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Protecting Constitutional Freedoms in the Face of Terrorism: Hearing Before the S. Comm. on the Judiciary, 107th Cong., Oct. 3, 2001 (Statement of David D. Cole, Prof. of Law, Geo. U. L. Center)

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said for might be abused, the prudent course would not be to deny the needed authority, but to draft a cause of action for damages to rectify possible misapplication, or to provide for a sunset of the authority after a period of time sufficient to meet the present exigency. The possibility of abuse should not obscure the present need and the supposition of trust that one must have if our democratic order is to be safeguarded from those outside our borders who wish to subvert it.

Thank you for the opportunity to appear before you this morning.

Chairman FEINGOLD. Thank you, Dean. I am intrigued by this distinction between constitutional law and constitutional policy. I do think that there are questions of constitutional law here, but surely if there is such a separate area as constitutional policy, that is even more our responsibility than the United States Supreme Court because we are here to make policy. But I do appreciate your testimony.

Now, I would like to turn to Professor David Cole. Professor Cole currently teaches at Georgetown University Law Center and he has long been associated with the Center for Constitutional Rights. In addition to litigating several important First Amendment before the United States Supreme Court, Professor Cole has written extensively on the issue before us today, co-authoring the book Terrorism and the Constitution: Sacrificing Civil Liberties in the Name of National Security.

I welcome you, Professor, and you may proceed.

STATEMENT OF DAVID COLE, PROFESSOR OF LAW, GEORGETOWN UNIVERSITY LAW CENTER, WASHINGTON, D.C.

Mr. COLE. Thank you, Senator Feingold.

Precisely because the terrorists violated every principle of civilized society, of human decency and of the rule of law, we must, in responding to the threat of terrorism, maintain our commitments to principle. I want to suggest three principles.

First, we should not overreact, as we have so often overreacted in the past in times of fear.

Second, we should not sacrifice the constitutional principles for which we stand.

Third, in balancing liberty and security, we should not trade the liberties of a vulnerable group—immigrants, and particularly Arab and Muslim immigrants—for the security of the majority.

Unfortunately, the immigration provisions that have been advanced by the Bush administration, that have been proposed in the House and that are now being considered in the Senate—Justice Department negotiation violate all three principles. They overreact because they impose guilt by association for wholly innocent associational activity, and they authorize indefinite detention on the Attorney General’s say-so of any such alien.

They sacrifice our constitutional principles, and this is constitutional law, not constitutional policy. Guilt by association, the Supreme Court says, violates the Fifth Amendment and the First Amendment, both of which apply, the Supreme Court has said, without distinction to citizens and aliens living here.

Executive detention without any showing of current dangerousness or risk of flight, which is what the mandatory detention provision in the House bill would authorize, violates both substantive due process and procedural due process. And in reacting this way, we are trading the liberties of the few, of those without a voice, of
immigrants who can’t vote, and particularly Arabs and Muslims, for the purported security of the rest of us.

These are provisions which will, we know, be targeted at Arabs and Muslims, and not for their individual conduct, but for their group identity, the very type of thinking that underlies the hate crimes that we all so virulently oppose.

First, guilt by association. Current law makes aliens deportable for terrorist activity, for supporting terrorist activity, for planning, facilitating, or encouraging terrorist activity any way, shape or form. The Bush proposal makes aliens deportable for any associational support of any group that has ever engaged in or used violence. There is no requirement of any nexus between the alien’s support and the actual violence.

If an immigrant in the 1980s gave money to the African National Congress to support its non-violent struggles against apartheid, just as thousands of Americans did, he would be deportable under this statute for providing support to a terrorist organization. The African National Congress also engaged in violent opposition to apartheid. The African National Congress was listed every year until it came to power as a terrorist organization by the Secretary of State. That wholly innocent activity would be a deportable activity. Is that a measured response? No.

Even if the alien shows that his support was designed to counter terrorist activity, that is no defense. So if an alien today wants to further the peace process in England by providing peacemaking training to the IRA, he is deportable. Even if he can prove that his support furthered peace and countered terrorism, he is deportable. Is that a measured response? I suggest no.

The mandatory detention provisions are also clearly and plainly unconstitutional, for two reasons. First of all, they are essentially a form of preventive detention. The Supreme Court has held that preventive detention is only permissible under narrow circumstances where the Government shows dangerousness to others or risk of flight. Under the House bill and the Bush proposal, the Government would be permitted to engage in preventive detention without any showing of dangerousness to others or risk of flight.

Under the House bill, all they have to show is that they have reasonable grounds to believe that someone is described in the terrorist activity provisions of the bill. But then the terrorist activity provisions of the bill are defined so broadly that they include every violent crime other than an armed robbery—every violent crime other than an armed robbery. That is not what the man on the street understands to be terrorism, that is not what the international community understands to be terrorism, and that is not a narrow class of people who pose a particular danger to society. Yet, that is the class of people who would be subject to mandatory detention under this provision.

In addition, it would apply to people who gave money to the African National Congress or who gave peace-making training to the IRA. Even if there is no evidence that those people pose a threat to national security or pose a risk of flight, the statute would authorize their detention.

The second problem: it authorizes indefinite detention. There have been news reports that have suggested erroneously that the
House solves this problem by requiring the filing of charges within seven days. That is wrong because whether or not charges are filed doesn’t matter. The statute provides that mandatory indefinite detention of aliens is permitted.

Even if the alien prevails in his deportation proceeding and cannot be removed and has a right to remain here permanently, the statute provides for mandatory detention, not on a finding that the alien is a danger to society, but solely on a finding that the Attorney General had reasonable grounds to believe that he engaged in a crime of violence, that he was in a domestic dispute where he picked up a plate and threw it at his wife, or he was in a bar and picked up a broken bottle. That would constitute sufficient grounds for mandatory detention. That, I submit, is not a narrow, measured response. It is not the kind of careful consideration of civil liberties that we should be demanding in this time of fear. It is unfortunately precisely the kind of overreacting that we have so often seen in the past.

Thank you.

[The prepared statement of Mr. Cole follows:]

STATEMENT OF DAVID COLE, PROFESSOR OF LAW, GEORGETOWN UNIVERSITY LAW CENTER, WASHINGTON, D.C.

INTRODUCTION

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

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

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

The Administration’s proposal seeks a wide range of new law enforcement powers. I will focus my remarks on the immigration section of the Administration proposal.

In doing so, I will also refer to the Sensenbrenner-Conyers bill, referred to as the PATRIOT Act, recently introduced in the House. In my view, the Administration’s proposal is neither measured nor effective, and unnecessarily sacrifices our commitment to both equal treatment and political freedom. The PATRIOT Act mitigates some of the troubling aspects of the Administration’s proposal, but remains deeply problematic, and unconstitutional in several respects. I will focus my remarks on the Administration’s proposal, but will also note where the PATRIOT Act differs.

The Administration’s proposal has four fundamental flaws:

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

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

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1 Professor, Georgetown University Law Center, and attorney with the Center for Constitutional Rights.
3) It authorizes the INS to detain immigrants potentially indefinitely, even where they cannot be deported and have a legal right to live here permanently.

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

HISTORY

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

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

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

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

We have learned from these mistakes. The Palmer Raids are seen as an embarrassment. In 1988, Congress paid restitution to the Japanese internees. In 1990, Congress repealed the McCarran-Walter Act political exclusion and deportation grounds. But at the time these actions were initially taken, they all appeared reasonable in light of the threats we faced. This history should caution us to ask carefully whether we have responded today in ways that avoid overreaction and are measured, to balance liberty and security. In several respects detailed below, the Administration's proposed Anti-Terrorism Act fails that test.

COUNTERTERRORISM AUTHORITY IN EXISTING LAW

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

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

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

3. It may deport any alien who has engaged in terrorist activity, or supported terrorist activity in any way. Terrorist activity is defined under existing law very broadly, to include virtually any use or threat to use a firearm with intent to endanger person or property (other than for mere personal monetary gain), and any provision of support for such activity. 8 U.S.C. § 1227(a)(4). Pursuant to the Alien Terrorist Removal provisions in the 1996 Antiterrorism Act, the INS may use secret evidence to establish deportability on terrorist activity grounds.
4. Relatedly, the Secretary of State has broad, largely unreviewable authority under the 1996 Anti-Terrorism and Effective Death Penalty Act to designate “foreign terrorist organizations” and thereby criminalize all material support to such groups. 8 U.S.C. § 1189, 18 U.S.C. § 2339B. This provision triggers criminal sanctions, and applies to immigrants and citizens alike. Osama bin Laden’s organization is so designated, and thus it is a crime, punishable by up to 10 years in prison, to provide any material support to his group.

THE ADMINISTRATION’S PROPOSED ANTI-TERRORISM ACT

The immigration provisions of the Administration’s Anti-Terrorism Act: (1) expand the grounds for deporting and denying entry to noncitizens; (2) expand the Secretary of State’s authority to designate and cut off funding to “foreign terrorist organizations;” (3) create a new mandatory detention procedure for aliens certified as terrorists by the INS; (4) authorize the Secretary of State to share certain immigration information with foreign governments; and (5) require the FBI and the Attorney General to share certain criminal history data with the INS and the State Department to improve visa decision making.

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

A. THE ADMINISTRATION BILL IMPOSES GUILT BY ASSOCIATION

The term “terrorism” has the capacity to stop debate. Everyone opposes terrorism, which is commonly understood to describe premeditated, politically-motivated violence directed at noncombatants. See 28 U.S.C. § 2556.8(d)(2) (defining terrorism as “premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents”).

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

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

The point is not that such routine acts of violence are acceptable, or that armed struggle is generally permissible. But to call virtually every crime of violence “terrorist” is to trivialize the term. And because so much else in the Administration bill and the PATRIOT Act turns on “terrorist activity,” it is critical to keep in mind the stunning overbreadth of this definition. Government action that might seem reasonable vis-a-vis a hijacker may not be justified vis-a-vis an immigrant who found himself in a bar fight, threw a rock during a demonstration, or who sent humanitarian aid to an organization involved in civil war. Yet the Administration bill draws no distinction between the hijacker, the humanitarian, the political demonstrator, and the barroom brawler.

2In his testimony, Douglas Kmiec defends this expansion by erroneously stating that under current law, “an alien is inadmissible and deportable for engaging in terrorist activity only when the alien has used explosives or firearms.” Kmiec Statement at 7. Therefore, he argues, the change is needed to encompass attacks like those of September 11. That is plainly wrong. In its current from 8 U.S.C. §1182(a)(3)(B)(ii) already defines “terrorist activity” to include, among other things, “hijacking or sabotage of any conveyance (including a governmental organization) to do or abstain from doing any act as an explicit or implicit condition for the release of the individual seized or detained,” “assassination,” the use of any biological, chemical, or nuclear weapon, and the use or threat to use any explosive or firearm against person or property (other than for mere personal monetary gain). Thus, no rewriting of the act is required to reach the conduct of September 11.
The breadth of “terrorist activity” is expanded still further by the Administration’s proposed redefinition of “engage in terrorist activity.” Under current law, that term is defined to include engaging in or supporting terrorist activity in any way. 8 U.S.C. § 1182(a)(3)(B)(iii). The Administration proposes to expand it to include any associational activity in support of a “terrorist organization.” Section 201(a)(1)(C). And because the INS has argued that a terrorist organization is any group that has ever engaged in terrorist activity, as defined in the INA, irrespective of any lawful activities that the group engages in, this definition would potentially reach any group that ever used or threatened to use a “firearm or other weapon” against person or property.3

The Administration’s bill contains no requirement that the alien’s support have any connection whatsoever to terrorist activity. Thus, an alien who sent coloring books to a day-care center run by an organization that was ever involved in armed struggle would appear to be deportable as a terrorist, even if she could show that the coloring books were used only by 13-year olds. Indeed, the law apparently extends even to those who seek to support a group in the interest of countering terrorism. Thus, an immigrant who offered his services in peace negotiating to the IRA in the hope of furthering the peace process in Great Britain and forestalling further violence would appear to be deportable as a terrorist.

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

And unlike the 1986 statute barring funding to designated foreign terrorist groups, the Administration bill does not distinguish between foreign and domestic organizations. Thus, immigrants would appear to be deportable as terrorists for paying dues to an American pro-life group or environmental organization that ever in the past used or threatened to use a weapon against person or property.

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

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

In my view, the principle that people should be held responsible for their own individual conduct, and not for the wrongdoing of those with whom they are merely associated, brooks no compromise. Guilt by association, the Supreme Court has ruled, violates the First and the Fifth Amendments.4 It violates the First Amend-

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

4The First and Fifth amendments apply to citizens and aliens residin in the United States. Kwong Hai Chew v. Colding, 344 U.S. 590, 596 n.5 (1953). Mr. Kmiec suggest that this is wrong because the First and Fifth Amendments do not extend to aliens seeking entry from abroad. Kmiec Statement at 8. But of course such aliens are not residing in the United States. The Su...
ment because people have a right to associate with groups that have lawful and unlawful ends. United States v. Robel, 389 U.S. 258, 262 (1967).

Guilt by association also violates the Fifth Amendment, because "in our jurisprudence guilt is personal." United States v. Robel, 389 U.S. 258 (1961). To hold an alien responsible for the military acts of the ANC fifteen years ago because he offers a donation today, or for providing peace negotiating training to the IRA, violates that principle. Without some connection between the alien's support and terrorist activity, the Constitution is violated. Douglas Kmiec argues that the guilt by association cases "deals with domestic civil rights." Kmiec Statement at 7. In fact, this principle was developed with respect to association with the Communist Party, an organization that Congress found to be, and the Supreme Court accepted as, a foreign-dominated organization that used sabotage and terrorism for the purpose of overthrowing the United States by force and violence. Yet even as it accepted those findings as to the Communist Party, the Court held that guilt by association was not permissible.

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

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

B. THE ADMINISTRATION'S BILL WOULD APPLY ITS EXPANDED GROUNDS FOR DEPORTATION RETROACTIVELY, SO THAT ALIENS WOULD BE DEPORTED FOR CONDUCT FULLY LAWFUL AT THE TIME THEY ENGAGED IN IT

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

As noted above, aliens are currently deportable for engaging in or supporting terrorist activity. However, the new law would add as new grounds of deportation wholly innocent and nonviolent associational support of political organizations that have at some time used a weapon. Activity. Even to apply that ground prospectively raises substantial First and Fifth Amendment concerns, as noted above. But to apply it retroactively is grossly unfair.

Moreover, retroactive application would serve no security purpose whatsoever. Since under current law any alien supporting terrorist activity is already deportable, the only aliens who would be affected by the bill's retroactive application would be those who were not supporting terrorist activity - the immigrant who donated to the peaceful anti-apartheid activities of the ANC, or who provided peace-masking training to the IRA, or who made a charitable donation of his time or money.

The Supreme Court has long distinguished between aliens who are not residing in the United States. The Supreme Court has long distinguished between aliens seeking entry from outside our borders, who have no constitutional protections, and aliens here, whether here legally or illegally, who are protected by the First and Fifth Amendments to the Constitution. The Court reiterated this basic point, apparently missed by Mr. Kmiec, as recently as last term, in Saadounis v. Deux, 121 S. Ct. 3491, 2500 (2001) "Once an alien enters the country, the legal circumstance changes, for the due process here is lawful, unlawful, temporary, or permanent." The Supreme Court could not have been any clearer in Carington, in which it stated that neither First or Fifth Amendment "acknowledges any distinction" between citizens and aliens residing here.
to the lawful activities of an environmental or pro-life group that once engaged in violence. There is simply no justification for retroactively imposing on such conduct — fully lawful today — the penalty of deportation.

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

C. THE MANDATORY DETENTION PROVISION SECTION VIOLATES DUE PROCESS BY AUTHORIZING INDEFINITE UNILATERAL EXECUTIVE DETENTION IRRESPECTIVE OF WHETHER THE ALIEN CAN BE DEPORTED

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

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

Current law is sufficient to meet the country’s needs in fighting terrorism. The INS is authorized to detain without bond any alien in a removal proceeding who poses a threat to national security or a risk of flight. It routinely does so. It also has authority, as illustrated in recent weeks, to detain aliens without charges for up to 48 hours, and in extraordinary circumstances, for a reasonable period of time. This provision raises four basic concerns. First, it is plainly unconstitutional, because it mandates detention of persons who pose no threat to national security or risk of flight. If the Attorney General certifies that an individual may provide humanitarian support to a group that has engaged in a civil war, for example, the person is subject to mandatory detention, without any requirement that the alien currently poses a threat to national security or risk of flight.

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

Second, the detention authority proposed would allow the INS to detain aliens indefinitely, even where they have prevailed in their removal proceedings. This, too, is patently unconstitutional. Once an alien has prevailed in his removal proceeding, and has been granted relief from removal, he has a legal right to remain here. Yet the Administration’s proposal would provide that even aliens granted relief from removal would still be detained. At that point, however, the INS has no legitimate basis for detaining the individual. The INS’s authority to detain is only incident to its removal authority. If it cannot remove an individual, it has no basis for detaining him.

Zadvydas v. INS, 121 S. Ct. 2491 (holding that INS could not detain indefinitely even aliens ruled deportable where there was no reasonable likelihood that they could be deported because no country would take them).

Third, the detention authority proposed by clarifying explicitly that judicial review would include review of the merits of the Attorney General’s certification decision, and by barring

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

6 While the Court in Zadvydas left undecided the question of indefinite detention of a deportable alien where applied “narrowly to a small segment of particularly dangerous individuals,” say suspected terrorists,” 121 S. Ct. at 2499, the Court did not decide that such detention would be permissible since the question was not presented. Moreover, the Administration’s proposed definition of “terrorist activity” would not be limited to a narrow, “small segment of particularly dangerous individuals,” as the Court in Zadvydas contemplated, but to a broad category of criminal activity, and those who have supported such activity, but provided humanitarian support to the African National Congress. It beggars credibility to characterize such an open-ended authority as limited to a “small segment of particularly dangerous individuals.”
delegation below the INS Commissioner of the certification decision. But like the
Administration provision, it affords the alien no administrative opportunity to de-
fend himself, and therefore violates due process.

D. THE BILL RESURRECTS IDEOLOGICAL EXCLUSION, BARRING ENTRY TO ALIENS BASED
ON PURE SPEECH

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

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

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

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

The PATRIOT Act shares this problem, and goes further, by rendering aliens de-
portable for their speech. However, it qualifies the deportation provisions with the
requirement that the speech be intended and likely to promote or incite imminent
lawless action, the constitutional minimum required before speech advocating illegal

CONCLUSION

In responding to terrorism, we must ensure that our responses are measured and
balanced. Is it a measured response to terrorism to make deportable anyone who
provides humanitarian aid to the African National Congress today? Is it measured
to deport aliens for donating their time to a pro-life group that once engaged in an
act of violence but no longer does so? Is it measured to deport an immigrant who
sends human rights pamphlets to an organization fighting a civil war? Is it measured
to label any domestic dispute or barroom fight with a weapon an act of ter-
rorism? Is it measured to subject anyone who might engage in such activity subject
to mandatory detention? Is it measured to restore exclusion for ideas? Is it meas-
ured to make aliens deportable for peaceful conduct fully lawful at the time they
engaged in it?

I submit that the Administration’s proposal falls short in all of these respects. The
overbreadth of the bill reflects the overreaction that we have often indulged in when
threatened. The expansive authorities that the Administration bill grants, moreover,
are not likely to make us safer. To the contrary, by penalizing even wholly lawful,
nonviolent, and counterterrorist associational activity, we are likely to drive such ac-
tivity underground; to encourage extremists, and to make the communities that will
inevitably be targeted by such broad-brush measures disinclined to cooperate with
law enforcement. As Justice Louis Brandeis wrote nearly 75 years ago, the Framers
of our Constitution knew “that fear breeds repression; that repression breeds hate;
and that hate menaces stable government.” Whitney v. California, 274 U.S. 357, 376
(1927). In other words, freedom and security need not necessarily be traded off
against one another; maintaining our freedoms is itself critical to maintaining our
security.

The Administration’s bill fails to live up to the very commitments to freedom that
the President has said that we are fighting for. As the Supreme Court wrote in
1967, declaring invalid an anti-Communist law, “It would indeed be ironic if, in the
name of national defense, we would sanction the subversion of one of these lib-
erties—the freedom of association—which makes the defense of the Nation worth-