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## A Constitutional Case for Extending the Due Process Clause to Asylum Seekers: Revisiting the Entry Fiction After *Boumediene*

Zainab A. Cheema  
*Fordham University School of Law*

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## **A CONSTITUTIONAL CASE FOR EXTENDING THE DUE PROCESS CLAUSE TO ASYLUM SEEKERS: REVISITING THE ENTRY FICTION AFTER *BOUMEDIENE***

*Zainab A. Cheema\**

*In the last two decades, the U.S. Supreme Court has actively grappled with balancing the interests of immigrant detainees and the federal government in the context of prolonged immigration detention by reconciling the statutory framework with constitutional guarantees of due process. The Court has focused on how prolonged detention without an opportunity for an individualized custody determination poses a serious constitutional threat to an alien's liberty interest. The Court's jurisprudence has focused, however, on aliens who have effected an entry into the United States. The constitutional entitlements of nonresidents who are detained upon presenting themselves at the border have so far been excluded from this new immigration narrative and continue to be governed by a more than half-century-old precedent establishing the "entry fiction" and acceding to the plenary power of the Executive.*

*This Note focuses on a discrete category of aliens, namely nonresident arriving aliens seeking asylum who are detained pursuant to section 235 of the Immigration and Nationality Act (INA). These aliens stand on a different legal footing than other categories of aliens detained under the INA because they are subject to the entry fiction doctrine, which has manifest ramifications for not only their legal status but also the degree of constitutional protections they are entitled to. This Note discusses how developments in the extraterritorial application of the Constitution inform the entry fiction doctrine in the context of extending procedural protections to asylum seekers detained upon entry into the United States.*

*This Note shows how the functional approach to extraterritoriality articulated in *Boumediene v. Bush* alters the legal landscape and affords an opportunity to extend due process protections to nonresident arriving aliens. Cognizant of the limitations imposed by the plenary power doctrine, this Note*

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\* J.D. Candidate, 2019, Fordham University School of Law. I would like to thank Professor Joseph Landau for his guidance and the editors and staff of the *Fordham Law Review* for their assistance and support in preparing this Note. I would also like to thank my family for their constant love, support, and encouragement, without which none of this would have been possible.

does not argue for extending the complete panoply of procedural protections to section 1225(b) detainees; instead it focuses on how a discrete remedy—bond hearings—would help alleviate the procedural deficiencies in the statutorily prescribed procedure. In so doing, this Note departs from the approach that has currently been adopted by lower courts by positing that recent Supreme Court precedent provides a very strong constitutional basis for extending procedural protections to section 1225(b) detainees, and it would be remiss to rely solely on *Clark v. Martinez*-inspired constitutional avoidance arguments.

|  |     |
|--|-----|
| INTRODUCTION.....  | 291 |
| I. IMMIGRATION DETENTION AND THE CONSTITUTION.....   | 294 |
| A. <i>The Illegal Immigration Reform and Immigrant Responsibility Act</i> .....                  | 295 |
| B. <i>Interpreting the Statutory Framework in Light of Constitutional Concerns</i> .....         | 297 |
| 1. 8 U.S.C. § 1231 .....   | 297 |
| 2. 8 U.S.C. § 1226.....  | 299 |
| 3. 8 U.S.C. § 1225.....  | 301 |
| C. <i>The Entry Fiction, Plenary Power, and Procedural Protections</i> .....                     | 304 |
| II. THE CONTINUING VITALITY OF THE ENTRY FICTION IN IMMIGRATION JURISPRUDENCE.....               | 306 |
| A. <i>Treatment by Lower Courts</i> .....  | 308 |
| 1. The Southern District of New York: <i>Arias v. Aviles</i> and <i>Saleem v. Shanahan</i> ..... | 308 |
| 2. The Ninth Circuit: <i>Rodriguez v. Robbins</i> .....  | 309 |
| B. <i>Procedural Protections and a Constitutional Theory of Immigration</i> .....                | 310 |
| III. TERRITORIALITY AND THE CONSTITUTION: FROM STRICT FORMALISM TO PRAGMATIC FUNCTIONALISM ..... | 312 |
| A. <i>Eisentrager and Verdugo-Urquidez: A Lesson in Formalism</i> .....                          | 312 |
| B. <i>Boumediene and the Emergence of the “Impracticable and Anomalous” Test</i> .....           | 313 |
| IV. <i>BOUMEDIENE</i> AND THE FUTURE OF THE ENTRY FICTION.....                                   | 316 |
| A. <i>Functionalism and the Demise of the Entry Fiction</i> .....                                | 317 |
| 1. Citizenship and Status of the Detainee and Adequacy of the Determination Process .....        | 317 |
| 2. Nature of Sites Where Apprehension and Detention Took Place.....                              | 318 |
| 3. Inherent Practical Obstacles.....   | 318 |

|   |     |
|---|-----|
| B. <i>Ascertaining the Content of Due Process</i> ..... | 320 |
| CONCLUSION.....   | 322 |

## INTRODUCTION

Eighteen-year-old asylum seeker Lilian Uriba fled her home in El Salvador to come to the United States after a drug trafficker killed her father, raped her, forced her to transport narcotics, and threatened to kill her six siblings if she defected.<sup>1</sup> After presenting herself at the border to the authorities, she passed the first phase of her asylum case—credible-fear screening—but, as of this writing, she remains in indefinite detention at T. Don Hutto Residential Center, a 512-bed immigrant detention facility in rural Texas, after Immigration and Customs Enforcement (ICE) denied her release.<sup>2</sup> Uriba, like many others in her position, is experiencing the effects of a new immigration policy.

On January 25, 2017, President Trump issued an executive order entitled “Border Security and Immigration Enforcement Improvement,” which requires immigration personnel to “ensure the detention of aliens apprehended for violations of immigration law” and grant parole “only on a case-by-case basis.”<sup>3</sup> A Department of Homeland Security (DHS) memorandum implementing the executive order gives immigration officials wide latitude to target removable aliens.<sup>4</sup> Although the memo authorizes U.S. Customs and Border Protection (CBP) and ICE personnel to release an alien found to have a credible fear of persecution or torture under certain limited circumstances,<sup>5</sup> ICE has “virtually stopped granting . . . bond or

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1. Meredith Hoffman, *Trump Era Ushers in New Unofficial Policy on Asylum-Seekers*, ROLLING STONE (Apr. 4, 2017, 4:37 PM), <http://www.rollingstone.com/politics/features/trump-era-ushers-in-new-unofficial-policy-on-asylum-seekers-w473930> [https://perma.cc/575Q-7MR9].

2. *Id.*; see also Kate Morrissey, *Even Before Trump, Asylum Seeker Already Caught Up in Clogged System*, SAN DIEGO UNION-TRIB. (Jan. 20, 2017), <http://www.sandiegouniontribune.com/news/immigration/sd-me-asylum-detention-20170120-story.html> [https://perma.cc/YSD4-ZGJL] (discussing an asylum seeker who fled from a terrorist organization in Somalia and who was detained in the U.S. for over a year despite passing his credible-fear screening).

3. Exec. Order No. 13,767, 3 C.F.R. 263, 265–66 (2017).

4. See generally Memorandum from John Kelly, Sec’y, Dep’t of Homeland Sec., to Kevin McAleenan et al. (Feb. 20, 2017) [hereinafter DHS Memo], [https://www.dhs.gov/sites/default/files/publications/17\\_0220\\_S1\\_Implementing-the-Presidents-Border-Security-Immigration-Enforcement-Improvement-Policies.pdf](https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Implementing-the-Presidents-Border-Security-Immigration-Enforcement-Improvement-Policies.pdf) [https://perma.cc/2MYS-AX29]; see also Jonathan Blitzer, *What Will Trump Do with Half a Million Backlogged Immigration Cases*, NEW YORKER (June 20, 2017), <https://www.newyorker.com/news/news-desk/what-will-trump-do-with-half-a-million-backlogged-immigration-cases> [https://perma.cc/NV5E-54EG] (“So far this year, federal immigration authorities have made forty per cent more arrests than they did at an equivalent point in 2016, and the [DHS] has eliminated all the guidelines for how [ICE] is supposed to prioritize the people it targets for arrest.”).

5. See DHS Memo, *supra* note 4, at 3 (providing that parole may be granted if said alien “affirmatively establishes to the satisfaction of an ICE immigration officer his or her identity, that he or she presents neither a security risk nor a risk of absconding, and provided that he or she agrees to comply with any additional conditions of release imposed by ICE to ensure public safety and appearance at any removal hearings”).

parole” to eligible detainees.<sup>6</sup> Immigrants like Uriba are legally ineligible to appeal ICE’s decision to detain them to an immigration judge.<sup>7</sup> Hence, if they are denied parole and found to have no right to a bond hearing after a reasonable period of time has elapsed, ICE’s new practice of withholding parole effectively results in detention for the entire duration of asylum proceedings, however long they may last.<sup>8</sup> Exacerbating the situation is the fact that detention often bears no relation to the merits of a detainee’s application or the need for detention.<sup>9</sup>

The statutory framework regarding the conditions and procedures of immigration detention is set out in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA).<sup>10</sup> Whether detention is mandatory or discretionary, and whether the Executive has authority to grant parole, is carefully circumscribed and depends in large part on the status of the alien.<sup>11</sup> Asylum seekers like Uriba languish in indefinite civil detention with no recourse to procedural protections, such as bond hearings, because they are classified as nonresident arriving aliens under IIRIRA.<sup>12</sup> Despite being detained in civil detention centers in the United States, these asylum seekers are treated as if they never effected an entry into U.S. territory, that is, they are subject to the “entry fiction” doctrine.<sup>13</sup>

The U.S. Supreme Court has not ruled on what constitutional protections, if any, nonresident arriving aliens like Uriba are entitled to with respect to the conditions of their detention and release. However, since 2000, the Court has, on three separate occasions, ruled on the Executive’s authority to detain aliens during various stages of removal proceedings.<sup>14</sup> These decisions address the potential due process violations emanating from prolonged detention without recourse to procedural protections—individual custody

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6. See Hoffman, *supra* note 1. The DHS Memo worsens already bleak prospects for asylum seekers. Compared to fiscal year 2010, when 15,683 asylum seekers (45 percent of all asylum seekers in removal proceedings) were detained, 44,228 asylum seekers (representing 77 percent of all asylum seekers in court proceedings) were detained in fiscal year 2014. See OLGA BYRNE, ELEANOR ACER & ROBYN BARNARD, HUMAN RIGHTS FIRST, LIFELINE ON LOCKDOWN: INCREASED U.S. DETENTION OF ASYLUM SEEKERS 2 (2016), [http://www.humanrightsfirst.org/sites/default/files/Lifeline-on-Lockdown\\_0.pdf](http://www.humanrightsfirst.org/sites/default/files/Lifeline-on-Lockdown_0.pdf) [<https://perma.cc/FN3B-Z83E>]. Even in the limited situations where parole is granted, ICE often sets the bond amount at levels that arriving asylum seekers are unable to pay. See *id.* at 4, 25.

7. See discussion *infra* Part I.B.3; see also *infra* note 114.

8. See *Asylum in the United States*, AM. IMMIGR. COUNCIL 4–5 (Aug. 22, 2016), [https://www.americanimmigrationcouncil.org/sites/default/files/research/asylum\\_in\\_the\\_unit\\_ed\\_states.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/research/asylum_in_the_unit_ed_states.pdf) [<https://perma.cc/E4L9-BHGN>].

9. See BYRNE, ACER & BARNARD, *supra* note 6, at 13. In many cases, ICE officials fail to follow the procedures governing parole decisions and withhold parole even when aliens have satisfied the requisite criteria. See *id.* at 13–19.

10. Pub. L. No. 104-208, 110 Stat. 3009-546 (codified as amended in scattered sections of 8, 18, 20, 22, 28, 32, 42, 48 and 50 U.S.C.).

11. See discussion *infra* Part I.B.

12. See *infra* notes 93–94 and accompanying text.

13. See discussion *infra* Part I.C.

14. See discussion *infra* Part I.B; see also *infra* note 138 and accompanying text.

determinations in particular.<sup>15</sup> Although the Court explicitly reserved judgment on the constitutionality of indefinitely detaining applicants for admission,<sup>16</sup> it has hinted at the Executive's plenary power over the matter.<sup>17</sup> This suggestion, coupled with the territorial application of the Constitution, effectively places applicants for admission beyond the reach of procedural protections afforded by the Constitution.<sup>18</sup>

Lower court decisions dealing with procedural protections for nonresident arriving aliens, like *Uriba*, have focused on whether these aliens are entitled to receive bond hearings after a presumptively reasonable period of time.<sup>19</sup> However, following the Supreme Court's lead, courts that have engaged with the question have relied solely on statutory interpretation to reach a decision, leaving the entry fiction doctrine intact and the question of constitutional entitlements of these nonresident arriving aliens unresolved.<sup>20</sup>

While the entry fiction doctrine is deemed to be largely dispositive of what, if any, constitutional protections applicants for admission are entitled to, developments in Supreme Court jurisprudence regarding the extraterritorial application of the Constitution cast doubt on its continuing validity.<sup>21</sup> In *Boumediene v. Bush*,<sup>22</sup> the Supreme Court rejected a rigid adherence to notions of territoriality and citizenship in favor of a functional approach and held that the Suspension Clause was in "full effect at Guantanamo Bay."<sup>23</sup> Using the due process framework outlined in *Mathews v. Eldridge*,<sup>24</sup> the Court evaluated the sufficiency of review procedures available to Guantanamo detainees to determine if they were an adequate substitute to habeas relief.<sup>25</sup> Although *Boumediene* was rendered in the context of alien detention at Guantanamo and focused on the reach of the Suspension Clause, the case's exposition of the "impracticable and anomalous test" provides the building blocks for ascertaining the extraterritorial reach of the Constitution in other contexts.<sup>26</sup>

This Note adopts *Boumediene*'s functional approach to show how the Due Process Clause may be extended to nonresident arriving aliens.<sup>27</sup> Recognizing that due process is an amorphous standard, this Note uses the balancing approach set forth in *Eldridge* to argue that congressionally prescribed procedures for the detention of asylum seekers like *Uriba* are constitutionally insufficient and that the shortfalls may be counteracted by

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15. See discussion *infra* Part I.B.

16. See *infra* note 166 and accompanying text.

17. See *infra* note 167 and accompanying text.

18. See *infra* note 136 and accompanying text.

19. See discussion *infra* Part II.A.

20. See *infra* notes 151–52, 157–58 and accompanying text.

21. See discussion *infra* Part IV.A.

22. 553 U.S. 723 (2008).

23. *Id.* at 771; see *infra* notes 192–96 and accompanying text.

24. 424 U.S. 319 (1976).

25. See *infra* note 190 and accompanying text.

26. See *infra* notes 202–15 and accompanying text.

27. See discussion *infra* Part IV.A.

simple remedies like bond hearings without running up against the Executive's plenary power.<sup>28</sup>

Part I of this Note serves as a brief primer on the history and purposes of IIRIRA, how different sections apply to different categories of aliens, and the interaction between the statutory scheme and the Constitution. It outlines how the Court has responded to due process concerns arising from prolonged detention of aliens subject to removal orders and aliens in detention pending removal proceedings. Part I goes on to discuss the development of the entry fiction doctrine, the Executive's plenary power over immigration matters, and how these doctrines affect nonresident arriving aliens. Part II highlights how the entry fiction doctrine has dominated courts' resolution of the problem of extending procedural protections to nonresident arriving aliens. Part III posits that the continuing vitality of the entry fiction ought to be questioned in light of recent developments in the Supreme Court's jurisprudence regarding extraterritorial application of the Constitution. Finally, Part IV shows how *Boumediene*, the most recent iteration of the Court's jurisprudence on territoriality, may be applied to extend procedural protections to nonresident arriving aliens in Uribi's position, without running into plenary power concerns.

#### I. IMMIGRATION DETENTION AND THE CONSTITUTION

Immigration detention has long been employed by the U.S. government to enforce immigration policies.<sup>29</sup> Unlike criminal detention, immigration detention is civil in nature.<sup>30</sup> Hence, even though the conditions of immigration detention may closely resemble those of criminal detention—or may be even worse<sup>31</sup>—and the private interests at stake may be as substantial, immigration detainees only have access to the procedural protections which have been prescribed by Congress and not the protections typically afforded to criminal defendants.<sup>32</sup>

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28. See discussion *infra* Part IV.B.

29. Kevin Johnson, *Trump's Immigration Detention Plan Faces a Long-Established Uphill Battle*, BUS. INSIDER (Feb. 7, 2017, 5:41 PM), <http://www.businessinsider.com/trumps-immigration-detention-plan-faces-uphill-battle-2017-2> [<https://perma.cc/VTL3-ZLUH>] (noting that immigration detention “goes as far back as the detention of Chinese immigrants on Angel Island in San Francisco Bay, which began processing immigrants in the late 1800s”).

30. See MICHAEL A. SCAPERLANDA, IMMIGRATION LAW: A PRIMER 33 (2009) (noting that the decision to remove an alien from the United States has long been considered a civil matter).

31. See *Immigration Detention Conditions*, ACLU, <https://www.aclu.org/issues/immigrants-rights/immigrants-rights-and-detention/immigration-detention-conditions> [<https://perma.cc/6RXP-5JXM>] (last visited Aug. 24, 2018); see also CARL TAKEI, MICHAEL TAN & JOANNE LIN, ACLU, SHUTTING DOWN THE PROFITEERS: WHY AND HOW THE DEPARTMENT OF HOMELAND SECURITY SHOULD STOP USING PRIVATE PRISONS 1–2 (2016), [https://www.aclu.org/sites/default/files/field\\_document/white\\_paper\\_09-30-16\\_released\\_for\\_web-v1-opt.pdf](https://www.aclu.org/sites/default/files/field_document/white_paper_09-30-16_released_for_web-v1-opt.pdf) [<https://perma.cc/GM8Q-QD59>].

32. See SCAPERLANDA, *supra* note 30, at 31–33. In most instances, it is hard, if not impossible, for aliens to benefit from the limited protections afforded to them because of the conditions of their detention. For example, section 292 of the Immigration and Nationality Act provides that aliens in removal proceedings “shall have the privilege of being represented” by counsel provided that the government is not required to pay for it. 8 U.S.C. § 1362 (2012).

The following discussion focuses on the statutory framework governing the treatment and detention of aliens, how the Court has sought to reconcile the statutory scheme with constitutional guarantees of due process, and the development of the entry fiction doctrine as it pertains to select categories of aliens.

*A. The Illegal Immigration Reform and Immigrant Responsibility Act*

In 1996, Congress enacted IIRIRA, which created a new framework for the classification and detention of aliens.<sup>33</sup> Different sections of IIRIRA deal with different categories of aliens and prescribe the procedures that executive officials must follow with respect to their admission, detention, and removal.<sup>34</sup> Under the Immigration and Nationality Act (INA), aliens are classified as either immigrants or nonimmigrants.<sup>35</sup> Lawfully admitted aliens who have permission to remain permanently in the United States and who may eventually seek citizenship are categorized as immigrants and are more popularly known as Lawful Permanent Residents (LPRs).<sup>36</sup> Aliens who only have permission to temporarily stay in the United States, usually for a specified purpose, are classified as nonimmigrants.<sup>37</sup>

With respect to aliens who do not have permission to reside in the United States, either temporarily or permanently, the INA distinguished between aliens who have already effected entry into U.S. territory and aliens attempting to effect an entry.<sup>38</sup> While this distinction is still important, IIRIRA replaced the concept of “entry” with the broader concept of “admission,” which is defined as “the lawful entry of [an] alien into the United States after inspection and authorization by an immigration officer.”<sup>39</sup> Hence, under IIRIRA, aliens entering without authorization and those denied entry at the border are presumptively on the same legal footing, as opposed

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However, in practice it is very hard for immigrant detainees to find lawyers willing and able to take on their cases. *See Importance of Counsel for Asylum Seekers and Immigrants in Detention Stressed by Faith, Civil Rights, Legal and Other Leaders*, HUM. RTS. FIRST (Apr. 26, 2013), <https://www.humanrightsfirst.org/2013/04/26/importance-of-counsel-for-asylum-seekers-and-immigrants-in-detention-stressed-by-faith-civil-rights-legal-and-other-leaders> [<https://perma.cc/P7HW-NZUT>].

33. Pub. L. No. 104-208, 110 Stat. 3009-546 (1996) (codified as amended in scattered sections of 8, 18, 20, 22, 28, 32, 42, 48 and 50 U.S.C.) (amending various sections of the Immigration and Nationality Act); *see also* SCAPERLANDA, *supra* note 30, at 4 (noting IIRIRA’s major impact on immigrants by “expanding the categories of inadmissible and deportable aliens, restricting relief from deportation, stream-lining removal and other immigration procedures, providing for increased detention of removable aliens, and attempting to strip courts of jurisdiction to review numerous immigration matters”).

34. *See* discussion *infra* Part I.B.

35. 8 U.S.C. § 1101(a)(15) (2012); *see also id.* § 1101(a)(3) (noting that an alien is any person who is not a citizen or national of the United States).

36. Karen Nelson Moore, *Aliens and the Constitution*, 88 N.Y.U. L. REV. 801, 809 (2013).

37. *See id.*

38. *Xi v. INS*, 298 F.3d 832, 838 (9th Cir. 2002) (noting that “Section 1101(a)(13) . . . formerly defined ‘entry’ as ‘any coming of an alien into the United States, from a foreign port or place’”).

39. 8 U.S.C. § 1101(a)(13)(A).

to the old regime, which gave preferential treatment to aliens who had effected an entry without authorization or inspection.<sup>40</sup>

Under the pre-IIRIRA framework, aliens could be denied the “hospitality of the United States” either through an exclusion hearing or a deportation hearing, depending on whether the alien had effected an entry.<sup>41</sup> Aliens subject to deportation hearings were entitled to certain procedural protections—such as advance notice and the right to appeal directly to a federal circuit court—not available to aliens in exclusion proceedings.<sup>42</sup> Under IIRIRA, however, deportation and exclusion hearings were consolidated into a single “removal” proceeding,<sup>43</sup> which is conducted by an immigration judge who determines whether the alien is “removable.”<sup>44</sup> In the case of an alien not admitted to the United States, removability requires a showing of inadmissibility, while in the case of an alien admitted to the United States removability means that the alien is deportable.<sup>45</sup> The conditions for inadmissibility and deportability are set forth in sections 212 and 241 of IIRIRA, respectively.<sup>46</sup> Grounds for inadmissibility include health-related concerns, security concerns, criminal convictions, illegal entry and immigration violations, and failure to have proper documentation,<sup>47</sup> while grounds for deportability include immigration status violations, criminal offenses, and security concerns.<sup>48</sup> Further, certain categories of inadmissible aliens are subject to expedited removal without a removal proceeding.<sup>49</sup>

The initiation of removal proceedings or expedited removal proceedings is closely tied to immigration detention because aliens subject to either may be subject to discretionary or mandatory detention.<sup>50</sup> The next section of this Note delineates the statutory framework that authorizes immigration detention and the constitutional limitations imposed on prolonged detention of select categories of aliens. It further explores how constitutional

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40. See Moore, *supra* note 36, at 855. *But see infra* note 137 and accompanying text.

41. *Landon v. Plasencia*, 459 U.S. 21, 25 (1982) (noting that an alien already present in the United States is subject to a deportation hearing, while “the exclusion hearing is the usual means of proceeding against an alien outside the United States seeking admission”).

42. See *id.* at 26–27.

43. See 8 U.S.C. § 1229a(a)(2) (2012) (“An alien placed in proceedings under this section may be charged with any applicable ground of inadmissibility under section 1182(a) of this title or any applicable ground of deportability under section 1227(a) of this title.”); see also 8 U.S.C. § 1229 (2012) (setting forth procedural requirements for initiating removal proceedings).

44. See 8 U.S.C. § 1229a(a)(1).

45. *Id.* § 1229a(e)(2).

46. See 8 U.S.C. §§ 1182, 1227 (2012).

47. *Id.* § 1182.

48. 8 U.S.C. § 1227.

49. 8 U.S.C. § 1225(b)(1)(A)(i) (2012) (“If an immigration officer determines that an alien . . . is inadmissible under section 1182(a)(6)(C) or 1182(a)(7) of this title, the officer shall order the alien removed from the United States without further hearing or review unless the alien indicates either an intention to apply for asylum . . . or a fear of persecution.”); see *infra* notes 95–99 and accompanying text.

50. See Moore, *supra* note 36, at 856–57.

entitlements of inadmissible arriving aliens—especially nonresident arriving aliens—continue to be closely tied to presence within U.S. territories.<sup>51</sup>

*B. Interpreting the Statutory Framework in Light of  
Constitutional Concerns*

Sections 241, 236, and 235 of the INA (as amended by IIRIRA), codified at 8 U.S.C. §§ 1231, 1226, and 1225, respectively, each address different categories of aliens in different stages of removal proceedings. Each of these sections authorize or mandate detention but do not expressly limit the length of detention. This statutory ambiguity precipitated concerns about whether prolonged detention, in the absence of an opportunity to challenge the factual basis of detention, was constitutionally permissible.

1. 8 U.S.C. § 1231

Section 1231 focuses on the detention and removal of aliens who are subject to a removal order.<sup>52</sup> Once an alien has been ordered removed, the Attorney General of the United States is required to remove him from the country within ninety days.<sup>53</sup> This is referred to as the “removal period.”<sup>54</sup> During the removal period, the alien is subject to mandatory detention.<sup>55</sup> In a limited set of circumstances, the Attorney General has the authority to detain an alien beyond the removal period;<sup>56</sup> however, the statutory text does not limit the length of time the alien may be detained beyond the removal period.

In *Zadvydas v. Davis*,<sup>57</sup> the Supreme Court addressed the due process concerns arising from the prospect of aliens being detained indefinitely pursuant to § 1231(a)(6). The Court considered the constitutionality of detaining resident aliens, subject to orders of removal, past the removal period on account of the government’s inability to remove them.<sup>58</sup> In determining whether the Attorney General had the authority to detain these aliens indefinitely, the Court found that “[a] statute permitting indefinite detention of an alien would raise a serious constitutional problem”<sup>59</sup> because

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51. See *Landon v. Plasencia*, 459 U.S. 21, 32 (1982) (“[O]nce an alien gains admission to our country and begins to develop the ties that go with permanent residence, his constitutional status changes accordingly.”).

52. 8 U.S.C. § 1231 (2012).

53. *Id.* § 1231(a)(1)(A).

54. *Id.*

55. *Id.* § 1231(a)(2) (“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 . . .”).

56. See *id.* § 1231(a)(6) (“An alien ordered removed who is inadmissible under section 1182 of this title, removable [on grounds of violating immigration status, criminal convictions, or security concerns] 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 . . .”).

57. 533 U.S. 678 (2001).

58. See *id.* at 682.

59. *Id.* at 690.

the Fifth Amendment's Due Process Clause forbids the government from depriving any person of liberty without due process of law.<sup>60</sup> Highlighting the nonpunitive nature of civil detention and the need for detention to bear a reasonable relation to its purpose, the Court found that the government's proffered justifications for indefinite detention—ensuring the appearance of aliens at future immigration proceedings and preventing danger to the community—to be lacking.<sup>61</sup> In light of the perceived ambiguity of the statute and the “serious constitutional threat” posed by indefinite detention of aliens who had been admitted to the country,<sup>62</sup> the Court interpreted the statute to only permit detention that is related to the statute's “basic purpose [of] effectuating an alien's removal.”<sup>63</sup> The Court held that “once removal is no longer reasonably foreseeable, continued detention is no longer authorized by statute.”<sup>64</sup> Additionally, the Court decided that detention is “presumptively reasonable” for a period of six months following the final removal order, after which the alien ought to be provided the opportunity to challenge the basis of his detention.<sup>65</sup> In so doing, the Court drew a distinction between unauthorized detention and the right to “liv[e] at large”: even though aliens subject to a removal order have no right to remain in the United States unencumbered and unmonitored, they still have a right to be free from unreasonable detention.<sup>66</sup>

Following *Zadvydas*, courts were split over whether the procedural protections extended in *Zadvydas* ought to be extended to aliens who had never been legally admitted to the United States (i.e., inadmissible aliens present in the United States who were subject to removal orders).<sup>67</sup> In *Clark v. Martinez*,<sup>68</sup> the Court explicitly extended its holding in *Zadvydas* to prohibit indefinite detention of inadmissible aliens—without opportunity for

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60. *See id.* at 689–90. Drawing upon case law from the civil commitment context, the Court emphasized that government detention violates the Due Process Clause unless ordered in a criminal proceeding with adequate procedural protections or in certain limited circumstances where a special justification, such as harm-threatening mental illness, outweighs the individual's constitutionally protected interest in avoiding physical restraint. *Id.* at 690.

61. *See id.* at 690–92 (noting that the government's interest in preventing flight is nonexistent where “removal seems a remote possibility” and the alien's removable status itself bears no relation to dangerousness).

62. *Id.* at 699.

63. *Id.* at 697.

64. *Id.* at 699.

65. *Id.* at 701.

66. *Id.* at 696.

67. *Compare Xi v. INS*, 298 F.3d 832, 835 (9th Cir. 2002) (noting that § 1231(a)(6) does not draw a “distinction between individuals who are removable on grounds of inadmissibility and those removable on grounds of deportability” nor did the *Zadvydas* Court limit its holding to deportable aliens), *with Benitez v. Wallis*, 337 F.3d 1289, 1299 (11th Cir. 2003) (holding that indefinite detention of inadmissible aliens does not raise serious constitutional concerns and interpreting “*Zadvydas* as limiting the detention period of only those aliens whose continued confinement raises serious constitutional doubt, i.e., resident aliens who have effected entry”), *rev'd sub nom. Clark v. Martinez*, 543 U.S. 371 (2005).

68. 543 U.S. 371 (2005) (involving aliens who had arrived in the United States as part of the Mariel boatlift).

a bond hearing after six months—under § 1231(a)(6).<sup>69</sup> Relying solely on statutory interpretation, the Court held that a statute’s ambiguous language could be given a “limiting construction” based on one of its applications “even though other . . . applications, standing alone, would not support the same limitation.”<sup>70</sup> That is, having decided that constitutional concerns arising from the indefinite detention of resident aliens precluded interpreting § 1231(a)(6) from authorizing such detention,<sup>71</sup> statutory interpretation compelled the same result for inadmissible aliens, even though the statute as applied to inadmissible aliens did not give rise to the same constitutional concerns.<sup>72</sup> Hence, even if the constitutional concerns that had influenced the Court’s statutory construction in *Zadvydas* were absent in the context of inadmissible aliens, the same detention provision could not be given a different meaning based on the category of aliens it was being applied to.<sup>73</sup>

Taken together, § 1231(a)(6), *Zadvydas*, and *Clark v. Martinez* afford both deportable and inadmissible aliens subject to a removal order and detained beyond the removal period the opportunity to review the basis of their detention after a presumptively reasonable period of six months.

## 2. 8 U.S.C. § 1226

Section 1226 sets forth the procedures and guidelines governing the detention and release of aliens in removal proceedings.<sup>74</sup> Under § 1226(a) the Attorney General has the authority to detain an arrested alien or release her on bond pending a decision on whether the alien is to be removed.<sup>75</sup> Section 1226(c) carves out an exception to § 1226(a)’s general immigration detention and provides for the mandatory detention of a narrow category of criminal noncitizens during the pendency of removal proceedings.<sup>76</sup> An alien detained pursuant to § 1226(c) may be released on parole only if she is a government witness or is assisting in a major criminal investigation, and if the Attorney General is satisfied that she “will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding.”<sup>77</sup>

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69. *Id.* at 378.

70. *Id.* at 380 (“The lowest common denominator, as it were, must govern.”).

71. *See supra* notes 60–65 and accompanying text.

72. *See Martinez*, 543 U.S. at 380.

73. *See id.* at 380–81.

74. 8 U.S.C. § 1226 (2012).

75. *See id.* § 1226(a) (“On a warrant issued by the Attorney General, an alien may be arrested and detained pending a decision on whether the alien is to be removed . . .”).

76. *See id.* § 1226(c). Section 1226(c) applies to any alien who is inadmissible or deportable by reason of having committed a qualifying offense. The DHS is allowed to take these noncitizen offenders into custody at any time after they are released from criminal custody. *See* Gerard Savarisse, Note, *When Is When?: 8 U.S.C. § 1226(c) and the Requirements of Mandatory Detention*, 82 *FORDHAM L. REV.* 285, 289 (2013).

77. 8 U.S.C. § 1226(c)(2).

In *Demore v. Kim*,<sup>78</sup> the Supreme Court addressed a split among the circuits regarding whether mandatory detention of a resident alien, in the absence of an individualized determination of the detainee's dangerousness or flight risk, was a violation of due process.<sup>79</sup> The Court upheld the constitutionality of § 1226(c) against a facial challenge, holding that mandatory detention of certain criminal aliens pending removal proceedings does not, by itself, offend due process.<sup>80</sup> However, the Court based its ruling on its understanding that detention prior to removal is for a short, fixed, and finite term.<sup>81</sup> In his concurrence, Justice Anthony Kennedy underscored the need for individualized hearings when detention becomes unreasonable.<sup>82</sup> According to Justice Kennedy, an LPR detained under § 1226(c) could be entitled to an "individualized determination as to his risk of flight and dangerousness if the continued detention became unreasonable or unjustified."<sup>83</sup>

The Court chiefly distinguished *Zadvydas* on two grounds. First, the Court noted that the aliens challenging their detention in *Zadvydas* were ones for whom removal was "no longer practically attainable" because detention was no longer reasonably related to its purpose of preventing flight.<sup>84</sup> However, detention of criminal aliens in removal proceedings was found to serve the purpose of preventing deportable criminal aliens from fleeing, which increased the chances of successful removal upon issuance of a removal order.<sup>85</sup> Secondly, the Court explained that while the period of detention at issue in *Zadvydas* was "indefinite" and "potentially permanent," detention under § 1226(c) is "of a much shorter duration" and "has an obvious termination point."<sup>86</sup>

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78. 538 U.S. 510 (2003). The case involved an LPR, charged with deportability after being convicted of first-degree burglary and petty theft with priors, who was being detained by the Immigration and Naturalization Service pending his removal hearing. *See id.* at 513.

79. *Compare Kim v. Ziglar*, 276 F.3d 523, 535 (9th Cir. 2002) (holding that § 1226(c) was unconstitutional as applied to LPRs on account of the government's failure to provide a "special justification" for no-bail civil detention that would be "sufficient to overcome a lawful permanent resident alien's liberty interest"), *rev'd sub nom.* *Demore v. Kim*, 538 U.S. 510 (2003), *with Parra v. Perryman*, 172 F.3d 954, 958 (7th Cir. 1999) (holding that the government's interest in detention outweighed the petitioner's liberty interest when he had conceded removability and was no longer entitled to remain in the United States).

80. *See Demore v. Kim*, 538 U.S. at 531 (Kennedy, J., concurring).

81. *See id.*

82. *See id.* at 531–33.

83. *Id.* at 532.

84. *See id.* at 527 (majority opinion).

85. *See id.* at 528. The Court also noted that the petitioner had conceded that he was deportable and had thereby willingly foregone "a hearing at which he would have been entitled to raise any nonfrivolous argument available to demonstrate that he was not properly included in a mandatory detention category." *See id.* at 514. *But see id.* at 541–42 (Souter, J., concurring in part and dissenting in part) (stating that the Court's suggestion that the petitioner had conceded deportability was mistaken).

86. *See id.* at 528–29 (majority opinion). Relying on statistics provided by the Executive Office for Immigration Review, the Court noted that "the detention at stake under § 1226(c) lasts roughly a month and a half in the vast majority of cases in which it is invoked, and about five months in the minority of cases in which the alien chooses to appeal." *See id.* at 529–30.

In the years since *Demore v. Kim*, however, several circuits have construed the detention authorized by § 1226(c) to contain an “implicit temporal limitation”<sup>87</sup> to avoid the serious constitutional concerns that would arise from authorizing prolonged detention. For instance, the Second Circuit in *Lora v. Shanahan*<sup>88</sup> established a bright-line rule that “mandatory detention for longer than six months without a bond hearing affronts due process” and concluded that “an immigrant detained pursuant to section 1226(c) must be afforded a bail hearing before an immigration judge within six months of his or her detention.”<sup>89</sup> The Second Circuit stressed that prolonged detention of noncitizens would raise serious constitutional concerns because “freedom from imprisonment” lies at the heart of the liberty that the Due Process Clause protects.<sup>90</sup> The court noted that mandatory detention under § 1226(c) is permissible, but there must be some procedural safeguard in place for immigrants detained for months without a hearing.<sup>91</sup>

### 3. 8 U.S.C. § 1225

Section 1225 prescribes the immigration procedures for “applicants for admission.”<sup>92</sup> An applicant for admission is an alien who arrives in the United States or an alien who is present in the United States but has not been admitted.<sup>93</sup> As a practical matter, this category largely includes aliens who arrive at the border without valid documentation, such as nonresident arriving aliens, and LPRs who are not “clearly and beyond a doubt entitled to be admitted.”<sup>94</sup>

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87. See *Lora v. Shanahan*, 804 F.3d 601, 614 (2d Cir. 2015) (involving the detention of an LPR convicted of drug-related offenses), *vacated sub nom. Shanahan v. Lora*, 138 S. Ct. 1260 (2018); *Rodriguez v. Robbins*, 715 F.3d 1127, 1135–36 (9th Cir. 2013) (noting that *Demore v. Kim*’s reach is limited to relatively brief periods of detention and holding that subclass members detained under § 1226(c) are entitled to a bond hearing after a presumptively reasonable period of six months); *Diop v. ICE/Homeland Sec.*, 656 F.3d 221, 232 (3d Cir. 2011) (construing *Demore v. Kim* as recognizing that the constitutionality of mandatory detention is a function of the length of the detention). Even though most circuits have construed § 1226(c) to contain an implicit temporal limitation, they have differed over whether to establish a presumptively reasonable period at the end of which bond hearings must be provided, or adopt a case-by-case approach to determine the reasonableness of detention. Compare *Lora*, 804 F.3d at 614–17 (bright line rule), with *Diop*, 656 F.3d at 235 (case-by-case approach). See generally *Rodriguez v. Robbins*, 804 F.3d 1060 (9th Cir. 2015), *rev’d sub nom. Jennings v. Rodriguez*, 138 S. Ct. 830 (2018).

88. 804 F.3d 601.

89. *Id.* at 606, 616.

90. *Id.* at 606.

91. *Id.* at 614.

92. 8 U.S.C. § 1225 (2012).

93. *Id.* § 1225 (a)(1).

94. *Id.* § 1225(b)(2)(A); see also 8 U.S.C. § 1101(a)(13)(c) (2012) (requiring that an LPR be treated as an applicant for admission if she (1) “has abandoned or relinquished [LPR] status,” (2) “has been absent from the United States for a continuous period in excess of 180 days,” (3) “has engaged in illegal activity after having departed the United States,” (4) “has departed from the United States while under legal process seeking removal,” (5) “has committed an offense identified in section 1182(a)(2) of this title,” or (6) “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”).

Two classes of applicants for admission are subject to screening for expedited removal: “arriving aliens” and “certain other aliens.”<sup>95</sup> An arriving alien is “an applicant for admission coming or attempting to come into the United States at a port-of-entry.”<sup>96</sup> “Certain other aliens” are those arriving aliens who have not been admitted or paroled into the United States and have not been continuously present in the country for the last two years.<sup>97</sup>

If an immigration officer determines that an arriving alien or certain other alien is inadmissible (e.g., does not possess valid entry documents, has presented fraudulent documents, or has made a false claim of U.S. citizenship),<sup>98</sup> “the officer shall order the alien removed from the United States without further hearing or review.”<sup>99</sup> A removal order entered in accordance with § 1225(b)(1)(A)(i) is generally not subject to administrative appeal, that is, the decision cannot be appealed to an immigration judge.<sup>100</sup> Judicial review of expedited removal orders is available in habeas corpus proceedings, but is limited to determinations of whether the petitioner is an alien, whether she was ordered removed pursuant to the authority conferred by § 1225(b)(1), and whether she can prove by a preponderance of evidence that she is entitled to be admitted to the United States.<sup>101</sup> Unless granted parole upon a showing of exigent circumstances, an alien subject to expedited removal is detained until removed.<sup>102</sup>

However, if an alien subject to expedited removal indicates an intention to apply for asylum or a fear of persecution, the immigration officer is to refer the alien for an interview with an asylum officer.<sup>103</sup> The interview is to be conducted either at the port of entry or at any other place designated by the

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95. See 8 U.S.C. § 1225(b)(1)(A)(i), (iii); 8 C.F.R. § 1235.3(b)(1)(i)–(ii) (2017).

96. 8 C.F.R. § 1001.1(q) (2017).

97. See 8 U.S.C. § 1225(b)(1)(A)(iii)(II); see also Designating Aliens for Expedited Removal, 69 Fed. Reg. 48,877, 48,880 (Aug. 11, 2004) (authorizing DHS to place in expedited removal proceedings any or all members of the following class of aliens: “who are physically present in the U.S. without having been admitted or paroled,” who are found “within 100 air miles of any U.S. international land border,” and who cannot establish that they have been physically present in the United States for the immediately preceding fourteen days).

98. See 8 U.S.C. § 1182(a)(6)(C), (a)(7) (2012).

99. 8 U.S.C. § 1225(b)(1)(A)(i).

100. *Id.* § 1225(b)(1)(C); see also SCAPERLANDA, *supra* note 30, at 69 (discussing the limited jurisdiction of courts to review matters related to expedited removal).

101. 8 U.S.C. § 1252(e)(2) (2012); see also *id.* § 1252(e)(3) (conferring jurisdiction on the U.S. District Court for the District of Columbia to hear challenges to the constitutionality of § 1225(b)(1)); *Am. Immigration Lawyers Ass’n v. Reno*, 18 F. Supp. 2d 38, 58–60 (D.D.C. 1998) (upholding expedited removal provisions against a due process challenge).

102. See 8 U.S.C. § 1182(d)(5)(A) (“The Attorney General may . . . 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.”); see also 8 C.F.R. §§ 235.3(b)(2)(iii), 1235.3 (b)(2)(iii) (2017).

103. 8 U.S.C. § 1225(b)(1)(A)(ii); see also *id.* § 1225(b)(1)(E) (defining asylum officer as an immigration officer who has had “professional training in country conditions, asylum law, and interview techniques” and is supervised by a qualified officer who has had substantial experience adjudicating asylum applications); 8 C.F.R. §§ 208.9, 208.30 (2017).

Attorney General.<sup>104</sup> If the asylum officer determines that an alien has a credible fear of persecution,<sup>105</sup> the alien “shall be detained for further consideration of the application for asylum.”<sup>106</sup> Similarly, an LPR returning from a trip abroad who is classified as an applicant for admission and is unable to show that he is “clearly and beyond a doubt entitled to be admitted” shall be detained for a removal proceeding.<sup>107</sup> In each of these instances, the decision of the immigration officer—if favorable to the alien—can be challenged before an immigration judge in a removal proceeding.<sup>108</sup>

Section 1225(b) neither explicitly limits the length of detention for LPRs seeking admission or arriving aliens with a credible fear of persecution, nor discusses the availability of bail or an individualized bail hearing; however, discretionary parole is available in certain limited circumstances.<sup>109</sup> For aliens detained under § 1225(b), parole may be granted if the alien is “neither a security risk nor a risk of absconding” and (1) has a serious medical condition; (2) is pregnant; (3) falls within certain categories of juveniles; (4) will be a witness; or (5) if continued detention is otherwise “not in the public interest.”<sup>110</sup>

For nonresident arriving aliens detained under § 1225(b)(1)(B)(ii), ICE policy requires a parole hearing to be provided as soon as practicable following a credible-fear determination; each alien’s eligibility for parole is to be considered and analyzed on its own merits and based on facts of the individual alien’s case.<sup>111</sup> If an arriving alien found to have a credible fear establishes her identity to the satisfaction of the Detention and Removal Office (DRO) and is able to show that she neither presents a flight risk nor a danger to the community, ICE policy allows the DRO officer to—absent additional factors—parole the alien because her continued detention is not in the public interest.<sup>112</sup> If parole is denied, an alien may request

104. 8 U.S.C. § 1225(b)(1)(B)(i).

105. *Id.* § 1225(b)(1)(B)(ii); *see also id.* § 1225(b)(1)(B)(v) (defining credible fear of persecution as there being a significant possibility that the alien could establish eligibility for asylum).

106. *Id.* § 1225(b)(1)(B)(ii). If, however, an alien is found not to have a credible fear of persecution, the alien is ordered removed without further hearing or review. *Id.* § 1225(b)(1)(B)(iii)(I). Upon the alien’s request, the immigration officer’s determination of credible fear may be reviewed by an immigration judge within seven days of the initial determination. *Id.* § 1225(b)(1)(B)(iii)(III).

107. *Id.* § 1225(b)(2)(A).

108. *Id.* § 1225(b)(3).

109. 8 U.S.C. § 1182(d)(5)(A) (2012); 8 C.F.R. § 235.3(c) (2017) (“[A]ny arriving alien who appears to the inspecting officer to be inadmissible, and who is placed in removal proceedings . . . shall be detained . . . . Parole of such alien shall only be considered in accordance with Section 212.5(b) . . . .”).

110. 8 C.F.R. § 212.5(b) (2017).

111. U.S. IMMIGRATION & CUSTOMS ENF’T, DIRECTIVE NO. 11002.1, PAROLE OF ARRIVING ALIENS FOUND TO HAVE A CREDIBLE FEAR OF PERSECUTION OR TORTURE §§ 6.1–6.2 (2009), [https://www.ice.gov/doclib/dro/pdf/11002.1-hd-parole\\_of\\_arriving\\_alien\\_found\\_credible\\_fear.pdf](https://www.ice.gov/doclib/dro/pdf/11002.1-hd-parole_of_arriving_alien_found_credible_fear.pdf) [<https://perma.cc/QV6Y-48Z4>].

112. *Id.* § 6.2. The decision to grant or deny parole is prepared by the DRO officer and must pass through at least one level of supervisory review before being approved by the field office. *Id.* § 6.7.

redetermination of this decision based upon changed circumstances or additional evidence relevant to her “identity, security risk, or risk of absconding.”<sup>113</sup> However, immigration judges are precluded from holding bond hearings for “[a]rriving aliens in removal proceedings.”<sup>114</sup>

*C. The Entry Fiction, Plenary Power, and Procedural Protections*

This Part focuses on the interaction between immigration law and the Constitution with reference to the constitutional protections available to aliens based on their presence within the United States. Like other noncitizens, inadmissible arriving aliens are entitled to certain substantive due process protections.<sup>115</sup> The real problem arises in the context of what procedural protections, if any, they are entitled to. This difference is attributable in part to the plenary power of the Executive over immigration matters and the entry fiction doctrine.

As early as 1889, the Supreme Court affirmed the plenary power of the Executive to exclude foreigners, holding that the “power of exclusion of foreigners” was an incident of sovereignty and executive determinations of exclusion and admission were “conclusive upon the judiciary.”<sup>116</sup> Hence, it was deemed to be beyond the province of the judiciary to oppose immigration decisions made by the legislative and executive branches regarding foreigners who had neither been naturalized in, domiciled in, resided in, nor gained lawful admission into the United States; notably, the Court held that “[a]s to such persons, the decisions of executive or administrative officers, acting within powers expressly conferred by Congress, are due process of law.”<sup>117</sup>

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113. *Id.* § 6.5.

114. 8 C.F.R. § 1003.19(h)(2)(i)(B) (2017); *see* *Rodriguez v. Robbins*, 804 F.3d 1060, 1081 (9th Cir. 2015) (“Because parole decisions under § 1182 are purely discretionary, they cannot be appealed to [immigration judges] or courts. This lack of review has proven especially problematic when immigration officers have denied parole based on blatant errors.”), *rev’d sub nom.* *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018).

115. *See* *Wong Wing v. United States*, 163 U.S. 228, 237 (1896) (holding unconstitutional a statute that imposed a year of hard labor upon aliens subject to a final deportation order and noting that “to declare unlawful residence within the country to be an infamous crime, punishable by deprivation of liberty and property, would be to pass out of the sphere of constitutional legislation, unless provision were made that the fact of guilt should first be established by a judicial trial”); *Kwai Fun Wong v. United States*, 373 F.3d 952, 974 (9th Cir. 2004) (holding that the entry fiction does not necessarily preclude a nonadmitted alien from “coming within the ambit of the equal protection component of the Due Process Clause”); *Ngo v. INS*, 192 F.3d 390, 396 (3d Cir. 1999) (“Even an excludable alien is a ‘person’ for purposes of the Fifth Amendment and is thus entitled to substantive due process.”); *see also* Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625, 1626 (1992) (noting the contrast between the stunted growth of constitutional immigration law and the “flowering of constitutional protections for aliens” in other areas).

116. *Chae Chan Ping v. United States (The Chinese Exclusion Case)*, 130 U.S. 581, 606–09 (1889) (involving the exclusion of a Chinese laborer held on a ship in the San Francisco Bay).

117. *Ekiu v. United States*, 142 U.S. 651, 660 (1892). The reach of the Executive’s plenary power was eventually extended beyond orders of exclusion to deportation orders entered

However, in *Yamataya v. Fisher*<sup>118</sup> the Court announced an important limitation to the Executive's plenary power, holding that aliens inside the United States were entitled to greater constitutional safeguards than aliens seeking admission, and the procedures used to make immigration decisions were subject to the Due Process Clause and, hence, independent evaluation by the courts.<sup>119</sup> In the latter half of the twentieth century, the Court built upon the territorial distinction introduced in *Yamataya* to limit the grant of procedural due process protections to deportable aliens, that is, aliens who were already physically present in the United States.<sup>120</sup> However, excludable aliens—including nonresident arriving aliens—remained beyond the reach of these constitutional protections because admission into the United States was a privilege granted by the sovereign, which could only be exercised in accordance with the procedures prescribed by the government.<sup>121</sup>

Judicial deference to the Executive's power over immigration matters and adherence to the territorial underpinning of constitutional entitlements of immigrant detainees reached its apex in *Shaughnessy v. United States ex rel. Mezei*.<sup>122</sup> Mezei was an LPR who traveled behind the Iron Curtain at the height of the Cold War and was ordered permanently excluded upon return.<sup>123</sup> The decision to exclude was made by the Attorney General on the basis of national security concerns, and Mezei was afforded no opportunity for a hearing before a neutral decision maker.<sup>124</sup> Following the government's successive failures to affect Mezei's departure from Ellis Island, Mezei sought relief from his allegedly unlawful confinement through habeas proceedings.<sup>125</sup> However, the Supreme Court held that, unlike "aliens who have once passed through our gates, even illegally, [and] may be expelled only after proceedings conforming to traditional standards of fairness

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against resident aliens already in the United States. See *Fong Yue Ting v. United States*, 149 U.S. 698, 731 (1892) (rejecting a due process challenge brought by Chinese immigrants working in the United States); Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 550–53 (1990).

118. 189 U.S. 86 (1903).

119. See *id.* at 100–01; David A. Martin, *Graduated Application of Constitutional Protection for Aliens: The Real Meaning of Zadvydas v. Davis*, 2001 SUP. CT. REV. 47, 53–54; Motomura, *supra* note 117, at 553–55 (noting that the harshest aspects of the plenary power doctrine were ameliorated by requiring some level of due process in deportation proceedings); *The Supreme Court—Leading Cases*, 117 HARV. L. REV. 226, 287–88 (2003) (noting that the Court has limited the plenary power doctrine to substantive criteria for admission and expulsion).

120. See *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 545–47 (1950) (rejecting procedural challenge brought by a war bride regarding the Executive's decision to exclude her without a hearing); see also Martin, *supra* note 119, at 54–56.

121. *Knauff*, 338 U.S. at 542.

122. 345 U.S. 206 (1953).

123. *Id.* at 208. Even though Mezei was an LPR, the Court held that his protracted absence marked a clear break in his continuous residence and he stood on the same legal footing as an entrant alien. See *id.* at 214. However, the Court acknowledged that under some circumstances temporary absence from the United States cannot deprive an LPR of his constitutional right to due process. See *id.* at 213.

124. *Id.* at 212–13.

125. *Id.* at 208–09.

encompassed in due process of law,” aliens like *Mezei* who stand on the threshold of entry are only entitled to the procedural protections granted by Congress.<sup>126</sup> The Court clarified that *Mezei*’s harborage at Ellis Island was an act of legislative grace and neither constituted an entry nor affected his legal rights for purposes of immigration law.<sup>127</sup> In sum, the Court not only upheld the indefinite detention of an excludable alien but also withheld any constitutional entitlement to due process protections for excludable aliens.<sup>128</sup> In the years since, *Mezei* has come to be seen as establishing the entry fiction: aliens seeking admission into the United States may physically be allowed within its borders pending a determination of admissibility, but they are legally considered to be detained at the border and hence enjoy limited protections under the Constitution.<sup>129</sup>

With the passage of IIRIRA and consolidation of exclusion within the broader concept of admission, the entry fiction has manifest ramifications for the constitutional entitlements of nonresident arriving aliens. The next Part explores how presence within the United States has become the hallmark of due process within the immigration framework and how the entry fiction has precluded courts from considering the procedural protections available to nonresident arriving aliens.

## II. THE CONTINUING VITALITY OF THE ENTRY FICTION IN IMMIGRATION JURISPRUDENCE

Despite the passage of IIRIRA, which sought to place inadmissible aliens within and without the United States on the same legal footing, the entry fiction doctrine continues to occupy an increasingly significant role in immigration law jurisprudence. Even though *Mezei*’s impact on the constitutional entitlement of LPRs who may be treated as applicants for admission was circumscribed,<sup>130</sup> it continues to hold unabated force as far as nonresident arriving aliens are concerned.

In *Landon v. Plasencia*,<sup>131</sup> the Supreme Court held that an LPR who is only briefly absent from the United States is entitled to the same due process

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126. *Id.* at 212; see also T. Alexander Aleinikoff, *Citizens, Aliens, Membership and the Constitution*, 7 CONST. COMMENT. 9, 10 (1990) (noting that Congress acts essentially free from any constitutional limits when it establishes admission and detention procedures at the border).

127. *Mezei*, 345 U.S. at 213.

128. Professor Motomura notes that during the 1950s the Supreme Court expressed a readiness to recite an abstract procedural due process requirement but a reluctance to apply it for an alien’s benefit in the context of immigration detention. See Motomura, *supra* note 115, at 1643–44.

129. *Barrera-Echavarria v. Rison*, 44 F.3d 1441, 1450 (9th Cir. 1995), *superseded by statute*, Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546, *as recognized in* *Xi v. INS*, 298 F.3d 832, 837–38 (9th Cir. 2002); see also 8 U.S.C. § 1182(d)(5)(A) (2012) (noting that the discretionary parole of an alien shall not be regarded as admission).

130. See *Rodriguez v. Robbins*, 715 F.3d 1127, 1143 (9th Cir. 2013) (noting that the impetus for providing bail hearings to LPRs detained under § 1225(b) is greater than that for affording bail hearings to aliens detained under § 1226(c)).

131. 459 U.S. 21 (1982).

protections as a continuously present resident alien.<sup>132</sup> However, the Court held that the precise contours of the due process the petitioner was entitled to was a question of balancing the competing private and government interests at stake.<sup>133</sup> In so doing, the Court adopted the test it outlined in *Mathews v. Eldridge*,<sup>134</sup> which balances three factors in determining the level of protection due: (1) the private interest at stake; (2) the risk of erroneous deprivation of said interest and the value of additional safeguards; and (3) the government's interest.<sup>135</sup>

In contrast, as recently as its 2001 holding in *Zadvydas*, the Supreme Court reiterated that the “distinction between an alien who has effected an entry into the United States and one who has never entered runs throughout immigration law,” such that “certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders.”<sup>136</sup> Hence, even though IIRIRA intended to place aliens having effected an illegal entry into the United States on the same legal footing as aliens seeking admission at the border, it remains unclear whether that is actually the case.<sup>137</sup> Given the unique position nonresident arriving aliens occupy in the constitutional landscape, the next section of this Note looks at how courts have approached the question of whether nonresident arriving aliens are entitled to any procedural protections with respect to their detention.

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132. *See id.* at 32–34. In distinguishing *Mezei*, the Court drew a distinction between an LPR only briefly absent from the United States who can assert due process rights and an LPR who may lose his constitutional entitlements because of extended absence from the U.S. *Id.* at 33–34.

133. *Id.* at 34.

134. 424 U.S. 319, 349 (1976) (holding that, in order to comport with due process, the procedures at issue should be tailored to “the capacities and circumstances of those who are to be heard” to insure that they are given a meaningful opportunity to present their case” (citation omitted) (quoting *Goldberg v. Kelly*, 397 U.S. 254, 268–69 (1970))).

135. *Id.* at 334–35.

136. *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001). The majority affirmatively concluded that rejection of *Mezei*'s procedural challenge had rested upon a “basic territorial distinction.” *See id.* at 694.

137. *See Rusu v. INS*, 296 F.3d 316, 321 n.8 (4th Cir. 2002) (“[I]t is well established that even one whose presence in this country is unlawful, involuntary, or transitory is entitled to the constitutional protection of the Fifth Amendment’s Due Process Clause.”); *see also* Moore, *supra* note 36, at 855–56. In *In re X-K-*, 23 I. & N. Dec. 731 (B.I.A. 2005), the Board of Immigration Appeals held that an alien who is initially screened for expedited removal under 8 U.S.C. § 1225(b)(1)(A), but is subsequently placed in removal proceedings following a positive credible-fear determination, is eligible for a custody redetermination hearing before an immigration judge. Aliens found eligible for a custody redetermination before an immigration judge in *In re X-K-* and arriving aliens detained under § 1225(b)(1)(B)(ii) only differ in one respect: the former enter the United States without inspection, while the latter present themselves at the border. *See* Martin, *supra* note 119, at 97–99.

*A. Treatment by Lower Courts*

Before the Supreme Court's decision in *Jennings v. Rodriguez*,<sup>138</sup> lower courts were split over whether § 1225(b) detainees are entitled to the procedural protection of bond hearings. The split was most pronounced in the Southern District of New York.<sup>139</sup> Of the courts to have addressed the issue, none have addressed the question of whether nonresident arriving aliens have any constitutional entitlement to procedural protections, such that subjecting them to prolonged detention would raise serious constitutional problems. Instead, as delineated below, the courts have chosen to rely on a statutory interpretation approach inspired by *Clark v. Martinez*.

1. The Southern District of New York:  
*Arias v. Aviles* and *Saleem v. Shanahan*

In *Arias v. Aviles*,<sup>140</sup> the court had to decide what constitutional protections are available to LPRs designated as applicants for admission.<sup>141</sup> *Arias*, an LPR who had briefly left the United States, was taken into custody upon his return at John F. Kennedy Airport when federal law enforcement officials found cocaine in his luggage.<sup>142</sup> *Arias* pled guilty to criminal possession of a controlled substance and was sentenced to imprisonment for one year.<sup>143</sup> After completing his sentence, he was transferred back to DHS custody and detained pursuant to 8 U.S.C. § 1225(b).<sup>144</sup>

*Arias* argued that as an LPR he was entitled to due process protections and that “the *Lora* court’s constitutional avoidance analysis applies equally to the mandatory detention provision in § 1225(b) as it did to § 1226(c).”<sup>145</sup> The government argued that *Arias*, as an arriving alien, did “not have the same due process protections as aliens who have been admitted” and the court

138. 138 S. Ct. 830, 842–48, 851 (2018) (holding that aliens detained under sections 1225(b), 1226(a), and 1226(c) have no statutory right to periodic bond hearings during the course of their detention, but remanding the case to the Ninth Circuit to “consider respondents’ constitutional arguments on their merits”).

139. Compare *Ricketts v. Simonse*, No. 16 Civ. 6662, 2016 WL 7335675, at \*4 (S.D.N.Y. Dec. 16, 2016) (holding that, “post-*Lora*, detention pursuant to § 1225(b) must be construed to contain a reasonableness limitation of six months”), *Saleem v. Shanahan*, No. 16-CV-808, 2016 WL 4435246, at \*5 (S.D.N.Y. Aug. 22, 2016) (declining “to interpret 8 U.S.C. § 1225(b)(2)(A) differently depending on which litigant is before it, the Court construe[d] the provision to include a reasonable temporal limitation of six months on [nonresident arriving alien’s] detention”), *appeal filed*, No. 16-3587 (2d Cir. Oct. 21, 2016), and *Arias v. Aviles*, No. 15-CV-9249, 2016 WL 3906738, at \*4 (S.D.N.Y. July 14, 2016) (finding that § 1225(b) “must be construed to avoid due process concerns” and “that a six-month limit as outlined in *Lora* is the appropriate limiting principle in this circuit”), with *Perez v. Aviles*, 188 F. Supp. 3d 328, 332 (S.D.N.Y. 2016) (holding that detention under § 1225(b) is neither “implicitly time limited [n]or requires a bond hearing”), and *Cardona v. Nalls-Castillo*, 177 F. Supp. 3d 815, 816 (S.D.N.Y. 2016) (declining to extend *Lora* to § 1225(b)).

140. No. 15-CV-9249, 2016 WL 3906738 (S.D.N.Y. July 14, 2016).

141. *Id.* at \*1.

142. *Id.*

143. *Id.*

144. *See id.* at \*2.

145. *Id.* at \*4.

should defer to Congress's statutory scheme that "lessens any possible due process concerns."<sup>146</sup> Relying on *Plasencia*, the court held that "LPRs like . . . Arias possess the same rights at the border as they do inside it, in spite of their brief absence from the United States."<sup>147</sup> Having determined that Arias was entitled to the protections of the Due Process Clause, the court saw no basis to distinguish the constitutional protections claimed by Arias and those afforded to the petitioner in *Lora*, and it read § 1225(b) to include a reasonable limit on the length of detention before a bond hearing was needed to avoid serious constitutional concerns.<sup>148</sup> The import of the *Arias* decision lies in how the constitutional protections afforded to LPRs detained under § 1225(b) were subsequently extended to nonresident arriving aliens.

In *Saleem v. Shanahan*,<sup>149</sup> the court had to decide whether the petitioner, a nonresident arriving alien seeking asylum, was entitled to a bond hearing.<sup>150</sup> The court relied on *Clark v. Martinez* to hold that, having construed § 1225(b) to avoid infringing upon the due process rights of certain LPRs in *Arias*, it must interpret the provision consistently for all aliens detained pursuant to § 1225(b) "irrespective of whether or not those constitutional problems pertain to the particular litigant before the Court."<sup>151</sup> Significantly, the court refused to engage in delineating the constitutional entitlement of petitioner to due process protection with respect to his status but noted that "the extent of his due process rights remains unclear in light of his nonresident alien status."<sup>152</sup>

## 2. The Ninth Circuit: *Rodriguez v. Robbins*

Among the circuit courts, the Ninth Circuit is the only one that has addressed the issue of whether "the prolonged detention of 'applicants for admission' under Section 1225(b) raises the same 'serious constitutional concerns' that are implicated by prolonged detention of other detained aliens."<sup>153</sup> The case involved a certified class of noncitizens (the § 1226(c) subclass and the § 1225(b) subclass) who challenged their prolonged detention on account of not having been given an individualized custody determination to justify continued detention.<sup>154</sup> The § 1225(b) subclass was

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146. *Id.*

147. *Id.* at \*8.

148. *Id.* at \*8–10 (noting that a decision allowing indefinite detention of LPRs under § 1225(b) "could result in affording more protections to nonresident aliens detained under § 1226(c), and for whom removal is authorized by law, than to LPRs detained pursuant to § 1225(b) [who are] merely accused of wrongdoing").

149. No. 16-CV-808, 2016 WL 4435246 (S.D.N.Y. Aug. 22, 2016), *appeal filed*, No. 16-3587 (2d Cir. Oct. 21, 2016).

150. *Id.* at \*1.

151. *Id.* at \*4.

152. *Id.*

153. *Rodriguez v. Robbins*, 715 F.3d 1127, 1139–40 (9th Cir. 2013); *see also* *Rodriguez v. Robbins*, 804 F.3d 1060 (9th Cir. 2015), *rev'd sub nom. Jennings v. Rodriguez*, 138 S. Ct. 830 (2018).

154. *Rodriguez*, 715 F.3d at 1130–31.

comprised of LPRs returning from abroad as well as nonresident arriving aliens (i.e., applicants for admission subject to the entry fiction doctrine).<sup>155</sup>

The Ninth Circuit noted that even though most of the members of the § 1225(b) subclass fell into the category of aliens described in *Mezei* as entitled to limited due process protections, applying § 1225(b) to authorize prolonged detention of LPRs within the same class would raise serious constitutional concerns.<sup>156</sup> Since the § 1225(b) subclass included “at least some aliens who [were] not subject to the entry fiction doctrine,” the court relied on *Clark v. Martinez* to construe the statute with these aliens in mind and extended the right to an individual bond hearing at the six-month mark to the entire subclass.<sup>157</sup> Significantly, the court’s analysis of the constitutional entitlements of nonresident arriving aliens as a group unto themselves was limited to the recognition that its earlier decisions holding that excludable aliens—who were subject to the entry fiction—had no substantive right to be free from immigration detention were still good law.<sup>158</sup>

### *B. Procedural Protections and a Constitutional Theory of Immigration*

The jurisprudence of immigration detention is heavily reliant on statutory interpretation, be it the courts’ adherence to the canon of constitutional avoidance or the innovation of the least-common-denominator approach.<sup>159</sup> Acknowledging Congress’s plenary power over matters of immigration policy, courts have been reluctant to grant aliens constitutional procedural protections.<sup>160</sup> However, this is not to say that this plenary power is not subject to constitutional limitations. Courts have frequently addressed possible constitutional difficulties that may arise from prolonged detention of aliens without recourse to procedural protections.<sup>161</sup>

This Note does not purport to address the merits of a constitutionalized theory of immigration detention as opposed to a statutory theory; rather, it seeks to show how the gap within immigration jurisprudence resulting from judicial recalcitrance to address the constitutional entitlement of nonresident arriving aliens to certain procedural protections may be filled by recent Supreme Court jurisprudence related to extraterritorial application of the Constitution.<sup>162</sup> Given the Court’s decision in *Jennings*, the time is ripe for lower courts to consider the constitutionality of prolonged immigration detention.<sup>163</sup>

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155. *Id.* at 1140–42.

156. *Id.*

157. *Id.* at 1142–44; *see also supra* notes 68–72 and accompanying text.

158. *See Rodriguez*, 715 F.3d at 1141; *cf. supra* note 138.

159. *See discussion supra* Part I.B.1.

160. *See discussion supra* Part II.A.

161. *See discussion supra* Part I.B.1.

162. *See discussion infra* Parts III.B., IV.

163. *See* Kevin Johnson, *Opinion Analysis: Court Tees Up Issue of the Constitutionality of Indefinite Immigration Detention for the 9th Circuit*, SCOTUSBLOG (Feb. 27, 2018, 8:44 PM), <http://www.scotusblog.com/2018/02/opinion-analysis-court-tees-issue-constitutionality>

Although courts have increasingly emphasized the distinction between an alien who has effected an entry into the United States and one who has never entered, the implications of this distinction have largely been dealt with either in a cursory way or not at all.<sup>164</sup> This treatment, or lack thereof, is problematic on two counts. First, even though statutory ambiguity may yield temporary protection for nonresident arriving aliens, they are increasingly vulnerable to changes in executive or legislative policy.<sup>165</sup> The *Clark v. Martinez* Court explicitly avoided extending constitutional protections to inadmissible aliens, relying solely on statutory interpretation.<sup>166</sup> Furthermore, the Court hinted that it was within Congress's power to revise the statute to allow indefinite detention of inadmissible aliens.<sup>167</sup> This vulnerability becomes even more pronounced when a decision like *Clark v. Martinez*, which dealt with inadmissible aliens, is compared with *Zadvydas*, which dealt with aliens present within the United States. Unlike *Clark v. Martinez*, which has been interpreted as setting down a rule of statutory interpretation, *Zadvydas*—although decided on grounds of constitutional avoidance—has come to be seen as establishing the constitutional requirements with respect to aliens detained pursuant to § 1231.<sup>168</sup> Constitutional due process has developed as a dialogue between courts and the other branches of government, such that courts have persuaded legislatures to add important procedural protections to protect liberty interests to keep up with evolving notions of fundamental fairness.<sup>169</sup> So, when courts declare that they have no role to play in the process—as in the case of nonresident arriving aliens—this dialogue is seriously undermined.<sup>170</sup>

Second, and more importantly, relying solely on *Clark v. Martinez*'s lowest-common-denominator approach promulgates the notion that standing as a class unto themselves, nonresident arriving aliens are bereft of procedural protections. This Note primarily seeks to show how developments in Supreme Court jurisprudence regarding the extraterritorial

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-indefinite-immigration-detention-9th-circuit/ [https://perma.cc/55G3-4RBT] (noting that by remanding the case to the Ninth Circuit, the Court has tasked the Ninth Circuit with deciding “whether indefinite detention of noncitizens without a bond hearing as authorized by the immigration statute[s] is constitutional”); see also Leah Litman, *Jennings v. Rodriguez, Immigration Sins of the Past, and the Forced Separation of Families*, TAKE CARE (June 6, 2018), <https://takecareblog.com/blog/jennings-v-rodriguez-immigration-sins-of-the-past-and-the-forced-separation-of-families> [https://perma.cc/B5T4-EA7X] (“The Court did not . . . address whether the statutes, by allowing indefinite detentions with no individualized bond hearings, are consistent with the due process clause.”).

164. See discussion *supra* Parts I.C., II.A.

165. See José Javier Rodríguez, *Clark v. Martinez: Limited Statutory Construction Required by Constitutional Avoidance Offers Fragile Protection for Inadmissible Immigrants from Indefinite Detention*, 40 HARV. C.R.-C.L.L. REV. 505, 506 (2005).

166. See *id.*

167. See *id.*; see also *Clark v. Martinez*, 543 U.S. 371, 386 (2005).

168. See Martin, *supra* note 119, at 79.

169. See T. Alexander Aleinikoff, *Aliens, Due Process and “Community Ties”*: A Response to Martin, 44 U. PITT. L. REV. 237, 258 (1983).

170. See *id.* at 258–59.

application of the Constitution undermine the latter proposition and provide an arguably stronger foundation to ground procedural protections for nonresident arriving aliens.

### III. TERRITORIALITY AND THE CONSTITUTION: FROM STRICT FORMALISM TO PRAGMATIC FUNCTIONALISM

The geographic scope of the Constitution has been hotly contested since the late eighteenth century.<sup>171</sup> At its core, territoriality posits that government action outside the borders of the nation is not constrained by constitutional limitations.<sup>172</sup> This Part explores how the Supreme Court has approached the question of extraterritorial application of the Constitution by focusing on three seminal cases, which involve questions of citizenship as well as extraterritoriality. It goes on to discuss how the most recent iteration of extraterritoriality could fill the gap in immigration law jurisprudence created by the entry fiction doctrine and bring nonresident arriving aliens within the fold of the Constitution's protection.

#### A. *Eisentrager and Verdugo-Urquidez: A Lesson in Formalism*

In *Johnson v. Eisentrager*,<sup>173</sup> a group of twenty-one German nationals convicted of war crimes and imprisoned in occupied Germany sought review of their detention via habeas corpus. The Supreme Court denied the requested relief and explained that it is an "alien's presence within [U.S.] territorial jurisdiction" that creates constitutional protection and that there is "no authority whatever for holding that the Fifth Amendment confers rights upon all persons, whatever their nationality, wherever they are located and whatever their offenses."<sup>174</sup> The Court held that it would be paradoxical to grant constitutional rights to these detainees because they were enemy aliens, had never been in or resided in the United States, and had been captured outside the United States.<sup>175</sup>

In *United States v. Verdugo-Urquidez*,<sup>176</sup> the Court held that the Fourth Amendment did not apply to searches and seizures that occurred in Mexico, even though the searches would have violated the Fourth Amendment if committed within the United States.<sup>177</sup> The Court noted that even if a

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171. See Gerald L. Neuman, *Whose Constitution?*, 100 YALE L.J. 909, 910–12 (1991).

172. See *id.* at 915.

173. 339 U.S. 763 (1950).

174. See *id.* at 771, 783.

175. See *id.* at 777–78, 784.

176. 494 U.S. 259 (1990).

177. The Court reversed the Ninth Circuit, which had affirmed the district court's holding that the Constitution imposes substantive constraints on the federal government, even when it operates abroad, and that the nonresident respondent was entitled to constitutional protections. See *United States v. Verdugo-Urquidez*, 856 F.2d 1214 (9th Cir. 1988), *rev'd*, 494 U.S. 259 (1990). However, the dissenting judge on the panel, relying on *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936), argued that "[n]either the Constitution nor the laws passed in pursuance of it have any force in foreign territory unless in respect of [U.S.] citizens." *Verdugo-Urquidez*, 856 F.2d at 1230 (Wallace, J., dissenting).

constitutional violation had occurred, it had occurred outside the United States and thus the plaintiff could not claim the protections of the Constitution.<sup>178</sup> The Court's holding was premised on complementary considerations of territoriality and citizenship.<sup>179</sup> The majority interpreted *Eisentrager*'s holding to "emphatic[ally]" reject the "claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States."<sup>180</sup> The Court noted that even though aliens enjoy limited constitutional protections, these protections are dependent on the aliens' presence within U.S. territory and substantial connections with the country.<sup>181</sup>

Justice Kennedy's concurrence, however, while acknowledging that the Constitution does not apply to "some undefined, limitless class of noncitizens . . . beyond [U.S.] territory,"<sup>182</sup> articulated a different test for the extraterritorial application of the Constitution.<sup>183</sup> According to Justice Kennedy, the citizenship of the person claiming the constitutional protection and his presence or absence within the U.S. at the time of the alleged violation were relevant considerations, but not dispositive of the inquiry; he opined that the focus of the inquiry ought to be whether adherence to constitutional guarantees would be impracticable and anomalous under the circumstances.<sup>184</sup>

#### *B. Boumediene and the Emergence of the "Impracticable and Anomalous" Test*

In *Boumediene v. Bush*,<sup>185</sup> the Supreme Court was asked to settle whether protections of habeas corpus could be extended to alien detainees at Guantanamo Bay.<sup>186</sup> The Court held that the Suspension Clause of the Constitution<sup>187</sup> "has full effect at Guantanamo Bay."<sup>188</sup> The Court concluded that foreign nationals detained at Guantanamo had a constitutional right to challenge the factual basis for their detention.<sup>189</sup> The Court ruled that provisions of the Detainee Treatment Act, which provides individuals with a military hearing before a Combatant Status Review Tribunal (CSRT)

178. See *Verdugo-Urquidez*, 494 U.S. at 264–68.

179. See Moore, *supra* note 36, at 835–36.

180. *Verdugo-Urquidez*, 494 U.S. at 269.

181. See *id.* at 271. Justice William Rehnquist drew a distinction between the text of the Fourth Amendment, which refers to "the people," and the Fifth Amendment, which refers to any "person," and suggested that "the people" was used as a term of art to refer to "a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community." *Id.* at 264–66.

182. See *id.* at 275 (Kennedy, J., concurring).

183. See Neuman, *supra* note 171, at 965–70.

184. *Verdugo-Urquidez*, 494 U.S. at 277–78 (Kennedy, J., concurring); see also Neuman, *supra* note 171, at 974.

185. 553 U.S. 723 (2008).

186. See *id.* at 739.

187. U.S. CONST. art. I, § 9, cl. 2 ("The privilege of the writ of *habeas corpus* shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.")

188. *Boumediene*, 553 U.S. at 771.

189. See *id.* at 783–84.

and limited judicial review in the D.C. Circuit, did not provide the prisoners with an adequate opportunity to challenge the lawfulness of their detention and was an inadequate substitute for the writ of habeas corpus.<sup>190</sup>

The Court held that the writ of habeas extends despite detainees' noncitizen status and their presence outside domestic borders.<sup>191</sup> In so doing, the Court rejected a strict non-extraterritorial test and articulated a functional approach to determine the Constitution's geographical reach: "whether a constitutional provision has extraterritorial effect depends upon the 'particular circumstances, the practical necessities, and the possible alternatives which Congress had before it' and . . . whether judicial enforcement of the provision would be 'impracticable and anomalous.'"<sup>192</sup> In line with his concurrence in *Verdugo-Urquidez*, Justice Kennedy—now writing for the majority—noted that practical considerations bearing on the reach of the Constitution relate not only to citizenship, but also to the place of confinement and the sufficiency of process provided.<sup>193</sup>

Even though the Guantanamo detainees were not American citizens, their status as enemy combatants was contested and the alien detainees' only recourse to challenging their status was through CSRTs.<sup>194</sup> The Court found the lack of procedural protections afforded in CSRT hearings—lack of counsel and limited ability to rebut government evidence—particularly troubling.<sup>195</sup> Moreover, unlike the alien prisoners in *Eisentrager*, who were detained in foreign territory, these aliens were detained at Guantanamo, which was "within the constant jurisdiction of the United States."<sup>196</sup>

In delineating the reach of the Constitution, the Court clarified that "[n]othing in *Eisentrager* says that de jure sovereignty is or has ever been the only relevant consideration in determining the geographic reach of the Constitution" and emphasized that "questions of extraterritoriality turn on objective factors and practical concerns, not formalism."<sup>197</sup> The Court explained that *Eisentrager* was influenced as much by practical considerations as it was by notions of de jure sovereignty: the costs of producing alien prisoners being detained at Landsberg Prison in Germany would have presented significant difficulties for the government, damaged the prestige of the military at a sensitive time, and interfered with military efforts to contain enemy elements in postwar Germany.<sup>198</sup>

In contrast, the Guantanamo detainees were being kept at a "secure prison facility located on an isolated and heavily fortified military base,"<sup>199</sup> and

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190. *See id.* at 783–90.

191. *See id.* at 766–69.

192. *Id.* at 759 (quoting *Reid v. Covert*, 354 U.S. 1, 74–75 (1957) (Harlan, J., concurring)).

193. *See id.* at 760; *see also* Richard Nicholson, Note, *Functionalism's Military Necessity Problem: Extraterritorial Habeas Corpus, Justice Kennedy, Boumediene v. Bush, and Al Maqaleh v. Gates*, 81 FORDHAM L. REV. 1393, 1425 (2012).

194. *See Boumediene*, 553 U.S. at 766.

195. *See id.* at 767.

196. *See id.* at 768–69.

197. *Id.* at 764.

198. *See id.* at 762.

199. *Id.* at 770.

there was no indication that adjudicating a habeas petition would cause friction with an international government or compromise the military mission at Guantanamo.<sup>200</sup> Although extending the reach of the Suspension Clause would inevitably require expenditure of funds by the government, the Court did not find these costs to be dispositive as “[c]ompliance with any judicial process requires some incremental expenditure of resources.”<sup>201</sup>

Hence, even though it did not overrule any of the Court’s previous cases, *Boumediene* signified a shift in the Court’s jurisprudence from strict formalism to pragmatism with respect to extraterritorial application of the Constitution.<sup>202</sup> Casting *Eisentrager* in the mold of pragmatism, as the *Boumediene* Court did, paves the way for ascertaining whether the Due Process Clause can be extended to aliens beyond the territory of the United States.<sup>203</sup> As a matter of doctrine, *Boumediene* was decided on Suspension Clause grounds<sup>204</sup> and does not address whether the Constitution’s other provisions—due process in particular—extend beyond the territorial jurisdiction of the United States. This issue has fallen largely to the D.C. Circuit to resolve; while several opinions have intimated that alien detainees lack any constitutional rights beyond the Suspension Clause, no such rule has been conclusively adopted.

In *Kiyemba v. Obama (Kiyemba I)*,<sup>205</sup> the D.C. Circuit had to decide whether Uighur detainees being held at Guantanamo, whose enemy combatant status had been removed, could seek federal habeas relief in the form of entry and release inside the United States.<sup>206</sup> Although the thrust of the holding came from Congress’s plenary power over decisions of admission, the court noted that the Due Process Clause would offer scant protection to petitioners.<sup>207</sup> Since *Kiyemba III*,<sup>208</sup> the D.C. Circuit has yet to resolve whether its initial pronouncement in *Kiyemba I*—that alien detainees had no constitutional rights—remains good law.<sup>209</sup>

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200. *See id.* at 770–71.

201. *Id.* at 769.

202. *See* Charles Ellison, *Extending Due Process Protections to Unadmitted Aliens Within the U.S. Through the Functional Approach of Boumediene*, 3 CRIT 1, 5 (2010).

203. *See supra* notes 197–98 and accompanying text.

204. *See supra* notes 185–90 and accompanying text.

205. 555 F.3d 1022 (D.C. Cir. 2009), *vacated*, 559 U.S. 131 (2010).

206. *See id.* at 1023.

207. *See id.* at 1026 (“[T]he due process clause does not apply to aliens without property or presence in the sovereign territory of the United States.”); *see also* *Kiyemba v. Obama (Kiyemba III)*, 605 F.3d 1046, 1048 (D.C. Cir. 2010) (reinstating *Kiyemba I*’s opinion “as modified here to take account of new developments” without revisiting detainees’ constitutional due process rights); Ernesto Hernández-López, *Kiyemba, Guantánamo, and Immigration Law: An Extraterritorial Constitution in a Plenary Power World*, 2 U.C. IRVINE L. REV. 193, 204–05 (2012) (discussing how plenary power assumptions provide a fallback set of norms to exclude noncitizens from constitutional protections).

208. 605 F.3d at 1046.

209. *See* *Aamer v. Obama*, 742 F.3d 1023, 1039 (D.C. Cir. 2014) (“[W]e shall . . . assume without deciding that the constitutional right to be free from unwanted medical treatment extends to nonresident aliens detained at Guantanamo . . . .”); *Al-Madhwani v. Obama*, 642 F.3d 1071, 1077 (D.C. Cir. 2011) (restating the language of *Kiyemba I*, but concluding that any discussion of due process was not essential to its holding).

There is a wealth of scholarship on the various interpretations of the *Boumediene* decision and its implications for an extraterritorial Constitution;<sup>210</sup> it is beyond the scope of this Note to delve into a thorough exposition of each of these theories. This Note adopts *Boumediene*'s functional approach outlined above to determine how, and to what extent, the Due Process Clause may be applied extraterritorially to nonresident arriving aliens.

#### IV. *BOUMEDIENE* AND THE FUTURE OF THE ENTRY FICTION

The hurdle to extending due process protection to arriving aliens who are treated as never having effected entry into the United States is the idea that legal circumstances change once an alien enters the country. “[F]or the Due Process Clause applies to all ‘persons’ *within* the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent.”<sup>211</sup> Given that the entry fiction doctrine places aliens who were never formally admitted outside the territory of the United States and hence beyond the reach of the Due Process Clause,<sup>212</sup> the functional approach can be applied to “extend” constitutional protections to unadmitted aliens detained within the United States.

Although the Guantanamo detainees are on a different legal footing than nonadmitted aliens,<sup>213</sup> their legal similarities—citizenship and location—are significant. Moreover, the differences among them support extending the Due Process Clause to inadmissible aliens. If the Court was willing to extend due process protections—in the guise of the Suspension Clause—to potential enemy combatants held at Guantanamo Bay, it is difficult to see why similar protections should not be afforded to aliens whose only infraction is a lack of proper entry documents and who have major private interests at stake.<sup>214</sup> Significantly, it would not be “impracticable or anomalous” to extend

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210. See generally, e.g., Joshua Alexander Geltzer, *Of Suspension, Due Process, and Guantanamo: The Reach of the Fifth Amendment After Boumediene and the Relationship between Habeas Corpus and Due Process*, 14 U. PA. J. CONST. L. 719 (2012). Professor Geltzer offers five conceptions of how the Suspension Clause and Due Process Clause relate to each other, and he then draws on these to offer five understandings of *Boumediene*, ranging from those pointing most strongly against finding that the Due Process Clause applies to Guantanamo detainees to those pointing most strongly in favor of such a finding. See *id.* at 720–21, 754–78. According to Professor Geltzer, if the Suspension Clause’s application to Guantanamo was neither impractical nor anomalous, then the Due Process Clause would be similarly situated. See *id.* at 776.

211. See *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) (emphasis added).

212. See *supra* notes 126–29 and accompanying text.

213. Arguably, Guantanamo detainees deserve more process because they have never been charged with a crime by the U.S. government and may have no idea why they are being detained. Moreover, these detainees are initially captured in foreign countries and held at Guantanamo with no access to the resources needed to prove their innocence. See Faiza W. Sayed, Note, *Challenging Detention: Why Immigrant Detainees Receive Less Process Than Enemy Combatants and Why They Deserve More*, 111 COLUM. L. REV. 1833, 1864 (2011).

214. See *supra* notes 94–99 and accompanying text; cf. Sayed, *supra* note 213, at 1863–73 (comparing the procedural protections available to enemy combatants held at Guantanamo and LPRs detained pursuant to § 1226, and arguing that LPRs deserve greater due process protections than they are currently afforded).

procedural protections to nonresident arriving aliens. “Practical considerations” shaping the reach of the Constitution weigh heavily in favor of extending procedural due process protections: the inspection stations for U.S. ports of entry are clearly on U.S. territory, the ongoing detention of arriving aliens occurs at U.S. jails or prisons within the interior, and producing them for bond hearings neither damages the prestige of immigration authorities nor imposes a heavy burden on government resources.<sup>215</sup> The following discussion focuses on how the practical considerations central to the *Boumediene* Court’s disposition counsel in favor of extending the reach of the Due Process Clause to asylum seekers.<sup>216</sup>

#### A. *Functionalism and the Demise of the Entry Fiction*

*Boumediene*’s focus on practical factors in determining the reach of the Constitution is arguably a death knell for the entry fiction. If the reach of the Due Process Clause is shaped by practical considerations, as discussed below, then the entry fiction’s archaic emphasis on physical presence loses its value. The following discussion explores how the *Boumediene* functional approach bolsters the extension of the Due Process Clause to nonresident arriving aliens.

##### 1. Citizenship and Status of the Detainee and Adequacy of the Determination Process

Asylum seekers, like the Guantanamo detainees in *Boumediene*, are not citizens of the United States.<sup>217</sup> The designation of asylum seekers as nonresident arriving aliens is statutorily prescribed, but status determinations of whether a nonresident arriving alien seeking asylum has demonstrated a credible fear of persecution and whether she is to be granted parole are made by executive officials.<sup>218</sup> Even though a DRO’s decision to grant or deny parole is subject to at least one level of supervisory review, the review is also conducted by executive officials.<sup>219</sup> Requests for redetermination are heard by executive officials and the field office has the discretion to either re-interview the alien or consider the request solely based on documentary material already provided.<sup>220</sup> Detention authorized by executive officials without the possibility of review before a neutral decision maker hardly qualifies as adequate process.<sup>221</sup>

Moreover, the ability of these alien detainees to gather evidence and present their case for parole is severely constrained on account of their

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215. See Ellison, *supra* note 202, at 46–49.

216. See *Boumediene v. Bush*, 553 U.S. 723, 765 (2008); *supra* notes 192–93 and accompanying text.

217. See *supra* notes 93, 103 and accompanying text.

218. See *supra* notes 111–12 and accompanying text.

219. See *supra* note 112.

220. See *supra* note 113 and accompanying text.

221. Cf. *Hamdi v. Rumsfeld*, 542 U.S. 507, 509 (2004).

detention and lack of access to counsel.<sup>222</sup> Despite having a statutorily granted privilege of access to counsel, less than 14 percent of all aliens in detention manage to secure legal representation.<sup>223</sup> Given the fact that these asylum seekers have little or no familiarity with the U.S. legal system and are often still suffering from the effects of trauma and persecution, their ability to gather evidence and effectively represent themselves in the redetermination process is severely impeded.<sup>224</sup> Hence, not only is the parole determination process completely shielded from review by a neutral decision maker, it also places severe constraints on an asylum seeker's ability to have a meaningful opportunity for a hearing.<sup>225</sup> The similarity between the parole process for asylum seekers and the procedurally deficient CSRT hearings in *Boumediene*<sup>226</sup> counsels in favor of extending the reach of the Due Process Clause to detained asylum seekers.

## 2. Nature of Sites Where Apprehension and Detention Took Place

Comparably to the Guantanamo detainees, the asylum seekers who are the focus of this Note are apprehended at the border—outside the United States.<sup>227</sup> However, unlike the Guantanamo detainees in *Boumediene* who were held in an area over which the United States exerts only de facto sovereignty and control,<sup>228</sup> asylum seekers are detained at detention facilities in U.S. territory,<sup>229</sup> over which the United States inarguably exerts de facto and de jure sovereignty and control. This favors using the functional approach to apply the Due Process Clause to these aliens. The mere fact of being detained on U.S. soil does not entitle asylum seekers to constitutional protections.<sup>230</sup> However, the location of detention does favor extending the reach of the Due Process Clause, as doing so is unlikely to raise practical anomalies, such as those encountered in *Eisentrager*, where aliens seeking procedural protections were being detained in another country.<sup>231</sup>

## 3. Inherent Practical Obstacles

*Boumediene* was animated by concerns about costs and international comity that would attach upon extending the Suspension Clause to reach Guantanamo detainees.<sup>232</sup> With respect to asylum seekers, there is no

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222. See *supra* note 32.

223. See BYRNE, ACER & BARNARD, *supra* note 6, at 32–33.

224. Cf. Johan Fatemi, *A Constitutional Case for Appointed Counsel in Immigration Proceedings: Revisiting Franco-Gonzalez*, 90 ST. JOHN'S L. REV. 915, 934 (2016) (noting that asylum seekers without legal representation are 12.5 times less likely to be granted asylum than those with legal representation).

225. See *supra* note 114 and accompanying text.

226. See *supra* note 195 and accompanying text.

227. See *supra* notes 95–96, 103–04 and accompanying text.

228. See *Boumediene v. Bush*, 553 U.S. 723, 755 (2008).

229. See, e.g., *supra* note 2 and accompanying text.

230. See discussion *supra* Part I.A; cf. *supra* note 127 and accompanying text.

231. See *supra* note 196 and accompanying text.

232. See *supra* notes 199–201 and accompanying text.

concern that extending due process would invoke friction with other nations; in fact, quite to the contrary, denial of procedural protections stands in stark contrast to the United States's obligations under international conventions for the protection of asylum seekers and refugees.<sup>233</sup>

Although extending the Due Process Clause to asylum seekers might require government expenditure, *Boumediene* is instructive.<sup>234</sup> Reasonable costs incurred in complying with requirements of judicial process should not be used as a sword to ward off executive responsibility.<sup>235</sup> Moreover, the exact magnitude of costs incurred would depend on the degree and measure of procedural protections extended under the Due Process Clause.<sup>236</sup>

Thus, on balance, practical considerations tip the scale in favor of extending the Due Process Clause to applicants for admission. The discussion above, although dealing with asylum seekers, could arguably be applied to applicants for admission subject to expedited removal. If this were the case, it would hamper the enforcement of immigration policies by interposing the judiciary in the Executive's way at every step.<sup>237</sup> However, that is not the case. Recognizing that the Due Process Clause applies to asylum seekers—or applicants for admission—is only the first step. The content of due process protections would inevitably depend on balancing the purpose and government interest in detention against the private interests at stake,<sup>238</sup> which would not only delimit the protections available to asylum seekers in a manner reconcilable with the plenary power doctrine, but also exclude applicants for admission subject to expedited removal from the purview of enhanced procedural protections. As in *Plasencia*, the question of whether an alien is entitled to invoke the protection of the Due Process Clause is different from what specific process she is entitled to and whether the procedure prescribed by Congress is sufficient in the context.<sup>239</sup>

Having posited that *Boumediene* entirely circumvents the entry fiction doctrine and provides a constitutional basis for extending due process protections to asylum seekers, the following discussion focuses on how the constitutional guarantees of due process can be extended without undermining the Executive's plenary power over immigration matters. By balancing the government and private interests at stake and evaluating the fairness and reliability of existing procedures, the next section of this Note addresses whether the prolonged detention of nonresident arriving aliens—

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233. *Cf. supra* note 200 and accompanying text. For a discussion of the United States's obligations towards asylum seekers under international human rights law, see Lara Domínguez, Adrienne Lee & Elizabeth Leiserson, U.S. Detention and Removal of Asylum Seekers: An International Human Rights Law Analysis (June 20, 2016) (unpublished paper, Yale Law School, Allard K. Lowenstein International Human Rights Clinic), [https://law.yale.edu/system/files/area/center/schell/human\\_rights\\_first\\_-\\_immigration\\_detention\\_-\\_final\\_-\\_20160620\\_for\\_publication.pdf](https://law.yale.edu/system/files/area/center/schell/human_rights_first_-_immigration_detention_-_final_-_20160620_for_publication.pdf) [<https://perma.cc/S6NK-M9M7>].

234. *See supra* note 201 and accompanying text.

235. *See supra* note 201 and accompanying text.

236. *See* discussion *infra* Part IV.B.

237. *Cf. supra* notes 117–21 and accompanying text.

238. *See supra* note 133 and accompanying text.

239. *See supra* notes 131–35 and accompanying text.

both asylum seekers and applicants for admission subject to expedited removal—raises serious constitutional threats and how they may be remedied.

*B. Ascertaining the Content of Due Process*

Whether the prolonged detention of nonresident arriving aliens raises constitutional concerns and warrants judicial interference with congressionally prescribed procedures depends on whether the procedures governing detention comport with due process.<sup>240</sup> Since the notion of due process is inherently flexible, the nature of procedural protections required varies with the demands of a particular situation and is determined by balancing the interests at stake.<sup>241</sup>

As a preliminary matter, the procedures prescribed for examination and detention of nonresident arriving aliens subject to an order of expedited removal are constitutionally sufficient because balancing the interests involved yields a result analogous to *Demore v. Kim*.<sup>242</sup> The determination of whether an arriving alien possesses valid and requisite documentation is made by executive officers at the ports of entry in accordance with established guidelines and regulations.<sup>243</sup> The availability of judicial review via habeas proceedings to challenge these threshold determinations, as prescribed by Congress, makes it unlikely that any additional procedures would yield much value.<sup>244</sup> At the examination stage, the private interest at stake is the right to enter the United States. However, no alien has a right of admission into the United States as it is a privilege and not an entitlement.<sup>245</sup> Moreover, the public interest in expediting the examination of applicants for admission who fall under the purview of § 1225(b)(1) is significant given the need to protect the nation's borders.<sup>246</sup>

Detention of aliens subject to an order of expedited removal certainly implicates their liberty interest,<sup>247</sup> which on its face seems particularly significant. However, when reviewed in the context of the purpose of detention it becomes significantly diminished. The government has a compelling interest in minimizing the risk of flight for aliens not entitled to admission into the United States so that removal may be carried out.<sup>248</sup> Hence, detention bears a reasonable relation to its purpose as the risk of flight for aliens who have failed the credible-fear screening is considerably greater compared to aliens who have passed the credible-fear screening and have

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240. See discussion *supra* Part I.B.

241. See *supra* notes 134–35 and accompanying text.

242. See *supra* notes 81, 85 and accompanying text.

243. See 8 C.F.R. § 235.1(f) (2017); see also 8 C.F.R. § 211.1 (2017); *supra* note 99 and accompanying text.

244. See *supra* note 101 and accompanying text.

245. See discussion *supra* Part I.C.

246. Cf. *supra* note 29 and accompanying text.

247. See *supra* notes 60, 89–90 and accompanying text.

248. See *supra* note 85 and accompanying text.

strong defenses against removal.<sup>249</sup> Moreover, the provision of discretionary parole accounts for extenuating circumstances where detention may be unreasonable, and it renders superfluous the need for additional procedural protections for arriving aliens subject to expedited removal.<sup>250</sup> As the procedures prescribed by Congress with respect to the detention of aliens subject to expedited removal are constitutionally sufficient, they do not raise any serious constitutional concerns that would warrant the need for judicial interference.

With respect to nonresident arriving aliens seeking asylum, however, the calculus changes significantly as the interests implicated are qualitatively different. As a procedural matter, because aliens in this category would have already passed the credible-fear screening,<sup>251</sup> the following discussion focuses on their detention during the pendency of removal proceedings and whether the procedural protections afforded in detention are constitutionally sufficient. This Note posits that the statutorily prescribed procedure is insufficient in light of the interests at stake and emphasizes how adopting a discrete remedy—bond hearings after a reasonable period of detention—could yield a constitutionally sufficient process.<sup>252</sup>

By virtue of their status, asylum seekers lack sufficient connections with the United States to be considered a part of the national community. But as Chief Justice William Rehnquist intimated in *Verdugo-Urquidez*, protections of the Fifth Amendment—and concomitantly the Due Process Clause—do not turn on whether or not an individual is part of the national community.<sup>253</sup> Moreover, although asylum seekers have only a tenuous relationship to the national polity, their personal interest at stake—not being returned to a country where they might face torture, imprisonment, or death—is of the “highest possible” magnitude.<sup>254</sup> Given that they have already cleared the initial credible-fear screening, their private interests are more than a mere frivolity.<sup>255</sup> Unarguably, the government has a strong interest in ensuring that these asylum seekers appear at their scheduled removal proceedings.<sup>256</sup> However, this interest is tempered by the fact that these asylum seekers have already passed the credible-fear screening and hence have little incentive to flee and abandon a substantial defense to removal.<sup>257</sup>

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249. *Cf. supra* notes 61–66, 83–85 and accompanying text.

250. *See supra* note 102.

251. *See* discussion *supra* Part I.B.3.

252. If the provision of bond hearings for asylum seekers is to have its desired impact, it must also be accompanied by improved access to counsel for these alien detainees. Assistance of counsel is essential if an alien is to meet the high burden to rebut the government’s case and affirmatively show that continued detention is no longer warranted. For a discussion of how *Eldridge* can be used to extend a right to counsel to immigrants in removal proceedings, see generally Fatemi, *supra* note 224.

253. *See supra* note 181.

254. *See* Aleinikoff, *supra* note 169, at 247–48.

255. *See supra* notes 103–06 and accompanying text.

256. *See supra* notes 61, 85 and accompanying text.

257. *See supra* Part I.B.3.

Furthermore, although detention in this instance has an obvious termination point—the conclusion of removal proceedings—the length of this period is uncertain and often runs into months or even years, unlike the five-month detention the *Demore v. Kim* Court found to be reasonable.<sup>258</sup> Since balancing the interests at stake with respect to the detention of asylum seekers yields a result sufficiently analogous to *Zadvydas*, due process requires that procedural protections be afforded to ensure that detention continues to bear a reasonable relation to its purpose.<sup>259</sup>

Providing an opportunity for individual custody determinations before an immigration judge after a presumptively reasonable period of time has elapsed would alleviate the concerns outlined above without undermining the Executive's plenary power. Affording the opportunity for a bond hearing would not entitle aliens to be admitted into the United States.<sup>260</sup> Requiring the government to produce the asylum seekers before an immigration judge and to articulate the precise basis for their continuing detention would merely ensure that detention continues to bear a reasonable relation to its purpose. The standards and requirements for admitting aliens into the United States would continue to be governed by Congress and the Executive, preserving their plenary power over immigration matters.<sup>261</sup> Moreover, continued detention would remain justified and proper if the government can show that a particular alien poses a danger to the community or a high risk of flight.<sup>262</sup>

However, if the alien can show that neither justification is warranted, he or she should be released subject to appropriate conditions and restrictions. Moreover, the opportunity for review before an impartial decision maker is likely to improve the accuracy of the parole process by not only curing any erroneous deprivations of liberty but also encouraging executive officials to be more conscientious in rendering their initial determinations.<sup>263</sup>

Hence, the constitutional threats raised by the prolonged detention of asylum seekers can be alleviated by affording the detained asylum seekers the opportunity to challenge the basis of their detention, after a reasonable period of detention, without undermining the Executive's plenary power.

#### CONCLUSION

Although the Executive possesses plenary power over the substantive criteria governing admission of aliens into the United States, the procedures employed to enforce these decisions must remain subject to judicial scrutiny. Given the inherent vulnerabilities plaguing asylum seekers detained pursuant to § 1225(b), it is crucial that courts reevaluate the utility of the entry fiction doctrine. Judicial recalcitrance to address the constitutional entitlements of nonresident arriving aliens seeking asylum and strict adherence to old and

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258. *See supra* notes 8, 81, 86 and accompanying text.

259. *See supra* notes 57–66 and accompanying text.

260. *See supra* note 66 and accompanying text.

261. *See discussion supra* Part I.C.

262. *See supra* Part I.B.1–2.

263. *Cf. supra* notes 134–35 and accompanying text.

presumably antiquated precedent not only puts these aliens in serious jeopardy by grossly undervaluing their liberty interest but also stands in stark contrast to recent jurisprudence.

Although *Clark v. Martinez*-inspired approaches might yield temporary relief for this vulnerable group, they remain susceptible to Executive override. Using the pragmatic functionalism of *Boumediene* to extend the reach of the Due Process Clause will ameliorate the harm wrought by the entry fiction doctrine without impeding the control of the Executive over immigration policy and enforcement. Given the inherently amorphous nature of the Due Process Clause, there is no real danger that extending it to afford procedural protections to asylum seekers, which are comparable to those afforded to other aliens in removal proceedings, will compromise or overwhelm the government's interests.