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ON CIVIL LIBERTIES AND PROPOSED ANTI-TERRORISM LEGISLATION

BEFORE THE SUBCOMMITTEE ON THE CONSTITUTION, FEDERALISM AND

PROPERTY RIGHTS OF THE SENATE JUDICIARY COMMITTEE

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INTRODUCTION

The deplorable and horrific attacks of September 11 have shocked and stunned us all, and have quite properly spurred renewed consideration of our capability to forestall future attacks. Yet in doing so, we must not rashly trample upon the very freedoms that we are fighting for.

Nothing tests our commitments to principle like fear and terror. But as we take up what President Bush has called a fight for our freedoms, we must maintain our commitments to those freedoms at home. The attack of September 11, and in particular the fact that our intelligence agencies missed it entirely, requires a review of our law enforcement and intelligence authorities. Everyone agrees that more should be done to ensure the safety of American citizens at home and abroad. But we must be careful not to overreact, and should therefore insist that any response be measured and effective.

Three principles must guide our response to threat of terrorism. First, we should not overreact in a time of fear, a mistake we have made all too often in the past. Second, we should not sacrifice the bedrock foundations of our constitutional democracy -- political freedom and equal treatment. And third, in balancing liberty and security, we should not trade a vulnerable minority's liberties, namely the liberties of immigrants in general or Arab and Muslim immigrants in particular, for the security of the rest of us.

The Administration's proposal seeks a wide range of new law enforcement powers. I will focus my remarks on the immigration section of the Administration proposal. In doing so, I will also refer to the Sensenbrenner-Conyers bill, referred to as the PATRIOT Act, recently introduced in the House. In my view, the Administration's proposal is neither measured nor effective, and unnecessarily sacrifices our commitment to both equal treatment and political freedom. The PATRIOT Act mitigates some of the troubling aspects of the Administration's proposal, but remains deeply problematic, and unconstitutional in several respects. I will focus my remarks on the Administration's proposal, but will also note where the PATRIOT Act differs. The Administration's proposal has four fundamental flaws:

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1) It indulges in guilt by association, a concept that the Supreme Court has rejected as "alien to the traditions of a free society and the First Amendment itself." *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 932 (1982).

2) It would apply its newly expanded deportation grounds for associational activity retroactively, making aliens deportable for activity that was wholly legal at the time they engaged in it.

3) It authorizes the INS to detain immigrants potentially indefinitely, even where they cannot be deported and have a legal right to live here permanently.

4) It resurrects ideological exclusion -- the notion that people can be excluded for their political beliefs -- a concept Congress repudiated in 1990 when it repealed the McCarran-Walter Act.

HISTORY

I will address each of these problems in turn. But before doing so, it is worth reviewing a little history. This is not the first time we have responded to fear by targeting immigrants and treating them as suspect because of their group identities rather than their individual conduct.

In 1919, a series of politically motivated bombings culminated in the bombing of Attorney General A. Mitchell Palmer's home here in Washington, DC. Federal authorities responded by rounding up 6,000 suspected immigrants in 33 cities across the country, not for their part in the bombings, but for their political affiliations. They were detained in overcrowded "bull pens," and beaten into signing confessions. Many of those arrested turned out to be citizens. In the end, 556 were deported, but for their political affiliations, not for their part in the bombings.

In World War II, the attack on Pearl Harbor led to the internment of over 100,000 persons, over two-thirds of whom were citizens of the United States, not because of individualized determinations that they posed a threat to national security or the war effort, but solely for their Japanese ancestry. The internment began in April 1942, and the last camp was not closed until four years later, in March 1946.

In the McCarthy era, we made it a crime even to be a member of the Communist Party, and passed the McCarran-Walter Act, which authorized the government to keep out and expel noncitizens who advocated Communism or other proscribed ideas, or who belonged to the Communist Party or other groups that advocated proscribed ideas. Under the McCarran-Walter Act, the United States denied visas to, among others, writers Gabriel Garcia Marques and Carlos Fuentes, and to Nino Pasti, former Deputy Commander of NATO, because he was going to speak against the deployment of nuclear cruise missiles.

We have learned from these mistakes. The Palmer Raids are seen as an embarrassment. In 1988, Congress paid restitution to the Japanese internees. In 1990, Congress repealed the

McCarran-Walter Act political exclusion and deportation grounds. But at the time these actions were initially taken, they all appeared reasonable in light of the threats we faced. This history should caution us to ask carefully whether we have responded today in ways that avoid overreaction and are measured. to balance liberty and security. In several respects detailed below, the Administration's proposed Anti-Terrorism Act fails that test.

COUNTERTERRORISM AUTHORITY IN EXISTING LAW

In considering whether the Administration's bill is necessary, it is important to know what authority the government already has to deny admission to, detain, and deport aliens engaged in terrorist activity. The government already has extremely broad authority to act against any alien involved in or supporting any kind of terrorist activity:

1. It may detain without bond any alien with any visa status violation if it institutes removal proceedings and has reason to believe that he poses a threat to national security or a risk of flight. The alien need not be charged with terrorist activity. 8 U.S.C. §1226, 8 C.F.R. §241 The INS contends that it may detain such aliens on the basis of secret evidence presented in camera and ex parte to an immigration judge.

2. It may deny entry to any alien it has reason to believe may engage in any unlawful activity in the United States, and to any member of a designated terrorist group. It may do so on the basis of secret evidence. 8 U.S.C. §1182(a)(3).

3. It may deport any alien who has engaged in terrorist activity, or supported terrorist activity in any way. Terrorist activity is defined under existing law very broadly, to include virtually any use or threat to use a firearm with intent to endanger person or property (other than for mere personal monetary gain), and any provision of support for such activity. 8 U.S.C. §1227(a)(4). Pursuant to the Alien Terrorist Removal provisions in the 1996 Antiterrorism Act, the INS may use secret evidence to establish deportability on terrorist activity grounds.

4. Relatedly, the Secretary of State has broad, largely unreviewable authority under the 1996 Anti-Terrorism and Effective Death Penalty Act to designate "foreign terrorist organizations" and thereby criminalize all material support to such groups. 8 U.S.C. §1189, 18 U.S.C. §2339B. This provision triggers criminal sanctions, and applies to immigrants and citizens alike. Osama bin Laden's organization is so designated, and thus it is a crime, punishable by up to 10 years in prison, to provide any material support to his group.

THE ADMINISTRATION'S PROPOSED ANTI-TERRORISM ACT

The immigration provisions of the Administration's Anti-Terrorism Act: (1) expand the grounds for deporting and denying entry to noncitizens; (2) expand the Secretary of State's authority to designate and cut off funding to "foreign terrorist organizations;" (3) create a new mandatory detention procedure for aliens certified as terrorists by the INS; (4) authorize the Secretary of State to share certain immigration file information with foreign governments; and

(5) require the FBI and the Attorney General to share certain criminal history data with the INS and the State Department to improve visa decision making.

The most troubling provisions are the expanded grounds for deportation and exclusion, and the new mandatory detention procedure.

A. The Administration Bill Imposes Guilt by Association

The term "terrorism" has the capacity to stop debate. Everyone opposes terrorism, which is commonly understood to describe premeditated, politically-motivated violence directed at noncombatants. *See* 22 U.S.C. §2656f(d)(2) (defining terrorism as "premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents").

The INA, however, defines "terrorist activity" much more broadly, and under the Administration bill would define it beyond any common understanding of the term. Under current law, the INA defines "terrorist activity" to include any use or threat to use an "explosive or firearm (other than for mere personal monetary gain) with intent to endanger .. the safety of one or more individuals or to cause substantial damage to property." 8 U.S.C. §1182(a)(3)(B)(ii). Under the Administration bill, this would be expanded to include the use or threat to use any "explosive, firearm or other weapon or dangerous device" with the intent to endanger person or property. Section 201(a)(1)(B)(ii). This definition encompasses a domestic disturbance in which one party picks up a knife, a barroom brawl in which one party threatens another with a broken beer bottle, and a demonstration in which a rock is thrown at another person. It would also apply to any armed struggle in a civil war, even against regimes that we consider totalitarian, dictatorial, or genocidal. Under this definition, all freedom fighters are terrorists.[2]

The PATRIOT Act would define "terrorist activity" even more broadly, to include the use of "any object" with intent to endanger person or property. Under this bill, a demonstrator who threw a rock during a political demonstration would be treated as a "terrorist."

The point is not that such routine acts of violence are acceptable, or that armed struggle is generally permissible. But to call virtually every crime of violence "terrorism" is to trivialize the

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[2] In his testimony, Douglas Kmiec defends this expansion by erroneously stating that under current law, "an alien is inadmissible and deportable for engaging in terrorist activity only when the alien has used explosives or firearms." Kmiec Statement at 7. Therefore, he argues, the change is needed to encompass attacks like those of September 11. That is plainly wrong. In its current form 8 U.S.C. 182(a)(3)(B)(ii) already defines "terrorist activity" to include, among other things, "highjacking or sabotage of any conveyance (including an aircraft, vessel, or vehicle)," "seizing or detaining, and threatening to kill, injure, or continue to detain, another individual in order to compel a third person (including a governmental organization) to do or abstain from doing any act as an explicit or implicit condition for the release of the individual seized or detained," "assassination," the use of any biological, chemical, or nuclear weapon, *and* the use or threat to use any explosive or firearm against person or property (other than for mere personal monetary gain). Thus, no rewriting of the act is required to reach the conduct of September 11.

term. And because so much else in the Administration bill and the PATRIOT Act turns on "terrorist activity," it is critical to keep in mind the stunning overbreadth of this definition. Government action that might seem reasonable vis-a-vis a hijacker may not be justified vis-a-vis an immigrant who found himself in a bar fight, threw a rock during a demonstration, or who sent humanitarian aid to an organization involved in civil war. Yet the Administration bill draws no distinction between the hijacker, the humanitarian, the political demonstrator, and the barroom brawler.

The breadth of "terrorist activity" is expanded still further by the Administration's proposed redefinition of "engage in terrorist activity." Under current law, that term is defined to include engaging in or supporting terrorist activity in any way. 8 U.S.C. §1182(a)(3)(B)(iii). The Administration proposes to expand it to include any associational activity in support of a "terrorist organization." Section 201(a)(1)(C). And because the INS has argued that a terrorist organization is any group that has ever engaged in terrorist activity, as defined in the INA, irrespective of any lawful activities that the group engages in, this definition would potentially reach any group that ever used or threatened to use a "firearm or other weapon" against person or property.[3]

The Administration's bill contains no requirement that the alien's support have any connection whatsoever to terrorist activity. Thus, an alien who sent coloring books to a day-care center run by an organization that was ever involved in armed struggle would appear to be deportable as a terrorist, even if she could show that the coloring books were used only by 3-year olds. Indeed, the law apparently extends even to those who seek to support a group in the interest of *countering* terrorism. Thus, an immigrant who offered his services in peace negotiating to the IRA in the hope of furthering the peace process in Great Britain and forestalling further violence would appear to be deportable as a terrorist.

The bill also contains no requirement that the organization's use of violence be contemporaneous with the aid provided. An alien would appear to be deportable as a terrorist for making a donation to the African National Congress today, because fifteen years ago it used military as well as peaceful means to oppose apartheid.

And unlike the 1996 statute barring funding to designated foreign terrorist groups, the Administration bill does not distinguish between foreign and domestic organizations. Thus, immigrants would appear to be deportable as terrorists for paying dues to an American pro-life

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[3] In the Administration draft circulated Wednesday, September 19, terrorist organization was expressly defined to include any group that has ever engaged in or provided material support to a terrorist activity, irrespective of any other fully lawful activities that the group may engage in. In the revised draft circulated Thursday, September 20, the bill deleted the definition of terrorist organization, but still made any support of a terrorist organization a deportable offense. This is even worse from a notice perspective, as it makes aliens deportable for providing support to an entity that is undefined. In litigation, the INS has argued that the term "terrorist organization" means any group that has ever committed "terrorist activity," as that term is defined in the INA.

group or environmental organization that ever in its past used or threatened to use a weapon against person or property.

The net effect of the Administration's expansion of the definition of "engage in terrorist activity" and "terrorist activity" is to make a substantial amount of wholly innocent, nonviolent associational conduct a deportable offense. By severing any tie between the support provided and terrorist activity of any kind, the bill indulges in guilt by association. Douglas Kmiec disputes this assertion in his testimony, but in doing so refers not to the Administration's proposal, but to the PATRIOT Act. Kmiec Statement at 7. Even as to the PATRIOT Act, however, Professor Kmiec is wrong.

The PATRIOT Act seeks to strike a compromise on the issue of guilt by association. It gives the Administration what it seeks -- the power to impose guilt by association -- for support of any group designated as a foreign terrorist organization by the Secretary of State under 8 U.S.C. §1189. An alien who sends humanitarian aid to a designated foreign terrorist group would be deportable, without more. But for those groups that are not designated, the bill requires a nexus to terrorist activity: the alien would be deportable only if he provided support to a non-designated group in circumstances in which he knew, or reasonably should have known, that his support was furthering terrorist activity. Thus, for designated groups, the PATRIOT Act permits guilt by association, but for non-designated groups, the PATRIOT Act retains the existing requirement that the INS show a nexus between the alien's act of support and some terrorist activity. The compromise reflected in the PATRIOT Act thus properly eliminates guilt by association for non-designated groups, but expressly authorizes guilt by association for any organization designated by the Secretary of State under 8 U.S.C. §1189.

In my view, the principle that people should be held responsible for their own individual conduct, and not for the wrongdoing of those with whom they are merely associated, brooks no compromise. Guilt by association, the Supreme Court has ruled, violates the First and the Fifth Amendments.[4] It violates the First Amendment because people have a right to associate with groups that have lawful and unlawful ends. Accordingly, the Court has ruled that one can be held responsible for one's associational ties to a group only if the government proves "specific intent" to further the group's *unlawful* ends. *United States v. Robel*, 389 U.S. 258, 262 (1967).

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[4] The First and Fifth amendments apply equally to citizens and aliens residing in the United States. *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596 n.5 (1953). Mr. Kmiec suggests that this is wrong because the First and Fifth Amendments do not extend to aliens seeking entry from abroad. Kmiec Statement at 8. But of course such aliens are not residing in the United States. The Supreme Court has long distinguished between aliens seeking entry from outside our borders, who have no constitutional protections, and aliens here, whether here legally or illegally, who are protected by the First and Fifth Amendments to the Constitution. The Court reiterated this basic point, apparently missed by Mr. Kmiec, as recently as last term, in *Zadvydas v. Davis*, 121 S. Ct. 2491, 2500 (2001) ("once an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent." The Supreme Court could not have been any clearer in *Colding*, in which it stated that neither First or Fifth Amendments "acknowledges any distinction" between citizens and aliens residing here.

Guilt by association also violates the Fifth Amendment, because "in our jurisprudence guilt is personal." *Scales v. United States*, 367 U.S. 203 (1961). To hold an alien responsible for the military acts of the ANC fifteen years ago because he offers a donation today, or for providing peace negotiating training to the IRA, violates that principle. Without some connection between the alien's support and terrorist activity, the Constitution is violated. Douglas Kmiec argues that the guilt by association cases "deal with domestic civil rights." Kmiec Statement at 7. In fact, this principle was developed with respect to association with the Communist Party, an organization that Congress found to be, and the Supreme Court accepted as, a foreign-dominated organization that used sabotage and terrorism for the purpose of overthrowing the United States by force and violence. Yet even as it accepted those findings as to the Communist Party, the Court held that guilt by association was not permissible.

The guilt by association provisions of the Administration bill also suffer from tremendous notice problems. In the most recent draft, "terrorist organization" is wholly undefined, yet an alien can lose his right to remain in this country for supporting such an undefined entity. Is a terrorist organization one that engages exclusively in terrorism, primarily in terrorism, engages in terrorism now, or ever engaged in terrorism? The definition proffered in the Administration's Wednesday draft, and argued for by the INS in litigation, does not solve the notice problem, because it is so broad that it encompasses literally thousands of groups that ever used or threatened to use a weapon. Any alien who sought to provide humanitarian aid to any group would have to conduct an extensive investigation to ensure that neither the organization nor any subgroup of it ever used or threatened to use a weapon.

Congress repudiated guilt by association in 1990 when it repealed the McCarran-Walter Act provisions of the INA, which made proscribed association a deportable offense, and had long been criticized as being inconsistent with our commitments to political freedom. In 1989, a federal district court declared the McCarran-Walter Act provisions unconstitutional. *American-Arab Anti-Discrimination Comm. v. Meese*, 714 F. Supp. 1060 (C.D. Cal. 1989), *rev'd in part and aff'd in part on other grounds*, 970 F.2d 501 (9th Cir. 1991). In 1990, Congress repealed those provisions. Yet the Administration would resurrect this long-rejected and unconstitutional philosophy.

B. The Administration's Bill Would Apply its Expanded Grounds for Deportation Retroactively, so that Aliens Would be Deported for Conduct Fully Lawful at the Time they Engaged in it

The expansive definitions of "terrorist activity" and "engage in terrorist activity" detailed above are exacerbated by the fact that they apply retroactively, to conduct engaged in before the effective date of the Act. Since the principal effect of the Administration's new definitions is to render deportable conduct that is now wholly lawful, this raises serious problems of fundamental fairness.

As noted above, aliens are currently deportable for engaging in or supporting terrorist activity. However, the new law would add as new grounds of deportation wholly innocent and nonviolent associational support of political organizations that have at some time used a weapon.

activity. Even to apply that ground prospectively raises substantial First and Fifth Amendment concerns, as noted above. But to apply it retroactively is grossly unfair.

Moreover, retroactive application would serve no security purpose whatsoever. Since under current law any alien supporting terrorist activity is already deportable, the *only* aliens who would be affected by the bill's retroactive application would be those who were *not* supporting terrorist activity – the immigrant who donated to the peaceful anti-apartheid activities of the ANC, or who provided peacemaking training to the IRA, or who made a charitable donation of his time or money to the lawful activities of an environmental or pro-life group that once engaged in violence. There is simply no justification for retroactively imposing on such conduct – fully lawful today – the penalty of deportation.

The PATRIOT Act largely solves the retroactivity problem, at least with respect to the guilt by association provisions, by limiting its newly expanded grounds of deportation for support of designated terrorist organizations to support provided after the designations were made. Since the designation already triggers a criminal penalty under current law, most aliens affected by this provision even for pre-Act conduct would not be able to claim that they were being deported for conduct that was legal when they engaged in it. However, the PATRIOT Act would present some retroactivity problems. Under the existing criminal provisions for material support to terrorist organizations, it is lawful to send medicine or religious materials to a designated group. 18 U.S.C. §2339A. Yet the PATRIOT Act would make such conduct, even conduct engaged in before the PATRIOT Act took effect, a deportable offense. There is no warrant for deporting people for providing humanitarian aid at a time when it was fully legal to do so.

C. The Mandatory Detention Provision Section Violates Due Process by Authorizing Indefinite Unilateral Executive Detention Irrespective of Whether the Alien Can be Deported

The Administration bill would amend current INS detention authority to provide for "mandatory detention" of aliens certified by the Attorney General as persons who may "commit, further, or facilitate acts described in sections 237(a)(4)(A)(I), (A)(iii), or (B), or engage in any other activity that endangers the national security of the United States." Section 202(1)(e)(3). Such persons would be detained indefinitely, even if they are granted relief from removal, and therefore have a legal right to remain here. This provision would authorize the INS to detain persons whom it has no authority to deport, and without even instituting deportation proceedings against them, simply on an executive determination that there is "reason to believe" that the alien "may commit" a "terrorist activity."

To appreciate the extraordinary breadth of this unprecedented power, one must recall the expansive definition of "terrorist activity" and "engage in terrorist activity" noted above. This bill would *mandate* detention of any alien who the INS has "reason to believe" may provide humanitarian aid to the African National Congress, peace training to the IRA, or might get into a domestic dispute or barroom brawl. There is surely no warrant for preventive detention of such people, much less *mandatory* detention on a "reason to believe" standard. Mr. Kmiec, defending the provision, suggests that these examples are unlikely to arise. But the point is that

any provision so broad as to permit such applications is in no way narrowly tailored to addressing true terrorist threats.

Current law is sufficient to meet the country's needs in fighting terrorism. The INS is authorized to detain without bond any alien in a removal proceeding who poses a threat to national security or a risk of flight. It routinely does so. It also has authority, as illustrated in recent weeks, to detain aliens *without charges* for up to 48 hours, and in extraordinary circumstances, for a reasonable period of time.

This provision raises four basic concerns. First, it is plainly unconstitutional, because it mandates detention of persons *who pose no threat to national security or risk of flight.* If the Attorney General certifies that an individual may provide humanitarian support to a group that has engaged in a civil war, for example, the person is subject to mandatory detention, without any requirement that the alien currently poses a threat to national security or risk of flight.

The mandatory detention provision is a form of preventive detention prior to trial. But the Supreme Court has held that "[i]n our society, liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." *United States v. Salerno*, 481 U.S. 739, 755 (1987). Preventive detention is constitutional only in very limited circumstances, where there is a demonstrated need for the detention -- because of current dangerousness or risk of flight -- and only where there are adequate procedural safeguards. *Salerno*, 481 U.S. at 746 (upholding preventive detention only where there is a showing of threat to others or risk of flight, where the detention is limited in time, and adequate procedural safeguards are provided); *Foucha v. Louisiana*, 504 U.s. 71, 80 (1992) (civil commitment constitutional only where individual has a harm-threatening mental illness, and adequate procedural protections are provided); *Zadvydas v. Davis*, 121 S., Ct. 2491, 2498-99 (2001) (explaining constitutional limits on preventive detention, and interpreting immigration statute not to permit indefinite detention of deportable aliens). Where there is no showing that the alien poses a threat to national security or a risk of flight, there is no justification whatsoever for detention, and any such detention would violate substantive due process.

Second, the detention authority proposed would allow the INS to detain aliens *indefinitely, even where they have prevailed in their removal proceedings.* This, too, is patently unconstitutional. Once an alien has prevailed in his removal proceeding, and has been granted relief from removal, he has a legal right to remain here. Yet the Administration proposal would provide that even aliens *granted* relief from removal would still be detained.[5] At that point, however, the INS has no legitimate basis for detaining the individual. The INS's authority to detain is only incident to its removal authority. If it cannot remove an individual, it has no basis for detaining him. *Zadvydas v. INS*, 121 S. Ct. 2491 (holding that INS could not detain indefinitely even aliens ruled deportable where there was no reasonable likelihood that they could be deported because no country would take them).[6]

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[5] In many instances, an alien who poses a threat to national security will not be eligible for discretionary relief.

[6] While the Court in *Zadvydas* left undecided the question of indefinite detention of a deportable alien where applied "narrowly to 'a small segment of particularly dangerous

Third, the standard for detention is vague and insufficiently demanding, and raises serious constitutional concerns. It is important to keep in mind that the bill proposes to authorize *mandatory* and potentially *indefinite* detention. That is a far more severe deprivation of liberty than holding a person for interrogation or trial. Yet the INS has in litigation argued that "reason to believe" is essentially equivalent to the "reasonable suspicion" required for a brief stop and frisk under the Fourth Amendment. The Constitution would not permit the INS to detain an alien indefinitely on mere "reasonable suspicion," a standard which does not even authorize a custodial arrest in criminal law enforcement.

Fourth, and most importantly, it is critical to the constitutionality of any executive detention provision that the person detained have a meaningful opportunity to contest his detention both administratively and in court. *INS v. St. Cyr*, 121 S. Ct. 2271 (2001). I read the judicial review provision as authorizing judicial review of the evidentiary basis for detention, and as authorizing the reviewing court to order release if the evidence does not support the Attorney General's determination that the alien poses a current threat to national security. In any event, such review would be constitutionally required: aliens may not be deprived of their liberty without notice of the basis for the detention and a meaningful opportunity to confront and rebut the evidence against them. *See, e.g.*, *Landon v. Plasencia*, 459 U.S. 21, 34 (1982); *Kwong Hai Chew v. Colding*, 344 U.S. 590 (1953); *American-Arab Anti-Discrimination Comm. v. Reno*, 70 F.3d 1045 (9th Cir. 1995), *Rafeedie v. INS*, 880 F.2d 506 (D.C. Cir. 1989); *Al Najjar v. Reno*, 97 F. Supp.2d 1329 (S.D. Fla. 2000); *Kiareldeen v. Reno*, 71 F. Supp.2d 402 (D.N.J. 1999). Unilateral executive detention knows no place in American law.

The PATRIOT Act's mandatory detention provision share many of the above flaws. Most problematically, it, too, authorizes preventive detention without any showing that an alien poses any current danger to national security or a risk of flight. It only requires the Attorney General to certify that an alien "is described" in various deportation or exclusion provisions. These include aliens who the Attorney General believes may be mere members of designated foreign terrorist groups, and any alien involved in a domestic dispute or a barroom brawl in which a weapon or other object was used with intent to endanger person or property. Even if such aliens pose no threat to others or risk of flight, they are subject to mandatory detention.

In addition, like the Administration's proposal, the PATRIOT Act permits *indefinite* detention. The PATRIOT Act adds a requirement that the government file immigration or criminal charges against an alien mandatorily detained within 7 days, but that is a largely irrelevant protection, because the provision authorizes *indefinite detention even of those aliens*

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individuals,' say suspected terrorists," 121 S. Ct. at 2499, the Court did not decide that such detention would be permissible, since the question was not presented. Moreover, the Administration's proposed definition of "terrorist activity" would not be limited to a narrow, "small segment of particularly dangerous individuals," as the Court in *Zadvydas* contemplated, but to garden variety criminals, barroom brawlers, and those who have supported no violent activity whatsoever, but provided humanitarian support to the African National Congress. It begs credulity to characterize such an open-ended authority as limited to a "small segment of particularly dangerous individuals."

who prevail in their deportation proceedings. The requirement that charges be filed means nothing if the resolution of those charges in the alien's favor has no effect on the detention.

The judicial review provision of the PATRIOT Act marks an improvement on the Administration proposal by clarifying explicitly that judicial review would include review of the merits of the Attorney General's certification decision, and by barring delegation below the INS Commissioner of the certification decision. But like the Administration provision, it affords the alien no administrative opportunity to defend himself, and therefore violates due process.

D. The Bill Resurrects Ideological Exclusion, Barring Entry to Aliens Based on Pure Speech

The bill would also amend the grounds of inadmissibility. These grounds would apply not only to aliens seeking to enter the country for the first time, but also to aliens living here who seek to apply for various immigration benefits, such as adjustment of status to permanent resident, and to permanent residents seeking to enter the country after a trip abroad.

The bill expands current law by excluding aliens who "endorse or espouse terrorist activity," or who "persuade others to support terrorist activity or a terrorist organization," in ways that the Secretary of State determines undermine U.S. efforts to combat terrorism. Section 201(a)(1). It also excludes aliens who are representatives of groups that "endorse acts of terrorist activity" in ways that similarly undermine U.S. efforts to combat terrorism.

Excluding people for their ideas is flatly contrary to the spirit of freedom for which the United States stands. It was for that reason that Congress repealed all such grounds in the INA in 1990, after years of embarrassing visa denials for political reasons.

Moreover, because of the breadth of the definitions of "terrorist activity" and "terrorist organizations," this authority would empower the government to deny entry to any alien who advocated support for the ANC, for the contras during the war against the Sandinistas, or for opposition forces in Afghanistan and Iran today. Because all of these groups have used force or violence, they would be terrorist organizations, and anyone who urged people to support them would be excludable on the Secretary of State's say-so.

The PATRIOT Act shares this problem, and goes further, by rendering aliens deportable for their speech. However, it qualifies the deportation provisions with the requirement that the speech be intended and likely to promote or incite imminent lawless action, the constitutional minimum required before speech advocating illegal conduct can be penalized. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

CONCLUSION

In responding to terrorism, we must ensure that our responses are measured and balanced. Is it a measured response to terrorism to make deportable anyone who provides humanitarian aid to the African National Congress today? Is it measured to deport aliens for donating their time to a pro-life group that once engaged in an act of violence but no longer does so? Is it measured to

deport an immigrant who sends human rights pamphlets to an organization fighting a civil war? Is it measured to label any domestic dispute or barroom fight with a weapon an act of terrorism? Is it measured to subject anyone who might engage in such activity subject to mandatory detention? Is it measured to restore exclusion for ideas? Is it measured to make aliens deportable for peaceful conduct fully lawful at the time they engaged in it?

I submit that the Administration's proposal falls short in all of these respects. The overbreadth of the bill reflects the overreaction that we have often indulged in when threatened. The expansive authorities that the Administration bill grants, moreover, are not likely to make us safer. To the contrary, by penalizing even wholly lawful, nonviolent, and counterterrorist associational activity, we are likely to drive such activity underground, to encourage extremists, and to make the communities that will inevitably be targeted by such broad-brush measures disinclined to cooperate with law enforcement. As Justice Louis Brandeis wrote nearly 75 years ago, the Framers of our Constitution knew "that fear breeds repression; that repression breeds hate; and that hate menaces stable government." *Whitney v. California*, 274 U.S. 357, 375 (1927). In other words, freedom and security need not necessarily be traded off against one another; maintaining our freedoms is itself critical to maintaining our security.

The Administration's bill fails to live up to the very commitments to freedom that the President has said that we are fighting for. As the Supreme Court wrote in 1967, declaring invalid an anti-Communist law, "`It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties - the freedom of association - which makes the defense of the Nation worthwhile." *United States v. Robel*, 389 U.S. 258, 264 (1967).