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Volume 37
Number 4 *Symposium: Social Justice in the
21st Century*

Article 11

3-1-2004

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Recommended Citation

John W. Lam, *The Prisoner's Dilemma: Reassessment of Borrero v. Aljets and the Indefinite Detention of Inadmissible Aliens*, 37 Loy. L.A. L. Rev. 1297 (2004).

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THE PRISONER'S DILEMMA: REASSESSMENT OF *BORRERO V. ALJETS* AND THE INDEFINITE DETENTION OF INADMISSIBLE ALIENS

I. INTRODUCTION

Every day the reverberating crash of steel doors echoes throughout prisons across the nation. The echo rings louder for some than others, because for some the deafening sound serves as a continual reminder of a state of uncertainty associated with a possible life sentence. This sentence is neither the product of judge and jury nor the result of a heinous crime against society. Rather, it is a life sentence resulting from the government's inability to find another alternative. This is Lazaro Borrero's reality, and that of thousands of other imprisoned aliens like him.

Indefinite imprisonment without the possibility of release conjures images of the most Draconian penalties, believed to be long abandoned by rational and sophisticated Western societies. The United States, however, finds itself in the twenty-first century pursuing an immigration policy that authorizes the indefinite detention of aliens found within its borders.

In *Borrero v. Aljets*,¹ the Eighth Circuit Court of Appeals held that 8 U.S.C.A. § 1231(a)(6),² which allows continued detention of inadmissible aliens *beyond* the standard removal period, authorized the United States government to indefinitely detain inadmissible aliens.³ In so holding, the Eighth Circuit Court rejected the Sixth and Ninth Circuit Courts of Appeals' decisions. The *Borrero* decision

1. 325 F.3d 1003 (8th Cir. 2003).

2. 8 U.S.C.A. § 1231(a)(6) (West 1999).

3. *Borrero*, 325 F.3d at 1005. An inadmissible alien is one that is determined ineligible to receive visas and is ineligible to be admitted into the United States. See *infra* text accompanying notes 9–10.

highlights the dilemma facing thousands of inadmissible aliens today—namely, indefinite detention inside U.S. prisons.

This Comment re-examines the *Borrero* decision concerning the indefinite detention of inadmissible aliens. Part II details the relevant law and facts framing the central issue in *Borrero*. Next, Part III outlines the court's underlying reasoning in upholding the constitutionality of the indefinite detention of Lazaro Borrero. Part IV provides a detailed analysis of the *Borrero* court's flawed reasoning. Part V looks beyond *Borrero* and addresses the implications that flow from the *Borrero* court's decision. Lastly, Part VI concludes that the *Borrero* court, by upholding the government's right to detain inadmissible aliens indefinitely, reaches the wrong conclusion

II. BACKGROUND

A nation's right to regulate its immigration policy has long been recognized as inherent to the concept of sovereignty.⁴ As such, it is the United States' sovereign prerogative to govern aliens seeking entry into its borders.⁵ Congress enacted 8 U.S.C.A. § 1231(a)(6), which arises from this inherent power. It reads:

An alien ordered removed who is inadmissible under section 1182 of this title, removable under section 1227(a)(1)(C), 1227(a)(2), or 1227(a)(4) of this title or who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, *may be detained beyond the removal period* and, if released, shall be subject to the terms of supervision in paragraph (3).⁶

4. See *Landon v. Plasencia*, 459 U.S. 21, 32 (1982) ("This Court has long held that an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application, for the power to admit or exclude aliens is a sovereign prerogative."). Sovereignty is "freedom from external control." MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 1125 (10th ed. 1996).

5. See *Mathews v. Diaz*, 426 U.S. 67, 81 (1976) ("[R]egulating the relationship between the United States and our alien visitors has been committed to the political branches of the Federal Government.").

6. 8 U.S.C.A. § 1231(a)(6) (West 1999) (emphasis added).

For purposes of § 1231(a)(6), 8 U.S.C.A. § 1182(a)⁷ states that an inadmissible alien is one who is determined ineligible to receive visas and is ineligible to be admitted into the United States.⁸ Section 1182 lists various categories of aliens who are inadmissible.⁹

In recent years, § 1231(a)(6) has been at the epicenter of several constitutional challenges initiated by aliens facing indefinite detention. With little guidance from § 1231's language, imprisoned aliens, whose native countries have denied them repatriation, often endure an uncertain fate inside U.S. prisons as detention "beyond the removal period" becomes indefinite detention.

In the Supreme Court case *Zadvydas v. Davis*,¹⁰ the Court set out to address the constitutionality of the indefinite detention of aliens pursuant to § 1231(a)(6).¹¹ In *Zadvydas*, the class of aliens at issue was removable aliens—aliens already *admitted*, but whom the government sought to remove from the United States.¹² Regarding this class of aliens, the Court determined that although the statute's express language does not demand it, removable aliens could only be detained for a reasonable period—not indefinitely.¹³ The Court's decision, however, left unanswered the question of whether the *Zadvydas* interpretation of § 1231(a)(6), implying a reasonable detention period, also applied to inadmissible aliens. This question went before the Eighth Circuit Court in *Borrero v. Aljets* in 2002.

A. *Zadvydas v. Davis*

In *Zadvydas*, the Supreme Court held that 8 U.S.C.A. § 1231(a)(6), which grants the Attorney General the power to detain *removable* aliens beyond the ninety-day statutory "removal period," did not authorize the Immigration and Naturalization Service (INS) to indefinitely detain removable aliens.¹⁴ Rather, the Court narrowed

7. 8 U.S.C.A. § 1182(a) (West 1999).

8. *Id.*

9. *Id.* Possible grounds for inadmissibility under § 1182 are: (1) carrying communicable diseases or those suffering from physical or mental disorders; (2) having multiple criminal convictions; (3) trafficking controlled substances; (4) prostitution; and (5) security reasons. *See id.*

10. 533 U.S. 678 (2001).

11. *Id.* at 686.

12. *Id.* at 682.

13. *Id.* at 699.

14. *See id.*

the statute's scope to avoid unconstitutionality by reading a six month reasonableness limitation into the statute.¹⁵ The Court, however, failed to address whether the six month reasonableness period applied equally to the other categories of aliens listed in § 1231(a)(6)—namely to inadmissible aliens.

B. Borrero v. Aljets

The pertinent facts in the *Borrero* case are undisputed. Lazaro Borrero immigrated to the United States in the midst of the Mariel boatlift in 1980.¹⁶ During this period, nearly 125,000 Cuban refugees sought entry into the United States.¹⁷ Refusing to grant the Mariel Cubans legal entry, the government instead offered the refugees *parole* status.¹⁸ Parole under 8 U.S.C.A. § 1182(d)(5)(A) authorizes the Attorney General to physically admit aliens into the country, yet simultaneously preserving the government's rights over paroled aliens as non-entrants.¹⁹ The statute reads:

The Attorney General may . . . in his discretion parole into the United States temporarily under such conditions as he may prescribe only on a case-by-case basis for urgent humanitarian reasons or significant public benefit any alien applying for admission to the United States, *but such parole of such alien shall not be regarded as an admission* of the alien and when the purposes of such parole shall, in the opinion of the Attorney General, have been served the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States.²⁰

In other words, due to their parole status, paroled aliens are treated as though still awaiting entry at the border, despite being physically present within the geographical United States.²¹

15. See *id.* at 682, 701.

16. *Borrero v. Aljets*, 325 F.3d 1003, 1005 (8th Cir. 2003).

17. Joshua W. Gardner, *Halfway There: Zadvydas v. Davis Reins in Indefinite Detentions, but Leaves Much Unanswered*, 36 CORNELL INT'L L.J. 177, 200 (2003).

18. *Id.*

19. See 8 U.S.C.A. § 1182(d)(5)(A) (West 1999).

20. *Id.* (emphasis added).

21. See Gardner, *supra* note 17, at 200.

Borrero was officially paroled on June 4, 1980,²² and it was not long thereafter that Borrero developed a criminal record. In 1983, Borrero was convicted of battery. A year later, he was convicted of cocaine possession, and in 1987, theft.²³ In 1993, Borrero was again arrested and convicted this time for the sale and possession of cocaine, and for the possession of a handgun by a felon.²⁴ While in state custody serving time for his 1993 convictions, the INS commenced removal proceedings against Borrero.²⁵ The immigration judge ruled Borrero removable and inadmissible due to his extensive criminal record.²⁶ On appeal the Board of Immigration Appeals affirmed the immigration judge's decision.²⁷

In the fall of 2000, Borrero served his full prison sentence in state custody and he was released into INS custody for further detention.²⁸ Subsequently, the INS revoked Borrero's parole, referencing his lengthy criminal past as grounds for revocation, and determined that paroling Borrero was not in the public interest.²⁹ To complicate matters, Borrero's native country of Cuba refused the U.S. permission to deport Borrero back to his country of origin.³⁰

With no alternatives, Borrero appealed the INS's decision to the United States District Court of Minnesota, alleging that because he could not be removed in the reasonably foreseeable future, his indefinite detention beyond the ninety-day INS removal period violated his constitutional due process rights.³¹ The district court held in favor of Borrero.³² In its decision, the court extended the six-month reasonableness period, set forth in *Zadvydas*, to apply equally

22. *Borrero v. Aljets*, 325 F.3d 1003, 1005 (8th Cir. 2003).

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.* Many Mariel Cubans are considered criminals in the eyes of the Cuban Government and are not granted re-entry. Louise Taylor, *Court: Criminal Immigrants Have Right to Due Process*, LEXINGTON HERALD-LEADER, Mar. 6, 2003, available at <http://www.kentucky.com/mld/heraldleader/news/local/5327755.htm>.

31. See *Borrero*, 325 F.3d at 1005.

32. *Id.*

to removable and inadmissible aliens.³³ The district court argued that without a significant probability that Borrero “actually will be removed from the United States in the reasonably foreseeable future,” the INS no longer has the statutory authority to hold the alien in custody.³⁴ As such, the district court granted Borrero’s petition for writ of habeas corpus, releasing him on parole pursuant to the terms and conditions that the INS deemed appropriate.³⁵ The government appealed.

III. *BORRERO* DECISION ON APPEAL

The issue before the Eighth Circuit Court of Appeals in *Borrero* was whether the *Zadvydas* interpretation of § 1231(a)(6) applied to inadmissible aliens. The court of appeals held that the *Zadvydas* interpretation did not apply to inadmissible aliens.³⁶ Its decision rested on two major points. First, the court held that *Zadvydas* was not controlling in *Borrero* because the Supreme Court remained silent on the issue of indefinite detention of inadmissible aliens.³⁷ Second, the court rejected Borrero’s due process argument because paroled aliens (for their failure to affect legal entry) are not guaranteed the same due process rights that are extended to admissible aliens.³⁸

A. *Zadvydas Is Not Controlling In Borrero*

The Eighth Circuit Court of Appeals found that the *Zadvydas* decision was not controlling in *Borrero* because the *Zadvydas* court squarely addressed only the constitutionality of the indefinite detention of removable aliens.³⁹ Therefore, *Zadvydas* did not require the *Borrero* court to extend the reasonableness limitation to inadmissible aliens.⁴⁰ The *Borrero* court stated that the constitutional issue avoided in *Zadvydas* was whether the “post-removal-period statute authorizes the Attorney General to detain a

33. *Id.*

34. *Id.* (quoting *Borrero v. Aljets*, 178 F. Supp. 2d 1034, 1044 (D. Minn. 2001)).

35. *Id.*

36. *Id.*

37. *See id.* at 1006–07.

38. *See id.* at 1007–08.

39. *Id.* at 1007.

40. *See id.* at 1006–07.

removable alien *indefinitely* beyond the removal period or only for a period *reasonably necessary* to secure the alien's removal."⁴¹ The court held that granting the Attorney General authority to indefinitely detain removable aliens would raise "serious constitutional problem[s]" under the Fifth Amendment's Due Process Clause.⁴² Therefore, a narrow interpretation was needed to maintain the statute's constitutionality. Because the *Zadvydas* decision only applied to aliens whose detention "raise[d] serious constitutional doubt—admitted aliens,"⁴³ the presumptive six month reasonable detention period set forth in *Zadvydas* did not apply to Borrero. Ultimately, the *Borrero* court found *Zadvydas* silent on the issue of inadmissible aliens.

B. The Court Rejects Borrero's Due Process Claim

Next, the Eighth Circuit addressed Borrero's due process claims. The Supreme Court decided long ago that the Due Process Clause protects aliens from arbitrary punishment.⁴⁴ Additionally, the government may not deprive an alien of life, liberty or property without due process of the law.⁴⁵ Therefore, Borrero argued that although the *Zadvydas* holding did not expressly refer to inadmissible aliens, the *Zadvydas* reasoning that § 1231(a)(6) contained an implicit six-month reasonable detention period, as applied to removable aliens, should apply with equal force and weight to inadmissible aliens.⁴⁶

The Eighth Circuit, however, reasoned that Borrero's parole status precluded his due process argument.⁴⁷ The court concluded that once an alien physically enters the country, the Due Process Clause applies to him equally;⁴⁸ however, with respect to aliens who have not effected entry, the government may apply a different standard of due process, because "[w]hatever the procedure

41. *Id.* at 1006 (quoting *Zadvydas v. Davis*, 533 U.S. 678, 682 (2001)).

42. *Id.*

43. *Id.* at 1007.

44. *See Wong Wing v. United States*, 163 U.S. 228, 238 (1896).

45. *See Mathews v. Diaz*, 426 U.S. 67, 77 (1976).

46. Brief of Appellee at 22, *Borrero v. Aljets*, 325 F.3d 1003 (8th Cir. 2003) (No. 02-1506).

47. *Borrero*, 325 F.3d at 1008.

48. *See Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953).

authorized by Congress is, it is due process as far as an alien denied entry is concerned."⁴⁹

The court focused on the fact that Borrero had yet to effect entry into the United States, and that his failure to do so presented an entirely different question.⁵⁰ The *Borrero* court instead cited to *Mezei* as controlling. In *Mezei*, the Supreme Court rejected an alien's due process challenge to indefinite detention on the grounds that he had not effected entry into the United States.⁵¹

Mezei involved an alien who, after living in the United States for twenty-five years, traveled abroad for nineteen months.⁵² Upon returning to the United States, the government stopped Mezei at Ellis Island and, without a hearing, permanently excluded him from the United States.⁵³ With no nation willing to take Mezei in, he faced indefinite detention on Ellis Island.⁵⁴

The *Borrero* court stressed that the "critical difference [between *Zadvydas* and *Mezei*] was that Mezei had not effected an entry into the United States. Although Mezei was physically present on Ellis Island, 'he was "treated," for constitutional purposes, "as if stopped at the border." And that made all the difference.'"⁵⁵ Consequently, Mezei could be detained under a lower standard of due process than aliens who had effected entry.

Therefore, much like an alien stopped at Ellis Island, an alien paroled into the United States is not entitled to the same constitutional protections afforded to admitted aliens. In effect, the court extended *Mezei* to cover aliens physically present in the United States who had yet to effect "legal" entry. Despite Borrero's physical presence in the United States, the court held that "[p]arole does not constitute an entry."⁵⁶ Thus, the Eighth Circuit held that the

49. *Id.*

50. *See Borrero*, 325 F.3d at 1007-08.

51. *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953). In fact, Mezei was an immigrant who was detained at Ellis Island. The Court held this to be the equivalent of being stopped at the border. *Id.* at 215.

52. *Id.* at 208-09.

53. *Id.* at 208.

54. *Id.* at 208-09.

55. *Borrero*, 325 F.3d at 1007-08 (quoting *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001)).

56. *Id.* at 1008.

indefinite detention of Borrero, in light of *Zadvydas* and *Mezei*, did not violate his due process rights.⁵⁷

Furthermore, the Eighth Circuit distinguished *Borrero* from other cases in which the government granted inadmissible aliens full due process rights.⁵⁸ Those cases concerned due process pertaining to criminal proceedings and did not address the issue of due process concerning aliens stopped at the border.⁵⁹ As a result, the *Borrero* court held that § 1231(a)(6), as applied to paroled aliens, fell within the “sovereign prerogative of the executive branch to set immigration policy and [the indefinite detention of inadmissible aliens did] not violate the Fifth Amendment’s Due Process Clause.”⁶⁰

Consequently, the Court of Appeals for the Eighth Circuit reversed and remanded the *Borrero* case to the district court with directions to dismiss Borrero’s petition for writ of habeas corpus.⁶¹

IV. THE APPELLATE COURT’S REASONING IN *BORRERO* IS FLAWED

The Eighth Circuit Court of Appeals’ conclusion seems questionable, and its reasoning is unpersuasive. In holding that § 1231(a)(6) contained an implicit distinction between inadmissible and removable aliens, the *Borrero* court (1) ignored § 1231’s clear language; (2) the *Zadvydas* decision, upon which the court heavily relied, does not support a dual interpretation of § 1231; (3) limited the constitutional protections extended to inadmissible aliens, thereby depriving inadmissible aliens of their due process rights; and (4) erred in failing to consider the United States’ binding international treaty obligations and customary international law in its interpretation of § 1231(a)(6).

A. *The Court Ignored Statutory Language*

The Eighth Circuit Court of Appeals ignores the fact that neither the statute’s language nor the *Zadvydas* opinion warrants

57. *Id.*

58. *See id.* (citing *Sierra v. INS*, 258 F.3d 1213, 1218 (10th Cir. 2001); *Hoyte-Mesa v. Ashcroft*, 272 F.3d 989, 991 (7th Cir. 2001); *Barrera-Echavarria v. Rison*, 44 F.3d 1441, 1450 (9th Cir. 1995)).

59. *Id.*

60. *Id.*

61. *Id.*

distinguishing between inadmissible and removable aliens concerning indefinite detention.⁶²

The clear language of 8 U.S.C.A. § 1231(a)(6) demonstrates that the statute draws no distinction between removable and inadmissible aliens.⁶³ In *Zadvydas*, Justice Kennedy took notice of this fact in his dissent.⁶⁴ He noted that the statute's text "provides for detention of both categories within the same statutory grant of authority," and "it is not a plausible construction of § 1231(a)(6) to imply a time limit as to one class but not to another. The text does not admit of this possibility."⁶⁵ Rather, the more plausible construction is that the statute only authorizes the Attorney General to detain the three categories of aliens (inadmissible, removable, and those aliens presenting a risk to the public) beyond the removal period.

Justice Scalia also had difficulty understanding how § 1231's language implies a distinction between inadmissible and removable aliens. He stated, "[w]e are offered no justification why an alien under a valid and final order of removal—which has *totally extinguished* whatever right to presence in this country he possessed—has any greater due process right to be released into the country than an alien at the border seeking entry."⁶⁶ Furthermore, Scalia added, "both groups of aliens—inadmissible aliens at the threshold and criminal aliens under final order of removal [removable aliens]—could be constitutionally detained on the same terms, since it provided the authority to detain both groups in the very same statutory provision."⁶⁷ Consequently, the statute's express language provides little justification for the Eighth Circuit's decision to distinguish between admissible and inadmissible aliens.

62. See 8 U.S.C.A. § 1231(a)(6) (West 1999); see *Zadvydas v. Davis*, 533 U.S. 678 (2001).

63. 8 U.S.C.A. § 1231(a)(6) reads: An alien ordered removed who is inadmissible under section 1182 of this title, removable under section 1227(a)(1)(C), 1227(a)(2), or 1227(a)(4) of this title or who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, may be detained beyond the removal period and, if released, shall be subject to the terms of supervision in paragraph (3). 8 U.S.C.A. § 1231(a)(6).

64. See *Zadvydas*, 533 U.S. at 710 (Kennedy, J., dissenting).

65. *Id.* (Kennedy, J., dissenting).

66. *Id.* at 704 (Scalia, J., dissenting).

67. *Id.* at 705 (Scalia, J., dissenting).

B. The Zadvydas Decision Does Not Support an Implied Distinction Between Inadmissible and Admissible Aliens as to the Application of § 1231(a)(6)

The *Zadvydas* holding provides little justification for distinguishing between inadmissible and admissible aliens. The *Zadvydas* Court's holding is clear, stating "we construe *the statute* to contain an implicit 'reasonable time' limitation, the application of which is subject to federal-court review."⁶⁸ Moreover, the Court was clear as to whom the statute applied—"aliens who have been ordered removed, namely *inadmissible aliens*, criminal aliens, aliens who have violated their nonimmigrant status conditions."⁶⁹ Furthermore, the Supreme Court referred to aliens *generally*, stating, "[i]n our view, the statute, read in light of the Constitution's demands, limits *an alien's* post-removal-period detention to a period reasonably necessary to bring about *that alien's* removal from the United States."⁷⁰

The *Zadvydas* Court's use of broad language describing the statute's application to a general class of aliens is illuminating. Had the Supreme Court desired to clarify that there was a distinction between removable and inadmissible aliens, it could easily have qualified its holding to apply solely to admissible aliens. Based on the Supreme Court's holding in *Zadvydas*, the *Borrero* court's decision denying inadmissible aliens the same reasonable detention period granted to removable aliens conflicts with the Court's broad and general language. This suggests a *uniform* interpretation of § 1231 (a)(6) as applied to both admissible and inadmissible aliens.

Two circuit courts agree that 8 U.S.C.A. § 1231(a)(6) applies equally to inadmissible aliens and removable aliens. In *Rosales-Garcia v. Holland*,⁷¹ based upon a review of the plain language of the statute, the Sixth Circuit Court of Appeals found it difficult to understand how the *Zadvydas* Court could interpret the statute to contain a reasonable detention period for removable aliens, but not for inadmissible aliens.⁷² The court recognized that interpreting the statute to have different meanings for inadmissible and admissible

68. *Id.* at 682 (emphasis added).

69. *Id.* at 688 (emphasis added).

70. *Id.* at 689 (emphasis added).

71. 322 F.3d 386 (6th Cir. 2003).

72. *Id.* at 404.

aliens “would render the meaning of any statute as changeable as the currents of the sea, and potentially as cruel and capricious.”⁷³

Similarly, the Ninth Circuit Court of Appeals in *Xi v. INS*⁷⁴ held that in light of *Zadvydas*, § 1231(a)(6) “bears the same meaning for an individual deemed inadmissible” and removable.⁷⁵ The Ninth Circuit further acknowledged the principle that when the court narrowly interprets a statute to avoid unconstitutionality, the interpretation should apply “categorically to all future cases whether or not the circumstances raise the same constitutional questions.”⁷⁶ Therefore, based on the statute’s clear language and the *Zadvydas* Court’s decision, the Ninth Circuit held that the *Zadvydas* interpretation of § 1231(a)(6) applied with equal force to inadmissible and removable aliens.⁷⁷

C. Due Process Should Be Afforded to Inadmissible Aliens

By substantially limiting the due process rights granted to paroled aliens, the *Borrero* court wrongly ignored the purpose underlying the parole fiction. The Due Process Clause of the Fifth and Fourteenth Amendments is “universal in [its] application, [applying] to *all persons* within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality.”⁷⁸ Also, “the Due Process Clause applies to all ‘persons’ within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent.”⁷⁹ There is no doubt that *Borrero* is a *person* in every sense of the word and a *person within the United States* deserving of the constitutional protections afforded by the Due Process Clause.

73. *Id.* at 406 (quoting *Chmakov v. Blackman*, 266 F.3d 210, 215 (3rd. Cir. 2001)).

74. 298 F.3d 832 (9th Cir. 2002).

75. *Id.* at 834.

76. *Borrero v. Aljets*, 325 F.3d 1003, 1007 (8th Cir. 2003).

77. *Xi*, 298 F.3d at 836.

78. *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) (emphasis added).

79. *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) (citing *Plyler v. Doe*, 457 U.S. 202, 210 (1982)).

1. The Parole fiction is not intended to strip
aliens of their due process rights

The *Borrero* court relied on the parole fiction to limit Borrero's due process rights. Although parole is the legal equivalent of being stopped at the border, the parole fiction is often considered an "administrative compromise,"⁸⁰ and "parole . . . is simply a device through which needless confinement is avoided while administrative proceedings are conducted."⁸¹ Further, the parole fiction was not intended to deprive aliens living in the United States of due process.⁸² In *Rosales-Garcia*, the Sixth Circuit held that the INS could not indefinitely detain paroled Cuban aliens whose removal was not significantly likely within the foreseeable future.⁸³ The *Rosales-Garcia* court acknowledged the "parole fiction" in its decision, but that factor was not dispositive. The court stated that "[w]hile we respect the historical tradition of the 'entry fiction,' we do not believe it applies to deprive aliens living in the United States of their status as 'persons' for the purposes of constitutional due process"⁸⁴ because "once an alien gains admission to our country and begins to develop ties that go with permanent residence his constitutional status changes accordingly."⁸⁵

Also, in *Mathews v. Diaz*, the Supreme Court held with respect to paroled Cuban aliens that "[e]ven one whose presence in this country is unlawful, involuntary, or transitory is entitled to that constitutional protection [of the Due Process Clause of the Fifth and Fourteenth Amendments]."⁸⁶ Therefore, the parole fiction should not be employed to strip or severely limit Borrero's due process rights.

2. Reliance on *Mezei* is misplaced

The court of appeals erred by relying too heavily on the Supreme Court's decision in *Mezei*. *Mezei* is not dispositive and is distinguishable from *Borrero*. In *Mezei* the Court sustained the

80. Note, *Indefinite Detention of Immigrant Parolees: An Unconstitutional Condition?*, 116 HARV. L. REV. 1868, 1872 (2003).

81. *Leng May Ma v. Barber*, 357 U.S. 185, 190 (1958).

82. See *Rosales-Garcia v. Holland*, 322 F.3d 386, 409 (6th Cir. 2003).

83. *Id.* at 390.

84. *Id.* at 409.

85. *Id.* (quoting *Landon v. Plasencia*, 459 U.S. 21, 32 (1982)).

86. *Mathews v. Diaz*, 426 U.S. 67, 77 (1976).

government's right to indefinitely detain Mezei without violating his due process rights because he had failed to effect entry.⁸⁷ The *Mezei* Court, however, "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,"⁸⁸ citing the Passport Act of 1918 as the Attorney General's grant of power to indefinitely detain Mezei.⁸⁹ In *Borrero*, although he was a convicted criminal, a crucial distinguishing factor was that Borrero was never determined to be a threat to national security and no similar justification existed for his indefinite detention as in *Mezei*. Therefore, *Mezei* should not be dispositive in *Borrero*.

D. The Borrero Court Ignores Prevailing International Law Principles and Customary Standards

The last deficiency in the Eighth Circuit Court of Appeals' analysis lies in its complete failure to consider binding United States treaty obligations and customary international legal standards. Article IX of the International Covenant on Civil and Political Rights ratified by the United States in 1992⁹⁰ states that "[n]o one shall be subjected to arbitrary arrest or detention."⁹¹ The United Nations finds detention arbitrary when a detainee is detained beyond the completion of his sentence.⁹² By adopting *Borrero*, the courts discount the weight and relevance of a binding international treaty. If Congress intended to directly contravene a binding treaty obligation by authorizing indefinite detention, it could have done so through proper legislation specifically overriding the binding treaty.⁹³ When a statute conflicts with international law, the courts

87. See *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953).

88. *Rosales-Garcia*, 322 F.3d at 413-14.

89. *Borrero v. Aljets*, 325 F.3d 1003, 1010 (8th Cir. 2003).

90. 138 CONG. REC. S4781-84 (Apr. 2, 1992).

91. International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, art. 9, 999 U.N.T.S. 171, 175 (*entered into force* Mar. 23, 1976).

92. Gardner, *supra* note 17, at 205.

93. *Id.* at 204.

must construe it in a manner that does not directly violate a valid treaty obligation.⁹⁴

Similarly, the *Borrero* court failed to consider customary international law, which strongly condemns arbitrary and indefinite detention.⁹⁵ The Universal Declaration of Human Rights states that “[n]o one shall be subjected to arbitrary arrest, detention or exile.”⁹⁶ Also, the American Convention on Human Rights reads, “[e]very person has the right to personal liberty and security. . . No one shall be subject to arbitrary arrest or imprisonment.”⁹⁷ Additionally, the Restatement (Third) of Foreign Relations Law states that a state violates international law if it “practices, encourages, or condones . . . prolonged arbitrary detention.”⁹⁸ The United States’ practice of detaining aliens indefinitely beyond the standard removal period is cruel and arbitrary to say the least, and when interpreting the statute, the courts should not ignore the international denunciation of arbitrary and indefinite detention.

Considering existing treaty obligations and customary international law would allow the courts to interpret Congress’s intent more faithfully. If “Congress [had] intended to give the Attorney General the power to act in a way so contradictory to international law, one would have expected Congress to have done so more explicitly.”⁹⁹ In light of the sentiment against indefinite detention, the *Borrero* court erred in failing to consider binding treaty obligations and international law.

Although this Comment illustrates the *Borrero* decision’s glaring shortcomings, it does not necessarily follow that the alternative is the unconditional release of inadmissible aliens convicted of crimes into the public. To the contrary, once the six-month reasonable detention period is exhausted and repatriation is no

94. *Id.* at 203–04. This doctrine is known as the Charming Betsy principle, which calls for courts to interpret statutes so they are consistent with international law. *Id.* at 204.

95. *Id.* at 204–05.

96. *Universal Declaration of Human Rights*, G.A. Res. 217A, U.N. Doc. A/810, at 71(1948).

97. *American Convention on Human Rights: “Pact of San Jose, Costa Rica”*, opened for signature Nov. 22, 1969, art. 7, 1144 U.N.T.S. 123, 147 (entered into force July 18, 1978).

98. RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 702 (1987).

99. Gardner, *supra* note 17, at 206.

longer a viable option, the inadmissible alien should be released subject to the conditions set forth by the Attorney General. Justice Heaney, in his dissent in *Borrero*, echoed this sentiment, stating that “a writ of habeas corpus will not make Petitioner a truly free man The INS can still impose terms and conditions of release upon him and can still take him back into custody if he violates those terms and conditions,” and that the “[p]etitioner is still subject to removal from the United States whenever the government can find some place to send him.”¹⁰⁰ This policy is more reasonable than indefinite detention, because it serves justice, while preserving the alien’s rights and individual dignity.

V. THE IMPLICATIONS OF ADOPTING A “*BORRERO*” POLICY

Adopting the *Borrero* interpretation of § 1231(a)(6) and allowing the indefinite detention of inadmissible aliens who have no hope of removal has significant implications. Doing so severely limits the constitutional rights of thousands of aliens; incentivizes aliens to disobey immigration laws; unduly strains limited government resources; and reflects negatively on the image of the United States within the international community.

A. *Borrero* Extends the Government Limitless Power to Deprive Inadmissible Aliens of Due Process

One implication flowing from *Borrero* is that it leaves inadmissible aliens vulnerable to the whims of the government. If the government has the right to proscribe whatever due process measures it deems appropriate concerning inadmissible aliens, this raises the question—what are the limits of this power?

The *Borrero* decision leaves open the possibility for the government to deprive an inadmissible alien of due process rights entirely. In *Rosales-Garcia v. Holland*, Justice Moore expressed this concern in a more extreme fashion, stating that “[i]f excludable 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

100. *Borrero v. Aljets*, 325 F.3d 1003, 1010 (8th Cir. 2003) (Heaney, J., dissenting) (quoting *Borrero v. Aljets*, 178 F. Supp. 2d 1034, 1044 (D. Minn. 2001)).

summarily execute them.”¹⁰¹ The narrow interpretation of *Borrero* leaves paroled aliens with few constitutional protections. The few remaining safeguards they have remain subject to the capriciousness of the political process.

B. Borrero Deters Aliens From Complying With United States Immigration Laws

Another consequence of severely limiting an aliens' due process rights under the guise of the parole fiction is that it discourages them from obeying current immigration laws.¹⁰² A “*Borrero*” policy leaves an alien with little incentive to respect our immigration laws and processes.¹⁰³ As opposed to illegal immigrants, “many parolees have shown respect for our admissions system and the rule of U.S. law.”¹⁰⁴ An alien is constitutionally no better off seeking parole status and complying with our immigration laws under *Borrero* than if the alien ignored our immigration laws entirely and entered the country illegally. Consequently, a “*Borrero*” policy may deter an alien, who would otherwise follow proper immigration regulations, from complying with immigration procedures.

C. The Indefinite Detention of Inadmissible Aliens Wastes Government Resources

In addition to severely limiting an alien's constitutional rights and deterring aliens from respecting United States immigration laws, the practice of indefinitely detaining inadmissible aliens, validated by *Borrero*, wastes valuable government resources. As of 2001, the United States had in its custody approximately 1,750 Marielitos like *Borrero* serving time in its prisons; “not serving time for crimes, but in jailhouse limbo because Cuba refuses to take them back.”¹⁰⁵ These prisoners require food, clothing, medical care, and housing while incarcerated. Furthermore, these detained aliens occupy space within an already crowded prison system. Society will have to

101. *Rosales-Garcia v. Holland*, 322 F.3d 386, 410 (6th Cir. 2003).

102. *See Gardner, supra* note 17, at 201.

103. *Id.*

104. *Id.*

105. Louise Taylor, *Court: Criminal Immigrants Have Right to Due Process*, LEXINGTON HERALD-LEADER, Mar. 6, 2003, available at <http://www.kentucky.com/mld/heraldleader/news/local/5327755.htm>.

provide additional prison facilities in order to accommodate the increased demand for space. In addition, indefinite detention interferes with an alien's ability to work and economically support his or her dependants.¹⁰⁶ This leads to additional costs incurred by the government, which will most likely have the burden of supporting the families.¹⁰⁷

D. Borrero Tarnishes the Image of the United States Within the International Community

Lastly, the *Borrero* decision reflects negatively on the United States in the international community. The decision of the United States to accept the *Borrero* court's holding allowing for the indefinite detention of inadmissible aliens, runs counter to a multitude of international legal standards denouncing arbitrary and indefinite detention of prisoners.¹⁰⁸ As one of the world's staunchest advocates of human rights, the United States loses legitimacy in light of such hypocrisy. Adopting a "*Borrero*" policy might undermine foreign relations with those nations that disagree with the proposition advanced in *Borrero*.

VI. CONCLUSION

Unless the courts extend § 1231's six-month reasonable detention period as set forth in *Zadvydas* with respect to removable aliens, inadmissible aliens imprisoned in the United States will be subject to indefinite detention regardless of whether their debt to society has been paid.

Borrero will not be the last United States judicial decision regarding the indefinite detention of inadmissible aliens. As it stands, the Eighth Circuit Court of Appeals' ruling in *Borrero* is contrary to the Sixth and Ninth Circuit decisions.¹⁰⁹

The Eighth Circuit decision in *Borrero* incorrectly interpreted § 1231 to contain an implicit distinction between inadmissible and removable aliens. The plain text of the statute, however, leaves no

106. ACLU, *Analysis of Immigration Detention Policies*, (Aug. 18, 1999), at <http://www.aclu.org/ImmigrantsRights/ImmigrantsRights.cfm?ID=5075&c=95>.

107. *Id.*

108. See *supra* text accompanying notes 92–103.

109. See *supra* text accompanying notes 71–77.

room for such an interpretation. Moreover, the Supreme Court's interpretation of § 1231(a)(6) in *Zadvydas*, on which the *Borrero* court relied, does distinguish between removable and inadmissible aliens with respect to the reasonableness limitation. Also, the *Borrero* decision significantly limits constitutional protections afforded to inadmissible aliens. Lastly, the *Borrero* Court erred in interpreting § 1231(a)(6) in a manner that conflicts with binding United States treaty obligations and existing international legal standards.

These oversights will have long term repercussions. The decision leaves inadmissible aliens vulnerable to the whims of the political process; deters future aliens from complying with U.S. immigration laws; puts undue strain on government resources; and reflects negatively on the United States among the international community.

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*J.D. Candidate, May 2005, Loyola Law School, Los Angeles. Thanks, first and foremost, to my family and friends for their support and encouragement. Also, thanks to the staff and editors of the *Loyola of Los Angeles Law Review* for their hard work, and especially to Kirsten Miller and Amanda Gamer for their guidance.

