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Andrew Bramante

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## ENDING INDEFINITE DETENTION OF NON-CITIZENS

*“It 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>1</sup>

–Justice Felix Frankfurter

### INTRODUCTION

In 1988, Santos Hernandez–Carrera, a refugee from Cuba,<sup>2</sup> was convicted of sexual assault and sentenced to six years in prison.<sup>3</sup> He was released from prison in 1993, and, if he had been a United States citizen, he might now be a free man. But because he is not a citizen, he will remain detained indefinitely. He may be an unsympathetic and unlikely person to use as the exemplar for an immigrants’ rights argument, but the very fact that he has offended public sensibilities encourages consideration of the foundation of constitutional protections—whether that foundation is a shared humanity or a particular legal status.

Hernandez–Carrera’s conviction required that he be deported once he completed his prison term in 1993, but the United States and Cuba did not have an agreement under which he could be “removed.” The Immigration and Naturalization Service, (“legacy INS”)<sup>4</sup> continued to

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<sup>1</sup> United States v. Rabinowitz, 339 U.S. 56, 69 (1950) (Frankfurter, J., dissenting).

<sup>2</sup> Santos Hernandez–Carrera was one of over 125,000 Cubans allowed to enter the United States as part of the Mariel Boatlift in 1980. Brief for Appellees at 2, Hernandez–Carrera v. Carlson, 547 F.3d 1237 (10th Cir. 2008) (No. 08-3097). During a four month period in 1980, the Cuban government opened its port in Mariel, Cuba to American citizens to pick up their family members. David A. Martin, *Graduated Application of Constitutional Protections for Aliens: The Real Meaning of Zadvydas v. Davis*, 2001 SUP. CT. REV. 47, 56 (2002).

<sup>3</sup> Brief for Appellees, *supra* note 2, at 2.

<sup>4</sup> The Immigration and Naturalization Service was absorbed into the Department of Homeland Security (“DHS”) on March 1, 2003. Homeland Security Act of 2002, Pub. L. No. 107–296, § 471, 116 Stat. 2135, 2205 (2002). The DHS requested that “legacy INS” be used to refer to the agency prior to March 1, 2003, and “DHS” afterwards. AMERICAN IMMIGRATION LAWYERS ASSOCIATION, AILA PUBLICATIONS MANUAL OF STYLE 20 (2010), available at <http://aila.org/Content/default.aspx?docid=22107>.

detain him and over 3,000 other “non-removable” aliens<sup>5</sup> until 2001 when the landmark case, *Zadvydas v. Davis*,<sup>6</sup> held that indefinite detention of lawful permanent residents (“LPRs”)<sup>7</sup> raised serious constitutional questions.<sup>8</sup> After this decision, legacy INS released over one thousand LPRs.<sup>9</sup> While Hernandez–Carrera is not an LPR, the Department of Homeland Security (“DHS”) should have released him four years later when *Clark v. Martinez*<sup>10</sup> extended the protection against indefinite detention to inadmissible aliens. Instead, the DHS determined that Hernandez–Carrera was “especially dangerous” and continued to hold him pursuant to a new regulation.<sup>11</sup> That regulation, 8 C.F.R. § 241.14(f), is the subject of this Note.

When *Zadvydas* disallowed indefinite detention, legacy INS quickly promulgated 8 C.F.R. § 241.14(f)<sup>12</sup> under which Hernandez–Carrera is presently held. The regulation requires the indefinite detention of any alien if: (1) the alien committed a violent crime, (2) the alien suffers from mental illness, and (3) there is no condition of the alien’s release that can guarantee public safety.<sup>13</sup> The regulation provides some procedural protections, but these protections fall well short of those afforded citizens. A line of Supreme Court decisions from 1972 to 1996 considered the substantive and procedural due process problems inherent in the civil commitment of

<sup>5</sup> “Alien” is the legal term used to refer to any non-citizen in the United States. 8 U.S.C. § 1101(a)(3) (2006).

<sup>6</sup> 533 U.S. 678 (2001). At the time, if a non-citizen’s home country had no extradition treaty with the United States, legacy INS could hold him indefinitely for an infraction as minor as overstaying a tourist visa. *Id.* at 691. In 2001, Cuba, Laos, Cambodia, Guyana, and Vietnam were among the nations to whom aliens could not be returned. Cindy Rodriguez, *To Immigrant ‘Lifers,’ Prison Release is Overdue*, BOSTON GLOBE, Aug. 5, 2001, at B1.

<sup>7</sup> Immigrants who have not yet gained their citizenship can be classified in two groups: lawful permanent residents and “inadmissible aliens.” See *infra* Part I.A. Santos Hernandez–Carrera was technically an “inadmissible alien” because by committing a crime, he violated a condition of his parole. See 8 U.S.C. § 1182(a)(2)(A)(i)(I) (2006) (providing that any alien who commits a “crime involving moral turpitude” is inadmissible).

<sup>8</sup> 533 U.S. at 696.

<sup>9</sup> See Robert Charles Hill & Donald Kerwin, *Immigration and Nationality Law*, 36 INT’L LAW. 527, 534 n.68 (2002) (citing Caryl Clarke, *Detainee Release Slowly Progresses*, YORK DAILY REC., Sept. 3, 2001, at 3A).

<sup>10</sup> 543 U.S. 371 (2005).

<sup>11</sup> See *Hernandez–Carrera v. Carlson*, 546 F. Supp. 2d 1185, 1188 (D. Kan. 2008), *vacated*, 547 F.3d 1237 (10th Cir. 2008) (explaining that after *Clark v. Martinez*, the DHS reviewed Hernandez–Carrera’s detention and determined that continued detention was warranted under 8 C.F.R. § 241.14(f)).

<sup>12</sup> See Notice of Memorandum, 66 Fed. Reg. 38433 (July 24, 2001) (ordering the development of new regulations “for aliens presenting special circumstances”); John S. Richbourg, *Liberty and Security: The Yin and Yang of Immigration Law*, 33 U. MEM. L. REV. 475, 492–93 (2003).

<sup>13</sup> 8 C.F.R. § 241.14(f)(1) (2010).

mentally ill citizens.<sup>14</sup> As a result, citizens convicted of even the most atrocious crimes cannot be held beyond their prison terms without considerable due process.<sup>15</sup> If Hernandez–Carrera had been protected by the procedures required for citizens, he would almost certainly be free today.

Hernandez–Carrera was diagnosed with schizophrenia in 1993,<sup>16</sup> and in the fifteen years since his DHS detention began, he received five psychiatric evaluations, each confirming that he had some form of mental illness. Only one found any predilection toward violence. The other evaluators found that his “insight was good . . . , [he had] adapted well to his incarceration,” and that “[t]here were no reports of disciplinary incidents [in over five years], and no indication of violence perpetrated against others while incarcerated.”<sup>17</sup> The senior psychiatrist at the University of Kansas Medical Center found that Hernandez–Carrera’s mental health condition was unrelated to his crime. In June 2006, the government’s own psychiatrist recommended that he be released to a group home.<sup>18</sup> Nevertheless, an Immigration Judge found that Hernandez–Carrera met the requirements of the DHS’s regulation, so the DHS could hold him indefinitely.<sup>19</sup> Hernandez–Carrera successfully challenged his detention in federal district court,<sup>20</sup> but the government won its appeal

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<sup>14</sup> See *Jackson v. Indiana*, 406 U.S. 715, 731 (1972) (holding an Indiana statute which allowed for indefinite detention for criminal defendants determined unfit to stand trial violated due process); *Addington v. Texas*, 441 U.S. 418, 432–33 (1979) (holding that in order to commit a person to a mental institution in a civil commitment proceeding and still comport with procedural due process, the State must prove by a preponderance the evidence that the person is mentally ill); *Foucha v. Louisiana*, 504 U.S. 71, 77–78 (1992) (holding that a Louisiana statute violated due process where it allowed for the indefinite commitment of a person acquitted on the basis of insanity if that person exhibited anti-social behavior, regardless of whether that person was still mentally ill); *Kansas v. Hendricks*, 521 U.S. 346, 360 (1997) (holding a Kansas statute that allowed for the civil commitment of anyone who had conditions that fell within the statute’s definition of “mental abnormality” satisfied due process); see also *Kansas v. Crane*, 534 U.S. 407, 411–12 (2002) (holding that *Hendricks* does not require the State to prove complete lack of control of his or her behavior, but it does require the State to prove some degree of lack of control).

<sup>15</sup> See, e.g., *Hendricks*, 521 U.S. at 360 (holding that due process was met in the civil commitment of a man convicted seven times for the sexual abuse of dozens of pre-pubescent children).

<sup>16</sup> Brief for Appellees, *supra* note 2, at 3. Schizophrenia is a condition that places him at greater risk to be a victim of violence than to be a perpetrator of violence. *Id.* at 4.

<sup>17</sup> *Id.* at 4.

<sup>18</sup> *Id.* at 4–5.

<sup>19</sup> *Id.* at 5 (“On February 10, 2006, an immigration judge issued a decision ordering Carrera’s continued detention under federal regulation 8 C.F.R. § 241.14.”).

<sup>20</sup> See *Hernandez–Carrera v. Carlson*, 546 F. Supp. 2d 1185, 1191 (D. Kan. 2008) (holding that Hernandez–Carrera was “entitled to release under appropriate conditions of supervision”), *vacated*, 547 F.3d 1237 (10th Cir. 2008).

to the Tenth Circuit.<sup>21</sup> In December 2009, the Supreme Court denied certiorari.<sup>22</sup> As a result, Hernandez–Carrera remains in prison.

Whether the DHS indefinite-detention regulation 8 C.F.R. § 241.14(f) can or should be overturned depends on the answers to several difficult questions. First, may the Supreme Court assert its authority and “say what the law is”<sup>23</sup> with regard to the DHS regulation? If it may, does the DHS regulation offend substantive or procedural due process? If the DHS regulation satisfies due process, does it nevertheless violate equal protection principles?

Constitutional questions that bear on the rights of immigrants are particularly problematic. The doctrine of plenary power has traditionally forestalled judicial review of the political branches’ immigration laws and regulations.<sup>24</sup> When, as in *Zadvydas*, the Supreme Court has hinted at the existence of immigrants’ constitutional rights,<sup>25</sup> it has done so almost entirely through statutory interpretation rather than a direct constitutional pronouncement.<sup>26</sup> The different categories of aliens create an added dimension of uncertainty. The constitutionality of DHS’ indefinite-detention regulation is a very close question.

This Note argues that though the Supreme Court is not compelled by its precedents to strike down the indefinite-detention regulation, it has ample latitude to, and should, do so. Absent Supreme Court action, Congress should seize the earliest opportunity to indicate to the DHS that the regulation is not authorized.

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<sup>21</sup> *Hernandez–Carrera v. Carlson*, 547 F.3d 1237, 1257 (10th Cir. 2008) (vacating the district court’s prior decision ordering the release of Hernandez–Carrera).

<sup>22</sup> *Hernandez–Carrera v. United States*, 130 S. Ct. 1011 (2009) (mem.), *denying cert. to* 547 F.3d 1237 (10th Cir. 2008).

<sup>23</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

<sup>24</sup> See Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 *YALE L.J.* 545, 547 (1990) (“The plenary power doctrine’s contours have changed over the years, but in general the doctrine declares that Congress and the executive branch have broad and often exclusive authority over immigration decisions. Accordingly, courts should only rarely, if ever, and in limited fashion, entertain constitutional challenges to decisions about which aliens should be admitted or expelled.”).

<sup>25</sup> See *Zadvydas v. Davis*, 533 U.S. 678, 682 (2001) (finding that “indefinite detention of [lawful permanent residents] would raise serious constitutional concerns” and invoking the canon of constitutional avoidance).

<sup>26</sup> See, e.g., *Hamdan v. Rumsfeld*, 548 U.S. 557, 576–77 (2006) (avoiding Suspension Clause question by denying that Congress intended its revocation of statutory habeas to be retroactive); *Rasul v. Bush*, 542 U.S. 466, 484 (2004) (avoiding Suspension Clause question by finding that statutory habeas right was not rescinded); *Demore v. Kim*, 538 U.S. 510, 517 (2003) (finding that where a statute’s provision is purported to bar habeas review, Supreme Court requires particularly clear statement that such is Congress’ intent); *INS v. St. Cyr*, 533 U.S. 289, 314 (2001) (finding that a statute did not rescind judicial review of matters of law because to do so would pose constitutional questions).

Part I of this Note reviews the tradition of plenary power and the “entry fiction” doctrine by which earlier Courts upheld the denial of immigrants’ constitutional rights. It discusses *Zadvydas*’s narrowing of plenary power and the Supreme Court’s implicit recognition of LPRs’ substantive right to be free from indefinite detention.<sup>27</sup>

Part II considers the parallel evolution of aliens’ rights to habeas corpus review. Two recent lines of Supreme Court cases upheld LPRs’ statutory right to judicial review in matters of law,<sup>28</sup> and recognized all aliens’ constitutional right to habeas corpus protection.<sup>29</sup> Equally importantly, these cases confirmed that plenary power does not preclude the Supreme Court from overturning unconstitutional immigration statutes.

Part III reviews the due process issues posed by civil detention of persons considered dangerous to the community. Though the DHS regulation does not violate the substantive component of Fifth Amendment due process, its procedural protections fall well short of those provided by state and federal civil commitment statutes. Part III argues that *Landon v. Plasencia*<sup>30</sup> exemplifies how the Supreme Court should use *Mathews v. Eldridge*<sup>31</sup> to evaluate the DHS regulation’s procedural sufficiency. The Court may find the DHS regulation unconstitutional, but because the Court stopped short of a definitive ruling in *Plasencia*, such a finding is not compelled.

Part IV shows that equal protection arguments will not be successful in challenging the DHS regulation, and Part V sets forth two policy reasons for the Supreme Court to complete the work it began in *Plasencia* and find the regulation unconstitutional or, in the

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<sup>27</sup> See T. Alexander Aleinikoff, *Detaining Plenary Power: The Meaning and Impact of Zadvydas v. Davis*, 16 GEO. IMMIGR. L.J. 365, 366 (2002) (reading *Zadvydas* as possibly a radical shift in immigration law reasserting Supreme Court oversight of non-citizens’ constitutional protections).

<sup>28</sup> See *Demore*, 538 U.S. at 517 (refusing to recognize congressional intent to deny judicial review of questions of law and constitutionality); *St. Cyr*, 533 U.S. at 314 (declining to recognize congressional intent to prohibit judicial review of important issues of law).

<sup>29</sup> See *Boumediene v. Bush*, 128 S. Ct. 2229, 2275 (2008) (holding that the Suspension Clause applies to enemy combatants at Guantanamo Bay); *Hamdan*, 548 U.S. at 576–84 (holding that because Congress did not clearly intend law stripping federal courts of jurisdiction to hear habeas petitions to be retroactive, two enemy combatants held at Guantanamo Bay could file habeas petitions); *Rasul*, 542 U.S. at 485 (holding that federal courts had jurisdiction to hear challenges to the indefinite detention of enemy combatants by the Executive branch).

<sup>30</sup> 459 U.S. 21 (1982) (considering what procedural protections are required when a lawful permanent resident faces deportation after forfeiting her lawful status by helping smuggle aliens into the country).

<sup>31</sup> 424 U.S. 319, 334–35 (1976) (setting forth a balancing test to assess the sufficiency of procedural protections when a private interest will be affected by government action).

alternative, for Congress to clarify that DHS is not authorized to detain aliens indefinitely.

## I. PLENARY POWER AND CONSTITUTIONAL RIGHTS

### A. Introduction

Before reviewing the Supreme Court's evolving authority to review the constitutionality of immigration statutes, it is necessary to define several different categories of non-citizens. An "alien" is any person in the country who is "not a citizen or national of the United States."<sup>32</sup> Historically, the government has afforded different benefits and levels of constitutional protection to different categories of aliens.<sup>33</sup> A discussion of plenary power and constitutional rights therefore requires a clear description of these categories. Two classifications are particularly important to the following discussion.<sup>34</sup> The first distinction is between *immigrants* who intend to stay in the country and create a life here, and *nonimmigrants* who do not intend to abandon their residence in a foreign country.<sup>35</sup> This Note deals primarily with immigrants.

Among immigrants there are two major categories: (1) *lawful permanent residents* ("LPR")<sup>36</sup> (immigrants who have been granted permission to live and work in the United States), and (2) *inadmissible aliens* (non-citizens who entered the country without authorization or who are otherwise ineligible to enter the country or remain).<sup>37</sup> The government typically grants LPRs greater rights and privileges.<sup>38</sup>

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<sup>32</sup> 8 U.S.C. § 1101(a)(3) (2006).

<sup>33</sup> See *Mathews v. Diaz*, 426 U.S. 67, 83 (1976) (finding that it is "unquestionably reasonable" for Congress to differentiate between non-citizens based on their immigration status and their duration in the country).

<sup>34</sup> There are a wide variety of ways to categorize non-citizens. See *id.* at 79 n.13. (describing the different classifications of aliens under American law).

<sup>35</sup> 8 U.S.C. § 1101(a)(15) (2006 & Supp. III 2010) (defining all non-immigrant categories).

<sup>36</sup> See *id.* § 1151 (describing the categories of non-citizens "who may . . . acquire the status of an alien lawfully admitted to the United States for permanent residence").

<sup>37</sup> See *id.* § 1182 (establishing health problems, criminal activity, national security and foreign policy concerns, labor competition, and others as bases for an alien's inadmissibility).

<sup>38</sup> See *Clark v. Martinez*, 543 U.S. 371, 389 (2005) (Thomas, J., dissenting) ("[C]onstitutional questions raised by detaining inadmissible aliens are different from those raised by detaining admitted aliens." (emphasis omitted)); *Johnson v. Eisentrager*, 339 U.S. 763, 770 (1950) ("The alien, to whom the United States has been traditionally hospitable, has been accorded a generous and ascending scale of rights as he increases his identity with our society. Mere lawful presence in the country creates an implied assurance of safe conduct and gives him certain rights.").

### B. Plenary Power

Before the Supreme Court explicitly examines the constitutionality of 8 C.F.R. § 241.14(f), the indefinite-detention regulation, it must decide if the doctrine of plenary power precludes such judicial review. Though the Court is far from unanimous, its recent decisions suggest that the plenary power doctrine does not bar constitutional review of the regulation.

#### 1. Roots of Plenary Power

In immigration law, plenary power is a separation-of-powers doctrine under which courts have accorded to the political branches almost absolute deference when the federal government legislates or acts to deport or exclude an alien.<sup>39</sup> The application of this doctrine to immigration law has its roots in the anti-Chinese sentiments that swept California in the 1880's.<sup>40</sup> After twelve years of lawful residence in the San Francisco area, Chae Chan Ping obtained a reentry permit and set off by steam ship to visit his family in China.<sup>41</sup> During his absence, Congress reacted to the Chinese "menace to our civilization" by passing a law that, among other provisions, denied reentry to returning Chinese residents even if they had obtained proper permits.<sup>42</sup> After he was denied reentry in 1888, Chae Chan Ping challenged the law, asserting vested rights, contractual rights, and constitutional protections.<sup>43</sup> The Supreme Court held that the government had sovereign, constitutionally unrestrained plenary power to exclude any non-citizen; therefore, Chae Chan had no such rights or protections.<sup>44</sup>

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<sup>39</sup> See *Chae Chan Ping v. United States*, 130 U.S. 581, 609–10 (1889) (holding that Congress has plenary power, even in times of peace, to exclude aliens from or to prevent their return to the United States for any reason).

<sup>40</sup> *Id.* at 595.

<sup>41</sup> *Id.* at 582.

<sup>42</sup> *Id.* at 595.

<sup>43</sup> DANIEL KANSTROOM, *DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY* 16 (2007).

<sup>44</sup> See *Chae Chan Ping*, 130 U.S. at 606 ("The government, possessing the powers which are to be exercised for protection and security, is clothed with authority to determine the occasion on which the powers shall be called forth ; and its determination, so far as the subjects affected are concerned, are necessarily conclusive upon all its departments and officers. . . . In both [times of war and peace, the government's determination of the necessity of exclusion] is conclusive upon the judiciary."); see also Daniel Kanstroom, *Post-Deportation Human Rights Law: Aspiration, Oxymoron, or Necessity?* 3 STAN. J. C.R. & C.L. 195, 231 (2007). ("[T]he Court rejected all of the doctrinal categories . . . including contractual rights, vested rights, constitutional protections, and limited governmental powers.").

Shortly thereafter, in *Fong Yue Ting v. United States*,<sup>45</sup> a divided Court held that Congress' unrestrained immigration power included the power to deport immigrants already living in the United States. Cited by Supreme Court majorities more than seventy times,<sup>46</sup> this case became the foundation for immigration jurisprudence. Under *Chae Chan Ping* and *Fong Yue Ting*, the doctrine of plenary power asserted that the political branches should be unfettered by Supreme Court review when they act to keep immigrants from entering the country—called *exclusion*—and when they act to deport them—called *removal*.

## 2. Early Limitations on Plenary Power

Early on, the Supreme Court recognized some limitations to the government's power regarding immigrants. In 1896, it acknowledged aliens' due process protections in federal criminal proceedings,<sup>47</sup> and in 1915, the Court held that Fourteenth Amendment equal protection bars states from curtailing aliens' economic opportunities.<sup>48</sup> Initially, these rights applied to the lives of immigrants in the United States, but the rights did not limit government power over the processes of immigration or deportation.

In *Yamataya v. Fisher*,<sup>49</sup> however, the Court identified such a limit to government power. *Yamataya* involved an inadmissible Japanese woman who, within two weeks of arrival in Seattle, was the subject of a warrant for "surreptitiously, clandestinely, unlawfully and without any authority, com[ing] into the United States . . ."<sup>50</sup> The Court insisted that it is a violation of due process to detain and deport without a hearing even a non-citizen who was unlawfully and briefly

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<sup>45</sup> 149 U.S. 698, 707 (1893) ("The right of a nation to expel or deport [non-citizens] . . . is as absolute and unqualified as the right to prohibit and prevent their entrance into the country"). Ironically, the author of the *Chae Chan Ping* opinion, Justice Field, penned the most passionate dissent. *Id.* at 759 (Field, J., dissenting) ("As to its cruelty, nothing can exceed a forcible deportation from a country of one's residence, and the breaking up of all the relations of friendship, family and business there contracted.").

<sup>46</sup> Kanstroom, *supra* note 44, at 231.

<sup>47</sup> *Wong Wing v. United States*, 163 U.S. 228, 237 (1896) (holding that a federal statute that punished non-citizens with hard-labor for up to one year without a judicial trial for the crime of being in the country illegally was unconstitutional).

<sup>48</sup> *Truax v. Raich*, 239 U.S. 33 (1915) (finding an equal protection violation in an Arizona law requiring establishments with five employees or more to have a staff consisting of at least 80% native born citizens); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (finding a Fourteenth Amendment violation where a San Francisco ordinance requiring laundries in wooden buildings to get a permit resulted in no Chinese persons being issued a permit while virtually every white applicant was issued one).

<sup>49</sup> 189 U.S. 86 (1903).

<sup>50</sup> *Id.* at 87.

present in the United States.<sup>51</sup> Though *Yamataya* is still cited today for its limitation on congressional power in deportation proceedings,<sup>52</sup> its scope was significantly curtailed with the advent of the “entry fiction” doctrine.<sup>53</sup>

### 3. Entry Fiction—The Extreme of Plenary Power

Under the entry fiction doctrine, courts consider inadmissible aliens to be “outside of the country for constitutional purposes.”<sup>54</sup> In *Yamataya*, the Court held that a woman “unlawfully” in the United States was nevertheless entitled to due process protections. Yet, in the early 1950s, two national security cases effectively ignored *Yamataya* and introduced a new doctrine. In *United States ex rel. Knauff v. Shaughnessy*,<sup>55</sup> the government detained the wife of an honorably discharged American soldier when she tried to enter the country. After holding her for two months on Ellis Island, the Attorney General denied her admission to the United States without any process or explanation. When she challenged her exclusion in habeas corpus proceedings, the federal courts denied her writ and the Supreme Court affirmed, ruling that aliens had significantly restricted due process rights.<sup>56</sup> Though the Court devoted most of its brief opinion to the political branches’ national security powers, the *Knauff* opinion is most quoted for its broadly sweeping dicta that “[w]hatever the procedure authorized by Congress is, it is due process as far as an

<sup>51</sup> The Court found that the Secretary of the Treasury necessarily erred in interpreting the congressional statute to allow deportation without giving the alien a chance to be heard. *Id.* at 101. “No such arbitrary power can exist where the principles involved in due process of law are recognized. This is the reasonable construction of the acts of Congress here in question, and they need not be otherwise interpreted.” *Id.*

<sup>52</sup> See *Reno v. Flores*, 507 U.S. 292, 306 (1993) (“[T]he Fifth Amendment entitles aliens to due process of law in deportation proceedings.” (citing *Yamataya*, 189 U.S. at 100–01)).

<sup>53</sup> See *Rosales–Garcia v. Holland*, 322 F.3d 386, 391 n.2 (6th Cir. 2003) (“This paradox of paroling aliens into the United States yet refusing to recognize their ‘entry’ into the United States has been termed the ‘entry fiction’ by some courts.”).

<sup>54</sup> Aaron Greene Leiderman, *Agency Polymorphism*, 61 ADMIN. L. REV. 781, 783 n.3 (2009) (citing *Kaplan v. Tod*, 267 U.S. 228, 230 (1925)).

<sup>55</sup> 338 U.S. 537 (1950). On August 14, 1948, Knauff sought to enter the United States to be naturalized but was detained at Ellis Island until October 6, 1948 at which time the Supreme Court entered a final order of exclusion “without a hearing on the ground that her admission would be prejudicial to the interests of the United States.” *Id.* at 539–40.

<sup>56</sup> *Id.* at 543 (“Normally Congress supplies the conditions of the privilege of entry into the United States. But because the power of exclusion of aliens is also inherent in the executive department of the sovereign, Congress may in broad terms authorize the executive to exercise the power, *e.g.*, as was done here, for the best interests of the country during a time of national emergency. Executive officers may be entrusted with the duty of specifying the procedures for carrying out the congressional intent.”).

alien denied entry is concerned.”<sup>57</sup> The entry fiction doctrine was significantly extended in *Shaughnessy v. United States ex rel. Mezei*,<sup>58</sup> when the Court denied both substantive and procedural due process to a man facing indefinite detention.

Mezei was a lawful, gainfully employed resident of the United States for over twenty years until 1948 when he left to visit his dying mother in Romania. Romania denied him entry, and Hungary, through which he was travelling, denied him an exit permit for nineteen months. When he finally returned to the United States, legacy INS detained him at Ellis Island. Legacy INS refused to divulge the national security concerns upon which it based his incarceration,<sup>59</sup> and it continued to hold Mezei when it found that no country was willing to take him. Over a “vigorous dissent”<sup>60</sup> by Justices Black, Jackson, Frankfurter, and Douglas, Justice Clark wrote for the majority that because Mezei was not legally in the United States, his indefinite detention violated no constitutional right.<sup>61</sup> Although Justice Clark’s opinion emphasized the importance of the national security concerns, the denial of constitutional protections to aliens requesting entry was soon expanded to inadmissible aliens already present in the United States who posed no national security risk.

In *Leng May Ma v. Barber*,<sup>62</sup> a woman fleeing from persecution in China arrived in the United States and claimed citizenship on the ground that her father was a United States citizen. The government detained her for fifteen months and then paroled her into the country pending the review of her claim. Failing in her assertion of derived citizenship, she sought protection from persecution back in China by requesting asylum. At the time, asylum was available only to aliens “within the United States,”<sup>63</sup> and the Court determined that as a parolee, she was not in the United States. “She was still in theory of law at the boundary line and had gained no foothold in the United States.”<sup>64</sup> The advent of the entry fiction doctrine was thus the low

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<sup>57</sup> *Id.* at 544. *Knauff* denied the procedural due process required by *Yamataya* perhaps because *Knauff* dealt with a woman who had never lived in the United States and who could be returned to her home country. *Knauff* recognized *Yamataya* with no more than a “cf.” citation. *Id.* at 543.

<sup>58</sup> 345 U.S. 206 (1953).

<sup>59</sup> *Id.* at 209.

<sup>60</sup> Motomura, *supra* note 24, at 558.

<sup>61</sup> *Mezei*, 345 U.S. at 214–15 (“[T]he Attorney General may lawfully exclude respondent without a hearing . . . [H]e is treated as if stopped at the border.”).

<sup>62</sup> 357 U.S. 185 (1958).

<sup>63</sup> 8 U.S.C. § 1253(h) (1976).

<sup>64</sup> *Leng May Ma*, 357 U.S. at 189 (quoting *Kaplan v. Tod*, 267 U.S. 228, 230 (1925)).

watermark for the Court's recognition of aliens' constitutional rights.<sup>65</sup> Apparently, aliens had none.

### B. Narrowing Plenary Power

The entry fiction is still a living part of the "plenary power edifice,"<sup>66</sup> but the Supreme Court has narrowed its scope.<sup>67</sup> In *Landon v. Plasencia*,<sup>68</sup> an LPR who had lived in the United States for five years spent several days in Mexico. While returning, legacy INS caught her helping several aliens make an unlawful entry into the United States.<sup>69</sup> Because of the nefarious purpose of her excursion from the country, the Supreme Court held that she had relinquished the statutory protections normally accorded to an LPR in a deportation hearing. Nevertheless, the Court held that since she had made a previous lawful entry as a permanent resident she was entitled to due process before being excluded.<sup>70</sup>

This holding had two implications for plenary power. First, the Court held that a lawful permanent resident did not necessarily lose her due process protections upon reentry to the country after a brief absence.<sup>71</sup> *Plasencia*, therefore, arguably limited the entry fiction to

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(Holmes, J.)). As in *Mezei, Leng May Ma* commanded only a five-justice majority. The four dissenting justices objected particularly to the application of the entry fiction to deny protection from persecution. *Id.* at 192 (Douglas, J., dissenting) ("This alien is not in custody at our border. She is here on parole. . . . How an alien can be paroled 'into the United States' and yet not be 'within the United States' remains a mystery.").

<sup>65</sup> Though one may speculate that the 5-4 *Mezei* decision may have turned on the national security issue, by 2001 many courts generalized the holding. See *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001); see also, Brian G. Slocum, *The War on Terrorism and the Extraterritorial Application of the Constitution in Immigration Law*, 84 DENV. U. L. REV. 1017, 1025-26 (2007) (interpreting the *Mezei* decision as "uncompromising" and clearly defining the scope of the entry fiction).

<sup>66</sup> Aleinikoff, *supra* note 27, at 374.

<sup>67</sup> See Slocum, *supra* note 65, at 1025-26 ("[T]he [entry fiction] doctrine is not as absolute as it might have once seemed. In *Landon v. Plasencia*, the Court indicated that a long-term resident alien had due process rights even though she had been stopped at the border after a brief stay outside of the country." (footnote omitted)); see also Richbourg, *supra* note 12, at 494 (complaining that *Zadvydas* rejected the government argument that since *Zadvydas*' conviction made him inadmissible, he was outside the border and without constitutional protections).

<sup>68</sup> 459 U.S. 21 (1982).

<sup>69</sup> *Id.* at 23. As an LPR, *Plasencia* requested that her removal be litigated in deportation proceedings where she would be afforded greater procedural protections. *Id.* at 26.

<sup>70</sup> *Id.* at 35 ("[T]he courts must evaluate the particular circumstances and determine what procedures would satisfy the minimum requirements of due process on the reentry of a permanent resident alien.").

<sup>71</sup> Prior to the redefinition of "entry" and "admission" in 1996, whether a lawful permanent resident retained her right to reenter the United States depended on whether her trip was more than "an innocent, casual, and brief excursion." *Rosenberg v. Fleuti*, 374 U.S. 449, 462 (1963). In 1996, Congress codified the Court's holdings when it defined the new concept of

immigrants who had not yet made a lawful entry.<sup>72</sup> Second, and equally important, *Plasencia* emphasized that its holding was constitutional and not just statutory.<sup>73</sup> This signaled the possibility that the Supreme Court might be willing to limit plenary power deference where sufficiently compelling constitutional rights were at stake. It took almost twenty years, however, for it to do so.

### C. *Zadvydas v. Davis and Its Progeny*

In 2001, *Zadvydas v. Davis* confirmed that Congress' power to regulate immigrants is constitutionally limited and that the Supreme Court would assert its authority to enforce those limits.<sup>74</sup> Kestutis Zadvydas, a lawful permanent resident born to Lithuanian parents in a German displaced persons camp, was ordered removed from the United States due to his criminal activity.<sup>75</sup> Neither Lithuania nor Germany would accept him, and it became clear that his detention would be indefinite.<sup>76</sup> Legacy INS justified the detention as a

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"admission." See 8 U.S.C. § 1101(a)(13) (2006) (setting forth the statutory requirements for lawful admission).

<sup>72</sup> Aleinikoff, *supra* note 27, at 374 ("Mezei was read [by *Plasencia*] to apply only to initial entrants . . .").

<sup>73</sup> *Plasencia*, 459 U.S. at 329–30. To justify its recognition of due process rights in an alien who had previously entered the country lawfully, *Plasencia* relied on *Kwong Hai Chew v. Colding*, 344 U.S. 590 (1953), which had recognized such a right in a lawful permanent resident who, prior to leaving for several months as a maritime sailor, had obtained immigration papers to allow him to reenter. *Plasencia*, 459 U.S. at 31 n.7. The *Mezei* majority cited but then ignored *Chew v. Colding*'s holding when it concluded that "the legal incidents of an alien's entry remain unaltered whether he has been here once before or not." *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 213 (1953). *Plasencia* effectively resuscitated *Chew v. Colding* by affirming the constitutional foundations of its holding. *Plasencia*, 459 U.S. at 33 ("Although the [*Chew v. Colding*] holding was one of regulatory interpretation, the rationale was one of constitutional law. Any doubts that *Chew* recognized constitutional rights in the resident alien returning from a brief trip abroad were dispelled by *Rosenberg v. Fleuti*, where we described *Chew* as holding 'that the returning resident alien is entitled as a matter of due process to a hearing on the charges underlying any attempt to exclude him.'" (quoting *Rosenberg v. Fleuti*, 374 U.S. 449, 460 (1963))).

<sup>74</sup> See Ernesto Hernández-López, *Sovereignty Migrates in U.S. And Mexican Law: Transnational Influences in Plenary Power and Non-Intervention*, 40 VAND. J. TRANSNAT'L L. 1345, 1348 (2007) ("[I]n 2001, contrary to a century of precedent, the U.S. Supreme Court in *Zadvydas v. Davis* explicitly stated that plenary power over immigration is 'subject to important constitutional limitations.'"); see also Aleinikoff, *supra* note 27, at 366 (by subjecting Congress' immigration power "to important constitutional limitations" *Zadvydas* "may represent a radical shift, a turning point for immigration law no less important than *Miranda v. Arizona* and *Mapp v. Ohio* for criminal procedure, *Baker v. Carr* for equal protection, and *Goldberg v. Kelly* for due process." (quoting *Zadvydas*, 533 U.S. at 696)).

<sup>75</sup> *Zadvydas*, 533 U.S. at 678.

<sup>76</sup> The second case consolidated in the *Zadvydas* decision was that of a Cambodian, Kim Ho Ma, who at the age of 17 was involved in a gang-related shooting, convicted of manslaughter, and served two years of a 38-month sentence before being released into legacy

permissible reading of 8 U.S.C. § 1231(a)(6), which provided that an “alien ordered removed 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.”<sup>77</sup> A 5-4 Court ruled that because Zadvydas was a lawful permanent resident, legacy INS could *not* hold him indefinitely.<sup>78</sup>

The Court framed its decision as one of statutory interpretation, relying on the doctrine of constitutional avoidance.<sup>79</sup> The Court explained that, “[b]ased on [its] conclusion that indefinite detention . . . would raise serious constitutional concerns,” it was limiting post-removal-order detention to six months.<sup>80</sup> *Zadvydas* included an extensive analysis of its “serious constitutional concern,” citing frequently the Court’s line of cases circumscribing the power of the government to hold someone deemed dangerous to society in a non-criminal context.<sup>81</sup> Dissenting, Justice Kennedy (joined by the Chief

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INS custody. 533 U.S. at 685.

<sup>77</sup> 8 U.S.C. § 1231(a)(6) (2006) (emphasis added). The Section specifies four categories of aliens to whom the extended removal period applies: (1) aliens who are inadmissible, and aliens who are deportable because (2) they violated their immigration status, (3) they committed a crime, or (4) they pose a national security threat. *Id.*

<sup>78</sup> *Zadvydas*, 533 U.S. at 679 (holding that the detention statute implicitly limits an alien’s detention “to a period reasonably necessary to bring about that alien’s removal from the United States”). The constitutionality of indefinite detention of post-removal-order aliens had been questioned before. In 1952, the Senate Judiciary Committee rejected indefinite detention proposed in the House version of the Immigration and Nationality Act because it “present[ed] a constitutional question.” Martin, *supra* note 2, at 59 (quoting S. Rep. No. 2239 (1950)). Congress ultimately authorized legacy INS to hold aliens for six months while arrangements were made for removal. Thereafter, the bill provided for supervised release. *Id.*

<sup>79</sup> See *Zadvydas*, 533 U.S. at 679 (adhering to the general rule that if there are two equally plausible interpretations of an ambiguous statute and one of the two poses constitutional questions, then the doctrine of constitutional avoidance requires that the court assume that Congress intended the other one); *id.* at 707 (Kennedy, J., dissenting) (arguing that where a court finds “two interpretations of equal plausibility, it should choose the construction that avoids confronting a constitutional question.”).

<sup>80</sup> *Id.* at 682. The Court limited to six months the presumptively reasonable time period during which an alien can be held following the alien’s final removal order. *Id.* at 701.

<sup>81</sup> *Id.* at 690–702. See *Jackson v. Indiana*, 406 U.S. 715, 738–39 (1972) (holding that, prior to indefinite civil detention, full due process rights were due to a criminal defendant unable to stand trial due to incompetence); *United States v. Salerno*, 481 U.S. 739, 747 (1987) (upholding pre-trial detention only for “the most serious of crimes” and only with “stringent time limitations” and other judicial safeguards); *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992) (holding that since “[f]reedom from physical restraint has always been at the core of the liberty protected by the Due Process Clause,” the state may confine someone only if it shows by clear and convincing evidence that he is both mentally ill and dangerous); *Kansas v. Hendricks*, 521 U.S. 346, 371 (1997) (finding no due process or double jeopardy violation where a sexual predator had access to court-appointed counsel, the opportunity to cross-examine witnesses, and other protections prior to post-sentence civil commitment, which included rehabilitation services). The DHS focused particularly on the *Hendricks* dicta, which allowed that a “finding of dangerousness, standing alone, is ordinarily not a sufficient ground upon which to justify

Justice and Justices Scalia and Thomas) opined that an alien had no substantive rights and was due no procedural protections, so there were no constitutional questions to avoid.<sup>82</sup> Nevertheless, the majority recognized both substantive and procedural rights. As summarized by Justice Souter, “The *Zadvydas* opinion opened by noting the clear applicability of general due process standards: physical detention requires both a ‘special justification’ that ‘outweighs the individual’s constitutionally protected interest in avoiding physical restraint’ and ‘adequate procedural protections.’”<sup>83</sup>

While framing a decision as statutory interpretation rather than a constitutional pronouncement shows judicial deference to congressional authority, *Zadvydas* was noteworthy for its limitation on Congress’s plenary power.<sup>84</sup> Justice Breyer explicitly emphasized that plenary power “is subject to important constitutional limitations. . . . Congress must choose ‘a constitutionally permissible means of implementing’ that power. . . .”<sup>85</sup> The Supreme Court showed that it was prepared to go beyond merely reminding Congress of its duty to respect Constitutional boundaries.<sup>86</sup> Both in *Zadvydas* and *Plasencia*, the Court’s rulings indicated that judicial restraint in immigration was not absolute, and that it would step in and enforce constitutional boundaries if Congress overstepped them. In *Plasencia*, the Court insisted on procedural due process for an LPR being denied reentry to the United States, and in *Zadvydas*, the Court disallowed indefinite detention of LPRs.

While *Zadvydas* limited plenary power and recognized the rights of LPRs, it left open three important questions. First, did the prohibition of indefinite detention extend beyond LPRs to

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indefinite involuntary commitment. We have sustained civil commitment statutes when they have coupled proof of dangerousness with the proof of some additional factor, such as a ‘mental illness’ or ‘mental abnormality.’” *Id.* at 358.

<sup>82</sup> *Zadvydas*, 533 U.S. at 721 (Kennedy, J., dissenting) (“Whether a due process right is denied when removable aliens who are flight risks or dangers to the community are detained turns, then, not on the substantive right to be free, but on whether there are adequate procedures to review their cases . . .”).

<sup>83</sup> *Demore v. Kim*, 538 U.S. 510, 553 (2003) (Souter, J., dissenting) (quoting *Zadvydas*, 533 U.S. at 690).

<sup>84</sup> *See Zadvydas*, 533 U.S. at 705 (Kennedy, J., dissenting) (“Any supposed respect the Court seeks in not reaching the constitutional question is outweighed by the intrusive and erroneous exercise of its own powers. In the guise of judicial restraint the Court ought not to intrude upon the other branches.”).

<sup>85</sup> *Id.* at 695 (quoting *INS v. Chadha*, 462 U.S. 919, 941 (1983)).

<sup>86</sup> *See Martin*, *supra* note 2, at 71 n.64 (“For the critics the crucial issue is not whether the Constitution controls, but whether the courts would play any role in holding the executive and Congress to such limitations.”).

inadmissible aliens as well? In *Zadvydas*, the government argued that indefinite detention of all aliens was permissible under *Mezei*.<sup>87</sup> The Court could have ruled that *Mezei* was not controlling because national security was a dominant concern in that case and not in *Zadvydas*. The Supreme Court instead distinguished between *Zadvydas*' LPR status and *Mezei*'s inadmissible status.<sup>88</sup> This distinction suggested that indefinite detention might still be possible for inadmissible immigrants like *Mezei*.<sup>89</sup> Second, would the Court explicitly recognize due process rights, either substantive or procedural, in cases where aliens were detained temporarily? Especially if indefinite detention is impermissible, there may be a term of detention that is *per se* too long or that requires a minimum of procedural protections. Third, could legacy INS continue to indefinitely detain non-removable LPRs whom the agency deemed dangerous to society? After *Zadvydas*, federal appellate courts reached opposite conclusions as to whether an alien posing a danger to society may be indefinitely detained, regardless of the required procedural protections.

### *1. Indefinite Detention for Inadmissible Aliens*

After *Zadvydas*, the circuits split as to whether *Zadvydas* six-month, post-removal limit on detention also applied to inadmissible aliens. The Sixth and Ninth Circuits held that it did,<sup>90</sup> while the Eighth and Eleventh Circuits upheld legacy INS's authority to hold such aliens indefinitely.<sup>91</sup> Significantly, the Sixth Circuit's en banc decision in *Rosales–Garcia v. Holland* explicitly repudiated the entry fiction doctrine and rejected *Mezei* as controlling precedent.<sup>92</sup> The

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<sup>87</sup> *Zadvydas*, 533 U.S. at 692.

<sup>88</sup> *Id.* at 693 (“The distinction between an alien who has effected an entry into the United States and one who has never entered runs throughout immigration law.”).

<sup>89</sup> The language that caused the most difficulty was Justice Breyer's comment: “We deal 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.” *Id.* at 682.

<sup>90</sup> See *Rosales–Garcia v. Holland*, 322 F.3d 386 (6th Cir. 2003) (en banc) (holding that alien detention statute implicitly carries a reasonable time limitation); *Xi v. INS*, 298 F.3d 832 (9th Cir. 2002) (holding that, due to the *Zadvydas* decision, legacy INS must limit an alien's detention period to a reasonable time).

<sup>91</sup> See *Borrero v. Aljets*, 325 F.3d 1003 (8th Cir. 2003) (holding that the *Zadvydas* decision did not apply where the alien was not admitted to the United States); *Benitez v. Wallis*, 337 F.3d 1289 (11th Cir. 2003) (holding that detention of an inadmissible alien did not violate due process), *rev'd sub nom.* *Clark v. Martinez*, 543 U.S. 371 (2005).

<sup>92</sup> *Rosales–Garcia*, 322 F.3d at 413–14 (reasoning that the *Mezei* decision was “explicitly grounded . . . in the special circumstances of a national emergency” and the Attorney General's conclusion that *Mezei* was “a threat to national security”).

Sixth Circuit concluded that an inadmissible alien must have constitutional protections:

If [inadmissible] aliens were not protected by even the substantive component of constitutional due process . . . 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 . . . to be subjected to *any* government action without limit, we conclude that government treatment of [inadmissible] aliens *must* implicate the Due Process Clause of the Fifth Amendment.<sup>93</sup>

The *Rosales–Garcia* court also considered the statutory question of whether Congress could have intended a different meaning for inadmissible aliens than it did for lawful permanent residents. In section 1231(a)(6), the text drew no distinction between LPRs and inadmissible aliens in the subject of the sentence. “An alien ordered removed who is *inadmissible* under section 1182 [or] *removable* under section 1227(a)(1)(C), 1227(a)(2), or 1227(a)(4) [referring to LPRs] . . . may be detained beyond the removal period . . . .”<sup>94</sup> The *Rosales–Garcia* court joined the Ninth Circuit in concluding that it was implausible that Congress could have intended that legacy INS could hold one group indefinitely but not the other.<sup>95</sup>

Because the Supreme Court agreed with this latter argument, it did not reach the constitutional question.<sup>96</sup> Writing for a 7-2 majority in *Clark v. Martinez*, Justice Scalia sidestepped any constitutional consideration and simply explained that the language of the statute at the center of attention in *Zadvydas* allowed for no distinction between lawful permanent residents and inadmissible aliens.<sup>97</sup> By restricting

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<sup>93</sup> *Id.* at 410.

<sup>94</sup> 8 U.S.C. § 1231(a)(6) (2006) (emphasis added).

<sup>95</sup> *Rosales–Garcia*, 322 F.3d at 408 (“[W]e can find no sound reason to interpret and apply the statute one way for one category of aliens, but a different way for others.” (quoting *Borrero v. Aljets*, 178 F. Supp. 2d 1034, 1042 (D. Minn. 2001))). Justice Scalia suggested the same argument in his *Zadvydas* dissent. *Zadvydas v. Davis*, 533 U.S. 678, 704–05 (2001) (Scalia, J., dissenting); see also Leiderman, *supra* note 54, at 784–85 (comparing this “lowest common denominator” approach or “unitarianism” with agency “polymorphism” under which an agency may interpret a statute differently in different situations).

<sup>96</sup> The Supreme Court faced a split among the circuits and the real possibility that the DHS would transfer detainees out of the Sixth and Ninth Circuits to hold them indefinitely. *Rosales–Garcia*, 322 F.3d at 418 (Boggs, J., dissenting).

<sup>97</sup> 543 U.S. 371, 378 (“To give these same words a different meaning for each category would be to invent a statute rather than interpret one.”).

his opinion to statutory interpretation, Justice Scalia avoided suggesting that inadmissible aliens had constitutional protections.

## 2. *Temporary Detention of Aliens*

Though *Zadvydas* arguably recognized a substantive due process right for LPRs to be free from indefinite detention, it gave no indication whether temporary pre-removal-order detention might also pose constitutional problems.<sup>98</sup> In *Demore v. Kim*, the Court addressed this issue and considered whether the Fifth Amendment was offended when an LPR, who had completed his criminal sentence six months earlier, was still being held pending his removal hearing.<sup>99</sup> Though the DHS held him without bail or a process to determine if he was a danger to society or a flight risk,<sup>100</sup> the Court found no due process violation.<sup>101</sup> Chief Justice Rehnquist, writing for the Court, distinguished *Zadvydas* in two ways. First, in *Zadvydas* the detention was “‘indefinite’ and ‘potentially permanent,’” whereas Kim’s pre-hearing detention was “‘of a much shorter duration.’”<sup>102</sup> Second, the detention in *Zadvydas* was outside the scope of plenary power because removal was no longer possible, whereas the pre-hearing detention in *Demore v. Kim* was part of the removal process.<sup>103</sup> This distinction suggested that plenary power may continue to have force when the government acts within the narrow confines of exclusion and removal.<sup>104</sup>

Justice Kennedy’s concurrence, however, implied that even within those narrow confines, an LPR’s right to liberty might trump the government’s need for expediency when detention becomes prolonged. “[S]ince the Due Process Clause prohibits arbitrary deprivations of liberty, a lawful permanent resident alien such as respondent could be entitled to an individualized determination as to his risk of flight and dangerousness if the continued detention became

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<sup>98</sup> After an alien convicted of a crime has completed a prison term, he is turned over to the DHS. He is held in detention waiting for a hearing to determine if he is removable. See 8 U.S.C. § 1226(c) (2006) (defining the Attorney General’s detention and release authority).

<sup>99</sup> *Demore v. Kim*, 538 U.S. 510 (2003). Kim had been convicted of burglary and petty theft. *Id.* at 513.

<sup>100</sup> See 8 U.S.C. § 1226(c)(1) (“The Attorney General shall take into custody any alien who . . . is deportable by reason of having committed [a specified criminal offense].”).

<sup>101</sup> *Demore*, 538 U.S. at 531 (“Detention during removal proceedings is a constitutionally permissible part of that process.”).

<sup>102</sup> *Id.* at 528 (quoting *Zadvydas*, 533 U.S., at 690–91).

<sup>103</sup> *Demore*, 538 U.S. at 527–28 (discussing how the pre-removal detention serves the purpose of assuring that deportable aliens will be available for hearing and thus actually removed if determined removable.).

<sup>104</sup> See *supra* Part I.B.1.

unreasonable or unjustified.”<sup>105</sup> Though Justice Kennedy gave no indication when detention would become “unreasonable or unjustified,” he left the door open for a future Court to consider when extended detention might become unconstitutional. As in *Zadvydas*, he denied that aliens have substantive due process rights, but he reminded his fellow justices that aliens may still be entitled to procedural protections, even for detention that was not open-ended.<sup>106</sup> When the Supreme Court found itself divided over the rights of Guantanamo detainees three times in the next five years, Kennedy’s viewpoint would determine the Court’s ruling: aliens have a right to procedural due process when detention becomes prolonged.<sup>107</sup>

### 3. Indefinite Detention of Aliens Under “Special Circumstances”

The *Zadvydas* majority recognized an LPR’s substantive liberty interest to be free from “an indefinite term of imprisonment,”<sup>108</sup> but it acknowledged that special arguments might be made for “terrorism or other special circumstances.”<sup>109</sup> When crafting its indefinite-detention regulation, legacy INS seized upon this language to limit the reach of *Zadvydas*. The agency grafted the reference to “special circumstances” to the majority opinion’s entirely unrelated reference to civil detention cases.<sup>110</sup> The result was a regime of continued detention for any alien determined to be “specially dangerous.”<sup>111</sup> This designation would attach to any alien who satisfied three criteria: (1) he committed a violent crime; (2) he was likely to engage in future acts of violence due to a mental condition; and (3) for him there was

<sup>105</sup> *Denmore*, 538 U.S. at 532 (Kennedy, J., concurring).

<sup>106</sup> “Whether a due process right is denied when removable aliens who are flight risks or dangers to the community are detained turns, then, not on the substantive right to be free, but on whether there are adequate procedures to review their cases . . . .” *Zadvydas*, 533 U.S. at 721 (Kennedy, J., dissenting).

<sup>107</sup> See *infra* Part II.C.

<sup>108</sup> *Zadvydas*, 533 U.S. at 695.

<sup>109</sup> *Id.* at 696.

<sup>110</sup> *Zadvydas* cited the *Hendricks* line of cases to support its conclusion that indefinite detention poses serious constitutional questions. *Id.* at 690. Later in the decision, the Court explained that its prohibition of indefinite detention did not extend to “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 matters of national security.” *Id.* at 696 (emphasis added). That the Court used the phrase “special circumstances” in both sections of its opinion apparently provided legacy INS a plausible, though disingenuous, connection.

<sup>111</sup> 8 C.F.R. § 241.14(f) (2010). Section 241.14 also permits indefinite detention of an alien “with a highly contagious disease that is a threat to public safety,” aliens “detained on account of serious adverse foreign policy consequences of release,” and aliens “detained on account of security or terrorism concerns.” 8 C.F.R. §§ 241.14(b)–(d).

no condition of release that could reasonably ensure public safety.<sup>112</sup> Legacy INS included some procedural protections in the regulation,<sup>113</sup> but these protections were significantly inferior to those required for citizens facing long-term civil commitment.<sup>114</sup> The circuit courts ultimately split on whether the DHS's indefinite-detention regulation was authorized after *Zadvydas* limited detention to a maximum time period of six months.

In 2004, in *Tuan Thai v. Ashcroft*,<sup>115</sup> the Ninth Circuit concluded that the Supreme Court had not authorized indefinite detention except for reasons of national security. The court ruled that even “[a]n alien’s ill mental health coupled with dangerousness cannot justify indefinite detention under *Zadvydas*.”<sup>116</sup> The Fifth Circuit reached the same conclusion in *Tran v. Mukasey*.<sup>117</sup> *Tran* found that the government’s justification for detention was based upon the faulty premise that *Zadvydas* allowed an exception to its general prohibition from indefinite detention for aliens with “harm-threatening mental illness.”<sup>118</sup> The *Tran* court read *Clark v. Martinez* as explicitly rejecting a different reading of section 1231(a)(6) for any subcategory of aliens.<sup>119</sup>

The Tenth Circuit disagreed. In *Hernandez–Carrera v. Carlson*,<sup>120</sup> the Tenth Circuit held that the DHS has the authority to detain an alien indefinitely if the agency determines that the alien “poses a special danger.”<sup>121</sup> It argued that under *National Cable &*

<sup>112</sup> 8 C.F.R. § 241.14(f)(1)(i)–(iii).

<sup>113</sup> The new regulation required an administrative hearing at which the detainee, with the help of a court-provided interpreter, would have a chance to examine evidence against him, to cross-examine the government’s expert witness, and to bring a witness of his own. 8 C.F.R. § 241.14(g)(3). However, he would have no right to an attorney, no right to an expert witness of his own, and no right to an interpreter to help review evidence and prepare a defense in advance of the hearing. *Id.*

<sup>114</sup> See *infra* Part III.B.2.

<sup>115</sup> 366 F.3d 790 (9th Cir. 2004).

<sup>116</sup> *Id.* at 798. The court found that in drafting 8 C.F.R. § 241.14, the Attorney General took the following *Zadvydas* dicta out of context: “certain special and narrow nonpunitive circumstances” such as a harm-threatening mental illness, may outweigh “the alien’s constitutionally protected interest in avoiding physical restraint.” *Id.* at 794. The *Zadvydas* majority language taken in context “was intended to illustrate what the Government is generally prohibited from doing . . . .” *Id.* at 795 (“[D]espite the Government’s contentions to the contrary, the reference in *Zadvydas* to special justifications and harm-threatening mental illnesses was not a statement of what § 1231(a)(6) authorizes. It was instead, an explanation of why the Court felt it was necessary to construe the statute narrowly.”).

<sup>117</sup> 515 F.3d 478 (5th Cir. 2008).

<sup>118</sup> *Id.* at 483.

<sup>119</sup> *Id.* at 482 (requiring the uniform application of § 1231(a)(6) to all aliens covered by the statute).

<sup>120</sup> 547 F.3d 1237 (10th Cir. 2008).

<sup>121</sup> *Id.* at 1253.

*Telecommunications Ass'n v. Brand X Internet Services*,<sup>122</sup> *Zadvydas* was not dispositive as to the DHS's post-*Zadvydas* interpretation of the detention statute. *Brand X* held that a "prior judicial construction of a statute trumps [a subsequent] agency construction . . . only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion."<sup>123</sup> Since *Zadvydas* and *Martinez* "explicitly found the statute to be ambiguous as to whether and under what circumstances Congress authorized the Attorney General to detain aliens indefinitely,"<sup>124</sup> the Tenth Circuit concluded that the court should defer to the DHS both as to the length of time an alien may be detained and as to the possibility of indefinite detention.<sup>125</sup>

The DHS is within its authority to hold an alien indefinitely, so long as the regulation satisfies procedural due process and contains sufficient substantive limitations to indefinite detention.<sup>126</sup> The court found that both conditions were satisfied. Unlike the original DHS regulation struck down by *Zadvydas*, the new DHS regulation was limited to "a small segment of particularly dangerous individuals."<sup>127</sup> Moreover, the evidentiary burden required by the new regulations for a finding of "particularly dangerous" provided sufficient procedural protections.<sup>128</sup> In December 2009, the Supreme Court denied Hernandez-Carrera's petition for certiorari,<sup>129</sup> and the circuit split remains.

#### D. Current Status of Plenary Power and Substantive Alien Rights

When *Zadvydas* explicitly limited the political branches' action in immigration, there was some speculation that it signaled an end to plenary power—that the Supreme Court would no longer defer to the political branches in their regulation of immigrants.<sup>130</sup> *Demore v. Kim*

<sup>122</sup> 545 U.S. 967 (2005). Prior to *Brand X*, it had been well-established under *Chevron* that when a statute administered by an agency "is silent or ambiguous" on an issue, courts owe that agency deference if the agency's reading is a "permissible construction of the statute." *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984). *Brand X* clarified that even when a federal court construed the statute *before* the agency did, the courts still owed deference to the agency if the agency's construction was permissible. *Brand X*, 545 U.S. at 982.

<sup>123</sup> *Hernandez-Carrera*, 547 F.3d at 1244 (alteration in original) (quoting *Brand X*, 545 U.S. at 982).

<sup>124</sup> *Id.* at 1245.

<sup>125</sup> *Id.* at 1256 (deferring to the Attorney General's interpretation of § 1236(a)(6)).

<sup>126</sup> *Id.* at 1251.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at 1252.

<sup>129</sup> *Hernandez-Carrera v. United States*, 130 S. Ct. 1011, 1011–12 (2009) (mem.).

<sup>130</sup> See Aleinikoff, *supra* note 27, at 366 (conjecturing that *Zadvydas* might represent a

reaffirmed that the Court would exercise discretion in reviewing immigration law, especially where the political branches acted within the narrow scope of exclusion and deportation. Justice Kennedy's fifth-vote concurrence suggested, however, that deference to the political branches might not be absolute even within that narrow scope if constitutional boundaries were overstepped.

The location of those constitutional boundaries is still unclear. *Zadvydas* identified a substantive liberty right of LPRs to be free from indefinite detention. With Justice O'Connor, the fifth-vote in *Zadvydas*, having retired, Justice Kennedy's opinion takes on added meaning. He made clear both in *Zadvydas* and *Demore* that while he recognized no alien's substantive right to liberty, he did recognize procedural guarantees even for inadmissible aliens.

The Supreme Court's decision to deny a writ of certiorari to Hernandez-Carrera could indicate that the Court agrees with the Tenth Circuit and will not expand *Zadvydas*, or it could simply mean that the facts of the case did not provide a suitable opportunity to invalidate the DHS's indefinite-detention statute.<sup>131</sup> The Supreme Court's recent line of alien habeas corpus cases demonstrate that the plenary power doctrine no longer prevents the Court from directly challenging the political branches when they withhold aliens' constitutional protections.

## II. HABEAS RIGHTS—THE SUSPENSION CLAUSE<sup>132</sup> APPLIES TO ALIENS

From 2001 through 2008, while *Zadvydas* and its progeny were narrowing the plenary power doctrine and suggesting the existence of aliens' substantive liberty interests, the Court wrestled with the question of whether aliens had a constitutional right to habeas corpus.<sup>133</sup> During the same term as *Zadvydas*, the Supreme Court used

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“radical shift” in immigration law).

<sup>131</sup> See *Barefoot v. Estelle*, 463 U.S. 880, 907 n.5 (1983) (Marshall, J., dissenting) (“Denials of certiorari never have precedential value . . .”). However, in *Hernandez-Carrera*, the Tenth Circuit hinted that lawful permanent residents might be entitled to greater procedural due process than inadmissible aliens, and it noted that Hernandez-Carrera had access to pro bono counsel and his own expert testimony. 547 F.3d at 1255–56. Implicitly, a *pro se* LPR would have a much stronger constitutional claim.

<sup>132</sup> U.S. CONST. art. I, § 9 cl. 2 (“The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”).

<sup>133</sup> A writ of habeas corpus is the order under which a person may challenge the legal authority under which the person is being detained. BLACK'S LAW DICTIONARY 778 (9th ed. 2009). The authority of federal courts to consider such a challenge is codified by federal statute. 28 U.S.C. § 2241 (2006). Since on its face the Suspension Clause prohibits Congress from

the constitutional avoidance doctrine to tentatively assert LPRs' right to judicial review of matters of law.<sup>134</sup> It used constitutional avoidance twice more to protect the habeas rights of "enemy combatants" imprisoned at Guantanamo Bay. When no longer able to avoid confronting the question directly, the Supreme Court ruled that the Suspension Clause applies to such aliens.<sup>135</sup> Enemy combatants are a class of "inadmissible aliens,"<sup>136</sup> and the Court's rationale for granting them this constitutional right may apply to inadmissible aliens as a whole.

*A. Lawful Residents' Right to Judicial Review  
of Questions of Law*

With the 1996 enactments of the Antiterrorism and Effective Death Penalty Act ("AEDPA") and Illegal Immigration Reform and Immigrant Responsibility Act ("IIRAIRA"), Congress tried to eliminate judicial review under 28 U.S.C. § 2241, the general habeas corpus statute.<sup>137</sup> The Supreme Court, however, held in *Immigration and Naturalization Service v. St. Cyr* that the federal courts' power to review pure questions of law was undisturbed by either the AEDPA or the IIRAIRA.<sup>138</sup> In *St. Cyr*, legacy INS challenged an LPR's right to judicial review of his deportation proceeding following a controlled-substance conviction.<sup>139</sup> Though four dissenting justices found no ambiguity in Congress' intent to eliminate statutory habeas

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suspending such a right, when Congress unambiguously amended the habeas statute to limit judicial authority to review aliens' detention, the Supreme Court was forced to consider whether the Suspension Clause gave aliens a constitutional right to a writ of habeas corpus. See *Boumediene v. Bush*, 128 S. Ct. 2229, 2243–44 (2008).

<sup>134</sup> See *INS v. St. Cyr*, 533 U.S. 289, 311–14 (2001) (holding that LPRs were not deprived of their right to judicial review of questions of law).

<sup>135</sup> *Boumediene*, 128 S. Ct. at 2247 ("The Clause protects the rights of the detained by a means consistent with the essential design of the Constitution. It ensures that, except during periods of formal suspension, the Judiciary will have a time-tested device, the writ, to maintain the delicate balance of governance that is itself the surest safeguard of liberty.") (internal quotation omitted); see also *infra* Part II.C.

<sup>136</sup> Since members of organizations which the United States government has designated as "terrorist" and other persons who threaten national security are considered inadmissible aliens under the immigration statute, Guantanamo detainees are "inadmissible aliens." 8 U.S.C. § 1182(a)(3)(B)(i) (2006) (2006) ("Any alien who . . . is a member of a terrorist organization . . . is inadmissible.").

<sup>137</sup> 28 U.S.C. § 2241 (2006). "[P]rotecting the Executive's discretion from the courts . . . can fairly be said to be the theme of the legislation." *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 486 (1999).

<sup>138</sup> 533 U.S. 289 (2001).

<sup>139</sup> *Id.* at 289.

corpus and insisted that this intent be respected,<sup>140</sup> the majority held that to “preclude review of a pure question of law by any court would give rise to substantial constitutional questions.”<sup>141</sup> Since the LPR framed his question as one of law, he was entitled to judicial review.

Two years later, in *Demore v. Kim*,<sup>142</sup> six justices confirmed that detained LPRs have a right to judicial review of matters of law. Legacy INS interpreted section 1226(e) as revoking judicial review of its bond and parole decisions. The statute stated:

The Attorney General's discretionary judgment regarding the application of this [pre-hearing detention] section shall not be subject to review. No court may set aside any action or decision by the Attorney General under this section regarding the detention or release of any alien or the grant, revocation, or denial of bond or parole.<sup>143</sup>

Chief Justice Rehnquist recited for the majority the doctrine that the intent to revoke judicial review must be clear.<sup>144</sup> He asserted that the statute “contains no explicit provision barring habeas review” of non-discretionary decisions.<sup>145</sup> Since the detained LPR challenged the statute’s constitutionality, the Supreme Court retained jurisdiction. Justice O’Connor disagreed. She read the statute as unambiguously rescinding judicial review of all legacy INS decisions.<sup>146</sup> Based on her own exhaustive historical analysis, she concluded that the writ of habeas corpus would not have been available to aliens under common law at the time of ratification in 1789, and so the Suspension Clause

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<sup>140</sup> Justice Scalia filed a dissenting opinion in which Chief Justice Rehnquist and Justices O’Connor and Thomas joined. *Id.* at 327 (Scalia, J., dissenting) (“In categorical terms that admit of no exception, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA), unambiguously repeals the application of 28 U.S.C. § 2241 (the general habeas corpus provision), and of all other provisions for judicial review, to deportation challenges brought by certain kinds of criminal aliens.” (internal citation omitted)).

<sup>141</sup> *Id.* at 300.

<sup>142</sup> 538 U.S. 510 (2003).

<sup>143</sup> 8 U.S.C. § 1226(e) (2006). If the two sentences are read together, the restriction on judicial review can be fairly read to apply only to discretionary judgments; if read separately, the restriction applies to “any action or decision.”

<sup>144</sup> *Demore v. Kim*, 538 U.S. at 517 (“This Court has held that ‘where Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear.’” (quoting *Webster v. Doe*, 486 U.S. 592, 603 (1988))). While a total of six justices agreed that the statute did not rescind the LPR’s rights to judicial review, Kim lost his constitutional challenge to a mandatory pre-hearing detention on the merits. *See supra* Part I.C.2.

<sup>145</sup> *Demore*, 538 U.S. at 517.

<sup>146</sup> *Id.* at 537 (O’Connor, J., dissenting) (“The clarity of § 1226(e)’s text makes such a question unavoidable, unlike in *St. Cyr*, where the Court invoked the doctrine of constitutional doubt and interpreted the relevant provisions of AEDPA and IIRAIRA not to repeal habeas jurisdiction.”).

was inapplicable to any aliens.<sup>147</sup> Thus, *DeMore* on the surface supports an LPR's right to judicial review of questions of law, but Justice O'Connor's dissent showed that the Suspension Clause's applicability, even to LPRs, was not fully resolved.

*B. Enemy Combatants' Statutory Right to  
Judicial Review of Detention*

Whereas *St. Cyr* and *Demore* wrestled with the availability of habeas for LPRs, a line of Guantanamo Bay detention cases considered whether habeas could be withheld from inadmissible aliens. In *Rasul v. Bush*,<sup>148</sup> the government argued that enemy combatants had no right to habeas corpus. The Court avoided any constitutional issue by holding that enemy combatants were entitled to challenge their detention at Guantanamo Bay under the general habeas statute.<sup>149</sup> In Justice Kennedy's noteworthy concurrence, the extended nature of the detention was again a deciding factor.<sup>150</sup>

By restricting its ruling to the statutory habeas provisions of section 2241, *Rasul* invited Congress to speak clearly regarding the access of enemy combatants to habeas review. Congress wasted little time. It passed the Detainee Treatment Act of 2005 ("DTA")<sup>151</sup> and amended section 2241 to provide that "no court . . . shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by . . . an alien detained . . . as an enemy combatant . . ."<sup>152</sup> In *Hamdan v. Rumsfeld*,<sup>153</sup> the Supreme Court nevertheless allowed Salim Ahmed Hamdan, Osama bin Laden's bodyguard and personal driver, to challenge his detention. Hamdan had been in custody since 2001,<sup>154</sup> and his case was pending when the

<sup>147</sup> *Id.* at 537–39 (O'Connor, J., dissenting). Justice O'Connor stopped just short of reaching a final conclusion, noting that the majority accepted jurisdiction and she agreed with the majority's decision on the merits. *Id.* at 540.

<sup>148</sup> 542 U.S. 466 (2004).

<sup>149</sup> 28 U.S.C. §§ 2241(a), (c)(3) (2006) (stating that "within their respective jurisdictions," federal courts have the authority to hear applications for habeas corpus by any person who claims to be held "in custody in violation of the Constitution or laws or treaties of the United States"); see also *Rasul*, 542 U.S. at 485 (finding that the courts retained jurisdiction "to determine the legality of the Executive's potentially indefinite detention" of *Rasul* and similarly situated prisoners).

<sup>150</sup> *Rasul*, 542 U.S. at 488 (Kennedy, J., concurring) ("In light of the status of Guantanamo Bay and the indefinite pretrial detention of the detainees, I would hold that federal-court jurisdiction is permitted in these cases.")

<sup>151</sup> Detainee Treatment Act, Pub. L. No. 109–148, §§ 1001–1006, 119 Stat. 2739–2744 (2005).

<sup>152</sup> 28 U.S.C. § 2241(e)(1).

<sup>153</sup> 548 U.S. 557 (2006).

<sup>154</sup> *Id.* at 566.

DTA was enacted.<sup>155</sup> Because the Supreme Court's interpretation of the statute concluded that the DTA's habeas-corpus-stripping provision was not intended to be retroactive,<sup>156</sup> the provision did not apply to Hamdan's case. This reasoning allowed the Supreme Court to uphold Hamdan's right to judicial review under the general habeas statute without deciding whether the Suspension Clause extended to inadmissible aliens.<sup>157</sup>

### C. The Suspension Clause Applies to Inadmissible Aliens

In response to the *Hamdan* ruling, Congress "quickly enacted the Military Commissions Act, emphatically reasserting that [Congress] did not want [Guantanamo] prisoners [to file] habeas petitions."<sup>158</sup> Enemy combatants filed petitions for habeas review of their detention, and there was no longer a plausible reading of the habeas statutes by which the Court could retain jurisdiction.<sup>159</sup> In *Boumediene v. Bush*, the Court was therefore forced to consider whether enemy combatants had "the constitutional privilege of habeas corpus" which could not "be withdrawn except in conformance with the Suspension Clause."<sup>160</sup> Justice Kennedy concluded for the Court that the Suspension Clause "protects the rights of the detained by affirming the duty and authority of the Judiciary to call the jailer to account"<sup>161</sup> and "that at common law a petitioner's *status as an alien* was not a categorical bar to habeas corpus relief."<sup>162</sup>

<sup>155</sup> *Id.* at 576 (finding that the bar to judicial review did not apply to "this case, which was pending at the time the DTA was enacted").

<sup>156</sup> *Id.* (rejecting the argument that "Congress' failure to expressly reserve federal courts' jurisdiction over pending cases erects a presumption against jurisdiction" and that the presumption is not rebutted by the text).

<sup>157</sup> *Id.* at 575–76 ("We find it unnecessary to reach either of these [constitutional] arguments. Ordinary principles of statutory construction suffice to rebut the Government's theory—at least insofar as this case, which was pending at the time the DTA was enacted, is concerned."); see also Tung Yin, *Tom and Jerry (and Spike): A Metaphor for Hamdan v. Rumsfeld, the President, the Court, and Congress in the War on Terrorism*, 42 TULSA L. REV. 505, 511 (2007).

<sup>158</sup> *Boumediene v. Bush*, 128 S. Ct. 2229, 2296 (2008) (Scalia, J., dissenting).

<sup>159</sup> *Id.* at 2244 ("[W]e agree with [the Court of Appeals'] conclusion that the MCA deprives the federal courts of jurisdiction to entertain the habeas corpus actions now before us.").

<sup>160</sup> *Id.* at 2240. The canon of constitutional avoidance can only be utilized when "after the application of ordinary textual analysis, the statute is found to be susceptible of more than one construction; and the canon functions as a means of choosing between them." *Id.* at 2271 (emphasis omitted) (quoting *Clark v. Martinez*, 543 U.S. 371, 385 (2005)).

<sup>161</sup> *Id.* at 2247.

<sup>162</sup> *Id.* at 2248 (emphasis added). Finding that the United States has *de facto* sovereignty over Guantanamo Bay, the Court rejected the government's contention that the Suspension Clause did not apply to aliens there. It found that the detainees were being "held in a territory that, while technically not part of the United States, is under the complete and total control of

Having determined that even inadmissible aliens were entitled to Suspension Clause protections, the Court had to consider whether the procedural protections mandated under the DTA provided adequate safeguards, substituting for habeas procedures.<sup>163</sup> It found three particularly important procedural shortcomings in the statutorily prescribed tribunals: (1) The aliens had only “limited means to find or present evidence to challenge the Government’s case” against them;<sup>164</sup> (2) they would have a “personal representative,”<sup>165</sup> but they would “not have the assistance of counsel” at the tribunal,<sup>166</sup> and (3) they “may not be aware of the most critical allegations” upon which their detention was based.<sup>167</sup>

The Court also considered whether prudential concerns required it to defer to the United States District Court for the District of Columbia, which had been granted jurisdiction under the DTA to review the constitutionality of the tribunal procedures.<sup>168</sup> The Court emphasized the importance of the length of detention and concluded that because six years had elapsed “without the judicial oversight that habeas corpus or an adequate substitute demands[,] . . . the costs of delay can no longer be borne by those who are held in custody. The detainees in these cases are entitled to a prompt habeas corpus hearing.”<sup>169</sup>

#### *D. The Significance of Boumediene*

As the culmination of a decade of jurisprudence regarding the constitutional rights of aliens to judicial review and freedom from extended detention, *Boumediene* illustrates at least three Court leanings. Most dramatically, the Supreme Court for the first time afforded an inadmissible alien a substantive constitutional right. Specifically, aliens who are inadmissible because they might be terrorists or threats to national security had the right to judicial review of their detention under the Suspension Clause. Conferring this

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our Government.” *Id.* at 2262.

<sup>163</sup> *Id.* at 2266 (“[W]e must interpret the DTA and assess its adequacy as a substitute for habeas corpus.”).

<sup>164</sup> *Id.* at 2269.

<sup>165</sup> *Id.* at 2288 (Roberts, C.J., dissenting) (noting that the personal representative “may review classified documents at the [tribunal] stage and summarize them for the detainee” and that legal counsel would be provided later on appeal before the D.C. Circuit).

<sup>166</sup> *Id.* at 2269.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.* at 2274.

<sup>169</sup> *Id.* at 2275.

constitutional right on Guantanamo detainees, a small category of inadmissible aliens, does not necessarily confer it upon all inadmissible aliens. Nevertheless, this substantive constitutional right should extend to some other inadmissible aliens.<sup>170</sup> Since aliens obtain greater rights and privileges as their ties to the community become stronger,<sup>171</sup> inadmissible aliens who live in the United States arguably have at least as great a claim for habeas rights as enemy combatants who never set foot on United States soil.

Additionally, as discussed above, the Court found the DTA's administrative proceedings deficient in their failure both to provide legal counsel and to provide the alien a reasonable opportunity to develop evidence to challenge the government's allegations.<sup>172</sup> Finally, the length of detention again appeared to be an important factor in the Court's willingness to assert its authority.

Finally, *Boumediene* calls into question foundational arguments in the *Mezei* decision, and, therefore, weakens the "entry fiction," perhaps fatally.<sup>173</sup> In *Mezei*, the most salient reasons for denying an alien's right to procedural due process were his status as an inadmissible alien, the territorial ambiguity of Ellis Island as an extension of the U.S. border, and the national security interests involved. A fair application of *Boumediene* undermines all three of these rationales. First, most inadmissible aliens facing indefinite detention have actually lived in the United States and have a greater claim to constitutional protections than an enemy combatant. Second, the United States has *de jure*, not merely *de facto*, sovereignty over Ellis Island and its detention centers.<sup>174</sup> And, third, enemy combatants pose at least as great a threat to national security as Knauff, Mezei, or Hernandez-Carrera, the inadmissible alien who is the concern of this

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<sup>170</sup> See Slocum, *supra* note 65, at 1034 ("If the Court holds that the Guantanamo detainees possess constitutional rights, however, the decision should compel lower courts to conclude that (at least some) inadmissible aliens possess constitutional rights.").

<sup>171</sup> See *Johnson v. Eisentrager*, 339 U.S. 763, 770 (1950) (noting that an alien is "accorded a generous and ascending scale of rights as he increases his identity with our society").

<sup>172</sup> For an alien in DHS detention with poor English skills and limited education, the lack of the first (legal representation) necessarily implicates the second (inability to develop evidence).

<sup>173</sup> See Slocum, *supra* note 65, at 1035-36 (expressing doubt that *Boumediene* will be interpreted so expansively as to grant aliens a full panoply of constitutional rights, but suggesting that it may minimally serve to weaken the entry fiction, and provide the basis to accord inadmissible aliens the same substantive protections as lawful permanent residents against indefinite detention).

<sup>174</sup> *Boumediene* concluded that though the United States does not have *de jure* sovereignty over Guantanamo Bay, its *de facto* sovereignty is sufficient for habeas corpus rights to apply. 128 S. Ct. at 2253.

Note.<sup>175</sup> By undermining the foundations of *Mezei*, *Boumediene* poses a direct challenge to the continued vitality of the “entry fiction” in denying constitutional protections to inadmissible aliens. As the entry fiction is a foundational legal construct for denying constitutional rights to aliens, to weaken or end the entry fiction is to open the door to explicit recognition of a panoply of constitutional rights for aliens.

The Supreme Court’s rulings in *St. Cyr*, *Demore*, and *Boumediene*, when considered alongside *Zadvydas*, affirm that lawful permanent residents and some inadmissible aliens are protected by the Constitution when they face prolonged detention. Because the DHS’s indefinite-detention regulation falls outside the narrowed ambit of plenary power,<sup>176</sup> the Supreme Court should assert its authority and insist that the DHS respect the due process rights of aliens facing indefinite detention. The remaining question to resolve is whether those due process rights require the government to abandon its indefinite-detention regulation.

### III. THE INDEFINITE-DETENTION REGULATION AND DUE PROCESS

This Part reviews the constitutional protections enjoyed by citizens facing civil commitment, compares these protections to those provided to non-citizens by the DHS indefinite-detention regulation, and considers whether the DHS regulation violates non-citizens’ constitutional rights. *Zadvydas* recognized the close parallels between civil commitment and the earlier DHS indefinite-detention statute.<sup>177</sup> Both allowed open-ended deprivation of liberty outside the context of criminal punishment, and both pose serious constitutional questions.

Less than thirty days after *Zadvydas* was decided, the Attorney General ordered legacy INS “to develop regulations to address . . . special circumstances . . . such as . . . especially dangerous individuals,” and he required that the regulations “provide constitutionally sufficient procedural protections.”<sup>178</sup> The result was

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<sup>175</sup> It is beyond the scope of this Note, however, to consider the indefinite detention of aliens posing a national security threat under 8 C.F.R. § 241.14(d).

<sup>176</sup> 8 C.F.R. § 241.14(f) only applies to lawful permanent residents and inadmissible aliens for whom removal is not possible. Their detention, however, serves no government interest related to deportation or exclusion. *Boumediene* similarly involved aliens outside this ambit, as enemy combatants seek to return home, not to enter the United States.

<sup>177</sup> See *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) (“[T]his Court has said that government detention violates [the Fifth Amendment Due Process Clause] unless the detention is ordered in a *criminal* proceeding with adequate procedural protections or, in certain special and “narrow” nonpunitive “circumstances,” where a special justification, such as harm-threatening mental illness, outweighs the “individual’s constitutionally protected interest in avoiding physical restraint.”) (citations omitted, emphasis in original).

<sup>178</sup> Notice of Memorandum, 66 Fed. Reg. 38433–34 (July 19, 2001).

the indefinite-detention regulation under which Hernandez–Carrera is presently held. The regulation functions like a state or federal civil commitment statute in that it defines the process for determining when someone who is mentally ill should be subject to prolonged detention. The Supreme Court’s civil commitment cases along with the state and federal statutes they spawned therefore provide a standard against which to assess the constitutional validity of the indefinite-detention regulation.<sup>179</sup> That regulation’s procedures are markedly inferior to those that protect citizens, and the Supreme Court could invalidate the indefinite-detention regulation based on these procedural shortcomings. Nevertheless, in the absence of a clear precedent upon which to conclusively gauge the level of procedural due process due to aliens, the Court is not compelled to find the regulation is unconstitutional.

*Kansas v. Hendricks*<sup>180</sup> provides the most frequently cited analysis of long-term civil commitment. Upholding commitment under the Kansas Sexually Violent Predator Act,<sup>181</sup> the Court repeated its prior holding that “[a]n individual’s constitutionally protected liberty interest in avoiding physical restraint may be overridden” in the case of persons who are “unable to control their behavior and thereby pose a danger to the public health and safety.”<sup>182</sup> The Court identified three requirements for such civil detention. First, confinement must take “place pursuant to proper procedures and evidentiary standards”; second, there must be a finding of “dangerousness either to one’s self or to others”; and third, the proof of dangerousness must be “coupled . . . with the proof of some additional factor, such as ‘mental illness’ or ‘mental abnormality.’”<sup>183</sup> These elements indicate the contours of both substantive and procedural due process requirements for a civil commitment statute.

#### A. Substantive Due Process Requirements for Civil Commitment

The Court first held in *Foucha v. Louisiana*<sup>184</sup> that indefinite civil detention violates substantive due process regardless of the

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<sup>179</sup> *Zadvydas* itself relied on the Supreme Court’s civil commitment jurisprudence to assess the constitutional problems inherent in indefinitely detaining aliens. 533 U.S. at 690.

<sup>180</sup> 521 U.S. 346 (1997).

<sup>181</sup> KAN. STAT. ANN. § 59-29a01 (2005) (providing for the civil commitment of persons convicted of a sexually violent crime who are “likely to engage in repeat acts of sexual violence if not treated for their mental abnormality or personality disorder”).

<sup>182</sup> *Hendricks*, 521 U.S. at 356–57.

<sup>183</sup> *Id.* at 357–58. These three elements were later parsed from *Hendricks* by *Kansas v. Crane*, 534 U.S. 407, 409–10 (2002).

<sup>184</sup> 504 U.S. 71 (1992).

procedures used unless the individual is found to be both mentally ill and dangerous.<sup>185</sup> Four years after a man was found not guilty by reason of insanity and committed to a psychiatric hospital, a hospital review board recommended his release. Even though Foucha had previously “manifested the reality of anti-social conduct,”<sup>186</sup> he had a substantive due process right to freedom unless he was both “mentally ill and dangerous.”<sup>187</sup> *Hendricks* explained that the mental illness requirement could be satisfied by “a ‘mental abnormality’ or ‘personality disorder’ that makes it ‘difficult, if not impossible, for the [dangerous] person to control his dangerous behavior.’”<sup>188</sup> In *Kansas v. Crane*,<sup>189</sup> the Court clarified that civil commitment proceedings must include “a lack of control determination.”<sup>190</sup> Specifically, the Court emphasized that “there must be proof of serious difficulty in controlling behavior.”<sup>191</sup> Civil commitment, therefore, does not offend a detainee’s substantive due process right to be free from prolonged detention when (1) the detainee is dangerous and (2) he has a mental illness or mental abnormality that creates a serious difficulty in controlling behavior.

The government’s current indefinite-detention regulation meets both prongs of this substantive due process exception. To be detained under the DHS regulation, an Immigration Judge must find that:

- (i) [t]he alien has previously committed one or more crimes of violence as defined in 18 U.S.C. 16;<sup>192</sup>

<sup>185</sup> See *id.* at 79–80 (emphasizing that the testimony in the case did not establish that Foucha was suffering from a mental illness, and that therefore Due Process required the State to establish the grounds for his confinement).

<sup>186</sup> *Id.* at 110 (Thomas, J., dissenting) (quoting *Dixon v. Jacobs*, 427 F.2d 589, 604 (D.C. Cir. 1970) (Leventhal, J., concurring)).

<sup>187</sup> *Id.* at 80 (opinion of the Court) (quoting *Jones v. United States*, 463 U.S. 354, 362 (1983)). The Court in *Foucha* held that “the Due Process Clause contains a substantive component that bars certain arbitrary, wrongful government actions.” *Id.* (quoting *Zinermon v. Burch*, 494 U.S. 113, 125 (1990)). *Foucha* noted, however, that in addition to incarcerating criminals, “[t]he State may also confine a mentally ill person if it shows ‘by clear and convincing evidence that the individual is mentally ill and dangerous.’” *Id.* (quoting *Jones*, 463 U.S. at 362).

<sup>188</sup> 521 U.S. at 358 (citing Kan. Stat. Ann. § 59-29a02(b) (1994)).

<sup>189</sup> 534 U.S. 407 (2002).

<sup>190</sup> *Id.* at 412 (“We do not agree with the State, however, insofar as it seeks to claim that the Constitution permits commitment of the type of dangerous sexual offender considered in *Hendricks* without any lack-of-control determination.”).

<sup>191</sup> *Id.* at 413. Lower courts have generally concluded, “[a] fair reading of *Crane*, however, requires no explicit finding [of lack of ability to control dangerous behavior] as long as the evidence presented proves ‘serious difficulty in controlling behavior.’” *Richard S. v. Carpinello*, 589 F.3d 75, 85 (2d Cir. 2009) (quoting *Crane*, 534 U.S. at 413).

<sup>192</sup> 18 U.S.C. § 16 (2006) (“The term ‘crime of violence’ means—(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or

- (ii) [d]ue to a mental condition or personality disorder and behavior associated with that condition or disorder, the alien is likely to engage in acts of violence in the future; and
- (iii) [n]o conditions of release can reasonably be expected to ensure the safety of the public.<sup>193</sup>

Though the earlier indefinite-detention regulation detaining all inadmissible aliens and lawful residents created serious constitutional problems in its expansiveness, the new regulation avoids the problems by restricting detention to aliens who are both mentally ill and dangerous.<sup>194</sup> Based on *Foucha*, as interpreted by *Hendricks* and *Crane*, the DHS regulation satisfies substantive due process.

### B. Procedural Due Process

#### 1. Constitutional Requirements for Civil Commitment

In *Addington v. Texas*<sup>195</sup> the Court asserted, “civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection.”<sup>196</sup> Due to the risk of error in making a commitment determination, the Court insisted that the government’s burden of proof be greater than a preponderance of the evidence,<sup>197</sup> and it set “clear and convincing evidence” as the minimum standard for all civil commitment cases.<sup>198</sup>

As to whether an administrative hearing is sufficient for civil commitment, virtually every state requires a formal judicial hearing.<sup>199</sup> The Adam Walsh Act, which authorizes civil commitment

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property of another, or (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.”).

<sup>193</sup> § C.F.R. § 241.14(f)(1)(i)–(iii) (2010).

<sup>194</sup> *Hernandez–Carrera v. Carlson*, 547 F.3d 1237, 1253 (10th Cir. 2008).

<sup>195</sup> 441 U.S. 418 (1979).

<sup>196</sup> *Id.* at 425.

<sup>197</sup> *Id.* at 427 (“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. We conclude that the individual’s interest in the outcome of a civil commitment proceeding is of such weight and gravity that due process requires the state to justify confinement by proof more substantial than a mere preponderance of the evidence.”).

<sup>198</sup> *Id.* at 433 (“[T]he ‘clear and convincing’ standard . . . is required to meet due process guarantees . . .”).

<sup>199</sup> *See, e.g.*, N.J. STAT. ANN. § 30:4-27:10 (West 2010) (defining New Jersey court proceedings which must precede involuntary commitment); N.Y. MENT. HYG. LAW § 9.31 (McKinney 2006) (requiring judicial review within sixty days of any civil commitment of a person in New York); OHIO REV. CODE ANN. § 5122.38 (West 2010) (making judicial review available in Ohio “upon written request by any [civilly committed individual], his guardian, or

of a sexually dangerous person currently in federal prison, also requires a judicial hearing.<sup>200</sup> Though the Supreme Court has not explicitly made such a finding, “[t]here is no longer any serious question as to the constitutional requirement of some kind of a judicial hearing prior to an order of involuntary civil commitment.”<sup>201</sup>

The Supreme Court has not directly ruled on a free person’s right to court-appointed counsel prior to civil commitment, but it has answered a related question. In *Vitek v. Jones*,<sup>202</sup> the Supreme Court considered whether Nebraska could transfer an indigent prisoner to a mental institution without affording him access to counsel. The Court pointed out that Jones was due less protection than a free citizen because his conviction had extinguished his right to freedom from confinement for the duration of his sentence.<sup>203</sup> Nevertheless, four justices recognized a categorical requirement for court-appointed counsel, and Justice Powell’s concurrence decided the issue.<sup>204</sup> He held that qualified and independent assistance must be provided, but that it need not be an attorney in all situations.<sup>205</sup> Crucial to the Court’s reasoning, according to Justice Powell, was that a person “threatened with involuntary transfer to mental hospitals will [unlikely] possess the competence or training to protect adequately his own interest.”<sup>206</sup>

Though the Supreme Court has not decided whether a free person has a *per se* guarantee of counsel in civil commitment proceedings, the Second Circuit has resolved the question affirmatively. In *Project*

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the chief clinical officer to the probate court”); *see also* RALPH REISNER, ET AL., *LAW AND THE MENTAL HEALTH SYSTEM: CIVIL AND CRIMINAL ASPECTS* 781–86 (4th ed. 2004) (discussing the significant differences among the states with regard to the burden of proof required at the civil commitment hearings, as well as the role and composition of the ultimate decisionmaker).

<sup>200</sup> Adam Walsh Child Protection and Safety Act of 2006, 18 U.S.C. § 4248(a) (2006).

<sup>201</sup> MICHAEL L. PERLIN, *LAW AND MENTAL DISABILITY* 60 (1994).

<sup>202</sup> 445 U.S. 480 (1980).

<sup>203</sup> *See id.* at 492 (“Were an ordinary citizen to be subjected involuntarily to these consequences, it is undeniable that protected liberty interests would be unconstitutionally infringed absent compliance with the procedures required by the Due Process Clause.”).

<sup>204</sup> *See id.* at 497 (Powell, J., concurring) (agreeing with the majority that an inmate whom the State wishes to transfer indefinitely to a mental health institution is entitled to some form of representation).

<sup>205</sup> *Id.* (“I do not agree, however, that the requirement of independent assistance demands that a licensed attorney be provided.”). Justice Powell identified two factors to decide if counsel should be required: “(i) the existence of factual disputes or issues which are ‘complex or otherwise difficult to develop or present,’ and (ii) ‘whether the probationer appears to be capable of speaking effectively for himself.’” *Id.* at 498 (Powell, J., concurring) (quoting *Gagnon v. Scarpelli*, 411 U.S. 778, 790–91 (1973)).

<sup>206</sup> *Id.* at 498.

*Release v. Prevost*,<sup>207</sup> the Second Circuit reviewed the constitutional adequacy of New York's civil commitment procedures. It concluded that a "right to counsel in civil commitment proceedings may be gleaned from the Supreme Court's recognition that commitment involves a substantial curtailment of liberty and thus requires due process protection."<sup>208</sup> The Second Circuit, therefore, has filled a gap in the Supreme Court's civil commitment jurisprudence by affirming a person's right to counsel at a civil commitment judicial hearing.

Constitutional protections from civil commitment of citizens have been well established. The Supreme Court clearly stated that involuntary civil commitment is "a massive curtailment of liberty,"<sup>209</sup> and that the burden is on the government to show mental illness and dangerousness by clear and convincing evidence. Courts and commentators agree that due process requires a judicial hearing and, for the indigent, court-appointed counsel. It is illustrative to compare these three protections with those provided by the DHS under 8 C.F.R. § 241.14(f)-(h).

## 2. Shortcomings of the DHS Indefinite-Detention Regulation

Consistent with constitutional requirements, the DHS regulation places the burden of proof on the government to show by "clear and convincing evidence" that "[d]ue to a mental condition or personality disorder and behavior associated with that condition or disorder, the alien is likely to engage in acts of violence in the future; and [n]o conditions of release can reasonably be expected to ensure the safety of the public."<sup>210</sup> The regulation's shortcomings, however, are significant. The merits hearing is administrative, not judicial, so the detainee is without the protection of customary rules of evidence and procedure.<sup>211</sup> Indigent detainees are not provided counsel,<sup>212</sup> and,

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<sup>207</sup> 722 F.2d 960 (2d Cir. 1983).

<sup>208</sup> *Id.* at 976.

<sup>209</sup> *Vitek*, 445 U.S. at 491 (quoting *Humphrey v. Cady*, 405 U.S. 504, 509 (1972)).

<sup>210</sup> 8 C.F.R. §§ 241.14(f)(1), (i)(1) (2010).

<sup>211</sup> In *Hernandez-Carrera v. Carlson*, the Tenth Circuit argued that due process is satisfied by the availability of judicial review at the appellate court level. 547 F.3d 1237, 1255 (10th Cir. 2008) ("This is sufficient to satisfy the requirements of the Due Process Clause."). As discussed in Part II, however, IIRAIRA stripped away review of discretionary and factual findings, thus preventing the alien from challenging the dangerousness finding unless in some way the "commissioner of immigration is exceeding his power." *Id.* (quoting *INS v. St. Cyr*, 533 U.S. 289, 306 (2001)).

<sup>212</sup> If free immigration detention legal services are available in the area, the detainee will be provided a list of such services, 8 C.F.R. § 241.14(g)(3)(i), but there is no assurance that the services will be forthcoming.

though the government must use an expert witness,<sup>213</sup> there is no provision for an indigent detainee to be provided independent expert testimony.<sup>214</sup>

The lack of counsel and expert testimony are major obstacles to an immigration judge's fact finding. Aliens in DHS detention often have poor English skills, limited education, and heavily constrained access to the outside world.<sup>215</sup> Consequently, they have almost no opportunity to prepare meaningful evidence to rebut the government's contentions of dangerousness. The importance of being able to prepare a defense was underscored by *Boumediene*.<sup>216</sup> There, the enemy combatant's inability to develop evidence was among three identified deficiencies that required the Court to reject the Detainee Treatment Act's procedures.<sup>217</sup> Cut off from the outside world, the lack of counsel makes it virtually impossible for the alien to mount even a nominal defense.

The DHS regulation's protections of aliens would be constitutionally deficient if applied to a citizen due to their failure to require a judicial hearing and guarantee access to counsel. These shortcomings are not merely theoretical, but seriously undermine the alien's ability to protect himself from unnecessary indefinite detention. *Boumediene* suggests that these deficiencies may make the DHS regulation constitutionally unacceptable even in the context of an alien's protection.

### 3. Alternative to the DHS Indefinite-Detention Regulation

It would not be a burden on the DHS to remedy these deficiencies. The primary purpose of the DHS indefinite-detention regulation is to protect the public.<sup>218</sup> Prior to the completion of the alien's criminal

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<sup>213</sup>The government is required to commission a report by a Public Health Services physician based on a physical and mental examination of the detainee. 8 C.F.R. § 241.14(f)(3). The report must make a recommendation "whether, due to a mental condition or personality disorder and behavior associated with that condition or disorder, the alien is likely to engage in acts of violence in the future." *Id.* Of note is that the likelihood "to engage in acts of violence" is not conditioned upon the absence or presence of DHS-imposed release conditions.

<sup>214</sup>8 C.F.R. §§ 241.14(f)–(h). The DHS regulation also provides no requirement that the detainee receive treatment to rehabilitate him and return him to health so that he may return to society. *Id.*

<sup>215</sup>*See, e.g.*, Cheryl Little, *INS Detention in Florida*, 30 U. MIAMI INTER-AM. L. REV. 551, 567 (1999) ("Detainees' ability to make telephone calls to lawyers or to their families for assistance in their cases is severely restricted.").

<sup>216</sup>*See supra* Part II.C.

<sup>217</sup>*Boumediene v. Bush*, 128 S. Ct. 2229, 2269–70 (2008).

<sup>218</sup>*See* Notice of Memorandum, 66 Fed. Reg. 38433 (July 19, 2001). The Attorney General ordered legacy INS to draft the regulation as part of efforts to "ensure that we take all responsible steps to protect the public." *Id.*

sentence, the DHS could complete removal proceedings, issue its formal removal order, and coordinate travel documents with the alien's home country. At the completion of his sentence, the DHS could promptly remove him. If, as is the case with Hernandez-Carrera, the country has no extradition agreement or is otherwise unwilling to accept him, then upon the expiration of his prison sentence, the DHS could release him subject to supervision. If the DHS has concerns about the alien's mental illness and future dangerousness, it could notify state authorities well in advance of the alien's release. To preserve public safety, the state could institute the same civil commitment proceedings as it would if the alien were a mentally ill citizen completing a criminal sentence.<sup>219</sup>

There are several practical reasons for the DHS to proceed in this fashion and turn over a potentially dangerous post-removal-order alien to the appropriate state civil commitment regime. The states presumably have greater experience and expertise than the DHS whose primary mission is to apprehend and remove inadmissible aliens, not detain them. Moreover, the states have better procedural protections and a more developed jurisprudence that would reduce the risk of imprisoning an alien unnecessarily at substantial government expense.<sup>220</sup> The states would also provide better rehabilitative services,<sup>221</sup> helping return the alien to a productive life.

It is arguably more efficient, more reliable, and less costly to allow states to retain control over non-removable and potentially dangerous aliens at the end of their criminal sentence. Just because it is smarter, however, does not necessarily mean that it is constitutionally compelled. Nor does the DHS regulation's failure to provide a judicial hearing and the guarantee of counsel necessarily violate due process. Though the DHS regulations would be constitutionally

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<sup>219</sup> For example, if Hernandez-Carrera today was completing a Kansas prison sentence for sexual assault, and it was feared he would pose a threat of violence upon his release, the DHS could leave him in Kansas custody. Ninety days before the end of his prison sentence, the Kansas Sexually Violent Predator Act would require a psychiatric evaluation and judicial hearing to determine if civil commitment was necessary. KAN. STAT. ANN. § 59-29a03 (2005). If there were no Kansas act, the Adams Walsh Act would fill the gap, again requiring both a psychiatric evaluation and judicial hearing with full procedural protections. Adam Walsh Child Protection and Safety Act of 2006, 18 U.S.C. § 4248(a) (2006).

<sup>220</sup> The DHS detention budget for the 2010 fiscal year is \$1.7 billion. National Immigration Forum, *The Math of Immigration Detention*, BACKGROUND 1 (July 7, 2009), available at <http://www.immigrationforum.org/images/uploads/MathofImmigrationDetention.pdf>.

<sup>221</sup> See, e.g., Riddhi Mukhopadhyay, *Death in Detention: Medical and Mental Health Consequences of Indefinite Detention of Immigrants in the United States*, 7 SEATTLE J. FOR SOC. JUST. 693, 694 (2009) ("On any given day, there are over thirty thousand immigrants placed in privately run detention facilities around the country who are unable to access appropriate medical and mental health support or services.").

deficient if they governed citizens, the regulations may still satisfy due process for non-citizens.<sup>222</sup> *Landon v. Plasencia*<sup>223</sup> provided a framework for evaluating what process may be due to a non-citizen.

### C. Application of *Eldridge* Analysis

“The Supreme Court's 1982 decision in *Landon v. Plasencia* marked the arrival of the due process revolution in immigration law.”<sup>224</sup> *Plasencia* was an LPR taken into custody while reentering the country after helping several aliens enter the country unlawfully. During the process to remove her from the United States, the DHS denied her the procedural protections normally afforded an LPR being deported. Instead, it allowed her only the protections available to an inadmissible alien in “exclusion” hearings. In *Plasencia*, the Court applied the due process analysis of *Mathews v. Eldridge*<sup>225</sup> to assess whether the procedural protections available in an exclusion hearing were constitutionally sufficient for an LPR.<sup>226</sup> Because *Plasencia* had been caught smuggling, the Court determined that she was not entitled to the protections typically available to an LPR. Nevertheless, the Court insisted that the exclusion hearing procedures might still be inadequate.<sup>227</sup>

*Plasencia*'s significance was twofold: it explicitly recognized an alien's constitutional right to procedural due process;<sup>228</sup> and it implicitly recognized the applicability of the *Eldridge* procedural due process analysis to regulations concerning aliens. *Eldridge* has been criticized for undervaluing individual rights,<sup>229</sup> but it has the

<sup>222</sup> See *Mathews v. Diaz*, 426 U.S. 67, 78 (1976) (“The fact that all persons, aliens and citizens alike, are protected by the Due Process Clause does not lead to the further conclusion that all aliens are entitled to enjoy all the advantages of citizenship . . .”).

<sup>223</sup> 459 U.S. 21 (1982).

<sup>224</sup> Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625, 1652 (1992) (footnote omitted) (observing that *Landon v. Plasencia* was the first case in which a court used procedural due process arguments to protect aliens' substantive constitutional rights).

<sup>225</sup> 424 U.S. 319 (1976). Justice Powell's opinion in *Mathews v. Eldridge* is “the cornerstone for all analysis of procedural adequacy.” 32 CHARLES ALAN WRIGHT & CHARLES H. KOCH, JR., FEDERAL PRACTICE & PROCEDURE § 8129(a) (2006).

<sup>226</sup> *Landon v. Plasencia* recognized *Eldridge* as providing the appropriate framework by which to evaluate *Plasencia*'s procedural challenges. 459 U.S. at 34.

<sup>227</sup> Because the impact of the deficiencies and the burden on the government of curing them had not been briefed, the Court declined to reach a conclusion, instead remanding the question to the lower court. *Id.* at 37.

<sup>228</sup> See *supra* note 73, and accompanying text.

<sup>229</sup> See Jim Rosenfeld, *Deportation Proceedings and Due Process of Law*, 26 COLUM. HUM. RTS. L. REV. 713, 740 (1995) (asserting that the *Eldridge* analysis “ignores the inherent value of individual rights”).

flexibility to adapt to harsh governmental action like that of the indefinite-detention regulation. Judge Friendly explained,

“Deprivation of liberty . . . is the harshest action the state can take against the individual through the administrative process. The Supreme Court thus was right in demanding a very high level of procedural protection . . . . Civil commitment warrants a similarly high [level of procedural protection.]”<sup>230</sup>

Protecting immigrants from the “harshest action the state can take” with only watered-down procedures should invoke healthy skepticism.

In *Eldridge*, the Court created a three-factor balancing test to evaluate whether administrative procedures conform to due process.

In evaluating the procedures in any case, the courts must consider [1] the interest at stake for the individual, [2] the risk of an erroneous deprivation of the interest through the procedures used as well as the probable value of additional or different procedural safeguards, and [3] the interest of the government in using the current procedures rather than additional or different procedures.<sup>231</sup>

Both the second and third factors of the *Eldridge* test require a comparison of the challenged procedures to “different or additional procedures.” For the purpose of applying the *Eldridge* analysis to the DHS regulation, the “different or additional procedures” compared in this Note are those proposed in Part III.B.3. At the completion of an alien’s criminal prison sentence, if his home country will not accept him and there are concerns about his dangerousness, he is left in the custody of the state or federal authority. The alien is then subject to the same civil commitment regime (and attendant protections) as a citizen. The second and third parts of the *Eldridge* analysis therefore compare the procedures of the DHS indefinite-detention regulation to the civil commitment procedures and protections provided to citizens under state and federal statutes.

The first factor of the *Eldridge* analysis, “the interest at stake for the individual,” weighs heavily for the detained alien who faces the prospect of indefinite detention. Short of capital punishment, it is hard to imagine an interest that is weightier than indefinite loss of freedom. The second factor, “the risk of an erroneous deprivation of the interest

<sup>230</sup> Henry J. Friendly, “*Some Kind of Hearing*”, 123 U. PA. L. REV. 1267, 1296 (1975).

<sup>231</sup> *Plasencia*, 459 U.S. at 34 (citing *Eldridge*, 424 U.S. at 334–35).

... [and] the probable value of additional or different procedural safeguards” assesses the increased risk of unnecessary detention under the current DHS procedures as compared to state or federal civil commitment procedures. The additional risk is significant. That all states and the federal Adam Walsh Act require both a judicial hearing and court-appointed counsel in civil commitment proceedings indicates the importance of these safeguards and the risk created by their absence. The first and second factors therefore both weigh heavily against the constitutional adequacy of the DHS procedures.

As to the third factor, “the interest of the government,” *Plasencia* shows how the Court could weigh the government’s interest in the existing DHS procedures.<sup>232</sup> In *Plasencia*, the Court recognized two government interests: the Court’s tradition of plenary power<sup>233</sup> and its avoidance of an “undue burden.”<sup>234</sup> Both concerns are considerably less weighty here than in *Plasencia*. First, *Plasencia* was being denied entry into the country—a government action in which plenary power deference is strongest.<sup>235</sup> In contrast, as noted by both *Zadvydas* and *Demore*, post-removal-order detention is outside the ambit of plenary power because it does not involve exclusion or deportation.<sup>236</sup> Moreover, *Boumediene* and *Zadvydas* demonstrate the Court’s readiness to challenge the political branches where non-removal detention of aliens becomes prolonged. The concern about plenary power would therefore have little or no weight.

Efficient administration of immigration law is also a less serious concern here than it was in *Plasencia*. In that case, a decision that more process was required would have required that legacy INS institute additional procedures before excluding any LPR, thus dramatically increasing the government’s workload. In contrast, if aliens in Hernandez–Carrera’s situation were simply turned over to state and federal civil commitment authorities, the DHS would be freed of an administrative burden for which it has less expertise and

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<sup>232</sup> *Plasencia*, 459 U.S. at 34.

<sup>233</sup> *Id.* (“The Government’s interest in efficient administration of the immigration laws at the border also is weighty. Further, it must weigh heavily in the balance that control over matters of immigration is a sovereign prerogative, largely within the control of the Executive and the Legislature.”).

<sup>234</sup> *Id.* at 36.

<sup>235</sup> See *Chae Chan Ping v. United States*, 130 U.S. 581 (1889) (creating the plenary power doctrine in a case where a returning lawful permanent resident was denied reentry to the United States).

<sup>236</sup> *Demore v. Kim*, 538 U.S. 510, 527 (2003) (justifying the Court’s deference to Congress in a pre-removal detention statute by distinguishing *Zadvydas* in which indefinite detention “did not serve its purported immigration purpose” since “removal was ‘no longer practically attainable.’” (quoting *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001))).

experience. Consequently, the third *Eldridge* factor, the DHS's interest in retaining its existing procedures, deserves significantly less weight here than in *Plasencia*.

That the first two *Eldridge* factors weigh heavily in favor of the individual alien, and that the third factor weighs relatively lightly for the government may seem to imply that the DHS regulation provides constitutionally insufficient process. This is not, however, a necessary conclusion.

#### D. Creating a Procedural Due Process Benchmark

The Supreme Court has implied on numerous occasions that aliens, even lawful permanent residents, may be entitled to less due process protection than a citizen.<sup>237</sup> If aliens are entitled to less process, then the Court can give less weight to the individual's interests or greater weight to the government's interests. The pivotal unanswered question is how much more or less weight.<sup>238</sup> If *Plasencia* had definitively decided that exclusion protections were insufficient for *Plasencia*, the Court would have provided a touchstone for future due process evaluations. In *Plasencia*, however, the government had not briefed the Court on the burden that would be created by remedying the procedural deficiencies.<sup>239</sup> Rather than unilaterally define minimal procedural protections based on incomplete information, the Court remanded the case.<sup>240</sup> If, as argued by Justice Marshall in his concurrence, the Court had taken the extra step and found the exclusion procedures constitutionally defective,<sup>241</sup> it would have created a benchmark for immigrant due process. Future courts could compare the governmental and individual interests in

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<sup>237</sup> See, e.g., *Zadvydas*, 533 U.S. at 694; *Plasencia*, 459 U.S. at 32–34; *Johnson v. Eisentrager*, 339 U.S. 763, 770 (1950).

<sup>238</sup> The only other Supreme Court case applying the *Eldridge* due process analysis to aliens was *Boumediene*. There, the majority used the first two factors of the *Eldridge* analysis to invalidate the procedural protections provided by the DTA's statutory proceedings, but it never discussed the third factor. *Boumediene v. Bush*, 128 S. Ct. 2229, 2267–68 (2008). The dissent reached a different conclusion in part by noting the government's interest in not burdening its war-making responsibilities. *Id.* at 2288 (Roberts, C.J., dissenting).

<sup>239</sup> 459 U.S. at 37 n.9.

<sup>240</sup> *Id.* at 37. *Landon v. Plasencia* prompted a dialogue between Congress and the Supreme Court, which ultimately resulted in the 1996 IIRAIRA conflation of deportation and exclusion procedural protections, thus vindicating *Plasencia*'s insistence on greater protections for exclusion. Kevin R. Johnson, *Maria and Joseph Plasencia's Lost Weekend: The Case of Landon v. Plasencia*, in *IMMIGRATION STORIES* 221, 240 (David A. Martin & Peter H. Schuck eds., 2005).

<sup>241</sup> 459 U.S. at 38 (Marshall, J., concurring) (“The Court has already set out the standards to be applied in resolving the question. Therefore, rather than just remand, I would first hold that respondent was denied due process. . .”).

*Plasencia* to the ones before the court. As discussed above, the government's interest in retaining the indefinite-detention regulation is less weighty than its interest was in *Plasencia*, and the individual's interest in striking it down is considerably stronger. If *Plasencia* had provided a determinative ruling, one might with certainty conclude that *Eldridge* compels the Court to invalidate the procedures of the DHS indefinite-detention regulation. Absent any precedential benchmark, however, the Court is not compelled to find the DHS regulation constitutionally invalid.

This Note invites the Supreme Court to use the DHS indefinite-detention regulation as a first step in establishing such a benchmark for due process. As the individual's interests are extreme, the risk of an erroneous deprivation of liberty is significant, and the government's interest in efficiency is minimal, the *Eldridge* analysis easily leads to such a conclusion. As Justice Kennedy, the probable fifth justice in such a case, has expressed particular concern with extended detention and insufficient due process, there is some reason to hope that the Court will choose such a path.

#### IV. EQUAL PROTECTION

This Part considers whether constitutional guarantees of equal protection require that an alien have the same protection from indefinite detention as a citizen. Indigent citizens with mental illness who are completing prison terms for violent crimes are subject to civil commitment only after a judicial review finds that they pose a serious danger to the public.<sup>242</sup> Under existing federal and state statutes, they will also have access to counsel.<sup>243</sup> A similarly situated alien may be committed after an administrative review during which he has no access to counsel.<sup>244</sup> A clear disparity in procedural protections exists. Equal protection under the Fifth and Fourteenth Amendments may apply to the disparate application of statutory procedural protections to different classes of persons.<sup>245</sup> It is nevertheless unlikely that equal

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<sup>242</sup> See *supra* note 202 and accompanying text describing representative civil commitment requirements for judicial review.

<sup>243</sup> See *supra* Part III.B.1.

<sup>244</sup> See 8 C.F.R. §§ 241.14(g)–(i) (2010) (omitting a right to an attorney).

<sup>245</sup> See *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982) (striking down as an equal protection violation an Illinois statute which effectively separated persons bringing unjust termination claims before the state's Fair Employment Practices Commission into two groups, giving force to claims the state processed within 120 days and allowing no recourse for claims whose processing was delayed); see also, *Washington v. Davis*, 426 U.S. 229, 239 (1976) (“[T]he Due Process Clause of the Fifth Amendment contains an equal protection component prohibiting the United States from invidiously discriminating between individuals or groups.”).

protection will compel relief for the disparate protections afforded aliens facing “civil commitment” under the DHS indefinite-detention regulation.

Equal protection applies only to disparate treatment by the same governmental sovereign.<sup>246</sup> Consequently, it does not prohibit disparate treatment under a federal regulation such as section 241.14(f) and a state regulation providing greater protections to citizens. It is conceivable that an alien finishing a federal sentence for a violent sex crime and then detained under the DHS indefinite-detention regulation, could bring an equal protection challenge. He would have a valid claim of disparate treatment under federal regulations. The scenario, however, is unlikely. Of the challenges to the DHS regulation that reached the circuit courts, none involved an alien convicted of a violent crime under federal law.<sup>247</sup>

Even if such a case emerged, aliens making an equal protection claim have a high threshold when challenging disparate treatment under federal law. In *Mathews v. Diaz*, the foundational equal protection case for aliens challenging federal statutes, the Supreme Court required only a rational basis analysis to justify discrimination against aliens.<sup>248</sup> Medicare benefits were denied to inadmissible aliens and LPRs with fewer than five years of residency.<sup>249</sup> The Court recognized the federal government’s legitimate interest in protecting the program’s fiscal integrity by denying Medicare to some lawful permanent residents. It also found that inadmissible immigrants could not advance “even a colorable constitutional claim” to the bounty of a nation.<sup>250</sup> The Court reasoned that because the federal government’s immigration-and-naturalization authority gave it deportation power over aliens that is unavailable over citizens, discriminating between

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<sup>246</sup> *Cf.* *Romer v. Evans*, 517 U.S. 620, 633–34 (1996) (holding that for the purposes of the equal protection clause of the Fourteenth Amendment, the state of Colorado and its political subdivisions are a single sovereign and must be impartial to all who seek their assistance).

<sup>247</sup> These cases include: *Tran v. Mukasey*, 515 F.3d 478 (5th Cir. 2008) (Louisiana law); *Hernandez–Carrera v. Carlson*, 547 F.3d 1237 (10th Cir. 2008) (Kansas law); *Tuan Thai v. Ashcroft*, 366 F.3d 790 (9th Cir. 2004) (Washington law); *Rosales–Garcia v. Holland*, 322 F.3d 386 (6th Cir. 2003) (Kentucky law); *Borrero v. Aljets*, 325 F.3d 1003 (8th Cir. 2003) (Minnesota law); *Benitez v. Wallis*, 337 F.3d 1289 (11th Cir. 2003), *rev’d sub nom.* *Clark v. Martinez*, 543 U.S. 371 (2005) (Florida law); *Xi v. INS*, 298 F.3d 832 (9th Cir. 2002) (federal smuggling law); *Ma v. Reno*, 208 F.3d 815 (9th Cir. 2000) (Washington law); and *Zadvydas v. Underdown*, 185 F.3d 279 (5th Cir. 1999) (New York law).

<sup>248</sup> 426 U.S. 67, 83 (1976) (justifying the requirement that federal Medicare benefits be restricted to LPRs with at least five years of residency on the basis that “neither requirement is wholly irrational”).

<sup>249</sup> *Id.* at 71.

<sup>250</sup> *Id.* at 80.

citizens and aliens is not necessarily invidious, even if the alien has lawful resident status.<sup>251</sup>

It is highly unlikely that an alien, whether an LPR or an inadmissible alien, could successfully challenge disparate treatment under a rational basis analysis. In the case of an illegal alien, providing less robust procedural protections from indefinite detention might rationally serve the government's interest in deterring the flow of unlawful immigration.<sup>252</sup> In the case of a lawful permanent resident, lesser due process protections might rationally serve the government's legitimate interest in inducing aliens to naturalize.

Because equal protection jurisprudence requires only a rational basis for treating citizens and aliens differently under federal law, there is little reason to expect that the Supreme Court would strike down the DHS indefinite-detention regulation on equal protection grounds.<sup>253</sup>

#### V. POLICY REASONS FOR INVALIDATING DHS INDEFINITE-DETENTION REGULATION

As concluded above in Parts III and IV, the Supreme Court is not compelled to strike down the DHS indefinite-detention regulation on either due process or equal protection grounds. Nevertheless, a future challenge to this regulation may provide the Court the opportunity to complete the work it left unfinished in *Plasencia*. *Plasencia* and *Eldridge* provide the Court ample room to strike down the indefinite-detention regulation and establish a benchmark for evaluating the procedural sufficiency of other regulations governing aliens. Part V outlines two policy reasons why the Supreme Court should do so; and, if it does not, why Congress should clarify that section 241.14(f) does not authorize indefinite detention.

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<sup>251</sup> *Id.* (“The exclusion of aliens and the reservation of the power to deport have no permissible counterpart in the Federal Government's power to regulate the conduct of its own citizenry. The fact that an Act of Congress treats aliens differently from citizens does not in itself imply that such disparate treatment is ‘invidious.’” (footnotes omitted)).

<sup>252</sup> See *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 151 (2002) (upholding the punitive denial of back pay to an illegal alien fired in violation of NLRB regulations as a permissible deterrent to illegal immigration).

<sup>253</sup> It is beyond the scope of this Note to argue that the Supreme Court should revise its equal protection jurisprudence and require federal discrimination against LPRs to withstand strict scrutiny, as state discrimination is required to do.

### A. Simple Fairness and Humanity

First, simple fairness and humanity require it. Fairness in government action is a core American value.<sup>254</sup> Stringent procedural safeguards are built into the United States criminal justice system because the consequences of criminal convictions are potentially severe.<sup>255</sup> Citizens facing the possibility of civil commitment are protected by rigorous due process.<sup>256</sup> Such protections of liberty are enshrined in the Constitution; and “fundamental fairness” is guaranteed to all persons under the Fifth and Fourteenth Amendments.<sup>257</sup> Nevertheless, twenty-five million United States immigrants—our neighbors and friends—may be deprived of basic liberty protections without the most basic judicial protections.<sup>258</sup> Aliens may be subjected to indefinite detention under section 241.14(f) without the benefit of a judicial hearing or court-provided counsel.<sup>259</sup> Justice Field wrote that “[a]s to its cruelty, nothing can exceed a forcible deportation from a country of one's residence, and the breaking up of all the relations of friendship, family and business.”<sup>260</sup> Yet, that cruelty is exacted upon long-time alien members of our communities as a routine matter, often over the period of just a few days by the mere action of an administrative

<sup>254</sup> See Daniel Yankelovich, *How Changes in the Economy Are Reshaping American Values*, in *VALUES AND PUBLIC POLICY* 16, 23 (Henry J. Aaron et al. eds., 1994) (listing fairness and equality of opportunity as among America's core values).

<sup>255</sup> See Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 *WASH. & LEE L. REV.* 469, 473 (2007) (pointing out the dangers of importing criminal justice norms into immigration law).

<sup>256</sup> See *supra* Part III.B.1.

<sup>257</sup> *Pedersen v. S. Williamsport Area Sch. Dist.*, 677 F.2d 312, 317 (3d Cir. 1982) (“Essentially, fundamental fairness is what due process means.” (citing *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306 (1950))).

<sup>258</sup> Approximately half are lawful permanent residents and half are illegal aliens. Nancy Rydina, *Estimates of the Legal Permanent Resident Population in 2008*, *Population Estimates*, DEP'T OF HOMELAND SECURITY OFFICE OF IMMIGRATION STATISTICS (Oct. 2009), available at [http://www.dhs.gov/xlibrary/assets/statistics/publications/ois\\_lpr\\_pe\\_2008.pdf](http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_lpr_pe_2008.pdf). Some commentators have suggested that the sheer number and rootedness of illegal immigrants in our society and national economy argue for a new approach to their rights relative to those of lawful permanent residents. See Jason H. Lee, *Unlawful Status as a “Constitutional Irrelevancy”?: The Equal Protection Rights of Illegal Immigrants*, 39 *GOLDEN GATE U. L. REV.* 1, 30 (2008) (“The claim that illegal immigrants should receive the same level of equal protection of the laws as legal immigrants gains further, normative support from the application of a participation model of rights. . . . [This model] is premised on the idea that *membership* in a community is what matters morally when it comes to the distribution of most Constitutional protections and government benefits.”).

<sup>259</sup> Detainees are allowed to be represented at no cost to the government, and, in cities where pro bono services exist, detainees are given a list of free legal service providers. See 8 C.F.R. § 241.14(g)(3)(i). However, there is no assurance that such services will be available.

<sup>260</sup> *Fong Yue Ting v. United States*, 149 U.S. 698, 759 (1893) (Field, J., dissenting).

hearing in which the alien has no representation.<sup>261</sup> Mentally ill persons subject to the DHS regulation are, despite their dangerousness, among the most vulnerable in the population. They suffer from a debility over which they have little or no control. To imprison them for life with little or no medical treatment<sup>262</sup> and without the procedural protections provided to citizens, is ignoble and beneath the ideals of this nation.<sup>263</sup>

### B. *The Risk of Further Entrenching an Underclass of Aliens*

Second, judicially or legislatively invalidating the DHS indefinite-detention regulation is a small but necessary step in dismantling a two-tiered system of constitutional rights. Disparate treatment of the profoundly mentally ill is but part of a larger societal trend whereby the nation has pushed immigrants into the shadows. President George W. Bush correctly observed, “illegal immigrants live in the shadows of our society. . . . [T]he vast majority . . . are decent people who work hard, support their families, practice their faith, and lead responsible lives. They are part of American life, but they are beyond the reach and protection of American law.”<sup>264</sup> Nor are illegal

<sup>261</sup> During the first six months of 2009, more than two-thirds of the over 1,600 removals presided over by the Cleveland Immigration Court were pro se. Dep’t of Justice, Executive Office of Immigration Review, Cleveland Caseload: Pro Se vs. Represented, (July 2009) (custom report on file with the author).

<sup>262</sup> See *ACLU Sues U.S. Immigration Officials and For-Profit Corrections Corporation Over Grossly Deficient Health Care*, ACLU, (June 13, 2007), <http://www.aclu.org/immigrants-rights/aclu-sues-us-immigration-officials-and-profit-corrections-corporation-over-grossly>.

(“[D]etainees are routinely subjected to long delays before treatment, denied necessary medication for chronic illnesses, and refused essential referrals prescribed by medical staff.”).

<sup>263</sup> See, e.g., David Cole, *Are Foreign Nationals Entitled to the Same Constitutional Rights as Citizens?*, 25 T. JEFFERSON L. REV. 367, 378 (2003) (“The Fifth and Fourteenth Amendment Due Process Clauses should also apply equally to citizens and noncitizens. If the state cannot take a citizen’s life, liberty, or property without due process of law, why should it be able to take a noncitizen’s life, liberty or property without due process? It is generally just as much an imposition on a foreign national’s physical freedom to be locked up as it is an imposition on a citizen’s freedom. The government sometimes argues that noncitizens are entitled to diminished due process, but it is not clear why that should be so.”); David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953, 984 (2002) (“[W]hile the rights of aliens are undoubtedly qualified in certain circumstances, these circumstances do not justify the imposition of a double standard across the board. Rather, they suggest that outside of a declared war against an identifiable nation, aliens living among us are entitled to those constitutional rights not expressly restricted to citizens, including most critically the rights of due process, political freedom, and equal protection.”); Clay McCaslin, *“My Jailor is My Judge”*: *Kestutis Zadvydas and the Indefinite Imprisonment of Permanent Resident Aliens by the INS*, 75 TUL. L. REV. 193, 230 (2000) (“To imprison a person indefinitely after completion of his or her criminal sentence . . . offends every conceivable notion of due process and liberty contained in the United States Constitution. For these unfortunate individuals, a simple error in judgment can result in a lifetime of hell at the hands of the U.S. government.”).

<sup>264</sup> George W. Bush, President of the United States, Address to the Nation on Immigration

immigrants the only aliens denied fundamental protections. Lawful permanent residents as well as illegal immigrants are subject to the DHS indefinite-detention regulation, and LPRs may be deported for offenses as trivial as shoplifting.<sup>265</sup> Immigration Control and Enforcement (“ICE”) officers may with impunity enter any alien’s home without a warrant and interrogate his children regarding his parents’ and relatives’ immigration status.<sup>266</sup> In some communities, parents cannot walk their children to school or drive to the grocery store for fear of being unlawfully interrogated by ICE. By causing millions of our immigrant neighbors to fear the government, these policies make them susceptible to exploitation and abuse.

The Supreme Court itself recognized in *Plyler v. Doe*<sup>267</sup> the danger of perpetuating a permanent subclass of persons within the country. In that case, the Court considered a Texas school law that denied free elementary education to immigrants who entered without proper documentation.<sup>268</sup> The Supreme Court unanimously affirmed that the Constitution protects aliens as “persons” under the Fourteenth Amendment even if they are in the United States unlawfully.<sup>269</sup> Though prior Supreme Court precedents had required strict scrutiny analysis when lawful permanent residents challenged state law on equal protection grounds,<sup>270</sup> illegal immigrants had never been afforded greater protection than that of a rational basis review.

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Reform, 42 Weekly Comp. Pres. Doc. 924, 931 (May 15, 2006).

<sup>265</sup> See 8 U.S.C. § 1227(a)(2)(A)(ii) (2006) (making a lawful permanent resident removable for a crime of moral turpitude when it is a second offense); *Da Rosa Silva v. INS*, 263 F. Supp. 2d 1005, 1010–1012 (E.D. Penn. 2003) (holding shoplifting to be a crime of moral turpitude under the federal immigration law).

<sup>266</sup> Because deportation is a civil action, information gleaned from such 4th Amendment violations are rarely subject to exclusion. See *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1050–51 (1984) (holding that the exclusionary rule does not apply in civil deportation hearings).

<sup>267</sup> 457 U.S. 202 (1982).

<sup>268</sup> *Id.* at 205.

<sup>269</sup> *Plyler*, 457 U.S. at 210 (“Whatever his status under the immigration laws, an alien is surely a ‘person’” for purposes of the Fourteenth Amendment); see also, *id.* at 243 (Burger, C.J., dissenting) (“I have no quarrel with the conclusion that the Equal Protection Clause of the Fourteenth Amendment applies to aliens who, after their illegal entry into this country, are indeed physically ‘within the jurisdiction’ of a state.”); U.S. CONST. amend. XIV, § 1 (“[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”).

<sup>270</sup> See *Graham v. Richardson*, 403 U.S. 365 (1971) (striking down Arizona and Pennsylvania laws denying welfare benefits to lawful permanent residents). The Court explained that “[a]liens as a class are a prime example of a ‘discrete and insular minority’ . . . for whom . . . heightened judicial solicitude is appropriate.” *Id.* at 372 (quoting *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938)); see also *Nyquist v. Mauclet*, 432 U.S. 1 (1977) (striking down New York law denying college scholarships to foreign born lawful permanent residents who chose not to relinquish their foreign citizenship).

Nevertheless, *Plyler* “employed a heightened level of rational basis review” to strike down the Texas law.<sup>271</sup> Justice Powell defended the approach as a proper response to the “lifelong penalty and stigma” that would attach to immigrant children who lacked an education.<sup>272</sup> He explained, “[a] legislative classification that threatens the creation of an underclass of future citizens and residents cannot be reconciled with one of the fundamental purposes of the Fourteenth Amendment.”<sup>273</sup> Though the *Plyler* dissent objected to the plurality’s undisguised policy making,<sup>274</sup> it fully agreed with the ends of that policy.<sup>275</sup>

*Plyler* may have been constitutionally infirm in its reasoning, but by assuring immigrant children’s access to basic education, it helped avoid deepening the shadow into which immigrants are forced to retreat. The Supreme Court acknowledged that while immigrants’ labor is welcome, they are “virtually defenseless against any abuse, exploitation, or callous neglect to which the state or the state’s natural citizens and business organizations may wish to subject them.”<sup>276</sup> They can be deprived of fair wages and safe working conditions and they can be subject to workplace sexual abuse, domestic violence, and human trafficking with impunity by those who rely on their fear of deportation.<sup>277</sup> Every time immigration laws are made harsher and procedural protections weaker, the immigrant community is made more fearful and pushed deeper into the shadows. “This situation raises the specter of a permanent caste of undocumented resident aliens, encouraged by some to remain here as a source of cheap labor,

<sup>271</sup> *LeClerc v. Webb*, 419 F.3d 405, 416 (5th Cir. 2005).

<sup>272</sup> *Plyler*, 457 U.S. at 239 (Powell, J., concurring).

<sup>273</sup> *Id.*

<sup>274</sup> *Id.* at 242 (Burger, C.J., dissenting) (“The Court makes no attempt to disguise that it is acting to make up for Congress’ lack of ‘effective leadership’ . . .”).

<sup>275</sup> *Id.* (“I fully agree that it would be folly—and wrong—to tolerate creation of a segment of society made up of illiterate persons . . .”).

<sup>276</sup> *Id.* at 219 n.18 (quoting *Plyler v. Doe*, 458 F. Supp. 569, 585 n.18 (E.D. Tex. 1978)).

<sup>277</sup> See Laura Carothers Graham, *Relief for Battered Women Under the Violence Against Women Act*, 10 DEL. L. REV. 263, 263 (2008) (“A large number of immigrant victims of domestic violence cite fear of being reported to immigration authorities by their abuser . . . [as one of] their main bases for remaining in an abusive relationship.”); Suzanne H. Jackson, *To Honor and Obey: Trafficking in “Mail-Order Brides,”* 70 GEO. WASH. L. REV. 475, 477 (2002) (“[T]raffickers . . . abuse people physically and sexually, confiscating passports and threatening deportation.”); Gerhard A. Miller, *Immigration and National Law*, 1977 ANN. SURV. AM. L. 205, 228 (“Once the aliens arrive, they live under the constant fear of detection and deportation, and are thus easily exploited . . .”); Jayashri Srikantiah, *Perfect Victims and Real Survivors: The Iconic Victim in Domestic Human Trafficking Law*, 87 B.U. L. REV. 157, 158 (2007) (discussing the magnitude of human trafficking on immigrants subject to deportation).

but nevertheless denied the benefits that our society makes available to citizens and lawful residents.”<sup>278</sup>

Aliens detained indefinitely under the DHS regulation are less sympathetic than the school children of *Plyler*, but this does not make their plight less important. The regulation’s anemic protections unnecessarily impose the risk of lifelong incarceration.<sup>279</sup> The regulation’s procedures would be clearly unconstitutional if they were used as a civil commitment mechanism for similarly situated citizens.<sup>280</sup> The regulation is therefore a piece of the dark patchwork of United States immigration laws that relegates our alien neighbors to the shadows of society. Whether it is by Supreme Court action on due process grounds or by Congressional fiat, the invalidation of the DHS regulation would help the nation move back toward its egalitarian ideal.

#### CONCLUSION

Santos Hernandez–Carrera committed a crime, and his prison sentence paid his debt to society. His subsequent seventeen years of imprisonment and the lifetime of detention before him are unconscionable unless the detention is necessary to keep him from harming society. If the necessity of his incarceration had been litigated with the protections available to a citizen, Hernandez–Carrera would almost certainly be a free man. But the procedural due process ensured to a citizen was not provided, and he faces a lifetime in prison. Such denial of foundational constitutional rights relegates Hernandez–Carrera and millions of law-abiding aliens to a life of fear and injustice.

During the past ten years, the Supreme Court narrowed plenary power in immigration law, explicitly recognized some inadmissible aliens’ constitutional right to habeas corpus, and implicitly recognized a substantive right of lawful permanent residents to be free from indefinite detention. *Zadvydas* and *Boumediene* seriously undermined *Mezei*, and, with it, the entry fiction doctrine. The Supreme Court is now free to consider the sufficiency of the procedural due process provided by the DHS indefinite-detention regulation. The question is a close one, but a fair application of *Eldridge* balancing does not quite

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<sup>278</sup> *Plyler*, 457 U.S. at 218–19.

<sup>279</sup> Four of five of Hernandez–Carrera’s professional psychiatric evaluators concluded that the public would be safe if he was released with modest restrictive conditions. Brief for Appellees, *supra* note 2, at 4.

<sup>280</sup> See *supra* Part III.B.3 (comparing protections under 8 C.F.R. § 241.14 with those required for citizens).

compel the invalidation of the regulation. Invalidating the regulation would not require the Court to weigh an alien's liberty interest the same as a citizen's, but the ruling would require some explicit weighting, creating a precedential benchmark.

The Supreme Court should create such a precedent. It would be fairer and more humane to mentally ill aliens to protect them from unnecessary indefinite detention. Equally importantly, the precedent would provide a touchstone by which to evaluate other egregious denials of aliens' due process protections. Providing aliens with greater legal protections allows them to step out of the shadows where they are subject to exploitation and prejudice.

If the DHS regulation is invalidated and men like Hernandez-Carrera are turned over to the states' civil detention regimes, the DHS may ensure the public's safety and reduce its workload. It could complete removal proceedings and decide before the completion of the alien's sentence whether he had to be deported.<sup>281</sup> If the DHS could not return him to his own country, it could let the local state officials handle the case the same as they do a citizen. If after completion of the state civil-commitment proceedings, a court found that the alien was not sufficiently dangerous to require incarceration, he would be freed subject to supervision, and the state would be spared a major, long-term expense. If the court decided that he required confinement, he would have access to the same treatment services available to citizens, and, as a result, he might again become a contributing member of society.

If the Supreme Court is unable or unwilling to invalidate the DHS regulation on procedural due process grounds, Congress should do so based on its unfairness and its contribution to a two-class society.

*Throughout the world today there are men, women, and children interned indefinitely, awaiting trials which may never come or which may be a mockery of the word, because their governments believe them to be "dangerous." Our Constitution, whose construction began two centuries ago, can shelter us forever from the evils of such unchecked power.*<sup>282</sup>

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<sup>281</sup> This would have the additional benefit of deporting removable aliens immediately at the conclusion of their prison term rather than waiting up to six months to determine removability.

<sup>282</sup> *United States v. Salerno*, 481 U.S. 739, 767 (1987) (Marshall, J., dissenting).

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*ENDING INDEFINITE DETENTION*

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ANDREW BRAMANTE<sup>Ψ</sup>

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<sup>Ψ</sup> J.D. Candidate, 2011, Case Western Reserve University School of Law.