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## FOREWORD: NATIONAL SECURITY'S DISTORTION EFFECTS

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## WESTERN NEW ENGLAND LAW REVIEW

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# SYMPOSIUM: GLOBAL PERSPECTIVES ON NATIONAL SECURITY

## FOREWORD: NATIONAL SECURITY'S DISTORTION EFFECTS

STEPHEN I. VLADECK\*

In retrospect, we should hardly be surprised that “national security” concerns have become so pervasive across such a wide and diverse range of legal fields over the past decade. As our social, political, and legal cultures have evolved in response to one of the most traumatic attacks on the United States in its history, it is only natural that the government’s interest in defending the nation—and, specifically, in preventing another act of terrorism even approaching the scale of September 11—has played such a ubiquitous role in so many seemingly unrelated legal disciplines.

To be sure, there are the obvious cases where the national security implications are inescapable, such as lawsuits arising out of the detention of noncitizens at Guantanamo Bay,<sup>1</sup> or challenges to military commissions,<sup>2</sup> or even the civilian criminal prosecutions of

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\* Professor of Law, American University Washington College of Law. My thanks to Sudha Setty, Sara Fawk, and the editors of the *Western New England Law Review* for inviting me to provide this foreword.

1. See, e.g., *Boumediene v. Bush*, 128 S. Ct. 2229, 2262 (2008) (holding that the Suspension Clause “has full effect” at Guantanamo). For an excellent recent survey of the post-*Boumediene* litigation, see Baher Azmy, *Executive Detention, Boumediene, and the New Common Law of Habeas*, 95 IOWA L. REV. 445 (2010).

2. See, e.g., *Hamdan v. Rumsfeld*, 548 U.S. 557, 653 (2006) (holding that military commissions established by President Bush were unlawful because they were inconsistent with the authority that Congress had provided).

high-profile terrorism suspects like Zacarias Moussaoui,<sup>3</sup> Jose Padilla,<sup>4</sup> Ali Saleh Kahlah al-Marri,<sup>5</sup> Richard Reid,<sup>6</sup> and Ahmed Omar Abu Ali.<sup>7</sup> But even (if not especially) in less obvious cases, examples abound of national security concerns precipitating an expansion or alteration of established precedent: The Second Circuit has held that the Supreme Court's "special needs" doctrine, ordinarily invoked to justify mass, suspicionless searches wholly unrelated to law enforcement,<sup>8</sup> authorizes random searches of anyone traveling on the New York City subway system<sup>9</sup>—perhaps a surprising extension of precedent until one considers its temporal proximity to the subway bombings in Madrid and London (not to mention the more recent episodes in Moscow).<sup>10</sup> The same court has also upheld the government's power to detain terrorism suspects as "material witnesses" even in investigations in which no one has been indicted<sup>11</sup> and for a length of time that would probably have been far more difficult to defend on September 10, 2001.<sup>12</sup>

3. See, e.g., *United States v. Moussaoui*, 382 F.3d 453 (4th Cir. 2004).

4. See, e.g., *United States v. Hassoun*, No. 04-60001-CR, 2007 WL 4180844 (S.D. Fla. Nov. 20, 2007) (denying Padilla and his codefendants' post-trial motion for judgment of acquittal); *United States v. Hassoun*, No. 04-60001-CR, 2007 WL 4180847 (S.D. Fla. Nov. 20, 2007) (denying the defendants' motion for a new trial). Padilla's appeal to the Eleventh Circuit remains pending as of this writing.

5. See, e.g., *al-Marri v. Spagone*, 129 S. Ct. 1545 (2009) (mem.) (vacating the en banc Fourth Circuit's rejection of al-Marri's challenge to his military detention in light of his indictment in civilian criminal court and his transfer to civilian custody), *vacating al-Marri v. Pucciarelli*, 534 F.3d 213 (4th Cir. 2008) (en banc) (per curiam).

6. See, e.g., *United States v. Reid*, 206 F. Supp. 2d 132 (D. Mass. 2002).

7. See, e.g., *United States v. Abu Ali*, 528 F.3d 210 (4th Cir. 2008), *cert. denied*, 129 S. Ct. 1312 (2009). For more on *Abu Ali* as a microcosm for the broader debate over trying terrorism suspects in the Article III courts, see Stephen I. Vladeck, *Terrorism Trials and the Article III Courts After Abu Ali*, 88 TEX. L. REV. (forthcoming 2010).

8. See, e.g., *Illinois v. Lidster*, 540 U.S. 419, 423-25 (2004); *Ferguson v. City of Charleston*, 532 U.S. 67, 84 (2001); *City of Indianapolis v. Edmond*, 531 U.S. 32, 44 (2000); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 653 (1995); *Mich. Dep't of State Police v. Sitz*, 496 U.S. 444 (1990); *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 665-66 (1989); *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 620 (1989).

9. See *MacWade v. Kelly*, 460 F.3d 260, 269-71, 275 (2d Cir. 2006).

10. See, e.g., Clifford J. Levy, *Female Suicide Bombers Strike at Moscow Subway*, N.Y. TIMES, Mar. 30, 2010, at A1 (describing the March 29 terrorist attacks in Moscow). As the Second Circuit noted in *MacWade*, the New York policy was directly motivated by the London attacks. See *MacWade*, 460 F.3d at 264.

11. See *United States v. Awadallah*, 349 F.3d 42, 56 (2d Cir. 2003).

12. The Ninth Circuit has recently taken serious issue with the government's post-September 11 understanding (and application) of the material-witness statute, 18 U.S.C. § 3144, upholding a damages claim (and denying qualified immunity to former Attorney General Ashcroft) arising out of one particularly egregious case. See *al-Kidd v. Ashcroft*, 580 F.3d 949, 973 (9th Cir. 2009), *reh'g en banc denied*, 598 F.3d 1129 (9th Cir.

The Federal Circuit—yes, even *it* gets terrorism cases—has held that the political-question doctrine bars a takings claim for damages arising out of the United States's 1998 destruction of a Sudanese pharmaceutical plant in retaliation for the terrorist attacks on our embassies in Kenya and Tanzania.<sup>13</sup> In its view, once the President determines that a particular facility is “enemy property,” there is nothing more for the courts to do.<sup>14</sup> The political-question doctrine has also been invoked by the Eleventh Circuit in affirming the dismissal of a lawsuit brought by the wife of a service member alleging that her husband's critical injuries in a traffic accident in Iraq were caused by the negligence of a military contractor.<sup>15</sup>

In another round of cases, the Third Circuit concluded that the government may categorically close to the public and the press removal proceedings in immigration cases in which the Attorney General merely asserts a “special interest” in national security.<sup>16</sup> In a similar vein, the Fourth Circuit has held that the so-called state-secrets privilege categorically bars a civil suit by a German citizen of Lebanese descent who was subjected to “extraordinary rendition,”<sup>17</sup> even though all parties now concede most of the material

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2010). I leave for another day the thorny question of whether *al-Kidd* and *Awadallah* are inconsistent with each other.

13. See *El-Shifa Pharm. Indus. Co. v. United States*, 378 F.3d 1346, 1364-67 (Fed. Cir. 2004).

14. *Id.* at 1363-65; see also *El-Shifa Pharm. Indus. Co. v. United States*, 559 F.3d 578, 583-84 (D.C. Cir. 2009) (reaching same result in separate suit brought under the Federal Tort Claims Act), *vacated and reh'g en banc granted*, 330 F. App'x 200 (D.C. Cir. 2009) (per curiam).

15. See *Carmichael v. Kellogg, Brown & Root Servs., Inc.*, 572 F.3d 1271, 1281-83 (11th Cir. 2009), *petition for cert. filed*, 78 U.S.L.W. 3368 (U.S. Dec. 10, 2009) (No. 09-683). But see *Lane v. Halliburton*, 529 F.3d 548, 568 (5th Cir. 2008) (holding that a suit against a contractor by its employees arising out of insurgent attacks in Iraq was not necessarily barred by the political-question doctrine). On March 8, 2010, the Supreme Court called for the views of the Solicitor General as to whether the certiorari petition in *Carmichael* should be granted. *Carmichael v. Kellogg, Brown & Root Servs., Inc.*, 78 U.S.L.W. 3521 (U.S. Mar. 8, 2010) (mem.) (No. 09-683). As of this writing, the government has not yet replied.

16. See *N. Jersey Media Group, Inc. v. Ashcroft*, 308 F.3d 198, 219-20 (3d Cir. 2002). But see *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 710 (6th Cir. 2002) (holding that the categorical closure of such hearings violated the First Amendment).

17. See *El-Masri v. United States*, 479 F.3d 296, 311-13 (4th Cir. 2007). Similar claims brought by others subjected to extraordinary rendition have been dismissed on the ground that courts should not infer a *Bivens* remedy in such cases because of the unique national security concerns they raise. See *Arar v. Ashcroft*, 585 F.3d 559, 574-77 (2d Cir. 2009) (en banc), *petition for cert. filed*, 78 U.S.L.W. 3461 (U.S. Feb. 1, 2010) (No. 09-923). For a critique of this understanding of *Bivens*, see Stephen I. Vladeck, *National Security and Bivens After Iqbal*, 14 LEWIS & CLARK L. REV. 255 (2010).

facts, including that it was a case of mistaken identity.<sup>18</sup> And the circuit-level Foreign Intelligence Surveillance Court of Review—a court that had not published a single opinion in its twenty-three-year existence as of September 11—has become the first court formally to recognize a “foreign intelligence surveillance” exception to the Fourth Amendment,<sup>19</sup> a question the Supreme Court expressly reserved in the 1970s.<sup>20</sup>

There are countless other examples, but I suspect that the point has been made: For better or worse, one can find national security considerations influencing ordinary judicial decision making across almost the entire gamut of contemporary civil and criminal litigation. And while one may well question the merits of each (and perhaps all) of these decisions, as a body they bespeak a larger “distortion effect”—where extant doctrine evolves (or devolves) to accommodate national security considerations for which prior case law may not adequately have provided. Indeed, the larger and more important question to me seems not to be whether this distortion effect has in fact occurred; the cases cited above, among countless others, provide thorough proof of this proposition. Rather, the real query going forward is whether the result has been a body of national security-specific doctrine in which exceptional rules are applied in exceptional cases (and the lines between the exceptional and the norm are carefully policed), or whether the exceptions have in fact become the rules—whether the stress to recognize exceptions in extraordinary cases has led to the normalization of these exceptions in all cases.<sup>21</sup> As just one example, should we have a special “national security court” to handle cases raising unique secrecy concerns, or should we find ways to amend the current evi-

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18. See, e.g., Ingrid Detter Frankopan, *Extraordinary Rendition and the Law of War*, N.C. J. INT'L L. & COM. REG. 657, 682 (2008); J. Troy Lavers, *Extraordinary Rendition and the Self Defense Justification: Time to Face the Music*, 16 MICH. ST. J. INT'L L. 385, 407-08 (2007); Margaret L. Satterthwaite, *Rendered Meaningless: Extraordinary Rendition and the Rule of Law*, 75 GEO. WASH. L. REV. 1333, 1337-38 & n.16 (2007); Sudha Setty, *Litigating Secrets: Comparative Perspectives on the State Secrets Privilege*, 75 BROOK. L. REV. 201, 214-15 (2009).

19. See *In re Directives* [redacted text] Pursuant to Section 105B of the Foreign Intelligence Surveillance Act, 551 F.3d 1004, 1010-12 (FISA Ct. Rev. 2008).

20. *United States v. U.S. Dist. Court (Keith)*, 407 U.S. 297, 321-22 (1972).

21. For a broader suggestion that such a normalization of emergency may be inevitable in the modern state, see Harold D. Lasswell, *The Garrison State*, 46 AM. J. SOC. 455 (1941).

dentiary framework in the civilian courts to accommodate those concerns?<sup>22</sup>

To be fair, the scholarship that follows in this symposium issue of the *Western New England Law Review* was not specifically addressed to this question. And yet, in each of these four distinct and thought-provoking pieces, we see at least some signs of the (troubling) answer. Moreover, as I briefly explain in the short observations that follow, the authors have each put their fingers not just on an important legal question with national security implications but, more specifically, on issues that are currently (or likely soon to come) before the U.S. Supreme Court.

Aloke Chakravarty's article is perhaps the best place to start, all the more so since he brings to bear his perspective and experience as a federal prosecutor.<sup>23</sup> In that respect, it is telling that his focus is not on the criminalization of terrorism but rather on the need to promote greater humanitarian efforts in conflict-torn (and terrorist-prone) regions as a means of obviating some of the socio-economic conditions that allow terrorist groups to thrive in the first place. As he explains, "[t]he stabilization and concomitant empowerment of governments where terrorist groups thrive is essential to promote the rule of law and to compete with the ideological drivers that sustain the terrorists."<sup>24</sup> Thus, his article proposes to supplement the already harsh measures in place to block the assets of terrorist groups with an influx of charitable aid into the same regions, to fill the economic gap created by the deprivation of terrorist-backed funds. Chakravarty thereby reminds us not to think about the fight against terrorism purely as a conflict we win on the battlefield but also as a struggle to ameliorate the poverty and local political instability on which terrorist groups capitalize.

So conceived, Chakravarty's article presents the precise conflict at the heart of the *Humanitarian Law Project* case currently before the Supreme Court, which raises several constitutional challenges to a 1996 federal statute that prohibits individuals from providing material support to designated "Foreign Terrorist

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22. See, e.g., GLENN SULMASY, *THE NATIONAL SECURITY COURT SYSTEM: A NATURAL EVOLUTION OF JUSTICE IN AN AGE OF TERROR* (2009). For a critique of these proposals, see Stephen I. Vladeck, *The Case Against National Security Courts*, 45 *WILLAMETTE L. REV.* 505 (2009).

23. Aloke Chakravarty, *Feeding Humanity, Starving Terror: The Utility of Aid in a Comprehensive Antiterrorism Financing Strategy*, 32 *W. NEW ENG. L. REV.* 295 (2010).

24. *Id.* at 297.

Organizations” (FTOs).<sup>25</sup> After several rounds of litigation, the Ninth Circuit concluded that the statute is unconstitutionally vague to the extent that it prohibits the provision of “service,” “training,” or “expert advice or assistance.”<sup>26</sup> Specifically, the crux of the court of appeals’s analysis was that such prohibitions are vague because they may also bar constitutionally protected speech in support of the nonviolent (and specifically peace-building) initiatives of the two designated FTOs at issue—the Kurdistan Workers’ Party and the Tamil Tigers.<sup>27</sup> And although nothing would stop the federal government itself from providing the types of aid that Chakravarty proposes in his article, a reversal of the Ninth Circuit in the *Humanitarian Law Project* case could well have a chilling effect on the willingness of *private* humanitarian groups, especially those within the United States, to continue to pursue such activities. Indeed, the government’s view of the statute is so sweeping that it would even encompass the preparation of an amicus brief on behalf of an FTO.<sup>28</sup>

Peter Margulies, too, offers a new way of thinking about issues with which we have already been grappling, framing the contemporary debate over the future of detention policy as a combination of three factors: efficiency, equity, and accuracy.<sup>29</sup> As Margulies puts it, these factors have as much to say about the differing positions over *where* to house current and future detainees as they have to say about the substantive merits of these cases and the scope of the government’s detention authority. More than that, though, Margulies’s thoughtful analysis draws on examples from everyday cases to show how, even in the unique context of detaining terrorism suspects, we can gain insight from revisiting conventional “siting” considerations that we take into account in transporting psychiatric

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25. See 18 U.S.C. § 2339B (2006).

26. *Humanitarian Law Project v. Mukasey*, 552 F.3d 916, 928-31 (9th Cir. 2009), cert. granted sub nom. *Holder v. Humanitarian Law Project*, 130 S. Ct. 48 (2009). Chakravarty himself notes the overlap. See Chakravarty, *supra* note 23, at 314 n.60 (discussing *Humanitarian Law Project*).

27. *Humanitarian Law Project*, 552 F.3d at 928-30. The court rejected a vagueness challenge to the statutory prohibition on providing “personnel” to FTOs, given that Congress in 2004 had expressly rewritten the statute to provide a more specific definition. *Id.* at 930-31.

28. See Transcript of Oral Argument at 47–48, *Holder v. Humanitarian Law Project*, No. 08-1498 (U.S. argued Feb. 23, 2010), available at [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/08-1498.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/08-1498.pdf).

29. See Peter Margulies, *Putting Guantanamo in the Rear-View Mirror: The Political Economy of Detention Policy*, 32 W. NEW ENG. L. REV. 339 (2010).

patients, locating wind farms, and other run-of-the-mill policy choices.<sup>30</sup>

As importantly, Margulies reminds us that the detention issue is, first and foremost, a political problem. Uncertainty still reigns paramount with regard to whether the Constitution provides non-citizens held outside the United States (and not at Guantanamo) with a right to pursue habeas relief.<sup>31</sup> And even in cases where such protection *is* available, the law has done very little to articulate the specific claims that the writ protects.<sup>32</sup> With such a dearth of legal clarity, it may be a far more effective and realistic conversation to focus on the political factors behind the shaping of detainee policy, as opposed to our obsession with the legal rules that may or may not constrain the government's choices. And we need look no further for signs of this approach than to the Supreme Court's March 2010 decision not to reach the merits of whether the federal courts have the power to release Uighurs, detained at Guantanamo, into the United States,<sup>33</sup> instead remanding the case to the D.C. Circuit to consider the changed diplomatic (and political) circumstances.<sup>34</sup>

One can find similar themes in the two student notes in this issue, as well. Thus, Thomas Gray tackles the thorny but critical issues of contractor liability and immunity, a problem that grows only that much more important every year as more and more conventional military functions are served by private contractors, even—if not especially—in foreign combat zones.<sup>35</sup> Gray proposes as a solution the adoption of a standard along the lines of the test articulated by the Supreme Court in *Boyle v. United Technologies*

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30. *See id.* at 343-45.

31. The question is currently raised in sharpest relief in *Al Maqaleh v. Gates*, the government's appeal to the D.C. Circuit of Judge Bates's ruling that noncitizens *not* initially detained in Afghanistan and not citizens of Afghanistan are protected by the Suspension Clause at Bagram Air Base. *See Al Maqaleh v. Gates*, 604 F. Supp. 2d 205, 214-26 (D.D.C. 2009).

32. *See, e.g., Kiyemba v. Obama (Kiyemba II)*, 561 F.3d 509, 513-16 (D.C. Cir. 2009), *cert. denied*, No. 09-581, 2010 WL 1005960 (U.S. Mar. 22, 2010).

33. *See Kiyemba v. Obama (Kiyemba I)*, 130 S. Ct. 1235 (2010) (per curiam), *vacating* 555 F.3d 1022 (D.C. Cir. 2009).

34. *Kiyemba I*, 130 S. Ct. at 1235 (“[W]e vacate the judgment and remand the case to the [D.C.] Circuit. It should determine, in the first instance, what further proceedings in that court or in the District Court are necessary and appropriate for the full and prompt disposition of the case in light of the new developments.”).

35. *See* Thomas Gray, Note, *I'm Just Following Orders: A Fair Standard of Immunity for Military Service Contractors*, 32 W. NEW ENG. L. REV. 373 (2010).

*Corp.*<sup>36</sup> In his view, the law should shield contractors from liability when the injury in question resulted from an order, plan, or directive from the U.S. military; the contractor was not negligent; and the contractor disclosed to the United States any concerns or potential risks.<sup>37</sup> Put somewhat differently, Gray's note offers an argument to generalize a standard traditionally reserved for contractors in the products-liability context, in order to account for the unique national security concerns that arise when contractors are both literally and figuratively on the front lines.

Although Gray is not the first to propose a thorough reconceptualization of contractor liability, his discussion, like those offered by Chakravarty and Margulies, also dovetails with important ongoing litigation, especially in the Supreme Court. Thus, the Court is currently waiting for the views of the Solicitor General as to whether it should grant certiorari in *Carmichael v. Kellogg, Brown & Root Services, Inc.*, the Eleventh Circuit decision mentioned above that relied upon the political-question doctrine to bar a zone-of-combat tort claim against a government contractor.<sup>38</sup> Moreover, although the *Boyle* test on which Gray proposes to rely has been heavily criticized in some circles,<sup>39</sup> it should not be difficult to see how his multifactor balancing would allow for far more case-specific consideration than the categorical bar to justiciability embraced by the court of appeals in *Carmichael*. It would thereby risk far less distortion than a rule that effectively immunizes any and all claims arising out of contractor torts overseas.

Last, although Sara Fawk's note is perhaps the least obvious fit insofar as the distortion effect of national security considerations in contemporary jurisprudence, she deftly summarizes the hypertechnical—and yet quite significant—circuit split that has arisen over whether lawful permanent residents (LPRs) facing removal for pre-1996 convictions may still seek relief under former section 212(c) of the Immigration and Nationality Act if the basis for their removal was not a basis for *exclusion* under the pre-1996

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36. 487 U.S. 500, 512-13 (1988).

37. See Gray, *supra* note 35, at 375.

38. See *Carmichael v. Kellogg, Brown & Root Servs., Inc.*, 572 F.3d 1271, 1280 (11th Cir. 2009), *petition for cert. filed*, 78 U.S.L.W. 3368 (U.S. Dec. 10, 2009) (No. 09-683).

39. For criticisms of *Boyle*, see Ronald A. Cass & Clayton P. Gillette, *The Government Contractor Defense: Contractual Allocation of Public Risk*, 77 VA. L. REV. 257 (1991), and Michael D. Green & Richard A. Matasar, *The Supreme Court and the Products Liability Crisis: Lessons from Boyle's Government Contractor Defense*, 63 S. CAL. L. REV. 637 (1990).

framework.<sup>40</sup> The issue arises because section 212(c) was itself styled as providing a “waiver of *excludability*,” giving rise to the possibility that such relief would not be available to individuals—such as LPRs—not subject to exclusion.

At first blush, section 212(c) has little to do with national security concerns, especially given the other national-security related authorities for either removing noncitizens from the country or, at the very least, denying to terrorism suspects immigration remedies that might otherwise be available.<sup>41</sup> But the circuit split at the heart of Fawk’s note is emblematic of the clear and well-documented anti-immigrant mentality that motivated the Antiterrorism and Effective Death Penalty Act of 1996<sup>42</sup> (AEDPA) and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996<sup>43</sup> (IIRIRA), the latter of which eliminated section 212(c) relief altogether. And much of that anti-immigrant mentality behind the 1996 reforms was itself a response to fears of increased security threats posed by noncitizens, especially in light of the first World Trade Center bombing in 1993.<sup>44</sup>

True, the Supreme Court saved at least some of section 212(c) in *INS v. St. Cyr*, holding that discretionary relief must still be available for individuals who pleaded guilty to the offenses that rendered them removable *prior* to AEDPA and IIRIRA, lest the statutes have an impermissible retroactive effect.<sup>45</sup> Nevertheless, the elimination in future cases of such an important case-specific means of blocking deportation at least in part because of the most amorphous of national security concerns provides perhaps the beginning of our story, rather than the end. And, given both the circuit split that Fawk identifies and an even more pronounced split over whether *St. Cyr* also applies when the defendant went to trial

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40. See Sara Fawk, Note, *Eligibility for Section 212(c) Relief from Deportation: Is It the Ground or the Offense, the Dancer or the Dance?*, 32 W. NEW ENG. L. REV. 417 (2010); see also Sarah Koteen Barr, Comment, *C is for Confusion: The Tortuous Path of Section 212(c) Relief in the Deportation Context*, 12 LEWIS & CLARK L. REV. 725 (2008) (also discussing the circuit split).

41. See, e.g., *Hussain v. Mukasey*, 518 F.3d 534, 536–38 (7th Cir. 2008).

42. Pub. L. No. 104-132, 110 Stat. 1214.

43. Pub. L. No. 104-208, div. C, 110 Stat. 3009-546.

44. Cf. *Padilla v. Kentucky*, No. 08-651, 2010 WL 1222274, at \*4–5 (U.S. Mar. 31, 2010) (summarizing the increasing harshness of federal immigration law culminating with the 1996 revisions). See generally Daniel Kanstroom, *The Better Part of Valor: The REAL ID Act, Discretion, and the “Rule” of Immigration Law*, 51 N.Y.L. SCH. L. REV. 161, 162–63 & n.7 (2006–2007) (summarizing the background and implications of AEDPA and IIRIRA).

45. See *INS v. St. Cyr*, 533 U.S. 289, 325-26 (2001).

as opposed to pleading guilty,<sup>46</sup> the odds are strong that section 212(c) will be back before the Court before long.<sup>47</sup>

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Justice Cardozo famously warned readers of “the tendency of a principle to expand itself to the limit of its logic.” That is the concern here. Although no one can deny that the government has a compelling interest in protecting us against future acts of terrorism, it is long-past the time to carefully reflect upon the extent to which this interest has affected (and will continue to influence) areas of previously settled doctrine. We may end up deciding that the law is evolving in exactly the way that it should. We may, instead, conclude that we’ve made mistakes, overzealously championing extensions of precedent that, with the benefit of hindsight, we realize were neither necessary nor prudent. I leave it to the individual readers to decide for themselves which is a fairer view of the current state of affairs. If nothing else, though, each of these four works of scholarship should help us better to appreciate the many ways in which this distinction matters.

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46. The logic is a bit hard to follow, but it is basically thus: *St. Cyr* concluded that noncitizens who faced criminal charges prior to 1996 might have pleaded guilty with the knowledge that they would still be eligible to apply for section 212(c) relief, relief that might not have been available had they been convicted at trial. Thus, to apply the removal of section 212(c) relief to them would be “retroactive.” In contrast, noncitizens who went to trial anyway cannot be said to have made this calculation—that is, they did not decline to plead guilty strategically in order to preserve their eligibility for section 212(c) relief. As such, to apply the statute to them would *not* have an impermissible retroactive effect. See, e.g., *Kellermann v. Holder*, 592 F.3d 700, 705–07 (6th Cir. 2010) (summarizing the issue and noting the large and sharp circuit split).

47. *But see* *Ferguson v. U.S. Attorney Gen.*, 563 F.3d 1254 (11th Cir. 2009) (raising the same issue), *cert. denied*, 2010 WL 757697 (U.S. Mar. 8, 2010) (No. 09-263).