United States’s Nobel laureates were immigrants. Rafael Bernal, *Amid Debate, All 2016 American Nobel Laureates Are Immigrants*, THE HILL (Oct. 10, 2016, 2:29 PM), <http://thehill.com/latino/300237-all-american-2016-nobel-prize-honorees-are-immigrants> [https://perma.cc/TL2X-RF2D] (last visited Oct. 17, 2016).

13. “Bogeyman” is a common allusion to a creature used to frighten people. Because there is no specific embodiment or image of the bogeyman, the bogeyman is intangible, but nonetheless, powerful. Like our fear of the bogeyman, our fear of immigration is irrational and rooted in the unknown.

“fear” that has led to legal action. Part III of this Article provides the reader with a picture of the current legal framework of immigration law, including provisions of the Immigration and Nationality Act. By examining provisions of the Act and peripheral legal issues, such as providing “material support to terrorist organizations,”<sup>14</sup> this Part addresses the national security questions of protecting the borders, population control, and the very essence of the rule of law. Last, Part IV of this Article explores the conflict between individual rights and national security. This Part attempts to answer the threshold question of whether it is appropriate that our national security interests and perhaps exaggerated fear should drive the development and implementation of immigration law.

### I. DEFINING NATIONAL SECURITY

It is necessary first to define “national security” and the term’s parameters before engaging in a meaningful discussion about the national security implications of immigration law. Indeed, “if we cannot define national security, we are less apt to uphold and defend it.”<sup>15</sup> The definition used in the immigration context cannot be so broad as to account for every crevasse of national interest, yet it cannot be drawn so narrowly that critical issues are overlooked. One commentator on the subject noted that “[d]efining national security is more than an academic exercise,” continuing, “[t]erminology matters. It matters to policy, to process, to the law and to the application of legal values to all three. Core definitions of national security inform how . . . lawyers interpret the application of specific statutory definitions tied to national security.”<sup>16</sup>

The question, “What is ‘national security’?” is one that is rooted in the very founding of the United States.<sup>17</sup> Yet, not until the last 20 years have

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14. 18 U.S.C. 2339B(a)(1) (2012).

15. JAMES E. BAKER, IN THE COMMON DEFENSE: NATIONAL SECURITY LAW FOR PERILOUS TIMES 20 (2007).

16. *Id.* Judge James E. Baker was appointed to the United States Court of Appeals for the Armed Forces in 2000 and retired in 2015. Judge Baker previously served as Special Assistant to the President and Legal Adviser to the National Security Council (NSC) from 1997 to 2000, where he advised the President, the National Security Advisor, and the NSC staff on U.S. and international law involving national security, including the use of force, the law of armed conflict, intelligence activities, foreign assistance, terrorism, arms control, human rights, and international law enforcement. Judge Baker is now a Visiting Professor of Law at Georgetown Law Center. *See James Baker*, GEORGETOWN LAW, <https://www.law.georgetown.edu/faculty/baker-james.cfm#> [<https://perma.cc/3KFY-U7KR>] (last visited Oct. 16, 2016).

17. *See* STEPHEN DYCUS ET AL., NATIONAL SECURITY LAW 1 (4th ed. 2007) (stating that “[i]t might appear that national security issues have only recently

the battle lines truly been drawn.<sup>18</sup> As a legal matter, there is no single, official, and agreed upon definition of national security. The two most predominate national security laws, the National Security Act<sup>19</sup> and the PATRIOT Act,<sup>20</sup> are totally devoid of a formal definition. Without a formal legal definition, the executive branch has the flexibility to act in the name of some amorphous notion that is national security—in other words, to “shoot first and ask questions later.” Different areas of the law, however, do place the term into a framework with legal consequences. Most relevant to the discussion at hand, the Immigration and Nationality Act (the “INA”) states that “‘national security’ means the national defense, foreign relations, or economic interests of the United States.”<sup>21</sup>

Beyond the lack of any codified definition, different presidents have highlighted their own views of the term.<sup>22</sup> President Barack Obama’s definition of national security accounts for a more comprehensive worldview than those of his predecessors.<sup>23</sup> In President Obama’s view, America’s national security interests encompass not only the security of the United States and its citizens, but also the security of its allies and partners.<sup>24</sup> He has emphasized a “strong, innovative, and growing U.S. economy in an open international economic system promoting opportunity and prosperity, respect for universal values at home and around the world, and an international order advanced by U.S. leadership that promotes peace, security, and opportunity through stronger cooperation to meet global challenges.”<sup>25</sup>

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taken center stage in our national life. In fact, they have held that position periodically throughout our history”); *see also* Mark Shulman, *The Progressive Era Origins of the National Security Act*, 104 DICK. L. REV. 289, 291 (noting that this issue was debated at universities in the late 1700s).

18. DYCUS, *supra* note 17, at 2 (stating that “the lines between foreign and domestic issues of national security, and even between peace and war, have seriously eroded: [e]very foreign issue has domestic ramifications, and the country lives in a seemingly permanent [War]”).

19. *See generally* National Security Act § 101, 50 U.S.C. § 402 (2012).

20. *See* Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act [PATRIOT Act], Pub. L. No. 107-56, 115 Stat. 272 (2001) (codified in scattered sections of 8, 12, 15, 18, 31, 42, 47, 49, 50, and 51 U.S.C.). The Act was signed into law on October 26, 2001.

21. 8 U.S.C. § 1189(d)(2).

22. *See infra* notes 23–33.

23. *See* THE WHITE HOUSE, NATIONAL SECURITY STRATEGY (2010), [https://www.whitehouse.gov/sites/default/files/rss\\_viewer/national\\_security\\_strategy.pdf](https://www.whitehouse.gov/sites/default/files/rss_viewer/national_security_strategy.pdf) [<https://perma.cc/6HCV-RFAQ>].

24. *See generally id.* at 1–5.

25. *Id.* at 7.

Before that global definition held prevalence, President George W. Bush stressed those protections more easily connected to the physical homeland and its people.<sup>26</sup> He stressed protection of the United States's constitutional system of government, the military interests of the United States "around the globe," and the economy as fundamental aspects of national security.<sup>27</sup> President Bush was focused more on hard-power objectives in defining America's security concerns than President Obama.<sup>28</sup>

President Clinton offered a broader definition, believing that there were national security concerns when an issue generally concerned "our people, our territory and our way of life."<sup>29</sup> The Clinton camp often defined national security as events that

(1) [t]hreaten drastically and over a relatively brief span of time to degrade the quality of life for the inhabitants of a state, or (2) threaten significantly to narrow the range of policy choices available to the government of a state or to private, nongovernmental entities (persons, groups, corporations) within the state.<sup>30</sup>

Given the scope of the Clinton administration's definition of a "national security threat," global warming and immigration could easily be placed into that category.<sup>31</sup> Despite that seemingly expansionist language, the Clinton definition actually focused more on the people of

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26. President George W. Bush, National Security Presidential Directive-1, Organization of the National Security Council System, No. 0211, at 2 (Feb. 13, 2001) [hereinafter Presidential Directive-1].

27. *Id.* at 2.

28. *Id.* See also Joseph S. Nye, Jr., *Think Again: Soft Power*, FOREIGN POL'Y (Feb. 3, 2006), <http://foreignpolicy.com/2006/02/23/think-again-soft-power/> [<https://perma.cc/BBZ9-DNQ2>].

29. See THE WHITE HOUSE, A NATIONAL SECURITY STRATEGY FOR A NEW CENTURY, at iii, 1 (1999) [hereinafter NATIONAL SECURITY FOR A NEW CENTURY], <http://nssarchive.us/NSSR/2000.pdf> [<https://perma.cc/SB2M-F7P2>].

30. BAKER, *supra* note 15, at 18; see also NATIONAL SECURITY FOR A NEW CENTURY, *supra* note 29. This definition was laid down first by Richard Ullman, Professor of International Affairs at Princeton University's Woodrow Wilson School of Public and International Affairs. See Richard Ullman, *Redefining Security*, 8 INT'L SECURITY 129, 133 (1983).

31. NATIONAL SECURITY FOR A NEW CENTURY, *supra* note 29, at 13, 39. Some would argue that that concerns about global warming and immigration may have motivated the administration to define "national security event" so broadly. *Id.*

the United States, rather than President Bush's general "interests around the globe."<sup>32</sup> Therefore, President Clinton's broader definition of national security is more appropriate for the subject at hand.

## II. THE FEAR OF VIOLENCE AND ITS NOT SO SUBTLE EFFECT ON IMMIGRATION LAWS

Fear in response to immigration is not a uniquely American experience. Throughout history and across the globe, the "native" population has met waves of immigrants with vitriol.<sup>33</sup> Today, the European Union is becoming much more nationalistic as Europe grapples with a migration surge.<sup>34</sup> Just as the events of September 11, 2001 sparked fear in America, the European "economic malaise" prompted fear across Europe.<sup>35</sup> Those fears have only been heightened with further immigration from Northern Africa and have already resulted in xenophobic and fascist demonstrations.<sup>36</sup> The emergence of Golden Dawn in Greece is especially startling. The open air military formations in Syntagma Square, at which those present "gave a hearty rendition of the Nazi Horst Wessel song—albeit with Greek lyrics,"

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32. Presidential Directive-1, *supra* note 26.

33. See, e.g., BRYAN ROMMEL RUIZ, AMERICAN HISTORY GOES TO THE MOVIES 148–51 (2011) (describing the tendency, as dramatically portrayed in Martin Scorsese's *Gangs of New York* (2002), for "native" populations to be hostile toward immigrant communities and for the various immigrant communities, as well, to be hostile toward one another). The "immigrant" is but a manifestation of the "other," of whom we are socialized to be afraid. See also Tom R. Burns et al., The Social Construction of Xenophobia and Other-isms 1–3 (Apr. 5, 2001) (unpublished manuscript), [https://cordis.europa.eu/pub/improving/docs/ser\\_racism\\_burns.pdf](https://cordis.europa.eu/pub/improving/docs/ser_racism_burns.pdf) [<https://perma.cc/LSM2-4T2K>] ("[A] community or group distinguishes . . . between itself as a system and its 'environment.' In interacting with internal and/or external agents which are judged or perceived as different, possibly dangerous or threatening, the community or group asserts, possibly re-constructs, its identity by differentiating itself from 'other.'").

34. Michael Birnbaum & Griff Witte, *'People in Europe are Full of Fear' Over Refugee Influx*, WASH. POST (Sept. 3, 2015), [https://www.washingtonpost.com/world/hungarys-leader-to-migrants-please-dont-come/2015/09/03/d5244c6d-53d8-4e82-b9d7-35ec41ca2944\\_story.html](https://www.washingtonpost.com/world/hungarys-leader-to-migrants-please-dont-come/2015/09/03/d5244c6d-53d8-4e82-b9d7-35ec41ca2944_story.html) [<https://perma.cc/F878-VUAE>]; see also *Hate Knows No Borders*, LEADERSHIP CONF., <http://www.civilrights.org/publications/hatecrimes/borders.html> [<https://perma.cc/72X7-7TWP>] (last visited Oct. 23, 2016).

35. Rachel Donadio, *Fears About Immigrants Deepen Divisions in Europe*, N.Y. TIMES (Apr. 12, 2011), [http://www.nytimes.com/2011/04/13/world/Europe/13europe.html?\\_r=0](http://www.nytimes.com/2011/04/13/world/Europe/13europe.html?_r=0) [<https://perma.cc/5J3Z-R859>].

36. Birnbaum & Witte, *supra* note 34.



shocked observers.<sup>37</sup> One article described that political party as a group who “feels untouchable . . . [and] fears nothing”<sup>38</sup>—an interesting point given that fear, at least in part, motivated the group’s growing popularity.

In the U.S., national security has been an inherent aspect of immigration law since the founding of the country.<sup>39</sup> In 1798, ten years after the Constitution was ratified, the country’s fear of violence advanced a political message—terrorism—and manifested itself in the Alien and Sedition Acts of 1798, which authorized the President to arrest and deport any alien noncitizen who was deemed dangerous and a threat to national security.<sup>40</sup> In 1903, the fear of immigration was revived after the assassination of President McKinley by an anarchist from a Polish immigrant family.<sup>41</sup> In response to this assassination, Congress immediately enacted laws that allowed the government to remove any anarchist from the United States—the irony that Leon Czolgosz, President McKinley’s assassin, was born in Detroit and was a United States citizen and thus would not have been affected by the new statute was lost on Congress.<sup>42</sup>

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37. Helena Smith, *SS Songs and Anti-Semitism: The Week Golden Dawn Turned Openly Nazi*, *GUARDIAN* (Jun. 7, 2014, 4:14 PM), <http://www.theguardian.com/world/2014/jun/07/greece-golden-dawn-fascism-threat-to-democracy> [https://perma.cc/RW4U-YGLU].

38. *Id.*

39. See generally Will Maslow, *Recasting Deportation Law: Proposals for Reform*, 56 *COLUM. L. REV.* 309, 311–12 (1956).

40. Alien Friends Act, ch. 58, 1 Stat. 570 (expired in 1800). In addition to this national law, certain colonies had deportation laws codified from their conception. Indeed, the Plymouth Colony had a law in 1639 that provided for the deportation of paupers to Europe. Maslow, *supra* note 39, at 311 n.14. In the Massachusetts Colony, there was a 1647 law that banned the immigration of Roman Catholic priests and ordered the deportation of any found in the colony. *Id.* See also *Alien and Sedition Acts*, *LIBR. OF CONGRESS* (Apr. 21, 2006), <http://www.loc.gov/rr/program/bib/ourdocs/Alien.html> [https://perma.cc/ZS2K-EQZF] (stating that the Alien and Sedition Acts consisted of four laws passed by the Federalist-controlled Congress in anticipation of war with France). The acts did three things: (1) they altered the residency requirement for American citizenship; (2) they allowed the President to imprison or deport aliens; and (3) they restricted speech. *Id.*

41. See Maslow, *supra* note 39, at 313 n.25 (“The assassination of President McKinley prompted the provision relating to anarchists. The Secretary of Commerce and Labor was empowered to take into custody and deport those aliens whom he was ‘satisfied’ were here illegally. No judicial review was provided.”); Act of March 2, 1903, ch. 1012, § 20, 32 Stat. 1213, 1218.

42. See Maslow, *supra* note 39, at 313 n.25.

During and just before World War I, the growing fear over subversives and radical aliens like Emma Goldman resulted in reinforcing legislation against such individuals.<sup>43</sup> In 1919, Emma Goldman, along with 248 other aliens, was deported under the 1918 Alien Act.<sup>44</sup> Goldman was born in Russia, but came to the United States in 1885 at the age of 16.<sup>45</sup> Goldman was a vocal opponent of America's potential involvement in World War I.<sup>46</sup> Therefore, when the U.S. finally entered the war in 1917, her activism was considered a threat to national security, and she was sentenced to 18 months in federal prison.<sup>47</sup> Upon her release, J. Edgar Hoover, the Director of the Justice Department's General Intelligence Division—the forbearer of the FBI—ordered Goldman's re-arrest and persuaded courts to deny Goldman's citizenship claims.<sup>48</sup> Because of that further action, she was eligible for deportation under the Alien Act, which allowed for the expulsion of any alien found to be an anarchist.<sup>49</sup>

Other dissident aliens were interned as a result of their anti-war campaigns, and an anti-German sentiment prevailed across the country.<sup>50</sup> Germans and German Americans were suspected of being disloyal for simply being like, acting like, or speaking like Germans. For example, the state of Nebraska enacted a law prohibiting the teaching of languages other than English.<sup>51</sup> The Nebraska Supreme Court upheld the law, affirming the conviction of a teacher who had been teaching German to a juvenile who was not yet passed the eighth grade, which was a condition of the statute.<sup>52</sup> The court's argument in defending the statute reflects the pervasive anti-German sentiment of that time: "The legislature had seen the baneful

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43. Ruchir Patel, *Immigration Legislation Pursuant to Threats to U.S. National Security*, 32 DENVER J. INT'L L. & POL'Y 83, 84 (2003) ("Under wartime conditions, Congress passed the so-called Anarchists Act of October 16, 1918, which ordered the deportation of alien anarchists residing within the United States and made it a felony punishable by imprisonment for those deported to reenter or attempt to reenter the country. This Act was amended by the June 5, 1920 Act which included in the anarchist class aliens who advocate 'the unlawful damage, injury or destruction of property, or sabotage.'").

44. *Deportation of Emma Goldman as a Radical "Alien,"* JEWISH WOMEN'S ARCHIVE, <http://jwa.org/thisweek/dec/21/1919/emma-goldman> [<https://perma.cc/Z8AV-D7J9>] (last visited Dec. 26, 2015).

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. See Patel, *supra* note 43, at 84.

51. *Meyer v. Nebraska*, 262 U.S. 390, 397–98 (1923).

52. *Id.*

effects of permitting foreigners, who had taken residence in this country, to rear and educate their children in the language of their native land. The result of that condition was found to be inimical to our own safety.”<sup>53</sup> In *Meyer v. Nebraska*, however, the U.S. Supreme Court found the statute unconstitutional because it violated the Due Process Clause of the Fourteenth Amendment, though noting that the legislature’s intent was “easy to appreciate.”<sup>54</sup>

The anti-German prejudice was not limited to laws preventing the teaching of German. That prejudice eventually led to the gathering of 6,300 German aliens into internment camps during World War I under the President’s summary powers and to unsanctioned lynchings.<sup>55</sup> The state’s action in setting up internment camps would set the precedent for Japanese internment 20 years later.<sup>56</sup> In addition, “the regulations governing the remaining Germans were tightened, requiring them to register and forbidding them to move without official permission.”<sup>57</sup> Indeed, the fear that Germans would “threaten the ‘American way of life’” spilled over into immigration reform as well as violence toward or internment of German immigrants.<sup>58</sup>

This climate of fear continued after World War I, but that fear was directed toward a different “other”—toward Communists rather than the now-vanquished Germans.<sup>59</sup> The focus on Communists began in earnest

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53. *Id.*

54. *Id.* at 400. The Court commented that Nebraska enacted its prohibition on teaching German for the purpose of fostering nationalism after World War I between the United States and Germany. But, prohibition of teaching German in schools was too extreme. It is important to note that the court did not say that there was no legitimate purpose. In fact, the Court said, “[t]he desire of the Legislature to foster a homogenous people with American ideals . . . is easy to appreciate.” *Id.* at 402.

55. See ARNOLD KRAMMER, *UNDUE PROCESS: THE UNTOLD STORY OF AMERICA’S GERMAN ALIEN INTERNEES* 14–15 (1977).

56. Patel, *supra* note 43, at 84; see also *infra* text accompanying notes 65–69.

57. Patel, *supra* note 43, at 84–85.

58. *Id.*

59. *Id.* at 85 (stating that “[t]he climate of repression established during World War I continued against Communists even after the conclusion of the war”). Communism took on prominence on the world stage and thus a status worthy of fearing with the Bolshevik Revolution and that Communist Party’s command of such a large landmass, immense resources, and huge population. See generally 3 EDWARD HALLETT CARR, *THE BOLSHEVIK REVOLUTION, 1917-1923* (W.W. Norton & Co., Inc. 1985) (discussing the Bolshevik’s rise to power, culminating with the signing of the Treaty of Brest–Litovsk, which saw the

after immigrants, who were members of the Communist Party, carried out a politically motivated bombing of U.S. Attorney General Mitchell Palmer's house.<sup>60</sup> As a result, 3,000 aliens, then suspected of being members of the Communist Party, were detained for deportation.<sup>61</sup>

As the 20th century progressed, the fear of aliens did as well. Indeed, World War II brought a robust movement pushing for the government to create a national alien registration system to protect the homeland.<sup>62</sup> In 1940, the Alien Registration Act was enacted.<sup>63</sup> The Act mandated the registration and fingerprinting of aliens and provided grounds for deportation for certain acts, including possessing a sawed-off shotgun or helping other aliens illegally enter the United States.<sup>64</sup> These actions toward aliens, however, although certainly terrible, pale in comparison to the sending of 110,000 people, mostly Japanese immigrants who were in fact American citizens, to internment camps for the duration of the war.<sup>65</sup>

The authority for the Japanese internment was derived from Executive Order No. 9066, issued on February 19, 1942 by President Franklin Roosevelt.<sup>66</sup> The order enabled the Secretary of War to designate areas within the United States as military zones from which "any and all persons may be excluded, and with respect to which, the right of any person to enter, remain in, or leave shall be subject to whatever restrictions the Secretary of War . . . may impose in his discretion."<sup>67</sup> The constitutionality of the order and the actions of the U.S. government with respect to interning Americans of Japanese ancestry were challenged in the landmark

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Central Powers of Europe acknowledge the Bolshevik government of Soviet Russia on the world stage).

60. *3,000 Arrested in Nation-Wide Round-Up of 'Reds'; Palmer Directs Raids in 35 Cities; 650 Seized Here*, N.Y. TRIB., Jan. 3, 1920, at 1.

61. *Id.*; see also *Deportation of Emma Goldman as a Radical "Alien," supra* note 44.

62. *3,000 Arrested in Nation-Wide Round-Up of 'Reds,' supra* note 60.

63. Alien Registration Act, Pub. L. No. 76-670, 54 Stat. 670 (1940) (codified as amended at 18 U.S.C. § 2385).

64. Patel, *supra* note 43, at 85.

65. Exec. Order No. 9066, 7 Fed. Reg. 38,1407 (Feb. 25, 1942) (President Roosevelt issued this executive order after declaring war with Japan.); Paula Branca-Santos, *Injustice Ignored: The Internment of Italian-American During World War II*, 13 PACE INT'L L. REV. 151 (2001) ("After President Roosevelt signed Executive Order 9066, General DeWitt 'designated California, Washington, Oregon and Southern Arizona as military zones and, to prevent sabotage and espionage . . . he ordered the relocation of persons of Japanese descent residing in those areas.'").

66. Exec. Order No. 9066, *supra* note 65.

67. *Id.*

Supreme Court case *Korematsu v. United States*.<sup>68</sup> In *Korematsu*, the Supreme Court upheld the constitutionality of Executive Order No. 9066, holding that military urgency necessitated governmental action against Japanese Americans for the sake of protecting the country against espionage.<sup>69</sup> Although *Korematsu* is not directly related to immigration, as the vast majority of detainees were in fact U.S. citizens, it is related to national security jurisprudence and illustrates the overall thesis of this Article—that fear drives policy.

After the conclusion of World War II, the culture of distrust toward aliens continued and, just as it had after World War I, refocused on Communists, starting the “Red Scare.”<sup>70</sup> This anti-Communist sentiment directly led to the enactment of the 1952 McCarran–Walter Act, known today as the Immigration and Nationality Act, which commenced an ideological litmus test for alien admission.<sup>71</sup> This law provided for a system by which immigrants and foreign visitors could be denied entry to the United States because of their political philosophies—in this particular example, for being a Communist.<sup>72</sup>

Subsequent case law held that mere membership or other affiliation with the Communist Party was sufficient grounds for deportation<sup>73</sup> and that knowledge or support of the Communist Party’s advocacy of violence

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68. 323 U.S. 214 (1944) (holding that state laws restricting the rights of people based on race are subject to strict scrutiny and would only be upheld if they further a “pressing public necessity”). In *Korematsu*, because it was a time of war, there was justification for excluding Japanese Americans from their homes in the particular area. Because the U.S. Government lacked the resources to make individual determinations of loyalty, excluding *Korematsu*, regardless of his loyalty was justified. The Court applied the holding of the prior decision, *Hirabayashi v. United States*, and held that concerns over preventing espionage and sabotage constituted a “pressing public necessity.” *Id.* at 216.

69. *Id.* at 218.

70. Patel, *supra* note 43, at 85.

71. Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified at 8 U.S.C. §§ 1101–1537 (2012)); see H.R. REP. NO. 82,1365 (1952); SEN. REP. NO. 82,1137 (1952); Patel, *supra* note 43, at 85.

72. Patel, *supra* note 43, at 85.

73. See *Titile v. INS*, 322 F.2d 21 (9th Cir. 1963); *Berdo v. INS*, 432 F.2d 824 (6th Cir. 1970).

was not a prerequisite for such deportation.<sup>74</sup> In *Carlson v. Landon*,<sup>75</sup> the Supreme Court ruled that the use of force to achieve political control constitutes a sufficient basis for Congress to expel alien Communists under its power to regulate the exclusion, admission, and expulsion of aliens.<sup>76</sup> The Court relied on the purpose of the Internal Security Act,<sup>77</sup> which was “to deport all alien Communists as a menace to the security of the United States.”<sup>78</sup> With that policy as guidance, the Court concluded that the discretion in the Attorney General “was certainly broad enough to justify his detention of all these parties without bail as a menace to the public interest.”<sup>79</sup> The Court also ruled that the government should not be required to also show “specific acts of sabotage or incitement to subversive action.”<sup>80</sup> The dissent argued that if Congress can authorize the imprisonment of alien Communists because they are dangerous, Congress can also authorize the imprisonment of citizen Communists on the same ground.<sup>81</sup>

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74. See *Galvan v. Press*, 347 U.S. 522 (1954); *Rowoldt v. Perfetto*, 355 U.S. 115 (1957) (holding that a record disclosing an alien’s past membership in a Communist Party and the alien’s work in a Communist bookstore was not sufficient to support the order of deportation as an alien who had been a member of the Communist Party of the U.S.); *Schleich v. Butterfield*, 252 F.2d 191 (6th Cir. 1958) (holding that because Schleich freely joined the Communist Party knowing that the party operated as a distinct and active political organization, there was sufficient evidence to constitute him as a member of the Communist Party within the terms of the Act); *Grubisich v. Esperdy*, 175 F. Supp. 445 (D.C.N.Y. 1959) (holding that deportation was justified because there was evidence that warranted a finding that the alien had a meaningful association with the Communist Party and he did not have a valid reentry permit).

75. 342 U.S. 524 (1952) (holding that there was no abuse of discretion in denial of bail; placing of discretion as to grant of bail in the Attorney General was constitutional; denial of bail did not violate constitutional prohibition against excessive bail; and on re-arrest of an alien who had been released on bail, a new warrant should be obtained); see also *Prentis v. Manoogia*, 16 F.2d 422, 424 (6th Cir. 1926) (holding that if it is said that the official may give a privilege to an applicant, the words are presumptively permissive only, but if it is said that the applicant may have the privilege, the words are presumptively mandatory upon the official); but see *United States ex rel. Zapp v. District Director*, 120 F.2d 762, 765 (2nd Cir. 1941) (holding that release is discretionary with the Attorney General given the language “may be released under a bond”).

76. *Carlson*, 342 U.S. at 535–36.

77. Internal Security Act of 1950 § 23.

78. *Carlson*, 342 U.S. at 541.

79. *Id.*

80. *Id.*

81. *Id.* at 552.

Today, the changes to immigration law do not stem from wars, *per se*—kinetic or cold—but from the threat of terrorism and the United States’s struggle to defeat extremism. Following September 11, 2001, “the Department of Homeland Security [DHS] has assumed responsibility for immigration and immigrant policy and has subordinated these concerns to separate larger terrorism policy goals.”<sup>82</sup> As a result, the Bush Administration’s terrorism policy, “designed to prevent other terrorist attacks, dramatically altered the way the nation treats people seeking to enter the United States, and those noncitizens who are already here.”<sup>83</sup> The Obama administration has largely carried on this policy.<sup>84</sup>

It is not, of course, that immigration policy has or “should operate entirely separate from terrorism policy.”<sup>85</sup> In contrast, immigration law and national security policy have overlapped throughout American history.<sup>86</sup> Since September 11th, however, this overlap has developed into a single body of law in which the fear of terrorism drives the implementation of current immigration law, as well as the development of new law, as a tool of national security policy. At the least, any conversation about immigration policy must now always take place against the backdrop of national security policy.<sup>87</sup>

Consider that before September 11th, the immigration system was used almost exclusively to regulate the movement of aliens across U.S. borders.<sup>88</sup> Today, that same immigration system has become, in addition to a means of regulating movement of aliens, a tool for criminal investigations and gathering intelligence.<sup>89</sup> The immigration system has become a frequently used antiterrorism mechanism in large part because

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82. Karen C. Tumlin, *Suspect First: How Terrorism Policy Is Reshaping Immigration Policy*, 92 CAL. L. REV. 1173, 1177 (2004).

83. *Id.*

84. *See generally* NATIONAL SECURITY FOR A NEW CENTURY, *supra* note 29.

85. Tumlin, *supra* note 82, at 1177.

86. *Id.*

87. The United States Citizen and Immigration Services (“CIS”) has been under intense scrutiny since issuing visa approval letters to the September 11, 2001 hijackers six months after the attacks. Mark Potter & Rich Phillips, *Six Months After Sept. 11, Hijackers’ Visa Approval Letter Received*, CNN (Mar. 13, 2002, 5:07 AM), <http://archives.cnn.com/2002/us.03/12.inv.flight.school.visas/> [<https://perma.cc/48WH-W8ZD>].

88. *See* Tumlin, *supra* note 82, at 1178–79.

89. *See* Bill Ong Hing, *Misusing Immigration Policies in the Name of Homeland Security*, 6 NEW CENTENNIAL REV. 195, 217–18 (2006).

it is a system of civil, rather than criminal, procedures.<sup>90</sup> Thus, using the immigration system to detain suspected terrorists for violations of immigration law circumvents due process safeguards that would otherwise apply in a criminal context.<sup>91</sup>

Historically, fear of subversives—and, all too often, of immigrants—has led to immigration reform of some type, responding to the particular threat of the day.<sup>92</sup> Although not a new concept, these reforms and their continuing utilization to uphold national security objectives became a critical aspect of the government's Global War on Terror.<sup>93</sup> In light of this utilization, Part III surveys the current legal framework surrounding national security and how immigration tools are used to further national security objectives.

### III. NATIONAL SECURITY, FEAR, AND THE TRANSFORMATION OF IMMIGRATION LAW

Soon after assuming the role of immigration enforcement along with the duty to effectuate terrorism policy in the United States, the DHS began using its immigration powers to fight domestic terrorism.<sup>94</sup> This shift in policy is sensible, considering that the hijackers who perpetrated the September 11th attacks entered the United States with “valid” visas.<sup>95</sup> The 9/11 Commission Report<sup>96</sup> disclosed that slipshod visa screening had permitted most of the hijackers to enter the United States with fraudulent passports and false statements on their visa applications.<sup>97</sup> The

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90. See Asli Ü Bali, *Changes in Immigration Law and Practice after September 11: Practitioner's Perspective*, 2 CARDOZO PUB. L. POL'Y & ETHICS J., 161, 163 (2003).

91. *Id.*

92. See *supra* notes 3–12 and accompanying text.

93. See Ved P. Nanda, *International Law Implications of the United States' "War on Terror,"* 37 DENVER J. INT'L L. & POL'Y 513, 533–34 (2009).

94. See Tumlin, *supra* note 82, at 1178–79. The majority of immigration enforcement comes from the United States Citizenship and Immigration Services and the Immigration and Customs Enforcement both agencies of DHS. *Our History*, USCIS.GOV, <https://www.uscis.gov/about-us/our-history> [<https://perma.cc/KUR6-PP3U>] (last visited Feb. 2, 2016).

95. de Leon, *supra* note 9, at 115–16.

96. NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT (2004), <http://www.9-11commission.gov/report/911Report.pdf> [<https://perma.cc/6SJR-62DV>].

97. See de Leon, *supra* note 9, at 116.



Commission Report concluded that the authorities could have intercepted as many as 15 of the 19 hijackers if proper procedures had been observed.<sup>98</sup>

More recently, in 2014, the fear that terrorists could gain entry into the U.S. through a hole in the border—like those holes known to be used by Mexican and other Latin-American illegal immigrants who cross for work—was exacerbated when prayer rugs were found on the Texas side of the U.S.–Mexico border.<sup>99</sup> Texas’s Lieutenant Governor David Dewhurst claimed that a note reading, “See you in New York,” was found on the border as well.<sup>100</sup> He suggested Islamic extremists might have left the prayer rug behind when entering Texas.<sup>101</sup> Dewhurst’s statements echoed what Texas Governor Rick Perry had hinted at earlier, saying that there was a “real possibility” that extremists affiliated with ISIS could cross into the U.S. through Mexico.<sup>102</sup>

It follows, then, that a vital part of the nation’s national security plan should be to prevent terrorists from entering the United States and to reduce the likelihood that America will face another terrorist attack. Moreover, when individuals who wish to do harm to the United States or her people are found in the United States, the ability to remove or detain those individuals is absolutely vital from a national security perspective. Thus, an understanding of the current immigration and national security legal framework is essential to develop good policy. This portion of the Article will focus on the exclusion and deportation grounds under the INA for national security threats, including espionage, terrorist activity, and foreign policy. Section A will also cover summary exclusion for national security reasons and the Alien Terrorist Removal Court.

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98. *Id.*; see also THE 9/11 COMMISSION REPORT, *supra* note 96, at 384 (“[A]s many as 15 of the 19 hijackers were potentially vulnerable to interception by border authorities. Analyzing their characteristic travel documents and travel patterns could have allowed authorities to intercept 4 to 15 hijackers and more effective use of information available in U.S. government databases could have identified up to 3 hijackers. Looking back, we can also see that the routine operations of our immigration laws—that is, aspects of those laws not specifically aimed at protecting terrorism—inevitably shaped al Qaeda’s planning and opportunities.”).

99. Julian Aguilar, *Dewhurst Tells D.C. Crowd Prayer Rugs Found on Border*, TEXAS TRIB. (Sept. 26, 2014), <http://www.texastribune.org/2014/09/26/dewhurst-tells-dc-crowd-prayer-rugs-found-border/> [<https://perma.cc/46C5-49U5>].

100. *Id.*

101. *Id.*

102. *Id.*

*A. Removal, Holds, and Denial of Benefits*

Historically, the INA has provided for both the exclusion and deportation (“removal”) of aliens from the United States who were deemed to pose a national security risk.<sup>103</sup> In June 1946, Attorney General Tom Clark spoke to the Chicago Bar Association and claimed that the United States faced a plot by Communists.<sup>104</sup> He described Communists as “outside ideologists . . . who sought to divide the country.”<sup>105</sup> Shortly after his speech, Clark turned his attention to deportation.<sup>106</sup> It is clear that the words this high-ranking official spoke stemmed from the fear that captivated the nation at a tumultuous time. Those words led to action—action that triggered consequences still felt today.

The INA focused on removing aliens who were associated with organizations that advocated Communism or overthrowing the government.<sup>107</sup> In 1990, the INA added bans with respect to terrorists, aliens who presented adverse foreign policy consequences, and the catchall provision of aliens who pose a national security risk, which includes aliens that are involved in espionage, sabotage, and sedition.<sup>108</sup> These types of ideological elimination were challenged in the courts, and between 1951 and 1963, the United States Supreme Court routinely upheld these statutes against constitutional attack.<sup>109</sup> The Court specifically

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103. There is a legal difference between the terms “exclusion” and “deportation.” “Exclusion” refers to being denied entry into the United States, while “deportation” means that an alien is removed while in the United States. One can be excluded while in the United States, however, if not allowed to be here in the first place. Because of overlapping meaning, the term removal is used throughout this Article. *Deportation*, USCIS.gov, <https://www.uscis.gov/tools/glossary/deportation> [<https://perma.cc/4JDK-ZV2H>] (last visited Oct. 17, 2016).

104. DAN KANSTROOM, *DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY* 200 (2007).

105. *Id.*

106. *Id.*

107. *See, e.g.*, 8 U.S.C. § 1182(a)(3)(D) (2012) (stating that “[a]ny immigrant who is or has been a member of or affiliated with the Communist or any other totalitarian party (or subdivision or affiliate thereof), domestic or foreign, is inadmissible”).

108. *See id.* § 1251(a).

109. *See* *Gastelum-Ouinones v. Kennedy*, 374 U.S. 469 (1963) (holding that because the government did not sustain its burden of establishing that the petitioner was a meaningful member of the party, the deportation order could not stand); *Niukkanen v. McAlexander*, 362 U.S. 390 (1960) (finding that the district court’s rulings that the petitioner was subject to deportation as a member of the Communist Party and that the petitioner perjured himself when he denied

upheld those laws limiting Communist Party membership and affiliation, holding them to be legal and necessary.<sup>110</sup> To date, these decisions have never been overruled.

At the conclusion of the Cold War, America's enemy, its "other," was ill-defined. The world, seemingly overnight, had gone from one in which the U.S. and its allies opposed and were opposed by the Soviet Union and its allies to one in which the U.S. and its allies were opposed to whatever bogeyman was to fill the vacuum. Congress diligently updated the ideological provisions in the INA with new provisions consistent with the nation's modern-day threats—threats that were decidedly less concrete than the Soviet Union's had been during the Cold War.<sup>111</sup> Specifically, in 1990, most of the 1950s language dealing with advocacy and membership provisions was replaced with language dealing with broad national security concerns, terrorism, and foreign policy.<sup>112</sup> These new provisions were generally "conduct-oriented" and focused on acts such as material support.<sup>113</sup>

### *1. The New Enemy: Defining a National Security Threat*

For immigration law, 1996 was a watershed year. The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") was passed in response to the 1995 Oklahoma City bombing, an act of domestic terror,

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membership were not clearly erroneous); *Rowoldt v. Perfetto*, 355 U.S. 115 (1957) (concluding that the record showing the alien's past membership in the Communist Party and work in a Communist bookstore was insubstantial to support the order of deportation based on the alien having been a member of the Communist Party of the United States); *Galvan v. Press*, 347 U.S. 522 (1954) (holding that if the petitioner had joined the Communist Party without knowledge of the party's advocacy of violence, he was deportable as a party member absent a claim that he joined the party "accidentally, artificially, or unconsciously in appearance only"); *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952) (ruling that the Alien Registration Act of 1940 did not deprive aliens of due process of law in violation of the Fifth Amendment, it did not infringe on freedoms of speech and assembly under the First amendment, and that it was not invalid as an ex post facto law); *Carlson v. Landon*, 342 U.S. 524, 535–36 (1952) (concluding that there was no abuse of discretion in denial of bail; placing of discretion to grant bail in the Attorney General was not unconstitutional; denial of bail was constitutional; and on re-arrest of the alien released on bail, a new warrant should be obtained).

110. See, e.g., *Harisiades*, 342 U.S. at 594–95.

111. Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978.

112. *Id.*

113. *Id.*; see, e.g., 8 U.S.C. §§ 1182(a)(3), 1227(a)(4)(A)–(B) (1996).

and imposed sweeping immigration policy by expanding the grounds for deportation and narrowing the provisions for discretionary relief.<sup>114</sup> The bombing of the Alfred P. Murrah Federal Building in Oklahoma City took the lives of 146 people, including 15 children.<sup>115</sup> That tragedy, combined with the 1993 World Trade Center bombing and the siege at Waco, Texas, created just the political environment—emotionally charged, fearful of the next tragedy, and reactionary—necessary to pass such legislation.<sup>116</sup> Also in 1996, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (“IIRIRA”), which focused on the apprehension and expeditious removal of undocumented immigrants.<sup>117</sup> Despite having the basic framework established, the U.S. government lacked the ability to confront national security threats—terrorism—through its immigration laws directly, something that, after September 11, 2001, would change dramatically and with incredible haste.<sup>118</sup>

Relevant to this topic, the AEDPA and the IIRIRA specifically changed the methods by which suspected terrorist aliens and other national security threats could be detained and removed.<sup>119</sup> Later, the PATRIOT Act and REAL ID Act were passed into law, making even more substantive changes to the INA’s terrorism provisions.<sup>120</sup>

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114. See Benjamin R. Orye III, *The Failure of Words: Habeas Corpus Reform, the Antiterrorism and Effective Death Penalty Act, and When a Judgment of Conviction Becomes Final for the Purposes of 28 U.S.C. 2255(1)*, 44 WM. & MARY L. REV. 441, 451–53 (2002); AEDPA, IIRIRA, the 1990’s & the Clintons (*A Betrayal of Democratic Values*), DAILY KOS (Feb. 3, 2008, 6:57 PM), <http://www.dailykos.com/story/2008/02/03/449127/> [https://perma.cc/3RJ3-ZHK4].

115. *Id.*

116. *Id.*

117. See Gwendolyn M. Holinka, *Q-T-M-T: The Denial of Humanitarian Relief for Aggravated Felons*, 13 EMORY INT’L L. REV. 405, 438 (1999).

118. Patel, *supra* note 43, at 86–87.

119. See Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214; Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009.

120. The PATRIOT Act is an acronym for the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001. Pub. L. No. 107-56, 115 Stat. 272 (codified in scattered sections of 8, 12, 15, 18, 31, 42, 47, 49, 50, and 51 U.S.C.). The REAL ID Act was a rider, formally Division B of H.R. 1268, the Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005. On May 11, 2005, the President signed into law the REAL ID Act, Pub. L. No. 109-13, 119 Stat. 231 (2005) (codified as amended at 8 U.S.C. §§ 1101–1107).

The INA now not only mandates the removal of aliens who engage in the standard national security threats such as espionage,<sup>121</sup> sabotage,<sup>122</sup> the transfer of restricted technology or information—that is, spying<sup>123</sup>—and membership in Communist or totalitarian parties, but it also mandates removal for actions deemed to be “terrorist activity.”<sup>124</sup> The removal of an alien for terrorist activities is set forth in sections 212(a)(3)(B) and 212(a)(3)(F) of the INA.<sup>125</sup> More specifically, the INA’s mandatory removal of aliens is contingent upon its own definition of what it means to “engage in terrorist activity”:

- (I) to commit or to incite to commit, under circumstances indicating an intention to cause death or serious bodily injury, a terrorist activity;
- (II) to prepare or plan a terrorist activity;
- (III) to gather information on potential targets for terrorist activity;
- (IV) to solicit funds or other things of value for--

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121. Section 212(a)(3)(A) of the INA mandates that an individual who is reasonably believed to be seeking admission into the United States to engage solely, principally, or incidentally in

any activity (I) to violate any law of the United States relating to espionage or sabotage or (II) to violate or evade any law prohibiting the export from the United States of goods, technology, or sensitive information . . . any other unlawful activity, or . . . any activity [that intends to] overthrow [the] Government of the United States.

8 U.S.C. § 1182(a)(3)(A) (2012). A 1999 decision from the Board of Immigration Appeals construed INA section 237(a)(4)(A)(i) in a case involving a Cuban spy who failed to register under 50 U.S.C. § 851. *In re Luis-Rodriguez*, 22 I. & N. Dec. 747 (BIA 1999) (addressing section 241(a)(4)(A)(i), which is now codified in section 237(a)(4)(A)(i) of the INA). In *Luis-Rodriguez*, the Board held that no conviction under the espionage statute was necessary. *Id.* at 756.

122. *Id.*

123. *Id.*

124. The Immigration Act of 1990 left Communist Party members and affiliates excludable, but not deportable: “Any immigrant who is or has been a member of or affiliated with the Communist or any other totalitarian party (or subdivision thereof), domestic or foreign, is excludable.” 8 U.S.C. § 1182(a)(3)(D). *See also id.* § 1101(a)(37) (defining “totalitarian party” to cover dictatorships); H.R. Rep. No. 101-955, at 131 (1990) (Conf. Rep.), *as reprinted in* 1990 U.S.C.C.A.N. 6784, 6796 (joint conference report issued with the 1990 Act).

125. Section 212(a)(3)(B) and (F) of the INA pertain to the inadmissibility of an alien; the REAL ID Act incorporated these provisions in their entirety by reference in the deportation provision of the INA in section 237(a)(4)(B). *See* 8 U.S.C. § 1227(a)(4)(B) (“Any alien who is described in subparagraph (B) or (F) of section 1182(a)(3) is deportable.”).

- (aa) a terrorist activity;
- (bb) a terrorist organization described in clause (vi)(I) or (vi)(II);
- or
- (cc) a terrorist organization described in clause (vi)(III), unless the solicitor can demonstrate by clear and convincing evidence that he did not know, and should not reasonably have known, that the organization was a terrorist organization;
- (V) to solicit any individual--
- (aa) to engage in conduct otherwise described in this subsection;
- (bb) for membership in a terrorist organization . . . or
- (VI) to commit an act that the actor knows, or reasonably should know, affords material support, including a safe house, transportation, communications, funds, transfer of funds or other material financial benefit, false documentation or identification, weapons (including chemical, biological, or radiological weapons), explosives, or training--
- (aa) for the commission of a terrorist activity;
- (bb) to any individual who the actor knows, or reasonably should know, has committed or plans to commit a terrorist activity; . . .<sup>126</sup>

“Terrorist activity” is then defined as follows:

- (I) The hijacking 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) or upon the liberty of such a person.
- (IV) An assassination.
- (V) The use of any--
- (a) biological agent, chemical agent, or nuclear weapon or device,
- or
- (b) explosive, firearm, or other weapon or dangerous device (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.

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126. *Id.* § 1182(a)(3)(B)(iv).

(VI) A threat, attempt, or conspiracy to do any of the foregoing.<sup>127</sup>

In addition to the definition above, the Department of Justice (“DOJ”) has defined “a terrorist” as any person whom a consular officer or the Attorney General has reasonable grounds to believe is engaged in or is likely to engage in terrorist activity.<sup>128</sup> The DOJ has defined the term “reasonable ground” as equivalent to “probable cause.”<sup>129</sup> Aliens who have received terrorist training from a designated terrorist organization are also removable, as defined in 18 U.S.C. § 2339(c)(1).<sup>130</sup> A powerful catchall provision also allows the removal of aliens that the Secretary of State or the Attorney General determine to have been “associated with a terrorist organization” and who “intend while in the United States to engage solely, principally, or incidentally in activities that could endanger the welfare, safety, or security of the United States.”<sup>131</sup>

## 2. Denial of Relief

In addition to being removed, aliens who are national security threats are also ineligible for immigration relief and other benefits.<sup>132</sup> For instance, individuals who are removable under section 237(a)(4)(B) of the INA cannot adjust their status.<sup>133</sup> The same holds true for asylum; there is a mandatory denial for aliens who are deemed national security risks,

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127. *Id.* § 1182(a)(3)(B)(iii).

128. *See* Matter of U-H-, 23 I. & N. Dec. 355, 356–57 (BIA 2002) (holding that section 412 of the PATRIOT Act does not change the standard for determining whether there is reasonable ground to believe that the respondent is engaged or will engage in terrorist activity or whether there are reasonable grounds to believe that he is a threat to national security).

129. *Id.*

130. 8 U.S.C. § 1182(a)(3)(B)(i)(VIII).

131. *Id.* § 1182 (a)(3)(F). This provision bars entry; REAL ID Act section 105, however, extended that bar to deportation cases.

132. Aliens deportable under section 237(a)(4)(B) of the Act are ineligible to adjust status. *Id.* § 1227(a)(4)(B). Section 237(a)(4)(B) of the Act renders any alien who has engaged, is engaged, or at any time after admission engages in any terrorist activity, as defined in section 212(a)(3)(B)(iii) of the Act, deportable. *Id.* Under section 245(c)(6) of the Act, persons who are deportable under section 237(a)(4)(B) of the Act are ineligible to adjust status under section 245(a) of the Act. *Id.* § 1255(c)(6). Any person who is deportable under section 237(a)(4)(B) of the Act is also ineligible to adjust status under section 245(i) of the Act. *Id.* § 1227(a)(4)(B); 8 C.F.R. 245.10(g) (2016).

133. *See, e.g.*, 8 U.S.C. § 1227(a)(4)(B).

regardless of whether they would otherwise have a valid claim.<sup>134</sup> Aliens who fall into the national security threat category are also barred from all forms of cancellation,<sup>135</sup> voluntary departure,<sup>136</sup> and withholding of removal.<sup>137</sup>

### 3. Denial of Adjudication

In addition to being denied relief on national security grounds, aliens who apply for certain immigration benefits can have the adjudication of their applications “withheld.”<sup>138</sup> Specifically, aliens who apply to have their status adjusted—for example, from that of a refugee to that of a lawful permanent resident—might have the adjudication of that application suspended or “withheld” if that alien poses or is suspected of posing a national security risk. Section 209 of the INA authorizes the Secretary of the DHS to adjust certain refugees in the United States to permanent residence status.<sup>139</sup> The Supreme Court case, *Elkins v. Moreno*, makes clear that adjustment of status is expressly subject to the Secretary’s discretion, holding that “adjustment of status is a matter of grace, not right.”<sup>140</sup> In addition, the statute does not set forth any time frame in which a determination must be made on whether to adjust an alien’s status.<sup>141</sup>

This reasoning is exactly what the government argued in *Ayyoubi v. Eric Holder*, in the District Court for the Eastern District of Missouri.<sup>142</sup> The plaintiff, Salahaddin Ayyoubi, was an Iranian refugee who applied for adjustment of status to become a lawful permanent resident.<sup>143</sup> His

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134. Section 208(a)(2) and (b)(2) govern this if the alien is inadmissible as a terrorist under INA section 212(a)(3)(B)(i)(I)–(IV), (VI), and 237(a)(4)(B).

135. Aliens are ineligible for both forms of cancellation under INA section 240A(c). An alien is deportable under INA section 237(a)(4) or inadmissible under section 212(a)(2). 8 U.S.C. §§ 1227(a)(4), 1182(a)(3).

136. Aliens are ineligible for prehearing voluntary departure under INA section 137(a)(4)(B). 8 U.S.C. § 1227(a)(4)(B).

137. Aliens are ineligible for withholding if deemed a terrorist under INA section 241(b)(3). 8 U.S.C. § 1231(b)(3).

138. 8 U.S.C. § 1159(b).

139. *Id.* In pertinent part, section 209(b) provides: “The Secretary of Homeland Security . . . in the Secretary’s . . . discretion and under such regulations as the Secretary . . . may prescribe, may adjust to the status of an alien lawfully admitted for permanent residence the status of any alien granted asylum.” *Id.*

140. 435 U.S. 647, 667 (1978).

141. 8 U.S.C. § 1159(b).

142. Case No. 4:10-CV-1881, 2011 WL 2983462 (E.D. Mo. Jul. 22, 2011), *appeal dismissed, vacated in part*, 712 F.2d 387 (2013).

143. *Id.* at \*1.



application was “on hold” for three years and was pending for a total of five years before he filed a lawsuit seeking declaratory judgment, asking the district court judge to find that he was eligible for the adjustment.<sup>144</sup> Ayyoubi was granted refugee status after the INS found that he had a well-founded fear of future persecution by Iranian intelligence authorities.<sup>145</sup> When Ayyoubi applied for his adjustment, officials learned that he had received military training from the Kurdish Democratic Party of Iran, which is considered a terrorist organization under 8 U.S.C. § 1182(a)(3)(B)(vi).<sup>146</sup> Because of this military training, the United States Citizenship and Immigration Services refused to adjudicate his application for adjustment of status.<sup>147</sup> The district court held that

the plaintiff’s application has been pending only five years . . . [and] in view of all other circumstances in the case, especially national security concerns and the high-level, detailed, and discretionary reviews necessitated by exemption determinations under [the INA], a three-year delay of adjudication . . . is not unreasonable as a matter of law.<sup>148</sup>

Ultimately, the case was dismissed.<sup>149</sup>

#### *4. Summary Removal*

Another tool available to the government to use against aliens who pose a national security threat is section 235(c) of the INA.<sup>150</sup> Section 235(c) mandates that, in arriving-alien cases, the conventional removal process halts when it appears that the alien is inadmissible on security or foreign policy grounds.<sup>151</sup> The provision permits the alien’s expeditious removal without a hearing, which is predicated on confidential national security information.<sup>152</sup> The national security information is not exposed and judicial review is extremely limited.<sup>153</sup> If an arriving alien is deemed by an immigration officer or judge to have acted in a way prohibited under any of the espionage, terrorism, or foreign policy provisions, the officer or

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144. *Id.*

145. *Id.*

146. *Id.* at \*1–2.

147. *Id.* at \*1.

148. *Id.* at \*10.

149. *Id.*

150. 8 U.S.C. § 1225(c) (2012).

151. *Id.*

152. *Id.*

153. *Id.*

judge must first order the alien removed, report the case to the Attorney General, and finally halt further inquiry unless directed by the Attorney General to proceed.<sup>154</sup> This system, while unforgiving, has survived judicial scrutiny.<sup>155</sup>

If the government decides against using section 235(c) to remove the alien, then the immigration courts acquire jurisdiction for conventional removal through section 212(a)(6)(A).

### 5. Alien Terrorist Removal Court

In 1996, through the enactment of AEDPA, Congress established the Alien Terrorist Removal Court ("ATRC"), which allows the government to bring classified information to bear in a removal case on the merits of a terrorism charge—usually in cases where summary exclusion is not available because the alien has already been admitted.<sup>156</sup> The ATRC comprises five judges from the district court who are appointed by the district court's chief judge.<sup>157</sup> The sole function of the ATRC is to conduct removal proceedings against deportable aliens on national security and terrorism charges.<sup>158</sup> The process begins when the government certifies that conventional removal proceedings are not adequate because of the national security threat bringing such proceedings against the alien would pose.<sup>159</sup> The government then files an *ex parte* application under seal, arguing that there is probable cause that the alien in question is a terrorist who poses a national security threat.<sup>160</sup>

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154. *See id.*

155. *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950) (upholding a summary exclusion regulation that, in its essentials, had existed since 1917 and which Congress later enacted in INA section 235(c)). The Court found that "[u]nder the immigration laws and regulations applicable to all aliens seeking entry into the United States during the national emergency, [the alien petitioner] was excluded by the Attorney General without a hearing. In such a case [the Court] ha[s] no authority to retry the determination of the Attorney General." *Id.* at 546 (internal citation omitted).

156. 8 U.S.C. §§ 1531–1537.

157. *Id.* § 1532(a).

158. *See id.*

159. *Id.* § 1531(1) ("'[A]lien terrorist' means any alien described in section 237(a)(4)(B) of this title."); *id.* § 1533.

160. *Id.* §§ 1533(a)(1)–(2). The district judge who reviews the application may consider *ex parte* and *in camera* other information, including classified information, "presented under oath or affirmation," or testimony. *Id.* § 1533(c)(1).

As soon as the government files the application with the court, the suspected terrorist alien may be taken into custody.<sup>161</sup> While the proceeding is expedited, the non-classified portion is open to the public.<sup>162</sup> The burden of proof on the government is simply a showing by a preponderance of the evidence, and the rules of evidence do not apply.<sup>163</sup> The alien who is in the ATRC does not have the right to seek most forms of relief, including the rights of asylum, withholding, cancellation, removal, and voluntary departure.<sup>164</sup> A removal order that would violate the Convention Against Torture (“CAT”), however, may not be executed.<sup>165</sup> Last, once taken into custody, only a legal permanent resident—that is, a green-card holder—is permitted to petition the Attorney General to be released.<sup>166</sup>

This court, as with many of the provisions described,<sup>167</sup> is evidence of an overbroad response prompted by an imprecise fear. The result of such a response—here, the secret and powerful ATRC—is enough to warrant scrutiny of its establishment and operation. It is questionable, for example, whether this court is constitutional. “Tension embroils the ATRC” as the United States relentlessly combats the constant threat of terrorism on its soil.<sup>168</sup>

Congress created the ATRC “to sidestep” constitutional barriers and consequently created a framework that allows the U.S. Attorney General to deport a suspicious resident alien without following the procedural requirements the Constitution demands.<sup>169</sup> This framework violates a resident alien’s Fifth Amendment right to procedural due process.<sup>170</sup> First, the alien is unable to examine the secret evidence or test its accuracy.<sup>171</sup> Second, because the source of the information is secret, the alien is unable to confront the source and may not know what the basis for a charge is or how to defend against it.<sup>172</sup>

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161. *Id.* § 1536(a). This action requires no probable cause finding by the court. *See id.*

162. *Id.* § 1534(a).

163. *Id.* §§ 1534(g)–(h).

164. *Id.* § 1534(k).

165. 28 C.F.R. § 200.1 (2016).

166. 8 U.S.C. § 1536(a)(2)(A).

167. *See supra* Part III.A.2–4.

168. *See* John Dorsett Niles, *Assessing the Constitutionality of the Alien Terrorist Removal Court*, 57 DUKE L. J. 1833, 1834 (2008).

169. *Id.* at 1834–35.

170. *Id.* at 1836.

171. *Id.*

172. *Id.*

The options available—removal, holds, and denial of benefits—are all at the disposal of the government because of the implementing legislation’s passage in response to instinctual motivations driving the represented and their representatives alike. There is yet a greater consequence that might befall an alien, even an alien who has jumped through the hoops, dealt with the red tape, and taken an oath of allegiance to become a citizen of the United States.

### *B. Denaturalization*

Even for those individuals who transcend the heavy burdens imposed by statutes and other bureaucratic procedures and take the oath of allegiance, the prize can be revoked.<sup>173</sup> To revoke someone’s citizenship, the United States Attorney must institute an action to revoke citizenship in federal district court by showing that the citizenship was procured illegally, specifically that the alien concealed a material fact in the application process or that there was a willful misrepresentation in obtaining citizenship.<sup>174</sup> The burden of proof for the government is proof by clear, unequivocal, and convincing evidence.<sup>175</sup>

This tool is powerful in the national security arena—it is also easy to imagine how massive this weight could be on the shoulders of an immigrant. An obvious application for denaturalization would be for an individual who poses a national security threat and who evidence shows obtained citizenship through marriage fraud. Because of the sensitivity of the information that proves the alien is a national security threat, the citizen can be “denaturalized” and removed from the country without the government even having to speak to the particulars of the national security concerns.

The driving force behind giving the government the power to revoke citizenship is a fear that this current citizen will commit an act of terrorism—fear of a possible future event only made more likely by that individual’s physical presence on American soil. In 2014, another Republican presidential contender, Texas Senator Ted Cruz, went even further, introducing a bill that would strip Americans of their citizenship if they were deemed to have provided “material assistance” to

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173. Amy D. Ronner, *Denaturalization and Death: What it Means to Preclude the Exercise of Judicial Discretion*, 20 GEO. IMMIGR. L.J. 101, 110 (2005).

174. 8 U.S.C. § 1451(a) (2012).

175. See *In re Cardines*, 366 F. Supp. 700, 703 (D. Guam App. Div. 1973).

organizations designated as terrorist organizations.<sup>176</sup> Cruz introduced this bill in spite of the fact that the U.S. Supreme Court ruled that stripping an individual of U.S. citizenship violates the Eighth Amendment's prohibition on cruel and unusual punishment.<sup>177</sup> Taking such extreme steps as that bill proposed is either motivated by or capitalizing upon fear of attack. Although fear is an inevitability, especially when American citizens have experienced tragedies and are constantly reminded of them by the media, imposing such harsh and broad consequences on those who lawfully obtained U.S. citizenship—consequences imposed and strictly enforced because of an ill-defined fear of attack—seems to overreach. Further, courts have been known to acquiesce in the name of national security in some of the seemingly wrongful actions, like internment, that were instituted according to laws of the United States. It is therefore important to notice and sound the alarm when a law is enacted from motivations that do not sound in reason and justice, but rather motivations that sound in fear of the unknown, of the different, of the “bogeyman.” Such laws will not only likely fail to accomplish the objective of monitoring terrorists and keeping true threats to national security off American soil, but those laws will also serve to hurt this nation's proud history of taking in the “tired . . . poor, [and] huddled masses”<sup>178</sup> and consequently our standing in the world community.

Unlike Senator Cruz's bill, some laws that have been enacted turn on a finding of giving material support to a terrorist organization. These provisions have become both a powerful tool in the national security arena and in targeting “unwanted” aliens.

### *C. Material Support*

Material support of a terrorist organization is a critical topic when addressing the intersection between national security and immigration law—specifically, in how fear drives American policing practices. Material support of a terrorist organization is an act that prevents aliens from adjusting their status to legal permanent resident or citizen and might make an alien removable. Because the DHS defines material support very broadly, much of the enforcement is left to subjective analysis.

“The United States now has a series of statutes that make it an offense to provide material support to a terrorist activity or to an organization

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176. Matt Welch, *Citizenship-Stripping on the Rise Worldwide*, REASON.COM (Dec. 31, 2015), <https://reason.com/blog/2015/12/31/citizenship-stripping-on-the-rise-worldw> [<https://perma.cc/X4ZN-YGKU>].

177. See *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

178. THE NEW COLOSSUS, *supra* note 11.

designated . . . as a terrorist organization.”<sup>179</sup> For immigration purposes, an organization may be deemed a terrorist organization in three different ways. First, an organization may be designated by the Secretary of State as a foreign terrorist organization (“FTO”) pursuant to section 219 of the INA.<sup>180</sup> Second, an organization may be designated as a terrorist organization by the Secretary of State in consultation with the Attorney General and the Secretary for Homeland Security.<sup>181</sup> Third, an organization may be designated as such if it is “a group of two or more individuals, whether organized or not, which engages in, or has a subgroup which engages in, the activities described in [the INA]”<sup>182</sup>—this was a catchall provision added by the REAL ID Act.<sup>183</sup> As a result, these groups are listed on the State Department’s terrorist exclusion list (“TEL”) or identified as immigration terrorist organizations (“ITOs”).<sup>184</sup>

The legal consequences differ if an organization is designated as a terrorist organization under the FTO versus the TEL or ITO. Specifically, a designation under the FTO subjects an alien to criminal penalties, bank account freezes, and immigration sanctions which include detention and removal.<sup>185</sup> Designation under TEL or ITO, on the other hand, provides only for immigration consequences.<sup>186</sup>

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179. WAYNE MCCORMACK, UNDERSTANDING THE LAW OF TERRORISM 115 (Matthey Bender & Company, Inc. 2007); 18 U.S.C. §§ 2339A, 2339B (2012).

180. 8 U.S.C. § 1189; *id.* § 1182(a)(3)(B)(vi).

181. § 1182(a)(3)(B)(vi).

182. *Id.*

183. *Id.*

184. *See id.*

185. *See id.* §§ 2339A–2339B; *see* Rachel D. Settlege, *Affirmatively Denied: The Detrimental Effects of a Reduced Grant Rate of Affirmative Asylum Seekers*, 27 B.U. INT’L L.J. 61, 89 n.155 (2009); *see also* Daniel C. LaPenta, *Fighting Terrorism Through the Immigration and Nationality Act: Dangers of Limiting the INA’s Breadth Under Chema v. Ashcroft*, 40 NEW ENGLAND L. REV. 165, 193 (2005).

186. Both FTO and TEL-ITO support constitute per se or strict liability offenses; any support provided to designated organizations after the designation date will subject the alien to automatic immigration ramifications; no excuses will be heard, except in rare circumstances under a waiver provision committed to the Secretaries of State and Homeland Security, in consultation with the Attorney General under 8 U.S.C. § 1182(d)(3)(B)(i). Otherwise, the government need not prove that the alien was aware of the designation, that the organization is a terrorist organization, or that the support provided would further the organization’s terrorist activity. This latter point is important in situations in which the organization conducts ostensibly charitable functions as well as its terrorist activities, and the alien claims to have intended the support to benefit only the charitable functions. An alien charged with materially supporting the undesignated third kind of group is

Because of the broad definition of “material support” and because of the varying penalties available depending upon which list an individual or group is placed, the consequences are not likely to be uniform. Rather, depending upon the enforcing officer or body and, most important to this discussion, the political climate, an individual or group may suffer consequences that bear little relation to the alleged threat. Because fear drives popular mandates for far-reaching legislation to combat faceless threats, the possibility that serious miscarriages of justice will occur is real.

#### *D. Classified Information*

The ATRC and the summary removal provision are important and powerful immigration law mechanisms that allow the government to use classified information in a removal proceeding without risk of that information being released.<sup>187</sup> Similar to how classified information is protected in immigration proceedings, the government’s ability to protect classified information in the immigration setting due to limited discovery rules is important.

In the criminal setting, when the government brings a national security or terrorism charge, the accused is entitled to the same constitutional protections as would be available if the charge were theft. Relevant to the discussion at hand, the accused is entitled to the right to trial by jury,<sup>188</sup> to a public trial,<sup>189</sup> to confront witnesses and evidence,<sup>190</sup> to not be “compelled in any criminal case to be a witness against himself,”<sup>191</sup> and to due process.<sup>192</sup> Because immigration law is civil, however, none of the criminal protections, except for the right to due process, attach to an alien in the immigration setting.<sup>193</sup> Even the right to due process is more limited in an immigration action.<sup>194</sup> However, there are times when the evidence that

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not strictly liable and might avoid immigration sanctions if “he can demonstrate by clear and convincing evidence that he did not know, and should not reasonably have known, that the organization was a terrorist organization.” See 8 U.S.C. §§ 1182(a)(3)(B)(iv)(IV)–(VI). REAL ID Act section 103 increased the alien’s burden in this respect. REAL ID Act section 104 enacted a new waiver provision in INA section 212(d)(3).

187. See 8 U.S.C. §§ 1531–1537; *id.* § 1225(c).

188. U.S. CONST amend. VI.

189. *Id.*

190. *Id.*

191. U.S. CONST amend. V.

192. *Id.*

193. See Bali, *supra* note 90, at 163.

194. In *Jay v. Boyd*, the Supreme Court has emphasized the breadth of the Attorney General’s discretion in granting relief under the INA. 351 U.S. 345, 354

could be used against an alien in a criminal case is so sensitive that its release is more harmful to the nation's security than not bringing the criminal case at all. In these cases, the government may investigate to determine if the alien has broken any immigration laws, which will likely be the case if the alien is a national security threat, and may bring an immigration case so that the criminal protections do not apply.<sup>195</sup> Although a successful immigration action does not place the dangerous alien in jail, the alien may be detained and removed from the country.<sup>196</sup>

### *E. Detention*

Detention law is at the forefront of the immigration and national security crossroads. Section 236A of the INA "specifically provides for the mandatory detention of suspected terrorists and sets forth requirements of *habeas corpus* and judicial review."<sup>197</sup> In addition, the Supreme Court has long held detention to be a necessary part of the deportation process in national security cases.<sup>198</sup> In the case of *Zadvydas v. Davis*, however, the Supreme Court also held that in cases in which there is an order of removal,

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(1956) ("Although such aliens have been given a right to a discretionary determination on an application for suspension, a grant thereof is manifestly not a matter of right under any circumstances, but rather is in all cases a matter of grace."); *INS v. Yue Shaio Yang*, 519 U.S. at 30 (reaffirming the *Jay*'s description of the Attorney General's discretion); *Foti v. INS*, 375 U.S. 217, 222 n.7 (1963) (same). The Court has likened the discretion of the Attorney General with respect to suspension of deportation to "a judge's power to suspend the execution of a sentence, or the President's to pardon a convict." *Jay*, 351 U.S. at 354 n.16 (quoting *United States ex rel. Kaloudis v. Shaughnessy*, 180 F.2d 489, 491 (2d Cir. 1950) (Hand, J.)); see also *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 273 (1998) (expressly reaffirming *Conn. Bd. of Pardons v. Dumschat*, 452 U.S. 458, 467 (1981), which held there is no liberty interest in a pardon).

195. If the government were to bring a removal action alleging that the alien was in fact a national security concern, it may have to release some evidence in its case in chief but not if the case was brought on a peripheral charge, for example, marriage fraud, no such release would be necessary. In addition, because there is not a liberty interest in the immigration context, the government would not have to release classified information in discretionary relief that is sought by the alien.

196. See *supra* Part III.D.

197. de Leon, *supra* note 9, at 125 (citing INA § 236A).

198. See *Demore v. Kim*, 538 U.S. 510, 531 (2003) ("Detention during removal proceedings deportation proceedings is a constitutionally permissible part of that process."); *Carlson v. Landon*, 342 U.S. 524, 538 (1952) ("Otherwise, aliens arrested for deportation would have opportunities to hurt the United States during the pendency of deportation proceedings.").



detention could not be indefinite while the government attempts to remove the alien.<sup>199</sup>

As currently construed, the government may detain only admitted aliens for a period reasonably necessary to remove them, presumptively six months, absent evidence showing that deportation is likely to occur in the reasonably foreseeable future, beyond the six-month threshold.<sup>200</sup> This six-month “limitation” poses significant problems for aliens who are suspected or confirmed terrorists. The United States cannot simply let them roam the streets, but the aliens’ home countries might not want them on their streets either, thus making removal to these countries difficult and requiring the process to extend past six months.

*Zadvydas* anticipated that certain aliens may pose this problem and observed that in some cases, in which suspected terrorism or other “special circumstances” exist, it may be possible to detain those individuals for longer periods of time.<sup>201</sup> Based on this language, DHS promulgated regulations that authorize the continued detention of certain aliens not deemed likely to be removed within the six-month timeframe.<sup>202</sup> This regulation has been challenged by habeas cases in two circuits to date. Both cases held that the United States Immigration and Customs Enforcement Agency (“ICE”) could not hold the aliens past the *Zadvydas* period.<sup>203</sup> These cases exhibit an ongoing conflict in the immigration field: the executive branch’s duty through the INA to protect the country by keeping the threat out and by detaining current threats and the court’s duty

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199. 533 U.S. 678 (2001) (Here, resident aliens who had been ordered to be removed and were held by the INS beyond the 90-day removal period because of the government’s inability to remove them brought habeas petitions seeking release. The Supreme Court held that the INA’s post-removal-period detention provision contained an implicit reasonableness limitation, the federal habeas statute granted federal courts the power to decide whether the detention was authorized, and the presumptive limit to reasonable duration of post-removal-period detention was six months.).

200. *Id.* at 698.

201. *Id.*

202. 8 C.F.R. § 241.14 (2016). Aliens who pose serious foreign policy consequences, aliens detained because of terrorism concerns, and aliens determined to be especially dangerous by virtue of mental illness are considered to be potential “special circumstances.” *Id.* §§ 241.14(b)–(f). To invoke a “special circumstances” ground under the regulation, Immigration and Customs Enforcement must first conduct a repatriation likelihood review under 8 C.F.R. § 241.13.

203. *Tuan Thai v. Ashcroft*, 366 F.3d 790, 798–99 (9th Cir. 2004) (holding that 8 U.S.C. § 1231(a)(6), as construed by *Zadvydas*, did not authorize potentially indefinite detention pursuant to 8 C.F.R. § 241(f)); *Tran v. Mukasey*, 515 F.3d 478, 484 (5th Cir. 2008).

and right to grant remedies, in this case through a petition for habeas corpus.

The PATRIOT Act reinforced the power to detain any person whom the Attorney General has reasonable grounds to believe is a person described in INA section 121(a)(3)(A)(i), that is, those suspected of espionage, sabotage, or the like, or section 212(a)(3)(B), that is, one suspected of terrorist activity.<sup>204</sup> The aliens may be detained for seven days before putting them in immigration proceedings or charging them criminally.<sup>205</sup> If the aliens are not charged, they shall be released.<sup>206</sup> If proceedings begin, however, the detention becomes mandatory even if the individual is eligible for relief until either the *Zadvydas* time runs out or the Attorney General has reason to believe that the individual is no longer removable.<sup>207</sup> Moreover, the Attorney General or his designated official must review the alien's detention certification every six months.<sup>208</sup> If it is unlikely that the detained individual will be removed or can be released in the reasonably foreseeable future, under the *Zadvydas* doctrine, the Attorney General can detain the individual for an additional six months only if that person's release will threaten national security or the safety of the community.<sup>209</sup> However, consider the hypothetical scenario where a member of al Qaeda is captured in Yemen. After his final order of removal is issued and his *Zadvydas* time runs out, which is a presumptive six months, it is unlikely that the government will be in a position to return the alien back to Yemen, as the CAT prevents the alien's removal due to the likelihood of torture. Because the release of this individual poses a national security risk, the individual can be detained for an additional six months, but must eventually be released.<sup>210</sup>

On November 13, 2001, President Bush issued the Presidential Order on Detention, which established the military procedures to detain and try suspected terrorists who are not citizens of the United States.<sup>211</sup> The Order

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204. INA § 236A, 8 U.S.C. § 1226A (2012), PATRIOT Act § 412.

205. 8 U.S.C. § 1226A.

206. *Id.*

207. *Id.*

208. *Id.*

209. *Id.* The Attorney General may also detain suspected terrorist pursuant to INA § 236(c)(1)(D), 8 U.S.C. § 1226(c)(1)(D), if they are inadmissible or deportable for terrorist activities, and the Attorney General may also authorize mandatory detention for individuals described in 8 U.S.C. § 1227(a)(4).

210. 8 U.S.C. § 1226A (a)(6).

211. *See generally* Military Order of November 13, 2001, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66

gives the Secretary of Defense the authority to detain noncitizens who are members of al Qaeda; who have engaged in, aided, or conspired to commit acts of international terrorism; or who have harbored one or more such individuals.<sup>212</sup> A decade later, President Obama signed the National Defense Authorization Act (“NDAA”) into law.<sup>213</sup> President Obama signed the bill into law after threatening to veto it because of its controversial language—some have even compared provisions of the bill to the PATRIOT Act.<sup>214</sup> He voiced these concerns when he said that he signed the NDAA “chiefly because it authorizes funding for the defense of the United States . . . I have signed this bill despite having serious reservations with certain provisions that regulate the detention, interrogation, and prosecution of suspected terrorists.”<sup>215</sup> Even though President Obama voiced apprehension regarding the bill, he still made the executive decision to enact it.

#### *F. Holes in the Border*

Criminals cannot migrate into the United States legally, so they come illegally.<sup>216</sup> In November 2015, a team of Los Zetas cartel gunmen crossed the Texas border to escape Mexican authorities.<sup>217</sup> Once they reached Texas, they disappeared.<sup>218</sup> To some degree, these criminals represent a national security threat because they are hurting the quality of life of thousands of Americans.<sup>219</sup> When there are motives for individuals to illegally enter the United States and the opportunity to do so, there is a

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Fed. Reg. 57,833–36 (Nov. 16, 2001), *reprinted in* 78 INTERPRETER RELEASES 1775 app.II (2001).

212. *Id.* at 57,834.

213. Adam Clark Estes, *Obama Makes It Official: Suspected Terrorists Can Be Indefinitely Detained Without a Trial*, WIRE (Dec. 31, 2011), <http://www.thewire.com/politics/2011/12/obama-makes-it-official-suspected-terrorists-can-be-indefinitely-detained-without-trial/46818/> [<https://perma.cc/CE34-YCYW>].

214. *Id.*

215. *Id.*

216. Mary De Ming Fan, *The Immigration-Terrorism Illusory Correlation and Heuristic Mistake*, 10 HARV. LATINO L. REV. 33, 40 (2007).

217. Cartel Chronicles, *Exclusive: Los Zetas Cartel Gunmen Crossed into Texas—Disappeared into U.S.*, BREITBART (Nov. 16, 2015), <http://www.breitbart.com/texas/2015/11/16/exclusive-los-zetas-cartel-gunmen-crossed-texas-disappeared-u-s/> [<https://perma.cc/9UNK-9BMD>].

218. *Id.*

219. It is not argued that all crime should be treated as a national security issue; rather crime should be treated as a national security issue only when the crime is significant enough to alter the way of life for many Americans, such as crimes related to illegal drugs.

possible national security issue. Moreover, when those individuals do cross the border, their crossing is not only a national security concern, but also an immigration concern. For instance, from February through June 2007, the ICE California Gang Initiative in San Diego, San Francisco, and Los Angeles targeted gang members who had illegally reentered the United States after they had already been deported once or more.<sup>220</sup> During that initiative, ICE arrested 139 gang members and associates, 46 of whom were prosecuted for criminal violations, beyond the immigration charge.<sup>221</sup> ICE's Criminal Alien Program ("CAP") aims to identify allegedly removable noncitizens who are incarcerated in jails and prisons and initiate the removal proceedings.<sup>222</sup> CAP is considered a "jail status check" program, and it operates in federal, state, and local prisons and jails.<sup>223</sup>

In addition to "conventional" criminals slipping across the borders, terrorists and other foreign agents also use the holes in the United States's borders.<sup>224</sup> These individuals often use the same illegal infrastructure used by those who traffic drugs and human beings into the United States.<sup>225</sup> Indeed, evidence surfaced that al Qaeda had plans to infiltrate the United States using the southern border: "Several al Qaeda leaders believe operatives can pay their way into the country through Mexico and also believe illegal entry is more advantageous than legal entry for operational security reasons."<sup>226</sup> Intelligence agencies have warned local law enforcement that al Qaeda terrorists were identified and seen with members of the gang Mara Salvatrucha, also known as MS-13.<sup>227</sup>

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220. See U.S. IMMIGRATIONS & CUSTOMS ENF'T, FISCAL YEAR 2007 ANNUAL REPORT: PROTECTING NATIONAL SECURITY AND UPHOLDING PUBLIC SAFETY (2007) [hereinafter ICE ANNUAL REPORT], <http://www.ailadownloads.org/advo/ICEFY2007AnnualReport.pdf> [<https://perma.cc/3QAF-G4KB>].

221. *Id.*

222. *The Criminal Alien Program (CAP): Immigration Enforcement in Prisons and Jails*, AM. IMMIGR. COUNCIL (Aug. 1, 2013), <http://www.immigrationpolicy.org/just-facts/criminal-alien-program-cap-immigration-enforcement-prisons-and-jails> [<https://perma.cc/KT7V-7M7W>].

223. *Id.*

224. See, e.g., Dina Francesca Haynes, *(Not) Found Chained to a Bed in a Brothel: Conceptual, Legal, and Procedural Failures to Fulfill the Promise of the Trafficking Victims Protection Act*, 21 GEO. IMMIGR. L. J. 337, 362 (2007).

225. *Id.*

226. See *id.*

227. Michele McPhee, *Gang Tied To Terrorists*, BOS. HERALD, Jan. 5, 2005, at 5. FBI Special Agent Robert B. Salle told the Washington Post, "MS-13 is the strongest gang, the biggest gang. They are the strongest thing going on in terms of organized gangs. MS-13's motto is kill, rape and control. . . . In terms of MS-13, the estimates vary from 1,500 to 3,000 members in the D.C. region." Del Quentin

During Operation Community Shield (“OCS”), ICE focused on the national security threat that violent transnational gangs, such as MS-13, pose.<sup>228</sup> OCS established that most major cities in the United States are experiencing an increase in gang activity.<sup>229</sup> The major cities were not alone, however; smaller communities throughout the United States are experiencing an increase in gang activity as well.<sup>230</sup> The OCS study demonstrated that the ranks of these violent transnational gangs are largely composed of foreign-born nationals and that MS-13 is “among the largest and most violent of street gangs in the United States.”<sup>231</sup> If gangs like MS-13 are willing to traffic drugs or women and children as sex slaves—as they do currently—then there is no reason to believe they would not help smuggle in a terrorist, spy, or bomb. Further, there is evidence that ISIS may be planning to infiltrate the U.S with the aid of transnational drug cartels, a Department of Defense Analyst has said, citing MS-13 as the most likely organization for such a partnership.<sup>232</sup>

Along with conventional national security and criminal laws, criminal immigration statutes have been used to combat this threat. Two of the most common criminal laws used by law enforcement are those prohibiting illegal reentry<sup>233</sup> and alien smuggling and harboring.<sup>234</sup> To obtain a conviction under § 1326, a prosecutor must show that a defendant: first, is not a citizen of the United States; second, has been ordered to be removed from the United States; third, has been physically removed from the United States; forth, has reentered or attempted to reenter the United States after the removal; and finally, did not have permission from the Attorney General to reenter the United States.<sup>235</sup> It might appear that this crime does not have any overt national security implications. As mentioned, however, whenever the border is breached, there is a national security implication.

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Wilber, *MS-13 Gang out to “Kill, Rape and Control”*: *FBI Agent*, WASH. POST (Jan. 11, 2010, 6:10 AM), <http://voices.washingtonpost.com/crime-scene/gangs/ms-13-gang-out-to-kill-rape-an.html> [<https://perma.cc/UW97-ACJJ>].

228. See ICE ANNUAL REPORT, *supra* note 220. OCS was an assessment whereby each ICE field office examined threat assessments to identify gangs and associated criminal activity within its area of responsibility. *Id.*

229. *Id.*

230. *Id.*

231. *Id.*

232. Andrew J. Ireland, *New Border Risk: ISIS Ties to Mexican Drug Lords: Expert Warns Middle East Turmoil Could Sting U.S.*, WND (July 4, 2014, 6:46 PM), <http://www.wnd.com/2014/07/new-border-risk-isis-ties-to-mexican-drug-lords/> [<https://perma.cc/T79S-RD7H>].

233. 8 U.S.C. § 1326 (2012).

234. *Id.* § 1324.

235. *Id.* § 1326.

More important to the discussion at hand, charging an individual with illegal reentry carries a heavy hammer with regard to sentencing.<sup>236</sup> Specifically, the statutory maximum for reentry after removal is two years, unless the alien had three or more misdemeanor convictions.<sup>237</sup> Then, the sentence can be for up to ten years.<sup>238</sup> If the alien's deportation was subsequent to conviction for an aggravated felony, which a crime implicating national security would be, the maximum term of imprisonment is 20 years for merely returning to the United States after being removed—a powerful weapon against a particular type of alien.<sup>239</sup>

The national security implications of criminal alien smuggling and harboring are more obvious—specifically, the potential that terrorists are being smuggled across the border. Individuals are guilty of alien smuggling and harboring if they knowingly bring or attempt to bring an alien into the United States or recklessly disregard the “fact that an alien has come to, entered, or remains in the United States in violation of law, transports, or moves or attempts to transport or move such alien within the United States.”<sup>240</sup> An individual is also guilty of alien smuggling and harboring if in “reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, conceals, harbors, or shields from detection, or attempts to conceal, harbor, or shield from detection, such alien”<sup>241</sup> or “encourages or induces an alien to come to, enter, or reside in the United States, knowing or in reckless disregard of the fact that such coming to, entry, or residence is or will be in violation of law.”<sup>242</sup> The typical punishment for alien smuggling and harboring is a five-year maximum sentence, unless the act was done for the purpose of financial gain, which carries a ten-year maximum sentence.<sup>243</sup> If, however, the individual who is smuggled commits an offense against the United States, the maximum sentence is ten years.<sup>244</sup> Moreover, in these cases there is also a statutory mandatory minimum of three years.<sup>245</sup>

The current legal framework of immigration law provides a vast array of tools for the U.S. government to use in its pursuit of national security objectives. The availability of several remedies, including deportation,

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236. *See id.*

237. *Id.*

238. *Id.*

239. *Id.*

240. *Id.* § 1324.

241. *Id.*

242. *Id.*

243. *Id.*

244. *Id.*

245. *Id.*

exclusion, detainment, and denaturalization, makes the implementation of immigration law a powerful asset to the government. In fact, the use of the civil immigration laws allows the government to circumvent procedural safeguards that would apply in criminal proceedings against suspected terrorists. Immigration laws and their use are critical in upholding national security, as well as protecting the overall quality of life of American citizens. The question remains, however, as to whether allowing fear to drive immigration reform and law enforcement to further national security interests is appropriate, considering the inherent and significant conflicts with individual rights under the U.S. Constitution.

#### IV. LIBERTY CONCERNS WHEN USING IMMIGRATION LAW AS A TOOL OF NATIONAL SECURITY

The notion of the “rule of law” plays a key role in the immigration and national security debate. In ancient Greece, the phrase referred primarily to the concept that the government is subordinate to the law.<sup>246</sup> Thus, many argue that the rule of law in the immigration context should focus on the ends that the system should serve: upholding the larger goal of human and civil rights.<sup>247</sup> On the other end of the spectrum, rule of law means a strict observance to “law and order,” which requires the government to adhere to standing laws.<sup>248</sup>

Both pro- and anti-immigration advocates use the rule of law as support for their positions.<sup>249</sup> Restrictionists see the rule-of-law argument as the key to answering a chaotic and ballooning alien population.<sup>250</sup> These advocates maintain that lackadaisical enforcement traduces the rule of law,

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246. Donald Kerwin & Margaret D. Stock, *The Role of Immigration in a Coordinated National Security Policy*, 21 GEO. IMMIGR. L.J. 383, 425 (2007) (“These can include: (1) government adherence to standing laws (with judicial review); (2) ‘law and order’ in the sense of protection of the lives, rights and property of residents; (3) equality before the law; (4) human rights; and (5) efficient and predictable justice.”).

247. *See id.* at 425–26.

248. *Id.*

For example, a legal system might exemplify the rule of law if its rules were: (1) prospective and possible to comply with; (2) promulgated, clear, and coherent; (3) stable enough to allow persons to be guided by knowledge of their content; (4) the basis of decrees and orders governing specific situations; (5) binding on those with the authority to make, administer and apply rules; and (6) administered consistently.

*Id.*

249. *Id.* at 426.

250. *Id.*

making it less powerful.<sup>251</sup> Discounting the traditional Greek sense of rule of law as a subordinate government, restrictionists instead focus on a single goal of the legal system: policing.<sup>252</sup> However, “[i]mmigrant advocates focus on how the U.S. immigration system violates human rights and does not serve appropriate ‘ends’ such as predictable justice or equality under the law.”<sup>253</sup>

This argument regarding the rule of law is often phrased as a debate over security versus civil liberties and human rights.<sup>254</sup> There is no doubt that immigration policy and national security are linked.<sup>255</sup> Most of the September 11th hijackers were in the U.S. because of breaches in the immigration armor.<sup>256</sup> It therefore makes sense that if an essential aspect of national security is to prevent further attacks, then to ignore the immigration aspect in this argument is to leave an “unprotected spot in the Nation’s armor.”<sup>257</sup>

Many have argued, however, that using immigration policy to combat terrorism and other national security threats is an abuse of power because it treats aliens first as terrorist suspects “and it sends a hostile, unwelcoming message to the world.”<sup>258</sup> In addition, those who oppose the use of immigration law as a national security weapon cite the fact that in doing so, the United States draws lines between U.S. citizens and noncitizens, which erodes the constitutional protections and civil liberties that have been endowed to noncitizens over the past two centuries.<sup>259</sup> What these opponents seem to overlook is the enumerated power over immigration that the Constitution provides to the federal government. It is well established that Congress has plenary power over immigration.<sup>260</sup> In

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251. *Id.*

252. *Id.*

253. *Id.* “A growing body of legal reform reports, for example, has decried the retroactive application of certain immigration laws, the lack of clarity in legal standards and decision-making, the inconsistent application of immigration law, and the lack of coherence between immigration and other laws.” *Id.* In this regard the rule of law is undermined by the “closed deportation hearings, a summary appeals process, restrictions on judicial review, and the absence of government-appointed counsel.” *Id.*

254. *See id.* at 426–27.

255. de Leon, *supra* note 9, at 115.

256. *See generally id.* at 116.

257. *Id.*

258. *Id.*

259. *Id.*

260. U.S. CONST. art. I, § 9, cl. 1 (“The Migration or Importation of such Persons as any of the States now existing shall think proper to permit, shall not be prohibited by the Congress prior to the year one thousand eight hundred and



addition, the President is charged with the power and duty under Article II to enforce the Constitution, which would include the laws Congress enacted concerning immigration.<sup>261</sup>

The flaw in the arguments for both those who believe that immigration law is merely an arrow in the national security quiver and those who argue that using such an arrow is a breach of civil liberties is that both parties seem to argue that these concepts are mutually exclusive.<sup>262</sup> Specifically, “the debate has been miscast as one that requires a trade-off between security and rights.”<sup>263</sup> Nonetheless, “a human rights framework can embrace both individual rights and the ends they serve, including safety, liberty, and the common good. The quality of the immigration debate depends on a more nuanced view of security and human rights.”<sup>264</sup>

One commentator on this subject noted that discourse on this issue tends to be proffered in “absolute language, in individual terms, and without reference to their ends or to corresponding duties.”<sup>265</sup> Thus, the debate over just what constitutes the parameters of an individual alien’s rights has become more vociferous and uncompromising, and at the same time, the number of claimed civil liberties in the immigration context has expanded.<sup>266</sup> Moreover, there now appears to be a sense that if advocates can describe their desired outcome as a “right,” it will magically resolve the underlying issue.<sup>267</sup> Yet “[r]ights”—so formulated—may express desirable social outcomes, but they often have little relevance to the ‘common good’ or to other ends.”<sup>268</sup> For example, an individual fleeing persecution because of race, religion, or political affiliation is historically considered to have the right to do so.<sup>269</sup> However, if as a result, the United States current immigration policy allows dangerous individuals to enter its borders, that policy risks infringing on other Americans’ rights to be free from dangerous individuals.

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eight.”); U.S. CONST. art. I, § 8, cl. 4 (authorizing Congress “[t]o establish a uniform Rule of Naturalization”); *Gibbons v. Ogden*, 22 U.S. 1, 17 (1824) (establishing the plenary power doctrine, under which the federal government’s power over immigration may be exercised at its complete and utmost extent without limitations, save for those limitations prescribed in the Constitution).

261. U.S. CONST. art. II.

262. Kerwin & Stock, *supra* note 246, at 427.

263. *Id.*

264. *Id.*

265. *Id.* (citing MARY ANN GLENDON, RIGHTS TALK 12, 14 (1991)).

266. *Id.*

267. *Id.* (citing BRIAN TIERNEY, THE IDEA OF NATURAL RIGHTS 346–47 (1997)).

268. *Id.*

269. *Id.*

No doubt that many Americans view the immigration apparatus as an ineffective tool against terrorism or other threats.<sup>270</sup> “On the other hand, many immigration advocates believe that [U.S.] immigration laws offend the right to family reunification, the right to make a living, and the right to just working conditions.”<sup>271</sup> Still others, especially Americans who live by the border, view illegal immigration as an infringement on their rights to pursue happiness, security, and property.<sup>272</sup> Those in the business sector see immigration restrictions as a violation of their ability to hire immigrant workers and move the prosperity of their companies forward.<sup>273</sup> “Some U.S. workers see their rights to a just wage and appropriate working conditions undermined by immigrants. In many ways, these competing sides talk past each other, a problem exacerbated by the way the proponents use “rights language.”<sup>274</sup>

The Constitution echoes this aim of balance between rights and security, specifically to “form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty.”<sup>275</sup> Thomas Jefferson understood that the concept of common defense did not have to conflict with individual rights, stating that “[a] strict observance of the written laws is doubtless one of the high duties of a good citizen, but it is not the highest. The laws of necessity, of self-preservation, of saving our country when in danger, are of higher obligation.”<sup>276</sup> Jefferson went on to say that to “lose [the] country by a scrupulous adherence to written law, would be to lose the law itself, with life, liberty, property and all those who are enjoying them with us; thus absurdly sacrificing the end to the means.”<sup>277</sup>

Thomas Jefferson’s view of this problem focuses on the practicality necessary to effectively maintain our rights and security. When framed in a contemporary context, the absolute need for that practicality is evident. This practicality is captured in a monologue delivered on a television show, *The Wire*, in which a police captain tells his officers about the need to evaluate each threat for its severity before acting to have resources left to achieve the police department’s larger goals effectively:

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270. *Id.* at 427.

271. *Id.*

272. *Id.* at 427–48.

273. *Id.*

274. *Id.*

275. U.S. CONST. pmbl; *see also* Kerwin & Stock, *supra* note 246, at 428.

276. Kerwin & Stock, *supra* note 246, at 428 (citing Letter from Thomas Jefferson to John B. Colvin (Sept. 20, 1810)).

277. *Id.*

Somewheres, back in the dawn of time, this District had itself a civic dilemma—of epic proportion. The City Council had just passed a law that forbid alcoholic consumption in public places, on the streets, and on the corners. But the corner is, and it was, and it always will be the poor man's lounge. It's where a man wants to be on a hot summer's night. It's cheaper than a bar, catch a nice breeze, and watch the girls go by. But the law is the law. The Western cops rolling by, what were they going to do? If they arrested every dude out there for tipping back a High Life, there'd be no other time for any kind of police work. And if they looked the other way, they'd open themselves to all kinds of flaunting, all kinds of disrespect. Now, this was before my time when it happened, but somewhere back in the 50s or 60s, there was a small moment of god-damn genius by some nameless smokehound who comes out the cut-rate one day and, on his way to the corner, he slips that just-bought pint of elderberry into a paper bag. A great moment of civic compromise. That small, wrinkled-ass paper bag allowed the corner boys to have their drink in peace, and it gave us permission to go and do police work—the kind of police work that's actually worth the effort, that's worth actually taking a bullet for.<sup>278</sup>

In the immigration context, a “strict observance of the written laws”<sup>279</sup> is important, but it is not so important that other concerns should not also be weighed. Just as the police in that scene from *The Wire* had to focus on dealing with those “cornerboys” who openly flaunted the breaking of a rather unimportant law, a strict adherence to our immigration laws—most often in reaction to events rather than with a cool heart and steady pen—will lead to our finite law enforcement and intelligence resources being diverted toward otherwise rather unimportant causes. The United States has shone as a beacon for much of its history, but if the United States forgets its own history as a nation of immigrants, a nation that has always been a place where the persecuted could find shelter, it will find itself a lesser nation as a result. However, the Constitution itself would cease to be worth the paper on which it is written if the U.S. cannot maintain security. Indeed, just as the American way of life can be destroyed by gradually forgetting who we are and what we stand for, it can also be obliterated by the shockwave and fallout from a mushroom cloud.

Accordingly, when considering the threshold question of whether it is appropriate to use immigration law and policy as a national security tool,

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278. *The Wire: All Due Respect* (HBO television broadcast Sept. 27, 2004).

279. Kerwin & Stock, *supra* note 246, at 428.

the answer is absolutely. However, that power must be tempered and used with wisdom and balance. Otherwise, too much is forfeited.

#### CONCLUSION

Throughout this nation's history, fear has driven the development of immigration laws. Today, candidates for the American presidency trumpet that same fear as a means to stir opinions and encourage voting. National security, however, is a broader issue than the events displayed on the six o'clock news—it is more than just terrorism and a nuclear Korean Peninsula.

America is a land of immigrants and the ability to maintain the reality that immigration has achieved—a whole that is greater than the sum of its parts—is a vital part of our national security interest. Not only does a rational immigration policy bring the best and brightest to the United States—such as Albert Einstein—it also brings a diversity of culture that has proven to be our greatest diplomatic instrument.

Conversely, an immigration policy that is not rational can lead to borders that are too open, allowing this country's enemies access to its streets. September 11, 2001 brought this reality into focus. As a result, the federal government has enacted new immigration laws, in addition to using current laws pointedly, as tools of national security. Far from a new development, the creation of new immigration laws was merely the latest reaction to an event that revealed the holes in the nations' armor and shook the nation to its core. That reaction was one based in fear.

Because of the unique nature of immigration law, the lines of liberty and security have been hard to define and balance. Because maintaining integrity at the borders and continuing our great experiment as a nation of immigrants are both national interests, this conflict will most likely always exist. It is the balance of those interests that will ultimately define us, and we must work to ensure that this Great Experiment continues on terms we coolly and logically set down. Fear is instinctual: it protects us, but it also prompts irrational reactions. The great power of human beings, however, is that we may reason beyond mere instinct—this above all else, must be remembered. If the United States is to remain the “shining city upon the hill,” it cannot be a faux façade. While her gates cannot be open to all, they must be open.