

TERRORISM: THE PROBLEM AND THE SOLUTION—*THE COMPREHENSIVE TERRORISM PREVENTION ACT OF 1995*¹

I. INTRODUCTION

Recently, the United States has been the target of various terrorist attacks, including the bombing of the Federal Building in Oklahoma City,² the bombing of the World Trade Center,³ the attempted bombing of the United Nations Building in New York City⁴ and the bombing of New York-bound Pan Am Flight #103.⁵ These deliberate acts of aggression killed innocent bystanders and terrorized countless people in the United States and beyond. It is clear that domestic terrorism is an imminent threat to the national security of the United States and, as a result, the public is exerting pressure on Congress to take action.

Throughout history, national security fears have driven our nation's leaders to take extreme action. During World War II, Japanese-Americans were removed, relocated and placed in internment camps based on wartime suspicions. Then, in the 1960's, the government engaged in widespread infiltration and surveillance of persons and organizations suspected of Communist sympathies during the Cold War.⁶ The American public was angry and frustrated. In response, the government quickly acted in the name of national security with absolute intolerance for anyone related in any way to these abhorrent acts. Although seemingly rational in light of the passions of the times, the government's responses injured the rights of many people. Instead of using the deprivation of rights to punish wrongful acts, the government deprived rights based solely on race and suspected political affiliations.

Under the laws of this country, political association and nationality are indeterminate of guilt, innocence, or liability. The principle of legality⁷ demands that "the law

1. S. 735, 104th Cong., 1st Sess. (1995), reprinted in 141 CONG. REC. S7857 (daily ed. June 7, 1995) (enacted by the United States Senate on June 7, 1995).

2. See David Johnston, *Terror in Oklahoma City: The Investigation; at Least 30 are Dead, Scores are Missing After Car Bomb Attack in Oklahoma City Wrecks 9-Story Federal Office Building*, N.Y. TIMES, Apr. 20, 1995, at A1.

3. See Robert D. McFadden, *Explosion at the Twin Towers: The Overview; Blast hits Trade Center, Bomb Suspected; 5 Killed, Thousands Flee Smoke in Towers*, N.Y. TIMES, Feb. 27, 1993, at A1.

4. See Michael Isikoff & Jim McGee, *8 Foreign Nationals Accused of Plotting to Blow up U.N.*, WASH. POST, June 25, 1993, at A1.

5. See Edward Cody, *Bomb Caused Pan Am Crash, British Probers Conclude; Analysis of Debris Suggests Plastic Explosive*, WASH. POST, Dec. 29, 1988, at A1.

6. This surveillance operation, entitled COINTELPRO, was directed at groups opposed to the Vietnam War, particularly Martin Luther King Jr. The FBI, led by J. Edgar Hoover, conducted this extensive operation under the auspices of combating communism. See, e.g., CURT GENTRY, J. EDGAR HOOVER: THE MAN AND THE SECRETS 412, 442, 682-83 (1991).

7. "In a very wide sense, the principle of legality—the 'rule of law'—refers to and requires not only a body of legal precepts but also supporting institutions, procedures, and values . . . [including] legal procedures . . . designed to effect the protection of essential interests of individuals guaranteed by our society through limitations on the authority of the State." (citations omitted) JEROME HALL,

is impartially and regularly administered”⁸ through rational procedures which preserve the integrity of the legal process.⁹ Alternatively, if the judicial process lacks its essential integrity, its purposes of ascertaining the truth and determining an individual’s responsibility are undermined.¹⁰ The result is arbitrary punishment which serves no other purpose than to intimidate, or terrorize. Therefore, procedural safeguards must be provided equally for everyone to preserve the legitimacy of our legal system by providing basic due process rights to everyone,¹¹ including the politically unpopular. To best determine individual responsibility, a hearing is held in which evidence is presented and refuted on both sides.¹² Such is a minimal due process of law guarantee¹³ which is necessary to preserve our system of justice. As Justice Felix Frankfurter aptly observed, “The history of liberty has largely been the history of the observance of procedural safeguards.”¹⁴

Our government deprived many innocent people of their freedom and privacy rights in response to timely national security concerns. But, with hindsight and less reactionary politics, our government eventually recognized these grave injustices. The first official recognition of these wrongs came in 1976, as a response to the widespread infiltration and surveillance practices of the 1960’s. The F.B.I. created Domestic Security Guidelines,¹⁵ to establish standards and procedures for investigations, safeguarding against further violations of innocent persons’ rights to privacy. Then, in 1988, Congress passed legislation which officially apologized and awarded nominal restitution to Japanese-Americans for the harms inflicted upon their relatives in the internment camps during World War II.¹⁶ An important provision of this legislation anticipates future judgments based upon identities, not actions, of individuals and issues a solemn warning: “[T]o discourage the occurrence of similar injustices and violations of civil liberties in the future.”¹⁷

Within the existing framework of the laws of our country, and in light of lessons learned from history, this note evaluates Congress’ most recently proposed solutions to the imminent problem of terrorism: The Comprehensive Terrorism Prevention Act of 1995.¹⁸ This note concedes that national security concerns mandate reasonable limits on rights of anyone suspected of terrorist activities. However, this note takes issue with the extreme action proposed by the United States Senate and House of Representatives, specifically directed at the expedited removal of legal aliens based upon secret allegations.¹⁹ Accordingly, Part II sets forth and analyzes this provision as it was enacted

GENERAL PRINCIPLES OF CRIMINAL LAW 27, 27 n.1 (2nd ed.) (1960).

8. JOHN RAWLS, A THEORY OF JUSTICE 241 (1971).

9. *Id.* at 239.

10. *See generally id.* at 235-43.

11. “The ‘rule of law’ requires some form of due process.” *Id.* at 239.

12. For a discussion of the constitutional requirements for a fair hearing, including one’s right to know the evidence against them, see Henry J. Friendly, *Some Kind of Hearing*, 123 U. PENN. L. REV. 1264 (1975).

13. U.S. CONST. amend. V.

14. *McNabb v. United States*, 318 U.S. 332, 347 (1943).

15. ‘*See Excerpts from Attorney General’s New Guidelines for F.B.I. Investigations*, N.Y. TIMES, Mar. 8, 1983 at A12 (explaining the original 1973 F.B.I. Domestic Security Guidelines and the 1983 revisions).

16. Public Law 100-383 § 1 (1988), 102 Stat. 903, (codified as amended at 50 U.S.C.A. App. § 1989 (1990)).

17. *Id.* at 6.

18. S. 735, *supra* note 1.

19. Rather than undertake a detailed analysis of the proposed legislation in its entirety, this note

by the United States Senate on June 7, 1995. Next, Part III summarizes the present state of constitutional rights and procedural protections presently afforded to aliens. Based on this foundation, Part IV undertakes a critical evaluation of the secret evidence provisions in light of these rights, concluding with a workable solution.

II. CONGRESS' PROPOSED LEGISLATIVE SOLUTIONS

Originally introduced as part of the Clinton administration's response to the 1993 World Trade Center Bombing,²⁰ The Comprehensive Terrorism Prevention Act focuses on safeguards against international terrorist threats. Despite the wholly international focus of the legislation, it was an instance of domestic terrorism—the Oklahoma City bombing—which created the intense political pressure on Congress to enact The Comprehensive Terrorism Prevention Act.²¹

The proposed legislation creates a new special removal court to expeditiously remove aliens²² who are legally present in the United States. An alien qualifies for these new proceedings if he is believed to be part of an organization that has been designated a "terrorist organization" by the Secretary of State. Under the current anti-terrorism laws, the government possesses the power to deport any alien who engages in or supports terrorist activity.²³ Although, under current immigration law,²⁴ classes of aliens are simply defined as deportable,²⁵ the proposed legislation focuses on the deportation of a new class of aliens who are considered terrorists according to the

focuses on the provisions authorizing secret evidence to be used against an alien at a deportation hearing. ("Alien Terrorist Removal Procedures," S. 735, *supra* note 1, Title V § 503) [hereinafter *Secret Evidence Provision*].

20. The Omnibus Counterterrorism Act of 1995, H.R. 896, S. 390, 104th Cong., 1st Sess. (1995). Most of the provisions of this bill have been adopted by the Comprehensive Terrorism Prevention Act. S. 735, *supra* note 1.

21. Shortly after the bombing in Oklahoma City, President Clinton "prodded Congress to act swiftly on the bill, [he said] 'We must not dawdle or delay, Congress must act, and act promptly.'" CONG. Q., May 11, 1995, at 1180. In the same context, Senator Dianne Feinstein said, "I'm going to vote for everything because I think we need to take an unparalleled step in our society to put an end to this." CONG. Q., May 11, 1995, at 1180. Also, during the Senate floor debates on S. 735, Senators Hatch, Dole, Specter, Lieberman, and Daschle each emphasized the need to pass this legislation with urgency in light of the Oklahoma City Bombing. 141 CONG. REC. S7585, S7596, S7599, S7608 (daily ed. May 26, 1995). *Contra* Naftali Rendavid, *Of Primary Concern; Campaign Creeps Up On Senate Crime Bill*, LEGAL TIMES, July 17, 1995 at 1 (Senator Orrin Hatch expressing concerns with the urgency surrounding this legislation: "[W]e'd be better bringing [the bill] up next year . . . where we have some time to really consider it").

22. "The term 'alien' means any person not a citizen or national of the United States." 8 U.S.C.S. § 1101(a)(3) (1987).

23. "Any alien who has engaged, is engaged, or at any time after entry engages in any terrorist activity . . . is deportable." 8 U.S.C. § 1105(a)(4)(B) (1995). "Terrorist activity" is defined as any activity which is unlawful under the laws of the place where it is committed and involves any of the following, or a threat, attempt or conspiracy to do any of the following: Hijacking; threatening to kill, injure or continue to detain another individual in order to compel another person; violently attacking an internationally protected person; an assassination; using biological agents, chemical agents or nuclear devices; using an explosive or firearm with the intent to endanger the safety of one or more individuals or to cause substantial damage to property. 8 U.S.C. § 1182(a)(3)(B)(ii) (1994). Note, this definition remains intact under the proposed legislation. S. 735, *supra* note 1, § 303(a)(B)(ii).

24. Existing deportation proceedings are governed by 8 C.F.R. § 242 (1995) as authorized by 8 U.S.C.S. § 1252(b) (1987). *See also infra* Part III. B.

25. 8 U.S.C.S. §§ 1251(a)(4)-(7), (11), (12), (14)-(17), (18), and (19)(1987). The classes of deportable aliens include: Anarchists; advocates of opposition to government; affiliates of Communism; narcotic drug addicts and prostitutes, among others. Ironically, this statute authorizes the deportation of an alien who has "ordered, incited, assisted, or otherwise participated in the persecution of any person because of race, religion, national origin, or political opinion." *Id.* § 1251(a)(19).

Secretary of State. Furthermore, unlike current immigration proceedings, the new special removal court allows these aliens to be deported without being informed of the government's evidence against them. This legislation allows the government to use secret evidence against an alien to ultimately deport them from this country.

The secret evidence provision is the result of an attempt to reconcile two competing concerns. First, Congress is concerned with safety risks which may endanger national security, particularly retaliatory action from a terrorist group against confidential informants. Second, however, is the dual recognition that persons accused at hearings have a right to confront the evidence against them. The Comprehensive Terrorism Prevention Act purports to reach a compromise between these competing interests by allowing the government to use secret evidence without exposing confidential information while requiring the government to provide a summary of the classified information to the alien.

A. The Secret Evidence Provisions of The Comprehensive Terrorism Prevention Act

Less than two months after the Oklahoma City bombing, the Senate overwhelmingly approved The Comprehensive Terrorism Prevention Act²⁶ upon a vote of 91 yeas to 8 nays.²⁷ Described as "[a] bill to prevent and punish acts of terrorism,"²⁸ this legislation purports to "add[] important tools to the Government's fight against terrorism . . . in a temperate manner that is protective of civil liberties," thereby attempting to reconcile these competing interests.²⁹

The bill creates a new designation, a "terrorist organization," which is defined as "an organization that engages in, or has engaged in, terrorist activity as designated by the Secretary of State, after consultation with the Secretary of the Treasury."³⁰ Once deemed part of any such terrorist organization, an alien is labeled an "alien terrorist" for the purpose of the newly created "Alien Terrorist Removal Procedures."

Under the proposed Alien Terrorist Removal Procedures, a "Special Removal Hearing" is provided for any alien who, if deported in the present fashion,³¹ would "pose a risk to the national security of the United States because such proceedings would disclose classified information."³² In these hearings, five federal judges, chosen

26. S. 735, *supra* note 1.

27. 141 CONG. REC. S7857 (daily ed. June 7, 1995) [Rollcall Vote No. 242 Leg.].

28. 141 CONG. REC. S7479 (daily ed. May 25, 1995).

29. *Id.* (statement of Senator Hatch).

30. S. 735, *supra* note 1, § 210(2)(iv) (defining terrorist organizations for the explicit purpose of exclusion from the United States). Defining these organizations as excludable, in effect, also defines them as deportable. 8 U.S.C. § 1227 (1995) (Any excludable alien shall be immediately deported).

31. Under current law, the government may introduce classified information at deportation hearings, provided it is relevant. Alternatively, the government may provide an unclassified summary of the information whenever it can do so. Said summary should provide the alien an opportunity to offer opposing evidence. 8 C.F.R. § 242.17(c)(4)(iv) (1995). Further, "[t]he Immigration Judge shall . . . advise the respondent that he will have a reasonable opportunity to examine and object to the evidence against him . . . and to cross-examine witnesses presented by the Government" 8 C.F.R. § 242.16(a). On the other side, the alien has a right to obtain all information compiled against him *except*: 1) matters that are secret by executive order in the interest of national policy, and 2) matters that are "classified pursuant to such an executive order." 5 U.S.C.A. § 552(b)(1) (1977) ("The Freedom of Information Act").

32. S. 735, *supra* note 1, §§ 503(a) & (e).

by the Chief Justice of the United States, hear and decide these cases.³³ The government must prove their case by a clear and convincing evidence standard.³⁴ The alien is given the right to an attorney at the expense of the government,³⁵ and illegally obtained evidence is admissible against the alien.³⁶

At this special removal hearing, the alien has a "reasonable opportunity to cross-examine any witness"³⁷ except when the judge determines that to do so would disclose classified information.³⁸ In such instances, a summary of the classified evidence shall be prepared in a manner sufficient "to provide the alien with substantially the same ability to make his defense as would disclosure of the classified information."³⁹

If a summary of classified information does not meet this standard, then the hearing is terminated unless the following three criteria are met:⁴⁰ 1) the alien's continued presence in the United States would likely cause serious and irreparable harm to the national security or death or serious bodily injury to any person; 2) any summary prepared according to the standard above,⁴¹ if revealed, would likely cause the same harm or injury; and 3) a summary is provided which is "adequate to allow the alien to prepare a defense."⁴²

B. Analysis of The Comprehensive Terrorism Prevention Act

1. Syntactical Analysis of Secret Evidence Provision

The Comprehensive Terrorism Prevention Act provides that an alien who is suspected of associating with a terrorist organization, and suspected of being a risk to national security, has a right to see a summary of the government's case against him. But, since the legislation fails to explain the scope of this right, this guarantee is hollow.

Before the new removal procedures are initiated, a group must be declared a "terrorist organization."⁴³ The importance of this determination cannot be underestimated. The proposed Comprehensive Terrorism Prevention Act defines "terrorist orga-

33. S. 735, *supra* note 1, § 503(c)(1).

34. S. 735, *supra* note 1, § 503(f).

35. S. 735, *supra* note 1, § 503(e)(2).

36. S. 735, *supra* note 1, §§ 503(e)(4)(A)(ii) & 503(e)(4)(B). *See also* Immigration & Naturalization Serv. v. Lopez-Mendoza, 468 U.S. 1032, 1040-50 (1984) (exclusionary rule does not apply to current deportation proceedings).

37. S. 735, *supra* note 1, § 503(e)(3).

38. "The judge shall authorize the introduction in camera and ex parte of any evidence for which the Attorney General determines that public disclosure would pose a risk to the national security of the United States because it would disclose classified information." S. 735, *supra* note 1, § 503(e)(C)(5).

39. S. 735, *supra* note 1, § 503(e)(C)(6)(B). The Secret Evidence Provision originated as the Specter-Simon-Kennedy Amendment for the explicit purpose of ensuring due process in deportation proceedings. S. 735, *supra* note 1, §§ 503(e)(C)(6)(B)-(G); 141 CONG. REC. S7761-63, S7765-66, S7773 (daily ed. June 6, 1995).

40. S. 735, *supra* note 1, § 503(e)(6)(E).

41. A summary of the classified evidence shall be prepared in a manner sufficient "to provide the alien with substantially the same ability to make his defense as would disclosure of the classified information." S. 735, *supra* note 1, § 503(e)(B).

42. S. 735, *supra* note 1, § 503(e)(6)(E)(iii).

43. A "terrorist organization" is defined as "an organization that engages in, or has engaged in, terrorist activity as designated by the Secretary of State, after consultation with the Secretary of the Treasury." S. 735, *supra* note 1, § 210(2)(iv).

nization" as whatever organization the Secretary of State determines has threatened, attempted or conspired to commit an unlawful act.⁴⁴ In effect, this bill affords broad, unchecked implementation power solely to the Secretary of State, a presidentially-appointed cabinet member.⁴⁵ The requisite unlawful act is limited only to a broad range of acts that are specified in a list of "terrorist activities."⁴⁶

Although the bill fails to provide specific requirements of the summary of classified information, the scope of this provision is indicated by the actual language of the bill. By comparing the later description of the guaranteed summary to the earlier mention of the substitute summary, the varying standards surface. The bill initially explains that the summary of the classified information to be used against the alien shall "provide the alien with the same ability to make his defense as would disclosure of the classified information." Later language clarifies that the required summary must only be "adequate to prepare a defense."⁴⁷ The initial heightened-standard summary's relevance is unclear in light of the subsequent language which guarantees only the lower-standard summary.

The burden the government must meet before denying an alien a heightened-standard summary, providing him with the same ability to make his defense as would disclosure of the classified information, is ambiguous. The criteria that must be met before the bill permits a lower-standard summary⁴⁸ to be acceptable are:⁴⁹ 1) the alien's continued presence in the United States would likely cause serious and irreparable harm to the national security or death or serious bodily injury to any person; and 2) any summary prepared according to the heightened standard,⁵⁰ if revealed, would likely cause the same harm or injury. Although the language indicates that the lower-standard summary will be substituted only after these specific conditions are fulfilled, a close reading of these two criteria indicates otherwise. This obscurity suggests that these conditions could be quite easily satisfied by even a vague showing of alleged future harm or injury, thereby indicating that the specified criteria are, in fact, quite liberal.

The language of the secret evidence provision is confusing. The question of whether the summary must contain painstaking details or few generalities remains unsettled. Furthermore, the precise procedures for presenting the summary are unan-

44. See *supra* note 23 (defining "terrorist activity" which is incorporated as part of the "terrorist organization" definition in S. 735).

45. The Secretary of State is required to consult with the Secretary of the Treasury, another presidentially-appointed cabinet member, before designating a group to be a "terrorist organization." S. 735, *supra* note 1, § 210(2)(iv).

46. The list includes any of the following, or a threat, attempt or conspiracy to do any of the following: Hijacking; threatening to kill, injure or continue to detain another individual in order to compel another person; violently attacking an internationally protected person; an assassination; using biological agents, chemical agents or nuclear devices; using an explosive or firearm with the intent to endanger the safety of one or more individuals or to cause substantial damage to property. 8 U.S.C. § 1182(a)(3)(B) (1994).

47. S. 735, *supra* note 1, §§ 503(e)(C)(6)(B) & 6(E)(iii); see *supra* text accompanying note 40 (explaining the three conditions that must be satisfied before the standard for the requisite summary is adjusted from a heightened standard to a lower standard).

48. A lower-standard summary must only be "adequate to allow the alien to prepare a defense. S. 735, *supra* note 1, § 503(e)(6)(E)(iii).

49. S. 735, *supra* note 1, § 503(e)(6)(E).

50. A heightened-standard summary of the classified evidence shall be prepared in a manner sufficient "to provide the alien with substantially the same ability to make his defense as would disclosure of the classified information." S. 735, *supra* note 1, § 503(e)(6)(B).

swered. Whether the procedures allow oral argument over the summary or whether the document is submitted without question is unspecified by this legislation; these questions are critical to an evaluation of the degree of rights actually afforded to the alien in these new proceedings.

2. Legislative Intent Analysis

Although the language of this provision is vague, the Senate's intentions are unambiguous. The Senate's intent behind the language of the new removal procedures was to ensure 1) that aliens are informed of the charges against them, and 2) that aliens are afforded an opportunity to confront the evidence against them. Senator Arlen Specter, a sponsor of the bill, expressed "very grave concerns about the constitutionality of any deportation proceeding in which secret evidence is used and there is not a right of confrontation."⁵¹ To alleviate these concerns, he sponsored an amendment "to ensure due process in deportation proceedings" which was incorporated into The Comprehensive Terrorism Prevention Act.⁵² Adding to Senator Specter's concerns, Senator Joseph Biden denounced secret evidence provisions and praised procedural protections while successfully urging members of the Senate to pass this legislation:

I do not think people fully understand how significant this [provision] is. [T]he dangers posed by secret evidence are neither hypothetical nor are they imagined. Secret evidence runs counter to all the principles underlying due process of law and our judicial system, and it cheapens our system by placing in doubt the accuracy of its decision.⁵³

To demonstrate the gravity of his concerns, Senator Biden shared a story with his colleagues in the Senate about an American soldier's German bride. She was excluded from the United States on the grounds she was a national security risk. Initially, the government's evidence against her was not revealed. Ultimately, when the secret evidence was revealed it proved to be wholly unfounded. In fact, the most substantive of the allegations were derived from an estranged lover. Once able to confront and refute this faulty evidence, the bride was admitted to the United States.⁵⁴ By telling this story, Senator Biden illustrated the tragic consequences of depriving an accused person the opportunity to prepare a defense through use of secret evidence which may be uncorroborated and unreliable.

Senator Specter and Senator Biden's dissatisfaction with due process inadequacies as described above were raised in objection to an early version of The Comprehensive Terrorism Prevention Act which did not include any provisions for a required summary.⁵⁵ In this context, the addition of any form of summary provisions constituted tantamount progress. The Senators' initial constitutional concerns were alleviated upon passage of The Comprehensive Terrorism Prevention Act by the United States

51. 141 CONG. REC. S7760 (daily ed., June 6, 1995) (statement of Senator Specter).

52. *Id.* The Specter-Simon-Kennedy amendment includes the Secret Evidence Provision. See S. 735, *supra* note 1, §§ 503(e)(C)(6)(B)-(G).

53. 141 CONG. REC. S7762 (daily ed., June 6, 1995) (statement of Senator Biden).

54. *Id.* For the full version of Senator Biden's true story, see *Knauff v. Shaughnessy*, 338 U.S. 537 (1950). See also Charles D. Weisselberg, *The Exclusion and Detention of Aliens: Lessons from the Lives of Ellen Knauff and Ignatz Mezei*, 143 U. PENN. L. REV. 933 (1995). Although this case involves exclusion, not deportation, the story illustrates the dangers of allowing the government to use secret evidence in immigration proceedings.

55. See S. 390, 104th Cong., 1st Sess. (1995) (introduced February 10, 1995).

Senate on June 7, 1995,⁵⁶ which guarantees a summary of the classified information to the alien.

3. Legislative Language that Conflicts with Legislative Intent

Contrary to the Senators' assurances that due process had, in fact, been satisfied, the language of The Comprehensive Terrorism Prevention Act suggests otherwise. The undefined standards of "injury to any person"⁵⁷ and continued presence which "would likely cause irreparable harm,"⁵⁸ plus the possibility of conducting a deportation hearing based upon a lower-standard summary⁵⁹ which must only meet the unspecified criteria of "adequate to . . . prepare a defense,"⁶⁰ create ambiguity and, therefore, dilute any protections set forth in the legislation. Based on this tenuous foundation, the secret evidence provisions seem inadequate to satisfy the protections explicitly set forth by Senator Specter and Senator Biden, should this bill become law.⁶¹ During the Senate floor debate on The Comprehensive Terrorism Prevention Act, Senator Biden explained the injustices inflicted upon an American soldier's wife to illustrate the inherent problems involved when immigration decisions are based upon secret evidence.⁶² Ironically, the same uncorroborated statements erroneously relied upon to exclude the soldier's wife could be relied upon to deport legal resident aliens under the secret evidence provision as presently drafted.

III. CONSTITUTIONAL RIGHTS OF ALIENS

Immigration law was structured in light of wartime considerations, therefore these laws antagonistically pitted United States citizens against enemy aliens.⁶³ Despite changed fears, immigration law is still based on these premises, thereby resulting in modern-day xenophobic laws. Congress granted administration and enforcement responsibilities of immigration law to the Attorney General, who has since delegated authority to the Commissioner of the Immigration and Naturalization Service.⁶⁴ In doing so, Congress explicitly left immigration law outside the reach of constitutional protections.⁶⁵ Therefore, because immigration law governs aliens' ability to remain in

56. S. 735, *supra* note 1.

57. S. 735, *supra* note 1, §§ 503(e)(6)(E)(i)(II) & 503(e)(6)(E)(ii)(II).

58. S. 735, *supra* note 1, §§ 503(e)(6)(E)(i)(I) & 503(e)(6)(E)(ii)(I).

59. See *supra* text accompanying notes 39-42 (explaining the two standards for summaries of classified information as set forth in S. 735, *supra* note 1).

60. S. 735, *supra* note 1, § 503(e)(6)(E)(iii).

61. Perhaps to compensate for this reduction in rights, S. 735 expressly increases the alien's right to counsel by providing a government paid attorney for the alien. S. 735, *supra* note 1, § 503(e)(2). Compare 8 C.F.R. § 242.16 (1995) (current deportation procedures afford the alien the right to be represented by counsel at no charge to the government).

62. *Supra* Part II.B.2.

63. See *Johnson v. Eisentrager*, 339 U.S. 763 (1950).

64. United States Government Manual 388, 391 (1994-95).

65. The so-called Plenary Power doctrine granted full power over immigration law to the federal government. This power is not enumerated in the Constitution. See *Chae Chan Ping v. United States*, 130 U.S. 581 (1889) (extending federal control over immigration, specifically exclusion) (often referred to as the Chinese Exclusion case); *Fong Yue Ting v. United States*, 149 U.S. 698 (1889) (extending Chinese Exclusion to deportation proceedings); Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L. J. 545 (1990) (discussing the Plenary power doctrine's current vitality); Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and its Progeny*, 100 HARV. L. REV. 853, 861 (1987) (criticizing the oppressive nature of the Plenary Power doctrine).

this country, protections of aliens' rights are less than citizens' rights under the United States Constitution.⁶⁶ Nonetheless, fundamental rights of aliens are recognized by the United States Supreme Court.⁶⁷ The following section illustrates the overall scope of constitutional rights afforded to aliens. Then, the superseding section explains rights presently afforded to aliens in deportation hearings under present legislation in conjunction with standards set by the United States Supreme Court.

A. Rights Presently Afforded to Aliens

1. Varying Degrees of Aliens' Rights

In *Johnson v. Eisentrager*, the United States Supreme Court described the overall realm of aliens' rights: "[T]he alien . . . [is] accorded a generous and ascending scale of rights as he increases his identity with our society."⁶⁸ The Court explained that permitting an alien to be present in this country implies protection of that alien; this protection does not extend to aliens who have no territorial connection with this country.⁶⁹ Based on the Court's reasoning, it follows not only that aliens' rights are acknowledged by the Court, but also that resident aliens are viewed under a heightened standard as compared to non-resident aliens.⁷⁰ In general, the Court demands protection of constitutional rights of aliens, not only of resident aliens, but also of non-resident and illegal aliens.⁷¹

For example, in *United States v. Verdugo-Urquidez*,⁷² the Court articulated specific outer boundaries of constitutional protections. The Court held that the Fourth Amendment does not protect property located in a foreign country owned by a nonresident alien.⁷³ The Court reasoned that because of the alien's lack of voluntary attachment to the United States, and because the property involved was located in a foreign country, the United States Constitution offered him no protection. Other examples are the *Insular Cases* where the Court held that not every constitutional provision applies to governmental activity even in geographical regions where the United States has sovereign power.⁷⁴ "Only 'fundamental' constitutional rights are guaranteed to inhab-

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

67. This note does not address rights of illegal aliens.

68. *Eisentrager*, 339 U.S. at 770.

69. *Id.* at 777-78.

70. *Id.*

71. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 270-71 (1990) (listing cases which establish that illegal and legal aliens receive certain constitutional protections).

72. *Verdugo-Urquidez*, 494 U.S. at 259.

73. *Id.* at 274-75; see also *Eisentrager*, 339 U.S. at 763 (rejecting the extraterritorial application of the Fifth Amendment). But see *Reid v. Covert*, 354 U.S. 1, 7 (1957) ("[C]onstitutional protections for the individual were designed to restrict the United States Government when it acts outside of this country, as well as here at home.").

74. The *Insular Cases* as cited in *Verdugo-Urquidez*, 494 U.S. at 268, include *Balzac v. Porto Rico*, 258 U.S. 298 (1922) (Sixth Amendment right to jury trial inapplicable in Porto Rico); *Ocampo v. United States*, 234 U.S. 91 (1914) (Fifth Amendment Grand Jury provision inapplicable in Philippines); *Dorr v. United States*, 195 U.S. 138 (1904) (jury trial provision inapplicable in Philippines); *Downes v. Bidwell*, 182 U.S. 244 (1901) (Revenue Clauses of Constitution inapplicable to Porto Rico); *Hawaii v. Mankichi*, 190 U.S. 197 (1903) (provisions on indictment by grand jury and jury trial inapplicable in Hawaii).

itants of those territories."⁷⁵

In *Verdugo-Urquidez* and the *Insular Cases*, the Court articulated two important distinctions: 1) extraterritorial from territorial rights, and 2) nonresident aliens from resident aliens. Although the Court has been reluctant to recognize nonresident aliens' rights in foreign countries, the Court respects the rights of resident aliens in the United States who have demonstrated "voluntary attachment" to the United States: "Mere lawful presence in the country creates an implied assurance of safe conduct and gives him certain rights."⁷⁶ Resident aliens seem to demonstrate voluntary attachment to the United States by residing here, thereby satisfying the Fourth Amendment test articulated in *Verdugo-Urquidez*. This level of protection, therefore, should readily be extended to the more general constitutional rights. In fact, as early as 1886, the Court, reinforcing this reasoning, explicitly held that the due process clauses of the Fourteenth Amendment⁷⁷ protects resident aliens.⁷⁸ The Court describes these provisions of the Fourteenth Amendment as "universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality."⁷⁹ Then, in 1896, the Court declared that aliens are entitled to Fifth and Sixth Amendment rights: "[E]ven aliens shall not be held to answer for a capital or other infamous crime, unless on a presentment or indictment of a grand jury, nor be deprived of life, liberty or property without due process of law."⁸⁰ In addition to the Court's consistent recognition of resident aliens' due process protections, the Court acknowledged, in 1945, that resident aliens also have First Amendment rights.⁸¹

2. The Hierarchy of Constitutional Rights

The language of the Constitution describes the beneficiaries of the Fifth and Fourteenth Amendments as "persons."⁸² In contrast, those described in the First, Second, Fourth, Ninth and Tenth Amendments are "the people."⁸³ Although this syntactical ambiguity is by no means conclusive, such distinctions suggest the varying scopes of protections afforded under the Amendments. The Fifth Amendment's "person" category is universal and inclusive, while remaining Amendments, through use of "the people," create a more limited category.⁸⁴

In 1953, the Court used this legislative construction analysis in concluding that a

75. *Verdugo-Urquidez*, 494 U.S. at 268 (citing *Dorr*, 195 U.S. at 148).

76. *Eisentrager*, 339 U.S. at 770.

77. U.S. CONST. amend. XIV ("Nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.").

78. *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886).

79. *Id.*

80. *Wong Wing v. United States*, 163 U.S. 228, 238 (1896) (This statement was made in the context of aliens within the territorial jurisdiction of the United States.)

81. *Bridges v. Wixon*, 326 U.S. 135, 148 (1945).

82. U.S. CONST. amends. V, XIV. The Sixth Amendment uses the language "accused" which has been construed similarly to "person" under the Fifth and Fourteenth Amendments.

83. *Id.* amends. I, II, IV, IX, X; see also *id.* Art. I, § 2, cl. 1 ("The House of Representatives shall be composed of Members chosen every second Year by the People of the several States") (emphasis added).

84. See, e.g., *Verdugo-Urquidez*, 494 U.S. at 265-66, 269; see also *United States ex rel. Turner v. Williams*, 194 U.S. 279, 292 (1904) (The First Amendment does not apply to excludable alien because he is not "one of the people to whom these things are secured by our Constitution") (emphasis added); Louis Henkin, *The Constitution as Compact and as Conscience: Individual Rights Abroad and at Our Gates*, 27 WM. & MARY L. REV. 11, 14-15 (1985).

resident alien is a "person" within the meaning of the Fifth Amendment,⁸⁵ thereby reinforcing its earlier decisions extending due process to resident aliens. Furthermore, the Court, when refusing to extend the Fourth Amendment's protections in *Verdugo-Urquidez*, noted that "[the Fourth Amendment] operates in a different manner than the Fifth Amendment."⁸⁶ In addition, the Court expressly noted that the Fifth Amendment was not at issue in *Verdugo-Urquidez*, thereby distanced its restrictive interpretation of the Fourth Amendment from the Fifth Amendment. These sharp distinctions reinforce the hierarchical distinction between broad due process protections and the other constitutional provisions, as indicated by their language. In sum, the Court has established that resident aliens in the territorial United States are afforded some rights, at the very least. Therefore, aliens must be protected by the most basic procedural shields of due process under present law.

B. Constitutional Rights Presently Afforded to Aliens at Deportation Hearings

Since Congress explicitly left immigration law outside the reach of constitutional protections,⁸⁷ the applicability of even the most fundamental constitutional due process protections is less clear. Furthermore, although liberty interests are at stake, deportation proceedings are civil, not criminal,⁸⁸ therefore, the guaranteed criminal procedural protections do not apply to deportation hearings.⁸⁹

But, in 1903, the United States Supreme Court acknowledged that due process applies to aliens in the deportation context: "[T]his court has never held . . . that administrative officers, when executing the provisions of a statute involving the liberty of persons, may disregard the fundamental principles that inhere in 'due process of law'"⁹⁰ Then, in 1993, the Court explicitly expanded this principle: "It is well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings."⁹¹ Although this decision affirmed the extenuation of fundamental procedural rights for aliens in deportation proceedings, the specific application of this due process guarantee has been the subject of much debate.⁹²

The United States Supreme Court extends minimal due process requirements, specifically the right of confrontation, not only to criminal procedure, but also to administrative and regulatory hearings.⁹³ Due process requires an adequate hearing including the opportunity to confront and cross-examine adverse witnesses.⁹⁴ Although

85. *Kwong Hai Chew v. Colding*, 344 U.S. 590, 601 (1953) (An alien's "status as a person within the meaning and protection of the Fifth Amendment cannot be capriciously taken from him.").

86. *Verdugo-Urquidez*, 494 U.S. at 264.

87. *Supra* note 63 (discussing the Plenary Power doctrine).

88. *Hirsiades v. Shaughnessy*, 342 U.S. 580, 594 (1952) (citations omitted).

89. *See, e.g., Carlson v. Landon*, 342 U.S. 524 (1952) (no bail requirement); *Trias-Hernandez v. Immigration & Naturalization Serv.*, 528 F.2d 366, 368 (9th Cir. 1975) (Miranda warnings are not required).

90. *Yamataya v. Fisher*, 189 U.S. 86, 100 (1903) (this case is often referred to as *The Japanese Immigrant Case*). *But see Fong Yue Ting*, 149 U.S. at 707 (equating deportation powers with exclusionary powers, describing both as "absolute and unqualified" rights of the federal government).

91. *Reno v. Flores*, 113 S. Ct. 1439, 1449 (1993); *accord Landon v. Plasencia*, 459 U.S. 21, 32-34 (1982); *Kwong Hai Chew*, 344 U.S. at 596-97, 602.

92. *See, e.g., Jim Rosenfeld, Deportation Proceedings and Due Process of Law*, 26 COLUM. HUM. RTS. L. REV. 713 (1995) (tracing this debate from the Alien Acts of 1798 to early versions of Congress's 1995 proposed legislation).

93. *Greene v. McElroy*, 360 U.S. 474, 496-97 (1959).

94. *Goldberg v. Kelly*, 397 U.S. 254 (1970) (explaining due process requirements for an adequate

"due process is flexible, subjective, difficult to determine,"⁹⁵ the Court explicitly guarantees, at the very least, some degree of procedural protections to aliens in deportation hearings. The minimum basic protection in the context of a hearing is the accused's right to confront the evidence against him or her.⁹⁶ Therefore, according to the aforementioned United States Supreme Court decisions, aliens must, *at the very least*, be afforded the right of confrontation.

In accordance with the Court's guarantees, legislation governing present-day deportation hearings explicitly provides the alien with the right to confront opposing evidence.⁹⁷ In addition, the alien "shall be given notice . . . of the nature of the charges against him"⁹⁸ and the alien "shall have the privilege of being represented (at no expense to the Government) by . . . counsel"⁹⁹ Although not expressly required to do so under the United States Constitution, current deportation legislation provides aliens more than the minimal due process guarantees.

IV. ANALYSIS OF THE COMPREHENSIVE TERRORISM PREVENTION ACT IN LIGHT OF ALIENS' EXISTING RIGHTS

Congress' attempt to reconcile the competing concerns of national security risks with aliens' right to confront evidence resulted in the secret evidence provisions. Without further elaboration, the language of this bill is open to varying interpretations with varying results. Without explicit constitutional guarantees,¹⁰⁰ aliens are susceptible to restrictions on their rights imposed by legislation, limited only by rights explicitly established by the United States Supreme Court. Therefore, the importance of procedural protections afforded to aliens through legislation cannot be underestimated. The secret evidence provisions in The Comprehensive Terrorism Prevention Act constitute an intolerable deprivation of procedural rights. There are two chief concerns with the proposed Act: First, the procedures for determining who is an alien terrorist, and second, the lower-standard summary of classified information provided to the alien to prepare a defense. The following sections explain these concerns and then discuss the long-term ramifications.

A. The Alien Terrorist Determination

The proposed Comprehensive Terrorism Prevention Act gives the Secretary of State, a presidentially-appointed cabinet member, full discretion in defining "terrorist organization."¹⁰¹ Under the proposed Comprehensive Terrorism Prevention Act, an entire group of people might be officially classified as a "terrorist organization" based upon no more than one unlawful act committed by one of its members. As a result of

hearing for the termination of welfare benefits). *But see* Wolff v. McDonnell, 418 U.S. 539, 568-69 (1974) (limiting availability of cross-examination in prison hearings).

95. *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

96. *See* Kenneth Culp Davis, *The Requirement of a Trial-Type Hearing*, 70 HARV. L. REV. 193, 213-14 (1956) (explaining the need for confrontation and the dangers of "faceless" informers).

97. "The Immigration Judge shall . . . advise the respondent that he will have a reasonable opportunity to examine and object to the evidence against him . . . and to cross-examine witnesses presented by the Government" 8 C.F.R. § 242.16(a) (1995).

98. 8 U.S.C. § 1252(b)(1) (1995).

99. *Id.* § 1252(b)(2); *see also* 8 C.F.R. § 242.16(a) (alien shall be advised of available free legal services programs).

100. *See supra* note 65.

101. S. 735, *supra* note 1, § 210(2)(iv).

this classification, each alien member would be considered an "alien terrorist" for the purposes of the new Alien Terrorist Removal Procedures.¹⁰² In any circumstance where the government has evidence, whether weighty or inadequate, indicating that an alien is a member of an organization which the Secretary of State has declared a "terrorist organization,"¹⁰³ the government may initiate Alien Terrorist Removal Procedures against that alien. These procedures provide for the expedited removal of an alien based on the government's secret evidence. Under this legislation, politically unpopular groups may be singled out, and, based upon nothing more than their status as aliens and the Secretary of State's designation of an organization to which they belong, law-abiding resident aliens may be deported.

B. The Substitute Lower-Standard Summary

1. The New Procedure

Although it is not uncommon for some types of hearings to provide less procedural safeguards than a criminal trial, the secret evidence provision, providing that a written summary may be substituted for classified information, contains an even lower level of protection. For example, in bail hearings, the Rules of Evidence do not apply and hearsay evidence is admissible.¹⁰⁴ Although admitting hearsay evidence may limit defendants' opportunities to cross-examine the evidence against them at bail hearings, admitting substitute written summaries *eliminates* the aliens' opportunity to cross-examine evidence against them. The opportunity to call a live witness to testify gives criminal defendants an opportunity to challenge the witness's credibility and explore the issue. In contrast, under the summary provision of The Comprehensive Terrorism Prevention Act, aliens are forced to accept a summary of the evidence against them without dispute. In effect, by allowing the government to present their entire case in a written summary, The Comprehensive Terrorism Prevention Act nullifies the fundamental procedural guarantee of the right to confront opposing evidence outlined by the United States Supreme Court¹⁰⁵ and followed in present-day legislation governing deportation hearings. Although the language of the secret evidence provision requires the lower-standard summary to be adequate to allow the alien to prepare a defense, the procedures deny aliens any opportunity to confront evidence against them.

In the secret evidence provision, not only are the procedural safeguards lower

102. See also David Cole, *The Politics of Crime Makes for Strange Bedfellows*, CONN. L. TRIB., Nov. 15, 1993, at 25 (discussing early opposition to these and other similar provisions which were later adopted by The Comprehensive Terrorism Prevention Act).

103. This determination, which underlies the alien removal procedures, rests wholly with the Secretary of State, restrained only by a "consultation with the Secretary of the Treasury." This legislation includes no procedures by which an alien terrorist could appeal this determination. S. 735, *supra* note 1, § 210(2)(iv).

104. The Bail Reform Act of 1984, 18 U.S.C. § 3141 (1994). In contrast with The Comprehensive Terrorism Prevention Act, note the increased procedural safeguards provided for defendants in bail hearings, including: detention hearing must be prompt; findings of fact must be in writing; appellate review is expedited; right to counsel at government's expense; and defendant's ability to cross-examine witnesses. See also *United States v. Salerno*, 481 U.S. 739 (1987) (explaining these procedural safeguards).

105. See *Jay v. Boyd*, 351 U.S. 345 (1956) (upholding the use of secret evidence in exclusion case, but expressly stating secret evidence may not be used in deportation proceedings); *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 171-72 (1951) (Frankfurter, J., concurring) ("Secrecy is not congenial to truth-seeking . . .").

than those provided for defendants in bail hearings, but the consequences of a deportation hearing are also more severe. Following a bail determination, the defendants are given another opportunity to be heard, with full range of procedural protections, at a criminal trial. In contrast, following the deportation hearing, aliens are not given an opportunity to defend themselves; rather, they must leave the United States.

2. *The Contents of the Substitute Summary*

The language of The Comprehensive Terrorism Prevention Act reads as if openness is the rule and secrecy is the exception, and as if heightened-standard summaries¹⁰⁶ are the rule and lower-standard summaries¹⁰⁷ are the exception. In effect, however, the boundless "exceptions" allow the "rules" to be circumvented with ease. As discussed in Part II.B.1, the prerequisites which must be fulfilled before heightened-standard summaries are bypassed, are ambiguous and provide little protection to the alien.¹⁰⁸ A mere recitation of even the most vague allegations seem to satisfy the ambiguous threshold set forth in the language of this bill. As a result, the purported rules become suggestions, dramatically lowering the standards of protection afforded to aliens, in addition to undermining legislative intent behind this legislation.

A lower-standard summary may, in fact, allow an alien to prepare a defense, but it does not offer the alien substantially the same ability as full disclosure of classified information. By dramatically lowering the standard for the requisite summary, the bill deprives aliens of the right to confront evidence against them, and leaves open the question of whether aliens will be informed of any charges against them when they are subject to deportation proceedings. Although this legislation specifies that the summary presented to the alien must be "adequate to allow the alien to prepare a defense,"¹⁰⁹ this legislation does not explain how, without any indication of the government's accusations, an alien could possibly prepare any defense at all.

C. *The Potential Ramifications of The Secret Evidence Provision*

Though countless explanations for the passage of the secret evidence provisions are feasible, none are sufficient. Perhaps due to misguided anti-terrorist passions, or perhaps due to politics, the Senate passed a bill which potentially undermines fundamental procedural protections. The assurances of fairness and justice were taken away in the name of national security, for the purposes of combating the modern-day enemy. If history is a fair indicator, the consequences of this legislation, if enacted, will not be widely understood until after substantial damage is done.¹¹⁰

Despite political rhetoric to the contrary, this proposed legislation fails to guarantee aliens the most fundamental due process right: The right of confrontation. Without procedural protections, the government is free to unilaterally accuse and administer punishment.¹¹¹ The persons whose rights are subject to the newfound vulnerability

106. The heightened-standard summary must "provide the alien with substantially the same ability to make his defense as would disclosure of the classified information." S. 735, *supra* note 1, § 503(e)(6)(B).

107. The lower-standard summary must be "adequate to allow the alien to prepare a defense." S. 735, *supra* note 1, § 503(e)(6)(E)(iii).

108. For the list of these prerequisites, see *supra* text accompanying notes 39-42.

109. S. 735, *supra* note 1, § 503(e)(6)(E)(iii).

110. See *supra* Part I.

111. In the context of these provisions, the punishment is deportation.

under The Comprehensive Terrorism Prevention Act include aliens who are legally residing in the United States. Although an argument can be made that such aliens' rights are, and should be, less than rights of citizens, the United States Supreme Court, as discussed earlier, has determined that aliens are afforded fundamental procedural rights, including the right to confront evidence against them. Furthermore, permitting an alleged terrorist to confront evidence does not undermine the government's case against him. Alternatively, procedural protections simply ensure the innocent will not be deported without justification from the United States government.¹¹²

The legal reasoning behind The Comprehensive Terrorism Prevention Act is an invalid syllogism.¹¹³ The secret evidence provisions are based upon a logical fallacy: Some terrorists are foreigners, therefore all foreigners are terrorists. Such an underlying premise is not only incoherent, but also offensive to the integrity of the principle of legality.¹¹⁴ Generalizations about what people may do based solely upon their status as an alien intimidates aliens based only upon the belief that foreigners *may* be terrorists.

Terrorism is defined as the "use of violence and threats to intimidate or coerce, esp[ecially] for political purposes."¹¹⁵ Since no legitimate goals are served by punishing a person who is not culpable and did not act in violation of any laws,¹¹⁶ it follows that this type of punishment is administered for the purpose of intimidating or coercing. In other words, this legislation proposes a terrorist solution which undermines the impartiality and legitimacy of the rules of law.¹¹⁷ The Comprehensive Terrorism Prevention Act enables the government to use secret evidence in new deportation proceedings to intimidate and coerce aliens based upon ideological and political fears of foreigners who may be terrorists. Such policy is reminiscent of Japanese-American internment camps and widespread infiltration of organizations suspected of Communist sympathies.¹¹⁸ In effect, the Senate passed a bill which repeated recognized historic mistakes; the Senate passed a bill which undermined the principle of legality.

V. REDRAFTING THE LEGISLATION

Although supporters of this bill assert its fairness and its effectiveness in both combating terrorism and protecting national security, opponents remain concerned with civil rights abuses.¹¹⁹ The prevention of terrorist attacks is a goal clearly supported

112. See *supra* notes 7-11 and accompanying text (explaining the importance of procedural protections to preserve the legitimacy of our judicial system).

113. See generally, Edwin W. Patterson, *Logic in the Law*, 90 U. PENN. L. REV. 875 (1942) (applying the psychology of problem-solving to legal analysis, including formal and instrumental logic).

114. See *supra* notes 7-11 and accompanying text.

115. THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1960 (2nd. ed. 1987).

116. The legitimate goals served by punishment are prevention, restraint, rehabilitation, deterrence, education and retribution. See WAYNE R. LAFAYE & AUSTIN W. SCOTT, JR., CRIMINAL LAW 21-25 (1972).

117. See *supra* notes 7-11 and accompanying text (explaining the rules of law).

118. See *supra* Part I (explaining instances of extreme actions taken by the United States government in the name of national security which have since been recognized as wrong).

119. See, e.g., Benjamin Wittes, *Immigrants, Civil Libertarians Unite; Clinton Anti-Terrorism Bill Angers Rights Groups*, LEGAL TIMES, Mar. 13, 1995, at 2; Representative Schumer, *Editorial: Life and Liberty*, N.Y. TIMES, April 28, 1995 at A33; Holly Idelson, *Complaints Slow Panel Action on Anti-Terrorism Bill*, CONG. Q. WK. REP., June 19, 1995 at 1750 (discussing opposition to an earlier House version of these provisions).

unanimously, as are universal civil rights protections. Deportation procedures need to be streamlined to facilitate the expedited removal of aliens who pose a legitimate threat to the safety of the United States. But, as an appeal to fairness and principles of legality, in addition to lessons learned from history, Congress must modify the proposed secret evidence provisions which fail to distinguish between aliens and terrorists. The best solution lies in a synthesis of the competing concerns. In light of the broader principles at stake, the following section focuses on major pitfalls present in the proposed deportation proceedings set forth in The Comprehensive Terrorism Prevention Act: 1) The definition of "terrorist organization;"¹²⁰ 2) the secret evidence determination; and 3) the required standard for summaries of secret evidence; and 4) the questionable right of confrontation. Each will be addressed, in turn, along with a workable solution.

A reform of The Comprehensive Terrorism Prevention Act must be founded on basic notions of justice in light of the United States Constitution, lessons learned from history, and the principles of legality.¹²¹ Further, such a proposal must attempt to remedy the imminent threat of terrorism without losing sight of sensitive national security concerns or basic procedural protections. In accordance with these objectives, this following submission attempts to modify the Senate bill to better serve the laudable intentions of the Senators who supported it.

A. Eliminate "Terrorist Organization" Determination

Under the current anti-terrorism laws, the government possesses the power to deport any alien who engages in or supports terrorist activity.¹²² Establishing a new class of persons who are defined as deportable does not combat terrorism. Other than facilitating guilt by association, the creation of this new class adds no new powers to the fight against terrorists. In addition, it is important to prevent any one person, namely the Secretary of State, from possessing such a concentration of power to unilaterally declare any group to be a terrorist organization. Eliminating this determination ensures that politically unpopular groups are not singled out under the auspices of security risks. Eliminating this new label also ensures that aliens are not labeled "alien terrorists" unless they personally commit a terrorist act, not because they belong to an organization which is considered a "terrorist organization."

B. Raise the Standard for Secret Evidence Determination

Classified information must remain secret, but the government must be restrained in some way from using it liberally against an alien, without his knowledge, at a deportation hearing. All evidence obtained against an alleged terrorist must be used

120. Representative Hyde, a sponsor of this legislation in the House of Representatives, "blamed the bill's broad definition of terrorism for creating problems" passing this legislation. Stephen Labaton, *Bill on Terrorism, Once a Certainty, Derails in House*, N.Y. TIMES, Oct. 3, 1995, at A1.

121. See *supra* notes 7-11 and accompanying text.

122. "Any alien who has engaged, is engaged, or at any time after entry engages in any terrorist activity . . . is deportable." 8 U.S.C. § 1105(a)(4)(B) (1994). "Terrorist activity" is defined as any activity which is unlawful under the laws of the place where it is committed and involves *any* of the following, or a threat, attempt or conspiracy to do any of the following: hijacking; threatening to kill, injure or continue to detain another individual in order to compel another person; violently attacking an internationally protected person; an assassination; using biological agents, chemical agents or nuclear devices; using an explosive or firearm with the intent to endanger the safety of one or more individuals or to cause substantial damage to property. 8 U.S.C. § 1182(a)(3)(B) (1994).

against them to prosecute them effectively. This includes classified information, but it must only be relied upon by the government if it is corroborated and deemed reliable by more than one judge. The problem with the language as drafted¹²³ can be remedied by instituting a rigorous system of checks and balances. As illustrated earlier, the lower-standard summary, as drafted, potentially deprives the alien of any procedural protections. To avoid this extreme infringement of rights, in all cases purporting to involve classified information, lower-standard summaries should be limited to matters that are 1) secret by executive order in the interest of national policy and 2) classified pursuant to an executive order.¹²⁴ Furthermore, harsh sanctions must be imposed on the government if it attempts to withhold evidence from aliens.¹²⁵ Such threats will force the government to reveal all that it can, instead of creating incentives for the government to get away with as much as it can. In addition, a detailed definition of the standards "harm to the national security" and "bodily injury to any person" are required before the lower-standard summary may be substituted. Instituting these additional safeguards will guarantee the higher-standard summary to nearly all accused aliens. The vague standard articulated in The Comprehensive Terrorism Prevention Act must be replaced by a heightened standard to curb abuses. By providing the alien with only a heightened summary, the government will no longer be able to avoid the question of confronting witnesses.

C. Redraft the Summary Provisions.

Raising the standards for defining a "terrorist organization," providing the alien with the right to confrontation, and raising the standard of "secret evidence" will improve the application of the Senate bill. Most importantly, the language authorizing the summary provisions must be reformed. As discussed earlier, the Senate's legislation requires the alien to be presented with an unclassified summary, in lieu of mandatory disclosure of classified information. The summary must be sufficient to 1) inform the alien of the nature of the evidence against him, and 2) provide the alien with substantially the same ability to make his defense as would disclosure of the classified information. If the higher-standard summary was the rule and the lower-standard summary was the rare exception, as intended by Senator Specter and Senator Biden, this provision would deprive a smaller group of aliens their rights to confront the evidence against them. The minimal threshold present in The Comprehensive Terrorism Prevention Act, the standard which renders the potential of stripping aliens of all procedural rights, must be resorted to only sparingly.

D. Provide the Alien with the Right of Confrontation.

As discussed in Part III, aliens are protected by the Due Process Clause of the Fifth Amendment. Although the precise scope of this protection remains unclear, the United States Supreme Court has assured them at least a minimal degree of protection.

123. See *supra* Part II.B.3 (explaining the problems with the summary provisions).

124. Institute a definition of classified information similar to the one articulated as an exception to The Freedom of Information Act. See 5 U.S.C.A. § 552(b)(1) (1977).

125. For similar sanctions imposed on the government for violations of Classified Information Procedures Act (C.I.P.A.), see 18 U.S.C. App. IV § 1 (1995). Compare S. 735, *supra* note 1, §§ 503(D)-(E) (giving the government a second chance to draft an acceptable summary, then, upon second failure, proceeding under a lower-standard summary).

The most basic of these protections is the right of confrontation. Affording such a basic procedural safeguard to aliens will not only protect the innocent alien, but will also preserve the integrity of our legal system. In addition to eliminating any temptation to abuse deportation powers, affording procedural safeguards will reinforce public confidence in our system of justice. The alien will be provided this right if the aforementioned proposals are adopted.

VI. CONCLUSION

The bombing of the federal building in Oklahoma City was a horrific tragedy; the perpetrators must be punished to the full extent of the law. However, during the emotional times following such a disaster, we must be cautious to avoid far-reaching legislative remedies which often result in unintended harms inflicted on innocent persons. In a rush to respond to the bombing, the Senate passed legislation which tramples the rights of law-abiding resident aliens. The Comprehensive Terrorism Prevention Act should not be adopted without substantial revisions as discussed above. The government's case against an alleged terrorist will not be undermined if he is permitted to confront the government's evidence against him. Supporters of this legislation are rightfully concerned about the consequences of revealing classified information. But, opponents of this legislation are equally concerned about the far-reaching effects of stripping fundamental rights from an entire group of people. Congress would be unwise to disregard their own codified warning "to discourage the occurrence of similar injustices and violations of civil liberties in the future"¹²⁶ based upon popular fears and stereotypes. As discussed above, a workable compromise can be attained without further endangering informants, without facilitating terrorist groups and without violating the principle of legality.

*Melissa A. O'Loughlin**

126. See *supra* notes 16-17 and accompanying text (statute authorizing nominal reparations to Japanese-Americans for civil liberties violations).

* B.S., Political Science, Santa Clara University, 1993; J.D. Candidate, Notre Dame Law School, 1997.