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THE WAR ON TERRORISM AND THE EXTRATERRITORIAL APPLICATION OF THE CONSTITUTION IN IMMIGRATION LAW

BRIAN G. SLOCUM†

"It is war that exposes the relative vulnerability of the alien's status."[1]

ABSTRACT

For quite some time, the prevailing judicial view has been that it is constitutional for the government to indefinitely (even permanently) detain within the United States aliens who have been stopped at our borders. The justification for these decisions is that even though these aliens are located within the United States they are deemed, under a doctrine known as the "entry fiction," to be outside the territory of the United States, and thus beyond the reach of the Constitution. Recently, however, courts have struggled with issues involving the definition and scope of the entry fiction. Courts have faced similar issues involving the extraterritorial application of the Constitution in cases involving the current Guantanamo "enemy combatant" detainees. In this Article, Professor Slocum argues that a recognition by the Supreme Court that the current Guantanamo detainees possess at least some constitutional rights should compel courts to conclude that aliens stopped at our borders and detained within the United States also possess constitutional rights, including the right to be free from indefinite detention. Even if the Court declines to recognize that the Guantanamo detainees possess constitutional rights, lower courts should continue to reevaluate the definition and scope of the outdated and unnecessarily harsh entry fiction.

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1. Johnson v. Eisentrager, 339 U.S. 763, 771 (1950) (Jackson, J.).

INTRODUCTION

Consider the following two cases:

(1) The President authorizes the arrest and detention of an elderly woman in Switzerland who for years has written large checks to a charity that ostensibly helps orphans in Afghanistan. In reality, the charity is a front to finance al-Qaeda activities. The woman, a Swiss national, is arrested in Switzerland and detained by the United States on Guantanamo Bay Naval Base, Cuba ("Guantanamo"). The U.S. government labels the woman an "enemy combatant" and declares that it intends to detain her indefinitely, until the end of the government's "War on Terrorism."[2]

(2) The President authorizes the seizure and detention of a Cuban national who flees Cuba by boat in order to immigrate to the United States. The Cuban national is arrested off the shores of the United States but is detained in an American prison in Louisiana. The Cuban government refuses to accept the return of the Cuban national and indicates that it will never do so. The U.S. government declares that it will detain the

2. This hypothetical is modified from a hypothetical posed by a district court judge to government counsel during oral argument in *In re* Guantanamo Detainee Cases, 355 F. Supp. 2d 443, 475 (D.D.C. 2005). Government counsel asserted that the government would have authority to detain the elderly woman. *See id.* The government has also indicated that it intends to hold some of the enemy combatant detainees indefinitely. *See* Hamdi v. Rumsfeld, 542 U.S. 507, 540 (2004) (Souter, J., concurring) (stating that "[t]he Government asserts a right to hold Hamdi under these conditions indefinitely, that is, until the government determines that the United States is no longer threatened by the terrorism exemplified in the attacks of September 11, 2001"). For a description of how the government has used Guantanamo for anti-terrorism purposes see Diane Marie Amann, *Guantanamo*, 42 COLUM. J. TRANSNAT'L L. 263, 267-74 (2004).

Cuban national indefinitely, although it may release him on "parole" if one of its periodic reviews of his dangerousness warrants such release.[3]

The cases described above raise many important questions regarding the constitutional rights of aliens indefinitely detained by the United States.[4] For example, do either of the aliens in cases (1) and (2) possess *any* constitutional rights? If both are entitled to constitutional protections, do they have the same constitutional protections? If the Supreme Court first determined in case (1), a terrorism-related case, that the detainee possesses at least some constitutional rights, would the decision compel a subsequent finding that the detainee in case (2), a traditional immigration case,[5] also possesses constitutional rights, including a liberty interest sufficient to preclude indefinite detention? If a court determined that the Cuban national in case (2) could not constitutionally be detained indefinitely, would the government still be able to effectively use immigration provisions to protect national security?

It may seem quite counterintuitive that in 2007 the United States could permanently detain human beings without formal charges or any type of judicial oversight, but at this time it is not clear that either the Swiss national in case (1) or the Cuban national in case (2) possess any constitutional rights. Currently, courts are wrestling with the issue of whether the government's terrorism-related alien detainees on Guantanamo possess constitutional rights.[6] For quite some time, immigration law has struggled with similar issues involving the extraterritorial reach of the Constitution. In fact, the denial of constitutional rights to aliens stopped at the U.S. border is one of the major reasons why immigration law has long been notorious for its failure to comply with the rule of law and its isolation from other areas of public law.[7]

This Article discusses how the judicial resolution of the constitutional rights of the Guantanamo alien detainees, which case (1) represents, may present a unique opportunity for reconsideration of the long-

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3. This hypothetical is intended to describe facts similar to those of a typical "Mariel Cuban." In 1980, approximately 125,000 Cuban nationals fled Cuba and were intercepted off the shores of the United States. Many of the Mariel Cubans were "paroled" into the United States, but, until recently, all of the Mariel Cubans were subject to the possibility of indefinite detention in U.S. jails. *See infra* notes 51-54 and accompanying text (explaining why the Mariel Cubans are no longer subject to indefinite detention); *see also* Eliot Walker, Note, *Safe Harbor: Is Clark v. Martinez the End of the Voyage of the Mariel?*, 39 CORNELL INT'L L.J. 121 (2006). The Mariel Cubans were subject to indefinite detention because Cuba has refused to accept their return. In addition, no other country has expressed a willingness to accept the Mariel Cubans. *See* Morales-Fernandez v. I.N.S., 418 F.3d 1116, 1118 (10th Cir. 2005).

4. The term "alien" is considered by many to be pejorative. Case law and the Immigration and Nationality Act refer extensively to "alien" and "alienage," however. *See infra* note 18 (defining the term). In order to avoid unnecessary confusion, the term will be used in this Article.

5. *See infra* note 17 and accompanying text (defining immigration law as the law governing the admission and expulsion of aliens).

6. *See infra* Part II.B. (discussing the cases).

7. *See generally* Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1 (1984) (explaining immigration law's isolation from other areas of public law).

standing problem in immigration law of the constitutional rights of aliens stopped at the border and sometimes detained indefinitely, which case (2) represents. Many commentators have recently focused on the government's use of immigration laws to combat terrorism and how these actions have undermined sound immigration policy.[8] Scholars have also recently focused a great deal on the egregious violations of human rights committed in the War on Terrorism.[9] Little attention, however, has been paid to the possibility that future terrorism-related decisions, by declaring that the Guantanamo detainees possess constitutional rights, could impact immigration law in a positive manner.

Part I of this Article describes the inherent connection between the current Guantanamo detention cases and immigration law. Part II describes the traditional understanding of the territorial limits to the application of the Constitution in immigration law and how this traditional understanding is now being questioned by some courts. In addition, this Part describes how courts in the current Guantanamo detention cases have addressed similar issues involving the extraterritorial application of the Constitution.

A detailed analysis of whether the current Guantanamo detainees should be recognized as possessing constitutional rights (as well as the identity and breadth of those rights) has been made by other scholars and is beyond the scope of this Article. Instead, Part III argues that judicial recognition that the Guantanamo detainees possess at least some constitutional rights should lead to the recognition that detainees in the same position as the Cuban national in case (2) also possess at least some constitutional rights, including the right to be free from indefinite detention. Contrary to the government's likely arguments, such a holding would be relatively modest and would allow the government to continue to use immigration laws, including laws authorizing detention, for national security purposes.

I. THE CONNECTION BETWEEN THE WAR ON TERRORISM AND IMMIGRATION LAW

Most of the government's immigration activities are not related to terrorism and, undoubtedly, much of its anti-terrorism activities are not related to immigration law.[10] Nevertheless, there is an undeniable con-

8. *See, e.g.*, Kevin Johnson & Bernard Trujillo, *Immigration Reform, National Security After September 11, and the Future of North American Integration*, 91 MINN. L. REV. (forthcoming 2007), *available at* http://ssrn.com/abstract=962963; Karen C. Tumlin, Comment, *Suspect First, How Terrorism Policy is Reshaping Immigration Policy*, 92 CAL. L. REV. 1173 (2004).

9. *See, e.g.*, Owen Fiss, *The War Against Terrorism and the Rule of Law*, 26 OXFORD J. LEGAL STUD. 235, 235 (2006) (arguing that the War Against Terrorism has violated the tradition of requiring the "government to abide by the Constitution's restrictions on its power no matter where or against whom it acts").

10. Before September 11, 2001, it was especially true that the government's immigration activities were mostly not connected to its anti-terrorism efforts. *See* Gerald L. Neuman, *Terrorism,*

nection between the two. Immigration law has long been a tool used to pursue various interests of the political branches, including ones related to national security and foreign policy.[11] Although the relevant provisions have been amended at various times to extend or retract the government's powers, the Immigration and Nationality Act has consistently contained provisions that have given the executive branch authority to consider foreign policy consequences when making decisions regarding deportation.[12] Indeed, the Supreme Court has on more than one occasion acknowledged that immigration laws serve multiple purposes, especially ones connected to foreign policy.[13]

The War on Terrorism is no exception to the historical use of immigration laws to serve foreign policy and national security purposes. Immigration functions have been transferred to the Department of Homeland Security, formally making immigration a national security concern in a more direct way than in the past. Immigration provisions are especially tempting for the government to use in combating terrorism because aliens have fewer constitutional protections than do citizens, and immigration law is largely unconstrained by the rule of law.[14] Not surprisingly, immigration laws have been used in various ways to help combat terrorism, including facilitating the detention of terrorist suspects.[15] Indeed, the government's use of immigration laws in its War on Terrorism

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Selective Deportation and the First Amendment After Reno v. AADC, 14 GEO. IMMIGR. L.J. 313, 316 (2000) ("Immigration policies with foreign policy dimensions are by far the exception rather than the rule. The vast bulk of immigration enforcement involves routine matters such as poverty, crime, regulatory violations, and protection of the domestic labor market."). Due, in part, to the country's high immigration and deportation rates, it is still true now.

11. *See* HIROSHI MOTOMURA, AMERICANS IN WAITING 38-45 (2007); David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953, 988-1003 (2002).

12. For current provisions see, for example, 8 U.S.C. § 1227(a)(4)(C)(i) (2006) (providing authorization to deport if an alien's presence in the United States could result in "adverse foreign policy consequences"); 8 U.S.C. § 1231 (b)(2)(C)(iv) (2006) (providing that the "Attorney General may disregard [an alien's designation of a country to which he would like to be deported] if the Attorney General decides that removing the alien to the country is prejudicial to the United States"); 8 C.F.R. § 215.3 (b), (c) (2004) (providing that the Attorney General may block the departure of an alien from the United States when it would be deemed prejudicial to national security interests to permit him to depart).

13. *See, e.g.*, Reno v. Am.-Arab Anti-Discrimination Comm., 525 U.S. 471, 491 (1999) (referencing the government's power "to antagonize a particular foreign country by focusing on that country's nationals"); Mathews v. Diaz, 426 U.S. 67, 81 (1976) (noting that decisions relating to immigration "may implicate our relations with foreign powers").

14. *See infra* Part II.A. (discussing the lack of constitutional restrictions on the government's creation and use of immigration laws); *see also* Brian G. Slocum, *Courts vs. The Political Branches: Immigration "Reform" and the Battle for the Future of Immigration Law*, 5 GEO. J.L. & PUB. POL'Y (forthcoming 2007).

15. *See infra* notes 114-117 and accompanying text (explaining how the government has used immigration laws for national security purposes). The government has been explicit about its intent to use immigration laws to fight terrorism. *See* Daniel Kanstroom, *Criminalizing the Undocumented: Ironic Boundaries of the Post-September 11th "Pale of Law,"* 29 N.C. J. INT'L L. & COM. REG. 639, 642 (2004) (quoting Attorney General John Ashcroft, "Let the terrorist among us be warned: If you overstay your visa even by one day we will arrest you. If you violate a local law, you will be kept in jail and kept in custody as long as possible.").

has made some immigration commentators fear that immigrants have been unfairly linked to the figure of the terrorist.[16]

In turn, even when the government's anti-terrorism actions do not directly involve the application of specific immigration laws, they can have a connection to immigration law. Unlike case (1) described above, case (2) is traditionally considered to be an immigration case because the Cuban national intended to immigrate to the United States (and immigration law refers to the federal law "governing the admission and the expulsion of aliens"),[17] but both case (1) and case (2) involve "aliens."[18] Even in situations, such as case (1), where the alien is not attempting to enter the United States, a judicial decision that resolves territorial issues regarding the availability of constitutional protections for aliens can have a substantial impact on immigration cases. As mentioned above, courts have recently struggled with the long-standing and controversial issue in immigration law of which, if any, constitutional rights should be afforded aliens, such as the Cuban national in case (2), who are considered to have been stopped at the border.[19] Thus, as this Article argues, the judicial recognition that the alien in case (1) (similarly situated to the detainees in the current Guantanamo cases) possesses constitutional rights, even though arrested and detained outside of U.S. sovereign borders, should help clarify that the Cuban national in case (2) also possesses constitutional rights.

II. ALIENS AND THE EXTRATERRITORIAL APPLICATION OF THE CONSTITUTION

Some commentators on the current Guantanamo detention cases have been puzzled about why citizenship or territoriality should matter in determining the constitutional rights of detainees at Guantanamo.[20] To immigration scholars, such a focus is not surprising. In immigration law, both status and territoriality have historically been crucial in determining the scope of applicable constitutional rights although, as indicated above, the degree to which territorial issues should affect the constitutional

16. *See, e.g.*, Victor C. Romero, *Decoupling "Terrorist" from "Immigrant:" An Enhanced Role for the Federal Courts Post 9/11*, 7 J. GENDER RACE & JUST. 201 (2003).

17. Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255, 256; *see also* Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L. J. 545, 547 (1990) (defining immigration law as the law governing the admission and expulsion of aliens, rather than the more general law of aliens' rights and obligations, such as their tax status and eligibility for government benefits and employment).

18. 8 U.S.C. § 1101 (2006) (defining an alien as "any person not a citizen or national of the United States").

19. *See supra* note 7 and accompanying text.

20. *See, e.g.*, Jonathan L. Hafetz, *The Supreme Court's "Enemy Combatant" Decisions: Recognizing the Rights of Non-Citizens and the Rule of Law*, 14 TEMP. POL. & CIV. RTS. L. REV. 409, 410 (2005) (arguing that the "Court never provided a coherent theory explaining why citizenship should determine the scope of constitutional protections for those classified by the executive as 'enemy combatants'").

rights of aliens is a source of much debate and confusion.[21] Section A of this Part describes the confusion in immigration law regarding the application of the Constitution to aliens stopped at the border. Section B describes the issues involving the extraterritorial application of the Constitution in the current Guantanamo cases.

A. The Territorial Distinction and the "Entry Fiction" in Immigration Law

Constitutional rights in immigration law are based on the "plenary power doctrine," the territorial distinction, and the "entry fiction." The Supreme Court has consistently maintained that, based on the United States' existence as a sovereign state, the government possesses unfettered "plenary power" to control immigration, and aliens, consequently, possess far fewer constitutional rights than do citizens when the government's immigration powers are being utilized.[22] The constitutional rights that aliens do possess are based on a longstanding territorial distinction. Deportable aliens, those aliens deemed under immigration law to have made an "entry" into the United States, are entitled to due process and other constitutional rights.[23] For constitutional (but no longer statutory) purposes, an "entry" occurs even if the alien enters the country surreptitiously.[24]

Under the standard account, inadmissible aliens, considered under immigration law as having not made an entry, have fewer, if any, constitutional rights.[25] Even if the Attorney General has "paroled," but not

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21. Immigration law scholars have addressed these issues for some time. *See, e.g.*, Gerald L. Neuman, *Whose Constitution?*, 100 YALE L.J. 909 (1991); Louis Henkin, *The Constitution as Compact and as Conscience: Individual Rights Abroad and at Our Gates*, 27 WM. & MARY L. REV. 11 (1985). As a result of the current Guantanamo detention cases, other scholars are also examining issues relating to the extraterritorial reach of the Constitution. *See, e.g.*, Kal Raustiala, *The Geography of Justice*, 73 FORDHAM L. REV. 2501 (2005) (arguing that the historical importance of territoriality should be reexamined).

22. *See* Fong Yue Ting v. United States, 149 U.S. 698, 708 (1893) (asserting that the power to deport is "an inherent and inalienable right of every sovereign and independent nation, essential to its safety, its independence and its welfare . . . ."); *see also* T. Alexander Aleinikoff, *Federal Regulation of Aliens and the Constitution*, 83 AM. J. INT'L L. 862, 862 (1989) (stating that early cases "denied virtually any authority for the judiciary to review substantive decisions as to which classes of aliens should be entitled to enter or remain in the country").

23. Deportable aliens are entitled to at least due process rights. Whether, and to what extent, they possess other constitutional rights is a matter of debate. *See* Brian G. Slocum, *Canons, The Plenary Power Doctrine and Immigration Law*, 34 FL. ST. U. L. REV. (forthcoming 2007).

24. *See* Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 155, 175 (1993) (holding that "[i]t is important to note at the outset that our immigration laws have long made a distinction between those aliens who have come to our shores seeking admission . . . and those who are within the United States after an entry, irrespective of its legality." (quotation omitted)). On September 30, 1996, Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, 110 Stat. 3009-546, which changed the definition of "deportable" to only include those aliens who have been "admitted" into the U.S. *See* Brian G. Slocum, *The Immigration Rule of Lenity and Chevron Deference*, 17 GEO. IMMIGR. L.J. 515, 524-25 (2003) (explaining IIRIRA's changes to immigration terminology).

25. *See* Landon v. Plasencia, 459 U.S. 21, 32 (1982) (stating that "an alien seeking admission to the United States requests a privilege and has no constitutional rights regarding his application, for

formally admitted, an inadmissible alien into the country, under a concept known as the "entry fiction" the alien is still considered to be at the border, even though he or she may actually have lived and worked in this country for many years.[26] Needless to say, the entry fiction has been harshly criticized by immigration scholars and others.[27]

Application of the territorial distinction and entry fiction in immigration law has produced some of the most egregious examples of the rejection of the rule of law known to American jurisprudence. In one of the most notorious cases, *Shaughnessy v. United States ex rel. Mezei*,[28] Mezei was excluded without a hearing based on confidential information.[29] Because Mezei could not establish his nationality, other nations would not take him, and he remained confined by the government on Ellis Island.[30] Despite the indefinite, and potentially permanent, nature of his detention, the Court held that Mezei's due process rights were not violated because Mezei was treated "as if stopped at the border" and thus had *no* due process rights.[31]

The *Mezei* case is widely considered to be an example of the entry fiction because Mezei was detained on Ellis Island rather than outside of

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the power to admit or exclude aliens is a sovereign prerogative . . . . [H]owever, once an alien gains admission to our country and begins to develop the ties that go with permanent residence his constitutional status changes accordingly.") (citations omitted). In IIRIRA, Congress substituted the term "inadmissible" for "excludable" wherever the latter term appeared in the INA. I use the terms "inadmissible" and "excludable" interchangeably. In using the term inadmissible, I intend for it to be understood as synonymous with excludable, even if doing so is somewhat inaccurate, and to only include those aliens who are deemed under immigration law to have been stopped at the border.

26. Congress has explicitly indicated that the parole of an alien into the country should not be considered an entry. *See* 8 U.S.C. § 1182(d)(5)(A) (2006) (specifying that "parole of such alien shall not be regarded as an admission of the alien"). Courts have uniformly agreed that a parole should not be considered an entry. *See, e.g.*, Leng May Ma v. Barber, 357 U.S. 185, 188-90 (1958) (holding that an alien paroled into the United States had not effected an entry); *see also* Charles D. Weisselberg, *The Exclusion and Detention of Aliens: Lessons from the Lives of Ellen Knauff and Ignatz Mezei*, 143 U. PA. L. REV. 933, 954 (1995) (describing the entry fiction). The importance of having entered the United States has led to significant litigation regarding whether an alien could be deemed to have made an entry. *See, e.g.*, Rosenberg v. Fleuti, 374 U.S. 449 (1963) (determining whether a return from a visit of a couple of hours in Mexico was an entry).

27. *See, e.g.*, Ibrahim J. Wani, *Truth, Strangers, and Fiction: The Illegitimate Uses of Legal Fiction in Immigration Law*, 11 CARDOZO L. REV. 51, 89-96 (1989) (lamenting that the entry fiction is the primary determinant of procedural due process despite its "acknowledged falsity and outrageousness"); Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of the Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1389-96 (1953).

28. 345 U.S. 206 (1953).

29. *See Mezei*, 345 U.S. at 208.

30. *See id.* Before his return from a trip abroad to visit his dying mother, Mezei had lived in the United States for twenty-five years and was married to an American citizen. *Id.* at 216-17 (Black, J. dissenting).

31. *Id.* at 212 (holding that "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned." (quotation omitted)). The *Mezei* case is not an anomaly. The Court has made similar statements in other cases about the rights of inadmissible aliens. *See, e.g.*, United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537 (1950) (holding that the Attorney General was authorized to exclude the wife of a United States citizen without a hearing); Kaplan v. Tod, 267 U.S. 228, 230 (1925) (holding that an alien who had been released into the country for almost ten years was nevertheless "still in theory of law at the boundary line and had gained no foothold in the United States." (citation omitted)).

U.S. territory.[32] Other cases, however, provide a better picture of how courts have held that the entry fiction still retains its constitutional significance even when the aliens are imprisoned within the United States after having lived within the country for extended periods of time after being paroled. In *Gisbert v. Attorney General*,[33] for example, the detainees were Mariel Cubans who had arrived in 1980 on the Mariel boatlift and were granted parole into the United States.[34] The detainees committed crimes, however, and, after the completion of their criminal sentences, were imprisoned indefinitely by the government.[35] Despite their indefinite imprisonment within the United States, the Fifth Circuit held that the detainees had no due process rights and thus no constitutional right to be free from indefinite detention.[36]

Similar to the Fifth Circuit's decision in *Gisbert*, lower courts have almost uniformly held that the government has constitutional authority to indefinitely detain inadmissible aliens, even those aliens who have lived in the United States for long periods of time.[37] Typically, these aliens are indefinitely detained after they have received a final order of deportation but their countries of origin refuse to accept their returns. In some cases, the intransigence of the country of origin raises the possibility of permanent detention. Perhaps the most notorious example is the thousands of Cubans who, like the detainees in *Gisbert*, came to the United States on the Mariel boatlift in 1980 and were subject to indefinite detention within the United States after Cuba refused to accept their return.[38] Cuba's intransigence is not unique, however. Other nations have also refused to accept the return of their citizens.[39]

Despite the uncompromising reasoning in decisions such as *Mezei*, the definition and scope of the entry fiction, as well as the significance of territoriality, is now unclear.[40] What is clear is that the doctrine is not as absolute as it might have once seemed. In *Landon v. Plasencia*,[41] the Court indicated that a long-term resident alien had due process rights even though she had been stopped at the border after a brief stay outside

32. *See, e.g.*, David Cole, *In Aid of Removal: Due Process Limits on Immigration Detention*, 51 EMORY L. J. 1003, 1033-34 (2002).

33. 988 F.2d 1437 (5th Cir. 1993).

34. *See Gisbert*, 988 F.2d at 1439-40; *see also supra* note 3 (describing the Mariel boatlift).

35. *See Gisbert*, 988 F.2d at 1439-40.

36. *See id.* at 1442-43; *see also* Barrera-Echavarria v. Rison, 44 F.3d 1441, 1443, 1449 (9th Cir. 1995) (rehearing en banc) (holding that a Mariel Cuban detained by the government for the previous ten years "in a variety of prisons" within the United States did not "have a constitutional right to be free from detention, even for an extended time").

37. *See* Slocum, *supra* note 23, at 43.

38. *See supra* note 3.

39. *See, e.g.*, Zadvydas v. Davis, 533 U.S. 678, 684-86 (2001) (stating that one of the aliens was indefinitely detained because his country of origin, Cambodia, does not have a repatriation agreement with the United States and would not accept his return).

40. *See* Alvarez-Garcia v. Ashcroft, 378 F.3d 1094, 1099 (9th Cir. 2004) (noting that the "precise reach of the entry fiction doctrine is unclear" (citation omitted)).

41. 459 U.S. 21 (1982).

of the country.[42] In some recent cases, lower courts have indicated that even inadmissible aliens who were never legal residents at all possess at least some due process rights.[43] Other courts, somewhat inconsistently, have suggested that the "entry fiction" means that inadmissible aliens do not possess procedural due process rights, but that they do have other constitutional rights.[44]

The confusion regarding the application of the Constitution to aliens stopped at the border extends outside the traditional parameters of immigration law. The rights of inadmissible aliens are based on a territorial distinction, but some courts have, without much analysis of territoriality issues, held that the entry fiction determines aliens' "rights with regard to immigration and deportation proceedings" but does not limit the right of aliens detained within United States territory to "humane treatment."[45] Other courts have disagreed about the applicability of specific constitutional provisions, such as the Fourth Amendment.[46]

Recent Supreme Court cases have not clarified the confusion regarding the reach of the Constitution. In *Zadvydas v. Davis*,[47] the Supreme Court stated that the indefinite detention of deportable aliens (those aliens considered to have entered the United States) would raise serious constitutional issues. The Court rejected the government's argument that *Mezei* controlled, noting that the case before it involved de-

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42. *See Landon*, 459 U.S. at 33-34.

43. *See, e.g.*, Rosales-Garcia v. Holland, 322 F.3d 386, 410 (6th Cir. 2003) (en banc) (holding that "[t]he fact that [inadmissible] aliens are entitled to less process . . . does not mean that they are not at all protected by the Due Process Clauses of the Fifth and Fourteenth Amendments."), *cert. denied*, 539 U.S. 941 (2003). While the Sixth Circuit recognized a due process right to be free from indefinite detention, other courts have recognized more limited due process rights. *See* Ngo v. INS, 192 F.3d 390, 399 (3d Cir. 1999) (holding that excludable aliens who could not be removed were entitled, as a matter of due process, to periodic review of the necessity for their continued detention); Correa v. Thornburgh, 901 F.2d 1166, 1171 n.5 (2d Cir. 1990) (noting that apart from "protection[s] against gross physical abuse," aliens seeking initial admission are entitled to no constitutional due process protections).

44. *See, e.g.*, *Alvarez-Garcia*, 378 F.3d 1094 (suggesting that inadmissible aliens possess equal protection rights, although denying the specific claim of an equal protection violation); *cf.* Sierra v. INS, 258 F.3d 1213, 1218 n.3 (10th Cir. 2001) (noting that the entry fiction "applies to procedural due process challenges such as Sierra's. This case does not involve, and we do not address, a substantive due process challenge . . . ." (citation omitted)); *Barrera-Echavarria*, 44 F.3d at 1449 (explaining that "[w]hile it is . . . clear that excludable aliens have no procedural due process rights in the admission process, the law is not settled with regard to nonprocedural rights").

45. Lynch v. Cannatella, 810 F.2d 1363, 1373 (5th Cir. 1987); *see also* Martinez-Aguero v. Gonzalez, 459 F.3d 618 (5th Cir. 2006) (holding that the entry fiction only applies to immigration proceedings and aliens stopped at the border have a constitutional right to be free from false imprisonment and the use of excessive force by law enforcement personnel).

46. *Compare Martinez-Aguero*, 459 F.3d 618 (holding that the "entry fiction" would not be applied outside the immigration context and that the alien had a Fourth Amendment right to be free from false imprisonment and use of excessive force), *with* United States v. Esparza-Mendoza, 265 F. Supp. 2d 1254 (D. Utah 2003) (holding that even an alien who had been deported and then entered the country illegally was not entitled to Fourth Amendment rights). *See* Linda Bosniak, *A Basic Territorial Distinction*, 16 GEO. IMMIGR. L.J. 407, 411 (2002) (arguing that "if a paroled [Mariel Cuban] is arrested on criminal charges, he is entitled to full criminal due process by virtue of his presence here, and his lack of entry is irrelevant").

47. 533 U.S. 678 (2001).

portable not inadmissible aliens, and the "basic territorial distinction" "runs throughout immigration law."[48] Because of the serious constitutional concerns raised by the authorization of indefinite detention, the Court interpreted the current INA provision authorizing detention, 8 U.S.C. § 1231(a)(6), as only allowing detention for a six month period unless there is a "significant likelihood of removal in the reasonably foreseeable future . . . ."[49] The Court reasoned that it was not required by the case to "consider the political branches' authority to control entry into the United States," terrorism, or "other special circumstances," and thus had left no "unprotected spot in the Nation's armor."[50] Subsequently, however, the Court held in *Clark v. Martinez*,[51] that it had established the meaning of 8 U.S.C. § 1231(a)(6) in *Zadvydas* and that interpretation must control even if the detention at issue involved inadmissible rather than deportable aliens.[52]

Based on the standard account of the entry fiction, the Cuban national in case (2) may not be entitled to *any* constitutional rights, even though he is physically located in the United States.[53] Certainly, if the executive branch possessed statutory authority to detain him indefinitely, it could do so without violating the Constitution.[54] But some lower courts have challenged the standard account and have questioned whether the Court's most extreme statements about the constitutional rights of inadmissible aliens can really be taken literally.[55]

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48. *Zadvydas*, 533 U.S. at 693-94; *see* T. Alexander Aleinikoff, *Detaining Plenary Power: The Meaning and Impact of* Zadvydas v. Davis, 16 GEO. IMMIGR. L.J. 365, 375 (2002) (noting that that the Court's opinion in *Zadvydas* "reaffirm[s] . . . the border/interior distinction as a constitutional matter").

49. *Zadvydas*, 533 U.S. at 693, 701. The Court's decision was technically one of statutory interpretation, but courts have treated the decision as though it also made binding statements regarding the constitutional rights of aliens. *See* Slocum, *supra* note 23, at 22.

50. *Zadvydas*, 533 U.S. at 695-96 (citation omitted).

51. 543 U.S. 371 (2005).

52. *See Martinez*, 543 U.S. at 380-81.

53. This is especially true if the governmental actions at issue could be said to involve immigration law. Governmental actions outside of immigration law involving inadmissible aliens may be subject to closer constitutional scrutiny, although the extent of such protections is a matter of debate. *See supra* notes 45-46 and accompanying text. The idea that inadmissible aliens have no constitutional rights may intuitively strike some as an absurd overstatement, but the law is certainly not clear that they have any constitutional rights. During oral argument in Clark v. Martinez, for example, Justice Stevens asked the government attorney whether the government could just "shoot" the Mariel Cubans. The government attorney responded, "Absolutely not" but gave no answer when Stevens asked why. *See* Transcript of Oral Argument at 22-23, *Martinez*, 543 U.S. 371 (No. 03-878).

54. The Court's decision in *Martinez* abruptly ended the ability that the executive branch had enjoyed for decades to indefinitely detain inadmissible aliens. Congress is of course free to amend the INA to once again grant the executive branch the power to indefinitely detain any inadmissible alien. Thus, the potential that the executive branch will once again attempt to indefinitely detain inadmissible aliens remains.

55. *See, e.g.*, *Rosales-Garcia*, 322 F.3d at 410.

> If [inadmissible] aliens were not protected by even the substantive component of constitutional due process, as the government appears to argue, we do not see why the United States government could not torture or summarily execute them. Because we do not believe that our Constitution could permit persons living in the United States . . . to be sub-

Unfortunately, even the decisions of the courts that have expressed reservations about an extreme version of the entry fiction have raised more questions than they have answered. If some of the extreme statements about the rights of inadmissible aliens cannot be taken literally, what rights do inadmissible aliens possess? If, as some courts have suggested, the "entry fiction" deprives inadmissible aliens of some constitutional rights but not others, what principle serves to distinguish amongst the constitutional rights?[56] How can it be that the entry fiction is dependent on the view that the Constitution does not apply because the alien has not entered the United States, but that this territorial fiction mysteriously vanishes depending on whether the claim can be said to fall within immigration law?[57]

B. The Current Guantanamo Detention Cases and the Territorial Distinction

Not surprisingly, in the current Guantanamo detention cases courts have struggled with the same constitutional issues that have perplexed courts in immigration cases. Similar to immigration law, status is important. It is likely that citizens are entitled to due process protections, even when they have allegedly engaged in combat against the United States and are detained outside the country. In *Hamdi v. Rumsfeld*,[58] the Court held that the President could not detain Hamdi, a United States citizen, as an "enemy combatant" without the "essential constitutional promises" of due process, including notice and an opportunity to be heard before a neutral decision maker.[59] In a plurality opinion, Justice O'Connor indicated that the Court would have reached the same conclusion regarding the scope of constitutional rights possessed by Hamdi even if he had been detained in "Afghanistan or even Guantanamo Bay."[60]

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jected to any government action without limit, we conclude that government treatment of [inadmissible] aliens *must* implicate the Due Process Clause of the Fifth Amendment.

Id.

56. *See supra* note 43 and accompanying text (describing how some courts have stated that the entry fiction may only deprive inadmissible aliens of procedural due process rights). While it is important to highlight the unanswered questions regarding the constitutional rights of inadmissible aliens, it is not the intention of this Article to define precisely the constitutional rights inadmissible aliens should be afforded. This Article instead focuses on how a judicial recognition that the current Guantanamo detainees possess constitutional rights should result in a subsequent judicial recognition that inadmissible aliens possess due process rights sufficient to preclude indefinite detention. *See infra* Part III.A.3.

57. *See supra* notes 45-46 and accompanying text (describing how some courts have stated that the entry fiction is limited to immigration law).

58. 542 U.S. 507 (2004).

59. *See Hamdi*, 542 U.S. at 533.

60. *Id.* at 524 (indicating that it is "not at all clear why [detention in the United States as opposed to overseas] should make a determinative constitutional difference"). Illustrating the issues of the interplay of status and territoriality that these cases raise, a lower court has held that an alien captured within the United States and held as an enemy combatant is to be subject to the same due process protections as the Court outlined in *Hamdi*, rejecting the detainee's arguments that his capture within U.S. territory entitled him to greater protections. *See* Al-Marri v. Wright, 443 F. Supp. 2d 774 (D.S.C. 2006). It has also been suggested that detainees captured in the theatre of war who

Lower courts, in cases involving refugees and ones involving the current detainees, have disagreed about whether alien detainees on Guantanamo possess constitutional rights, however.[61] The United States holds the territory under a grant of indefinite duration that gives the government complete jurisdiction and control over the territory.[62] The determination of whether Guantanamo detainees possess constitutional rights typically turns on how Guantanamo is characterized. Guantanamo is not seen as functionally equivalent to the United States, but such a characterization has not been necessary to a holding that the detainees possess some constitutional rights. When Guantanamo is seen as equivalent to an unincorporated U.S. territory (a territory not clearly destined for statehood), courts typically hold that the detainees possess constitutional rights.[63] Only "fundamental" constitutional rights are protected, however.[64] When Guantanamo is characterized as equivalent to foreign territory, however, courts typically hold that the detainees have no constitutional rights, although some scholars believe such decisions are erroneous.[65]

Although the Court has had the opportunity, it has not yet clearly decided the constitutional rights of the Guantanamo detainees. In *Rasul v. Bush*,[66] the Court indicated that it considers Guantanamo to be "territory over which the United States exercises exclusive jurisdiction and control" but not "ultimate sovereignty."[67] The Court held that the detainees at Guantanamo had a right under the habeas statute, 28 U.S.C. § 2241, to challenge the legality of their detention, even though the United

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are citizens of the country with whom we are at war may lack constitutional rights. *See* Ronald D. Rotunda, *The Detainee Cases of 2004 and 2006 and Their Aftermath*, 57 SYRACUSE L. REV. 1, 33 (2006).

61. *See* Gerald L. Neuman, *Closing the Guantanamo Loophole*, 50 LOY. L. REV. 1, 3-6 (2004) (describing the refugee cases).

62. *See* Gerald L. Neuman, *Anomalous Zones*, 48 STAN. L. REV. 1197, 1197-98 (1996).

63. *See, e.g.*, Gherebi v. Bush, 374 F.3d 727, 738 (9th Cir. 2003) (holding that for habeas purposes, Guantanamo was a part of the sovereign territory of the United States); *see also In re* Guantanamo Detainee Cases, 355 F. Supp. 2d 443, 462-64 (D.D.C. 2005) (recognizing the "special nature of Guantanamo Bay" and characterizing it as the "equivalent of a U.S. territory in which fundamental constitutional rights exist."); Neuman, *supra* note 61, at 15, 34-43.

64. *See* United States v. Verdugo-Urquidez, 494 U.S. 259, 268 (1990) (holding that "[o]nly 'fundamental' constitutional rights are guaranteed to inhabitants of those territories" (citations omitted)).

65. *See, e.g.*, Khalid v. Bush, 355 F. Supp. 2d 311, 321 (D.D.C. 2005) (stating that the detainees are held on foreign territory and determining that they therefore have no constitutional rights); Al Odah v. United States, 321 F.3d 1134, 1144 (D.C. Cir. 2003), *rev'd sub nom.* Rasul v. Bush, 542 U.S. 466 (2004). The decisions holding that the detainees lack constitutional rights typically rely on cases such as *Verdugo-Urquidez*, 494 U.S. 259, where the Court held that the Fourth Amendment does not apply to a search of a nonresident's property in Mexico. *See also* Johnson v. Eisentrager, 339 U.S. 763, 781-85 (1950) (rejecting the extraterritorial application of the Fifth Amendment). Professor Neuman argues that the detainees should receive due process protections regardless of how Guantanamo is classified. *See* Neuman, *supra* note 61, at 44-53 (arguing that the Court should hold that long-term detainees held in an offshore prison are entitled to fundamental due process protections).

66. 542 U.S. 466.

67. *Id.* at 476 (quotation omitted).

States lacked formal sovereignty over the territory.[68] In the fifteenth, and last, footnote in the opinion, the Court stated that:

> [Being] held in Executive detention for more than two years in territory subject to the long-term, exclusive jurisdiction and control of the United States, without access to counsel and without being charged with any wrongdoing—unquestionably describe[s] "custody in violation of the Constitution or laws or treaties of the United States,"[69]

which is all that the habeas statute requires.

Soon after the Court's decision in *Rasul*, many prominent legal scholars argued, based mostly on the quoted passage above, that the Court held, or at least strongly implied, that the aliens possess constitutional rights.[70] Lower courts disagreed, though, about how the case should be interpreted. In one case, *In re Guantanamo Detainee Cases*,[71] the district court held that the Court in *Rasul* indicated that the aliens detained on Guantanamo possess a "fundamental right to due process."[72] In another case, *Khalid v. Bush*,[73] the district court held that the Court's decision in *Rasul* was merely a statutory holding and that even if the detainees have a statutory right to habeas corpus, they do not have constitutional protections.[74]

The Court's recent decision in *Hamdan v. Rumsfeld*,[75] involving a Yemeni national captured by the United States in Afghanistan and de-

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68. *See id.* at 484.

69. *Id.* at 483 n.15 (quoting 28 U.S.C. § 2241(c)(3) (2006)).

70. In addition to the language quoted above in the text, the fifteenth footnote in Rasul also cited to Justice Kennedy's concurring opinion in *Verdugo-Uquidez*, 494 U.S. 259, where he argued that "the Government may act only as the Constitution authorizes, whether the actions in question are foreign or domestic." *Id.* at 277 (Kennedy, J., concurring) (citation omitted). As noted above, some scholars have interpreted the *Rasul* footnote as indicating that the detainees possess constitutional rights. *See, e.g.*, Gerald L. Neuman, *Extraterritorial Rights and Constitutional Methodology After* Rasul v. Bush, 153 U. PA. L. REV. 2073, 2073 (2005) (arguing that the "majority opinion strongly suggests in a footnote that foreign nationals in U.S. custody at Guantanamo . . . possess constitutional rights" but noting that the "opinion leaves ambiguous the reason why foreign nationals have constitutional rights there—whether because they are human beings in long-term U.S. custody or because of the special character of U.S. authority at Guantanamo"); Kermit Roosevelt III, *Guantanamo and the Conflict of Laws:* Rasul *and Beyond*, 153 U. PA. L. REV. 2017, 2026-28 (2005) (arguing that the Court at least hinted that the detainees possess constitutional rights); Neal K. Katyal, *Executive and Judicial Overreaction in the Guantanamo Cases*, 2004 CATO SUP. CT. REV. 49, 55 (stating that the "sharp reference to Justice Kennedy's *Verdugo* concurrence underscores the point—that certain fundamental rights may apply abroad"). Some commentators would no doubt argue that, even apart from the language in the footnote, the Court's statutory holding compels the recognition that the detainees possess constitutional rights. *See* Hart, *supra* note 27, at 1393 ("The great and generating principle of this whole body of law—that the Constitution always applies when a court is sitting with jurisdiction in habeas corpus"); Roosevelt, *supra* at 2026 (suggesting that the scope of habeas jurisdiction should be deemed to be coextensive with the scope of substantive federal rights).

71. 355 F. Supp. 2d 443.

72. *Guantanamo Detainee Cases*, 355 F. Supp. 2d at 463.

73. 355 F. Supp. 2d 311, *vacated by* Boumediene v. Bush, 476 F.3d 981 (D.C. Cir. 2007).

74. *Khalid*, 355 F. Supp. 2d at 323.

75. 126 S. Ct. 2749 (2006).

tained on Guantanamo, was similarly decided without a determination of the constitutional rights possessed by the detainees. In *Hamdan*, the Supreme Court invalided the military commissions set up by the government to try the Guantanamo detainees on the basis of federal statutes relating to military justice, treaties relating to the treatment of military detainees, and the customary international laws of war.[76] While the decision is undoubtedly important, by deciding the case on non-constitutional grounds, and thus allowing Congress to legislate around the decision, the Supreme Court did not quite deliver the "knockout blow" that some commentators had described the decision as delivering.[77]

Soon after the *Hamdan* decision, Congress passed the Military Commissions Act (MCA), which purported to strip federal courts of jurisdiction over habeas corpus petitions filed by any "alien" detained by the United States as an "enemy combatant."[78] Recently, the D.C. Circuit held that the statute clearly stripped courts of jurisdiction over habeas corpus petitions and that the statute was constitutional with regard to the alien detainees on Guantanamo because an alien captured abroad and detained outside the sovereign territory of the United States is not protected under the Suspension Clause.[79] In the D.C. Circuit's view, the Supreme Court's decision in *Rasul* rested only on statutory interpretation and did not compel a constitutional holding in favor of the detainees.[80] The D.C. Circuit reasoned that Guantanamo is no different than a foreign country because Congress has made clear that Cuba, and not the United States, has sovereignty over Guantanamo.[81]

III. IMMIGRATION LAW AND NATIONAL SECURITY ABSENT THE "ENTRY FICTION"

Now that Congress has eliminated statutory habeas corpus jurisdiction, resolution of the Guantanamo cases will likely force the Supreme Court to decide the constitutional rights of the detainees.[82] Section A

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76. *See* Ariel Zemach, *Taking War Seriously: Applying the Law of War to Hostilities Within an Occupied Territory*, 38 GEO. WASH. INT'L L. REV. 645, 655-56 (2006) (describing the *Hamdan* decision).

77. *See, e.g.*, Martin S. Flaherty, *More Real Than Apparent: Separation of Powers, the Rule of Law, and Comparative Executive "Creativity" in* Hamdan v. Rumsfeld, 2006 CATO SUP. CT. REV. 51, 51 (2005-2006) (describing the "common view" that the Court had delivered a "knockout blow").

78. *See* Military Commissions Act of 2006, Pub. L. No. 109-366, § 950j, 120 Stat. 2600 (2006).

79. *See Boumediene*, 476 F.3d at 991-94, *cert. denied*, 127 S. Ct. 1478 (2007).

80. *See Boumediene*, 476 F.3d at 992 n.10.

81. *See id.* at 992. On remand from the Supreme Court, the District Court in *Hamdan* also held that Hamdan was not constitutionally entitled to habeas corpus because, although he has been a prisoner of the United States for five years, his detention on Guantanamo "lacks the geographical and volitional predicates necessary to claim a constitutional right to habeas corpus." *See* Hamdan v. Rumsfeld, 464 F. Supp. 2d 9, 16-18 (D.D.C. 2006) (citation omitted).

82. Such a decision may not be immediate, however. The Supreme Court has denied certiorari in *Boumediene*. *See* Boumediene v. Bush, 127 S. Ct. 1478. The Court may decide to hear the case at a later date, however. The Detainee Treatment Act of 2005, Tit. X, 119 Stat. 2739, provides

explains why judicial recognition that the Guantanamo detainees possess constitutional rights should lead to subsequent judicial recognition that inadmissible aliens detained within the United States also possess constitutional rights, including rights against indefinite detention. Section B argues that the recognition that at least some inadmissible aliens possess constitutional rights would not undermine the government's national security efforts. Thus, as Section C explains, recognition that the Cuban national from case (2) possesses constitutional rights against indefinite detention would not necessarily mean that the Swiss national from case (1) also possesses constitutional rights against indefinite detention.

A. The Possibility that the Current Guantanamo Cases Could Lead to the End of the "Entry Fiction" in Immigration Law

1. The Effects of a Holding That the Detainees Lack Constitutional Rights

The range of possible grounds for a decision regarding the constitutional rights of the current Guantanamo detainees is, of course, relatively large. For example, the Supreme Court could decline to address whether the current detainees possess fundamental constitutional rights on the basis that even if they do, such rights do not include a right to habeas corpus.[83] Conversely, the Court could hold that the current Guantanamo detainees do not possess any constitutional rights. Any of the Court's possible holdings would likely not prevent any lower court from reexamining the entry fiction and holding that aliens located within the United States (even if under the entry fiction) possess at least some constitutional rights, however.[84] A decision by the Supreme Court that territoriality will continue to retain its importance in determining constitutional

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for limited review by the D.C. Circuit of certain determinations of the Combatant Status Review Tribunals. The statute will undoubtedly be challenged on the basis that it does not provide a constitutionally adequate substitute for habeas corpus. If it is challenged on this basis, it is probable that the Court will grant certiorari. Three Justices (Justices Breyer, Souter and Ginsburg) dissented from the denial of certiorari in *Boumediene*, and Justices Steven and Kennedy issued a statement indicating that they would agree to hear the case if aliens seek to establish that they would agree to hear the case if the aliens seek to establish that they have been injured by the Detainee Treatment Act. *See* 127 S. Ct. 1478. In any case, review of the constitutional rights of the alien detainees would not be likely if Congress passes legislation restoring habeas corpus jurisdiction. *See* Habeas Corpus Restoration Act of 2006, S. 4081, 109th Cong. (2006). The passage of such a statute would again present the possibility of nonconstitutional decisions.

83. For a discussion of the complexities of the Suspension Clause issues see Amanda Tyler, *Is Suspension a Political Question*, 59 STAN. L. REV. 333, 408-12 (2006); James E. Pfander, *The Limits of Habeas Jurisdiction and the Global War on Terror*, 91 CORNELL L. REV. 497, 537-38 (2006).

84. *See supra* notes 40-46 and accompanying text (describing the judicial confusion regarding the definition and scope of the entry fiction). Indeed, the Court could hold that the current Guantanamo detainees lack constitutional rights for reasons unconnected to immigration law, such as, for example, their status as "enemy combatants," although a decision relying solely on such a basis seems unlikely. *See* Boumediene v. Bush, 476 F.3d 981, 991 n.8 (D.C. Cir. 2007) (indicating that its decision holding that the alien detainees on Guantanamo lack protection under the Suspension Clause was based on territoriality and that enemy alien status played no role); *see also* Rotunda, *supra* note 60, at 33 (indicating the possibility that detainees captured in the theatre of war who are citizens of the country with whom we are at war may lack constitutional rights).

rights would not necessarily compel the continuing recognition of territorial fictions. In other words, a holding that aliens detained on foreign territory do not possess constitutional rights should not preclude a holding that detainees on U.S. soil do possess constitutional rights.

A decision by the Court regarding the constitutional rights of the current Guantanamo detainees would thus not likely prevent lower courts from eliminating the entry fiction and holding that aliens have due process rights sufficient to prevent indefinite detention.[85] A holding that an alien in the position of the Cuban national in case (2) possesses constitutional rights sufficient to preclude indefinite detention would not, however, require the elimination of the entry fiction.[86] Certainly, inadmissible aliens may constitutionally be detained pending their deportation.[87] However, as some courts have recognized, inadmissible aliens have constitutional rights (including due process rights) that protect them from governmental actions that occur outside of immigration law.[88] Indefinite detention when there is no foreseeable possibility of deportation could be analogized to these cases outside of immigration law that recognize that inadmissible aliens possess constitutional rights. As the Court stated in *Zadvydas*, once deportation is no longer foreseeable, the immigration justification for the detention is absent and continued detention is thus unreasonable.[89] Thus, indefinite detention could be characterized by courts as government action that occurs outside of immigration law. At the same time, courts could continue to hold that inadmissible aliens

85. Indeed, although it is in the minority, the Sixth Circuit has already held that indefinite detention of inadmissible aliens is unconstitutional. *See* Rosales-Garcia v. Holland, 322 F.3d 386 (6th Cir.) (en banc), *cert. denied*, 539 U.S. 941 (2003).

86. In any case, lower courts would not of course be able to overrule Supreme Court precedent and would thus have to distinguish *Mezei* and other entry fiction cases. In *Rosales-Garcia*, the Sixth Circuit did just that in holding that the indefinite detention of inadmissible aliens is unconstitutional. *Rosales-Garcia*, 322 F.3d. at 413-14 (claiming that the Court in *Mezei* "explicitly grounded its decision in the special circumstances of a national emergency and the determination by the Attorney General that Mezei presented a threat to national security").

87. *Cf.* Wong Wing v. United States, 163 U.S. 228, 235 (1896) (stating that "detention or temporary confinement, as part of the means necessary to give effect to the provisions for the exclusion or expulsion of aliens, would be valid. Proceedings to exclude or expel would be vain if those accused could not be held in custody pending the inquiry into their true character, and while arrangements were being made for their deportation.").

88. *See supra* notes 45-46 and accompanying text.

89. Zadvydas v. Davis, 533 U.S. 678, 699-700 (2001); *see also* Demore v. Kim, 538 U.S. 510, 527 (2003) (reasoning that the potentially indefinite detention in *Zadvydas* "did not serve its purported immigration purpose" because it affected aliens for whom removal was "no longer practically attainable" due to the aliens' native countries refusing to accept their return); Cole, *supra* note 32, at 1007 (arguing that "preventive detention should be constitutionally permissible only where necessary in aid of removal."). A decision that indefinite detention of inadmissible aliens, like indefinite detention of deportable aliens, is outside of immigration law would not require a court to directly overrule *Mezei*. *See supra* note 86. It would, however, require a somewhat aggressive interpretation of *Zadvydas*, considering that the Court indicated that indefinite detention of deportable aliens was outside of immigration law when deportation is not foreseeable, but, at the same time, emphasized the territorial distinction in immigration law. *See supra* note 48 and accompanying text.

have no constitutional rights with regard to immigration and deportation proceedings.[90]

2. The Effects of a Broad Holding That the Detainees Possess Constitutional Rights

If the Court holds that the Guantanamo detainees possess constitutional rights, however, the decision should compel lower courts to conclude that (at least some) inadmissible aliens possess constitutional rights. A broad (and very unlikely) holding by the Court that Guantanamo is not equivalent to an unincorporated U.S. territory, but that the Constitution binds the federal government wherever it acts would raise many difficult issues for immigration law.[91] Such a ruling could be construed as overruling the "basic territorial distinction" in immigration law and establishing that all inadmissible aliens potentially possess at least some constitutional rights.[92] Discounting the importance of territory as a determinant of constitutional rights would not, however, necessarily undermine the importance of status. The recognition that inadmissible aliens have constitutional rights would not mean that they would be entitled to the same rights as deportable aliens.[93] Courts would undoubtedly hold that inadmissible aliens have fewer constitutional rights due to their diminished connection to the United States.[94]

Nevertheless, many would be troubled by the idea that aliens with little or no connection to the United States would be able to make constitutional claims regarding actions by the U.S. government that occur on foreign soil. Consider, for example, a national of a foreign country, say Switzerland, who applies for a visa at a consulate in Switzerland that would allow her to enter the United States. The Swiss national claims that her application was denied because of her political associations, in violation of the First Amendment.[95] Recognizing such claims would be a significant departure from our current system.[96] In essence, such recog-

90. *See* Lynch v. Cannatella, 810 F.2d 1363, 1373 (5th Cir. 1987).

91. *See* Neuman, *supra* note 61, at 44; *see also supra* notes 63-65 and accompanying text (describing the different ways that courts have characterized the status of Guantanamo).

92. *See supra* Part II.A (describing the territorial distinction in immigration law).

93. *See supra* notes 23-27 and accompanying text (explaining the differences between inadmissible and deportable aliens).

94. *See Zadvydas*, 533 U.S. at 694 (indicating that the nature of constitutional protections "may vary depending upon status and circumstance" (citation omitted)); *see also* David A. Martin, *Graduated Application of Constitutional Protections for Aliens: The Real Meaning of* Zadvydas v. Davis, 2001 SUP. CT. REV. 47 (describing how immigration status affects constitutional rights).

95. A holding that the Constitution applies wherever the government acts could be limited (and most likely would be) to only the application of certain constitutional provisions, such as due process. *See* Roosevelt, *supra* note 70, at 2042-43. Even if the hypothetical above involved a due process claim, instead of a First Amendment claim, however, many would no doubt still be troubled by the idea that an alien with little or no connection to the United States could make constitutional claims when the government action in question occurs on foreign soil.

96. *See* Am. Immigration Lawyers Ass'n v. Reno, 18 F. Supp. 2d 38, 60 (D.D.C. 1998) (rejecting the aliens' constitutional challenge to the procedures for expedited removal of aliens arriving in the United States without proper documentation because, as aliens seeking initial admission, they

nition could mean that any alien who comes into contact with our immigration system (even through voluntary application) would possess at least some constitutional rights.[97] While some commentators would no doubt celebrate such an extension of the reach of the Constitution, speculation about the effects of a broad constitutional holding described above is likely purely academic considering the unlikelihood of such a decision.

3. The Effects of a Narrow Holding That the Detainees Possess Constitutional Rights

A narrower (and much more likely) ruling by the Court that categorizes Guantanamo as equivalent to an unincorporated United States territory and holds that the detainees therefore have fundamental constitutional rights should still impact immigration law even if the Court does not make any broad statements about the extraterritorial reach of the Constitution.[98] Such a holding would not necessarily lead to the recognition of constitutional rights for all inadmissible aliens, however. For one reason, many alleged constitutional violations would involve nonresident aliens in foreign territories. Thus, the narrower holding would not raise the question of whether the precedents precluding a constitutional challenge in the visa example above should be reconsidered.

A narrower ruling *should* raise questions about the continuing validity of the entry fiction in immigration law, though.[99] A holding that maintained that detainees being held indefinitely on Guantanamo possess fundamental constitutional rights without subsequent repudiation (in all jurisdictions) of the principle that detainees being held indefinitely *in* the United States possess *no* constitutional rights would be arbitrary and nonsensical.[100] Similar to a broad holding, a narrow holding would not compel the recognition that deportable and inadmissible aliens possess equivalent rights (or even that inadmissible aliens possess a great deal of constitutional protection), but it could place inadmissible aliens in a simi-

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had no procedural due process rights); *see also* Gerald L. Neuman, *Discretionary Deportation*, 20 GEO. IMMIGR. L.J. 611, 617 (2006) (stating that "[a]s extraterritorial decision makers . . . consular officers have substantial de facto leeway, employ informal procedures, and are not subject to judicial review.").

97. *See* Hiroshi Motomura, Review Essay, *Whose Immigration Law?: Citizens, Aliens, and the Constitution*, 97 COLUM. L. REV. 1567, 1579 (1997) (questioning whether the alien in the position of the Swiss national described above should be able to make a constitutional claim).

98. *See* Neuman, *supra* note 70, at 2073-74 (predicting that the cases will be resolved on issues peculiar to Guantanamo). Another possibility is a narrower holding that turns on the special circumstances involving long-term detention by the government rather than the characterization of Guantanamo. *See* Neuman, *supra* note 61, at 44-53.

99. Or, to put it another way, the decision could resolve the current confusion regarding the entry fiction by leading to a clarification by lower courts that the entry fiction only means that inadmissible aliens have less constitutional protection than do deportable aliens, not that they are entirely without constitutional protection.

100. Of course, the entry fiction itself is arbitrary and nonsensical, so there is no guarantee that the entry fiction would be reexamined on the basis of the outcome of the current Guantanamo cases.

lar position as deportable aliens with regard to indefinite detention.[101] If inadmissible aliens possess due process protections, even if to a lesser extent than deportable aliens, there may be no principled basis for determining that deportable aliens, but not inadmissible aliens, have a due process liberty interest against indefinite detention.[102] This would be especially true if, as discussed above, a court were to characterize the indefinite detention of inadmissible aliens as falling outside the scope of immigration law.[103]

B. The National Security Implications of the Recognition of Constitutional Rights for Inadmissible Aliens

A decision that inadmissible aliens have constitutional rights against indefinite detention would undoubtedly be opposed by the government on national security grounds.[104] The government would likely claim that a decision eliminating the entry fiction and preventing the indefinite detention of inadmissible aliens would prevent it from controlling entry into the country. A foreign state could, for example, simply refuse to accept the return of its citizens, knowing that the U.S. government would likely be forced to eventually release the aliens into the United States.[105] The government would argue that elimination of the entry fiction would thus violate the promise of the Court in *Zadvydas* that by recognizing the territorial distinction in immigration law, it left no "unprotected spot in the Nation's armor."[106] Such fears would likely be taken seriously.

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101. *Cf.* Michael Louis Corrado, *Sex Offenders, Unlawful Combatants, and Preventative Detention,* 84 N.C. L. REV. 77, 113-20 (2005) (arguing that Congress could not constitutionally authorize indefinite detention even for terrorist suspects).

102. *See Zadvydas*, 533 U.S. at 694-95 (stating "[n]or are we aware of any other authority that would support . . . limitation of due process protection for removable aliens to freedom from detention that is arbitrary or capricious"); *cf. id.* at 690 (requiring a "sufficiently strong special justification . . . for indefinite civil detention"). Any distinction between deportable and inadmissible aliens would be especially weak if one concludes that deportable aliens who entered the country surreptitiously would be protected from indefinite detention under *Zadvydas*. *See supra* notes 47-50 and accompanying text (explaining the *Zavydas* decision). As of now, this issue is undecided. *See supra* note 24 and accompanying text (explaining that the definition of deportable aliens for both constitutional and statutory purposes used to include surreptitious entries into the United States but now the statutory definition only includes lawful entries).

103. *See supra* notes 88-90 and accompanying text.

104. *Cf. Zadvydas*, 533 U.S. at 699-700 (responding to the government's national security and foreign policy concerns about its decision).

105. *See supra* note 3 and accompanying text (describing a situation, the Mariel boatlift, where a foreign state authorized the departure of its citizens and refused to accept their return). One possible (but highly objectionable) way around the problem would be for the government to house the aliens on foreign soil. *See* Neuman, *supra* note 70, at 2074 (noting that the government could "relocate its operations for maritime enforcement of U.S. immigration laws against refugees, economic migrants, and smugglers" to more "authentically extraterritorial venues"). This would only be a feasible alternative, however, if aliens detained on foreign territory do not possess constitutional rights that could be asserted against detention. *See* Part III.A.2. (discussing the possibility that the Court could hold that aliens located on foreign territory possess constitutional rights).

106. *Zadvydas*, 533 U.S. at 695-96. Of course, the Court followed up its decision in *Zadvydas* by holding that the government did not have statutory authority to detain inadmissible aliens indefinitely; *see supra* notes 51-52 and accompanying text.

Lower courts have assumed the legitimacy of the scenario described above in justifying the indefinite detention of inadmissible aliens.[107]

Nevertheless, the government's national security fears would be misplaced. Elimination of the entry fiction would not result in open borders. It would only give inadmissible aliens *some* constitutional rights. Most, if not all, of the government's existing anti-terrorism related measures that involve immigration laws (as well as those that involve non-immigration laws) would still be allowed if the entry fiction were to be eliminated.[108] Eliminating the entry fiction would not, after all, necessarily eliminate the plenary power doctrine.[109] Thus, governmental actions would, for the most part, not be subject to mainstream constitutional constraints.

Detention, likely even indefinite detention, would still be constitutionally permissible in some circumstances.[110] In *Zadvydas*, the Court made clear that special circumstances such as terrorism might require "heightened deference" to Congress when a court considers a statute that provides for terrorism-related detention of *deportable* aliens.[111] Undoubtedly, the "heightened deference" to Congress would be even more heightened for a statute that provided for the detention of inadmissible aliens. At the very least, short-term detention would be constitutionally permissible. In *Demore v. Kim*,[112] for example, the Court held that the mandatory detention of criminal permanent resident aliens pending their deportation hearings does not violate due process, stating that "[i]n the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens."[113] Thus, the government would still be able to use federal immi-

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107. *See* Barrera-Echavarria v. Rison, 44 F.3d 1441, 1448 (9th Cir. 1995) (en banc) (stating that "[a] judicial decision requiring that excludable aliens be released into American society when neither their countries of origin nor any third country will admit them might encourage the sort of intransigence Cuba has exhibited in the negotiations over the Mariel refugees."); Jean v. Nelson, 727 F.2d 957, 975 (11th Cir. 1984) (en banc) (holding that "this approach would ultimately result in our losing control over our borders. A foreign leader could eventually compel us to grant physical admission via parole to any aliens he wished by the simple expedient of sending them here and then refusing to take them back."), *aff'd*, 472 U.S. 846 (1985). The same problem could arise currently, however, under the Court's decision in *Zadvydas* if the aliens entered the country surreptitiously instead of being stopped at the border. *See supra* note 102.

108. I am not endorsing all of the government's anti-terrorism efforts, but merely explaining how they would not be jeopardized by the elimination of the entry fiction.

109. *See supra* note 22 and accompanying text (describing the plenary power doctrine).

110. Arguably, the Court has already acknowledged that the terrorism-related detainees on Guantanamo may be indefinitely detained. *See infra* note 122.

111. 533 U.S. at 696 (stating that "[we do not] consider terrorism or other special circumstances where special arguments might be made for forms of preventive detention and for heightened deference to the judgments of the political branches with respect to matters of national security."). Subsequent to *Zadvydas*, Congress passed a statute providing for the indefinite detention of terrorist suspects. *See* Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT Act) of 2001 § 412, 8 U.S.C. § 1226a (2006).

112. 538 U.S. 510 (2003).

113. *Demore*, 538 U.S. at 521, 530 (quoting Mathews v. Diaz, 426 U.S. 67, 79-80 (1976)).

gration laws to arrest and detain aliens suspected of terrorist ties, as it did after the September 11th attacks without constitutional problems.[114]

The government would also be able to continue its other controversial (and many would say ill-conceived) uses of immigration laws to enhance national security. Eliminating the entry fiction certainly would not prevent the government from tracking the movements of foreign nationals who enter the United States. The government would thus not be prevented from having registration programs like the National Security Entry-Exit Registration System (NSEERS), which requires nationals of certain countries to be fingerprinted and photographed upon entry, to register periodically with the government, and to comply with exit controls when they leave the country.[115] The government would thus be able to continue to engage in racial profiling and selective treatment of Arabs and Muslims, including singling them out for deportation.[116] In addition, the government would still be able to take a myriad of other actions, such as closing removal hearings and targeting aliens based on their political associations.[117]

C. Inadmissible Aliens, Indefinite Detention, and Legal Fictions

It is intuitive to believe that issues of national security inevitably lead to greater judicial deference to the political branches' assertions of authority, and decreased respect for constitutional and human rights.[118] While undoubtedly true in large part, the current Guantanamo detainee cases present an opportunity for courts to counter that assumption, at

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114. *See* Susan M. Akram & Maritza Karmely, *Immigration and Constitutional Consequences of Post-9/11 Policies Involving Arabs and Muslims in the United States: Is Alienage a Distinction Without a Difference?*, 38 U.C. DAVIS L. REV. 609, 620-22 (2005) (describing the massive arrests that occurred after the attacks of 9/11); Donald Kerwin, *The Use and Misuse of "National Security" Rationale in Crafting U.S. Refugee and Immigration Policies*, 17 INT'L J. REFUGEE L. 749, 749-50 (2005); Margaret H. Taylor, *Dangerous by Decree: Detention Without Bond in Immigration Proceedings*, 50 LOY. L. REV. 149, 152 (2004).

115. *See* Akram & Karmely, *supra* note 114, at 630-32 (describing the NSEERS program).

116. *See id.* at 630-31 (describing how the government has engaged in racial profiling and selective treatment of Arabs and Muslims). Thus far, challenges to the government's activities have not been particularly successful. *See, e.g.*, Zafar v. U.S. Att'y Gen., 461 F.3d 1357, 1367 (11th Cir. 2006) (citing Reno v. Am.-Arab Anti-Discrimination Comm., 525 U.S. 471 (1999) (holding that it was not an equal protection violation to require the aliens to register pursuant to the NSEERS process and rejecting the petitioners' argument that the NSEERS program infringed their equal protection rights by "precipitat[ing] them being placed in these discretionary removal proceedings by the Attorney General" because the record did not support the argument)); Ali v. Gonzales, 440 F.3d 678, 681-82 (5th Cir. 2006) (rejecting argument that NSEERS program violated equal protection).

117. *See generally* Neuman, *supra* note 10 (describing the difficulties of challenging immigration decisions on the basis of the First Amendment). Some courts have recognized certain First Amendment limitations on the government in the context of deportation proceedings, however. *See* Detroit Free Press v. Ashcroft, 303 F.3d 681, 710 (6th Cir. 2003) (holding that there is a First Amendment right of access to deportation proceedings that was violated by a government directive that required closure of "special interest" deportation proceedings).

118. *Cf.* Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625, 1642 (1992) (explaining how the Supreme Court's due process jurisprudence for aliens became less favorable "at the height of McCarthyism and the nation's preoccupation with the perceived Communist threat").

least as regards the entry fiction in immigration law. Under the standard theory of the entry fiction, the Cuban national in case (2) does not have any constitutional protections and may be detained in a U.S. prison indefinitely without violating the Constitution.[119] As explained above, a judicial recognition that the detainees on Guantanamo possess constitutional rights should change the outcome of case (2).[120] The Cuban national would have constitutional rights, including, absent evidence of a national security threat or other special circumstances, constitutional rights that should be recognized as sufficiently strong to prevent indefinite detention.

It is beyond the scope of this Article to join the debate regarding the precise constitutional rights that should be guaranteed the current Guantanamo detainees. Nevertheless, while the recognition that the aliens on Guantanamo possess constitutional rights could lead to the elimination of the entry fiction in immigration law, the government would still be able to take use immigration and other laws to ensure national security.[121] Thus, the Swiss national from case (1) might have fundamental constitutional rights, but those rights may not be sufficient to prevent indefinite detention.[122]

Regardless of whether the Supreme Court ultimately rules that the current Guantanamo detainees possess constitutional rights, it is time for the entry fiction to be further redefined, or eliminated altogether.[123] It is true that legal fictions are not unique to immigration law.[124] Fictions should be discarded, however, when they are unnecessary and immoral.[125] Thus, because there is no need for a legal fiction that pretends that aliens imprisoned within the United States are actually outside our territory and thus unprotected by the Constitution,[126] the entry fiction should be discarded.

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119. *See supra* Part II.A. (describing the entry fiction and indefinite detention). The executive branch would also need statutory authority in order to detain the Cuban national indefinitely, which it does not currently possess. *See supra* notes 51-54 and accompanying text. The current lack of statutory authority should not give inadmissible aliens much comfort, however. Such authority can easily be granted the executive branch.

120. *See supra* Part III.A.3.

121. *See supra* Part III.B.

122. It is perhaps true that not even citizens have a right to be free from indefinite detention when they are detained as enemy combatants. *See* Hamdi v. Rumsfeld, 542 U.S. 507, 521 (2004) (stating that detention was authorized, in a case involving a citizen, for as long as "United States troops are still involved in active combat in Afghanistan"). *But see* Corrado, *supra* note 101.

123. As discussed earlier, the entry fiction can be defined to exclude indefinite detention on the theory that indefinite detention when deportation is not foreseeable is outside of immigration law, and thus outside the scope of the entry fiction. *See supra* notes 88-90 and accompanying text.

124. *See* Note, *Lessons From Abroad: Mathematical, Poetic, and Literary Fictions in the Law*, 115 HARV. L. REV. 2228 (2002).

125. The entry fiction is unnecessary because the government can ably protect national security without resorting to the entry fiction. *See supra* Part III.B.

126. There have been arguments that eliminating the entry fiction could compel the government to refuse to parole aliens into the country. *See* Martin, *supra* note 94, at 81-83, 99-100 (stating that granting parolees due process protections may induce restrictions on the parole program); *see*

Perhaps it is time for a new legal fiction, the "detention fiction," that allows inadmissible aliens to avoid indefinite imprisonment while recognizing the extreme limits on their claim to remain in the United States. Ordering an alien released on parole is not equivalent to affording the alien legal admission into the country. Although temporarily free of custody, an inadmissible alien has no legal right to remain in the United States and can be deported whenever the United States is able to do so. In addition, an alien released on parole may be subjected to release conditions that aim to meet the government's security concerns.[127] Releasing the alien is no more a legal "entry" than is holding him in custody within the United States. Thus, under the detention fiction, an alien would be legally considered to be detained by the government, but would be free from imprisonment. Such a legal fiction is certainly less preposterous than the current entry fiction, and is a good deal more humane.

CONCLUSION

It is impossible to deny that human rights have been a major casualty of the War on Terrorism. Counterintuitively, though, the War on Terrorism may have some positive effects on immigration law because it may help lead to the elimination of the entry fiction. While this would result in the recognition that inadmissible aliens possess constitutional rights, and thus move immigration law closer to the rule of law ideal, its effects should not be overstated. Immigration law would still suffer from unnecessary unfairness and discrimination, and the government would still be able to use immigration laws for national security purposes. Nevertheless, national security issues may dominate the current discourse on immigration law, but given the many reasons for our current high-volume admission system, immigration responses to terrorism will always be secondary.[128] Despite the modest nature of the changes that the elimination of the entry fiction would bring, the possible recognition that even aliens stopped at our borders possess fundamental constitutional rights should be celebrated.

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also Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 215 (1953) (stating that government could choose to "keep entrants by sea aboard the vessel pending determination of their admissibility"). It is true that the government could choose to detain aliens in a purely foreign territory and perhaps not be bound by the Constitution. *See supra* note 105. It is, however, a rather weak argument that the entry fiction should not be eliminated because the government may then look to indefinitely detain aliens on foreign soil rather than within the United States.

127. *See Zadvydas*, 533 U.S. at 696 (stating that the issue before the Court was "not between imprisonment and the alien 'living at large'" but rather "between imprisonment and supervision under release conditions that may not be violated" (citation omitted)).

128. *See* David A. Martin, *Preventive Detention: Immigration Law Lessons for the Enemy Combatant Debate*, 18 GEO. IMMIGR. L.J. 305, 307 (2004).