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GONZALEZ V. ASHCROFT, 278 F. Supp. 2D 402 (D.N.J. 2003)

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FACTS

Xiomara Gonzalez (Petitioner) is a citizen of Cuba who came to the United States on or about June 21, 1980 as part of the Mariel boat lift[1] from Cuba to Florida.[2] Petitioner was granted discretionary parole into the United States under the former Section 212(d)(5) of the Immigration and Nationality Act[3] on or about August 23, 1980, and has since resided in the United States.[4] In March 1987, Petitioner was convicted of carrying a concealed weapon in violation of Florida law and trafficking in cocaine.[5] In April 1988, Petitioner filed for permanent resident status pursuant to the Cuban Adjustment Act[6], but the district director of the Immigration and Naturalization Service (INS) in Miami, Florida deemed Petitioner ineligible for adjustment of status due to her conviction for trafficking in cocaine.[7] In May 1995, Petitioner was convicted in New Jersey of distribution/possession with intent to distribute cocaine and sentenced to twenty years in prison.[8] In August 1995, the INS revoked her parole, but Petitioner remained in the custody of the State of New Jersey.[9]

On June 26, 2002, the INS served a Notice to Appear on Petitioner, initiating removal proceedings based on Petitioner's 1987 drug trafficking conviction.[10] The following day, the Cuban Review Panel[11] performed a custody review and decided to detain Petitioner.[12] In July 2002, Petitioner was transferred to the custody of the INS and on July 26, 2002, an immigration judge issued a final order of removal.[13] The INS has detained

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[1] The Mariel boat lift occurred between April and October of 1980 when "Fidel Castro permitted any person who wanted to leave Cuba free access to depart from the port of Mariel, Cuba" and "approximately 124,000 undocumented Cuban migrants entered the United States by a flotilla of mostly [United States] vessels in violation of [United States] law." GLOBALSECURITY.ORG, MARIEL BOATLIFT (2004), *at* http://www.globalsecurity.org/military/ops/mariel-boatlift.htm (last modified Oct. 12, 2003).

[2] Gonzalez v. Ashcroft, 278 F. Supp. 2d 402, 403 (D.N.J. 2003).

[3] Immigration and Nationality Act, 8 U.S.C. § 1182(d)(5) (2003).

[4] *Gonzalez*, 278 F. Supp. 2d at 404.

[5] *Id.*

[6] Cuban Refugee Adjustment Act, Pub. L. No. 89-732, 80 Stat. 1161 (1969).

[7] *Gonzalez*, 278 F. Supp. 2d at 404.

[8] *Id.*

[9] *Id.* at 405.

[10] *Id.*

[11] The Cuban Review Plan, promulgated by the Immigration and Naturalization Service in 1987 by final rule, establishes a separate immigration parole review process for certain detained, excludable nationals of Cuba who came to the United States during the 1980 Mariel Cuban boatlift. *See* 8 C.F.R. § 212.12 (2003). The regulation establishes several levels of review to determine whether certain detained, excludable Mariel Cubans should be paroled, and sets forth the procedures and factors for consideration governing such parole decisions. *See* 8 C.F.R. § 212.12(d) (2003). The regulation also requires a yearly parole review for continued detention cases. 8 C.F.R. § 212.12(g)(2) (2003).

[12] Gonzalez v. Ashcroft, 278 F. Supp. 2d 402, 405 (D.N.J. 2003).

[13] *Id.*

Petitioner at the Hudson County Correctional Center in New Jersey since July 2002.[14]

Petitioner made several requests for an impartial parole hearing but received no response from the INS.[15] On June 26, 2002, Petitioner submitted a parole request packet to the Cuban Review Panel but received no response. On October 3, 2002, Petitioner submitted a written inquiry to the panel and again received no response. On October 21, 2002, Petitioner again requested a parole hearing to the Cuban Review Panel but received no response. Petitioner then filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241 in the U.S. District Court for the District of New Jersey, challenging her continued detention by the INS on constitutional and statutory grounds.[16] Petitioner argued that her continued post-removal-period detention violated her Fifth Amendment right to due process of law because it exceeded the presumptive reasonable detention period set out in *Zadvydas v. Davis*.[17] Petitioner also argued that her continued detention was unlawful under the Cuban Review Plan absent meaningful and periodic custody reviews.[18]

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[14] *Id.*

[15] *Id.*

[16] *Id.* at 403.

[17] Zadvydas v. Davis, 533 U.S. 678 (2001). In *Zadvydas*, the Supreme Court considered the government's statutory authority to detain indefinitely "aliens who were admitted to the United States but subsequently ordered removed." *Id.* at 682. In addressing this question, the Court considered and consolidated two conflicting circuit decisions, Zadvydas v. Underdown, 185 F.3d 279 (5th Cir. 1999), and Kim Ho Ma v. Reno, 208 F.3d 815 (9th Cir. 2000). In 1994, the INS ordered Kestutis Zadvydas, a resident alien of Lithuanian descent, deported to Germany due to his criminal record. *Zadvydas*, 533 U.S. at 684. When Germany refused, the INS kept him in custody after expiration of the statutory removal period. *Id.* Zadvydas then filed a petition for a writ of habeas corpus and a Federal District Court granted the petition. *Id.* at 685. The Fifth Circuit reversed, concluding that "Zadvydas's continued detention did not violate the Constitution because eventual deportation was not 'impossible,' good faith efforts to remove him from the United States continued, and his detention was subject to periodic administrative review." *Id.* Conversely, in *Ma*, the Ninth Circuit ordered an alien's release under similar circumstances, concluding that the statute did not authorize detention for more than ninety days. *Id.* at 686. Ma was born in Cambodia and eventually fled to the United States. *Id.* at 685. When INS ordered his removal, Ma filed a petition for writ of habeas corpus, which a five-judge panel of the U.S. District Court for the Western District of Washington granted, holding that the Constitution forbids post-removal-period detention unless there was a realistic chance of deportation. *Id.* at 686. The Supreme Court of the United States vacated both decisions and remanded the cases for further proceedings. *Id.* at 702. In doing so, the Court held that 8 U.S.C. § 1231(a)(6) "limits an alien's post-removal-period detention to a period reasonably necessary to bring about that alien's removal from the United States." *Id.* at 689. The Court recognized six months as the presumptive reasonable period of detention upon which to effectuate removal of the alien. *Id.* at 701. "After this 6-month period, once the alien provides good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future, the Government must respond with evidence sufficient to rebut that showing." *Id.*

[18] Gonzalez v. Ashcroft, 278 F. Supp. 2d 402, 415 (D.N.J. 2003).

HOLDING

The U.S. District Court for the District of New Jersey denied in part and granted in part the petition for a writ of habeas corpus.[19] The court found that Petitioner had not effected entry into the United States and thus was an inadmissible alien based on her criminal history.[20] Consequently, the court held that Petitioner's status as an inadmissible alien distinguished her from the petitioners in *Zadvydas v. Davis* and thus her detention was not subject to the requirements that the Supreme Court handed down in *Zadvydas*.[21] Accordingly, the court held that "Petitioner's continued detention is . . . constitutional so long as it meets the individualized parole review provisions set forth in 8 C.F.R. § 212.12."[22] The court granted the petition, ordering the INS to convene the Cuban Review Panel within thirty days to evaluate Petitioner's parole requests and stating that it would grant the writ of habeas corpus and order Petitioner released if the Review Panel failed to do so.[23]

ANALYSIS

The court first addressed the Petitioner's constitutional claim that her continued post-removal-period detention violated her Fifth Amendment right to due process of law because it exceeded the six-month presumptive reasonable detention period set out in *Zadvydas v. Davis*.[24] In response, the government argued that the *Zadvydas* holding did not apply to Petitioner because she was neither a lawful resident nor an alien "admitted" to the United States.[25] The court, citing a range of statutory authority and precedents holding that "an alien paroled into the United States has not effected an 'entry,'" found that petitioner had not effected entry into the United States.[26]

Petitioner argued that she was not on the "threshold of entry" because of her familial ties and length of residence in the United States, but the court dismissed this line of reasoning as not conforming with precedent.[27] Specifically, the court noted that paroled aliens "are legally considered to be

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[19] *Id.* at 416.
[20] *Id.* at 407.
[21] Zadvydas v. Davis, 533 U.S. 678 (2001).
[22] *Gonzalez*, 278 F. Supp. 2d at 409.
[23] *Id.* at 417.
[24] *Id.* at 406.
[25] *Id.*
[26] *Id.* at 406–07 (citing Zadvydas v. Davis, 533 U.S. 678, 693 (2001); Leng May Ma v. Barber, 357 U.S. 185, 188–90 (1958); Delgado-Carrera v. I.N.S., 773 F.2d 629, 632 (5th Cir. 1985)).
[27] *Id.* at 407.

detained at the border and hence as never having effected entry into this country."[28] The court further found that Petitioner's 1987 and 1995 convictions for trafficking in cocaine rendered her an inadmissible alien under 8 U.S.C. § 1182(a)(2)(A).[29]

After establishing Petitioner's status as an inadmissible alien, the court noted that *Zadvydas* applies only to aliens who have effected entry into the United States and not inadmissible aliens such as Petitioner.[30] The court further emphasized that *Chi Thon Ngo v. I.N.S.*[31] was controlling precedent.[32] That case held that "excludable aliens with criminal records as specified in the Immigration Act may be detained for lengthy periods when removal is beyond the control of the INS, *provided that appropriate provisions for parole are available.*"[33] The Petitioner argued that the holding of *Chi Thon Ngo* was no longer valid after *Zadvydas*, but the court rejected that argument, choosing to follow instead the decision of the U.S. District Court for the Middle District of Pennsylvania in *Soto-Ramirez v. Ashcroft*[34] and its own decision in *Chavez-Rivas v. Olsen*[35] that *Chi Thon Ngo* remains good law.[36]

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[28] *Id.* (citing Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206, 215 (1953); Kaplan v. Tod, 267 U.S. 228, 230 (1925); Gisbert v. United States Atty. Gen., 988 F.2d 1437, 1440 (5th Cir. 1993)).

[29] *Id. See also* 8 U.S.C. § 1182(a)(2)(A)(II) (2003) (stating that any alien who is convicted of "a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States or a foreign country relating to a controlled substance" is inadmissible).

[30] Gonzalez v. Ashcroft, 278 F. Supp. 2d 402, 408 (D.N.J. 2003) (citing Zadvydas v. Davis, 533 U.S. 678, 692–94 (2001)).

[31] Chi Thon Ngo v. I.N.S., 192 F.3d 390 (3d Cir. 1999). In *Chi Thon Ngo*, the U.S. Court of Appeals for the Third Circuit considered whether excludable aliens who have committed serious crimes in this country may be detained in custody for prolonged periods when the country of origin refuses to allow the individual's return. *Id.* at 392. In *Chi Thon Ngo*, the petitioner was a Vietnamese national whose parole was revoked because of criminal convictions for possession of a firearm and attempted robbery. *Id.* The court held that "excludable aliens with criminal records as specified in the Immigration Act may be detained for lengthy periods when removal is beyond the control of the INS, provided that appropriate provisions for parole are available." *Id.* at 398.

[32] *Gonzalez*, 278 F. Supp. 2d at 409.

[33] *Id.* (emphasis in original).

[34] Soto-Ramirez v. Ashcroft, 228 F. Supp. 2d 566 (M.D. Pa. 2002). In *Soto-Ramirez*, the United States District Court for the Middle District of Pennsylvania considered whether a Cuban national's continued detention while awaiting removal violates his Fifth Amendment right to due process of law and constitutes cruel and unusual punishment in violation of the Eighth Amendment. *Id.* at 567. The petitioner had been paroled into the United States, but his parole was revoked after he "demonstrated a propensity to engage in assaultive criminal behavior," and the INS eventually deemed him excludable. *Id.* at 568. Petitioner filed a petition for a writ of habeas corpus under 28 U.S.C. § 2241. *Id.* at 567. In denying the petitioner the writ sought, the court noted that "the Third Circuit [had] dealt specifically with the constitutionality of prolonged detention of inadmissible aliens whose country of citizenship will not allow repatriation" and held that "excludable aliens with criminal records as specified in the Immigration Act may be detained for lengthy periods when removal is beyond the control of the INS, provided that appropriate provisions for parole are available." *Id.* at 572–73 (quoting Chi Thon Ngo v. I.N.S., 192 F.3d 390, 398 (3d Cir. 1999)).

[35] Chavez-Rivas v. Olsen, 207 F. Supp. 2d 326 (D.N.J. 2002). *Chavez-Rivas* also dealt with the constitutionality of the prolonged detention of a Mariel Cuban who had been paroled into the United States, but whose parole was later revoked after being convicted for drug-related crimes. *Id.* at 328–29. In denying the petitioner the writ of habeas corpus sought, the court also noted that "the Third Circuit had

Consequently, the court held that Petitioner's continued detention was constitutional "as long as it meets the individualized parole review provisions set forth in 8 C.F.R. § 212.12."[37] Further bolstering its holding, the court noted that a majority of circuits that have addressed the issue, including the Fifth, Seventh, and Eighth Circuits, as well as a number of district courts, have rejected similar post-*Zadvydas* claims by Mariel Cubans.[38] Moreover, the court noted that it had previously held that the *Zadvydas* reasonable post-removal-period timeframe did not apply to inadmissible Mariel Cubans.[39]

Having rejected Petitioner's constitutional arguments under the Fifth Amendment, the court considered whether there was statutory authority to detain Petitioner.[40] First, the INS contended that, under Section 236(e) of the former Immigration and Nationality Act,[41] it had statutory authority to detain Petitioner.[42] Former section 236(e) of the Immigration and National Act (INA) requires the Attorney General to "take into custody any excludable alien convicted of an aggravated felony" and not release such felon unless he determines both (1) that the alien's country of origin had denied or unduly delayed deportation and (2) that the alien will not pose a danger to society if released.[43] The court rejected, however, the INS's contention that there was authority to detain Petitioner under former INA section 236(e), finding that, although it was undisputed that Cuba had "denied or unduly delayed acceptance of the return of Petitioner," the INS or the Attorney General had made an insufficient showing that Petitioner posed a danger if released.[44]

Next, the court considered the INS's arguments that Petitioner could be detained as an excludable alien ordered deported based on a criminal conviction for a drug trafficking crime under 8 U.S.C. §§ 1231(a)(1) and (a)(2).[45] The court again rejected the INS's contentions.[46] The court noted that § 1231(a)(1) required the Attorney General to remove the alien within

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already upheld the constitutionality of the indefinite detention of aliens having the same legal status as Chavez-Rivas." *Id.* at 330 (citing *Chi Thon Ngo v. I.N.S.*, 192 F.3d 390, 398 (3d Cir. 1999)).

[36] Gonzalez v. Ashcroft, 278 F. Supp. 2d 402, 409 (D.N.J. 2003).

[37] *Id.*

[38] *Id.* at 409–10. *See Rios v. I.N.S.*, 324 F.3d 296 (5th Cir. 2003) (rejecting the post-*Zadvydas* habeas corpus petition of a Mariel Cuban); Borrero v. Aliets, 325 F.3d 1003 (8th Cir. 2003) (same); Hoyte-Mesa v. Ashcroft, 272 F.3d 989 (7th Cir. 2001) (same); Morales v. Conley, 224 F. Supp. 2d 1070 (S.D.W.V. 2002) (same); Hernandez-Nodarse v. United States, 166 F. Supp. 2d 538 (S.D. Tex. 2001) (same); Fernandez-Fajardo v. I.N.S., 193 F. Supp. 877 (M.D. La. 2001) (same).

[39] *Gonzalez*, 278 F. Supp. 2d at 410–11 (citing Herrero-Rodriguez v. Bailey, 237 F. Supp. 2d 543, 547–548 (D.N.J. 2002); Damas-Garcia v. United States, Civ. No. 01-716(JBS), 2001 U.S. Dist. LEXIS 17498, *5 (D.N.J. Oct. 17, 2001)).

[40] *Id.* at 411.

[41] 8 U.S.C. § 1226(e) (1994).

[42] Gonzalez v. Ashcroft, 278 F. Supp. 2d 402, 411 (D.N.J. 2003).

[43] 8 U.S.C. §§ 1226(e)(1)–(3) (1994).

[44] *Gonzalez*, 278 F. Supp. 2d at 411–12.

[45] *Id.* at 412.

[46] *Id.*

ninety days and that § 1231(a)(2) authorized the Attorney General to detain the alien only during that ninety day period.[47] The court held that as Petitioner was first detained by the INS on July 1, 2002, the INS's statutory authority to detain Petitioner under 8 U.S.C. § 1231(a) ended on or about September 30, 2002.[48]

Finally, the court considered the INS's contention that statutory authority existed to detain Petitioner under 8 U.S.C. § 1231(a)(6).[49] Section 1231(a)(6) provides:

> An alien ordered removed who is inadmissible under section 1182 of this title, removable under section 1227(a)(1)(C), 1227(a)(2), or 1227(a)(4) of this title or who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, may be detained beyond the removal period and, if released, shall be subject to the terms of supervision in paragraph (3).[50]

Although it was undisputed that Petitioner qualified as an inadmissible alien based on her criminal history and thus fell under the ambit of § 1231(a)(6), Petitioner argued that the *Zadvydas* decision required that the temporal limit apply to all detainees under § 1231(a)(6) because it specifically interpreted § 1231(a)(6) to include a six-month time limit on post-removal-period detention.[51] The Court, however, rejected Petitioner's arguments and instead held that there was statutory authorization for her detention under § 1231(a)(6).[52] The court, following *Borrero v. Aliets*,[53] held "that the *Zadvydas* reasonable time period limitation on post-removal-period detention [was] limited to admitted aliens."[54]

Lastly, Petitioner argued that, under the Cuban Review Plan[55] and the Third Circuit's decision in *Chi Thon Ngo v. I.N.S.*,[56] she was entitled to

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47 *Id.*

48 *Id.*

49 *Id.*

50 8 U.S.C. § 1231(a)(6) (2003).

51 Gonzalez v. Ashcroft, 278 F. Supp. 2d 402, 413 (D.N.J. 2003). *See* Rosales-Garcia v. Holland, 322 F.3d 386 (6th Cir. 2003), *cert. denied*, 123 S. Ct. 2607 (2003) (finding it "difficult to believe that the Supreme Court in *Zadvydas* could interpret § 1231(a)(6) as containing a reasonableness limitation for aliens who are removable on grounds of deportability but not for aliens who are removable on grounds of inadmissibility); Lin Guo Xi v. United States Immigration & Naturalization Serv., 298 F.3d 832 (9th Cir. 2002) (concluding that the petitioner fell within ambit of § 1231(a)(6) and, consequently, within the Court's holding in *Zadvydas*).

52 *Gonzalez*, 278 F. Supp. 2d at 415.

53 Borrero v. Aliets, 325 F.3d 1003 (8th Cir. 2003).

54 *Gonzalez*, 278 F. Supp. 2d at 415.

55 8 C.F.R. § 212.12.

56 Chi Thon Ngo v. I.N.S., 192 F.3d 390 (3d Cir. 1999).

meaningful and periodic individualized custody review.[57] Under the Cuban Review Plan, Mariel Cubans are to be provided with a parole review by a two-member Cuban Review Panel within three months of detainment and a subsequent review at least once a year thereafter.[58] In this case, Petitioner did receive an initial parole review on June 27, 2002, but failed, despite her repeated requests, to receive any subsequent reviews.[59] Consequently, the court found that the INS violated the Cuban Review Plan and ordered the INS to convene a Cuban Review Panel within thirty days of the decision.[60] The court further noted that it would grant the writ of habeas corpus and order Petitioner released if the Panel did not convene within thirty days.[61]

CONCLUSION

> Two decades ago, in 1980, the United States made the decision as a nation to allow over 100,000 refugees to emigrate from Cuba to our shores. We tempered our welcome, however, by treating these Cuban immigrants as though they were still in the perpetual legal limbo of an immigrant just outside our territorial borders, with all the limitations on personal rights and liberties that derive from that status.[62]

The Fifth Amendment to the Constitution provides, in relevant part, that "no *person* shall be . . . deprived of life, liberty, or property, without due process of law . . . ."[63] In *Zadvydas v. Davis*, the Supreme Court noted that the Due Process Clause of the Fifth Amendment applies to all "persons" within the United States, "including aliens, whether their presence here is lawful, unlawful, temporary, or permanent,"[64] yet simultaneously held that the constitutional protections secured by the Due Process Clause "are unavailable to aliens outside our geographical borders," even if that "geographical border" is but a mere legal fiction.[65] The court in *Gonzalez v. Ashcroft* carried on this [un]constitutional distinction by finding that, even

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[57] Gonzalez v. Ashcroft, 278 F. Supp. 2d 402, 415 (D.N.J. 2003).

[58] 8 C.F.R. §§ 212.12(g)(1)–(3).

[59] *Gonzalez*, 278 F. Supp. 2d at 416.

[60] *Id.*

[61] *Id.* at 417.

[62] Chavez-Rivas v. Olsen, 207 F. Supp. 2d 326, 327–28 (D.N.J. 2002).

[63] U.S. CONST. amend. V.

[64] Zadvydas v. Davis, 533 U.S. 678, 693 (2001) (citing Plyler v. Doe, 457 U.S. 202, 210 (1982); Mathews v. Davis, 426 U.S. 67, 77 (1976); Kwong Hai Chew v. Colding, 344 U.S. 590, 596–98 (1953); and Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886)).

[65] *See id.* (noting that "it is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographical borders" and citing United States v. Verdugo-Urquidez, 494 U.S. 259, 269 (1990), for the proposition that Fifth Amendment due process protections do not apply to aliens outside the country's territorial borders).

though she had lived in the United States for over two decades, Petitioner had not effected "entry" into the United States and thus was not eligible for the constitutional protections to indefinite detention set out in *Zadvydas*.[66] Although both *Zadvydas* and *Gonzalez* are well-reasoned decisions that follow established precedent, it is difficult to view these outcomes as anything but constitutionally absurd, permitting the government to treat individuals such as Gonzalez, who have lived within the United States for two decades, as if they were "continuously knocking at the gate."[67]

Gonzalez v. Ashcroft interprets the Supreme Court's decision in *Zadvydas* and its six-month presumptively reasonable limit on post-removal-period detention as limited to aliens "within" the United States and thus inapplicable to "parolees" because the Immigration and Naturalization Act[68] considers them as not having "entered" the United States. The INA provides, in relevant part, that "the Attorney General may . . . in his discretion parole into the United States temporarily . . . for urgent humanitarian reasons or significant public benefit any alien applying for admission to the United States, but such parole of such alien shall not be regarded as an admission of the alien . . . ."[69] It was under this provision that in 1980, over 125,000 "Marielitos" were paroled into the United States after having fled Cuba through the Cuban port of Mariel.[70] Thereafter, most Marielitos eventually attained permanent resident status, but thousands made the mistake of committing crimes while paroled and thus found themselves trapped in this legal fiction.[71]

This [un]constitutional and arbitrary distinction rests upon the weight of Justice Holmes's majority opinion in *Kaplan v. Tod*,[72] which stated that

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[66] Gonzalez v. Ashcroft, 278 F. Supp. 2d 402, 406–07 (D.N.J. 2003).

[67] *See generally* Note, *Indefinite Detention of Immigrant Parolees: An Unconstitutional Condition?*, 116 HARV. L. REV. 1868 (2003).

[68] 8 U.S.C. §§ 1101–1537 (2003).

[69] 8 U.S.C. § 1182(d)(5)(A) (2003).

[70] *See generally* T. Alexander Aleinikoff, *Detaining Plenary Power: The Meaning and Impact of Zadvydas v. Davis*, 16 GEO. IMMIGR. L. J. 365, 375–78 (2002).

[71] *Id.* at 377.

[72] Kaplan v. Tod, 267 U.S. 228 (1925). In *Kaplan*, the Supreme Court considered whether a minor had effected entry into the United States when, after being ordered to be excluded, she was turned over to a humanitarian group after her deportation was suspended because of World War I. *Id.* at 229. Kaplan was born in Russia and came to the United States with her mother in July, 1914. *Id.* At the time, Kaplan was thirteen years old and came to the United States in order to join her father, who was already here. *Id.* Upon her arrival at Ellis Island, however, she was certified to be "feeble minded" and ordered deported. *Id.* Kaplan was detained at Ellis Island until June, 1915, when she was handed over to the custody of the Hebrew Sheltering and Immigrant Aid Society, and then the Society allowed her to live with her father. *Id.* In December 1920, her father was naturalized a citizen when she was still a minor. *Id.* In January 1923, Kaplan was again ordered deported and she filed a petition for a writ of habeas corpus in the U.S. District Court for the Southern District of New York. *Id.* The district court denied Kaplan's petition, and she appealed directly to the Supreme Court. Before the Supreme Court, Kaplan argued that she became a citizen by the naturalization of her father when she was a minor and in the

despite an excluded alien's nine years in the United States, he was "in theory of law at the boundary line and had gained no foothold in the United States."[73] The Supreme Court reaffirmed this notion in *Shaughnessy v. United States ex rel. Mezei*,[74] citing *Kaplan* to hold that an alien detained indefinitely at Ellis Island had not effected entry into the United States.[75] It is upon this distinction that the *Zadvydas* Court limited its decision, and suggested that a parolee would be unable to challenge the constitutionality of immigration proceedings, including her long-term detention, to remove her from the United States.[76] Accordingly, a Mariel parolee, such as Gonzalez, is treated as an initial applicant for admission to the United States without any Due Process rights regarding her immigration status, regardless of the fact that she has literally resided in this country since June 1980.[77]

The constitutional problems of this situation are readily apparent to even the most casual observer, yet this fiction continues to distinguish

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United States. *Id.* at 230. Justice Holmes, writing for a 7-2 majority, dismissed Kaplan's arguments, emphasizing that naturalization of parents affects children only "if dwelling in the United States." *Id.* The Court found that because Kaplan was feeble-minded and had been ordered deported in 1914, she "was still in theory of law at the boundary line and had gained no foothold in the United States" and thus was not dwelling in the United States when her father was naturalized. *Id.* at 230.

[73] *Id.* at 230. *See also* Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206, 215 (1953) (holding that an excludable alien "is treated as if stopped at the border").

[74] Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206 (1953). In *Mezei*, the Court considered the habeas corpus petition of a Hungarian immigrant who had lived in the United States from 1923 to 1948, traveled abroad to Hungary for nineteen months and was detained at Ellis Island on his return. *Id.* at 207–09. Petitioner was eventually permanently excluded from the Unites States on security grounds, yet was stranded on Ellis Island because the Attorney General was unable to effect his deportation. *Id.* at 207. After twenty-one months of confinement, the U.S. District Court for the Southern District of New York sustained the petitioner's writ, finding that the continued detention was excessive and justifiable only by affirmative proof of the petitioner's danger to the public. *Id.* at 209. The U.S. Court of Appeals for the Second Circuit affirmed the district court's decision, holding that the petitioner's confinement was no longer justifiable as a means of removal elsewhere, thus not authorized by statute and in violation of due process. *Id.* (citing Shaughnessy v. United States ex rel. Mezei, 195 F.2d 964, 967–69 (2d Cir. 1952)). Judge Learned Hand dissented, arguing that this was a case of "exclusion" and that the petitioner's transfer from ship to shore granted him no due process rights. *Id.* at 209–10 (citing Shaughnessy v. United States ex rel. Mezei, 195 F.2d 964, 970 (2d Cir. 1952)). The Supreme Court reversed, siding with Judge Hand's dissent, and noted that Congress's power to exclude aliens is a fundamental one largely outside the control of the judiciary. *Id.* at 210. The Court emphasized that the petitioner's harborage at Ellis Island was not an entry into the United States, and thus, neither his harborage on Ellis Island nor his prior residence in the United States transformed the case into something other than an exclusion case. *Id.* at 213. The Court held that "temporary harborage [on Ellis Island], an act of legislative grace, bestows no additional rights," and thus the petitioner's continued detention did not deprive him of any due process right because "whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned." *Id.* at 212, 215 (quoting Knauff v. Shaughnessy, 338 U.S. 537, 544 (1950)).

[75] *Id.* at 215.

[76] Zadvydas v. Davis, 533 U.S. 678, 682 (2001) ("We deal here with aliens who were admitted to the United States but subsequently ordered removed. Aliens who have not yet gained initial admission to this country would present a very different question."). *See also* Aleinikoff, *supra* note 70, at 377 (arguing that because *Zadvydas* distinguished *Mezei*, Mariel Cubans may be unable to challenge the constitutionality of immigration proceedings to remove them from the United States).

[77] *See generally* Aleinikoff, *supra* note 70, at 376.

parolees from other aliens.[78] Aliens who have entered the United States, albeit illegally, are protected by the Fifth Amendment and are therfore guaranteed procedural due process conforming to traditional standards of fairness.[79] The Due Process Clause does not protect parolees and other aliens "on the threshold of initial entry," however, and thus, whatever procedure Congress has authorized for their expulsion is "due process as far as an alien denied entry is concerned."[80] Further confusing the situation, it is firmly established that the Due Process and Equal Protection clauses cover a parolee in non-immigration contexts.[81] Nonetheless, lower courts such as the *Gonzalez* court have continued to uphold and reaffirm this legal fiction as the decisive precedent, giving and taking away constitutional protections at will; but can or will they continue to do so forever?

Although it is common sense that an admitted alien is a "person" within the United States under the Fifth Amendment and it is equally so that an inadmissible alien stopped on the border is not a "person" within the United States, the Court's conclusions that parolees must be treated "as if stopped at the border" and not protected by the Fifth Amendment ignores the reality of their physical presence in the United States.[82] Absent the *Mezei* entry fiction, however, it seems clear that a parolee who has lived freely in the United States for years would fall within the class of persons protected by the Fifth Amendment.[83] Accordingly, the Court need only erase the entry fiction to extend the protections of the Due Process Clause to paroled aliens who have lived within the United States for a number of years. Although the entry fiction is itself firmly established in precedent, it can only be a matter of years before the Court realizes that it is constitutionally unsound to deny a class of persons physically living within this country a substantive right based upon an absurd legal fiction.

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[78] *See id.* at 377 (noting that lower courts have relied on *Mezei* and largely rejected cases brought by Marielitos challenging their long-term detention).

[79] Note, *Indefinite Detention of Immigrant Parolees: An Unconstitutional Condition?*, 116 HARV. L. REV. 1868, 1870 (2003).

[80] Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206, 212 (1953). *See also* Note, *supra* note 79, at 1870 (discussing due process distinction between resident aliens and aliens "on the threshold of initial entry").

[81] Yick Wo. V. Hopkins, 118 U.S. 356 (1886).

[82] *See generally* Note, *supra* note 79.

[83] *See* Zadvydas v. Davis, 533 U.S. 678, 693 (2001) (noting that "the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent").