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Aubrey Glover

“He’s a Palestinian, not a U.S citizen but a legal resident, never charged with a crime, but suspected of terrorism.”

"[T]hey distributed magazines, passed out leaflets and organized fund-raising dinners where national anthems were sung, poetry was read and money was raised for hospitals and schools. They even demonstrated in public plazas on occasion, carrying signs that criticized the actions of the U.S. government and other foreign governments."

I. INTRODUCTION

Although not convicted of any crimes, aliens who have engaged in speech and association with unpopular groups, specifically those linked with terrorism, have increasingly been deported or have been threatened with deportation proceedings. Many of these aliens engaged in conduct protected by the First Amendment but were placed into proceedings to remove them from the United States because this conduct was linked to groups the United States Government labeled terrorist groups. Based on current cases, it appears that aliens may be removed from the United States for exercising rights that would be protected by the First Amendment if the person were a United States citizen. This


3. 8 U.S.C §1189 (2002). (This section of the immigration law describes the process of designating an organization as “terrorist” for immigration purposes.).

4. See supra note 2.
raises serious questions. First, does the First Amendment protect aliens who are in the United States? Second, if the First Amendment does protect these aliens, does it protect them in the context of deportation/removal proceedings? Third, do the grounds of deportation for terrorism violate the First Amendment rights of lawfully admitted aliens? Fourth, if aliens' rights are violated, what can be done to correct the ground of deportation so that it complies with the First Amendment? This comment concludes that aliens have rights under the First Amendment that are violated by the current grounds of deportation for terrorism. It will provide suggestions to revise the grounds of deportation and other sections of the Immigration and Nationality Act in such a way to achieve the goal of deporting terrorists without violating the First Amendment rights of aliens.

II. THE FIRST AMENDMENT DOES PROTECT THE SPEECH AND ASSOCIATIONS OF ALIENS PRESENT IN THE UNITED STATES.

In 1999, the Supreme Court decided Reno v. American-Arab Anti-Discrimination Committee. This decision followed twelve years of litigation between the Immigration & Naturalization Service ("INS") and eight aliens claiming they were targeted for deportation because of their political beliefs and associations in violation of their First Amendment rights. Justice Scalia, for the majority, held that changes in the immigration law in 1996 "deprive[d] the federal courts of jurisdiction over respondents'..."
Many have assumed this decision means that aliens are without the protection of the First Amendment. However, the Court never stated that aliens' speech and associations lacked the protection of the First Amendment. Instead, it determined the method used to reach the Court was no longer valid so it lacked jurisdiction to hear the case; the Court left the door open for challenges using habeas review. Unfortunately, this decision did vacate the prior decisions in which the eight aliens had succeeded. But it did not vacate the case law relied upon in those decisions.

One decision relied upon by the vacated lower court decisions was Bridges v. California. In 1941, the United States Supreme Court reversed a state court's contempt conviction of Harry Bridges. Although Bridges was an alien, the Court never questioned whether, because of his alienage, his rights were different from a citizen's rights under the First Amendment. Rather, the Court treated him the same as any citizen whose rights were violated. In his dissenting opinion, Justice Frankfurter took exception to the fact that the majority did not address Bridges' alienage. According to Justice Frankfurter, "only the Due Process Clause assures constitutional protection of civil liberties to aliens and corporations." Despite this criticism, Bridges v. California has been cited as acknowledging that lawfully admitted

10. Id. at 492.
12. American-Arab Anti-Discrimination Committee, 525 U.S. at 488. Justice Scalia did state: "As a general matter—and assuredly in the context of claims such as those put forward in the present case—an alien unlawfully in this country has no constitutional right to assert selective enforcement as a defense against his deportation." Id.
13. Id. at 480. See also David G. Savage, supra note 11.
15. 314 U.S. 252 (1941) ("Bridges I").
16. Bridges I, 314 U.S. at 278. As a motion for a new trial was pending in a case involving the union that Bridges was an officer of, he sent a telegram that was published to the Secretary of Labor warning that the port of Los Angeles would be "tied up" because of the state court judge's decision. Bridges, 314 U.S. at 277-76 (1941). As a result, Bridges was convicted for his comments. Id. at 277. California tried to justify its actions by arguing that because of its obligation to administer justice, it was necessary to take action to ensure judicial trials were fair and free from coercion or intimidation. Id. at 259.
19. Id.
aliens possess First Amendment right. The decision has not since been overruled.

In a second case before the Court involving Harry Bridges, the Court stated, "Freedom of speech and of press is accorded aliens residing in this country." Leading up to this case, deportation proceedings were instituted against Bridges because of his alleged membership and his alleged affiliation with the Communist party. The Court determined that the meaning of affiliation relied on by the government was too broad. The Court interpreted affiliation to mean "that quality which indicates an adherence to or a furtherance of the purposes or objectives of the proscribed organization as distinguished from mere cooperation with its lawful activities." The government failed to prove that Bridges had done anything beyond cooperating with the Communist party's lawful activities, thereby holding that these activities were protected by the First Amendment. Moreover, Bridges' alleged membership in the Communist party also was not proven. The government had relied on the same evidence that was too weak to prove affiliation with the Communist party. Therefore the evidence used against Bridges was insufficient to render him deportable for being a member of the Communist party.

Six years later, in *Harisiades v. Shaughnessy*, the Court upheld an order of deportation against Harisiades, a Greek national who had been a member of the Communist party. The actual question decided in this case was whether a resident alien could legally be deported based on membership in the Communist party, when said membership ended prior to enactment of the law which

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22. *Id.* at 138-39.
23. *Id.* at 149.
24. *Id.* at 143-44.
25. *Id.* at 145-46. At this time, the Communist party was alleged to advocate the overthrow of the government by force. The evidence used against Bridges only linked him to lawful activities based upon his position in the Marine Workers Industrial Union. *Id.*
27. *Id.* at 149-50.
28. *Id.* at 143.
provided the ground for deportation.\footnote{31} One argument put forth by Harisiades was that by joining the Communist party, an alien only exercised his or her freedom of speech and assembly as protected by the First Amendment.\footnote{32} The Court rejected this argument because Congress was allowed to distinguish between groups advocating peaceful change from those advocating change through violence, like the Communist party.\footnote{33} Relying on \textit{Dennis v. United States},\footnote{34} the Court concluded that allowing the deportation of Harisiades did not violate his First Amendment rights.\footnote{35}

Aliens and their advocates alike believed that the decision in \textit{Harisiades} meant that the First Amendment did not protect the speech and associations of legal aliens.\footnote{36} This was similar to the reaction of some commentators following \textit{Reno v. American-Arab Anti-Discrimination Committee}.\footnote{37} This belief was, however, unfounded.\footnote{38} For the majority, Justice Jackson determined that aliens' First Amendment rights were not violated.\footnote{39} This conclusion was reached after the Court applied the same test it used to determine whether criminal statutes violated United States citizens' rights.\footnote{40} Justice Jackson never suggested that aliens lacked the same rights.\footnote{41} In fact, one can argue that aliens' First Amendment rights were afforded the same level of protection as the rights of United States citizens.

In subsequent cases to \textit{Harisiades} and \textit{Bridges}, the Court has further reinforced the fact that aliens have protected rights under the First Amendment. In \textit{Kwong Hai Chew v. Colding},\footnote{42} a permanent resident alien returning from abroad was excluded from reentering the United States.\footnote{43} Chew contested his exclusion, and the Court found that because Chew was a permanent resident

\begin{itemize}
\item 31. Id. at 581.
\item 32. Id. at 591-92.
\item 33. Id. at 592.
\item 34. 341 U.S. 494 (1951).
\item 35. \textit{Harisiades}, 342 U.S. at 592.
\item 38. Id. at 869.
\item 39. \textit{Harisiades}, 342 U.S. at 592.
\item 40. Aleinikoff, \textit{supra} note 37, at 868.
\item 41. Id.
\item 42. 344 U.S. 590 (1953).
\item 43. \textit{Kwong Hai Chew}, 344 U.S. at 592.
\end{itemize}
alien, he was entitled to due process, such as notice of the charge against him. The Court distinguished between returning permanent resident aliens and aliens attempting to enter the United States for the very first time. Aliens attempting to enter for the first time did not have protection under the Bill of Rights; the returning resident alien, however, was "invested with the rights guaranteed by the Constitution to all people within our borders. Such rights include those protected by the First and Fifth Amendments and by the due process clause of the Fourteenth Amendment. None of these provisions acknowledge any distinction between citizens and resident aliens."

The Supreme Court, therefore, has acknowledged that aliens possess rights under the First Amendment. The text of the Constitution and the Bill of Rights provide support for the conclusion that aliens should have the same First Amendment rights as any citizen. In fact, where not explicitly provided for under the Constitution, aliens generally enjoy the same rights as citizens. There are several provisions within the Constitution where the framers elected to treat citizens differently than aliens. As a precondition to being elected to the House or Senate of Congress, those seeking election were required to be United States citizens for a certain length of time. To be eligible for the presidency of the United States, not only is the person required to be a United States citizen, he or she must have been born a United States citizen. Anticipating that some aliens in the United States would choose to become citizens, Congress was given the task of establishing "an uniform rule for naturalization."

If the framers specifically distinguished between aliens and citizens in the Constitution, the same could have been done within the Bill of Rights. Instead, the first eight amendments refer to a "person," the "right of the people," and the "accused." It can still be debated, of course, who "the people" are. The Court has

44. Id. at 595-96.
45. Id. at 596.
46. Id. at 596-97 n.5. (The Court quotes extensively from Bridges v. Wixon.).
47. Id.
49. Id. at art. II, §1.
50. Id. at art. I, §8.
51. Id. at amend. V.
52. Id. at amend. I, II, and IV.
53. U.S. Const. amend. VI.
determined that this is a term of art and has suggested that the term "refers to a class of persons who are part of a national community or who have otherwise developed sufficient connections with this country to be considered part of that community." Aliens who are lawfully admitted have become a part of the national community and, depending on whether they are permanent residents or only temporarily residing in the United States, have developed sufficient connections to be considered a part of this nation. Further, at least one of the founding fathers, James Madison, held the belief that aliens should receive protection under the Bill of Rights. Madison stated, "As [aliens] owe, on one hand, a temporary obedience, they are entitled, in return, to their protection and advantage."

Further proof can be found in the First Amendment itself. That amendment states: "Congress shall make no law...abridging the freedom of speech." The Amendment does not require the speaker to be a citizen to receive its protection. It does not provide, "Congress shall make no law...abridging the freedom of speech" of United States citizens. The First Amendment values speech, regardless of the source.

Examining three of the several philosophical explanations for free expression, specifically the marketplace of ideas, self-governance, and self-realization, one finds nothing within these concepts that excludes aliens from participating in free expression. The first rationale for free expression, known as the search for the truth within the marketplace of ideas, is that "the best test of the truth is the power of the thought to get itself accepted in the competition of the market." Since there is no way to know for certain what is true and false within the marketplace of ideas, it is in the

55. Verdugo-Urquidez, 494 U.S. at 265.
58. U.S. CONST. amend. I.
best interest of those seeking the truth that aliens be allowed to participate and freely express themselves. At least a portion of the ideas aliens convey may be true or contribute to the distillation of the truth. The source of the idea is wholly irrelevant. In the context of foreign affairs, aliens may even possess "superior" ideas because of their access to information obtained by keeping in touch with friends and family in their home countries.

The second philosophical rational for free expression, self-governance, also supports the notion that aliens should freely express themselves. The premise behind this theory is that, in order to govern effectively in a democracy, people need information to make wise and educated decisions. Under this rationale, there are two reasons that aliens should be allowed to freely express themselves. First, for United States citizens to make wise choices in self-governance, they need information to help them form decisions on matters such as foreign relations and policy, even domestic matters, where a new perspective might be needed. Second, many lawfully admitted aliens seek to become U.S. citizens through naturalization. At some point, they will need to be informed because they will become a part of the self-governing body. Further, they will need to be informed and must be able to participate in order to make the decision to become a United States citizen.

With regard to the third philosophical justification for free expression, self-realization and autonomy, aliens again should have the same right to freely express themselves. Self-realization focuses on the fact that there is a relationship between free expression and personal fulfillment. Those living in this country, whether aliens or citizens, need information to know what possibilities exist for them in life. United States immigration law, in one sense, seems to support this view. Aliens who are persecuted in their home countries because of religion, membership in a particular social group, or because of their political opinion can seek and receive refuge in the United States. In their home countries,


these aliens were unlikely to achieve personal autonomy because of their repression. However, they are likely to reach such a goal in the United States. Also, as mentioned above, aliens need to freely participate so that they have adequate information to decide whether to naturalize or not.

The freedoms of speech and association treasured by United States citizens is extended to aliens present in the United States. This has been established by case law and supported by discussion of the philosophical background of the First Amendment. The next section will demonstrate that, unlike United States citizens, aliens' First Amendment rights are vulnerable to attack in the context of deportation proceedings.

III. ALTHOUGH ALIENS' SPEECH AND ASSOCIATIONS ARE PROTECTED BY THE FIRST AMENDMENT IN GENERAL, THEIR RIGHTS ARE NOT PROTECTED WITHIN THE CONTEXT OF DEPORTATION PROCEEDINGS.

Deportation is considered by the Supreme Court to be a civil proceeding. 66 Therefore, many of the protections afforded in criminal proceedings are not applicable. 67 At the same time, though, the Court recognizes the cruelty imposed by deportation. The Bridges II Court declared that:

The impact of deportation upon the life of an alien is often as great if not greater than the imposition of a criminal sentence. A deported alien may lose his family, his friends and his livelihood forever. Return to his native land may result in poverty, persecution and even death. 68

Deportation is "the removal or sending back of an alien to the country from which he came because his presence is deemed inconsistent with the public welfare, and without any punishment being imposed or contemplated." 69 The actual grounds of deportation are located within Title 8 of the United States Code. 70 The requirements that are in place are derived from the protections

67. Id. For example, in this case, the Court held that to strike down the law as retroactive and violative of the ex post facto provision of the Constitution would require the Court to alter its view that deportation proceedings are civil in nature. Id.
68. Bridges II, 326 U.S. at 164.
guaranteed by the due process clause and are provided for by agency regulation.71 Generally, the INS must provide to the alien both notice72 and a hearing.73

An immigration judge oversees the removal proceedings. His or her authority is limited to determining removability of aliens, to making decisions that include orders of removal, to determining applications, and to withholding removal.74 The immigration judge's actions are to be consistent with applicable laws and regulations.75 During removal proceedings, the immigration judge must advise the alien of his or her rights, including the right to an attorney at no cost to the government, the right to examine the evidence against him or her, the right to present evidence on his or her behalf, and the right to cross-examine witnesses.76

In the removal proceeding, INS bears the burden of proving that an alien is removable.77 First, INS must establish that the person charged with removal is an alien without claim to U.S. citizenship.78 Second, INS is required to prove by "clear and convincing evidence that the respondent is deportable as charged."79 While this standard is higher than that required in most civil proceedings, it is far from the "proof beyond a reasonable doubt" standard used in criminal trials. Further, at any time during the proceeding, INS may substitute new grounds of deportation for the grounds the alien was originally charged with or additional new grounds.80

After INS has met its burden, the alien has an opportunity to present evidence on his or her behalf which may prove that he or she is not removable, or that the alien is eligible for requested benefits or privileges that should be granted.81 If the alien proves that he or she is eligible for benefits or privileges, and the evidence also appears to indicate that grounds for mandatory denial

72. 8 C.F.R. § 239.1 (2002).
73. See id. § 240.10. In general, 8 C.F.R. § 240 (2001) regulates the proceedings to determine removability of aliens in the United States.
74. 8 C.F.R. § 240.1.
75. Id.
76. 8 C.F.R. § 240.10(a)(1)-(4).
77. 8 C.F.R. § 240.8(a).
78. Id.
79. Id.
80. 8 C.F.R. § 240.10(e).
81. 8 C.F.R. § 240.8(d).
are applicable, the burden is on the alien to prove, by a preponderance, that the grounds for denial do not apply.\textsuperscript{82}

Once the immigration judge has heard all the evidence, he or she will issue a decision.\textsuperscript{83} The decision should include a finding as to whether the alien was deportable and reasons for granting/denying requests for benefits and privileges.\textsuperscript{84} If the immigration judge orders the alien removed, the alien may appeal the decision within thirty days to the Board of Immigration Appeals ("BIA").\textsuperscript{85}

The BIA is responsible for reviewing and deciding appeals from immigration judges' decisions.\textsuperscript{86} It issues its decisions in the form of written opinions that set precedent, binding immigration judges and employees of INS.\textsuperscript{87} However, the Attorney General may direct the BIA to refer cases to him or her and the Attorney General's decision on the matter becomes binding in the same way.\textsuperscript{88}

Although immigration judges and the BIA make decisions that seriously impact the lives of aliens, immigration judges and the BIA lack the authority to decide whether a ground of deportation is constitutional.\textsuperscript{89} In the \textit{Matter of Church Scientology International},\textsuperscript{90} the BIA acknowledged this limitation.\textsuperscript{91} "Of course, the Service cannot pass upon the constitutionality of the statute it administers. Nevertheless, we can address questions relating to the constitutionality of its application."\textsuperscript{92} In other words, the BIA can determine whether INS violated an alien's right to due process by not providing the alien notice as required by regulation. On the other hand, the BIA cannot determine whether a ground of deportation, as written, violates an alien's First Amendment rights because the BIA is the body charged with administering the law.

Recognizing that the deportation proceeding is not a forum in which an alien can challenge a ground of deportation as violating his or her First Amendment rights, where can an alien make such

\begin{itemize}
\item \textsuperscript{82} Id.
\item \textsuperscript{83} 8 C.F.R. § 240.12(a).
\item \textsuperscript{84} Id.
\item \textsuperscript{85} 8 C.F.R. § 240.15.
\item \textsuperscript{86} 8 C.F.R. § 3.1(b)(1)-(3).
\item \textsuperscript{87} 8 C.F.R. § 3.1(g).
\item \textsuperscript{88} 8 C.F.R. § 3.1(h).
\item \textsuperscript{89} Matter of Church Scientology International, 19 I. & N. Dec. 593, 603 (1988).
\item \textsuperscript{90} 19 I. & N. Dec. 593, 603 (1988).
\item \textsuperscript{91} \textit{Church Scientology International}, 19 I. & N. Dec. at 603.
\item \textsuperscript{92} Id.
\end{itemize}
challenge? Aliens ordered removed may seek review of the final order of removal within thirty days after the final order was issued in the court of appeal, with jurisdiction over the location where the immigration judge completed the removal proceeding.\(^9\) Unless the court of appeals orders the alien's removal stayed, filing a petition for review of the final order of deportation does not prevent the Attorney General from removing the alien and essentially mooting the issue.\(^3\) The court of appeals is limited to deciding the petition based on the administrative record on which the final order was based.\(^4\) Further, the findings of fact made by the BIA "are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary."\(^5\) Review of all questions of law and fact by the court of appeal, including interpretation and application of constitutional and statutory provisions, is available only when there is a final order of removal.\(^6\)

United States citizens can challenge statutes for being overbroad under the First Amendment because an overbroad statute may chill protected First Amendment rights.\(^7\) Citizens can seek injunctive and declaratory relief in certain situations. But does this mean an alien can seek to enjoin or restrain the operation of the grounds of deportation because it violates the First Amendment? Unfortunately, Title 8 of the U.S. Code denies aliens the same opportunity when addressing grounds of deportation. To challenge his/her ground of deportation, an alien must have been found deportable under a final order of removal, after exhausting all administrative remedies.\(^8\) Title 8 specifically states:

Regardless of the nature of the action or claim or the identity of the party or parties bringing the action, no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of the provisions of part 4 of this subchapter, as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, other than with respect to the application of such provisions to an indi-

\(^{97}\) 8 U.S.C. § 1252(b)(9).
individual alien against whom proceedings under such part have been initiated.\textsuperscript{100}

The result of this limitation is that aliens may forego otherwise protected speech and association because they cannot challenge grounds of deportation without risking practically everything. In the current climate, speech and association such as meeting with fellow Palestinians to picket over the present crisis in the Middle East might be cause to remove an alien if he or she is suspected of engaging in terrorist activity. An alien may firmly believe that United States policy is wrong and wish to speak out. However the individual will likely question whether speaking out may result in losing the life he/she has built in the United States. Perhaps out of fear of being returned to a place of persecution or a place of war and hostility, the alien will frequently choose not to speak. This robs society, consisting of citizens and aliens, of information that could be useful in determining foreign policy of the United States during this Middle East crisis and information citizens could use when choosing an elected official.

It has been established that removal or deportation proceedings do not provide aliens with an opportunity to challenge their removal on constitutional grounds. Left open is the question of whether any ground of deportation is unconstitutional. This is a serious question because, as discussed, aliens’ ability to challenge portions of the Immigration and Nationality Act are very limited. In the next section, the ground of deportation related to terrorism is examined to determine if it is unconstitutional because it violates the First Amendment rights of aliens.

IV. 8 USC § 1227(A)(4)(B), AS AMENDED BY THE USA PATRIOT ACT, VIOLATES ALIENS’ RIGHTS TO FREE EXPRESSION AND ASSOCIATION, AS PROTECTED BY THE FIRST AMENDMENT.

Aliens, whether lawfully or unlawfully in the United States, can be removed under a number of grounds of deportation.\textsuperscript{101} Most of these grounds focus on conduct engaged in by the alien. One example of such conduct is when an alien votes in a federal election, which is prohibited under the law because only United States citizens are permitted to vote in federal elections;\textsuperscript{102} another example

\textsuperscript{100} See id. at 8 U.S.C. § 1252(f)(1).
\textsuperscript{101} 8 U.S.C. § 1227.
\textsuperscript{102} 8 U.S.C. §1227(a)(6).
is when an alien becomes an overstay, meaning the alien remained in the United States beyond the time period he or she was admitted.\textsuperscript{103} The ground focusing on terrorist activity goes beyond conduct alone, though. This ground states: "Any alien who has engaged, is engaged, or at any time after admission engages in any terrorist activity (as defined in section 1182(a)(3)(B)(iv) of this title) is deportable."\textsuperscript{104} The fact that there is a ground of deportation for terrorism is not new.\textsuperscript{105} What is new is the current climate and hysteria under which this ground may be applied.

On its surface, this ground of deportation appears to be reasonable and benign. However, when examining the definition of "engage in terrorist activity," upon which this ground relies, it becomes less evident. This definition is located within the section of law that addresses grounds of inadmissibility of aliens who are applying for admission into the United States.\textsuperscript{106} Applying for admission means that the alien is just arriving in the United States, perhaps at a port of entry on the Canadian/Mexican border or on an international flight.\textsuperscript{107} An immigration officer will inspect the alien and determine whether or not to admit the alien.\textsuperscript{108} At this time, it is the alien’s burden to satisfy the immigration officer that no ground of inadmissibility prevents the admission of the alien into the United States.\textsuperscript{109}

Aliens’ rights at the border are extremely limited, although there is an exception for returning resident aliens.\textsuperscript{110} These applicants for admission have some due process rights. Otherwise, however, much of the Bill of Rights and Constitution are inapplicable to them, including the rights protected by the First Amendment.\textsuperscript{111} Since these applicants are not within the boundaries of the United States and usually lack sufficient ties, these applicants

\begin{thebibliography}{111}
\bibitem{103} 8 U.S.C. § 1227(a)(1)(C).
\bibitem{104} 8 U.S.C. § 1227(a)(4)(B).
\bibitem{107} See id. § 1101(a)(4).
\bibitem{109} 8 U.S.C. § 1361.
\bibitem{110} Kwong Hai Chew, 344 U.S. at 596.
\bibitem{111} Id. at 598 n.5 (1953) (citing concurring opinion of Bridges v. Wixon, 326 U.S. 135, 161 (1945)).
\end{thebibliography}
are not recognized as "the people" protected by the Constitution. Practically speaking, it makes sense to have stringent requirements in place before admitting an alien. This is the best opportunity to prevent an individual who may become a threat from entering the United States. It is the burden of the applicant to show that he or she is not and will not become a threat.

After admission, the scene changes. Although not citizens, aliens become vested with certain rights when admitted, including the rights protected by the First Amendment. Another dramatic change occurs. In order to remove an alien, INS has the burden of proving, with clear and convincing evidence, that the alien is removable. But this does not save the ground of deportation. It still suffers from substantial overbreadth.

Specific sections of the definition relied upon by this ground of deportation are overbroad because they include, as reasons for removing an alien, conduct protected by the First Amendment. Additionally, this ground has not been interpreted in such a way to "save" it by limiting it to what is permissible under the Constitution. Future interpretation is not likely to change this understanding, either, because the definition is doing double-duty by supporting a ground of inadmissibility that places the burden on the alien and a ground of deportation, which places the burden upon the INS. Further, after September 11, 2001, terrorism has become a catch phrase for that "evil" that is being fought by the United States, similar to the communism and subversive speech of old. For instance, in response to September 11, 2001, INS detained many aliens for indefinite periods of time, primarily because of their ethnicity and religious beliefs. Part of the reason behind this detainment was that the U.S. did not know who the

112. U.S. v. Verdugo-Urquidez, 494 U.S. 259, 265 (1990). Applying definition of who "the people" are from this opinion. Id. at 265.
113. See supra note 46 and note 47 and accompanying text.
114. 8 C.F.R., § 240.8(a) (2002).
"terrorists" were in the United States, only what ethnic and religious background they might come from.

The challenged definition, "engages in terrorist activity," states in relevant part:

As used in this chapter, the term "engage in terrorist activity" means, in an individual capacity or as a member of an organization—

(IV) to solicit funds or other things of value for—

(aa) a terrorist activity;

(bb) a terrorist organization described in clause (vi)(I) or (vi)(II); or

(cc) a terrorist organization described in clause (vi)(III), unless the solicitor can demonstrate that he did not know, and should not reasonably have known, that the solicitation would further the organization's terrorist activity; 119

For an alien to be found deportable under this portion of the definition, the alien needs to first seek money or other things of value. 120 Second, the money or things of value must be obtained for either a terrorist activity, a terrorist organization as designated by 8 U.S.C. §1189, a terrorist organization as designated by either the Secretary of State or the Attorney General and published in the Federal Register, or a group of at least two individuals that engage in any number of activities, including providing material support for a terrorist organization. 121 It is this last portion that is of real concern because all that is required is for an alien to engage in activity with one other person, regardless of whether the two were actually working in concert. In addition, if INS proves that the alien solicited funds or things of value for a group of at least two individuals engaging in proscribed activities, the alien can only claim lack of knowledge as a defense to being removed if he can prove that he did not know and should not reasonably have known that his or her solicitation would further the terrorist organization's terrorist activity. This effectively shifts the burden to the alien. 122

This deportation ground implicates speech because it involves fundraising, which is often a form of expression, or, at a minimum,

is often intertwined with speech and association. The definition fails to fully take into account whether the alien's solicitation was for protected speech or unlawful activity. If a citizen contributes money or donates property to a religious group, to a political group, or to an artist, that citizen has expressed his or her support for the cause that the group or artist works towards. Generally, citizens are free to do this. The same should be true for aliens who are lawfully in the United States. But because of the definition above, it is not the same for aliens.

To illustrate the over breadth of the newly revised ground of deportation, a hypothetical will be considered that tests a portion of the definition "engages in terrorist activity." The hypothetical involves an alien engaging in protected conduct, conduct similar to that quoted at the beginning of this comment. Consider the following. Emanon is a Palestinian and lawful permanent resident of the United States. He wants the United States to support the Palestinian side of the Israeli/Palestinian conflict. Finding a group of friends with similar goals, he pickets with his friends outside of Congress with signs like, "Stop Israeli Murder, Support Yasser Arafat!!" While picketing, Emanon and his friends hand out pamphlets providing information about the cause from the Palestinian perspective. These pamphlets also ask for money in support of this cause. Emanon is only supporting a cause he believes in and he does not know that his friends are linked to the Popular Front for the Liberation of Palestine ("PFLP"), one of the groups designated by the Secretary of State as being a terrorist organization. Likewise, Emanon does not know that the money received while picketing may be used to purchase things of value to be sent to Palestine, possibly to support militant activities or maybe only for humanitarian activities, such as for the purchase of blankets. However, that same day, an Immigration officer arrests Emanon and his friends based on the ground of deportation incorporating the definition quoted above. Is Emanon deportable because he "solicited funds...for a terrorist organization?"

124. This is only one possible example of overbreadth within this definition and ground of deportation.
Examine what Emanon actually did. He delivered his message, his speech, in two ways. First, he picketed, seeking to raise public awareness of the crisis between Israel and Palestinians. Specifically, he picketed in front of Congress, where those chosen by the people to govern the United States are located. Second, he handed out pamphlets. These pamphlets provided information that readers could use and consider when making decisions regarding whom to elect. It would assist them in considering candidates' view regarding American policy towards the Middle East. The request for monetary support was only incidental to Emanon's activity and he believed the money was being raised to support more activity or expression of this kind. Unfortunately, if INS proves that Emanon solicited funds for a terrorist organization such as the PFLP, he will be removed from the United States, against his will. His only hope is that after a final order of deportation is issued, he can convince an Article III judge, through a writ of habeas corpus\textsuperscript{127} or petition per chapter 158 of 28 U.S.C.,\textsuperscript{128} that as applied to him this ground of deportation violated his rights as protected by the First Amendment.

If INS fails to prove that Emanon supported the PFLP, it may be able to prove that he supported a group of two individuals or more who were "planning a terrorist activity."\textsuperscript{129} After all, where did the group picket? It picketed outside of Congress, a potential target for a terrorist attack. How is Emanon supposed to know what activities his friends are planning? In the end, it will be very difficult for Emanon to show that he did not know and should not reasonably have known that the solicitation would further terrorist activity. Based on the above hypothetical, why even risk being deported? Why support a cause and risk losing everything? The broad definition of "engages in terrorist activity" therefore chills speech and association. The chilling effect is serious too, because it implicates many of the reasons for the First Amendment, like self-governance, the search for truth, and self-autonomy.

Other sections of the definition "engages in terrorist activity" implicate similar First Amendment interests. Part V of 8 U.S.C. §1182(a)(3)(B)(iv) renders an alien deportable for soliciting individuals to become members of an alleged terrorist organization.\textsuperscript{130}

\begin{itemize}
\item \textsuperscript{127} 28 U.S.C. § 2242 (2002).
\item \textsuperscript{128} 28 U.S.C. § 2344.
\item \textsuperscript{130} See id. § 1182(a)(3)(B)(iv)(V).
\end{itemize}
Since a terrorist organization can be made up of only "a group of two or more individuals, whether organized or not," inviting acquaintances or friends or even a family member for coffee could later turn out to be a reason to deport an alien. This definition requires someone to know so much about the background of family, friends, and acquaintances that it discourages meeting and discussions between aliens. Otherwise, how would aliens know the persons with whom they met were not going to later engage in terrorist activity?

Part VI of 8 U.S.C. §1182(a)(3)(B) makes an alien deportable for committing an act that the alien knows, or reasonably should know, affords material support:

(VI) to commit an act that the actor knows, or reasonably should know, affords material support, including a safe house, transportation, communications, funds, transfers of funds or other material financial benefit, false documentation or identification, weapons (including chemical, biological, or radiological weapons), explosives, or training—

(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 clause (vi)(I) or (vi)(II); or

(dd) to a terrorist organization described in clause (vi)(III), unless the actor can demonstrate that he did not know, and should not reasonably have known, that the act would further the organization's terrorist activity. 132

Many ordinary activities, like driving a cousin to a friend's house or to a demonstration outside of Congress, could become a basis for removal. This is due to the portion of the definition immediately above, the alien may have provided transportation to someone he or she reasonably should have known planned to engage in terrorist activity. The next time an alien's friend visits his home, the alien will need to consider whether, by allowing his friend to use his internet service or phone, he may helping his friend engage in terrorist activity. The issue in this case is

whether the alien is providing "communications" to someone he reasonably should know plans to commit a terrorist activity. Based on these examples, it is evident that other parts of this definition relied upon by the ground of deportation are also overbroad.

Sadly, current immigration law promotes a scheme which emphasizes efficiency in removing aliens as quickly as possible over recognition of aliens' constitutional rights. As a result, aliens' ability to challenge this ground of deportation is virtually non-existent, only increasing the potential chilling effect on speech and association. Since aliens are unable to challenge the ground of deportation prior to engaging in the expressive conduct that they believe is protected by the First Amendment, in order to challenge it, aliens must actually engage in the speech and expressive conduct, risking deportation. \(^3\) Who would reasonably risk everything to test this ground of deportation? Further, what does this legislative scheme say about the United States? Is it truly dedicated to the ideals expounded in the First Amendment? At least when judged in reference to the recent anti-terrorist legislation, which amended the Immigration and Nationality Act, the answer must be no.

Finally, one could analyze this ground of deportation and the definition it relies upon to see if it would pass scrutiny under the standard set forth in *Brandenburg v. Ohio*. \(^1\) The Ku Klux Klan is an organization that has only limited support for its ideas and its members have, at times, engaged in violent activities. But the Ku Klux Klan and its members are allowed to speak and associate so long as they do not cross the line into immediate and likely violation of the law. \(^2\) The same should be true of the speech and association of aliens, even when the aliens associate with groups allegedly linked to supporting terrorism, like the Popular Front for the Liberation of Palestine. As long as aliens do not engage in lawless conduct or have not crossed the line into likely and immediate violation of the law, they should not be deportable. Further, they should not be prohibited from soliciting funds or new members

134. 395 U.S. 444, 447 (1969). "[T]he constitutional guarantees of free speech and free press do not permit a State to forbid or prescribe 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.*
who share similar beliefs. It is the acts of violence or terrorism that are the concern, not their speech and association.

V. SINCE THE FIRST AMENDMENT RIGHTS OF ALIENS ARE VIOLATED BY 8 U.S.C. §1227A(4)(B), SOMETHING SHOULD BE DONE TO CORRECT THIS GROUND OF DEPORTATION SO THAT IT COMPLIES WITH THE FIRST AMENDMENT.

The ultimate purpose of this ground of deportation and the definition it relies upon appears to be the prevention of actual acts of terrorism by removing those aliens who are members of groups that may meet, plan, and acquire materials to commit acts of terrorism. This purpose can be accomplished without infringing on aliens' First Amendment rights, however, because alternatives exist that would allow the United States to deport aliens for terrorist activity and comply with the First Amendment. These alternatives include revising the ground of deportation and the definition it relies upon, utilizing the ground of deportation for crimes involving moral turpitude, revising the Immigration and Nationality Act to allow aliens to challenge the terrorism ground on its face, and allowing aliens ordered removed under this ground to present new evidence if the court of appeals, in its discretion, deems it appropriate.

A. Revising The Definition Of “Engages In Terrorist Activity.”

The first step that should be taken to correct the ground of deportation based on terrorism is to use the definition of “engages in terrorist activity” in its current form only within the grounds of inadmissibility and cease to use it to support a ground of deportation. As the ground of deportation is now written, it refers the reader to the definition of “engages in terrorist activity” contained in the grounds of inadmissibility.\textsuperscript{136} It states: “Any alien who has engaged, is engaged, or at any time after admission engages in any terrorist activity (as defined in section 1182(a)(3)(B)(iv) of this title) is deportable.”\textsuperscript{137} But this legislative scheme, by relying on the definition within the grounds of inadmissibility, fails to take into account the fact that aliens already within the United States possess First Amendment rights that aliens who are seeking admission into the United States lack. As a result of these First

\textsuperscript{137} See id. § 1227(a)(4)(B) (2002).
Amendment rights, a different definition is needed to support the ground of deportation for terrorist activity.

A second step that should be taken is to include within the ground of deportation a definition of “engages in terrorist activity” that does comply with the First Amendment. This could be achieved by using the same definition of “engages in terrorist activity” located within the grounds of inadmissibility and revising it. For instance, here is one portion of the definition, “engages in terrorist activity,” as it is today:

(IV) to solicit funds or other things of value for—
(aa) a terrorist activity;
(bb) a terrorist organization described in clause (vi)(I) or (vi)(II); or
(cc) a terrorist organization described in clause (vi)(III), unless the solicitor can demonstrate that he did not know, and should not reasonably have known, that the solicitation would further the organization's terrorist activity; 138

As written now, the quoted section above allows aliens to be deported because of raising money or things of value for a terrorist organization described in clause (vi)(III), meaning a group of two or more individuals who engage in certain activities including the material support of a terrorist organization, 139 unless the aliens can show that they did not know and should not reasonably have known that the solicitation would further a terrorist organization. 140 This definition is overbroad because, as discussed earlier, it captures a wide range of activities that are protected by the First Amendment. The portion that addresses groups of two or more should be completely removed from the definition that the ground of deportation would rely on. Instead, it should be amended to read:

The term "engage in terrorist activity" means, in an individual capacity or as a member of an organization—
(IV) to solicit funds or other things of value for--
(aa) a terrorist activity;

(bb) a terrorist organization described in clause (vi)(I) or (vi)(II);\footnote{8 U.S.C. § 1182(a)(3)(B)(iv).}

By omitting (cc), this revision permits those aliens who solicited money for recognized terrorist groups like Al-Qaeda to be deported while allowing aliens who exercised their First Amendment rights by supporting friends and relatives, not knowing that they were engaged in terrorism, to remain. Further, since aliens are still deportable for engaging in terrorist activity, the friends and relatives engaging in terrorism, if aliens would still be deportable. This is but one example of the many revisions that are necessary to bring this definition into compliance with the First Amendment.

Finally, Congress should refer to the standard set forth in \textit{Brandenburg v. Ohio} when rewriting this ground of deportation.\footnote{See supra note 134 and accompanying text.} Although the Court considers deportation to be a civil action, it has recognized the severity of deportation.\footnote{See supra note 69 and accompanying text.} The majority of the grounds of deportation in 8 U.S.C. §1227 focus on conduct of aliens that is unlawful.

The ground used for terrorism should not be any different. Where the aliens' activities are directed to inciting or producing imminent lawless action and their actions are likely to incite or produce such action, nothing should prevent the United States from deporting these aliens. Based on this, the definition, "engages in terrorist activity" should be further amended to read:

The term "engage in terrorist activity" means, in an individual capacity or as a member of an organization—

(IV) to solicit funds or other things of value for—

(aa) a terrorist activity; or,

(bb) a terrorist organization described in clause (vi)(I) or (vi)(II),\footnote{8 U.S.C. § 1182(a)(3)(B)(iv)(IV)(2002).} when one knows or reasonably should have known that his or her solicitation for funds or other things of value is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.
Additionally, the INS should bear the burden of proving that aliens knew or reasonably should have known that their activity could result in violence, instead of aliens proving that did not know and reasonably should not have known.\textsuperscript{145}

B. Utilizing the Ground of Deportation for Crimes Involving Moral Turpitude.

In addition to relying on the ground of deportation for terrorism to remove aliens, it may also be possible to remove aliens who have engaged in terrorist activity using the ground of deportation that makes aliens removable for the committing of crimes involving moral turpitude.\textsuperscript{146} It seems probable that aliens who engage in terrorist activity have conspired and solicited others to commit crimes. Therefore, if these aliens were prosecuted and convicted for these crimes by using the criminal laws the United States already has in place, like conspiracy\textsuperscript{147} and solicitation,\textsuperscript{148} the aliens could be deportable for committing crimes involving moral turpitude. One drawback to this approach, however, is that not every alien engaged in terrorist activity may have committed crimes. Using the ground of deportation for crimes involving moral turpitude only removes those that have committed crimes and been convicted for those crimes.

C. Revising the Immigration And Nationality Act to Allow Aliens to Challenge the Terrorism Ground on its Face and Allow Aliens Ordered Removed Under This Ground to Present New Evidence Should the Court Of Appeals, in its Discretion, Deems it Appropriate.

Despite the potential utility of the ground of deportation for crimes involving moral turpitude, it is still necessary to have a ground of deportation for terrorism because not all terrorists may commit crimes. As a result, some aliens engaged in terrorist activity may only be removable on a terrorist based ground of deportation. Even if the definition of “engages in terrorist activity” relied upon by the ground of deportation is thoroughly revised, these corrections may not fully resolve all conflicts with the First Amend-

\textsuperscript{145} See supra note 122 and accompanying text.
\textsuperscript{148} See id. § 373 (2002).
ment. For this reason, it is necessary that the federal courts play an active role in the removal process in order to provide an opportunity for judicial review to aliens so that the ground of deportation, as applied to them, does not violate their First Amendment rights.

At present, aliens’ ability to challenge final orders of removal is very limited.\textsuperscript{149} Per the Immigration and Nationality Act, an alien may challenge a final order of removal to the court of appeals, however, the court of appeals is restrained from hearing any new evidence beyond that contained in the record from the administrative proceeding.\textsuperscript{150} This prevents an alien from being able to challenge his or her final order on constitutional grounds because he or she cannot present evidence during the administrative hearing demonstrating why the ground of deportation is violative of the First Amendment. As discussed previously, both the INS and the BIA lack the authority to decide whether a ground of deportation complies with the Constitution.\textsuperscript{151} Therefore, evidence that would demonstrate that the ground, as applied, violates the First Amendment rights of the alien ordered removed is not likely to be presented. To correct this, the Immigration and Nationality Act should be revised to allow new evidence to be presented if the court, in its discretion, deems it necessary or pertinent in its review of the final order of removal of an alien by INS.

An additional option that should be considered is to allow the ground of deportation to be challenged on its face as overbroad.\textsuperscript{152} This would permit the court to review the revised ground of deportation, prior to aliens’ risking removal by engaging in speech and association, to determine if it would chill aliens’ First Amendment rights. If the court found it to be overbroad, there would be other opportunities to further revise this ground until it was in compliance with the First Amendment. A benefit of this approach is that once cases have held that the ground complies with the First Amendment, especially if those cases reached the Supreme Court, the danger of it being facially overbroad is minimized. Final adjudication on this matter would also allow deportation of such aliens to occur more rapidly because questions as to whether the ground

\begin{footnotes}
\item 149. See supra note 94 and accompanying text.
\item 150. Id.
\item 151. See supra note 91 and accompanying text.
\item 152. See supra note 100 and accompanying text. The current Immigration and Nationality Act has limitations that prevent aliens from challenging grounds of deportation as being overbroad. Id.
\end{footnotes}
VI. CONCLUSION

Although the events of September 11, 2001 and the continuing crisis in the Middle East have made "terrorism" the hot topic of today, the United States, as a nation must not lose sight of the values it is fighting for, especially the values the First Amendment is meant to protect, such as the freedom of speech and the freedom to associate. While aliens are present in the United States as either its guests or as permanent residents, the First Amendment protects their right to speak and to associate. As a result, the Immigration and Nationality Act, specifically the ground of deportation for terrorism contained within it, must be amended to recognize aliens' First Amendment rights and to cease violation of those rights.

The ground of deportation for terrorism can be amended and still accomplish its goal of removing those aliens who are a danger to society. This can be achieved by providing the ground of deportation with a separate and unique definition of "engages in terrorist activity" independent from the definition used within the grounds of inadmissibility. The definition of "engages in terrorist activity" should also omit those portions that relate to "two or more people" soliciting funds, members, etc. In addition, the definition should include an element requiring INS to prove that the aliens' conduct was directed to inciting or producing imminent lawless action and that the conduct was likely to incite or produce such action. By requiring this element, it is less likely that those engaging in mere speech and association would become deportable.

Finally, to be certain that changes made to the ground of deportation for terrorism correct the violations to aliens' First Amendment rights, the Supreme Court should play its usual role in reviewing governmental actions and determining if those actions violate the Constitution. This means that aliens should be able to challenge the ground of deportation on its face if it potentially chills their speech and association. It also means that if an alien is ordered removed, he or she should have an opportunity to seek judicial review of the agency's decision. During that review, the alien should be allowed to present new evidence when appropriate. If these changes are made, not only will the United States be
able to pursue its war on terrorism, it will stay true to itself and the ideals the First Amendment was meant to protect.