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American-Arab -- Getting the Balance Wrong -- Again!

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AMERICAN-ARAB — GETTING THE BALANCE WRONG — AGAIN!

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In a sense, research for this Article began when I collaborated with David Cole and contributed to the brief for the Petitioners in *American-Arab Anti-Discrimination Committee v. Meese*, 714 F. Supp. 1060 (C.D. Cal. 1989), and *American-Arab Anti-Discrimination Committee v. Reno (AAADC I)*, 70 F.3d 1045 (9th Cir. 1995).

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INTRODUCTION: LOSING SIGHT OF THE BALL

Reading the Supreme Court's opinion in *Reno v. American-Arab Anti-Discrimination Committee (American-Arab)*,[1] it is difficult to remember that the case, now in its thirteenth year, has grown, in the words of Henry James, into a "baggy monster." The case began with a First Amendment challenge to a since-repealed statute that rendered aliens deportable for their associations and beliefs. The INS set the whole thing into motion when it charged seven Palestinians and one Kenyan "under various provisions of the McCarran-Walter Act of 1952 (1952 Act) for membership in an organization, the Popular Front for the Liberation of Palestine (PFLP), that allegedly advocates the doctrines of world communism."[2] It is almost as difficult to be certain that some years from now, it will end with the Court confronting the constitutionality of at least one statute that has rendered aliens deportable for engaging in fund-raising activities on behalf of so-called "terrorist organizations."[3]

This Article has three goals. First, the Article re-focuses attention on the government's asserted statutory authority, its heavy-handed efforts to stifle political expression under that authority, and the important First Amendment issues that these efforts raise. Second, it explains why the First

1. 119 S. Ct. 936 (1999).

2. American-Arab Anti-Discrimination Comm. v. Reno, 70 F.3d 1045, 1052-53 (9th Cir. 1995) (*AAADC I*).

3. At various times, some or all of the aliens whose right to remain in the United States is at issue in the *American-Arab* litigation have been charged with violating the Immigration and Nationality Act (INA), section 212(a)(28)(D), (F), and (G), as well as section 241(a)(6)(D), (F), and (G) (as they existed prior to 1998). These sections were amended by the Foreign Relations Authorization Act (FRAA), Fiscal Years 1988 and 1989, Pub. L. No. 100-204, § 901(a), 101 Stat. 1331, 1399-400 (codified at 22 U.S.C. § 2651). These same sections were later repealed by INA sections 212(a)(3)(B), Pub. L. No. 101-649, 104 Stat. 4978 (1990) (codified at 8 U.S.C. § 1182(a)(3)(B) (1994 & Supp. IV 1998)) and 237(a)(4)(B), Pub. L. No. 101-649, 104 Stat. 4978 (1990) (codified at 8 U.S.C. § 1227(a)(4)(B) (Supp. III 1997)). There is also a possibility that they will be changed in the future with one or more provisions of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, tit. III and IV, 110 Stat. 1214, 1247-81 (codified at scattered sections of 8 and 18 U.S.C. (Supp. IV 1998)).

Amendment issues so central to the case are virtually invisible in the Supreme Court's recent opinion. In so doing, it will point to a number of reasons, including several unfavorable early judicial opinions in the Ninth Circuit, the legal strategy of the aliens facing deportation, and some important changes in the underlying substantive and procedural immigration law. Yet it will also demonstrate that Justice Scalia's majority opinion is carefully crafted to "hide the ball," that is, to elevate form over substance, with empty rhetoric about the government's hypothetical interests over the actual harm inflicted on the respondents and on the political process during a thirteen-year campaign to deter unpopular political expression.

Finally, this Article briefly shows that this approach to governmental power and alien rights is not unique, but instead is typical of the way that the Court has dealt with immigration matters over the last two decades. Immigration law inevitably involves a balancing of interests. The government has the right to enforce its immigration laws, and to protect its citizenry from the dangers posed by those afflicted with communicable diseases, by criminals, and by terrorists. The government also has the right to take action against aliens who plot terror, or engage actively in violence or subversion. Aliens at the "threshold" of entry traditionally have been afforded only the rights that Congress chooses to grant them. Yet many of those entering from abroad are protected by United States statutes or international treaties. All have the right to have the immigration statutes interpreted fairly, to tell their stories, and to have them listened to without prejudgment. Permanent resident aliens[4] and non-immigrants physically present in the United States are protected by the Constitution and entitled to due process in deportation proceedings. They are also entitled to associate and engage in debate about matters of public concern. *American-Arab* — like most immigration cases decided by the Supreme Court during the Rehnquist years — strikes the wrong balance, putting its thumb firmly on the government's side of the scale.

4. "Permanent residents" do not surrender their constitutional protection when they briefly leave the United States and then attempt to re-enter it. *See* Landon v. Plasencia, 459 U.S. 21, 33 (1982).

I. STIFLING SPEECH AND ASSOCIATION: THE ORIGINS OF *AMERICAN-ARAB*

A. The Legal and Factual Context

1. Phase One: 1987 – ca. 1990

a. The Court's Opinion

Justice Scalia's majority opinion opens with a three-sentence summary of the case, which treats it exclusively as a "selective enforcement" case where the federal courts perhaps have been deprived of jurisdiction by congressional action. The Court states:

> Respondents sued petitioners for allegedly *targeting them for deportation* because of their *affiliation* with a politically unpopular group. While their suit was pending, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 which contains a provision restricting judicial review of the Attorney General's "decision or action" to "commence proceedings, adjudicate cases, or execute removal orders against any alien under this Act." The issue before us is whether, as petitioners contend, this provision deprives the federal courts of jurisdiction over respondents' suit.[5]

Justice Scalia then provides an abbreviated account[6] of the history of the *American-Arab* litigation, which focuses on procedures: the government's institution and re-institution of deportation proceedings, the aliens' responsive lawsuits, and two key holdings in the Ninth Circuit. The Court almost completely ignores the substantive basis for the aliens' claims.[7] Instead, Justice Scalia recounts a simple tale in which the government identifies and then seeks to deport seven Palestinians and one Kenyan as members of "the [PFLP], a group that the government characterizes as an international terrorist and communist organization."[8] Initially, the government proceeded under provisions of "the McCarran-Walter Act, which, though now repealed, provided at the time for the deportation of aliens who '*advocate* . . .

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5. *American-Arab*, 119 S. Ct. at 938 (emphasis added) (citations omitted).

6. As the Court notes:

> Since this suit seeking to prevent the initiation of deportation proceedings was filed — in 1987, during the administration of Attorney General Edwin Meese — it has made four trips through the District Court for the Central District of California and the United States Court of Appeals for the Ninth Circuit. The first two concerned jurisdictional issues not now before us.

Id. at 939 (citations omitted).

7. *See id.* (ignoring substantive basis for aliens' claims).

8. *Id.* at 938.

world communism."[9] But the government did not stop there: "In addition, the INS charged the first six, who were only temporary residents, with routine status violations such as overstaying a visa and failure to maintain student status."[10]

The eight aliens contested initiation of deportation proceedings on the ground that it targeted constitutionally-protected political association and free speech.[11] The Court noted further:

> INS regional counsel William Odencrantz said at a press conference that the charges had been changed for tactical reasons but the INS was still seeking respondents' deportation because of their affiliation with the PFLP. . . . Respondents amended their complaint to include an allegation that the INS was selectively enforcing immigration laws against them in violation of their First and Fifth Amendment rights.[12]

In addition, the government had to contend with a busy Congress, which kept amending the Immigration and Nationality Act. Undaunted, the Justice Department persisted in its attempt to remove the eight. Over the next three years, it amended its original charges or substituted new ones several times.

b. The Broader Legal and Factual Context

The aliens who sued the government in 1987 were labeled the "LA 8" because they resided in Los Angeles and had been targeted for deportation by the District Director of the INS Los Angeles Office. Within the eight, there were important distinctions. Two of the plaintiffs — Khader Hamide and Michel Shehadeh — were permanent resident aliens. The "Other Six," all of whom had been admitted as non-immigrants, actually consisted of two groups. In the first group, Aiad Barakat and Naim Sharif had resided in the United States for at least five years and had already filed papers to "legalize" their status and become permanent residents under the provisions of the Immigration Reform and Control Act of 1986.[13] The remaining four — Bashar Amer, Julie Mungai, Amjad Obeid and Ayman Obeid — had been admitted but were not eligible for "legalization." The suit, which all eight filed in April 1987, initially was not a "targeting" or "selective enforcement" suit at all. Instead, it directly challenged the relevant provisions

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9. *Id.* (emphasis added).

10. *Id.* at 939.

11. Justice Scalia makes no mention of the fact, but the eight charged aliens also immediately began demanding information from the government about the sources of its information.

12. *American-Arab*, 119 S. Ct. at 939 (citation omitted).

13. Pub. L. No. 99-603, § 201(b), 100 Stat. 3394 (codified at 8 U.S.C. §§ 1422-1427 (1994)) (providing for adjustment of status only to certain aliens who had entered the United States prior to January 1, 1982, and had already lost lawful status by that date).

of the 1952 Act, arguing that they were unconstitutional "on their face" or "as applied," since they denied resident aliens the same expressive and associational rights guaranteed to United States citizens by the First Amendment.[14]

However, two events transformed the suit into one that put primary emphasis on "selective enforcement." First, Hamide and Shehadeh — who remained in deportation proceedings only because of their alleged membership in, or affiliation with, the PFLP — were not permitted to maintain their "facial" and "as applied" challenge because the district court, followed by the Ninth Circuit, found that such a challenge was not yet justiciable.[15] Second, the statement of Odencrantz, and others by former FBI Di-

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14. In relevant part, title 8, section 1251 of the United States Code provided:

(a) Any alien in the United States . . . shall, upon order of the Attorney General, be deported who –

(6) is or at any time has been, after entry, a member of the following classes of aliens:

(D) Aliens not within any of the other provisions of this paragraph who advocate the economic, international, and governmental doctrines of world communism or the establishment in the United States of a totalitarian dictatorship, or who are members of or affiliated with any organization that advocates the economic, international, and governmental doctrines of world communism or the establishment in the United States of a totalitarian dictatorship, either through its own utterances or through any written or printed publications issued or published by or with the permission or consent of or under the authority of such organization or paid for by the funds of, or funds furnished by, such organization;

(F) Aliens who advocate or teach or who are members of or affiliated with any organization that advocates or teaches . . .

(iii) the unlawful damage, injury, or destruction of property;

(G) Aliens who write or publish, or cause to be written or published, or who knowingly circulate, distribute, print, or display, or knowingly cause to be circulated, distributed, printed, published, or displayed, or who knowingly have in their possession for the purpose of circulation, publication, distribution, or display, any written or printed matter, advocating or teaching opposition to all organized government, or advocating or teaching . . .

(v) the economic, international, and governmental doctrines of world communism or the establishment in the United States of a totalitarian dictatorship;

(H) Aliens who are members of or affiliated with any organization that writes, circulates, distributes, prints, publishes, or displays, or causes to be written, circulated, distributed, printed, published, or displayed, or that has in its possession for the purpose of circulation, distribution, publication, issue, or display any written or printed matter of the character described in paragraph (G) of this subdivision.

8 U.S.C. § 1251(a)(6) (1988).

15. *See* American-Arab Anti-Discrimination Comm. v. Thornburgh, 970 F.2d 501, 510 (9th Cir. 1991) (concluding first amendment challenges not ripe for review); American-Arab Anti-Discrimination Comm. v. Meese, 714 F. Supp. 1060, 1063 (C.D. Cal. 1989) (noting matter was not ripe for review because Hamide and Shehadeh did not exhaust administrative remedies).

rector William Webster, convinced the Other Six that the "technical" status-offender charges which the Immigration and Naturalization Service (INS) retained were entirely pretextual, masking a continuing intent to deport them because of their alleged membership in, or affiliation with, the PFLP.

2. *Phase Two: 1990 – 1995*

a. The Court's Opinion

While much happened between 1990 and 1994, the Court does not linger over the details. Instead, Justice Scalia's account moves us quickly to a few key events in 1994 and 1995:

> In 1994, the District Court preliminarily enjoined deportation proceedings against the six temporary residents, holding that they were likely to prove that the INS did not enforce routine status requirements against immigrants who were not members of disfavored terrorist groups and that the possibility of deportation, combined with the chill to their First Amendment rights while the proceedings were pending, constituted irreparable injury. With regard to Hamide and Shehadeh's claims, however, the District Court granted summary judgment to the federal parties for reasons not pertinent here.
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> *American-Arab Anti-Discrimination Committee v. Reno*, a case that we shall call "AA[A]DC I" was the Ninth Circuit's first merits determination in this case, upholding the injunction as to the six and reversing the District Court with regard to Hamide and Shehadeh. The opinion rejected the Attorney General's argument that selective-enforcement claims are inappropriate in the immigration context, and her alternative argument that the special statutory-review provision of the Immigration and Nationality Act (INA) precluded review of such a claim until a deportation order issued. The Ninth Circuit remanded the case to the District Court, which entered an injunction in favor of Hamide and Shehadeh and denied the Attorney General's request that the existing injunction be dissolved in light of new evidence that all respondents participated in fundraising activities of the PFLP.[16]

b. The Broader Legal and Factual Context

Justice Scalia's account is remarkably spare. It accurately portrays the legal situation of the LA 8 on the eve of the passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA).[17] However, it ignores, or glosses over, governmental actions and judicial findings that persuaded the Ninth Circuit to finally reach the merits of the case six years after the first hearings were conducted.

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16. *American-Arab*, 119 S. Ct. at 939-40 (citations omitted).
17. Pub. L. No. 104-208, 110 Stat. 3009 (codified at scattered sections of U.S.C.).

For at least some of the eight aliens facing deportation, a merits determination was possible much earlier. Indeed, in 1989 the District Court concluded that:

> [T]he Other Six . . . have standing to challenge the [1952 Act] provisions. On the merits, we hold that aliens who are legally within the United States are protected by the First Amendment of the United States Constitution and that this protection is not limited in the deportation arena by the Government's plenary immigration power. Applying established First Amendment principles, we find that the [1952 Act's] provisions are substantially overbroad in violation of the First Amendment. We therefore grant Plaintiffs' motion for summary judgment and request for declaratory relief.[18]

The finding and grant of standing, however, was nullified by the Ninth Circuit in 1991 when the court held that the aliens' First Amendment challenges were not ripe for review.[19] Undeterred, the aliens sued again.[20] Four years later, the Ninth Circuit found on the merits that all eight of the aliens were protected by the First Amendment, and that they were likely to succeed on their claim.[21]

Finding that each claim was ripe for review, the Ninth Circuit not only upheld a preliminary injunction granted by the district court on behalf of the Other Six, it also reversed that court's determination that it lacked jurisdiction to review Hamide's and Shehadeh's selective enforcement claim, and remanded that facet of the case back to the district court for review.[22]

i. The Judicial Change of Heart: New Insight into "Ripeness" and "Exhaustion Remedies"?

In its 1991 decision, the Ninth Circuit based its ripeness holding on three principal grounds. First, it looked to the absence of a fully-developed factual record.[23] Second, it pointed to the fact that there was no "benefit of the

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18. *Meese*, 714 F. Supp. at 1063.

19. *See Thornburgh*, 970 F.2d at 510 (finding First Amendment challenge not ripe for review).

20. *Res judicata* did not apply because the later suit was filed after the INS commenced new proceedings against permanent resident aliens Hamide and Shehadeh under the 'terrorist activity' provision of the Immigration Act of 1990 (IMMACT), Pub. L. No. 101-649, § 602(a)(a)(4)(B), 104 Stat. 4978 (1990) (codified as amended at 8 U.S.C. § 1251(a)(4)(B) (1994)).

21. *See* American-Arab Anti-Discrimination Comm. v. Reno (AAADC I), 70 F.3d 1045, 1066 (9th Cir. 1995) (finding evidence of impermissibly motivated enforcement of immigration laws and strong likelihood of success on claim that the INS has selectively enforced the immigration laws).

22. *See id.* at 1071 (finding district court had subject matter jurisdiction and remanding case for consideration on selective enforcement claims).

23. As the court noted:

INS's interpretations of the challenged provisions."[24] Implicit in this argument is the notion that such interpretations would delineate the circumstances under which the government would most likely seek to deploy the 1952 Act's ideological deportation provisions, and might take the opportunity "to correct its own mistakes and apply its expertise."[25] Third, the Ninth Circuit discounted the hardship that the individual appellees might suffer:

> Finally, we believe that any hardship suffered by the individual appellees resulting from our decision to delay resolution of their claims does not amount to a justification for us to exercise jurisdiction. The individual appellees are not now charged under the challenged provisions. Moreover, if charged and found deportable for violation of the challenged provisions, the individual appellees will have the opportunity to present their constitutional challenges to a court. We therefore do not have a case in which "delayed resolution of these issues would foreclose any relief from the present injury suffered by appellees.[26]

Four years later, the Ninth Circuit distinguished its earlier holding in the case on several grounds. First, it noted "that the perpetual threat of deportation based on group affiliation constitutes the kind of irreparable injury that is relevant to the ripeness inquiry here."[27] Second, the court agreed with the Other Six that exhaustion of administrative remedies would be a futile exercise because the INS does not have jurisdiction to review a selective enforcement claim.[28] More broadly, the court found that the Board of Immigration Appeals (BIA) lacks the authority to hear any constitutional claims.[29] This finding of limited agency jurisdiction is fully consistent with prevailing case law,[30] and was specifically endorsed in Justice Scalia's opinion in the instant case.[31] Third, the Ninth Circuit noted that:

> This case has come to us upon a sketchy record and with many unknown facts. Given the procedural posture of the case, the facts understandably have not been well-developed. As a result, we do not know, for example, whether the appellees are actually members of the PFLP or what specific acts the government alleges the appellees to have committed in violation of the challenged provisions. In such situations, the Supreme Court has indicated that we ought not to exercise jurisdiction.

Thornburgh, 970 F.2d at 510-11.

24. *Id.* at 511.

25. *Id.* (quoting FTC v. Standard Oil Co., 449 U.S. 232, 242 (1980)).

26. *Id.* (citations omitted).

27. *AAADC I*, 70 F.3d at 1058.

28. *See id.* (citing Lopez-Telles v. INS, 564 F.2d 1304 (9th Cir. 1977)) (finding exhaustion of administrative remedies to be futile under circumstances).

29. This is an inference drawn from the court's citation to *Xiao v. Barr*, 979 F.2d 151, 154 (9th Cir. 1992). *See AAADC I*. 70 F.3d at 1058 ("If the agency lacks the authority to resolve the constitutional claims, there is little point in requiring exhaustion.").

30. *See generally Xiao*, 979 F.2d at 156 (finding within province of immigration judge to determine jurisdiction).

31. *See* Reno v. American-Arab Anti-Discrimination Comm. (American-Arab), 119 S.

> We customarily decline to apply the prudential ripeness doctrine when exhaustion would be a futile attempt to challenge a fixed agency position. Other circuits have similarly found exhaustion futile unless "there is genuine doubt as to what is going to happen in the administrative process."[32]

Finally, the Ninth Circuit purported to find a lesser need to rely on a fully-developed factual record after the new filing:

> [O]ur earlier opinion in this case is not dispositive here. We held that prudential concerns weighed against the district court's assuming jurisdiction of the unconstitutional-as-applied challenge to the 1952 Act, because the factual record developed in the agency proceeding to support the application of the statute would assist our review of that claim. In contrast, this case does not involve a facial or as-applied challenge to a statute.[33]

Each of the first three arguments could (and should) have been made by the Ninth Circuit in 1991 to defeat the government's "not yet ripe" defense. The fourth argument is not convincing on its face, since a selective enforcement claim almost certainly requires more factual development than a "facial or as-applied challenge to a statute."[34]

ii. A Better Answer: "Reality Bytes"

Litigation is not simply about law — it is about law and facts, about the way that people and incorporeal bodies, including governmental agencies, act and interact, and about the limitations that statutes, courts, and the Constitution impose on their conduct. A better explanation for the Ninth Circuit's about-face probably lies in a developing awareness that the government's case against the LA 8 was factually weak, was being pursued for political rather than "national security" reasons, inflicted real harm on people with very limited ability to protect their own interests, undermined important constitutional values, and was likely to go on forever unless the judiciary moved to stop it.

This awareness almost certainly had its roots in three principal sources. First, a gauntlet of statutes tailored to disadvantage Palestinians and governmental initiatives intended to put those statutes into effect, which im-

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Ct. 936, 940 (1999) ("[N]either the Immigration Judge nor the Board of Immigration Appeals has authority to hear [selective enforcement] claims.").

32. *AAADC I*, 70 F.3d at 1058 (quoting Rafeedie v. INS, 880 F.2d 506, 514 (D.C. Cir. 1989)).

33. *Id.* (citations omitted).

34. Indeed, the court virtually acknowledged this fact when it stated, "[t]he government's argument that the selective enforcement claim in this case is 'purely legal' and thus reviewable only in the court of appeals is unpersuasive. Both prongs of the selective enforcement claim — disparate impact and discriminatory intent — require factual proof." *Id.* at 1055.

posed ever-higher barriers at a time when Congress was questioning the legitimacy of "ideological" grounds for exclusion or deportation. Second, a close examination of the INS's use of confidential information that occurred both because the LA 8 pressed for information about its use in the case against them and because the government sought to use such information to deny legalization to Barakat and Sharif. Third, a substantial body of evidence was developed in the principal case, indicating that the government was in fact selectively targeting supporters of the Palestinian Liberation Organization (PLO) for deportation. Feedback from other courts probably tended to confirm these insights.

(1) The Emerging Legislative Dichotomy

The United States has a long history of demonizing certain aliens and certain elements of the foreign population in its midst. For more than two centuries, it labeled people as "Un-American" because of their beliefs and their speech, and unsuccessfully sought to limit immigration on that basis. The Alien Act of 1798 authorized the deportation of aliens whom the President judged "dangerous to the peace and safety of the United States."[35] Two years later, before it had ever been enforced, Congress permitted it to lapse.[36] Throughout the nineteenth century, nativists sought to deny immigrants the right to naturalize as a means of discouraging their entry. Writing in 1835, Samuel F.W.B. Morse decried the negative "influence of foreign movements upon us, in the great contest between liberty and despotism."[37] His particular target was "[f]oreigners from the various Catholic countries of Europe,"[38] and "human priest-controlled machines."[39] Morse further asserted:

> [N]aturalization has become door of entrance not alone to the ever welcome lovers of liberty, but also for the priest-ridden troops of the Holy Alliance, with their Jesuit officers well skilled in all the arts of darkness. Now emigrants are selected for a service to their tyrants; not for their affinity to liberty, but for their mental servitude, and their docility in obeying the orders of their priests.[40]

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35. Act of July 6, 1798, ch. 66, 1 Stat. 577.

36. *See* THOMAS ALEXANDER ALEINIKOFF & DAVID A. MARTIN, IMMIGRATION PROCESS AND POLICY 475 (2d ed. 1991) ("[This] section was apparently never invoked and was allowed to expire two years later.").

37. SAMUEL F.W.B. MORSE, IMMINENT DANGERS TO THE FREE INSTITUTIONS OF THE UNITED STATES THROUGH FOREIGN IMMIGRATION 5 (1835), *reprinted in* 19 THE AMERICAN IMMIGRATION COLLECTION (1969).

38. *Id.* at 12.

39. *Id.* at iv.

40. *Id.* at 28.

Identifying the newcomers as a "foreign turbulence,"[41] strangers to "our own institutions"[42] and not "well versed in the nature of American liberty,"[43] he asked, "[c]an one throw mud into pure water and not disturb its clearness?"[44]

Later in the century, the anti-foreign animus focused first on the Irish, and later on immigrants from central and eastern Europe. Fierce competition in the labor market and ethnic prejudice played major roles. It was common, for example, to dismiss the Irish as wild, lazy, or drunken "Celts." Yet nativist politicians tended to ignore these cultural stereotypes in their quest for anti-Catholic legislation. The Irish were frequently identified as the worst sort of Catholic; but their great flaw was their Catholicism, not their Irishness. In the end, "the nativist ideologues did not make much effort to tap [the] sentiment" of anti-Irish "ethnic prejudice."[45] Some nativists focused instead on their "foreignness," equating them with intending French, German or Swiss immigrants. Most relied, however, on the time-tested rhetoric of anti-Catholicism and its fundamental assumption that all followers of the Pope were inherently incapable of "good citizenship" in a freedom-loving republic.[46] In the 1880s and 1890s, similar arguments — which now included a "biological" component — were made alleging that the "new" immigrants from eastern and central Europe were incapable of understanding or abiding by "American" values.[47]

In 1903, however, Congress finally took action. Responding to the assassination of William McKinley by a native-born American of Polish par-

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41. *Id.* at iv.

42. *Id.* at 12.

43. MORSE, *supra* note 37, at 12.

44. *Id.* at iv.

45. DALE T. KNOBEL, PADDY AND THE REPUBLIC 137 (1986).

46. *See id.* at 135-37 (1986) (describing role of anti-Catholicism). *See generally* RAY ALLEN BILLINGTON, THE PROTESTANT CRUSADE 1800-1860: A STUDY OF THE ORIGINS OF AMERICAN NATIVISM (1952) (providing fullest account of sources and manifestations of anti-Catholic prejudice in antebellum America).

47. *See* KITTY CALAVITA, U.S. IMMIGRATION LAW AND THE CONTROL OF LABOR: 1820-1924 105-06 (1984).

> Capitalists had long explained labor unrest and class cleavages by insisting that they were imported by foreigners who knew nothing of American ideals. Some trade journals even argued that more selective immigration might defuse militant unionism by barring foreign agitators. Many industry journals began to adopt the New England elite's convenient physiological explanation of the immigrant as troublemaker. "Anarchism is a blood disease," reported a leading business magazine after the Haymarket affair [in 1886]. In 1890, [another] wrote, "We are absorbing the vicious and diseased of the earth into the national body, and coming face to face with the consequences."

Id.

entage,[48] Congress enacted a new measure that authorized the exclusion of "anarchists, or persons who believe in or advocate the overthrow by force or violence of the government of the United States or of all government or of all forms of law, or the assassination of public officials."[49] Almost immediately, the government used this provision to remove John Turner, a recently-arrived Englishman who had delivered a speech in New York predicting and "look[ing] forward to a general strike in Europe which will spread over the industrial world."[50] His appeal reached the Supreme Court, which rejected a First Amendment challenge to the Act.[51] Until 1990, Congress maintained similar anti-anarchist provisions.

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48. McKinley was shot on September 6, 1901, and died on September 14. His assassin was Leon Czolgosz, "an anarchist." *See* 7 THE NEW ENCYCLOPAEDIA BRITANNICA 639-40 (1998).

49. Act of March 3, 1903, ch. 1012, § 2, 32 Stat. 1213, 1214; *see also* ch. 1012, § 38, 32 Stat. 1213, 1221.

> That no person who disbelieves in, or who is opposed to, all organized government, or who is a member of or affiliated with any organization entertaining and teaching such disbelief in or opposition to all organized government, or who advocates or teaches the duty, necessity, or propriety of the unlawful assaulting or killing of any officer or officers, either of specific individuals or of officers generally, of the Government of the United States or of any other organized government, because of his or their official character, shall be permitted to enter the United States or any Territory or place subject to the jurisdiction thereof.

Id.

Neither section of the Act of March 3, 1903, granted explicit authority to *deport* anybody on these grounds. Nevertheless, as the case of *Turner v. Williams*, 194 U.S. 279 (1904), demonstrated, the government used the statute to remove aliens who had already landed. That result is peculiar, since the Supreme Court had recognized the distinction between *excludable* and *deportable* aliens, and of the enhanced constitutional rights afforded to the latter, a year earlier, in the case of *Yamataya v. Fisher* (Japanese Immigrant Case), 189 U.S. 86 (1903).

50. *Turner*, 194 U.S. at 283. At the time he was arrested, Turner was in possession of "a list of his proposed series of lectures," one of which was entitled, "The Essentials of Anarchism." *See id.*; *see also* Kevin R. Johnson, *The Antiterrorism Act, the Immigration Reform Act, and Ideological Regulation in the Immigration Laws: Important Lessons for Citizens and Noncitizens*, 28 ST. MARY'S L.J. 833, 844-45 (1997) (discussing fears surrounding McKinley assassination and *Turner*).

51. *See Turner*, 194 U.S. at 292-95 (rejecting First Amendment challenge). The majority appears to have found the Act of March 3, 1903, constitutional on its face. Justice Brewer found the Act constitutional as applied. *See id.* at 295 (Brewer, J., concurring).

> It is not an unreasonable deduction therefrom that petitioner is an anarchist in the commonly accepted sense of the term, — one who urges and seeks the overthrow by force of all government. If that be not the fact, he should have introduced testimony to establish the contrary. It is unnecessary, therefore, to consider what rights he would have if he were only what is called, by way of differentiation, a philosophical anarchist, — one who simply entertains and expresses the opinion that all government is a mistake, and that society would be better off without any.

During World War I and after the outbreak of the Russian Revolution, however, Congress shifted its attention to Marxists and those seeking to advance the goals of "World Communism" in any way, shape, manner, or form.[52] Americans had been deeply distrustful of the Russian Revolution from its inception and had supported early attempts to overthrow it militarily. Most stood behind Attorney General A. Mitchell Palmer in 1919 when he used the immigration laws to imprison thousands of aliens (and to deport over five hundred) whom he identified as "Reds" about "'to rise up and destroy the government at one fell swoop.'"[53]

When Congress initially enacted the 1952 Act, its ideological target was the same as it had been in 1917. The 1952 Act preserved features of turn-of-the-century and World War I legislation, but was primarily a codification of internal security acts enacted in 1940 and 1950.[54]

Id.

52. *See* Robert Plotkin, *First Amendment Challenges to the Membership and Advocacy Provisions of the Antiterrorism and Effective Death Penalty Act of 1996*, 10 GEO. IMMIGR. L.J. 623, 627 (1996). Robert Plotkin notes:

> The first modern wave of First Amendment litigation arose out of federal legislation passed during World War I and in its aftermath. United States involvement in the War and the concurrent Bolshevik Revolution in Russia created a national mood of great anxiety and fear of foreigners, Communists, and others viewed as subversive both to the war effort and to the nation as a whole. The first such piece of legislation passed in response to the perceived need to prevent the spread of Communism within the United States and the disruption of the war effort was the Espionage Act of 1917. The Act prohibited, *inter alia*, during wartime: (1) causing or attempting to cause insubordination in the [United States] military forces, (2) obstructing or conspiring to obstruct the recruiting and enlistment service of the United States, and (3) using or conspiring to use the mails for the transmission of materials declared to be nonmailable by the Postmaster General.

Id. at 627.

53. JOHN HIGHAM, STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM, 1860-1925 229 (1955) (quoting LOUIS F. POST, THE DEPORTATIONS DELERIUM OF NINETEEN-TWENTY: A PERSONAL NARRATIVE OF AN HISTORIC OFFICIAL EXPERIENCE (1970)); *see also* THOMAS ALEXANDER ALIENIKOFF & DAVID A. MARTIN, IMMIGRATION: PROCESS AND POLICY 352-55 (1985).

54. The Internal Security Act of 1950 (ISA), ch. 1024, 64 Stat. 987, included a lengthy section which was intended "to deny entry to all alien Communists, Communist Sympathizers, and allied classes." *See* E.P. HUTCHINSON, LEGISLATIVE HISTORY OF AMERICAN IMMIGRATION POLICY 1798-1965 426-27 (1981) (discussing purpose and provisions of ISA of 1950).

The Alien Registration Act of June 28, 1940, ch. 439, § 2, 54 Stat. 670, 671, rendered it unlawful to advocate in any way the overthrow of the United States. *See* HUTCHINSON, *supra*, at 258 (noting Alien Registration Act's provision making it "unlawful to advocate in any way the overthrow of the Government of the United States"). Most of the 1952 Act's anti-subversive provisions were identical to those enunciated in the ISA.

The Cold War sharpened fears about communist subversion and "un-American activities." From the late 1940s into the 1950s, the government pursued criminal prosecutions and immigration proceedings against present and former resident communists and those suspected of Communist Party membership or ties.[55] Several Supreme Court cases found in favor of the alien, holding that under the Court's interpretation of the underlying statutes, there was not enough evidence to subject the aliens to deportation or denial of naturalization.[56] In only one case, *Harisiades v. Shaughnessy*,[57] did the Court squarely address possible First Amendment limits to the deportation power. In that case, the Court found that the First Amendment did apply and that it required the Court "to determine whether ambiguous speech is advocacy of political methods or subtly shades into a methodical but prudent incitement to violence."[58] Finding that the activities of the three petitioners fell into the latter category, the Court upheld the petitioners' deportations.[59] Well into the 1970s and 1980s, the ideological grounds for excluding and deporting aliens continued to be directed primarily at persons like the late Ernest Mandel or Hortensia Allende, whom the government identified as advocating communism or belonging to organizations affiliated with the Communist Party.[60]

Yet beginning about 1970, political violence that had its roots in the Middle East, Ireland, and Central America initiated profound attitudinal changes in the United States. Widely-publicized attacks launched by Pal-

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55. Sometimes the government pursued multiple actions against a single alien. *See* Maurice A. Roberts, *The Harry Bridges Cases*, 76 INTERPRETER RELEASES 1385 (1999). He reflects:

> During my long career in the Department of Justice, no project or case involving an individual took up more of my time than the series of cases involving left-wing labor leader Harry Bridges. The government sought unsuccessfully over a period of two decades to deport him, to prosecute him criminally for perjury in obtaining naturalization, and finally to revoke his naturalization in plenary denaturalization proceedings.

Id.

56. *See, e.g.*, Gastelum-Quinones v. Kennedy, 374 U.S. 469 (1963); Rowoldt v. Perfetto, 355 U.S. 115 (1957); Bridges v. Wixon, 326 U.S. 135 (1945).

57. 342 U.S. 580 (1952).

58. Harisiades v. Shaughnessy, 342 U.S. 580, 592 (1952).

59. *See id.* at 592, 596 (upholding deportations).

60. *See* Kliendienst v. Mandel, 408 U.S. 753 (1972) (seeking to obtain nonimmigrant visa despite communist beliefs); Allende v. Schultz, 845 F.2d 1111 (1st Cir. 1988) (contesting denial of visa under statute that permits exclusion of aliens who engage in activities that endanger security of United States). For detailed listings of the more notorious names who have been ordered excluded, see STEPHEN LEGOMSKY, IMMIGRATION LAW AND POLICY 332 (1992), and John A. Scanlan, *Aliens in the Marketplace of Ideas: The Government, The Academy, and the McCarran-Walter Act*, 66 TEXAS L. REV. 1481, 1497 & n.75 (1988).

estinians and by fundamentalist Muslims had particular impact. These included the killing of eleven members of the Israeli Olympic team by the Black September Organization in Munich in 1972; the attack on a United States barracks in Lebanon by Islamic Jihad that killed 241 Marines in 1983; and the hijacking of the Italian cruise liner Achille Lauro and subsequent murder of Leon Klinghoffer by four Palestinian guerrillas in 1985.[61] As the prospect of Soviet domination faded, fears of communist "subversives" quickly gave way to fears of "terrorists."[62]

The growth in interest, however, was not confined to academics. Writing in the late 1980s, Edward Said observed:

> As a word and concept, "terrorism" has acquired an extraordinary status in American public discourse. It has displaced Communism as public enemy number one, although there are frequent efforts to tie the two together. It has spawned uses of language, rhetoric and argument that are frightening in their capacity for mobilizing opinion, gaining legitimacy and provoking various sorts of murderous action.[63]

Four years later, Lawrence Howard noted:

> The phenomenon of terrorism has become a major concern of the American public. The Reagan administration elevated it to the foremost foreign policy problem of the nation. The American and Canadian publics consider terrorism to be a greater threat to their personal safety than driving on the freeways and working at their jobs, worse even than the risk of nuclear war. However, these same people are much more at risk from their jobs and their daily commute than they are from terrorist attacks — by orders of magnitude . . . [I]n 1985 a total of twenty-three U.S. citizens died in terrorist incidents around the world, one quarter the number killed that year by lightning. Terrorism, abhorrent as it is, is largely a symbolic threat to America.[64]

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61. *See* Dave Martella, Comment, *Defending the Land of the Free and the Home of the Fearful: The Use of Classified Information to Deport Suspected Terrorists*, 7 AM. U. J. INT'L L. & POL'Y 951, 953 (1992) (noting certain paradigmatic terrorist incidents which occurred before the government commenced deportation proceedings against the LA 8 and the 1988 bombing of Pan Am Flight 103, which killed 270 people, including 181 United States citizens, and was a key incident occurring during the proceedings).

62. *See* DAVID C. RAPOPORT, INSIDE TERRORIST ORGANIZATIONS 1 (David C. Rapoport ed., 1988). David Rapoport notes:

> In 1969 when I began to prepare a series of lecture . . . entitled Assassination and Terrorism, I struggled to find appropriate materials but could only discover a handful of items. Seventeen years later, Amos Lakos published a bibliography on the same subjects which contained 5,622 items in English alone! Has any academic enterprise ever grown so much in so short a time?

Id.

63. EDWARD SAID, *The Essential Terrorist*, *in* BLAMING THE VICTIMS: SPURIOUS SCHOLARSHIP AND THE PALESTINIAN QUESTION 149 (Edward Said & Christopher Hitchins eds., 1988).

64. LAWRENCE HOWARD, TERRORISM: ROOTS, IMPACT, RESPONSES 1 (Lawrence Howard ed., 1992).

But even symbolic threats require poster children. According to Howard, "[t]he phenomenon of terrorism is . . . often associated in the public's mind with radical Palestinians or members of fundamentalist Islamic groups who wreak spiteful acts of terror against the innocent to fulfill the commands of the Koran."[65] When some of these same people announce their implacable opposition to the State of Israel, when some are implicated in attacks on Israeli citizens, when some espouse a Marxist view of history, or when, as in the 1980s, some ally themselves with Iran, symbolically they come across as more than potential suicide bombers. Instead, they are perceived as opponents of American interests and enemies of the United States.

So it is not entirely surprising that beginning in the 1970s, the government began to use existing ideological provisions of the 1952 Act to target Arabs generally, and Palestinians more particularly. Members of the PFLP were particularly easy targets, since the PFLP historically has been committed, not only to the "liberation" of Palestine, but also to secular restructuring of society in accordance with Marxist theory.[66] The LA 8 were not the only Palestinians and supporters of the PLO who were targeted, nor were they the only members of the PFLP. The American-Arab Anti-Discrimination Committee estimates that several dozen people, at a minimum, have been singled out for exclusion or deportation because they have been identified as members or supporters of the PLO. Seven years after the *American-Arab* proceedings commenced, the INS initiated exclusion proceedings against Faoud Rafeedie, Tarak Mustafa, and Sulieman Shihadeh on the ground that three had traveled to Syria to "attend the First Conference of the Palestine Youth Organization [(PYO)],"[67] "a group closely associated with the [PFLP]."[68] But the LA 8 were among the first so targeted, and almost certainly the first to launch a full-fledged counter-attack in the courts.

As Palestinians, however, they quickly discovered that they needed to overcome special statutory difficulties. Facing deportation because of their associations and beliefs in 1987, ordinarily they would have been encouraged by the direction of recent and still on-going congressional initiatives. As early as 1977, Congress began to back away from ideological grounds for excluding aliens. Committed by the Helsinki Accords[69] to the principle of free movement of people across borders, Congress became acutely

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65. *Id.* at 3.

66. *See* MATTI STEINBERG, *The Worldview of Habash's 'Popular Front'*, THE JERUSALEM Q., Summer 1998, at 3 (explaining PFLP ideology).

67. Rafeedie v. INS, 880 F.2d 506, 509 (D.C. Cir. 1989).

68. Rafeedie v. INS, 795 F. Supp. 13, 16 (D.D.C. 1992).

69. *Conference on Security & Cooperation in Europe, Final Act, Helsinki, 1975*, 73 DEP'T ST. BULL. 323 (1975).

aware that the practice of denying access to people on ideological grounds undercut its efforts to persuade the Soviet Union to abide by the principle of "free emigration."[70] Congress therefore enacted the so-called "McGovern Amendment," which imposed stringent reporting and approval requirements on the State Department every time it denied a waiver of the ideological grounds of exclusion to an intending non-immigrant.[71] In 1987, Congress allowed the McGovern Amendment to expire. In its stead, Congress adopted section 901 of the Foreign Relations Authorization Act for Fiscal Years 1988 and 1989 (FRAA).[72] The provision, which was in effect for fourteen months, provided that:

> Notwithstanding any other provisions of law, no alien may be denied a visa or excluded from admission into the United States, . . . or subjected to deportation because of any past, current, or expected beliefs, statements, or associations which, if engaged in by a United States citizen in the United States, would be protected under the Constitution of the United States.[73]

Describing the purpose of section 901, the House Conference Committee noted that:

> [C]urrent law provides authority to the executive branch to deny admission to aliens or to deport them on a variety of grounds including those related to national security, ideological or political beliefs, and, more generally, the interests of the United States. These provisions, since their codification in 1952 as part of the Immigration and Nationality Act, have been used by the executive branch to deny aliens entry into the United states on the basis not only of their potential threat to the national security interests of the United States or their past involvement in criminal activity, but also on the basis of their expression of beliefs, their advocacy of political positions, or their

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70. David Carliner, *United States Compliance with the Helsinki Final Act: The Treatment of Aliens*, 13 VAND. J. TRANSNAT'L L. 397, 401-02 (1980) (discussing United States' compliance record with regard to Helsinki Accords).

71. *See* 22 U.S.C. § 2691(a) (1982) (original version at ch. 841, § 112, 91 Stat. 848, Pub. L. No. 95-105 (Aug. 17, 1977), *amended by* Pub. L. No. 95-426, § 119, 92 Stat. 970 (Oct. 7, 1978) and Pub. L. No. 96-60, § 109, 93 Stat. 397 (Aug. 15, 1979)) (requiring, in most circumstances, Secretary of State to recommend that Attorney General grant approval necessary for issuance of visa to nonimmigrant alien otherwise excludible by reason of membership in proscribed organization).

72. Pub. L. No. 100-204, § 901(a), 101 Stat. 1399, 1400 (1987) (codified at 8 U.S.C. § 1182 note (1994)).

73. *Id.* The FRAA was later amended to protect only "non-immigrants." *See* Pub. L. No. 100-461, § 555, 102 Stat. 2268-36 (1988) (codified as amended at 8 U.S.C. § 1182 note (1994)).

As originally enacted, section 901(a) temporarily suspended the enforcement of most of the McCarran-Walter Act ideological provisions for both immigrant and non-immigrant aliens. However, section 901(b) limited the scope of this suspension. Thus, members of the Palestine Liberation Organization [PLO] were denied the benefits of the Act. As amended in 1988, section 901(a) of the FRAA further limited its protections to "nonimmigrant aliens."

> association in political organizations which would be constitutionally protected if engaged in by [United States] citizens within the United States.[74]

These practices, the committee indicated, were objectionable for several reasons:

> The committee of conference notes that as a result of this history of visa denial, the citizens of the United states have been denied the opportunity to have access to the full spectrum of international opinion, and the reputation of the United States as an open society, tolerant of divergent ideas, has suffered . . . [T]he committee of conference believes that, in order to make it clear that the United States is not fearful of foreign ideas or criticism or the individuals who espouse such ideas, a thorough reform of the grounds for exclusion and deportation is long overdue. Furthermore, the committee of conference observes that some of the grounds for exclusion and deportation may be at variance with U.S. international obligations as expressed in the Helsinki Accords.[75]

Rather than undertaking the proposed "thorough reform," Congress instead adopted an interim approach:

> The conference substitute continues to permit the denial of visas or the deportation of aliens when it is in the interests of the United States, but makes it clear that it is not in the interests of the United States to establish one standard of ideology for citizens and another for foreigners who wish to visit the United States. Accordingly, under [section 901] the executive branch would retain the ability to exclude or deport aliens on criminal, espionage, and terrorism grounds (among others), and, in certain circumstances, on national security and foreign policy grounds. But national security or foreign policy exclusion or deportation would not be permitted if such exclusion or deportation were based on beliefs, statements, or associations which would be constitutionally protected if engaged in by [United States] citizens in the United States. Under this section, statements would be construed as including writings and other forms of non-verbal communications.[76]

Yet Congress's reluctance to establish a "double standard" of ideology had its limits. The conference report noted three, only two of which are relevant here. First, section 901 offered no protection to "an individual who has committed or who is likely to engage, after entry, in terrorist activity." "Terrorist activity" was broadly defined as:

> [T]he intent of the managers to include persons involved in hostage taking, kidnap[p]ing, threatened violence or other acts which do not actually involve death or injury. These acts, whether or not they result in bodily harm, are a form of violence and are crimes. The managers also consider that organizing, abetting, or participating in terrorist acts or activities would include not only pulling a trigger or planting a bomb but providing support and assistance, such as but not limited to: planning, pro-

74. H.R. CONF. REP. NO. 100-475, at 162 (1987), *reprinted in* 1987 U.S.C.C.A.N. 2423, 2424 (citing 8 U.S.C. § 1182(a) (1994)).

75. *Id.* at 163.

76. *Id.*

> viding facilities, recruiting, financing or fundraising, surveillance, courier service, transportation, providing weapons, or forging or unlawfully procuring documents. The term "terrorist activity" . . . is intended to include international, targeted acts of terrorism such as assassinations . . . An alien would be considered to have participated in an act of terrorism whether he or she did so individually or as a member of an organization.[77]

Second, and probably more importantly,

> the prohibitions on exclusion and deportation, in particular those based on constitutionally protected associations, would not apply to certain aliens. These included those aliens who had assisted in Nazi persecutions; aliens seeking refugee status, asylum, withholding of deportation or legalization who had engaged in persecution; or any alien who was a member, officer, official, representative, or spokesman of the PLO.[78]

These exceptions (which appeared in section 901(b) of the FRAA) thus excluded members of the PLO from the Act's benefits simply because of their membership. It was also possible that they would be denied the Act's benefits because, merely by belonging to the PFLP or raising funds for it, they might, under the Act's broad definition of "terrorist activity," be deemed "terrorists."

As the *American-Arab* case progressed through the courts, this difficulty did not disappear. Instead, it was accentuated in 1990 and again in 1996. In 1990, Congress enacted sweeping amendments to the INA. The amendments included "a comprehensive revision of all existing grounds for exclusion and deportation, including . . . the substantial revision of security and foreign policy grounds . . . ."[79] Among other things, the Immigration Amendments of 1990 (IMMACT)[80] repealed the 1952 Act's ideological grounds for exclusion[81] and deportation.[82] Congress replaced them with new provisions that closely mirrored the language of the FRAA. As amended by the IMMACT, the INA established a general category of exclusion based on "Security and Related Grounds." This category included a "General" subcategory that excluded aliens seeking to enter the United States to "engage solely, principally, or incidentally" in:

> (i) any activity (I) to violate any law of the United States relating to espionage or sabotage or (II) to violate or evade any law prohibiting the export from the United States of goods, technology, or sensitive information,

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77. *Id.* at 164.

78. *See id.* at 164-65 (discussing certain aliens to whom exclusions would not apply).

79. H.R. CONF. REP. NO. 101-955, at 128 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6784, 6793.

80. Pub. L. No. 101-649, 104 Stat. 4978-5088.

81. *See* INA § 237(a)(6), 8 U.S.C. § 1182(a)(6) (repealed 1990).

82. *See id* § 241(a)(6), 8 U.S.C. § 1251(a)(6) (repealed 1990).

(ii) any other unlawful activity, or
(iii) any activity a purpose of which is the opposition to, or the control or overthrow of, the government of the United States by force, violence, or other unlawful means.[83]

The INA further included a "terrorist activities" subcategory that excluded "any alien who (I) has engaged in a terrorist activity, or (II) a consular officer or the Attorney General knows, or has reason to believe, is likely to engage after entry in any terrorist activity."[84]

The INA also provided for the possible exclusion of PLO (or PFLP) members in a manner similar, but not identical, to the way that the FRAA had denied them protection. First, the INA stated: "An alien who is an officer, official, representative, or spokesman of the [PLO] is considered, for purposes of this chapter, to be engaged in a terrorist activity."[85] Present in the FRAA, but missing here, is any presumption arising out of simple "membership" in the PLO.

Second, the INA defined "engage in terrorist activity" broadly:

As used in this Act, the term "engage in terrorist activity" means to commit, in an individual capacity or as a member of an organization, an act of terrorist activity, or an act which the actor knows, or reasonably should know, affords material support to any individual, organization, or government in conducting a terrorist activity at any time.[86]

Under this broad definition, anyone who "solicits[s] funds or other things of value for terrorist activity or for any terrorist organization" or "solicit[s] any individual for membership in a terrorist organization" is defined as "engag[ing] in terrorist activity."[87] Again, the reach of the definition is broad enough to reach many individuals who have neither approved, condoned, nor even known about particular violent acts or plans.

Third, the drafters of the IMMACT provided no textual definition of "terrorist organization," but the conference report made it clear that the term is broad enough to include organizations whose members or leadership engaged in terrorist activities years ago. The drafters also gave their approval to using "information from the intelligence community" determining the status of an organization, but made no provision for sharing that information with aliens implicated by it.[88]

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83. 8 U.S.C. § 1182(a)(3)(A) (1994).
84. *Id.* § 1182(a)(3)(B)(i).
85. *Id.* § 1182(a)(3)(B).
86. *Id.* § 1182(a)(3)(B)(iii). As amended, the INA defines "terrorist activity" to include a variety of violent acts, ranging from hijacking and sabotage, to kidnapping, assassination, and biological warfare. *See id.* § 1182(a)(3)(B)(ii) (defining "terrorist activity").
87. *Id.* § 1182(a)(3)(B)(iii)(IV), (V).
88. *See* H.R. REP. No. 101-955, at 131 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6784, 6796.

The IMMACT also added section 237(a)(4) to the INA, which established new "Security and Related Grounds" for deportation. In most respects, these grounds mirrored the parallel grounds for exclusion, which the statute incorporated by reference.[89]

Thus, "after the repeal of the 1952 Act, the INS instituted new proceedings against permanent resident aliens Hamide and Shehadeh under the 'terrorist activity' provision of the Immigration Act of 1990."[90] With the new proceedings, the INS was apparently attempting to take advantage of yet another recently-enacted, anti-terrorist, anti-Palestinian statute. For the third time in three years, it had instituted charges under a different theory, relying on a different statutory predicate. Clearly, the INS was "piling on." When, in 1995, the Ninth Circuit addressed the case again in *AAADC I*, pertinent information about the INS campaign against the LA 8 was revealed:

> The status of the charges under the 1952 Act [were] not clear: the government has asserted at different times that the prior charges and proceedings under that Act remain pending concurrent with the new proceedings, or that the new charges 'amended' the basis of the deportation proceedings so that the 'terrorist activity' charges are the only ones currently pending.[91]

> For the purposes of this legislation, the conferees consider a "terrorist organization" to be one whose leadership, or whose members, with the knowledge, approval or acquiescence of the leadership, have taken part in terrorist activities. In making determinations for the purpose of establishing excludability, the Department of State (or the Immigration Service when appropriate) should take into account the best available information from the intelligence community. A group may be considered a terrorist organization even if it has not conducted terrorist operations in the past several years, but there is reason to believe it still has the capacity and inclination to conduct such operations.

Id. There was, however, one significant, and perhaps unintended, exception. As amended by the IMMACT, INA section 237(a)(4) deportation established no *explicit* presumption that an "officer, official, representative, or spokesman of the [PLO] is considered, for the purposes of this Act, to be engaged in a terrorist activity."

89. *See* 8 U.S.C. § 1251(a)(4)(B) (1994) (defining "engaged in terrorist activities" through cross-reference to 8 U.S.C. § 1182(a)(3)(b)(iii)).

90. American-Arab Anti-Discrimination Comm. v. Reno (AAADC I), 70 F.3d 1045 (9th Cir. 1995).

91. *Id.*; *see also* Reno v. American-Arab Anti-Discrimination Comm. (American-Arab), 119 S. Ct. 936, 939 n.2 (1999) ("When the 1952 Act was repealed, a new 'terrorist activity' provision was added by the Immigration Act of 1990. The INS charged Hamide and Shehadeh under this, but it is unclear whether that was in addition to, or in substitution for, the old McCarran-Walter charges.") (citation omitted).

(2) Confidential Information

A footnote in the Supreme Court's *American-Arab* decision informs us that "[r]espondents Barakat and Sharif were subsequently granted legalization and are no longer deportable based on the original status violations."[92] Nothing in the opinion explains how that happened or why it might be important in explaining the Ninth Circuit's turn-around.

The brief answer to both the "how" and the "why" is confidential information. The struggle for legalization under INA section 245A in which Barakat and Sharif successfully engaged has always been a side issue in *American-Arab*, but it deserves more than a one-sentence footnote, if for no other reason than it sheds considerable light on the role played by confidential information in the litigation.

(I) Foreign Intelligence Surveillance

As the court in *United States v. Hamide*[93] indicated:

> On March 10, 1987, in the course of the original deportation proceedings, the eight aliens filed a motion before the immigration judge under 18 U.S.C. [section] 3504 (1982), requesting that the government affirm or deny the existence of electronic surveillance of any of the eight or their attorneys. The motion also requested a hearing on the adequacy of any government denial, or, if the government acknowledged surveillance, 'a hearing concerning the legality of that surveillance and the extent to which evidence in the current proceedings was obtained as a result of that surveillance.'[94]

The inquiry into the government's sources and uses of information thus commenced *before* the LA 8 initiated their first amendment action. The question reached the Ninth Circuit in 1990[95] and the District of Columbia Circuit in 1991.[96] Initially formulated as an inquiry about, and a challenge to, the government's use of the Foreign Intelligence Surveillance Act of 1978 (FISA),[97] its overt fruits were meager.

Plaintiffs questioned the basis for governmental action, as provided by the FISA:

> If an appropriate challenge to surveillance conducted under the authority of the act is filed, Federal district courts 'shall' conduct *ex parte*, *in camera* reviews to determine

92. *American-Arab*, 119 S. Ct. at 939 n.1.

93. 914 F.2d 1147 (9th Cir. 1990).

94. *Id.* at 1148-49.

95. *See id.* at 1147 (noting question of inquiry into government's sources).

96. *See* ACLU v. Barr, 952 F.2d 457 (D.C. Cir. 1991) (noting question of inquiry into government's sources).

97. Pub. L. No. 95-511, 92 Stat. 1783 (1978) (codified at 50 U.S.C. § 1801 (1994 & Supp. I 1995)).

> whether FISA surveillance, undertaken pursuant to an order of the FISA Court, was 'lawfully authorized and conducted' whenever the issue arises in a proceeding and the Attorney General, in an affidavit, represents that disclosure or an adversary hearing would harm the national security interests of the United States.[98]

Judge Real, sitting in the United States District Court for the Central District of California, concluded that the government had not abused the authority granted it by FISA and refused to grant relief.[99] The Ninth Circuit challenge foundered when the Court found that Judge Real's determination was not a "final order," and hence, not yet reviewable in the Court of Appeals.[100] The Court held out the possibility that review would become available if and when a final order of deportation was issued.[101]

As the *Barr* court noted:

> On August 9, 1989, before the Ninth Circuit had ruled, plaintiffs brought this lawsuit. The Complaint, as amended, alleged that the eight alien plaintiffs had been and were continuing to be subject to illegal surveillance, that their communications with the thirteen plaintiff attorneys had been intercepted and that they were continuing to communicate with their attorneys.[102]

The District Court dismissed the case on the ground that complainants had failed to state a claim upon which relief could be granted.[103]

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98. *Barr*, 952 F.2d at 462. According to the *Barr* court:

> FISA sets forth three circumstances in which the issue could arise: (1) in an administrative, criminal or civil proceeding when a governmental body gives notice of its plan to use the fruits of FISA surveillance against a person who has been subjected to the surveillance; (2) when such a person moves to suppress the evidence obtained or derived from FISA surveillance; and (3) when such a person otherwise moves to discover or obtain information derived from FISA surveillance.

Id.

99. According to the *Barr* court:

> Chief Judge Real, after conducting an *ex parte, in camera* review in compliance with [section] 1806(f), issued an order on February 28, 1989, deciding "that the electronic surveillance[s] disclosed to this court in camera were legally obtained pursuant to proper order of a court of competent jurisdiction" and that "it is not necessary to the determination of the legality of the electronic surveillances submitted to the court to disclose those applications, orders and materials or any portion thereof to respondents."

Id. at 463.

100. *See* United States v. Hamide, 914 F.2d 1147, 1150 (9th Cir. 1990) (noting that 28 U.S.C. section 1291 "confers jurisdiction on courts of appeals from final decisions of district courts, and 'embodies a strong congressional policy against piecemeal reviews, and against obstructing or impeding an ongoing judicial proceeding by interlocutory appeals'").

101. *See id.* at 1150-51 (holding out possibility for review upon final decision of deportation).

102. *Barr*, 952 F.2d at 463.

103. *See id.* (noting district court dismissal).

The *Barr* court accepted most of the District Court's reasoning. With respect to "past surveillance," it followed the District Court in deciding that "Chief Judge Real's order had conclusively determined the legality of any past surveillance disclosed in the Lindemann declaration," and "that review here would amount to an impermissible collateral attack on that decision."[104] The court also found that certain plaintiffs lacked standing to challenge FISA or its implementation. It dismissed certain additional challenges brought by the Other Six on the ground that they were not "United States Persons," who are accorded special protection by FISA.[105] Nevertheless, in a very narrow ruling, the *Barr* court held that the district court had improperly dismissed the claim that ongoing surveillance violated the petitioner aliens' rights.[106] Rather than holding out any meaningful hope to them, however, the *Barr* court suggested that permitting the petitioners to file a claim would not necessarily entitle them to discover any of the confidential information at the government's disposal. Instead, the court intimated that after the case was filed, and before any evidence was produced, it would look with favor on a summary judgment motion made by the government.[107]

Despite the failure to achieve favorable rulings, the FISA litigation forced the government to publicly take early positions, and thus, shed important light on its subsequent conduct. For example, two weeks after the surveillance issue was raised, "*the government responded that none of the evidence in the deportation proceedings had been gathered by electronic surveillance, without stating whether any such surveillance had occurred.*"[108] Undeterred, "[t]he eight filed motions after deportation proceedings were reinstituted in June 1987 and again in December 1988 requesting affirmance or denial of the surveillance."[109] After the immigration

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104. *Id.*

105. *See id.* at 464.

> Among the eight alien plaintiffs, only Khader Hamide and Michel Shehadeh, who are permanent resident aliens, fit within the definition of "United States persons" to which [section] 1805(a)(3)(A) might apply. There are six other alien plaintiffs. Four of them (Amer, Mungai, Amjad Obeid and Ayman Obeid) were parties in the [section] 1806(f) proceeding; two (Sharif and Barakat) were not. All six are non-resident aliens who entered the United States on the basis of student or visitors visas between 1975 and 1983. None of them therefore qualify as a "United States person" — that is, in the case of an individual, a United States citizen or an alien lawfully admitted for permanent residence.

Id.

106. *See id.* at 467 (disagreeing with district court's dismissal of claim).

107. *See id.* at 469-70 (intimating summary judgment ruling in favor of government because of conflict with system of judicial authorization Congress intended FISA to have).

108. United States v. Hamide, 914 F.2d 1147, 1149 (9th Cir. 1990) (emphasis added).

109. *Id.*

court granted the motion, Michael P. Lindemann, the government's chief attorney in the case, filed a declaration with the immigration court:

> Lindemann's declaration disclosed that five of the six appellants had been overheard on electronic surveillance. Lindemann also stated that there had been some video surveillance, and that the Federal Bureau of Investigation had placed a pen register on the telephone of one of the appellants. *He asserted that the government would not use any of the surveillance in the immigration proceedings* . . . .[110]

The accuracy of Lindemann's assertion would become an important, though never fully articulated, issue in the long struggle of Barakat and Sharif to achieve legalization.

(II) Legalization

Aiad Barakat and Naim Sharif first applied for legalization in June, 1987. As described by the district court:

> [l]egalization under IRCA is a two-step process. First, the Attorney General grants temporary resident status to any alien who establishes: (1) that he has maintained a continuous, unlawful residence in the United States from a date prior to January 1, 1982; (2) that he is admissible as an immigrant; and (3) that he has not been convicted of a felony or more than two misdemeanors committed in the United States. Second, the Attorney General grants permanent resident status to any alien granted temporary resident status who resides here continuously for eighteen months and meets certain literacy requirements.[111]

Barakat and Sharif met all of the statutory requirements for legalization. Both had been in the United States in "continuous, unlawful residence" since December 31, 1981.[112] Neither had been convicted of a felony or more than two misdemeanors. Both were literate in English and unlikely to depart the United States even temporarily, since both were fighting deportation. The only issue was whether each was admissible as an immigrant. For purposes of INA section 245A, to be "admissible" was equivalent to

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110. *Id.* (emphasis added). Lindemann also asserted:

> "[W]hile attorneys of record in this case have been overheard, only a single conversation was in connection with this case, and that single conversation did not involve attorney-client communication and was not otherwise privileged." The declaration also stated that the government intended to seek a determination of the legality of the surveillance from the district court.

Id.

111. American-Arab Anti-Discrimination Comm. v. Reno, 883 F. Supp. 1365, 1368 (C.D. Cal. 1995) (citations omitted).

112. In fact, the government did not contest the fulfillment of the required residency period. As the court noted, "[t]he INS concedes that Barakat and Sharif have a substantial interest at stake because they seek the right to remain legally in this country . . . . Both have lived in this country for more than 12 years, and have extensive community ties." *Id.* at 1375.

not being "excludable" under the provisions of INA section 212(a), as it then existed.[113]

Barakat and Sharif waited nearly four years for a determination of their admissibility.[114] When they had applied for "legalization" in June 1987, "INS regulations required all issues of statutory eligibility for immigration benefits, including legalization, to be determined solely on the basis of information in the record disclosed to the applicant."[115]

> On January 7, 1991, the INS amended the rules regarding confidential information. While the prior rule had allowed the INS to rely on undisclosed, classified information only for discretionary determinations such as exclusion and withholding of deportation, the new regulations additionally allow reliance on such information for nondiscretionary immigration benefits such as legalization.[116]

In March 1991, after a delay of nearly four years, the INS finally adjudicated their legalization claim,[117] denying it on the basis of undisclosed classified information[118] that the INS asserted, demonstrated that they were excludable under INA section 212(a)(28)(F).[119]

Barakat and Sharif filed suit in United States district court, challenging the use by the INS of classified and undisclosed information as the basis for its decision to deny legalization. They made five claims: (1) the regulation allowing for reliance on undisclosed classified information should not be applied retroactively because it would cause them manifest injustice; (2) the use of undisclosed classified evidence denies them due process; (3) the use of such evidence violates the First Amendment, which requires heightened procedural safeguards where government officials review speech and associational activities; (4) the INS waived its right to invoke the regulation when it represented to the Ninth Circuit that it would not enforce a similar

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113. *See* INA § 245A(d)(2)(A), 8 U.S.C. § 1255a(d)(2)(A) (1994) (indicating certain grounds for exclusion, including overstays, failure to obtain required labor certification, documentary violations at time of last entry, and illiteracy, were not applicable at all); *id* § 245A(d)(2)(B)(i) (indicating other grounds were waivable in discretion of Attorney General); *id.* § 245A(d)(2)(B)(ii) (delineating enumerated grounds, including 1952 Act ideological grounds codified in INA section 212(a)(28) which were not waivable).

114. *See Reno*, 883 F. Supp. at 1368 ("Although plaintiffs filed their applications in 1987, the [INS] did not adjudicate those applications until March 1991.").

115. *Id.* at 1368.

116. *Id.* at 1369 (citations omitted).

117. *See id.* at 1368. Recent case law suggests that delays of more than 20 months in "adjustment of status" cases may be deemed unreasonable and give rise to the award of attorneys' fees. *See* Nadine K. Wettstein, *Wasted Days and Wasted Nights: INS Visa Processing Delays and How to Combat Them*, 76 INTERPRETER RELEASES 1441, 1446-47 (1999) (discussing cases in which attorneys' fees were awarded).

118. *See Reno*, 883 F. Supp. at 1369 (noting INS denied legalization on basis of classified information).

119. *See id.* at 1369 n.1 (discussing INA section 212(a)(28)(F)).

provision against Barakat and Sharif; and (5) INA section 212(A)(28) violates the First Amendment on its face because it penalizes constitutionally protected associations.[120]

Although this suit was apparently filed in the Spring of 1991, a decision by the District Court was not forthcoming until January 24, 1995 — seven and one-half years after Barakat and Sharif had first sought "legalization."[121] None of the delay, it is important to note, was attributable in any way to their conduct. Since the INS had withdrawn the original ideological charges against them and substituted routine status violations as the grounds for their deportation, they were statutorily entitled to apply for the benefit of legislation.

When the District Court finally did hear Barakat's and Sharif's case, it first disposed of claims made by the government that the case was not "ripe" for adjudication and that neither had yet exhausted their administrative remedies.[122] The court also described part of the process that Barakat and Sharif confronted:

> The Notices [to deny "legalization"] conclude by stating that unless the plaintiffs can disprove the INS's charges (the evidence of which remains confidential), the INS will deny their applications. If the applications are denied, Barakat and Sharif will be ineligible for temporary resident status--the first step in the legalization process. In addition, they will lose their right to work in this country. . . . The next step in the application process will be for the INS to hold a hearing giving Barakat and Sharif an opportunity to rebut the Government's allegations of PFLP membership. The Government contends that it does not need to reveal the classified information to the plaintiffs at that hearing.[123]

Although the statute is ambiguous, it appears that three other steps also were available and could have been required before a final resolution of the issue in ordinary INS proceedings: a deportation hearing before an immigration judge (in which Barakat and Sharif would not have been able to present either constitutional or selective enforcement arguments), an appeal of any denial by the immigration judge to the Board of Immigration Appeals (where again no constitutional or selective enforcement arguments would be entertained), and finally, an appeal of the BIA's decision to the Ninth Circuit.[124]

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120. *See id.* at 1369-70 (outlining appellants' claims).

121. *See id.* at 1365 (listing date of decision).

122. *See id.* at 1370 (discussing justiciability of claims).

123. *Id.* at 1369.

124. *See* INA § 245A(f)(3)(A), 8 U.S.C. § 1255a(f)(3)(A) (1994) (providing for "single level of administrative appellate review" under a newly-established "appellate authority" to be created by the Attorney General). *But see id.* § 245A(f)(4)(A), 8 U.S.C. § 1255a(f)(4)(A) (1994 & Supp. IV 1998) (providing that "there shall be judicial review of [an administrative review] denial only in the judicial review of an order of deportation under section [106]").

Having rejected the government's argument for more delay and finding the case "justiciable," the District Court then focused most of its attention on the due process implications of deporting a resident alien without affording him the opportunity to see or challenge the evidence used against him. The District Court first concluded that Barakat and Sharif, as aliens physically present in the United States, were entitled to Fifth Amendment due process.[125] The court then employed the *Mathews v. Eldridge*[126] balancing test[127] determining whether the government's intended use of confidential, undisclosed evidence in a legalization case passed constitutional muster. Finding that the interest of Barakat and Sharif in avoiding deportation was great and that the interest of the government in withholding all evidence from them was not nearly as compelling, the court found in the aliens' favor.[128]

Furthermore, the court took particular notice of the virtually impossible burden that the government would have imposed on Barakat and Sharif:

> The INS's reliance on undisclosed, classified information in this case imposes on plaintiffs the nearly impossible burden of proving two negatives — that they are not members of the PFLP, and that the PFLP does not advocate any of the statutorily-disapproved doctrines. In *Rafeedie II*, the D.C. Circuit likened such a position to the dilemma faced by Joseph K. in Franz Kafka's *The Trial*, and concluded that "[i]t is difficult to imagine how even someone innocent of all wrongdoing could meet such a burden."[129]

The court's decision also attempted to take available "facts" into account when attempting to distinguish between the government's asserted general interest in protecting "national security" and its apparent particular interest in excluding Barakat and Sharif:

> While the Government made a strong showing that Barakat and Sharif are affiliated with the PFLP, it has not shown that Barakat and Sharif personally have advocated

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INA section 106 has since been repealed. Section 242(b) of the INA now governs judicial review of deportation hearings.

125. *See Reno*, 883 F. Supp. at 1372-73 (concluding resident aliens are entitled to due process protections that other aliens are not entitled to).

126. 424 U.S. 319 (1976).

127. *See id.* at 335 (delineating test in which court must weigh).

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id.

128. *See Reno*, 883 F. Supp. at 1373-78 (concluding that plaintiffs have substantial interest at stake and INS's use of undisclosed, classified information would violate due process rights).

129. *Id.* at 1376 (quoting Rafeedie v. INS, 880 F.2d 506, 516 (D.C. Cir. 1989)).

> any of the doctrines of 8 U.S.C. [section] 1182(a)(28)(F). These particular plaintiffs have never been charged with any crime, and there is no indication that they are violent terrorists. If the INS had made a stronger showing that allowing these particular plaintiffs to stay in the country would create a serious threat to national security, the balance might very well have tipped in the government's favor.[130]

The court buttressed this conclusion, referring to one of the few "unclassified" facts in the record. The court noted, "[i]n fact, former FBI Director William Webster admitted that plaintiffs 'had not been found to have engaged themselves in illegal activity . . . [and that] if these individuals had been United States citizens, there would not have been a basis for their arrest.'"[131]

On appeal, the Ninth Circuit affirmed the District Court's decision in part.[132] It upheld the District Court's findings regarding the balancing test discussed above.[133] Yet with respect to the use of classified, undisclosed information, it devoted most of its opinion to questions of justiciability.[134] As did the District Court, the Ninth Circuit relied on the D.C. Circuit's opinion in *Rafeedie v. INS*,[135] concluding that no good purpose would be served by delaying a decision.[136]

The Ninth Circuit's affirmation of the District Court's holding on the use of confidential, undisclosed information had no direct bearing on the principal claim made by the LA 8, namely, that their associations with the PFLP were protected by the First Amendment. But it demonstrated a strong willingness to look beyond claims of governmental "plenary authority" to matters of individual constitutional entitlement and a respect for the importance of facts (including government-created delay and the emptiness of additional administrative proceedings) in deciding whether to adjudicate the claims of aliens facing deportation.

3. *The Emerging Evidence*

The final factor pushing the Ninth Circuit to change its mind and decide the case "on the merits" undoubtedly was the volume of evidence that the

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130. *Id.* at 1378.

131. *Id.* at 1378 n.14.

132. *See* American-Arab Anti-Discrimination Comm. v. Reno (AAADC I), 70 F.3d 1045, 1071 (9th Cir. 1995) (affirming in part, and reversing and remanding in part District Court's decision).

133. *See id.* at 1061-62 (recognizing test applied by District Court).

134. *See generally id.* at 1054-70.

135. 880 F.2d 506 (D.C. Cir. 1989).

136. *See AAADC I*, 70 F.3d at 1061-62 (quoting Rafeedie v. INS, 880 F.2d 506, 516 (D.C. Cir. 1989)) ("No facts relevant to the due process determination can be adduced at the agency hearing because that hearing proceeds under the premise that use of undisclosed information against the alien is legal.").

LA 8 managed to assemble in the course of the litigation. As previously stated, a major factor in the Ninth Circuit's 1991 decision to vacate the District Court's 1989 judgment in favor of the Other Six was its determination that the case was not yet ripe, lacking a fully-developed factual record.[137] Subsequent developments, including the government's commitment to using confidential, undisclosed information, helped demonstrate the practical difficulties of ever generating such a record.

Nevertheless, by the time that the LA 8 managed to reach the Ninth Circuit again in 1995, they had managed to secure substantial discovery. The Ninth Circuit described that discovery in the context of the selective enforcement claims made by the Other Six:

> The district court ordered discovery and reviewed evidence from the aliens and from the Government that would not be available in a deportation proceeding. The aliens have submitted to the district court more than 450 pages of declarations, exhibits, and transcripts in support of their claims. In the course of factual development, for example, the INS has conceded that Amer is the only alien that the Los Angeles INS office has sought to deport for taking too few credits as a student, even though many such students have been reported to the INS. We therefore find that the district court had jurisdiction to consider these selective enforcement claims.[138]

B. The Ninth Circuit Confronts the First Amendment

In 1989, Judge Wilson held that the Other Six were entitled to First Amendment protection in deportation proceedings and had been unconstitutionally denied that protection when the government sought to deport them for expressive conduct that was protected under the test enunciated by the Supreme Court in *Brandenburg v. Ohio*.[139]

In his opinion, Judge Wilson asserted that, "[s]ince aliens enjoy full First Amendment protection outside the deportation setting, we decline to adopt a lesser First Amendment test for use within that setting."[140] He continued:

> We do not dispute the Government's interests in preserving national security and promoting foreign policy in the exercise of its immigration power. These interests are adequately protected, however, by the prevailing First Amendment standard allowing for the deportation of individuals who advocate imminent lawless action and whose speech is likely to induce such action.[141]

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137. *See* American-Arab Anti-Discrimination Comm. v. Thornburgh, 970 F.2d 501, 510-11 (9th Cir. 1991) (discussing ripeness issue), *aff'g in part, rev'g in part*, Arab-American Anti-Discrimination Comm. v. Meese, 714 F. Supp. 1060 (C.D. Cal. 1989).

138. *AAADC I*, 70 F.3d at 1055-56.

139. 395 U.S. 444 (1969).

140. *Meese*, 714 F. Supp. at 1082.

141. *Id.* at 1082 n.18 (citing Brandenburg v. Ohio, 395 U.S. 444, 447 (1969)).

Judge Wilson conceded that "[t]he government could also deport aliens, without violating the First Amendment, for their affiliation with an organization, if it established that that group affiliation posed a legitimate threat to the government."[142] Nevertheless, he argued that "there is no basis for a lower standard of First Amendment protection for aliens"[143] because:

> [A]s long as the Government narrowly tailors its deportation laws to further its compelling interests in foreign policy and national security, it can enact laws, (e.g., espionage or national secrecy laws), that allow for the deportation of aliens on the basis of their First Amendment activities.[144]

Six years later, when the Ninth Circuit finally found the matter ripe enough to go forward, it reached a remarkably similar conclusion — although the strange procedural evolution of the case meant that the latter opinion was expressed in "selective enforcement," rather than "facial" or "as applied" terms.[145]

1. The Basic Argument

a. Political Expression and Association are Core Values Protected by the First Amendment

The Ninth Circuit accepts as fundamental that political expression and association are core values protected by the First Amendment. The Court commences its First Amendment argument with the observation that:

> The Government does not dispute that the First Amendment protects a citizen's right to associate with a political organization; even if that association includes ties with groups that advocate illegal conduct or engage in illegal acts, the power of the Government to penalize association is narrowly circumscribed. "[T]he right of association is a 'basic constitutional freedom' . . . [that] lies at the foundation of a free society."[146]

142. *Id.* (citing Healy v. James, 408 U.S. 169, 186 (1972); United States v. Robel, 389 U.S. 258, 265-66 (1967)).

143. *Id.*

144. *Id.*

145. *See* American-Arab Anti-Discrimination Comm. v. Reno (AAADC I), 70 F.3d 1045, 1061 (9th Cir. 1995) (couching opinion allowing for deportation of aliens in terms of "selective enforcement").

146. *Id.* at 1063 (quoting Buckley v. Valeo, 424 U.S. 1, 25 (1976)).

b. Protection Extends to Resident Aliens as Well as to Citizens

Resident aliens are "persons" entitled to the benefits of the First Amendment. Physical presence in the United States conveys certain rights. As the court in *AAADC I* noted:

> The Supreme Court has consistently distinguished between aliens in the United States and those seeking to enter from outside the country, and has accorded to aliens living in the United States those protections of the Bill of Rights that are not, by the text of the Constitution, restricted to citizens. Accordingly, the Court has explicitly stated that "[f]reedom of speech and of press is accorded aliens residing in this country."[147]

This extension of First Amendment rights to aliens is based on a broad notion of community, which includes not only citizens but also resident aliens.[148] Thus, as James Madison noted in his Report on the Virginia Resolutions, "[a]s [aliens] owe, on one hand, a temporary obedience, they are entitled, in return, to their protection and advantage."[149]

Therefore, "although Congress and the President may regulate aliens' admission and residence in the country, that regulation must be 'consistent with the Constitution.'"[150] As Justice Murphy noted in his concurring opinion in *Bridges v. Wixon*,[151] "[s]ince resident aliens have constitutional rights, it follows that Congress may not ignore them in the exercise of its 'plenary' power of deportation."[152]

c. Protection Is Not Restricted to Popular or "Mainstream" Political Groups

The First Amendment is violated by depriving racists, communists and flag-burners of the opportunity to express themselves peacefully, and to associate and organize in pursuit of their political aims. The United States government cannot "deny[ ] rights and privileges solely because of a citizen's association with an unpopular organization."[153] This is particularly true because our nation's history reveals an unfortunate tendency to demonize foreigners:

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147. *Id.* at 1063-64 (quoting Bridges v. Wixon, 326 U.S. 135, 148 (1945)) (citation omitted).

148. *See id.* at 1064-65 (noting distinction between exclusion and deportation rests on territorial concept of diverse national community).

149. *Id.* at 1065 (quoting JAMES MADISON, REPORT ON THE VIRGINIA RESOLUTIONS (1799), *reprinted in* 4 DEBATES ON THE FEDERAL CONSTITUTION 546, 556 (Jonathan Elliot ed., 1987)).

150. *Id.* (quoting Fong Yue Ting v. United States, 149 U.S. 698, 712 (1893)).

151. 326 U.S. 135 (1945).

152. *AAADC I*, 70 F.3d at 1065 (quoting *Bridges*, 326 U.S. at 161 (Murphy, J., concurring)).

153. *Id.* at 1063 (quoting Healy v. James, 408 U.S. 169, 186 (1972)).

> Aliens, who often have different cultures and languages, have been subjected to intolerant and harassing conduct in our past, particularly in times of crises.[154] It is thus especially appropriate that the First Amendment principle of tolerance for different voices restrain our decisions to expel a participant in that community from our midst.[155]

The court's argument stands as a powerful counsel for special vigilance when those targeted are members of the group that is subject to the most pervasive stereotyping in the last several decades: Palestinians, particularly if they are identified, as are the LA 8, with policies or organizations opposed to the State of Israel or the Israeli Peace Process.

d. To Lose Protection, the Threat Posed by the Alien Must Be Substantial and Immediate

The Ninth Circuit argued that "the values underlying the First Amendment require the full applicability of First Amendment rights to the deportation setting."[156] According to the court, "read properly, *Harisiades* [*v. Shaughnessy*] establishes that deportation grounds are to be judged by the same standard applied to other burdens on First Amendment rights."[157]

Judge Wilson analyzed *Harisiades v. Shaughnessy*[158] extensively in his 1989 District Court opinion. According to Judge Wilson:

> Decided in 1952, *Harisiades v. Shaughnessy* . . . involved an attack on the provision in the Alien Registration Act of 1940 that authorized deportation of aliens based on their past Communist Party memberships. The aliens assailed this provision on three grounds: the Fifth Amendment Due Process Clause, the First Amendment freedom of speech and assembly, and the prohibition of passing an ex post facto law under Article I, [section] 9, clause 3 of the Constitution.[159]

Only their First Amendment argument received serious attention from the court:

> In addressing the aliens' First Amendment argument, the *Harisiades* Court dealt directly with the question of whether aliens have First Amendment rights in deportation

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154. *Id.* at 1064. *See generally* Alien Enemies Act of 1798, ch. 58, 1 Stat. 570, 571 (authorizing President to expel "all such aliens as he shall judge dangerous to the peace and safety of the United States"); JOHN HIGHAM, STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM 1860-1925 229-31 (2d ed. 1963) (describing the Palmer Raids of 1919-20).

155. *AAADC I*, 70 F.3d at 1064.

156. *Id.*

157. *Id.* (quoting T. Alexander Aleinikoff, *Federal Regulation of Aliens and the Constitution*, 83 AM. J. INT'L L. 862, 869 (1989)).

158. 342 U.S. 580 (1952).

159. American-Arab Anti-Discrimination Comm. v. Meese, 714 F. Supp. 1060, 1077 (C.D. Cal. 1989).

> matters. The Government, as in this case, urged the Court to find that the First Amendment does not apply "to the political decision of Congress to expel a class of aliens whom it deems undesirable residents." The Court rejected this argument, ruling that it had the duty of distinguishing between aliens' constitutionally protected "advocacy of political methods" and their unprotected "methodical but prudent incitement to violence." To make this distinction, the Court explicitly employed the then prevailing First Amendment test from *Dennis v. United States*.[160]

The significance of this decision lay not in the result, but in the court's method of reaching that result. The court reasoned that, "[a]lthough the [*Harisiades*] Court found that the First Amendment did not prevent the resident aliens' deportation, the importance of its ruling for the instant case is that the Court applied the same First Amendment standard to aliens' claims that then applied to United States citizens' First Amendment challenges.[161]

According to the Ninth Circuit, applying the same method to aliens facing deportation today will yield a different result, because the constitutional standard has changed:

> Under the standard enunciated by the Supreme Court in *Brandenburg v. Ohio*, advocacy may be punished only if it is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action." The government must establish a "knowing affiliation" and a "specific intent to further those illegal aims." "Guilt by association alone" violates the First Amendment.[162]

The government was required to shoulder a burden, demonstrating that the LA 8 are not merely "associated" with the PFLP but also are meaningfully implicated in its violent activities. The court clearly believed that the government had not met this burden.

2. *Hinting at a Variation on the Theme: "Selective Enforcement"*

The Ninth Circuit employed the language of "selective enforcement" for two very different reasons. First, for Hamide and Shehadeh, the two permanent resident members of the LA 8, it was the only theory that would overcome earlier determinations, which were not particularly well-founded, that they would be unable to mount a "facial" or "as applied" legal challenge until they had exhausted their administrative remedies.[163] Second, for the Other Six, and particularly for the "Other Four" after Barakat and Sharif achieved "legalization," the theory provided the only certain means of securing their protection after a transparent attempt by the government to

160. *Id.* (citations omitted).
161. *Id.*
162. *AAADC I*, 70 F.3d at 1063 (citations omitted).
163. *See supra* note 145 and accompanying text.

substitute a "status violation" rationale for deportation for the real reason admitted by INS and Justice Department officials, namely, the desire to deport them for their alleged PFLP membership and activities.[164]

I will return briefly to "selective enforcement" in Part II when I consider how the Supreme Court dealt with the issue. Here, I simply note that in making their "selective enforcement" argument, the LA 8 presented evidence to demonstrate that Palestinians had been specially singled out for deportation and exclusion on the basis of 1952 Act prohibited associations or so-called "terrorist activities." This evidence was intended to demonstrate not only the government's motives (which were, after all, quite transparent), but also the government's "disparate treatment" of different groups.[165] We will reconsider the significance of these dual objectives, the evidence necessary to demonstrate them, and their relationship to the First Amendment when we turn again to "selective enforcement" in Part II.

II. PLAYING GAMES WITH THE FACTS AND THE LAW: THE SUPREME COURT'S DECISION

A. Getting from AAADC I *to the Supreme Court*

1. The Remand to District Court, the Release of Previously Confidential Information, and the Issue of Fundraising

When the case emerged from the Ninth Circuit in 1995 all of the respondents, after a long and complicated legal struggle, had secured a decision (*AAADC I*) that such "targeting" on account of an alien's affiliation, membership or advocacy of the general goals of the PFLP or the more general doctrines of "world communism" violated the First Amendment.[166] The decision upheld the preliminary injunction enjoining continuing efforts to deport the Other Six, and remanded the case against Shehadeh and Hamide to the District Court with instructions that it hear Shehadeh's and Hamide's selective enforcement claim.[167]

At this point the government, after attempting for nearly a decade to deport the LA 8 on the basis of undisclosed confidential information, sud-

164. *See* discussion *supra* Part I.A.1.

165. *See AAADC I*, 70 F.3d at 1054 (suggesting that "[t]o succeed on a selective prosecution claim, the defendant bears the burden of showing both 'that others similarly situated have not been prosecuted and that the prosecution is based on an impermissible motive'") (citations omitted).

166. *See generally id.* at 1066.

167. *See id.* at 1052 (upholding preliminary injunction and remanding for consideration of selective enforcement claim).

denly shifted gears. It delivered to the court a "new 10,000-page submission" intended to demonstrate that Shehadeh and Hamide were, in fact "terrorists" or persons who had engaged in "terrorist activities." The government asserted, among other things, that they had engaged in fundraising for the PFLP. But the District Court refused to consider the government's "new" evidence since it found that the submission was available to the government at the time the preliminary injunction was entered, and that the government simply chose not to litigate the facts at that time.[168] The District Court then entered a permanent injunction staying the proceedings against Hamide and Shehadeh.[169]

Subsequently, the government took two actions. First, it filed an appeal with the Ninth Circuit contesting the District Court's new determination with respect to Hamide and Shehadeh, and the court's pre-*AAADC I* preliminary injunction in favor of the Other Six.[170] Second, while the appeal was pending, the government filed motions to dismiss the case both with the District Court and the Ninth Circuit panel.[171]

2. AAADC II: *The Ninth Circuit Refuses to Dissolve the Injunction Protecting the Other Six*

The Ninth Circuit summarily affirmed the district court's decision refusing to dissolve the existing preliminary injunction for two reasons. First, the court noted that "the government had not demonstrated changed circumstances."[172] Second, the court found an impropriety in using a motion to dissolve an existing preliminary injunction in an attempt "to relitigate on a fuller record preliminary injunction issues already decided."[173]

The Ninth Circuit adopted the District Court's reasoning in explaining why it believed the government's new submissions in the case did not support a claim of "changed circumstances:"

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168. *See* American-Arab Anti-Discrimination Comm. v. Reno (AAADC II), 119 F.3d 1367, 1370 (9th Cir. 1997) (discussing proceedings and decision in district court after remand from *AAADC I*).

169. *See id.*

170. *See id.* at 1370-71 (noting government appeal arguing that deportation proceedings were initiated for permissible reasons).

171. *See id.* at 1371 (noting government contention that federal courts lack subject matter jurisdiction except on review of final deportation orders).

172. *Id.* at 1375 (citing Favia v. Indiana Univ. of Pa., 7 F.3d 332, 337 (3d Cir. 1993)) (noting that modification of preliminary injunction requires changed circumstances that would render continuance of injunction in original form inequitable).

173. *Id.* at 1375 (quoting American Optical Co. v. Rayex Corp., 394 F.2d 155, 155 (2d Cir. 1968)).

> Up until [the] point [of that submission], the government had argued that the Plaintiffs did not possess the same First Amendment rights as citizens. Because the only change in circumstances is of the government's own making, resulting from its decision to change its litigation strategy, we conclude that it is equitable to continue the original injunction staying proceedings against the Six without consideration of the new evidence.[174]

3. AAADC II: *The Ninth Circuit Refuses to Overturn the New Injunction Protecting Shehadeh and Hamide*

The Ninth Circuit concluded that it and the District Court both retained jurisdiction before it addressed the lower court's decision on Hamide and Shehadeh.[175] The Ninth Circuit applied the standard they originally set forth[176] to all of the controverted issues, and found that the District Court had not abused its discretion. The court first addressed the issue of whether, as the government contended, Plaintiffs "failed to produce sufficient evidence showing that the INS refrained from deporting fundraisers in other terrorist organizations."[177] The court found that "the comparison with aliens who engaged in fundraising for other terrorist organizations is unnecessary," since "the government does not dispute the district court's conclusion that the INS sought to deport the Plaintiffs because of mere membership in the PFLP" and "Plaintiffs did show that members of numerous other organizations advocating violence and the destruction of property were not deported."[178] The court further found that "[e]ven if such a comparison were required, the Plaintiffs ha[d] produced sufficient evidence to this effect."[179]

Next, the court turned to the issue of whether the lower court employed the wrong legal standard in evaluating the "new evidence" of fundraising activity. Since fundraising "activity, rather than mere association, is at issue, the government maintain[ed] that the case should be analyzed under the standard set forth in *United States v. O'Brien.*"[180] The Ninth Circuit

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174. *AAADC II*, 119 F.3d at 1375.

175. *See* discussion *infra* Parts II.A.1.d & II.A.1.e. Here, the Article examines the *AAADC II* court's substantive reasons for its decision to affirm the injunction in favor of Hamide and Shehadeh.

176. *AAADC II*, 119 F.3d at 1371 ("We review a decision regarding a preliminary injunction for an abuse of discretion. A district court abuses its discretion 'if the court bases its decision on an erroneous legal conclusion or on clearly erroneous findings of fact.'").

177. *Id.* at 1375.

178. *Id.*

179. *Id.*

180. *Id.* at 1376; *see also* United States v. O'Brien, 391 U.S. 367 (1968) (holding that government has more latitude in restricting expressive conduct than in curtailing pure speech).

found that "*O'Brien* is inapplicable in a case such as this one, in which the restrictions are in effect content-based."[181] The appropriate consideration, as the court determined, which the District Court adequately took into account, was the government's intent to stifle expression because of its ideological content.[182] Secondly, the court concluded that "the government has not challenged the factual finding made by the District Court that the INS targeted the Plaintiffs for their mere association with the PFLP. Indeed, in the prior appeal the government conceded that citizens would not have been treated in the same fashion."[183]

4. Congress Enacts IIRIRA and Limits Jurisdiction in Pending Deportation Cases

a. Judicial Review Prior to IIRIRA

In 1995, when *AAADC I* was decided, the INA contained three key provisions governing judicial review. Section 106 of the INA governed orders of deportation and exclusion.[184] Subsection (a) established "the sole and exclusive procedure for, the judicial review of all final orders of deportation . . . ."[185] The Courts of Appeals were granted exclusive jurisdiction. Among other things, the section established time limits for the filing of a petition for review, venue rules, and the requirement that, as a general rule, "the petition shall be determined solely upon the administrative record upon which the deportation order is based."[186] Subsection (b) limited review of a final order of exclusion to habeas corpus proceedings.[187] Subsection (c) provided, "[a]n order of deportation or of exclusion shall not be reviewed by any court if the alien has not exhausted the administrative

181. *AAADC II*, 119 F.3d at 1376.

182. *See id.* at 1376.

> Here, the central issue is whether the government impermissibly targeted the Plaintiffs due to their affiliation with the PFLP, and did not so target aliens affiliated with other foreign-dominated organizations advocating violence and destruction of property. Thus, the stringent First Amendment standard articulated in [*AAADC I*] continues to apply.

Id.

183. *Id.* (citing American-Arab Anti-Discrimination Comm. v. Reno (AAADC I), 70 F.3d 1045, 1063 (9th Cir. 1995)).

184. *See* 8 U.S.C. § 1105a (1994) (repealed by Pub. L. No. 104-208, § 306(b), 110 Stat. 3009-612 (1996)).

185. *Id.* § 1105a(a).

186. *Id.* § 1105a(a)(4).

187. *Id.* § 1105a(b).

remedies available to him as of right under the immigration laws and regulations . . . ."[188]

INA section 242 generally governed the apprehension and deportation of aliens.[189] Subsection (b) set forth "the sole and exclusive procedure for determining the deportability of an alien under this section."[190] It delineated the powers of "special inquiry officer" (later redesignated as an "immigration judge") and established broad due process and evidentiary guidelines for the conduct of deportation proceedings.[191] Although the focus of the subsection clearly was on the authority and conduct of administrative officials, in the 1957 case of *Woodby v. INS*, the Supreme Court determined that it also imposed an obligation on reviewing courts not to uphold any order of deportation unless it was "based upon reasonable, substantial, and probative evidence."[192]

In contrast to these provisions, which dealt directly with the procedure for removing aliens from the United States, INA section 279 was much more general. It provided that "[t]he district courts of the United States shall have jurisdiction of all causes, civil and criminal, arising under any of the provisions of this subchapter."[193] Reading it in conjunction with title 28, section 1331 of the United States Code establishing general "federal question" jurisdiction, courts customarily found that INA section 279 conferred authority to consider all matters not governed by INA sections 106 and 242(b).[194]

Certain collateral matters clearly fell within the scope of sections 106 and 242(b) of the INA and thus could not be reviewed until they reached the court of appeals after deportation proceedings had concluded. In *Foti v. INS*,[195] the Supreme Court set forth the general rule that "all determinations made during and incident to the administrative proceeding conducted by a special inquiry officer [immigration judge], and reviewable together by the [BIA] . . . are . . . included within the ambit of the exclusive jurisdiction of the Court of Appeals under INA sec[tion] 106(a)."[196] Other matters clearly fell outside their range. For example, in *Cheng Fan Kwok v. INS*[197] the court found that "[a] denial by the district director of a stay of deportation

188. *Id.* § 1105a(c).

189. *See generally* 8 U.S.C. § 1252 (1994) (repealed in Pub. L. No. 104-208, § 306(b), 110 Stat. 3009-612 (1996)).

190. *Id.* § 1252(b).

191. *Id.*

192. Woodby v. INS, 385 U.S. 276, 281 (1966).

193. 8 U.S.C. § 1329 (1994).

194. *See generally id.* §§ 1105a, 1252(b).

195. 375 U.S. 217 (1963).

196. *Id.* at 229.

197. 392 U.S. 206 (1968).

is not literally a 'final order of deportation,' nor is it . . . entered in the course of administrative proceedings conducted under [INA section] 242(b)."[198] Consequently, the Supreme Court held in *Cheng Fan Kwok* that this was not a matter governed by these statutory provisions and permitted plaintiff to challenge the denial of the stay in district court.[199]

Considerable uncertainty marked other determinations, particularly if they involved collateral challenges brought by aliens facing deportation against whom a final order had not yet issued. In the 1980s, district courts began entertaining challenges to general INS practices brought by aliens facing exclusion or deportation.[200] In the early 1990s, the Supreme Court upheld the jurisdiction of a district court to hear a class action brought by two organizational plaintiffs and by aliens whose legalization under IRCA had been denied. That case challenged the government's actions on procedural due process grounds.[201] The principal suit brought by the LA 8 in 1987 and renewed in 1991 was a variant of these "pattern and practices" suits alleging constitutional violations.

b. IIRIRA: A "Bold New Direction"

The 104th Congress pursued an aggressive agenda intended to deter "illegal immigration." One prong of its attack was the immigration provisions of the Antiterrorism and Effective Death Penalty Act of 1996,[202] which established a special summary deportation procedure for aliens accused of being "terrorists."[203] The other prong was its enactment, on the last day of Congress's last session, of the IIRIRA.[204] Representative Lamar Smith, the chairman of the subcommittee that drafted IIRIRA, and Edward R. Grant, the subcommittee's general counsel, subsequently explained the act in a symposium article:

> [T]his law is by far the most comprehensive immigration reform package of the past generation. The IIRIRA builds upon earlier reforms to control illegal immigration, but takes such efforts in bold new directions, particularly in the areas of deterring il-

198. *Id.* at 212. In its decision, the Court acknowledged that the petitioner's application "assumed the prior existence of an order of deportation." *Id.* at 213. Nevertheless, it held that the "petitioner did not 'attack the deportation order itself but instead [sought] relief not inconsistent with it.'" *Id.*

199. *Id.* at 216.

200. *See* LEGOMSKY, *supra* note 60, at 713-16.

201. *See id.*

202. Pub. L. No. 104-132, tit. IV, 110 Stat. 1258 (1996) (codified as amended at 8 U.S.C. § 1531-37 (Supp. II 1996 & Supp. III 1997 & Supp. IV 1998)).

203. LEGOMSKY, *supra* note 60, at 713-16.

204. IIRIRA was part of the Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, 110 Stat. 3009-546 (1996) (codified in scattered sections of 8 U.S.C.)

> legal migration to the United States, and of apprehending, detaining, and removing those who have illegally entered our country.[205]

Other commentators were less kind. One critic described it as "the most diverse, divisive and draconian immigration law enacted since the Chinese Exclusion Act of 1882."[206]

c. *IIRIRA Revisions of Judicial Review*

Among IIRIRA's "bold new directions" was the first comprehensive revision of the judicial review provisions of the INA since its enactment in 1952.[207]

IIRIRA repealed INA section 106 and appended the following sentence to INA section 279: "Nothing in this section shall be construed as providing jurisdiction for suits against the United States or its agencies or officers."[208] IIRIRA also continued a "bold new direction" that Congress had embarked upon five months earlier, namely, the establishment and codification of "alien terrorist removal procedures," which created a special "re-

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205. Representative Lamar Smith & Edward R. Grant, *Immigration Reform: Seeking the Right Reasons*, 28 ST. MARY'S L.J. 883, 891 (1997).

206. Dan Danilov, *U.S. Courts Offer No Protection from Latest Immigration Law*, SEATTLE POST-INTELLIGENCER, Dec. 17, 1996, at A19, *cited in* David M. Grable, Note, *Personhood Under the Due Process Clause: A Constitutional Analysis of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996*, 83 CORNELL L. REV. 820, 821 n.4 (1998).

207. Smith and Grant identified "limitations on appeals" as one of the most "significant reforms" enacted by IIRIRA. *See* Smith & Grant, *supra* note 205, at 918-19. They note:

> The Department of Justice has developed a sophisticated system of administrative tribunals under the Executive Office of Immigration Review (EOIR) to adjudicate issues relating to the removal of aliens. Decisions of the EOIR may be referred to the Attorney General. Appeals to the federal courts, therefore, should be extraordinary and limited to situations in which there is a likelihood of a contested issue of law or fact relating to an alien's right to remain in the United States. Hence, section 306 of the IIRIRA reserves appeal of an order of removal to the issue of whether the alien is inadmissible or deportable. In contrast, issues pertaining to purely discretionary relief, including cancellation of removal and voluntary departure, should remain within the sole discretion of the Attorney General and, thus, are no longer appealable to the federal courts. In addition, there is no right of judicial review in the case of an alien who is removable on the grounds of a criminal conviction. On the other hand, asylum, which is not purely a discretionary form of relief, remains appealable. Finally, section 306 also places new time limits on appeals and provides, in the case of an alien who has not been admitted to the United States, that the filing of an appeal does not automatically stay the order of removal.

Id.

208. INA § 279, 8 U.S.C. § 1329 (Supp. II 1996) (amended by IIRIRA, Pub. L. No. 104-208, § 381(a), 110 Stat. 3009-650 (1996)).

moval court,"[209] special "removal court" procedures and hearings,[210] and special rules for appealing matters arising out of the operation of the removal court and the orders of deportation it would generate.[211]

IIRIRA also modified the traditional distinction between "exclusion" and "deportation," and adopted a new terminology to reflect the new distinction. It divided aliens subject to removal into two groups: those who had not yet been admitted or paroled, who were classified as "applicants for admission,"[212] and those who had been admitted or paroled, who were classified as "deportable."[213] Subsection 235(b) of the INA now provides for the summary removal of most inadmissible aliens — including certain aliens who have not been admitted or paroled, but excluding certain aliens seeking refugee status — "without further hearing or review."[214]

IIRIRA consolidated all other provisions relating to judicial review of orders of removal in INA section 242.[215] Subsection (a) includes a provision for "review of a final order of removal" which mirrors subsection (a) of former INA section 106.[216] Subsection (a)(2) lists a variety of matters "not subject to judicial review," including denials of most forms of discretionary relief,[217] and final orders of removal issued against many aliens non-admissible or deportable for a broad range of criminal offenses.[218]

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209. *See id.* § 502, 8 U.S.C. § 1532.

210. *See id.* §§ 503, 504, 8 U.S.C. §§ 1533, 1534.

211. *See id.* § 505, 8 U.S.C. § 1535.

212. *See id.* § 235(a), 8 U.S.C. § 1225(a).

This group roughly corresponds to the group formerly subject to exclusion proceedings under the repealed INA section 106(b), but it is broader, since it includes aliens who enter the United States without inspection. Under prior law, any alien who successfully entered the United States, whether legally or not, could not be excluded. Instead, illegal entrants were subject to deportation.

213. *See id.* § 237(a), 8 U.S.C. § 1227(a).

214. INA § 235(b)(1)(A)(i), 8 U.S.C. § 1225(b)(1)A)(i) (Supp. II 1996 & Supp. IV 1998). Aliens physically present in the United States for less than two years, and never admitted or paroled, are subject to summary removal if and when the Attorney General decides to authorize the procedure in her "sole and unreviewable discretion." *Id.* § 235(b)(1)(3), 8 U.S.C. § 1225(b)(1)(A) (Supp. IV 1998).

Aliens seeking asylum under INA section 208 or claiming a fear of persecution, who otherwise would be subject to summary removal, are granted a limited opportunity to demonstrate that they possess a "credible fear," and thus, are entitled to an asylum hearing, *id.* § 235(b)(1)(A)(i), 8 U.S.C. § 1225(b)(1)(A)(i) (Supp. II 1996 & Supp. IV 1998), *id.* § 235(b)(1)(B), 8 U.S.C. § 1225(b)(1)(B) and judicial review of any discretionary denial of asylum, *id.* § 242(a)(2)(B)(ii), 8 U.S.C. § 1252(a)(2)(B)(ii) (Supp. II 1996).

215. *See generally id.* § 242(a)(1), 8 U.S.C. § 1252(a)(1) (Supp. II 1996 & Supp. IV 1998).

216. *See id.*

217. *See id.* § 242(a)(2)(B), 8 U.S.C. § 1252(a)(2)(B). This subsection of the INA reads in full:

Subsection (d) precludes judicial review for any alien who has not "exhausted all administrative remedies available to the alien as of right" and also generally precludes review if another court has decided the validity of the order.[219]

Subsection (e) limits judicial review of aliens subject to summary exclusion to a truncated habeas corpus proceeding that is not permitted to reach the merits of any due process claim.[220] Subsection (e) further limits review to actions brought in the United States District Court for the District of Columbia to determine whether the section challenged, or any implementing regulation is constitutional, not consistent with applicable provisions of the subchapter governing deportation or otherwise is in violation of law.[221]

Subsection (f) includes subsection (f)(1), which generally forbids any court other than the Supreme Court to enjoin or restrain the operation of the provisions of chapter 4 of title II of the INA.[222] Included within this chapter are INA sections 231 to 244, which deal with the "inspection, apprehension, examination, exclusion, and removal" of aliens.[223] This limitation on the issuance of injunctions with respect to the provisions of chapter 4, however, does not apply "with respect to the application of such provisions to an individual alien against whom proceedings under such part have been initiated."[224]

Subsection (f)(2) applies only to aliens against whom final orders of removal have issued. It forbids all courts from enjoining the removal "unless

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DENIALS OF DISCRETIONARY RELIEF — Notwithstanding any other provision of law, no court shall have jurisdiction to review —

(i) any judgment regarding the granting of relief under [INA sections 212(h), 212(i), 240A, 240B, or 245B], or

(ii) any other decision or action of the Attorney General the authority for which is specified under this subchapter to be in the discretion of the Attorney General, other than the granting of relief under [INA section 208(a)].

Id.

218. *See id.* § 242(a)(2)(C), 8 U.S.C. § 1252(a)(2)(C) (Supp. II 1996 & Supp. IV 1998).

219. *See* INA § 242(d)(1), (2), 8 U.S.C. § 1252(d)(1), (2).

220. *See id.* § 242(e)(2), 8 U.S.C. § 1252(e)(2).

Judicial review of any determination made under section 235(b)(1) is available in habeas corpus proceedings, but shall be limited to determinations of —

(A) whether the petitioner is an alien,

(B) whether the petitioner was ordered removed under such section, and

(C) whether the petitioner can prove by a preponderance of evidence [that belongs to a statutory category, such as an alien lawfully admitted for permanent residence, not subject to summary removal.].

Id.

221. *See id.* § 242(e)(3)(A).

222. *See id.* § 242(f)(1).

223. *See generally id.* §§ 231-244, 8 U.S.C. §§ 1221-1254.

224. *Id.* § 242(f)(1).

the alien shows by clear and convincing evidence that the entry or execution of such order is prohibited as a matter of law."[225]

Subsection 242(g) of the INA, providing for exclusive jurisdiction, reads in its entirety:

> Except as provided in this section and notwithstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter.[226]

d. Application of IIRIRA to "Transitional" Aliens

The Ninth Circuit noted that "IIRIRA explicitly provides for the retroactive application of subsection (g)."[227] Similarly the Supreme Court stated in its decision in *American-Arab*:

> Although the general rule set forth in [section] 309(c)(1) of IIRIRA is that the revised procedures for removing aliens, including the judicial-review procedures of [INA section 242], do not apply to aliens who were already in either exclusion or deportation proceedings on IIRIRA's effective date, [section] 306(c)(1) of IIRIRA directs that a single provision, [INA section 242(g)], shall apply "without limitation to claims arising from all past, pending, or future exclusion, deportation, or removal proceedings."[228]

Both courts apparently treated the on-going *American-Arab* litigation as presenting "claims arising from . . . pending . . . deportation or removal proceedings."[229] The question of whether any court had jurisdiction to consider the claims of the LA 8 prior, or even after, the issuance of a final or-

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225. INA § 242(f)(2).

226. *Id.* § 242(g).

227. American-Arab Anti-Discrimination Comm. v. Reno (AAADC II), 119 F.3d 1367, 1371 (9th Cir. 1997).

228. Reno v. American-Arab Anti-Discrimination Comm. (American-Arab), 119 S. Ct. 936, 940-41 (1999).

Section 306(c)(1) of IIRIRA generally provides that the amendments to the INA judicial review provisions "shall apply to all final orders of deportation or removal and motions to reopen filed on or after the date of the enactment of this Act." The reference to INA subsection 242(g) immediately follows as part of the same sentence.

229. 8 U.S.C. § 1252(g) (1994). Clearly, the deportation proceedings that had been stayed against each of the LA 8 were still "pending." It is by no means clear, however, that all of the "claims" deriving from the litigation were still "pending." *AAADC I*, decided in 1995, had affirmed a district court injunction in favor of the Other Six issued in 1991. The District Court reached "the merits" of their claim five years before IIRIRA was enacted, and the merits decision had been affirmed more than a year before IIRIRA was enacted. In 1997 the Ninth Circuit refused to disturb the earlier determinations made with respect to the Other Six.

der of deportation therefore turned on the judicial interpretation of the meaning and scope of this final clause of IIRIRA section 306(c).

5. AAADC II: *The Ninth Circuit Finds that the IIRIRA Did Not Deprive the Courts of Jurisdiction*

First, the LA 8 argued that INA section 242(g) did not have retroactive application to their case.[230] Additionally, the LA 8 argued that if it did apply, it did not bar the relief that the district court had granted and the Ninth Circuit had upheld.[231]

The government argued that section (g) did have a retroactive effect, barring any judicial review or judicially mandated relief until after a final order of deportation had been issued, and that such delay neither denied the plaintiffs the opportunity to eventually present their case nor constituted a denial of constitutionally protected rights.[232]

The Ninth Circuit concluded that subsection (g) did have retroactive application,[233] but the court found that it did not preclude the granting of injunctive relief under INA section 242(f).[234] The court reached this conclusion through several steps. First, the court emphasized the title, "Exclusive Jurisdiction," and language in the second clause of INA section 242(g) which, by its express terms, provided that "no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action of the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter."[235] The Ninth Circuit — as well as the government — read this clause as relating to all matters arising from the moment that a deportation proceeding began until the moment that it ended.

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230. *See AAADC II*, 119 F.3d at 1369 (discussing issues of case).

231. *See id.* at 1370 (noting District Court granting of injunction affirmed by Ninth Circuit).

232. *See id.* at 1371 (noting government's assertions). The author has not read the briefs filed by the parties in *AAADC II*. The above arguments are inferences that these were the arguments made to the court in light of the court's opinion, as well as the briefs they filed in the Supreme Court in *American-Arab*. *See* Brief for Petitioner, American-Arab Anti-Discrimination Comm. v. Reno (AAADC II), 119 F.3d 1367 (9th Cir. 1997), *available in* Westlaw, 1998 WL 411431; Brief for Respondent, American-Arab Anti-Discrimination Comm. v. Reno (AAADC II), 119 F.3d 1367 (9th Cir. 1997), *available in* Westlaw, 1998 WL 614300; Reply Brief for the Petitioner, American-Arab Anti-Discrimination Comm. v. Reno (AAADC II), 119 F.3d 1367 (9th Cir 1997), *available in* Westlaw, 1998 WL 727540.

233. *See AAADC II*, 119 F.3d at 1372 (concluding subsection 242(g) did have retroactive application).

234. *See id.* at 1374-76 (discussing and upholding injunctive relief).

235. *Id.* at 1371 (quoting INA section 242(g)).

Second, the Ninth Circuit turned its attention to the introductory clause of section 242(g): "Subsection (g) states that 'except as provided in . . . [8 U.S.C. section 1252],' no court can consider any claim . . . . The provision thus expressly contemplates the applicability of other jurisdictional amendments to 8 U.S.C. [section] 1252."[236] Here, the court confronted the difficulty caused by the first clause of IIRIRA section 306(c), which provided that "the amendments made by subsections (a) and (b) shall apply to all final orders of deportation or removal and motions to reopen filed on or after the date of the enactment of this Act."[237] These amendments created a new section 242(b) of the INA in its entirety and also repealed INA section 106.

The second clause of IIRIRA section 306(c), however, establishes a seemingly different rule for reviewing transitional claims, which appears to limit judicial review to what is provided for in subsection (g).[238] Thus, the court acknowledged, "[I]t is true that retroactive application of the entire amended version of 8 U.S.C. [section] 1252 would threaten to render meaningless section 306(c) of IIRIRA, which provides that in general, the narrow set of jurisdictional reforms codified at 8 U.S.C. [section] 1252 do not govern in pending cases."[239] It went on to note, however, "[y]et a reading of subsection (g) that did not incorporate any exceptions would contradict the plain meaning of the text of (g)."[240]

Third, the court noted that subsection (g), read in isolation from the rest of INA section 242, appears to afford no right of appeal at all, now or later, to anyone. In the term that was later employed by the Supreme Court, it appears to be a "zipper" clause,[241] excluding everything not specifically in-

236. *Id.* at 1372 (quoting INA section 242(g)).

237. *Id.* at 1371 (quoting first clause of IIRIRA section 306(c)).

238. "[A]nd *subsection (g) of section 242 of the Immigration and Nationality Act (as added by subsection (a)) . . . shall apply without limitation to claims arising from all past, pending, or future exclusion, deportation, or removal proceedings under such Act.*" *Id.* (quoting second clause of IIRIRA section 306(c)) (emphasis in original).

239. *AAADC II*, 119 F.3d at 1372.

240. *Id.*

241. As the court in *American-Arab* noted:

> The parties' interpretive acrobatics flow from the belief that [section] 306(c)(1) cannot be read to envision a straightforward application of the "[e]xcept as provided in this section" portion of [section] 1252(g), since that would produce in *all* pending INS cases jurisdictional restrictions identical to those that were contained in IIRIRA anyway. That belief, however, rests on the unexamined assumption that [section] 1252(g) covers the universe of deportation claims — that it is a sort of "zipper" clause that says "no judicial review in deportation cases unless this section provides judicial review."

Reno v. American-Arab Anti-Discrimination Comm. (American-Arab), 119 S. Ct. 936, 943 (1999) (emphasis in original).

cluded — and nothing is explicitly included. Thus, the Ninth Circuit concluded that if the clause were read literally, it would foreclose all possible judicial relief, including later judicial review of a final order of deportation.[242]

Fourth, having identified the apparent contradiction (which both parties also had noted and struggled with), the Ninth Circuit argued that logic required that it find some subsection of INA section 242 that could afford them judicial review.[243] How, the court asked, could Congress have intended to treat transitional aliens so much worse than those who confronted deportation after the enactment of the statute:

> Divorced from all other jurisdictional provisions of IIRIRA, subsection (g) would have a more sweeping impact on cases filed before the statute's enactment than after that date. Without incorporating any exceptions, the provision appears to cut off federal jurisdiction over all deportation decisions. We do not think that Congress intended such an absurd result.[244]

Fifth, the court identified INA section 242(f) as a likely candidate. That provision, as we have noted, bars every court but the Supreme Court from "enjoin[ing] or restrain[ing]" the government in a broad range of activities related to the admission, processing, and removal of aliens.[245] However, the bar "with respect to the application of such provisions"[246] does not apply "to an individual alien against whom proceedings under [the relevant part of the statute] have been initiated."[247] The Ninth Circuit further noted, "[b]ecause this case involves individual aliens against whom deportation

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242. *See AAADC II*, 119 F.3d at 1373. The court noted:

> The government contends that subsection (g) alone applies and that the provision does not cut off federal review of constitutional claims because it allows courts to consider such claims on review of final orders of deportation. The difficulty with this position is that the text of (g) alone does not appear to authorize judicial review of final orders of deportation. The provision can be read as authorizing such review only if it is read in conjunction with other subsections, such as the amended version of 8 U.S.C. [§] 1252(b)(9), which provides:
>
> > Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this chapter shall be available only in judicial review of a final order under this section.

Id.

243. *See id.* at 1372 ("We believe that when it applies to pending cases, (g) must apply along with at least *some* of the other provisions of section 1252, as amended by IIRIRA.") (emphasis added).

244. *Id.*

245. *See* INA § 242(f), 8 U.S.C. § 1252(f) (1994) (giving only Supreme Court power to enjoin government from engaging in range of activities with respect to aliens).

246. *AAADC II*, 119 F.3d at 1372 (quoting IIRIRA section 306(a)).

247. *Id.*

proceedings have been initiated, subsection (f) would appear to allow federal jurisdiction over the Plaintiffs' claims."[248]

Finally, the court made it clear that its reason for reading the statute liberally, finding a possible avenue of relief, involved constitutional considerations as well as textual and logical ones:

> In determining whether subsection (f) applies, and in interpreting its meaning, we are guided by the well-established principle that where possible, jurisdiction-limiting statutes should be interpreted to preserve the authority of the courts to consider constitutional claims. The Supreme Court has stated unequivocally that "serious constitutional question[s] . . . would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim." Under subsection (f), individual aliens would appear to be able to seek judicial review of constitutional claims such as those at issue here.[249]

6. The Supreme Court Grants Petition for Writ of Certiorari Only on the Jurisdictional Issue

On June 1, 1998, the Supreme Court granted the petition for writ of certiorari sought by the government, but limited its grant "to the following question: 'Whether, in light of the [IIRIRA], the courts below had jurisdiction to entertain respondents' challenge to the deportation proceedings prior to the entry of a final order of deportation?'"[250]

B. The Decision of the United States Supreme Court

1. Jurisdiction

a. The Majority Opinion and Its Rationale

Justice Scalia wrote for the majority. He found that INA section 242(g) did apply, but not for the reasons nor in the manner that the Ninth Circuit had found. Rather than acting as "zipper," which precludes review of all issues arising in all deportation cases, the Court held that INA section 242(g) "applies only to three discrete actions that the Attorney General may take: her 'decision or action' to '*commence* proceedings, *adjudicate* cases, or *execute* removal orders.'"[251] The *American-Arab* litigation involves a challenge to one of these discrete actions: "Respondents' challenge to the

248. *Id.*

249. *Id.* at 1372-73 (citations omitted).

250. Reno v. American-Arab Anti-Discrimination Comm., 524 U.S. 903 (1998).

251. Reno v. American-Arab Anti-Discrimination Comm. (American-Arab), 119 S. Ct. 936, 943 (1999) (emphasis in original).

Attorney General's decision to 'commence proceedings' against them falls squarely within [section] 1252(g) — indeed . . . the language seems to have been crafted with such a challenge precisely in mind — and nothing elsewhere in [section] 1252 provides for jurisdiction."[252] Thus, the Court decided that subsection (g) deprives the federal courts of jurisdiction at this point in this case, and the Court must "vacate the judgment of the Ninth Circuit and remand with instructions for it to vacate the judgment of the District Court."[253]

Justice Scalia prefaces this analysis of jurisdiction with another conclusion that skewers the Ninth Circuit's attempt to establish INA section 242(f) as an alternative source of jurisdiction permitted by the first clause of subsection (g):

> Even respondents scarcely try to defend the Ninth Circuit's reading of § 1252(f) as a jurisdictional grant. By its plain terms, and even by its title, that provision is nothing more or less than a limit on injunctive relief. It prohibits federal courts from granting classwide injunctive relief against the operation of [sections] 1221-1231, but specifies that this ban does not extend to individual cases. To find in this an affirmative grant of jurisdiction is to go beyond what the language will bear.[254]

b. "Bricks Without Straw:" Creatively Re-Writing the Statute

Justice Scalia's approach is elegant and has more than a superficial appeal. Undoubtedly, these factors persuaded four of his colleagues to join in his opinion — and three more to concur in his judgment. Part of its appeal lies in the assured way that Justice Scalia traverses the "horns of a dilemma"[255] via a heretofore invisible pathway provided by Congress. That pathway, however, is a mirage. Nonetheless, Justice Scalia makes two arguments in support of his approach. Both are suspect or even false.

First, Justice Scalia argues that the authors of IIRIRA were skilled legislative drafters who knew exactly what they were doing when they drafted subsection (g).[256] Ordinarily, however, experts in a field demonstrate their

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252. *Id.* at 945.
253. *Id.* at 947.
254. *Id.* at 942.
255. *Id.* at 941.
256. *See id.* at 943. The Court noted:

> It is implausible that the mention of three discrete events along the road to deportation was a shorthand way of referring to all claims arising from deportation proceedings. Not because Congress is too unpoetic to use synecdoche, but because that literary device is incompatible with the need for precision in legislative drafting. We are aware of no other instance in the United States Code in which language such as this has been used to impose a general jurisdictional limitation; and that those who enacted IIRIRA were familiar with the normal manner of imposing such a limitation is

expertise by satisfying their intended audience. Probably no statute in recent years has generated more uncertainty or confusion than IIRIRA. Probably no part of IIRIRA has generated more confusion than its amendment of the judicial review provisions of the INA. This confusion has not been confined to those seeking benefits for alien clients; it has extended to many governmental officials seeking to deny or limit those benefits, and to multiple courts seeking to determine whether they have jurisdiction to act.[257]

Second, Justice Scalia supports his argument by claiming that "[t]here was good reason for Congress to focus special attention upon, and make special provision for, judicial review of the Attorney General's discrete acts of 'commenc[ing] proceedings, adjudicat[ing] cases, and execut[ing] removal orders' — which represent the initiation or prosecution of various stages in the deportation process."[258] The "good reason" he gives is congressional concern about challenges to INS exercise of discretion when it "engage[d] in a regular practice (which had come to be known as 'deferred action') of exercising that discretion for humanitarian reasons or simply for its own convenience."[259] According to Justice Scalia, "[s]ince no generous act goes unpunished . . . the INS's exercise of this discretion opened the door to litigation in instances where the INS chose not to exercise it."[260]

The formal cause of such litigation was a statutory scheme that rendered INA section 106 "inapplicable to various decisions and actions leading up to or consequent upon final orders of deportation, and relied on other jurisdictional statutes to permit review."[261] Therefore, Justice Scalia asserts, "[s]ection 1252(g) seems *clearly designed to give* some measure of protection to 'no deferred action' decisions and similar discretionary determinations."[262]

This argument is unconvincing. Proving that a condition existed does not prove that a subsequent measure that the government took occurred because of the original condition. Causation traditionally has been a matter of some concern to lawyers and the court. Did Congress enact subsection (g) to thwart "deferred action" challenges? If we refer to the legislative his-

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demonstrated by the text of [section] 1252(b)(9), which stands in stark contrast to [section] 1252(g).

Id.

257. For examples of cases demonstrating courts' contemplation of the IIRIRA's confusing jurisdictional language, see 8 CHARLES GORDON ET AL., IMMIGRATION LAW AND PROCEDURE § 104.13[4] (1999).

258. *American-Arab*, 119 S. Ct. at 943.

259. *Id.* at 943 (citing 16 GORDON ET AL., *supra* note 257, § 242.1 (1998)).

260. *Id.* at 944.

261. *Id.*

262. *Id.* (emphasis added).

tory, we find no specific indication that the provision was "clearly designed" — or indeed, designed at all — to promote that end.[263] We do, however, find legislative history demonstrating that INA section 242(a)(2)(B), not subsection (g), was intended to cut off all judicial review of any "decision or action of the Attorney General which is specified to be in the discretion of the Attorney General (except a discretionary judgment whether to grant asylum) . . . ."[264] Indeed, if we play the title game, that subsection is entitled, "Denials of discretionary relief," whereas subsection (g) is entitled "Exclusive jurisdiction" — and makes no reference at all to "discretionary" actions of the Attorney General.

Second, Congress had no reason in 1996 to draft section 242(g) as a hedge against suits brought by disappointed aliens. It is true that in 1979 the Ninth Circuit did hold that the failure to grant deferred action status under particular circumstances could support a claim against the INS based on its failure to follow its own guidelines.[265] As Aleinikoff, Martin, and Motamura noted, however, "[o]ther circuits rejected the *Nicholas* holding, characterizing the [relevant INS operations instruction] as an internal guideline for the exercise of prosecutorial discretion, they concluded that it created no entitlement to deferred action status and that denials were not subject to judicial review."[266] Further, as the same authors noted, the INS responded to the *Nicholas* decision in 1981 by re-writing the relevant operations instruction to state explicitly that "no alien has the right to deferred action. It is used solely at the discretion of the Service and confers no protection or benefit upon any alien. Deferred action does not preclude the Service from commencing removal proceedings at any time against an alien."[267]

Moreover, Justice Scalia's deferred action argument is also suspect for another reason: having imagined circumstances that (hypothetically) justify limiting the reach of subsection (g), he casts the statute as an (imagined)

263. Subsection (g) had not yet been added to section 242 when Congress proposed and commented upon the Immigration and National Interest Act of 1996. *See* H.R. REP. NO. 104-469, at 237-38 (1996). The Conference Report on IIRIRA provides no substantive interpretation of subsection 242(g). *See generally* H.R. CONF. REP. No. 104-828, 219-21 (1996).

264. H.R. REP. NO. 104-828, at 219.

265. *See* Nicholas v. INS, 590 F.2d 802, 807 (9th Cir. 1979) (holding out possibility of claim against INS for failure to follow own procedures).

266. T. ALEINIKOFF ET AL., IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 769 (4th ed. 1998) (citing *Valasco-Guiterrez v. Crossland*, 732 F.2d 792 (10th Cir. 1984), and *Pasquini v. Morris*, 700 F.2d 658 (11th Cir. 1983), and citing for inferential support *Heckler v. Chaney*, 470 U.S. 821 (1985)).

267. *Id.* (quoting Standard Operating Procedures for [INS] Enforcement Officers: Arrest, Detention, Processing and Removal).

congressional response to the problems the INS faces attempting to be "generous." Of course, the INS often is generous, but it is also often bureaucratic, inefficient, mean-spirited, sloppy, and harsh. If we are going to evaluate the purpose of legislation, we ought to be honest about the "evils" it is addressing and make a serious effort to determine who is wearing the white hats. The sort of case that Justice Scalia's "narrow" reading puts outside the pale of prompt review includes all of those decided in the 1980s that questioned the government's right to treat Central American and black Haitian asylum seekers with special severity, and which addressed the constitutionality of indefinitely detaining people in federal prisons whose only "crime" was "illegal entry." Of course, it directly includes the claims of the LA 8, who, if they are found deportable, now will receive no judicial review until after final deportation orders issue.

c. The Sandbag Falls: Expanding the Scope of Certiorari

The authoritative treatise on Supreme Court practice discusses the practice invoked by the Court in this case: the grant of certiorari limited to particular questions.

> [T]he Court will frequently limit its granting of a petition for certiorari to particular questions presented in the petition. The Court uses this technique to sift out and concentrate attention on those issues in a case which are worthy of review, while excluding those that reveal no basis for further consideration.[268]

The editors make three points relevant to *American-Arab*. First, "[a]n order limiting the grant of certiorari to certain questions is binding upon counsel, and argument ordinarily will not be heard on questions outside the scope of the order."[269] Second, "[w]hile the Court's decision usually stays within the bounds of the limited order, such an order 'does not operate as a jurisdictional bar' to the Court's consideration of 'questions outside the scope of the limited order *when resolution of those questions is necessary for the proper disposition of the case*.'"[270] Third, "going beyond the limited questions and resting decision on grounds not briefed or argued is unfair to the losing party."[271]

These points are relevant because the Court significantly expanded its holding in Part III of its opinion when it asserted:

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268. SUPREME COURT PRACTICE 244 (R. Stern et al. eds., 1993) (citations omitted) [hereinafter Stern].

269. *Id.*

270. *Id.* (emphasis added) (quoting Piper Aircraft v. Reyno, 454 U.S. 235, 247 n.12 (1981)).

271. *Id.*

> We do not believe that the doctrine of constitutional doubt has any application here. As a general matter — and assuredly in the context of claims such as those put forward in the present case — an alien unlawfully in this country has no constitutional right to assert selective enforcement as a defense against his deportation.[272]

Did the Court properly consider only those questions necessary for the proper disposition of the case? Or did it engage in some old-fashioned judicial activism by stretching to reach constitutional issues which its jurisdictional holding properly delayed until another day?

i. The Doctrine of "Constitutional Doubt"

In his dissenting opinion, Justice Souter proposed another reading of IIRIRA that "reveals that Congress, apparently unintentionally, enacted legislation that simultaneously grants and denies the right of judicial review to certain aliens who were in deportation proceedings before April 1, 1997."[273] His exegesis of IIRIRA, INA section 242, and subsection (b) seems at least as convincing as that proposed by Justice Rehnquist — but it commanded fewer votes.[274] I do not intend to recount it exhaustively.

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272. Reno v. American-Arab Anti-Discrimination Comm. (American-Arab), 119 S. Ct. 936, 945 (1999) (emphasis added).

273. *Id.* at 952 (Souter, J., dissenting).

274. Justice Souter begins by assuming that the effect of IIRIRA section 306(c) is indeed to establish INA section 242(g) as a bar to all forms of judicial review at any time:

> [B]y operation of [IIRIRA] [section] 306(c)(1), it would appear that aliens who did not obtain judicial review as of the enactment date of October 11, 1996, and who were in proceedings as of IIRIRA's effective date of April 1, 1997, can never obtain judicial review of 'the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien' in any forum. In short, [section] 306(c)(1) appears to bar members of this class of aliens from any review of any aspect of their claims.

Id. (Souter, J., dissenting). Justice Souter also rejected the key part of Justice Scalia's creative reading of IIRIRA section 306(c):

> The Court's interpretation, it seems to me, parses the language of subsection [242](g) too finely for the business at hand. The chronological march from commencing proceedings, through adjudicating cases, to executing removal orders, surely gives a reasonable first impression of speaking exhaustively. While it is grammatically possible to read the series without total inclusion, [ ] the implausibility of doing this appears the moment one asks why Congress would have wanted to preserve interim review of the particular set of decisions by the Attorney General to which the Court adverts. It is hard to imagine that Congress meant to bar aliens already in proceedings before the effective date from challenging the commencement of proceedings against them, but to permit the same aliens to challenge, say, the decision of the Attorney General to open an investigation of them or to issue a show-cause order.

Id. at 954 (Souter, J., dissenting); *see also id.* at 951 (Stephens, J., concurring) ("I should add that I agree with Justice Souter's explanation of why [section] 1252(g) applies broadly to removal proceedings rather than to only three discrete parts of such proceedings.").

Nonetheless, its principal conclusion is that there is no clear way of breaking the "tie," of avoiding the contradiction, of saying with any sort of certainty which reading of the relevant IIRIRA and INA section 242(g) provisions is preferable. Under such circumstances, Justice Souter argues that the Court should base its determination, not on the imperatives of grammar, but on concerns about the rights of the plaintiffs.[275]

According to Justice Souter, "[e]ither aliens in proceedings on April 1, 1997, have no access to judicial review or else they have the access available under the law that applied before [section] 1252 came into effect."[276] Confronted with this choice, the doctrine of constitutional doubt requires a judge to choose the option that avoids the doubtful constitutional result. Complete preclusion of judicial review of any kind for claims brought by aliens subject to proceedings for removal would raise the serious constitutional question whether Congress may block every remedy for enforcing a constitutional right. The principle of constitutional doubt counsels against adopting the interpretation that raises this question. As Justice Souter notes, "[W]here a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter."[277]

Justice Souter also notes, however, that:

> This arrangement, however, conflicted with the different transitional provision set out in [section] 309(c)(4). This section, entitled 'Transitional Changes in Judicial Review,' provides that where a final order was 'entered more than 30 days after the date of enactment of this Act,' subsection (b) [which dealt only with judicial review of *exclusion* proceedings] of the old 8 U.S.C. [section] 1105a does not apply. This subsection provides for habeas corpus proceedings for 'any alien against whom a final order of exclusion has been made.' In other words, [section] 309(c)(4) expressly contemplates that old [section] 1105a, less its habeas provision, applies to cases where a final order is issued more than 30 days after September 30, 1996, whereas the original [section] 306(c)(1) as enacted contemplated that when a final order was issued on or after September 30, 1996, the new [section] 1252 would apply.

Id. at 952-53 n.1 (Souter, J., dissenting).

Justice Souter further noted, "[o]n October 4, 1996, Representative Lamar Smith of Texas explained on the floor of the House that he had 'become aware of an apparent technical error in two provisions' of IIRIRA." Id. at 953 n.1 (Souter, J., dissenting). Justice Souter argued that Representative Smith, who was the Chair of the House Immigration Subcommittee, explained the error in a manner consistent with Souter's own interpretation of the conflict beween IIRIRA section 306(c) and IIRIRA section 309(c)(4). See id. (Souter, J., dissenting) (explaining Representative Smith's understanding of conflict).

275. *Id.* at 952 (Souter, J., dissenting) ("Finding no trump in the two mutually exclusive statutory provisions, I would invoke the principle of constitutional doubt and apply the provision that avoids a potential constitutional difficulty.").

276. *Id.* at 953 (Souter, J., dissenting).

277. *Id.* at 955 (Souter, J., dissenting) (citations omitted).

But Justice Scalia's analysis of the controlling statutes argues that it is not "susceptible of two constructions." Instead, his analysis insists on one that resolves all apparent contradictions in the statutory scheme.[278] Furthermore, the majority's analysis assumes that the LA 8 will eventually have their day in court,[279] and that any possible additional delay has no constitutional significance.[280] Therefore, in light of the majority's ambitious reasoning, Justice Scalia is correct in asserting, "[w]e do not believe that the doctrine of constitutional doubt has any application here."[281]

ii. Do Not Pass Go: Selective Enforcement Takes a Free Ride

Since, under the majority's theory of the case we are not in the realm of constitutional doubt, the Court clearly did not have to reach the question of selective enforcement. Alternatively, it can delay addressing that issue until after the LA 8 have been given deportation hearings and found deportable. Under the commonly accepted standard of fairness governing Supreme Court practice, resolution of this question hardly "is necessary for the proper disposition of the case."[282] So why does the Court purport to resolve it? Why does it, without the benefit of briefing or a hearing, "generally deprive deportable aliens of the defense of selective prosecution"?[283]

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278. *See American-Arab*, 119 S. Ct. at 945. Justice Scalia states:

> Our narrow reading of [section] 1252(g) makes sense of the statutory scheme as a whole, for it resolves the supposed tension between [section] 306(c)(1) and [section] 309(c)(1). In cases to which [section] 1252(g) applies, the rest of [section] 1252 is incorporated through the "[e]xcept as provided in this section" clause. This incorporation does not swallow [section] 309(c)(1)'s general rule that [sections] 1252(a)-(f) do not apply to pending cases, for [section] 1252(g) applies to only a limited subset of deportation claims. Yet it is also faithful to [section] 306(c)(1)'s command that [section] 1252(g) be applied "without limitation" (i.e., including the "[e]xcept as provided" clause) to "claims arising from all past, pending, or future exclusion, deportation, or removal proceedings."

Id.

279. The majority identifies, but does not explicitly explain, a section 1252(a)(1) exception to section 1252(g). *See id.* at 945 (identifying exception). Apparently, this "exception" is the right of every alien to appeal a final order of deportation to the courts.

280. The absence of concern about the constitutional implications of delay is apparent in the majority's embrace of a statutory theory that permits the government to vacate a decision on behalf of the plaintiffs in the *American-Arab* litigation twelve years after original charges were brought, with no consideration of any sort about why delay of such magnitude occurred in this case, and what the consequences of such delay might be on the parties involved.

281. *Id.* at 945.

282. Stern, *supra* note 268, at 244.

283. *American-Arab*, 119 S. Ct. at 946 n.10.

There appears to be only one possible answer: deciding the matter summarily puts the focus where the majority believes it belongs — on the abstract authority of the federal government to protect the national security, unhindered by any consideration of the particular facts lying behind the government's campaign against the LA 8 and their defense, and more generally, of the effect which such unfettered authority has on the exercise of political association and expression.

2. *The First Amendment in the Balance: Tilting the Machine*

a. *Justice Scalia and the Disappearance of Individual Rights*

In determining that the LA 8 were entitled to bring their selective enforcement claims, the Ninth Circuit in *AAADC I* set forth "the prima facie elements of the claim: (1) 'others similarly situated have not been prosecuted' (disparate impact) and (2) 'the prosecution is based on an impermissible motive' (discriminatory motive)."[284] The court examined the government's conduct and found that both elements were present. It concluded that:

> The aliens have provided evidence of disparate impact and of impermissibly motivated enforcement of the immigration laws. The aliens' First Amendment rights are subject to irreparable harm because of the prosecution, and they have a strong likelihood of success on their claim that the INS has selectively enforced the immigration laws in retaliation for their exercise of constitutionally protected rights.[285]

The key determinations that the court made were disparate impact,[286] impermissibly motivated enforcement,[287] and above all, irreparable harm[288] experienced because the government was engaged in ongoing conduct directed at their associational and expressive activities that "chilled" their First Amendment rights.[289] Effectively, the court concluded that selective enforcement was bad, not because it was "selective" (although it was), but because the principle of selectivity violated fundamental values shared by every United States resident and protected by the First Amendment.[290]

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284. American-Arab Anti-Discrimination Comm. v. Reno (AAADC I), 70 F.3d 1045, 1062-63 (9th Cir. 1995) (citations omitted).

285. *Id.* at 1066.

286. *See id.* (finding aliens provided evidence of disparate impact).

287. *See id.* (finding aliens provided evidence of impermissibly motivated enforcement).

288. *See id.* at 1071 (finding irreparable harm supporting grant of injunction).

289. *See id.* (noting government's actions effectively amounted to "chilling" of First Amendment rights).

290. *See AAADC I*, 70 F.3d at 1066 (discussing First Amendment rights).

Justice Scalia's approach writes the interests of the individual alien out of the equation and deals with the selective enforcement issue as if he were examining the right of the government to selectively issue speeding tickets on odd-numbered days, rather than to selectively deport politically-active residents (including four permanent resident aliens) because of their affiliation with, or support of, an organization engaged in constitutionally-protected activities.[291] His emphasis throughout is on the harm that will befall the state if the government is impeded or regulated in any way in making its law-enforcement decisions.

Thus, instead of emphasizing the harm that is likely to befall the activist facing deportation, the majority emphasizes the similarity between a criminal prosecution and a deportation proceeding — the only difference (ignoring the absence of trial by jury, the absence of the exclusionary rule, or the absence of any necessary evidence of a crime) being that the alien ordered deported will only be removed, not punished.[292]

Continuing with the analogy of deportation to prosecution — and parodying its ordinary concern about the potential "chilling effect" of governmental restrictions on free speech[293] — the court next emphasizes the "chill

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291. Indeed, it appears that Justice Scalia and the other members of the majority would accord speeders more rights, because "the consideration on the other side of the ledger in deportation cases — the interest of the target in avoiding 'selective treatment' — is less compelling than in criminal prosecutions. While the consequences of deportation may assuredly be grave, they are not imposed as a punishment." *American-Arab*, 119 S. Ct. at 947.

292. *See id.* at 946. The Court notes:

> Even in the criminal-law field, a selective prosecution claim is a *rara avis*. Because such claims invade a special province of the Executive — its prosecutorial discretion — we have emphasized that the standard for proving them is particularly demanding, requiring a criminal defendant to introduce "clear evidence" displacing the presumption that a prosecutor has acted lawfully. . . . We have said:
>
> > "This broad discretion [afforded the Executive] rests largely on the recognition that the decision to prosecute is particularly ill-suited to judicial review . . . ."

Id. (citation omitted). It does not merit a footnote that the history of the instant case is largely the history of an attempt by the government to keep all of its evidence away from the people it is attempting to deport.

293. A Westlaw search uncovered references to more than a hundred Supreme Court decisions discussing the potential "chilling effect" on protected First Amendment rights of a variety of federal, state, and local measures. Particularly pertinent is the dictum of the Court in *Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539, 556-57 (1963), concerning a law mandating that an organization being investigated for "subversive and Communist activities" produce its membership records:

> While, of course, all legitimate organizations are the beneficiaries of these protections, they are all the more essential here, where the challenged privacy is that of persons espousing beliefs already unpopular with their neighbors and the deterrent and 'chilling' effect on the free exercise of constitutionally enshrined rights of free speech, expression, and association is consequently the more immediate and substan-

to law enforcement" that will occur if enforcement decisions are examined too closely:

> Judicial supervision in this area, moreover, entails systemic costs of particular concern. Examining the basis of a prosecution delays the criminal proceeding, threatens to chill law enforcement by subjecting the prosecutor's motives and decisionmaking to outside inquiry, and may undermine prosecutorial effectiveness by revealing the Government's enforcement policy. All of these are substantial concerns that make the courts properly hesitant to examine the decision whether to prosecute.[294]

Of course, none of the eight plaintiffs in the *American-Arab* litigation were charged with any criminal violation, and it is by no means clear that any of their expressive or associational conduct could be criminally enjoined under prevailing First Amendment standards. But for the Court, that is beside the point. What matters is that these concerns about the government's interests "are greatly magnified in the deportation context."[295] Justice Scalia gives us two principal instances, of which the first is potential for delay:

> Regarding, for example, the potential for delay: Whereas in criminal proceedings the consequence of delay is merely to postpone the criminal's receipt of his just deserts, in deportation proceedings the consequence is to permit and prolong a continuing violation of United States law. Postponing justifiable deportation (in the hope that the alien's status will change — by, for example, marriage to an American citizen — or simply with the object of extending the alien's unlawful stay) is often the principal object of resistance to a deportation proceeding . . . .[296]

Undoubtedly, aliens sometimes seek to delay proceedings, hoping to build up equities that will prolong their residence in the United States. But the INA, both before the IIRIRA and after, is replete with measures designed to thwart those who seek to better their immigration prospects while they are in deportation proceedings.[297] More importantly, two of the Plaintiffs in *American-Arab* were already permanent resident aliens when the

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> tial. What we recently said in *NAACP v. Button*, with respect to the State of Virginia is, as appears from the record, equally applicable here: "We cannot close our eyes to the fact that the militant Negro civil rights movement has engendered the intense resentment and opposition of the politically dominant white community . . . . "

Florida Legislative Investigation Comm., 372 U.S. at 556-57.

294. *American-Arab*, 119 S. Ct. at 946 (quoting Wayte v. United States, 470 U.S. 598, 607-08 (1985)).

295. *Id.* at 946.

296. *Id.* at 946-47.

297. *See generally* INA § 245(e), 8 U.S.C. § 1255(e) (1994) (denying opportunity to "adjust status" to alien who marries a United States citizen after commencement of "administrative or judicial proceedings" to remove alien from United States); *Id.* § 241(a), 8 U.S.C. § 1231(a) (providing for detention of aliens who are found "removable," including "inadmissible aliens" who ordinarily are not accorded opportunity to wait for long periods before "removal" order issues).

case began, and two others secured that status by perfectly legal means while the case was pending. Finally, (although the summary procedure employed by the Court appears to be designed to obscure this fact), most of the delay in *American-Arab* was due, first, to the government's filing, withdrawing and re-filing of charges under different statutes and (slightly) different legal theories; and second, to the interminable delays in adjudicating claims, both at the trial court level (two years elapsed, for example, between the filing of the first motion for disclosure of confidential information, and the first decision denying it), and at the appellate level (nearly four years elapsed before the Ninth Circuit heard the appeal in *AAADC I*).

Justice Scalia's second instance is the special need to protect the sacrosanct realm of foreign policy and foreign intelligence:

> And as for "chill[ing] law enforcement by subjecting the prosecutor's motives and decisionmaking to outside inquiry": What will be involved in deportation cases is not merely the disclosure of normal domestic law-enforcement priorities and techniques, but often the disclosure of foreign-policy objectives and (as in this case) foreign-intelligence products and techniques. The Executive should not have to disclose its 'real' reasons for deeming nationals of a particular country a special threat — or indeed for simply wishing to antagonize a particular foreign country by focusing on that country's nationals — and even if it did disclose them a court would be ill equipped to determine their authenticity and utterly unable to assess their adequacy.[298]

In other words, it is acceptable to treat aliens as pawns in the game of global politics. But why is this true? How can we square such a cynical view of the world with established law holding that aliens — particularly resident aliens — have ties to the United States that the Constitution protects?[299] What principle elevates foreign-policy and foreign-intelligence concerns over the First Amendment rights that even unpopular aliens enjoy? Of course, there is no answer forthcoming. In the end, the Supreme Court in *American-Arab* is giving us more of the same, but without an explanation, only a slogan: "When an alien's continuing presence in this country is in violation of the immigration laws, the Government does not offend the Constitution by deporting him for the additional reason that it believes him to be a member of an organization that supports terrorist activity."[300] This is plenary power with a vengeance, lacking even a rhetorical "fig-leaf" to cover up its naked exercise.

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298. *American-Arab*, 119 S. Ct. at 947.

299. *See, e.g.*, Landon v. Plasencia, 459 U.S. 21 (1982); Johnson v. Eisentrager, 339 U.S. 763 (1950).

300. *American-Arab*, 119 S. Ct. at 947.

b. Justice Ginsburg on Fundraising and Free Speech

Although Justice Souter's dissent took the First Amendment into account in fashioning a reading of IIRIRA and section 242(g) of the INA, only the opinion of Justice Ginsburg (which Justice Breyer joined)[301] devoted any explicit attention to the substance of the LA 8's constitutional claim, and the effect that more delay would have on their asserted First Amendment rights. Justice Ginsburg "agree[s] with Justice Scalia that [INA section 242 (g)] applies to this case and deprives the federal courts of jurisdiction over respondents' pre-final-order suit."[302] Yet this conclusion does not lead her either to support the Court's "selective enforcement" ruling or to find that "the First Amendment necessitates *immediate* judicial consideration of their selective enforcement plea."[303]

Justice Ginsburg's critique of the majority's approach centers on the First Amendment. Unlike the majority, she states unequivocally that "[i]t is well settled that '[f]reedom of speech and of press is accorded to aliens residing in this country.'"[304] Traditionally, the Court has enjoined the government for selectively prosecuting individuals for constitutionally-impermissible reasons: [T]he decision to prosecute may not be deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification, including the exercise of protected statutory and constitutional rights."[305] A removal proceeding is not a "prosecution." Nevertheless, Justice Ginsburg is "not persuaded that selective enforcement of deportation laws should be exempt from that prescription."[306] She premises that conclusion on the often-observed fact that deportation places "the liberty of an individual . . . at stake. . . . Though deportation is not technically a criminal proceeding, it visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom."[307]

Therefore, Justice Ginsburg argues, the LA 8 must *at some point* be permitted to employ the First Amendment to challenge "selective enforcement."[308] But she concludes that it is not necessary to permit them to do so

301. Justices Ginsburg and Breyer concurred in Part I of the Court's opinion, which consists only of the Court's recitation of the facts and history of the case. They also concurred in the majority's judgment. *See id.* at 947-50.

302. *Id.* at 947.

303. *Id.* (emphasis added).

304. *Id.* at 950 (quoting Bridges v. Wixon, 326 U.S. 135, 148 (1945)).

305. *Id.* at 950 (quoting Wayte v. United States, 470 U.S. 598, 608 (1985)).

306. *American-Arab*, 119 S. Ct. at 950.

307. *Id.* (citation omitted).

308. *Id.* ("[W]ere respondents to assert a colorable First Amendment claim as a now or never matter," review would not be precluded).

yet. First, Justice Ginsburg notes, "[t]he petition for certiorari asked this Court to review the merits of respondents' selective enforcement objection, but we declined to do so, granting certiorari on the jurisdictional question only. . . . We thus lack full briefing on respondents' selective enforcement plea and on the viability of such objections generally."[309] Second, Justice Ginsburg argues that additional factfinding is necessary to establish the "merits of respondents' objection."[310]

> The Attorney General argued in the court below and in the petition for certiorari that the INS may select for deportation aliens who it has reason to believe have carried out fundraising for a foreign terrorist organization. . . . Whether the INS may do so presents a complex question in an uncharted area of the law, which we should not rush to resolve here."[311]

Third, Justice Ginsburg argues that additional factfinding will be possible because "[t]he Hobbs Act authorizes a reviewing court of appeals to transfer the proceedings to a district court for the resolution of material facts when 'the agency has not held a hearing before taking the action of which review is sought.'"[312]

Justice Ginsburg's opinion at least keeps the First Amendment simmering on the back burner. But it is by no means clear why she chooses to leave it there, rather than serving it as the main course. Resolution of the relevant constitutional issues has languished for thirteen years, so any attempt to resolve them now will hardly qualify as a "rush." Admittedly, those issues may be "complex," and the law "uncharted." But that affords the Court no excuse for further delay. Justice Scalia correctly observes that "Justice Ginsburg chooses to resolve the constitutional question whether Congress can exclude the courts from remedying an alleged First Amendment violation with immediate effects, pending the completion of administrative proceedings."[313] Justice Scalia is also correct when he concludes that Justice Ginsburg's solution is potentially as far-reaching as the one he advocates: "Our holding generally deprives deportable aliens of the defense of selective prosecution. Hers allows all citizens and aliens to be deprived of constitutional rights (at least where the deprivation is not 'blatantly lawless') pending the completion of agency proceedings."[314]

AAADC II provided a simple way of addressing the reach of the First Amendment without reaching the additional complications posed by fundraising. But if fundraising needs to be addressed — as it surely will if and

309. *Id.*
310. *Id.* at 948.
311. *Id.*
312. *American-Arab*, 119 S. Ct. at 949 n.2 (citation omitted).
313. *Id.* at 945 n.10.
314. *Id.*

when the case reaches the Ninth Circuit again — at least four of the LA 8 (Shehadeh, Hamide, Barakat, and Sharif) (the "Final Four") will be able to present strong arguments that they face removal for constitutionally-protected conduct and that the government should therefore be enjoined from deporting them.

Thus, the "Final Four," if they are removable at all, are only removable because of their association with, or activities on behalf of, the PFLP — no status violation grounds exist for deporting them. All of the aliens in this case already have been charged with conducting such fundraising on behalf of the PFLP. Such fundraising, independent of any other activity and independent of any evidence that the funds collected are being used to finance acts of violence, is sufficient ground under current and past statutory law for their removal.

INA section 237(a)(4)(B) provides for the removal of "[a]ny alien who has engaged, is engaged, or at any time after admission engages in any terrorist activity as defined in [INA section 212](a)(3)(B)(iii)." INA section 212(a)(3)(B)(iii) defines "engage in terrorist activity" to include two sorts of support. The first encompasses "the providing of any type of material support, including a safe house, transportation, communications, funds, false documentation or identification, weapons, explosives, or training, to any individual the actor knows or has reason to believe has committed or plans to commit a terrorist activity."[315] The second encompasses "the soliciting of any funds or other things of value for terrorist activity or for any terrorist organization."[316] INA section 219(a)(1) permits the Secretary of State to designate a "foreign organization" which "engages in terrorist activity" as a "terrorist organization," provided that "the terrorist activity of the organization threatens the security of United States nationals or the national security of the United States."[317] The PFLP is currently designated as a "terrorist organization"[318] — as it has been officially since 1990, and unofficially since 1987 or 1988.[319]

315. INA § 242(a)(3)(B)(iii), 8 U.S.C. § 1182(a)(3)(B)(iii) (1994 & Supp. II 1996).

316. *Id.* § 212(a)(3)(B)(iii)(III) & (IV).

317. *Id.* § 219(a)(1), 8 U.S.C. § 1189(a)(1).

318. *See id.*

319. The term "terrorist organization" was first enacted into law in the IMMACT of 1990, which repealed INA sections 212(a)(27), (28), (29), and 237(a)(6), and enacted INA sections 212(a)(3) and 237(a)(4), establishing new statutory grounds for excluding and deporting "terrorists" and other threats to "national security." According to the House Conference Report:

> [T]he conferees consider a "terrorist organization" to be one whose leadership, or whose members, with the knowledge, approval or acquiescence of the leadership, have taken part in terrorist activities. In making determinations for the purpose of establishing excludability, the Department of State (or the Immigration Service when

The effect of these provisions is to render deportable anyone who solicits funds or renders any financial support to any "terrorist organization," without regard to the purpose, place, or manner of the solicitation or contribution, and without regard to the specific use to which the organization is likely to put that contribution. Indeed, in its Preamble to its "Prohibition of International Terrorist Fundraising," Congress in 1996 insisted that:

> (6) some foreign terrorist organizations, acting through affiliated groups or individuals, raise significant funds within the United States, or use the United States as a conduit for the receipt of funds raised in other nations; and
> (7) foreign organizations that engage in terrorist activity are so tainted by their criminal conduct that *any contribution* to such an organization facilitates that conduct.[320]

The unconstitutionality of these provisions is problematic only because *American-Arab* is an immigration case. For at least a half-century, the Supreme Court has recognized that the First Amendment protects fundraising. It has imposed strict limits on governmental restrictions on governmental restrictions on campaign financing,[321] and also on charitable solicitation.[322]

In *Buckley v. Valeo*, the Court addressed limits imposed by the Federal Election Campaign Act of 1971 on political contributions made by an indi-

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appropriate) should take into account the best available information from the intelligence community. A group may be considered a terrorist organization even if it has not conducted terrorist operations in the past several years, but there is reason to believe it still has the capacity and inclination to conduct such operations.

H.R. CONF. REP. NO. 101-955, at 131, *reprinted in* 1990 U.S.C.C.A.N. 6796. In 1996, Congress added INA section 219 to formalize the process of "designating" terrorist organizations. *See* H.R. CONF. REP. NO. 104-518, 2d Sess., *reprinted in* 1996 U.S.C.C.A.N. 944 (INA section 219 is created by section 302 of the AEDPA, tit. III, Pub. L. No. 104-132, 1996 U.S.C.C.A.N. (110 Stat.) 1248).

As the American-Arab case illustrates, this authority to designate "terrorist organizations" was employed immediately by the INS against the PFLP in 1990. However, the legislative history of the Foreign Relations Authorization Act for 1988 and 1989 indicates that Congress had begun informally to couple the term "terrorist" with particular organizations as early as 1987, and had effectively identified the PLO and its constitutive sub-groups as "terrorist organizations" underserving of immigration benefits. *See supra* notes 66-72 and accompanying text.

320. AEDPA § 301(a) (emphasis added).

321. *See* Buckley v. Valeo, 424 U.S. 1 (1975).

322. *See generally* Jon Strauss, *First Amendment Protection of Charitable Solicitation*, 13 WHITTIER L. REV. 669 (1992) (discussing principal cases, including Village of Schaumburg v. Citizens for a Better Env't, 444 U.S. 620 (1980), Secretary of State v. Joseph H. Munon Co., 467 U.S. 947 (1984), and Riley v. National Fed'n of the Blind of N. C., Inc., 487 U.S. 781 (1988)). Jon Strauss's article also discusses earlier cases finding that the First Amendment offered protection to the private solicitation of funds, including *Schneider v. State*, 308 U.S. 147 (1939); *Thomas v. Collins*, 323 U.S. 516 (1945); and *Hynes v. Mayor of Oradell*, 425 U.S. 610 (1976).

vidual, or to a particular candidate. It looked to the particular setting in which the regulated contributions were made, a campaign for political office. Yet it reaffirmed much broader First Amendment values.

First, it reasserted "our 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open,'"[323] and the necessity of "afford[ing] the broadest protection to such political expression in order 'to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'"[324]

Second, it recognized that there is force in numbers, that effective political advocacy requires organization:

> The First Amendment protects political association as well as political expression. The constitutional right of association explicated in *NAACP v. Alabama*, 357 U.S. 449, 460 (1958), stemmed from the Court's recognition that "[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association." Subsequent decisions have made clear that the First and Fourteenth Amendments guarantee "'freedom to associate with others for the common advancement of political beliefs and ideas.'"[325]

Third, and most importantly, it found that "association," in and of itself, is not enough, that effective political speech requires the expenditure of money:

> A restriction of the amount of money a person or group can spend on political communication . . . necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached. . . . The distribution of the humblest handbill or leaflet entails printing, paper, and circulation costs. Speeches and rallies generally necessitate hiring a hall and publicizing the event. The electorate's increasing dependence on television, radio, and other mass media for news and information has made these expensive modes of communication indispensable instruments of effective political speech.[326]

The record in *American-Arab* is replete with evidence that the LA 8 were engaged in political speech, that the government objected to the content of that speech, and that it initiated deportation proceedings against them to curtail that speech.[327]

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323. *Buckley*, 424 U.S. at 14 (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)).

324. *Id.* at 14 (quoting Roth v. United States, 354 U.S. 476, 484 (1957)).

325. *Id.* at 15 (per curium).

326. *Id.* at 19.

327. According to the brief filed by the Respondents in *American-Arab*:

> Contemporaneous FBI memoranda prepared to urge the INS to deport plaintiffs confirm that plaintiffs were targeted solely for lawful political associations and advocacy. The documents consist entirely of accounts of lawful political activity, and include detailed reports on political demonstrations, meetings, and dinners, as well as exten-

Clearly, the logic of Buckley would protect fundraising intended to facilitate such political expression, if engaged in by United States citizens. For First Amendment purposes, it simply would be irrelevant if such fundraising were intended to marshal support for President Reagan, Israel, and the Middle East "Peace Process" — or opposition to all three.

Of course, contributions and the solicitation of funds also might be directed to non-political recipients — to schools or clinics, for example. The recipients might be located in the United States, or abroad. According to the American-Arab Anti-Discrimination Committee, a "major priority for the Justice Department has been criminalizing, and stopping, humanitarian aid to schools, medical facilities and even orphanages located overseas that the United States claims have some ties to a 'foreign terrorist group.'"[328] But such contributions do not lose their First Amendment protection merely because donors intend to promote social or humanitarian goals, rather than overtly political ones. On three occasions between 1980-88 the Supreme Court examined state regulations seeking to restrict "charitable solicitation." In each, the Court found that such solicitation was entitled to broad protection under the First Amendment. In *Village of Schaumburg v. Citizens for a Better Environment*,[329] the Court rejected a governmental body's argument that a restrictive ordinance should be sustained "because it deals only with solicitation and because any charity is free to propagate its views . . . without a permit as long as it refrains from soliciting money."[330] The Court examined nine earlier cases decided by the Supreme Court between 1942-76 and concluded that "[p]rior authorities . . . clearly establish that charitable appeals for funds . . . involve a variety of speech interests — communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes — that are within the protection of the First Amendment."[331]

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sive quotations from political speeches and leaflets. Over 300 pages are devoted to tracking plaintiffs' distribution of PFLP newspapers that are available in public libraries throughout the United States. The memos repeatedly criticize plaintiffs' political views as "anti-US, anti-Israel, anti-Jordan," and even "anti-REAGAN and anti-MABARAK [sic]." . . . The principal FBI report . . . specifically urges plaintiff Hamide's deportation, not because he engaged in any criminal acts, but because he is "intelligent, aggressive, dedicated, and shows great leadership ability."

Brief for the Respondents, No. 97-1252 (Supreme Court, October Term, 1997), *available in* Westlaw, 1998 WL 614300.

328. American-Arab Anti-Discrimination Committee Press Release, The Selective and Political Targeting of Arab Immigrants.

329. 444 U.S. 620 (1980).

330. *Id.* at 627.

331. *Id.* at 631.

Although it permitted "reasonable regulation" of those [s]oliciting financial support," the Court in *Village of Schaumburg* indicated that such regulation:

> must be undertaken with due regard for the reality that solicitation is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or particular views on economic, political, or social issues, and for the reality that without solicitation the flow of such information and advocacy would likely cease.[332]

Without regard for the specific "message" intended to be conveyed by the plaintiff or the fact that the ordinance in question reached all organizations equally,[333] it therefore subjected the ordinance in question to searching scrutiny under the First Amendment, and asserted: "[t]he [government] may serve its legitimate interests, but it must do so by narrowly drawn regulations designed to serve those interests without necessarily interfering with First Amendment freedoms."[334] The regulating authority was not able to meet this burden.[335]

The Court struck down similar limitations on the solicitation of funds in *Secretary of State of Maryland v. Munson*[336] and *Riley v. National Federation of the Blind of North Carolina, Inc.*[337] In both cases, it continued to subject "the State[s'] statutes to exacting First Amendment scrutiny."[338] This scrutiny led to the invalidation of all of the restrictions being challenged.

Finally, a third line of cases must be noted. In 1961, the Supreme Court upheld the conviction under the Smith Act of Junius Irving Scales because he was an "'active' member of the [Communist] party."[339] The same day, the Court overturned the conviction under the Smith Act of John Francis Noto, against whom no credible evidence of active party membership had been presented.[340] Although it reached different results in these cases, the

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332. *Id.*

333. The ordinance at issue was "content neutral" in the sense that it denied solicitation permits to every organization that did not direct at least 75% of all monies collected to the ultimate charitable beneficiaries. *See id.* at 835 n.9.

334. *Id.* at 836.

335. *Village of Schaumburg*, 444 U.S. at 835 ("We agree with the Court of Appeals that the 75-percent limitation is a direct and substantial limitation on protected activity that cannot be sustained unless it serves a sufficiently strong, subordinating interest that the Village is entitled to protect. We also agree that the Village's proffered justifications are inadequate and that the ordinance cannot survive scrutiny under the First Amendment.").

336. 467 U.S. 947 (1984).

337. 487 U.S. 781 (1988).

338. *Id.* at 789.

339. Scales v. United States, 367 U.S. 203, 224 (1961).

340. Noto v. United States, 367 U.S. 290, 298-99 (1961).

Court presented two common themes. First, it suggested that evidence of knowing, willing, and active support of an organization's proscribed activities was necessary to avoid constitutional difficulties: "[w]e decline to attribute to Congress a purpose to punish nominal membership, even though accompanied by 'knowledge' and 'intent' . . . because of the close constitutional questions that such a purpose would raise."[341] Second, it insisted that the "activity" that constitutionally could be punished must be examined carefully and construed strictly, "for otherwise there is a danger that one in sympathy with the legitimate aims of . . . an organization, but not specifically intending to accomplish them by resort to violence, might be punished for his adherence to lawful and constitutionally-protected purposes, because of other and unprotected purposes which he does not necessarily share."[342] In a subsequent case, the Court required the government to "establish [the individual's] knowing affiliation with an organization possessing unlawful aims and goals, and a specific intent to further those illegal aims."[343]

Despite this history, the only case directly to confront AEDPA's fundraising restrictions has rejected arguments that the statute's restrictions on solicitation be subjected to such "exacting" scrutiny. Thus *Humanitarian Law Project v. Reno*,[344] in an opinion written by Judge Collins, found that those seeking to make such contributions can invoke the First Amendment to challenge governmental regulations prohibiting or penalizing them.[345] However, it held that the "fact that AEDPA burdens protected First Amendment rights is only the first step of the Court's analysis."[346] The second step is determining the "standard of review that the Court should apply;" the third is applying that standard.[347]

Judge Collins identified two potentially relevant standards of review. The first holds that "[a] regulation that prohibits expression or association based on disapproval of the content of the speech is subject to the most exacting scrutiny."[348] The second holds that "when the government's regulation is unrelated to the suppression of a particular message or idea, it is content-neutral, and subject to an intermediate standard of review."[349] It

341. *Scales*, 367 U.S. at 222.

342. *Noto*, 367 U.S. at 299-300.

343. Healy v. James, 408 U.S. 169, 186 (1972).

344. 9 F. Supp.2d 1176 (C.D. Cal. 1998).

345. *Id.* at 1185-86.

346. *Id.* at 1186.

347. *Id.*

348. *Id.* (quoting R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992), for the proposition that First Amendment prohibits government from "proscribing speech or even expressive conduct because of the ideas expressed").

349. *Id.* (citing Turner Broad. Sys. v. FCC, 512 U.S. 622, 643 (1994) and United States

then found that "[n]otwithstanding its obstruction of material support to specified organizations, the Court finds that the AEDPA is in fact a content-neutral regulation of the Plaintiffs' political speech and association."[350] Having made that finding, it applied the "intermediate standard of review" enunciated in *United States v. O'Brien*,[351] and "balanced" the governmental interests supporting the regulation against the statute's impact on those seeking to contribute their support to the proscribed organizations.[352]

As a result, he refused to extend constitutional protection to individuals who did not "seek to support any military or unlawful activities" of particular "terrorist organizations," but instead sought only "to solicit and make donations of cash, clothing, food, including prepared food for infants, and educational materials" to those organizations" for humanitarian assistance" or to support their "humanitarian, social, and political efforts."[353]

However four things are surprising. First, Judge Collins makes no reference at all to the *Village of Schaumburg*, *Munson*, and *Riley* cases, and to their common holding that governmental fundraising restrictions are subject to heightened or "exacting" First Amendment review. Second, in turning to the *O'Brien* "intermediate standard of review," he ignores the fact that the Supreme Court in *Buckley* repudiated that standard in political fundraising cases.[354] Thus Judge Collins quotes the following passage from *Buckley*: "this Court has never suggested that the dependence of a communication on the expenditure of money operates itself to introduce a non-speech element or to reduce the exacting scrutiny required by the First

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v. O'Brien, 391 U.S. 367, 376 (1968)).

350. *Humanitarian Law Project*, 9 F. Supp.2d at 1188.

351. 391 U.S. 367 (1968).

352. As articulated in *O'Brien*, in analyzing whether a content-neutral regulation that affects First Amendment activity is justified, a court must determine the following:

(1) whether the regulation is within the power of the government;

(2) whether the regulation furthers an important or substantial governmental interest;

(3) whether the proffered interest is unrelated to the suppression of free expression; and

(4) whether the incidental restriction on First Amendment freedoms is no greater than is essential to further the important interest.

Id. at 1192 (citing *O'Brien*, 391 U.S. at 377). Applying the *O'Brien* test, the court concluded:

Plaintiffs have failed to establish a probability of success on the merits on their claim that the AEDPA's prohibitions on all material support to designated terrorist organizations, regardless of the individual's lack of intent to further illegal activities, violates their First Amendment rights to freedom of speech and association.

Id. at 1196-97.

353. *Id.* at 1183-84. The intended recipient organizations were the Liberation Tigers of Tamil Eelam (a.k.a. Tamil Tigers or LTTE) and the Kurdistan Workers' Party (a.k.a. PKK).

354. Buckley v. Valeo, 424 U.S. 1 (1976)

Amendment."[355] But he conspicuously omits the passage in *Buckley* that immediately precedes the one quoted: "We cannot share the view that the present Act's contribution and expenditure limitations are comparable to the restrictions on conduct upheld in *O'Brien*. The expenditure of money simply cannot be equated with such conduct as destruction of a draft card."[356]

Third, Judge Collins' conclusion that the restrictions imposed by AEDPA are not content-based is inherently implausible. Political, economic, and social-financial contributions and fundraising are activities protected by the First Amendment. The Government has specially designated some thirty potential recipients as "terrorist organizations," and barred all "material support" to those organizations on pain of imprisonment or deportation. As the record in *American-Arab* shows, it may have designated some of those organizations for reasons that may have something to do with actual or threatened "terrorist" attacks, but it clearly has designated other organizations, including the PFLP, for reasons relating to the objectives of United States foreign policy, and the goal of silencing opposition to that policy. Finally, although his decision quotes from *Healy v. James*, it does not recognize or acknowledge the necessity, announced clearly in *Noto*, of distinguishing carefully between activity that is constitutionally protected and that which is not.

Humanitarian Law Project v. Reno is thus a very vulnerable opinion. But it demonstrates that fundraising remains problematic as a First Amendment issue. Judge Collins' willingness to extend so much deference to the government on this issue suggests that if and when it arises again in *American-Arab*, it will be fiercely contested.[357]

3. *Down by Law*

Toward the beginning of his career as Chief Justice, William Rehnquist wrote an opinion that avoided a constitutional question crying out for resolution. The case was *Jean v. Nelson*.[358] The question presented to the Court was the right of the government to accord differential treatment to aliens on the basis of their race. The question arose because the INS in Miami had embarked on a policy of holding "illegal" Haitians in detention —

355. *Id.* at 16.

356. *Id.*

357. "Although not on the issue of what constitutes "material support" with respect to statutory prohibitions on "personnel" and "training." *Humanitarian Law Project v. Reno* found that these terms, as they are employed in title 18, section 2339A(b) of the United States Code are so unclear that they are likely, in a merits determination, to be found "void for vagueness." 9 F. Supp.2d 1176, 1202-04 (C.D. Cal. 1998).

358. 472 U.S. 846 (1985).

all of whom were black — at the same time that it was paroling Cubans and other "illegals" back into society. A generation earlier, Justice Frankfurter, concurring in *Harisiades v. Shaughnessy*,[359] had restated the "plenary power" doctrine enunciated by the Supreme Court in *Chae Chan Ping v. United States*,[360] *Fong Yue Ting v. United States*,[361] and *Nishimura Ekiu v. United States*.[362] According to Justice Frankfurter:

> It is not for this Court to reshape a world order based on politically sovereign States. In such an international ordering of the world a national State implies a special relationship of one body of people, *i.e.*, citizens of that State, whereby the citizens of each State are aliens in relation to every other State. Ever since national States have come into being, the right of people to enjoy the hospitality of a State of which they are not citizens has been a matter of political determination by each State . . . Though as a matter of political outlook and economic need this country has traditionally welcomed aliens to come to its shores, it has done so exclusively as a matter of political outlook and national self-interest. This policy has been a political policy, belonging to the political branch of the Government wholly outside the concern and the competence of the Judiciary.[363]

The natural consequence of this view was absolute abstention, even in the face of the most overt acts of governmental prejudice:

> The conditions for entry of every alien, the particular classes of aliens that shall be denied entry altogether, the basis for determining such classification, the right to terminate hospitality to aliens, the grounds on which such determination shall be based, have been recognized as matters solely for the responsibility of the Congress and wholly outside the power of this Court to control . . . . [W]hether immigration laws have been crude and cruel, whether they may have reflected xenophobia in general or anti-Semitism or anti-Catholicism, the responsibility belongs to Congress. Courts do enforce the requirements imposed by Congress upon officials in administering immigration laws, and the requirement of Due Process may entail certain procedural observances. But the underlying policies of what classes of aliens shall be allowed to enter and what classes of aliens shall be allowed to stay, are for Congress exclusively to determine even though such determination may be deemed to offend American traditions and may, as has been the case, jeopardize peace.[364]

Yet reluctantly and grudgingly, the majority in *Harisiades* continued a trend that had its earliest roots in a case decided in 1903, namely, the extension of more extensive constitutional rights to aliens already physically present in the United States.[365] In addition, two years after it decided *Hari-*

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359. 342 U.S. 580 (1952).
360. 130 U.S. 581 (1889).
361. 149 U.S. 698 (1893).
362. 142 U.S. 651 (1892).
363. *Harisiades*, 342 U.S. at 596.
364. *Id.* at 596-97 (citations omitted).
365. *See* Yamataya v. Fisher, 189 U.S. 86 (1903) (extending constitutional rights to aliens already present in the United States).

siades, in *Brown v. Board of Education*,[366] the Court assumed a new role in the struggle to eradicate racism from American society. So the real question presented in *Jean v. Nelson*[367] was whether the Court would take the opportunity to bring immigration law into line with the rest of American law when confronting an important national issue.[368]

Justice Rehnquist, in effect, declined. The Eleventh Circuit had found a broad power to discriminate, based on the Court's historical insistence that the Congress and Executive possessed virtually unlimited and unreviewable power where excludable aliens were concerned.[369] The Supreme Court set aside the Circuit Court decision, not because it decided the equal protection challenge wrongly, but because it chose to address it at all:

> We conclude that the Court of Appeals should not have reached and decided the parole question on constitutional grounds, but we affirm its judgment remanding the case to the District Court . . . Had the court in *Jean II* followed [the] rule [of avoiding unnecessary constitutional construction], it would have addressed the issue involving the immigration statutes and INS regulations first, instead of after its discussion of the Constitution. Because the current statutes and regulations provide petitioners with nondiscriminatory parole consideration — which is all they seek to obtain by virtue of their constitutional argument — there was no need to address the constitutional issue.[370]

As Justices Marshall and Brennan persuasively demonstrated, however, the regulations at issue did not in fact prohibit racial discrimination, and so served as no substitute for the Court's constitutional judgment.[371]

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366. 347 U.S. 483 (1954).

367. 472 U.S. 846 (1985).

368. *See id.*

369. *See* Jean v. Nelson, 727 F. 2d 957, 968 (11th Cir. 1984) (en banc).

> While resident aliens, regardless of their legal status, are therefore entitled to at least limited due process rights, aliens "who have never been naturalized, nor acquired any domicile or residence within the United States, nor even been admitted into the country pursuant to law" stand in every different posture: "As to such persons, the decisions of executive or administrative officers, acting within powers expressly conferred by congress, are due process of law."
>
> In the eighty years since the Court first recognized this distinction between the rights of excludable and deportable aliens, it has become engrained in our law.

Id. (citation omitted).

370. Jean v. Nelson, 472 U.S. 846, 848, 854-55 (1985).

371. *See id.* at 858-59 (Marshall, J., dissenting) (citations omitted).

> The Court's decision rests entirely on the premise that the parole regulations promulgated during the course of this litigation preclude INS officials from considering race and national origin in making parole decisions. The Court then reasons that if petitioners can show disparate treatment based on race or national origin, these regulations would provide them with all the relief that they seek. Thus, it sees no need to address the independent question whether such disparate treatment would also violate the Constitution, and invokes *Ashwander v. TVA* to avoid deciding that question. If

Since it avoided the question in *Jean*, the Supreme Court has seldom taken a stand that the Constitution, treaties, or acts of Congress afford any protection to the alien engaged in a conflict with the government. The most prominent exception probably has been *Landon v. Plasencia*,[372] which determined that a returning resident alien was entitled to some measure of procedural due process.[373] In that case the Court devoted significant, although not voluminous, attention to the "facts" of Mrs. Plasencia's residence, departure, and return.

The other important exception was *INS v. Cardoza-Fonseca*,[374] decided in 1987, which determined that under prevailing United States and international standards, an alien seeking to qualify as a refugee need not demonstrate a clear probability of persecution, but only a "well-founded fear" which if genuine, could be supported by a chance of harm no greater than one in ten.[375]

The general pattern, however, since *Jean* — and particularly since *Cardoza-Fonseca* — has been otherwise. The Court, in dealing with immigration cases, has chosen to speculate about the harm that aliens might do and all of the reasons that the stories they tell are likely to be misleading or false. More importantly, the Court has chosen to minimize the significance of protective interpretive contexts, guidelines imposed by tradition, and tests that were designed to afford the individual a basis for making claims against the state. The First Amendment, implicated in *Harisiades* and *American-Arab*, establishes one such context, as does the due process clause of the First Amendment, implicated in *Landon v. Plasencia*. But, extra-constitutional sources of protection exist as well. For example, some of the terms of the INA, particularly those that confer the benefit of "asylum," provide extra-constitutional protections.[376] Also, the 1951 Conven-

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> the initial premise were correct, the Court's decision would be sound. But because it is not, the remainder of the Court's opinion simply collapses like a house of cards . . . [A]n examination of the regulations themselves, as well as the statutes and administrative practices governing the parole of unadmitted aliens, indicates that there are no nonconstitutional constraints on the Executive's authority to make national-origin distinctions.

Id.

372. 459 U.S. 21 (1982).

373. *Id.* at 32 (agreeing that resident alien can invoke due process upon returning to country).

374. 480 U.S. 421 (1987).

375. *See id.* at 431 (citing 1 A. GRAHL-MADSEN, THE STATUS OF REFUGEES IN INTERNATIONAL LAW 180 (1966)).

376. *See* INA § 101(a)(42), 8 U.S.C. § 1101(42) (1994 & Supp. IV 1998) (defining "refugee"); *Id.* § 208, 8 U.S.C. § 1158 (establishing the eligibility criteria for seeking and obtaining "asylum").

tion relating to the Status of Refugees[377] as well as the 1967 Protocol relating to the Status of Refugees provide protections outside the realm of the constitution.[378]

The interpretation that the Court has accorded these documents in recent years has often, in the words of the dissenters in *Elias-Zacarias v. INS*,[379] been "narrow and grudging."[380] In *Elias-Zacarias*, that narrow approach led the Court to conclude that a young man who claimed he faced forced conscription by a guerrilla army either was lying or, if confronting a genuine hardship, faced something that did not fit the statutory definition of "persecution," and so did not entitle him to asylum.[381]

In *Sale v. Haitian Centers Council, Inc.*,[382] the Court rejected a challenge to the United States policy of "interdicting" Haitian "boat people" on the high seas, and returning them to Haiti without granting them the opportunity to make a claim under section 243(h)(1) of the INA, which then read:

> The Attorney General shall not deport or return any alien (other than an alien described in section 1251(a)(4)(D) of this title) to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion.[383]

The court accomplished this result by ignoring the plain meaning of INA section 243(h) and Article 33 of the 1951 Refugee Convention.[384]

As the wheel has turned, an occasional alien plaintiff has emerged on top. Generally, however, facts have been subordinated to law, and the more humane aspects of the law to its harsher, more sadist side.

CONCLUSION

Thus, the approach taken by the Court in *American-Arab* is not an exception to the rule, it is merely an exemplification. The LA 8 remain in the United States pending deportation hearings. A move is afoot to secure special legislative protection for them. If that initiative fails, all will face final

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377. 189 U.N.T.S. 137 (July 28, 1951).

378. 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 267 (Jan. 31, 1967).

379. 502 U.S. 478 (1992).

380. *Id.* at 487.

381. *Id.* at 480.

382. 509 U.S. 155 (1993).

383. *Id.* at 170. The statutory language at issue in *Sale* has since been redesignated as INA section 241(b)(3)(A), 8 U.S.C. § 1231(b)(3)(A), and has been modified somewhat.

384. *See generally* Keith Highet & George Kahale III, *Aliens — Interdiction of Haitians on High Seas — Definition of 'Return' Under U.S. Statute — Extraterritorial Effect of Statute (*Sale v. Haitian Centers Council, Inc., *113 S. Ct. 2549)*, 88 AM. J. INT'L L. 114 (1994) (noting court rejected bilateral agreement between United States and Haiti).

orders of deportation. They will finally get the opportunity to have their case heard on the merits. For the Other Four — Bashar Amer, Julie Mungai, Amjad Obeid, and Ayman Obeid — that is likely to bring little comfort, since their best legal claim was "selective enforcement," now rejected by the Supreme Court. For Khader Hamide and Michel Shehadeh, and also for Aiad Barakat and Naim Sharif, the prospects are better since they should eventually be able to secure a hearing on their First Amendment claims. The government's belated decision to open its files also should permit them to defend the proposition that they face deportation, not because of their support of violence or engagement in lawless conduct, but because they have dared to associate with parties opposed to United States policy in the Middle East. But *American-Arab* raises questions that go well beyond the ultimate fate of the LA 8: will this Supreme Court find a way to take the situation of individual aliens into account, according respectful attention to the law that protects them? Or will it choose to continue to keep its thumbs firmly on the government's side of the balance?