No. 03-878

In the Supreme Court of the United States

PHIL CRAWFORD, INTERIM FIELD OFFICE DIRECTOR, PORTLAND, OREGON, UNITED STATES IMMIGRATION AND CUSTOMS ENFORCEMENT, ET AL., PETITIONERS

v.

SERGIO SUAREZ MARTINEZ

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONERS

THEODORE B. OLSON
Solicitor General
Counsel of Record

PETER D. KEISLER
Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

PATRICIA A. MILLETT
Assistant to the Solicitor General

DONALD E. KEENER
EMILY A. RADFORD
JOHN ANDRE
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether the continued detention of a criminal alien, who was apprehended at the border of the United States, was denied admission, and was subsequently ordered removed from the United States based on his criminal activities, is lawful, when effectuation of the removal order is not immediately foreseeable.

PARTIES TO THE PROCEEDINGS

Petitioner, Phil Crawford, the Interim Field Office Director in Portland, Oregon, of United States Immigration and Customs Enforcement, is the successor to Ronald J. Smith, District Director, District of Oregon, Immigration and Naturalization Service. John Ashcroft, Attorney General of the United States was named as a habeas corpus respondent below and is also a petitioner here.

Respondent is Sergio Suarez Martinez.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Constitutional, statutory, and regulatory provisions involved	2
Statement	2
1. Statutory framework	2
2. Factual background	7
3. Procedural history	11
Summary of argument	12
Argument:	
Section 1231(a)(6) of Title 8 permits the continued exclusion, through detention beyond the statutory removal period, of criminal aliens who have not been admitted to the United States and who cannot be immediately removed	14
A. Aliens stopped at the border and denied admission lack any protected liberty interest in release into the United States	15
1. The Executive and Legislative Branches have comprehensive control over immigration	15
2. The Executive and Legislative Branches have plenary control over aliens at the border	16
3. Parole does not enhance an excluded alien's rights	21
B. The text, structure, and history of Section 1231(a)(6) confirm the Executive Branch's authority to detain excluded criminal aliens	24
1. The statutory text and structure support the Secretary's detention authority	24
2. The legislative history supports the Secretary's detention authority	30

Table of Contents—Continued: Page

3. The six-month cap adopted in *Zadvydas* does not apply to excluded aliens 32
a. Preserving the Secretary's detention authority serves important purposes 33
b. Extending *Zadvydas* to excluded aliens would create, not avoid, constitutional problems 36
C. The existing parole scheme adequately protects the interests of excluded aliens pending their removal 43
Conclusion 49
Appendix 1a

TABLE OF AUTHORITIES

Cases:

Almendarez-Torres v. *United States*, 523 U.S. 224 (1998) 37, 38
Amanullah v. *Nelson*, 811 F.2d 1 (1st Cir. 1987) 26
Barrera-Echavarria v. *Rison*, 44 F.3d 1441 (9th Cir.), cert. denied, 516 U.S. 976 (1995) 26, 31
Barrera, In re, 19 I. & N. Dec. 837 (BIA 1989) 9
Benitez v. *Wallis*, 337 F.3d 1289 (11th Cir. 2003), cert. granted, 124 S. Ct. 1143 (2004) (No. 03-7434) 8, 25
Bridges v. *Wixon*, 326 U.S. 135 (1945) 18
Carey v. *Piphus*, 435 U.S. 247 (1978) 43
Carlson v. *Landon*, 342 U.S. 524 (1952) 47, 48
Chae Chan Ping v. *United States*, 130 U.S. 581 (1889) 15, 16, 23
Chin Yow v. *United States*, 208 U.S. 8 (1908) 20
Crowell v. *Benson*, 285 U.S. 22 (1932) 29
Demore v. *Kim*, 538 U.S. 510 (2003) 4, 15, 30, 45
Ekiu v. *United States*, 142 U.S. 651 (1892) 16, 19, 20, 21

Cases—Continued: Page

Fernandez-Roque v. *Smith*:
622 F. Supp. 887 (N.D. Ga. 1985) 7
734 F.2d 576 (11th Cir. 1984) 7, 41
Fiallo v. *Bell*, 430 U.S. 787 (1977) 15, 19
Fong Yue Ting v. *United States*, 149 U.S. 698 (1893) 16
Foucha v. *Louisiana*, 504 U.S. 71 (1992) 35
Gisbert v. *Attorney General*, 988 F.2d 1437 (5th Cir.), as amended, 997 F.2d 1122 (1993) 7, 9, 36, 41
Greenholtz v. *Inmates of the Nebraska Penal & Corr. Facility*, 442 U.S. 1 (1979) 44, 45, 48
Harisiades v. *Shaughnessy*, 342 U.S. 580 (1952) 15, 24
Heller v. *Doe*, 509 U.S. 312 (1993) 46
INS v. *Abudu*, 485 U.S. 94 (1988) 16
INS v. *Aguirre-Aguirre*, 526 U.S. 415 (1999) 15, 41
Jackson v. *Indiana*, 406 U.S. 715 (1972) 33
Jean v. *Nelson*, 727 F.2d 957 (11th Cir. 1984), aff'd, 472 U.S. 846 (1985) 22
Johnson v. *Eisentrager*, 339 U.S. 763 (1950) 3
Jones v. *United States*:
526 U.S. 227 (1999) 32
463 U.S. 354 (1983) 46
Kansas v. *Hendricks*, 521 U.S. 346 (1997) 43, 46
Kaplan v. *Tod*, 267 U.S. 228 (1925) 17, 21
Kleindienst v. *Mandel*, 408 U.S. 753 (1972) 16, 18
Kwock Jan Fat v. *White*, 253 U.S. 454 (1920) 20
Kwong Hai Chew v. *Colding*, 344 U.S. 590 (1953) 18, 43
Landon v. *Plasencia*, 459 U.S. 21 (1982) 3, 17, 18
Lane v. *Pena*, 518 U.S. 187 (1996) 29
Leng May Ma v. *Barber*, 357 U.S. 185 (1958) 4, 17, 21, 22, 23
Mathews v. *Diaz*, 426 U.S. 67 (1976) 15, 28, 39
Mathews v. *Eldridge*, 424 U.S. 319 (1976) 43, 45
Miller v. *Albright*, 523 U.S. 420 (1998) 28
Morrissey v. *Brewer*, 408 U.S. 471 (1972) 36, 43, 44
Palma v. *Verdeyen*, 676 F.2d 100 (4th Cir. 1982) 7, 32, 40

Cases—Continued: Page

Plyler v. *Doe*, 457 U.S. 202 (1982) 18, 28
Railroad Retirement Bd. v. *Fritz*, 449 U.S. 166 (1980) 30
Reno v. *American-Arab Anti-Discrimination Comm.*, 525 U.S. 471 (1999) 15
Reno v. *Flores*, 507 U.S. 292 (1993) 28, 35
Rogers v. *Quan*, 357 U.S. 193 (1958) 21, 24
Rosales-Garcia v. *Holland*, 322 F.3d 386 (6th Cir.), cert. denied, 123 S. Ct. 2607 (2003) 19, 23, 44, 46
Rust v. *Sullivan*, 500 U.S. 173 (1991) 37
Sale v. *Haitian Ctrs. Council, Inc.*, 509 U.S. 155 (1993) 17, 21, 40, 42, 48
Schall v. *Martin*, 467 U.S. 253 (1984) 35
Shaughnessy v. *United States ex rel. Mezei*, 345 U.S. 206 (1953) ..... *passim*
Tod v. *Waldman*, 266 U.S. 113 (1924), as modified, 266 U.S. 547 (1925) 20
United States v. *Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936) 39
United States v. *Flores-Montano*, 124 S. Ct. 1582 (2004) 17
United States v. *Ju Toy*, 198 U.S. 253 (1905) 18
United States v. *Oakland Cannabis Buyers' Coop.*, 532 U.S. 483 (2001) 37
United States v. *Salerno*, 481 U.S. 739 (1987) 43, 46, 48
United States v. *Verdugo-Urquidez*, 494 U.S. 259 (1990) 28
United States ex rel. Knauff v. *Shaughnessy*, 338 U.S. 537 (1950) 16, 17, 19, 20
United States ex rel. Mezei v. *Shaughnessy*, 195 F.2d 964 (2d Cir. 1952) 19
United States ex rel. Turner v. *Williams*, 194 U.S. 279 (1904) 18, 33
Wong Wing v. *United States*, 163 U.S. 228 (1896) 33

Cases—Continued: Page

Xi v. *INS*, 298 F.3d 832 (9th Cir. 2002) 11, 12, 27, 28, 29, 36, 37
Yamataya v. *Fisher*, 189 U.S. 86 (1903) 20
Zadvydas v. *Davis*, 533 U.S. 678 (2001) ..... *passim*

Constitution, treaty, statutes and regulations:

U.S. Const.:
Art. I 37
§ 7, Cl. 2 (Presentment Clause) 37
§ 8 38
Amend. I 18
Amend. V (Due Process Clause) 28, 33, 43, 44, 47, 1a
Immigration Joint Communique Between the United States and Cuba, Dec. 14, 1984, T.I.A.S. No. 11,057 9
Act of Mar. 3, 1875, ch. 141, 18 Stat. 477 38
Cuban Refugee Adjustment Act, Pub. L. No. 89-732, 80 Stat. 1161 (8 U.S.C. 1255 note) 7-8
Homeland Security Act of 2002, Pub. L. No. 107-296, § 441(2), 116 Stat. 2192 (to be codified at 6 U.S.C. 251(2)) 4
Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546 3
§ 303(b)(3)(B)(ii), 110 Stat. 3009-587 31
§ 307(a), 110 Stat. 3009-614 31
Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.* 4
8 U.S.C. 1101(a)(13) 26, 2a
8 U.S.C. 1101(a)(13)(B) 21, 2a
8 U.S.C. 1182 (1994) 3
8 U.S.C. 1182(a) (1994) 26
8 U.S.C. 1182(a) (2000 & Supp. I 2001) 26
8 U.S.C. 1182(a)(6) 3
8 U.S.C. 1182(a)(9) (1982) 8, 9
8 U.S.C. 1182(d)(5) (1976) 4, 7, 9
8 U.S.C. 1182(d)(5)(A) (Supp. IV 1980) 4, 7, 9

Statutes and regulations—Continued: Page

8 U.S.C. 1182(d)(5)(A) (1994) 25, 26
8 U.S.C. 1182(d)(5)(A) ..... *passim*, 3a
8 U.S.C. 1225(b) (1994) 26
8 U.S.C. 1225(b)(1)-(3) 26
8 U.S.C. 1225(b)(1)(B)(iii)(IV) 25
8 U.S.C. 1226 4
8 U.S.C. 1226 (1994) 26
8 U.S.C. 1226(c)(1)(A) 25, 26
8 U.S.C. 1226(e)(1) (1994) 25
8 U.S.C. 1226(e)(3) (1994) 25
8 U.S.C. 1227 (1994) 3
8 U.S.C. 1227(a)(1) (1994) 26
8 U.S.C. 1227(a)(2) (1994) 26
8 U.S.C. 1229a 3
8 U.S.C. 1231 4
8 U.S.C. 1231(a) 5, 4a
8 U.S.C. 1231(a)(1)(A) 5, 4a
8 U.S.C. 1231(a)(2) 5, 5a
8 U.S.C. 1231(a)(6) ..... *passim*, 6a
8 U.S.C. 1231(b)(1) 26
8 U.S.C. 1231(c) 26
8 U.S.C. 1231(h) 25
8 U.S.C. 1251 (1994) 3
8 U.S.C. 1252 (1994) 3
8 U.S.C. 1252(a)(1) (1988) 28
8 U.S.C. 1253(d) 31
8 U.S.C. 1255a(a)(4) 8
8 U.S.C. 1255 note 8, 24
8 U.S.C. 1522(f)(5) 8, 8a
Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 202(a)(3), 100 Stat. 3404 8
22 U.S.C. 6021-6091 40
28 U.S.C. 2241 11
8 C.F.R.:
Section 212.5 ..... 5, 6, 9a
Section 212.12 ..... 6, 14a

Regulations—Continued: Page

Section 212.12(b)(1) 45, 14a
Section 212.12(d) 45, 15a
Section 212.12(d)(2) 6, 34, 16a
Section 212.12(d)(4) 6, 45, 17a
Section 212.12(d)(4)(i) 6, 45, 17a
Section 212.12(d)(4)(ii) 6, 17a
Section 212.12(d)(4)(iii) 6, 45, 17a
Section 212.12(f) 6, 18a
Section 212.12(g) 10, 18a
Section 212.12(g)(2) 6, 47, 18a
Section 212.12(g)(3) 6, 47, 19a
Section 212.12(h) 6, 19a
Section 241.4 ..... 5, 20a
Section 241.4(d)(1) 6, 34, 23a
Section 241.4(e) 6, 25a
Section 241.4(f) 45, 25a
Section 241.4(f)(8) 6, 26a
Section 241.4(g)(5) 6, 45, 28a
Section 241.4(h)(1) 6, 45, 29a
Section 241.4(h)(2) 6, 45, 29a
Section 241.4(i)(5) 6, 45, 32a
Section 241.4(j) 6, 33a
Section 241.4(k)(2)(iii) 6, 36a
Section 241.4(k)(2)(v) 47, 36a
Section 241.4(*l*) 6, 38a
Section 241.4(*l*)(3) 47, 39a
Section 241.5 ..... 6, 40a

Miscellaneous:

142 Cong. Rec. 7972 (1996) 30
David W. Engstrom, *Presidential Decision Making Adrift: The Carter Administration and the Mariel Boatlift* (1997) 15, 40
52 Fed. Reg. (1987):
p. 48,799 ..... 9, 22, 40
p. 48,802 6
67 Fed. Reg. 39,259 (2002) 6, 45

Miscellaneous—Continued: Page

GAO, *Criminal Aliens: INS' Efforts to Identify and Remove Imprisoned Aliens Need to Be Improved* (July 15, 1997) 30
Kelly M. Greenhill, *Engineered Migration as a Coercive Instrument: The 1994 Cuban Balseros Crisis* (Feb. 2002) 39-40
H.R. 4349, 100th Cong., 2d Sess. (1988) 32
H.R. 5200, 100th Cong., 2d Sess. (1988) 32
H.R. 1915, 104th Cong., 1st Sess. (1995) 31
H.R. 2202, 104th Cong., 1st Sess. (1995) 31
H.R. Conf. Rep. No. 828, 104th Cong., 2d Sess. (1996) 31
H.R. Rep. No. 469, 104th Cong., 2d Sess. Pt. 1 (1996) 31
H.R. Rep. No. 879, 104th Cong., 2d Sess. (1997) 30, 31
Human Rights Watch/Americas, *Cuba: Repression, the Exodus of August 1994, and the U.S. Response* (Oct. 1994) 39
Alex Larzelere, *Castro's Ploy—America's Dilemma: The 1980 Cuban Boatlift* (1988) 40
C. Todd Piczak, *The Helms-Burton Act: U.S. Foreign Policy Toward Cuba, the National Security Exception to the GATT and the Political Question Doctrine*, 61 U. Pitt. L. Rev. 287 (Fall 1999) 40
Wayne S. Smith, *The Closest of Enemies: A Personal and Diplomatic Account of U.S.-Cuban Relations Since 1957* (1987) 40
U.S. Comm'n on Immigration Reform:
Legal Immigration: Setting Priorities (1995) 22
U.S. Immigration Policy: Restoring Credibility (1994) 30, 32, 39

In the Supreme Court of the United States

No. 03-878

PHIL CRAWFORD, INTERIM FIELD OFFICE DIRECTOR, PORTLAND, OREGON, UNITED STATES IMMIGRATION AND CUSTOMS ENFORCEMENT, ET AL., PETITIONERS

v.

SERGIO SUAREZ MARTINEZ

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The order of the court of appeals (Pet. App. 1a) is unreported. The order of the district court (Pet. App. 2a) is also unreported.

JURISDICTION

The court of appeals entered its judgment on August 18, 2003. On November 7, 2003, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including December 16, 2003, and the petition was filed on that date. The petition for a writ of certiorari was granted on March 1, 2004. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The relevant constitutional, statutory, and regulatory provisions are reproduced in an addendum to this brief.

STATEMENT

The issue in this case is whether aliens, who are stopped at the border, denied admission, and subsequently ordered removed based on their commission of crimes within the United States while on immigration parole, may be detained when their country of origin refuses to accept their return. Such detention is proper because Congress authorized it and a century of constitutional precedent from this Court permits it. Further, a judicially created time limit on detention would interfere significantly with the constitutional responsibility of the political Branches to protect the Nation's borders, manage migration crises, and conduct foreign relations.

1. Statutory Framework

a. Aliens governed by federal immigration law may be grouped into four general categories based on the relative levels of statutory and constitutional protection accorded their interest in residing within the United States. First, aliens who have been lawfully admitted for permanent residence enjoy the greatest statutory and constitutional protection. They generally are entitled to remain in the United States unless they commit certain crimes or engage in other conduct that renders them removable. Second, aliens admitted temporarily as non-immigrants (*e.g.*, students) may remain only for the designated time and purposes of their admission. Third, aliens who have entered illegally and who, therefore, have no statutory claim to remain, nonetheless enjoy some constitutional rights, including a right to due process in any removal proceedings.

Fourth, aliens who have been stopped at the border and are seeking admission in the first instance have no constitutional or statutory entitlement to be admitted or released into the United States. See generally *Zadvydas* v. *Davis*, 533 U.S. 678, 693-694 (2001); *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206, 212 (1953); *Johnson* v. *Eisentrager*, 339 U.S. 763, 770 (1950) ("The alien * * * has been accorded a generous and ascending scale of rights as he increases his identity with our society."). This case concerns the rights of the last group—aliens who have been inspected and denied admission into the United States.

The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009-546, altered the statutory nomenclature used to refer to the different categories of aliens and the procedures for their return or removal. Previously, aliens who were seeking admission into the United States in the first instance, but were ineligible to enter, were denominated "excludable" aliens and were subject to administrative "exclusion" proceedings. See *Landon* v. *Plasencia*, 459 U.S. 21, 25, 28 (1982); 8 U.S.C. 1182, 1252 (1994). Aliens who already had entered the United States, whether legally or illegally, but were ineligible to remain were referred to as "deportable" aliens subject to "deportation" procedures. See 8 U.S.C. 1227, 1251 (1994). Now, under IIRIRA, the term "inadmissible" alien refers both to excludable aliens and those who have entered illegally. 8 U.S.C. 1182(a)(6). The administrative proceeding conducted to determine whether any alien, whether lawfully admitted or inadmissible, can reside within the United States is now denominated a "removal" proceeding. 8 U.S.C. 1229a. For ease of reference, this brief refers to the subcategory of inadmissible aliens who have been refused admission at the border and whose rights are at issue in this case as "excluded" aliens.

b. The Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.*, has long afforded the Attorney General or, since March 1, 2003, the Secretary of Homeland Security (Secretary), the discretion to parole into the United States aliens who have been detained at the border and are seeking admission.[1] Such parole may be granted "temporarily under such conditions as [the Attorney General or, now, the Secretary] may prescribe" and only for "urgent humanitarian reasons or significant public benefit." 8 U.S.C. 1182(d)(5)(A); see 8 U.S.C. 1182(d)(5) (1976); 8 U.S.C. 1182(d)(5)(A) (Supp. IV 1980). The Act makes clear, however, that the discretionary "parole of such alien shall not be regarded as an admission of the alien." 8 U.S.C. 1182(d)(5)(A); see generally *Leng May Ma* v. *Barber*, 357 U.S. 185, 188-190 (1958). Section 1182(d)(5)(A) also provides that when, in the opinion of the Attorney General (or, now, the Secretary), the purposes of the alien's immigration parole have been served, the alien shall be returned to custody, "and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States." 8 U.S.C. 1182(d)(5)(A).

Congress enacted IIRIRA in 1996 in part to streamline the removal of certain criminal aliens from the United States and to expand the authorization for their detention pending the removal process. To that end, IIRIRA, as amended, requires the Secretary to detain aliens who have committed specified crimes before, during, and for a certain time after a decision regarding their removability. See 8 U.S.C. 1226, 1231; see generally *Demore* v. *Kim*, 538 U.S. 510 (2003). Af-

---

[1] On March 1, 2003, the functions of several border and security agencies, including those of the former Immigration and Naturalization Service, were transferred to the Department of Homeland Security and assigned within that Department to Immigration and Customs Enforcement. See Homeland Security Act of 2002, Pub. L. No. 107-296, § 441(2), 116 Stat. 2192 (to be codified at 6 U.S.C. 251(2)).

ter an order requiring the removal of an alien becomes final, IIRIRA directs the Secretary to remove the alien from the United States within 90 days and to continue detention of criminal aliens during that removal period. 8 U.S.C. 1231(a)(1)(A) and (2). If the Secretary is unable to effect the removal within that 90-day period, IIRIRA provides:

> An alien ordered removed who is inadmissible under section 1182 of this title [*i.e.*, aliens who are statutorily ineligible for admission due, *inter alia*, to the commission of crimes], removable under section 1227(a)(1)(C), 1227(a)(2), or 1227(a)(4) [*i.e.*, aliens who, subsequent to entry, violate their status or conditions of entry, commit specified crimes, or pose a security threat] 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.

8 U.S.C. 1231(a)(6). When Congress enacted Section 1231 in 1996, it left unamended the longstanding discretionary authority of the Attorney General under Section 1182(d)(5)(A) to parole, to decline to parole, and to revoke the parole, of aliens seeking admission to the United States.

c. While the vast majority of excluded aliens can be removed within or shortly after the 90-day window prescribed by Section 1231(a), the dynamic and fluid nature of foreign relations, as well as political developments in the countries to which aliens are to be removed, sometimes delay removals. In order to minimize the detention of aliens stopped at the border, including those who are subject to a formal order of exclusion or removal but whose removal has been delayed, the Attorney General promulgated regulations (which the Secretary now administers and enforces) governing the release on parole of such aliens. 8 C.F.R. 212.5, 241.4. Those regulations largely mirror the framework developed by the

Attorney General in 1987 under his Section 1182(d)(5)(A) parole authority to govern the detention and release of Mariel Cubans (*i.e.*, any Cuban who came to the United States between April 15, 1980, and October 20, 1980). 8 C.F.R. 212.12; see also 52 Fed. Reg. 48,802 (1987).

Under those regulations, an alien may be paroled if he demonstrates that he "(i) is presently a nonviolent person; (ii) * * * is likely to remain nonviolent; (iii) * * * is not likely to pose a threat to the community following his release; and (iv) * * * is not likely to violate the conditions of his parole." 8 C.F.R. 212.12(d)(2); see 8 C.F.R. 212.5, 241.4(d)(1), (e) and (f)(8). The parole determination includes a review of the alien's administrative file, detention record, history of cooperation with removal efforts, and any statement submitted by the alien. 8 C.F.R. 212.12(d)(4), 241.4(g)(5) and (h)(1) (as amended by 67 Fed. Reg. 39,259 (2002)). For Mariel Cubans, parole may not be denied without the alien being personally interviewed. 8 C.F.R. 212.12(d)(4)(ii). For all other aliens, such an interview is discretionary. 8 C.F.R. 241.4(h)(1) (as amended by 67 Fed. Reg. at 39,259). Aliens are provided notice that a parole decision will be made and may be assisted by a person of their choice in preparing submissions. 8 C.F.R. 212.12(d)(4)(ii), 241.4(h)(2) (as amended by 67 Fed. Reg. at 39,259). A written parole decision is issued. 8 C.F.R. 212.12(d)(4)(i) and (iii), 241.4(i)(5). Parole reviews for detained aliens are conducted at least annually, with provision made for interim parole decisions based on changed circumstances. 8 C.F.R. 212.12(g)(2) and (3), 241.4(k)(2)(iii).

If the alien is granted parole, the Secretary may impose conditions and restrictions on the alien. 8 C.F.R. 212.12(f), 241.4(j), 241.5. Parole may be revoked if, among other things, the parolee violates the conditions of parole, repatriation becomes possible, or the purposes of parole have been served. 8 C.F.R. 212.12(h), 241.4(*l*).

2. Factual Background

a. Respondent is one of approximately 125,000 Cuban nationals, many with criminal records in Cuba, who were stopped and denied admission as they attempted to enter the United States illegally during the 1980 Mariel boatlift. Pet. 2; see *Fernandez-Roque* v. *Smith*, 734 F.2d 576, 578 (11th Cir. 1984); *Palma* v. *Verdeyen*, 676 F.2d 100, 101 (4th Cir. 1982). Because the Mariel Cubans had arrived in ramshackle boats and makeshift rafts, the government concluded that forcing them to remain at sea or to sail in another direction could have imperiled their lives or physical safety. *Fernandez-Roque* v. *Smith*, 622 F. Supp. 887, 898 (N.D. Ga. 1985). When the government of Cuba refused to accept its nationals back, the Attorney General exercised his discretionary authority to parole most of those Cubans, including respondents, into the United States. See 8 U.S.C. 1182(d)(5) (1976); 8 U.S.C. 1182(d)(5)(A) (Supp. IV 1980); *Gisbert* v. *Attorney General*, 988 F.2d 1437, 1439 (5th Cir.), as amended, 997 F.2d 1122 (1993); *Fernandez-Roque*, 734 F.2d at 579; *Palma*, 676 F.2d at 102.[2]

Federal law permitted Cubans who were paroled into the United States to adjust their status to that of lawful permanent resident after one year. See Cuban Refugee Adjustment Act, Pub. L. No. 89-732, 80 Stat. 1161, as amended

---

[2] The government's humanitarian actions were acompanied by clear warnings that "exclusion proceedings will also be started against those who have violated American law while waiting to be reprocessed or relocated." See *Fernandez-Roque* v. *Smith*, 622 F. Supp. 887, 894 (N.D. Ga. 1985) (quoting White House statement of June 7, 1980); see also *id.* at 899. In 1981, when Cuba's refusal to allow repatriation created the possibility of prolonged detention for the small number of Cuban aliens who were not initially paroled because of their criminal backgrounds or serious medical and psychiatric problems, the Attorney General adopted a special Status Review Plan for Mariel Cubans. See generally *Fernandez-Roque*, 734 F.2d at 579. That Plan resulted in the parole of 2040 more Mariel Cubans.

(reproduced at 8 U.S.C. 1255 note). However, Cuban aliens who engaged in serious criminal activity were not eligible for adjustment of status. See *ibid.* (applicant must be "admissible to the United States for permanent residence").[3]

All Mariel Cubans were released on parole at some point after they arrived at the border. The vast majority either remain on parole or have had their status adjusted to that of lawful permanent resident. Approximately 750 Mariel Cubans (including respondent) are currently in immigration custody, after having their parole revoked, and have been held for more than six months.[4] Since 1987, the Immigration and Naturalization Service (INS), as succeeded by the Department of Homeland Security, has granted parole to Mariel Cubans who were previously in immigration custody approximately 9206 times. Nearly half—approximately 4020—of those paroles were revoked because of subsequent criminal activity in the United States.

b. The United States has consistently maintained that Cuba is required, as a matter of international law, to take back all of its nationals denied admission to the United States. See 8 U.S.C. 1522(f)(5). To that end, the United States has been engaged since the 1980s in ongoing discussions with the Cuban government for the return of excluded Mariel Cubans. In 1984, the United States and Cuba reached an accord on immigration and repatriation that, *inter alia*, called for the return to Cuba of 2746 specified individuals with serious criminal backgrounds or mental

---

[3] See also 8 U.S.C. 1182(a)(9) (1982); Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 202(a)(3), 100 Stat. 3404 (disqualifying Mariel Cubans convicted of serious crimes); 8 U.S.C. 1255a(a)(4); *Benitez* v. *Wallis*, 337 F.3d 1289, 1290 n.2 (11th Cir. 2003), cert. granted, 124 S. Ct. 1143 (2004) (No. 03-7434).

[4] The approximate number of excluded aliens of all nationalities who have been held in custody for more than six months is 1058. Approximately 15,000 aliens are on parole.

infirmities. See Immigration Joint Communique Between the United States and Cuba, Dec. 14, 1984, T.I.A.S. No. 11,057. Since that accord, the process of returning excluded aliens to Cuba has been halting, and discussions with the Cuban government on the full range of migration issues have stopped and restarted a number of times. See 52 Fed. Reg. 48,799 (1987); *Gisbert*, 988 F.2d at 1439 n.4; *In re Barrera*, 19 I. & N. Dec. 837 (BIA 1989). Approximately 1672 Mariel Cubans have been repatriated under that accord, with the most recent repatriations occurring in April 2004.[5]

c. Respondent arrived in Florida in June 1980, was apprehended at the border, and was detained by the INS. Later that month, the INS granted respondent temporary immigration parole, pursuant to 8 U.S.C. 1182(d)(5)(A) (Supp. IV 1980). See Pet. 7; Gov't C.A. Resp. to Mot. for Summ. Affirmance (Gov't C.A. Resp.) 3. The law authorizing parole provided then (as it does now, see 8 U.S.C. 1182(d)(5)(A)) that "parole of such alien shall not be regarded as an admission of the alien." 8 U.S.C. 1182(d)(5) (1976); 8 U.S.C. 1182(d)(5)(A) (Supp. IV 1980).

In March 1983, respondent pled guilty in Rhode Island to assault with a deadly weapon and was sentenced to six months' imprisonment and three years of probation. Pet. 7; Gov't C.A. Resp. 3. In January 1984, respondent was convicted in California of burglary and was sentenced to five years' probation. *Ibid.* In January 1991, respondent applied for adjustment of his status to that of a lawful permanent resident. That application was denied based on respondent's criminal conduct within the United States. Gov't D. Ct. Mot.

---

[5] The United States recently suspended the periodic bilateral discussions because of the Cuban government's refusal to discuss migration issues seriously, including the repatriation of Cuban nationals. The existing migration accords between the two countries remain in effect, however, and the repatriation of some excluded criminal aliens to Cuba is continuing.

for Continuance to Answer Habeas Corpus Pet. (Gov't D. Ct. Mot.) 3.

In October 1996, respondent was convicted in California of petty theft with priors and was sentenced to three years' imprisonment. Gov't D. Ct. Supp. Mot to Hold in Abeyance (Gov't D. Ct. Supp. Mot.) 3. In July 1998, he was convicted in California of assault with a deadly weapon and was sentenced to three years' imprisonment. *Ibid.*; Gov't C.A. Resp. 3. One year later, respondent was convicted in California of attempted oral copulation by force and was sentenced to two years in prison. *Ibid.*

In December 2000, the INS revoked respondent's parole, took him into custody, and initiated removal proceedings against him based on his criminal convictions. Gov't C.A. Resp. 3-4; Gov't D. Ct. Mot. 3. In January 2001, an immigration judge determined that respondent is inadmissible and ordered him removed to Cuba. Gov't C.A. Resp. 4. Respondent did not appeal that order. *Ibid.*

Pursuant to the parole regulations governing Mariel Cubans, the INS evaluated respondent for parole in May 2001 and March 2002. Gov't C.A. Resp. 4. Both times, following an interview and review of the file, the INS Associate Commissioner for Enforcement determined that parole was not warranted because of respondent's propensity to engage in recidivist criminal behavior and his inability to accept responsibility for his criminal acts. *Ibid.*[6]

---

[6] There are five other cases currently pending before this Court presenting the same question that this case does. In *Benitez* v. *Mata*, No. 03-7434 (consolidated for argument with the instant case), Benitez had his parole revoked after being convicted of grand theft, armed burglary, armed robbery, aggravated battery, unlawful possession of a firearm while engaged in a crime, carrying a concealed weapon, and unlawful possession, sale, or delivery of a firearm. 03-7434 Pet. App. at 2a-4a. In *Perez-Aquillar* v. *Ashcroft*, No. 03-8075, Perez-Aquillar repeatedly committed sexual crimes against children and was arrested for possession of a

3. Procedural History

In July 2002, respondent filed a habeas corpus petition, under 28 U.S.C. 2241, in the United States District Court for the District of Oregon. Pet. App. 3a. On October 30, 2002, the district court granted the petition in a one-page order without opinion, and ordered respondent released from custody under supervisory conditions. *Id.* at 2a. Petitioners released respondent pursuant to that order on March 31, 2003.

The court of appeals summarily affirmed based on its earlier decision in *Xi* v. *INS*, 298 F.3d 832 (9th Cir. 2002). Pet. App. 1a. In *Xi*, a divided panel of the Ninth Circuit held that the presumptive six-month cap on the detention of lawful permanent residents adopted by this Court in *Zadvydas* v. *Davis*, 533 U.S. 678 (2001), should be extended to excluded criminal aliens. The court emphasized that the text of 8 U.S.C. 1231(a)(6) draws no distinction between excluded aliens and those who have gained entry, and thus concluded that the two groups must be treated identically under *Zadvydas*. 298 F.3d at 836-839. The court acknowledged that this Court's opinion in *Zadvydas* expressly reserved the question of whether excluded aliens could be detained, but found no authority "suggesting that a litigant may not take advantage of a statutory interpretation that

---

controlled substance while on parole. 03-8075 Resp. Br. at 4. In *Crawford* v. *Riveron-Aguilera*, No. 03-1265, Riveron-Aguilera committed aggravated criminal sexual assault, rape with a gun, robbery, kidnaping, and possession of controlled substances while on parole. 03-1265 Pet. at 4-5. In *Alcanter* v. *Pedroso*, No. 03-1436, Pedroso was convicted while on parole of carrying a concealed weapon, second degree burglary, battery with corporal injury, exhibiting a deadly weapon, vandalism, corporal injury, and threats with intent to terrorize. 03-1436 Pet. at 5. In *Sierra* v. *Ashcroft*, No. 03-8662, Sierra committed "a series of serious criminal acts" while on parole, including carrying a deadly weapon, theft, and breaking and entering. 03-8662 Pet. App. at 4a.

was guided by the principle of constitutional avoidance when that litigant's case does not present the constitutional problem that prompted the statutory interpretation." *Id.* at 839.

SUMMARY OF ARGUMENT

Respondent's continued detention is lawful because he has never been formally admitted into the United States, and a century of precedent and practice make clear that there is nothing legally or constitutionally questionable about excluding aliens, even for life, from entry into the United States. Indeed, the power to exclude aliens is an essential attribute of the United States' sovereignty, to be exercised exclusively by the Executive Branch and Congress. The detention of respondent is the only means by which the United States can enforce exclusion when foreign governments turn their backs on their own citizens.

Respondent claims a statutory and constitutional right to be paroled into the United States, rather than detained. No such right exists. The Attorney General granted respondent and the other excluded aliens whose cases are pending before this Court parole upon their arrival as a humanitarian gesture, rather than leaving them to drown or die of dehydration in the open seas. The United States Government went even further and offered the aliens the opportunity to become lawful permanent residents. Respondent and the other aliens responded to those offers by committing crime after crime within this country.

In respondent's view, the United States government has not been generous enough, and he insists that he has a right to be released, notwithstanding any express determination by the government that he poses a risk to the public. But Congress expressly provided in IIRIRA that such inadmissable and criminal aliens "may be detained" even after the removal period has passed, 8 U.S.C. 1231(a)(6), and

Congress left unaffected the discretionary authority of the Attorney General under 8 U.S.C. 1182(d)(5)(A) to either grant or deny parole to aliens stopped at the border and to revoke the parole of such aliens after they have been released. Nothing in those statutory provisions or in constitutional principles vests excluded criminal aliens with an entitlement to rejoin the communities they have already victimized. Nor does this Court's decision in *Zadvydas* v. *Davis*, 533 U.S. 678 (2001), require such a result. *Zadvydas* held only that there is a presumptive six-month cap on detentions for aliens who previously had been granted lawful permanent resident status, because their ongoing detention raised substantial constitutional concerns. The ongoing *exclusion* of aliens who have never been admitted to the United States and whose own recidivist criminal behavior has divested them of the opportunities for residence or parole offered by the government raises no similar constitutional concerns.

Finally, the foreign policy and national security concerns that the Court considered to be absent in *Zadvydas* would be squarely joined were the courts to compel the release into this country of aliens that the political Branches have together determined should be excluded. Such a ruling would provide an open channel for foreign governments to thrust their unwanted citizens and dangerous individuals into American society. It blinks reality to read into Congress's express authorization for the Executive Branch to *detain* excluded criminal aliens a sea change in those aliens' liberty interests or an intent to render the United States more vulnerable to the insinuation of dangerous individuals or other forms of manipulation by foreign powers.

ARGUMENT

SECTION 1231(A)(6) OF TITLE 8 PERMITS THE CONTINUED EXCLUSION, THROUGH DETENTION BEYOND THE STATUTORY REMOVAL PERIOD, OF CRIMINAL ALIENS WHO HAVE NOT BEEN ADMITTED TO THE UNITED STATES AND WHO CANNOT BE IMMEDIATELY REMOVED

Section 1231(a)(6) of Title 8 expressly authorizes the Secretary to "detain[] beyond the removal period" aliens whose removal cannot be effected within the statutory 90-day removal window. With respect to excluded criminal aliens, the statute should be construed to mean exactly what it says and to permit their continued detention, even when removal is not immediately foreseeable. That is because aliens stopped at the border and then formally ordered to be excluded have never enjoyed any statutory or constitutionally recognized liberty interest in release into the United States. Recidivist criminal aliens like respondent and the other excluded aliens whose cases are pending, see note 6, *supra*, are particularly ill-positioned to ask this Court to read into a *detention* statute a novel liberty interest that entitles them, despite their criminal histories, to be released into the United States over the express objection of the Executive Branch. Furthermore, continued detention is the only practicable means of effectuating the government's legitimate and enduring interest in excluding such aliens from American society.

A. Aliens Stopped At The Border And Denied Admission Lack Any Protected Liberty Interest In Release Into The United States

1. *The Executive and Legislative Branches Have Comprehensive Control Over Immigration*

For more than a century, this Court has repeatedly emphasized that "'over no conceivable subject is the legislative power of Congress more complete than it is over' the admission of aliens." *Fiallo* v. *Bell*, 430 U.S. 787, 792 (1977); see *Chae Chan Ping* v. *United States*, 130 U.S. 581, 606 (1889). That is because "any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government." *Demore* v. *Kim*, 538 U.S. 510, 522 (2003) (quoting *Mathews* v. *Diaz*, 426 U.S. 67, 81 n.17 (1976), and *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 588-589 (1952)). This case is illustrative—Cuba provides a "dramatic example of bending immigration policy to meet a United States foreign policy objective." Fla. Immig. Br. 10 (quoting David W. Engstrom, *Presidential Decision Making Adrift: The Carter Administration and the Mariel Boatlift* 16 (1997)). The judiciary is "ill equipped to determine the[] authenticity and utterly unable to assess the[] adequacy" of those foreign policy objectives or the political Branches' implementation of them through the admission or removal of particular aliens. *Reno* v. *American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 491 (1999). For that reason, "[s]uch matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference." *Harisiades*, 342 U.S. at 589; see *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 425 (1999) (deference on immigration matters is "especially appropriate" because "officials 'exercise especially sensitive political functions that implicate

questions of foreign relations'") (quoting *INS* v. *Abudu*, 485 U.S. 94, 110 (1988)).

The singular authority of the political Branches over immigration derives from the "inherent and inalienable right of every sovereign and independent nation" to determine which aliens it will admit or expel. *Fong Yue Ting* v. *United States*, 149 U.S. 698, 711 (1893). Indeed, the power "to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe," is not only "inherent in sovereignty," but also "essential to self-preservation." *Ekiu* v. *United States*, 142 U.S. 651, 659 (1892); see *Ping*, 130 U.S. at 603-604 ("Jurisdiction over its own territory to that extent is an incident of every independent nation. It is a part of its independence."). That power is vital "for maintaining normal international relations and defending the country against foreign encroachments and dangers." *Kleindienst* v. *Mandel*, 408 U.S. 753, 765 (1972). The power to exclude is a legislative and an "inherent executive" power. *United States ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537, 542 (1950). Accordingly, "[c]ourts have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control." *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206, 210 (1953).

2. *The Executive and Legislative Branches Have Plenary Control Over Aliens at the Border*

The political Branches' comprehensive control over immigration matters reaches its apex when dealing with aliens who are stopped at the border and are seeking admission to the United States:

> This Court has long held that an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application, for

> the power to admit or exclude aliens is a sovereign prerogative. * * * Our recent decisions confirm that view. * * * [H]owever, once an alien gains admission to our country and begins to develop the ties that go with permanent residence, his constitutional status changes accordingly.

Landon v. *Plasencia*, 459 U.S. 21, 32 (1982); see also *United States* v. *Flores-Montano*, 124 S. Ct. 1582, 1585 (2004) ("The Government's interest in preventing the entry of unwanted persons * * * is at its zenith at the international border."). That legal "distinction between an alien who has effected an entry into the United States and one who has never entered runs throughout immigration law." *Zadvydas*, 533 U.S. at 693.[7] And with respect to excluded aliens, "the Court without exception has sustained Congress' plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has for-

---

[7] See also *Sale* v. *Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 175 (1993) ("[O]ur immigration laws have long made a distinction between those aliens who have come to our shores seeking admission * * * and those who are within the United States after an entry, irrespective of its legality. In the latter instance the Court has recognized additional rights and privileges not extended to those in the former category."); *Leng May Ma* v. *Barber*, 357 U.S. 185, 187 (1958) (rights and privileges accorded resident aliens are denied to those merely "on the threshold of initial entry"); *Mezei*, 345 U.S. at 212 ("aliens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law"; "[b]ut an alien on the threshold of initial entry stands on a different footing"); *Knauff*, 338 U.S. at 543 ("Whatever the rule may be concerning deportation of persons who have gained entry into the United States, it is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government to exclude a given alien."); *Kaplan* v. *Tod*, 267 U.S. 228, 230 (1925) (an "excluded" alien was "still in theory of law at the boundary line and had gained no foothold in the United States").

bidden." *Mandel*, 408 U.S. at 766 (internal quotations omitted).

That distinction between the rights and protections accorded aliens stopped at the border and those who have been admitted by our government is one of constitutional magnitude:

> The Bill of Rights is a futile authority for the alien seeking admission for the first time to these shores. But once an alien lawfully enters and resides in this country he becomes invested with the rights guaranteed by the Constitution to all people within our borders.

Kwong Hai Chew v. *Colding*, 344 U.S. 590, 596 n.5 (1953) (quoting *Bridges* v. *Wixon*, 326 U.S. 135, 161 (1945) (Murphy, J., concurring)); see *Zadvydas*, 533 U.S. at 693 ("It is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders.").[8]

More particularly, this Court has "long held" that aliens stopped at the border have no constitutionally protected liberty interest in release into the United States. *Plasencia*, 459 U.S. at 32. "[A]n alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application, for the power to admit or exclude aliens is a sovereign prerogative." *Ibid.*; see *Mezei*, 345 U.S. at 210 ("[N]o alien so situated 'can force us to admit

---

[8] See *Plyler* v. *Doe*, 457 U.S. 202, 212-213 n.12 (1982) (Court's equal protection ruling did not encompass excluded aliens, due to "the long-standing distinction between exclusion proceedings, involving the determination of admissibility, and deportation proceedings"); *Mandel*, 408 U.S. at 762, 768-770; *United States* v. *Ju Toy*, 198 U.S. 253, 263 (1905); *United States ex rel. Turner* v. *Williams*, 194 U.S. 279, 292 (1904) (excluded alien does not enjoy First Amendment protections: "[T]hose who are excluded cannot assert the rights in general obtaining in a land to which they do not belong as citizens or otherwise.").

him at all.'") (quoting *Mezei*, 195 F.2d 964, 970 (2d Cir. 1952) (Learned Hand, J., dissenting)). In fact, this Court's decision in *Mezei* flatly rejected the identical liberty interest asserted by respondent here. Mezei was stopped at the border and ordered excluded, but no other country would accept him. As this Court described it, "[t]he issue [was] whether the Attorney General's continued exclusion" of Mezei "amount[ed] to an unlawful detention, so that courts may admit him temporarily to the United States on bond until arrangements are made for his departure abroad." 345 U.S. at 207. The Court held that Mezei enjoyed only those protections that the political Branches chose to afford him. "Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned." *Id.* at 212 (quoting *Knauff*, 338 U.S. at 544). Thus, as this Court recently reaffirmed in *Zadvydas*, in analyzing an alien's interest in being free from detention, his status as an excluded alien will "ma[k]e all the difference." 533 U.S. at 693; see also *Ekiu*, 142 U.S. at 659-660.[9]

That constitutional distinction rests not just on historical conceptions of the power of the national government to control immigration and the very limited rights of individuals arriving at the border, but also on practical separation-of-

---

[9] Efforts to distinguish *Mezei* as a national security case, see *Rosales-Garcia* v. *Holland*, 322 F.3d 386, 413-414 (6th Cir.), cert. denied, 123 S. Ct. 2607 (2003), are misplaced. Although the Court referred to national security concerns in explaining why *Congress* might have chosen to exclude aliens like Mezei, the Court's holding concerning the constitutionality of his continued detention was categorical: "[Mezei's] right to enter the United States depends on the congressional will, and courts cannot substitute their judgment for the legislative mandate." 345 U.S. at 216. Moreover, this Court rejected a similar effort to distinguish prior immigration cases on national security grounds in *Fiallo*, finding "no indication in our prior cases that the scope of judicial review is a function of the nature of the policy choice at issue." 430 U.S. at 796.

powers considerations in this sensitive area where foreign policy and national security intersect. When an individual is formally admitted to the United States, a court's recognition and protection of a liberty interest does not *cause* the entry. The court's role (*e.g.*, in *Zadvydas*) simply delineates the *consequences*, statutory and constitutional, of an entry that has already been authorized by the political Branches and has been accomplished without judicial intervention. By contrast, when the political Branches have stopped an alien at the border and have made the quintessentially political determination that he should not be admitted or released into the United States, a judicial order compelling his release into the Country would *cause* an entry that the political Branches have refused and, in the process, would directly countermand the specific and individualized entry decision made by those whom the Constitution has charged with protecting the borders and conducting foreign relations. It simply "is not within the province of the judiciary to order that foreigners who have never * * * even been admitted into the country" should "be permitted to enter, in opposition to the constitutional and lawful measures of the legislative and executive branches." *Ekiu*, 142 U.S. at 660; see *Knauff*, 338 U.S. at 543; *Yamataya* v. *Fisher*, 189 U.S. 86, 98 (1903).[10]

[10] Efforts to cast doubt on *Mezei* by noting the additional process afforded aliens in *Chin Yow* v. *United States*, 208 U.S. 8 (1908), and *Kwock Jan Fat* v. *White*, 253 U.S. 454 (1920)—cases decided prior to *Mezei*—are to no avail. The narrow question presented in those cases "was whether the petitioner was a citizen of the United States before he sought admission." *Tod* v. *Waldman*, 266 U.S. 113, 119 (1924), as modified, 266 U.S. 547 (1925).

3. *Parole Does Not Enhance An Excluded Alien's Rights*

The political Branches' control over excluded aliens does not diminish, nor do the rights of the aliens increase, just because they have been paroled into the United States, for two reasons.

First, this Court has repeatedly ruled that the Executive Branch's discretionary parole of an excluded alien does "not alter her status as an excluded alien or otherwise bring her 'within the United States.'" *Leng May Ma* v. *Barber*, 357 U.S. 185, 186 (1958).[11] Indeed, Congress has expressly provided in current law, as it has historically done, that the discretionary parole of an alien "shall not be regarded as an admission of the alien." 8 U.S.C. 1182(d)(5)(A); accord 8 U.S.C. 1101(a)(13)(B). Thus, today, just as in 1958, any argument that the constitutional balance changes due to "the effect of parole certainly finds no support in this statutory language." *Leng May Ma*, 357 U.S. at 188. Quite the opposite, to attach such legal consequences to parole would defy duly enacted statutory text, congressional design, more than a century of consistent precedent, and—importantly—the explicit conditions and understandings on which the Attorney General originally granted respondent and thousands of other aliens discretionary parole.

---

[11] See also *Sale*, 509 U.S. at 159 (those "temporarily paroled" remain subject to exclusion proceedings); *Mezei*, 345 U.S. at 215 ("But such temporary harborage, an act of legislative grace, bestows no additional rights."); *Rogers* v. *Quan*, 357 U.S. 193, 195 (1958); *Kaplan*, 267 U.S. at 230 (nine-year parole of alien did not alter "the nature of her stay within the territory * * *. She was still in theory of law at the boundary line and had gained no foothold in the United States."); *Ekiu*, 142 U.S. at 661 ("Putting her in the mission house, as a more suitable place than the steamship, * * * left her in the same position, so far as regarded her right to land in the United States, as if she never had been removed from the steamship.").

Second, attaching any such legal consequences to a grant of parole would misapprehend the nature of parole. The purpose of parole is not to give excluded aliens enhanced legal protections. *Leng May Ma*, 357 U.S. at 190 (parole "was never intended to affect an alien's status"). Rather, "[p]arole is an act of extraordinary sovereign generosity" because it "grants temporary admission" into the United States "to an alien who has no legal right to enter and who would probably be turned away at the border if he sought to enter by land, rather than coming by sea or air." *Jean* v. *Nelson*, 727 F.2d 957, 972 (11th Cir. 1984) (en banc), aff'd, 472 U.S. 846 (1985). Parole thus "is simply a device through which needless confinement is avoided while administrative proceedings are conducted" and while removal is effectuated. *Id.* at 969 (quoting *Leng May Ma*, 357 U.S. at 190). Furthermore, when masses of aliens flood the border, arriving under conditions in which their physical exclusion or forced return would imperil their lives, parole allows the United States to respond to that crisis and to manage the foreign relations implications of the influx in a decent, civilized, and humane manner. *Ibid.*; U.S. Comm'n on Immigration Reform, *Legal Immigration: Setting Priorities* 157 (1995) ("Parole also provides great flexibility to the executive branch to respond to humanitarian and foreign policy situations."); see 8 U.S.C. 1182(d)(5)(A) (allowing parole for "urgent humanitarian reasons").

Because parole does not alter the alien's legal status, the government is able to exercise such compassion and protect the short-term safety of aliens who have arrived at our shores without endangering the government's ability, in the long run, to ensure the safety and security of the American public by returning the aliens to physical custody if necessary to protect society. See 52 Fed. Reg. at 48,799 (use of parole in Mariel Cuban crisis balanced individual and public interests). If, however, new legal consequences were

to attach to the parole decision, that calculus would change. The inevitable, practical consequence of granting parole would be to restrict the government's ability to prevent dangerous aliens from circulating through American society. It would also reward the foreign powers that generate such humanitarian crises by signaling to them that mass migrations weaken Congress's and the President's control over the borders and facilitates the infiltration of dangerous individuals onto American streets.[12] Respondent's position, in short, would restrict the President's and Congress's flexibility in responding to humanitarian migration emergencies by forcing them to choose, during the heat of the crisis, between the immediate physical safety and security of the aliens and the long-term safety and security of the American public. That position may well prove more harm than help to aliens. See *Leng May Ma*, 357 U.S. at 190 (treating parole as altering the excluded alien's legal status "would be quite likely to prompt some curtailment of current parole policy"). Thus, at bottom, respondent's position would have this Court adopt, in the asserted interest of fairness and liberty for those few excluded criminal aliens who already have proven themselves least deserving of release into free society, a conception of parole that weights the scales in favor of mass and prolonged detention for *all* arriving aliens at the border. It is hard to see the fairness in that approach.

---

[12] See *Ping*, 130 U.S. at 604 ("If [a nation] could not exclude aliens it would be to that extent subject to the control of another power."); *Rosales-Garcia*, 322 F.3d at 419 (Boggs, J., dissenting) (criticizing the majority's holding extending *Zadvydas* to excluded aliens because, if "hundreds of thousands" of non-removable aliens "present themselves at our borders, * * * the government of the United States is constitutionally disabled from doing anything, after a short interval, other than set all such persons at liberty in our country").

It is true that, when parole is prolonged, the alien may develop substantial ties to the community. But "[w]e doubt that the Congress intended the mere fact of delay to improve an alien's status from that of one seeking admission to that of one legally considered within the United States." *Rogers*, 357 U.S. at 196. If the alien develops ties, he does so with the full knowledge that his release on parole is temporary and conditional. *Harisiades*, 342 U.S. at 586-587 ("[T]o protract this ambiguous status within the country is not his right but is a matter of permission and tolerance."). Congress, moreover, has provided other mechanisms for dealing with such assimilation, chiefly the opportunity provided to Mariel Cubans to adjust their status to that of lawful permanent resident. See 8 U.S.C. 1255 note.

Beyond that, this case and the others pending before the Court are not about paroled aliens who established stable and law-abiding lives in the United States. Those individuals are not being detained. Rather, this case is about aliens who have spent a significant portion of their time in the United States in the American criminal justice system. The fact is that the government offered respondent the keys to the liberty he now seeks, through his first parole and the opportunity to adjust his status. He threw those keys away. The same self-chosen behavior that caused his parole to be revoked and rendered him ineligible for adjustment of status leaves him ill-positioned to claim some sort of reliance interest in his community ties.

B. The Text, Structure, And History of Section 1231(a)(6) Confirm The Executive Branch's Authority To Detain Excluded Criminal Aliens

1. *The Statutory Text and Structure Support the Secretary's Detention Authority*

In providing, in 8 U.S.C. 1231(a)(6), that excluded aliens "may be detained beyond the removal period," Congress

acted against the long-established background principle—which was voiced with particular clarity in *Mezei* and *Leng May Ma*—that excluded aliens have no liberty interest in being released into the United States and that their release on parole is committed to the discretion of the Executive. Nothing in the text of Section 1231(a)(6), which affirmatively *authorizes* detention, supports the court of appeals' contraction of the Executive Branch's historic authority to detain aliens stopped at the border. To the contrary, the language "suggests discretion," and "literally" sets no time limit on the detention of excluded aliens who cannot be removed. *Zadvydas*, 533 U.S. at 689, 697.

The overall structure of IIRIRA reinforces the Executive Branch's power to detain excluded aliens beyond the removal period. As an initial matter, it would be particularly inappropriate to read into Section 1231(a)(6) a "drastic expansion of the rights of inadmissible aliens," *Benitez* v. *Wallis*, 337 F.3d 1289, 1300 (11th Cir. 2003), cert. granted, 124 S. Ct. 1143 (2004) (No. 03-7434), in the face of Congress's express statutory directive that Section 1231 not be construed to "create any substantive or procedural right or benefit that is legally enforceable." 8 U.S.C. 1231(h). Furthermore, at the same time that it enacted Section 1231(a)(6), Congress adjusted the rights of aliens who had entered the United States both legally and illegally. See H.R. Rep. No. 879, 104th Cong., 2d Sess. 107 (1997). With respect to aliens stopped at the border, Congress retained and strengthened the statutory restrictions. Congress, for example, preserved the Attorney General's (now the Secretary's) discretion to detain or parole such aliens into the United States, including both during their removal proceedings and pending their physical removal, compare 8 U.S.C. 1182(d)(5)(A), 1226(e)(1) and (3) (1994), with 8 U.S.C. 1182(d)(5)(A), 1225(b)(1)(B)(iii) (IV), 1226(c)(1)(A), 1231(a)(6) (2000), and continued to provide that parole is not an

admission and remains discretionary, temporary, conditional, and subject to revocation, compare 8 U.S.C. 1182(d)(5)(A) (1994), with 8 U.S.C. 1101(a)(13), 1182(d)(5)(A) (2000).[13]

That retention of the Executive's discretionary parole authority, 8 U.S.C. 1182(d)(5)(A), is particularly instructive. That provision allows the Secretary, "in his discretion," to "parole into the United States temporarily under such conditions as he may prescribe only on a case-by-case basis for urgent humanitarian reasons or significant public benefit any alien applying for admission to the United States." The tenor of that Section indicates that Congress expected the parole of excluded aliens to be an exceptional act of grace. See *Barrera-Echavarria* v. *Rison*, 44 F.3d 1441, 1446 (9th Cir.) (en banc), cert. denied, 516 U.S. 976 (1995); *Amanullah* v. *Nelson*, 811 F.2d 1, 6 (1st Cir. 1987). Further, a necessary concomitant of that discretionary authority to grant parole is the parallel authority *not* to parole—and instead to detain—aliens stopped at the border. Accordingly, the Secretary's authority to detain excluded aliens pending their removal has its roots not only in Section 1231(a)(6), but also in Section 1182(d)(5)(A). The court of appeals' holding that Section 1231(a)(6) should be read to make mandatory for those criminal aliens who abused their parole privilege and became subject to final orders of removal the very release on parole that Section 1182(d)(5)(A) expressly makes exceptional and discretionary for *all* aliens who were stopped

---

[13] Congress also (i) carried forward the provisions delineating which classes of aliens cannot be admitted to the United States, compare 8 U.S.C. 1182(a) (1994), with 8 U.S.C. 1182(a) (2000 & Supp. I 2001); (ii) again directed the Attorney General to detain such aliens on arrival pending their exclusion or removal proceedings, compare 8 U.S.C. 1225(b), 1226 (1994), with 8 U.S.C. 1225(b)(1)-(3), 1226(c)(1)(A) (2000); and (iii) reiterated the mandate that the Attorney General promptly remove aliens ordered excluded, compare 8 U.S.C. 1227(a)(1) and (2) (1994), with 8 U.S.C. 1231(b)(1) and (c) (2000).

at the border and denied admission turns the congressional design on its head.

The court of appeals reasoned (*Xi* v. *INS*, 298 F.3d 832, 835-839 (9th Cir. 2002), that, having already been construed in *Zadvydas* to impose a presumptive six-month cap on detentions, the text of Section 1231(a)(6) cannot draw any distinction based on the alien's status. This Court certainly thought otherwise in *Zadvydas*. If an alien's status were irrelevant, there would have been no point to opening the opinion with the reservation that "[a]liens who have not yet gained initial admission to this country would present a very different question" (533 U.S. at 682), and then devoting two full pages of the opinion (*id.* at 693-694) to discussing what was twice described as the "critical" distinction (*ibid.*) between excluded aliens and those already present in the United States. Nor would the Court have eschewed "consider[ing] the political branches' authority to control entry into the United States." *Id.* at 695. Furthermore, the Secretary's authority to detain excluded aliens derives not just from Section 1231(a)(6), but also from Section 1182(d)(5)(A)'s general parole authority for excluded aliens. That distinct authority was not implicated in *Zadvydas*. But in this case, the two statutory provisions must be read *in pari materia*.

Furthermore, the court of appeals overlooked that the statutory language construed in *Zadvydas* was the word "may" in the phrase "may be detained," 533 U.S. at 697. That language, under *Zadvydas*, authorizes detention until it approaches constitutional limits. In addition, "may" is not the type of word that bespeaks a single, uniform, and unbending application across statutorily and constitutionally divergent applications. To the contrary, it suggests flexibility and discretion to adapt to different contexts. Thus nothing in the statutory text precludes recognition that the detention authority varies in scope based on circumstances.

The court of appeals suggested (*Xi*, 298 F.3d at 835-836) that it would be unusual to have the meaning of the same words change based on the characteristics of the individual before the Court. That cannot be right. The scope of the protection afforded by the Due Process Clause of the Fifth Amendment—the constitutional fount of the very liberty interest that respondent claims—routinely turns upon the background or characteristics of the individual, such as membership in a class afforded special protection, see, *e.g.*, *Miller* v. *Albright*, 523 U.S. 420 (1998), or, in the case of aliens, whether they are inside or outside the United States, see *Zadvydas*, 533 U.S. at 693; *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 271 (1990). Respondent, as an alien stopped at the border, is in the latter category.

Indeed, this would not be the first time, in the field of immigration law, that legal status and rights would vary depending upon the categorization of an alien. "[I]t is 'a routine and normally legitimate part' of the business of the Federal Government to classify on the basis of alien status, [and] * * * to 'take into account the character of the relationship between the alien and this country.'" *Plyler* v. *Doe*, 457 U.S. 202, 225 (1982) (quoting *Diaz*, 426 U.S. at 80, 85). In *Zadvydas* itself, the Court acknowledged that the detention authority might differ in cases involving "terrorism or other special circumstances." 533 U.S. at 696. In *Reno* v. *Flores*, 507 U.S. 292 (1993), the same words in a single statutory provision that, like Section 1231(a)(6), provided that the Attorney General "may" detain an alien, see 8 U.S.C. 1252(a)(1) (1988), supported different applications for juvenile aliens and adults. Indeed, the court of appeals presumably would agree that Section 1231(a)(6)'s presumptive cap on the detention of resident aliens would tolerate the lengthier detention of a juvenile if there were no appropriate sponsor. At bottom, then, the court of appeals decision reflected not so much "fidelity" to statutory uni-

formity, *Xi*, 298 F.3d at 836, as a selective opposition to any variations in the Secretary's detention authority that are adverse to this particular respondent's situation.

Nor would it be unprecedented for this Court to construe the same words of a statute one way for constitutional reasons and another way when those same constitutional constraints do not apply. *Crowell* v. *Benson*, 285 U.S. 22 (1932), did exactly that. There, the Court construed statutory language that provided a commission "'full power and authority to hear and determine all questions.'" *Id.* at 62. In light of what the Court regarded as the substantial constitutional question that would arise if the quoted language precluded judicial review of jurisdictional facts, the Court construed the language to permit review of those facts, even though the same statutory language continued to limit or preclude judicial review of facts pertaining to, *e.g.*, the employees' injuries. *Id.* at 46, 54, 62.[14] The court of appeals' insistence on the wooden extension of the result in *Zadvydas* to the critically different context of excluded aliens thus cannot be justified as the ineluctable byproduct of past practice.[15]

---

[14] See also *Xi*, 298 F.3d at 841 (Rymer, J., dissenting); cf. *Lane* v. *Pena*, 518 U.S. 187, 196-197 (1996) (statutory language that permits monetary damages against municipal defendants and others does not permit monetary damages against the federal government).

[15] The court of appeals emphasized (*Xi*, 298 F.3d at 836) Justice Kennedy's comment in his *Zadvydas* dissent (see 533 U.S. at 710), that construing Section 1231(a)(6) to operate differently for excluded aliens is not "plausible." But Justice Kennedy also considered any argument that the *Zadvydas* holding embraces excluded aliens—the very holding of the court of appeals here—to be equally unsustainable. *Ibid.* Beyond that, Justice Kennedy's "comments in [his] dissenting opinion * * * are just that: comments in a dissenting opinion." *Railroad Retirement Bd.* v. *Fritz*, 449 U.S. 166, 177 n.10 (1980).

2. *The Legislative History Supports the Secretary's Detention Authority*

The history of IIRIRA's enactment documents that Congress was legislating exactly contrary to the court of appeals' supposition that the authority to detain excluded aliens was narrowed and capped. Congress enacted IIRIRA, not to enhance the rights of excluded aliens, but to combat the growing problem of criminal recidivism by aliens and to diminish the rights of aliens who have illegally entered the country. Underlying IIRIRA was Congress's recognition that "[c]riminal aliens cost our criminal justice systems hundreds of millions of dollars annually and are generally perceived to be a serious and growing threat to public safety." GAO, *Criminal Aliens: INS' Efforts to Identify and Remove Imprisoned Aliens Need to Be Improved* 3 (July 15, 1997) (explaining impetus for 1996 legislation); see U.S. Comm'n on Immigration Reform, *U.S. Immigration Policy: Restoring Credibility* 153 (1994) ("[T]he top priority of enforcement strategies should be the removal of criminal aliens from the U.S."). One of IIRIRA's sponsors stressed that "[r]ecidivism rates for criminal aliens are high," citing a General Accounting Office study that found that "77 percent of noncitizens convicted of felonies are arrested at least one more time." 142 Cong. Rec. 7972 (1996).[16]

In June 1995, the House of Representatives considered a bill, H.R. 1915, designed to improve the "removal of illegal and criminal aliens." H.R. Rep. No. 879, 104th Cong., 2d Sess. 105 (1997). That bill proposed "more stringent stan-

---

[16] See also *Kim*, 538 U.S. at 518-519 (noting evidence before Congress of high rates of recidivism, including that 45% of deportable criminal aliens were arrested multiple times); *Criminal Aliens*, *supra*, at 7 (in one study, 23% of released aliens had been rearrested for crimes, including 184 felonies).

dards for the release of aliens (particularly aliens convicted of aggravated felonies) during and after removal proceedings." H.R. 1915, 104th Cong., 1st Sess. § 300(3), at 36 (1995). The bill specifically provided that, upon expiration of the removal period, excluded aliens could be continued in detention. *Id.* § 305(3), at 83-84 ("An alien ordered removed who is inadmissible under section [1182] may be detained beyond the removal period and, if released, shall be subject to [statutory] terms of supervision."). That bill was aimed at "increas[ing] detention of aliens who are ordered removed." H.R. Rep. No. 879, *supra*, at 108.

The detention provisions of H.R. 1915 were incorporated into H.R. 2202, 104th Cong., 1st Sess. (1995), the bill that ultimately became IIRIRA. See H.R. Rep. No. 469, 104th Cong., 2d Sess. Pt. I, at 18-19, 25-26, 234 (1996); H.R. Conf. Rep. No. 828, 104th Cong., 2d Sess. 210-211 (1996). As modified in conference, IIRIRA allowed, but did not require, the release on supervision of aliens who were not removed during the removal period. H.R. Conf. Rep. No. 828, *supra*, at 53-54, 215-216. Importantly, in passing the provision authorizing continued detention after the removal period, Congress was fully aware that certain countries have refused to accept the return of their nationals.[17] Moreover, before IIRIRA's enactment, the long-term detention of Mariel Cubans had been upheld by courts and had been the subject of extensive congressional hearings. See *Barrera-Echavarria*, 44 F.3d at 1447 ("Congress has for at least four decades been aware of instances of long-term detention of excludable aliens by the executive branch."); *ibid.* n.5 (listing

[17] See IIRIRA § 307(a), 110 Stat. 3009-614 (amending 8 U.S.C. 1253(d) to authorize the Secretary of State to discontinue granting immigrant visas to citizens of a country that "denies or unreasonably delays" accepting the return of its own nationals); IIRIRA § 303(b)(3)(B)(ii), 110 Stat. 3009-587.

congressional hearings); *Restoring Credibility*, *supra*, at 171 ("[L]ong-term detention has been a common response to immigration emergencies," including "the Mariel boatlift."). There is not a hint of any intent to restrict such detentions in the legislative history of IIRIRA, and "Congress is unlikely to intend any radical departures from past practice without making a point of saying so." *Jones* v. *United States*, 526 U.S. 227, 234 (1999).

Furthermore, while Congress had in the past imposed time limits on the detention of aliens who had gained admission to the country, see *Zadvydas*, 533 U.S. at 697-698, the detention of aliens stopped at the border and then formally excluded has never been subject to such time limits. See *Mezei*, 345 U.S. at 208-209, 216; *Palma*, 676 F.2d at 104. In fact, Congress, in the past, has declined to enact legislation that would have imposed just such a time limit. See H.R. 4349, 100th Cong., 2d Sess. § 1(a) (Mar. 31, 1988); H.R. 5200, 100th Congress, 2d Sess. § 1(a) (Aug. 10, 1988). Section 1231(a)(6) thus should not be interpreted to provide the very right to parole that Congress has long declined to afford excluded aliens.

3. *The Six-Month Cap Adopted in* Zadvydas *Does Not Apply to Excluded Aliens*

In *Zadvydas*, the Court crafted a presumptive six-month cap on the post-order detention of former lawful permanent residents whose removal cannot be effectuated. The Court did so as a means of implementing its determination that Section 1231(a)(6) implicitly limits the detention of such aliens to a time period that reasonably serves the purposes of detention. 533 U.S. at 701. The Court inferred that "implicit limitation" to avoid the serious constitutional question that would arise were the statute read to permit the indefinite detention of aliens who already had effected an entry into the United States. *Id.* at 689. That judicially

inferred limitation, however, cannot logically be extended to the detention of excluded aliens, for two reasons.

a. ***Preserving the Secretary's Detention Authority Serves Important Purposes.*** In *Zadvydas*, this Court explained that detention of an alien who had been admitted for lawful permanent residence before being ordered removed becomes problematic under the Due Process Clause when the detention "no longer bears a reasonable relation to the purpose for which the individual was committed." 533 U.S. at 690 (quoting *Jackson* v. *Indiana*, 406 U.S. 715, 738 (1972) (internal brackets and quotation marks omitted)). For aliens previously admitted for permanent residence, the primary purpose of detaining the aliens after entry of a final order of removal is to "assur[e] the alien's presence at the moment of removal." *Zadvydas*, 533 U.S. at 699. The Court found that purpose insufficient to permit detention beyond what it concluded was a reasonable time to effect removal—presumptively, six months—because the need to "prevent[] flight * * * is weak or nonexistent where removal seems a remote possibility at best." *Id.* at 690. The Court also recognized that detention could protect the community from danger, but noted that "the alien's removable status itself[] * * * bears no relation to a detainee's dangerousness." *Id.* at 692.

By contrast, the "basic purpose" (*Zadvydas*, 533 U.S. at 699) of detaining aliens who were stopped at the border and then formally excluded through a final order of removal is exclusion itself. The central means of effectuating exclusion is to stop and hold the individual. *United States ex rel. Turner* v. *Williams*, 194 U.S. 279, 291 (1904) ("Detention or temporary confinement [i]s part of the means necessary to give effect to the exclusion."); *Wong Wing* v. *United States*, 163 U.S. 228, 235 (1896) (same). That purpose, moreover, does not diminish when a removal order cannot be executed. To the contrary, when, due to their mode of arrival or the

home government's refusal to accept them, aliens cannot physically be turned back at the border, the only means of exercising the United States' sovereign prerogative to exclude those aliens and to prevent them from entering American society is to detain them. There thus is a 100% correlation between the alien's excluded status and the purpose of ongoing detention, which plainly satisfies the *Zadvydas* requirement that there be a "reasonable relation" between the detention and its purpose. See 533 U.S. at 690. In addition, the government's fundamental interest in protecting the Nation's borders furnishes a "sufficiently strong special justification" to permit civil detention for purposes of constitutional analysis, see *Zadvydas*, *id.* at 690—and therefore for purposes of statutory analysis under the principle of constitutional avoidance, see *id.* at 699.

While conditional parole on the terms established by the Secretary and upon a determination by the Secretary that the alien does not pose a risk to the community is consistent with the political Branches' power of exclusion, the judicially compelled parole of an alien whom the Secretary has refused to parole because he is "likely to pose a threat to the community," unlikely "to remain nonviolent," or "likely to violate the conditions of his parole," 8 C.F.R. 212.12(d)(2); see also 8 C.F.R. 241.4(d)(1), does not comport with the historic power of exclusion. The whole purpose of exclusion is to protect the Nation prospectively from a perceived risk and to prevent harms before they happen. A judicial order of release, even if accompanied by "release conditions that may not be violated," *Zadvydas*, 533 U.S. at 696, does not adequately vindicate that interest. The nature of release conditions and the day-to-day resource constraints on immigration officials preclude the close monitoring of every paroled alien that would be necessary to preempt repeat criminal activity by those aliens whom the political Branches have deemed unfit for release and who have statistically high

rates of recidivism. The parole system, instead, is structured largely to respond after the fact to such crimes with parole revocation. Accordingly, the forced parole of excluded aliens whom the Secretary has determined pose a threat to the safety and security of the community works an expansion of the excluded alien's rights, at the expense of the public, and directly undermines the historic role and purpose of exclusion.

Some compromise of the alien's and society's competing interests may be appropriate for the *Zadvydas* aliens who had previously been admitted as lawful permanent residents and who thus were being "uprooted from our midst." *Mezei*, 345 U.S. at 215. Such aliens may have cognizable interests in "rejoin[ing] the community until the Government effects their leave." *Id.* at 215-216. But that rationale has no logical application to aliens like respondent, who were stopped at the border and then formally ordered excluded after committing crimes while released on discretionary parole. Those aliens were uprooted, not by the government, but by their own private choices, and they have no arguable preexisting liberty interest in or claim to join or rejoin American society. Indeed, aliens stopped at the border and then later ordered excluded, like the juvenile aliens in *Reno* v. *Flores*, *supra*, "are always in some form of custody." 507 U.S. at 302 (quoting *Schall* v. *Martin*, 467 U.S. 253, 265 (1984)). For them, "liberty" is *not* "the norm." *Foucha* v. *Louisiana*, 504 U.S. 71, 83 (1992). Rather, the constitutional and statutory starting point for such aliens is custody, not liberty. When their own criminal conduct leads to revocation of their parole, the only practicable option for the government is to revert back to detention.

Finally, a judicial decision requiring the Secretary, against his best judgment, to parole recidivist criminal aliens and others who have repeatedly violated parole conditions in the past would undercut the incentives for compliance with the

Secretary's terms of parole. Criminal aliens may quickly deduce that the availability of parole will be little affected by their misconduct. Reading *Zadvydas* as bestowing on excluded aliens the very privilege that was "denied them when their immigration parole was revoked on the basis of their criminal activity," *Gisbert* v. *Attorney General*, 988 F.2d 1437, 1447 (5th Cir.), as amended, 997 F.2d 1122 (1993), thus could undermine significantly the Secretary's "enforcement leverage" and the functioning of the parole system as a whole. *Morrissey* v. *Brewer*, 408 U.S. 471, 478 (1972). And it would do so at the very same time that parole would be judicially mandated for those aliens who pose the greatest risk to the public and for whom vigorous parole-compliance incentives are most needed.

b. ***Extending* Zadvydas *to excluded aliens would create, not avoid, constitutional problems.*** *Zadvydas*'s presumptive limit on detention was driven by constitutional doubt concerning the lawfulness of open-ended detention for aliens who had been affirmatively granted the status of lawful permanent residents. 533 U.S. at 689. No such constitutional considerations obtain here. See Section A(2), *supra*. Indeed, *Zadvydas* itself found the distinction between excluded aliens and those who have entered to be "critical" and to "ma[k]e all the difference" on the constitutional front. 533 U.S. at 693; see also *id.* at 682. Because there are no constitutional problems to avoid when the detention involves excluded aliens, Section 1231(a)(6)'s provision that the Secretary "may" detain excluded aliens should be accorded its ordinary and established meaning, which "suggests discretion" to detain—a discretion that has not historically included temporal limitations. *Id.* at 697.

The court of appeals concluded (*Xi*, 298 F.3d at 835-836), however, that *Zadvydas*'s special, constitutionally driven rule should now control all applications of the statute. Excluded aliens, in the court of appeals' view, should

effectively get to ride the litigation coattails of the lawful permanent residents in *Zadvydas*. But it is not that simple. The Constitution charges Congress, through Article I, and the President, through the Presentment Clause, Art. I, § 7, Cl. 2, with the drafting and enactment of legislation. The judiciary's task is to "interpret, rather than author," federal laws. *United States* v. *Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 494 n.7 (2001). The Court is "not at liberty to rewrite" Section 1231(a)(6). *Id.* at 495 n.7. When, as occurred in *Zadvydas*, the Court reads "implicit" "significant limitations" into duly enacted statutory text, 533 U.S. at 689, the Court presses the judicial role to its separation-of-powers limits. And the Court does so only when necessary to avoid the likely invalidation of an Act of Congress. "This canon is followed out of respect for Congress, which we assume legislates in the light of constitutional limitations." *Rust* v. *Sullivan*, 500 U.S. 173, 191 (1991).

To function as a doctrine of inter-branch "respect," *Rust*, 500 U.S. at 191, the judicial adoption of "significant" extra-textual statutory limitations, *Zadvydas*, 533 U.S. at 689, must be resorted to only as a matter of strict necessity. To extend judicially developed limitations to new applications, where constitutional pressures do not support the conclusion that Congress intended such a result, would loose the doctrine from its analytical moorings. Accordingly, once the constitutional concerns attending detention of criminal aliens "evaporate," as they do when excluded aliens are at issue, the Court cannot, "through the power of precedent," create "statutes foreign to those Congress intended." *Almendarez-Torres* v. *United States*, 523 U.S. 224, 238 (1998). It is only when a "serious likelihood" of constitutional invalidation exists that "the doctrine serve[s] its basic democratic function of maintaining a set of statutes that reflect, rather than distort, the policy choices that elected representatives have made." *Ibid.* But here, there is no "serious likelihood" that

detention—which functionally is just continued exclusion—is unconstitutional as applied to aliens stopped at the border and then formally ordered excluded after committing criminal offenses.

Such circumspection is particularly appropriate in this context because extension of *Zadvydas* to excluded aliens would actually raise rather than avoid significant constitutional questions. The doctrine of construing statutes to avoid constitutional problems is supposed to "minimize disagreement between the branches," not "aggravate that friction." *Almendarez-Torres*, 523 U.S. at 238. Since Congress first began regulating immigration in 1875, see Act of Mar. 3, 1875, ch. 141, 18 Stat. 477, decisions about the admission or exclusion and parole of excluded aliens have been constitutionally assigned to the political Branches, because such decisions are inextricably intertwined with the conduct of foreign relations, Congress's power to regulate naturalization, U.S. Const. Art. I, § 8, and the protection of national security. This Court's cases have recognized and enforced that constitutional demarcation again and again. See Sections A(1) and A(2), *supra*. Simply put, the historic constitutional and statutory paradigms pertaining to excluded aliens and lawful permanent residents are dramatically different, and those historic, practical, and legal distinctions continue today to "ma[k]e all the difference," just as they did three years ago in *Zadvydas*, see 533 U.S. at 693. As a result, there is a difference of constitutional magnitude between courts, on the one hand, declaring and enforcing the constitutional or statutory consequences of entries by aliens that occurred independent of the Judicial Branch, and, on the other hand, courts compelling those entries in the first place over the express determination of the Executive Branch and Congress that an alien should not be admitted into American society because his criminal recidivism poses a continuing danger to the American public.

Moreover, adopting what would be, for all practical purposes, a time limit on the physical exclusion of aliens would have significant foreign policy and security implications for the United States—areas into which the judiciary should be loath to tread (if at all) without the clearest direction from Congress and the Executive Branch. See generally *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936). Any diminution in the political Branches' comprehensive control over the borders, the admission of aliens, and the management of international migration crises would render the Nation more vulnerable to manipulation and infiltration by hostile powers and would tie the government's hands in responding to humanitarian emergencies. Because it "would inhibit the flexibility of the political branches of government to respond to changing world conditions," that reading of Section 1231(a)(6) "should be adopted only with the greatest caution." *Diaz*, 426 U.S. at 81; see *Restoring Credibility*, *supra*, at 162-174 (discussing the complexity of immigration emergencies and the government's need for "effective and humane responses").

Cuba is a case in point. The 1980 Mariel boatlift was not the first or the last time the Castro regime used its citizens as "bargaining chips" in an attempt to pressure the United States to modify its policies toward and relations with Cuba. Human Rights Watch/Americas, *Cuba: Repression, the Exodus of August 1994, and the U.S. Response* 2 (Oct. 1994). Banking that "the appearance of loss of control over US borders—coupled with the perception inside the US that Florida might be overrun—would be viewed by US leaders as politically costlier than the alternative of dealing with him," Castro flooded the United States with 5000 migrants from the Port of Camarioca in 1965.[18]

---

[18] Kelly M. Greenhill, *Engineered Migration as a Coercive Instrument: The 1994 Cuban Balseros Crisis* 13 (Feb. 2002); see *id.* at 10-17 (discussing

In 1980, anger over, among other things, the United States' immigration policies toward Cubans, public statements labeling Cuba a Soviet puppet state, and the Peruvian and Costa Rican governments' handling of the 10,000 asylum seekers that had poured into the Peruvian embassy in early 1980, prompted Castro to open the Port of Mariel, flooding the United States with more than 100,000 migrants. Wayne S. Smith, *The Closest of Enemies: A Personal and Diplomatic Account of U.S.-Cuban Relations Since 1957*, at 200-210 (1987); Engstrom, *supra*, at 47-56. As part of that migration assault on the United States, Castro forced thousands of hardened criminals out of his prisons and into the departing boats. 52 Fed. Reg. at 48,799; *Palma*, 676 F.2d at 101.

Castro again resorted to the use of humans as diplomatic weapons in 1994. In an attempt to pressure the United States to ease its economic embargo on Cuba, to alter the immigration policies that had so rankled the Castro regime for decades, and to force the United States into bilateral negotiations, Castro reopened the Port of Mariel, sending tens of thousands of Cubans to the Florida shores.[19] In April 1995, Castro threatened yet another boatlift in an effort to derail the proposed Helms-Burton legislation, see 22 U.S.C. 6021-6091. Pet. App. 2a n.1.

Further, as recent events have taught, the Cuban government is not the only foreign power or organization that thinks little of putting civilian lives at risk as part of its

---

Castro's use of immigration as a foreign policy tool in the 1965, 1980, and 1994 boatlifts); Engstrom, *supra*, at 19; Alex Larzelere, *Castro's Ploy—America's Dilemma: The 1980 Cuban Boatlift* 117 n.* (1988); C. Todd Piczak, *The Helms-Burton Act: U.S. Foreign Policy Toward Cuba, the National Security Exception to the GATT and the Political Question Doctrine*, 61 U. Pitt. L. Rev. 287, 312-313 (Fall 1999).

[19] See Greenhill, *supra*, at 17-25; Engstrom, *supra*, at 188; see also *Sale*, 509 U.S. at 163-164 (discussing the difficult international and diplomatic problems occasioned by the 1991 influx of Haitian migrants).

hostile endeavors. It is difficult to understate the damage that could occur to the United States' international relations and national security if the government does not speak with one voice in the handling of migration crises at the border, or if foreign powers are told that the President and Congress cannot control the physical infiltration into the United States of criminals and other aliens stopped at the border. The "judiciary is not well positioned to shoulder primary responsibility for assessing the likelihood and importance of [the] diplomatic repercussions" and national security consequences that would result from an immigration regime that rewarded foreign governments who evacuate their prisons or other dangerous individuals onto the United States' shores. *Aguirre-Aguirre*, 526 U.S. at 425.[20] Such judgments must be left to Congress and the President. Section 1231(a)(6), for its part, contains no trace of a congressional intent to visit such foreign policy and security consequences on the United States or to arm hostile governments or organizations with a new diplomatic weapon.[21]

---

[20] See also *Zadvydas*, 533 U.S. at 711-712 (Kennedy, J., dissenting) ("[O]ther countries can use the fact of judicially mandated release to their strategic advantage, refusing the return of their nationals to force dangerous aliens upon us."); *Gisbert*, 988 F.2d at 1447 ("Accepting petitioners' arguments here would allow one country to export its unwanted nationals and force them upon another country by the simple tactic of refusing to accept their return."); *Fernandez-Roque*, 734 F.2d at 582 ("A foreign leader could eventually compel us to grant physical admission via parole to any aliens he wished by the simple expedient of sending them here and then refusing to take them back.").

[21] The statutory provisions permitting the removal of alien terrorists alone do not offer sufficient protection of the United States' national interests. First, those provisions address security risks posed by particular individuals to the United States. They do nothing to address security risks that are created by the policies of foreign governments, rather than the character of individual aliens. Second, while political terrorists can undoubtedly cause harm to the American public, public

Finally, the United States has a distinct humanitarian interest in dissuading migrants from undertaking treacherous voyages to the United States in ramshackle boats or other vessels that are so unseaworthy as effectively to preclude the government from turning the aliens back. See *Sale* v. *Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 163 (1993). Adoption of an immigration policy that virtually guaranteed such aliens' eventual release into American society would undercut those efforts and encourage more life-endangering migrations, especially when political turmoil in or difficult diplomatic relations with the aliens' native countries suggests that the United States may not be able to effect a repatriation.

In sum, the time constraints on detention that were adopted in *Zadvydas* to avoid a constitutional question cannot be extended to excluded aliens without generating even more substantial constitutional problems and inter-Branch tension. Furthermore, while the Court in *Zadvydas* did not perceive the presumptive cap on the detention of lawful permanent residents as threatening the Nation's security, implying a time limit on the physical exclusion of criminal aliens stopped at the border would confound "the political branches' authority to control entry into the United States" and open a large "unprotected spot in the Nation's armor."

---

security can also be threatened on a day-to-day basis by the lawlessness of ordinary criminals. Congress's creation of a special provision to deal with the exigencies of terrorism did not abdicate the government's historic power, through exclusion, to protect the United States from such criminal elements. Third, due to proof difficulties or the sensitivity of using classified information, the government may, at times, find it more expedient to exclude an individual based on his criminality or other factors than to attempt to prove his status as a terrorist. Nothing in the terrorism provisions suggests that Congress denominated that procedural mechanism to be the *sole* avenue for protecting the safety of the United States.

Zadvydas, 533 U.S. at 695-696 (quoting *Kwong Hai Chew*, 344 U.S. at 602).

C. The Existing Parole Scheme Adequately Protects The Interests Of Excluded Aliens Pending Their Removal

The existing federal parole schemes for Mariel Cubans and other aliens stopped at the border fairly balance the governmental and private interests at stake in the detention decision. See *Mathews* v. *Eldridge*, 424 U.S. 319, 334-335 (1976). Due process, after all, "is flexible and calls for such procedural protections as the particular situation demands." *Brewer*, 408 U.S. at 481. Procedural due process rules," moreover, "are meant to protect persons not from the deprivation, but from the *mistaken or unjustified* deprivation of life, liberty, or property." *Carey* v. *Piphus*, 435 U.S. 247, 259 (1978) (emphasis added). Thus, even if it is assumed, *arguendo*, that due process principles apply to some extent in this setting, the parole regulations are more than adequate.

The starting point is "analysis of the governmental and private interests that are affected." *Mathews*, 424 U.S. at 334. On the one hand, the government's interest in "preventing danger to the community is a legitimate regulatory goal," *United States* v. *Salerno*, 481 U.S. 739, 747 (1987), and has been "historically so regarded," *Kansas* v. *Hendricks*, 521 U.S. 346, 363 (1997). See also *Salerno*, 481 U.S. at 749 ("The government's interest in preventing crime by arrestees is both legitimate and compelling."). And the government's interest in ensuring that its parole mechanism does not operate in a manner that leaves the Nation vulnerable to manipulation by foreign powers is compelling. The public as a whole also has a weighty interest in ensuring that the parole process does not become so procedurally unwieldy or so ineffective at preventing the release of dangerous individuals that the parole program as a whole is

forced to be curtailed or abandoned. See *Greenholtz* v. *Inmates of the Nebraska Penal & Corr. Facility*, 442 U.S. 1, 13 (1979). That result, of course, would be contrary to the interests of the prospective parolees themselves. It would also deprive the public of the benefits it receives from the contributions of law-abiding parolees and the value of allowing them to integrate themselves into the life of the community to the extent that the political Branches conclude is consistent with the broader national interest. Cf. *ibid.*

On the private side, the liberty interest of an alien who was stopped at the border, whose subsequent parole has already been revoked at least once, and who has been ordered removed based on a criminal conviction in the United States is virtually non-existent (if it exists at all). Relying on *Morrissey* v. *Brewer*, and *United States* v. *Salerno*, the Sixth Circuit stressed the premium that the Due Process Clause places on protecting individuals against deprivations of liberty. *Rosales-Garcia*, 322 F.3d at 409-412. But this is not a case about terminating or depriving individuals of a pre-existing liberty. Neither respondent nor any of the other excluded aliens whose cases are pending before this Court challenges the propriety of his initial detention at the border, his parole revocation, his criminal convictions, or his subsequent re-detention. The interest asserted here thus is not against the deprivation of preexisting liberty; it is in "being denied a conditional liberty that one desires." *Greenholtz*, 442 U.S. at 9. That is "quite different." *Ibid.*

In *Greenholtz*, the Court stressed the very minimal protection that the Due Process Clause accords to the "natural desire" of those lawfully detained to be released on parole following a criminal conviction. 442 U.S. at 7. As long as the government provides an opportunity to be heard and an explanation of the grounds for denial, the Court concluded, that is all "the process that is due" under the Constitution.

Id. at 16; see *Mathews*, 424 U.S. at 333 (the "fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner"). If that is all the process that is due to citizens seeking parole, certainly no more process should be demanded when parole is sought by criminal aliens who were stopped at the border when they first arrived and have never acquired any right or liberty interest to be in the United States.

The existing parole regulations, both for Mariel Cubans and other aliens stopped at the border, more than satisfy that standard. The regulations provide aliens with written notice of an upcoming parole determination, the opportunity to submit material orally or in writing, and the right to have the assistance of others. 8 C.F.R. 212.12(d)(4), 241.4(g)(5), (h)(1) and (2), and (i)(5) (as amended by 67 Fed. Reg. at 39,259). Consideration also is given to the alien's institutional progress, ties to the community, criminal and disciplinary records, psychological evaluations, and any other information that is probative of whether parole is in the public interest. 8 C.F.R. 212.12(b)(1) and (d), 241.4(f). If parole is denied, a written decision is provided. 8 C.F.R. 212.12(d)(4)(i) and (iii), 241.4(i)(5).

While the Secretary places the burden of proving the absence of a threat of violence or renewed criminal activity on the alien, that is especially appropriate here in light of the alien's already established record of criminality and parole revocation. "[A] criminal record accumulated by an [excluded] alien is a good indicator of future danger," and "[a]ny suggestion that aliens who have completed prison terms no longer present a danger simply does not accord with the reality that a significant risk may still exist." *Demore*, 538 U.S. at 526 n.9 (quoting *Zadvydas*, 533 U.S. at

714 (Kennedy, J., dissenting)).[22] Furthermore, at the border, the burden is on the alien to demonstrate a legal basis for admission; the government need not justify its decision to exclude or to detain the alien. See *Mezei*, 345 U.S. at 209, 216. There is no reason that the excluded alien's burden should be eased after he has taken advantage of the gift of parole to commit crimes in the United States and has been formally ordered removed.[23]

Respondent and the Sixth Circuit (*Rosales-Garcia*, 322 F.2d at 410-411) decry what they perceive to be potentially indefinite detention. But nothing in the Constitution or federal law (or, for that matter, international law) forbids the United States from indefinitely excluding a criminal alien from its territory, even for life. Exclusion, by its nature, "has no obvious termination point." *Zadvydas*, 533 U.S. at 697. That is all the detention here accomplishes. Detention therefore is, by definition, "for a period reasonably necessary to secure the alien's" exclusion. *Id.* at 682.

In any event, the parole regulations guarantee annual review of the detention decision. A denial of parole thus is not for life or even for the foreseeable future. Parole is denied only for one year—even less if changed circumstances

---

[22] See also *Hendricks*, 521 U.S. at 358 ("[P]revious instances of violent behavior are an important indicator of future violent tendencies.") (quoting *Heller* v. *Doe*, 509 U.S. 312, 323 (1993)); *Jones* v. *United States*, 463 U.S. 354, 364 (1983) ("The fact that a person has been found, beyond a reasonable doubt, to have committed a criminal act certainly indicates dangerousness.").

[23] The suggestion (see *Rosales-Garcia*, 322 F.3d at 410-411) that the alien must be shown to be a known risk by the same exacting standards required to detain citizens and other lawful residents fundamentally misconceives the status of an excluded alien. Heavy burdens of proof were appropriate in those cases because the detained individual possessed a preexisting "strong interest in liberty." *Salerno*, 481 U.S. at 750. Excluded aliens have no such pre-existing liberty interest, let alone a strong one, in release into American society.

warrant an earlier review. 8 C.F.R. 212.12(g)(2) and (3), 241.4(k)(2)(v) and (*l*)(3). Those annual reviews are meaningful, as the impending release of the petitioner in No. 03-7434 demonstrates. Indeed, since 1987, thousands of Mariel Cubans whose parole was revoked following a criminal conviction have been re-released on parole.

Finally, the government's ongoing diplomatic efforts to effectuate the return of excluded aliens diminish the prospect of indefinite detention. For example, the Department of Homeland Security reports that twenty aliens have already been returned to Cuba this year, and Lin Guo Xi, the alien whose supposedly indefinite detention prompted the Ninth Circuit to extend *Zadvydas* to excluded aliens in *Xi*, was recently removed to China. Removal efforts no doubt will take longer in some situations than others. But in those cases, responsibility for the alien's ongoing detention cannot fairly be laid on the United States Government alone, which has every right to exclude the alien from its territory. Responsibility more appropriately rests with the alien's country of origin, which is shirking its responsibilities to its own citizens and international law. Respondent "is no more ours than theirs." *Mezei*, 345 U.S. at 216.

Significant responsibility also rests with the alien himself, who has thrown away the opportunities for uninterrupted parole or lawful residence generously offered by the United States, choosing instead to commit crimes and victimize the very community in which he now asserts a right to reside. Nothing in law or logic compels elevating the excluded criminal alien's interests over the safety and security of the community into which he would be released. Quite the opposite is true. This Court held in *Carlson* v. *Landon*, 342 U.S. 524 (1952), that detention does not violate the Due Process Clause "where there is reasonable apprehension of

hurt from aliens," *id.* at 542.[24] And *Zadvydas* itself imposed no time limit on detention for aliens previously admitted for lawful permanent residence whose release following a formal order of removal has been revoked. To the contrary, the Court emphasized that release would be under "conditions that may not be violated." 533 U.S. at 696.

In sum, the specter of detention for life that is largely that: a specter. It has not happened for the overwhelming majority of excluded aliens. In those cases where detention is relatively prolonged, it still is only as long as is necessary to continue to effect the alien's physical exclusion from the United States or to ensure that he may be conditionally released into the community without undue risk. Those decisions concerning the detention or release of excluded aliens whose continued presence here is, *by definition*, a matter of diplimatic sensitivity (due to the other government's refusal or political inability to repatriate) must be left in the hands of the political Branches. It is precisely when foreign governments prove most intransigent and when problems posed by excluded aliens prove most intractable that flexibility for the political Branches and deference by the judiciary is most imperative. In such situations, there are admittedly no good choices. But the longstanding sovereign right of self-determination through exclusion —and the constitutional assignment of immigration, foreign relations, and national security matters to Congress and the Executive Branch—vest both the authority and the responsibility for those hard choices in the political Branches. Cf. *Sale*, 509 U.S. at 163-166, 187-188. The

---

[24] See *Salerno*, 481 U.S. at 748 ("We have repeatedly held that the Government's regulatory interest in community safety can, in appropriate circumstances, outweigh an individual's liberty interest."); *Greenholtz*, 442 U.S. at 8 (parole decision should reflect "what is best both for the individual inmate and for the community").

response chosen by the political Branches to migration crises—preserving the historic national prerogative of exclusion, while permitting the Secretary to detain or parole excluded aliens as circumstances warrant—carefully balances humanitarianism, national security, and the domestic safety of the American public. When foreign governments deliberately send boatloads of aliens to the shores of the United States, and when such aliens use their humanitarian parole to commit crimes against Americans, the Secretary needs the flexibility to recalibrate that balance and give real-world effect to the political Branches' combined judgment that such criminal aliens should not be here in the first place. Rather than tie the government's hands, as respondent proposes, humanitarian measures like parole can reasonably presuppose some mutuality of obligation.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General
Counsel of Record
PETER D. KEISLER
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
PATRICIA A. MILLETT
Assistant to the Solicitor General
DONALD E. KEENER
EMILY A. RADFORD
JOHN ANDRE
Attorneys

MAY 2004

APPENDIX

1. U.S. Constitution Amendment V provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

2. 8 U.S.C. 1101(a)(13) provides:

(A) The terms "admission" and "admitted" mean, with respect to an alien, the lawful entry of the alien into the United States after inspection and authorization by an immigration officer.

(B) An alien who is paroled under section 1182(d)(5) of this title or permitted to land temporarily as an alien crewman shall not be considered to have been admitted.

(C) An alien lawfully admitted for permanent residence in the United States shall not be regarded as seeking an admission into the United States for purposes of the immigration laws unless the alien—

(i) has abandoned or relinquished that status,

(ii) has been absent from the United States for a continuous period in excess of 180 days,

(iii) has engaged in illegal activity after having departed the United States,

(iv) has departed from the United States while under legal process seeking removal of the alien from the United States, including removal proceedings under this chapter and extradition proceedings,

(v) has committed an offense identified in section 1182(a)(2) of this title, unless since such offense the alien has been granted relief under section 1182(h) or 1229b(a) of this title, or

(vi) is attempting to enter at a time or place other than as designated by immigration officers or has not been admitted to the United States after inspection and authorization by an immigration officer.

3. 8 U.S.C. 1182(d)(5) provides:

(A) The Attorney General may, except as provided in subparagraph (B) or in section 1184(f) of this title, in his discretion parole into the United States temporarily under such conditions as he may prescribe only on a case-by-case basis for urgent humanitarian reasons or significant public benefit any alien applying for admission to the United States, but such parole of such alien shall not be regarded as an admission of the alien and when the purposes of such parole shall, in the opinion of the Attorney General, have been served the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States.

(B) The Attorney General may not parole into the United States an alien who is a refugee unless the Attorney General determines that compelling reasons in the public interest with respect to that particular alien require that the alien be paroled into the United States rather than be admitted as a refugee under section 1157 of this title.

4. 8 U.S.C. 1231(a) provides in pertinent part:

Detention, release, and removal of aliens ordered removed

(1) Removal period

(A) In general

Except as otherwise provided in this section, when an alien is ordered removed, the Attorney General shall remove the alien from the United States within a period of 90 days (in this section referred to as the "removal period").

(B) Beginning of period

The removal period begins on the latest of the following:

(i) The date the order of removal becomes administratively final.

(ii) If the removal order is judicially reviewed and if a court orders a stay of the removal of the alien, the date of the court's final order.

(iii) If the alien is detained or confined (except under an immigration process), the date the alien is released from detention or confinement.

(C) Suspension of period

The removal period shall be extended beyond a period of 90 days and the alien may remain in detention during such extended period if the alien fails or refuses to make timely application in good faith for travel or other documents necessary to the

alien's departure or conspires or acts to prevent the alien's removal subject to an order of removal.

(2) Detention

During the removal period, the Attorney General shall detain the alien. Under no circumstance during the removal period shall the Attorney General release an alien who has been found inadmissible under section 1182(a)(2) or 1182(a)(3)(B) of this title or deportable under section 1227(a)(2) or 1227(a)(4)(B) of this title.

(3) Supervision after 90-day period

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

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

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

(C) to give information under oath about the alien's nationality, circumstances, habits, associations, and activities, and other information the Attorney General considers appropriate; and

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

* * * * *

(6) Inadmissible or criminal aliens

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 (3).

5. 8 U.S.C. 1522(f) provides:

Assistance to States and counties for incarceration of certain Cuban nationals; priority for removal and return to Cuba

(1) The Attorney General shall pay compensation to States and to counties for costs incurred by the States and counties to confine in prisons, during the fiscal year for which such payment is made, nationals of Cuba who—

(A) were paroled into the United States in 1980 by the Attorney General,

(B) after such parole committed any violation of State or county law for which a term of imprisonment was imposed, and

(C) at the time of such parole and such violation were not aliens lawfully admitted to the United States—

(i) for permanent residence, or

(ii) under the terms of an immigrant or a non-immigrant visa issued,

under this chapter.

(2) For a State or county to be eligible to receive compensation under this subsection, the chief executive officer of the State or county shall submit to the Attorney General, in accordance with rules to be issued by the Attorney General, an application containing—

(A) the number and names of the Cuban nationals with respect to whom the State or county is entitled to such compensation, and

(B) such other information as the Attorney General may require.

(3) For a fiscal year the Attorney General shall pay the costs described in paragraph (1) to each State and county determined by the Attorney General to be eligible under paragraph (2); except that if the amounts appropriated for the fiscal year to carry out this subsection are insufficient to cover all such payments, each of such payments shall be ratably reduced so that the total of such payments equals the amounts so appropriated.

(4) The authority of the Attorney General to pay compensation under this subsection shall be effective for any fiscal year only to the extent and in such amounts as may be provided in advance in appropriation Acts.

(5) It shall be the policy of the United States Government that the President, in consultation with the Attorney General and all other appropriate Federal officials and all appropriate State and county officials referred to in paragraph (2), shall place top priority on seeking the expeditious removal from this country and the return to Cuba of Cuban nationals described in paragraph (1) by any reasonable and responsible means, and to this end the Attorney General may use the funds authorized to carry out this subsection to conduct such policy.

7. 8 C.F.R. 212.5 provides:

Parole of aliens into the United States.

(a) The authority of the Secretary to continue an alien in custody or grant parole under section 212(d)(5)(A) of the Act shall be exercised by the Assistant Commissioner, Office of Field Operations; Director, Detention and Removal; directors of field operations; port directors; special agents in charge; deputy special agents in charge; associate special agents in charge; assistant special agents in charge; resident agents in charge; field office directors; deputy field office directors; chief patrol agents; district directors for services; and those other officials as may be designated in writing, subject to the parole and detention authority of the Secretary or his designees. The Secretary or his designees may invoke, in the exercise of discretion, the authority under section 212(d)(5)(A) of the Act.

(b) The parole of aliens within the following groups who have been or are detained in accordance with § 235.3(b) or (c) of this chapter would generally be justified only on a case-by-case basis for "urgent humanitarian reasons" or "significant public benefit," provided the aliens present neither a security risk nor a risk of absconding:

(1) Aliens who have serious medical conditions in which continued detention would not be appropriate;

(2) Women who have been medically certified as pregnant;

(3) Aliens who are defined as juveniles in § 236.3(a) of this chapter. The Director, Detention and Removal; directors of field operations; field office directors; deputy field office directors; or chief patrol agents shall follow the guidelines set forth in § 236.3(a) of this chapter and paragraphs

(b)(3)(i) through (iii) of this section in determining under what conditions a juvenile should be paroled from detention:

(i) Juveniles may be released to a relative (brother, sister, aunt, uncle, or grandparent) not in Service detention who is willing to sponsor a minor and the minor may be released to that relative notwithstanding that the juvenile has a relative who is in detention.

(ii) If a relative who is not in detention cannot be located to sponsor the minor, the minor may be released with an accompanying relative who is in detention.

(iii) If the Service cannot locate a relative in or out of detention to sponsor the minor, but the minor has identified a non-relative in detention who accompanied him or her on arrival, the question of releasing the minor and the accompanying non-relative adult shall be addressed on a case-by-case basis;

(4) Aliens who will be witnesses in proceedings being, or to be, conducted by judicial, administrative, or legislative bodies in the United States; or

(5) Aliens whose continued detention is not in the public interest as determined by those officials identified in paragraph (a) of this section.

(c) In the case of all other arriving aliens, except those detained under § 235.3(b) or (c) of this chapter and paragraph (b) of this section, those officials listed in paragraph (a) of this section may, after review of the individual case, parole into the United States temporarily in accordance with section 212(d)(5)(A) of the Act, any alien applicant for admission, under such terms and conditions, including those set forth in paragraph (d) of this section, as he or she may deem appropriate. An alien who arrives at a port-of-entry and applies for parole into the United States for the sole purpose of seeking adjustment of status under section 245A of the

Act, without benefit of advance authorization as described in paragraph (f) of this section shall be denied parole and detained for removal in accordance with the provisions of § 235.3(b) or (c) of this chapter. An alien seeking to enter the United States for the sole purpose of applying for adjustment of status under section 210 of the Act shall be denied parole and detained for removal under § 235.3(b) or (c) of this chapter, unless the alien has been recommended for approval of such application for adjustment by a consular officer at an Overseas Processing Office.

(d) *Conditions.* In any case where an alien is paroled under paragraph (b) or (c) of this section, those officials listed in paragraph (a) of this section may require reasonable assurances that the alien will appear at all hearings and/or depart the United States when required to do so. Not all factors listed need be present for parole to be exercised. Those officials should apply reasonable discretion. The consideration of all relevant factors includes:

(1) The giving of an undertaking by the applicant, counsel, or a sponsor to ensure appearances or departure, and a bond may be required on Form I-352 in such amount as may be deemed appropriate;

(2) Community ties such as close relatives with known addresses; and

(3) Agreement to reasonable conditions (such as periodic reporting of whereabouts).

(e) *Termination of parole*—(1) *Automatic.* Parole shall be automatically terminated without written notice (i) upon the departure from the United States of the alien, or, (ii) if not departed, at the expiration of the time for which parole was authorized, and in the latter case the alien shall be processed in accordance with paragraph (e)(2) of this section except that no written notice shall be required.

(2)(i) *On notice.* In cases not covered by paragraph (e)(1) of this section, upon accomplishment of the purpose for which parole was authorized or when in the opinion of one of the officials listed in paragraph (a) of this section, neither humanitarian reasons nor public benefit warrants the continued presence of the alien in the United States, parole shall be terminated upon written notice to the alien and he or she shall be restored to the status that he or she had at the time of parole. When a charging document is served on the alien, the charging document will constitute written notice of termination of parole, unless otherwise specified. Any further inspection or hearing shall be conducted under section 235 or 240 of the Act and this chapter, or any order of exclusion, deportation, or removal previously entered shall be executed. If the exclusion, deportation, or removal order cannot be executed within a reasonable time, the alien shall again be released on parole unless in the opinion of the official listed in paragraph (a) of this section the public interest requires that the alien be continued in custody.

(ii) An alien who is granted parole into the United States after enactment of the Immigration Reform and Control Act of 1986 for other than the specific purpose of applying for adjustment of status under section 245A of the Act shall not be permitted to avail him or herself of the privilege of adjustment thereunder. Failure to abide by this provision through making such an application will subject the alien to termination of parole status and institution of proceedings under sections 235 and 236 of the Act without the written notice of termination required by § 212.5(e)(2)(i) of this chapter.

(f) *Advance authorization.* When parole is authorized for an alien who will travel to the United States without a visa, the alien shall be issued Form I-512.

(g) *Parole for certain Cuban nationals.* Notwithstanding any other provision respecting parole, the determination whether to release on parole, or to revoke the parole of, a native of Cuba who last came to the United States between April 15, 1980, and October 20, 1980, shall be governed by the terms of § 212.12.

(h) *Effect of parole of Cuban and Haitian nationals.* (1) Except as provided in paragraph (h)(2) of this section, any national of Cuba or Haiti who was paroled into the United States on or after October 10, 1980, shall be considered to have been paroled in the special status for nationals of Cuba or Haiti, referred to in section 501(e)(1) of the Refugee Education Assistance Act of 1980, Public Law 96-422, as amended (8 U.S.C. 1522 note).

(2) A national of Cuba or Haiti shall not be considered to have been paroled in the special status for nationals of Cuba or Haiti, referred to in section 501(e)(1) of the Refugee Education Assistance Act of 1980, Public Law 96-422, as amended, if the individual was paroled into the United States:

(i) In the custody of a Federal, State or local law enforcement or prosecutorial authority, for purposes of criminal prosecution in the United States; or

(ii) Solely to testify as a witness in proceedings before a judicial, administrative, or legislative body in the United States.

8. 8 C.F.R. 212.12 provides:

Parole determinations and revocations respecting Mariel Cubans.

(a) *Scope.* This section applies to any native of Cuba who last came to the United States between April 15, 1980, and October 20, 1980 (hereinafter referred to as *Mariel Cuban*) and who is being detained by the Immigration and Naturalization Service (hereinafter referred to as the *Service*) pending his or her exclusion hearing, or pending his or her return to Cuba or to another country. It covers Mariel Cubans who have never been paroled as well as those Mariel Cubans whose previous parole has been revoked by the Service. It also applies to any Mariel Cuban, detained under the authority of the Immigration and Nationality Act in any facility, who has not been approved for release or who is currently awaiting movement to a Service or Bureau Of Prisons (BOP) facility. In addition, it covers the revocation of parole for those Mariel Cubans who have been released on parole at any time.

(b) *Parole authority and decision.* The authority to grant parole under section 212(d)(5) of the Act to a detained Mariel Cuban shall be exercised by the Commissioner, acting through the Associate Commissioner for Enforcement, as follows:

(1) *Parole decisions.* The Associate Commissioner for Enforcement may, in the exercise of discretion, grant parole to a detained Mariel Cuban for emergent reasons or for reasons deemed strictly in the public interest. A decision to retain in custody shall briefly set forth the reasons for the continued detention. A decision to release on parole may contain such special conditions as are considered appropriate. A copy of any decision to parole or to detain, with an attached copy translated into Spanish, shall be provided to

the detainee. Parole documentation for Mariel Cubans shall be issued by the district director having jurisdiction over the alien, in accordance with the parole determination made by the Associate Commissioner for Enforcement.

(2) *Additional delegation of authority.* All references to the Commissioner and Associate Commissioner for Enforcement in this section shall be deemed to include any person or persons (including a committee) designated in writing by the Commissioner or Associate Commissioner for Enforcement to exercise powers under this section.

(c) *Review Plan Director.* The Associate Commissioner for Enforcement shall appoint a Director of the Cuban Review Plan. The Director shall have authority to establish and maintain appropriate files respecting each Mariel Cuban to be reviewed for possible parole, to determine the order in which the cases shall be reviewed, and to coordinate activities associated with these reviews.

(d) *Recommendations to the Associate Commissioner for Enforcement.* Parole recommendations for detained Mariel Cubans shall be developed in accordance with the following procedures.

(1) *Review Panels.* The Director shall designate a panel or panels to make parole recommendations to the Associate Commissioner for Enforcement. A Cuban Review Panel shall, except as otherwise provided, consist of two persons. Members of a Review Panel shall be selected from the professional staff of the Service. All recommendations by a two-member Panel shall be unanimous. If the vote of a two-member Panel is split, it shall adjourn its deliberations concerning that particular detainee until a third Panel member is added. A recommendation by a three-member Panel shall be by majority vote. The third member of any Panel shall be the Director of the Cuban Review Plan or his designee.

(2) *Criteria for Review.* Before making any recommendation that a detainee be granted parole, a majority of the Cuban Review Panel members, or the Director in case of a record review, must conclude that:

(i) The detainee is presently a nonviolent person;

(ii) The detainee is likely to remain nonviolent;

(iii) The detainee is not likely to pose a threat to the community following his release; and

(iv) The detainee is not likely to violate the conditions of his parole.

(3) *Factors for consideration.* The following factors should be weighed in considering whether to recommend further detention or release on parole of a detainee:

(i) The nature and number of disciplinary infractions or incident reports received while in custody;

(ii) The detainee's past history of criminal behavior;

(iii) Any psychiatric and psychological reports pertaining to the detainee's mental health;

(iv) Institutional progress relating to participation in work, educational and vocational programs;

(v) His ties to the United States, such as the number of close relatives residing lawfully here;

(vi) The likelihood that he may abscond, such as from any sponsorship program; and

(vii) Any other information which is probative of whether the detainee is likely to adjust to life in a community, is likely to engage in future acts of violence, is likely to engage in future criminal activity, or is likely to violate the conditions of his parole.

(4) *Procedure for review.* The following procedures will govern the review process:

(i) Record review. Initially, the Director or a Panel shall review the detainee's file. Upon completion of this record review, the Director or the Panel shall issue a written recommendation that the detainee be released on parole or scheduled for a personal interview.

(ii) Personal interview. If a recommendation to grant parole after only a record review is not accepted or if the detainee is not recommended for release, a Panel shall personally interview the detainee. The scheduling of such interviews shall be at the discretion of the Director. The detainee may be accompanied during the interview by a person of his choice, who is able to attend at the time of the scheduled interview, to assist in answering any questions. The detainee may submit to the Panel any information, either orally or in writing, which he believes presents a basis for release on parole.

(iii) Panel recommendation. Following completion of the interview and its deliberations, the Panel shall issue a written recommendation that the detainee be released on parole or remain in custody pending deportation or pending further observation and subsequent review. This written recommendation shall include a brief statement of the factors which the Panel deems material to its recommendation. The recommendation and appropriate file material shall be forwarded to the Associate Commissioner for Enforcement, to be considered in the exercise of discretion pursuant to § 212.12(b).

(e) *Withdrawal of parole approval.* The Associate Commissioner for Enforcement may, in his or her discretion, withdraw approval for parole of any detainee prior to release when, in his or her opinion, the conduct of the detainee, or

any other circumstance, indicates that parole would no longer be appropriate.

(f) *Sponsorship.* No detainee may be released on parole until suitable sponsorship or placement has been found for the detainee. The paroled detainee must abide by the parole conditions specified by the Service in relation to his sponsorship or placement. The following sponsorships and placements are suitable:

(1) Placement by the Public Health Service in an approved halfway house or mental health project;

(2) Placement by the Community Relations Service in an approved halfway house or community project; and

(3) Placement with a close relative such as a parent, spouse, child, or sibling who is a lawful permanent resident or a citizen of the United States.

(g) *Timing of reviews.* The timing of review shall be in accordance with the following guidelines.

(1) *Parole revocation cases.* The Director shall schedule the review process in the case of a new or returning detainee whose previous immigration parole has been revoked. The review process will commence with a scheduling of a file review, which will ordinarily be expected to occur within approximately three months after parole is revoked. In the case of a Mariel Cuban who is in the custody of the Service, the Cuban Review Plan Director may, in his or her discretion, suspend or postpone the parole review process if such detainee's prompt deportation is practicable and proper.

(2) *Continued detention cases.* A subsequent review shall be commenced for any detainee within one year of a refusal to grant parole under § 212.12(b), unless a shorter interval is specified by the Director.

(3) *Discretionary reviews.* The Cuban Review Plan Director, in his discretion, may schedule a review of a detainee at any time when the Director deems such a review to be warranted.

(h) *Revocation of parole.* The Associate Commissioner for Enforcement shall have authority, in the exercise of discretion, to revoke parole in respect to Mariel Cubans. A district director may also revoke parole when, in the district director's opinion, revocation is in the public interest and circumstances do not reasonably permit referral of the case to the Associate Commissioner. Parole may be revoked in the exercise of discretion when, in the opinion of the revoking official:

(1) The purposes of parole have been served;

(2) The Mariel Cuban violates any condition of parole;

(3) It is appropriate to enforce an order of exclusion or to commence proceedings against a Mariel Cuban; or

(4) The period of parole has expired without being renewed.

9. 8 C.F.R. 241.4 provides:

Continued detention of inadmissible, criminal, and other aliens beyond the removal period.

(a) *Scope.* The authority to continue an alien in custody or grant release or parole under sections 241(a)(6) and 212(d)(5)(A) of the Act shall be exercised by the Commissioner or Deputy Commissioner, as follows: Except as otherwise directed by the Commissioner or his or her designee, the Executive Associate Commissioner for Field Operations (Executive Associate Commissioner), the Deputy Executive Associate Commissioner for Detention and Removal, the Director of the Detention and Removal Field Office or the district director may continue an alien in custody beyond the removal period described in section 241(a)(1) of the Act pursuant to the procedures described in this section. Except as provided for in paragraph (b)(2) of this section, the provisions of this section apply to the custody determinations for the following group of aliens:

(1) An alien ordered removed who is inadmissible under section 212 of the Act, including an excludable alien convicted of one or more aggravated felony offenses and subject to the provisions of section 501(b) of the Immigration Act of 1990, Public Law 101-649, 104 Stat. 4978, 5048 (codified at 8 U.S.C. 1226(e)(1) through (e)(3)(1994));

(2) An alien ordered removed who is removable under section 237(a)(1)(C) of the Act;

(3) An alien ordered removed who is removable under sections 237(a)(2) or 237(a)(4) of the Act, including deportable criminal aliens whose cases are governed by former section 242 of the Act prior to amendment by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Div. C of Public Law 104-208, 110 Stat. 3009-546; and

(4) An alien ordered removed who the decision-maker determines is unlikely to comply with the removal order or is a risk to the community.

(b) *Applicability to particular aliens*—(1) *Motions to reopen.* An alien who has filed a motion to reopen immigration proceedings for consideration of relief from removal, including withholding or deferral of removal pursuant to 8 CFR 208.16 or 208.17, shall remain subject to the provisions of this section unless the motion to reopen is granted. Section 236 of the Act and 8 CFR 236.1 govern custody determinations for aliens who are in pending immigration proceedings before the Executive Office for Immigration Review.

(2) *Parole for certain Cuban nationals.* The review procedures in this section do not apply to any inadmissible Mariel Cuban who is being detained by the Service pending an exclusion or removal proceeding, or following entry of a final exclusion or pending his or her return to Cuba or removal to another country. Instead, the determination whether to release on parole, or to revoke such parole, or to detain, shall in the case of a Mariel Cuban be governed by the procedures in 8 CFR 212.12.

(3) *Individuals granted withholding or deferral of removal.* Aliens granted withholding of removal under section 241(b)(3) of the Act or withholding or deferral of removal under the Convention Against Torture who are otherwise subject to detention are subject to the provisions of this part 241. Individuals subject to a termination of deferral hearing under 8 CFR 208.17(d) remain subject to the provisions of this part 241 throughout the termination process.

(4) *Service determination under 8 CFR 241.13.* The custody review procedures in this section do not apply after

the Service has made a determination, pursuant to the procedures provided in 8 CFR 241.13, that there is no significant likelihood that an alien under a final order of removal can be removed in the reasonably foreseeable future. However, if the Service subsequently determines, because of a change of circumstances, that there is a significant likelihood that the alien may be removed in the reasonably foreseeable future to the country to which the alien was ordered removed or to a third country, the alien shall again be subject to the custody review procedures under this section.

(c) *Delegation of authority.* The Attorney General's statutory authority to make custody determinations under sections 241(a)(6) and 212(d)(5)(A) of the Act when there is a final order of removal is delegated as follows:

(1) *District Directors and Directors of Detention and Removal Field Offices.* The initial custody determination described in paragraph (h) of this section and any further custody determination concluded in the 3 month period immediately following the expiration of the 90-day removal period, subject to the provisions of paragraph (c)(2) of this section, will be made by the district director or the Director of the Detention and Removal Field Office having jurisdiction over the alien. The district director or the Director of the Detention and Removal Field Office shall maintain appropriate files respecting each detained alien reviewed for possible release, and shall have authority to determine the order in which the cases shall be reviewed, and to coordinate activities associated with these reviews in his or her respective jurisdictional area.

(2) *Headquarters Post-Order Detention Unit (HQPDU).* For any alien the district director refers for further review after the removal period, or any alien who has not been released or removed by the expiration of the three-month

period after the review, all further custody determinations will be made by the Executive Associate Commissioner, acting through the HQPDU.

(3) *The HQPDU review plan.* The Executive Associate Commissioner shall appoint a Director of the HQPDU. The Director of the HQPDU shall have authority to establish and maintain appropriate files respecting each detained alien to be reviewed for possible release, to determine the order in which the cases shall be reviewed, and to coordinate activities associated with these reviews.

(4) *Additional delegation of authority.* All references to the Executive Associate Commissioner, the Director of the Detention and Removal Field Office, and the district director in this section shall be deemed to include any person or persons (including a committee) designated in writing by the Executive Associate Commissioner, the Director of the Detention and Removal Field Office, or the district director to exercise powers under this section.

(d) *Custody determinations.* A copy of any decision by the district director, Director of the Detention and Removal Field Office, or Executive Associate Commissioner to release or to detain an alien shall be provided to the detained alien. A decision to retain custody shall briefly set forth the reasons for the continued detention. A decision to release may contain such special conditions as are considered appropriate in the opinion of the Service. Notwithstanding any other provisions of this section, there is no appeal from the district director's, Director of the Detention and Removal Field Office's or the Executive Associate Commissioner's decision.

(1) *Showing by the alien.* The district director, Director of the Detention and Removal Field Office, or Executive Associate Commissioner may release an alien if the alien

demonstrates to the satisfaction of the Attorney General or her designee that his or her release will not pose a danger to the community or to the safety of other persons or to property or a significant risk of flight pending such alien's removal from the United States. The district director, Director of the Detention and Removal Field Office, or Executive Associate Commissioner may also, in accordance with the procedures and consideration of the factors set forth in this section, continue in custody any alien described in paragraphs (a) and (b)(1) of this section.

(2) *Service of decision and other documents.* All notices, decisions, or other documents in connection with the custody reviews conducted under this section by the district director, Director of the Detention and Removal Field Office, or Executive Associate Commissioner shall be served on the alien, in accordance with 8 CFR 103.5a, by the Service district office having jurisdiction over the alien. Release documentation (including employment authorization if appropriate) shall be issued by the district office having jurisdiction over the alien in accordance with the custody determination made by the district director, Director of the Detention and Removal Field Office, or by the Executive Associate Commissioner. Copies of all such documents will be retained in the alien's record and forwarded to the HQPDU.

(3) *Alien's representative.* The alien's representative is required to complete Form G-28, Notice of Entry of Appearance as Attorney or Representative, at the time of the interview or prior to reviewing the detainee's records. The Service will forward by regular mail a copy of any notice or decision that is being served on the alien only to the attorney or representative of record. The alien remains responsible for notification to any other individual providing assistance to him or her.

(e) *Criteria for release.* Before making any recommendation or decision to release a detainee, a majority of the Review Panel members, or the Director of the HQPDU in the case of a record review, must conclude that:

(1) Travel documents for the alien are not available or, in the opinion of the Service, immediate removal, while proper, is otherwise not practicable or not in the public interest;

(2) The detainee is presently a non-violent person;

(3) The detainee is likely to remain nonviolent if released;

(4) The detainee is not likely to pose a threat to the community following release;

(5) The detainee is not likely to violate the conditions of release; and

(6) The detainee does not pose a significant flight risk if released.

(f) *Factors for consideration.* The following factors should be weighed in considering whether to recommend further detention or release of a detainee:

(1) The nature and number of disciplinary infractions or incident reports received when incarcerated or while in Service custody;

(2) The detainee's criminal conduct and criminal convictions, including consideration of the nature and severity of the alien's convictions, sentences imposed and time actually served, probation and criminal parole history, evidence of recidivism, and other criminal history;

(3) Any available psychiatric and psychological reports pertaining to the detainee's mental health;

(4) Evidence of rehabilitation including institutional progress relating to participation in work, educational, and vocational programs, where available;

(5) Favorable factors, including ties to the United States such as the number of close relatives residing here lawfully;

(6) Prior immigration violations and history;

(7) The likelihood that the alien is a significant flight risk or may abscond to avoid removal, including history of escapes, failures to appear for immigration or other proceedings, absence without leave from any halfway house or sponsorship program, and other defaults; and

(8) Any other information that is probative of whether the alien is likely to—

(i) Adjust to life in a community,

(ii) Engage in future acts of violence,

(iii) Engage in future criminal activity,

(iv) Pose a danger to the safety of himself or herself or to other persons or to property, or

(v) Violate the conditions of his or her release from immigration custody pending removal from the United States.

(g) *Travel documents and docket control for aliens continued in detention*—(1) *Removal period.* (i) The removal period for an alien subject to a final order of removal shall begin on the latest of the following dates:

(A) The date the order becomes administratively final;

(B) If the removal order is subject to judicial review (including review by habeas corpus) and if the court has ordered a stay of the alien's removal, the date on which,

consistent with the court's order, the removal order can be executed and the alien removed; or

(C) If the alien was detained or confined, except in connection with a proceeding under this chapter relating to removability, the date the alien is released from the detention or confinement.

(ii) The removal period shall run for a period of 90 days. However, the removal period is extended under section 241(a)(1)(C) of the Act if the alien fails or refuses to make timely application in good faith for travel or other documents necessary to the alien's departure or conspires or acts to prevent the alien's removal subject to an order of removal. The Service will provide such an alien with a Notice of Failure to Comply, as provided in paragraph (g)(5) of this section, before the expiration of the removal period. The removal period shall be extended until the alien demonstrates to the Service that he or she has complied with the statutory obligations. Once the alien has complied with his or her obligations under the law, the Service shall have a reasonable period of time in order to effect the alien's removal.

(2) *In general.* The district director shall continue to undertake appropriate steps to secure travel documents for the alien both before and after the expiration of the removal period. If the district director is unable to secure travel documents within the removal period, he or she shall apply for assistance from Headquarters Detention and Deportation, Office of Field Operations. The district director shall promptly advise the HQPDU Director when travel documents are obtained for an alien whose custody is subject to review by the HQPDU. The Service's determination that receipt of a travel document is likely may by itself warrant continuation of detention pending the removal of the alien from the United States.

(3) *Availability of travel document.* In making a custody determination, the district director and the Director of the HQPDU shall consider the ability to obtain a travel document for the alien. If it is established at any stage of a custody review that, in the judgment of the Service, travel documents can be obtained, or such document is forthcoming, the alien will not be released unless immediate removal is not practicable or in the public interest.

(4) *Removal.* The Service will not conduct a custody review under these procedures when the Service notifies the alien that it is ready to execute an order of removal.

(5) *Alien's compliance and cooperation.* (i) Release will be denied and the alien may remain in detention if the alien fails or refuses to make timely application in good faith for travel documents necessary to the alien's departure or conspires or acts to prevent the alien's removal. The detention provisions of section 241(a)(2) of the Act will continue to apply, including provisions that mandate detention of certain criminal and terrorist aliens.

(ii) The Service shall serve the alien with a Notice of Failure to Comply, which shall advise the alien of the following: the provisions of sections 241(a)(1)(C) (extension of removal period) and 243(a) of the Act (criminal penalties related to removal); the circumstances demonstrating his or her failure to comply with the requirements of section 241(a)(1)(C) of the Act; and an explanation of the necessary steps that the alien must take in order to comply with the statutory requirements.

(iii) The Service shall advise the alien that the Notice of Failure to Comply shall have the effect of extending the removal period as provided by law, if the removal period has not yet expired, and that the Service is not obligated to complete its scheduled custody reviews under this section

until the alien has demonstrated compliance with the statutory obligations.

(iv) The fact that the Service does not provide a Notice of Failure to Comply, within the 90-day removal period, to an alien who has failed to comply with the requirements of section 241(a)(1)(C) of the Act, shall not have the effect of excusing the alien's conduct.

(h) *District director's or Director of the Detention and Removal Field Office's custody review procedures.* The district director's or Director of the Detention and Removal Field Office's custody determination will be developed in accordance with the following procedures:

(1) *Records review.* The district director or Director of the Detention and Removal Field Office will conduct the initial custody review. For aliens described in paragraphs (a) and (b)(1) of this section, the district director or Director of the Detention and Removal Field Office will conduct a records review prior to the expiration of the removal period. This initial post-order custody review will consist of a review of the alien's records and any written information submitted in English to the district director or Director of the Detention and Removal Field Office by or on behalf of the alien. However, the district director or Director of the Detention and Removal Field Office may in his or her discretion schedule a personal or telephonic interview with the alien as part of this custody determination. The district director or Director of the Detention and Removal Field Office may also consider any other relevant information relating to the alien or his or her circumstances and custody status.

(2) *Notice to alien.* The district director or Director of the Detention and Removal Field Office will provide written notice to the detainee approximately 30 days in advance of the pending records review so that the alien may submit

information in writing in support of his or her release. The alien may be assisted by a person of his or her choice, subject to reasonable security concerns at the institution and panel's discretion, in preparing or submitting information in response to the district director's or Director of the Detention and Removal Field Office's notice. Such assistance shall be at no expense to the Government. If the alien or his or her representative requests additional time to prepare materials beyond the time when the district director or Director of the Detention and Removal Field Office expects to conduct the records review, such a request will constitute a waiver of the requirement that the review occur prior to the expiration of the removal period.

(3) *Factors for consideration.* The district director's or Director of the Detention and Removal Field Office's review will include but is not limited to consideration of the factors described in paragraph (f) of this section. Before making any decision to release a detainee, the district director or Director of the Detention and Removal Field Office must be able to reach the conclusions set forth in paragraph (e) of this section.

(4) *District director's or Director of the Detention and Removal Field Office's decision.* The district director or Director of the Detention and Removal Field Office will notify the alien in writing that he or she is to be released from custody, or that he or she will be continued in detention pending removal or further review of his or her custody status.

(5) *District office or Detention and Removal Field office staff.* The district director or the Director of the Detention and Removal Field Office may delegate the authority to conduct the custody review, develop recommendations, or render the custody or release decisions to those persons directly responsible for detention within his or her geographical

areas of responsibility. This includes the deputy district director, the assistant director for detention and deportation, the officer-in-charge of a detention center, the assistant director of the detention and removal field office, the director of the detention and removal resident office, the assistant director of the detention and removal resident office, officers in charge of service processing centers, or such other persons as the district director or the Director of the Detention and Removal Field Office may designate from the professional staff of the Service.

(i) *Determinations by the Executive Associate Commissioner.* Determinations by the Executive Associate Commissioner to release or retain custody of aliens shall be developed in accordance with the following procedures.

(1) *Review panels.* The HQPDU Director shall designate a panel or panels to make recommendations to the Executive Associate Commissioner. A Review Panel shall, except as otherwise provided, consist of two persons. Members of a Review Panel shall be selected from the professional staff of the Service. All recommendations by the two-member Review Panel shall be unanimous. If the vote of the two-member Review Panel is split, it shall adjourn its deliberations concerning that particular detainee until a third Review Panel member is added. The third member of any Review Panel shall be the Director of the HQPDU or his or her designee. A recommendation by a three-member Review Panel shall be by majority vote.

(2) *Records review.* Initially, and at the beginning of each subsequent review, the HQPDU Director or a Review Panel shall review the alien's records. Upon completion of this records review, the HQPDU Director or the Review Panel may issue a written recommendation that the alien be released and reasons therefore.

(3) *Personal interview.* (i) If the HQPDU Director does not accept a panel's recommendation to grant release after a records review, or if the alien is not recommended for release, a Review Panel shall personally interview the detainee. The scheduling of such interviews shall be at the discretion of the HQPDU Director. The HQPDU Director will provide a translator if he or she determines that such assistance is appropriate.

(ii) The alien may be accompanied during the interview by a person of his or her choice, subject to reasonable security concerns at the institution's and panel's discretion, who is able to attend at the time of the scheduled interview. Such assistance shall be at no expense to the Government. The alien may submit to the Review Panel any information, in English, that he or she believes presents a basis for his or her release.

(4) *Alien's participation.* Every alien shall respond to questions or provide other information when requested to do so by Service officials for the purpose of carrying out the provisions of this section.

(5) *Panel recommendation.* Following completion of the interview and its deliberations, the Review Panel shall issue a written recommendation that the alien be released or remain in custody pending removal or further review. This written recommendation shall include a brief statement of the factors that the Review Panel deems material to its recommendation.

(6) *Determination.* The Executive Associate Commissioner shall consider the recommendation and appropriate custody review materials and issue a custody determination, in the exercise of discretion under the standards of this section. The Executive Associate Commissioner's review will include but is not limited to consideration of the factors

described in paragraph (f) of this section. Before making any decision to release a detainee, the Executive Associate Commissioner must be able to reach the conclusions set forth in paragraph (e) of this section. The Executive Associate Commissioner is not bound by the panel's recommendation.

(7) *No significant likelihood o[f] removal.* During the custody review process as provided in this paragraph (i), or at the conclusion of that review, if the alien submits, or the record contains, information providing a substantial reason to believe that the removal of a detained alien is not significantly likely in the reasonably foreseeable future, the HQPDU shall treat that as a request for review and initiate the review procedures under § 241.13. To the extent relevant, the HQPDU may consider any information developed during the custody review process under this section in connection with the determinations to be made by the Service under § 241.13. The Service shall complete the custody review under this section unless the HQPDU is able to make a prompt determination to release the alien under an order of supervision under § 241.13 because there is no significant likelihood that the alien will be removed in the reasonably foreseeable future.

(j) *Conditions of release*—(1) *In general.* The district director, Director of the Detention and Removal Field Office, or Executive Associate Commissioner shall impose such conditions or special conditions on release as the Service considers appropriate in an individual case or cases, including but not limited to the conditions of release noted in 8 CFR 212.5(c) and § 241.5. An alien released under this section must abide by the release conditions specified by the Service in relation to his or her release or sponsorship.

(2) *Sponsorship.* The district director, Director of the Detention and Removal Field Office, or Executive Associate Commissioner may, in the exercise of discretion, condition

release on placement with a close relative who agrees to act as a sponsor, such as a parent, spouse, child, or sibling who is a lawful permanent resident or a citizen of the United States, or may condition release on the alien's placement or participation in an approved halfway house, mental health project, or community project when, in the opinion of the Service, such condition is warranted. No detainee may be released until sponsorship, housing, or other placement has been found for the detainee, if ordered, including but not limited to, evidence of financial support.

(3) *Employment authorization.* The district director, Director of the Detention and Removal Field Office, and the Executive Associate Commissioner, may, in the exercise of discretion, grant employment authorization under the same conditions set forth in § 241.5(c) for aliens released under an order of supervision.

(4) *Withdrawal of release approval.* The district director, Director of the Detention and Removal Field Office, or Executive Associate Commissioner may, in the exercise of discretion, withdraw approval for release of any detained alien prior to release when, in the decision-maker's opinion, the conduct of the detainee, or any other circumstance, indicates that release would no longer be appropriate.

(k) *Timing of reviews.* The timing of reviews shall be in accordance with the following guidelines:

(1) *District director or Director of the Detention and Removal Field Office.* (i) Prior to the expiration of the removal period, the district director or Director of the Detention and Removal Field Office shall conduct a custody review for an alien described in paragraphs (a) and (b)(1) of this section where the alien's removal, while proper, cannot be accomplished during the period because no country currently will accept the alien, or removal of the alien prior

to expiration of the removal period is impracticable or contrary to the public interest. As provided in paragraph (h)(4) of this section, the district director or Director of the Detention and Removal Field Office will notify the alien in writing that he or she is to be released from custody, or that he or she will be continued in detention pending removal or further review of his or her custody status.

(ii) When release is denied pending the alien's removal, the district director or Director of the Detention and Removal Field Office in his or her discretion may retain responsibility for custody determinations for up to three months after expiration of the removal period, during which time the district director or Director of the Detention and Removal Field Office may conduct such additional review of the case as he or she deems appropriate. The district director or Director of the Detention and Removal Field Office may release the alien if he or she is not removed within the three-month period following the expiration of the removal period, in accordance with paragraphs (e), (f), and (j) of this section, or the district director or Director of the Detention and Removal Field Office may refer the alien to the HQPDU for further custody review.

(2) *HQPDU reviews*—(i) *District director or Director of the Detention and Removal Field Office referral for further review.* When the district director or Director of the Detention and Removal Field Office refers a case to the HQPDU for further review, as provided in paragraph (c)(2) of this section, authority over the custody determination transfers to the Executive Associate Commissioner, according to procedures established by the HQPDU. The Service will provide the alien with approximately 30 days notice of this further review, which will ordinarily be conducted by the expiration of the removal period or as soon thereafter as practicable.

(ii) *District director or Director of the Detention and Removal Field Office retains jurisdiction.* When the district director or Director of the Detention and Removal Field Office has advised the alien at the 90-day review as provided in paragraph (h)(4) of this section that he or she will remain in custody pending removal or further custody review, and the alien is not removed within three months of the district director's or Director of the Detention and Removal Field Office's decision, authority over the custody determination transfers from the district director or Director of the Detention and Removal Field Office to the Executive Associate Commissioner. The initial HQPDU review will ordinarily be conducted at the expiration of the three-month period after the 90-day review or as soon thereafter as practicable. The Service will provide the alien with approximately 30 days notice of that review.

(iii) *Continued detention cases.* A subsequent review shall ordinarily be commenced for any detainee within approximately one year of a decision by the Executive Associate Commissioner declining to grant release. Not more than once every three months in the interim between annual reviews, the alien may submit a written request to the HQPDU for release consideration based on a proper showing of a material change in circumstances since the last annual review. The HQPDU shall respond to the alien's request in writing within approximately 90 days.

(iv) *Review scheduling.* Reviews will be conducted within the time periods specified in paragraphs (k)(1)(i), (k)(2)(i), (k)(2)(ii), and (k)(2)(iii) of this section or as soon as possible thereafter, allowing for any unforeseen circumstances or emergent situation.

(v) *Discretionary reviews.* The HQPDU Director, in his or her discretion, may schedule a review of a detainee at

shorter intervals when he or she deems such review to be warranted.

(3) *Postponement of review.* In the case of an alien who is in the custody of the Service, the district director or the HQPDU Director may, in his or her discretion, suspend or postpone the custody review process if such detainee's prompt removal is practicable and proper, or for other good cause. The decision and reasons for the delay shall be documented in the alien's custody review file or A file, as appropriate. Reasonable care will be exercised to ensure that the alien's case is reviewed once the reason for delay is remedied or if the alien is not removed from the United States as anticipated at the time review was suspended or postponed.

(4) *Transition provisions.* (i) The provisions of this section apply to cases that have already received the 90-day review. If the alien's last review under the procedures set out in the Executive Associate Commissioner memoranda entitled *Detention Procedures for Aliens Whose Immediate Repatriation is Not Possible or Practicable*, February 3, 1999; *Supplemental Detention Procedures*, April 30, 1999; *Interim Changes and Instructions for Conduct of Post-order Custody Reviews*, August 6, 1999; *Review of Long-term Detainees*, October 22, 1999, was a records review and the alien remains in custody, the HQPDU will conduct a custody review within six months of that review (Memoranda available at http:// www.ins.usdoj.gov). If the alien's last review included an interview, the HQPDU review will be scheduled one year from the last review. These reviews will be conducted pursuant to the procedures in paragraph (i) of this section, within the time periods specified in this paragraph or as soon as possible thereafter, allowing for resource limitations, unforeseen circumstances, or an emergent situation.

(ii) Any case pending before the Board on December 21, 2000 will be completed by the Board. If the Board affirms

the district director's decision to continue the alien in detention, the next scheduled custody review will be conducted one year after the Board's decision in accordance with the procedures in paragraph (i) of this section.

(l) *Revocation of release*—(1) *Violation of conditions of release.* Any alien described in paragraph (a) or (b)(1) of this section who has been released under an order of supervision or other conditions of release who violates the conditions of release may be returned to custody. Any such alien who violates the conditions of an order of supervision is subject to the penalties described in section 243(b) of the Act. Upon revocation, the alien will be notified of the reasons for revocation of his or her release or parole. The alien will be afforded an initial informal interview promptly after his or her return to Service custody to afford the alien an opportunity to respond to the reasons for revocation stated in the notification.

(2) *Determination by the Service.* The Executive Associate Commissioner shall have authority, in the exercise of discretion, to revoke release and return to Service custody an alien previously approved for release under the procedures in this section. A district director may also revoke release of an alien when, in the district director's opinion, revocation is in the public interest and circumstances do not reasonably permit referral of the case to the Executive Associate Commissioner. Release may be revoked in the exercise of discretion when, in the opinion of the revoking official:

(i) The purposes of release have been served;

(ii) The alien violates any condition of release;

(iii) It is appropriate to enforce a removal order or to commence removal proceedings against an alien; or

(iv) The conduct of the alien, or any other circumstance, indicates that release would no longer be appropriate.

(3) *Timing of review when release is revoked.* If the alien is not released from custody following the informal interview provided for in paragraph (l)(1) of this section, the HQPDU Director shall schedule the review process in the case of an alien whose previous release or parole from immigration custody pursuant to a decision of either the district director, Director of the Detention and Removal Field Office, or Executive Associate Commissioner under the procedures in this section has been or is subject to being revoked. The normal review process will commence with notification to the alien of a records review and scheduling of an interview, which will ordinarily be expected to occur within approximately three months after release is revoked. That custody review will include a final evaluation of any contested facts relevant to the revocation and a determination whether the facts as determined warrant revocation and further denial of release. Thereafter, custody reviews will be conducted annually under the provisions of paragraphs (i), (j), and (k) of this section.

10. 8 C.F.R. 241.5 provides:

Conditions of release after removal period.

(a) *Order of supervision.* An alien released pursuant to § 241.4 shall be released pursuant to an order of supervision. The Commissioner, Deputy Commissioner, Executive Associate Commissioner Field Operations, regional director, district director, acting district director, deputy district director, assistant district director for investigations, assistant district director for detention and deportation, or officer-in-charge may issue Form I-220B, Order of Supervision. The order shall specify conditions of supervision including, but not limited to, the following:

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

(2) A requirement 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;

(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.

(b) *Posting of bond.* An officer authorized to issue an order of supervision may require the posting of a bond in an amount determined by the officer to be sufficient to ensure compliance with the conditions of the order, including surrender for removal.

(c) *Employment authorization.* An officer authorized to issue an order of supervision may, in his or her discretion, grant employment authorization to an alien released under an order of supervision if the officer specifically finds that:

(1) The alien cannot be removed because no country will accept the alien; or

(2) The removal of the alien is impracticable or contrary to the public interest.