

NOTE

TORTUROUS CONSEQUENCES AND THE CASE OF MAHER ARAR: CAN CANADIAN SOLUTIONS “CURE” THE DUE PROCESS DEFICIENCIES IN U.S. REMOVAL PROCEEDINGS?

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INTRODUCTION

Aliens have never enjoyed the full protection of the Bill of Rights.¹ Aliens arriving at the U.S. border are entitled to little, if any,

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¹ See *Mathews v. Diaz*, 426 U.S. 67, 78 n.12 (1976) (“The Constitution protects the privileges and immunities only of citizens”); *id.* at 78 (“[A] host of constitutional and statutory provisions rest on the premise that a legitimate distinction between citizens and aliens may justify attributes and benefits for one class not accorded to the other”).

constitutional protection.² This lack of protection extends to both substantive and procedural due process rights.³ However, the level of constitutional protection afforded to aliens is unclear because of the Judiciary's willingness to defer to immigration decisions made by the Executive.⁴ This deference has degraded the value of the procedural safeguards enshrined in the Constitution.⁵

Perhaps the most striking illustration of judicial deference to the Executive in immigration proceedings, even when there are serious life and liberty interests at stake, is the case of Maher Arar. Arar, a dual citizen of Canada and Syria,⁶ was tortured after the U.S. government removed him to Syria.⁷ Former U.S. Attorney General John Ashcroft claimed that the government executed this decision under his statutory discretion under the Immigration and Nationality Act (INA).⁸ This Note will compare the immigration proceedings that Maher Arar faced in the United States with the Canadian proceedings Arar would have been subject to had he been a foreign national applying for entrance to Canada. More specifically, this Note will focus on whether the U.S. Executive⁹ has too much discretion in immigration

Unless otherwise stated in this Note, the term "alien" refers to a nonresident foreign national.

² See *Landon v. Plasencia*, 459 U.S. 21, 32 (1982).

³ See *United States v. Verdugo-Urquidez*, 494 U.S. 259, 273 (1990) (explaining that treating aliens differently from citizens under the Fourth Amendment does not violate the Equal Protection Clause of the Fifth Amendment).

⁴ See *Kleindienst v. Mandel*, 408 U.S. 753, 769–70 (1972); *Shaughnessy v. U.S. ex rel. Mezei*, 345 U.S. 206, 210 (1953); *U.S. ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 543 (1950).

⁵ See *United States v. Robel*, 389 U.S. 258, 264 (1967) ("Implicit in the term 'national defense' is the notion of defending those values and ideals which set this Nation apart."); *Korematsu v. United States*, 323 U.S. 214, 244–46 (1944) (Jackson, J., dissenting) (noting that if the U.S. Supreme Court were to defer to military orders issued by the Executive when the orders are clearly unconstitutional, the Court would be manipulating the Constitution and validating unconstitutional actions by the Executive).

⁶ Maher Arar Deportation Order 3 (INS Oct. 7, 2002) (on file with author) [hereinafter *Deportation Order*].

⁷ See *COMM'N OF INQUIRY INTO THE ACTIONS OF CANADIAN OFFICIALS IN RELATION TO MAHER ARAR*, REPORT OF PROFESSOR STEPHEN J. TOOPE: FACT FINDER 15–19 (2005), available at http://www.ararcommission.ca/eng/ToopeReport_final.pdf.

⁸ See 8 U.S.C. §§ 1103(a)(1), 1225(c)(2)(B), 1231(b)(2)(C) (2000); *Arar v. Ashcroft*, 414 F. Supp. 2d 250, 271–73 (E.D.N.Y. 2006).

⁹ On March 31, 2003, the Immigration and Naturalization Service, a division of the Department of Justice and thus under the direction of the Attorney General, dissolved and its functions were transferred to the Department of Homeland Security (DHS). See *Homeland Security Act of 2002*, Pub. L. No. 107-296, 116 Stat. 2135. In addition, the Attorney General delegated much, though not all, of his authority under the INA to the Secretary for Homeland Security. See *Authority of the Secretary of Homeland Security, Delegations of Authority, Immigration Laws*, 68 Fed. Reg. 10,922 (Mar. 6, 2003) (codified at 8 C.F.R. §§ 1.1(o), 2.1, 103.1, 239.1). However, the INA and the Code of Federal Regulations still refer to the Attorney General. Thus, it is somewhat unclear who the relevant decision maker is in many sections of the U.S. Code and Federal Regulations. For the purposes of this Note, I will refer to the Attorney General as the decision maker for the sake of clarity

proceedings and whether judicial deference to the Executive Branch in immigration decisions creates a legal vacuum that ignores the basic due process rights of persons subject to removal from the United States. This Note will use Canadian law as a point of comparison for the discretion of the Executive in removal proceedings.

Part I will provide the background legal and factual information of Maher Arar's case and the applicable U.S. and Canadian law. Part II is divided into two subparts: subpart A will detail the U.S. laws that applied to Arar, and subpart B will explain what Canadian laws would have applied had Arar applied to enter Canada as a foreign national. Part III will assess the constitutional adequacy of the current U.S. process for removing aliens based on security grounds, and will propose a new procedural framework with reference to Canadian removal proceedings.

I

LEGAL AND FACTUAL BACKGROUND

A. Legal Background

1. *U.S. Law*

An alien may be subject to removal from the United States in two ways: inadmissibility and deportation. The government deems an alien inadmissible either upon arrival at the U.S. border or after entry if the alien entered the United States without a U.S. government official admitting that alien.¹⁰ An alien may be inadmissible for several reasons, including on security grounds for being a member of a terrorist organization.¹¹ An alien is deportable if a U.S. government official admitted that alien to the United States and that individual subsequently violated the Immigration and Nationality Act.¹²

An alien is subject to removal from the United States through either "normal,"¹³ "expedited,"¹⁴ or "summary" removal proceedings.¹⁵ In normal removal proceedings, the Department of Homeland

and because when Arar's case occurred it was the Attorney General who would have made the removal decisions. I will, however, refer to the Department of Homeland Security when it is clear that the DHS is the relevant decision maker.

¹⁰ See THOMAS ALEXANDER ALEINIKOFF ET AL., *IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY* 428 (5th ed. 2003).

¹¹ See 8 U.S.C. § 1182(a)(3)(B)(i)(V) (Supp. V 2005).

¹² See *id.* § 1227(a)(1)(B); Immigration and Nationality Act, Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended in 8 U.S.C. §§ 1101-1557 (2000 & Supp. V 2005)).

¹³ 8 U.S.C. § 1229a (2000 & Supp. V 2005).

¹⁴ See *id.* § 1225(b) (2000). The government removes aliens through expedited removal proceedings for certain violations of the Immigration and Nationality Act, such as misrepresentation. See *id.* §§ 1182(a)(6)(C), 1225(b)(1)(A)(i). Expedited removal is beyond the scope of this Note.

¹⁵ See *id.* § 1225(c).

Security (DHS) serves an alien with a document ordering that alien to appear before an immigration judge (IJ).¹⁶ The hearing cannot take place until at least ten days after service of the order, but it may take place earlier if the alien so requests.¹⁷ The alien is entitled to counsel, but the government need not provide counsel at its own expense.¹⁸ The proceeding is similar to a court proceeding: the alien may examine the evidence against him, present his own evidence, and cross-examine agency witnesses.¹⁹ In a normal removal proceeding, the alien has three options for administrative review. The alien may appeal the decision,²⁰ file a motion to reconsider the decision,²¹ or file a motion to reopen the proceedings.²²

In contrast, summary removal proceedings involve a truncated process.²³ An immigration officer or an IJ may issue a summary removal order if, like Maher Arar, the government considers the alien a security risk.²⁴ After making such an order, neither the officer nor the IJ may conduct a hearing unless the Attorney General so instructs.²⁵ The Attorney General has discretion to request such a hearing after reviewing the decision of the immigration officer or the IJ.²⁶ If the Attorney General “is satisfied . . . that the alien is inadmissible” on security grounds and, after discussing the case with the relevant government agencies, “concludes that disclosure of the information would be prejudicial to the public interest, safety, or security, the Attorney General may order the alien removed without further inquiry or hearing by an immigration judge.”²⁷ This power is a distinct difference from normal removal proceedings. There is no automatic hearing in summary removal—there is only a limited ability to challenge either the initial determination by the immigration officer or IJ or the final decision by the Attorney General.²⁸

¹⁶ See *id.* § 1229(a)(1); ALEINIKOFF ET AL., *supra* note 10, at 626.

¹⁷ See 8 U.S.C. § 1229(b)(1).

¹⁸ See *id.* § 1229a(b)(4)(A).

¹⁹ See *id.* § 1229a(b)(4)(B).

²⁰ *Id.* § 1229a(c)(5) (Supp. V 2005).

²¹ *Id.* § 1229a(c)(6).

²² *Id.* § 1229a(c)(7).

²³ Summary removal orders are also rare. See COMM’N OF INQUIRY INTO THE ACTIONS OF CANADIAN OFFICIALS IN RELATION TO MAHER ARAR, REPORT OF THE EVENTS RELATING TO MAHER ARAR FACTUAL BACKGROUND VOLUME I 207 (2006), available at http://www.ararcommission.ca/eng/Vol_I_English.pdf [hereinafter COMM’N REPORT: FACTUAL BACKGROUND VOLUME I].

²⁴ 8 U.S.C. § 1225(c) (2000); see Deportation Order, *supra* note 6, at 2.

²⁵ See 8 U.S.C. § 1225(c)(1)(C).

²⁶ See *id.* § 1225(c)(2)(B).

²⁷ See *id.*

²⁸ See *id.* § 1252(a)(2)(B)(ii) (Supp. V 2005). While the statute seems to preclude all judicial review of removal orders of aliens inadmissible on security grounds, in practice the courts are willing to exercise a basic level of review. See *infra* notes 188–200 and accompanying text.

Before determining whether an alien is entitled to judicial review of his removal order, it is necessary to determine if the alien is entitled to due process.²⁹ The Supreme Court has held that aliens who have not yet entered the United States are entitled to few due process rights.³⁰ Lower federal courts have elucidated the scope of these limited protections. More specifically, the First Circuit has held that arriving aliens have constitutional protection against illegal government action, such as police officer abuse, but such aliens cannot use these due process rights to challenge admission or removal procedures.³¹ The Fifth and Eleventh Circuits have similarly held that aliens are entitled to basic due process rights.³² The Eleventh Circuit has stated that “aliens can raise constitutional challenges to deprivations of liberty . . . outside the context of entry or admission.”³³ While it is clear that there is a minimum level of due process for inadmissible aliens, it is unclear where the outer limit of due process lies. Although the U.S. Supreme Court has stated that technically, inadmissible aliens can challenge the constitutionality of the statutory inadmissibility provision applied to them, in reality this challenge almost always fails because the government need only have a “bona fide reason” for the decision.³⁴

²⁹ It is important to note that Congress has amended the statutory section that limits judicial review of immigration decisions since the government removed Maher Arar from the United States. See REAL ID Act of 2005, Pub. L. No. 109-13, § 106, 119 Stat. 231, 310–11 (codified at 8 U.S.C. § 1252 (2000 & Supp. V 2005)). This Note applies the current statutory section to analyze what would happen if a situation like Arar’s were to arise in the United States today.

³⁰ See *U.S. ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950) (“Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.”).

³¹ See *Amanullah v. Nelson*, 811 F.2d 1, 9 (1st Cir. 1987). That case involved the consolidated appeals of four Afghans who were detained by the Immigration and Nationalization Service (INS) pending the outcome of exclusion proceedings brought against them. See *id.* at 3. They filed habeas petitions with a U.S. district court seeking release from detention. See *id.* The petitions were denied. See *id.* On appeal, the First Circuit held that while inadmissible aliens are entitled to minimal due process rights, there was no due process violation in refusing parole to the aliens because their detention was not “unnecessarily prolonged.” See *id.* at 9.

³² See *Lynch v. Cannatella*, 810 F.2d 1363, 1372–73 (5th Cir. 1987); *Jean v. Nelson*, 727 F.2d 957, 972 (11th Cir. 1984).

³³ *Jean*, 727 F.2d at 972.

³⁴ See, e.g., *Fiallo v. Bell*, 430 U.S. 787, 795 n.6 (1977) (holding that Congress could give preferential status to certain citizens in order to make administration of the permanent resident program easier, even if it may violate the Equal Protection Clause); *Kleindienst v. Mandel*, 408 U.S. 753, 770 (1972) (holding that the Attorney General has the discretion to deny an alien entry if the alien has a record of abusing the grounds of his previous entries, even if First Amendment issues are at stake); *Padilla-Padilla v. Gonzales*, 463 F.3d 972, 979 (9th Cir. 2006) (holding that the expeditious removal of aliens is a bona fide reason).

Statutory language that restricts judicial review of removal orders further limits arriving aliens' procedural rights.³⁵ However, the statute also states that the restrictive clauses shall not be interpreted as precluding judicial review of constitutional claims or questions of law.³⁶ Further, while the plain language of the statute limits appeals of summary removal orders,³⁷ at least two circuits have refused to interpret the statute so narrowly.³⁸ Moreover, the Supreme Court has held that if Congress wants to limit judicial review, its intent to do so must be clear.³⁹ Thus, while the scope of review in summary removal cases is more limited than in normal removal decisions, it does exist, and historically courts have occasionally refused to defer to the Attorney General's decisions in summary removal proceedings.⁴⁰

Regardless of due process concerns, once the government orders the alien's removal, the government must select the destination country for removal based on the nature of the alien and the type of removal proceeding.⁴¹ If an arriving alien is subject to normal removal proceedings, the government should remove the alien to the country from which he arrived unless that country will not accept him or the country is contiguous to the United States.⁴²

³⁵ See 8 U.S.C. § 1252(a)(2), (b)(9), (g) (Supp. V 2005).

³⁶ *Id.* § 1252(a)(2)(D).

³⁷ See *id.*; *id.* § 1252(a)(2)(B)(ii) (“[N]o court shall have jurisdiction to review . . . any . . . decision or action of the Attorney General . . . the authority for which is specified under this subchapter to be in the discretion of the Attorney General”); *id.* § 1252(b)(9) (providing that there can only be judicial review of a final removal order); *id.* § 1252(g) (establishing that no court shall have jurisdiction to hear any case by an alien that arises from an “action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders”).

³⁸ See *Alsamhour v. Gonzales*, 484 F.3d 117, 122 (1st Cir. 2007) (finding that 8 U.S.C. § 1252(a)(2)(B)(ii) only precludes review of decisions that are explicitly specified to be within the Attorney General's discretion); *Kwai Fun Wong v. United States*, 373 F.3d 952, 963 (9th Cir. 2004) (noting that the statute cannot bar constitutional claims because it is not within the Attorney General's discretion to violate the Constitution).

³⁹ See *Webster v. Doe*, 486 U.S. 592, 599–600 (1988).

⁴⁰ See, e.g., *Rafedie v. INS*, 880 F.2d 506, 510–13 (D.C. Cir. 1989) (holding that permanent resident aliens who were inadmissible for being suspected terrorists could seek review of their summary removal order); *Azzouka v. Meese*, 820 F.2d 585, 587 (2d Cir. 1987) (holding that a summary removal order is subject to limited judicial review, namely “that the Government acted on a facially legitimate and bona fide reason” and refusing to grant the alien's habeas petition on this basis (quoting *El-Werfali v. Smith*, 547 F. Supp. 152, 153 (S.D.N.Y. 1982)). It should be noted that both cases deal with the former 8 U.S.C. § 1255(c); there are few, if any, removal cases under the current section. See COMM'N REPORT: FACTUAL BACKGROUND VOLUME I, *supra* note 23, at 207.

⁴¹ See 8 U.S.C. § 1231(b) (2000 & Supp. V 2005).

⁴² See *id.* § 1231(b)(1)(A) (2000). If an alien arrives from a country contiguous to the United States and is not a citizen or national of that country, the government shall remove the alien to the country he was in before arriving in the contiguous country. See *id.* § 1231(b)(1)(B). If neither the country from which the alien arrived, nor the contiguous country will accept the alien, the government may remove the alien to a country of which the alien is a citizen or national, the alien's birth country, the country where the alien

“Other aliens,” presumably those not arriving in the United States and those not subject to normal removal proceedings, undergo a different country selection process.⁴³ Although “other aliens” may designate a country for removal, the Attorney General may disregard an alien’s designation if: (1) the alien fails to designate a country within the allowed statutory time; (2) within thirty days of notification of the alien’s designated country, the government of the alien’s designated country does not tell the Attorney General whether it will accept the alien; (3) the government of the alien’s designated country is unwilling to accept the alien; or (4) “the Attorney General decides that removing the alien to the country is prejudicial to the United States.”⁴⁴ The Supreme Court has recognized that if the alien is a citizen of the removal country and if he was convicted of a crime in that country, it would prejudice the United States *not* to remove the alien to that country.⁴⁵

However, U.S. law does not permit the Attorney General to order an alien removed to a country where the alien’s life or freedom would be threatened.⁴⁶ This is an important limitation on both the selection process itself and the Attorney General’s discretion to select countries for removal. Congress enshrined this policy, called nonrefoulement, in U.S. law by passing the Foreign Affairs Reform and Restructuring Act (FARRA) in 1998.⁴⁷ FARRA prohibits the United States from sending an alien, against his will, to a country where “there are substantial grounds for believing the [alien] would be in danger of being subjected to torture, regardless of whether the [alien] is physically present in the United States.”⁴⁸ Federal regulations do not make exceptions to nonrefoulement—8 C.F.R. § 235.8(b)(3) provides that the INS may not execute a removal order under 8 U.S.C. § 1225(c) if the removal would violate nonrefoulement.⁴⁹ The procedure to determine whether an alien would be subject to torture in the proposed

resides, or any other country that is willing to accept the alien if removal to the previous three countries is “impracticable, inadvisable, or impossible.” *See id.* § 1231(b)(1)(C).

⁴³ *See id.* § 1231(b)(2).

⁴⁴ *See id.* § 1231(b)(2)(C).

⁴⁵ *See INS v. Doherty*, 502 U.S. 314, 320 (1992).

⁴⁶ *See* 8 U.S.C. § 1231(b)(3) (2000 & Supp. V 2005).

⁴⁷ *See* Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, § 2242, 112 Stat. 2681, 2681–822; STEPHEN W. YALE-LOEHR & JEFFREY C. O’NEILL, THE LEGALITY OF MAHER ARAR’S TREATMENT UNDER U.S. IMMIGRATION LAW, SUBMISSION TO THE COMMISSION OF INQUIRY INTO THE ACTIONS OF CANADIAN OFFICIALS IN RELATION TO MAHER ARAR 3 (2005), http://www.ararcommission.ca/eng/Yale-Loehr_may16.pdf.

⁴⁸ *See* § 2242, 112 Stat. at 2681–822. The last part of the clause (“regardless of whether the person is physically present in the United States”) is important because the government does not consider arriving aliens to be on U.S. soil. *See Shaughnessy v. U.S. ex rel. Mezei*, 345 U.S. 206, 213, 215 (1953).

⁴⁹ *See* 8 C.F.R. § 235.8(b)(4) (2007); YALE-LOEHR & O’NEILL, *supra* note 47, at 8.

country of removal depends upon the nature of the removal proceeding.⁵⁰

In summary removal, the Attorney General cannot send an alien to a country where the Attorney General determines that the alien's life would be threatened.⁵¹ However, the Attorney General can ask the Secretary of State to seek assurances from the proposed removal country that the alien will not be subject to torture or inhumane treatment.⁵² The Attorney General and the Secretary of State will then determine if these assurances are "sufficiently reliable" to remove the alien "to that country consistent with [the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment]."⁵³ If they decide that the assurances are reliable, neither an IJ nor the Board of Immigration Appeals (BIA) can review this decision,⁵⁴ and the U.S. government may remove the alien to that country.

Thus, the Attorney General is left to interpret removal law with only limited oversight from the judiciary. Further, courts have exercised this limited check on the Attorney General sparingly,⁵⁵ thus subjecting immigration law, and more specifically summary removal proceedings, to abuse.

2. *Canadian Law*

The Canadian government may remove a foreign national⁵⁶ from Canada if the government deems that national inadmissible.⁵⁷ The government may deem a foreign national inadmissible on several grounds, including criminality and security.⁵⁸ Regardless of their legal status, Canada removes all foreign nationals under the same provisions of the Immigration and Refugee Protection Act (IRPA).⁵⁹ In most cases, except for serious criminality and security grounds, once an immigration officer decides that a foreign national is inadmissible, the officer writes a report outlining both the inadmissibility section

⁵⁰ See YALE-LOEHR & O'NEILL, *supra* note 47, at 4–5.

⁵¹ See 8 U.S.C. § 1231(b)(3)(A) (2000).

⁵² See YALE-LOEHR & O'NEILL, *supra* note 47, at 9.

⁵³ 8 C.F.R. § 208.18(c)(2); see YALE-LOEHR & O'NEILL, *supra* note 47, at 10.

⁵⁴ See 8 C.F.R. § 208.18(c)(3); YALE-LOEHR & O'NEILL, *supra* note 47, at 10.

⁵⁵ See *supra* note 4 and accompanying text.

⁵⁶ The Immigration and Refugee Protection Act (IRPA) refers to foreign nationals where the United States Code would refer to nonresident aliens. The meanings of the two terms are identical for the purposes of this Note.

⁵⁷ See generally Immigration and Refugee Protection Act, 2001 S.C., ch. 27, §§ 34–42 (Can.) (describing the grounds for inadmissibility).

⁵⁸ See *id.*

⁵⁹ See *id.* § 44. This is in contrast to U.S. removal proceedings in which an alien's status in the United States determines the applicable removal procedure. See *supra* text accompanying notes 10–12.

applicable to the foreign national and the reasons for inadmissibility.⁶⁰ The officer then refers the report to the Minister of Citizenship and Immigration Canada (CIC) (or her delegate), who then decides whether or not to initiate removal proceedings.⁶¹ If the Minister decides to proceed, a Member of the Immigration Division of the Immigration and Refugee Board (Board) holds a hearing, and the foreign national may appeal an adverse decision to a federal court.⁶²

However, if a foreign national is inadmissible on security grounds, the Minister may choose an alternate removal procedure instead of an admissibility hearing. In this situation, an immigration officer must contact the Security Review at the National Security Division of Canada Border Services Agency (CBSA) for approval before refusing the foreign national entry to Canada or writing an inadmissibility report.⁶³ If CBSA approves, the immigration officer (or CBSA) then writes an inadmissibility report and forwards the report to the Minister of CIC.⁶⁴ The Ministers of Public Safety (PS) and CIC⁶⁵ then decide how to proceed.⁶⁶ If the Ministers decide that the report is well-founded, the Ministers have two procedural options: (1) the Minister of CIC may refer the foreign national for an admissibility hearing before a Member of the Board because the Minister believes the foreign national is inadmissible;⁶⁷ or (2) the Ministers may remove the foreign national through a security certificate.⁶⁸

If the Ministers decide to remove a foreign national through an admissibility hearing, the foreign national has a right to counsel, though the government need not provide one.⁶⁹ For the right to counsel to be meaningful, not only must the Member of the Board allow enough time for the foreign national to retain counsel, but the

⁶⁰ See Immigration and Refugee Protection Act § 44(1).

⁶¹ See *id.* § 44(2).

⁶² See *id.* §§ 44(2), 72. The foreign national may also appeal an adverse decision to the Board if he is a “protected person” under IRPA. See *id.* § 63(3). A foreign national is a protected person if the Minister of CIC has approved his PRRA application. See *id.* § 112(1).

⁶³ See CITIZENSHIP & IMMIGRATION CAN., ENFORCEMENT MANUAL, ENF 5: WRITING 44(1) REPORTS 10 (2007), available at <http://www.cic.gc.ca/english/resources/manuals/enf/enf05e.pdf> [hereinafter ENFORCEMENT MANUAL, WRITING 44(1) REPORTS].

⁶⁴ See Immigration and Refugee Protection Act § 44(1).

⁶⁵ Public Safety Canada includes several Canadian government agencies including CBSA. See Canada Border Services Agency, Who We Are, <http://www.cbsa.gc.ca/agency-agence/who-qui-eng.html> (last visited Jan. 23, 2008).

⁶⁶ See ENFORCEMENT MANUAL, WRITING 44(1) REPORTS, *supra* note 63, at 8–10.

⁶⁷ See Immigration and Refugee Protection Act § 44(2).

⁶⁸ See *id.* § 77. Note that parts of the Canadian Security Certificate process may change in the coming year because the Canadian Supreme Court ruled in 2007 that portions of the procedure are unconstitutional. See *Charkaoui v. Canada (Citizenship & Immigration)*, [2007] 1 S.C.R. 350, 2007 SCC 9, para. 3 (Can.); *infra* notes 92–94 and accompanying text.

⁶⁹ See Immigration and Refugee Protection Act § 167(1).

Member must provide enough time for counsel to prepare the case.⁷⁰ The proceeding is quasi-judicial in nature because, while formal evidence rules do not apply,⁷¹ both the government and the foreign national may present evidence.⁷² Further, the hearing will be public unless the foreign national makes a confidentiality application or the Board decides to conduct the hearing in private.⁷³ At the end of the hearing, the Member must either decide that the foreign national is admissible or order the foreign national removed because he is inadmissible.⁷⁴ If the Member deems the foreign national inadmissible on security grounds, the foreign national may appeal the decision to a federal court but not to the Board unless the foreign national is a protected person.⁷⁵ However, there is no *right* to appeal, and it is only granted with leave of the federal court.⁷⁶ Further, if the appeal is granted, the level of review is deferential and the court will only overturn the Member's decision if it is "patently unreasonable" because the Member made it arbitrarily or in bad faith, or because the decision was unsupported by the evidence.⁷⁷

However, before or during the admissibility hearing, an eligible foreign national may apply for a Pre-Removal Risk Assessment (PRRA).⁷⁸ A PRRA application is filed if a foreign national fears torture or prosecution if returned to his country of citizenship, birth country, or the country from which the foreign national arrived.⁷⁹ The foreign national must submit the application to the Minister of CIC for review.⁸⁰ In evaluating whether a foreign national is in need of protection, the Minister must decide whether removing the foreign national to his country or countries of nationality would subject him to a danger "believed on substantial grounds to exist," pose a threat to the foreign national's life, or present "a risk of cruel and unusual treatment or punishment."⁸¹ The Minister must also consider

⁷⁰ See LORNE WALDMAN, 2004 CANADIAN IMMIGRATION & REFUGEE LAW PRACTICE 103 (2003).

⁷¹ See Immigration and Refugee Protection Act § 162(2) ("Each Division shall deal with all proceedings before it as informally and quickly as the circumstances and the considerations of fairness and natural justice permit.").

⁷² See WALDMAN, *supra* note 70, at 105.

⁷³ See Immigration and Refugee Protection Act § 166.

⁷⁴ See *id.* § 45.

⁷⁵ See *id.* §§ 63(3), 72(1).

⁷⁶ See *Bains v. Canada* (Minister of Employment & Immigration), [1990] 109 N.R. 239, para. 4 (Can.).

⁷⁷ See *Suresh v. Canada* (Minister of Citizenship & Immigration), [2002] 1 S.C.R. 3, 2002 SCC 1, para. 29 (Can.).

⁷⁸ See Immigration and Refugee Protection Act § 112(1).

⁷⁹ See *id.* §§ 97, 113(d). For a full discussion of the PRRA process, see CITIZENSHIP & IMMIGRATION CAN., ENFORCEMENT MANUAL, ENF 10: REMOVALS (2006), available at <http://www.cic.gc.ca/english/resources/manuals/enf/enf10e.pdf>.

⁸⁰ See Immigration and Refugee Protection Act § 112(1).

⁸¹ See *id.* §§ 97(1)(a)-(b), 113(d).

whether to refuse the application because the foreign national presents a danger to Canada's security.⁸² In considering whether to grant a PRRA application, the Minister of CIC, like the Secretary of State in U.S. removal proceedings, may seek assurances from the country to which Canada is considering removing a foreign national that the foreign national would be safe from torture if Canada returned that individual to the removal country.⁸³ In determining the reasonableness of the assurances, the Canadian Supreme Court has held that it is difficult to rely "too heavily on assurances by a state that it will refrain from torture in the future when it has engaged in illegal torture or allowed others to do so on its territory in the past."⁸⁴

If the Minister grants a PRRA, and the Minister decides that a foreign national is in need of protection, this, in effect, stays his removal,⁸⁵ and the government cannot remove the foreign national unless the conditions in his country of removal change such that it is unlikely the foreign national would be tortured if he returned.⁸⁶ However, if the Minister decides that there is no such risk, the government may remove a foreign national if the Member deems him inadmissible. However, even if the Minister believes that such a risk exists, the Minister has discretion to deny the PRRA upon the belief that the foreign national is a danger to Canada's security.⁸⁷ However, such a case must be an exceptional one.⁸⁸

If, instead of referring the foreign national to an admissibility hearing, the Ministers of CIC and PS issue a security certificate, they must follow a strict process. First, the Ministers must agree that a foreign national is inadmissible on security grounds and then sign a certificate to that effect.⁸⁹ Once signed, the Ministers refer the certificate to a chief justice, or a designated judge, of a federal court who determines the reasonableness of the certificate.⁹⁰

In reviewing the reasonableness of the security certificate, the federal judge, using a less stringent standard than the balance of probabilities, reviews all evidence that the Ministers submitted.⁹¹ The primary reason for using the security certificate process is that the government has highly sensitive information that it does not want made

⁸² See *id.* § 113(d)(ii).

⁸³ See *Suresh v. Canada (Minister of Citizenship & Immigration)*, [2002] 1 S.C.R. 3, 2002 SCC 1, para. 123 (Can.).

⁸⁴ See *id.* at para. 124.

⁸⁵ See *Immigration and Refugee Protection Act* § 114(1)(b).

⁸⁶ See *id.* § 114(2).

⁸⁷ See *id.* § 115(2).

⁸⁸ See *Suresh*, 1 S.C.R. at para. 129.

⁸⁹ See *Immigration and Refugee Protection Act* § 77(1).

⁹⁰ See *id.* §§ 77(1), 80(1).

⁹¹ See Colleen Bell, *Subject to Exception: Security Certificates, National Security and Canada's Role in the "War on Terror,"* 21 CAN. J.L. & SOC'Y 63, 72 (2006).

public. Before February 2007, this process allowed the Minister of PS to request that the judge hear all or part of the evidence in camera without the foreign national or his counsel present.⁹² However, in February 2007, the Canadian Supreme Court ruled that such a “secret” proceeding is unconstitutional because it violates section 7 of the Canadian Charter of Rights and Freedoms.⁹³ Thus, it is unlikely that this part of the process will survive Parliament’s amendment of the IRPA pursuant to the Court’s opinion.⁹⁴

Once the government has presented its case, the foreign national is entitled to present his case.⁹⁵ The judge may receive any relevant evidence, even if it would be inadmissible “in a court of law.”⁹⁶ The foreign national is also entitled to counsel, though the government need not provide for one.⁹⁷ During the security certificate proceeding, but before a judge renders a final decision, a foreign national may apply for a PRRA.⁹⁸ Once the foreign national applies, the security certificate proceeding ceases and the judge must submit the PRRA to the Minister of CIC for review.⁹⁹ Even if the Minister believes that the foreign national will be tortured when removed, the Minister does not have to grant the PRRA if she believes that the foreign national is a danger to Canadian national security.¹⁰⁰ Once the Minister decides to grant or deny the PRRA, the certificate process resumes and the federal judge “shall review the lawfulness of the [Minister’s] decision.”¹⁰¹

After hearing all of the evidence, the federal judge must decide the reasonableness of the security certificate.¹⁰² If the judge finds it reasonable, the certificate becomes an effective order of deportation

⁹² See Immigration and Refugee Protection Act § 78(e); Benjamin L. Berger, *Our Evolving Judicature: Security Certificates, Detention Review, and the Federal Court*, 39 U.B.C. L. REV. 101, 107 (2006).

⁹³ See *Charkaoui v. Canada (Citizenship & Immigration)*, [2007] 1 S.C.R. 350, 2007 SCC 9, para. 3 (Can.). The Court also ruled that the government violated the Charter by detaining foreign nationals for 120 days before allowing them to challenge the certificate. See *id.* at paras. 3, 141. This part of the *Charkaoui* opinion is beyond the scope of this Note.

⁹⁴ The Court has given the Canadian government one year to rewrite this portion of the IRPA. See *id.* at para. 140.

⁹⁵ See Immigration and Refugee Protection Act § 78(i).

⁹⁶ See *id.* § 78(j).

⁹⁷ See *id.* § 167(1).

⁹⁸ See *id.* §§ 79(1), 112(1); *supra* notes 78–88 and accompanying text.

⁹⁹ See Immigration and Refugee Protection Act § 79(1).

¹⁰⁰ See *id.* § 115(2)(b). However, except in exceptional cases, it may violate section 7 of the Charter. See *Suresh v. Canada (Minister of Citizenship & Immigration)*, [2002] 1 S.C.R. 3, 2002 SCC 1, para. 129 (Can.).

¹⁰¹ See Immigration and Refugee Protection Act §§ 79(2), 80(1); Marianne “Chuck” Davies, *Unequal Protection Under the Law: Re Charkaoui and the Security Certificate Process Under the Immigration and Refugee Protection Act*, 69 SASK. L. REV. 375, 382 n.48 (2006).

¹⁰² See Immigration and Refugee Protection Act § 80(1).

that cannot be appealed to either the Board or to a federal court.¹⁰³ The judge shall quash the certificate if the judge finds it to be unreasonable.¹⁰⁴ If the foreign national applied for protection and the judge determines that the Minister of CIC unlawfully denied the protection, the judge “shall quash the decision and suspend the proceeding to allow the Minister to make a decision on the application for protection.”¹⁰⁵

Although the Minister of CIC may use the security certificate proceedings, use of a security certificate is unlikely. While Canada removes approximately nine thousand persons a year, only twenty-seven security certificates have been issued since 1991.¹⁰⁶ Further, given the Canadian Supreme Court’s recent ruling on security certificate proceedings and the resulting uncertainty surrounding those proceedings, the Canadian government is unlikely to use this process in the near future.¹⁰⁷

Regardless of the process the Minister chooses, once the removal order becomes final “it must be enforced as soon as is reasonably practicable” and the foreign national must leave Canada as quickly as possible.¹⁰⁸ If a foreign national is inadmissible on security grounds, the order is effective the day it is issued if the foreign national has not been granted leave to appeal the order.¹⁰⁹ If the foreign national has the right to appeal and does not exercise it, the order becomes effective when the appeal period expires.¹¹⁰ If the foreign national does appeal, the order becomes effective on the date of the final determination of the appeal.¹¹¹ The foreign national may then either leave voluntarily, or the Minister of CIC will enforce the order.¹¹² However, a foreign national may withdraw his application to enter Canada before the Minister issues an inadmissibility report.¹¹³ Foreign nationals who leave voluntarily may choose their country of removal.¹¹⁴ However, the immigration officer may ignore this choice if the officer determines that the foreign national is “(a) a danger to the public; (b) a fugitive from justice in Canada or another country; or (c) [is] seek-

¹⁰³ See *id.* §§ 80(3), 81(b).

¹⁰⁴ See *id.* § 80(2).

¹⁰⁵ See *id.*

¹⁰⁶ See Public Safety Canada, Security Certificates, <http://www.psepc.gc.ca/prg/ns/seccert-en.asp> (last visited Jan. 24, 2008). Of these twenty-seven certificates, only six have been issued since September 11, 2001. See *id.*

¹⁰⁷ See *Charkaoui v. Canada (Citizenship & Immigration)*, [2007] 1 S.C.R. 350, 2007 SCC 9, para. 140 (Can.).

¹⁰⁸ See Immigration and Refugee Protection Act § 48(2).

¹⁰⁹ See *id.* § 49(1)(a).

¹¹⁰ *Id.* § 49(1)(b).

¹¹¹ *Id.* § 49(1)(c).

¹¹² See Immigration and Refugee Protection Regulations SOR/2002-227, § 237 (Can.).

¹¹³ See *id.* § 42(1).

¹¹⁴ See *id.* § 238(2).

ing to evade or frustrate the cause of justice in Canada or another country.”¹¹⁵

If, however, a foreign national does not leave Canada voluntarily either because that individual refuses to leave or because the immigration officer believes the foreign national is a danger to the public, the government must remove the foreign national to (1) the country from which he arrived; (2) the country where he last permanently resided; (3) his country of citizenship or nationality; or (4) his birth country.¹¹⁶ If none of these countries is willing to accept the foreign national, the Minister must remove the foreign national to any other willing country the Minister chooses.¹¹⁷

Thus, under Canadian law an inadmissible foreign national has many opportunities to seek judicial review of both the admissibility decision and the country to which he will be removed. The extensiveness of this review under Canadian law is in stark contrast to the inability of aliens to appeal the same decisions in U.S. courts.

B. Factual Background of the Case of Maher Arar¹¹⁸

Maher Arar is a dual citizen of Canada and Syria.¹¹⁹ He traveled to the United States from Switzerland on September 26, 2002.¹²⁰ At the U.S. border, Arar presented a Canadian passport and stated that he was seeking transit through, and not admission to, the United States to Canada.¹²¹ The Immigration and Naturalization Service (INS) had prior notice of his impending arrival and detained him for questioning.¹²² INS officials questioned Arar based on information received from Canadian authorities.¹²³ In fact, former U.S. Secretary of State Colin Powell stated that the United States would not have

¹¹⁵ See *id.* The foreign national must also satisfy the officer that he has the necessary means to leave Canada and enter his designated country. See *id.* § 238(1)(a). He must also present himself to an officer at a port of entry to “verify [his] departure . . . [and] obtain[] a certificate of departure from [CIC].” *Id.* § 240(1)(a)–(b); see *id.* § 238(1)(b).

¹¹⁶ See *id.* § 241(1).

¹¹⁷ See *id.* § 241(2).

¹¹⁸ Most of the facts in this subpart come from the Canadian commission appointed to investigate Maher Arar’s case because the U.S. government has refused to release documents relating to Arar’s time in the United States. See COMM’N OF INQUIRY INTO THE ACTIONS OF CANADIAN OFFICIALS IN RELATION TO MAHER ARAR, REPORT OF THE EVENTS RELATING TO MAHER ARAR: ANALYSIS AND RECOMMENDATIONS 11 (2006), available at http://www.ararcommission.ca/eng/AR_English.pdf [hereinafter ARAR COMM’N REPORT: ANALYSIS AND RECOMMENDATIONS].

¹¹⁹ See Deportation Order, *supra* note 6, at 3.

¹²⁰ *Id.*

¹²¹ See *id.*

¹²² See *Arar v. Ashcroft*, 414 F. Supp. 2d 250, 253 (E.D.N.Y. 2006); Deportation Order, *supra* note 6, at 3.

¹²³ See ARAR COMM’N REPORT: ANALYSIS AND RECOMMENDATIONS, *supra* note 118, at 161.

detained Arar but for the information that U.S. authorities had received from their Canadian counterparts.¹²⁴

Arar was not allowed to contact a lawyer at any point during his two days of questioning.¹²⁵ In fact, Arar did not receive access to counsel until October 5,¹²⁶ nine days after the INS had detained him and three days before the government removed him to Syria. The INS deemed Arar inadmissible to the United States because he was allegedly a member of the terrorist organization al-Qaeda.¹²⁷ Although U.S. officials gave Arar the opportunity to voluntarily depart from the United States to Syria, he requested to be removed to Canada and expressed fears of being tortured if he was removed to Syria.¹²⁸

Officials detained Arar for five days before informing him that he would be subject to summary removal.¹²⁹ On October 1, the INS served Arar with the unclassified documents that supplied the basis for his inadmissibility and gave him five days to respond to the inadmissibility charge.¹³⁰ According to the INS, by October 7, Arar had not provided a written response to its charges;¹³¹ the INS served Arar with the order to remove him to Syria on October 8.¹³²

Evidently, the INS believed that removing Arar to Syria would not violate FARRA. The INS Commissioner was satisfied that Arar would not be tortured once removed apparently because Syrian officials assured the Commissioner to that effect.¹³³ However, a 2002 U.S. State Department report on Syria indicated that Syrian authorities engaged in torture and were more likely to do so when they were trying to elicit a confession or information from a detainee.¹³⁴ This behavior directly contravenes U.S. law.¹³⁵

¹²⁴ See *id.*

¹²⁵ *Arar*, 414 F. Supp. 2d at 253.

¹²⁶ See ARAR COMM'N REPORT: ANALYSIS AND RECOMMENDATIONS, *supra* note 118, at 167–68.

¹²⁷ See *Arar*, 414 F. Supp. 2d at 253.

¹²⁸ See *id.* Arar feared he would be tortured in Syria because he had left Syria before fulfilling his military service requirement and the Syrian government had accused one of his family members of being a member of a terrorist organization. See YALE-LOEHR & O'NEILL, *supra* note 47, at 10.

¹²⁹ See Deportation Order, *supra* note 6, at 3.

¹³⁰ See *id.*

¹³¹ See *id.* at 4.

¹³² See *id.* at 9; ARAR COMM'N REPORT: ANALYSIS AND RECOMMENDATIONS, *supra* note 118, at 139.

¹³³ See ARAR COMM'N REPORT: ANALYSIS AND RECOMMENDATIONS, *supra* note 118, at 156.

¹³⁴ See BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, U.S. DEP'T OF STATE, SYRIA: COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES—2002 (2003), available at <http://www.state.gov/g/drl/rls/hrrpt/2002/18289.htm> [hereinafter SYRIA: COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES].

¹³⁵ See 18 U.S.C. §§ 2340–2340A (2000); SYRIA: COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES, *supra* note 134.

Syria detained and tortured Arar for nearly one year before releasing and returning him to Canada.¹³⁶ He was *never* charged with any crime.¹³⁷ In fact, before removing Arar to Syria, the U.S. Federal Bureau of Investigation (FBI) told Canadian authorities that it lacked the necessary evidence to charge Arar and asked Canadian authorities whether they had sufficient evidence to charge him.¹³⁸

After returning to Canada, Arar brought a civil suit in the U.S. District Court for the Eastern District of New York against former U.S. Attorney General John Ashcroft, seeking relief under the Due Process Clause of the Fifth Amendment of the U.S. Constitution and under the Torture Victim Prevention Act.¹³⁹ Arar lost in the district court, and the Second Circuit has heard his appeal,¹⁴⁰ but as of February 17, 2008, the decision was still pending. Arar also asked the Canadian government to conduct an official inquiry into its involvement in his case.¹⁴¹ The Canadian government established a commission in 2004, and in September 2006 the commission issued its final report.¹⁴² After the report was issued, both the Canadian House of Commons and the former Royal Canadian Mounted Police Commissioner formally apologized to Arar.¹⁴³ However, while the United States and Canada have entered into an agreement aimed at preventing similar situations in the future,¹⁴⁴ the U.S. Executive Branch has yet to apologize to Arar for subjecting him to torture in Syria.¹⁴⁵

¹³⁶ See ARAR COMM'N REPORT: ANALYSIS AND RECOMMENDATIONS, *supra* note 118, at 9, 139.

¹³⁷ See *id.* at 9.

¹³⁸ See *id.* at 152. The Canadian authorities reported that they too lacked sufficient evidence to charge Arar in Canada. *Id.*

¹³⁹ Arar v. Ashcroft, 414 F. Supp. 2d 250, 252 (E.D.N.Y. 2006).

¹⁴⁰ See Alan Feuer, *U.S. Judge Questions Lawyers on Suit by Tortured Canadian*, N.Y. TIMES, Nov. 10, 2007, at A7.

¹⁴¹ See Graham Fraser, *Arar's Syrian Hell: 'I Lived in a Grave'*, TORONTO STAR, Nov. 5, 2003, at A1.

¹⁴² See Press Release, Comm'n of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, Arar Commission Releases Its Findings on the Handling of the Maher Arar Case (Sept. 18, 2006), available at http://www.ararcommission.ca/eng/ReleaseFinal_Sept18.pdf. For the commission's recommendations and conclusions, see generally ARAR COMM'N REPORT: ANALYSIS AND RECOMMENDATIONS, *supra* note 118.

¹⁴³ See Les Whittington, *No U.S. Apology in Works for Arar*, TORONTO STAR, Oct. 31, 2006, at A10.

¹⁴⁴ The agreement, the Monterey Accord, requires the U.S. government to consult with the Canadian government before the United States deports a Canadian to a third country. See Jim Brown, *No Regrets over Arar: U.S. Envoy*, TORONTO STAR, Sept. 19, 2005, at A8.

¹⁴⁵ See Whittington, *supra* note 143, at A10. There has been no apology even though U.S. Secretary of State Condoleezza Rice acknowledged that the U.S. government "mishandled" Arar's case. See Rice Admits U.S. Erred in Deportation, N.Y. TIMES, Oct. 25, 2007, at A10.

II

THE APPLICATION OF U.S. AND CANADIAN LAW TO THE
FACTS OF ARAR'S CASE

A. U.S. Law

1. *Inadmissibility and the Order of Removal*

The U.S. government deemed Arar inadmissible on security grounds for allegedly being a member of al-Qaeda.¹⁴⁶ The INS removed Arar from the United States under the summary removal process¹⁴⁷ after detaining him for twelve days. Because Arar was subject to summary removal at the U.S. border, it is likely that an immigration officer made his inadmissibility determination and a regional director of the INS ordered him removed.¹⁴⁸ Arar was allowed to review only unclassified information, which consisted mainly of his passport, his reasons for travel, and his alleged association with a person of interest to Canadian and U.S. authorities.¹⁴⁹ Arar was not entitled to cross-examine witnesses or file an appeal with a U.S. court to determine the legality and constitutionality of his removal order.¹⁵⁰ In essence, the U.S. government summarily deemed Arar a terrorist and never allowed him to challenge that determination.

2. *Country of Removal*

While U.S. courts have seldom allowed nonresident aliens to challenge their admissibility to the United States,¹⁵¹ they have allowed aliens to challenge the country to which the United States may remove them.¹⁵² Although two sections of the U.S. Code govern the selection process of a country to which the United States may remove a nonresident alien,¹⁵³ it is unclear which section the United States used to select a country of removal for Arar because the U.S. government has been unwilling to release the pertinent documents.¹⁵⁴ In Arar's civil suit, however, former U.S. Attorney General John Ashcroft

¹⁴⁶ See Deportation Order, *supra* note 6, at 2.

¹⁴⁷ See 8 U.S.C. § 1225(c) (2000).

¹⁴⁸ See *id.* § 1225(c)(1); Deportation Order, *supra* note 6, at 2.

¹⁴⁹ See Deportation Order, *supra* note 6, at 3–5.

¹⁵⁰ See 8 U.S.C. § 1225(c)(1)(C) (2000); ARAR COMM'N REPORT: ANALYSIS AND RECOMMENDATIONS, *supra* note 118, at 154.

¹⁵¹ See *supra* note 28 and accompanying text.

¹⁵² See generally *Jama v. Immigration & Customs Enforcement*, 543 U.S. 335 (2005) (holding that while aliens could challenge Somalia as their country of removal because no government existed there to “accept” them, the U.S. could remove aliens to Somalia without the consent of the Somalian government); *Wangchuck v. Dep't of Homeland Sec.*, 448 F.3d 524 (2d Cir. 2006) (finding that the BIA erred in allowing petitioner's removal to China because the BIA did not establish that he was indeed a citizen of China and because the petitioner did not ask the United States to remove him to China).

¹⁵³ See *supra* notes 41–53 and accompanying text.

¹⁵⁴ See *supra* note 118.

filed a memo stating that the country for Arar's removal was determined under the provision for "other aliens."¹⁵⁵ As Arar was removed under this section, 8 U.S.C. § 1231(b)(2), the Attorney General was free to disregard Arar's designation of Canada as his removal country¹⁵⁶ if the Attorney General thought removing Arar to Canada would prejudice the United States.¹⁵⁷ This is the only way that the INS could have removed Arar to Syria.

U.S. immigration law provides four ways that the Attorney General could have ignored Arar's designated country of removal: (1) Arar failed to designate a country for removal in a timely fashion; (2) the country Arar designated did not inform the Attorney General within thirty days that it would accept him; (3) the designated country was not willing to accept him; or (4) removing Arar to his designated country would have prejudiced the United States.¹⁵⁸ Presumably Arar notified U.S. authorities of his designated country in a timely fashion: he told them he wanted to be removed to Canada or Switzerland the day after being detained.¹⁵⁹ Canadian authorities informed the FBI that they would accept Arar when the FBI inquired.¹⁶⁰ Thus, Canada likely provided a timely answer under the statute, and the Attorney General could not ignore Arar's selection under the second and third options.¹⁶¹ The Attorney General could only have ignored Arar's designation of Canada or Switzerland if he deemed removal to either of those two countries prejudicial to the United States.¹⁶² The prejudice that Arar's removal to Canada might have caused remains unclear given that Canada issued the intelligence report upon which he was detained and subsequently removed. It is also unclear what prejudice there could be in removing Arar to Switzerland, the country from which he arrived.¹⁶³

Further, Arar's removal to Syria is peculiar given that in *INS v. Doherty*, the Supreme Court held that where the respondent was charged with a crime in England, it would be prejudicial to remove him to any country other than England.¹⁶⁴ If Canada gave the United States the information on which the U.S. government detained and

¹⁵⁵ See *Arar v. Ashcroft*, 414 F. Supp. 2d 250, 271 (E.D.N.Y. 2006); *supra* notes 41–45.

¹⁵⁶ See *Arar*, 414 F. Supp. 2d at 271.

¹⁵⁷ See 8 U.S.C. § 1231(b)(2)(C)(iv) (2000); *Arar*, 414 F. Supp. 2d at 271.

¹⁵⁸ See 8 U.S.C. § 1231(b)(2)(C).

¹⁵⁹ See *Arar*, 414 F. Supp. 2d at 253.

¹⁶⁰ See ARAR COMM'N REPORT: ANALYSIS AND RECOMMENDATIONS, *supra* note 118, at 152.

¹⁶¹ This assumes that the FBI told the U.S. Attorney General that Canada would accept Arar. The Arar Commission Report and Arar's civil suit do not make clear whether the FBI did so.

¹⁶² See 8 U.S.C. § 1231(b)(2)(C)(iv).

¹⁶³ See Deportation Order, *supra* note 6, at 3.

¹⁶⁴ 502 U.S. 314, 320 (1992).

removed Arar,¹⁶⁵ and Canadian authorities suspected Arar of terrorist ties,¹⁶⁶ under *Doherty* it should have been prejudicial to remove Arar to any country other than Canada.

Even if Arar's removal to Canada would have prejudiced the United States, case law suggests that the United States should not have considered Arar a Syrian citizen.¹⁶⁷ While Arar is a dual citizen of Syria and Canada, under the United States' "dual nationality policy," the United States should have treated him as a Canadian citizen. Under this policy, the "operative" nationality of a dual national is the nationality he claims when entering the United States—that is, the passport the alien presents when seeking admission to the United States.¹⁶⁸ Thus, the Attorney General cannot claim that he was returning Arar to the country of his citizenship because under U.S. law the government should not have considered him a Syrian citizen.¹⁶⁹ Consequently, the INS could only have removed Arar to Syria if the Attorney General thought it was prejudicial to the interests of the United States to remove him to Switzerland or Canada. If it was prejudicial to remove him to the country of his citizenship, and the country that issued the intelligence information, there must have been a very strong U.S. national interest at stake. Though any proposed reason is merely speculation, it is possible that Arar was removed under a policy of extraordinary rendition.¹⁷⁰ The Central Intelligence Agency uses the term "extraordinary rendition" to describe the practice of sending suspected terrorists to foreign countries to be interrogated with methods that would violate U.S. law if used by U.S. officials.¹⁷¹ Not only has Arar argued that this is why he was removed to Syria,¹⁷² but a member of the U.S. House of Representatives, Edward J. Markey of Massachusetts, has stated that Arar was sent to Syria, and not to Canada, *because* Syria engages in torture.¹⁷³

Regardless of whether the United States actually removed Arar to Syria under a policy of extraordinary rendition, under U.S. law, the

¹⁶⁵ See ARAR COMM'N REPORT: ANALYSIS AND RECOMMENDATIONS, *supra* note 118, at 161.

¹⁶⁶ See *id.* at 86.

¹⁶⁷ See *Jang v. Reno*, 113 F.3d 1074, 1076 (9th Cir. 1997).

¹⁶⁸ See *id.*

¹⁶⁹ See *id.*

¹⁷⁰ See COMM'N OF INQUIRY INTO THE ACTIONS OF CANADIAN OFFICIALS IN RELATION TO MAHER ARAR, REPORT OF THE EVENTS RELATING TO MAHER ARAR, FACTUAL BACKGROUND VOLUME I: ADDENDUM 245 (2006), available at <http://www.ararcommission.ca/eng/2007-08-08-addendum.pdf>; Jane Mayer, *Outsourcing Torture*, NEW YORKER, Feb. 14, 2005, at 106, 106, available at http://www.newyorker.com/printables/fact/050214fa_fact6; Gary Williams, *Indefinite Detention and Extraordinary Rendition*, L.A. LAW., Sept. 2006, at 44, 47–48.

¹⁷¹ See *Arar v. Ashcroft*, 414 F. Supp. 2d 250, 256 (E.D.N.Y. 2006); Mayer, *supra* note 170, at 106; Williams, *supra* note 170, at 47.

¹⁷² See *Arar*, 414 F. Supp. 2d at 256.

¹⁷³ See Scott Shane, *The Costs of Outsourcing Interrogation: A Canadian Muslim's Long Ordeal in Syria*, N.Y. TIMES, May 29, 2005, at 10.

United States should not have sent him to Syria precisely because it was more likely than not that he would be tortured there. Under these circumstances, the Secretary of State must promptly seek assurances from the country to which an alien is to be removed that the country will not torture the alien once he arrives there, and the Secretary must be satisfied that it is more likely than not that the alien will not be tortured in that country.¹⁷⁴ In Arar's case, assuming that the Secretary did in fact seek such assurances from Syria, it is difficult to believe that the "more likely than not" standard was met for two reasons. First, the State Department's own reports indicate that Syrian authorities engage in torture.¹⁷⁵ Second, the United States has a distrustful relationship with Syria.¹⁷⁶ Unfortunately, it is impossible to know if this standard was met because the decisions by the Secretary of State and the Attorney General were not subject to judicial review.¹⁷⁷

3. *Judicial Review*

Arar would have had difficulty procuring judicial review of the Attorney General's decision to remove him to Syria because U.S. law limits the availability of judicial review.¹⁷⁸ Moreover, as a practical matter, because the INS informed Arar that he was to be removed to Syria the same day that the United States removed him,¹⁷⁹ he had little time to file an appeal or contact his lawyer before he was removed.

However, if the government had afforded Arar enough time to appeal his removal, he could have challenged the government's actions in two ways. After the final removal order was issued, Arar could have challenged the order through a habeas petition¹⁸⁰ and appealed the removal order itself.¹⁸¹

In filing a habeas petition, Arar could have argued both that his detention was unlawful because he was admissible and that he was detained for too long. However, Arar would likely have lost on both of these grounds. Courts review inadmissibility decisions only to the ex-

¹⁷⁴ See *Al-Anazi v. Bush*, 370 F. Supp. 2d 188, 192 (D.D.C. 2005).

¹⁷⁵ See SYRIA: COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES, *supra* note 134.

¹⁷⁶ See BUREAU OF NEAR E. AFFAIRS, U.S. DEP'T OF STATE, BACKGROUND REPORT: SYRIA (2007), available at <http://www.state.gov/r/pa/ei/bgn/3580.htm>.

¹⁷⁷ See *Arar*, 414 F. Supp. 2d at 267.

¹⁷⁸ See *supra* notes 29–40 and accompanying text.

¹⁷⁹ See ARAR COMM'N REPORT: ANALYSIS AND RECOMMENDATIONS, *supra* note 118, at 139, 154. Arar was served with the order at four o'clock in the morning and removed later that day to Jordan. See *id.*

¹⁸⁰ See *INS v. St. Cyr*, 533 U.S. 289, 313 (2001) (finding that 8 U.S.C. § 1252(b) does not preclude habeas jurisdiction over removal orders not subject to judicial review).

¹⁸¹ See 8 U.S.C. § 1252(b)(9) (2000) ("Judicial review . . . shall be available only . . . of a final order under this section.").

tent of determining that the government has a “facially legitimate and bona fide reason” for exclusion.¹⁸² Given this low standard of review, a court would be unlikely to overturn the INS’s determination that Arar was a terrorist, even if the grounds for that determination were suspect.¹⁸³ As for the length of his detention, while the U.S. Supreme Court has found a constitutional violation in holding an inadmissible alien indefinitely,¹⁸⁴ it is unlikely that a court would consider holding an inadmissible alien like Arar for twelve days to be holding him “indefinitely.” Thus, Arar was unlikely to succeed on either of these arguments. However, since Arar’s removal, the REAL ID Act has changed the appeals process and aliens can no longer file habeas petitions for review of removal orders.¹⁸⁵ To obtain judicial review of final removal orders, aliens must now use 8 U.S.C. § 1252(a)(2)(D), which permits review of legal and constitutional questions. However, if Arar’s case is any indication, many aliens lack the time to bring such appeals before the United States removes them under summary removal because the DHS tends to remove aliens immediately after serving the final order.¹⁸⁶

Thus, if Arar’s case occurred today and he filed his petition after the final order had issued, he would still lose the inadmissibility and unlawful detention arguments, but he might succeed on other claims. To file such claims, Arar would have to establish the court’s jurisdiction to hear his case. While the language of 8 U.S.C. § 1252 generally limits the jurisdiction of courts of appeals in immigration cases,¹⁸⁷ Arar, or someone in his place today, could establish that jurisdiction exists. Arar could make three arguments in support of jurisdiction: (1) section 1252(a)(2)(D) gives the court jurisdiction to hear constitutional claims;¹⁸⁸ (2) the decision to remove him to a country is not expressly a discretionary decision of the Attorney General;¹⁸⁹ and (3) section 1252(g) does not preclude the claim because it is not an ap-

¹⁸² *Kleindienst v. Mandel*, 408 U.S. 753, 770 (1972); *see Adams v. Baker*, 909 F.2d 643, 647 (1st Cir. 1990) (stating that inadmissibility decisions are reviewed only for clear error); *supra* note 34 and accompanying text.

¹⁸³ *See* 8 U.S.C. § 1252(b)(4)(B) (2000 & Supp. V 2005) (“[A]dministrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary . . .”). This is in contrast to the relatively higher judicial standard for assurances from a foreign country where an alien fears torture if removed to that country. *See Al-Anazi v. Bush*, 370 F. Supp. 2d 188, 192 (D.D.C. 2005).

¹⁸⁴ *See Clark v. Martinez*, 543 U.S. 371, 386 (2005).

¹⁸⁵ REAL ID Act of 2005, Pub. L. No. 109-13, § 106, 119 Stat. 231, 310–11 (codified at 8 U.S.C. § 1252(b)(9) (2000 & Supp. V 2005)).

¹⁸⁶ *See infra* note 254.

¹⁸⁷ *See supra* notes 35–40.

¹⁸⁸ *See* 8 U.S.C. § 1252(a)(2)(D) (Supp. V. 2005).

¹⁸⁹ *See* 8 U.S.C. § 1252(a)(2)(B)(ii) (Supp. V 2005).

peal of a decision to “commence proceedings, adjudicate cases, or execute removal orders.”¹⁹⁰

Had Arar’s case occurred after Congress enacted the REAL ID Act, he could have argued that a court had jurisdiction to hear his case under 8 U.S.C. § 1252(a)(2)(D) because the removal order likely violated the Constitution. It is likely a violation of substantive due process because an alien has, at minimum, a right to be free from torture or physical abuse.¹⁹¹ While the government can argue that Syria, not the United States, tortured Arar and thus there was no violation of the Constitution, this is a weak argument. The U.S. government likely acquiesced in Arar’s torture by sending him to a country where he would likely be tortured.¹⁹² Further, Arar could also have argued that detaining him without counsel for nine days, allowing him to meet with counsel once, and then removing him to a country where he would likely be tortured violated procedural due process.¹⁹³ Thus, there would likely be jurisdiction under 8 U.S.C. § 1252(a)(2)(D) to hear the constitutional due process claim.¹⁹⁴

The second argument, here under 8 U.S.C. § 1252(a)(2)(B)(ii), is also compelling. Because the Attorney General did not have discretion to send Arar to Syria, a court of appeals could still review Arar’s removal order. 8 U.S.C. § 1231(b)(2)(C) provides that if “the Attorney General *decides* that removing the alien to the country is prejudicial to the United States,” the Attorney General may select another country.¹⁹⁵ At least one circuit has held that the statutory restriction on judicial review applies only when Congress has clearly stated that

¹⁹⁰ See *id.* § 1252(g).

¹⁹¹ See *Amanullah v. Nelson*, 811 F.2d 1, 9 (1st Cir. 1987).

¹⁹² See 8 U.S.C. § 1231(b)(3)(A) (2000); 8 C.F.R. § 208.1(a) (2007); *id.* § 208.18(a)(7) (stating that a government acquiesces to torture under the Convention Against Torture (CAT) if “the public official, prior to the activity constituting torture, ha[s] awareness of such activity and thereafter breach[es] his or her legal responsibility to intervene to prevent such activity”); see also 8 C.F.R. § 208.18(d) (2007) (discussing the U.S. government’s obligation when an alien subject to removal under 8 U.S.C. § 1225(c) seeks protection under Article 3 (nonrefoulement) of the CAT). In Arar’s civil suit the district court noted that Arar’s torture allegedly was a result of his removal from the United States by U.S. government officials. See *Arar v. Ashcroft*, 414 F. Supp. 2d 250, 278 (E.D.N.Y. 2006). Further, Second Circuit Court of Appeals Judge José Cabranes stated “[t]here’s something awfully mechanistic about [the government’s argument that the Constitution did not protect Arar from torture in Syria] which is difficult to understand.” See Simon Houpt, *Judges Question U.S. Logic in Arar Hearing*, THE GLOBE & MAIL, Nov. 10, 2007, at A10.

¹⁹³ See *Arar*, 414 F. Supp. 2d at 268 (explaining that Arar’s “case thus raises a serious question whether the procedural system administering the admission and exclusion of aliens is truly capable of remedying the alleged torture and detention”); *id.* at 280 (“Arar alleges that his final order of removal was issued moments before his removal to Syria, which suggests that it may have been unforeseeable or impossible to successfully seek a stay, preserving Arar’s procedural rights under the INA.”).

¹⁹⁴ See 8 U.S.C. § 1252(a)(2)(D) (Supp. V 2005).

¹⁹⁵ See *id.* § 1231(b)(2)(C) (2000) (emphasis added).

the only basis of the decision was the Attorney General's discretion.¹⁹⁶ While 8 U.S.C. § 1231(b)(2)(C)(iv) states that the Attorney General may "decide[] that removing the alien to the [designated] country is prejudicial to the United States,"¹⁹⁷ which suggests that the decision of prejudice is a discretionary one, the Attorney General lacks the discretion to violate FARRA or the Constitution.¹⁹⁸ Thus, by removing Arar to Syria, the Attorney General violated U.S. law and the Constitution, and because the Attorney General does not have the discretion to violate either, the decision by the Attorney General to send Arar to Syria could have been subject to judicial review.

Arar's third argument would be that § 1252(g), which prohibits judicial review of the Attorney General's decision to either "commence proceedings, adjudicate cases, or execute removal orders,"¹⁹⁹ does not apply to preclude judicial review of his removal order. Arar would not be challenging the decision to commence proceedings, as he would not be contesting his inadmissibility or removability. He also would not be challenging the decision to adjudicate the case because he would not be questioning the BIA's authority to hear his case, because his case would be filed with a court of appeals.²⁰⁰ Finally, Arar would not be appealing for review of the Attorney General's decision to execute the order but rather would be claiming that the order itself violates the Constitution. Thus, § 1252(g) would not preclude Arar from challenging his removal to a country that engages in torture.

Assuming that Arar was able to establish jurisdiction, he could then challenge the constitutionality of the removal order.²⁰¹ The most likely constitutional challenge would be a claim alleging a denial of procedural due process.²⁰² This is a complicated claim to raise be-

¹⁹⁶ See *Alaka v. Att'y Gen.*, 456 F.3d 88, 95 (3d Cir. 2006).

¹⁹⁷ 8 U.S.C. 1231(b)(2)(C)(iv) (2000).

¹⁹⁸ See *Kwai Fun Wong v. United States*, 373 F.3d 952, 963 (9th Cir. 2004).

¹⁹⁹ 8 U.S.C. § 1252(g) (Supp. V 2005); *Reno v. Amer.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 482 (1999). In *Reno*, the Supreme Court held that 8 U.S.C. § 1252(g) was not intended to apply to all aspects of a deportation proceeding; instead the section's narrow application was limited to decisions by the Attorney General to "commence proceedings, adjudicate cases, or execute removal orders." See *id.* The Court reasoned that these three decisions were excluded from judicial review to make it easier for the INS to "decline to institute proceedings, terminate proceedings, or decline to execute a final order of deportation." *Id.* at 483-84 (emphasis added).

²⁰⁰ See *Selgeka v. Carroll*, 184 F.3d 337, 342 (4th Cir. 1999).

²⁰¹ While in Arar's case the government likely violated FARRA and the policy of nonrefoulement, aliens cannot maintain claims under the FARRA. See *Arar v. Ashcroft*, 414 F. Supp. 2d 250, 264 (E.D.N.Y. 2006).

²⁰² Substantive due process rights protect persons from governmental actions that are arbitrary and oppressive. See *County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998) (citing *Daniels v. Williams*, 474 U.S. 327, 331 (1986)). An example of a substantive due process right is the right to be free from discrimination on the basis of race, gender, or national origin. See *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 470-71

cause the threshold inquiry is whether an inadmissible alien is entitled to any process at all. To claim a Due Process Clause violation, an individual must demonstrate that his or her right to life, liberty, or property was violated.²⁰³ Because an unadmitted, nonresident alien has no constitutional right of entry to the United States,²⁰⁴ it would not violate due process to deny such an individual the right to appeal an inadmissibility determination. However where, as in the case of summary removal on security grounds, an alien is subject to removal to a country that engages in torture, due process protects the alien's life interest, and as such, the alien has a right to a hearing before being removed.

In addition, Arar could have raised two procedural violations. First, he could have argued that it was a violation of due process to provide him with so little time to file an appeal. Second, Arar could have argued that removing him to a country where he might face torture without first holding a hearing deprived him of his life interest guaranteed by the Due Process Clause. If Arar could establish that the United States would violate his life interest by removal to Syria, he would reach the second part of the due process test: whether the process he was afforded satisfies procedural due process.²⁰⁵ In determining whether the process the U.S. government afforded him satisfied the requirements of the Due Process Clause, a court must weigh the cost of an erroneous decision as well as the interests of the individual and the government.²⁰⁶ Regardless of how minimal the due process protections are for inadmissible aliens,²⁰⁷ when an alien's life interest is at stake, the individual interest should at least counter any government-advocated bona fide reason²⁰⁸ and should give a court pause before overriding such a strong individual interest.²⁰⁹ Further, when

(1985) (Marshall, J., concurring in part and dissenting in part). Procedural due process rights are "meant to protect persons . . . from the mistaken or unjustified deprivation of life, liberty, or property." *Carey v. Piphus*, 435 U.S. 247, 259 (1978).

²⁰³ See *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976) (finding that Eldridge was able to challenge the sufficiency of the procedures afforded to him under a due process argument because he had a property interest in the continued receipt of government benefits).

²⁰⁴ See *Kleindienst v. Mandel*, 408 U.S. 753, 762 (1972).

²⁰⁵ See *Mathews*, 424 U.S. at 332-33; *infra* notes 256-259 and accompanying text.

²⁰⁶ See *Mathews*, 424 U.S. at 334-35; *infra* Part III.B.

²⁰⁷ See *supra* notes 2-3, 29-34 and accompanying text.

²⁰⁸ See *Addington v. Texas*, 441 U.S. 418, 425-27 (1979). The U.S. Supreme Court in *Addington* held that the individual interest in proceedings to confine the individual to a mental hospital outweighs the public interest in providing health care to its citizens and "protect[ing] the community from the dangerous tendencies of some who are mentally ill." *See id.* at 426 (emphasis added). The Court went on to state that "the individual should not be asked to share equally with society the risk of error when the possible injury to the individual is significantly greater than any possible harm to the state." *Id.* at 427; see also *infra* Part III.B (discussing the adequacy of the process afforded Arar and the risks and costs to him and the U.S. government of more procedure).

²⁰⁹ See *Addington*, 441 U.S. at 425-27.

the alien faces removal to a country that engages in torture and, after removal, the alien is in fact tortured, the cost of error is very high.

To establish the inadequacy of the current process, Arar could argue that receiving mere hours between being served with a removal order and being removed does not allow an adequate opportunity to be heard and thus the government action would violate the Due Process Clause. Although it is unclear whether the Constitution requires the government to give an alien inadmissible on security grounds a hearing before removal, the Supreme Court has stated that the opportunity to be heard “is a fundamental requirement of due process.”²¹⁰ Presumably, the current process is inadequate if the government’s removal procedure failed to provide Arar with an appropriate opportunity to be heard.²¹¹ While the minimum amount of time necessary to satisfy the Due Process Clause is unclear, due process likely requires more than the few hours Arar was afforded.²¹² Further, Arar may also be able to claim that the government violated his due process rights by removing him to Syria, where he was tortured, without first holding a hearing. This would be a slightly more difficult argument to make given that it is unclear how much process inadmissible aliens are entitled to under the Constitution,²¹³ but given the strong life interest and the cost of error involved, Arar could argue that some kind of hearing is required.²¹⁴

Regardless of whether Arar’s procedural due process claims were successful, he could allege that his treatment by U.S. officials violated his substantive due process rights. First, Arar could challenge his detention without counsel for nine days.²¹⁵ Second, he could argue that, by sending him to a country known to engage in torture, the U.S. government acquiesced to the torture he was ultimately subjected to in Syria in violation of the Due Process Clause. Arar may have difficulty proving the first allegation because the right to counsel in immigration proceedings attaches only under normal removal

²¹⁰ See *Mathews*, 424 U.S. at 333 (citing *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)); accord *Landon v. Plasencia*, 459 U.S. 21, 32 (1982) (holding that a resident alien is entitled to due process rights with respect to a removal hearing).

²¹¹ See *Arar v. Ashcroft*, 414 F. Supp. 2d 250, 273 (E.D.N.Y. 2006) (noting that the government “rendered meaningful review an impossibility”).

²¹² The Supreme Court has suggested that providing eleven hours between detaining a resident alien and holding an exclusion proceeding for that alien may violate due process. See *Landon*, 459 U.S. at 35–37 (dictum).

²¹³ See *supra* notes 2–3, 29–34 and accompanying text.

²¹⁴ See *Arar*, 414 F. Supp. 2d at 268 (stating that Arar’s case “raises a serious question whether the procedural system administering the admission and exclusion of aliens is truly capable of remedying the alleged torture and detention” that Arar faced); *id.* at 278 (noting that Arar was denied “a meaningful process of any kind”).

²¹⁵ See ARAR COMM’N REPORT: ANALYSIS AND RECOMMENDATIONS, *supra* note 118, at 167–68.

proceedings,²¹⁶ which were inapplicable to Arar.²¹⁷ Arar could likely establish the second basis because he was likely to be, and indeed was, tortured in Syria and he would not have been in Syria but for the Attorney General's removal order. Thus, the Attorney General likely violated the Due Process Clause of the Fifth Amendment.

Thus, while Arar would have faced serious jurisdictional impediments in challenging his removal to Syria, they would not have been insurmountable. Assuming that Arar had enough time to retain counsel and appeal his removal order, he would have had several grounds for doing so. While it is unlikely that Arar could have challenged the inadmissibility decision itself, he likely could have challenged Syria as the country of his removal.

B. Canadian Law

1. *Inadmissibility and the Order of Removal*

If Maher Arar had instead arrived in Canada and was not a Canadian citizen but was instead a dual national of Syria and another country, a Canadian immigration officer would likely have deemed him inadmissible on security grounds as a member of a terrorist organization.²¹⁸ After making this determination, the immigration officer would have contacted Security Review at CBSA for approval before refusing Arar admission and proceeding with an inadmissibility report.²¹⁹ If CBSA had approved, the immigration officer (or CBSA) would then have written the report and outlined the bases for Arar's inadmissibility.²²⁰ However, it is important to note that before a report was written, Arar could have invoked his right to withdraw his application to enter Canada and have returned to his country of citizenship.²²¹ As a dual national, Arar could have returned to Syria or to the other country of his citizenship.²²² Arar would likely have asked to leave to his other country of citizenship, and as long as the Canadian government did not deem him a danger to the public,²²³ he would have been allowed to do so.

²¹⁶ See 8 U.S.C. § 1229a(b)(4)(A) (2000).

²¹⁷ See *supra* text accompanying note 24.

²¹⁸ See Immigration and Refugee Protection Act, 2001 S.C., ch. 27, § 34(1)(f) (Can.). An immigration officer would have made this determination because Arar was subject to a "lookout" in the Canadian immigration databases. See ARAR COMM'N REPORT: ANALYSIS AND RECOMMENDATIONS, *supra* note 118, at 19.

²¹⁹ See ENFORCEMENT MANUAL, WRITING 44(1) REPORTS, *supra* note 63, at 10.

²²⁰ See Immigration and Refugee Protection Act § 44(1).

²²¹ See *supra* text accompanying notes 113–15.

²²² See *supra* text accompanying notes 114–15.

²²³ See *supra* note 115 and accompanying text.

However, if the immigration officer had issued a report, it would have been forwarded to the Minister of CIC for review.²²⁴ It is highly unlikely that the Minister would have chosen, with the Minister of PS, to pursue a security certificate because of the rarity of such an occurrence.²²⁵ Thus, if Arar's case had reached this point, the Minister would likely have referred Arar to the Board for an admissibility hearing.²²⁶

For such a hearing, Arar would not only have had the right to an attorney,²²⁷ but he also would receive a reasonable amount of time to find an attorney and to allow the attorney to prepare his case.²²⁸ Arar would have had the right to present evidence and cross-examine any witnesses the government presented.²²⁹ Given the findings of the Canadian commission appointed to investigate his case, it is unlikely that the Board would have found Arar inadmissible because the Canadian government lacked the information to charge him with a crime.²³⁰ As the Canadian government could not charge Arar, it probably lacked sufficient information to establish that he was inadmissible on security grounds.²³¹

Regardless of the outcome of the admissibility hearing, Arar could have filed a PRRA application during the proceeding to ensure that Canada could not remove him to Syria.²³² Even if the Minister of CIC refused to grant the PRRA, upon review, it is unlikely that the Board would have believed that it was reasonable for the Minister to rely on assurances from the Syrian government that Arar would not be tortured because of Syria's infamous human rights record.²³³ If the Minister granted the PRRA, it likely would have only prevented Arar's removal to Syria, not to the country of his other citizenship, assuming that the other country did not engage in torture.²³⁴ However, even if the Minister thought Arar's fears were well-founded, the Canadian government could still have removed Arar to Syria if the Minister thought that he was a danger to Canadian security.²³⁵ If the Minister

²²⁴ See Immigration and Refugee Protection Act § 44(1).

²²⁵ See *supra* note 106 and accompanying text.

²²⁶ See Immigration and Refugee Protection Act § 44(2).

²²⁷ See *id.* § 167.

²²⁸ See WALDMAN, *supra* note 70, at 103.

²²⁹ See *id.* at 105.

²³⁰ See ARAR COMM'N REPORT: ANALYSIS AND RECOMMENDATIONS, *supra* note 118, at 152.

²³¹ See *supra* note 137 and accompanying text.

²³² See Immigration and Refugee Protection Act § 112(1); *supra* notes 78–88 and accompanying text.

²³³ See *Suresh v. Canada (Minister of Citizenship & Immigration)*, [2002] 1 S.C.R. 3, 2002 SCC 1, paras. 39, 124 (Can.) (stating that it is difficult to rely “too heavily on assurances by a state that it will refrain from torture in the future when it has engaged in illegal torture or allowed others to do so on its territory in the past”).

²³⁴ See Immigration and Refugee Protection Act § 115(1).

²³⁵ See *id.* § 115(2); *Suresh*, 1 S.C.R. at para. 58.

issued this “danger opinion,” a court would likely overturn it either because it was patently unreasonable or because Arar’s case was not an exceptional one.²³⁶

At the end of the admissibility hearing, the Board would have to determine Arar’s admissibility.²³⁷ If Arar was admissible, he would have been released from custody and allowed to proceed to his destination country; if he was inadmissible, he would have been subject to a removal order.²³⁸ If Arar was inadmissible on security grounds, he would have had no right to appeal to the Board,²³⁹ but he would have been able to ask for leave to file an appeal with a federal court.²⁴⁰ Even if Arar received adverse decisions on all of these fronts—the Minister had denied Arar’s PRRA application, Arar had been granted leave to appeal and the federal court had affirmed that denial, Arar’s choice to return to his other country of citizenship had been ignored, *and* the Minister chose to remove him to Syria because of the danger he posed to Canada²⁴¹—Arar *still* could have appealed the constitutionality of Syria as his country of removal under section 7 of the Canadian Charter of Rights and Freedoms.²⁴² Moreover, he likely would have won this appeal because, under the applicable standard of review, the Minister’s decision was patently unreasonable since it could not be supported by the evidence.²⁴³ As the government lacked the necessary information to charge Arar with a crime, there was likely insufficient evidence to support the determination that he posed a danger to national security.²⁴⁴ Thus, given the extensive opportunities for judicial review in Canada, it is unlikely that Canada could have removed Arar to Syria through an admissibility hearing.

If instead the Ministers of CIC and PS had chosen the highly unlikely course of issuing a security certificate, it is *still* unlikely that Canadian law would have allowed Arar to be removed to Syria. Once the Ministers decided to issue the certificate, it would have been referred to a federal court and the chief judge, or a judge the chief designates, would determine the certificate’s reasonableness.²⁴⁵ During the hearing, Arar could have applied for a PRRA, which would have stopped

²³⁶ See *Suresh*, 1 S.C.R. at paras. 58, 78, 129.

²³⁷ See Immigration and Refugee Protection Act § 45.

²³⁸ See *id.* § 45(d).

²³⁹ See *id.* § 64(1).

²⁴⁰ See *supra* note 75 and accompanying text.

²⁴¹ See *supra* text accompanying note 115.

²⁴² See *Suresh v. Canada (Minister of Citizenship & Immigration)*, [2002] 1 S.C.R. 3, 2002 SCC 1, para. 27 (Can.).

²⁴³ See *id.* at paras. 28, 39.

²⁴⁴ See *id.* at para. 90; ARAR COMM’N REPORT: ANALYSIS AND RECOMMENDATIONS, *supra* note 118, at 152.

²⁴⁵ See Immigration and Refugee Protection Act, 2001 S.C., ch. 27, §§ 76, 80(1) (Can.).

the proceeding.²⁴⁶ The PRRA application in this situation would be subject to the same review as a PRRA application in an admissibility hearing.²⁴⁷ If the Minister granted the PRRA, Canada could not have removed Arar to Syria under a reasonable security certificate unless conditions in the country changed such that it was unlikely that Arar would have been tortured in Syria.²⁴⁸ Further, even if the Minister denied the PRRA, the judge could have suspended the certificate proceedings and quashed the Minister's PRRA decision if the judge thought that the Minister's PRRA decision was unlawful, thus allowing the Minister to decide whether to issue a "danger opinion."²⁴⁹ If the Minister issued a danger opinion the judge could overturn it if Arar's case was not an exceptional one, which it likely was not given that the Canadian government lacked the necessary information to charge him with a crime.²⁵⁰ If the judge found the certificate reasonable and the PRRA application was either not filed or lawfully denied, the certificate would have become a deportation order that Arar could not have appealed to either the Board or a federal court.²⁵¹

Thus, while there is a remote possibility that Arar could have been removed to Syria under Canadian law, this is unlikely given the opportunities for judicial review. While procedural safeguards do not inherently protect constitutional and human rights, they do increase the chances that discretionary decisions by either the Minister of CIC or of PS will be overturned should they constitute an abuse of discretion. These protections far exceed the protections under U.S. law, which do not provide meaningful opportunities for judicial review.

III

THE PROBLEM WITH UNCHECKED DISCRETION AND A PROPOSED SOLUTION

Perhaps the most disturbing aspect of Arar's case is the Attorney General's lack of accountability. The most fundamental way to ensure the accountability of the executive branch is through judicial review. While it is not certain that Arar would not have been removed to and tortured in Syria had the United States afforded Arar the opportunity to appeal his removal order, at least an independent adjudicator would have been able to review the Attorney General's decision to determine both its legal and constitutional validity.

²⁴⁶ See *id.* § 79(1).

²⁴⁷ See *supra* notes 98–101 and accompanying text.

²⁴⁸ See Immigration and Refugee Protection Act §§ 114(2), 115(2).

²⁴⁹ See *id.* §§ 80(2), 115(2)(a); *Charkaoui v. Canada (Citizenship & Immigration)*, [2007] 1 S.C.R. 350, 2007 SCC 9 paras. 49–52, 63 (Can.); *supra* notes 87–88.

²⁵⁰ See *supra* note 230 and accompanying text.

²⁵¹ See *id.* §§ 80(3), 81(b).

A. The Current Process Afforded

The current summary removal process provided by the United States leaves much to be desired. Since Arar was removed, Congress has further restricted the availability of judicial review by enacting the REAL ID Act of 2005.²⁵² Today, aliens have no right to habeas review.²⁵³ Further, aliens, like Arar, can be summarily removed from the United States to countries that may or may not torture them with minimal notice of the decision.²⁵⁴ The U.S. government would likely argue that allowing aliens who are subject to summary removal on security grounds five days to respond in writing to an agency document is enough notice of the inadmissibility decision and, hence, the subsequent removal decision. This may be true if, unlike in Arar's case, the alien has more than one day to consult an attorney and the government has provided the basis for the removal order.²⁵⁵ Regardless of whether one day was enough time to consult an attorney, it is unlikely that a few hours was enough time to respond to the decision to remove Arar to Syria or file an appeal.

B. The Constitutional Adequacy of the Process Afforded

To determine whether the current summary removal process satisfies the Due Process Clause, it is necessary to engage in the balancing test set out by the Supreme Court in *Mathews v. Eldridge*.²⁵⁶ The balancing test applies if a state actor has violated a life, liberty, or property interest.²⁵⁷ In the case of an alien removed from the United States to a country that tortures the alien, the United States would likely violate a life interest, giving the alien the ability to invoke due process protection.²⁵⁸ A process is constitutionally valid if the balance of the governmental interest, the individual interest, and the risk of error weighs in favor of the existing process.²⁵⁹

²⁵² See *supra* notes 185 and accompanying text.

²⁵³ See *supra* Part II.A.3.

²⁵⁴ See, e.g., *Arar v. Ashcroft*, 414 F. Supp. 2d 250, 254 (E.D.N.Y. 2006). Arar was served with the final removal order at four o'clock in the morning on October 8, 2002, and physically removed from the United States "later that day." See *id.* However, the detention center where the INS originally held Arar told his lawyer that he had been removed from the center "between three and four o'clock that morning." See COMM'N REPORT: FACTUAL BACKGROUND VOLUME I, *supra* note 23, at 200.

²⁵⁵ The document that the INS gave Arar merely told him that he was inadmissible. See *Arar*, 414 F. Supp. 2d at 253.

²⁵⁶ 424 U.S. 319, 334–35 (1976).

²⁵⁷ See *supra* notes 203, 206 and accompanying text.

²⁵⁸ See *Nunez v. Boldin*, 537 F. Supp. 578, 584–87 (S.D. Tex. 1982) (stating that life interests are implicated when considering an asylum application where the alien would be subject to persecution if it is not granted); *supra* notes 203–05 and accompanying text.

²⁵⁹ *Mathews*, 424 U.S. at 335.

There is a strong government interest in national security in summary removals on security-related grounds and the courts have consistently deferred to national security decisions by Congress and the Executive.²⁶⁰ Further, the Supreme Court has held that the Attorney General should not have to make these reasons public.²⁶¹ This is reasonable because if the Attorney General were forced to reveal why removing an alien to a particular country would prejudice the United States, she may be forced to compromise military or intelligence operations in that country.²⁶² There are, however, strong foreign relation costs in not *reviewing* such a determination. The United States faced diplomatic problems with Canada after it was revealed that the United States had removed Arar to Syria.²⁶³ Further, the treatment of Arar and the related U.S. extraordinary rendition policy have diminished the reputation of the United States abroad.²⁶⁴

The U.S. government also has a strong interest in the efficiency of the current immigration system.²⁶⁵ Hundreds of thousands of aliens arrive at U.S. borders everyday. To require judicial review for each inadmissible alien before removing him or her to a particular country could cost a significant amount of money and create a huge adjudicative backlog.²⁶⁶ However, only a small fraction of those persons entering the United States are inadmissible, and an even smaller proportion of these persons are inadmissible on security grounds. Hence, in the absence of information regarding how many aliens are inadmissible and removed on security grounds,²⁶⁷ the Attorney General would have a difficult time arguing that the cost to the govern-

²⁶⁰ See, e.g., *Bassiouni v. FBI*, 436 F.3d 712, 724 (7th Cir. 2006) (noting that national security issues belong to the Executive), *cert. denied*, 127 S. Ct. 709 (2006), *reh'g denied*, 127 S. Ct. 1170 (2007); *United States v. Afshari*, 426 F.3d 1150, 1161 (9th Cir. 2005).

²⁶¹ See *Reno v. Amer.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 491 (1999).

²⁶² See *Hamdi v. Rumsfeld*, 542 U.S. 507, 532–33 (2004). In *Hamdi*, the government argued that it could not afford a U.S. citizen enemy combatant more process than it had given him because to provide more would “intrude on the sensitive secrets of national defense.” See *id.* at 531–32. The U.S. Supreme Court held that the government’s process was unconstitutional and required the government to provide more procedural safeguards. See *id.* at 533.

²⁶³ See John Geddes, *Blame America*, *MACLEAN’S*, Dec. 8, 2003, at 31, 31; Christopher Mason, *Canada Formally Protests to U.S. over Deported Man*, *N.Y. TIMES*, Oct. 7, 2006, at A6.

²⁶⁴ See Aziz Z. Huq, *Extraordinary Rendition and the Wages of Hypocrisy*, 23 *WORLD POL’Y J.* 25, 29–30 (2006).

²⁶⁵ See *Landon v. Plasencia*, 459 U.S. 21, 34 (1982).

²⁶⁶ But see Lenni B. Benson, *Back to the Future: Congress Attacks the Right to Judicial Review of Immigration Proceedings*, 29 *CONN. L. REV.* 1411, 1442–43 n.159 (1997) (arguing that judicial review of immigration proceedings is not a significant cause of the delay in removing aliens from the United States).

²⁶⁷ While in 2005 DHS removed 208,521 aliens through formal removal procedures, not all of them would have been removed on security grounds. See *MARY DOUGHERTY ET AL., DEP’T OF HOMELAND SEC., IMMIGRATION ENFORCEMENT ACTIONS: 2005*, at 1, 5 (2006), available at http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2005/Enforcement_AR_05.pdf.

ment should be given great weight in the *Mathews* calculus. Thus, requiring a hearing for those persons inadmissible on security grounds would likely create only a modest increase in cost and delays.

Nevertheless, regardless of the strength of the counterarguments, a court would likely find in favor of the Attorney General, reasoning that there is a strong government interest in not having a hearing because of the judicial deference to the Executive when national security is implicated.

The next element in the balance is the individual life interest that aliens have at stake in summary removal proceedings. The life of an alien is at risk if the government removes the alien to a country that engages in torture. Aliens also have an interest in learning the grounds for removal, the removal procedure, the country to which the United States intends to remove them, and the evidence upon which the government has made these decisions so that they may retain an attorney and meaningfully explore their legal rights.

The government would likely counter that aliens would only appeal removal orders to delay their inevitable removal, thus increasing the strain on the already resource-strapped judicial and immigration systems. While this criticism would likely be true for some aliens, for others, an appeal would be the only way to prevent their removal to countries that might torture them. Thus, regardless of the government's counterargument, an alien's individual interest in life should weigh strongly against the constitutionality of the current process.

The risk of error factor in the *Mathews* balancing test also weighs strongly in favor of the inadmissible alien. As discussed earlier, while there would be an increased monetary cost in providing more process, the likelihood of an error in the current process is substantial. If only the Attorney General decides whether an alien is inadmissible on security grounds, to which country the alien should be removed, and (in concert with the Secretary of State) whether the alien would be subject to torture, then in the absence of an adversarial process, there is a great risk that the decision will be wrong.²⁶⁸ While the adversarial process does not guarantee that the correct decision will be reached, it does ensure that the relevant decision-maker has access to as much information as possible and that the available evidence is subject to exacting scrutiny.²⁶⁹ Thus, a hearing will not ensure that an alien is not subject to torture, but it will reduce the risk that it will occur.

²⁶⁸ Cf. *Charkaoui v. Canada (Citizenship & Immigration)*, [2007] 1 S.C.R. 350, 2007 SCC 9 paras. 49–52, 63 (Can.) (suggesting that in Canadian Security Certificate proceedings, where there is no adversarial process, federal judges may make incorrect decisions because they are not based on all of the available evidence or on correct interpretations of the law).

²⁶⁹ Cf. *id.*

However, as the government might also point out, if a court overturns a correct DHS decision there may be serious national security implications. If an alien was a threat to national security and if removing the alien to his designated country did prejudice the United States because the alien was subsequently able to engage in terrorist activities in that country, the additional procedure would hamper U.S. national security. Nevertheless, regardless of the country to which the United States removed the alien, he could still migrate to the country he had wanted to be removed to and could resume terrorist activities there.

The overall balance of the test is a close one. However, the life interest of the alien and the constitutional interest in reducing due process violations would likely outweigh the government's national security interest.²⁷⁰ Thus, under *Mathews*, I believe the current process is constitutionally inadequate.

C. A Possible Solution

As I believe that the current removal process for aliens inadmissible to the United States on security grounds is constitutionally inadequate, I propose a new process that would protect both the Constitution and U.S. national security. This new process is meant to guard against one of the worst transgressions of U.S. law: sending inadmissible aliens, such as Maher Arar, to countries where they will be tortured. In order to ensure consistency among the circuits and to avoid separation of power challenges, Congress should enact such a process as national law.

In comparing the U.S. and Canadian removal laws that could have applied to Arar, it is apparent that aspects of the Canadian process could be incorporated into U.S. removal proceedings to cure the constitutional defects of the current U.S. process. However, I concede that the United States cannot implement wholesale Canadian removal proceedings because the United States would be unable to administer the Canadian process fully. The United States has approximately five times as many aliens trying to enter its borders as Canada does each year.²⁷¹ To impose the Canadian process without accounting for the financial and administrative burdens that would be imposed on the U.S. immigration system would be impractical and overly idealistic. However, there are elements of the Canadian removal process for for-

²⁷⁰ See *supra* notes 208–09, 214 and accompanying text.

²⁷¹ In 2005, the U.S. admitted 175,400,000 nonimmigrants. See OFFICE OF IMMIGRATION STATISTICS, DEP'T OF HOMELAND SEC., 2005 YEARBOOK OF IMMIGRATION STATISTICS 63 (2006), available at http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2005/OIS_2005_Yearbook.pdf. This number does not include persons arriving from Canada or Mexico on short trips. See *id.* In contrast, Canada admitted 36,160,100 persons in 2005. See Statistics Canada, Non-Resident Travellers Entering Canada, <http://www40.statcan.ca/101/cst01/arts34.htm> (last visited Jan. 24, 2008).

eign nationals inadmissible on security grounds that the United States can implement that would not occasion such large costs.

For example, under Canadian law, if Canada contemplates removing a foreign national to a country where he may be tortured, this implicates the procedural protections of section 7 of the Canadian Charter of Rights and Freedoms.²⁷² As U.S. law already forbids removing an alien to face torture in a foreign country, the Due Process Clause should be invoked to protect both the alien and U.S. law.²⁷³ This minimal extension of the Due Process Clause would be consistent with U.S. legal precedent.²⁷⁴ As the right to be free from torture is already enshrined in U.S. law in FARRA,²⁷⁵ the only change the U.S. government would have to make is ensuring that the Attorney General actually complies with the Act. The best way to ensure compliance with FARRA is to create a process in which there is little discretion to violate it by allowing aliens inadmissible on security grounds to challenge the country for removal under FARRA. To challenge the country for removal, aliens inadmissible to the United States on security grounds should have a right of automatic review or removal orders when there is a high probability that they would be subject to torture in their country of removal.

The most conservative way to afford an automatic right of review to aliens who would likely be subject to torture in the country of removal would be to define the right narrowly. Congress could restrict such review to only those aliens subject to removal to countries that the State Department has determined engage in torture. The list of these countries could be subject to review at set intervals to ensure they reflect current human rights trends. The scope of this review would be a compromise to the Canadian right to automatic review for all inadmissible aliens.²⁷⁶ This compromise recognizes both the administrative infeasibility of granting an automatic right of review to all inadmissible aliens who arrive at the U.S. border and U.S. legal precedent.²⁷⁷

In exercising this right of review, the United States should not allow aliens to challenge the determination that they are inadmissible on security grounds. While inadmissible foreign nationals are able to do so under Canadian law,²⁷⁸ such a right would be contrary to U.S.

²⁷² See *Charkaoui v. Canada (Citizenship & Immigration)*, [2007] 1 S.C.R. 350, 2007 SCC 9, para. 3 (Can.).

²⁷³ See *supra* notes 46–49 and accompanying text.

²⁷⁴ See *supra* note 30–34 and accompanying text.

²⁷⁵ See *supra* notes 47–49 and accompanying text.

²⁷⁶ See *supra* notes 75, 114–15 and accompanying text.

²⁷⁷ See *supra* notes 30–33 and accompanying text.

²⁷⁸ See *supra* notes 62, 90 and accompanying text.

legal precedent.²⁷⁹ The Supreme Court has developed a clear line of jurisprudence that states it is the prerogative of the sovereign to exclude persons from the United States.²⁸⁰

However, aliens inadmissible on security grounds should be able to challenge the Attorney General's designation of the *country* to which the United States will remove them. To ensure that inadmissible aliens may challenge the Attorney General's designation, they should be given notice both of the removal decision and their right to a hearing. Arguably, unlike Arar, an alien should be given more than a few hours notice before the government removes that individual in order to ensure time to file an appeal. There is some basis in U.S. law for this requirement as the Supreme Court has stated that due process requires both an opportunity to be heard *and* that the hearing be held "at a meaningful time and in a meaningful manner."²⁸¹ There is a similar presumption in Canadian removal proceedings in that it is reversible error to not allow an alien enough time to prepare his case with his attorney.²⁸² Thus, while both jurisdictions provide that an inadmissible alien must be afforded some time before facing removal proceedings, it is unclear how much time is sufficient.

In keeping with current U.S. law, it appears as though ten days would be a sufficient period of time to allow an alien to prepare his case against removal to a country that engages in torture. The normal removal proceedings provision provides ten days to file a written response to inadmissibility determinations.²⁸³ As statutes have a presumption of validity,²⁸⁴ this time frame would likely be reasonable to allow an alien to appeal his country of removal decision. This is clearly not satisfied in the current summary removal process, and thus there should be the same mandatory "waiting period" that exists in normal removal proceedings.

This right of review should be before an independent adjudicator, ideally a U.S. federal judge. A federal judge would be the appropriate adjudicator because immigration law is within the jurisdiction of the federal courts and because, unlike an IJ, a federal judge is not

²⁷⁹ See *supra* notes 31–33 and accompanying text.

²⁸⁰ See *Chae Chan Ping v. United States*, 130 U.S. 581, 603–04, 609 (1889).

²⁸¹ *Goldberg v. Kelly*, 397 U.S. 254, 267 (1970) (citing *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

²⁸² See *supra* note 70 and accompanying text.

²⁸³ See 8 U.S.C. § 1229(b)(1) (2000). While Arar was afforded five days to respond to the removal order, the INA does not specify how many days he should have been given to respond. See *Deportation Order*, *supra* note 6, at 3. While the *Deportation Order* refers to 8 C.F.R. § 235.8, there is no time requirement in that regulation; there is only a requirement that the alien be informed of his right to submit information for the Attorney General's consideration. See 8 C.F.R. § 235.8(a) (2007).

²⁸⁴ See, e.g., *United States v. Five Gambling Devices, Labeled in Part "Mills," and Bearing Serial Nos. 593-221, Etc.*, 346 U.S. 441, 449 (1953).

employed by an executive agency. Further, there are several provisions in Title 8 that limit the ability of the BIA or an IJ to review decisions that the Attorney General has made; federal judges are less restricted.²⁸⁵ This would be similar to Canadian security certificate proceedings—a process that prohibits judicial review—where the Canadian government must bring the case before a federal judge when it is given the benefit of a truncated process.²⁸⁶ Ultimately, an independent adjudicator could ensure that the Executive does not abuse the benefits given to it under a truncated removal process.²⁸⁷

While there should be an independent adjudicator in summary removal proceedings, the U.S. government need not provide counsel for an alien inadmissible on security grounds. The current U.S. removal process does not afford a nonresident alien the right to government-provided counsel because it is not a criminal proceeding;²⁸⁸ nor does the Canadian process afford such a right.²⁸⁹ Such a change in U.S. law would not only increase the costs of providing a right of review but would also overturn a century's worth of precedent and practice.²⁹⁰ The United States should allow aliens inadmissible on security grounds to retain counsel if they can afford to do so, but the U.S. government should not be forced to provide counsel at its own expense.

However, although government-provided counsel is not required, the U.S. government should have to provide an inadmissible alien with the reason the alien's designated country for removal would prejudice the United States, if the Attorney General decides to remove the alien to an alternate country. Even under the unconstitutional restricted Canadian security certificate removal process, the foreign national is entitled to know the basis of his inadmissibility determination.²⁹¹ Thus, at the very least, the U.S. Attorney General should have to provide a federal judge with evidence that proves removing an alien to the alien's choice country would prejudice the United States and with evidence that establishes that the alien would not face torture upon removal.²⁹² In turn, the judge should provide a

²⁸⁵ Compare 8 U.S.C. § 1225(c) (2000), with *id.* § 1252 (2000 & Supp. V 2005).

²⁸⁶ See *supra* notes 90–91 and accompanying text; see also *Suresh v. Canada* (Minister of Citizenship & Immigration), [2002] 1 S.C.R. 3, 2002 SCC 1, para. 117 (Can.) (discussing the procedural protections relating to the the issuance of such certificates).

²⁸⁷ See *supra* notes 27–28 and accompanying text.

²⁸⁸ See *Harisiades v. Shaughnessy*, 342 U.S. 580, 594 (1952).

²⁸⁹ See *supra* notes 69, 97 and accompanying text.

²⁹⁰ See *supra* note 18 and accompanying text.

²⁹¹ See *supra* notes 94–96 and accompanying text. Note however that this process will likely change and the Canadian government will likely have to provide either more evidence or have their evidence stand up to independent scrutiny. See *supra* notes 93–94 and accompanying text.

²⁹² See *supra* notes 44, 46–53 and accompanying text.

summary of this evidence to the alien. The need for such evidence is supported by the statutory presumption that the alien's designated country should be the preferable country for removal.²⁹³

While not all of the evidence in support of the removal country should necessarily be public, the federal judge's decision should be published in a written record. Under Canadian law, foreign nationals are entitled to a written record of their admissibility hearing decisions.²⁹⁴ The U.S. judiciary should similarly be required to publish the opinions produced in all summary removal proceedings. This requirement would ensure conformity within the Attorney General's office and among the circuits²⁹⁵ and would also hold adjudicators accountable to the Supreme Court.²⁹⁶ This would not be a hard requirement to implement because most U.S. courts produce published opinions.

The proposed changes articulated in this section would require only modest amendments to the current removal proceeding. Fundamentally, they would require that an alien be afforded enough time to meet with counsel and appeal the Attorney General's selected country for removal. The other key change would be to require the Attorney General to provide inadmissible aliens with at least one reason their designated country of removal prejudices the United States. This would not be a difficult process to implement, nor would it require a large expenditure of resources. However, it would be a significant step forward in protecting the due process requirements that all persons are entitled to under the Constitution.

CONCLUSION

In general, U.S. immigration law is a complex area that is hard to understand, much less apply. However, the removal procedure for aliens inadmissible on security grounds is even more difficult to apply. U.S. law lacks the necessary procedural safeguards to protect due process rights, and U.S. courts have been unwilling to fill in the gaps. More specifically, the U.S. Supreme Court's unwillingness to review the Attorney General's decisions in immigration proceedings has created a legal vacuum where the rights of individuals such as Maher Arar are lost.

In the case of removal procedures for aliens inadmissible on security grounds, Congress should refer to Canadian removal proceed-

²⁹³ See 8 U.S.C. § 1231(b)(2) (2000) (presuming that an alien will select a country for removal and providing that the alien should be removed there unless the limitation provided by the section applies).

²⁹⁴ See Immigration and Refugee Protection Act, 2001 S.C., ch. 27, § 169(b) (Can.).

²⁹⁵ See Henry J. Friendly, "Some Kind of Hearing," 123 U. PA. L. REV. 1267, 1292 (1975).

²⁹⁶ See *id.*

ings to revise current U.S. law in order to ensure that aliens will not be tortured upon their removal to a foreign country. To do so Congress need only provide a statutory provision that ensures that the DHS does not remove aliens from the United States before they are afforded the opportunity to appeal the country of their removal. This does not mean that the courts must grant such appeals, it simply ensures the alien a reasonable amount of time to consider and pursue an appeal. The courts then must be willing to evaluate these appeals under a higher level of review to ensure that other aliens will not be subjected to the torture Maher Arar faced. At this point, it is the least they should do.