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Uncertain Arrivals: Immigration, Terror, and Democracy After September 11

Peter Margulies[*]

American immigration law has struggled to balance two crucial values: democracy and security.[1] Historically, national imagery celebrates immigration's role in renewing democracy.[2] Yet, apprehension about the risks of immigration has also fueled recurring concerns about the security of American institutions.[3] The tragic events of September 11, 2001 have heightened this ambivalence.

For some, the post-September 11 relationship between democracy and security in immigration law is a zero-sum game. Officials stressing security may view democratic freedoms such as the right to dissent as a vehicle for assistance to the enemy.[4] Conversely, advocates for civil liberties may view changes in immigration law that enhance security as a threat to fundamental democratic principles.[5] Closer examination reveals, however, that democracy and security are

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[1]*See* Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 72–90 (1984) (discussing dialectic between desire to control immigration and judicial regard for individual rights); *cf.* MARVIN E. FRANKEL & ELLEN SAIDEMAN, OUT OF THE SHADOWS OF NIGHT: THE STRUGGLE FOR INTERNATIONAL HUMAN RIGHTS 64–65 (1989) (noting historic tension between refugees' rights and U.S. State Department's view of American foreign policy interests); Peter Margulies, *Democratic Transitions and the Future of Asylum Law*, 71 U. COLO. L. REV. 3, 4 (1999) (same); David A. Martin, *Reforming Asylum Adjudication: On Navigating the Coast of Bohemia*, 138 U. PA. L. REV. 1247, 1331–34 (1990) (discussing political influences on asylum decisions).

[2]*See* BONNIE HONIG, DEMOCRACY AND THE FOREIGNER 101 (2001) (discussing immigrant heroes of American "narrative of democratic activism").

[3]*See id.* at 95–96 (discussing images of "bad immigrant . . . [who] takes things from us and has nothing to offer in return"); Daniel Kanstroom, *Dangerous Undertones of the New Nativism: Peter Brimelow and the Decline of the West*, *in* IMMIGRANTS OUT! THE NEW NATIVISM AND THE ANTI-IMMIGRANT IMPULSE IN THE UNITED STATES 300, 300–13 (Juan F. Perea ed., 1997) (analyzing concerns of immigration opponents such as Peter Brimelow, author of *Alien Nation*).

[4]*See* Neil A. Lewis, *Ashcroft Defends Antiterrorism Plan*, N.Y. TIMES, Dec. 7, 2001, at A1 (quoting U.S. Attorney General John Ashcroft as asserting, in testimony before Senate Judiciary Committee: "To those who scare peace-loving people with phantoms of lost liberty, my message is this: your tactics only aid terrorists.").

[5]*See, e.g.*, NANCY CHANG, CTR. FOR CONSTITUTIONAL RIGHTS, SILENCING POLITICAL DISSENT 63 (2002) (arguing that post-September 11 legislation "permits guilt to be imposed solely on the basis of political associations protected by the First Amendment"); David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953, 1003 (2002) (arguing that post-September 11 response sacrifices freedoms of

complementary concepts.[6] This Article advances an integrative conception of immigration law based on the interdependence of these core values.

Immigration law has been at the intersection of democracy and security since the September 11 attacks. Reacting to revelations that many of the attackers manipulated United States immigration law to enter this country,[7] Congress enacted sweeping legislation, the USA PATRIOT Act (USAPA),[8] that provides for the removal from the United States of immigrants whom the government proves solicit funds, recruit personnel, or supply other tangible assistance that directly furthers terrorist activity.[9] To be applied retroactively as well as prospectively, the USAPA imposes on the immigrant the burden of proving that he did not know and should not reasonably have known that his actions would support terrorist acts.[10] The USAPA also provides for the removal of immigrants who render assistance to groups designated by the U.S. Secretary of State as engaging in terrorist activity.[11]

In addition to expanding grounds for removal of immigrants, the post-September 11 immigration arena has triggered debates about the use of ethnicity and nationality in antiterrorist immigration enforcement, and about public and media access to immigration proceedings. The U.S. Department of Justice has detained hundreds of alleged visa violators from countries where Al Qaeda is active.[12] The government has also closed immigration proceedings, asserting the

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noncitizens and "constitutes a reprise of some of the worst mistakes of our past"); Ronald Dworkin, *The Threat to Patriotism*, N.Y. REV. BOOKS, Feb. 28, 2002, at 44, 44 (asserting that post-September 11 legislation designed to disrupt terrorist groups' ability to raise funds and recruit new members "sets out a new, breathtakingly vague and broad definition of terrorism" and is inconsistent with our established laws and values).

[6]*See* 147 CONG. REC. S11019 (daily ed. Oct. 25, 2001) (statement of Sen. Leahy) (quoting Benjamin Franklin as observing that "a nation that would trade its liberties for security deserves neither").

[7]*See* Patrick J. McDonnell & Russell Carollo, *An Easy Entry for Attackers: Immigration Flaws Garner Attention as Authorities Track the Sept. 11 Hijackers' Movements Through the United States*, L.A. TIMES, Sept. 30, 2001, at A1.

[8]Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act) Act of 2001, Pub. L. No. 107-56, § 411, 115 Stat. 345 (amending 8 U.S.C. § 1182(a)(3) (2001)).

[9]*Id.* § 411(a)(1)(F), 115 Stat. at 346–47 (amending 8 U.S.C. § 1182(a)(3)(B)(iv)).

[10]*Id.* § 411(a)(1)(D), 115 Stat. at 346 (codified at 8 U.S.C. § 1182(a)(3)(B)(ii)).

[11]*Id.* § 411(a)(2), 115 Stat. at 348 (codified at 8 U.S.C. § 1182(a)(3)(F)).

[12]*See* Susan M. Akran & Kevin R. Johnson, *Race, Civil Rights, and Immigration Law After September 11, 2001: The Targeting of Arabs and Muslims*, 58 N.Y.U. ANN. SURV. AM. L. 295, 295–301(2002) (describing marginalization of particular communities after September 11); Sameer Ashar, *Immigration Enforcement and Subordination: The Consequences of Racial Profiling After September 11*, 34 CONN. L. REV. 1185, 1197–99 (2002) (same); Letti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575, 1575–86 (2002) (same). *See generally* Kevin R. Johnson, *The Case Against Race Profiling in Immigration Enforcement*, 78 WASH. U. L.Q. 675, 688–728 (2000) (arguing against use of race or ethnicity as tool in immigration enforcement, on grounds that such

need to avoid inadvertent disclosures to terrorist groups.[13] These developments raise substantial concerns about the relationship between immigration law, security, and democracy.

An integrative approach can help resolve the relationship between security and democracy in immigration law. Under an integrative approach, enhancing security also provides an opportunity to strengthen democracy. The political branches should retain the power to make immigration policy flexible enough to disrupt the infrastructure of terrorism.[14] On the other hand, the plenary deference courts have historically accorded Congress in the immigration arena fails to accord proper respect to the humanity of immigrants and emboldens government to cut corners on democracy for all. To respond to these concerns, an integrative approach must combine flexibility with fit, tailoring measures to meet legitimate security goals through means least restrictive of liberty.

To integrate democracy and security values, this Article suggests reliance on two criteria: institutional accountability and fairness in time. Institutional accountability promotes transparency of transnational organizations supporting terror and curbs overreaching by the United States government in combating terrorism. Fairness in time protects expectations of immigrants through principles such as notice and prospectivity. Immigration decisionmakers should reject any measure that fails the test of either institutional accountability or fairness in time.

The Article is in five parts. Part I offers a brief history of the interaction of democracy and security in American immigration law. Part II sets out an integrative approach to analysis of immigration law responses to the attacks, articulating the tests of institutional accountability and fairness in time. Part III extends the integrative approach to analysis of detention based on nationality, ethnicity, or religion. Part IV examines justifications for the nondisclosure of evidence in immigration proceedings. Part V applies the integrative approach to the limits on association in the USAPA. For each issue, the flexibility and fit provided by the tests of institutional accountability and fairness in time preserve the fruitful interaction of democracy and security.

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criteria lead to harassment of citizens and lawful permanent residents).

[13]*See* William Glaberson, *U.S. Asks To Use Secret Evidence in Many Cases of Deportation*, N.Y. TIMES, Dec. 9, 2001, at B1.

[14]A complete convergence of immigration law with otherwise applicable constitutional law would preclude this flexibility. *See* Linda S. Bosniak, *Membership, Equality, and the Difference That Alienage Makes*, 69 N.Y.U. L. REV. 1047, 1130–33 (1994) (arguing that deportation grounds should track First Amendment protections while acknowledging that courts have historically interpreted First Amendment more flexibly in deportation setting).

I. SECURITY AND DEMOCRACY IN IMMIGRATION HISTORY: THE REDS, WHITES, AND BLUES

Debates about the relationship of security and democracy start with the framers. Alexander Hamilton, discussing the relationship of security and liberty in wartime, observed that Americans would "resort for repose and security, to institutions, which have a tendency to destroy their civil and political rights."[15] There has always been a counterweight to Hamilton's dire prediction: the judgment embodied in American constitutionalism that dispensing with liberty threatens our security.[16] Yet, a theory of governance that neglects security altogether will eventually have little liberty to protect.

Before we explore the relationship of democracy, security, and terrorism in greater depth, it may be helpful to define our terms. Democracy contemplates a community of discourse whose members undertake the challenge of self-government.[17] Self-government requires a commitment to promoting the participation of all members of the community and avoiding barriers to participation erected by official arbitrariness, private overreaching, and patterns of inequality.[18] The value of security, defined as physical safety and freedom from fear, flows from this same premise. Just as a tyrant who governs through force and fear destroys self-government, entities inside or outside a country that employ such means to exert their will on a country's affairs impose a similar toll.[19] Fear cuts the legs out from under participation, rendering people afraid of

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[15]THE FEDERALIST NO. 8, at 45 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

[16]*See* JED RUBENFELD, FREEDOM AND TIME 168 (2001) ("If democratic self-government involves a nation's generation-spanning struggle to live under self-given foundational law over time, apart from or even contrary to popular will at any given moment, the counter-majoritarian difficulty collapses."); *cf.* JON ELSTER, *Social Institutions*, *in* NUTS AND BOLTS FOR THE SOCIAL SCIENCES 147, 150 (1989) (observing that "[t]he parts of a constitution that make it more difficult to change the constitution than to enact ordinary legislation . . . force people to think twice before they change it").

[17]The account offered here echoes the civic humanist understanding articulated by political theorists such as Hannah Arendt and Michael Walzer. *E.g.*, HANNAH ARENDT, THE HUMAN CONDITION (1958); MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY (1983); *cf.* Peter Margulies, *The Mother with Poor Judgment and Other Tales of the Unexpected: A Civic Republican View of Difference and Clinical Legal Education*, 88 NW. U. L. REV. 695, 696–701 (1994) (discussing application of civic humanist theory to narratives of poverty law).

[18]*See* WALZER, *supra* note 17, at 19.

[19]*See id.* at 64–67 (discussing importance of security as foundation for just society).

leaving their homes to assemble and engage in conversation about public matters necessary for self-government.[20]

Terrorism may involve the most contested definition in our trio of terms. In the political thought of the twentieth century, "terror" often was linked with violence by the state.[21] However, American political discourse has for some time embodied images of terrorism as intentional violence against civilians committed by groups that do not publicly associate themselves with states but may benefit from state sponsorship or, as in the case of Al Qaeda in Afghanistan, exercise clandestine control over the state apparatus.[22]

Terrorism as the intentional targeting of civilians by nongovernmental groups engenders special challenges for both democracy and security. The clandestine nature of terrorist activity has historically hindered efforts to hold terrorists responsible through economic and military sanctions that the international community relies upon to control states. In addition, terrorist actions, such as assassinations, decimate democratic institutions and can pave the way for replacement of a weakened democracy by a totalitarian regime.[23] Moreover, terrorist mass murders, including both Oklahoma City and September 11, take place in cities, targeting the diversity at the heart of American democratic life.[24]

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[20]*See* Irving L. Markovitz, *Constitutions, the Federalist Papers, and the Transition to Democracy*, *in* TRANSITIONS TO DEMOCRACY 42, 58 (Lisa Anderson ed., 1999) (citing THE FEDERALIST NO. 37, at 234 (James Madison) (Jacob E. Cooke ed., 1961) ("Stability in Government, is essential . . . to that repose and confidence in the minds of the people, which are among the chief blessings of civil society.")); *cf.* Philippe C. Schmitter & Terry Lynn Karl, *What Democracy Is . . . and Is Not*, *in* TRANSITIONS TO DEMOCRACY 3, 7–8 (Geoffrey Pridham ed., 1995) (discussing adverse impact of recurring violence on democratic institutions).

[21]*See, e.g.*, DANA R. VILLA, POLITICS, PHILOSOPHY, TERROR: ESSAYS ON THE THOUGHT OF HANNAH ARENDT 14–21 (1999) (discussing "totalitarian terror"); *cf.* Gerald L. Neuman, *Terrorism, Selective Deportation and the First Amendment After* Reno v. AADC, 14 GEO. IMMIGR. L.J. 313, 323 (2000) (discussing "state terrorism" as one strand in debates about definition of terrorism).

[22]*See* PHILIP B. HEYMANN, TERRORISM AND AMERICA: A COMMONSENSE STRATEGY FOR A DEMOCRATIC SOCIETY 6 (1998) (defining terrorism as "violence conducted as part of a political strategy by a subnational group or secret agents of a foreign state"); *cf.* Richard Falk, *Ends and Means: Defining a Just War*, THE NATION, Oct. 29, 2001, at 11, 12 (arguing that Al Qaeda is "transnational actor . . . [whose] relationship to the Taliban regime in Afghanistan [was] contingent, with Al Qaeda being more the sponsor of the state rather than the other way around").

[23]*Cf.* HANNAH ARENDT, THE ORIGINS OF TOTALITARIANISM 344 (1951) (noting power of "terror" and stating that Nazis' assassination with impunity of socialists during dwindling days of Weimar Republic "made clear to the population at large that the power of the Nazis was greater than that of the authorities and that it was safer to be a member of a Nazi paramilitary organization than a loyal Republican").

[24]*See* Kanan Makiya & Hassan Mneimneh, *Manual for a 'Raid,'* N.Y. REV. BOOKS, Jan. 17, 2002, at 18, 20 (discussing Al Qaeda training manuals' targeting of population centers).

For these reasons, this Article defines terrorism as the intentional targeting of civilians for political purposes by nongovernmental groups.[25]

Terrorism also creates risks for both democracy and security. Gripped by fear, members of a democratic community may address terrorist threats by discounting the individual rights that safeguard participation for all.[26] Unless the constitutional framework provides a remedy, James Madison predicted,

> [T]here is nothing to check the inducements to sacrifice the weaker party, or an obnoxious individual. Hence it is, that such Democracies have ever been spectacles of turbulence and contention; have ever been found incompatible with personal security . . . and have in general been as short in their lives, as they have been violent in their deaths.[27]

Moreover, effective security measures demand the shared stake that can "only emerge in a settled state with just and equitable institutions."[28] A state must be settled and stable to inspire patriotic allegiance[29] but must also be just.

American immigration law has stressed security's role as a bulwark of democracy. Over a century ago, in *Chae Chan Ping v. United States* (*Chinese Exclusion Case*),[30] the United States Supreme Court established the cornerstone of American immigration law—Congress's "plenary power" over substantive criteria for the admission and removal of immigrants[31]—by invoking the nation's

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[25]Of course, abuses by states—including allies of America—must also elicit concern. *See* Margulies, *supra* note 1, at 11 (arguing that deference to U.S. Department of State is inappropriate in asylum adjudication because "the State Department . . . has an interest in downplaying human rights problems to avoid rocking the foreign policy boat").

[26]*Cf.* JAMES X. DEMPSEY & DAVID COLE, TERRORISM AND THE CONSTITUTION: SACRIFICING CIVIL LIBERTIES IN THE NAME OF NATIONAL SECURITY 33–46 (1999) (detailing pre-September 11 law enforcement targeting of Palestinian students for espousing unpopular views).

[27]THE FEDERALIST NO. 10, at 61 (James Madison) (Jacob E. Cooke ed., 1961).

[28]Michael Mallett, *The Theory and Practice of Warfare in Machiavelli's Republic*, *in* MACHIAVELLI AND REPUBLICANISM 173, 179 (Gisela Bock et al. eds., 1990).

[29]*Id.*

[30]130 U.S. 581 (1889).

[31]*Id.* at 589–611. Although I use the term "immigrant" throughout the Article, the term as used here actually takes in a varied group. A brief typology of aliens (the term used most often by courts) may be useful here:

1. *Lawful permanent resident aliens (LPRs)* include close relatives of U.S. citizens who are beneficiaries of visa petitions filed by citizen spouses and parents, *see* Immigration and Nationality Act (INA) § 201(b), 8 U.S.C. § 1151(b)(2)(A)(i) (2000), as well as persons granted permanent residence as employees with special skills not possessed by other LPRs or citizens. *See* INA § 203(b), 8 U.S.C. § 1153(b)(3)(A)(i). LPRs can be removed (i.e., deported) on various behavior-related grounds, including criminal convictions. *See* INA § 241(a), 8 U.S.C. § 1227(a) (Supp. 2002).

2. *Lawful nonimmigrants* are granted temporary visas for short periods in the case of tourists or other visitors, or for longer periods in the case of students or nonimmigrant workers, trainees, or

duty to "preserve its independence, and give security against foreign aggression and encroachment."[32] The Court's rationale seems prescient in the wake of the September 11 hijackers' use of the immigration system to facilitate the most lethal attack in American history.

However, appreciation of the Court's foresight should not mask awareness of the heavy cost that application of the plenary power imposes on democratic principles. The losing party in *Chae Chan Ping*, for example, did not pose a threat to public safety but had worked hard to obtain a lawful immigration status in this country and then reasonably relied on that status in making basic life decisions. Congress, motivated principally by racial animus, summarily undermined that reliance by enacting the Chinese Exclusion Act.[33] In upholding Chae's exclusion, the Court discounted both his reliance and the animus that prompted the legislation, holding that in the immigration sphere Congress could act in a manner that would "be unacceptable if applied to citizens."[34]

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intracompany transferees. *See* INA § 101(a)(15), 8 U.S.C. § 1101(a)(15) (2000). The September 11 hijackers came in as visitors or students and in some cases "overstayed," i.e., stayed past the date by which they had agreed to leave as a condition of obtaining their visas. *See* McDonnell & Carollo, *supra* note 7.

3. *Undocumented aliens* consist of two subgroups. The first subgroup, entrants, includes aliens who have entered without inspection, crossing over a border or through a port of entry such as an airport without being detected by immigration authorities. *See* INA § 275(a), 8 U.S.C. § 1325(a). The second subgroup consists of nonentrants, who have been apprehended seeking entrance at a port of entry or border crossing within the United States or who seek admission to the United States at a consulate abroad. *See* INA § 275(b), 8 U.S.C. § 1325(b).

As a general matter, courts have held that among aliens, nonentrants have the weakest constitutional protections while LPRs have the strongest. *See, e.g.*, Zadvydas v. Davis, 533 U.S. 678, 689–96 (2001) (asserting that indefinite detention of LPRs who have received final removal order but whose countries of origin have declined to accept them raises serious due process concerns while distinguishing cases upholding indefinite detention of nonentrants); *cf.* David A. Martin, *Graduated Application of Constitutional Protections for Aliens: The Real Meaning of* Zadvydas v. Davis, 2001 SUP. CT. REV. 47, 92–101 (arguing that constitutional protections should in many cases hinge on where alien fits in typology outlined above). The integrative approach, *see infra* note 51 and accompanying text, generally places less emphasis on the immigrant's status. I indicate in the text where immigrant status does make a difference.

[32] *See Chae Chan Ping*, 130 U.S. at 589.

[33] STEPHEN H. LEGOMSKY, IMMIGRATION LAW AND POLICY 15–17 (1992) (discussing roots of Chinese Exclusion Act in enmity and envy of white Californians toward Chinese immigrants); Richard P. Cole & Gabriel J. Chin, *Emerging from the Margin of Historical Consciousness: Chinese Immigrants and the History of American Law*, 17 LAW & HIST. REV. 325, 326–29 (1999) (same). The facts of the *Chinese Exclusion Case* are compelling. *See Chae Chan Ping*, 130 U.S. at 582. Chae had traveled to China, relying on federal legislation that allowed Chinese laborers to return to the United States after temporarily leaving the country. *Id.* After Chae had started his trip, Congress changed the law so that Chae and others similarly situated became excludable aliens. *Id.* Immigration authorities barred Chae from reentry. *Id.*

[34] *See* Mathews v. Diaz, 426 U.S. 67, 79–80 (1976).

The plenary power doctrine, read broadly, creates a separate sphere in which democracy has little purchase. However, both immigrants and immigration law have striven for a more complex portrait of the interaction of democracy and security.[35] Immigrant activists like the labor leader Harry Bridges, who successfully fought deportation,[36] and the anarchist Emma Goldman, who failed in her fight, called America to account for inequality toward the poor and disenfranchised. Efforts to redress these inequities enhance both American democracy and America's standing in the world.[37]

Times of crisis erode this appreciation for the interdependence of democracy and security. In such times, the courts have often, but not always, invoked the plenary power as a justification for deference to the political branches. Courts did nothing to curb the "Palmer Raids" initiated by then-U.S. Attorney General A. Mitchell Palmer and his young deputy, J. Edgar Hoover, during the "Red Scare" after World War I that resulted in the jailing and deportation of many immigrants suspected of radical activities.[38] During the anti-Communist hysteria of the McCarthy era, the Supreme Court upheld the indefinite detention, based on secret evidence of national security risks, of persons seeking admission to the United States.[39] However, the McCarthy era also spurred courts to respond with greater vigor to the tension between First Amendment principles and the deportation of immigrants for allegedly subversive speech or association. In a series of cases dating from the McCarthy era, the Supreme Court held that deportation required not merely nominal membership in an organization such as the Communist Party but "meaningful association" or a "degree of participation" in the activities of the organization.[40]

In the last twenty years, the law of asylum, established by statute and international agreement, has added another strand in the interweaving of

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[35]In addition, the U.S. Supreme Court has repeatedly held that in areas distinct from immigration regulation, such as criminal law, discrimination against aliens is suspect. *See, e.g.*, Wong Wing v. United States, 163 U.S. 228, 238 (1896) (holding that aliens charged with crime have right to due process of law); *cf.* Michael Scaperlanda, *Partial Membership: Aliens and the Constitutional Community*, 81 IOWA L. REV. 707, 741–43 (1996) (discussing *Wong Wing*).

[36]*See* Bridges v. Wixon, 326 U.S. 135, 156–57 (1945); HONIG, *supra* note 2, at 81.

[37]*See* Mary L. Dudziak, *Desegregation as a Cold War Imperative*, *in* CRITICAL RACE THEORY: THE CUTTING EDGE 106, 109–10 (Richard Delgado ed., 2000) (discussing international controversies spurred by racial discrimination within United States).

[38]*See* GERALD NEUMAN, STRANGERS TO THE CONSTITUTION 150 (1996).

[39]*See* Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 215–16 (1953); United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 546–47 (1950); *cf.* Charles D. Weisselberg, *The Exclusion and Detention of Aliens: Lessons from the Lives of Ellen Knauff and Ignatz Mezei*, 143 U. PA. L. REV. 933, 954–85 (1995) (discussing history of these cases).

[40]*E.g.*, Gastelum-Quinones v. Kennedy, 374 U.S. 469, 479 (1963); Rowoldt v. Perfetto, 355 U.S. 115, 120–21 (1957).

democracy and security.[41] Granting asylum to persons with a well-founded fear of persecution in their country of origin promotes international mobilization against regimes that violate human rights. Makers of U.S. foreign policy sometimes view asylum claims as an embarrassment, particularly when those claims concern governments that the United States supports.[42] A more productive perspective would treat asylum determinations as a kind of "forward indicator" of security problems triggered by the excesses of despotic regimes. Viewed in this light, asylum claims not only preserve democracy but also help gauge when U.S. foreign policies should change to avoid future crises.

The courts have also imposed some democratic checks on the discretion of immigration policymakers. For example, the Supreme Court in two recent decisions affirmed the availability of habeas corpus in the immigration sphere[43] and proceeded to invalidate policies that had yielded inequitable or oppressive results. In *INS v. St. Cyr*,[44] the Supreme Court declined to interpret provisions of the INA as retroactively repealing relief from deportation on which an immigrant relied in reaching a plea bargain in a criminal case.[45] The Court bridled at an interpretation that would countenance this discounting of reliance interests.[46] In *Zadvydas v. Davis*,[47] the Court held that the government could not detain an LPR indefinitely without regularly showing that the immigrant was a threat to public

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[41] DEBORAH E. ANKER, LAW OF ASYLUM IN THE UNITED STATES 1–11 (Paul T. Lufkin ed., 1999); *see also* T. Alexander Aleinikoff, *The Meaning of "Persecution" in United States Asylum Law*, 3 INT'L J. REFUGEE L. 5 *passim* (1991) (analyzing meaning of persecution in refugee law); *cf.* Linda Kelly, *Stories from the Front: Seeking Refuge for Battered Immigrants in the Violence Against Women Act*, 92 NW. U. L. REV. 665, 668–69 (1998) (discussing expansion of relief available for battered immigrant women, who were formerly virtual hostages of abusive U.S. citizen and resident spouses); Peter Margulies, *Asylum, Intersectionality, and AIDS: Women with HIV as a Persecuted Social Group*, 8 GEO. IMMIGR. L.J. 521 *passim* (1994) (discussing expansion of asylum availability for those persecuted on basis of gender); Michele R. Pistone & Philip G. Schrag, *The New Asylum Rule: Improved but Still Unfair*, 16 GEO. IMMIGR. L.J. 1, 7–8, 17–23 (2001) (discussing procedural barriers to asylum claims).

[42] *See* Margulies, *supra* note 1, at 11; *see also* Peter Margulies, *Children, Parents, and Asylum*, 15 GEO. IMMIGR. L.J. 289, 305 n.91 (2001) (discussing effects of foreign policy on asylum policy).

[43] Zadvydas v. Davis, 533 U.S. 678, 687–88 (2001); INS v. St. Cyr, 533 U.S. 289, 298–314 (2001). For discussions of habeas corpus and judicial review in the immigration context, see STEPHEN LEGOMSKY, IMMIGRATION AND THE JUDICIARY 143–222 (1987); David Cole, *Jurisdiction and Liberty: Habeas Corpus and Due Process as Limits on Congress's Control of Federal Jurisdiction*, 86 GEO. L.J. 2481, 2494–512 (1998); Gerald L. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 COLUM. L. REV. 961, 987–1020 (1998).

[44] 533 U.S. 289 (2001).

[45] *Id.* at 293, 325–26.

[46] *Cf.* Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 560–64 (1990) (arguing that courts have used statutory interpretation to infuse immigration doctrine with constitutional principles).

[47] 533 U.S. 678 (2001).

safety or national security.[48] The Court viewed the governmental overreaching and undermining of reasonable expectations in these cases as threatening democracy while offering illusory security benefits.

II. AN INTEGRATIVE APPROACH TO IMMIGRATION LAW

This brief history of American immigration law demonstrates that the relationship of democracy and security is not a zero-sum game. Recent Supreme Court decisions such as *Zadvydas v. Davis*[49] and *INS v. St. Cyr*[50] suggest that democracy and security are mutually constitutive, with each value establishing the conditions necessary for the other to flourish. Decisionmakers trade off one value against the other only at the risk of losing both.

The complementary relationship between democracy and security in immigration law requires what political theorists call an integrative approach.[51] Political theorists draw a distinction between aggregative and integrative institutions. In aggregative institutions, efficiency is the guiding norm. Rights facilitate exchange between constituents of the institution and other institutions.[52] In contrast, integrative institutions focus not on exchange, but on identity. They emphasize empathy, reciprocity, and a shared search for core values.[53] The goal of an integrative institution is not homogeneity, but instead an equitable regard for the importance of diverse perspectives.[54] An integrative institution should respond to diversity, not just at a particular moment, but over time.[55] Flexibility and the capacity to experiment are therefore crucial elements of an integrative approach.

Viewed in this light, the integrative approach is superior to the two most prominent alternatives: the deference and equivalency theses. For the deference

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[48] *Id.* at 689.

[49] 533 U.S. 678 (2001).

[50] 533 U.S. 289 (2001).

[51] *See* JAMES G. MARCH & JOHAN P. OLSEN, REDISCOVERING INSTITUTIONS: THE ORGANIZATIONAL BASIS OF POLITICS 124–29 (1989). My discussion here borrows from an earlier article on integrative approaches to law reform litigation. *See* Peter Margulies, *The New Class Action Jurisprudence and Public Interest Law*, 25 N.Y.U. REV. L. & SOC. CHANGE 487, 526–38 (1999).

[52] *See* MARCH & OLSEN, *supra* note 51, at 125 ("Within an aggregative process, rights are either rules designed to ameliorate imperfections in the system of exchange, or they are resources distributed as initial endowments and available for barter.").

[53] *Id.* (noting that, in an integrative process, "rights express key aspects of the structure of social belief. They are metaphors of human unity, symbolizing the common destiny and humanity of those who share them.").

[54] *Id.* at 126–27; *cf. id.* at 127 (rejecting use of integrative institutions to cloak social conflict or co-opt groups subjected to ongoing subordination).

[55] *See* WALZER, *supra* note 17, at 58 (discussing importance to democracy of adjusting to changing circumstances).

thesis, which takes plenary power over immigration as its touchstone, national security requires that courts accord the political branches carte blanche in immigration matters.[56] The deference thesis fails, however, to take into account how this judicial abdication loosens the checks and balances crucial to both democracy and security. In contrast, the equivalency thesis regards as suspect any differences between immigration jurisprudence and other areas of American law, such as the constitutional and criminal domains.[57] The equivalency thesis fails to acknowledge the threat to democracy posed by insecure institutions of governance,[58] the importance of immigration law in promoting the security that enables democracy, and the resounding manner in which immigrants coming to America "vote with their feet" for the union of democracy and security, often emigrating from countries suffering from the absence of both attributes.

Under an integrative approach to immigration law, democracy and security survive and prevail together. When events, either internal or external, create the impetus for change, decisionmakers should take the opportunity to refine commitments to both values. Seizing this opportunity is not easy. Crises such as September 11 tend to cast people back on their instincts, arguing reflexively for more government action to police immigrants, or arguing that government cannot be trusted to act without invidious consequences. Such reactions do not meet the challenge of the moment. The more difficult mission requires asking what governmental initiatives can both promote security and affirm democracy. To consider this question, an integrative approach provides two elements: institutional accountability and fairness in time.

A. Institutional Accountability

One factor common to discussions of democracy and security is the accountability of institutions. Democracy contemplates self-governance, reflecting careful deliberation and the articulation of reasons for decisions.[59] Even if it seems convenient at times to license the government to act arbitrarily with respect to particular groups such as immigrants, the best practice in a democracy is to hold the government to account. The Supreme Court's recent decision in *Zadvydas*, requiring procedural safeguards for indefinite INS detention of LPRs, embodies this view.[60]

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[56]*See* Chae Chan Ping v. United States, 130 U.S. 581, 602–03 (1889).

[57]*See* DEMPSEY & COLE, *supra* note 26, at 33–46; *cf.* Bosniak, *supra* note 14, at 1130–33 (arguing that deportation grounds regulating behavior should track First Amendment law in other settings).

[58]*See* Schmitter & Karl, *supra* note 20, at 7–8.

[59]*See* RUBENFELD, *supra* note 16, at 163–77; WALZER, *supra* note 17, at 64–85.

[60]533 U.S. at 682.

Institutional accountability also helps combat those transnational organizations, such as Al Qaeda, that use fear to infringe on the crucial democratic prerogative of self-government.[61] When persons, groups, or states threaten the lives of persons in the United States, the nation should hold accountable those making such threats.[62] By insisting on accountability, the government reduces the risk that American immigrants and citizens will endure further deadly attacks.[63] Immigration legislation should play a significant role in this transnational accountability project.

Immigration law can promote transnational accountability by transforming the institutional practices of entities that support violence against innocent civilians here and abroad. Entities that support terrorist activity such as the targeting of civilians by sharing funds, information, and training should not be able to exploit their operatives' otherwise lawful immigration status in the United States. Similarly, immigration law should provide no safe harbor for persons, groups, or states that tacitly or negligently support violence against civilians by failing to put in place internal systems of accountability.[64]

The juxtaposition of democratic and security-based conceptions of institutional accountability demonstrates their interdependence. Immigration laws, regulations, and enforcement that target the infrastructure of terror cannot invoke generalizations in place of sound factfinding and analysis.[65] Failing this

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[61]*See* HEYMANN, *supra* note 22, at 9–18 (discussing effects of terrorism on governance).

[62]*Cf. id.* at 47–77 (discussing methods for holding terrorist organizations accountable); *id.* at 71 ("[S]tate sponsors of terrorism often do their best to conceal their involvement for the very purpose of avoiding international condemnation and potential retaliation by the targeted state.").

[63]The September 11 hijackers' victims included foreign visitors, undocumented persons, LPRs, and former refugees. *See, e.g.*, Tara Bahrampour et al., *Blunt Talker, Devoted Aunt, Russian Emigre, Young but Wise Man*, N.Y. TIMES, Feb. 3, 2002, at A15 (telling story of Faina Rapoport, who fled religious persecution in Russia, received refugee status in United States, and worked as computer programmer in World Trade Center). The strong presence of immigrants in America's cities makes it likely that future attacks would exact a similar toll. *See* Makiya & Mneimneh, *supra* note 24, at 18, 20 (noting "practical considerations that surely would have been part of the planning stage [of the hijackings] (such as maximizing the number of casualties by targeting heavily populated buildings)"). The secondary economic impact on immigrants has also been severe, including massive layoffs in the restaurant and hospitality industries that employ hundreds of thousands of immigrants. *See* Mary Beth Sheridan, *Wall Street to Washington, Layoffs Shatter Lives; D.C. Tourism Losses Hit Immigrants Hard*, WASH. POST, Oct. 31, 2001, at A1. Both immigrants and citizens have a stake in measures consistent with democracy that reduce the risk of future attacks.

[64]*See* William F. Wechsler, *Strangling the Hydra: Targeting Al Qaeda's Finances*, *in* HOW DID THIS HAPPEN? 129, 133–35 (James F. Hoge, Jr. & Gideon Rose eds., 2001) (discussing diversion of funds, frequently without official authorization, from Islamic charities to terrorist activities).

[65]*See* JOHN L. ESPOSITO, THE ISLAMIC THREAT: MYTH OR REALITY 121–25 (3d ed. 1999) (discussing ebb and flow of liberalization in Iran); *cf.* Graham E. Fuller, *The Future of Political Islam*, FOREIGN AFF., Mar./Apr. 2002, at 48, 50–52 (discussing diversity and change in Islamic

test would jeopardize both democratic and security-based accountability. Similarly, efforts to eliminate terrorist targeting of civilians are not sustainable unless policymakers also seek to reduce overreaching by states friendly to American interests.[66]

This transnational conception of accountability fits squarely within the broad authority given to Congress to regulate immigration. It also is consistent with the scrutiny of persecution abroad provided by American asylum law. Indeed, as the case of the Taliban and their Al Qaeda principals reveals, the policies of governments that violate human rights in their own countries can also threaten the lives of persons in the United States. Here, as elsewhere, accountability promotes both democracy and security.

B. Fairness in Time

To complement institutional accountability, an integrative account adds fairness in time. A conception of time is crucial to democracy. Constitutional democracies do not exist solely in the present. Instead, they cohere through commitments shaped over time.[67] Time explains why courts serve democracy by ensuring that transitory majorities cannot sweep away constitutional principles.[68] Many of these principles, embodied in the Ex Post Facto, Contracts, and Due Process Clauses of the United States Constitution, also contemplate a particular relationship between past, present, and future that helps define the role of government.

In a democracy, prospectivity is the default position.[69] Governments honor reasonable expectations on which persons rely; when a democracy wants people to adjust their expectations or conform their conduct, it provides some manner of notice of the change.[70] An integrative approach refers to the temporal obligations that democratic governments assume as "fairness in time."[71]

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world).

[66]*See* Edward W. Said, *A New Current in Palestine*, THE NATION, Feb. 4, 2002, at 14, 14–15 (analyzing failures of Ariel Sharon's government in Israel, as well as those of Yasir Arafat's Palestinian Authority).

[67]*See* ARENDT, *supra* note 17, at 243–47 (discussing importance of promises for shaping future of self-governance).

[68]*See* RUBENFELD, *supra* note 16, at 168; *cf.* WALZER, *supra* note 17, at 58 (arguing that consent to domination by others, "given at a single moment in time," is not sufficient to waive requirements of justice and democracy).

[69]RUTI G. TEITEL, TRANSITIONAL JUSTICE 215 (2000) (discussing principle of prospectivity in transitions to democracy).

[70]*See id.*

[71]A number of immigration scholars have articulated analogous concerns, focusing on the retroactivity provisions of the 1996 amendments to immigration laws that expanded the category of criminal offenses considered "aggravated felonies," conviction of which would subject an

Fairness in time is important not just for its own sake, but also because it instills in the public the dispositions necessary for self-governance.[72] Changing rules without notice resembles a favorite totalitarian practice: rewriting the past.[73] When rules change without notice, people spend their time peering over their shoulders, wondering what innocent or inadvertent portions of their past will come back to haunt them. Ultimately, the government's failure to practice fairness in time can breed alienation, despair,[74] and violence.[75] Unconstrained retroactivity thus deprives persons of the opportunity to develop habits that are conducive to democratic life.[76]

Despite this democratic wisdom, American immigration law has often trenched on the expectations of immigrants, subjecting them to the changing winds of policy and politics without the protection that citizens receive. Congress may state grounds for deportation or removal that are retroactive, giving immigrants no opportunity to conform their conduct. Unlike the criminal law, immigration provisions generally are not subject to the Ex Post Facto Clause or other constitutional guarantees of fairness in time.[77]

The impact of such confounded expectations on the democratic dispositions of immigrants may seem irrelevant, given that American law already excludes immigrants from participation in core democratic rituals such as voting.[78]

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immigrant to removal. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 321, 110 Stat. 3009-627, 3009-627 to -628 (1996) (amending 8 U.S.C. § 1101(a)(43)); Daniel Kanstroom, *Deportation and Justice: A Constitutional Dialogue*, 41 B.C. L. REV. 771, 771–78 (2000); Martin, *supra* note 31, at 116–17, 126–36; Nancy Morawetz, *Rethinking Retroactive Deportation Laws and the Due Process Clause*, 73 N.Y.U. L. REV. 97, 99 (1998); Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936, 1937 (2000).

[72]Justice Brandeis made this point eloquently in *Whitney v. California*, 274 U.S. 357 (1927): "Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary." *Id.* at 375; *cf.* EDWARD J. EBERLE, DIGNITY AND LIBERTY: CONSTITUTIONAL VISIONS IN GERMANY AND THE UNITED STATES 46 (2002) (analyzing Brandeis's account).

[73]*See* HANNAH ARENDT, *Truth in Politics*, *in* BETWEEN PAST AND FUTURE 227, 231, 256 (1954) (discussing alteration of past in Soviet Union, including erasure of Trotsky and other foes of Stalin from history books).

[74]*Cf.* WALZER, *supra* note 17, at 59 (arguing that immigrants such as metics, guest workers of ancient Athens, without political rights or prospect of citizenship for themselves or their children, "experience the state as a pervasive and frightening power that shapes their lives and regulates their every move . . . [and view] deportation [as] a continuous practical threat").

[75]*See* HEYMANN, *supra* note 22, at 114 (observing that harsh governmental responses to terrorism "have at times poured kerosene on the fire of terrorist violence, increasing opposition to the government and expanding the scope of the conflict").

[76]*See* ARENDT, *supra* note 73, at 257 (noting that when governments rewrite history, "the sense by which we take our bearings in the real world . . . is being destroyed").

[77]*See* Kanstroom, *supra* note 71, at 773, 780–85.

[78]*Cf.* HONIG, *supra* note 2, at 102 (arguing for expansion of alien suffrage).

However, this argument ignores both time and accountability. First, consider time. Since the United States promotes the naturalization of immigrants, immigrant and citizen exist on a temporal continuum. Immigration policy should prepare immigrants for full-fledged participation in democratic life, not alienate them before they even have a chance to participate. Second, accountability suffers because the political branches' power to upset immigrants' expectations makes immigrants a convenient scapegoat for problems elsewhere in our democracy.[79] Curbing this power would oblige policymakers to address fundamental issues instead of blaming immigrants to placate a disgruntled electorate.

Perhaps recognizing these concerns, courts have never been entirely comfortable with the idea of a separate immigration sphere where fairness in time need not apply. Illustrating this unease, the Supreme Court in *St. Cyr* recently strove to interpret the INA to avoid the compromise of reliance interests that retroactive application would have engendered.[80] With its decision, the Court may have signaled that fairness in time has finally come of age in immigration law. That development is overdue.

III. DETENTION BASED ON NATIONALITY

An appropriate initial testing ground for the integrative approach is the government's selective detention of overstays from countries where Al Qaeda is active. In the weeks after September 11, the government detained over a thousand persons. Some had committed no violation of American law. Most detainees came from countries where Al Qaeda is active, and were deportable because they have overstayed their nonimmigrant visas.[81]

Use of nationality, ethnicity, or religion as a criterion in antiterrorist policy illustrates the contingent nature of the relationship between democracy and security. On the one hand, reliance on factors such as nationality or religion erodes the institutional accountability of law enforcement. Reliance on these broad characteristics encourages law enforcement authorities to use crude

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[79]This is one reason that at times of political unrest, such as the McCarthy era, the government's focus has been on immigrants as wrongdoers. *Id.* at 34 (discussing "the *politics* of foreignness—the cultural symbolic organization of a social crisis into a resolution-producing confrontation between an 'us' and a 'them'").

[80]533 U.S. at 309–10.

[81]The government held most of the detainees for several months, and then either released or deported them. *See* Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice, 215 F. Supp. 2d 94, 98 n.4 (D.D.C. 2002); Susan Sachs, *Dispute That Prevented New Jersey Deportations Is Resolved*, N.Y. TIMES, Apr. 27, 2002, at A11. A civil rights group has also filed a class action lawsuit alleging that the post-September 11 detentions violate constitutional and statutory guarantees. *See* Turkmen v. Ashcroft, No. 02-Civ-02307-JG (E.D.N.Y. complaint filed Apr. 17, 2002), *available at* http://news.findlaw.com/legalnews/us/terrorism/cases/civil.html.

measures in place of careful policing. Moreover, employing such factors generates invidious images and practices that spill over from the immigration realm into the broader democratic landscape.[82]

On the other hand, the heightened stakes for self-government and the challenge posed by transnational obstacles to collecting information in terrorism cases argue for some continuing role for reliance on nationality in enforcement. The ability to prevent future attacks from entities outside the United States is at the core of our ability to govern ourselves. External threats to our independence as a self-governing community[83] justify greater flexibility than transgressions perpetrated by those with more mundane internal agendas.[84] Moreover, the transnational sphere of terrorist groups' operations makes it materially more

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[82]One component of the post-September 11 effort to apprehend immigration law violators from countries where Al Qaeda is active is the National Crime Information Center (NCIC)—a national criminal justice database. *See* Memorandum from the Deputy Attorney General to the Commissioner of INS, the Directors of the FBI and the U.S. Marshals Service, and U.S. Attorneys, on Guidance for Absconder Apprehension Initiative 1–3 (Jan. 25, 2002) [hereinafter Guidance], *available at* http://news.findlaw.com/legalnews/us/terrorism/documents; Dan Eggen, *Deportee Sweep Will Start with Mideast Focus*, WASH. POST, Feb. 8, 2002, at A1. Local and state law enforcement personnel use the database reactively, "running" names and other data such as license plate numbers when they make a stop for another purpose. Nationality-based NCIC data will encourage local law enforcement officials to stop persons whose perceived attributes match those of the targeted group. Persons stopped in this manner will include U.S. citizens and LPRs. *Cf.* HEYMANN, *supra* note 22, at 114 (discussing tendency of antiterrorist law enforcement to become discriminatory); Johnson, *supra* note 12, at 688 (discussing impact on citizens and residents of using profiles in immigration enforcement).

[83]*See* WALZER, *supra* note 17, at 84–86.

[84]*See* Zadvydas v. Davis, 533 U.S. 678, 696 (2001) (noting that in cases of "terrorism or other special circumstances . . . special arguments might be made . . . for heightened deference to the political branches with respect to matters of national security"); Kiareldeen v. Ashcroft, 273 F.3d 542, 556–57 (3d Cir. 2001) (observing that government, when making decision to apprehend individual suspected of plotting terrorist activity—in that case pre-September 11 plan to bomb World Trade Center—is entitled to consider not only probability that individual has engaged in such activity, but gravity of destruction if plot succeeds). For further discussion of *Kiareldeen*, see *infra* note 119 (discussing secret evidence).

Indeed, even for routine immigration apprehensions, the Supreme Court has expressly declined to apply the exclusionary rule. *See* INS v. Lopez-Mendoza, 468 U.S. 1032, 1046–47 (1984) (asserting that "the social costs of applying the exclusionary rule in deportation proceedings are both unusual and significant . . . [the petitioner, an undocumented immigrant] is a person whose unregistered presence in this country, without more, constitutes a crime"). *But see* Johnson, *supra* note 12, at 707–10 (criticizing racial profiling in ordinary immigration enforcement).

difficult to obtain individualized information.[85] Broader criteria may be necessary to overcome this transnational information deficit.

At this difficult juncture, the integrative approach can make a difference. Because reliance on race or ethnicity always creates tensions with democratic ideals of equality,[86] courts should reject the deference model, which would tolerate virtually any governmental action in the immigration sphere. However, the self-government and information challenges inherent in immigration law also counsel skepticism about the equivalency view, which seeks to press immigration law into mechanical conformity with other sectors of American jurisprudence.[87] Reconciling these concerns, an integrative approach would permit immigration authorities to use nationality, ethnicity, or religion as factors influencing responses to terrorism only if: (1) the governmental response does not trigger concerns about fairness in time, (2) use of such factors is reasonably related to national security goals, and (3) no less restrictive strategy is practicable.

Unfortunately, the government's selective detention of overstays does not pass this integrative test. It is true that overstays cannot invoke fairness in time. Persons who breach their agreement to leave the United States after a specific period of time should not expect immigration authorities to ratify that choice.[88]

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[85]*See* Humanitarian Law Project v. Reno, 205 F.3d 1130, 1135–36 (9th Cir. 2000) (discussing how transnational dimension shapes context for determining scope of First Amendment protections in antiterrorism enforcement efforts); *cf.* Neuman, *supra* note 21, at 331 ("Foreign organizations differ from domestic organizations in the degree to which the federal government has the capacity to control their actions directly. The United States has limited ability to enforce anti-terrorist legislation against foreign organizations that are based in countries with which the United States has amicable relations, and even less ability to enforce it against organizations that are based in hostile countries.").

[86]*See, e.g.*, Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259, 1280–83 (2000) (discussing racial implications of "stop and frisk" doctrine); Dorothy E. Roberts, *Race, Vagueness, and the Social Meaning of Order-Maintenance Policing*, 89 J. CRIM. L. & CRIMINOLOGY 775, 818 (1999) (discussing problems with racial profiling in law enforcement); *cf.* Tracey L. Meares & Dan M. Kahan, *Law and (Norms of) Disorder in the Inner City*, 32 LAW & SOC'Y REV. 805, 819 (1998) (discussing social disorganization caused by drug trade while arguing against law enforcement approaches such as mandatory minimum sentences for drug possession that disproportionately target low-income persons of color).

[87]*See supra* notes 56–58 and accompanying text (discussing equivalency and deference models).

[88]While lay commentators sometimes refer to overstaying as a "minor" violation, *see* Sachs, *supra* note 81, this characterization is overly casual. Overstaying on a nonimmigrant visa is a circumvention of statutory and administrative control over immigration. By overstaying, a nonimmigrant visa-holder evades the more thorough review imposed on applicants for permanent residence. *See* McDonnell & Carollo, *supra* note 7 (discussing strategy of September 11 hijackers). Overstays act on the knowledge that INS historically has lacked the resources to apprehend those who fail to comply with immigration requirements, in essence betting that future immigration enforcement will continue to be lax. However, fairness in time does not require that the law back this wager. Enforcement regimes are inherently subject to change. *See* Gerard E. Lynch, *Our*

However, this is merely the beginning, not the end, of the inquiry under the integrative approach. The government still has to demonstrate a reasonable relationship with national security goals and the absence of less restrictive alternatives. To be consistent with these criteria, detention of overstays should not exceed the time reasonably required to assess the extent of the immigrant's terrorist ties, other indicia of dangerousness, and flight risk.[89]

Generally, detention will not be appropriate for persons with families, jobs, or other indications of stability, whose history reveals no pattern of dishonesty or links to terrorism. These criteria may justify detention in particular cases. Consider, for example, the case of Rabih Haddad, the head of an organization, the Global Relief Foundation, that the government is investigating for links to terrorism. Haddad overstayed for three years on an expired tourist visa.[90] Haddad also told an immigration judge that he had no income.[91] However, Haddad previously asserted in writing that he was paid an annual salary of $29,500.[92] Haddad also obtained both a gun and a hunting license, which, along with his employment, were prohibited for a person on a tourist visa.[93] The pattern of

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Administrative System of Criminal Justice, 66 FORDHAM L. REV. 2117, 2120–21 (1998). The reasonable person understands that she should conform her conduct not to the vagaries of enforcement, but to the more deliberate and public guidance provided by statutes, regulations, and case law. *See* BRIAN Z. TAMANAHA, A GENERAL JURISPRUDENCE OF LAW AND SOCIETY 167 (2001) ("[A]s a matter of general social practice people do not lightly apply the label 'law.'"). These authorities clearly inform the overstay that his or her failure to comply is unlawful. For these reasons, the overstay's bet on the perpetuation of a lax enforcement regime warrants far less legal solicitude than, for example, the *St. Cyr* appellee's forgoing a constitutional right to trial in reliance on a *statutory* basis for relief from deportation. *See* INS v. St. Cyr, 533 U.S. 289, 326 (2001) (declining to imply retroactive repeal of section 212(c) of INA, which allows LPRs convicted of certain crimes to seek relief from deportation).

[89]*Cf.* Kim v. Ziglar, 276 F.3d 523, 528 (9th Cir. 2002) (striking down as applied INA provision, 8 U.S.C. § 1226(c)(1)(B), that precluded bond for aliens removable as result of conviction for "aggravated felonies"), *cert. granted sub nom* Demore v. Kim, 122 S. Ct. 2696 (2002); Patel v. Zemski, 275 F.3d 299, 314 (3d Cir. 2001) (same). *But see* Parra v. Perryman, 172 F.3d 954, 958 (7th Cir. 1999) (upholding statute). The Supreme Court has already held that post-final order detention requires an individualized determination. *See Zadvydas*, 533 U.S. at 696. *But see id.* (reserving consideration of "terrorism or other special circumstances where special arguments might be made for forms of preventive detention").

[90]*See* Detroit Free Press v. Ashcroft, 303 F.3d 681, 687 (6th Cir. 2002).

[91]*See* David Ashenfelter & Niraj Warikoo, *Cleric's Secret File Raises Questions on Terror Role*, DETROIT FREE PRESS, Apr. 20, 2002, at 1A. Haddad has invoked the Fifth Amendment in declining to cooperate in the government's investigation of the organization that he heads. *Id.*

[92]*Id.*

[93]*Id.*

deception demonstrated in Haddad's case justifies skepticism about his assertions that he would appear for his removal hearing.[94]

Unfortunately, the government has detained significant numbers of people under harsh conditions without making such a showing.[95] Permitting such blanket detentions allows the government to use immigrants as scapegoats for larger problems. Governance by scapegoating does not serve security or democracy.[96]

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[94]Even in Haddad's case, however, the presence of family suggests a stake in continued appearances that counseled against detention. *Id.* Pursuant to an order from U.S. District Judge Nancy Edmunds, Haddad had a new hearing in late October on his bond and asylum requests. *See* David Ashenfelter, *U.S. Must Open Case or Release Haddad*, DETROIT FREE PRESS, Sept. 18, 2002, at 1B; Niraj Warikoo, *Activist Sees Risk in Leaving U.S.*, DETROIT FREE PRESS, Oct. 24, 2002, at 7B.

[95]*See, e.g.*, Sachs, *supra* note 81 (discussing case of Anser Mahmood, Pakistani truck driver who lived with his family in Bayonne, New Jersey; Mahmood was arrested on October 3 and allegedly was held in isolation for four months at Metropolitan Detention Center in Brooklyn); *see also* Christopher Drew & Judith Miller, *Though Not Linked to Terrorism, Many Detainees Cannot Go Home*, N.Y. TIMES, Feb. 18, 2002, at A1 (noting many detainees have spent several months in confinement although government has not discovered any evidence linking them to terrorism); *cf.* Akram & Johnson, *supra* note 12, at 331–35 (discussing apparent use of nationality in detention decisions by U.S. Department of Justice and INS); Volpp, *supra* note 12, at 1576–86 (analyzing identification of community and persons outside community in post-September 11 discourse and policy).

[96]While the integrative approach outlined here parts company with the deferential model, it also rejects the equivalency model. The integrative approach would allow the government to prioritize its *investigation* by using nationality to select among the group of persons who have come to this country on student, tourist, or business visas and then violated the terms of their visa by overstaying. *See* Registration of Certain Nonimmigrant Aliens from Designated Countries, 68 Fed. Reg. 2363 (Jan. 16, 2003) (requiring registration of visitors from countries including Egypt and Jordan). *But see* Barry James, *U.S. Plan to Monitor Muslims Meets with Widespread Protest*, N.Y. TIMES, Jan. 18, 2003, at A9 (quoting Pakistani diplomat as asserting that insensitive administration of registration program will alienate Muslims). Mohamed Atta, the ringleader of the September 11 attacks, violated his visa in this fashion, as did at least one of the other hijackers. *See* McDonnell & Carollo, *supra* note 7. Prompt apprehension of Atta could have derailed plans for the attacks. In light of Atta's overstay history and the Middle Eastern nationalities of all of the hijackers, the government could reasonably view the combination of overstaying and nationality as a starting point in its efforts. *See* Reno v. Am.-Arab Anti-Discrimination Comm., 525 U.S. 471, 488 (1999) (expressing, in dicta, doubts about viability of most selective enforcement claims in immigration context). However, whatever the starting point of an investigation, subsequent detention of overstays should require the more particularized criteria set out in the text. *Cf.* Am.-Arab Anti-Discrimination Comm. v. Ashcroft, 2003 WL 186647, at *1 (C.D. Cal. Jan. 15, 2003) (denying preliminary injunction against registration program based, inter alia, on lack of evidence supporting plaintiffs' claim that federal officials failed to use particularized criteria in making detention decisions).

Because of its emphasis on reasonableness and fairness in time, the integrative approach is skeptical about two related government antiterrorist measures: (1) apprehension of persons from countries where Al Qaeda is active who have received but have failed to comply with final orders of deportation, *see* Guidance, *supra* note 82, at 4; Eggen, *supra* note 82, and (2) interviews of students and others recently arrived on visas from countries where Al Qaeda is active, *see* Susan

IV. IMMIGRATION, TERRORISM, AND SECRET PROCEEDINGS

In deciding if an immigrant meets the criteria for detention or removal, a further dilemma arises: whether the government can hold proceedings in secret. Limits on public and press access erode government accountability. However, mandating access in all cases could damage security by hindering the government's use of intelligence sources and methods that offer the best hope of preventing future terrorist attacks. The absolutism of the authoritarian and equivalency approaches cannot resolve this tension. The tailoring of flexibility and fit contemplated by the integrative approach is a more promising alternative.

The issue of secret proceedings arose because of a memorandum executed after September 11 by Chief Immigration Judge Michael Creppy directing that hearings in cases designated by the U.S. Attorney General as "special interest" matters be closed to the public and the media.[97] As a result of this memo, the Executive Office of Immigration Review, a unit within the U.S. Department of Justice, denied the public and the press access to deportation and bond hearings concerning post-September 11 detainees.[98] The family and friends of detainees were also denied access.[99] Furthermore, the dockets of individual immigration judges omitted any mention of "special interest" cases.[100]

For authoritarians, the Creppy Memo was not a big reach. Under the authoritarian view, Congress's plenary power over immigration signaled extraordinary judicial deference to executive decisions about matters such as access to proceedings. Challenged in court, the government argued that any First Amendment interest asserted by aliens, the press, or the public must bow to a

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Sachs, *Long Resistant, Police Now Start Embracing Immigration Enforcement*, N.Y. TIMES, Mar. 15, 2002, at A11 (describing interview program). Final order violators, like overstays, have a weak fairness in time argument rooted in a gamble on continued lax enforcement for which they should assume the risk. However, final order violators have also been through exhaustive immigration proceedings that typically would have revealed any evidence of terrorist activity and have already resulted in detention in appropriate cases. Students and other recent lawful arrivals have a colorable fairness in time argument since their visa application did not require them to consent to impromptu interviews based on nationality. Given the doubts about the voluntariness of the interview program, *see* Sachs, *supra*, this program is also problematic.

[97]Memorandum from Michael Creppy, Chief Immigration Judge, to All Immigration Judges and Court Administrators (Sept. 21, 2001) [hereinafter Creppy Memo], *available at* http://news.findlaw.com/hdocs/docs/aclu/creppy092101memo.pdf.

[98]*See* Detroit Free Press v. Ashcroft, 303 F.3d 681, 683 (6th Cir. 2002); N. Jersey Media Group v. Ashcroft, 205 F. Supp. 2d 288, 290–91 (D.N.J. 2002), *stay granted*, 122 S. Ct. 2655 (2002); *judgment rev'd* 308 F.3d 198 (3d Cir. 2002).

[99]*See Detroit Free Press*, 303 F.3d at 683–84.

[100]*Id.* at 684.

government justification that was merely "facially legitimate and bona fide."[101] The national security reasons invoked by the government to justify blanket secrecy clearly met this deferential standard, although these reasons were too speculative to satisfy more searching review.[102]

Equivalence theorists realized to their credit that arguing for open hearings in all cases was not a tenable position. They adopted an integrative stance, asserting that immigration judges could close individual proceedings upon a showing of need by the government. Circuit courts are split on the need to consider this less restrictive means for vindicating the government's concerns.

Previously, the only certainty in the access arena was that criminal proceedings were presumptively open.[103] Lower courts had held that other proceedings, including civil actions, came with a right of access.[104] However, another line of cases from the Supreme Court had indicated that the specialized responsibilities of administrative and executive agencies could justify limits on access.[105] The presence of a clear right of access only to criminal proceedings

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[101]*See* Kleindienst v. Mandel, 408 U.S. 753, 758 (1972) (upholding exclusion of avowedly Marxist professor against First Amendment challenge brought by U.S. citizens who had invited professor to speak in United States).

[102]For example, the government argued that a terrorist group that had recruited an alien might read that the government was charging the alien only with immigration offenses, such as overstaying a visa. As a result, the government asserted, the group could surmise that the government was unaware of the alien's terrorist ties. *See Detroit Free Press*, 303 F.3d at 687. The government never considered that such groups, known for their willingness to entertain conspiracy theories, might suspect just the opposite: that the government *was* aware of the alien's terrorist ties and was merely trying to mislead the terrorists about the extent of its knowledge. *Cf.* Cass R. Sunstein, *Why They Hate Us: The Role of Social Dynamics*, 25 HARV. J.L. & PUB. POL'Y 429, 429–30 (2002) (discussing terrorist group structure, interaction, and discourse). In addition, the ability of detainees to self-disclose, which the government did not constrain, further vitiated the government's arguments. *See Detroit Free Press*, 303 F.3d at 687.

The government also propounded a "mosaic" theory, asserting that a terrorist group might assemble apparently innocuous "bits and pieces" of information, such as the identity of a detainee or the charges against him, into a useful block of data. Courts have rejected the "mosaic" argument, observing that it lacks specificity and concreteness, and have insisted that the government, when seeking to bar access to adjudications, demonstrate that such a barrier serves significant, as opposed to speculative, government interests. *See id.*; *cf.* Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice, 215 F. Supp. 2d 94, 100–07 (D.D.C. 2002) (holding that government could not categorically refuse to disclose names of post-September 11 detainees under Freedom of Information Act provision, 5 U.S.C. § 552, that permits withholding information that "could reasonably be expected to interfere with [law] enforcement proceedings"), *order stayed by* 217 F. Supp. 2d 58 (D.D.C. 2002).

[103]*See* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 573 (1980).

[104]*See* Publicker Indus., Inc. v. Cohen, 733 F.2d 1059, 1067 (3d Cir. 1984) (holding First Amendment required presumptive openness of civil trials).

[105]*See* Houchin v. KQED, Inc., 438 U.S. 1, 3 (1978) (rejecting argument that television station had First Amendment right to film inside jail); Capital Cities Media, Inc. v. Chester, 797 F.2d 1164, 1174–76 (3d Cir. 1986) (rejecting argument that media had First Amendment right to inspect documents on water contamination). Neither of these cases, however, involved access to actual

posed a special problem in the immigration context, since courts have just as definitively held that deportation is *not* punishment but merely a regulatory action designed to enforce visa conditions to which an alien agreed or to abate other violations such as entry without proper inspection.[106]

Courts considering the legality of the government's blanket secrecy policy have held that even a remedy such as deportation, while it may not carry the stigma that society associates with punishment, nonetheless has consequences that make public scrutiny essential.[107] These courts have invoked the test of "logic" and "experience" that the Supreme Court announced when it held that criminal trials are presumptively open to press and public.[108] The courts' analysis of these factors in the deportation context owes much to the values of institutional accountability and fairness in time identified by the integrative approach. Noting that federal regulations historically have allowed public access to deportation proceedings,[109] courts have also pointed to the effects of a finding of deportability on the unsettled lives of immigrants,[110] and the adverse effect of such a finding, at least for LPRs, on "the ties that go with permanent residence."[111] Courts rejecting the government's policy have asserted that imposing the "drastic deprivation"[112] of deportation in an adversarial setting logically requires the same access that the public enjoys in the judicial setting.[113] Without access, courts have warned, the government would be effectively unaccountable in deportation matters.[114]

Courts have recognized that the severe consequences of deportation and the arbitrariness bred by lack of public access are an unhealthy combination in a democracy. As noted in the previous section, the vast majority of special interest cases do not seem to involve persons with terrorist ties.[115] Rather, most of these cases involve garden-variety overstays from countries in the Middle East and South Asia. Viewed in this light, the special interest cases signify very little

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administrative adjudicative proceedings. *See N. Jersey Media Group*, 205 F. Supp. 2d at 293 (distinguishing cases).

[106]*See* Fong Yue Ting v. United States, 149 U.S. 698, 730 (1893).

[107]*See Detroit Free Press*, 303 F.3d at 696.

[108]*See Richmond Newspapers*, 448 U.S. at 573.

[109]*See N. Jersey Media Group*, 205 F. Supp. 2d at 303 (citing 8 C.F.R. § 3.27 (2002)).

[110]*See Detroit Free Press*, 303 F.3d at 693.

[111]*Id.* at 689. While the Creppy Memo has been implemented largely in cases involving aliens who have overstayed their visas, nothing in the memo excludes hearings involving LPRs from the reach of the government's secrecy policy. *See* Creppy Memo, *supra* note 97.

[112]*Detroit Free Press*, 303 F.3d at 696 (quoting Woodby v. INS, 385 U.S. 276, 285 (1966)).

[113]*Id.*

[114]*Id.* at 683 (asserting that "[d]emocracies die behind closed doors").

[115]*See* Sachs, *supra* note 81; *cf. Ctr. for Nat'l Sec. Studies*, 215 F. Supp. 2d at 98 n.4 (discussing lack of terrorist ties of deported detainees, including group of 130 Pakistani nationals who had committed immigration or miscellaneous criminal offenses).

besides the government's interest in *appearing* to be doing something. Targeting other groups composed largely of U.S. citizens would be more difficult, because these groups can seek their remedy at the polls. The electoral helplessness of aliens[116] makes the press virtually the only avenue for holding the government accountable. For example, if granted access, the press could have asked why an individual such as Anser Mahmood was held in isolation for four months even though the government uncovered no evidence of terrorist ties.[117] If aliens from specific countries are being detained and deported for show, surely the public has a right to know.

A presumptive right of public access would not materially impair legitimate national security concerns. Where deportation proceedings involve evidence of dangerousness implicating intelligence sources and methods, the government retains the ability to seek to close proceedings on a case-by-case basis. Courts rejecting the government's blanket secrecy policy have indicated a willingness to entertain such individualized requests.[118] This balance allows the government sufficient flexibility to vindicate national security goals, while fitting government discretion within a framework that preserves fairness and accountability.[119]

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[116]*Cf.* WALZER, *supra* note 17, at 59 (discussing political powerlessness of some immigrant communities); Bosniak, *supra* note 14, at 1126–37 (same); Stephen H. Legomsky, *Fear and Loathing in Congress and the Courts: Immigration and Judicial Review*, 78 TEX. L. REV. 1615, 1626 (2000) (same).

[117]*See* Sachs, *supra* note 81.

[118]*See Detroit Free Press*, 303 F.3d at 709–11.

[119]Courts also stress the careful tailoring of restrictions on information in cases, originating in enforcement efforts by the Clinton Administration, in which the government sought to withhold evidence not only from the public, but from the individual detainee; such limits on access trigger due process concerns, since they impair the ability of the detainee to rebut government charges. *See* Kiareldeen v. Reno, 71 F. Supp. 2d 402, 416–17 (D.N.J. 1999) (ordering release of detainee held on basis of secret evidence when detainee demonstrated that evidence had been provided by detainee's ex-wife, who had made repeated allegations of domestic violence against him but had failed to substantiate any of these accusations); *see also* Kiareldeen v. Ashcroft, 273 F.3d 542, 545 (3d Cir. 2001) (denying immigrant's motion for attorney's fees, holding that government's provision of specific public summary of secret evidence to alien allowed him to rebut charges and rendered government's position "substantially justified"); Najjar v. Ashcroft, 257 F.3d 1262, 1303–04 (11th Cir. 2001) (affirming denial of asylum); Najjar v. Reno, 97 F. Supp. 2d 1329, 1359 (S.D. Fla. 2000) (granting writ of habeas corpus and rejecting use of secret evidence in case in which government summary was vague and conclusory), *order vacated and appeal dismissed by* 273 F.3d 1330 (11th Cir. 2001); *cf. In re* Haddam, File No. A22 751 813-Arlington (Bd. of Immigration App. Dec. 1, 2000) (interim decision), 2000 BIA LEXIS 20 (considering secret evidence, but granting claimant's request for asylum); Susan M. Akram, *Scheherezade Meets Kafka: Two Dozen Sordid Tales of Ideological Exclusion*, 14 GEO. IMMIGR. L.J. 51, 62 (1999) (discussing secret evidence issues); Martin, *supra* note 31, at 68–76 (arguing that due process bars use of secret information in removal proceedings against LPRs).

Secret evidence has a long history in immigration proceedings. *See* United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 551 (1950) (Jackson, J., dissenting) (arguing that secret evidence "is abhorrent to free men, because it provides a cloak for the malevolent, the misinformed,

V. THE USAPA, SECURITY, AND DEMOCRACY

As the immigration system sorts out issues regarding the apprehension of suspected terrorists and access to information about pending proceedings, it will look to the USAPA for guidance on the definition of terrorist activity.[120] The USAPA is a wide-ranging statute devoted to making terrorist organizations accountable. To that end, the USAPA provides for the removal of immigrants who engage in fundraising, solicitation of new members, and the provision of material support for organizations designated as terrorist organizations by the U.S. Secretary of State.[121] It also creates a duty of care for immigrants assisting organizations *not* so designated, requiring that immigrants take reasonable steps to ascertain whether their assistance would further specific terrorist activities.[122]

The substance of the USAPA's removal provisions centers on terrorist infrastructure, not ideas.[123] Overall, this approach enhances transnational

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the meddlesome, and the corrupt to play the role of informer undetected and uncorrected"); Weisselberg, *supra* note 39, at 1020–33 (discussing McCarthy era use of secret evidence).

[120]The INA, including amendments enacted as part of the USAPA, defines terrorist activity, in part, as committing or threatening or conspiring to commit hijacking, kidnapping, violent attacks on persons, assassination, or the use of biological or explosive agents to endanger the safety of one or more persons or to damage property. *See* INA § 212, 8 U.S.C. § 1182(a)(3)(B)(iii) (Supp. 2002). The USAPA's main addition here is the inclusion of damage to property as a form of terrorist activity. *See id.*, 8 U.S.C. § 1182(a)(3)(B)(iii)(V). Civil liberties groups have expressed concern that this provision could lead to the classification as terrorists of groups such as People for the Ethical Treatment of Animals (PETA), Greenpeace, and various anti-globalization groups that target property to disrupt practices with which these groups disagree. *See* Press Release, American Civil Liberties Union, Upsetting Checks and Balances: Congressional Hostility to Courts in Times of Crisis, Statement of Laura W. Murphy (Nov. 1, 2001), *at* www.aclu.org/NationalSecurity/NationalSecurity.cfm?ID=9811&c=111&Type=s. These are legitimate concerns. However, because the government has given no indication that it will target such groups, I do not address this issue here.

[121]*See* INA § 212, 8 U.S.C. § 1182(a)(3)(B)(iv)(IV)–(VI) (Supp. 2002).

[122]*Id.*, 8 U.S.C. § 1182(a)(3)(B)(iv)(VI)(dd).

[123]The provisions of the USAPA that govern *admissibility* of immigrants to the United States do target ideas. *See, e.g., id.*, 8 U.S.C. § 1182(a)(3)(B)(i)(VI) (declaring inadmissible any alien who "has used [his or her] position of prominence within any country to endorse or espouse terrorist activity . . . in a way that the Secretary of State has determined undermines United States efforts to reduce or eliminate terrorist activities"). While removal provisions concern immigrants who have already entered the United States, either lawfully or unlawfully, admissibility provisions deal with prospective immigrants who seek entry into the United States from abroad or have been apprehended or detained seeking entrance at a port of entry such as an airport, harbor, or border crossing. Since courts have held that immigrants who have entered the United States and are thus subject to removal tend to have deeper ties to this country and therefore should enjoy a greater spectrum of constitutional protections than those who have not entered, the discussion here focuses on the removal provisions. *Cf.* Zadvydas v. Davis, 533 U.S. 678, 713–14 (2001) (distinguishing entrants from non-entrants). For a useful and comprehensive discussion of the inadmissibility provisions, see Regina Germain, *Rushing to Judgment: The Unintended Consequences of the USA*

accountability. It also avoids the tension with democracy that restrictions on the expression of ideas would entail. However, certain procedural aspects of the statutory scheme threaten democratic values. The best way to grasp both the substantive strengths and procedural infirmities of the USAPA is to consider separately the two kinds of organizations addressed in the Act: (1) organizations designated by the U.S. Secretary of State as terrorist organizations, and (2) organizations not so designated at the time of the conduct that gave rise to removal proceedings. The following subsections address these two categories in turn.

A. Designated Organizations

In 1996, Congress granted the U.S. Secretary of State authority to designate transnational groups as terrorist organizations.[124] The USAPA creates an additional mechanism for the U.S. Secretary of State to designate organizations, in consultation with the U.S. Attorney General. The USAPA also streamlines the required notice to Congress. Designation of an organization has significant consequences for immigrants actively participating in organizational activities.[125]

For both designated and undesignated organizations, the USAPA identifies a range of conduct as a basis for removability.[126] However, when conduct concerns a designated organization, the government need not show a nexus between the conduct and specific terrorist activity.[127] In addition, the government need not afford the immigrant an opportunity to demonstrate that the organization designated does not condone or materially support terrorist acts.[128]

PATRIOT Act for Bona Fide *Refugees*, 16 GEO. IMMIGR. L.J. 505, 517–30 (2002).

[124]*See* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 302, 110 Stat. 1214, 1248–50 (1996) (current version at 8 U.S.C. § 1189(a) (2000)). In the past, "the list" has included groups, such as Hamas, that engage in attacks on civilians but also claim to engage in humanitarian activities. During the last quarter century, precursors to "the list" have included groups such as the African National Congress, which during the reign of apartheid in South Africa declined to rule out attacks on civilians.

[125]Since September 11, the U.S. Secretary of State has put Al Qaeda on "the list," as well as several organizations that the government believes have financially supported terrorist activity. *See* James Risen, *Saudi Prisoner Called a Chief of Al Qaeda*, N.Y. TIMES, Dec. 18, 2001, at B3 (reporting on designation of Wafa Humanitarian Organization, Saudi-based charity, high-ranking official of which allegedly diverted money raised in United States to Al Qaeda).

[126]These activities include fundraising, solicitation of new members, and the provision of safe houses, transportation, false documents, weapons, and training. INA § 212, 8 U.S.C. § 1182(a)(3)(B)(iv)(IV)–(VI) (Supp. 2002).

[127]*Id.*, 8 U.S.C. § 1182(a)(3)(B)(iv)(IV)(bb).

[128]*See* INA § 219, 8 U.S.C. § 1189(a)(8) (2000) (barring immigrants from contesting bases for designation in removal proceedings); *cf.* Nat'l Council of Resistance of Iran v. Dep't of State, 251 F.3d 192, 204 (D.C. Cir. 2001) (holding that due process applies to designation decision).

1. Designation and Transnational Accountability

The absence of a nexus requirement for designated organizations embodies the recognition that an organization cannot hermetically seal off acts of violence against civilians from other aspects of its operations. "Legitimate" business enterprises or religious charities contribute substantial revenue to terrorist activity.[129] Organizations such as Hamas use humanitarian aid as a tactical tool, assuring suicide bombers that their families will receive special assistance.[130] In addition, humanitarian activities serve marketing goals. Humanitarian efforts win over persons who might be discomfited by an exclusive focus on violence and lend organizations that conduct terrorist activities a veneer of respectability and

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[129]*See* Abbas Amanat, *Empowered Through Violence: The Reinventing of Islamic Extremism*, *in* THE AGE OF TERROR: AMERICA AND THE WORLD AFTER SEPTEMBER 11, at 23, 44 (Strobe Talbott & Nayan Chanda eds., 2001) (describing bin Laden "and his associates [as] men of worldly capabilities who could employ business administration models to generate revenue [and] invest capital in the market"); Wechsler, *supra* note 64, at 133–34 (discussing role of contributions to Islamic charities in supporting terrorism); William K. Rashbaum & Benjamin Weiser, *A Tramp Freighter's Money Trail to Bin Laden*, N.Y. TIMES, Dec. 27, 2001, at B1 (detailing links between businesses set up by bin Laden associates and funding for terrorism, including September 11 attacks); Risen, *supra* note 125 (discussing Al Qaeda's diversion of charitable contributions from United States); Mike Robinson, *Ill. Charity Hid Bin Laden Ties*, ASSOC. PRESS ONLINE, May 1, 2002, 2002 WL 20247580 (announcing federal indictment on perjury charges of executives of Illinois charity).

Congress has made findings in enacting legislation that echo these concerns. *See* USAPA Title III—International Money Laundering Abatement and Anti-Terrorist Financing Act of 2001, Pub. L. No. 107-56, § 302, 115 Stat. 296, 296–98 (codified at 31 U.S.C. § 5311) ("[M]oney launderers subvert legitimate financial mechanisms and banking relationships by using them as protective covering for the movement of criminal proceeds and the financing of crime and terrorism.").

The aid to terrorist groups provided by charities does not always reflect the intentions of such organizations. In many instances, well-placed persons within the organization may divert funds to terrorist groups without the knowledge or approval of the organization's officers or board. *See* Wechsler, *supra* note 64, at 133 ("[M]any legitimate charities have been infiltrated by Al Qaeda associates who then steal money that they direct to terrorism.").

[130]Some critics of the effort to disrupt terrorists' funding sources validate this concern. *See, e.g.*, Tahir Mahmoud, *Muslim Charities in US Feel the Force of Anti-Islamic Crackdown*, MUSLIMEDIA INT'L, Jan. 1–15, 2002, *at* http://www.muslimedia.com/archives/world02/us-charity.htm ("Apparently zionists consider it a crime to support the children of martyred Palestinians."); *cf.* Amanat, *supra* note 129, at 45 (critiquing as perversion of Islam vision of "martyrdom in the 'battle for the sake of God'" reflected in last writing of September 11 hijackers' ringleader, Mohamed Atta). *See generally* ESPOSITO, *supra* note 65, at 282 ("The use of violence against civilians revealed deep cleavages within Hamas. If some of its leaders claimed that they were not able to control some members of the [military] brigade, its critics rejected this distinction between its political and military branches as duplicitous.").

religious authority.[131] As Congress found several years ago, organizations that commit terrorist acts "are so tainted by their criminal conduct that *any* contribution to such an organization facilitates that conduct."[132]

Immigration law, by leveraging the sought-after good of lawful immigration status in the United States, can play a significant role in fashioning alternatives to these organizations. New organizations can accomplish humanitarian or market goals without subsidizing terrorism. Strengthened antiterrorism accounting procedures can assist in this task. Transparency in tracing the destination of contributions will deter organizations from deceiving contributors by disguising aid for violent activities as humanitarian assistance.[133] Just as for-profit corporations in the post-Enron era have to demonstrate that their accountants are reliable,[134] charities with sound antiterrorist accounting will earn the trust of

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[131]*Cf.* Amanat, *supra* note 129, at 42–43 (describing how schools preaching Wahhabi interpretation of Islam favored by Saudi establishment became "fertile ground for garnering support for bin Laden"). *But see* Mahmoud, *supra* note 130 ("Hamas runs several different wings; its military wing is completely distinct from its charitable wing, which runs schools, clinics, orphanages, and so forth.").

[132]*See* Antiterrorism and Effective Death Penalty Act of 1996, § 301(a)(7), 110 Stat. 1214, 1247 (codified at 18 U.S.C. § 2339B(a)(7) (2001)); *cf.* HEYMANN, *supra* note 22, at 156 (arguing in favor of "[f]orbidding financial support of any organization that is actively involved in supporting political violence"). The infrastructural approach taken by the USAPA in dealing with terrorist organizations resembles the economic pressure placed on the apartheid regime in South Africa by the transnational corporate divestment movement. *See* Audie Klotz, *Norms Reconstituting Interests: Global Racial Equality and U.S. Sanctions Against South Africa*, 49 INT'L ORG. 451, 464 (1995) ("[A]dvocates of divestment . . . argued for complete corporate withdrawal as well as government [and international] enforcement of economic disengagement.").

[133]Some charities have not attained this level of transparency. *See* John Mintz, *Muslim Charity Leader Indicted; Foundation Charged With Giving Money, Aid to Al Qaeda, Bin Laden*, WASH. POST, Oct. 10, 2002, at A14 (reporting on indictment of Esaam Arnaout, director of Benevolence International Foundation in Chicago, who allegedly solicited contributions for "humanitarian" aid and siphoned off these contributions to support suicide bombers); Eric Lichtblau, *Charity Leader Accepts a Deal in Terror Case*, N.Y. TIMES, Feb. 11, 2003, at A1 (reporting on Arnaout's guilty plea, in which he did not admit to funding terror but acknowledged that he had concealed use of funds for Chechnyan and Bosnian rebel fighters by telling donors that contributions would be "solely for humanitarian work for the benefit of civilian populations"); *cf.* Holy Land Foundation for Relief & Development v. Ashcroft, 219 F. Supp. 2d 57, 71–72 (D.D.C. 2002) (ruling that record supported government's contention that organization allegedly linked with Hamas sent special assistance to families of suicide bombers).

[134]*See* Floyd Norris, *Can Investors Believe Cash Flow Numbers*, N.Y. TIMES, Feb. 15, 2002, at C1 (discussing investors' search for sound accounting in wake of Enron fiasco); *cf.* John C. Coffee, Jr., *The Future as History: The Prospects for Global Convergence in Corporate Governance and Its Implications*, 93 NW. U. L. REV. 641, 693 (1999) (noting that consistent transnational accounting standards can promote informed investing).

prospective donors.[135] Organizations that decline to implement such procedures should not be able to exploit the pool of human and financial capital represented by America's immigrants.

The transnational accountability perspective is consistent with First Amendment principles.[136] Mindful of national security concerns, courts have never mechanically applied First Amendment categories to the immigration context. Instead, courts have sought to balance the transnational and democratic conceptions of accountability.

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[135]Charities with sound antiterrorist systems will more effectively solicit contributions. *See* Wechsler, *supra* note 64, at 143 (predicting that "risk-averse donors [will] start to find alternative ways to further their political causes"); Diana J. Schemo, *Arab Students Rediscover Voices Silenced on Sept. 11*, N.Y. TIMES, Jan. 28, 2002, at A7 (quoting student who said that her group of activists for Palestinian rights "wanted to contribute to a charity that said it built playgrounds in Bethlehem but that students feared the foundation might turn up on a list of terrorist fronts").

The trend toward accountability has also affected the way in which business organizations function in international and domestic legal systems. Policies that promote institutional accountability are also an important element in other legal contexts, such as sexual harassment law. *See, e.g.*, Faragher v. City of Boca Raton, 524 U.S. 775, 805–08 (1998) (discussing importance of corporate sexual harassment policy as defense to sexual harassment claims); *cf.* Peter H. Schuck, *Against (And For) Madison: An Essay in Praise of Factions*, 15 YALE L. & POL'Y REV. 553, 596 (1997) (arguing for more extensive and expeditious disclosure of donations to political candidates and other transactions). *See generally* Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443, 475–86 (2001) (arguing that multinational corporations should be held accountable for human rights violations resulting from enterprises over which they have control).

[136]The War Power would allow Congress to bar material assistance by citizens as well as immigrants to organizations such as Al Qaeda, against whom Congress has authorized military action in response to the September 11 attacks. The government would have a panoply of remedies, both civil and criminal, in such an instance. As John Walker Lindh, the American captured in Afghanistan with Taliban and Al Qaeda forces, has discovered, even American citizens allegedly offering assistance to Al Qaeda may be prosecuted criminally. It seems likely that an American citizen who did not go to Afghanistan but instead sought to aid Al Qaeda at a distance, through significant financial support, could be prosecuted as well. The citizen charged with providing such assistance would probably be precluded from asserting as a defense that his contribution was intended for Al Qaeda's philanthropic endeavors. *See* Cramer v. United States, 325 U.S. 1, 38–39 (1945) (noting in dicta that offering financial services to enemy agents, if proven by two witnesses, might well constitute treason). The government would also be able to proceed civilly in such a case, seizing funds that the citizen had given to the enemy government or entity. *See* McGrath v. Mfrs. Trust Co., 338 U.S. 241, 246–47 (1949) (discussing provisions of Trading with the Enemy Act). For a useful analysis of the ability of the United States to engage in military action in Afghanistan to reduce the threat of future attacks by Al Qaeda, see Falk, *supra* note 22, at 12 (arguing that action by United Nations was not practical substitute for self-defense undertaken by United States); *see also* Harold Hongju Koh, *Preserving American Values: The Challenge at Home and Abroad*, *in* THE AGE OF TERROR, *supra* note 129, at 143, 154 ("Given bin Laden's responsibility for the September 11 attacks, international law also permits us to treat him and those in his network as unlawful combatants who can be subjected to a reciprocal and proportionate military response.").

Reflecting this balance, case law has tracked the "infrastructure, not ideas" paradigm of the integrative approach. Modern courts have been reluctant to uphold the deportation of immigrants merely for the expression of ideas embodied in organizational membership. Instead, courts have considered the immigrant's "degree of participation" or "meaningful association" in a designated organization.[137] Courts have also recognized that Congress, through its power over defense and naturalization, can shape the contours of immigrant status to meet national security concerns and provide an appropriate proving ground for prospective citizens.[138] Congress acts within that authority when it reserves both immigrant and visitor status for persons who decline to build the global infrastructure of terror.[139] Indeed, far from silencing immigrants, the USAPA removal provisions may create *more* speech, encouraging immigrants to question and change transnational institutions that engage in violence.[140]

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[137]Generally, courts have regarded persons who belonged to an organization for a short period and whose links to the organization seemed casual as lacking the requisite degree of participation. *See, e.g.*, Rowoldt v. Perfetto, 355 U.S. 115, 118 (1957) (refusing to deport immigrant who had been member of Communist Party for less than one year and had worked as salesman at Party bookstore, apparently because he needed job). Courts have been more willing to find a meaningful association in cases involving longer and more intense involvement, collaboration with leaders of the organization, and maintenance of secrecy surrounding group activities. *See* Galvan v. Press, 347 U.S. 522, 524 (1954) (deporting immigrant who had regularly attended Party meetings and had been active in Speaking Club, affiliated group). Courts also generally have declined to find the requisite degree of participation by immigrants substantially engaged in lawful domestic activities, such as peaceful activism for social justice, even when these activities flowed from Communist Party membership. *See* Gastelum-Quinones v. Kennedy, 374 U.S. 469, 479–81 (1963); Najjar v. Reno, 97 F. Supp. 2d 1329, 1360–62 (S.D. Fla. 2000), *order vacated and appeal dismissed by* 273 F.3d 1330 (11th Cir. 2001). One court has held that Congress, in setting criteria for the deportation of immigrants, is subject to the same First Amendment restrictions that apply in criminal law or other contexts. *See* Am.-Arab Anti-Discrimination Comm. (AADC) v. Meese, 714 F. Supp. 1060, 1084 (C.D. Cal. 1989), *aff'd in part, vacated sub nom.* Am.-Arab Anti-Discrimination Comm. v. Thornburgh, 970 F.2d 501, 505 (9th Cir. 1991); *see also* Bosniak, *supra* note 14, at 1131–37 (discussing district court decision). Under an integrative approach, the government requires more flexibility than the *AADC* decision permitted.

[138]*See* Chae Chan Ping v. United States, 130 U.S. 581, 603 (1889). For critiques of this proposition as it applies to the intersection of immigration status and First Amendment doctrine, see Bosniak, *supra* note 14, at 1130–37; Katherine L. Pringle, Note, *Silencing the Speech of Strangers: Constitutional Values and the First Amendment Rights of Resident Aliens*, 81 GEO. L.J. 2073, 2077–80 (1993).

[139]*Cf.* Neuman, *supra* note 21, at 330–32 (arguing that 1996 statutory designation provisions are consistent with First Amendment principles, even when, as in 18 U.S.C. § 2339B(a)(1), they subject U.S. citizens to criminal penalties for material support of designated organizations).

[140]*See generally* ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES 30–43 (1970) (discussing importance of voice to dislodging complacency within organizations). *See also* ESPOSITO, *supra* note 65, at 244–45 (arguing that democracy is important element of modern Islam while acknowledging that "[a] major issue facing Islamic movements is their ability, if in power, to tolerate diversity and political dissent"). If the

2. Designation and Democratic Norms

Procedural aspects of the provisions on designated organizations nevertheless pose a significant problem for both democratic accountability and fairness in time. Designation is a powerful weapon, allowing the government to block bank accounts and bar the organization's receipt of material support.[141] Permitting the government to designate an organization without providing due process, such as notice and an opportunity to respond, is a recipe for arbitrariness and irremediable harm.

The most significant basis for concern is the impact of designation on charities and other financial entities that do not engage in violence against civilians. For example, the U.S. Secretary of State has designated Al Barakaat, an organization working to rebuild Somalia's devastated infrastructure. While the government has not demonstrated a link between Al Barakaat and terrorist activity, the consequences of designation have imperiled recovery in Somalia.[142] Affording the organization predeprivation notice and an opportunity to be heard could have averted this harm by providing the U.S. Secretary of State with more information with which to reach a decision. Tailoring security concerns to democratic principles would require such safeguards.

B. Undesignated Organizations

The USAPA removal provisions dealing with undesignated organizations constrain government further by requiring proof of a nexus between the assistance rendered by the immigrant and a specific terrorist activity.[143] The undesignated organization provisions also impose what amounts to a duty of care

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USAPA is to assist in achieving these goals, it must exist alongside a more proactive American foreign policy that stresses openness and equal rights among our allies. Koh, *supra* note 136, at 145, 162 (calling for continuation of "long-standing [United States] effort to promote respect for human rights on the part of... coalition partners"). To ensure that the USAPA, in promoting transnational accountability, does not chill democratic accountability, courts should also resist any governmental attempts to use the statute to target immigrants who question United States domestic and foreign policy.

[141] *See* Nat'l Council of Resistance of Iran v. Dep't of State, 251 F.3d 192, 204 (D.C. Cir. 2001); *see also* United States v. Rahmani, 209 F. Supp. 2d 1045, 1049–54 (S.D. Cal. 2002) (holding that designation decision by U.S. Secretary of State may be attacked collaterally by defendants in criminal proceeding and that designation provisions of the Antiterrorism and Effective Death Penalty Act of 1996 are unconstitutional on their face because they fail to provide organizations with opportunity to submit evidence challenging designation).

[142] *See* Donald G. McNeil, Jr., *How Blocking Assets Erased a Wisp of Prosperity*, N.Y. TIMES, Apr. 13, 2002, at A10.

[143] INA § 212, 8 U.S.C. § 1182(a)(3)(B)(iv)(VI)(dd) (Supp. 2002). The nexus requirement also applies in the case of organizations not designated at the time of the charged conduct, but designated previously or subsequently. *See id.*, 8 U.S.C. § 1182(a)(3)(A).

on immigrants. If the government can show a nexus, the burden shifts to the immigrant to prove that "he did not know, and should not reasonably have known, that [his assistance] . . . would further the organization's terrorist activity."[144] Prospective application of this burden-shifting approach is appropriate. However, retroactive application fails the test of fairness in time.

1. Accountability and the Duty of Care

In creating a duty of care for immigrants based on reasonableness, Congress clearly sought to promote the accountability of terrorist organizations. To this end, the duty of care provision provides for the removal of those who may not have specifically intended to further terrorist activity, but who acted with awareness that this result would occur, or failed to take reasonable steps, such as asking questions or seeking documentation, that could have led to such awareness. As in other settings, such as tort, a reasonableness standard provides a measure of safety for the public that a standard based on specific intent or recklessness lacks.[145]

In the terrorist context, a duty of care provides a particularly important safeguard. Terrorist organizations perpetrating outrages such as the September 11 attacks thrive on compartmentalized decisionmaking and access to information.[146] Deniability is their stock in trade. Participants who ask questions about matters beyond their "need to know" threaten deniability. A standard of care requiring reasonable questions thus disrupts the organizational core of the terrorist enterprise.[147]

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[144]*Id.*, 8 U.S.C. § 1182(a)(3)(B)(iv)(VI)(dd).

[145]*See generally* CARL T. BOGUS, WHY LAWSUITS ARE GOOD FOR AMERICA: DISCIPLINED DEMOCRACY, BIG BUSINESS, AND THE COMMON LAW 173–96 (2001) (discussing evolution of products liability law).

[146]*See* Brian M. Jenkins, *The Organization Men: Anatomy of a Terrorist Attack*, *in* HOW DID THIS HAPPEN?, *supra* note 64, at 1, 9 (discussing importance of compartmentalization in Al Qaeda operations, including September 11 attacks); *cf.* SEBASTIAN DE GRAZIA, MACHIAVELLI IN HELL 9 (1989) (discussing Machiavelli's view that conspiracies fail when they disseminate information too widely among participants).

[147]The legislative history of the USAPA seemingly contradicts both statutory language and legislative purpose on this score. Read superficially, it suggests that to be removable under these provisions, the alien must "intend" to further terrorist activities. *See* 147 CONG. REC. S11046–47 (daily ed. Oct. 25, 2001) (Joint Memorandum of Sens. Edward M. Kennedy & Sam Brownback). An intent standard holds harmless even those persons who, through the exercise of reasonable diligence, could have discovered the relationship of their act to terrorist activity. Such a standard would allow those charged under this subsection to assert in their defense, as Claude Rains protested in a memorable line from the film *Casablanca*, that they are "shocked! Shocked!" that malfeasance could occur. This elaborately orchestrated deniability is an essential element of terrorist infrastructure. Congress clearly intended to dismantle it. The consistency of a reasonableness standard with both the statutory language and Congress's policy goal of greater institutional

To see how the nexus and duty of care requirements would work, consider an example involving alleged fundraising for terrorist activity. A nexus could involve a showing that $15,000 in funds solicited by an immigrant ended up laundered through bank accounts whose "beneficial ownership" resided with a terrorist organization[148] and that such accounts were subsequently drawn down to fund terrorist activities.[149] Despite the government's showing of a nexus, an immigrant might be able to prevail if he could demonstrate that he had made reasonable inquiries of the person or persons receiving the funds about compliance with the money laundering abatement provisions of the new legislation. If, on the other hand, the immigrant had merely handed over a large quantity of cash with no questions about its destination, he would have failed to discharge his duty of care.

2. Shifting the Burden on Duty of Care to the Immigrant

Prospective application of the burden-shifting provisions of the USAPA is also consistent with fairness in time. Consider the test typically used for assessing burdens and standards of proof: the *Mathews v. Eldridge*[150] test that weighs the individual interest, the government's interest, and the risk of error.[151] Here the individual's interest is in avoiding a "false positive" finding that he has acted to further terrorism—a finding that could give rise to detention and removal. The government's interest is in furthering the institutional accountability of terrorist organizations, by encouraging prospective donors of human and financial capital to make reasonable inquiries about the destination of their donations. As is often the case in a *Mathews v. Eldridge* analysis, risk of error is the deciding factor.

For prospective application, the risk of error factor favors placing the burden on the immigrant to demonstrate that he discharged his duty of care, once the government has demonstrated a nexus. Evidence pertaining to the exercise of care

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accountability for terrorist organizations counsels against overreliance on the legislative history on this point. This view is buttressed by the rushed drafting of the legislative history of the USAPA, placed in the *Congressional Record* instead of a formal committee report.

Indeed, read in context, the legislative history seems more an attempt to explain the nexus requirement than to opine on the issue of a standard of care. The discussion cited above appears in the paragraph that describes the absence of a nexus requirement for assistance to *designated* organizations. *See id.* The overarching theme of the paragraph is the clarification that the statute waives proof of nexus only for organizations designated by the U.S. Secretary of State at the time of provision of the alleged assistance. Any impact on the separate issue of the appropriate standard of care seems inadvertent.

[148]*See* 147 CONG. REC. S11036 (daily ed. Oct. 25, 2001) (statement of Sen. Levin) (discussing International Money Laundering Abatement and Financial Anti-Terrorism Act of 2001).

[149]*See* INA § 212, 8 U.S.C. § 1182(a)(3)(B)(iv)(IV)(cc) (Supp. 2002).

[150]424 U.S. 319 (1976).

[151]*Id.* at 335.

is within the immigrant's control. Upon the enactment of the USAPA, a prudent lawyer would tell a prospective large donor[152] to put inquiries to organizations in writing. To meet his burden, the immigrant would produce these documents.[153] Such shifting of the burden based on a party's superior access to information is hardly without precedent in immigration law. Indeed, adjudication of the most common basis for removal—physical presence in the United States without documents establishing a lawful basis for such presence—involves an analogous burden-shifting process.[154]

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[152]An integrative approach would require that, to be a basis for removal, any assistance rendered would have to be "material" in a legal sense, i.e., not casual or de minimis. Consider the case of membership dues. Ordinarily, such dues represent a nominal amount. Allowing the payment of dues to qualify as "material support" under INA § 212, 8 U.S.C. § 1182(a)(3)(B)(iv)(VI), would convert membership itself into a basis for removal, undermining the "infrastructure, not ideas" paradigm outlined in the previous subsection. *See supra* notes 123 and 137–40 and accompanying text (setting out paradigm).

[153]The defendant's control over this evidence effectively counters the argument of opponents of burden-shifting that the immigrant is being asked to "prove a negative." *See* 147 CONG. REC. S11022 (daily ed. Oct. 25, 2001) (statement of Sen. Feingold). One can just as easily conceptualize the immigrant's burden here as proving a positive, i.e., that he made reasonable inquiries. Viewed prospectively, the immigrant is on notice that he should make such inquiries and retain evidence to that effect. The notice provided and the immigrant's control over the evidence make burden-shifting fair on the issue of exercise of care. On other issues, such as the nexus between the assistance rendered and specific terrorist activity, burden-shifting would not meet the fairness in time test. Given all the events in the world that one individual cannot control, it would not be reasonable to require an immigrant to prove that none of his acts had a connection to any terrorist activity. The USAPA recognizes this unfairness, too. That is why the burden of proving nexus resides with the government. In a case where the government is more likely to have control over the relevant evidence, the government should bear the burden. *See* Woodby v. INS, 385 U.S. 276, 279 (1966) (interpreting INA to mandate that on certain issues government bears burden of proof by clear and convincing evidence in deportation proceedings).

[154]Under section 291 of the INA, 8 U.S.C. § 1361, *see* LEGOMSKY, *supra* note 33, at 687, once the government has established that the person in immigration proceedings is a foreign national, the immigrant bears the burden of proving "the time, place, and manner" of his entry into the United States. The same logic of control over evidence that drives the burden-shifting under the USAPA dictates this result. The government would encounter difficulty in describing the time, place, and manner of entry for the tens of millions of immigrants and visitors who enter the United States annually. However, the immigrant has documentation readily within her control, including a visa and a stamped passport, to demonstrate that she has entered the country lawfully. If an immigrant cannot produce this evidence, and the government does not have it, it is not unreasonable to presume that she has entered without inspection. Burden-shifting is also a feature that courts have upheld in the civil forfeiture context. *See* Annette Gurney, *Beginner's Guide to Federal Forfeiture*, J. KAN. BAR ASS'N, Mar. 2001, at 18, 21 (discussing imposition of burden of proof on claimant to show that he was "innocent owner" of property seized by federal government).

3. Retroactive Application

The analysis of burden-shifting is different for retroactive application. Here, the respective interests are the same, but the risk of error—the risk of a false positive—rises exponentially. Prior to the effective date of the USAPA, the immigrant had no notice of a legal requirement for making the inquiries or obtaining the documentation that the accountability reading of the Act contemplates. An immigrant who cannot produce documentation because he did not have notice that such documentation was expected bears a high risk that a factfinder will erroneously determine that he aided terrorism.

An example from the post-September 11 investigation illustrates how retroactive application violates fairness in time. Consider the case of Mohdar Mohamed Abdoulah, an acquaintance of two of the hijackers.[155] Abdoulah provided the hijackers with what could be considered material assistance, including selecting flight schools for the hijackers to attend.[156] The government could readily prove that such assistance furthered the attacks of September 11. Yet there is no indication that Abdoulah had any prior knowledge of the hijacker's plans.[157]

After September 11, Abdoulah's acquiescence in the hijackers' requests for help seems puzzling, at best. Given what we know now, the law can reasonably expect a person to make a connection between flight schools and potential terrorism. A person approached by another for help in making arrangements to attend a flight school could reasonably be required to ask basic questions such as, "Are you employed by a carrier that will pay for the school?" or "Are you interested just in flying, or also in landing and taking off?" Before September 11, however, even agencies charged with protecting the nation, such as the FBI, failed to ask the right questions.

Before September 11, in other words, a flight school was just a flight school. It seems only fair to impose the burden on the government to prove that the

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[155]*See* James Sterngold, *Muslims in San Diego Waver on Bail Pledge*, N.Y. TIMES, Dec. 9, 2001, at B6.

[156]*See id.*

[157]*See* James Sterngold, *Man Linked to Hijackers Is Granted Bail; San Diego Muslims Put up Money*, N.Y. TIMES, Nov. 21, 2001, at B7. Abdoulah is currently charged with criminal counts of immigration fraud, stemming from his alleging on his petition for asylum that he was a Somali national, when in fact Yemen is his country of origin. *Id.* Based on Abdoulah's admitted assistance to the hijackers and the fact that the hijackers are not available to confirm his account, a judge has set Abdoulah's bail at $500,000. Sterngold, *supra* note 155. Members of the Muslim community who initially indicated a willingness to raise the money for the bond have not yet achieved success, because of wariness about federal scrutiny and concern that Abdoulah is not well known in the community. *See id.*

immigrant knew then or should reasonably have known that his assistance would further terrorist activity. Retroactively imposing the burden of proof on the immigrant for pre-September 11 conduct obliges individuals not merely to make reasonable assessments, but to predict the future. Requiring clairvoyance is not consistent with fairness in time.

For this reason, retroactive application of new criteria for removal violates not merely procedural, but substantive due process.[158] Immigrants, of whatever status, should be on notice to conform their conduct before the law can impose consequences such as detention[159] and removal. Retroactive application of removal provisions therefore fails the test of democracy.

VI. CONCLUSION

The September 11 attacks pose a challenge for reconciling security and democracy in American immigration law. The consequences of discounting security concerns are clear in the hijackers' gaming of the immigration system. However, the elevation of security at the expense of democracy threatens both of these crucial values.

This Article proposes an integrative approach to the interaction of democracy and security in immigration law. The premise of the integrative approach is that democracy and security are interdependent in the immigration arena. Immigrants historically have pushed the United States to live up to its democratic ideals. Targeting immigrants threatens to render those ideals expendable. At the same time, a nation must effectively protect persons within its borders if it is to make good on the promise of self-government that democracy entails.

On an integrative view, immigration measures needed to enhance security also challenge America to refine and reaffirm its commitment to democracy. Two criteria are central: institutional accountability and fairness in time. Accountability is necessary to control the institutions of American democracy, guarding against overreaching and inequality. Accountability requires that American institutions justify actions that single out particular groups, even (or perhaps especially) groups that are universally reviled, by showing a reasonable relationship between those actions and public safety. Transnational accountability

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[158] *See* INS v. St. Cyr, 533 U.S. 289, 316–17 (2001) (interpreting statute to avoid hardship that would have arisen from retroactive repeal of statutory relief from deportation upon which immigrant relied in plea bargain).

[159] *See* USAPA § 412(a) (codified at 8 U.S.C. § 1226a(a)) (providing for mandatory detention of aliens upon certification by U.S. Attorney General that they have engaged in terrorist activity); *cf.* Drew & Miller, *supra* note 95 (discussing lengthy detention of overstays pending verification of detainees' lack of involvement in terrorism).

is also vital, dismantling infrastructures of violence around the world, particularly those that support the targeting of civilians here and abroad.

Fairness in time supplements democratic accountability, and tempers transnational accountability, by setting norms of notice and prospective application for immigration law that echo the dominant strains of American jurisprudence. By respecting reasonable expectations that courts have allowed immigration law to undermine since *Chae Chan Ping v. United States* (*Chinese Exclusion Case*),[160] fairness in time permits immigrants to exercise the human faculty of planning for a better future. Fairness in time also recognizes that disregarding the reliance interests of any group, including immigrants from particular countries of origin, fosters disillusion and despair that can damage national security.

Institutional accountability and fairness in time provide the flexibility and fit required for immigration responses to terrorism. Consider three issues: the detention of immigrants based on nationality or religion, the closure to the public and media of immigration proceedings, and the USAPA's provisions for the removal of immigrants who assist or materially support terrorist activity. Immigration authorities should tailor detention to danger and flight risk and not take the easy way out of reliance on nationality or religion. Courts should require that immigration officials who seek to close immigration hearings show a particularized basis for such a request.

With regard to the USAPA's terrorist removal provisions, transnational accountability supports treating designated terrorist organizations, including Al Qaeda, as integrated organizations in which assistance for alleged humanitarian activities helps to market and subsidize violence against civilians. However, to avoid arbitrariness, the U.S. Secretary of State should offer organizations notice and an opportunity to be heard prior to designation. In enforcing the USAPA's removal provisions regarding assistance to undesignated terrorist organizations, once the government has shown a nexus between assistance and specific terrorist activity, it is appropriate to shift the burden of proof to the immigrant to demonstrate that he has made reasonable inquiries about the ultimate object of his assistance. However, fairness in time requires that both the burden-shifting provision and the substantive removal provisions of the statute operate prospectively, not retroactively, to provide adequate notice to the immigrant of the contours of his duty of care.

The focus of the integrative approach on institutional accountability and fairness in time provides guidance in meeting post-September 11 challenges to American immigration law. Decisionmakers caught up in the rush of events may not always find time to reflect on the interaction of democracy and security.

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[160] 130 U.S. 581 (1889).

Turmoil may tempt decisionmakers to trade off one value against the other. An integrative approach reminds us that trade-offs cannot substitute for helping democracy and security go forward in the only way possible: together.