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Putting the Terror in Territorial: Reflections on the Global War on Terrorism and U.S. Detention Policy

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A. Introduction

Some miles off in the distance on a swelteringly hot and sunny day, as the waves of the Gulf of Mexico lazily lap at the shore, a group of individuals are held by the U.S. Government without access to the most basic right of Due Process amongst others. Most readers will assume that this description refers to the infamous detention of individuals in Guantanamo Bay at Camp X Ray and now Camp Delta as enemy combatants in the aftermath of 9/11 terrorist attacks. Indeed, readers could be forgiven for thinking this given the extensive media coverage of this topic. However, the picture just painted is not of those held as enemy combatants but rather the plight of a lesser known group of individuals known as the Marielitos who also have been detained by the U.S. Government; not for days, not for weeks, not for months and not just in the years since 9/11 but rather in a continuing program of indefinite detention since their arrival 1980.

The Marielitos are Cuban refugees who first came to the U.S. via a boatlift on what was referred to as the Freedom Flotilla. This misnomer aside, since then some of these refugees have been held as part of an on-going program of indefinite detention. Yet despite their thirty-one year plight, the Marielitos barely garner mainstream media attention when compared the situation of Guantanamo Bay detainees. Indeed, such headline domination by the latter looks set to continue given that September of this year marked the tenth anniversary of the 9/11 attacks on the Twin Towers and the ensuing and now all too familiar war on terror. [1] Inevitably, academia has played host to countless conferences and special editions to mark this occasion reflecting upon the significant changes that have followed in the past decade. Without a doubt, the war on terror has worked numerous changes worthy of such attention and in particular the law has witnessed more than its fair share at both the national and the international level.

However, in this flurry of analysis it has been overlooked that in certain and significant ways the war on terror presents nothing new. Regardless of the legal framework, whether it is one of peace or under the rubric of the war on terror, the U.S. Government successfully has waged a campaign to deny Due Process to these individuals which effectively amounts to their indefinite detention. This article explores what explains the plight of these seemingly disparate groups despite provision in the U.S. Constitution for Due Process and its broader implications.

B. All in the Same Boat: The *Mezei* Principle and Indefinite Detention

The Due Process Clause of the Fifth Amendment provides that the U.S. Government cannot "deprive" any "person … of … liberty … without due process of law." [2] This constitutional protection extends to all "persons" within the jurisdiction of the U.S. regardless of their legal status. [3] In its understanding of a person, the Supreme Court has made physical presence in the U.S. a requirement for constitutional Due Process protections to apply. In *Shaughnessy v. United States ex rel. Mezei,* [*Mezei*] the Supreme Court stated:

> It is true that aliens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law. But an alien on the threshold of initial entry stands on a different footing: "Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned." [4]

In essence, *Mezei* stands for the principle that an alien [non-citizen] [5] outside of the territory of the U.S. does not qualify as a "person" for the purposes of the constitutional protection of Due Process. Although a seemingly uncontroversial principle of territoriality simply denying the extraterritorial application of the Constitution to non-citizens, it has served as the source of the indefinite detention of the Marielitos and Guantanamo Bay detainees who have been subject to a denial of Due Process.

Marielitos: Life with Parole

In total, approximately 125,000 Marielitos arrived in Florida in 1980. [6] Many were either sent back to Cuba pursuant to deals struck between Cuba and the U.S. shortly after their arrival or they were paroled into the U.S. pursuant to the Attorney General's authority under 8 U.S.C. § 1182(d)(5) of The Immigration and Nationality Act [INA]. [7] In U.S. immigration law, the term "parole" has a very specific meaning. A person who has been "paroled" under this section of the INA has not been "admitted" to the U.S. despite the fact that the individual, known as a "parolee" is permitted physical entry into the U.S. following inspection by an immigration officer. Rather,

> [a] parolee is an alien, appearing to be inadmissible to the inspecting officer, allowed into the United States for urgent humanitarian reasons or when that alien's entry is determined to be for significant public benefit. Parole does not constitute a formal admission to the United States and confers temporary status only, requiring parolees to leave when the conditions supporting their parole cease to exist. [8]

Although physically present in the U.S. amongst the general population living life with all of its trials and tribulations, parole allows the U.S. Government to regard parolees as never having entered the U.S. for purposes of immigration law and so creates a fiction; the "entry fiction"

which distinguishes actual physical presence from judicially recognized physical presence in the U.S. [9] Simply, parolees are not "within" the United States for legal purposes. Therefore, despite their prolonged and actual physical presence in the U.S., the Marielitos are considered to have the same Due Process rights as aliens seeking initial entry to the country at an inspection post. Given the ruling in *Mezei*, this territorial distinction is critical since it establishes that non-citizens outside the U.S. have no constitutional Due Process rights [10] with the ultimate result that a core group of Marielitos have been subject to indefinite detention. [11] Ultimately, the legislative creature of parole and its doctrine of entry fiction have made the *Mezei* principle the source of the indefinite detention of the Marielitos.

However, the situation of the Marielitos has changed via a long and drawn-out process of legal gymnastics involving a heady mix of U.S. immigration law and statutory interpretation. In *Clark v. Martinez*, [12] the Supreme Court held that the detention of an inadmissible non-citizen should be limited to a reasonable period of time which the Court interpreted to mean six months. [13] Yet this victory may still prove a hollow. Rather than grant constitutional rights to inadmissible non-citizens, the Court went to pains to explicitly avoid deciding the case on constitutional grounds. Rather, the Court decided on the grounds of the statutory interpretation of an immigration law; 8 U.S.C. § 1231(a)(6) of the INA. [14] Prior to *Martinez,* the Supreme Court considered § 1231(a)(6) in *Zadvydas v. Davis* and whether it authorized the Government to indefinitely detain an admitted non-citizen who had been ordered removed but where the Government could not effectuate his removal to another state. The Court found that such indefinite detention would raise "serious constitutional concerns" and so applied the canon of constitutional avoidance and construed the statute to contain a "reasonable time limitation". [15] Specifically, the Court in *Zadvydas* found that this construction was necessary in light of the constitutional requirement of Due Process and so it interpreted the statute to limit the non-citizen's post-removal-period detention to "a period reasonably necessary to bring about the alien's removal from the United States. It does not permit indefinite detention." [16] It limited this period where it was reasonably necessary to effectuate such removal to six months. [17] The same statute also applies to inadmissible non-citizens such as the Marielitos. In turn, in the years following *Zadvydas* the federal courts of appeals split over whether or not this interpretation applied to the situation of inadmissible non-citizens. Therefore, the Supreme Court took *Martinez,* another case concerning the Marielitos, to resolve this split. [18]

In *Martinez,* The Supreme Court stated that the "constitutional concerns that influenced [the] statutory construction in *Zadvydas* are not present for aliens … who have not been admitted to the United States." [19] In fact, mention of the Fifth Amendment right to Due Process is conspicuously absent in the *Martinez* opinion. Nonetheless, the Court held that since the statute applies to both categories of non-citizens, the Government may only detain inadmissible non-citizens beyond their post-removal-period also for a time that is reasonably necessary to

effectuate their removal. [20] In turn, the *Martinez* Court reached its decision by construing §1231(a)(6) of the INA in such a way that it does not distinguish between admissible and inadmissible non-citizens; in essence it followed a path of statutory interpretation noting that to give the post-removal-period language in the statute a different meaning for each category of aliens "would be to invent a statute rather than interpret one." [21] Ultimately then, the Supreme Court did not overrule *Mezei* but actually confirmed that there is a distinction between admissible and inadmissible non-citizens and that the detention of the latter does not raise constitutional concerns. In turn, this 'victory' for the Marielitos is really a quite limited vindication of human rights for the estimated 800-900 Marielitos who remain in detention. [22]

Guantanamo Bay Detainees: Here We Go Again

Non- citizens held at Guantanamo Bay also have been held subject to indefinite detention. In late 2001, the U.S. Government began to transfer both citizens and non-citizens captured on the battlefield in Afghanistan and later in Iraq as part of the broader war on terror to a detention facility at Guantanamo Bay Naval Base in Cuba. The first detainees actually arrived on January 11, 2002 and since then 779 individuals have been passed through its gates [23] with more individuals coming from Afghanistan than any other state. [24] Legal challenges to this detention quickly ensued with the first decisions from the Supreme Court in 2004. In *Rasul v. Bush [25]* the Supreme Court held that it had the power to hear federal habeas corpus petitions under 28 U.S.C. 2241 [26] from individuals, both citizens and non-citizens, held in Guantanamo Bay as the statute then did not make distinctions based on location. [27] However, it did not extend the constitutional guarantee of habeas corpus or any other constitutional rights including that of Due Process. It was not until 2008 in *Boumediene v. Bush [28]* that the Supreme Court ruled that all Guantanamo Bay detainees including non-citizens had the right to the constitutional guarantee of habeas corpus as provided for in the "Great Writ" known as the "Suspension Clause" which allows for individuals to challenge the legality of their detention. [29] In making this determination, the Court noted that the Constitution's extraterritorial application depends on "objective factors and practical concerns" [30] including: "(1) the citizenship and status of the detainee and the adequacy of the process through which that status determination was made; (2) the nature of the sites where apprehension and then detention took place; and (3) the practical obstacles inherent in resolving the prisoner's entitlement to the writ." [31]

Although a victory, it is limited and may prove hollow. The Supreme Court in *Boumediene* left open almost as many questions as it answered. Crucially, it did not speculate on the remedy available for those persons to be found unlawfully detained and nor the extent to which other constitutional provisions extend to non-citizens at Guantanamo. Following *Boumediene*, in *Rasul v. Myers [32]* four British nationals formerly detained at Guantanamo Bay sued for damages alleging that their treatment in custody violated their rights under the Fifth Amendment to Due

Process and under the Eighth Amendment to be free from cruel and unusual punishment as secured in the Constitution. The D.C. Circuit in rejecting this claim interpreted *Boumediene* on remand as "disclaim[ing] any intention to disturb existing law governing the extraterritorial reach of any constitutional provisions, other than the Suspension Clause". [33] In essence, in the circuit courts it appears that non-citizens detained at Guantanamo have no rights under the Constitution other than the right to petition of habeas corpus. More recently, in 2010 in *Kiyemba v. Obama*, [34] the D.C. Circuit held that although the constitutional writ of habeas enables Guantanamo Bay detainees to challenge the legality of their detention, habeas courts lack the authority absent the enactment of an authorizing statute to compel the transfer of a non-citizen detainee into the U.S. The D.C. Circuit found this to be the case even if the detainees are found to be unlawfully held and the government has been unable to secure their release to a foreign state. [35] The D.C. Circuit denied their release on a number of grounds but of significance here it gave its decision based on the long standing jurisprudence that underpins *Mezei*; the jurisprudence that constitutional protections do not apply to non-citizens outside of the U.S. The D.C. Circuit noted that "[t]he due process clause cannot support the court's order of release Decisions of the Supreme Court and of this court … hold that the due process clause does not apply to aliens without property or presence in the sovereign territory of the United States." [36] In essence, the court applied the *Mezei* principle that has made the Marielitos subject to indefinite detention to the non-citizen Guantanamo Bay detainees which denies them the constitutional protections of Due Process and rather posits that, "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned." [37] The Supreme Court has yet to rule if any other constitutional protections other than habeas corpus apply to the Guantanamo Bay detainees as it vacated the decision to review the *Kiyemba* case as other countries agreed to take the petitioners. [38] In turn, this victory like that of the Marielitos is a limited and tenuous at best for the 171 individuals that remain at Guantanamo Bay. [39]

C. **The Legal Lacuna and Its Progeny**

Ostensibly, the *Mezei* principle that constitutional protections do not apply to non-citizens outside of the U.S. has created this legal lacuna that both the Marielitos and Guantanamo Bay detainees find themselves thrown into; a lacuna where the U.S. Government has been allowed to wage a successful campaign of indefinite detention by denying both groups access to the protections of the U.S. Constitution. [40] Yet, a deeper and more fundamental concern is at work which accounts for this denial of human rights; a policy of judicial deference to the Executive and Congress. The indefinite detention of these seemingly disparate groups ultimately demonstrates not simply judicial restraint but judicial deference to political choices even at the cost of sacrificing the denial of liberty; a sacrifice that is grossly contrary to the fundamental American

scheme of justice [41] amongst other unpalatable results. This deference is evident in the decisions of courts concerning both groups.

As aforementioned, in *Kiyemba* the court denied the release of Guantanamo Bay detainees where the Government could not effectuate their removal despite their successful habeas corpus challenge on the long standing jurisprudence that underpins *Mezei* that constitutional protections do not apply to non-citizens outside of the U.S. [42] However, the court also explicitly relied on Mezei for its decision noting that it lacked the authority to order a prisoner held outside of the U.S. into the country absent a law to that effect.

> It "is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government to exclude a given alien." With respect to these seventeen petitioners, the Executive Branch has determined not to allow them to enter the United States. The critical question is: what law "expressly authorized" the district court to set aside the decision of the Executive Branch and to order these aliens brought to the United States and released in Washington, D.C.? The district court cited no statute or treaty authorizing its order, and we are aware of none. [43]

In turn, *Kiyemba* emerges as a stark example of judicial deference to the Executive and Congress. This has the effect of making the courts mere purveyors of advisory opinions which at least raises the specter of a constitutional concern as it is widely understood that Article III section 2 of the Constitution forbids the judicial branch to issue such opinions. [44]

> Of course, if it turns out that … the executive branch does not release winning petitioners because no other country will accept them and they will not be released into the United States, then the whole process leads to virtual advisory opinions. It becomes a charade prompted by the Supreme Court's defiant – if only theoretical – assertion of judicial supremacy, *see Boumediene*, 553 U.S. 723, sustained by posturing on the part of the Justice Department, and providing litigation exercise for the detainee bar. [45]

Furthermore in announcing the principle that the courts cannot admit a non-citizen into the U.S. by its own authority, the Kiyemba court claws back the fragile constitutional gains that the Supreme Court offered non-citizen detainees in Boumediene by eviscerating the constitutional protection of habeas corpus. [46]

> And so we ask again: what law authorized the district court to order the government to bring petitioners to the United States and release them here? It cannot be that because the court had habeas jurisdiction, it could fashion the sort of remedy petitioners desired. The courts in *Knauff* and in *Mezei* also had habeas jurisdiction,

> yet in both cases the Supreme Court held that the decision whether to allow an alien to enter the country was for the political departments, not the Judiciary. [47]

In doing so the court has ignored that habeas corpus is both a right and a remedy and without the latter the former becomes meaningless. Indeed, its entire function is to prevent unlawful imprisonment springing from an excess of Executive power [48] by offering the right to challenge the legality of detention and the typical remedy has been release. [49] In turn, *Kiyemba* violates one of the law's most basic tenets that for every wrong there must be a remedy. As Chief Justice Marshall noted in *Marbury v Madison,* "[t]he government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right." [50] However, in *Marbury* the Supreme Court could not issue a remedy as it lacked the jurisdiction; [51] demonstrating that in reality not every wrong receives a remedy as there remain the practical requirements of proof of the violation of a right and the power to exercise jurisdiction in order to issue relief.

The court in *Kiyemba* achieved this ability to deny a remedy by asserting that it lacked the later; the power to exercise jurisdiction by placing it within the strictures of immigration law. [52] However, this ignores that it is inappropriate to apply the framework of immigration law to the detainees in this particular case as well as the other Guantanamo Bay detainees as they were brought to Guantanamo against their will rather than voluntarily as is typical in immigration cases. [53] Moreover, even if this does not distinguish the Guantanamo Bay detainees and so they are properly within the immigration context, it also ignores the developments in immigration law in *Zadvydas [54]* and more appropriately *Martinez*, albeit is a precarious victory, where the Supreme Court through statutory interpretation ruled that where the Government cannot effectuate the removal of an inadmissible non-citizen indefinite detention is not permissible. [55] Finally, regardless of the immigration context, the court in *Kiyemba* undoubtedly after *Boumediene* has jurisdiction over the issue as this federal district courts possesses habeas jurisdiction; the power to determine whether the detainment of an individual is lawful or an abuse of Executive power and in the case of the latter to order the remedy of release to be free from unlawful detention. Therefore, neither the proof of the violation of a right and the power to exercise jurisdiction in order to issue relief are at issue here. However, the *Kiyemba* court still denied the remedy of release typically associated with habeas corpus by placing this analysis within the strictures of the immigration context. Ultimately, it is this placement that is at the root of the judicial deference in *Kiyemba* as it allows courts to apply the doctrine of plenary power. Indeed, the doctrine of plenary power also has been at the root of the deference in the case of the Marielitos. As regards the Marielitos, the Supreme Court explicitly refused to grant them and other non-citizens in a similar position any constitutional rights but rather decided *Martinez* on

the grounds of the statutory interpretation of an immigration law consistent with the doctrine of plenary power. [56]

The plenary power doctrine refers to the idea that something is so "exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference." [57] Undoubtedly, this doctrine seeks to preserve the sovereign role of the political branches and has been used extensively in immigration law tracing its roots to *The Chinese Exclusion Case* where the Supreme Court fleshed out its reasoning for its application to immigration noting:

> The power of exclusion of foreigners being an incident of sovereignty belonging to the government of the United States as a part of those sovereign powers delegated by the constitution, the right to its exercise at any time when, in the judgment of the government, the interests of the country require it, cannot be granted away or restrained on behalf of any one. [58]

The Court further added that any issues with the policy should be directed toward the political branches of the Government as it is solely entrusted with power over these matter and so it not a question for judicial determination [59]; thus establishing a hands off approach by the courts in the realm of immigration and in particular questions concerning the exclusion of non-citizens. However, this deference of the plenary doctrine relies on too simplistic of a conception of the institutional competence of the different branches of government. The Constitution does grant supreme power to Congress over immigration but not exclusive power. [60] In fact the Supreme Court has recognized that it is not possible "to delineate a fixed and precise line of separation in these matters between political and judicial power under the Constitution." [61] In turn, in this "zone of twilight" [62] the balance surely must tip in favor of protecting the most fundamental of rights to the American scheme of justice, the liberty of individuals to be the free from unlawful detention. Yet, the plenary power in both the cases of the Guantanamo Bay detainees and the Marielitos seems to have morphed from a doctrine of judicial restraint out of respect for the separation of powers enshrined in the Constitution into a creature of judicial deference which has been used by the judiciary as a mechanism for the abandonment of its constitutional role. After all, the judiciary in the U.S. has a strong tradition of [63] and indeed it is one of its primary functions to protect individuals against governmental excess. However, this increasing abnegation is exactly what the war on terror has allowed the judiciary to achieve through raising the specter of security concerns and risks.

D. Conclusions

Although the above principle of *Mezei* and judicial deference exist in both the rubric of peace and the war on terror with the result that both the Marielitos and Guantanamo Bay detainees have

been subject to indefinite detention, the war on terror has increased such deference. This increased deference is at the root of and is the most disconcerting of all the changes that the war on terror has worked by reaffirming a commitment to the doctrine of plenary power [64] through its importation from the framework of immigration law. The war on terror has affected such change as it offers a clear and simple framework for the courts to easily abandon their role to protect the rights of individuals against the excesses of government. Specifically, it offer courts broad and ambiguous terms like "security concerns" and "security risks" amongst other sound bites as an excuse for such abandonment which is almost unassailable in the current political climate and necessarily has increased such deference. Ironically, this is especially detrimental given that the stakes are so high within the context of the war on terror. Indeed, all one needs to do is examine how the war on terror has operated in regard to the detention of the Guantanamo Bay detainees to see how the dangers of such deference have resulted in a denial of constitutional protections. However, this importation of bad practice works both ways. The framework of the war on terror with its security concerns and risks has now seeped into immigration law which already limited the constitutional protections for inadmissible non-citizens such as the Marielitos through the doctrine of plenary power The war on terror only further makes achieving such protections unlikely. Justice O'Connor in her concurrence in *Martinez* noted that the U.S. Government has at its disposal, "other statutory means for detaining aliens whose removal is not foreseeable and whose presence poses security risks." [65] Namely, the U.S. Government has the USA PATRIOT Act which enables the Secretary of the Department of Homeland Security to detain non-citizens suspected of certain terrorist or dangerous activities for successive six month periods [66] provided that the "release of the alien will threaten the national security of the United States or the safety of the community or any person." [67] The implications of this observation are serious. The first is that international law concerns are essentially irrelevant which is not surprising given the U.S. approach to international law. [68] Second, this seems to conflate the Marielitos who are inadmissible with terrorists as most assuredly this language is broad and ambiguous enough to include inadmissible non-citizens who have been convicted of non-violent crimes [69] and served their sentences. Indeed, in *Martinez* the Supreme Court all but invited Congress to take such an interpretation by inviting them to correct§1231(a)(6) of the INA to allow the indefinite detention of inadmissible non-citizens, noting that if Congress "fears that the security of our borders will be compromised if it must release into the country inadmissible aliens who cannot be removed," it "can attend to it." [70] In fact, a bill to amend the INA which would have made the Supreme Court's decisions concerning indefinite detention in *Zadvydas* and *Martinez* moot was proposed in 2006. [71] Although it did not pass, it reinforces that the limited victory in *Martinez* remains just that as a result of the war on terror; limited and precarious.

These developments are unacceptable. There is a strong tradition supporting the notion that the primary role of the judicial branch is to protect the fundamental rights of individuals against the

excesses of the political branches. However, with the war on terror there is an identifiable trend towards deference to the political branches even in matters core to human dignity. The judiciary must work to reclaim its role as the defender of individual rights for the sake of fundamental scheme of American justice. [72] After all,

> [p]rocedural fairness and regularity are of the indispensable essence of liberty.... Let it not be overlooked that due process of law is not for the sole benefit of an accused. It is the best insurance for the Government itself against those blunders which leave lasting stains on a system of justice.... [73]

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Shaughnessy v. Mezei, 345 U.S. 206 (1953)

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U.S. Constitution

Xi v. INS, 298 F.3d 832 (9th Cir. 2002)

Zadvydas v. Davis, 533 U.S. 678 (2001)

Notes

[1]The Obama administration has abandoned the term war on terror coined by the Bush administration for the far less fire and brimstone laden "overseas contingency operations". *See* Burkeman, Oliver**.** (25 March 2009) "Obama administration says goodbye to 'war on terror'," *The Guardian*. Semantics aside, this re-branding does not change any of the issues or the analysis herein.

[2]U.S. Const. amend. V.

[3]*Ibid.*

[4]*Shaughnessy v. Mezei,* 345 U.S. 206 (1953) at 212. (internal citations omitted)

[5]The use of the term alien in U.S. immigration law refers to any non-citizen. "By definition, aliens are outsiders to the national community. Even if they have lived in this country for many years, have had children here, and work and have deep community ties in the United States, noncitizens remain aliens, an institutionalized "other," different and apart from "us."" Johnson, Kevin R. (1996) ""Aliens" and the U.S. Immigration Laws: The Social and Legal Construction of Nonpersons," *The University of Miami Inter-American Law Review* (28:2) p. 264. In turn, many commentators have criticized the use of this terminology as in addition to its obvious legal significance, it has latent racial undertones:

"The "term 'alien' is standard usage, but ... [has] a distancing effect and somewhat pejorative connotation." Gerald Neuman has observed that "[i]t is no coincidence that we still refer to noncitizens as 'aliens' a term that calls attention to their 'otherness' and even associates them with nonhuman invaders from outer space." Gerald Rosberg acknowledged that "[t]he very word, 'alien' calls to mind someone strange and out of place, and it has often been used in a pejorative way..." *Ibid* at 267. (citations omitted) In turn for the purpose of this analysis, the term alien will not be used but rather non-citizen bar when quoting from U.S. immigration laws.

[6]*See Palma v. Verdeyen*, 676 F.2d 100,101 (4th Cir. 1982) (recounting the facts of the Mariel Boatlift).

[7]*See* Immigration and Nationality Act of 1952, Ch. 477, 66 Stat. 163 (codified as amended in 8 U.S.C.) at § 1182(d)(5)(A) (2005).

[8]Department of Homeland Security, Definition of Terms, *available at* http://www.dhs.gov/files/statistics/stdfdef.shtm#15 (last accessed 1 June 2011); *see also op. cit* INA n.7 (making clear that such parole of inadmissible non-citizens is a privilege, not a right, and as such is a power that is not often exercised save in the situation of truly deserving cases.).

[9]Justice Douglas in his dissent alludes to the suitability of this term 'fiction' given that the doctrine allows the government to deny reality. "How an alien can be paroled 'into the United States' and yet not be 'within the United States' remains a mystery." *Leng May Ma v. Barber,* 357 U.S. 185, 192 (1958)(Douglas J., dissenting).

[10]*Op. Cit Mezei* n. 4 and accompanying text.

[11]Most parolees were "adjusted" to permanent resident status pursuant to the Immigration and Control Act of 1986. *See* Pub. L. No. 99-603, § 201(a)(1), 100 Stat. 3359, 3394 (codified as amended at 8 U.S.C. § 1255a (2005)). However, not all parolees could be adjusted. Specifically, those who committed and were convicted of certain crimes were rendered inadmissible under 8 U.S.C. § 212(a)(2005) of the INA. Initial reports that most of the Marielitos were criminals who fled from the prison gates that Castro opened proved much exaggerated but such a depiction will remain forever emblazoned on the mind of the popular culture as a result of films such as *Scarface.* However, in reality, of the 125,000 refugees that entered only 23,000 indicated to immigration officials that they had previous criminal convictions and among these most were for convictions that would not warrant detention in the U.S. However, two percent or 2,746 were considered criminals under U.S. law. *Mariel Boatlift,* Global Security Website, 7 May 2011 *available at* http://www.globalsecurity.org/military/ops/mariel-boatlift.htm (last accessed 8 November 2011). Some as aforementioned committed these offenses in Cuba while others committed and were convicted of crimes in the U.S. prior to their adjustment to permanent resident status. Regardless, removal proceedings were then initiated against these individuals but as the U.S. does not have a repatriation agreement with Cuba and as such an agreement has not materialized, these inadmissible Marielitos have been unable to be removed even after a final removal order has been entered against them. *See Clark v. Martinez*, 543 U.S. 371, 385 (2005). As other countries have proved unwilling to accept these Marielitos, the Secretary of the Department of Homeland Security asserted the right to detain these non-citizens indefinitely and indeed many have remained in detention for decades, long after having served a criminal sentence. *See* Carey, Michelle. (2003) "Comment, and "You Don't Know If They'll Let You Out in One Day, One Year, or Ten Years…" Indefinite Detention of Immigrants After Zadvydas v Davis," *Chicano-Latino L. Rev.* (24:12) p. 31.

[12]*Clark v. Martinez,* 543 U.S. 371 (2005).

[13]*Ibid* at 378.

[14] "An alien ordered removed [1] who is inadmissible . [2] [or] removable [as a result of violations of status requirements or entry conditions, violations of criminal law, or reasons of security or foreign policy] or [3] who has been determined by the Attorney General to be a risk to the

community or unlikely to comply with the order of removal, may be detained beyond the removal period and, if released, shall be subject to [certain] terms of supervision ." *Op. Cit* INA n.7 at § 1231(a)(6).

[15]*Zadvydas v. Davis,* 533 U.S. 678, 682 (2001).

[16]*Ibid* at 689.

[17]*Ibid* at 701.

[18]*Compare Sierra v. Romaine*, 347 F.3d 559(3d Cir. 2003) (holding that because constitutional protections do not apply to inadmissible aliens that § 1231(a)(6) authorizes their indefinite detention) and *Rios v. INS*, 324 F.3d 296 (5th Cir. 2003) (per curiam) (holding that the distinction between admissible and inadmissible aliens in *Zadvydas* to find that the indefinite detention of the latter does not violate the Due Process Clause of the Fifth Amendment) *with Rosales-Garcia v. Holland*, 322 F.3d 386 (6th Cir. 2003) (holding that as § 1231(a)(6) does not differentiate between admissible and inadmissible aliens and that the statute also contains a reasonableness limitation for inadmissible aliens) and Xi v. INS, 298 F.3d 832 (9th Cir. 2002) (holding that the *Zadvydas* six month presumption of reasonableness was also applicable to inadmissible aliens).

[19] *Op. Cit Martinez* n. 12 at 380.

[20]*Ibid* at 381.

[21]*Ibid* at 378.

[22]*Op Cit. Mariel Boatlift* n.11.

[23]Guantanamo Docket, The N.Y. Times, 27 September 2011 available at http://projects.nytimes.com/guantanamo/ (last accessed 8 November 2011).

[24]218 of the 779 detainees are Afghan. Of those forty-one percent are aged between twenty and thirty years old with another seven percent under twenty years old. The Guantanamo Bay Detainees- the full list, The Guardian, 25 April 2011available at http://www.guardian.co.uk/world/datablog/2011/apr/25/guantanamo-bay-detainees-full-list# (last accessed 8 November 2011).

[25]*Rasul v. Bush*, 542 U.S. 466 (2004).

[26] "We therefore hold that § 2241 confers on the District Court jurisdiction to hear petitioners' habeas corpus challenges to the legality of their detention at the Guantanamo Bay Naval Base." *Ibid* at 483.

[27] "Putting Eisentrager and Ahrens to one side, respondent contend that we can discern a limit on § 2241 through the application of the "longstanding principles of American law" that congressional legislation is presumed not to have extraterritorial application unless such intent it clearly manifested. Whatever traction the presumption against extraterritoriality might have in other contexts, it certainly has no application to the operation of the habeas statute with respect to persons detained within "the territorial jurisdiction" of the United States. By the express terms of its agreement with Cuba, the United States exercises "complete jurisdiction and control" over the Guantanamo Bay naval Base, and may continue to exercise such control permanently if it so chooses. Respondents themselves concede that the habeas statute would create federal-court-jurisdiction over the claims of an American citizen held in federal custody, there is little reason to think that congress intended the geographical coverage of the statute to vary depending on the federal courts' authority under § 2241." *Ibid* at 483. (internal citations omitted) The Government responded by passing the Detainee Treatment Act of 2005 and the Military Commissions Act of 2006 which removed jurisdiction from the courts to hear federal habeas petitions from Guantanamo detainees. *See* Detainee Treatment Act of 2005, Pub. L. 109-148, Title X and Pub. L. 109-63, Title XIV; Military Commissions Act of 2006, Pub. L. 109-366, 120 Stat. 2600 (Oct. 17, 2006).

[28]*Boumediene v. Bush,* 128 S. Ct. 2229 (2008).

[29] "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." U.S. Const. Art. 1 sec. 9 cl. 2. Habeas corpus literally translates as "that you have the body." Garner, Bryan A. (ed.) (2004) *Black's Law Dictionary 8th Edition*

[30]*Op. Cit Boumediene* n. 28 at 2258.

[31]*Ibid* at 2259.

[32]*Rasul v. Myers,* 563 F.3d 527 (D.C. Cir. 2009) (*per curiam), cert. denied,* 130 S. Ct. 1013 (U.S. Dec. 14, 2009).

[33]*Ibid* at 529.

[34]*Kiyemba v. Obama,* 555 F.3d 1022, *vacated,* 130 S. Ct. 1235 (2010).

[35]This case involves seventeen Uigurs who brought a successful habeas challenge to their detention and were held to no longer be enemy combatants. However, they could not be returned to China. "Releasing petitioners to their country of origin poses a problem. Petitioners fear that if they are returned to China they will face arrest, torture or execution. United States policy is not to transfer individuals to countries where they will be subject to mistreatment." *Ibid* at 1024.

[36]*Ibid* at 1026.

[37]*Op Cit. Mezei* n.4 at 212. (internal citations omitted)

[38]Through a combination of State Department negotiations and offers of help all of the petitioners have been resettled in Albania, Bermuda, Palau and Switzerland.

[39]As aforementioned, 779 individuals have been subject to detention at Guantanamo. See op cit. Guantanamo Docket n. 23. At present, 600 have been transferred while eight have died in custody leaving 171 subject to indefinite detention. Ibid. These remaining detainees comprise twenty-eight different nationalities with the bulk coming from Yemen. After Yemen and rounding out the top five are Afghanistan, Saudi Arabia, Algeria and Tunisia. Op Cit. The Guantanamo Bay Detainees n. 24.

[40]The other regime open to these refugees and detainees, which also includes a right to be free from indefinite detention and its corollary of Due Process, is international human rights law; both customary law and treaty law as the U.S. has ratified the International Covenant on Civil and Political Rights [ICCPR]. However, the approach of the U.S. to international law has meant that these protections also have not been available. As regards treaty law, the increasing use of non-self-executing declarations prevents the domestication of international human rights treaties and so denies litigants in the U.S. from invoking the greater protections of human rights that international law can sometimes offer where existing U.S. law does not comport with these obligations, claims and remedies. *See* Esterling, Shea. (2007) "The Illusion of Human Rights: The U.S. Constitution, Non-Self-Executing Declarations and Human Rights Treaty Law," *Malawi Law Journal* (1:2) p. 179 Customary law also has been an unsuccessful vehicle for litigants in the U.S. to found a right of action, especially in the case of the Marielitos despite initial short-lived success. *See Rodriguez –Fernandez v. Wilkinson,* 505 F. Supp. 787, 798 (D. Kan. 1980), *aff'd on other grounds,* 654 F.2d 1382 (10th Cir. 1981) (granting writ of habeas corpus and locating this remedy in customary international prohibition of arbitrary detention); *Soroa-Gonzales v. Civiletti,* 515 F. Supp. 1049, 1061 n. 18 (N.D. Ga. 1981) (noting in *obiter dictum* that Marielitos continued detention amounted to arbitrary detention in violation of the Universal Declaration of Human Rights and the American Convention on Human Rights.) On appeal of several consolidated cases involving the Marielitos, the Eleventh Circuit rejected the argument that these refugees had an actionable claim based on

international law. *See Garcia-Mir v. Meese* 788 F.2d 1446 (11th Cir. 1986). Judge Johnson concluded that international customary law such as a prohibition on indefinite detention cannot be invoked as a right of action in U.S. if a high ranking Executive branch official such as the Attorney General acted in violation of the law. *Ibid* at1453-55 ("Thus we hold that the executive acts here evident constitute a sufficient basis for affirming the trial court's finding that international law does not control.") *Ibid* at 1455. Judge Johnson noted that even if there was not a controlling executive act as the petitioners alleged, a controlling judicial act would still control; in particular the judicial decision of *Mezei. "*In *Jean v. Nelson,* we interpreted the Supreme Court's decision in *Mezei* to hold that even an indefinitely incarcerated alien "could not challenge his continued detention without a hearing." This reflects the obligation of the courts to avoid any ruling that would "*inhibit the flexibility of the political branches of government to respond to changing world conditions*...." *Ibid* (internal citations omitted)(emphasis added). This suggests at the real root of this indefinite detention is a policy of judicial deference which operates on the approach of U.S. courts to international law but also as will be demonstrated herein on domestic law.

[41]This language is evocative of the well-known and often quoted test formulated in *Duncan v. Louisiana* which refers to rights that are "fundamental to the American scheme of justice." *Duncan v. Louisiana,* 391 U.S. 145, 149 (1968). Specifically, it is the test for determining which rights in the Bill of Rights also have been made applicable to the states through a process known as incorporation. Undoubtedly, Due Process is just such a fundamental right being included twice in the Constitution; once at the Fifth Amendment as applied to the federal government and also in the Fourteenth Amendment as applied to the states and in the latter is the vehicle through which other protections in the Bill of Rights have been incorporated to constraint the actions of states.

[42]*Op. Cit* ns. 34-38 and accompanying text.

[43]*Op. Cit Kiyemba* n. 34 at 1026. (internal citations omitted)

[44]The Constitution provides that the "judicial power shall extend to all Cases [and] … Controversies ..." U.S. Const. Art. III sec. 2. The Supreme Court has understood this cases and controversies language to mean that it forbids all federal courts from issuing an advisory opinion. This was established as far back as 1793 when President George Washington asked the Supreme Court for advice on a point of international law concerning a treaty between the U.S. and France. Chief Justice John Jay informed the Executive by letter that it is not the role of the judiciary to give advisory opinions. *Reprinting* Letter from John Jay et al., U.S. Supreme Court Justices, to George Washington, President of the United States (Aug. 8, 1793). This constitutional precept has been consistently followed and developed under the doctrine of justiciability. *See Clinton v. Jones*, 117 S. Ct. 1636, 1647 & n.33 (1997) (noting the long-standing prohibition on Article III courts' providing advisory opinions and citing two centuries worth of case law in support of this prohibition).

[45]*Esmail v Obama*, (D.C. Cir. April 8, 2011) Silberman J., (concurring opinion) (internal citations partially omitted)

[46]*Op. Cit* ns. 28-31. The decision in *Boumediene* was clearly an effort by the Supreme Court to strike back at the political branches and reassert protection for its constitutional role. Specifically, the Court built upon its jurisprudence in *St. Cyr* which provided that Congress could not remove its habeas corpus jurisdiction to review challenges to certain non-citizens removal orders. *See INS v. St Cyr,* 533 U.S. 289 (2001). In making such a ruling the Supreme Court engaged the canon of constitutional avoidance to protect itself and it power of judicial review. *See* Morrison, Trevor W. (2006) "Constitutional Avoidance in the Executive Branch," *Colum. L. Rev*. (106:1189) p. 1233 (noting the use of the canon of constitutional avoidance in *St Cyr* by the Supreme Court in a self-protective way to prevent Congress from "arguably stripping the courts of an important and historic jurisdiction and remedy.") In *Boumediene*, the Court relied on this ruling in *St Cyr* to again preserve its own power by confirming and extending its understanding of habeas. *See* Neuman, Gerald L. (2010) "The Habeas Corpus Suspension clause After Bush v. Boumediene" *Colum. L. Rev* (110: 537) p. 541. Yet, clawing back these gains undoubtedly was the purpose of the court in *Kiyemba.* Justice Randolph who penned the

Kiyemba decision noted in a speech last year entitled "The Guantanamo Mess" that the Supreme Court was wrong from overturning him in *Boumediene* and virtually expressed contempt for their holding. "As the basis for the speech's title suggest, he compared the justices who reached it to characters in 'The Great Gatsby.' 'They were careless people,' he read. 'They smashed things up ... and let other people clean up the mess they had made.'" *A Right Without a Remedy,* N.Y. Times Editorial, 28 Feb. 2011 *available* at http://oppenheimer.mcgill.ca/A-Right-Without-a-Remedy (last accessed 29 June 2011).

[47]*Op. Cit Kiyemba* n. 34 at 1028. (internal citations omitted)

[48]*See Op. Cit Zadvydas* n. 15 at 699 (internal citations omitted) (noting that the "historic purpose of the writ [was], namely, to relieve detention by executive authorities without judicial trial.); *INS v. St Cyr*, 533 U.S. 289, 301 (2001) (recognizing that the historic purpose of habeas corpus "has been to relieve detention.")

[49]*See Munaf v Green*, 128 S. Ct 2007, 2221 (2008) ("Habeas is at its core a remedy for unlawful detention. The typical remedy for such detention is, of course release.")

[50]*Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

[51]This case resulted from a petition to the Supreme Court by William Marbury, who had been appointed by President John Adams in his last hours of office as Justice of the Peace in the District of Columbia but whose commission was not subsequently delivered. Marbury petitioned the Supreme Court to force Secretary of State James Madison to deliver the documents. Marbury based his claim on a portion of a law passed by Congress, The Judiciary Act of 1789, which gave the Supreme Court the power to issue writs of mandamus outside of its appellate jurisdiction granted to it in the Constitution. However, the Court denied Marbury's petition holding that the statute passed by Congress upon which he based his claim was unconstitutional and so the Court lacked the jurisdiction to issue the mandamus despite the existence of a right to a remedy. *Ibid* at 175-77. Incidentally, although the Supreme Court lost the battle as it forewent the power to issue writs of mandamus it won the war as it established it had the power of judicial review. As Chief Justice Marshall said "It is emphatically the province and duty of the Judicial Department to say what the law is." *Ibid* at 176.

[52]*Op. Cit* n. 47 and accompanying text.

[53]The Uighur detainees like others in Guantanamo Bay were brought there against their will. The Uighurs are a religious minority of Turkic Muslims in China. Persecuted, they fled to Afghanistan in the winter of 2001. Shortly after their arrival, the U.S. Government began its campaign against the Taliban which resulted in the destruction of the village where they had settled. The Uighurs again fled; this time over the border into Pakistan where they were eventually handed over by local villagers to U.S. forces in exchange for a bounty. Arun, Neil. (Jan. 11, 2007) "Guantanamo Uighurs' Strange Odyssey," *BBC News, available at* http://news.bbc.co.uk/1/hi/world/europe/6242891.stm (last accessed 29 June 2011).

[54]*Op. Cit ns* 15-18 and accompanying text.

[55]*Op. Cit ns* 12-21 and accompanying text.

[56]The Court offered that it was compelled to reach this statutory interpretation as result of the canon of constitutional avoidance. *See Martinez, op. cit* n. 12 at 381-2. It is a canon of statutory interpretation and in particular a method of substantive interpretation that stems from the principle that "[t]he court will not pass upon a constitutional question although properly presented by the record if there is also present some other ground upon which the case may be disposed of." *Ashwander v. Tenn. Valley Authority.,* 297 U.S. 288, 347 (1936) (Brandeis, J., concurring). Like the doctrine of plenary power it is rooted in judicial restraint; although it can result in judicial empowerment. *Op. Cit* n. 46 (noting that in

Boumediene the doctrine of constitutional avoidance was used by the Supreme Court to protect itself and it power of judicial review.); *see also* Morrison, *op. cit* n. 46 at 1208-10 (detailing how the canon of constitutional avoidance does not actually always fulfill its purpose as a tool of judicial restraint.) However, its use within the context of immigration law which couples it with the plenary power undoubtedly makes it use here a tool of restraint.

[57]*Harisiades v. Shaughnessy,* 342 U.S. 580, 588-89 (1952).

[58]*Chae Chan Ping v United States*, 130 U.S. 581, 609 (1889).

[59]*Ibid.*

[60]The Constitution provides that Congress has the power "[t]o establish an uniform Rule of Naturalization…" U.S. Const. Art. 1 sec. 8 cl. 4

[61]*Op. Cit Harisiades* n. 57 at 590.

[62]*Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579, 637 (1952) (Jackson J., concurring) (describing areas over overlapping constitutional authority between the different branches as a "zone of twilight").

[63]As Supreme Court Justice Ruth Bader Ginsberg notes"[m]any jurists in the United States regard constitutional review by the court in the human rights sphere as our nation's hallmark and pride. I agree." Ginsberg, Ruth Bader. (1996-97) "An Overview of Court Review for Constitutionality in the United States," *La. L. Rev.* (57:1019) p. 1024.

[64]Some scholars suggested that there had been an erosion of the plenary power doctrine. *See* T.A. Aleinikoff, T.A. (2002). *Semblances of Sovereignty: The Constitution, the State, and American Citizenship,* pp. 153-65. The war on terror has reversed this trend.

[65]*Op. Cit Martinez* n. 12 at 387. (O'Connor J., concurring)

[66]*Op. Cit* INA n. 7 at 8 § 1226(a)(3) (2000 & Supp. II 2002).

[67]*Ibid* at § 1226(a)(6).

[68]*Op. Cit* n. 40.

[69]As aforementioned, the reason that a core group of Marielitos have been indefinitely detained is due to the fact that they were rendered inadmissible as they had been convicted of certain crimes under 8 U.S.C. § 212(a)(2005) of the INA. However, these crimes do not have to be violent or serious. *Ibid.*

[70]*Op. Cit Martinez* n. 12 at 386.

[71]*See* Comprehensive Enforcement and Immigration Reform Act of 2006, S. 2611, 109th Cong., 2d Sess., Title II, § 202(b)(1)(C)(2006).

[72]Also for the sake of international law as well as undoubtedly these changes at the domestic level will impact international norms.

[73] *Op. Cit Mezei* n. 4, at 224-5 (Jackson, J., dissenting)