THE EXIT FICTION: UNCONSTITUTIONAL INDEFINITE DETENTION OF DEPORTABLE ALIENS

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I. INTRODUCTION

In December 1999, eight inmates at a Louisiana prison took hostages—the prison warden, two prison deputies, and five female inmates.[1] After an initial burst of violence, the hostage-taking settled into a tense six-day negotiation between the hostage takers, the FBI, and the governments of the United States and Cuba.[2] The demands of the hostage takers were simple; they wanted to be released, either in Cuba or another country.[3] Normally, this would be a non-negotiable request, but

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1 Armando Villafranca, *Jail Standoff a Product of Cuban Detainees' Legal Limbo*, HOUS. CHRON., Dec. 18, 1999, at A1.

2 Alan Clendenning, *Cuban Detainees' Riot Not Likely to be the Last*, ADVOCATE (Baton Rouge, La.), Dec. 27, 1999, at 9B.

3 Anne Rochell Konigsmark, *Cuban Inmates Take Hostages at Louisiana Jail; INS Prisoners Demand Right to Leave U.S.*, ATLANTA J. & CONST., Dec. 15, 1999, at A3.

these were not ordinary prisoners.

These inmates were not in prison serving time for crimes. They were Immigration and Naturalization Service (INS) detainees, waiting to be returned to Cuba and the Bahamas.[4] The INS would not release them in the United States and their home countries would not take them back.[5] These detainees were looking at the possibility of spending the rest of their lives in jail awaiting extradition.[6] They knew that they had no remedy to their plight through the court system, as the courts have repeatedly ruled that the Cubans who came to the United States as part of the Mariel boatlift can be detained potentially indefinitely.[7] Taking hostages must have appeared the only way to resolve their unjust and untenable situation.

Cuba agreed to the return of the detainees.[8] However, the plight of these detainees was only one example of a large and mushrooming problem in the United States. Before 1980, there were few, if any, aliens in indefinite INS detention.[9] From 1980 until the mid-1990s, the INS took custody of some 1,840 "Marielito" Cubans, holding them indefinitely.[10] In 1996, with

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4 Kevin Blanchard, *Judge Critical of Detentions*, ADVOCATE (Baton Rouge, La.), Mar. 15, 2000, at 1A.

5 Villafranca, *supra* note 1; Blanchard, *supra* note 4.

6 Villafranca, *supra* note 1.

7 *E.g.*, Barrera-Echavarria v. Rison, 44 F.3d 1441, 1443, 1445 (9th Cir. 1995) (en banc); *see also* Margaret H. Taylor, *Detained Aliens Challenging Conditions of Confinement and the Porous Border of the Plenary Power Doctrine*, 22 HASTINGS CONST. L.Q. 1087, 1142–43 (1995) (explaining that most cases following Jean v. Nelson have denied due process protection to excludable alien detainees seeking parole).

8 *See Caught on the Rocks*, NEWS & OBSERVER (Raleigh, N.C.), Dec. 21, 1999, at A16. Three of the detainees were charged with crimes relating to the hostage-taking and will be tried in the United States. Blanchard, *supra* note 4.

9 Taylor, *supra* note 7, at 1139–41. The Supreme Court stated in the early 1950s that the indefinite detention of excludable aliens was not unconstitutional. Shaughnessy v. United States *ex rel*. Mezei, 345 U.S. 206, 210–11, 215 (1953). However, the INS did not detain many aliens until the 1980s. Taylor, *supra* note 7, at 1139–40.

10 Scott W. Wright, *Between Two Worlds: Stranded After Boat Lift, Cubans Yearn for Freedom*, AUSTIN AM.-STATESMAN, Feb. 28, 1993, at A1. In the early 1980s, more than 125,000 Cubans came to the United States from the port of Mariel in Cuba. The INS paroled them into the country to be processed later. Many were arrested over the next decade and a half for crimes committed after their parole. They were tried and served their time in jail. At the end of their sentences, they were taken into INS detention for exclusion proceedings and then to await their return to Cuba. *See id.*

the passage of the Anti-Terrorism and Effective Death Penalty Act (AEDPA)[11] and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA),[12] a much larger group of aliens could be detained indefinitely.[13] The number of aliens detained indefinitely by the INS grew from approximately 3,435 in the summer of 1999[14] to 4,566 in February 2000.[15]

Besides the suffering imposed on these 4,566 individuals, there is another reason that the sudden growth of indefinite detention is disturbing. Before 1996, only excludable aliens—aliens who were considered to be outside the United States for the purpose of constitutional protection[16]—could be detained indefinitely. With the change in the law, it appears that some deportable aliens—aliens who have already entered the United States—may be indefinitely detained. In spite of a long history of providing more constitutional protections to these aliens, some courts have allowed the indefinite detention of individuals who have lived in the United States, worked here, married and raised families here.[17] These individuals find themselves, by an act of Congress, suddenly stripped of the constitutional protections to which they were previously entitled by reason of being in the United States.

Although the Supreme Court first suggested that it might be constitutional to detain excludable aliens indefinitely in 1953,[18]

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11 Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of 8, 18, 22, 28, 40, and 42 U.S.C.) (1994 & Supp. IV 1998).

12 Pub. L. No. 104-208, 110 Stat. 3009-546 (codified as amended in scattered sections of 8 and 18 U.S.C.) (1994 & Supp. IV 1998). Because the indefinite detention provision of AEDPA, § 440(c), was superseded by the indefinite detention provision of IIRIRA, now codified at 8 U.S.C. § 1231(a)(2), this comment will not discuss the AEDPA provision.

13 Yvette M. Mastin, Comment, *Sentenced to Purgatory: The Indefinite Detention of Mariel Cubans*, 2 SCHOLAR: ST. MARY'S L. REV. MINORITY ISSUES 137, 152–53 (2000).

14 Michael Sangiacomo, *New Law Puts Immigrants on the Edge; Some Wait in U.S. Jails, Rejected by Their Homeland*, PLAIN DEALER, Aug. 30, 1999, at 1B.

15 Bruce Finley, *Trapped Between Two Countries: Laotian Among Immigrant Criminals in Limbo*, DENV. POST, Feb. 29, 2000, at A1.

16 For a discussion of the distinction between excludable aliens and deportable aliens, see discussion *infra* note 30 and accompanying text.

17 *See, e.g.*, Sivongxay v. Reno, 56 F. Supp. 2d 1167, 1168 (W.D. Wash. 1999) cert. granted sub nom, Reno v. Kim Ho Ma, 121 S. Ct. 297 (2000).

18 Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 215–216 (1953).

it was only after the passage of IIRIRA in 1996 that courts began to question whether a deportable alien could be held indefinitely.[19] Prior to 1996, immigration statutes did not allow for the indefinite detention of deportable aliens and so it was not a question. With the changes in the immigration statute included in IIRIRA, Congress required the INS to detain aliens after deportation proceedings while awaiting actual removal.[20] If the removal does not happen within three months, Congress authorized the INS to continue to detain any alien previously convicted of almost any felony, without any outside review or any time limitations.[21] Aliens can challenge their detention in federal courts only in habeas corpus proceedings where they must show that they are "in custody in violation of the Constitution or laws . . . of the United States."[22] Because IIRIRA appears to allow for indefinite detention of aliens pending removal, aliens ordered deported need to show that their detention is unconstitutional.

As mentioned above, courts have generally found that excludable aliens can be detained indefinitely. However, aliens that have entered the United States have traditionally enjoyed greater constitutional guarantees—before, during, and after deportation proceedings. The historical protections of deportable aliens notwithstanding, several courts have recently decided that deportable aliens assimilate to the status of excludable aliens after deportation proceedings, and therefore have found that their prolonged detention does not violate the Constitution.[23] Other courts have rejected the so-called "entry fiction"—the notion that the aliens' status, for the purpose of constitutional protection, reverts to that of excludable aliens.[24] Finding that the aliens still enjoy constitutional protections,

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19 *See*, *e.g.*, Zadvydas v. Caplinger, 986 F. Supp. 1011, 1127 (E.D. La. 1997); Binh Phan v. Reno, 56 F. Supp. 2d 1149, 1151 (W.D. Wash. 1999) (en banc) cert. granted sub nom, Reno v. Kim Ho Ma, 121 S. Ct. 297 (2000).

20 8 U.S.C. § 1231(a)(2) (Supp. IV 1998).

21 8 U.S.C. § 1231(a)(6) (Supp. IV 1998).

22 28 U.S.C. § 2241(c)(3) (1994).

23 *E.g.*, Avila-Sanabria v. Lapin, 2000 U.S. App. Lexis 25261 at *1, *2–7 (7th Cir. Sept. 26, 2000).

24 *Phan*, 56 F. Supp. 2d at 1153.

these courts have worked through the due process analysis to determine whether indefinite detention is constitutional and have arrived at the conclusion that it is not.[25] One court, recognizing the significant possibility that indefinite detention might be permissible under the statute as written but unconstitutional, avoided the question of the constitutionality of indefinite detention entirely, interpreting the statute to allow INS detention only for a reasonable period.

Part I of this Article lays out the statutory and regulatory provisions for immigration detention, provisions that do not make any distinction between excludable and deportable aliens. Part II of the Article explains the traditional difference between excludable and deportable aliens, focusing particularly on the difference in constitutional due process protections for the two groups and the reasons for the distinction.[26] Part III describes the due process analysis for detention, as it currently stands. Part IV explores the new theory that the status of resident aliens assimilates to that of an excludable alien upon completion of deportation proceedings, and the process that would be due to aliens whose status has thus changed. Parts V and VI set up the due process analysis by establishing the appropriate level of scrutiny and laying out the government interests.

The final section of the Article works through the due process analysis for the challenges to indefinite immigration detention of deportable aliens. For the substantive due process analysis, indefinite INS detention, as an infringement on a fundamental liberty interest, should be subject to strict judicial scrutiny, being allowed only if it is narrowly tailored to a compelling interest.

Though indefinite immigration detention probably cannot survive the substantive due process analysis, the final section

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25 *Kim Ho Ma*, 208 F.3d at 824–25; *Phan*, 56 F. Supp. 2d at 1157; Thien Van Vo v. Greene, 63 F. Supp. 2d 1278, 1286—87 (D. Colo. 1999).

26 The word "deportable" is used in different ways. Sometimes it refers to aliens pending a determination of deportability, other times it only refers to people who have been ordered deported, pending their actual removal, other times it is both. In this paper, the term refers to people either before or after a final determination, who are subject to deportation proceedings, as opposed to exclusion proceedings. Deportation and exclusion will refer to the respective legal proceedings, and removal will refer to the act of physically returning the alien to her country of origin.

also works through the procedural due process analysis. I propose that rather than requiring the alien to show that he should be released from detention, the courts should require the government to prove that the alien should not be released. By shifting the burden, the risk that the government is erroneously depriving the alien of liberty would be lowered. Secondly, in weighing the interest of the government against the individual's interest in liberty, courts should carefully analyze what the government interests really are. Though the government claims that the interest in protecting the community from dangerous aliens outweighs the private interest in liberty, the dangerousness of the individual should not be presumed from the alien's criminal record. Also, the government interest in ensuring that the alien is available for removal when it becomes possible should be discounted by the remoteness of the possibility of removal. Finally, the government sovereignty interest should not weigh heavily in the balancing test because detention is essentially a domestic question and there is already an effective mechanism for controlling the borders. The most important safeguard, however, is that the courts actually work through the analysis, rather than deferring to INS judgment.

Lastly, I suggest that the most prudent route for the courts is to avoid the question of constitutionality altogether. Because the statute does not explicitly provide for indefinite detention and because there is a significant question whether such a provision would be constitutional, the courts should exercise restraint and avoid making constitutional pronouncements by interpreting the statute to allow detention only for a reasonable period.

II. STATUTORY AND REGULATORY FRAMEWORK

In 1996, President Clinton signed into law a massive immigration reform statute—IIRIRA.[27] This statute allowed for the potentially indefinite detention of some aliens who had been found to be deportable or excludable, but whose physical

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27 David M. Grable, Note, *Personhood Under the Due Process Clause: A Constitutional Analysis of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996*, 83 CORNELL L. REV. 820, 821 (1998).

removal the United States was unable to accomplish.[28] This section of the paper sets out the relevant provision of IIRIRA and the regulations that the INS has established to determine whether to release or detain an alien whose removal is not feasible.

A. IIRIRA–Detention Pending Removal

IIRIRA made sweeping changes to immigration procedures and to the Immigration and Naturalization Act (INA). One of the changes it purported to make was to merge the process for deportation and exclusion into a single process known as removal.[29] Nonetheless, significant distinctions remain between the two classes of deportable aliens and excludable aliens.[30]

The provision in IIRIRA for detaining aliens pending removal does not differentiate between deportable and excludable aliens. The provision requires that the Attorney General detain all aliens under final orders of deportation or exclusion during a ninety-day removal period, during which aliens are normally removed.[31] There are two separate provisions dealing with aliens whose removal by the end of the ninety-day period is not feasible. Most aliens are "subject to supervision under regulations prescribed by the Attorney General."[32] The other provision reads:

> (6) Inadmissible or criminal aliens
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> An alien ordered removed [as a result of having been convicted for certain crimes] or who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, may be detained beyond the removal period and, if released, shall be subject to the terms of supervision in paragraph (3).[33]

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28 *See infra* notes 29–31 and accompanying text.

29 Rep. Lamar Smith & Edward R. Grant, *Immigration Reform: Seeking the Right Reasons*, 28 ST. MARY'S L.J. 883, 915–17 (1997).

30 Mastin, *supra* note 13, at 155-58.

31 8 U.S.C. § 1231(a)(1)(A) (Supp. IV 1998).

32 8 U.S.C § 1231(a)(3).

33 8 U.S.C. § 1231(a)(6) (Supp. IV 1998). There have not been any cases in which the Attorney General has determined that an alien who has not been convicted of any

The statute does not limit the time the Attorney General or the INS, as the Attorney General's delegate, may detain a person under paragraph (6).

The crimes for which a person can be detained under paragraph (6) range from any two convictions for crimes of moral turpitude to any aggravated felony.[34] For the purposes of deportation and immigration detention, a criminal offense is an aggravated felony unless "the maximum penalty possible . . . did not exceed imprisonment for one year and, if the alien was convicted of such crime, the alien was not sentenced to a term of imprisonment in excess of six months (regardless of the extent to which the sentence was ultimately executed)."[35] The statute appears to give the Attorney General complete discretion in deciding whom to detain among those people covered by paragraph (6).

B. INS Procedures

The procedures established for dealing with aliens after the removal period were explained in a memorandum written and circulated by INS Executive Associate Commissioner Michael Pearson in February 1999. This memorandum, entitled "Detention Procedures for Aliens Whose Immediate Repatriation is Not Possible or Practicable," allows for the release of aliens who demonstrate by "clear and convincing evidence that [they are] not a threat to the community and [are] likely to comply with removal order[s]."[36] Pearson directed INS district directors to carry out a review of the status of aliens in this situation every six months "to determine whether [there] has been a change in circumstances that would support a release decision."[37] After each review, the district directors were to

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crime is, nonetheless, dangerous. However, the use of the word "or" suggests that this would be permissible under a literal reading of paragraph 6. *Id*.

34 8 U.S.C. § 1231(a)(6) (Supp. IV 1998).

35 INA, 8 U.S.C. § 1182(a)(2)(A)(ii)(II) (1994 & Supp. II 1997).

36 Memorandum from Michael A. Pearson, INS Executive Associate Commissioner, to INS Regional Directors, "Detention Procedures for Aliens Whose Immediate Repatriation Is Not Possible or Practicable," (February 3, 1999), *in* 4 BENDER'S IMMIGR. BULL. 299, 300 (1999) [hereinafter Pearson Memorandum].

37 *Id.*

document in the alien's file why the alien was or was not released.[38] Though assistants could carry out the review, the INS district director had to make the actual decision to detain the alien or release her on bail.[39]

The burden is on the alien to show that the circumstances have changed.[40] In order to do so, the alien may present his situation in writing, orally, or a combination of the two, apparently at the discretion of the local INS district director.[41] If the alien wishes to contest the decision, he may request a review by the same district director.[42] After filing a written request for review, an alien may appeal the decision to the Board of Immigration Appeals (BIA).[43] The BIA reviews the decisions only to determine whether the INS district director's decision was reasonable, not whether detention is otherwise unlawful.[44]

Some of the things to be considered in reviewing the alien's circumstances are:

- the nature and seriousness of the alien's criminal convictions;
- other criminal history;
- sentence(s) imposed and time actually served;
- history of failures to appear for court;
- probation history;
- disciplinary problems while incarcerated;
- evidence of rehabilitative effort or recidivism;
- equities in the United States; and
- prior immigration violations and history.[45]

It should be noted that most of these factors are already established at the time an alien is taken into INS custody pending removal. Therefore, an alien once determined to be

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38 *Id*.

39 *Id.* at 300; Aliens and Nationality, 8 C.F.R. § 241.4 (a)–(b); *see* Phan, 56 F. Supp. 2d at 1152.

40 Pearson Memorandum, *supra* note 36 at 300; 8 C.F.R. § 241.4 (a)–(b).

41 Pearson Memorandum, *supra* note 36, at 300.

42 Aliens and Nationality, 8 C.F.R. § 236.1(d)(2)(ii).

43 8 C.F.R. § 236.1(d)(3)(ii)–(iii).

44 *Phan*, 56 F. Supp. 2d at 1153.

45 8 C.F.R. § 241.4(a)(1)–(9); Pearson Memorandum, *supra* note 34 at 301.

dangerous or a flight risk is unlikely to be able to show that his circumstances have changed.[46]

In August 1999, the INS announced certain limited changes to its procedures for detention decisions in a document entitled "Interim Procedures."[47] The new procedures require that:

- the INS give detained aliens notice thirty days prior to a custody review and advise them that they may present information;
- the INS provide detainees with written explanations of the reasons for detention decisions;
- detainees be allowed to have representation at custody reviews;
- detainees have the opportunity to have a personal interview at least once a year;
- detainees have some form of review every six months;
- detainees have the opportunity to have detention decisions reviewed by INS Headquarters; and
- the INS should not presume continued detention on the basis of criminal history.[48]

The risk that the INS will wrongfully deprive aliens' of their liberty remains considerable under the new procedures set up by the INS. There is no impartial adjudicator, either for the original decision to detain or for the review of that decision. Both decisions are made within the INS, a body that is accountable to the political branches of government and is evaluated by its effectiveness at deporting aliens,[49] not by its

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46 *See, e.g.*, Kim Ho Ma v. Reno, 208 F.3d 815, 819–20 (9th Cir. 2000). Mr. Kim Ho Ma was convicted of first degree manslaughter at the age of seventeen. After serving out his sentence he was taken into INS custody. The court noted that the INS investigator had found that his family was very supportive of him, that his elder brother would give him a job, that he regularly counseled his younger brother to avoid getting into trouble, and that he was not a flight risk. Nonetheless, the INS deputy director rejected his application for release on bail. *Id*.

47 Ngo v. INS, 192 F.3d 390, 399 (3rd Cir. 1999). At the same time, the INS announced that it intended to establish regulations similar to Interim Procedures. *Id.* at 399.

48 *Id.*

49 *See, e.g., Removal of Criminal and Illegal Aliens: Hearings Before the Subcomm. on Immigration and Claims of the House Comm. on the Judiciary*, 104th Cong. (1995) ("[W]e still have . . . a real problem with the low deportations of . . . illegal and criminal

respect for their rights and liberties. INS officials have acknowledged in the past that they do not always follow their internal guidelines in detention cases.[50] Additionally, the review at INS headquarters may be even more politicized, as higher level INS officials must answer to the Attorney General and members of Congress who want to see an increase in the number of deportations and to be assured that criminal aliens will not have the opportunity to commit further crimes.[51]

The importance of having detention decisions reviewed by someone outside the INS is highlighted by the new rule instructing INS officials not to presume that an alien should be detained because of a criminal past. The fact that it was necessary to state this rule suggests that there has been a problem with it in the past. There is also evidence that the INS district directors have continued to violate this rule since Commissioner Pearson's second memo.[52] As long as there is no oversight outside the INS, there is little reason to believe that simply disallowing the detention presumption has eliminated it.

A second problem with the current procedures is that they require the detainee to show, by clear and convincing evidence, a change of circumstances that justifies a decision to release the detainee.[53] This may be an insurmountable burden for many aliens in detention. Besides the difficulty of showing an absence

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aliens. What do you think we should do so that we will send a message that we are serious about enforcing immigration policy . . . ." Question of Rep. Lamar S. Smith to INS General Counsel and Director of Executive Office for Immigration Review); *see also* Dan Malone, *INS Faulted for Secret Detentions*, FLA. TIMES-UNION (Jacksonville, Fla.), Jan. 13, 2000, at A4 (quoting David Venturella, INS Assistant Commissioner for Detention and Removal, "[W]hen we release someone and they end up committing a crime, we get banged over the head for that.").

50 Thien Van Vo v. Greene, 63 F. Supp. 2d 1278, 1287 (D. Colo. 1999).

51 *See, e.g.*, *Removal of Criminal and Illegal Aliens: Hearings on H.R. 2202 Before the Subcomm. on Immigration and Claims of the House Comm. on the Judiciary*, 104th Cong. (1996) (testimony of David Martin, General Counsel, INS).

52 *See, e.g.*, Kim Ho Ma v. Reno, 208 F.3d 815, 820 (9th Cir. 2000) (noting that in September 1999, after the second memo, Kim Ho Ma's request for release was rejected, "based on the seriousness of his conviction and also on the ground of his threatened participation in a hunger strike while in custody. The reviewers stated that they were unable to conclude that Kim Ho Ma would 'remain non-violent' and abide by the terms of his release.").

53 *See supra* text accompanying notes 34-35.

of a problem, there are structural problems with detention that may tend to make aliens less likely to be able to show that they are deserving of release. Detention facilities used by the INS are seriously overcrowded and frequently understaffed.[54] INS detainees are often housed with criminal convicts.[55] The boredom, frustration, and difficult detention conditions have led to numerous problems in the detention facilities,[56] ensuring that aliens in detention facilities will be assumed to be dangerous. Additionally, many detainees do not have lawyers to assist them, and may have difficulties with the English language.[57]

III. THE DISTINCTION BETWEEN EXCLUDABLE AND DEPORTABLE ALIENS

For the last hundred years, American courts have recognized a difference between the status of aliens who have not entered the United States and those who have. Aliens in the first category, excludable aliens, enjoy only extremely limited constitutional due process protections.[58] Those in the second category, deportable aliens, have traditionally had greater constitutional protection both before and after deportation proceedings.[59]

A. Excludable Aliens

Constitutional due process protections for excludable aliens are minimal. In *Chae Chan Ping v. United States*,[60] one of the earliest cases to discuss the constitutional rights of aliens stopped at the border, the Supreme Court found those rights to be extremely narrow.[61] In *Chae*, a Chinese national working in the United States was denied entry into the country upon his

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54 *See* Taylor, *supra* note 7, at 1113-16.

55 *See id.* at 1111-20.

56 *See id.* at 1118; *see also supra* text accompanying notes 1-13.

57 *United States: Locked Away: Immigration Detainees in Jails in the United States*, HUM. RTS. WATCH, Sept. 1998, at 1, 52-53, 64.

58 *See* Christopher R. Yukins, *The Measure of a Nation: Granting Excludable Aliens Fundamental Protections of Due Process*, 73 VA. L. REV. 1501, 1513 (1987).

59 *See id.*

60 130 U.S. 581 (1889).

61 *See id.* at 609-10.

return after a visit to China.[62] He petitioned for habeas corpus review, challenging the law under which his re-entry had been denied.[63] The Court found that the power to admit or exclude citizens of other countries was an inherent sovereign power and that Congress had the authority to pass a law excluding aliens.[64]

Additionally, the Supreme Court refused to examine the constitutional claim that the law should not be applied retroactively. The Court explained that government actions in the area of exclusion of immigrants are not "judicial questions."[65]

A short time later, another excluded alien challenged a law preventing the entry of aliens found likely to become a public charge.[66] In this case, the Supreme Court again held that Congress had the authority to pass the statute under powers implied by sovereignty. This time, however, the Court went further, declaring that

> [i]t is not within the province of the judiciary to order that foreigners who have never been naturalized, nor acquired any domicile or residence within the United States, nor even been admitted into the country pursuant to law, shall be permitted to enter, in opposition to the constitutional and lawful measures of the legislative and executive branches of the national government. *As to such persons, the decisions of executive or administrative officers, acting within powers expressly conferred by [C]ongress, are due process of law*.[67]

Thus, for aliens arriving at the border, only statutory due process mattered; they were not protected by the Due Process Clause of the Constitution.[68] In 1953, the Supreme Court again refused to extend constitutional protections to an excludable alien, noting that the man was "no more ours" than any other

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62 *See id.* at 582.

63 *See id.*

64 *See id.* at 603.

65 *Id*. at 602.

66 *See* Nishimura Ekiu v. United States, 142 U.S. 651, 661-662 (1892).

67 *Id.* at 660 (emphasis added).

68 *See* Charles D. Weisselberg, *The Exclusion and Detention of Aliens: Lessons from the Lives of Ellen Knauff and Ignatz Mezei*, 43 U. PA. L. REV. 933, 948-49 (1995).

country's.[69] A more recent decision from the Eleventh Circuit reiterated this quite bluntly, stating that "[a]liens seeking admission to the United States . . have no constitutional rights with regard to their applications and must be content to accept whatever statutory rights and privileges they are granted by Congress."[70]

B. Deportable Aliens

Contrary to the rather precarious situation of excludable aliens, aliens within the United States enjoy the protection of the Due Process Clause of the Fifth and Fourteenth Amendments.[71] One of the earliest cases to distinguish aliens facing deportation from those facing exclusion was *Yamataya v. Fisher*.[72] In this 1903 case, the Supreme Court held that deportable aliens can challenge actions of deportation officers under the Due Process Clause.[73] Yamataya was a Japanese national who had recently arrived in the United States.[74] She was to be deported under a law that allowed for the deportation of an alien who became "a public charge within one year after his arrival in the United States."[75] The Court recognized the legality of the law and the power of the legislature and the executive to exercise control over such aliens.[76] However, the Court explained that it had

> never held, nor must [it] now be understood as holding, that administrative officers, when executing the provisions of a statute involving the liberty of persons, may disregard the fundamental principles that inhere in 'due process of law' as understood at the time of the adoption of the Constitution Therefore, it is not competent for . . .any executive officer . . .arbitrarily to cause an alien who has entered the country, and has

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69 Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 215-16 (1953).

70 Jean v. Nelson, 727 F.2d 957, 968 (1lth Cir. 1984).

71 *See* Yukins, *supra* note 58, at 1513.

72 *See* 189 U.S. 86, 98, 101 (1903).

73 *See id.* at 101.

74 *See id.* at 87.

75 *Id.* at 96.

76 *See id.* at 97.

> become subject in all respects to its jurisdiction, and a part of its population, although alleged to be illegally here, to be taken into custody and deported without giving him all opportunity to be heard upon the questions involving his right to be and remain in the United States. No such arbitrary power can exist where the principles involved in due process of law are recognized.[77]

Since *Yamataya v. Fisher*, courts have steadily clarified the due process rights guaranteed to deportable aliens. Courts have recognized a right to procedural due process, including a right to be heard,[78] and to have a "reasoned, rather than an arbitrary, determination,"[79] a right to be represented by counsel,[80] and a right to notice of the charges against them.[81]

The status of deportable aliens gave them greater rights than those of excludable aliens, both during deportation proceedings and while awaiting removal from the country. In *United States ex rel. Ross v. Wallis*, the Second Circuit found that a deportable alien could not be held if his deportation could not be carried out.[82] In *Bonder v. Johnson*, a district court held that an alien accused of being a member of the Communist Party who had been found to be deportable must either be deported or be released.[83] In *Saksagansky v. Weedin* and *Wolck v. Weedin*, the Ninth Circuit held that if an alien could not be deported to the country specified in his deportation order, the alien must be released from custody.[84] These cases were all brought by aliens under final orders of deportation, challenging the means of enforcement of deportation orders, rather than the deportation orders themselves. Though these deportable aliens

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77 *Yamataya*, 189 U.S. at 100-01.

78 *See id.* at 101.

79 United States *ex rel*. Chen Ping Zee v. Shaughnessy, 107 F. Supp. 607, 610 (S.D.N.Y. 1952).

80 *See, e.g*., Landon v. Plasencia, 459 U.S. 21, 36 (1982) (citing 8 U.S.C.A. § 1362 (1999)).

81 *See id.* at 36-37.

82 *See* 279 F. 401, 403 (2d Cir. 1922).

83 *See* 5 F.2d 238, 239-40 (D. Mass. 1925).

84 *See* Saksagansky v. Weedin, 53 F.2d 13, 16 (9th Cir. 1931); Wolck v. Weedin, 58 F.2d 928, 931 (9th Cir. 1932).

did not specifically challenge the length of detention, one of the courts found that "the right to deport does not include any right of indefinite imprisonment under the guise of awaiting an opportunity for deportation."[85] All of these courts required that the aliens be released within a reasonable amount of time, generally twenty or thirty days, if they could not be removed from the United States.[86]

Though the Supreme Court has never specifically addressed time limits for the detention of aliens, it has recognized the continued constitutional protections of deportable aliens with final orders of deportation. In *United States v. Witkovich*, an alien who had been ordered deported but whose removal was not feasible challenged the constitutionality of a provision of the then-current immigration law.[87] At the time, the immigration law authorized detention for six months after an alien was ordered deported.[88] At the end of the six months, the alien was to be "subject to supervision under regulations prescribed by the Attorney General."[89] The provision went on to require that the alien "give information under oath as to his nationality, circumstances, habits, associations, and activities, and such other information, whether or not related to the foregoing, as the Attorney General may deem fit and proper."[90] The alien refused to answer questions about his acquaintances, his affiliations, and his activities.[91] He was arrested for failing to provide the information requested by the Attorney General.[92] The Supreme Court agreed with the District Court that the provision should be construed to only require the alien to provide information that would enable the Attorney General to be certain that the

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85 *Ross*, 279 F. at 403.

86 *See, e.g., Saksagansky*, 53 F.2d at 16. Although these cases were decided under the 1917 Immigration and Nationality Act, they give some guidance on the constitutional limits of Congress' power to regulate immigration). Heikkila v. Barber, 345 U.S. 229, 234-35 (1953) (stating that the 1917 immigration law was an attempt by the Congress to reduce habeas corpus review to its constitutional minimum in the immigration context).

87 *See* 353 U.S. 194, 194-95 (1957).

88 *See id.* at 195.

89 *See id.*

90 *Id.*

91 *See id.* at 194-95.

92 *See id*.

alien was ready to be deported if and when it became possible.[93]

The Court highlighted the difference between *Witkovich* and *Carlson v. Landon*, an earlier immigration case in which it had found that an alien "could be detained during the customarily brief period pending determination of deportability."[94] It held that, contrary to *Carlson*, *Witkovich* involved "supervision of the undeportable alien [that] may be a lifetime problem. In these circumstances, issues touching liberties that the Constitution safeguards, even for an alien 'person' would fairly be raised" if a court accepted the literal words of the statute.[95] The Court carefully construed the statute in such a way that it could avoid the question whether the statute violated Witkovich's constitutional rights.[96] Thus, in *Witkovich*, the Supreme Court, like earlier lower court cases, recognized that constitutional rights of deportable aliens continue after the determination that the alien is to be deported.

C. The Reasons for the Distinction

The most frequently cited reason for distinguishing between individuals within the United States and those outside the United States is that once people arrive here, they begin to develop ties to the community.[97] The reasoning is that the process that the country owes to an individual is a function of the thing we are taking from the person.[98] As an individual develops personal relationships, acquires new skills, adapts to American life, and accepts American ideals and goals, the interest in staying in the United States becomes much greater than the interest of coming to the United States for someone who has never been here.[99] Therefore, there should be more

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93 *See id.* at 196, 202.

94 *Id.* at 201 (citing Carlson v. Landon, 342 U.S. 524, 527-28 (1952)).

95 *Id.*

96 *See id.* at 201-02.

97 *See* T. Alexander Aleinikoff, *Aliens, Due Process, and "Community Ties": A Response to Martin*, 44 U. PITT. L. REV. 237, 244-45 (1983); *see also* Landon v. Plasencia, 459 U.S. 21, 32 (1982).

98 *See* Aleinikoff, *supra* note 97, at 244.

99 *See* GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW 132 (1996).

procedural safeguards for a person who has been living in the United States.[100] The rationale is consistent with the reasoning of the procedural due process test of *Mathews v. Eldridge* in which the private interest of the individual must be weighed against governmental interests.[101]

The community ties reasoning is also consistent with the Supreme Court's decisions in cases where it has upheld an alien's right to due process. In *Landon v. Placensia*, the Court held that Plasencia, a legal permanent resident, was entitled to due process, because "once an alien gains admission to our country and begins to develop the ties that go with permanent residence, [her] constitutional status changes accordingly."[102] Even in *Yamataya*, when first distinguishing between excludable and deportable aliens, the Court noted that aliens within the United States have become "a part of its population."[103]

A second reason to distinguish between deportable and excludable aliens is that there is a difference between preventing someone from acquiring a government benefit to which he has no right and depriving him of it once he has acquired it.[104] The courts recognize this and use the *Mathews v. Eldridge* test to safeguard acquired interests in government benefits.[105] Additionally, this test is flexible, allowing the court to take the importance of the benefit into account.[106]

An alien who is granted entry, to which he has no right,

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100 *See* Aleinikoff, *supra* note 97, at 245.

101 *See id.*; *see also* Mathews v. Eldridge, 424 U.S. 319, 334-35 (1976).

102 *Plasencia*, 459 U.S. at 32-33 (holding that a lawful permanent resident who was properly subject to exclusion proceedings under the then-current immigration statute was, nevertheless, entitled to due process) (citing Johnson v. Eisenstrager, 339 U.S. 763, 770 (1950)).

103 Yamataya v. Fisher, 189 U.S. 86, 101 (1903).

104 *See* Neuman, *supra* note 99, at 132.

105 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 17.8 (1999).

106 *See id.* § 17.9 (comparing the holdings of Goldberg v. Kelly, 397 U.S. 254 (1970), in which the Court required detailed hearings before subsistence welfare benefits, to Califano v. Yamasaki, 442 U.S. 682 (1979), in which the Court found that it was not necessary to have a hearing concerning a request for repayment of an overpayment).

begins to develop an interest in staying, which cannot be taken away without adhering to the safeguards of the procedural due process analysis.[107] The alien relies on the interest and is entitled to safeguards to prevent erroneous deprivation of it.[108]

Additionally, the alien's acquired right to due process survives the determination of deportability. Deportation proceedings, which are generally required to meet due process standards,[109] are conducted for the purpose of depriving the alien of her right to remain in the United States, one of the interests that the alien has acquired while in the United States.[110] They do not purport to deprive the alien of the right to due process, a separate interest acquired as a result of being a person within the jurisdiction of the United States.[111] They also do not purport to deprive the alien of the right to freedom from bodily restraint, other than for the limited purpose of effecting her removal. To deprive an alien of her freedom indefinitely is a different deprivation than depriving her of the right to remain in the United States and should not be taken away without the procedural safeguards provided for other significant and cognizable interests.

D. Indefinite Detention of Excludable Aliens

In 1953, the Supreme Court heard the case *Shaughnessy v. U.S. ex rel. Mezei*.[112] Ignatz Mezei, a Romanian national, had lived in the United States for twenty-five years. He left the United States in 1948 to visit his family in Romania, and, upon his return in 1950 he was detained at Ellis Island, on the

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107 *See* Aleinikoff, *supra* note 97, at 238.

108 *See id.* at 243. *see also* Kwong Hai Chew v. Colding, 344 U.S. 590, 596 (1953) ("It is well established that if an alien is a lawful permanent resident of the United States and remains physically present there, he is a person within the protection of the Fifth Amendment. He may not be deprived of his life, liberty or property without due process of law.").

109 *See Kwong Hai Chew*, 344 U.S. at 597.

110 *See* 8 U.S.C. § 1229a(c)(1)(A) (Supp. IV 1999) ("At the conclusion of the proceeding the immigration judge shall decide whether an alien is removable from the United States."); *id.* § 1229a(c)(3)(A) ("In the proceeding the Service has the burden of establishing . . . [that] the alien is deportable.").

111 *See id.*; U.S. CONST. amends. V, XIV, § 1.

112 345 U.S. 206 (1953).

strength of undisclosed information.[113] The Supreme Court found that he was an excludable alien, and therefore could not challenge the procedure of his exclusion hearing.[114] The Court explained that although

> [i]t is true that aliens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law . . . an alien on the threshold of initial entry stands on a different footing: "Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned."[115]

Mezei was detained on Ellis Island, and thus had actually entered United States territory. His treatment as a person outside of the United States for purposes of determining whether he enjoyed constitutional due process protections, is generally viewed as the beginning of the entry fiction doctrine.[116] Under this doctrine, a person who presented himself to immigration officials could be paroled into the United States without being considered to have entered the country for the purpose of constitutional due process protection. For the next three decades, though the Supreme Court had found that the prolonged detention of an excludable alien did not violate the Constitution, the INS did not detain many aliens upon arrival.[117] Instead, the INS preferred to use the entry fiction, paroling people into the country and determining their admissibility later.[118]

After 1980, the question of what process is due to excludable aliens within U.S. territory became far more important, at least in terms of the number of people affected by it. In 1980, some 120,000 Cubans arrived in the United States.[119] These Cubans,

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113 *See id.* at 208.

114 *See id.* at 215.

115 *Id.* at 212 (quoting United States *ex rel*. Knauff v. Shaughnessy, 338 U.S. 537, 544 (1950)).

116 *See* Barrera-Echavarria v. Rison, 44 F.3d 1441, 1450 (9th Cir. 1995).

117 *See* Taylor, *supra* note 7, at 1139-40.

118 *See id.* at 1100.

119 *See Barrera-Echavarria*, 44 F.3d at 1443.

some of them convicted criminals, were paroled into the United States under the entry fiction doctrine.[120] They remained, for the purpose of due process protection, at the border. In the following years, some of these Cubans, still technically excludable aliens, were arrested for offenses in the United States. After serving their time in American prisons, they were taken into INS custody, pending removal to Cuba.[121] Cuba refused to take them back and so they sat in detention for years.[122] Eventually their cases began reaching the circuit courts. In *Barrera-Echavarria v. Rison*, the Ninth Circuit held that the nine-year detention of an excludable alien was not unconstitutional, because he had "no constitutional right to immigration parole, and therefore, no right to be free from detention pending his deportation."[123] The court went on to say that "[n]oncitizens who are outside United States territories enjoy very limited protections under the United States Constitution," and found that the Fifth Amendment was not applicable to aliens outside the United States.[124] Similarly, in *Gisbert v. U.S. Attorney General*, the Fifth Circuit held that the continued detention of excludable aliens did not violate due process because the aliens had no liberty interest in being paroled.[125]

There continues to be a sharp debate about what protections are or should be afforded to excludable aliens.[126]

IV. THE STANDARD DUE PROCESS ANALYSIS FOR DETENTION

The inquiry for substantive due process begins with the

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120 *See id.*

121 *See* Taylor, *supra* note 7, at 1140-41.

122 *See id*.

123 44 F.3d at 1448.

124 *Id.* at 1450.

125 *See* 988 F.2d 1437, 1443 (5th Cir. 1993). It is unclear from the language of the decision whether the court meant "paroled into the country" or "paroled from detention."

126 *See, e.g.,* Weisselberg, *supra* note 68, at 1033 (asserting that excludable aliens should be afforded the same due process protections as any other person inside United States borders); Grable, *supra* note 27, at 823 (arguing that the "subsequent prosecution of any alien for the violation of an expedited removal order is unconstitutional"). Though this paper examines only the rights of deportable aliens, this is not meant to assert anything about the rights, or lack thereof, of excludable aliens.

determination of the right asserted.[127] If it is a fundamental liberty interest, the infringement on the right must be "narrowly tailored to serve a compelling state interest."[128] If, on the other hand, the right is not fundamental, the detention is judged under a lower standard; it must rationally "advance some legitimate government interest."[129]

In the detention context generally, once the right at issue has been defined, a court must first determine if detention is for the purpose of punishment. If it is, the person is entitled to constitutional due process protections.[130] If detention is for purposes other than punishment, it must be based on permissible regulatory goals.[131] If detention exceeds those goals, it is unconstitutional.

If a court finds that the interest with which the government is interfering is not a fundamental liberty interest and that its interference is not excessive, it does a procedural due process analysis. The procedural due process analysis is an attempt to ensure that when the government deprives an individual of something, that deprivation is done fairly.[132] For persons protected by the Due Process Clause of the Constitution, the analysis is the *Mathews v. Eldridge* test, balancing the private interest against the government's interest and the risk of erroneous deprivation.[133] For individuals not protected by the Due Process Clause, such as excludable aliens, the analysis appears to be limited to determining whether the process provided by statute was followed.[134]

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127 *See* Collins v. Harker Heights, 503 U.S. 115, 125 (1992).

128 Reno v. Flores, 507 U.S. 292, 301 (1993).

129 *Id.* at 305-06.

130 In *Wong Wing v. United States*, 163 U.S. 228, 241 (1896), the Court held that a law sentencing deportable aliens to hard labor before their deportation was unconstitutional because it punished the aliens without the due process protections of the Fifth Amendment.

131 *See* Schall v. Martin, 467 U.S. 253, 269 (1984).

132 *See* Rotunda & Nowak, *supra* note 105, § 17.7.

133 *See* 424 U.S. 319, 335 (1976).

134 *See Mezei*, 345 U.S. at 216.

V. EXIT FICTION THEORY

Traditionally, the distinction between deportable and excludable aliens has survived beyond the issuance of final orders of deportation or exclusion.[135] Deportable aliens have been able to challenge the means of enforcing deportation orders.[136] Also, in nearly every case in which an excludable alien with final orders of exclusion challenged indefinite detention pending removal and lost, the courts emphasized the distinction between excludable and deportable aliens, suggesting that the distinction remained after final orders were issued.[137]

However, several courts have recently found that the constitutional protection of the Fifth Amendment is reduced to that of an excludable alien after a resident alien has been ordered deported, accepting a novel legal theory sometimes described as the "exit fiction."[138] The theory is that once an alien has final administrative orders of deportation, she ceases to be a lawful resident, and therefore has no right to remain in the country.[139] As a person with no right to be in the country, she assimilates to the status of an excludable aliens with no right to enter the country.[140] Because the alien's status assimilates to that of an excludable alien, the person no longer has a right to remain in the United States and can be expelled according to

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135 *See* Kim Ho Ma v. Reno, 208 F.3d 815, 825-26 (9th Cir. 2000); *see also*, *supra*, text accompanying notes 80-91.

136 *See*, *e.g.*, Saksagansky v. Weedin, 53 F.2d 13, 16 (9th Cir. 1931) (holding that if the deportation order could not be effected within thirty days, the prisoner must be released from custody); Ross v. Wallace, 279 F. 401, 403 (2d Cir. 1922) (noting that a deportation order requires that transportation be obtained and deportation be effected within a reasonable time).

137 *See, e.g., Mezei*, 345 U.S. at 215-16; *Barrera-Echavarria*, 44 F.3d at 1448-49; *Gisbert*, 988 F.2d at 1445; Alvarez-Mendez v. Stock, 941 F.2d 956, 960-62 (9th Cir. 1991).

138 The government made a similar version of this argument a few years ago in Tran v. Caplinger, 847 F. Supp. 469, 476 (W.D. La. 1993). It argued the exit fiction in numerous immigration detention cases in 1999. *See*, *e.g.*, *Zadvydas*, 185 F.3d at 285; Phan v. Reno, 56 F. Supp. 2d 1149, 1154 (W.D. Wash. 1999).

139 *See Zadvydas*, 185 F.3d at 296.

140 *See*, *e.g.*, *Zadvydas*, 185 F.3d at 296-97 (noting that once the decision to deport has been made, there is little difference in the government's interest in deporting a resident alien and an excludable alien); Ho v. Greene, 204 F.3d 1045, 1059-60 (10th Cir. 2000) (concluding that after a final removal order has been entered, a formerly lawful resident alien's constitutional rights compare with those of an excludable alien).

whatever process Congress mandates.[141]

This theory affects both the substantive and the procedural due process analyses. As noted above, the substantive due process analysis requires that the right at issue be defined. If the right is a fundamental liberty interest, a court will generally find any infringement of it to be unconstitutional. Courts have defined the right at issue in immigration detention cases in two different ways: as a right to be free from detention[142] and as a right to enter or be at large in the United States.[143] By defining aliens who are subject to final orders of deportation as people who no longer have a right to be in the United States and equating them with people who have no right to enter the United States (excludable aliens), the theory bypasses the process of defining the right at issue. Rather, by defining the person as an alien without any right to be in the United States, these courts assume that the right at issue is the right to be in the United States, a right the alien lost in the deportation proceedings. This incidental defining of the asserted right lessens the likelihood of the right being found to be a fundamental liberty interest in the substantive due process analysis and increases the likelihood that the detention will not be found to be an unconstitutional deprivation of liberty.

In the procedural due process analysis, the exit fiction theory works in two ways. First, it may eliminate the due process analysis altogether. The Fifth Circuit found in *Zadvydas v. Underdown* that because excludable and deportable aliens have no right to be at large in the United States, and one of the groups, excludable aliens, has no constitutional due process rights, the second group, deportable aliens, also does not have a right to constitutional due process protection.[144] This is only a

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141 *See Zadvydas*, 185 F.3d at 297 (noting that detention of a deportable resident alien may be an acceptable means of achieving the ultimate goal of deportation); *Ho*, 204 F.3d at 1060 (holding that because the aliens had no liberty interest arising under the Constitution, the statutes authorize their continued, indefinite detention).

142 *See Barrera-Echavarria*, 44 F.3d at 1450 (defining the asserted right as freedom from immigration detention); *Phan*, 56 F. Supp. 2d at 1154 (defining the right as freedom from incarceration).

143 *See Mezei*, 345 U.S. at 216 (defining the asserted right as the right to enter); *Ho*, 204 F.3d at 1059 (defining the right to be at large in the United States).

144 *See Zadvydas*, 185 F.3d at 295-97.

necessary conclusion if either the two rights are actually the same right or if the two rights only occur together.[145] Nonetheless, if a court accepts this argument, it does not have to work through the procedural due process analysis at all. It need only determine whether the statutes and regulations about detention pending removal have been followed, as that is the only procedural due process to which excludable aliens and, by extension, deportable aliens are entitled.

If a court accepts that the right at issue is the right to be at large in the United States, but finds that the alien still has due process protection, this definition of the right can still influence the procedural due process analysis. The procedural due process analysis requires balancing the private interest against the risk of erroneous deprivation of that interest and the governmental interest, including the cost of providing extra safeguards.[146] If the private interest is defined as the right to be at large in the United States, this is a very slight interest for a person who has been ordered deported. The governmental interests in protecting the community, ensuring that the alien is present if and when removal becomes feasible, and in preserving sovereignty, will almost certainly outweigh the slim interest of the deportable alien in being at large in the United States.

VI. THE LEVEL OF SCRUTINY FOR IMMIGRATION DETENTION DECISIONS

This part of the Article examines several components of the exit fiction theory. One argument that has been made for deferential review of immigration detention cases is that Congress and the executive branch have broad powers over immigration and the judiciary should not be involved in immigration policies. A closely related argument is that immigration detention is a necessary, lesser power in the power to regulate immigration and it therefore gets the same deferential review as immigration. Finally, the definition of the

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145 The two rights have never been so closely linked, as demonstrated by the due process protections afforded resident aliens ordered deported. *See, e.g.*, *Saksagansky*, 53 F.2d at 16 (finding that, if deportation orders cannot be effected, a resident alien must be discharged from custody); *Wolck*, 58 F.2d at 931; *Ross*, 279 F. at 403.

146 *See* Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

liberty interest of detained aliens is also used to lower the level of scrutiny under the exit fiction. Each of these aspects of the theory suggest that the decision to detain aliens whose removal is not feasible should be subject only to a deferential judicial review to assure that the decisions are rationally related to a legitimate interest. However, the arguments are unpersuasive.

A. Plenary Power

The courts that have found that the indefinite detention of deportable aliens is not unconstitutional have noted that immigration detention, as an area of immigration law, should only be subject to deferential review by the courts, under the plenary power doctrine.[147] The rationale of the plenary power doctrine is that the political branches should have the power to regulate and control immigration.[148]

Conditions of immigration detention have never been left entirely to the political branches however. More than a century ago, in *Wong Wing v. United States*, the Supreme Court struck down a law that imposed a year of hard labor on Chinese aliens before deporting them.[149] The Court did not defer to the political branches on the treatment of individuals between the deportation proceedings and the physical removal of the alien from the United States. The Eleventh Circuit interpreted *Wong Wing* as allowing aliens to "raise constitutional challenges to deprivations of liberty or property outside the context of entry or admission, when the plenary authority of the political branches is not implicated."[150]

A decision to release or detain an individual pending removal is a more domestic issue than actual deportation or exclusion decisions, and thus the plenary power doctrine is less compelling. The decision to return a person to her country of origin necessarily involves two countries. It is an expression by the United States of its ability to determine who is in its

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147 *See Zadvydas*, 185 F.3d at 288-90.

148 *See* INS v. Aguirre-Aguirre, 526 U.S. 415, 425 (1999).

149 *See* 163 U.S. 228, 237 (1896). *Wong Wing* was decided before the distinction between deportable and excludable aliens was established in the *Japanese Immigrant Case*, 189 U.S. 86, 101 (1903).

150 Jean v. Nelson, 727 F.2d 957, 972 (11th Cir. 1984).

territory and who is not, a power that is central to sovereignty. However, the decision to detain or release an alien pending removal only determines where in the United States the person awaits removal.

The Supreme Court has noted that judicial deference in the immigration context is particularly "appropriate . . . where officials 'exercise especially sensitive political functions that implicate questions of foreign relations.'"[151] However, there is no obvious reason why the decision to detain or release an alien pending removal should affect foreign relations at all. The countries that refuse to repatriate their nationals are not doing it out of concern for their nationals' well-being. Rather, their concern appears to be that they do not want the individuals returned to them.[152] The fact of detention does not, therefore, affect negotiations or relations with those nations.

Another government interest protected by the plenary power doctrine is the sovereignty of the United States. In a case involving excludable Cuban nationals, the Fifth Circuit noted that "[t]he United States cannot be forced to violate its national sovereignty in order to parole these aliens merely because Cuba is dragging its feet on repatriating them."[153] But this is not a real concern in the context of the detention of deportable aliens. The

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151 *Aguirre-Aguirre*, 526 U.S. at 425 (quoting INS v. Abudu, 485 U.S. 94, 110 (1988). The alien who brought this case was challenging his deportation because he would be subject to persecution in his country of origin, Guatemala. Deportation is withheld for individuals facing persecution, unless they have committed a "serious nonpolitical crime," a category of crime that includes political crimes that are found to be out of proportion to the political purpose. The government argued, and the court agreed, that he was not eligible for withholding of deportation because his activities in a student organizations included illegal protests against the Guatemalan government were disproportional to the problems against which they were protesting. The nature of this case was political. A finding that his protest activities were proportional would have been a judgment of internal Guatemalan policies. This case, like most asylum cases, implicated foreign relations.

152 *See, e.g.*, Sok v. INS, 67 F. Supp. 2d 1166, 1167 (E.D. Cal. 1999) (noting that "[t]he Cambodian Government has refused the INS's request for travel documents for petitioner. Petitioner has been in INS custody awaiting repatriation for over three years."); Philip P. Pan, *INS Shifts Policy on Criminal Detainees; Agency Releasing Some Immigrants*, WASH. POST, Aug. 9, 1999, at A1 (noting that Cuba, Vietnam, Cambodia and Laos do not accept criminal deportees).

153 Gisbert v. Attorney Gen., 988 F.2d 1437, 1447 (5th Cir. 1993), *modified by* 997 F.2d 1122 (5th Cir. 1993).

problem involved is a practical one, not one of sovereignty. The United States, though it has the sovereign authority to admit or expel whomever it decides, does not have the authority to make other nations accept its decisions. Claiming that this is an issue of the U.S. authority to regulate immigration misses the point. Indefinite detention is not a policy goal of the United States.[154] The policy goal is to return them to their countries of origin. The aliens in detention after the 90-day removal period are symptoms of a failure, not part of a policy to regulate.

Plenary power is intended to protect the authority of the political branches in their relations with foreign nations. When the government makes decisions about the treatment of aliens within the United States, particularly aliens who have been rejected by their own countries of origin, the rationale behind the plenary power doctrine is less compelling. In the context of detention decisions, as opposed to deportation decisions, the plenary power doctrine should not be available to the government as a tool for avoiding judicial review.

B. Greater power/lesser power argument

The greater power/lesser power argument states that the greater power—the power to regulate immigration—includes the necessary lesser power which in this case is the power to detain aliens pending removal.[155] Because the lesser power is included in the greater power, the exercise of the lesser power should not be carefully examined by courts, or so the argument goes.[156] It is hardly certain that the greater power/lesser power argument supports executive detention in the immigration context, even if one generally accepts that greater powers include lesser powers.

1. Which is the greater power?

It is not clear which power actually is the greater power.

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154 *Cf.* Plyler v. Doe, 457 U.S. 202, 226 (1981) (noting that there was also no national policy served by denying education to the children of illegal immigrants).

155 *See* Zadvydas v. Underdown, 185 F.3d 279, 289-90, 296-97 (5th Cir. 1999), *cert granted, 121 S. Ct. 297* (2000).

156 *See* Brooks R. Fudenberg, *Unconstitutional Conditions and Greater Powers: A Separability Approach*, 43 UCLA L. REV. 371, 373 (1995) [hereinafter Fudenberg].

Courts that have approved indefinite detention of deportable aliens have noted that the power to detain is a necessary component of the power to regulate immigration.[157] This does not necessarily show that detention is the lesser power, however, as there are different ways to determine the relative importance of each power.

One way of defining which power is greater is by looking at the interests affected by each power.[158] Immigration to the United States is a privilege that can be denied entirely without implicating any constitutional issues; no person outside the United States has a right to immigrate.[159] The detention of a person in the United States does, on the other hand, raise constitutional concerns. At the very least, the Suspension Clause forbids the government from denying any detainee the right to petition for habeas corpus relief on a claim that the detention is unlawful.[160] Aliens, as well as citizens, have enjoyed the right to challenge the legality of executive detention since well before the Constitution was drafted.[161] The Framers' concern about detention is also evident in the Fifth Amendment right to liberty.[162] Thus, while the government's power over immigration does not implicate constitutional concerns, the power to detain— for immigration purposes or otherwise—does. Arguably, this suggests that the power to detain is the greater power.

Another way of evaluating the importance of the powers is to look at the intrusiveness of each power.[163] The denial of the privilege to immigrate to the United States results in the aliens

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157 *See Zadvydas*, 185 F.3d at 289–90.

158 *See* Michael Herz, *Justice Byron White and the Argument that the Greater Includes the Lesser*, 1994 BYU L. REV. 227, 247-48 (1994).

159 *See Zadvydas*, 185 F.3d at 294 (noting that "[a]n attempt to enter the United States is a request for a privilege rather than an assertion of right."); Knauff v. Shaughnessy, 338 U.S. 537, 544 (1950) (stating that "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.").

160 *See* Gerald L Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 COLUM. L. REV. 961, 1020 (1998) [hereinafter Neuman, *Habeas Corpus*).

161 *See id*. at 989-90.

162 U.S. Const. amend. V.

163 *See* Fudenberg, *supra* note 156, at 385.

remaining where they are. Continued immigration detention in cases where removal is not feasible results in the aliens remaining in prison, potentially for the rest of their lives. In the former case, a person is free to move around the world, except for the United States. In the second case, a person is only free to move around a prison cell. The intrusiveness of the power to detain appears to be greater than that of the power to deny permission to immigrate.

Another question regarding the hierarchy of the governmental powers is whether it makes sense to describe one as greater and one as lesser when one is not necessarily a subset of the other.[164] While it may be true that the power to detain is necessary to implement the power to deport, the government has the power to detain in other contexts as well. The government can detain dangerous, mentally ill individuals, and it can impose quarantines for public health reasons.[165] It can detain individuals suspected of committing crimes pending trial.[166] The power to detain is a distinct governmental power, separate from the power to deport or exclude aliens. As such, the description of one power as greater than the other may not be appropriate.

2. Separability of powers

Even if immigration detention is a lesser power, subordinate to the power over immigration, it may be that the government cannot exercise the lesser power separately from the greater power. The central thesis of a recent article on the greater power/lesser power debate is that there are situations in which a lesser power included in a greater power cannot be separated

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164 *See* Herz, *supra* note 158, at 242.

165 *See* RONALD D. ROTUNDA & JOHN E. NOWAK, *supra* note 105, at § 17.4 (noting that "an adult cannot be committed for a treatment of 'mental illness' unless there has been a fair procedure to determine that the person is a danger to himself or others."); Compaigne Francaise de Navigation a Vapeur v. Lousiana State Bd. Of Health, 186 U.S. 380, 387 (1902) (noting "the power of the states to enact and enforce quarantine laws for the safety and the protection of the health of their inhabitants . . . is beyond question.").

166 *See* ROTUNDA & NOWAK § 17.4, at 30 n.8 (noting that the Supreme Court has held that the Bail Reform Act, which allows for the pre-trial detention of defendants, does not violate the Eight Amendment or the due process clause of the Fifth Amendment).

from the greater power.[167] For example, the government can draft a man into the army. If a man is drafted, the government has the power to require him to cut his hair. However without drafting him, the government cannot exercise this obviously lesser power.[168] According to this argument, the level of judicial review of the exercise of the lesser power separately from the greater power should depend, in part, on the nature of the lesser power. When the government exercises a lesser power that may, depending on the situation, violate the Constitution, the courts should use a heightened level of scrutiny, allowing the government's action only if the use of the power is narrowly tailored.[169]

Under this argument, in the context of immigration detention, the government has a power to detain aliens derived from the power to deport them. Because detention would be unconstitutional in many situations, it must be narrowly tailored to the government's interest. The interest in immigration detention lies in the ability to physically remove the alien when deportation becomes possible. However, in situations where the country of origin does not accept its nationals, the U.S. government is unable to exercise its greater power, the power to deport. Thus, the lesser power, the power to detain, is separated from the greater power.[170] At the same time, it becomes difficult to argue that the power to detain is narrowly tailored to its purpose, as these people who are detained for the purpose of removal are not likely to be removed.

C. Defining the right

The first step in the substantive due process analysis is the "careful description of the asserted right."[171] Defining the right

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167 Fudenberg, *supra* note 156, at 381.

168 *See id.* at 460.

169 *See id.* at 475-76 (using as an example of a narrowly tailored exercise of a lesser power the "requirement that ex-CIA employees submit to government censors any writing about the Agency.").

170 Kim Ho Ma v. Reno, 208 F.3d 815, 828 (9th Cir. 2000), cert. granted, 121 S. Ct. 297 (2000) (rejecting the argument that the intended removal of an alien justified his continued, indefinite detention).

171 Reno v. Flores, 507 U.S. 292, 302 (1993).

at issue is one of the most important steps in the due process analysis, as the nature of the right determines the appropriate standard of scrutiny.[172] This subsection argues that the right at issue is the right to be free from unlawful detention, a fundamental liberty interest. It then examines the ways in which the courts that accept the exit fiction argument have defined these rights. Finally, it explains the definition found by the majority of courts, which find it to be the right to freedom from detention.

1. The asserted right – freedom from unlawful detention

The aliens in the recent immigration detention cases claim to be challenging their detention, not their orders of deportation.[173] While their claims may not be conclusive of the right that is actually being asserted, it is a reasonable starting place for an analysis of the right. Earlier cases give guidance in how to interpret the right asserted when an alien challenges immigration detention and other means of enforcement of deportation or exclusion orders. Under previous immigration laws, aliens were able to challenge both deportation or exclusion orders and immigration detention or other enforcement issues.[174]

Federal courts analyzed two different rights. They reviewed the orders of deportation or exclusion to determine whether the alien had a right to remain in the United States.[175] The courts

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172 *See id* at 301-03 (stating that if a right is considered "fundamental," the government is forbidden to infringe upon it "unless the infringment is narrowly tailored to serve a compelling state interest.").

173 *See, e.g.*, Zadvydas v. Underdown, 185 F.3d 279, 283-84 (5th Cir. 1999) (noting that petitioner "admitted his past criminal history [and] conceded deportability." Nevertheless, he "filed the instant petition for a writ of habeas corpus . . . claiming that his continued detention violated the Eighth Amendment, the due process clause, and international law.").

174 *See* David Cole, *Jurisdiction and Liberty: Habeas Corpus and Due Process as Limits on Congress's Control of Federal Jurisdiction*, 86 GEO. L. J. 2841, 2486 (1998) (noting that before 1996, "federal courts have found numerous class action challenges to the INS's practices and procedures to be cognizable in district court. . . .").

175 *See, e.g.*, Shaughnessy v. Mezei, 345 U.S. 206, 214 (1953); Ross v. Wallis, 279 F. 401, 403 (2d Cir. 1922); Wolck v. Weedin, 58 F. 2d 928, 929-30 (9th Cir. 1932); Saksagansky v. Weedin, 53 F.2d 13, 16 (9th Cir. 1931).

also reviewed collateral issues in habeas corpus proceedings.[176] Thus, the courts examined two rights: the right to be in the United States, as asserted by a challenge to deportation or exclusion procedures, and the right to be free from unlawful detention or other unlawful means of enforcement, as asserted by the challenges to the way removal was carried out.

Under IIRIRA, habeas corpus review is the only possible review of detention.[177] The core of habeas review is the right to challenge executive detention.[178] If the court could not review the legality of the detention itself, or if it were required to be deferential to the decisions of the INS and the BIA, there would be no review outside of the executive branch.[179] This would strip habeas corpus review of its central purpose of reviewing executive detention.

If Congress enacts a law that allows the executive branch to detain individuals and does not provide any outside review of such detention, it appears likely that such a law would violate the Suspension Clause.[180] As Henry Hart explained nearly half a century ago, if the government hurts someone and Congress strips courts of jurisdiction to review the hurtful practice, a court would have a duty to invalidate the jurisdiction-stripping provision and examine the government's practice.[181] In order to avoid finding that Congress unconstitutionally suspended habeas corpus review for immigration detainees, the statute

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176 *See, e.g.*, *Mezei*, 345 U.S. at 215; *Ross*, 279 F. at 403; *Wolck*, 58 F.2d at 930-31; *Saksagansky*, 53 F.2d at 16.

177 8 U.S.C. § 1252 (2000).

178 Cole, *supra* note 174, at 2495 (citing Swain v. Pressley, 430 U.S. 372, 386 (1977) (Burger, C.J.), and Brown v. Allen, 344 U.S. 443, 533 (1953) (Jackson, J.)).

179 *See* Neuman, *Habeas Corpus*, *supra* note 160, at 964-68 (discussing the Antiterrorism and Effective Death Penalty Act [AEDPA] and the Illegal Immigration Reform and Immigrant Responsibility Acts [IIRIRA], which limit habeas corpus review of certain deportation orders, giving finality to the adjudications of an executive agency).

180 *See id.* at 1058-59 (noting that "[t]o the extent that AEDPA or IIRIRA cannot be construed as preserving constitutionally required habeas inquiry, the offending provisions should be invalidated and severed.").

181 *See* Henry Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1387 (1953) (stating that "if the court finds that what is being done is invalid, its duty is simply to declare the jurisdictional limitation invalid also, and then proceed under the general grant of jurisdiction.").

should be construed to allow for judicial review of detention.[182] That this is the appropriate response to jurisdiction stripping statutes is suggested by the fact that no statutes have ever been construed by the Supreme Court to preclude judicial review of executive detention.[183]

The centrality of review of executive detention and the writ of habeas corpus suggests that the right asserted in requests for habeas corpus review of immigration detention cases is the right to be free from unlawful detention. This right, described in various terms, has always been considered a fundamental liberty interest.[184]

2. The definition of the right under the exit fiction theory

According to the Fifth and Tenth Circuits, once a person has been ordered deported, there is no right to be released from detention if the deportation cannot be effectuated. The person only enjoyed constitutional protections because of her legal status as a resident alien; once that status has changed, the rights and protections also change.[185] According to these courts, an alien under final orders of deportation is in the same situation as aliens who have "sought but been denied initial entry into this country and who [are] subject to indeterminate detention . . . [T]hey have no constitutional rights regarding their application for admission."[186]

By defining the right that is being asserted as the "right to

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182 *See* Cole, *supra* note 174, at 2507 (noting that "the courts have always interpreted statutory jurisdictions to preserve judicial review where its preclusion would raise serious constitutional questions.").

183 *See id.* at 2499.

184 *See, e.g.*, Foucha v. Louisiana, 504 U.S. 71, 80 (1992) (recognizing the right to freedom from bodily restraint as a fundamental liberty interest, "at the core of the liberty protected by the Due Process Clause from arbitrary government action.").

185 *See* Duy Dac Ho v. Greene, 204 F.3d 1045, 1059 (10th Cir. 2000) (observing that "a resident alien is entitled to a greater procedural due process rights than those accorded excludable aliens . . . once a removal order has become final and the only act remaining to be carried out is the actual expulsion of the alien, no distinction exists between the constitutional rights of former resident aliens and those of excludable aliens.").

186 *Id.* at 1058-59

be at large in the United States,"[187] the government claims that the right at issue is not a fundamental right. Because it is not a fundamental right, detention by the INS is judged under the easily met "unexacting" rationality standard.[188]

In *Le Dinh Tran v. Caplinger*, the District Court for the Eastern District of Louisiana explained that the "liberty interest asserted must be carefully described," and noted that "[i]t may be that a legal alien has a fundamental right not to be detained as the result of 'arbitrary governmental action.'"[189] However, the court held that this right would not be implicated in a complaint of prolonged, potentially indefinite detention pending deportation, and thus no fundamental rights were implicated.[190]

In *Zadvydas,* the Fifth Circuit Court did not even determine what right Zadvydas was asserting, other than the right not to be punished without due process of law.[191] By defining the right at issue so dismissively, these courts have put the right into the category of non-fundamental rights. As a result, the standard of scrutiny for the government action was only whether it was rationally related to a legitimate government purpose, a standard that few government actions fail to meet. Following the reasoning in *Zadvydas*, the Tenth Circuit stated that the detained aliens in *Duy Dac Ho v. Greene* "fundamentally mischaracterize[d] the true nature of their right" when they claimed that the right they were asserting was the right to be free.[192]

3. The right of freedom from detention – Kim Ho Ma, Phan*,* Nguyen*,* Ngo *and* Barrera

In *Kim Ho Ma v. Reno*, the Ninth Circuit did not actually work through the due process analysis, as it construed the statute to avoid the constitutional question altogether. However, the court explicitly rejected the petitioner's argument, the right

187 *Id.* at 1058.

188 Reno v. Flores, 507 U.S 292, 306 (1993).

189 Le Dinh Tran v. Caplinger, 847 F. Supp. 469, 474 (E.D. La. 1993).

190 *See id*.

191 *See* Zadvydas v. Underdown, 185 F.3d 279, 289 (5th Cir. 1999)), *cert granted*, 69 U.S.L.W. 3257 (2000).

192 Duy Dac Ho v. Greene, 204 F.3d 1045, 1058 (10th Cir. 2000).

to be in the United States.[193] In *Binh Phan v. Reno*, the District Court for the Western District of Washington rejected the argument that the asserted right was the "right to be released into the United States pending removal."[194] Instead, that court found that the issue is simply the right to be at liberty, to be "free from incarceration," and that this is a fundamental liberty interest.[195] Because the right at issue is a fundamental liberty interest, the court judged governmental action by a strict scrutiny standard, requiring detention to be "narrowly tailored to serve a compelling government interest" if it is to be found to be constitutional.[196]

A more recent decision from the Southern District of California, *Hoang Manh Nguyen v. Fasano*, reiterated all that the *Phan* court had found, and rejected the *Zadvydas* court's reasoning.[197] Similarly, a district court in Colorado (before the *Ho* decision) emphasized the significance of detention, citing the Supreme Court's recognition that "[f]reedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action."[198]

Even in two cases involving the detention of excludable aliens, *Barrera* and *Ngo*, the Ninth and the Third Circuits found that the right at issue was the "right to be free from detention" or the "right to liberty."[199]

The definition of the right as the right to be free from detention (or some variant of it) thus appears to be both the predominant definition and the appropriate one. As this is a fundamental liberty interest, courts should subject detention

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193 *See* Kim Ho Ma v. Reno, 208 F.3d 815, 825 (9th Cir. 2000) *cert. granted*, 121 S. Ct. 297 (2000) (noting that "[petitioner] does not seek to 'force us to admit him.'").

194 Binh Phan v. Reno, 56 F. Supp. 2d 1149, 1154 (W.D. Wash. 1999) *cert. granted sub nom.* Reno v. Kim Ho Ma, 121 S. Ct. 297 (2000).

195 *Id.*

196 *Id.* at 1154-55 (citing Reno v. Flores, 507 U.S. 292, 301 (1993)).

197 *See* Hoang Manh Nguyen v. Fasano, 84 F. Supp. 2d 1099, 1109-10 (S.D. Cal. 2000).

198 Thien Van Vo v. Greene, 63 F. Supp. 2d 1278, 1284 (1999) (citing Foucha v. Louisiana, 504 U.S. 71 (1992)).

199 Barrera-Echavarria v. Rison, 44 F.3d 1441, 1448 (9th Cir. 1995); Chi Thon Ngo v. INS, 192 F.3d 390, 398 (3d Cir. 1999).

decisions to strict judicial review.[200]

VII. DEFINING THE GOVERNMENT INTERESTS

The government has three general interests it asserts as justification for immigration detention. These interests are assuring that the alien will be available for removal, if and when removal becomes possible, protecting the community from potentially dangerous aliens, and maintaining control over U.S. immigration. The three interests, examined in this section, are the interests against which detention is compared to determine whether it is excessive in the substantive due process analysis, and, are also the government interests balanced against the private interest in the procedural due process analysis.

A. Ensuring aliens' availability for removal

One of the driving concerns of Congress in drafting the immigration reform was that the INS should be more effective in actually removing deportable individuals.[201]

It is certainly true that aliens who are in custody are available to the INS if and when removal becomes feasible. However, detaining criminal aliens pending removal, after removal has been shown not to be practicable, is both under-inclusive and over-inclusive.

The detention is under-inclusive in that the concern of the immigration reform statute is to remove aliens who are deportable or excludable, not merely the aliens convicted of the enumerated crimes. In drafting the detention provisions of the statute, Congress relied on a Department of Justice study that did not distinguish between criminal and non-criminal aliens. Rather, the Justice Department study showed that 89% of all non-detained aliens subject to a final order of deportation failed

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200 *See, e.g.*, Plyler v. Doe, 457 U.S. 202, 216-17 (1982) (stating "we have treated as presumptively invidious those classifications that . . . impinge upon the exercise of a 'fundamental right.'").

201 *See Committee for Governmental Affairs Report: Criminal Aliens in the United States*, S. REP. NO. 104-48, at 1-2 (1995); *see also Removal of Criminal Aliens and Illegal Aliens: Hearing Before the Subcommittee on Immigration and Claims of the House Judiciary Committee*, 104th Cong. (1996).

to report for deportation.[202] There is no information available showing whether criminal aliens are more or less likely to report for deportation. If the purpose of detention is to ensure the removal of aliens, it would appear that the INS should be detaining all aliens subject to final orders of deportation, or finding some alternative means of ensuring their availability.

The detention provision is over-inclusive in that it allows for the detention of persons who are unlikely to flee. Because the statute does not require individualized bond hearings for aliens who have been found to be deportable, there is no opportunity for anyone outside the INS or the Board of Immigration Appeals to determine whether an individual is actually likely to flee. Such determinations are normally based, among other things, on an individual's ties to the community and what incentive the person has to flee. Aliens whose governments do not accept them back are quite possibly less of a flight risk than aliens for whom removal is a more real possibility. If, for example, a Laotian knows that Laos does not receive Laotians deported from the United States and that the only power the INS has is to deport her to Laos, then that alien has no reason to hide from the INS.[203]

B. Protecting the community

One of the purposes of detaining potentially dangerous aliens pending removal is to protect the community.[204] However, the situations in which the Supreme Court has allowed for detention of potentially dangerous individuals are quite different than the indefinite detention of aliens.

There are two important distinctions between the two leading cases in which the Supreme Court has allowed

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202 Immigration and Naturalization Service and Executive Office for Immigration Review, 62 Fed. Reg. 48183 (Sept. 15, 1997) (to be codified at 8 C.F.R. pts. 3 & 236).

203 This leaves an issue of how to effectuate the deportation, if and when relations with governments that are reluctant to receive their nationals change. However, this is a problem that needs to be addressed for all deportations. Currently, aliens are given 72 hours notice that they are to report for deportation, a period that INS officials refer to as "run notice." COMM. ON GOVERNMENTAL AFFAIRS, CRIMINAL ALIENS IN THE UNITED STATES, S. REP. NO. 104-48, at 3 (1995).

204 *See Ho*, 204 F.3d at 1056–57.

preventive detention, *Carlson v. Landon* and *United States v. Salerno*, and immigration detention cases.[205] The first is that *Carlson* and *Salerno* both allowed detention without bail for a limited period of time. The second is that both cases allowed detention based on risk of dangerousness of a narrow class of particularly dangerous individuals.

The aliens in *Carlson* were challenging their detention without bail pending a determination of deportability.[206] Even this is a limited period, the length of which is determined by U.S. officials. To decide the constitutionality of this limited period of detention without bail, the Court focused on the individualized nature of the hearings provided to protect the aliens' liberty interests.[207] The constitutionality of detention pending removal at some unknown time in the future is another question.

In *Salerno*, the Court also found that an individual could be detained without bail due to his dangerousness.[208] However, like *Carlson*, the case does not provide support for the constitutionality of indefinite detention, but only for detention without bail for a limited period of time.[209] Salerno challenged the constitutionality of the Bail Reform Act, after a judge refused to set pretrial bond for him.[210] When the judge denied him bond, the worst that could happen without the benefit of a judicial trial was that he could be detained for some limited period of time. The majority opinion quite clearly did not lend support to indefinite detention, explaining that "the maximum length of pretrial detention is limited by the stringent time limitations of the Speedy Trial Act."[211]

The second distinction between *Carlson* and *Salerno* and the immigration detention cases is that the two Supreme Court cases only allow for the detention of particularly dangerous

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205 *See* Carlson v. Landon, 342 U.S. 524, 541 (1952); United States v. Salerno, 481 U.S. 739, 748 (1987).

206 *Carlson*, 342 U.S. at 526–28.

207 *See id.* at 543–44.

208 *Salerno*, 481 U.S. at 748.

209 *See id.* at 747.

210 *Id.* at 739.

211 *Id.* at 747.

individuals. In *Carlson*, the Court allowed the detention of aliens believed to be members of an organization that sought to overthrow the U.S. government through violence. In *Salerno*, the Court listed the restriction of the Bail Reform Act to only the "most serious of crimes . . . crimes of violence, offenses for which the sentence is life imprisonment or death, serious drug offenses, or certain repeat offenders" as one of the reasons that the Act did not violate the Due Process Clause.[212] Neither of these decisions supports the proposition that all dangerous or potentially dangerous individuals can be detained indefinitely because of their dangerousness.

IIRIRA grants the INS the authority to deny bail for an alien convicted of a crime for which the potential sentence is one year or more, any drug offenses, and two or more crimes of moral turpitude.[213] Individuals have been detained under IIRIRA as a result of convictions for removing a parking boot from a car, stealing a carton of cigarettes and bouncing checks.[214] Others have been detained as a result of convictions where the trial court did not find it necessary to incarcerate the individual for even a day.[215] The level of threat they pose to the community is qualitatively different than the threat posed by someone who has recently committed a crime punishable by life imprisonment or death.

C. Maintaining U.S. sovereignty

The last governmental interest in detaining aliens pending removal is the need to maintain control over immigration policies.[216] However, the distinction between excludable and deportable is important here, for the simple reason that the distinction is the result of the screening process, a process designed to control entry into the country.

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212 *Id.*

213 Immigration and Nationality Act, 8 U.S.C.A. § 1231(a)(6) (1999) (referring to 8 U.S.C. § 1227(a)(2) (1999) which lists crimes that subject aliens to deportation).

214 Pan, *supra* note 152 at A1.

215 *See generally* Sivongxay v. Reno, 56 F. Supp. 2d 1167 (W.D. Wash. 1999), *cert. granted sub nom*. Reno v. Kim Ho Ma, 121 S. Ct. 297 (2000).

216 *See* Jean v. Nelson, 727 F.2d 957, 975 (11th Cir. 1984).

In *Jean v. Nelson*,[217] an Eleventh Circuit case brought by an excludable alien from Haiti, the court explained that allowing the alien to be released from custody "would ultimately result in our losing control over our borders. A foreign leader could eventually compel [the United States] to grant physical admission via parole to any aliens he wished by the simple expedient of sending them here and then refusing to take them back."[218] Following the same reasoning, the Ninth Circuit in *Barrera* expressed concern that "[a] judicial decision requiring that excludable aliens be released into American society when neither their countries of origin nor any third country will admit them might encourage the sort of intransigence Cuba has exhibited in the negotiations over the Mariel refugees."[219]

However, the distinction between excludable and deportable is important for this very reason. Before being admitted, an arriving alien is screened by immigration officials.[220] At that stage, the INS exercises control over who may enter the United States. In order to deal with large numbers of arriving immigrants, the courts have allowed for the legal fiction of paroling someone into the United States, pending a decision to allow them to legally enter.[221] The importance of the screening process and the ability to determine whom to admit and whom to exclude, as a part of U.S. foreign relations, would be hard to deny after the arrival of the Mariel Cubans. Fidel Castro did send some less than desirable individuals to our shores and then refused to take them back, compelling the United States to allow them to stay.[222] However, the situation of the Mariel Cubans highlights the difference between excludable and deportable aliens and clarifies the problem with indefinite detention of admitted and subsequently deported aliens.

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217 727 F.2d 957 (11th Cir. 1984).

218 *Id.* at 975.

219 Barrera-Echavarria v. Rison, 44 F.3d 1441, 1448 (9th Cir. 1995) (en banc).

220 *Enforcement of Federal Laws and the Use of Federal Funds in the Northern Mariana Islands: Statement Before the House Comm. on Resources*, 106th Cong. (1999) (statement of Nicholas M. Gess, Associate Deputy Attorney General).

221 *Barrera-Echavarria*, 44 F.3d at 1450, (citing Gisbert v. U.S. Attorney Gen., 988 F.2d 1437, 1440 (5th Cir. 1993), *amended by* 997 F.2d 1122 (5th Cir. 1993)).

222 *See Caught on the Rocks*, NEWS & OBSERVER (Raleigh, N.C.), Dec. 21, 1999 at A16.

The United States has a mechanism for dealing with the national security concern that foreign governments will destroy our control over our borders by sending their nationals to the United States and refusing to take them back. This mechanism is the entry fiction, and it was developed to address security issues at U.S. borders. In *Mezei*, the Supreme Court recognized that a person at our border is "no more ours than [his national government's]."[223] The Court discussed at some length the status of Mezei as an excludable rather than a deportable alien and created the entry fiction by stating that although he was in U.S. custody, he had not yet entered the United States.[224] The Court went on to explain that the determination that he had not yet entered meant that he could be detained without the benefit of due process protections.[225]

The Mariel Cubans present a worst case scenario. While the Cold War was in full swing, Cuba sent 125,000 individuals, including some convicts and mentally ill individuals, to the United States and refused to take them back. However, the entry fiction theory proved effective at dealing with this problem. The Mariel Cubans were not legally admitted.[226] They were paroled into the United States, retaining their status as excludable aliens.[227] The few Mariel Cubans who have had problems with the law have been taken into INS custody, gone through exclusion hearings, and await removal.[228] The vast majority have not had problems with the law and have remained at large in the country, presumably contributing to their communities. No court has ever accepted the idea that a foreign government could undermine U.S. immigration policies by sending many of its nationals who could meet our admission criteria to our shores and then refusing to allow their return if they committed a crime in the United States. This would be an extremely tenuous claim. The United States has the power to

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223 Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 216 (1953).

224 *See id.* at 215.

225 *Id.* at 215–16.

226 *See* William G. Belden, *Paradise Lost*: *The Continuing Plight of the Excludable Mariel Cubans*, 5 KAN. J.L. & PUB. POL'Y 181, 182 (1996).

227 *Id*.

228 *Id*.

cut off this process, and exercises it freely, as evidenced by the case of the Mariel Cubans. An individual who has been admitted has gone through an individualized process during which the INS inspects their past, their reasons for coming to the United States, and their prospects for their future in this country.

VIII. PROPOSED DUE PROCESS ANALYSIS FOR DEPORTABLE ALIENS

This section works through the appropriate due process analysis in the context of indefinite detention of deportable aliens. The substantive due process analysis suggests that indefinite detention is an unconstitutional infringement on the right to liberty. Even if one reaches the procedural due process analysis, there are still significant reasons to find that the deprivation of liberty is being carried out unconstitutionally.

A. Substantive due process analysis

As noted above, the first step of the substantive due process analysis is to define the right at issue, in order to determine whether it is a fundamental liberty interest. The right asserted in the context of indefinite immigration detention is the right to be free from detention. The "[f]reedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause . . ."[229] Thus, the right asserted is a fundamental liberty interest and any infringement it faces a heightened level of scrutiny, requiring the government to show that its actions are narrowly tailored to serve a compelling interest.

The plenary authority, weakened as it is in this essentially domestic realm, should not outweigh the court's responsibility to review government actions that affect fundamental liberty interests.[230]

In detention cases, a court must "consider the

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229 Foucha v. Louisiana, 504 U.S. 71, 80 (1992).

230 *See supra* notes 130–135 and accompanying text. *See also* Phan v. Reno, 56 F. Supp. 2d 1149, 1155 (W.D. Wash. 1999) (en banc), *aff'd sub nom. Kim Ho Ma v. Reno, 208 F.3d 815 (9th Cir. 2000)* (noting that the plenary power doctrine has less force in determining whether an individual should be released on bond while pending deportation than it has in deciding who should or should not be deported).

constitutionality of the detention in light of its purpose . . . "[231] It must also determine "whether the detention is based upon 'permissible' regulatory goals of the government and, if it is, whether the detention is excessive in relation to those goals."[232] The government argues that it had three regulatory interests: ensuring the removal of aliens ordered deported, protecting the community from dangerous aliens, and preventing aliens from fleeing prior to removal. Courts have recognized that all three are legitimate in some circumstances.[233] However, the first of these goals is the primary objective of the INS, and the other two, though legitimate, are only legitimate INS goals insofar as they are derived from the power to deport.[234]

The third aspect of the substantive due process analysis for immigration detention is the purpose for detention, and if that purpose is not punishment, whether it is excessive.[235] Deportation is not considered to be punishment.[236] Detention, as part of the deportation process, is not considered punishment either, as noted above.[237]

Therefore, it appears that the crucial question is whether the detention is excessive in relation to the goals. In *Phan* and *Vo*, the courts found that as the probability that the government can actually deport an alien decreases, the government's

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231 *Id*.

232 *Id*. (citing Martinez v. Greene, 28 F. Supp. 2d 1275, 1282 (D. Colo. 1998)).

233 *See, e.g., Phan*, 56 F. Supp. 2d at 1155–56.

234 *Id*; *see also* Nguyen v. Fasano, 84 F. Supp. 2d 1099, 1111 (S.D. Cal. 2000) (noting that the primary regulatory purpose of detaining deportable aliens appears to be ensuring their deportation and removal).

235 *Phan*, 56 F. Supp. 2d at 1155; *see also Nguyen*, 84 F. Supp. 2d at 1110–11.

236 *See* Bilokumsky v. Tod, 263 U.S. 149, 154 (1923) (noting that deportation proceedings are civil in their nature).

237 Some courts have noted that this legal belief becomes less and less tenable as an individual spends more time behind bars. In *Rodriguez-Fernandez v. Wilkinson*, the Tenth Circuit ordered an alien released from detention, noting that "detention under pretense of awaiting opportunity for deportation would amount . . . to an unlawful imprisonment, from which relief may be afforded. . . . " 654 F.2d 1382, 1388 (10th Cir. 1981). The Third Circuit recognized that, whatever the legal definitions, detention at some point becomes punishment, both in the eyes of the detainees and of the government. The court noted that it is "unrealistic to believe that these INS detainees are not actually being 'punished' in some sense. . . ." Chi Thon Ngo v INS, 192 F.3d 390, 398 (3rd Cir. 1999).

interest in detaining that alien becomes less compelling and the invasion into the alien's liberty more severe.[238] These courts recognize that INS detention can only be lawful if it is a part of the removal process.[239] Thus, if there is no realistic chance that an alien will be removed, and will therefore be detained indefinitely, the detention is excessive, and therefore, unconstitutional.[240]

B. Procedural due process analysis

Because there is no legal support for a finding that a deportable alien assimilates to the status of an excludable alien, a court must work through the balancing test of *Mathews v. Eldridge.* A court should weigh the private interest in liberty against the likelihood that the person is being deprived of his liberty erroneously and against the government interests in keeping the alien in detention.

The current INS procedures place the burden on the alien to show by clear and convincing evidence that he should not be detained.[241] Because the alien has the burden, and it is a high standard, the risk of erroneous deprivation is considerable. Demonstrating in a convincing way that a person is not going to be a danger and is not going to flee is difficult in most

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238 *Phan*, 56 F. Supp. 2d at 1156; *see also* Thien Van Vo v. Greene, 63 F. Supp. 2d 1278, 1285 (D. Colo. 1999) (determining detention of petitioners is a severe infringement upon their liberty interests because of the unlikely chance of actual deportation in the foreseeable future).

239 *Phan*, 56 F. Supp. 2d at 1156; *Vo*, 63 F. Supp. 2d at 1285.

240 *See*, *e.g.*, Kim Ho Ma v. Reno, 208 F.3d 815, 830–31 (9th Cir. 2000), cert. granted, 121 S. Ct. 297 (2000) ("[W]here it is reasonably likely that an alien who has entered the United States cannot be removed in the reasonably foreseeable future, detention beyond the removal period is not justified."); *see also*, Phan v. Smith, 56 F. Supp. 2d 1158, 1160 (W.D. Wash. 1999), cert. granted sub nom. Reno v. Kim Ho Ma, 121 S. Ct. 297 (2000); Sivongxay v. Reno, 56 F. Supp. 2d 1167, 1173 (W.D. Wash. 1999) cert. granted sub nom. 121 S. Ct. 297 (2000); Huynh v. Reno, 56 F. Supp. 2d 1160, 1162 (W.D. Wash. 1999); Ma v. INS, 56 F. Supp. 2d 1165, 1166 (W.D. Wash. 1999); Batyuchenko v. Reno, 56 F. Supp. 2d 1163, 1164 (W.D. Wash. 1999). Three of the five petitioners were granted writs of habeas corpus because the court found that there was little chance that the United States would be able to return them to their countries of origin in the foreseeable future. The cases of the other two were remanded for further proceedings as it was unclear whether they could be removed from the country.

241 Pearson Memorandum, *supra* note 36, at 300.

circumstances. Additionally, immigration detainees generally are detained in volatile settings, are frequently unrepresented by counsel, and may have language difficulties.[242] The burden of proof should be on the government, rather than on the alien, as this would lessen the risk of erroneous deprivation of the alien's liberty.[243]

There are three government interests the courts have balanced against the individual's private interest in liberty. The government has an interest in detaining a person who may be dangerous. However, this interest is speculative, as the aliens in immigration detention are not actually accused of any crimes. A court must weigh this uncertain government interest against the clear liberty interest of the alien. While this government interest might outweigh the individual interest if the potential for danger is great, this should be an extremely rare case. Many of the detainees are being held as a result of non-violent crimes or crimes committed long ago. In all cases, the alien in INS detention has already served the sentence deemed appropriate by the trial judge. An alien's criminal history should not be sufficient to support the government's claim that its interest in protecting the community from a dangerous individual outweighs the alien's interest in liberty.

Courts also balance the alien's interest in liberty against the government interest in knowing where the person is when removal becomes possible. The importance of this interest logically depends on whether there is any likelihood that the removal actually will become feasible.[244] It also depends on what other methods could be used (many of which would be less expensive than detention)[245] to ensure that the INS knows the alien's whereabouts. The government should be required to show

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242 HUMAN RIGHTS WATCH, *supra* note 57, at 22, 52, 64.

243 *See, e.g.*, Nguyen v. Fasano, 84 F. Supp. 2d 1099, 1111 (S.D. Cal. 2000) (noting that government should bear the burden of showing that continued detention in order to prevent flight and protect the community is not an excessive restriction on petitioner's liberty).

244 *Kim Ho Ma*, 208 F.3d at 830–31.

245 For example, in Louisiana, the federal government has paid more than two times as much money per day to house INS detainees in state and county jails than it has paid for state prisoners. David Firestone, *Local Jails Deal With Federal Dilemma on Deportation*, N.Y. TIMES, Dec. 17, 1999, at A22.

that removal is likely to be accomplished within a reasonable period of time.[246] Because the individual interest in liberty is considerable, the government should also be required to show that detention would be the least restrictive method to ensure that the alien will be available for removal, a determination that would take into consideration the other possible methods as well as the alien's history for appearing for court or immigration proceedings.

The third governmental interest against which the individual's liberty must be weighed is the interest in maintaining sovereignty. However, the determination of whether a person is at large in the United States or detained in the United States is more of a domestic issue than most immigration questions. Therefore, the sovereignty interest is less essential than is often the case in the immigration context. Given that the detention of unremovable deportable aliens is not a policy goal, and that the entry fiction provides a mechanism for the government to safeguard its borders from the influx of aliens sent by a foreign government, a court should not find that the sovereignty interest outweighs an individual's liberty interest.

The procedural due process analysis would probably come out differently on different cases, depending on the dangerousness of the individual, the likelihood that the person would flee, and the ability of the government to accomplish the removal. However, a court should perform an in-depth analysis, recognizing the importance of the private interest at stake. None of the arguments given by the INS justify judicial deference to the executive branch when an individual's physical liberty is at stake.

C. Constitutional Avoidance

In *Kim Ho Ma*, the Ninth Circuit recognized that there was a serious question about the constitutionality of a statute allowing indefinite detention of deportable aliens and construed the immigration statute to allow detention only for a

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246 *See*, *e.g.*, *Kim Ho Ma*, 208 F.3d at 831.

"reasonable" period.[247] The court noted the Supreme Court's longstanding recommendation "that courts should interpret statutes in a manner that avoids deciding substantial constitutional questions."[248] The court also acknowledged that this canon of statutory construction is as applicable in immigration cases as in other fields of law.[249]

Citing a line of cases decided under the 1917 Immigration Act, an act that also appeared to allow indefinite detention, the Ninth Circuit found that in the earlier cases, the law was construed to allow detention only for a reasonable period.[250] The court explained that "when faced with the absence of an express time limitation, courts should ordinarily not assume that Congress intended a result as harsh and constitutionally dubious as indefinite detention."[251] Therefore, the Supreme Court, like the courts deciding cases under the 1917 act, interpreted the statute to allow detention only for a reasonable period, thereby avoiding the decision whether an indefinite detention provision would violate the constitution.[252]

This constitutional avoidance approach is consistent with the Supreme Court's exhortation to courts to exercise restraint in interpreting statutes that might violate the constitution. It is also consistent with precedent under the 1917 Immigration Act. Besides being the approach demanded by earlier decisions, constitutional avoidance is both the simplest and the most prudent approach to the interpretation of the detention provision.

IX. CONCLUSION

For the last hundred years, U.S. courts have recognized that deportable aliens are entitled to the protection of the Due Process Clause of the Fifth Amendment, both before and after they are under final orders of deportation. The core of that

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247 *Id*. at 829.

248 *Id*. at 822.

249 *Id*. (citing United States v. Witkovich, 353 U.S. 194 (1957)).

250 *Id*. at 828–29.

251 *Id*. at 829.

252 *Id*.

protection is the right of freedom from bodily restraint. Recently, the INS has argued that deportable aliens lose that protection upon receiving final deportation orders. This argument goes against precedent and has no statutory backing.

The INS, with its exit fiction theory, is attempting to strip deportable aliens of their right to challenge indefinite detention pending a removal that may never happen. It does this by defining the right at issue to be merely the right to be at liberty in the United States, rather than the right to be at liberty. In defining the right this way, the INS is attempting to do two things: strip the alien of due process protection, and failing that, skew the due process analysis by diminishing the value of the right asserted.

However, courts have a responsibility to review claims of unlawful detention. The INS claims that because immigration detention falls under the government's authority to regulate detention, the courts should review only detention under the unexacting standard of being rationally related to a legitimate interest. The INS arguments are weak, as the decision to detain or release an individual is essentially a domestic one; either way, the alien remains in the United States. Because the right to liberty is so important and the reasons offered by the INS not to protect that right are so weak, courts should carefully examine INS detention decisions, ensuring that any detentions are narrowly tailored to serve a compelling government interest.

Because the indefinite detention of deportable aliens is "constitutionally dubious," and the question implicates substantial constitutional concerns, courts would be prudent to avoid the question completely. This could be done easily, following the lead of the Ninth Circuit in *Kim Ho Ma*, simply by reading the statute to allow detention only for a reasonable period.