Law, Terrorism, and the Plenary Power Doctrine:
Limiting Alien Rights

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The World Trade Center and Pentagon attacks on September 11 have revived the
country debate over what constitutes an appropriate balance between civil liber-
ties and domestic security. This debate is crucial, and should not be closed off
prematurely through the naïve assumption that the government should simply
exercise prudence in its calculus of liberties and safety. Prudence is a virtue that
governments often lack in times of crisis. Historically, during periods of political
and economic uncertainty the United States has targeted foreigners within its
borders as political enemies, using a combination of internal security legislation
and immigration law to detain, prosecute, and deport suspected ‘terrorists’
(however defined at the time), and often providing little if any legal remedy to the
accused.

In political terms, antiterrorism legislation concerns the tension between guar-
anteeing civil liberties and maintaining national security. In constitutional terms,
the discussion concerns the respective powers of Congress and the judiciary,
understood through the ‘plenary power’ doctrine, whereby the Supreme Court has
traditionally recognized the legislature’s sovereignty over immigration issues and
its right to delineate the jurisdiction of federal courts. Because of the Court’s
general deference to Congress on issues pertaining to aliens, I argue that strate-
gies to protect the civil rights of non-citizens should focus on legislative efforts
to guarantee due process rights, rather than on trial advocacy aimed at overturn-
ing antiterrorism and immigration law as unconstitutional. If the Court continues
to defer to Congress on aliens’ rights, as I believe it will in the aftermath of the
September attacks, civil liberties advocates would do well to focus their resources
on legislative lobbying.

Precisely because the general tenor of national debate about foreigners changes
from presumed innocence to presumed guilt – or even betrayal – in the present
circumstances it is crucial that legal remedies be in place for those accused of
terrorist sympathies. Of course, it is not surprising that aliens do not enjoy the same
rights as citizens; this status hierarchy is a constitutive element of any legally
bound community, and the authority to grant only limited rights to aliens is a basic
prerogative of the sovereign state. The concern in this essay is more limited. I high-
light the tendency to remove most avenues of legal protection for aliens facing
deportation, a tendency that becomes more pronounced in times of national crisis.
The issue, then, is not that aliens have fewer rights vis-à-vis citizens (an issue that
requires a much more extended treatment), but rather that they have significantly limited forms of judicial protection in the face of malicious or misguided accusations of terrorist activity. In effect, they are left with few if any means to protect themselves from such accusations.

The first part of this article gives a brief history of the government’s use of the law to persecute aliens. Part two introduces the plenary power doctrine, tracing its development through a series of key Supreme Court cases. Part three discusses the 1996 antiterrorism and immigration laws that restricted the habeas corpus and judicial review protections for non-citizens, and part four discusses how these protections have been further constricted in the October 2001 antiterrorism legislation.

I. The Enemy Within

Foreigners have been perceived as a potential national threat since the very earliest days of the republic. The Federalists’ infamous Alien and Sedition Acts of the 1790s sought to limit immigrant support for the Republicans, effectively marking aliens of a specific political persuasion as treasonous and unpatriotic. The 1880s witnessed the Chinese Exclusion Laws, an attempt to curtail the population explosion of Chinese workers who had become indispensable to the economic development of nineteenth-century America. In both instances, immigration laws coalesced with prevailing degrading stereotypes of foreigners to produce a political discourse which effectively demonized groups perceived as ‘other’ and threatening. The Haymarket Riot in 1886 changed the object of political scorn but worked on fundamentally the same principles: rather than targeting foreigners according to race or ethnicity, critics focused on the perverse effects of foreign political ideas. Anarchism became the bête noire of American politics, an ideology capable of infecting rational and patriotic discourse with dangerous calls for revolution. In the aftermath of the Haymarket Riot, the Supreme Court upheld the convictions of several anarchists – including two foreign born and sentenced to death – under the pretext that anarchism represented a threat to the very security of the nation and thus required repudiation in the most powerful terms. The 1901 assassination of President McKinley by anarchist Leon Czolgosz (an American with an apparently un-American last name) resulted in the Immigration Act of 1903, permitting the exclusion of “anarchists, or persons who believe in or advocate the overthrow by force or violence of the Government of the United States or of all government or of all forms of law, or the assassination of public officials.”

The pattern of fighting internal security threats with immigration laws continued through the early part of the twentieth century. The domestic persecution of the Industrial Workers of the World (IWW), or ‘Wobblies,’ was carried out under the pretense of combating international anarchism and communism, and was often pursued through intimidation, police violence, and harassment of union
members. Wobblies were branded enemies of the state and incarcerated arbitrarily. The 1918 Anarchist Act, supplemented by a series of laws in 1920, expanded the definition of anarchism and permitted broader grounds for detainment and deportation.

During the McCarthy era, the US energetically enforced the ideological exclusion and deportation provisions of immigration law. The courts offered little resistance. In Shaughnessy v. United States ex rel. Mezei, the Supreme Court held that “[c]ourts have long recognized the power to expel aliens as a fundamental sovereign attribute exercised by the Government’s political departments largely immune from judicial control.” The Red Scare of the 1950s proved to be a high water mark for ideologically based deportations, though the practice continued throughout the Cold War with little opposition from the judiciary. The government also ensured that foreigners with Marxist or leftist leanings were prevented from entering the country.

However, after the collapse of the Soviet Union came a remarkable relaxation of ideologically-based deportations and exclusions. The 1990 Immigration Act significantly limited the grounds for deportation and scaled back the use of ‘totalitarian party membership’ and proof of attachment to ‘constitutional principles’ as litmus tests for naturalization. Nevertheless, many of the rights of aliens remained outside the purview of the courts, and the status of non-citizens continued to be the sole province of the legislature. The deference to Congress in all issues of political sensitivity and immigration continued.

II. The Judiciary, Congress, and the Plenary Power Doctrine

Though normally cast as a debate between the courts and the executive, the conflict between civil rights and domestic security reflects a deeper tension between the power of the judiciary to maintain jurisdiction over non-citizens and the power of the legislature to determine the security interests of the nation. The Constitution does not explicitly define jurisdiction over aliens, but constitutional law has historically recognized the legislature’s sovereignty in this area.

Traditionally, the Supreme Court has ruled that the federal judiciary has a determinate say over aliens’ rights when states, rather than the federal government, are involved. Drawing on the expansion of federal due process protections over state power delineated in the Slaughterhouse cases, in Yick Wo v. Hopkins a unanimous Court held that the equal protection clause of the Fourteenth Amendment applied to aliens as well as citizens – a remarkable argument considering that federal law at the time forbade Chinese immigrants from becoming citizens. This in effect recognized some legal protections and rights for aliens, at least against the power of the states.

The Court has been significantly less enthusiastic, however, about restricting Congress’s power over aliens. Under the ‘plenary power’ doctrine, the Supreme
Court recognizes Congress’s prerogative over both aliens’ rights and the extent of court authority. Plenary power exists in two forms: power over court jurisdiction, and over immigration. The legislature’s power over courts is derived from Article III, Section 1 of the Constitution. Section 1 grants Congress the power to “ordain and establish” courts, traditionally interpreted as permitting the legislature to define the jurisdictional powers of inferior courts as it sees fit. Section 2 provides the Supreme Court with original jurisdiction over only a handful of issues; in all other cases, the Court “shall have appellate jurisdiction, both as to law and fact, with such regulations, as the Congress shall make.” This is, on first appearance, rather curious, since the typical understanding of the American constitutional architecture as one defined by checks and balances – and not the dominance of one branch over another – would seem to prohibit the legislature from having such originary and overarching say in the jurisdiction of the courts. Nevertheless, the Court has recognized the plenary doctrine since the late nineteenth century. In *ex parte McCardle*, the Court acknowledged Congress’s authority over federal appellate jurisdiction in habeas corpus actions and, more broadly, Congress’s right to limit the courts’ jurisdiction. “We are not at liberty to inquire into the motives of the legislature. We can only examine into its power under the Constitution; and the power to make exceptions to the appellate jurisdiction of this court is given by express words.”

The second form of plenary power concerns immigration. The legislature’s sovereignty over immigration issues has been recognized by the federal judiciary in a number of cases, with the result that the Court has often dismissed as non-justiciable suits aliens have brought against immigration laws. In *United States ex. rel. Knauff v. Shaughnessy*, the Supreme Court held that “whatever the rule may be concerning deportation of persons who have gained entry into the United States, it is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the government to exclude a particular alien,” and later, “the exclusion of aliens is a fundamental act of sovereignty.” *Matthews v. Diaz* holds in part that there is no constitutionally mandated obligation to provide aliens with the same rights and benefits as citizens, stating that “for reasons long recognized as valid, the responsibility for regulating the relationship between the United States and our alien visitors has been committed to the political branches of the Federal Government.”

The upshot of the plenary power is that aliens can be stripped of certain due process protections and have little legal remedy. The courts, deferring to the legislature on immigration issues, are unlikely to step in to secure these rights, leaving aliens, particularly those who fall into a politically ‘suspicious’ class such as foreign Arabs and Muslims, with little legal protection against malicious (or simply misguided) accusations of terrorist sympathies.
III. The 1996 Antiterrorist and Immigration Acts

In 1996, the US Congress passed the Antiterrorism and Effective Death Penalty Act (AEDPA) and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA). The new legislation came in the wake of the 1993 World Trade Center attack, the 1995 Oklahoma City terrorist bombing, and general concern about immigration evident in the political discourse of the mid-nineties. The AEDPA permitted the use of secret evidence in deportation cases, broadened the definition of terrorist activity (and made this definition non-contestable in court), limited considerably the protections given to convicted criminal aliens by expanding the scope of offenses for which they could be deported, and eliminated all judicial review of final orders of deportation as well as previously available statutory protections of habeas corpus. The IIRIRA also limited alien rights. It granted increased judicial power to the Justice Department’s Board of Immigration Appeals, an executive agency, limiting the judicial scrutiny and relief that aliens enjoyed under earlier immigration law. Under previous law, if an alien’s appeal for review of a deportation order failed, the appeal would normally go to a federal court of appeals. Additionally, prior law provided for judicial review of habeas corpus appeals. The AEDPA essentially eliminated these rights, stating that “any final order of deportation against an alien who is deportable by reason of having committed” any of a long list of criminal offenses “shall not be subject to review by any court.” The result was the elimination of judicial hearings for many detained aliens, effectively granting the INS both prosecutorial and judicial powers over aliens slated for deportation and permitting no avenue for contesting orders of removal. Even President Clinton acknowledged that “the bill also makes a number of major, ill-advised changes in our immigration law which have nothing to do with fighting terrorism.”

The close pairing of immigration and antiterrorist law is not surprising; as discussed above, the United States has historically scapegoated immigrant groups in times of perceived political and economic crisis. Though the United States of the nineties enjoyed unprecedented political stability and economic growth, political discourse consistently focused on the threat of mass immigration and terrorist attacks against the country, threats to American values that would undermine the nation and leave it beholden to the vicissitudes of a people significantly different from ‘us.’ The September terrorist attacks against New York and Washington rekindled the debate about alien rights, leading to the passage of the USA Patriot Act seven weeks later.

IV. The 2001 USA Patriot Act

When the September 11 airjackings occurred, the main legal instruments available to combat terrorism were the 1996 antiterrorism and immigration laws. In the wake of the attacks, and at the urging of the Bush administration, Congress passed
a significantly more powerful package of law enforcement tools under the title “USA Patriot Act” (Uniting and Strengthening America Act by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism). President Bush promptly signed the bill into law on October 26.

The new law expands the definitions of terrorism, terrorist, and terrorist organization, and makes them retroactive to cover actions regardless of when they occurred. In addition, it permits the use of “roving wiretaps” and other broad surveillance powers by the FBI. Certainly one of the most controversial elements includes the Attorney General’s power to certify a non-citizen as a terrorist. Upon such certification, detention is mandatory, although the person must be criminally charged, placed in removal proceedings, or released from detention within seven days. If deportation is not possible (the home nation may refuse repatriation), the suspect’s continued detention and status as terrorist must be reviewed every six months. Continued detention is permitted if the Attorney General finds “reasonable grounds to believe” that the detainee may be involved in terrorist activity that poses a danger to national security. Consequently, detention could effectively become indefinite, constituting a ‘life’ prison sentence.

In *Zadvydas v. Davis* and *Ashcroft v. Ma* (heard together and decided in June 2001 and referred to as *Zadvydas* here), the Supreme Court held that the 1996 AEDPA and IIRIRA allowing for the indefinite detention of immigrants who could not be deported constituted a violation of habeas corpus rights and thus posed a “serious constitutional problem.” The Court ruled that the government cannot detain immigrants, including those who are felons and have lost their right to remain in the country, if their deportation was unlikely “in the foreseeable future.” Indefinite detainment constitutes life imprisonment without trial, a violation of basic due process protections found in the Fifth and Fourteenth Amendments. As the Court held, “the due process clause applies to all persons within the United States, including aliens, whether their presence here is lawful, unlawful, temporary or permanent.” It would appear, therefore, that the USA Patriot Act fails the constitutional test set forth in *Zadvydas* insofar as it requires only a review by the Attorney General every six months. The law carries no stipulation that the detainee be tried or given a hearing in which the government would have to prove she is a terrorist. It follows that other procedural protections, such as the requirement of proof “beyond a reasonable doubt” (the standard for criminal trials) or “proof by clear, convincing, and unequivocal evidence” (the standard in deportation proceedings), are not met either. Some human rights groups point to *Zadvydas* as the precedent by which the Court will reaffirm the due process protections of aliens, significantly curtailing the extent of the plenary power doctrine. But *Zadvydas* contains a loophole.

Both *Zadvydas* and *Ma* dealt with non-political felons, that is, persons whose crimes were not committed for political reasons. Zadvydas was guilty of selling cocaine, and Ma was implicated in a gang-related drive-by shooting. Both had served their sentences and were detained by immigration authorities upon release.

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from prison. Consequently, the government did not try them as terrorists, but rather as regular criminals. In the majority opinion, Justice Breyer made this distinction clear, noting that the cases do not “require us to consider the political branches’ authority,” and “hence, we leave no ‘unprotected spot in the Nation’s armor.’” Neither do we consider terrorism or other special circumstances where special requirements might be made for forms of preventive detention or heightened deference to the judgements of the political branches with respect to matters of national security.” 19 The implication is that the political branches – Congress and the executive – would have greater leeway in dealing with issues of national security and terrorism, and specifically that the due process protections affirmed in this case may not be relevant in instances involving domestic security. Considering the current political climate and the Court’s traditional deference to Congress on issues of immigration and national security, it appears likely that the Justices will avoid limiting the powers of federal enforcement agencies fighting domestic terrorism. Without checks from the judiciary, however, the likelihood of governmental abuse increases substantially.

V. Conclusion

Within six weeks of the World Trade Center and Pentagon attacks, the government had detained over 1,000 suspects, refusing to release their names. The secret detentions reflected the Justice Department’s growing confidence that the new antiterrorism legislation permitted a much broader range of action against aliens without strong requirements of accountability. These bold prerogatives pose serious challenges to civil liberties advocates fighting the encroachment of state power.

The alternative to these antiterrorist measures need not be a slackening of national security. Rather, these measures should be complemented by guarantees of basic due process protections for suspects, providing those who are wrongly accused a method of defending themselves. At the very least, this includes the return of habeas corpus appeals heard before a competent court. It is precisely because accusations of terrorism carry such serious consequences that the reinstatement of habeas corpus provisions is crucial to curb the rapid expansion of reckless national security powers. However, the history of judicial deference provides little reassurance that the courts will actively defend the rights of aliens, particularly in times of national crisis. Because of this, trial advocacy will probably not work as a broad-based strategy. Rights advocates should instead focus on pressuring Congress to change the law, though admittedly success here also seems unlikely, at least at present. Congressional action will most likely require a particularly egregious case gaining national attention, but regardless, the courts will enter the debate cautiously and warily, if at all. Without action from the legislature, things will remain grim for innocent aliens accused of terrorism.

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NOTES


4. Slaughterhouse Cases, 16 Wallace 36 (1873); Yick Wo v. Hopkins 118 U.S. 356 (1886).

5. The Court has original jurisdiction only in cases “affecting ambassadors, public ministers or consuls, and cases in which the state is a party.” US Constitution, Article III, Section 2.


7. Though Chief Justice Chase, writing for the majority in McCardle, noted that the ruling did not grant Congress power over all court jurisdictional issues, which would essentially render the Court meaningless, the decision has been interpreted as one of the key statements on the plenary power doctrine. See Michael Perry, The Constitution, The Courts, and Human Rights (New Haven: Yale University Press, 1982). It should also be noted that Congress has not always succeeded in passing legislation limiting the Supreme Court’s jurisdiction. In the fifties, Congress introduced a bill that would have limited federal court jurisdiction in proceedings against those charged under federal anti-subversion statutes or with contempt of Congress. The legislature has also introduced legislation limiting the warning requirement in Miranda v. Arizona, and has sought to limit jurisdiction in politically sensitive areas including school prayer, membership in the armed forces, abortion and school desegregation. None of these bills became law. See Alison Holland, “Across the Border and Over the Line: Congress’s Attack on Criminal Aliens and the Judiciary under the Antiterrorism and Effective Death Penalty Act of 1996,” American Journal of Criminal Law 27 (2000): 385.


10. 426 U.S. 81 (1976). See Charles D. Weisselberg, “The Exclusion and Detention of Aliens: Lessons from the Lives of Ellen Knauff and Ignatz Mezei,” University of Pennsylvania Law Review 143 (1995): 933, 939, arguing that the plenary power doctrine consists of three interrelated principles: (1) immigration policy is the responsibility of the federal government; (2) the primary federal immigration authorities are the legislative and executive branches; and (3) the judiciary has extremely limited, if any, power to review the immigration decisions of the other branches.

11. One could draw a rather ominous list of terrorist attacks against US nationals over the last decade and a half, all of which have reinforced Congressional calls for stricter immigration and antiterrorism measures. Consider the Pan Am 103 bombing in 1988; the attacks against a US military complex in Saudi Arabia in 1996; the bombings of US embassies in Kenya and Tanzania in 1998; and the attack against the USS Cole in Yemen in 2000.


13. See AEDPA, Section 440 (a) (10): Criminal Alien Removal. Reasons include aggravated felonies, narcotics crimes involving more than thirty grams of marijuana, and crimes of “moral turpitude,” among others.


15. See *USA Patriot Act*, section 412, “Mandatory Detention of Suspected Terrorists; Habeas Corpus; Judicial Review.”


18. See, for example, the *American Civil Liberties Union* commentary on the *Zadvydas* case in ‘High Court says INS Cannot Indefinitely Jail Immigrants’; at http://www.aclu.org/news/2001/n062801c.html, accessed November 15, 2001.