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THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996:
AN ATTEMPT TO QUENCH ANTI-IMMIGRATION SENTIMENTS?

ELLA DLIN*

INTRODUCTION
Most Americans believe a correlation exists between immigration and terrorism.¹ In fact, the flow of immigrants² into the United States has not been found to be a significant contributing factor to violence in this country during the last twenty-five

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¹ See Brian Michael Jenkins, Don't Link Terrorism to Immigration, Viewpoints, NEWSDAY, Aug. 24, 1993, at 73 (citing a Newsweek poll determining that 75 percent of Americans believe a link exists between immigration and terrorist activity). Brian Jenkins served on the White House Commission on Aviation Safety and Security and is considered a leading authority on international terrorism. See Richard Cole, Terror Gets New Label: Assembled in the USA, STAR LEDGER (Newark, N.J.), May 25, 1997, available in 1997 WL 8074601. Jenkins asserts that the perceived link between immigration and terrorism is unfounded, and that the facts reveal that most bombings in this country which could be characterized as terrorist activity are executed by native-born American citizens reacting to domestic political concerns, such as the Vietnam War, class struggle, abortion, white supremacy and Puerto Rican independence. See id.

² For the purposes of this article, the term "immigrant" shall mean all persons granted legal permanent residence in the United States, including those who have arrived in this country with immigrant visas issued abroad and those who have adjusted their status while in the United States from temporary to permanent status. Immigration and Nationality Act, 8 U.S.C. § 1101(15) (1994 & Supp. II). An "alien" is "any person not a citizen [or national] of the United States." 8 U.S.C. § 1103(3) (1994).
Terrorist acts, because of their unpredictable nature, can inspire fear, panic and hysteria which may lead to an exaggeration of the possibility that subsequent acts will flow from the initial attack. Consequently, when an act of terrorism causes death and destruction, lawmakers propose and enact legislation targeting the suspected perpetrators of such heinous acts. Unfortunately, given the link in the public mind between immigrants and terrorism, such legislation can unfairly target certain groups.

One year after the tragic bombing of the Alfred P. Murrah Federal Building in Oklahoma City, Congress approved and

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3 See Jenkins, supra note 1, at 73 (asserting that domestic terrorism is the predominant source of terrorist activity); see also Stefan H. Leader, The Rise of Terrorism, 41 SEC. MGMT., Apr. 1997, at 34 (documenting statistical evidence showing that while terrorism as a whole remains relatively constant, acts of domestic terrorism are on the rise at the same time that international acts of terrorism are on the decline).

4 The Immigration and Nationality Act defines terrorist activity as any activity which is unlawful under the laws of the place where it is committed and which involves any of the following:

(I) The hijacking or sabotage of any conveyance.

(II) The seizing or detaining, and threatening to kill, injure, or continue to detain, another individual in order to compel a third person to do or abstain from doing any act as a condition for the release of an individual seized or detained.

(III) A violent attack upon an internationally protected 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 mere personal monetary gain), with intent to endanger the safety of individuals or to cause substantial damage to property.

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


See also George J. Church, The Terror Within, TIME, July 5, 1993, at 22, 24 (noting the evolution of the term “terrorism” from a narrow definition of “politically motivated violence involving citizens or territory of more than one country” to a broader interpretation encompassing domestic acts of violence committed within a country by its own citizens); Louis Rene Beres, The Meaning of Terrorism - Jurisprudential and Definitional Clarifications, 28 VAND. J. TRANSNAT’L L. 239, 240-41 (1995) (comparing varying definitions of terrorism among federal agents).

5 See Church, supra note 4, at 22 (detailing assessment of worldwide terrorist activity and resulting public reaction).

6 On April 19, 1995, a bomb exploded in the Alfred P. Murrah Federal Building [hereinafter Federal Building] in Oklahoma City, killing 168 people and injuring more than 600 others. See Note, Blown Away? The Bill of Rights After Oklahoma City, 109 HARV. L. REV. 2074, 2074 (1996) [hereinafter Blown Away]; Edward Walsh, 2 Sought in Bombing; $2 Million Reward Offered, WASH. POST, Apr. 21, 1995, at A1; see also Stephen Barr & Edward Walsh, At a Tense Time, Federal Fa-
President Clinton signed an antiterrorism bill, The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). The bill had the dual purpose of assuaging public outrage and showing a commitment to battling domestic and international terrorism. Congress and the President wanted to demonstrate that the United States would take a firm stance on terrorism, and would prevent the recurrence of such violent and senseless acts against American citizens. While the AEDPA was originally introduced as a harsh antiterrorism measure, it ultimately emerged as a weak manifestation of the initial proposal, as it failed to include all possible measures to prevent terrorism and was diluted by immigration provisions which do nothing to prevent terrorist acts.

Modifications of some of the problematic immigration provisions of the AEDPA were enacted in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), which was passed several months after the AEDPA. It has been noted, however, that some of IIRIRA's provisions are so harsh as to amount to “national scapegoating” of immigrants.

This Note argues that Congress took advantage of the public outrage over the Oklahoma tragedy to include provisions in the AEDPA that had minimal or no relationship to the prevention of

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8 President Clinton signed the AEDPA into law on April 24, 1996. It became effective on November 1, 1996. See 110 Stat. at 1214. The bill purported to “provide broad new Federal jurisdiction to prosecute anyone who commits a terrorist attack in the United States or who uses the United States as a planning ground for attacks overseas.” Statement by the President of the United States, 32 WEEKLY COMP. PRES. DOC. 720 (Apr. 24, 1996). The President's statement enumerated the ultimate goals of the AEDPA, including to

- ban fundraising ... support[ing] terrorist organizations; allow U.S. officials to deport ... and to bar terrorists from entering the United States ...; require plastic explosives to contain chemical markers so that criminals ... can be tracked ...; enable the Government to issue regulations requiring that chemical taggants be added to ... explosives so that police can better trace bombs ...; increase our controls over biological and chemical weapons; toughen penalties over a range of terrorist crimes; and ban the sale of defense goods ... to countries ... not “cooperating fully” with U.S. antiterrorism efforts.

Id.
terrorism. Despite the lack of an established link between immigration and terrorism, sections of the Act affecting immigration were passed along with other provisions meant to further the purposes of the AEDPA. These provisions are aimed specifically towards aliens, both those seeking asylum within American borders and those already residing in the United States. Part I of this Note discusses recent events in the United States that have created both a fear of terrorist activities and a popular but mistaken belief in the existence of a link between immigration and terrorism. Part II expounds upon the general anti-immigration mood in America and on the prevailing feeling that the United States is unable to control its borders. Part III discusses the sections of the AEDPA that directly target terrorism. Part IV considers those provisions of the AEDPA and IIRIRA which unfairly discriminate against legal aliens and impose harsh restrictions on persons seeking asylum within American borders.

I. EVENTS LEADING UP TO THE PRESENT FEAR OF TERRORISM

The bombing of the Federal Building in Oklahoma City affected the entire nation due to its sheer magnitude. Although

11 See 110 Stat. at 1214 (stating the purpose of the Act is "to deter terrorism, provide justice for victims, provide for an effective death penalty, and for other purposes").

12 See supra note 2 (defining alien).


14 It is argued that while the asylum procedures were in need of reform, the AEDPA was not the proper vehicle for implementing such immigration and asylum reform measures. See, e.g., Bruce W. Nelan, Not Quite So Welcome Anymore, TIME, Fall 1993 (Special Issue), at 10, 11-12 (narrating the public's negative perception of the asylum process stemming from factors such as the thousands of applications for asylum filed by those who enter America illegally, only after they have been caught by authorities; the ten-year review process which results in the disappearance of many asylum-seekers after initiating the process; and the tremendous increase in the quantity of asylum applications, contributing to an immense backlog of applications with the Immigration and Naturalization Service (INS)).

Additionally, a particularly disturbing provision of the AEDPA infringes upon the constitutional right to habeas corpus of all aliens residing in the United States. See infra note 64 (discussing habeas corpus restrictions).

15 A Ryder truck carrying a bomb composed of 4800 pounds of fertilizer and fuel oil exploded at a curb outside the entrance to the Federal Building. See Edward Walsh, One Arraigned, Two Undergo Questioning, WASH. POST, Apr. 22, 1995, at
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the tragedy was later found to have been committed by two American citizens, there was immediate speculation that it may have been due to foreign terrorist activity. Immediately after the bombing, President Clinton issued a statement warning Americans to avoid engaging in “ethnic stereotyping” by assuming that the explosion was perpetrated by Arab terrorists. The President gave the warning because of two events in 1993 which gave rise to premature suspicions and accusations being made

A1; see also Blown Away, supra note 6, at 2074.

Approximately one hour after the explosion at the Federal Building, Timothy McVeigh, an American, was arrested in Perry, Oklahoma, for driving without license plates. Later an identification was made from an FBI sketch connecting McVeigh to the bombing. A friend of McVeigh's, Terry Nichols, also an American, surrendered to police shortly thereafter. The two men were indicted on charges of murder, conspiracy, and destroying federal property. See David Jackson, U.S. Charges Pair in Oklahoma Blast, CHI. TRIB., Aug. 11, 1995, at 1; Tom Morganthau & Melinda Liu, Still Holes in the Case, NEWSWEEK, Aug. 21, 1995, at 29 (detailing the indictments). On April 19, 1997, McVeigh was convicted. See Tom Morganthau & Peter Annin, Should McVeigh Die?, NEWSWEEK, June 16, 1997, at 20, 20. McVeigh was sentenced to death by the jury on June 13, 1997. See Peter Annin & Tom Morganthau, The Verdict: Death, NEWSWEEK, June 23, 1997, at 40 (discussing jury deliberations). On December 23, 1997, Nichols was convicted of conspiracy and involuntary manslaughter for his part in the bombing. See George Lane, Jurors Find Nichols Guilty of Conspiracy, Manslaughter; Death Penalty Still Option Despite Murder Acquittal, DENVER POST, Dec. 24, 1997, at A1, available in 1997 WL 13887121. On February 9, 1998, prosecutors in the Nichols case requested that the judge impose the death penalty on Nichols, while Nichols' lawyers asked that the judge limit the sentence to no more than six years. See Judge Given Arguments on Sentence for Nichols, N.Y. TIMES, Feb. 10, 1998, at 16.

The explosion in the Federal Building prompted widespread speculation that Arab terrorists were responsible for the attack. Consequently, Oklahoma's "sizable Muslim and Middle Eastern immigrant populations found themselves the focus of attention." Id. The nation turned against Arab Americans in the midst of speculation that the explosion was caused by Islamic terrorists. See id.; see also Richard Lacayo, Rushing to Bash Outsiders, TIME, May 1, 1995, at 70, 70 (stating that passage of the AEDPA was "bitterly opposed" by Arab Americans, thereby fueling the drive for passage).
about who may have perpetrated the Oklahoma City bombing.

On January 25, 1993, two employees of the Central Intelligence Agency (CIA) were gunned down outside CIA headquarters in Langley, Virginia. One month later, on February 26, 1993, a 1200 pound bomb exploded in an underground parking garage of New York City's World Trade Center, killing six people and injuring more than 1000 others. Both of these crimes shared a common element. Illegal residents were responsible for both of these incidents which, prior to the Oklahoma City bombing, were two of the most heinous terrorist acts to occur on American soil.


20 See Church, supra note 4, at 22-24.

21 See Keisha A. Gary, Congressional Proposals to Revive Guilt by Association: An Ineffective Plan to Stop Terrorism, 8 GEO. IMMIGR. L.J. 227, 250-51 (1994) (detailing the exploitation of deficiencies in the American immigration system by those aliens accused in both the World Trade Center bombing and the CIA murders). Sheik Omar Abdel Rahman, implicated in the World Trade Center incident, was listed on the Automatic Visa Lookout System (AVLOS), a list maintained on both computer and microfilm of over one million people prohibited from obtaining entry visas into the United States. See id. at 243, 250. Rahman's alleged involvement in three previous terrorist incidents in Egypt classified him as an excluded alien. See id. at 250. However, despite the AVLOS listing, Rahman's visa was granted because the consular official responsible for checking AVLOS either failed to check the system or failed to conduct the required exit interview. See id. Although Rahman's visa was revoked when officials realized the error, Rahman was able to leave and reenter the United States illegally on multiple occasions. See id. at 250-51.

Mir Amal Kansi, accused in the CIA killings, was not listed on AVLOS and obtained a business visa to enter the United States. See id. at 251. When his visa expired, Kansi requested political asylum and was permitted to remain in the United States pending a decision on his application. See id. During this time, Kansi purchased two assault rifles and, on January 25, 1993, killed two CIA employees. See id. He then fled to his homeland of Pakistan. See id.

These two incidents demonstrate that loopholes are available to those persons wishing to commit a terrorist act in the United States. It is highly unlikely that Congress can enact a statute that will guard against all creative entry methods potential terrorists have at their disposal. See id. at 251 (asserting that those who "want to commit terrorist acts will find a way to enter the United States, either by abusing the present system or sneaking across the borders").

22 See Dillin, supra note 19, at 1 (relating how Mir Amal Kansi, the Pakistani suspect charged in the killing of the two CIA employees, and Mohammed Salameh, a Jordanian arrested in the World Trade Center bombing, both abused the asylum process to remain in America); see also Gary, supra note 21, at 251 (discussing
Consequently, after the World Trade Center bombing many Americans associated immigrants with violence and terrorism. Polls taken in the aftermath of the two incidents indicated that roughly two-thirds of Americans favored legislation to curtail the flow of all persons seeking entry into the United States. This perceived link between the issues of terrorism and immigration was coupled with the fear that the United States would be subjected to a new level of international terrorism, one that previously "seemed a distant phenomenon." Consequently, the Oklahoma City blast resulted in a clamor for the passage of strict anti-terrorist legislation. Since an anti-immigration feeling was still prevalent, President Clinton demanded and Congress wrote provisions urging restrictions on immigration into the AEDPA.

II. GENERAL ANTI-IMMIGRATION SENTIMENT

Anti-immigration sentiment is now as strong as it has ever been, but the feeling is not a new phenomenon in America. In
the mid-nineteenth century, for example, California adopted a “commutation tax” to discourage continued Chinese immigration to California and enacted other laws to encourage Chinese residents to leave the state. Despite historical anti-immigration sentiments, the words of Emma Lazarus’ poem inscribed on the pedestal of the Statue of Liberty, “give me your tired, your poor, your huddled masses yearning to breathe free” have never been less indicative than they are today of the prevailing mood in America. Likewise, America’s “golden door” through which the world’s downtrodden can pass on their journey to a new and better life is less open to immigrants and asylum seekers. The World Trade Center bombing and the shooting of the two CIA agents has contributed to the antipathy felt towards immigrants.

Undeniably, increasing numbers of people are entering the


Under sections 212(a)(27)-(29) of the McCarran-Walter Act, visas were denied to over eight thousand people seeking entrance into the U.S. from ninety-eight countries. See Gary, supra note 21, at 247.


Michael Scaperlanda, Are We That Far Gone?: Due Process and Secret Deportation Proceedings, 7 STAN. L. & POL’Y REV. 23, 23 (Summer 1996).

See Gary, supra note 21, at 227-28. Another event fueling the prevailing anti-immigrant mood occurred when “[o]ff the shore of New York’s Long Island, a rusty tramp steamer called the Golden Venture [ran] aground, disgorging nearly 300 frightened Chinese trying to enter the country illegally,” adding to the impression that the nation is under siege. See Nelan, supra note 14, at 10; see generally Celia W. Dugger, Dozens of Chinese from 1993 Voyage Still in Jail, N.Y. Times, Feb. 3, 1997, at A1 (explaining the plight of the Chinese immigrants who were aboard the ship).
United States. According to INS estimates, approximately 800,000 legal immigrants enter the United States each year. Presently, an estimated 4 million illegal immigrants live in the United States and another 300,000 illegal immigrants enter this country or exceed their visitation rights annually. The dramatic increase in the number of immigrants who circumvent the lengthy process of obtaining legal immigration status by claiming political asylum only adds to the problem. While asylum applications were extremely rare in the 1970s, presently the request for political asylum appears to be the “plea of choice.” Due to the swelling number of immigrants seeking entry into the United States, the prevailing feeling is that America “has lost control of its own borders.”

In recent years, anti-immigration sentiment has materialized in proposed legislation on the federal level and proposed and enacted laws on the state level. While anti-immigration feelings seem to be cyclical in this country, they have never before reached this heightened level. On the federal level, Representative Brian Bilbray, in one of the more extreme examples of anti-immigration feeling, introduced legislation to amend the Immigration and Nationality Act to deny automatic citizenship at birth to persons born in the United States to parents who are not citizens or permanent aliens. A number of congressional

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33 See id.
34 Nelan, supra note 14, at 11. Although only 200 asylum applications were filed in 1975, by 1992 asylum applications had skyrocketed to 103,000, with a backlog of approximately 300,000 cases. See id. Under the asylum system as it existed in 1993, almost everyone who declared that he or she sought to escape from political oppression had an excellent chance of being granted admission into the United States. See id. at 10.
37 See H.R. 7, 105th Cong. (1997). See generally Jeffrey R. Sipe, Will Debate About Citizenship Be Settled in Court or Congress?, INSIGHT, Oct. 7-14, 1996, at 38. Birthright citizenship provides that a person born within the physical boundaries of the United States is a citizen, even if the person’s parents are in the country illegally. See id. at 39.

The question of citizenship has been a viable one since the ruling by the Supreme Court in the Dred Scott case. See id. The Court ruled that neither black people who came to this country as slaves, nor their descendants, could become American citizens. See id. In response to the infamous holding, the Fourteenth Amendment to the Constitution was passed. Under the Fourteenth Amendment, “[a]ll persons born or naturalized in the United States, and subject to the jurisdic-
resolutions to amend the Constitution have been proposed to accomplish the same result.\textsuperscript{39} Such an amendment or legislation, if passed, would be antithetical to the very values on which America, a nation of immigrants, was founded. Although it is highly unlikely that this type of legislation will ever pass, the fact that such bills were proposed demonstrates the prevailing anti-immigrant mood.

The anti-immigration sentiment is especially visible in border states such as California, which are disproportionately affected by the total annual immigration increases.\textsuperscript{40} In November of 1994, California’s voters passed Proposition 187,\textsuperscript{41} which excludes undocumented aliens from public schools, public health

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\textsuperscript{40} See Kevin C. Wilson, Recent Development, And Stay Out! The Dangers of Using Anti-Immigrant Sentiment as a Basis for Social Policy: America Should Take Heed of Disturbing Lessons from Great Britain’s Past, 24 GA. J. INTL. & COMP. L. 567, 578 (1995). Concerned that too many undocumented and/or illegal immigrants are entering California, many Californians blame these immigrants for the state’s declining economy, primarily due to a belief that illegal immigrants are taking jobs away from California’s citizens and abusing the state’s welfare benefits. See id.

\textsuperscript{41} Proposition 187 was an initiative measure passed by voters in California on November 8, 1994. Its stated purpose was to prevent illegal aliens in the United States from receiving benefits or public services in California. See Scaperlanda, supra note 30, at 23 & n.13. Other states that have considered similar legislation include Arizona, Colorado, Florida, Illinois, Louisiana, Minnesota, Missouri, Nebraska, Nevada, New York, Texas, Vermont, Washington, Wisconsin, and Wyoming. See Wilson, supra note 40, at 584 n.128 (noting similar legislation was considered by at least fifteen states). In addition, Congress has considered several immigration reform bills similar to California’s Proposition 187. See Scaperlanda, supra note 30, at 24.
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care, and public social service. New York is also privy to hostility towards immigrants. A 1993 Empire State Survey telephone poll found that most residents believe there are too many immigrants in New York and that the increasing presence of illegal immigrants intensifies the threat of terrorism. Nationwide during the 1990s, immigrants have also been held responsible for criminal activity in amounts disproportionate to their numbers in the population, for competing with and replacing Americans in the job market, and for excessive use of public benefits.

III. EFFECTIVE PROVISIONS OF THE AEDPA

Lawmakers must avoid the temptation to use issues of terrorism to disguise attempts to achieve other agendas. The passage of the AEDPA illustrates that Congress and the President failed to heed this advice. One of the main problems with the AEDPA as enacted is that attempts to enact immigration reforms diffused the initial focus of taking a tough stance against terrorism.

Some provisions of the AEDPA, however, are actual and legitimate attempts to combat the evils of domestic and international terrorism. The AEDPA expands the federal government's jurisdiction to anyone who commits a terrorist act in the

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43 See Kevin R. Johnson, Fear of an "Alien Nation": Race, Immigration, and Immigrants, 7 STAN. L. & POL'Y REV. 111, 111-13 (Summer 1996) (noting that such charges against immigrants have led to legislative initiatives such as California's Proposition 187, and that the intensity of criticisms of immigrants have increased due to the changed racial composition of today's immigrant population); see also PETER BRIMELOW, ALIEN NATION: COMMON SENSE ABOUT AMERICA'S IMMIGRATION DISASTER 111-12 (1995) (maintaining that immigrants are responsible for economic, political and social problems in America).

44 See Jenkins, supra note 1, at 74.

45 See supra notes 9-10 and accompanying text; see also Statement by President William J. Clinton Upon Signing § 735, 1996 U.S.C.C.A.N. 961-1, 961-3 (Apr. 29, 1996) [hereinafter Statement by President Upon Signing § 735] (urging Congress to amend provisions of the bill that make "a number of major, ill-advised changes in our immigration laws having nothing to do with fighting terrorism").

46 See 142 CONG. REC. S3454, S3463 (daily ed. Apr. 17, 1996) (statement of Sen. Brown) (stating that certain key provisions of the AEDPA will "strengthen U.S. efforts to combat international terrorism"); see also Statement by President Upon Signing § 735, supra note 45, at 961-1 (describing contents of two original antiterrorism legislative proposals, most of which were included in the final legislation, as reflecting a "comprehensive approach to fighting terrorism both at home and abroad"); 142 CONG. REC. S3454, S3456 (statement of Sen. Hatch) (noting that the "bill contains alien terrorist removal provisions that will make a real difference").
United States, or who commits within the United States any acts constituting part of a conspiracy to commit a terrorist act internationally. The AEDPA also prohibits any fundraising in the United States to aid a terrorist group, precludes the entry of known terrorists into the United States, allows for deportation of terrorists, requires that plastic explosives contain taggants to facilitate the identification and prosecution of users, toughens penalties for a range of terrorist crimes, and precludes the sale of arms to nations not complying with U.S. anti-terrorism efforts. Moreover, the Act provides for mandatory restitution to victims of terrorism.

In a statement made upon signing the AEDPA, President Clinton enumerated the strengths of the Act in providing some effective means of combating violence but recognized that the bill "should have been stronger." By enacting the AEDPA,

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48 Id. § 704, 110 Stat. at 1294-95. "The AEDPA does not define terrorism but references INA provisions on terrorist activity." Blown Away, supra note 6, at 2086.
49 Id. § 303, 110 Stat. at 1250.
50 Id. § 411, 110 Stat. at 1268-69.
51 Id. § 440, 110 Stat. at 1276-77.
52 Id. § 603, 110 Stat. at 1289 (making it unlawful for any manufacturer of plastic explosives to produce an explosive without a "detection agent," or for any person to bring such an explosive into or out of the U.S.).
54 § 330, 110 Stat. at 1258.
55 Id. § 204, 110 Stat. at 1227-28.
56 Statement by President Upon Signing § 735, supra note 45, at 961-2. For instance, President Clinton claims that he asked Congress to grant U.S. law enforcement officials greater authority in terrorism cases, including the power to use wiretaps, so that police could follow the telephone activity of a suspected terrorist, similar to the authority for emergency wiretaps currently available in cases involving organized crime. See id; see also 142 Cong. Rec. S3454, S3456 (daily ed. Apr. 17, 1996) (statement of Sen. Biden) (acknowledging his remorse that terrorism was not included in the list of offenses for which law enforcement officials can get a wiretap).

Other provisions that President Clinton requested which were not incorporated into the final legislation included "a mandatory penalty for those who knowingly transfer a firearm for use in a violent felony"; "a longer statute of limitations to give law enforcement more time to prosecute terrorists who use weapons such as machine guns, sawed-off shotguns, and explosive devices"; and "a ban on cop-killer bullets." Statement by President upon Signing § 735, supra note 45, at 961-2.

Immediately before it was passed, Senator Ted Kennedy said of the bill that "[a]ll that is left now is the hollow shell of a terrorism bill, a mockery of the strong bipartisan legislation passed by the Senate." 142 Cong. Rec. S3454, S3458 (daily ed. Apr. 17, 1996).
"Congress passed a weak shadow of the original bills, which responds too broadly to earlier charges of extremism and is likely to do little to stop terrorism."\textsuperscript{557}

IV. PROBLEMATIC PROVISIONS OF THE AEDPA AND IIRIRA

This Note does not argue that immigrants are not responsible for any violent acts within the nation's borders.\textsuperscript{58} Actually, immigrants arrive with "their traditions[,] ... ambitions[,] ... prejudices and ... quarrels."\textsuperscript{59} It is clear that improvements are needed in the procedural aspects relating to the nation's immigration and asylum policies. The best way to approach immigration policy, however, is through "a calm and informed national dialogue on immigration that culminates in a comprehensive plan of action for the next century."\textsuperscript{60}

The main purpose of the AEDPA was to prevent terrorism on American soil.\textsuperscript{61} A thorough review of the legislation, however, demonstrates that it contains very few provisions that could have prevented the tragic bombing in Oklahoma City, the main impetus for the passage of the Act.\textsuperscript{62} The most effective way to protect American citizens from terrorist acts is to stop terrorists before they strike. Although the AEDPA contains some legitimate provisions which may combat terrorism,\textsuperscript{63} other

\textsuperscript{557} Blown Away, supra note 6, at 2091. The Senate passed the Comprehensive Terrorism Prevention Act of 1995 on June 7, 1995. See id. at 2074-75. The House of Representatives introduced the Comprehensive Antiterrorism Act of 1995 on May 25, 1995, but the House adopted a modified version, the Effective Death Penalty and Public Safety Act of 1996, on March 14, 1996. See id. at 2075. On April 17 and 18, 1996, both houses approved a conference bill closely resembling the House version. See id. The bill was signed into law by President Clinton on April 24, 1996. See id.

\textsuperscript{58} Cf. 142 CONG. REC. H3605, H3617 (daily ed. Apr. 18, 1996) (statement of Rep. Smith) ("[O]ver one-quarter of all Federal prisoners are noncitizens."). In border states the percentage is much higher; for example, 42% of all federal prisoners in Texas are noncitizens. See id.

\textsuperscript{61} Jenkins, supra note 1, at 73.

\textsuperscript{62} Johnson, supra note 43, at 112.

\textsuperscript{63} See supra note 8 and accompanying text.

\textsuperscript{65} See 142 CONG. REC. S3454, S3462 (daily ed. Apr. 17, 1996) (statement of Sen. Feingold) (conveying that legislative measures focused on raising "resources and support necessary to investigate and prosecute terrorists" would have been a more effective provision than habeas corpus reformation).

\textsuperscript{66} Some commentators have suggested that the AEDPA has not gone far enough, and that it should have provided more potent weapons in its antiterrorism arsenal, such as wiretapping, spying and electronic eavesdropping, and other such surveillance mechanisms. See Blown Away, supra note 6, at 2078-79. But see GARY T. MARX, UNDERCOVER: POLICE SURVEILLANCE IN AMERICA 230 (1988) (warning that "[e]ach small extension of surveillance can shift the balance between the liber-
provisions in the Act unfairly discriminate against particular groups of people.\textsuperscript{64} The President himself acknowledged when signing the bill that it caused several “major, ill-advised changes in our immigration laws having nothing to do with fighting terrorism.” Under the umbrella of preventing terrorism, the Act precludes state death row inmates from seeking essential habeas corpus review,\textsuperscript{66} lessens the burden on the government to successfully deport criminal aliens,\textsuperscript{67} and facilitates denial of asylum to politically persecuted refugees and victims seeking the welcoming arms of liberty.\textsuperscript{68}

Congress continued the assault on important procedural ties and rights of individuals and the state and relations among the three branches of government. The impact of such shifts can be incremental, but cumulatively they can change relationships and principles central to our form of government.”).\textsuperscript{69}

\textsuperscript{64} Although beyond the scope of this Note to explore fully, one of the most troubling provisions of the AEDPA, containing increased restrictions on habeas corpus, should be noted. See Statement by President Upon Signing § 235,\textsuperscript{70} supra note 45, at 961-3. See generally 142 CONG. REC. S3454 (daily ed. Apr. 17, 1996); 142 CONG. REC. H3605 (daily ed. Apr. 18, 1996). Section 102 of the AEDPA amended 28 U.S.C. § 2255, which allowed a prisoner to apply for a writ of habeas corpus from a court of appeals after a motion for relief was denied by the sentencing court. 28 U.S.C. § 2255 (1948). Section 102 now bars repeat habeas corpus petitions unless a circuit court certifies that they are based either on newly discovered evidence of innocence, or on a new rule of constitutional law. § 102, 110 Stat. at 1217-18. This “eviscerates the ancient writ of Habeas Corpus, denying [even] death row inmates the opportunity to obtain even one meaningful Federal review of the constitutional-ity of their convictions.” 142 CONG. REC. S3454, S3458 (daily ed. Apr. 17, 1996) (statement of Sen. Kennedy). Since the connection between habeas corpus and terrorism is tenuous at best, it is troubling that the AEDPA was used as the carrier for this provision. See 142 CONG. REC. S3454, S3462 (statement of Sen. Feingold) (“The only time habeas corpus is even remotely related to terrorism is after the terrorist has committed an act of terrorism, has been apprehended, convicted and is sitting in a prison cell.”).

\textsuperscript{66} Statement by President Upon Signing § 735,\textsuperscript{71} supra note 45, at 961-3. President Clinton further commented that such provisions eradicate “most remedial relief for long-term legal residents” and limit a “key protection for battered spouses and children.” Id. Furthermore, “[t]he provisions produce extraordinary administrative burdens on the Immigration and Naturalization Service.” Id. President Clinton also expressed his hope that these problems in the AEDPA will be corrected by Congress in future immigration reform legislation. See id.


rights when it passed IIRIRA, which "attacks undocumented immigration aggressively on several fronts."\(^6\)

The AEDPA also has the effect of making it much easier to deport legal aliens. Section 440 of the AEDPA permits the issuance of final orders of deportation without judicial review.\(^7\) It also blocks judicial review of deportation orders for legal permanent residents who have been convicted of certain crimes.\(^8\)

Furthermore, the AEDPA incongruously provides the terrorists at whom it was ostensibly aimed more protection than it grants to most immigrants.\(^9\) As one immigration lawyer has noted, the statute grants [suspected terrorists … the right to appointed counsel, the right to bond proceedings, the right to a court hearing and the right

\(^6\) Pub. L. No. 104-208, div. C, 110 Stat. 3009-546 (codified in scattered sections of 8 U.S.C.). For example, section 302 of IIRIRA provides that if an asylum officer determines after an interview that an alien who is applying for asylum due to fear of persecution in his native country has no credible fear of persecution, the officer may "order the alien removed from the United States without further hearing or review." Id. § 302, 110 Stat. at 3009-581.


\(^8\) § 440. CRIMINAL ALIEN REMOVAL.
(a) JUDICIAL REVIEW.—Section 106 of the Immigration and Nationality Act (8 U.S.C. 1105a(a)(10)) is amended to read as follows:
"(10) Any final order of deportation against an alien who is deportable by reason of having committed a criminal offense covered in section 241(a)(2)(A)(iii), (B), (C), or (D), or any offense covered by section 241(a)(2)(A)(ii) for which both predicate offenses are covered by section 241(a)(2)(A)(i), shall not be subject to review by any court.".

(b) FINAL ORDER OF DEPORTATION DEFINED.—Section 101(a) of such Act (8 U.S.C. 1101(a)) is amended by adding at the end the following new paragraph:
"(47)(A) The term 'order of deportation' means the order of the special inquiry officer, or other such administrative officer to whom the Attorney General has delegated the responsibility for determining whether an alien is deportable, concluding that the alien is deportable or ordering deportation.

"(B) The order described under subparagraph (A) shall become final upon the earlier of—
"(i) a determination by the Board of Immigration Appeals affirming such order; or
"(ii) the expiration of the period in which the alien is permitted to seek review of such order by the Board of Immigration Appeals."

Id. (emphasis added).

This provision has been repealed by IIRIRA § 306(a); however, much of its substance remains intact. See 8 U.S.C. § 1252 (1997).


\(^{70}\) See id.
to judicial review in removal proceedings while the same law takes away all of those rights for long-term permanent residents who have had even a minor criminal violation, with no possibility for relief from deportation.\textsuperscript{74}

Additionally, provisions in IIRIRA further limit access to the courts for all aliens, regardless of their status.\textsuperscript{75}

The AEDPA and IIRIRA also redefined what constitutes an “aggravated felony.”\textsuperscript{76} Commission of an aggravated felony triggers deportation proceedings for a legal alien already residing in the United States.\textsuperscript{77} Under prior immigration law, “aggravated felonies” were any crimes that carried a penalty of five or more years of imprisonment.\textsuperscript{78} The AEDPA amended this definition to include almost any crime which would result in a sentence of one year or more.\textsuperscript{79} The amendments also significantly reduced the minimum monetary amounts for non-violent “aggravated felonies.”\textsuperscript{80} It is important to note that attempts or conspiracies to commit any of the crimes set forth in these provisions now fall within the definition of “aggravated felony.”\textsuperscript{81} The possible consequences for an immigrant who attempts to commit a crime for which the term of imprisonment is one year or greater includes both imprisonment and deportation. Consequently, this imposes

\textsuperscript{74} Id.
\textsuperscript{76} Id. § 1101(a)(43).
\textsuperscript{77} Crimes that are now “aggravated felonies” if punishable by imprisonment of one year or more are crimes of violence, theft or burglary, and crimes relating to gambling, racketeering, commercial bribery, counterfeiting, forgery and trafficking in vehicles where the vehicle identification numbers have been changed. 8 U.S.C. § 1101(a)(43)(F),(G),(J),(R). Also added to the definition were crimes relating to obstruction of justice, perjury, subornation of perjury, and bribery of a witness. Id. § 1101(a)(43)(S).
\textsuperscript{78} Title 8 includes in the definition of “aggravated felony” offenses relating to “laundering of monetary instruments” and “engaging in monetary transactions in property derived from specific unlawful activity.” Id. § 1101(a)(43)(D). In the 1994 version, the amount of funds in the offense had to exceed $100,000 before the offense was considered an “aggravated felony.” Id. § 1101(a)(43)(D) (1994), amended by 8 U.S.C. § 1101(a)(43)(D). After the amendments, this amount was reduced to $10,000. 8 U.S.C. § 1101(a)(43)(D) (1997). Similarly, the AEDPA and IIRIRA reduced the minimum monetary amounts in the definition for crimes that involved fraud or deceit from $200,000 to $10,000. Id. § 1101(a)(43)(M)(i). For crimes relating to tax fraud, the amendment reduced the required amount of lost government revenue from $200,000 to $10,000. Id. § 1101(a)(43)(M)(ii).
\textsuperscript{80} Id. § 1101(a)(43)(U).
harsher criminal penalties on legal aliens than it does on others. As Senator Mink of Hawaii stated during debates on the AEDPA:

[While] we are all legitimately disturbed with terrorism and violence in our communities ... it is wrong to place upon legal immigrants a higher penalty for crimes which in themselves are not related to terroristic actions. Deportation should be reserved for only the most heinous of crimes rending [sic] the person unfit to remain in this country.  

Another result of the passage of the AEDPA and IIRIRA was the creation of exclusionary provisions without any due process or judicial review protection for immigrants. These Acts amended Title VIII to allow "summary" or "expedited" exclusion of asylum-seekers upon arrival in the United States. All asylum seekers who enter the country without proper documentation must immediately show they have a "credible fear of persecution" or they may be excluded without further hearing or

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84 Section 1225(b)(1)(C)(iii)(I) of Title 8 now empowers an immigration officer at the port of entry to exclude any alien "without further hearing or review" if, after an interview, the officer determines that the alien does not have a "credible fear of persecution." Id. § 1225(b)(1)(C)(iii)(I) (1997) (emphasis added).

The Supreme Court has recognized the validity of the legislative and executive power to exclude aliens with little or no judicial review. In The Chinese Exclusion Case (Chae Chan Ping v. United States), 130 U.S. 581, 606-07 (1889), the Court found that the power to exclude aliens was a fundamental sovereign attribute; see also Yamataya v. Fisher, 189 U.S. 86, 100-01 (1902). The Court in a later case reasoned that since the power to admit or exclude aliens is a sovereign privilege, an alien has no constitutional rights regarding an application for admission. See United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537, 542 (1950).

Thus the decision to admit or to exclude an alien may be lawfully placed with the President, who may in turn delegate the carrying out of this function to a responsible executive officer of the sovereign, such as the Attorney General. The action of the executive officer under such authority is final and conclusive. 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 given alien.

Id. at 543 (citations omitted).
85 8 U.S.C. § 1225(b)(1)(C)(ii). For the purposes of such a showing, the term "credible fear of prosecution" means that there is a "significant possibility," taking into account the credibility of the statements made by the alien in support of the alien's claim and any other facts that are known to the officer, that the alien could "establish eligibility for asylum under section 1158 of this title." Id. § 1225(b)(1)(O)(v).
review. These expedited exclusion provisions raise serious concerns about due process. The Supreme Court has held that aliens who reside in the United States, whether they entered legally or illegally, are to be afforded more constitutional protection than aliens who have not yet entered the country. Now, the AEDPA and IIRIRA operate to deny the fundamental protection of judicial review to an alien who resides in the United States and seeks asylum. These new laws effectively strip away whatever extended rights to which the alien may have been entitled. For an alien seeking asylum, the stakes are high. If he is unable to show a sufficient basis for asylum, he will be returned to a country where his life and freedom is likely to be placed in jeopardy.

**Conclusion**

The AEDPA was enacted to address valid concerns about terrorist attacks in this country, and to diminish the possibility of such attacks. In taking a stance against terrorism, however, the legislative and executive branches also embraced the prevailing anti-immigrant sentiments that accompanied and were fanned by the recent tragic events on American soil. The AEDPA is overbroad and has exceeded its central purpose by unfairly discriminating against legal aliens residing in the United States as well as those persons seeking refuge within American borders. IIRIRA further strips certain immigrant groups of constitutional due process protections previously afforded them. Congress should reexamine these Acts and amend them to better protect both the people legally residing within the United States and the people who have legitimate cause to seek refuge within America's borders.

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86 See id. § 1225(b)(1)(C)(iii)(I). However, upon request, and subject to administrative regulation, the alien may be entitled to review of the officer's determination. See id. § 1225(b)(1)(E)(i).

87 See Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206, 212 (1953) (citations omitted) (finding that aliens who have entered the United States were entitled to "traditional standards of fairness encompassed in due process of law," but deemed the procedure set out by Congress to constitute due process for aliens who have not yet entered); see also Nishimura Ekiu v. United States, 142 U.S. 651, 663-64 (1892) (stating it is not in the Judiciary's power to order foreigners, who have not acquired any domicile or residence within the United States, to be allowed into the country in contradiction to constitutional legislative measures).