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## ARTICLE

### THE EXCLUSION AND DETENTION OF ALIENS: LESSONS FROM THE LIVES OF ELLEN KNAUFF AND IGNATZ MEZEI

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## INTRODUCTION‡

In August 1994, thousands of Cuban citizens put to sea in a flotilla of rafts, hoping to reach the United States.<sup>1</sup> Many did, and were released into our country under long-standing practices.<sup>2</sup> Faced with a rising number of refugees, the Clinton Administration instituted a policy of detention.<sup>3</sup> Those who managed to reach our shores would be confined in detention centers in the United States; others would be interdicted on the high seas and held at the United States Naval Base at Guantánamo Bay, Cuba and, for a time, at U.S. facilities in Panama.<sup>4</sup> While our government clearly needed to

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‡ The heart of this Article is the story of two people, Ellen Knauff and Ignatz Mezei. This Article relies on unpublished materials to tell Mezei's tale. The unpublished materials come primarily from three sources. One source is the papers of Justice Robert H. Jackson. Jackson's papers are archived in the Manuscript Reading Room of the Library of Congress. Container 180 of Jackson's papers includes a file on Ignatz Mezei's case before the United States Supreme Court. Cites to "RHJP" are to documents in that file. Another primary source is the collection of papers belonging to Ignatz Mezei's late attorney, Jack Wasserman. Wasserman's law firm, Wasserman, Mancini & Chang, has maintained the lawyer's files on Ignatz Mezei. Cites to "JWP" are to Jack Wasserman's papers. The final source is the Immigration and Naturalization Service's file on Mezei, portions of which were disclosed to the author pursuant to the Freedom of Information Act. Cites to "INS" are to materials in that file. The author has on file copies of all documents from these sources that are cited in this Article.

<sup>1</sup> See, e.g., *Concern Rising on U.S. Shores as Cubans Flee*, N.Y. TIMES, Aug. 17, 1994, at A1 (estimating that 6000 refugees had already fled by this time); Jon Nordheimer, *U.S. Will Expand Patrols to Stop Cuban Refugees*, N.Y. TIMES, Aug. 23, 1994, at A1 (stating that 1770 refugees had been picked up by the Coast Guard in one day).

<sup>2</sup> See, e.g., Steven Greenhouse, *Cubans Who Seized Boat Win Asylum*, N.Y. TIMES, Aug. 11, 1994, at A8 (explaining that the United States has not returned exiles who have hijacked boats since the defectors are "people who have justifiably used extreme measures to escape deplorable conditions and persecution"); Mireya Navarro, *Cuban Exiles Not Pushing for Boatlift*, N.Y. TIMES, Aug. 14, 1994, at 20 (noting the Clinton Administration's position that refugees would continue to be granted political asylum).

<sup>3</sup> See, e.g., John M. Broder, *Clinton Halts Special Treatment for Cubans*, L.A. TIMES, Aug. 20, 1994, at A1 (stating that Cuban refugees "will no longer receive preferential treatment from the United States or special help in resettling in this country"); Steven Greenhouse, *U.S., in New Policy, Intends to Detain Cuban Immigrants*, N.Y. TIMES, Aug. 19, 1994, at A1 (explaining the Clinton Administration's new plan to "detain Cubans for an indefinite period after they arrive in the United States").

<sup>4</sup> See Broder, *supra* note 3, at A1; Mireya Navarro, *Resources Strained at Guantánamo Bay*, N.Y. TIMES, Sept. 4, 1994, at 12. By the end of September, 1994, over 30,000 Cuban refugees were detained at Guantánamo Bay. See Mike Clary, *U.S. Immigration Door Ajar to Some of 30,000 Cuban Detainees at Guantánamo*, L.A. TIMES, Sept. 30, 1994, at A19. To relieve the strain at Guantánamo Bay, the government of Panama agreed to the temporary detention of up to 10,000 refugees at U.S. bases in Panama. Nearly 7500 Cuban refugees were held there. The United States began returning those

respond quickly to this crisis, the Administration's policy committed our country to incarcerating thousands of refugees for an indefinite period of time.<sup>5</sup> How, one might ask, does our President have the power to order the detention of people without a criminal trial? Can they be confined forever? And what of the Cubans who came here in the 1980 "Mariel" boatlift? Fourteen years after their arrival, over a thousand are detained in prison facilities in the United States because Fidel Castro will not take them back and our government will not let them go.<sup>6</sup> How long may they be held?

This Article addresses the treatment of people at our door. Our government attempts to return noncitizens to other countries in one of two fashions, depending upon territorial standing. "Exclusion" is the mechanism to keep out aliens who seek admission to the United States from outside the country. "Deportation" is the procedure to remove aliens who are already in this country.<sup>7</sup> The rights that aliens have in these processes depend upon their classification as "excludable" or "deportable." Under current law, aliens

refugees to Guantánamo Bay in February 1995. See Art Pine, *Tight Security to Mark Airlift of 7,400 Cubans*, L.A. TIMES, Jan. 31, 1995, at A12; Larry Rohter, *U.S. Starts Evacuating Cuban Refugees from Panama Camps*, N.Y. TIMES, Feb. 2, 1995, at A4.

<sup>5</sup> On September 9, 1994, Cuba agreed to the repatriation of volunteers from the most recent wave of immigration, and the United States agreed to accept the legal migration of at least 20,000 Cuban citizens per year. See Joint Communique, United States-Cuba, Sept. 9, 1994, at 1-2. However, those Cuban refugees at Guantánamo will not be able to apply for an immigrant visa. The United States has announced that it will only consider applications from potential immigrants in Cuba. See Clary, *supra* note 4, at A19 (citing U.S. Attorney General Janet Reno as saying that any Cuban who wants to enter the United States must apply from Cuba); Daniel Williams, *Appeals Court Overturns Order Blocking Return of Refugees to Cuba*, WASH. POST, Nov. 5, 1994, at A16 ("Clinton administration officials said that the only path to the United States for Guantanamo and Panama detainees ran through Havana, where the refugees could apply for one of the 20,000 yearly visas."). While this announcement gives the Guantánamo Bay detainees an incentive to return to Cuba, most of those who will not or cannot return face indefinite detention. The Clinton Administration has made only limited exception to this policy. See *Cuban Am. Bar Ass'n v. Christopher*, Nos. 94-5138, 94-5231, and 94-5234, 1995 WL 16410, at \*2 (11th Cir. Jan. 18, 1995) (stating that the Attorney General has exercised discretion to admit, from Guantánamo, only ill or elderly refugees and unaccompanied minors under the age of 13, and that she has begun to consider, on a case-by-case basis, accompanied minors and their families); Mike Clary, *New U.S. Policy to Allow in Some Cuban Refugees*, L.A. TIMES, Dec. 3, 1994, at A1 (describing new policy to admit some accompanied minors and their families); Pine, *supra* note 4, at A12 (reporting that a total of 2300 detainees have been allowed into the United States for humanitarian reasons).

<sup>6</sup> See *infra* notes 333-42 and accompanying text.

<sup>7</sup> See *Landon v. Plasencia*, 459 U.S. 21, 25-26 (1982) (explaining the difference between a deportation hearing and an exclusion hearing); *Leng May Ma v. Barber*, 357 U.S. 185, 187 (1958) (noting the distinction between exclusion and deportation).

have no constitutional rights with respect to their exclusion. They are deemed to be outside of our borders and not entitled to the protection of our domestic laws, including the Fifth Amendment's Due Process Clause.<sup>8</sup> Deportable aliens, on the other hand, are considered to be in this country, and they are entitled to the protections of the Constitution.<sup>9</sup> The distinction is driven largely by the assumption that people already in the United States are likely to have strong ties to this country. Thus, when the government endeavors to remove these people, it is thought that they deserve a different process than those aliens who seek entry from outside our land.<sup>10</sup>

In a simple world, these broad categories might be perfectly rational. Territorial standing might be an easy way to determine whether people have a strong connection to the United States or a substantial interest in admission. Aliens ordered excluded from this country would promptly return home. But the world is not so simple. Many "excludable" people at the border have family in the United States or a substantial interest in admission. Many aliens in the deportation process, on the other hand, have entered illegally, have no family in the United States, and have no legitimate interest in remaining here. Also, sometimes people ordered excluded from our country cannot return home because their countries of origin will not accept them. Some, like the Mariel Cubans, are detained in federal prisons for years. Because these aliens are considered "excludable," they have few rights even though our government is incarcerating them inside the United States.

Although one might question whether aliens' rights ought to be

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<sup>8</sup> See *Sale v. Haitian Ctrs. Council, Inc.*, 113 S. Ct. 2549, 2560-61 (1993) (noting the distinction between deportation and exclusion and stating that an alien facing deportation has "the added benefit of 'deportation proceedings'"); *Leng May Ma*, 357 U.S. at 187-88; *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 213-15 (1953).

<sup>9</sup> See *Reno v. Flores*, 113 S. Ct. 1439, 1449 (1993) ("It is well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings."); *Plasencia*, 459 U.S. at 32, 33-34 (stating that "once an alien gains admission to our country and begins to develop the ties that go with permanent residence, his constitutional status changes accordingly").

<sup>10</sup> See *Rosenberg v. Fleuti*, 374 U.S. 449, 462-63 (1963) (concluding that a permanent resident's return to the United States after an afternoon trip to Mexico should not be construed as an "entry" under § 101(a)(13) of the Immigration and Naturalization Act so as to render him an excludable alien); *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596, 597-602 (1953) ("It is well-established that if an alien is a lawful permanent resident of the United States and remains physically present there, he is a person within the protection of the Fifth Amendment.").

determined by territorial standing, courts have continued to give effect to the territorial distinction. One reason is that the judiciary generally defers to the executive in immigration matters. Courts have come to view the federal immigration authority as inseparable from the foreign affairs power. In no other area, the Supreme Court tells us, does the federal government have more power.<sup>11</sup> Thus, as long as the executive acts within the broad boundaries set by Congress, the judiciary will generally defer to executive decisions in immigration matters. The concepts of full federal authority and judicial deference are commonly called the "plenary power doctrine." The plenary power doctrine and the rule of territorial standing are exemplified by two leading Supreme Court decisions. The two cases, *United States ex rel. Knauff v. Shaughnessy*,<sup>12</sup> and *Shaughnessy v. United States ex rel. Mezei*,<sup>13</sup> hold that, with respect to admission and detention, whatever process the government affords excludable aliens is due process of law.<sup>14</sup> As part of its examination of the plenary power doctrine and the principle of territorial standing, this Article discusses the *Knauff* and *Mezei* cases in detail.

Part I traces the history of the territorial distinction and of the plenary power doctrine and shows that our current doctrines are not necessarily required by our past. Part II tells the full stories of Ellen Knauff and Ignatz Mezei. The Court decisions upholding the government's actions in their cases are well-known. Most people are unaware, however, that after the Supreme Court decided their cases, Congress sought to assist Ellen Knauff and Ignatz Mezei, and the press upbraided the government's actions. Knauff and Mezei were both eventually released into the United States. In addition to relating an important part of our history, this section of the Article demonstrates the public's ambivalence about the plenary power doctrine and the rule of territorial standing and shows the value of a hearing. Part III of the Article traces the impact of the *Knauff* and *Mezei* decisions and argues that these rulings are inconsistent with more recent developments in immigration and constitutional law. Part IV sets forth a normative claim, that all people at or within our border—or detained by our government—ought to be protected by the Due Process Clause, and that the courts should not defer to the executive in all immigration matters. In addition, this section offers

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<sup>11</sup> See *infra* notes 68-71 and accompanying text.

<sup>12</sup> 338 U.S. 537 (1950).

<sup>13</sup> 345 U.S. 206 (1953).

<sup>14</sup> See *Mezei*, 345 U.S. at 212; *Knauff*, 338 U.S. at 544.

an alternative (and more limited) model of judicial deference, the political question doctrine. Finally, Part V addresses the consequences that would follow if we were to abandon the territorial distinction and acknowledge that all people at our door are entitled to the protection of our laws.

# I. THE GROWTH OF THE PLENARY POWER DOCTRINE AND THE PRINCIPLE OF TERRITORIAL STANDING

## A. *The Constitution and Early Claims of Federal Immigration Authority*

The plenary power doctrine is a collection of several separate but related principles: first, that the immigration authority is reposed in the federal government and not the states; second, that the authority is allocated in some fashion between the executive and legislative departments of the federal government; and, third, that the judicial branch has an extremely limited role in reviewing the executive's immigration decisions if, indeed, the judiciary may review those decisions at all.<sup>15</sup> The executive/legislative and the judicial deference prongs of the doctrine were not developed until late in the nineteenth century. Until that time there was great uncertainty whether the immigration power resided with the federal government at all.

A primary reason for the uncertainty was that the United States Constitution does not expressly grant the federal government the power to exclude (or deport) aliens. Perhaps, surprisingly, the

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<sup>15</sup> Most commentators have identified these three principles as central elements of the plenary power doctrine, although they do not necessarily characterize the doctrine solely in these terms. For helpful discussions of the plenary power doctrine, see generally THOMAS A. ALEINIKOFF & DAVID A. MARTIN, *IMMIGRATION: PROCESS AND POLICY* 1-39 (2d ed. 1991); STEPHEN H. LEGOMSKY, *IMMIGRATION AND THE JUDICIARY: LAW AND POLITICS IN BRITAIN AND AMERICA* 180-222 (1987); T. Alexander Aleinikoff, *Federal Regulation of Aliens and the Constitution*, 83 AM. J. INT'L L. 862, 864-69 (1989); Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny*, 100 HARV. L. REV. 853, 854-63 (1987); David A. Martin, *Due Process and Membership in the National Community: Political Asylum and Beyond*, 44 U. PITT. L. REV. 165, 166-80 (1983); Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625, 1632-50 (1992) [hereinafter Motomura, *Curious Evolution*]; Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 550-60 (1990) [hereinafter Motomura, *Phantom Norms*]; Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 14-18 (1984).

Constitution contains only two plausible references to immigration. The Naturalization Clause gives Congress the power to establish "a uniform Rule of Naturalization."<sup>16</sup> But naturalization is different from immigration; naturalization is the process of making citizens of those who have already emigrated to the United States.<sup>17</sup> Thus, the Naturalization Clause has generally been construed only to permit Congress to describe who may become citizens.<sup>18</sup> The only other plausible reference to immigration in the Constitution is the clause barring Congress from prohibiting, prior to 1808, "[t]he Migration or Importation of Such Persons as any of the States now existing shall think proper to admit."<sup>19</sup> This clause has been interpreted only to forbid Congress from outlawing the importation of slaves during the nation's first twenty years.<sup>20</sup>

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<sup>16</sup> U.S. CONST. art. I, § 8, cl. 4.

<sup>17</sup> "Naturalization" is "the act of adopting a foreigner, and clothing him with the privileges of a native citizen." *Boyd v. Nebraska ex rel. Thayer*, 143 U.S. 135, 162 (1892); *see also* *Elk v. Wilkins*, 112 U.S. 94, 101 (1884) (stating that an immigrant becomes a citizen of the United States through "such form of naturalization as may be required by law").

<sup>18</sup> Courts have repeatedly described Congress's power under the Naturalization Clause as the power to promulgate rules governing the ways that aliens become citizens. *See, e.g.,* *United States v. Wong Kim Ark*, 169 U.S. 649, 672 (1898) (noting that in the exercise of its power under the Naturalization Clause, "Congress . . . has made provision for the admission to citizenship of . . . classes of persons"); *Boyd*, 143 U.S. at 162 (noting that under the Naturalization Clause, Congress "has enacted general laws under which individuals may be naturalized"); *Lanz v. Randall*, 14 F. Cas. 1131, 1133 (D. Minn. 1876) (No. 8080) (stating that laws enacted under the Naturalization Clause set forth "the only rules by which a citizen or subject of a foreign government could become a citizen or subject of one of the states of this Union").

In just the last several years, the Supreme Court has occasionally cited to the Naturalization Clause as one of the sources of the federal immigration authority. *See infra* notes 394-95 and accompanying text. But the Court's cases merely refer to the Clause without any discussion and without considering the distinction between naturalization and immigration. *See, e.g.,* *Toll v. Moreno*, 458 U.S. 1, 10 (1982) ("Federal authority to regulate the status of aliens derives from various sources, including the Federal Government's power '[t]o establish [a] uniform Rule of Naturalization.'"); *Plyler v. Doe*, 457 U.S. 202, 225 (1982) (noting that the Constitution grants Congress the authority to regulate the U.S. borders).

<sup>19</sup> U.S. CONST. art. I, § 9, cl. 1.

<sup>20</sup> The Constitution gives the federal government the power to regulate foreign commerce, *see* U.S. CONST. art. I, § 8, cl. 3, and at the time the Constitution was ratified, slaves were seen as potential articles of commerce. Under this view, the Migration and Importation Clause served as a *limitation* on Congress's power to regulate foreign commerce, and not as an affirmative grant of power to regulate immigration. *See* *People v. Compagnie Générale Transatlantique*, 107 U.S. 59, 62 (1882) (explaining that the Clause refers to slaves only and not to free Blacks); *Passenger Cases* (*Smith v. Turner & Norris v. City of Boston*), 48 U.S. (7 How.) 283,



Another reason for the uncertainty about federal immigration authority was the issue of slavery. During the antebellum era, a number of states passed legislation restricting the migration of free Blacks, both from other states and from abroad.<sup>21</sup> Several states also enacted laws barring the entry of indigent or diseased immigrants or immigrants who had been sentenced to "transportation" by a foreign country.<sup>22</sup> If the federal government was deemed to possess the exclusive power to control immigration, states might have been forced to admit free Blacks and immigrants whom the states sought to exclude. Until the late 1800s, Congress simply refrained from passing immigration legislation,<sup>23</sup> and thus avoided

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474-76 (1849) (Taney, C.J., dissenting) (arguing that the context of the Clause and the construction that the Framers would have given it "show that it was intended to embrace those persons only who were brought in as property"); *id.* at 512-14 (Daniel, J., dissenting) (arguing that it would not be proper to extend the power of Congress, under this Clause, beyond the immigration of convicts and foreign slaves); *id.* at 542-44 (Woodbury, J., dissenting) (noting that the word "persons" was meant to embrace slaves alone and thus that the Clause refers only to slaves); *see also* THE FEDERALIST NO. 42, at 281 (James Madison) (Jacob E. Cooke ed., 1961) (referring to the Clause as "this restriction on the general government"). Madison noted that, under the Clause, the power to prohibit the importation of slaves had been postponed until 1808. Madison also pointed out that some critics attempted to argue that the Clause may be used to prevent "voluntary and beneficial emigrations from Europe to America," but that this argument was a "misconstruction[.]" *Id.*; *see also* Walter Berns, *The Constitution and the Migration of Slaves*, 78 YALE L.J. 198 (1968) (arguing that the Framers most likely intended the Clause to apply only to slaves, but that many in the South probably voted to ratify the Constitution with the understanding that the Clause did *not* expressly apply to slaves). *But see Passenger Cases*, 48 U.S. at 453-54 (McKinley, J.) (arguing that the inclusion of the word "migration" made the phrase applicable to immigrants as well as slaves, and that, by negative implication, Congress could regulate immigration after 1808).

<sup>21</sup> *See* Gerald L. Neuman, *The Lost Century of American Immigration Law (1776-1875)*, 93 COLUM. L. REV. 1833, 1865-80 (1993) (discussing the antebellum tendency to restrict the movement of Blacks, both free and slave).

<sup>22</sup> *See id.* at 1841-65 (discussing immigration restrictions based on crime, poverty, disability, and disease).

<sup>23</sup> The Fifth Congress passed the Alien Act of June 25, 1798, ch. 58, 1 Stat. 570. Part of the Act gave the President the power to order the deportation of aliens judged dangerous to the peace and safety of the United States. *See id.* § 1. The Act, however, was only effective for two years. *See id.* § 6. It was characterized by President Adams as a war measure and was denounced by Jefferson, Madison, and others as unconstitutional. *See* CLEMENT L. BOUVÉ, A TREATISE ON THE LAWS GOVERNING THE EXCLUSION AND EXPULSION OF ALIENS IN THE UNITED STATES 53 (1912); Gerald L. Neuman, *Whose Constitution?*, 100 YALE L.J. 909, 927-38 (1991). After the passage of the 1798 Act, and prior to 1860, Congress enacted a number of measures relating to naturalization, but not to immigration. While some members of Congress were concerned about the immigration of paupers and criminals, no federal legislation restricting immigration was passed. *See generally* E.P. HUTCHINSON, LEGISLATIVE HISTORY OF AMERICAN IMMIGRATION POLICY 1798-1965, at 11-46 (1981).

a conflict with the states over the authority to control immigration.

Given Congress's inaction, the power to control immigration was first tested in disputes involving assertions of state authority. In the *Passenger Cases*, the Supreme Court struck down two state laws that imposed taxes upon vessel owners for each alien passenger arriving in the ports of the states.<sup>24</sup> The Court split five to four. Only three of the five Justices in the majority found that the federal government, not the states, had the power to exclude aliens.<sup>25</sup> All four dissenting Justices ruled that, under the Constitution, the states retained the power to exclude aliens.<sup>26</sup> Although the exact basis for the majority's decision is difficult to determine, later decisions in accord with the *Passenger Cases* struck down similar state laws as interfering with foreign commerce (even though the slavery issue had been resolved by that time).<sup>27</sup> In the late 1800s, Congress

Congressional inaction has led some to characterize immigration during this period as wide open, with the ability to emigrate considered to be a "natural right." Henkin, *supra* note 15, at 854-56. This view finds some support in public documents of the time. For example, a 1868 treaty between the United States and China states, in part, that the two countries

cordially recognize the inherent and inalienable right of man to change his home and allegiance, and also the mutual advantage of the free migration and emigration of their citizens and subjects respectively from the one country to the other for the purposes of curiosity, of trade, or as permanent residents

Treaty of Trade, Consuls and Emigration, China-U.S., July 28, 1868, art. V, 16 Stat. 739, 740, T.S. No. 48. Nevertheless, given the actions of various state legislatures, it cannot truly be said that immigration was unhindered during this period.

<sup>24</sup> See *Passenger Cases*, 48 U.S. at 392, 409 (opinion of McLean, J.).

<sup>25</sup> See *id.* at 448-52 (opinion of Catron, J.); *id.* at 454 (opinion of McKinley, J.); *id.* at 460-64 (opinion of Grier, J.). The other two justices in the majority based their decisions primarily upon the federal government's exclusive power to regulate foreign commerce. See *id.* at 401 (opinion of McLean, J.); *id.* at 423-26 (opinion of Wayne, J.).

<sup>26</sup> See *id.* at 466-70 (Taney, C.J., dissenting, joined by Nelson, J.); *id.* at 509-14 (Daniel, J., dissenting); *id.* at 522-27 (Woodbury, J., dissenting).

<sup>27</sup> See, e.g., *People v. Compagnie Générale Transatlantique*, 107 U.S. 59, 60 (1882) (striking down a New York statute that levied a tax of one dollar on each alien passenger coming by vessel from a foreign port to the New York port); *Chy Lung v. Freeman*, 92 U.S. 275, 280 (1875); *Henderson v. Mayor of New York*, 92 U.S. 259, 269-71 (1875). In *Henderson*, the Court specifically held that a statute that taxed vessel owners interfered with the federal power over foreign commerce. See *id.* The Court reserved the question whether states could enact more narrowly tailored legislation to protect themselves against the entry of foreign paupers, vagrants, criminals, and diseased persons. See *id.* at 275. The decision in *Chy Lung* is more curious. The Court stated that "[t]he passage of laws which concern the admission of citizens and subjects of foreign nations to our shores belongs to Congress, and not to the States." *Chy Lung*, 92 U.S. at 280. The *Chy Lung* Court then tied this authority to the federal foreign commerce power. See *id.* And, although the decision seems to indicate that this is a power placed solely in the federal government, the Court

became active in the field, passing a law that levied a federal duty for each alien passenger arriving in the United States from a foreign port.<sup>28</sup> That statute was similarly upheld as part of the federal government's exclusive authority to regulate foreign commerce.<sup>29</sup>

### B. Governmental Authority and Judicial Deference

It was not difficult for the Supreme Court to think about the *Passenger Cases* and their progeny in the context of foreign commerce. The statutes at issue levied taxes upon businesses (mainly vessel owners) that operated internationally. In the *Chinese Exclusion Case (Chae Chan Ping v. United States)*,<sup>30</sup> the Supreme Court faced a challenge to the government's power to limit immigration in a context unrelated to business. The Court's decision in that case is acknowledged to be the real beginning of the plenary power doctrine.<sup>31</sup>

Chae Chan Ping, a citizen of China, came to the United States in 1875,<sup>32</sup> when immigration was encouraged.<sup>33</sup> In 1882, however, the immigration of Chinese laborers was suspended by a federal statute.<sup>34</sup> The new law did not apply to Chinese laborers already in the United States, and those laborers who wished to leave the country were entitled to certificates of identity that would entitle

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reserved, as in *Henderson*, the question whether the states could enact "necessary and proper laws against paupers and convicted criminals from abroad." *Id.*

<sup>28</sup> See Act of Aug. 3, 1882, ch. 376, § 1, 22 Stat. 214. The plaintiffs apparently challenged only § 1 of the Act, which imposed the tax. Other portions of the Act gave federal officers the power to deny certain immigrants (convicts, the mentally ill, and those deemed likely to become public charges) permission to land in the United States. See §§ 2, 4.

<sup>29</sup> See *Head Money Cases (Edye v. Robertson & Cunard S.S. Co. v. Robertson)*, 112 U.S. 580, 591-94 (1884).

<sup>30</sup> 130 U.S. 581 (1889).

<sup>31</sup> See, e.g., LEGOMSKY, *supra* note 15, at 184-85; Henkin, *supra* note 15, at 853-54; Motomura, *Curious Evolution*, *supra* note 15, at 1633-34 ("The *Chinese Exclusion Case* established that the political branches would generally enjoy plenary power over immigration . . .").

<sup>32</sup> See *Chae Chan Ping*, 130 U.S. at 582.

<sup>33</sup> In an 1868 treaty, the United States and China recognized the "mutual advantage" of free immigration, granting residents of each country reciprocal privileges of travel and residence. See Treaty of Trade, *supra* note 23, at arts. V, VI.

<sup>34</sup> See Act of May 6, 1882, ch. 126, § 1, 22 Stat. 58, 58-59. In 1880, China agreed to a supplementary treaty permitting the United States to regulate, limit, or suspend the immigration of Chinese laborers. See Immigration Treaty, China-U.S., Nov. 17, 1880, art. I, 22 Stat. 826. The 1880 treaty was not self-executing. See *Chae Chan Ping*, 130 U.S. at 597. The 1882 legislation executed the treaty, but went further than the treaty required.

them to reenter.<sup>35</sup> In 1887, Chae Chan Ping obtained such a certificate and traveled to China.<sup>36</sup> In 1888, Congress passed a law prohibiting Chinese laborers from returning to this country and voiding the previously issued certificates.<sup>37</sup> Chae Chan Ping returned to the United States a few days after the new law became effective, and customs officials denied him permission to land.<sup>38</sup> He brought a habeas corpus petition, alleging that he was illegally confined on board the vessel by the vessel master, who acted under the direction of the customs officials.<sup>39</sup> Habeas corpus was probably not the most promising remedy for Chae Chan Ping. At the time, the federal courts examined habeas corpus petitions through the lens of "jurisdiction." That is, in deciding whether a person held under a court order (or executive decree) was lawfully confined, the federal courts asked whether the committing court or executive officer had "jurisdiction" over the petitioner.<sup>40</sup>

The Supreme Court upheld the 1888 law and its application to Chae Chan Ping. Congress, the Court ruled, had inherent authority to pass the statute. As Justice Field wrote for the Court, the ability to enact legislation to exclude aliens "is a proposition which we do

<sup>35</sup> See Act of May 6, 1882, ch. 126, §§ 3-4, 22 Stat. at 59-60. These provisions of the 1882 legislation were consistent with the government's obligations under the 1880 supplementary treaty. Under the terms of the 1880 treaty, laborers then in the United States would be permitted to leave and return to the United States. See Immigration Treaty, *supra* note 34, art. II; see also *Chae Chan Ping*, 130 U.S. at 596-97.

<sup>36</sup> See *Chae Chan Ping*, 130 U.S. at 582.

<sup>37</sup> See Act of Oct. 1, 1888, ch. 1064, §§ 1, 2, 25 Stat. 504; see also *Chae Chan Ping*, 130 U.S. at 599.

<sup>38</sup> See *Chae Chan Ping*, 130 U.S. at 582.

<sup>39</sup> See *id.* at 582-83.

<sup>40</sup> See, e.g., *Ex parte Siebold*, 100 U.S. 371, 375-77 (1880) (holding that the lower court lacked "jurisdiction" to try defendants in a criminal case because defendants were indicted under an unconstitutional statute); *Ex parte Lange*, 85 U.S. (18 Wall.) 163, 176 (1873) (finding that because of a double jeopardy violation, the second court was without "jurisdiction" to impose any further judgment of conviction); *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 118 (1866) (questioning whether a military commission had jurisdiction to try and sentence petitioner); *Ex parte Benedict*, 3 F. Cas. 159, 170-71 (C.C.N.D.N.Y. 1862) (No. 1292) (holding that War Department officials were without authority to order petitioner's arrest). For general discussions of habeas corpus and the concept of "jurisdiction," see *Withrow v. Williams*, 113 S. Ct. 1745, 1768 (1993) (Scalia, J., concurring in part and dissenting in part); WILLIAM F. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 225-48 (1980); Erwin Chemerinsky, *Thinking About Habeas Corpus*, 37 CASE W. RES. L. REV. 748, 754 (1987); Henry M. Hart, Jr., *The Supreme Court, 1958 Term, Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84, 103-05 (1959); Charles D. Weisselberg, *Evidentiary Hearings in Federal Habeas Corpus Cases*, 1990 B.Y.U. L. REV. 131, 139-44.

not think open to controversy.”<sup>41</sup> Although under the Constitution many matters are left to local authorities, in foreign affairs the federal government is vested with the powers of independent nations that allow those nations to maintain their independence and security.<sup>42</sup> Thus, “[t]he powers to declare war, make treaties, suppress insurrection, repel invasion, regulate foreign commerce, secure republican governments to the States, and admit subjects of other nations to citizenship, are all sovereign powers, restricted . . . only by the Constitution itself and considerations of public policy and justice.”<sup>43</sup> The power of exclusion, the Court held, is one of the sovereign powers belonging to the federal government.<sup>44</sup>

This argument would not likely persuade a textualist or a federalist. In describing the powers that inhere to a sovereign and independent nation, the Court listed powers that were all expressly enumerated in the Constitution.<sup>45</sup> Although the Court described the authority to exclude aliens as one of the attributes of a sovereign nation, it did not identify any specific provision of the Constitution that gives that power to the federal government. The Court did not rule, for example, that the ability to regulate immigration is rooted in either the Foreign Commerce or Naturalization Clauses. And Justice Field’s assertion that the proposition is not “open to controversy” would surely have surprised the four dissenting Justices in the *Passenger Cases*. Just forty years earlier, they held that the power to exclude aliens belongs to the states.<sup>46</sup>

*Chae Chan Ping*, however, did more than just affirm the federal power to control immigration. The Court ruled that the judiciary should not review substantive claims about the application of the 1888 law. *Chae Chan Ping* contended that the law could not

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<sup>41</sup> *Chae Chan Ping*, 130 U.S. at 603.

<sup>42</sup> *See id.* at 604.

<sup>43</sup> *Id.*

<sup>44</sup> *See id.* at 609.

<sup>45</sup> *See* U.S. CONST. art. I, § 8, cl. 11 (power to declare war); *id.* art. I, § 10, cl. 1 (power to enter into treaties); *id.* art. II, § 2, cl. 2 (same); *id.* art. I, § 8, cl. 15 (power to suppress insurrections and repel invasions); *id.* art. I, § 8, cl. 3 (power to regulate foreign commerce); *id.* art. IV, § 4 (duty to guarantee every state a republican form of government); *id.* art. I, § 8, cl. 4 (power to establish a uniform rule of naturalization).

<sup>46</sup> *See supra* note 26 and accompanying text; *see also* LEGOMSKY, *supra* note 15, at 190 (citing the ruling of the four dissenting Justices to support his argument that the Framers’ failure to include an express federal power to exclude aliens in the Constitution was not because “the existence of such a power was too obvious to require mention”).

constitutionally be applied to him. He had a right to be in the United States under the laws and treaties in effect at the time he left.<sup>47</sup> As applied to him, Chae Chan Ping argued, the 1888 law was either a bill of attainder or an ex post facto law.<sup>48</sup> Yet the Court refused to decide whether the 1888 law could be applied retroactively, holding that such claims are not questions for judicial determination and that decisions by the federal government in this area are "conclusive upon the judiciary."<sup>49</sup> *Chae Chan Ping* thus stands not only for the proposition that the exclusion power is an implied federal power, but also that its exercise is due an extreme form of judicial deference. The courts may not determine whether the exercise of the federal exclusion power meets the constitutional standards that measure most governmental acts.

After *Chae Chan Ping*, the plenary power doctrine—including the principle of judicial deference—came into full force. In *Nishimura Ekiu v. United States*,<sup>50</sup> a Japanese immigrant challenged an exclusion decision. An immigration act authorized officers to greet arriving vessels and to deny permission to land to "persons likely to become a public charge."<sup>51</sup> *Nishimura Ekiu* was excluded on this ground.<sup>52</sup> The Court found that the statute was properly enacted under the federal government's inherent sovereign authority to control immigration.<sup>53</sup> Under the statute, immigration officials had sole discretionary authority to make exclusion decisions.<sup>54</sup> Hence, the Court could only inquire whether the immigration officer was

<sup>47</sup> See *Chae Chan Ping*, 130 U.S. at 586-88 (argument for Appellant).

<sup>48</sup> See *id.* at 589.

<sup>49</sup> *Id.* at 606. Stephen Legomsky argues that the "conclusive on the judiciary" language was never meant to prevent judicial review of all laws enacted under Congress's (new) exclusion power. He contends that the language "meant only that the Court could not interfere because Congress had done nothing unconstitutional." LEGOMSKY, *supra* note 15, at 193. It is true that the Court acknowledged that the government's inherent sovereign powers were restricted by the Constitution. See *Chae Chan Ping*, 130 U.S. at 604. But Legomsky's argument does not explain why the Court refused to address Chae Chan Ping's ex post facto and bill of attainder claims. These were constitutional issues. See U.S. CONST. art I, § 9, cl. 3 ("No Bill of Attainder or ex post facto Law shall be passed."). If the Court had been truly committed to measuring whether specific exercises of inherent sovereign power exceeded constitutional limitations, the Court would have decided those issues.

<sup>50</sup> 142 U.S. 651 (1892).

<sup>51</sup> Act of Mar. 3, 1891, ch. 551, §§ 1, 8, 26 Stat. 1084, 1084-85.

<sup>52</sup> See *Nishimura Ekiu*, 142 U.S. at 656. Customs officials ordered her detained in a mission pending a final exclusion decision. See *id.* at 653.

<sup>53</sup> See *id.* at 659.

<sup>54</sup> See *id.* at 660.

properly appointed under the statute and whether the statute authorized the officer's actions.<sup>55</sup>

As in *Chae Chan Ping*, Nishimura Ekiu challenged her exclusion order by filing a habeas corpus petition.<sup>56</sup> In *Chae Chan Ping*, the Court did not indicate whether its decision was influenced by the procedural posture of the case. By contrast, in *Nishimura Ekiu* the Court specifically acknowledged its limited powers of review under habeas corpus doctrines.<sup>57</sup> Although the scope of judicial review was restricted by the habeas corpus principle of "jurisdiction,"<sup>58</sup> Justice Gray, writing for the Court, penned an opinion that would appear to apply to any immigration challenge in any context. The opinion contains a classic statement of the plenary power doctrine: "It is not within the province of the judiciary" to order the entry of foreigners who are neither naturalized nor are residents of the United States.<sup>59</sup> For these people, "the decisions of executive or administrative officers, acting within powers expressly conferred by Congress, are due process of law."<sup>60</sup>

*Chae Chan Ping* and *Nishimura Ekiu* were both exclusion cases. The Court had more difficulty determining whether to apply all elements of the plenary power doctrine in deportation matters. In finding that excludable aliens had no rights, the *Nishimura Ekiu* Court compared excludable aliens to resident aliens—people already on our soil. Thus, *Nishimura Ekiu* seemingly would afford deportable aliens, who may only be removed from the country through the deportation process, a strong claim to the protections of the Constitution. Nevertheless, the Court initially applied the plenary power doctrine equally in deportation and exclusion matters. The power to deport, the Court held, is "as absolute and unqualified" as the power to exclude aliens.<sup>61</sup> But the Court later eased its

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<sup>55</sup> See *id.* at 662-64.

<sup>56</sup> See *id.* at 652-53; *Chae Chan Ping*, 130 U.S. at 582-83.

<sup>57</sup> See *Nishimura Ekiu*, 142 U.S. at 662 (distinguishing a habeas corpus petition from other civil actions). The Court determined that the immigration inspector had been properly appointed. See *id.* at 662-63. The immigration statute did not provide for judicial review. See *id.* at 663. The Court concluded that the judiciary cannot examine the decisions of an immigration inspector "acting within the jurisdiction conferred upon him." *Id.*

<sup>58</sup> See *supra* note 40 and accompanying text.

<sup>59</sup> *Nishimura Ekiu*, 142 U.S. at 660.

<sup>60</sup> *Id.* (citing *Den v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272 (1856), and *Hilton v. Merritt*, 110 U.S. 97 (1884)).

<sup>61</sup> *Fong Yue Ting v. United States*, 149 U.S. 698, 707 (1893). The *Fong Yue Ting* Court was faced with a challenge to yet another statute relating to Chinese laborers. This newest law required Chinese laborers in the United States to apply for a certifi-

application of the "judicial deference" element of the plenary power doctrine in deportation cases. In 1903, it ruled that the actions of deportation officers must be measured by the Due Process Clause.<sup>62</sup> The Court held that a deportable alien must be afforded an opportunity to be heard and that immigration officials cannot act arbitrarily.<sup>63</sup>

Thus, by the start of this century, the Supreme Court had established the main contours of the plenary power doctrine and of constitutional immigration law.<sup>64</sup> During the next fifty years, the Supreme Court would continue to echo these same basic themes. Deportable aliens, who were by definition within United States territory, could raise constitutional challenges in deportation cases. Nevertheless, the scope of judicial review would be limited to procedural claims or to assertions that immigration officials acted arbitrarily.<sup>65</sup> Excludable aliens received less generous treatment.

cate of residence; those without certificates could be deported. See Act of May 5, 1892, ch. 60, § 6, 27 Stat. 25, 25-26. The majority found that deportation is not punishment and that an alien facing deportation is not entitled to the same procedural protections as a person facing criminal charges. See *Fong Yue Ting*, 149 U.S. at 730. The Court refused to decide whether the procedures contained in the new law were constitutional and, instead, simply deferred to Congress and the executive. See *id.* at 712, 731. Three Justices, however, would have struck down the statute as violating due process; these Justices would have distinguished between the power to deport and the power to exclude. See *id.* at 733, 736-38 (Brewer, J., dissenting); *id.* at 746, 754-60 (Field, J., dissenting); *id.* at 761-63 (Fuller, C.J., dissenting).

<sup>62</sup> See *The Japanese Immigrant Case (Yamataya v. Fisher)*, 189 U.S. 86, 100-01 (1903). The decision was driven by the notion that aliens already here are likely to have strong connections to the United States. In announcing its rule, the Court left aside the question whether the Due Process Clause would protect an alien who has clandestinely entered "and who has been here for too brief a period to have become, in any real sense, a part of our population." *Id.* at 100.

<sup>63</sup> See *id.* at 101. The Court, however, stopped short of permitting a right to judicial review. See *id.* at 102.

<sup>64</sup> Hiroshi Motomura writes that these cases "established a classical immigration law with two significant dimensions—the alien's location and the nature of the constitutional challenge to an adverse immigration decision." Motomura, *Phantom Norms*, *supra* note 15, at 554 (footnote omitted). Peter Schuck describes "classical immigration law" as containing "seven central elements": "(1) the restrictive ideal of national community; (2) the principle of judicial deference; (3) the extraconstitutional status of exclusion; (4) the broad federal power to classify aliens; (5) the civil nature of the deportation sanction; (6) the detention power; and (7) the integration of adjudication and enforcement." Schuck, *supra* note 15, at 7-8.

<sup>65</sup> See, e.g., *Bridges v. Wixon*, 326 U.S. 135, 149, 156 (1945) (holding that in habeas proceedings, a court limits its review so as to determine only whether there is some evidence supporting the deportation order); *United States ex rel. Vajtauer v. Commissioner of Immigration*, 273 U.S. 103, 106 (1927) (holding that an alien may raise a due process challenge to deportation procedures and orders that are not supported by any evidence; a habeas corpus court will not reweigh the facts, but will



Since the Constitution stops at the border, aliens could not raise constitutional challenges to the exclusion process.<sup>66</sup>

There was one significant development during the first half of the twentieth century. Although it was clear that the immigration power resided with the federal government, it was not entirely

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determine whether there is some evidence to support the deportation order); *United States ex rel. Tisi v. Tod*, 264 U.S. 131, 133-34 (1924) (holding that an alien cannot prove denial of a fair deportation hearing merely by proving that an administrative decision was wrong). There was, however, a statutory exception to even this limited judicial review. See *Ludecke v. Watkins*, 335 U.S. 160, 164, 173 (1948) (upholding a statute granting an executive the power to deport, without any hearing, an enemy alien during time of war, and precluding judicial review of orders issued under that power).

<sup>66</sup> See, e.g., *United States v. Ju Toy*, 198 U.S. 253, 263 (1905) (noting that an excludable alien is regarded "as if he had been stopped at the limit of our jurisdiction" and that no judicial trial is required by the Due Process Clause even when the alien claims to be a citizen). The era was also marked by a number of decisions that confused (and sometimes even equated) exclusion with deportation. See *Motomura, Curious Evolution*, *supra* note 15, at 1641 & n.76.

In some exclusion matters, however, the Court was willing to recognize an exception to the plenary power doctrine. People in exclusion proceedings who claimed to be citizens could perhaps also raise a due process challenge based on arbitrary action of governmental officials. The main case establishing this "citizenship exception" was *Kwock Jan Fat v. White*, 253 U.S. 454 (1920). The petitioner claimed to be a citizen and presented substantial evidence that he was born in the United States. Part of the administrative record was not transcribed, however; the immigration authorities made a final exclusion decision based on a record that did not contain the testimony of witnesses who had identified the petitioner as a citizen. See *id.* at 459-60, 464.

With this exception, aliens continued to bring habeas corpus petitions challenging immigration decisions, although it is unclear how many petitions met with any success on the merits. Henry Hart wrote that, prior to 1950, the courts recognized their responsibility to ensure that immigrants "were not unreasonably subjected, even by direction of Congress, to an uncontrolled official discretion." Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1390 (1953). Under these principles, Hart wrote, "the law grew and flourished, like Egypt under the rule of Joseph. Thousands of cases were decided whose presence in the courts cannot be explained on any other basis." *Id.* at 1391.

Despite the raw number of cases, it must be acknowledged that even those courts willing to entertain due process challenges applied a weak standard. Petitioners who claimed that immigration decisions were "arbitrary" had a heavy burden to meet. See *Martin*, *supra* note 15, at 175 (stating that the standards for fairness "were not terribly rigorous"). *Motomura* contends that the federal courts still did not engage in active judicial review: "Professor Hart must have focused on the rhetoric of the [due process] decisions . . . , rather than on the actual results reached." *Motomura, Curious Evolution*, *supra* note 15, at 1639 n.64. As *Motomura* points out, even *Kwock Jan Fat*, where the Court granted relief, may not be "a ringing endorsement of nonwhite aliens' right to be heard, since the Court's indignation stemmed at least partly from the fact that white United States citizens' testimony had been all but ignored." *Id.* at 1640-41.

certain whether that power was reposed primarily with the Congress or with the President. In an early series of cases, the Supreme Court held that the plenary power over immigration was a congressional power.<sup>67</sup> There was a shift in the late 1930s. In *United States v. Curtiss-Wright Export Corp.*,<sup>68</sup> the Supreme Court found that the states could never have possessed sovereign authority in matters of foreign affairs.<sup>69</sup> The power to expel undesirable aliens, the Court held, is one of the powers relating to international affairs that is not expressly affirmed by the Constitution but that is "inherently inseparable from the conception of nationality."<sup>70</sup> Moreover, the

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<sup>67</sup> See, e.g., *Lloyd Sabaudo Societa Anonima Per Azioni v. Elting*, 287 U.S. 329, 334 (1932) ("Under the Constitution and laws of the United States, control of the admission of aliens is committed exclusively to Congress . . ."); *Lapina v. Williams*, 232 U.S. 78, 88 (1914) ("The authority of Congress over the general subject-matter is plenary; it may exclude aliens altogether, or prescribe the terms and conditions upon which they may come into or remain in this country."); *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320, 339-40 (1909) ("[O]ver no conceivable subject is the legislative power of Congress more complete than it is over [immigration].").

<sup>68</sup> 299 U.S. 304 (1936).

<sup>69</sup> See *id.* at 316. These powers were therefore passed to the federal government not by the Constitution, but by the signing of the Declaration of Independence. See *id.* Justice Sutherland, who wrote for the Court in *Curtiss-Wright*, had propounded these same views many years before the *Curtiss-Wright* decision. See GEORGE SUTHERLAND, CONSTITUTIONAL POWER AND WORLD AFFAIRS 35-47, 56-60 (1919).

<sup>70</sup> *Curtiss-Wright*, 299 U.S. at 318. The doctrine of inherent federal sovereign power seems to run counter to the principles under which the Constitution was adopted. Even if there are certain generally recognized powers of a sovereign, these powers may be restricted by the "consent of the nation." *The Schooner Exchange v. McFadden*, 11 U.S. (7 Cranch) 116, 136 (1812). As Stephen Legomsky argues, the Constitution, which reposes only limited affirmative powers in the federal government and restricts other acts, was adopted by the "consent of the nation." LEGOMSKY, *supra* note 15, at 185 (quoting Chief Justice Marshall in *The Schooner Exchange*, 11 U.S. (7 Cranch) at 136). The constitutional limitations on federal power ought to be recognized as limitations on federal sovereign power. See *id.* at 185-90. Ron Garet has suggested to me that early in our nation's history, most citizens might well have agreed with the concept of inherent sovereign powers, but would have thought that any such powers should be exercised by the states and not by the federal government. See Conversation with Ron Garet, Carolyn Craig Franklin Professor of Law and Religion, U.S.C. Law Center, in Los Angeles, Cal. (Aug. 1994).

Some have postulated that inherent federal sovereign powers may be implied from the structure of the Constitution, which, after all, places in the federal government powers that are usually given to independent nations. See ALEINIKOFF & MARTIN, *supra* note 15, at 17-18. But see LEGOMSKY, *supra* note 15, at 190-91 (criticizing this proposition). But if the federal government was to have inherent authority in matters of foreign affairs, it is not clear why the Framers thought it necessary to enumerate certain specific federal powers that relate to foreign affairs, but not others. See *id.* at 191-92; LOUIS HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 24 n.\* (1972).

President is "the sole organ of the federal government in the field of international relations."<sup>71</sup>

Between *Chae Chan Ping* and *Curtiss-Wright*, the Supreme Court was not clear whether the Congress or the executive had primary authority in matters of immigration. However, it was certain that the executive's actions would be accorded judicial deference, whether those actions were taken pursuant to a congressional grant or an inherent sovereign power.

### C. *The Parole Power and the "Entry Fiction"*

Before turning to the exclusion and detention of aliens in contemporary law, it is important to consider the relevance of aliens' physical presence on our land. By the late nineteenth century, it became impossible to complete all immigration inspections aboard vessels. Congress therefore passed several immigration laws to permit inspectors to order the "temporary removal" of an alien from a vessel for inspection; the statutes also specified that this removal would not be considered "a landing."<sup>72</sup> The "removal" and "landing" provisions were the beginning of what has come to be called the "entry fiction."<sup>73</sup> Under this fiction, an alien on United States soil pending admission would be treated as if she was still at the border, and was not within the United States.<sup>74</sup> Because courts did not consider the Constitution to reach extraterritorially, the Due Process Clause would only protect an alien who had managed to effect "a landing."

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<sup>71</sup> *Curtiss-Wright*, 299 U.S. at 320.

<sup>72</sup> Act of Feb. 5, 1917, ch. 29, § 15, 39 Stat. 874, 885; Act of Feb. 20, 1907, ch. 1134, § 16, 34 Stat. 898, 903; Act of Mar. 3, 1891, ch. 551, § 8, 26 Stat. 1084, 1085-86. All three acts contained precisely the same language about "removals" and "landings."

<sup>73</sup> See *Lynch v. Cannatella*, 810 F.2d 1363, 1373 (5th Cir. 1987) (describing the "entry fiction" as the principle "that excludable aliens are to be treated as if detained at the border despite their physical presence in the United States"); *Augustin v. Sava*, 735 F.2d 32, 36 n.8 (2d Cir. 1984) (explaining the "entry doctrine"); *Jean v. Nelson*, 727 F.2d 957, 968-69 (11th Cir. 1984) (en banc) ("The Supreme Court has consistently rejected claims that the parole or detention of an excludable alien has any effect on his status under the law."), *aff'd on other grounds*, 472 U.S. 846 (1985).

<sup>74</sup> For example, *Nishimura Ekiu* was removed from a steamship and placed temporarily in the Methodist Chinese Mission because the vessel was "not a proper place" to detain her. *Nishimura Ekiu v. United States*, 142 U.S. 651, 653 (1892). Placing her in the mission "left her in the same [legal] position . . . as if she never had been removed from the steamship." *Id.* at 661; see also *Chin Yow v. United States*, 208 U.S. 8, 12-13 (1908) ("[T]he petitioner gains no additional right of entrance by being allowed to pass the frontier in custody for the determination of his case.").

The entry fiction becomes increasingly strained when "removals" are extended in time. In *Kaplan v. Tod*,<sup>75</sup> the Court first addressed the problem of a long-term "removal." Kaplan was ordered excluded in 1914, but she could not be returned to her home country due to the war.<sup>76</sup> She was held for a year on Ellis Island and eventually was placed by immigration authorities with a local charity.<sup>77</sup> The authorities issued a warrant in 1923, seeking to return Kaplan home.<sup>78</sup> Kaplan challenged the warrant. She alleged that she could not be excluded because she had already effected an entry into the United States.<sup>79</sup> The Court rejected her claim, ruling that Kaplan's placement did not alter her legal status: "She was still in theory of law at the boundary line and had gained no foothold in the United States."<sup>80</sup>

The *Kaplan* Court did not cite to any statute giving the executive the power to place an alien inside the country. The case contains no discussion of whether Kaplan's nine-year placement could be considered a "temporary removal" under the statute, or whether the power to release an alien during a protracted exclusion process sprang from some other source. Releasing excludable aliens on "immigration parole" became an administrative practice, even though it may not have been strictly authorized by statute.<sup>81</sup> In 1952, Congress codified the parole power as part of a sweeping revision of the immigration laws.<sup>82</sup> The statute also provides that parole "shall not be regarded as an admission,"<sup>83</sup> meaning that release on parole does not confer territorial standing.

<sup>75</sup> 267 U.S. 228 (1925).

<sup>76</sup> *See id.* at 229.

<sup>77</sup> *See id.*

<sup>78</sup> *See id.*

<sup>79</sup> *See id.* at 230.

<sup>80</sup> *Id.* (citing *Nishimura Ekiu v. United States*, 142 U.S. 651, 661 (1892)).

<sup>81</sup> At least one set of commentators has noted that immigration parole "was fashioned by administrative ingenuity alone, without statutory sanction." ALEINKOFF & MARTIN, *supra* note 15, at 348.

<sup>82</sup> *See* Immigration and Nationality Act of 1952, ch. 477, § 212(d)(5), 66 Stat. 163, 188 (1952) (codified as amended at 8 U.S.C. § 1182(d)(5) (1988 & Supp. V. 1993)). That section provides that the Attorney General may, in his or her discretion, temporarily parole excludable aliens into the United States. *See id.* The parole may be under conditions prescribed by the executive and must be for "emergent reasons" or "reasons deemed strictly in the public interest." *Id.* In *Leng May Ma v. Barber*, 357 U.S. 185, 188 (1958), the Court noted that this provision was "generally a codification of the administrative practice."

<sup>83</sup> 8 U.S.C. § 1182(d)(5)(A) (1988 & Supp. V. 1993).

### D. History Lessons

One may make several observations from the history of the plenary power doctrine. First, whatever the source of the federal immigration authority, it is not an enumerated power. And, for many years, it was not settled that the federal government had authority over immigration at all. This point tends to undercut assertions that the immigration power is so central to the executive's function that the courts must be disabled from reviewing the merits of all exclusion decisions. In addition, this point is relevant to a comparison between the judicial deference prong of the plenary power doctrine and another rule of judicial deference. As discussed later in this Article, the political question doctrine provides a test for courts to use when it is claimed that the judiciary must defer to the executive. One part of the test is whether the *text* of the Constitution commits the issue to a coordinate branch of government.<sup>84</sup>

Second, as *Nishimura Ekiu* makes clear, the restrictions on judicial review of exclusion decisions were in part due to doctrinal limits on the reach of federal habeas corpus. At the time, courts looked to see whether the custodian or the court lacked "jurisdiction" over the petitioner. The Supreme Court expressly abandoned the "jurisdiction" limitation in 1942.<sup>85</sup> To the extent that the judicial deference prong of the plenary power doctrine may be based upon the now-repudiated notion of jurisdiction, it is no longer on sound footing.

Third, the Court in *Chae Chan Ping* did not explain why the existence of federal immigration authority meant that the judiciary could not decide whether immigration officers have violated a person's enumerated rights. The lack of a clear theory necessarily weakens the judicial deference prong of the doctrine.

Some observations are also warranted about the entry fiction and its interplay with the plenary power doctrine. One may readily understand the need for immigration parole as a humanitarian device. It is difficult to question Congress's wisdom in codifying the parole power and the entry fiction. Nevertheless, the statutory entry fiction has been elevated to constitutional status. As discussed in the next part of this Article, the fiction has been permitted to determine who is a "person" within the meaning of the Due Process

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<sup>84</sup> See *infra* notes 387, 393-98 and accompanying text.

<sup>85</sup> See *Waley v. Johnston*, 316 U.S. 101, 104-05 (1942).

Clause. Statutes do not normally decide the construction of the Due Process Clause.<sup>86</sup> What gives the entry fiction its potency is the plenary power doctrine. Under the doctrine's extreme form of judicial deference, the courts have been unwilling to examine the scope of the entry fiction. The plenary power doctrine permits the entry fiction to be given constitutional significance.

## II. THE ZENITH OF THE PLENARY POWER DOCTRINE AND STORIES UNTOLD

During the early 1950s, the Supreme Court decided a pair of cases, *United States ex rel. Knauff v. Shaughnessy*<sup>87</sup> and *Shaughnessy v. United States ex rel. Mezei*,<sup>88</sup> that together represent the modern zenith of the plenary power doctrine in the Supreme Court. In these decisions, the Court reinforced the notions that the Constitution stops at the border and that the government has absolute and unreviewable authority in exclusion matters.

This part of the Article explores the full stories of Ellen Knauff and Ignatz Mezei. The Supreme Court decisions in the two cases are well-known. The accounts of their lives, however, have either not been fully told or have been forgotten. They are remarkable. Knauff and Mezei were both initially excluded from the country without hearings. In both cases, public pressure forced the government to hold further proceedings, and Knauff and Mezei were eventually released into the United States. Their stories are worth telling for several reasons. They are of historical interest because *Knauff* and *Mezei* are the leading cases on the government's power to exclude and detain. But the full stories also reveal the tension between the Supreme Court's pronouncements of abstract legal rules and the public's acceptance of those rules. Moreover, they illustrate the importance and value of a hearing.

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<sup>86</sup> For example, once a court finds that a person has an interest protected by the Due Process Clause, the process that is due is a matter of federal law. The process due is not limited simply to the procedures set out by statute. See *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 540-41 (1985); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 432 (1982).

<sup>87</sup> 338 U.S. 537 (1950).

<sup>88</sup> 345 U.S. 206 (1953).

*A. Ellen Knauff in the Courts*

Ellen Knauff was born in Germany in 1915.<sup>89</sup> While Hitler was in power, Knauff went to Czechoslovakia, where she was married and later divorced.<sup>90</sup> In 1939, she retreated to England as a refugee.<sup>91</sup> Knauff served as a flight sergeant with the Royal Air Force in England from 1943 to 1946, and later worked as a civilian employee of the United States Army in Germany, serving in both the Civil Censorship and Signal Divisions.<sup>92</sup> In 1948, she married Kurt Knauff in Germany.<sup>93</sup> Kurt Knauff, a United States citizen, was an Army veteran and fellow civilian Army employee.<sup>94</sup> Kurt and Ellen Knauff received permission to marry from the Army's Commanding General at Frankfurt.<sup>95</sup> She subsequently took a temporary leave from her civilian job and traveled to the United States to apply for naturalization under the immigration laws<sup>96</sup> and under the recently passed War Brides Act.<sup>97</sup>

Ellen Knauff arrived in the United States on August 14, 1948.<sup>98</sup> That same day, she was temporarily excluded from the United States and was detained at Ellis Island.<sup>99</sup> Two months later, the Attorney General ordered Knauff excluded, without a hearing, because "her admission would be prejudicial to the interests of the United States."<sup>100</sup> Knauff brought a habeas corpus petition to challenge this decision. Both the district court and the court of appeals denied relief.<sup>101</sup>

The Supreme Court affirmed.<sup>102</sup> In a four-to-three decision, the Court found that the Attorney General was authorized to exclude Knauff without a hearing for security reasons.<sup>103</sup> Under a 1941 Act, the executive could promulgate regulations restricting

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<sup>89</sup> See *Knauff*, 338 U.S. at 539.

<sup>90</sup> See *id.*

<sup>91</sup> See *id.*

<sup>92</sup> See *United States ex rel. Knauff v. Watkins*, 173 F.2d 599, 601 (2d Cir. 1949), *aff'd sub nom. United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950).

<sup>93</sup> See *id.*

<sup>94</sup> See *id.*

<sup>95</sup> See *Knauff*, 338 U.S. at 539.

<sup>96</sup> See *Knauff*, 173 F.2d at 601.

<sup>97</sup> See *id.* at 603-04 (citing Act of Dec. 28, 1945, ch. 591, 59 Stat. 659 (1946)).

<sup>98</sup> See *Knauff*, 338 U.S. at 539.

<sup>99</sup> See *id.*

<sup>100</sup> *Id.* at 539-40.

<sup>101</sup> See *Knauff*, 173 F.2d at 601, 604.

<sup>102</sup> See *Knauff*, 338 U.S. at 547.

<sup>103</sup> See *id.* at 544. Justices Clark and Douglas did not participate in the case.

entry into the United States during wartime.<sup>104</sup> The President issued a proclamation providing that an alien may be excluded if his or her entry "would be prejudicial to the interests of the United States."<sup>105</sup> Under regulations promulgated by the Attorney General, the alien could be excluded without a hearing on the basis of confidential information, if disclosure would be similarly prejudicial.<sup>106</sup> The statutory and regulatory schemes were upheld; the national emergency, the Court ruled, had never been terminated, and the power to exclude aliens stemmed from the executive's inherent authority, as well as from the legislation passed by Congress.<sup>107</sup>

The plurality opinion went further and reinvigorated the judicial deference prong of the plenary power doctrine. Admission, the Court held, is a privilege, not a right.<sup>108</sup> The executive's exclusion decision "is final and conclusive."<sup>109</sup> Thus, "[w]hatever the rule may be concerning deportation of persons who have gained entry into the United States, it is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government to exclude a given alien."<sup>110</sup> Citing *Nishimura Ekiu*,<sup>111</sup> the plurality gave a classic statement of the doctrine: "Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned."<sup>112</sup> In addition to *Nishimura Ekiu*, the Court relied upon *Curtiss-Wright*<sup>113</sup> and its formulation of inherent authority.<sup>114</sup> The Court also found that the War Brides Act, which would otherwise have permitted Knauff's entry, did not alter Knauff's

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<sup>104</sup> See Act of June 21, 1941, ch. 210, 55 Stat. 252 (1942) (authorizing the President to promulgate restrictions on immigration during time of war or national emergency). The President had previously declared a national emergency. See Proclamation No. 2487, 3 C.F.R. 234 (1938-1943), reprinted in 55 Stat. 1647 (1942).

<sup>105</sup> Proclamation No. 2523, 3 C.F.R. 270-72 (1938-1943), reprinted in 55 Stat. 1696, 1698 (1942), amended by Proclamation No. 2850, 3 C.F.R. 27-28 (1949-1953), reprinted in 63 Stat. 1289, 1289-90 (1950).

<sup>106</sup> See 8 C.F.R. § 175.57(b) (Supp. 1945); *Knauff*, 338 U.S. at 541 n.3.

<sup>107</sup> See *Knauff*, 338 U.S. at 542.

<sup>108</sup> See *id.*

<sup>109</sup> *Id.* at 543.

<sup>110</sup> *Id.* (citations omitted).

<sup>111</sup> For a discussion of *Nishimura Ekiu*, see *supra* notes 50-63 and accompanying text.

<sup>112</sup> *Knauff*, 338 U.S. at 544.

<sup>113</sup> For a discussion of *Curtiss-Wright*, see *supra* notes 68-71 and accompanying text.

<sup>114</sup> See *Knauff*, 338 U.S. at 542 (noting that when Congress passes a law concerning the admission of aliens, "it is not dealing alone with a legislative power"; rather, "[i]t is [also] implementing an inherent executive power").



status or remove her from the Attorney General's exclusion power.<sup>115</sup>

Three Justices dissented. Justice Frankfurter did not contest the government's overall authority to exclude aliens. Rather, he argued that the more specific War Brides Act overrode the general powers contained in the 1941 legislation.<sup>116</sup> He also suggested that considerations of national security could be protected by an in camera hearing.<sup>117</sup>

Justice Jackson wrote the primary dissent. Like Frankfurter, Jackson did not question Congress's ability to authorize immigration officers to exclude aliens.<sup>118</sup> But he believed that Congress would have to use more specific language than that contained in the 1941 legislation before administrators could break up a family.<sup>119</sup> Because Knauff had been excluded without a hearing, the Court did not know the basis for the claim that Knauff's admission would compromise national security. Jackson was willing to believe that the immigration officers acted from a sense of duty "and no doubt upon information which, if it stood the test of trial, would justify the order of exclusion."<sup>120</sup> "But," he wrote, "not even they know whether it would stand this test."<sup>121</sup> Hence, "[t]he plea that evidence of guilt must be secret is abhorrent to free men, because it provides a cloak for the malevolent, the misinformed, the meddlesome, and the corrupt to play the role of informer undetected and uncorrected."<sup>122</sup>

The rule of *Knauff* is that the government has absolute power to exclude. When an official claims that the exclusion concerns the country's security, no court may examine the government's claim.

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<sup>115</sup> See *id.* at 546.

<sup>116</sup> See *id.* at 548-50 (Frankfurter, J., dissenting).

<sup>117</sup> See *id.* at 549.

<sup>118</sup> See *id.* at 550 (Jackson, J., dissenting, joined by Black and Frankfurter, JJ.) ("I do not question the constitutional power of Congress to authorize immigration authorities to turn back from our gates any alien or class of aliens.").

<sup>119</sup> See *id.* at 551-52. *Knauff* has appropriately been called a test of the plenary power doctrine "against the countervalues of Home and Motherhood." HARRY KALVEN, JR., A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA 438 (1988).

<sup>120</sup> *Knauff*, 338 U.S. at 551 (Jackson, J., dissenting).

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

B. *The Rest of the Story (Mrs. Knauff Goes  
to Washington)*

The Supreme Court's decision did not play in Peoria or on Capitol Hill. Newspapers across the country condemned the Court's ruling.<sup>123</sup> The *St. Louis Post-Dispatch* and the *New York Post* mounted publicity campaigns for Ellen Knauff,<sup>124</sup> and, in the face of this publicity, Congress rallied to her support. Senator William C. Langer introduced a private bill for Knauff's relief.<sup>125</sup> Representative Francis E. Walter, a ranking member of the Judiciary Committee, introduced a similar measure in the House.<sup>126</sup> The Attorney General rushed to deport Knauff before Congress could act on the legislation, but this effort was thwarted by several stays, including one from Justice Jackson.<sup>127</sup>

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<sup>123</sup> See, e.g., *Awe for the Attorney General?*, ST. LOUIS POST-DISPATCH, Jan. 22, 1950, at A1 (noting that the case needs rethinking); *The Banished War Bride*, N.Y. POST, Feb. 14, 1950, at 33, § 1 ("[W]e think Justice Jackson's dissent . . . far more eloquently voices the American conscience."); *The Case of Ellen Knauff*, ST. LOUIS POST-DISPATCH, Jan. 18, 1950, at 2C ("[T]he decision against Mrs. Knauff . . . presented one of the most unusual spectacles in Supreme Court history."); *The Case of the War Bride*, N.Y. TIMES, Mar. 4, 1950, at 16 ("[I]rrespective of a man's citizenship . . . he should be informed of charges against him and should have the opportunity of answering them."); *The G.I.'s Bride*, OMAHA SUNDAY WORLD-HERALD, Feb. 19, 1950, at F6 (noting that Mrs. Knauff should have had the right to a hearing); *The Knauff Affair*, N.Y. TIMES, Mar. 30, 1950, at 28 (stating that the opinion was most notable for Jackson's dissent); *The Knauff Case*, N.Y. TIMES, May 7, 1950, at E12 ("We think the law should be revised . . ."); *The Letter Killeth*, N.Y. TIMES, Jan. 28, 1950, at 12 (supporting Jackson's dissent).

<sup>124</sup> Irving Dilliard wrote a series of 15 editorials for the *St. Louis Post-Dispatch*. See *Woman with a Country*, TIME, Apr. 17, 1950, at 57-58 (describing the publicity campaign, and calling the campaign "more effective" than Justice Jackson's dissent). Full-page advertisements supporting Knauff also appeared in the *Washington Post* and the *Washington Star*. See *id.* at 58; see also ELLEN KNAUFF, THE ELLEN KNAUFF STORY 101-04, 106 (1952) (describing interviews with the press); *Immigration: Case of Ellen Knauff*, NEWSWEEK, Apr. 10, 1950, at 24, 27 (discussing the publicity). Knauff's book, though one-sided, contains many helpful and otherwise unavailable details about her personal life and her case.

<sup>125</sup> See S. 2979, 81 Cong., 2d Sess. (1950). The bill was introduced in the Senate on February 2, 1950 and was referred to the Judiciary Committee. See 96 CONG. REC. 1333 (1950); see also KNAUFF, *supra* note 124, at 99 (describing a meeting between Knauff and Senator Langer at which he promised to introduce the bill).

<sup>126</sup> See H.R. 7614, 81st Cong., 2d Sess. (1950). This bill directed the Attorney General to discontinue exclusion proceedings against Knauff and to consider her as having been lawfully admitted for permanent residence as of the date of her last entry. See 96 CONG. REC. 6174 (1950).

<sup>127</sup> During the course of the Supreme Court proceedings, Knauff was free on bond, which had been set by Justice Jackson, sitting as circuit justice. See KNAUFF, *supra* note 124, at 82-83. The Supreme Court's mandate, denying habeas corpus relief, was filed in the district court on February 20, 1950. See *United States ex rel.*

A House subcommittee held hearings on Representative Walter's bill.<sup>128</sup> In a letter to the Judiciary Committee, the Justice Depart-

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Knauff v. McGrath, 181 F.2d 839, 840 (2d Cir. 1950). On February 23, immigration authorities arrested Knauff and prepared to deport her. See KNAUFF, *supra* note 124, at 107-12.

Knauff was scheduled to be deported on February 28, 1950. On February 27, her counsel filed a habeas corpus petition to stay the deportation. See Knauff, 181 F.2d at 840. Counsel alleged that the Immigration and Naturalization Service invariably suspended deportation proceedings if a private bill was introduced for the relief of an alien and that, in the Knauff case, the INS improperly determined not to follow its own policy. See *id.* The district court denied relief. See *id.* A split court of appeals granted a stay and remanded for the district court to conduct a hearing into the INS's policy. See *id.* at 843. On remand, the district court denied relief, and this time the court of appeals affirmed. See United States *ex rel.* Knauff v. McGrath, 182 F.2d 1020, 1020 (2d Cir. 1950), *vacated*, 340 U.S. 940 (1951).

The court of appeals decided the second stay case on May 16, 1950. See *id.* The INS attempted to deport Knauff on May 17, the very next day. See KNAUFF, *supra* note 124, at 147. Knauff's lawyers sought Supreme Court review and asked for a stay. Justice Jackson issued a stay on May 17. See *id.* at 152-54 (reprinting the stay order); 96 CONG. REC. A3750, A3750-51 (1950) (remarks of Rep. Franklin D. Roosevelt, Jr.) (reprinting the stay order). Jackson seemed incensed by the INS's actions in "[b]undling this woman onto an airplane to get her out of this country within hours after the decision of the court of appeals." *Id.* at A3751.

Justice Jackson's stay came at the very last second. Knauff was already at the airport. She learned of the stay just before boarding the plane. In fact, the plane took off with her luggage. See KNAUFF, *supra* note 124, at 147-49. The government's efforts to deport Knauff were quickly and roundly condemned in both the press and the Congress. See, e.g., 96 CONG. REC. A3750 (1950) (remarks of Rep. Franklin D. Roosevelt, Jr.); *id.* at A3990 (remarks of Rep. Emanuel Celler); Max Lerner, *One Is Not Zero*, N.Y. POST, May 18, 1950, at 28 (questioning Justice Department policy on the matter); *Whose?*, ST. LOUIS POST-DISPATCH, May 18, 1950, at 2E (same).

<sup>128</sup> The first hearing was held on March 27, 1950. See *Exclusion of Ellen Knauff: Hearings Before Subcomm. No. 1 of the House Comm. on the Judiciary on H.R. 7614*, 81st Cong., 2d Sess. (1950) [hereinafter *Exclusion of Ellen Knauff*]. Prior to the hearing, the Subcommittee served a subpoena upon Edward J. Shaughnessy, the district director of immigration in New York, commanding Shaughnessy to bring Knauff to Washington. See *id.* at 1 (statement of Rep. Walter noting the subpoena). The Justice Department directed Shaughnessy to disregard the subpoena. See *id.* at 3 (statement of McKay, Deputy Commissioner of Immigration). A Supreme Court rule provided that pending a review of the denial of a habeas corpus petition, the custody of a prisoner "shall not be disturbed." H.R. REP. NO. 1940, 81st Cong., 2d Sess. 5 (1950) (letter from Peyton Ford, Assistant to the Attorney General, quoting former Sup. Ct. R. 45). The Justice Department took the position that Knauff could not be brought to Washington without permission of the Second Circuit, see *id.*, which, ironically, was deciding whether to stay Knauff's deportation to permit action on Representative Walter's bill. The House Subcommittee was angered even more because it appeared that the Second Circuit was willing to consent to Knauff's trip to Washington, but Shaughnessy would not file the necessary court papers to obtain that consent. See *Exclusion of Ellen Knauff*, *supra*, at 1 (citing an Associated Press story that quoted Shaughnessy). The hearings were continued to permit the Subcommittee to receive a report from the Justice Department. See *id.* at 3.

ment opposed the bill and asserted that the Attorney General acted properly in excluding Knauff without a hearing.<sup>129</sup> The Department's letter reviewed the procedural history of the case, but did not reveal—even to Congress—the confidential information upon which the exclusion decision was based.<sup>130</sup> Knauff testified before the Subcommittee. She explained that she neither had received an exclusion hearing nor had been officially told the reasons for her exclusion.<sup>131</sup> Knauff and Representative Ed Gossett discussed "gossip" that Knauff had previously furnished secrets to Czechoslovakian officials.<sup>132</sup> Knauff denied ever giving any information to the Czech government or engaging in any acts of espionage or disloyalty.<sup>133</sup> Justice Department officials at the hearing declined to question Knauff, and they would not provide Congress with any of the facts supporting the exclusion decision.<sup>134</sup> Angered by the Department's position, the Judiciary Committee reported the bill favorably, and it passed unanimously in the House.<sup>135</sup>

Although the House acted quickly, the private bill languished in the Senate until the end of the session.<sup>136</sup> In January 1951, private bills were introduced again in a new session of Congress.<sup>137</sup> That

On March 28, the day after the first hearing, the Second Circuit ruled in the habeas corpus case and stayed Knauff's deportation. *See United States ex rel. Knauff v. McGrath*, 181 F.2d 839, 843 (2d Cir. 1950). The next Congressional hearing was held on April 3, 1950, and Knauff was brought to Washington to testify. *See Exclusion of Ellen Knauff, supra*, at 5.

<sup>129</sup> *See* H.R. REP. No. 1940, 81st Cong., 2d Sess. 4-5 (1950) (letter from Peyton Ford).

<sup>130</sup> *See id.*

<sup>131</sup> *See Exclusion of Ellen Knauff, supra* note 128, at 7 (testimony of Ellen Knauff).

<sup>132</sup> *See id.* at 10-11. Although Knauff had never been officially notified of the facts underlying the Attorney General's exclusion order, she was aware of the gist of the allegations against her. As Knauff explains in her book, her cousin had a friend who contacted Attorney General Tom Clark in the latter part of 1948. Clark wrote to the friend that Knauff "was formerly a paid agent of the Czechoslovak Government, and reported on American Personnel assigned to the Civil Censorship Division in Germany." KNAUFF, *supra* note 124, at 54 (quoting letter from Tom Clark).

<sup>133</sup> *See Exclusion of Ellen Knauff, supra* note 128, at 11 (testimony of Ellen Knauff).

<sup>134</sup> *See id.* at 9, 11 (statements of Commissioner Miller, INS, and Deputy Commissioner McKay, INS). At the conclusion of the hearing, Knauff—whom the Attorney General asserted was a risk to national security—was Senator Langer's lunch guest in the Senate dining room. *See id.* at 17 (statement of Rep. Walter noting that Senator Langer wanted to meet with her); *see also* KNAUFF, *supra* note 124, at 137-38.

<sup>135</sup> *See* 96 CONG. REC. 6174 (1950); KNAUFF, *supra* note 124, at 141.

<sup>136</sup> *See* KNAUFF, *supra* note 124, at 158-60 (describing lobbying efforts in the Senate); *M'Carran Unit Acts Against Mrs. Knauff*, N.Y. TIMES, July 13, 1950, at 20 (reporting that Senator McCarran's Subcommittee would recommend that the Senate Judiciary Committee pigeonhole the bill).

<sup>137</sup> The House bill, H.R. 893, 82d Cong., 1st Sess., 97 CONG. REC. 40 (1951), was

same month, Knauff's husband met with Attorney General McGrath, who ordered immigration officials to reopen the case.<sup>138</sup> Knauff—who had been denied entry as a “security risk”—was paroled from Ellis Island by the Attorney General.<sup>139</sup> In March 1951, two and one-half years after the first order of exclusion was entered, Attorney General McGrath decided that Knauff should be afforded a full exclusion hearing before a Board of Special Inquiry.<sup>140</sup> At that time, the Immigration and Naturalization Service regularly conducted hearings before three-member panels, called Boards of Special Inquiry.<sup>141</sup>

At the hearing, the government sought to exclude Ellen Knauff because she allegedly engaged in espionage while she was employed by the Army's Civil Censorship Division in Frankfurt, Germany.<sup>142</sup>

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introduced by Representative Walter on January 3, 1951. The Senate measure, S. 372, 82d Cong., 1st Sess., 97 CONG. REC. 128 (1951), was introduced by Senator Hennings on January 11, 1951. Neither bill was brought to a vote because of the subsequent actions of the Attorney General.

<sup>138</sup> See KNAUFF, *supra* note 124, at 175-78. At the time, Knauff had pending a petition for writ of certiorari challenging the administrative proceedings in her case. See *supra* note 127 and accompanying text. Because the Attorney General agreed to reopen the administrative case, the Supreme Court dismissed Knauff's appeal as moot. See *United States ex rel. Knauff v. McGrath*, 340 U.S. 940 (1951).

<sup>139</sup> KNAUFF, *supra* note 124, at 182-83.

<sup>140</sup> See *Knauff Hearing Slated*, N.Y. TIMES, Mar. 21, 1951, at 13. The Attorney General had the discretion to order a Board of Special Inquiry in Knauff's case. At the time, the regulations provided that no alien excluded as a security risk could be afforded a hearing before a Board until directed by the Attorney General. See 8 C.F.R. § 175.57(b) (Supp. 1945). Under the regulation (upheld by the Supreme Court in *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542, 544 (1950)), the Attorney General could deny a hearing if disclosure of confidential information would be prejudicial to the public interest. See *id.* Nothing in this regulation prevented the Attorney General from directing that a Board of Special Inquiry hear a case if, in the Attorney General's discretion, a hearing was warranted.

<sup>141</sup> See Immigration Act of 1917, ch. 29, §§ 16-17, 39 Stat. 886, 886-87 (repealed 1952); 8 C.F.R. § 130.1 (Supp. 1945).

<sup>142</sup> The government brought two formal exclusion charges: (1) that Knauff was excludable under the Act of Oct. 16, 1918, ch. 186, § 1, 40 Stat. 1012, *as amended by* 8 U.S.C. § 137 (repealed 1952), because there was reason to believe that Knauff would be likely to engage in espionage or subversive activity if admitted; and (2) that Knauff was excludable under 8 C.F.R. § 175.53(k) (Supp. 1945), because even if Knauff was not a foreign agent or alien enemy, she was of a sufficiently similar character that her admission would be prejudicial to the interests of the United States. See *In re Ellen Raphael Knauff*, No. A-6937471 (B.I.A. Aug. 29, 1951), 1, 1-2 [hereinafter *In re Knauff*], reprinted in KNAUFF, *supra* note 124, app. at 242. A condensed version of the opinion is published at 1 JAMES A. PIKE & HENRY G. FISCHER, ADMINISTRATIVE LAW 640 (2d ed. 1952). Because this Article relies upon sections of the *Knauff* decision that are not in Pike and Fischer, cites to the Board of Immigration Appeals decision are to the pages of the typewritten decision as

The government relied upon three witnesses to prove its case. The first witness, Anna Lavickova, served as a typist at the Czechoslovak Liaison Mission in Frankfurt.<sup>143</sup> She saw Knauff at the Mission three times, and observed Knauff visiting the offices of Major Vecerek and Colonel Podhora.<sup>144</sup> Lavickova testified that Podhora was a spy for the Czech government and that Podhora met with Knauff in the fall of 1947.<sup>145</sup> According to Lavickova, neither Vecerek nor Podhora customarily handled passport matters or visas at the Mission.<sup>146</sup> The implication was that there would have been no reason for Knauff to see these officers unless she was passing secrets to them.

The government's main witness was Major Vaclav Victor Kadane, who was attached to the Liaison Mission beginning in August 1947.<sup>147</sup> Kadane testified that he saw several intelligence reports from an agent code-named "Kobyla," including one report about a new U.S. Army decoding machine, and that in 1948 he received a message identifying "Kobyla" as Knauff.<sup>148</sup> Kadane admitted that he had no firsthand knowledge of any espionage work performed by Knauff, but he asserted that Major Vecerek once told him that Knauff was a "valuable source of information."<sup>149</sup>

The last witness for the government was Captain William Hacker, a counterintelligence officer at Frankfurt.<sup>150</sup> Hacker asserted that he had received confidential information that Knauff passed classified information about the Civil Censorship Division to Colonel Podhora.<sup>151</sup> He also testified that Kadane had told him the same thing in 1948.<sup>152</sup>

Knauff was not afforded the same hearing procedures that a defendant would receive at a criminal trial,<sup>153</sup> but at least she was

reprinted in *Knauff*.

<sup>143</sup> See *In re Knauff*, *supra* note 142, at 4.

<sup>144</sup> See *id.* at 5.

<sup>145</sup> See *id.*

<sup>146</sup> See *id.*

<sup>147</sup> See *id.* at 6.

<sup>148</sup> See *id.*

<sup>149</sup> *Id.* at 7.

<sup>150</sup> See *id.* at 8.

<sup>151</sup> See *id.*

<sup>152</sup> See *id.*

<sup>153</sup> For example, the Board considered hearsay evidence on crucial points, such as messages from unidentified sources naming Knauff as "Kobyla." See *id.* at 12. The Board also restricted counsel's cross-examination. Knauff's lawyer was denied permission to question Captain Hacker about the confidential information given him or about other alleged information in his dossier on Knauff. See *id.* at 8.

able to hear the evidence against her. With this knowledge, Knauff put forward a defense. Knauff testified that she had indeed visited the Czechoslovak Liaison Mission; she needed to go there for passport and visa purposes.<sup>154</sup> Although Anna Lavickova had claimed that Major Vecerek and Colonel Podhora did not handle passports and visas, Knauff produced her own passport, which contained the signatures of both Vecerek and Podhora.<sup>155</sup> Knauff had two responses to the allegations that she passed classified information from the Civil Censorship Division in the fall of 1947 and during 1948. Knauff established that she had left the Division by early August 1947, and thus had no access to the Division information after the summer of 1947.<sup>156</sup> She also produced evidence that the Division did not deal in classified or secret information.<sup>157</sup>

The Board, however, ruled against Knauff. She was found to be excludable as a threat to national security.<sup>158</sup> Knauff's immigration parole was revoked and she was once again returned to Ellis Island.<sup>159</sup>

Knauff appealed the exclusion decision to the Board of Immigration Appeals. While the appeal was pending, Knauff's counsel gathered additional affidavits to show that Knauff had no access to secret or confidential information.<sup>160</sup>

The Board of Immigration Appeals reversed. According to the Board, there was no substantial evidence that Knauff gave secret information to the Czechoslovakian authorities, nor was there evidence to support any inference that Knauff would engage in subversive activities if admitted to the United States.<sup>161</sup> Uncorroborated hearsay, the Board held, does not amount to substantial

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<sup>154</sup> See *id.* at 9. Ellen Knauff's previous marriage was to a Czech citizen. Prior to her marriage to Kurt Knauff, she was considered a Czech citizen. See *id.* at 3.

<sup>155</sup> See *id.* at 10.

<sup>156</sup> See *id.* at 4, 9.

<sup>157</sup> See *id.* at 11.

<sup>158</sup> See *id.* at 2. Edward H. Clark, the chairman of the Board of Special Inquiry, said that "it was reasonable to suspect" that Knauff would engage in espionage or other subversive activities if admitted into the United States. *Mrs. Knauff Is Called a Spy; Immigration Unit Bars Her*, N.Y. TIMES, Mar. 27, 1951, at 1, 18.

<sup>159</sup> See KNAUFF, *supra* note 124, at 202-03; *Mrs. Knauff Held on Ellis Island*, N.Y. TIMES, Mar. 28, 1951, at 18.

<sup>160</sup> The most important item of new information was an affidavit showing that the U.S. Army's decoding machines were neither secret nor classified. In fact, the Signal Corps gave the machines to the German government after the war. See *In re Knauff*, *supra* note 142, at 11-12 n.4, 16-17 n.5.

<sup>161</sup> See *id.* at 18.

evidence to support an exclusion decision.<sup>162</sup> The Board ordered Knauff admitted to the United States for permanent residence.<sup>163</sup> Attorney General McGrath approved the Board's decision.<sup>164</sup>

The rule of *Knauff* is that the Attorney General has the unchallengeable power to exclude an alien. But the full story of Ellen Knauff shows a populace and a Congress unwilling to accept the exercise of this sort of raw power. And the story illustrates the value of a hearing. Once the government was required to justify its exclusion decision with substantial and reliable evidence, in an open proceeding, Knauff gained admission into the United States.

### C. Ignatz Mezei in the Courts

Ellen Knauff was held at Ellis Island during long portions of her fight for entry into the United States. But she had a choice. If she wished to abandon her claim for admission, she could leave Ellis Island and return to Frankfurt, Germany. Ignatz Mezei did not have that option. His case added a poignant dimension to the *Knauff* decision.

Mezei was "born in Gibraltar of Hungarian or Rumanian parents."<sup>165</sup> He came to the United States in 1923 and lived in Buffalo until May 1948.<sup>166</sup> He married an American citizen and, during World War II, sold war bonds and served as an air-raid warden.<sup>167</sup> In 1948, Mezei left the United States to visit his

<sup>162</sup> See *id.* at 14.

<sup>163</sup> See *id.* at 18. Ellen Knauff was admitted as a lawful permanent resident. However, after her admission, Knauff sought to become a U.S. citizen. The INS fought her petition for naturalization. The Service again raised the old espionage allegations, and presented new testimony by Colonel Hacker and a counter-intelligence officer that Knauff had allegedly visited Communist Party headquarters in Frankfurt for fifteen minutes in 1947. Rather than continue through expensive and protracted litigation, Knauff gave up her quest for citizenship. See GLENDON SCHUBERT, *DISPASSIONATE JUSTICE: A SYNTHESIS OF THE JUDICIAL OPINIONS OF ROBERT H. JACKSON* 206 (1969) (citing letter from Knauff's attorney, Alfred Feingold); *Mrs. Knauff Walks out of Hearing on Bid to Obtain U.S. Citizenship*, N.Y. TIMES, July 3, 1953, at 6.

<sup>164</sup> The Attorney General's order, dated November 2, 1951, is reproduced in KNAUFF, *supra* note 124, at app.

<sup>165</sup> *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 208 (1953). The Supreme Court and the district court both discerned "a certain vagueness" about Mezei's family history. *Id.*; *United States ex rel. Mezei v. Shaughnessy*, 101 F. Supp. 66, 67 (S.D.N.Y. 1951), *aff'd in part, rev'd in part*, 195 F.2d 964 (2d Cir. 1952), *rev'd*, 345 U.S. 206 (1953).

<sup>166</sup> See *Mezei*, 101 F. Supp. at 67.

<sup>167</sup> See *id.*



dying mother in Romania.<sup>168</sup> He was denied permission to enter Romania, and he remained in Hungary for nineteen months due to problems in securing exit papers.<sup>169</sup> Mezei obtained a quota immigrant visa in Budapest and traveled to France, where he boarded a ship to return to the United States.<sup>170</sup> Upon arrival at Ellis Island in February 1950, Mezei was temporarily excluded under the same statute and regulations applied to Knauff.<sup>171</sup> In May 1950, the Attorney General ordered Mezei excluded without a hearing, based upon confidential information. The Attorney General determined that disclosing the information would be "prejudicial to the public interest."<sup>172</sup>

Mezei repeatedly attempted to leave the United States. Twice he tried to return to Europe. France and Great Britain both refused him permission to land.<sup>173</sup> The State Department was unable to negotiate Mezei's readmission to Hungary.<sup>174</sup> Mezei wrote a dozen Latin American countries for visas, but was turned down.<sup>175</sup>

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<sup>168</sup> See *Mezei*, 345 U.S. at 208.

<sup>169</sup> See *id.* Mezei claimed to be a citizen of Great Britain, due to his birth in Gibraltar. See *Mezei*, 101 F. Supp. at 67. The record contains evidence that Mezei lost whatever claim he might have made to derivative Hungarian citizenship. See Transcript of Record at 15-17, *United States ex rel. Mezel [sic] v. Shaughnessy*, 195 F.2d 964 (2d Cir. 1952) (No. 22263) (affidavit of Alexander Glattstein). The record does not indicate whether Mezei could claim Romanian citizenship, though that point seems unimportant since Romania would not allow him to enter.

<sup>170</sup> See *Mezei*, 345 U.S. at 208.

<sup>171</sup> See *id.*

<sup>172</sup> *Id.*; 8 C.F.R. § 175.57(b) (Supp. 1945); see also *supra* notes 104-06 and accompanying text.

<sup>173</sup> See *Mezei*, 345 U.S. at 208-09. Mezei had traveled through France in 1950 before embarking for the United States. France twice denied Mezei permission to return because Mezei had never resided in France and was there in transit status only. See Transcript of Record at 18, *Mezei*, 195 F.2d 964 (2d Cir. 1952) (No. 22263) (letter from Pierre Basdevant, Secretary of French Embassy); *id.* at 20-22 (letter from C. Di Maria, Manager, Legal Department, Compagnie Générale Transatlantique). Compagnie Générale Transatlantique, which owned the vessel on which Mezei had traveled to the United States, arranged meetings between Mezei and the British Consul in New York. See *id.* at 21 (letter from Di Maria). Mezei was apparently never able to satisfy the British Consul that he was a British subject. See *id.* The French Embassy even asked the U.S. State Department to intervene with the immigration authorities to allow Mezei to enter the United States. See *id.* at 18 (letter from Pierre Basdevant).

<sup>174</sup> See *Mezei*, 345 U.S. at 209.

<sup>175</sup> See *id.* Compagnie Générale Transatlantique also unsuccessfully approached consulates of different European countries on Mezei's behalf, and solicited the help of the International Refugee Organization. See Transcript of Record at 22, *Mezei*, 195 F.2d 964 (2d Cir. 1952) (No. 22263) (letter from Di Maria).

Because no country would take him, Mezei remained in custody on Ellis Island.

Interspersed with his efforts to find a country that would take him, Mezei filed a series of five habeas corpus petitions. The first four were summarily denied without addressing the government's power to exclude and detain an alien who could not leave the United States.<sup>176</sup> The fifth petition was successful. Judge Irving R. Kaufman ruled that the Constitution "applies even to aliens on Ellis Island"; under the Due Process Clause, detention pending exclusion proceedings must still be reasonable.<sup>177</sup> The court found that Mezei's detention—then twenty-one months long—appeared unreasonable, but that the confinement might be justified if the government could establish that Mezei's release would endanger public safety.<sup>178</sup> The court offered to review the government's confidential information in camera.<sup>179</sup> The government, however, refused to disclose the evidence and the district court ordered Mezei released on bond.<sup>180</sup> The court of appeals affirmed, over Learned Hand's dissent.<sup>181</sup> For both the district court and the majority in the court of appeals, the lengthy detention and the

<sup>176</sup> See Order, United States *ex rel.* Mezei v. Shaughnessy, Civ. No. 58-211 (S.D.N.Y. July 5, 1950); Order, United States *ex rel.* Mezei v. Shaughnessy, Civ. No. 61-272 (S.D.N.Y. Nov. 17, 1950); Order, United States *ex rel.* Mezei v. Shaughnessy, Civ. No. 64-156 (S.D.N.Y. Mar. 26, 1951); Order, Mezei v. Shaughnessy, Civ. No. 67-108 (S.D.N.Y. June 12, 1951).

<sup>177</sup> United States *ex rel.* Mezei v. Shaughnessy, 101 F. Supp. 66, 68-69 (S.D.N.Y. 1951), *aff'd in part, rev'd in part*, 195 F.2d 964 (2d Cir. 1952), *rev'd*, 345 U.S. 206 (1953).

<sup>178</sup> See *id.* at 70.

<sup>179</sup> See *id.*

<sup>180</sup> See *Mezei*, 195 F.2d 964, 967, 970 (2d Cir. 1952), *rev'd*, 345 U.S. 206 (1953).

<sup>181</sup> See *id.* at 970. Mezei was unable to raise the necessary funds for release under the bond set by the district court. The court of appeals remanded for a new bond hearing to facilitate Mezei's release. See *id.* The court also denied the government's motion to stay the issuance of the mandate (pending Supreme Court review). See Order, United States *ex rel.* Mezei v. Shaughnessy, C.A. No. 22263 (2d Cir. Apr. 14, 1952).

Judge Hand dissented because he found no constitutional question. See *Mezei*, 195 F.2d at 970-71 (Hand, J., dissenting). Judge John Noonan has called the dissent "one of Hand's worst opinions." John T. Noonan, Jr., *Master of Restraint*, N.Y. TIMES, May 1, 1994, at 7 (book review). Judge Noonan, in turn, authored the majority opinion in *Barrera-Echavarria v. Rison*, which distinguished the Supreme Court's (and Learned Hand's) ruling in *Mezei*. See *Barrera-Echavarria v. Rison*, 21 F.3d 314, 315-16 (9th Cir. 1994) (holding that eight-year detention of excludable alien differed from detention of Mezei and was not authorized by law), *vacated en banc*, No. 93-56682, 1995 WL 9709 (9th Cir. Jan. 12, 1995).

prospect of permanent incarceration distinguished this case from *Knauff*.<sup>182</sup>

The Supreme Court did not agree. In a five-to-four decision, the Court held that Mezei was properly excluded and detained without a hearing.<sup>183</sup> Justice Clark wrote for the Court.<sup>184</sup> Clark's majority opinion stands as the Court's strongest statement of the plenary power doctrine and the entry fiction. Citing *Chae Chan Ping* and *Knauff*, the opinion states that the power to exclude aliens is a "fundamental sovereign attribute" that is "largely immune from judicial control."<sup>185</sup> The Court reiterated the holding in *Knauff* that "[w]hatever the procedure authorized by Congress is, it is due process."<sup>186</sup> The majority rejected the argument that Mezei's indefinite incarceration distinguished the case from *Knauff*; no additional rights accrued from his extended stay on Ellis Island. Mezei had simply not made a "landing" in the United States; for immigration and constitutional law purposes, Mezei must be treated "as if stopped at the border."<sup>187</sup> Further, to admit a person barred from entry on national security grounds would "nullif[y] the very purpose of the exclusion proceeding[s]."<sup>188</sup>

As in *Knauff*, Justice Jackson authored the primary dissent.<sup>189</sup> Jackson was displeased with the government's conduct in the case. Indeed, he initially voted to deny the government's petition for a writ of certiorari, which would have allowed the court of appeals

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<sup>182</sup> See *Mezei*, 101 F. Supp. at 68 (holding that although *Knauff* establishes the power to exclude without a hearing, detention must still be reasonable); *Mezei*, 195 F.2d at 967 (affirming the lower court's holding).

<sup>183</sup> See *Mezei*, 345 U.S. 206, 214-15 (1953).

<sup>184</sup> As Attorney General, Tom Clark personally reviewed (and affirmed) Ellen Knauff's exclusion order. See KNAUFF, *supra* note 124, at 54. Justice Clark did not participate in the consideration or decision of *Knauff* in the Supreme Court. See *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 547 (1950).

<sup>185</sup> *Mezei*, 345 U.S. at 210.

<sup>186</sup> *Id.* at 212 (quoting *Knauff*, 338 U.S. at 544).

<sup>187</sup> *Id.* at 215 (citing *Nishimura Ekiu v. United States*, 142 U.S. 651, 661-62 (1892); *United States v. Ju Toy*, 198 U.S. 253, 263 (1905); *Kaplan v. Tod*, 267 U.S. 228, 230 (1925)).

<sup>188</sup> *Id.* at 216.

<sup>189</sup> See *id.* at 218 (Jackson, J., joined by Frankfurter, J., dissenting). Justice Black wrote a separate dissent, agreeing with many of Jackson's points but emphasizing the unfairness of imprisonment on the basis of secret information. See *id.* at 216-18 (Black, J., joined by Douglas, J., dissenting). Justice Black felt strongly about the case. He read his dissent from the bench. According to one of Justice Douglas's law clerks, Black's reading "was an oration. It went from a whisper to a thunder. The courtroom was transfixed." ROGER K. NEWMAN, HUGO BLACK: A BIOGRAPHY 410-11 (1994) (quoting Douglas's law clerk, Charles Ares).

decision to stand.<sup>190</sup> He penned his dissent over the strong contrary views of one of his law clerks, William H. Rehnquist.<sup>191</sup>

<sup>190</sup> One of Jackson's law clerks, Donald Cronson, wrote a memorandum to Jackson, recommending that Jackson vote to deny the government's petition for a writ of certiorari. See Memorandum from "DC," Clerk, to Justice Robert Jackson 1 (no date) (RHJP) (titled "No. 139 *Shaughnessy v. U.S. ex. rel. Mezei*"). Cronson thought that the lower courts' decisions were correct and that "this case tends to point up the horrors of *Knauff*." *Id.* at 1. He was in favor of granting certiorari if *Mezei* could be used to overturn *Knauff*. See *id.* But Cronson was afraid that the Supreme Court would reverse the court of appeals, "in which case we are well on our way toward the institution of the letter de cachet." *Id.* After counting the votes, he recommended that Jackson vote to deny review. See *id.* at 1-2.

From Jackson's handwritten notes on the margin of Cronson's memorandum, it appears that Jackson followed his law clerk's advice. See *id.* at 1. Jackson's notes indicate that he voted to deny certiorari (along with Justices Black, Frankfurter, and Clark), but at least four Justices (Reed, Burton, Minton, and Vinson) voted to grant the government's petition. See *id.* At the bottom of Cronson's memorandum, the Justice wrote of his dissatisfaction with *Mezei*'s treatment: "Shame that gov't most stable[,] powerful and prosperous in world asks France [to] take one whom we fear. France—exploited by conqueror [sic], divided by collaborator[,] shaken by strong communist power." *Id.* at 2. These same sentiments found their way into Jackson's published dissent: "Since we proclaimed him a Samson who might pull down the pillars of our temple, we should not be surprised if peoples less prosperous, less strongly established and less stable feared to take him off our timorous hands." *Mezei*, 345 U.S. at 220 (Jackson, J., dissenting).

<sup>191</sup> After certiorari was granted, Rehnquist wrote a memorandum to Jackson, which was "submitted in great deference" because Rehnquist's opinion was contrary to Cronson's "and also to some of the views which [Jackson] expressed in *Knauff*." See Memorandum from "whr," Clerk, to Justice Robert Jackson 1 (no date) (RHJP) (titled "No. 139 Reflections on *Shaughnessy v. Mezei*"). Rehnquist raised the entry fiction, noting that *Mezei* was legally in the same position as someone attempting to enter the country for the first time. See *id.* He attempted to sway Jackson by distinguishing *Knauff* as a case mostly about the construction of the War Brides Act. See *id.* Rehnquist wrote:

But when we come to this guy, who seeks entry under the provisions of the general immigration law, I have some trouble crying. He was in this country twenty-five years and never bothered to become a citizen, and in this respect the case is sharply distinguishable from *Knauff*, where Mrs. Knauff had never had a chance to become a citizen. His case has no connection with the War Brides Act, and therefore your statutory construction in *Knauff* would not necessarily carry over here. I think Congress . . . has provided that this man was excludible [sic] without [a] hearing. That it had the power to do so I have not the slightest doubt. . . . That the majority on occasion must be checked when proceeding against a minority of its fellow citizens is inevitable and probably salutary; but that the majority must be checked in proceeding against hostile aliens by a judge, simply because he doesn't think deportation is a good idea, is intolerable. If Congress plainly said that all aliens with green hair shall be excluded, I know of nothing in the Constitution which would prevent them.

*Id.* Rehnquist concluded that *Mezei*'s detention at Ellis Island did not affect the case. *Mezei* "is perfectly free to get on the first outbound boat that comes along. . . . I

Justice Jackson attacked the application of the entry fiction to Mezei. He acknowledged the "impeccable legal logic of the Government's argument" supporting detention, but recognized that such logic "leads to an artificial and unreal conclusion" when an alien cannot be returned to another country.<sup>192</sup> Although the government correctly pointed out that Mezei was free to leave Ellis Island, Jackson wryly noted that "[t]hat might mean freedom, if only [Mezei] were an amphibian!"<sup>193</sup> For Jackson, the touchstone was reasonableness.<sup>194</sup> A real threat to the nation could justify detention, and so Jackson sided with the majority in rejecting Mezei's substantive due process claim. The Court must uphold the detention of an enemy alien if the danger is real and the alien is afforded a reasonable chance to defend himself—that is, if the alien is given procedural due process.<sup>195</sup> But because Mezei had been given no chance to defend himself, Jackson split with the majority on the procedural due process issue.

In ruling that Mezei had been denied procedural due process, Jackson compared Mezei's detention with the system of "protective custody" in Nazi Germany.<sup>196</sup> Jackson argued that Mezei was entitled to notice of the charges against him, the opportunity to

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think the government is right." *Id.* at 2.

<sup>192</sup> *Mezei*, 345 U.S. at 220 (Jackson, J., dissenting).

<sup>193</sup> *Id.*

<sup>194</sup> *See id.* at 222-24.

<sup>195</sup> *See id.* at 224.

<sup>196</sup> *Id.* at 225-26. The *Mezei* dissent quotes portions of Hermann Göering's testimony at the Nazi war crimes trials in Nuremberg. According to Göering, those who committed acts of treason were turned over to the German courts. Those who had not committed treason, but "of whom one might expect such acts," were placed in "protective custody" and were taken to concentration camps. *Id.* at 225-26 & n.8 (quoting testimony of Hermann Göering); *see also* 9 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 420-21 (1947). Jackson had served as Chief U.S. Prosecutor at Nuremberg. In this role, he personally cross-examined Hermann Göering. *See* 9 *id.* at 417-56, 512-71 (cross-examination of Göering). The Nuremberg prosecutors, including Jackson, considered the system of "protective custody" to be an important political tool of the Nazi Party. The Nuremberg indictment alleged that the defendants used "protective custody" to make the Nazis "secure from attack and to instill fear in the hearts of the German people." 2 *id.* at 34-35 (reprinting the indictment). In his opening statement, Jackson pointed out that, less than a month after becoming Chancellor, Hitler had obtained a suspension of portions of the constitution of the Weimar Republic. One of the suspended provisions was Article 114, which had restricted the government's ability to detain individuals. *See* 2 *id.* at 110-11. According to Jackson, "[s]ecret arrest and indefinite detention, without charges, . . . became the method of inflicting inhuman punishment on any whom the Nazi police suspected or disliked. No court could issue an injunction, or writ of *habeas corpus*, or *certiorari*." 2 *id.* at 112.

confront and cross-examine adverse witnesses, and the chance to produce evidence in his favor.<sup>197</sup> These rights are "especially necessary where the occasion of detention is fear of future misconduct, rather than crimes committed."<sup>198</sup> As in *Knauff*, Jackson assumed that the government would act in good faith. Nevertheless, a fair hearing is "the best insurance" against governmental errors that "are bound to occur on *ex parte* consideration."<sup>199</sup> Jackson noted that Ellen Knauff was saved by administrative and congressional hearings, and he called her case "a near miss."<sup>200</sup>

Despite Justice Jackson's dissent, the rule of *Mezei* is simple and straightforward: Mezei came to the border without permission to enter. Based upon the executive's national security concerns, he was properly excluded and detained without a hearing. Though Mezei had made it to U.S. soil, he would be treated the same as someone who had not. Indefinite detention may be regrettable, but the length of confinement does not diminish the executive's power to detain.

#### D. *The Rest of the Story (Shuffled off to Buffalo)*

At first, the aftermath of the *Mezei* decision seemed a replay of *Knauff*. Once again, many newspapers excoriated the opinion.<sup>201</sup>

<sup>197</sup> See *Mezei*, 345 U.S. at 225 (Jackson, J., dissenting).

<sup>198</sup> *Id.*

<sup>199</sup> *Id.* at 224-25.

<sup>200</sup> *Id.* at 225. Jackson's dissent, which was joined by Justice Frankfurter, emphasized the reality of Mezei's predicament. Of all the Justices, Frankfurter could perhaps best empathize with Mezei's plight. Frankfurter himself emigrated to the United States through Ellis Island in 1894. See DAVID M. BROWNSTONE ET AL., *ISLAND OF HOPE, ISLAND OF TEARS* 246 (1979); MICHAEL E. PARRISH, *FELIX FRANKFURTER AND HIS TIMES* 10 (1982).

<sup>201</sup> See, e.g., *Abridging Due Process*, TOLEDO BLADE, Mar. 26, 1953, at 16 ("Is the United States so insecure that it must resort to the kind of 'protective custody' which has put millions of individuals behind the walls of German and Russian concentration camps?"); *Deprived of Liberty*, WASH. POST, Mar. 18, 1953, at 12 ("Aside from all questions of law, this result is most unfortunate in a country that lays great store upon freedom of the individual."); *Detention for Life—on Undisclosed Charges*, I.F. STONE'S WEEKLY, Mar. 28, 1953, at 4 ("It remains to be seen whether individual liberty is that highly prized in the cowed and confused U.S.A. of 1953."); *Ignatz and Everybody's Freedoms*, RICHMOND NEWS LEADER, Mar. 28, 1953, at 12 (claiming that this "decision put before the nation a splendid example of one of the faults in our immigration laws"); *The Story of Ignatz Mezei*, ST. LOUIS POST-DISPATCH, Apr. 5, 1953, at 2F (questioning "[h]ow . . . anyone [can] know these facts and not worry about what they may foretell for our country").

At least one future member of the Supreme Court was also offended by the decision. In *Trop v. Dulles*, 356 U.S. 86 (1958), Chief Justice Warren called the

Once again, the Supreme Court's ruling and the public response led to the introduction of private relief bills in Congress.<sup>202</sup> Like Ellen Knauff, Ignatz Mezei was returned to custody at Ellis Island.<sup>203</sup> As with Ellen Knauff, the Attorney General determined that the Justice Department would review the matter and decide whether to grant a hearing.<sup>204</sup> But Mezei did not have the same support in Congress that Ellen Knauff enjoyed. In Knauff's case, the INS had angered Congress by refusing to disclose the evidence supporting her exclusion. This time the Justice Department shared some of its information with Congress, which dampened some members' enthusiasm for a hearing on the private bills.<sup>205</sup> As a more public signal of the evidence supporting exclusion, Mezei was moved to the "Communist Ward" at Ellis Island.<sup>206</sup>

Despite the softening of congressional support for Ignatz Mezei, Attorney General Brownell announced in December 1953 that he

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memory of the *Mezei* case "still fresh," and he characterized as "intolerable" Mezei's extended confinement without judicial review. *Id.* at 102 n.36 (plurality opinion).

<sup>202</sup> On March 23, 1953, Senator Langer—who had previously sponsored legislation for Ellen Knauff—introduced a bill for Mezei's relief. *See* S. 1414, 83d Cong., 1st Sess. (1953); *supra* text accompanying note 125. Representative Celler introduced a similar measure on April 24. *See* H.R. 4858, 83d Cong., 1st Sess. (1953).

<sup>203</sup> Mezei had been released on May 10, 1952, on a \$3000 bond set by District Judge Kaufman, and on April 22, 1953, one month after the Supreme Court's ruling, Mezei was returned to Ellis Island. *See* Walter Froehlich, *Mezei on Way to Ellis Island Exile*, BUFFALO COURIER-EXPRESS, Apr. 22, 1953, at 1; Kalman Seigel, *Stateless, He Faces Life on Ellis Island*, N.Y. TIMES, Apr. 23, 1953, at 1.

<sup>204</sup> The INS initially resisted the request for an administrative review of Mezei's case. *See* Letter from Commissioner Mackey, INS, to Jack Wasserman (Mar. 26, 1953) (JWP). One month later, however, Attorney General Herbert Brownell, Jr. announced that the Justice Department would look at the case anew. *See Hope for Stateless Man*, N.Y. TIMES, Apr. 24, 1953, at 12; *Sixty-Two Units Are Added to Subversive List*, N.Y. TIMES, Apr. 30, 1953, at 19. During a press conference, Brownell said that "You can be sure justice will be tempered with mercy in this department." Bert Andrews, *Brownell Studying Aid for Ellis Island "Lifer"*, N.Y. HERALD TRIB., Apr. 30, 1953, at 1. Calls for further review came from a number of sources including the American Legion. *See* Letter from Miles D. Kennedy, Director, American Legion, to Herbert Brownell, Jr., U.S. Attorney General (June 11, 1953) (JWP).

<sup>205</sup> Senator Arthur V. Watkins, a member of the Senate Judiciary Committee, discussed Mezei's case with the Justice Department. Based upon the Department's information, Watkins found that the case involved "very serious matters of security." The Senator deemed it "unwise" to convene a hearing before the Immigration Subcommittee. Letter from Senator Arthur V. Watkins to Jack Wasserman (Apr. 2, 1953) (JWP).

<sup>206</sup> *See* Letter from P.A. Esperdy, Deputy District Director, INS, to Jack Wasserman (July 22, 1953) (JWP) (stating that "[i]n view of the basis for Mr. Mezei's exclusion, the present detention quarters in which he is kept is considered the appropriate one"); Letter from Jack Wasserman to INS (July 10, 1953) (JWP) (protesting the transfer).

would grant Mezei an exclusion hearing before a Board of Special Inquiry.<sup>207</sup> This was the same type of hearing afforded to Ellen Knauff. Brownell also took the unusual step of appointing distinguished private citizens to Mezei's Board. Mezei's case would be heard by William Dean Embree, former president of the New York City Bar Association, Russell Niles, dean of New York University Law School, and Elliott Cheatham, a law professor at Columbia University.<sup>208</sup>

Because Mezei's original exclusion order was entered without a hearing, Mezei did not know the full extent of the government's case. But Mezei was surely aware of the reasons why the government sought to exclude him. In 1924, Mezei had joined the Hungarian Working Sick Benefit and Education Society in New York City.<sup>209</sup> The Society merged in 1930 with other groups and became a Hungarian lodge of the International Workers Order (IWO).<sup>210</sup> While the IWO described itself as simply a fraternal society that provided insurance and benefits to its members,<sup>211</sup>

<sup>207</sup> See *Alien to Get a Hearing*, N.Y. TIMES, Dec. 10, 1953, at 62; *Hearing Granted Ex-Buffalonian Barred by U.S.*, BUFF. EVENING NEWS, Dec. 10, 1953, at 54; Press Release from the Department of Justice 1 (Dec. 9, 1953) (JWP). Brownell was quoted as stating that while the Attorney General has the statutory authority to exclude without a hearing, "this power should be exercised sparingly." *Id.*

<sup>208</sup> See THE FUND FOR THE REPUBLIC, INC., DIGEST OF THE PUBLIC RECORD OF COMMUNISM IN THE UNITED STATES 144 (1955) (listing the makeup of the Board); *Hungarian Who Jumped His Ship in '23 to Enter U.S. Is Declared Security Risk*, N.Y. TIMES, Apr. 10, 1954, at 9 (same); *Ruling Due on Deporting Man Held on Ellis Island 3 Years*, EVENING STAR (Washington, D.C.), Feb. 20, 1954, at A-11 (same). Brownell had originally announced that a New York lawyer, recommended by the New York Bar Association, would preside at the hearing. See Press Release from the Department of Justice, *supra* note 207, at 1 (announcing the selection of Edward W. Bourne to preside). But Mezei would not waive his right to a hearing before a three-member Board of Special Inquiry, and so a full Board was appointed. See Letter from Andrew Reiner, Attorney, to Jack Wasserman 1 (Dec. 16, 1953) (JWP) ("I have . . . advised Mr. Mezei not to sign the waiver."). The appointments to Mezei's Board were highly unusual. Indeed, while one might understand why the Attorney General would wish to appoint a particularly distinguished Board, it was not entirely clear that the Attorney General had the power to do so. The governing immigration statute and regulations permitted private persons to be appointed to a Board only in ports where permanent Boards were not functioning and then only when it was "impracticable" to detail another Board from some other INS station. See Immigration Act of 1917, ch. 29, § 17, 39 Stat. 887 (repealed 1952); 8 C.F.R. § 60.29(c) (1949). In contrast, while Ellen Knauff's hearing was held in Washington, the members of her Board were the same immigration officers who regularly sat in hearings at Ellis Island. See KNAUFF, *supra* note 124, at 193-94.

<sup>209</sup> See *In re Ignatz Mezei*, No. A-2024778, at 3 (B.I.A. Aug. 9, 1954) (JWP).

<sup>210</sup> See *id.* at 4.

<sup>211</sup> In its own internal documents, the IWO stated:



others took a different view. In 1947, Attorney General McGrath listed the IWO as a communist organization in documents submitted to the Loyalty Review Board.<sup>212</sup> According to the Attorney General, the IWO operated under the direction and control of the Communist Party, and regularly disseminated communist propaganda.<sup>213</sup>

Although Mezei asserted that the IWO was not a communist organization,<sup>214</sup> he would have difficulty persuading the INS to agree. At the time, the INS was one of several government agencies leading an attack against the IWO and its members. For over ten years, INS officials had been instructed to give IWO members "extra scrutiny" in immigration proceedings.<sup>215</sup> In 1950, in a highly

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The IWO provides sick, disability and death benefits. It organizes for its members medical aid and other forms of fraternal services. It pledges aid and comfort to its members in case of need. The ranks of the International Workers Order and its societies are open to all regardless of sex, nationality, race, color, creed or political affiliation.

ARTHUR J. SABIN, *RED SCARE IN COURT: NEW YORK VERSUS THE INTERNATIONAL WORKERS ORDER* 11 (1993) (quoting the IWO Declaration of Principles). For a general description of the IWO, see *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123 (1951). As explained in that case, the IWO was incorporated under New York insurance laws in 1930. *See id.* at 134. Although it was formed as a corporation, the IWO was organized under a lodge system and had a representative form of government. *See id.* By late 1947, the organization had some 185,000 members. *See id.* at 128, 134. The IWO provided life insurance and other benefits for its members. *See id.* at 134.

<sup>212</sup> *See Joint Anti-Fascist Refugee Comm.*, 341 U.S. at 128-29 ("The Attorney General included [the IWO] in the list he furnished to the Loyalty Review Board November 24, 1947."). In 1954, shortly before Mezei's Board hearing, the IWO was listed as a "Communist-front organization" by the Subversive Activities Control Board. Notice, 19 Fed. Reg. 424 (1954).

<sup>213</sup> *See Joint Anti-Fascist Refugee Comm. v. McGrath*, 104 F. Supp. 567, 569-71 n.2 (D.D.C. 1952) (summarizing affidavit of Attorney General McGrath), *aff'd in part, rev'd in part sub nom.* *Joint Anti-Fascist Refugee Comm. v. Brownell*, 215 F.2d 870 (D.C. Cir. 1954), *cert. denied*, 345 U.S. 911 (1953).

<sup>214</sup> In one of his prose pleadings, Mezei wrote that "[t]he Hungarian Brotherhood of the Sick and Death Benefit Society, Lodge 1013 of the International Workers Order was not a Communist front organization." Addendum to Petition for Writ of Habeas Corpus, *Mezei v. Shaughnessy*, Civ. No. 67-108 (S.D.N.Y. June 5, 1951).

<sup>215</sup> The Board of Immigration Appeals determined that when IWO membership is alleged, INS examiners should give the case "extra scrutiny" to determine whether the alien is affiliated with the Communist Party. *See In re L-*, 1 I. & N. Dec. 450, 453 (B.I.A. 1943) (quoting *In re C- Z-*, No. 56106/708 (unpublished decision)). For examples of this "extra scrutiny," see, for example, *United States ex rel. Kaloudis v. Shaughnessy*, 180 F.2d 489, 490 (2d Cir. 1950) (involving the Board of Immigration Appeals refusal to suspend alien's deportation order because of his IWO affiliation); *Stasiukevich v. Nicolls*, 168 F.2d 474, 476 (1st Cir. 1948) (involving an INS examiner who testified that alien was a Communist largely because of his IWO membership);

publicized case, the INS deported an IWO officer, Andrew Dmytryshyn, on the grounds that he was active with the IWO, which the INS claimed was affiliated with the Communist Party.<sup>216</sup> In that same year, the New York Superintendent of Insurance obtained a court order dissolving the IWO, essentially because the IWO was politically "hazardous" to its policyholders.<sup>217</sup> The INS gave its evidence from the Dmytryshyn hearing to the New York Superintendent of Insurance, and the INS's coterie of witnesses formed the backbone of the Superintendent's case against the IWO.<sup>218</sup>

With this background, it is easy to see why the INS sought to exclude Mezei. Mezei was more than a mere member of the IWO. He served as secretary and president of the IWO's Hungarian lodge in Buffalo.<sup>219</sup> During Mezei's detention at Ellis Island in 1950, he was repeatedly questioned by an INS examiner about the IWO and the Communist Party.<sup>220</sup> Mezei acknowledged that about half of the members of the Buffalo Hungarian lodge were communist sympathizers and that Communist Party speakers sometimes came to lodge meetings.<sup>221</sup> He denied, however, that he was a member of the Communist Party himself or that he was a communist

Vergas v. Shaughnessy, 97 F. Supp. 335, 341 (S.D.N.Y. 1951) (involving the Board of Immigration Appeals's refusal to suspend alien's deportation order because of his IWO officership).

<sup>216</sup> See SABIN, *supra* note 211, at 64. Dmytryshyn's immigration appeal is published as *In re D—*, 4 I. & N. Dec. 578 (B.I.A. 1951). Dmytryshyn was a national committee member of the Ukrainian section of the IWO, and he helped organize IWO lodges. See *id.* at 579.

<sup>217</sup> See *In re Bohlinger*, 106 N.Y.S.2d 953, 976-79 (N.Y. Sup. Ct. 1951), *aff'd sub nom. In re International Workers Order*, 113 N.Y.S.2d 755 (N.Y. App. Div. 1952), *aff'd sub nom. In re Bohlinger*, 112 N.E.2d 280 (N.Y.), *cert. denied*, 346 U.S. 857 (1953). The state trial court also determined that the IWO's business practices were hazardous because the IWO was too liquid, and funds could therefore be expropriated in the event of a conflict between the United States "and the world of Communism." *Id.* at 979.

<sup>218</sup> See SABIN, *supra* note 211, at 64 (describing an interview with the attorney for the New York Superintendent of Insurance).

<sup>219</sup> See *In re Ignatz Mezei*, No. A-2024778, at 4 (B.I.A. Aug. 9, 1954) (JWP). Mezei explained that he was elected president of the lodge because he could write. Most of the other lodge members were illiterate. See Sworn Statements of Ignac [sic] Mezei to William Fliegelman, INS Hearing Examiner 15 (Feb. 10, 13, & 14 1950) (JWP).

<sup>220</sup> The INS transcribed four of these sessions. See Sworn Statements of Mezei, *supra* note 219; Examination of Ignac [sic] Mezei (Nov. 7, 1950) (JWP).

<sup>221</sup> See Sworn Statements of Mezei, *supra* note 219, at 13, 17.

sympathizer.<sup>222</sup> Mezei also denied that he had ever personally invited Communist Party members to speak at lodge meetings.<sup>223</sup>

While Mezei knew that the INS wanted to exclude him because of his IWO activities, Mezei did not know the formal charges against him. Prior to the exclusion hearing, Mezei's attorneys met with a Justice Department official, who disclosed the charges.<sup>224</sup> The government alleged that Ignatz Mezei was excludable on three grounds: (1) that he was a member of the Communist Party at least some time during the period from 1929 to 1945; (2) that he was convicted of a crime involving moral turpitude (petty larceny) during his previous period of residence in Buffalo; and (3) that he gave false information to consular officers in Hungary to obtain an immigrant quota visa.<sup>225</sup> The government did not, however, disclose the specific facts on which these charges were based. At the Board hearing, Mezei's attorney, Jack Wasserman, objected to the nondisclosure. He asserted that the lack of specificity about dates and events denied Mezei a fair hearing.<sup>226</sup>

Mezei's Board hearing was not to be a replay of Knauff's. The two grounds for excluding Knauff focused upon her alleged activities in Germany. Because the INS could not prove that Knauff engaged in espionage, she defeated the exclusion charges and was admitted to the country under the War Brides Act. Mezei, on the other hand, denied being a Communist and giving false information to consular officials. But he could not deny his prior criminal conviction, and the prior conviction—standing alone—was a sufficient ground for exclusion. Mezei therefore turned his Board of Special Inquiry hearing into a trial in mitigation. He had no chance of disproving all of the exclusion charges, but he could show that his former activities with the IWO were insignificant and that he did not deserve what would amount to a life sentence on Ellis Island. Mezei attempted to use the hearing before the Board to convince the Attorney General to grant him discretionary relief, immigration

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<sup>222</sup> See *id.* at 5. When an INS officer asked Mezei whether he was elected president because he was a communist sympathizer, Mezei denied the allegation, saying "[o]n that question I am as white as the wall." *Id.* at 16.

<sup>223</sup> See *id.* at 14-15.

<sup>224</sup> See Letter from Jack Wasserman to Ignatz Mezei 1 (Jan. 6, 1954) (JWP).

<sup>225</sup> See *id.*; Reporter's Transcript of Exclusion Proceedings Against Ignatz Mezei at 7, File No. A-2 024 778 (N.Y. 0300-307995) [hereinafter cited as Tr.] (opening statement of Alfred P. O'Hara, Assistant U.S. Attorney).

<sup>226</sup> See Tr. at 10-12. The government pointed out that it was the practice in exclusion cases not to disclose specifics. See *id.* at 12-13. Wasserman conceded the practice, but would not concede that the practice should be the law. See *id.* at 13.

parole, even if the Board found that he was legally excludable. Ignatz Mezei had lived in the United States for twenty-five years. Apart from the petty larceny conviction, he had no criminal record.<sup>227</sup> He worked as a carpenter and was father to his four stepchildren.<sup>228</sup> And Mezei had maintained good conduct during the year he was released on immigration bond in Buffalo.<sup>229</sup>

The Board of Special Inquiry convened in February 1954.<sup>230</sup> The government introduced copies of Mezei's criminal conviction.<sup>231</sup> In 1935, Mezei was charged with receiving seven bags of stolen flour. He pleaded guilty to petty larceny, and he was fined ten dollars.<sup>232</sup> The government argued that this offense was a crime involving moral turpitude, a ground for exclusion.<sup>233</sup> Al-

<sup>227</sup> There was a dispute in the evidence on this point. The INS claimed that Mezei had been arrested in 1927, while distributing communist literature in Pennsylvania. *See id.* at 380-83 (summary of criminal charge). Mezei denied this arrest. *See id.* at 93-99 (testimony of Ignatz Mezei). The government did not assert that this arrest resulted in a conviction.

<sup>228</sup> *See id.* at 41 (testimony of Ignatz Mezei); *id.* at 560-61 (testimony of Louis L. Long).

<sup>229</sup> Mezei lived in Buffalo on bond from May 10, 1952 to April 22, 1953. *See supra* note 203. He maintained good conduct during that period. *See* Letter from Richard C. Haberstroh, INS, to Ignatz Mezei (Aug. 27, 1952) (JWP) (containing notations for each week that Mezei reported to an INS officer). At the hearing, the INS stipulated that there was no evidence that Mezei had engaged in activities detrimental to the United States while on parole. *See Tr.* at 800.

<sup>230</sup> *See Tr.* at 1; *see also* *Alien Faces "Exile" on Ellis Island*, N.Y. TIMES, Feb. 25, 1954, at 9.

<sup>231</sup> *See Tr.* at 83-84.

<sup>232</sup> *See* Summary of Exhibits 2 (JWP) (summarizing Exhibits 7-9 regarding Mezei's information, docket sheet, and police records).

Julia Mezei, Ignatz Mezei's spouse, once prepared an affidavit with a detailed (and somewhat exculpatory) version of the offense. According to Mrs. Mezei, two young men brought a large bag of flour to their house. Mrs. Mezei was not home at the time, and Mr. Mezei paid for the flour, believing that Mrs. Mezei had ordered it from the grocer. The flour turned out to be stolen. Mr. Mezei was arrested, along with about ten women from the neighborhood, all of whom had purchased flour from the two men. Everyone was convicted and fined ten dollars. *See* Affidavit of Julia Mezei (Jan. 15, 1954) (JWP). On February 4, 1954, Ignatz Mezei applied for a pardon for this offense. *See* Letter from Jack Wasserman to Executive Clemency Bureau of the Division of Parole, State of New York Executive Chamber (Feb. 4, 1954) (JWP) (containing Mrs. Mezei's affidavit). At the hearing before the Board, Mezei gave a rather confused account of the offense; about all that he was able to communicate was that the offense involved a single bag of flour. *See Tr.* at 66-67, 77-78 (testimony of Ignatz Mezei). Julia Mezei was not questioned about the incident at the hearing.

<sup>233</sup> *See* Memorandum Re Exclusion of Ignatz Mezei 8-9 (JWP) (government's post-hearing brief submitted to the Board of Special Inquiry). One ground for exclusion under the Immigration Act of 1917 was conviction of a crime involving moral turpitude. *See* Immigration Act of 1917, ch. 29, § 3, 39 Stat. 874, 875 (1917) (codified as amended at 8 U.S.C. § 1182(a)(2)(A)(i)(I) (Supp. V 1993)). The case law was clear

though Mezei contended that a petty larceny conviction should not be a basis for exclusion, the law was decidedly in favor of the government.<sup>234</sup> With the conviction established, Mezei would most likely be deemed excludable. Most of the remainder of the hearing was devoted to the main event, Mezei's alleged communist activities.

The government relied primarily upon two witnesses, Manning Johnson and Louis Reed, who testified that Mezei had been an active member of the Communist Party. Manning Johnson was a district organizer of the Communist Party in Buffalo from 1932 to 1934.<sup>235</sup> Johnson testified that Mezei was an active member during that period and had attended closed Party meetings.<sup>236</sup> Reed was the former national secretary of the Hungarian Federation of the Workers Party of America, which later became the Communist Party of the United States.<sup>237</sup> Reed claimed that he recruited Mezei into the Federation in 1924, and that he later saw Mezei at

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that larceny, whether grand or petty, was a crime involving moral turpitude. *See, e.g.*, *Tillinghast v. Edmead*, 31 F.2d 81, 83-84 (1st Cir. 1929) (holding that petty theft of 15 dollars was a crime of moral turpitude); *United States ex rel. Ulrich v. Kellogg*, 30 F.2d 984, 986 (D.C. Cir.) (holding that all degrees of theft involve moral turpitude), *cert. denied*, 279 U.S. 868 (1929); *Bartos v. United States Dist. Ct.*, 19 F.2d 722, 724 (8th Cir. 1927) (holding that petty theft is *malum in se* and that it involves moral turpitude).

Mezei's exclusion proceeding was governed by the Immigration Act of 1917 because that law was in effect in 1950, when Mezei attempted to reenter the United States. While Mezei's case was pending, Congress revised the immigration laws. Conviction for a crime involving moral turpitude remained a ground for exclusion under the new law. *See* Immigration and Nationality Act of 1952, ch. 477, § 212(a)(9), 66 Stat. 182 (1952) (current version at 8 U.S.C. § 1182(a)(2)(A)(i)(I) (Supp. V 1993)). Congress has since created a minor offense exception to this ground of exclusion. *See* 8 U.S.C. § 1182(a)(2)(A)(ii)(II) (Supp. V 1993).

<sup>234</sup> *See* Memorandum Re Exclusion of Ignatz Mezei 1-2 (JWP) (Mezei's post-hearing brief submitted to the Board of Special Inquiry). Jack Wasserman, Mezei's lead counsel, previously served as a member of the INS's Board of Immigration Appeals. During his tenure, the Board decided *In re T—*, 2 I. & N. Dec. 22, 27 (B.I.A. 1944), holding that the theft of a three-dollar automobile coil was a crime of moral turpitude. Wasserman dissented, arguing that the statute must be construed to distinguish between serious and nonserious crimes. *See id.* at 39-41 (Wasserman, member, dissenting). He would have held that the INS must examine the circumstances of petty thefts, especially when only a fine or suspended sentence is imposed. *See id.* at 41 n.10. In the brief he submitted for Mezei, Wasserman could cite only his own prior dissent. *See* Memorandum Re Exclusion of Ignatz Mezei, *supra*, at 1-2. The weight of the law was against him.

<sup>235</sup> *See* Tr. at 512 (testimony of Manning Johnson); *see also In re Mezei*, No. A-2024778, at 4 (B.I.A. Aug. 9, 1954) (JWP).

<sup>236</sup> *See* Tr. at 504-06, 512-15 (testimony of Manning Johnson).

<sup>237</sup> *See id.* at 337-38, 341 (testimony of Louis Reed); *see also 2 Ex-Red Officials Identify Suspect*, N.Y. TIMES, Feb. 27, 1954, at 7.

closed meetings of the Federation and the Party.<sup>238</sup> Reed also testified that he sent Mezei to other cities for the Party on small jobs.<sup>239</sup> Although the government had no direct evidence that Mezei was active in the Party after 1934, three other government witnesses stated that Mezei had made statements indicating his support for communism as late as 1948.<sup>240</sup>

Mezei denied that he had ever been a member of the Communist Party.<sup>241</sup> Three family members testified that he was not a Party member.<sup>242</sup> Mezei presented letters and affidavits from thirty-nine character witnesses.<sup>243</sup> But Mezei could not present conclusive evidence to refute Johnson's and Reed's specific allegations,<sup>244</sup>

<sup>238</sup> See Tr. at 345-48, 400-01 (testimony of Louis Reed); see also *In re Mezei*, No. A-2024778, at 4 (B.I.A. Aug. 9, 1954) (JWP).

<sup>239</sup> See Tr. at 349-52 (testimony of Louis Reed); see also Trial Notes of Jack Wasserman (JWP).

<sup>240</sup> See Tr. at 671-74 (testimony of George Chaba); *id.* at 725-32 (testimony of John Acs); *id.* at 761-62 (testimony of Julius A. Weigh). Weigh's testimony was typical. He owned a curtain and drapery business in Buffalo. See *id.* at 760. According to Weigh, Mezei would look at Weigh's stock and make statements such as "[t]here will be plenty to divvy up here when the time comes." *Id.* at 761. Mezei also allegedly stated that Weigh would get "the lamp post treatment." *Id.* at 762.

<sup>241</sup> See *id.* at 59 (testimony of Ignatz Mezei); see also *In re Mezei*, No. A-2024778, at 4 (B.I.A. Aug. 9, 1954) (JWP).

<sup>242</sup> See Tr. at 441-42 (testimony of Susan Bodi, the mother of Mezei's daughter-in-law); *id.* at 562-63 (testimony of Louis Long, Mezei's stepson); *id.* at 594-97 (testimony of Julia Mezei, Mezei's spouse). Julia Mezei was impeached by her two prior bootlegging convictions. See *id.* at 643-47.

<sup>243</sup> See *id.* at 667-68 (discussion of the exhibits); see also Summary of Exhibits 5 (JWP). Although Wasserman's files contain an assortment of letters of recommendation, neither Wasserman's files nor the hearing transcript indicates who wrote the letters and affidavits that were submitted to the Board. Wasserman's file indicates that Ellen Knauff, who had met Mezei at Ellis Island, did not think that Mezei was a Communist. According to Knauff, "anyone who spent as much time reading the Bible as Mezei did could not possibly be a Communist." Letter from Jack Wasserman to Ellen Knauff (Jan. 6, 1954) (JWP). Knauff did not testify before the Board, and it is unknown whether she submitted her views in writing as one of the 39 character witnesses.

<sup>244</sup> At the conclusion of the hearing, Wasserman was forced to concede that "[a]t the present time . . . we can not disprove what the government has placed in evidence, other than the denial of Mr. Mezei." Tr. at 830 (closing statement of Jack Wasserman). While it is impossible to say whether Mezei could have ever produced conclusive proof to refute the charges, it appears that Mezei had difficulty preparing his defense. Mezei tried to show that he had been a member of the IWO only and not of the Communist Party. According to one of Mezei's supporters, the FBI had frightened Hungarian members of the IWO, making it difficult to find witnesses who could testify on Mezei's behalf:

Approximately 100 Hungarian members of [the IWO insurance association] have been visited by the F.B.I. and questioned relative to Mezei and they are all scared to death . . . especially the older members. The mention of

and so the hearing turned into a credibility battle between Johnson and Reed on one side and Mezei on the other.

Mezei lost the battle for two reasons. First, Mezei proved to be a terrible witness.<sup>245</sup> He was impeached with his own prior inconsistent statements<sup>246</sup> and with several previous false claims to citizenship.<sup>247</sup> Second, Mezei's counsel, Jack Wasserman, did

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"Communists" terrifies them and they want no part of it or any investigation concerning Mezei and their chief plea is "Keep me out of this. I know nothing about Communism."

Letter from Esther B. Mueller to Jack Wasserman 1 (Jan. 18, 1954) (JWP) (ellipses in original).

<sup>245</sup> Mezei was called by the government as the first witness in the hearing. See Tr. at 24. His testimony was riddled with inconsistencies, and he seemed to have great difficulty understanding and answering many questions. Several of his statements lacked credibility. For example, he was asked about a still that was found in the home that he shared with Julia Horvath (later Julia Mezei). See *id.* at 295-97. Mezei testified that the still was used only to distill water for Julia, on the orders of her doctor. See *id.* at 297-98. That claim must have been difficult for the Board to believe, especially after the government proved that Julia had been convicted of possession of an unregistered still and for manufacture of mash. See *id.* at 646. Jack Wasserman kept Mezei off the stand as much as possible. After the government finished its direct examination of Mezei, Wasserman postponed his cross-examination until the conclusion of the government's case. See *id.* at 313. Wasserman told the Board that he would still have to recall Mezei after the government's case, and it would save time if Wasserman questioned Mezei only once. See *id.* Wasserman never put his client back on the stand.

<sup>246</sup> For example, in 1950, Mezei was interviewed by an immigration officer (under oath and with counsel) about some lodge meetings he arranged. Mezei stated that the Communist Party sent a newspaper editor, Emil Gardos, to Buffalo to speak to lodge members and that Mezei had set the attendance at those meetings. See Statement of Ignatz Mezei to INS Officials 5 (Nov. 7, 1950) (JWP). During the hearing before the Board of Special Inquiry, Mezei denied arranging the meetings and even denied making the prior statement to the immigration officer. See Tr. at 57-58, 260-66 (testimony of Ignatz Mezei); see also *In re Mezei*, No. A-2024778, at 4 (B.I.A. Aug. 9, 1954) (JWP). Moreover, even though Mezei had a criminal conviction for petty larceny, he made several statements denying that he had ever been guilty of a criminal act. See Petition for Writ of Habeas Corpus at ¶ 5, *United States ex rel. Mezei v. Shaughnessy*, Civ. No. 64-156 (S.D.N.Y. 1951); Ignatz Mezei, *Barred Alien's Case Stated*, N.Y. TIMES, Jan. 1, 1954, at 22. These were used effectively against Mezei at the hearing. See Tr. at 129-35.

<sup>247</sup> Mezei had claimed on several occasions that he was born in the United States. See Tr. at 69, 213-15; see also Summary of Exhibits 1-3 (JWP) (summarizing Alien Registration Form, Air Warden application, and Selective Service Registration Card, all of which indicate that Mezei asserted he was born in Illinois). At the hearing, Mezei testified that he had lied about his place of birth on the Air Warden application and on the draft form out of a sense of duty to the United States. See Tr. at 216-17. The false statements about his birthplace proved especially harmful at the hearing, as one of the charges against Mezei was that he made a false statement to the American Consulate in Budapest to obtain an immigrant quota visa. Mezei told consular officials that he was born in Gibraltar and was, therefore, a native of Great

not have sufficient information to impeach Manning Johnson. Johnson was a professional witness who figured in some of the most notorious loyalty cases of the day. Between 1942 and 1954, Johnson testified for the government in numerous congressional and administrative hearings and court cases, including Dmytryshyn's deportation hearing and the New York IWO trial.<sup>248</sup> He was paid as much as \$4500 per year to testify for the government.<sup>249</sup> Johnson was loyal to the government; indeed, as he admitted in other cases, he would lie under oath to assist the FBI.<sup>250</sup> His

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Britain. Had Mezei claimed birth in Romania, he would have been unable to obtain an immigrant visa, because the quota for Romania was oversubscribed. See *In re Mezei*, No. A-2024778, at 5.

<sup>248</sup> See SABIN, *supra* note 211, at 134-36. Sabin accurately describes Manning Johnson as a "professional ex-Communist." *Id.* at 135. Johnson testified in some 25 court cases, in addition to administrative and congressional hearings. See Frank J. Donner, *The Informer*, NATION 298, 305 (Apr. 10, 1954). Johnson was a witness for the government in Harry Bridges's 1949 perjury trial. See DAVID CAUTE, *THE GREAT FEAR: THE ANTI-COMMUNIST PURGE UNDER TRUMAN AND EISENHOWER* 129 (1978); VINCENT HALLINAN, *A LION IN COURT* 253-59 (1963); VICTOR S. NAVASKY, *NAMING NAMES* 14 (1980). Before the House Committee on Un-American Activities (HUAC), Johnson testified that Paul Robeson was a member of the Communist Party; Johnson even claimed that Robeson wanted "to be the Black Stalin among Negroes." *Hearings Regarding Communist Infiltration of Minority Groups—Part 2: Hearing Before the House Comm. on Un-American Activities*, 81st Cong., 1st Sess. 505 (1949) (testimony of Manning Johnson); see also MARTIN B. DUBERMAN, *PAUL ROBESON* 359 (1988) (quoting Johnson's HUAC testimony that Robeson "had 'delusions of grandeur,' and was 'desirous of becoming the Black Stalin'"); *Investigation of the Unauthorized Use of United States Passports—Part 3: Hearings Before the House Comm. on Un-American Activities*, 84th Cong., 2d Sess. 4497 (1956) (statement of Committee Director Arens, reading Johnson's prior testimony). Johnson also named Langston Hughes as a Communist. See NAVASKY, *supra*, at 191.

The government vigorously defended its use of ex-communist witnesses. According to the former director of the FBI, "[i]t is through the efforts of [ex-communist] confidential informants that we have been able to expose the Communist conspiracy in the past, and through them we must stake much of the future security of the United States." J. Edgar Hoover, *Why U.S. Uses Ex-Reds as Informants*, U.S. NEWS & WORLD REP., Oct. 4, 1955, at 106 (reprinting an extract from Hoover's address, "Our Common Task"); see also J. Edgar Hoover, *A Comment on the Article "Loyalty Among Government Employees,"* 58 YALE L.J. 401, 409-10 (1949) (defending the "FBI's refusal to identify confidential sources").

<sup>249</sup> See CAUTE, *supra* note 248, at 129; SABIN, *supra* note 211, at 135; Richard H. Rovere, *The Kept Witnesses*, HARPER'S, May 1955, at 25, 28.

<sup>250</sup> Manning Johnson gave the following testimony in another administrative proceeding:

Q. In other words, you will tell a lie under oath in a court of law rather than run counter to your instructions from the FBI. Is that right?

A. If the interests of my government are at stake. In the face of enemies, at home and abroad, if maintaining secrecy of the techniques of methods of operation of the FBI who have responsibility for the protection of our



downfall came in May 1954, only three months after the Mezei hearing. Johnson testified before the International Employees Loyalty Board against Dr. Ralph Bunche, the U.N. diplomat and winner of the 1950 Nobel Peace Prize.<sup>251</sup> The Board unanimously cleared Bunche.<sup>252</sup> In July 1954, the Justice Department announced that it would investigate Johnson for perjury.<sup>253</sup> Johnson

people, I say I will do it a thousand times.

Rovere, *supra* note 249, at 33 (quoting Johnson's testimony before the Subversive Activities Control Board). In a sedition trial, Johnson was questioned as follows about prior testimony he had given in a deportation case:

Q. That testimony was not correct, was it, Mr. Johnson?

A. No, it wasn't, precisely, because I could not at that time reveal that I had supplied information to the FBI. . . . I think the security of the government has priority over . . . any other consideration.

*Id.* Although Rovere does not identify the sedition trial in which Johnson gave this testimony, it was apparently the first prosecution of Communist Party leader Steve Nelson in Pennsylvania state court in 1951. See CAUTE, *supra* note 248, at 129; MURRAY KEMPTON, *AMERICA COMES OF MIDDLE AGE* 14 (1963); see also *Commonwealth v. Nelson*, 92 A.2d 431, 444-45 (Pa. Super. Ct. 1952) (sustaining jury verdict against Nelson after second trial), *rev'd*, 104 A.2d 133 (Pa. 1954), *aff'd*, 350 U.S. 497 (1956).

<sup>251</sup> See BRIAN URQUHART, *RALPH BUNCHE: AN AMERICAN LIFE* 253 (1993); Joseph Alsop & Stewart Alsop, *Matter of Fact: The Bunche Informers*, WASH. POST, July 2, 1954, at 23; A.M. Rosenthal, *Bunche Inquiry Called a "Farce,"* N.Y. TIMES, May 27, 1954, at 22. Johnson and another witness, Leonard Patterson, claimed that Bunche was a party member. See URQUHART, *supra*, at 253. They also asserted that Bunche had met with publisher John P. Davis to discuss communist policy. See *id.* Both Davis and Bunche rebutted this claim. See *id.* at 253-54.

<sup>252</sup> See URQUHART, *supra* note 251, at 254; A.M. Rosenthal, *Dr. Bunche Cleared by Loyalty Board*, N.Y. TIMES, May 29, 1954, at 1.

<sup>253</sup> See URQUHART, *supra* note 251, at 254; Alsop, *supra* note 251, at 23. The Bunche matter was not the only case in which Johnson apparently committed perjury. During the 1949 Harry Bridges trial, Johnson testified that Bridges was in New York City on June 28, 1936, attending the Communist Party's national convention. Bridges proved conclusively that he was in Stockton, California on that date, meeting with union officials. See HALLINAN, *supra* note 248, at 254-58; Donner, *supra* note 248, at 305. Bridges's lawyer asked that Johnson be charged with perjury. Although the judge told Johnson to hold himself in "readiness for the processes of this court," no action was taken against Johnson. *Id.*

One issue concerning Manning Johnson's perjury also reached the Supreme Court. Johnson had testified before the Subversive Activities Control Board, which ordered the Communist Party to register as a "Communist-action" organization. See *Communist Party v. Subversive Activities Control Bd.*, 351 U.S. 115, 116 (1956). While the case was on appeal, the Party submitted evidence showing that Johnson and two other witnesses "committed perjury, are completely untrustworthy and should be accorded no credence." *Id.* at 120 (referring to the Party's motion). The government did not deny these allegations, see *id.* at 121, and the Supreme Court remanded the case to the Board. See *id.* at 124-25. On remand, the Board struck the testimony of Johnson and the other two witnesses and modified its prior order. See *Communist Party v. Subversive Activities Control Bd.*, 277 F.2d 78, 80 (D.C. Cir. 1959), *aff'd*, 367

was never again used as a government witness.<sup>254</sup> Wasserman knew that Johnson had testified in a number of other cases, but Wasserman was unaware of the full extent of Johnson's work for the government.<sup>255</sup> He was unable to cross-examine Johnson effectively. The Board never learned any details about Johnson's work for the government, or about any claims that Johnson gave false testimony in other proceedings.<sup>256</sup>

U.S. 1 (1961); *Communist Party v. Subversive Activities Control Bd.*, 254 F.2d 314, 318 (D.C. Cir. 1958).

<sup>254</sup> See SABIN, *supra* note 211, at 135-36. After he was discarded by the government in 1954, Johnson became an insurance salesman. See CAUTE, *supra* note 248, at 129; SABIN, *supra* note 211, at 135-36. Within a year, Attorney General Herbert Brownell announced that the Justice Department would no longer keep its full-time former communist witnesses on retainer. See *Brownell Drops Informant Plan*, N.Y. TIMES, April 16, 1955, at 28.

<sup>255</sup> Wasserman took copious trial notes and prepared assiduously for cross-examination. Wasserman's trial notebook contains the notations "F.B.I. undercover" and "professional witness" in the section for Manning Johnson, but there is no indication in the notebook, in Wasserman's correspondence, in the hearing exhibits, or in the hearing transcript that Wasserman knew about the payments to Johnson or the extent of Johnson's work for the FBI and the INS.

Wasserman was handicapped by the lack of formal prehearing discovery. Although Wasserman learned of the charges in advance of the hearing, no rules required the government to disclose the names of its witnesses or documents containing the witnesses' statements. At the hearing, Wasserman objected to the lack of notice of the facts. See Tr. at 10-12. According to Wasserman, the lack of notice about dates of alleged Communist Party membership and about Mezei's alleged crime "left us to search the man's record from the time of his birth on." *Id.* at 11. Wasserman's trial notebook does not contain any indication that he was told, in advance of the hearing, who would testify for the government. Indeed, a letter from Wasserman's co-counsel reports Ignatz Mezei's speculations about who might testify. Mezei was off the mark; he did not foresee the testimony of Manning Johnson, Louis Reed, or any of the witnesses from Buffalo. See Letter from Andrew Reiner to Jack Wasserman 2-3 (Dec. 16, 1953) (JWP). It would have been difficult for Wasserman to conduct a full background investigation of the government's witnesses when he did not learn the identities of the witnesses until the hearing itself, and when he never received any prior statements of the witnesses.

<sup>256</sup> On direct examination, Johnson described himself as "a consultant in the investigation section" of the INS. Tr. at 501. He testified that, prior to 1950, he was employed as a labor official, served in the Navy, and worked for the FBI as an undercover agent. See *id.* Wasserman's cross-examination on this point was brief and generalized:

Q [Wasserman]: You are a professional witness on this particular subject, are you not? You have testified in other cases?

A [Johnson]: I have testified in other cases, yes.

Q: And you are continually testifying in immigration cases now; is that right?

A: I testify in immigration cases when I am called upon.

*Id.* at 515-16.

The Board of Special Inquiry ordered Mezei excluded from the United States.<sup>257</sup> The Board found that Mezei had made false statements in immigration documents about his criminal record and place of birth.<sup>258</sup> With respect to the allegations of communist activity, the Board determined that Mezei was a member of the Communist Party from 1925 to at least 1934<sup>259</sup> (the last year that Manning Johnson testified that Mezei had been active in the Party). The Board of Immigration Appeals affirmed the ruling.<sup>260</sup>

Although Mezei was found excludable, the "trial in mitigation" proved successful. In his closing argument, Jack Wasserman, Mezei's attorney, contended that even if Mezei was excludable, he should not be forced to live out his life on Ellis Island.<sup>261</sup> The Board did not have the authority to grant Mezei any form of discretionary relief, such as parole.<sup>262</sup> Nevertheless, the Board went out of its way to make one important finding: it determined that Mezei never played more than a minor role in the Communist Party because he did nothing more than attend meetings and demonstrations, and distribute literature.<sup>263</sup> At Wasserman's request, the Board also made a separate (and off-the-record) recommendation to the Attorney General that Mezei be released on immigration parole.<sup>264</sup> On August 9, 1954, the day the exclusion decision was affirmed by the Board of Immigration Appeals, the

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<sup>257</sup> See *id.* at 849 (Board's conclusion of law).

<sup>258</sup> See *id.* at 848 (Board's findings of fact).

<sup>259</sup> See *id.* at 847.

<sup>260</sup> See *In re Mezei*, No. A-2024778 (B.I.A. Aug. 9, 1954), at 6. The affirmation, which relies upon Manning Johnson's testimony, came one month after the Justice Department announced that it would investigate Johnson for perjury.

<sup>261</sup> See Tr. at 825-28 (noting that no countries had agreed to allow Mezei entry, thus precluding his deportation); see also Memorandum Re Exclusion of Ignatz Mezei 2-4 (Mezei's post-hearing brief submitted to the Board of Special Inquiry) (JWP).

<sup>262</sup> See Tr. at 846 ("The Board understands that under the terms of the reference by the Attorney General it is confined to the single issue of admissibility of the alien.") (statement of Chairman Embree).

<sup>263</sup> See *id.* at 849 (Board's findings of fact).

<sup>264</sup> See Kenneth C. Davis, *The Requirement of a Trial-Type Hearing*, 70 HARV. L. REV. 193, 251 & n.220 (1956) (recounting a conversation with a member of the Board of Special Inquiry, Elliott Cheatham, who revealed that the Board recommended to the Attorney General that Mezei be released and allowed to return to Buffalo); Letter from Jack Wasserman to Rabbi Paul Richman (Nov. 1, 1954) (JWP) (noting that the Attorney General released Mezei after the Board of Special Inquiry found that no useful purpose would be served by Mezei's continued detention and that the Board recommended Mezei's release). In his closing argument, Wasserman asked the Board to make a parole recommendation. See Tr. at 828, 831. The government argued that the Board had no power to make any such recommendation. See *id.* at 831-33. The Board thus sided with Wasserman.

Attorney General announced that Mezei would be paroled.<sup>265</sup> Ignatz Mezei was never admitted to the United States as a citizen or permanent resident, but he was at least able to avoid life imprisonment on Ellis Island.<sup>266</sup>

### E. More History Lessons

The stories of Ellen Knauff and Ignatz Mezei illustrate several points. Both show the lack of congruence between the Supreme Court's willingness to render abstract rulings and the public's willingness to accept them when the results seem particularly unjust. The stories also show the value of a hearing, though in very different fashions.

Ellen Knauff prevailed because the government could not produce substantial evidence linking her to espionage. With a hearing comes at least some formalized process, which includes the requirement that one side prove its case by some specified standard. Without a hearing, INS officials would never have been required to examine the evidence against Knauff under an articulated standard of proof.

There is another traditional purpose of a hearing, illustrated by the case of Ignatz Mezei. When a decision-maker enjoys at least some measure of discretion, a hearing provides perhaps the best forum to seek mercy. While the Board of Special Inquiry did not

<sup>265</sup> See *Alien, Long Held, Freed*, N.Y. TIMES, Aug. 12, 1954, at 10; *Exclusion Order Valid*, N.Y. TIMES, Aug. 10, 1954, at 10.

<sup>266</sup> Under the terms of the parole order, Mezei was required to remain within 50 miles of Buffalo and to report monthly to an immigration officer. See *Order of Conditional Parole Under Outstanding Excluding Order No. 0300-307993* (Aug. 11, 1954), at 1. He was also ordered to disassociate himself from the Communist Party and people who promoted communism. See *id.* at 2.

Ignatz Mezei spent the rest of his life on immigration parole. See Telephone Interview with Mark Mancini, Wasserman's former law partner (July 1, 1993). Because Mezei could not become a citizen or permanent resident, he was unable to join the Carpenters Union and he struggled with low-paying, nonunion jobs. See Letter from Esther B. Mueller to Jack Wasserman (Aug. 1, 1956) (JWP); Letter from Jack Wasserman to Esther B. Mueller (Aug. 3, 1956) (JWP). Over the next few years, Mezei dutifully sent modest payments to Wasserman to be applied against the outstanding legal fees. Mezei also wrote Wasserman several rather sorrowful letters, describing his financial worries and asking for help in gaining permanent legal residence. Wasserman continued to look for legal avenues to help Mezei, but Mezei simply remained on immigration parole. See Letter from Ignatz Mezei to Jack Wasserman (undated but probably Jan. 1960) (JWP); Letter from Ignatz Mezei to Jack Wasserman (July 17, 1959) (JWP); Letter from Jack Wasserman to Ignatz Mezei (Jan. 22, 1960) (JWP); Letter from Jack Wasserman to Ignatz Mezei (July 20, 1959) (JWP).

have parole authority, the hearing officers examined the government's evidence critically. They found no proof that Mezei had been an active member of the Communist Party after 1934 and that, even when he was an active member, he was no more than a minor player. The Board weighed the evidence and made a parole recommendation to the Attorney General. Until he was afforded a hearing, Mezei was unable to show that he posed no danger to national security.

### III. THE DOCTRINES LEFT BEHIND

American jurisprudence has been anything but static since 1953, when *Mezei* was decided. We have witnessed virtual revolutions in constitutional, immigration, and other areas of our law. Despite these significant developments, the Supreme Court has essentially followed the formulations of the plenary power doctrine and the entry fiction set forth in *Knauff* and *Mezei*. When compared to other advances in our law, the plenary power doctrine and the entry fiction have become the doctrines left behind. Part A of this section discusses the growing inconsistency between *Knauff*, *Mezei*, and other decisions relating to aliens. Part B examines the conflict between *Mezei* and the substantive due process limitations that have been placed upon other forms of administrative detention. Part C gives one reason why the plenary power doctrine and the entry fiction have enjoyed continued support, even though the Supreme Court has long been aware of the dissonance between those doctrines and more recent legal developments.

#### A. *Knauff*, *Mezei*, and the Rights of Aliens

*Knauff* and *Mezei* are the Supreme Court's fullest statements of the plenary power doctrine and the entry fiction. Legal commentators have disparaged the rulings from the moment they were issued.<sup>267</sup> Nevertheless, over the last forty years, courts have

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<sup>267</sup> The cases were roundly criticized at the time they were decided. See, e.g., Hart, *supra* note 66, at 1390-96; Richard E. Hodge, Case Note, 27 S. CAL. L. REV. 315, 315-21 (1954); Henry J. Hoye, Jr., Comment, 34 B.U. L. REV. 85, 89-90 (1954); Ronald W. Hunter, Recent Cases, 33 NEB. L. REV. 94, 96 (1953); Mildred M. Mangum, Recent Decision, 15 OHIO. ST. L.J. 78, 79 (1954); Decision, 28 N.Y.U. L. REV. 1042, 1044 (1953); *The Supreme Court, 1952 Term*, 67 HARV. L. REV. 91, 97-102 (1953). The criticism has not abated. See, e.g., LEGOMSKY, *supra* note 15, at 200-01; Louis Henkin, *The Constitution as Compact and as Conscience: Individual Rights Abroad and at Our Gates*, 27 WM. & MARY L. REV. 11, 27-34 (1985); Martin, *supra* note 15, at 166-80;

continued to cite the two cases to underscore the breadth of the executive's immigration authority and the limited scope of judicial review. *Knauff* and *Mezei* have been the champions relied upon by the Supreme Court to uphold an immigration preference that discriminates against unwed fathers,<sup>268</sup> to deny relief from deportation based upon confidential information,<sup>269</sup> and to deny a visa to a visiting speaker.<sup>270</sup> More recently, the Court has used the two decisions and the plenary power doctrine to sustain the interdiction of Haitians seeking political asylum in the United States.<sup>271</sup> In the lower federal courts, *Mezei* and *Knauff* are regularly relied upon to curtail challenges to the detention of excludable aliens.<sup>272</sup> The cases are also cited to limit judicial review of other types of immigration judgments, such as in matters relating to asylum and exclusion.<sup>273</sup>

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Motomura, *Curious Evolution*, *supra* note 15, at 1642-43; Schuck, *supra* note 15, at 20; see also Tamara J. Conrad, Note, *The Constitutional Rights of Excludable Aliens: History Provides a Refuge*, 61 WASH. L. REV. 1449, 1461-64 (1986); *Developments in the Law—Immigration Policy and the Rights of Aliens*, 96 HARV. L. REV. 1286, 1322-24 (1983); Christopher R. Yukins, Note, *The Measure of a Nation: Granting Excludable Aliens Fundamental Protections of Due Process*, 73 VA. L. REV. 1501, 1509-30 (1987).

<sup>268</sup> See *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (quoting *Mezei*).

<sup>269</sup> See *Jay v. Boyd*, 351 U.S. 345, 358-59 (1956) (citing *Mezei* and *Knauff*).

<sup>270</sup> See *Kleindienst v. Mandel*, 408 U.S. 753, 762, 766 n.6 (1972) (citing *Mezei* and *Knauff*).

<sup>271</sup> See *Sale v. Haitian Ctrs. Council, Inc.*, 113 S. Ct. 2549, 2560-63 (1993) (citing *Mezei*).

<sup>272</sup> See, e.g., *Gisbert v. United States Attorney General*, 988 F.2d 1437, 1440, 1442-43 (5th Cir. 1993) (citing *Mezei* and *Knauff* and finding that denial or revocation of parole does not implicate Due Process Clause); *Adras v. Nelson*, 917 F.2d 1552, 1558 (11th Cir. 1990) (citing *Mezei* and *Knauff* and finding that parole decisions are discretionary and cannot give rise to liability under *Bivens*); *Amanullah v. Nelson*, 811 F.2d 1, 4, 17 (1st Cir. 1987) (citing *Mezei* and deferring to INS's decision to deny parole); *Fernandez-Roque v. Smith*, 734 F.2d 576, 582 (11th Cir. 1984) (citing *Mezei* and finding that parole is part of the admissions process and its denial or revocation does not implicate Due Process Clause); *Palma v. Verdeyen*, 676 F.2d 100, 103, 105-06 (4th Cir. 1982) (citing *Mezei* and *Knauff* and deciding that there should be no review of parole decision, except to see if Attorney General complied with statute); *Petition of Cahill*, 447 F.2d 1343, 1344 (2d Cir. 1971) (citing *Mezei* and *Knauff* and allowing no judicial review of parole decision); *Wong Hing Fun v. Esperdy*, 335 F.2d 656, 657 (2d Cir. 1964) (citing *Mezei* and noting that the INS may revoke immigration parole without affording a hearing), *cert. denied*, 379 U.S. 970 (1965); *Ahrens v. Rojas*, 292 F.2d 406, 408 (5th Cir. 1961) (citing *Mezei* in determining that the INS can detain excludable alien when parole would be prejudicial to the public interest); *Fragedela v. Thornburgh*, 761 F. Supp. 1252, 1255, 1257 (W.D. La. 1991) (citing *Mezei* and *Knauff* and allowing the Attorney General to detain a Mariel Cuban); *Sanchez v. Kindt*, 752 F. Supp. 1419, 1423, 1433 (S.D. Ind. 1990) (citing *Mezei* for the same); *Chin Ming Mow v. Dulles*, 117 F. Supp. 108, 109 (S.D.N.Y. 1953) (citing *Mezei* and allowing no review of parole denial).

<sup>273</sup> See, e.g., *Adams v. Baker*, 909 F.2d 643, 647 (1st Cir. 1990) (citing *Mezei* in

This adherence to the holdings of *Knauff* and *Mezei* is contrasted with the development of rights of aliens in matters unrelated to immigration. In other contexts, the Supreme Court has affirmed that all aliens are "persons" within the meaning of the Due Process Clause.<sup>274</sup> Thus, undocumented children must receive the same education as citizens and permanent residents.<sup>275</sup> The Civil Service Commission cannot deny federal employment to aliens, at

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holding that there is limited review of a visa denial); *Ukrainian-Am. Bar Ass'n v. Baker*, 893 F.2d 1374, 1382, 1381 (D.C. Cir. 1990) (citing *Mezei* in finding no requirement that INS advise excludable aliens of availability of free counsel); *United States ex rel. Kordic v. Esperdy*, 386 F.2d 232, 235 (2d Cir. 1967) (citing *Mezei* and holding that excludable aliens are not entitled to formal hearing to establish claim of political asylum), *cert. denied*, 392 U.S. 935 (1968); *United States ex rel. Stellas v. Esperdy*, 366 F.2d 266, 268-69 (2d Cir. 1966) (citing *Mezei* and *Knauff* in upholding exclusion without a hearing); *Montgomery v. Ffrench*, 299 F.2d 730, 734, 735 (8th Cir. 1962) (citing *Mezei* and *Knauff* and allowing no review of Attorney General's decision that orphan was not entitled to enter United States); *United States ex rel. Wulf v. Esperdy*, 277 F.2d 537, 539 (2d Cir. 1960) (citing *Mezei* and *Knauff* in deciding that there is no right to hearing on order of exclusion based upon medical certificate); *Avila v. Rivkind*, 724 F. Supp. 945, 948, 950 (S.D. Fla. 1989) (citing *Mezei* and noting *Mezei*'s citation of *Knauff* in upholding summary exclusion of alien claimed to be a security risk); *Louis v. Meissner*, 532 F. Supp. 881, 891, 892 (S.D. Fla. 1982) (citing *Mezei* and *Knauff* and finding no standing to challenge exclusion procedures prior to entry of final orders of exclusion); *Hermine Sague v. United States*, 416 F. Supp. 217, 220, 221 (D.P.R. 1976) (citing *Mezei* and allowing no review of consular officer's decision to deny immigrant visa); *United States ex rel. Nicoloff v. Shaughnessy*, 139 F. Supp. 465, 467 (S.D.N.Y. 1956) (citing *Mezei* and *Knauff* and finding that Attorney General may exclude without a hearing on basis of danger to public interest); *Savelis v. Vlachos*, 137 F. Supp. 389, 395, 399 (E.D. Va. 1955) (citing *Mezei* and *Knauff* and allowing no review of INS's decisions regarding seamen's landing permits), *aff'd*, 248 F.2d 729 (4th Cir. 1957).

<sup>274</sup> See, e.g., *Plyler v. Doe*, 457 U.S. 202, 210 (1982) ("Aliens, even aliens whose presence in this country is unlawful, have long been recognized as 'persons' guaranteed due process of law by the Fifth and Fourteenth Amendments."); *Mathews v. Diaz*, 426 U.S. 67, 77 (1976) (holding that Due Process Clause protects even an alien "whose presence in this country is unlawful, involuntary, or transitory"); *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) (holding that the provisions of the Fourteenth Amendment "are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences . . . of nationality").

The Fifth Amendment forbids the federal government from depriving "any person" of life, liberty or property without due process of law. U.S. CONST. amend. V. The phrase "any person" does not permit any distinction between citizens and aliens. In this respect, the Fifth Amendment differs from the Fourth Amendment, which protects "the people" from unreasonable searches and seizures. The Supreme Court has noted that, unlike the term "any person" in the Due Process Clause, "the people," as used in the First, Second, Fourth, Ninth, and Tenth Amendments, "refers 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 the community." *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990).

<sup>275</sup> See *Plyler*, 457 U.S. at 230.

least not without adequate justification.<sup>276</sup> Alien corporations are protected by the Due Process Clause.<sup>277</sup> Municipal ordinances cannot be enforced in a fashion that discriminates against aliens.<sup>278</sup>

In addition, the Supreme Court has created an exception to the territorial principles epitomized by *Knauff* and *Mezei*, and the exception cannot be reconciled with the holdings in those two cases. In *Kwong Hai Chew v. Colding*,<sup>279</sup> the Court ruled that a resident alien could not be excluded without a hearing. Chew was a permanent resident who served aboard a merchant vessel of American registry.<sup>280</sup> The Court ruled that this temporary overseas travel could not deprive Chew of his right to notice of the charges and a hearing.<sup>281</sup> *Kwong Hai Chew* was followed by *Rosenberg v. Fleuti*.<sup>282</sup> In *Rosenberg*, the Court held that a resident alien returning to the United States after an "innocent, casual and brief"<sup>283</sup> trip abroad could not be subjected to the same exclusion criteria that apply to other aliens seeking entry for the first time.<sup>284</sup> *Landon v. Plasencia*<sup>285</sup> further blurred the line between exclusion and deportation proceedings. In that case, Maria Plasencia, a permanent resident, was stopped at the border while attempting to smuggle aliens into the country.<sup>286</sup> The INS sought to exclude her. It was difficult for Plasencia to avoid exclusion under *Fleuti*, in that her smuggling adventure was not considered "innocent." The Court determined that Plasencia could properly be placed in exclusion, rather than deportation proceedings, but that she was entitled to a full hearing that comported with due process.<sup>287</sup>

*Kwong Hai Chew* and *Fleuti* were decided on nonconstitutional grounds. The *Kwong Hai Chew* Court took a regulation that

<sup>276</sup> See *Hampton v. Mow Sun Wong*, 426 U.S. 88, 116-17 (1976) (holding the United States liable for compensation for requisition of ships owned by plaintiff).

<sup>277</sup> See *Russian Volunteer Fleet v. United States*, 282 U.S. 481, 491-92 (1931).

<sup>278</sup> See *Yick Wo*, 118 U.S. at 369, 373-74.

<sup>279</sup> 344 U.S. 590 (1953). *Kwong Hai Chew* was decided after *Knauff* but shortly before *Mezei*.

<sup>280</sup> See *id.* at 592.

<sup>281</sup> See *id.* at 601-03.

<sup>282</sup> 374 U.S. 449 (1963).

<sup>283</sup> *Id.* at 461.

<sup>284</sup> See *id.* at 460-63.

<sup>285</sup> 459 U.S. 21 (1982).

<sup>286</sup> See *id.* at 23.

<sup>287</sup> See *id.* at 32-37.



addressed the exclusion of aliens and construed it to apply only to aliens entering for the first time.<sup>288</sup> In *Fleuti*, the exception was created by interpreting Fleuti's exit and return to the United States as something other than a formal departure and a new "entry" under the statute; as a result, the strict admissions criteria used in exclusion proceedings would not apply.<sup>289</sup> By creating its own definition of "entry," the Court preserved the strict territorial fiction and, at the same time, afforded relief to some aliens who had strong ties to the United States. A real leap from the territorial doctrine came in *Plasencia*. The Court could have modified the *Fleuti* test and construed Plasencia's return as something other than a new "entry," as the Court did in *Fleuti* itself. Had it done so, Plasencia would have been deemed to be in deportation proceedings and entitled to all the process due an allegedly deportable alien. The Court would then have maintained the territorial fiction without reaching any constitutional issues. Instead, the Court said that Plasencia was properly in exclusion proceedings, but, given her ties to the country, she was entitled to the protection of the Due Process Clause.<sup>290</sup>

*Plasencia* directly conflicts with *Mezei* and *Knauff*. While still ruling that Plasencia was legally outside of the United States, the Court held that Plasencia's connections with the country gave her rights under the Constitution. In both *Knauff* and *Mezei*, the Court found that these sorts of ties did not give any rights to an excludable alien. Ellen Knauff was married to a United States citizen, employed by the United States armed forces, and would have been entitled to enter the country under the War Brides Act—yet she was excluded without a hearing. Ignatz Mezei had resided in the United States for twenty-five years and was married to a U.S. citizen—yet he was excluded and detained without a hearing. Knauff's and Mezei's ties to the country were deemed entirely irrelevant; what mattered was that they stood at the border. Ellen Knauff and Ignatz Mezei were on the outside looking in, and so they had no rights at all.<sup>291</sup>

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<sup>288</sup> *Kwong Hai Chew v. Colding*, 344 U.S. 590, 598-600 (1953). The term "excludable" aliens was taken to refer to "entrant aliens and to those assimilated to their status." *Id.* at 599. The decision may seem ambiguous as to whether the Court was stating a constitutional principle. The Justices noted that Chew's voyage would not terminate his rights under the Due Process Clause, even if he were to be treated as an entrant alien. *See id.* at 600. But the Court expressly stated that it did not need to reach the constitutional question. *See id.* at 602.

<sup>289</sup> *See Rosenberg v. Fleuti*, 374 U.S. 449, 462-63 (1963).

<sup>290</sup> *See Landon v. Plasencia*, 459 U.S. 21, 32-34 (1982).

<sup>291</sup> *Knauff* and *Mezei* are the culmination of a line of decisions beginning with the

This conflict remains in our law. In 1985, the Court passed up an opportunity to decide how much of *Mezei* survived *Plasencia*. In *Jean v. Nelson*,<sup>292</sup> Haitian refugees asserted that the INS discriminated on the basis of race and national origin in its parole decisions.<sup>293</sup> Because the refugees were in exclusion proceedings, the government argued that they were legally outside of the United States, without any rights, and that the refugees were therefore unable to contest their parole decisions.<sup>294</sup> The Court granted certiorari on a petition that directly questioned the continued validity of *Mezei*.<sup>295</sup> Over a strong dissent, the Court decided the case on nonconstitutional grounds and did not reach the *Mezei* issue.<sup>296</sup>

Thus, the federal courts have continued to apply *Knauff* and *Mezei*, although the rights of aliens have expanded in matters

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*Chinese Exclusion Case* (Chae Chan Ping v. United States), 130 U.S. 581 (1889). Chae Chan Ping had previously lived in this country, and, before departing, he obtained a certificate entitling him to reenter. *See id.* at 582. The Court was nevertheless unmoved by his previous lawful residence in the United States and he was barred from reentering. *See id.* at 603. Professor Motomura writes that *Plasencia* looked beyond the statutory categories of exclusion or deportation "and thereby extended procedural due process in immigration law to a wider circle of aliens." Motomura, *Curious Evolution*, *supra* note 15, at 1653 (footnote omitted); *see also* Martin, *supra* note 15, at 214-15 (discussing *Plasencia*'s extension of procedural due process protections to lawful permanent residents).

<sup>292</sup> 472 U.S. 846 (1985).

<sup>293</sup> *See id.* at 848.

<sup>294</sup> *See id.* at 854.

<sup>295</sup> The questions presented in the petition directly confronted *Mezei*, the entry fiction, and the plenary power doctrine. The questions were the following:

(1) Is invidious discrimination on basis of race and nationality . . . in incarceration of excludable black Haitian refugees in detention camps, wholly beyond constitutional scrutiny? (2) Does judicial deference to actions of Congress and President in exercising their authority to admit or exclude aliens preclude constitutional review . . . in regard to non-admission questions? (3) Does *Shaughnessy v. U.S. ex rel. Mezei*, 345 U.S. 206 (1953), have continuing validity and should it be extended to permit invidious discrimination . . . in incarceration of aliens pending determination of their asylum claims?

*Jean v. Nelson*, 53 U.S.L.W. 3442, 3442 (1984).

<sup>296</sup> The Court ruled that the INS's regulations already prohibit the Service from making parole decisions based upon race and national origin, and so there was no reason to reach the constitutional questions in the case. *Jean*, 472 U.S. at 854-57. Justices Marshall and Brennan dissented. They would have limited *Mezei* to cases with national security concerns because, when national security is at stake, parole may indeed be the same as entry. *See id.* at 877-80 (Marshall, J., dissenting). They would have held that detained excludable aliens are protected by the Constitution. *See id.* at 875.

unrelated to immigration. And, within immigration law, the Supreme Court has deviated from the uniform application of the entry fiction and plenary power doctrine. The returning resident exception, formulated in *Plasencia*, cannot be reconciled with the holdings in *Knauff* and *Mezei*.

### B. *Mezei and the Limits of Detention*

Under the entry fiction, excludable aliens are not considered to be "here." Legally, they are not within the United States and they have no constitutional rights with respect to their admission. The Supreme Court upheld Ignatz Mezei's incarceration at Ellis Island, finding that his detention was part and parcel of the admissions process.<sup>297</sup> Mezei contended that he was being punished without a criminal trial. Because no country would accept him, Mezei could not be deported. Thus, Mezei argued that his confinement could not reasonably be considered detention pending exclusion and must therefore be considered punishment.<sup>298</sup> Relying upon the entry fiction and the plenary power doctrine, the majority did not reach this issue.

When the Supreme Court decided *Mezei*, the "punishment doctrine" was only partly developed. At the end of the nineteenth century, the Court had struck down a portion of one of the Chinese exclusion laws, ruling that it unconstitutionally permitted punishment without a criminal trial. The statute had directed that any person of Chinese descent, who was determined by immigration authorities not to be entitled to remain in the United States, should "be imprisoned at hard labor for a period of not exceeding one year" and then deported.<sup>299</sup> In *Wong Wing v. United States*,<sup>300</sup> the Court invalidated the provision authorizing imprisonment.<sup>301</sup> Immigration officials could impose "detention, or temporary confinement, as part of the means necessary to give effect to . . . the exclusion or expulsion of aliens."<sup>302</sup> But imprisonment at hard labor was an infamous punishment, and it could not be imposed

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<sup>297</sup> See *Mezei*, 345 U.S. at 213-16.

<sup>298</sup> See Brief for Respondent at 7-25, and Memorandum in Opposition to Petition for Writ of Certiorari at 3-4, *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953) (No. 139).

<sup>299</sup> Act of May 5, 1892, ch. 60, § 4, 27 Stat. 25.

<sup>300</sup> 163 U.S. 228 (1896).

<sup>301</sup> See *id.* at 242-44.

<sup>302</sup> *Id.* at 235.

without a criminal trial.<sup>303</sup> Even excludable aliens could not be punished without an indictment and a criminal trial.<sup>304</sup>

A court commissioner had ordered Wong Wing imprisoned at hard labor for 60 days.<sup>305</sup> To both nineteenth and mid-twentieth-century jurists, Wong Wing's incarceration would clearly seem punitive. Imprisonment at hard labor is, after all, a classic criminal sentence.<sup>306</sup> Ignatz Mezei, on the other hand, could leave Ellis Island if he found a country to accept him. And while Mezei was held on Ellis Island for twenty-one months, he was not ordered to remain in custody for a definite term, nor was he committed to hard labor.<sup>307</sup> Unfortunately for Mezei, in 1953 the Supreme Court had not yet fully developed a test to sort out subtle distinctions between regulatory and punitive sanctions. It was difficult for Mezei to argue that *Wong Wing* applied to conditions of confinement that did not include a clearly recognized criminal sanction.

Ten years after *Mezei*, the Supreme Court reformulated the punishment doctrine. In *Kennedy v. Mendoza-Martinez*,<sup>308</sup> the Court struck down a law<sup>309</sup> that permitted immigration officials to divest

<sup>303</sup> See *id.* at 237.

<sup>304</sup> See *id.* at 238 (citing *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886)).

<sup>305</sup> See *id.* at 234.

<sup>306</sup> See *Ex parte Wilson*, 114 U.S. 417, 428 (1885) ("For more than a century, imprisonment at hard labor in the State prison or penitentiary or other similar institution has been considered an infamous punishment in England and America."); 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 370 (1769) (listing various criminal punishments, including "perpetual or temporary imprisonment" and "hard labour in the house of correction").

<sup>307</sup> Although Mezei was not sentenced to hard labor, his confinement at Ellis Island could not have been easy. Following the passage of the Internal Security Act of 1950, Ellis Island became severely overcrowded. See 3 HARLAN D. UNRAU, ELLIS ISLAND/HISTORIC RESOURCE STUDY 973-74 (1984). The overcrowding strained the facility's resources. The population grew from 400 to 1500, while the dining hall, for example, sat only 300 people. See 3 *id.* at 974-75. The number of detainees remained high during most of Mezei's stay. See 3 *id.* at 998.

Ellis Island residents were granted a fair measure of freedom on the island; many slept in dormitories, and they could socialize as they wished. See generally A.H. Raskin, *New Role for Ellis Island*, N.Y. TIMES, Nov. 12, 1950, (Magazine), at 20, 76, 78 (describing conditions); Richard Thruelsen, *The Things That Happen on "The Island!"*, SAT. EVENING POST, July 21, 1951, at 32, 86 (same). Nevertheless, a high wire fence served as a reminder that the residents were detainees and not invited guests. See *id.* at 85. Escapes from Ellis Island were accompanied by all of the high drama that marks breaks from maximum security prisons. See 2 *Ellis Island Aliens Captured in Jersey*, N.Y. TIMES, Apr. 3, 1953, at 11 (describing an escape in which the detainees tied sheets and blankets together, slid from the third floor of a dormitory, dodged guard patrols, and swam to Jersey City).

<sup>308</sup> 372 U.S. 144 (1963).

<sup>309</sup> Act of Sept. 27, 1944, ch. 418, § 1, 58 Stat. 746 (amending The Nationality Act

an American of citizenship for leaving the country to avoid the draft. The Court deemed loss of citizenship to be a punitive and not merely a regulatory sanction. The sanction could not be imposed "without providing the safeguards which must attend a criminal prosecution."<sup>310</sup>

*Mendoza-Martinez* sets out the test to determine whether a civil sanction should be considered criminal, and therefore not imposed without the rights afforded criminal defendants.<sup>311</sup> Under the *Mendoza-Martinez* test, a court should first look for evidence of an intent to punish.<sup>312</sup> Absent this intent, a court should then consider a multitude of factors, including the nature of the sanction and the government's interest in imposing it.<sup>313</sup> More recent decisions have isolated the most critical elements of the *Mendoza-Martinez* test. If there is no direct punitive intent, the punitive/regulatory distinction depends upon whether there is a rational alternative purpose for the sanction and whether the sanction is excessive in relation to that alternative purpose.<sup>314</sup>

These two elements of the *Mendoza-Martinez* test impose a rule of reasonableness upon regulatory confinements. The elements parallel the analysis developed in a separate strand of due process cases. In the landmark decision of *Jackson v. Indiana*,<sup>315</sup> the

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of 1940, ch. 876, § 401, 54 Stat. 1168, 1168-69).

<sup>310</sup> *Mendoza-Martinez*, 372 U.S. at 184.

<sup>311</sup> See *Austin v. United States*, 113 S. Ct. 2801, 2806 n.6 (1993).

<sup>312</sup> See *Mendoza-Martinez*, 372 U.S. at 169.

<sup>313</sup> See *id.* at 168-69. The Court described the various factors as follows:

Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned are all relevant to the inquiry, and may often point in differing directions. Absent conclusive evidence of congressional intent as to the penal nature of a statute, these factors must be considered in relation to the statute on its face.

*Id.* (emphasis omitted) (citations omitted). These factors provide guidance, but they are neither exhaustive nor dispositive. See *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 365 & n.7 (1984), *superseded by statute as stated in* *Cooper v. Greenwood*, 904 F.2d 302 (5th Cir. 1990); *United States v. Ward*, 448 U.S. 242, 249 (1980).

<sup>314</sup> See *United States v. Salerno*, 481 U.S. 739, 747 (1987); *Schall v. Martin*, 467 U.S. 253, 269 (1984); *Bell v. Wolfish*, 441 U.S. 520, 537-39 (1979).

<sup>315</sup> 406 U.S. 715 (1972).

Supreme Court ruled that criminal defendants may not be committed to custody as incompetent to stand trial for more than a reasonable period necessary to determine whether they will become competent in the foreseeable future.<sup>316</sup> *Jackson* affirms the basic principle that, under the Due Process Clause, "the nature and duration of commitment [must] bear some reasonable relation to the purpose for which the individual is committed."<sup>317</sup>

The majority upheld Ignatz Mezei's detention because it considered his confinement to be part and parcel of the exclusion process, a process in which Mezei had no rights whatsoever.<sup>318</sup> Had *Mezei* been decided after *Mendoza-Martinez* and *Jackson*, the Court would have been required to measure Ignatz Mezei's confinement by the rule of reasonableness. It is clear that *Mendoza-Martinez* and *Jackson* apply to excludable aliens as well as to citizens. At least since *Wong Wing v. United States*,<sup>319</sup> it has been established that aliens are entitled to the same procedures that citizens receive in criminal prosecutions. Excludable aliens may not be subjected to criminal sanctions without a full trial.<sup>320</sup> Had the Supreme Court applied the *Mendoza-Martinez* test, or the more generalized requirement of reasonableness set forth in *Jackson*, *Mezei* might well have been decided differently.

It would have been difficult for the government to assert a rational, nonpunitive purpose for Mezei's extended confinement. He was held for deportation. Thus, once it became established that Mezei could not be deported, no rational, nonpunitive purpose remained. In that respect, *Mezei* is similar to *Foucha v. Louisiana*,<sup>321</sup> in which the Court invalidated the hospitalization of an insanity acquittee who was determined to be dangerous but no longer mentally ill.<sup>322</sup> *Foucha* was acquitted of a crime; therefore, he was committed to a mental health facility for treatment, not

<sup>316</sup> See *id.* at 738.

<sup>317</sup> *Id.*

<sup>318</sup> See *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 215-16 (1953).

<sup>319</sup> 163 U.S. 228 (1896).

<sup>320</sup> See *id.* at 238; see also *United States v. Verdugo-Urquidez*, 494 U.S. 259, 278 (1990) (Kennedy, J., concurring) ("The United States is prosecuting a foreign national in a court established under Article III, and all of the trial proceedings are governed by the Constitution. All would agree . . . that the dictates of the Due Process Clause . . . protect the defendant."); *United States v. Henry*, 604 F.2d 908, 912-14 (5th Cir. 1979) (explaining that excludable aliens may raise *Miranda* violations in criminal proceedings).

<sup>321</sup> 112 S. Ct. 1780 (1992).

<sup>322</sup> See *id.* at 1784-85.

punishment.<sup>323</sup> Because Foucha was no longer mentally ill, the Court held, he could no longer be held on that basis and further confinement became unreasonable.<sup>324</sup>

The government might have characterized the purpose of Mezei's detention as "keeping him out of our society." This might have served as a rational, nonpunitive purpose that could have been accomplished by detention. Nevertheless, Mezei's confinement probably still would have failed under *Jackson* and the second prong of *Mendoza-Martinez*. Courts regularly examine commitments that are for facially legitimate purposes, such as pretrial detention under the federal bail statute<sup>325</sup> and the commitment of defendants who are found mentally unfit to stand trial.<sup>326</sup>

The statutes authorizing these sorts of confinements routinely provide for limited periods of detention and full evidentiary hearings.<sup>327</sup> When a person alleges that his or her confinement is excessive, even under these process-laden statutes, courts carefully balance the need for detention with the conditions and length of confinement. Lower courts have scrutinized the length of pretrial detention under the Bail Reform Act.<sup>328</sup> Similarly, courts and

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<sup>323</sup> See *id.* at 1785 ("As Foucha was not convicted, he may not be punished."); see also *Jones v. United States*, 463 U.S. 354, 369 (1983) (stating that confinement of insanity acquittees "rests on continuing [mental] illness and dangerousness").

<sup>324</sup> See *Foucha*, 112 S. Ct. at 1785 ("Due process requires that the nature of commitment bear some reasonable relation to the purpose for which the individual is committed.").

<sup>325</sup> 18 U.S.C. §§ 3141-3145 (1988); see, e.g., *United States v. Salerno*, 481 U.S. 739 (1987) (discussing detention under the federal bail statute); *Schall v. Martin*, 467 U.S. 253 (1984) (discussing detention of juveniles under a New York statute).

<sup>326</sup> See *Foucha*, 112 S. Ct. at 1780.

<sup>327</sup> Indeed, these limits and procedures may be required by the Due Process Clause. The Court upheld the pretrial detention provisions of the Bail Reform Act of 1984, 18 U.S.C. §§ 3141-3145, in *Salerno*. See *Salerno*, 481 U.S. at 747. The length of pretrial detention is necessarily limited because defendants have a right to a speedy trial. See U.S. CONST. amend. VI; 18 U.S.C. § 3161. A detainee is also entitled to a full adversarial detention hearing within a few days of the first court appearance. See 18 U.S.C. § 3142(e)-(f) (1988). In upholding the Bail Reform Act, the Court cited these protections. See *Salerno*, 481 U.S. at 747; see also *Schall*, 467 U.S. at 274-81 (upholding the pretrial preventive detention of juvenile delinquents and noting that the juveniles received a panoply of procedural protections, including a formal adversarial probable cause hearing). Strikingly, the statute at issue in *Schall* limited detention to 17 days. See *Schall*, 467 U.S. at 270.

In *Foucha*, the Court compared Louisiana's detention of insanity acquittees with the federal pretrial detention upheld in *Salerno*. Striking down the Louisiana statute, the *Foucha* Court determined that the Louisiana law failed to provide for an adversarial hearing, and the statute also lacked any limit to the length of detention. See *Foucha*, 112 S. Ct. at 1786-87.

<sup>328</sup> *Salerno* upheld the provisions of the Bail Reform Act against a facial challenge.

legislatures have scrupulously limited the duration of the commitment of defendants held as unfit to stand trial, as required by *Jackson v. Indiana*.<sup>329</sup>

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The Court expressly left open the opportunity for a defendant to assert a due process violation in his or her individual case, such as when pretrial detention has "become excessively prolonged, and therefore punitive." *Salerno*, 481 U.S. at 747 n.4. When such a claim is raised, a court is more likely to find a due process violation where the charge is less serious, the government's case is weak, the government is responsible for some or all of the pretrial delay, or the end of confinement is speculative. *See, e.g.*, *United States v. Hare*, 873 F.2d 796, 801 (5th Cir. 1989) (stating that a 10-month pretrial confinement raised due process concerns and required a remand for a hearing); *United States v. Ojeda Rios*, 846 F.2d 167, 169 (2d Cir. 1988) (holding that continued detention after 32 months violated due process when defendant agreed to all release conditions, including the use of an ankle bracelet); *United States v. Gelfuso*, 838 F.2d 358, 359 (9th Cir. 1988) (stating that 10-month confinement pending a racketeering trial did not violate due process because the government was not responsible for the delay); *United States v. Jackson*, 823 F.2d 4, 7-8 (2d Cir. 1987) (holding that potential pretrial detention of over eight months did not violate due process when there was a great flight risk and the defendant was partially responsible for the delay of the trial); *United States v. Melendez-Carrion*, 820 F.2d 56, 59-61 (2d Cir. 1987) (stating that confinement for 19 months was not a denial of due process when there was no prosecutorial delay and the defendants were members of a paramilitary terrorist group that claimed responsibility for a number of extremely violent acts); *United States v. Gonzales Claudio*, 806 F.2d 334, 340-41 (2d Cir. 1986) ("Detention that has lasted for fourteen months and, without speculation, is scheduled to last considerably longer, points strongly to a denial of due process." (citation omitted)), *cert. dismissed*, 479 U.S. 978 (1986).

<sup>329</sup> 406 U.S. 715 (1972). The federal courts engage in a fact-based, case-by-case inquiry to determine what is a "reasonable period" of mental health commitment, and at what point that confinement ceases to have any rational relationship to its original purpose. *See, e.g.*, *United States v. Charters*, 829 F.2d 479, 485-87 (4th Cir. 1987) (holding that a three-year confinement of defendant who has no chance of becoming competent is unreasonable), *cert. denied*, 494 U.S. 1016 (1990); *United States v. DeBellis*, 649 F.2d 1, 3 (1st Cir. 1981) (holding that it is unreasonable to hold an incompetent defendant committed for competency determination beyond the duration of the maximum possible sentence he could receive if convicted (30 days)); *United States v. Juarez*, 540 F. Supp. 1288, 1293 (W.D. Tex. 1982) (noting that "once it [is] determined that the chance of the accused achieving competence is remote, the committing court must" order a civil commitment hearing or release the defendant); *United States v. Pardue*, 354 F. Supp. 1377, 1382 (D. Conn. 1973) (holding that the three-year detention of a defendant not likely to become competent violates due process and "surpasse[s] any reasonable period of time permitted").

About half of the states have implemented *Jackson* by enacting laws that set an absolute maximum period of commitment. The periods allowed by these state statutes range from as low as 90 days (Washington) to as high as three years (Oregon). *See* OR. REV. STAT. § 161.370(6)(a) (1993); WASH. REV. CODE ANN. § 10.77.090 (West 1994); *see also* CAL. PENAL CODE § 1370.1(c)(1)(A) (West 1994) (providing for a maximum of six months); CONN. GEN. STAT. ANN. § 54-56d(i) (West 1993) (providing for a maximum of 18 months); WIS. STAT. ANN. § 971.14(5)(a) (West 1993) (providing for a maximum of 12 months).

Other states have drafted vague statutes and have left it to the courts to imple-



Ignatz Mezei was kept from our society because of his alleged communist activities and because he had previously been convicted of petty theft.<sup>330</sup> Given Mezei's minimal risk to our community, his indefinite confinement would seem excessive in relation to the danger that he posed to us. Had a majority of the Supreme Court in *Mezei* recognized *any* constitutional limitation upon Mezei's confinement, the majority might well have sided with Justice Jackson. Justice Jackson's prescient dissent sought to impose on Mezei's detention the same rule of reasonableness that was expressed later in *Mendoza-Martinez* and *Jackson*. For Justice Jackson, Mezei's confinement "no longer [could] be justified as a step in the process of turning him back to the country whence he came."<sup>331</sup> Mezei's incarceration was, instead, a substitute for exclusion. Impermissibly, it became "an end in itself."<sup>332</sup>

Since *Mezei* preceded *Mendoza-Martinez* and *Jackson*, the Supreme Court did not judge Mezei's detention by the reasonableness standard. Nevertheless, *Mezei* is inconsistent with the Supreme Court's more recent due process pronouncements. This inconsistency has caused problems for the lower federal courts, which have been called upon to decide numerous challenges to the detention of excludable aliens. The issue has been raised most consistently in litigation over the confinement of "Mariel" Cubans.

In 1980, approximately 125,000 Cuban refugees came to the United States in the "Mariel" boatlift.<sup>333</sup> Most of the immigrants

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ment *Jackson*. The courts in those states have strictly limited the periods of commitment. See, e.g., *State ex rel. Lockhart v. Armistead*, 351 So. 2d 496, 498 (La. 1977) (finding two-year confinement unreasonable, even though statute allowed confinement for up to the maximum possible sentence of nine years); *People v. Miller*, 489 N.W.2d 60, 65 (Mich. 1992) (following statute and limiting confinement to 15 months); *State v. Bias*, 352 S.E.2d 52, 57 (W. Va. 1986) (holding that one-year confinement is "prima facie unreasonably long" under the statute and a prior decision applying *Jackson*).

For a general discussion of the states' implementation of *Jackson*, see MICHAEL L. PERLIN, MENTAL DISABILITY LAW §§ 14.14-16 (1989 & Supp. 1993).

<sup>330</sup> See *supra* notes 219-26 and accompanying text.

<sup>331</sup> *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 227 (1953) (Jackson, J., dissenting).

<sup>332</sup> *Id.*

<sup>333</sup> During the spring and summer of 1980, approximately 125,000 to 129,000 Cuban citizens arrived in South Florida on the boatlift from Mariel, Cuba. See *Fernandez-Roque v. Smith*, 734 F.2d 576, 578 (11th Cir. 1984) (explaining that the Cubans were being excluded from the United States and that the Cuban government refused to allow them to return); *Mariel Cuban Detainees: Events Preceding and Following the November 1987 Riots: Hearing Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 100th Cong., 2d

were excludable because they arrived at the U.S. border without proper entry documents or because they had committed crimes in Cuba.<sup>334</sup> Apart from limited agreements reached in 1984 and (perhaps) 1993, the United States has been unable to repatriate Mariel Cubans ordered excluded from the country.<sup>335</sup> The overwhelming majority of Mariel Cubans have been paroled into the United States, and most have taken advantage of special legislation to become permanent residents.<sup>336</sup> However, the INS is presently

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Sess. 32 (1988) [hereinafter *Mariel Cuban Detainees Hearing*] (testimony of Michael G. Kozak, Principal Deputy Legal Adviser, Dep't of State). For a general description of the boatlift and the subsequent treatment of the Mariel Cubans, see Mark D. Kemple, Note, *Legal Fictions Mask Human Suffering: The Detention of the Mariel Cubans: Constitutional, Statutory, International Law, and Human Considerations*, 62 S. CAL. L. REV. 1733, 1735-44 (1989).

<sup>334</sup> See *Fernandez-Roque*, 734 F.2d at 578; Kemple, *supra* note 333, at 1736. Estimates vary widely, but it has been reported that as many as 23,000 of the refugees had criminal records in Cuba. See *Cuban Detainees and the Disturbance at the Talladega Federal Prison: Hearing Before the Subcomm. on Intellectual Property and Judicial Administration of the House Comm. on the Judiciary*, 102d Cong., 1st Sess. 1 (1991) [hereinafter *Talladega Hearing*] (opening statement of Chairman Hughes); *Detention of Aliens in Bureau of Prisons Facilities: Hearing Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice, House Comm. on the Judiciary*, 97th Cong., 2d Sess. 17 (1982) (testimony of Rudolph W. Giuliani, Assoc. Attorney Gen., U.S. Dep't of Justice) (noting that Fidel Castro emptied several prisons "to the tune of maybe 15,000 to 20,000 criminals"). But see Virginia I. Postrel, *Let Cubans in, and Watch Castro Rot*, L.A. TIMES, Sept. 18, 1994, at M5 (noting that of the 125,000 Cubans who fled, only 5,000 Mariel Cubans were prisoners and mental health patients).

<sup>335</sup> In December 1984, the United States and Cuba concluded a migration agreement. Under the terms of the agreement, Cuba consented to the return of excludable aliens that the INS was able to identify at the time the agreement was reached. See *Mariel Cuban Detainees Hearing*, *supra* note 333, at 31-34. Some 2746 Mariel Cubans were covered by the agreement. See *id.* at 83 (statement of Arnold I. Burns, Deputy Attorney Gen., U.S. Dep't of Justice). As of January 11, 1995, 1208 Mariel Cubans were repatriated to Cuba under the 1984 agreement. See Immigration and Naturalization Service, *Mariel Cuban Factsheet* (Jan. 11, 1995) (unpublished memorandum, on file with author) [hereinafter *Mariel Cuban Factsheet*].

In 1993, the United States announced a new agreement with Cuba to return an additional 1500 excludable Mariel Cubans. See Thomas W. Lippman, *U.S.-Cuba Accord Limited to Convicts*, WASH. POST, Oct. 2, 1993, at A14 (discussing generally the agreement reached between the United States and Cuba); Larry Rohter, *U.S. Pact to Return Inmates to Havana Alarms Emigrés*, N.Y. TIMES, Sept. 30, 1993, at A16 (discussing agreement to return 1500 émigrés, at a rate of 50 per month). Cuba, however, renounced the agreement. See *Despite Deal, Cuban Inmates Still Awaiting Deportation*, CORRECTIONS DIG., Dec. 1, 1993, at 8, 8 (citing INS Commissioner Doris Meissner and reporting that Cuba denied the existence of the 1993 agreement).

<sup>336</sup> The legislation to adjust the status of Mariel Cubans was passed in 1986. See Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 202, 100 Stat. 3359, 3404-05 (codified as amended at 8 U.S.C. § 1255(a) (1988)). According to the State Department, "[t]he overwhelming majority of [Mariel Cubans] eventually integrated themselves successfully into U.S. society." *Mariel Cuban Detainees Hearing*,

detaining over a thousand "nonparolable" Mariel Cubans in U.S. prison facilities.<sup>337</sup> Although they are not serving criminal sentences, Cuba will not take these detainees back, and the INS will not release them into U.S. society.

Five circuit courts have considered whether incarcerating excludable Mariel Cubans amounts to impermissible punishment. The Fourth, Fifth, and Eleventh Circuits have upheld the aliens' confinement; in each of these decisions, the courts of appeals have not undertaken the full *Mendoza-Martinez* and *Jackson* analyses.<sup>338</sup> A Ninth Circuit panel found that eight years of imprisonment is impermissible.<sup>339</sup> However, an en banc panel vacated that decision and found that the Supreme Court's opinion in *Mezei* made the punishment cases "irrelevant."<sup>340</sup> The Tenth Circuit has held that

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*supra* note 333, at 32.

<sup>337</sup> Over the years, the number of detainees has fluctuated between about 1400 and 3000. In 1984, when the migration agreement was reached with Cuba, the INS had identified 2746 excludable detainees. See *Mariel Cuban Detainees Hearing*, *supra* note 333, at 83. In November 1991, 2363 Mariel Cubans were in INS custody. See *Talladega Hearing*, *supra* note 334, at 293 (reprinting Justice Department's *Mariel Cuban Report*). As of January 11, 1995, 1409 Mariel Cubans were in INS custody, 919 were held in Federal Bureau of Prisons facilities, and the remainder were detained in INS centers, state prisons or jails, and St. Elizabeth's Hospital. See *Mariel Cuban Factsheet*, *supra* note 335.

<sup>338</sup> See *Gisbert v. United States Attorney Gen.*, 988 F.2d 1437, 1441-42 (5th Cir. 1993) (determining that protection of society is a rational alternative purpose for the sanction, but failing to discuss in any detail the conditions of confinement or whether indefinite incarceration may be excessive in light of the alternative purpose), *opinion amended by* 997 F.2d 1122 (5th Cir. 1993); *Jean v. Nelson*, 727 F.2d 957, 967-72 (11th Cir. 1984) (en banc) (upholding confinement of Haitian detainees on basis of *Mezei* and failing to apply the analyses of *Mendoza-Martinez* and *Jackson*), *aff'd on other grounds*, 472 U.S. 846 (1985); *Palma v. Verdeyen*, 676 F.2d 100, 103 (4th Cir. 1982) (citing *Wong Wing* but failing to discuss the punishment doctrine).

<sup>339</sup> See *Barrera-Echavarria v. Rison*, 21 F.3d 314, 317 (9th Cir. 1994) ("We need not draw the line exactly as to when attempted exclusion becomes punishment. Over eight years of prison are too many. Over eight years of such deprivations constitute punishment."), *vacated en banc*, No. 93-56682, 1995 WL 9709 (9th Cir. Jan. 12, 1995). A previous Ninth Circuit panel upheld a three-year confinement without applying the full punishment analysis. See *Alvarez-Mendez v. Stock*, 941 F.2d 956, 962 (9th Cir. 1991) (concluding that detention is not an excessive means of "[p]rotecting society from a potentially dangerous alien," but failing to examine circumstances or length of confinement), *cert. denied*, 113 S. Ct. 127 (1992).

<sup>340</sup> *Barrera-Echavarria v. Rison*, No. 93-56682, 1995 WL 9709, \*6 (9th Cir. Jan. 12, 1995) (en banc). The Ninth Circuit rejected Mr. Barrera's punishment analysis:

We do not view the constitutional question in these terms. . . . Consistent with the Supreme Court's decision in *Shaughnessy v. Mezei*, and in light of the annual parole reviews provided [by the INS], we find that Barrera has no constitutional right to immigration parole and, therefore, no right to be free from detention pending his deportation. The punishment cases he

indefinite detention may amount to punishment.<sup>341</sup> The overwhelming majority of district courts have upheld indefinite confinement, relying upon *Mezei* and its predecessors (including *Knauff*).<sup>342</sup>

These have been challenging cases for the circuit and district courts.<sup>343</sup> Instead of undertaking the full due process/punishment analysis, many lower courts have simply applied *Mezei*'s bright-line territorial rule. The Supreme Court has failed to resolve whether *Mezei* has been eroded by the Court's subsequent due process decisions. This failure has complicated the work of the federal courts.

*C. Justice Frankfurter's "Clean Slate"  
and the Fortunes of War*

If the plenary power doctrine and the constitutionalization of the entry fiction are inconsistent with our overall treatment of aliens, if they conflict with *Landon v. Plasencia*,<sup>344</sup> and if they

relies upon are therefore irrelevant to our decision.

*Id.* Because the INS could consider Barrera for release every year, the Ninth Circuit characterized his incarceration "as a series of one-year periods of detention followed by an opportunity to plead his case anew." *Id.* at \*8. Viewing the detention in this fashion, the court held, "we have no difficulty concluding that Barrera's detention is constitutional under *Mezei*." *Id.*

<sup>341</sup> See *Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382, 1389-90 (10th Cir. 1981) ("[D]etention is permissible during proceedings to determine eligibility to enter and, thereafter, during a reasonable period of negotiations for their return. . . . After such a time . . . the alien would be entitled to release."). Though it did not cite *Jackson*, the court analogized detention of Mariel Cubans to detention pending trial, and noted that such confinement can be justified "only as a necessary, temporary measure." *Id.* at 1387. Detention pending exclusion is impermissible "if there is to be no trial." *Id.* In the case of Mariel Cubans, detention pending exclusion is impermissible after reasonable efforts to expel the person have been exhausted. See *id.* at 1390.

<sup>342</sup> See, e.g., *Rodriguez v. Thornburgh*, 831 F. Supp. 810, 813 (D. Kan. 1993) (citing *Knauff*, and ruling that detention is administrative, not punitive; court does not apply *Mendoza-Martinez* or *Jackson* tests); *In re Cuban*, 822 F. Supp. 192, 195-97 (M.D. Pa. 1993) (same); *Pena v. Thornburgh*, 770 F. Supp. 1153, 1158-59 (E.D. Tex. 1991) (citing *Mezei*; same holding); *Fragedela v. Thornburgh*, 761 F. Supp. 1252, 1255-57 (W.D. La. 1991) (citing *Mezei* and finding that confinement is temporary because of yearly administrative parole review; court did not apply *Mendoza-Martinez* or *Jackson* tests); *Barrios v. Thornburgh*, 754 F. Supp. 1536, 1542 (W.D. Okla. 1990) (citing *Knauff*; same holding); *Sanchez v. Kindt*, 752 F. Supp. 1419, 1422-23 (S.D. Ind. 1990) (citing *Mezei*; same holding). But see Report and Recommendation of Stephen L. Verkamp, U.S. Magistrate Judge, *Mendinueta v. Reno*, Civ. No. 90 1082 PHX PGR (SLV) (D. Ariz. Sept. 30, 1993), at 18-19 (finding the incarceration of Mendinueta, a Mariel Cuban, "excessive," thus constituting impermissible punishment).

<sup>343</sup> For further discussion, see *infra* notes 456-65 and accompanying text.

<sup>344</sup> 459 U.S. 21 (1982).

cannot be harmonized with contemporary principles of substantive due process, how have they survived? Part of the answer lies in the power and momentum of precedent.

The Supreme Court is aware that the plenary power doctrine and the entry fiction are inconsistent with the Court's more recent decisions. The Court granted certiorari in *Jean v. Nelson*<sup>345</sup> to assess the continuing validity of *Mezei*, although *Jean* was eventually decided on nonconstitutional grounds.<sup>346</sup> As early as 1954, the Court acknowledged the tension between the plenary power doctrine and our developing due process jurisprudence. That year, Justice Frankfurter—a wordsmith of the first order—wrote for the Court:

In light of the expansion of the concept of substantive due process as a limitation upon all powers of Congress, even the war power, . . . much could be said for the view, were we writing on a clean slate, that the Due Process Clause qualifies the scope of political discretion heretofore recognized as belonging to Congress in regulating the entry and deportation of aliens. . . . But the slate is not clean. As to the extent of the power of Congress under review, there is not merely "a page of history," . . . but a whole volume . . . . [T]hat the formulation of [immigration] policies is entrusted exclusively to Congress has become about as firmly imbedded in the legislative and judicial tissues of our body politic as any aspect of our government.<sup>347</sup>

Subsequent decisions have echoed Frankfurter's plaint that the "slate is not clean" and have similarly declined litigants' invitations to revisit the doctrine.<sup>348</sup> But as Louis Henkin has observed, "[s]ince Justice Frankfurter's statement, many other slates have been cleaned."<sup>349</sup> Why not this one as well?

It is too simplistic to say that precedent alone accounts for the longevity of the entry fiction and the judicial deference prong of the plenary power doctrine. The plenary power doctrine is premised on

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<sup>345</sup> 472 U.S. 846 (1985).

<sup>346</sup> See *supra* notes 292-96 and accompanying text.

<sup>347</sup> *Galvan v. Press*, 347 U.S. 522, 530-31 (1954) (citations omitted).

<sup>348</sup> See, e.g., *Fiallo v. Bell*, 430 U.S. 787, 792-93 n.4 (1977) (quoting Justice Frankfurter's opinion in *Galvan* and stating that the Court is not now inclined to reconsider this line of cases); *Kleindienst v. Mandel*, 408 U.S. 753, 766-67 (1972) (same).

<sup>349</sup> Henkin, *supra* note 267, at 29. David Martin makes much the same point. See Martin, *supra* note 15, at 235 ("[T]he Supreme Court has shown itself quite capable of throwing over the ancient writings in the name of current conceptions of due process, whenever it is persuaded that it has good reasons for such an overruling.").

the not unnatural belief that the executive should be given a relatively free hand in international affairs, so long as she acts within broad bounds set by Congress. What makes the doctrine unreasonable is the extent to which the executive has sought that free hand, and the failure of the doctrine to keep pace with advances in the rest of our law. Yet the doctrine is appealing. And, particularly when our country is engaged in war or is in a state of national emergency, there is a strong inclination to defer to the executive.<sup>350</sup>

Alexander Aleinikoff disputes the notion that judicial deference in immigration matters is based primarily upon foreign policy concerns. He argues that foreign affairs is "a convenient excuse" for our treatment of immigrants.<sup>351</sup> He asserts that courts are less inclined to come to the aid of aliens because, by definition, aliens lack full membership in our national community.<sup>352</sup> Aleinikoff is certainly right in perceiving this undercurrent in many judicial decisions. However, a lack of membership in the national community does not, for instance, justify the courts' failure to enforce rights under the Due Process Clause, where the Clause itself does not distinguish between citizens and aliens. Nor does it explain why certain aliens are granted more process than others. For example, an alien who enters illegally and is arrested a mile inside the border has territorial standing and thus has greater rights than an alien who is married to a United States citizen but who stands at the border.<sup>353</sup> The heightened protection afforded to the illegal entrant is not supported by any measure of membership in our national community. In the end, one must return to the foreign policy explanation—the reason given most often by the Supreme Court for deference to the executive.<sup>354</sup> After all, the Supreme Court

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<sup>350</sup> For an example of the Supreme Court's deference to the executive in time of war, see *Ex parte Quirin*, 317 U.S. 1 (1942). There the Court denied habeas corpus petitions brought by aliens to challenge their trials, which were conducted by military commissions pursuant to a presidential proclamation. The Court held that detentions and trials that are ordered by the President as Commander in Chief in time of war "are not to be set aside by the courts without the clear conviction that they are in conflict with the Constitution or laws of Congress." *Id.* at 25.

<sup>351</sup> T. Alexander Aleinikoff, *Citizens, Aliens, Membership and the Constitution*, 7 CONST. COMMENTARY 9, 12 (1990).

<sup>352</sup> See *id.* at 12-20.

<sup>353</sup> See Aleinikoff, *supra* note 15, at 867.

<sup>354</sup> See, e.g., *Kleindienst v. Mandel*, 408 U.S. 753, 765-66 (1972) (discussing the executive's power to exclude aliens as necessary to maintain international relations); *Harisiades v. Shaughnessy*, 342 U.S. 580, 588-89 (1952) (noting that policy toward aliens is "intricately interwoven with contemporaneous policies in regard to the

determined that the federal government has authority over immigration primarily because of its nexus to foreign affairs.<sup>355</sup>

This inclination to defer to the executive in foreign affairs, particularly during times of conflict, helps explain the vitality of the entry fiction and the judicial deference element of the plenary power doctrine. These doctrines were reinvigorated and reached their modern zeniths in *Knauff* and *Mezei*. These decisions were rendered at the height of the Cold War, when the judiciary's desire to defer to the executive was manifest. In extrajudicial writings, Chief Justice Rehnquist has acknowledged this point. He has noted that the end of World War II and the existence of the undeclared war in Korea affected the work of the federal courts:

[T]he influence [on the courts] is aptly expressed in the Latin phrase "*silent Leges inter arma*"—in time of war, the laws are silent and the guns speak. Put in a more jurisprudential and restrained fashion, it is the not unfounded belief that in times of military crisis other branches of the government must uphold the action of the executive if it is reasonably possible to do so.<sup>356</sup>

To magnify this influence, *Knauff* and *Mezei* both also involved allegations that judicial intervention would undermine the nation's security.<sup>357</sup> Even if the Court's holdings in those cases were stated broadly and have since been applied outside the context of threats to national security, it is important to understand the settings in which the decisions were rendered.<sup>358</sup>

During war, governments act in ways that would be unthinkable during peace. We are no longer in the state of emergency that marked the end of World War II and the Korean conflict. That is not to say that the world is no longer a dangerous place. But we should take stock of immigration doctrines that became fixed

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conduct of foreign relations"); *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542-44 (1950) (stating that the right to exclude aliens "is inherent in the executive power to control the foreign affairs of the nation").

<sup>355</sup> See *Chae Chan Ping v. United States*, 130 U.S. 581, 605-06 (1889); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936). For a discussion of *Chae Chan Ping* and *Curtiss-Wright*, see *supra* part I.B.

<sup>356</sup> William H. Rehnquist, *Robert H. Jackson: A Perspective Twenty-Five Years Later*, 44 ALB. L. REV. 533, 538 (1980).

<sup>357</sup> See *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 216 (1953); *Knauff*, 338 U.S. at 546-47.

<sup>358</sup> See *Jean v. Nelson*, 472 U.S. 846, 879 (1985) (Marshall, J., dissenting) (arguing that the procedural due process holding in *Mezei* "had less to do with *Mezei*'s status as an alien than with the Court's willingness to defer to the Executive on national security matters in the midst of the Cold War").

during a time of war and consider carefully whether they must necessarily be applied in a time of peace.

#### IV. RECASTING THE PLENARY POWER DOCTRINE AND THE TERRITORIAL FICTION

##### A. *The Due Process Clause and Judicial Review*

The thesis of this Article is that we should revisit the plenary power doctrine and the territorial fiction. All people at or within our borders ought to be deemed "persons" within the meaning of the Due Process Clause; we should no longer give constitutional effect to the territorial fiction. We should also consider abandoning the judicial deference prong of the plenary power doctrine, which would ameliorate the harsh impact of *Knauff* and *Mezei*. It would also harmonize the law of detention and exclusion with the *Plasencia* exception and the *Mendoza-Martinez/Jackson* tests. More fundamentally, however, it is the right course for our nation.

We bear a responsibility to human beings at our door. We are accountable for how we treat immigrants, regardless of the problems that have brought them here. Once people arrive at our border (or are interdicted on the high seas and held in United States facilities abroad), they become subject to actions by our government's officials. These actions are taken by representatives of the United States and not agents of a foreign nation. Questions about our treatment of arriving immigrants are, at their heart, questions about *us* and not questions about *them*. Do we want *our* government to exclude people without hearings? Should *our* government confine human beings in prisons or detention camps for lengthy periods of time without affording them criminal trials or evidentiary hearings? Are we comfortable with the notion that *our* government's treatment of immigrants is not constrained by the Due Process Clause?<sup>359</sup>

What drove the public and congressional response to *Knauff* and *Mezei* was the notion that this is the United States of America. As leader of the free world, we have a responsibility to hold ourselves to the highest standards. These sentiments led Judge Herbert Stern to afford constitutional protections to German citizens tried in a

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<sup>359</sup> See, e.g., Harold H. Koh, *The Human Face of the Haitian Interdiction Program*, 33 VA. J. INT'L L. 483, 488 (1993) (arguing that the policy of returning Haitian refugees to the former military regime "converted our own Coast Guard into agents of a brutal dictatorship that we ourselves have repeatedly called illegitimate").



United States court in Berlin.<sup>360</sup> Whatever the rule for courts convened by other governments, "[w]e deal here," Judge Stern wrote, "with an *American* court."<sup>361</sup> Applying the same logic, one federal district court found that the protections of the Due Process Clause extend to Haitians detained at the U.S. Naval Station at Guantánamo Bay.<sup>362</sup> The Station is operated by our government and is on land leased from Cuba.<sup>363</sup> More recently, a federal district judge in Miami (later overturned on appeal) temporarily restrained the government from repatriating Cubans from Guantánamo Bay until the refugees had an opportunity to consult with counsel and had sufficient information to make an informed decision about whether to return to Cuba voluntarily.<sup>364</sup> What moved the court was the fact that the Cubans were not on the high seas, but rather were within United States territory at Guantánamo Bay and were subject to actions by U.S. officials.<sup>365</sup>

There is another reason to grant due process protection to aliens, at least with respect to their detention. When we examine our treatment of immigrants, we must look beyond our domestic laws. Our nation's actions must also be measured by international

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<sup>360</sup> See *United States v. Tiede*, 86 F.R.D. 227, 260 (U.S. Ct. Berlin 1979) (holding that civilians charged with nonmilitary offenses in a U.S. court in Berlin shall be provided with the same constitutional safeguards that are given to civilians in any other United States court).

<sup>361</sup> *Id.* at 249. In the *Insular Cases*—*Balzac v. Porto Rico*, 258 U.S. 298, 304 (1922); *Hawaii v. Mankichi*, 190 U.S. 197, 218 (1903); and *Downes v. Bidwell*, 182 U.S. 244, 287 (1901)—the Supreme Court ruled that the Constitution applies in U.S. territories in varying degrees, depending upon the status of the territories. Judge Stern distinguished the *Insular Cases* to the extent that they address whether the Constitution applies in territorial courts not operated by the United States government. Stern ruled that the *Insular Cases* "do not apply when the United States is acting as prosecutor in its own court." *Tiede*, 86 F.R.D. at 249.

<sup>362</sup> See *Haitian Ctrs. Council, Inc. v. Sale*, 823 F. Supp. 1028, 1041-45 (E.D.N.Y. 1993).

<sup>363</sup> See *id.* at 1036.

<sup>364</sup> See *Order, Cuban Am. Bar Ass'n v. Christopher*, No. 94-2183-CIV-ATKINS, at 13 (S.D. Fla. Oct. 31, 1994) (granting plaintiffs' emergency motion for temporary restraining order) [hereinafter *Temporary Restraining Order*], *dissolved*, 1995 WL 16410, at \*13 (11th Cir. Jan. 18, 1995).

<sup>365</sup> See *id.* at 8-10. The court of appeals was not similarly moved. In *Cuban American Bar Ass'n, Inc. v. Christopher*, Nos. 94-5138, 94-5231, and 94-5234, 1995 WL 16410 (11th Cir. Jan. 18, 1995), the court dissolved the temporary restraining order entered by the district court. According to the Eleventh Circuit, the district court erred in concluding that Guantánamo was a United States territory. See *id.* at \*8. The court of appeals determined that "control and jurisdiction" is not equivalent to sovereignty and that the plaintiffs could only prevail if they could show that statutory or constitutional rights had extraterritorial application. *Id.*

law, which establishes certain norms of governmental conduct. Customary international law prohibits prolonged arbitrary detention.<sup>366</sup> All major human rights instruments recognize a right to be free from arbitrary arrest or detention.<sup>367</sup> The United States

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<sup>366</sup> The most authoritative compilation of international law principles, as applied in our country, is contained in the American Law Institute's RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (1987) [hereinafter RESTATEMENT (THIRD)]. Section 702 provides that "[a] state violates international law if, as a matter of state policy, it practices, encourages, or condones . . . prolonged, arbitrary detention." *Id.* § 702.

Our federal courts have periodically recognized this human rights norm in cases involving detention within the United States. *See, e.g.,* *Fernandez-Roque v. Smith*, 622 F. Supp. 887, 902 (N.D. Ga. 1985) ("Even the government admits that customary international law of human rights contains at least a general principle prohibiting prolonged, arbitrary detention."), *rev'd on other grounds*, 781 F.2d 1450 (11th Cir. 1986); *Fernandez v. Wilkinson*, 505 F. Supp. 787, 798 (D. Kan. 1980) ("Our review of the sources from which customary international law is derived clearly demonstrates that arbitrary detention is prohibited by customary international law."), *aff'd sub nom. Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382, 1388 (10th Cir. 1981) (observing, in dicta, that "[n]o principle of international law is more fundamental than the concept that human beings should be free from arbitrary imprisonment").

The federal courts have been more than willing to acknowledge the norm in litigation concerning detention in other countries. *See, e.g.,* *De Sanchez v. Banco Central de Nicaragua*, 770 F.2d 1385, 1397 (5th Cir. 1985) (identifying the right "not to be arbitrarily detained" as a human right incorporated into the law of nations); *Nguyen Da Yen v. Kissinger*, 528 F.2d 1194, 1201 n.13 (9th Cir. 1975) (recognizing that illegal detention may constitute a tort in violation of the "law of nations"); *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1541-42 (N.D. Cal. 1987) ("There is case law finding sufficient consensus to evince a customary international human rights norm against arbitrary detention." (citing *Fernandez*, 505 F. Supp. at 795-98)); *Von Dardel v. U.S.S.R.*, 623 F. Supp. 246, 257 (D.D.C. 1985) (holding that the prolonged arbitrary detention and death of diplomat constituted clear violation of the law of nations), *vacated*, 736 F. Supp. 1 (D.D.C. 1990); *see also* *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 781 (D.C. Cir. 1984) (Edwards, J., concurring) (noting that prolonged arbitrary detention violates current norms of international law and citing RESTATEMENT OF THE LAW OF FOREIGN RELATIONS (REVISED) § 702 (Tentative Draft No. 3, 1982)), *cert. denied*, 470 U.S. 1003 (1985).

In international judicial fora, our executive has argued that arbitrary prolonged detention is a violation of international law. In the Iranian hostage case, the United States urged, and the International Court of Justice agreed, that

[w]rongfully to deprive human beings of their freedom and to subject them to physical constraint in conditions of hardship is in itself manifestly incompatible with the principles of the Charter of the United Nations, as well as with the fundamental principles enunciated in the Universal Declaration of Human Rights.

*United States v. Iran* (*In re* United States Diplomatic & Consular Staff in Tehran), 1980 I.C.J. 3, 42 (May 24).

<sup>367</sup> *See, e.g.,* American Convention on Human Rights, Nov. 22, 1969, art. 7, para. 3, 9 I.L.M. 673, 677 (1970) (entered into force July 18, 1978) ("No one shall be subject to arbitrary arrest or imprisonment."); Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 5, para. 1, 213 U.N.T.S.

recently ratified the International Covenant on Civil and Political Rights,<sup>368</sup> which contains not only a prohibition against arbitrary detention,<sup>369</sup> but also states that international law requires judicial review: "Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful."<sup>370</sup> The concepts of arbitrary detention and lack of judicial review are interrelated. Cases in international fora hold that noncriminal detention that is unreviewable by a competent court is "arbitrary."<sup>371</sup> Our practice of confining excludable aliens for prolonged periods of time without full judicial review amounts to arbitrary detention, in violation of customary international law and the express language of international agreements.<sup>372</sup>

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222, 226 (entered into force Sept. 3, 1953) [hereinafter European Convention] ("Everyone has the right to liberty and security of person."); *Universal Declaration of Human Rights*, G.A. Res. 217, U.N. GAOR, 3d Sess., 183d plen. mtg. art 9, at 137, U.N. Doc. A/810 (1948) ("No one shall be subjected to arbitrary arrest, detention, or exile."). Whether or not these instruments are themselves enforceable in domestic courts, they evince international support for the norm prohibiting prolonged arbitrary detention.

<sup>368</sup> International Covenant on Civil and Political Rights, *opened for signature*, G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, at 168, U.N. Doc. A/6316 (1967) [hereinafter International Covenant] (entered into force Mar. 23, 1976). President Carter signed the International Covenant on behalf of the United States on October 5, 1977. See President's Message to the Senate Transmitting Human Rights Treaties, 1 PUB. PAPERS 395 (1978). The Senate ratified it on April 2, 1992. See 138 CONG. REC. S4783 (daily ed. Apr. 2, 1992). However, the Senate attached a series of reservations, including a declaration that the International Covenant would not be self-executing. See *id.* at S4784.

<sup>369</sup> See International Covenant, *supra* note 368, art. 9, para. 1.

<sup>370</sup> *Id.* art. 9, para. 4; see also European Convention, *supra* note 367, art. 5, para. 4 (containing similar requirement of judicial review). The rights described in the International Covenant apply to everyone, regardless of nationality or statelessness. See International Covenant, *supra* note 368, cmt. 15.

<sup>371</sup> See *Camargo v. Colombia*, 71 I.L.R. 317, 325 (U.N. H.R. Comm'n 1982) (holding that confinement under domestic law authorizing emergency detention, without habeas corpus review, violates Article 9 of the International Covenant); *Massiotti v. Uruguay*, 71 I.L.R. 310, 316 (U.N. H.R. Comm'n 1982) (holding that detention past end of criminal sentence is arbitrary and violates Article 9 of the International Covenant where there is no appeal to a competent court); see also *Winterwerp Case*, 58 I.L.R. 653, 674-77 (Eur. Ct. H.R. 1979) (holding that continued mental health commitment violates Article 5, paragraph 4 of the European Convention where review of confinement is conducted by government administrators and not by a court).

<sup>372</sup> Detained excludable aliens may bring habeas corpus petitions in federal court to challenge their continued confinement, pursuant to 28 U.S.C. § 2241. The problem is that in reviewing these petitions, the courts consider their powers to be

Whether or not our domestic courts are willing to enforce these human rights norms and instruments,<sup>373</sup> they represent the

extremely limited if, indeed, the courts admit to any powers of review at all. See *supra* notes 47-60, 65-66, 102-15, 183-88, and accompanying text. Thus, although there is the appearance of judicial review, in practice the right of review is virtually meaningless.

<sup>373</sup> From the earliest days, courts have recognized that the United States is bound by international law. See, e.g., *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 474 (1793) (explaining that, by taking its place among nations, the United States became subject to the law of nations); *In re The Nereide*, 13 U.S. (9 Cranch) 388, 423 (1815) ("[T]he Court is bound by the law of nations which is a part of the law of the land."). Domestic courts have not, however, always enforced international law.

Customary international law is treated as federal common law. See RESTATEMENT (THIRD), *supra* note 366, § 111 cmt. d. In *In re The Paquete Habana*, 175 U.S. 677, 700 (1900), the Supreme Court noted that customary international law must be administered by our courts, but that it may be ousted or repealed from the body of domestic law by a "controlling executive or legislative act or judicial decision." The Supreme Court has never defined what constitutes such a controlling act or decision.

One might wonder how the executive or the courts could act in derogation of international law. The President has the duty to "take Care that the Laws be faithfully executed." U.S. CONST. art. II, § 3; see also *Brown v. United States*, 12 U.S. (8 Cranch) 110, 125, 128 (1814) (under international law, property of the enemy is not immediately confiscated; absent an act of Congress, the executive does not have the power to confiscate enemy property); Louis Henkin, *The President and International Law*, 80 AM. J. INT'L L. 930, 934 (1986) (arguing that the executive must enforce international law unless it has ceased to be a law or has been superseded by another law that the President has a duty to execute). Similarly, the courts have the same function of "finding" customary international law—that is, construing the law's dimension—that they otherwise have in interpreting domestic law. See *Paquete Habana*, 175 U.S. at 700 (courts must ascertain international law whenever questions depending on it are presented); see also *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (stating that courts must not interpret domestic law to violate international law if any other construction remains). See generally Ralph G. Steinhardt, *The Role of International Law as a Canon of Domestic Statutory Construction*, 43 VAND. L. REV. 1103 (1990). Nevertheless, several courts have relied upon executive acts or judicial decisions in "ousting" customary international human rights norms. See, e.g., *Alvarez-Mendez v. Stock*, 746 F. Supp. 1006, 1013-14 (C.D. Cal. 1990) (holding that norm prohibiting prolonged arbitrary detention is not controlling, given Attorney General's plan to review status of Cuban detainees and given Supreme Court's decision in *Mezei*), *aff'd*, 941 F.2d 956 (9th Cir. 1991), *cert. denied*, 113 S. Ct. 127 (1992); *Garcia-Mir v. Meese*, 788 F.2d 1446, 1453-55 (11th Cir.) (same), *cert denied*, 479 U.S. 889 (1986).

Courts are also required to give effect to international agreements, although "non-self-executing" agreements will not be enforced without implementing legislation. RESTATEMENT (THIRD), *supra* note 366, § 111(3). The Senate has declared that the *International Covenant* is not self-executing. See *supra* note 368. Although the lack of implementing legislation means that no one may claim rights directly under the term of the *International Covenant*, the President's signature and the Senate's ratification both act as a reaffirmation of the norm prohibiting prolonged arbitrary detention. One might argue that this reaffirmation explicitly establishes that this customary norm has not been ousted from domestic law.

The question whether our domestic courts are willing to enforce international

agreement of the international community as to the minimum rights that should be enjoyed by all people. These norms provide a yardstick to measure our own nation's conduct. We can—and should—reexamine our laws to determine whether our government meets the baseline standards required of all nations. Determining that all people at or within our gates, or detained abroad by our government, are persons within the Due Process Clause and affording them judicial review would harmonize our immigration practices with human rights norms.

Extending the reach of the Due Process Clause would not mean that all people who seek to come to the United States must be granted entry. The point here is only that applicants for admission should be protected by our laws while they make their case for entry and, further, that there is a limit to how our government may treat these applicants. Congress determines the substantive criteria for admission to the United States. Granting applicants the protection of the Due Process Clause would not affect the merits of their claims. It would merely permit many aliens a full opportunity to prove that they meet the standards for entry set by Congress.

Some may argue that extending these protections to aliens would be inconsistent with the grant of executive authority over immigration. Not so. We may accept the first two prongs of the plenary power doctrine, that the immigration authority rests with the federal government and that the executive implements the federal immigration power (whether that implementation is pursuant to a legislative grant or an inherent sovereign right), but these first two parts of the plenary power doctrine do not lead ineluctably to the third. Because the federal executive implements the immigration power does not mean that the exercise of that power must be free of all judicial oversight.

There are other models that mix plenary power with some measure of judicial review. For example, Congress is deemed to possess plenary power to address the special problems of Indians.<sup>374</sup> The Supreme Court has held that “the plenary power of

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law is not, however, relevant to the issue of what our laws should be. As a normative matter, the United States should aspire to comply with international agreements and customary international law.

<sup>374</sup> See, e.g., *United States v. Sioux Nation of Indians*, 448 U.S. 371, 413 (1980) (recognizing that “[p]lenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning” (quoting *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903))); *Morton v. Mancari*, 417 U.S. 535, 551-52 (1974) (“The plenary power of Congress to deal with the special problems of Indians is drawn both

Congress in matters of Indian affairs 'does not mean that all federal legislation concerning Indians is . . . immune from judicial scrutiny.'<sup>375</sup> Thus, individual Indians may file a lawsuit and allege that federal legislation denies them rights under the Due Process Clause.<sup>376</sup> Similarly, while Congress has plenary power to regulate interstate commerce, the legislation is still subject to other constitutional constraints.<sup>377</sup> When Congress legislates pursuant to its plenary power in these areas, the courts do not hold that whatever process Congress chooses to provide is due process of law.

A more troublesome criticism is that bringing all immigrants within the reach of the Due Process Clause, and affording judicial review, would diminish the executive's power over foreign affairs. Some have asserted that laws relating to aliens are inextricably linked to foreign affairs and that the courts cannot decide such questions without hindering our ability to function in the community of nations.<sup>378</sup> This assertion has some merit, but it is vastly overstated.<sup>379</sup> By definition, any restriction placed upon the executive lessens the government's ability to act. Requiring the executive to comply with international human rights norms is a restriction on the government's power. Yet, not every restriction on executive power is necessarily undesirable.

A strong argument can be made that forcing the executive to comply with human rights norms strengthens our hand in foreign affairs. In a world where international law is increasingly asserted

explicitly and implicitly from the Constitution itself.").

<sup>375</sup> Delaware Tribal Business Comm. v. Weeks, 430 U.S. 73, 83-84 (1977) (quoting Appellants' Brief at 19 n.19, No. 75-1495).

<sup>376</sup> See *id.* at 83-85 (noting that Indians may argue that their exclusion from an award of compensation violates the Due Process Clause). When such a challenge is made, courts apply a deferential standard of review: "the legislative judgment [is] not disturbed '[a]s long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians . . .'" *Id.* at 85 (quoting *Morton*, 417 U.S. at 555) (second alteration in original); see also *Hodel v. Irving*, 481 U.S. 704, 717-18 (1987) (holding that, despite Congress's broad power to regulate Indian trust lands, federal statute violates Fifth Amendment's Just Compensation Clause).

<sup>377</sup> See, e.g., *Quill Corp. v. North Dakota ex rel. Heitkamp*, 112 S. Ct. 1904 (1992). *Quill* involved a nonresident corporation's challenge to state taxation. The Supreme Court held that, although Congress has plenary power to regulate interstate commerce, it "does not . . . have the power to authorize violations of the Due Process Clause." *Id.* at 1909.

<sup>378</sup> See Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255, 261-69 (noting but not endorsing this view).

<sup>379</sup> Not all cases relating to aliens touch on foreign affairs. See *infra* notes 400-02 and accompanying text.

as the basis for intervention abroad, the disregard of our own human rights obligations puts our diplomatic efforts at risk. The United States government has been quite willing to recognize that other nations violate international law when they detain people arbitrarily.<sup>380</sup> The United States has been among the most vocal nations in protesting human rights abuses in other countries.<sup>381</sup> Moral suasion is one of the principal forces for the protection of human rights abroad. In the international community, "do as I say, not as I do" is a rather devalued currency.

Nevertheless, there may be special circumstances in which the government's immigration decisions strongly implicate foreign affairs. In those rare instances, the executive may argue for judicial deference, as described below. The problem with the current law, however, is that deference is assumed to be necessary under all circumstances. The next section of this Article discusses a more limited model for judicial deference.

### B. *An Alternative Model of Judicial Deference*

Basing judicial deference on the need for a free hand in foreign policy amounts to a claim that immigration matters are nonreviewable political questions. The political question doctrine serves as a mechanism to enforce the separation of powers. Whether it is considered a substantive rule of decision or a finding of lack of

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<sup>380</sup> This is perhaps most apparent in the restrictions that Congress has placed on our programs of foreign assistance. See, e.g., 22 U.S.C. § 2151n(a) (1988) (prohibiting foreign development assistance to any country engaging "in a consistent pattern of gross violations of internationally recognized human rights," including "prolonged detention without charges"); 22 U.S.C. §§ 2304(a)(2), (d)(1) (1988) (prohibiting security assistance to any country engaging in a "consistent pattern of gross violations of internationally recognized human rights," including "prolonged detention without charges and trial"); 22 U.S.C. § 262d(a)(1) (1988) (noting that the assistance policy of the United States government toward international financial institutions "shall advance the cause of human rights, including by seeking to channel assistance toward countries other than those whose governments engage in . . . a pattern of gross violations of internationally recognized human rights," including "prolonged detention without charges").

<sup>381</sup> Our current human rights dispute with China is one of the most recent examples. The United States has sought to hold China to the standards set forth in international instruments. Premier Li Peng has stated that "China will never accept the United States' human rights concept." Jim Mann & Rone Tempest, *U.S., China Trade Embittered Words on Human Rights*, L.A. TIMES, Mar. 13, 1994, at A1. Secretary of State Warren Christopher countered by noting that the United States was only asking "that China follow the basic standards of the Universal Declaration of Human Rights that binds most of the nations of the world today." *Id.* at A10.

jurisdiction, the political question doctrine disables the judiciary from adjudicating certain disputes that are solely committed to the other branches of government or that the judiciary lacks the capacity to resolve.<sup>382</sup> The political question doctrine provides a set of criteria to judge claims of nonjusticiability.

In domestic matters, the political question doctrine is rarely the basis for a judicial decision. The Supreme Court has invoked the doctrine in only the most limited of circumstances.<sup>383</sup> In a host of other prominent cases, the Justices have rejected the doctrine; they have resolved such seemingly intractable disputes as a President's resistance to a subpoena issued by a special prosecutor,<sup>384</sup> the refusal of the House of Representatives to seat an elected member,<sup>385</sup> and a state's malapportionment of its own legislative districts.<sup>386</sup>

The reasons for the political question doctrine themselves signal the rarity and significance of the doctrine's application. Alexander

<sup>382</sup> See *Baker v. Carr*, 369 U.S. 186, 210 (1962) ("The nonjusticiability of a political question is primarily a function of the separation of powers."); *Coleman v. Miller*, 307 U.S. 433, 454-55 (1939) (noting that the dominant considerations for nonjusticiability under the doctrine are the appropriateness of attributing finality to the decisions of the political departments and the lack of criteria for judicial determinations); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 9 (1959) ("I submit that . . . the only proper judgment that may lead to an abstention from decision is that the Constitution has committed the determination of the issue to another agency of government than the courts."). For more complete explications of the political question doctrine, see ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 183-98 (2d ed. 1962); ERWIN CHEMERINSKY, *FEDERAL JURISDICTION* 124-45 (1989); JESSE H. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* (1980); LEARNED HAND, *THE BILL OF RIGHTS* 15-30 (1958); Michael J. Gerhardt, *Rediscovering Nonjudiciability: Judicial Review of Impeachments After Nixon*, 44 DUKE L.J. 231, 237-48 (1994); Louis Henkin, *Is There a "Political Question" Doctrine?*, 85 YALE L.J. 597 (1976); Fritz W. Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 YALE L.J. 517 (1966). For more detailed discussions of judicial review in matters of foreign affairs, see THOMAS M. FRANCK, *POLITICAL QUESTIONS/JUDICIAL ANSWERS* 45-60 (1992); LOUIS HENKIN, *CONSTITUTIONALISM, DEMOCRACY, AND FOREIGN AFFAIRS* 69-91 (1990); Anne-Marie Slaughter Burley, *Are Foreign Affairs Different?*, 106 HARV. L. REV. 1980, 1981-87 (1993) (book review).

<sup>383</sup> See, e.g., *Nixon v. United States*, 113 S. Ct. 732, 735-40 (1993) (holding that the validity of the Senate's impeachment of a federal judge is nonjusticiable); *Gilligan v. Morgan*, 413 U.S. 1, 5-12 (1973) (noting that the Constitution expressly leaves the power to regulate state militia to Congress and state governments); *Luther v. Borden*, 48 U.S. (7 How.) 1, 42 (1849) (holding that federal courts cannot determine whether a state has violated the Republican Form of Government Clause, U.S. CONST. art. IV, § 4).

<sup>384</sup> See *United States v. Nixon*, 418 U.S. 683, 692-97 (1974).

<sup>385</sup> See *Powell v. McCormack*, 395 U.S. 486, 518-49 (1969).

<sup>386</sup> See *Baker*, 369 U.S. at 208-11.



Bickel has eloquently described the political question doctrine as the [Supreme] Court's sense of lack of capacity, compounded in unequal parts of (a) the strangeness of the issue and its intractability to principled resolution; (b) the sheer momentousness of it, which tends to unbalance judicial judgment; (c) the anxiety, not so much that the judicial judgment will be ignored, as that perhaps it should but will not be; (d) finally . . . the inner vulnerability, the self-doubt of an institution which is electorally irresponsible and has no earth to draw strength from.<sup>387</sup>

When a political question claim is made, the Supreme Court generally engages in a two-part inquiry. First, it will determine whether the text of the Constitution commits the issue solely to another branch of government.<sup>388</sup> Next, it will consider, essentially for the reasons described by Bickel, whether the individual case is one that the judiciary lacks the capacity to resolve.<sup>389</sup> The mere allegation of a political question, or the fact that the litigants are governmental entities, does not control.<sup>390</sup>

The same two-part test is applied when the political question doctrine is raised in matters of foreign affairs that do not relate to aliens. In *Baker v. Carr*, the Supreme Court declared that "[not] every case or controversy which touches foreign relations lies beyond judicial cognizance."<sup>391</sup> The Court stated that its own

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<sup>387</sup> BICKEL, *supra* note 382, at 184.

<sup>388</sup> See *Baker*, 369 U.S. at 217 (explaining that the Court will look for "a textually demonstrable constitutional commitment of the issue to a coordinate political department"); see also *Nixon v. United States*, 113 S. Ct. 732, 735 (1993) (following *Baker*); *Powell*, 395 U.S. at 518-22 (same).

<sup>389</sup> See, e.g., *Nixon*, 113 S. Ct. at 738-40 (holding that the issue presents a political question because the Impeachment Trial Clause commits authority solely to the Senate and because "the lack of finality and the difficulty of fashioning relief counsel against justiciability"); *United States v. Nixon*, 418 U.S. 683, 696-97 (1974) (finding no political question because the production of evidence in a federal criminal case is justiciable by a federal court); *Powell*, 395 U.S. at 518-22, 548-49 (holding that no political question exists because the text of the Constitution shows no commitment of the issue to the House of Representatives and because the Court is fully capable of interpreting the Constitution and adjudicating the dispute); *Baker*, 369 U.S. at 226 (determining that there is no political question because the apportionment decision neither implicates a decision by a coequal branch of government nor requires a court to make a standardless policy determination).

<sup>390</sup> See *Nixon*, 418 U.S. at 693 ("The mere assertion of a claim of an 'intra-branch dispute,' without more, has never operated to defeat federal jurisdiction; justiciability does not depend on such a surface inquiry."); *United States v. Interstate Commerce Comm'n*, 337 U.S. 426, 430 (1949) ("While this case is *United States v. United States, et al.*, it involves controversies of a type which are traditionally justiciable.");

<sup>391</sup> 369 U.S. at 211.

political question decisions involving foreign affairs "show a discriminating analysis of the particular question posed, in terms of . . . its susceptibility to judicial handling in the light of its nature and posture in the specific case, and of the possible consequences of judicial action."<sup>392</sup>

The contrast with the judicial deference prong of the plenary power doctrine could not be more marked. When aliens are the subject of litigation, the courts do not ask whether the resolution of the issue truly requires expertise in matters of foreign affairs or whether judicial participation would somehow diminish the ability of the United States to speak with one voice in foreign affairs. The Supreme Court has stated that its own plenary power immigration decisions show

no indication . . . that the scope of judicial review is a function of the nature of the policy choice at issue. To the contrary, "since decisions in these matters may implicate our relations with foreign powers, . . . such decisions are frequently of a character more appropriate to either the Legislature or the Executive than to the Judiciary . . . ."<sup>393</sup>

In immigration matters, then, the courts give talismanic significance to the plenary power doctrine's principle of judicial deference.

The courts ought not to afford the executive such blanket deference. The political question doctrine offers an alternative model to determine whether cases involving aliens are susceptible to judicial handling. Applying this alternative model, the political question test, would allow only a small category of cases relating to aliens to qualify for judicial deference.

First, it is difficult to argue that the text of the Constitution demonstrably commits all questions relating to aliens solely to another branch of government. The Naturalization Clause<sup>394</sup> gives Congress the power to establish rules concerning naturalization. No provision of the Constitution, however, expressly addresses immigration or commits immigration authority to the sole discretion of any one branch of the federal government. Some recent decisions have cited the Naturalization and Foreign Commerce Clauses as additional sources of the federal government's immigration authority.<sup>395</sup> But these references do not demonstrate a clear

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<sup>392</sup> *Id.* at 211-12.

<sup>393</sup> *Fiallo v. Bell*, 430 U.S. 787, 796 (1977) (quoting *Mathews v. Diaz*, 426 U.S. 67, 81 (1976)).

<sup>394</sup> U.S. CONST. art. I, § 8, cl. 4.

<sup>395</sup> See, e.g., *Plyler v. Doe*, 457 U.S. 202, 225 (1982); *Toll v. Moreno*, 458 U.S. 1, 10

textual commitment to a coordinate branch of government. Nor does a finding of inherent sovereign power necessarily mean that the exercise of the immigration authority can never be challenged by a court constituted under Article III, especially when a litigant asserts that the immigration authority has been exercised in derogation of certain enumerated rights. *Knauff, Mezei*, and other plenary power decisions rely upon one or both of the following lines of precedent for inherent authority over immigration: *Chae Chan Ping v. United States*,<sup>396</sup> which inferred the federal immigration power from the other grants of congressional authority in the Constitution, and *United States v. Curtiss-Wright Export Corp.*,<sup>397</sup> which found that such inherent authority passed to the new collective government when the United States declared its own independence.<sup>398</sup> That the power to exclude is *similar* to express grants of power in the Constitution, as determined in *Chae Chan Ping*, does not lead to the conclusion that the exclusionary power has *greater* force than other express provisions such as the Due Process Clause. Furthermore, the Court in *Curtiss-Wright* explicitly acknowledged that inherent sovereign powers are subordinate to the requirements set out in the text of the Constitution.<sup>399</sup>

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(1982). In describing the federal power over immigration, these cases cite the Naturalization and Foreign Commerce Clauses in addition to the doctrine of inherent sovereign authority. *Plyler* and *Toll* do not analyze the Naturalization and Foreign Commerce Clauses or the earlier decisions interpreting these provisions.

<sup>396</sup> 130 U.S. 581, 604 (1889); see also *supra* part I.B.

<sup>397</sup> 299 U.S. 304, 316-17 (1936); see also *supra* notes 68-71 and accompanying text.

<sup>398</sup> See, e.g., *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542-44 (1950) (relying on both lines of cases); *Harisiades v. Shaughnessy*, 342 U.S. 580, 587-89 (1952) (same); *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 210-15 (1953) (relying on the *Knauff*, *Harisiades*, and *Chae Chan Ping* line of cases); *Kleindienst v. Mandel*, 408 U.S. 753, 765-70 (1972) (relying primarily on the *Chae Chan Ping* line of cases); *Fiallo v. Bell*, 430 U.S. 787, 792-96 (1977) (following *Kleindienst*).

<sup>399</sup> See *Curtiss-Wright*, 299 U.S. at 320. Justice Sutherland wrote that the President is endowed with the "very delicate, plenary and exclusive power . . . as the sole organ of the federal government" in international affairs. *Id.* Nevertheless, Sutherland described that authority as one "which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution." *Id.* The Court in *Perez v. Brownell*, 356 U.S. 44 (1958), stated:

Broad as the power in the National Government to regulate foreign affairs must necessarily be, it is not without limitation. The restrictions confining Congress in the exercise of any of the powers expressly delegated to it in the Constitution apply with equal vigor when that body seeks to regulate our relations with other nations.

*Id.* at 58; see also HENKIN, *supra* note 382, at 252-56 (noting that the exercise of the foreign affairs power is not exempt from limitations that favor individual rights).

Second, not all disputes relating to aliens have the same potential consequences for our foreign relations. Cases involving aliens are not all of the same stripe. The plenary power doctrine has been invoked to curtail judicial review, for example, of questions concerning the eligibility of aliens for Medicare,<sup>400</sup> an immigration preference given to legitimate but not illegitimate children,<sup>401</sup> and the alleged deprivation of citizens' First Amendment rights due to the denial of a visa to an invited foreign speaker.<sup>402</sup> It is difficult to conclude that judicial review of the questions raised in these cases would impede our role in the community of nations or that the courts somehow lack the basic tools necessary to afford reasoned justice. Stephen Legomsky argues that when the government seeks judicial deference, the court should conduct a "realistic appraisal" of the effect of judicial review upon our foreign policy.<sup>403</sup> Whether one engages in a "realistic appraisal" or the "discriminating analysis" required by *Baker v. Carr*,<sup>404</sup> these issues should be subject to judicial review.

That these cases should receive judicial review is made more clear by examining the sorts of disputes touching on foreign affairs that the courts will resolve. The judiciary has reached the merits of claims concerning the executive's refusal to impose trade sanctions for violations of an international convention,<sup>405</sup> the Civil Aeronautics Board's interpretation of the Warsaw Convention,<sup>406</sup> and the validity of an executive agreement that ended the hostage crisis in Iran.<sup>407</sup> Only four Justices, not a majority, would find non-justiciable a challenge brought by several members of Congress to the President's termination of a treaty.<sup>408</sup> Furthermore, the First

<sup>400</sup> See *Mathews v. Diaz*, 426 U.S. 67, 79-84 (1976).

<sup>401</sup> See *Fiallo*, 430 U.S. at 791.

<sup>402</sup> See *Kleindienst*, 408 U.S. at 765-70.

<sup>403</sup> See Legomsky, *supra* note 378, at 263 (arguing that judicial deference should be afforded only in "the special case in which the court concludes, after a realistic appraisal, that applying the normal standards of review would interfere with the conduct of foreign policy").

<sup>404</sup> 369 U.S. 186, 211 (1962).

<sup>405</sup> See *Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221, 229-30 (1986) (expressly rejecting the argument that the issue was nonjusticiable).

<sup>406</sup> See *Trans World Airlines v. Franklin Mint Corp.*, 466 U.S. 243, 254 n.25 (1984) (finding no political question).

<sup>407</sup> See *Dames & Moore v. Regan*, 453 U.S. 654, 669-74 (1981) (omitting discussion of any claim that the issue presented a political question because the President's powers were derived from an act of Congress).

<sup>408</sup> See *Goldwater v. Carter*, 444 U.S. 996, 1002-03 (1979) (Rehnquist, J., concurring).

Congress gave aliens the power to sue in federal court for torts committed "in violation of the law of nations or a treaty of the United States."<sup>409</sup> Under this statute, and under a more recent law, the federal courts have adjudicated charges of torture against former leaders of other countries.<sup>410</sup> These suits may have a substantial impact on foreign relations. Nevertheless, the courts continue to adjudicate these matters.

Most exclusion and detention issues would be justiciable if courts were to examine claims of judicial deference critically. Deportable aliens, who are considered to be inside our territory, are protected by the Due Process Clause.<sup>411</sup> There is no foreign policy reason to afford full review of claims raised in deportation cases, but not in exclusion cases. Both instances present courts with similar, if not identical, legal and practical difficulties. The grounds for deportation overlap many of the grounds for exclusion, and the issues in both categories of proceedings are much the same.<sup>412</sup> Further, most courts should be able to review claims that detention has become so prolonged as to amount to punishment. Courts adjudicating those claims would be asked to decide whether there

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<sup>409</sup> Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 77 (codified as amended at 28 U.S.C. § 1350 (1988)).

<sup>410</sup> See, e.g., *Filartiga v. Pena-Irala*, 630 F.2d 876, 878 (2d Cir. 1980) (permitting a citizen of Paraguay to sue a former Inspector General of Police for the alleged torture and death of a family member); *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1538-40 (N.D. Cal. 1987) (permitting Argentine citizens to sue a former general for alleged torture, murder, and prolonged arbitrary detention); see also Torture Victim Protection Act of 1991, Pub. L. No. 102-256, § 2, 106 Stat. 73, 73 (1992) (establishing a cause of action against any individual who, while acting under authority or color of law of a foreign nation, subjects anyone to torture).

<sup>411</sup> Compare *Reno v. Flores*, 113 S. Ct. 1439, 1449 (1993) (stating that the Fifth Amendment entitles aliens to due process in deportation proceedings) with *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 214 (1953) (holding that the Fifth Amendment does not apply to the exclusion of aliens).

<sup>412</sup> Compare 8 U.S.C. § 1182(a)(1)-(9) (Supp. V 1993) (grounds for exclusion) with 8 U.S.C. § 1251(a)(1)-(5) (Supp. V 1993) (grounds for deportation). Furthermore, 8 U.S.C. § 1251(a)(1)(A), a catch-all provision, states that an alien may be deported if that person was excludable at the time of his or her entry into the country.

The issues in immigration cases that have perhaps the greatest potential impact on foreign relations concern applications for political asylum. Asylum applicants may seek permission to remain in the United States because of persecution based upon "political opinion." 8 U.S.C. § 1101(a)(42) (1988 & Supp. V 1993) (defining the term "refugee"); 8 U.S.C. § 1158(a) (1988 & Supp. V 1993) (allowing "refugees" within the meaning of § 1101 to apply for asylum). The grant of an asylum application may signal the United States' disapproval of the government in the alien's home country. Aliens may apply for asylum in either deportation or exclusion proceedings. See 8 U.S.C. § 1158(a); 8 C.F.R. § 208.4(c)(1) (1993).

is a rational, nonpunitive purpose for the detention, and whether the detention has become excessive in relation to that purpose.<sup>413</sup> Foreign policy concerns should not prevent the courts from addressing these issues in the overwhelming majority of cases. Once again, the full stories of Ellen Knauff and Ignatz Mezei provide telling illustrations.

The government sought to exclude Knauff based upon legal grounds that also serve as a basis for deportation under current laws.<sup>414</sup> The disclosure of the government's evidence against Knauff did not work any great evil to our nation's foreign relations. Nor were the legal issues so complex that, had they been reviewed by an Article III court, the court would have been disabled from deciding the questions presented.

Similarly, the government considered Ignatz Mezei to be excludable on several grounds.<sup>415</sup> Two of the allegations, that Mezei had been convicted of a crime of moral turpitude and that he had made a false statement to consular officers, were unremarkable. They are similar to grounds for deportation, litigated every day for deportable aliens.<sup>416</sup> The allegation that Mezei was a member of the Communist Party potentially touched on foreign affairs but was, in the end, determined by Mezei's activities in New York and by his affiliation with the IWO. In the deportation proceedings brought against Andrew Dmytryshyn and in the New York state insurance case, the INS had already helped litigate the question of whether the IWO was dominated by the Communist Party.<sup>417</sup> Requiring the executive to litigate this same issue for Ignatz Mezei would have neither diminished the federal government's authority in foreign affairs nor presented a question beyond the competence of a court to resolve. Nor would it have been difficult for a court to adjudicate whether Mezei's detention was so excessive as to amount to

<sup>413</sup> See *supra* notes 312-17 and accompanying text.

<sup>414</sup> The government sought to exclude Knauff on the theory that she might engage in espionage in the United States. See *supra* note 142. Under current laws, that is a ground for both exclusion, see 8 U.S.C. § 1182(a)(3)(A), and deportation, see 8 U.S.C. § 1251(a)(4)(A).

<sup>415</sup> See *supra* note 225 and accompanying text.

<sup>416</sup> See 8 U.S.C. § 1251(a)(2)(A)(i) (stating that an alien may be deported for conviction of a crime involving moral turpitude committed within five years of entry, if sentence of over one year is imposed); 8 U.S.C. § 1251(a)(1)(A) (stating that an alien may be deported if excludable at time of entry); 8 U.S.C. § 1182 (a)(6)(C) (stating that an alien may be excluded if he seeks to obtain entry by fraud or misrepresentation).

<sup>417</sup> See *supra* notes 216-18 and accompanying text.

punishment. Indeed, the Board of Special Inquiry found that Mezei played only a minor role with the Communist Party, and the Board recommended to the Attorney General that he be released on parole.<sup>418</sup>

There may be rare circumstances in which the government can demonstrate a strong link between an exclusion or detention decision and the power to conduct foreign affairs. In such a case, a court might defer to the executive under the political question doctrine. A possible candidate for deference might be, for example, the President's decision in August 1994 to detain Cuban immigrants in order to discourage their migration to the United States. A lawsuit challenging their detention *might* be deemed to present a nonjusticiable political question *provided* that the executive can demonstrate that the detention is integral to our foreign policy.<sup>419</sup> The political question assertion should not prevail any longer than necessary; once the consequences of judicial action no longer significantly affect foreign policy, the issues should be considered susceptible of judicial handling.

Under this test, not all claims that detention is linked to foreign policy would succeed. Many Mariel Cubans, for example, are still held in prison facilities fourteen years after their arrival in the United States.<sup>420</sup> It would be difficult for the government to persuade courts that the executive's decisions to detain them are nonjusticiable political questions. The INS has released the overwhelming majority of Mariel Cubans and has established regulations to govern the parole of those who are still in custody.<sup>421</sup> Judicial review of these parole decisions would in no way interfere with foreign affairs.

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<sup>418</sup> See *supra* notes 263-65 and accompanying text.

<sup>419</sup> It is not clear that the executive can make such a showing. On September 9, 1994, the United States and Cuba issued a Joint Communiqué. The Communiqué refers to recent decisions by the United States that were taken "to discourage unsafe voyages." Joint Communiqué, Sept. 9, 1994, U.S.-Cuba, at 1. If our detention policy is aimed merely at discouraging unsafe voyages, rather than at altering the relationship between the United States and the Republic of Cuba, the issue of detention may not be integral to foreign affairs.

<sup>420</sup> See *supra* notes 333-37 and accompanying text.

<sup>421</sup> See *infra* note 464.

## V. A NEW CONSTITUTIONAL LAW OF EXCLUSION AND DETENTION

The preceding section argued for the revision of the entry fiction and the plenary power doctrine. This part of the Article examines the impact these revisions would have, applying contemporary standards for determining what process is due under the Constitution.<sup>422</sup> If all people at or within our borders are "persons" within the meaning of the Due Process Clause, and if we no longer defer to the executive in all immigration matters, courts will have to reexamine the constitutional requirements in exclusion and detention cases.

Under current law, the first step in any procedural due process analysis is assessing whether there is a constitutionally protected interest. Only if there is such an interest does one proceed to the next step, determining what process is due before a person may be deprived of that interest.<sup>423</sup> Courts determine the process that is due under the familiar calculus of *Mathews v. Eldridge*.<sup>424</sup> Factors to consider include the nature of the individual's interest, the risk of an erroneous decision through current procedures, the cost and

<sup>422</sup> The use of contemporary due process standards in this Article, particularly the balancing test set out in *Mathews v. Eldridge*, 424 U.S. 319 (1976), is not meant as an endorsement of those standards. There are many reasons to criticize the Supreme Court's current procedural due process methodology. See, e.g., Richard H. Fallon, Jr., *Some Confusions About Due Process, Judicial Review, and Constitutional Remedies*, 93 COLUM. L. REV. 309, 330-31 (1993) (describing limits to the application of the *Mathews* test); Jerry L. Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in Mathews v. Eldridge: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28, 46-57 (1976) (criticizing *Mathews*'s utilitarian approach for omitting certain important values); Gerald L. Neuman, *The Constitutional Requirement of "Some Evidence,"* 25 SAN DIEGO L. REV. 633, 698 (1988) (noting that *Mathews* does not provide a framework for all procedural due process questions); Richard B. Saphire, *Specifying Due Process Values: Toward a More Responsive Approach to Procedural Protection*, 127 U. PA. L. REV. 111, 154-56 (1978) (criticizing the *Mathews* approach for undervaluing individual dignity). Nevertheless, this part of the Article assesses the impact of the previous section's normative arguments; it therefore applies *Mathews* and other recent due process decisions. Unless one also revises the Supreme Court's current due process methodology (a project that is beyond the scope of this Article), this is the analysis that courts must employ.

<sup>423</sup> See generally *Hewitt v. Helms*, 459 U.S. 460, 471-72 (1983) (finding that the language in the statute gave rise to a protected liberty interest, and then determining what process was due); *Vitek v. Jones*, 445 U.S. 480, 487-97 (1980) (finding a liberty interest, protected by the Due Process Clause, where a prisoner was involuntarily transferred to a mental hospital, and then assessing the process due).

<sup>424</sup> 424 U.S. 319 (1976). For an example of the application of the *Mathews v. Eldridge* test in an immigration case, see *Rafeedie v. INS*, 795 F. Supp. 13, 18-20 (D.D.C. 1992) (assessing whether sufficient process was afforded to returning resident alien).



potential value of additional safeguards, and the government's interest in maintaining current practices.<sup>425</sup>

### A. *Exclusion*

#### 1. The Interests at Stake

Not all aliens have the same stake in gaining admission to the United States. Some people arrive at our gates as tourists, some come seeking asylum due to persecution in their homeland, some intend to join family members who are citizens or permanent residents, and others may themselves be returning permanent residents. Their interests vary along a continuum. If the entry fiction no longer prevents the Due Process Clause from reaching to the border, whether these aliens have a constitutionally protected interest will depend primarily upon the nature of their contacts with the United States, rather than upon territorial standing.<sup>426</sup> Courts considering their constitutional claims will likely apply the analysis of *Landon v. Plasencia*,<sup>427</sup> in which the Court overlooked the territorial fiction and determined that permanent residents cannot be excluded without a full hearing because of their significant contacts with our country.<sup>428</sup>

In addition to the contacts-based analysis, a number of aliens might also have a claim to a constitutionally protected interest in admission based upon the language of federal statutes. Statutes with mandatory language may create rights protected by the Constitution.<sup>429</sup> Some federal statutes presently provide, for

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<sup>425</sup> See *Mathews*, 424 U.S. at 335.

<sup>426</sup> David Martin has proposed a test based upon degrees of affiliation with our national community; he would consider aliens in several broad categories, such as permanent residents and first-time applicants for admission. See Martin, *supra* note 15, at 190-234. His categories have been criticized as overbroad. They do not, for example, acknowledge the varying interests that even first-time applicants may possess. See T. Alexander Aleinikoff, *Aliens, Due Process and "Community Ties": A Response to Martin*, 44 U. PITT. L. REV. 237, 243-46 (1983) (arguing for the use of "community ties," rather than the more rigid degrees of affiliation with the community, in determining the level of due process owed the individual). Martin's broad categories are useful starting points, but the only analysis fully consistent with that given by *Landon v. Plasencia*, 459 U.S. 21, 32-37 (1982), is one that examines each individual alien's ties to the United States.

<sup>427</sup> 459 U.S. 21 (1982).

<sup>428</sup> See *id.* at 32-37; *supra* notes 285-91 and accompanying text.

<sup>429</sup> See, e.g., *Board of Pardons v. Allen*, 482 U.S. 369, 373-81 (1987) (holding that a state statute containing mandatory ("shall") language creates a liberty interest in parole, protected by the Due Process Clause, even though parole officials retain some

example, that certain classes of aliens "shall" be granted a preference in receiving an immigrant visa.<sup>430</sup> Aliens who arrive at the border with an immigrant visa are admitted, unless they fall within certain established disqualifying criteria.<sup>431</sup> This statutory scheme may create a constitutionally protected interest. Similarly, aliens are eligible for asylum if they meet specified statutory criteria.<sup>432</sup> These established criteria may also permit a court to find a protected interest. Furthermore, some of these aliens will also have family ties to the United States that may lead courts to that same conclusion.<sup>433</sup> Several other classes of aliens will be unlikely to prevail with a claim to a constitutionally protected interest in admission. Most tourists, for example, would be unable to assert a constitutional claim because they have no substantial ties to the country and cannot obtain admission under the mandatory language of any statute or regulation.<sup>434</sup>

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discretion in determining who meets release criteria); *Greenholtz v. Inmates of the Neb. Penal and Correctional Complex*, 442 U.S. 1, 11-12 (1979) (same).

<sup>430</sup> See, e.g., 8 U.S.C. § 1154(b) (1988) (stating that the Attorney General "shall" approve a petition for preference status or immediate relative status if the facts in the petition are true and the alien meets the statutory criteria).

<sup>431</sup> See 8 U.S.C. § 1182(a) (Supp. V 1993) (describing some of the grounds that "shall" call for exclusion).

<sup>432</sup> An alien is eligible for asylum if the Attorney General determines that he or she is a "refugee." 8 U.S.C. § 1158(a) (1988 & Supp. V 1993); see also *INS v. Cardoza-Fonseca*, 480 U.S. 421, 427-28 (1987) (citing § 1158(a)). A "refugee" is a person "who is persecuted or who has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1101(a)(42) (1988 & Supp. V 1993). While § 1158(a) gives the Attorney General discretion to grant asylum to a refugee, the criteria for such a grant are well defined in the statute. In addition, the asylum law implements the United States's international obligations to grant safe harbor to refugees. See *INS v. Stevic*, 467 U.S. 407, 416-30 (1984) (describing relationship between our domestic asylum statutes and the United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223 (acceded to by the United States in 1968)).

A remedy similar to political asylum is "withholding" of deportation or exclusion. A statute directs that the Attorney General "shall not deport or return" an alien whose life or freedom would be threatened because of race, religion, or political opinion, unless the alien meets certain narrow statutory criteria. 8 U.S.C. § 1253(h) (1988).

<sup>433</sup> Alexander Aleinikoff has noted the established "ties" that these people may have with the United States. He has pointed out the illogic of granting the protection of the Due Process Clause to an alien who has entered the United States clandestinely but, at the same time, denying such protection to a person who arrives at the border with an immigrant visa in hand. See Aleinikoff, *supra* note 15, at 867. Aleinikoff argues that aliens with immigration visas have a greater interest in admission than most other first-time entrants and may well have an interest protected by the Constitution. See Aleinikoff, *supra* note 426, at 246-47.

<sup>434</sup> A tourist is considered a "nonimmigrant." 8 U.S.C. § 1101(a)(15)(B) (1988).

These categories are not exhaustive. Whenever aliens arrive at our border and claim an interest in admission, courts will be required to examine their assertions individually. But at least the cases will be determined by the immigrants' legitimate interests, rather than by the less accurate proxy of territorial standing. And those with strong ties to the United States will be afforded a fair opportunity to seek admission.

## 2. The Process Due

For those aliens with constitutionally protected interests, the next question is the process due. There are so many different postures in which aliens present themselves that it is difficult to sketch out, in the abstract, a comprehensive procedural code. The stories of Ellen Knauff and Ignatz Mezei reaffirm that the core of the Due Process Clause is the right to be heard in a meaningful manner. At a minimum, then, all aliens with a protected interest in admission ought to receive a full exclusion hearing before a neutral decision-maker, who is required to find the facts according to some articulable standard of proof. Further, they ought to learn the full extent of any evidence that might support an order of exclusion, so that their right to be heard will be meaningful.<sup>435</sup>

Although *Knauff* and *Mezei* presently permit exclusion without a hearing, Congress has provided for exclusion hearings in *most* instances. Exclusion hearings are held before immigration judges, who may "present and receive evidence, and interrogate, examine, and cross-examine the alien or witnesses."<sup>436</sup> However, the statutes still permit exclusion without a hearing under the same circumstances present in *Knauff* and *Mezei*. An immigration officer or judge may order the temporary exclusion of aliens who appear to pose security or foreign policy risks.<sup>437</sup> The Attorney General

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The Attorney General has discretion to admit nonimmigrants "for such time and under such conditions" as may be prescribed by regulation. 8 U.S.C. § 1184(a) (1988).

<sup>435</sup> David Martin proposes that even first-time applicants for admission (who generally have a lesser interest in admission than permanent residents) should receive "an unbiased decision-maker, notice of the proceedings and of the general grounds asserted by the government for denial of admission; a meaningful opportunity to dispute or overcome those grounds, orally or in writing; and a statement of reasons, even if oral and summary, for any adverse decision." Martin, *supra* note 15, at 218.

<sup>436</sup> 8 U.S.C. § 1226(a) (1988). Section 1226(a) provides that "special inquiry officers" conduct exclusion proceedings. These officers are immigration judges. See 8 C.F.R. §§ 1.1(l), 3.10, 236.1 (1993).

<sup>437</sup> See 8 U.S.C. §§ 1182(a)(3)(A)-(C), 1225(c) (1988 & Supp. V 1993). Section

may permanently exclude those aliens, based upon confidential information.<sup>438</sup> While the aliens and their counsel may submit written materials to the Attorney General, the Attorney General need not afford a hearing of any kind.<sup>439</sup> For those aliens who do receive exclusion hearings, INS regulations fill out the full contours of the process. Excludable aliens may be represented by counsel, though they are not entitled to appointment of counsel.<sup>440</sup> The regulations do not provide for prehearing discovery.<sup>441</sup>

Several problems remain with this framework. The general hearing requirement, which includes confrontation and cross-examination, is as it ought to be. But the Attorney General should not be permitted to exclude *any* alien without a hearing. The statute does not impose a meaningful check on the Attorney General's decisions to exclude without a hearing.<sup>442</sup> There is no way to determine, for example, just what sorts of security threats the Attorney General considers serious enough to warrant bypassing the usual hearing process. Because there is no hearing, the govern-

1182(a)(3) lists the substantive grounds for exclusion that may be accomplished without a hearing. Sections 1182(a)(3)(A)(i) and (iii) permit exclusion when there is a reasonable belief that an alien will engage in any activity relating to espionage or sabotage or the opposition or overthrow of the government by violent or unlawful means. Section 1182(a)(3)(B) provides for exclusion when there is reasonable belief that an alien has engaged or will engage in terrorist activity. And § 1182(a)(3)(C) permits exclusion when admission would lead to potentially serious adverse foreign policy consequences.

<sup>438</sup> See 8 U.S.C. § 1225(c) (1988 & Supp. V 1993); see also 8 C.F.R. § 103.2(b)(16) (iii)-(iv) (1994) (providing for use of classified, undisclosed information in decision-making process).

<sup>439</sup> See *id.*

<sup>440</sup> See 8 C.F.R. §§ 3.15(b)(5), 236.2(a) (1993).

<sup>441</sup> The regulation governing exclusion proceedings, 8 C.F.R. § 236.2, sets out aliens' basic rights at exclusion hearings. Those rights do not include an entitlement to discover, prior to the hearing, the evidence supporting the government's charge, but the regulations do allow the alien to "examine and object to evidence against him" during the proceeding. 8 C.F.R. § 236.2(a) (1993).

<sup>442</sup> The only procedural requirements in § 1225(c) are that the aliens and their representatives may submit materials for review by the Attorney General, and the Attorney General must consult "the appropriate security agencies of the Government." 8 U.S.C. § 1225(a) (1988 & Supp. IV 1993). There is only one check contained in the related substantive grounds for exclusion. Aliens may be excluded if admission would have "potentially serious adverse foreign policy consequences." 8 U.S.C. § 1182(a)(3)(C) (Supp. IV 1993). These aliens may be excluded based upon past associations or beliefs, even those that would be lawful within the United States, if the Secretary of State personally determines that admission "would compromise a compelling United States foreign policy interest." § 1182(a)(3)(C)(iii). If the Secretary of State makes such a determination, the Secretary must notify the House and the Senate. See § 1182(a)(3)(C)(iv).

ment's witnesses are not tested by cross-examination. In addition, it is difficult for aliens to present meaningful defense information to the Attorney General when they do not know the full nature of the government's evidence.<sup>443</sup> Under this statutory framework, the Attorney General would exclude the next Ellen Knauff without a hearing.

Even if one might concede to the government the power to exclude without a hearing in truly exceptional circumstances, the statute is problematic. The law does not give the Attorney General any incentive to schedule hearings for aliens who may be excludable on security grounds. The government does not benefit from affording them hearings. As far as the Attorney General is concerned, why reveal information and witnesses and risk losing the case when the exclusion may be accomplished without any adversarial process whatsoever? The government has an important interest in screening out serious potential threats to our national security, but that interest ought not lead to the denial of process altogether. Ellen Knauff's Board hearing did not compromise national security, despite a charge of espionage. Further, contrary to the claims that the government made in defending Ignatz Mezei's

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<sup>443</sup> At least one court has held that this summary exclusion procedure violates due process when an alien has a protected liberty interest. In *Rafeedie v. INS*, 880 F.2d 506 (D.C. Cir. 1989), the court found that a returning resident alien had an interest in admission protected by the Due Process Clause even though the government alleged that he went abroad for a "nefarious" reason. *Id.* 519-24. The court of appeals remanded for the lower court to decide whether he received the process due under the *Mathews* test. *See id.* at 524-25. On remand, the district court found that the INS's summary exclusion procedures violated due process because Rafeedie was only given an opportunity to present a written statement and his readmission decision was based on confidential information. *See Rafeedie v. INS*, 795 F. Supp. 13, 18-20 (D.D.C. 1992).

In an analogous case, a federal district court recently struck down the INS's attempt to deny legalization petitions based on confidential information. The plaintiffs in that case were United States residents who applied for legalization under the Immigration Reform and Control Act of 1986, 8 U.S.C. § 1255a. *See Memorandum Opinion and Order, American-Arab Anti-Discrimination Comm. v. Reno*, CV 87-2107 SVW (Kx) (C.D. Cal. Jan. 24, 1995), at 1 [hereinafter *Order, American-Arab Anti-Discrimination Comm.*]. The INS sought to deny their applications, based on classified and undisclosed information that the applicants were members of the Popular Front for the Liberation of Palestine. *See id.* at 2-4. The court found that they had a protected liberty interest in the legalization process, rejecting the government's argument that applicants for legalization have no greater rights than excludable aliens. *See id.* at 9-15. Applying the *Mathews* analysis, the judge concluded that the INS's use of undisclosed confidential information violated due process. *See id.* at 15-27. The court stated that the INS's use of this information placed a "nearly impossible burden" upon the applicants. *Id.* at 21.

habeas corpus case, granting a hearing did not compromise any confidential sources. The most sensitive evidence that surfaced at the hearing concerned the Communist Party and the IWO in the 1930s, and the main witnesses at Mezei's hearing were ex-Communists who had already assisted the government in other cases. The lesson from these cases is that the government may tend to choose the easiest route, exclusion without a hearing, even when following the regular process would not raise legitimate security concerns.<sup>444</sup>

We ought to do better. It is possible to protect the government's interests and still provide a safeguard to avoid abuse of discretion by the executive. Protective orders could be fashioned which would allow the government to go forward with its case without compromising classified information. Some sensitive portions of documents might be redacted. Congress also might consider enacting a statute (or the INS might promulgate a regulation) similar to the Classified Information Procedures Act,<sup>445</sup> which protects sensitive information from disclosure in criminal cases and, at the same time, safeguards defendants' trial rights.<sup>446</sup>

Alternatively, immigration judges could review sensitive information in camera. This would permit at least some review of the Attorney General's power, and the court might be able to strike an appropriate balance between the government's security concerns and the excludable aliens' right to a hearing. The unfortunate aspect of such a process, however, is that it would tend to legitimize executive actions in circumstances in which the reviewing judges may not be able to make fully informed decisions. In an early draft of his dissent in *Mezei*, Justice Jackson decried in camera proceedings for just that reason. Jackson wrote:

[The government] should not obtain judicial blessing conferred in further secret proceedings. . . . I think, as I did in *Korematsu* [*v. United States*]<sup>447</sup>, that there is more harm from the judiciary

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<sup>444</sup> In *American-Arab Anti-Discrimination Committee*, the district court reviewed the INS's evidence in camera. The judge ruled that at least some of the confidential information could be disclosed to the legalization applicants without compromising national security. See Order, *American-Arab Anti-Discrimination Comm.*, at 24. The district court found a due process violation in part because of the INS's refusal to disclose any of its evidence linking the applicants to the Popular Front. See *id.*

<sup>445</sup> Pub. L. No. 96-456, 94 Stat. 2025 (1980) (codified at 18 U.S.C. IV app. §§ 1-16 (1988)).

<sup>446</sup> See 94 Stat. at 2026-28 (providing procedural safeguards for defendants).

<sup>447</sup> 323 U.S. 214 (1944).

becoming partners in a plan of dubious legality than in letting it rest on the political accountability of the administration.<sup>448</sup>

Jackson eventually removed this language, so that Justice Frankfurter would join the dissent.<sup>449</sup> Despite Jackson's misgivings, an in camera proceeding would provide at least a modicum of protection against governmental overreaching. And aliens who face exclusion without a hearing would probably prefer at least this much court review, rather than stand on principle and receive no hearing at all.

These are not perfect solutions, but at least they strike a balance

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<sup>448</sup> Draft Dissent (Feb. 17, 1953), *Shaughnessy v. United States ex rel. Mezei* 10 n.8 (RHJP). Justice Jackson believed that courts should not proceed in camera where the executive has far greater knowledge of the facts and the courts' scrutiny is likely not to be particularly rigorous. In his dissent in *Korematsu*, Jackson commented on the difficulty in reviewing military decisions. He noted that without any real evidence before it, the Court "ha[d] no choice but to accept General DeWitt's own unsworn, self-serving statement, untested by any cross-examination, that what he did was reasonable." *Korematsu*, 323 U.S. at 245 (Jackson, J., dissenting). Further, by "the very nature of things, military decisions are not susceptible of intelligent judicial appraisal." *Id.*

Anne-Marie Slaughter Burley points out that it may be better for courts not to play this sort of "legitimizing function." Burley, *supra* note 382, at 1992 (citing BICKEL, *supra* note 382, at 30-33). In the rare case in which an immigration issue would involve a court in foreign affairs matters beyond the court's competence, perhaps the court should determine that the case presents a nonjusticiable political question. This might be a "second-best solution" that would, at least, not legitimize executive acts. *See id.* at 1993.

<sup>449</sup> Frankfurter, who had disagreed with Jackson's position in *Korematsu*, wanted to join Jackson's dissent in *Mezei* but balked at those lines. *See* Letter from Felix Frankfurter to Robert Jackson 1 (Feb. 18, 1953) (RHJP); *see also Korematsu*, 323 U.S. at 224 (Frankfurter, J., concurring). Frankfurter suggested removing those sentences and simply taking no position on the propriety of an in camera hearing, since the issue did not need to be resolved in *Mezei*. *See* Letter from Felix Frankfurter, *supra*, at 1-2. Although Frankfurter did not mention the point in his letter to Jackson, Frankfurter had suggested in *Knauff* that an in camera proceeding might be the appropriate mechanism to review the government's claims of danger to national security. *See Knauff*, 338 U.S. at 549 (Frankfurter, J., dissenting). After the offending language was removed from Jackson's draft footnote, Frankfurter joined the dissent. *See* Draft Dissent (Feb. 25, 1953), *Shaughnessy v. United States ex rel. Mezei* 1, 11 n.9 (RHJP).

The final version of Jackson's *Mezei* dissent does not take a position on propriety of an in camera hearing. *See Mezei*, 345 U.S. at 228 n.9 (Jackson, J., dissenting) ("I do not know just how an in camera proceeding would be handled in this kind of case."). Jackson's failure to speak to the question of in camera proceedings seems incongruous given his preoccupation, in other parts of the dissent, with the need for confrontation, cross-examination, and a "fair hearing." *Id.* at 225, 228. The other dissenters in *Mezei* believed that *Mezei* could be held only after a full trial-type hearing. *See id.* at 218 (Black, J., dissenting) ("*Mezei* should not be deprived of his liberty indefinitely except as the result of a fair open court hearing in which evidence is appraised by the court, not by the prosecutor.").

of the competing concerns. For those aliens who have a constitutionally protected interest in admission, these are the procedures that, at a minimum, should be required by the Due Process Clause. Under the *Mathews v. Eldridge* test,<sup>450</sup> even when aliens are alleged to be risks to our security, at a minimum, they should be afforded an exclusion hearing with special procedures to protect the confidentiality of government information. There is a substantial risk of an erroneous decision when a hearing is denied altogether. The cost of these safeguards is reasonable, given that the government already affords hearings to the vast majority of aliens seeking admission. Also, with protections in place to avoid dangerous disclosures, the government has little or no interest in maintaining the current practices. Hearings ought to be provided in every case.

There is one additional problem apparent with the current statutory scheme: the lack of discovery. Without discovery, even those aliens who do receive full exclusion hearings may not have the time or the ability to counter the charges. Ellen Knauff did not know all of the government's evidence prior to her Board of Special Inquiry hearing. After that hearing, Knauff gathered additional affidavits to support her defense and these affidavits helped convince the Board of Immigration Appeals to overturn the exclusion decision. Had she known all the government's evidence prior to the initial hearing, Knauff might have prevailed before the Board of Special Inquiry. Other aliens may not have her perseverance. They may be excluded and deported simply because they cannot gather evidence to dispute an exclusion charge or because they cannot afford to pursue the case.

There is no reason to deny aliens access to information in the INS file or in the Service attorney's file, such as statements of government witnesses and aliens' own prior criminal records. These materials are routinely revealed in other types of federal cases. In federal civil cases, these documents would generally be discoverable.<sup>451</sup> In federal criminal cases, where discovery is more limited, defendants are entitled to their own statements, copies of their prior criminal records, government exhibits and test results.<sup>452</sup> The government has an overriding obligation to disclose exculpatory

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<sup>450</sup> See 424 U.S. 319, 334-35 (1976) (describing three factors to be considered in identifying the dictates of due process).

<sup>451</sup> See FED. R. CIV. P. 26(b)(1), (3) (parties may generally discover any relevant nonprivileged matter, and materials collected for litigation—such as witness statements—may be obtained upon a showing of substantial need).

<sup>452</sup> See FED. R. CRIM. P. 16(a)(1).



information in criminal cases (and, perhaps, in certain kinds of immigration matters).<sup>453</sup> And statements of government witnesses are also discoverable, although the statements need not be produced until after the witness has testified on direct examination.<sup>454</sup>

The process of permitting government witnesses to testify in immigration proceedings, without discovery of their prior statements, is quite troubling.<sup>455</sup> Again, under the *Mathews* test, discovery should be required. These types of disclosures would cost the government little. The additional safeguards would enable aliens and their counsel to prepare properly for direct and cross-examinations. There is a significant risk of erroneous decisions without disclosure. With disclosure of Manning Johnson's complete past, for example, Mezei's Board of Special Inquiry may have made a different finding on at least one of the exclusion charges. Pre-hearing disclosure would lead to more meaningful hearings and more accurate results. The high stakes in exclusion proceedings favor disclosure.

## B. Detention

### 1. The Interests at Stake

Under current law, the INS has discretion to detain most aliens pending exclusion proceedings or to release them on immigration parole.<sup>456</sup> Congress has required that all aliens convicted of serious felonies be detained pending exclusion.<sup>457</sup> For most other aliens in exclusion proceedings, the parole decision is left to the

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<sup>453</sup> *Brady v. Maryland*, 373 U.S. 83, 87 (1963), sets forth the basic principle that the prosecutor must disclose exculpatory evidence in criminal cases. While the Supreme Court has not applied *Brady* in civil cases, one circuit has recently held that "*Brady* should be extended to . . . denaturalization and extradition cases where the government seeks denaturalization or extradition based on proof of alleged criminal activities." *Demjanjuk v. Petrovsky*, 10 F.3d 338, 353 (6th Cir. 1993), *cert. denied*, 115 S. Ct. 295 (1994).

<sup>454</sup> See 18 U.S.C. § 3500 (1988) (known as the Jencks Act, after *Jencks v. United States*, 353 U.S. 657 (1957)); FED. R. CRIM. P. 26.2(a) (stating that after the witness has testified, the defendant can move the court to order the government to produce all relevant statements made by that witness).

<sup>455</sup> In a thoughtful book that examines the testimony of ex-Communist informants, Herbert Packer proposes the adoption of a rule similar to the Jencks Act to govern in all loyalty cases. See HERBERT L. PACKER, *EX-COMMUNIST WITNESSES: FOUR STUDIES IN FACT FINDING* 233-35 (1962).

<sup>456</sup> See 8 U.S.C. § 1225(b) (1988 & Supp. V 1993) (stating that aliens may be detained pending further inquiry); *id.* § 1182(d)(5) (parole power).

<sup>457</sup> See *id.* § 1226(e)(2).

sole discretion of the district director of the INS, who considers requests for parole and does not conduct parole hearings.<sup>458</sup> When exclusion proceedings move rapidly, detention may be limited to a few days or a week. However, exclusion cases may take a long time to process and detention may sometimes stretch into years.<sup>459</sup> In addition, other aliens—such as those held at Guantánamo Bay—may be detained for extended periods as part of an interdiction effort.

If the territorial fiction no longer determines the reach of the Due Process Clause, all of these detentions will implicate the Constitution. Liberty is the norm in this country; detention or physical restraint of any kind “is the carefully limited exception.”<sup>460</sup> This does not mean that an alien may never be detained. There may be appropriate reasons to support detention, such as to effect the return of an alien who may be repatriated in the reasonably near term, or to protect the public if an alien is a demonstrable threat to public safety and will shortly be returned home. But, as with pretrial detention, mental health commitment, and other forms of regulatory confinements, the procedures afforded such a person

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<sup>458</sup> See 8 C.F.R. § 212.5 (1993) (describing factors to be considered by the district director; the regulations do not provide for a hearing of any kind). As discussed at *infra* note 464, special procedures apply to Mariel Cubans.

<sup>459</sup> See *supra* notes 75-83, 333-37 and accompanying text (discussing the problem of the long-term “removal” and detention of Mariel Cubans). Aside from the difficulties posed by aliens who cannot be returned home, there are often substantial delays in processing affirmative requests for relief, such as asylum applications. In April 1993, the INS reported to Congress that it had a backlog of 261,000 asylum cases. See *Asylum and Inspections Reform: Hearing on H.R. 1153, H.R. 1355, and H.R. 1649 Before the Subcomm. on International Law, Immigration, and Refugees of the House Comm. on the Judiciary*, 103d Cong., 1st Sess. 124 (1993) (testimony of Chris Sale, Acting Commissioner of INS). One witness told Congress that it takes two to five years to complete the asylum administrative process. See *id.* at 330 (testimony of Michael T. Lempres, former Executive Associate Commissioner for Operations, INS).

<sup>460</sup> *United States v. Salerno*, 481 U.S. 739, 755 (1987); see also *Youngberg v. Romeo*, 457 U.S. 307, 316 (1982) (explaining that freedom from bodily restraint is at the core of the liberty protected by the Due Process Clause); *Parham v. J.R.*, 442 U.S. 584, 600 (1979) (finding a substantial liberty interest, protected by the Due Process Clause, “in not being confined unnecessarily for medical treatment”); *Addington v. Texas*, 441 U.S. 418, 425 (1979) (stating that “civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection” (emphasis added)); *O'Connor v. Donaldson*, 422 U.S. 563, 580 (1975) (Burger, C.J., concurring) (noting that “involuntary confinement of an individual for any reason[] is a deprivation of liberty which the State cannot accomplish without due process of law” (emphasis added)); *Humphrey v. Cady*, 405 U.S. 504, 509 (1972) (describing involuntary commitment to a mental health facility as “a massive curtailment of liberty”).

must be measured by the requirements of the Due Process Clause.

## 2. The Process Due

Unless the government has established that detention is integral to the exercise of the power over foreign affairs, and that the issue of detention ought not to receive judicial review, all aliens in exclusion proceedings should receive detention hearings. At such hearings, the burden should be on the government to establish that detention is warranted. Even if detention is justified, the length of confinement must be carefully limited.

Currently, aliens in exclusion proceedings have no right to a detention hearing of any kind. This is shameful. In no other setting may our government confine a person without a hearing at which the government also bears the burden of proof. Hence, mental health commitments require a full hearing with the burden on the State to show, by clear and convincing evidence, that a person is mentally ill and dangerous to herself or others.<sup>461</sup> People arrested on criminal charges are at least entitled to a hearing on the issue of bail, and the government generally bears a heavy burden if it seeks to detain without bail.<sup>462</sup>

Aliens have at least the same interest in avoiding detention as people facing mental health commitment or pretrial confinement. They ought to receive at least the same panoply of procedural protections. They should be entitled to ask for bond before a judicial officer, such as an immigration judge (who hears such

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<sup>461</sup> See *Foucha v. Louisiana*, 112 S. Ct. 1780, 1786 (1992) (dangerousness, without mental illness, will not always support commitment); *Addington*, 441 U.S. at 431-33 (applying *Mathews* test and holding that Due Process Clause requires at least "clear and convincing" evidence to support commitment); *O'Connor*, 422 U.S. at 575-76 (mental illness alone, without dangerousness, may not support commitment).

<sup>462</sup> There are several layers of review when a person is held in custody to face criminal charges. If a person is arrested pursuant to a warrant, a judicial officer will have determined that there is probable cause for arrest. See, e.g., U.S. CONST. amend. IV; *United States v. Watson*, 423 U.S. 411, 423 (1976). When a person is arrested without a warrant, the Fourth Amendment generally requires a judicial determination of probable cause within 48 hours of arrest. See *County of Riverside v. McLaughlin*, 500 U.S. 44, 57 (1991).

In addition to the probable cause determination, a criminal defendant at least has the opportunity to ask for bail before a judicial officer. In *Schall v. Martin*, 467 U.S. 253 (1984) and *Salerno*, 481 U.S. 739 (1987), the Supreme Court approved pretrial detention statutes for juveniles and for adults. See *supra* note 327. Both of those decisions found no due process violations largely because of the procedures afforded the detainees, including the requirement of a formal adversarial hearing. See *id.*

applications in deportation cases).<sup>463</sup> If the INS seeks to detain without bond, the government should bear the burden of establishing that a person will not attend his or her exclusion hearings, or that the person poses a significant threat to the community. An alien should be permitted to introduce evidence at a detention hearing as well as to confront and cross-examine witnesses who appear at the proceeding.<sup>464</sup> Ignatz Mezei obtained his release on parole after he was afforded these minimum procedures. Other detainees should be granted the same fair opportunity to seek release.

### 3. The Limits of Detention

The substantive component of the Due Process Clause provides limits on detention, even when that detention has followed fair hearings.<sup>465</sup> The basic limits have already been noted. Unless criminal charges are lodged and proved, the government may not impose a form or length of confinement that amounts to punishment. People held pending trial or defendants who are confined as unfit to stand trial may not be detained for an excessive period of time. These principles, too, must limit the detention of aliens who are held pending exclusion.

<sup>463</sup> See 8 C.F.R. § 3.19(a) (1993) (stating that the INS makes the initial bond or custody decision in deportation matters, but the immigration judge may redetermine the bond).

<sup>464</sup> These suggestions parallel some of the hearing requirements of the Bail Reform Act of 1984, 18 U.S.C. § 3142(f) (1988 & Supp. V 1993).

The INS has put special procedures in place to govern the parole of Mariel Cubans. The INS regulation is 8 C.F.R. § 212.12 (1993). Perhaps due to the possibility of long-term confinement, the INS has sought to give Mariel Cubans more process. But even that regulation falls woefully short of the requirements of the Due Process Clause. Each Mariel Cuban is afforded a yearly "interview" with a panel of INS officers (the INS will not call the proceeding a "hearing," which would imply certain rights and process). *Id.* § 212.12(d)(4)(ii). A Mariel Cuban will be paroled only if the detainee proves that he or she is nonviolent, will remain nonviolent, will not pose a threat to the community, and will not violate the conditions of parole. *See id.* § 212.12(d)(2). The burden of proof is on the detainee, rather than the government. And the burden may be exceedingly difficult to meet. The INS regulation permits the detainee to be accompanied at the interview by counsel or a representative, but does not require the appointment of counsel. *See id.* § 212.12(d)(4)(ii). While the detainee may submit information to the panel orally or in writing, there is no provision for examination of any witness or for any mechanism to test the veracity of the information in the INS file. *See id.*

<sup>465</sup> See *Zinerman v. Burch*, 494 U.S. 113, 125 (1990) (noting the substantive due process bar on arbitrary and wrongful government actions, despite the fairness of the procedures that implement them).

Justice Jackson's rule of reason must be met. If an alien is detained for the purpose of exclusion and that exclusion cannot be accomplished, detention can no longer be justified. Ignatz Mezei's detention became unreasonable once it was clear that no nation would accept him. At that point, the government could not plausibly contend that he was being held pending return to another country. Mezei's continued detention was also excessive in relation to any other legitimate purpose that the government could offer for his confinement.

Marinel Cubans, if Cuba will not take them back, must be released unless their detention furthers a different legitimate purpose and is not excessive in relation to that purpose. The government might assert that simply keeping some Marinel Cubans out of our society is a legitimate, nonpunitive purpose. If so, courts must carefully examine the potential danger that each of these detainees poses to our society and must carefully consider why other sanctions, such as those provided by our criminal or mental health laws, would not suffice. For Cubans who have made it to our shore in the most recent wave of immigration, or for Cubans detained in U.S. military facilities abroad, the government has argued that detention is necessary to discourage the migration of additional immigrants. That reason might serve as a facially nonpunitive purpose for detention, but courts must consider whether detention is excessive to accomplish that purpose. Given the availability of other methods, such as diplomacy, to stem the flow of immigration, detention appears punitive. Furthermore, as the detention of the most recent immigrants becomes extended, that detention may more clearly seem excessive and punitive, in violation of the Due Process Clause.

### CONCLUSION

Because it has always been so does not mean that it always must be. It is time for our nation to address the dissonance among the executive's immigration authority, our developing constitutional jurisprudence, and our obligations under international law.

This Article has explored the constitutionalization of the entry fiction and the notion that excludable aliens are not "persons" within the meaning of the Due Process Clause. It has offered several reasons why all human beings at or inside our gates must be deemed "persons" and why they must be afforded meaningful access to our courts. Perhaps the most important reason, however, is that

our treatment of aliens ultimately becomes a tale about *us* and not about *them*. It is discomfoting to be part of a nation that permits indefinite detention and unreviewable decision-making, particularly when our own government seeks to enforce human rights norms around the world.

Justice Robert Jackson is the hero of this piece. During the height of the Cold War, at a time when internal security was at the fore of public debate, his was the voice of reason. Jackson argued that secret decision-making exacts too dear a price and that detention cannot be allowed to become an end in itself. As the complete stories of Ellen Knauff and Ignatz Mezei illustrate, it is all too easy for the government to bring to bear the full measure of its power. What is allowed is not always what is wise. Forcing exclusion and detention decisions into the daylight can only increase the accuracy of the process and help the executive temper its rulings with those most elusive qualities, justice and mercy. And there must be some reasonable limit to the power to detain.