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HOW CAN THE UNITED STATES RECTIFY ITS POST-9/11 STANCE ON NONCITIZENS’ RIGHTS?

Quinn H. Vandenberg*

INTRODUCTION

Changes in immigration law following Congress’ 1996 legislation and post-September 11, 2001 legislation created an inhospitable and discriminatory environment for noncitizens. Pursuant to Congress’ 1996 and post-9/11 legislation, increases in the scope of crime-related deportation grounds¹ and lack of judicial review result in a system where violations of individual rights are not only possible but guaranteed.² Rights violations will likely occur whenever entry-level bureaucrats in the criminal system as well as the immigration system possess virtually unrestrained control in deciding the effect that possible criminal or terrorist-related activity will have upon a noncitizen’s immigration status in the United States. The primary guiding principle for immigration officers and entry-level bureaucrats is the current Immigration and Nationality Act (INA),³ which defines the

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3. The Immigration and Nationality Act (INA), 82 Pub. L. No. 414, 66 Stat. 163 (1952), was enacted in 1952. Amended numerous times, the INA specifies the ways in which a noncitizen becomes deportable. Although immigration officers are bound by the INA, lower bureaucrats in the criminal justice
current categories of immigrants, the grounds for deportation in the realm of criminal activity, and relief waivers. Currently, noncitizens face increased obstacles to their ability to remain in the United States, a higher probability of deportation, and extreme detention conditions—i.e., detention in local jails mixed in with the criminal population, absence of legal counsel, secrecy, and lack of judicial review—resulting from, for example, minor visa violations, illegal statuses, or "suspicious" activity or associations. This Note argues that the United States' post 9/11 stance treats noncitizens like criminals rather than immigrants, and this type of treatment could lead to unintended, undesirable, and unethical consequences.

Contrary to popular opinion, immigrants are not prone to crime, but, starting in the late 1980s through 1996, the criminal activities of noncitizens attracted increased public scrutiny. Specifically, in 1996 Congress pushed to enact anti-terrorist legislation, the Antiterrorism and Effective Death Penalty Act (AEDPA), before the one-year anniversary of the Oklahoma City bombing. Both the AEDPA and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) expanded the crime-related deportability grounds. Then Congress enacted the USA PATRIOT Act weeks after the September 11 attacks, which

system will probably have little knowledge and understanding of the INA's intricacies.

4. United States law classifies all noncitizens as immigrants or nonimmigrants. The immigrant classifications are pertinent for this Note. In particular, the INA defines a legal permanent resident (LPR, or a "green card holder") as a person who has attained the "status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws." Immigration and Nationality Act, § 101(a)(20), 8 U.S.C. § 1101(a)(20) (2000). An LPR has increased rights and benefits over other immigrants and nonimmigrants present in the United States. Nonimmigrants—such as diplomats, foreign students, temporary agricultural workers, tourists, or exchange visitors—are admitted for a temporary time period and a specific purpose. See Ruth Ellen Wasem, Immigration and Naturalization, in IMMIGRATION POLICY IN TURMOIL 2 (Theodore B. Gunderson et al. eds., 2002). Outside the scope of this Note, the issue of illegal aliens, referred to as EWIs (entered without inspection), poses an ever-increasing question about what to do with the estimated nine million illegal immigrants in the United States as of the 2000 census of the United States population. Id. at 7.

5. See infra Section III-IV.


placed noncitizens' rights (especially those of Legal Permanent Residents)\(^\text{10}\) and their statuses\(^\text{11}\) in a precarious position.

Section II of this Note establishes an overview of constitutional and critical issues concerning immigration law. Section III examines the statutory basis for specific increases in crime-related grounds leading to deportation. Section III also argues that Congress' procedural and substantive changes to crime-related deportation by AEDPA, IIRIRA, and the USA PATRIOT Act lead to a "rights-deprived" environment for immigrants. Section IV analyzes the implications of the increased hostility toward immigrants caused by AEDPA, IIRIRA, and the USA PATRIOT Act. This section argues that the problems in the process of deportation—namely the amplified use of ethnic profiling, the lack of procedural safeguards, the strict substantive changes of the INA's deportation section, and the decreased ability of courts to review immigration administrative agencies' decisions—have led and will continue to lead to unanticipated and extreme results. Finally, Section IV discusses the public policy of strictly applying the detainment and deportation standards and how the strict application will lead to an unethical decrease of the rights and dignity of both immigrants and citizens. Section V concludes with an analysis of the current immigration scheme.

In the wake of September 11, the United States needs to rethink its border and internal security—i.e., the United States must reevaluate how it monitors noncitizens and their activities. Yet, in the securing of the U.S. borders, Congress and the Supreme Court inappropriately expanded the methods of deportation for noncitizens and sanctioned their lengthy and difficult detainments. Moreover, Congress conferred the power and discretion formerly held by the Immigration and Naturalization Service\(^\text{12}\) to the Department of Homeland Security to carry out these

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10. One of the initial obstacles for a noncitizen is obtaining a certain status in the United States. In general, all noncitizens are "aliens," which is defined by the INA as any "foreign born person who is not a citizen or a national of the United States." INA § 101(a)(3), 8 U.S.C. §1101(a)(3) (2000). There are many different statuses. One status in particular, Legal Permanent Resident (LPR), will be addressed in Section III.

11. A noncitizen's status is inextricably intertwined with his or her level of rights and opportunities. In the current anti-immigrant climate, the rights and opportunities of noncitizens are being subjected to a changing and retroactive application of law.

deportations and detainments of noncitizens with few restraints and even fewer checks. When detained, because of the overriding concern for national security, noncitizens do not have the benefit of any real procedural or substantive rights, the full scrutiny of the press, review by the judicial system, or the American public's sense of injustice.

I. Constitutional Basis, Foundational Cases, and Critical Issues in Immigration Law

In order to appreciate the undesirable consequences facing noncitizens in the U.S. during this time of heightened national security, it is imperative first to understand the constitutional basis, foundational cases, and critical issues of immigration law. Before this Note can address the issues facing noncitizens' respective statuses today, it is essential to review the fundamental and historical challenges that created a hostile immigration environment in the United States. That is, looking back through U.S. history, American citizens' sentiments towards immigrants and their acceptance in society have been rooted in the need, or lack thereof, for labor in this country.13

The first federal legislation concerning immigration was the Alien Act of 1798, which authorized the President to expel from the United States any alien the President deemed dangerous.14 With the California Gold Rush of the late 1840s and the subsequent need for labor to build the transcontinental railroad, Chinese immigrants flooded the western coast.15 After the completion of the transcontinental railroad and the Depression of 1877, Westerners' distaste for the Chinese led to Congress'
enactment of a statute suspending all future immigration of Chinese laborers. In general, once the United States no longer needed laborers, Congress suspended immigration. This suspension reflected the current popular sentiment against immigrants.

Subsequently, in 1889, the Supreme Court in *Chae Chan Ping v. United States* (The Chinese Exclusion Cases) determined that the federal government, as represented by Congress, possessed the complete authority to determine immigration policies. In essence, the Supreme Court found that controlling a nation’s borders was an implicit federal power—one that was essential to the establishment and preservation of national security.

The Court made it clear that Congress had plenary power over noncitizens at the borders and inside the United States in terms of immigration law. When addressing the power of the United States Government over immigration law, the Supreme Court stated in *Nishimura Ekiu v. United States*:

> [E]very sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrances of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe. In the United States, this power is vested in the national government, to which the Constitution has committed the entire control of international relations, in peace as well as in war. It belongs to the political department of the government, and may be exercised either through treaties made by the President and Senate, or through statutes enacted by Congress . . . .

16. Besides an 1875 statute barring convicts and prostitutes, the 1882 Act excluded Chinese immigrants, which “remained an important facet of immigration policy until it was repealed in 1943.” LEGOMSKY, supra note 6, at 125 (referencing Act of March 3, 1875, ch. 141, 18 Stat. 497 (1875); Act of May 6, 1882, ch. 126, 22 Stat. 58 (1882)).

17. 130 U.S. 581 (1889).

18. Id. After Chae Chan Ping, the Court decided in *Nishimura Ekiu v. United States*, 142 U.S. 651 (1892), that there is an inherent power in the sovereign to control the borders. Then in *Fong Yue Ting v. United States*, 149 U.S. 698 (1893), the general federal deportation power was affirmed against numerous constitutional challenges. Objections to the plenary doctrine were voiced before its adoption. See, e.g., Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny*, 100 HARV. L. REV. 853, 862 (1987) (discussing how the plenary doctrine emerged in an environment of racist and nativist sentiments throughout America).

Despite continuing uncertainty about the exact constitutional or external source of federal immigration power, "it is settled law today that the power exists." As a result, when Congress passes legislation, the courts uphold the legislation through less than sound judicial reasoning.

The Supreme Court then moved beyond the constitutional breadth afforded to Congress through Chae Chan Ping and Nishimura Ekiu, and in 1893, the Supreme Court decided *Fong Yue Ting v. United States.* The *Fong Yue Ting* Court left an important and devastating legacy upon American immigration law

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20. Possible sources include the enumerated powers of the Commerce Clause, U.S. Const. art. I, § 8, cl. 3; the Migration Clause, U.S. Const. art. I, § 9, cl. 1; the Naturalization Clause, U.S. Const. art. I, § 8, cl. 4; the War Clause, U.S. Const. art. I, § 8, cl. 11; or any implied constitutional power, according to the Law of Nations. See generally Sarah H. Cleveland, *The Plenary Power Background of Curtiss-Wright,* 70 Colo. L. Rev. 1127, 1154 (1999) (clarifying that the "authority inherent in sovereignty" recognized in cases like Chinese Exclusion "bore an uncertain relationship to the enumerated and reserved powers in the Constitution").

21. LEGOMSKY, supra note 6, at 26.


23. In theory, the Constitution had always alluded to the complete power of Congress to determine immigration policies, but this power was constructed through a historical path that reflects the current sentiment towards immigrants and the need for laborers in the United States.

24. 149 U.S. 698, 730 (1893). This Chinese Exclusion Act of 1882 reads in part:

[[I]t shall be the duty of all Chinese laborers, within the limits of the United States at the time of the passage of this act, and who are entitled to remain in the United States, to apply to the collector of internal revenue of their respective districts, within one year after the passage of this act, for a certificate of residence; and any Chinese laborer, within the limits of the United States, who shall neglect, fail or refuse to comply with the provisions of this act . . . shall be deemed and adjudged to be unlawfully within the United States . . . .

The Act of May 5, 1892, ch. 60, § 6, reprinted in LEGOMSKY, supra note 6, at 30 (referencing the Act of May 5, 1892, ch. 60, 27 Stat. 25 (1892)). The case dealt with three Chinese laborers who were arrested for failure to possess the required certificates. See *Fong Yue Ting v. United States,* 149 U.S. 698, 699 (1893). The Supreme Court held that "Congress, having the right, as it may see fit, to expel aliens of a particular class, or to permit them to remain, has undoubtedly the right to provide a system of registration and identification of the members of that class within the country, and take all proper means to carry out the system which it provides." *Id.* at 714.
because it distinguished between civil and criminal proceedings in the realm of deportation. The Court’s designation of deportation as a civil matter changed the course of immigration law and the lives of immigrants who committed minor and major crimes. After convicted noncitizens served their criminal sentences, they lost their statuses, lives, and property in the United States through their subsequent deportations, because the criminal system was wholly separate from the civil system.

The Supreme Court’s construction of Congress’ great discretion in immigration law has led to three critical dilemmas facing immigrants today: (1) harsh consequences arising from the use of the plenary doctrine; (2) a constitutionally suspect dichotomy between criminal proceedings and the civil immigration proceedings; and (3) an inability by noncitizens to have their cases reviewed.

First, through the plenary doctrine, instead of relying upon firm legal analysis, the Supreme Court not only upheld racist statutes as constitutional but indulged the popular opinion of the time. The Court’s decision that Congress has plenary power over immigration issues leads to the unintended consequence of “political departments [being] largely immune from judicial control” when the issue is the federal government’s control over expelling or excluding noncitizens. As stated in Fiallo v. Bell, the Supreme Court’s “decisions have not departed from this long-established rule.... [F]or example, the Court had occasion to note that ‘the power over aliens is of a political character and therefore subject only to narrow judicial review.’” Reflecting upon the changing political atmosphere of the United States, one statement is true: that the political branches through history have bowed to popular sentiment. Justice Frankfurter explained

25. Fong Tug Ting, 149 U.S. at 730.
26. See generally Kanstroom, supra note 22.
27. How legitimate is it for the Supreme Court Justices to permit external influences, namely popular preferences, to affect their opinions of constitutional questions?
30. Id. at 792 (citing Hampton v. Mow Sun Wong, 426 U.S. 88, 101 n.21 (1976); accord, Fong Yue Ting, 149 U.S. at 713; Mathews v. Diaz, 426 U.S. 67, 81–82 (1976)).
the complexity and the historical roots of Congress' power and the lack of review by the judicial system in the area of immigration in *Galvan v. Press.*\(^3\)

[M]uch could be said for the view, were we writing on a clean slate, that the Due Process Clause qualifies the scope of political discretion heretofore recognized as belonging to Congress in regulating the entry and deportation of aliens. . . . But the slate is not clean. As to the extent of the power of Congress under review, there is not merely 'a page of history,' . . . but a whole volume. Policies pertaining to the entry of aliens and their right to remain here are peculiarly concerned with the political conduct of government. In the enforcement of these policies, the Executive Branch of the Government must respect the procedural safeguards of due process. . . . But that the formulation of these policies is entrusted exclusively to Congress has become about as firmly embedded in the legislative and judicial tissues of our body politic as any aspect of our government. . . .

We are not prepared to deem ourselves wiser or more sensitive to human rights than our predecessors, especially those who have been most zealous in protecting civil liberties under the Constitution, and must therefore under our constitutional system recognize congressional power in dealing with aliens . . . .\(^3\)

Justice Frankfurter's statements exemplify the need for judicial review of the immigration system; at the same time, they explain why the Court shows extreme restraint in the area of immigration. Justice Frankfurter's statements illustrate that the Court's unwillingness to become involved in the immigration system and in the deprivation of the rights and dignity of noncitizens is the product of many factors, including judicial precedent and respect for the Congress' complete power over immigration. However, this line of reasoning leads to the unintended consequence of guaranteed abuses inflicted upon noncitizens by Congress' shifting political views without the proper judicial review.

The second dilemma facing noncitizens is the Supreme Court's construction of a rigid dichotomy between criminal proceedings and the civil proceedings of the immigration system. The Court's construction of this rigid dichotomy deprived people in immigration proceedings of the constitutional protections afforded to defendants in criminal trials: due process, the right

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32. *Id.* at 530–32.
to confront his accuser, the right to a speedy trial, the Sixth Amendment right to assistance of counsel, the Fourteenth Amendment's Exclusionary Rule, the Ex Post Facto Clause, the Double Jeopardy Clause, the Eighth Amendment's protection against cruel and unusual punishment, and the Bill of Attainder Clause.\textsuperscript{33} In \textit{United States ex rel. Knauff v. Shaughnessy},\textsuperscript{34} the Court continues the line of reasoning it established in 1889, and recites the dicta that "[w]hatsoever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned."\textsuperscript{35} In this case, the Court denies any violation of the First Amendment, the Fifth Amendment, and the Fourteenth Amendment Due Process clause, and states that deportation is civil and, thus, not punishment.

Inside the designation of deportations as civil proceedings, the Supreme Court facilitated the transfer of discretionary power from Congress to the agency formerly known as INS, which led to virtually unreviewable decisions by entry-level officers.\textsuperscript{36} Thus, not only does the judicial system allow Congress nearly unfettered power over immigration in the United States with little review, the fact that deportation is a civil matter eliminates the constitutional protections applicable to criminal cases. This lack of constitutional safeguards leads to the undesirable consequence of treating immigrants with less dignity than is afforded to criminals.

Because of the Court's rigid construction of immigration proceedings as a civil matter, noncitizens are facing a third

\textsuperscript{33} David Cole, \textit{Enemy Aliens}, 54 Stan. L. Rev. 953 (2002). Cole argues persuasively that the criminal process entitles immigrants to the due process rights in the criminal context:

The Constitution does distinguish in some respects between the rights of citizens and noncitizens. But in fact, relatively little turns on citizenship status. The right to vote and the right to run for federal elective office are restricted to citizens, but all of the other rights are written without such limitation. Thus, the First and Fourth Amendments protect the rights of "the people," while the Fifth and Fourteenth Amendment Due Process Clauses, as well as the Equal Protection Clause, extend their protections to all "persons." . . . For more than a century, the Court has recognized that the Equal Protection Clause is "universal in [its] application to all persons within the territorial jurisdiction, without regard to differences of . . . nationality."

\textit{Id.} at 978–79.

\textsuperscript{34} 338 U.S. 537 (1950).

\textsuperscript{35} \textit{Id.} at 544.

\textsuperscript{36} See generally Michael J. Churgin, \textit{Immigration Internal Decisionmaking: A View From History}, 78 Tex. L. Rev. 1633 (2000) (discussing the immigration process at the turn of the twentieth century and the great deference allotted to the INS agents).
dilemma: namely, the lack of a voice to fight against deportation orders. Traditionally, "[c]onsistent with the civil nature of the proceeding, various protections that apply in the context of a criminal trial do not apply in a deportation hearing."\textsuperscript{37} That is, the deportation proceeding has historically been considered a streamlined mechanism where procedural safeguards do not apply. For example, the noncitizen "must be given 'a reasonable opportunity to be present at [the] proceeding,' but if the [noncitizen] fails to avail himself of that opportunity the hearing may proceed in his absence."\textsuperscript{38} Yet, in \textit{Yamataya v. Fisher},\textsuperscript{39} the Supreme Court held that the government may not deport an alien without giving him the right to answer why the deportation is improper.\textsuperscript{40} Pursuant to AEDPA, IIRIRA, and the USA PATRIOT Act, the right to answer why the deportation is improper has diminished—increasing the likelihood that noncitizens will be punished without the opportunity to contest the merits of their case.

Generally speaking, commentators have argued that there is a middle ground between the severity of civil deportation and the cumbersome application of criminal proceeding protections to deportation cases:\textsuperscript{41}

There is a middle ground of "quasi-criminal" cases in which some, but not all, of the constitutional safeguards apply. In these cases, the government does not impose hardships in order to punish for past wrongdoing, but instead regulates or imposes a hardship on certain individuals in order to achieve some benefit for other members of the community. However, because the sanction appears at least partially penal in nature, some constitutional safeguards are relevant.\textsuperscript{42}

Although the middle ground of "quasi-criminal" cases with some constitutional safeguards seems appealing to deportation cases, the reality is that after September 11, 2001 and the USA PATRIOT Act, Congress and the public are less concerned about the rights of immigrants. In addition to Congress' insufficient

\textsuperscript{38} Id. at 1038–39 (citing 8 U.S.C. §1252(b)).
\textsuperscript{39} 189 U.S. 86 (1903).
\textsuperscript{40} Id. at 100–01. The Court ultimately found no violation of due process, but set a precedent that deportation proceedings must comport with due process.
\textsuperscript{42} Id.
interest in the rights of immigrants, the judicial system and the immigration system both appear to be following the popular anti-immigrant sentiment, as well.

The United States must not neglect the rights and human dignity afforded to all “persons” under the Constitution. Notwithstanding the obstacles that a noncitizen must overcome in relation to his or her status and the standards set forth in the foundational Chinese Exclusion Cases, the Supreme Court has found some limits to Congress’ plenary power. These limitations include the following: (1) Congress must choose a “constitutionally permissible means of implementing [the plenary] power [over immigration]”, and (2) “Congress has plenary authority in all areas in which it has substantive legislative jurisdiction, so long as the exercise of that authority does not offend some other constitutional restriction.” Additionally, pursuant to two decisions arising from the 2000 term, Zadvydas v. Davis and INS v. St. Cyr, scholars were optimistic about the diminishing scope of the plenary power doctrine. However, their optimism has waned because, in the post-September 11 United States, the limits to the plenary doctrine rest on narrow and precarious ground due to the lack of judicial review of immigration decisions and the increased discretion given to the federal government by the judicial branch.

Beyond the decreased optimism in the judicial system about protecting the rights of noncitizens, the reorganization of the

43. See Cole, supra note 33, at 957, 959 (discussing the limits the Constitution places “on sacrificing the immigrants’ liberties for citizens’ purported security”). The “basic rights at stake—political freedom, due process, and equal protection of the laws—are not limited to citizens, but apply to all ‘persons’ subject to our laws.” Id. at 957. Cole takes the rights of “persons,” meaning noncitizens, farther than the Supreme Court has held.

44. See Chae Chan Ping v. United States, 130 U.S. 581 (1889).

45. See also American-Arab Anti-Discrimination Committee v. Meese, 714 F. Supp. 1060 (C.D. Cal. 1989) (refusing to use the plenary power doctrine against First Amendment challenges to deportation. For a more recent case on the cracks in the plenary power doctrine, see Zadvydas v. Davis, 533 U.S. 678 (2001).


48. 533 U.S. 678 (2001). See infra Section IV.

49. 533 U.S. 289 (2001). See infra Section IV.

50. Under Yamataya v. Fisher (The Japanese Immigrant Case), LPRs have procedural due process rights. See 189 U.S. 86 (1902). However, with the USA PATRIOT Act, immigrants’ rights to judicial review are practically zero. See infra Section III-IV.

51. See infra Section IV.
INS creates open questions about the protection of noncitizens' rights. As of March 1, 2003, the INS was transferred to the Department of Homeland Security into two separate divisions: Border and Transportation Security (BTS), which was delegated the responsibility of the border patrol, detention, and removal of noncitizens, intelligence, investigations, and inspections, and the Bureau of Citizenship and Immigration Services (BCIS), which provides immigration services. The BCIS is now referred to as the U.S. Citizenship and Immigration Services (USCIS). In the former INS, the Agency's decisions and review of those decisions were controlled solely by the Attorney General. Because of the new oversight structures, one could be optimistic about the reorganization of the INS into the BTS and USCIS. For example, the Under U.S. Secretary of the BTS must inspect the operations and management of the BTS through the Professional Responsibility and Quality Review. However, the optimism must be stilted by the current anti-immigrant sentiment, as well as the fact that the same individuals who run the BTS must also do the review of professional responsibility and quality.


53. BTS "is led by Under Secretary Asa Hutchinson, and is responsible for maintaining the security of our nation's borders and transportation systems." Id.


56. This change from BCIS to USCIS does not change the agency's immigration functions. See Aliens and Nationality; Homeland Security; Reorganization of Regulations, 68 Fed. Reg. 10,349 (March 5, 2003).

57. See infra Section IV.
II. **Procedural and Statutory Basis for Deportation and Detainment: How Will the Rights of Immigrants Be Protected?**

The current lack of dignity and rights of noncitizens is a result of Congressional legislation from 1990 to the current USA PATRIOT Act that creates a harsh environment for noncitizens in the United States and leads to the unintended consequence of treating noncitizens more like criminals than immigrants. Since the 1990s, Congress has exhibited a trend of decreasing judicial review of deportations and detentions while increasing the number of deportable crimes. In order to understand the current system of treating noncitizens more like criminals than immigrants and the proverbial "blinders" that Congress wears when faced with threats of terrorism and national security, it is essential to examine the consequences of Congress' 1996 legislation—AEDPA and IIRIRA—that was passed during a time of heightened national security: the one year anniversary of the Oklahoma City bombing.

A. **1996 Legislation: Congress' Blinders**

Following Congress' Acts that pre-date the 1996 legislation, which set the groundwork for how drastically any criminal activity or criminal-like activity may affect a noncitizen's status, in 1996, during the Clinton Administration, Congress passed AEDPA, which contained severe provisions for noncitizens. These provisions included the following: controversial summary exclusion procedures, an expansion of the grounds of deportability, the restriction of discretionary relief, and the requirement of detention of almost all criminal offenders. Specifically, AEDPA created...
ated harsh provisions for immigrants in the changes it made to the categories of substantive deportable aggravated felonies and in the elimination of possible relief. AEDPA changed the classification of immigration proceedings from "deportation" or "exclusion" to "removal," and it expansively and retroactively made LPRs removable for past crimes. Then, just five months later, Congress attempted to "amend" the harsh provisions placed upon immigrants by the AEDPA through IIRIRA's enactment.

IIRIRA, however, did not amend the situation; it instead made the situation more severe for noncitizens by focusing on the apprehension and removal of undocumented immigrants.

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62. Before 1996, an LPR who committed a deportable offense could apply for relief if he had resided in the United States for seven years and the immigration judge balanced the equitable factors in favor of the LPR. Post-AEDPA, INS trial attorneys and immigration judges denied waivers under Section 212(c) for LPRs with minor controlled substance violations. See Taylor, supra note 59, at 278 n.35.


Both AEDPA and IIRIRA have added new crimes and lowered the sentence required for existing crimes to the point that seemingly all convictions considered felonies under federal law will qualify as aggravated felonies. The definition of aggravated felony at INA § 101(a)(43), 8 U.S.C. § 1101(a)(43), began as one paragraph in 1988. Eight years later the provision consists of twenty-one paragraphs labeled (A) through (U). In 1988 the statute identified three general crimes. Today over fifty crimes or general classes of crimes are enumerated. In addition to the nature of the amount of loss, maximum possible penalty for the crime and actual sentence imposed, regardless of any suspension or probation of that sentence, are the current mechanisms to qualify crimes as aggravated felonies.

Id. at 322-25.

64. In the realm of aggravated felonies, IIRIRA reduced the sentence requirement leading to deportation from a five-year minimum to a one-year minimum for the following crimes: (1) a crime of violence that is defined in 18
In the process, Congress essentially altered several areas of immigration law. IIRIRA expanded the scope of the substantive criteria for removing noncitizens, restricted discretionary relief, and created various expedited removal procedures. Procedurally, IIRIRA, not to mention AEDPA, decreased the remedies and waivers available to criminal immigrants. By expanding the definition of "aggravated felony" and replacing relief from deportation under section 212(a) with a far more limited remedy known as "cancellation of removal for permanent residents," IIRIRA makes a conviction of a crime grounds for deportability without a realistic possibility for relief. Without the realistic

U.S.C. § 16 as "an offense that has an element the use, attempted use, or threatened use of physical force against person or property of another, or any other offense that is a felony that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense"; (2) non-citizen smuggling; (3) document fraud; (4) burglary; (5) a RICO violation; (6) a minor controlled substance violation, INA § 237(a)(2)(B)(i); (8) theft, 8 U.S.C. § 1101(a)(43)(G) (2000). IIRIRA, § 321(a)(4), 8 U.S.C. § 1101(a)(43) (2000). Under the "crime of violence" subset of the "aggravated felony" category, an immigrant may be removed if a court finds that a crime of violence includes driving while intoxicated ("felony DWI"). For an interesting discussion about DWI as a crime of violence under 18 U.S.C. § 16(B), see Julie Anne Rah, Note, The Removal of Aliens Who Drink and Drive: Felony DWI As A Crime of Violence Under 18 U.S.C. §16(B), 70 FORDHAM L. REV. 2109 (2002).

65. IIRIRA § 921(a)(1), 8 U.S.C. §1101(a)(43)(A) (2000). IIRIRA modified the definition of "aggravated felony" by expanding the class of crimes to include rape and sexual abuse of a minor. Therefore, many kinds of misdemeanors are now called "aggravated felonies" by the INS and a conviction could make someone deportable, regardless of whether or not an immigrant has children or other family here and regardless of any other circumstances. Crimes such as shoplifting, transporting a prostitute, possession of marijuana, domestic violence, violating a protection order, gambling, perjury, entering the country without an inspection by the INS, and entering the country without the proper paperwork with you, can make an immigrant deportable. See generally Prinz, supra note 63.

66. See INA § 235(b), 8 U.S.C. § 1225(b) (2000). If an immigration officer determines that an arriving noncitizen is inadmissible because he or she arrived with either fraudulent immigration documents or no documents, the officer may order the alien removed from the United States without a regular removal hearing. Id.

67. The waivers for deportation include the following sections of the INA: §§ 237(a)(1)(D)(ii), (E)(ii)–(iii), (H); § 237(a)(2)(A)(v); § 237(a)(3)(C)(ii); § 237(c).

68. See INA § 240A, 8 U.S.C. § 1229B (Supp. 1997). Cancellation of Removal (formerly known as Suspension of Deportation and § 212(c) Waiver of Deportability) replaced the leniency offered to certain aliens who were longtime residents of the United States, and who showed equitable grounds for waiver. Under IIRIRA, conviction of a crime that constitutes grounds for deportation alters and, in most instances, eliminates availability to relief. Although under Cancellation of Removal, longtime residents need only to have
possibility for relief, the various expedited removals require greater scrutiny, because expedited removals not only affect criminal noncitizens but all noncitizens. All noncitizens are potentially affected because IIRIRA vests the power of expedited removal in the hands of individual immigration officers whose decisions are neither judicially nor administratively reviewable.\(^69\)

Another example of the judicial system's inability to offer noncitizens relief from such severe and unrelenting immigration legislation is illustrated in the change in the definition of "conviction" of deportable crimes. Prior to IIRIRA's definition of "conviction," the Board of Immigration Appeals'\(^70\) decision in Matter of Ozkok\(^71\) held, for immigration purposes, that a conviction exists when any of the following three factors are present:

1. A judge or jury has found the alien guilty or he has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilty;
2. The judge has ordered some form of punishment, penalty, or restraint on the person's liberty to be imposed; and
3. A judgment or adjudication of guilt may be entered if the person violates the terms of his probation or fails to comply with the requirements of the court's order without the availability of further proceedings regarding the person's guilt or innocence of the original charge.\(^72\)

That is, prior to IIRIRA, "conviction" needed finality—i.e., a decision of guilt or nolo contendere. After IIRIRA's enactment, the conviction need not be final.\(^73\) Moreover, for purposes of deportability, IIRIRA changes the relevant penalty to be considered in the definition of deportable crimes from penalties that are imposed to sentences that a judge may impose.\(^74\) By both eliminating the finality of the conviction and changing the sentencing requirements, IIRIRA increases the chances that an LPR or

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69. See INA § 235(b).
70. The Board of Immigration Appeals (BIA) hears appeals from the immigration judges' decisions and from certain INS decisions.
72. Id. at 551.
74. See INA §§ 101(a)(43)(F), (G), (J).
immigrant may be deported. IIRIRA eliminates the judicial system’s opportunity to show compassion to noncitizens that face deportation at the end of possible sentences. AEDPA and IIRIRA both stifle any judicial scrutiny of deportation cases and create an environment of almost entirely unregulated administration.

Currently, IIRIRA continues to deprive noncitizens any judicial review of decisions made by the USCIS, BTS, and BIA, just as IIRIRA deprived noncitizens of review of the decisions made by immigration officers. Moreover, a result of the aforementioned legislation is that U.S. courts impose virtually no substantive limits on deportation power even though IIRIRA and AEDPA violate both the substantive as well as the procedural process rights of immigrants. Since immigration officers have such complete control over the lives of immigrants—in particular in the areas of noncitizens’ statuses and cases of expedited removals—the possibility of neglect or abuse in the current immigration system exists and is increased by the changes set forth in the subsequent sections.

B. USA PATRIOT Act: Congress Returns to Its Blinders

Pursuant to this analysis of the increasingly severe atmosphere under which noncitizens reside in the United States, Congress once again placed blinders on in terms of immigration legislation in the enactment of the USA PATRIOT Act just six weeks after the terrorist attacks on September 11, 2001. Specifically, the USA PATRIOT Act "makes noncitizens deportable for wholly innocent associational activity, excludable for pure speech, and detainable on the Attorney General’s say-so, without a hearing and without a finding that they pose a danger or flight risk." The Act affords the Attorney General the ability to certify


76. IIRIRA “disappointed those who had hoped to reconsider AEDPA’s innovations, and . . . cracked down even harder on long-term residents with minor criminal convictions.” Taylor, supra note 59, at 279.

77. Kanstroom, supra note 22, at 705.

78. LECOMSKY, supra note 6, at 134. See also Calcano-Martinez v. INS, 533 U.S. 348 (2001); INS v. St. Cyr, 533 U.S. 289 (2001) (both considering the meaning and the constitutionality of the restraints on judicial review).


80. Cole, supra note 33, at 966 (“Before September 11, however, aliens were deportable for engaging in or supporting terrorist activity, but not for mere association.”) (citing Immigration Act of 1990, 8 U.S.C. §§ 1182(a)(3)(B)(iii), 1227(a)(4)(B) (2000)).
and detain any noncitizen under section 236A if the Attorney General has "reasonable grounds to believe" that the noncitizen has engaged in any activity that "endangers the national security of the United States." An examination of the USA PATRIOT Act illustrates how the expansion of terrorism-related inadmissibility and removal grounds, combined with sweeping and non-specific definitions, cause dramatic hardships for noncitizens. The consequence of the Act's emphasis on mandatory detentions of suspected terrorists without a meaningful review system results in the neglect of noncitizens' dignities and rights. By aggregating the lack of respect and dignity afforded to noncitizens and the violations of their rights, the infringement even of citizens' rights is an understandable and observable consequence.

Analyzing the USA PATRIOT Act's definitions pertaining to terrorism demonstrates the blinders that Congress wore through the passage of this legislation. "Domestic terrorism" is defined in section 802 of the USA Patriot Act. "Terrorist activity" includes, among other things, any use or threat to use a weapon, and the Act includes as a "terrorist organization" a group of two or more persons that has used or threatened to use a weapon. The USA PATRIOT Act's broad definitions relating to terrorism and association to terrorism, raise at least three pertinent questions: (1) what does "activity" mean?; (2) what type of association will suffice?; and (3) how much knowledge of the organization's activities must the citizen or noncitizen have in order to invoke


82. See infra notes 88-97 and accompanying text.

83. Section 802 of the USA PATRIOT Act defines "domestic terrorism" to mean activities occurring primarily within the territorial jurisdiction of the United States involving acts dangerous to human life that are a violation of the criminal laws of the United States or any state and appear to be intended to intimidate or coerce a civilian population, influence the policy of a government by intimidation or coercion, or affect the conduct of a government by mass destruction, assassination, or kidnapping. § 802, 115 Stat. at 377.


Any alien who the Secretary of State, after consultation with the Attorney General, or the Attorney General, after consultation with the Secretary of State, determines has been associated with a terrorist organization and intends 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 is inadmissible.

criminal charges. For noncitizens, this definition of “terrorist” and “organization” could have and has had dramatic effects on their lives. Entry-level bureaucrats who are unaware of the current immigration laws or are of the mind to discriminate can severely damage an immigrant’s life with a certain criminal charge, indictment, plea, or review by criminal justice officers, BTS agents, or USCIS representatives. Because of the open-ended definitions, lack of review of the immigration system’s agents’ decisions, and the current anti-immigrant sentiment, judicial scrutiny is needed more than ever.

In addition to the onslaught of the USA PATRIOT Act’s unrelenting provisions and the anti-immigrant sentiment running rampantly throughout the United States, the protection of the rights of immigrants—a particularly vulnerable group because of their absence in the legislative and voting process—is now pushed aside by the greater call for national security:

We love liberty and security, but recognize that sometimes we must limit one to enjoy the other. When a democratic society strikes that balance in ways that impose the costs and benefits uniformly on all, one might be relatively confident that the political process will ultimately achieve a proper balance. But all too often we seek to avoid the difficult trade-offs by striking an illegitimate balance, sacrificing the liberties of a minority group in order to further the majority’s security interests. In the wake of September 11, citizens and their elected representatives have repeatedly chosen to sacrifice the liberties of noncitizens in furtherance of the citizenry’s purported security. Because noncitizens have no vote, and thus no direct voice in the democratic process, they are a particularly vulnerable minority. And in the heat of the nationalistic and nativist fervor engendered by war, noncitizens’ interests are even less likely to weigh in the balance.

In this heightened time of terrorism, economic strife, and anti-immigrant sentiment, “what we are willing to allow government to do to immigrants creates precedents for how it treats citizens.” When the United States violates the rights of a vul-

85. This is not an exhaustive list but merely an illustrative line of questioning.
86. Cole, supra note 33, at 956–57 (emphasis added). Cole effectively argues that even though the United States fears for our national security, the United States cannot trump the rights of the vulnerable immigrant group. Id.
87. Id. at 959.
nerable group, the sweeping result is one of violations of all noncitizens and United States citizens alike.

One such example involves material witnesses. A material witness is one who the United States government detains without charge by a court order because the detained individual is believed to have information relevant to an upcoming trial or grand jury probe.88 A material witness can be a U.S. citizen or noncitizen. The material witness provision, 18 U.S.C. § 3144, provides a rare exception to U.S. law because it allows for the detainment of an individual without probable cause of criminal conduct. However, to successfully receive a material witness warrant, an applicant must prove that incarceration is required to secure the witness's testimony. For example, if evidence exists to hint that a witness might purposely evade testifying or if a witness's life is in danger, then the warrant may be obtained.

The statute neither sets the limits on the maximum length of time a witness can be detained, nor dictates whether the government can compel a witness to testify. A vagueness encompasses the statute, and this vagueness is noted in Padilla ex rel. Newman v. Bush.89 In Padilla, the court dealt with the Defense Department's treatment of Jose Padilla, a United States citizen, after his arrest on May 8, 2002, in Chicago, as a material witness

88. 18 U.S.C.A. § 3144 (2000). There are two terms that the government uses to label and justify detainments: material witness and enemy combatant. According to 18 U.S.C.A. § 3144:

[i]f it appears from an affidavit filed by a party that the testimony of a person is material in a criminal proceeding, and if it is shown that it may become impracticable to secure the presence of the person by subpoena, a judicial officer may order the arrest of the person and treat the person in accordance with the provisions of section 3142 of this title. No material witness may be detained because of inability to comply with any condition of release if the testimony of such witness can adequately be secured by deposition, and if further detention is not necessary to prevent a failure of justice. Release of a material witness may be delayed for a reasonable period of time until the deposition of the witness can be taken pursuant to the Federal Rules of Criminal Procedure.

Id. For the purposes of this Note, a "material witness" can be a citizen or noncitizen who is detained by a court order because the person is believed to have information relevant to either a grand jury probe or an upcoming trial or someone who might fail to respond to a subpoena. Id. An "unlawful combatant" includes a person detained by the Defense Department without charges, hearing, or a trial on the theory he or she is a soldier fighting against the United States without a uniform and with the intent of committing hostile acts. See Ex parte Quirin, 317 U.S. 1, 15 (1942) (finding that an unlawful enemy combatant may be tried by military tribunal).

pursuant to 18 U.S.C. § 3144.\textsuperscript{90} The arresting officers from the U.S. Department of Justice utilized the label of “material witness” in order to “enforce a subpoena to secure Padilla’s testimony before a grand jury” in the Southern District of New York.\textsuperscript{91} After Mr. Padilla’s arrest in Chicago, he was moved to New York to the custody of the Justice Department at the Metropolitan Correctional Center.\textsuperscript{92} Padilla appeared before the United States District Court for the Southern District of New York, represented by court-appointed attorney Donna Newman, on May 22, 2002, in order to vacate the warrant.\textsuperscript{93} Then, on June 9, 2002, the government “notified the court ex parte that it was withdrawing the subpoena” of Mr. Padilla.\textsuperscript{94} After the court vacated the warrant, President Bush designated Padilla as an “enemy combatant,” and detained Padilla without communication with his lawyer or with anyone else. Since the Padilla case reflects how the United States government may neglect the rights of American citizens, the probability that the Government is infringing upon the rights of noncitizens is practically guaranteed.\textsuperscript{95}

III. PUBLIC POLICY FITNESS: THE NEED FOR UNITED STATES COURTS TO IMPOSE SUBSTANTIVE LIMITS ON DETAINMENTS AND DEPORTATIONS

Although the post-9/11 world necessitates heightened national security, this need does not give Congress or the Executive the power or the moral authority to violate the rights of a vulnerable group of persons living in the United States. A noncitizen “who comes into the United States... illegally, who conducts a terrorist operation killing thousands of innocent Americans—men, women, and children—is not a lawful combatant... They don’t deserve the same guarantees and safeguards that would be used for an American citizen going through the

\begin{itemize}
\item \textsuperscript{90} Id. at 568.
\item \textsuperscript{91} Id. at 568-69. In particular, Mr. Padilla’s arresting agent, Joseph Ennis (a special FBI agent) declared that “Padilla appeared to have knowledge of facts relevant to a grand jury investigation into the September 11 [terrorist] attacks... and [appeared] to be committed and involved in planning further attacks.” Id. at 571.
\item \textsuperscript{92} Id. at 571.
\item \textsuperscript{93} Id.
\item \textsuperscript{94} Id.
\item \textsuperscript{95} See United States v. Awadallah, 349 F.3d 42 (2d Cir. 2003); Ctr. for Nat’l Sec. Studies v. U.S. Dep’t of Justice, 217 F. Supp. 2d 58 (D.D.C. 2002). But see In re the Application of the United States for a Material Witness Warrant, 213 F. Supp. 2d 287 (S.D.N.Y. 2002). See also infra Section IV (discussing possible solutions to this problem).\end{itemize}
normal judicial process." Yet, what about the noncitizens who do not commit or are not associated with a heinous terrorist attack? The undesirable and unintended consequences of neglecting to recognize noncitizens' rights increases the possibility of treating noncitizens more like criminals than immigrants.

Congress used its blinders on September 14, 2001, when Representative C.W. Young introduced the 2001 Emergency Supplemental Appropriations Act for Recovery from and Response to Terrorist Attacks on the United States that bestowed President Bush and Attorney General John Ashcroft with their initial powers for extensive use of executive orders and regulations concerning the Department of Justice and the INS (now the USCIS and BTS). One of the primary issues flowing from this legislation as well as the USA PATRIOT Act concerns the government's use of the immigration system's power to detain "persons of interest." By charging noncitizens with immigration violations instead of using the criminal justice system, the government


97. Upon enactment, the bill was officially titled: Making emergency supplemental appropriations for fiscal year 2001 for additional disaster assistance, for anti-terrorism initiatives, and for assistance in the recovery from the tragedy that occurred on September 11, 2001, and for other purposes. H.R. 2888, 107th Cong. (2001) (enacted as Pub. L. No. 107-38, 115 Stat. 220 (2001)). This bill enacts the following:

[E]mergency supplemental appropriations for fiscal year 2001, namely . . . for emergency expenses to respond to the terrorist attacks on the United States on September 11, 2001, to provide assistance to the victims, and to deal with other consequences of the attacks. Makes $40 billion available to the Executive Office of the President and Funds Appropriated to the President for the Emergency Response Fund for such expenses, including for the costs of: (1) providing Federal, State, and local preparedness for mitigating and responding to the attacks; (2) providing support to counter, investigate, or prosecute domestic or international terrorism; (3) providing increased transportation security; (4) repairing damaged public facilities and transportation systems; and (5) supporting national security.


98. One of the primary issues flowing from this legislation as well as the USA Patriot Act concerns the government's use of the immigration system's power to detain a noncitizen who might have committed an immigration viola-
avoids the protections afforded in the criminal justice system, such as probable cause for arrest, the right to be brought before a judge within forty-eight hours of arrest, and the right to court-appointed counsel. Noncitizens detained for post-9/11 inquiries are "special interest" cases, and thus their cases bypass the safeguards given to people under a criminal investigation.

The draconian 1996 legislation, coupled with the USA PATRIOT Act, the pervasive anti-immigrant sentiment, and the lack of reviewable guarantees in the detainment and deportation process, illustrate the neglectful nature of the United States' treatment of noncitizens as well as the need to protect the noncitizens' dignity. Following the statutory analysis thus far of the increase in the crime-related grounds leading to deportation, there are three central remaining issues that create an especially hazardous environment for immigrants: (1) racial discrimination and ethnic profiling; (2) lack of procedural and substantive rights with the intermingling of the immigration and criminal justice systems; and (3) the conditions of detainment—i.e., secrecy, incommunicado, and lack of judicial scrutiny.

A. Ethnic Profiling, Nativism, and Racism's Influence On Immigration Law

Ethnic profiling has always presented a problem in the United States, especially when anti-immigrant sentiments are high. Ethnic profiling is the most dangerous when that profiling is coupled with the power of the federal government and entry-level bureaucrats to exercise control over the statuses and detainments of noncitizens. After September 11, Americans and the federal government appear to approve or at least acquiesce to the racial profiling occurring. It seems that the great majority of Americans will racially profile Arab males and noncitizens in the pursuit of national security and safety of U.S. citizens. Perhaps the end result of protecting U.S. citizens demands some form of racial profiling as a necessary yet distasteful means? Yet, this distasteful means of trying to protect U.S. society will not prove successful because the identity of the terrorist enemy will continue to change. Additionally, by permitting racial profiling to be an acceptable practice, noncitizens will be treated more like criminals and the rights of every U.S. citizen will subsequently decrease. In order to contain the possible abuses to
noncitizens and citizens alike in the United States, USCIS, BTS, and local criminal justice agents must be educated about the foreseeable spill-over effect that racial profiling has on all immigrants. The actions of the respective agents and agencies involved with the security and immigration system of the United States must also be reviewed.

Our nation is not known for our compassion and open-mindedness in the realm of immigration law and policy; rather, the United States has a “well-documented history of racism and nativism in U.S. immigration law and policy.” While nativism is a “subcategory of xenophobia” that results in a fear of an internal minority due to its foreign connections, nativism also views the minority’s members as marked enemies of an American culture. Over the course of the United States’ history, “society consistently has viewed new waves of immigrants as racially different outsiders.”

The federal government is taking advantage of the pervasiveness of today’s nativism and racism in the U.S. in order to detain noncitizens under the pretext of national security, without much scrutiny or opposition. Racial profiling is a reality of the “war” on terrorism in the United States and abroad. Civil rights organizations like the ACLU accuse the Departments of Justice and Homeland Security of targeting Muslims, Arabs, and South Asian immigrants. Neither of the Departments of Justice or Homeland Security seem to deny directing their investigations toward spe-


103. Racial profiling could be seen as a violation of the rights and liberties of those being racially profiled. There are additional problems with racial profiling: namely, its actual effectiveness. At any time, the face of the “terrorist” could change. Instead of looking “Muslim” or “Arab,” the face could change to Egyptian, Moroccan, or Caucasian. How effective is racially profiling? Yet, on the other side, how effective is a random checking of passengers at the airport when the security is making an elderly Polish woman take off her shoes for examination?
pecific groups. Although similarly-situated non-Muslims and non-Arabs who might have committed the same immigration violations are not being detained, the possible spill-over effect to an increasing number of noncitizens is a probable and unethical consequence.

In the months following the September 11 attacks, over 1,200 non-U.S. nationals were taken into custody; most of these individuals were men of Arab or South Asian origin. On November 9, 2001, the Department of Justice announced an initiative to conduct voluntary interviews of more than 5,000 young men from countries suspected of harboring terrorists who had entered the United States on temporary visas in the past two years. Then on January 8, 2002, the Department of Justice announced a prioritization of the apprehension and removal from the U.S. of 4,000 to 6,000 men from particular countries of origin. On November 6, 2002, the “Registration of Certain Nonimmigrant Aliens from Designated Countries” was announced, requiring special registration of male visitors to the United States from specified countries. Included in these named countries were Iraq, Iran, Libya, Sudan, and Syria; later the Department of Justice added Afghanistan, Algeria, Bahrain, Eritrea, Lebanon, Morocco, North Korea, Oman, Qatar, Somalia, Tunisia, United Arab Emirates, Yemen, Pakistan, Saudi Arabia, Bangladesh, Egypt, Indonesia, Jordan, and Kuwait to the list.


106. Jodi Wilgoren, A Nation Challenged: The Interviews; Prosecutors Begin Effort to Interview 5,000, but Basic Questions Remain, N.Y. TIMES, Nov. 15, 2001, at B7.

107. Neil A. Lewis, A Nation Challenged: Immigration Control; I.N.S. to Focus on Muslims Who Evade Deportation, N.Y. TIMES, Jan. 9, 2002, at A12. This number of men is out of the more than 300,000 “absconders” who have exhausted their administrative and judicial appeal rights to their final deportation order. Id.


109. Id.

The ACLU argues that the Department of Justice’s guidelines “went far beyond any legitimate quest for factual information,” because “[o]fficials were instructed to inquire into political beliefs of the targeted young men, and to ask them to report on the political beliefs of their families and friends.” This technique is a discriminatory dragnet that is neither an effective nor a permissible substitute for the constitutional requirement of individualized suspicion for wrongdoing.

During this time of heightened fear, the United States’ priority of national security seems justified. But the priority of national security should not be allowed to create a rights-deprived environment. Yet, in reality, this fear propels United States citizens to justify suspending the civil rights of people, particularly those of immigrants, in order to detain individuals that look “suspect.” This practice of detaining those who look suspect, namely, those who belong to a racial or ethnic class not dominant in the United States, will not stop with those of Arab descent. Rather, this racist practice will most likely lead to discrimination and inappropriate race-based practices to those individuals most susceptible and vulnerable, namely the noncitizens.

In addition to the racial profiling occurring in the highest of levels of the federal government and the Department of Homeland Security, the prejudices that follow in tandem with racial profiling encourage entry-level bureaucrats and local authorities to discriminate against noncitizens as well. For example, in charging and indicting a noncitizen, the agents in the criminal justice system might be harsher and less concerned about the possible deportability of a noncitizen through a certain charge, indictment, conviction, or plea when certain prejudices are present. These prejudices could lead to increased ethnic profiling and discrimination against noncitizens. The increased probability of entry-level agents in the criminal justice system using discriminatory practices may occur at many stages in the detainment and deportation process—i.e., from the local authorities that arrest and charge the noncitizen, to the prosecutor, to the defense counsel and judges. These actors in the criminal justice system have “tremendous power to control (or substantially affect) the outcome of a future immigration proceeding when


112. Note that the vulnerability of immigrants is heightened by the obvious lack of voting rights.
the criminal defendant is an alien." The actors working within the criminal justice system must be aware of the way in which a decision made during the course of criminal proceedings directly affects immigration matters and the "obligation to exercise the power fairly and responsibly" during this time of heightened national security and widespread ethnic and racial profiling.

B. The Criminal Justice System and the Immigration Regulatory System

Because the immigration system is administrative and not criminal, noncitizens are not afforded the protections associated with the criminal justice system. The immigration system serves the domestic war on terrorism well, as far as efficiency is concerned, because of the lack of due process rights. Because of the punishment-like nature of immigration detainments and deportations, and lack of due process, the officials and agents of the immigration and criminal systems should be aware of the consequences of their decisions and discretion. Analysis of the last ten years of laws affecting noncitizens shows that because of the increased possibility of detainment and deportation, a need exists for safeguards and a heightened awareness by the agents in the immigration and criminal systems of the consequences of one another's actions.

Since an immigrant's status and possible deportation is inextricably linked to the criminal justice system's decision about how to treat the immigrant defendant, the criminal justice system and the regulatory immigration system should have an awareness of the other's policies. In recent years, Congress "has ... begun to tie immigration and criminal justice processes more closely together, gradually rendering inappropriate categorical restrictions on the scope of professional roles in the criminal justice arena." Agents in both the immigration and criminal systems


Just as sentencing guidelines limit the discretion of judges and improve predictability of outcomes for the prosecutor, so do the categorical immigration outcomes prescribed by the INA limit the discretion of immigration judges and improve the predictability of immigration outcomes for criminal justice decisionmakers.

Id.

114. Id. Back in 1997, Pilcher understood the role of lower bureaucrats in the criminal justice system and how their actions affect the immigrant's possible deportation after a commission of a crime.

115. Id. at 272.
should realize an ethical and moral duty to pay attention to and advise regarding the consequences of their actions in other spheres. Arguably, since the protections afforded to the criminal defendant are not applicable in immigration cases, the agents in the criminal justice system have no responsibility to consider the implications of their actions upon an immigrant’s possible deportation. However, the reality of deportation is that it creates harsh consequences for a noncitizen and has an appearance similar to punishment. In particular, in the last ten years, Congress has sought to increase substantively and procedurally the ways in which an immigrant can be deported and detained.

Substantively, Congress, through the USA PATRIOT Act and preceding immigration legislation, increased the number and substance of crimes that change a non-citizen’s immigration status and that could lead to deportation. Indeed, in the USA PATRIOT Act, Congress added that by mere association a noncitizen could be guilty of an aggravated felony, a crime of moral turpitude, a controlled substance offense, a crime of violence, or a terrorist act.

Prior to September 11, an immigrant could not be found deportable by mere association, but Section 411 of the USA PATRIOT Act makes an immigrant guilty by association. Under the USA PATRIOT Act, the government need not prove a nexus between the immigrant’s conduct and the terrorist activity, and the broad definition of “engaged in terrorist activity” includes any use or threat to use a weapon. Moreover, the noncitizen can be deported for any connection between the noncitizen and the “terrorist organization,” which could include any two persons who commit a crime of violence. If a noncitizen has any

116. See id. at 300. Even proponents see the distinction between the two systems. Pilcher argues: “I do not mean to suggest the criminal system should ignore immigration law; indeed, this article’s central premise is that it is appropriate for the criminal justice system to operate with full awareness of immigration-related consequences.” Id. at 302.

117. See Fong Yue Ting v. United States, 149 U.S. 698, 730 (1893) (holding that the “order of deportation is not punishment for a crime”); Mahler v. Eby, 264 U.S. 32, 39 (1924) (reaffirming the “well-settled” aspect of immigration law that deportation is not a punishment, even though it “may be burdensome and severe for the alien”).


121. Id. at § 411(a)(G)(vi).
involvement or association with said criminal activity, then the noncitizen is detainable and probably deportable.\footnote{122}{See supra Section III for a discussion of crimes of moral turpitude, aggravated felonies, crimes of violence, and controlled substance offenses.}

Procedurally, Congress has initiated “abbreviated hearing procedures, eliminating immigration judges’ discretion and abolishing the rights to judicial review of immigration proceedings.”\footnote{123}{Pilcher, supra note 113, at 273.} Furthermore, “in 1996, Congress authorized judges in federal criminal cases to issue deportation orders concurrently with, and in some cases \emph{as part of}, the judgment of sentence.”\footnote{124}{Id. The article discusses three “mechanisms” of interest that interweave criminal and immigration law procedurally. \textit{Id.} First, “judicial removal” allows a court in a federal criminal case to “hold its own mini-deportation hearing at the time of sentencing and issue a ‘judicial order of removal’” pursuant to the request of a federal prosecutor. \textit{Id.} (quoting the AEDPA-created INA § 258(c), 8 U.S.C. § 1228(c) (Supp. 1997) (formerly INA § 242A, 8 U.S.C. § 1252a(d)). Second, Congress created the “stipulated judicial order of deportation” where the “parties to a federal criminal proceeding ‘may stipulate to the entry of a judicial order of deportation from the United States as a condition of the plea agreement or as a condition of probation or supervised release, or both’ in both felony and misdemeanor cases.” \textit{Id.} (citing INA § 258(c)(5), 8 U.S.C. § 1228(c)(5) (Supp. 1997)). Finally, the “final means by which criminal and immigration procedures have become more closely intertwined is through a statute authorizing federal judges to provide for deportation as a condition of a criminal defendant’s supervised release.” \textit{Id.} at 274 (subsequently citing to 18 U.S.C. § 3583(d) (1994)).}

While Congress is pushing for an integration of immigration-related matters into the criminal justice system, Congress will not allow any part of the protections of the criminal justice system to filter into the immigration law sector.

Notwithstanding the 1996 legislation’s procedural morass, the USA PATRIOT Act diminished the procedural rights of immigrants. In particular, the INA is amended by section 412 of the USA PATRIOT Act, authorizing the mandatory detentions of suspected terrorists without the assistance of judicial review.\footnote{125}{USA PATRIOT Act of 2001 § 412, 8 U.S.C. § 1226a(a)(1), (2); (b)(1) (West Supp. 2003).}

Alternatively, the USA PATRIOT Act states:

\begin{quote}
... Except as provided in paragraphs (5) and (6), the Attorney General shall take into custody any alien who is certified under paragraph (3).
\end{quote}
The Attorney General shall place an alien detained under paragraph (1) in removal proceedings, or shall charge the alien with a criminal offense, not later than seven days after the commencement of such detention. If the requirement of the preceding sentence is not satisfied, the Attorney General shall release the alien.\textsuperscript{126}

The USA PATRIOT Act requires procedural safeguards for detainees both substantively and in duration, such as placement in removal proceedings or charge of a criminal offense no later than seven days after the beginning of the detention. The U.S. government may utilize the immigration system instead of relying upon the relevant procedures of the USA PATRIOT Act to detain individuals because of the immigration system's lack of procedural safeguards. In addition, by utilizing the immigration system to detain people, Department of Justice officials avoid terrorism law, such as the terrorist removal court Congress created in 1996 and the terrorist certification for detention in the USA PATRIOT Act that requires a set procedure, a heightened standard of accountability, and time constraints.

In addition to the procedures mentioned above, the Department of Justice has advocated the enforcement of immigration law by local law enforcement agents instead of immigration representatives.\textsuperscript{127} The circumstances where the police are able to act as immigration enforcement agents exist during immigration emergencies caused by a mass influx of aliens or other circumstances. The possibilities for human rights violations and abuse

\textsuperscript{126} USA PATRIOT Act § 412, 8 U.S.C. § 1226a(a)(5).

\textsuperscript{127} On April 10, 2002, the Department of Justice's Office of Legal Counsel issued a legal opinion stating that local law enforcement officers have "inherent" powers to enforce immigration laws. On July 24, 2002, the Department of Justice expanded the police powers of state and local governments by allowing their police, under INS (now BTS) direction, to act as immigration enforcement agents. See National Immigration Forum, Backgrounder: Immigration Law Enforcement by State and Local Police, at http://www.immigrationforum.org/currentissues/articles/Backgrounder_SLPolice.pdf (Oct. 2003) (on file with Notre Dame Journal of Law, Ethics & Public Policy).
by local law enforcement officials in dealing with immigration violations are high because of the lack of knowledge about the immigration system in the United States coupled with the current anti-immigrant sentiment.\textsuperscript{128}

Given the lessened standard of mere association to a crime, and the close relation between the criminal justice system and immigration law, criminal justice system agents’ professional responsibilities must conform to the immigration consequences that could result from a certain plea or conviction. In a noncitizen’s criminal case, a defense attorney must provide each client with competent and zealous representation.\textsuperscript{129} That is, the attorney should not only be an expert in the practice of criminal law, but he or she must also understand the repercussions of the criminal justice system’s outcomes upon the noncitizen in the area of deportation. With the intermingling of the criminal justice system and the immigration regulatory system, the U.S. government should counsel and educate criminal justice agents regarding possible deportation consequences for the noncitizen.

Ethically, prosecutors, in particular, have a responsibility “to see that justice is fairly done.”\textsuperscript{130} The prosecutor’s immense discretion in the range of possible charges presents a choice in which “[i]f the gravity of the offense and the community’s need for retribution and deterrence can be . . . accounted for by alternative theories of the case, the obligation to pursue individualized justice requires serious consideration of those alternatives.”\textsuperscript{131} Besides prosecutorial discretion, if the criminal justice system increases the awareness of a noncitizen’s status and possible deportation after the completion of the sentence, then, at the very least, when the equitable scale weighs in favor of keeping a family together or some other extreme hardship, perhaps


\textsuperscript{129} See \textit{Model Rules of Prof. Conduct} R. 1.1-1.3 (2003).

\textsuperscript{130} Pilcher, \textit{supra} note 113, at 331 (quoting the ABA \textit{Standards for Criminal Justice—Prosecution Function and Defense Function}, Standard 3-6.1 cmt. (1993)).

\textsuperscript{131} Id. at 332. In order to illustrate her point, Pilcher presents the scenario in which a prosecutor has the choice between charging an immigrant with “breaking and entering with intent to commit larceny,” which is a crime of moral turpitude, or “trespass,” which is not. She argues that “[i]f the trespass conviction can result in punishment that serves goals of incapacitation, retribution, and/or deterrence, the interests of justice demand no more.” \textit{Id.}
justice can be done through consideration of alternative treatments, detainments, or charges of the immigrant.

C. Conditions of the Detainments of Noncitizens

A major concern in the detention of noncitizens is how they are being held: namely, with lack of judicial review rights, incommunicado status, and limited or no legal counsel. Noncitizens detained on immigration charges may be held in many different facilities and without communication with family members, both of which lead to possible problems in the treatment of the detainees due to lack of transparency and accountability. Although Attorney General Ashcroft assured the United States public and international sector that detainees were being promptly charged within forty-eight hours or within the USA-PATRIOT-Act-required seven-day grace period to charge or release the detainee, there have been numerous incidents of longer detentions without charges.

Because of the 1996 legislation and the USA PATRIOT Act, the Attorney General, the former head of the immigration system, has exercised great discretion over the detainments and removals of noncitizens. Specifically, as amended by the 1996


Implementation of the Detention Standards is mandatory for all INS Service Processing Centers (SPCs), Contract Detention Facilities (CDFs), and state and local government facilities (IGSA facilities) that house INS detainees for more than 72 hours. Implementation of the Detention Standards will take place in two phases over a period of 24 months. The first phase will cover SPCs, CDFs and the nine largest IGSA facilities. During the second phase, implementation will extend to all other IGSA facilities. All phase-two facilities will have completed implementation, and be in compliance with all INS Detention Standards, by December 31, 2002.

Id.

133. See, e.g., Dan Eggen, Delays Cited in Charging Detainees; With Legal Lattitude, INS Sometimes Took Weeks, WASH. Post, Jan. 15, 2002, at A1 (describing how after the INS arrested two Pakistani nationals on October 2, 2001, they were not charged with overstaying theirs visas until 49 days later).
legislation, the INA granted the Attorney General the discretion to indefinitely detain deportable, criminal aliens who were not removable. The Attorney General's power and unfettered discretion in the detainments and removals of noncitizens created an atmosphere of little accountability. Then after September 11, the Department of Justice issued an emergency rule allowing the period of detention before filing of charges against noncitizens to be stretched from twenty-four to forty-eight hours or "an additional reasonable period of time" in the event of an emergency or other extraordinary circumstance. Although the extension of time from twenty-four to forty-eight hours is not a drastic emergency measure, the clause does state that "an additional reasonable period of time" could be used to detain someone. The vagueness in this clause allows the FBI and local officers to exercise their own discretion in what constitutes a reasonable length of time and an extraordinary or emergency situation. The vagueness of the emergency rule, coupled with the unfettered discretion and the 1996 legislation, create an environment with no accountability.

In addition to the 1996 legislation and emergency rule, the power and unregulated discretion over the detainments and removals of the Attorney General grew with the enactment of the USA PATRIOT Act. The USA PATRIOT Act's Section 412 is the immigration mandatory detention provision. Section 412 authorizes the Attorney General to certify a noncitizen when the Attorney General has "reasonable grounds to believe" that the noncitizen has been described in various anti-terrorism provisions of the Immigration Act. The Attorney General may detain the noncitizen without a hearing and without a showing that the person poses a threat to national security or a flight risk. Yet, the charges (criminal or immigration-related) against a noncitizen are supposed to be filed within seven days.

However, in reality, the Attorney General has not used this detention provision in the "special interest" cases presumably

135. In Zadvydas v. Davis, the Court takes exception to the full deference typically given to the INS and Congress over immigration matters. 533 U.S. 678, 701 (2001) (citing a period of six months as the constitutionally maximum duration of detention for noncitizens with pending removal orders).
136. 8 C.F.R. § 287.3(d) (2003).
137. Id.
139. USA PATRIOT Act § 412, 8 U.S.C.A. § 1226(a)(5).
because of the requirement that the charges need to be filed within seven days. Instead the Attorney General has used the immigration custody rule, expanded through the executive fiat, to arrest noncitizens without bringing charges for weeks. Since the BTS and USCIS regulations and procedures offer fewer procedural rights and are afforded great deference by the judicial system, the United States' immigration system is a convenient device to detain noncitizens for indefinite periods of time.

Because of the secrecy behind the detentions, accountability is a problem. In general, the Department of Homeland Security's detention practices, under the auspices of terrorism and national security, have included secret and incommunicado detentions, closed hearings, and a lack of access to attorneys and family members. One particular and intriguing example of a U.S. federal judiciary adjudication of an immigration issue dealing with detainment, the First Amendment, and deportability hearings of suspected criminal immigrants is *Detroit Free Press v. Ashcroft*. This case deals with the detention of immigrants in relation to the 9/11 terrorist attacks.

The case began when Attorney General Ashcroft ordered the Chief Immigration Judge Michael Creppy to not list on the public docket the immigration cases related to terrorist attacks. Chief Immigration Judge Michael Creppy's memo not only closed hearings and files of special interest FBI terror probe to public, press, and politicians, but the "Creppy Memo" made the detainments of noncitizens secret even from the noncitizens'

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140. See Tom Brune, *Of 'Special Interest': Immigration System Being Used to Detain Some Suspects*, *Newsday*, Sept. 16, 2002, at A8. The article reported that Shakir Ali Baloch, a forty-year-old man and a Pakistani-born Canadian citizen, was detained by federal agents nine days after the September 11 attacks. Baloch thought that he was picked up for illegally living in a Queens Boulevard apartment, and he assumed he would be deported in days. Yet, "the FBI labeled him a 'special interest' case in its terror probe, and he spent the next seven months in jail." In a high-security, solitary confinement Brooklyn jail, Baloch allegedly received "once-a-month phone access and no lawyer" and law enforcement officials searched his apartment, bank accounts, and questioned him numerous times. *Id.*


142. 303 F.3d 681 (6th Cir. 2002).

143. See *id.* at 705.
families. This restriction included neither confirming or denying whether a case was actually on the docket. In particular, the memo stated that Attorney General Ashcroft has "implemented additional security procedures" for detainee cases of the FBI terror probe of "special interest" cases. Thus, Creppy states that in "closing the special interest deportation hearings, the Government's stated purpose is to avoid disclosing potentially sensitive information to those who may pose an ongoing security threat to the United States and its interests."

However, when the "Creppy Memo" entered the judicial system, the Honorable Nancy G. Edmunds of the United States District Court of the Eastern District of Michigan held that the First Amendment conferred a public right of access to deportation hearings. The reviewing judge, Sixth Circuit Judge Keith, affirmed the injunction that opened the proceedings because the closure to the public and press violated First Amendment rights. Judge Keith stated:

A true democracy is one that operates on faith—faith that government officials are forthcoming and honest, and faith that informed citizens will arrive at logical conclusions. Without question, the events of September 11, 2001, left an indelible mark on our nation, but we as a people are united in the wake of the destruction to demonstrate to the world that we are a country deeply committed to preserving the rights and freedoms guaranteed by our democracy.

This example of detainment and closed trials with the façade of immigration violations shows the extent to which the federal government can manipulate the dignity afforded to immigrants and the necessity of the judiciary to be a "check" on the federal government's actions. In the end, before Detroit Free


148. See Detroit Free Press, 303 F.3d at 705.

149. Id. at 711.
Press v. Ashcroft was decided, over 700 noncitizens had already been tried in secret proceedings. Since the federal government exhibits an extreme willingness to forego the rights that immigrants had in our country before September 11, 2001, not only is the judiciary's scrutiny essential, but this extreme willingness to forego the rights of noncitizens may lead entry-level bureaucrats and local authorities to treat immigrants with less dignity, compassion, or constitutional firmness.

In addition to the "Creppy Memo," Attorney General Ashcroft issued a new statement of policy encouraging federal agencies to resist the Freedom of Information Act (FOIA) requests and supersede Attorney General Janet Reno's 1993 statement promoting disclosure of government information unless it was "reasonably foreseeable that disclosure would be harmful." The Department of Justice has instructed its agencies to withhold information whenever one could argue that there is a "sound legal basis." In particular, 8 C.F.R. sections 236 and 241 concern the release of information regarding INS detainees in nonfederal facilities. Specifically, the rules state:

No person, including any state or local government entity or any privately operated detention facility, that houses, maintains, provides services to, or otherwise holds any detainee on behalf of the Service... shall disclose or otherwise permit to be made public the name of, or other information relating to, such detainee.

Federal agencies' restriction of FOIA requests not only decrease accountability but increase secrecy and possibility for abuse.

In addition to the secrecy surrounding the detainments, once detained, the detainee does not have a guarantee of attorney-client privilege. The Bureau of Prisons promulgated regula-
tions that permit the Department of Justice to monitor confidential attorney-client conversations when the Attorney General feels there is "reasonable suspicion" that a federal prisoner "may" use communications with attorneys or agents to "further or facilitate acts of terrorism." This means that the Attorney General could find reasonable suspicion in cases concerning "persons of interest" (noncitizens) as well as "material witnesses" (citizens and noncitizens, alike). The significance of the regulations is that the Attorney General’s discretion of monitoring conversations between attorneys and clients applies to persons in custody: pretrial detainees, material witnesses, and individuals suspected of immigration violations (including ones not accused of any crime).

Why do we need this new regulation when the DOJ had the authority under United States v. Harrelson to obtain a warrant from a judge based on probable cause that the attorney is facilitating a crime? One argument could be made that the finding of probable cause is too strict a standard in terrorist activities and with threats to national security. The Department of Justice defends the new regulation by pointing to the requirement of notice to the inmate that his or her conversations may be monitored. On the other side, why does the Department of Justice have the ability to forego the neutral role of a judge and the long-standing requirement of probable cause? Also, what harm may come to the attorney-client privilege and the rights associated with the Sixth Amendment? Some argue that the procedural safeguards protect the detainees’ Sixth Amendment and attorney-client rights, including: (1) the “written advance notification that their communication will be monitored”; (2) the “‘firewall’ between the team monitoring the communications and the outside world, including persons involved with any ongoing prosecution of the client”; (3) “absent imminent violence or terrorism, the government would have to obtain court approval before any information from monitored communications is used for any purpose, including for investigative purposes”; and (4) “no privileged information would be retained by the monitoring team . . . only information that is not privileged may be retained.”

Although the Office of Inspector General of the U.S. Department of Justice investigates complaints into the lack

157. 754 F.2d 1153, 1168–69 (5th Cir. 1985).
158. Viet D. Dinh, Freedom and Security After September 11, 25 HARV. J.L. & PUB. POL’Y 399, 404–05 (2002). The bias in Dinh’s argument is obvious once a reader reads that Dinh is an Assistant Attorney General at the United States Department of Justice in the Office of Legal Policy.
of access to attorneys and various other civil rights violations, the undesirable result of intrusions into the attorney-client privilege could be the complete distrust of the attorney-client privilege by detainees as well as extreme erosion of the privilege, in general.

The judicial branch is the main check on the status of noncitizens in the immigration system controlled by Homeland Security and influenced by the FBI. Yet, when one speaks of immigration lawmaking, the courts sustain various egregious forms of discrimination and deprivation of process under the guise of Congress' plenary power. In "constitutional discourse," the plenary power has "long been relegated to a sort of constitutional hall of shame." Possible relief to the current harsh immigration and detention environment for noncitizens came during the Supreme Court's 2000 term in the Zadvydas v. Davis and INS v. St. Cyr cases that both pointed to the Court possibly moving away from Congress' plenary power in immigration law.

In particular, Zadvydas v. Davis dealt with LPRs who had been ordered removed and who were held in custody by the INS (now BTS) beyond the ninety-day removal period. Under section 241(a)(6) of the INA—added to the code in 1996—the


161. 533 U.S. 678, 695 (2001) (citing with approval INS v. Chadha, 462 U.S. 919, 941–42 (1983) (limiting Congress' plenary power)). For a persuasive article discussing the impact of Zadvydas v. Davis, see T. Alexander Aleinikoff, Detaining Plenary Power: The Meaning and Impact of Zadvydas v. Davis, 16 GEO. IMMIGR. L.J. 365 (2002); but see Nguyen v. INS, 533 U.S. 53 (2001). This case dealt with an LPR, Tuan Ahn Nguyen, who had been born out of wedlock in Vietnam, but his United States citizen father, Joseph Boulais, appealed his removal order which was based on two crimes of moral turpitude and one crime of an aggravated felony. Id. at 57. The removal process began because Nguyen pleaded guilty in a Texas state court to two counts of sexual assault on a child. Justice Kennedy, writing for the court, stated that the statute making it more arduous for children born out of wedlock to claim citizenship through the United States citizen parent did not violate the equal protection guarantee of the Fifth Amendment. Id.


163. Aleinikoff, supra note 161; Spiro, supra note 160, at 340; Taylor, supra note 59.
Attorney General may indefinitely detain some non-citizens subject to a final order of removal from the United States.\textsuperscript{164} For example, if removal cannot be effected within ninety days after the entry of a final order of removal, those who have been convicted of criminal offenses or those the Attorney General has determined to be a "risk to the community or unlikely to comply with the order of removal" may be held longer.\textsuperscript{165} When the government argued that the "goal of detention was to ensure removal of the non-citizen, not simply to lock up dangerous persons," the Court was skeptical.\textsuperscript{166} The Court also found it hard to believe that "detention [was] an important element of INS removal practices" when the government had "no reasonable prospect of removing a non-citizen."\textsuperscript{167} Justice Breyer, writing for a 5-4 majority, wrote that Congress' immigration power "is subject to important constitutional limits"—i.e., "Congress must choose a 'constitutionally permissible means of implementing' that power"—and that the INA's post removal-period detention contains an implicit reasonableness limitation (six months).\textsuperscript{170}

Another example of a case possibly limiting Congress' plenary power is \textit{INS v. St. Cyr}, which dealt with aliens who had pled guilty to deportable crimes prior to the enactment of the AEDPA and IIRIRA.\textsuperscript{171} The defendant, Enrico St. Cyr, was a citizen of Haiti who was admitted to the United States as an LPR in 1986.\textsuperscript{172} Ten years after his admission, St. Cyr pled guilty in a Connecticut state court to a charge of selling a controlled substance, which made him deportable.\textsuperscript{173}

Under pre-AEDPA law applicable at the time of his conviction, St. Cyr would have been eligible for a waiver of depo-

\textsuperscript{164} INA § 241(a)(6), 8 U.S.C. § 1231(a)(6)(2000). The statute reads: An alien ordered removed who is . . . removable under § 237(a)(2) [criminal offense], or § 237(a)(4) [security and foreign policy grounds], or who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, may be detained beyond the removal period [i.e., ninety days following entry of removal] and, if released, shall be subject to the terms of supervision of paragraph (3).

\textsuperscript{165} \textit{Id}.


\textsuperscript{167} \textit{Aleinikoff, supra} note 161, at 370.


\textsuperscript{169} \textit{Id}. (citing \textit{INS v. Chadha}, 462 U.S. 919, 941-42 (1983)).

\textsuperscript{170} \textit{Id}. at 680.


\textsuperscript{172} \textit{Id}.

\textsuperscript{173} \textit{Id}.
tation at the discretion of the Attorney General. However, removal proceedings against him were not commenced until April 10, 1997, after both AEDPA and IIRIRA became effective, and, as the Attorney General interpreted those statutes, he no longer has discretion to grant such a waiver.\(^\text{174}\)

That is, the "pre-AEDPA and pre-IIRIRA [character] of the law . . . gave the Attorney General discretion to waive deportation in certain cases."\(^\text{175}\) While both the AEDPA and IIRIRA decreased the applicable relief for immigrants, IIRIRA repealed the Attorney General's section 212(c) discretionary waiver.\(^\text{176}\)

On certiorari, the Court addressed two questions: (1) procedurally, what is the effect of AEDPA and IIRIRA on the availability of habeas corpus jurisdiction under 28 U.S.C. § 2241 and (2) substantively, what is the impact of AEDPA and IIRIRA on "conduct that occurred before their enactment and on the availability of discretionary relief."\(^\text{177}\) The Court held that AEDPA and IIRIRA did not deprive the Court of jurisdiction to review an immigrant's habeas petition.\(^\text{178}\) The Court also held that the provisions of AEDPA and IIRIRA repealing the discretionary relief by the Attorney General did not apply retroactively to St. Cyr.\(^\text{179}\) The Court held in a 5-4 decision that legal immigrants facing deportation because of felony convictions could raise pure "questions of law" in habeas corpus proceedings brought in federal courts under 28 U.S.C. section 2241.\(^\text{180}\) This holding is critical to noncitizens, because this means that district courts retain the "general habeas corpus jurisdiction to review the legality of deportation orders."\(^\text{181}\) Lastly, as a result of INS v. St. Cyr, the Executive Office of Immigration Review (EOIR) published a proposed rule on August 13, 2002, amending INS and EOIR regulations to establish procedures implementing INS v. St. Cyr for LPRs with certain criminal convictions, arising from plea agreements reached before a verdict at trial, to apply for relief from deportation or removal pursuant to former INA section 212(c).

Without invoking the traditional plenary power reasoning, the Supreme Court in Zadvydas and St. Cyr suggested that the Court was "backing away from the heightened deference that the

\(^{174}\) Id.  
^{175}\) Id.  
^{176}\) INA § 212(c), 8 U.S.C. § 1182(c) (repealed 1996).  
^{177}\) St. Cyr, 533 U.S. at 292–93.  
^{178}\) Id. at 289.  
^{179}\) Id.  
^{180}\) Id.  
^{181}\) Taylor, supra note 59, at 275.
judiciary has long afforded to the political branches’ regulation of immigration.” However, even though both Supreme Court cases point to the limitation of Congress’ plenary power in the realm of immigration law, a post-9/11 Court will likely grant full discretion to Congress to implement more restrictive regulations concerning immigrants and increase the deportations of immigrants with minor infractions. The USA PATRIOT Act “dramatically increased the power of the executive branch to detain and remove noncitizens, authorizing federal action on vague, open-ended grounds and secret evidence.” Immigrants who were charged with criminal involvement in the 9/11 terrorist acts were detained by the Justice Department on immigration charges. The number of undesirable consequences that can result from the vague, open-ended and secret nature surrounding the detentions of noncitizens is limitless. At least four unintended consequences are practically guaranteed: (1) a decrease in the idea that individuals within the borders of the United States should be treated with respect, dignity, and at least a modicum of constitutional firmness; (2) an increase in the distrust and distain of the American government not only by noncitizens, but by the international community, as well; (3) a sweeping erosion in the rights of citizens along with the rights of LPRs and other noncitizens; and (4) a depth of abuse in the immigration system that will lead to violations of individuals—citizens and noncitizens alike—at the hands of entry-level officers who work within the system without adequate checks.

CONCLUSION

In addition to the offensiveness of the ethnic profiling and discrimination against noncitizens, the lack of procedural safeguards and increased substantive crime-related deportations diminishes the opportunities and rights of immigrants. The intermingling of the criminal and immigration systems, and the approval by the federal government and Congress of the use of secret trials, secret evidence, and indefinite detention of noncitizens suspected of terrorist activity, affects all noncitizens, an extremely vulnerable group. When the United States restricts noncitizens’ rights for the security of the nation, it heightens the possibility of violations of the rights of noncitizens as well as citi-

182. Id. at 271.
183. See, Aleinikoff, supra note 161, at 366.
Through an increased awareness of immigration law by the local authorities in the criminal justice system, stricter judicial review of Congress' plenary power and immigration officers' decisions concerning detainments and deportations, and an ethical focus on issues concerning national security, perhaps the rights and dignity of noncitizens will improve.

185. See Cole, supra note 33, at 953.