NOTE

Patriotic or Unconstitutional? The Mandatory Detention of Aliens Under the USA Patriot Act

Shirin Sinnar*

* J.D. Candidate, Stanford Law School, 2003; M.Phil., 1999, Cambridge University; A.B., 1998, Harvard and Radcliffe Colleges. Law clerk to the Honorable Warren J. Ferguson, United States Court of Appeals for the Ninth Circuit, 2003-2004. I would like to acknowledge my parents, Abbas and Zehra Sinnar, and my sister Shamim for their constant love and encouragement—and my beloved husband Imran Maskatia for immeasurable support. My warmest thanks to my adviser Tom Campbell, Matthew Stephenson, Nancy Chang, David Cole, Monique Sherman, and the editors of the *Stanford Law Review* for their insightful comments and suggestions on drafts of this Note.

INTRODUCTION

The USA Patriot Act, enacted seven weeks after the September 11 attacks, granted the federal government sweeping new powers to expand surveillance, curtail financing, and deport aliens in connection with terrorist activity.[1] The first major piece of legislation to respond to apparent weaknesses in U.S. national security, the statute expanded the range of aliens who could be excluded or deported from the United States on terrorism-related grounds, while reducing the procedural protections available to them. Under the new law, immigrants "certified" as threats to national security must be held in government custody without bond pending deportation proceedings and removal from the country. Detention could become indefinite for those aliens found to be deportable but whom other countries decline to accept.

As the USA Patriot Act went into effect, several hundred immigrants remained in government detention under a separate emergency order[2] allowing them to be held without charge for an extended period. The lengthy detention of so many aliens, few of whom were suspected of involvement in the terrorist attacks, generated concern that efforts to protect national security in the wake of September 11 had infringed on the constitutional rights of noncitizens.[3] In 2002, civil liberties organizations mounted several legal challenges on behalf of individuals detained after September 11, including a class action lawsuit asking a federal district court to declare the detention of a group of Muslim men unconstitutional.[4]

Numerous legal scholars have addressed the tension between national security and civil liberties posed by new government policies since September 11. In immigration scholarship, law review articles have addressed the mass

---

1. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA Patriot Act), 107 Pub. L. No. 56, 115 Stat. 272 (2001) (codified in scattered titles and sections of the U.S.C.).

2. 66 Fed. Reg. 48,334 (Sept. 20, 2001) (codified at 8 C.F.R. pt. 287) (allowing the government to hold aliens without charge in "situations involving an emergency or other extraordinary circumstance" for a "reasonable period of time").

3. *See, e.g.*, Cesar Muñoz Acebes, *Presumption of Guilt: Human Rights Abuses of Post-September 11 Detainees*, HUMAN RIGHTS WATCH, Aug. 2002; *see also* Jim Edwards, *"Special Case" INS Detainees Decline, but Not as Fast as Ashcroft Reckons*, N.J. L.J., Jan. 14, 2002; Dan Eggen, *Delays Cited in Charging Detainees*, WASH. POST, Jan. 15, 2002, at A1; Jane Fritsch, *Grateful Egyptian Is Freed As U.S. Terror Case Fizzles*, N.Y. TIMES, Jan. 18, 2002, at A1; Josh Meyer, *Dragnet Produces Few Terrorist Ties*, L.A. TIMES, Nov. 28, 2001, at A1; Peter Slevin & Mary Beth Sheridan, *Justice Dept. Uses Arrest Powers Fully; Scope of Jailings Stirs Questions on Detainees' Rights to Representation and Bail*, WASH. POST, Sept. 26, 2001, at A10; Jodi Wilgoren, *Swept Up in a Dragnet, Hundreds Sit in Custody and Ask, "Why?,"* N.Y. TIMES, Nov. 25, 2001, at B1; Richard Willing & Toni Locy, *U.S. Now a Less-Forgiving Host to Illegal Immigrants*, USA TODAY, Nov. 30, 2001, at 1A.

4. Turkmen v. Ashcroft, 02-CV-02307-JG (E.D.N.Y. 2002); *see* Susan Sachs, *Civil Rights Group to Sue over U.S. Handling of Muslim Men*, N.Y. TIMES, Apr. 17, 2002, at A13.

detention of noncitizens,[5] the use of racial profiling in immigration enforcement,[6] and expanded secrecy in immigration proceedings.[7] Yet no article published to date has closely analyzed the mandatory detention provisions of the USA Patriot Act or subjected them to detailed constitutional scrutiny.

This Note argues that the USA Patriot Act's provisions for certification and mandatory detention contravene the Fifth Amendment's guarantee of due process of law. By denying noncitizens the opportunity for meaningful review of the certification decision, and by authorizing the detention of aliens on substantively inadequate grounds, the USA Patriot Act raises serious constitutional concerns under both the procedural and substantive prongs of the Due Process Clause. Part I of this Note describes the changes to immigration law presented by sections 411 and 412 of the USA Patriot Act, focusing on the establishment of a new "certification" process that triggers mandatory detention for noncitizens. Part II explains that the Due Process Clause of the Fifth Amendment, applicable to citizens and aliens alike, provides a constitutional basis for challenging section 412. Part III presents the procedural due process claim. The Note argues that mandatory detention of certified aliens implicates a protected liberty interest under the Due Process Clause, and that the procedures of section 412 most likely do not pass constitutional muster. Moving to the substantive due process claim, Part IV argues that section 412 wrongfully authorizes the detention of aliens who pose neither a danger to the community nor a risk of flight. This argument draws support in part from recent federal appeals court cases that have invalidated the mandatory detention of aliens convicted of particular criminal offenses.

---

5. *See, e.g.*, David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953 (2002) (arguing that noncitizens' civil liberties have been sacrificed in favor of security for citizens through mass preventive detention, the USA Patriot Act, and other post-September 11 developments); *Developments in the Law: The Law of Prisons v. Plight of the Tempest-Tost: Indefinite Detention of Deportable Aliens*, 115 HARV. L. REV. 1915 (2002) (surveying recent changes to alien detention law after a key Supreme Court decision and the USA Patriot Act).

6. *See, e.g.*, Sameer M. Ashar, *Immigration Enforcement and Subordination: The Consequences of Racial Profiling After September 11*, 34 CONN. L. REV. 1185 (2002) (describing experience of Pakistani detainee in United States in context of racial profiling); Samuel Gross & Debra Livingston, *Racial Profiling Under Attack*, 102 COLUM. L. REV. 1413, 1413 (2002) (presenting framework for defining and evaluating the legitimacy of racial profiling after September 11); Leti Volpp, *Critical Race Studies: The Citizen and the Terrorist*, 49 UCLA L. REV. 1575 (2002) (discussing the conceptual exclusion from citizenship of people who appear to be Muslim, Arab, or Middle Eastern).

7. *See, e.g.*, Cole, *supra* note 5, at 1000-03 (discussing government use of classified evidence in immigration proceedings); Sadiq Reza, *Privacy and the Post-September 11 Immigration Detainees: The Wrong Way to a Right (and Other Wrongs)*, 34 CONN. L. REV. 1169 (2002) (discussing government's decision to close immigration hearings of designated individuals detained in connection with September 11 investigation); Kelley Brooke Snyder, *A Clash of Values: Classified Information in Immigration Proceedings*, 88 VA. L. REV. 447 (2002) (arguing that courts are ill-suited to balance national security and individual rights).

The argument presented is circumscribed in two ways. First, this Note focuses on the detention of aliens pending the completion of removal proceedings. Therefore, it does not address the additional constitutional problems posed by the potentially indefinite detention of aliens following a final deportation order. Second, the discussion focuses on aliens who have already "entered" the United States and who are accordingly subject to removal based on "deportability" rather than "inadmissibility" under the Immigration and Nationality Act (INA).[8]

Courts will grapple with all of these questions in the coming years as aliens are detained under the USA Patriot Act and other laws. The resolution of these issues will bear on the vitality of American civil liberties at a time of national insecurity.

I. STATUTORY ANALYSIS: THE USA PATRIOT ACT IMMIGRATION PROVISIONS

The USA Patriot Act expands the substantive grounds on which aliens can be excluded or deported for reasons of terrorism (section 411) and establishes a new mechanism for certifying and detaining aliens pending removal (section 412). Section 412, the focus of this Note, raises constitutional problems in part because section 411 expands the range of aliens who can be excluded or deported on terrorism-related grounds. The new criteria cover not just individuals who plot or undertake acts of terrorism, but also individuals who are more remotely affiliated with proscribed organizations.

Before the USA Patriot Act, the United States Secretary of State designated certain groups as "foreign terrorist organizations" in a specific procedure under section 219 of the INA.[9] That statute limited designation to foreign groups that

8. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009-546 (1996) (codified in scattered sections of 8 U.S.C. and 18 U.S.C.), amended the Immigration and Nationality Act (INA), 66 Stat. 163 (1952) (codified as amended in scattered sections of 8 U.S.C.), to reflect new concepts of "inadmissibility" and "removal." Previous immigration law was based on the concepts of "exclusion" (applied to aliens at the border seeking entrance into the United States) and "deportation" (the expulsion of aliens already present inside the country). The new concept of "inadmissibility" applies both to aliens who have not entered the United States and to aliens who have entered, but without inspection. In other words, an alien present in the United States who had evaded inspection at the border is now subject to the grounds for inadmissibility. In contrast, aliens who have been admitted are subject to removal proceedings with slightly different burdens of proof and greater opportunities for obtaining discretionary relief. Both types of proceedings are now called "removal" proceedings. For ease of reference, this Note continues to use the terms "exclusion" and "deportation" in addition to the new legal terms—the former to refer to "inadmissibility" and the latter to the removal of aliens who have been admitted. The USA Patriot Act and new INS regulations use both the old and the new terminology.

9. INA § 219 (codified as amended at 8 U.S.C. § 1189 (2001)). Note that this did not mean that no criminal or immigration consequences flowed from involvement with other organizations, but it did mean that in the case of designated foreign terrorist organizations, the general requirement that guilt be personal was replaced with a presumption of guilt based

engaged in terrorism and that threatened U.S. national security or the security of U.S. nationals. Section 219 provided for advance notice to Congress, publication of designations in the Federal Register, and a procedure for renewing designations. The USA Patriot Act retains the section 219 designation procedure but in addition attaches immigration consequences to involvement with two other types of organizations. First, it establishes a second type of "designated" organization. Under the new law, the Secretary of State, in consultation with the Attorney General, may now designate any organization, domestic or international, as a terrorist group after finding that the organization commits, incites, prepares, plans, gathers information for, or provides material support toward terrorist activities.[10] The names of these organizations would be publicized, providing notice of the designation to potential participants. Second, the statute also penalizes involvement with *undesignated* organizations. Section 411 broadens the concept of terrorist organizations to include any group that the government deems to be a "group of two or more individuals, whether organized or not" that engages in committing, inciting, or planning a terrorist activity.[11] There is thus no advance designation of this category of organization.

The statute then makes inadmissible or deportable any alien who has raised funds, solicited members, or provided material support to any of these groups—or is likely to do so in the future.[12] In the case of an undesignated organization, an individual can escape liability *only* if he can meet the burden of proving that he did not know, and reasonably should not have known, that his solicitation for funding or membership would further the group's terrorist activity. For designated organizations, the statute does not differentiate according to the intent of an individual in raising funds, soliciting members, or funding the organization; even if the individual sought to support only the lawful humanitarian or social efforts of an organization with both lawful and unlawful activities, he or she may be excluded or deported. The statutory changes particularly affect individuals involved with broad-based organizations that engage both in lawful conduct (for instance, political struggle and social work) and in violent activities.[13]

The statute specifically makes the application of the section 411 amendments retroactive: It extends to actions taken by an alien before, on, or after the date of enactment of the new law. The new provisions apply to all

---

on organizational affiliation. Therefore, membership in a designated group made an alien inadmissible in and of itself, while membership alone in other groups would require an additional determination that the person individually had engaged in proscribed activity.

10. USA Patriot Act § 411, 8 U.S.C. § 1182(a)(3) (2001).

11. *Id.* § 411(a)(1)(G), 8 U.S.C. § 1182(a)(3)(B)(vi)(III).

12. *Id.* § 411(a)(1)(C), (F), 8 U.S.C. § 1182(a)(3)(B)(i)(II), (iv)(IV)-(VI).

13. The African National Congress, a broad-based organization that combated apartheid in South Africa both through political means and incidents of terrorism, would presumably have qualified under all three categories of organizations.

aliens seeking admission on or after the law's enactment, and to all present and future removal proceedings of aliens already present.[14] There is one exception to retroactivity. An individual who fundraised, solicited members, or provided material support for a designated terrorist organization prior to its designation will not be liable,[15] but only if that organization does not qualify under the new category of undesignated terrorist organizations established in section 411.[16] Under that provision, a noncitizen who made a donation a decade ago for the humanitarian activities of a group not previously designated in any published government list, but now considered a terrorist group, may be deported for that contribution.

A. *Section 412: Mandatory Detention of "Certified" Aliens*

Section 412 of the USA Patriot Act provides for the certification of aliens suspected of terrorist involvement and for their mandatory detention until removal from the United States. Under that section, the Attorney General may certify an alien if he has "reasonable grounds to believe" that the alien falls under any of the security-based grounds for deportation in the INA, or that the alien otherwise endangers U.S. national security.[17] Under the INA, a noncitizen can be excluded or deported for national security reasons, including involvement in espionage, the attempted overthrow of the government by unlawful means, or terrorist activities. Now, any alien whom the Attorney General believes is inadmissible or deportable under the terrorism-related grounds of U.S. law, including the expansive new grounds in section 411, may be certified under the USA Patriot Act. Even if an alien is not deportable based on these grounds, he may be certified if the Attorney General has "reasonable grounds to believe" that he otherwise endangers national security. The statute does not require the Attorney General to limit certification to aliens who are believed to be dangerous or pose a high risk of flight, or to make any finding to that effect.

The Attorney General *must* take into custody any certified alien.[18] While the decision to certify an alien involves some discretion on the part of the Attorney General, the detention it triggers is mandatory. Within seven days of detaining an immigrant, the Attorney General must place the alien in removal

14. USA Patriot Act § 411(c)(1)(A).

15. *Id.* § 411(c)(3)(A).

16. *Id.* § 411(c)(3)(B)(ii).

17. Section 412(a)(3) of the USA Patriot Act, codified at 8 U.S.C. § 1226a(a)(3) (2001), provides:

> The Attorney General may certify an alien under this paragraph if the Attorney General has reasonable grounds to believe that the alien—
>
> (A) is described in section 212(a)(3)(A)(i), 212(a)(3)(A)(iii), 212(a)(3)(B), 237(a)(4)(A)(i), 237(a)(4)(A)(iii), or 237(a)(4)(B); or
>
> (B) is engaged in any other activity that endangers the national security of the United States.

18. USA Patriot Act § 412(a)(1), 8 U.S.C. § 1226a(a)(1).

proceedings or charge him or her with a criminal offense.[19] If no immigration or criminal charge is filed, the alien must be released.[20] Mandatory detention of the alien applies irrespective of any relief from removal for which the alien may be eligible or that he may have received, unless the certification is revoked. Detention ends if the alien is determined not to be removable.[21] The section also contains a special provision for certified aliens who have been ordered removed but whose removal has not occurred in the ninety-day period generally allotted, and "whose removal is unlikely in the reasonably foreseeable future." For such an individual, continued detention is authorized for additional six-month periods "only if the release of the alien will threaten the national security of the United States or the safety of the community or any person."[22] That limitation applies only to the detention of aliens who have been ordered removed, not to those awaiting the completion of deportation proceedings.

The Attorney General must review an individual's certification every six months, and may decide "in [his] discretion" to revoke the certification and release the alien under certain conditions. In addition, every six months, a certified alien can request that the government reconsider his certification and may submit documents or other evidence in his favor.[23] Apart from petitioning for reconsideration, an alien can challenge his or her certification only through a habeas corpus petition, since section 412 specifically limits judicial review to a habeas proceeding. This restriction applies to any certification decision made by the Attorney General or any decision made pursuant to the provision's limitations on indefinite detention.[24] The statute does not elaborate on what claims, specifically, an alien may raise in a habeas proceeding. Habeas proceedings may be initiated in the United States Supreme Court, the District of Columbia Circuit, or any district court which otherwise has jurisdiction to hear it, while appeals may be filed only in the D.C. Circuit.[25] Finally, section 412 provides that the Attorney General must report to the Judiciary committees of both houses of Congress twice a year on its use of that provision.[26]

19. *Id.* § 412(a)(5), 8 U.S.C. § 1226a(a)(5).

20. *Id.*

21. *Id.* § 412(a)(2), 8 U.S.C. § 1226a(a)(2).

22. *Id.* § 412(a)(6), 8 U.S.C. § 1226a(a)(6) ("Limitation on indefinite detention.").

23. *Id.* § 412(a)(7), 8 U.S.C. § 1226a(a)(7).

24. *Id.* § 412(b)(1), 8 U.S.C. § 1226a(b)(1).

25. *Id.* § 412(b)(2)-(3), 8 U.S.C. § 1226a(b)(2)-(3).

26. *Id.* § 412, adding 8 U.S.C. § 1226a(c). Pursuant to this provision, in April 2002, the Attorney General reported to Congress that it had not yet used the section to certify aliens. Tom Brune, *U.S. Evades Curbs in Terror Law*, NEWSDAY, Apr. 26, 2002, at A17.

B. *The Effect of Section 412*

The principal change that section 412 introduces into immigration law is in establishing a certification process that triggers mandatory detention. Previously, aliens suspected of involvement in terrorist activities could be arrested on the basis of terrorism offenses or other immigration charges, and then granted or denied bail upon the discretion of the Immigration and Naturalization Service (INS). In general, the INS has statutory discretion to decide whether to detain aliens or release them on bail pending deportation hearings.[27] In practice, the INS denied bail only where an alien was believed to present a threat to national security or a high risk of failing to appear for deportation proceedings. The Board of Immigration Appeals stated a policy to that effect in *In re Patel*, a 1976 decision, which the Supreme Court cited in *Reno v. Flores*:

> Congress has given the Attorney General broad discretion to determine whether, and on what terms, an alien arrested on suspicion of being deportable should be released pending the deportation hearing. The Board of Immigration Appeals has stated that "an alien generally . . . should not be detained or required to post bond except on a finding that he is a threat to the national security . . . or that he is a poor bail risk."[28]

When the District Commissioner of the INS made a decision to detain an alien on the basis of either of these factors—threat to security or poor bail risk—the alien retained a number of procedural rights to contest that determination. He had the right to request a hearing with an immigration judge to review the denial of bond, and could appeal a negative decision to the Board of Immigration Appeals.[29] Beyond administrative review, an alien could also contest detention through appeal to a district court on a habeas petition.

Under the new law, detention is mandatory for aliens certified by the Attorney General, and any alien that the government has "reasonable grounds to believe" meets any of the broad grounds for inadmissibility or deportation in section 412, or is otherwise considered a national security threat, may be certified. Thus, certification could apply to an alien whose sole offense was a donation to an undesignated organization intended for charitable purposes, and who neither presents a danger to the public nor appears likely to abscond. Aliens may potentially be certified by the Attorney General for reasons other than threat to the public or bail risk.[30] Certified aliens are automatically

27. 8 U.S.C.A. § 1226(a)(1)-(2) (West 2003). The statute, since 1996, contains an exception for aliens with certain criminal convictions, who are automatically denied bail. *Id.* § 1226(c).

28. Reno v. Flores, 507 U.S. 292, 294-95 (1993) (upholding INS regulation releasing alien juveniles only to the custody of certain adults) (citing *In re* Patel, 15 I. & N. Dec. 666 (1976)).

29. 8 C.F.R. § 242.2(d) (1995).

30. Even before September 11, the government occasionally cited a regulation that it claims shows that it may detain aliens pending deportation at its sole discretion, regardless of

ineligible for bail; there is no opportunity for an adversarial hearing to contest their detention. In sum, section 412 introduces an irrebuttable presumption that aliens subject to certification are unfit for release.

II. THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT

The Supreme Court has ruled over the past century that many constitutional protections available to the accused in the criminal justice process do not apply to aliens in deportation proceedings. Courts have justified the lesser protection on the grounds that deportation is not a punishment.[31] For instance, the "exclusionary rule" protecting individuals from the use of unlawfully obtained evidence, based on the Fourth Amendment prohibition on unreasonable searches and seizures, does not generally protect aliens in deportation hearings.[32] Similarly, the Article I, Section 9 prohibition on ex post facto legislation does not bar Congress from making an alien deportable for past conduct that was not a deportable offense at the time of its commission.[33]

By contrast, the Supreme Court has explicitly held that the Fifth Amendment to the Constitution[34] protects every "person," citizen or alien, from government deprivations of life, liberty, or property without "due process of law." In *Zadvydas v. Davis*,[35] an important recent immigration decision, the Supreme Court reaffirmed its longstanding position that due process of law applies to aliens present within the United States, regardless of the lawfulness of their presence.[36] In *Zadvydas*, the Court held that an immigration statute,

---

whether or not they meet the criteria of danger or flight risk. The new regulation, 8 C.F.R. § 236.1(c)(8) (West 2003), states:

> Any officer authorized to issue a warrant of arrest may, in the officer's discretion, release an alien not described in section 236(c)(1) of the Act, under the conditions at section 236(a)(2) and (3) of the Act; provided that the alien must demonstrate to the satisfaction of the officer that such release would not pose a danger to property or persons, and that the alien is likely to appear for any future proceeding. Such an officer may also, in the exercise of discretion, release an alien in deportation proceedings pursuant to the authority in section 242 of the Act (as designated prior to April 1, 1997), except as otherwise provided by law.

See also Brief of Appellant at 28-29, Najjar v. Ashcroft, 273 F.3d 1330 (11th Cir. 2001) (No. 00-14947). The INS, however, has never advanced reasons other than danger or flight risk for detaining an alien without bond.

31. Fong Yue Ting v. United States, 149 U.S. 698, 730-31 (1893).

32. INS v. Lopez-Mendoza, 468 U.S. 1032, 1032 (1984).

33. Mahler v. Eby, 264 U.S. 32, 39 (1924).

34. "No person shall . . . be deprived of life, liberty or property, without due process of law." U.S. CONST. amend. V.

35. 533 U.S. 678 (2001).

36. "But once an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary or permanent." *Id.* at 693; *see also* Plyler v. Doe, 457 U.S. 202, 210 (1982); Mathews v. Diaz, 426 U.S. 67, 77 (1976); Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 212 (1953); Kwong Hai Chew v. Colding, 344

interpreted to avoid constitutional doubts, did not permit the government to detain indefinitely an alien ordered deported from the country whose removal was not reasonably foreseeable. Previously, the INS held in custody indefinitely many aliens who were ordered removed but whose home countries refused to accept them, or who had no country of citizenship. The INS had detained Kestutis Zadvydas, a permanent resident with a long criminal record, for several years after his deportation order; neither Germany, where he was born in 1948 in a displaced persons camp, nor Lithuania, his parents' home country, would accept him since he did not have citizenship in either country.[37] The *Zadvydas* Court limited detention of an alien whose removal was unforeseeable to a "reasonable" time (presumptively six months) after a final order of removal.[38] The Supreme Court found that the Fifth Amendment would raise serious constitutional difficulties with a statute that authorized the indefinite detention of an alien.[39] In reaching this conclusion, the Court noted a territorial distinction it adopted over a century ago between the status of aliens outside the borders of the United States, who effectively have no claim to constitutional protection, and those who have entered the country, even if illegally.[40] Once present in the country, aliens can claim due process protection.[41]

In light of *Zadvydas* and other cases successfully challenging alien detention based on due process review, this Note focuses on challenges to USA Patriot Act section 412 under the Due Process Clause of the Fifth Amendment. Objections to mandatory detention based on the Fourth Amendment prohibition of unlawful seizures[42] or the Eighth Amendment prohibition of excessive bail[43] might also be feasible, but are not considered here. The Due Process Clause provides two independent tests for evaluating whether government action passes constitutional muster: Procedural due process considers whether government action depriving an individual of life, liberty, or property was implemented in a "fair manner," while substantive due process prevents government conduct that "shocks the conscience" or intrudes on rights

U.S. 590, 596-98 & n.5 (1953); Wong Yang Sung v. McGrath, 339 U.S. 33, 49-50 (1950); The Japanese Immigrant Case, 189 U.S. 86, 100-01 (1903); Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886).

37. *Zadvydas*, 533 U.S. at 684.

38. *Id.* at 689, 701.

39. *Id.* at 690.

40. *Id.* at 693.

41. *Id.*

42. The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

43. "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." U.S. CONST. amend VIII.

"implicit in the concept of ordered liberty."[44] The certification and mandatory detention of suspected aliens can be challenged on both procedural and substantive due process grounds.

The procedural due process claim, considered first in this Note, finds constitutional fault in the absence of fair procedures protecting against wrongful certification. The opportunity for a meaningful hearing is a critical component of procedural due process, yet the USA Patriot Act offers an alien no opportunity for a hearing before certification and only tenuous and uncertain opportunities for judicial review after certification. As argued below, whether or not this problem amounts to an actual constitutional violation will depend largely on how courts construe the scope of habeas corpus review of certification. Meanwhile, the substantive due process challenge stems from the excessive scope of the grounds for certification in section 412: The USA Patriot Act authorizes the certification of individuals who may neither be dangerous nor present a risk of flight, permitting detention for substantively inadequate grounds.

III. PROCEDURAL DUE PROCESS

A. *Is There a Protected Liberty Interest?*

A court considering a procedural due process claim asks first whether an individual has been deprived of a protected liberty or property interest, and second, whether the procedures provided offer sufficient protection against wrongful deprivation.[45] Only if it finds that a protected interest is at stake does it move to analyzing the adequacy of the procedures.

Government detention by definition deprives an alien of physical liberty, but the question arises whether the alien has a protected interest in that liberty. The Supreme Court has upheld as constitutional the detention of aliens pending deportation, so aliens awaiting the conclusion of removal proceedings do not have an absolute legal right to be free from detention.[46] Furthermore, as the Court has affirmed, the decision to grant bond is within the discretion of the Attorney General.[47] Some lower courts have held that given the absence of a statutory entitlement to bond, aliens cannot contest INS detention because they have no protected liberty interest at stake—squashing the procedural due process inquiry at the first step. Several district courts reached that conclusion

44. United States v. Salerno, 481 U.S. 739, 746 (1987).

45. Am. Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40, 59 (1999); Mathews v. Eldridge, 424 U.S. 319, 332 (1976).

46. Carlson v. Landon, 342 U.S. 524, 538 (1952); Wong Wing v. United States, 163 U.S. 228, 235 (1896).

47. Reno v. Flores, 507 U.S. 292, 294-95 (1993); *Carlson*, 342 U.S. at 540.

in considering whether the mandatory detention of aliens in the nonterrorism context ran afoul of the Fifth Amendment.[48]

In 1996, the Illegal Immigration Reform and Immigrant Responsibility Act required that aliens with certain criminal convictions be held in custody pending removal, foreclosing the possibility of bail for a broad class of aliens.[49] Challenges to the constitutionality of this mandatory detention provision, codified as section 236(c) of the INA, reached numerous courts. Five federal courts of appeal have now considered whether section 236(c) violates the Due Process Clause,[50] and the Supreme Court has granted certiorari over the issue.[51] Although all four appeals courts to consider the question after the Supreme Court's decision in *Zadvydas* have invalidated the provision, these courts reached their conclusion on substantive due process grounds and did not rule on whether the statute also violated the aliens' procedural due process rights. Meanwhile, the Seventh Circuit, ruling before *Zadvydas*, sustained the law but did not rule out procedural due process inquiry altogether.[52] Therefore, the argument that aliens challenging detention do not have a protected liberty interest has not succeeded at the appellate level in the section 236(c) context, but has also not been explicitly overruled by higher courts.

Yet Supreme Court cases outside the section 236(c) context indicate that aliens do have a protected liberty interest in freedom pending removal proceedings. *Zadvydas* in particular, though not resolved as a procedural due process case, suggests that the Supreme Court would reject a claim that an alien detained by the government has no procedural rights with respect to his detention. In *Zadvydas*, the Supreme Court reaffirmed that "[f]reedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that [the Due Process] Clause protects."[53] If aliens ordered removed from the country still have substantive rights to liberty protected by the Due Process Clause, they must surely have the less exacting right to fair procedures in the implementation of detention.

---

48. *See, e.g.*, Diaz-Zaldierna v. Fasano, 43 F. Supp. 2d 1114, 1121 (S.D. Cal. 1999) (denying writ of habeas corpus to alien detained by INS for criminal convictions) ("The insuperable problem with this argument is that there can be no requirement of procedures for a right—here, bail during deportation proceedings—that does not exist."); *see also* Caballero v. Caplinger, 914 F. Supp. 1374, 1378 (E.D. La. 1996) (linking the existence of procedural rights to the prior establishment of a constitutionally protected liberty interest in freedom pending deportation, but in the context of another statute).

49. INA § 236(c), 8 U.S.C. § 1226(c) (2000).

50. Welch v. Ashcroft, 293 F.3d 213 (4th Cir. 2002); Hoang v. Comfort, 282 F.3d 1247 (10th Cir.), *petition for cert. filed*, 70 U.S.L.W. 3698 (U.S. May 3, 2002) (No. 01-1616); Kim v. Ziglar, 276 F.3d 523 (9th Cir.), *cert. granted sub nom.* Demore v. Kim, 122 S. Ct. 2696 (2002); Patel v. Zemski, 275 F.3d 299 (3d Cir. 2001); Parra v. Perryman, 172 F.3d 954 (7th Cir. 1999).

51. *Demore*, 122 S. Ct. at 2696 (granting writ of certiorari).

52. *Parra*, 172 F.3d at 958.

53. Zadvydas v. Davis, 533 U.S. 678, 690 (2001).

The Supreme Court has in fact explicitly held that aliens in deportation proceedings are entitled to procedural due process. Well-settled precedent affirms that deportation is a deprivation sufficient to trigger the requirement of procedural due process.[54] Because detention is part of the deportation process,[55] it must accordingly be covered by procedural due process standards. That is, not only must the substantive evaluation of an alien's deportability be subject to due process of law, but the detention of an alien pursuant to deportation hearings must also comport with due process. The Supreme Court's decision in *Reno v. Flores*[56] confirms that alien detention implicates a protected liberty interest. In *Flores*, the Court explicitly subjected alien custody to a procedural due process inquiry. That case concerned an INS regulation permitting the release of arrested alien juveniles only to their parents or close family members. A class of alien juveniles argued that the regulation violated due process because it did not require the INS to determine in each individual case whether the best interests of the minor lay in INS custody or in release to a "responsible adult" beyond those authorized under the regulation.[57] The Court approached the procedural due process inquiry first by repeating the point that it is "well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings."[58] Having cited that principle, it turned immediately to a determination of whether the specific custody procedures met those standards. Although it ultimately found that the procedures were adequate, the *Flores* Court reached that conclusion through a detailed assessment of the procedures, and not by questioning whether INS custody implicated a liberty interest of the alien. The Court apparently found its own precedent conclusive on the issue. This precedent appears to settle the point that detention of an alien pursuant to removal does implicate a protected interest.

B. *What Process Is Due?*

Having established that alien detention implicates a protected liberty interest, the next step of the procedural due process inquiry is to evaluate whether the procedures provided are adequate. This Part will describe the procedures section 412 provides, discuss the applicable Supreme Court

54. The Court has stated that deportation is a "drastic measure and at times the equivalent of banishment or exile," Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948), and that it may result "in loss of both property and life; or all that makes life worth living." Ng Fung Ho v. White, 259 U.S. 276, 284 (1922); *see also supra* note 36.

55. *See* Carlson v. Landon, 342 U.S. 524, 538 (1952) (describing detention as "necessarily a part of this deportation procedure").

56. Reno v. Flores, 507 U.S. 292 (1993).

57. *Id.* at 300.

58. *Id.* at 306.

precedent on alien custody, and apply the procedural due process balancing test to assess whether the procedures are sufficient.

1. *The procedures of USA Patriot Act section 412.*

Section 412 offers the following procedures to prevent wrongful certification and detention: (1) the "reasonable grounds to believe" standard required for certification, (2) an opportunity to request reconsideration of certification through written submissions, and (3) habeas corpus review of detention in a federal district court. The statute does not provide for a hearing at any level within the Department of Justice before (or after) certification. The extent of protection offered by these procedures is difficult to assess because the statute leaves unanswered important questions that have yet to be clarified by INS regulations or the federal courts.

"Reasonable grounds to believe." The statute provides that the Attorney General may certify a noncitizen who he has "reasonable grounds to believe" falls within any of the enumerated classes of aliens deportable for national security reasons. It is unclear how rigorously the INS or courts will interpret this standard; there is little case law defining it. In the Fourth Amendment context, "reasonable suspicion" amounts to a lower requirement than "probable cause"; when a law enforcement officer has "reasonable suspicion" of criminal activity, he can only "stop and frisk" an individual, not arrest him.[59] If the INS interprets a "reasonable grounds to believe" standard to require less than probable cause, an alien could be subjected to lengthy mandatory detention based on a level of suspicion that would only permit a brief stop and frisk on the street. On the other hand, the standard might be interpreted to require more: The Board of Immigration Appeals, in a case two years ago interpreting a statute on terrorism-related grounds for inadmissibility, actually equated "reasonable grounds to believe" with a finding of probable cause.[60] In sum, it is not yet clear how the government or courts will interpret this standard. In any event, even the higher standard only affects what the government must allege, and does not offer the alien an opportunity to counter the allegations.

Petitioning for reconsideration of certification. The certification decision is ex parte, with the alien allowed only to request every six months in writing that the Attorney General reconsider the certification.[61] While the alien can challenge his certification through written submissions, the statute does not provide for a hearing or for notice of the basis of certification. It is possible,

59. *See* Terry v. Ohio, 392 U.S. 1 (1968); *Developments in the Law*, *supra* note 5, at 1936-37 (commenting on "reasonable grounds to believe" standard in light of *Terry v. Ohio*).

60. *In re* Haddam, No. A22 751 813, 2000 BIA LEXIS 20 (Dep't of Justice Dec. 1, 2000) (approving grant of asylum to Algerian connected with Islamic Salvation Front and rejecting immigration judge's conclusion that there were "reasonable grounds to believe" applicant would engage in terrorist activity under section 212(a)(3)(B) of the INA).

61. USA Patriot Act § 412(a)(7), 8 U.S.C. § 1226a(a)(7) (2001).

however, that the INS might develop regulations that expand on the minimal protections legislated by statute. In November 2001, responding to *Zadvydas*, the INS issued regulation section 241.14 governing the detention of aliens subject to a final order of removal whose release does not seem reasonably foreseeable within ninety days of the removal order.[62] This regulation does not apply to aliens whose removal proceedings are pending, since the regulations specifically responded to the *Zadvydas* Court's concern over the possibly indefinite detention that might arise after a final order of removal. The regulation provides that detention of aliens suspected of terrorism would continue, but that detainees would be provided a written description of the factual basis for their detention and an opportunity to submit a written statement and evidence.[63] In addition, an alien suspected of terrorism whose removal order stemmed from an ordinary immigration offense would be granted an interview with an immigration officer.[64] Similar rules, if extended to detainees awaiting the completion of removal hearings, would allow for greater notice and hearing than the statute currently provides.

Yet section 241.14 suggests that even then, the level of notice and review provided might be truncated on national security grounds. That regulation states that the alien will be given notice of the factual basis for detention only to the extent "consistent with the protection of national security and classified information."[65] In recent years, the INS has regularly denied bond to aliens on the basis of "secret evidence" allegedly connecting them with terrorist groups; in such cases, the detainee sometimes received no more than a vague, one-sentence summary of the government's allegations.[66] The INS defended its practice in federal district court proceedings when detained aliens challenged the use of classified evidence.[67] Since September 11, the government has regularly defended the use of "secret evidence" and other secrecy measures it says are necessary to protect national security.[68] Given that history, it is likely that in cases arising under section 412, the government would disclose very little information. With limited disclosure, it is questionable whether an alien would have real notice of the basis for his certification or a meaningful opportunity to rebut it.

---

62. Continued Detention of Aliens Subject to Final Orders of Removal, 66 Fed. Reg. 56967 (Nov. 14, 2001) (to be codified at 8 C.F.R. pts. 3, 241).

63. 8 C.F.R. § 241.14(d)(2) (2001).

64. *Id.* § 241.14(d)(3).

65. *Id.* § 241.14(d)(2).

66. *See, e.g.*, Najjar v. Reno, 97 F. Supp. 2d 1329 (S.D. Fla. 2000) (granting writ of habeas corpus to detainee who received only a one-line unclassified summary by the immigration judge of the classified evidence on which basis he was detained), *vacated as moot sub nom.* Najjar v. Ashcroft, 273 F.3d 1330 (11th Cir. 2001).

67. *See infra* notes 99-100 and accompanying text.

68. *See, e.g.*, Global Relief Found., Inc. v. O'Neill, 207 F. Supp. 2d 779, 808-09 (N.D. Ill. 2002) (finding that ex parte, in camera submission of evidence did not violate charitable foundation's due process rights).

Habeas corpus relief. USA Patriot Act section 412 restricts judicial review of any action or decision under the section to a habeas challenge, including review over the merits of any certification decision.[69] The statute is silent on what claims an alien might raise in a habeas petition, and courts would likely wrestle with this jurisdictional question much as they have disputed the scope of habeas review over final orders of removal following changes in the 1996 immigration laws. In particular, it is not clear whether a court reviewing a habeas petition could examine the factual basis for a certification decision.

The Constitution protects the right to petition for a writ of habeas corpus, but its availability may be subject to congressional limits.[70] In an important case decided in 2001, *INS v. St. Cyr*, the Supreme Court discussed whether federal courts could consider questions of law, challenges to discretionary immigration decisions, and questions of fact raised in a habeas corpus petition.[71] That case concerned the availability of habeas relief for aliens after amendments to the INA passed in 1996. The Court ruled that federal district courts do have jurisdiction to consider the habeas petition of an alien who challenged his detention based on a pure question of law.[72] The alien argued that contrary to the government's interpretation, the 1996 amendments passed by Congress did not strip the Attorney General of the power to grant him discretionary relief from deportation. The Court suggested that pure questions of law could be considered in a habeas petition, stating that a congressional statute precluding such review would raise "substantial constitutional questions"[73] and that historically, the writ was always available to review the lawfulness of executive detention.[74] Thus, a federal district court could consider the statutory claim at issue in *St. Cyr*.

Turning from pure questions of law to the review of discretionary relief from deportation, *St. Cyr* stated that courts have traditionally recognized that a habeas petition could challenge the government's failure to exercise discretion but not the actual outcome of a discretionary review.[75] Concerning questions

69. USA Patriot Act § 412(b)(1), 8 U.S.C. § 1226a(b)(1) (2001).

70. U.S. CONST. art. I, § 9, cl. 2 ("The privilege of the writ of habeas corpus shall not be suspended unless when in cases of rebellion or invasion the public safety may require it.").

71. 533 U.S. 289, 303-05 (2001) (interpreting 1996 immigration laws to preserve habeas review over a final order of removal because only a clear and unambiguous statement of congressional intent to revoke habeas jurisdiction would lead a court to conclude that the writ was no longer available); *see* Daniel Kanstroom, St. Cyr *or Insincere: The Strange Quality of Supreme Court Victory*, 16 GEO. IMMIGR. L.J. 413 (2002) (analyzing questions presented by the *St. Cyr* decision, particularly concerning the exercise of discretion in immigration law); Gerald Neuman, *The Habeas Corpus Suspension Clause After* INS v. St. Cyr, 33 COLUM. HUM. RTS. L. REV. 555 (2002).

72. *St. Cyr*, 533 U.S. at 297-98.

73. *Id.* at 300.

74. *Id.* at 305.

75. *Id.* at 307.

of fact, the Court noted briefly that before 1952, when aliens regularly used habeas petitions to challenge INS decisions, courts did not review the factual determinations behind a deportation order except to find whether there was "some evidence" in support of the order.[76] The *St. Cyr* Court did not elaborate on the "some evidence" standard, and substantial controversy surrounds its meaning. Immigration law scholar Gerald Neuman has argued that this standard demands less than the "sufficient evidence" required in judicial review based on the Administrative Procedure Act, but more than "any evidence whatsoever."[77]

Based on *St. Cyr*, an alien detained pursuant to section 412 could raise constitutional questions and pure questions of law on a habeas petition. For instance, a court could consider a habeas petition alleging violations of the Fifth Amendment, or it could resolve questions of statutory interpretation of section 412. It is not clear, however, whether a detainee could argue that the Attorney General in fact had no "reasonable grounds to believe" that he was certifiable. That question involves the application of the law to the facts of a particular case, and *St. Cyr* itself does not resolve the issue. A court might find, based on *St. Cyr* and earlier cases involving the review of facts on habeas petitions, that it should determine whether "some evidence" existed to support a "reasonable grounds to believe" determination. Not only is that standard murky, but its application in the particular case is even more uncertain. It is not clear whether the alien would be able to offer evidence to challenge this determination, or whether the judge's review would turn only on the government's evidence. If there were enough evidence for a prima facie finding that reasonable grounds existed for the government's determination, then it might not be possible for an alien to argue on habeas that he *actually* had no connection with terrorism or presented no threat to national security.[78] This would result in a very truncated review of the Attorney General's certification decision. An individual would effectively have no means to argue in a court of law that he in fact posed no threat to national security. While under the statute, habeas review appears to offer the alien an opportunity for judicial review, in practice that protection may not amount to a meaningful hearing.

At this point, given the uncertain course of INS and judicial interpretation of the USA Patriot Act, the scope of procedures available to certified aliens remains murky. The following section turns from the statutory provisions of the USA Patriot Act to the law that might guide an analysis of the procedures that are constitutionally required.

---

76. *Id.* at 306; *see also* Gerald L. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 COLUM. L. REV. 961 (1998).

77. Gerald Neuman, *The Constitutional Requirement of "Some Evidence,"* 25 SAN DIEGO L. REV. 631, 634, 661 (1988).

78. *See* Adams v. Baker, 909 F.2d 643, 648-49 (1st Cir. 1990) (finding sufficient evidence for State Department to reasonably believe that Sinn Fein leader Gerry Adams had participated in terrorist activity).

2. *Supreme Court precedent.*

Supreme Court decisions provide no definitive guidance on the level of procedures constitutionally due to aliens detained under section 412. In two cases prior to *Zadvydas*, the Court evaluated the constitutionality of INS detention pending deportation, in both cases finding that the Fifth Amendment applied but that the requirements of due process were met. In *Carlson v. Landon*, the Court considered habeas petitions of aliens arrested and charged with membership in the Communist Party in violation of the Subversive Activities Control Act of 1950.[79] The INS ordered the aliens detained without bond pending deportation proceedings, and the Supreme Court upheld their detention, finding no denial of due process "where there is reasonable apprehension of hurt from aliens charged with a philosophy of violence against the Government."[80] Yet *Carlson* did not address the *procedural* protections required before a denial of bail, and instead focused on whether the *grounds* for detention—membership in the Communist Party—sufficiently justified custody. While the case is entirely relevant for a substantive due process challenge to section 412, its holding does not control the procedural due process question at hand.

In *Reno v. Flores*, discussed above, the Supreme Court sustained an INS regulation barring the release of detained alien juveniles except to their parents, close relatives, or other legal guardians.[81] The Supreme Court reviewed the extensive procedures provided and found them to be sufficient; these procedures included a right to request a "custody redetermination" by an immigration judge and a right to appeal that decision to the Board of Immigration Appeals and then to the federal courts.[82] Because the extent of these procedures is so much greater than those afforded aliens under section 412, *Flores* provides little guidance on whether the diminished protections in section 412 would also comport with due process.

In situations of civil confinement outside the immigration context, the Supreme Court has upheld "preventive detention" only in limited circumstances subject to exacting procedural safeguards. In *United States v. Salerno*, the Court upheld a law authorizing federal courts to detain an arrested individual pending trial if the government demonstrated by clear and convincing evidence that the safety of the community could not otherwise be guaranteed.[83] In sustaining the law, the Court placed great emphasis on the procedural protections it offered: These included a government demonstration of "probable cause" that the charged crime had been committed; a "full-blown adversary hearing" in which a neutral arbiter was convinced by "clear and

79. 342 U.S. 524 (1952).
80. *Id.* at 541-42.
81. Reno v. Flores, 507 U.S. 292 (1993).
82. *Id.* at 308.
83. 481 U.S. 739 (1987).

convincing evidence" that no release conditions could guarantee community safety; a right to counsel at the detention hearing; statutorily enumerated factors guiding the detention decision; written findings of facts and a written statement of reasons for a decision; and immediate appellate review of the detention decision.[84] This degree of protection, once again, significantly exceeds the procedures provided in section 412.

3. *Applying the* Mathews *test.*

In general, due process has been interpreted as requiring both notice of the reasons for a government deprivation of a liberty interest and a hearing to contest that deprivation. Notice is an "elementary and fundamental requirement of due process in any proceeding" and must realistically "afford [parties] an opportunity to present their objections."[85] *Goldberg v. Kelly*, the case that launched the "procedural due process revolution," held that a welfare recipient's benefits could not be terminated without a prior evidentiary hearing.[86] Subsequent cases have reaffirmed the principle that it is a "root requirement" of due process that "an individual be given an opportunity for a hearing *before* he is deprived of any significant [liberty or] property interest."[87] This requirement has been relaxed where providing predeprivation process is not feasible because of the random and unauthorized nature of the deprivation, or where the situation requires quick government action, and as long as a postdeprivation remedy would be adequate.[88] A prior hearing is generally required, however, when it is feasible, even if a postdeprivation remedy is available.[89] To determine whether the section 412 provisions meet the requirements of procedural due process, a court would apply the classic balancing test stated in *Mathews v. Eldridge*.[90] In *Mathews*, the Court upheld the procedures in place for termination of a recipient's Social Security disability benefits after considering three factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural

84. *Id.* at 750-52.

85. Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950).

86. 397 U.S. 254 (1970).

87. Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 542 (1985) (quoting Boddie v. Connecticut, 401 U.S. 371, 379 (1971)); *see also* Fuentes v. Shevin, 407 U.S. 67 (1972); Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969).

88. Parratt v. Taylor, 451 U.S. 527, 543 (1981) (holding that the negligent loss of a prison inmate's hobby kit did not violate procedural due process because the state had not authorized the act and because an adequate postdeprivation remedy existed).

89. Zinermon v. Burch, 494 U.S. 113, 132 (1990) ("In situations where the State feasibly can provide a predeprivation hearing before taking property, it generally must do so regardless of the adequacy of a postdeprivation tort remedy to compensate for the taking.").

90. 424 U.S. 319 (1976).

> safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[91]

Private interest of the individual. The private interest of an alien in resisting wrongful deprivation of his liberty pending deportation is great. At its root, detention strips his freedom from physical confinement, a weighty and traditionally protected liberty interest. Detention also implicates secondary interests—an individual's ability to work, maintain community relations, and otherwise exercise the benefits of society, especially for lawful permanent residents.[92] Detention may lead to separation from family, impinging on the integrity of the family unit, a traditionally protected liberty interest.[93] As a liberty interest, it is also significant that a deprivation of liberty cannot be undone; while mistakenly appropriated property can be returned to an individual, the loss of liberty cannot be restored upon a finding that the decision was in error.

Value of safeguards and the risk of error. For the individual detained pursuant to USA Patriot Act section 412, the value of additional procedures supplying meaningful notice and a hearing would be significant. In particular, an adversarial hearing at an administrative level before or soon after certification and an opportunity for meaningful judicial review afterwards of the basis for certification would substantially reduce the risk of improper detention. The current procedures of written submissions of evidence and habeas review are problematic, as described in Part III.B.1; the opportunity to present factual material to challenge government allegations in an adversarial fashion might well be limited. Due process requires that notice and a hearing be "meaningful,"[94] not just formal. While the Fifth Amendment does not require that an individual always be given a hearing prior to the deprivation of a significant interest—and the national security concerns present here may prevent such a hearing before the initial detention of the individual—due process does require a meaningful hearing at some point in time relevant to protecting the individual's interest. Once the individual is in government custody, the immediacy of the national security concerns can no longer justify delaying such an opportunity to an individual deprived of liberty.

Without additional safeguards, the risk of error is significant in light of the lack of notice and the ex parte process. As stated by Justice Frankfurter in *Joint Anti-Fascist Refugee Committee v. McGrath*, an early Cold War case, "fairness can rarely be obtained by secret, one-sided determination of facts

---

91. *Id.* at 335.

92. *See, e.g.*, Kim v. Ziglar, 276 F.3d 523, 528-29 (9th Cir. 2002).

93. *See, e.g.*, Moore v. City of E. Cleveland, 431 U.S. 494 (1977); Griswold v. Connecticut, 381 U.S. 479 (1965); Skinner v. Oklahoma, 316 U.S. 535 (1942); Meyer v. Nebraska, 262 U.S. 390 (1923).

94. Bell v. Burson, 402 U.S. 535, 541-42 (1971) (quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965)).

decisive of rights."[95] His opinion continued: "No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it."[96] The risks of error in relying on a one-sided process are particularly high when the certification decision may be based on intelligence sources that are generally not subject to public scrutiny and accountability.[97] The strong possibility of error in such national security determinations came to light in several cases in the late 1990s where the INS relied on classified evidence to deny bond to aliens suspected of terrorist links. When individuals detained on "secret evidence" brought habeas petitions in district courts, judges questioned the reliability of determinations based on undisclosed evidence.[98] Many reports on the "secret evidence cases" alleged a pattern of government reliance on sources with dubious credibility and mishandling of the collection and use of that information.[99]

Section 412 goes one step further than the practice of using classified evidence by dispensing with a bond hearing altogether, exacerbating the notice and fair hearing concerns present in those cases. A certified alien would be in the precarious position of proving he was not a terrorist in the face of undisclosed charges; it is "difficult to imagine how even someone innocent of all wrongdoing could meet such a burden."[100] Meanwhile, the habeas review may not permit the alien to dispute factual allegations sufficiently in order to show that he ought not to be certified under section 412.

---

95. 341 U.S. 123, 170 (1951) (Frankfurter, J., concurring).

96. *Id.* at 171-72.

97. *See, e.g.*, Carlson v. United States, 342 U.S. 524, 552 (Black, J., dissenting).

98. *See* Najjar v. Reno, 97 F. Supp. 2d 1329, 1354 (S.D. Fla. 2000), *vacated as moot sub nom.* Najjar v. Ashcroft, 273 F.3d 1330 (11th Cir. 2001) (ruling that procedural due process rights had been violated insofar as use of classified evidence deprived petitioner of right to a fair hearing and noting "substantial risk that the Immigration Judge and the BIA could reach an erroneous or unreliable determination that Petitioner should continue to be detained as a threat to national security"); Kiareldeen v. Reno, 71 F. Supp. 2d 402, 413, 419 (D.N.J. 1999) (granting petitioner's writ of habeas corpus based on challenge to the use of secret evidence and stating that "the INS' reliance on secret evidence raises serious issues about the integrity of the adversarial process, the impossibility of self-defense against undisclosed charges, and the reliability of government processes initiated and prosecuted in darkness"), *rev'd in part sub nom.* Kiareldeen v. Ashcroft, 273 F.3d 542 (3rd Cir. 2001) (reversing grant of attorney's fees only).

99. *See Kiareldeen*, 71 F. Supp. at 416-17 (discussing speculation that source of government's information was petitioner's ex-wife involved in custody dispute with petitioner); Susan Akram, *Scheherezade Meets Kafka: Two Dozen Sordid Tales of Ideological Exclusion*, 14 GEO. IMMIGR. L.J. 51, 83-90 & nn.186-87 (1999) (describing submission of mistranslated documents, erroneous classifications, and agency bias in secret evidence cases); Martin Lasden, *Under Suspicion*, CAL. LAW., Nov. 1999, at 40-45, 95 (discussing case of "Iraqi Six," Iraqi Kurds held on classified evidence and defended by former CIA director James Woolsey).

100. Rafeedie v. INS, 880 F.2d 506, 516 (D.C. Cir. 1989) (affirming preliminary injunction against summary exclusion proceedings for a returning permanent resident).

Government interest. On the other side of the balance from the private interest at stake is the interest of the government in avoiding further procedures. Most broadly construed, the government interest could be presented as one of national security, which would present a heavy counterweight to the individual's liberty interest at stake. Courts applying procedural due process scrutiny have found it "'obvious and unarguable' that no government interest is more compelling than the security of the Nation."[101] The Attorney General frequently uses arguments from national security and foreign policy to justify deferential judicial review of immigration decisions. National security considerations after the September 11 attacks were plainly the congressional impetus and justification for the USA Patriot Act. Yet courts should not characterize the government interest at stake as national security writ large, but as the interests in security and efficiency that are served by the absence of additional procedures. In other words, they should evaluate the government interest in terms of the marginal benefits gained by the mandatory detention provision that would be lost if courts required individualized hearings.

The provision of a certification hearing and meaningful judicial review would entail additional financial costs for the government.[102] These costs are offset, however, by the reduction in costs from not having to house and feed an alien in custody, so it is not clear where the balance of costs would lie. Second, and more significant to the national security claim, the elimination of mandatory detention might lead to the release of some aliens on bond who are threats to the public or who may not subsequently appear for deportation. The government has a strong interest in avoiding a procedure that might increase the risk of potential terrorists remaining at large. Compared to the current system where individualized bond hearings are held, the government may also claim an interest in avoiding proceedings where it faces a choice between revealing classified evidence linking an alien to terrorism—which might expose its informants and sources—or facing a court order to release the alien on constitutional grounds.

Although these risks may be real, they should not be overstated. Additional procedures do not block the government from detaining aliens who are genuine threats; it merely provides for a level of review where the individual herself has an opportunity to present her side. Even before section 412, the INS kept in detention deportable aliens whom it considered to be dangerous. In fact, under an INS regulation passed last fall, an immigration

101. Haig v. Agee, 453 U.S. 280, 307 (1981) (holding citizen's right to procedural due process was not violated by revocation of passport without a predeprivation hearing) (quoting Aptheker v. Sec'y of State, 378 U.S. 500, 509 (1964)).

102. *See* Stanley v. Illinois, 405 U.S. 645, 656-57 (1972) (finding parents constitutionally entitled to a hearing on parental fitness before the removal of their children) ("Procedure by presumption is always cheaper and easier than individualized determination.").

judge's decision to order an alien's release is automatically stayed, pending review by the Board of Immigration Appeals or the Attorney General, if the INS district director had ordered that the alien be held without bond or where the bond was set above $10,000.[103] Multiple levels of review already guard against the release of an individual who poses a genuine security threat. In addition, although national security concerns may result in a government preference to avoid disclosure, the government could still make the argument for nondisclosure in an individualized setting rather than be granted blanket permission to avoid any review whatsoever. On balance, the government's interest in national security would not be unduly burdened by procedures that allowed individuals to contest certification. Procedures such as a certification hearing and meaningful judicial review would still allow the government to detain dangerous individuals, satisfying national security concerns, but would provide an alien notice and a hearing before losing his liberty for months or years. Unless a court determines that on habeas corpus review an alien can fully contest the certification decision, with a fair opportunity to rebut the government's factual allegations, it should invalidate section 412 for failing to provide constitutionally adequate procedures.

IV. SUBSTANTIVE DUE PROCESS

While the procedural due process argument finds section 412 deficient in not providing constitutionally adequate procedures, the substantive due process claim derives from the wrongfulness of the detention irrespective of the procedures available.[104] This challenge rests on the arbitrariness of government detention legislated in the USA Patriot Act: Section 412 violates substantive due process by authorizing government detention of some aliens who pose neither a danger to the community nor a risk of flight. While it is constitutional to detain an alien charged with a deportable offense if the individual endangers society or appears likely to abscond, the detention of an alien who meets neither of these criteria violates the individual's substantive rights. This argument, therefore, rests not on the absence of an individualized hearing to determine whether an alien should be detained, but on the fact that section 412 authorizes certification and detention of aliens who meet neither justification for detention.

Under the new law, an alien who is not dangerous and who does not pose a high risk of flight may be certified and detained. Under section 411, a noncitizen can be deported for providing material support to an organization,

103. Review of Custody Determinations, 66 Fed. Reg. 54909, 54910 (Oct. 31, 2001) (interim rule) (to be codified at 8 C.F.R. pt. 3).

104. *See* Zinermon v. Burch, 494 U.S. 113, 125 (1990) ("[T]he Due Process clause contains a substantive component that bars certain arbitrary, wrongful government actions 'regardless of the fairness of the procedures used to implement them.'" (quoting Daniels v. Williams, 474 U.S. 327, 331 (1986))).

even one which is not officially designated a terrorist group.[105] An immigrant who makes such a donation can be expelled even if she intended to fund only the humanitarian or social activities of an organization that engages in a range of social and political functions. The individual may oppose terrorism and pose no threat of violence; she may also have strong community ties that make it unlikely that she would abscond. Yet because her offense now subjects her to the terrorism-related grounds for deportation, she can be certified by the Attorney General and face mandatory detention. When mandatory detention is considered in light of the newly expanded substantive grounds for removal, its justification appears less compelling. The broad grounds for mandatory detention—and its impact in depriving individuals of liberty, sometimes for years—arguably constitute a violation of substantive due process.

However appealing in principle, this substantive due process challenge would encounter resistance in a court of law unless the Supreme Court reconsiders the fifty-year-old decision in *Carlson v. Landon*, or courts construe that decision as narrowly limited to its facts. As noted above, that case concerned a challenge to predeportation detention by aliens arrested and charged with membership in the Communist Party, a deportable offense. Under the Internal Security Act, the Attorney General, at his discretion, could hold in custody without bail aliens who were members of the Communist Party.[106] The government did not deny bail to all aliens arrested for Communist Party membership; in fact, government statistics showed that a large majority did receive bail.[107] The Court found that in light of the Attorney General's exercise of discretion, the denial of bail to some was not "arbitrary or capricious or an abuse of power," and accordingly found no violation of due process.[108] The Court concluded: "When in the judgment of the Attorney General an alien Communist may so conduct himself pending deportation hearings as to aid in carrying out the objectives of the world communist movement, that alien may be detained."[109] In a similar vein, a court today might conclude that when in the judgment of the Attorney General an alien charged with terrorism poses a special risk to society, that alien may be certified and thus detained.

---

105. *See* ACLU, *How the Anti-Terrorism Bill Allows for Detention and Deportation of People Engaging in Innocent Associational Activity*, Oct. 25, 2001, *at* www.aclu.org/congress/1102301h.html ("Under the definition [of terrorist activity in the USA Patriot Act] groups such as the World Trade Organization protestors who engage in minor vandalism, abortion foes who engage in civil disobedience, or protestors at Vieques, Puerto Rico who damage a fence, would be deemed terrorist organizations. Likewise, purely humanitarian assistance to the Northern Alliance, foes of the Taliban and foes of Osama bin Laden, could be assistance to a terrorist organization.").

106. Carlson v. Landon, 342 U.S 524, 526-28 (1952).

107. *Id.* at 541-42.

108. *Id.* at 542.

109. *Id.* at 544.

Carlson has often been cited for the rule that the Attorney General is vested with broad discretion to detain aliens pending removal hearings.[110] This general principle is unlikely to be overturned by a court, and a substantive due process argument would have to squarely counter its implications. Yet whether *Carlson*, a fifty-year-old case passed during the height of McCarthyism and the Cold War, should control the result in a challenge to section 412 is less clear. In the last fifty years, particularly since the mid-1960s, substantive due process analysis has reemerged and moved well beyond the post-*Lochner* period of avoidance by courts.[111] In addition, courts have invalidated other types of noncriminal detention on substantive due process grounds. In *Foucha v. Louisiana*, the Supreme Court struck down on substantive due process grounds a state law permitting the civil confinement of individuals acquitted of criminal charges due to mental illness, in spite of the fact that the individual was no longer mentally ill.[112] In *Zadvydas v. Davis*, discussed above, the Supreme Court found an alien detention statute to raise serious constitutional doubts, again on the basis of substantive due process. Finally, in the past year, several appellate courts have invalidated the mandatory detention of criminal aliens under section 236(c) of the INA as a violation of substantive due process. A substantive due process argument regarding section 412 is still a challenging claim to make in light of both legal precedent and the current political context, and is likely to encounter even more objections than a procedural due process claim. Yet recent decisions open the possibility of a successful substantive due process challenge.

A. *Level of Scrutiny*

Under modern substantive due process analysis, a court would first consider whether the mandatory detention of certified aliens implicates a fundamental right or at least a sufficiently important right to call for some form of heightened review. If so, it would consider whether the means in section 412 are excessive with respect to its purpose. In substantive due process analysis, a court typically applies heightened scrutiny if fundamental rights are at stake and otherwise applies a deferential, rational basis standard of review. Under strict scrutiny, government action impinging on a fundamental right is valid only if it furthers a compelling state interest and is narrowly tailored to

110. "Detention is necessarily a part of this deportation procedure. Otherwise aliens arrested for deportation would have opportunities to hurt the United States during the pendency of deportation proceedings." *Id.* at 538; *see, e.g.*, Reno v. Flores, 507 U.S. 292, 306 (1993) (citing *Carlson*, 342 U.S. at 538, for discretion granted Attorney General over detention).

111. The Supreme Court's decision in *Griswold v. Connecticut*, 381 U.S. 479 (1965) is often credited with reviving substantive due process analysis after several decades of avoidance following the stigmatization of *Lochner v. New York*, 198 U.S. 45 (1905), an early "economic due process" decision that became notorious in the 1930s.

112. 504 U.S. 71, 80-86 (1992).

further only the interest in question.[113] The mandatory detention of certified aliens arguably merits strict scrutiny on the grounds that freedom from arbitrary physical confinement is a fundamental right. In *Foucha*, the Supreme Court stated that it had "always been careful not to 'minimize the importance and fundamental nature' of the individual's right to liberty."[114] In *United States v. Salerno*, the Supreme Court emphasized that "in our society, liberty is the norm, and detention prior to trial or without trial is the carefully limited exception."[115] *Zadvydas* reaffirmed that "[f]reedom from imprisonment," including freedom from government custody, lay "at the heart of the liberty that [the Due Process] Clause protects."[116]

Yet the Supreme Court has sometimes rejected strict scrutiny in the alien detention context by narrowly characterizing the right in question. In *Flores*, the Supreme Court upheld an INS regulation limiting the release of alien juveniles from custody after describing the liberty interest involved in constricted terms.[117] Justice Scalia's majority opinion stated that freedom from physical restraint was not at issue since the minors were institutionalized in certified care facilities rather than in "shackles, chains, or barred cells."[118] The Court framed the right in question as "the alleged right of a child who has no available parent, close relative, or legal guardian . . . to be placed in the custody of a willing-and-able private custodian rather than of a government-operated or government-selected child care institution."[119] Defined as such, the right was not fundamental. Justice O'Connor, meanwhile, concurred but wrote separately to emphasize that "freedom from institutional confinement" is a protected liberty interest "within the core of the Due Process Clause.[120] While Scalia refused to apply strict scrutiny based on his narrow description of the asserted right,[121] O'Connor asserted that "institutionalization of an adult by the government triggers heightened, substantive due process scrutiny."[122]

---

113. *See, e.g.*, *Flores*, 507 U.S. at 302, 305 (explaining that the substantive Due Process Clause forbids governmental infringement on fundamental rights "unless the infringement is narrowly tailored to serve a compelling state interest" but the "impairment of a lesser interest . . . demands no more than a 'reasonable fit' between governmental purpose . . . and the means chosen to advance that purpose").

114. *Foucha*, 504 U.S. at 80 (quoting United States v. Salerno, 481 U.S. 739, 750 (1987)).

115. *Salerno*, 481 U.S. at 755.

116. Zadvydas v. Davis, 533 U.S. 678, 690 (2001).

117. For an analysis of *Reno v. Flores* and the differences in the majority and concurring opinions' characterizations of the due process right in question, see Ellis M. Johnston, *Once a Criminal, Always a Criminal? Unconstitutional Presumptions for Mandatory Detention of Criminal Aliens*, 89 GEO. L.J. 2593, 2605-06 (2001).

118. *Flores*, 507 U.S. at 302.

119. *Id.*

120. *Id.* at 315 (O'Connor, J., concurring).

121. *Id.* at 305.

122. *Id.* at 316 (O'Connor, J., concurring).

In two decisions that may prove most analogous to the evaluation of mandatory detention under section 412, the Supreme Court applied neither a strict scrutiny nor a mere rational basis test to the substantive due process claim. In *Zadvydas*, the Court required not that the statute be "narrowly tailored," but that there be some "special justification" for the detention. The *Zadvydas* Court stated:

> [G]overnment detention violates [the Due Process] Clause unless the detention is ordered in a *criminal* proceeding with adequate procedural protections, or, in certain special and narrow non-punitive circumstances, where a special justification, such as harm-threatening mental illness, outweighs the individual's constitutionally protected interest in avoiding physical restraint.[123]

The Court evaluated the government's two explanations for detention—ensuring that aliens appear for removal and protecting the community—and found neither rationale persuasive in establishing a "special justification" in the case at hand. Because it resolved *Zadvydas* through statutory interpretation, the Court did not find a constitutional violation, but the opinion nonetheless provides a test by which to evaluate the constitutionality of section 412.

An earlier Supreme Court case, *United States v. Salerno*, established a two-step test for evaluating the pretrial detention of individuals in the criminal context.[124] In *Salerno*, the Supreme Court sustained the constitutionality of the federal Bail Reform Act,[125] which required courts to detain arrested individuals prior to trial if the government demonstrated that no release conditions could guarantee community safety. The *Salerno* Court asked first whether the statute satisfied a "legitimate regulatory goal" rather than an impermissible punitive purpose, and, if so, whether it was "excessive in relation to the regulatory goal Congress sought to achieve."[126] The Court found that the statute was both regulatory in purpose and not excessive, thereby passing constitutional muster. *Salerno* rejected the idea that the Due Process Clause posed an absolute barrier to government detention without trial, stating "that the Government's regulatory interest in community safety can, in appropriate circumstances, outweigh an individual's liberty interest."[127] Thus, *Salerno* applied neither strict scrutiny nor the rational basis test, but a test that balanced the effect on the individual's liberty against Congress's legitimate regulatory goal.

Salerno and *Zadvydas* essentially point to a single mode of analysis: *Salerno* inquires into the "excessiveness" of the means employed by the statute with respect to its purpose, while *Zadvydas* considers whether there is a

---

123. Zadvydas v. Davis, 533 U.S. 678, 690 (2001) (quotation marks and citations omitted).

124. 481 U.S. 739 (1987).

125. Bail Reform Act of 1984, Pub. L. No. 98-473, § 203(a), 98 Stat. 1976, 18 U.S.C.A. 3141 et seq. (West 2003).

126. *Salerno*, 481 U.S. at 747.

127. *Id.* at 748.

"special justification" for the means. Each case examines the proportionality of the means to the stated ends of the law. Federal courts of appeals have used these tests to evaluate the mandatory detention of criminal aliens under section 236(c) of the INA.

B. *Mandatory Detention of Criminal Aliens*

As discussed above, five federal courts of appeals have now ruled on the constitutionality of section 236(c) of the INA, the law that mandates the detention of aliens with certain criminal convictions until they are removed from the United States. The Supreme Court will review the Ninth Circuit's decision in *Kim v. Ziglar* this Term.[128] Apart from the Seventh Circuit, which ruled on section 236(c) before *Zadvydas*, every federal court of appeals has found it unconstitutional. The courts are divided on whether to label the right in question "fundamental" and on whether to invalidate the law on its face only with respect to lawful permanent residents, or to the particular individual in the case before them. Every court to rule on the issue, however, found a substantive due process violation in light of *Zadvydas*.

In the first of these cases, *Patel v. Zemski*, the Third Circuit found that heightened scrutiny should be applied to the claim of a permanent resident who was detained because he had been convicted of an aggravated felony.[129] The court ruled that Patel's detention implicated his "fundamental" interest in freedom from physical constraint and should accordingly be evaluated according to the heightened review standard of *Salerno*. Applying the two-step *Salerno* test, the court found that the immigration statute failed to supply "an adequate and proportionate justification for detention."[130] In concluding that predeportation detention involves a fundamental right, the court distinguished *Flores*, which had found no fundamental liberty interest in the detention of alien juveniles; the Third Circuit noted that *Flores* was based on the notion that children are always in some form of custody, whereas the case at hand involved an adult entitled to personal liberty.[131] Next, in analyzing whether the statute was excessive, the *Patel* court found that the reasons identified by the government for the rule did not justify detention without a hearing.[132] *Patel* therefore rejected the "irrebuttable presumption" that aliens with criminal convictions under section 1226(c) were necessarily flight risks or dangerous to the public. In a nonprecedential decision argued the same day as *Patel*, the

128. 276 F.3d 523 (9th Cir. 2002), *cert. granted sub nom.* Demore v. Kim, 122 S. Ct. 2696 (2002).

129. 275 F.3d 299 (3d Cir. 2001).

130. *Id.* at 311.

131. *Id.* at 309.

132. *Id.* at 312.

Third Circuit extended its reasoning to require an individualized hearing for an undocumented alien who had never had legal status in the United States.[133]

Ruling one month after *Patel*, the Ninth Circuit in *Kim v. Ziglar*,[134] held that mandatory detention was unconstitutional as applied to lawful permanent residents.[135] Following *Zadvydas*, it asked whether the civil detention in question was limited and based on a "special justification" that outweighed the individual's liberty interest. Without calling the liberty interest a "fundamental right," the court cited *Salerno* and cases of involuntary civil commitment for the rule "that civil detention will be upheld only when it is narrowly tailored to people who pose an unusual and well-defined danger to the public."[136] *Kim* rejected the government's argument that criminal aliens present flight risks and danger to the public as a whole, finding that the "presumption" was overly broad in light of the wide range of crimes that could trigger mandatory detention.

Using very similar reasoning, the Tenth Circuit in *Hoang v. Comfort* found that mandatory detention, as applied to three permanent resident petitioners, violated substantive due process.[137] The court agreed that while the government could constitutionally detain aliens pending removal hearings, the aliens still had a "fundamental liberty interest that may not be arbitrarily infringed upon . . . absent an opportunity for an individualized hearing to address risk of flight and danger to the public."[138] Applying both the *Salerno* and *Zadvydas* tests, the court found that the government's interest in ensuring the presence of aliens for deportation was compelling but that section 236(c) was not "narrowly tailored" to serve that interest.[139]

Finally, in the most limited of these decisions, the Fourth Circuit in *Welch v. Ashcroft* held section 236(c) unconstitutional as applied to a permanent resident with a misdemeanor conviction.[140] The court concluded that the liberty interest in question did not amount to a "fundamental right" requiring

133. United States *ex rel.* Radoncic v. Zemski, 28 Fed. Appx. 113 (3d Cir. 2001).

134. 276 F.3d 523 (9th Cir. 2002), *cert. granted sub nom.* Demore v. Kim, 122 S. Ct. 2696 (2002).

135. While *Kim* restricted its holding to permanent residents, it is significant that *Zadvydas* did not. The reasoning in *Kim* follows some Supreme Court decisions that have granted aliens an "ascending scale of rights" according to the depth of their official relationship with the United States. Kwong Hai Chew v. Colding, 344 U.S. 590, 596 n.5 (1953) (quoting Johnson v. Eisentrager, 339 U.S. 763, 770-71 (1950)). *Zadvydas*, however, distinguished only between aliens who have not yet entered the United States and those who have, and none of its reasoning was restricted to permanent residents. Zadvydas v. Davis, 533 U.S. 678, 693-94 (2001). Following *Zadvydas*, this Note restricts its analysis to those who have entered the United States but does *not* limit its argument to permanent residents.

136. *Kim*, 276 F.3d at 532-34.

137. 282 F.3d 1247, 1251 (10th Cir. 2002).

138. *Id.* at 1256-57.

139. *Id.* at 1259.

140. 293 F.3d 213 (4th Cir. 2002).

strict scrutiny, and rejected a facial challenge to the statute.[141] But on the facts of the case, it held that detention constituted "punishment without trial" in violation of due process.[142] The *Welch* court found the government could not justify detention by citing flight risk and dangerousness because the resident had an opportunity to obtain relief from removal and also because the alien had been detained based on a single nonfelony firearm violation.[143] The court also noted the protracted nature of detention in his case, finding the fourteenth-month incarceration to be "excessive" in light of *Zadvydas*.[144]

These decisions are significant for USA Patriot Act section 412 for several reasons. First, the analysis by which the courts of appeals primarily applied heightened scrutiny to the constitutional claim would apply with equal force to section 412. Three courts of appeals found that the practice of detaining aliens pending removal hearings requires heightened review, while the Fourth Circuit found a due process violation on the alternative grounds that detention amounted to impermissible punishment before trial. Second, these cases transferred the *Zadvydas* analysis of aliens detained *after* a final order of removal to the context of aliens in custody *pending* removal proceedings. The Supreme Court in *Zadvydas* may have been particularly troubled by the prospect of indefinite detention, but the appeals courts extended its reasoning to aliens awaiting the conclusion of deportation proceedings. Third, these cases are relevant because they disapprove a presumption—that all aliens in a particular statutory category are necessarily dangerous or flight risks—that is similar to one that courts might face in analyzing section 412.

Of course, distinctions can be drawn between the situation of aliens covered by section 236(c) of the INA and those detained under section 412 of the USA Patriot Act. Most importantly, the crimes that trigger mandatory detention of aliens under section 1226(c) do not involve allegations of terrorism. In addition, the mandatory detention of aliens with certain criminal convictions is automatic, while detention in section 412 proceeds only upon the case-specific certification of the Attorney General. The implications of these distinctions will be explored further below.

C. *A "Special Justification" for Detention?*

1. *The case of terrorism.*

The analysis above suggests that because physical confinement involves a fundamental right, heightened scrutiny should be applied to USA Patriot Act

141. *Id.* at 221.
142. *Id.* at 224.
143. *Id.* at 225-26.
144. *Id.* at 226.

section 412 certification and detention. But, turning to the second part of the *Zadvydas* test, the fact that section 412 is aimed at the prevention of terrorism might be viewed as sufficient justification for the mandatory detention of certified aliens. Courts have always treated national security as a powerful justification for government restrictions on individual rights, especially in the immigration context. In many cases touching on immigration, courts have exercised less searching constitutional review because of the "plenary power doctrine." This is the historical idea that courts ought to defer to the judgments of the executive and legislative branches on substantive immigration policy because immigration touches on foreign relations, national security, and other highly political concerns. In *Fiallo v. Bell*, a case often cited for its summation of the plenary power idea, the Supreme Court stated that immigration decisions "are frequently of a character more appropriate to either the Legislature or the Executive than to the Judiciary" and thus "dictate a narrow standard of review."[145] In *Harisiades v. Shaughnessy*, an early Cold War case that upheld the deportation of aliens for past Communist Party membership, the Court stated that policies toward aliens were "intricately interwoven" with "the conduct of foreign relations, the war power, and the maintenance of a republican form of government" and were thus "largely immune from judicial inquiry or interference."[146]

The Supreme Court has, however, qualified the plenary power doctrine and invalidated immigration legislation for surpassing constitutional limits. In *INS v. Chadha*, the Court ruled that while Congress may have "plenary authority" over immigration policy, it must still exercise its power through "a constitutionally permissible means."[147] *Zadvydas* reiterated that plenary power to create immigration law is "subject to important constitutional limitations."[148] In both *Zadvydas* and *St. Cyr*, the Court rejected the INS's interpretation of the law in spite of the government's insistence on plenary power.[149] While the Court in both cases reached its results through statutory construction, not constitutional invalidation, the Court interpreted the statutes as it did in order to avoid constitutionally doubtful outcomes. These decisions suggest that the Court has become more willing to scrutinize government explanations for immigration policy. Following this trend, the appellate courts in the section 236(c) cases closely scrutinized the government's justifications for the

145. 430 U.S. 787, 796 (1977) (quoting Mathews v. Diaz, 426 U.S. 67, 81-82 (1976)).

146. 342 U.S. 580, 588-89 (1952); *see also* Galvan v. Press, 347 U.S. 522, 530-31 (1952) (upholding deportation of former Communist Party member without requiring full awareness of Party purpose).

147. 462 U.S. 919, 940-41 (1983); *see also* Kim v. Ziglar, 276 F.3d 523, 529-30 (9th Cir. 2002).

148. *Zadvydas*, 533 U.S. at 695.

149. *See* Kanstroom, *supra* note 71, at 416.

mandatory detention of criminal aliens and rejected the idea that plenary power should block such scrutiny.[150]

Yet even if the plenary power doctrine as a whole has less bite, its call for deferential judicial review would appear most compelling when applied to aliens believed to pose a particular threat to national security, such as suspected terrorists. The Supreme Court in *Zadvydas*, an opinion issued three months before the September 11 attacks, specifically distinguished the case of criminal aliens from that of suspected terrorists. In dicta, the *Zadvydas* Court stated that it was not considering "terrorism or other special circumstances where special arguments might be made for forms of preventive detention and for heightened deference to the judgments of the political branches with respect to matters of national security."[151] It also suggested that "suspected terrorists" might be a special class of "especially dangerous individuals."[152] Both the Ninth Circuit in *Kim* and the Fourth Circuit in *Welch* quoted these statements from *Zadvydas* to distinguish criminal aliens detained under section 236(c) from aliens charged with terrorism.[153] If the fact that section 412 involves aliens suspected of terrorism is itself an adequate "special justification" for detention, the substantive due process inquiry would end here.

The mere invocation of a counterterrorism motivation should not stop the inquiry, however; such a broad reading would mean that any statute on detention passed with the stated justification of national security could evade judicial scrutiny. Federal courts have already rejected the government's claims of national security offered since September 11 to justify its refusal to disclose the number and names of individuals detained in connection with the terrorism investigation[154] and its closure of "special interest"[155] immigration cases from the public and the media.[156] Moreover, while the *Zadvydas* dicta suggested that "terrorists" might constitute a special case of dangerous individuals, the certification procedures of section 412 apply not just to actual "terrorists," but to individuals who are very remotely connected to acts of terrorism. The Sixth

150. *But see* T. Alexander Aleinikoff, *Detaining Plenary Power: The Meaning and Impact of* Zadvydas v. Davis, 16 GEO. IMMIGR. L.J. 365, 383-86 (2002) (doubting that *Zadvydas* marks the demise of plenary power).

151. *Zadvydas*, 533 U.S. at 696.

152. *Id.* at 691 ("The provision authorizing detention does not apply narrowly to 'a small segment of particularly dangerous individuals,' . . . say suspected terrorists, but broadly to aliens ordered removed for many and various reasons, including tourist visa violations." (quoting Kansas v. Hendricks, 521 U.S. 346, 368 (1997))).

153. Welch v. Ashcroft, 293 F.3d 213, 226 n.10 (4th Cir. 2002); Kim v. Ziglar, 276 F.3d 523, 538 (9th Cir. 2002).

154. Ctr. for Nat'l Sec. Studies v. United States Dept. of Justice, 215 F. Supp. 2d 94 (D.D.C. 2002).

155. "Special interest" cases concern individuals designated by the government as having some relationship with terrorism, Al Qaeda, or the September 11 hijackers.

156. Detroit Free Press v. Ashcroft, 303 F.3d 681 (6th Cir. 2002). *Contra* N. Jersey Media Group v. Ashcroft, 308 F.3d 198 (3d Cir. 2002).

Circuit made a similar point in *Detroit Free Press v. Ashcroft*, in which it invalidated the government's closure of immigration hearings on First Amendment grounds, noting that nothing in *Zadvydas* would compel courts to defer to legislative understandings of who qualified as "particularly dangerous individuals."[157] Given the broadened definitions of terrorism and terrorism-related grounds for deportability in the USA Patriot Act, it is unlikely that the Supreme Court would have intended that detention of a broad category of aliens should pass constitutional muster solely because it fell under the heading of national security.

Finally, as the Sixth Circuit emphasized in *Detroit Free Press*, the plenary power doctrine has served to limit review primarily of Congress's substantive decisions on immigration, that is, its legislative determinations about the terms for admission into or deportation from the United States. The Sixth Circuit, however, rejected the view that the judicial deference demanded by the plenary power doctrine extends to the decision to open or close deportation hearings, holding that "the Constitution meaningfully limits non-substantive immigration laws and does not require special deference to the Government."[158] The government's authority to detain noncitizens in advance of removal proceedings does not affect the terms of admission or removal from the United States, and thus falls outside the formal bounds of the plenary power doctrine. Courts evaluating challenges to section 412 should thus follow *INS v. Chadha*, *Zadvydas*, and *Detroit Free Press* in requiring constitutionally permissible means for the implementation of Congress's substantive immigration decisions. While sensitive to the national security context, a court should proceed to the next step of analyzing whether the stated rationale for detention under section 412 justifies the measures legislated. Or, in the language of the *Salerno* test, the Court should consider whether the statute is "excessive" with regard to its legitimate purpose.

2. *The excessiveness of section 412.*

A substantive due process claim brought to challenge the USA Patriot Act would contend that the act authorizes the certification and mandatory detention of aliens who do not necessarily pose a danger to the community or a high risk of flight. The broad sweep of the new terrorism-related grounds for deportation makes it unlikely that every individual certifiable under section 412 is in fact a "terrorist" or an "especially dangerous individual." As noted above, an immigrant who donated years ago to an undesignated group now considered a terrorist organization may not be dangerous. He may not even be ultimately

157. *Detroit Free Press*, 303 F.3d at 692.

158. *Id.* at 685. Significantly, even the Third Circuit, which ruled in favor of the government on the closure of immigration hearings, noted that plenary power was not at issue given the non-substantive nature of the question. *See N. Jersey Media Group*, 308 F.3d at 219 n.15.

deportable, since the statute gives him the opportunity to prove during the merits phase of his case that he did not have reason to know that his donation was supporting unlawful activity. Yet section 412 authorizes his certification—and the mandatory loss of liberty that flows from it. Thus, it establishes an unconstitutional, irrebuttable presumption that an alien subject to certification under section 412 is a danger to society or a flight risk. As the Supreme Court has noted, cases where it considers whether an irrebuttable presumption violates substantive due process turn on the "adequacy of the 'fit' between the classification and the policy that the classification serves."[159] The inadequate fit between the classification in section 412 and the policies it intends to serve supplies the basis for the due process violation.

One problem with this argument is that it is not clear that any source of law—constitutional, statutory, or regulatory—actually requires the INS to limit the detention of aliens only to those who pose a danger to society or risk of flight. If the INS may lawfully detain people for reasons other than those two common justifications, and if the government claims that broader reasons justify detentions under section 412, then the "fit" of the classification does not rest on the two rationales discussed above. The government has indeed taken this position in some recent cases—arguing that the INS's discretion to hold aliens in custody is not circumscribed by these two factors.[160] The Supreme Court has never explicitly limited the INS to those two rationales for detaining an alien pending removal. Yet the question of whether it is constitutional for the government to detain an (adult) alien for other reasons has not reached the Court. In *Flores*, the Supreme Court stated that the Attorney General has "broad discretion" over the bail decision, but then quoted a Board of Immigration ruling limiting detention in practice to aliens who endangered the community or posed a risk of flight.[161] In *Carlson*, the Court explained that the government had authority to detain aliens pending deportation because otherwise "aliens arrested for deportation would have opportunities to hurt the United States during the pendency of deportation proceedings."[162] But *Carlson* justified predeportation detention as a means of preventing harm to the community, suggesting a reasoned basis for the detention of some, not all, aliens. In light of these rulings and the narrow circumstances under which the Supreme Court has permitted civil detention in *Salerno*, *Zadvydas*, and cases

159. Michael H. v. Gerald D., 491 U.S. 110, 121 (1989).

160. *See* Brief for Appellant at 28-29, Najjar v. Ashcroft, 273 F.3d 1330 (11th Cir. 2001) (No. 00-14947) (quoting 8 C.F.R. § 236.1(c)(8) ("Any officer authorized to issue a warrant of arrest may, *in the officer's discretion*, release an alien . . . provided that the alien must demonstrate to the satisfaction of the officer that such release would not pose a danger to property or persons, and that the alien is likely to appear for any future proceeding." (emphasis added))).

161. Reno v. Flores, 507 U.S. 292, 294-95 (1993); *see supra* note 28 and accompanying text.

162. Carlson v. Landon, 342 U.S. 524, 538 (1952).

involving the commitment of the mentally ill,[163] it seems unlikely that the Supreme Court would accept the idea that the discretion to release or detain is absolute.

A second objection to the substantive due process claim is that the government's presumption is reasonable: One might argue that it is reasonable to presume that an individual who is deportable under the terrorism-related sections of the immigration law is a threat to the public. From this perspective, even the least egregious offense—a donation in the past to an undesignated group—is sufficient to classify that person as a source of danger to the public. That argument, however, would risk stretching the concept of "danger" beyond all recognition, sweeping in many associational and political activities that, even if unlawful, do not pose a direct threat to human life or safety. The breadth of that interpretation seems at odds with the Supreme Court's attempts to restrict civil detention to "particularly dangerous individuals." Moreover, even the INS's response to *Zadvydas*, in the form of regulation section 241.14, discussed above, suggests that the INS does not believe that all aliens detained on account of terrorism concerns are too dangerous to be released. The regulation provides that detention of an individual whose successful removal is unlikely after the ninety-day removal period could continue indefinitely only if the alien's release would present "a significant threat to the national security or a significant risk of terrorism" and "[n]o conditions of release" could be reasonably expected to "avoid the threat."[164] Thus, the regulation does not presume that the individual is too dangerous to be released, but requires a more specific finding to that effect—in addition to a finding that no release conditions could guard against the danger. Notably, such narrowly tailored conditions are absent from section 412 of the USA Patriot Act, which relies on the broader presumption.

A third problem with the substantive due process challenge is that unlike the section 236(c) cases of criminal aliens, detention under section 412 is not automatically applied to a wide class of aliens. Under section 412, the Attorney General "may" certify an alien whom he has reasonable grounds to believe is deportable under certain enumerated provisions, but is not required to do so. Using this discretion, he could certify only individuals who pose the greatest threat and allow the standard INS bond procedures for other aliens. The government would argue that the Attorney General would use its power fairly to certify only those aliens posing the greatest risks. The response to this argument is that the *authorization* of certification for a whole class of aliens,

163. *See, e.g.*, Kansas v. Hendricks, 521 U.S. 346, 358 (1997) (sustaining involuntary commitment of a sexually violent predator with mental illness) ("A finding of dangerousness, standing alone, is ordinarily not a sufficient ground upon which to justify indefinite involuntary commitment. We have sustained civil commitment statutes when they have coupled proof of dangerousness with the proof of some additional factor, such as a 'mental illness' or 'mental abnormality.'").

164. 8 C.F.R. § 241.14(d)(ii)-(iii).

whether or not it is required, is itself arbitrary and a violation of substantive due process. The mere fact that the Attorney General has the authority to detain aliens who ought not to be detained is excessive. At a time of national insecurity, where the counterterrorism imperative makes civil liberties susceptible to infringement, broad discretion in the hands of an executive official is especially dangerous.

In court, the substantive due process claim is most likely to be raised not as a "facial" challenge to the statute but as an "as applied" challenge to the situation of a particular alien. In a facial challenge to a law, an applicant must demonstrate that that no set of circumstances could exist under which the law would be valid.[165] An "as applied" challenge, by contrast, maintains that the law is unconstitutional as applied to the individual. An alien making a substantive due process claim could argue that his or her own certification shows that the Attorney General has *in fact* certified an individual who poses neither danger nor a risk of flight. For example, an alien could argue that the sole basis for her certification was a donation made years ago to an organization for humanitarian reasons, and that the government had no other grounds to certify her under section 412. As a practical matter, a successful demonstration of an actual instance of "invalid" certification—that is, certification based on conduct that arguably "ought not" to trigger mandatory detention—would help show the constitutional shortcomings of a law that authorizes the Attorney General to detain aliens who are not in fact dangerous and who do not pose a risk of flight. In addition, the possibility of finding a substantive due process violation "as applied" to individuals in particular circumstances would allow a court to strike the most objectionable features of the law without appearing to intrude too far into the domain of congressional and executive power over immigration.

CONCLUSION

While the protection of national security rightly dominates the American political agenda after September 11, fears of terrorism should not trump constitutional integrity. Even the most compelling security-related powers of government—such as the war power—are subject to constitutional limits.[166] Justice O'Connor, speaking two weeks after the attacks on the World Trade Center, warned that restrictions on personal liberty would be enacted but questioned whether "a society that prides itself on equality before the law" could "treat terrorists differently than ordinary criminals." She asked, "At what

165. United States v. Salerno, 481 U.S. 739, 745 (1987). *But see* City of Chicago v. Morales, 527 U.S. 41, 55 n.22 (1999) (Stevens, J., plurality opinion) (rejecting the *Salerno* standard for facial challenges as dictum).

166. Hamilton v. Ky. Distilleries & Warehouse Co., 251 U.S. 146, 154 (1919).

point does the cost to civil liberties from legislation designed to prevent terrorism outweigh the added security that that legislation provides?"[167]

From a constitutional perspective, the certification and mandatory detention of suspected immigrants in the USA Patriot Act should give pause. In particular, there is good reason to believe that the provisions do not comport with the procedural due process required by the Fifth Amendment. Without an opportunity to hear the charges against him and to contest them in a true adversarial proceeding, a wholly innocent person may well find himself deprived of liberty on unfounded allegations of terrorism. Accusations of terrorism do not justify procedural injustice.[168] Furthermore, widespread reports of individuals wrongfully detained by the Justice Department since September 11 suggest the frequency of mistaken suspicion and government error in the terrorism probe.[169] Truncated procedures only increase the risk of such deprivations.

There is still a possibility that a federal court might construe habeas corpus review broadly enough to allow a certified alien to contest the Attorney General's certification decision. If a court interprets *INS v. St. Cyr* and other precedent to permit it to review the factual basis for the certification, with a full opportunity for the alien to hear the case against him and to present evidence to refute that case, such judicial review might satisfy the fair hearing requirement of procedural due process. On the other hand, if a court finds that the scope of habeas corpus review more narrowly limits its inquiry, it would not be able to grant a detained individual a real opportunity to challenge the government's decision. In the absence of such judicial review, section 412 of the USA Patriot Act should be invalidated as a denial of procedural due process.

While there is a strong case for a violation of procedural due process, it is less clear that courts would find that section 412 impinges on the substantive component of the Due Process Clause. The USA Patriot Act authorizes the detention of many individuals who are neither necessarily dangerous nor likely to abscond pending removal hearings. This amounts to an arbitrary deprivation of liberty that fails to meet the strict requirements for civil detention established in Supreme Court cases, including *Zadvydas*, the Court's latest pronouncement on alien detention. A court *ought* to rule section 412 a violation of substantive due process of law. Still, some case law on substantive due process—particularly *Carlson*—and plenary power considerations might lead courts to reject a substantive challenge. Courts might distinguish section 412 from both *Zadvydas* and the mandatory detention of criminal aliens under section 236(c)

167. Linda Greenhouse, *A Nation Challenged: The Supreme Court: In New York Visit, O'Connor Foresees Limits on Freedom*, N.Y. TIMES, Sept. 29, 2001, at B5.

168. *See, e.g.*, Rafeedie v. INS, 880 F.2d 506, 523-24 (D.C. Cir. 1989) (rejecting summary exclusion proceedings initiated against a returning permanent resident accused of terrorist links) ("The Government cannot assert as an argument against procedural safeguards that the accused is guilty as charged.").

169. *See* sources cited *supra* note 3.

of the INA by finding that the case of terrorism warrants a different approach. They might find that *Zadvydas* recognized a terrorism exception to its general rules on alien detention, and that mandatory detention under the USA Patriot Act falls within that exception.

Yet courts should reject the idea that any immigration legislation relating to terrorism is beyond the reach of judicial inquiry. Although the current political climate is unsympathetic to immigrants, and hostile to individuals detained in connection with the government's counterterrorism investigation, broad judicial deference to the government's claims is a constitutionally flawed response. Courts should not treat the invocation of terrorism as a touchstone for judicial deference. Laws constraining civil liberties, supported by arguments of "necessity" and "national security," often meet with judicial approval at moments of national fear—and with subsequent repentance and recantation.[170] When faced with the question, courts should rigorously evaluate the USA Patriot Act against the robust constitutional commitment to due process of law.

170. The *Korematsu* opinion, in which the Supreme Court sustained the wartime relocation and internment of Japanese Americans, is a prime example. Korematsu v. United States, 323 U.S. 214 (1944) (upholding conviction of American citizen of Japanese descent for violation of a military exclusion order). In 1984, the Northern District of California set aside Korematsu's conviction through a writ of coram nobis. *See* Korematsu v. United States, 584 F. Supp. 1406 (N.D. Cal. 1984).