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Obviously, this is dated and has to be streamlined. But we can pull some of the info from here.

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National Security
Immigration Removal Grounds
& Special Removal Processes

by

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I. INTRODUCTION

The Immigration and Nationality Act (INA) has historically provided for the exclusion and deportation of aliens who pose national security risks. Since 1990, the INA has included specific bars for aliens associated with terrorism, aliens who present adverse foreign policy consequences, and other aliens posing national security risks. In 1996 and 2001, Congress substantially revised and augmented the procedures for removing these aliens. The INA now provides three enforcement mechanisms for removing aliens who come to the United States to engage in terrorism or subversive activities. These mechanisms are conventional removal proceedings, summary removal, and removal proceedings in the Alien Terrorist Removal Court (ATRC) under Title V of the INA. In 2004 and 2005, Congress continued to revise and expand the terrorism provisions in the INA.

In the past, the government rarely brought removal cases against terrorist aliens on the explicit basis of national security or terrorism charges. Such actions have been limited for several reasons. First, declassifying sufficient information to prove a terrorism charge often entails unacceptable costs to continuing investigations and national security. Second, the continuation of intelligence gathering operations often outweighs identifying an alien as a terrorist or national security risk. Third, prior to 1990, the INA contained no "terrorism-specific" provisions, thus making removal for such grounds difficult. Fourth and most importantly, aliens usually can be removed more efficiently on other removal grounds not explicitly related to national security.

II. INADMISSIBLE AND REMOVABLE GROUNDS

United States immigration law has always provided for the denial of admission or the eventual removal of aliens who threaten the national security. From 1950 to 1990, exclusion, deportation, and naturalization provisions focused on an alien's association with organizations advocating world communism or the overthrow of the United States government. The Supreme Court upheld these provisions against a variety of constitutional attacks. See Gastelum-Quinones v. Kennedy, 374 U.S. 469 (1963); Niukkanen v. McAlexander, 362 U.S. 390 (1960); Rowoldt v. Perfetto, 355 U.S. 115 (1957); Galvan v. Press, 347 U.S. 522 (1954); Harisiades v. Shaughnessy, 342 U.S. 580 (1952); see also Carlson v. Landon, 342 U.S. 524 (1952).

In 1990, Congress replaced most of the advocacy and membership provisions with broad national security, terrorism, and foreign policy provisions. See generally Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978. The 1990 terrorism provisions were generally conduct-oriented and specifically included providing material support to terrorists and terrorist organizations. INA §§ 212(a)(3), 237(a)(4), 8 U.S.C. §§ 1182(a)(3), 1227(a)(4).[2] The USA

PATRIOT Act and two 1996 enactments also brought major changes concerning the removal of alien terrorists. See generally Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act), Pub. L. No. 107-56, 115 Stat. 272; Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546-3009-724; Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214.

In 2004, the Intel Reform Act added new grounds of removability and enhanced terrorism-related criminal statutes. See generally Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, 118 Stat. 3638. In 2005, the REAL ID Act made significant changes to the national security provisions, including adding and revising the grounds of inadmissibility and removability and expanding the definition of "engage in terrorist activities." See Emergency Supplemental Appropriations Act for Defense, The Global War on Terror, and Tsunami Relief, 2005, Pub. L. No. 109-13, Div. B, 119 Stat. 231, 302-323 (REAL ID Act).

The security and related grounds of inadmissibility are currently located at INA § 212(a)(3)(A)-(D) and (F), 8 U.S.C. § 1182(a)(3)(A)-(D) and (F). These grounds target the following general categories: espionage, sabotage, and the transfer of restricted technology, INA § 212(a)(3)(A); terrorism, INA § 212(a)(3)(B); foreign policy grounds, INA § 212(a)(3)(C); membership in Communist and totalitarian parties, INA § 212(a)(3)(D); and association with terrorist organizations, INA § 212(a)(3)(F). The grounds of inadmissibility under INA § 212(a)(3)(A) and (C) have parallel provisions in INA § 237(a)(4)(A)[3] and (C). After the REAL ID Act, INA § 212(a)(3)(B) and (F) are incorporated by reference into the grounds of removability under INA § 237(a)(4)(B), 8 U.S.C. § 1227(a)(4)(B). None of these grounds require an actual conviction.

There is a separate set of national security-related removal grounds under INA § 237(a)(2)(D), 8 U.S.C. § 1227(a)(2)(D). These grounds require convictions to sustain the ground of removability. This section of the Act specifically concerns convictions for the following: espionage, sabotage, treason and sedition, INA § 237(a)(2)(D)(i); threats against the President and his successors, INA § 237(a)(2)(D)(ii); military expeditions against friendly nations, INA § 237(a)(2)(D)(ii); violations of the Military Selective Service Act, INA § 237(a)(2)(D)(iii); and violations of the Trading with the Enemy Act, INA § 237(a)(2)(D)(iii). Convictions involving conspiracies or attempts to commit any of the list offenses under INA § 237(a)(2)(D) are also removable offenses.

Pursuant to INA § 101(a)(43)(L), 8 U.S.C. § 1101(a)(43)(L), the

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[2] In immigration proceedings, the parties cite to the Immigration and Nationality Act (INA) instead of Title 8 of the United States Code. Where appropriate, this outline provides the citations to the INA followed by the duplicate citations in Title 8.

[3] However, § 237(a)(4)(A) does not have the "reasonable ground to believe" standard found in § 212(a)(3)(A).

definition of the term "aggravated felony" also includes offenses that concern matters of national security. Some of these offenses are also listed in INA § 237(a)(2)(D) and may also fall within other removability provisions of the INA. Subparagraph (L) specifically defines "aggravated felony" as the gathering or transmitting of national defense information, the disclosure of classified information, sabotage, and treason as defined in federal law. Subparagraph (L) also includes offenses related to the protection of the identity of undercover intelligence agents.

A. ESPIONAGE, SABOTAGE, AND OTHER DANGEROUS ACTIVITIES

INA § 212(a)(3)(A), 8 U.S.C. § 1182(a)(3)(A) mandates the inadmissibility of any alien "who a consular officer or the Attorney General knows, or has reasonable ground to believe, seeks to enter the United States to engage solely, principally, or incidentally" in:

> **INA § 212(a)(3)(A)(i)(I):** any activity to violate any law of the United States relating to espionage or sabotage;
>
> **INA § 212(a)(3)(A)(i)(II):** any activity to violate or evade any law prohibiting the export of restricted goods, technology, or sensitive information;
>
> **INA § 212(a)(3)(A)(ii):** any other unlawful activity;
>
> **INA § 212(a)(3)(A)(iii):** any activity a purpose of which is the opposition to, or the control of, or overthrow of the United States government by force, violence, or other unlawful means.

Admitted aliens who have committed the above acts may be removed under INA § 237(a)(4)(A), 8 U.S.C. § 1227(a)(4)(A). INA § 237(a)(4)(A) requires that an alien "has engaged, is engaged, or at any time after admission engages" in the proscribed activities listed at INA § 212(a)(3)(A). INA § 237(a)(4)(A)(ii) requires "criminal activity which endangers public safety or national security" rather than "any other unlawful activity," as stated in INA § 212(a)(3)(A)(ii).

1. Espionage and Sabotage

In Matter of Luis-Rodriguez, 22 I&N Dec. 747 (BIA 1999), the Board of Immigration Appeals (Board) addressed the scope of former INA § 241(a)(4)(A)(i), now INA § 237(a)(4)(A)(i), 8 U.S.C. § 1227(a)(4)(A)(i). In that case, a Cuban spy failed to register under 50 U.S.C. § 851. Id. The Board determined that the phrase "related to," as it appeared in former INA §

241(a)(4)(A)(i), was very broad in scope, and thus, the statute referred to any violation of law related to espionage and did not require evidence that the alien was engaged in an act of espionage. The alien's knowledge and skills with regard to intelligence gathering were sufficient to fall within the broad scope of 50 U.S.C. § 851. Id. at 760. Therefore, the failure to register as a foreign agent was a law related to espionage. Id. The Board also concluded that the language of former INA § 241(a)(4)(A)(i) did not require an actual conviction. Id. at 756.

2. Violation of Export Laws

There are a variety of export control statutes within the United States Code. The most commonly enforced control statutes are the Export Administration Act (EAA), 50 App. U.S.C. §§ 2401-20, the Arms Export Control Act (AECA), 22 U.S.C. §§ 2751-2799aa-2, the International Emergency Economic Powers Act (IEEPA), 50 U.S.C. §§ 1701-06, and the Trading with the Enemy Act (TWEA), 50 App. U.S.C. §§ 1-44.

a. The Export Administration Act

The Export Administration Act (EAA), 50 App. U.S.C. §§ 2401-20, regulates the export of strategic dual-use goods and technologies from the United States. The EAA authorizes export controls for national security, foreign policy, and short supply. 50 App. U.S.C. §§ 2404-06. As an example, for national security reasons, the EAA authorizes the restriction of exports that would make "a significant contribution to the military potential of [any] country or combination of countries which would prove detrimental to the national security of the United States." 50 App. U.S.C. § 2404(b).

Under the EAA, the Secretary of Commerce has been delegated the power to authorize export controls. 50 App. U.S.C. §§ 2403-06. The Department of Commerce publishes regulations implementing the EAA as the Export Administration Regulations (EAR). 15 C.F.R. Parts 730-799. The EAR contains the Commerce Control List. 15 C.F.R. Part 774; see also 50 App. U.S.C. § 2403(b). The EAR states that no item on the Control List may be exported to any destination without a validated license issued by the Commerce Department, except where the export is specifically authorized under a general license or authorization. 15 C.F.R. § 736.2.

The EAA contains several penalty provisions and a criminal forfeiture provision. 50 App. U.S.C. §§ 2410, 2410b, and 2410c. The EAA criminalizes knowing and willful violations (most typically unlicensed exports), as well as attempts, conspiracies, possession of goods or technology with the intent to illegally export them, and any actions taken with the intent to evade the provisions of the EAA. 50 U.S.C. § 2410.

b. The Arms Export Control Act

The Arms Export Control Act (AECA), 22 U.S.C. §§ 2751-2799aa-2, regulates the export and import of defense articles, defense services, and related technical data. The AECA authorizes the President to designate items as defense articles and services, to require licenses for the export of such articles and services, and to promulgate regulations for the import and export of such articles and services. 22 U.S.C. § 2778. This power has been delegated to the Department of State, Office of Defense Trade Controls (ODTC). 22 C.F.R. § 120.1, as amended by 71 Fed. Reg. 20534-01 (effective Apr. 21, 2006).

The ODTC publishes its regulations as the International Traffic in Arms Regulations (ITAR). 22 C.F.R. Parts 120-130. The ITAR contains a list of all ODTC controlled items, which is called the United States Munitions List. 22 C.F.R. §§ 120.2 and Part 121; see also 22 U.S.C. § 2778(a)(1). If an item or service appears on the Munitions List, it is considered a defense item or service and requires an individual license from the ODTC for export to all destinations. 22 U.S.C. § 2778(b)(2).

Under the ITAR, the following five activities are considered an export:

1) Sending or taking defense articles out of the United States in any manner, except by mere travel outside of the United States by a person whose personal knowledge includes technical data;
2) Transferring registration, control, or ownership to a foreign person of any aircraft, vessel, or satellite covered by the United States Munitions List, whether in the United States or abroad;
3) Disclosing or transferring in the United States any defense article to an embassy, an agency, or subdivision of a foreign government;
4) Disclosing or transferring technical data to a foreign person, whether in the United States or abroad;
5) The performance of a defense service on behalf or, or for the benefit of, a foreign person, whether in the United States or abroad.

22 C.F.R. § 120.17.

The AECA criminalizes knowing and willful violations (most typically unlicensed exports), false statements or omissions of required facts in a registration or license application, attempted illegal exports, and failure of defense exports brokers to register with the ODTC. 22 U.S.C. § 2778(c).

c. The International Emergency Economic Powers Act and the Trading with the Enemy Act

The International Emergency Economic Powers Act (IEEPA), 50 U.S.C. §§ 1701-06, and the Trading with the Enemy Act (TWEA), 50 App. U.S.C. §§ 1-44, with certain exceptions, give the President broad authority to regulate exports and other international transactions in times of national emergency. 50 U.S.C. §§ 1701, 1702, and 1704; 50 App. U.S.C. § 5. Controls under these acts originate as an executive order declaring a national emergency based upon an unusual and extraordinary foreign threat to the national security, foreign policy, or economy of the United States. See 50 U.S.C. § 1701(a); 50 App. U.S.C. § 5.

The Department of the Treasury, Office of Foreign Assets Control (OFAC) is responsible for regulating the controls and sanctions under IEEPA and TWEA. See generally 31 C.F.R. Parts 500 to 598. OFAC regulations require exporters, importers, and others under United States jurisdiction to obtain OFAC licenses prior to engaging in any type of commercial transaction with the targeted country or its nationals. See id.

d. Relevant Immigration Case Law

At the present time, there is little published case law on the violation of export laws as they relate to immigration law. The Seventh Circuit has determined that the ground of removability under INA § 212(a)(3)(A)(i)(II), 8 U.S.C. § 1182(a)(3)(A)(i)(II), concerning the export of goods, technology, and sensitive information, is not unconstitutionally vague. Beslic v. INS, 265 F.3d 568, 571-72 (7th Cir. 2001). In Beslic, the alien was convicted of conspiring to export military weapons and related articles without a license. Id. at 569. The appellate court did not provide an analysis of the conviction as it relates to the charge of removability. However, the Board had concluded that the alien's actions violated national security because it undermined the strong national security interest in restricting the export of military weapons and maintaining control over who receives such weapons. Id. at 570.

e. Other Case Law

For IEEPA cases, several courts in non-immigration contexts have recognized the underlying national security concerns inherent in violating regulations promulgated under IEEPA executive orders. The Ninth Circuit Court of Appeals refused to enforce a contract based on illegal trade with an IEEPA-designated country, finding that the public policy underlying the Executive Order outweighed any equitable concerns. Bassidji v. Goe, 413 F.3d 928, 933-34, 938-39 (9th Cir. Jun. 15, 2005) (finding guarantee of payments violated IEEPA and the Iranian Sanctions Executive Order, and therefore contract was unenforceable). The California court cited in Bassidji expressed the underlying public policy concern:

> The violations of the Regulations are not mere technicalities with no consequence. Rather, violations of the Regulations are considered to be contrary to the security interests of the United States. The President issued the Orders "to deal with [Iran's] unusual and extraordinary threat to the national security, foreign policy, and economy of the United States.

Kashani v. Tsann Kuen China Enter. Co., 118 Cal. App. 4th 531, 558, 13 Cal. Rptr. 3d 174, 194 (Cal. Ct. App. 2004) (quoting Exec. Order No. 12959, 60 Fed. Reg. 24757 (May 6, 1995)).

The First Circuit, in a criminal case, noted that "IEEPA codifies Congress's intent to confer broad and flexible power upon the President to impose and enforce economic sanctions against nations that the President deems a threat to national security interests." United States v. McKeeve, 131 F.3d 1, 10 (1st Cir. 1997) (affirming eight-level enhancement under sentencing guidelines on ground that defendant's offense evaded "national security or nuclear proliferation controls," and rejecting McKeeve's contention that the government had to prove that the shipment of computers in violation of IEEPA constituted an actual threat to national security). The court also refused to second-guess the national security determination made by the President. Id. at 14 (rejecting McKeeve's attempt to "substitute the judgment of a factfinder for that of the executive branch, which has made a determination that the export of any goods to Libya … threatens national security interests and citing case noting the primacy of the presidential power to protect national security interests"). The sanctions regulations which prohibit the transfer of money serve to "den[y] hostile foreign governments and nationals access to funds which might be used to promote activities inimical to the interests of the United States." Paradissiotis v. United States, 304 F.3d 1271, 1275 (Fed. Cir. 2002) (citing cases) (internal quotations deleted).

3. Any Other Criminal Activity

There is no published case precedent involving INA § 212(a)(3)(A)(ii), 8 U.S.C. § 1182(a)(3)(A)(ii). The Board has addressed this issue in unpublished decisions that provide guidance on the interpretation of the provision. The Board concluded that other criminal activity that endangers public safety or national security, under INA § 241(a)(4)(A)(ii), 8 U.S.C. § 1231(a)(4)(A)(ii), the predecessor to INA § 237(a)(4)(A)(ii), 8 U.S.C. § 1227(a)(4)(A)(ii), does not include a racketeering conviction under 18 U.S.C §§ 1961 and 1962(c). See Matter of Chow, A17-582-742 (Feb. 7, 2000) (finding former INA § 241(a)(4)(A)(ii) to be broad and concluding that the section encompasses danger to the country at large rather than to particular individuals in order to avoid making § 241(a)(2) crimes surplusage). Likewise the Board concluded that other criminal activity that endangers public safety or national security, under INA § 241(a)(4)(A)(ii), does not include a conviction for statutory rape. See Matter of Javier-Camarena, A91-996-032 (Aug. 17 1993).[4] INA § 237(a)(4)(A)(ii) only

addresses serious crimes that affect the security of the country at large rather than the security of particular individuals. Id. In an unpublished decision, an Immigration Judge found that an alien's intentionally misleading actions endangered the public safety or national security of the United States under § 237(a)(4)(A)(ii). See Matter of Sheikh, A90-671-452 (Jan. 21, 2004). In that case, the alien intentionally misled federal agents as to the whereabouts of an individual of interest, thereby preventing the agents from possibly intercepting the individual en route and diverting them from their other homeland security duties while they attempted, in vain, to locate the individual in this country.

4. Acts Against the U.S. Government

There is no published case law interpreting § 212(a)(3)(A)(iii), 8 U.S.C. § 1182(a)(3)(A)(iii).

B. TERRORISM

INA § 212(a)(3)(B), 8 U.S.C. § 1182(a)(3)(B), contains the inadmissibility provisions related to terrorism, and INA § 237(a)(4)(B), 8 U.S.C. § 1227(a)(4)(B), contains the terrorist provisions for removability. The removal grounds under INA § 237(a)(4)(B), as amended by the REAL ID Act, now incorporate all the inadmissibility grounds plus the terrorist association ground: "Any alien who is described in subparagraph (B) or (F) of section 212(a)(3) is deportable."

The starting point to working with these provisions, therefore, is understanding the grounds of inadmissibility in INA § 212(a)(3)(B)(i).[5] To apply INA § 212(a)(3)(B)(i), other portions of the terrorism statute must be considered as they define key terms in the inadmissibility grounds. "Terrorist activity" and "engage in terrorist activity" are fully defined in INA § 212(a)(3)(B)(iii) and (iv). The term "representative" is also defined in INA § 212(a)(3)(B)(v). Finally, the term "terrorist organization" is defined at INA § 212(a)(3)(B)(vi), which provides three bases for determining whether a specific group qualifies as a terrorist organization. The REAL ID Act revised some of the definitions in §§ 212(a)(3)(B)(iv) and (vi). See Part II.B.1, II.B.3, and II.B.6 below.

The REAL ID Act amendments to INA §§ 212(a)(3)(B) and 237(a)(4)(B)

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[4] These cases are available through National Security Law Division (NSLD) archives. Please contact NSLD if you need a copy.

[5] It is also important to note that the REAL ID Act expanded and re-numbered some of these grounds without re-numbering them in other references. See, e.g., INA § 208(b)(2)(A)(v) which refers to certain grounds of inadmissibility that bar asylum.

are fully retroactive.[6] They became effective on the date of enactment, and they apply to proceedings "instituted before, on, or after the date of enactment." REAL ID Act §§ 103(d), 105(a)(2). They also apply to "acts and conditions constituting a ground for inadmissibility, excludability, deportation, or removal occurring or existing before, on, or after" the date of enactment. Id. (emphasis added).

1. Grounds of Inadmissibility

As amended by the REAL ID Act, INA § 212(a)(3)(B)(i), 8 U.S.C. § 1182(a)(3)(B)(i), provides that an alien is inadmissible on the following bases:

INA § 212(a)(3)(B)(i)(I): the alien has engaged in a terrorist activity;[7]

INA § 212(a)(3)(B)(i)(II): a consular officer, the Attorney General, or the Secretary of Homeland Security knows, or has reasonable ground to believe,[8] that the alien is engaged or is likely to engage after entry in any terrorist activity (as defined in clause iv);

INA § 212(a)(3)(B)(i)(III): the alien has, under circumstances indicating an intention to cause death or serious bodily harm, incited terrorist activity;

INA § 212(a)(3)(B)(i)(IV)(aa): the alien is a representative (as defined in clause v) of a terrorist organization (as defined in clause (vi));

INA § 212(a)(3)(B)(i)(IV)(bb): the alien is a representative (as defined in clause v) of a political, social, or other group that endorses or espouses terrorist activity;

INA § 212(a)(3)(B)(i)(V): the alien is a member of a terrorist organization described in subclause (I) or (II) of clause (vi);

INA § 212(a)(3)(B)(i)(VI): is a member of a terrorist organization described in clause (vi)(III), unless the alien can demonstrate by clear and convincing evidence that the alien did not know, and should not reasonably have known, that the organization was a terrorist organization;

INA § 212(a)(3)(B)(i)(VII): endorses or espouses terrorist activity or

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[6] Not all provisions of the REAL ID Act are fully retroactive. Per REAL ID Act § 101(b) and (h)(2), the change in language in INA § 208(b)(2)(A)(v) is effective for asylum applications made "on or after" the REAL ID Act's effective date. See Matter of S-B-, 24 I&N Dec. 42 (BIA 2006).

[7] Pursuant to the flush language in INA § 212(a)(3)(B)(i), an alien "who is an officer, official, representative, or spokesman of the Palestine Liberation Organization" is considered to be "engaged in a terrorist activity" (for the purposes of Chapter 2, "Qualifications for Admission of Aliens" in Title II of the INA).

[8] For a discussion of the term "reasonable ground to believe," see Interpretation of Terms under Part II.C.3.

persuades others to endorse or espouse terrorist activity or support a terrorist organization; or

INA § 212(a)(3)(B)(i)(VIII): has received military-type training (as defined in section 2339D(c)(1) of Title 18) from or on behalf of any organization that, at the time the training was received, was a terrorist organization (as defined in clause (vi)).

INA § 212(a)(3)(B)(i)(IX) provides that the spouse or child of an alien found inadmissible under the terrorist provisions is also inadmissible if the activity causing the inadmissibility of the principal alien occurred within the last five years. Congress provided an exception for spouses and children who did not know or should have reasonably known of the activity causing inadmissibility. INA § 212(a)(3)(B)(ii)(I).[9] Congress provided a second exception for when the consular officer or the Attorney General[10] has reasonable grounds to believe that the spouse or child has renounced the activity causing the alien to be inadmissible. INA § 212(a)(3)(B)(ii)(II). See INA § 101(a)(35) for the definition of "spouse" and INA § 101(b) for definition of "child" for purposes of this section.

2. Definition of "Terrorist Activity"

INA § 212(a)(3)(B)(iii), 8 U.S.C. § 1182(a)(3)(B)(iii), defines "terrorist activity" as any activity that is unlawful where committed or would be unlawful if committed in the United States, and involves:

INA § 212(a)(3)(B)(iii)(I): the hijacking or sabotage of any conveyance, including an aircraft, vessel, or vehicle;

INA § 212(a)(3)(B)(iii)(II): hostage-taking, that is the seizing or detaining and threatening to kill, injure, or continue to detain, another to compel a third person, including a government, to do or abstain from doing an act as a condition for the release of the person;

INA § 212(a)(3)(B)(iii)(III): a violent attack on an "internationally

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[9] Note: the cross reference in INA § 212(a)(3)(B)(ii) to the inadmissibility ground for spouses and children was not updated by the REAL ID Act.

[10] Following the creation of the Department of Homeland Security and the transfer of many immigration responsibilities from the Attorney General to the Secretary of Homeland Security, one may assume that references in this outline to the Attorney General refer to the Secretary of Homeland Security, or in some instances, both the Secretary and the Attorney General, when not explicitly stated. Although the REAL ID Act added references to the Secretary of Homeland Security in several provisions, see, e.g., INA §§ 208(b)(1), 212(a)(3)(B)(i)(II), other provisions still need to be updated, see, e.g., INA §§ 208(b)(2), 212(a)(3)(B)(ii). The references to the Attorney General in this outline remain where the additional conforming amendments to the INA have not yet been enacted.

protected person," as defined in 18 U.S.C. § 1116(b)(4);

INA § 212(a)(3)(B)(iii)(IV): an assassination;

INA § 212(a)(3)(B)(iii)(V)(a): the use of any biological or chemical agent, or nuclear weapon or device with intent to endanger the safety of others or to cause substantial damage to property;

INA § 212(a)(3)(B)(iii)(V)(b): the use of any explosive, firearm, or dangerous device, other than for personal monetary gain, with intent to endanger the safety of others or to cause substantial damage to property; or

INA § 212(a)(3)(B)(iii)(VI): a threat, attempt, or conspiracy to commit any of the foregoing acts.

a. Violent Attack on "Internationally Protected Person"

An internationally protected person, as stated in INA § 212(a)(3)(B)(iii)(III), 8 U.S.C. § 1182(a)(3)(B)(iii)(III), is defined at 18 U.S.C. § 1116(b)(4). Section 1116(b)(4) provides:

> (4) "Internationally protected person" means—
>
> > (A) a Chief of State or the political equivalent, head of government, or Foreign Minister whenever such person is in a country other than his own and any member of his family accompanying him; or
> >
> > (B) any other representative, officer, employee, or agent of the United States Government, a foreign government, or international organization who at the time and place concerned is entitled pursuant to international law to special protection against attack upon his person, freedom, or dignity, and any member of his family then forming part of his household.

Also relevant to this analysis is the federal definition of "foreign official." 18 U.S.C. § 1116(b)(3) defines the term as:

> (A) a Chief of State or the political equivalent, President, Vice President, Prime Minister, Ambassador, Foreign Minister, or other officer of Cabinet rank or above of a foreign government or the chief executive officer of an international organization, or any person who has previously served in such capacity, and any member of his family, while in the United States; and

> (B) any person of a foreign nationality who is duly notified to the United States as an officer or employee of a foreign government or international organization, and who is in the United States on official business, and any member of his family whose presence in the United States is in connection with the presence of such officer or employee.

There is no published case law addressing INA § 212(a)(3)(B)(iii)(III).

b. Assassination

INA § 212(a)(3)(B)(iii)(IV), 8 U.S.C. § 1182(a)(3)(B)(iii)(IV), does not define the term "assassination." There is criminal case law interpreting the term "assassination," but the term is not defined in the federal criminal code. 18 U.S.C. § 1751 criminalizes threats to kill the President and other high-ranking officials. The title of the statute refers to "assassination." Case law also refers to the killing of a high-ranking public official as an assassination. See Elnager v. INS, 930 F.2d 784, 788 (9th Cir. 1991) (referring to the assassination of Anwar Sadat); Dolores v. INS, 772 F.2d 223, 225 (6th Cir. 1985) (referring to the assassination of Filipino opposition leader Benigno Aquino); United States v. Fromme, 405 F. Supp. 578, 580 (E.D. Cal. 1975) (stating that Fromme was indicted for the attempted assassination of President Ford); see also Hunter v. Bryant, 502 U.S. 224, 228, 229 (1991) (referring to an assassination scheme against the President); United States v. Miller, 115 F.3d 361, 364 (6th Cir. 1997) (concerning a threatened assassination against the President and Vice President); Singh-Kaur v. Ashcroft, 385 F.3d 293, 301 (3d Cir. 2004) (reasoning that assassinations are a form of terrorist activity); Matter of A-H-, 23 I&N Dec. 774, 784 (A.G. 2005) (referring to the widespread murders of journalists and intellectuals because of their political opinions or religious beliefs as terrorist acts).

c. Use of Explosives

The Third Circuit and the Attorney General have specifically stated that the use of explosives is a form of terrorist activity. Singh-Kaur v. Ashcroft, 385 F.3d 293, 301 (3d Cir. 2004) (reasoning that assassinations and the use of explosives are a form of terrorist activity); Matter of A-H-, 23 I&N Dec. 774, 784 (A.G. 2005) (referring to the bombing of civilian targets as terrorist acts). The Third Circuit also ruled that the definition of terrorist activity in INA § 212(a)(3)(B)(iii)(V)(b) is "neither constitutionally overbroad nor vague." McAllister v. Attorney General, 444 F.3d 178, 186-87 (3rd Cir. 2006).

3. Definition of "Engage in Terrorist Activity"

INA § 212(a)(3)(B)(iv), 8 U.S.C. § 1182(a)(3)(B)(iv), broadly defines "engage in terrorist activity" in six subparts. An alien engages in terrorist activity if, in an individual capacity or as a member of an organization,[11] he or she:

INA § 212(a)(3)(B)(iv)(I): commits or incites to commit, under circumstances indicating an intention to cause death of serious bodily injury, a terrorist activity;

INA § 212(a)(3)(B)(iv)(II): prepares or plans a terrorist activity;

INA § 212(a)(3)(B)(iv)(III): gathers information on potential targets for terrorist activity;

INA § 212(a)(3)(B)(iv)(IV): solicits funds or other things of value for:

- (aa) a terrorist activity;
- (bb)a terrorist organization described in clause (vi)(I) or (II); or
- (cc) a terrorist organization described in clause (vi)(III), unless the solicitor can demonstrate by clear and convincing evidence that he or she did not know, and should not reasonably have known, that the organization was a terrorist organization;

INA § 212(a)(3)(B)(iv)(V): solicits any individual –

- (aa) to engage in conduct otherwise described in this subsection;
- (bb) for membership in a terrorist organization described in clause (vi)(I) or (vi)(II); or
- (cc) for membership in a terrorist organization described in clause (vi)(III) unless the solicitor can demonstrate by clear and convincing evidence that the actor did not know, and should not reasonably have known, that the organization was a terrorist organization; or

INA § 212(a)(3)(B)(iv)(VI): commits an act that the actor knows, or should reasonably know, affords material support –

- (aa) for the commission of a terrorist activity;
- (bb) to any individual who the actor knows, or reasonably should know, has committed or plans to commit a terrorist activity;
- (cc) to a terrorist organization described in subclause (I) or (II) of clause (vi) or to any member of such an organization; or
- (dd) to a terrorist organization described in clause (vi)(III), or to any member of such an organization, unless the actor can demonstrate by

[11] For the purposes of the introductory language in INA § 212(a)(3)(B)(iv), the alien does not have to be a member of a *terrorist* organization. McAllister v. Attorney General, 444 F.3d 178, 187 (3rd Cir. 2006) (finding reasonable the BIA's interpretation of § 212(a)(3)(B)(iv) that "an alien must be acting either individually or as a member of *an* organization-but not necessarily as a member of a *terrorist* organization" when determining whether an alien engaged in terrorist activity) (emphasis in the original).

clear and convincing evidence that the actor did not know, and should not reasonably have known, that the organization was a terrorist organization.[12]

4. Analysis of "Material Support"

An alien affords material support when he or she commits an act that one knows or reasonably should know affords such support. INA § 212(a)(3)(B)(iv)(VI), 8 U.S.C. § 1182(a)(3)(B)(iv)(VI). Acts of material support include providing:

- a safe house,
- transportation,
- communications,
- funds, transfer of funds or other material financial benefit,
- false documentation or identification,
- weapons, including chemical, biological or radiological,
- explosives, or
- training;

INA § 212(a)(3)(B)(iv)(VI), 8 U.S.C. § 1182(a)(3)(B)(iv)(VI). This list is not exhaustive. Singh-Kaur v. Ashcroft, 385 F.3d 293, 299 (3d Cir. 2004) (providing food and setting up tents for members of a terrorist organization constitutes material support). Raising money for a terrorist organization constitutes material support even if the individual in question does not personally handle any funds. Cheema v. Ashcroft, 383 F.3d 848, 851, 857 (9th Cir. 2004). However, sending money to the widows and orphans belonging to a particular religion or ethnic group without a link to a specific organization or to terrorist activity does not constitute material support. Id. at 856-57.

a. Nature of the term "material"

i. Amount of funds is irrelevant

[12] Congress provided an exception to the material support provision. The REAL ID Act revised and moved the exception to INA § 212(d)(3)(B)(i). The statute now provides that the Secretary of State or the Secretary of Homeland Security, in consultation with each other and with the Attorney General, can conclude in their "sole unreviewable discretion" that certain provisions in INA § 212(a)(3)(B) do not apply:

(1) That INA § 212(a)(3)(B)(i)(IV)(bb) or (VII) shall not apply to an alien;
(2) that INA § 212(a)(3)(B)(iv)(V) shall not apply to any material support the alien afforded to an organization or individual that has committed a terrorist activity; or,
(3) that INA § 212(a)(3)(B)(vi)(III) shall not apply to a group solely by having a subgroup within the scope of INA § 212(a)(3)(B)(vi)(III).

The term "material" as part of "material support" does not have the same context as "material" elsewhere in immigration law, such as in the term "material misrepresentation." An individual may afford material support regardless of the amount of funds contributed. Boim v. Quranic Literary Institute, 291 F.3d 1000, 1015 (7th Cir. 2002). To find otherwise would compromise efforts to cut off funding for terrorist organizations. Id. If a certain threshold level for funding were established, a terrorist group could simply pool together small donations to fund their activities while their contributors could avoid any liability. Id.

ii. Contributor's reason for giving is irrelevant

Even if an individual provides funds to a terrorist organization with the intent of supporting a humanitarian cause, the individual has still provided material support to terrorists. Humanitarian Law Project v. Reno, 205 F.3d 1130, 1134, 1136 (9th Cir. 2000) (HLP II). Any donation qualifies because there is no way to determine how the terrorists will use the funds. Id. More importantly, money is fungible. Id. at 1136. Donations intended for peaceful purposes free up resources that can be used to promote terrorist activity. Id.; see also United States v. Hammoud, 381 F.3d 316, 329 (4th Cir. 2004) (en banc) (quoting same portion of HLP II), reversed on other grounds, 543 U.S. 1097 (2005). See also Matter of S-K-, 23 I&N Dec. 936, 943-44 (BIA 2006) (noting that the panel was "unaware of any legislative history which indicates a limitation on the definition of the term 'material support' and rejecting the alien's claim that there must be a link between the provision of material support and the intended use by the recipient organization to further a terrorist activity).

The Ninth Circuit's analysis is also consistent with subsequent congressional intent concerning section 411 of the USA PATRIOT Act. Under section 411, Congress broadened the definition of "engage in terrorist activity" to include "anyone who affords material support to an organization that the individual knows or should know is a terrorist organization, regardless of whether or not the purported purpose for the support is related to terrorism." 147 Cong. Rec. H7159-03, H7198 (Oct. 23, 2001).

b. No Conflict with the First Amendment

While the First Amendment protects an individual's right to speech, including political advocacy, the government may regulate contributions to organizations that engage in harmful and unlawful activities. HLP at 1134-35. Congress has the right to stop aid to terrorist groups in an effort to prevent the spread of international terrorism. Id. at 1135.

Donations to a terrorist organization do not amount to speech or the expression of political views. They instead provide material assistance. United States v. Afshari, 426 F.3d 1150, 1159-60 (9th Cir. 2005), reh'g denied and reh'g

en banc denied, 446 F.3d 915 (2006), cert. denied sub. nom., Rahmani v. United States, 127 S.Ct. 930 (2007) (mem.). "Though contributions of money given to fund speech receive some First Amendment protection, it does not follow that all contributions of money are entitled to protection as though they were speech." Id. at 1160 (footnote omitted). Donations of funds to a terrorist organization are "more like the donation of bombs and ammunition than speech." Id. Furthermore, there is no First Amendment right to give terrorists the weapons and explosives to carry out their missions. Id. at 1161. See also United States v. Hammoud, 381 F.3d at 329 (finding that the criminal prohibition for material support did not violate the First Amendment right to association); Holy Land Found. for Relief and Dev. v. Ashcroft, 333 F.3d 156, 166 (D.C. Cir. 2003) (reasoning that "there is no First Amendment right nor any other constitutional right to support terrorists"); People's Mojahedin Org. of Iran v. Dept. of State, 327 F.3d 1238, 1244-45 (D.C. Cir. 2003) (concurring with HLP II finding that there is no constitutional right to facilitate terrorism by providing weapons and explosives or by providing the resources to obtain such items); United States v. Al-Arian, 308 F.Supp.2d 1322, 1343 (M.D. Fla. 2004) (reasoning that stopping the spread of terrorism is a compelling government interest and preventing terrorism by inhibiting fundraising is directly related to this government interest). See also United States v. Awan, 459 F.Supp.2d 167, 178-79 (E.D.N.Y. 2006) (providing funds and recruits knowing they are to be used to further a conspiracy to commit violence are not acts protected by rights to freedom of expression and association).

c. Other considerations

There has been extensive litigation in the Ninth Circuit over certain terms in the criminal material support statute. See 18 U.S.C. § 2339B. In Humanitarian Law Project v. U.S. Dept. of Justice, 352 F.3d 382 (9th Cir. 2003), the Ninth Circuit reasoned that the terms "personnel" and "training" were unconstitutionally vague. Id. at 403-05. Subsequent to the passage of the Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, 118 Stat. 3638, which amended the definition of criminal material support, the Ninth Circuit vacated HLP II. Humanitarian Law Project v. U.S. Dept. of Justice, 393 F.3d 902 (9th Cir. 2004). Upon remand, the district court determined that the terms "training," "expert advice or assistance," and "service" were unconstitutionally vague, but the term "personnel" withstood constitutional scrutiny after the Intel Reform Act clarified the *mens rea* requirement in 18 U.S.C. § 2339B. Humanitarian Law Project v. Gonzales, 380 F.Supp.2d 1134, 1149-53 (C.D. Cal. 2005). Another district court also determined that the term "personnel," as stated in a separate criminal material support statute, was not unconstitutionally vague. United States v. Sattar, 314 F.Supp.2d 279, 298-300 (S.D.N.Y. 2004) (construing 18 U.S.C. § 2339A). See also United States v. Shah, 474 F.Supp.2d 492, 497 n.5 (S.D.N.Y. 2007) (finding the criminal statute not constitutionally vague under the definitions of "expert advice or assistance" or "personnel" as applied to doctor who was

indicted for conspiring to provide material support to al Qaeda in the form of medical support to wounded jihadists).

It should be noted that the immigration material support and the criminal material support statutes are not identical. The immigration statute provides a non-exhaustive list and is subject to different standards of law. Out of the terms addressed in the Ninth Circuit, the only term that appears in the immigration material support statute is "training." Thus, the meaning of this term could be subjected to constitutional attack. However, the current grounds of inadmissibility related to terrorism include a more specific provision: "has received military-style training (as defined in section 2339D(c)(1) of title 18, United States Code)." INA § 212(a)(3)(B)(i)(VIII). Since this provision is more specific, it may better survive any constitutional attack.

5. Definition of "Representative"

INA § 212(a)(3)(B)(v), 8 U.S.C. § 11821(a)(3)(B)(v), defines the term "representative" as including "an officer, official, or spokesman of an organization, and any person who directs, counsels, commands, or induces an organization or its members to engage in terrorist activity."

6. Definition of "Terrorist Organization"

INA § 212(a)(3)(B)(vi), 8 U.S.C. § 11821(a)(3)(B)(vi), sets out three types of groups that qualify as terrorist organizations under the INA. Two groups involve Secretary of State designations, and the third type defines an "undesignated" group. These groups are:

- an organization designated under INA § 219, INA § 212(a)(3)(B)(vi)(I);
- an organization otherwise designated, upon publication in the Federal Register, by the Secretary of State in consultation with or upon the request of the Attorney General or the Secretary of Homeland Security, as a terrorist organization, after finding that the organization engages in the activities described in subclauses (I) through (VI) of § 212(a)(3)(B)(iv); or
- a group of two or more individuals, whether organized or not, which engages in, or has a subgroup which engages in, the activities described in subclauses (I) through (VI) of § 212(a)(3)(B)(iv).

Based on their ranking in INA § 212(a)(3)(B)(vi), these types group definitions are also commonly referred to as Tier I, Tier II, and Tier III.

a. Secretary of State Designation under INA § 219 (Tier I or FTO)

In 1996, Congress added INA § 219, 8 U.S.C. § 1189, which authorizes the Secretary of State to designate "foreign terrorist organizations." Section 302 of AEDPA. To designate under this provision, the Secretary must find that a foreign organization "engages in terrorist activity" that "threatens the security of United States nationals or the national security of the United States." INA § 219(a)(1). The Secretary may consider classified information in making such designations. INA § 219(a)(3)(B). The Secretary has published lists of designated foreign terrorist organizations. See, e.g., 69 Fed. Reg. 75587-02, -03 (Dec. 17, 2004); 69 Fed. Reg. 13347-03 (Mar. 22, 2004); 68 Fed. Reg. 56860-03 (Oct. 2, 2003) (redesignation); 68 Fed. Reg. 25672-02 (May 13, 2003); 66 Fed. Reg. 51088-01 (Oct. 5, 2001) (redesignation); 64 Fed. Reg. 55112-01 (Oct. 8, 1999); 62 Fed. Reg. 52650-01 (Oct. 8, 1997). Such groups are commonly referred to as "designated foreign terrorist organizations" or "FTOs."

The ability of an individual to challenge an FTO designation has been addressed in criminal proceedings. The federal courts have consistently ruled that a criminal defendant does not have a constitutional right to collaterally attack or challenge an FTO designation. United States v. Afshari, 426 F.3d at 1155; United States v. Hammoud, 381 F.3d at 331; United States v, Marzook, 383 F.Supp.2d 1056, 1071-72 (N.D. Ill. 2005); United States v. Al-Arian, 308 F.Supp.2d at 1344 (lacking standing). The Ninth Circuit has also reasoned that the restriction of judicial review for FTO designations to the D.C. Circuit is constitutional. Afshari, 426 F.3d at 1154. Such review "avoids the awkwardness of criminalizing material support for a designated organization in some circuits but not others." Id. at 1155.

b. The Terrorist Exclusion List (Tier II or TEL)

Section 411 of the USA PATRIOT Act created INA § 212(a)(3)(B)(vi)(II), 8 U.S.C. § 1182(a)(3)(B)(vi)(II), which allows the Secretary of State, in consultation with or upon request of the Attorney General or the Secretary of Homeland Security, to designate an organization as a terrorist organization for immigration purposes through publication of a notice in the Federal Register. In order to be designated as a terrorist organization, there must be a finding that the organization has engaged in the activities described in subclauses (I) through (VI) of § 212(a)(3)(B)(iv). INA § 212(a)(3)(B)(vi)(II), as amended by the REAL ID Act. The Secretary of State has published lists of organizations designated under INA § 212(a)(3)(B)(vi)(II). This list is known as the "Terrorist Exclusion List" or TEL. See 69 Fed. Reg. 75587-01 (Dec. 17, 2004); 69 Fed. Reg. 23555-01 (Apr. 29, 2004); 68 Fed. Reg. 7836-03 (Feb. 18, 2003); 66 Fed. Reg. 63620-01 (Dec. 7, 2001).

c. Third Type of Terrorist Organization (Tier III or undesignated)

Section 411 of the USA PATRIOT Act created a third definition of a terrorist organization for immigration purposes. As amended by the REAL ID Act, INA § 212(a)(3)(B)(vi)(III), 8 U.S.C. § 1182(a)(3)(B)(vi)(III), defines a terrorist organization as a group of two or more individuals, whether organized or not, that engages in, or has a subgroup which engages in, the activities described in subclauses (I) through (VI) of § 212(a)(3)(B)(iv). INA § 212(a)(3)(B)(vi)(III).

There are instances in which an alien may have provided material support to a foreign terrorist organization prior to designation under INA § 219 or its appearance on the Terrorist Exclusion List. In these instances, Congress intended that the alien who afforded such support be treated as if he or she afforded the support in question "to a non-designated organization" as defined in section 411 of the USA PATRIOT Act. 147 Cong. Rec. H7159-03, H7198 (Oct. 23, 2001). Therefore, keep in mind the time frame in which the activity occurred when analyzing under this section. Activity that occurred before a designation must be analyzed with regard to the "undesignated" terrorist organization definition in Tier III, INA § 212(a)(3)(B)(vi)(III). As such, this may require the alien to show that he or she did not know or reasonably should not have known that the organization was a terrorist organization.

When determining whether an organization engaged in terrorist activity, the Board has held that the statute does not allow a "totality of the circumstances" test. Matter of S-K-, 23 I&N Dec. at 940-41. The Board found no statutory or case law support for the alien's assertion that the Board must look at the motivation of the group when determining whether the organization engaged in terrorist activity. Id. (distinguishing persecutor case law as inapplicable to the terrorism bar to relief in INA § 212(a)(3)(B)(i)(I)). Analyzing the statutory language, the Board noted that Congress has added exceptions in other parts of the INA; therefore, the omission of any exception for justifiable force was intentional. Id. at 941.

C. Serious Adverse Foreign Policy Consequences

1. Nature of the Charge

The INA provides a ground of inadmissibility concerning foreign policy matters. If "the Secretary of State has reasonable ground to believe" that an alien's entry or proposed activities in the United States would have "potentially serious adverse foreign policy consequences," the alien is inadmissible. INA § 212(a)(3)(C)(i), 8 U.S.C. § 1182(a)(3)(C)(i). INA § 237 contains a similar ground of removability. INA § 237(a)(4)(C)(i), 8 U.S.C. § 1227(a)(4)(C)(i). The INA authorizes only the Secretary of State to make this determination.

INA § 212(a)(3)(C)(i) contains two exceptions to this ground of inadmissibility. These exceptions also apply to removability. INA § 237(a)(4)(C)(ii). First, an alien who is a foreign government official or a

candidate for office immediately preceding an election is not inadmissible solely on the basis of past, current, or expected beliefs, statements, or associations if such views would be lawful in the United States. INA § 212(a)(3)(C)(ii). Second, for those not listed in clause (ii), an alien is not inadmissible on the basis of the past, current, or expected beliefs, statements, or associations if such views would be lawful in the United States, unless the Secretary of State determines that the alien's admission would compromise a compelling foreign policy interest. INA § 212(a)(3)(C)(iii).

2. Standard of Proof for Removability

Once the Secretary of State has made a determination that an alien's presence or activities pose potentially serious adverse foreign policy consequences, the Secretary's decision should be treated as conclusive evidence of removability. Matter of Ruiz-Massieu, 22 I&N Dec. 833 (BIA 1999). A letter from the Secretary conveying the reasons that there are such potential consequences is sufficient evidence to prove removability. Id. Thus, removability may be proven solely on the basis of the Secretary's "facially reasonable and bona fide determination." Id. Neither the Board of Immigration Appeals nor an Immigration Judge may second-guess the determination of the Secretary of State, whose determinations regarding foreign policy are insulated from judicial review. Id. The Board and the Immigration Judges may only evaluate whether the Secretary's reasoning is facially reasonable and bone fide. Id. If such basis exists, removability must be sustained. Id.; see also Matter of Khalifah, 21 I&N Dec. 107 (BIA 1995) (alien charged under former § 241(a)(4)(C) was properly held without bond because he was a serious flight risk).

3. Interpretation of Terms

The Secretary of State's determination consists of two key elements. The Secretary of State must have a "reasonable ground to believe" to make a proper determination. The Secretary must also articulate the reasons that the alien's entry or activities would have "potentially serious adverse foreign policy consequences."

a. "Reasonable ground to believe"

The "reasonable ground to believe" standard has been compared to both the "probable cause" and the "reasonable person" standards. Matter of A-H-, 23 I&N Dec. 774, 788 (A.G. 2005) (citing to Adams v. Baker, 909 F.2d 643, 649 (1st Cir. 1990) (reasonable person); Matter of U-H-, 23 I&N Dec. 355, 357 (BIA 2002) (probable cause). See also Terry v. Ohio, 392 U.S. 1, 27 (1968) (equating "reasonable suspicion" with "reason to believe" to stop an individual for further investigation); Wong Sun v. United States, 371 U.S. 471, 478 n.6 (1963) (stating that "probable cause" and "reasonable grounds" were substantially the same).

Analyzing similar language, the Attorney General clarified that "reasonable grounds for regarding" is "substantially less stringent than preponderance of the evidence." Matter of A-H-, 23 I&N Dec. at 789 (citing cases). The standard is satisfied when the evidence is "sufficient to justify a reasonable person in the belief that the alien falls within the proscribed category." Adams v. Baker, 909 F.2d at 649, quoted in Matter of A-H-, 23 I&N Dec. at 789-90. To make this determination, the Secretary of State may rely upon all available information. Id. at 649. The Secretary may also rely upon information that would not be admissible in a court of law so long as the information is not "intrinsically suspect." Id. The Secretary is not required to conclusively prove that an alien poses the risk in question. Id. The First Circuit is the only circuit to have analyzed this issue in the context of immigration and national security.

b. "Adverse foreign policy consequences"

Neither section 212 nor section 237 of the INA defines the term "potentially serious adverse foreign policy consequences." However, another section of the INA defines national security as including matters of foreign policy. See INA § 219(d)(2), 8 U.S.C. § 1189(d)(2); Matter of A-H-, 23 I&N Dec. at 788. In determining that such consequences exist, the Secretary of State does not need to prove that such consequences will occur. Matter of Ruiz-Massieu, 22 I&N Dec. 833 (BIA 1999). The Secretary only needs to articulate the potential for such consequences. Id.

In Ruiz-Massieu, the Secretary of State determined that allowing the former Deputy Attorney General of Mexico to remain in the United States would have potentially serious foreign policy consequences. Id. The former Mexican official was under indictment in Mexico and allowing him to remain would undermine bilateral efforts to fight crime and the United States' efforts to reform the Mexican criminal justice system. Id.

There is nothing in the INA or published case law to limit the foreign policy consequences ground of removability to only the type of situations found in Ruiz-Massieu. The Secretary of State may find that other situations warrant such consideration. For example, the Secretary may conclude that allowing human rights abusers to remain in the United States would have potentially serious adverse foreign policy consequences. See Matter of A-H-, 23 I&N Dec. at 782 (noting that "[t]he United States has significant interests in combating violent acts of persecution and terrorism wherever they may occur … and it is inconsistent with these interests to provide safe haven to individuals who have connections to such acts of violence").

D. Communist and Totalitarian Parties

Communist Party members and affiliates and those associated with any

other totalitarian party are inadmissible but not removable. INA specifically provides, "Any immigrant who is or has been a member of or affiliated with the Communist or any other totalitarian party (or subdivision or affiliate thereof), domestic or foreign, is inadmissible." INA § 212(a)(3)(D), 8 U.S.C. § 1182(a)(3)(D).

INA § 212(a)(3)(D) provides three exceptions to inadmissibility. First, those aliens whose membership was involuntary, occurred while under the age of sixteen, by operation of law, or for the purposes of obtaining the "essentials of living" are not inadmissible. INA § 212(a)(3)(D)(ii). Second, past members of affiliates who are not a threat to national security, and whose association terminated two years prior to the application for admission, or five years prior if such association was with the totalitarian party controlling the foreign government, are also not inadmissible. INA § 212(a)(3)(D)(iii). Third, close family members (a spouse, parent, son, daughter, or sibling of a United States citizen; spouse, son or daughter of a permanent resident) may also be admitted for humanitarian purposes, to assure family unity, or when otherwise in the public interest, so long as the alien is not a threat to national security. INA § 212(a)(3)(D)(iv).

For additional discussion concerning INA § 212(a)(3)(D), see Gastelum-Quinones v. Kennedy, 374 U.S. 469 (1963); Niukkanen v. McAlexander, 362 U.S. 390 (1960); Rowoldt v. Perfetto, 355 U.S. 115 (1957); Galvan v. Press, 347 U.S. 522 (1954); Harisiades v. Shaughnessy, 342 U.S. 580 (1952); see also Carlson v. Landon, 342 U.S. 524 (1952).

E. Association with Terrorist Organizations

Section 411 of the USA PATRIOT Act added INA § 212(a)(3)(F), 8 U.S.C. § 1182(a)(3)(F). This section provides that an alien is inadmissible if the Secretary of State or the Attorney General determines, after consultation with the other, that the alien has been "associated with a terrorist organization and intends while in the United States to engage solely, principally, or incidentally in activities that could endanger the welfare, safety, or security of the United States."

F. Miscellaneous Crimes

INA § 237(a)(2)(D), 8 U.S.C. § 1227(a)(2)(D), contains a set of removability grounds entitled "Miscellaneous Crimes," which primarily concern matters of national security.[13] As opposed to the security-related grounds under

[13] INA § 237(a)(2)(D)(iv) states that any alien who has been convicted of an offense a travel document violation under INA § 215, 8 U.S.C. § 1185, or importation of an alien for an immoral purpose under INA § 278, 8 U.S.C. § 1328, is deportable. An attempt or conspiracy to violation of these statutes is also a deportable offense under INA § 237(a)(2)(D)(iv). This ground of removability is not discussed in the body of the outline because it is not a security-related ground.

INA §§ 212(a)(3) and 237(a)(4), 8 U.S.C. §§ 1182(a)(3) and 1227(a)(4), the grounds of removability under INA § 237(a)(2)(D) require convictions, including convictions for attempts and conspiracies concerning the prohibited acts. Convictions for the following are deportable offenses:

1. Espionage, Sabotage, Treason, and Sedition

INA § 237(a)(2)(D)(i) provides for removability for any of the following offenses for which a term of imprisonment of five years or greater may be imposed:

- Espionage under Chapter 37 of Title 18 (18 U.S.C. §§ 792-99)
- Sabotage under Chapter 105 of Title 18 (18 U.S.C. §§ 2151-56)
- Treason or Sedition under Chapter 115 of Title 18 (18 U.S.C. §§ 2381-90)

2. Threats Against the President and his Successors

INA § 237(a)(2)(D)(ii) provides for the removability of any alien convicted of an offense concerning threats against the President and his successors under 18 U.S.C. § 871. This issue has been successfully litigated before the Immigration Court in Arlington, Virginia. The alien in question wrote communications to the President, threatening his assassination.

3. Military Expeditions Against Friendly Nations

INA § 237(a)(2)(D)(ii) also provides for the removability of any alien convicted of conducting military expeditions against a friendly nation in violation of 18 U.S.C. § 960.

4. Violations of the Military Selective Service Act

INA § 237(a)(2)(D)(iii) provides for the removability of any alien convicted of violating any provision of the Military Selective Service Act under 50 App. U.S.C. §§ 451-73.

5. Violations of the Trading with the Enemy Act

INA § 237(a)(2)(D)(iii) also provides for the removability of any alien convicted of violating any provision of the Trading with the Enemy Act under 50 App. U.S.C. §§ 1-44. 50 App. U.S.C. § 2 defines the enemy as a government at war with the United States and any individual, partnership, other body of individuals, or corporation associated with that government. However, other federal authority has defined "enemy" under the Trading with the Enemy Act as including nations that are in a hostile state in relation to the United States, but there is no actual war. For example, Cuba, North Korea, and Iran are considered the enemy for the purposes of the Act. See 31 C.F.R. §§ 500.201 (North Korea),

515.201 (Cuba), and 535.201 (Iran).

G. Special Aggravated Felony Provisions

INA § 101(a)(43)(L), 8 U.S.C. § 1101(a)(43)(L), defines the term "aggravated felony" as including a variety of offenses relating to national security. Subparagraph (L) specifically includes offenses "described in" the following categories:

- 18 U.S.C. § 793, gathering or transmitting national defense information
- 18 U.S.C. § 798, disclosure of classified information
- 18 U.S.C. § 2153, sabotage
- 18 U.S.C. § 2381 or 2382, treason
- 50 U.S.C. § 421, section 601 of the National Security Act of 1947, protecting the identity of undercover intelligence agents

As with other categories of aggravated felonies, convictions for attempts or conspiracies to commit any of the offenses listed under subparagraph (L) also qualify as aggravated felonies. See INA § 101(a)(43)(U), 8 U.S.C. § 1101(a)(43)(U).

III. DEFINITION OF "NATIONAL SECURITY"

As noted above, "national security" as defined in INA § 219(d)(2), 8 U.S.C. § 1189(d)(2), means "the national defense, foreign relations, or economic interests of the United States."

Also, the Attorney General has defined the phrase "danger to the security of the United States" in the context of determining whether an alien was barred from receiving withholding of deportation under former INA § 243(h)(2)(D). Matter of A-H-, 23 I&N Dec. 774, 788 (A.G. 2005). Noting that the word "danger" was not modified in § 243(h)(2)(D), the Attorney General found that "[a]ny level of danger to national security is deemed unacceptable; it need not be a 'serious,' 'significant,' or 'grave' danger." Id. Similarly, section 237(a)(4)(A)(ii)'s phrase "endangers," which is a verb form of the noun "danger,"[14] has no qualifier. Citing to INA § 219, the Attorney General concluded that the phrase "danger to the security of the United States," therefore, means any "nontrivial risk" to the Nation's defense, foreign relations, or economic interests. Id.

Other case law has interpreted the term "national security" in the context of other immigration provisions. In Matter of D-J-, the Attorney General framed the concept of "national security" broadly, finding that the diversion of U.S. Coast Guard and DOD personnel from important responsibilities involving homeland

[14] Endanger: "to expose to harm or danger; imperil." The Am. Heritage Dictionary (4th ed. 2000) (viewed at www.dictionary.com).

security impacted national security. Matter of D-J-, 23 I&N Dec. 572, 578-79 (A.G. 2003) (finding it appropriate, in denying release on bond, to consider national security interests implicated by the encouragement of unlawful mass migrations and the release of undocumented alien migrants into the United States without adequate screening).

IV. SPECIAL REMOVAL PROCESSES

Three processes are available to remove aliens charged with the national security provisions. Arriving aliens may be placed in conventional removal proceedings under the charges listed in INA § 212 or in summary removal under INA § 235(c). INA §§ 212, 235, and 240(a)(2), 8 U.S.C. §§ 1182, 1225, and 1229a(a)(2). In these proceedings, the alien has the burden of proving admissibility. See INA §§ 235(c)(1) and 240(c)(2)(A).

An alien other than an arriving alien may be placed in conventional removal proceedings before the Immigration Court, pursuant to the charges in INA §§ 212 and 237, or in terrorist removal in the Alien Terrorist Removal Court (ARTC) under Title V of the Act. INA §§ 237, 240(a)(2), and 504, 8 U.S.C. §§ 1227, 1229a(a)(2), and 1535. In both types of proceedings, the government must prove removability. INA §§ 240(c)(3)(A) and 504(g). The Title V removal process, however, permits removal on the basis of a summary of classified evidence and, in certain cases, without providing an unclassified summary. INA § 504(e)(3)(E).

A. Summary Removal under INA § 235(c)

In 1952, Congress enacted INA § 235(c), 8 U.S.C. § 1225(c), to exclude aliens who "pose a menace to this Nation's security." Azzouka v. Sava, 777 F.2d 68, 71 (2d Cir. 1985) (quoting Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206, 219 (1953) (Jackson, J., dissenting)).

An alien is subject to summary removal under INA § 235(c) if:

- he or she is an arriving alien, and
- an immigration officer or Immigration Judge suspects that the alien may be inadmissible due to:
    - any activity related to espionage or sabotage, INA § 212(a)(3)(A)(i)(I);
    - any activity related to the unlawful export of goods, technology, or sensitive information, INA § 212(a)(3)(A)(i)(II);
    - any activity the purpose of which is the opposition to, control of, or the overthrow of the United States government by force, violence or other unlawful means, INA § 212(a)(3)(A)(iii);
    - the alien's association with terrorist activity, INA § 212(a)(3)(B); or

- the Secretary of State has reasonable ground to believe that the alien's entry or proposed activities in the United States would have potentially serious adverse foreign policy consequences, INA § 212(a)(3)(C).

INA § 235(c)(1); 8 U.S.C. § 1225(c)(1); 8 C.F.R. § 235.8(a) and (e).[15]

INA § 235(c) only applies to arriving aliens as defined in 8 C.F.R. § 1.1(q). 8 C.F.R. § 235.8(e). Summary removal under INA § 235(c) may not be used against a returning permanent resident unless the alien abandoned such status. See section A.2.b. below.

1. Procedures for Summary Removal

The following procedures for summary removal are stated as they appear in the present regulations. These regulations do not take into account the creation of the Department of Homeland Security, the abolishing of the INS, and the elimination of the District Director and Regional Director positions.

a. Initial Finding

Once an immigration officer or Immigration Judge suspects that an alien falls within the provisions of INA § 212(a)(3)(A) to (C) (except INA § 212(a)(3)(A)(ii)), the officer or judge shall

- order the alien removed;
- report the action promptly to the district director who has jurisdiction over the place where the alien arrived or where the hearing was held;
- if possible, take a brief question and answer statement from the alien;
- notify the alien of the action taken by personal service of Form I-147, Notice of Temporary Inadmissibility; and
- notify the alien of the right to submit a written statement and any additional information for consideration by the Attorney General.[16]

INA § 235(c)(1); 8 U.S.C. § 1225(c)(1); 8 C.F.R. § 235.8(a).

b. Action by the District Director

The district director shall forward the report to the regional director for further action. 8 C.F.R. § 235.8(a).

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[15] The numbers for the Code of Federal Regulations under Title 8 do not always correspond to the numbers in the Immigration and Nationality Act or under Title 8 of the United States Code.

[16] Note that on March 14, 2007, the Assistant Secretary issued policy guidance regarding section 235(c) that requires, upon service of Form I-147 on an alien, such alien will be provided a minimum of fifteen calendar days to submit a written statement and any additional information for consideration by the Assistant Secretary. The fifteen-day period may be abbreviated, in the Assistant Secretary's discretion, after consultation with the Secretary of Homeland Security.

c. Action by the Regional Director

i. The Decision of the Regional Director

The regional director may order the alien removed without any further inquiry if:

- on the basis of confidential information, the alien is inadmissible on one of the enumerated grounds; and
- after consulting with the appropriate security agencies, the regional director concludes that disclosure of the information would be prejudicial to the public interest, safety, or security.

INA § 235(c)(2)(B); 8 U.S.C. § 1225(c)(2)(B); 8 C.F.R. § 235.8(b).

If the regional director believes that the foregoing conditions exist, the regional director shall order the alien removed by personal service of Form I-148, Notice of Permanent Inadmissibility, or issue any other appropriate order that disposes of the case. 8 C.F.R. § 235.8(b)(1).

If the regional director does not find that removal without further inquiry is warranted, the regional director may:

- direct the immigration officer conduct a further examination concerning the alien's inadmissibility;
- refer the case to an Immigration Judge for a hearing; or
- refer the case for the continuation of any prior hearing.

INA § 235(c)(2)(C); 8 U.S.C. § 1225(c)(2)(C); 8 C.F.R. § 235.8(b)(2).

ii. Requirement of a Written Decision

The regional director's report shall be in writing. The decision shall be served upon the alien unless the decision contains confidential information, and the disclosure of such information would prejudice the public interest, safety, or security of the United States. 8 C.F.R. § 235.8(b)(3). If the decision contains confidential information, the alien shall be served with an order showing the disposition of the case with the confidential information deleted. Id.

iii. Finality of the Decision

The regional director's decision is final, and there is no administrative appeal of the decision. 8 C.F.R. § 235.8(c).

d. Asylum, Withholding, and Deferral of Removal

An alien who is ordered removed under INA § 235(c) is not entitled to apply for asylum. See 8 C.F.R. § 235.8(b)(4); see also Azzouka v. Sava, 777 F.2d 68, 75 (2d Cir. 1985); Avila v. Rivkind, 724 F.Supp. 945, 950 (S.D. Fla. 1989) (citing to Azzouka). An alien subject to INA § 235(c) may also be ineligible for asylum pursuant to the mandatory bars under INA § 208(b)(2), 8 U.S.C. § 1158(b)(2).

DHS may not execute an order under INA § 235(c) under circumstances that would violate the provisions for withholding of removal under INA § 241(b)(3), 8 U.S.C. § 1253(b)(3), or withholding and deferral under the Convention Against Torture. 8 C.F.R. § 235.8(b)(4). An alien subject to summary removal may still be barred from withholding. An alien is ineligible for withholding if he or she assisted in the persecution of others, was convicted of a particularly serious crime, committed a serious nonpolitical crime outside the United States, or there are reasonable grounds to believe that the alien is a danger to national security. INA § 241(b)(3)(B); 8 U.S.C. § 1253(b)(3); 8 C.F.R. § 208.16(d)(2).

e. Action by the Immigration Judge

If the regional director directs that further hearings shall occur, all further hearings shall take place in accordance with the provisions of INA § 240, 8 U.S.C. § 1229a, and other provisions of the law as they would for any other case referred to an Immigration Judge. 8 C.F.R. § 235.8(d). If the Immigration Judge had ordered the alien removed under INA § 235(c) and the case is referred back the judge, proceedings shall automatically be reopened upon the referral. Id.

After referral, if there is confidential information presented to support inadmissibility under one of the grounds listed in INA § 235(c)(1) and the Immigration Judge determines that disclosure of such information may be prejudicial to the public interest, safety or security, the Immigration Judge may again order the alien removed under INA § 235(c) and take further action as previously described. Id.

2. Other Applicable Case Law

a. Arriving Aliens

An alien seeking admission may be excluded without a hearing when such admission would be prejudicial to the United States. In fact, "[t]he exclusion of aliens is a fundamental act of sovereignty." United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537, 542 (1950); see also Avila v. Rivkind, 724 F.Supp. 945, 947 (S.D. Fla. 1989). An alien's admission is not a right; it is only a privilege granted on the terms that the United States prescribes. Knauff, 338 U.S. at 542.

An alien seeking admission is only entitled to a limited amount of due process. An alien is "knocking at the door" and can assert no substantive constitutional right. Avila, 724 F.Supp. at 947. Regarding procedural due process, whatever procedures Congress authorizes for admission is due process for an alien denied entry. Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206, 212 (1953); Knauff, 338 U.S. at 544; Rafeedie v. INS, 880 F.2d 506, 512-13 (D.C. Cir. 1989). Thus, the courts are limited to determining whether an alien was properly summarily excluded according to the authorized procedures. Avila, 724 F.Supp. at 948.

An arriving alien may be excluded under INA § 235(c) even if he or she was not informed of the reasons for the exclusion. United States ex rel. Nicoloff v. Shaughnessy, 139 F.Supp. 465, 467 (S.D.N.Y. 1956); United States ex rel. Kasel de Pagliera v. Savoretti, 139 F.Supp. 143, 145 (S.D. Fla. 1956). Such action may be taken as an extreme precaution for the safety of national interests. Kasel, 139 F.Supp. at 146. However, "[a]dministrative orders based upon secret information should be indulged only when the reason for such orders is clear and compelling." Id.

b. Exception for Permanent Residents

Prior to the enactment of INA § 235 in 1952, the regulations allowed for an alien's summary exclusion without a hearing when it was based upon confidential information, which if disclosed, would have been prejudicial to the public interest. Kwong Hai Chew v. Colding, 344 U.S. 590, 591 n.1 (1953) (quoting former 8 C.F.R. § 175.57). In Chew, the Supreme Court determined that summary exclusion could not be applied to a permanent resident because such action violates the right to due process. Id. at 596. The Court reasoned that a returning resident alien has the same rights as an alien "continuously residing and physically present in the United States." Id. Thus, a returning resident alien's due process rights include notice of the nature of the charges, a hearing, and a fair opportunity to be heard. Id. at 597-98.

In Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206 (1953), the Supreme Court again asserted that a returning permanent resident cannot be "captiously" deprived of the right to procedural due process. Id. at 213. However, the Court determined that nineteen months "behind the Iron Curtain"

was a protracted absence that broke an alien's continuous residence, and thus, the alien could be subject to summary exclusion. Id. at 214-15.

In Rafeedie v. INS, 880 F.2d 506 (D.C. Cir. 1989), the Circuit Court for the District of Columbia addressed the propriety of summary exclusion under INA § 235(c) for a permanent resident. The Circuit Court noted that an applicant for initial entry has no constitutional interest in being permitted entry. Id. at 520. "In contrast, a permanent resident alien … has a liberty interest in being permitted to reenter this country and is therefore entitled to due process before he can be denied admission." Id. (citation omitted). Thus, summary exclusion was not appropriate for most permanent residents. See id. at 520-23; see also United States ex rel. Kasel de Pagliera v. Savoretti, 139 F. Supp. 143, 148 (S.D. Fla. 1956) (finding that summary exclusion for a permanent resident violates due process).

In following Supreme Court precedent, the court in Rafeedie reasoned that a permanent resident who had abandoned his status could be subject to summary exclusion. Rafeedie, 880 F.2d at 520-23. In determining whether abandonment occurred, the reason for the alien's trip is irrelevant. Id. at 522. The only relevant question is whether the alien departed for so long that he lost permanent resident status. Id. Once an alien has been absent from the United States for such an extended period, upon his return, the alien may be treated as "an initial entrant for due process purposes." Id. at 522-23.

B. Alien Terrorist Removal Court

In many instances, an alien's specific conduct or associations cannot be proven without wholesale disclosure of classified information. In recognition of this problem, Congress provided an alternative to such disclosure and its attendant risk to the national security. In 1996, Congress passed the Anti-Terrorism and Effective Death Penalty Act (AEDPA), which established the Alien Terrorist Removal Court (ATRC). INA §§ 501-507 (Title V), 8 U.S.C. §§ 1531-1537. The ATRC is comprised of five U.S. District Court judges designated by the Chief Justice of the Supreme Court. INA § 502(a), 8 U.S.C. § 1532(a). The ATRC's sole function is to conduct expedited removal proceedings involving alien terrorists. INA § 504(a); 8 U.S.C. § 1534(a).[17] An ATRC proceeding permits the government to establish removability with undisclosed classified information. INA § 504(d)(5) and (e)(3); 8 U.S.C. § 1534(d)(5) and (e)(6).

1. Initiating ATRC Proceedings

The ATRC process begins when the government files an ex parte, in camera, and under seal application. INA § 503(a)(2); 8 U.S.C. § 1533(a)(2). The

[17] In Title V, the term "alien terrorist" means "any alien described in section 241(a)(4)(B)," now § 237(a)(4)(B). INA § 501(1).

application must state that the alien in question is a terrorist physically present in the United States and that placing him in removal proceedings under Title II would pose a risk to national security. INA § 503(a)(1); 8 U.S.C. § 1533(a)(1). In determining whether to grant the application, an ATRC judge may consider other ex parte and in camera information, including classified information, presented under oath or affirmation. INA § 503(c)(1); 8 U.S.C. § 1533(c)(1).

Once an application is filed with the ATRC, the Attorney General may take the subject alien into custody. INA § 506(a)(1)(A); 8 U.S.C. § 1536(a)(1)(A). An alien may remain in custody pending the removal hearing, except for a permanent resident who may request a release hearing. INA § 506(a)(1)(B) and (2); 8 U.S.C. § 1536(a)(1)(B) and (2). In such a hearing, a permanent resident bears the burden of demonstrating that (1) he is lawfully admitted for permanent residence, (2) if released, he is not likely to flee, and (3) if released, he will not endanger national security, the safety of any person, or the safety of the community. INA § 506(a)(2)(A); 8 U.S.C. § 1536(a)(1)(A). The ATRC judge may consider classified information submitted in camera and ex parte to determine whether the alien should be released. INA § 506(a)(2)(B); 8 U.S.C. § 1536(a)(2)(B).

2. Nature of the Proceedings/Classified Evidence

Title V proceedings are unique in immigration law because they provide for the use of undisclosed classified information in the case-in-chief, an Article III judge, compensated right to counsel, nationwide subpoenas, unclassified summaries of the classified evidence in most cases (by statute), and "special attorneys" to assist permanent resident aliens who are denied summaries of classified information. INA §§ 502(a) and 504(c)(1), (d)(3), (5), (e)(3); 8 U.S.C. § 1532(a) and 1534(c)(1), (d)(3), (5), (e)(3).

INA § 504(b), 8 U.S.C. § 1534(b), requires that the alien be provided with reasonable notice of the nature of the charges. An alien must also be given a reasonable opportunity to examine the evidence and witnesses against him, but the alien does not have a right to access of classified information. INA § 504(a)(2), (3), (d)(5); 8 U.S.C. § 1534(a)(2), (3), (d)(5). INA § 504(e) authorizes the Government to use evidence from electronic surveillance and unconsented physical searches pursuant to the Foreign Intelligence Surveillance Act (FISA), 50 U.S.C. §§ 1801 et seq., without regard to FISA's notice provision. INA § 504(e)(1); 8 U.S.C. § 1534(e)(1). Section 504(e) similarly precludes the alien from filing suppression motions and motions under 18 U.S.C. § 3504 relative to electronic surveillance. INA § 504(e)(1)(C); 8 U.S.C. § 1534(e)(1)(C).

If the disclosure of information "would pose a risk to national security or risk to an individual because it would disclose classified information," reference to such information shall only be made in an unclassified summary. INA § 504(e)(3)(A) and (B); 8 U.S.C. § 1534(e)(3)(A) and (B). To consider whether

such action should be taken, an ATRC judge shall review the evidence ex parte and in camera. INA § 504(e)(3)(A); 8 U.S.C. § 1534(e)(3)(A). The ATRC judge shall also approve an unclassified summary if it is "sufficient to enable the alien to prepare his defense." INA § 503(e)(3)(C); 8 U.S.C. § 1534(e)(3)(C).

If the summary is not sufficient, the government may submit a revised summary for further review. INA § 504(e)(3)(D)(i); 8 U.S.C. § 1534(e)(3)(D)(i). If the revised summary fails to gain approval, the court must terminate the removal hearing unless it finds that:

> (I) the continued presence of the alien in the United States would likely cause serious and irreparable harm to the national security or death or serious bodily injury to any person, and
> (II) the provision of the summary would likely cause serious and irreparable harm to the national security or death or serious bodily injury to any person.

INA § 504(e)(3)(D)(ii) and (iii); 8 U.S.C. § 1534(e)(3)(D)(ii) and (iii).

When the ARTC court determines that the case should proceed without an unclassified summary and the alien is a permanent resident, the alien is entitled to the appointment of a "special attorney" who may review and challenge in camera the classified information. INA § 504(e)(3)(E) and (F); 8 U.S.C. § 1534(e)(3)(E) and (F). However, the special attorney may not disclose the classified information to the alien or any other attorney representing the alien. INA § 504(e)(3)(F)(ii); 8 U.S.C. § 1534(e)(3)(F)(ii).

INA § 504(g), 8 U.S.C. § 1534(g), requires the government to prove removability by only a preponderance of the evidence. As with conventional removal proceedings, the Federal Rules of Evidence do not apply in ATRC proceedings. INA § 504(h); 8 U.S.C. § 1534(h). Due to the nature of ATRC proceedings, the Federal Rules of Civil and Criminal Procedure are also inapplicable. See Fed. R. Civ. P. 1; Fed. R. Crim. P. 1.

3. Appeals

INA § 505, 8 U.S.C. § 1535, provides for appeals. The government may seek review of an ATRC decision rejecting the government's application in the Circuit Court for the District of Columbia. INA § 505(a); 8 U.S.C. § 1535(a). The government may also take an interlocutory appeal due to the rejection of an unclassified summary to the same court. INA § 505(b); 8 U.S.C. § 1535(b). The lack of a ruling from the ATRC within fifteen days of submission of an unclassified summary constitutes a rejection for appeal purposes. INA §§ 504(e)(3)(D) and 505(b)(1)(B); 8 U.S.C. § 1534(e)(3)(D) and 1535(b)(1)(B). Both parties may appeal to the D.C. Circuit from an ATRC decision on removal, and both may petition the Supreme Court for writ of certiorari. INA § 505(c) and

(d); 8 U.S.C. § 1535(c) and (d).

4. Post Order Detention and Designation of Country

Once the alien is ordered removed, he or she must be detained while an appeal is pending or until removal. INA §§ 504(i) and 507(b)(1); 8 U.S.C. § 1534(i) and 1537(b)(1). The alien has an opportunity to designate a country to which he or she will be removed. INA § 507(b)(2); 8 U.S.C. § 1537(b)(2). If the alien does not designate a country, or if the Attorney General, in consultation with the Secretary of State, determines that removal of the alien to the designated country would impair a treaty obligation or adversely affect foreign policy, the alien will be removed to any country willing to receive him or her. INA § 507(b)(2)(A) and (B); 8 U.S.C. § 1537(b)(2)(A) and (B). If there is no such country, the Attorney General may retain the alien in custody. INA § 507(b)(2)(C); 8 U.S.C. § 1537(b)(2)(C). The Attorney General may also delay removal to allow for a trial on any criminal charge and the service of any sentence of confinement resulting from such trial. INA § 507(c)(1); 8 U.S.C. § 1537(c)(1).

5. The Alien Terrorist Removal Task Force

The Alien Terrorist Removal Task Force was created in 1996 for the identification, trial, and removal of terrorist aliens. The Chief of the Counterterrorism Section (CTS) chairs the Task Force, and its members include representatives of CTS, OIL, FBI, DHS CIS/ICE, and the Office of Intelligence Policy Review (OIPR). OIL heads the Trial Unit. Since its inception, no cases have been brought before the ATRC.