COMMENTS

WITHOUT A COUNTRY: INDEFINITE DETENTION AS CONSTITUTIONAL PURGATORY

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INTRODUCTION

Caught between the forces of failed international diplomacy, latent xenophobia, and the bureaucratic lethargy of American criminal justice, some Immigration and Naturalization Service (INS) detainees have found little reason to retain hope. The results are shocking.

In the spring of 1999, Thanom Posavtoy, a Laotian alien in the custody of the INS in a San Pedro, California, prison, walked into the showers and hung himself with his own bed-sheet. He had become despondent upon learning that it was unlikely that he would ever be released.

Late in the afternoon of Monday, December 13, 1999, five men wielding homemade knives overtook the prison guards who were escorting them from an exercise area to the cellblock at the parish jail in St. Martinville, Louisiana. A six-day hostage stalemate ensued, with the prisoners demanding only that they be allowed to leave the

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I am thankful to my father, B.J. Costello, for being the sort of a lawyer that helps people and to my mother, Nancy Costello, for providing endless shelter from the storm of the outside world. I am also deeply indebted to both of my grandmothers, Catherine Costello and the late Mildred "Grammy B" Boutilier for their sacrifices, as well as my late grandfather, Bardey J. Costello. In life, as in golf, he played them as they lay. My thanks to Bethany Morris, Cathy Eckhardt, Pete Costello, and Steve Costello for their love, support, and grace. I thank all the members of the Journal of Constitutional Law for their continued patience with me, especially David Rush, Mary Sigler, Jeremy Blumenthal, Louis J. Virelli III, Damon Hewitt, David Leibowitz, and Rick Swedloff. This comment is dedicated to the memory of Peter Cicchino, a friend and mentor, for his willingness to hold out the lantern and light the path ahead. His words continue to be an inspiration, even after the sound of his laughter has left us. "Our lives are the only things that are completely ours. The kind of life we make is the most important work—the single most important project we will ever undertake. I suppose what I am trying to say is that in my own life as I have struggled with the question of what makes a good and happy human life, I have become ever more convinced that fighting to secure the conditions for a decent human life for others is a large part of the answer."

2 Id.
country.

Between mid-March and early May of 1999, a group of six protestors went on a hunger strike outside the Krome Detention Center near Miami, Florida. The strikers were parents of men imprisoned inside that facility. The authorities finally acceded to the protestors after forty-eight days, releasing four of the detainees.

These three incidents all trace their dynamic nature to a common root: each involves prisoners indefinitely detained by the INS. Under the statutory authority of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), the INS detains criminal aliens upon the completion of their full penal sentence. A detainee's imprisonment becomes indefinite when the INS is unable to effect deportation due to external forces, usually the lack of diplomatic relations with the alien's nation of origin. The consequence is an excruciatingly arduous legal limbo. The "lifer," as she is known in the colloquialism of the INS, is shipwrecked between the Scylla of her deportation status and the Charybdis of her detention status. The INS cannot deport an alien to a country that will not accept her; and, in many cases, it will not release the detainee back into the U.S., based on the perceived risk that she will commit another crime. INS detainees represent the fastest-growing segment of the prison population in the United States; among this group are over 3,500 indefinite detainees.

On October 10, 2000, the United States Supreme Court consolidated and granted certiorari in two cases reaching disparate results.

Id. (reporting that the stalemate ended when the United States brokered a deal with Fidel Castro wherein U.S. authorities agreed to allow the detainees to return to a willing Cuba).

Luisa Yanez, INS Frees Hunger Strikers' Relatives, FT. LAUDERDALE SUN-SENTINEL, May 13, 1999, at 1B.

Id.

Id.

Id.


Most frequently, these nations include Cuba, Vietnam, Cambodia, and Laos. Other common groups in the indefinite detainee population include Palestinians, Africans, former Soviet citizens, Iranians, or any person who is without formal citizenship. See, e.g., Zadvydas v. Underdown, 185 F.3d 279 (5th Cir. 1999) (reporting the plight of a stateless man who was born in a refugee camp in Germany in 1948 and immigrated to the U.S. when he was eight years old).


Dan Malone, INS Faulted in Extended Detentions: Agency Defends Lockup Despite Lack of Charges, DALLAS MORNING NEWS, Dec. 12, 1999, at 1A ("The INS said it has deported almost 177,000 people this year. But impasses between the United States and the prisoners' home countries have, at least temporarily, prevented the agency from deporting an additional 3,500.").

on the issue of indefinite detention: Zadvydas v. Underdown\(^{15}\) and Kim Ho Ma v. Reno.\(^{16}\) In Zadvydas, the Fifth Circuit ruled that the plain language of IIRIRA\(^{17}\) authorized the INS to indefinitely detain removable aliens and further ruled that this practice did not violate due process norms.\(^{18}\) Conversely, when considering indefinite detention in Kim Ho Ma, the Ninth Circuit did not reach the due process question, invoking the doctrine of constitutional avoidance.\(^{19}\) Instead, the court construed the governing statute\(^{20}\) to include an implicit stan-

\(^{15}\) 185 F.3d 279 (5th Cir. 1999).
\(^{16}\) 208 F.3d 815 (9th Cir. 2000).
\(^{17}\) IIRIRA § 305(c), 8 U.S.C. § 1231(a)(6) (1999). After a brief discussion examining the rapid evolution of statutory authority for immigration detention, the Fifth Circuit concluded that 8 U.S.C. § 1231(a)(6) was applicable to Mr. Zadvydas. 185 F.3d at 285. The Fifth Circuit may not agree with the characterization of Mr. Zadvydas's detention as indefinite, both because of the facts present in his case and because of the connotation of the term.

\(^{18}\) Id. at 291 (citing Barrera-Echaarria v. Rison, 44 F.3d 1441, 1450 (9th Cir. 1999) (en banc)). Indeed, the court notes that eventually Mr. Zadvydas's age alone will obviate the need to determine his dangerousness to the community or flight risk. Zadvydas, 185 F.3d at 291 n.12 ("We also note that at a certain point—which Zadvydas may be approaching—age alone would likely weigh heavily against an INS finding of continued danger to the community or flight risk."). Presumably, the court is recognizing that Mr. Zadvydas may eventually be freed based on the lone fact that the INS has held him for so long that he has become a fragile, elderly man.

\(^{19}\) Zadvydas, 185 F.3d at 297 ("We hold that the government may detain a resident alien based on either danger to the community or risk of flight while good faith efforts to effectuate the alien's deportation continue and reasonable parole and periodic review procedures are in place."). The court neither explains what constitutes "good faith" efforts to deport an alien, nor explains how "reasonable parole and periodic review procedures" are interdependent with such efforts. For instance, it offers no guidance to the INS in the case where their good faith efforts have been exhausted, but the procedural protections are still in place. Furthermore, by requiring "good faith" efforts to deport an alien, the court ignores the situation of the vast majority of lifers whose inability to be deported, unlike Mr. Zadvydas, hinges on the lack of an extradition treaty with another nation. Without an extradition treaty, the INS's efforts to deport an alien, be they in good faith or not, become meaningless. This obstacle must be addressed by the State Department. See Hoang Manh Nguyen v. Fasano, 84 F. Supp. 2d 1099, 1111 (S.D. Cal. 2000) (observing that "there is no real chance that any of these [Vietnamese] aliens will be deported in the foreseeable future because no extradition treaty with Vietnam exists, and although there have been negotiations to develop a treaty for several years, the State Department cannot give any reasonable projection as to when, if ever, a treaty will be agreed upon"). Cf. Hermanowski v. Farquharson, 39 F. Supp. 2d 148, 150-51 (D.R.I. 1999) (explaining that when the INS was unable to secure travel documents from Poland for the alien in that case, the problem was referred to the United States State Department).

\(^{20}\) Kim Ho Ma, 208 F.3d at 823-26. The statute provides that:

An alien ordered removed who is inadmissible under Section 1182 of this title, removable under section 1227(a)(1)(C), 1227(a)(2), or 1227(a)(4) of this title or who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, may be detained beyond the removal period and, if released, shall be subject to the terms of supervision in paragraph (8). 8 U.S.C. § 1231(a)(6). The "removal period" is a reference to § 1231(a)(1), which allows 90 days from the time of the removal order for the INS to effect deportation. 8 U.S.C. § 1231(a)(1).
dard of reasonableness. As such, the court ruled that any detention beyond the original ninety-day removal period violates the statute when deportation of the detainee is not reasonably foreseeable.

The task before the Supreme Court is to reconcile these two ships passing in the night. By interpreting the statute as including an implicit reasonableness standard, the *Kim Ho Ma* court avoided directly engaging the rationale of the Fifth Circuit on the issue of the constitutionality of indefinite detention. While many district courts have addressed the constitutional aspect of this question, the Supreme Court does not have before it a Court of Appeals opinion rebutting the *Zadvydas* position, which concludes that indefinite detention is constitutional. The purpose of this Comment is to draw both from federal court jurisprudence and constitutional theory to sketch the strongest argument possible that the INS practice of indefinite detention of removable criminal aliens violates the Constitution's promise of due process of law.

This Comment argues that even if the Supreme Court reverses *Kim Ho Ma* and rules that the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 authorizes indefinite detention, the Court should hold that this practice is unconstitutional. Part I briefly examines the history of the legal authority governing the INS practice of indefinite detention since 1988. Part II examines the argument that indefinite detention is constitutionally justified. Part III examines recent district court cases to argue that indefinite detention of removable aliens violates constitutional norms. Part III also draws upon John Hart Ely's "representation reinforcing theory" to sketch a constitutional baseline against which the practice of indefinite detention is measured. Part IV offers a specific analysis of the consolidated *Zadvydas v. Underdown* case, now pending before the Supreme Court. This comment concludes that indefinite detention of removable criminal aliens with little chance of deportation violates the Constitution.

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22 *Kim Ho Ma*, 208 F.3d at 822 (interpreting the statute "as providing the INS with authority to detain aliens only for a reasonable time beyond the statutory removal period").

23 *Id.* at 828 ("Where no removal in the reasonably foreseeable future is possible ... the statutory language, properly construed, does not authorize indefinite detention of such aliens.").

24 See *id.* at 826 n.23 ("Although we seriously question the Fifth Circuit's conclusion in *Zadvydas* ... we need not reach the constitutional question here.").

25 See, e.g., Thien Van Vo v. Greene, 63 F. Supp. 2d 1278 (D. Colo. 1999) (granting relief to an excludable alien being held under indefinite detention and concluding that IIRIRA does not deprive the court of jurisdiction to hear habeas petitions); Hermanowski v. Farquharson, 39 F. Supp. 2d 148 (D.R.I. 1999) (granting alien's petition for writ of habeas corpus and finding that his continued indefinite detention order was a violation of his substantive due process rights); Binh Phan v. Reno, 56 F. Supp. 2d 1149 (W.D. Wash. 1999) (holding that heightened scrutiny, not judicial deference, applies in determining substantive due process violations of deportable aliens).
I. THE ORIGINS OF INDEFINITE DETENTION

A. Mariel Cubans

The line-drawing problems inherent in immigration law have existed nearly as long as our nation itself.26 Federal courts were first forced to deal with the problem on a massive scale in 1980. At that time, Fidel Castro allowed 125,000 Cubans to emigrate to the United States in an event that came to be known as the Mariel Boatlift.27 The flood of immigrants included a substantial group of aliens who had been convicted of crimes in Cuba, as well as a significant number of aliens who would be admitted into the United States and go on to be convicted of crimes on American soil, rendering them deportable.28 The impact of this event is still being felt today. Indeed, many Mariel Cubans are currently at the core of the lifer population.29

Although diplomatic efforts partially succeeded in returning the detained Mariel Cubans, many have remained in the United States.30 After it became clear that efforts to deal with the Mariel Cubans as a group would be thwarted by poor diplomatic relations with Fidel Castro, the federal district courts began to face the problem of indefinite detention.31 The general consensus of these cases, based both on the plenary power doctrine32 and the finding that excludable aliens en-

26 See, e.g., Wong Wing v. United States, 163 U.S. 228 (1896) (striking down a law that allowed deportable aliens to be put to hard labor pending their departure); In re Brooks, 5 F.2d 238, 239 (D. Mass. 1925) (holding that the United States may not detain a deportable alien in anticipation of the revival of diplomatic relations with that alien’s home nation); In re Desbois, 2 Mart. (o.s.) 185 (La. 1812) (dealing with the citizenship of aliens who enter the United States through the admission of a new state).
29 See, e.g., id.
30 E.g., id. at 383 (reporting the history of the Mariel Cubans). In 1984, Fidel Castro agreed to accept approximately 2,500 of the detained Cubans back into Cuba. Id. at 384. The process of repatriating the Cubans was interrupted in 1987, but resumed after Cuban detainees noted at the Oakdale Federal Detention Center in Louisiana and at the Atlanta Federal Penitentiary. See id. at 385; see also J. Michael Kennedy & Barry Bearak, The Worstest Riot: ‘The Joint Could Blow’—And It Did, L.A. TIMES, Dec. 5, 1987, at 1 (comparing the detainee riots in Louisiana to those in Atlanta); Guillermo Martinez, We Shouldn’t Deride Cuba on Human Rights: A Hypocritical U.S. Has Imprisoned Mariel Inmates in a Legal Limbo, NEWSDAY, Dec. 4, 1987, at 97 (arguing that Mariel inmates in Atlanta should receive individual hearings).
31 See, e.g., Barrera-Echavarria v. Rison, 44 F.3d 1441 (9th Cir. 1995) (ruling that the United States Attorney General had statutory authority to indefinitely detain an excludable alien).
32 The plenary power doctrine can be defined generally as the notion that, because immigration issues are so central to the nation’s sense of self-determination, the judiciary should defer to the popularly-elected legislative branch of government. E.g., Hiroshi Motomura, Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation, 100 YALE L.J. 545, 547 (1990) (“[T]he doctrine declares that Congress and the executive branch
joyed a diminished level of substantive due process rights, was that indefinite detention of Mariel Cubans was not unconstitutional. 39

B. Legal Status of Excludable Aliens

Criminal aliens subject to deportation have traditionally been divided into two categories for the purposes of legal analysis. First, the INS detains removable criminal aliens, or those who are present in the United States and commit crimes. 34 Second, the INS detains excludable criminal aliens, 35 or those who have never been legally admitted to the United States, but may be present through the functioning of the entry fiction. 36 This Comment will primarily focus on the first class of aliens—those who are legal permanent residents in the United States but have been deemed removable. While the plight of excludable aliens is equally dark, this discussion will describe their situation only in order to shed light on the relative position of their removable brethren. It is important, however, to carefully define the legal status of the excludable aliens because recent judicial justifications of indefinite detention have rested on the premise that excludable and removable aliens share a common constitutional status. 37

While the influx of cases concerning excludable aliens remained steady following the Mariel Boatlift, the constitutional status of excludable aliens was never wholly clear. Despite significant theoretical inconsistencies, 38 the majority of courts considering the issue have de-
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The legal status of excludable aliens is clearer with regard to procedural due process rights; however, an equally troublesome application exists. The Supreme Court has held that excludable aliens possess due process rights, but courts have generally deferred to the INS's method of according procedural protection. As discussed below, this rationale—until recently only applicable to excludable aliens—has been extended by some courts to removable aliens.

C. Statutory Evolution

The INS has statutory authority to deport aliens who commit certain specified offenses. The legislative trend emerging from Congress in the last twelve years reveals an increasing willingness to ex-
pand administrative power in this area.\textsuperscript{35} Beginning with the introduction of the concept of 'aggravated felony' in the Anti-Drug Abuse Act of 1988,\textsuperscript{36} congressional legislation has evinced an increasing hostility toward criminal immigrants.\textsuperscript{37} First, Congress severely restricted the judicial review and procedural protections for aliens seeking to challenge INS decisions.\textsuperscript{38} The congressional debates over the Immigration Act of 1990 introduced summary deportation procedures as an instrument to limit the opportunities for aliens to receive judicial review of their removal orders.\textsuperscript{39}

Six years later, IIRIRA, which has been referred to by commentators as "[perhaps] the harshest, most procrustean immigration control measure in this century,"\textsuperscript{50} furthered the trend of anti-immigrant sentiment in Congress. By wholly eliminating Section 106 of the Immigration and Naturalization Act, Congress severely limited the federal judiciary's power to review deportation orders.\textsuperscript{51} The restriction of opportunities for judicial review of orders of deportation has aggravated the problem of lifers. As the number of criminal aliens to deport grows, so too does the number of lifers among them.

This trend is also apparent in the specific statutory provisions governing the detention of aliens pending deportation. The class of aliens covered by the statute has expanded through a gradual broadening of the definition of what constitutes an aggravated felony.\textsuperscript{52} Over time, the class of aliens that will be affected by indefinite detention has grown, while their procedural protections have eroded.\textsuperscript{53} For instance, prior to 1996, the INS was statutorily permitted to detain the alien for only six months.\textsuperscript{54} IIRIRA, however, did not foreclose detention beyond the original time period of administrative detention al-


\textsuperscript{37} See Newcomb, supra note 45, at 702-04 (charting Congress’s efforts to enact more stringent penalties).

\textsuperscript{38} \textit{See, e.g.,} IIRIRA § 304.

\textsuperscript{39} \textit{See Newcomb, supra note 45, at 703 (citing 136 CONG. REC. S17109 (daily ed. Oct. 26, 1990)).}


\textsuperscript{41} Newcomb, supra note 45, at 703.

\textsuperscript{42} \textit{See Newcomb, supra note 45, at 697, 698-701 (tracing the evolution of the statutory definition of aggravated felonies for criminal aliens)}.


\textsuperscript{44} Toledo, supra note 53, at 679-80. This does not mean that there were no lifers prior to 1996, but rather that they enjoyed greater procedural protection.
lotted for deportation. While the language plainly allows for detention "beyond the removal period," it does not specify how long detention is authorized after the original ninety-day period ends. It was precisely this ambiguity that the *Kim Ho Ma* court seized upon in disallowing the indefinite detention of lifers whom the INS had no reasonable expectation of deporting.

Even before the *Kim Ho Ma* decision, the INS was under pressure to dispel the ambiguity of the statute and the consequent problem of lifers. In response to the growing concern of both the press and the federal courts, the INS adopted interim regulations. In substance, these regulations do no more than add another layer of procedural due process. The interim regulations mandate, first, that an administrative review of the alien's case be scheduled before the ninety-day 'removal period' described in 8 U.S.C. § 1231(a)(1)(A). The burden for showing a lack of flight risk or danger to the community remains squarely with the detainee. If the District Director, or her designee, determines that the alien has not shown by clear and convincing proof that he is not a danger to the community, the alien will remain in detention. Subsequently, the interim procedures require a review of the alien's case, with allowances for a face-to-face interview every six months thereafter.

In *Chi Thon Ngo v. Immigration and Naturalization Service,* the Third Circuit upheld the legitimacy of these interim procedures, ruling that the procedural protection they afford detainees adequately safeguards their due process rights. A close reading of the court's language, however, reveals its caution in granting this degree of deference to the administrative authority of the INS. Indeed, the Chief

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53. 8 U.S.C. § 1231(a)(6) now provides, "An alien ordered removed . . . who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, may be detained beyond [ninety days] . . . ." The title of this section, "Inadmissible or criminal aliens" suggests that one's status as a criminal alien and the finding that the alien is a "risk to the community" or "unlikely to comply with the order of removal" are synonymous in the eyes of the drafters. 8 U.S.C. § 1231(a)(6). This raises procedural due process questions in its own right.

54. *See* *id.* at 208 F.3d at 822 (construing the statute as "providing the INS with authority to detain aliens only for a reasonable time beyond the removal period").

55. *See* *Chi Thon Ngo v. INS,* 192 F.3d 390, 400 (3d Cir. 1999) (reprinting the interim procedures in an appendix to the reported case).

56. *Id.*

57. *See* *id.* at 400-01 ("Custody determinations will be made by weighing favorable and adverse factors to determine whether the detainee has demonstrated by clear and convincing evidence that he does not pose a threat to the community, and is likely to comply with the removal order."). *See also* 8 C.F.R. § 241.4 (2000) (listing factors that may be considered by the INS in making a determination of dangerousness and risk to the community).

58. *Chi Thon Ngo,* 192 F.3d at 400-01.

59. *Id.* at 400.

60. 192 F.3d 390 (3d Cir. 1990).

61. *Id.* at 399.

62. *Id.* ("[I]f experience should show that our initial reaction to the Interim Rules or eventual
District Judge of the United States District Court for the Central District of California ruled that the interim procedures "do not meet the minimum standards for due process." Whatever the impact of popular attention and judicial intervention, it is clear that the INS has recognized the newly aggravated crisis of lifers and acted upon it. As much as the legal status of lifers has been twisted and manipulated, the constitutional implications of indefinite detention remain an open question. The Supreme Court has never spoken to the constitutional ramifications of indefinitely detaining removable criminal aliens. The following sections outline the strongest arguments on both sides of this discussion.

II. THE CONTRARY VIEW: INDEFINITE DETENTION IS NOT UNCONSTITUTIONAL

Section A examines the position that some courts have taken in declining to grant jurisdiction to lifers under the new judicial review provisions of IIRIRA. Sections B and C, respectively, explore the substantive and procedural due process obstacles facing lifers.

A. Jurisdiction

The constitutional status of removable aliens notwithstanding, some courts have exercised discretion to refuse to hear habeas claims, based on the jurisdictional limitations of IIRIRA. While the majority of district courts considering these claims have little problem exercising jurisdiction, the Eleventh Circuit has found that IIRIRA prevents the court from doing so.

In Richardson v. Reno, the Eleventh Circuit originally ruled that 8 U.S.C. § 1252(g) repealed the federal court's jurisdiction over ha-
beas petitions by deportable aliens. However, following the Eleventh Circuit’s ruling, the Supreme Court had occasion to interpret this same provision in another case, *Reno v. American-Arab Anti-Discrimination Committee.* In that case, Justice Scalia interpreted § 1252(g) rather narrowly, holding that “[t]he provision applies only to three discrete actions that the Attorney General may take: her ‘decision or action’ to ‘commence proceedings, adjudicate cases, or execute removal orders.’” As the petitioner’s habeas petition challenging the indefinite nature of his detention did not fall within one of these three categories, the Eleventh Circuit was forced to reconsider its opinion in *Richardson I* in light of the Supreme Court’s new statutory interpretation.

Despite Justice Scalia’s narrow reading of § 1252(g) in *American-Arab,* the Court of Appeals refused to waver from its original position. In *Richardson II,* the court abandoned its reliance on the provision interpreted in *American-Arab* and alternatively invoked another section of the Immigration and Naturalization Act to justify its earlier ruling: “We reach this conclusion for reasons similar to those outlined in *Richardson I* except that we rely on [8 U.S.C. § 1252(b)(9)], rather than [§ 1252(g)], as the expression of congressional intent to preclude [habeas corpus] jurisdiction in this situation.”

The Eleventh Circuit, it appears, was intent on denying jurisdiction of the petitioner’s habeas claim, thereby effectively defying a clear Supreme Court mandate. Although the Eleventh Circuit’s position has not been adopted by the majority of district courts, its willingness to ignore Supreme Court precedent exemplifies the entrenchment of courts that have opposed the bids of lifers to escape indefinite detention.

### B. Substantive Due Process

The first question that a court must answer in its substantive due process analysis is whether the detention is punitive or administra-

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75. *Richardson I,* 180 F.3d at 1315.
76. The court relied upon 8 U.S.C. § 1252(b)(9), which provides:
Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this [subchapter] shall be available only in judicial review of a final order under this section.
Id.
77. *Richardson II,* 180 F.3d at 1315.
Most courts have ruled that a limited detention for the purpose of effecting the civil process of deportation is not punitive, but rather amounts only to administrative confinement. The rationale holds that because the confinement is imposed to accomplish a legitimate government interest, namely the exercise of the INS's statutory authority to deport criminal aliens, the detention is merely a necessary step toward achieving that end. Courts have accepted this justification in cases of confinement lasting up to eight years.

Even if the court finds a legitimate government interest justifying the detention, it may still find a violation of substantive due process if the measures taken are excessive relative to the legitimate government purpose of confinement or are such that they would "shock the conscience." In the case of excludable aliens, indefinite detention has often been found constitutional. Resting on the theory of the "entry fiction," courts have held that an alien who has not yet been granted legal admittance to the United States does not develop the ties necessary to warrant constitutional protection because they are legally "detained at the border." This analysis rests on the notion that entrance into the nation is a privilege and not a right that can be enforced by an alien seeking entry. According to this rationale, the alien who legally stands at our border may not assert any constitutional right to enter, but may only gain the privilege through the rules established by Congress. Courts applying this doctrine strip the alien of an ability to assert a fundamental liberty interest, her actual presence on U.S. soil notwithstanding.

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80 E.g., Gisbert, 988 F.2d at 1442.


82 E.g., Barrera-Echavarria v. Rison, 44 F.3d 1441, 1443-44, 1450 (9th Cir. 1995) (holding that the detention of an excludable criminal alien for over eight years, with little chance of deportation, was not unconstitutional under substantive due process analysis).

83 E.g., Cholak, 1998 WL 249222, at *8 ("[T]his Court's substantive due process analysis ultimately turns on whether Cholak's detention is excessive in relation to the goals of the IIRIRA.").

84 This is a more traditional test of substantive due process and does not often appear when lifers are at issue. A court, however, will occasionally apply this test when considering indefinite detention. See Duy Dac Ho v. Greene, 204 F.3d 1045, 1060 (10th Cir. 2000) (Brorby, J., dissenting); Zadvydas v. Underdown, 986 F. Supp. 1011 (E.D. La. 1997), overruled by 185 F.3d 279 (5th Cir. 1999). See also Leader v. Blackman, 744 F. Supp. 500, 507 (S.D.N.Y. 1990) (quoting United States v. Salerno, 481 U.S. 739, 746 (1987)).

85 E.g., Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206, 212 (1953).

86 Cf. Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382, 1387 (10th Cir. 1981) (noting that imprisonment would be considered punitive but for the "euphemistic fiction [that] was created to accommodate the necessary detention of excludable and deportable aliens while their cases are considered and arrangements for expulsion are made").

87 Zadvydas, 185 F.3d at 294 (citing Landon v. Plasencia, 459 U.S. 21 (1982)).

88 See Duy Dac Ho, 204 F.3d at 1060 (ruling that "the Due Process Clause does not provide Petitioners a liberty interest in the right they assert").
strong due process interest in her favor, the excludable alien is unlikely to prevail on the balance of her freedom against any nebulous risk to the community that may be imputed to her.\textsuperscript{59}

Removable legal permanent residents who are being indefinitely detained would rarely lose this balancing test if found to have the due process rights afforded by \textit{Landon}.\textsuperscript{50} Consequently, the strongest substantive due process arguments justifying indefinite detention of removable aliens have come from courts that equate their constitutional protection with that of excludable aliens.\textsuperscript{71} The Fifth Circuit’s decision in \textit{Zadvydas} is a leading example of this position.

In \textit{Zadvydas}, the Fifth Circuit ascribed the same due process rights to removable aliens as to excludable aliens.\textsuperscript{92} The court looked at the interests involved in the detention process and determined that because both excludable and removable aliens are the same, vis-à-vis their expulsion from the national community pending deportation, their due process rights in that regard should also be the same.\textsuperscript{93} Further, the court examined the government interest involved in both removable and excludable cases and determined them to be the same. “The need to expel [removable aliens] is identical, from a national sovereignty perspective, to the need to remove an excludable alien who has been finally and properly ordered returned to his country of origin.”\textsuperscript{94}

Having determined that excludable and removable aliens are identical both in the weight of the due process right asserted and the governmental interest involved, the constitutional discussion is essentially ended for courts following the \textit{Zadvydas} rationale. If the indefinite detention of excludable aliens is constitutionally justifiable,\textsuperscript{53} then such is the case for removable aliens as well.\textsuperscript{95}

\textsuperscript{59} See, e.g., Barrera-Echavarria v. Rison, 44 F.3d 1441, 1450 (9th Cir. 1995) (holding that prolonged detention of an excludable alien is justified).

\textsuperscript{60} See \textit{Landon}, 459 U.S. at 32.

\textsuperscript{61} \textit{Zadvydas} v. Underdown, 185 F.3d 279, 290 (5th Cir. 1999); see also \textit{Duy Dat Ho}, 204 F.3d at 1059-60 (“We conclude that once a removal order has become final and an alien who was formerly a lawful permanent resident seeks temporary re-entry into the United States, the alien possesses identical constitutional rights with respect to his application for admission as an excludable alien.”); Tran v. Caplinger, 847 F. Supp. 469, 476 (W.D. La. 1993) (implying that administrative detention cannot be excessive in stating that “the court finds that the detention of Petitioner is not punishment and does not constitute a violation of Petitioner’s right to substantive due process”).

\textsuperscript{62} \textit{Zadvydas}, 185 F.3d at 294-97.

\textsuperscript{63} Id. at 294-95.

\textsuperscript{64} Id. at 296.

\textsuperscript{65} See \textit{Barrera-Echavarria}, 44 F.3d 1441, 1449-50 (9th Cir. 1995) (relying on the Court’s holding in \textit{Shaughnessy v. United States ex rel. Mezei}, 345 U.S. 206 (1953), suggesting that “excludable aliens simply enjoy no constitutional right to be paroled into the United States, even if the only alternative is prolonged detention.”).

\textsuperscript{66} This argument is specifically rebutted in Part IV below.
C. Procedural Due Process

The only obstacle still impeding the government's policy of indefinite detention is the constitutional requirement of adequate procedural protection. In this regard, Zadvydas concedes that there is a difference between excludable and removable aliens concerning procedural due process rights.97 As such, the INS must show that, despite the plenary power, there are adequate administrative reviews in place to check the unfettered discretion of the INS District Director.98 There are very few instances where federal courts have found procedural deficiencies in the administrative practice of the INS.99 If the Director makes a decision on the detention of an alien, it will usually be afforded tacit deference.100

The interim procedures described above in Part I represent a recent development on this front.101 The Third Circuit upheld these procedures as valid in Chi Thon Ngo v. Immigration and Naturalization Service.102 For the time being, at least, the INS seems to have foreclosed challenges to procedural due process challenges. When framed in the context of the deference accorded by the plenary power doctrine and the existing procedural safeguards, the task of persuading a court to find procedural due process violations is nearly impossible. That victory for courts seeking to justify indefinite detention may prove pyrrhic, however, if the momentum of recent district court cases gains favor.

III. THE CASE AGAINST INDEFINITE DETENTION

Recent district court decisions in Seattle,103 Rhode Island,104 Colorado,105 and California106 have given lifers reason to hope that the tide

97 Zadvydas, 185 F.3d at 294. This point highlights the reasoning that the court relied on to equate the substantive due process rights of excludable and removable aliens. The removable alien is entitled to "normal" procedural due process rights prior to her final order of expulsion. Once the deportation has been authorized, however, the court reasoned that she stands with the excludable alien who has never legally passed our borders in the first place. Zadvydas, 185 F.3d at 294-97.
98 Id.
99 Research of post-IIRIRA case law has yielded only one such instance: Chi Thon Ngo v. INS, 192 F.3d 390, 399 (3d Cir. 1999) (ruling that the petitioner must be conditionally released because he has not had adequate regular review of his case to challenge the ruling that he is a danger to the community).
100 Schuck & Williams, supra note 50, at 391.
101 Chi Thon Ngo, 192 F.3d at 400; see also supra text accompanying notes 58-62. These procedures were enacted partially to remedy the lack of individualized detention decisions that came in the wake of IIRIRA.
102 Chi Thon Ngo, 192 F.3d at 399.
103 Binh Phan v. Reno, 56 F. Supp. 2d 1149 (W.D. Wash. 1999) (holding that heightened scrutiny, not judicial deference, applies in determining substantive due process violations of deportable aliens). The result in Binh Phan was recently affirmed on different grounds in Kim Ho Ma v. Reno, 208 F.3d 815 (9th Cir. 2000).
of constitutional interpretation has begun to turn in their favor. The judges in these cases arguably viewed their role differently from those in the cases described in Part II. This much is apparent in their willingness to sidestep both the traditional restraints placed on the judiciary by the doctrine of plenary power, as well as the jurisdictional restrictions of IIRIRA itself.\(^{107}\) Although these two obstacles have been enough to stop some judges facing similar issues before they even reached the merits of a lifer's case,\(^{108}\) courts are increasingly likely to sustain the challenges of lifers.

This section presents the strongest argument that indefinite detention violates the Constitution. Section A examines the similarities among three recent district court cases articulating these arguments, focusing on jurisdiction, balancing, and characterizing the government’s interest. Section B addresses the fundamental tension courts face when considering indefinite detention issues. In particular, courts confront “the crystal ball problem,” using the same fortune-telling processes that are used in other exercises of fundamental governmental power, such as civil commitment, without any of the same safeguards. Section C evaluates this debate in terms of one popular theory of constitutional interpretation.

### A. Three Recent Cases

In 1999, three district courts considering habeas petitions brought by removable criminal aliens determined their continued detention to be unconstitutional.\(^{109}\) Each petitioner was a legal permanent resi-

\(^{107}\) See, e.g., Thien Van Vo v. Greene, 63 F. Supp. 2d 1278 (D. Colo. 1999) (granting relief to excludable alien being held under indefinite detention and concluding that IIRIRA does not deprive the court of jurisdiction to hear habeas petitions).

\(^{108}\) See, e.g., Richardson v. Reno, 162 F.3d 1338 (11th Cir. 1998) (stating that provisions in the IIRIRA deprive the court of jurisdiction to hear an illegal alien’s habeas claim).
dent who was convicted of an aggravated felony and found to be removable under IIRIRA. In all three of these cases, the petitioner was in the custody of the INS for at least two years prior to the court's decision. The similarities reach beyond the facts and illustrate common tenets that comprise the strongest substantive due process arguments available. The greatest difficulty in reconciling these cases lies in the fact-specific basis of the rulings. Despite this potential stumbling block, a comparison of these three cases reveals common themes.

1. Jurisdiction

The first theme that emerges from these cases is the courts' willingness to place themselves under the yoke of jurisdiction. After describing the jurisdictional provisions of IIRIRA and the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), the court in Hermanowski v. Farquharson remarked, "[n]onetheless, despite this whirlwind of reform stirred up by Congress, this Court's authority to review constitutional complaints delivered by a petition for a writ of habeas corpus has weathered the storm." The court noted that recent legislation has resulted in some district courts abdicating their constitutional responsibility to hear habeas petitions and refused to follow suit.

In the Colorado case, Thien Van Vo v. Greene, the court arrived at
the same conclusion, refusing to hold that Congress could do away with federal district court habeas jurisdiction by implication. After citing IIRIRA's jurisdiction-limiting language, the court stood firm: "Although this language is of broad sweep, the question remains whether its intent was to deprive this court of its authority . . . to hear and determine fundamental constitutional issues such as the liberty interest question presented here." The Thien Van Vo court concluded that it retained jurisdiction to hear the detainee's claim.

In Binh Phan v. Reno, the court did not elaborate, stating simply that "[p]etitioners' claims here fall squarely within § 2241." This exercise of jurisdiction is not inconsistent with Justice Scalia's reasoning in Reno v. American-Arab Anti-Discrimination Committee. As described above, when the Supreme Court and the Eleventh Circuit disagreed about the scope of IIRIRA's jurisdiction-limiting provision, the Eleventh Circuit found alternative statutory authority for refusing to hear a habeas petition. The Eleventh Circuit has held fast to the position that IIRIRA completely repealed the habeas jurisdiction for deportable criminal aliens. Thus, each of the district court cases is circumventing persuasive authority from another circuit to assert their jurisdiction to hear these claims.

These courts’ decisions to exercise judicial review in these cases also runs against the teachings of the plenary power doctrine. Despite bucking this guiding tradition, however, the courts in these cases did not see their actions as judicial activism. By acting within their discretion, but refusing to follow the path of least resistance, the judges’ rulings in these cases serve to protect a voiceless constituency whose relatively small numbers have been forgotten in the landscape of political maneuvering.

118 8 U.S.C. § 1252(g) (1997) provides:
Except as provided in this section and notwithstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or to execute removal orders against any alien under this act.

119 Id.

120 Id.

121 Thien Van Vo, 63 F. Supp. 2d at 1281.

122 Id.


124 Binh Phan, 56 F. Supp. 2d at 1153. The reference to "§ 2241" is a citation to 28 U.S.C. § 2241, where the federal court's power to hear habeas petitions is codified.

125 525 U.S. 471, 482-83 (1999) (holding that the IIRIRA does not impose a general jurisdiction limitation).

126 See Richardson v. Reno, 180 F.3d 1311, 1314-15 (11th Cir. 1999) (focusing on the Immigration and Naturalization Act §§ 242(g) and 242(b)(9) found in 8 U.S.C. § 1252).

127 See Mike Clary & Patrick J. McDonnell, Sentenced to a Life in Limbo, L.A. TIMES, Sept. 9,
2. Balancing the Lifer’s Interest

Another motif that emerges from these cases is the courts’ approach to balancing. The notion of balancing as an instrument of judicial subjectivity is now an accepted tenet of a major school of legal scholarship. In the context of lifers, the decisions do not appear political, but rather ideological in nature. In deciding to consider the liberty interests of lifers as seriously as they do, the judges in these cases have not acted as political arbiters as much as they have drawn upon constitutional principles of freedom from arbitrary government seizure and deeper beliefs about personal autonomy.

These three district courts arrived at the same general conclusion in defining the lifer’s due process interest for the purposes of constitutional analysis. The *Binh Phan* court rejected the government’s narrow characterization of the detainees’ interest. "The issue here is much more basic—it is simply the right to be at liberty. Put another way, at issue is petitioners’ fundamental liberty interest in being free from incarceration." By taking this step, the court promised to look beyond the bureaucratic and legalistic obstacles that have stopped other courts and to consider the perspective of the indefinite detainee. The *Thien Van Vo* court largely adopted this reasoning without change, finding that the detainee at issue was suffering from a violation of his due process rights.

The *Hermanowski* court engaged in what was arguably the most careful balancing analysis of the three cases. The court outlined a standard balancing process to evaluate the specific nature of the lifer’s predicament, namely the "length of detention to which the petitioner has already been subjected, the likelihood of deportation, [and] the potential length of the detention into the future." These three factors make up the detainee’s position in the balancing equation. Under this balancing test, the longer the detainee has been in...
prison, the greater the weight of his due process claim. This awkward posture makes a detainee's chances of freedom contingent upon how long he has already languished in administrative limbo.\textsuperscript{155}

In taking this position, these district courts stood in clear conflict with the Fifth Circuit's \textit{Zadvydas} decision.\textsuperscript{155} Most significantly, \textit{Binh Phan} and the decisions that followed it refused to equate the due process rights of excludable and removable aliens. Treating excludable and removable aliens as constitutionally different is in accord with express Supreme Court language. In \textit{Landon v. Plasencia},\textsuperscript{157} Justice O'Connor distinguished the two classes of aliens, noting that "once an alien gains admission to our country and begins to develop the ties that go with permanent residence, his constitutional status changes accordingly."\textsuperscript{158} In applying this principle to the context of due process in deportation proceedings, Justice O'Connor noted that the Court has "developed the rule that a continuously present permanent resident alien has a right to due process in such a situation."\textsuperscript{159}

3. \textit{Governmental Interest: Punitive or Administrative?}

The courts also adopted a similar approach to evaluating the governmental interest in these cases. In order to defend the practice of imprisonment without a criminal conviction, the government first must show that the detention is not based on a punitive rationale.\textsuperscript{160} In the instance of lifers, the government usually overcomes this hurdle easily by exploiting the ambiguity of the standard that defines what constitutes punitive detention. At the commencement of the detention, the government has clear statutory authority to hold the criminal alien for the administrative purpose of effecting deportation.\textsuperscript{161} The government continues to rely on this rationale for the duration of the detention, and it is unclear at what point the administrative purpose of the detention becomes outweighed by the detainee's liberty interest.\textsuperscript{162} From the detainee's perspective, short of

\textsuperscript{155} As noted above, some courts have found indefinite detention of up to eight years constitutional in the case of an excludable alien. See Barrera-Echavarría v. Rison, 44 F.3d 1441, 1443-44, 1450 (9th Cir. 1995).

\textsuperscript{156} \textit{Zadvydas} v. Underdown, 185 F.3d 279 (5th Cir. 1999) (finding that a removable alien has no fundamental liberty interest in being released from detention).

\textsuperscript{157} 459 U.S. 21 (1982).


\textsuperscript{159} Id. at 33. The \textit{Zadvydas} court would most likely respond to this language by arguing that the lifer's final order of deportation has stripped the lifer of any liberty interest that he may have previously had. See \textit{Zadvydas}, 185 F.3d at 296. This argument is addressed specifically in Part IV.

\textsuperscript{160} See Schall v. Martin, 467 U.S. 253, 256-257 (1984) (holding that preventative detention, however, does serve a legitimate state purpose).

\textsuperscript{161} See IIRIRA § 305.

\textsuperscript{162} See \textit{Binh Phan v. Reno}, 56 F. Supp. 2d 1149 (W.D. Wash. 1999) (holding that at some
an express governmental statement of intent to detain based on punitive reasons, it is virtually impossible to prove that the purpose of detention is punitive. The Supreme Court has ruled that even in the case of removable legal permanent residents, deportation proceedings do not constitute punishment even when the consequence is a prolonged indefinite prison term.

If the detainee cannot show a punitive intent, the court must determine "whether an alternative purpose to which [the restriction] may rationally be connected is assignable for it." Given that the government will not admit a punitive purpose, the court must consider non-punitive rationales as alternatives. Finally, the court will weigh "whether the detention is excessive in relation to the 'alternative purpose' proffered."

Presumably, if the detention is not based on punitive grounds, it is being imposed for administrative purposes. The Binh Phan court discerned three primary regulatory interests of the INS. The first interest is ensuring that the deportable aliens would actually be deported. Second, and most speculative, is the interest in protecting the community from potential crime. A third interest, closely related to the goal of removal, is preventing flight as a deportable, criminal alien, a paroled lifer would have little to lose by fleeing.

Thus, the court's decision depends upon a set of speculations. First, will the nation to which the criminal alien is to be deported ever accept him? Second, will the criminal alien pose a danger to the community? Third, will the criminal alien be likely to abscond if released pending deportation? The outcome of these predictions reveals the fragile difference between a lifer's freedom and an indefinite period of constitutionally justified detention. With the outcome of these questions as murky as the answers of a street corner fortune-teller, the cumulative effect of these considerations gives rise to the "crystal ball problem."

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143 See, e.g., Tran v. Caplinger, 847 F. Supp. 469, 475 (W.D. La. 1993) ("The legislative history and text of Section 1252 clearly show that Congress did not provide for detention of aliens convicted of aggravated felonies as a means of punishment.").
144 INS v. Lopez-Mendoza, 468 U.S. 1032, 1039 (1984) ("The purpose of deportation is not to punish past transgressions but rather to put an end to a continuing violation of the immigration laws.").
145 Schall, 467 U.S. at 269 (quoting Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69 (1963)).
147 Binh Phan, 56 F. Supp. 2d at 1155-56.
148 Id. at 1155.
149 Id. at 1156.
150 Id.
B. The Crystal Ball Problem

Upon establishing that the purpose of the detention is not punitive, the government typically asserts three administrative interests in detaining the lifer: to effect deportation, to protect the community from danger and to prevent flight. The weight afforded these governmental interests will decide the outcome of the lifer’s constitutional balancing inquiry. This section will address these interests in turn, concluding that each fails to justify a sentence of indefinite detention.

1. Administrative Purpose of Effecting Deportation

The first aspect of the “crystal ball problem” suggests at least part of the reason that the American media has found the problem of lifers so interesting. To hinge freedom from detention upon the likelihood of deportation places lifers in the awkward posture of having their freedom depend on United States foreign policy. Given that lifers in the United States are from only a handful of foreign nations, evaluating their likelihood of deportation is relatively straightforward. These predictions can be reduced to a question of foreign policy and relationships with nations unfriendly to the United States. In the absence of favorable diplomatic relations, there is little chance that the INS will successfully effect deportation.

For instance, in situations where the urgency falls short of the St. Martinville incident, Cuba has very rarely cooperated with INS efforts to repatriate deportable Cuban aliens. Likewise, the lifers at issue in a recent California case suffered because the United States lacks an extradition treaty with Vietnam. The court exhibited a heightened sense of realism when it observed:

there is no real chance that any of these aliens will be deported in the foreseeable future because no extradition treaty with Vietnam exists, and although there have been negotiations to develop a treaty for several years, the State Department cannot give any reasonable projection as to when, if ever, a treaty will be agreed upon.

152 Most frequently, these nations are Cuba, Vietnam, Cambodia, and Laos. Also common among the ranks of the lifers are Palestinians, Africans, former Soviet citizens, Iranians, or any person who is without formal statehood. See supra text accompanying note 10.
153 See supra note 3 and accompanying text (recounting the incident in which prisoners took guards hostage for six days before being allowed to return to Cuba).
154 See Sandberg, supra note 28, at 384–85 (describing the difficulties of negotiating the return of the Mariel Cubans).
155 See Hoang Manh Nguyen v. Fasano, 84 F. Supp. 2d 1099, 1111 (S.D. Cal. 2000) (holding that when deportation is not likely in the foreseeable future, the burden shifts to the government to show that continued detention is warranted).
156 Id.
For the purpose of illustrating the "crystal ball problem," the Vietnam example is poignant. While the United States has bargained with the Vietnamese government for years, still no agreement exists to repatriate their citizens. Absent a sea-change in our diplomatic relations with their home government, it is unlikely that Vietnamese lifers will be deported in the foreseeable future. Thus, for many detainees, the "crystal ball problem" is moot: because there is no realistic possibility that they will be repatriated, speculation is futile.7

In light of this reality, the governmental interest appears increasingly shallow. While the INS is authorized to hold detainees for the purposes of effectively executing deportation,8 in the case of many lifers, this rationale is meaningless. "Once it becomes evident that the deportation is not realizable in the future, the continued detention of the alien loses its raison d'etre."59

The Supreme Court has addressed such fundamental shifts in the purpose of confinement in other contexts. Due process requires that, "the nature and the duration of commitment bear some reasonable relation to the purpose for which the individual is committed."16 If the purpose for detention becomes meaningless, the Court has found that the detention "could not constitutionally continue after that basis no longer existed."161 In the many cases involving detainees from countries without extradition treaties with the United States, the government's administrative purpose of effecting deportation is without merit. Gazing into the foggy future, the government's first justification for indefinite detention is undermined by its own ambiguity.

2. Administrative Purpose of Protecting the Community from Danger

The second part of the "crystal ball problem" is more complex, both because its outcome is more contingent on the particular facts of the case and because the speculation about future behavior is more tentative. The Supreme Court has accepted the practice of detaining U.S. citizens in the interest of protecting public safety.162 In

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7 It should be noted that recent diplomatic developments between Vietnam and the United States foreshadow a brighter day. See, e.g., A.J. Langguth, Editorial, The Forgotten Debt to Vietnam, N.Y. TIMES, Nov. 18, 2000, at A19 (noting that President Clinton's visit to Vietnam could "lay groundwork for more progress in what is already a much improved relationship").

8 8 U.S.C. § 1231.


10 Jones v. United States, 463 U.S. 354, 368 (1983) (authorizing the institutionalization of a defendant who was acquitted on the basis of mental illness only as long as the acquittedee continues to be mentally ill or a danger to herself or others).

11 O'Connor v. Donaldson, 422 U.S. 563, 575 (1975) (holding that a state could not continue to detain a harmless, mentally ill person).

12 See, e.g., Schall v. Marín, 467 U.S. 253, 279-81 (1984) (allowing for the detention of "dan-
1987, the Court summarized: "We have repeatedly held that the Government’s regulatory interest in community safety can, in appropriate circumstances, outweigh an individual’s liberty interest." The closest analogy to preventative detention of lifers is the detention of populations determined to be mentally incompetent or chronic sexual offenders, who are deemed to be a threat to society.

"In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." The terms of this exception should apply equally to both the mentally incompetent and the criminal alien, but they do not. At stake for both groups is the ultimate liberty interest—the interest in being free from bodily restraint imposed by the government.

Despite this similarity, circuit courts have defended the differential treatment of the mentally incompetent and lifers. In Gisbert v. United States Attorney General, the Fifth Circuit distinguished the situation of the dangerous mentally ill from lifers on two separate grounds. First, the court differentiated the two groups as citizens and non-citizens. Second, the court contrasted the plight of those detained in psychiatric facilities from those held in jails. An argument can be made that those distinctions work in favor of the lifer, not against her.

First, the distinction between citizen and non-citizen is not relevant to the case of indefinitely detained, removable aliens. While it is true that regarding aliens, "Congress regularly makes rules that would..." juvenile delinquents pending trial); Bell v. Wolfish, 441 U.S. 529, 531-34 (1979) (authorizing detention pending trial where the accused is considered to be a flight risk); Addington v. Texas, 441 U.S. 418, 426 (1979) (sanctioning the detention of criminal defendants who are incompetent to stand trial and have been found to be dangerous).

165 United States v. Salerno, 481 U.S. 739, 748 (1987) (upholding the constitutionality of the Bail Reform Act of 1984, which allows a federal court to detain a person arrested pending trial if there are no release conditions that will reasonably assure the safety of the community).

166 See Addington, 441 U.S. at 426 (noting that the state has police power authority "to protect the community from the dangerous tendencies of some who are mentally ill").

167 See Kansas v. Hendricks, 521 U.S. 346 (1997) (dealing with the commitment of "sexually violent predators").

168 The analogy of pre-trial detention may seem appropriate, but given the temporal considerations at stake here, the more apt analogy would be that of a prisoner already tried and convicted, but awaiting a sentence. In this case, it is a sentence that may never come. See Debora Ann Gorman, Note, Indefinite Detention: The Supreme Court’s Inaction Prolongs the Wait of Detained Aliens, 8 GEO. IMMIG. L.J. 47, 61 (1994) (noting that the deportable aliens may be subject to indefinite detention due to the "limitless discretion" given to the Attorney General).

169 Foucha v. Louisiana, 504 U.S. 71, 83 (1992). Foucha has been distinguished as inapposite from the situation of criminal aliens because it dealt with citizens in psychiatric facilities. See Gisbert v. United States Attorney Gen., 988 F.2d 1437, 1441 n.6 (5th Cir. 1993).

170 The Zadvydas court would distinguish the two groups on the basis that removable criminal aliens have been ordered permanently expelled from our borders. Zadvydas v. Underdown, 185 F.3d 279 (5th Cir. 1999). As is argued in Part IV below, this distinction does not mean that the removable alien is without due process rights.

169 988 F.2d 1437 (5th Cir. 1993).

170 Gisbert, 988 F.2d at 1441 n.6.
be unacceptable if applied to citizens,” the interest asserted here does not fall within that universe of congressional power. The interest asserted by lifers may be described as the right to be at liberty, which is a fundamental due process right for citizens and aliens alike, and one that removable aliens have by virtue of their presence in the United States. For the purpose of fundamental liberty interest analysis, a distinction based on citizenship shows only that removable aliens enjoy similar constitutional protection.

The second tenet of the Gisbert argument posits that because lifers are held in jails, their situation is distinct from that of the mentally incompetent. A psychiatric facility is at least suitable for the patients that it serves; the patients have been placed there by the court to receive the services they need. Upon a finding that a patient is incompetent, it is legally appropriate that she be institutionalized. In the case of removable aliens, however, their legal status dictates that they should be in their “native” countries; local and federal detention centers serve only as a second best alternative.

Jails, then, do not justify a diminished due process interest for lifers, relative to the mentally incompetent. Indeed, the second-best nature of the legal posture requires that the alien’s interest in bodily freedom be afforded more weight. The lifer’s interest in being freed once the administrative basis of their detention evaporates is even stronger than in other contexts where the Supreme Court has definitively affirmed this resolution. The Fifth Circuit’s effort in Gisbert to distinguish removable criminal aliens from institutionalized patients is thus unpersuasive.

In other respects, however, the similarities between the two groups are striking. Given that the government’s inability to effect deportation creates the absence of a cogent administrative justification for detention, both the lifer and the patient with a mental abnormality are detained by the government under the same rationale. Both groups can be held following the completion of their penal sentence for the purpose of protecting the general public from potential

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172 Binh Phan v. Reno, 56 F. Supp. 2d 1149, 1154 (W.D. Wash. 1999) (“The issue here is much more basic—it is simply the right to be at liberty. Put another way, at issue is petitioners’ fundamental liberty interest in being free from incarceration.”).
173 See Duy Dac Ho v. Greene, 204 F.3d 1045, 1062 (10th Cir. 2000) (Brorby, J., dissenting) (arguing that removable aliens enjoy a right to fundamental constitutional protections by quoting Foucha v. Louisiana, 504 U.S. 71, 80 (1992), when stating that “[l]iberty is one of those basic rights enjoyed by all ‘persons’ as freedom from bodily restraint has always been at the core of liberty protected by the Due Process clause”).
174 The term “native” country is used loosely, because many lifers have spent the majority of their lives in the United States.
175 See Foucha, 504 U.S. at 82-83 (emphasizing that the detention found constitutionally permissible was strictly limited in duration in United States v. Salerno, 481 U.S. 739, 747 (1987)).
176 See supra Part III.B (discussing the “crystal ball problem”).
danger. In the case of chronic sexual offenders, however, the Supreme Court has insisted that the detention be based on a minimal degree of scientific certainty. Lifers, by contrast, are left to the vagaries of the INS bureaucracy. Yet, their ultimate fate is the same: a de facto life sentence as long as the underlying condition—in one case, mental aberration, in the other, foreign policy—remains unchanged. A comparison of the procedural protections for each of these groups reveals the disparity in treatment that lifers receive.

Before a mentally ill patient is institutionalized, he must be found to suffer from a cognitive, psychological, or developmental disorder that creates a heightened risk of danger. In order for this finding to legally warrant indefinite commitment, it must be determined that the detainee lacks the ability to comprehend the moral weight or the broader social consequences of her actions. In these cases, the court can point to scientific evidence justifying its conclusion that but for institutionalization, a mentally incompetent patient would be a danger to the community.

Similarly, the Supreme Court has approved of statutes that allow for the non-penal detention of chronic sexual offenders only where the evidentiary threshold is sufficiently rigorous. In Kansas v. Hendricks, for example, the Supreme Court upheld a state involuntary commitment statute because it required a clear, scientific resolution of the "crystal ball problem." In that regard Justice Thomas wrote, "[t]he statute thus requires proof of more than a mere predisposition to violence; rather, it requires evidence of past sexually violent behavior and a present mental condition that creates a likelihood of such conduct in the future if the person is not incapacitated."

The record in Hendricks illustrates that in order to prove that the prisoner presented a future threat, the state had to meet a very high burden of proof. In that case, Kansas presented evidence of future dangerousness from the chief psychologist at a state hospital, the report of a licensed clinical social worker specializing in treating male sexual offenders, testimony from the victims, and a statement from the patient himself stating that even after his prison sentence, he "cannot control the urge" to molest children. Given the weight of

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177 See Hoang Manh Nguyen v. Fasano, 84 F. Supp. 2d 1099, 1113 (S.D. Cal. 2000) (finding fault with the use of criminal history alone to justify a finding of dangerousness).

178 See, e.g., Foucha, 504 U.S. at 82-83 (discussing the high burden of proof necessary to justify indefinite confinement to a mental institution).

179 See id. at 80 ("The State may also confine a mentally ill person if it shows 'by clear and convincing evidence that the individual is mentally ill and dangerous.'" (citing Jones v. United States, 463 U.S. 354, 362 (1983))).

180 521 U.S. 346 (1997) (considering the constitutional validity of a Kansas statute that mandated detention for sex crime offenders following the completion of their criminal sentence if they are found to present a danger to the public).

181 Id. at 357 (stating the opinion of the Court on the evidentiary standard).

182 Id. at 355 n.2, 360 (noting the vast amount of scientific evidence presented against the defendant).
this evidence, the Supreme Court had little trouble agreeing that the patient would present a danger to the public if released.\textsuperscript{183} Relative to this standard, the lifer receives little procedural protection, despite a similar procedural posture. After the first ninety days of detention, the INS is required to conduct a review of the criminal alien’s situation.\textsuperscript{184} However, this review is not uniform throughout the country and lacks substantive guidelines for determining dangerousness.\textsuperscript{185} In effect, low-level INS bureaucrats are using their own discretion to determine whether or not the lifer poses a threat to the community.\textsuperscript{186}

The insufficiencies of this haphazard method of determining dangerousness are apparent when measured against the standards required by Supreme Court precedent. In \textit{United States v. Salerno},\textsuperscript{187} the Court cited with approval an enumeration of procedural protections for detainees held for administrative purposes. These included the lifer’s right to representation, to testify in her own defense, to a hearing before a neutral decision-maker, and the right to appeal the administrative decision.\textsuperscript{188} The typical INS procedure includes none of these measures. Indeed, perhaps the most egregious feature of INS detention proceedings is that the lifer’s jailer is also his judge.\textsuperscript{189}

Beyond the problems related to the structure of the detention process, the INS custody review also suffers from a lack of evidentiary standards. Even when the INS’s own procedural rules are properly followed, the determination of a lifer’s dangerousness is still almost entirely based on her history and the degree to which it establishes a predisposition of violence.\textsuperscript{190} The guidelines are wholly without a

\textsuperscript{183} \textit{Id.} at 360 (noting that the level of evidence necessary to prove the prisoner mentally abnormal had been met).

\textsuperscript{184} See \textit{Chi Thon Ngo v. INS}, 192 F.3d 390, 400 (3d Cir. 1999) (reprinting from the INS interim procedures, “Pursuant to the provisions of 8 C.F.R. § 241.4, the District Director will continue to conduct a custody review of administratively final order removal cases before the ninety-day removal period . . . expires for aliens whose departure cannot be effected within the removal period”).

\textsuperscript{185} See \textit{Phuong Le, Judges Say INS Detention Can’t Last Indefinitely}, \textit{Seattle Post-Intelligencer}, July 10, 1999, at A1 (discussing an example of the subjectivity of review).

\textsuperscript{186} See \textit{Chi Thon Ngo}, 192 F.3d at 400 (“The District Director may delegate custody decisions to the level of Assistant District Director, Deputy Assistant District Director, or those acting in their capacity.”).

\textsuperscript{187} 481 U.S. 739 (1987) (upholding, against a due process challenge, an act requiring extensive protections for people detained prior to trial).

\textsuperscript{188} See \textit{Thien Van Vo v. Greene}, 63 F. Supp. 2d 1278, 1287 (D. Colo. 1999) (discussing the rights that should be afforded detainees).

\textsuperscript{189} In fact, INS officials who make these determinations have gone on record as stating their own belief that they are not impartial decision makers. \textit{See Thien Van Vo}, 63 F. Supp. 2d at 1287 (“Indeed, Respondent Greene acknowledged he was not a neutral decision maker.”).

\textsuperscript{190} 8 C.F.R. § 241.4 (2000). The guidelines suggest that the factors considered in determining dangerousness may include, but are not limited to: “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 (defaults); probation history; disciplinary problems while incarcerated; evidence of rehabilitative effort or recidivism; equities in the United
mechanism to even evaluate the lifer's "present mental condition," as is required in the case of the sexual offender. The INS thus resolves the "crystal ball problem" without gazing into the future, but rather by looking only to the past.

This lack of an evidentiary standard has disturbed some federal courts. For example, in Hoang Manh Nguyen v. Fasano, Judge Keep of the Southern District of California criticized the lack of substantive guidelines for determinations of dangerousness. He noted that the decision to continually detain each of the petitioners "appears to have been predicated solely on each Petitioner's criminal history." Rejecting this approach, Judge Keep found that "[a]n alien's criminal history does not militate a finding of danger to the community." Because he could find no principled basis upon which determinations of dangerousness were made, Judge Keep strongly disapproved of this ad hoc system of justice. Indeed, despite the fact that each of the petitioners had received their proper "file review" by the INS to consider dangerousness, Judge Keep concluded that "[i]t is... unclear to the court... that Petitioners pose a danger to the community."

The federal reporters are filled with similar condemnations of INS shortcomings in reviewing lifer cases. The In re Indefinite Detention Cases court noted that "the INS has not meaningfully and impartially reviewed the Petitioner's custody status." Likewise, in Binh Phan, the court concluded that "[t]he absence of any individualized assessment or consideration of the petitioners' situations in light of the pertinent factors set forth in the regulations violates their procedural due process rights."

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191 See Kansas v. Hendricks, 521 U.S. 346, 357-58 (1997) (noting that "a finding of dangerousness standing alone is ordinarily not a sufficient ground upon which to justify indefinite involuntary confinement").

192 Any possibility that a criminal alien has reformed her ways is thus ignored, in effect further punishing the lifer for past acts for which she has already served a full penal sentence. The Zadvydas court noted that the whole rationale behind this immigration scheme rests on the notion that the American public does not have to tolerate a similar level of risk with regard to criminal aliens. See Zadvydas v. Underdown, 185 F.3d 279, 296-97 (3d Cir. 1999). While this reasoning certainly justifies the removal of criminal aliens as an initial matter, Congress in no way anticipated or balanced this interest against the possibility that the result of the statutory scheme would be a potential life sentence in prison for criminal aliens who have completed their penal sentence.


194 Id. at 1113.

195 Id.

196 Id.

197 In re Indefinite Detention Cases, 82 F. Supp. 2d 1098, 1099-1100 (C.D. Cal. 2000) (condemning the failure of the INS to meet even the minimum procedural standards set forth in their own interim procedures).

When compared to the procedural and evidentiary standards for committing both the mentally incompetent and the chronic sexual offender, the typical lifer receives only the benefit of a perfunctory INS review. Unfortunately, the freedom at stake is just as significant. The average removable criminal alien, while certainly guilty of at least some anti-social behavior, does not pose the same threat to public safety that a typical chronic sexual offender or patient with unstable mental illness does. Yet, the process afforded these groups of detainees entails a more rigorous effort to establish their dangerousness to a degree of scientific certainty. Indeed, in many cases, lifers are detained for past offenses that are relatively minor.

3. Administrative Interest in Preventing Flight

Lastly, the INS typically argues that it is detaining a lifer for the legitimate administrative purpose of preventing him from absconding. The argument posits that a released removable criminal alien will have little to lose by escaping from the grasp of authorities, making deportation impossible even if a repatriation agreement were reached. The legitimacy of this interest is contingent upon the possibility that repatriation will become possible in the foreseeable future, an unlikely prospect in light of the political realities complicating the establishment of extradition agreements. More importantly, this interest fails even on its own terms.

As an initial matter, the government does not have to incarcerate a lifer in order to ensure his availability. The INS has narrower measures at its disposal to secure this interest. In particular, a variety of supervised parole measures, such as those used in the non-immigration criminal context, provide a viable alternative to incarceration. In fact, the Code of Federal Regulations provides specific guidance in this area. The minimum amount of supervision under 8 C.F.R. § 241.5 includes:

1. A requirement that the alien report to a specified officer periodically and provide relevant information under oath as directed; (2) A require-

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199 See Immigration and Naturalization Service Decisions Impacting the Agency's Ability to Control Criminal and Illegal Aliens: Hearing Before the Subcommittee on Immigration and Claims of the House Committee on the Judiciary, 106th Cong. 66-73 (1999) (statement of Bishop Nicholas DiMarzio, Auxiliary Bishop of Newark, New Jersey and Chairman of the Bishop's Committee on Migration for the United States) (reporting on his work with an immigrant in his diocese who was being deported for petty larceny); Varied Routes Led Immigrants to INS Custody, SEATTLE POST-INTELLIGENCER, June 17, 1999, at B1 (reporting that some of the petitioners in the consolidated Binh Phan case were being held for crimes of "moral turpitude," such as theft and receipt of stolen property).


201 See 8 C.F.R. § 241.5 (2000) (listing conditions to be attached to prisoner's release including order of supervision, posting of bond, and employer authorization parameters).

202 See id.
ment that the alien continue efforts to obtain a travel document and assist the Service in obtaining a travel document; (3) A requirement that the alien report as directed for a mental or physical examination or examinations as directed by the Service; (4) A requirement that the alien obtain advance approval of travel beyond previously specified times and distances; and (5) A requirement that the alien provide the Service with written notice of any change of address on Form AR-11 within ten days of the change.\textsuperscript{203}

This provision illustrates the congressional belief that lifers are no more likely to flee than criminal defendants facing trial. Reflecting this insight, the court in \textit{Hoang Manh Nguyen v. Fasano} could not understand "why the procedures set forth in 8 C.F.R. § 241.5 are not sufficient to prevent Petitioners from absconding."\textsuperscript{204} Given the fundamental liberty interest at issue, the government must achieve its stated purpose through the narrowest means available.\textsuperscript{205} Indefinite detention of all lifers oversteps these bounds.

In sum, an examination of the governmental interests for the indefinite detention of removable criminal aliens reveals a series of empty formalisms. The INS cannot continue to justify prolonged confinement of these long-term U.S. residents based only on the shadow of meaningful administrative purposes.\textsuperscript{206} If the administrative purpose is not reasonably attainable or may be achieved through means more narrow than imprisonment, the INS must release the detained lifer.

\textbf{C. Toward a Consistent Constitutional Theory}

While the concerns raised by the "crystal ball problem" have proved difficult to reconcile across the expanse of the federal judiciary, the cases discussed above are consistent with the representation reinforcing theory of constitutional interpretation.\textsuperscript{207} Articulated by John Hart Ely and building upon Justice Harlan Fisk Stone's famous \textit{Caroline Products} footnote,\textsuperscript{208} the representation reinforcing theory

\textsuperscript{203} 8 C.F.R. § 241.5(a).

\textsuperscript{204} Hoang Manh Nguyen v. Fasano, 84 F. Supp. 2d 1099, 1111 (S.D. Cal. 2000).

\textsuperscript{205} See Reno v. Flores, 507 U.S. 292, 301-02 (1993) (stating that governmental burdens on fundamental liberty interests must be narrowly tailored to serve a compelling governmental interest).

\textsuperscript{206} Surely, the three administrative purposes described above are meaningful for removable aliens whose deportation is imminent. In the case of lifers, however, the administrative purposes possess only a shadow of their originally intended meanings.


\textsuperscript{208} See United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) (suggesting that heightened judicial scrutiny is appropriate when "legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation" or when "prejudice against discrete and insular minorities ... tends to seriously curtail the operation of those political processes ordinarily to be relied upon to protect minorities"); see also Bruce A. Ackerman, Beyond Carolene Products, 98 Harv. L. Rev. 713 (1985) (re-examining Caro-
laid the foundation for the contemporary debate over judicial restraint. As applied in the context of indefinite detainees, the representation reinforcing theory would require the judge to use her role to protect the voiceless lifer minority from majoritarian forces.

Indeed, Ely could very well have been writing of the lifers themselves when he urged judges to vindicate the rights of minorities when "representatives beholden to an effective majority are systematically disadvantaging some minority out of simple hostility or a prejudiced refusal to recognize commonalities of interest, and thereby [are] denying that minority the protection afforded other groups by a representative system." If one accepts that removable aliens are afforded the same due process rights as citizens, it is difficult to imagine what, other than xenophobic hostility or a "prejudiced refusal to recognize commonalities of interest," underlies the collective government apathy toward the plight of lifers. Is it conceivable that U.S. citizens would ever be subjected to this draconian legal limbo?

The principal argument that the representation reinforcing model is inapplicable comes from advocates of the plenary power doctrine. This theory posits that issues of immigration are uniquely insulated from judicial interference, because the elected branches of government must have complete control over an issue so central to the national sense of self-identity.

The argument for the plenary power doctrine is especially weak in the cases of removable aliens, however. The traditional justification for the plenary power doctrine is that immigration policies deeply affect the nation's foreign relations and national identity, thus making judges particularly unsuited to act in this area. In the case of re-


210 The representational reinforcing theory has been applied to the problem of indefinite detention before. See Gorman, supra note 166 at 63–64. In the post-IIRIRA era, the obligation of the judiciary to uphold the interests of those absent from the majority political process has become even more important, because IIRIRA further eroded the procedural due process afforded to criminal aliens. As a result, the detainee is more exposed to the will of the majority, without the same protection against error that accompanies other government actions. As with most judicial balancing, the constitutional theory is borne out in the respective weights that the judge chooses to assign to the opposing interests. As will be discussed below, Binh Phan v. Reno, 56 F. Supp. 2d 1149 (W.D. Wash. 1999) offers a good illustration of the representation reinforcing theory at work.

211 ELY, supra note 207, at 103.


213 See INS v. Aguirre-Aguirre, 526 U.S. 415, 425 (1999) ("The judiciary is not well positioned to shoulder primary responsibility for assessing the likelihood and importance of such diplo-
movable criminal aliens, however, concerns about foreign relations and national identity are not implicated. The government objectives of effecting deportation, preventing harm to the American public, and preventing flight do not involve foreign relations or nationalities. As the Binh Phan court noted, "[i]ndefinite detention of aliens ordered deported is not a matter of immigration policy; it is only a means by which the government implements Congress's directives." As such, the principles underlying the plenary power doctrine are not implicated. As if heeding the call of the representation reinforcing model, the Binh Phan court found that indefinite detention implicated fundamental notions of liberty and thus applied a heightened degree of judicial scrutiny to the actions of the INS.

More generally, the plenary power doctrine is increasingly disfavored in modern jurisprudence. Commentators have observed that regulation of immigration law exists in a sort of "phantom" or subconstitutional state. Consequently, internal inconsistency and external criticism mark the application of this body of law. The plenary power doctrine has been persuasively attacked by scholars as an archaic holdover from the era of Plessy v. Ferguson.

The best example of the plenary power doctrine's basis in outmoded beliefs may be found in the Zadvydas decision itself. After concluding that Mr. Zadvydas is not asserting a fundamental liberty interest, the Court goes on to argue that the plenary power, as explained in Wong Wing, may overcome the constitutional rights of aliens. In doing so, the court quotes Wong Wing for the distinction between the Constitution's bar on governmental abuse that violates substantive due process and "the power of congress to protect, by summary methods, the country from the advent of aliens... or to expel such if they have already found their way into our land, and un-

motic repercussions.")

215 Id. at 1155-56 ("[D]etention threatens the deprivation of a fundamental liberty interest and thus clearly triggers 'heightened, substantive due process scrutiny,' not judicial deference.") (quoting Reno v. Flores, 507 U.S. 292, 316 (1993) (O'Connor, J., concurring)).
216 See Motomura, supra note 32, at 449-50 (suggesting that the plenary power doctrine is in decline and that this trend is "best understood as a function of the tension in immigration cases between constitutional doctrine and statutory interpretation").
217 See Gabriel J. Chin, Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration, 46 UCLA L. REV. 1 (1998) (arguing that the isolation of immigration policy from effective judicial review is a product of the outdated and unacceptable principles of the Plessy v. Ferguson, 163 U.S. 537 (1896), era and should thus be abandoned); see also Stephen H. Legomsky, Immigration Law and the Principle of Plenary Congressional Power, 1984 SUP. CT. REV. 235 (arguing that the Court's allegiance to the plenary power doctrine in the area of immigration is a result of "misconceived doctrinal theory" and should be abandoned). In a similar vein, Nancy Morawetz has argued that plenary power does not justify the retroactivity provisions of IIRIRA in the face of substantive due process doctrine. See Nancy Morawetz, Rethinking Retroactive Deportation Laws and the Due Process Clause, 73 N.Y.U. L. REV. 97 (1998).
218 185 F.3d 279, 295-96 (5th Cir. 1999).
219 Wong Wing v. United States, 163 U.S. 228 (1896).
lawfully remain therein." The language replaced by the court’s ellipsis is omitted with good reason; the original sentence is at odds with the Constitution’s present state of evolution but also with our contemporary standards of moral decency. The original, unedited sentence in *Wong Wing* itself read:

No limits can be put by the courts upon the power of congress to protect, by summary methods, the country from the advent of aliens whose race or habits render them undesirable as citizens, or to expel such if they have already found their way into our land, and unlawfully remain therein.

That the *Zadvydas* court omitted this language is not surprising. That we continue to allow for the reliance upon so outmoded a doctrine is.

The judges of the *Binh Phan* court looked past this outmoded formalism to address the underlying constitutional norms at stake. They refused to surrender their role of protecting constitutional rights to the nebulous tentacles of plenary power. In doing so, the court has vindicated the representation reinforcing theory, which has historically insisted on the protection of minority interests in the face of majoritarian hostility. As the representational reinforcing analysis suggests, indefinite detention of removable criminal aliens strikes discord with fundamental American principles in legalistic, theoretical, and even practical terms.

IV. LEGAL REALISM OR LEGAL FICTION: THE NATURE OF LAW AND THE SUPREME COURT’S CHOICE IN ZADVYDAS

The Supreme Court faces a clear choice in its consolidated *Zadvydas* case, to be decided sometime during the October 2000 term. The unique and factually complex situation that lifers find themselves in has no clearly correct legal answer. Neither of the two viable alternatives reaches the legally “correct” result for these detainees. On the

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220 *Zadvydas*, 185 F.3d at 296.
221 *Wong Wing*, 163 U.S. at 237 (emphasis added).
222 Indefinite detention is maintained at great cost to American taxpayers. The INS estimates that each detainee costs the United States approximately $55 per day. *See* Malone, supra note 13, at 1A.
223 Arguably, the two cases before the Court in this consolidated grant of certiorari are not inconsistent. The facts of *Zadvydas* are so unique as to provide ample opportunity for the Court to distinguish it from other, more common lifer scenarios. For instance, because of Mr. Zadvydas’s situation as a “stateless man,” *see* *Zadvydas v. Underdown*, 185 F.3d 279, 291-94 (5th Cir. 1999), the Fifth Circuit imagined possibilities for deportation that had not yet been pursued by the INS. These included different theories on which to base claims of Lithuanian, German, and Russian citizenship, all arising from Zadvydas’s tortured, ambiguous family history. *Id.* By finding these new possibilities, the court at once avoided the necessity of terming Mr. Zadvydas’s imprisonment “indefinite” and resurrected the “raison d’etre” of the detention. In short, the court unearthed what it believed to be unexhausted avenues of deportation and therefore continued justification for detention. “We hold that the government may detain a resident alien based on either danger to the community or risk of flight while good faith efforts to effectuate the alien’s deportation continue and reasonable parole and periodic review procedures
one hand, a lifer’s release into the United States on immigration parole is in tension with her final order of deportation. On the other, prolonged, indefinite detention without criminal conviction and supported only by a vacuous administrative purpose contradicts our basic notions of liberty for all persons within our borders. That so many federal courts have reached such widely ranging results bears out the complexity of the lifers’ predicament. As shown above, either opposing position can be supported with ample logic and vigor, a truism that might be said for much of constitutional law. Yet, while constitutional methodology provides no one overwhelming result, the Court is faced with a clear choice. The Court can choose to give force to narrow legal fictions that fail to account for this unique situation, or the Court can choose to acknowledge the human side of its substantive due process jurisprudence. In turn, the true nature of law will be borne out: is law to serve the needs of real people, or is it only a set of wooden rules to be followed and manipulated for their own sake?

A. Defining the Lifer’s Interest

The starting point for the Court will be the characterization of the lifer’s interest which is crucial, because the constitutional framework used is contingent upon it. As a matter of common sense, the lifer’s interest is in her freedom; however, courts have manipulated this basic idea to fit their desired result.

The *Zadvydas* position reveals that the Fifth Circuit turns a blind eye to the suffering of the petitioner, instead invoking legalisms that gloss over the liberty actually at stake. From this perspective, the lifer’s interest is identified as the right to be paroled in the United States, rather than the more fundamental right to be at liberty.

This argument was expressed most overtly by the majority in *Duy Dac Ho v. Greene*. The *Duy Dac Ho* court acknowledged both sides of this are in place.” *Id.* at 297. The court does not address the question of continued detention when no such unexhausted avenues exist, removing the possibility of good faith efforts. It is this latter scenario which exists for the vast majority of lifers, epitomized by the case with which *Zadvydas* is consolidated. Kim Ho Ma v. Reno, 208 F.3d 815 (9th Cir. 2000). In this way, if the Supreme Court so chooses, it could reasonably hold that the *Zadvydas* framework, by its own terms, would allow for the release of the majority of lifers.

224 See Binh Phan v. Reno, 56 F. Supp. 2d 1149, 1154-55 (W.D. Wash. 1999) (noting that “[a]s a general rule, governmental invasions of fundamental liberty interests are subject to strict scrutiny review”).

225 This term will be used to describe all arguments that support or are in accord with the Fifth Circuit’s decision in *Zadvydas v. Underdown*, 185 F.3d 279 (5th Cir. 1999).

226 See *id.* at 289 (disagreeing with petitioner’s claim that “his detention amounts to punishment without trial, and thus violates his substantive due process liberty interest”).

227 *Duy Dac Ho v. Greene*, 204 F.3d 1045, 1058 (10th Cir. 2000) (noting that if the petitioners were granted the relief they sought, they would be granted “the right to be at large in the United States”).
coin, preferring the former. "Although the petitions could be characterized as requests to be released from incarceration, the relief they seek is indistinguishable from a request to be readmitted to this country, albeit temporarily, until their return to Vietnam can be effectuated."

Both the Duy Dac Ho dissent and the district court cases that are in accord with it illustrate that the outcome of the due process analysis is different when the court chooses the equally defensible position of characterizing the lifer's interest as the right to be at liberty. While logic allows for either of these characterizations to stand, the Court will face a clear choice in deciding which way to characterize it.

**B. Establishing a "Reverse Entry Fiction"?**

From the perspective of lifers, the most troubling aspect of the Zadvydas position is its lumping together of the substantive due process rights of excludable and removable aliens. It is this legal maneuver atop which the Zadvydas decision stands and upon which its reasoning is entirely contingent. Close analysis reveals that this argument manipulates a narrow legal fiction in order to justify its ultimate conclusion that removable aliens should be without meaningful substantive due process rights.

The entry fiction was created in order to allow aliens whose legal status does not permit entry into the United States to be admitted in order to avoid literally holding them at the border. Their legal status remains unchanged, however, retaining the notion that they are standing at our gates, awaiting entry. The basis for this fiction is that the alien is considered to be still at our border, without having gained entry or any of the constitutional privileges that come with it. This comports with a basic tenet of the plenary power doctrine that the request to be admitted into our country is a privilege and not a right. Both because excludable aliens have no right to be admitted into the United States, and because their status of being outside our border leaves them beyond the cloak of constitutional protection, courts have allowed for their prolonged detention.

The court in Zadvydas inverts this logic to create, in effect, a reverse entry fiction or an exit fiction. It argues that once a lifer's final

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228 Id.
229 Id. at 1060, 1062 (Brorby, J., dissenting) (concluding that the Petitioners are asserting a fundamental liberty interest).
230 See, e.g., Binh Phan v. Reno, 56 F. Supp. 2d 1149, 1154 (W.D. Wash. 1999) (rejecting as too narrow the government's argument that the Petitioners seek only the right to be released into the United States pending deportation and, instead, characterizing that interest as a "fundamental liberty interest in being free from incarceration"); see also supra text accompanying notes 124-35.
232 Id.
order for deportation has been completed, that alien, too, stands legally outside our borders, despite her physical presence in the United States and her previous status as a constitutionally protected alien.\(^{253}\)

When a former resident alien is... finally ordered deported, the decision has irrevocably been made to expel him from the national community. Nothing remains but to effectuate this decision. The need to expel such an alien is identical, from a national sovereignty perspective, to the need to remove an excludable alien who has been finally and properly ordered returned to his country of origin.\(^{254}\)

With this language, the Zadvydas court joins together the constitutional fate of excludable and removable aliens. In doing so, the court must maneuver around two major obstacles. First, the court must argue that the final order of deportation takes the lifer outside of our borders. Second, the Fifth Circuit must find support for the notion that a removal order strips an alien of her previously-held constitutional protection and the derivative right to claim a valid liberty interest. Neither of these propositions can claim support in our courts' federal jurisprudence.

First, the Zadvydas position argues that a final order of removal takes an alien outside of our borders.\(^{255}\) Yet, the inquiry for constitutional protection has always been physical presence within our borders. There is a long and venerable line of case law granting substantive due process rights to aliens who gain physical entry into the United States.\(^{256}\) The seminal case in this area is Plyler v. Doe,\(^{257}\) establishing that “[a]liens, even aliens whose presence in this country is unlawful, have long been recognized as ‘persons’ guaranteed due process of law by the Fifth and Fourteenth Amendments.”\(^{258}\) What is important for this analysis is not the legal status of the alien, as the Zadvydas decision suggests by placing emphasis on the effect of the final order of deportation, but rather the fact that the alien has gained entry into the United States and is now physically present...

\(^{253}\) Zadvydas v. Underdown, 185 F.3d 279, 295-96 (5th Cir. 1999).

\(^{254}\) Id. at 296.

\(^{255}\) Id. at 295-96; see also Duy Dac Ho v. Greene, 204 F.3d 1045, 1058 (10th Cir. 2000) (“The purported liberty interests at stake in these cases, therefore, are most appropriately viewed from the perspective of an alien who has sought but been denied initial entry into this country...”).

\(^{256}\) See, e.g., Wong Wing v. United States, 163 U.S. 228, 238 (1896) (concluding that “all persons within the territory of the United States are entitled to the protection guaranteed [sic] by [the Fifth and Sixth] [A]mendments”); Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886) (ruling that the due process and equal protection provisions of the Fourteenth Amendment “are universal in their application to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or nationality”); see also Wong Wing, 163 U.S. at 242 (Field, J., concurring in part and dissenting in part) (“The term ‘person’ used in the fifth amendment... is broad enough to include any and every human being within the jurisdiction of the republic. A resident, alien born, is entitled to the same protection under the laws that a citizen is entitled to.”).

\(^{257}\) 457 U.S. 202 (1982).

\(^{258}\) Plyler, 457 U.S. at 210.
here. The removable alien’s constitutional status is thus different from the excludable alien who, because of the operation of the entry fiction, is deemed to be still outside the United States seeking entry. The *Zadvydas* court cannot accept the operation of the entry fiction inasmuch as it allows excludable aliens to become available for the purposes of analogy, and then forget that this same fiction holds these people outside of our borders. Yet, this is exactly how the *Zadvydas* position proceeds.

Second, the Fifth Circuit argues that this removal order also strips the alien of the constitutional rights that she previously enjoyed. The *Hoang Manh Nguyen* court reveals the vulnerability of this legal maneuvering. “This court is not persuaded by [Zadvydas] that a final order of deportation erases any rights a permanent resident alien previously possessed . . . . [G]iven that resident aliens have acknowledged constitutional rights, we cannot make those rights vanish by the legal expedient of a final order of deportation.”

With their physical presence here, excludable aliens, complete with the lack of due process rights necessitated by this legal fiction, have become available for the *Zadvydas* court to use for analogy. To do so, however, ignores the fundamental notion upon which the entry fiction rests: these aliens have never gained entrance to our borders. By manipulating the entry fiction with its own unsupported line of argument, the *Zadvydas* position exploits the wooden rules of law at the cost of neglecting actual human suffering. Even if the Supreme Court rejects the *Kim Ho Ma* construction of IIRIRA, which infers a reasonableness limitation in the language of the statute, it may still find that indefinite detention violates the Constitution’s promise of due process. Indeed, close analysis of the *Zadvydas* position illustrates that no other contention is supported by our history, our jurisprudence, or our shared sense of decency to those within our borders.

CONCLUSION

The dilemma of lifers has existed for decades. The Court has now risen to the constitutional challenge it presents, but only after it was so jarringly introduced into the popular conscience with acts of desperation inside the walls of our prisons. In doing so, the Court will squarely face an administrative context where Congress’s statutory authorization of agency action raises human rights concerns so grave as to be constitutional in scope. The *Kim Ho Ma* Court gives Congress the benefit of the doubt, offering a construction of the statute that

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Hoang Manh Nguyen v. Fasano, 84 F. Supp. 2d 1099, 1110 (S.D. Cal. 2000) (citing Thien Van Vo v. Greene, 63 F. Supp. 2d 1278, 1283 (D. Colo. 1999)). See also Duy Dac Ho, 204 F.3d at 1061 (Brorby, J., dissenting) (referring to this line of argument as an “unsupported conclusion”).
does not allow for indefinite, non-penal detention. The question remains, however: what if this brand of governmental cruelty is precisely what Congress intended to allow?

The United States owes a duty to its legal permanent residents. In granting them such a status, the nation has invited them to the constitutional table. Despite the lifer’s crimes, for which she has already been fully punished, the government has benefited from her presence as a contributing member of society. The Court’s duty is to make the constitutional promise equally meaningful for all who participate in its burdens. The Court’s choice is between equally plausible interpretations of the Constitution that will help us to understand the most basic functions of law itself. Will we endorse a wooden set of rules and the manipulation of judicially created legal fictions toward the end of law’s existence for its own sake? Or will we choose an interpretation of the Constitution that relieves needless human suffering and allows restrictions on human liberty only to the narrowest extent necessary to achieve realizable governmental interests? Nestor Campos, a lifer suffering intolerable conditions at a local prison in Louisiana recounts that “[t]he guards used to tell me ‘You’ll be here until you’re dead.’” Is it possible that the Court could allow this purgatory to continue? For the sake of Nestor Campos, let us hope not.