GIRDING THE NATION’S ARMOR: 
THE APPROPRIATE USE OF IMMIGRATION LAW 
TO COMBAT TERRORISM

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I. INTRODUCTION

Three years after the tragic September 11, 2001, attacks, it is tempting to believe that America has returned to a time of normalcy. Yet, few would dispute that the nation is engaged in an ongoing War on Terror. September 11 has forever changed America, triggering a war that is affecting the everyday lives of Americans. This nation now realizes that, despite its strength, it is vulnerable. Vigilance is necessary to prevent future terrorist attacks. The United States government has vigilantly exercised its duty to protect the nation—and so far it has been successful in preventing subsequent terrorist attacks on American soil.

In the early days of the United States, clear constitutional authority existed to protect the nation. “No axiom is more clearly established in law, or in reason, than that wherever the end is required, the means are authorized; wherever a general power to do a thing is given, every particular power necessary for doing it, is included.”1 Moreover, “[i]f the end be legitimate, let it be within the scope of the [C]onstitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the [C]onstitution, are constitutional.”2 The justification of appropriate means to a legitimate end squarely describes the propriety of utilizing immigration policy in the nation’s efforts to combat terrorism.

Immigration policy and its enforcement are inextricably linked to the War on Terror. The terrorist hijackers who perpetrated the Sep-

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1 The Federalist No. 44, at 235 (James Madison) (George W. Carey & James McClellan eds., 2001).

tember 11 attacks entered the United States through authorized visas. The 9/11 Commission’s recent investigation of the September 11 attacks determined that lax screening by immigration officials allowed many of the hijackers to enter the United States with fraudulent passports and false statements on their visa applications. The 9/11 Commission also concluded that border authorities potentially could have intercepted as many as fifteen of the nineteen hijackers. It follows that an essential part of the nation’s War on Terror is to prevent terrorists from entering the United States in order to keep American soil free from subsequent terrorist attacks. In doing so, the government leaves no “unprotected spot in the Nation’s armor.”

Some have argued that using immigration law to combat terrorism is a misuse of the law because doing so treats noncitizens primarily as terrorist suspects, and it sends a hostile, unwelcoming message to the world. Others vehemently disagree with the Bush Administration’s use of immigration law as a part of its counterterrorism measures because the government draws a line between citizens and noncitizens, thereby limiting the constitutional protections and civil liberties of noncitizens.

An additional contention regarding the disparate constitutional protections between citizens and noncitizens asserts that the current immigration policy treats noncitizens as “Americans in waiting.” Their putative mistreatment and dignitary harms also affect the ethnic communities where they live in the United States. This, in turn, delete-
riously affects their citizen relatives and friends.\footnote{Id. at 422.} Arguments on both sides are valid and serve as checks on the political branches’ actions. However, in light of the exigent historical moment, the use of immigration policy to combat terrorism is not only proper, but it is necessary.

This note supports the political branches’ effective use of immigration law in the nation’s ongoing War on Terror for two reasons. First, the well-established plenary power doctrine has expressly designated foreign and immigration policy as the province of the political branches.\footnote{United States v. Valenzuela-Bernal, 458 U.S. 858, 864 (1982).} Second, the President has a duty under Article II of the Constitution to “preserve, protect and defend the Constitution.”\footnote{U.S. CONST. art. II, § 1.} Ultimately, protection of the Constitution must be predicated upon protection of the nation. This proposition is based on Michael Paulsen’s argument resurrecting Abraham Lincoln’s “Constitution of necessity” rationale\footnote{Michael Stokes Paulsen, The Constitution of Necessity, 79 NOTRE DAME L. REV. 1257, 1257-58, 60 (2004).} and Richard Posner’s pragmatic position that, when necessary, winning wars is an integral part of constitutional protection.\footnote{Richard A. Posner, Security Versus Civil Liberties, THE ATLANTIC MONTHLY ¶ 4 (December 2001), at http://www.theatlantic.com/doc/prem/200112/posner (last visited Nov. 17, 2004).}

Therefore, since the political branches have the valid authority to shape and enforce immigration policy, they can use immigration law to achieve counterterrorism and national security objectives which constitute compelling governmental interests.\footnote{Reno v. Flores, 507 U.S. 292, 345 (1993).} The current dispute regarding noncitizens suspected of terrorist activity centers around the propriety of using their immigration violations as a means of removing them from the country. The difficulty arises when, as alleged by some, the government overgeneralizes or overreacts and begins profiling noncitizens by race, ethnicity, religion, and/or gender.\footnote{See Susan M. Akram & Kevin R. Johnson, Immigration Policy, Race, Civil Rights, and Immigration Law After September 11, 2001: The Targeting of Arabs and Muslims, 58 NYU ANN. SURV. AM. L. 295, 297 (2002); Ellen Baker, Flying While Arab—Racial Profiling and Air Travel Security, 67 J. AIR L. & COM. 1375, 1375-76 (2002).} In particular, the detainees held in custody by the Immigration and Naturalization Service (INS)\footnote{On March 1, 2003, the Department of Homeland Security subsumed the INS. Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (2002).} due to immigration...
violations were males between the ages of 26 and 40, primarily from Arab and Muslim countries. The question, therefore, is whether this selectivity impermissibly deprives detainees of civil liberties. The hijackers who perpetrated the September 11 attacks were Muslim males between the ages of 20 to 40 years old. Twelve of the hijackers were nationals of Saudi Arabia; the remaining hijackers were from Egypt and Lebanon. Therefore, the composites of Al Qaeda terrorists involve all four problematic criteria: race, ethnicity, religion and gender. However, these criteria may only be a starting point for law enforcement officials’ investigations. Indeed, problematic selectivity may even be unavoidable for effective preemptive law enforcement efforts.

In actuality, the dispute centers around the fundamental principles of our democracy. Is it proper for Congress and executive agencies such as the Department of Justice, the Federal Bureau of Investigation, and the Department of Homeland Security to operate in a manner that may extend fewer civil liberties to noncitizens due to their race, ethnicity, religion, and sex? Apart from the specific provisions of the Immigration and Nationality Act (INA) delineating grounds for inadmissibility and deportability for terrorists and suspected terrorists, the propriety of the government’s actions are predicated on the question of whether the political branches have such authority under the Constitution. This note asserts that political branches do have valid authority to limit civil liberties of noncitizens based on race, ethnicity, religion, and sex, based on historical precedent and the structure of the Constitution.

Part II of this note outlines the actions taken by the executive and legislative branches in response to the September 11 attacks. Part III surveys the history and structure of the Immigration and Nationality Act, its specific provisions addressing terrorism and national security, and the changes that have been made to it by the USA PATRIOT Act (UPA). Part IV argues that the executive and congressional plenary power over immigration and foreign policy justifies the use of immi-

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20 Id.
gration law to combat terrorism. Lastly, Part V asserts that the "Constitution of necessity" justifies the subordination of certain provisions of the Constitution to the preservation of the nation.

II. Post September 11 Measures Taken by the Political Branches

Congress aptly enacted legislation in response to the September 11 attacks as part of the nation's counterterrorism initiatives. Congress enacted the Authorization for Use of Military Force Joint Resolution (AUMF) just days after the September 11 attacks. The AUMF authorizes the President "to use all necessary and appropriate force against those nations, organizations, or persons . . . [that] planned, authorized, committed, or aided" in the September 11, 2001, Al Qaeda terrorist attacks. Furthermore, Congress granted the administration additional necessary tools by strengthening the INA through enactment of the UPA on October 26, 2001. The sweeping immigration reform modified intelligence, surveillance, investigation, and law enforcement policies.

Furthermore, the executive branch launched its own counterterrorism initiatives, parallel to Congress' actions. First, President George W. Bush issued a Military Order on November 13, 2001, titled Detention, Treatment, and Trial of Certain Noncitizens in the War Against Terrorism. The Order was promulgated pursuant to the AUMF, and focused on protecting the United States and its citizens from further terrorist attacks. The Order authorized the detention of any noncitizen who "is or was a member of . . . Al Qaeda . . . [and who] has engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefore, that have caused, threaten to cause, or have as their aim to cause, injury to or adverse effects on the United States . . . ."

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23 Id.
25 See generally USA PATRIOT Act.
27 See generally id.
Second, on September 17, 2001, Attorney General John Ashcroft directed the Federal Bureau of Investigation (FBI) and other law enforcement agencies to use “every available law enforcement tool” to arrest individuals who “participate in, or lend support to, terrorist activities.”\textsuperscript{29} Pursuant to the Attorney General’s mandate, the FBI launched the Pentagon/Twin Towers Bombing Investigation (PENTTBOM) following the September 11 attacks.\textsuperscript{30} The FBI questioned individuals possibly involved in the September 11 attacks or other terrorist activities.\textsuperscript{31} The FBI turned over to the INS suspected individuals who were thought to have connections with, or possess information pertaining to, terrorist activity brought against the United States.\textsuperscript{32} As a result of the investigation, over 700 individuals were detained on immigration violation charges.\textsuperscript{33} By June 13, 2002, only seventy-four detainees remained after most of the detainees had been deported.\textsuperscript{34}

Third, in 2002 and 2003, under powers conferred upon him by the INA, the Attorney General created a series of special registration requirements for immigrants from nations known to have a strong Al Qaeda presence, who were not lawful permanent residents.\textsuperscript{35} “Special registration” requires immigrants from certain nations to register as they enter the United States, and subjects such immigrants to ongoing registration requirements in order for the government to effectively track the entry and timely exit of immigrants granted permission to temporarily remain in the United States.\textsuperscript{36} As a result of the ongoing

\textsuperscript{29} OIG REPORT, supra note 18, at 1 (citing Attorney General John Ashcroft’s Memorandum to United States Attorneys titled “Anti-Terrorism Plan,” dated Sept. 17, 2001).

\textsuperscript{30} OIG REPORT, supra note 18, at 69-70.

\textsuperscript{31} Id. at 69.

\textsuperscript{32} See id.

\textsuperscript{33} Ctr. for Nat’l Sec. Studies v. United States Dep’t of Justice, 331 F.3d 918, 921 (D.C. Cir. 2003).

\textsuperscript{34} Id.


“special registration,” 13,434 noncitizens were found deportable due to immigration violations.\(^{37}\)

The Attorney General also developed the Absconder Apprehension Initiative to address the problem of immigrants remaining in the United States after their final deportation orders have been issued.\(^{38}\) The initiative is a proactive measure in response to the September 11 attacks and focuses on apprehending absconders who have violated U.S. immigration laws, been ordered deported, and remain as criminal fugitives fleeing deportation.\(^{39}\)

Several proactive initiatives were also introduced by executive agencies subsequent to the Congressional and Executive action taken in response to the September 11 attacks. On April 29, 2003, Homeland Security Secretary, Tom Ridge, made remarks concerning the launch of the U.S. Visitor and Immigration Status Indication Technology (U.S. VISIT) System.\(^{40}\) This initiative created a centralized electronic database of all noncitizens that enter or exit the United States, including foreign students.\(^{41}\) U.S. VISIT also keeps track of foreign students’ college and university enrollment information, immigration status changes, and any disciplinary actions brought against foreign students.\(^{42}\) U.S. VISIT remains an important component of the homeland security policy in light of the fact that two of the September 11 hijackers entered on student visas; one failed to enroll at a university, while the other enrolled at a flight school which should not have been certified to accept foreign students.\(^{43}\) U.S. VISIT consolidated the National Security Entry-Exit Registration System (NSEERS)\(^{44}\) and the Student and Exchange Visitor Information Program (SEVIS), which had its


\(^{39}\) Press Release, Dep’t of Justice (Feb. 8, 2002), available at http://www.usdoj.gov/opa/pr/2002/February/02_ag_066.htm (last visited on Dec. 10, 2004). 314,000 fugitives are currently identified as absconders. Id.

\(^{40}\) 80 Interpreter Release 690 (May 12, 2003).

\(^{41}\) Id.


roots in the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA).\textsuperscript{45} This centralized database now assists law enforcement agencies to identify potential terrorists, and to deter the use of fraudulent documents for entry into the United States.\textsuperscript{46}

Another response to the September 11 attacks is the voluntary interviews conducted by the Department of Justice of individuals who might have information on potential terrorists and/or terrorist activities.\textsuperscript{47} The Justice Department’s Executive Office for United States Attorneys (EOUSA) conducted two sets of interviews between November 9, 2001 and March 19, 2002.\textsuperscript{48} The interviewees were comprised of male noncitizens between the ages of 17-47 who had entered the United States after January 1, 2000, and those who had entered between January 1 and February 27, 2002.\textsuperscript{49} The interviewees were nationals of twenty-six countries where Al Qaeda purportedly had a strong presence.\textsuperscript{50} Of the 3,200 interviews conducted, twenty noncitizens were arrested based largely on immigration violations.\textsuperscript{51}

The actions of the political branches in response to the September 11 attacks have caused mixed reactions. To some, the measures were appropriate and justified,\textsuperscript{52} while to others, the government’s measures unnecessarily infringed upon the civil liberties of noncitizens and citizens.\textsuperscript{53}

\textsuperscript{45} Id.; 10 Interpreter Releaser 453 (Mar. 17, 1997).

\textsuperscript{46} Hendricks, supra note 42, at A6.

\textsuperscript{47} OIG REPORT, supra note 18, at 4. UNITED STATES GENERAL ACCOUNTING OFFICE REPORT TO CONGRESSIONAL COMMITTEES: HOMELAND SECURITY, JUSTICE DEPARTMENT’S PROJECT TO INTERVIEW ALIENS AFTER SEPTEMBER 11, 2001, 1 (Apr. 2003) [hereinafter GAO REPORT].


\textsuperscript{49} GAO REPORT, supra note 47, at 7-8.

\textsuperscript{50} Id.

\textsuperscript{51} Id. at 5-6.

\textsuperscript{52} Jan C. Ting, Unobjectionable but Insufficient—Federal Initiatives in Response to the September 11 Terrorist Attacks, 34 CONN. L. REV. 1145, 1151-52 (2002). While some consider this form of interviewing as onerous due to the perception that individuals are selected for interviewing through racial profiling, Ting argues that this is not always wrong. Id. at 1153. He also rejects the analogies of such a response to the Japanese internment camps during World War II. Id.

\textsuperscript{53} C. WILLIAM MICHAELS, NO GREATER THREAT: AMERICA AFTER SEPTEMBER 11 AND THE RISE OF A NATIONAL SECURITY STATE 8 (2002).

[T]here is no greater threat to the security of this country than a systematic dismantling of civil liberties and the rule of law with a dramatic shifting of
III. TERRORISM CONCERNS ENGRAINED IN THE HISTORY AND STRUCTURE OF THE INA

As a starting point, it is superfluous to list the clear provisions of the INA that directly apply to noncitizens suspected of terrorist activity. The structure of the INA demonstrates how it is a fundamental governmental tool to exclude and remove terrorists or suspected terrorists from American soil in order to avert future attacks.

As discussed below, the UPA modified numerous provisions of the INA in response to the September 11 attacks. However, the INA’s structure has continually undergone modifications since its inception to address the nation’s evolving terrorism concerns.

National security and foreign policy are inherent in immigration law. As early as 1798, less than ten years after the United States Constitution was ratified, fears of terrorism compelled government action. The Alien Act of 1798 authorized the President to arrest and deport any noncitizen he deemed “dangerous” and an agent of foreign powers at war with the United States. Some States (e.g., Kentucky and Virginia) rejected the Alien Act, and, eventually, Congress allowed it to expire. In 1903, national security fears were rekindled following the assassination of President McKinley. Subsequently, Congress enacted legislation that excluded anarchists and persons whose views were considered subversive.

As evidenced by American history, the nation’s concern for national security has been clear, and one of the fundamental methods to combat security threats has been through strengthening immigration law. The McCarran-Walter bill, also known as the Immigration and

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Id.; see LOST LIBERTIES: ASHCROFT AND THE ASSAULT ON PERSONAL FREEDOMS (Cynthia Brown ed. 2003); DAVID COLE, ENEMY ALIENS: DOUBLE STANDARDS AND CONSTITUTIONAL FREEDOMS IN THE WAR ON TERRORISM x (2003); see generally DAVID COLE and JAMES X. DEMPSEY, TERRORISM AND THE CONSTITUTION: SACRIFICING CIVIL LIBERTIES IN THE NAME OF NATIONAL SECURITY (2002).


55 Michaels, supra note 53, at 20.

Nationality Act (INA), was enacted on June 27, 1952. In 1952, the INA contained three exclusion provisions pertaining to national security or political expression:

1) Section 212(a)(27) covered noncitizens believed to be entering the United States to engage in activities "prejudicial to the public interest;"\(^{58}\)

2) Sections 212(a)(28)(B), (C), and (G) excluded noncitizens who had "ever advocated, been members of or affiliated with any organization that advocated, or published or circulated writings advocating, any of certain political views, including communism, anarchy, or the propriety of overthrowing the United States government or all government;"\(^{59}\)

3) Section 212(a)(29) excluded noncitizens believed likely "to engage, after entry, in such activities as espionage, sabotage, or other subversion."\(^{60}\)

In 1996, in response to the Oklahoma City bombing, Congress passed the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA),\(^{61}\) which imposed sweeping changes in immigration policy. This comprehensive bill, primarily concerned with terrorism and other major crimes, expanded grounds for deportation and narrowed provisions for discretionary relief.\(^{62}\)

In the same year, a second major modification of the INA was accomplished by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA).\(^{63}\) This legislation focused on the apprehension and expeditious removal of undocumented immigrants. In addition, the current structure of the INA provides stringent restrictions on noncitizens seeking admission to the United States. It also subjects noncitizens permitted to reside in the country to certain conditions that, if violated, would be grounds for deportation. Title II of the INA, § 212(a)(3) (2004), outlines the grounds for inadmissibility of a

\(^{57}\) Immigration and Nationality Act, Pub. L. No. 414, 66 Stat. 163 [hereinafter INA].

\(^{58}\) Id. at § 212(a)(27).

\(^{59}\) Id. at § 212(a)(28)(B)(C)(G).

\(^{60}\) Id. at § 212(a)(29).


\(^{62}\) See 1-2 CHARLES GORDON, STANLEY MAILMAN, AND STEPHEN YALE-LOEHR, IMMIGRATION LAW AND PROCEDURE, § 2.04(14) (2001) [hereinafter GORDON & MAILMAN].

noncitizen when national security and foreign policy concerns arise. In § 212(a)(3)(B) the definition of "terrorist activities" has been modified by AEDPA, IIRAIRA, and UPA. Section 236A of the INA specifically provides for mandatory detention of suspected terrorists and sets forth requirements of habeas corpus and judicial review. This section, added by the UPA, established the requirement that the Attorney General must first certify a noncitizen as a terrorist in order to require mandatory detention. Section 237(a)(4) establishes deportability grounds as a result of security, terrorist activity, and foreign policy concerns. Lastly, Title V of the INA is solely dedicated to alien terrorist removal procedures. This title was the major modification effected by AEDPA. To date, the removal court delineated by this title has not been used, probably due to the "[specific] range of circumstances that fall within its jurisdiction."

The UPA made substantial changes to immigration law. The UPA was the second response of Congress to the September 11 attacks (after the AUMF joint resolution) and was passed in Congress with overwhelming bipartisan majorities. The UPA was signed into law by President Bush on October 26, 2001, a conglomeration of initiatives in direct response to terrorism. The UPA provides for:

increased funding for counterterrorism activities, particularly for increased border protection, condemnation of discrimination against Arab and Muslim Americans, preservation of immigration benefits for victims, and direct assistance for victims and their families. The Act also includes new initiatives to prevent and disrupt the financing of terrorist organizations, to

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64 INA § 236A.
65 Id.
66 INA § 237(a)(4).
67 See INA tit. V.
70 CONGRESSIONAL RESEARCH SERVICE, supra note 24, at 1.
strengthen criminal laws against terrorism, and to improve intelligence gathering.\textsuperscript{71}

The UPA also promulgated changes in the INA. Currently, providing material support to a certified terrorist organization constitutes "terrorist activity" under INA § 212(a)(3)(B)(iv), and is grounds for inadmissibility and deportation. The INA has been strengthened by the UPA with a new, workable definition of "terrorist organization," which includes any organization that is either certified by the Secretary of State or one that commits or prepares to commit terrorist activities under INA § 212(a)(3)(C)(vi). The UPA also created new grounds of inadmissibility: endorsing or espousing terrorist activity and for associating with a terrorist organization with the intent to engage in activities endangering the safety and security of the United States under INA § 212(a)(3)(B)(iv). Lastly, an alien who has been determined by the Secretary of State or the Attorney General to have been "associated with a terrorist organization and intends while in the United States to engage solely, principally, or incidentally in activities that could endanger the welfare and safety, or security, of the United States is inadmissible" under INA § 212(a)(3)(F).

More notably, the UPA added INA § 236A, which provides for the mandatory detention of suspected terrorists whom the Attorney General has certified as meeting the criteria for terrorism. Further, INA §§ 236A(a)(3) and (5), allow the detention of suspected terrorists for seven days, as opposed to only forty-eight hours as previously permitted, without filing formal immigration charges if the Attorney General certifies that the noncitizen is a terrorist.

These additions have sparked opposition because some argue that noncitizens' personal rights have been infringed, and noncitizens are entitled to the same due process protection as American citizens.\textsuperscript{72} However, safeguards were built into this provision by limiting the classification of aliens who cannot be removed to those whose release would threaten national security or public safety as codified in INA § 236A(a)(3), delineating a structured certification process for the Attorney General and Deputy Attorney General. Further, a mandatory review of certification is required every six months,\textsuperscript{73} and a provision

\textsuperscript{71} Ting, supra note 52, at 1147-48 (citing respectively USA PATRIOT Act §§ 101, 103; 402, 404; 102; 421-427; 611-614, 621-624; 301-303, 311-330, 351-377; 801-817; 901-908).

\textsuperscript{72} Cole, supra note 53, at 218-19; see generally Michaels, supra note 53, at 134-35.

\textsuperscript{73} INA § 236A(a)(7).
extends to aliens the right to petition for habeas corpus proceedings, judicial reviews, and appeals.74

The changes effected by the UPA are common sense responses to the nation’s ongoing War on Terror. The strict requirements for admission are proper during times of danger since the political branches have the authority to prohibit those who threaten and choose to harm Americans from entering the country. The United States must protect its borders from terrorists and those who advocate terrorism. The UPA is a bipartisan congressional action which adequately responded to the exigencies created by the September 11 attacks by implementing a workable system of checks and balances. Serious lessons were learned and Congress prudently codified them in the UPA.

IV. THE PLENARY POWER OF THE POLITICAL BRANCHES AUTHORIZES USE OF IMMIGRATION LAW TO COMBAT TERRORISM

In Gibbons v. Ogden,75 the Supreme Court defined plenary power as the government’s power that may be exercised at its complete and utmost extent without limitations other than those specifically prescribed in the Constitution.76 The plenary power doctrine over immigration policy77 is premised on the political branches’ constitutional province enumerated in the Commerce Clause,78 the Migration Impor-

74 INA § 236A(b).
75 Gibbons v. Ogden, 22 U.S. 1 (1824).
76 Id. at 17, 197.
77 See, e.g., Kleindiest v. Mandel, 408 U.S. 753, 766, 768, 769 (1972); Boutillier v. INS, 387 U.S. 118, 123 (1967).
78 U.S. CONST. art. I, § 8, cl. 3 (“Congress may . . . regulate commerce with foreign nations”).
79 U.S. CONST. art. I, § 9, cl. 1 (“The Migration or Importation of such Persons as any of the States now existing shall think proper to permit, shall not be prohibited by the Congress prior to the year one thousand eight hundred and eight”).
80 U.S. CONST. art. I, § 8, cl. 4 (authorizing Congress “[t]o establish a uniform Rule of Naturalization”).
81 U.S. CONST. art. I, § 8, cl. 11 (Congress has the power “[t]o declare war”).


over foreign policy based on principles of national sovereignty.\textsuperscript{83} Moreover, it has been asserted that issues within the political branches' constitutional province, such as immigration and foreign policy, are nonjusticiable.\textsuperscript{84} The political question doctrine, established in \textit{Baker v. Carr},\textsuperscript{85} holds that a case is nonjusticiable when it facially reflects

a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.\textsuperscript{86}

Immigration policies implicate foreign policy and national security concerns and are within the realm of nonjusticiable questions. The Supreme Court has indicated reticence to involve itself in immigration policy.

\textit{A. Judicial Deference to Political Branches Has Been Established in Constitutional Case Law}

The first reported case in which the Supreme Court differentiated immigration law from the general body of substantive law is \textit{Chae Chan Ping v. United States},\textsuperscript{87} the Chinese Exclusion Case.\textsuperscript{88} The Supreme Court described Congress' power over immigration policy as absolute and complete, thus requiring judicial deference in immigra-

\textsuperscript{86} \textit{Id.}
\textsuperscript{87} \textit{Chae Chan Ping v. United States}, 130 U.S. 581 (1889).
\textsuperscript{88} \textit{Id.}
tion matters.\textsuperscript{89} Later, in 1903, the Supreme Court created exceptions to Congressional plenary power by affording procedural due process rights to aliens in deportation cases.\textsuperscript{90} However, Congress ultimately concluded that the type of procedural due process an alien was entitled to is less than what is required for United States citizens.\textsuperscript{91} Nevertheless, limitations on judicial review over immigration policy have still been largely upheld.\textsuperscript{92} In a 1982 cases \textit{Landon v. Plasencia}, procedural due process was extended to exclusion proceedings for lawful permanent residents that have established ties and connections while living in the United States.\textsuperscript{93}

Under the plenary power doctrine, immigration is viewed as a form of contract between the United States and its noncitizens.\textsuperscript{94} The Supreme Court has supported this view, stating that admission to America is a temporary grant of permission that is revocable by the government when a noncitizen violates the condition of his stay.\textsuperscript{95} Therefore, not every immigrant is guaranteed naturalization. Each immigrant must meet the naturalization requirements prescribed by the INA and should not violate any conditions of his or her immigrant status in order to qualify for naturalization.

The last time the Supreme Court directly addressed the plenary power of Congress in immigration policy was in \textit{Zadvydas v. Davis}.\textsuperscript{96} Although the Court acknowledged that deportable criminal aliens who could not be repatriated to any foreign country could not be imprisoned indefinitely, the Court articulated that the constitutional due process right for criminal aliens may be different if the circumstances

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\textsuperscript{89} See, \textit{e.g.}, id. at 606; \textit{Lees v. United States}, 150 U.S. 476, 480 (1893) (holding that the power to exclude aliens is absolute and is not open to challenge in the courts); \textit{Fong Yue Ting v. United States}, 149 U.S. 698, 706 (1893).

\textsuperscript{90} \textit{Yamataya v. Fisher}, 189 U.S. 86, 100 (1903) (the Japanese Immigrant Case).

\textsuperscript{91} \textit{See Shaughnessy v. United States ex rel. Mezei}, 345 U.S. 206, 215-16 (1953) (holding that alien did have right to due process because he had a liberty interest, but the actual process is determined by Congress under its plenary power); \textit{Knauff v. Shaughnessy}, 338 U.S. 537, 544 (1950). "Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned." \textit{Id.}

\textsuperscript{92} \textit{See, \textit{e.g.}}, \textit{Fiallo v. Bell}, 430 U.S. 787, 792 (1977) (stating congressional power is immune from judicial review); \textit{Harisiades v. Shaughnessy}, 342 U.S. 580, 588-89 (1952) (acknowledging that immigration statutes are "largely immune from judicial interference").


\textsuperscript{94} Motomura, \textit{supra} note 9, at 426.

\textsuperscript{95} \textit{Id.} at 427.

\textsuperscript{96} \textit{Zadvydas v. Davis}, 533 U.S. 678 (2001).
involve terrorism. The Court articulated that "[n]either do we consider 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." In the context of the ongoing War on Terror, the scenario painted by the Zadvydas Court has become today's reality. Accordingly, judicial deference to the political branches is merited.

The Supreme Court's most recent exercise of judicial deference was in the 2003 case, 
Demore v. Kim. The Court acknowledged that there is a distinction between the rights of citizens and noncitizens and based its decision to uphold preventive detentions of criminal aliens prior to their removal hearings on 
Mathews v. Diaz, concluding "[i]n the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens." Moreover, the Court found clear precedent in 
Mathews to defer to Congress in matters within its constitutional province because "any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government."

Even scholars who are most antagonistic to a distinction between citizens' and noncitizens' constitutional protections have conceded that there are permissible differentiations, particularly in the areas of admission, expulsion, elective franchise, and eligibility for federal executive office. Such differentiations help substantiate the continued plenary power of the political branches over immigration and foreign policy by justifying the right of a sovereign state to exercise preferential treatment of its citizens over noncitizens.

Some may argue that the plenary power doctrine has been severely weakened, or even abrogated, based on the Supreme Court's recent decision in the enemy combatants' case. The enemy combatants' case is inapposite because the enemy combatants neither intentional immigrants nor present in United States territory. Instead, United

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97 Id. at 696.
98 Id.
101 Demore, 538 U.S. at 521.
102 Id. at 521-22 (quoting Mathews, 426 U.S. at 81 n.17).
103 Cole, supra note 53, at 226.
States Armed Forces and their allies captured the detainees in the war theater during the hostilities between the United States and the Taliban.\textsuperscript{105} The detainees were found bearing arms in opposition to the United States.\textsuperscript{106} Therefore, because the enemy combatants did not voluntarily enter a United States territory, their situation is distinguishable from noncitizens who have come into the United States on their own volition. These noncitizens either consented to abide by the Nation's immigration laws as a condition for entry, or deliberately circumvented and violated such laws in order to attain entry. Henceforth, the enemy combatants' case does not affect the plenary power of the political branches over immigration.

The executive branch properly used immigration law to combat terrorism because it has expertise and access to intelligence in matters of national security and foreign policy. Furthermore, the executive branch has first-hand knowledge of the types of individuals who support and are members of Al Qaeda based upon information gathered from the Federal Bureau of Investigation, Central Intelligence Agency, National Security Agency, and various other intelligence services under the supervision of the President. Based upon the information all intelligence services have gathered, executive agencies investigated individuals who fit the composite of Al Qaeda members. This has resulted in enhanced rationality and accuracy of law enforcement and counterterrorism efforts.\textsuperscript{107}

Plenary power does have its limits and is susceptible to abuse. As such, checks and balances are necessary to prevent its misuse or usurpation. "[P]ower in the President is dangerous to liberty, and may be abused. All power may be abused if placed in unworthy hands. But it would be difficult . . . to point out any other hands in which this power would be more safe, and at the same time equally effectual."\textsuperscript{108} The national political process serves as the most direct check on the actions of the political branches.\textsuperscript{109} America is governed by the Lockesian concept of the collective consent of the people, and, without the man-

\textsuperscript{105} Id. at 2692.
\textsuperscript{106} Id.
\textsuperscript{108} Luther v. Borden, 48 U.S. (7 How.) 1, 44 (1849).
\textsuperscript{109} If Americans disagree with the Administration's immigration policies and with Congress' actions, they can, of course, opt not to reelect their representatives or the current President.
date of the people, government officials are removed from office and are replaced with individuals who do have the popular support.\textsuperscript{110}

Therefore, plenary power is not an unfettered license for the political branches to do what they please, but rather, it is the most direct method to carry out the will of the people.

\textit{B. Political Branches’ Use of Plenary Power}

As previously discussed, constitutional precedent delineates the Executive’s plenary power and serves as another justification for the use of immigration law to combat terrorism. President Bush’s actions in response to the September 11 attacks fit squarely into Justice Jackson’s categories of executive power outlined in his concurring opinion in \textit{Youngstown Sheet & Tube Co. v. Sawyer}.\textsuperscript{111} The President’s power is at its zenith when he acts under his Article II powers, buttressed by a congressional act. Under Article II, the President has power as both the Chief Executive and Commander in Chief of the Army and Navy to “preserve, protect and defend the Constitution.”\textsuperscript{112}

Under this rubric, Congress passed the AUMF shortly after the September 11 attacks, authorizing the President to use all necessary means to kill or capture the terrorists responsible for the attacks.\textsuperscript{113} President Bush acted pursuant to AUMF and directed the agencies under his control to conduct investigations and initiatives both domestically and abroad in an effort to capture terrorists and prevent subsequent attacks upon American soil.\textsuperscript{114} Thus, the President’s actions are supported by one of \textit{Youngstown’s} categories—a well-established constitutional principle in delineating the limits of the executive branch.

\textit{C. Noncitizen Civil Liberty Claims Under the Constitution}

Nonimmigrant and noncitizen advocates accuse the government of committing two constitutional violations: (1) the government’s use of secrecy in its post September 11 investigations curtailed the press’ and the public’s statutory and constitutional right to information; and (2)

\textsuperscript{112} U.S. CONST. art. II, § 1, cl. 8.
\textsuperscript{113} AUMF, \textit{supra} note 22.
the government’s post September 11 detentions allegedly infringed on nonimmigrants’ substantive due process by depriving them of physical liberty without the process purportedly guaranteed by the Constitution.\textsuperscript{115} Both contentions are adequately resolved, as will be discussed, under the political branches’ plenary power over immigration and foreign policy which demonstrates that their actions are constitutional. Attorney General John Ashcroft defended the Department of Justice’s post September 11 actions by warning the Senate and the public:

To those who pit Americans against immigrants and citizens against noncitizens, to those who scare peace-loving people with phantoms of lost liberty, my message is this: Your tactics only aid terrorists, for they erode our national unity and diminish our resolve. They give ammunition to America’s enemies and pause to America’s friends.\textsuperscript{116}

If citizenship is not a legitimate trigger for constitutional protection, what other characteristics can serve as a proper threshold? Once any person sets foot on American soil, whether lawfully or unlawfully, should he or she enjoy the same constitutional safeguards as citizens? A demarcation must be drawn in some way and by some means so that the United States satisfies the obligations it owes itself and its citizens, of both self-preservation and protection.

Although some U.S. citizens have turned and supported Al Qaeda’s mission,\textsuperscript{117} this does not diminish the nation’s obligation and authority to place some limitations on noncitizen status; however, once a citizen violates the rule of law, he will be subject to criminal penalties.\textsuperscript{118} Furthermore, noncitizens are not afforded the same level of constitutional protection because they enjoy neither \textit{jus soli}\textsuperscript{119} nor \textit{jus sanguinis}\textsuperscript{120} affiliation with the United States. Instead, noncitizens

\begin{footnotesize}
\textsuperscript{115} Tumlin, \textit{supra} note 7, at 1193.
\textsuperscript{116} \textit{Dep’t of Justice, Oversight: Preserving Our Freedoms While Defending Against Terrorism: Hearings Before the Comm. on the Judiciary, U.S. Senate, 107th Cong}, 309, 313 (2001).
\textsuperscript{118} See id.
\textsuperscript{119} \textit{Jus soli} literally means “right of the land.” This principle of citizenship confers a nation’s citizenship on persons born within that nation’s territory. GORDON \& MARLMAN, \textit{supra} note 62, at vol. 7, \textsection{} 91.02[2].
\textsuperscript{120} \textit{Jus sanguinis} means “right of blood.” Citizenship is acquired by descent under this principle. The children of the citizens of a nation are entitled citizenship to that nation regardless where the children were born. \textit{Id.}
\end{footnotesize}
must apply for naturalization according to the means prescribed by Congress. Even a prominent scholar, who is a strong proponent of protecting noncitizens’ constitutional rights, has recognized that the most basic difference between the rights of citizens and noncitizens is that immigrants can be expelled from the country for immigration law infractions, while citizens cannot be “banished and cannot have their citizenship taken away.”

Furthermore, federal courts have routinely held that many noncitizens have a diminished stake compared to citizens. Also, as stated earlier, the Supreme Court has carved out an exception to extend procedural due process rights to noncitizens. This exception can be discerned from the text of the Fourteenth Amendment.

All persons born or naturalized in the United States . . . are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The due process and equal protection clauses apply to any person, while the privilege and immunities clause applies only to citizens. This distinction is instructive in demonstrating that noncitizens have some constitutional protection, but the protection does not rise to the same level enjoyed by citizens. For example, noncitizens are entitled to due process, as recognized by Supreme Court precedents; however, the process noncitizens receive is not as extensive as those accorded to citizens.

The distinction of constitutional rights between citizens and noncitizens allows the government to treat noncitizens differently from...
citizens. The government's authority comes from the plenary power doctrine. Under this doctrine, the federal government has the authority, upon a showing a compelling public interest, to treat noncitizens differently from citizens even if inconsistent with specific constitutional provisions.\(^{127}\) Under its plenary power over immigration law, Congress may apply to noncitizens substantive immigration laws that would otherwise violate constitutional principles and would be unacceptable if applied to citizens.\(^{128}\) Therefore, the mistaken assumption that noncitizens enjoy the same amount of constitutional guarantees as citizens is not textually supported by the Fourteenth Amendment. Also, in light of the current exigent national security concerns, the Fourteenth Amendment supports the immigration policy changes effected by the political branches in their response to terrorism.

Chief Justice Rehnquist presciently described the present state of affairs: "In any civilized society the most important task is achieving a proper balance between freedom and order. In wartime, reason and history both suggest that this balance shifts in favor of order—in favor of the government's ability to deal with conditions that threaten national well-being."\(^{129}\) For the sake of safety and order, the political branches promptly acted in response to the September 11 attacks. The measures taken by the political branches after the September 11 attacks were executed within their constitutional power, and they did not overstep the limits set forth by the Constitution. It remains the government's duty to protect itself and its citizens; and it remains part of the nation's armor to maintain the distinction between citizens and noncitizens as a constitutionally permissible and prudential means to provide that protection.

V. THE CONSTITUTION OF NECESSITY AUTHORIZES THE POLITICAL BRANCHES TO USE MEANS WHICH PRESERVE THE NATION

The laws of necessity, of self-preservation, and of saving our country when in danger are of higher obligation. To lose our country by a scrupulous adherence to the written law would be to lose the law itself, with life, liberty, property and all

\(^{127}\) See Mathews, 426 U.S. at 79-91; see also Mezei, 345 U.S. at 212 (holding that what Congress deems to be the "threshold of initial entry" is due process for an alien awaiting entry, as opposed to the aliens who are already in the United States, legal or not, and who are deserving of the traditional standards of due process).

\(^{128}\) Id.

those who are enjoying them with us; thus absurdly sacrificing the end to the means.  

A. The Constitutional Underpinnings

The rationale behind the "Constitution of necessity," as espoused by Michael Paulsen, is that "[t]he Constitution itself embraces an overriding principle of constitutional and national self-preservation that operates as a meta-rule of construction for the document's specific provisions and that may even, in cases of extraordinary necessity, trump specific constitutional requirements." Further, interpretations of the Constitution should be construed to complement its various provisions and should not be given a contradictory interpretation. However, when interpretations which are inconsistent or contrary to the purpose of the Constitution will likely result, "the necessity of preserving the Constitution and the constitutional order as a whole requires that priority be given to the preservation of the nation whose Constitution it is, for the sake of preserving constitutional government over the long haul, and even at the expense of specific constitutional provisions." The text of the Constitution recognizes the constitutional law of necessity and, based on the presidential oath to "preserve, protect and defend the Constitution of the United States," charges the President with both the duty of executing the Constitution and the discretion to judge the necessity of those efforts.

The Framers also gave the legislative branch necessary and proper powers so that in times of national crisis, Congress has the power to legislate measures to accomplish preservation. Paulsen further contends that, given the Supreme Court's jurisprudence regarding a compelling interest analysis, national survival—the protection of innocent life and preservation of constitutional government—is the quintessential example of a compelling interest.

130 Letter from Thomas Jefferson, President of the United States, to John B. Colvin (Sept. 20, 1810), in BASIC WRITINGS OF THOMAS JEFFERSON 682 (Philip S. Foner ed., 1944).
131 Paulsen, supra note 13, at 1257.
132 Id.
133 Id. at 1257-58.
134 U.S. CONST. art. II, § 1, cl. 8.
135 Paulsen, supra note 13, at 1291.
136 U.S. CONST. art. I, § 8, cl. 18.
137 Paulsen, supra note 13, at 1258; see also McCullough, 17 U.S. (4 Wheat.) at 316.
138 Paulsen, supra note 13, at 1260.
Judge Posner presents a similar view of constitutional jurisprudence in times of exigency. Recognizing that the Constitution should not be made into a suicide pact, Posner contends that the present rights which the Constitution confers are a result of judicial interpretation rather than the Constitution’s literal text and "are alterable in response to changing threats to national security" \[^{139}\] in order to produce the most efficient and just resolution. Posner further argues that in response to the September 11 attacks, police powers and military force are required to control the threat of international terrorism. As a result, some civil liberties will and should be curtailed "to the extent that the benefits in greater security outweigh the costs in reduced liberty." \[^{140}\]

Notwithstanding exigent national security concerns, legislative and judicial officials "must weigh the costs as carefully as the benefits." \[^{141}\] History has shown the tendency of government officials to underestimate dangers to national security that have led to the most violent incidents in the nation’s history, namely, the Civil War, the Japanese attack at Pearl Harbor, the emboldening of North Korea to invade South Korea, the Tet Offensive of 1968, the Iranian revolution and Iran hostage crisis of 1979. \[^{142}\] Posner, like Paulsen, cites Abraham Lincoln’s wartime suspension of habeas corpus as the foremost example that "even legality must sometimes be sacrificed for other values." \[^{143}\] He stressed that "[w]e are a nation under law, but first we are a nation." \[^{144}\] Although Posner’s views are based on an economic analysis of the law, he brings force to his argument by acknowledging the necessity of preserving the nation.

B. The Rationale Applied Today’s in Context

Justice Holmes’ proverb holds true today: “[A] page of history is worth a volume of logic." \[^{145}\] The lessons from Korematsu v. United

\[^{139}\] Posner, supra note 14.
\[^{140}\] Id.
\[^{141}\] Id.
\[^{142}\] Id.
\[^{143}\] Id; see also Oren Gross, Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?, 112 YALE L.J. 1011, 1022 (2003) (arguing that political authorities should act outside the law so long as they are acting forthrightly and remain accountable after the emergency).
\[^{144}\] Posner, supra note 14.
States should never be forgotten. This nation learned a logical and valuable lesson from Korematsu: mistakes should not be repeated. Today, Korematsu serves as a grave reminder that civil liberties should be vigilantly guarded and should be limited only upon the most pressing of circumstance. Korematsu will forever remind the government to cautiously weigh the present exigent circumstances against the overall scheme of constitutional government and democracy.

The present historical moment calls for some measure of increased protection against a formidable foe. Nevertheless, every protective measure must be sufficiently analyzed, and weighed against competing interests, to determine whether the curtailment of some civil liberties is warranted by the immediate circumstances.

It is well established that national security is a compelling governmental interest. “It is ‘obvious and unarguable’ that no governmental interest is more compelling than the security of the nation.” The measures taken by the government post-September 11 are necessary and proper and within the confines of the political branches’ constitutional authority. “[N]o one can doubt that uniquely compelling governmental interests are at stake: the government’s need to respond to the September 11 attacks—unquestionably the worst ever acts of terrorism on American soil—and its ability to defend the nation against future acts of terrorism.”

The District of Columbia and Third Circuit Courts of Appeals have recently wrestled with the difficult task of balancing national security interests and civil liberties. In Center for National Security Studies v. United States Department of Justice, the District of Columbia Circuit held that immigration proceedings for alleged enemy combatants were

148 Some may argue that Korematsu was correctly decided given the national security concerns presented by World War II. However, since the majority of the internees were American citizens, the high level of constitutional protections guaranteed to every citizen should have protected them. This note only argues that noncitizens are not entitled to the same constitutional protections as citizens. A response to proponents of the Korematsu decision is beyond the scope of this note.
150 Ctr. for Nat’l Sec. Studies v. United States Dep’t of Justice, 331 F.3d 918, 937 (D.C. Cir. 2003).
to remain closed from the press since crucial information essential to national security was at stake.\textsuperscript{151} The Third Circuit reached a similar conclusion when adjudicating immigration proceedings within its jurisdiction.\textsuperscript{152} The Third Circuit held that the press’ First Amendment right of access to deportation proceedings was outweighed by significant national security concerns.\textsuperscript{153} In both cases, the Supreme Court denied \textit{certiorari} review.\textsuperscript{154} These cases illustrate that because national security is a compelling state interest it can outweigh certain First Amendment claims. These cases also demonstrate proper judicial deference to the executive branch’s authority after a careful weighing of competing interests.

Lincoln’s rhetorical question—“[A]re all the laws but one to go unexecuted, and the Government itself go to pieces, lest that one be violated?”\textsuperscript{155}—encapsulates the essence of the “Constitution of necessity.” Parts are subordinate to the whole, and, in order to preserve the whole in drastic times, parts may have to be surrendered. Stated aptly by Lincoln: “[A] life is never wisely given to save a limb.”\textsuperscript{156} Moreover, James Madison also subscribed to the view that the less important parts should give way to the more important: “[T]he means should be sacrificed to the end, rather than the end to the means.”\textsuperscript{157} The bottom line is that civil liberties are sacrificed in wartime—only temporarily—and are fully restored upon resumption of peace and normalcy.

Paulsen proposed a formula in weighing the costs of the “Constitution of necessity.” He posits that the reasonableness of an intrusion on civil liberties is a function of the circumstances and the magnitude of the imminent danger, and as such, can justify what otherwise might be an unreasonable infringement.\textsuperscript{158} The constitutional calculus works out to be something like this: certain constitutional rights, such as a non-

\textsuperscript{151} \textit{Id.} at 938.
\textsuperscript{152} N. Jersey Media Group, Inc. v. Ashcroft, 308 F.3d 198, 211 (3d Cir. 2002). \textit{But see} Detroit Free Press v. Ashcroft, 303 F.3d 681 (6th Cir. 2002), \textit{recons. denied} (Apr. 9, 2002).
\textsuperscript{153} N. Jersey Media Group, 308 F.3d at 221.
\textsuperscript{157} \textbf{THE FEDERALIST} \textit{No.} 40, at 201 (James Madison).
\textsuperscript{158} Paulsen, \textit{supra} note 13, at 1280.
citizen's substantive due process rights, are accorded less importance when protecting the nation from another catastrophic terrorist attack.

However, is the intrusion on civil liberties reasonable in light of pressing national security concerns and does the magnitude of imminent terrorist attacks justify what otherwise might be an unreasonable infringement? The answer is unequivocally yes—even three years after the September 11 attacks. The benefits gained from increased security, which resulted from the investigations conducted by executive agencies and additional protections provided by Congress under the UPA, outweigh the burdens of the curtailing certain civil liberties. The cost of saving millions of lives, preventing another devastating attack, protecting the nation's economy, and preserving America's democracy are worth some temporary and putative loss of freedom or disruption.

It is important to note that the political branches have not acted to such extremes as suspending the writ of habeas corpus or enacting legislation beyond their constitutionally permissible province. Instead, they have acted within their constitutional boundaries in matters of immigration law and foreign policy and utilized existing means in a limited, targeted way. These means have been utilized for three years, but the War on Terror is still ongoing. Osama Bin Laden remains at large, and Al Qaeda is continuing its odious plots against the United States. Thus, the government must continue to combat terrorism by utilizing means which are reasonable, appropriate, and available.

The use of immigration law as part of the nation's counterterrorism efforts remains proper as long as such use does not overstep the bounds of the Constitution and U.S. treaty obligations, and preserves the basic rights that are inherent to all humans. The current exigency has not required the political branches to override specific constitu-


160 See, e.g., Lynch v. Cannatella, 810 F.2d 1363, 1366 (5th Cir. 1987) (holding that even excludable criminal aliens are protected from brutality of government officials); see also INA § 241(b)(3) (2004) (prohibiting Attorney General from removing an alien to a country where alien's life or freedom would be threatened); Universal Declaration of Human Rights, General Assembly Res. No. 217A (III), UN Doc. A/810 (1948).
tional provisions. Instead, law enforcement has used existing prosecutorial tools at their disposal to prevent, disrupt, and capture terrorists and potential terrorists.

It is undisputed that the noncitizens deported as a result of the Department of Justice’s interviews violated immigration laws. It is also undisputed that the September 11 hijackers escaped the surveillance of the government at a time when immigration laws were not as robust as they are today. It should also be undisputed that the inconveniences and limitations placed upon noncitizens living in America post-September 11 do not outweigh the overarching need to preserve and protect the entire nation from subsequent terrorist attacks. Indeed, the need for preservation and protection is shared by all those that reside in the United States—citizens and noncitizens alike.

VI. CONCLUSION

The preservation of the nation and protection of civil liberties are compelling interests that are necessarily difficult to reconcile during wartime. This note provides some insight into the complex task of pursuing counterterrorism efforts while preserving basic civil liberties. Immigration policy has been central in this ongoing debate because it is one of the powerful and effective tools to protect America. As demonstrated here, the government has used existing tools within its constitutional authority to fight terrorism and has done so in a way that does not unconstitutionally infringe upon the civil rights of noncitizens. However, every change in policy should be carefully analyzed, reviewed, and debated so that efforts to protect American life do not oppress the lives of others. All life is precious and worthy of dignity and respect; we must carefully preserve and protect all.