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Protecting America First: Deporting Aliens Associated with Designated Terrorist Organizations That Have Committed Terrorism in America in the Face of Actual Threats to National Security

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PROTECTING AMERICA FIRST: DEPORTING
ALIENS ASSOCIATED WITH DESIGNATED TERRORIST
ORGANIZATIONS THAT HAVE COMMITTED TERRORISM
IN AMERICA IN THE FACE OF ACTUAL THREATS TO
NATIONAL SECURITY

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I. INTRODUCTION

On September 11, 2001, members of a terrorist organization killed nearly 4,000 people on American soil when they carried out deadly attacks they had planned while some of them were living in the United States for nearly nine months and completing their training for this mission.¹ Unfortunately, the American government, unaware of these aliens' plan, did not have the power to deport these known members of a terrorist organization because of their membership in that group.² Without evidence these aliens were planning the attacks, officials were powerless to remove from this country these real threats to national security.

Although that Tuesday began as a typical September day, before most Americans had poured their first cup of coffee life as we knew it changed right in front of our very eyes. At 8:45 a.m., a commercial airliner slammed into the North Tower of the

¹*Ashcroft Confirms New Terror Threat*, (Nov. 27, 2001), at <http://www.cnn.com/2001/US/11/28/rec.athome.facts/index.html> (last visited Nov. 28, 2001) [hereinafter *Ashcroft*]. This fact sheet listed the events occurring the week of November 27th relating to the 'War on Terrorism' and provided an update on the number of victims from the September 11th attacks. While the numbers did not include the victims from the plane crash in Pennsylvania, the total dead or missing is estimated at more than 4,000 people; see also Michael Elliot, *Hate Club*, TIME MAGAZINE, Nov. 12, 2001, at 58; Michael Elliot, *How the U.S. Missed the Clues*, TIME MAGAZINE, May 27, 2002, at 24.

Officials have since revised the September 11th death toll on numerous occasions, and as of the first anniversary of the attacks, the count stands at 3,025 people killed. Eric Lipton, *A Nation Challenged: Death Toll Is Near 3,000, but Some Uncertainty Over the Count Remains*, N.Y. TIMES, Sept. 11, 2002, at G47.

²8 U.S.C. § 1227(a)(4)(B) (2000), amended by Pub. L. No. 107-56, 115 Stat. 272 (2001). Any alien who has engaged, is engaged, or at any time after admission engages in any terrorist activity (as defined in section 1182 (a)(3)(B)(iii) of this title) is deportable. § 1227(a)(4)(B) (amendments omitted to show force of statute prior to September 11th); see 8 U.S.C. § 1182 (a)(3)(B)(iii) (2000) amended by Pub. L. No. 107-56, 115 Stat. 272 (2001).

'Engage in terrorist activity' means to commit, in an individual capacity or as a member of an organization, an act of terrorist activity or an act which the actor knows, or reasonably should know, affords material support to any individual, organization, or government in conducting a terrorist activity at any time, including acts such as gathering information on potential targets for terrorist activity, preparing or planning a terrorist activity, providing any type of material support, soliciting of funds, and solicitation of individuals for membership in a terrorist organization.

Id. (amendments omitted to show force of statute prior to September 11th).

World Trade Center in New York,³ immediately engulfing the upper floors of the building in jet-fuel fired flames. Within minutes, every news station in America began covering what people originally believed to be a “freak accident.”⁴

Shortly thereafter, at 9:06 a.m., Americans would learn that this was not the case.⁵ We watched on live television as a second commercial airliner barreled into the South Tower.⁶ A similar inferno ensued. At this point, it was quite obvious that New York was under attack, and many people would die as a result.

Unfortunately, we could not imagine just how many people would be killed from the impact of the planes and the subsequent explosions. In fact, we did not imagine that the impact of the planes could take the towers down. But that is exactly what happened. Once again, we watched on live television as the South Tower crumbled to the ground.⁷ We gasped as the 110-story steel structure turned to dust as it showered down on those who stood below.⁸ We cried as we watched terrified New Yorkers run screaming from the debris of the falling tower.⁹ As if this was not already enough death and destruction to bear, we watched the North Tower crumble just twenty-nine minutes later.¹⁰

Once the dust began to settle, we began to comprehend that anyone remaining inside the buildings that might have survived the impact of the airplanes, would not have survived the disintegration of the buildings.¹¹ Even more disheartening – we realized that many of those left inside the now-crumbled towers were the firefighters, policeman, and emergency medical technicians, who had rushed into the buildings to save those injured in the initial explosions.¹²

We focused in silent disbelief on the unimaginable events unfolding before our eyes, and we soon learned that another plane had crashed into the Pentagon in Washington, D.C., and then another crashed into a rural Pennsylvania field.¹³ We understood that America, not just New York, was under attack.¹⁴ We learned shortly after the attacks that investigators determined that a group of terrorists had conducted these deadly strikes.¹⁵

³Nancy Gibbs, *Day of Infamy*, TIME MAGAZINE, Sept. 11, 2001, Special Issue, at 30.

⁴*Id.* at 31.

⁵*The Today Show* (NBC television broadcast, Sept. 11, 2001) [hereinafter *Today Show*].

⁶*See* Gibbs, *supra* note 3, at 31.

⁷*Id.* at 45.

⁸*Id.*

⁹*See Today Show, supra* note 5.

¹⁰*See* Gibbs, *supra* note 3, at 45.

¹¹*See Today Show, supra* note 5.

¹²*See* Gibbs, *supra* note 3, at 45.

¹³*Id.* at 41.

¹⁴*Id.* at 38.

¹⁵*Id.* at 48-49. The article discusses how the passengers who made cellular phone calls from two of the four planes before they crashed told investigators that terrorists had hijacked the planes. The article also mentions that by the afternoon of September 11th, officials at the

We are left full of sorrow and fear by the events of September 11th. But we are angered by the fact that these unspeakable acts were committed not only by terrorists, but terrorists who had entered the United States as aliens and who lived here while plotting and training for these deadly attacks.¹⁶ We are frustrated by the fact that under immigration and naturalization laws effective at the time of the attacks, aliens living in the United States were not deportable for mere association¹⁷ with a known terrorist organization.¹⁸ Therefore, unless these aliens, most of whom were known associates of their terrorist organization,¹⁹ had committed acts proving their intent to carry out the attacks, immigration officials did not have the power to deport them simply because of their status as members of these dangerous groups. Immigration statutes do not specifically provide for deportation for association with terrorist groups,²⁰ and many recent cases involving deportation of aliens, while not specifically addressing the constitutionality of such laws, have protected an alien's right to associate with a terrorist organization by narrowly construing deportation statutes to protect the alien and allow them to remain in the country.²¹

In light of the devastation and destruction caused by the September 11th attacks and the remaining imminent threat of more attacks in this country,²² this Note

National Security Agency had already intercepted electronic transmissions indicating the terrorists involved in the attacks had ties to Osama bin Laden. *Id.* See Reuel Marc Gerecht, *The Future of bin Ladenism*, N.Y. TIMES, Jan. 11, 2002, at A21 (describing Osama bin Laden as the leader of the terrorist group Al-Qaeda, whose mission is to make America "taste [the] bitterness" bin Laden harbors because Islam is no longer the "glorious and militarily strong civilization" it once used to be).

¹⁶See Elliot, *supra* note 1.

¹⁷The word "association" is defined in the context of this note as mere "affiliation" or "membership." "Affiliate" means to unite or associate oneself. WEBSTER'S NEW UNIVERSAL UNABRIDGED DICTIONARY 32 (2d ed. 1979). "Membership" means the state of being, or the status as, a member (a person belonging to some association, society, community, party, etc.). *Id.* at 1122-23.

¹⁸8 U.S.C. § 1227(a)(4)(B) (2000), amended by Pub. L. No. 107-56, 115 Stat. 272 (2001); see 8 U.S.C. § 1182(a)(3)(B)(iii) (2000), amended by Pub. L. No. 107-56, 115 Stat. 272 (2001).

¹⁹Steven Erlanger & Chris Hedges, *A NATION CHALLENGED: THE TRAIL; Terror Cells Slip Through Europe's Grasp*, N.Y. TIMES, Dec. 28, 2001, at A1.

²⁰§ 1227(a)(4)(B).

²¹Humanitarian Law Project v. Reno, 9 F. Supp. 2d 1176 (C.D. Cal. 1998) (finding provisions of the federal Antiterrorism and Effective Death Penalty Act (AEDPA) do not criminalize mere association with designated terrorist organizations by prohibiting a United States citizen from providing material support regardless of the donor's intent). See also *Bridges v. Wixon*, 326 U.S. 135, 161 (1945) (Murphy, J., concurring).

²²See *Ashcroft*, *supra* note 1 (fact sheet also contained November 26th warning that terrorists plan attack on natural gas supplies in the U.S.); see also *Bush Says U.S. Needs New Defenses* (Nov. 7, 2001) at <http://stacks.msnbc.com/news/639359.asp#BODY> (last visited Nov. 28, 2001) [hereinafter *Bush Says*]. This article about declarations made by President Bush also discussed the statement made by Homeland Security Director Tom Ridge that America will remain on alert indefinitely against terrorist attacks. Ridge also said individual warnings will be issued about specific threats when credible information about such planned attacks becomes available, such as the warnings issued on October 11th and 29th. See also

proposes legislation that would provide for removal of aliens who are merely associated with a known terrorist organization that has committed acts of terrorism in the United States. Part II outlines the Immigration and Naturalization Services (INS) legislation in effect at the time of the attacks and the rationale behind prohibiting deportation for mere association with a known terrorist organization. Part III discusses newly enacted legislation strengthening deportation laws, which do not go as far as to allow for removal under the proposed circumstances. Part IV traces the historical protection of aliens' right to associate and examines the existence of conflicting views about how to approach judicial review of immigration legislation. Part V presents the argument that aliens should not be given constitutional protection of the freedom to associate with a known terrorist organization that has acted in the United States, and even if aliens deserve that protection, the interest of protecting national security outweighs any constitutional issues. This section also explores and rebuts criticism about the proposed legislation. Part VI concludes that enacting such legislation is necessary to uphold the interest of national security in the face of actual, imminent threats of more terrorist acts against this country.

II. INS LEGISLATION PRIOR TO SEPTEMBER 11TH ATTACKS

Current immigration and naturalization statutes do not specifically provide for deportation of aliens for mere association with a known terrorist organization.²³ Similarly, federal case law does not provide for deportation under these circumstances.²⁴ Many courts have deferred immigration decisions to Congress and handled most cases dealing with such legislation by construing statutes narrowly to protect aliens,²⁵ rather than deciding the larger constitutional issues. Some justices disagree with this approach and suggest that an alien's association with any organization should be protected by the Bill of Rights and therefore, under the First Amendment's Freedom of Association.²⁶ These justices believe that the

Bill Sanderson, *Stop Him: Terrorist Could Strike Today*, N.Y. POST, Feb. 12, 2002, at 1 (describing latest warning that new attack could occur as early as February 12, 2002, and that numerous other alerts have been issued to specific industries such as the Nuclear Regulatory Commission about possible suicide airliner attacks on power plants).

²³§ 1227(a)(4)(B).

²⁴*Bridges v. Wixon*, 326 U.S. 135 (1945) (reversing a judgment against an alien providing for deportation due to Communist Party membership by narrowly defining "membership" to find that alien did not fall within class of aliens subject to removal). The Supreme Court did not decide the larger issue about whether such a statute violated the freedom of association under the First Amendment. *Id.*

²⁵Katherine L. Pringle, Note, *Silencing the Speech of Strangers: Constitutional Values and the First Amendment Rights of Resident Aliens*, 81 GEO. L.J. 2073, 2080 n.56 (1993) (citing Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 564-65 (1990)). Motomura claims courts use constitutional norms derived from areas outside of immigration to guide immigration statute interpretation that reaches results more favorable to aliens than those that would arise through the application of constitutional analysis giving deference to such statutes.

²⁶See Michael Scaperlanda, *Symposium: The Life and Jurisprudence of Justice Thurgood Marshall: Justice Thurgood Marshall and the Legacy of Dissent in Federal Alienage Cases*, 47 OKLA. L. REV. 55 (1994) (discussing Justice Thurgood Marshall's dissents in federal

constitutional provisions extend to all people living in the United States and do not distinguish between citizens and aliens living in this country.²⁷ These justices claim that despite the fact that aliens are given no constitutional protections before they come into the United States, once they enter and live in the country they “become invested with the rights guaranteed by the Constitution to all people within our borders.”²⁸

Some justices contend that since aliens have constitutional rights, Congress does not have the power to ignore them when exercising its “plenary power”²⁹ of deportation.³⁰ These justices claim immigration statutes may not “disregard the basic freedoms the Constitution guarantees to resident aliens.”³¹ As Chief Justice Murphy stated while quoting another Justice in his concurring opinion in *Bridges v. Wixon*,³²

The First Amendment prohibits all laws abridging freedom of press and religion, not merely some laws or all except certain disfavored laws.³³ It would follow that the First Amendment (and other constitutional

alienage cases, in which the Justice suggested that the Bill of Rights applies to aliens and that immigration legislation should be subject to constitutional review); *see also* N.A.A.C.P. v. Alabama, 357 U.S. 449 (1958) (identifying the independent constitutional right of association under the freedom of speech enumerated in the First Amendment).

²⁷*Bridges*, 326 U.S. at 161 (Murphy, J., concurring); *but see* Price v. United States I.N.S., 962 F.2d 836 (9th Cir. 1992) (recognizing Congress may limit associational rights when courts give deference to Congress in the INS arena); *Humanitarian Law Project*, 9 F. Supp. 2d at 1189 (recognizing that even American citizens’ right to associate with foreign terrorist organizations is not absolute).

²⁸*Bridges*, 326 U.S. at 161 (stating such rights include those protected by the First and the Fifth Amendments and by the Due Process clause of the Fourteenth Amendment).

²⁹*See* Pringle, *supra* note 25, at 2078. Pringle explains that the “plenary power” of Congress over federal immigration is derived from the belief that the federal power to regulate aliens is inherent in the definition of national sovereignty and is therefore entrusted to the political branches of government, and basically immune to constitutional challenge or judicial review. Pringle quotes cases recognizing Congress’s ability to enact immigration legislation to exclude and deport, and explains what it means to give deference to Congress’s judgment under the plenary power.

When Congress entrusts its discretionary power over immigration to an executive officer “he is made the sole and exclusive judge of the existence of those facts, and no other tribunal, unless expressly authorized by law to do so, is at liberty to reexamine or controvert the sufficiency of the evidence on which he acted.”

Id. at 2078 n.32 (*quoting* Nishimura Ekiu v. United States, 142 U.S. 651, 660 (1892)).

³⁰*Bridges*, 326 U.S. at 161. *See also* Victor C. Romero, *On Elian and Aliens: A Political Solution to the Plenary Power Problem*, 4 N.Y.U. J. LEGIS. & PUB. POL’Y 343 (2000 - 2001) (explaining that the Supreme Court has implied Congress’s plenary power over immigration by reference to the Naturalization Clause of the Constitution and other express powers over foreign relations and commerce).

³¹*Bridges*, 326 U.S. at 162.

³²*Id.*

³³*Id.* (citing the dissenting opinion in *Jones v. Opelika*, 316 U.S. 584, 609 (1942)).

amendments) make no exception in favor of deportation laws or laws enacted pursuant to the “plenary” power of the Government.³⁴

This recognition, that resident aliens should be given the same constitutional guarantees in the context of immigration as citizens are given in other contexts, has protected aliens from being deported for mere association with a known terrorist organization.³⁵

III. USA PATRIOT ACT OF 2001

In response to the terrorist attacks, Congress, upon the signature of President George W. Bush, passed the Uniting and Strengthening Americas by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act) (hereinafter the Act) on October 26, 2001.³⁶ Congress enacted this legislation in an effort to deter and punish terrorist acts in the United States and around the world, to enhance law enforcement investigatory tools, and to further numerous other purposes.³⁷ In addition to enhancing domestic security against terrorism, enhancing [electronic and wiretap] surveillance procedures, removing obstacles to investigating terrorism, and providing for victims of terrorism, public safety officers, and their families, the Act provides enhanced immigration provisions pertaining to exclusion and deportation.³⁸ The immigration provisions expand the definition of a terrorist organization and the reasons that allow the government to deport a resident alien.³⁹ Prior to this amendment, the statute required actual knowledge or a reason to know that the activity provided material support to an organization planning to conduct a terrorist activity in order for deportation to arise.⁴⁰ Under the USA PATRIOT Act, an alien is subject to deportation for engaging in an enumerated terrorist activity in an individual capacity or as a member of an organization.⁴¹ Under the Act, there is no longer a requirement that the actor knows or reasonably should know, that the action affords material support to any individual, organization, or government in conducting a terrorist activity at any time with respect to the enumerated actions.⁴² Therefore, under the Act, an alien would be deportable for “soliciting funds for a terrorist activity” despite lacking knowledge or

³⁴*Id.*

³⁵*Id.* However, these deportation orders have been struck down based on narrow statutory construction rather than on a constitutional basis. *See supra* text accompanying note 25.

³⁶Uniting and Strengthening Americas by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001).

³⁷*Id.*

³⁸*Id.* at 272-74.

³⁹*Id.* at 347-49.

⁴⁰*See* 8 U.S.C. § 1182 (a)(3)(B)(iii) (2000), *amended by* Pub. L. No. 107-56, 115 Stat. 272 (2001).

⁴¹115 Stat. at 346-47.

⁴²*Id.* *See* § 1182 (a)(3)(B)(iv) (prior to 2001 amendment required knowledge that the activity provided material support to an organization planning to conduct a terrorist activity).

having reason to know that the group is planning to commit a terrorist activity.⁴³ Prior to the amendment, soliciting funds for a terrorist activity would subject an alien to deportation only if the government could prove that the alien knew the group was planning an attack and that the funds would further that attack.⁴⁴

Presently, only some of the prohibited terrorist activities in the new legislation require knowledge that the alien is engaging in terrorist activity, such as giving material support⁴⁵ to an individual who has committed or is planning to commit a terrorist activity.⁴⁶ Despite the expanded definition of terrorist activity subjecting an alien to deportation, the new law does not provide for deportation of aliens who are merely associated with a known terrorist organization.⁴⁷

The Act is the result of two attempts by both the House and Senate to enact antiterrorism legislation.⁴⁸ The House originally passed a bill that included enhanced provisions to strengthen immigration laws,⁴⁹ as did the Senate.⁵⁰ The House leadership, rather than following the usual process for enacting legislation by proceeding to a conference committee with the Senate to reconcile the two bills, incorporated some of the Senate's provisions into a second attempt at anti-terrorism legislation with the introduction of the version of the Act as enacted.⁵¹ The House passed this second version on October 24, 2001, and the Senate subsequently considered and passed the bill on October 25, 2001.⁵²

The quick passage of the second version of the Act came in response to mounting pressure from the public, the media, and the Bush Administration to enact anti-terrorism measures.⁵³ As a result, although the bill broadens the government's power to conduct electronic surveillance of suspected terrorist groups and expands the definition of terrorist activity that will subject an alien to deportation, the Act lacks many provisions desired by Senators, Representatives, and members of the Bush administration alike.⁵⁴ While some feel the legislation does not contain strong

⁴³115 Stat. at 346-47.

⁴⁴§ 1182(a)(3)(B)(iv).

⁴⁵*Id.* at 347. Material support is defined as providing a safe house, transportation, communications, funds, transfer of funds or other material financial benefit, false documentation or identification, weapons (including chemical, biological, or radiological weapons), explosives, or training. *Id.*

⁴⁶*Id.* at 346-47.

⁴⁷*Id.* at 346-49.

⁴⁸147 CONG. REC. S10,990 (daily ed. Oct. 25, 2001) (statement of Sen. Leahy).

⁴⁹H.R. 2928, 107th Cong. (1st Sess. 2001).

⁵⁰S. 1510, 107th Cong. (1st Sess. 2001).

⁵¹147 CONG. REC. S10,990.

⁵²*Id.*

⁵³147 CONG. REC. S10,990. In his address to the Senate, Senator Leahy said, "...[t]here is no question we will vote on this piece of legislation today and we will pass this legislation today The American people and the Members of this body deserve fast work and final action." *Id.*

⁵⁴*Id.*

enough provisions to aid in the prevention and deterrence of terrorist acts, the passage of the Act has concerned some legislators and commentators about the potential infringement on the civil liberties of those at whom the bill is aimed.⁵⁵ It is possible this concern resulted in the absence of a provision expanding the reasons for deportation to include an alien's association with a terrorist organization that acted here in the United States. It is the lack of such a provision that causes the Act to fall short of this Note's proposed expansion of immigration and naturalization law to include deportation for association with a known terrorist organization that has engaged in terrorist activity in America. Without this added power, the government will be unable to effectively remove all threats to our national security.

IV. ALIENS' RIGHT TO ASSOCIATE

A. Aliens' Constitutional Rights, Generally

1. Fourteenth Amendment Applies to Aliens

It is well established that aliens are afforded protections under the U.S. Constitution against state action.⁵⁶ In *Yick Wo v. Hopkins*,⁵⁷ the Supreme Court reversed a Chinese resident alien's conviction and imprisonment under a California law regulating the operation of public laundries.⁵⁸ The law on its face did not make a classification between Chinese and citizen businessmen, but the law as applied adversely affected only Chinese laundry operators.⁵⁹ In invalidating the statute, the Court determined that the Fourteenth Amendment of the Constitution is not limited to the protection of citizens when a state statute is at issue.⁶⁰ The Justices relied on

⁵⁵*Id.* The legislative history in the Congressional Record suggests that some Senators are concerned that the new provisions expanding electronic surveillance provisions, though admittedly needed to combat this new threat of terrorism in America, will infringe upon *Americans'* right to privacy. *Id.* at S11,019 (emphasis added). Wisconsin Senator Feingold expressed concern that the burden of any infringement on civil liberties this legislation will make will be borne primarily by immigrants from Arab, Muslim and South Asian countries. *Id.* at S11,022.

⁵⁶*See* Scaperlanda, *supra* note 26, at 57-58. Scaperlanda's article discussing Justice Marshall's opposition to the Supreme Court majority's approach of giving deference to Congress under the plenary power doctrine introduces the subject of the article by explaining the differential treatment the Court gives to federal and state alienage legislation. Notwithstanding some exceptions, state legislation discriminating based on alienage classifications are often challenged under the Equal Protection clause and subject to heightened scrutiny. As for federal legislation, the Court will apply due process analysis to procedural measures affecting aliens. If the challenge is based on the substantive requirements of the statute, the Court will invoke the plenary power doctrine and give deference to Congress or the President. The statute will be subject to a less exacting standard of review.

⁵⁷118 U.S. 356 (1886).

⁵⁸*Id.* at 374.

⁵⁹*Id.* at 368.

⁶⁰*Id.* at 369.

the language of the Fourteenth Amendment⁶¹ to conclude that “its equal protections of the laws apply to all people within the United States, regardless of their race, color or nationality.”⁶²

The Court continues to recognize the protection of aliens by the Fourteenth Amendment against state legislation and subjects such legislation to an Equal Protection challenge.⁶³ Therefore, the courts take a heightened approach to judicial review of state legislation that applies to aliens.⁶⁴ It has long been recognized that “classifications based on alienage, like those based on race, are inherently suspect and are therefore subject to close judicial scrutiny.”⁶⁵ In reviewing such legislation, courts use a strict scrutiny analysis.⁶⁶ Under strict scrutiny, a court will look to the substantiality of the state’s interest in enforcing the statute in question, and the statute will only be sustained if the means are suitably tailored to serve that compelling state interest.⁶⁷ In order to survive this standard of review, states must tailor such limitations and explore less restrictive alternatives.⁶⁸

2. Governmental Function Exception to State Legislation

While *Yick Wo* established that the Fourteenth Amendment applies to aliens, the courts recognize that aliens’ constitutional rights are limited in certain contexts because of their noncitizen status.⁶⁹ It is permissible for states to exclude aliens from

⁶¹*Id.* It says “Nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” *Id.*

⁶²*Yick Wo*, 118 U.S. at 369.

⁶³See Scaperlanda, *supra* note 26, at 57-58; but see David F. Levi, Note, *The Equal Treatment of Aliens: Preemption or Equal Protection*, 31 STAN. L. REV. 1069 (1979) (suggesting that the Supreme Court’s differential treatment of state and federal decisions concerning alienage classifications are better explained in preemption rather than Equal Protection terms).

⁶⁴*Id.*

⁶⁵See *City of Chicago (Alvarez) v. Shalala*, 189 F.3d 598, 603 (7th Cir. 1999) (using rational basis test under plenary power doctrine to reject due process challenge to federal welfare reform act restricting certain aliens’ eligibility for benefits). The Alvarez court did acknowledge that in *Graham v. Richardson*, 403 U.S. 365 (1971), the Supreme Court held that aliens are a “discrete and insular minority” and applied a “heightened” or “close judicial scrutiny” to the state statute at issue. *Id.* The court limited the *Graham* holding to state legislation. *Id.*

⁶⁶See Pringle, *supra* note 25, at 2081.

⁶⁷*City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 440 (1985) (holding invalid a city ordinance that discriminated against the mentally retarded, but declining to hold mental retardation a quasi-suspect classification entitled to heightened review). *Cleburne* included a detailed discussion about suspect classification and the appropriate standard of review for a suspect class. *Id.*

⁶⁸See Levi, *supra* note 63, at 1076.

⁶⁹See *Foley v. Connelie*, 435 U.S. 291 (1978) (holding New York could bar resident aliens from employment as state troopers under governmental function exception); see also *Romero*, *supra* note 30, at 350 (citing *Fong Yue Ting v. United States*, 149 U.S. 698 (1893), in which

such governmental positions as elected officials,⁷⁰ police officers,⁷¹ and public school teachers, provided the state has a rational basis for enacting such legislation.⁷² In recognizing these limitations on aliens' right to public employment, the Supreme Court looks to the federal government's ability to enact citizenship requirements with respect to federal civil service.⁷³ In addition, the Supreme Court has always recognized that aliens are legitimately excluded from voting in state [and federal] elections.⁷⁴

The Supreme Court recognizes these exclusions from public employment based upon citizenship under a "governmental function" exception to the general standard of strict scrutiny applied to state alienage classifications.⁷⁵ According to the Court, the rationale behind allowing such classifications is an important principle inherent in the Constitution.⁷⁶

The Constitution itself refers to the distinction between citizens and aliens no less than 11 times, which indicates that the Framers meant to give significance in the structure of our government to the status of citizenship. Possessing this status, whether by birth or naturalization, denotes an association with the policy, which, in a democratic republic, exercises the powers of governance.⁷⁷ The form of this association is important: an oath of allegiance or similar ceremony cannot substitute for the unequivocal legal bond citizenship represents.⁷⁸

the Supreme Court recognized that because "they [the Chinese plaintiffs] continue to be aliens, they remain subject to Congress's power to deport them, whenever it is in the government's judgment that removal is necessary or expedient for the public interest"). In *Fong Yue Ting*, the Court upheld a Congressional statute requiring aliens of Chinese nationality to register with the federal government or face deportation. *Id.*

⁷⁰*Id.* at 296.

⁷¹*Id.* at 300.

⁷²*Ambach v. Norwick*, 441 U.S. 68 (1979) (holding a state may refuse to employ aliens who have not manifested an intent to apply for citizenship because public education constitutes a governmental function that states can regulate, so long as there is a rational basis for doing so).

⁷³*Sugarman v. Dougall*, 413 U.S. 634, 646 n.12 (1973) (holding unconstitutional New York statute barring noncitizens from civil service because position did not have a rational relation to the State's legitimate interest). The Supreme Court did note that where citizenship does bear a rational relation to the special demands of the particular position, such a statute will be held constitutional. *Id.* at 647.

⁷⁴*Id.* at 648 (stating that the Supreme Court has never held that aliens have the constitutional right to vote or hold high public office under the Equal Protection Clause).

⁷⁵*Ambach*, 441 U.S. at 75.

⁷⁶*Id.*

⁷⁷*Id.* at 75 (citing *Foley v. Connelie*, 435 U.S. 291, 295 (1978)).

⁷⁸*Id.* (citing *Sugarman*, 413 U.S. at 651-52 (Rehnquist, J., dissenting)).

In *Ambach v. Norwick*,⁷⁹ the Supreme Court rejected an Equal Protection challenge to a New York statute restricting certification as public school teachers to any person who is not a citizen, unless that person had manifested the intent to apply for citizenship.⁸⁰ The persons challenging the constitutionality of the statute were two resident aliens who met all the other state requirements for certification, but who had consistently refused to seek citizenship despite their eligibility for that status.⁸¹ Upon deciding that public school education was in fact a government function, the Court rejected the challengers' argument based on the "principle that some functions are so bound up with the operation of a State as a governmental entity as to permit the exclusion from those functions those who have not become part of the process of self-government."⁸² The Supreme Court adheres to the belief that when dealing with a state's governmental function, the state's concerns about its political community are sufficient justification for classifications based on alienage if the limitation is rationally related to that interest.⁸³ In *Ambach*, the Court found the certification restriction based on a lack of intent to obtain citizenship rational in light of the legitimate state interests of desiring teachers who shape students perceptions, values, and attitudes about government.⁸⁴

This exception, however, is narrowly construed by the courts,⁸⁵ which have held invalid statutes preventing aliens from practicing law,⁸⁶ working as an engineer,⁸⁷ and receiving state educational benefits.⁸⁸ Despite this limited exception to aliens' constitutional right to obtain public employment, it is clear that aliens are granted some Constitutional protection from adverse state action.

B. Differential Treatment of Citizens and Aliens

The governmental function exception exemplifies a willingness by the courts to concede that there is a difference between citizens and aliens. This distinction remains prevalent in America where aliens are governed by immigration and naturalization statutes devoted exclusively to regulating noncitizens' admission, presence, and departure from this country. In fact, the INS laws provide for differential treatment of aliens in many respects. Most notable are the consequences for aliens convicted of crimes, which differ dramatically from those of citizens. An

⁷⁹441 U.S. 68 (1979).

⁸⁰*Id.* at 70.

⁸¹*Id.* at 71.

⁸²*Id.* at 73-74.

⁸³*Id.* at 80.

⁸⁴*Ambach*, 441 U.S. at 79-81. The *Ambach* court added that the statute had a rational relationship to New York's interest because the law did not affect all aliens, only a certain group of aliens that chose to classify themselves as aliens who prefer to retain citizenship in a foreign country. *Id.* at 80-81.

⁸⁵*See id.* at 73.

⁸⁶*Id.* (citing *In re Griffiths*, 413 U.S. 717 (1973)).

⁸⁷*Id.* (citing *Examining Board v. Flores de Otero*, 426 U.S. 572 (1976)).

⁸⁸*Id.* (citing *Nyquist v. Mauclet*, 432 U.S. 1 (1977)).

alien who is convicted of a crime of moral turpitude within five years after admission to the country, and is also convicted of a crime for which a sentence of one year or longer may be imposed, is deportable upon serving his or her criminal sentence.⁸⁹ Citizens, on the other hand, may remain in the country once their sentence is complete. In fact, citizens cannot be removed from the country under the Constitution. However, when utilizing its power over immigration, Congress regularly makes rules for aliens that would be impermissible as against United States citizens.⁹⁰ It is in this context of immigration that the Supreme Court limits aliens' constitutional rights and upholds deportation legislation.

C. Aliens' Freedom of Association with Designated Terrorist Organizations

Currently, resident aliens cannot be deported under a statutory basis for associating with designated terrorist organizations. In addition, cases overruling aliens' deportations for such associations have been decided by narrowly construing the statutes at issue so the aliens' associations did not fall within the kinds prohibited by legislation.⁹¹ Although these cases were not decided on the larger issue of whether prohibiting aliens' rights to associate with terrorist organizations under the First Amendment is unconstitutional, the effect of these holdings is to protect aliens' associations with known terrorist organizations.

D. Plenary Power of Congress over Immigration: Federal Legislation

In the context of immigration, aliens are given constitutional protections in regard to the procedural immigration laws,⁹² and Congress "must respect the procedural safeguards of Due Process."⁹³ Consequently, the government is constitutionally required prior to deportation or exclusion to give an alien notice of the charge and a hearing to provide the alien with an opportunity to present

⁸⁹8 U.S.C. § 1227 (a)(2)(A)(i) (2000), amended by Pub. L. No. 107-56, 115 Stat. 272 (2001). The statute also provides for deportation if an alien is, at any time after admission, convicted of two or more crimes involving moral turpitude arising out of more than one scheme of criminal conduct and regardless of whether the convictions were in a single trial. § 1227 (a)(2)(A)(ii). An alien is also deportable if at any time after admission convicted of an aggravated felony, a violation of a controlled substance law (other than a single offense involving possession for one's own use of a limited amount of marijuana), and certain firearm offenses. §§ 1227 (a)(2)(A)-(C).

⁹⁰*Mathews v. Diaz*, 426 U.S. 67, 79-80 (1976) (claiming Congress's power to exclude and deport aliens has no permissible counterpart in the federal government's power to regulate its own citizens).

⁹¹*Bridges*, 326 U.S. at 135.

⁹²*See Scaperlanda*, *supra* note 26, at 57-58.

⁹³*Price v. United States I.N.S.*, 962 F.2d 836, 841 n.4 (9th Cir. 1992). *But see Diaz*, 426 U.S. at 78-79 (recognizing that the fact aliens are protected by the Due Process Clause does not lead to the further conclusion that all aliens are entitled to enjoy all of the advantages of citizenship). The *Diaz* court went on to list federal statutes that distinguish between citizens and aliens, and explained that Title 8 of the United States Code regulating aliens and nationality is founded on the legitimacy of distinguishing between the two classifications. *Id.*

objections.⁹⁴ However, challenges regarding the substance of Congressional decisions about exclusion, deportation, and naturalization are usually unsuccessful.⁹⁵

The judiciary gives great deference to the legislature in the area of immigration under the plenary power doctrine.⁹⁶ The rationale behind this deference is based on the reality that decisions to exclude or remove aliens must be made by Congress in light of the changing political and economic circumstances.⁹⁷ Therefore, courts will invoke this power and uphold federal statutes when aliens challenge their constitutionality.⁹⁸ In fact, the Supreme Court has even invoked the plenary power over immigration to limit citizen's First Amendment Rights.⁹⁹ In *Kleindienst v. Mandel*,¹⁰⁰ the Supreme Court rejected a claim by American citizens that an exclusion provision violated their right to hear a speech conducted by a foreign journalist who was not allowed to enter the country due to his political beliefs.¹⁰¹ The Court refused to weigh the strength of the government's interests against the rights of the citizens because the majority believed the plenary power doctrine disposed of the need for such analysis.¹⁰² Whether the plenary power doctrine is invoked when aliens or citizens challenge immigration statutes, the recognition of this doctrine has given rise to the application of two different levels of judicial review with respect to state and federal legislation.¹⁰³

1. Majority Approach

It is clear that enacting immigration laws is within the plenary power of Congress.¹⁰⁴ In fact, the Supreme Court, for the same reasons that preclude judicial review of political questions,¹⁰⁵ has followed a narrow standard of review of

⁹⁴*Price*, 962 F.2d at 841 n.4; *Rafeedie v. I.N.S.*, 795 F. Supp. 13, 19 (D.D.C. 1992) (finding that withholding nature of charge from aliens in summary deportation proceedings violates due process).

⁹⁵*See Pringle*, *supra* note 25, at 2083-84 (claiming the Supreme Court has stated that judicial review is limited to the fairness of immigration procedures and does not extend to substantive review of the policy choices made by the federal government).

⁹⁶*Price*, 962 F.2d at 840.

⁹⁷*Id.*

⁹⁸*Diaz*, 426 U.S. at 67; *City of Chicago (Alvarez) v. Shalala*, 189 F.3d 598 (7th Cir. 1999) (invoking the plenary power to reject under rational basis review a challenge to certain provisions of the Welfare Reform Act restricting certain aliens' eligibility for benefits, despite challenger's assertion that the plenary power doctrine only applies to immigration legislation such as deportation measures, rather than welfare legislation that has an impact on aliens).

⁹⁹*Harisiades v. Shaughnessy*, 342 U.S. 580 (1952).

¹⁰⁰408 U.S. 753 (1972).

¹⁰¹*Id.* at 759.

¹⁰²*Id.* at 765.

¹⁰³*See Pringle*, *supra* note 25.

¹⁰⁴*See Romero*, *supra* note 30, at 350.

¹⁰⁵*See Pringle*, *supra* note 25, at 2093 n.146. *Pringle* explains that deference given to immigration legislation under the plenary power doctrine is compared to the doctrine of

Congressional and Presidential decisions about immigration and naturalization.¹⁰⁶ In following this view, courts have reasoned that although aliens are given constitutional rights regarding non-immigration matters, those rights are limited by the plenary power of Congress over immigration when it comes to deportation.¹⁰⁷ In support of this argument, many cases hold that such deference dictates “a narrow standard of review of immigration.”¹⁰⁸ This deferential standard of review is the rational basis test.¹⁰⁹ Under this test, a federal statute’s constitutionality will be upheld if there is a rational relationship between the interest Congress seeks to protect and the measure taken to protect that interest.¹¹⁰ This means that a statute will not be held in violation of the Constitution unless the means used to further the interest Congress seeks to protect are irrational or that the state’s interest itself is not legitimate.¹¹¹ Congress does not need to produce evidence or statistics to “sustain the rationality of a statutory classification” and instead can base its legislation on

political questions, in which certain issues of foreign affairs are not reviewable by the courts. See references:

Baker v. Carr, 369 U.S. 186, 211 (1962), in which the Supreme Court labeled questions of foreign affairs as political questions because they turn on standards that defy judicial application and because in issues of foreign affairs, the government must speak with one voice. The Baker court however, affirmed that questions involving foreign affairs are not categorically removed from review, but should only be considered political questions if, after “discriminating analysis,” a question is found to be inappropriate for judicial handling.

Id. at 2093 n.146.

¹⁰⁶*Price v. United States I.N.S.*, 962 F.2d 836, 841 (9th Cir. 1992) (stating that the Supreme Court has given this deference on the basis that such decisions implicate foreign relations and, “since a wide variety of classifications must be defined *in the light of changing political and economic circumstances*,” such decisions are often more appropriately made by Congress or the Executive rather than the Judiciary) (emphasis added).

¹⁰⁷See *Romero*, *supra* note 30, at 350.

¹⁰⁸*Miller v. Albright*, 523 U.S. 420 (1998) (striking down an Equal Protection challenge to an immigration statute on theory that immigration policy is subject to the plenary power of Congress). See also *A.A.D.C. v. Reno*, 525 U.S. 471 (1999) (stating the judiciary should otherwise defer to Congress’s expertise in immigration matters, even if an analogous prosecution of citizens based on their group affiliations would raise a valid constitutional claim); *Romero*, *supra* note 30, at 357 (suggesting decision in *Landon v. Plasencia*, 459 U.S. 21 (1982), illustrates the Supreme Court’s reluctance to completely protect aliens’ rights even in the face of a rather sympathetic plaintiff). But see *Scaperlanda*, *supra* note 26, at 63 (discussing Justice Marshall’s view as expressed in his dissenting opinion in *Fiallo v. Bell*, 430 U.S. 787, 805 (1977), that deferential review under the plenary power doctrine is “toothless” and amounts to “abdication”). “Abdication” is the [Court’s] abandonment of its [judicial] responsibility. BLACK’S LAW DICTIONARY 1 (Pocket Ed. 1996).

¹⁰⁹*Mathews v. Diaz*, 426 U.S. 67 (1976) (giving deference to Congress in immigration arena and upholding Social Security provision providing certain Medicare benefits to citizens but excluding certain aliens).

¹¹⁰*Id.* at 85.

¹¹¹See *Pringle*, *supra* note 25, at 2082.

“rational speculation.”¹¹² Some courts have described this as “any reasonably conceivable state of facts will suffice to satisfy rational basis scrutiny.”¹¹³

2. Suggested Approach

The immigration cases upholding deportation and exclusion provisions under the plenary power doctrine have not been decided without opposition. While agreeing with the ultimate outcome of upholding such provisions, some Justices have explained in their concurring and dissenting opinions that they reached their decision using a heightened level of scrutiny, which they claim must be applied when immigration laws implicate Constitutional rights of aliens.¹¹⁴ Dissenting Justices have argued that Constitutional restraints impose restrictions on the federal government’s exercise of its immigration power.¹¹⁵ Such limitations on the plenary power over immigration would lead to the more exacting strict scrutiny that is applied against the states.¹¹⁶

In his concurring opinion in *Bridges v. Wixon*,¹¹⁷ Justice Murphy discussed the unconstitutionality of a statute providing for deportation of aliens who are members of, or affiliated with, any organization that believes in the forceful overthrow of the government of the United States.¹¹⁸ While the majority opinion held an alien’s detention pursuant to a deportation statute unlawful by narrowly construing the statute, rather than deciding the case using a constitutional analysis, the concurrence of Justice Murphy dove into the larger issue of whether such a statute was constitutional.¹¹⁹ In deciding the statute was unconstitutional, Justice Murphy claimed allowing deportation under the law would amount to guilt by association, a principle disallowed under the Bill of Rights as against aliens and citizens alike.¹²⁰

¹¹²*Lewis v. Thompson*, 252 F.3d 567, 582 (2d Cir. 2001) (citing *Heller v. Doe*, 509 U.S. 312, 320 (1993), quoting *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 315 (1993)) (using rational basis test to sustain a provision of a federal welfare statute and reverse an injunction requiring the Secretary of the Department of Health and Human Services to provide Medicaid prenatal care to an illegal alien pregnant woman). *See also* Scaperlanda, *supra* note 26, at 57 (claiming deferential review of federal alienage cases lurks somewhere between a rational basis review and no review at all).

¹¹³*Lewis*, 252 F.3d at 582 (quoting *Beach Communications*, 508 U.S. at 313).

¹¹⁴*See* Scaperlanda, *supra* note 26, at 60-62 (stating that Justice Marshall claimed in his dissenting opinion in *Kleindeinst v. Mandel*, 408 U.S. 753, 770 (1972), that he would have applied heightened scrutiny and struck down a law excluding a Marxist scholar from the United States because the government failed to meet its burden by showing it had a compelling interest for enacting the statute).

¹¹⁵*Id.*

¹¹⁶*Id.*

¹¹⁷326 U.S. 135, 161 (1945).

¹¹⁸*Id.* at 157.

¹¹⁹*Id.* at 157. The majority opinion decided the deportation provision was unlawful due to a misconstruction of the statute’s terms, rather than deciding the larger issue of whether such a provision violated an alien’s right to associate under the First Amendment. *Id.*

¹²⁰*Id.* at 163.

Justice Murphy argued that the Constitution protects aliens living within our borders in the exercise of “the great individual rights necessary to a sound political and economic democracy;” therefore, the right of aliens should be weighed against any purported governmental interest.¹²¹ If a court were to apply Justice Murphy’s approach to immigration legislation, a strict scrutiny level of review would be used.

Justice Marshall, in his dissenting opinion in *Kleindeinst v. Mandel*,¹²² disagreed with the majority of the Supreme Court’s approach of using an “unusual” standard of a “facially legitimate and bona fide reason” to find that an immigration provision excluding aliens based on their political associations did not violate the First Amendment.¹²³ Justice Marshall claimed that when the First Amendment freedom of association is implicated, the government’s rationale must survive a heightened standard of review.¹²⁴ “It is established constitutional doctrine, after all, that the government may restrict First Amendment rights only if the restriction is necessary to further a compelling governmental interest.”¹²⁵ According to the dissenting Justice’s opinion, the government had not made such a showing here.¹²⁶

E. Limits on Citizens’ Rights to Associate with Foreign Organizations

Americans’ rights to associate with foreign organizations are limited.¹²⁷ In *Humanitarian Law Project v. Reno*,¹²⁸ the United States District Court of the Central District of California held that a provision in the Antiterrorism and Effective Death Penalty Act criminalizing support by American citizens to designated terrorist organizations was not in violation of their right to associate under the First

¹²¹*Id.* at 166.

¹²²408 U.S. 753, 774 (1972).

¹²³*Id.* at 777.

¹²⁴*Id.*

¹²⁵*Id.*

¹²⁶*Id.* at 779-80. Justice Marshall admits that the government can use its immigration power to regulate aliens when the government has a compelling interest, such as actual threats to national security and genuine requirements of law enforcement. *Id.* at 783-84. In fact, Marshall claims these interests are “surely compelling.” *Id.* (emphasis added). These statements suggest that Justice Marshall might have supported taking a deferential approach to immigration legislation in the context of the modern world in which terrorism poses a real and significant threat to national security. Even if this assumption is incorrect, the “surely” compelling interest of actual threats to national security would, as according to Justice Marshall, survive strict scrutiny review.

¹²⁷See *Humanitarian Law Project*, 9 F. Supp. 2d at 1190 (citing DKT Memorial Fund, Ltd. v. Agency for Int’l Dev., 887 F.2d 295 (D.C. Cir. 1989)). See also *N.A.A.C.P. v. Alabama*, 357 U.S. 449 (1958) (recognizing the independent constitutional right of association under the freedom of speech enumerated in the First Amendment, while distinguishing that case from others in which the Supreme Court upheld governmental regulation that abridged the freedom of association because of the particular violent character of the groups in question and the reasons advanced by the government were constitutionally sufficient to justify infringement on that right). The N.A.A.C.P. court found Alabama fell short of showing a compelling interest to justify infringement on the [citizens’] right to associate. *Id.* at 466.

¹²⁸*Humanitarian Law Project*, 9 F. Supp. 2d at 1190.

Amendment.¹²⁹ The court, in applying a strict scrutiny test because the legislation implicated the right to associate, found the government's interest in national security a compelling interest that permits the imposition on citizens' ability to maintain associations with foreign organizations.¹³⁰ Although a heightened level of scrutiny will be applied where First Amendment rights are implicated, the fact remains that Congress can limit that right where national security is at issue.

V. IMMIGRATION LAWS SHOULD PROVIDE FOR DEPORTATION OF ALIENS
FOR MERE ASSOCIATION WITH TERRORIST ORGANIZATIONS THAT HAVE
ACTED IN THE UNITED STATES

Terrorism poses a real and imminent threat to United States citizens,¹³¹ both abroad and, as proven on September 11th, here in America. Although the government is limited by outside forces as to what steps it can take to prevent the occurrence of terrorist acts against Americans abroad, it has the power to act as stringently as possible to keep its citizens safe at home.¹³² In order to ensure prevention of another terrorist attack on our soil, the government must be able to exercise its deportation power to remove all alien members of a terrorist organization that has acted in the United States. Without that ability, the government will be powerless to remove an alien it knows to be a member of a terrorist organization but has not yet engaged, or cannot prove has engaged, in the unlawful activity beyond membership that is currently required for deportation. If government officials had that power prior to the September 11th attacks, they could have removed the aliens who were silently planning the attacks while living among our citizens,¹³³ which might have enabled officials to help prevent the deadly events of that terrible day.

A. *Aliens Do Not Deserve Constitutional Protection to Associate with Terrorist Organizations that Have Committed Terrorism In America*

1. Plenary Power of Congress

Congress has the plenary power to enact immigration legislation it deems necessary to protect the interest of national security.¹³⁴ The fact that a terrorist organization acted within the United States¹³⁵ and the credible evidence that the group plans future attacks¹³⁶ proves that national security is at risk. The recent acknowledgement by government officials that there are "sleeper cells" hiding in America waiting to launch another attack that could possibly be more devastating

¹²⁹*Id.*

¹³⁰*Id.* at 1192.

¹³¹*See Ashcroft, supra* note 1. *See supra* note 22, and accompanying text.

¹³²*See supra* notes 29, 30 and accompanying text.

¹³³Steven Mufson, *The Way Bush Sees the World*, THE WASHINGTON POST, Feb. 17, 2002, at B1.

¹³⁴*See supra* notes 29, 30 and accompanying text.

¹³⁵*See Gibbs, supra* note 3, at 48-49.

¹³⁶*See Bush Says, supra* note 22.

than the September 11th attacks,¹³⁷ is even greater evidence of the imminent threat to national security. With America facing such grave danger, Congress must be able to exercise its legislative power and enact restrictions on aliens' rights to freely associate with a known terrorist organization that has committed terrorism here in America in an effort to protect national security.

Under the plenary power doctrine, courts give great deference to Congress and uphold such legislation as long as there is a rational relationship between the interest Congress seeks to protect and the measure taken to protect that interest.¹³⁸ Under this doctrine, an immigration statute providing for deportation of aliens who are associated with terrorist organizations would pass the rational basis test. It is rational to believe that Congress can better protect national security by removing aliens for mere association with terrorist organizations, rather than waiting until the government can prove an intent to engage in terrorist activity before the power to deport arises. Waiting until that point is often too late. As we learned shortly after the September 11th attacks, the aliens who carried out the attacks lived in our society and carried on like regular citizens, often frequenting typical "American" venues such as bars and strip clubs.¹³⁹ Meanwhile, these aliens were taking lessons at flight schools with the intent to use these acquired skills to steer planes into buildings.¹⁴⁰ This outward behavior was nothing more than lawful, and without proof of their intent to carry out attacks on Americans and their government, immigration laws were powerless to remove these aliens from our country.

Many of the nineteen alien attackers were known members of their terrorist organization.¹⁴¹ Under the proposed legislation, government officials could have removed these aliens from the United States before they executed their plan or exhibited the intent to carry out a terrorist act. It is rational to take the measure of prohibiting alien association with terrorist groups acting in the United States since it could in fact prevent the occurrence of the very terrorist acts that threaten this country's security. Since the means taken to protect the government interest is not irrational, such a statute would not be held in violation of the Constitution.¹⁴² Therefore, if Congress, in the face of imminent danger, exercises its plenary power over immigration and allows for removal of aliens for mere association with such groups to protect the interest of national security, such a statute would be justified under the rational basis test.

¹³⁷Philip Shenon & James Risen, *A Nation Challenged: Bin Laden's Network; Al Qaeda Leader Is Reported to Plan New Raids on U.S.*, N.Y. TIMES, Feb. 14, 2002, at A1.

¹³⁸*Diaz*, 426 U.S. at 83.

¹³⁹James Risen & David Johnson, *A Nation Challenged: The Investigation; Authorities Seek Man In Organizing of Attacks*, N.Y. TIMES, Sept. 21, 2001, at B1.

¹⁴⁰Clyde Haberman, *A Nation Challenged: An Overview: Nov. 28, 2001; Troop Buildup, an Aggressive Dragnet and the High Price of Terror*, N.Y. TIMES, Nov. 29, 2001, at B1.

¹⁴¹Judith Miller, *A Nation Challenged: The Response; Planning for Terror but Failing to Act*, N.Y. TIMES, Dec. 30, 2001, at 1A1.

¹⁴²*See Pringle*, *supra* note 25, at 2082.

2. Similar Justification to the “Governmental Function” Exception

Although deference to immigration legislation is usually only given to the federal government, under the governmental function exception, state laws based on citizenship that ordinarily would be held unconstitutional are subject to minimal judicial review.¹⁴³ In allowing states to exclude aliens from employment in certain occupations, the Supreme Court justifies such classifications based on the significance of the status of citizenship.¹⁴⁴

It is this status of citizenship that justifies the proposed legislation. Citizenship is a form of association with the policy of the United States,¹⁴⁵ and in times where national security is seriously threatened, a policy ridding those aliens whose membership ties suggest anti-American-policy sentiments is equally as justified as an exclusion from public employment. It is possible some critics might argue that restricting aliens’ employment opportunities is not as extreme as removing them from the country. While that is true, the interest protected by limiting employment eligibility is not as extreme a threat as further terrorist attacks in this country. If the proposed legislation were viewed in these terms, the rationale behind the governmental function exception to strict scrutiny review of legislation affecting aliens would support a similar lower standard of judicial review for legislation prohibiting aliens’ association with known terrorist organizations when national security is at risk. Under this lower standard of review, such a provision would be subject to the rational basis test, which would be passed.¹⁴⁶

3. Differential Treatment of Aliens and Citizens

Some critics of the proposed legislation might question why alien associates of known terrorist organizations are any more of a threat to national security than citizen members of the same groups. The proposed legislation does not assert this. It is possible that a citizen member of such a group is equally as dangerous.¹⁴⁷ However, aliens and citizens have long been treated differently when it comes to unlawful behavior, as evidenced by Congress’s power to deport aliens who have been convicted of certain crimes.¹⁴⁸ While a citizen would not be subject to deportation, they would be subject to other punishment for activity that threatened national security.¹⁴⁹ This difference in treatment recognizes that aliens and citizens

¹⁴³See *supra* Part IV.A.2.

¹⁴⁴*Id.*

¹⁴⁵*Ambach*, 441 U.S. at 75 (citing *Foley v. Connelie*, 435 U.S. 291,295 (1978)). The *Ambach* court explained that the assumption of the status of citizenship, whether by birth or naturalization, denotes an association with the policy of the American government. *Id.*

¹⁴⁶See *supra* Part IV.D.1.a.

¹⁴⁷If not even more dangerous because of the greater constitutional protections afforded to citizens.

¹⁴⁸See *supra* Part IV.B.

¹⁴⁹See *e.g.*, Espionage Act of 1917, 18 U.S.C. § 794 (2003) (subjecting citizens convicted of committing espionage against the United States to imprisonment for any term of years or for life, and in certain extreme cases, imposition of the death penalty).

are not given the same constitutional protections, especially where immigration legislation is involved.

*B. Interest of National Security Outweighs Aliens' Right to Associate
with Terrorist Organizations*

It is undeniable that national security is at risk.¹⁵⁰ Government officials have received credible information that more attacks in the United States are planned, and that some of the potential attackers could likely to be residing in the country.¹⁵¹ With these facts illustrating the seriousness of the current state of American affairs, Congress, along with many other government officials, needs to be able to do everything in its power to prevent these planned attacks from occurring.

1. National Security Is a Compelling Governmental Interest

If, for the sake of argument, the plenary power doctrine would not protect Congress from heightened judicial scrutiny of a deportation law prohibiting aliens' associations with terrorist organizations that have acted here in America, then such legislation would be subject to strict scrutiny review. Under this heightened standard, a statute will be held unconstitutional if the means used are not narrowly tailored to serve a compelling state interest.¹⁵²

Legislation allowing deportation for mere association with a known terrorist group is constitutional under the strict scrutiny test. Courts have undoubtedly held that the government's interest in national security is a substantial one.¹⁵³ If Congress determines that abridging aliens' freedom of association is the only effective way to enable the government to root out terrorists before they act in a manner signifying intent to commit terrorist activities and jeopardizing national security, then the strict scrutiny test would be satisfied if the statute is narrowly tailored. Congress must show that there are no less restrictive means to achieve its goal of protecting the country from future attacks by terror groups that plan to strike. Congress could make such a showing that future attacks could be prevented by deporting alien members of these organizations, since they "camouflage" into American society without engaging in behavior other than their affiliation that would alert officials to another act of terrorism.¹⁵⁴ Assuming such a showing could be made, this showing coupled with the sufficiently important interest of national security in the face of actual threats of additional terrorist attacks on United States soil, would enable the

¹⁵⁰See *supra* text accompanying note 22.

¹⁵¹See Erlanger & Hedges, *supra* note 19.

¹⁵²*City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 440 (1985).

¹⁵³*Humanitarian Law Project*, 9 F. Supp. 2d at 1193. See also Justice Marshall's dissent in *Kleindienst v. Mandel*, 408 U.S. 753, 783-84 (1972) (claiming that although the government made no such showing here, an actual threat to national security is surely a compelling governmental interest sufficient to restrict First Amendment rights).

¹⁵⁴See Erlanger & Hedges, *supra* note 19 (discussing how many terrorists slipped into the United States and adopted deceptive outward habits of the West such as drinking and dating to mask their activities). Erlanger and Hedges also assert that the nature of sleeper cells, integrating into mainstream society, makes it hard to know when more attacks will occur. *Id.*

proposed statute to survive a constitutional challenge under a heightened level of review. Even Justice Marshall admitted this in his *Kleindeinst* dissent.¹⁵⁵

2. Rationales Behind Suggested Approach to Immigration Laws Are No Longer Valid in Modern World

Historically, many judges in federal alienage cases argued that aliens should enjoy protection of the freedom of association under the First Amendment and that the plenary power doctrinal approach to immigration legislation be abandoned.¹⁵⁶ If these justices are correct, then Congress cannot ignore constitutional rights of aliens in exercising its plenary power, and a heightened scrutiny standard of review should apply.¹⁵⁷ Even though the proposed legislation would pass a heightened scrutiny test,¹⁵⁸ it is necessary to examine why the arguments advanced by these justices are no longer relevant in today's world.

The opinions discussing this alternative approach to federal alienage legislation are largely based on assumptions that no longer exist in the modern world in which terrorism exists and which presents a real danger to Americans not just abroad, but here at home. For example, Justice Murphy's concurring opinion in *Bridges v. Wixon*,¹⁵⁹ claimed the Constitution gives aliens protection "in the exercise of the great individual rights necessary to a sound political and economic democracy."¹⁶⁰ Justice Murphy's rationale for protecting aliens' constitutional rights has limited significance in the current context where the goals of the terrorist organization that acted on September 11th are aimed at disturbing our sound political and economic democracy.¹⁶¹ In fact, the personal, political, and economic destruction caused by

¹⁵⁵*Kleindeinst*, 408 U.S. at 783-84.

¹⁵⁶*See supra* Part IV.D.1.b.

¹⁵⁷*Id.*

¹⁵⁸*See supra* Part V.B.1.

¹⁵⁹326 U.S. 135, 161 (1945).

¹⁶⁰*Id.* at 166.

¹⁶¹*See* Gibbs, *supra* note 3, at 33, 41. Gibbs wrote, "We couldn't move – that must have been the idea." Gibbs added, "Having hit the country's financial and cultural heart, the killers went for its political and military muscle." *Id.* *See also* Lisa Beyer, *Roots of Rage*, TIME MAGAZINE, Oct. 1, 2001, at 44. This article discusses how bin Laden and his followers' hatred toward America leads them to focus on killing large numbers of Americans.

terrorists on September 11th,¹⁶² and the threat of future attacks,¹⁶³ did exactly that: disrupted our sound political and economic democracy.¹⁶⁴

Protecting the rights of aliens to associate with terrorist organizations that have committed terrorism in America will enable these groups to further their goals of disrupting the democracy that Justice Murphy was concerned about.¹⁶⁵ If the government does not have the power to deport aliens it knows to be members of such a terrorist organization and can not prove anything beyond association,¹⁶⁶ the government will be powerless to protect the political and economic climates and the safety of Americans. In light of the changing world in which the threat of terrorism is a reality, the same rationale that Justice Murphy advanced to support protecting an alien's right to associate should now be used to limit that right in relation to terrorist organizations in order to protect democracy within the United States.

3. Citizens' Right to Associate with Foreign Organizations Is Limited

In recognizing the government's interest in national security, courts have imposed restrictions on a citizen's right to associate with foreign groups.¹⁶⁷ It follows that in the interest of national security, the government could be compelled to restrict an alien's right to associate with a terrorist organization that has committed deadly acts of violence in our country. In fact, the government may impose limitations or regulations on "free association conducted for an illegitimate purpose."¹⁶⁸ Since terrorist organizations by definition have the illegitimate purpose of engaging in terrorist activity,¹⁶⁹ Congress would be allowed to prohibit aliens'

¹⁶²Bill Powell, *Economy Under Siege*, FORTUNE MAGAZINE, Oct. 15, 2001, at 88. Powell explains that when Wall Street re-opened the Monday after the attacks, the stock market suffered its worst one-week loss since the Great Depression. See also Noam Neusner, *Is It Really That Bad? Welcome to the Fear Recession, Where People With Money Won't Spend It*, U.S. NEWS & WORLD REPORT, Nov. 19, 2001, at 36. Neusner claims economists believed the economy was ready to recover prior to the attacks, but since September 11th, the key economic indicators such as the unemployment rate, productivity, and retail sales have declined.

¹⁶³See *Ashcroft*, *supra* note 1. See also *Bush Says*, *supra* note 22.

¹⁶⁴See *supra* text accompanying note 162.

¹⁶⁵See Powell, *supra* note 162, at 91. Powell stated that "two weeks after the September 11th, attacks, the still-burning World Trade Center ruins reminds Americans of our new world that is economically and politically unrecognizable." *Id.*

¹⁶⁶While it is argued that mere membership without the intent to act illegally does not further terrorist groups' goals, protecting aliens' membership in such groups provides "moral support" that legitimizes the beliefs of these groups.

¹⁶⁷*Humanitarian Law Project*, 9 F. Supp. 2d at 1193.

¹⁶⁸*Id.* at 1186 (citing *Palestine Information Office v. Shultz*, 853 F.2d 932, 941 (D.C.Cir. 1988)).

¹⁶⁹8 U.S.C. § 1189 (a)(1) (2000), amended by Pub. L. No. 107-56, 115 Stat. 272 (2001). In general, the Secretary is authorized to designate an organization as a foreign terrorist organization in accordance with this subsection if the Secretary finds that: (A) the organization is a foreign organization; (B) the organization engages in terrorist activity (as defined in section 1182(a)(3)(B) of this title); and (C) the terrorist activity

association with such groups in the interest of national security. Even if aliens should be given the same constitutional rights as citizens, it should not follow that they should be given greater protection than Americans. If it is constitutional to limit a citizen's right to associate with certain organizations, then it is constitutional to limit an alien's right to associate with a terrorist organization in light of the special characteristics of an environment in which terrorists have acted in the United States, and the threat of future attacks is real.

C. Response to Criticism About the Proposed Legislation

Some activists are concerned that any legislative response to combating terrorism in the United States will sacrifice the civil rights of aliens. These activists have expressed concern about the loss of aliens' political freedom and equal treatment, and have urged that those liberties should not be traded to protect national security.¹⁷⁰ During testimony given to a subcommittee of the Senate Judiciary Committee, Georgetown University Law Center Professor David Cole claims:

[T]he [then proposed] Patriot Act gives Immigration and Naturalization officials the power to impose 'guilt by association,' for any alien's support of any group designated as a foreign terrorist organization by the Secretary of State.¹⁷¹ Imposing guilt by association is a concept that the Supreme Court in *NAACP v. Claiborne Hardware Co.*¹⁷² rejected as "alien to the traditions of a free society and the First Amendment itself."¹⁷³

Professor Cole further claims that Congress repudiated guilt by association altogether in 1990, when it repealed the McCarran-Walter Act¹⁷⁴ provisions of the Immigration and Naturalization Act, which made association with the Communist Party a deportable offense.¹⁷⁵ Professor Cole likens the McCarran-Walter Act to proposed legislation, which he claims would in effect make an alien deportable for mere association with a terrorist organization. He concludes that such legislation would be in violation of the First Amendment of the Constitution.¹⁷⁶

of the organization threatens the security of United States nationals or the national security of the United States.

Id. (amendments not included because do not change meaning of statute).

¹⁷⁰USA PATRIOT Act of 2001: Hearing on S. 1510 Before the Subcommittee on the Constitution, Federalism and Property Rights of the Senate Judiciary Committee, 107th Cong. (2001) (testimony of David Cole, Professor, Georgetown University Law Center) [hereinafter *Patriot Act Hearing*].

¹⁷¹*Id.* See also 8 U.S.C. § 1189 (a)(1).

¹⁷²458 U.S. 886, 932 (1982) (holding a state may not impose liability for the consequences of the *nonviolent elements* of the petitioners' boycott activities, which *were entitled to First Amendment protection*) (emphasis added).

¹⁷³See *Patriot Act Hearing*, *supra* note 170.

¹⁷⁴8 U.S.C. § 1251 (1988), amended by Pub. L. No. 104-208, 110 Stat. 3009-589 (1996) and transferred to 8 U.S.C. § 1227 (a)(4)(B).

¹⁷⁵See *Patriot Act Hearing*, *supra* note 170.

¹⁷⁶*Id.*

Cole also asserts that “freedom and security need not necessarily be traded off against one another; maintaining our freedoms is itself critical to maintaining our security.”¹⁷⁷ To prove his assertion, Cole cites *United States v. Robel*,¹⁷⁸ in which the Supreme Court declared invalid a provision of the Subversive Activities Control Act of 1950, denying employment in any defense facility to members of the Communist Party because the law violated an alien’s freedom to associate under the First Amendment.¹⁷⁹ In the words of the deciding Justices, “[I]t would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties - the freedom of association - which makes the defense of the Nation worthwhile.”¹⁸⁰

The arguments of civil rights activists such as Professor Cole assume that aliens are undoubtedly given the same constitutional rights as American citizens. In response to the contention that such legislation is in violation of the First Amendment freedom of association, that argument assumes federal case law unequivocally provides that right to aliens.¹⁸¹ Professor Cole refers to *Robel* to claim that it does; however, at issue in that case was whether the government could limit an alien’s First Amendment rights under its war powers, not whether the government can limit aliens’ constitutional rights under its plenary immigration power.¹⁸² *Robel*, therefore, is not controlling authority to the immigration issue.

When Congress exercises its plenary power, the Supreme Court has historically given the government great deference to its decisions about immigration and naturalization.¹⁸³ The Court will uphold immigration legislation that implicates aliens’ constitutional rights if the government has a rational basis for enacting such laws.¹⁸⁴ It is, therefore, likely that the courts would uphold anti-terrorist legislation that limits First Amendment rights in the context of deportation if Congress were so inclined to legislate for the rational reason of removing alien members of a terrorist

¹⁷⁷*Id.*

¹⁷⁸389 U.S. 258, 264 (1967).

¹⁷⁹*Id.* at 268.

¹⁸⁰ See *Patriot Act Hearing*, *supra* note 170.

¹⁸¹See *United States v. Robel*, 389 U.S. 258, 267-68 (1967) (recognizing that in striking down on First Amendment grounds the Anti-Communist law at issue, the Court will not strike down all legislation placing a substantial burden on protected activities, so long as Congress achieves its goal by means which have a ‘less drastic’ impact on the First Amendment freedoms). The Supreme Court in *Robel* in effect created a heightened scrutiny standard of review for legislation impacting aliens’ First Amendment rights. If Professor Cole’s assertion is correct that *Robel* is controlling, then this heightened standard would apply to the proposed legislation. Even if that is so, the legislation would pass under that test. See *supra* Part V.B.1.

¹⁸²*Robel*, 389 U.S. at 263-64.

¹⁸³*Price*, 962 F.2d 836 (citing numerous cases to prove statement that it has long been recognized that resident aliens enjoy the protections of the First Amendment, however, the protection afforded may be limited).

¹⁸⁴*Id.* at 841.

group threatening to commit further acts of terrorism in the United States, which presents an actual threat to national security.¹⁸⁵

VI. CONCLUSION

The world as Americans knew it changed the morning of September 11th, when we learned that terrorism had come to our country after nineteen resident aliens hijacked four commercial airliners with plans to crash them into significant American targets.¹⁸⁶ Once these aliens took control of the planes, they used them as weapons of mass destruction and killed more than 4,000 people in New York City, Washington, D.C., and rural Pennsylvania.¹⁸⁷ The terrorists plotted these attacks for nine months, while living in the United States under resident alien status.¹⁸⁸ Under immigration laws available at that time, these aliens were not deportable for mere association with their terrorist organization.¹⁸⁹ Law enforcement officials did not [and still do not] have the power to deport aliens for such association. Until the government can prove a resident alien has intent to conduct a terrorist activity, officials are restrained from exercising their deportation power.¹⁹⁰ In light of the changing world in which terrorism poses an imminent threat here in America, aliens' freedom to associate with terrorist organizations that have committed terrorism in the United States should not be protected under the Constitution.

Congress has the plenary power to enact immigration legislation and limit aliens' rights when it has a rational basis for this action.¹⁹¹ There is no more rational reason for limiting a resident alien's First Amendment right to associate than national security in the current situation, in which the threat of more attacks makes Americans vulnerable to more death and destruction in the United States. Even if the plenary power doctrine would not support such legislation under a rational basis test, Congress still has the power to enact such legislation if it has compelling interest.¹⁹² There is no more compelling interest than that of protecting the security of the United States by attempting to prevent more attacks, when there have been actual threats made that more violence is being planned. In order to effectively protect national security, the government must have the power to remove aliens for mere association with these groups, rather than waiting until these aliens' actions above and beyond mere membership signify the intent to further terrorism.

The courts have historically placed a value on citizenship, and in doing so have upheld State public employment statutes distinguishing between aliens and citizens in the public employment context.¹⁹³ This recognition of a distinction based on

¹⁸⁵ See *supra* Part V.B.1.

¹⁸⁶ Johanna McGeary & David Van Biema, *Inside the Conspiracy: The New Breed of Terrorist*, TIME MAGAZINE, Sept. 24, 2001, at 28.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at 31.

¹⁸⁹ 8 U.S.C. § 1227(a)(4)(B) (2000), amended by Pub. L. No. 107-56, 115 Stat. 272 (2001).

¹⁹⁰ See *supra* Parts II, III.

¹⁹¹ See *supra* Part IV.D.

¹⁹² See *supra* Part IV.D.1.b.

¹⁹³ See *supra* Part IV.A.2.

citizenship is even more evident in the treatment of criminal aliens. This class of aliens is subject to deportation upon completion of their criminal sentences; a consequence not similarly shared by citizens who are protected under the Constitution from such treatment. These rules illustrate Congress's power to regulate aliens in ways that would be unconstitutional as applied against citizens.

In addition, the rationale behind upholding an alien's right to associate under the constitution is no longer relevant in the context of a world in which terrorism exists and remains an imminent threat. Justices advancing the belief that aliens should be given constitutional protection did so under the premise that we need to uphold our sound political and economic democracy.¹⁹⁴ Under that approach, the recent change in America's economic and political climates requires limiting that right to protect national security.

Other Justices advancing the belief that aliens should be given constitutional protections recognize that those protections can be limited when the government can show a compelling governmental interest.¹⁹⁵ Justice Marshall admitted that actual threats to national security are "surely" the kinds of compelling governmental interests that would survive strict scrutiny review of legislation infringing on aliens' constitutional rights.¹⁹⁶ Since the government has received actual threats of more attacks, it has a compelling interest to deport aliens who are associated with a terrorist organization that has acted in the United States.

Equally important is that protecting association with such organizations would give aliens greater rights than those given to American citizens, whose freedom to associate with foreign organizations is limited under special circumstances.¹⁹⁷ Considering the "special circumstances" in which the threat of more attacks is real, aliens should not be given the right to associate with designated terrorist organizations and should be subject to deportation for such activity. In fact, in recognizing citizens' independent right to associate under the freedom of speech enumerated in the First Amendment, the Supreme Court noted that it had limited the right to associate where the government had a substantial interest for doing so and the particular nature of the group in question was one of violence.¹⁹⁸ If the Supreme Court is willing to limit a citizen's right to associate with a violent group when the government has a substantial interest, then the Court would certainly limit an alien's right to associate with a violent terrorist group when the government has a substantial interest in protecting the country from further attacks.

It is clear that aliens' constitutional rights are not absolute. Whether immigration legislation providing for deportation for mere association with a known terrorist organization that has committed terrorism in the United States would be subject to a narrow standard of review under the government's plenary power, or whether subject to strict scrutiny, such legislation would pass constitutional muster under either test. By withstanding these levels of scrutiny, such legislation, if enacted, is within the realm of Congress's legislative authority.

¹⁹⁴*Bridges*, 326 U.S. at 161 (Murphy, J., concurring).

¹⁹⁵*Kleindienst*, 408 U.S. at 777.

¹⁹⁶*Id.*

¹⁹⁷*Humanitarian Law Project*, 9 F. Supp. 2d at 1176.

¹⁹⁸*NAACP v. Alabama*, 357 U.S. 449 (1958).

The government needs to exercise its ability to deport alien members of designated terrorist organizations acting in America and threatening to strike again to adequately protect national security. Without this power, alien members of terrorist groups can continue to reside in the United States while waiting to execute more attacks that government officials warn are being planned. Before September 11th, the government did not have this ability to help prevent the attacks. If the government been able to deport the aliens for their association with a known terrorist organization, officials could have removed them from the country before they had the opportunity to carry out their terrorist plan. The government must be able to exercise this kind of power so that September 11th will be the worst day in history that Americans should ever have to remember.

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