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# Calling For An End To Indefinite Detention: The Judicial Role In Applying The Constitution To Alien Paroles

Phillip J. Riblett

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**CALLING FOR AN END TO INDEFINITE DETENTION:  
THE JUDICIAL ROLE IN APPLYING THE CONSTITUTION TO ALIEN  
PAROLEES**

*Phillip J. Riblett\**

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**Introduction**

Three men residing in the United States have each been convicted of identical crimes, which carry a prison sentence of three years. The first man was born in Tennessee. He serves a three-year sentence, and then, naturally, he is free to continue living in the United States. The second man was born in Thailand. Several years prior to committing his crime, he had applied for and gained admission to the United States. He serves a three-year sentence, and then faces

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deportation. While awaiting the second man's deportation, the U.S. government detains him. Unfortunately, neither Thailand nor any other country will accept him. The U.S. Constitution prevents the government from detaining the second man indefinitely.<sup>1</sup> Instead, if deportation is no longer reasonably foreseeable, the government will likely release him subject to certain conditions, much like parole after release from prison.<sup>2</sup>

The third man was born in Cuba. Several years prior to committing his crime, he landed in a small boat on the Florida coast, where the U.S. Coast Guard intercepted him. While his application for admission to the United States was pending, rather than detaining him, the U.S. "paroled" him into the country, where he could reside until the conclusion of administrative proceedings to determine his admissibility. After residing in the United States for several years, the third man commits a crime and serves a three-year sentence, after which he faces deportation. Like the second man, the third man is detained while awaiting deportation. Unfortunately, neither Cuba nor any other country will accept him. If the U.S. government chooses to detain him indefinitely, possibly forever, most courts will find no constitutional problem with his detention.

The third man's indefinite detention is made possible by the "entry fiction." Under this doctrine, the third man is suspended in some kind of constitutional wasteland, where he physically resides in the United States but is treated as if he has never entered the country and is waiting at the border. If one were to line up these three men, one next to the other, one would certainly see three men. However, under the entry fiction doctrine, the third man must be blurry, or perhaps appear as a shadow, because while he is capable of eating, buying, working, and committing crimes here, he is treated by the law as though he is not really here. As a result, the protections of the U.S. Constitution do not apply to him because he is treated as though he is not within the jurisdiction of the United States.

As of January 2004, 2,269 immigrants awaiting deportation were in prison, 920 of whom were Cubans who were paroled into the country

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<sup>1</sup> See *infra* note 50 and accompanying text.

<sup>2</sup> See *infra* note 46 for a summary of these conditions. Note also that if the second man had been born in Mexico, for example, and had entered this country undetected by crossing the border into Arizona from Mexico several years prior to committing his crime, the result would likely be the same. See *infra* note 25 and accompanying text (noting the difference between an alien who has entered, even illegally, and an alien who stands at the border awaiting entry).

after the 1980 Mariel boatlift. Of these several thousand aliens, over half have been in jail for more than six months.<sup>3</sup> As the law currently stands, most courts find that the indefinite detention of alien parolees is constitutionally permissible. However, this term the U.S. Supreme Court confronts this issue in *Clark v. Martinez* and *Benitez v. Rozos*.<sup>4</sup>

This article contends that unjustified institutional concerns are what ultimately drive the circuit courts' analyses. When these institutional concerns are removed, the rationale for refusing to apply the Constitution to alien parolees disappears. Under this analysis, the Constitution should apply to alien parolees, and the Supreme Court should affirm the Ninth Circuit's ruling in *Clark* and reverse the Eleventh Circuit's ruling in *Benitez*, thus ending our government's policy of indefinite detention of alien parolees.

Part I of this article provides background information on the constitutional rights of aliens, the roles of the different branches of government in admitting aliens, and the indefinite detention of aliens. Part II argues that the U.S. Constitution should apply to alien parolees because they are legally indistinguishable from other aliens and because the judiciary has no legitimate institutional concerns in applying the Constitution to parolees. Part III discusses how the indefinite detention of alien parolees violates the Due Process Clause of the Fifth Amendment of the Constitution.

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<sup>3</sup> Gina Holland, *Supreme Court Says it will Resolve Future of Immigrant Prisoners*, ST. PAUL PIONEER PRESS, Jan. 16, 2004, available at 2004 WL 56300888.

<sup>4</sup> *Martinez-Vasquez v. I.N.S.*, 346 F.3d 903 (9th Cir. 2003), cert. granted, 124 S.Ct. 1507 (Mar. 1, 2004) (NO. 03-878); *Benitez v. Wallis*, 337 F.3d 1289 (11th Cir. 2003), cert. granted, 124 S.Ct. 1143 (Jan. 16, 2004) (NO. 03-7434). When this article went to press, the Supreme Court had yet to issue decisions in these two cases.

## I. Background

### A. An Overview of the Basic Rights of Aliens

Generally, all persons within the territorial jurisdiction of the United States enjoy the basic rights granted by the Constitution.<sup>5</sup> However, aliens do not enjoy all of the same rights as citizens, and Congress may permissibly treat them differently.<sup>6</sup> For example, while a lawful permanent resident is entitled to a fair hearing prior to deportation,<sup>7</sup> certain constitutional protections applicable to a criminal defendant are not accorded to an alien subject to a deportation proceeding.<sup>8</sup> Additionally, while aliens enjoy “the right to education and public welfare, along with the ability to earn a livelihood and engage in licensed professions, the right to govern is reserved to citizens.”<sup>9</sup> Indeed, the admission of an alien, and presumably the constitutional rights belonging to an alien as a new citizen or legal resident, are privileges granted to that alien by the U.S. government.<sup>10</sup>

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<sup>5</sup>For example, the Fifth Amendment and Fourteenth Amendment protect all persons within the United States “from deprivation of life, liberty, or property without due process of law.” *Mathews v. Diaz*, 426 U.S. 67, 77 (1976). In addition, the Sixth Amendment provides that all such persons are entitled to a fair criminal trial. *Wong Wing v. United States*, 163 U.S. 228, 238 (1896). Meanwhile, the Fourteenth Amendment provides for the equal protection of the laws “to all persons within the territorial jurisdiction.” *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886); *see also Plyler v. Doe*, 457 U.S. 202, 213, 230 (1982) (holding that the Equal Protection Clause prevents a state from discriminating against illegal aliens when providing education because “[t]he Equal Protection Clause was intended to work nothing less than the abolition of all caste-based and invidious class-based legislation”). Finally, the First Amendment protections of the freedom of speech and freedom of the press are extended to “aliens residing in this country.” *Bridges v. Wixon*, 326 U.S. 135, 148 (1945).

<sup>6</sup>*Mathews*, 426 U.S. at 78 n.12.

<sup>7</sup>*Kwong Hai Chew v. Colding*, 344 U.S. 590, 597 (1953); *see also Landon v. Plasencia*, 459 U.S. 21, 32 (1982) (noting “that a continuously present resident alien is entitled to a fair hearing when threatened with deportation”).

<sup>8</sup>*See INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038, 1050 (1984) (holding that the exclusionary rule provided by *Miranda* and the Fourth Amendment does not apply to deportation proceedings); *Carlson v. Landon*, 342 U.S. 524, 544 (1952) (holding that the Eighth Amendment does not require a reasonable bail amount for a deportation proceeding).

<sup>9</sup>*Foley v. Connelie*, 435 U.S. 291, 297 (1978).

<sup>10</sup>*United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950).

### B. Executive and Legislative Power to Admit Aliens

The political branches of the Federal Government regulate the relationship between aliens and the United States.<sup>11</sup> When Congress passes immigration laws, “[i]t is implementing an inherent executive power,” necessary for the executive “to control the foreign affairs of the nation.”<sup>12</sup> It is not the position of a court “to review the determination of the political branch of the Government to exclude a given alien.”<sup>13</sup> After all, the determination of how many and which immigrants to admit to our country involves numerous value choices unsuitable for judicial determination.<sup>14</sup>

When dealing with immigration law, the Supreme Court has long applied the Plenary Power Doctrine, under which the Court exercises considerable deference when reviewing executive or legislative actions.<sup>15</sup> While not identical to the political question doctrine, the premise behind the Plenary Power Doctrine is similar,<sup>16</sup> as noted by the Court in *Fiallo v. Bell*:

“[s]ince decisions in these matters may implicate our relations with foreign powers, and since a wide variety of classifications must be defined in the light of changing political and economic circumstances, such decisions are frequently of a character more appropriate to either the Legislature or the Executive than to the Judiciary,” and “[t]he reasons that preclude judicial

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<sup>11</sup> *Mathews*, 426 U.S. at 81.

<sup>12</sup> *Knauff*, 338 U.S. at 542.

<sup>13</sup> *Id.* at 543; see also *Plasencia*, 459 U.S. at 34-35 (noting that “[t]he role of the judiciary is limited to determining whether the procedures meet the essential standard of fairness under the Due Process Clause and does not extend to imposing procedures that merely displace congressional choices of policy”); *Lem Moon Sing v. United States*, 158 U.S. 538, 547 (1895) (noting that “[t]he power of Congress to exclude aliens altogether from the United States, or to prescribe the terms and conditions upon which they may come to this country, and to have its declared policy in that regard enforced exclusively through executive officers, without judicial intervention, is settled”).

<sup>14</sup> GERALD L. NEUMAN, *STRANGERS TO THE CONSTITUTION* 138 (Princeton University Press 1996) (specifically noting choices related to “national identity, population density, economic growth, and global distribution of resources”).

<sup>15</sup> Cornelia T.L. Pillard & T. Alexander Aleinikoff, *Skeptical Scrutiny of Plenary Power: Judicial and Executive Branch Decision Making in Miller v. Albright*, 1998 Sup. Ct. Rev. 1, 32.

<sup>16</sup> NEUMAN, *supra* note 14, at 137.

review of political questions also dictate a narrow standard of review of decisions made by the Congress or the President in the area of immigration and naturalization.”<sup>17</sup>

Historically, the Court has permitted Congress to order the deportation or expulsion of aliens whenever Congress considers such action necessary for the public interest,<sup>18</sup> even if it means excluding aliens of a particular race<sup>19</sup> or those who hold certain political beliefs.<sup>20</sup> Indeed, the Court has noted that “no limits can be put by the courts upon the power of Congress to protect, by summary methods, the country from the advent of aliens whose race or habits render them undesirable as citizens . . . .”<sup>21</sup> Furthermore, the Court has provided that if aliens “fail to obtain and maintain citizenship by naturalization, they remain subject to the plenary power of Congress to expel them under the sovereign right to determine what noncitizens shall be permitted to remain within our borders.”<sup>22</sup>

Of course, “neither the Constitution nor the laws passed in pursuance of it have any force in foreign territory unless in respect of our own citizens.”<sup>23</sup> As a result, “our immigration laws have long made a distinction between those aliens who have come to our shores seeking

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<sup>17</sup> 430 U.S. 787, 796 (1977) (quoting *Mathews*, 426 U.S. 67, 81-82).

<sup>18</sup> The Chinese Exclusion Case, 130 U.S. 581, 606-07 (1889). This case “has come to stand for the idea of immigration control as an unenumerated, or even extraconstitutional, power inherent in nationhood.” NEUMAN, *supra* note 14, at 122.

<sup>19</sup> *Yamataya v. Fisher*, 189 U.S. 86, 97 (1903) (Japanese).

<sup>20</sup> *United States ex rel. Turner v. Williams*, 194 U.S. 279, 289 (1904) (anarchists).

<sup>21</sup> *Wong Wing*, 163 U.S. at 237.

<sup>22</sup> *Carlson*, 342 U.S. at 534.

<sup>23</sup> *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318 (1936). See also *United States v. Verdugo-Urquidez*, 494 U.S. 259, 261 (1990) (holding that the Fourth Amendment does not apply to a nonresident alien located in a foreign country); *Johnson v. Eisentrager*, 339 U.S. 763, 784 (1950) (noting that “[i]f the Fifth Amendment confers its rights on all the world . . . [it] would mean that during military occupation irreconcilable enemy elements [and] guerrilla fighters . . . could require the American Judiciary to assure them freedoms of speech, press, and assembly as in the First Amendment, right to bear arms as in the Second, security against ‘unreasonable’ searches and seizures as in the Fourth, as well as rights to jury trial as in the Fifth and Sixth Amendments”).

admission . . . and those who are within the United States after an entry, irrespective of its legality.”<sup>24</sup> In *Shaughnessy v. United States ex rel. Mezei*, the Court noted that while

aliens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law . . . an alien on the threshold of initial entry stands on a different footing: “Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.”<sup>25</sup>

Until 1996, aliens in the former category were known by statute as deportable aliens, subject to deportation proceedings, while aliens in the latter category were known as excludable aliens, subject to exclusion proceedings.<sup>26</sup>

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<sup>24</sup> *Leng May Ma v. Barber*, 357 U.S. 185, 187 (1958).

<sup>25</sup> 345 U.S. 206, 212 (1953) (quoting *Knauff*, 338 U.S. at 544).

<sup>26</sup> *Plasencia*, 459 U.S. at 25; *Rosales-Garcia v. Holland*, 322 F.3d 386, 391 n.1 (6th Cir. 2003). In 1996, Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act (“IIRIRA”). Pub. L. No. 104-208, 110 Stat. 3009-546. Congress made several fundamental changes in immigration terminology:

As amended, the Immigration Act refers to ‘inadmissible’ aliens in the place of ‘excludable’ aliens. Although there are still separate grounds of ‘inadmissibility’ and ‘deportability,’ the distinction now turns on whether an alien has been ‘admitted’ to the United States, rather than on whether the alien has gained ‘entry.’ Also, the former distinction between ‘exclusion’ and ‘deportation’ proceedings has been dropped in favor of one procedure, called ‘removal proceedings.’ *Chi Thon Ngo*, 192 F.3d at 395 n.4 (citations omitted).

Admission is defined as “the lawful entry of the alien into the United States after inspection and authorization by an immigration officer.” 8 U.S.C. § 1101(13)(A). In other words, formerly excludable aliens as well as formerly deportable aliens in the United States illegally are now classified as inadmissible aliens. However, many courts still refer to “excludable” aliens, and doing so is necessary to follow the common law. As a result, this article will later refer to



### C. The Entry Fiction

An alien who applies for admission to the United States from his home country is located outside of U.S. jurisdiction, so the Plenary Power Doctrine demands that the Constitution not apply to his application.<sup>27</sup> However, many applicants apply for admission upon arrival at a U.S. port, when they are physically within the territory of the United States.<sup>28</sup> To avoid forcing the Coast Guard to intercept an alien at sea, the alien is deemed to retain his extraterritorial status by which he is subject to the plenary power of the political branches to determine whether or not he should be admitted.<sup>29</sup> As stated by the Supreme Court in *U.S. v. Ju Toy*, the alien, "although physically within our boundaries, is to be regarded as if he had been stopped at the limit of our jurisdiction and kept there while his right to enter was under debate."<sup>30</sup>

An alien who arrives in the United States is considered to be an applicant for admission.<sup>31</sup> If the "immigration officer determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted," the alien is detained for a proceeding before an immigration judge.<sup>32</sup> However, the alien may request parole while awaiting a ruling on his admission.<sup>33</sup> Indeed, an alien is seldom confined at the border pending the resolution of administrative hearings to determine admission.<sup>34</sup> Rather, he is paroled into the country.<sup>35</sup> "Parole" in this context differs from the conventional sense of the word, referring instead to "permission by the Attorney General for ingress into the country but . . . not a formal 'admission.'"<sup>36</sup> This article and many commentators refer to aliens paroled into the country as "parolees."<sup>37</sup>

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excludable aliens, even though the terminology is inconsistent with IIRIRA, because courts continue to do so today.

<sup>27</sup> *U.S. v. Ju Toy*, 198 U.S. 253, 263 (1905).

<sup>28</sup> NEUMAN, *supra* note 14, at 124-25.

<sup>29</sup> *Id.*

<sup>30</sup> 198 U.S. at 263.

<sup>31</sup> 8 U.S.C. § 1225(a)(1).

<sup>32</sup> *Id.* §§ 1225(b)(2)(A), 1229a(a)(1).

<sup>33</sup> *Jean v. Nelson*, 472 U.S. 846, 855 (1985).

<sup>34</sup> *Leng May Ma*, 357 U.S. at 190.

<sup>35</sup> *Id.*

<sup>36</sup> *Chi Thon Ngo v. INS*, 192 F.3d 390, 392 n.1 (3d Cir. 1999) (summarizing 8 U.S.C. § 1182(d)(5)(A)). 8 U.S.C. § 1101(13)(B) provides that "an alien who is paroled under section 1182(d)(5) of this title or permitted to land temporarily as an alien crewman shall not be considered to have been admitted."

Congress delegated to the Attorney General the authority to “in his discretion parole into the United States temporarily under such conditions as he may prescribe only on a case-by-case basis for urgent humanitarian reasons or significant public benefit any alien applying for admission to the United States . . . .”<sup>37</sup> The Attorney General, in turn, delegated this power to the Department of Homeland Security (hereinafter “DHS”) Secretary as well as other DHS agents.<sup>39</sup> While legislative history suggests that “parole was meant to be the exception rather than the rule,”<sup>40</sup> the discretion of the Attorney General and DHS officials in granting parole is significant, and it “frequently has been used

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<sup>37</sup> See T. Alexander Aleinikoff, *Detaining Plenary Power: The Meaning and Impact of Zadvydas v. Davis*, 16 GEO. IMMIGR. L.J. 365, 375 (2002) (referring to these aliens as “parolees”). To clarify, there are two categories of excludable aliens: (1) those detained upon arrival and who continue to be detained; and (2) alien parolees. However, many courts will also refer to alien parolees generally as “excludable aliens.”

<sup>38</sup> 8 U.S.C. § 1182(d)(5)(A).

<sup>39</sup> 8 C.F.R. § 212.5(a). On March 1, 2003, the responsibility for providing immigration-related services shifted from the Immigration and Naturalization Service (INS) to the U.S. Citizenship and Immigration Services (USCIS), a bureau of the Department of Homeland Security (DHS). Responsibility for investigation and enforcement of immigration laws shifted from the INS to the Bureau of Immigration and Customs Enforcement (ICE), also a bureau of DHS, and the Border and Transportation Security (BTS), a division of DHS. Immigration and Borders, *available at* [http://www.dhs.gov/dhspublic/theme\\_home4.jsp](http://www.dhs.gov/dhspublic/theme_home4.jsp) (last visited Feb. 19, 2004).

<sup>40</sup> *Amanullah v. Nelson*, 811 F.2d 1, 6 (1st Cir. 1987). Indeed the Senate committee stated that

it is the express intent of the committee that the parole provisions of the Immigration and Nationality Act, which remain unchanged by this bill, be administered in accordance with the original intention of the drafters of that legislation. The parole provisions were designed to authorize the Attorney General to act only in emergent, individual, and isolated situations, such as the case of an alien who requires immediate medical attention, and not for the immigration of classes or groups outside of the limit of the law.

as well in lieu of detention when a determination of an arriving alien's admissibility has been delayed."<sup>41</sup>

To deal with the legal status of such aliens, the U.S. Supreme Court applied the entry fiction: although an alien parolee is physically within the jurisdiction of the United States, that alien would be treated as if he was "stopped at the boundary line and kept there unless [his] right to enter should be declared."<sup>42</sup> In *Kaplan v. Tod*, the Court addressed a situation where a Russian girl refused admission to the country was prevented from leaving due to the outbreak of World War I:

When her prison bounds were enlarged by committing her to the custody of the Hebrew Society, the nature of her stay within the territory was not changed. She was still in theory of law at the boundary line and had gained no foothold in the United States . . . . Theoretically she is in custody at the limit of the jurisdiction awaiting the order of the authorities.<sup>43</sup>

In *Leng May Ma v. Barber*, the Court further explained the rationale behind the entry fiction:

The parole of aliens seeking admission is simply a device through which needless confinement is avoided while administrative proceedings are conducted. It was never intended to affect an alien's status, and to hold that petitioner's parole placed her legally "within the United States" is inconsistent with the congressional mandate, the administrative concept of parole, and the decisions of this Court. Physical detention of aliens is now the exception, not the rule, and is generally employed only as to security risks or those likely to abscond. Certainly

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<sup>41</sup> U.S. v. Kavazanjian, 623 F.2d 730, 733 n.1 (1st Cir. 1980). For example, many of the 120,000 Mariel Cubans who came to the United States in 1980 were paroled into the country. See note 61 and accompanying text.

<sup>42</sup> *Kaplan v. Tod*, 267 U.S. 228, 230 (1925); see also *United States v. Ju Toy*, 198 U.S. 253, 263 (1905) (also applying entry fiction); *Nishimura Ekiu v. United States*, 142 U.S. 651, 661-62 (1892) (same).

<sup>43</sup> *Kaplan*, 267 U.S. at 229-31.

this policy reflects the humane qualities of an enlightened civilization.<sup>44</sup>

As seen above, proponents of the entry fiction claim that it (1) provides needed flexibility to the government; and (2) is a humane policy because parole is better than detention, the likely alternative.

#### **D. Indefinite Detention of Aliens**

##### **1. The Alien Detention Statute**

8 U.S.C. § 1231 provides guidelines for the detention, release, and removal of aliens ordered removed. The statute directs the Attorney General to remove these aliens within ninety days.<sup>45</sup> In addition, § 1231(a)(6) provides that the Attorney General may detain certain aliens beyond the ninety-day removal period:

An alien ordered removed who is inadmissible under section 1182 of this title, removable under section 1227(a)(1)(C) [violation of status or condition of entry requirements], 1227(a)(2) [commission of crimes], or 1227(a)(4) [national security concerns] of this title or who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, may be detained beyond the removal period and, if released, shall be subject to the terms of supervision in paragraph (3).<sup>46</sup>

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<sup>44</sup> 357 U.S. 185, 190 (1958).

<sup>45</sup> *Id.* § 1231(a)(1)(A).

<sup>46</sup> *Id.* § 1231(a)(6). The § 1231(a)(3) terms of supervision referred to above provide as follows:

If the alien does not leave or is not removed within the removal period, the alien, pending removal, shall be subject to supervision under regulations prescribed by the Attorney General. The regulations shall include provisions requiring the alien—

(A) to appear before an immigration officer periodically for identification;

(B) to submit, if necessary, to a medical and psychiatric examination at the expense of the United States Government;

(C) to give information under oath about the alien's nationality, circumstances, habits, associations, and activities,

Justice Breyer summarized the regulatory scheme of the review process for these detained aliens in his majority opinion in *Zadvydas v. Davis*:

[T]he [DHS] District Director will initially review the alien's records to decide whether further detention or release is warranted after the 90-day removal period expires. 8 C.F.R. § 241.4(c)(1), (h), (k)(1)(i) (2001). If the decision is to detain, then [a] [DHS] panel will review the matter further, at the expiration of a 3-month period or soon thereafter. § 241.4(k)(2)(ii). And the panel will decide, on the basis of records and a possible personal interview, between still further detention or release under supervision. § 241.4(i). In making this decision, the panel will consider, for example, the alien's disciplinary record, criminal record, mental health reports, evidence of rehabilitation, history of flight, prior immigration history, and favorable factors such as family ties. § 241.4(f). To authorize release, the panel must find that the alien is not likely to be violent, to pose a threat to the community, to flee if released, or to violate the conditions of release. § 241.4(e). And the alien must demonstrate 'to the satisfaction of the Attorney General' that he will pose no danger or risk of flight. § 241.4(d)(1). If the panel decides against release, it must review the matter again within a year, and can review it earlier if conditions change. §§ 241.4(k)(2)(iii), (v).<sup>47</sup>

## 2. *Zadvydas v. Davis*: Indefinite Detention of Legal Aliens

Because the statute and regulatory scheme described above impose no firm limits upon the duration of detention, the question arises

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and other information the Attorney General considers appropriate; and

(D) to obey reasonable written restrictions on the alien's conduct or activities that the Attorney General prescribes for the alien.

<sup>47</sup> 533 U.S. 678, 683-84 (2001).

whether aliens ordered removed may be detained indefinitely under § 1231(a)(6). In *Zadvydas*, the Supreme Court addressed this very question regarding legally admitted aliens.<sup>48</sup> Two such aliens who faced deportation for committing crimes had been detained for some time because no country would accept them.<sup>49</sup> The Court held that because an interpretation that the statute permits indefinite detention “would raise serious constitutional concerns, [it would] construe the statute to contain an implicit ‘reasonable time’ limitation, the application of which is subject to federal-court review.”<sup>50</sup> In other words, it is reasonable to detain an alien only so long as removal is reasonably foreseeable; once it is not, the alien’s detention must end.<sup>51</sup> The Court noted that a reasonable time period is presumed to be six months:

After this 6-month period, once the alien provides good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future, the Government must respond with evidence sufficient to rebut that showing. And for detention to remain reasonable, as the period of prior postremoval confinement grows, what counts as the ‘reasonable foreseeable future’ conversely would have to shrink. This 6-month presumption, of course, does not mean that every alien not removed must be released after six months. To the contrary, an alien may be held in confinement until it has been determined that there is no significant likelihood of removal in the reasonably foreseeable future.<sup>52</sup>

The Court explained the rationale behind its decision, observing that “freedom from imprisonment—from government custody, detention,

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<sup>48</sup> 533 U.S. at 682.

<sup>49</sup> *Id.* at 684-86.

<sup>50</sup> *Id.* at 682.

<sup>51</sup> *Id.* at 699-700. Once detention ends, the alien is not simply released into society without restriction. Rather, he is released subject to certain conditions with which he must comply. See *supra* note 46 and accompanying text; *infra* note 117 and accompanying text.

<sup>52</sup> *Id.* at 701. The Court did not come up with the six-month period out of thin air. It “[had] reason to believe . . . that Congress previously doubted the constitutionality of detention for more than six months.” *Id.*

or other forms of physical restraint—lies at the heart of the liberty that [the Due Process Clause] protects.”<sup>53</sup> Indeed, detention is only appropriate when ordered in a criminal trial, with certain procedural protections, or in the nonpunitive setting, when some special justification outweighs the individual’s interest in freedom from imprisonment.<sup>54</sup> The Court further noted that “[t]he serious constitutional problem arising out of a statute that, in these circumstances, permits an indefinite, perhaps permanent, deprivation of human liberty without any such protection is obvious.”<sup>55</sup>

In limiting its holding to legally admitted aliens, the Court distinguished *Mezei*, a case upholding the indefinite detention of an excludable alien.<sup>56</sup> In that case the alien, in custody on Ellis Island, had yet to effect an entry into the United States, “[a]nd that made all the difference.”<sup>57</sup> The Court noted that while constitutional protections are not available outside the borders of the United States, “[o]nce an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all ‘persons’ within the United States, whether their presence here is lawful, unlawful, temporary, or permanent.”<sup>58</sup> However, the only issue the Court ultimately addressed was the application of § 1231(a)(6) to legally admitted aliens.<sup>59</sup>

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<sup>53</sup> *Id.* at 690.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 692.

<sup>56</sup> *Id.* at 693 (discussing *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 213-215 (1953)).

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 682. The Court noted that it was dealing “here with aliens who were admitted to the United States but subsequently ordered removed. Aliens who have not yet gained initial admission to this country would present a very different question.” Unfortunately, such a statement does not exactly clarify the issue, because the Court referred to “admission,” the term used since imposition of the IIRIRA, rather than “excludable” or “deportable,” terms used prior to the IIRIRA. The problem is that later in the opinion, when distinguishing *Mezei*, the Court emphasizes the fact that the alien was excludable, and observes that the Due Process Clause applies to all persons within the United States (i.e., all aliens but excludable aliens). *Id.* at 693. Thus, the terminology used by the Court is inconsistent.

### 3. Indefinite Detention of Alien Parolees

Whether § 1231(a)(6) permits the indefinite detention of alien parolees is the subject of a split among the circuit courts of appeal. Two circuit courts of appeal have held that the statute does not allow the government to detain alien parolees indefinitely. In *Rosales-Garcia v. Holland*, the Sixth Circuit extended the *Zadvydas* ruling to alien parolees.<sup>60</sup> Both petitioners had come to the United States from Cuba in the 1980 Mariel boatlift and were then paroled into the country,<sup>61</sup> and both had since committed serious crimes and were ordered excluded.<sup>62</sup> However, Cuba refused to accept their deportation, so the INS continued to detain them.<sup>63</sup> One of the petitioner aliens had been in INS custody for almost fifteen years, almost nine of which were subsequent to his exclusion, and all of which were subsequent to the completion of his sentence.<sup>64</sup>

The court based its conclusion on two separate grounds. First, it noted that it would be difficult for the Supreme Court to interpret § 1231(a)(6) as having a reasonableness requirement for aliens removable on deportability grounds but not aliens removable on inadmissibility grounds.<sup>65</sup> After all, the statute did not “draw any distinction between the categories of removable aliens; nor would there be any statutory reason to interpret ‘detained beyond the removal period’ differently” for these two categories of aliens.<sup>66</sup> The court also observed that the Court opinion in *Zadvydas* repeatedly referred to aliens generally, not distinguishing between different categories of aliens.<sup>67</sup> In addition, the court noted that the discussion in *Zadvydas* regarding *Mezei* and other cases merely established that excludable aliens were entitled to less process, but not that they were not protected at all by the Due Process Clause of the Fifth and Fourteenth Amendments:

If excludable aliens were not protected by even the substantive component of constitutional due process, as

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<sup>60</sup> 322 F.3d 386, 390 (6th Cir. 2003).

<sup>61</sup> Many of these 120,000 Mariel Cubans were paroled into the United States. *Id.* at 390-391.

<sup>62</sup> *Id.* at 391.

<sup>63</sup> *Id.* at 391-92.

<sup>64</sup> *Id.* at 393 n.5.

<sup>65</sup> *Id.* at 404.

<sup>66</sup> *Id.* at 404-405.

<sup>67</sup> *Id.* at 406, 408.



the government appears to argue, we do not see why the United States government could not torture or summarily execute them. Because we do not believe that our Constitution could permit persons living in the United States—whether they can be admitted for permanent residence or not—to be subjected to *any* government action without limit, we conclude that government treatment of excludable aliens *must* implicate the Due Process Clause of the Fifth Amendment.<sup>68</sup>

As a second basis for its holding, the court held that even if *Zadvydas* did not support its conclusion, the indefinite detention of inadmissible aliens independently “raises the same constitutional concerns . . . as the indefinite detention of aliens who have entered the United States.”<sup>69</sup> The court noted that subsequent Supreme Court decisions had undermined *Mezei*, and that *Mezei* was based in large part on the fact that the alien was a threat to national security.<sup>70</sup> Finally, the court observed that the aliens’ status as excludable aliens did not affect either of the main rationales for detention, risk of flight or danger to society:

An excludable alien who cannot be removed to his country of origin presents no greater risk of flight than the aliens who could not be removed to their countries of origin in *Zadvydas*; nor does an excludable alien’s status relate any more to his dangerousness than the removable status of the aliens in *Zadvydas* related to their dangerousness.<sup>71</sup>

The Ninth Circuit has also held in *Xi v. INS* that *Zadvydas* extends to excludable aliens, but it did not reach the constitutional issues

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<sup>68</sup> *Id.* at 410 (emphasis in original).

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 413-14. In *Mezei*, the Court noted that the alien “simply left the United States and remained behind the Iron Curtain for 19 months.” 345 U.S. at 214. “An exclusion proceeding grounded on danger to the national security . . . presents different considerations; neither the rationale nor the statutory authority for such release exists.” *Id.* at 216.

<sup>71</sup> *Rosales-Garcia*, 322 F.3d at 411.

considered by the Sixth Circuit in *Rosales-Garcia*; rather, it based its holding solely on statutory interpretation, the first basis for the *Rosales-Garcia* decision.<sup>72</sup> The court in *Xi* noted that “[i]n enacting § 1231(a)(6), Congress chose to treat all of the categories of aliens the same.”<sup>73</sup> Therefore, the court refused to amend the statute, which “falls within the legislative, not the judicial, prerogative.”<sup>74</sup>

*Martinez-Vazquez v. INS*, the Ninth Circuit case before the Supreme Court, fits the typical fact pattern for these cases.<sup>75</sup> Gilberto Martinez-Vasquez was paroled into the U.S. from Cuba in 1980, after which he committed numerous felonies and served time in prison. He entered INS custody in October 2001 to await his removal to Cuba, but predictably Cuba refused to accept him.<sup>76</sup> The Ninth Circuit upheld the District Court’s decision to grant Martinez’s petition for habeas corpus, following *Xi* and holding that *Zadvydas* extends to alien parolees.<sup>77</sup>

However, with the exception of the Sixth Circuit and the Ninth Circuit, all five of the other circuits confronting the issue have upheld the indefinite detention of excludable aliens as constitutionally and statutorily permissible.<sup>78</sup> Much of the reasoning underlying these decisions is the same. In *Borrero v. Aljets*, the Eighth Circuit held that “*Zadvydas*’s narrowing construction of § 1231(a)(6) does not limit the government’s statutory authority to detain inadmissible aliens.”<sup>79</sup> The court noted that “[t]he constitutional issue avoided in *Zadvydas* is simply

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<sup>72</sup> *Xi v. INS*, 298 F.3d 832, 839 (9th Cir. 2002). Note that *Xi* dealt with an excludable alien who was not an alien parolee. *Id.* at 834. See note 37 for an explanation of the difference between alien parolees and other excludable aliens who have not been paroled into the country. This article later argues that *Zadvydas* should not apply to excludable aliens not paroled into the country, which would dictate a result contrary to the holding of *Xi*.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> 346 F.3d 903 (9th Cir. 2003). The name of the case before the Supreme Court is now *Clark v. Martinez*.

<sup>76</sup> *Id.* at 904-905.

<sup>77</sup> *Id.*

<sup>78</sup> *Sierra v. Romaine*, 347 F.3d 559 (3d Cir. 2003); *Benitez v. Wallis*, 337 F.3d 1289 (11th Cir. 2003); *Borrero v. Aljets*, 325 F.3d 1003 (8th Cir. 2003); *Rios v. INS*, 324 F.3d 296 (5th Cir. 2003); *Hoyte-Mesa v. Ashcroft*, 272 F.3d 989 (7th Cir. 2001).

<sup>79</sup> 325 F.3d at 1005.

not present in the context of aliens who have not effected an entry into the United States.”<sup>80</sup>

Similarly, in *Benitez v. Wallis*, the other case now before the Supreme Court,<sup>81</sup> the Eleventh Circuit held that based on *Mezei*, excludable aliens have no constitutional right precluding indefinite detention.<sup>82</sup> In addition, the Court held that under the *Zadvydas* interpretation of § 1231(a)(6) such aliens have no statutory right precluding indefinite detention: “Because *Zadvydas* was qualified in so many respects and reads like an as-applied decision, we conclude that the Supreme Court left the law, and it seems to us the statutory scheme too, intact with respect to inadmissible aliens who never have been admitted into the United States.”<sup>83</sup> Finally, the Court noted that “[c]reating a right to parole for unadmitted aliens after six months would create an unprotected spot in this country’s defense of its borders.”<sup>84</sup>

With the circuit courts upholding indefinite detention outnumbering those striking it down by a count of five to two, the current state of the law is that the indefinite detention of alien parolees is generally upheld as constitutionally permissible. However, the Supreme Court granted certiorari in January 2004 to hear *Benitez v. Rozos* and in March to hear *Clark v. Martinez*.<sup>85</sup> The Court heard oral arguments for the two cases jointly on October 13, 2004.<sup>86</sup>

## II. Application of the Constitution to Parolees

A statute permitting the indefinite detention of U.S. citizens would be blatantly unconstitutional.<sup>87</sup> Meanwhile, a statute permitting the indefinite detention of aliens intercepted at sea or at the port of entry

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<sup>80</sup> *Id.* at 1007.

<sup>81</sup> The name of the case before the Supreme Court is now *Benitez v. Rozos*.

<sup>82</sup> 337 F.3d 1289, 1298 (11th Cir. 2003), *cert. granted*, 124 S.Ct. 1143 (Jan. 16, 2004) (NO. 03-7434).

<sup>83</sup> *Id.* at 1299.

<sup>84</sup> *Id.* at 1300.

<sup>85</sup> *See supra* note 4.

<sup>86</sup> Supreme Court of the United States, October Term 2004 Monthly Argument Calendar, October, available at [http://a257.g.akamaitech.net/7/257/2422/02aug20041430/www.supremecourtus.gov/oral\\_arguments/argument\\_calendars/monthlyargumentcaloctober2004.pdf](http://a257.g.akamaitech.net/7/257/2422/02aug20041430/www.supremecourtus.gov/oral_arguments/argument_calendars/monthlyargumentcaloctober2004.pdf) (last visited August 20, 2004).

<sup>87</sup> *See infra* note 123 and accompanying text for a discussion of when the government has appropriately detained persons due to the use of adequate safeguards.

would be permissible, because these aliens have no enforceable constitutional rights. The issue confronted in this article and in *Benitez* and *Crawford* is the constitutionality of a statute that permits the indefinite detention of alien parolees, many of whom have lived and worked here side by side with U.S. citizens and legally admitted aliens.

The Plenary Power Doctrine has long influenced the courts' treatment of aliens,<sup>88</sup> and it has undoubtedly impacted the circuit courts of appeal which have upheld the indefinite detention of parolees. However, an analysis of the issue presented in this article would not be complete without taking a step back and asking whether such deference to the political branches is appropriate under these circumstances. Courts exercise deference in immigration matters because of institutional concerns—i.e., the judiciary's preoccupation with overstepping its role in our system of government. One must examine whether these institutional concerns are justified in the political branches' treatment of alien parolees.

Therefore, in selecting a mode of analysis, it is appropriate to apply a theory that incorporates adequate consideration of the judiciary's institutional concerns. Professor Lawrence Sager presents such a theory, arguing that when the judiciary makes a substantive decision based upon institutional concerns, the political branches interpret the judiciary's institutional decision as a clear definition of a constitutional norm.<sup>89</sup> When these institutional concerns cause the definition presented in the judiciary's decision to fall short of the conceptual limits of the constitutional norm, the political branches underenforce the norm.<sup>90</sup> Therefore, Professor Sager argues that "judicially underenforced constitutional norms should be regarded as legally valid to their conceptual limits."<sup>91</sup>

Applying Professor Sager's theory in the context of the issue presented in this article clarifies and helps drive the analysis of the judiciary's proper role in applying the Constitution to alien parolees. If the government may not indefinitely detain a U.S. citizen, then it follows that extending constitutional norms to their conceptual limits would result in a finding that all persons within the jurisdiction of the United

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<sup>88</sup> See *supra* Part I.B..

<sup>89</sup> Lawrence G. Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1226 (1978). See *infra* note 101 and accompanying text for further explanation of Professor Sager's theory.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

States are protected from indefinite detention.<sup>92</sup> This is not the law, which means that, as an analytical matter, there are two possibilities: (1) different substantive constitutional norms apply to alien parolees; or (2) institutional concerns constrain the courts from more fully enforcing constitutional norms—i.e., § 1231(a)(6) is subject to the Plenary Power Doctrine.<sup>93</sup> This article concludes that the latter is what underlies courts' approach to alien parolees, and that these institutional concerns are in reality unjustified.

#### A. Different Substantive Constitutional Norms?

The first possibility is that lower substantive constitutional norms apply to parolees than to U.S. citizens. In other words, institutional concerns are irrelevant, and the Constitution has a double standard for substantive norms.<sup>94</sup> Georgetown Law Center Dean T. Alexander Aleinikoff, widely published in the area of immigration law,<sup>95</sup> argues that while there are many statements from Supreme Court opinions that would support such a reading, in this argument ultimately there are “weaknesses [that] suggest that something else is the engine that drives the plenary power train,” namely institutional concerns.<sup>96</sup>

The question then becomes whether there should be lower substantive constitutional norms for alien parolees. More specifically, should the norms be so low that our government should be able to detain these aliens indefinitely? The parolee resides in the United States, enjoying many of the benefits of life here that others enjoy, at times for a period of years. What relevant differences are there between this alien and his neighbors that would justify applying lower substantive constitutional norms? The longer he is here, the more he assimilates into his community:

As an alien resides in the United States for a longer period of time, it is foreseeable and highly probable that she will develop a network of personal associations,

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<sup>92</sup> *See id.*

<sup>93</sup> *See id.* at 1224; T. ALEXANDER ALEINIKOFF, *SEMBLANCES OF SOVEREIGNTY: THE CONSTITUTION, THE STATE, AND AMERICAN CITIZENSHIP* 155 (2002).

<sup>94</sup> ALEINIKOFF, *supra* note 93, at 156.

<sup>95</sup> Georgetown University Law Center web site, available at [http://www.law.georgetown.edu/curriculum/tab\\_faculty.cfm?Status=Faculty&Detail=208](http://www.law.georgetown.edu/curriculum/tab_faculty.cfm?Status=Faculty&Detail=208) (last visited Feb. 29, 2004).

<sup>96</sup> ALEINIKOFF, *supra* note 93, at 156-57.

integrating into some segment of American society and adapting to its way of life. . . . To lead more fulfilling lives, immigrants develop knowledge, skills, and relationships—they “invest in human capital”—that would be wasted if they had to return in their country of origin. They may adopt ideals or life goals that could not be realized in their native countries. Some of these attachments implicate particular constitutional rights that serve as side constraints on deportation, but many do not, and their cumulative effect is greater than the sum of the parts.<sup>97</sup>

By paroling the alien into the country, the government gives him a taste of American life without the full protection of the U.S. Constitution. While the legal fiction that an excludable alien detained at the border is not within the territorial jurisdiction of the United States is a practical necessity,<sup>98</sup> the entry fiction as applied to a parolee creates a separate constitutional class of persons residing in the United States when there is no compelling reason to do so. Again, the DHS policy that many courts sanction involves drastically different constitutional treatment for alien parolees, despite the fact that these aliens are permitted by DHS to live and work among citizens. These people do not appear to be so different that they should not enjoy similar basic constitutional protections. DHS has decided to parole these aliens into the country. Therefore, courts should hold DHS accountable for this decision, forcing it to live with the consequences of constitutional protection for these parolees, rather than bailing out DHS by applying the entry fiction.

Moreover, while different treatment might be appropriate in some contexts, such as voting rights, the thought that different substantive constitutional norms might exist for such fundamental protections as the prohibition of deprivation of liberty without due process of law is disturbing indeed. Again, alien parolees, like other noncitizen aliens, have not pledged their primary allegiance to the U.S., and therefore are unable to vote or have a Social Security number. However, their mere physical presence within the U.S., not to mention the U.S. government’s approval of it, should be sufficient to allow them to enjoy the most fundamental of constitutional protections.

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<sup>97</sup> NEUMAN, *supra* note 14, at 132.

<sup>98</sup> See *supra* note 29 and accompanying text.

## B. Institutional Concerns

The second possibility is that the judiciary believes that constitutional norms apply equally to parolees but that it is inappropriate for the Court in its institutional role to enforce these norms as to these particular aliens.<sup>99</sup> If this is the case, then the duty falls upon Congress and DHS officials to obey the constitutional norms despite the fact that they are underenforced by the judiciary.<sup>100</sup> However, as Professor Sager explains:

When institutional concerns result in the invocation of the political question doctrine, we understand the constitutional norm at issue to retain its legal validity. But when institutional concerns lead instead to limited federal enforcement of the constitutional norm in question, we treat the absence of judicial intervention as an authoritative statement about the norm itself. There is thus an inconsistency in the current understanding of federal judicial decisions which withhold full enforcement of constitutional norms in the service of institutional concerns.<sup>101</sup>

If § 1231(a)(6) is any indication, Congress has failed to fulfill its obligation to fully obey the underenforced constitutional norms. On its face, the statute permits the detention of removable aliens “beyond the removal period” without providing any limits on exactly how long the government may detain these aliens.<sup>102</sup> The Supreme Court thought it necessary to imply a reasonable time limitation in *Zadvydas* in order to avoid “rais[ing] serious constitutional concerns.”<sup>103</sup>

Of course, the *Zadvydas* case lacked plenary power concerns because the federal government had already admitted the two aliens.<sup>104</sup> Therefore, by imposing limitations upon their detention, the Court could not possibly interfere with the power of the political branches to determine whom they allow to enter the United States. In the future,

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<sup>99</sup> Sager, *supra* note 89, at 1224-25; ALEINIKOFF, *supra* note 93, at 155.

<sup>100</sup> Sager, *supra* note 89, at 1227.

<sup>101</sup> *Id.* at 1226.

<sup>102</sup> 8 U.S.C. § 1231(a)(6) (2000).

<sup>103</sup> *Zadvydas*, 533 U.S. at 682.

<sup>104</sup> *Id.* at 684-85.

when Congress enacts legislation and DHS makes policies related to the indefinite detention of legal aliens, they will do so with *Zadvydas* in mind—the Supreme Court has made clear the constitutional norm, so the other two branches are forced to comply.

However, because most circuit courts of appeal have refused to extend *Zadvydas* to parolees,<sup>105</sup> Congress and DHS are not forced to obey certain constitutional norms in their dealings with alien parolees. So the duty falls upon those branches to obey the constitutional norms without enforcement by the judiciary.<sup>106</sup> However, since *Zadvydas* was issued, Congress has not revised § 1231(a)(6), and the government continues to argue that *Zadvydas* should not be extended to alien parolees.<sup>107</sup> The political branches have thus once again failed to fulfill their obligation to fully obey constitutional norms beyond the interpretation by the judicial branch. It is doubtful that they will fulfill this obligation anytime in the near future. After all, aliens have no voting power, so the political branches will not be inclined to address aliens' concerns. The obvious solution is for the Court itself to extend *Zadvydas* to alien parolees, thus putting the issue of treatment of parolees back on the table for Congress and DHS to consider.

This proposal and the refusal of many courts to accept it raises another question: is the indefinite detention of parolees really an issue that should raise institutional concerns for the Court? When DHS paroled an excludable alien into the country, it is taking an affirmative action to allow the alien to enter our country (in the physical, if not the legal, sense) and reside here while his case is pending. DHS could just as easily detain the alien at the border until his status is resolved. One may assume that if DHS finds the alien to be undesirable as a citizen,<sup>108</sup> it would detain him at the border. However, by paroling the alien into the country, DHS is making a determination that it is safe to allow the alien to reside in our country, at least temporarily, while his application is pending.

An excludable alien held at the border is a different story.<sup>109</sup> In this case, if the government is held to the reasonable time limitation set

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<sup>105</sup> See *supra* note 78.

<sup>106</sup> See *supra* note 100.

<sup>107</sup> See generally *supra* notes 71, 72, and 78.

<sup>108</sup> See *supra* note 21.

<sup>109</sup> Again, see note 37 for an explanation of the difference between an alien parolee and an excludable alien who is not paroled into the country. Also note that where exactly the alien is detained is unimportant. See Kaplan, *supra* note



forth in *Zadvydas*, a court could order DHS to release the excludable alien into the United States, subject to certain conditions.<sup>110</sup> The end result of such a rule would be that the judiciary is effectively determining who may enter the country, which would violate over a century of precedent regarding the Plenary Power Doctrine.<sup>111</sup> For this reason, *Zadvydas* should not apply to excludable aliens held at the border. It would take the power to determine the physical admission of an alien away from the political branches and transfer that power to the judicial branch, a duty which the judiciary is ill-suited to perform.<sup>112</sup> However, this distinction should not be interpreted as suggesting that no protections should be available to excludable aliens held at the border. This proposal simply means that the judiciary should not *enforce* constitutional norms to the fullest extent—keeping in mind, however, that the political branches still carry an affirmative duty to obey these constitutional norms when dealing with excludable aliens held at the border.<sup>113</sup>

On the other hand, by paroling an alien into the country, the political branches are exercising their plenary power by determining which aliens may enter this country, even if only temporarily. Consequently, the judiciary is not interfering with Congress's plenary power if it imposes a reasonable time limitation upon the indefinite detention of parolees. Unlike when addressing the detention of excludable aliens held at the border, the judiciary would not be effectively determining who may enter the country; rather, it would

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42, at 230-231. The distinction is drawn upon the alien's status—i.e., has the alien been in custody since arrival, or has the alien been paroled into the country? If the alien has been in custody since arrival and has been transferred to a facility in Wyoming, for example, the fact that the alien is detained in Wyoming is unimportant. Because his status has not changed, he is and should be treated as if he is being held at the border. Note how drastically different this situation is from one in which an alien is paroled in and allowed the freedom to live and work in this country without being detained.

<sup>110</sup> *Zadvydas*, 533 U.S. at 695-96 (noting that “[t]he choice . . . is not between imprisonment and the alien ‘living at large.’ It is between imprisonment and supervision under release conditions that may not be violated.” (citing 8 U.S.C. §§ 1231(a)(3) (granting authority to Attorney General to prescribe regulations governing supervision of aliens not removed within 90 days); § 1253 (imposing penalties for failure to comply with release conditions) (1994 ed., Supp. V); 8 C.F.R. § 241.5 (2001) (establishing conditions of release after removal period)).

<sup>111</sup> See *supra* Part I.B.

<sup>112</sup> See NEUMAN, *supra* note 14.

<sup>113</sup> Sager, *supra* note 89, at 1227.

simply be relying upon DHS's decision to parole the alien into the country. Therefore, there are no institutional limitations on the judiciary that prevent it from applying the Constitution to alien parolees. The judiciary may proceed to enforce constitutional norms regarding parolees, and Congress and DHS will be forced to comply with these clearly-established norms.

### C. Practical, Moral, and Policy Concerns

Several concerns exist regarding this proposal which, upon close examination, prove to be unproblematic. First, there is the practical concern that if courts grant parolees constitutional rights equal to other aliens, DHS will simply stop paroling aliens into the country, choosing instead to detain them at the border.<sup>114</sup> Although the government will likely respond in this manner, one must ask whether that would ultimately be an imprudent change in policy.

To the contrary, ending our system of parole would introduce order and efficiency to U.S. immigration policy. The current system allows DHS to delay adjudication of applications for admission for years, because parolees and their home governments are unlikely to complain that the aliens are being allowed to reside in the United States. By refusing to recognize the constitutional rights of parolees, the courts have only encouraged the authorities to continue to allow aliens to enter the country, only to be treated with second-class constitutional status.

Notably, however, extending constitutional protections to parolees would eliminate this second-class status that is inconsistent with the ideals of the premier democracy in the world. When Congress or DHS responds by abolishing the parole policy, they may initially detain some applicants for a length of time at the border. However, political and diplomatic pressures, as well as the cost of detention, would demand that our immigration system become more efficient in its adjudication of applications, thus shortening the length of detention at the border.

Assuming that DHS is adequately funded, there is no reason that applications for admission cannot be processed more quickly. DHS will scrutinize these applications in order to prevent the entry of terrorists and will act consistently with country- and industry-specific entry quotas determined by Congress. Some applicants will be permitted to enter, and the many others who are not will be successfully deported back to their home countries. As seen earlier, in some cases there will be no

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<sup>114</sup> ALEINIKOFF, *supra* note 37, at 376.

government that will accept the deportee. In such cases, the courts should require that DHS fully obey the relevant constitutional norms.<sup>115</sup>

It is true that the current DHS policy of parole, and the courts' tolerance of it, provide significant flexibility to DHS. But this policy has done even greater harm both to the parolees and to this country, whose citizens may well believe that their country has moved past the time when its inhabitants were allowed two levels of constitutional protection. A court ruling extending constitutional protections to parolees would both protect parolees currently residing in the United States and force the government to improve the efficiency of our immigration system.

An additional moral concern exists because most of the aliens in these cases are criminals. One might wonder why we should grant constitutional protections to people whose behavior is so morally objectionable. However, as Justice Frankfurter noted, “[i]t is a fair summary of history to say that the safeguards of liberty have frequently been forged in controversies involving not very nice people.”<sup>116</sup> While many of these aliens do not inspire much sympathy due to the crimes that they have committed, courts must keep in mind, especially in our common law system, that judicial decisions affect not only the case at hand but also many other cases that follow. Even if a court decision benefits a “not very nice” person, that fact is more than outweighed by the benefits the decision could bring to many other alien parolees. After all, § 1231(a)(6) applies to other classes of deportees as well, not just criminals. Finally, as the Court noted in *Zadvydas*, “[t]he choice . . . is not between imprisonment and the alien ‘living at large.’ It is between imprisonment and supervision under release conditions that may not be violated.”<sup>117</sup>

A final policy concern is whether, in light of the September 11, 2001 attacks, we should really be more generous to outsiders. The Eleventh Circuit in *Benitez* expressed this very concern when it noted that disallowing indefinite detention of alien parolees would “create an unprotected spot in this country’s defense of its borders.”<sup>118</sup> However, as noted earlier, the government has already decided to parole these aliens into the country. Again, one may assume that if DHS deems an alien unfit for entry, it would not parole him into the country. In addition,

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<sup>115</sup> See note 113 and accompanying text.

<sup>116</sup> *United States v. Rabinowitz*, 339 U.S. 56, 69 (1950) (Frankfurter, J., dissenting).

<sup>117</sup> 533 U.S. at 696 (citations omitted).

<sup>118</sup> 337 F.3d at 1300.

there is nothing stopping the courts from carving out an exception to the proposed rule for terrorists. In fact, the Court in *Zadvydas* explicitly considered this possibility, noting that it was not “consider[ing] terrorism or other special circumstances where special arguments might be made for forms of preventive detention and for heightened deference to the judgments of the political branches with respect to national security.”<sup>119</sup> By limiting the new rule to parolees and not extending it to those detained at the border, courts would create no such “unprotected spot” in our borders.

Institutional concerns appear to be at the heart of why most courts refuse to apply the Constitution to alien parolees. However, applying the above analysis, one can see that these institutional concerns are unjustified, which removes the circuit courts’ rationale for refusing to apply the Constitution to parolees. Therefore, the Constitution should apply to parolees just as it does to legal residents and other aliens granted basic constitutional protections.

### III. Constitutional Problems with Indefinite Detention

Having established that the Constitution should apply to alien parolees, it follows necessarily that the *Zadvydas* analysis should extend to alien parolees. This indefinite, potentially permanent detention violates the Due Process Clause of the Fifth Amendment as a matter of both substantive and procedural due process. The Due Process Clause of the Fifth Amendment provides that “[n]o person shall . . . be deprived of life, liberty, or property, without due process of law . . . .” “Substantive due process” prohibits our government from taking action that “shocks the conscience.”<sup>120</sup> If a government action passes substantive due process scrutiny, it still must be implemented in a fair manner, known as procedural due process.<sup>121</sup>

#### A. Substantive Due Process

Section 1231(a)(6) does not pass substantive due process scrutiny. The freedom to move about without restraint is the most

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<sup>119</sup> 533 U.S. at 696.

<sup>120</sup> *Rochin v. California*, 342 U.S. 165, 172 (1952).

<sup>121</sup> *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

fundamental liberty interest a person can possess,<sup>122</sup> so a court should review § 1231(a)(6) with some level of heightened scrutiny. As noted by the Court in *Zadvydas*,

Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that Clause protects. See *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992). And this Court has said that government detention violates that Clause unless the detention is ordered in a *criminal* proceeding with adequate procedural protections, see *United States v. Salerno*, 481 U.S. 739, 746 (1987), or in certain special and ‘narrow’ nonpunitive ‘circumstances,’ *Foucha, supra*, at 80, where a special justification, such as harm-threatening mental illness, outweighs the ‘individual’s constitutionally protected interest in avoiding physical restraint.’ *Kansas v. Hendricks*, 521 U.S. 346, 356 (1997).<sup>123</sup>

In *Zadvydas*, the Court noted that “the proceedings at issue here are civil, not criminal, and we assume that they are nonpunitive in purpose and effect.”<sup>124</sup> However, at a certain point, when the government restrains a person’s liberty for such a significant period of time, the effect of this detention must be punitive, even if it is labeled as nonpunitive civil detention.

Even Chief Justice Rehnquist’s majority opinion in *United States v. Salerno* recognized this possibility.<sup>125</sup> In *Salerno*, the Court upheld provisions of the Bail Reform Act of 1984 that allowed pretrial detention based on concerns of future dangerousness.<sup>126</sup> The Court first stated that

the mere fact that a person is detained does not inexorably lead to the conclusion that the government

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<sup>122</sup> *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1, 18 (1979) (Powell, J., concurring in part and dissenting in part) (noting that “[l]iberty from bodily restraint always has been recognized as the core of the liberty protected by the Due Process Clause from arbitrary governmental action”).

<sup>123</sup> 533 U.S. at 690 (emphasis in original).

<sup>124</sup> *Id.*

<sup>125</sup> *United States v. Salerno*, 481 U.S. 739 (1987).

<sup>126</sup> *Id.* at 746.

has imposed punishment. . . . Unless Congress expressly intended to impose punitive restrictions, the punitive/regulatory distinction turns on ‘whether an alternative purpose to which [the restriction] may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned [to it].’<sup>127</sup>

However, the Court went on to note that it “intimate[d] no view as to the point at which detention in a particular case might become excessively prolonged, and therefore punitive, in relation to Congress’ regulatory goal.”<sup>128</sup>

The Court in *Zadvydas* noted that the government argued that § 1231(a)(6) serves two regulatory goals: (1) ensuring that aliens appear at future immigration proceedings (in other words, ensuring that they are already in custody when their deportation is secured); and (2) protecting society from dangerous individuals.<sup>129</sup> Based upon the reasonableness test set forth by the Court, however, one can see that the Court thought that the former was the true regulatory goal. After all, the rule relates to the likelihood that the alien will be deported, not to his dangerousness.<sup>130</sup>

Applying the Court’s analysis from *Salerno*, the ultimate question is whether the indefinite detention of alien parolees is excessive in relation to the regulatory goal of ensuring their presence when their deportation is secured.<sup>131</sup> The Court in *Zadvydas* found that the indefinite detention of legal aliens is excessive in relation to this regulatory goal.<sup>132</sup> It follows that if the Constitution applies to alien parolees, then the *Zadvydas* analysis applies and indefinite detention violates substantive due process. The issue presented here involves the potentially permanent government detention of a person just to ensure

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<sup>127</sup> *Id.* at 746-47 (citations omitted).

<sup>128</sup> *Id.* at 748 n.4.

<sup>129</sup> 533 U.S. at 690.

<sup>130</sup> *Id.* at 699-700. See notes 50 and 51 and accompanying text for a discussion of the rule in *Zadvydas*. The Court in *Zadvydas* noted that “the statute’s basic purpose . . . [is] assuring the alien’s presence at the moment of removal.” *Id.* at 699. “The second justification—protecting the community—does not necessarily diminish in force over time. But we have upheld preventive detention based on dangerousness only when limited to specially dangerous individuals and subject to strong procedural protections.” *Id.* at 690-91.

<sup>131</sup> 481 U.S. at 747.

<sup>132</sup> 533 U.S. at 690.

that this person will be physically present if his deportation is secured. Surely the government may accomplish the same goal by detaining the individual until his deportation is no longer reasonably foreseeable, and then releasing him subject to certain conditions. Indefinite detention, however, is excessive, unnecessary, and certainly “shocks the conscience” such that it violates substantive due process.<sup>133</sup>

### B. Procedural Due Process

Even if indefinite detention did not violate substantive due process, it would violate procedural due process. In *Salerno*, the Court noted that “[t]he Bail Reform Act carefully limits the circumstances under which detention may be sought to the most serious of crimes. . . . and the maximum length of pretrial detention is limited by the stringent time limitations of the Speedy Trial Act.”<sup>134</sup> Section 1231(a)(6) applies to a variety of aliens, even those who have committed no crime. In addition, the statute leaves open-ended the length of detention for alien parolees, merely providing that they “may be detained beyond the removal period.”<sup>135</sup>

Moreover, an examination of the regulatory review process shows that there are inadequate procedural safeguards surrounding the detention. First, the burden is placed upon the alien to show that he is not a flight risk or a danger to the community.<sup>136</sup> As the Court in *Zadvydas* noted, in *Foucha v. Louisiana* the Supreme Court struck down a Louisiana statute that placed the burden upon an insane detainee to show that his release would present no danger to society.<sup>137</sup> Second, if the DHS panel decides against release, it is required to review the alien’s status only after another year of detention.<sup>138</sup> Mandating review only once a year is inadequate, especially in light of the fact that some of these aliens are being detained for at least ten or fifteen years.<sup>139</sup> Detention of a human being is a grave matter, not to be taken lightly. The presumption should be *against* detention. Relying upon this premise

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<sup>133</sup> *Rochin*, 342 U.S. at 172.

<sup>134</sup> 481 U.S. at 747.

<sup>135</sup> 8 U.S.C. §§ 1231(a)(6). Of course, the statute on its face provides no limitation for any of the categories of aliens, but in practice DHS must apply the reasonable time limitation to legal aliens due to *Zadvydas*.

<sup>136</sup> 8 C.F.R. § 241.4(d)(1).

<sup>137</sup> 504 U.S. 71, 81-82 (1992).

<sup>138</sup> 8 C.F.R. §§ 241.4(k)(2)(iii), (v).

<sup>139</sup> *Rosales-Garcia*, 322 F.3d at 393 n.5.

would both place the burden upon the government to prove that detention is necessary and demand that the detainee's case be more frequently reviewed.

The government's indefinite detention of alien parolees is substantively and procedurally problematic. This conclusion is no surprise—the Court in *Zadvydas* found that the same government policy, when applied to legal aliens, violates the Constitution. It follows that if the Constitution applies to alien parolees, then their indefinite detention must also violate the Constitution.

#### IV. Conclusion

Indefinite detention of alien parolees is a practice that is contrary to the high constitutional and moral standards which our nation should uphold. With Congress and DHS unlikely to appropriately apply due process and end this practice, the judiciary should enforce due process and disallow the practice of indefinite detention. Because DHS has already decided to temporarily allow parolees to enter the country, the courts may extend *Zadvydas* without stepping outside of their proper role.

The end of our government's policy of parole, a likely consequence of this proposal, would introduce much needed efficiency to our immigration system. Meanwhile, all who currently reside in the United States could enjoy the same basic constitutional protections, thus ending the current two-tiered system of constitutional treatment. In its decisions in *Clark v. Martinez* and *Benitez v. Rozos*, the Supreme Court has the opportunity to take a positive step toward accomplishing these goals.

The impact of these rulings will reach far beyond this narrow issue, however. Underlying the above analysis is the premise that the United States is somehow different from much of the rest of the world. Our Constitution and our rule of law should set an example for the world to follow because we treat people justly and firmly, but with respect for their basic rights. The Supreme Court has the opportunity to set such an example. It can do so by extending *Zadvydas* to alien parolees, applying a reasonable time limitation in both *Clark* and *Benitez*, and disallowing the continued practice of indefinite detention of alien parolees.