SUPREME COURT OF THE UNITED STATES

October Term, 2000
No. 00-38

JANET RENO,
Attorney General of the United States; *Petitioner*,

v.

KIM HO MA,

Respondent.

On Writ of Certiorari to
the United States Court of Appeals for the Ninth Circuit

BRIEF OF LAW PROFESSORS AS *AMICI CURIAE*, SUPPORTING AFFIRMANCE

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SUMMARY OF ARGUMENT, and INTEREST OF *AMICI*

"Nor shall any *person*. . .be deprived of life, liberty, or property, without due process of law." U.S. Const., amend. V. These bedrock guarantees "are universal in their application, to all persons within the territorial jurisdiction" of the United States, "without regard to any differences of . . . nationality." *Yick Wo v. Hopkins,* 118 U.S. 356, 369 (1886).

Respondent is one of thousands of "INS lifers"—lawfully-admitted resident aliens now held in what Justice Jackson correctly labeled "executive" imprisonment because, although the United States would like to deport them, it has not found any nations willing to take them off our hands. See *Shaughnessy v. United States ex rel. Mezei* ("*Mezei*"), 345 U.S. 206, 220 (1953) (dissenting opinion).

Kim Ho Ma became a permanent resident after his lawful admission into the United States in 1985 when, at age 7, he fled here as a refugee from Cambodia. Ten years later, Respondent fell from grace and was convicted of a crime that may permit his deportation, if and when the government can find another nation willing to take him off our hands. But that is a pretty big "if," and meanwhile, Respondent nevertheless remains a person who cannot be deprived of his liberty without due process of law.

Against the principle that the Constitution protects all those within our borders is set one strand of authority that permits the government broad power to determine who may enter the United States *ab initio,* and to detain those it rejects pending their eventual repatriation. Two cases mark the zenith of this power: *Mezei* itself, and its

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progeny in the courts below, *Barrera-Echavarria v. Rison* (*"Barrera"*), 44 F.3d 1441 (9th Cir, *en banc*), *cert. denied*, 516 U.S. 976 (1995)., and *Gisbert v. U.S. Attorney General*, 988 F.2d 1437 (5th Cir. 1993) *("Gisbert").*

In attempting to justify Respondent's long-term detention, the government argues that he "stands constitutionally on the same footing as an excludable alien seeking to enter the United States for the first time." (citation). The Fifth Circuit's decision in the companion case rests upon the same footing—"there is nothing to adequately distinguish the plenary interest from the one encountered in Gisbert. *Zadvydas v. INS*, 185 F.3d 279, 297 (5th Cir. 1999) In so contending, the government advances two propositions. The first is that the same interests that permit detention in excludable alien cases apply here with equal force. (citation). The second is a related but separate theory: that the government, by re-classifying permanent residents, can somehow alter their constitutional status and relegate them to the position of first-time applicants at our door. (citation).

Amici respectfully submit that neither logic nor precedent support the government's position. The Ninth Circuit was dead right in rejecting it below, and indeed, not one judge in active service on that court—over 30 in number—thought the government's rehearing petition was worthy of even calling for a vote. This Court likewise has long drawn a distinction between the government's power over permanent residents and that over first-time applicants seeking entry. The government's interest in detaining permanent residents domiciled in this country—like Respondent and thousands of other INS "lifers"—differs from its stake in

excluding large numbers of aliens such as those who sought to enter the United States as part of the Mariel boatlift. Moreover, the only doctrine that permits the government to treat non-citizens within our territory as if they had never been admitted is the "entry fiction," an often-criticized rule that has no application here.

Amici are the immigration law professors whose individual names appear *ante*, pages *i-ii*. Many of us have written about the principles that the government invokes in this appeal. There may well be disagreement among us about the scope of the government's authority to detain people who have never entered the United States. But we need not resolve our own disagreements on that issue to conclude that the government may not assert counterpart authority over non-citizens who have been admitted as permanent residents. Thus, we write to explain the origins and application of the government's power over non-citizens and to place this case within the broader context of constitutional immigration law, thereby to assist this Court in understanding the novelty of the government's argument that the Executive has unfettered discretion to detain indefinitely non-citizens who have been accepted as members of our constitutional community.

ARGUMENT

I. ALIENS WITHIN THE TERRITORY OF THE UNITED STATES ARE PROTECTED BY THE CONSTITUTION.

Respondent was admitted into the United States as a refugee, and later became a lawfully admitted permanent resident. He has since remained physically within our boundaries. As such, he is enveloped in the protections of our Constitution.

This Court has long held that aliens within our physical borders are persons within the meaning of the Due Process Clause. *See Yick Wo, supra*, 118 U.S. at 369 (all aliens within the United States are protected by the Fourteenth Amendment); *Wong Wing v. United States*, 163 U.S. 228, 237-38 (1896) (aliens within the United States are protected by the Fifth and Sixth Amendments, and may not be punished without a criminal trial, even though ordered deported after completion of their sentences). More recently, the Court reaffirmed this territorial principle in *Plyler v. Doe*, 457 U.S. 202, 210 (1982), holding that undocumented aliens enjoy constitutional protections when their children are denied education based on their status, saying that "[a]liens, even aliens whose presence in this country is unlawful, have long been recognized as 'persons' guaranteed due process of law by the Fifth and Fourteenth Amendments."

Thus, in matters other than immigration, non-citizens enjoy substantial constitutional protection.[1] There is, however, authority under which the government's

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[1] See, e.g., (*Almeida-Sanchez v. United States*, 413 U.S. 266 (1973) (Fourth Amendment: searches and seizures within the United States); *United States v. Henry*,

interest in "controlling our borders" impacts the constitutional protection afforded some non-citizens, namely, would-be first time entrants. While lawful permanent residents are entitled to full constitutional protection in determining whether they may remain in the United States and what they may do while here, aliens who have not been legally admitted are subject to diminished protection in matters relating to their admission (citation). In *Barrera*, the court determined that lesser scrutiny may be accorded the detention of this category of non-citizens, on the theory that such detention is part of the government's "plenary" power to determine who may be admitted to the United States. Yet, "plenary power" is not absolute power. The authority granted the political branches under this doctrine is very different for resident aliens than for applicants seeking admission, and the exercise of that authority must be properly related to the government's interests in regulating immigration into the United States.

In drawing the line between governmental acts that are justified under the immigration power and those that are not, *Wong Wing v. United States*, *supra*, is particularly instructive. *Wong Wing* arose under a statute authorizing executive imprisonment of unlawful entrants for one year before they were deported. The

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604 F.2d 908 (5th Cir. 1975) (Fifth Amendment: custodial interrogation); *Russian Volunteer Fleet v. United States*, 282 U.S. 481 (1931) (Fifth Amendment: takings clause).

government defended the statute by talismanic recitation of its "power" over immigration, but the Court declined to sanction this unwarranted expansion. The justices acknowledged the political departments' primacy in determining the grounds upon which immigration would or would not be allowed, as well as the permissibility of "temporary confinement . . . while arrangements were being made for their deportation" (*id.*, at 235), but struck down the statute's authorization of imprisonment before deportation. Quoting *Yick Wo's* holding that the Fourteenth Amendment is "universal in [its] application to all persons within the territorial jurisdiction, without regard to … nationality," the Court continued:

> "Applying this reasoning to the Fifth and Sixth Amendments, it must be concluded that all persons within the territory of the United States are entitled to the protection guaranteed by those amendments, and that even aliens shall not be held to answer for a capital or other infamous crime, unless on a presentment or indictment of a grand jury, and not be deprived of life, liberty or property without due process of law." (*Id.*, at 238)

In the remainder of this Brief, *Amici* explain why the plenary power doctrine does not grant the Executive a license to detain Respondent indefinitely.

II. THE PLENARY POWER DOCTRINE DERIVES FROM THE EXECUTIVE'S SOVEREIGN INTEREST IN CONTROLLING OUR BORDERS, AN INTEREST THAT IS ABSENT HERE.

The government justifies its detention of Ma by asserting its interest in "protecting its borders," an interest accorded deference because of its close relationship to the Executive's control over foreign affairs.[2]

But these interests are wholly lacking here, for Respondent is not an "excludable" alien. Rather, he was admitted as a lawful permanent resident, and although the United States now would like to deport him, it finds itself presently unable to do so. Any asserted link between his detention and the foreign affairs power is wholly different from, the power asserted in excludable alien cases.

A. The Plenary Power Doctrine Was First Developed—And Is At Its Zenith—In Cases Involving "Excludable" Aliens

The government argues that it has the authority to imprison Respondent—and thousands of others that it deems "dangerous" to our society—for howsoever long it wishes, under a collection of principles called the "plenary power doctrine." This doctrine arose a century ago, when the Court confronted many laws aimed at other "undesirable" non-citizens. The doctrine is legal shorthand for at least two related principles: *First*, power over immigration is reposed in the national government, not the states. *Second*, this authority flows from sovereignty itself and, accordingly,

[2] As well, the Executive's decision to bar entry of an Osa bin Laden, for example, ordinarily does not create any justiceable controversy under Article III. See *post*, Part IV.

decisions regarding the substance and application of immigration laws receive somewhat deferential judicial review.[3] The beginnings of the doctrine are found in *Chae Chan Ping v. United States*, 130 U.S. 581 (1889), and *Ekiu v. United States*, 142 U.S. 651 (1892).

Chae Chan Ping involved a lawfully-admitted alien's subsequent exclusion under an amended version of the Chinese Exclusion Act of 1888. The Act originally provided that Chinese residing in the United States could obtain certificates of residence, enabling them to visit their homeland and then return to their jobs and families in the United States. But while Chae Chan Ping was on just this kind of overseas visit, Congress amended the Act, declaring such certificates "void and of no effect," thereby barring those who had left from ever returning. The Court rejected Chae Chan Ping's argument that the amendment violated his rights as a "person"

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[3] For descriptions of the plenary power doctrine, *see* T. Alexander Aleinikoff & David A. Martin, IMMIGRATION: PROCESS AND POLICY 1-39 (1991); Stephen H. Legomsky, IMMIGRATION AND THE JUDICIARY: LAW AND POLITICS IN BRITAIN AND AMERICA 180-222 (1987); Aleinikoff, *Federal Regulation of Aliens and the Constitution*, 83 AM. J. INT'L L. 862, 864-69 (1989); Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny*, 100 HARV. L. REV. 853, 854-63 (1987); David A. Martin, *Due Process and Membership in the National Community: Political Asylum and Beyond*, 44 U. PITT. L. REV. 165, 166-80 (1983); Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625, 1632-50 (1992); Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 550-60 (1990); Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 14-18 (1984); Margaret Taylor, *Detained Aliens Challenging Conditions of Confinement and the Porous Border of the Plenary Power Doctrine*, 22 HASTINGS CONSTIT. L.Q. 1087, 1128-39 (1995); 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, 939-951 (1995).

under the Fifth Amendment, reasoning that the exclusion of foreigners was an "incident of sovereignty," and saying:

> "To preserve its independence, and give security against foreign aggression and encroachment, is the highest duty of every nation; and to attain these ends nearly all other considerations are to be subordinated. It matters not in what form such aggression and encroachment come, whether from the foreign nation acting in its national character, or from vast hordes of its people crowding in upon us." (142 U.S. at 607).

The Court reiterated these views in *Ekiu*, where another alien sought judicial review of the Executive's decision regarding her exclusion. The Court again refused relief, saying that "every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions," and that the decisions of executive officers "are due process of law" as to "foreigners who have never been naturalized, nor acquired any domicile or residence within the United States, nor even been admitted into the country pursuant to law." *Ekiu*, *supra*, 142 U.S. at 660.[4]

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[4] The plenary power doctrine has proved controversial, generating strong dissents throughout the entire history of its existence. See, e.g., *Fong Yue Ting v. United States*, 149 U.S. 698, 737 (1893) (Brewer, J., dissenting) ("Where are the limits to such powers to be found, and by whom are they to be pronounced? Is it within legislative capacity to declare the limits? If so, then the mere assertion of an inherent power creates it, and despotism exists."); *Harisiades v. Shaughnessy*, 342 U.S. 580, 598 (1952) (Douglas J., dissenting) ("The view that the power of Congress to deport aliens is absolute and may be exercised for any reason which Congress deems appropriate . . . seems to me to be inconsistent with the philosophy of constitutional law which we have developed for the protection of resident aliens."); *Mezei*, *supra*, 345 U.S at 226 (Jackson, J., dissenting) ("Does the power to exclude mean that exclusion may be continued or effectuated by any means which happen to seem appropriate to the authorities?"); *Jean v. Nelson*, 472 U.S. 846, 874 (1985) (Marshall J., dissenting) ("Only the most perverse reading of the Constitution would deny detained aliens the right to bring constitutional challenges to the most basic conditions of their confinement.")

B. Judicial Deference to the Government's Exercise of Power to Exclude Aliens Stems In Part From The Connection Between Exclusion and Foreign Affairs.

The relationship between the political branches' control over immigration to the United States and their ability to conduct foreign affairs has been a constant theme in the Court's plenary power decisions. *See, e.g., Kleindienst v. Mandel*, 408 U.S. 753, 766 (1972) (the power to exclude aliens is "inherent in sovereignty, necessary for maintaining normal international relations and defending the country against foreign encroachments and dangers--a power to be exercised exclusively by the political branches of government"); *Harisiades v. Shaughnessy, supra*, 342 U.S. at 588-89 ("any policy towards aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government."). As noted, this relationship first was expressed in *Chae Chan Ping, supra*, which stressed the importance of the power over immigration in conducting foreign affairs (130 U.S. at 604-607). [5] *See, also, United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950) (the power to exclude aliens "stems not alone from legislative power but is inherent in the executive power to control the foreign affairs of the nation"); *Jean v.*

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[5] Many commentators have documented this relationship as well. *See, e.g.*, Louis Henkin, FOREIGN AFFAIRS AND THE CONSTITUTION, 23, 289 -91 (1972); Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and its Progeny*, 100 HARV. L. REV. 853, 858-63 (1987); Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255, 261-269; Legomsky, IMMIGRATION LAW AND POLICY, 184 (1992); Aleinikoff, *Citizens, Aliens, Membership and the Constitution*, 7 CONST. COMMENTARY 9, 12 (1990).

Nelson, 727 F.2d 957, 975 (11th Cir. 1984) (court-ordered release of excludable aliens "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).

C. The Foreign Affairs Considerations Justifying Detention of Excludable Aliens Are Not Present Here.

These foreign policy concerns are plainly absent here. *Chae Chan Ping* was decided on national security grounds, as the exclusion of excludable aliens squarely implicated the Executive's power to protect our nation from large numbers of people—the "vast hordes." As the government explained in *Barrera*, one such excludable alien case:

> "This immigration law case . . .concerns the power of the United States to enforce its immigration laws and protect the American public from the dangers presented by an excludable criminal alien sent to our shores by a hostile foreign government"[6]

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[6] See the government's Petition for Rehearing with Suggestion for Rehearing En Banc in *Barrera*, at 1 (emphasis added). A copy is of record as an Appendix to Amici's counterpart brief in the court below, which noted:

"Amici Law Professors note in their brief that in its petition for rehearing en banc which led to the Barrera-Echavarria decision, the INS relied on the fact that the petitioner was an alien seeking admission (rather than one who had entered)." A. ___ at note 19..

Accordingly, these decisions are properly viewed as a narrow subset of constitutional immigration law decisions. They delineate a category of cases marked by unique foreign policy concerns, where the plenary power doctrine is at its zenith. Importantly, in the same year that it decided *Mezei*, the Court employed a different analysis when these foreign policy considerations were absent. In *Kwong Hai Chew v. Colding*, 344 U.S. 590 (1953), the Court held that a resident alien seeking re-entry after a voyage at sea enjoyed the constitutional protections of a resident alien, rather than those of an excludable alien, saying:

> "[t]his preservation of petitioner's right to due process does not leave an unprotected spot in the Nation's armor. Before petitioner's admission to permanent residence, he was required to satisfy the Attorney General and Congress of his suitability for that status. Before receiving clearance for his foreign cruise, he was screened and approved by the Coast Guard. Before acceptance of his petition for naturalization, as well as before final action thereon, assurance [was] necessary that he is not a security risk." (*Id.*, at 602)

Thus, despite the alien's overseas venture, "he [was] still, from a constitutional point of view, a person entitled to procedural due process under the Fifth Amendment." *Id.*, at 600.

The case at bench involves an individual previously screened by immigration officials and admitted for permanent residence. He has been ordered deported in light of the government's proof, in an individualized proceeding, that he committed a felony. Whether the government is able to detain him does not "leave an unprotected spot in the Nation's armor." *Kwong Hai Chew*, **The specter of foreign nations**

"encroaching" upon our sovereignty by forcing "mass hordes" of people upon us is relevant only to the exercise of the power to exclude initial applicants for admission. It is not relevant to that of an individual whom we knowingly and voluntarily admitted to our community, but who we cannot now expel because the shoe is now upon the other foot: our own "sovereignty" is now utterly subservient to the absolute sovereignty of other nations that we claimed for ourselves in *Mezei* and its progeny.

III. NEITHER RESPONDENT'S STATUS AS "ORDERED DEPORTED" NOR THE "ENTRY FICTION" SANCTION THE GOVERNMENT'S ATTEMPT TO TREAT RESPONDENT AS A FIRST-TIME APPLICANT FOR ADMISSION.

We have thus far noted that non-citizens generally enjoy the same constitutional rights as citizens in matters unrelated to their exclusion or deportation, and that aliens seeking admission to the United States have diminished due process protection in matters relating to their admission. But, as *Amici* will show, non-citizens who have entered this country are "persons" protected by the Constitution, even in matters related to their deportation. In particular, the plenary power doctrine applies much less forcefully to persons lawfully admitted to the United States than to people at the border seeking admission. The only recognized exception to this territorial distinction—the "entry fiction"—is a limited doctrine not relevant here. This fiction does not permit the government to assimilate persons like Respondent to the diminished status of first-time applicants for admission.

A. The Supreme Court Has Applied The Plenary Power Doctrine To Permanent Residents To A Lesser Extent Than To Non-Citizens Seeking Admission.

It is an "accepted tenet[] of U.S. immigration law" that aliens subject to deportation are treated more favorably than those seeking initial admission. *Accord, e.g.*, *Alvarez-Mendez v. Stock*, 941 F.2d 956, 962 (9th Cir. 1991), *cert. denied*, 506 U.S. 842 (1992). This is because aliens lawfully admitted to our country are different: they reside within the territory of the United States and have been accepted into our constitutional community. The development of the plenary power doctrine makes this distinction clear.

The Court's first application of the plenary power doctrine to aliens within our borders came in *Fong Yue Ting v. United States*, 149 U.S. 698 (1893). The majority in that case held that the powers both to exclude and deport "rest upon one foundation, are derived from one source, are supported by the same reasons, and are in truth but parts of one and the same power." (*Id.*, at 713). The dissent, however, distinguished between Congress' power over resident and excludable aliens, building upon *Yick Wo's* statement of the general principle that constitutional rights protect all "within the territorial jurisdiction." *Yick Wo, supra*, 118 U.S. at 369. Each dissenting justice urged that the **societal ties** that resident aliens establish by virtue of their admittance entitled them to greater protections than excludable aliens:

- "This right to protect persons having a domicile, though not nativeborn or naturalized citizens, rests on the firm foundation of justice, and the claim to

be protected is earned by considerations which the protecting power is not at liberty to disregard." (149 U.S. at 734-37, Brewer, J., dissenting).

- "The moment any human being from a country at peace with us comes within the jurisdiction of the United States . . . he becomes subject to all their laws, is amenable to their punishment, and entitled to their protection." (*Id*., at 746 , Field, J., dissenting).
- "Conceding that the exercise of the power to exclude is committed to the political department . . . the exercise of the power to expel, the manner in which the right to remain may be terminated, rests on different ground, since limitations exist or are imposed upon the deprivation of that which has been lawfully acquired." (*Id*. at 762 **,** Fuller, C.J., dissenting).

The views of the dissenters in *Fong* later became the Court's majority view in *Yamataya v. Fisher*, 189 U.S. 86 (1903), involving a resident alien whom the government sought to deport after her lawful admission into the United States. Citing *Chae Chin Ping* and *Eiku*, the government insisted—as it now essentially does here (citation)—that its "plenary powers" apply with equal force to aliens lawfully admitted and to those seeking entry for the first time. In *Yamataya*, counsel for the United States argued:

> "Congress has the right to expel as well as to exclude aliens. Deportation merely enforces the withholding of the privilege of coming or remaining here, which Congress has denied in its sovereign capacity for reasons of policy, founded in national self-protection." (*Id.*, at 93; reporter's summary of argument).

The Court rejected the government's assertion of identical "plenary powers" as respects excludable and resident aliens. Speaking through Justice Harlan, the Court held:

> "But this court has *never* held, nor must we now be understood as holding, that administrative officers, when executing the provisions of a statute involving the liberty of persons, may disregard the fundamental principles that inhere in 'due process of law' ****
>
> "Therefore, it is not competent for the Secretary of the Treasury or any executive officer, at any time . . . arbitrarily to cause an alien who has entered this country and has become subject in all respects to its jurisdiction, and a part of its population, although alleged to be illegally here, to be taken into custody and deported without giving him all opportunity to be heard upon the questions involving his right to be and remain in the United States. No such arbitrary power can exist where the principles involved in due process of law are recognized." (*Id.*, at 101-02) (emphasis added).

Since *Yamataya*, this Court has consistently adhered to this sharp distinction between the rights of aliens admitted as permanent residents and those who have not been admitted. *See, e.g., United States v. Verdugo-Urquidez*, 494 U.S. 259, 271 (1990) ("aliens receive constitutional protections when they have come within the territory of the United States and developed **substantial connections** with this country."); *Leng May Ma v. Barber*, 357 U.S. 185, 187 (1958) ("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"); *Barrera*, *supra*, 44 F.3d at 1448 (quoting *Leng May Ma*).

Landon v. Plasencia, 459 U.S. 21 (1982), sharply illustrates this critical distinction. There, a resident alien briefly left the United States and was caught smuggling aliens upon her return. The government argued that she should be treated

as an "excludable" alien, the very same argument it now advances here (citation). The Court disagreed and held that, although Plasencia's right to return to the United States could be determined in an exclusion proceeding, she nevertheless was protected by the Due Process Clause because of her status as a resident alien, saying that "once an alien gains admission to our country and begins to **develop the ties** that go with permanent residence, his constitutional status changes accordingly." *Id.*, 459 U.S. at 32; *see also Reno v. Flores*, 507 U.S. 292, 306 (1993) (detention of aliens in the deportation process must be measured by the Due Process Clause).

The Court in *Plasencia* determined that a permanent resident has a liberty interest protected by the Constitution even when she stood outside the physical boundary of our country, making it clear that even in matters relating to deportation—matters in which the government asserts a form of "plenary power"—resident aliens still enjoy substantial liberty interests under the Fifth Amendment.

B. The Sole Exception to Territorial Standing—The "Entry Fiction"— Does Not Apply To Aliens Admitted as Permanent Residents.

The cases discussed above—particularly *Yamataya* and *Plasencia*—stand for the proposition that once a person has lawfully entered our country, and has been accepted into our midst, he is not treated in the same fashion as one arriving at the border for the first time, hat in hand, seeking admission. The sole exception to this principle is the "entry fiction," a peculiarity that applies *only* to aliens who have not been granted admission into the United States.

The entry fiction exists solely to accommodate the Executive's grace in releasing applicant-aliens on "parole," pending their exclusion hearings or their eventual repatriation. This longstanding practice, codified in the Immigration and Nationality Act, allows the Executive to release an applicant-alien—for "humanitarian reasons" (8 U.S.C. § 1182(d)(5)(A))—during what is sometimes a protracted exclusion process. Parole eschews needless confinement, but if temporary release endowed an alien with the same rights and privileges as those granted permission to reside here, the Executive might well hesitate to exercise its parole authority.

Accordingly, the entry fiction simply assures release on immigration parole does not change an unadmitted alien's status; he remains constructively at the border seeking admission. *See United States v. Ju Toy*, 198 U.S. 253, 263 (1905) ("petitioner, although physically within our boundaries, is to be regarded as if he had been stopped at the limit of our jurisdiction, and kept there while his right to enter was under debate."); *Leng May Ma, supra*, 357 U.S. at 190 (immigration parole reflects "the humane qualities of an enlightened civilization" and refusal to apply the entry fiction "would be quite likely to prompt some curtailment of current parole policy—an intention we are reluctant to impute to Congress.").

> The *Barrera* decision was bottomed upon the "entry fiction" owing to Barrera's status as an excludable alien. His temporary release on parole meant that Barrera was "deemed under the entry doctrine not to be present on United States territory." *Barrera*, *supra.*, 44 F.3d at 1450. Barrera was never admitted to the United States and never attained the status of a permanent resident. The

court expressly relied upon this distinction in passing upon the legality of his confinement. *Id.*, at 1448-50.[7]

The entry fiction therefore does not serve the government in this case; the fiction is a unique gesture of humanitarian treatment of would-be entrants, but the fiction does not work in reverse. The Executive may certainly insist that an immigration parolee gain no legal advantage by virtue of this generosity, but that is poles apart from allowing the government to create an additional fiction, simply because it is frustrated in its ability to repatriate a person whom it has admitted but cannot presently remove. The government's invitation should be rejected under principles settled in *Yamataya*, *Wong Wing* and *Plasencia*, each rejecting the view that a resident alien's prospective "deportablility" strips him of his substantive and procedural rights as a "person" under the Fifth Amendment. This Court has never held that an order of deportation breaks a resident's continued physical presence within our borders, and the government cannot change things by the legerdemain it advances here.

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[7] Moreover, in *Barrera*, the government itself claimed the power to detain Barrera specifically because he remained an excludable alien seeking initial admission to the United States, distinguishing him on that basis from resident aliens. *See* Petition for Rehearing in *Barrera* , at 7-8. Having prevailed in *Barrera* on "excludable alien" grounds, the government now comes with little grace in arguing that the decision supports the detention of resident aliens. Indeed, this *volte facé* gives fresh meaning to Justice Jackson warning in *Mezei:* "the government's theory of custody for 'safekeeping,' . . .once established with the best of intentions, will drift into oppression of the disadvantaged in this country just as surely as it has elsewhere." (345 U.S. at 226) (dissenting opinion).

IV. THE PLENARY POWER DOCTRINE DOES NOT PRECLUDE JUDICIAL REVIEW OF THE GOVERNMENT'S REPRESENTATIONS REGARDING THE POSSIBILITY OF DEPORTATION.

Amici respectfully submit that the precedents we have discussed confirm that resident aliens have a liberty interest substantively protected by the Constitution, and that they may not be detained indefinitely if removal cannot be accomplished. In *Wong Wing*, *supra*, 163 U.S. at 235, the Court declared valid "detention, or temporary confinement, as part of the means necessary to give effect to the provisions for the exclusion or expulsion of aliens." As the district court below held, detention may be justified, if at all, as a means to an end; surely it may not be justified if the end is beyond timely reach.[8]

The government argues that "[t]he courts should be especially reluctant to second-guess Executive Branch judgments regarding the prospects" of accomplishing removal. (citation). But courts regularly decide cases that touch on foreign affairs.[9]

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[8] A discussion of the period after which detention in aid of removal becomes impermissible is beyond the scope of this brief. The more important point is that the government's claim of an unlimited power to detain--endorsed by the Fifth Circuit in *Zadvydas*—is fundamentally flawed because it rests upon the assumption that if the desired end-result is deportation in all instances, the means chosen to "effect" it cannot possibly matter. (*See Zadvydas*, A. ___, citing *Fong Yue Ting*).

[9] For example, the judiciary has reached the merits of claims concerning the Executive's refusal to impose trade sanctions (*Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221, 229-30 (1986)), the Executive's interpretation of the Warsaw Convention (*Trans World Airlines v. Franklin Mint Corp.*, 466 U.S. 243, 254 n.25 (1984)) and the validity of an executive agreement that ended the Iran hostage crisis (*Dames & Moore v. Regan*, 453 U.S. 654, 669-74 (1981). *See, also, Hilao v. Estate of Ferdinand Marcos*, 103 F.3d 789 (9th Cir. 1996) (suit involving actions of former foreign government officials); Legomsky, *supra*, 1984 SUP. CT. REV. 255

Because an alien detained by the INS may not be "punished," courts are not disabled from asking at least two fundamental questions: *first*, what is the nature of the government's claim that removal may occur in the foreseeable future; and, *second*, has the nature of its claim changed over time? In the case at bench, the government answers the first question by saying only that "[t]he State Department hopes to begin negotiations with Cambodia" in early 2000 (citation), and it answers the second question by failing to cite anything suggesting that the government's "hope" has been expressed with any more certainty than in October 1998, when Respondent's final order of removal was entered.

Accordingly, the government's argument of non-reviewability is premised on the notion that judges somehow are unable to grapple with factual questions involved in determining the prospects for removal, for the government certainly cannot (and does not) present any credible claim that judicial review of the government's own evidence would "interfere" with – or hobble with a "Denver boot" – the Executive's negotiations with foreign nations. But an alien has a protected interest in being free from detention pending removal when removal may not reasonably take place. Given that interest, courts can and must decide whether the prospects of removal are clear or ephemeral, even if the scope of judicial review may be somewhat narrow.

(misplaced concerns about foreign policy unnecessarily becloud judicial review of immigration cases: *Baker v. Carr* and its progeny authorize and require judicial review except in the narrowest of circumstances).

Moreover, the government's argument about judicial "second guessing" is hyperbole. The government states that the processes of negotiating repatriation treaties are often protracted and sensitive. (citation). The district court in which this case arose neither disagreed with this assessment, nor criticized the Executive for proceeding at whatever pace it deems appropriate or necessary. *Per contra,* the district court simply determined that the objective facts placed before it by the government justified the common-sense conclusion that Respondent's deportation is not likely to occur very soon, and the government's Brief does not quarrel with this conclusion. This was not "second guessing" any more than was a newspaper report's conclusion that the circumstances of these cases place Respondent and thousands of others like him in "an international quagmire that offers little hope for release."[10]

Accordingly, the district court did not intrude upon the Executive's turf in any inappropriate way. Consistent with the principle — first expressed in *Wong Wing, supra*, and never doubted since — that so long as he remains within the territory of the United States, even a deportable alien remains entitled to the substantive due process protections of the Fifth Amendment, the district court simply held that the farther Respondent stands from permissible "temporary confinement while arrangements were being made for [his] deportation" (*Wong Wing*, 163 U.S. at 235), the greater is the government's burden to show an appropriate justification.

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[10] *See* "Secret Prisoners of INS," *San Francisco Examiner*, December 13, 1999, pp. 1, 18.

CONCLUSION

The judgment below should be affirmed.

Dated: December 26, 2000

Respectfully submitted,

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