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## Overseas Lawful Permanent Resident Terrorists: The Novel Approach for Revoking Their LPR Status

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# Overseas Lawful Permanent Resident Terrorists: The Novel Approach for Revoking Their LPR Status

DANIEL PINES\*

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## I. INTRODUCTION

In between U.S. citizens on one end of the spectrum and illegal aliens on the other lies a group of individuals who are intimately connected to the United States but with fewer protections than U.S. citizens. Lawful Permanent Residents (LPRs), informally known as “green card holders,” occupy a special place in the United States. As their name implies, they have been granted the ability to permanently reside in the United States,<sup>1</sup> presumably as a stepping stone toward full U.S. citizenship. Approximately 13 million individuals are currently categorized as LPRs.<sup>2</sup>

Most of these 13 million individuals fall squarely within the purpose of their status. They are resident in the United States, fully law-abiding, and intent on taking the steps necessary to gain U.S. citizenship. Unfortunately, many LPRs do not fit within the intent and purpose of LPR status. Specifically, they are no longer resident in the United States and have demonstrated no plan to return. More troubling, a significant number of these “out-of-status” LPRs not only have zero intention of permanently residing in the United States but also are terrorists engaged in activities intended to harm the United States. Individuals who fall within this category are sprinkled throughout the terrorist hierarchy, from line soldiers to recruiters to one of al Qaeda’s top operatives. Here are a few examples:

- Najibullah Zazi is an LPR who traveled overseas for the intended purpose of fighting Americans in Afghanistan.<sup>3</sup> After receiving training at an al Qaeda camp, the terrorist organization directed Mr. Zazi to return to the United States in 2009 in order to stage an attack on the New York City subway system using homemade improvised explosive devices.<sup>4</sup>
- Approximately thirty U.S. residents, including many LPRs, have traveled to Somalia since 2007 in order to join Al Shabaab, an al Qaeda-connected terrorist group.<sup>5</sup> Amongst this group were five young, male, Somali LPRs who left Minnesota

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1. 8 U.S.C. § 1101(a)(20) (2012).

2. See NANCY RYTINA, U.S. DEP’T OF HOMELAND SEC., ESTIMATES OF THE LEGAL PERMANENT RESIDENT POPULATION IN 2011, at 1, 3 (2012), available at [http://www.dhs.gov/sites/default/files/publications/immigration-statistics/ois\\_lpr\\_pe\\_2011.pdf](http://www.dhs.gov/sites/default/files/publications/immigration-statistics/ois_lpr_pe_2011.pdf).

3. See Lauren B. O’Brien, *The Evolution of Terrorism Since 9/11*, FBI L. ENFORCEMENT BULL., Sept. 2011, at 4; Mosi Secret, *Jury Convicts U.S. Citizen in Plot To Bomb City’s Subways*, N.Y. TIMES, May 2, 2012, at A19.

4. See O’Brien, *supra* note 3, at 4, 6, 8; Secret, *supra* note 3, at A19, A24.

5. See *Responding to the Call: Al Qaeda’s American Recruits*, ANTI-DEFAMATION LEAGUE (July 25, 2011), [http://www.adl.org/main\\_Terrorism/al\\_qaeda\\_american\\_recruits.htm](http://www.adl.org/main_Terrorism/al_qaeda_american_recruits.htm).

in 2007 in order to train with the terrorist organization.<sup>6</sup> Believed to still be in Somalia working with Al Shabaab, these five LPRs were charged in a U.S. indictment in 2009 with providing and conspiring to provide material support to terrorists, as well as conspiring to kill, kidnap, maim, and injure.<sup>7</sup> The individual who recruited these young Minnesotans for Al Shabaab was also an LPR residing overseas.<sup>8</sup>

- Habis Abdulla al Saoub is an LPR who was a member of the “Portland Seven,” an infamous terrorist cell in Portland, Oregon.<sup>9</sup> He fled overseas in 2001 to avoid arrest.<sup>10</sup> He has been placed on the FBI’s most wanted list, with U.S. authorities offering \$5 million for information leading to his capture or conviction.<sup>11</sup>
- Most concerning perhaps is Adnan Shukrijumah, an LPR who at one time was a student at Broward Community College in Florida.<sup>12</sup> Shukrijumah left Florida in the early 2000s to join

6. See ANTI-DEFAMATION LEAGUE, AL SHABAAB’S AMERICAN RECRUITS 1, 12–14 (2013), available at <http://www.adl.org/assets/pdf/combating-hate/al-shabaabs-american-recruits.pdf>. The United States designated Al Shabaab as a terrorist organization in 2008. *Foreign Terrorist Organizations*, U.S. DEP’T ST., <http://www.state.gov/j/ct/rls/other/des/123085.htm> (last visited May 26, 2014).

7. See ANTI-DEFAMATION LEAGUE, *supra* note 6, at 12–14. The family of one of these LPRs claims that he was killed while fighting in Somalia in July 2009. *Id.* at 14.

8. See *id.* at 12.

9. See *Habis Abdulla al Saoub*, GLOBAL JIHAD (Apr. 9, 2008, 6:56 AM) [http://www.globaljihad.net/view\\_page.asp?id=1096](http://www.globaljihad.net/view_page.asp?id=1096); Peter Y. Hong, *Portland Terror Suspect Released Pending Trial*, L.A. TIMES (Oct. 11, 2002), <http://articles.latimes.com/2002/oct/11/nation/na-portland11>.

10. *Habis Abdulla al Saoub*, *supra* note 9.

11. See *id.*; *Two Plead Guilty in Oregon Terror Case*, CNN (Oct. 16, 2003, 6:21 PM), [http://articles.cnn.com/2003-10-16/justice/terror.suspects\\_1\\_qaeda-habis-abdulla-al-saoub-october-martinique-lewis?\\_s=PM:LAW](http://articles.cnn.com/2003-10-16/justice/terror.suspects_1_qaeda-habis-abdulla-al-saoub-october-martinique-lewis?_s=PM:LAW). There are reports that al Saoub was killed in Pakistan in 2003. See *Habis Abdulla al-Saoub*, DISCOVERTHENETWORKS.ORG, <http://www.discoverthenetworks.org/individualProfile.asp?indid=724> (last visited May 26, 2014).

12. See *Fla. Mom Says Son Is Not a High-Ranking al Qaeda Terrorist, but a Kind Boy*, N.Y. POST (Aug. 7, 2010, 5:33 PM), [http://www.nypost.com/p/news/national/kind\\_mom\\_says\\_son\\_terrorist\\_not\\_aBCgnOitZO16AXv57TASMP](http://www.nypost.com/p/news/national/kind_mom_says_son_terrorist_not_aBCgnOitZO16AXv57TASMP) [hereinafter *Fla. Mom*] (reporting that a Florida resident named Adnan Shukrijumah traveled to Afghanistan to learn battle tactics from al Qaeda and subsequently returned to the United States to participate in the plot to bomb the New York City subway system). Some reports have erroneously claimed that Shukrijumah is a naturalized U.S. citizen. See, e.g., William K.

al Qaeda.<sup>13</sup> He originally trained with Jose Padilla to engage in various terrorist activities on behalf of the organization<sup>14</sup> but has steadily moved up al Qaeda's ranks. He is now believed to be al Qaeda's head of global operations, a rank generally considered to be the third highest in the organization and a position once held by alleged 9/11-mastermind Khalid Sheikh Mohammed.<sup>15</sup> In 2010, the U.S. government indicted Shukrijumah in the Eastern District of New York for his alleged involvement in terrorist plots against subway targets in both the United States and Great Britain.<sup>16</sup> He is currently on the FBI's most wanted terrorist list with a \$5 million reward for information leading to his capture.<sup>17</sup> He remains in hiding overseas.<sup>18</sup>

These and similar LPR terrorists who have been out of the country for months if not years sully the good name of the vast majority of LPRs who are actually residents here and entirely law-abiding. Such out-of-status LPR terrorists also may be taking away immigration opportunities that could be provided to others.<sup>19</sup> More concerning, their LPR status allows them to enter the United States more easily,<sup>20</sup> possibly to commit terrorist attacks. Typically, LPRs who have been overseas for a

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Rashbaum, *Shadowy Qaeda Leader Is Indicted in Subway Bomb Plot*, N.Y. TIMES, July 8, 2010, at A18.

13. See *Fla. Mom*, *supra* note 12.

14. JANICE L. KEPHART, CTR. FOR IMMIGRATION STUDIES, IMMIGRATION AND TERRORISM: MOVING BEYOND THE 9/11 STAFF REPORT ON TERRORIST TRAVEL 19 (2005), available at <http://www.cis.org/sites/cis.org/files/articles/2005/kephart.pdf>.

15. See *Fla. Mom*, *supra* note 12.

16. *Most Wanted Terrorists: Adnan G. El Shukrijumah*, FED. BUREAU INVESTIGATION, [http://www.fbi.gov/wanted/wanted\\_terrorists/adnan-g.-el-shukrijumah](http://www.fbi.gov/wanted/wanted_terrorists/adnan-g.-el-shukrijumah) (last visited May 26, 2014).

17. *Id.*

18. See *Fla. Mom*, *supra* note 12.

19. See *Demore v. Kim*, 538 U.S. 510, 518 (2003) (noting with approval Congress's statement that "aliens who enter or remain in the United States in violation of our law are effectively taking immigration opportunities that might otherwise be extended to others" (quoting S. REP. NO. 104-249, at 7 (1996)) (internal quotation marks omitted)); CONG. BUDGET OFFICE, IMMIGRATION POLICY IN THE UNITED STATES: AN UPDATE 6 (2010), available at [http://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/119xx/doc11959/12-03-immigration\\_chartbook.pdf](http://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/119xx/doc11959/12-03-immigration_chartbook.pdf) (discussing in detail the numeric limitations of certain categories of persons eligible for admission for LPR status).

20. See *International Travel as a Permanent Resident*, U.S. CITIZENSHIP & IMMIGR. SERVICES, <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=0c353a4107083210VgnVCM100000082ca60aRCRD&vgnnextchannel=0c353a4107083210VgnVCM100000082ca60aRCRD> (last updated July 26, 2010) (asserting that an LPR needs only a valid, unexpired permanent resident card to reenter the United States after overseas travel).

significantly long period of time are required to formally “abandon” their LPR status if and when they seek to enter the United States.<sup>21</sup> However, even if an LPR agrees to abandon LPR status, it is usually in exchange for the opportunity to enter the country on a visa.<sup>22</sup> If the LPR is traveling to the United States in order to commit a terrorist attack, relinquishing LPR status in exchange for admission is quite a good deal. Indeed, there is significant evidence that al Qaeda and other terrorist organizations are seeking to recruit U.S. citizens and LPRs precisely due to the relative ease with which they can pierce U.S. borders and operate in the United States.<sup>23</sup> As one observer notes, LPR status affords terrorists “almost complete freedom of action, without most of the restrictions that encumber visitors, not to mention illegal aliens.”<sup>24</sup> It seems to be a successful campaign, as the number of such U.S. and LPR terrorists appears to be increasing.<sup>25</sup>

Perhaps most critical, the LPR status of these overseas terrorists hinders the U.S. government’s ability to locate and monitor them, share information on them amongst U.S. government agencies, develop evidence to prosecute

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21. See *Bigler v. U.S. Attorney Gen.*, 451 F.3d 728, 730 (11th Cir. 2006) (discussing how an LPR had to fill out a form abandoning LPR status in order to reenter the United States); Igbanugo, *Unintentional Abandonment of Lawful Permanent Resident Status: Causes, Consequences and Prevention*, MSHALE (Oct. 21, 2011), <http://mshale.com/2011/10/21/unintentional-abandonment-of-lawful-permanent-resident-status-causes-consequences-and-prevention/> (describing how LPRs may have to abandon status to reenter the United States); *International Travel as a Permanent Resident*, *supra* note 20.

22. See *Bigler*, 451 F.3d at 730 (describing how an out-of-status LPR was issued an entry visa after agreeing to formally abandon status). Even if the LPR refuses to formally abandon LPR status, the U.S. government will typically take the person’s “green card,” stamp the individual’s foreign passport allowing one year of reentry to the United States, and serve the individual with a Notice to Appear before an immigration court to explain why the individual’s LPR status should not be revoked. Erinna Delle Brodsky, *Losing a Green Card*, LAW BRODSKY, [http://www.lawbrodsky.com/losing\\_a\\_green\\_card.htm](http://www.lawbrodsky.com/losing_a_green_card.htm) (last visited May 26, 2014).

23. See Catherine Herridge, *Al Qaeda in Yemen Targets More American Recruits*, FOX NEWS (Jan. 10, 2012), <http://www.foxnews.com/politics/2012/01/10/al-qaeda-in-yemen-targets-more-american-recruits/>; *Al Qaeda Recruits a Growing Number of Americans*, NEWSWEEK, <http://www.thedailybeast.com/newsweek/2009/09/29/homecoming.html> (last updated July 1, 2010, 1:41 PM).

24. Mark Krikorian, *Eternal Vigilance: Handing Out Green Cards Is a Security Matter*, CENTER FOR IMMIGR. STUD. (July 2002), <http://cis.org/GreenCardSecurity>.

25. See Andrea Stone, *No-Fly List Maintained by FBI Includes Double the U.S. Citizens Since 2009*, HUFFINGTON POST, [http://www.huffingtonpost.com/2012/06/01/no-fly-list\\_n\\_1563261.html](http://www.huffingtonpost.com/2012/06/01/no-fly-list_n_1563261.html) (last updated June 1, 2012, 5:26 PM) (noting that the number of U.S. citizens and green card holders on the FBI’s terrorist watchlist has more than doubled since 2009).

them, and take action against them to prevent them from engaging in a terrorist attack.<sup>26</sup> LPRs—even overseas, out-of-status, terrorist LPRs—are protected by at least some aspects of the U.S. Constitution wherever they reside, though the courts are still trying to determine exactly which constitutional rights apply to LPRs overseas.<sup>27</sup> Critical statutes and executive orders also serve to protect such LPRs, including key portions of the Foreign Intelligence Surveillance Act of 1978 (FISA), the Privacy Act of 1974, and Executive Order (EO) 12,333.<sup>28</sup>

As a result, individuals who have violated every provision and concept of their LPR status, are focused on destroying this country, and would be stripped of their LPR status and removed from this country—and possibly prosecuted—if they resided in the United States or appeared at U.S. borders are permitted to remain protected by their LPR status because they reside overseas and out of U.S. government reach. Further, there is no indication that the U.S. government has taken any steps to strip these overseas terrorists of their LPR status. I have been unable to find a single court case—whether in federal, state, or immigration court—in which the U.S. government has attempted to revoke the status of an out-of-status LPR. There is no indication that any member of Congress or the executive branch has raised the issue in any speech or report. In fact, I was unable even to find mention of the matter in a single law review, magazine, or newspaper article. And this gap in discussion applies not just to revoking the status of overseas LPR terrorists but indeed to the revocation of the status of *any* overseas LPR, regardless of how long the LPR may have been abroad and what the LPR may have been doing. Indeed, it is difficult to find any discussion at all of the issue of overseas LPRs in any statute, court case, scholarly writing, or media piece.

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26. See Exec. Order No. 12,333, 3 C.F.R. 200, 212, 215–16 (1982), *reprinted as amended in* 50 U.S.C. § 401 app. at 57–66 (2006 & Supp. V 2011); Krikorian, *supra* note 24.

27. See, e.g., *United States v. Verdugo-Urquidez*, 494 U.S. 259, 264–68 (1990) (suggesting that portions of the U.S. Constitution, especially the portions of the Fifth and Sixth Amendments that regulate procedure in criminal trials, may apply to persons overseas who have developed significant connections with the United States); *United States v. Barona*, 56 F.3d 1087, 1094 (9th Cir. 1995) (“It is yet to be decided, however, whether a resident alien [is protected by the Fourth Amendment] when he or she steps outside the territorial borders of the United States.” (citation omitted)); Tung Yin, *Procedural Due Process To Determine “Enemy Combatant” Status in the War on Terrorism*, 73 TENN. L. REV. 351, 376–77 (2006) (noting that some protections of the Bill of Rights, such as portions of the First, Second, Third, and Sixth Amendments, would not work well outside of the country as they could open the U.S. government to lawsuits for foreign policy activities).

28. See *infra* Part III.A–B.

This Article therefore seeks to break the silence by examining the issue of overseas LPRs and offering a mechanism by which the U.S. government could take affirmative action to file cases in immigration courts to strip out-of-status LPR terrorists of their LPR status. As the United States legally can, and routinely does, revoke the LPR status of out-of-status LPRs who appear at U.S. borders,<sup>29</sup> the United States could also take away such status for those who have resorted to terror, without having to wait—perhaps in vain—for them to appear on the United States’ doorstep. The purpose of granting an individual LPR status is, as the name suggests, to allow that person to reside permanently inside the United States as an initial stage toward U.S. citizenship. Out-of-status terrorists display by their acts and deeds that they have no interest in this goal and indeed embody the exact antithesis of the purpose of Lawful Permanent Resident status, given that they are in fact unlawful, nonpermanent, and nonresident. And, although their numbers might not yet be enormous, as case after case after case has demonstrated, even terrorists in small numbers can have grave impact.<sup>30</sup> Indeed, out-of-status terrorist LPRs raise an even greater threat than standard terrorists due to the above-mentioned ability of such LPR terrorists to travel into the United States and the legal limitations on the U.S. government to track and thwart them.

Part II of this Article provides a background on immigration law in general and LPR status in particular. Part III evaluates the limits that the Constitution and U.S. laws place on the government’s ability to locate, monitor, track, collect evidence on, and prevent attacks by overseas terrorist LPRs. Part IV depicts the current mechanisms for revoking LPR status as a general matter—mechanisms that the government routinely uses with regard to LPRs inside the United States but has thus far chosen not to employ with regard to out-of-status overseas LPRs. Finally, Part V describes how the United States could take affirmative steps to use existing statutory and case law to strip out-of-status terrorist LPRs of their status in a manner that fully comports with due process.

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29. See, e.g., *Alvarez v. Dist. Dir.*, 539 F.2d 1220, 1222–25 (9th Cir. 1976).

30. See, e.g., *9/11 Attacks*, HISTORY, <http://www.history.com/topics/9-11-attacks> (last visited May 26, 2014); *1993 World Trade Center Bombing*, 9/11 MEMORIAL, <http://www.911memorial.org/1993-world-trade-center-bombing> (last visited May 26, 2014).

## II. BACKGROUND

U.S. statutes define an *alien* as any person who is “not a citizen or national of the United States.”<sup>31</sup> *LPR* is defined as an alien who has been “lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed.”<sup>32</sup> The number of individuals with *LPR* status has increased dramatically in recent years.<sup>33</sup> Approximately 600,000 individuals were granted *LPR* status in 2000; by 2011, that number had surged to more than 1 million.<sup>34</sup> As noted above, there are now approximately 13 million individuals holding U.S. *LPR* status.<sup>35</sup>

Among aliens, lawful permanent residence is considered the “gold standard,”<sup>36</sup> just one notch below U.S. citizenship.<sup>37</sup> As Supreme Court Justice Souter has stated, “The immigration laws give *LPRs* the opportunity to establish a life permanently in this country by developing economic, familial, and social ties indistinguishable from those of a citizen.”<sup>38</sup> He further notes that

*LPRs* share in the economic freedom enjoyed by citizens: they may compete for most jobs in the private and public sectors without obtaining job-specific authorization, and apart from the franchise, jury duty, and certain forms of public assistance, their lives are generally indistinguishable from those of United States citizens.<sup>39</sup>

*LPRs* also have considerable flexibility in leaving the United States for limited trips and as one commentator has described, “may travel for short periods of time as freely as their passports and pocketbooks will allow.”<sup>40</sup> Generally speaking, immigration statutes and regulations permit *LPRs* to travel outside the United States for up to six months without

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31. 8 U.S.C. § 1101(a)(3) (2012).

32. 8 U.S.C. § 1101(a)(20) (2012).

33. See RUTH ELLEN WASEM, CONG. RESEARCH SERV., R42866, PERMANENT LEGAL IMMIGRATION TO THE UNITED STATES: POLICY OVERVIEW 6–9 (2012), available at <http://www.fas.org/sgp/crs/homesecc/R42866.pdf>.

34. See *id.* at 7 fig.2, 8.

35. See RYTINA, *supra* note 2, at 1.

36. Nancy Morawetz, *The Invisible Border: Restrictions on Short-Term Travel by Noncitizens*, 21 GEO. IMMIGR. L.J. 201, 205 (2007).

37. Krikorian, *supra* note 24.

38. *Demore v. Kim*, 538 U.S. 510, 544 (2003) (Souter, J., concurring in part and dissenting in part).

39. *Id.*; see also *Alvarez v. Dist. Dir.*, 539 F.2d 1220, 1224 (9th Cir. 1976) (recognizing the ability of *LPRs* to work in the United States); CONG. BUDGET OFFICE, *supra* note 19, at 5 (“*LPRs* are eligible to live and work in the United States, own property, and join the armed forces . . .”).

40. Morawetz, *supra* note 36, at 205; see also *Alvarez*, 539 F.2d at 1224 (noting that *LPRs* can make short trips outside the United States).

any restrictions, including the need for a visa.<sup>41</sup> An absence of more than six months will generally require an LPR to obtain an immigrant visa and be subject to other requirements<sup>42</sup> and may be considered as breaking the continuous residency necessary for acquiring U.S. citizenship.<sup>43</sup> Stay away for more than a year, and the U.S. government generally considers the LPR to have effectively abandoned LPR status.<sup>44</sup>

However, if they remain in the United States, LPRs are eligible to be placed on the short list to become naturalized U.S. citizens. Pending satisfaction of certain eligibility requirements,<sup>45</sup> LPRs generally can apply to become U.S. citizens after five years of residence or as little as three years if they marry a U.S. citizen.<sup>46</sup> LPRs can also acquire U.S. visas for their family members.<sup>47</sup> Once they become U.S. citizens, they can then sponsor a foreign national spouse and certain other foreign national family members for LPR status.<sup>48</sup>

Like U.S. citizens, LPRs are fully protected by the U.S. Constitution when they reside inside the United States.<sup>49</sup> As discussed in Part III.C below, LPRs also appear to be protected by at least parts of the Constitution even when they are overseas.

### III. LIMITATIONS ON U.S. GOVERNMENT ACTION WITH REGARD TO OVERSEAS LPRS

The LPR status of overseas terrorists places significant restrictions on the ability of the United States to prevent terrorism. Specifically, such

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41. See 8 U.S.C. § 1101(a)(13)(C)(ii) (2012); *Singh v. Reno*, 113 F.3d 1512, 1515 (9th Cir. 1997) (noting that an LPR does not need a visa to return to the United States); *Aleem v. Perryman*, 114 F.3d 672, 676 (7th Cir. 1997) (same); *Morawetz*, *supra* note 36, at 205–06.

42. See 8 U.S.C. § 1101(a)(13)(C) (2012); *Vartelas v. Holder*, 132 S. Ct. 1479, 1485 (2012).

43. See *International Travel as a Permanent Resident*, *supra* note 20.

44. See *id.*

45. 8 U.S.C. § 1422 (2012).

46. See 8 C.F.R. § 316.2 (2013); 8 C.F.R. § 319.1 (2013); see also Jose Antonio Vargas, *Not Legal Not Leaving*, TIME, June 25, 2012, at 34, 38 (noting that “[o]nce you have a green card, you’re on your way to eventual citizenship”).

47. See CONG. BUDGET OFFICE, *supra* note 19, at 10–11.

48. *Id.*

49. See *Demore v. Kim*, 538 U.S. 510, 543 (2003) (Souter, J., concurring in part and dissenting in part); *Plyler v. Doe*, 457 U.S. 202, 210 (1982); *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212–13 (1953); *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886); *DeSousa v. Reno*, 190 F.3d 175, 184 (3d Cir. 1999).

LPR status limits the ability of the U.S. government to find and monitor such terrorists, share information about them with other U.S. government agencies, procure evidence to prosecute them, and take steps to prevent them from engaging in terrorist attacks.

#### A. Finding and Monitoring Terrorists

EO 12,333 is a presidential directive originally issued by President Reagan in 1981.<sup>50</sup> Amended several times since,<sup>51</sup> EO 12,333 is considered the seminal presidential order for the U.S. intelligence community, providing guidance and restrictions on what the U.S. government can and cannot do to protect national security.<sup>52</sup>

Amongst its various provisions, EO 12,333 sets limitations on the U.S. government's ability to collect information overseas against "*United States persons*," which it defines as including not just U.S. citizens but also LPRs.<sup>53</sup> The intelligence community must employ "the least intrusive collection techniques feasible" to collect information on U.S. persons.<sup>54</sup> Further, physical surveillance of U.S. persons overseas can be conducted only if its purpose is to collect "significant" foreign intelligence that cannot reasonably be acquired by other methods.<sup>55</sup>

Most critically, EO 12,333 precludes the U.S. government from engaging in electronic surveillance, unconsented physical searches, mail surveillance, physical surveillance, or video monitoring against U.S. persons overseas unless such actions "are in accordance with procedures established by the head of the Intelligence Community element concerned or the head of a department containing such element and approved by the Attorney General, after consultation with the [Director of National Intelligence]."<sup>56</sup> The Attorney General must then, on a case-by-case basis, personally approve the use of any such technique against a U.S. person abroad after determining "that there is probable cause to believe that the technique is directed against a foreign power or an agent of a foreign power" and that the collection conforms with the FISA.<sup>57</sup>

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50. See Exec. Order No. 12,333, *supra* note 26.

51. See, e.g., Exec. Order No. 13,284, 3 C.F.R. 161, 163, (2004), *reprinted as amended in* 6 U.S.C. § 121, at 764 (2012) (amending Exec. Order No. 12,333); Exec. Order No. 13,355, 3 C.F.R. 218 (2005) (same); Exec. Order No. 13,470, 3 C.F.R. 218 (2009) (same).

52. See Exec. Order No. 12,333, *supra* note 26, § 1.1.

53. *Id.* § 3.4(i).

54. *Id.* § 2.4.

55. *Id.* § 2.4(d).

56. *Id.* § 2.4.

57. *Id.* §§ 2.4, 2.5.

The FISA statute also defines *United States persons* to include LPRs.<sup>58</sup> Generally speaking, the statute requires the U.S. government to acquire a warrant from a special U.S. federal court in Washington, D.C. in order to target U.S. persons overseas using electronic surveillance<sup>59</sup> or to use other collection techniques—such as video monitoring, conducting physical searches, or opening mail—where the U.S. person “has a reasonable expectation of privacy and a warrant would be required if the acquisition were conducted inside the United States for law enforcement purposes.”<sup>60</sup> Acquisition of such FISA warrants is a complicated, difficult, and time-consuming affair.<sup>61</sup> In 2007, then-Director of National Intelligence Mike McConnell estimated that it took about 200 man-hours for the U.S. government to get a FISA warrant to collect on just a single telephone number of a U.S. person.<sup>62</sup>

### B. Sharing Information About Terrorists

The Privacy Act prohibits any U.S. government agency from disclosing “any record which is contained in a system of records” to any person or even to another U.S. government agency, absent various exceptions or the consent of the individual to whom the record pertains.<sup>63</sup> Its restrictions, however, apply to protect only the records of U.S. citizens and LPRs.<sup>64</sup> It

58. 50 U.S.C. § 1801(i) (2006).

59. 50 U.S.C. § 1881b(a)(1) (2006).

60. 50 U.S.C. § 1881c(a)(2) (2006).

61. See Chris Roberts, *Transcript: Debate on the Foreign Intelligence Surveillance Act*, EL PASO TIMES (Aug. 22, 2007, 1:05 AM), [http://www.elpasotimes.com/news/ci\\_6685679](http://www.elpasotimes.com/news/ci_6685679) (discussing then-Director of National Intelligence Mike McConnell’s lament about the extraordinary difficulty in acquiring FISA warrants); Douglas Waller, *A Better Way To Eavesdrop?*, TIME (Feb. 2, 2006), <http://www.time.com/time/nation/article/0,8599,1155835,00.html> (noting complaints by the Bush Administration that obtaining a FISA warrant took too long and required too much paperwork).

62. Roberts, *supra* note 61 (interviewing then-Director of National Intelligence Mike McConnell).

63. 5 U.S.C. § 552a(b) (2012).

64. See 5 U.S.C. § 552a(a)(2) (2012); see also *Adjudicator’s Field Manual—Redacted Public Version*, U.S. CITIZENSHIP & IMMIGR. SERVICES, <http://www.uscis.gov/ilink/docView/AFM/HTML/AFM/0-0-0-1/0-0-0-1067/0-0-0-1780.html> (last visited May 26, 2014) (“The Privacy Act of 1974, 5 U.S.C. 552a, establishes safeguards for the protection of records the Government collects and maintains on United States citizens and lawfully admitted permanent residents.”); *Frequent Questions*, U.S. ENVTL. PROTECTION AGENCY, <http://www.epa.gov/privacy/faqs/index.htm> (last updated Sept. 17, 2013) (“The Privacy Act only applies to U.S. citizens or lawful permanent resident aliens . . . .”); *Frequently Asked Questions—General Information*, OFF. SECRETARY DEF. & JOINT STAFF,

therefore precludes U.S. government agencies from sharing information amongst themselves with regard to LPR terrorists, unless a given government record related to an LPR fits within one of the exceptions listed in the statute.<sup>65</sup> Failure to comply exposes violators to both civil suit and criminal penalty.<sup>66</sup>

### C. Taking Action To Prevent Terrorist Attacks

Once an overseas LPR terrorist has been identified, the U.S. government would obviously like to be able to take action to prevent the LPR from launching a terrorist attack. Most ideally, this would involve bringing the terrorist to justice by prosecuting and convicting the LPR in a U.S. court and then imprisoning the LPR in a U.S. jail where the LPR can no longer commit terrorist acts. Alternatively, either alone or in conjunction with another country, the government might also wish to seize the LPR's property or bank accounts to eliminate financing options or may desire to detain the individual for questioning.

The LPR status of these overseas terrorists, however, complicates matters and may in fact preclude the ability of the U.S. government to take some or all of these actions to prevent terrorist attacks. The issue hinges on whether overseas LPRs are entitled to constitutional protections, and in particular, whether they are entitled to the Fourth Amendment's protection against "unreasonable searches and seizures" and warrant requirement and the Fifth Amendment's due process protection.<sup>67</sup>

Unfortunately, the question of whether overseas LPRs are protected by the Constitution is an extremely murky area. As one commentator has noted, it is an issue that has "bedeviled the courts" time and time again.<sup>68</sup> It is well established that all LPRs, as well as all U.S. citizens and indeed all aliens, including those illegally inside U.S. borders, are protected by the U.S. Constitution when they reside *inside* the United States.<sup>69</sup> Whether

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<http://www.dod.gov/pubs/foi/privacy/FrequentlyAskedQuestions.html> (last visited May 26, 2014) ("The Privacy Act only applies to U.S. citizens or lawful permanent resident aliens . . .").

65. See 5 U.S.C. § 552a(b).

66. See 5 U.S.C. §§ 552a(g), 552a(i) (2012).

67. See U.S. CONST. amends. IV, V.

68. Kevin Johnson, *Argument Preview: The Rights of Lawful Permanent Residents Returning to the U.S.*, SCOTUSBLOG (Jan. 15, 2012, 9:00 AM), <http://www.scotusblog.com/2012/01/argument-preview-the-rights-of-lawful-permanent-residents-returning-to-the-u-s/>.

69. See, e.g., *Demore v. Kim*, 538 U.S. 510, 543 (2003) (Souter, J., concurring in part and dissenting in part) ("It has been settled for over a century that all aliens within our territory are 'persons' entitled to the protection of the Due Process Clause."); *Plyler v. Doe*, 457 U.S. 202, 210 (1982) ("Aliens, even aliens whose presence in this country is unlawful, have long been recognized as 'persons' guaranteed due process of law by the

such constitutional protections, and especially the Fourth and Fifth Amendments, apply to LPRs outside U.S. borders becomes less clear.

As noted in the discussion below, however, it does appear that at least some provisions of those amendments protect LPRs overseas and therefore restrict the U.S. government's ability to take action against them.<sup>70</sup> Moreover, until the courts decide these matters definitively, there is valid reason to believe that U.S. government agencies operate under the presumption that these provisions do in fact apply to overseas LPRs and therefore self-regulate their actions against LPRs given that a mistake in this area would not only violate the premier law of this land but could also subject individual government employees to personal liability.<sup>71</sup>

### 1. Fourth Amendment

The Fourth Amendment provides in pertinent part for the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."<sup>72</sup> The Supreme Court has determined that by using the term *the people*, the Founders of this country intended the extraterritorial protections of the Fourth Amendment to apply solely to "a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community."<sup>73</sup> Based upon this, the Court concluded that the Fourth Amendment does not protect aliens overseas who have no

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Fifth and Fourteenth Amendments."); *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 213 (1953) ("[A] lawful resident alien may not captiously be deprived of his constitutional rights to procedural due process."); *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) (holding that Chinese aliens in the United States are entitled to due process); *DeSousa v. Reno*, 190 F.3d 175, 184 (3d Cir. 1999) ("It is undisputable that our constitution provides due process and equal protection guarantees to aliens as well as citizens.").

70. See *infra* Part III.C.1-2.

71. See *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 397 (1971) (holding that government officers can be sued in their personal capacity for violating certain provisions of the U.S. Constitution). Thus far, the Court has authorized *Bivens* claims only for certain alleged constitutional violations, including claims for Fourth Amendment violations, but not yet for claims of violations of the Fifth Amendment's due process provisions. See *Arar v. Ashcroft*, 585 F.3d 559, 571 (2d Cir. 2009) (en banc).

72. U.S. CONST. amend. IV.

73. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990).

connection with the United States.<sup>74</sup> On the flip side, the Court indicated that the amendment clearly applies to protect U.S. citizens overseas.<sup>75</sup>

Whether it also applies to overseas LPRs has not been clarified by the courts. As the Ninth Circuit has noted, “It is yet to be decided, however, whether a resident alien has . . . ‘otherwise developed sufficient connection with this country,’ to be considered one of ‘the People of the United States’ even when he or she steps outside the territorial borders of the United States.”<sup>76</sup> However, all indications are that it should. After all, as noted above, no category of noncitizens has established a greater connection to the United States than LPRs.<sup>77</sup> If the Supreme Court did not intend the phrase “a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community”<sup>78</sup> to apply to LPRs, then it is difficult to imagine who the Court believes could possibly fit into this category. Put another way, if the Supreme Court believed extraterritorial Fourth Amendment protections extended solely to U.S. citizens, then it easily could have so stated. By using the more expansive “sufficient connection” language, the Court has indicated that the protection applies beyond U.S. citizens, with LPRs logically fitting into this more expansive category.

The Fourth Amendment also contains a requirement that “no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”<sup>79</sup> Given that overseas U.S. citizens and apparently LPRs are covered by the Fourth Amendment’s protection from unreasonable searches and seizures, it might be logical to assume that such individuals are also protected by the amendment’s Warrant Clause. However, the Second Circuit, which appears to be the only circuit to have considered this issue, has ruled otherwise in a case involving only U.S. citizens, but which presumably would also extend to overseas LPRs.<sup>80</sup> Reflecting on comments offered by the Supreme Court in dicta, the Second

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74. *See id.* at 266, 274–75.

75. *Id.* at 266; *see also id.* at 283 n.7 (Brennan, J., dissenting) (“[N]othing in the Court’s opinion questions the validity of the rule, accepted by every Court of Appeals to have considered the question, that the Fourth Amendment applies to searches conducted by the United States Government against United States citizens abroad.”).

76. *United States v. Barona*, 56 F.3d 1087, 1094 (9th Cir. 1995) (citation omitted) (quoting *Verdugo-Urquidez*, 494 U.S. at 265).

77. *See supra* text accompanying notes 36–39.

78. *Verdugo-Urquidez*, 494 U.S. at 265.

79. U.S. CONST. amend. IV.

80. *See In re Terrorist Bombings of U.S. Embassies in E. Afr.*, 552 F.3d 157, 167 (2d Cir. 2008) (holding that the Fourth Amendment’s Warrant Clause does not apply to overseas searches of U.S. citizens’ property after noting that no other court has considered the issue).

Circuit adroitly observed that U.S. judicial officers have no power to issue a warrant to authorize overseas searches; there is no legal precedent in U.S. history that requires such a warrant; and even if a U.S. court were to issue a warrant, it would have little to no legal effect in the foreign country.<sup>81</sup> The Second Circuit therefore concluded that “the Fourth Amendment’s warrant requirement does not govern searches conducted abroad by U.S. agents; such searches of U.S. citizens need only satisfy the Fourth Amendment’s requirement of reasonableness.”<sup>82</sup> It is unclear, however, whether the Second Circuit’s reasoning, though persuasive, will be adopted by other courts.

Overall, then, though the law in this area is ill-defined, it appears that the Fourth Amendment’s protection against unreasonable searches and seizures, and perhaps the warrant requirement, should apply to LPRs overseas. As noted above, the U.S. government has already indicted a number of overseas LPR terrorists<sup>83</sup> and no doubt would be interested in seeking and acquiring evidence to be used against them and other such terrorists if and when such individuals are brought to justice in U.S. courts. The LPR status of such terrorists, however, imposes Fourth Amendment restrictions on the U.S. government and thus limits the government’s ability to acquire evidence against these individuals for use at trial.

## 2. *Fifth Amendment*

The relevant portion of the Fifth Amendment of the U.S. Constitution protects any “person” from being “deprived of life, liberty, or property, without due process of law.”<sup>84</sup> This therefore requires the U.S. government to provide due process to any individual protected by this provision before the government can seize the person’s assets or detain the person. Whether the Fifth Amendment applies to LPRs overseas, however, is entirely unclear.

Like the Fourth Amendment, it is well established that the Fifth Amendment protects all individuals *inside* the United States, including LPRs.<sup>85</sup> The Supreme Court has also long held that the amendment protects

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81. *See id.* at 169–71.

82. *Id.* at 167.

83. *See supra* text accompanying notes 7, 16.

84. U.S. CONST. amend. V.

85. *See, e.g., Plyler v. Doe*, 457 U.S. 202, 210 (1982).

U.S. citizens overseas.<sup>86</sup> However, the Court has made clear that the amendment does *not* protect non-LPR aliens outside the sovereign territory of the United States.<sup>87</sup> Indeed, the Court has gone so far as to emphasize that for these non-LPR aliens, its “rejection of extraterritorial application of the Fifth Amendment was emphatic.”<sup>88</sup> Thus, even when a nonresident alien is at a U.S. border, the nonresident alien is entitled to *no* due process—“[t]his Court has long held that an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application, for the power to admit or exclude aliens is a sovereign prerogative.”<sup>89</sup>

Whether overseas LPRs are or are not entitled to due process under the Fifth Amendment, however, is not so clear. As noted above, the use of the term *the people* in the Fourth Amendment appears to ensure that the amendment’s protections apply not just to U.S. citizens overseas but also to LPRs abroad.<sup>90</sup> The Fifth Amendment does not use the term *the people* to describe who is entitled to due process but rather the term *person*,<sup>91</sup> which is generally considered to apply to a much broader spectrum of individuals.<sup>92</sup> As such, it would appear logical that the Fifth Amendment’s due process protections would apply to overseas LPRs as well.

Applicable case law appears to support this assertion. Although no court appears to have considered the due process rights of LPRs who are overseas, courts have routinely and consistently held that LPRs are entitled to the Fifth Amendment’s due process protection when they arrive at a U.S. border after returning from a brief trip abroad.<sup>93</sup> As the

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86. See, e.g., *Reid v. Covert*, 354 U.S. 1, 5–6 (1957); see also *United States v. Verdugo-Urquidez*, 494 U.S. 259, 270 (1990) (noting that *Reid* “decided that United States citizens stationed abroad could invoke the protection of the Fifth and Sixth Amendments”); Yin, *supra* note 27, at 353 (“[I]t is undisputed that . . . citizens within or outside the United States are entitled to due process.”).

87. See *Johnson v. Eisentrager*, 339 U.S. 763, 783–84 (1950); see also *Verdugo-Urquidez*, 494 U.S. at 269 (noting that under *Eisentrager*, “we have rejected the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States”).

88. *Verdugo-Urquidez*, 494 U.S. at 269.

89. *Landon v. Plasencia*, 459 U.S. 21, 32 (1982).

90. See *supra* text accompanying notes 72–78.

91. See U.S. CONST. amend. V.

92. See *Verdugo-Urquidez*, 494 U.S. at 265–66; *United States v. Barona*, 56 F.3d 1087, 1093 (9th Cir. 1995) (citing *Verdugo-Urquidez*, 494 U.S. at 274).

93. *Landon*, 459 U.S. at 31 (“The reasoning of *Chew* was only that a resident alien returning from a brief trip has a right to due process just as would a continuously present resident alien.” (citing *Kwong Hai Chew v. Colding*, 344 U.S. 590 (1953))); *Rafeedie v. INS*, 880 F.2d 506, 520 (D.C. Cir. 1989) (“[An LPR] has a liberty interest in being

courts have made clear that U.S. borders are not part of the United States—as indicated by the courts granting due process rights to non-LPR aliens inside the United States but not to such aliens at U.S. borders<sup>94</sup>—it certainly would appear that by granting due process to LPRs at U.S. borders, U.S. courts are indicating that LPRs are entitled to due process whenever they are outside the United States. Put another way, there is no suggestion in any constitutional, judicial, or scholarly precedent that constitutional rights are based on geographical proximity to the United States—neither precedent nor logic suggests that an LPR “magically” acquires Fifth Amendment rights by being five feet away from the United States at a border versus ten miles away in Mexico or thousands of miles away in Somalia or Afghanistan.

The only case law potentially tempering this conclusion is the 1953 Supreme Court case of *Shaughnessy v. United States ex rel. Mezei*.<sup>95</sup> That case involved an LPR who had been abroad in Hungary for nineteen months.<sup>96</sup> Upon seeking readmission, the U.S. government determined that he was a security threat, decided to permanently exclude him from the United States, and held him at Ellis Island because no other country would accept him.<sup>97</sup> Though noting that “a lawful resident alien may not captiously be deprived of his constitutional rights to procedural due process,” the Court nonetheless determined that the LPR in *Mezei* was not entitled to due process—specifically, a hearing regarding his detainment at Ellis Island—presumably due to his “protracted absence” from the United States, though the opinion is not especially clear.<sup>98</sup> However, *Mezei* appears to be an aberration, based on the Court being confronted with the extremely odd factual scenario of having an LPR excluded from the United States on security grounds but having no place else to go. Indeed, in the more than sixty years since its issuance, no court appears to have ever relied upon the *Mezei* opinion to preclude due process rights to an LPR.<sup>99</sup>

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permitted to reenter this country and is therefore entitled to due process before he can be denied admission.”).

94. See *supra* text accompanying notes 87–89.

95. 345 U.S. 206 (1953).

96. See *id.* at 214.

97. See *id.* at 207–08.

98. *Id.* at 213, 214.

99. See, e.g., *Landon v. Plasencia*, 459 U.S. 21, 33–34 (1982) (determining that *Mezei* did not “govern” the case before it as the appellant there “was absent from the country only a few days, and the United States . . . conceded that she ha[d] a right to due

Presuming then that the Fifth Amendment does apply to protect LPRs overseas in the same manner that it protects U.S. citizens abroad, it greatly limits the ability of the U.S. government to take action against overseas LPR terrorists. As noted above, the Fifth Amendment precludes the deprivation of life, liberty, or property without due process. This would therefore require the U.S. government to provide due process before engaging in a host of activities against an LPR overseas, including seizing the LPR's property, or requesting another country to do so,<sup>100</sup> or detaining the LPR, or requesting another country to detain the LPR for questioning.<sup>101</sup>

The actual amount of due process the government owes an overseas LPR, however, and the mechanism required for ensuring that due process are unclear. The Supreme Court has acknowledged that, unlike most other laws, due process is "flexible and calls for such procedural protections as the particular situation demands."<sup>102</sup> Some commentators assert that due process in such circumstances always requires prior approval from a federal judge. The U.S. government though has suggested that, in certain situations, executive branch review suffices to fulfill the due process requirement and prior judicial approval is unnecessary.<sup>103</sup> Everyone, however, appears to agree that at least some due process is required.<sup>104</sup>

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process"); *Rafeedie v. INS*, 880 F.2d 506, 521–22 (D.C. Cir. 1989) (determining that *Mezei* did not apply to the facts of the case before it).

100. See *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 52, 59 (1993) (holding that the U.S. government must provide due process before seizing property as part of a civil forfeiture); *Reid v. Covert*, 354 U.S. 1, 6 (1957) ("When the Government reaches out to punish a citizen who is abroad, the shield which the Bill of Rights and other parts of the Constitution provide to protect his life and liberty should not be stripped away just because he happens to be in another land."); *In re Terrorist Bombings of U.S. Embassies in E. Afr.*, 552 F.3d 157, 167 (2d Cir. 2008) (noting that it is "well settled" that "the Bill of Rights has extraterritorial application to the conduct abroad of federal agents directed against United States citizens" (quoting *United States v. Toscanino*, 500 F.2d 267, 280 (2d Cir. 1974)) (internal quotation marks omitted)).

101. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 531 (2004) (reaffirming "the fundamental nature of a citizen's right to be free from involuntary confinement by his own government without due process of law" in assessing the due process rights owed to a U.S. citizen picked up overseas as an enemy combatant and then detained on U.S. soil); *Demore v. Kim*, 538 U.S. 510, 513, 523–25 (2003) (noting that LPRs are entitled to due process before being detained); *Ferreras v. Ashcroft*, 160 F. Supp. 2d 617, 620–21, 629 (S.D.N.Y. 2001) (finding that LPRs are entitled to due process before being placed in detention after arriving back in the United States from a short trip abroad).

102. *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976) (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)) (internal quotation marks omitted).

103. See Eric Holder, U.S. Attorney Gen., Attorney General Eric Holder Speaks at Northwestern University School of Law (Mar. 5, 2012), available at <http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-1203051.html>.

104. See *id.*

Even if only executive branch review is required in order to comport with the due process rights of overseas LPRs, that review at the very least slows the government's ability to take action against overseas LPR terrorists. At worst, it may preclude some or indeed all actions that the government can take against such individuals if the government is unsure what level of due process is owed or if the LPRs do not meet whatever due process threshold is determined applicable.

#### IV. CURRENT MECHANISM EMPLOYED TO REVOKE LPR STATUS

Taken together, the above-mentioned limitations on the U.S. government's ability to thwart overseas terrorist LPRs are sufficiently significant to cause concern. After all, these are individuals who, by having long ago left U.S. shores to live overseas, have clearly demonstrated no intention to "permanently reside" in the United States as required for LPR status. They have then taken the further steps of joining or assisting terrorist organizations or engaging in terrorist activities that are anathema to the very country that granted them residency status. Yet, their status as U.S. LPRs ironically serves to limit the government's ability to prevent them from attacking this country. One way to resolve this problem would be for the U.S. government to mount a vigorous effort to strip them of LPR status. After all, LPR status is intended to be provided to and maintained by individuals who actually plan to reside in the United States, not those who have not only indicated no intention to permanently reside in this country but are also affirmatively taking action to cause physical harm to it. As discussed below, U.S. law provides a simple mechanism to strip such LPRs of their status; however, there is no evidence that any effort has been made to utilize this option.

Under the Fourteenth Amendment, the government cannot strip a *U.S. citizen* of citizenship unless the citizen "voluntarily relinquishes that citizenship."<sup>105</sup> This is due to the well-established principle that Congress does not have "any general power, express or implied, to take away an American citizen's citizenship without his assent. . . . In our country the people are sovereign and the Government cannot sever its relationship to the people by taking away their citizenship."<sup>106</sup> Indeed, the Supreme Court has stated that the loss of citizenship "is more serious than a taking of

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105. *Afroyim v. Rusk*, 387 U.S. 253, 268 (1967); *see also Vance v. Terrazas*, 444 U.S. 252, 260–61 (1980) (reaffirming *Afroyim*).

106. *Afroyim*, 387 U.S. at 257.

one's property, or the imposition of a fine or other penalty. For it is safe to assert that nowhere in the world today is the right of citizenship of greater worth to an individual than it is in this country."<sup>107</sup> Thus, the taking of U.S. citizenship would be considered "an extraordinarily severe penalty."<sup>108</sup>

However, the same restrictions do not apply with regard to revoking the status of LPRs, due to the long-recognized difference between U.S. citizens and aliens such as LPRs.<sup>109</sup> As the Supreme Court noted more than a century ago, "It is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases . . . as it may see fit to prescribe."<sup>110</sup> Based upon this, the Court has accepted that the U.S. government "may make rules as to aliens that would be unacceptable if applied to citizens."<sup>111</sup>

Such power over immigration matters is not a judicial prerogative, however, but rather falls firmly within the powers of Congress and the President.<sup>112</sup> As the Supreme Court has stated, "Courts have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control."<sup>113</sup> Indeed, the Court has gone so far as to assert that "'over no conceivable subject is the legislative power of Congress more complete than it is over' the admission of aliens."<sup>114</sup> To this end, courts typically grant tremendous deference to Congress and the President when it comes to immigration matters, including matters involving the provision and revocation of LPR status.<sup>115</sup>

The political branches of government have taken their role in governing immigration matters very seriously, filling an entire volume of the U.S. Code—Title 8—with laws related to immigration issues, including the

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107. *Schneiderman v. United States*, 320 U.S. 118, 122 (1943).

108. *Klapprott v. United States*, 335 U.S. 601, 612 (1949).

109. *See, e.g., Nishimura Ekiu v. United States*, 142 U.S. 651, 659 (1892) (indicating that LPR status can be revoked).

110. *Id.*

111. *Demore v. Kim*, 538 U.S. 510, 522 (2003).

112. *See Landon v. Plasencia*, 459 U.S. 21, 34 (1982) (noting that "control over matters of immigration is a sovereign prerogative, largely within the control of the Executive and the Legislature").

113. *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 210 (1953).

114. *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (quoting *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320, 339 (1909)).

115. *See, e.g., United States v. Yakou*, 428 F.3d 241, 247–48 (D.C. Cir. 2005) (describing the deference provided to the executive and legislative branches with regard to LPRs).

relevant issue of “removal” of aliens such as LPRs.<sup>116</sup> Until about fifteen years ago, the United States had two separate mechanisms for denying aliens what has been colloquially referred to as “the hospitality of the United States”: deportation—used when the alien resided in the United States—and exclusion—used when the alien sought to enter the United States after being abroad.<sup>117</sup> Under current law, however, the “[p]rior law concepts of ‘exclusion’ and ‘deportation’ are subsumed in . . . ‘removal’ proceedings.”<sup>118</sup> Although Title 8 does not explicitly describe what should happen to an LPR’s status if an LPR is “removed” from this country, the courts have consistently stripped away such LPR status as part of a final removal order.<sup>119</sup> This, of course, is a logical conclusion—if an LPR is being deported from or denied entry into the United States, then the LPR is also being denied permanent residence in this country.

A significant portion of Title 8 is dedicated to removal proceedings. Section 1229 addresses the mechanisms for initiating removal proceedings, including the requisite notice that must be provided to the LPR.<sup>120</sup> Section 1229a describes the procedure to be used in such proceedings.<sup>121</sup> Finally, §§ 1182 and 1227 enumerate various bases upon which an LPR or other alien can respectively be deported from this country or denied entry into it.<sup>122</sup> These last sections provide a slew of different scenarios that could lead to an LPR’s—or any alien’s—removal, including the conviction of certain serious crimes, the falsification of immigration documentation, and even practicing polygamy.<sup>123</sup>

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116. See, e.g., 8 U.S.C. § 1229a (2012).

117. *Vartelas v. Holder*, 132 S. Ct. 1479, 1484 (2012) (quoting *Landon*, 459 U.S. at 25) (internal quotation marks omitted).

118. *Ferreras v. Ashcroft*, 160 F. Supp. 2d 617, 622 n.1 (S.D.N.Y. 2001) (citing 8 U.S.C.A. § 1229a (West 1999 & Supp. 2001)).

119. See, e.g., *Yakou*, 428 F.3d at 247–48 (discussing how, absent statutory guidance, courts typically strip LPR status as part of a final removal order); *In re Duarte*, 18 I. & N. Dec. 329, 332 (B.I.A. 1982) (noting that an LPR is typically divested of LPR status as part of a final administrative removal order); *In re Lok*, 18 I. & N. Dec. 101, 105 (B.I.A. 1981) (stating that the court would “deem[] the lawful permanent resident status of an alien to end with the entry of a final administrative order of deportation”). Federal courts generally give extensive deference to the opinions of the Board of Immigration Appeals (B.I.A.), recognizing the board’s expertise in the area of immigration matters. See *Yakou*, 428 F.3d at 248.

120. See 8 U.S.C. § 1229 (2012).

121. See 8 U.S.C. § 1229a (2012).

122. See 8 U.S.C. §§ 1182, 1227 (2012).

123. See *id.* §§ 1182(a), 1227(a).

However, beyond §§ 1182 and 1227, there is another method by which LPRs can be denied entry into the United States and thus stripped of their LPR status: abandonment.<sup>124</sup> The intent of an LPR to abandon LPR status can be indicated in several ways.<sup>125</sup> Probably the clearest indicator is when an LPR voluntarily renounces LPR status by filling out U.S. government form I-407, simply entitled “Abandonment of Lawful Permanent Resident Status.”<sup>126</sup>

However, LPRs can also demonstrate abandonment without even signing a form, namely by leaving the United States for a prolonged period of time with “no fixed intent to return.”<sup>127</sup> This is contrasted with an LPR’s ability to make what are known as “temporary visits abroad,” which would not indicate abandonment of LPR status.<sup>128</sup> Generally speaking, a trip is considered a temporary visit abroad if it is either for a relatively short period of time fixed by an event or is reasonably expected to terminate in a relatively short period of time upon the occurrence of an event.<sup>129</sup> However, the main issue the courts focus on is intent.<sup>130</sup> The intent under consideration, though, is not whether the LPR expresses an intention to retain LPR status, but rather whether the LPR has demonstrated an intent to

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124. See *Yakou*, 428 F.3d at 248–49; *Maintaining Permanent Residence*, U.S. CITIZENSHIP & IMMIGR. SERVICES, <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=3f443a4107083210VgnVCM100000082ca60aRCRD&vgnnextchannel=3f443a4107083210VgnVCM100000082ca60aRCRD> (last updated Aug. 29, 2013).

125. See *Yakou*, 428 F.3d at 249.

126. *Form I-407, Abandonment of Lawful Permanent Resident Status*, U.S. CITIZENSHIP & IMMIGR. SERVICES, <http://photos.state.gov/libraries/164203/dhs/I-407.pdf> (last visited May 26, 2014); see also *Bigler v. U.S. Attorney Gen.*, 451 F.3d 728, 733 (11th Cir. 2006) (signing form to abandon LPR status indicated intent to abandon LPR status); *Yakou*, 428 F.3d at 249 (noting that signing form I-407 indicates an LPR’s intent to abandon LPR status).

127. *Yakou*, 428 F.3d at 248 (quoting *In re Montero*, 14 I. & N. Dec. 399, 401 (B.I.A. 1973)); see also *In re Kane*, 15 I. & N. Dec. 258, 265 n.3 (B.I.A. 1975) (noting that an LPR’s status had already changed because her trips abroad were not temporary). *Yakou* notes that *Montero* and *Kane* allow an LPR’s status to change without a formal removal proceeding. See *Yakou*, 428 F.3d at 248.

128. See *Matadin v. Mukasey*, 546 F.3d 85, 88, 90 (2d Cir. 2008) (quoting 8 U.S.C. §§ 1181(b), 1101(a)(27)(A) (2006)) (internal quotation marks omitted) (describing how an LPR can “abandon” LPR status by remaining abroad for longer than a “temporary visit”); see also *Karimijanaki v. Holder*, 579 F.3d 710, 715 (6th Cir. 2009) (finding that an LPR could abandon LPR status by remaining abroad for longer than a temporary visit).

129. See *Moin v. Ashcroft*, 335 F.3d 415, 419 (5th Cir. 2003); *Ahmed v. Ashcroft*, 286 F.3d 611, 613 (2d Cir. 2002) (quoting *United States ex rel. Lesto v. Day*, 21 F.2d 307, 308–09 (2d Cir. 1927)); *Singh v. Reno*, 113 F.3d 1512, 1514 (9th Cir. 1997) (quoting *Chavez-Ramirez v. INS*, 792 F.2d 932, 937 (9th Cir. 1986)).

130. See, e.g., *Ahmed*, 286 F.3d at 613 (noting that the dispositive question is whether the LPR intended to return shortly or abandon LPR status).

return to the United States in a relatively short period of time.<sup>131</sup> Absent such intent, the LPR is deemed to have lost the intention to maintain status as a permanent resident of the United States, to have abandoned LPR status, and will not be readmitted into the United States as an LPR but rather only as an alien.<sup>132</sup> The burden is on the U.S. government to prove such lack of intent by “clear, unequivocal and convincing evidence.”<sup>133</sup>

Courts do not determine an intention to abandon LPR status solely on elapsed time.<sup>134</sup> As one circuit court described the process, “[A] returning resident does not necessarily abandon his status if he extends his trip beyond a relatively short period; the key remains whether his activities are consistent with an intent to return to the United States as soon as practicable.”<sup>135</sup> Thus, the courts do not always focus on an LPR’s statements of intention to return to the United States but rather evaluate the LPR’s actions to see if they support such an intention.<sup>136</sup> For example, taking an oath of citizenship for another country, especially if such an oath involves a renunciation of all other foreign affiliation, is indicative of an abandonment of status.<sup>137</sup> Courts also often look to the LPR’s family ties, property holdings, and business interests—both in the United States and abroad—as indicia of intent either to return to the United States after a temporary visit abroad or to remain overseas for a long duration.<sup>138</sup>

131. *Alaka v. Attorney Gen. of the U.S.*, 456 F.3d 88, 103 (3d Cir. 2006) (quoting *Singh*, 113 F.3d at 1514); *Moin*, 335 F.3d at 419 (quoting *Singh*, 113 F.3d at 1514); *Ahmed*, 286 F.3d at 613.

132. *See Karimijanaki*, 579 F.3d at 719; *Katebi v. Ashcroft*, 396 F.3d 463, 466 (1st Cir. 2005); *Moin*, 335 F.3d at 420–21; *Ahmed*, 286 F.3d at 613.

133. *Matadin*, 546 F.3d at 91; *see also* *Hana v. Gonzales*, 400 F.3d 472, 475 (6th Cir. 2005) (noting that the government needed to prove lack of intent by clear, unequivocal, and convincing evidence); *Khodaghlian v. Ashcroft*, 335 F.3d 1003, 1006 (9th Cir. 2003) (same).

134. *See Katebi*, 396 F.3d at 466.

135. *Id.*

136. *See, e.g.*, *Bigler v. U.S. Attorney Gen.*, 451 F.3d 728, 733 (11th Cir. 2006); *Khodaghlian*, 335 F.3d at 1007.

137. *See Richards v. Sec’y of State*, 752 F.2d 1413, 1421 (9th Cir. 1985) (determining that taking a Canadian oath that includes the statement “I hereby renounce all allegiance and fidelity to any foreign sovereign or state of whom or which I may at this time be a subject or citizen” constitutes a renunciation of U.S. citizenship); *United States v. Schiffer*, 831 F. Supp. 1166, 1189 n.14 (E.D. Pa. 1993), *aff’d*, 31 F.3d 1175 (3d Cir. 1994) (implying that taking a foreign oath can be indicative of renouncing U.S. citizenship); *Kahane v. Shultz*, 653 F. Supp. 1486, 1492–93 (E.D.N.Y. 1987) (same).

138. *See, e.g.*, *Karimijanaki v. Holder*, 579 F.3d 710, 715 (6th Cir. 2009); *Katebi*, 396 F.3d at 466–67; *Khodaghlian*, 335 F.3d at 1007.

Nonetheless, time away from the United States is still a critical ingredient in the analysis, with absences of more than one year considered an indication of abandonment.<sup>139</sup> Basically, as one commentator has noted, courts often look to the amount of time an LPR has been a resident in the United States to determine issues regarding citizenship, finding that long periods of residence serve as indicators of attachment to the United States; applying the same logic, long periods away from the United States indicate just the opposite intent—the LPR’s lack of attachment to this country.<sup>140</sup>

The problem is that U.S. courts engage in such analysis only for out-of-status LPR cases brought before them. And the only cases that appear to have been brought before the courts are with regard to LPRs seeking entry into the United States. There is no indication that abandonment cases have yet been brought against out-of-status LPRs who reside overseas but have not yet sought to reenter the United States, such as the out-of-status terrorist LPRs at issue in this discussion.

#### V. POSSIBLE SOLUTION: REVOKING LPR STATUS FOR OUT-OF-STATUS LPRS ENGAGED IN TERRORISM

The current standard mechanism for stripping the LPR status of out-of-status LPRs—which is to wait for them to seek readmission to the United States—is not only a passive mechanism for revoking LPR status but it also does not solve the problem of LPR terrorists who have been abroad for years and have demonstrated no intention of returning. As noted above, these individuals continue to be protected by various segments of the U.S. Constitution and several U.S. statutes, therefore denying the U.S. government the full ability to thwart them from attacking the United States.

To resolve this problem, the U.S. government could initiate affirmative steps to strip such individuals of their LPR status. Although I believe that the law permits such action for any out-of-status LPR, the U.S. government need not use its power so expansively but could instead focus its attention on those out-of-status LPRs who engage in terrorism. Not only do such individuals pose the most immediate threat to U.S. national security but the limitations imposed by their LPR status place the greatest restrictions on the U.S. government to thwart that threat. Ordinary out-of-status LPRs pose no real threat to the United States, and therefore the United States does not generally need to find, track, and

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139. See *Bigler*, 451 F.3d at 733 (asserting that one indicator of abandonment is absence from the United States for more than one year); see *supra* text accompanying note 44.

140. Morawetz, *supra* note 36, at 230.

take action against them. The exact opposite is true with regard to out-of-status LPR terrorists.

Once the U.S. government has identified an out-of-status LPR whom the government believes is involved in terrorism, the government could then initiate proceedings against that individual in immigration court using the exact same procedures that already exist for removal cases.<sup>141</sup> Service could be made on the LPR's last known address, notifying the LPR of the proceedings initiated against him or her, the LPR's right to appear with counsel and contest the allegations, and the date, place, and time of any hearing.<sup>142</sup> If the LPR appears, the revocation proceeding would go forward as any removal proceeding.<sup>143</sup> If the LPR fails to appear, the case could proceed *in absentia*.<sup>144</sup> In either case, the government would bear the burden of proving that the LPR has abandoned status.<sup>145</sup> If the court revokes the person's LPR status, notice of the revocation would be sent to the LPR's last known address.<sup>146</sup> The LPR then would have the opportunity to seek to reopen the hearing in order to contest the revocation.<sup>147</sup>

The benefits of this plan would be to create a process for revoking the status of these overseas LPR terrorists, and once these LPRs are stripped of their status, the U.S. government could invoke its full range of options to collect and share information on such individuals, gather information to prosecute them, and take steps to prevent them from attacking this country. This plan also benefits from the fact that the U.S. government would not need to prove or even allege that the LPR is engaged in terrorism.<sup>148</sup> Rather, the U.S. government need merely prove that the LPR abandoned his or her LPR status. On its face, this may seem unfair to the LPR. After all, the U.S. government is targeting the LPR for revocation based on the LPR's alleged ties to terrorism; should not the U.S. government need to prove that connection? The answer is no. The basis for granting an individual LPR status in the first place is for that

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141. See 8 U.S.C. §§ 1229–1229a (2012).

142. See *id.*

143. See *id.* § 1229a.

144. See *id.* § 1229a(b)(5).

145. See *id.* § 1229a(c)(3).

146. See *id.* § 1229a(c)(5).

147. See *id.* § 1229a(c)(6).

148. See, e.g., *Bigler v. U.S. Attorney Gen.*, 451 F.3d 728, 733 (11th Cir. 2006) (listing factors that aid courts in determining whether LPRs abandoned their status and not mentioning terrorism as a factor).

person to be a permanent resident in the United States. As noted above, LPRs regularly have their status revoked for abandoning their residency by indicating that they have no intention to permanently reside in the United States. The same rules should apply to overseas LPRs suspected of terrorism; the U.S. government should not bear an additional burden merely because the individual is believed to be a terrorist. Put another way, the U.S. government's belief that an LPR is involved in terrorism is merely a mechanism for prioritizing which out-of-status LPRs to target for revocation; it is not a required provision for actually revoking LPR status.

Admittedly, current statutes already permit removal of LPRs—and thus revocation of LPR status—for various terrorist-related reasons that do not require a showing of abandonment.<sup>149</sup> Indeed, Congress has even passed legislation creating a special court to allow for the removal of such aliens from the United States in an expeditious and confidential manner.<sup>150</sup> However, these options do not appear to be effective mechanisms for solving the problem. To begin with, the special court applies only to removal of aliens who are “physically present in the United States,”<sup>151</sup> which does not apply to overseas terrorist LPRs. Further, the special court has never actually been used.<sup>152</sup>

In addition, seeking to revoke LPR status based on ties to terrorism is more difficult than seeking revocation for abandonment because it is very difficult to prove terrorism.<sup>153</sup> Witnesses are difficult to locate and often loathe to testify; evidence is hard to procure, especially if the terrorist is merely in the planning stages; and much of the information against the individual may be classified, meaning that proving the individual's ties to terrorism might jeopardize sensitive material.<sup>154</sup> Given that proving abandonment does not raise these concerns and is a valid basis in and of

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149. See 8 U.S.C. § 1182(a)(3)(B) (2012).

150. See 8 U.S.C. §§ 1531–1534 (2012).

151. *Id.* § 1533(a)(1)(D)(ii).

152. See 8 U.S.C.A. §§ 1531–1537 (West 2005) (denoting no case law with regard to the special terrorist removal court in notes of decisions); John Dorsett Niles, Note, *Assessing the Constitutionality of the Alien Terrorist Removal Court*, 57 DUKE L.J. 1833, 1834 & n.4 (2008) (citing Carl Tobias, *The Process Due Indefinitely Detained Citizens*, 85 N.C. L. REV. 1687, 1723 (2007)) (noting that the terrorist removal court has never been used).

153. See Eugene Kontorovich, “A *Guantánamo on the Sea*”: *The Difficulty of Prosecuting Pirates and Terrorists*, 98 CALIF. L. REV. 243, 274–75 (2010) (noting that prosecuting terrorist-like pirates might be difficult because of “lack of evidence, the cost of presenting the evidence, the danger of asylum requests, or the strain on military operations” and that prosecuting trained terrorists is probably even more difficult); see also U.N. OFFICE ON DRUGS & CRIME, DIGEST OF TERRORIST CASES 79 (2010), available at [https://www.unodc.org/documents/terrorism/09-86635\\_Ebook\\_English.pdf](https://www.unodc.org/documents/terrorism/09-86635_Ebook_English.pdf) (explaining the extreme difficulty in investigating terrorist attacks).

154. See U.N. OFFICE ON DRUGS & CRIME, *supra* note 153, at 70–83.

itself for revoking LPR status, it makes more sense for the U.S. government to pursue the path of abandonment.

The key question, of course, is whether revoking the LPR status of out-of-status LPR terrorists is legal. The answer is yes. Even though the law in this area is, like most things related to LPRs, murky at best, it appears that current statutes authorize such revocation and that such revocation comports with due process, including legally adequate notice.

*A. Current Statutes Permit Revocation of an Overseas LPR's Status*

As noted above, § 1229a of Title 8 of the U.S. Code provides the guidelines for removal proceedings.<sup>155</sup> That statutory provision states that an “immigration judge shall conduct proceedings for deciding the inadmissibility or deportability of an alien.”<sup>156</sup> It explicitly asserts that the procedure outlined in the statute is the “sole and exclusive procedure” for admitting or deporting an alien to or from the United States.<sup>157</sup> Courts take this concept of exclusivity seriously—even rules and entitlements under the Administrative Procedures Act are considered inapplicable to removal proceedings.<sup>158</sup>

Whether the statutory scheme in § 1229a applies to stripping an *overseas* LPR of status does not appear to have ever been considered by the courts. The legislative history of the statute also provides no clues. Certainly, stripping an LPR of status cannot be deemed a “deportability of an alien” issue as that clearly applies only to individuals already inside the United States. Possibly, however, it could fall under the concept of *inadmissibility*.<sup>159</sup> Unfortunately, that term is not defined in Title 8 or anywhere else in the statutory code. The closest definition in Title 8 is for the terms *admission* or *admitted*, which are defined as “with respect to an alien, the lawful entry of the alien into the United States after inspection and authorization by an immigration officer.”<sup>160</sup> Presuming that *inadmissibility* is the antithesis of this definition, one could assert that revoking an overseas LPR's status would fall within its confines as

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155. See *supra* text accompanying note 121.

156. 8 U.S.C. § 1229a(a)(1) (2012).

157. *Id.* § 1229a(a)(3) (2012).

158. See, e.g., *Kaczmarczyk v. INS*, 933 F.2d 588, 595 (7th Cir. 1991).

159. See 8 U.S.C. § 1229a(a)(1) (providing that judges may conduct proceedings for “inadmissibility”).

160. *Id.* § 1101(a)(13)(A) (2012).

the U.S. government is effectively determining that the LPR no longer has a *lawful* basis for entering or residing in the United States. Further, when the concepts of *exclusion* and *deportation* were merged together to fall under the overarching concept of *removal*,<sup>161</sup> one could certainly interpret it as Congress seeking to eliminate any loopholes in the immigration law to ensure that one procedure covered all immigration matters involving the authority to reside in or enter the United States.

A further issue is that § 1229a seems to contemplate that the only grounds for removal proceedings are those enumerated in §§ 1182 and 1227 of Title 8,<sup>162</sup> and the bases for abandonment of LPR status come from neither of these sections of the code.<sup>163</sup> Yet courts nonetheless appear to use the removal process when evaluating abandonment cases.<sup>164</sup> Therefore, it seems that the current removal process outlined in § 1229a would cover the proposed revocation of overseas LPRs' status based on abandonment.

However, if the courts determine that § 1229a does not cover revocation of overseas LPR status through abandonment, the President could issue a statement so clarifying. Section 1182 of Title 8 authorizes the President, by proclamation, to “suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate” in any situation where he “finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States.”<sup>165</sup> Presidents have previously invoked this provision in several situations, including authorizing the interdiction of any undocumented aliens on the high seas or in the Caribbean region, where there is reason to believe aliens seek entry into the United States.<sup>166</sup> And certainly out-of-status LPR terrorists would constitute a class of aliens whose entry into this country

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161. See *supra* text accompanying notes 117–18.

162. See 8 U.S.C. § 1229a(a)(2) (2012) (“An alien placed in proceedings under this section may be charged with any applicable ground of inadmissibility under section 1182(a) of this title or any applicable ground of deportability under section 1227(a) of this title.”).

163. See *supra* text accompanying note 124.

164. See, e.g., *Karimijanaki v. Holder*, 579 F.3d 710, 713–14, 719 (6th Cir. 2009) (upholding a removal hearing conducted under § 1229a in which an LPR was determined to have abandoned LPR status); *Bigler v. U.S. Attorney Gen.*, 451 F.3d 728, 732 (11th Cir. 2006) (same); *Ahmed v. Ashcroft*, 286 F.3d 611, 612–13 (2d Cir. 2002) (same).

165. 8 U.S.C. § 1182(f) (2012).

166. See Exec. Order No. 13,276, 3 C.F.R. 252 (2003), *reprinted as amended in* 8 U.S.C. § 1182 (2012) (proclaiming interdiction of illegal aliens in the Caribbean); Proclamation No. 4865, 46 Fed. Reg. 48,107 (Sept. 29, 1981) (proclaiming interdiction of illegal aliens in the high seas).

“would be detrimental to the interests of the United States.”<sup>167</sup> Alternatively, of course, Congress can always pass legislation that amends § 1229a to clarify that it includes revocation of status of out-of-status LPRs.

### B. Due Process

Assuming the § 1229a mechanism is available to revoke the status of overseas LPRs, the issue arises whether the use of such a mechanism would violate the due process rights of those LPRs. The Due Process Clause of the Fifth Amendment guarantees that “[n]o person shall . . . be deprived of life, liberty, or property, without due process of law.”<sup>168</sup> As noted above, as a general matter, LPRs appear to be entitled to the Fifth Amendment’s due process protection even when overseas.<sup>169</sup>

However, general due process protection does not apply to every action undertaken by the United States but only to actions that deprive the individual of “life, liberty, or property.”<sup>170</sup> Therefore, it is necessary first to determine whether LPR status in and of itself is a life, liberty, or property interest protected by the Fifth Amendment. As with most aspects of LPR status, the courts have not provided a firm answer to this question. However, all indications are that LPR status is considered an important property or liberty right protected by the Fifth Amendment.

In the Supreme Court case of *Kwong Hai Chew v. Colding*, an LPR served as a seaman on an American vessel that often travelled overseas.<sup>171</sup> When he returned from one of his trips, U.S. immigration officials deemed him an alien who would not be readmitted to the United States and detained him on Ellis Island.<sup>172</sup> The Court held that the petitioner was entitled to due process:

While it may be that a resident alien’s ultimate right to remain in the United States is subject to alteration by statute or authorized regulation because of a voyage undertaken by him to foreign ports, *it does not follow that he is thereby deprived of his constitutional right to procedural due process. His status as a*

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167. See *supra* text accompanying note 165.

168. U.S. CONST. amend. V.

169. See *supra* Part III.C.2.

170. U.S. CONST. amend. V.

171. 344 U.S. 590, 594, 601 (1953).

172. See *id.* at 594–95.

*person within the meaning and protection of the Fifth Amendment cannot be capriciously taken from him.*<sup>173</sup>

Other courts and commentators have provided similar language indicating that LPR status is itself a protected right. Justice Souter, for example, has noted that “any decision about the requirements of due process for an LPR must account for the difficulty of distinguishing in practical as well as doctrinal terms between the liberty interest of an LPR and that of a citizen.”<sup>174</sup> Similarly, the D.C. Circuit and Southern District Court of New York have echoed the important “liberty interest” held by LPRs.<sup>175</sup>

This appears to be an appropriate result. LPR status is highly valuable to the aliens who possess it. Such status is considered the gold standard for aliens and brings with it significant benefits.<sup>176</sup> Further, LPRs might not only have strong personal ties to the United States, such as resident family members, but may have already provided considerable benefit to this country as well, including payment of taxes, establishment of a business, and service in the military.<sup>177</sup> As the D.C. Circuit has noted, “These ties give the permanent resident alien a stake in the United States substantial enough to command the protection of due process before he may be excluded or deported; the result, after all, may be to separate him from family, friends, property, and career . . . .”<sup>178</sup>

There is also a logical reason to give due process to overseas LPRs when seeking to revoke their LPR status. Before the government can strip away a status as significant as LPR status due to alleged abandonment, the U.S. government should be required to prove its basis for believing

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173. *Id.* at 601 (emphasis added). It should be noted that the Supreme Court found that the *Chew* case differs factually from *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 214 (1953), discussed *supra* text accompanying notes 95–99 and issued in the same Supreme Court term, for several reasons, including the fact that Chew was gone for only four months, in contrast with Mezei’s nineteen month absence.

174. *Demore v. Kim*, 538 U.S. 510, 547 (2003) (Souter, J., concurring in part and dissenting in part) (describing the due process rights of LPRs).

175. *See Rafeedie v. INS*, 880 F.2d 506, 524 (D.C. Cir. 1989) (finding that LPRs have a “liberty interest” protected by the Fifth Amendment to reside in the United States after traveling overseas); *St. John v. McElroy*, 917 F. Supp. 243, 250 (S.D.N.Y. 1996) (noting that an “important liberty interest is at stake” when an LPR is excluded from entering the United States after being abroad); *see also* Shalini Bhargava, *Detaining Due Process: The Need for Procedural Reform in “Joseph” Hearings After Demore v. Kim*, 31 N.Y.U. REV. L. & SOC. CHANGE 51, 67 (2006) (“A lawful permanent resident without a final order of removal has a significant liberty interest, one barely distinguishable from the interest of a citizen.” (citing *Demore*, 538 U.S. at 544)).

176. *See supra* text accompanying notes 36–39.

177. *See* Maritza I. Reyes, *Constitutionalizing Immigration Law: The Vital Role of Judicial Discretion in the Removal of Lawful Permanent Residents*, 84 TEMP. L. REV. 637, 643–44 (2012).

178. *Rafeedie*, 880 F.2d at 522.

the status has been abandoned. Otherwise, the U.S. government could unilaterally and capriciously determine an LPR to have abandoned status—a designation that in and of itself would not only deprive the LPR of the status but also unilaterally deprive the LPR of the opportunity to contest the very claim of abandonment that led to the revocation of the status. Bolstering this is the fact that the courts have repeatedly indicated that the key factor in abandonment is intent, not merely time outside of the country.<sup>179</sup> Thus, although the objective determination of time out of the country might be easy for the government to demonstrate, the subjective question of intent is one that is a matter of debate and therefore should be decided by a neutral arbitrator after providing the LPR the opportunity to present the LPR's point of view on the subject.

Assuming that out-of-status LPRs possess due process rights, it is well established that such rights encompass both a substantive and procedural facet.<sup>180</sup> Substantive due process protects against government conduct that “shock[s] the conscience”<sup>181</sup> or interferes with rights “implicit in the concept of ordered liberty.”<sup>182</sup> Procedural due process prohibits the government from depriving someone of life, liberty, or property without prior notice and a meaningful opportunity to be heard.<sup>183</sup> In the immigration context, procedural due process has long required that an LPR receive “notice of the nature of the charge and a hearing at least before an executive or administrative tribunal.”<sup>184</sup> As noted in Part V.A of this Article, § 1229a establishes a set statutory procedure for removal

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179. See *supra* text accompanying notes 130–33.

180. See, e.g., *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 845–46 (1998).

181. See *id.* at 855.

182. *Palko v. Connecticut*, 302 U.S. 319, 325 (1937), *overruled on other grounds* by *Benton v. Maryland*, 395 U.S. 796 (1969).

183. See U.S. CONST. amend. V (prohibiting deprivation of “life, liberty, or property” without due process); *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 48 (1993) (“Our precedents establish the general rule that individuals must receive notice and an opportunity to be heard before the Government deprives them of property.”).

184. *Kwong Hai Chew v. Colding*, 344 U.S. 590, 597 (1953); see also *Pierre v. Holder*, 588 F.3d 767, 776 (2d Cir. 2009) (“It is well-established that a lawful permanent resident is entitled to constitutional due process in removal proceedings. . . . ‘At the core of due process is the right to notice of the nature of the charges and a meaningful opportunity to be heard.’” (citation omitted) (quoting *Brown v. Ashcroft*, 360 F.3d 346, 350 (2d Cir. 2004))); *De Araujo v. Gonzáles*, 457 F.3d 146, 154 (1st Cir. 2006) (“The Supreme Court has long held that a permanent resident alien is protected under the Fifth Amendment and entitled to due process in the form of notice of the charges against him and a deportation hearing.” (citing *Kwong Hai Chew*, 344 U.S. at 596–98; *Choeum v. INS*, 129 F.3d 29, 38–40 (1st Cir. 1997))).

cases. This procedure includes detailed notice provisions to the LPR of the nature, time, and place of the removal hearing, as well as the right to counsel.<sup>185</sup> It further requires a hearing before a neutral immigration judge, in which the LPR has the right to examine the evidence against him or her, present evidence, cross-examine government witnesses, and appeal the immigration judge's decision.<sup>186</sup> The statute also describes the consequences to the LPR by failing to appear.<sup>187</sup>

Courts have routinely and consistently found that the removal of an LPR resulting in the stripping of status, as well as the § 1229a mechanism for such removal, comport with both substantive and procedural due process.<sup>188</sup> As revoking the status of out-of-status LPR terrorists could utilize this exact same procedure, it too should fulfill due process requirements.

One issue, however, needs to be examined in more detail. It can be presumed that most out-of-status terrorist LPRs have not informed the U.S. government that they no longer reside in this country and almost certainly have not provided the government with an exact forwarding address where they can be found. The question therefore arises whether the § 1229a process of providing notice of the hearing to strip the overseas terrorist of LPR status would be adequate, and equally important, whether the U.S. government can proceed to strip an out-of-status terrorist LPR of status if the LPR fails to appear at the hearing. I address that question next.

### *C. Notice Requirements for Revoking LPR Status*

U.S. law requires all aliens, including LPRs, to register themselves with the U.S. government if they remain in the United States for more than thirty days.<sup>189</sup> That registration includes providing a current address.<sup>190</sup> If an alien who is in the United States changes addresses, the alien is required by law to notify the U.S. government in writing of the new address

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185. See 8 U.S.C. § 1229(a)(1) (2012).

186. See 8 U.S.C. § 1229a (2012).

187. See *id.* § 1229a(a)(5)(A).

188. See, e.g., *Nolasco v. Holder*, 637 F.3d 159, 163 (2d Cir. 2011) (“[I]f an alien receives notice of [the information required under § 1229a] and a meaningful opportunity to participate in her removal proceedings, due process is satisfied.”); *Ovalles v. Holder*, 577 F.3d 288, 299 (5th Cir. 2009) (holding that an LPR removed under the general removal process of § 1229a receives “sufficient due process”); *Pena-Muriel v. Gonzales*, 489 F.3d 438, 443 (1st Cir. 2007) (noting that the U.S. government’s normal deportation hearings process complies with due process).

189. See 8 U.S.C. § 1302 (2012).

190. See *U.S. Customs and Border Patrol Form I-94*, U.S. CUSTOMS & BORDER PROTECTION, DEP’T HOMELAND SECURITY, <http://forms.cbp.gov/pdf/arrival.pdf> (last visited May 26, 2014).

within ten days of the change.<sup>191</sup> Such notification of a change of address is quite simple and can be done over the Internet.<sup>192</sup> Willful failure to register or provide notice of a change of address might not only preclude an LPR from receiving notice of a removal hearing but is actually a misdemeanor, subject to fine and imprisonment, and indeed is a basis in and of itself for removal.<sup>193</sup>

An LPR is expressly alerted of the obligation to keep the U.S. government informed of any change of address in numerous ways, beyond the above published statutes. For example, the website of the U.S. government agency in charge of immigration issues—the United States Citizenship and Immigration Service (USCIS)—explicitly informs an LPR that the LPR “must advise . . . [the U.S. government] of a change of address” and provides a link to a form to do so.<sup>194</sup> Even more explicit, the requirement to notify the government of a change of address is clearly stated in the very application that an individual fills out in order to apply for LPR status.<sup>195</sup> Form I-485 very clearly provides,

I understand and acknowledge that, under section 262 of the Immigration and Nationality Act (INA) . . . I am required to provide USCIS with my current address and written notice of any change of address within **10** days of the change. I understand and acknowledge that USCIS will use the most recent address that I provide to USCIS, on any form containing these acknowledgements, for all purposes, including the service of a Notice to Appear should it be necessary for USCIS to initiate removal proceedings against me. I understand and acknowledge that if I change my address without providing written notice to USCIS, I will be held responsible for any communications sent to me at the most recent address that I provided to USCIS. I further understand and acknowledge that, if removal proceedings are initiated against me and I fail to attend any hearing, including an initial hearing based on service of the Notice to Appear at the most recent address that I provided to USCIS or as otherwise provided by law, I may be ordered removed in my absence, arrested, and removed from the United States.<sup>196</sup>

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191. See 8 U.S.C. § 1305 (2012); 8 C.F.R. § 265.1 (2012).

192. See *Adjustment of Status*, U.S. CITIZENSHIP & IMMIGR. SERVICES, <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=2da73a4107083210VgnVCM100000082ca60aRCRD&vgnnextchannel=2da73a4107083210VgnVCM100000082ca60aRCRD> (last updated Mar. 30, 2011) (“You must advise USCIS of a change of address. To update your address, see the ‘Change of Address Information’ page.”).

193. See 8 U.S.C. §§ 1306(a)–(b) (2012).

194. See *Adjustment of Status*, *supra* note 192.

195. See *Form I-485, Application To Register Permanent Residence or Adjust Status*, U.S. CITIZENSHIP & IMMIGR. SERVICES, <http://www.uscis.gov/files/form/i-485.pdf> (last visited May 26, 2014).

196. *Id.*

By statute, if personal service on an alien is not practical, service of notice of a removal hearing can be made by mail to the last address provided by the alien.<sup>197</sup> Courts have continuously upheld such service by mail as conforming with due process even if the alien moved residences, as it is the alien's "affirmative duty" to update the alien's address upon moving.<sup>198</sup> If the alien fails to appear after such written notice has been provided, the proceeding can nonetheless continue against the alien *in absentia*, and the alien can be ordered removed if the government proves its case.<sup>199</sup> As the Ninth Circuit has summarized, in upholding deportation of an alien where the deportation hearing proceeded *in absentia* because the alien failed to notify the government of her updated address,

The "Supreme Court has made it clear that notice must be such as is reasonably calculated to reach interested parties." An alien "does not have to actually receive notice of a deportation hearing in order for the requirements of due process to be satisfied." Due process "is satisfied if service is conducted in a manner 'reasonably calculated' to ensure that notice reaches the alien." The government satisfies notice requirements "by mailing notice of the hearing to an alien at the address last provided to the [government]." If an alien fails to appear at the removal hearing, an [immigration judge] may enter an order of removal *in absentia* so long as these notice requirements are met.<sup>200</sup>

Although conducting removal cases *in absentia* is not preferred, the practice has been continuously upheld by the courts. As the Second Circuit noted, in quoting a Seventh Circuit case, "Clearly, '[t]he availability of recourse to a constitutionally sufficient administrative procedure satisfies due process requirements if the complainant merely declines or fails to take advantage of the administrative procedure.'"<sup>201</sup> The alien can later seek to contest a removal done *in absentia*, though there is a "strong presumption of effective service" where notice was sent by certified mail through the U.S. Postal Service to the alien's last known address, even if

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197. See 8 U.S.C. § 1229(a)–(c) (2012).

198. See, e.g., *Sousa v. Ashcroft*, 393 F.3d 271, 275 (1st Cir. 2005) (upholding removal of an alien *in absentia* when a Notice to Appear was sent to the alien's last known address but the alien had failed to notify the U.S. government that he had changed addresses).

199. See 8 U.S.C. § 1229a(a)(5)(A) (2012); *Ghounem v. Ashcroft*, 378 F.3d 740, 743 (8th Cir. 2004) (noting that the law permits an immigration judge "to hold removal proceedings in absentia if aliens are given proper notice"); *Dominguez v. U.S. Attorney Gen.*, 284 F.3d 1258, 1260 (11th Cir. 2002) (per curiam) ("[N]otice to the alien at the most recent address provided by the alien is sufficient notice, and . . . there can be an *in absentia* removal after such notice.").

200. *Popa v. Holder*, 571 F.3d 890, 897–98 (9th Cir. 2009) (citations omitted) (quoting *Dobrota v. INS*, 311 F.3d 1206, 1211 (9th Cir. 2002); *Farhoud v. INS*, 122 F.3d 794, 796 (9th Cir. 1997)).

201. *Ali v. Reno*, 22 F.3d 442, 449 (2d Cir. 1994) (quoting *Dusanek v. Hannon*, 677 F.2d 538, 542–43 (7th Cir. 1982)).

nobody signed for it.<sup>202</sup> The alien can contest a removal *in absentia* only by filing a motion to reopen in which the alien must demonstrate that the alien failed to appear due to “exceptional circumstances,” lack of proper notice, or being in state or federal custody.<sup>203</sup> However, courts routinely reject motions to reopen in cases where the alien’s claim of lack of notice is a result of the alien’s failure to inform the government of a change of address.<sup>204</sup> As the Eleventh Circuit has stated, “Failing to provide [the government] with a change of address will preclude the alien from claiming that [the government] did not provide him or her with notice of a hearing.”<sup>205</sup>

Therefore, the U.S. government would appear to provide adequate notice of a removal hearing to even an out-of-status LPR if the government sends the notice by certified mail to the LPR’s last known address. If the LPR has since moved from that last address and failed to inform the government of the new address as statutorily required, the fault lies with the LPR; the government has nonetheless complied with its notice requirement and provided adequate due process.

## VI. CONCLUSION

Immigration is a hot topic these days. It is the subject of headline articles in newspapers and magazines and an issue of intense debate in Congress.<sup>206</sup> President Obama has made it clear that immigration reform is one of his top domestic policies, indicating that the failure to overhaul the immigration system in the United States was the biggest failure of his first term in office.<sup>207</sup> As the President has stated, “We’ve known for years that our

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202. See *In re Grijalva*, 21 I. & N. Dec. 27, 37 (B.I.A. 1995); see also *Mejia-Hernandez v. Holder*, 633 F.3d 818, 822 (9th Cir. 2011) (upholding removal of an alien *in absentia* where notice was by certified mail but noting that regular mail service would result in a “weaker presumption” of effective notice).

203. See 8 U.S.C. § 1229a(b)(5)(C) (2012); *Ghounem*, 378 F.3d at 743.

204. See, e.g., *Vukmirovic v. Holder*, 640 F.3d 977, 979 (9th Cir. 2011).

205. *Dominguez v. U.S. Attorney Gen.*, 284 F.3d 1258, 1260 (11th Cir. 2002) (*per curiam*).

206. See, e.g., *Briefing*, TIME, Jan. 21, 2013, at 9 (noting that the U.S. government is spending more money on agencies enforcing immigration laws than on all other federal law enforcement agencies combined); Vargas, *supra* note 46; Zachary A. Goldfarb & Rosalind Helderman, *Obama Makes His Immigration Push*, WASH. POST (Jan. 29, 2013), [http://articles.washingtonpost.com/2013-01-29/politics/36609464\\_1\\_illegal-immigrants-immigration-laws-immigration-reform](http://articles.washingtonpost.com/2013-01-29/politics/36609464_1_illegal-immigrants-immigration-laws-immigration-reform).

207. See Goldfarb & Helderman, *supra* note 206.

immigration system is broken . . . . After avoiding the problem for years, the time has come to fix it once and for all.”<sup>208</sup> Republican leaders too have generally embraced the need for reforming the immigration system.<sup>209</sup> Top U.S. business and labor groups are focusing intensely on the issue.<sup>210</sup> Even religious conservatives, who have usually shied away from the matter, are generally providing strong public support for revising the nation’s immigration policy.<sup>211</sup>

However, one aspect of the immigration issue that has not been discussed as part of this overhaul, and indeed has gone entirely unnoticed as a general matter, is the significant problem posed by overseas LPR terrorists. Although Americans would like to believe that people they have permitted to reside in the United States, and to whom they have provided virtually all of the advantages and protections that the country has to offer, would not seek to harm them, the hard truth indicates this is not always the case. There is a significant number of LPRs residing overseas who are plotting terrorist attacks against this country. And their LPR status is hindering the ability of the U.S. government to stop them.

Although virtually every facet of law regarding overseas LPRs and their status is ill-defined at best, a fair reading of the limited statutory and case law on the topic indicates that the government currently has the authority to strip these out-of-status individuals of their status as LPRs. Employing already existing removal procedures and the concept of abandonment, the U.S. government could revoke the LPR status of these individuals and thus take significant steps to allow the United States to find, track, share information on, gather evidence against, and prevent attacks by these currently protected terrorists. And, of course, the U.S. government

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208. Julie Pace, *Obama Calls for April Debate on Immigration Bill*, YAHOO! NEWS (Mar. 25, 2013, 4:52 PM), <http://news.yahoo.com/obama-calls-april-debate-immigration-bill-155819076--politics.html> (internal quotation marks omitted).

209. See Chris Cillizza, *Republicans Find Religion on Immigration Reform. Is It Too Late?*, WASH. POST (Nov. 9, 2012, 12:54 PM), <http://www.washingtonpost.com/blogs/the-fix/wp/2012/11/09/republicans-find-religion-on-immigration-reform-is-it-too-late/> (noting that Republican House Speaker John Boehner has stated that a “comprehensive approach [for reforming immigration policy] is long overdue”); Rachel Weiner, *Republicans on Immigration Reform: Before and After*, WASH. POST (Mar. 20, 2013, 4:03 PM), <http://www.washingtonpost.com/blogs/the-fix/wp/2013/03/20/the-startling-speed-of-the-gops-shift-on-immigration/>.

210. See Ashley Parker & Steven Greenhouse, *Guest Workers at Crux of Deal on Immigration*, N.Y. TIMES, Mar. 30, 2013, at A1.

211. See Rosalind S. Helderman, *Religious Conservatives Make Moral Case for Immigration Reform*, WASH. POST (Mar. 20, 2013), [http://articles.washingtonpost.com/2013-03-20/politics/37870308\\_1\\_illegal-immigrants-immigration-laws-immigration-discussion](http://articles.washingtonpost.com/2013-03-20/politics/37870308_1_illegal-immigrants-immigration-laws-immigration-discussion) (noting that the Evangelical Immigration Table, a coalition of religious groups representing more than 100,000 churches, is initiating a grassroots push on immigration issues).

can always pass new legislation and create new case law on the issue if current law is deemed inadequate.

Though this issue of overseas LPR terrorists is not new, it has remained almost entirely outside of public view and awareness. This has not made it any less dangerous a concern but merely an unappreciated facet of the fight against terrorism, much like aviation hijacking prior to 9/11. It is now time not just to take the first step of acknowledging the existence of the problem but also to consider the appropriate next steps that need to be taken to resolve that problem. The United States cannot afford to wait for an attack by one of these out-of-status LPR terrorists before deciding to act.

