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Raquel Aldana
Pacific McGeorge School of Law

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THE SEPTEMBER 11 IMMIGRATION DETENTIONS AND UNCONSTITUTIONAL EXECUTIVE LEGISLATION

Raquel Aldana*

In response to the tragic September 11 attacks, the U. S. government waged "war" on terror internationally and domestically. One key component of the domestic "war" on terror has been the detention of thousands of civilians inside the United States. The target of these civilian detentions overwhelmingly has been foreign nationals from Arab and Middle Eastern countries, because of the profile of those who perpetrated the September 11 attacks.

Federal immigration agencies, with the cooperation of law enforcement, have employed immigration law as a principal tool to execute the civilian detentions. Immediately following the attacks, these agencies blurred the line between immigration and national security enforcement. These agencies, in fact, replaced standard immigration procedures with a law enforcement process intended to incapacitate those arrested for as long as possible while they are investigated and interrogated, with immigration enforcement merely as a secondary goal.[1]

Attorney General Ashcroft articulated this strategy in a speech weeks after the September 11 attacks:

> Let the terrorist among us be warned: If you overstay your visa–even by one day–we will arrest you. If you violate a local law, you will be put in jail and kept in custody as long as possible. We will use every available statute. We will seek every prosecutorial advantage. We will use all our weapons within the law and under the Constitution to protect life and enhance security for America.
>
> In the war on terror, this Department of Justice will arrest and detain any suspected terrorist who has violated the law. Our single objective is to prevent terrorist attacks by taking suspected terrorists off the streets. If

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* Associate Professor, William S. Boyd School of Law, University of Nevada Las Vegas. B.A. Arizona State University; J.D. Harvard University. I thank the support of the James E. Rogers Research Grant Foundation. Many thanks also to Victor Romero, Peter Alexander, and Cindy Buys for the opportunity to present this paper in the Immigration Matters symposium at the Southern Illinois University School of Law. This article benefitted greatly from the insightful comments from Victor Romero, Lynne Henderson, Carl Tobias, and Thomas McAffee, and from Kathleen Hamers' excellent research assistance. Finally, I thank Joe Wetzel, Adam Alstott and other members of the *SIU Law Journal* for their editorial assistance.

1. *See infra* Part I.

> suspects are found not to have links to terrorism or not to have violated the law, they are released. But terrorists who are in violation of the law will be convicted, and in some cases deported, and in all cases prevented from doing any harm to Americans.[2]

Despite Congress' rush to legislate expanded executive powers after September 11,[3] immigration and law enforcement agencies have not relied exclusively on the new legislation to execute the immigration detentions. Rather, the Attorney General, who prior to the Patriot Act had exclusive authority to enforce the immigration laws,[4] issued a number of immigration regulations to augment significantly the detention powers over foreign nationals post-September 11, some of which lack statutory authority and indeed conflict with existing statutory mandates.[5]

This paper focuses on whether the Attorney General, chose, citing the language in *INS v. Chadha*, a "constitutionally [im]permissible means of implementing [executive] power" when he promulgated the September 11 immigration regulations.[6] *Chadha* was significant because it imposed structural constitutional limits on Congress' plenary authority over immigration.[7] Specifically, *Chadha* held that matters that implicate political questions, like immigration or national security, are justiciable when the challenge is to whether one of the three branches has acted to exceed its constitutionally delegated authority.[8] Under *Chadha*, structural constitutional

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2. Attorney General John Ashcroft in a speech to the U.S. Conference of Mayors on October 25, 2001, quoted in Office of the Inspector General, *The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks* 1, 12 (June 2003) [hereinafter the OIG June 2003 Report].
3. Six weeks after the attack, Congress passed the U.S. Patriot Act. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism, Act of 2001, Pub. L. No. 105–56, 115 Stat. 272 (2001) [hereinafter The US Patriot Act].
4. After the Patriot Act, immigration enforcement is now shared between two agencies: The Department of Justice and the Homeland Security Office. *President Signs Homeland Security Measure*, 79 INTERPRETER RELEASES 1733 (2002). The Attorney General issued the regulations prior to the transition of powers to the Homeland Security Office in March 2003. David Martin, *Immigration Policy and the Homeland Security Act Reorganization: An Early Agenda for Practical Improvements*, 80 INTERPRETER RELEASES 601 (2003).
5. The Attorney General has also issued regulations pursuant to the Department of Justice's authority over the Bureau of Prisons that also affect the immigration detainees. These regulations, for example, purport to increase the time period that inmates may be treated as high-security persons or authorize the monitoring of mail or communications with attorneys. National Security; Prevention of Acts of Violence and Terrorism 66 Fed. Reg. 55062 (Oct. 31, 2001), amending 28 C.F.R. §§ 501.2 and 3, and 540.18, 19, 48 and 103. Since this paper focuses on the Attorney General's resort to his immigration powers, it will not discuss these provisions.
6. INS v. Chadha, 462 U.S. 919, 941 (1983).
7. *Id.* at 959. (sriking down then INA § 244(c)(2) because it violated the structural prohibition in the Constitution against the one-House veto).
8. *Id.* at 941.

challenges can offer an independent ground for challenging the September 11 immigration regulations, even when these could otherwise survive substantive constitutional challenges.

Similar structural constitutional challenges have been raised with respect to other executive acts post-September 11 undertaken in the name of national security. In December of 2003, the Second Circuit struck down the President's executive order to detain Jose Padilla, who allegedly was planning a dirty bomb attack on the United States, as an "enemy combatant," holding that it was an unconstitutional usurpation of Congress's power to legislate.[9] To date, however, structural challenges to the September 11 immigration regulations have not been raised, even though these regulations equally usurp Congress' power to legislate over immigration matters.[10]

The September 11 immigration regulations the Attorney General issued to facilitate the arrest and detention of foreign nationals fall within three broad categories. The first category is the "National Security Entry-Exit Registration System," commonly known as Special Registration regulations, under which certain nonimmigrant males over 16 years of age from 25 predominantly Arab and Middle Eastern countries have been required to be photographed, fingerprinted, and interviewed under oath.[11] The second includes the detention regulations, which permit the immigration agencies to prolong, potentially indefinitely, the detention of persons on alleged national security grounds from the moment of arrest until after the post-removal period.[12] The third category

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9. Padilla v. Rumsfeld, 352 F.3d 695 (2d Cir. (N.Y.))). *See also infra* notes 120–28 and accompanying text (discussing the Second Circuit's Padilla holding). On June 28 , 2004, the U.S. Supreme Court declared that the Southern District of New York, which initially heard Padilla's petition, lacked jurisdiction to hear the case because the warden of the facility where Padilla is being detained is the only proper respondent in the case. Rumsfeld v. Padilla, 124 S.Ct. 2711 (2004) In effect, this ruling voided the Second Circuit's holding, although it did not reverse the Second Circuit on the substance. The constitutionality of the President's executive order to detain Padilla based on separation of powers, therefore, is likely to be raised again in the district court having jurisdiction over his case.
10. *See infra* Part II.A.2.
11. The 25 countries have been identified in four groups, each having a different deadline. On November 6, 2002, the former Immigration and Naturalization Service (INS) ordered all males who are nationals of Iran, Iraq, Libya, Sudan and Syria, born on or before November 15, 1986, and who were inspected and last admitted to the United States on or before September 10, 2001 and who plan to remain in the United States at least until December 16, 2002 to register before an immigration officer by December 16, 2002. Registration of Certain Nonimmigrants from Designated Countries, 67 FED. REG. 67,766 (Nov. 6, 2002). Since then, the former INS (now USCIS) issued three very similar orders with respect to several other nationalities. Registration of Certain Nonimmigrants from Designated Countries, 67 FED. REG. 70,525 (Nov. 22, 2002) (requiring the registration of nationals from Afghanistan, Algeria, Bahrain, Erithrea, Lebanon, Morocco, North Korea, Oman, Qatar, Somalia, Tunisia, United Arab Erirates and Yemen); Registration of Certain Nonimmigrants from Designated Countries, 67 FED. REG. 77,642 (Dec. 18, 2002) (requiring the registration of nationals from Pakistan and Saudi Arabia); and AG Order 2643–2000 (Jan. 16, 2003) (requiring the registration of nationals from Bangladesh, Egypt, Indonesia, Jordan, and Kuwait).
12. On September 20, 2001, the former INS amended 8 C.F.R. § 287.3, which expanded the period from

includes those regulations intended to keep all information about the September 11 immigration detainees and their respective proceedings secret.[13]

The Attorney General has offered three independent sources of power for issuing the regulations. First, the Attorney General has argued that specific provisions of the Immigration and Nationality Act (INA) delegate to him the authority to issue the Special Registration and the detention regulations.[14] Second, with respect to the national security secrets regulations, the Attorney

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an absolute 24 hours to "within 48 hours of arrest, except in the event of emergency or other extraordinary circumstances" within which the agency must decide whether to retain in custody or release on bond or whether to issue a notice to appear or warrant of arrest to the foreign national. Custody Procedures, 66 Fed. Reg. 48334 (Sept. 20, 2001). On October 31, 2001, Executive Office for Immigration Review (EOIR) expanded the automatic stay of an immigration judge's decision to order a foreign national released in any case in which immigration agencies post a bond of $10,000 or more, until the BIA or the Attorney General reviews the order. Executive Office for Immigration Review; Review of Custody Determination, 66 Fed. Reg. 54909 (Oct. 31, 2001). Finally on November 14, 2001, the former INS issued regulations attempting to conform its handling of post-removal period detentions to the U.S. Supreme Court decision in Zadvydas v. Davis, 533 U.S. 678 (2001). Continued Detention of Aliens Subject to Final Orders of Removal, 66 Fed. Reg. 56967 (Nov. 14, 2001).

13. On September 21, 2001, the Attorney General issued a Directive through Chief Judge Immigration Michael Creppy, which mandated all immigration judges to close to the public and to keep all information secret in all proceedings for "special interest" cases upon notification. Memo from Chief Immigration Judge Michael J. Creppy, *available at* http://news.findlaw.com/hdocs/docs/asclu/creppy92101.memo.pdf. On May 28, 2002, the EOIR authorized immigration judges to issue protective orders and seal records relating to law enforcement or national security information. Protective Orders in Immigration Administrative Proceedings, 67 Fed. Reg. 36799 (May 28, 2002). Finally, on January 29, 2003, the former INS issued a final rule proscribing the release of any information relating to an immigration detainee by any state or local government entity or any privately operated detention facility, except if such information is provided by the immigration agencies. Release of Information Regarding Immigration and Naturalization Service Detainees in Non-Federal Facilities, 68 Fed. Reg. 4364 (Jan. 29, 2003).

14. The Attorney General cited INA §§ 263(a) and 265(b) for the Special Registration program, which authorize the registration and monitoring of non-immigrants. Registration of Certain Nonimmigrant Aliens from Designated Countries, 67 Fed. Reg. 77642 (Dec. 18, 2002). For the stay of immigration judge's removal or release orders, the Attorney General cited INA § 236, which authorizes, and at times mandates, the Attorney General to hold a foreign national in custody while removal proceedings are pending. Executive Office for Immigration Review; Review of Custody Determinations, 66 Fed. Reg. 54909 (Oct. 31, 2001). For the post-removal detention provision, the Attorney General cited INA § 241(a), as interpreted by the U.S. Supreme court in Zadvydas v. Davis, 533 U.S. 678 (2001), which authorizes the Attorney General to detain foreign nationals who are subject to finals orders of removal. For the provision on the disposition of cases for foreign nationals arrested without a warrant, the Attorney General did not specify the source of its authority, except to say that a 24 hour determination, as required previously by regulation, is not mandated by constitutional principles. Custody Procedures, 66 Fed. Reg. 48334 (Sept. 20, 2001). It is likely, however, that the Attorney General would cite INA § 287(a)(2) as its source of authority. INA § 287(a)(2), 8 U.S.C. § 1357(a)(2) (1997) authorizes the arrest of any foreign national who is entering or attempting to enter the United States in violation of immigration laws, but also prescribes that the arrestee "shall be taken without unnecessary delay for examination before an officer of the Service having authority to examine aliens as to their right to enter or remain in the United States."

General has claimed two types of powers. First, the Attorney General has cited his broad delegated authority under the INA to manage and to effectuate the administrative functions related to immigration.[15] Second, the Attorney

All regulations, except the Special Registration regulations,[16] promulgated by the Attorney General to augment the federal agencies' detention powers post September 11 usurp, in different ways, Congress' power to legislate. The clearest example of this violation has been when the attorney general purports to act pursuant to his inherent powers over foreign affairs, either as an exercise of immigration or national security (i.e., wartime) powers. While it is true that the executive enjoys certain inherent executive powers to act in "foreign affairs," the scope of these powers diminishes significantly the more executive

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15. Protective Orders in Immigration Administrative Proceedings, 67 Fed. Reg. 36799 (May 28, 2002) and Release of Information Regarding Immigration and Naturalization Service Detainees in Non-Federal Facilities, 68 Fed. Reg. 4364 (Jan. 29, 2003). These regulations cite INA § 103(a), which reads: "The Attorney General shall be charged with the administration and enforcement of this chapter and all other laws relating to the immigration and naturalization of aliens." The US Patriot Act amended this provision to read: "The Secretary of Homeland Security shall be charged with the administration and enforcement of this chapter and all other laws relating to the immigration and naturalization of aliens, except insofar as this chapter or such laws relate to the powers, functions, and duties conferred upon the President, Attorney General, the Secretary of State, the officers of the Department of State, or diplomatic or consular officers: Provided, however, That determination and ruling by the Attorney General with respect to all questions of law shall be controlling." INA § 103(a), 8 U.S.C. § 1103(a) (Supp. 2004).

16. With respect to the special registration program, the Attorney General's reliance on statutory authority is quite strong based on the language of the INA provisions. INA § 263(a), 8 U.S.C. 1303(a) (1997) provides that the Attorney General may prescribe special regulations and forms for the registration and fingerprinting of "aliens of any other class not lawfully admitted to the United States for permanent residence." INA § 265(b), 8 U.S.C. 1305(b) (1997) provides that the Attorney General may in his discretion, upon ten days notice, require foreign nationals to supply any change of address or any additional information the Attorney General may require. Some scholars have challenged that Congress has authorized the Special Registration regulations on the ground that the Attorney General has discriminated against Arabs, Muslims, and Middle Easterners in their implementation. *See, e.g.,* Louise Cainkar, *Special Registration: A Fervor for Muslims,* 7 J. OF ISLAMIC L. AND CULTURE 73, 75–78 (2002). While INA § 263(a)'s language "aliens of any other class not lawfully admitted to the United States" could be interpreted to mean classes of non-immigrants as defined under INA §101(a)(15), 8 U.S.C. § 1101 (a)(15) (1997), and not distinctions based on national origin, the statute is sufficiently ambiguous that *Chevron* deference likely permits the Attorney General to issue the regulation. *See infra* Part II.B (discussing the *Chevron* doctrine) Moreover, that a discriminatory implementation of the provision gives rise to an equal protection concern, unfortunately, may not be sufficient to trump *Chevron* deference based on the constitutional avoidance doctrine. *See infra* Part II.B.2 (discussing the constitutional avoidance doctrine and *Chevron* deference). The U.S. Supreme Court has not recognized selective immigration enforcement as unconstitutional. Reno v. American-Arab Anti-Discrimination Committee, 525 U.S. 471, 488 (1999) (declaring that "an alien unlawfully in this country has no constitutional right to assert selective enforcement as a defense against his deportation" and that "[o]ur holding generally deprives deportable aliens of the defense of selective prosecution.") *See also* David A. Martin, *On Counterintuitive Consequences and Choosing the Right Control Group: A Defense of Reno v. AADC,* 14 GEO. IMMIGR. L. J. 363 (2000) (interpreting AADC as a bar to selective prosecution defenses). *But see* Gerald L. Neuman, *Terrorism, Selective Deportation and the First Amendment after Reno v. AADC,* 14 GEO.IMMIGR. L. J. 313 (2000) (arguing for a narrower interpretation of *AADC*).

actions implicate domestic affairs.[17] The sole area of immigration law over which courts have recognized inherent executive powers pertains to the exclusion of foreign nationals.[18] In contrast, courts have not recognized similar inherent executive powers to legislate over immigrants present in the United States, and, in fact, have imposed greater constitutional restrictions on the power of both Congress and the executive to regulate foreign nationals who reside or are present in the United States.[19] Similarly, courts have imposed greater constitutional restrictions on wartime measures with greater domestic implications.[20] The September 11 detentions, having been carried out in the United States against persons residing in the United States, have had significant domestic affairs implications, whether the Attorney General characterizes them as necessary wartime measures or as immigration enforcement. As such, the Attorney General cannot resort to inherent executive powers to issue the regulations.

Furthermore, the Attorney General's claims to statutory authority are suspect in three respects. For the first two reasons, the *Chevron*[21] deference generally accorded to administrative agency interpretation of statutes does not apply either because the statute is clear or because "nondelegation canons" of statutory construction (Prof. Cass Sunstein's term[22]) trump *Chevron* deference. First, a number of the regulations adopted by the Attorney General are precluded by statutory provisions that regulate the detention and removal of "terrorists" as defined by the INA.[23] The Attorney General, therefore, lacks the power to issue regulations that circumvent Congress' specific intent under the INA. Second, the Attorney General's interpretation of the INA detention provisions violates the canon of statutory construction of constitutional avoidance, as these provisions could implicate the indefinite, unreviewable detention of some foreign nationals.[24] Finally, several of the regulations purportedly adopted under specific provisions of the INA are not supported by the language or a reasonable interpretation of the cited provisions.[25] These regulations, therefore, exceed the reasonable agency interpretation allowed for ambiguous statutes, even considering *Chevron* deference to administrative

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17. *See infra* Part II.A.
18. *See infra* Part II.A.1.
19. *Id.*
20. *See infra* Part II.A.2.
21. Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).
22. Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315 (2000).
23. *See infra* Part II.B.1.
24. *See infra* Part II.B.2.
25. *See infra* Part II.B.3.

agencies. As such, the Attorney General's claims to be acting within his delegated statutory authority still amount to unconstitutional legislation.

Part I of this article describes briefly how the September 11 immigrant detentions have been employed principally as a law enforcement tool, with immigration enforcement only as a secondary goal. Part II examines the constitutionality of the immigration regulations augmenting the September 11 detention powers under a separation of powers analysis.

I. THE IMMIGRATION DETENTIONS

Days after September 11, federal immigration and law enforcement agencies pursued a number of immigration strategies for investigating, arresting, and detaining foreign nationals in the United States. First, the Federal Bureau of Investigation (FBI) conducted "voluntary" interviews of thousands of foreign nationals selected based on characteristics similar to those of the hijackers, including type of visa, gender, age, date of entry into the United States, and country that issued the passport, to elicit information that could reasonably assist the anti-terrorism investigation and to detain those who were in violation of their immigration status.[26] Second, the Special Registration regulations[27] facilitated the monitoring and detention of thousands of young, mostly Arab, Middle Eastern and Muslim males.[28] Finally, immigration agencies stepped up their Absconder Apprehension Initiative in an effort to capture immigrants already ordered deported, and in particular those from Arab and Middle Eastern countries.[29]

Although the exact number of immigration detentions tied to the "war on terror" is unknown, this number has reached the thousands.[30] Moreover, the media, reports, litigation, and reports by the Department of Justice Office of the Inspector General (OIG), have revealed a great deal about the fate of many of these immigration detainees, despite efforts by executive agencies to maintain secrecy.[31]

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26. United States General Accounting Office, Homeland Security: Justice Department's Project to Interview Aliens After September 11, 2001 (April 2003), *available at* www.gao.gov/highlights/d03459high.pdf.
27. *See supra* note 11 and accompanying text.
28. *See supra* note 10 and accompanying text.
29. Internal Memorandum from Larry Thompson, Deputy Attorney General, Guidance for Absconder Apprehension Initiative (Jan. 25, 2002), (on file with author).
30. Raquel Aldana, *Derogation is Not the Norm!: Regulating the September 11 Detentions,* Manuscript, at 22–23.
31. *Id.*at 23.

Immediately after their arrest, immigration detainees have been taken to an immigration processing center where the FBI has assessed whether each detainee is "of high interest," "of interest," or "of interest undetermined" to the terrorism investigation.[32] The OIG found that this assessment has not been applied consistently, and that the FBI has categorized detainees as "of interest" even when little or no concrete information has tied them to the September 11 attacks on terrorism.[33] Yet, being classified as "of high interest" or "of interest" has had significant consequences for the detainees' prolonged detention, as these detainees had no ability to obtain bond or be removed from the United States until cleared by the FBI.[34] In fact, even the former INS began to express concern over the legality of this practice because the delay, whether within the 90-day removal period or not,[35] was for reasons unrelated to the removal, but rather for the purpose of concluding the criminal investigation.[36]

Further, the FBI classification of the immigration detainees also had significant ramifications for the detainees' place, condition of detention, and treatment. Those classified as "high interest" have been housed in high-security federal prisons across the country, while those classified as "of interest" or "of undetermined interest" have been detained in lower security facilities.[37] Generally, those detained in high-security federal prisons have experienced the harshest treatment, although human rights groups have also reported abuses in lower security facilities.[38] In high-security confinement, the detainees endured restrictive detention conditions, including incommunicado detention for at least several days, "lockdowns" for 23 hours, constantly illuminated cells, extensive escort procedures, video monitoring, and tight limits on the frequency and duration of telephone calls.[39] All these factors contributed to the detainees' inability to obtain and communicate freely with legal counsel, as well as to substantially limit their contact with family and

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32. The OIG June 2003 Report, *supra* note 2, at 18.
33. *Id.*
34. The OIG found that the average length of time from arrest of a September 11 detainee to clearance by FBI Headquarters was 80 days, and the median was 69 days. *Id.* at 42–52.
35. INA § 241 (a), 8 U.S.C. § 1231 (1997) prescribes a 90-day "removal period," which begins to toll after the foreign national is ordered removed.
36. OIG June 2003 Report, *supra* note 2, at 92–99.
37. *Id.* at 101–111. *See also* Aldana, *Derogation is Not the Norm!, supra* note 31, at 27–32 for a more detailed discussion of the detention conditions of September 11 immigration detainees.
38. *Amnesty International's Concerns Regarding Post September 11 Detention in the USA*, AI Index: AMR 5/1044/2002 (March 2002).
39. Aldana, *Derogation is Not the Norm!, supra* note 31 at 27–32 for a more detailed discussion of the detention conditions of September 11 immigration detainees.

consular officers.[40] In addition, the high-security detainees have been subject to a pattern of physical and verbal abuse,[41] as well as to interrogations by both immigration and law enforcement agents without the presence of counsel.[42]

Finally, the majority of September 11 immigration detainees have been deported in secret pursuant to the Creppy Directive, which ordered that all immigration judges not disclose any information to the public about "special interest" cases and to restrict public access to removal hearings.[43] The Creppy Directive does not explain what standard determines which is a "special interest" case, although it has been applied across the broad spectrum of persons classified of "high interest," "of interest," or "of interest undetermined" since September 11.[44]

II.

The constitutionality of some of these post-September 11 immigration practices have been challenged on substantive grounds with mixed or undetermined results.[45] The decisions in these challenges, to date, have focused on the public's right to know information about the detainees under the First Amendment.[46] In addition, civil rights groups have unsuccessfully pursued a Freedom of Information Act (FOIA) challenge, which rests in great part on the question of whether the executive acted within the scope of congressional authority.[47] Yet to be raised, however, are challenges to the immigration regulations based on executive usurpation of Congress' powers to legislate over immigration or national security matters in the domestic

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40. *Id.*
41. *Id.* at 30–31.
42. Turkmen v. Ashcroft, Class Action Complaint and Demand for Jury Trial, Civ. No. 02—( ) (E.D.N.Y. Apr. 17, 2002) (challenging the September 11 immigration detention practices) [hereinafter Turkmen, Class Action Complaint and Demand for Jury Trial], *available at* http://news.findlaw.com/hdocs/docs/terrorism/turkmenash41702cmp.pdf.
43. Creppy Directive, *supra* note 13.
44. *See* Detroit Free Press v. Ashcroft, 303 F. 3d 681, 692 (6th Cir. 2002) (observing that the Creppy Directive "does not apply to a 'small segment of a particularly dangerous' information but a broad indiscriminate range of information and noting that the executive even conceded that certain non-U.S. citizens known to have no links to terrorism would be designated "special interest," supposedly to foreclose the terrorists' ability to draw inferences about the investigation on the basis of which hearings are open or closed).
45. Raquel Aldana-Pindell, *The 9/11 "National Security" Cases: Three Principles Guiding Judge's Decision-Making*, 81 OR. L. REV. 985, 1013–25 (discussing post September 11 litigation challenging immigration detention practices).
46. *Id.*
47. *Id.*

sphere. These challenges if raised, should be successful either because (1) the Attorney General lacks any inherent executive powers to issue the regulations or (2) because he has exceeded his congressionally delegated authority.

A. Are the Attorney General's Regulations Constitutional Pursuant to Inherent Executive Power in the area of Foreign Affairs or National Security Powers?

The Attorney General has justified some of the regulations augmenting his powers in the September 11 immigration detentions on the basis that these are an exercise of inherent executive powers in foreign affairs over immigration or national security (i.e. war powers).[48] However, the September 11 immigration detentions have significant domestic affairs implications, a factor that undermines the Attorney General's reliance on inherent executive powers.

Generally, the U.S. Constitution vests Congress with the exclusive power to legislate,[49] and the executive with the power to execute the federal laws.[50] The executive, however, also enjoys certain inherent powers to act in matters of foreign affairs, a power that does not require as a basis for its exercise on an act of Congress.[51] The executive also enjoys some inherent powers to act in order to defend the nation against imminent threats to its national security.[52] In the past, judicial deference has broadly insulated the executive (and its

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48. The term national security was not officially coined until the cold war when Congress enacted the National Security Act of 1947. HAROLD HONGJU KOH, THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR 262 n. 23 (1990). The only quasi-official definition of the term was prepared for a dictionary used by the Joint Chiefs of Staff, which read "a military or defense advantage over any foreign nation or group of nations, or...a favorable foreign relations position, or...a defense posture capable of successfully resisting hostile or destructive action from within or without, overt or covert." *Id.* Thus, national security may refer to executive acts inside the United States, so long as these are related to war powers.

49. U.S. Const. Art. I, § 1 ("All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.") Commentators debate the meaning of legislative powers under this clause. Some commentators have argued, for example, that because "legislative powers" refers only to Congress' right to vote on bills or other *de jure* legislative powers, Congress is able to delegate broadly to third-parties. Eric A. Posner and Adrien Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI L. REV. 1721 (2003). However, the majority view is to interpret legislative powers broadly to include when Congress delegates too much discretion on administrative agencies to create or interpret law. *See* Larry Alexander and Saikrishna Prakash, *Reports of the Nondelegation Doctrine's Death Are Greatly Exaggerated*, 70 U. OF CHICAGO L. REV. 1297 (2003). This article adopts the broader interpretation of legislative powers.

50. U.S. Const. Art. II, § 1 ("The executive Power shall be vested in a President of the United States of America."). For a discussion of the meaning of executive Power, see Saikrishna Prakash, *The Essential Meaning of Executive Power*, 2003 U. ILL. L. REV. 701 (2003).

51. *See, e.g.*, United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319–20 (1936).

52. DANIEL FARBER, LINCOLN'S CONSTITUTION (2003).

agencies) from accountability in these matters, at least when Congress has remained silent, but also when deferring to the executive's expansive interpretation of statutes.[53] In fact, although many scholars challenge the constitutional propriety of such decisions,[54] in at least some cases, the U.S. Supreme Court has strongly suggested that the executive enjoys plenary powers to act unilaterally in matters uniquely concerning foreign affairs and national security,[55] even as many scholars have challenged the constitutional propriety of such decisions.[56]

When the executive has claimed inherent powers to act without congressional approval, the scope of judicial deference granted to the executive, however, has depended in great part on the extent to which courts have considered the executive's actions to implicate greater concerns with national security or foreign affairs than domestic affairs. This foreign affairs/national security and domestic affairs dichotomy, which the U.S. Supreme Court adopted in *United States v. Curtiss-Wright Exp. Corp*,[57] and implicitly affirmed in *Youngstown Sheet & Tube Co. v. Sawyer*,[58] dictates that the executive's inherent powers are correspondingly greater to the extent that the executive's actions affect foreign affairs/national security (*Curtiss-Wright*), and are correspondingly less to the extent that its actions affect domestic affairs (*Youngstown*). Thus, when deciding cases in which the executive agencies claim inherent national security powers, courts must first attempt the

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53. *See, e.g.*, KOH, *supra* note 49; Harold Edgar & Benno C. Schmidt, Jr., *Curtiss-Wright Comes Home: Executive Power and National Security Secrecy*, 21 HARV. C.R.-C.L. L. REV. 349 (1986); James R. Ferguson, *Government Secrecy After the Cold War: The Role of Congress*, 34 B.C. L. REV. 451 (1993); Matthew N. Kaplan, *Who will Guard the Guardians? Independent Counsel, State Secrets, and Judicial Review,* 18 NOVA L. REV. 1787 (1994); Henry P. Monaghan, *The Protective Power of the Presidency,* 93 COLUM. L. REV. 1 (1992).

54. Many scholars have argued that the founders intended national security to be a shared power among the three braches of government, subject to the system of institutional checks and balances. *See, e.g.*, KOH, *supra* note 49, at 69; FARBER, *supra* note 53, at 190–92.

55. *See, e.g.,* Envtl. Prot. Agency v. Mink, 410 U.S. 73, 83 (1973); Chicago & S Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103 (1948); and Curtiss-Wright, 299 U.S. at 320.

56. Many scholars have argued that the founders intended national security to be a shared power among the three braches of government, subject to the system of institutional checks and balances. *See, e.g.*, KOH, *supra* note 49, at 69; FARBER, *supra* note 53, at 190–92.

57. U.S. v. Curtiss-Wright Exp. Corp., 299 U.S. at 315 ("That there are differences between [external and internal affairs], and that these differences are fundamental, may not be doubted.").

58. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952). *See also* Roy E. Brownell II, *The Coexistence of United States v. Curtiss-Wright and Youngstown Sheet & Tube v. Sawyer in National Security Jurisprudence*, 16 J.L. & POL. 1, 49–53 (2000) (discussing the several times Justice Jackson referred in his *Youngstown* concurrence to the difference between national security and domestic powers).

difficult determination of whether the acts have a greater effect on national security or foreign affairs than they do domestic affairs.

Because the September 11 immigration detentions appear to have a mixed purpose, both as a law enforcement tool in the war on terror and as immigration enforcement, the inquiry as to the Attorney General's powers to promulgate the immigration regulations must be examined in terms of both the executive's inherent powers over both immigration and national security. As the following sub-sections conclude, the September 11 detentions implicate domestic affairs because they affect foreign nationals who reside in and who have substantial ties to the United States and because they are insufficiently related to the "war on terror." As such, any inherent executive powers whether over immigration or war powers occur in the domestic sphere or, in the alternative, are insufficiently related to national security that they must be reviewed under the *Youngstown* template.

Under the *Youngstown* template, when the President acts pursuant to an express or implied authorization from Congress, "his authority is at its maximum, for it includes the power he possesses in his own right plus all that Congress can delegate."[59] Second, when the President acts in the absence of either a congressional grant or denial of authority, "he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain."[60] Finally, the third category includes those situations where the President takes measures incompatible with the express or implied will of Congress. In such cases, "his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter."[61]

The following subsection of the paper is concerned with the second and third prongs of the *Youngstown* template and asks whether the Attorney General can act pursuant to inherent executive powers in the absence of either congressional grant or denial of authority or even when Congress has spoken on this issue. In summary, the conclusion must be no as to immigration law because the executive only has inherent executive powers to legislate with regard to the exclusion from the United States of foreign nationals, not to legislate as to those foreign nationals already present in the United States. Similarly, the conclusion must be no as to national security for two reasons. First, the executive lacks the power to "legislate" certain "war powers reserved for Congress" in the domestic sphere. Second, the immigration detentions do

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59. *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring).
60. *Id.* at 637.
61. *Id.* at 637–38.

not qualify as an exercise of war powers, but should be treated, instead, as law enforcement.

1. The Limits of Executive Inherent Immigration Powers

The September 11 immigration regulations fall beyond the scope of the executive's inherent immigration powers, which the Court has recognized only as to exclusion, even though the Constitution is silent as to the source of immigration powers. Except for the Naturalization Clause,[62] the U.S. Constitution does not expressly authorize Congress to regulate immigration which, in addition to their naturalization, includes the admission and removal of foreign nationals from the United States. However, since the Chinese Exclusion Case,[63] decided in 1889, the U.S. Supreme Court has declared immigration to be a federal power, and has specifically vested this power in the political branches.

Two questions that arise, however, are what is the source of this federal power, and, moreover, how this power is shared between the political branches. As to the source of federal immigration power, some commentators have proposed the Commerce Clause,[64] the Migration or Importation Clause,[65] or the War Clause[66] as potential sources of immigration powers. Moreover, immigration could be brought within the Naturalization Clause, with a little help from the "necessary and proper" Clause.[67] None of these theories, however, has gained prominence in the U.S. Supreme Court's jurisprudence.[68] Rather, the Court has characterized immigration control as a power inherent in sovereignty and rooted in the necessity of the United States as a nation to regulate its foreign affairs with other nations.[69]

The characterization of immigration as an exercise of foreign affairs powers, of course, implicates how this power is shared between the political branches. Specifically, the relevant question is whether the executive possesses any inherent "foreign affairs" powers that are independent from Congress to control immigration. In the area of immigration law, the answer

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62. U.S. CONST. art. I, § 8, cl. 4 authorizes Congress "[t]o establish an uniform Rule of Naturalization."
63. Chae Chan Ping v. U.S., 130 U.S. 581 (1889).
64. U.S. CONST. art. I, § 8,cl. 3.
65. U.S. CONST. art. I, § 9, cl. 1.
66. U.S. CONST. art. I, § 8, cl. 11.
67. U.S. CONST. art. I, § 8, cl. 18.
68. *See* STEPHEN H. LEGOMSKY, IMMIGRATION AND REFUGEE LAW AND POLICY, 10–13 (3d ed. 2002). *See also* Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1, 81–162 (2002).
69. Cleveland, *supra* note 69, at 123–149.

to this question has depended on whether the executive is exercising control over foreign nationals who are considered to be outside (excludable) or inside U.S. territory (deportable).[70]

In the area of exclusion, the U.S. Supreme Court has described the exclusion of aliens as "a fundamental act of sovereignty," stating that "the right [to exclude] stems not alone from legislative power, but is inherent in the executive power to control the foreign affairs of the nation."[71] Thus, the U.S. Supreme Court, at least in *dicta*, has recognized that the executive, acting through the Attorney General, could issue regulations affecting the exclusion of foreign nationals without express congressional delegation.

In *Knauff v. Shaugnessy*, the Attorney General approved the recommendation of Assistant Commissioner of Immigration and Naturalization that Knauff, a German national who married a naturalized U.S. citizen, be permanently excluded from the United States without a hearing on the ground that her admission would be prejudicial to the interests of the United States.[72] The Attorney General claimed authority to act primarily under the War Brides Act of 1941, which authorized the President, upon a finding that the interests of the United States requires it, to impose additional restrictions and prohibitions on the entry into and departure of persons from the United States.[73] Knauff argued that the 1941 Act and the regulations thereunder were void to the extent that they contained unconstitutional delegations of legislative power. The U.S. Supreme Court clearly held that there was no question of inappropriate delegation of legislative power involved because "the exclusion of aliens is a fundamental act of sovereignty."[74] Moreover, the Court went on to state, in *dicta*, that the right to exclude "stems not alone from legislative power but is inherent in the executive power to control the foreign affairs of the nation."[75]

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70. Since 1996, the INA has distinguished between excludable and deportable foreign nationals on the basis of their "admission" or lawful entry into the United States, except those who have been paroled or admitted temporarily for humanitarian reasons. INA § 101(a)(13)(A) and (B), 8 U.S.C § 1101 (1997). The U.S. Supreme Court, however, has to date continued to draw the distinction on the basis of the foreign national's physical presence inside U.S. territory, with the exception of persons physically present after being paroled. *See, e.g.*, Zadvydas v. Davis, 533 U.S. 678 (2002).
71. Knauff v. Shaughnessy, 338 U.S. 537, 542 (1950).
72. *Id.* at 539–40.
73. *Id.* at 540 (citing War Brides Act of June 21, 1941, 55 Stat. 252, 22 U.S.C. § 223 *repealed* 1951). Pursuant to the War Brides Act, on November 14, 1941, Congress and the President also issued Proclamation 2553, which provided that "no alien should be permitted to enter the united States if it were found that such entry would be prejudicial to the interest of the United States." *Id.* at 541 (citing Proclamation No. 2553, *and in* 55 Stat. 1696 (Jan. 3, 1941), 3 CFR, 1943 Cum.Supp., 270–72).
74. *Id.*
75. *Id.*

A few federal courts have cited *Knauff* for the proposition that the exclusion of foreign nationals is a fundamental element of sovereignty, and hence, part of executive control over foreign affairs.[76] However, courts have not recognized a similar inherent executive power to act in the absence of congressional delegation when the regulation affects foreign nationals who already have ties to the United States. For immigration purposes, foreign nationals can establish those ties merely by being "present" in the United States, although those ties ("stakes") increase when that presence has been long term.[77] Thus, for example, the U.S. Supreme Court has limited the plenary power of Congress, and the executive, over immigration law through the application of the Due Process Clause of the U.S. Constitution to immigration procedures.[78] The U.S. Supreme Court has also limited immigration's plenary power by interpreting INA provisions to avoid substantive due process violations.[79]

More importantly, since *Chadha*, the U.S. Supreme Court established that challenges to the constitutional authority of one of the three branches of government–i.e., structural constitutional challenges –cannot be evaded by the courts because the issues have political implications.[80] In this case, the Attorney General's issuance of immigration regulations without congressional approval usurps Congress' Article I powers. While it is true that, but for the Naturalization Clause, Article I does not enumerate the source of federal immigration powers, the Court has never conferred on the executive, except in the area of exclusion, any inherent power to legislate over immigration matters affecting foreign nationals inside the United States. Rather, in every case implicating foreign nationals inside the United States (i.e. "foreign affairs" with domestic implications), the Court has always referred to Congress' plenary power, not the executive's, to legislate to control immigration. In this regard, as Part II.A., *infra*, elaborates, Congress has not delegated to the Attorney General the power to issue the regulations under specific provisions of the INA or of any law enacted post-September 11 related

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76. *See, e.g.,* Jean v. Nelson, 727 F.2d 957 (11th Cir. 1984) (holding that "excludable aliens" have no constitutional rights with respect to their applications for admission, asylum, or parole); and Haitian Refugee Center, Inc., v. Gracey, 600 F. Supp. 1396, 1400 (D.D.C.1985) (upholding Haitian interdiction program based on executive powers to control foreign affairs).; Savelis v. Vlachos, 137 F. Supp. 389, 394 (E.D. Va.1955) (upholding the constitutionality of immigration official's discretion to refuse to change status of arriving "alien seamen").

77. *See, e.g.,* Hiroshi Motomura, *Immigration Law after a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L. J. 545 (1990).

78. *See, e.g.,* Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogate for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625 (1992).

79. Zadvydas v. Davis, 533 U.S. 678, 689 (2002).

80. INS v. Chadha, 462 U.S. 919, 943(1983).

to immigration, including the U.S. Patriot Act.[81] In the area of immigration law, the U.S. Supreme Court has described the exclusion of aliens as "a fundamental act of sovereignty," stating that "the right [to exclude] stems not alone from legislative power but is inherent in the executive power to control the foreign affairs of the nation."[82] Thus, the U.S. Supreme Court, at least in *dicta*, has recognized that the executive, acting through the Attorney General, could issue regulations affecting the exclusion of foreign nationals without express congressional delegation.

The September 11 immigration detainees are all persons who have been arrested inside the United States. Many of them entered the United States legally and have been long-term residents. For example, in a class action complaint filed by the American-Arab Anti-Discrimination Committee (AADC) et al. to challenge the special registration program, the AADC named as plaintiffs persons with pending or approved applications for lawful permanent resident status.[83] Plaintiff John Doe 4, for example, is an Iranian citizen who was granted political asylum in Sweden.[84] He entered the United States in 1995 as a Swedish citizen on the Visa Waiver Program and has remained in the United States since.[85] He is married and has a child born in the United States in 1999. His wife has an approved visa petition, and as a derivative beneficiary of that petition, plaintiff John Doe 4 has pending a petition to adjust his status to that of a lawful permanent resident since 1999.[86] The former INS arrested John Doe 4 on December 16, 2001without a warrant and without a determination being made that he was likely to flee or that he was a threat to the community or to national security, when he appeared for Special Registration.[87] Thus, the Attorney General cannot resort to claims of inherent executive powers to justify the regulations that permit him to alter the scope of his detention powers over foreign nationals as he lacks the power to legislate over immigration matters that fall beyond the scope of exclusion.

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81. U.S. Patriot Act, *supra* note 3.
82. Knauff v. Shaughnessy, 338 U.S. 537, 542 (1950).
83. American-Arab Anti-Discrimination Committee v. Ashcroft, Class Action Complaint for Injunctive and Declaratory Relief, Civil Case No. *available at* http://news.findlaw.com/cnn/docs/aadc/aadcash122402cmp.pdf.
84. *Id.* at ¶ 18.
85. *Id.*
86. *Id.*
87. *Id.*

2. The Limits of Executive Inherent National Security Powers

The Attorney General also cannot resort to the President's power as Commander-in-Chief–i.e., inherent war or national security powers–to issue the regulations augmenting the federal agencies' immigration detention powers for two reasons. First, the executive presents a rather weak claim that the September 11 immigration detentions are sufficiently related to the "war on terror." Second, even if some of the September 11 detentions are sufficiently related to national security, these implicate war powers in the domestic sphere, which are still subject to the analysis required by *Youngstown*. In this regard, because the Attorney General's issuance of the September 11 regulations without congressional authorization, and sometimes even contrary to congressional mandate,[88] usurps the "lawmaking" function entrusted by the Constitution to Congress, it violates separation of powers and is impermissible under *Youngstown*.

The national security/domestic affairs distinction, when applied to the new so-called "war on terror," can easily become muddled, given the complex combination of concrete and elusive factual and legal factors that have characterized it. Most, if not all, national security cases will interfere to some degree in domestic affairs. This was certainly the case in *Youngstown*, which involved President Truman's attempt, based solely on an executive order, to seize privately-owned steel mills in the United States in order to avert an industry-wide strike that the executive alleged would adversely affect the United State's position in the Korean War.[89] Therefore, the courts, as in *Youngstown*, will need to assess to what extent the September 11 detentions are less about national security and more about domestic affairs to determine the appropriate amount of deference it should give to the Attorney General. This assessment is not easy, as the distinction between national security and domestic affairs is often difficult.[90] The post-September 11 "war on terror" is no exception.

On the one hand, many of the characteristics of the September 11 events, and of the government's response to those events, are those of a country defending itself from a grave external threat to national security. The horrible events of September 11 offer tangible and compelling evidence that the United States was the target of an attack comparable in magnitude to Pearl Harbor,

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88. *See infra* Part II.A.
89. *Youngstown*, 343 U.S. at 583.
90. Brownell, *supra* note 59, at 103. *See also* Edgar & Schmidt, *supra* note 54, at 352.

and yet more callous, insofar as civilians were used as weapons and became the principal targets. Moreover, although the attack was not orchestrated by a nation, there was substantial consensus that the attack constituted an act of aggression that justified U.S. military retaliation in self-defense. Two months after the attack, the United States launched a military strike in Afghanistan for "harboring" al Qaeda. The executive undertook this military response with the approval of most nations,[91] the United Nations,[92] and the U.S. Congress.[93] These facts were significant because they signaled that attacks carried out by non-state actors could be considered acts of war, and that state responsibility for such acts could extend to those nations who "harbor" the perpetrators. It was in the course of this largely sanctioned U.S. strike in Afghanistan that the U.S. military captured and detained hundreds of "prisoners of war" in Afghanistan and in Guantanamo Bay, and at least three persons in the United States. Existing laws of war authorize the detention of combatants, despite serious concerns that the United States is exceeding the reasonable scope of military detentions.[94]

Even if the "enemy combatant" detentions qualify as an exercise of war powers, the executive has a substantially weaker claim to inherent national security powers when its detentions involve persons over whom the executive lacks evidence linking them to the September 11 attacks or to al Qaeda. The September 11 immigration detentions in this so-called domestic war on terror, rather than an exercise of war powers, conjure up images of the United States' past elusive wars, as for example, against a perceived communist threat,[95] or against all foreigners or U.S. citizens who look like the enemy.[96] Such "wars" become elusive not solely when the threat to national security is uncertain (unlike the threat of communism, few question that terrorism is a viable threat), but, even more so, when so many become too easily branded or treated like the "enemy."

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91. George W. Bush, President Thanks World Coalition for Anti-Terrorism Efforts, Office of the Press Secretary (Mar. 11, 2002), *available at* http://www.whitehouse.gov/news/releases/2002/03/print/20020311-1.html.
92. S.C. Res. 1368, U.N. SCOR, S/RES/1368 (2001).
93. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) [hereinafter September 18 Resolution].
94. *See* Raquel Aldana-Pindell, *The 9/11 "National Security" Cases, supra* note 46, at 1028–1031 (2003) (discussing executive abuses of power in executing the "enemy combatant" detentions).
95. *See, e.g.,* Steven J. Bucklin, *To Preserve These Rights: The Constitution and National Emergencies,* 47 S.D. L. REV. 85, 89–96 (2002) (discussing various examples of the U.S. domestic war against communism during the twentieth century).
96. *See Id.* at 86–94 (discussing "national security" measures directed at foreigners).

In the course of this domestic "war on terror," the executive has detained thousands of foreign nationals, mostly from Arab and Middle Eastern countries, often in secret, incommunicado detention, and for prolonged periods of time. Yet, from what the public knows, it appears that fewer than thirty of the detained have been charged with terrorist acts or linked to al Qaeda.[97] For this reason, not only civil rights groups but members of all three branches of government have criticized the executive for these practices. Members of Congress have expressed concern that the detainees' connection to terrorism or al Qaeda is attenuated at best.[98] Similarly, some judges who have reviewed the post-September 11 detentions have characterized these mostly as law enforcement rather than as a legitimate national defense operation.[99] In addition, the Office of the Inspector General of the Department of Justice criticized the FBI for classifying the September 11 immigration detainees as "of interest" to the terrorism investigation without specified criteria, and sometimes on the basis of little or no concrete information that tied them to the September 11 attacks or to terrorism.[100]

These criticisms are not surprising given the racial profiling strategies employed by law enforcement and immigration agencies to target the mostly Arab and Middle Eastern communities. The FBI interviewed and sometimes arrested many of the detainees through suspicions and tips based solely upon perceptions of their racial, religious, or ethnic identity.[101] Some were arrested on the basis of the so-called "voluntary" interviews of more than 5000 male foreign nationals from Middle Eastern or Islamic countries.[102] Finally, some were arrested upon showing up to register as required by the new regulations, mostly for immigration violation.[103]

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97. *See* Aldana-Pindell , *The 9/11 "National Security Cases," supra* note 46, at 987–88.
98. *See, e.g.*, 147 CONG. REC. S 13923 (daily ed., Dec. 20, 2001) (statement of Sen. Feingold) ("[W]e still do not know the identities of hundreds of other individuals still held in detention, the vast majority of whom have no link to September 11 or al-Qa[e]da.").
99. Ctr. For Nat'l Sec. Studies v. U.S. Dep't of Justice, 215 F. Supp. 2d 94 (D.D.C. 2002), rev'd by 331 F.3d 918 (D.C. Cir. 2003), *cert. denied by* 124 S. Ct. 1041 (2004); Ctr. For Nat'l Sec. Studies v. U.S. Dep't of Justice, 331 F.3d 918 (D. C. Cir. 2003) (J. Tatel, dissenting), *cert. denied by* 124 S. Ct. 1041 (2004); and Detroit Free Press v. Ashcroft, 303 F.3d 198 (3d Cir. 2002). *See also* Aldana-Pindell, *The 9/11 "National Security" Cases*, *supra* note 46, at 1013–23 (discussing the judicial "mixed" response the 9/11 litigation).
100. The OIG June 2003 Report, *supra* note 2, at 14, 18 and 40–41.
101. *Id.* at 15–16. *See also* Victor C. Romero, *Proxies for Loyalty in Constitutional Immigration Law: Citizenship and Race After September 11*, 52 DEPAUL L. REV. 871 (2003); Leti Volpp, *Critical Race Studies: The Citizen and the Terrorist*, 49 UCLA L. REV. 1575, 1578 (2002); Susan M. Akram & Kevin R. Johnson, *Race, Civil Rights, and Immigration Law after September 11, 2001: The Targeting of Arabs and Muslims*, 58 N.Y.U. ANN. SURV. AM. L. 295 (2002).
102. *See supra* note 27 and accompanying text.
103. *See supra* note 28 and accompanying text.

In the past, courts have acquiesced, sometimes reluctantly, to these elusive domestic wars, as, for example, when the Supreme Court upheld the internment of tens of thousands of Japanese and Japanese Americans during World War II in *Korematsu v. U.S.*[104] Nonetheless, two factors distinguish *Korematsu* from the present case. *Korematsu* followed not only a congressional declaration of war against Japan, but the challenged executive order to intern Japanese and Japanese Americans followed full congressional authorization.[105] There would have to be similar, clear congressional authorization even if the September 11 immigration detentions could be characterized as necessary national security measures.

The rationale of the recent Second Circuit decision in the *Padilla* litigation lends strong support to the argument that, even if the September 11 immigration detentions could be characterized as necessary national security measures, these may only be executed with clear congressional authorization.[106] In that case, Padilla challenged the Secretary of Defense Donald Rumsfeld's claim that the President has the inherent authority to detain those who take up arms against the United States pursuant to his responsibility under Article II, section 2 as Commander-in-Chief.[107] The Second Circuit refused to recognize such power. Rather, the Court applied the *Youngstown* analysis to the President's claim of war powers, as these were being exercised in the domestic sphere.[108] Under this template, the Second Circuit rejected that the President can lay claim to any of the powers, express or implied, allocated to Congress, even in times of grave national security threat or war, whether declared or undeclared.[109] Specifically, the Second Circuit held that when the President issued the executive order to detain Padilla, a U.S. citizen present in the United States, as an "enemy combatant," he engaged in the "'lawmaking'" functions entrusted by the Constitution to Congress in violation of separation of powers."[110] "Thus, while the President has the obligation to enforce laws passed by Congress, he does not have the power to legislate."[111]

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104. Korematsu v. U.S., 323 U.S. 214 (1944).
105. *Id.*
106. *Padilla*, 352 F.3d 695. *rev'd on jurisdictional grounds by* 124 S.Ct. 2711 (2004).
107. *Id.* at 711.
108. *Id.*
109. *Id.* at 713–15
110. *Id.* at 715
111. *Id.*

In deciding whether the President had legislated, the Second Circuit applied the standard in *Chadha*, that "legislative action depends 'not on form but upon whether [it] contain[s] matters which is properly to be regarded as legislative in its character in effect.'"[112] In the case of the Padilla executive order, the Second Circuit noted that the Constitution, *inter alia*, vests in Congress the ability to define and punish offenses against the law of nations and the right to suspend the writ of habeas corpus.[113] Similar arguments exist for the September 11 detentions. Under U.S. Supreme Court precedent, it is Congress that is vested with the authority to enact laws affecting immigration, except for the limited inherent executive powers to legislate recognized in exclusion matters.[114]

With respect to the detentions as national security measures, even though these affect foreign nationals, they are still being executed as alleged "war powers" in the domestic sphere. In this regard, the Second Circuit emphasized mostly that Padilla was detained inside of the United States, not his U.S. citizenship. In fact, while leaving the question open, the Second Circuit distinguished Padilla from Hamdi, who were both U.S. citizens, on the basis of where the men were captured, suggesting that Padilla's capture inside of the United States, in contrast to Hamdi who was captured in Afghanistan, was a significant factor for the court's characterization of the measure as a domestic "war time" measure.[115] Similarly, the immigration detainees are persons present and residing in the United States; many of whom have significant ties to this country. The nationality of the detainees should not be the sole basis for deciding to classify these as "foreign war powers," as the same has not been allowed in the area of immigration law.[116]

Thus, the Attorney General cannot resort solely to inherent executive powers as the basis of authority for issuing the September 11 immigration regulations. Instead, he must be able to point to statutory authority, which the Attorney General has asserted with respect to all of the regulations. As the next section of the paper explains, however, the Attorney General's claims to statutory delegation also fail because the Attorney General circumvented controlling provisions of the INA when he issued the regulations or because his interpretation of the INA provisions violate the Constitution or are unreasonable.

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112. *Id.* (citing *Chadha*, 462 U.S. at 952).
113. *Id.* at 15.
114. *See infra* Part II.A.1.
115. *Padilla*, 352 F.3d at 711. *rev'd on jurisdictional grounds by* 124 S.Ct. 2711 (2004).
116. *See infra* Part II.A.1.

B. When the Attorney General Purports to Act with Statutory Authority

Since the *Chevron* decision, deference is due to administrative agency's interpretation of statutes through regulations. *Chevron* directs reviewing courts to defer to reasonable agency interpretation, but only when the statute is silent or ambiguous.[117] In *Chevron*, the Supreme Court formulated a two-step test to determine the deference a reviewing court should accord an agency interpretation of a statute that it administers. The first step requires the reviewing court to inquire whether "Congress has directly spoken to the precise issue" before the agency.[118] Under step 1, therefore, *Chevron* deference will not apply to regulations if they contravene existing INA provisions that govern the September 11 detentions. Under step 2, if the reviewing court determines that the "statute is silent or ambiguous with respect to the specific issue," then courts must defer to any "permissible interpretation" made by the agency.[119] Under step 2, therefore, the agency's interpretation of the statute must still be reasonable.

Chevron deference may apply with even more deference to agencies when they execute laws over which the political branches enjoy plenary powers. In fact, the U.S. Supreme Court has indicated that the reasons for giving deference to agency decisions apply "with even greater force" in the immigration context because the responsible "officials 'exercise especially sensitive political functions that implicate questions of foreign relations.'"[120] Despite this, "there continues to be confusion about the scope of judicial deference" to immigration administrative decisions, including whether *Chevron* deference applies to agency interpretations of purely legal questions, especially ones that do not implicate agency expertise.[121]

There is also, however, a large area of immigration law where *Chevron* deference is indisputably inapplicable. For example, *Chevron* deference will not apply when the agency engages in decision-making that is prohibited until Congress has expressly authorized them to do so. Professor Cass R. Sunstein refers to this doctrine as the application of nondelegation canons to administrative decision-making.[122] Under these canons, a clear congressional statement of delegation is required, and an ambiguous statute will not lead to

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117. *Chevron*, 467 U.S. at 843.
118. *Id.* at 842.
119. *Id.* at 843.
120. INS v. Aguirre-Aguirre, 526 U.S. 415, 425 (1999).
121. Brian G. Slocum, *The Immigratin Rule of Lenity and Chevron Deference*, 17 GEO. IMMIGR. L. J. 515, 532–34 (discussing confusion regarding the scope of Chrevron in immigration cases).
122. Sunstein, *supra* note 23, at 315.

Chevron deference.[123] One such nondelegation canon of particular relevance in the area of immigration law is that administrative agencies are not permitted to construe federal statutes in such a way as to raise serious constitutional questions. If the constitutional question is substantial, Congress must clearly establish the intent to abrogate constitutional rights.[124] This principle has applied with great force in the immigration context, despite its treatment as a political question over which the political branches have plenary power.[125]

Applying these principles, the Attorney General's claims to possess delegated authority to issue the September 11 regulations fail for three independent reasons. For the first two reasons, *Chevron* deference does not apply, either because the statute is clear or because a nondelegation canon of statutory construction trumps *Chevron* deference. First, the regulations on the charging decision and secretive removal proceedings fail because the Attorney General has circumvented statutory provisions that Congress enacted to regulate, with greater procedural protections, the detention and removal of "terrorists" as defined by the INA. Second, the post-removal detention regulations fail under the nondelegation canon of constitutional avoidance because they violate substantive due process. Finally, the charging decision regulations fail because they rest on an interpretation of the INA that exceeds the permissible reasonable scope, even when applying *Chevron* deference.

1. When the Attorney General has Circumvented Statutory Provisions that Accord Greater Rights to the September 11 Detainees

The Attorney General should not be able to resort to his broad delegated powers to administer immigration laws or to general detention provisions under the INA when Congress has enacted specific provisions that prescribe the procedures for the detention and removal of suspected "terrorists" as defined under the INA. This is the case with respect to the regulations issued by the Attorney General to hold the September 11 detainees for months (and potentially indefinitely) without charging them with violation of any law and to remove them in secret immigration hearings on the basis of sealed or classified information.

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123. *Id.* at 330.
124. *Id.* at 316.
125. Slocum, *supra* note 122, at. 515, 543–55.

a. Regulations on Secret Removal Procedures

With Congress' adoption of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA)[126] and the Antiterrorism and Effective Death Penalty Act (AEDPA)[127] in 1996, following the Oklahoma City Bombing, Congress authorized the use of secret evidence in removal proceedings of "terrorists" as defined under the INA.[128] Immigration agencies, however, have not followed the INA Title V removal procedures to seal records under removal proceedings or remove persons in secret after September 11. Strangely enough, immigration agencies have not prosecuted a single case under the special 'alien terrorist' removal procedures authorized by AEDPA.[129] In fact, the INA practice of circumventing the "alien terrorist" removal procedures predated the September 11 detentions. According to Professor Susan M. Akram, the use of secret evidence in regular removal proceedings had become by 1999 "the most powerful tool in an apparently systematic attack by the U.S. governmental agencies on the speech, association, and religious activities of a very defined group of people: Muslims, Arabs, and U.S. lawful permanent residents of Arab origin residing in this country."[130]

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126. IRRIRA, Pub. L. No. 104–208, § 504(e)(3)(A)(1996) (codified as amended at 8 U.S.C. § 1229a(b)(4)(B) (1999).

127. AEDPA, Pub. L. 104– 32 (1996), 110 Stat. 1214 (codified as amended at 28 U.S.C. § 2244–66 (1999).

128. INA § 501 et seq., 8 U.S.C. § 1531 (1997). In 1996, with Congress' adoption of AEDPA, Congress defined "terrorist activity" broadly and vaguely as "to commit…an act of terrorist activity or an act which the actor knows, or reasonably should know, affords material support to any individual, organization, or government in conducting a terrorist activity." INA § 212(a)(3)(B), 8 U.S.C. § 1182(a)(3)(B) (1997), and 237 (a)(4)(B) (2000), 8 U.S.C. § 1227(a)(4)(B) (1997). That definition was expanded significantly under the U.S. Patriot Act, *supra* note 3. The U.S. Patriot Act expanded the definition of terrorist to include, for example, a representative of a political, social or other similar group whose public endorsement of acts of terrorist activity the Secretary of State determines undermines U.S. efforts to reduce terrorist activities. U.S. Patriot Act, *supra* note 3, § 411. It also includes the spouse or child of any person found to be a terrorist under the section, unless the spouse or child could not have reasonably known of the activity. *Id.* Moreover, the Patriot Act expanded the definition of terrorist activity to include, for example, the solicitation of funds or other things or the recruitment of members to a terrorist organization, unless the solicitor can demonstrate that he did not know or should not have reasonably known that the solicitation would further the organization's terrorist activities. *Id.* It also includes affording material support, including a safe house, transportation, communications, funds, or other material financial benefit, and documentation, *inter alia*, to any individual the actor should reasonably know has committed or plans to commit a terrorist activity or to terrorist organization. *Id.*

129. Susan M. Akram, *Scheherezade Meets Kafka: Two Dozen Sordid Tales of Ideological Exclusion*, 14 GEO. IMMIGR. L. J. 51, 72 (1999).

130. *Id.* at 52.

Yet, there are several detrimental consequences to foreign nationals when immigration agencies circumvent Title V procedures given that Title V, while already substantially limiting due process,[131] do accord greater due process than the September 11 regulations. In relevant part, these procedures, for example, allow for the classification and sealing of records but impose specific guidelines that ensure judicial oversight and some review rights to the foreign national over the classified information. Specifically, immigration agencies must produce an unclassified summary of the evidence to the foreign national and that evidence must be reviewed by a federal judge who may, *inter alia*, appoint a special attorney to represent the interest of the foreign national.[132] Also, Title V procedures require that the removal hearing be open to the public.[133] Further, Title V procedures apply only when the Attorney General certifies someone as a "terrorist."[134] Thus, the INS would still have to certify the foreign national as a "terrorist" and sustain that he or she meets the INA definition of terrorist.

One of the post-September 11 regulations that most clearly contravenes Title V of the INA is the Creppy Directive,[135] since Title V specifically requires that removal hearings be open to the public and be heard before federal judges. Similarly, any provision that complements the immigration court's procedures for the removal of "special interest" cases also contravenes Title V procedures. This is true, for example, of regulations that confer authority on immigration judges to issue protective orders and sealed submissions in immigration courts, if such disclosure will harm national

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131. Kevin R. Johnson, *The Antiterrorism Act, the Immigration Reform Act, and Ideological Regulations in the Immigration Laws: Important Lessons for Citizens and Noncitizens*, 28 ST. MARY'S L. J. 833 (1997).

132. INA § 504(e)(3)(A), 8 U.S.C. § 1534(e)(3)(A) (1997) authorizes the judge to examine *ex parte* and in camera any evidence the Attorney General has determined would pose a risk to national security or to the security of any individual if disclosed. INA § 504(e)(3)(B), 8 U.S.C. § 1534(e)(3)(B) requires that the Government submit to the removal court an unclassified summary of the specific evidence that does not pose a risk which under (C) must be approved by the judge within 15 days it he finds that summary is sufficient to enable the foreign national to prepare a defense. Under INA § 504(e)(3)(D), 8 U.S.C § 1534 (e)(3)(D), the judge is given the authority to disapprove of the summary and to terminate the removal hearing if the Attorney General fails to satisfactorily amend the summary. INA § 504(e)(3)(E), 8 U.S.C § 1534 (e)(3)(E), furthermore, allow a judge to designate a special attorney to assist the foreign national in reviewing and challenging the classified information.

133. INA § 504(a)(2).

134. INA § 503(a).

135. The Creppy Directive, *supra* note 13.

security or the law enforcement interest of the United States,[136] where Title V already prescribes procedures for the treatment of classified information.[137]

The Creppy Directive does not specify the Attorney General's source of authority for issuing the regulation. However, in the subsequent regulations intended to complement the Creppy Directive and the retention of information in September 11 removal hearings, the Attorney General cited as the source of authority his broad powers to administer immigration laws under INA § 103(a).[138] This general provision, however, cannot replace Title V procedures, where Congress has been clear as to what procedures should govern the removal of suspected "terrorists" under the INA.

The Creppy Directive does not include any specific criteria as to what constitutes a "special interest" case. Thus, the Creppy Directive could apply more broadly than to those cases that implicate the removal of "terrorists" as defined by the INA. Several reasons, however, support the conclusion that the Attorney General promulgated the Creppy Directive to circumvent Title V of the INA. First, the timing of the Creppy Directive, 10 days after the September 11 attacks, combined with the links that the Attorney General made between immigration enforcement and the war on terror,[139] strongly indicates that the Creppy Directive was intended for the removal of alleged terrorists. In fact, the Creppy Directive makes express reference to a "time of heightened security and concern."[140] Second, Title V procedures have still not been employed to remove any of the September 11 detainees, which indicates that the Attorney General, as he has in the past, intended to circumvent Title V procedures altogether.

The Attorney General's circumvention of Title V procedures with the Creppy Directive and complementary regulations is troublesome for two reasons. First, to the extent that Title V already codifies the minimum procedures for the removal of "alien terrorists," whereby Congress balanced the government's interest in protecting national security and the rights of the individuals affected by such procedures, it is troublesome that these minimum procedures are not being guaranteed to any of the September 11 detainees, whether they meet the INA definition of terrorist or not. Second, given the ample powers that Congress conferred under the Patriot Act to the Attorney

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136. 8 C.F.R.. §1003.46 (2002).
137. *See supra* note 144 and accompanying text.
138. Protective Orders in Immigration Administrative Proceedings, 67 Fed. Reg. 36799 (May 28, 2002).
139. *See supra* note 2 and accompanying text.
140. The Creppy Directive, *supra* note 13.

General to certify persons as "terrorists,"[141] and the expansion of an already broad definition of who qualifies as "terrorist" under the INA,[142] it is troublesome that the Attorney General chose not to utilize this ample power simply to circumvent the provisions that would normally apply to these removals.

b. Regulation on the Charging Decision

Similarly, the Attorney General's amendment to 8 C.F.R. § 287.3 days after September 11, which authorized the detention of uncharged foreign nationals for 48 hours or for "an additional reasonable period of time" in the event of "an emergency or other extraordinary circumstance,"[143] circumvents the seven day charging procedures that Congress intended to apply to the September 11 detentions under the U.S. Patriot Act.[144] In fact, Congress specifically rejected, when enacting the U.S. Patriot Act, the Attorney General's proposal, entitled the Mobilization Against Terrorism Act (MATA),[145] which would have authorized the Attorney General to detain indefinitely and without judicial review any foreign national that he believed posed a threat to national security.[146]

Under § 412 of the Patriot Act, once the Attorney General certifies a foreign national as a "terrorist," that person must remain in mandatory detention until the Attorney General de-certifies him.[147] Congress, however, incorporated several measures into the law to monitor the Attorney General's

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141. Under section 412 of the U.S. Patriot Act the Attorney General may detain a foreign national upon certification that the Attorney General has "reasonable grounds to believe" that the individual may be a terrorist or may have committed a terrorist activity, or otherwise endangers national security. The U.S. Patriot Act, *supra* note 3.
142. *See supra* note 142.
143. Prior to September 11th, INS regulations interpreted language in the Immigration and Nationality Act (INA) as requiring the agency to make the charging decision within 24 hours after her arrest. 8 C.F.R. § 287.3(d) (1997). On September 17, 2001, the Attorney General issued a new regulation that changed the time by which the INS had to make the charging decision to 48 hours after the arrest, which also included an exception to extend the time to a an additional reasonable period of time in the event of an emergency or other extraordinary circumstances. 8 C.F.R. § 287.3(d) (2001).
144. The U.S. Patriot Act grants the Attorney General the power to detain for up to seven days foreign nationals whom the Attorney General has "reasonable grounds" to believe fall within the expansive immigration anti-terrorist provisions. U.S. Patriot Act, *supra* note 2, at § 412.
145. Press Release, *U.S. Dep't of Justice, Attorney Genenal Ashcroft Outlines Mobilization Against Terrorism Act* (Sept. 24, 2001), *available at* http://www.usdoj.gov/opa/pr/2001/September/492ag.htm.
146. A. Christopher Bryant & Carl Tobias, *Youngstown* Revisited, 29 Hastings Const. L.Q. 373, 387–93 (2002).
147. The U.S. Patriot Act, *supra* note 3, at § 412.

otherwise broad discretion under the provision.[148] First, the suspected detainee must be placed in removal proceedings or charged with a criminal offense within seven days of his or her detention.[149] Second, once the foreign national is ordered removed, if he is still in detention after the 90-day removal period and removal appears unlikely in the foreseeable future, then he may be detained for an additional six months if his release would "threaten the national security of the United States or the safety of the community or any person."[150] At the end of each six-month period, however, the Attorney General must review his certification decision and allow the foreign national to provide evidentiary support for his release.[151] Third, the Attorney General must submit a report to the Judiciary Committee of the House of Representatives and the Senate every six months detailing its implementation of this provision of the Act.[152]

As the September 11 detentions practices demonstrate, however, the Attorney General has circumvented Congress' efforts to impose a seven-day limit by not certifying any of the detainees as terrorist suspects.[153] This has permitted immigration and law enforcement agencies, in fact, to hold foreign nationals for months without having to charge the person with any violation while denying them access to bond and holding some of them in high-security confinement.[154] In doing so, the Attorney General has argued that these measures are necessary to fight the war on terror. It is, therefore, inconceivable that the Attorney General refuses to certify any of the detainees as terrorists given the broad discretion he enjoys under the U.S. Patriot Act unless it is to circumvent the minimum procedural protections Congress imposed for the treatment of the detainees. In fact, if the Attorney General's argument is that none of the detainees meet the broad definition of terrorist under the INA, then it is dubious that they should be treated as national security risks unless the Attorney General has independent grounds for doing so. If the Attorney General does have independent grounds, it is, nevertheless, still dubious that Congress intended suspected "terrorists" to enjoy greater

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148. Some commentators have argued that INA § 412 still violates due process, even with the additional procedural safeguards that the Attorney General has chosen to ignore. *See e.g.*, Shirin Sinnar, Comment, *Patriotic or Unconstitutional? The Mandatory Detention of Aliens under the USA Patriot* Act, 55 STAN. L. REV. 1419 (2003); *Developments in the Law-The Law of Prisons, V. Plight of the Temptest-Tost: Indefinite Detention of Deportable Aliens*, 115 HARV. L. REV. 1915, 1935–39 (2002).

149. The U.S. Patriot Act, *supra* note 3, at § 412.

150. *Id.*

151. *Id.*

152. *Id.*

153. *See supra* Part I. *See also* Sameer M. Ashar, *Immigration Enforcement and Subordination: The Consequences of Racial Profiling After September 11*, 34 CONN. L. REV. 1185, 1189–90 (2002).

154. *See supra* Part I.

procedural protections than other persons who may present a national security risk for other reasons. Thus, at a minimum, immigration agencies should still have to act within at least seven days to charge persons it detains.

2. *When the September 11 regulations violate the Nondelegation Canon of Constitutional Avoidance*

Moreover, the U.S. Supreme Court has displaced *Chevron* deference when the constitutional avoidance doctrine applies to the interpretation of immigration provisions.[155] In *Zadvydas v. Davis*, for example, the Court utilized the constitutional avoidance canon to interpret INA § 246(a)(6) more narrowly than the Attorney General's interpretation, which would have permitted the indefinite detention of certain foreign nationals ordered removed in violation of the 5th Amendment.[156] The post-September 11 regulations adopted by the Attorney General to implement *Zadvydas*,[157] however, still result in the indefinite detention of certain foreign nationals contrary to *Zadvydas* and beyond that authorized by Congress under the U.S. Patriot Act.

In *Zadvydas*, the Court read a reasonable period restriction into the statute to require the release of foreign nationals when removal is not reasonably foreseeable or individual review of the necessity of any detention exceeding the 90-day removal period, even when removal is reasonably foreseeable.[158] Specifically, the Court devised a six-month period rule after which the foreign nationals who seeks release must provide good reason to believe that there is

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155. Slocum, *supra* note 122, at 446–47.

156. Zadvydas v. Davis, 533 U.S. 678, 689 (2001) ("'It is a cardinal principle' of statutory interpretation . . . that when an Act of Congress raises 'a serious doubt' as to its constitutionality, 'this Court will first ascertain whether a construction of the statute is fairly plausible by which the question may be avoided.").

157. Two other post-September 11 provisions also raise indefinite detention problems, although, perhaps, not as applied. For example, the Attorney General's amendment to 8 C.F.R. § 287.3 days after September 11, which authorized, the detention of uncharged foreign nationals for 48 hours or for "an additional reasonable period of time" in the event of "an emergency or other extraordinary circumstance," could, as applied, violate *Zadvydas.* However, to date, from what is known, the application of this regulation has resulted in an average length of time of 80 days, and a median of 69 days. *See supra* note 35 and accompanying text. While this time is certainly problematic, it may not be sufficient to give rise to a *Zadvydas* problem. Similarly, 8 C.F.R. § 1003.19, which authorized the Board of Immigration Appeals (the BIA) and the US CIS district director, in certain cases, to issue stays to the immigration judge's decision to release a foreign national on bond, could potentially result in the indefinite detention of certain individuals. While the regulation's primary purpose is to stay the IJ's order until the BIA rules on the matter, in cases where the USCIS has posted a bond of $10,000 or more, the Attorney General also has the discretion to stay even the order of the BIA affirming the IJ's order of release. 8 C.R.R. § 1003.19(i)(2). While it is possible that this stay could also be indefinite, it is too early to tell whether, as applied, it will have that effect.

158. 533 U.S. at 699–700.

no significant likelihood of removal in the reasonably foreseeable future, a showing which the government may rebut with sufficient evidence.[159]

Zadvydas was decided three months prior to September 11. Yet, Attorney General Ashcroft immediately made clear his strong disagreement with the opinion and sought to read *Zadvydas* as narrowly as possible, so as to avoid the release of then estimated 3,800 persons in indefinite detention.[160] Those regulations are now also applicable to the September 11 detainees.[161]

At least three factors about the *Zadvydas* decision made it plausible for the Attorney General to create loopholes in its implementation, some of which are likely not constitutional. These loopholes include the stringent substantive and procedural standards governing the showing of "significant likelihood that removal is not possible in the foreseeable future," the refusal to apply *Zadvydas* limits to certain foreign nationals that should have been included; and the carving out a broad "special circumstances" exception from dicta in Zadvydas.[162]

The stringent substantive and procedural standards governing the determination of whether there is a significant likelihood of removing a detained foreign national in the reasonably foreseeable future have significantly diminished the opportunity of foreign nationals to seek *Zadvydas* relief. Since the Court did not clarify when a foreign national would satisfy "good reason to believe there is no significant likelihood of removal," the Attorney General has exercised wide discretion to define as stringent a burden as possible. In this regard, the most problematic language in the relevant regulation prescribes that "[w]here the Service is continuing its efforts to remove the alien, there is no presumptive period of time within which the alien's removal must be accomplished," so long as the prospects for the

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159. *Id.* At 701

160. Michelle Carey, *"You Don't Know if They'll Let You Out in One Day, One Year, or Ten Years...." Indefinite Detention of Immigrants after Zadvydas v. Davis*, 24 CHICANO-LATINO L. REV. 12, 30–31 (2003) and T. Alexander Aleinikoff, *Detaining Plenary Power: The Meaning and Impact of Zadvydas v. Davis*, 16 GEO. IMMIGR. L. J. 365, 380 (2002).

161. *OIG Issues Analysis of DOJ and DHS Responses to Report on Treatment of 9/11 Detainees: Part III*, 81 INTERPRETER RELEASES 4, 5(2004).

162. A fourth potential loophole is the non-application of *Zadvydas* limits to foreign nationals paroled into the United States. However, it is unlikely that *Zadvydas* controlled as to this group. Raquel Aldana-Pindell, *The U.S. Supreme Court Grants Partial Victory to Some Non-Citizens in Indefinite INS Detention*, 9 NEV. LAW. 15 (2001). Subsequent courts have issued mixed rulings on the issue. Xi v. INS, 298 F.3d 832, 834 (9th Cir. 2001) (expanding *Zadvydas* to inadmissible foreign nationals); Borrero v. Alietz, 325 F.3d 1003, 1007 (8th Cir. 2003) (declining to expand *Zadvydas*); the U.S. Supreme Court recently accepted certiorari to resolve the issue. Benitez v. Wallis, 337 F.3d. 1289 (11th Cir. 2003), *cert. granted*, 72 U.S.L.W. 3460 (U.S. Jan. 16, 2004) (No. 03–7434).

timeliness of removal are reasonable under the circumstances.[163] In its implementation of this provision, immigration agencies have considered any length of time, even more than five years, as the "foreseeable future."[164] Furthermore, procedurally the determination is made solely by the Headquarters Post-order Detention Unit (HQPDU), without any right to administrative appeal, subject only to six-month interval reconsideration in case of denial, and subject to discretionary revocation.[165] Moreover, whereas foreign nationals who have been denied the good faith determination have sought habeas corpus review, district courts have offered mixed results to date. Some courts have considered "lengthy periods" of detention (e.g., twenty months) *per se* to demonstrate the absence of a significant likelihood of removal, while others have accepted the government's position that removability is still reasonably foreseeable so long as efforts to remove are ongoing.[166]

The second loophole is the Attorney General's decision not to apply *Zadvydas* limits to all inadmissible foreign nationals, to those admitted and being removed for criminal-related grounds, and to those whom the decision makers determined are a flight risk or a risk to the community.[167] Instead, the Attorney General issued separate regulations applicable to this group that, *inter alia*, impose the burden on the foreign national to show that his or her release will not pose a danger to the community or to property and present no flight risk,[168] even though similar regulations were struck down as unconstitutional under *Zadvydas*.[169] The Attorney General, however, is likely to argue that *Zadvydas* did not apply to any foreign national affected by this regulation for several reasons, all of which fail.

First, since petitioners were lawful permanent residents who were removed from the United States, the Attorney General is reading *Zadvydas* narrowly on

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163. 8 C.F.R. § 1241.13 (f) (2004).
164. Carey, *supra* note 161, at 34.
165. 8 C.F.R. § 1241.13 (g)(2), (h)(4) &(J).
166. Carey, *supra* note 161, at 35–36 (discussing several district court cases reviewing the "good reason to believe no significant likelihood of removal" standard).
167. 8 C.F.R. § 241.1.
168. *Id.* at 241.4(d)(1).
169. *Zadvydas*, 533 U.S. at 682–83. Similar to 8 C.F.R. §241.4, the implementing regulations prior related to *Zadvydas* prescribed that the INS District Director would review the decision to release from custody after the 90-day period. "If the decision [was] to detain, then an INS panel [would] review the matter further, at the expiration of a 3-month period and decide on the basis of records, and sometimes personal interview, whether to release under supervision." *Id.* To authorize release, the panel had to find that the foreign national was unlikely to be violent, to pose a threat to the community, and to flee if released. *Id.* at 684. The Zadvydas Court expressly cricitized the regulations because the "alien bears the burden of proving he is not dangerous, without (in the Governments' view) significant later judicial review." *Id.* at 684.

its facts to apply only to persons lawfully admitted to the United States, not to persons unlawfully present in the United States. This narrow reading of *Zadvydas*, however, contradicts the Court's unequivocal distinction "between an alien who has effected an entry into the United States and one who has never entered."[170] "It is well established that certain constitutional protections available inside the United States are unavailable to aliens outside of our geographic borders. But once an alien enters the country, the legal circumstances changes for the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent."[171]

Second, the non-application of *Zadvydas* limits to admitted persons being removed for crimes without an independent judicial assessment of dangerousness is also inconsistent with *Zadvydas.* In *Zadvydas*, the petitioners were also being removed for the commission of violent crimes, for which they had served their sentence.[172] Yet, the Court rejected the government's justification–protecting the community–by explaining that a vague notion of dangerousness did not justify detention past the 90-day removal period without the finding of some other special circumstances, such as mental illness, that helps to create the danger.[173] Similarly, the Court expressly criticized imposing the burden of disproving dangerousness on the foreign national.[174] On remand, in fact, both the Ninth and the Fifth Circuits read *Zadvydas* to require the release of Zadvydas and Ma, despite their criminal history, where the government failed to rebut the presumption that their removal was not foreseeable in the near future.[175]

Third, the non-application of *Zadvydas* limits to those who are a flight risk contradicts the Court's express rejection of the argument. "By definition," the Court stated, "preventing flight– is weak or nonexistent where removal seems a remote possibility at best."[176]

The final loophole pertains to the "special circumstance" exception[177] based on *Zadvydas'* prophetic *dicta* that "[n]either do we consider terrorism

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170. *Id.* at 693.

171. *Id.* In fact, subsequent cases interpreting *Zadvydas* have applied its holding to inadmissible foreign nationals. *See, e.g.,* Guo Xi v. INS, 298 F.3d.832 (9th Cir. 2002).

172. Zadvydas had a long criminal record, involving drug crimes, attempted robbery, attempted burglary, and theft. Ma had been convicted of manslaughter in a gang-related shooting. *Id.* at 685.

173. *Id.* at 691.

174. *Id.*

175. Kim Ho Ma v. Ashcroft, 257 F.3d 1095 (9th Cir. 2001) and Zadvyas v. Davis, 285 F.3rd 398 (5th Cir. 2002).

176. *Id.* at 690.

177. 8 *C.F.R.* § 1241.14 (2004).

or other special circumstance where special arguments might be made for forms of preventive detention or for heightened deference to the judgments of the political branches with respect to matters of national security."[178] This dicta strongly suggests that immigration agencies would receive greater discretion from courts in national security matters, although the Court does not resolve the issue of just how much deference. More importantly, regardless of this dicta, under *Youngstown*,[179] the courts would still not grant agencies the same discretion if the regulations circumvent express statutory provisions.

Indeed, Congress spoke directly on the detention provisions that should govern the September 11 immigration detentions of suspected terrorists when it enacted § 412 of the U.S. Patriot Act. Section 412 of the U.S. Patriot Act, in fact, modifies the *Zadvydas* ruling to permit the continued detention of persons ordered removed "and whose removal is unlikely in the reasonably foreseeable future . . . for additional periods of up to six months only if the release of the alien will threaten the national security of the United States or the safety of the community or any person."[180] Whereas the "special circumstance" exception regulation implements the procedures of § 412,[181] it nevertheless circumvents § 412 in three respects. First, contrary to the language of § 412, the regulation applies even when "there is no significant likelihood that the alien will be removed in the reasonably foreseeable future."[182] Second, the regulation, unlike § 412, is not restricted to persons whom the Attorney General has certified as "terrorists" under the INA, but includes more broadly any person who might have serious adverse foreign policy consequences for the United States.[183] Third, the "special circumstance" also applies to foreign nationals with "highly contagious diseases or those foreign nationals determined to be "specially dangerous" because they have committed crimes of violence or are likely to commit such acts in the future due to a mental condition or personality disorder which, in

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178. Zadvydas, 533 U.S. at 696.

179. *See infra* Part II.A.1 for a discussion of why *Youngstown* analysis applies to the September 11 immigration detentions.

180. U.S. Patriot Act, *supra* note 3, at §412(a)(6). Some scholars have argued that INA § 412 may be unconstitutional under *Zadvydas*. *See* American Civil Liberties Union, *How the USA-PATRIOT Act Permits Indefinite Detention of Immigrants Who Are Not Terrorists*, *available at* http://archive.aclu.org/congress/1102301e.html (Oct. 23, 2001). Nevertheless, that claim is weakened by the Court's unequivocal language that if "'Congress had made its intent' in the statute 'clear, we must give effect to that intent." *Zadvydas*, 533 U.S. at 696.

181. The regulations require that the Attorney General certify in writing that a person falls within the scope of the regulation and that certification must be subject to ongoing review on a semi-annual basis. 8 C.F.R. § 1241.14 (c)(1) and (3) (2004).

182. Id. at 1241.14(a).

183. *Id.* at 1241.14(c)(1)(ii).

addition to exceeding the scope of § 412, is a public safety concern unrelated to the President's inherent war powers.[184] It is also important to note that only the "specially dangerous" category is subject to administrative review by immigration judges or the Board of Immigration Appeals.[185]

Thus, because the Attorney General's implementation of *Zadvydas* exceeds either the permissible scope of *Zadvydas* or even the expansion of *Zadvydas* by the U.S. Patriot Act, the Attorney General cannot resort to *Chevron* deference to issue the regulations. Many scholars argue that the shift in interpretive responsibility announced by *Chevron* precludes reviewing courts from considering nondelegation canons to interpret statutes.[186] They contend that courts should not consider nondelegation canons because statutory interpretation involves a number of political, technical, social, and economic issues and agencies usually possess specialized fact-finding and policy-making competence superior to the judiciary.[187] Notwithstanding these objections, the use of nondelegation canons in the *Chevron* context can help prevent agencies from pursuing unjust policies. Nondelegation canons can help ensure that agencies respect constitutional and public values, follow congressional intent and statutory purpose, and work in a sensible manner.[188] In addition, nondelegation canons may help protect legality and separation of powers concerns by limiting the executive branch, which enforces the laws, by preventing it from determining the scope of its own powers.[189] As Professor Sunstein notes, nondelegation canons are "a modern incarnation of the framers" basic project of linking individual rights and interests with institutional design. The link comes from protecting certain rights and interests not through a flat judicial ban on governmental action, but through a requirement that certain controversial or unusual actions will occur only with respect for the institutional safeguards introduced through the design of Congress.[190]

3. "Impermissible" Interpretation of Statutes

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184. *Id.* at 1241.14(b).
185. *Id.* at 1241.14(g).
186. *See e.g.*, Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE. L. J. 969, 988 (1992).
187. Bradford C. Mank, *Textualism's Selective Canons of Statutory Construction: Reinvigorating Individual Liberties, Legislative Authority, and Deference to Executive Agencies*, 86 KY. L.J. 527, 613 (1997–1998).
188. Slocum, *supra* note 122, at 565.
189. Sunstein, *supra* note 23, at 330.
190. *Id.* at 339.

Finally, the Attorney General should not be able to resort to specific INA provisions authorizing the warrantless arrest or detention of foreign nationals when the agencies' interpretation of these provisions are either contrary to a "permissible interpretation" of the provision that trumps *Chevron* deference.

The Attorney General's amendment to 8 C.F.R. § 287.3 days after September 11, which authorized, the detention of uncharged foreign nationals for 48 hours or for "an additional reasonable period of time" in the event of "an emergency or other extraordinary circumstance," is an unreasonable interpretation of the INA § 287. INA § 287 authorizes immigration agents, under regulations prescribed by the Attorney General, to arrest a person without a warrant "in the United States, if [immigration agents] have reason to believe that the [foreign national] so arrested . . . is in violation of [immigration laws] or is likely to escape before a warrant can be obtained."[191] INA § 287, however, also requires that in such instances, the foreign national "shall be taken without unnecessary delay for examination before an officer of the Service having authority to examine [foreign nationals] as to their right to enter or remain in the United States"–that is, to make the charging decision.[192] Prior to September 11, regulations interpreted language in INA § 287 as requiring the agency to make the charging decision within 24 hours after her arrest.[193] As has been demonstrated since September 11, however, now that charging decision is occurring only after the FBI has cleared the detainee of any potential terrorist link, on average after 80 days.[194] No doubt the language "without unnecessary delay" is ambiguous, calling forth the application of *Chevron* deference to the Attorney General. Thus, so long as the Attorney General's interpretation of this language is reasonable, then courts should defer. Perhaps courts should not second guess the political branches' determination of what is reasonable "necessary delay" in the context of the war on terror. However, in this case, Congress has spoken about what it considers to be reasonable time during which the Attorney General must make such determination. Under the Patriot Act, Congress gave the Attorney General seven days by which he had to certify persons as terrorists under the expansive definition of terrorism.[195] Thus, any charging decision that expands beyond seven days should be considered, *per se*, unreasonable.

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191. INA § 287 (a)(1), 8 U.S.C. § 1357 (1997).
192. *Id.*
193. 8 C.F.R. § 287.3(d) (2004).
194. *See supra* note 35 and accompanying text.
195. U.S. Patriot Act, *supra* note 3, at § 412.

III. CONCLUSION

The focus of this article on the executive's usurpation of Congress' legislative powers is actually about greater executive accountability. Specifically, this article is a call for judicial scrutiny over the Attorney General's unchecked issuance of the immigration regulations to augment the government's detention powers without congressional approval and, at times, even contrary to existing statutes. Courts have long viewed the conduct of national security and foreign affairs as largely beyond the province of judicial inquiry or interference. This view also rests on separation of powers concerns that emphasize the constitutional allocation of foreign affairs powers to the political branches, as well courts' sense of institutional incompetence to resolve matters of national security. This should not mean, however, that courts should never have a significant role curtailing some of the actions of the political branches on matters of foreign affairs or national security. One important role for the courts, for example, is to step in when the political branches themselves have not been faithful to the structural requirements of checks and balances embedded in the Constitution.

Particularly in times of national emergency, the trend has proved too common that immigration law becomes a convenient tool to carry out law enforcement functions that fall beyond the scope of immigration control.[196] Many times, federal agencies have executed these broad powers against foreign nationals during times of national emergencies with full congressional approval and, therefore, without significant recourse to constitutional challenges.[197] Yet, when the executive acts alone, even the checks and balances that could result from Congress having to make more of these critical choices in its legislative chambers gets lost when vital decisions are made by the very agency that seeks to increase its powers to act expediently, and often in secret, and away from public scrutiny.[198] Thus, it is indeed when the political branches already enjoy uniquely broad power that the courts should be vigilant in ensuring that it is Congress, not the Attorney General at his sole discretion, that is responsible for legislating in the area. Without judicial intervention, the structural framework for ensuring institutional accountability

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196. DAVID COLE, ENEMY ALIENS: DOUBLE STANDARDS AND CONSTITUTIONAL FREEDOMS IN THE WAR ON TERRORISM 85–179 (2003).

197. *See generally Id.*

198. Andres Snaider, Note, *The Politics and Tension in Delegating Plenary Power: The Need to Revive Nondelegation Principles in the Field of Immigration*, 6 GEO. IMMIGR. L. J. 107, 116 (1992).

over largely unaccountable agencies during national emergencies is absent "This scheme, so antithetical to American society and jurisprudence, should not be tolerated."[199]

199. *Id.* at 127.