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Rafeedie v. Immigration and Naturalization Service: Summary Exclusion and the Procedural Due Process Rights of Permanent Resident Aliens

I. INTRODUCTION

Aliens[1] living in the United States, unlike those living abroad,[2] acquire constitutional rights by virtue of their physical presence within the country. The United States Supreme Court has held that nonimmigrant aliens,[3] illegal aliens, and lawful permanent resident aliens ("LPRs")[4] are "persons" with enforceable rights under the United States Constitution.[5] LPRs seemingly enjoy increased constitutional protection,[6] but under current statutory and case law, these otherwise protected rights may dissipate once the resident alien de-

1. An alien is "any person not a citizen or national of the United States." Immigration and Nationality Act § 101(a)(3), 8 U.S.C. § 1101(a)(3) (1988) [hereinafter INA].

2. Aliens seeking initial admission into the United States have no constitutional rights. Landon v. Plasencia, 459 U.S. 21, 32 (1982) (quoting Harisiades v. Shaughnessy, 342 U.S. 580, 596-97 (1952) (Frankfurter, J., concurring)); Kleindienst v. Mandel, 408 U.S. 753, 762 (1972); United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 542 (1950); United States *ex rel.* Turner v. Williams, 194 U.S. 279, 292 (1904); *see* Fiallo v. Bell, 430 U.S. 787, 796 (1977); Nishimura Ekiu v. United States, 142 U.S. 651, 660 (1892).

3. "Nonimmigrant" aliens include diplomats, aliens who temporarily visit the United States for business, study or pleasure, or alien crew members of vessels making temporary calls in the United States. INA § 101(a)(15), 8 U.S.C. § 1101(a)(15).

4. "LPR" is a common abbreviation used by the Immigration and Naturalization Service ("INS") that means "lawful permanent resident." Such aliens possess "the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed." *Id.* § 101(a)(20), 8 U.S.C. § 1101(a)(20). "Permanent" refers to a "relationship of continuing or lasting nature, as distinguished from temporary, but . . . it . . . may be dissolved eventually at the instance . . . of the United States. . . ." *Id.* § 101(a)(31), 8 U.S.C. § 1101(a)(31). A person's "residence" is his principle, actual dwelling place in fact (general abode) "without regard to intent." *Id.* § 101(a)(33), 8 U.S.C. § 1101(a)(33).

5. *See, e.g.*, Mathews v. Diaz, 426 U.S. 67, 77 (1976) (alien a "person" under the fifth and fourteenth amendments); Graham v. Richardson, 403 U.S. 365, 371 (1971) (alien a "person" under the fourteenth amendment); Bridges v. Wixon, 326 U.S. 135, 161 (1945) (First, fifth and fourteenth amendments do not acknowledge "any distinction between citizens and resident aliens. They extend their inalienable privileges to all 'persons'. . . ."); Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886) ("The Fourteenth Amendment . . . is not confined to the protection of citizens . . . [Its] provisions are universal in their application, to all persons within . . . [the United States.]").

6. *See* Landon v. Plasencia, 459 U.S. 21, 32 (1982). "[O]nce an alien gains admission to

parts the country and then attempts to re-enter.[7]

In *Rafeedie v. Immigration and Naturalization Service*,[8] Fouad Rafeedie, an LPR in the United States for fourteen years, discovered that after he made a trip overseas, the Immigration and Naturalization Service ("INS") could bar his legal re-entry into this country, simply on the basis of undisclosed and unproven allegations.[9] In contrast to many prior federal court decisions which deferred to the government's political branches in the area of immigration law,[10] the District of Columbia Circuit Court of Appeals ruled that Rafeedie was entitled to procedural due process in his exclusion proceeding. The procedural protections to which Rafeedie and others similarly situated should be entitled are the subject of this Note.[11]

First, this Note will briefly examine the constitutional and statutory framework pertaining to LPR exclusion. Second, this Note will set forth the facts of Rafeedie's attempted summary exclusion.[12] This Note will then analyze relevant federal court decisions and suggest alternative procedural protections which can remedy the constitutional problems inherent in summary exclusion. Finally, this Note will criticize the underlying assumptions and purposes of summary exclusion to conclude that Congress should fashion exclusion laws which consider modern views of alien rights.

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our country and begins to develop the ties that go with permanent residence, his constitutional status changes accordingly." *Id.*

7. *See infra* text accompanying notes 13-66 for a discussion of the re-entry doctrine.

8. 688 F. Supp. 729 (D.D.C. 1988), *aff'd in part, rev'd in part*, 880 F.2d 506 (D.C. Cir. 1989).

9. Rafeedie v. INS, 688 F. Supp. at 732, 734.

10. *See, e.g.*, Galvan v. Press, 347 U.S. 522, 531 (1954).

> Policies pertaining to the entry of aliens and their right to remain here are peculiarly concerned with the political conduct of government. In the enforcement of these policies, the Executive Branch . . . must respect the procedural safeguards of due process. But that the formulation of these policies is entrusted exclusively to Congress has become about as firmly imbedded in the legislative and judicial tissues of our body politic as any aspect of our government.

Id. at 531 (citations omitted); *see also* Carlson v. Landon, 342 U.S. 524, 534 (1952). "So long . . . as aliens fail to obtain . . . citizenship . . . they remain subject to the plenary power of Congress to expel them under the sovereign right to determine what noncitizens shall be permitted to remain within our borders." *Id.*

11. *See infra* pp. 202-225.

12. "Summary exclusion" refers to a statutory procedure used to exclude aliens which virtually denies them procedural due process. INA § 235 (c), 8 U.S.C. § 1225(c); *see infra* p. 190.

II. THE LEGAL PROCESS FOR RE-ENTERING LPRS

A. The Early Re-Entry Doctrine

The Supreme Court long recognized that the due process clause of the fifth amendment protected a continuously present LPR against arbitrary expulsion from the country.[13] However, until the middle of this century, an LPR who departed the United States and then attempted to return completely lost these protections. Court decisions at the turn of the century provided the durable proposition that aliens who had never entered[14] this country had no vested right to gain entry. In the absence of such a substantive right, Congress alone defined what procedural rights, if any, were available to returning aliens seeking admission to the United States.[15]

The courts of this era considered a returning LPR to have the same legal status as an alien entering this country for the first time. Aliens who resided in this country could claim no greater rights upon returning from abroad than an alien who had never set foot upon United States soil.[16] Under this "re-entry doctrine," an LPR returning to the United States was viewed as legally "standing at the border" *for the first time*.[17] In short, by leaving the country and attempting to re-enter, the LPR became an excludable,[18] rather than

13. The Japanese Immigrant Case, 189 U.S. 86, 100-01 (1903). Note that although due process protected the alien's right to remain, it did not speak to the right to enter the country. *See also* United States v. Ju Toy, 198 U.S. 253, 263 (1905) (executive decisions regarding entry of a first time alien entrant represented due process of law).

14. "Entry" is a legal term of art that determines whether an alien may be deported or excluded from the United States. INA § 101(a)(13), 8 U.S.C. § 1101(a)(13); *see infra* note 50 and accompanying text.

15. Nishimura Ekiu v. United States, 142 U.S. 651, 659-60 (1892); *see also* Fong Yue Ting v. United States, 149 U.S. 698 (1893); Chae Chan Ping v. United States, 130 U.S. 581 (1889).

16. For example, the Court in *Chae Chan Ping* stated that "[w]hatever license . . . Chinese laborers may have obtained . . . to return to the United States after their departure, is held at the will of the government, revocable at any time, at its pleasure." 130 U.S. at 609. Congress held similarly narrow views of alien rights extending well into the mid-twentieth century. "Congress . . . merely accords aliens the privilege or license of residing in this country; and regardless of the length of time of such residence, the privilege never ripens into a vested right to remain." S. REP. NO. 2031, 76th Cong., 3d Sess., pt. 2, at 5 (1940).

17. For an overview of the re-entry doctrine, see generally Klingsberg, *Penetrating the Entry Doctrine: Excludable Aliens' Constitutional Rights in Immigration Processes*, 98 YALE L.J. 639 (1989).

18. "Excludable" relates "to entrant aliens and . . . those assimilated to their status." Kwong Hai Chew v. Colding, 344 U.S. 590, 599 (1953). An "excludable" alien is one who has not yet *legally* entered the country and thus is still considered to be participating in the immigration process. Fernandez-Roque v. Smith, 734 F.2d 576, 578 n.2 (11th Cir. 1984). Thus, an alien may be physically present within our borders, at a detention center or on parole, but is

deportable, alien. Any procedural rights arising from the alien's former status as a continuously present resident alien simply evaporated.

The federal courts mechanically applied the re-entry doctrine and any LPR who departed the country felt the harsh consequences upon return.[19] Although these same courts recognized that the fifth amendment due process clause protected LPRs in deportation proceedings, they refused to examine the amendment's applicability to the exclusion procedures used for both LPRs and nonimmigrant aliens.[20] Returning LPRs were thus reduced, as a matter of law, to the status of excludable, first-time entrant aliens; whatever entry procedure Congress authorized was "due process as far as an alien denied entry [was] concerned."[21]

The federal judiciary's historical deference to the legislative and executive branches in immigration matters primarily arose from the Supreme Court's narrow interpretation of the separation of powers. The Court concluded that the political branches should oversee this area of the law so rooted in the nation's sovereignty.[22] Accordingly,

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considered to "remain at the border" until his admissibility is legally determined. In contrast, " 'expulsion' means forcing someone out of the United States who is actually within the United States or is treated as being so. 'Deportation' means the moving of someone away from the United States, after his exclusion or expulsion." *Chew*, 344 U.S. at 596 n.4.

19. For example, in Lewis v. Frick, 233 U.S. 291 (1914), an alien lawfully residing in the country for six years went to Canada for about a day and returned with a woman alleged to be a prostitute. The Supreme Court upheld the LPR's exclusion, saying

> if he departed from the country, even for a brief space of time, and on reentering brought into the country a woman for the purpose of prostitution or other immoral purpose, he subjected himself to the operation of the clauses of the Act that relate to the exclusion and deportation of aliens, the same as if he had no previous residence . . . in this country.

Id. at 297; *see also* Lapina v. Williams, 232 U.S. 78, 91 (1914) (excludability or deportability to be determined "irrespective of any qualification arising out of a previous residence or domicile in this country."). The early re-entry doctrine found perhaps its most rigid application in United States *ex rel.* Volpe v. Smith, 289 U.S. 422 (1933), where the Court upheld the deportation of a twenty-one year LPR following his re-entry after a "brief" trip to Cuba. The Court strictly construed "entry" to include "any coming of an alien from a foreign country into the United States whether such coming be the first or any subsequent one." *Id.* at 425.

20. For criticism of these early cases, see Hesse, *The Constitutional Status of the Lawfully Admitted Permanent Resident Alien: The Pre-1917 Cases*, 68 YALE L.J. 1578 (1959) [hereinafter Hesse, *The Pre-1917 Cases*]; Hesse, *The Constitutional Status of the Lawfully Admitted Permanent Resident Alien: The Inherent Limits of the Power to Expel*, 69 YALE L.J. 262 (1959) [hereinafter Hesse, *The Inherent Limits of the Power to Expel*].

21. Knauff v. Shaughnessy, 338 U.S. 537, 544 (1950).

22. *See* Chae Chan Ping v. United States, 130 U.S. 581, 629 (1889). "The powers to declare war . . . and admit subjects of other nations to citizenship, are all sovereign powers, restricted in their exercise only by the constitution itself. . . ." *Id.* The power "to establish a uniform Rule of Naturalization" is a further source of federal power over immigration. U.S.

the courts ceded exclusive control over immigration matters to the President and Congress.[23] The executive's exclusion decisions, even if procedurally deficient under the fifth amendment, were treated as judicially unreviewable, political questions properly categorized as conduct related to international relations.[24]

Signs of judicial discomfort with the re-entry doctrine surfaced soon after its inception, with a number of federal courts applying the doctrine with "express reluctance and explicit recognition of its harsh consequences. . . ."[25] Further, some courts refused to apply the doctrine in cases where aliens re-entered after only a "brief" absence from the United States.[26]

B. The Modern Re-Entry Doctrine

The Supreme Court finally rejected this blind application of the re-entry doctrine in *Delgadillo v. Carmichael*.[27] In that case, an LPR, serving aboard an American ship during World War II, unintentionally arrived in Cuba after his ship was torpedoed.[28] Following his return to the United States, the INS sought to deport him for a crime involving moral turpitude committed within five years of his new en-

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CONST. art. 1, § 8, cl. 2. For a general discussion of other sources, see Hesse, *The Pre-1917 Cases*, *supra* note 20.

23. *See generally*, Hesse, *The Inherent Limits of the Power to Expel*, *supra* note 20.

24. Justice Jackson observed that

> any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.

Harisiades v. Shaughnessy, 342 U.S. 580, 588-89 (1952).

25. Rosenberg v. Fleuti, 374 U.S. 449, 454 (1963) (citing United States *ex rel.* Ueberall v. Williams, 187 F. 470 (D.C.N.Y. 1925); Zurbrick v. Woodhead, 90 F.2d 991 (6th Cir. 1937); Jackson v. Zurbrick, 59 F.2d 937 (6th Cir. 1932); *Ex parte* Piazzola, 18 F.2d 114 (W.D.N.Y. 1926); Guimond v. Howes, 9 F.2d 412 (S.D. Me. 1911)).

26. In Di Pasquale v. Karnuth, 158 F.2d 878 (2d Cir. 1947), an LPR slept through a train journey from Buffalo to Detroit, which unknowingly took him through Canada. The court, speaking through Judge Hand, reasoned "that the intent of a carrier, unknown to the alien, to carry him across a border and back again . . . should not be imputed to him. [T]he alien would be subjected without means of protecting himself to the forfeiture of privileges . . . of the most grave importance to him." *Id.* at 879. The court held that Di Pasquale should not be subject to deportation for his "perfectly lawful conduct" which was not intended to constitute a departure or entry. *Id. See also* United States *ex rel.* Valenti v. Karmuth, 1 F. Supp. 370 (N.D.N.Y. 1932) (student's trip across Lake Erie for school picnic not departure and re-entry); Annello *ex rel.* Annello v. Ward, 8 F. Supp. 797 (D. Mass. 1934) (child's 25 minute trip to Canada not departure and re-entry).

27. 332 U.S. 388 (1947).

28. *Id.* at 389.

try.[29] The Court refused to allow Delgadillo's deportation, since it could "not attribute to Congress a purpose to make his right to remain here dependent on circumstances so fortuitous and capricious. . . ."[30] *Delgadillo* is significant because the Court rejected a doctrinal application of the re-entry doctrine which had forced the federal courts to blindly overlook the circumstances of an individual alien's departure or return.

Shortly thereafter, in *Kwong Hai Chew v. Colding*,[31] the Court extended the fifth amendment right to notice and a hearing to returning LPRs assimilated to continuously present status, regardless of whether the alien had effected statutory entry. Chew, an alien with approximately five years of lawful permanent residence, made a four month journey as a seaman on an American merchant vessel.[32] Upon his attempted return, the INS deemed his entry "prejudicial to the public interest" and temporarily excluded him.[33] The Attorney General then sought to permanently exclude Chew, while denying him access to information regarding his case.[34] The circumstances of Chew's absence,[35] and the fact that his service on an American vessel did not interrupt continuous residency for naturalization purposes,[36] persuaded the Court to assimilate him to the status of a continuously present LPR for constitutional purposes.[37] As a result, the due process clause of the fifth amendment barred the government from excluding Chew without first providing him notice and an opportunity to be heard.[38] Although such procedural rights were already constitutionally guaranteed to a continuously present LPR, the *Chew* court took the guarantee one step further by extending the procedural protections to returning LPRs.[39]

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29. *Id.* at 390.

30. *Id.* at 391. The Court noted that "the exigencies of war, not his voluntary act, put him on foreign soil[,]" and that "[h]e had no part in selecting the foreign port as his destination. His itinerary was forced on him by wholly fortuitous circumstances." *Id.* at 390-91.

31. 344 U.S. 590 (1953).

32. *Id.* at 592-95.

33. *Id.* at 595.

34. *Id.*

35. Chew was a steward on an American-flagged vessel whose home port was New York City. He sailed with the vessel on a voyage that included stops in the Far East, but he remained on board. *Id.* at 594.

36. *Chew*, 344 U.S. at 600-01.

37. *Id.* at 600.

38. *Id.* at 603. The Court noted that Chew's "status as a person within the meaning and protection of the Fifth Amendment cannot be capriciously taken from him." *Id.* at 601.

39. *Id.* at 600.

However, in *Shaughnessy v. United States ex rel. Mezei*,[40] the Court upheld the summary exclusion of an alien who lawfully resided in the United States for twenty-five years, and then sought re-entry after a nineteen month trip abroad.[41] The Court distinguished *Chew* by characterizing Mezei's "protracted absence" as a "clear break in . . . continuous residence . . . ."[42] The lengthy period that Mezei spent out of the country persuaded the Court to assimilate him to the status of an initial entrant with no procedural due process rights.[43] The fact that Mezei was excluded solely on the basis of undisclosed, confidential information carried little weight with the Court.[44] Congress was therefore the sole judge of what process was due.[45]

In *Rosenberg v. Fleuti*,[46] the Court focused on the returning LPR's statutory entry, rather than the process constitutionally due upon his return. Fleuti had been an LPR for approximately four years when he visited Mexico in 1956 for "a couple hours."[47] Almost three years after his return into the country, he was ordered deported, on the ground that he was excludable at the time of his 1956 entry as a person afflicted with a "psychopathic personality."[48] The Court, however, reasoned that

> [c]ertainly when an alien like Fleuti who has entered the country lawfully and has acquired a residence here steps across a border and, in effect, steps right back, subjecting him to exclusion for a condition for which he could not have been deported had he remained in the country seems to be placing him at the mercy of the

40. 345 U.S. 206 (1953).

41. *Id.* at 214-15. Mezei departed to visit his ailing mother in Romania, attempted to re-enter at Ellis Island nineteen months later, and was excluded on the basis of confidential information "the disclosure of which may [have been] prejudicial to the public interest." *Id.* at 200.

42. *Id.* at 214. Mezei departed without authorization or re-entry papers. *Id.* However, Chew had a seniority clearance, departed for only four months aboard an American ship, and had re-entry papers. *Chew*, 344 U.S. 592-94, 601. Additionally, Chew's maritime service counted towards his continuous residence for naturalization purposes. *Id.*

43. *Ex rel. Mezei*, 345 U.S. at 214. The Court reaffirmed the late nineteenth century view that "the legal incidents of an alien's entry remain unaltered whether he has been here once before or not. He is an entering alien just the same, and may be excluded if unqualified for admission under existing immigration laws." *Id.* at 213 (citing Lem Moon Sing v. United States, 158 U.S. 538, 547-48 (1895)).

44. *Id.* at 212 (quoting United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 544 (1950)).

45. *Id.*

46. 374 U.S. 449 (1963).

47. *Id.* at 450.

48. *Id.* at 451 (Fleuti's alleged "psychopathic personality" was his homosexuality.); *see* INA § 212(a)(4), 8 U.S.C. § 1182(a)(4) ("[a]liens afflicted with psychopathic personality, [or] sexual deviation . . ." shall be excluded).

> "sport of chance" and . . . "meaningless and irrational hazards. . . ."[49]

The Court noted that Congress had enacted an intent exception to the statutory entry laws[50] to ameliorate the severe results of the early re-entry doctrine.[51] The Court refused to believe that Congress desired to exclude LPRs returning from short trips abroad, such as Fleuti's excursion. Accordingly, the Court construed the intent exception to mean "an intent to depart in a manner which can be regarded as meaningfully interruptive of the aliens's permanent residence."[52] To determine the LPR's intent, the *Fleuti* Court directed the government to scrutinize the length of the alien's absence,[53] the purpose of the visit,[54] and the travel preparations.[55] The Court concluded that "an innocent, casual and brief excursion by a resident alien outside this country's borders may not have been 'intended' as a departure disruptive of his . . . status and therefore may not subject him to the consequences of an 'entry' into the country on his return."[56]

The *Fleuti* decision implied that an LPR who "intentionally" interrupts his permanent residence with a trip abroad can be excluded without due process upon his or her attempted re-entry.[57] A return after an unintended interruption, on the other hand, would not be

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49. *Fleuti*, 374 U.S. at 460 (quoting DiPasquale v. Karnuth, 158 F.2d 878, 879 (2d Cir. 1947)).

50. See INA § 101(a)(13), 8 U.S.C. § 1101(a)(13), which provides that an LPR returning to this country does not make an entry if "his departure to a foreign port or place or to an outlying possession was not intended or reasonably to be expected by him or his presence in a foreign port or place or in an outlying possession was not voluntary . . . ."

51. 374 U.S. at 461-62.

52. *Id.* at 462.

53. *Id.*

54. *Id.* "If the purpose of leaving the country is to accomplish some object which is itself contrary to some policy reflected in our immigration laws, it would appear that the interruption of residence thereby occurring would properly be regarded as meaningful." *Id.*

55. *Id.* "The need to obtain [travel documents] might well cause the alien to consider more fully the implications involved in his leaving the country." *Id.*

56. 374 U.S. at 462. The Court opened the door to wide judicial discretion in weighing these and other "relevant factors" that might be developed "by the gradual process of judicial inclusion and exclusion." *Id.* (quoting Davidson v. New Orleans, 96 U.S. 97 (1877)). For a discussion of how the courts have applied the *Fleuti* factors, see Comment, *Ensuring Due Process in Alien Exclusion Proceedings After Landon v. Plasencia*, 34 HASTINGS L.J. 911, 919 n.63 (1983).

57. After a long absence, the alien "may lose his entitlement to 'assimilat[ion of his] status' to that of an alien continuously residing and physically present in the United States." Landon v. Plasencia, 459 U.S. 21, 33 (1982) (citing Kwong Hai Chew v. Colding, 344 U.S. 590, 596 (1953)).

considered a re-entry, and the government could only expel the LPR by observing the procedural due process protections afforded in deportation hearings. Thus, *Fleuti* left two important issues unresolved: first, what procedural protections are due, if any, for an LPR in an exclusion proceeding; and second, whether the initial re-entry question should be resolved in an exclusion or deportation proceeding.

In *Landon v. Plasencia*,[58] the Supreme Court addressed both unresolved issues, but only settled the first issue regarding exclusionary proceedings. In *Plasencia*, a five-year LPR made a two day trip into Mexico. Upon her attempted return, she was detained by the INS at the border on suspicion of smuggling aliens into the United States.[59] The following day, the INS notified Plasencia that it would hold an exclusion hearing at 11:00 a.m. that same morning.[60] At this hearing, the immigration judge found Plasencia to have made a "meaningful" departure from the United States, and thus characterized her return to the United States as a re-entry which allowed her to be excluded without due process.[61] Plasencia, however, challenged her resulting exclusion under the fifth amendment.

On appeal, the Court agreed that the question of a returning LPR's statutory re-entry may be determined in an exclusion, rather than a deportation, hearing.[62] However, regarding the due process issue, the Court noted that *Chew* required the government to observe procedural due process when excluding an LPR returning from a brief trip abroad.[63] Therefore, given the fact that Plasencia's trip was sufficiently brief[64] and that she had a significant liberty interest in readmission to the country,[65] the Court held that she was protected by

58. 459 U.S. 21 (1982).

59. *Id.* at 23. An INS officer discovered six nonresident aliens in Plasencia's car. *Id.*

60. *Id.* at 23-24.

61. *Id.* at 24. Consequently, she was ordered excluded and deported. *Id.* at 25.

62. *Id.* at 28. The Court noted that "[n]othing . . . suggests that [Plasencia's] status as a permanent resident entitles her to a suspension of the exclusion hearing or requires the INS to proceed only through a deportation hearing." *Id.*

63. 459 U.S. at 31. Although *Chew* focused its analysis on regulatory interpretation, the *Plasencia* Court explicitly recognized that *Chew's* "rationale was one of constitutional law." *Id.* at 33.

64. The Court explicitly refused to decide what length of time would be sufficient to assimilate an LPR to the status of an initial entrant, since the government conceded that Plasencia's departure was sufficiently brief to entitle her to due process. *Id.* at 34.

65. Plasencia's "weighty" liberty interests included her right to live and work in the United States, and to rejoin her immediate family, the latter being "a right that ranks high among the interests of the individual." *Id.*

the due process clause of the fifth amendment.[66]

Plasencia thus allows the government to determine the entry question in an exclusion hearing. More significantly, however, the Court now requires that this exclusion hearing conform to procedural due process regardless of whether the LPR effected a statutory reentry.

C. *Statutory Framework*

Although *Plasencia* requires an exclusion proceeding involving an LPR who returns after a brief trip abroad to conform to procedural due process, current statutes allow the government, in certain limited circumstances, to exclude an LPR with practically no procedural due process. Which exclusion procedures apply depend upon the reasons for the LPR's exclusion, and whether confidential information supports excludability.

If an alien's entry into the United States jeopardizes the country's national security interests, federal statutes give the government broad powers. Section 212(a)(27) of the Immigration and Nationality Act ("INA")[67] bars entry to those aliens whose activities may be prejudicial to the United States.[68] Additionally, section 212(a)(28) purports to filter out those aliens whose ideology includes advocating the use of violence against the United States government.[69]

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66. *Id.* at 32. Since the parties had focused on the entitlement to a deportation, rather than an exclusion hearing, the briefs and arguments insufficiently developed the issue of the precise procedures due. The Court remanded the case for a determination of what process Plasencia was due, with instructions to balance the competing interests at issue. *Id.* at 37.

67. Rafeedie v. INS, 688 F. Supp. at 733-34. The INA is also known as the McCarran-Walter Act, Pub. L. No. 414, 66 Stat. 163 (1952) (codified at 8 U.S.C. §§ 1101-1557 (1988)).

68. An alien may be ordered excluded if a consular official or the Attorney General either "knows or has reason to believe [that the alien] seek[s] 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 . . . ." INA § 212(a)(21), 8 U.S.C. § 1182(a)(27).

69. Aliens may be excluded

> who advocate or teach or who are members of or affiliated with any organization that advocates or teaches . . . (ii) the duty, necessity, or propriety of the unlawful assaulting or killing of any officer or officers . . . of the Government of the United States or of any other organized government, because of his or their official character; or (iii) the unlawful damage, injury, or destruction of property; or (iv) sabotage.

INA § 212(a)(28)(F), 8 U.S.C. § 1182(a)(28)(F).

One district court recently found section 1251(a)(6) of Title 8 of the United States Code, a deportation statute with provisions identical to INA sections 212(a)(28)(F)(ii) and (iii), to be unconstitutionally vague and overbroad. *See* American-Arab Anti-Discrimination Comm. v. Meese, 714 F. Supp. 1060 (C.D. Cal. 1989), *argument heard on appeal*, No. 89-55358 (9th Cir. Aug. 10, 1990). Rafeedie has raised similar issues on remand. *See* Plaintiff's Memorandum in

Once the INS[70] concludes that section 212(a)(27), or 212(a)(28) applies, it will temporarily exclude the alien and forward the case, without further inquiry, to the Attorney General.[71] At this point, the alien receives notice only of the action taken and his right to make written representations.[72] If satisfied that the alien is excludable under section 212(a)(27), 212(a)(28), or 212(a)(29), the responsible INS regional commissioner must then decide how to conduct any further exclusion proceedings.[73]

As a threshold matter, the commissioner, exercising his discretion, must ascertain whether the basis of the alien's excludability implicates confidential information, "the disclosure of which would be prejudicial to the public interest, safety, or security. . . ."[74] The commissioner's findings will determine which of two distinct exclusion alternatives will be selected. If the commissioner concludes confidential information, if disclosed, will not prejudice the "public interest, safety, or security," he may either direct an immigration officer to further examine the alien as to his admissibility, or order the alien to undergo plenary exclusion hearings pursuant to section 236 of the INA.[75] If the commissioner decides he must protect against prejudicial disclosure of confidential information, he may conduct summary exclusion proceedings pursuant to section 235(c).[76]

Plenary exclusion hearings provide a number of procedural safeguards.[77] An immigration judge, rather than the regional commis-

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Support of Renewed Motion for Partial Summary Judgment, at 32-43, Rafeedie v. INS, No. 88-0366-JHG (D.D.C. 1990). This Note does not address these issues, but simply focuses on the summary procedures used to implement the substantive exclusion laws.

70. Normally, the INS examining officer at the port of entry makes this initial determination. In Rafeedie's case, however, other INS officials made the decision well after Rafeedie had been paroled into the country. Rafeedie v. INS, 688 F. Supp. at 733-34.

71. INA § 235(c), 8 U.S.C. § 1225(c). Section 212(a)(29) allows the government to exclude aliens whose suspected activities *after* entry would include espionage, sabotage, or overthrow of the government. INA § 212 (a)(29), 8 U.S.C. 1182(a)(29). This section also supports an alien's temporary exclusion. INA § 235(c), 8 U.S.C. § 1225(c). In addition, the Attorney General authorizes cases involving temporary exclusions to be forwarded directly to the INS regional commissioners for review. 8 C.F.R. § 235.8(a) (1989).

72. 8 C.F.R. § 235.8(a) (1989); *see also* INA § 235(c), 8 U.S.C. § 1225(c).

73. 8 C.F.R. § 235.8(b) (1989).

74. *Id.* at § 235.8(b)-235.8(d).

75. *See id.* at § 235.8(b).

76. *Id.*

77. Plenary hearings may be terminated at any time. For example, "if confidential information, not previously considered in the matter is adduced supporting the exclusion of the alien under paragraph (27), (28), or (29) of section 212(a) of the [INA]," and the immigration judge, in the exercise of his discretion, decides the disclosure of the confidential information "may be prejudicial to the public interest, safety, or security, . . . " the judge can "temporarily

sioner, conducts the hearings. Unlike the regional commissioner, the immigration judge remains independent of the prosecutorial and investigative functions of the INS[78] and can be expected to render a more independent and detached evaluation of the alien's excludability.[79] The alien must explicitly be informed: (1) of his or her ability to have the hearing open to the public; (2) of the nature and purpose of the hearing; (3) of the right to counsel; and (4) "that he will have a reasonable opportunity to present evidence in his own behalf, to examine and object to evidence against him, and to cross-examine witnesses presented by the government. . . ."[80] The immigration judge must provide the basis for his decision in writing,[81] and ensure that a complete record of the proceedings is maintained.[82] Finally, the alien has the right to appeal the decision to the Board of Immigration Appeals.[83]

Summary exclusion proceedings, intended to protect against prejudicial disclosure of confidential information, provide the alien with no such procedural protections. If confidential information provides the basis for excludability, the INS regional commissioner has the authority to "deny any hearing or further hearing by a special inquiry officer and order [the] alien excluded and deported. . . . "[84] The alien will merely receive an order "showing only the ultimate disposition of the case . . . signed by the regional commissioner. . . ."[85] The decision of the regional commissioner is final. The regulations provide no avenue of appeal.[86]

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exclude" the alien, and summary exclusion proceedings would then re-commence. 8 C.F.R. § 235.8(d) (1989).

78. Immigration judges or special inquiry officers conduct exclusion and deportation hearings assigned by the Attorney General. These judges, along with the Board of Immigration Appeals, are supervised by the Executive Office for Immigration Review, an entity completely separate from the investigative and enforcement functions delegated to the INS. However, they remain subject to the authority of the Attorney General. *See* 8 C.F.R. §§ 1.1, 2.1, 3.0, 3.1, 3.3, 3.9-3.10 (1989).

79. *But see infra* text accompanying notes 288-316.

80. 8 C.F.R. § 236.2(a) (1989).

81. *Id.* at § 236.5(a) - 236.5(b).

82. *Id.* at § 236.2(e).

83. *Id.* at § 236.7.

84. *Id.* at § 235.8(b). In Rafeedie's case, the court of appeals noted that "there is no practical possibility that the Regional Commissioner will take a legal position inconsistent with that adopted by the 'chief legal officer' of the INS." *Rafeedie*, 880 F.2d at 516.

85. 8 C.F.R. § 235.8(c) (1989).

86. *Id.* Only habeas corpus relief is available. INA § 105(a), 8 U.S.C. § 1105(a).

III. FACTUAL BACKGROUND

Fouad Rafeedie was a Jordanian national who had been an LPR in the United States since 1975.[87] His wife and child were United States citizens, and his mother and thirty-four other relatives resided in the United States.[88] He received a post-graduate education and had been employed during his residence in this country.[89] A political activist since his arrival in the United States, Rafeedie outspokenly criticized the United States government's policies toward Palestinians in the Middle East.[90]

On April 7, 1986, the INS granted Rafeedie a re-entry permit allowing him to travel abroad, ostensibly to visit his mother in Cyprus during her major heart surgery.[91] In reality, Rafeedie traveled to Syria after first obtaining a visa at the Syrian embassy.[92] Rafeedie then allegedly attended the First Conference of the Palestine Youth Organization, a group the United States government claimed was affiliated with terrorist organizations.[93] Less than a month after his departure, Rafeedie returned to New York, where he was questioned by the INS,[94] and paroled[95] for a deferred inspection, which was con-

87. *Rafeedie*, 880 F.2d at 508.

88. *Id.*

89. *Id.* Upon submission of a thesis, Rafeedie is eligible to receive a Master of Science degree in clinical chemistry from Youngstown State University. At the time of his trial, he was an assistant manager at a Cleveland, Ohio grocery store. Rafeedie v. INS, 688 F. Supp. at 732.

90. Rafeedie v. INS, 688 F. Supp. at 732. The district court noted that Rafeedie wrote "numerous articles and appeared on television and radio programs . . . and . . . belong[ed] to a number of Arab and Palestinian political and cultural organizations in this country." *Id.*

91. *Id.* The INS alleged that she never had the surgery but remained in her Ohio residence. *Id.*

92. *Id.* The visa had been stamped into his re-entry permit. *Id.*

93. *Rafeedie*, 880 F.2d at 509. The INS claimed that the Palestine Youth Organization "is affiliated with the Popular Front for the Liberation of Palestine (PFLP), and that the PFLP is a terrorist organization and a 'constituent group' of the Palestine Liberation Organization (PLO)." *Id.*

94. "Every alien . . . 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. . . ." INA § 235(b), 8 U.S.C. § 1225(b).

95. To parole an alien into the country is to allow him physical, but not legal, entry. The Attorney General may temporarily parole aliens into the United States "under conditions as he may proscribe for emergent reasons or reasons deemed strictly in the public interest . . . ." INA § 212(d)(5), 8 U.S.C. § 1182(d)(5). But, parole "shall not be regarded as an admission of the alien." *Id.* One commentator explains that "an alien is allowed to travel away from the border . . . yet remain subject to exclusion proceedings, rather than the more . . . protective deportation proceedings . . . technically, a parolee has made no entry." *See* T. ALEINIKOFF & D. MARTIN, IMMIGRATION: PROCESS AND POLICY 232 (1985).

ducted on May 15, 1986.[96] In May of the following year, the INS charged Rafeedie as "excludable"[97] under INA sections 212(a)(27) and (a)(28)(F).

Rafeedie's case was initially assigned for plenary hearings to an immigration judge[98] who ordered the INS to give Rafeedie specific notice of the charges against him and to reveal whether he was the subject of electronic surveillance.[99] But on December 31, 1987, one business day before the deadline for compliance with the judge's order, the INS temporarily excluded Rafeedie pursuant to section 235(c).[100]

At this eleventh hour, the INS asserted that it had acquired new confidential information which purportedly required Rafeedie's exclusion.[101] Although Rafeedie himself received no indication as to the content of the confidential information,[102] during later proceedings in district court, the INS alleged that the information revealed Rafeedie to be a "high ranking member of the PFLP [Popular Front for the Liberation of Palestine] in the United States."[103] The confidential information allegedly portrayed Rafeedie as an active fundraiser and recruiter for the organization, who sustained combat wounds in 1982

96. Rafeedie v. INS, 688 F. Supp. at 733. During this inspection, Rafeedie claimed he did not travel to Cyprus because his sister had telephoned, saying his mother's surgery had been cancelled. *Id.* Rafeedie did not respond to subsequent INS requests to verify this information. *Id.*

97. *See supra* note 18 and accompanying text. Since the INS merely paroled Rafeedie into the country, he was not entitled to a deportation hearing, but was instead subject to exclusion proceedings, despite his physical presence within the country. *See* Landon v. Plasencia, 459 U.S. 21, 28 (1982). "[W]hether or not the alien is a permanent resident, admissibility shall be determined in an exclusion hearing." *Id.*

98. *Rafeedie*, 880 F.2d at 509.

99. Rafeedie v. INS, 688 F. Supp. at 734.

100. *Id.* If the examining official at the port of entry concludes an alien is excludable pursuant to INA § 212(a)(27), (28), or (29), the alien will be "temporarily excluded," and the case reported to the INS district director. 8 C.F.R. § 235.8(a) (1989). The INS regional commissioner has the authority to conduct further exclusion proceedings. *Id.* § 235.8(b).

101. Rafeedie v. INS, 688 F. Supp. at 734.

102. Rafeedie received Form I-147 from the INS, which asserted that "[t]he confidential information establishe[d] that [his] admission into the United States would be prejudicial to the public interest, safety, or security. Disclosure of the confidential information would be prejudicial to the public interest, safety or security." *Id.* The INS set forth further factual allegations not involving confidential information. In part, the INS alleged that Rafeedie traveled with Tarak Mustafa (a United States citizen) and Sulieman Shihadeh (an LPR), both allegedly PFLP members who knew Rafeedie prior to the trip; that all three attended the Palestine Youth Organization ("PYO") conference; and that photographic and written evidence linking Rafeedie to the PFLP was confiscated upon their return. *Id.* at 732-34.

103. *Id.* at 734. The INS alleged that the PYO is affiliated with the PFLP. *Id.* at 731.

while fighting for the PFLP in Lebanon.[104]

Since the INS commenced summary proceedings against Rafeedie pursuant to section 235(c), on January 5, 1989 the immigration judge granted an INS motion to close the plenary exclusion hearings.[105] Rafeedie's loss of the ability to confront the evidence against him in a hearing reduced his procedural protections to the almost meaningless right to submit written statements on his own behalf.[106] Arguing that such governmental action violated his procedural and substantive rights under the due process clause of the fifth amendment, Rafeedie challenged his summary exclusion in the District Court for the District of Columbia.[107]

IV. THE DISTRICT COURT OPINION

Rafeedie contested his summary exclusion on a number of grounds. First, he sought to temporarily enjoin the INS from summarily excluding him.[108] He also brought a motion for summary judgment, primarily contending that summary exclusion violated his rights to procedural due process under the fifth amendment.[109] He also argued that the government's reasons for excluding him violated both section 901(a) of the Foreign Relations Authorization Act,[110] and his substantive due process rights under the first amendment.[111]

The court's analysis of Rafeedie's procedural due process claims focused on the circumstances of his departure from the United States. The court noted that *Chew*[112] stood "for the proposition that *'under some circumstances* temporary absence from our shores cannot constitutionally deprive a returning lawfully resident alien of his right to be

104. Rafeedie v. INS, 688 F. Supp. at 734.

105. *Id.* at 735.

106. *Id.* at 735-36.

107. *See Rafeedie*, 880 F.2d at 509.

108. *See* Rafeedie v. INS, 688 F. Supp. at 741-42.

109. *Id.* at 743-51.

110. Pub. L. No. 100-204, § 901, 101 Stat. 1331, 1399 (1987).

111. Rafeedie v. INS, 688 F. Supp. at 751-54. Additionally, the court rejected Rafeedie's contention that summary exclusion proceedings under section 235(c) did not apply to LPRs as a matter of statutory construction. Using a "plain meaning" approach, the court pointed out that section 235(c) applied to *any* alien, with no express or implied exceptions. *Id.* at 743. A decision interpreting the statute otherwise, the court noted, "would create interpretational problems in other sections of the [INA] where the term 'alien' is used without qualification." *Id.* Further, the court noted that where Congress intended to exempt LPRs from the INA, "it did so explicitly." *Id.*; *see, e.g.*, INA § 212(c), 8 U.S.C. § 1182(c).

112. 344 U.S. 590 (1953).

heard.' "[113] Similarly, the court relied on *Mezei*[114] for its view that "the circumstances of departure are critical to the determination of an alien's due process rights."[115]

By centering its analysis on the circumstances of the LPR's trip abroad, the court determined that *Fleuti*[116] was controlling on the procedural due process issue. It therefore, held that the *Fleuti* test,[117] used to determine whether an alien completed a statutory entry, would also resolve in exclusion hearings whether a returning LPR forfeited or retained the right to procedural due process.[118] Under this reasoning, if Rafeedie made a "meaningful" departure, he would not be entitled to due process upon his return.[119]

Since the court considered *Fleuti* controlling on the procedural due process issue, it was forced to consider the INS's allegations regarding Rafeedie's trip as "genuinely disputed issues of material fact" which played a "pivotal role in the constitutional analysis."[120] The court therefore denied Rafeedie's motion for summary judgment on his procedural due process claim.[121] However, because Rafeedie successfully persuaded the court that he had a substantial likelihood of success on the merits of his claim, and that the proceedings would cause him irreparable injury,[122] the court issued a preliminary injunc-

113. Rafeedie v. INS, 688 F. Supp. at 746 (quoting Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 213 (1953)).

114. 345 U.S. 206 (1953).

115. Rafeedie v. INS, 688 F. Supp. at 746.

116. 374 U.S. 449 (1963).

117. The test requires a court to determine whether the alien's trip abroad was "innocent, brief and casual." Rafeedie v. INS, 688 F. Supp. at 748-49; *see supra* text accompanying notes 52-56.

118. Rafeedie v. INS, 688 F. Supp. at 749. The court minimized the importance of *Plasencia* by noting that, although under the circumstances of that case, Plasencia had a right to due process, the Court did not decide "the contours of the process that is due. . . ." Rafeedie v. INS, 688 F. Supp. at 747. The court suggested that *Plasencia* was less important for its due process analysis than for its express reaffirmance of *Fleuti* since the former "elaborate[d] on what constitutes an interruption of permanent residence status for the purposes of statutory definition of 'entry.' " *Id.*

119. *See id.* at 749.

120. Rafeedie v. INS, 688 F. Supp. at 749.

121. *Id.* While Rafeedie denied "that he has ever been a member of the PLO, the PFLP, or a terrorist organization[,]" the INS alleged that he "intentionally lied . . . about the purpose of his trip[,] . . . traveled to Syria for two weeks to attend the conference of the Palestinian Youth Organization[,] . . . and then again lied to immigration officers about his trip upon his reentry into the United States." *Id.* Further factual examination of his departure from the United States was necessary in order to determine his right to due process. *Id.*

122. *Id.* at 754. Without such relief, Rafeedie would be subject to immediate detention and loss of employment, interests that are especially weighty in view of his family ties. *Id.*

tion against his exclusion.

The court agreed that Rafeedie raised serious procedural due process issues, assuming he was to attain the same legal status as a continuously present LPR.[123] It noted that a section 235(c) summary exclusion proceeding may "virtually assure[ ] that the Government attorney would present his case without factual or legal opposition."[124] The one opportunity Rafeedie had to present written information on his own behalf provided no confrontational value, and was of dubious utility, because he could not gain access to the government's classified information.[125] Somewhat ominously, the court stated that "[w]ithout any opportunity for confrontation, there appears to be no check on the quality of the confidential information upon which the INS relies. . . ."[126]

The court then considered Rafeedie's argument that sections 212(a)(27) and 212(a)(28)(F) of the INA violated section 901 of the Foreign Relations Authorization Act ("Act").[127] Section 901 protects all aliens from governmental reprisal for activities which would receive protection under the Constitution "if engaged in by a United States citizen."[128] The INS, however, argued that two exceptions in section 901 prevented Rafeedie from invoking its protection.[129] First, section 901 does not apply to any alien "who is a member, officer, representative, or spokesman of the Palestine Liberation Organiza-

123. *Id.* at 749.

124. *Id.* at 750 (quoting Landon v. Plasencia, 459 U.S. 21, 41 (1982) (Marshall, J., dissenting)).

125. Rafeedie v. INS, 688 F. Supp. at 749. The only information accessible to Rafeedie simply would be "the specific statutory provisions the INS contends [he] has violated." *Id.* at 750.

126. *Id.* at 750. However, the court pointed out that even in an ordinary section 236 plenary exclusion, "Rafeedie could be excluded on the basis of information he neither sees nor confronts." *Id.* at 751. Although Rafeedie might still have the benefit of an immigration judge to scrutinize the confidential information, any national security concerns would weigh against releasing the information. *See* Department of the Navy v. Egan, 484 U.S. 518, 529 (1988); Suci v. INS, 755 F.2d 127, 129 (8th Cir. 1985). For a discussion of this issue, see *infra* text accompanying notes 220-25.

127. Pub. L. No. 100-204, § 901, 101 Stat. 1331, 1399 (1987).

128. Section 901(a) provides:

> Notwithstanding any other provision of law, no alien may be denied a visa or excluded from admission into the United States, subject to restriction or conditions on entry into the United States, or subject to deportation because of any past, current, or expected beliefs, statements, or associations which, if engaged in by a United States citizen in the United States, would be protected under the Constitution of the United States.

101 Stat. at 1399-1400.

129. Rafeedie v. INS, 688 F. Supp. at 751.

tion."[130] Second, section 901 does not protect aliens who have, or are likely to, engage in terrorist activity.[131]

The court held that the first exception did not apply, since the "Palestine Liberation Organization" did not encompass the PFLP.[132] Next, the court noted that "mere association with an organization that advocates violence or terrorism, without proof that the individual's association poses the threat feared by the Government, is an impermissible basis upon which to deny First Amendment rights."[133] Rafeedie, however, "may have crossed the first amendment line drawn in Section 901 between passive membership or advocacy to active furtherance of the aims and goals of a terrorist organization."[134] The legislative history of the Act indicated that Rafeedie's activity would not be protected if he engaged in fundraising and recruiting activities for the PFLP.[135] The court, therefore, denied Rafeedie summary judgment on this issue, since his participation in these activities was a contested issue of fact.[136]

The court also rejected Rafeedie's argument that summary exclusion chilled his first amendment right to speak out on Palestinian is-

130. *Id.* Section 901 does not apply to any action described in section 21(e) of the State Department Basic Securities Act of 1956. 22 U.S.C § 2691(c) (1988).

131. Pub. L. No. 100-204, § 901, 101 Stat. at 1400. Such aliens include those "who[m] a consular official or the Attorney General knows or has reasonable ground to believe has engaged, in an individual capacity or as a member of an organization, in a terrorist activity or is likely to engage in a terrorist activity. . . ." *Id.* Terrorist activity is "the organizing, abetting, or participating in a wanton or indiscriminate act of violence with extreme indifference to the risk of causing death or serious bodily injury harm to individuals not taking part in armed hostilities." *Id.* § 901(b)(3), 101 Stat. at 1400. The INS contended that Rafeedie's alleged fundraising and recruiting constituted "abetting" of terrorist activities. Rafeedie v. INS, 688 F. Supp. at 753.

132. Rafeedie v. INS, 688 F. Supp. at 752-53.

133. *Id.* at 752 (quoting Healy v. James, 408 U.S. 169, 186 (1972)).

134. *Id.*

135. *Id.* Congress considered that "organizing, abetting, or participating in terrorist acts or activities would include not only actually pulling a trigger or planting a bomb, but providing support or assistance, such as but not limited to: planning, providing facilities, *recruiting*, financing or *fundraising*. . . ." *Id.* at 753. Rafeedie countered by arguing that to trigger the terrorist exception, "the purpose of the fundraising and recruiting must be to facilitate terrorist *activities*, not just generally to further the purposes of a terrorist *organization*." *Id.*

136. *Id.* at 753-54. The court implicitly agreed with Rafeedie's interpretation of the statute. *Id.* at 753. "[I]t is impossible to determine whether [Rafeedie's] alleged activities did in fact directly aid the PFLP in carrying out terrorist activities or whether they were clearly for nonterrorist purposes." *Id.* Rafeedie's interpretation finds additional support in Supreme Court precedent. *See, e.g.*, Bridges v. Wixon, 326 U.S. 135, 146 (1945) ("[C]lose cooperation is not sufficient to establish 'affiliation' . . . . It must evidence a working alliance to bring the proscribed program to fruition."). For Rafeedie's interpretation, see *supra* note 135.

sues.[137] The court noted that "the decision to place [Rafeedie] in Section 235(c) proceedings was based on the confidential information allegedly showing his membership in the PFLP and *not* on the speech and associational activities . . . in his affidavit."[138] Thus, the court found that Rafeedie had not properly alleged that the INS directly chilled his first amendment speech by charging him with PFLP-related activities.[139]

V. THE COURT OF APPEALS DECISION

Both the INS and Rafeedie disputed portions of the district court's ruling. The INS appealed the ruling insofar as the order prohibited it from conducting any kind of exclusion proceedings against Rafeedie.[140] Rafeedie sought to reverse the order denying his motion for partial summary judgment based on his substantive challenges to summary exclusion.[141]

The District of Columbia Circuit affirmed the preliminary injunction, but only to the extent that the order barred the INS from applying the summary exclusion procedure to Rafeedie.[142] The court also determined that Rafeedie's short trip abroad did not deprive him of his right to procedural due process in an exclusion proceeding, and he therefore was entitled to summary judgment on this issue.[143] However, since the district court did not determine exactly what process

137. Rafeedie v. INS, 688 F. Supp. at 740. The court noted that Rafeedie "failed to show . . . how the summary procedure chill[ed] his first amendment rights any more than would a Section 236 procedure before an immigration judge. . . ." *Id.* Rafeedie raised this argument in his motion for a preliminary injunction, arguing that such a chilling effect would cause him irreparable harm. *Id.*

138. *Id.*

139. *Id.*

140. *Rafeedie*, 880 F.2d at 507. The INS also argued that the district court lacked subject matter jurisdiction. *Id.* at 510. The INS first asserted that Rafeedie could only obtain judicial review via habeas corpus under section 106 of the INA (8 U.S.C. § 1105a(b)). *Id.* The court of appeals disagreed, finding that section 106 did not apply to LPRs as a matter of law. *Id.* at 510-13. Second, the INS argued that "[a]n order of deportation or of exclusion shall not be reviewed by any court if the alien has not exhausted the administrative remedies available to him as of right under the immigration laws and regulations . . . ." *See* INA § 106(c), 8 U.S.C. § 1105a(c). Having concluded that section 106 did not apply to an LPR, the court determined that strict adherence to the exhaustion doctrine would irreparably harm Rafeedie and would not serve the doctrine's general purposes. *Id.* at 513-18. These issues figured prominently in the concurring and dissenting opinions. *See id.* at 525-42. For the discussion of these issues in the district court, see Rafeedie v. INS, 688 F. Supp. at 736-41. This Note does not address these jurisdictional issues.

141. *Rafeedie*, 880 F.2d at 509.

142. *Id.* at 519.

143. *Id.* at 519-24.

Rafeedie was due, the court of appeals could not rule as to whether he had been denied due process.[144] The court, therefore, remanded this to the district court for a determination of this issue.[145]

In affirming the preliminary injunction, the court addressed the INS's contention that Rafeedie failed to show he would suffer irreparable harm.[146] Disagreeing with the district court, Judge Ginsberg recognized that the pendency of the section 235(c) summary exclusion proceeding would chill Rafeedie's substantive right to free speech,[147] thus causing him irreparable injury.

> Because [Rafeedie] is subject to a secret proceeding in which neither the substance underlying the charges against him nor the reason for any final order of exclusion need ever be disclosed, he is understandably concerned that he may be excluded not for terrorist or other illegitimate activities, but for his legitimate activities as an outspoken critic of the Government's foreign policy.[148]

Turning to Rafeedie's procedural due process challenge,[149] the court noted that "an initial entrant has no liberty (or other) interest in entering the United States, and thus has no constitutional right to *any* process in that context. . . ."[150] On the other hand, LPRs commonly possess numerous and close ties to this country. In Rafeedie's case,

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144. *Id.* at 524.

145. *Id.* at 524-25.

146. *Rafeedie*, 880 F.2d at 519.

147. The court rejected Rafeedie's "broad claim that the institution of any deportation or exclusion proceedings based on [sections] 212(a)(27) or (28)(F) would have a chilling effect on his expressive activities . . . ." *Id.* at 517. However, the court found the procedure of summary exclusion to have "substantial incremental chilling effects" greatly exceeding any similar effects arising from a plenary exclusion hearing. *Id.* A plenary hearing affords the alien some protection, leaving only minimal chilling effects upon the alien which are considered tolerable. *Id.* Further, Rafeedie had no basis for concern that an immigration judge in a plenary proceeding would prejudge the case. *See id.*

148. *Id.* The court ignored the district court's point that section 236 plenary exclusion hearings may likewise deny Rafeedie access to confidential information. *See supra* note 126 and accompanying text. Rafeedie also established irreparable injury insofar as the section 235(c) proceeding practically required him to disclose his entire defense, which would prejudice him in later exclusion proceedings. *Id.* If a court later found section 235(c) inapplicable to Rafeedie, the INS would know his defense well in advance of any subsequent section 236 plenary exclusion. *Id.* Further, Rafeedie's certain detention upon the conclusion of any summary proceeding would cause him to lose his liberty and right to work in the United States. *Id.* at 518.

149. On a preliminary note, the court upheld the district court's injunction against the application of section 235(c) to Rafeedie. *Id.* at 519.

150. *Id.* at 520 (interpreting United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537 (1950)).

these included his family, employment and education.[151] Such ties amounted to a protected liberty interest and gave Rafeedie "a stake in the United States substantial enough to command the protection of due process before he may be excluded or deported. . . ."[152]

The only remaining issue before the court was whether Rafeedie had somehow forfeited his right to procedural due process by leaving the country, which would allow the INS to treat him "as if he were an initial entrant for due process purposes."[153] The district court focused on the overall character of Rafeedie's trip abroad by applying the "innocent, brief and casual" criteria of *Fleuti* to the constitutional due process issue.[154] The court of appeals found the district court's reliance on *Fleuti* in this context misplaced. The appellate court stated that all three *Fleuti* factors, taken as a whole, do not determine whether the alien lost his procedural due process rights, but rather, determine whether the alien effected a statutory entry.[155]

Instead, the court of appeals found only one *Fleuti* factor—the length of the LPR's absence away from the United States—to be determinative of the returning LPR's right to procedural due process. In *Chew*, the LPR's four month absence from the United States as a seaman on an American vessel did not interrupt his continuous residence for naturalization purposes.[156] However, in *Mezei*, the LPR's nineteen month trip abroad was sufficiently protracted to curtail his residency status for such purposes.[157] While the circumstances of Chew's absence persuaded the Court to assimilate him to the status of continuously present permanent resident alien, Mezei's extended absence did not.[158] Chew thus retained his procedural due process

151. *Rafeedie*, 880 F.2d at 522. The court noted that Rafeedie's liberty interest in returning to the United States was especially weighty, since he was the sole financial provider for his family. *Id.* at 518. LPRs like Rafeedie are also subject to the draft and service in the armed forces. *Id.* at 522.

152. *Id.*

153. *Id.* at 523.

154. Rafeedie v. INS, 688 F. Supp. at 746. Indeed, the court of appeals initially framed the procedural due process issue as "whether a permanent resident alien forfeits his liberty interest in admission to the United States—and hence his right to due process upon reentry—by leaving the country to engage in 'sufficiently nefarious' activities." *Rafeedie*, 880 F.2d at 520.

155. *Rafeedie*, 880 F.2d at 521-22.

156. 344 U.S. 590, 601-02 (1953).

157. 345 U.S. 206, 214 (1953).

158. *Id.* at 214. The court of appeals somewhat minimized the fact that Mezei had departed "without authorization or reentry papers." *See Rafeedie*, 880 F.2d at 520.

rights upon returning,[159] but Mezei was held to have forfeited his rights.

The court of appeals bolstered its reasoning by citing *Landon v. Plasencia*,[160] in which an LPR attempting to smuggle aliens into the United States sought to return after a trip into Mexico lasting a "few days."[161] In *Plasencia*, the Supreme Court applied the *Fleuti* "innocent, casual and brief" test only to the question of whether Plasencia had made a statutory entry.[162] However, the court of appeals noted that "even if Plasencia had made an 'entry,' she was entitled to due process."[163] Further, "in its due process discussion, the *Plasencia* court did not so much as mention the LPR's purpose in going abroad."[164] Since the character of Plasencia's trip had nothing to do with her right to procedural due process upon returning, the court of appeals in Rafeedie's case held that the *Fleuti* statutory entry analysis did not apply to its constitutional analysis.[165] Otherwise, the court reasoned,

> a resident alien who is "entering" the United States would never be entitled to due process. But such an interpretation would be inconsistent with *Plasencia*. There, the Court found that regardless of whether Plasencia had "entered" the United States, she was entitled to due process in view of the brevity of her trip abroad.[166]

The court of appeals concluded that "[t]he only explanation for *Plasencia* is that the degree of nefariousness of the alien's trip was irrelevant to the due process inquiry; . . . the only relevant question was whether the alien had been gone so long as to lose her permanent resident status."[167] In other words, a *Fleuti* statutory entry analysis would apply only to the extent it examined the length of time the

159. Since the regulatory predecessor of section 235(c) would have denied Chew a hearing, the Court refused to apply summary exclusion "to a permanent resident alien who had made a brief trip outside the United States." *Id.* The *Chew* Court purported to ground its decision in statutory analysis, but as the court of appeals noted, subsequent Supreme Court cases indicated *Chew* was a decision of constitutional magnitude. *Id. See* Landon v. Plasencia, 459 U.S. 21, 33 (1982); Rosenberg v. Fleuti, 374 U.S. 449, 460 (1963); Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 214 (1953).

160. 459 U.S. 21 (1982).

161. *Id.* at 23.

162. *Rafeedie*, 880 F.2d at 520-21.

163. *Id.* at 521.

164. *Id.* at 522.

165. *Id.*

166. *Id.* at 521.

167. *Rafeedie*, 880 F.2d at 522. The court also reasoned that Plasencia's illegal smuggling activities were not "innocent"; therefore, if the Supreme Court had utilized the *Fleuti* factors

LPR had spent outside of the country. Therefore, the court of appeals held that the district court erred by applying the entire *Fleuti* test to the procedural due process issue.[168] According to the court of appeals, Rafeedie should be treated as an initial entrant with no due process rights "[o]nly if he ha[d] been absent from this country for such a period that he may be deemed to have abandoned his permanent resident status here. . . ."[169]

The court of appeals implied that the alien naturalization statutes[170] provided the dispositive constitutional guidepost as to the length of time required for a forfeiture of procedural due process rights.[171] At the time of Rafeedie's temporary exclusion, an LPR absent from the United States for less than six months did not interrupt his or her continuous residence status for naturalization purposes.[172] Rafeedie's trip abroad was well within that time frame. The few weeks he spent away from the country simply amounted to an insignificant period of time in determining whether he forfeited or retained his right to procedural due process.[173] Therefore, he was entitled to summary judgment on the issue as a matter of law.[174]

However, the court of appeals declined to hold that Rafeedie was actually denied procedural due process.[175] The district court, in holding that a genuine issue of material fact existed as to whether Rafeedie had any constitutional entitlement to due process, never reached this issue.[176] Therefore, the court of appeals remanded the case to determine whether the process already given Rafeedie and "the limited protections that section 235(c) requires the INS to give him in the future" were constitutionally sufficient.[177]

Nevertheless, the court of appeals offered some guidance to the district court noting that under *Mathews v. Eldridge*,[178] due process requires the government to give Rafeedie a meaningful opportunity to

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in its due process analysis, certainly the nature of Plasencia's trip would not have been ignored. *Id.*

168. *See id.* at 521-22.
169. *Id.* at 522-23.
170. *See* INA § 316(b), 8 U.S.C. § 1427(b).
171. *Rafeedie*, 880 F.2d at 522.
172. INA § 316(b), 8 U.S.C. § 1427(b).
173. *Rafeedie*, 880 F.2d at 522.
174. *Id.* at 524.
175. *Id.*
176. *Id.*
177. *Id.* at 525.
178. 424 U.S. 319 (1976).

be heard.[179] The court identified the factors from the *Eldridge* opinion for the district court to weigh in deciding whether a section 235(c) summary exclusion had, and would, afford Rafeedie procedural due process.[180]

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[181]

The court of appeals suggested that, as applied to a section 235(c) summary exclusion, the *Eldridge* procedural due process balancing test would encompass the following elements:

> (1) the importance to the permanent resident alien and others like him of not being imprisoned and forced to leave the United States; (2) the risk that such an alien will erroneously suffer such harm under the procedure set forth in section 235(c), together with the likelihood that giving the alien more procedural protections will reduce that risk; and (3) the interests of the Government, on behalf of the public, in summarily excluding terrorists and other undesirables from our shores and in avoiding the cost of additional safeguards for permanent resident aliens subject to section 235(c) exclusion proceedings.[182]

VI. What Process is Due?

With Rafeedie's right to procedural due process clearly established, the remaining issue for analysis is what process will minimally satisfy constitutional standards under the fifth amendment and *Mathews v. Eldridge*.[183]

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179. *Rafeedie*, 880 F.2d at 524 (quoting Mathews v. Eldridge, 424 U.S. 319, 333 (1976)).

180. Since Rafeedie's procedural due process challenge to his summary exclusion came in the midst of the proceedings, the district court would have to consider both the processes already afforded Rafeedie, and whether section 235(c), on its face, provides a constitutionally sufficient amount of procedural due process. *Id.*

181. *Id.* (quoting Mathews v. Eldridge, 424 U.S. 319, 335 (1976)).

182. *Id.* at 525.

183. The district court had not yet issued its decision on remand at the time this Note went to press.

A. Private Interests at Stake

The first *Eldridge* balancing factor according to the court of appeals is "the importance to the permanent resident alien and others like him of not being imprisoned and forced to leave the United States."[184] Concededly, the losses associated with imprisonment and permanent banishment from the United States are the greatest losses for LPRs.[185] For example, Rafeedie stands to lose the right "to stay and live and work in this land of freedom[,]"[186] and the right to be reunited with his family.[187] Banishment from the United States would certainly exact a great cost, taking from Rafeedie "all that makes life worth living."[188]

However, the court of appeals failed to account for other important private interests at stake in Rafeedie's exclusion. Such interests include: Rafeedie's interest in a favorable determination by immigration officials of the re-entry question; his substantive due process rights under the first amendment; and his substantive due process interest to freely travel.

1. The Re-entry Question as a Private Interest

The outcome of the statutory re-entry question may hold enormous significance for any politically active LPR who leaves the United States and then attempts to return. As a threshold matter, any inquiry into whether a returning LPR effected a statutory entry requires the INS to make factual determinations in each specific case.[189] The LPR has an interest in having such facts presented to an independent tribunal for resolution of this issue. An unfavorable result may subject the alien to diminished statutory procedural rights and later deportation.[190]

In a plenary exclusion hearing, if the immigration judge deter-

184. *Rafeedie*, 880 F.2d at 525.

185. Since the INS paroled Rafeedie into the United States, imprisonment holds much less significance than Rafeedie's ultimate banishment from this country. Since national security is at issue in a section 235(c) exclusion, other LPRs may not be so fortunate.

186. Bridges v. Wixon, 326 U.S. 135, 154 (1945).

187. In Rafeedie's case, the loss of these interests would work an especially severe hardship as he provided the only source of income for his family. *Rafeedie*, 880 F.2d at 518.

188. Ng Fung Ho v. White, 259 U.S. 276, 284 (1922).

189. The "innocent, casual and brief" test announced in *Fleuti* is necessarily a fact-laden inquiry. 374 U.S. 449; *see* Rafeedie v. INS, 688 F. Supp. at 749.

190. In Rafeedie's case, the court of appeals never reached this issue, since it merely held that Rafeedie was entitled to due process *regardless* of whether he made a statutory entry. *Rafeedie*, 880 F.2d at 521.

mines that the alien effected no entry, the hearing stops. The government must then release the alien, as "only 'entering' aliens are subject to exclusion."[191] The only available alternative is then to expel the alien from the country by deportation. Although plenary exclusions provide more procedural protections than summary exclusions, deportation proceedings generally offer more procedural protections than either plenary or summary exclusions.[192] Further, an entry by a returning LPR will subject him or her to provisions of law which make certain conditions or acts committed within five years of entry deportable offenses.[193]

Rafeedie thus has an interest in the outcome of the re-entry question. As a returning LPR, he is entitled to due process in the resolution of this issue.[194] This strong private interest demands that the entry issue be explicitly considered as a private interest of the alien during any procedural due process balancing.

2. First Amendment Rights as a Private Interest

Although the court of appeals acknowledged that summary exclusion chilled Rafeedie's substantive right to free speech,[195] it failed to include this interest in its due process calculus.[196] Rafeedie's exclusion may represent an attempt by the government to silence not only his politically-expressive activities, but also those activities of other LPRs within the United States. Thus, summary exclusion implicates

191. Landon v. Plasencia, 459 U.S. 21, 28 (1982); *Rafeedie*, 880 F.2d at 523. "If [Rafeedie] had never left the United States, the INS would have had to deport him, with the procedural safeguards such a course would entail." *Id.*

192. *Compare* INA § 236, 8 U.S.C. § 1226 *and* 8 C.F.R. § 236, *with* INA § 242, 8 U.S.C. § 1252 *and* 8 C.F.R. § 242. Although the Supreme Court mandated that certain returning LPRs receive due process in an exclusion hearing, the process actually received will probably not exceed that which is statutorily mandated in the section 236 plenary procedure. *Plasencia*, 459 U.S. at 32.

193. An alien who becomes institutionalized at public expense for a mental defect within five years of entry may be deported. INA § 241(a)(3), 8 U.S.C. § 1251(a)(3). An alien may be deported if "convicted of a crime involving moral turpitude committed within five years after entry. . . ." *Id.* § 241(a)(4), 8 U.S.C. § 1251(a)(4).

194. *Plasencia*, 459 U.S. at 31. "Nor is it in any way 'unfair' to decide the question of entry in exclusion proceedings as long as those proceedings themselves are fair." *Id.*

195. It is well settled that the first amendment protects aliens within the United States. *See* Bridges v. California, 314 U.S. 252 (1941) (first amendment protects LPR's freedom of speech); Bridges v. Wixon, 326 U.S. 135 (1945) (first amendment protects LPR's freedom of speech, press, and association); *cf.* Harisiades v. Shaughnessy, 342 U.S. 580 (1952) (although same standards governed alien and citizen claims based on the first amendment, deportation of aliens for membership in Communist party upheld by Court).

196. *See supra* text accompanying note 182.

concerns central to freedom of speech,[197] and the court of appeals should have explicitly incorporated Rafeedie's substantive first amendment interests within the procedural due process equation.[198]

Few would disagree that the government has substantial interests in excluding terrorists, drug dealers, and other aliens whose entries pose a threat to American life. Nonetheless, without procedural mechanisms available for the LPR to challenge the basis of the government's exclusion decision,[199] summary exclusion allows the government to exclude an alien without having to prove any substantive allegations. This gives the government the ability to use summary exclusion as a tool of censorship and prior restraint[200] on otherwise protected, LPR expressive activity.

By attempting to summarily exclude Rafeedie, the INS sent an ominous message of censorship not only to him, but to *all* LPRs within the United States who wish to criticize government policies.[201] The sanction of summary exclusion dissuades LPRs from either speaking out, or from leaving the country.[202] Section 235(c) summary exclusion gives the government unfettered discretion to impermissibly "grant the use of a forum to people whose views [it] finds acceptable, but deny use to those wishing to express less favored or more controversial views."[203]

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197. In the context of a libel suit, the Supreme Court, speaking through Justice Brennan, regarded the central meaning of the first amendment as the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open. . . ." New York Times v. Sullivan Co., 376 U.S. 254, 270 (1964).

198. *See* Monaghan, *First Amendment "Due Process,"* 83 HARV. L. REV. 518 (1970). Professor Monaghan argues that when evaluating any procedural safeguards designed to eliminate censorship, "the Court has placed little reliance upon the due process requirements of the fifth and fourteenth amendments, but instead has turned directly to the first amendment as the source of the rules." *Id.*

199. *See id.* at 519. "Like the substantive rules themselves, insensitive procedures can 'chill' the right of free expression." *Id.*

200. The doctrine of prior restraint is concerned with whether the government may permissibly restrict speech prior to its utterance. The doctrine "has its roots in the sixteenth- and seventeenth century English licensing systems under which all printing presses and printers were licensed by the state and no book . . . could lawfully be published without the prior approval of a government censor." G. STONE, L. SEIDMAN, C. SUNSTEIN, M. TUSHNET, CONSTITUTIONAL LAW 1046 (1986).

201. Summary exclusion could also possibly chill the speech of members of Rafeedie's immediate family, who might fear that their speech, and not his, could result in his unwarranted, but uncontestable, exclusion.

202. For a discussion of how summary exclusion's chilling effect on speech is related to its chilling effect on an LPR's interest in international travel, *see infra* text accompanying notes 208-13.

203. Police Dep't v. Mosley, 408 U.S. 92, 96 (1972).

Summary exclusion simply amounts to a procedure which may operate to indirectly prohibit the expression of ideas disagreeable to the government.[204] The law achieves its censorship effect by its inherent insensitivity to the "fragile" first amendment interests of LPRs.[205] By not including Rafeedie's first amendment interests as a private interest at stake, the court of appeals ignored the critical need to balance the strict "procedural safeguards designed to obviate the dangers of a censorship system"[206] against the other *Eldridge* procedural due process factors. Therefore, on remand, the district court's procedural due process balancing will not show "the necessary sensitivity to freedom of expression"[207] and will improperly tilt in the government's favor.

3. The LPR's Interest in International Travel

An LPR has a strong interest in his ability to travel across the nation's borders, free from unreasonable government restriction.[208] For citizens, the right to travel is "not a mere conditional liberty subject to regulation and control under conventional due process or equal protection standards, . . ." but is rather, "a virtually unconditional personal right."[209] For the LPR, "[t]ravel abroad, like travel within the country . . . may be as close to the heart of the individual as the choice of what he eats, or wears, or reads."[210] Indeed, as many LPRs commonly have numerous family members who live abroad, the importance of international travel to maintain family ties cannot be disputed.

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204. "[C]onstitutional violations may arise from the deterrent, or 'chilling,' effect of governmental regulations that fall short of a direct prohibition against the exercise of First Amendment rights." Laird v. Tatum, 408 U.S. 1, 11 (1972) (citations omitted).

205. *Cf.* Chicago Teachers Union v. Hudson, 475 U.S. 292, 303 (1986) (quoting Monaghan, *First Amendment "Due Process,"* 83 HARV. L. REV. 518, 551 (1970)). "The first amendment due process cases have shown that first amendment rights are fragile and can be destroyed by insensitive procedures." *Id.*

206. Freedman v. Maryland, 380 U.S. 51, 58 (1965). Although the procedural safeguards of *Freedman* addressed censorship efforts against obscenity in motion pictures, concerns against unfettered censorial discretion apply with even greater force when political speech is at stake. *See* Monaghan, *supra* note 198, at 519.

207. Monaghan, *supra* note 198, at 519.

208. It is understandable that Rafeedie did not raise this issue, as he had already completed his trip abroad. But it is necessary to analyze the due process issues "not merely with reference to a single case, but having in mind the type of case it is, with regard to the run of such cases." *Rafeedie*, 880 F.2d at 524.

209. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1378 (1988) (quoting Shapiro v. Thompson, 394 U.S. 618, 642-43 (1969) (Stewart, J., concurring)).

210. Kent v. Dulles, 357 U.S. 116, 126 (1958).

The threat of exclusion without procedural due process could force LPRs who actively criticize the government to either speak out and never leave the country, or remain silent to avoid sacrificing the ability to freely travel abroad. Although such methods of influence may exist elsewhere,[211] they remain abhorrent in our free system. As long as the *possibility* of arbitrary exclusion exists, politically active LPRs may simply forego their rights to free speech and foreign travel.[212]

United States laws which explicitly regulate alien travel generally do not *unreasonably* burden the alien's desire to freely travel abroad.[213] The courts should take a different view in judging a law which allows the government to arbitrarily restrict LPR travel as a method to censor otherwise protected speech. With respect to summary exclusion, the LPR's strong interest in international travel and the right to free speech become two sides of the same constitutional coin. Both must be considered together as part of Rafeedie's private interests in the procedural due process balance.

B. The Risk of Erroneous Deprivation

The structural trappings of summary exclusion—its built-in secrecy and exclusive control by the INS—make the risk of an erroneous exclusion a plausible outcome. Since the LPR cannot obtain information regarding the reason for a summary exclusion decision, the risk of politically-motivated or vindictive INS officials excluding LPRs for irrational reasons presents a credible and unreasonable threat. Even one of the INA's original sponsors recognized such a possibility.[214]

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211. "Free movement by the citizen is of course as dangerous to a tyrant as free expression of ideas or the right of assembly and it is therefore controlled in most countries in the interests of security." Aptheker v. Secretary of State, 378 U.S. 500, 519 (1964) (Douglas, J., concurring). The same reasoning applies with equal force to the LPR.

212. The *Aptheker* Court noted that for citizens, "freedom of travel is a constitutional liberty closely related to rights of free speech and association." *Id.* at 517.

213. *See, e.g.*, INA § 212, 8 U.S.C. § 1182 (travel control of citizens and aliens); INA § 223, 8 U.S.C. § 1203 (re-entry permits); INA § 316, 8 U.S.C. § 1427 (effect of travel on alien naturalization); 8 C.F.R. § 215 (controls of aliens departing the United States).

214. During hearings discussing section 235(c), Representative Walter remarked that "[t]he thing that disturbs all of us is the possibility of some immigration inspector acting capriciously or arbitrarily, and there being nobody that can review the life and death decisions that they can make." *Revision of Immigration, Naturalization, and Nationality Laws: Hearings on S. 716 Before the Special Subcomm. to Investigate Immigration and Nationality of the Comm. on the Judiciary*, 82d Cong., 1st Sess. 283 (1951) [hereinafter *Hearings*]. The Acting Commissioner responded by noting that the Attorney General reviews such cases. *Id.* This simply

For example, in a plenary exclusion hearing, the INS must produce sufficient evidence to prove the LPR had re-entered the United States.[215] However, summary exclusion removes this burden from the INS. If the INS can exclude an LPR who voices non-mainstream political viewpoints without having to prove any of its allegations, it will clearly desire to proceed from the assumption, rather than from an objective finding, that the LPR has re-entered the country. Under these circumstances, the risk of the INS making an erroneous determination of the entry question becomes an almost certain result.

The due process issue presents an additional problem of objectivity. The same agency that investigates the alien also prosecutes him and passes judgment on his future.[216] Any facts supporting exclusion will be weighed in favor of that outcome. Even if such facts would be insufficient to persuade an immigration judge to exclude the alien, the secrecy of summary exclusion, combined with its lack of accountability, encourages INS officials to exclude the alien. Summary exclusion, in equivalent criminal proceedings, would entail an accused criminal pleading his case in writing before a police desk sergeant, who then would pass judgment and sentence the criminal. Thus, section 235(c) summary exclusion does not encourage objective, fair findings.[217]

C. The Government's Interests

Next, the government's interests in a summary exclusion proceeding must be examined under the *Eldridge* balancing test. This evaluation illustrates the tension between Rafeedie's private interests and the government's interests in summarily excluding LPRs.

The government utilizes alien exclusion as one method of protecting the nation's sovereignty[218] and as "a weapon of defense and

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ignores the due process requirements of impartial review. *See infra* text accompanying notes 288-316.

215. *See supra* text accompanying note 80.

216. The chain of events beginning with an alien's temporary exclusion by an immigration inspector end after the INS district director forwards the case to the regional commissioner, who decides whether or not to exclude the alien. *See supra* text accompanying notes 70-86.

217. The INS's assertion that Rafeedie's due process rights turn on *allegations* of foreign activities which are prejudicial to United States security interests, illustrates the problem. *See Rafeedie*, 880 F.2d at 523. The court of appeals reasoned that "the Government's position . . . is at war with the fundamental purpose of the due process guarantee. The Government cannot assert as an argument against procedural safeguards that the accused is guilty as charged." *Id.* at 523-24.

218. The Supreme Court recently noted that the government's weighty interest in the "efficient administration of the immigration laws at the border . . . ," is a matter "largely within the control of the executive and the legislature." Landon v. Plasencia, 459 U.S. 21, 34 (1982).

reprisal" in conducting foreign relations.[219] Aliens who are genuine terrorists obviously operate surreptitiously. To root them out, the government must, to some degree, shroud its investigative and intelligence-gathering activities in secrecy. Extensive materials are derived from confidential sources associated with diplomatic and consular establishments; thus, "[d]isclosure of these materials, and their sources, would not only hamper the future work of the missions abroad, but would also place many of the sources in personal jeopardy."[220] Therefore, in conducting its foreign relations, the government has a legitimate interest in not disclosing such confidential information.[221]

Any disclosure of such confidential information may require coordination among the various agencies of the executive branch. To promote effective investigation and law enforcement, each agency often shares confidential information. For agency *A* to disclose any intelligence and investigative reports furnished by agency *B*, agency *A* may have to secure specific approval in advance of any release from agency *B*.[222] Blatant disregard for agency needs could breed intra-branch rivalries which diminish effective law enforcement.

Similarly, broad disclosure of classified materials may also hamper federal law enforcement. Disclosure of the identity of actual persons under investigation, and what the government knows about them, could "be of inestimable service to foreign agencies."[223] Such exposure may allow those under investigation to take counter-measures to defeat or impede law enforcement functions. The government must also consider whether disclosure of information originally gained in confidence[224] would jeopardize the future utility and well-being of federal informants.[225]

These concerns present legitimate reasons for guarding against unwarranted disclosure of confidential information. On the other hand, the current laws allow the government to trample the LPR's

219. Harisiades v. Shaughnessy, 342 U.S. 580, 587 (1952).

220. *Communist Activities in Alien and National Groups: Hearings Before the Special Subcomm. to Investigate Immigration and Naturalization of the Comm. on the Judiciary*, 81st Cong., 1st Sess. 171 (1949) (letter from James E. Webb, acting Secretary of State, to Senator Pat McCarran, Chairman, Comm. on the Judiciary) [hereinafter Letter].

221. *Compare* Jay v. Boyd, 351 U.S. 345, 365 (1956) (Black, J., dissenting) (criticizing the use of confidential information).

222. *See* Letter, *supra* note 220, at 171.

223. *Id.* at 172.

224. *Id.* "[M]uch . . . information is given in confidence and can only be obtained upon pledge not to disclose its sources." *Id.*

225. *Id.*

procedural due process rights in the name of protecting confidential information. As a result, an LPR may lose his or her due process rights upon a mere invocation of national security concerns, even if only minimally implicated in the alien's exclusion. The following sections address possible methods of reconciling these competing interests.

D. Additional Procedural Safeguards

1. Notice

Adequate notice to the party whose life, liberty and property are to be deprived has long been a requirement of constitutional fairness,[226] as it provides one of the most effective safeguards against an erroneous deprivation of liberty. Important factors to consider are whether the notice is sufficiently timely,[227] and whether notice has "clarif[ied] what the charges are in a manner adequate to apprise the individual of the basis for the government's proposed action."[228] Justice Frankfurter observed that "[n]o better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and an opportunity to meet it."[229]

Summary exclusion flouts the due process requirement of basic notice. Federal regulations merely specify that "the alien shall be notified by personal service of Form I-147 of the action taken and the right to make written representations."[230] The Form I-147 served on Rafeedie alleged excludability based on confidential information, and set forth additional factual accusations.[231] However, this notice was meaningless since the INS sought to exclude Rafeedie on the basis of the confidential information, not on the basis of the disclosed factual allegations.[232] Without notice of the factual basis for the govern-

226. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950). "[A]t a minimum, [due process] require[s] that deprivation of life, liberty or property . . . be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Id.*; *see also* Goldberg v. Kelly, 397 U.S. 254, 267-68 (1970) (due process requires "timely and adequate notice detailing the reasons for a proposed termination" of welfare benefits).

227. Landon v. Plasencia, 459 U.S. 21, 39 (1982) (Marshall, J., dissenting). "Notice must be provided sufficiently in advance of the hearing to 'give the charged party a chance to marshal the facts in his defense.' " *Id.*

228. *Id.* (quoting Wolff v. McDonnell, 418 U.S. 539, 564 (1974)).

229. Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 171-72 (1951) (Frankfurter, J., concurring).

230. 8 C.F.R. § 235.8 (1989).

231. Rafeedie v. INS, 688 F. Supp. at 734; *see supra* note 102 and accompanying text.

232. *Rafeedie*, 880 F.2d at 518. The court of appeals noted that a section 236 exclusion proceeding can make Rafeedie aware of the factual allegations against him.

ment's case, Rafeedie was unable to prepare an adequate defense. The requirement of adequate notice would help to cure these defects.

2. Adequate Hearing with Full Disclosure

The Supreme Court long recognized that a fair hearing provides an effective check on the exercise of arbitrary deportations by the government.[233] The concept that "openness of judicial proceedings serves to preserve both the appearance and the reality of fairness in the adjudication of United States courts"[234] applies with equal force to exclusion proceedings. The importance of the rights to be determined in an exclusion hearing mandates that an adequate hearing encompass some elements of confrontation and cross-examination.[235]

The excludability of an alien based on INA sections 212(a)(27) through 212(a)(29) often turns on disputed facts. For example, Rafeedie could rebut a finding that his entry would be prejudicial to the United States by subjecting the factual basis of such a conclusion to rigorous cross-examination. In this manner, unfounded rumor, witnesses with bias and memory lapses, and unreliable informants would be carefully scrutinized.[236]

Furthermore, facts supporting excludability on the basis of un-

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233. The Japanese Immigrant Case, 189 U.S. 86, 101 (1903). The Court stated:

> [I]t is not competent for . . . any executive officer . . . arbitrarily to cause an alien, who has entered the country, and has become subject in all respects to its jurisdiction . . . to be . . . deported without giving him all opportunity to be heard upon the questions involving his right to be and remain in the United States. No such arbitrary power can exist where the principles involved in due process of law are recognized.

Id.

234. Abourezk v. Reagan, 785 F.2d 1043, 1060 (D.C. Cir. 1986), *aff'd*, 484 U.S. 1 (1987); *see also* United States *ex rel.* Kasel De Pagliera v. Savoretti, 139 F. Supp. 143, 146 (S.D. Fla. 1956) ("The sunshine of publicity keeps government rational, lawful and just.").

235. Goldberg v. Kelly, 397 U.S. 254, 269 (1970). "In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses." *Id.* At least where Congress or the Executive have not explicitly authorized denial of a hearing, this principle is "immutable." Greene v. McElroy, 360 U.S. 474, 496 (1959); *see also* Ohio Bell Tel. Co. v. Public Utilities Comm., 301 U.S. 292 (1937) (decision based on "the strength of information secretly collected and never . . . disclosed" violated due process); Willner v. Committee on Character and Fitness, 373 U.S. 96, 103 (1963) ("[P]rocedural due process often requires confrontation and cross-examination of those whose word deprives a person of his livelihood.").

236. A public hearing eventually remedied a great injustice allowed by the Court in United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537 (1950). Ellen Knauff married an American serviceman during World War II, but she was summarily excluded as a "risk to national security" under the regulatory predecessor of section 235(c). *Id.* at 541. The Court upheld her exclusion, as she was a first-time entrant with no due process rights. *Id.* at 546. After enormous pressure, the INS granted her a hearing, which revealed the "confidential information"

protected speech, or membership in terrorist organizations, may not pass constitutional muster during a hearing. The Supreme Court has historically drawn a distinction between express advocacy of unlawful action and abstract doctrine.[237] A hearing that focuses on *specific* examples of Rafeedie's speech[238] could determine whether exclusion amounts to censorship or appropriately bars a dangerous person from entry.[239] Although membership in, or affiliation with prohibited organizations is an excludable offense, a hearing would allow the alien to constitutionally challenge such criteria.[240] In short, a hearing could uncover a subjective, illegal government intent to exclude Rafeedie on the basis of constitutionally protected activity. Only a hearing can adequately test the credibility and veracity of the government's assertions.

Unquestionably, section 235(c) falls far short of giving the alien a fair hearing because it simply allows for written submissions. Written submissions are inadequate as they do not permit the recipient to mold his argument to the issues the decision-maker considers important.[241] Particularly where credibility and veracity are at issue, written submissions are a wholly unsatisfactory basis for decision.[242]

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as nothing more than rumors generated by a jilted ex-lover of her husband. *See* E. KNAUFF, THE ELLEN KNAUFF STORY XV-XVI (1952).

237. *See* Dennis v. United States, 341 U.S. 494, 545 (1951). "Throughout our decisions there has recurred a distinction between the statement of an idea which may prompt its hearers to take unlawful action, and advocacy that such action be taken." *Id.*; Yates v. United States, 354 U.S. 298, 324-25 (1957). "The essential distinction is that those to whom the advocacy is addressed must be urged to *do* something, now or in the future, rather than merely to *believe* in something." *Id.*

238. *See* Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 STAN. L. REV. 719, 753 (1975) (In first amendment cases Justice Harlan "insisted on strict statutory standards of proof emphasizing . . . actual speech.").

239. *See* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969). The government may not "forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Id.* (footnote omitted).

240. Mere membership in an organization, without more, is an insufficient constitutional basis on which to exclude an LPR. Rafeedie v. INS, 688 F. Supp. at 752 (citing Healy v. James, 408 U.S. 169, 186 (1972)). Even at the height of the Cold War, the Supreme Court supported this idea, stating that "evidence of membership *plus personal activity* in supporting and extending the [Communist] Party's philosophy concerning violence gives adequate ground for detention." Carlson v. Landon, 342 U.S. 524, 541 (1952) (emphasis added). Instead, the government must shoulder "the burden of establishing a knowing affiliation with an organization possessing unlawful aims and goals, and a specific intent to further those illegal aims." Healy v. James, 408 U.S. 169, 186 (1972).

241. Goldberg v. Kelly, 394 U.S. 254, 269 (1970).

242. *Id.*; *see also* Califano v. Yamasaki, 442 U.S. 682, 697 (1979) ("written submissions are

An evidentiary-type hearing is one remedy to the problem; it would allow Rafeedie to present favorable testimony and refute adverse evidence. To be fair and effective, such a hearing must encompass some degree of cross-examination.[243] It should allow the LPR to be represented by counsel and require the INS to prove its case[244] by "clear, unequivocal, and convincing evidence that the facts alleged . . . are true."[245] Fair hearing procedures also would require an independent tribunal[246] to render an explanation of the ultimate decision, based solely on the record. An exclusion hearing with such elements would minimize the risk of an erroneous deprivation of an LPR's liberty.

3. Adequate Hearing Utilizing In Camera Procedures

Unquestionably, exclusion hearings that require the government to fully disclose its case would greatly protect the alien against arbitrary and capricious government action. On the other hand, such hearings could compromise legitimate national security concerns. A reasonable approach to reconciling these competing interests should not vindicate the rights of one party and completely ignore the rights of the other. *Jay v. Boyd*[247] may represent the seeds of such a compromise.

In *Jay*, an LPR who resided in the United States for twenty-four years was ordered deported for his five years of membership in the Communist party.[248] The LPR applied for relief from the Attorney General, who had discretionary power to suspend the deportation.[249] At a later hearing, an immigration judge found the LPR to have met

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a particularly inappropriate way to distinguish a genuine hard luck story from a fabricated tall tale").

243. If an in camera procedure is necessary to protect confidential information, the trier of fact, or possibly an advocate ad litem, must assume such a protective role. *See infra* text accompanying notes 257-87.

244. The government bears the burden of proof in exclusion hearings. *See* Kwong Hai Chew v. Rogers, 257 F.2d 606 (D.C. Cir. 1958).

245. Woodby v. INS, 385 U.S. 276, 286 (1966). Although the Supreme Court mandated this standard of proof for deportation, the Court's reasoning applies equally to an LPR's exclusion. *Id.* at 285. "This Court has not closed its eyes to the drastic deprivations that may follow when a resident of this country is compelled by our Government to forsake all the bonds formed here and go to a foreign land where he often has no contemporary identification." *Id.*

246. *See infra* text accompanying notes 288-316.

247. 351 U.S. 345 (1956).

248. *Id.* at 348.

249. The Attorney General could, in his discretion, "suspend deportation of any deportable alien who [met] certain statutory requirements relating to moral character, hardship and period of residence within the United States. *Id.* at 351.

the "statutory prerequisites to the favorable exercise of the discretionary relief," but denied the requested suspension on the basis of undisclosed, confidential information.[250]

The Supreme Court rejected the LPR's procedural due process challenge to the government's use of undisclosed, confidential information.[251] The Court framed the question as "not whether an alien is deportable, but whether, as a *deportable* alien who is qualified for *suspension* of deportation, he should be granted such suspension."[252] The Court concluded that discretionary relief from deportation was "gratuitous."[253] The LPR, therefore, was not entitled to *full* disclosure of the government's case.[254]

The primary importance of *Jay* rests in the Supreme Court's willingness, albeit under limited circumstances, to allow the use of undisclosed, confidential information in a deportation-related proceeding.[255] But unlike the gratuitous relief sought in *Jay*, the unrestrained use of confidential information to deprive an LPR of protected liberty interests raises serious procedural due process concerns. In order to pass muster under the fifth amendment, any exclusion procedure using confidential information must have built-in features which not only protect against the dangers associated with confidential information, but also eliminate the appearance of government arbitrariness.[256]

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250. *Id.* at 349.

251. *Id.* at 358-60.

252. *Jay*, 351 U.S. at 359 (emphasis added).

253. *Id.* On this point, summary exclusion is distinguishable. Rafeedie requested relief from a procedure to *determine* his excludability; such relief hardly can be characterized as "gratuitous." However, this point does not necessarily bar the use of confidential information in exclusion proceedings. It merely indicates a need for procedures that protect against the *abuses* associated with the use of undisclosed information.

254. *Id.* at 360-61.

255. *Id.* at 348-49. The Court maintained that "[i]f the statute permits any withholding of information from the alien, manifestly this is a reasonable class of cases in which to exercise that power." *Id.* at 358. The Court construed 8 C.F.R. § 244.3 (1952), which allowed such use of confidential information. The lack of a modern day equivalent to this regulation could signify executive recognition of the possible abuses associated with undisclosed confidential information. However, such recognition does not seem to have reached summary exclusions.

256. In *Jay*, some of these dangers were outlined:

> No nation can remain true to the ideal of liberty under law and at the same time permit people to have their homes destroyed and their lives blasted by the slurs of unseen and unsworn informers. There is no possible way to contest the truthfulness of anonymous accusations. The supposed accuser can neither be identified nor interrogated. He may be the most worthless and irresponsible character in the community. What he said may be wholly malicious, untrue, unreliable, or inaccurately reported.

In camera review[257] may provide such a solution. Such a procedure could efficiently preserve the adversarial process when the government seeks to exclude an LPR on the basis of confidential information. While avoiding the harms inherent in the use of confidential information, in camera review is one method of protecting the government's interest in non-disclosure.

The District of Columbia Circuit Court of Appeals outlined the prerequisites for a court to dispose of the merits of a case on the basis of ex parte, in camera submissions:[258] "[A] proper invocation of the privilege; a demonstration of *compelling* national security concerns; and public disclosure by the government, prior to any *in camera* examination, of as much of the material as it could divulge without compromising the privilege."[259] As an initial procedural matter, then, in camera review seeks to identify any information which does not merit secrecy.[260] Such scrutiny certainly would deter the government from improperly invoking its confidentiality privilege to avoid proving excludability.[261]

In this first procedural step of determining whether the privilege against disclosure should apply, the standard of review becomes a critical issue. In *Kleindienst v. Mandel*,[262] the Supreme Court ruled that when the executive provides a "facially legitimate and bona fide reason" for excluding an alien, a court may "neither look behind the exercise of that discretion, nor test it by balancing its justification against the First Amendment interests of *those who seek personal com-*

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351 U.S. 345, 365 (1956) (Black, J., dissenting).

Allende v. Shultz, 845 F.2d 1111 (1st Cir. 1988), illustrates a different sort of danger. The widow of ex-Chilean President Allende had sought to enter the United States to deliver various speeches. The government argued her presence in this country would harm foreign policy and excluded her. A partially declassified government affidavit, however, revealed the government's real concern to be impermissibly centered "over the anticipated content of her proposed speeches on the basis of prior speeches." *Id.* at 1121.

257. "In camera" inspection occurs when a trier of fact "inspect[s] a document which counsel wishes to use at trial in his chambers before ruling on its admissibility or its use." BLACK'S LAW DICTIONARY 684 (5th ed. 1979).

258. Abourezk v. Reagan, 785 F.2d 1043, 1061 (D.C. Cir. 1986), *aff'd*, 484 U.S. 1 (1987).

259. *Id.* at 1061 (emphasis added).

260. It is appropriate for a court to resolve disputed issues of privilege in camera. Halkin v. Helms, 598 F.2d 1, 5 (D.C. Cir. 1978) (citing Kerr v. United States District Court, 426 U.S. 394, 405-06 (1976)); United States v. Nixon, 418 U.S. 683, 714-15 (1974); United States v. Reynolds, 345 U.S. 1, 10 (1953)).

261. *Cf.* Abourezk v. Reagan, 592 F. Supp. 880, 888 (D.D.C. 1984), *vacated*, 785 F.2d 1043 (D.C. Cir. 1986), *aff'd*, 484 U.S. 1 (1987) (judicial scrutiny will deter a "mushrooming of exclusions based on [INA § 212(a)(27), 8 U.S.C. § 1182(a)(27)] and content-based denials.").

262. 408 U.S. 753 (1972).

munication with the applicant."[263] However, the *Kleindienst* standard of review was not intended for, and should not be applied to, in camera proceedings where the LPR's own liberty interests are at stake.

Kleindienst arose out of the exclusion of a nonimmigrant scholar who, as an initial entrant into the United States, had no protected liberty interest in entry.[264] The alien did not contest his exclusion. Instead, a group of university professors brought suit and asserted that *their* first amendment rights were violated.[265] In contrast, summary exclusion of a returning LPR puts *his* liberty at risk, the pendency of which chills the LPR's *own* first amendment rights. In short, the *Kleindienst* standard gives far too much deference to the executive.[266] Even if the standard is appropriate for nonimmigrant aliens, a more rigorous standard of review[267] should apply when exclusion jeopardizes the significant liberty interests of a returning LPR.

The second procedural hurdle for the government to overcome in an in camera proceeding should be to make a prima facie showing of compelling national security interests. In a criminal proceeding, if the government meets this burden and its confidential information is relevant to the merits of the case, the government must disclose or dismiss.[268] Convicting an individual of a crime on the basis of undisclosed information is a denial of basic procedural due process.[269]

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263. *Id.* at 770 (emphasis added).

264. *Id.* at 762.

265. *Id.* at 759-60.

266. Courts applying the standard generally defer to the executive. Many past invocations of privilege based on military or state secrets have resulted in overly deferential court rulings. *See generally* Note, *The Military and State Secrets Privilege: Protection for the National Security or Immunity for the Executive?*, 91 YALE L.J. 570 (1982). *But see* Allende v. Shultz, 605 F. Supp. 1220, 1225 (D. Mass. 1985) (court refused to examine confidential documents in camera as the court found no "facially legitimate and bona fide" reason for excluding Allende).

267. *E.g.*, Lawyers Comm. for Human Rights v. INS, 721 F. Supp. 552 (S.D.N.Y. 1989). Plaintiffs brought suit under the Freedom of Information Act, 5 U.S.C.A. § 552(b) (West Supp. 1989), to force the government to disclose information relating to the exclusion of a Columbian journalist under 8 U.S.C. §§ 1182(a)(26), (27) and (28). The court enumerated the following as factors to consider in deciding whether to conduct an in camera inspection of confidential materials: (a) judicial economy, (b) the conclusory nature of the agency affidavits, (c) bad faith on the part of the agency, (d) disputes concerning the contents of the documents, (e) whether the agency requests an in camera inspection, and (f) the strong public interest in disclosure. *Id.* at 566. The court held that affidavits purporting to support non-disclosure on national security grounds were insufficient, noting that "[b]oilerplate descriptions such as 'confidential information from a confidential source' do not sufficiently demonstrate that confidential information would invariably identify an informant." *Id.* at 565-66.

268. Alderman v. United States, 394 U.S. 165, 191-94 (1969); Tigar, *Judicial Power, the "Political Question Doctrine," and Foreign Relations*, 17 UCLA L. REV. 1135, 1176-78 (1970).

269. In *Alderman*, the government conceded that due process required disclosure of classi-

Although exclusion is not a criminal proceeding,[270] the consequences are sufficiently severe that similar fifth amendment due process standards should apply.[271]

Accordingly, the government's demonstration of compelling national security interests must be made in the context of asking whether grievous harm to the national security would likely result by *not* excluding the LPR.[272] The inquiry should focus exclusively on whether the LPR poses a direct threat to the physical security or safety of the United States. The significant liberty interests of the LPR at stake in an exclusion proceeding demand nothing less.

The government cannot simply rely upon an amorphous, speculative harm to national security.[273] Threats to national security based upon revealing the identity of foreign operatives or exposing intelligence gathering methods present legitimate concerns. However, such concerns are insufficiently compelling to justify using confidential information to deprive an LPR of a protected liberty interest. Due process favors dismissal under these circumstances. Quite simply, the government satisfactorily protects its intelligence capabilities by foregoing exclusion of an LPR who poses no direct threat to the national well-being.

In Rafeedie's case, the government has not demonstrated such compelling national security interests. By paroling Rafeedie into the country,[274] the government conceded that such action was "strictly in the public interest,"[275] and that he was unlikely to "pose a security risk."[276] In spite of its confidential information, the INS did not re-

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fied surveillance records which were relevant to deciding the merits of the case. 394 U.S. at 191.

270. *Cf.* Harisiades v. Shaughnessy, 342 U.S. 580, 594 (1952). "Deportation, however severe its consequences, has been consistently classified as a civil rather than criminal procedure." *Id.*

271. *See, e.g.*, Jordan v. DeGeorge, 341 U.S. 223, 231 (1951). The Court acknowledged the civil nature of deportation, but applied the due process vagueness doctrine (normally reserved for criminal matters) due to the "grave nature of deportation." *Id.*

272. *Cf.* United States v. Coplon, 185 F.2d 629 (2d Cir. 1950) (Hand, J.). In a criminal case, "the prosecution must decide whether the public prejudice of allowing the crime to go unpublished [is] greater than the disclosure of such 'state secrets' as might be relevant to the defence [sic]." *Id.* at 638.

273. *Cf.* Alderman v. United States, 394 U.S. 165, 199 (1969) (Harlan, J., concurring in part and dissenting in part). In criminal cases, Justice Harlan would "lay upon trial judges the affirmative duty of assuring themselves that the national security interests claimed to justify an in camera proceeding are real and not merely colorable." *Id.*

274. *See supra* notes 95-96 and accompanying text.

275. INA § 212(d)(5), 8 U.S.C. § 1182(d)(5)(a).

276. 8 C.F.R. § 235.3(c) (1989).

verse those findings.[277] Under these circumstances, the government apparently invoked a speculative and dubious claim of national security in order to fill evidentiary gaps in its case.[278] Therefore, due process weighs in favor of disallowing the use of confidential information to summarily exclude Rafeedie.

However, in the extraordinary case where the government has demonstrated that grievous harm to the national security would result by not excluding an LPR, the government should not be faced with an absolute choice of disclosure or dismissal. Procedural due process modeled after the rights of criminal defendants should not mechanically compel that choice in an exclusion proceeding. Instead, the inquiry should focus on tailoring a procedure which could reasonably accommodate both the government's interest in non-disclosure and the LPR's interest in notice, confrontation and cross-examination. Such a procedure would balance the relevant competing interests and substantially comport with the underlying goals of procedural due process.

Standard in camera proceedings, which prohibit participation by the LPR, do not provide an adequate procedural answer. While a tribunal sitting in camera would protect the government and would provide significant protection against unwarranted exclusions, the LPR still could not fully prepare or conduct his defense. Furthermore, a disinterested trier of fact may not be able to effectively advocate and adjudicate the LPR's cause.[279]

Modified in camera procedures may offer a solution. An advocate ad litem,[280] appointed by the tribunal for the sole purpose of representing the LPR during the in camera proceedings, could allow the LPR to adequately prepare and conduct a defense. Full disclosure would be made to an advocate/agent acting on behalf of the LPR. Despite the fact that the LPR would never personally discover the government's confidential information, his or her fully informed advocate could virtually eliminate the procedural due process deficien-

277. Plaintiff's Memorandum in Support of Renewed Motion for Partial Summary Judgment at 31, Rafeedie v. INS, No. 88-0366-JHG (D.D.C. 1990).

278. *Cf.* United States v. Coplon, 185 F.2d 629, 638 (1950). "It is . . . one thing to allow the privileged person to suppress the evidence, and . . . another thing to allow him to fill a gap in his own evidence by recourse to what he suppresses." *Id.*

279. *See* Alderman v. United States, 394 U.S. 165, 183-84 (1969).

280. "A guardian ad litem is a guardian appointed to prosecute or defend a suit on behalf of a party incapacitated by infancy or otherwise." BLACK'S LAW DICTIONARY 40 (5th ed. 1979).

cies associated with an ex parte, in camera proceeding.[281]

For example, an advocate ad litem would allow the trier of fact to assume a completely neutral, disinterested position. Such an advocate also gives the LPR an effective tool for confronting the government's classified information. Additionally, this modified in camera procedure would also minimize the tribunal's need to agonize over whether extremely sensitive material should be disclosed.[282]

It may not be easy to find an advocate for the defense who can simultaneously maintain his or her duty to the government. The tribunal could simply utilize the LPR's existing counsel and issue a protective order.[283] Unfortunately, such an order may provide insufficient assurance against unwarranted disclosure.[284] Perhaps an advocate appointed from the Federal Public Defender's office, on the other hand, could reasonably be expected to comply with a protective order.[285] Appointing a lawyer who is also, at least nominally, a federal employee has another possible advantage: the government arguably would be more willing to fully and accurately disclose its information to one of its own employees.[286]

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281. *See* Alderman v. United States, 394 U.S. 165, 183-84 (1969) (discussing in camera due process deficiencies). The burdens on a trial judge, typically associated with in camera procedures, also would be substantially alleviated.

282. Courts generally defer to executive decisions relating to national security for a wide variety of reasons, including separation of powers and the executive's expertise. *See generally* Chicago & S. Air Lines v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948) (judiciary should not review executive decisions which require evaluating secret information and political consequences); United States v. Marchetti, 466 F.2d 1309, 1318 (4th Cir. 1972), *cert. denied*, 409 U.S. 1063 (1972). "The courts[] . . . are ill-equipped to become sufficiently steeped in foreign intelligence matters to serve effectively in the review of secrecy classifications . . . ." *Id.*

283. *See* Alderman v. United States, 394 U.S. 165, 185 (1969) (When confidential matters must be disclosed to a criminal defendant and his counsel, a protective order may be appropriate.).

284. For example, Justice Harlan asserted the following:

> It is one thing to believe that the normal criminal defendant will refuse to pass on information if threatened with severe penalties for unauthorized disclosure. It is quite another thing to believe that a defendant who is probably a spy will not pass on to the foreign power any additional information he has received.

Id. at 198. In Halkin v. Helms, 598 F.2d 1 (D.C. Cir. 1978), the plaintiffs alleged that governmental agencies had illegally intercepted international communications, and sought to have confidential information produced for trial. The type of concern voiced by Justice Harlan prompted the court to not allow plaintiff's counsel to participate during in camera proceedings. *Id.* at 7-8.

285. One expects a highly trained government employee to have a greater sense of awareness of the consequences surrounding the indiscriminate disclosure of protected information. A background check, conducted on a voluntary basis, would give an even greater measure of reliability.

286. In United States v. Nixon, 418 U.S. 683, 715 n.21 (1974), the Court indicated the

However, there are inherent, practical difficulties with this approach. By not allowing the LPR himself to respond to the confidential information, the effectiveness of the advocate's defense may be somewhat impaired. Additionally, the advocate would have to reconcile the possible ethical dilemma of arguably representing both the government and the LPR, two clients with adverse interests.

In spite of these potential shortcomings, having an advocate ad litem present during in camera proceedings accords the LPR sufficient procedural protections to satisfy the underlying objectives of traditional due process. It is true that in camera proceedings of this type do not fit neatly into accepted conceptual outlines of procedural due process. However, the hallmark of due process is its flexibility.[287] All that is lost through these proceedings, therefore, is a ritualistic adherence to formalism, not meaningful protection for the LPR. In short, the procedure affords the LPR an effective protection against arbitrary and capricious government action. Fundamentally, that is all that the due process clause of the fifth amendment requires.

4. Independent Tribunal

In camera review will not protect the LPR unless it is conducted by an independent tribunal. Despite the Supreme Court's "presumption in favor of impartiality in administrative hearings irrespective of some overlap of adjudicative, prosecutorial and investigative function,"[288] summary exclusion's complete overlap of such functions makes "the risk of unfairness intolerably high."[289] This degree of risk distinguishes *Withrow v. Larkin*,[290] the Supreme Court case which set forth the presumption of agency impartiality.

In *Withrow*, a state medical disciplinary board investigating a physician conducted a "final investigative session," and then temporarily suspended his license.[291] The board later filed an action with the local district attorney for permanent revocation.[292] The Court found no due process violation, and set forth the rule creating a pre-

Special Prosecutor, himself an employee of the government, could be included in the in camera proceedings.

287. *Cf.* Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314-15 (1950) (due process as a practical concept).

288. Jonal Corp. v. Dist. of Columbia, 533 F.2d 1192, 1197 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 825 (1976).

289. Withrow v. Larkin, 421 U.S. 35, 58 (1974).

290. 421 U.S. 35, 58 (1974).

291. *Id.* at 39-41, 46.

292. *Id.* at 42.

sumption in favor of administrative impartiality.[293]

The strict applicability of *Withrow* is doubtful when applied to summary exclusion laws. The *Withrow* Court noted that "counsel actually attended the hearings and *knew the facts presented to the Board*."[294] The Court stated that "no issue [was] raised concerning the circumstances, if any, in which the Board could suspend a license without first holding an adversary hearing."[295] Significantly, the board in *Withrow* had no authority to revoke the license—it had to resort to the adversarial process to do so.[296] In contrast, section 235(c), in its present form, does not allow for counsel and cannot be characterized as adversarial.[297] Additionally, summary exclusion will likely result in permanent deprivation of liberty interests, not merely the temporary suspension of the right to practice a profession.[298]

Summary exclusion suffers from the same flaw discussed by the Court in *In re Murchison*,[299] in which a state judge acted as a "one man grand jury" by extensively interrogating a suspect about alleged gambling. The judge charged the suspect with perjury, and later tried and convicted him for criminal contempt.[300] Noting that "[i]t would be very strange if our system of law permitted a judge to act as a grand jury and then try the very persons accused as a result of his investigations," the Court struck down the procedure as a violation of due process.[301]

The Attorney General, or more likely, the regional commissioner, represents section 235(c)'s "one-man grand jury."[302] He conducts the investigation, renders judgment (i.e. exercises his discretion) and has the power to exclude (i.e. convict). As the primary partici-

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293. *Id.* at 55 (*citing* U.S. v. Morgan, 313 U.S. 409, 421 (1941)). In order to show an unconstitutional risk of bias due to the combination of adjudicatory and investigative functions in one agency, *Larkin* requires a litigant to "overcome a presumption of honesty and integrity in those serving as adjudicators; and . . . that . . . conferring investigative and adjudicative powers on the same individuals poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented." *Id.* at 47.

294. *Larkin*, 421 U.S. at 55 (emphasis added).

295. *Id.* at 40 n.3, n.4.

296. *Id.*

297. *See supra* text accompanying notes 84-86.

298. *Compare* Haig v. Agee, 453 U.S. 280 (1981) (*pre*-revocation hearing not required for a *temporary* suspension of passport for reasons of national security).

299. 349 U.S. 133 (1955).

300. *Id.* at 134-35.

301. *Id.* at 137, 139.

302. *See* 8 C.F.R. § 235.8(b) (1988).

pant in the process of exclusion, the Attorney General or regional commissioner "cannot be, in the very nature of things, wholly disinterested in" the entry or exclusion of the LPR.[303] Section 235(c)'s consolidation of investigative and adjudicative powers in one authority thus makes unfairness and bias not only a possibility, but a probability which the courts must endeavor to prevent.[304]

In general, a basic requirement of procedural due process is a "fair trial in a fair tribunal."[305] This requirement applies with equal force to administrative agencies with adjudicatory duties.[306] However, the Supreme Court, in *Marcello v. Bonds*,[307] held that the combination of adjudicatory and investigatory functions in special inquiry officers did not deny due process to an alien in deportation proceedings.[308]

In *Marcello*, the Court found immigration judges to be sufficiently impartial, objective and independent of the INS to satisfy minimum requirements of due process.[309] The Court's conclusion seems uncontroversial when viewed in terms of exclusions and deportations where the government does not rely on undisclosed confidential information. However, in the narrow circumstances of an in camera proceeding, immigration judges would not be sufficiently independent of the Attorney General to satisfy due process.

Immigration judges derive their authority from the Attorney General,[310] who alone provides the framework in which immigration

303. *Murchison*, 349 U.S. at 137.

304. *Larkin*, 421 U.S. at 47. In *Rafeedie*, the court noted that INS officials who impose section 235(c) summary proceedings first consult with the General Counsel of the INS. 880 F.2d at 516. Such consultation will result in "no practical possibility that the Regional Commissioner will take a legal position inconsistent with that adopted by the 'chief legal officer' of the INS." *Id.*

305. *Larkin*, 421 U.S. at 46. *See also* Morrissey v. Brewer, 408 U.S. 471, 489 (1972) ("[M]inimum requirements of due process . . . include . . . a 'neutral and detached' hearing body."); Wong Yang Sung v. McGrath, 339 U.S. 33, 50 (1950) *modified*, 339 U.S. 908 (1950) ("When the Constitution requires a hearing, it requires a fair one, one before a tribunal which meets at least currently prevailing standards of impartiality.").

306. *Larkin*, 421 U.S. at 46; *see also* Amos Treat & Co. v. SEC, 306 F.2d 260, 265 (D.C. Cir. 1962) ("[T]he investigative as well as the prosecuting arm of [an administrative] agency must be kept separate from the decisional function.").

307. 349 U.S. 302 (1955).

308. *Id.* at 311.

309. The Court specifically noted that INA section 242(b) "prohibits [a special inquiry officer] . . . from hearing cases which *he has taken some part in investigating or prosecuting.* . . ." *Marcello*, 349 U.S. at 305-06 (emphasis added). Today, immigration judges are more insulated from INS influence. *See supra* note 78 and accompanying text.

310. 8 C.F.R. § 3.0 (1989).

judges conduct exclusion and deportation proceedings.[311] Attorney General decisions, including those to withhold confidential information, are binding on immigration judges.[312] Clearly, immigration judges are not sufficiently autonomous within the Justice Department to be allowed to review confidential information in camera.

The current structure within the Justice Department is thus constitutionally inadequate to permit in camera proceedings, and leaves the district court with few options. The court could require the Attorney General to file summary exclusion actions directly with a federal judge, designated on an ad hoc basis.[313] Alternatively, the court could require the Attorney General to designate a small cadre of specially trained and qualified immigration judges to hear exclusion cases based on confidential information.[314] Significant limitations on the Attorney General's removal powers would be necessary to ensure the judge's autonomy.[315] Finally, the court could simply declare summary procedures unconstitutional, thereby leaving the appropriate remedy to Congress.[316]

E. The Government's Interest in Avoiding the Additional Safeguards

The final remaining issue involves the government's interest "in avoiding the cost of additional safeguards for permanent resident

311. *Id.* § 3.10.

312. *Id.* § 3.1 (1989); INA § 235(c), 8 U.S.C. § 1225(c).

313. The government makes relatively few exclusion efforts based upon ideological or national security grounds. *See infra*, note 323. Almost no exclusion efforts are made with confidential information used against LPRs. Therefore, appointing a federal judge to hear such cases would result in no addition to a "governmental structure of great and growing complexity." *Withrow v. Larkin*, 421 U.S. 35, 50 (1974) (quoting Richardson v. Perules, 402 U.S. 389, 410 (1971)).

314. This option's distinct advantage would be in keeping the confidential information within the executive branch. *See* Nixon v. Administrator of General Services, 433 U.S. 425, 444 (1977). "[I]t is clearly less intrusive to place custody and screening of [potentially confidential] materials within the Executive Branch itself than to have Congress or some outside agency perform the screening function." *Id.*

315. For example, a "good cause" restriction on the Attorney General's removal power would not "impermissibly burden[ ] the President's power to control or supervise" the execution of immigration laws. Morrison v. Olson, 487 U.S. 654, 692 (1988); *see also* Roberts, *Proposed: A Specialized Statutory Immigration Court*, 18 SAN DIEGO L. REV. 1, 21 (1980) (proposed removal standards for judges in an article I immigration court).

316. Proposals for the creation of article I, immigration tribunals to hear exclusion and deportation cases have not persuaded Congress to act. *See, e.g.*, Roberts, *supra* note 315; Fallon, *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 916 (1988).

aliens subject to [section] 235(c) exclusion proceedings."[317] From an economic standpoint, section 235(c) provides the government with a cost-effective exclusion option. The law permits exclusion based on unproven allegations. However, if procedural due process requires the government to prove rather than simply allege its case, investigations must necessarily become more lengthy, complicated and costly. Intra-agency coordination and cooperation becomes a significant issue, both in terms of initial investigations and later disclosures to the alien.[318]

If the INS must allocate more resources toward proving excludability, other agency functions could experience fiscal shortfalls.[319] In view of the escalating federal budget deficit, the INS can hardly expect to receive a greater budget allowance. Further, the necessary additional investigation time might diminish efficiency at the border due to increased detention periods for those LPRs whom the Attorney General decides not to parole into the country. Longer detention periods further increase costs. However, such additional fiscal burdens can be justified in light of summary exclusion's procedural due process failings, and the private interests at stake.

F. The Procedural Due Process Balance

The foregoing discussion illustrated the tension between Rafeedie's interests and the government's counter-interests. Rafeedie, and similarly situated LPRs, have compelling interests at stake in exclusion.[320] On the other hand, it is possible for the government to present a credible case against disclosing confidential information.[321] But even in the name of national security, summary exclusion, in its present form, unreasonably permits an erroneous, absolute deprivation of the LPR's private interests.[322] A more reasonable exclusion procedure would better protect the LPR without undue damage to the government's interests.

Since undisclosed, confidential information provides the basis for

317. *Rafeedie*, 880 F.2d at 525.

318. *See supra* text accompanying note 222.

319. A common perception of the INS was voiced over 35 years ago in Congress: "[i]f we give every alien that is turned back . . . a right to appear before a board of inquiry as a matter of right, our difficulties will mount. The Immigration Service is shorthanded now. They do not have a third enough people to do their job." *Hearings, supra* note 214, at 284 (comment by Rep. Gossett).

320. *See supra* notes 185-213.

321. *See supra* text accompanying notes 218-25.

322. *See supra* text accompanying notes 214-17.

a summary exclusion, the procedural due process balance hinges on that point. Modified in camera review conducted by an independent tribunal strikes the balance. Such a procedure ensures adequate protection for the government's interests and offers the LPR strict scrutiny at both the procedural and substantive levels. By preventing one party from unduly undermining the interests of the other, modified in camera review strikes a reasonable balance between the respective private and public interests. Additionally, because the in camera procedure nullifies the government's ability to make arbitrary and capricious exclusions, the underlying goals of the fifth amendment's due process clause are functionally satisfied.

Any additional fiscal and administrative burdens on the government resulting from such new procedures are fully justified. In general, there have been relatively few exclusions where undisclosed confidential information could play a role.[323] Summary exclusions were never intended to handle large numbers of cases.[324] Indeed, there has been a dearth of litigation in the federal courts regarding summary exclusions of returning LPRs.[325] With the procedures outlined above, the government will rarely be able to resort to confidential information to exclude an LPR. Given the compelling private interests at stake in exclusion, the actual burdens on the government will remain within acceptable fiscal limits.

VII. AN ARGUMENT FOR THE REPEAL OF SECTION 235(C)

This Note has discussed the procedural due process inadequacies of the section 235(c) summary exclusion laws. The legislative history outlined below illustrates Congress' complete disregard for the due process rights of any alien subject to summary exclusion. This section, therefore, argues that the underlying assumptions of summary exclusion are no longer constitutionally valid, and concludes that Congress should repeal a law that is an outdated relic of the past.

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323. From approximately 1964-1984, "almost 70 million non-immigrant visas were issued, and 519 were denied under [8 U.S.C. § 1182(a)(27)]." Abourezk v. Reagan, 592 F. Supp. 880, 888 n.26 (1984), *vacated*, 785 F.2d 1043 (D.C. Cir. 1986), *aff'd*, 484 U.S. 1 (1987) (citing affidavit of Deputy Assistant Secretary of State Louis P. Goelz).

324. *See Hearings*, *supra* note 214, at 287 (statement of Michael Horan, special assistant to the Attorney General). Section 235(c) "is reserved only for those relatively *few cases* where we have information that cannot be brought out in a hearing, that is from intelligence sources, disclosure of which would be prejudicial." *Id.* (emphasis added).

325. Only one other challenge to the summary exclusion of an LPR has been brought before the federal courts. In United States *ex rel.* Pagliera v. Savoretti, 139 F. Supp. 143 (S.D. Fla. 1956), the procedure was held unconstitutional.

A 1950 Senate Report ("Report") provided the basic foundations for the INA.[326] The Report asserted that investigations of aliens revealed a "need for imposing additional immigration restrictions with respect to the admission . . . of those aliens who it [was] believed [sought] to enter the United States to engage in activities subversive to the national security."[327] Noting the extent of the "Communist threat" and the importance of aliens to the success of Communism in the United States,[328] the Report urged that existing immigration law was inadequate to prevent the entry of subversives.[329]

The Report's reasoning illuminates the original motivations behind summary exclusion. It lamented the difficulties associated with proving that certain aliens and organizations advocated the overthrow of the government.[330] It noted that immigration law inadequately accounted for the problems in revealing the concealed, "real intentions" of communist organizations.[331] The authors asserted that "since by the very nature of such organizations their true purpose is concealed, it is difficult to prove that alien members fall within the proscribed excludable class of those who advocate the overthrow of government by force and violence."[332]

The authors of the Report were clearly not interested in providing due process of law to *any* alien. The subsequent Congressional debates on section 235(c) reflected this attitude. For example, during debates on section 235(c), one representative remarked, "I think we give [the] alien all the protection he is entitled to. It is a matter of

326. S. REP. NO. 1515, 81st Cong., 2d Sess. 798 (1950). This report was incorporated by explicit reference into the legislative history of the INA. *See* H.R. REP. NO. 1365, 82d Cong., 2d Sess. 27 (1952), *reprinted in* 1952 U.S. CODE CONG. & ADMIN. NEWS 1683.

327. S. REP. NO. 1515, 81st Cong., 2d Sess. 798 (1950).

328. *Id.* at 781-82. "As an international conspiracy, communism has organized systematic infiltration of our borders for the purpose of overthrowing the democratic Government of the United States by force, violence and subversion." *Id.* The Report asserted that since communism was necessarily an "alien force," it was "easy to see that the forces of world communism must . . . find ways and means for getting their minions into this country if they are to maintain [their] effectiveness. . . ." *Id.* at 782.

329. *Id.*

330. *Id.* at 797. "While Congress has clearly prescribed classes of aliens which are to be excluded . . . there is the obvious difficulty of establishing that certain aliens and organizations do advocate overthrowing the Government by force and violence." *Id.*

331. *Id.* "It is inherent in the tactics of [communist] persons and organizations that their real intentions be concealed under an aura of legitimacy in order to accomplish their purpose. Thus, while it may be common knowledge that certain organizations advocate such beliefs, satisfactory proof of that position offers a formidable obstacle." *Id.*

332. *Id.*

charity and grace in the first place."[333] Senator McCarran, a sponsor of the INA, expressed the view that "[f]rom time immemorial, a sovereign nation has had the absolute right to admit or exclude aliens."[334] He justified denying any alien procedural protections by reminding Congress that "no alien has ever had a right to enter the United States . . . . No country on earth today gives non-nationals any legal, moral, or equitable right . . . to cross its borders as immigrants."[335]

Although the Report viewed existing law as inadequate, its authors did not have to look beyond the letter of the law to implement more restrictive exclusion procedures. The Report noted that Congress already authorized the President "to impose additional restrictions on the entry into and departure of persons from the United States when the United States [was] at war or during the existence of [a] national emergency."[336] President Roosevelt exercised this power by declaring such an emergency on May 27, 1941.[337]

The Attorney General and Secretary of State then promulgated a regulation which closely resembled section 235(c).[338] The Report stated that this regulation "continue[s] in effect as part of the immigration laws, since the national emergency has never been terminated and a state of war still exists."[339] With few dissenting voices,[340] Congress incorporated the substance of these emergency and wartime regulations into the 1952 Immigration and Nationality Act; these regulations still exist today in the form of summary exclusion.[341]

Although the "Communist threat" seems less menacing today than forty years ago, the McCarthy-era reasoning used to support summary exclusion laws could be applied to the current threat posed by terrorist groups and drug cartels. These present-day perils to the nation's security are at least as menacing as the threat posed by Com-

333. *Hearings, supra* note 214, at 284.

334. 98 CONG. REC. 5789 (1952).

335. *Id.*

336. S. REP. NO. 1515, 81st Cong., 2d Sess. 794 (1950).

337. *Id.* In a proclamation issued on November 14, 1941, President Roosevelt said that "[n]o alien shall be permitted to enter the United States if it appears . . . that such entry would be prejudicial to the interests of the United States. . . . " Presidential Proclamation 2523, 3 C.F.R. 270, 271 (1938-1943 Compilation).

338. S. REP. NO. 1515, 81st Cong., 2d Sess. 794 (citing 8 C.F.R. § 175.53 (1945 Supp.)).

339. S. REP. NO. 1515 at 794.

340. *See* 98 CONG. REC. 4435, 5789 (1952) (comments of Rep. Powell and Sen. Morse).

341. *Compare* 66 Stat. 163, 199 (1952) *with* 8 U.S.C. § 1225(c) (1988) (section 235(c) unchanged since its enactment in 1952).

munism forty years ago. Just as Congress considered Communism to be a threat from "an alien force,"[342] the government could similarly argue that aliens have assumed a comparable role with the importation of drugs[343] and terrorism. Further, such activities may be extremely difficult to uncover and ultimately prove. This difficulty provides the sense of urgency used to justify summary exclusion.

Admittedly, it may be difficult to establish that an LPR's activities further the unlawful aims of a terrorist organization or drug cartel.[344] But Congress should repeal a procedure that circumvents such difficulties at the expense of fully compromising the constitutional rights of returning LPRs. If the government normally carries the burden of proving excludability,[345] then it should shoulder that burden regardless of the degree of difficulty presented by any particular case.

Assuming concerns surrounding alien involvement with terrorism and drugs are valid, summary exclusion still remains inherently flawed. The law's underlying assumptions about alien rights[346] are obsolete unconstitutional relics of another time. The McCarthy-era Congress simply grouped returning LPRs into the same constitutional category as first-time alien entrants.[347] It would have scoffed at the modern concept of an LPR's procedural due process rights upon returning to this country after a brief trip abroad. Congress, today, should not countenance the use of a law that completely ignores the constitutional rights of returning LPRs. Rather, it should repeal summary exclusion laws on the ground that they are outdated, unconstitutional anomalies.

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342. S. REP. NO. 1515, 81st Cong., 2d Sess. 782 (1950).

343. This perspective, of course, minimizes the country's demand for drugs.

344. *Compare* remarks made by a Deputy Attorney General during hearings on section 235(c). He emphasized the inadequate "means of performing the necessary investigations, some of which might lead to places far behind the iron curtain, which would be necessary to separate those who are truly repentant Communists from among those who may claim to be but are not." *Hearings, supra* note 214, at 713 (statement of Peyton Ford). This argument provides no legitimate justification for the drastic remedy of completely withholding information.

345. Kwong Hai Chew v. Rogers, 257 F.2d 606 (D.C. Cir. 1958).

346. *See supra* text accompanying notes 333-35.

347. "The authority of the Congress over the admission of aliens is plenary, and it may exclude them altogether or prescribe the terms and conditions upon which they may enter . . . the country." S. REP. NO. 1515, 81st Cong., 2d Sess. 798 (1950) (citing Lapina v. Williams, 232 U.S. 78 (1914) and Wong Wing v. United States, 163 U.S. 228 (1896)).

VIII. CONCLUSION

The court of appeals in *Rafeedie v. INS*[348] held that Rafeedie, as an LPR returning from a two-week trip abroad, was entitled to due process of law in an exclusion proceeding.[349] However, the approval of summary exclusion procedures currently in force would necessitate the conclusion that the due process balance completely favors the government over Rafeedie and similar returning LPRs. This Note has shown that the current procedure completely compromises Rafeedie's numerous and weighty private interests, seemingly forbidden by any reasonable interpretation of due process.

Although the government has legitimate interests, the due process balance struck by this Note shows that there is no compelling governmental need for a "truly summary action,"[350] which creates the possibility of serious abuse. Such abuse results from basing exclusions on *undisclosed* confidential information. Disclosure of such information, in camera, to an independent tribunal with exclusion authority or to the LPR's advocate ad litem, would strike the balance between Rafeedie's interest in a full hearing and the government's desire to protect its security interests. Imposing such additional safeguards would not be unduly burdensome and would deter governmental attempts to improperly and summarily exclude aliens by simply invoking "national security" concerns. Because the new procedure prevents arbitrary and capricious exclusions, the functional goals of the fifth amendment's due process clause are preserved.

But since the Supreme Court has explicitly stated that it refuses to "displace congressional choices of policy,"[351] the procedural remedies proposed by this Note may in fact be a matter for Congress. Certainly, none of the original assumptions about aliens which support summary exclusion provide constitutionally-sound justifications for upholding the law today. On the contrary, those assumptions demand the repeal of section 235(c). In drafting a replacement measure, Congress should pay close attention to a warning voiced by Justice Jackson against the indiscriminate use of confidential information.

> Security is like liberty in that many are the crimes committed in its

348. 880 F.2d 506 (D.C. Cir. 1989).

349. *Id.* at 524.

350. Landon v. Plasencia, 459 U.S. 21, 41 (1982) (Marshall, J., concurring in part and dissenting in part).

351. *Id.* at 34-35.

> name . . . . In the name of security the police state justifies its arbitrary oppressions on evidence that is secret, because security might be prejudiced if it were brought to light in hearings. The plea that evidence of guilt must be secret is abhorrent to free men, because it provides a cloak for the malevolent, the misinformed, the meddlesome, and the corrupt to play the role of informer undetected and uncorrected.[352]

*Steven J. Simerlein**

352. Knauff v. Shaughnessy, 338 U.S. 537, 551 (1950) (Jackson, J., dissenting).

* This Note is dedicated to my wife Ana for her patience and understanding.