

THE ACCIDENTAL TERRORISTS:¹ EXCLUDABLE ALIENS WHO SLIP ACROSS U.S. BORDERS

I. FACTUAL BACKGROUND

On the morning of January 25, 1993, rush hour vehicles filled with commuters wait patiently for the traffic signal to direct them into the Central Intelligence Agency (CIA) compound.² A man calmly exits his car, pulls out an AK-47 rifle, and fires bullet after bullet into the commuters.³ As the hysteria grows, two people lay dead and three are seriously injured while the mysterious gunman vanishes.⁴

One month later, the World Trade Center in New York City is nearly sent crashing to the ground as explosives fill the 110-story building with smoke, fire, fear and darkness.⁵ This second terrorist attack on U.S. soil caused six deaths, injured thousands,⁶ and destroyed six hundred billion dollars of property.⁷

¹ Steven Emerson, *The Accidental Terrorist; Coping with the New, Freelance Breed of Anti-West Fanatic*, WASH. POST, June 13, 1993, at C5 (discussing radical Islamic fundamentalists as the new terrorist threat present in United States, including circumstances surrounding the World Trade Center bombing and Sheik Omar Abdel-Rahman's involvement).

² Margaret Thomas, *Rush-Hour Carnage at the Entrance to the CIA*, WASH. POST, Aug. 10, 1993, at Z12.

³ *Id.*

⁴ *Id.* (discussing the incident which left both CIA intelligence analyst and physician Lansing Bennett and CIA covert operations agent Frank Darling dead and CIA employees Calvin Morgan and Nicholas Starr, and AT&T employee Stephen E. Williams injured).

⁵ Telephone Interview with Kathleen M. Hearn, World Trade Center bombing victim (Sept. 3, 1993). See also Russell Watson et al., *The Hunt Begins*, NEWSWEEK, Mar. 8, 1993, at 22.

⁶ Bill Gertz, *U.S. Jury Indicts Sheik in NYC Bombing Plots*, WASH. TIMES, Aug. 26, 1993, at A1. See also Dick Kirschten, *Shock Waves*, NAT'L J., June 5, 1993, at 1349; Richard Bernstein, *The Twin Towers: Terrorism*, N.Y. TIMES, Mar. 7, 1993, at 39 (both interpreting the bombing on American soil).

⁷ *Hearing of the International Security, International Organizations and Human Rights Subcommittee of the House Foreign Affairs Comm.*, 103rd Cong., 1st Sess. at *18, Federal News Service, July 13, 1993, available in LEXIS, NEXIS Library, Federal News Service File [hereinafter *International Security Hearing*] (discussing current American opinions on problems with immigration laws, a chronological history of Sheik Omar Abdel-Rahman's access to United States, and total economic and human losses which resulted from World Trade Center bombing).

These two incidents, and others like them, have one common element: they were orchestrated and accomplished by foreign nationals living in the United States, despite their status as illegal aliens. The responsibility for the CIA killings, for example, has been attributed to Mir Aimal Kansi, a member of Pakistan's elite and privileged society who entered the United States with a business visa in December of 1990.⁸ Once in the United States, Kansi applied for asylum as a political refugee claiming he was fleeing from political persecution in Pakistan.⁹

Even more disturbing than the history of Mir Aimal Kansi is the history of Sheik Omar Abdel-Rahman (Sheik Omar), a blind 55-year-old Egyptian cleric, indicted for "conspiring 'to levy a war of urban terrorism against the

⁸ David Savage, *Temporary Visas Used to Stay in U.S. Indefinitely; Borders: Recent Terrorist Incidents Point Up Looseness in Immigration Laws. Congress May Make Changes*, L.A. TIMES, Mar. 8, 1993, at A1. See also Michael Ross, 'Nice' Pakistani, Suspect in CIA Slaying, is Little Known; Crime: The 28-year-old Immigrant is Reported to Have Returned to his Native Country Shortly After Fatal Shootings at the Agency Gates, then Disappeared, L.A. TIMES, Feb. 12, 1993, at 12 (interviews with Mir Aimal Kansi's former co-workers who describe Kansi as quiet, nice and courteous, a person who brought muffins to work on Mondays and never failed to blush when his co-workers thanked him.); John Ward Anderson & Kamran Khan, *CIA Suspect's Divided Personality; Gentle, Naive Young Man Also Displayed Aggressive, Impetuous Side*, WASH. POST, Feb. 17, 1993, at A1. Kansi, a member of Pakistan's privileged society, was heir to a family fortune which included two hotels, a sprawling residential compound, and acres of fruit orchards. Instead of enjoying his birth right status, Kansi, who became a member of a militant nationalist movement in college, opted to leave Pakistan and "become a courier in the United States and end up the subject of an international manhunt." *Id.*

⁹ Savage, *supra* note 8, at A1. See also Michael Hedges, *Authorities Asking How Kansi Got Here*, WASH. TIMES, Feb. 12, 1993, at B4. Mir Aimal Kansi, without being interviewed by immigration officials, entered the United States through JFK Airport in New York on March 3, 1991. As a result, immigration officials had no record of his entry and no knowledge regarding the purpose of his entry. *Id.* On February 2, 1992, the first time immigration officials heard from Kansi since his unrecorded entry into the United States on March 3, 1991, Kansi, in a letter to the Immigration and Naturalization Services, claimed that although he entered the United States illegally he desired political asylum to escape from political persecution in Pakistan. In response to the letter, immigration officials granted him a one-year work permit and displayed no interest in this illegal alien until the CIA killings in January 1993. James Popkin and Doris Friedman, *Return to Sender—Please*, U.S. NEWS & WORLD REP., June 21, 1993, at 32. See also Ross, *supra* note 8, at 12 (explaining how a worldwide manhunt ensued for Kansi).

United States.'"¹⁰ The alleged leader of the international terrorist group is credited with the World Trade Center bombing, and preaches to his thousands of followers that the United States is a "den of evil and fornication" and should be annihilated.¹¹ Despite his anti-United States preachings and his alleged participation in the assassination of Anwar Sadat, Sheik Omar, who is included in the State Department's suspected terrorist watchlist and is therefore "excludable" from the United States, entered the United States on several occasions between 1986 and 1990.¹² The histories of Mir

¹⁰ Robert L. Jackson, *Sheik Pleads Not Guilty to Terrorist Acts; Crime: The State Department Warns American Tourists to be Careful After the Muslim Clerics Followers Abroad Issue a Written Threat*, L.A. TIMES, Aug. 27, 1993, at A4 (quoting Federal Grand Jury indictment). On August 26, 1993, Sheik Omar Abdel-Rahman and fourteen of his religious followers plead not guilty to the charge of "conspiring 'to levy a war of urban terrorism against the United States.'" *Id.*

¹¹ Steven Emerson, *A New Terrorism: Islamic Fundamentalism's Terrible Threat to the West*, SAN DIEGO UNION-TIMES, June 27, 1993, at G3. See also Robert Satloff, *What Makes the Sheik's Men Tick; The New York Bombing Can Be Seen as a Logical Extension of the War Being Waged to Isolate Egypt from the West*, L.A. TIMES, Mar. 18, 1993, at B7. As this author notes, the recent World Trade Center bombing raises the following questions: "Why?" "Why now?" and "Why the World Trade Center?"

First, the "Why?" Islamic terrorists, such as Sheik Omar Abdel-Rahman, believe "that Western influence, from politics to culture, has poisoned Muslim society . . . and view the Zionist enterprise in Israel as only one element of America's plan to infect Islamic society and subjugate the world's Muslim community." Sheik Omar and his followers believe what is needed to prevent "infection to Islamic society" is revolution—"swift, sure blows that would break the will of America and its agents, paving a sure path for the assumption of power by true believers."

Second, "Why now?" The day of the World Trade Center bombing, February 26, 1993, was several days before the 10th day of the holy month of Ramadan. On that holy day in 624 A.D., Prophet Mohammed began preparations for the battle of Badr. This battle symbolizes Prophet Mohammed's first victory in "the campaign that ended with his triumphant entry into Mecca." In 1973, that day symbolizes the day Sadat commenced Operation Badr (also known as the October War) against Israel. Once again on the same day in 1981, during the anniversary of the October War, Sheik Omar's followers assassinated Sadat.

Third, "Why the World Trade Center?" Besides the fact that the World Trade Center's underground parking garage afforded easy access, the World Trade Center as a "citadel of Western capitalism, may have been conceived as part of the plan to shake the West's commitment to Egypt's financial security and, by extension, the regime's stability." *Id.*

¹² There are currently 2.5 to 3 million names on various watchlists. Individuals on these watchlists, however, have been able to gain access to the United States for the following reasons: (1) the State Department's computer system, installed in the 1970's, makes it technologically unfeasible to verify names; (2) the consular posts worldwide, with the

Aimal Kansi and Sheik Omar reveal an important fact: the United States is vulnerable to terrorist attacks on its own soil by foreign nationals, not because of deficiencies in the provisions of the immigration laws, but rather as a result of deficiencies in the execution of the immigration laws. Thus, 1993 will be remembered in history as America's wake up call demanding, requiring, and necessitating changes in the execution of the immigration laws to prevent terrorism on United States' soil.¹³

II. LEGAL HISTORY

A. *Immigration Laws from 1952 to 1990*

Throughout the 20th century, immigrants have been scapegoats for the ill-perceived fears and insecurities of the American people.¹⁴ During the McCarthy Era of the 1950's, Americans feared antidemocratic and subversive ideas such as communism and anarchy. These fears ran rampant largely because of the unrestrained influx of foreigners, which Americans perceived as a weakness in the current immigration laws.¹⁵ In response to these concerns, Congress promulgated the McCarran-Walter Act of 1952.¹⁶ This Act provided that individuals entering the United States, either temporarily or permanently, who were anarchists or who advocated or were affiliated with the Communist or any other totalitarian party were excludable at the

responsibility for issuing visas, are not linked together by any information system; (3) the State Department is still "heavily dependent on microfiche which is enormously awkward to work, extremely antiquated, time-consuming, and is not capable translating an Arab name to English and looking at all the permutations of that kind of name"; and (4) during the late 1980s and early 1990s, the State Department discontinued its policy of checking each visa applicant's history with the FBI for possible criminal activity because Congress passed a mandate requiring that the FBI charge user fees of five- to seven-dollars to any entity accessing its information. *International Security Hearing, supra* note 7, at *16-19.

¹³ Emerson, *supra* note 11, at G3.

¹⁴ George C. Beck, Note, *Deportation on Security Grounds and the First Amendment: Closing the Gap Between Resident Aliens and Citizens*, 6 GEO. IMMIGR. L.J., 803 (1992); See also Arthur C. Helton, *Reconciling the Power to Bar or Expel Aliens on Political Grounds with Fairness and the Freedoms of Speech and Association: An Analysis of Recent Legislative Proposals*, 11 FORDHAM INT'L L.J., 467 (Spring 1988) (discussing the McCarran-Walter Act of 1952).

¹⁵ Beck, *supra* note 14, at 803.

¹⁶ McCarran-Walter Act, ch. 477, 66 Stat. 163 (1952) (codified at 8 U.S.C. §§ 1101-1524 (1988)).

port of entry or deportable if already residing in the United States.¹⁷ Hence, many aliens were denied entry to the United States based largely on the "perception that their views are antithetical to the mission of, or belief in, the government of the United States."¹⁸ The McCarran-Walter Act of 1952 promoted both the "unconstitutional censorship" of aliens within U.S. borders and the "anticipatory exclusion" of aliens seeking entry.¹⁹

Reformers of the McCarran-Walter Act of 1952 became invigorated in 1960 with the election of President Kennedy.²⁰ Kennedy, who had been a Congressman and Senator during the passage of the McCarran-Walter Act staunchly opposed the Act.²¹ During his presidency, Kennedy believed that foreigners, with antidemocratic and anti-American beliefs would, given the opportunity of exposure to the United States, "mitigate their doctrinaire

¹⁷ Mitchell C. Tilner, *Ideological Exclusion of Aliens: The Evolution of a Policy*, 2 GEO. IMMIGR. L.J. 1, 57-81 (1987). In early June 1952, the House of Representatives, by a vote of 203 to 53, and the Senate, by a voice vote, passed the McCarran-Walter Act. Ten days after the Act was accepted by both the House and the Senate, on June 25, 1952, it was vetoed by President Truman. President Truman, an advocate for liberal immigration policies, "decried the Act's distrust of citizen and alien alike." Specifically, he objected to "the Act's standardless delegation of authority to the Attorney General." In addition, President Truman objected to the unreviewable power vested in low-level immigration officers in which individuals could be denied entry into the United States or exported from the United States based upon the immigration officer's "opinion" of the individual's status. As such, President Truman concluded the individual's fate would be decided subjectively rather than objectively, which is contrary to the basis of our system of justice. Despite President Truman's objections, the House of Representatives and the Senate overrode the President's veto by a vote of 278 to 113 and 57 to 26, respectively. *Id.* at 64-65. See also Courtney E. Pellegrino, Note, *A Generously Fluctuating Scale of Rights: Resident Aliens and First Amendment Free Speech Protections*, 46 SMU L. REV. 225 (1992) (discussing impact of legislation on immigrants throughout 20th century). Deportable or excludable aliens, according to § 212(a)(28) of the McCarran-Walter Act (codified at 8 U.S.C. § 1182 (a)(27) (1988)), are defined as:

Aliens who the consular officer or the Attorney General knows or has reason to believe seek to enter the United States solely, principally, or incidentally to engage in activities which would be prejudicial to the public interest, or endanger the welfare, safety, or security of the United States.

¹⁸ Alexander Wohl, Note, *Free Speech and The Right of Entry Into The United States: Legislation to Remedy The Ideological Exclusion Provisions of the Immigration and Naturalization Act*, 4 AM. U.J. INT'L L. & POL'Y 443, 458 (1989).

¹⁹ *Id.* at 457-58 n.64-65.

²⁰ Tilner, *supra* note 17, at 75.

²¹ *Id.*

attitudes and misconceptions about the United States."²² President Kennedy, in 1962, "decrying America's 'police state' image, [stated]: 'I'm fed up with the image we have as a police state. I keep seeing reports about excluding visitors because of their political views. We act like a closed society. . . . I want . . . the freest possible movement in and out of the country.'"²³ Unfortunately, in 1963, America's most powerful advocate for reforming the McCarran-Walter Act of 1952 was lost with the assassination of President Kennedy.²⁴

In 1972, the Supreme Court reaffirmed the exclusion of aliens in *Kleindienst v. Mandel*.²⁵ In this case, Ernest Mandel, a Belgian journalist and Marxist, was invited to speak at several prestigious universities in the United States.²⁶ However, under section 212(a)(28) of the McCarran-Walter Act, Mandel was excluded because of his political views.²⁷ In response to the visa denial, Mandel and the American citizens who had invited him to speak challenged the constitutionality of the McCarran-Walter Act.²⁸ According to the plaintiffs, the McCarran-Walter Act violated their first amendment rights to receive information and ideas.²⁹ The Supreme Court, acknowledging the plaintiffs argument, nevertheless upheld the Attorney General's denial on the grounds that Congress, within its plenary power to admit or exclude aliens, had delegated this power to the Executive Branch.³⁰ As such, the Court would not question the Executive's action unless that action was not based on a "facially legitimate and bona fide reason."³¹ The Attorney General, in the Court's opinion, had acted properly in light of Mandel's alleged abuse of a prior visa.³²

Not until 1977, approximately twenty-five years after the McCarran-Walter Act was enacted, did Congress push for reform. The driving force behind

²² *Id.* at 76 (quoting A. SCHWARTZ, *THE OPEN SOCIETY* 26 (1968)).

²³ *Id.* (quoting SCHWARTZ, *supra* note 22, at 25, describing his conversation with President Kennedy "regarding Schwartz's nomination to Administrator of Bureau of Security and Consular Affairs").

²⁴ *Id.*

²⁵ 408 U.S. 753 (1972).

²⁶ *Id.* at 756. See also Helton, *supra* note 14, at 477; Tilner, *supra* note 17, at 76-77.

²⁷ *Kleindienst*, 408 U.S. at 756-57.

²⁸ *Id.* at 759.

²⁹ *Id.* at 762-65. See also Tilner, *supra* note 17, at 77.

³⁰ *Kleindienst*, 408 U.S. at 769-70.

³¹ *Id.* at 770.

³² *Id.* at 769.

these changes was the Helsinki Accords of 1975, in which the United States agreed to the free flow of ideas and people across its borders.³³ Realizing that the McCarran-Walter Act conflicted with the Helsinki agreement, Congress enacted the McGovern Amendment.³⁴ This Amendment "requires the [State Department] to waive exclusions on associational grounds [i.e., membership in or affiliation with one of the groups strictly prohibited from entry into the United States under section 212(a)(28) of the McCarran-Walter Act] for short-term visitors unless the alien's admission 'would be contrary to the security interests of the United States.'"³⁵ The weakness of this Amendment, however, was that it provided no protection to those individuals seeking to reside in the United States on a permanent basis.³⁶

In 1987, Congress, acknowledging the exigency of protecting aliens seeking permanent residence in the United States from exclusion and deportation, enacted section 901 of the Foreign Relations Authorization Act.³⁷ Section 901 was enacted to afford all aliens within the United States protection from exclusion and deportation based solely on ideologies which would otherwise be protected under the U.S. Constitution if espoused by U.S. citizens.³⁸ Congress' intent of eliminating the ideologically-based focus of the McCarran-Walter Act, however, was ignored by a provision of section 901 which preserved in the U.S. Government the power to exclude and deport an alien who "has engaged in . . . or is likely to engage in . . . terrorist activity."³⁹ Although section 901 was amended in 1988 to grant protection from exclusion to those entering the United States on a temporary basis,⁴⁰ immigration officials have nevertheless interpreted section 901 to

³³ See Final Act of the Conference on Security and Cooperation in Europe, Aug. 1, 1975, Dep't of State Pub. No. 8826 at 113-15; 14 I.L.M. 1292, 1313-14 (1975). See also Tilner, *supra* note 17, at 78.

³⁴ Act of Aug. 17, 1977, Pub. L. No. 95-105, § 112, 91 Stat. 844, 848 (repealed 1991). See also Dave Martella, Note, *Defending the Land of the Free and the Home of the Fearful: The Use of Classified Information To Deport Suspected Terrorists*, 7 AM. U.J. INT'L L. & POL'Y 951 (1992) (discussing legislation enacted during 20th century concerning immigration and terrorists).

³⁵ David Cole, *The 1952 McCarran-Walter Act: Is It Irrelevant in Today's World?*, NAT'L L.J., May 29, 1989, at 22 (quoting 22 U.S.C. § 269(a) (1982)).

³⁶ *Id.*

³⁷ Foreign Relations Authorization Act of 1987, Pub. L. No. 100-204, § 901, 101 Stat. 1331, 1399-1400 (1987) (repealed 1990).

³⁸ *Id.*

³⁹ *Id.* at 1400.

⁴⁰ Pellegrino, *supra* note 17, at 227.

“render excludable and deportable anyone who is a member of—or even a contributor to—a group that has engaged in terrorist activities, whether or not the individual ever engaged in or supported a particular terrorist activity.”⁴¹ Thus, although Congress attempted to remedy “exclusion by affiliation,” section 901 was enforced such that individuals who engaged in terrorist activities, or “whose entry was adverse to foreign policy,” remained excludable or deportable.⁴²

B. *The Immigration Act of 1990*

Still seeking to eliminate the ideological exclusion of aliens, Congress promulgated the Immigration Act of 1990.⁴³ Although this Act is significant for its elimination of many of the McCarran-Walter Act exclusionary provisions which had been in effect for almost forty years, it nevertheless retains the McCarran-Walter Act exclusion of aliens who “have engaged or are likely to engage in terrorist activit[ies].”⁴⁴ Thus, while the McCarran-

⁴¹ Cole, *supra* note 35, at 22.

⁴² *Id.*

⁴³ Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (codified at various sections of 8 U.S.C.).

⁴⁴ See *supra* notes 16-22 and accompanying text. The Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 1400 (codified at 8 U.S.C. § 1182 (a)(3)(B)) (1990 Supp. II), defines excludable aliens and provides that:

(i) In general

Any alien who-

(I) has engaged in a terrorist activity, or

(II) a consular officer or the Attorney General knows, or has reasonable ground to believe, is likely to engage after entry in any terrorist activity (as defined in clause (iii)), is excludable. An alien who is an officer, official, representative, or spokesman of the Palestine Liberation Organization is considered, for purposes of this chapter, to be engaged in a terrorist activity.

(ii) “Terrorist activity” defined

As used in this chapter, the term “terrorist activity” means any activity which is unlawful under the laws of the place where it is committed (or which, if committed in the United States or any State) and which involves any of the following:

(I) The hijacking or sabotage of any conveyance (including an aircraft, vessel, or vehicle).

(II) The seizing or detaining, and threatening to kill, injure, or continue to detain, another individual in order to compel a third person (including

Walter Act is heavily criticized for its supposedly unconstitutional "exclusion by association,"⁴⁵ Congress has repeatedly chosen statutory language which provides this result.⁴⁶

a governmental organization) to do or abstain from doing any act as an explicit or implicit condition for the release of the individual seized or detained.

(III) A violent attack upon a internationally protected person (as defined in section 1116(b)(4) of Title 18) or upon the liberty of such a person.

(IV) An assassination

(V) The use of any—

(a) biological agent, chemical agent, or nuclear weapon or device, or

(b) explosive or firearm (other than for the mere personal monetary gain), with intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property.

(VI) A threat, attempt, or conspiracy to do any of the foregoing.

(iii) "Engage in Terrorist Activity Defined"—As used in this Chapter, the term "engage in terrorist activity" means to commit, in an individual capacity or as a member of an organization, an act of terrorist activity or an act which the actor knows, or reasonably should know, affords material support to any individual, organization, or government in conducting a terrorist activity at any time, including the following acts:

(I) The preparation or planning of a terrorist activity.

(II) The gathering of information on potential targets for terrorist activity.

(III) The providing of any type of material support, including a safe house, transportation, communications, funds, false identification, weapons, explosives, or training, to any individual the actor knows or has reason to believe has committed or plans to commit an act of terrorist activity.

(IV) The soliciting of funds or other things of value for terrorist activity or for any terrorist organization.

(V) The solicitation of any individual for membership in a terrorist organization, terrorist government, or to engage in a terrorist activity.

See also, Charles C. Foster, *The New Immigration Act of 1990: Major Reform of Legal Immigration*, HOUSTON BAR ASS'N (Jan./Feb., 1991).

⁴⁵ Cole, *supra* note 35, at 22. See also Tilner, *supra* note 17, at 66-67; Wohl, *supra* note 18, at 457-58 n.64-65.

⁴⁶ Cole, *supra* note 35, at 22.

C. Congressional Proposals to Amend Current Immigration Laws

Although the current immigration laws contain provisions addressing terrorists and terrorist activities,⁴⁷ Congress, responding to the renewed fear and insecurities of the American people, is considering the Terrorist Interdiction Act of 1993⁴⁸ and the Exclusion and Asylum Reform Amendments of 1993.⁴⁹

The Terrorist Interdiction Act of 1993, introduced by Representatives Snowe (R-Maine), Gilman (R-New York), and McCollum (R-Florida), attempts to increase the scope by which aliens may be excluded. The language of this proposal excludes aliens who "are members of an organization that engages in terrorist activity or actively support or advocate terrorist activity."⁵⁰ The current immigration law, which originated in section 901 of the Foreign Relations Authorization Act, excludes aliens who engage in or are likely to engage in terrorist activity.⁵¹

Although the current proposal appears to provide an additional level of protection against terrorists entering the United States, this protection is largely illusory. Since its origin in section 901 of the Foreign Relations Authorization Act, the current statutory language has been interpreted by immigration officials as "render[ing] excludable and deportable anyone who is a member of . . . or even a contributor to . . . a group that has engaged in terrorist activities, whether or not the individual ever engaged in or supported a particular terrorist activity."⁵² As such, the State Department has been implicitly exercising the power offered by this proposal since the repeal of the McCarran-Walter Act. This bill will therefore offer no new solutions to

⁴⁷ See *supra* notes 43-44 and accompanying text.

⁴⁸ H.R. 2041, 103d Cong., 1st Sess. (1993).

⁴⁹ H.R. 1355, 103d Cong., 1st Sess. (1993).

⁵⁰ Terrorist Interdiction Act of 1993, *supra* note 48, amends 8 U.S.C. § 1182(a)(3)(B) as follows:

(2) by adding after clause (i)(II) the following:

"(III) is a member of an organization that engages in terrorist activity or who actively supports or advocates terrorist activity,";

(3) by adding after clause (iii) the following:

"(iv) Terrorist Organization Defined. - As used in this Act, the term 'terrorist organization' means an organization which commits terrorist activity as determined by the Attorney General, in consultation with the Secretary of State."

⁵¹ 8 U.S.C. § 1182(a)(3)(B) (1988).

⁵² See *supra* note 41 and accompanying text.

the United States' current immigration problems other than to comport the existing law with this practical realities of enforcement.

The second Congressional proposal aimed at preventing future terrorist attacks on United States soil is the Exclusion and Asylum Reform Amendments of 1993.⁵³ In addition to excluding aliens who fraudulently seek access to the United States, this bill proposes that an alien who lacks proper documentation⁵⁴ and fails to apply for asylum shall be barred from entry without a hearing.⁵⁵ However, if an alien does seek asylum, the proposal

⁵³ Exclusion and Asylum Reform Amendments, *supra* note 49.

⁵⁴ *Id.* (proper documentation includes valid immigrant visa and valid unexpired passport).

⁵⁵ Section 235(b) of the Immigration and Nationality Act (8 U.S.C. § 1225(b)) is amended as follows:

According to 8 U.S.C. § 1225 (b) (1988), every alien (other than an alien crewman), and except as otherwise provided in subsection (c) of this section and in section 1323(d) of this title, who may not appear to the examining immigration officer at the port of arrival to be clearly and beyond a doubt entitled to land shall be detained for further inquiry to be conducted by a special inquiry officer. The decision of the examining immigration officer, if favorable to the admission of any alien, shall be subject to challenge by any other immigration officer and such challenge shall operate to take the alien, whose privilege to land is so challenged, before a special inquiry officer for further inquiry.

The Exclusion and Asylum Reform Amendments will provide the following changes to the current law:

Sec. 3 Inspection and Exclusion by Immigration Officers. Section 235(b) of the Immigration and Nationality Act (8 U.S.C. § 1225(b)) is amended to read as follows:

(b) Inspection and Exclusion By Immigration Officers -

(1) An immigration officer shall inspect each alien who is seeking entry to the United States.

(2) (A) IF THE EXAMINING OFFICER DETERMINES THAT AN ALIEN SEEKING ENTRY-

(i) (I) is excludable under section 212 (a)(6)(C)(iii), or

(II) is excludable under section 212 (a)(7)(A)(i),

(ii) does not have any reasonable basis for legal entry into the United States, and

(iii) does not indicate an intention to apply for asylum under section 208, the alien shall be specially excluded from entry into the United States without a hearing.

(B) The examining immigration officer shall refer to an immigration officer, specially trained to conduct interviews and make determinations bearing on the eligibility for asylum, any alien who is (i) excludable under section 212(a)(6)(c) or section 212(a)(7)(A)(i) and (ii) who has

empowers the immigration officer to assess an alien's eligibility at the port

indicated an intention to apply for asylum. Such an alien shall not be considered to have entered into the United States for the purposes of this Act.

(C) An alien under subparagraph (B) who is determined by an immigration officer, specially trained to conduct interviews and make determinations bearing on the eligibility for asylum, to be excludable and ineligible for the exception under section 208(e)(2), shall be excluded and deported from the United States without further hearing.

(3)(A) Except as provided for in subparagraph (B), if the examining immigration officer determines that an alien seeking entry is not clearly and beyond a doubt entitled to enter, the alien shall be detained for a hearing before the immigration judge.

Those aliens excludable under section 212(a)(6)(c)(iii)(as defined in the current proposal) are defined as:

(iii) FRAUD, MISREPRESENTATION, AND FAILURE TO PRESENT DOCUMENTS;

(I) Any alien who, in seeking entry to the United States or boarding a common carrier for the purpose of coming to the United States, presents any document which, in the determination of the immigration officer, is forged, counterfeit, altered, falsely made, stolen, or inapplicable to the alien presenting the document, or otherwise contains a misrepresentation of a material fact, is excludable.

(II) Any alien who, in boarding a common carrier for the purpose of coming to the United States, presents a document that relates or purports to relate to the alien's eligibility to enter the United States, and fails to present such document to an immigration officer upon arrival at a port of entry into the United States, is excludable.

Those aliens excludable under section 212 (a)(7)(A)(i) (as defined by the current proposal) are defined as:

(A) Immigrants

(i) In general

Except as otherwise specifically provided in this chapter, any immigrant at the time of application for admission-

(I) who is not in possession of a valid unexpired immigrant visa, reentry permit, border crossing identification card, or other valid entry document required by this chapter, and a valid unexpired passport, or other suitable travel document, or document of identity and nationality if such document is required under the regulations issued by the Attorney General under section 1181(a) of this title, or

(II) whose visa has been issued without compliance with the provisions of section 1153 of this title, is excludable.

Exclusion and Asylum Reform Amendments of 1993, *supra* note 49.

of entry.⁵⁶ If the immigration officer detremines that the alien is not eligible for asylum, the alien shall be excluded and deported, again without a hearing.⁵⁷ Those aliens who are “not clearly and beyond a doubt entitled to enter,” shall be detained for a hearing.⁵⁸ Granting immigration officials such broad discretion at the port of entry is likely to subject many immigrants to the personal prejudices of these officials, thereby reverting the United States to its “police state” status of the 1950’s.

By recognizing the defects in the current laws, the inability of the proposals to correct these defects, the impact the proposals will have on nonexcludable aliens, and the availability of more effective solutions, the 103rd Congress, like its predecessors, apparently seeks to calm the fears and insecurities of its constituents with more rhetoric.

III. THE CURRENT CONTROVERSY AND FUTURE UNCERTAINTY: EXCLUDABLE ALIENS

A. *Defects in the Current Immigration Laws*

Current U.S. immigration laws provide that an alien who “has engaged [in] . . . or is likely to engage in terrorist activity” is excludable.⁵⁹ Immigration officials’ interpretation of this language has empowered them to “exclud[e] and deport[] anyone who is a member of—or even a contributor to—a group that has engaged in terrorist activities, whether or not the individual ever engaged in or supported a particular terrorist activity.”⁶⁰ Despite this statutory language and its current interpretation, individuals who advocate and support terrorism continue to enter and remain in the United States. The CIA killings and the World Trade Center bombing are but glaring indicators that the weakness in the current immigration law lies not in its language but rather in its execution.

The investigations of the World Trade Center bombing, which best exemplify the problems with the execution of the law, reveal several deficiencies. First, the consular offices, which issue entry visas, investigate an applicant’s history for possible terrorist activities via an antiquated micro-

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ 8 U.S.C. § 1182 (a)(3)(B)(i) (1988).

⁶⁰ Cole, *supra* note 35, at 22.

fiche system that is inefficient, time-consuming and "not capable of . . . a transliteration of an Arab name to English and looking for all of the permutations of that kind of name."⁶¹

Second, Congress has directed the FBI to charge all entities which access FBI information a five- to seven-dollar user fee. In accordance with Executive Order 12,291, the State Department performed a cost/benefit analysis regarding the user fees and concluded that the cost of investigating each visa applicant would far exceed the benefits.⁶² To avoid this consistent and burdensome inter-agency surcharge, the State Department discontinued accessing FBI information to determine whether a visa applicant has a criminal record.⁶³ The State Department's decision to save money at the risk of allowing more potential terrorists into the United States clearly indicates that Congress should focus on changing immigrant investigatory procedures rather than altering the statutory language itself.

B. The Ineffectiveness of the Congressional Proposals

Although Congress' goal is to prevent future terrorist attacks, immigration restrictions suggested in the Terrorist Interdiction Act of 1993 and the Exclusion and Asylum Reform Amendments of 1993 will likely be ineffective against persons currently living in the United States and against those who gain entry to the United States as "sleeper agents."⁶⁴ The deficiency of the Congressional proposals concerning aliens associated with terrorist activity and currently living in the United States is partly attributable to the government's inability to track aliens after entry.⁶⁵ For instance, each year over 15,000 aliens without proper documentation arrive in New York's JFK Airport seeking political asylum.⁶⁶ Although the authorities do not know the true identity of these aliens, many receive work permits while their political asylum requests are pending.⁶⁷ Upon gaining the supposedly

⁶¹ *International Security Hearing*, *supra* note 7, at *16.

⁶² *Id.* at *17-18.

⁶³ *Id.* at *17.

⁶⁴ Brian Duffy & Louise Lief, *Saddam Hussein's Unholiest Allies*, U.S. NEWS & WORLD REP., Jan. 28, 1991, at 42; *see also* Martella, *supra* note 34, at 955-57.

⁶⁵ Garnet K. Emery, *The American Dream - For the Lucky Ones: The United States' Confused Immigration Policy*, 12 U. ARK. LITTLE ROCK L.J. 755, 759 (1989-90).

⁶⁶ Debra J. Saunders, *Passport Without Policy*, SAN FRAN. CHRON., May 24, 1992, at A16.

⁶⁷ *Id.* at A16.

temporary work permit, many of these aliens vanish into the American landscape without ever facing the rigors or the asylum application process.⁶⁸

Although tracking unidentified aliens who enter the United States appears to be an effective solution, it is not. In order to monitor aliens entering the United States, the government must have “. . . information about where an alien goes, what that alien does, and with whom that alien associates.”⁶⁹ Once on United States soil, however, aliens are protected against illegal searches and seizures by the Fourth Amendment of the U.S. Constitution.⁷⁰ Given the constitutional restraints of tracking, the proposed Exclusion and Asylum Reform Amendments of 1993, which deny U.S. entry to aliens without proper documentation, appear to be a viable solution. This proposed reform, however, is likely to be ineffective in eliminating terrorist presence in the United States because of the existence of “sleeper agents.”⁷¹

Sleeper agents are individuals supported by terrorist organizations who enter the United States under new identities that are immune from U.S. exclusion and silently infiltrate a community.⁷² They often remain in a community for many years as they work, marry and raise families until they receive instructions from the leaders of their terrorist organizations ordering action against the community.⁷³ According to FBI investigations, “nearly every major Middle Eastern terrorist group operates a surrogate organization within the United States.”⁷⁴ These organizations are hidden among communities in major U.S. cities that are heavily settled by the non-terrorist Middle Easterners.

As long as sleeper agents can acquire new identities, current and proposed immigration legislation will remain ineffective tools in America's fight

⁶⁸ *Id.*

⁶⁹ Emery, *supra* note 65, at 759.

⁷⁰ *Id.* (U.S. government is not entitled to personal information on an individual, such as where a person goes, with whom a person associates, and what a person does, regardless of whether individual is a U.S. citizen or an alien, as this information is constitutionally protected). See also U.S. CONSTITUTION Amend. IV.

⁷¹ Duffy & Lief, *supra* note 64, at 42.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ Martella, *supra* note 34, at 956 n.34 (quoting Robert Ricks, FBI Deputy Assistant Director, address at the Conference entitled “Terrorism: An Evaluation of the Reagan Years and an Agenda for the Next Administration,” Wash. D.C., 11 TERRORISM 538, 539, in which FBI reports on terrorism where “sleeper agents” infiltrate among Palestinian populations in Los Angeles, Detroit, and Chicago).

against terrorism. Given each of the proposals' ineffectiveness against excludable aliens, only bona fide aliens will likely be severely affected.

C. *The Impact of the Congressional Proposals on Nonexcludable Aliens*

The Terrorist Interdiction Act of 1993, like the McCarran-Walter Act, expressly excludes aliens based upon their associations and affiliations.⁷⁵ Although the exclusion of aliens based upon their terrorist associations appears to be an appropriate measure to remedy terrorist attacks on U.S. soil, this bill "would bar anyone who advocated armed struggle against Iraq, Iran or the Serbs."⁷⁶ Although the language of the bill will not change the current enforcement procedures of immigration laws, those advocating armed struggles in the name of democracy will be emphatically denied entry.

Under the Exclusion and Asylum Reform Amendments of 1993, an alien's ability to gain entry is based solely on the immigration officer's discretion. Under this provision, an immigration officer must exclude an immigrant without a hearing if that person is not in possession of proper documentation and does not intend to apply for asylum.⁷⁷ For those seeking asylum, the immigration officer determines whether the applicant may enter the United States. Depending upon the immigration officer's determination, an immigrant may be excludable and deported without a hearing.⁷⁸ Those immigrants which the immigration officer determines are not "clearly and beyond a doubt" entitled to enter the United States are detained in detention centers.⁷⁹ Immigrants which the immigration officer determines to be excludable are immediately excluded and deported without a hearing.⁸⁰ Allowing an immigration officer who may be subject to personal biases to

⁷⁵ Terrorist Interdiction Act of 1993, *supra* note 48. See also *United States v. Robel*, 389 U.S. 258, 264 (1967) (Chief Justice Earl Warren, writing on exclusion of aliens in the name of national security, stated: "It would indeed be ironic if, in the name of national defense, we would sanction the subdivision of one of those liberties—the freedom of association—which makes the defense of the Nation worthwhile"); David Cole, *Inalienable Rights, but Not for Aliens*, CONN. L. TRIB., June 29, 1992, at 16 (quoting Chief Justice Earl Warren in *Robel*).

⁷⁶ Cole, *supra* note 75, at 16.

⁷⁷ The Exclusion and Asylum Reform Amendments of 1993, *supra* note 49 (proper documentation under proposal includes valid, unexpired passport and valid, unexpired visa).

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ The Exclusion and Asylum Reform Amendments, *supra* note 49.

decide an applicant's inclusion or exclusion without granting the applicant the right to a hearing renders this proposal a travesty to the founding principles of the United States of America.⁸¹

IV. POTENTIAL SOLUTIONS TO CURB TERRORIST ATTACKS IN AMERICA

Although the current enforcement procedures of U.S. immigration law are ineffective against the rising terrorism in the United States, several other enforcement procedures are available. One such solution is for the Immigration and Naturalization Services (INS) to enhance its alien identification procedures.⁸² The first step toward enhancing such procedures is to recognize that the five- to seven-dollar cost for an FBI character check is less costly than the loss of lives and billions of dollars in property damage incurred in the World Trade Center bombing.⁸³ In addition to researching visa applicants' backgrounds, the INS could use handprint readers to easily identify potential terrorists attempting to enter the United States.⁸⁴ Since the INS is plagued with budgetary constraints, however, investments in high-technology equipment may not be altogether feasible. An analysis of the current enforcement procedures indicates that viable alternative solutions are available.

During 1992, each time an airline transported an undocumented or badly documented passenger to a U.S. airport, the airline was fined \$3,000.⁸⁵ As a result, U.S. airlines paid a total of \$20 million in fines.⁸⁶ In light of the magnitude of the fines levied against the airline industry and the budgetary constraints of the INS, a possible solution to curb the influx of terrorists gaining access to the United States is to form a partnership between the INS

⁸¹ *Id.* See also Bill Tuque et al., *Why Our Borders Are Out of Control*, NEWSWEEK, Aug. 9, 1993, at 25 (a poll of Americans' viewpoints on immigration found that 61% of Americans polled believe immigration laws should be tougher on aliens from Middle East, while only 39% of Americans polled believe immigration laws should be tougher on aliens arriving from Eastern Europe).

⁸² Arthur R. Helton, *Uncontrolled Right of Entry Poses a Threat*, NAT'L L.J., May 3, 1993, at 15.

⁸³ *International Security Hearing*, *supra* note 7, at *18.

⁸⁴ Helton, *supra* note 82, at 15.

⁸⁵ Ira H. Mehlman, *The New Jet Set; How Questionable Political Asylum Claimants Enter the U.S. at New York, New York's John F. Kennedy International Airport Without Any Difficulty*, NAT'L REV., Mar. 15, 1993, at 40.

⁸⁶ *Id.*

and common carriers, rather than maintaining an adversarial relationship. This partnership would require common carriers, and not the INS, to research and verify an individual's includable/excludable status prior to being granted boarding privileges on the common carrier. For individuals who are potentially excludable, the final determination of includability/excludability would be the responsibility of the INS. Advantages of this proposal include: (1) common carriers, using high-technology and monetary resources to link their systems together, could provide a stronger network than the INS in assuring that terrorists did not gain entry to the United States; (2) common carriers, once making the initial investment in a verifying system, would likely experience monetary gains rather than losses of non-deductible fines of millions of dollars, in relation to the efficiency of the system; and (3) the INS could continue to achieve its goal, within its monetary constraints, of prohibiting terrorists from illegally entering the United States.

V. CONCLUSION

The 1990's, if the first third of the decade is any reliable forecast of things to come, is likely to be remembered as the period Americans became vulnerable to terrorist attacks on U.S. soil.⁸⁷ Why the vulnerability? The answer is simple: America's borders had become so porous that those who wished to send a message, whether political or religious, could easily gain entry to the United States and make their presence known with an inhumane act certain to gain worldwide media attention.

The question remains, however, how the United States' borders have become so porous, since, after all, throughout American history there have

⁸⁷ American's everyday fear of potential terrorist attacks on United States soil is best illustrated by the following letter sent to Rep. Benjamin Gilman of New York. The writer of the letter expresses his fear as follows:

As an American born and living in New York City for 38 years and now in Rockland County for 30 years, I no longer feel safe in this country. The latest incident of foreign terrorists in New York City has made me realize you must institute legislation that changes completely our immigration laws. We cannot continue to allow these people into our country. The laws are wrong. We've allowed our U.S. to become a dumping ground for hoodlums, terrorists, and people who are not interested in any good. They merely wish to destroy the U.S. I demand changes be made, and tomorrow will not be too soon.

International Security Hearings, *supra* note 7, at *2.

always been laws and limits on immigration. Indeed, throughout the 20th century, the United States has had voluminous texts of laws and limits on immigration. However, as the world has grown closer together because of technology, the problems with America's borders have become more apparent. A comparison of current immigration law and problems plaguing the immigration system indicates that the weakness lies not in the language of the current law but rather in its execution.

In granting visas, for example, the State Department uses antiquated computer technology to research the government watchlists for visa applicants' names. Low-level immigration officials oftentimes will not research an applicant's name because the system cannot translate an individual's name into English. This is especially true of Middle Eastern names: In addition, the State Department has discontinued its process of researching an applicant's history with the FBI for potential criminal records. The rationale supporting the State Department's decision not to access FBI information is attributable to the following: first, during the late 1980s and early 1990s Congress issued a mandate ordering the FBI to charge a five- to seven-dollar user fee to all entities that accessed its information. Second, the State Department, faced with this congressional mandate, was required under Executive Order 12,291 to perform a cost/benefit analysis regarding the payment of the user fees. Upon its analysis of the total user fee costs and the benefits derived from such costs, the State Department determined that the costs of accessing FBI information would greatly exceed its benefits. As a result, the State Department discontinued its FBI access and individuals like Mir Aimal Kansi, Sheik Omar and others freely entered the United States.

Rather than push for change in the execution of the law, Congress has opted to change the language of the law. Although two congressional proposals attempt to eliminate the threat of future terrorist attacks on U.S. soil, these bills are likely to be ineffective because they are inapplicable to aliens currently residing in the United States and allow potential sleeper agents with new identities to slip through U.S. borders. Unfortunately, those most likely to be injured by the proposals are those individuals who advocate armed struggles in the name of democracy, as well as immigrants who flee their country without money and documentation in the hope that America is truly the land of opportunity.

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